

TITLE 38—APPENDIX

RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

(Effective September 1, 1996, as amended to January 22, 2002)

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Rule 1. Scope of Rules

(a) **Scope.** These rules govern practice and procedure before this Court to review decisions of the Board of Veterans' Appeals (Board), and in applications for other relief which this Court or one of its judges is competent to give.

(b) **Rules not to Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of this Court as established by law.

CHANGE OF NAME

Reference to United States Court of Veterans Appeals deemed to refer to United States Court of Appeals for Veterans Claims, see section 512(c) of Pub. L. 105-368, set out as a note under section 7251 of this title.

Rule 2. Suspension of Rules

To expedite a decision, or for other good cause shown, this Court may suspend the application of any of these rules in a particular case and may order proceedings in accordance with its direction, but the Court may not extend the time for filing a Notice of Appeal.

Rule 3. How to Appeal

(a) **Filing.** An appeal will be taken by filing a written Notice of Appeal with the Clerk within the time allowed by Rule 4(a). A Notice of Appeal may be filed by facsimile sent to the Clerk of the Court. Failure of an appellant to take any step under these rules after the timely filing of a Notice of Appeal may be grounds for such action as the Court deems appropriate, which may include dismissal of the appeal.

(b) **Service.** The appellant shall serve on the Secretary of Veterans Affairs (Secretary), and any other party to the proceedings before the Board, a copy of the Notice of Appeal. See Rule 25.

(c) **Content.** The Notice of Appeal shall:

- (1) name the party or parties taking the appeal;
- (2) designate the Board decision appealed from; and
- (3) include the addresses of the appellant(s) and of any representative.

Form 1 in the Appendix of Forms is a suggested form of Notice of Appeal. An appeal will not be dismissed for informality of the Notice of Appeal.

(d) **Joint or Consolidated Appeals.** If more than one person is entitled to appeal from a decision of the Board and their interests make joinder practicable, they may file a joint Notice of Appeal or may join in an appeal after filing separate timely Notices of Appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Court on its own initiative or on motion of a party.

(e) **Payment of Fees.** Upon the filing of any separate or joint Notice of Appeal from a decision of the Board, each appellant shall include

with the Notice of Appeal a \$50.00 nonrefundable filing fee payable to “U.S. Court of Appeals for Veterans Claims.” If an appellant believes the payment of the fee will impose a financial hardship, the appellant may obtain a waiver of the fee by including with the Notice of Appeal a declaration of financial hardship on the form prescribed at Form 4 in the Appendix of Forms. See Rule 24. If the Court accepts the declaration, the fee will be waived. If the declaration is rejected for filing by the Court, the fee or an acceptable declaration must be received by the Court within the time set by the Court’s rules or the appeal will be dismissed. If a facsimile Notice of Appeal is filed, the filing fee or declaration must be received by the Court within 14 days after the facsimile was sent.

(f) Limited Appearance. See Rule 46(d)(6).

(As amended Feb. 11, 1998, eff. Apr. 1, 1998; Mar. 18, 1999, eff. May 1, 1999; Oct. 31, 2001, eff. Nov. 5, 2001.)

Rule 4. When to Appeal

(a) Time for Appeal. To obtain review by the Court of a Board decision, a person adversely affected by that decision must file a Notice of Appeal within 120 days after the date on which the Board mailed notice of the decision to the last known address of the appellant and the appellant’s authorized representative, if any. A Notice of Appeal shall be deemed to be received:

(1) on the date of its legible postmark, affixed by the United States Postal Service (not including a postage-metered date imprint other than one affixed by the United States Postal Service) on the cover in which the Notice is posted, if the mailing is properly addressed to the Court and is mailed; or

(2) on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the United States Postal Service, or it is delivered or sent by means other than United States mail, including facsimile.

But see Rule 25(b)(3) as to an incarcerated appellant.

(b) Notice of Docketing. The Clerk shall send a Notice of Docketing to all parties advising them of the date when the Clerk received the Notice of Appeal.

(c) Copy of Board Decision. Within 30 days after the date of the Clerk’s Notice of Docketing, the Secretary shall file and serve a copy of the Board’s decision, showing the date the decision was mailed, and shall report the filing date of any motion for its reconsideration and the date and nature of any action on such a motion.

(As amended Feb. 11, 1998, eff. Apr. 1, 1998.)

Rule 5. Suspension of Appellate Proceedings

The Court may suspend proceedings after an appeal has been filed under Rule 4: (1) on motion by the appellant seeking reconsideration by the Board; or (2) by motion of the Secretary for reasons of confession of error, by specifying the error below and the proceedings or remedy deemed to be appropriate on remand. The Court, on its own initiative, may also suspend appellate proceedings. See also Rule 28(b)(2).

Rules 6 and 7. (Reserved)

Rule 8. Stay or Injunction Pending Appeal

A party requesting immediate action by the Court to stay or enjoin an action by the Secretary or the Board pending an appeal to the Court shall do so by filing a motion and serving a copy of the motion on all other parties by an expedited method (including express mail, overnight delivery, facsimile or other printed electronic transmission, or hand delivery). The motion will not be accepted by the Clerk unless a Notice of Appeal has been filed. The motion must state the reason for the relief requested and the facts relied on. If the facts are subject to dispute, the motion must be supported by affidavits or other sworn statements or copies thereof. The motion normally will be considered by a panel of three or more judges of the Court, but in exceptional cases the motion may be acted on by a single judge pending consideration by a panel.

Rule 9. (Reserved)

Rule 10. Designation of the Record on Appeal

(a) Designation. Within 60 days after the date of the Clerk’s Notice of Docketing, the Secretary shall file with the Clerk and serve on the appellant a designation of all material in the record of proceedings before the Secretary and the Board that was relied upon by the Board in ruling against the appellant on the issues listed by the Board and any other material from the record which the Secretary considers relevant. The Secretary shall serve on the appellant a copy of those materials and a list of any record matter which cannot be duplicated.

(b) Counter Designation. Within 30 days after the Secretary serves the designation of the record on appeal, the appellant shall file with the Clerk and serve on the Secretary:

(1) a counter designation of any additional material which was before the Secretary and the Board and which the appellant considers relevant to the appeal, or

(2) a statement that the appellant accepts the content of the record as designated by the Secretary. See also Rule 11(c).

