

**Department of
Veterans Affairs**

Memorandum

Date: April 13, 2000

VAOPGCPREC 4-2000

From: General Counsel (022)

Subj: Nature of Manual Provisions Concerning Claims
Involving Asbestos-Related Diseases; Need for Medical-Nexus
Evidence in Asbestos-Related Claims

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

A. Do provisions of paragraph 7.21 in Veterans Benefits Administration (VBA) Adjudication Procedure Manual M21-1 (Manual M21-1), Part VI, pertaining to claims involving asbestos-related diseases constitute regulations which are binding on the Department of Veterans Affairs (VA)?

B. Is medical-nexus evidence required to establish a well-grounded claim for service connection for an asbestos-related disease referenced in paragraph 7.21 of VBA Manual M21-1, Part VI, and allegedly due to in-service asbestos exposure?

DISCUSSION:

1. These issues arise in the context of an order issued by the United States Court of Veterans Appeals (now the United States Court of Appeals for Veterans Claims (CAVC)) vacating a decision of the Board of Veterans' Appeals (Board) which denied the appellant entitlement to service connection for a lung disorder claimed to have resulted from exposure to asbestos in service. The CAVC granted a joint motion for remand for consideration of paragraph 7.21 of VBA Manual M21-1, Part VI, regarding claims involving asbestos-related diseases. You have requested our opinion as to (i) whether the manual provisions in question constitute substantive regulations that must be followed by the Board, and (ii) whether medical-nexus evidence is required to establish a well-grounded claim for service connection for an asbestos-related disease referenced in paragraph 7.21 of VBA Manual

M21-1, Part VI, and allegedly due to in-service asbestos exposure.

2. We begin with the question of whether the manual provisions at issue constitute substantive regulations that must be followed by the Board. Section 7104(c) of title 38, United States Code, provides that, "[t]he Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary,¹ and the precedent opinions of the chief legal officer of the Department." See also *Young v. Brown*, 4 Vet. App. 106, 109 (1993) (VA may not ignore its own regulations). Section 19.5 of title 38, Code of Federal Regulations, provides that, "[t]he Board is not bound by Department manuals, circulars, or similar administrative issues" in its review of VA decisions. The question which must therefore be addressed is whether the provisions of paragraph 7.21 of VBA Manual M21-1, Part VI, constitute "regulations" for purposes of 38 U.S.C. § 7104(c).

3. In many cases, courts have concluded that internal agency issuances, such as manuals and circulars, designed to convey instructions to personnel within an agency concerning procedure and practice, did not constitute binding rules. See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (Social Security claims manual); *Hoffman v. United States*, 894 F.2d 380, 384 (Fed. Cir. 1990) (Air Force regulation); *Horner v. Jeffrey*, 823 F.2d 1521, 1529-30 (Fed. Cir. 1987) (Federal personnel manual); *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir.), cert. denied, 459 U.S. 907 (1982) (VA Circulars and handbook). However, certain provisions of VBA Manual M21-1 have been found to contain binding substantive rules. E.g., *Hamilton v. Derwinski*, 2 Vet. App. 671, 675 (1992). Some courts have focused on the intent of the promulgator in inquiring whether an agency statement not published in the Federal Register is a binding rule. See, e.g., *Public Citizen, Inc. v. U.S. Nuclear Regulatory Comm'n*, 940 F.2d 679, 681-82 (D.C. Cir. 1991). However, decisions by the CAVC have emphasized the issue of whether the statements in VA

¹ "Instructions of the Secretary" is a term of art referring to a specific class of published documents providing instructions for implementation of newly enacted legislation prior to issuance of regulations. VAOPGCADV 5-89 (O.G.C. Advis. 5-89); VAOPGCPREC 7-92 (O.G.C. Prec. 7-92).

manuals and other internal publications are substantive or interpretative in determining the effect of such statements. See *Morton v. West*, 12 Vet. App. 477, 482 (1999) (citing cases where the CAVC found manual provisions to contain substantive rules); *Dyment v. West*, 13 Vet. App. 141, 145-46 (1999).

