Department of Veterans Affairs

Memorandum

Date: December 20, 2012

VAOPGCPREC 3-2012

From: General Counsel (022)

Subj: Review of Prior Decisions Involving Military Sexual Trauma

To: Under Secretary for Benefits (20)

QUESTIONS PRESENTED:

The Veterans Benefits Administration (VBA) plans to contact individuals whose claims for compensation for post-traumatic stress disorder (PTSD) due to military sexual trauma (MST) (also called in-service personal or sexual assault) have been previously denied and to offer them the opportunity to have their claims reviewed. The purpose of the review is to ensure that VBA properly developed and decided the claims. As necessary, VBA plans to take corrective action to remedy errors identified in the review. In connection with this review, your staff has asked for our advice on the following questions:

1. Under what legal authority can VBA undertake such a review of previously denied claims for compensation? Can the Department of Veterans Affairs (VA) undertake such review and corrective action without requiring the submission of new and material evidence or an allegation of clear and unmistakable error (CUE)? Does this authority apply to review of conditions other than PTSD which may be claimed as a result of MST? Would that authority apply to a review and possible reconsideration of the claim without the express written consent of the claimant?

2. What information should VBA include in its letter to claimants regarding this review?

3. After its review, if VBA should decide to grant the benefit originally sought, what factors affect the assigning of an effective date? In particular, would VBA be able to apply 38 C.F.R. § 3.114, "Change of law or Department of Veterans Affairs issue" to claims which are granted as a result of the review?

4. Does VA have the authority, by regulation or otherwise, to extend the liberalized evidentiary standards associated with compensation claims involving MST to claims based upon mental disorders other than PTSD or any physical disorders also alleged to involve MST?

5. If VA does not have this authority, what options may it consider to liberalize evidentiary standards for disabilities other than PTSD that may involve MST?

Under Secretary for Benefits (20)

6. What is the legal basis, if any, for VA to use difference-of-opinion authority in this review to grant compensation for disabilities caused by MST after adverse decisions have become final, i.e., decisions for which the appeal period has elapsed?

7. What consequences, if any, might VA expect from the use of difference-of-opinion authority to overturn final decisions as described above?

HELD:

1. VBA has authority under 38 U.S.C. § 303 to initiate a review of any class of claim decisions and may revise the decisions subject to the statutes and regulations governing finality. The consent of the claimant is not required to conduct such a review.

2. If the appeal period has elapsed or a final Board of Veterans' Appeals (Board) decision has issued, a decision on a claim may be revised only on the basis of submission of new and material evidence or a determination by VBA or the Board, as appropriate, that the original decision was the product of CUE. VBA may accept a claim to reopen and may develop for new and material evidence even if the claimant does not proffer new and material evidence at the time of the request to reopen. If new and material evidence is obtained and the claim is ultimately reopened and benefits are awarded, the effective date would be based on the date that the application to reopen was filed and the facts found, unless the new and material evidence consists of official service department records, in which case the effective date may be as early as the date of the original claim, if supported by the facts found. Decisions that are not timely appealed become final and are not subject to revision on the basis of difference of opinion.

3. If the appeal period has not elapsed and VBA wishes to revise the claim decision based on the evidence in the file, VBA may revise the decision in a manner favorable to the claimant based on difference of opinion, if the matter is referred to Central Office. 38 C.F.R. § 3.105(b). If review of the file leads VBA to believe that the claim may not have been adequately developed, VBA may conduct the necessary development. If development leads to an award of benefits prior to the expiration of the appeal period, the effective date would be the date entitlement arose or the date of receipt of the claim, whichever is later. If the claimant submits new and material evidence prior to the expiration of the appeal period and receives an award of benefits on that basis, the effective date would be the date entitlement arose or the date of original receipt of the claim, whichever is later. If a review of the file reveals the original decision was a product of CUE, the original decision must be revised, and the effective date would be the date entitlement arose or the date of the original receipt of the claim, whichever is later.

3.

Under Secretary for Benefits (20)

4. Neither 38 C.F.R. § 3.304(f)(5), nor documents issued by VA providing guidance on the implementation of that provision, would constitute a liberalizing administrative issue for purposes of the effective date rules of 38 C.F.R. § 3.114.

5. VA has authority to extend by notice and comment rulemaking evidentiary rules associated with compensation claims involving MST to claims involving physical and mental disabilities other than PTSD. Further, under existing statutes and regulations, VA may in a particular case find that evidence from alternative sources, such as those described in section 3.304(f)(5), is sufficient to establish a particular fact at issue, such as that a personal assault occurred during service.