Failure of the appellant to do either will be conclusive of the appellant’s acceptance of the record as designated by the Secretary.

(c) Disputes. If any difference arises as to the content of the record on appeal, the Court, on its own initiative or on motion of a party, shall resolve the matter. The motion of a party shall describe the good faith efforts that have been made to resolve the dispute.

(d) Irrelevant Materials. The parties should take note that the record on appeal may not include materials not relevant to the issues on appeal.

Rule 11. Transmission of the Record on Appeal

(a) Transmission of the Record. The Secretary shall retain the original claims file and shall transmit two certified copies of the record on appeal to the Clerk, serving a copy on each party. The Court may direct that additional copies be transmitted.

(1) *Content.* The record, preceded by a table of contents which subdivides service medical records by calendar year, must be paginated and contain, in this order:

(A) a photocopy of the Board's decision being appealed; and

(B) all documents agreed or ordered to be part of the record on appeal, assembled in chronological order.

(2) *Time.* Unless the Court orders otherwise, the Secretary shall transmit the record within 30 days after the appellant's counter designation or statement was due under Rule 10.

(b) Supplementation of Transmitted Record.

(1) *Motion.* If a party believes any additional part of the claims file before the Secretary and the Board is relevant to an issue on appeal, the party may, within 30 days after the record on appeal has been filed with the Clerk, file a motion to supplement the record, identifying the additional material to be transmitted.

(2) *Opposition.* A party who believes additional material sought by another party is beyond the scope of matters relevant to the appeal may, within 14 days after service of the motion to supplement, file an opposition to the motion, describing the good faith efforts made to resolve the dispute.

(3) *Supplemented record.* Within 14 days after the motion is decided, the Secretary shall transmit to the Clerk two certified copies of such supplemental record, assembled in chronological order, paginated, and accompanied by a table of contents, and shall serve a copy on the appellant.

(4) *Other time limits.* Unless the Court orders otherwise, supplementation of the record does not extend the time for filing either party's brief.

(c) Access of Parties or Representatives to Original Record.

(1) *Material not Subject to a Protective Order.* After a Notice of Appeal has been filed, the Secretary shall permit a party or a representative of a party to inspect and to copy material in the record before the Board. Such inspection and copying shall be subject to reasonable regulation by the Secretary.

(2) *Confidential Information.* On its own initiative or on motion of a party, the Court may take appropriate action to prevent disclosure of confidential information. See also Rule 48.

Rule 12. Docketing the Appeal; Filing the Record on Appeal

(a) Docketing the Appeal. Upon receipt of the Notice of Appeal, the Clerk shall enter the appeal upon the docket under the appellant's name, identified as appellant, unless otherwise ordered by the Court.

(b) Filing the Record or Supplemental Record. Upon receipt of the record on appeal, the Clerk shall file it and notify all parties when appellant's brief is due. See Rules 31 and 47.

Rules 13 and 14. (Reserved)

Rule 15. Intervention

A party who was allowed to intervene before the Board may proceed before the Court as an

intervenor without filing a motion, but shall serve on all parties and file with the Clerk, within 60 days after the date of the Clerk's Notice of Docketing in accordance with Rule 4(b), a notice of intent to intervene. A person who did not intervene before the Board and who desires to intervene before the Court in a proceeding initiated by a Notice of Appeal or a petition for extraordinary relief shall serve on all parties and file with the Clerk, within 30 days after the filing of a petition for extraordinary relief or within 60 days after the date of the Clerk's Notice of Docketing in accordance with Rule 4(b), a motion for permission to intervene. The motion must contain a concise statement of the interest of the moving person or party and the grounds upon which intervention is sought and should advise the Court of opposition to the motion, if any. A motion for permission to intervene beyond this time limit will be granted only in extraordinary circumstances.

Rules 16 to 20. (Reserved)

Rule 21. Extraordinary Relief

(a) Petition; Service and Filing. A party desiring extraordinary relief must file a petition with the Clerk with proof of service on the respondent(s), on any other party at interest, and on the Secretary. The petition must contain:

(1) a statement of the precise relief sought;

(2) a statement of the facts necessary to understand the issues presented by the petition;

(3) a statement of the reasons why the petition should be granted, including why the petitioner has a clear and indisputable right to the writ and why there are inadequate alternative means to obtain the relief sought; and

(4) copies of any order or decision or parts of the record necessary to understand the petition.

Upon receipt of the \$50.00 filing fee (unless waived pursuant to Rule 24), the Clerk shall docket the petition and submit it to the Court.

(b) Action on the Petition. Unless the Court concludes that the petition should be denied, it will order the respondent(s) to file an answer to the petition within a time fixed by the order. The order shall be served by the Clerk on the named respondent(s), on the Secretary, and on any other party at interest. Two or more respondents may answer jointly. Any respondent who does not desire to appear in the proceeding may so advise the Clerk and all parties by letter, but such action will not amount to agreement that the petition should be granted. The Clerk shall notify the parties of the time limits for the filing of any briefs, and of the date of any oral argument. The proceeding will be given preference by the Court. The petition may be acted upon after reasonable notice of its filing to all parties.

(c) Form and Length of Papers; Number of Copies. Except by permission of the Court, the form and length requirements in Rule 32(g) for principal briefs apply to petitions and responses thereto. An original and three copies must be filed with the Clerk, but the Court may direct that additional copies be furnished. The petition

must be entitled: “[Name of Petitioner], Petitioner v. [Name and Title of Respondent], Respondent.”

Rules 22 and 23. (Reserved)

Rule 24. Waiver of Filing Fee

Payment of the filing fee required by Rule 3(e) or Rule 21(a) will be waived, due to financial hardship, in any case where the appellant (or petitioner) submits a declaration of financial hardship and that declaration is accepted for filing. That declaration will be subject to the penalty for perjury pursuant to 28 U.S.C. §1746, and must be on the form prescribed at Form 4 in the Appendix of Forms. If the declaration is found to lack a signature or to be otherwise noncompliant, it will be rejected for filing, and the Clerk will promptly return it to the appellant (or petitioner); within 14 days (44 days if the declaration is filed by a person located outside a state, the District of Columbia, Puerto Rico, or the Virgin Islands) after the return mailing of such a noncompliant declaration, either the fee must be paid or a new declaration that addresses the deficiencies in the noncompliant declaration must be submitted.

