Date: February 11, 1997

VAOPGCPREC 9-97

From: General Counsel (022)

- subj: Perfecting an Appeal After Issuance of a Supplemental Statement of the Case—38 U.S.C. § 7105(d); 38 C.F.R. § 20.302(c)
- To: Acting Under Secretary for Benefits (20)

## QUESTIONS PRESENTED:

1. Can the issuance of a supplemental statement of the case in response to evidence received within the one-year period following the mailing date of notification of the determi-nation being appealed extend the time allowed to perfect an appeal beyond the expiration of that one-year period?

2. If a supplemental statement of the case is not or cannot be issued before the one-year period expires, does the appeal expire and must such evidence be considered an attempt to reopen a finally adjudicated claim?

## COMMENTS:

1. The fact situations posed in the opinion request are as follows. On January 25, 1995, an agency of original jurisdiction (AOJ) notified a veteran of an adverse determination of a claim. In February 1995, the AOJ received a notice of disagreement and, in April 1995, issued a statement of the case (SOC). The AOJ received additional evidence in November 1995, determined that no change in the prior determination was warranted, and issued a supplemental statement of the case (SSOC) on December 15, 1995. You have also proposed a situation in which a claimant who has not yet perfected an appeal submits additional evidence, but the AOJ does not or cannot issue a SSOC before expiration of the one-year period following notification of the decision being appealed.

2. An appeal to the Board of Veterans' Appeals is initiated by filing a notice of disagreement and is perfected by filing a substantive appeal after a SOC has been furnished. 38 U.S.C. § 7105(a); 38 C.F.R. § 20.200. A claimant may <Page 2>

submit additional evidence after initiating an appeal. 38 C.F.R. § 20.800; see also 38 C.F.R. § 19.37(a). In fact, by requiring that the AOJ "take such development or review action as it deems proper" if a claimant has timely filed a notice of disagreement, it is clear 38 U.S.C. § 7105(d)(1) contemplates the submission of additional evidence after the initiation of an appeal. If the development or review action does not resolve the disagreement, the AOJ "shall prepare a statement of the case." 38 U.S.C. § 7105(d)(1); 38 C.F.R. § 19.26. A SOC is to include a summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed, as well as a citation to pertinent laws and regulations, a discussion of how they affect the decision, the decision on each issue, and a summary of the reasons for each decision. 38 U.S.C. § 7105(d)(1); 38 C.F.R. § 19.29. Thus, section 7105(d)(1) requires that the AOJ apprise a claimant who has initiated an unresolved appeal of the pertinent evidence and the significance of that evidence to the determination being The vehicle for that apprisal is a SOC. appealed.

3. Although the time during which a claimant who has initiated an appeal may submit additional evidence is not unlimited, see 38 C.F.R. §§ 19.37, 20.1304, it is possible for additional evidence to be timely submitted after the AOJ has already issued a SOC. Sections 19.31 and 19.37(a) of title 38, Code of Federal Regulations, require the issuance of a SSOC in that situation. Both section 19.31 and section 19.37 cite section 7105(d) as their authority. Both sections are derived from regulations that the Veterans Administration promulgated to implement the provisions of Pub. L. No. 87-666, 76 Stat. 553 (1962), which introduced the SOC into the veterans' appeal process. VA Regulations, Appeals, Transmittal Sheet 4 (Jan. 22, 1964). However, neither Pub. L. No. 87-666 nor 38 U.S.C. § 7105 mentions a SSOC. SSOC is VA's term for a SOC issued after the issuance of, and to supplement, a SOC, see 38 C.F.R. § 19.31, to satisfy the section-7105(d)(1) requirement to apprise a claimant of the bases for a determination if pertinent evidence has been timely received after the AOJ has issued the SOC. For section-7105 purposes, a SSOC is essentially the equivalent of a SOC.

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4. Section 7105(d) not only requires VA to issue a SOC, it also requires VA to provide a claimant a certain period in which to respond to a SOC. A claimant has a period of 60 days from the date the SOC is mailed to file the formal (substantive) appeal. 38 U.S.C. § 7105(d)(3). Regulations provide the same period for response to a SSOC. If a SSOC is furnished, a claimant has 60 days from the date of its mailing to respond. 38 C.F.R. § 20.302(c). If a SSOC covers an issue that was not included in the original SOC, a substantive appeal must be filed within 60 days to perfect an appeal with respect to the additional issue. Id. Even with respect to the time permitted to perfect an appeal, the essential equivalence between a SOC and a SSOC is apparent.

5. VA, by regulations, has liberalized the requirement that a substantive appeal be filed within 60 days of the mailing date of the SOC. A substantive appeal is timely if filed within 60 days of the date the SOC is mailed or within the remainder of the one-year period following the mailing date of the notification of the determination being appealed ("one-year appeal period"), whichever period ends later. 38 C.F.R. § 20.302(b). Nevertheless, section 7105(d)(3) requires that a minimum period of 60 days be afforded, even if the AOJ issues the SOC on the last day of the one-year appeal period. In our opinion, if a response to a SSOC is needed to perfect an appeal, section 7105(d)(3) similarly requires VA to afford at least 60 days from the date the SSOC is mailed for response. Ιf VA mails the SSOC less than 60 days before the expiration of the one-year appeal period, then the time which section 7105(d)(3) requires VA to afford a claimant to perfect an appeal would extend beyond expiration of the one-year appeal period.