DISCUSSION:

1. As the administrative agency tasked with deciding veterans' claims for benefits, VBA has inherent authority to review and revise its decisions. "The power to reconsider is inherent in the power to decide." *Tokyo Kikai Seisakusho, Ltd. (TKS) v. U.S.*, 529 F.3d 1352, 1360 (Fed. Cir. 2008). Courts have generally held that administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, even absent specific statutory authority to do so. *Id*; *see also Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980); *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002). VA's inherent authority in this regard is grounded in 38 U.S.C. § 303, which assigns the Secretary of Veterans Affairs the responsibility for the proper execution and administration of all laws administered by VA. Pursuant to 38 C.F.R. § 2.6(b)(1), the Secretary has delegated to the Under Secretary for Benefits authority to act on all matters assigned to VBA.

2. However, an agency's inherent authority to revise its decisions is circumscribed to the extent it conflicts with other governing statutory and regulatory provisions. *TKS*, 529 F.3d at 1361; *Macktal*, 286 F.3d at 825 . In the VA context, the general authority to conduct a review is subject to more specific legal principles governing finality of decisions.

3. Several statutes and regulations limit VA's power to change a decision on a claim. Under these statutes and regulations, claim decisions become final and can be changed only in specified circumstances depending on whether the period allowed for appealing the decision has elapsed, whether the decision was appealed, and how far it was appealed. Because we understand that many of the cases VBA is concerned about: 1) potentially were not developed correctly; and 2) were not timely appealed, we will focus our discussion accordingly.

Under Secretary for Benefits (20)

Where the Appeal Period Has Not Yet Elapsed and No Notice of Disagreement (NOD) Has Been Filed

4. Appellate review of VA decisions is initiated by the filing of an NOD. Generally, an NOD must be filed within one year of the date on which the VA agency of original jurisdiction (AOJ) mails notice of its decision. 38 U.S.C. § 7105(b)(1). Decisions within the ambit of the planned review for which the appeal period has not yet run would be governed by 38 C.F.R. §§ 3.104 and 3.105. Under 38 C.F.R. § 3.104(a), a decision of an AOJ is final as to conclusions based on the evidence on file at the time of notification of the decision and is not subject to revision on the same factual basis except by appellate authorities, or as provided in 38 C.F.R. §§ 3.105 (revision of decisions) and 3.2600 (Decision Review Officer). A decision which contains clear and unmistakable error (CUE) must be reversed or amended. 38 C.F.R. § 3.105(a). Additionally, a proposed revision or amendment based on difference of opinion is to be recommended to Central Office. 38 C.F.R. § 3.105(b). We have previously stated that this regulation "can be fairly read to authorize Central Office personnel to revise or amend the decision." VAOPGCADV 21-1999, para. 7. We discuss difference-of-opinion review further in paragraphs 11-18 below. Section 3.2600 does not authorize revision of AOJ decisions absent the timely filing of an NOD by the claimant.

5. The restriction against revision of a decision "on the same factual basis" found in section 3.104(a) does not apply when VA receives new and material evidence prior to the expiration of the appeal period. VA will consider evidence received during the appeal period as having been filed in connection with the claim that was pending at the beginning of the appeal period. 38 C.F.R. § 3.156(b). In the event such evidence substantiates the claim, the effective date of benefits would be based on the original date of claim and the facts found.

6. Additionally, we note that certain VBA officials may file an administrative appeal of an AOJ decision to the Board. 38 U.S.C. § 7106; 38 C.F.R. §§ 19.50, 19.51(a), (b). Certain Central Office officials may initiate such an appeal within one year of the date of the mailing of notice of a decision. 38 C.F.R. § 19.51(a). Certain AOJ officials may do so within six months of mailing notice of a decision. 38 C.F.R. § 19.51(b). These appeals, however, do not allow these officials to revise decisions themselves, rather they transfer cases to the Board for review.

Where a Timely NOD Has Been Filed and an Appeal to the Board Has Not Yet Been Perfected

7. When a timely NOD is filed, VA may "take such development or review action as it deems proper." 38 U.S.C. § 7105(d)(1). If the claimant requests *de novo* review, the Decision Review Officer or other appropriate official may order any necessary development, or simply reconsider the original decision with "no

deference to the decision being reviewed." 38 C.F.R. § 3.2600(a) and (c). If the claimant does not timely request Decision Review Officer consideration or affirmatively elects the "traditional" appellate process, the AOJ may not make a new decision on the same record as the original decision. 38 C.F.R. § 3.104(a). However, it may conduct any needed evidentiary development pursuant to section 7105(d)(1), and, if new evidence is developed, the AOJ would not be barred by section 3.104(a) from making a new decision because the "factual basis" of the original decision would have changed.