(As amended Oct. 31, 2001, eff. Nov. 5, 2001.)

Rule 25. Filing and Service

(a) Filing. A paper required or permitted to be filed in this Court must be filed with the Clerk. Filing may be accomplished by mail addressed to the Clerk. Any paper except a brief may be filed by facsimile (fax) sent to the Clerk at (202) 501-5848 if it is:

(1) preceded by a cover sheet showing the sender's name, address, and telephone and fax numbers; the case number and caption; and the number of pages being sent; and

(2) has numbered pages and is not more than 8½" × 11" pages long. The page limit does not include the cover sheet but does include any supporting documents and the certificate of service. A paper may not be split into multiple transmissions to avoid this page limit.

The sender bears the risk of fax transmission. Court personnel will not provide a confirmed copy, and the sender need not telephone the Court to verify receipt. If all or part of a transmission is illegible, the Court may direct the sender to provide a legible copy by mail.

(b) Timeliness.

(1) *Facsimile Filing.* A paper may be sent at any time. A paper—except a Notice of Appeal or an Application for Attorney Fees and Expenses—received by the Clerk

(a) on any nonbusiness day or

(b) on any business day before 7:00 a.m. on that day

is considered received on the preceding business day. A Notice of Appeal or an Application for Attorney Fees and Expenses filed by facsimile will be considered received on the day on which it is received.

(2) *Other Papers.* Except as provided in paragraph (1), all papers must be received by the Clerk or deposited in the night box within the time specified for filing. See Rule 45.

(3) *Incarcerated Appellant.* A paper filed by an unrepresented appellant confined in an institution is timely filed if deposited in the institution's internal mail system within the time specified for filing, accompanied by evidence showing the date of deposit and stating that first-class postage has been prepaid.

(c) Service of Papers Required. A copy of any paper—except a motion to waive the filing fee—filed by any party or amicus must, at or before the time of filing, be served by a party or amicus on all other parties and amici to the appeal. Service on a represented party or amicus must be made on the representative.

(d) Manner of Service. Service may be personal or by mail. Personal service includes delivery of the copy to a responsible person at the office of the representative or the office or home of a party without a representative. The Secretary's representative is the General Counsel, Department of Veterans Affairs.

(e) Proof of Service. A paper presented for filing must contain an acknowledgement of service by the person served, showing that person's mailing address, or a statement certified by the person who made service (see sample on reverse side of Form 1), showing the date and manner of service and the names and addresses of the persons served. Proof of service may appear on or be attached to the paper filed.

(As amended Feb. 11, 1998, eff. Apr. 1, 1998.)

Rule 26. Computation and Extension of Time

(a) Computing Time.

(1) In computing a period of time set by these rules, or by a Court order, or by a statute, the day of the event that begins the period is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in the Court—a day when the Clerk's Office has been closed by direction of the Chief Judge. Notice that the Court is closed will be posted publicly, if circumstances permit, and placed on a recording for telephone callers.

(2) As used in this rule, “legal holiday” means New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President or Congress.

(b) Extension of Time. The Court, on its own initiative or on motion of a party for good cause shown, may extend the time prescribed by these rules for doing any act, or may permit an act to be done after the expiration of such time, but the Court may not extend the time for filing a Notice of Appeal.

(c) Additional Time After Service by Mail.

Wherever a party is required or permitted to do an act, other than the filing of a Notice of Appeal, within a prescribed period after service of a paper on that party by another party and the paper is served by mail, 3 days will be added to the prescribed period. Whenever such paper is served by the Secretary in a jurisdiction other than a state, the District of Columbia, Puerto Rico, or the Virgin Islands, 30 additional days

will be added to the prescribed period. Additional time is not added to the periods prescribed in orders and notices issued by the Court.

(As amended Feb. 11, 1998, eff. Apr. 1, 1998.)

Rule 27. Motions

(a) Content of Motions; Response. Unless another form is required by these rules, an application for relief must be made by filing a motion, with proof of service (see Rule 25(e)) on all other parties. The motion must:

- (1) contain or be accompanied by any material required by any of the rules governing such a motion;
- (2) state with particularity the specific grounds on which it is based;
- (3) describe the relief sought; and
- (4) if the appellant is represented

(A) describe the steps taken to contact the other party to determine whether the motion is opposed; and

(B) indicate whether the motion is opposed and, if so, whether the moving party has been advised that a response in opposition will be filed.

Motions should not be accompanied by proposed implementing orders. If a motion is supported by briefs, affidavits, or other papers, they must be served and filed with the motion. Any party may file a response or opposition to a motion within 14 days after service of the motion, but motions authorized by Rule 8 (Stay or Injunction Pending Appeal) may be acted upon after reasonable notice of the motion to all parties, and the Court may shorten or extend the time for responding to any motion.

(b) Motions for Procedural Orders. Notwithstanding subsection (a) of this rule, motions for procedural orders, including any motion for an extension of time under Rule 26(b), may be acted on at any time, without awaiting a response, and, by rule or order of the Court, motions for certain procedural orders may be disposed of by the Clerk. Any party adversely affected by such an action may, by motion, request that the Court reconsider, vacate, or modify the action within 10 days after the action is announced.

(c) Form and Length of Papers; Number of Copies. Except by permission of the Court, the form, length, and copy requirements in Rule 32 for principal briefs apply to motions and responses.

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain the appropriate headings and, in this order:

- (1) a table of contents, with page references;
- (2) a table of cases (alphabetically listed), statutes, and other authorities cited, with references to the page of the brief where they are cited, unless the case is expedited under Rule 47;
- (3) a statement of the issues;
- (4) a statement of the case, showing briefly the nature of the case, the course of proceedings, the result below, and the facts relevant

to the issues, with appropriate references to the record;

(5) an argument, beginning with a summary, and containing the appellant's contentions with respect to the issues and the reasons for them, with citations to the authorities and parts of the record relied on; and

(6) a short conclusion stating the precise relief sought.

(b) Secretary's Brief.