4. A substantive rule is one which "effect[s] a change in existing law or policy or which affect[s] individual rights and obligations." *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998). Such a rule "'narrowly limits administrative action.'" *Fugere v. Derwinski*, 1 Vet. App. 103, 107 (1990) (quoting *Carter v. Cleland*, 643 F.2d 1, 8 (D.C. Cir. 1980)), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992); *Morton*, 12 Vet. App. at 481-82. A rule may be considered substantive where it impinges on a benefit or right enjoyed by a claimant or where its application directly affects whether a claimant's benefits are to be granted, denied, retained or reduced. *Morton*, 12 Vet. App. at 483; *Fugere*, 1 Vet. App. at 107. In contrast, an interpretative rule "'merely clarifies or explains an existing rule or statute.'" *Morton*, 12 Vet. App. at 482 (quoting *Carter*, 643 F.2d at 8); see also *Paralyzed Veterans of Am.*, 138 F.3d at 1436. It is not intended to create new rights or duties, "'but only reminds affected parties of existing duties.'" *Paralyzed Veterans of Am.*, 138 F.3d at 1436 (quoting *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993)); *Morton*, 12 Vet. App. at 483.

5. As noted by the CAVC, "substantive rules may confer enforceable rights, while internal guidelines and interpretative statements of a federal agency . . . cannot." *Morton*, 12 Vet App. at 482 (citing cases). The CAVC has held that, "[s]ubstantive rules . . . in the VA Adjudication Procedure Manual [M21-1] are the equivalent of Department regulations." *Hamilton*, 2 Vet. App. at 675. Provisions of VBA Manual M21-1 have been found by the CAVC to be substantive when they have governed which rating criteria will be applied in a particular claim, *Fugere*, 1 Vet. App. at 107, or established an evidentiary threshold for a particular type of claim, *Moreau v. Brown*, 9 Vet. App. 389, 394-95 (1996), *aff'd*, 124 F.3d 228 (Fed. Cir. 1997); *Hayes v. Brown*, 5 Vet. App. 60, 66-67 (1993), *appeal dismissed*, 26 F.3d 137 (Fed. Cir. 1994); *Hamilton*, 2 Vet. App. at 674-75.

6. In *Morton*, which is currently on appeal to the United States Court of Appeals for the Federal Circuit, the CAVC determined that certain provisions of VBA Manual M21-1 pertaining to development of claims were not substantive rules. For example, paragraph 1.03a., Part III, of that manual provides in part that, "[b]efore a decision is made about a claim being well grounded, it will be fully developed." The CAVC determined that those claim development provisions were "policy declarations" stating "administrative directions to the field containing guidance as to the procedures to be used in the adjudication process" and "do not create rights with respect to specific disabilities." 12 Vet. App. at 483-84; see also *Flynn v. Brown*, 6 Vet. App. 500, 505 (1994) (circular contained only procedural guidance). The CAVC further concluded that those manual provisions only served to interpret 38 U.S.C. § 5107, *id.* at 484, which requires a claimant to submit and establish a "well-grounded" claim before VA is required to provide assistance in developing the facts of the claim.

7. Other provisions in VBA Manual M21-1 concerning claim development, however, have been found to be substantive in nature. In *Hayre v. West*, 188 F.3d 1327, 1331-32 (Fed. Cir. 1999), the Federal Circuit stated that VA had "substantively defined" its obligation to obtain service medical records for claim development purposes in a paragraph of VBA Manual M21-1, Part VI. The Federal Circuit observed that the manual provision at issue called for VA to make further requests for service department records under certain circumstances. 188 F.3d at 1332. In treating the manual provisions as substantive, the Federal Circuit noted that, "[t]hese requirements for obtaining records and evaluation of the complete medical history of the veteran's condition operate to protect a claimant against adverse decisions based on an incomplete, or inaccurate, record and to enable . . . VA to make a more precise evaluation of the level of the disability and of any changes in the condition." *Id.*

8. CAVC case law also indicates that certain provisions in VA manuals regarding claim development with respect to specific disabilities establish procedures which VA is obligated to follow. For example, in *Patton v. West*, 12 Vet. App. 272, 282 (1999), the CAVC held that provisions of paragraph 5.14c. of VBA Manual M21-1, Part III, addressing development of post-traumatic stress disorder (PTSD) claims based on personal assault, which "are favorable to a

veteran when adjudicating that veteran's claim," cannot be "ignore[d]" by VA. The CAVC noted that, through these manual provisions, "the Secretary has undertaken a special obligation to assist a claimant . . . who has submitted a well-grounded claim, in producing corroborating evidence of an in-service stressor." 12 Vet. App. at 280. In *Suttman v. Brown*, 5 Vet. App. 127, 138 (1993), the CAVC held that, in developing and adjudicating the well-grounded claim of a former prisoner of war (POW) for service connection for beriberi and beriberi heart disease, VA was required to ensure compliance with VA's "rules for adjudication of POW claims" contained in provisions of VBA Manual M21-1, Part III, regarding requests for POW records and standards for development and adjudication of POW claims.