Where a Timely NOD Has Been Filed and a Board Decision Has Been Issued

8. A Board decision is final unless the Chairman orders reconsideration of the decision. 38 U.S.C. § 7103(a); 38 C.F.R. § 20.1100(a). Revision based on difference of opinion is not possible once the Board has decided a claim. VAOPGCPREC 11-90, para. 11. If an AOJ decision is reviewed and affirmed by the Board, it is subsumed by the Board decision and may not be revised, even based on CUE. 38 C.F.R. § 20.1104; *Duran v. Brown*, 7 Vet. App. 216, 224 (1994). The subsuming Board decision is itself subject to revision by the Board based on CUE, unless the claim is appealed to and decided by the United States Court of Appeals for Veterans Claims (CAVC). 38 U.S.C. § 7111; 38 C.F.R. § 20.1400(b)(1). Therefore, VBA may only change a decision on a claim that has been appealed to and decided by the Board when new and material evidence is presented.

Where the Appeal Period Has Elapsed and No Timely NOD Has Been Filed

9. If no timely NOD is filed, the decision on a claim becomes final. 38 U.S.C. § 7105(c). The only exceptions to this rule of finality are specific statutory exceptions and exceptions that VA has made in regulations that are not inconsistent with title 38, United States Code. *Id.*

10. There are two statutory exceptions to the rule of finality. The first is 38 U.S.C. § 5108, allowing claims to be reopened upon the submission of new and material evidence. The second is clear and unmistakable error. 38 U.S.C. §§ 5109A, 7111. VBA may, on its own motion, initiate review of a decision to determine whether it is the product of CUE. 38 U.S.C. § 5109A(c). However, CUE may be found only where the correct facts, as they were known at the time, were not before the adjudicator, or the statutory or regulatory provisions existing at the time of the decision were incorrectly applied. *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994); *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (*en banc*). The error must have been outcome determinative. *Cook v. Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (*en banc*). Development errors, such as a breach of the duty to assist, cannot constitute CUE. *Id.* at 1344-46.

Under Secretary for Benefits (20)

Difference of Opinion

11. With regard to 38 C.F.R. § 3.105(b), VA's regulation authorizing revision of decisions based on difference of opinion, the question arises whether that regulation constitutes an exception to the rule of finality established by 38 U.S.C. § 7105(c) in the context of claims where the appeal period has elapsed and no timely NOD has been filed. We conclude that while section 3.105(b) does not expressly limit the circumstances under which a decision may be revised based on a difference of opinion, that regulation would be inconsistent with governing statutes if it were construed to authorize revision to decisions that are governed by section 7105(c).

12. In VAOPGCADV 21-1999, para. 7, we advised that section 3.105(b) could be fairly read to authorize Central Office personnel to revise or amend a decision. This statement was made in the context of discussing finality rules applicable when the period to file an NOD has not yet elapsed. *Id.*, para. 6-7. This statement is correct, but should be read as addressing the context in which it was made. When the appeal period has not yet run, the only source of finality for the AOJ decision is a VA regulation, 38 C.F.R. § 3.104(a). Section 3.104(a) expressly recognizes that actions under section 3.105 constitute an exception to the general rule of finality in section 3.104(a). In this context, the statutory rule of finality in section 7105(c) does not apply because the appeal period has not yet elapsed.

13. In VAOPGCADV 5-2005, para. 7, we stated without analysis that "section 3.105(b) authorizes Central Office authorities to revise, based on difference of opinion, an otherwise final AOJ decision." VA's effective date regulations also contemplate the possibility that VA may revise a decision subject to the statutory rule of finality under section 3.105(b) based on a difference of opinion. By specifying effective date treatment for "decisions which have become final" through failure to timely appeal, VA regulations implicitly accept the idea that such decisions may be altered in spite of the statutory rule of finality. 38 C.F.R. § 3.400(h)(2)-(3). Therefore, an argument can be made that difference of opinion review pursuant to section 3.105(b) is a valid exception to the statutory rule of finality because it is embodied in a VA regulation, and section 7105(c) authorizes exceptions to finality that are "provided by regulations not inconsistent with [title 38, United States Code]."