(1) The Secretary's brief must conform to the requirements of subsection (a) of this rule, but a statement of the issues or of the case need not be made unless the Secretary is dissatisfied with the appellant's statement.

(2) If the Secretary wishes to confess error as to any issue or issues raised by appellant, but not as to all the issues raised, and the relief the Secretary deems appropriate as to the confession of error is different from that sought by the appellant, the Secretary shall include a statement of concession in the brief and identify the relief thereunder that is deemed appropriate.

(c) Reply Brief. The appellant may file a brief in reply to the Secretary's brief. No further briefs may be filed except with the Court's permission.

(d) References to the Record. References in the briefs to the record must be to the pages as transmitted by the Secretary. Commonly understood abbreviations may be used.

(e) Reproduction of Materials. If determination of the issues requires the study of superseded statutes, rules, regulations, or unpublished authorities, relevant parts must be reproduced in the brief or in an appendix. Documents in the record on appeal may not be reproduced in or attached to the brief.

(f) Multiple Appellants. In cases involving more than one appellant, including consolidated cases, any number may join in a single brief, and any appellant may adopt by reference any part of the brief of another. Appellants may similarly join in reply briefs.

(g) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after the party's brief has been filed or after oral argument but before the decision, a party shall promptly advise the Clerk, by letter, with a copy to all other parties, setting forth the citations. If the authority is not readily available in a Reporter system, the party shall provide the Clerk with a copy. The letter must refer to the page of the brief or to a point argued orally to which each citation pertains, and the letter must state without argument the reasons for the supplemental citations. Any response must be made promptly and must be similarly limited.

(h) Brief of Unrepresented Appellant. An unrepresented appellant may file an informal brief on the form prescribed by the Court. All other briefs must conform to the requirements of these rules.

(As amended June 14, 2000.)

Rule 29. Brief of an Amicus Curiae

(a) Time. A brief of an amicus curiae must be filed within the time allowed the party whose

position it supports unless the Court permits later filing, in which event the Court will specify the time limit for an opposing party's response. An amicus curiae will be permitted to participate in oral argument only at the invitation of the Court.

(b) Form and Content. An amicus brief must comply with Rules 28(a)(1), (5) and (6); 28(d), (e), (g) and (i); and 32; and state which party the amicus supports and the interest of the amicus. The brief should avoid repeating the parties' briefs and should focus on the points not made or not emphasized in them.

Rule 30. Citation of Nonprecedential Authority

(a) A party, intervenor, or amicus curiae may not cite as precedent any action of this Court that is:

- (1) taken by a single judge;
- (2) not published in the *Veterans Appeals Reporter*; or
- (3) withdrawn after having been published in the *Veterans Appeals Reporter*.

(b) A person may refer to an action described in Rule 30(a)(1), (2), or (3) only when the binding or preclusive effect of that action, rather than its quality as precedent, is relevant. A copy of the action cited must be attached to the document containing such a reference.

(Added June 14, 2000.)

Rule 31. Filing and Service of Briefs

(a) Time Limits. Except in cases covered by Rule 47 (Expedited Consideration), the appellant shall serve and file a brief within 30 days after the date of the notice from the Clerk that the record has been filed. The Secretary shall serve and file a brief within 30 days after service of the appellant's brief. The appellant may serve and file a reply brief within 14 days after service of the Secretary's brief, but, except for good cause shown, any brief must be filed at least 3 days before argument. Service must be pursuant to Rule 25 (Filing and Service).

(b) Effect of Failure to File. If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, the Court, on its own initiative or on motion by the Secretary, may dismiss the appeal. If the Secretary fails to file a brief or other response, the Court may take appropriate action.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Format. Briefs, appendices, and other papers must be printed or typewritten, and may be produced by any copying process that produces a clear black image on white opaque paper, and onion skin paper is not permitted except for papers sent by international mail. Pages must be letter size (8½ by 11 inches), with margins at least one inch wide from all edges, and with type or print on only one side of the page.

(b) Type; Spacing. The type or print must be at least 11 points with horizontal spacing (pitch) of no more than 11 characters per inch, for both text and footnotes. Text must be double spaced (except that motions and responses under Rule

27(b) may be single spaced), with no more than three lines of type per inch, but quotations more than two lines long and footnotes may be single spaced. The parties may not use photo reproduction that reduces print size smaller than the size required by this rule. This subsection does not apply to pages of an appendix that are legible, unreduced photocopies of documents of record.

(c) Covers. Covers are not required on briefs or appendices but, if used, they should be blue for the appellant, red for the Secretary, green for an amicus curiae or an intervenor, gray for any reply brief and white for an appendix if separate from the brief. See Form 2 (Sample Brief Cover).

(d) Binding. All papers, other than the record on appeal, must be attached at the upper left-hand corner. The record on appeal must be bound at the top.

(e) Caption. A paper addressed to the Court must contain a caption setting forth the name of this Court, the Court's case number when assigned, the title of the case, the Department of Veterans Affairs claims file number, and a brief title indicating the purpose of the paper.

(f) Page Numbers. Pages must be numbered in the center of the bottom margin, using Arabic numerals for the pages subject to the page limitation and lower case Roman numerals for the table of contents, tables of citations, and any appendix containing statutes, rules, and regulations.

(g) Page Limits and Number of Copies. Except by permission of the Court or as limited by Rule 47, principal briefs may not exceed 30 pages and reply briefs may not exceed 15 pages, not counting the table of contents; the table of citations; any appendix containing superseded statutes, rules, and regulations, and unpublished authorities; and the certificate of service. An original and three copies of all papers must be filed with the Clerk, but the Court may require that additional copies be furnished. But see Rule 25 concerning fax filings.

(h) Identification of Proponent. The signature, printed name, address, and telephone number of the representative of record (see Rule 46(d)(1)) and of an unrepresented party must appear on a brief or other document being filed with the Clerk.

(As amended Aug. 24, 2001, eff. Sept. 4, 2001.)

Rule 33. Appeal Conference

(a) Participation. The Court may direct the representatives and parties without representatives to participate in a prehearing conference, in person or by telephone, to consider simplification of the issues and such other matters as may help the Court resolve the case. The Court will enter an appropriate order to control future proceedings.

This rule does not prevent the parties from discussing settlement or agreeing to dismiss the appeal at any time before argument or submission of the case.