9. We also note that, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 552(a)(1), a person generally may not be adversely affected by a matter required to be published in the Federal Register and not so published. Rules of procedure and substantive rules of general applicability are among the matters required to be published. 5 U.S.C. § 552(a)(1)(C) and (D); see also 5 U.S.C. § 553(b) (requiring notice of proposed rulemaking in the Federal Register); *Fugere v. Derwinski*, 1 Vet. App. at 110 (invalidating VA action which did not observe procedure required by law). Accordingly, manual provisions may not be given binding effect to the extent that they purport to create substantive rules which adversely affect claimants.

10. To sum up, while the case law is still developing in this area, Federal Circuit and CAVC decisions indicate that a provision in a VA manual constitutes a substantive rule when the provision effects a change in law, affects individual rights and obligations, or narrowly limits administrative action. Provisions which govern determination of rating criteria or establish evidentiary thresholds for particular claims will be considered substantive. Substantive provisions in manuals may be considered the equivalent of regulations and confer enforceable rights on claimants. However, manual provisions may not be given binding effect to the extent that they have a direct adverse effect on claimants. Further, the case law indicates that VA will be considered obligated to follow manual provisions which establish specific claim development procedures in well-grounded claims. Manual provisions that merely interpret a statute or regulation or provide general guidance as to the

procedures to be used in the adjudication process do not create enforceable rights.

11. We will now examine paragraph 7.21 of VBA Manual M21-1, Part VI, in light of these principles to determine whether the provisions of that paragraph should be considered binding on VA. Paragraph 7.21a. of the VBA manual discusses asbestos and asbestos-related diseases generally. Paragraph 7.21b. of the manual describes occupational and other exposure to asbestos. Paragraph 7.21b. also discusses the latent period between first exposure to asbestos and development of an asbestos-related disease as well as the significance of the period of exposure. Paragraph 7.21c. of the manual discusses the clinical diagnosis of asbestosis. Paragraph 7.21d.(3) of the manual and the last two sentences of paragraph 7.21d.(1) provide for application of the reasonable-doubt doctrine and create internal operating procedures not affecting the outcome of a claim. These provisions do not purport to effect a change in law, or affect a claimant's rights or obligations, nor do they narrowly limit administrative action in adjudication of claims. These provisions merely provide general information or guidance for consideration by adjudicators, remind adjudicators of existing law, or establish internal operating procedures having no effect on claimants' rights and obligations. Therefore, the provisions in paragraph 7.21a., b., c., and d.(3) and the last two sentences of paragraph 7.21d.(1) are not substantive in nature.

12. We caution, however, that decisions of the CAVC indicate that the Board may not simply ignore the general information provisions of paragraphs 7.21a., b., and c. because they are not substantive. In *McGinty v. Brown*, 4 Vet. App. 428, 432-33 (1993), the CAVC vacated and remanded a Board decision which had not addressed relevant considerations, similar to those contained in paragraph 7.21b., included in a VA circular on asbestos-related diseases. The court concluded that, in view of the Board's failure to address these considerations, the Board had failed to provide adequate reasons and bases for its decision as required by 38 U.S.C. § 7104(d)(1). 4 Vet. App. at 433. Similarly, in *Ennis v. Brown*, 4 Vet. App. 523, 527 (1993), the CAVC vacated and remanded a Board decision which had failed to analyze an asbestos-related claim in light of considerations discussed in the VA circular similar to those now found in paragraphs 7.21a.

and b. of the manual. See also *Nolen v. West*, 12 Vet. App. 347, 351 (1999) (citing *McGinty* and *Ennis* in upholding a Board decision as to adequacy of reasons and bases where the Board had extensively reviewed the criteria contained in the asbestos circular in light of the evidence). These cases indicate that relevant factors discussed in paragraphs 7.21a., b., and c. of the manual must be considered and addressed by the Board in assessing the evidence regarding an asbestos-related claim in order to fulfill the Board's obligation under 38 U.S.C. § 7104(d)(1) to provide an adequate statement of the reasons and bases for a decision.

13. Turning to the first three sentences of paragraph 7.21d.(1) of VBA Manual M21-1, Part VI, these provisions provide:

When considering VA compensation claims, rating specialists must determine whether or not military records demonstrate evidence of asbestos exposure in service. Rating specialists must also assure that development is accomplished to determine whether or not there is preservice and/or post-service evidence of occupational or other asbestos exposure. A determination must then be made as to the relationship between asbestos exposure and the claimed diseases, keeping in mind the latency and exposure information noted above.

