are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: April 2, 2019.

R. Joseph Durbala,

IRS Tax Analyst.

[FR Doc. 2019–06902 Filed 4–5–19; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Summary of Precedent Opinions of the General Counsel

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of legal interpretations issued by the Office of the General Counsel (OGC) involving Veterans' benefits under laws administered by VA. These interpretations are considered precedential by VA and will be followed by VA officials and employees in claim matters involving the same legal issues. This summary is published to provide the public and, in particular, Veterans' benefits claimants and their representatives, with notice of VA's interpretations regarding the legal matters at issue.

FOR FURTHER INFORMATION CONTACT: Suzanne Hill, Law Librarian, Office of General Counsel, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–7624.

SUPPLEMENTARY INFORMATION: A VA regulation at 38 CFR 2.6(e)(8) delegates to the General Counsel the power to designate an opinion as precedential, and 38 CFR 14.507(b) specifies that precedential opinions involving Veterans' benefits are binding on VA officials and employees in subsequent matters involving the legal issue decided in the precedent opinion. The interpretation of the General Counsel on legal matters, contained in such opinions, is conclusive as to all VA officials and employees, not only in the matter at issue, but also in future adjudications and appeals involving the same legal issues, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel or a judicial decision.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel that must be followed in future benefit matters and to assist Veterans' benefits claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above or by accessing the opinions on the internet at *http://www.va.gov/ogc/precedentopinions.asp.*

VAOPGCPREC 1–2018

Question Presented: How does a claimant's opt-in to the Rapid Appeals Modernization Program (RAMP) affect an existing fee agreement?

Held: If a claimant, who is represented by a claims agent or attorney, withdraws his or her notice of disagreement to opt-in to RAMP, that withdrawal does not obstruct the representative's eligibility for fees. VA does not construe the RAMP election as returning the claimant and representative to a period in the VA administrative process for which fees may not be charged or as otherwise affecting a legal existing fee agreement.

Effective Date: August 6, 2018.

James M. Byrne,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 1–2017

Question Presented: 1. Is obesity per se a ''disease'' for purposes of establishing entitlement to service connection under 38 U.S.C. 1110 and 1131?

2. If obesity is a disease, may obesity be considered the result of a veteran's willful misconduct for purposes of line-of-duty determinations under 38 U.S.C. 105(a)?

3. Is obesity per se a ''disability'' for purposes of secondary service connection under 38 CFR 3.310?

4. If obesity is not a disease, could it be an ''in-service event'' from which a service-connected disability may result?

5. If obesity is not a disease, could it be an ''intermediate step'' between a service-connected disability and a current disability that may be service connected on a secondary basis under 38 CFR 3.310(a)?

Held: 1. The longstanding policy of VA, that obesity per se is not a disease or injury for purposes of 38 U.S.C. 1110 and 1131 and therefore may not be service connected on a direct basis, is consistent with title 38, United States Code.

2. Because obesity is not considered a disease for purposes of 38 U.S.C. 1110 and 1131, we do not need to determine whether it may be considered the result of a veteran's willful misconduct for purposes of line-of-duty determinations under 38 U.S.C. 105(a).

3. Obesity per se is not a ''disability'' for purposes of 38 CFR 3.310. If, in a particular case, obesity resulting from a service-connected disease or injury is found to produce impairment beyond that contemplated by the applicable provisions of VA's rating schedule, VA may consider an extra-schedular rating under 38 CFR 3.321(b)(1) for the service-connected condition based on that impairment.

4. Obesity cannot qualify as an in-service event because it occurs over time and is based on various external and internal factors, as opposed to being a discrete incident or occurrence, or a series of discrete incidents or occurrences.

5. Obesity may be an ''intermediate step'' between a service-connected disability and a current disability that may be service connected on a secondary basis under 38 CFR 3.310(a).

Effective Date: January 6, 2017.

Richard J. Hipolit,
Acting General Counsel, Department of Veterans Affairs.

VAOPGCPREC 1–2015

Question Presented: 1. May VA pay individuals appointed under 38 U.S.C. 7405(a)(2) on a time basis either per hour or per annum?

2. If so, may these individuals be granted a full-time appointment under 38 U.S.C. 7401 or 7401(3) concurrently with an appointment under 38 U.S.C. 7405(a)(2) at the same facility without violating or compromising 5 U.S.C. 5533 or Department conflict of interest regulations (38 CFR, part 0)?