(b) Nondisclosure to Judges. Statements made during a conference may not be disclosed to a judge of the Court as having been made during a conference unless the parties agree in writing to such disclosure. This subsection does not

apply to a conference which has failed to resolve a dispute about the content of the record on appeal.

Rule 34. Oral Argument

(a) **In General.** Oral argument will be allowed only when ordered by the Court and will be held where and when the Court orders. The Court may order oral argument on its own initiative or on the motion of a party filed with that party's principal brief. The appellant may also request that oral argument be held in a location other than Washington, D.C.

(b) **Notice of Argument; Postponement.** The Clerk shall advise all parties whether oral argument is to be heard, and, if so, where and when, and the time to be allowed each side. Where possible, the Clerk will schedule oral argument so as to minimize inconvenience to appellants or their representatives. A request for postponement of the argument or for the allowance of additional time must be made by motion filed reasonably in advance of the date fixed for argument.

(c) **Order and Content of Argument.** The appellant may open and conclude the argument. A party will not be permitted to read at length from briefs, records, or authorities. In argument on motions, the movant may open and conclude the argument.

(d) **Non-appearance of Parties.** If any party fails to appear to present argument, the Court will hear argument by any appellant who is present, and may hear argument by any other party who is present. If no party appears, the case will be decided on the briefs and the record on appeal unless the Court orders otherwise.

(e) **Use of Physical Exhibits at Argument; Removal.** A party who intends to use physical exhibits other than documents shall arrange with the Clerk to have them placed in the courtroom on the date of the argument before the Court convenes. After the argument, the party shall remove the exhibits unless the Court otherwise directs. If the exhibits are not reclaimed within a reasonable time after notice is given by the Clerk, they will be disposed of by the Clerk.

(f) **Motions.** Oral argument normally is not granted on motions.

(g) **Oral Argument.** Oral argument will be held as announced by the Chief Judge. The announcement will indicate the composition of the panel, although there is no guarantee that the panel on the argument date will be identical to that announced since a judge may be recused from a case or, for a number of reasons, may be unavailable.

Rule 35. Motions for Reconsideration, or for Decision by a Panel or by the Full Court

(a) **Motion for Reconsideration.** A party in a case decided by a single judge may move for reconsideration by the single judge. A party in a case dismissed by the Clerk pursuant to Rule 45(i) may move for reconsideration by the Clerk. A party in a case decided by a panel may move for reconsideration by the panel. A party in a case decided by the full Court may move for reconsideration by the full Court.

(b) **Motion for Panel Decision.** A party in a case decided by a single judge may move for decision by a panel of the Court.

(c) **Motion for Full Court Decision.** A party may move for decision by the full Court (1) initially, or (2) after a panel has decided a case, or (3) after a panel has denied a motion for panel decision or reconsideration. A motion for decision by the full Court in a case decided only by a single judge is not permitted. Motions for full Court decision are not favored. Ordinarily they will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance.

(d) Time for Motion.

(1) A motion for Clerk reconsideration or single-judge decision, or both, and for single-judge reconsideration or a panel decision, or both, must be filed within 21 days (51 days if the motion is filed by a person located outside a state, the District of Columbia, Puerto Rico, or the Virgin Islands) after the date of the Clerk's or single judge's decision.

(2) A motion for panel reconsideration, for full Court decision, or for both, must be filed within 21 days (51 days if the motion is filed by a person located outside a state, the District of Columbia, Puerto Rico, or the Virgin Islands) after the date of the initial panel decision or order denying a motion for panel decision.

(3) A motion for initial consideration of a case by the full Court must be filed within 30 days after the date on which the appellant's brief was served.

(4) A motion for reconsideration of a case by the full Court must be filed within 21 days (51 days if the motion is filed by a person located outside a state, the District of Columbia, Puerto Rico, or the Virgin Islands) after the date of the initial full Court decision.

(e) **Content of Motion.** A motion under this rule must contain a supporting argument. In addition:

(1) a motion for panel decision or a motion for single-judge, panel, or full Court reconsideration must state the points of law or fact that the party believes the Court has overlooked or misunderstood, and

(2) a motion for full Court decision must state (A) how such action will secure or maintain uniformity of the Court's decisions or (B) what question of exceptional importance is involved.

(f) **Form; Length; Number of Copies.** Except by the Court's permission, a motion or response (including any supporting memorandum or brief) under this rule must not exceed 15 pages. The motion must otherwise comply with Rule 27, but it need not indicate whether it is opposed. A motion for full Court decision, and any response, must be filed in an original and 7 copies.

(g) **Response; Action on the Motion.** No response to a motion under this rule may be filed unless it is requested by the Court, but a motion for panel or full Court decision ordinarily will not be granted without such a request. A motion for reconsideration will be decided by the judge

or panel that rendered the decision. A motion for panel decision will be referred to a panel. A motion for full Court decision will be referred to all of the judges. Consideration by the full Court requires the vote of a majority of the judges. The Clerk shall return an untimely motion or one that fails to include the statement required by subsection (e) of this rule.

(As amended Feb. 11, 1998, eff. Apr. 1, 1998; Aug. 24, 2001, eff. Sept. 4, 2001.)

Rule 36. Entry of Judgment

Unless the Court orders otherwise, the judgment will be entered after the time allowed in Rule 35(d)(1) or (2) has expired, or after the Court has acted on a timely motion for single-judge or panel reconsideration or for panel decision. The filing of a motion for full Court decision or reconsideration will not postpone entry of the judgment. Entry of the judgment begins the 60-day time period for any appeal to the United States Court of Appeals for the Federal Circuit.

(As amended Feb. 11, 1998, eff. Apr. 1, 1998.)

Rule 37. (Reserved)

Rule 38. Frivolous Appeals

If the Court determines that an appeal is frivolous, it may enter such order as it deems appropriate.

Rule 39. Attorney Fees and Expenses

(a) **Time for filing.** An application pursuant to 28 U.S.C. §2412 for award of attorney fees and/or other expenses in connection with an appeal or petition must be filed with the Clerk within 30 days after this Court's judgment becomes final, which occurs 60 days after entry of judgment under Rule 36 or, consistent with Rule 41(b), upon the issuance of an order on consent dismissing, terminating, or remanding a case. See Rule 25 (Filing and Service).