14. Section 3.105(b), as published in the 1961 reorganization and promulgation of VA's regulations, was substantively identical to the current rule for all relevant purposes. *Compare* 38 C.F.R. § 3.105(b) (1961) with 38 C.F.R. § 3.105(b) (2012); *see* 26 Fed. Reg. 1561, 1569 (Feb. 24, 1961). The governing statutory structure, however, has changed dramatically in the years since. In particular, both of the two major statutory exceptions to the statutory rule of finality identified above, which started out as internal VA practices, have been elevated to the

statutory level and codified. *See* Pub. L. No. 100-687, § 103(a)(1), 102 Stat. 4105, 4107 (Nov 18, 1988); renumbered § 5108 by Pub. L. No. 102-40, § 402(b)(1), 105 Stat. 187, 238 (May 7, 1991) (recognizing new and material evidence as a statutory exception to finality); Pub. L. No. 105-111, § 1(a)(1), 111 Stat. 2271 (Nov. 21, 1997) (recognizing CUE as a statutory exception to finality).

15. The U.S. Court of Appeals for the Federal Circuit has explained that these two statutory exceptions to the rule of finality found in section 7105(c) are exclusive. *Cook*, 318 F.3d at 1339-41 ("The statutory scheme provides only two exceptions to the rule of finality."). The *Cook* court reasoned that "Congress knew how to create exceptions to the finality of VA decisions, and it explicitly did so in two circumstances." *Id.* at 1339. Applying established canons of statutory construction, the court concluded that "Congress did not intend to allow exceptions to the rule of finality in addition to the two that it expressly created." *Id.* This reasoning was part of the foundation for the court's ultimate conclusion that a "grave procedural error," such as a failure to secure records under VA's duty to assist, does not vitiate the finality of an AOJ decision. *Id.* at 1337, 1341. VA cannot, by regulation, add exceptions to an exhaustive list of statutory exceptions to a statutory rule. In order to avoid conflict with 38 U.S.C. §§ 5108 and 5109A, and the Federal Circuit's opinion in *Cook*, section 3.105(b) must therefore be construed as authorizing revision based on difference of opinion only in the case of non-final AOJ decisions.

16. The CAVC has reached this result in a precedential opinion. *Bradley v. Peake*, 22 Vet. App. 280, 287 (2008). In *Bradley*, the appellant received a noncompensable rating for certain service-connected disabilities and did not appeal the original decision, which became final, but was later awarded a compensable rating for those disabilities. *Id.* at 283. He argued that he should receive an earlier effective date for the higher ratings without having to show CUE because those later decisions constituted a "difference of opinion," requiring the AOJ to recommend a revision in the original rating to Central Office. *Id.* at 286-87. VA argued in response that section 3.105(b) is implicated only "when the [AOJ] has the opinion that a revision or amendment is warranted before a decision becomes final, and that it provides no procedural rights to a claimant to demand referral to the Central Office." *Id.* at 287. The CAVC stated it agreed with the VA's position. *Id.* The CAVC then explained "[i]f Mr. Bradley wishes to seek revision of a final decision, he must do so pursuant to 38 U.S.C. §§ 5109A . . . and [its] implementing regulations." *Id.*

17. Construing section 3.105(b) to apply to AOJ decisions that have become final under the statutory scheme would be inconsistent with sections 5108 and 5109A because it would permit VA to revise final decisions on essentially a discretionary basis, notwithstanding Congress' intent to permit only limited exceptions to statutory finality. Indeed, an interpretation of 3.105(b) allowing revision of final decisions based on a "difference of opinion" would be an even

more open-ended exception to the rule of finality than the exception for "grave procedural error" that was explicitly rejected in *Cook*. The "grave procedural error" standard would at least have required some ascertainable failure on VA's part before the finality of an AOJ decision could be disturbed. The "difference of opinion" standard, in contrast, has no such inherent limitation. *See Bradley*, 22 Vet. App. at 287 (section 3.105(b) contains no "manageable standards" sufficient to enable meaningful judicial review).

18. We acknowledge that there is some uncertainty regarding the scope and effect of the language in section 7105(c) contemplating exceptions "provided by regulations not inconsistent with this title." Now that Congress has codified VA's prior regulatory exceptions and has thereby established a more comprehensive statutory scheme governing finality and exceptions to finality, any authority VA has to create additional regulatory exceptions "not inconsistent" with that scheme necessarily would be narrow. For purposes of this opinion, we need not, and do not, conclude that VA is wholly foreclosed from establishing any additional exceptions. Rather, as discussed above, we conclude that applying the difference-of-opinion provision of section 3.105(b) to decisions that are final under section 7105(c) would be "inconsistent with this title."

