

# Appealing to the Board

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# Learning Objectives

Learn the basics reading AMA rating decisions and deciding when to appeal to the Board:

- Review an overview of the **review** and **appeal** lanes under AMA.
- Learn when to appeal to the Board.
- Learn AMA requirements for a VA rating decision.
- Learn how to read VA rating decisions to help Veterans **choose the best review or appeal lane.**

# Polling Question

How many years, on average, did it take for the Board to issue a decision in the legacy system?

- A. Less than one year.**
- B. More than one year, less than five years.**
- C. More than five years, less than ten years.**
- D. Over ten years.**

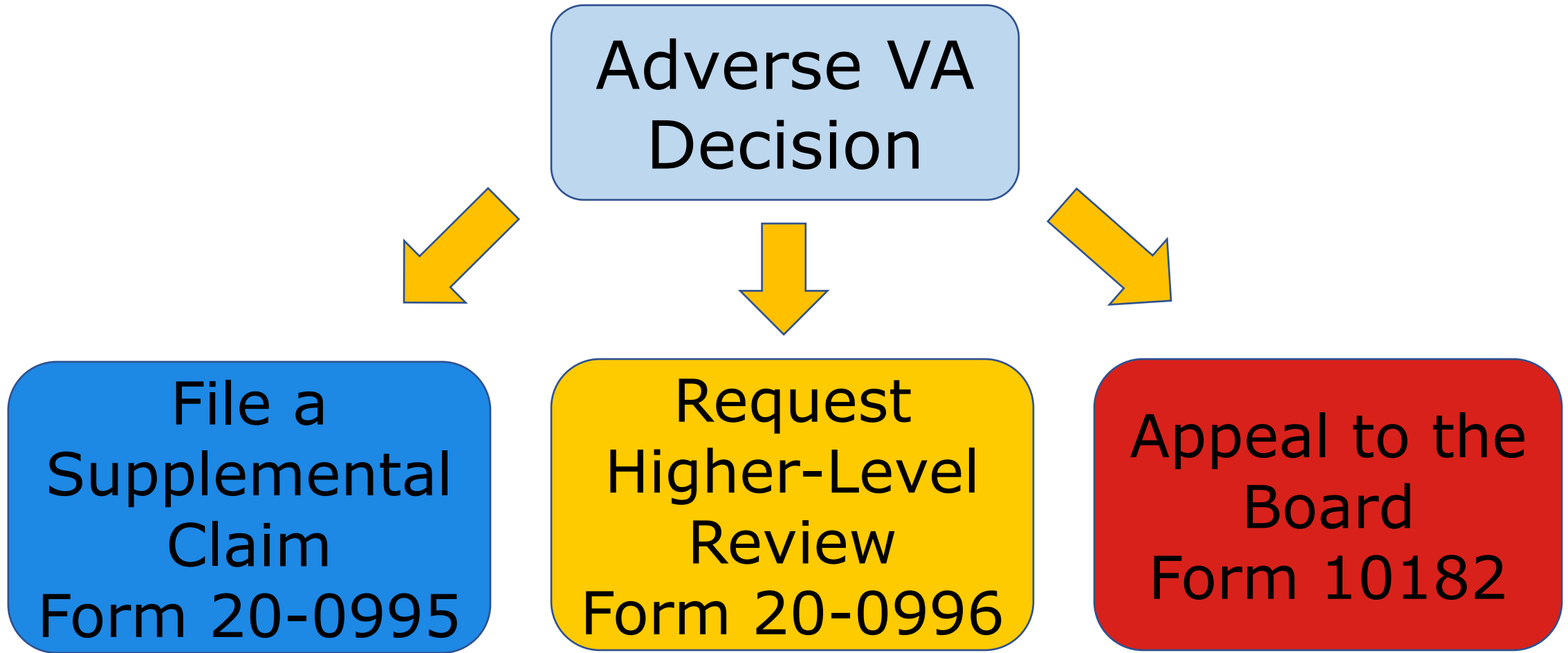


# Answer

## Seven Years

- On average, VA's Board of Veterans' Appeals (Board) took seven years to issue a decision to a Veteran in the legacy system.
- VA often took even longer, 7 to 10 years, to issue a decision if the Veteran sought a hearing with a Veterans Law Judge at the Board.

# Appeals Modernization Act (AMA)



# Advantages of Appealing to the Board

- Advantages of appealing to the Board in Washington, DC:
  - Review by a Veterans Law Judge, or “VLJ,” a trained VA attorney.
  - Board usually open to more complicated arguments than a local VA Regional Office.
  - Board may be more willing to grant based on lay evidence.



# Limitations of Appealing to the Board



- Limitations of appealing to the Board:
  - **No VA “Duty to Assist”:** VA will **not** help Veterans get evidence or exams while waiting for a Board decision.
  - **Time:** All three appeal dockets at the Board are **significantly slower** than the two VA Regional Office review lanes.

# Polling Question

Approximately how many Veterans Law Judges work at the Board of Veterans' Appeals?

**A. 100**

**B. 130**

**C. 215**

**D. More than 300**





# Answer

## **Approximately 130 VLJs**

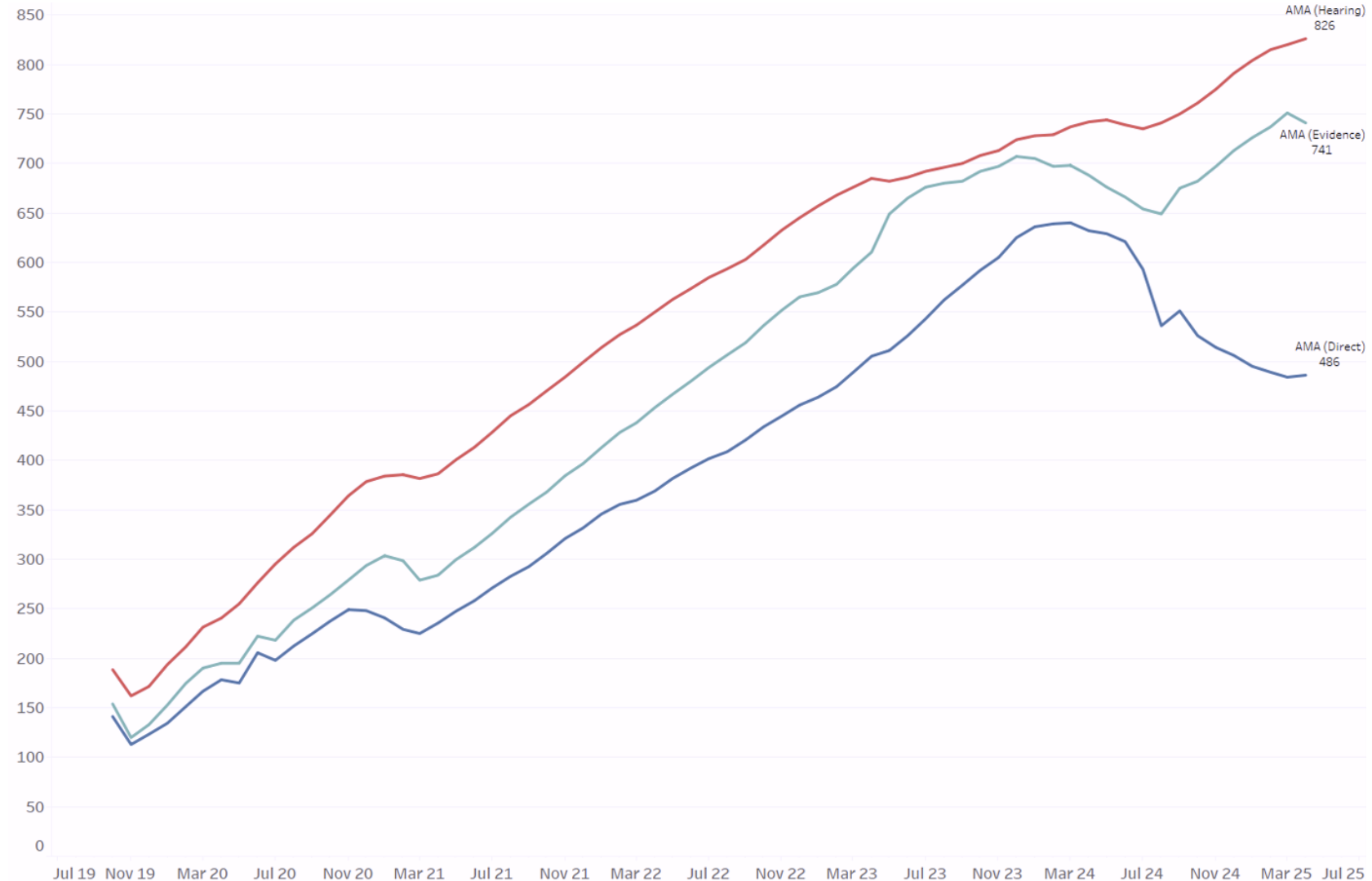
There are approximately 130 Veterans Law Judges to hold hearings and decide appeals.