3. If VA is able to appoint individuals under 38 U.S.C. 7405(a)(2) and compensate these individuals on a time-basis, would such appointees, if retired annuitants, be subject to a salary offset under 5 U.S.C. 8344 or 8468?

Held: 1. VA may not pay individuals appointed under 38 U.S.C. 7405(a)(2) on a time basis.

2. Since the answer to the first question is ''no,'' it is unnecessary to respond to this question.

3. Since the answer to the first question is ''no,'' it is unnecessary to respond to this question.

Effective Date: February 19, 2015.

Leigh A. Bradley,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 2–2015

Question Presented: Does VA's express statutory authority to accept gifts, contained in sec. 8301, of title 38, United States Code, include the implied authority to solicit gifts?

Conclusion: VA's express statutory authority to accept gifts under 38 U.S.C. 8301 includes the implied authority to solicit gifts.

Effective Date: March 20, 2015.

Leigh A. Bradley,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 3–2015 (Withdrawn)

Update: 1. VAOPGCPREC 3–2015 held that the designated cemetery official may be a proper applicant for a government-furnished headstone or marker under 38 CFR 38.632(b)(1). The opinion also held that Civil-War era graves at Oakwood Cemetery in Richmond, Virginia, which are currently identified with marble stones that do not show the names of each soldier but have identifying numbers that are tracked in a burial ledger, are not ''unmarked graves'' for purposes of VA furnishing a headstone or marker under 38 U.S.C. 2306(a)(3), even if such stones denote the location of more than one soldier.

2. This is to inform you that VAOPGCPREC 3–2015 is withdrawn.

Effective Date: December 7, 2016.

Leigh A. Bradley,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 3–2015 (Original Opinion)

Question Presented: 1. Is the designated cemetery official a proper applicant for a government-furnished headstone or marker under 38 CFR 38.632(b)(1)?

2. Do Civil-War era graves currently identified with marble stones that do not show the names of each soldier constitute ''unmarked graves'' for purposes of VA furnishing a headstone or marker under 38 U.S.C. 2306(a)(3)?

3. Do Civil-War era graves currently identified with marble stones that do not show the names of each soldier constitute ''unmarked graves'' for purposes of VA furnishing a headstone or marker under 38 U.S.C. 2306(a)(3) if such stones denote the location of more than one soldier?

Conclusions: 1. The designated cemetery official may be a proper applicant for a government-furnished headstone or marker under 38 CFR 38.632(b)(1).

2. Assuming the facts as stated in this opinion are accurate, Civil-War era graves at Oakwood Cemetery currently identified with marble stones that do not show the names of each soldier but that have identifying numbers that are tracked in a burial ledger are not ''unmarked graves'' for purposes of VA furnishing a headstone or marker under sec. 2306(a)(3).

3. Assuming the facts as stated in this opinion are accurate, Civil-War era graves at Oakwood Cemetery currently identified with marble stones that do not show the names of each soldier but that have identifying numbers that are tracked in a burial ledger are not ''unmarked graves'' for purposes of VA furnishing a headstone or marker under sec. 2306(a)(3) even if such stones denote the location of more than one soldier.

Effective Date: August 28, 2015 through December 6, 2016.

Leigh A. Bradley,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 4–2015

Question Presented: 1. Is the Board of Veterans' Appeals (Board), upon a veteran's death, required to dismiss the veteran's dispute as to payment of potential attorney's fees under 38 U.S.C. 5904(d) from money withheld from past-due disability benefits awarded to the veteran during the veteran's lifetime?

2. If the Board is required to dismiss the dispute, may a party pursue payment of the withheld money as accrued benefits pursuant to 38 U.S.C. 5121?

3. If the Board is required to dismiss the dispute, what effect does that dismissal have on the underlying decisions regarding that issue?

Held: 1. Upon a veteran's death, the Board is required to dismiss the veteran's dispute as to payment of potential attorney's fees under 38 U.S.C. 5904(d) when the money withheld from past-due disability benefits awarded to the veteran meets the statutory definition for accrued benefits.

2. A claim, pending at the time of a veteran's death, challenging an attorney's entitlement to payment of attorney fees under sec. 5904 from the veteran's retroactive periodic monetary benefits may provide a basis for an accrued benefits claim under sec. 5121, because such a claim concerns entitlement to periodic monetary benefits allegedly due and unpaid to the veteran at the time of death.