(b) **Supplemental application.** An appellant or petitioner whose application described in subsection (a) of this rule has been granted in whole or in part may, not later than 30 days after the Court action granting such application, file a supplemental application for attorney fees and other expenses in connection with the submission or defense of such subsection (a) application. See Rule 25.

(c) **Response.** Within 30 days after the date on which an application described in subsection (a) or a supplemental application described in subsection (b) is filed, the Secretary shall file and serve a response to the application or supplemental application, stating which elements of the application or supplemental application are not contested and explaining the Secretary's position on those elements that are contested.

(d) **Reply.** Within 30 days after service of the Secretary's response, the applicant may file and serve a reply addressing those matters contested by the Secretary.

(e) **Appendices.** The parties shall file as appendices to the application, response, and reply those relevant papers which are not already before the Court.

(As amended Aug. 16, 1996, eff. Aug. 16, 1996; Feb. 11, 1998, eff. Apr. 1, 1998; Nov. 1, 2001, eff. Nov. 9, 2001.)

Rule 40. (Reserved)

Rule 41. Issuance of Mandate; Stay of Mandate

(a) **Date of Issuance.** The mandate of this Court will issue 60 days after the date of entry of judgment pursuant to Rule 36 unless the time is shortened or extended by order. If a timely Notice of Appeal to the United States Court of Appeals for the Federal Circuit is filed with the Clerk, the mandate will issue in accordance with 38 U.S.C. §7291(a).

(b) **Mandate in Consent Dispositions.** An order on consent dismissing, terminating, or remanding a case will also constitute the final judgment and mandate of the Court.

(As amended Feb. 11, 1998, eff. Apr. 1, 1998; Nov. 1, 2001, eff. Nov. 9, 2001.)

Rule 42. Voluntary Termination or Dismissal

If the parties file with the Clerk a motion to terminate an appeal or petition based upon a settlement agreement to be effective upon the Court's termination of the case, the Clerk may enter the case terminated. On motion of the appellant or petitioner to dismiss, an appeal or petition may be dismissed by the Clerk on terms requested by the appellant or petitioner, agreed upon by the parties, or previously fixed by the Court.

(As amended Nov. 1, 2001, eff. Nov. 9, 2001.)

Rule 43. Substitution of Parties

(a) **Death of a Party.**

(1) *Before Notice of Appeal.* If a party entitled to appeal dies before filing a Notice of Appeal, the Notice of Appeal may, to the extent permitted by law, be filed within the time limit in Rule 4 by any person claiming entitlement to accrued benefits under 38 U.S.C. §5121(a), by the personal representative of the deceased party's estate, by any other appropriate person, or, if there is no such person, by the party's representative of record before the Board.

(2) *After Notice of Appeal.* If a party dies after a Notice of Appeal is filed or while a proceeding is pending in this Court, any person claiming entitlement to accrued benefits under 38 U.S.C. §5121(a), the personal representative of the deceased party's estate, or any other appropriate person may, to the extent permitted by law, be substituted as a party on motion by such person or by any party. If no such person exists, any party may suggest the death on the record and proceedings will then be as the Court directs.

(b) **Substitution for Other Causes.** If substitution of a party in this Court is necessary for any reason other than death, the Court may order it on motion of any party or on its own initiative.

(c) **Public Officers; Death or Separation from Office.**

(1) *Naming as Party.* The Secretary must be described as the appellee by name and by official title. Any public officer who is a respondent

must be described by official title rather than by name; but the Court may require that the name of the public officer be added.

(2) *Death or Separation.* When a public officer is a party in an official capacity and during the proceedings dies, resigns, or otherwise ceases to hold office, the proceedings are not stopped, and the public officer's successor is automatically substituted as a party. Proceedings following the substitution must be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties will be disregarded.

Rule 44. Judicial Conference

(a) **Purpose.** Pursuant to 38 U.S.C. § 7286, there shall be convened, at such time and place as the Chief Judge designates, a conference to consider the business of the Court and to recommend means of improving the administration of justice within the Court's jurisdiction.

(b) **Committee.** The Chief Judge will appoint a Judicial Conference Planning Committee to plan and conduct the conference. The Planning Committee may appoint such subcommittees as may be necessary to assure the efficient operation of the conference.

(c) **Attendance.** The Chief Judge presides at the conference. All persons admitted to practice before the Court, and such other persons as are designated by the Chief Judge, may be members of and participate in the conference.

(d) **Registration Fee.** Each member of the conference shall pay a registration fee in an amount fixed by the Court to defray expenses of the conference. The Chief Judge may excuse the payment of the fee in individual cases. These fees shall be maintained in a bank account which shall be known as the "CVA Judicial Conference Fund." Money from this account shall be disbursed by the Clerk at the direction of the Chief Judge to defray conference expenses. Any excess shall be used to pay future conference-related expenses.

(e) **Responsibility of the Clerk.** The Clerk shall be responsible for receipt and disbursement of conference funds, for all conference records and accounts, and for conference staff support, and shall perform such other duties pertaining to the conference as may be directed by the Chief Judge.

(f) **Delegation.** The Chief Judge may delegate any or all of his responsibilities to another judge of the Court.

Rule 45. Duties of Clerk

(a) **General Provisions.** The Clerk shall take the oath required by law. Neither the Clerk nor any deputy clerk may practice as an attorney or counselor in any court while continuing in office. The Court will be deemed always open for the purpose of filing any proper paper, of issuing and returning process, and of making motions and orders. The office of the Clerk, with the Clerk or a deputy clerk in attendance, will be open during business hours on all days except Saturdays, Sundays, and legal holidays (as defined in Rule 26(a)) from 9:00 a.m. to 4:00 p.m. A night box will be available at the entrance to

the Public Office from 4:00 p.m. to 6:00 p.m. on such business days.

(b) **The Docket; Calendar; Other Records Required.** The Clerk shall:

(1) maintain a docket containing a record of all papers filed with the Clerk, and all process, orders, and judgments;

(2) maintain an index of cases contained in the docket;

(3) prepare, under the direction of the Court, a calendar of cases submitted or awaiting argument; and

(4) keep such other books and records as may be required by the Court.