As of May 2025, the Board had over 170,000 pending AMA appeals.

This is part of the reason that appealing to the Board takes longer than the RO review lanes.

# Board Wait Times are Increasing

- The amount of time that Veterans have to wait for an AMA decision from the Board has increased since AMA was implemented.
- As of FY2024, this wait time is finally starting to decrease, but only on the Direct Docket.
- Veterans still have to wait much longer for a decision from the Board.



# AMA Wait Times at the Board



As of May 2025 the Board is reporting the following wait times:

- Direct - 484 days
- Evidence - 706 days
- Hearing - 837 days

**This report include cases that are advanced on the docket. Veterans should be prepared to wait even longer.**

# Changing from Board to HLR / Supp. Claim

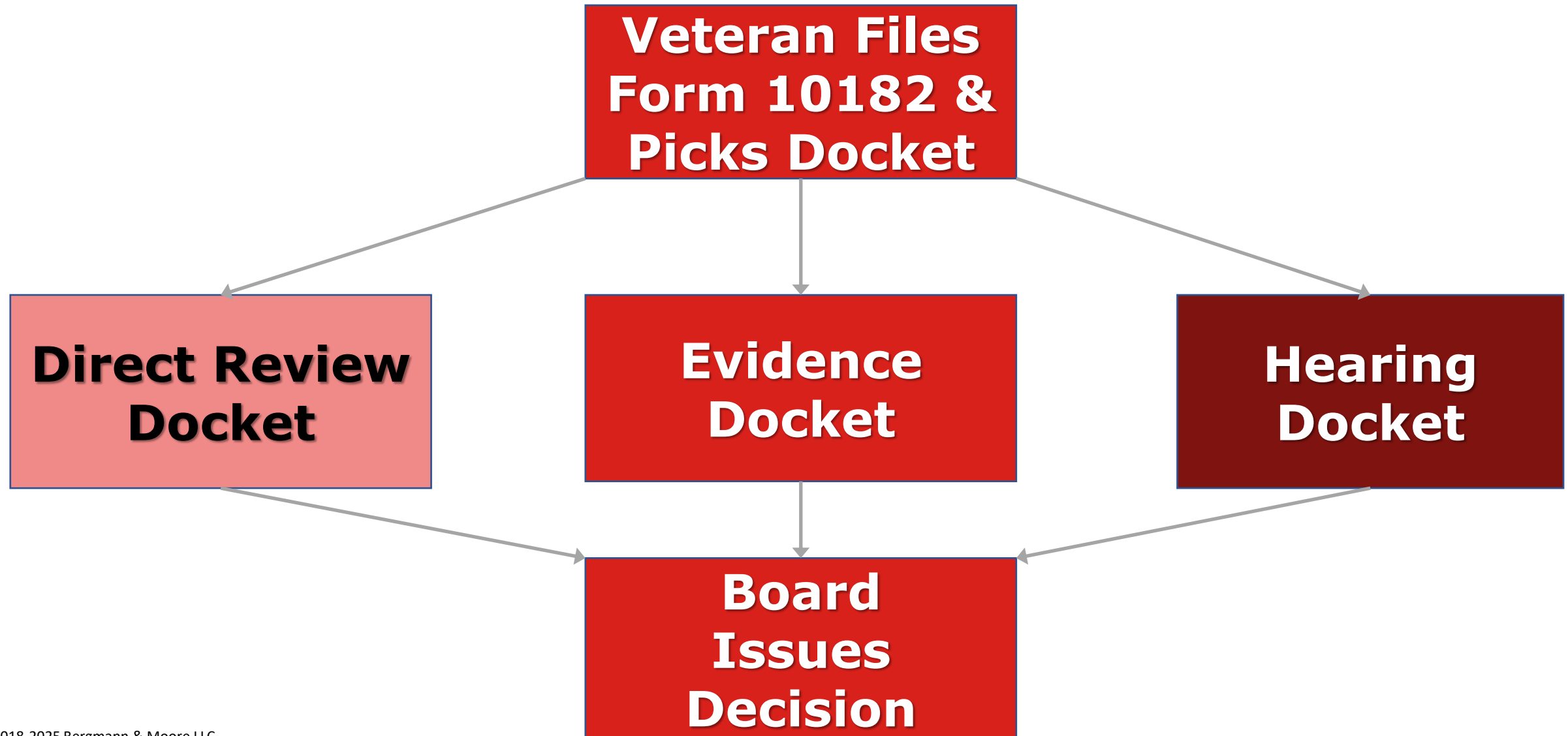
1. Withdraw Board appeal by sending VA Form 21-4138 to Board.
2. Then file desired HLR (VA Form 20-0996), or Supplemental Claim (VA Form 20-0995) with RO.



**If the Veteran withdraws a Board appeal more than one year after the prior VA decision, then the Veteran will lose their effective date protection.**



# Overview of Board Appeal Options



# Direct Review Docket

## VA Form 10182 – Box 10A

- Veteran may only submit argument(s) describing why VA made a mistake.
- Veteran may ***not*** submit evidence.
- VA has **NO** Duty to Assist to find evidence.
- VA's goal is to decide in one year, but in practice takes much longer.