3. The Board's dismissal of the veteran's dispute regarding payment of attorney's fees renders all underlying decisions regarding that issue that were not final at the time of the veteran's death legal nullities.

Effective Date: December 3, 2015.

Leigh A. Bradley,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 1–2014

Question Presented: Is a State home domiciliary required to provide primary care to a resident on whose behalf VA pays per diem for that care?

Held: In order for a State to receive per diem payments form VA for a resident in its State home domiciliary, the home must provide primary care to the resident.

Effective Date: March 21, 2014.

Will A. Gunn,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 2–2014

Question Presented: Are claims for burial benefits administered by the National Cemetery Administration (NCA) subject to the notice requirements in sec. 5103, of title 38, United States Code, in light of the unique time requirements associated with such claims?

Held: The notice requirements of 38 U.S.C. 5103 apply to all claims for benefits administered by VA, including claims for benefits administered by NCA. However, NCA may determine that notice under 38 U.S.C. 5103 is unnecessary in particular cases, either because VA has sufficient evidence to grant the requested benefit or because applicable law and undisputed facts establish that the claimant is ineligible for the claimed benefit. Further, pursuant to a recent amendment to sec. 5103(a), NCA may provide the notice required by that section ''by the most effective means available,'' which may include providing such notice on a benefit application form or transmitting it to the claimant electronically. Finally, NCA has discretion to adopt reasonable procedures for applying the requirements of sec. 5103 in the context of time-sensitive claims for burial benefits.

Effective Date: May 19, 2014.

Will A. Gunn,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 5–2014 (Revised)

Question Presented: 1. Is VA legally obligated under 38 U.S.C. 5103A(a) to obtain the service and other related records (including investigation reports, service treatment records, service personnel records, Service Record Books, etc.) that belong or pertain to a

Servicemember other than the Veteran who is seeking VA benefits, when such records may be potentially relevant to the Veteran's claim for benefits?

2. Do the special processing procedures set forth in 38 CFR 3.304(f)(5) for developing and deciding claims involving post-traumatic stress disorder (PTSD) asserted to be due to personal assault and/or military sexual trauma (MST) impose a requirement on VA to obtain records that belong or pertain to a Servicemember other than the Veteran claimant when such records may be useful for corroborating the Veteran's account of the stressor incident or to provide evidence of behavior changes following the incident?

a. Would it be required, and/or would it be legally appropriate, to attempt to solicit a written statement from, or depose during a hearing, the asserted Servicemember assailant for purposes of obtaining information concerning a claim of personal assault or MST that has been raised by a Veteran claimant?

3. If VA is legally obligated to obtain the records of a Servicemember other than the Veteran:

a. Does the Privacy Act, 5 U.S.C. 552, prohibit VA from obtaining and associating with a Veteran claimant's claims file service and other related records that belong or pertain to another Servicemember? What legal factors are for consideration in making this determination?

b. Assuming the Privacy Act does not prohibit VA from obtaining and associating a non-claimant Servicemember's records with a Veteran claimant's claims file, must VA obtain permission to request those records, and from whom must VA obtain such permission? Is the answer to this question the same or different if the Servicemember whose records are being sought is deceased? If permission is denied, does VA have any additional duty to assist the claimant in obtaining the records?

c. If records related to the non-claimant Servicemember are obtained, how should they be handled? May copies of the records be associated with the Veteran claimant's claims file? If so, must the records first be redacted in order to remove all personally identifiable information?

i. If VA is permitted to associate the non-claimant Servicemember's redacted records in the Veteran claimant's claims file, is VA also required to conduct a full and complete search of the Veteran claimant's claims file for other named references to the Servicemember and redact them (such as in this case where the alleged assailant is named in both records located in the claims file and in the remand decision of the Court of Appeals for Veterans Claims)?

Held: 1. In adjudicating a particular Veteran's claim for benefits, VA generally would be obligated under 38 U.S.C. 5103A to make reasonable efforts to obtain records pertaining to another individual if: (a) Those records were adequately identified, would be relevant to the Veteran's claim, and would aid in substantiating the claim; and (b) VA would be authorized to disclose the relevant portions of such records to the Veteran under the Privacy Act and 38 U.S.C. 5701 and 7332. VA adjudicators generally may not consider documents that cannot be disclosed to the claimant.