These provisions direct adjudicators to develop and consider various factors in the adjudication of claims involving asbestos-related diseases. Thus, they may be viewed as limiting the discretion of adjudicators, and they could affect the outcome of claims. On the other hand, the directions provided are very general in nature, and to a large degree describe procedural steps, e.g., review of military records for evidence supporting service incurrence, consideration of pertinent medical principles and evidence of service incurrence, that adjudicators would follow in all cases without regard to the manual.

14. In *Ashford v. Brown*, 10 Vet. App. 120, 124 (1997), the CAVC concluded that a VA circular containing provisions similar to paragraph 7.21d.(1) established "guidelines" which "did not . . . bestow any rights on VA claimants." Nonetheless, the court concluded that the steps described

in the circular were "mandated" and reviewed VA's actions to determine whether they had been followed. 10 Vet. App. at 124-25 (citing *Suttman*, 5 Vet. App. at 138); see also *Ennis*, 4 Vet. App. at 527 (remanding asbestos-exposure claim for development under circular); cf. *Patton*, 12 Vet. App. at 282 (remanding PTSD claim based on personal assault for development under VA manual).

15. Recently, in *Dyment*, 13 Vet. App. at 145, the CAVC found that provisions in former paragraph 7.68 (predecessor to paragraph 7.21) of VBA Manual M21-1, Part VI, "d[id] not give rise to enforceable substantive rights but merely contain[ed] statements of policy." The CAVC referred generally to the provisions as "policy guidelines" and interpretive statements. 13 Vet. App. at 146. The CAVC specifically referred to predecessors to the first and second sentences of paragraph 7.21b.(2) and the first two sentences of paragraph 7.21d.(1)). 13 Vet. App. at 145. However, the court reached these conclusions in the context of determining whether the manual provisions created a presumption of exposure to asbestos based solely on shipboard service. 13 Vet. App. at 145-46. It did not address the issue of whether the provisions bestowed procedural rights on claimants. Although the referenced case law is not completely clear regarding whether the manual provisions in question are substantive or otherwise binding, we believe that the most advisable course of action is to consider the first three sentences of paragraph 7.21d.(1) to establish a procedure which adjudicators are required to follow in asbestos-related claims.

16. In *Morton*, 12 Vet. App. at 485, the CAVC noted that that court and the United States Court of Appeals for the Federal Circuit have interpreted 38 U.S.C. § 5107 as conditioning VA's duty to assist a claimant in the development of the facts pertinent to a claim on the submission by the claimant of a well-grounded claim. The court went on to hold that "absent the submission and establishment of a well-grounded claim, [VA] cannot undertake to assist a veteran in developing facts pertinent to his or her claim." 12 Vet. App. at 486. Further, in *Hayre*, 188 F.3d at 1331-32, the United States Court of Appeals for the Federal Circuit indicated that a provision of VBA Manual M21-1 obligating VA to assist in obtaining service medical records was applicable only where the claimant had submitted a well-grounded claim. Although VA has interpreted 38 U.S.C. § 5107(a) and *Morton* as

permitting certain exceptions to this prohibition to be established by regulations and VA has proposed doing so, 64 Fed. Reg. 67,528, 67,529, procedures for development of asbestos-related claims are not among those which VA has proposed to establish as exceptions.

17. We note that the CAVC's decision in *Ashford*, 10 Vet. App. at 124-25, may be read as implying that the claim-development procedures of VA's asbestos circular applied without regard to whether the claim in question was well grounded. However, the question of whether the claim had to be well grounded was not addressed by the court, and the CAVC's later decision in *Morton* appears to resolve the question. Further, although the CAVC in *Ennis*, 4 Vet. App. at 527, remanded for further development under the circular an asbestos-related claim which seemingly would not have been considered well grounded under the standards later announced in *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (table), the court's recitation of certain factors which weighed in favor of the claim implies that the court considered the claim plausible within the criteria then current for assessing well-groundedness. See *Murphy v. Derwinski*, 1 Vet. App. 78, 81 (1990) ("[a] well grounded claim is a plausible claim"). Accordingly, we conclude that, to the extent paragraph 7.21d.(1) of VBA Manual M21-1, Part VI, establishes claim-development procedures, those procedures are only applicable in the case of a well-grounded claim.