VA		U.S. Department of Veterans Affairs		DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)	
PART I - PERSONAL INFORMATION					
1. VETERAN'S NAME (First, middle initial, last)		2. VETERAN'S FILE NUMBER		3. VETERAN'S DATE OF BIRTH (MM/DD/YYYY)	
4. IF I AM NOT THE VETERAN, MY NAME IS (First, middle initial, last)				5. MY DATE OF BIRTH (If I am not the Veteran) (MM/DD/YYYY)	
6. MY PREFERRED MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)					
<input type="checkbox"/> I AM EXPERIENCING HOMELESSNESS					
7. MY PREFERRED TELEPHONE NUMBER (Include Area Code) (999-999-9999)		8. MY PREFERRED E-MAIL ADDRESS		9. MY REPRESENTATIVE'S NAME	
PART II - BOARD REVIEW OPTION (Check only one)					
10. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. (For additional explanation of your options, please see the attached information and instructions.)					
<input checked="" type="checkbox"/> 10A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. (Choosing this option often results in the Board issuing its decision most quickly.)					
<input type="checkbox"/> 10B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will submit to the Board with my VA Form 10182 or within the 90 days of the Board's receipt of my VA Form 10182. (Choosing this option will extend the time it takes for the Board to decide your appeal.)					
<input type="checkbox"/> 10C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. I want the hearing type below: (Choosing this option will extend the time it takes for the Board to decide your appeal.)					
<input type="checkbox"/> Central Office Hearing (I will attend in person in Washington, DC)					
<input type="checkbox"/> Videoconference Hearing (I will go to a Regional Office)					
<input type="checkbox"/> Virtual Telehearing (I will attend using an internet-connected device) (Important: Provide your e-mail address and Representative in Part I)					

# When to choose Direct Review Docket?

**Yes:** When the Veteran has already submitted all evidence relevant to the claim.

**Yes:** When the Veteran wants to make a complicated legal argument to a Veterans Law Judge.

**Yes:** When the Veteran wants the fastest review available by the Board.

**No:** If the Veteran wants to submit new evidence.

**No:** If the Veteran needs VA's help to get new evidence or an exam.

# Evidence Docket

## VA Form 10182 – Box 10B

- Veteran can add new evidence with the VA Form 10182 **or** within 90 days of filing the Form.
- VA has **NO** Duty to Assist.
- VA's goal is to decide in 1.5 years, but in practice takes much longer.

VA U.S. Department of Veterans Affairs			DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)		
PART I - PERSONAL INFORMATION					
1. VETERAN'S NAME (First, middle initial, last)		2. VETERAN'S FILE NUMBER		3. VETERAN'S DATE OF BIRTH (MM/DD/YYYY)	
4. IF I AM NOT THE VETERAN, MY NAME IS (First, middle initial, last)				5. MY DATE OF BIRTH (If I am not the Veteran) (MM/DD/YYYY)	
6. MY PREFERRED MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)					
<input type="checkbox"/> I AM EXPERIENCING HOMELESSNESS					
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# Evidence and the IR Period on Appeal

- Under AMA, the record closes after the VBA decision. The Board has interpreted this to mean the period on appeal also closes.
- This means the Board is usually adjudicating increased rating claims **ONLY** through the date of the most recent VBA decision.
- The Veteran's new evidence should focus on the period **PRIOR** to the VBA decision.



# When to Choose Evidence Docket?

**Yes:** When the Veteran has new evidence to submit in support of the claim.

**Yes:** When the Veteran wants to make a complicated legal argument to a Veterans Law Judge.

**No:** If the Veteran needs VA's help to obtain new evidence.

**No:** If the Veteran's service-connected disability has gotten worse since the last VBA rating decision.

**No:** If the Veteran wants a fast resolution.

# Hearing Docket

## VA Form 10182 – Box 10C

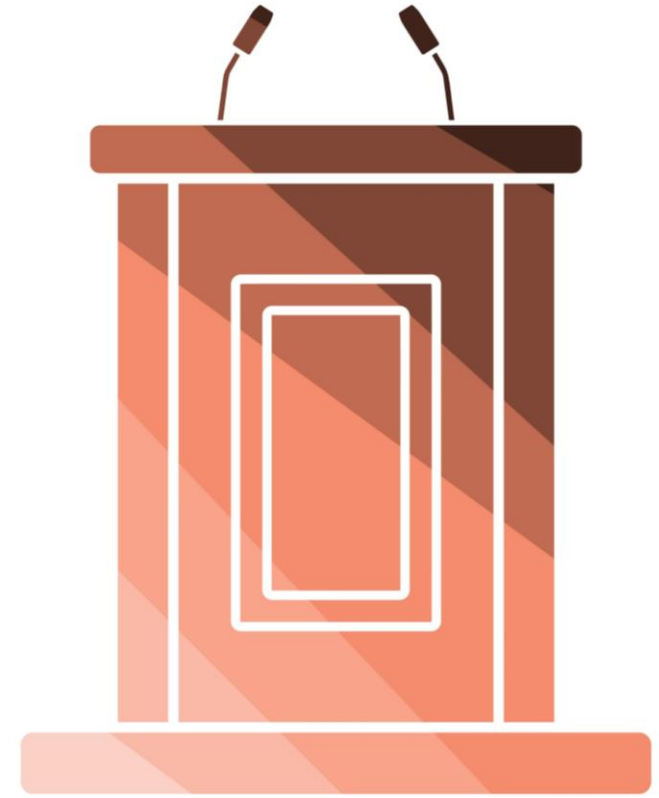
- VA schedules a hearing before a Veterans Law Judge (VLJ) who works for VA.
- Veterans can submit new evidence at the hearing **or** within 90 days of the hearing.
- VA has **NO** Duty to Assist.
- VA's goal is to decide in 2 years, but in practice takes much longer.

VA U.S. Department of Veterans Affairs			DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)		
PART I - PERSONAL INFORMATION					
1. VETERAN'S NAME (First, middle initial, last)		2. VETERAN'S FILE NUMBER		3. VETERAN'S DATE OF BIRTH (MM/DD/YYYY)	
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PART II - BOARD REVIEW OPTION (Check only one)					
10. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. (For additional explanation of your options, please see the attached information and instructions.)					
<input type="checkbox"/> 10A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. (Choosing this option often results in the Board issuing its decision most quickly.)					
<input type="checkbox"/> 10B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will submit to the Board with my VA Form 10182 or within the 90 days of the Board's receipt of my VA Form 10182. (Choosing this option will extend the time it takes for the Board to decide your appeal.)					
<input checked="" type="checkbox"/> 10C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. I want the hearing type below: (Choosing this option will extend the time it takes for the Board to decide your appeal.)					
<input type="checkbox"/> Central Office Hearing (I will attend in person in Washington, DC)					
<input type="checkbox"/> Videoconference Hearing (I will go to a Regional Office for a hearing)					
<input type="checkbox"/> Virtual Telehearing (I will attend using an Internet-based system)					

**Plus choose type of hearing!**

# Board Hearing Wait Time

- **Choosing the Board hearing docket significantly increases the time a Veteran waits for a Board decision.**
- The Board held almost 20,000 hearings in FY 2024. But nearly 70,000 Veterans are waiting for a hearing.
- Veterans will likely have to wait several years for a hearing before a Veterans Law Judge.



