

# CHAPTER 11

## STUDY PLAN

# THE VA APPEALS PROCESS

## OBJECTIVE

To become familiar with the VA appeals procedures to include important time limits and when a decision to adjudication appeals is appropriate.

## REFERENCES

- 38 Code of Federal Regulations, Parts 19 and 20
- Adjudication Manual M21-1MR (Manual Rewrite), Part I, Chapter 5
- Veterans Benefits Manual, Part V, the VA Claims Adjudication Process
- VA Forms:
  - 21-0958, *Notice of Disagreement, January 2015*
  - 21-0966, *Notice of Intent to File a Claim for Compensation and/or Pension, Survivors Pension, or Other Benefits, November 2014*
  - 9, *Appeal to Board of Veterans' Appeals, July 2015*
  - 4107, *Your Rights to Appeal Our Decision, June 2015*
- VA Board of Appeals (available at [www.bva.va.gov](http://www.bva.va.gov)):
  - *How Do I Appeal?, VA Pamphlet 01-15-02B, May 2015*
  - *The Veterans Appeals Process, February 28, 2014*

## INTRODUCTION

Any adjudicative decision by the VA that is found to be unfavorable, or not a full grant of benefits sought by the claimant, may be appealed. An adjudicative decision is one that establishes or denies eligibility to a VA benefit, such as service connection for a disability, entitlement to pension, the effective date of a benefit granted, eligibility for medical/dental treatment, monthly rate of education assistance, waiver

of overpayment, etc. A rating decision is the adjudicative decision most commonly dealt with by Veteran Service Representatives (VSRs). A medical decision by the veteran's physician is not an adjudicative decision, and is not appealable through this process.

There are specific actions that the appellant must take in a prescribed order and within specific time limits in order to appeal the decision. The VSR must be knowledgeable in these procedures and time limits to ensure the appellant does not have their appeal closed out as not timely perfected.

## THE CLAIMS PROCESS (AFTER THE CLAIM APPLICATION IS SUBMITTED)



### PRE-DECISIONAL HEARINGS

Pre-decisional hearings are conducted before one or more Veterans Service Center (VSC) employees who have decision-making authority over the issue(s) involved. As the name implies, "pre-decisional" means that a decision has not yet been made in a case. These typically involve due process issues where the VA has "proposed" to take an adverse action and the person affected must be given the opportunity to argue or present evidence that could result in the adverse action not being taken.

Examples would include a proposal to reduce a veteran's service-connected evaluation of a disability, a proposal to sever service connection, a proposal to terminate or suspend a benefit, or a proposal to rate a beneficiary incompetent. Sometimes a pre-decisional hearing is requested by a claimant to present testimony or evidence prior to a decision because they feel that the issue(s) are complicated and need to be explained in person to clarify any ambiguities prior to a decision.

## ADJUDICATIVE DECISION

The agency that makes a decision on a claim is known as the Agency of Original Jurisdiction (AOJ). In most cases, the AOJ is the Regional Office. However, the AOJ may also be a VA Medical Center that has made an adjudicative decision (e.g. denied entitlement to medical/dental eligibility or reimbursement of unauthorized medical expenses to an outside provider).

You'll learn how to read a rating decision in Chapter 34.

When the adjudicative decision is a rating decision, the VA will, in the case of service connection, grant or deny service-connection. If granting, the VA will assign an effective date and a rating percentage for each condition. Thus, the appealable issues are denial of service connection, the assigned effective date, and the rating percentage assigned.

## NOTICE OF DISAGREEMENT (NOD)

After a claimant receives an adjudicative decision from the VA, and disagrees in whole or in part with that decision, the initial step in the appeal process is to file a "Notice of Disagreement" (NOD). In February 2013, the VA issued a new Notice of

Disagreement form (VA Form 21-0958). Formerly, there was no specific form and no specific wording was required except that it had to be in writing and had to be in terms which can be reasonably construed as a disagreement with the VA decision. The NOD also had to state specifically what aspects of the decision were disagreed with.



### ADVOCACY TIP

Always ask for the highest percentage that could be reasonably applied to the veteran's condition, or if there is uncertainty, just ask for the highest percentage possible for that condition.

Form 21-0958 allocates space for the claimant to list the issue(s) of disagreement, the area of disagreement (service connection, rating percentage, effective date, etc.), and percentage evaluation sought.

The NOD must be filed within *one year* of the date the initial notification is *mailed to the claimant* (that is the date on the notice letter and not the date of the rating decision), and must be filed with the Regional Office making the decision, or AOJ.