18. Section 4.20 of title 38, Code of Federal Regulations, provides that, when a condition is encountered for which there are no rating criteria provided in VA's rating schedule, the condition may be rated by analogy to another closely related disease or injury. Paragraph 7.21d.(2) of VBA Manual M21-1, Part VI, directs adjudicators to rate certain diseases caused by exposure to asbestos by analogy to other specific conditions, such as silicosis and various types of cancer. Paragraph 7.21d.(2) narrowly limits adjudicators' action and may affect the rights of claimants in that, by specifying the rating criteria under which a veteran's asbestos-related disease is to be rated by analogy, it could affect the rating assigned to the veteran's disability. For this reason, we believe paragraph 7.21d.(2) should be regarded as substantive. However, it should not be treated as binding to the extent it may adversely affect a claimant by requiring that a particular asbestos-related disease be rated by analogy to

a specified condition, where a rating more favorable to the claimant would be obtained by rating by analogy to another disease pursuant to section 4.20.

19. Further, we note that paragraph 7.21d.(2) is to a significant extent obsolete and in conflict with the rating schedule in that the rating schedule now contains rating codes and rating criteria for certain of the conditions for which paragraph 7.21d.(2) specifies analogous conditions. In particular, a diagnostic code (diagnostic code 6845) and rating criteria are now specifically provided for chronic pleural effusion and fibrosis, two conditions which paragraph 7.21d.(2) provides are to be rated by analogy to silicosis (diagnostic code 6832). Moreover, the rating criteria for diagnostic codes 6845 and 6832 differ in some respects. Paragraph 7.21d.(2) should not be treated as binding where a rating more favorable to the claimant would be obtained by reference to current rating criteria for a particular disease in VA's rating schedule. A diagnostic code (diagnostic code 6833) and rating criteria are also provided for asbestosis, another of the conditions which paragraph 7.21d.(2) provides is to be rated by analogy to silicosis. However, since the rating criteria for asbestosis are identical to the rating criteria for silicosis, this inconsistency is of no consequence.

20. We now turn to the question of whether medical-nexus evidence is required to establish a well-grounded claim for service connection for a condition referenced in paragraph 7.21 of VBA Manual M21-1, Part VI, and allegedly due to in-service asbestos exposure. Under 38 U.S.C. § 5107(a), a person who submits a claim for benefits under a statute administered by VA has the burden of submitting "evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." The CAVC has defined a "well-grounded" claim as "a plausible claim, one which is meritorious on its own or capable of substantiation." *Murphy*, 1 Vet. App. at 81. The CAVC has stated that such a claim need not be conclusive, but only possible, to satisfy the initial burden of section 5107(a). *Id.* Further, the CAVC has explained the types of evidence necessary to establish a well-grounded claim for direct service connection of a disability for purposes of 38 U.S.C. §§ 1110 and 1131 and 38 C.F.R. § 3.303, see *Savage v. Gober*, 10 Vet. App. 488, 493, 495-97 (1997), and for purposes of presumptive service connection for disabilities associated with herbicide exposure under 38 U.S.C.

§ 1116(a) and 38 C.F.R. §§ 3.307(a)(6) and 3.309(e), *Brock v. Brown*, 10 Vet. App. 155, 162 (1997).

21. The CAVC and the Federal Circuit have held that a well-grounded claim for direct service connection generally requires submission of appropriate evidence of: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the in-service disease or injury and the current disability. See *Epps v. Gober*, 126 F.3d 1464, 1468 (Fed. Cir. 1997), cert. denied, 524 U.S. 940 (1998); *Savage*, 10 Vet. App. at 493. The failure to submit evidence with respect to any of those elements may require a conclusion that the claim is not well grounded. See, e.g., *Wade v. West*, 11 Vet. App. 302, 305 (1998) (no evidence of nexus); *Brock*, 10 Vet. App. at 164 (no evidence of current disability). The quality and quantity of the evidence required to meet the burden under 38 U.S.C. § 5107(a) will depend upon the issue presented by the claim. *Grottveit v. Brown*, 5 Vet. App. 91, 92-93 (1993). Where the determinative issue involves medical causation or a medical diagnosis, competent medical evidence to the effect that the claim is "plausible" is required. *Id.* at 93.