# Board Hearing Scheduling

- Veterans may request the type of hearing on their VA Form 10182:

☐ 10C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. I want the hearing type below: *(Choosing this option will extend the time it takes for the Board to decide your appeal.)*

☐ Central Office Hearing *(I will attend in person in Washington, DC)*

☐ Videoconference Hearing *(I will go to a Regional Office)*

☐ Virtual Telehearing *(I will attend using an internet-connected device) (Important: Provide your e-mail address and Representative in Part I)*

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- Virtual Telehearing is generally the fastest.
- Travel Board hearings are not available in AMA.



# Board Dockets and Evidence Windows

## Direct Review

Veteran **cannot** submit new evidence.

## Evidence

Veteran **can** submit evidence within 90 days of Board appeal.

Veteran **cannot** submit additional evidence before *or* after this period.

## Hearing

Veteran **cannot** submit evidence before hearing.

Veteran **can** submit evidence at hearing and within 90 days afterwards.

Veteran **cannot** submit evidence afterwards.



# Board Hearing Evidence Window

- Veterans selecting the hearing docket at the Board will likely wait **years** for a hearing.
- The Board will not consider any evidence submitted during these years.



**Advocacy tip:** After the Board hearing, resubmit ALL relevant evidence in the record since the Veteran filed VA Form 10182.

# Advanced on Docket (AOD)

- On all three Board dockets, a Veteran may ask for quicker review, or to be Advanced on the Docket (AOD).
- Veterans request an AOD for the following reasons:
  - Age: 75 or older - this is usually automatic.
  - Severe financial hardship.
  - Serious/Terminal illness.
  - Affected by a natural disaster.

**Advocacy tip:** Use VA Form 21-4138 to request AOD. State the qualifying reason and attach any documents in support of request.



# VA Form 10182

## PART II - BOARD REVIEW OPTION *(Check only one)*

10. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select.

*(For additional explanation of your options, please see the attached information and instructions.)*

- ☐ 10A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. *(Choosing this option often results in the Board issuing its decision most quickly.)*
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  - ☐ Virtual Telehearing *(I will attend using an internet-connected device) (Important: Provide your e-mail address and Representative in Part I)*

**Check preferred  
docket in box 10.**

**Check ONLY ONE docket per form.**

**If Veteran wants to split issues to  
different dockets, use a separate  
form for each docket.**

# VA Form 10182 Parts III and IV

**Box 11: List each issue appealing to the Board and date of VBA decision.**

**Check this box if attaching additional pages.**



PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD	
11. Please list each issue decided by VA that you would like to appeal. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision and the area of disagreement ( <i>e.g., service connection, disability evaluation, or effective date of award</i> ). <input type="checkbox"/> Check here if you are including a request for an extension of time to file the VA Form 10182 due to good cause and then attach additional sheets explaining why you believe there is good cause for the extension. <input type="checkbox"/> Check here if you are appealing a denial of benefits by the Veterans Health Administration (VHA).	
A. Specific Issue(s)	B. Date of Decision
C. Additional Issue(s) <input type="checkbox"/> Check here if you attached additional sheets. Include the Veteran's last name and the file number.	

**Advocacy Tip:** Use VA Form 21-4138, Statement in Support of Claim, for additional conditions and argument.

# Changing Board Dockets

If **within one year** of the decision under appeal, then the Veteran:

- **Can** “modify” NOD by submitting a new VA Form 10182 and selecting a different docket in Part II, Question 11.
- **Cannot** modify NOD if the Veteran has already submitted evidence or testimony.

**PART II - BOARD REVIEW OPTION** *(Check only one)*

10. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select.  
*(For additional explanation of your options, please see the attached information and instructions.)*

