

§ 42.38

38 CFR Ch. I (7-1-04 Edition)

§ 42.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the mailing in the absence of contrary proof.

(b) Every motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. The motion shall be accompanied by a supporting brief.

(c) Responses to the motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the Secretary and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the Secretary in accordance with § 42.39 of this part.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the Secretary and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Secretary in accordance with § 42.39 of this part.

§ 42.39 Appeal to the Secretary of Veterans Affairs.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal the decision to the Secretary of Veterans Affairs by filing a notice of appeal with the Secretary in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 42.8 of this part, consideration of the appeal shall be stayed automatically pending reso-

lution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The Secretary may extend the initial 30 day period for an additional 30 days if the defendant files with the Secretary a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the Secretary, and the time for filing motions for reconsideration under § 42.38 of this part has expired, the ALJ shall forward the record of the proceeding to the Secretary.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Secretary.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the Secretary shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Secretary that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present the evidence at the hearing, the Secretary shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The Secretary may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment, determined by the ALJ in any initial decision.

(k) The Secretary shall promptly serve each party to the appeal with a copy of the decision of the Secretary and a statement describing the right of any person to seek judicial review.