## DECISION REVIEW OFFICER (DRO) PROCESS

When a claimant files a Notice of Disagreement, the VA sends a letter asking if the claimant elects to have the Traditional Appeal Process or the Decision Review Officer (DRO) Process. The claimant has only *60 days* to elect the DRO Process or they will automatically be assigned the Traditional Appeal Process. There is no place allocated on the NOD Form 21-0958 to select a DRO review, but the claimant can use the space at the bottom of the form to do so.

The main difference between the DRO Process and the Traditional Appeal Process is that the Decision Review Officer has *de novo* (Latin for "over again", "anew") authority. This means that the DRO can look at exactly the same evidence the VA decision maker looked at and overrule the decision made. The DRO position was created by the VA in 2001, and they were given this *de novo* authority at that time.



### ADVOCACY TIP

An informal hearing can be conducted by telephone and is a good way for the VSR to connect directly with the DRO to find out what the DRO believes are the significant issues or flaws in the veteran's case.

The DRO replaced the local Hearing Officer position that did not have this *de novo* authority. The Traditional Appeal Process means that a Rating Veterans Service Representative (RVSR) will review the Notice of Disagreement, but the only way they can overturn the initial decision is if the veteran submits additional evidence.

Whether the appeal is reviewed by a DRO, if the review results in anything less than a full grant of benefits being sought, and the appellant does not withdraw the Notice of Disagreement, a Statement of the Case will be issued.



## DECISION REVIEW OFFICER HEARINGS

Post-decisional hearings are conducted by Decision Review Officers (DROs) after an initial decision has been implemented and the claimant has been notified of the decision. The request for a DRO hearing typically accompanies the claimant's Notice of Disagreement and request for a DRO *de novo* review; however, the request can be made at any time before an appeal is certified and sent to the Board of Veterans' Appeals (BVA). The DRO hearing can be either a formal hearing that is tape recorded with a transcript of the hearing prepared for the record, or an informal conference that is not tape recorded. Whether a formal hearing or an informal conference should be selected depends on the complexity of the case and personal preference.



Since the claimant's testimony at a formal hearing is considered "evidence," he or she must be sworn in by making an oath or affirmation that the testimony given is truthful. An informal conference is a tool available to the DRO to ensure that all parties understand the issue(s) pending review, the issues are focused and clarified, and the record is fully developed so an oath or affirmation is *not* required.

### **STATEMENT OF THE CASE (SOC)**

In response to the NOD, the VA must issue a Statement of the Case (SOC) to the appellant and any designated representative, unless the disagreement is resolved by a grant of the benefit(s) sought on appeal or the NOD is withdrawn by the appellant. The SOC will contain a listing of the evidence considered in the decision, the laws and regulations applicable to the decision, a statement of the decision and a discussion of the reasons and bases why the rules applied to this evidence did not permit the benefit(s) being sought to be granted.

The purpose of the SOC is to provide the appellant with an understanding of the basis for the decision so the appellant can prepare and present written and/or oral arguments to the Board of Veterans' Appeals (BVA) with a Substantive Appeal. The

VA is under no obligation to issue the SOC within a specified time period, and given the backlog of appeals, it could be many months/years before an SOC is issued.

### **SUPPLEMENTAL STATEMENT OF THE CASE (SSOC)**

A Supplemental Statement of the Case (SSOC) will be furnished if any additional evidence is considered after the original SOC has been issued; if an amended decision has been made granting part but not all of the issues on appeal; or, if there was any material defect in the original SOC. The SSOC contains the same elements as the SOC.

### **SUBSTANTIVE APPEAL: VA FORM 9**

After the VA issues a SOC the appellant has a limited time period to “perfect” his/her appeal by submitting their Substantive Appeal on VA Form 9, Appeal to Board of Veterans’ Appeals. A Substantive Appeal must be filed within 60 days from the date of mailing of the SOC. (If the SOC is issued within one year of the rating decision, the veteran has the remainder of the one-year period from the date of mailing of the original notice of the decision to file the VA Form 9. In practice, this *rarely* happens because the VA typically takes well over a year to issue the SOC.)

In contrast to the NOD, the Substantive Appeal must make specific contentions relating to errors of fact or law made by the VA in reaching the decision(s) being appealed. Although VA regulations (38 C.F.R.§ 20.202) permit the Board of Veterans’ Appeals to dismiss any appeal which fails to allege specific error of fact or law, the Board construes most arguments in a liberal manner, and their dismissal of a Substantive Appeal on this basis is extremely rare. The Substantive Appeal, however, must specifically identify the issues being appealed. The VA Form 9 asks the appellant whether they want to appeal all the issues listed on the SOC and any SSOC; or, if they are only appealing some of the issues listed, to identify them. The only issues that will come before the Board of Veterans’ Appeals will be those issues identified.