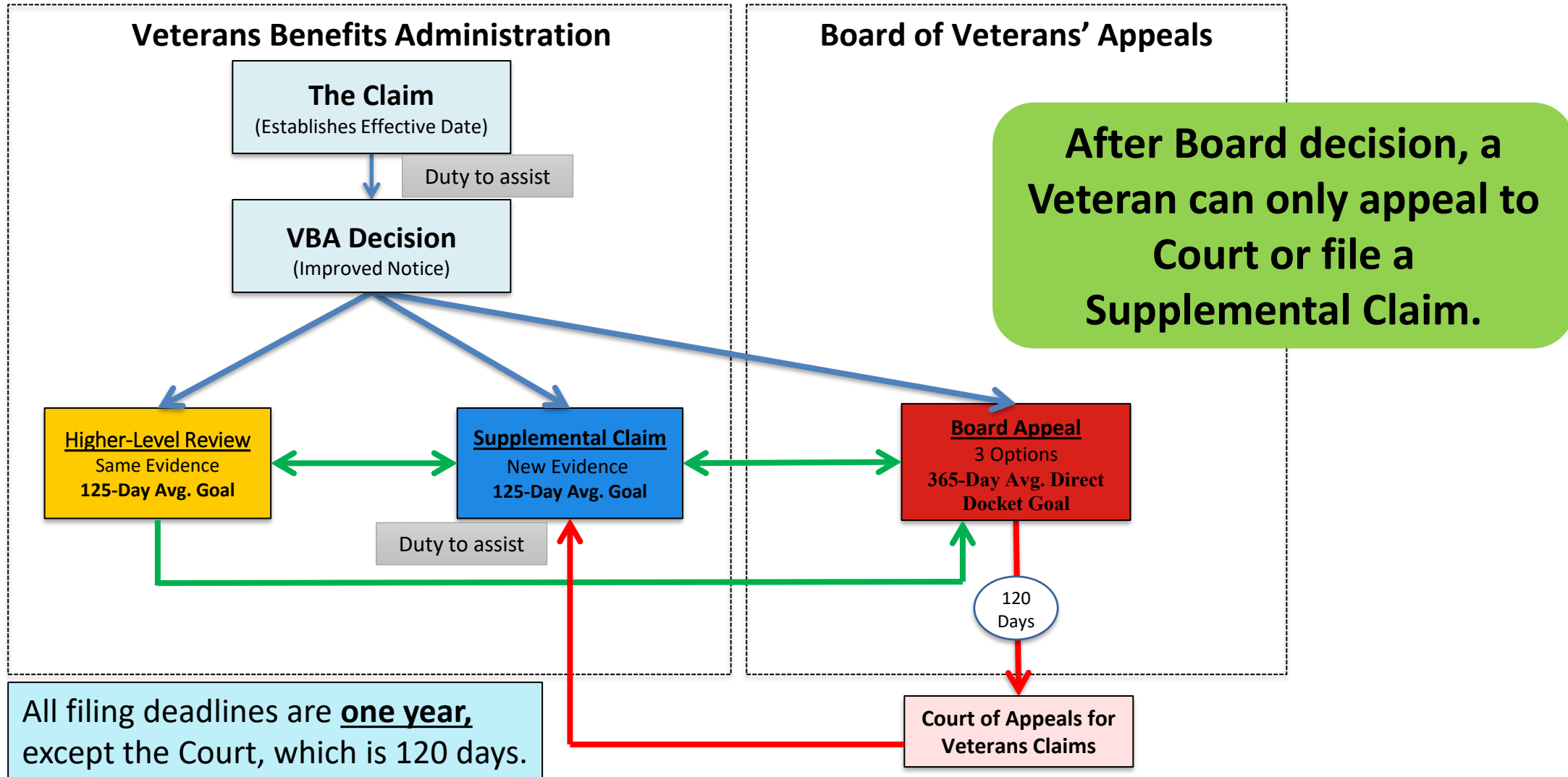
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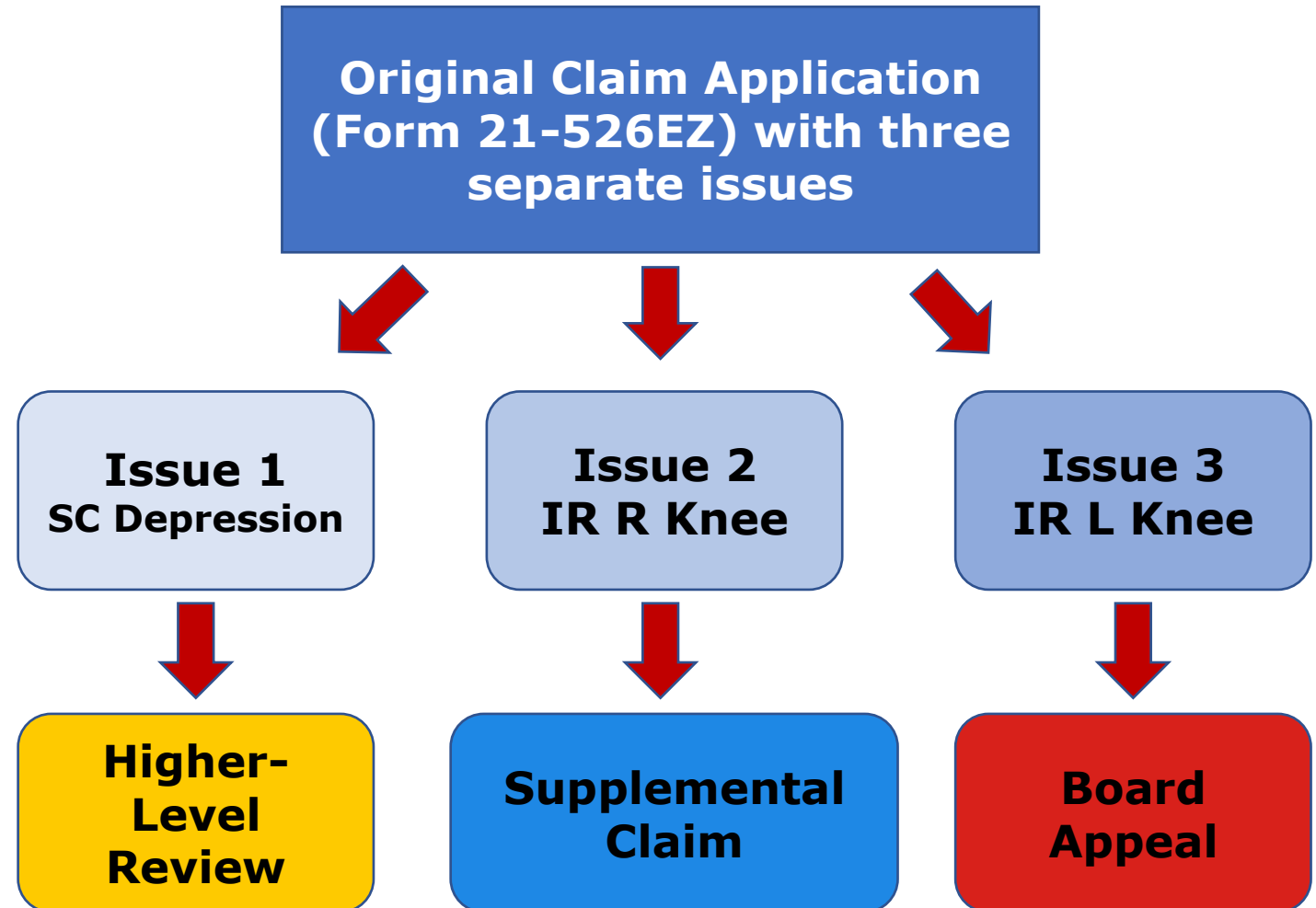
**If more than one year has passed since the prior VA decision, then this option is not available to the Veteran.**

# AMA Basic Structure



# Separate Issues and Separate Lanes

**Veterans have options under AMA. For example, different issues from the same claim can be split into separate review / appeal lanes depending on what is needed to win each issue.**






# **Reading AMA Decisions**

# Improved Notice

- One key feature of AMA is an improved notice of VA rating decisions.
- Intended to provide all the information Veterans and VSOs need to make an informed choice about the type of review or appeal they may seek.
- AMA requires VA to include 7 items in all rating decisions.



DEPARTMENT OF VETERANS AFFAIRS  
Veterans Benefits Administration  
Regional Office

VA File Number  
[REDACTED]

Represented By:  
[REDACTED]

Rating Decision  
05/29/2019

**INTRODUCTION**

The records reflect that you are a Veteran of the Korean Conflict Era. You served in the Army from [REDACTED] 1950 to [REDACTED] 1952. You filed an original disability claim that was received on December 21, 2018. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

**DECISION**

1. Service connection for bilateral hearing loss is granted with an evaluation of 60 percent effective December 21, 2018.
2. Service connection for tinnitus is denied.

**EVIDENCE**

- VA Form 21-526EZ Application for Disability Compensation and Related Compensation Benefits, received December 21, 2018

# AMA Notice Requirements

7 notice items required by AMA statute:

- (1) Identification of the **issues adjudicated**.
- (2) A summary of the **evidence considered** by the Secretary.
- (3) A summary of the **applicable laws** and regulations.
- (4) Identification of **findings favorable** to the claimant.




# AMA Notice Requirements Cont.

7 notice items required by AMA statute (cont.):

- (5) In the case of a denial, identification of **elements not satisfied** leading to VA's denial.
- (6) An explanation of how to obtain or access evidence used in making the decision.
- (7) If applicable, identification of the **criteria** that must be satisfied to grant service connection **or** the **next higher level of compensation**.

# Issues Adjudicated

- Here is a rating decision under AMA.
- Looks like a legacy rating decision:
  - Except no RO city or state location listed.
- (1) **Issues adjudicated** by VA are listed under the subsection "DECISION."
  - Statement of each issue granted or denied.



DEPARTMENT OF VETERANS AFFAIRS  
Veterans Benefits Administration  
Regional Office

██████████  
VA File Number  
██████████

Represented By:  
██████████

Rating Decision  
05/29/2019

INTRODUCTION

The records reflect that you are a Veteran of the Korean Conflict Era. You served in the Army from ██████████ 1950 to ██████████ 1952. You filed an original disability claim that was received on December 21, 2018. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

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EVIDENCE

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# Evidence Considered

- (2) **Evidence considered** is listed under section “EVIDENCE.”
- This section contains bullet points with high-level descriptions and dates.