(c) **Notice of Court Actions.** Immediately upon issuance of an opinion, memorandum decision, or order, or entry of judgment, the Clerk shall send a copy to each party to the proceeding, and shall note the date of issuance in the docket.

(d) **Custody of Records and Papers.** The Clerk shall have custody of the records and papers of the Court. The Clerk shall not permit any original record or paper to be taken from the Clerk's custody except as authorized by the United States Supreme Court, the United States Court of Appeals for the Federal Circuit, or this Court. Original papers transmitted as the record on appeal will be returned upon disposition of the case. The Clerk shall preserve copies of briefs and appendices and other printed papers filed.

(e) **Court Seal.** The Clerk shall be the custodian of the seal of the Court. The seal will appear as ordered by the Court. The seal will be the means of authentication of all records and certificates and process issued from this Court.

(f) **Schedule of Fees.** The Clerk shall maintain in the Public Office a schedule of fees approved by the Court.

(g) **Motions.** The Clerk may act on motions, if consented to or unopposed, that seek to:

(1) dismiss an appeal or an application for extraordinary relief with or without prejudice to reinstate it;

(2) remand a case;

(3) reinstate a case that was dismissed for failure to comply with the rules;

(4) extend the time for taking any action required or permitted by the rules or an order of the Court, unless the motion is made after the time limit has elapsed;

(5) consolidate appeals;

(6) withdraw or substitute an appearance; or

(7) correct a brief or other paper.

(h) **Applications for Attorney Fees and Expenses.** The Clerk may act on an application for attorney fees and expenses filed pursuant to 28 U.S.C. § 2412 (EAJA) when the Secretary does not contest the application, and on joint motions to dismiss EAJA applications.

(i) **Sua Sponte Dismissal of Cases.** The Clerk may dismiss a case for the appellant's failure to pay the filing fee or to file a brief. If a party's motion for reconsideration by the Clerk of a case dismissed by the Clerk under this subsection is not granted by the Clerk, the matter must be referred for decision by a judge.

(j) **Construction of Rules in Self-Representation Cases.** The Clerk shall liberally construe the rules as they apply to appellants representing themselves.

(As amended Apr. 30, 1998; Aug. 24, 2001, eff. Sept. 4, 2001.)

FEE SCHEDULE

It is ORDERED, pursuant to Rule 45(f), that the following revised schedule of fees approved by the Court is announced. The fees marked * apply to services on behalf of the United States, if the information requested is available through electronic access. The only change is marked by #:

For filing Notice of Appeal or Petition for Extraordinary Relief in this Court, but not when the Court orders case redocketing for its administrative convenience	\$50.00
For filing Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit (fee set by that court, payable to this Court)	105.00
For reproducing a paper copy from original documents or from microfiche or microfilm reproductions of original records, per copy page	.50*
For each microfiche sheet of film or microfilm jacket copy of any Court record, when available	3.00
For reproducing audio or video tape recording, including cost of materials	15.00
For searching Court records, per name or item searched	15.00*
For retrieval of a Court record from a Federal Records Center or National Archives	25.00
For certifying a document or paper, whether certification is made directly on the document or by separate instrument	5.00
For application for admission to practice before the Court	30.00
For a certificate of admission to practice, suitable for framing (fee set by, and payable to, printer)	25.65#
For processing a check paid to the Court which is returned for lack of funds (fee set by National Finance Center)	6.00

DATED: June 9, 1998

FOR THE COURT:
ROBERT F. COMEAU
CLERK OF THE COURT

Rule 46. Representation**(a) Admission of Attorneys to Practice.**

(1) *General.* A person of good moral character and repute who has been admitted to practice in the Supreme Court of the United States, or the highest court of any state, the District of Columbia, or a territory, possession, or commonwealth of the United States, and is in good standing therein, may be admitted to the bar of this Court upon application.

(2) *Application.* An attorney at law may be admitted to the bar of the Court upon filing with the Clerk a completed application accompanied by the prescribed fee (payable by check or money order) and a current certificate from the clerk of the appropriate court showing that the applicant is a member in good standing of the bar of one of the courts named in subparagraph (1). A current court certificate is one executed within three months preceding the date of the filing of the application.

(b) Admission of Non-attorney Practitioners to Practice. A non-attorney of good moral character and repute

(1) under the direct supervision of an attorney admitted to the bar of the Court, or

(2) employed by an organization which is chartered by Congress, is recognized by the Secretary of Veterans Affairs for claims representation, and provides a statement signed by the organization's chief executive officer certifying to the employee's:

(A) understanding of the procedures and jurisdiction of the Court and of the nature, scope, and standards of its judicial review; and

(B) proficiency to represent appellants before the Court

may be admitted to practice before the Court upon filing with the Clerk a completed application accompanied by the prescribed fee (payable by check or money order). In making the certification in subparagraph (2), the chief executive officer should be aware that knowledge of and competence in veterans law and the administrative claims process does not in and of itself connote competence in appellate practice and procedure.

(c) Appearance in a Particular Case. On motion and a showing of good cause, the Court may permit any attorney or non-attorney to appear on behalf of a party or amicus for the purpose of a particular case. Whenever a person is admitted to practice under this subsection, the person shall be deemed to have conferred disciplinary jurisdiction upon the Court for any alleged misconduct in the course of, in the preparation for, or in connection with any proceedings in that case.

(d) Representation Requirements.

(1) *Practitioner defined.* A person who has been admitted to practice under subsections (a) or (b) or has been permitted to appear under subsection (c) of this Rule 46 is referred to in this subsection (d) as a practitioner.

(2) *Appearance.* No practitioner may appear on behalf of a party or amicus in any proceedings in a case without first filing:

(A) a written notice of appearance in the detail prescribed by Form 3 in the Appendix of Forms; and

(B) a copy of the fee agreement if the practitioner is representing an appellant or petitioner or intervenor, unless the representation is without charge to that party. If the agreement provides for direct payment out of past-due benefits under 38 U.S.C. §5904, a copy must be served on the Secretary.

An appearance may not be made in the name of a law firm or other organization.

(3) *Papers filed by a non-attorney.* Each paper filed by a non-attorney practitioner must include the name, address, and signature of the responsible supervising attorney under Rule 46(b)(1) or the identification of the employing organization under Rule 46(b)(2).