**CERTIFICATION OF THE APPEAL TO THE BOARD OF  
VETERANS’ APPEALS**

After the AOJ receives the appellant's Substantive Appeal and there is no additional evidence that must be responded to with an SSOC, a thorough review of the case is done to ensure no steps were missed in the process and that the appeal is ready for certification to the BVA. Once this is determined, the electronic claims folder is available to the appellant's Power of Attorney (POA), if any, for review and the POA is given the opportunity to present any formal arguments in the form of an appeal brief. .

It is the POA's responsibility to make sure that any deficiencies that could potentially resolve the appeals locally are taken care of to avoid delaying the grant of benefits through lengthy BVA Remand processes. Once appeals are certified and mailed to the BVA, appellants should receive a letter from VA advising them of this action and that they have *90 days* to submit any additional evidence that they may want the Board to consider, to request a hearing (if not already done), or to change representation. This letter is rarely sent out by VA, however.

### **BOARD OF VETERANS' APPEALS**

Once the BVA receives an appeal, it is assigned a Docket Number and appeals are considered in the order of receipt. In special cases an appeal may be advanced on the docket (moved to the head of the line) if sufficient cause is shown. "Sufficient cause" would include terminal or serious illness of the appellant; advanced age of the appellant (age 75 or older); extreme financial hardship on the appellant, etc. To request that an appeal be advanced on the docket, a "Motion to Advance on the Docket" must be submitted to the BVA.

The BVA decision maker is a Veterans Law Judge (VLJ). The judge has BVA attorneys working for her or him, however, to review the case, to advise if an appeal is ready for a decision, or to advise if additional development is needed. If the VLJ makes a ruling that the appeal is not ready for a decision, she or he will remand it for additional development, observance of due process requirements, medical opinions, etc. Because of the large number of remanded appeals, the VA set up an Appeals Management Center (AMC) for the sole purpose of handling remanded appeals. On

remand, the VLJ will list the issues on appeal, discuss why the remand is necessary and give very specific instructions to the AMC for developing what is needed.

Once the AMC has completed all the VLJ's instructions and obtained any additional evidence requested, the AMC will review the appeal to see if a grant is in order or if a continuation of the denial is in order. Any issues that are a full grant by the AMC will be promulgated. If any issues are not a full grant or a continuation of the denial, the AMC will issue a SSOC to the appellant. The appellant is allowed *30 days* to respond to this SSOC if desired (not required) and then the claims folder is returned to the BVA.



An appellant may request a personal hearing before the BVA at any point in the appeal up to the time the BVA issues its decision. The appellant may choose a personal hearing before the BVA in Washington, DC (at his or her own expense); before a BVA Travel Board at their local VA Regional

Office; or by video teleconference with the appellant at the local VA Regional Office and the Veterans Law Judge in Washington, DC Generally, an appellant will only be scheduled once for a hearing on an appeal, unless good cause is shown why the hearing should be rescheduled or another hearing is required.

When the VLJ determines an appeal is ready for a decision, he or she will do a *de novo* review. If the VLJ grants an appeal in full or only grants some of the issues and denies others, the appellant and his or her representative, if any, will be notified of the decision. A grant of any benefits sought will be referred back to the AOJ to implement the grant. The BVA decision will include a listing of the issue(s) considered; findings of fact and law; a listing of the evidence considered; and the reasons and bases for the decision as to each issue. The decision will also include a notice of appeal rights to the Court of Appeals for Veterans' Claims. This will include instructions on how to appeal to the court and where to send it. An appeal to the

Court of Appeals for Veterans' Claims must be submitted within 120 days from the date of the BVA decision.



### **BOARD OF VETERANS' APPEALS HEARINGS**

When an appellant submits a VA Form 9, *Appeal to the Board of Veterans' Appeals*, in response to a Statement of the Case (SOC) or Supplemental Statement of the Case (SSOC), they are asked if they want a BVA hearing by live videoconference, a BVA hearing in Washington, DC or a BVA hearing at a local VA office. A BVA hearing can only be requested along with or after a VA Form 9 has been submitted.

If a BVA hearing in Washington, DC is requested, the appellant will have to travel to Washington, DC, at his or her own expense, for the hearing before a BVA Veterans Law Judge (VLJ). Given the backlog of appeals nationwide, there is no guarantee this option will speed up the individual's appeal process. If a BVA videoconference hearing is requested, or a hearing at a local VA office, the hearing will be held at the VA office (generally a VA Regional Office) nearest to where the appellant lives.