## EVIDENCE

- Rating Decision dated October 17, 2018
- VA Form 21-526EZ Application for Disability Compensation and Related Compensation Benefits received, November 28, 2018
- Private Treatment Records (Audiological Report), [REDACTED], dated January 14, 2019, received January 28, 2019
- VA Form 21-526EZ Application for Disability Compensation and Related Compensation Benefits received, January 28, 2019
- Disability Benefits Questionnaire, Posttraumatic Stress Disorder (Initial), QTC, dated February 14, 2019
- Disability Benefits Questionnaire, Hearing Loss and Tinnitus, QTC, dated March 7, 2019
- VAMC (Veterans Affairs Medical Center) treatment records, [REDACTED] VAMC dated May 2014 through February 2019, electronically reviewed March 14, 2019
- Disability Benefit Questionnaire, hearing loss and tinnitus, dated September 20, 2018

# Summary of Applicable Laws

- (3) Summary of **applicable laws and regulations**.
- No specific section or heading.
- Applicable laws described within the “Reasons for Decision” narrative.
  - Citations to laws and regulations are often in parenthesis.

The effective date of this grant is December 21, 2018. Service connection has been established from the day VA received your claim. When a claim of service connection is received more than one year after discharge from active duty, the effective date is the date VA received the claim.  
(38 CFR 3.400)

# Favorable Findings

- (4) Identification of **findings favorable** to claimant.
- No specific section or heading.
- Instead, VA provides a narrative under “Reasons for Decision.”
  - Sometimes set aside with a label, but not bolded or underlined.
  - Usually near the end.

**Favorable Findings** identified in this decision:

The evidence shows that a qualifying event, injury, or disease had its onset during your service. Military noise exposure is conceded as your DD-214, Certificate of Release or Discharge from Active Duty, indicates an MOS of Motor Vehicle Mechanic.

# Elements Not Satisfied

- (5) Identification of **elements not satisfied**.
  - Only required in the case of a denial.
- No separate section or heading.
- Instead, these are discussed in the narrative.
- Not usually set aside with any heading.

Lacking evidence of a diagnosis of tinnitus, we did not find a link between a medical condition and an event during military service.



# Favorable Findings and Elements Not Satisfied



- Carefully read the narrative “Reasons for Decision” to spot all **favorable findings** and **elements not satisfied**.
  - VA is not making these obvious.
- This is key information to determine which review / appeal options a Veteran should choose.

# Getting a copy of the evidence

- (6) An explanation of **how to obtain or access evidence** used in making the decision.
- Not included in the rating decision itself.
  - In the last paragraph of the notice letter.
- Includes only vague, unclear instructions.
  - VA will treat such communications as a Privacy Act request.

If you would like to obtain or access evidence used in making this decision, please contact us by telephone, email, or letter as noted below letting us know what you would like to obtain. Some evidence may be obtained online by visiting [VA.gov](https://www.va.gov).

Thank you for your service,

**Regional Office Director**

**Advocacy tip:**  
VSOs can access VBMS  
and view evidence  
easier and faster.



# Identification of Missing Criteria

- **(7) Identification of the criteria that must be satisfied** to grant service connection or the next higher level of compensation.
- No separate section or heading.
- Instead, listed only in narrative "REASONS FOR DECISION"
- May list specific criteria or may be only general

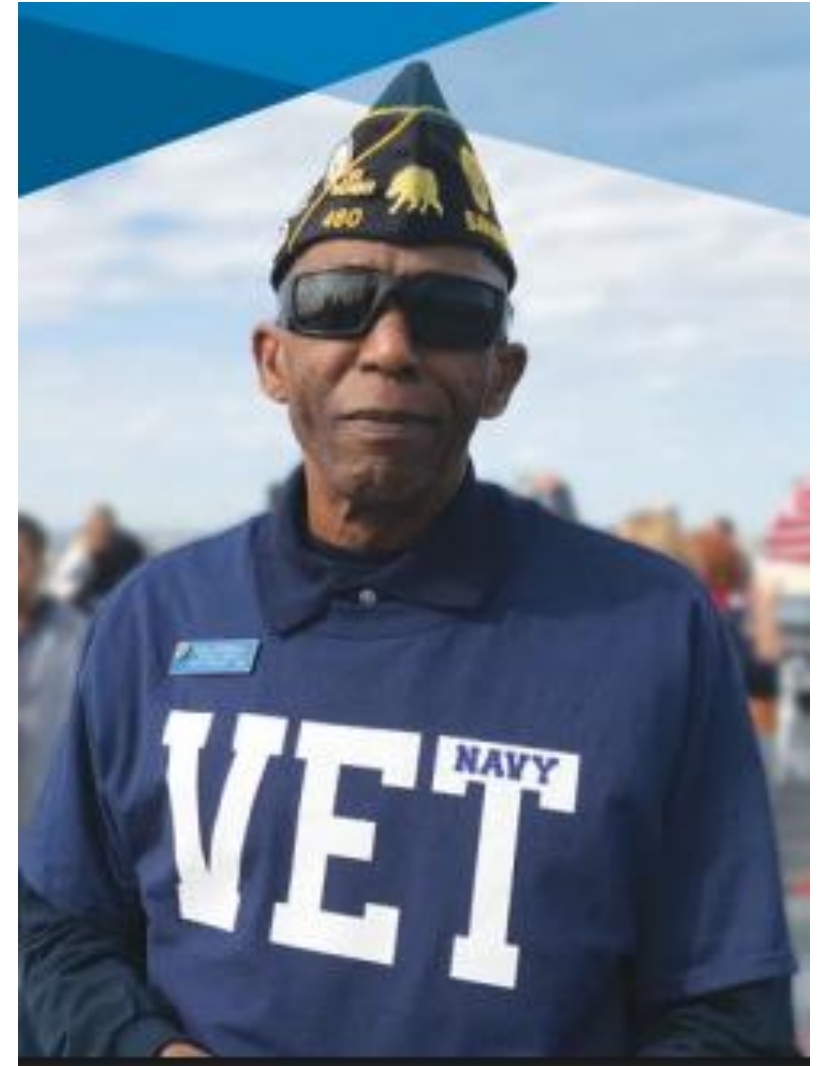
A higher evaluation of 50 percent is not warranted for posttraumatic stress disorder unless the evidence shows occupational and social impairment with reduced reliability and productivity due to such symptoms as:

- flattened affect
- circumstantial, circumlocutory, or stereotyped speech
- panic attacks more than once a week
- difficulty in understanding complex commands
- impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks)
- impaired judgment
- impaired abstract thinking
- disturbances of motivation and mood
- difficulty in establishing and maintaining effective work and social relationships. (38 CFR 4.130)

An evaluation of 0 percent is assigned because your right ear has a speech discrimination of 94 with an average decibel loss of 50 and your left ear has a speech discrimination of 98 with an average decibel loss of 45. The evaluation for hearing loss is based on objective testing. Higher evaluations are assigned for more severe hearing impairment. (38 CFR 4.85)