6. A SSOC's coverage of an additional issue is not the only situation requiring a response to a SSOC to perfect an appeal. A response to a SSOC is not required for the perfection of an appeal, provided that a substantive appeal has been timely filed in response to the SOC. 38 C.F.R. § 20.302(c). By implication, therefore, a response to a SSOC is required to perfect an appeal if a substantive appeal has not been timely filed in response to the SOC. This implication is strengthened by two things: First, if a

<Page 4> claimant has not yet filed a substantive appeal, VA provides another substantive appeal form when issuing a SSOC. Veterans Benefits Administration Adjudication Manual M21-1, Part IV, para. 8.12.a. (Aug. 26, 1996). Second, the VA cover letter used to transmit a SSOC states that, "[i]f this [SSOC] . . . contains an issue which was not included in [the claimant's] [s]ubstantive [a]ppeal, [the claimant] must respond within 60 days to perfect [an] appeal as to the new issue." VA FL 1-28 (April 1991). The reference to "the new issue" indicates that this statement in the cover letter was intended to refer to the section-20.302(c)provision con-cerning an issue not included in the original SOC, but the statement in fact specifies an issue not included in the substantive appeal. If a substantive appeal has not yet been filed, no issue has been included in it, and any issue contained in a SSOC would be a "new issue" requiring the filing of a substantive appeal.

7. Section 20.302(c) does not specify the time allowed to file a substantive appeal if none has been timely filed in response to the SOC and a SSOC has been issued. However, section 20.302(c) cites section 7105(d)(3) as its authority and provides 60 days to "respond" to a SSOC. Given that section 7105(d)(3) requires VA to afford at least 60 days following the mailing of a SOC, whether styled as a SOC or a SSOC, to perfect an appeal, we interpret section 20.302(c) to provide 60 days following the issuance of a SSOC to perfect an appeal if a substantive appeal has not yet been filed in response to the SOC, even if that 60day period would extend beyond the one-year appeal period (or any authorized extension of that period). This interpretation acknowledges the essential equivalence between a SOC and a SSOC.

8. Section 20.304 of title 38, Code of Federal Regulations, provides that the filing of additional evidence after receipt of notice of an adverse determination does not extend the time limit for initiating or completing (per-fecting) an appeal from that determination. The substance of that rule originated long before Congress enacted Pub. L. No. 87-666 and the veterans' appeal process involved a SOC. See Instruction No. 6, Veterans Reg. No. 2(a) (Jan. 4, 1934)

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(the submission of additional material evidence during the period in which an appeal may be taken will not extend the period in which to take an appeal). To the extent that section 20.304 purports to limit the time allowed by section 7105(d)(3) for response to a SSOC to perfect an appeal (at least 60 days, even if the 60-day period would extend beyond expiration of the one-year appeal period), it is inconsistent with section 7105(d)(3). To that extent, section 20.304 is invalid. To be valid, regulations must be consistent with the statute under which they are promulgated. United States v. Larionoff, 431 U.S. 864, 873 (1977).

9. An appeal does not expire just because VA cannot, or does not, issue a SSOC before the one-year appeal period expires. It would be inequitable for a claimant's opportunity to perfect an appeal to depend on VA's willingness or ability to act within a given time. Moreover, as indicated above, 38 U.S.C. § 7105(d)(3) requires the AOJ to issue a SSOC and afford the claimant at least 60 days to respond and perfect an appeal if the claimant has not yet done so and has timely submitted additional pertinent evidence after the issuance of the SOC. Furthermore, new and material evidence received during the one-year appeal period (or any autho-rized extension of that period) will be considered in connection with the pending claim. 38 C.F.R. § 3.156(b). This result does not depend on whether the AOJ can issue a SSOC before the one-year appeal period expires.

## HELD:

1. If a claimant has not yet perfected an appeal and VA issues a supplemental statement of the case in response to evidence received within the one-year period following the mailing date of notification of the determination being appealed, 38 U.S.C. § 7105(d)(3) and 38 C.F.R. § 20.302(c) require VA to afford the claimant at least 60 days from the mailing date of the supplemental statement of the case to respond and perfect an appeal, even if the 60-day period would extend beyond the expiration of the one-year period. To the extent that 38 C.F.R. § 20.304 purports to provide otherwise, it is invalid and requires amendment.

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2. If VA receives additional material evidence within the time permitted to perfect an appeal, 38 U.S.C. § 7105(d)(3) requires VA to issue a supplemental statement of the case even if the one-year period following the mailing date of notification of the determination being appealed will expire before VA can issue the supplemental statement of the case. Furthermore, 38 C.F.R. § 3.156(b) requires that such evidence be considered in connection with the pending claim.

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