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[Notices]

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DEPARTMENT OF VETERANS AFFAIRS

VA Adjudications Manual, M21-1; Rescission of Manual M21-1 Provisions Related To Exposure to Herbicides Based on Receipt of the Vietnam Service Medal

AGENCY: Department of Veterans Affairs.

ACTION: Notice, with request for comments.

SUMMARY: The Department of Veterans Affairs (VA) proposes to rescind provisions of its Adjudication Procedures Manual, M21-1 (M21-1) that were found by the U.S. Court of Appeals for Veterans Claims (CAVC) not to have been properly rescinded.

DATES: Comments must be received by VA on or before January 28, 2008.

ADDRESSES: Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "Rescission of Manual M21-1 Provisions Related to Exposure to Herbicides Based On Receipt of the Vietnam Service Medal." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 273-9515 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Rhonda F. Ford, Chief, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-7210.

SUPPLEMENTARY INFORMATION: This rulemaking is necessitated by the opinion rendered by the CAVC in *Haas v. Nicholson*, 20 Vet. App. 257 (2006), notice of appeal filed, No. 07-7037 (Oct. 26, 2006). In that opinion, the CAVC concluded that certain provisions of VA's Adjudication Procedures Manual M21-1 (M21-1) were substantive provisions that had not been properly rescinded. *Id.* at 276-78. We have appealed *Haas*, and if we are successful on appeal, this rulemaking will be withdrawn. However, in the event that we do not prevail on appeal, we now take action to properly rescind the provisions.

In *Haas*, the CAVC held that a 1991 M21-1 provision required VA to concede that Mr. Haas had served in Vietnam, and was presumed to have been exposed to herbicides during service, because he had received the Vietnam Service Medal (VSM). *Haas*, 20 Vet. App. at 270-72 (quoting in full and discussing M21-1, part III, para. 4.08(k)(1)-(2) (1991)). In 2002, VA had issued a new M21-1 provision that more clearly restated the 1991 provision, advising that receipt of the VSM could indicate service on land in Vietnam but, by itself, was not

proof of such service. M21-1, pt. III, para. 4.24(e)(1)-(2), change 88 (Feb. 27, 2002). However, the CAVC held that VA's 2002 revision of the M21-1 was ineffective because VA had not followed the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. Sec. 553(a). Haas, 270 Vet. App. at 275-78.

As interpreted by the CAVC, the 1991 M21-1 provision requires VA, in at least some circumstances, to concede service in Vietnam, and thus herbicide exposure, based merely on the receipt of the VSM, even if all other evidence indicates that the veteran did not serve on land or on inland waterways in Vietnam and therefore was exceedingly unlikely to have been exposed to herbicides as a result of Vietnam service. VA revised the M21-1 in 2002 because, although receipt of the VSM is an indication of possible service in Vietnam, it is not definitive or conclusive evidence of such service. It is inappropriate to include receipt of the VSM as a sole criterion for the presumption of exposure to herbicide agents due to service in Vietnam because a veteran may have received this medal for service in locations other than Vietnam. (The VSM was awarded to all members of the Armed Forces who served between July 3, 1965, and March 28, 1973, either: (1) In Vietnam and contiguous waters and airspace thereover; or (2) in Thailand, Laos, or Cambodia, or airspace thereover, in direct support of operations in Vietnam. See Army Reg. 600-8-22, para. 2-13.) The 2002 revision was intended to clarify VA's view that receipt of the VSM does not require or permit VA to ignore other evidence indicating that a veteran did not serve in the Republic of Vietnam. Because the CAVC's interpretation of the 1991 M21-1 provision does not accord with VA's intent in issuing that provision, we propose to rescind it.

The M21-1 is an internal manual used to convey guidance to VA adjudicators. It is not intended to establish substantive rules beyond those contained in statute and regulation. Neither the 1991 nor the 2002 M21-1 provision, nor any intervening revision to such provisions, was intended to establish a substantive rule. Further, the 1991 provision was not intended to convey the rule the CAVC imputed to that provision, treating the VSM as conclusive evidence of service in Vietnam even if other evidence would support a finding that the veteran did not serve in Vietnam. However, because the CAVC held that the 1991 M21-1 provision established a substantive rule, and because that rule, as interpreted by the CAVC, is inconsistent with VA's intent, we are proposing to rescind the M21-1 provision.

We note as well that we will soon be revising Sec. 3.307(a)(6)(iii) to clarify VA's interpretation of the statutory authority governing service in Vietnam for purposes of the presumption of herbicide exposure. In view of the confusion created by the M21-1 provisions in the Haas case, we believe it is preferable to rescind the M21-1 provisions relating to proof of service in Vietnam, including the 1991 provision at issue in Haas, the 2002 clarifying revision to that provision, and intervening revisions. This will enable VA to clarify and ensure that its interpretation of the governing statutory provisions set forth in its regulation and to minimize the possibility of a perceived or unintended inconsistency based on VA's internal manual.

Hence, VA proposes to rescind the following manual provisions describing service in Vietnam for the purposes of the presumption of exposure to herbicides: M21-1, pt. III, para. 4.08(k)(1)-(2) (November 8, 1991); M21-1, pt. III, para. 4.24(g)(1)-(2), change 23 (October 6, 1993); M21-1, pt. III, para. 4.24(g)(1)-(2), change 41 (July 12, 1995); M21-1, pt. III, para. 4.24(g)(1)-(2), change 76 (June 1, 1999); M21-1, pt. III, para. 4.24(e)(1)-(2), change 88 (February 27, 2002).

Approved: November 19, 2007.

Gordon H. Mansfield,
Acting Secretary of Veterans Affairs.

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