2. Pursuant to the Privacy Act, 5 U.S.C. 552a, and 38 U.S.C. 5701, VA records pertaining to another individual generally may be disclosed to a claimant only: (1) Pursuant to the written consent of the individual to whom the records pertain; (2) pursuant to a court order; or (3) where there is both an applicable routine use under the Privacy Act and a VA finding under 38 U.S.C. 5701(e) that disclosure of records other than names and addresses would serve a useful purpose. Because there currently is no applicable routine use, disclosure of another individual's VA records to a VA claimant for purposes of the latter's benefits claim generally requires written consent or a court order. Further, if the records at issue contain information protected by 38 U.S.C. 7332, any written consent or court order must comply with the specific requirements of that statute and VA's implementing regulations.

3. If a claimant identifies relevant records pertaining to another individual that are in the custody of the Department of Defense or another Federal agency, it would be consistent with VA's statutory duty to assist for VA to ask the custodian agency to furnish such records, but only if they may be disclosed to the VA claimant. The custodian agency would be responsible for determining whether its records may be disclosed to the VA claimant for the requested purpose. In making such requests, VA should clearly explain to the custodian agency the circumstances and conditional nature of the request. Specifically, VA should explain that the records are requested on behalf of a VA claimant who is not the individual to whom the record pertains and that VA requests a determination by the custodian agency as to whether such records may be disclosed to the VA claimant under the Privacy Act and any routine uses applicable to the relevant system of records of the custodian agency.

4. VA's duty under 38 U.S.C. 5103A to make ''reasonable efforts'' to assist claimants in obtaining evidence may in some cases include the duty to request that a third party provide written consent for VA to disclose records pertaining to the third party to the claimant. The Veterans Benefits Administration (VBA) may wish to consider issuing regulations or establishing uniform procedures to address the unique and sensitive issues that may arise where the records of an alleged assailant or other third party may be relevant to a claim. In the absence of regulations or procedures specifically addressing this issue, it generally must be resolved on a case-by-case basis. In determining whether ''reasonable efforts'' include such a request in a particular case, VA may consider factors including the third party's privacy interest in his or her records; the likelihood that the records exist; the likelihood that the request would result in consent to disclose the records to the claimant; and the potential for such requests to generate conflict or otherwise adversely affect the safety, health, or rights of either the claimant or the third party. A determination that ''reasonable efforts'' do not require seeking a third-party's consent to disclose his or her records to the claimant would be most strongly justified in a case where the interests of the third party are adverse to the claimant's interest, such as where the claimant alleges that the third party assaulted the claimant or engaged in other improper or unlawful behavior. In contrast, where the interests of the claimant and the third party are not adverse, there ordinarily would be a stronger basis for a finding that VA's ''reasonable efforts'' may include asking the third party to consent to disclosure of his or her records to the claimant.

5. If the individual to whom a record pertains is deceased, the Privacy Act would not apply, but other limitations would apply. First, under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(6), VA may be required to balance the privacy interests of a decedent's surviving family members against the public interest in disclosure of information concerning the decedent in order to determine whether disclosure is warranted. Second, VA must ensure compliance with 38 U.S.C. 5701 and 7332. Under sec. 5701(e), VA records other than names and addresses may be disclosed if VA finds that such disclosure would serve a ''useful purpose.'' Alternatively, the next of kin of the person to whom the records pertain may provide written consent to

disclose the records to a VA claimant. However, the next of kin cannot consent to disclosure of information protected by sec. 7332 for purposes of supporting a claim by a person other than a survivor or dependent of the person to whom the records pertain.

6. The provisions of 38 CFR 3.304(f)(5) do not impose on VA any duty to assist beyond that provided under 38 U.S.C. 5103A. Section 3.304(f)(5) identifies the types of evidence that may be relevant to corroborate a Veteran's claim of an in-service assault and seeks to ensure that the Veteran is aware of the types of evidence that may support his or her claim. The existence and extent of any duty on VA's part to obtain relevant records is governed by sec. 5103A and VA's regulations implementing that statute.

7. VA is not required to solicit a written statement from, or to depose during a hearing, the individual who allegedly assaulted a claimant who is seeking VA benefits for disability due to the alleged assault. Further, to prevent disparate treatment of similarly situated claimants and disparate commitment of VA adjudication resources, 38 CFR 3.159(g) reserves to the Secretary of Veterans Affairs the authority to authorize assistance beyond that currently specified in statute and regulation. Accordingly, VA generally may not, in an individual case, solicit statements or testimony from an alleged assailant, as doing so would give rise to the disparities § 3.159(g) was designed to prevent.