# Choosing AMA Options Summary

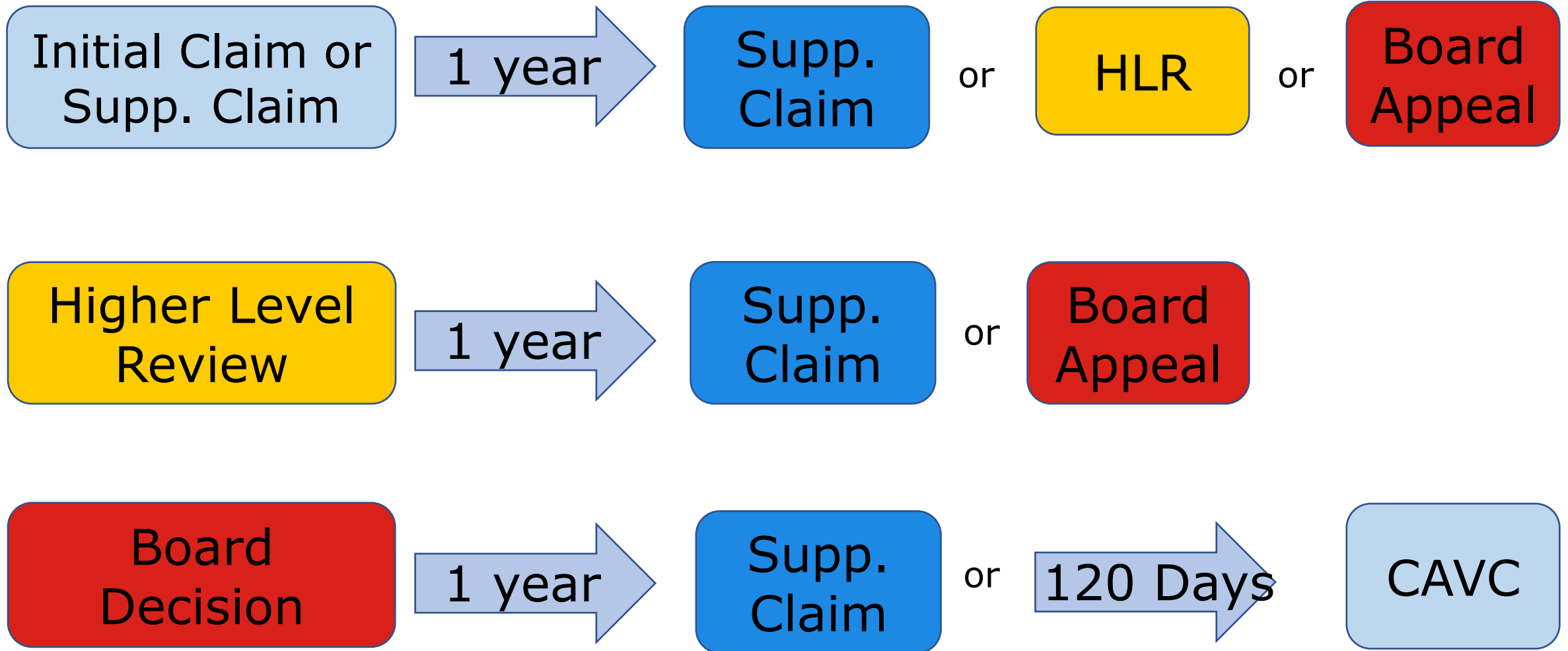
- Always start by asking, does the Veteran have additional evidence to submit?
  - **Yes**, choose Supplemental Claim
  - **No**, start with Higher Level Review
- Only go to the Board for a specific reason.
  - No success with Higher Level Review.
  - Complicated or new legal arguments.
  - Lay evidence.



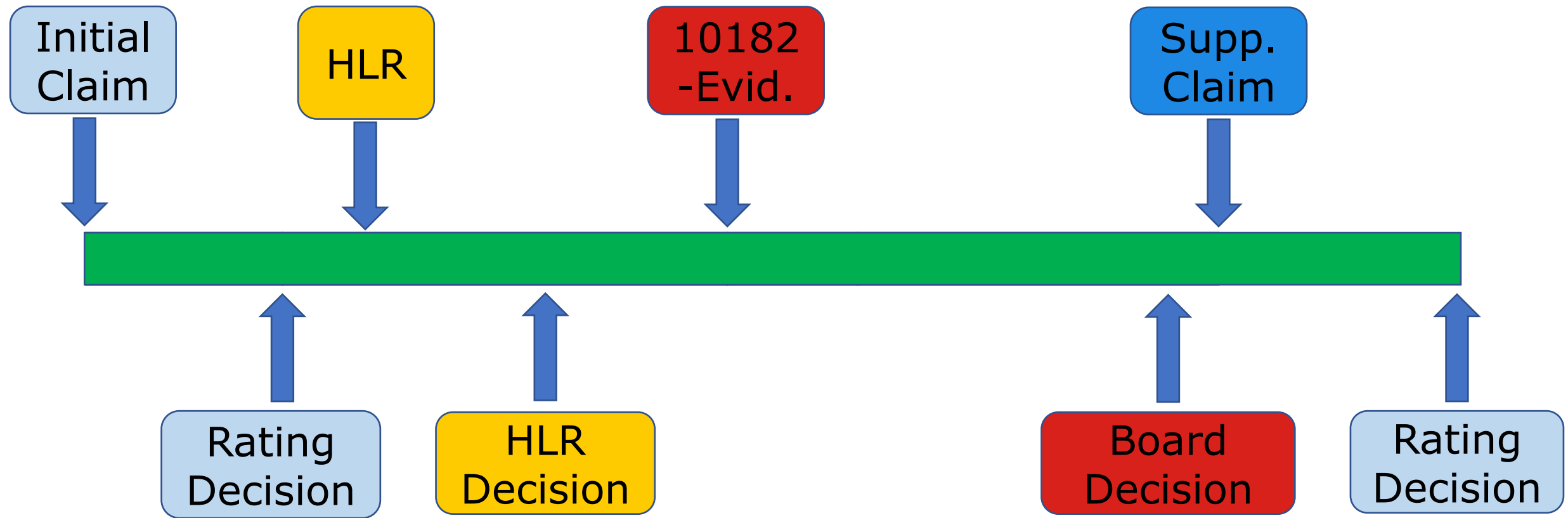
# Continuous Pursuit

- If the Veteran's review or appeal is denied, then they can choose another review / appeal option.
- If a Veteran files the correct form **within one year** of VA's most recent decision, **then the effective date of the claim will be preserved.** – This is called "**continuous pursuit.**"
  - For Example: If the Veteran filed a Higher-Level Review and VA denied the claim again, then the Veteran can file a 10182 to the Board.
- By continuing to pursue an issue, the period on appeal could become multiple years.

# Continuous Pursuit – Cont.



# Record During Continuous Pursuit



# Wrong Form Used

- AMA involves lots of different and new VA forms.
- If VA says the Veteran submitted the wrong form the **first** time, then submit the second form VA says is required as quickly as possible.
- Then, after the claim is granted, the Veteran should file an HLR and argue that the effective date should go back to the **first** form.
- A recent Court case, *Chisholm v. Collins*, suggests VA should accept either claims form to establish the effective date.



- This presentation is complete.
- A PDF version of these slides will be provided to you at the conclusion of the school for future reference.