Contours of the Review

19. In addressing the issues raised in the opinion request, it is necessary to distinguish VA's authority to "review" prior decisions from VA's authority to take corrective action, such as issuing new decisions and awarding benefits. A review may take place pursuant to VA's authority under 38 U.S.C. § 303 and/or under the quality review program required by 38 U.S.C. §§ 7731-7734, without the claimant's consent; VA personnel may review the contents of a claims file in the performance of their official duties. Nevertheless, initiating review only if a claimant responds to a letter informing the claimant of the possibility of review and the opportunity to submit new and material evidence would appear to be a common-sense way to focus on claims most likely in need of VA's attention. The scope of permissible reconsideration will vary depending on the posture of the claim and the type of error uncovered.

20. If the appeal period has not elapsed and VBA wishes to revise a claim decision based on the evidence in the file, VBA may revise it in a manner favorable to the claimant based on difference of opinion, if the matter is referred to Central Office. 38 C.F.R. § 3.105(b). If such a claim is granted, the effective date would be based on the date of the claim and the facts found. 38 C.F.R. § 3.400(h)(1). If review of the file leads VBA to believe that the claim may not have been adequately developed, VBA may conduct the necessary development (provided it has secured the necessary releases). If such development leads to an award of benefits prior to the expiration of the appeal period, the effective date would be the date entitlement arose or the date of receipt of the claim, whichever

is later. 38 C.F.R. § 3.400(b)(2). The claimant may also be encouraged to submit new and material evidence prior to the expiration of the appeal period; if such a submission leads to an award of benefits, the effective date would be based on the date of original receipt of the claim and the facts found. 38 C.F.R. § 3.156(b). If a review of the file reveals the original decision was a product of CUE, the original decision must be revised, and the effective date would be the same as if the corrected decision had been made on the date of the revised decision . 38 C.F.R. §§ 3.105(a), 3.400(k).

21. If the appeal period has elapsed or the claim was the subject of a final Board decision, the decision may be revised only on the basis of submission of new and material evidence or a determination that the original decision was the product of CUE (or in the case of a final Board decision, which would subsume a prior RO decision for purposes of CUE review, the Board decision was found by the Board to be the product of CUE). If the claimant submits new and material evidence, and the claim is ultimately reopened and benefits are awarded, the effective date would be based on the date that the application to reopen was filed and on the facts found. 38 U.S.C. § 5110(a); *Comer v. Peake*, 552 F.3d 1362, 1370 (Fed. Cir. 2009). However, if the new and material evidence consists of official service department records that existed and had not been associated with the claims file when the claim was first decided, VA must reconsider its decision on the original claim, and if benefits are ultimately awarded based on that claim, the effective date of the award would be based on the date of the original claim and the facts found. 38 C.F.R. § 3.156(c). In essence, VA treats the prior decision the same way it would treat a decision that is the product of CUE, because records in the Government's possession that should have been in the claim file were not considered. *See Spencer v. Brown*, 4 Vet. App. 283, 293 (1993) (discussing historical and statutory basis for similar effective date treatment accorded to revisions of prior decisions based on CUE and "reopening" a prior claim in light of newly obtained service department records).

22. With respect to claims that have become final, we note that VA may develop and consider a claim to reopen even if the claimant has not submitted new and material evidence. Under 38 C.F.R. § 3.159(c), VA will assist a claimant seeking to reopen a finally decided claim by attempting to obtain relevant records that may provide a basis for reopening. *See Akers v. Shinseki*, 673 F.3d 1352, 1358 (Fed. Cir. 2012) ("an application to reopen does not necessarily require the simultaneous submission or proffer of new and material evidence"). To the extent the contemplated review involves cases in which the prior claim may have been inadequately developed, VA could invite the claimant to request reopening, and VA could then assist the claimant in seeking to obtain records that may provide a basis for reopening and granting the claim.

23. The provisions of 38 C.F.R. § 3.114 would not provide a basis for different effective-date treatment of claims granted as a result of the contemplated review.

10.