If a videoconference hearing is held, the BVA VLJ sits at the BVA office in Washington, DC, the appellant at the local VA office, and the hearing is conducted via a video link between the two offices.

If an in-person hearing is held at the local VA office, a BVA VLJ travels from Washington, DC to the local VA office to conduct the hearing. These hearings are called Travel Board hearings. Depending on the size of the local VA Regional Office and the number of appeals they have pending, the BVA will send out one or two VLJs for a week, and the Travel Board may be scheduled for hearings at the local VA office two to four times during a fiscal year.

Each VLJ can hear approximately 43 hearings during the course of the week. Given the number of requests for Travel Board hearings, and the limited times VLJs travel to local VA offices, it could be years before an appellant has their hearing scheduled.

An example of this is the Los Angeles VA Regional Office which had 1,127 pending requests for Travel Board hearings as of December 1, 2011. Given that two VLJs come out to Los Angeles about four times a year, and they can each hear 43 hearings during the week, that equates to only 344 hearings in Los Angeles each fiscal year. With 1,127 hearing requests pending, that means it could be well over three years before an appellant's request for a Travel Board hearing may be scheduled.



All BVA hearings are formal hearings. The hearing is tape recorded with a transcript of the hearing prepared for the permanent record and the appellant must be sworn in by raising their right hand and making an oath or affirmation that they swear the testimony they are about to give will be the truth and nothing but the truth. Like pre-decisional and post-decisional VA hearings, the hearings before the BVA VLJs are non-adversarial and, other than being tape recorded and the appellant sworn in, are very informal proceedings. The purpose of the hearing is for the appellant and their representative, if any, to present oral arguments to the Veterans Law Judge regarding the issue(s) on appeal. The judge will listen to the oral testimony given by the appellant, their representative and any witnesses, and ask questions to clarify the testimony given. The judge will not engage in any adversarial cross examination, but will need to sufficiently question the appellant to elicit all relevant testimony.

If an appellant fails to report for a scheduled hearing, the BVA will consider the hearing request withdrawn, and no further request for a hearing for the same appeal will be granted unless failure of the appellant to appear arose under circumstances that did not allow for the submittal of a timely request to reschedule the hearing. If the appellant fails to report for the hearing but still wishes to have a hearing, he or she must file a motion with the BVA for a new hearing. The motion must be in writing, explain why he or she did not report, and explain why he or she could not

submit a timely request to reschedule. The motion must be submitted within 15 days of the missed hearing and mailed directly to the Travel Board Secretary at the Board of Veterans' Appeals in Washington, DC.

### **WHEN TO REQUEST A BVA HEARING**

As stated above, the appeal backlog nationwide is such that a request for a Board of Veterans' Appeals hearing typically takes a very long time before it can be scheduled. For this reason, when a hearing is requested, the appellant is reminded that his or her request could take a significantly long period of time to accommodate, and he or she is given the option of withdrawing the request so the appeal can be forwarded to the Board as soon as possible.

When a VSO is presented with a case where the claimant wants a personal hearing, the VSO should evaluate the advantages and disadvantages of such a request and counsel the claimant as to the best course of action. Often the record is full of statements by the claimant as to why the benefit sought should be granted, and waiting years to say the same thing already said in writing is redundant and unnecessary.

The VSO also needs to determine if traveling to the local VA office, which could be over a hundred miles away, is the best course of action for an appellant who is elderly or in poor health. Ultimately, however, some appellants want to have "their day in court" and are willing to wait as long as necessary to be able to personally present their arguments to the judge.

## COURT OF APPEALS FOR VETERANS' CLAIMS (CAVC)



An appellant has only *120 days* from the date of the notification of an unfavorable BVA decision to file an appeal with the Court of Appeals for Veterans' Claims (CAVC). The Notice of Appeal must be sent directly to the court, not to the BVA or to any other VA office. The time limit for filing *may not* be extended or waived. There is also a filing fee, which may be waived by the court. Only the appellant or representative may appeal a BVA decision to the court; the AOJ may not appeal.

The court may *only* consider the facts of the case (evidence and arguments that the BVA reviewed in its decision) as they relate to law. No new evidence may be submitted and no new arguments or issues may be raised. The CAVC may uphold the BVA decision, vacate the BVA decision because of error of fact or law with a remand for correction of the error and another decision made by the BVA, or outright overrule the BVA decision with a grant on appeal. Either the appellant or the VA may appeal the CAVC decision to the U.S. Court of Appeals for the Federal Circuit, and if still unsuccessful, to the U.S. Supreme Court.