8. If records pertaining to an individual other than the claimant are obtained and considered in relation to the claim, VA must include them in the claims file. However, VA should exercise care in ensuring that the protected information included in the claims file is limited to the information that VA is authorized to disclose under the applicable written consent, routine use, useful purpose determination, court order, or other authority. Accordingly, it may be necessary to redact the records to remove identifying information that is not relevant to the claim or not otherwise within the scope of the relevant authorization, such as the individual's address, telephone number, and Social Security number. However, if the claimant provided VA with the Servicemember's name, VA would not need to redact that name from the documents placed in the file. If VA includes records pertaining to a third party in a VA claims file, it ordinarily would not need to search the entire file for other records containing protected information, unless it has reason to believe that the file may contain protected third-party information that was not provided by the claimant.

Effective Date: January 5, 2017.

Richard J. Hipolit,

Acting General Counsel, Department of Veterans Affairs.

VAOPGCPREC 5–2014 (Original Opinion)

1. Is VA legally obligated under 38 U.S.C. 5103A(a) to obtain the service and other related records (including investigation reports, service treatment records, service personnel records, Service Record Books, etc.) that belong or pertain to a Servicemember other than the Veteran who is seeking VA benefits, when such records may be potentially relevant to the Veteran's claim for benefits?

2. Do the special processing procedures set forth in 38 CFR 3.304(f)(5) for developing and deciding claims involving PTSD asserted to be due to personal assault and/or MST impose a requirement on VA to obtain records that belong or pertain to a Servicemember other than the Veteran claimant when such records may be useful for corroborating the Veteran's account of the stressor incident or to provide evidence of behavior changes following the incident?

a. Would it be required, and/or would it be legally appropriate, to attempt to solicit a written statement from, or depose during a hearing, the asserted Servicemember assailant for purposes of obtaining information concerning a claim of personal assault or MST that has been raised by a Veteran claimant?

3. If VA is legally obligated to obtain the records of a Servicemember other than the Veteran:

a. Does the Privacy Act, 5 U.S.C. 552, prohibit VA from obtaining and associating with a Veteran claimant's claims file service and other related records that belong or pertain to another Servicemember? What legal factors are for consideration in making this determination?

b. Assuming the Privacy Act does not prohibit VA from obtaining and associating a non-claimant Servicemember's records with a Veteran claimant's claims file, must VA obtain permission to request those records, and from whom must VA obtain such permission? Is the answer to this question the same or different if the Servicemember whose records are being sought is deceased? If permission is denied, does VA have any additional duty to assist the claimant in obtaining the records?

c. If records related to the non-claimant Servicemember are obtained, how should they be handled? May copies of the records be associated with the Veteran claimant's claims file? If so, must the records first be redacted in order to remove all personally identifiable information?

i. If VA is permitted to associate the non-claimant Servicemember's redacted records in the Veteran claimant's claims file, is VA also required to conduct a full and complete search of the Veteran claimant's claims file for other named references to the Servicemember and redact them (such as in this case where the alleged assailant is named in both records located in the claims file and in the remand decision of the Court of Appeals for Veterans Claims)?

Held: 1. In adjudicating a particular Veteran's claim for benefits, VA generally would be obligated under 38 U.S.C. 5103A to make reasonable efforts to obtain records pertaining to another individual if: (a) Those records were adequately identified, would be relevant to the Veteran's claim, and would aid in substantiating the claim; and (b) VA would be authorized to disclose the relevant portions of such records to the Veteran under the Privacy Act and 38 U.S.C. 5701 and 7332. VA adjudicators generally may not consider documents that cannot be disclosed to the claimant.

2. Pursuant to the Privacy Act, 5 U.S.C. 552a, and 38 U.S.C. 5701, VA records pertaining to another individual generally may be disclosed to a claimant only:

(1) Pursuant to the written consent of the individual to whom the records pertain;

(2) pursuant to a court order; or (3) where there is both an applicable routine use under the Privacy Act and a VA finding under 38 U.S.C. 5701(e) that disclosure of records other than names and addresses would serve a useful purpose. Because there currently is no applicable routine use, disclosure of another individual's VA records to a VA claimant for purposes of the latter's benefits claim generally requires written consent or a court order. Further, if the records at issue contain information protected by 38 U.S.C. 7332, any written consent or court order must comply with the specific requirements of that statute and VA's implementing regulations.

