Proposed Rule – “Standard Claims and Appeal Forms”

NVLSP & MOPH Jointly Submitted Comments
Proposed Rule – “Standard Claims and Appeal Forms”

- VA is proposing to amend:
  - Its adjudication regs
  - Appeals regs
  - Rules of practice of the Board
Proposed Rule – “Standard Claims and Appeal Forms”

- Two Major Components:

1. Requires all claims to be filed on standard forms, regardless of the type of claim posture in which the claim arises

2. VA would accept an expression of dissatisfaction or disagreement with an adjudicative determination by the AOJ as an NOD only if submitted on a standardized form provided by VA for the purpose of appealing the decision
Current Rules

- VA allows a claimant to submit an “informal” claim in a non-standard format

- VA allows an NOD to be filed in any format, so long as it meets the VA appeal rules found in 38 C.F.R. § 20.201
Current NOD Rule

- Currently, VA will accept “[a] written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the [AOJ] and a desire to contest the result” as an NOD.

- Communication must be “in terms which can be reasonably construed as disagreement” with the determination(s) and “a desire for appellate review.”

- See 38 C.F.R. § 20.201.
NOD Proposed Changes

- Governing statutes permit VA to require that a claimant submit an NOD on a particular form.

- VA proposes to make the filing of a standard VA form the only way to submit a NOD in cases where the AOJ provided a form to the claimant for the purpose of initiating appeal.
Proposed Rule – “Standard Claims and Appeal Forms”

- Proposed rule would apply only with respect to claims and appeals filed 30 days after the date this rule is published as a final rule.

- Claims and Appeals pending under the current regs as of that date would continue to be governed by the current regs.
Proposed Rule – Revision to 38 C.F.R. § 3.154

- Current Rule: “VA may accept as a claim for benefits under 38 U.S.C. § 1151 . . . Any communication in writing indicating an intent to file a claim for disability compensation or dependency and indemnity compensation”

- Revised Rule: to require claimants to file or submit a complete paper or electronic claim in order to apply for benefits under 38 U.S.C. § 1151
Summary of Proposed Changes

- Change 38 C.F.R. Parts 3, 19, and 20
  - To require the use of standard forms to initiate claims for benefits and to initiate appeals of AOJ decisions on those claims

- Change 38 C.F.R. § 3.155
  - To achieve the requirement that all claims be filed on a standard form
Summary of Proposed Changes

- Change 38 C.F.R. § 20.201
  - To redefine what constitutes a NOD

- Change Part 19
  - Procedures for AOJ processing of NODs
  - Procedures governing the treatment of incomplete forms

- Change 38 C.F.R. § 3.2600
  - Review of benefit claims after filing for an NOD
Proposed Procedures

- If the VA receives an incomplete application –
  - VA will notify the claimant of the information necessary to complete the application AND
  - Will defer assistance until the claimant submits this information

- Claimant has 1 year –
  - If the VA does not receive a complete claim within 1 year of receipt of the incomplete application THEN
  - VA will not take action on processing or adjudicating the incomplete claim
Proposed Procedures

• Incomplete forms must be completed within 60 days from the date of VA’s request for clarification, or the remainder of the period in which to initiate an appeal of the AOJ decision, whichever is later.

• Able to obtain same effective date they would receive under current procedures.
eBenefits

- If a claimant files a completed electronic claim within 1 year of the initial submission of an incomplete electronic claim, THEN
  - The completed claim will be considered filed as of the date the incomplete electronic claim was electronically saved OR
  - Stored in eBenefits for effective date purposes
NVLSP/MOPH Comments

- NVLSP and MOPH filed written comments in response to the proposed changes on 12/30/13

- NVLSP and MOPH objected to these proposed rules because:
  1. Drastically alter the existing claims process to the detriment of all vets
  2. Discriminates against claimants who do not have access to the internet
  3. Segregates vets into groups, based upon their access to a computer with internet capability
The current NOD form, VA Form 21-0958, is confusing:

- Uses words of art without explanation
- Fails to ask the appellant if he/she wants a DRO review
- Sets a trap – because there is no box to indicate the claimant desires appellate review
Comments on Proposed Rule

- Amendment to 38 C.F.R. § 3.1 (p) redefines “claim” intentionally eliminating the words:
  - “Application”
  - “Formal”
  - “Informal”

- Proposed rule does not address how VA would handle inferred claims
  - A claim is reasonably raised by the evidence of record, but not specifically claimed within a complete application
Comments on Proposed Rule

• Will allow VA to artificially lower the number of its pending claims without major gains in efficiency

• Many vets would be hurt by this rule

• Some vets would be paid from a later date
Comments on Proposed Rule

- Other vets may fall through the cracks if VA sends letter to wrong address

- Burden falls on the vet

- VA would not put incomplete claims under computer control – so the number of claims pending would be reduced

- VA could report faster processing time
Comments on Proposed Rule

- These better numbers would make it seem that the VA was adjudicating claims at a faster rate and that there were fewer pending claims.

- The re-definition of a claim helps VA show better stats without any real improvement on its part.
Reasonably Raised Claims

- In the current system-
  - If the evidence of record supports a grant for benefits…..
  - The VA is required to identify the disability and award the benefit
  - Even if the particular disability was not specifically claimed
EXAMPLE

- Vet may file for entitlement to SC for an elbow condition and while reviewing the evidence, a VA adjudicator discovers that both of the vet’s legs were amputated in service due to a combat injury.