Under Secretary for Benefits (20)

Section 3.114 is the regulation implementing the special effective-date rule in 38 U.S.C. § 5110(g), which provides that when benefits are awarded "pursuant to any Act or administrative issue," the effective date of benefits may be up to one year before the date of the claimant's application or VA's determination concerning benefits under the new provision, but no earlier than the effective date of the Act or administrative issue, if this result is in accordance with the facts found. Neither the statute nor VA's regulations defines "administrative issue." However, we have previously held that a liberalizing issue is one which effects a substantive change in regulation and creates a new basis for entitlement to a benefit. VAOPGCPREC 11-99, para. 10 (citing *Routen v. West*, 142 F.3d 1434, 1441-42 (Fed. Cir. 1998)). VA's rule governing evidence that may substantiate the occurrence of a stressor incident for purposes of proving a claim for compensation for PTSD due to in-service personal assault was promulgated in 2002. 67 Fed. Reg. 10,330 (Mar. 7, 2002). That rule, currently codified in VA's regulations at 38 C.F.R. § 3.304(f)(5), provides that evidence outside a veteran's service records may corroborate a veteran's account of a stressor incident. We are aware of no regulation, manual provision, or other issuance in effect prior to the 2002 rule which specified that only evidence contained in service records could corroborate a claimed PTSD stressor. *See Doran v. Brown*, 6 Vet. App. 283, 289 (1994) ("There is nothing in the statute or the regulations which provides that corroboration must, and can only, be found in service records."); *see also* M21-1, Part III, para. 5.14.c.(5) (change 49, Feb. 20, 1996) (noting that service records "may be devoid of evidence" of an in-service assault because "many victims of personal assault . . . do not file official reports" and directing VA personnel to develop "[a]lternative sources that may provide credible evidence of the in-service stressor"). Rather, prior versions of 38 C.F.R. § 3.304(f) merely required that there be "credible supporting evidence" regarding the occurrence of the stressor. *See, e.g.*, 38 C.F.R. § 3.304(f) (1998). Moreover, rather than constituting a liberalizing issue under 38 C.F.R. § 3.114, section 3.304(f)(5) merely calls to the attention of adjudicators the types of evidence that may support a claim for benefits based on in-service personal assault and details procedures to ensure claimants are aware of the relevance of such evidence. It does not create a new basis for entitlement to compensation for PTSD or even establish a new evidentiary standard for adjudication of such claims. Instead, it merely clarifies the evidence that may be considered in determining whether the requirements for entitlement have been met. Similarly, other documents, such as manual provisions, issued by VA providing guidance on the implementation of section 3.304(f)(5) do not constitute liberalizing administrative issues for purposes of section 3.114 because they address claim development and remind adjudicators of the types of evidence that may support a claim and do not alter the substantive rules governing benefit entitlement. Therefore, the special rule in 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114 is inapplicable, and any awards under the contemplated review would be governed by the generally applicable rules grounded in 38 U.S.C. § 5110(a).

Under Secretary for Benefits (20)

Content of Letter to Claimants

24. The letter to claimants concerning the contemplated review should contain sufficient information to notify the claimant of VA's proposed action and to enable the claimant to make an informed decision concerning matters on which VA requests the claimant's response. Provided that the letter does not imply a right to reopening or to retroactive payments in a manner that would be beyond VA's authority, VBA has discretion in determining the content of the letter. If VBA wishes to invite claims to reopen even where the claimant currently has no new and material evidence, as discussed in paragraph 22, above, we recommend that the letter inform claimants that they may request such reopening. Of course, it would be helpful to encourage claimants to submit any new evidence they may have relevant to their claims and/or to identify any potential sources of new information, although they would not be required to do so at the time they request reopening.

Authority to Amend Evidentiary Rules

25. VA has authority to amend evidentiary rules associated with compensation claims involving MST to address claims involving physical and mental disabilities other than PTSD. Under 38 U.S.C. § 501(a), the Secretary has "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department . . . including (1) regulations with respect to the nature and extent of proof and evidence . . . in order to establish the right to benefits under such laws." The creation of any special evidentiary standards that could be determinative of claims would require notice and comment rulemaking. We note that VA is required to consider all lay and medical evidence in every case, *see* 38 U.S.C. § 5107(b), and may in any particular case find that evidence from alternative sources, such as those described in section 3.304(f)(5), is sufficient to establish a particular fact at issue, such as the fact that a personal assault occurred during service. However, if VA were to adopt a policy or practice of according greater significance to certain types of evidence or to evidence in specific classes of cases, such as those involving alleged personal assault, then rulemaking would be required to explain why we are according such significance and to provide the public an opportunity to comment on the policy.

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