22. The determinative issues in an asbestos-related claim would generally include a medical diagnosis and medical causation. For example, the asbestos-related diseases referenced in paragraph 7.21 of VBA Manual M21-1, Part VI, such as asbestosis, pleural effusions and fibrosis, pleural plaques, and mesothelioma of pleura or peritoneum, must first be medically diagnosed and then shown to be medically related to in-service exposure to asbestos. See *Nolen*, 12 Vet. App. at 351 (finding no medical-nexus evidence between the veteran's asbestosis and his service exposure). Therefore, although a claimant may provide competent evidence of a current disability and of in-service exposure to asbestos, the claimant would still need to present competent medical evidence of a nexus relating the current disability to in-service exposure to asbestos. *Id.*

23. If VBA Manual M21-1 creates a presumption of service connection for asbestos-related diseases referenced in paragraph 7.21 based on in-service asbestos exposure, then medical-nexus evidence would not be required to establish a well-grounded claim for service connection for those conditions. As discussed above, a well-grounded claim for service connection generally requires evidence of a current

disability, incurrence of a disease or injury in service, and a nexus between the in-service disease or injury and the current disability. See *Epps*, 126 F.3d at 1468; *Savage*, 10 Vet. App. at 493. A presumption of service connection for asbestos-related diseases would fulfill the requirement for evidence of a medical nexus. See *Darby v. Brown*, 10 Vet. App. 243, 246 (1997) (holding that when the presumptive provisions governing herbicide exposure claims are satisfied, the requirement for evidence of a causal nexus is satisfied), *appeal dismissed*, 152 F.3d 942 (Fed. Cir. 1998) (table); *Brock*, 10 Vet. App. at 162. Paragraph 7.21 of VBA Manual M21-1, Part VI, however, does not create such a presumption. The first sentence in paragraph 7.21d.(1) requires a determination as to "whether or not military records demonstrate evidence of asbestos exposure in service," and the third sentence in that paragraph requires a determination "as to the relationship between asbestos exposure and the claimed diseases." A claimant must therefore not only present specific evidence of in-service exposure to asbestos but must also show the relationship between the asbestos exposure and the claimed disease to establish entitlement to service connection for an asbestos-related disease. Thus, paragraph 7.21d.(1) does not provide for the presumption of service connection for asbestos-related diseases. See *Dyment*, 13 Vet. App. at 145-46 (provisions in predecessor to paragraph 7.21d. did not create a presumption); *Ashford*, 10 Vet. App. at 124 (provisions in former circular which were similar to provisions of paragraph 7.21d.(1) did not create a presumption). Accordingly, medical nexus evidence is required to establish a well-grounded claim for service connection for an asbestos-related disease.

HELD:

A.(1) Paragraph 7.21a., b., c., and d.(3) of Veterans Benefits Administration Adjudication Procedure Manual M21-1, Part VI, and the fourth and fifth sentences of paragraph 7.21d.(1) of that manual are not substantive in nature. However, relevant factors discussed in paragraphs 7.21a., b., and c. must be considered and addressed by the Board in assessing the evidence regarding an asbestos-related claim in order to fulfill the Board's obligation under 38 U.S.C. § 7104(d)(1) to provide an adequate statement of the reasons and bases for a decision.

(2) The first three sentences of paragraph 7.21d.(1) of Veterans Benefits Administration Adjudication Procedure Manual M21-1, Part VI, establish a procedure which, in light of current case law, adjudicators are required to follow in claims involving asbestos-related diseases. However, to the extent that paragraph 7.21d.(1) of that manual establishes claim-development procedures, those procedures are only applicable in the case of a well-grounded claim.

(3) Paragraph 7.21d.(2) of Veterans Benefits Administration Adjudication Procedure Manual M21-1, Part VI, should be regarded as substantive. However, that paragraph should not be treated as binding to the extent it may adversely affect a claimant by requiring that a particular asbestos-related disease be rated by analogy to a specified condition, where a rating more favorable to the claimant would be obtained by reference to current rating criteria for the particular disease in VA's rating schedule. Similarly, where the current rating schedule contains no criteria specific to the asbestos-related disease, paragraph 7.21d.(2) should not be treated as binding to the extent it would adversely affect a claimant by requiring that the asbestos-related disease be rated by analogy to a particular condition, where a rating more favorable to the claimant would be obtained by rating by analogy to another disease pursuant to 38 C.F.R. § 4.20.

B. Medical-nexus evidence is required to establish a well-grounded claim for service connection for an asbestos-related disease referenced in paragraph 7.21 of Veterans Benefits Administration Adjudication Procedure Manual M21-1, Part VI, and allegedly due to in-service asbestos exposure.

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