DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 20

RIN 2900–AI86

Board of Veterans' Appeals: Rules of Practice—Death of Appellant During Pendency of Appeal

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Rules of Practice of the Board of Veterans' Appeals (Board)—part of the Department of Veterans Affairs (VA)—relating to circumstances which arise when an appellant dies while an appeal is pending before the Board. These amendments provide that when an appellant dies while an appeal is pending, the appeal will be dismissed, and eliminate a provision which permitted a deceased appellant's representative to continue to act with respect to any appeal pending upon the death of the appellant. These changes are necessary because of a ruling made by the United States Court of Veterans Appeals.

DATES: Effective Date: These changes are effective June 13, 1997, the date of the court decision which requires the changes.

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Chief Counsel, Board of Veterans' Appeals, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420 (202–565–5978).

SUPPLEMENTARY INFORMATION: The Board is an administrative body that decides appeals from denials of claims for veterans' benefits.

Death of appellant during pendency of appeal. Previously, Rule 1302 (38 CFR 20.1302) provided that, when an appeal is pending before the Board at the time of the appellant's death, the Board could complete its action on the issues properly before it without application from the survivors. In *Smith (Irma)* v. *Brown*, No. 95–898 (Vet. App. June 13, 1997), the U.S. Court of Veterans Appeals ruled that this regulation is invalid because, pursuant to its ruling in *Landicho* v. *Brown*, 7 Vet. App. 42, 47 (1994), a pending claim for compensation benefits under chapter 11 of title 38, United States Code, does not survive the claimant's death. Thus, when an appellant dies prior to the promulgation of the Board's decision with regard to a compensation claim, the Board no longer has jurisdiction of the appeal, and the appeal must be dismissed.

While it is clear that Rule 1302 is no longer applicable to claims for disability compensation, we have concluded that, for purposes of that rule, there is no meaningful distinction between disability compensation and other claims which might come before the Board.

The Court's ruling in *Landicho* that compensation claims do not survive the claimant was based in part upon the fact that payments of disability compensation cease the last day of the month before the veteran's death. 38 U.S.C. 5112(b)(1). We note that the same statute applies to payments of pension (38 U.S.C. ch. 15) and dependency and indemnity compensation (38 U.S.C. ch. 13) in the case of a payee. Similarly, 38 U.S.C. 5113(a) provides that, in the case of educational benefits (38 U.S.C. ch. 30, 31, 32, 34 and 35 and 10 U.S.C. ch. 106), effective dates—including discontinuances based on a payee's death—are to correspond, to the extent feasible, to those for disability compensation.

The court in *Landicho* also found that Congress established a procedure, under the ''accrued benefits'' provisions of 38 U.S.C. 5121, for a qualified survivor to carry on, to a limited extent, a deceased veteran's disability compensation claim by submitting an application for accrued benefits within one year after the veterans' death. *Landicho*, 7 Vet. App. at 47. Similarly, we note that the law provides these same ''accrued benefit'' rights to the same qualified survivors of all payees who die entitled to periodic benefits which remain unpaid.

Finally, we note the general rule that a cause of action created by statute generally does not survive unless its survival is specifically provided for in the statute itself or in another statute. 1 Am. Jur. 2d *Abatement, Survival and Revival* § 62 (1994). There is no survival statute other than section 5121 for any veterans' benefit which would come before the Board.

In sum, we can find no meaningful distinction between claims for disability compensation and claims for other benefits which would reach the Board with respect to survivability. Accordingly, we have amended Rule 1302 to provide that an appeal pending before the Board of Veterans' Appeals when the appellant dies will be dismissed.

Continuation of representation following death of a claimant or appellant. Previously, Rule 611 (38 CFR 20.611) provided in part that an appellant's representative may continue to act with respect to any appeal pending upon the death of the claimant or appellant until such time as a final decision has been promulgated by the Board of Veterans' Appeals. In *Smith (Irma)* v. *Brown*, the Court of Veterans Appeals ruled that this portion of Rule 611 is invalid because a pending compensation claim does not survive the claimant's death and the Board has no jurisdiction to decide a defunct claim.

While the Court's ruling—as with its ruling with respect to Rule 1302—is technically limited to claims for disability compensation, we conclude, for the reasons stated above, that the ruling should apply to all matters which come before the Board. Accordingly, we have amended Rule 611 to delete the invalid sentence.

We have also modified the ''authority'' citations in each rule to include a reference to the court decision. 38 U.S.C. 501(b).

This final rule concerns an interpretive rule and also concerns agency policy, procedure or practice. Consequently, pursuant to 5 U.S.C. 553, the final rule is exempt from notice and comment requirements.

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule will affect only claims processing by VA and will not affect small businesses. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirements of §§ 603 and 604. In addition, since no notice of proposed rule making is required in connection with the adoption of this final rule, no regulatory flexibility analysis is required under the Regulatory Flexibility Act.

List of Subjects in 38 CFR Part 20

Administrative practice and procedure, Claims, Veterans.

Approved: October 8, 1997.

Hershel W. Gober,

Acting Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 20 is amended as set forth below:

PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

1. The authority citation for part 20 continues to read as follows:

Authority: 38 U.S.C. 501(a).