3. If a claimant identifies relevant records pertaining to another individual that are in the custody of the Department of Defense or another Federal agency, it would be consistent with VA's statutory duty to assist for VA to ask the custodian agency to furnish such records, but only if they may be disclosed to the VA claimant. The custodian agency would be responsible

for determining whether its records may be disclosed to the VA claimant for the requested purpose. In making such requests, VA should clearly explain to the custodian agency the circumstances and conditional nature of the request. Specifically, VA should explain that the records are requested on behalf of a VA claimant who is not the individual to whom the record pertains and that VA requests a determination by the custodian agency as to whether such records may be disclosed to the VA claimant under the Privacy Act and any routine uses applicable to the relevant system of records of the custodian agency.

4. VA's duty under 38 U.S.C. 5103A to make ''reasonable efforts'' to assist claimants in obtaining evidence may in some cases include the duty to request that an individual to whom a relevant record pertains provide written consent for VA to disclose that record to the claimant. The Veterans Benefits Administration may wish to consider issuing regulations or establishing uniform procedures to address the unique and sensitive issues that may arise where the records of an alleged assailant or other third party may be relevant to a claim. In the absence of such regulations or procedures, VA adjudicators must make case-by-case determinations as to whether the duty to assist requires VA to seek another individual's consent to disclosure of his or her records to the claimant. That determination may be based on, among other things, the extent to which the claimant has identified specific records likely to contain relevant evidence and the feasibility and appropriateness, in the particular case of seeking the consent of the individual to whom the record pertains. Where the records at issue pertain to an individual who allegedly assaulted the claimant, it would be advisable to determine whether the claimant wants VA to contact that individual.

5. If the individual to whom a record pertains is deceased, the Privacy Act would not apply, but other limitations would apply. First, under FOIA, 5 U.S.C. 552(b)(6), VA may be required to balance the privacy interests of a decedent's surviving family members against the public interest in disclosure of information concerning the decedent in order to determine whether disclosure is warranted. Second, VA must ensure compliance with 38 U.S.C. 5701 and 7332. Under sec. 5701(e), VA records other than names and addresses may be disclosed if VA finds that such disclosure would serve a ''useful purpose.'' Alternatively, the next of kin of the person to whom the records pertain may provide written consent to disclose the records to a VA claimant. However, the next of kin cannot consent to disclosure of information protected by sec. 7332 for purposes of supporting a claim by a person other than a survivor or dependent of the person to whom the records pertain.

6. The provisions of 38 CFR 3.304(f)(5) do not impose on VA any duty to assist beyond that provided under 38 U.S.C. 5103A. Section 3.304(f)(5) identifies the types of evidence that may be relevant to corroborate a Veteran's claim of an in-service assault and seeks to ensure that the Veteran is aware of the types of evidence that may support his or her claim. The existence and extent of any duty on VA's part to obtain relevant records is governed by sec. 5103A and VA's regulations implementing that statute.

7. VA is not required to solicit a written statement from, or to depose during a hearing, the individual who allegedly assaulted a claimant who is seeking VA benefits for disability due to the alleged assault. Further, to prevent disparate treatment of similarly situated claimants and disparate commitment of VA adjudication resources, 38 CFR 3.159(g) reserves to the Secretary of Veterans Affairs the authority to authorize assistance beyond that currently specified in statute and regulation. Accordingly, VA generally may not, in an individual case, solicit statements or testimony from an alleged assailant, as doing so would give rise to the disparities § 3.159(g) was designed to prevent.

8. If records pertaining to an individual other than the claimant are obtained and considered in relation to the claim, VA must include them in the claims file. However, VA should exercise care in ensuring that the protected information included in the claims file is limited to the information that VA is authorized to disclose under the applicable written consent, routine use, useful purpose determination, court order, or other authority. Accordingly, it may be necessary to redact the records to remove identifying information that is not relevant to the claim or not otherwise within the scope of the relevant authorization, such as the individual's address, telephone number, and Social Security number. However, if the claimant provided VA with the Servicemember's name, VA would not need to redact that name from the documents placed in the file. If VA includes records pertaining to a third party in a VA claims file, it ordinarily would not need to search the entire file for other records containing protected information, unless it has reason to believe that the file may contain protected third-party information that was not provided by the claimant.

