



National Veterans Affairs and Rehabilitation Commission

1608 K Street, N.W. • Washington, D.C. 20006

K. Robert Lewis, Chairman - Connecticut

Barry A. Searle, Director - Pennsylvania

**28-09**

**November 13, 2009**

## **Proposed Regulation-Claim Related Documents Not of Record**

### **Background**

On August 20, 2008, the Department of Veterans Affairs (VA)s Office of Inspector General (OIG) initiated an audit of select Veterans Benefits Administration (VBA) regional office (RO) mail processing procedures. The OIG audit team examined mail-handling activities and the activity that places claims under electronic control in four ROs. The audit team found 36 pieces of active mail and 93 original support documents improperly designated for destruction by shredding. Documents identified as designated for destruction included, among other things, the following: VA Form 21-526, Veteran's Application for Compensation and/or Pension; VA Form 21-686c, Declaration of Status of Dependents; VA Form 21-674, Request for Approval of School Attendance; and documents constituting informal claims.

In response to these findings, the Secretary suspended all document-shredding activities and provided new guidance and training to all RO personnel regarding the handling and shredding of claim-related documents and evidence in support of a claim. The Secretary also decided to establish temporary claims-handling procedures for veterans who allege that they submitted claim-related documents or evidence in support of a claim during the time period of April 14, 2007, through October 14, 2008, that are not of record in official VA files. On November 12, 2009, VA published a proposed regulation in the Federal Register to codify the temporary claims-handling procedures, which include a relaxed evidentiary standard for the adjudication of claims involving alleged submissions of documents or evidence during this 18-month time period. These temporary procedures would reflect VA's response to the OIG's findings of improper document handling and control at the ROs.

October 14, 2008, is the date on which the Secretary suspended all document-shredding activities following the OIG audit. To ensure that claimants who may have been affected by the former

document shredding activities have an opportunity to make assertions regarding missing documents, VA proposes to establish an 18-month time period from April 14, 2007, through October 14, 2008, during which affected claimants may receive the benefit of certain liberalized procedures. As described in greater detail below, the proposed 18-month period is based upon VA's claims adjudication experience. VA added an additional 12 months to reflect a reasonable amount of time for a claimant to learn that a submitted claim-related document may have been lost or mishandled by the RO.

With regard to lost evidence in support of a claim, the RO most likely would have issued a decision or a supplemental statement of the case within 18 months from the date of the alleged submission of evidence. Because the RO is required to summarize the evidence that it considered in denying a claim for benefits (38 U.S.C. 5104(b)(2)), a decision would have revealed that the RO had not considered the alleged submitted evidence. Also, the RO is required to address in a supplemental statement of the case new evidence submitted subsequent to the filing of a statement of the case (38 CFR 19.31(b)).

With regard to lost notices of disagreement, the RO is required to issue a statement of the case (38 U.S.C. 7105(d)) and usually does so within a year after receiving a notice of disagreement. With regard to lost substantive appeals, the Board of Veterans' Appeals (Board or BVA), as a matter of practice soon after the processing of a formal appeal, will notify a claimant that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board (38 CFR 20.1304(a)).

This rule would require a claimant to notify the RO within one year of the effective date of the final rule implementing the temporary claims handling procedures of an alleged submission during the 18-month period of April 14, 2007, through October 14, 2008. VA proposes that the one-year deadline reasonably gives claimants time to inform ROs of alleged submissions during the 18-month period and would be consistent with the 12-month time period given to claimants to file a Notice of Disagreement. After the expiration of this one-year period, VA would amend its regulations to remove the obsolete provisions in proposed Sec. 3.218.

For claims allegedly submitted between April 14, 2007, and October 14, 2008, the effective date would be established in accordance with the date asserted by the claimant as the date on which the Secretary received the claim.

In general practice, when a claimant asserts the submission of a claim-related document or evidence in support of a claim that was not of record in the official VA file, VA requests the claimant to submit any available secondary evidence that would support the alleged previous submission. For example, VA would ask a claimant to submit a copy of the claim-related document or evidence date stamped by VA or the claimant's representative, or a dated transmittal or cover sheet from the claimant or claimant's representative relating to the pertinent document, together with copies of any documents that were included with the alleged previous submission.

Accordingly, if a claimant asserts that a document was originally filed before April 14, 2007, or after October 14, 2008 (or if a claimant asserts after the one-year period following the effective date of the final rule that a document was originally filed during the time period of April 14, 2007, through October 14, 2008) and such document is not of record in official VA files, VA would ask the claimant to submit similar secondary evidence to support the alleged previous submission, consistent with VA's general practice. If entitlement to benefits is established under this scenario, VA would assign an effective date in accordance with the facts found based on credible corroborating evidence submitted by the claimant and applicable laws and regulations

This proposed regulation highlights the need for accredited representatives to be aware of the potential impact of this situation on claims currently pending within the system. Service Officers should review the claims files of their veterans to determine if they are affected by this regulation and take appropriate measures to assure that their veterans' supporting documentation has been resubmitted if necessary, and that the earliest possible effective date for their veterans' claims is being protected.

Any further questions regarding this proposed regulation should be directed to Ian de Planque, the Assistant Director for Claims Service, National Veterans Affairs and Rehabilitation (VA&R) Division at (202) 263-5762 or [ideplanque@legion.org](mailto:ideplanque@legion.org)

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