- Under current VA policy, the VA would be required to award benefits for loss of the vet’s legs even though the vet never filed a specific claim for the loss of his legs.

- Unfortunately, the proposed reg would prohibit this.
Reasonably Raised Claims

- If VA insists on using specified forms, then
  - VA must clarify what it must do when conditions are noted in the evidence and it is reasonable for VA to either grant or develop the given disability
  - Even if the claimant has not filed a “complete claim” for that particular disability

- VA must clarify how it intends to proceed with respect to reasonably raised claims within it’s new framework
Comments on Proposed Rule - Mental Disorders

- Proposed rule requires claimants to specify what disabilities they are claiming in order for the claim to be complete.
- This requirement may cause a problem— a special rule applies to claims for mental conditions.
- If a vet claims one type of mental disorder it cannot be a claim limited only to that diagnosis but must be considered a claim for any mental disability.
Comments on Proposed Rule

- Proposed reg is not clear in regards to
  - Aid and attendance (A&A),
  - Housebound (HB) and
  - Special monthly compensation (SMC).

- Many vets do know about these potential benefits – VA should clarify
Comments on Proposed Rule

- VA proposes to eliminate 38 C.F.R. § 3.157, which currently provides that reports of examination or hospitalization can constitute informal claims, including claims to increase or reopen.
- This limits retroactive payments to no more than one year.
- Under CURRENT regs, vets may be eligible for many years of retroactive benefits.
CONCLUSION

1. Proposed rule eliminates the informal claims process and is inherently unfair to vets

2. Proposed rule formalizes its claims process to the point where benefits are unfairly restricted

We recommend the Secretary withdraw the proposed rule or revise it extensively
Electronic v. Paper Claims

- Under proposed 38 C.F.R. § 3.155
  - There will be different effective dates according to the form in which claims are filed.

- We argue that the proposal is unfair, nonproductive, and may violate the due process and equal protection clauses of the Constitution.
Electronic v. Paper Claims

- **Incomplete Electronic Claim** - would protect the earliest possible effective date – if a complete claim is filed within a year

- **Incomplete Paper Claim** – would NOT protect the earliest possible effective date

- A vet who submits a paper claim may lose thousands of dollars in disability benefits
EXAMPLE

- Vet diagnosed with prostate cancer immediately prior to separation from service files a paper VA Form 21-526, 11 months after separation (he was delayed due to undergoing chemotherapy)

- Consequently, vet fails to check Box 13A (which asks if he had ever been a POW)
EXAMPLE

- 2 months later – the VA determines that the form is “incomplete” under the proposed regs
- VA Form 21-526 is sent back to the Vet for completion
- Vet promptly returns “complete” form – but since he submitted it beyond the 1-year period he loses over 1 year of disability benefits
- Assuming that the vet was rated as 100% for prostate cancer for a 1 year period, he would lose over $34,000 in VA disability comp
Electronic v. Paper Claims

- Incomplete electronic claims “count” for purposes of establishing an effective date.
- Incomplete paper claims “don’t count” for effective date purposes until the complete paper form is filed.
Electronic v. Paper Claims

- Creates a 2-tiered system – where benefits are determined by one’s access to a computer
- Vet is entitled to disability benefits upon showing he meets the eligibility requirements in the governing statues and regs
- Proposed reg implies access to a computer and a working knowledge of computer skills
- 2-tiered system will effect:
  - The elderly
  - The poor
  - Minorities
Electronic v Paper Claims

- Data from the U.S. Census Bureau reveals that over half of all U.S. householders age 65 and older do not have a computer with internet access in the home.

- This is particularly troubling given the average age of a Vietnam vet is 65 years old.

- It appears that the VA may be specifically seeking to limit the benefits and compensation available to:
  - Vietnam Vets
  - WWII Vets
  - Korea Vets
Electronic v Paper Claims

- Is it fair to separate into distinct groups those claimants who choose to file paper claims opposed to electronic claims?

- The Social Security Administration allows claimants to file either in hard copy or electronically and DOES NOT mandate a different set of effective dates.
Changes to NOD

- VA proposes to amend 38 C.F.R. § 20.201 to redefine an NOD
  - which will require claimant to initiate appeal only by submitting a standard form where such a form is provided

- This proposed form does not include any language through which a claimant may evidence a desire to contest the result as is currently required.
Changes to NOD

- The form does not reflect any field for the claimant to state he or she desires appellate review.

- Even box 16A asks vet to explain his/her disagreements
  - But does not instruct vet to indicate whether he/she wishes appellate review.

- If NOD form not provided, 38 C.F.R. § 20.201(b) applies, and “desire for appellate review” is required.
  - If vet submits NOD form, this could be a trap.
Changes to NOD

- VA needs to modify the form to include a field in which the claimant can indicate whether or not he or she desires a de novo review by a DRO – saving months of processing times.

- The form asks for unreasonably specific info that a vet may not know.
Change to NOD

- The form’s instructions do not comprehensively define what an effective date means or what the evaluation of disability means.
- The claimant is also asked to specify the percentage evaluation sought, if known.
- This is concerning because the proposed reg does not clarify whether “as specified by the vet” on the NOD form.
CONCLUSION

- The issue is not what percentage evaluation or the effective date the vet wants.

- The issue has always been what should be the correct percentage of disability and what should be the correct effective date.
Questions?