(4) *Withdrawal.* A practitioner may withdraw from a case by filing a notice stating that the party has consented to the withdrawal, if another practitioner has previously entered an appearance on behalf of the party. Otherwise, a practitioner may not withdraw from a case without obtaining the Court's permission by filing a motion to withdraw that

(A) lists the client's current address and telephone number, and

(B) assures the Court that

- (i) the client has been notified of the motion to withdraw, and
- (ii) copies of all papers filed by the parties, all notices and orders accumulated by the practitioner, and all files belonging to the client have been sent to the client or to a named substitute practitioner.

The practitioner's authority and duty continue until he or she is relieved by the Court, subject to conditions that the Court considers appropriate.

(5) *Change of address.* Each practitioner and self-represented party must notify the Clerk and all other parties of any change of his or her address or telephone number. Absent such notice, the mailing of documents to the address most recently provided by that person will be fully effective.

(6) *Limited representation.* This Rule 46(d) does not apply when a practitioner files a Notice of Appeal on behalf of an appellant and specifies that the representation is limited to that filing.

(7) Subsections (2)(B), (4), (5), and (6) of this Rule 46(d) do not apply to practitioners representing the Secretary.

(e) (Rescinded)

(f) Appearance by Law Students.

(1) An eligible law student, with the written consent of the appellant and the attorney of record, who must be a member of the bar of the Court, may appear in this Court.

(2) An eligible law student may participate in the preparation of briefs and other documents to be filed in this Court, but such briefs or documents must be signed by the attorney of record. The student may also participate in oral argument with leave of the Court, but only in the presence of the attorney of record. The attorney of record shall assume personal professional responsibility for the law student's work and for supervising the quality of his or her work. The attorney should be familiar with the case and prepared to supplement or correct any written or oral statement made by the student.

(3) In order to make an appearance pursuant to this rule, the student must:

(A) be duly enrolled in a law school approved by the American Bar Association;

(B) have completed legal studies amounting to at least four semesters, or the equivalent if studies are scheduled on other than a semester basis;

(C) be certified by the dean of the law school as being of good character and competent legal ability. This certification must be filed with the Clerk and may be withdrawn at any time by the dean, upon written notice to the Clerk, or by the Court, without notice of hearing and without any showing of cause;

(D) be introduced by the attorney of record in the case;

(E) neither ask for nor receive any compensation or remuneration of any kind for his or her services from the person on whose behalf such services are rendered, but this will not prevent an attorney, legal aid bureau, law school, a state, or the United States from paying compensation to the eligible law student,

nor will it prevent any agency from making such charges for its services as it may otherwise properly require;

(F) certify in writing that he or she has read and is familiar with the code of professional responsibility or rules of professional conduct in effect in the state or jurisdiction in which the student's law school is located.

(g) Self-representation. Any appellant, petitioner, or intervenor may be self-represented before the Court.

(As amended Mar. 18, 1999, eff. May 1, 1999; Dec. 14, 2001, eff. Dec. 26, 2001.)

LIMITED APPEARANCES

Order of the United States Court of Appeals for Veterans Claims, dated Mar. 18, 1999, provided that:

"This Court's Rules of Practice and Procedure, as changed effective May 1, 1999, permit a limited appearance by a practitioner only for the purpose of filing a Notice of Appeal. It is

"ORDERED that, notwithstanding the foregoing restriction, a staff attorney of a pro bono representation program operating under a grant or contract made in connection with the authority first provided in Public Law No. 102-229 may enter a limited appearance for the purpose of case screening and referral."

Rule 47. Expedited Consideration

(a) Motion and Order. On motion of a party for good cause shown, on written agreement of the parties, or on its own initiative, the Court may order that any matter before the Court be expedited.

(b) Filing and Service of Papers. Expedited proceedings will be scheduled as directed by the Court. Unless otherwise ordered, the appellant's principal brief shall be served and filed within 25 days after the date of the Clerk's notice that the record on appeal has been filed. The Secretary's brief shall be served and filed within 15 days after service of the appellant's brief. Any reply brief shall be served and filed within 10 days after service of the Secretary's brief.

(c) Form and Length of Briefs. Briefs filed under this rule shall comply with Rules 28 and 32, except that principal briefs must be limited to 10 pages, reply briefs must be limited to five pages, and a table of authorities is not required.

(d) Supplementation of the Transmitted Record. If expedited proceedings are ordered, any motion for supplementation of the record on appeal must be served and filed before the date on which the appellant's brief is due. See also Rule 11(b). Such supplementation does not extend the time for filing any brief.

Rule 48. Disclosure of Certain Protected Records

(a) If, during the time periods set out in Rule 10 or at any other time during a proceeding before the Court, the parties identify records protected by 38 U.S.C. §7332 and at least one of the parties believes that disclosure of such records is required in such proceeding and, further, the parties cannot agree with respect to the disclosure of such records, the party requesting disclosure shall make immediate application therefor, pursuant to 38 U.S.C. §7332(b)(2)(D), captioned the case "In re: Sealed Case No. [insert Court of Veterans Appeals case number]" (not disclosing

the identity of any individual), and serve on the protected patient or subject or successor in interest a copy of the application. Such application must include a statement specifying those steps taken by the parties to reach agreement before application was made to the Court. Upon receipt of such application, the Clerk, unless otherwise ordered by the Court, shall enter the case as “withdrawn” on the docket, assign a new case number and recaption the case using an encoded identifier, and seal the record on appeal and the file of the Court. Thereafter, any party or representative of a party, unless otherwise

ordered by the Court, shall refer any subsequent filing only to the new case number and caption assigned by the Clerk.

(b) The procedures described in this rule may, in the Court’s discretion, be applied to cases that the Court orders sealed but which do not contain records protected by 38 U.S.C. § 7332.

Rule 49. Complaints Against Judges

Rules for the processing of complaints of judicial misconduct or disability have been adopted by the Court pursuant to 28 U.S.C. § 372(c). Copies are available from the Clerk on request.

APPENDIX OF FORMS
FORM 1

T38AF1.EPS

T38AF2.EPS

FORM 3

T38AF3.EPS

FORM 4

T38AF4.EPS