### When to Appeal

A veteran may appeal several aspects of an adjudicative decision. For example, in a rating decision for service-connected disability benefits, the veteran could appeal VA's decision regarding:

- 1 Whether the claimed condition is service-connected,
- 2 the degree of disability rating, and
- 3 the effective date of the service-connection.

All three of the above aspects are important, because they all influence the amount of compensation a veteran receives.

Because of the severe backlog of VA appeals, which is causing them to take years to be decided, a VSR should use his or her knowledge to help claimants determine the best course of action to take. The VSR should review the decision to determine what was denied, what disability ratings are lower than what the VSR believes they should be, and/or what effective dates are later than what the VSR believes they should be.

If the VA did not accurately apply the facts of the claim to the law, and/or somehow got the law wrong, the claim should be appealed; the VSR should file a NOD and point out to the VA the errors it made, and how to correct them.

If the claim was denied because of a lack of sufficient evidence, the VSR should determine whether there is a potential opportunity to obtain new evidence to overcome the denial. If the denial is valid, the VSR should try to help the claimant understand the decision so as not to file a frivolous appeal that would have no hope of being successful. As long as any "new and material evidence" is submitted within *one year* of the denial, any award that is ultimately granted because of this new evidence will generally be from the date of the claim that resulted in the initial decision. This new evidence should be submitted as a "reopened claim" and should nowhere infer there is a "disagreement" with the initial decision. This way, the veteran keeps the original effective date, and only has to wait roughly 1 to 1 ½ years for a new decision, rather than the 2-5 years of an appeal.

If the new and material evidence needed to change the initial decision is not available, or if the one-year time limit for appealing a decision is close, the VSR should go ahead and file the NOD to protect the appeal if it has merit. Sometimes all of the evidence needed is already of record, and there is just a difference of opinion between the VA decision maker and the claimant as to how the evidence relates to the interpretation of the VA regulations. These cases should be referred to the claimant's designated service organization (POA) for review and professional development of arguments on appeal.



## STUDY QUESTIONS

Using the assigned references and reading materials, answer the following questions:

1. To initiate an appeal of a VA decision (not a contested claim), how long from the date of notice of the decision does a claimant have to file a Notice of Disagreement (N.O.D.)?
  - a. 60 days
  - b. Six months
  - c. One year
  - d. There is no time limit

38 C.F.R. § 20.302(a)

2. Where should a NOD. with a denial of fee basis authorization be sent?
  - a. To the Regional Office having the veteran's claims file.
  - b. To the VA Medical Center having jurisdiction of the veteran's area of residence.
  - c. To the Board of Veterans' Appeals.
  - d. Any of the above.

38 C.F.R. § 20.300

3. Any adjudicative decision as to eligibility for a VA benefit by any element of the Department of Veterans Affairs may be appealed. (T/F) 38 C.F.R. § 20.101
4. What constitutes an appeal?
  - a. A NOD, a Statement of the Case, and a substantive appeal.
  - b. A written NOD, a Statement of the Case, and a substantive appeal.
  - c. A timely filed NOD, a Statement of the Case, and a written substantive appeal.
  - d. A timely filed written NOD, a Statement of the Case, and a timely filed written substantive appeal.

38 C.F.R. § 20.200

5. A personal hearing is required in every appeal.(T/F)

38 C.F.R. § 20.700-20.717

6. After an initial decision has been made on a claim, submission of additional evidence extends the appeal period on the claim. (T/F)

38 C.F.R. § 20.304

7. An appeal which does not allege specific errors of fact or law may be dismissed by BVA. (T/F)

38 C.F.R. § 20.202

8. An appeal from a BVA decision must be filed with the U.S. Court of Appeals for Veterans Claims (CAVC) within:

- a. 60 days after the date of the BVA decision.
- b. 120 days after the date of the BVA decision.
- c. Six months after the date of the BVA decision.
- d. One year after the date of the BVA decision.

38 U.S.C. § 7266(a)(1)

9. When a BVA decision is appealed to the CAVC, the claimant will be given the opportunity to submit any additional evidence desired and to raise any new issues that may have arisen since the BVA made its decision. (T/F)

38 U.S.C. § 7261

10. Where should an appeal to CAVC be sent?

- a. To the Regional Office having the veteran's claims file.
- b. To the Board of Veterans' Appeals.
- c. To the Court of Appeals for Veterans Claims.
- d. To the Federal Court for the veteran's state.

38 U.S.C. § 7266(a)(2)

11. Since VA proceedings are non-adversarial in nature, a claimant may not be represented by an attorney unless and until an appeal is made to CAVC? (T/F)

38 C.F.R. § 3.12(a)