Effective Date: August 12, 2014 through January 5, 2017.

Tammy L. Kennedy,
Acting General Counsel, Department of Veterans Affairs.

VAOPGCPREC 6–2014

Question Presented: Whether, pursuant to 38 U.S.C. 5103(a)(1), VA is required upon receipt of a claim to reopen based upon new and material evidence to provide notice of the information and evidence necessary to substantiate the particular factual element or elements that were found insufficient in the previous denial of the claim.

Response: Pursuant to 38 U.S.C. 5103(a)(1), upon receipt of a claim to reopen a previously denied claim, VA is not required to provide notice of the information and evidence necessary to substantiate the particular factual element or elements that were found insufficient in the previous denial of the claim.

Effective Date: November 21, 2014.

Tammy L. Kennedy,
Acting General Counsel, Department of Veterans Affairs.

VAOPGCPREC 1–2012

Question Presented: What is the Secretary's responsibility for managing and distributing funds held in escrow for a Specially Adapted Housing (SAH) construction case if a Veteran decides not to complete the purchase of the property after grant funds have been deposited into an escrow account?

Held: When a Veteran decides not to complete the purchase of a property after SAH grant funds have been disbursed, the Secretary must determine whether the contractor has both performed his obligations under the construction contract and satisfied the SAH guidelines. If the contractor has done so, VA should release the funds to the contractor in accordance with 38 CFR 36.4410 and the escrow agreement. If the contractor has not, the funds should remain in the escrow account pending civil litigation.

Effective Date: January 24, 2012.

Will A. Gunn,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 2–2012

Question Presented: With regard to the implementation of Public Law 112–154—

a. Are new regulations necessary before implementing sec. 202?

b. When are secs. 204 and 205 effective?

c. Are surviving spouses under sec. 206 exempt from paying the statutory loan fee usually required under 38 U.S.C. 3729? Are such spouses eligible for double entitlement?

d. Is sec. 701 consistent with current regulations and policies? What regulations, if any, are necessary before implementing the provision?

Held: a. Regulations are not necessary before implementing sec. 202, as a new regulation would merely be a restatement of the statute. VA may provide the assistance, effective as of October 1, 2012. VA is still required, nevertheless, to promulgate a new final regulation, not subject to notice and comment, to address the statutory change.

b. In accordance with the plain meaning of the statute, the Department should implement sec. 204 on August 6, 2013, which is one year from the date of enactment of Public Law 112–154, and should have already implemented sec. 205, as it became effective August 6, 2012.

c. Surviving spouses under sec. 206 are, to the same extent as surviving spouses under 38 U.S.C. 3701(b)(2), exempt from paying the statutory loan fee. Also, sec. 206 surviving spouses are eligible for double entitlement.

d. Section 701 is not inconsistent with current regulations and policies and, for the most part, can be implemented before a final rule is published. To the extent VA is required to implement a new policy decision not expressly prescribed in the statute or addressed in current regulations, VA should publish a proposed rule and allow the public to comment on VA's plans for implementation.

Effective Date: October 31, 2012.

Will A. Gunn,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 3–2012

Question Presented: VBA plans to contact individuals whose claims for compensation for PTSD due to 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 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 CFR 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?

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 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 CFR 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.

4. Neither 38 CFR 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 CFR 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 § 3.304(f)(5), is sufficient to establish a particular fact at issue, such as that a personal assault occurred during service.

Effective Date: December 20, 2012.

Will A. Gunn,
General Counsel, Department of Veterans Affairs.

VAOPGCPREC 1–2011

Question Presented: A. What procedures are used to designate

documents as constituting Veterans Health Administration (VHA) medical quality-assurance documents?

B. What types of documents qualify as quality-assurance documents?

C. Is the Board authorized to examine quality-assurance records or documents to determine whether they are protected by 38 U.S.C. 5705?

D. Does VA's duty to assist in claim development under 38 U.S.C. 5103A require the Board to attempt to obtain quality-assurance records?