Subpart G—Representation

2. In subpart G, § 20.611 is revised to read as follows:

§ 20.611 Rule 611. Continuation of representation following death of a claimant or appellant.

A recognized organization, attorney, agent, or person properly designated to represent a claimant or appellant will be recognized as the representative of his or her survivors for a period of one year following the death of the claimant or appellant. The provisions of this section do not apply to any survivor who has appointed another representative in accordance with these rules or who has indicated in writing that he or she does not wish to be represented by the claimant's or appellant's representative. Written notice that a survivor does not wish to be represented by the claimant's or appellant's representative will be effective when received by the agency of original jurisdiction or, if the case has been certified to the Board for appellate review, by the Board of Veterans' Appeals.

(Authority: 38 U.S.C. 5902–5904)

Subpart N—Miscellaneous

3. In subpart N, § 20.1302 is revised to read as follows:

§ 20.1302 Rule 1302. Death of appellant during pendency of appeal.

An appeal pending before the Board of Veterans' Appeals when the appellant dies will be dismissed.

(Authority: 38 U.S.C. 7104(a))

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52

[MN54–01–7279a; FRL–5913–3]

Approval and Promulgation of Implementation Plan: Minnesota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The United States Environmental Protection Agency (EPA) approves Minnesota's 1993 periodic carbon monoxide (CO) emission inventory. The inventory was submitted by the State of Minnesota to satisfy a Federal requirement that those States containing CO nonattainment areas (NAA's) classified moderate and serious submit a revised emission inventory (i.e., from the 1990 base year inventory) at the end of each 3 year period thereafter, until the area is redesignated to attainment. It is an inventory of actual CO season emissions from all sources, in accordance with EPA guidance.

The geographic area covered in the 1993 periodic CO emission inventory includes counties of the Twin Cities seven county metropolitan area (Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington), and Wright County. The rationale for this approval is set forth in this final rule; additional information is available at the address indicated below in the supporting Technical Support Document (TSD). Elsewhere in this **Federal Register**, EPA is proposing approval and soliciting comment on this action; if adverse comments are received, EPA will withdraw the direct final rulemaking and address the comments received in a new final rule; otherwise no further rulemaking will occur on this action.

DATES: This final rule will be effective Decmeber 22, 1997 unless substantive adverse comments not previously addressed by the State or USEPA are received by Novmeber 24, 1997. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Written comments may be mailed to Carlton T. Nash, Chief, Regulation Development Section, Air Programs Branch (AR–18J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604. Copies of the material submitted by the Minnesota Pollution Control Agency may be examined during normal business hours at the same location.

FOR FURTHER INFORMATION CONTACT: Charles Hatten at (312) 886–6031.

SUPPLEMENTARY INFORMATION:

Background

Under the Clean Air Act as amended (including the 1990 Amendments)(the Act), States have the responsibility to inventory emissions contributing to the National Ambient Air Quality Standards nonattainment, to track these emissions over time, and to ensure that control strategies are being implemented that reduce emissions and move areas towards attainment. The Act required States with moderate and serious CO nonattainment areas to initially submit a base year CO inventory that represented actual emissions during the peak CO season by November 15, 1992. This base year inventory was for calendar year 1990. Moderate and serious CO nonattainment areas were also required to submit a revised emissions inventory periodically. The submittal of the first periodic emissions inventory is required no later than September 30, 1995, and every 3 years thereafter until the area is redesignated to attainment. The 1990 base year inventory is the primary inventory from which the periodic inventories are derived. Further information on these inventories and their purpose can be found in the document ''Emission Inventory Requirements for Carbon Monoxide State Implementation Plans,'' U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC, March 1991.

The air quality planning requirements for CO nonattainment areas are set out in section 187 of Title I of Clean Air Act (the Act). Under section 187(a)(5) of the Act, for those States containing areas designated nonattainment for CO, and classified moderate or serious, a revised emission inventory (i.e., from the 1990 base year inventory) must be submitted at the end of each 3 year period thereafter, until the area is redesignated to attainment. The State's submittal must include a comprehensive, accurate, and current inventory of actual CO season emissions from all sources. Stationary point, area, and on-road and off-road mobile sources are to be included in the inventory. This first periodic inventory is for calendar year 1993. The periodic inventory is to address actual CO emissions for the area during the peak CO season. The peak CO season should reflect the months when peaks CO air quality concentrations occur. For many, but not all areas of the country, the peak CO season will be in the winter-time months. For areas where winter is the peak CO season, the 1993 periodic inventory will include the winter months that begin in 1992 and extend into 1993 (e.g., December 1992 through January-February 1993). Available guidance for preparing emission inventories is provided in the General Preamble (57 FR 13498, April 16, 1992).

Emission inventories are first reviewed under the completeness criteria established under section 110(k)(C) of the Act (56 FR 42216, August 26, 1991). According to section 110(k)(1)(C) if a submittal does not meet the completeness criteria, ''the State shall be treated as not having made the submission.'' Under section 179(a)(1) and 110(c)(1), a finding by EPA that a submittal is incomplete is one of the actions that initiates the sanctions and Federal Implementation Plan.

Review of State 1993 CO Periodic Emission Inventory (PEI)

I. Procedural Background

The approach to developing the 1993 PEI should be to require a rigorous