Held: A. Under 38 U.S.C. 5705(a), records and documents created by VA as part of a medical quality-assurance program are confidential and privileged and may not be disclosed to any person or entity except as provided in sec. 5705(b). For a record or document to be protected from disclosure by sec. 5705(a), VA must designate the VA systematic health-care review activities to be carried out by or for VA for purposes of improving the quality of VA medical care or the utilization of VA health-care resources in VA health-care facilities, and VA must specify in regulations prescribed to implement sec. 5705 those activities so designated. VA has designated, at 38 CFR 17.501(a), four systematic health-care review activities to be carried out by or for VA for the stated purposes. In addition, only records or documents and parts of records or documents resulting from those activities that have been described in advance and in writing by the Under Secretary for Health (USH), a Veterans Integrated Service Network (VISN) director, or a VHA medical facility director as being included under the four designated classes of healthcare quality-assurance reviews are protected by sec. 5705 and implementing VA regulations. Further, if the activity that generated the document was performed at a VA medical treatment facility, either the activity must have been performed by staff of that facility or the non-staff individuals who performed the activity must have had their roles in performing the activity designated in writing before performing the activity. Whether these statutory, regulatory, and policy requirements were met in any particular case is a matter for determination by the appropriate VHA official in the first instance and, if the VHA determination is affirmative, by the General Counsel or Deputy General Counsel on appeal.

B. The types of documents that qualify as quality-assurance documents are described in 38 CFR 17.501. They may be in written, computer, electronic, photographic, or any other form. Generally, to constitute a VHA quality assurance record or document that is privileged and confidential, a record or document: (1) Must have been produced by or for VA in conducting a medical quality-assurance activity; (2) must have resulted from a quality-assurance activity described in advance in writing by the USH, a VHA VISN director, or a health-care facility director as being within the classes of healthcare quality assurance reviews listed in 38 CFR 17.501(a); and (3) must either: (A) Identify individual practitioners, patients, or reviewers; (B) contain discussions, by healthcare evaluators during a review of quality-assurance information, relating to the quality of VA medical care or the utilization of VA medical resources; (C) be individual committee, service, or study team minutes, notes, reports, memoranda, or other documents either produced by healthcare evaluators in deliberating on the findings of healthcare reviews or prepared for purposes of discussion or consideration by healthcare evaluators during a quality-assurance review; (D) be a memorandum, letter, or other document from a medical facility to a VISN director or VA Central Office that contains information generated by a quality-assurance activity; or (E) be a memorandum, letter, or other document produced by a VISN director or VA Central Office that either responds to or contains information generated by a quality-assurance activity. Clinical treatment records would generally not satisfy these criteria. Records and documents that do not qualify for protection under 38 U.S.C. 5705(a), even if they otherwise meet the criteria under § 17.501(a)–(c) for quality-assurance documents, are described in 38 CFR 17.501(g).

C. Under 38 U.S.C. 5705(b)(5), nothing in sec. 5705 is to be construed as limiting the use of quality-assurance records and documents within VA, and 38 U.S.C. 5705(b)(1) explicitly requires disclosures of quality-assurance records or documents under certain specified circumstances. However, under 38 CFR 17.508(a), access within VA to confidential and privileged quality-assurance records and documents is restricted to employees who need such information to perform their governmental duties and who are authorized access by the VA medical facility director, VISN director, or USH, by their designees, or by VA's implementing regulations at 38 CFR 17.500 through 17.511. Neither sec. 5705(b)(1) nor VA's implementing regulations at 38 CFR 17.500 through 17.511 authorize disclosure of quality-assurance records or documents to an agency of original jurisdiction or the Board for purposes of adjudicating a claim or an appeal to the Secretary of a claim decision.

D. Section 5103A, of title 38, United States Code, requires agencies of original jurisdiction and the Board to make reasonable efforts to request from VHA any quality-assurance records or documents that are relevant to a claim, provided the claimant furnishes information sufficient to locate the records or documents, and, if VHA denies access to the records and documents on the basis that they are protected by sec. 5705 and implementing regulations, to appeal VHA's denial to OGC under 38 CFR 17.506. Under 38 CFR 17.508(c), any quality-assurance record or document, whether confidential and privileged or not, may be provided to the General Counselor any attorney within OGC, wherever located. If VHA and OGC conclude that the records and documents are protected by sec. 5705 and implementing regulations, VA may not consider them and rely on them in the adjudication of the claim. If VHA or OGC concludes that the records and documents are not confidential and privileged, VA may consider them in adjudicating the claim.

Effective Date: April 19, 2011.

Will A. Gunn,

General Counsel, Department of Veterans Affairs.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on September 27, 2018, for publication.

Dated: April 3, 2019.

Luvenia Potts,

Program Specialist, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

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