# Hearings: Veteran Testimony and Advocate Arguments

<https://calvets.participoll.com/>



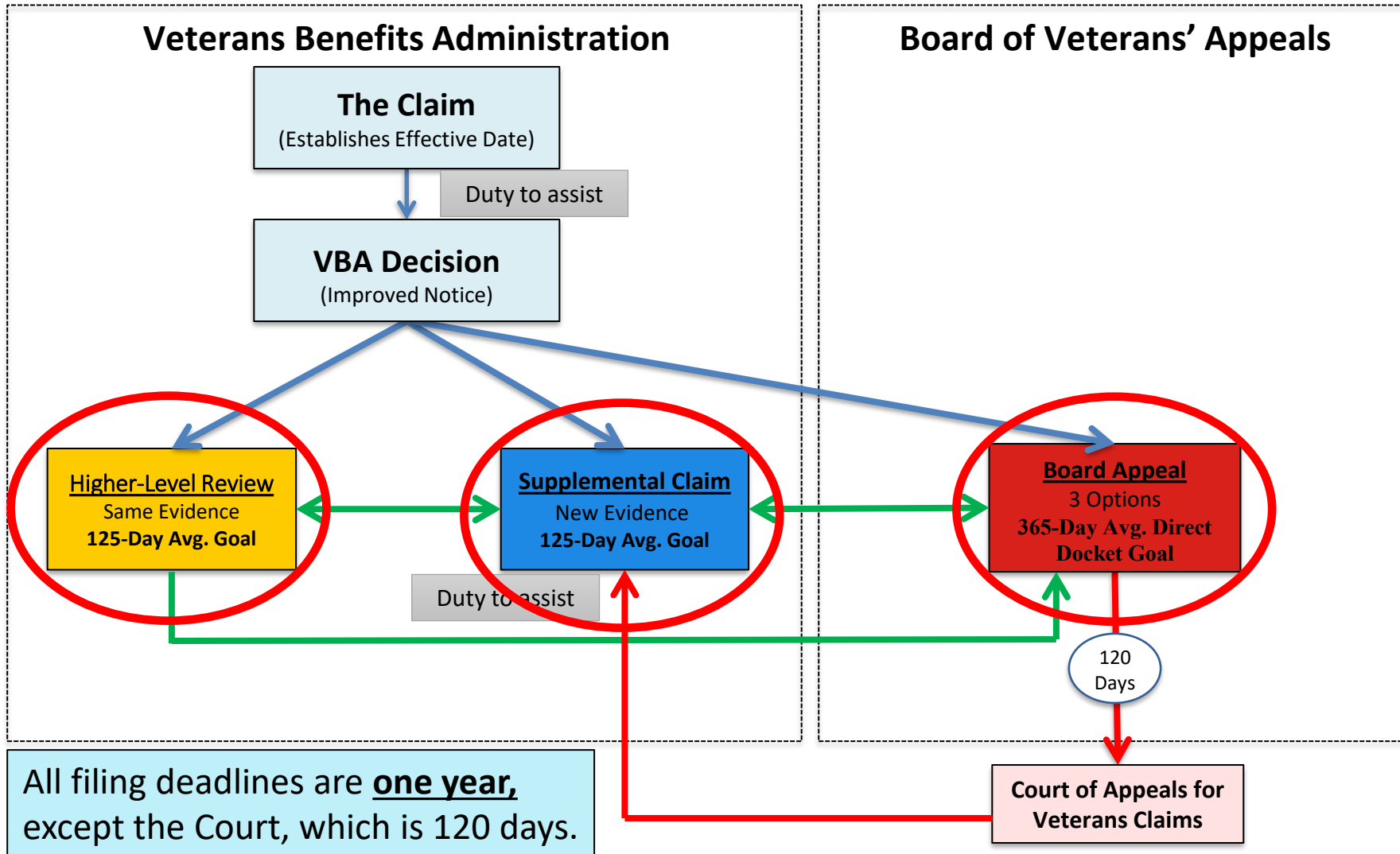
# Learning Objectives

Develop skills for effective presentations during hearings at a VA Regional Office (RO) and the Board of Veterans' Appeals (Board):

- Learn about a Veteran's right to a hearing before VA.
- Learn about the purpose of a VA hearing.
- Learn about how to prepare for a VA hearing.
- Learn strategies for effectively presenting a Veteran's case at a VA hearing.

# Three Different Types of Hearing

Three types  
of VA  
hearings are  
circled in  
red:




# HLR Informal Conference



- In Higher-Level Review, Veterans can request an informal conference.
- A phone call with **the Veteran, VSO representative, and VA**, yet can be the representative and VA alone.
- No new evidence can be submitted.
- No transcript.
- You can learn more about informal conferences at 38 C.F.R. § 3.2601(h) or M21-5, Chapter 5, Topic 3.

# Requesting HLR Informal Conference

- Use Box 16 on VA Form 20-0996 to request.
- VA will not recognize a later request for an informal conference.
- VA will contact the Veteran or VSO representative to schedule an informal conference approximately one week out.



SECTION IV - OPTIONAL INFORMAL CONFERENCE	
16. YOU OR YOUR AUTHORIZED REPRESENTATIVE MAY REQUEST AN INFORMAL CONFERENCE. (VA will only conduct one informal conference associated with this request for Higher-Level Review.)	
<input type="checkbox"/> 16A. I WOULD LIKE AN OPTIONAL INFORMAL CONFERENCE. I understand I will not be able to discuss or introduce new evidence that was not part of my file at the time of the decision at issue, and that VA may be able to make a decision faster if I do not request an informal conference. By requesting an informal conference, I understand VA may contact me or my representative in an available manner, such as mail, telephone, electronic notice, or by other means to schedule my conference.	
16B. IF YOU SELECTED THE BOX ABOVE, VA will make two attempts to contact you OR your representative to schedule the informal conference. INDICATE ONE PREFERENCE BY CHECKING THE APPROPRIATE BOX:	
<input type="checkbox"/> Contact the veteran/claimant. If contact will be by phone, contact in the morning hours based on time zone.	<input type="checkbox"/> Contact the veteran/claimant. If contact will be by phone, contact in the afternoon hours based on time zone.
<input type="checkbox"/> Contact the representative. If contact will be by phone, contact in the morning hours based on time zone.	<input type="checkbox"/> Contact the representative. If contact will be by phone, contact in the afternoon hours based on time zone.
17. IF YOU WOULD LIKE VA TO CONTACT YOUR REPRESENTATIVE, YOU MUST PROVIDE YOUR REPRESENTATIVE'S CONTACT INFORMATION BELOW:	
17A. REPRESENTATIVE'S NAME (First, Last)	
<input type="text"/>	
17B. REPRESENTATIVE'S TELEPHONE NUMBER (Include Area Code)	
<input type="text"/> - <input type="text"/> - <input type="text"/>	
17C. REPRESENTATIVE'S E-MAIL ADDRESS	
<input type="text"/>	

# Supplemental Claim Hearing

- Veterans also may request a hearing before a supplemental claim is decided. 38 C.F.R. § 3.103(d).
- Veterans can also request this same type of hearing before an initial claim, although this is less common.





# Supplemental Claim Hearing Cont.



- Supplemental claim hearings can be in person at the local RO or by **videoconference**.
- Hearing is recorded and transcript is placed into the file.
- Veteran generally must attend.
- Veteran and VSO can submit new evidence.
- M21-1, Part X, Subpart v, Chapter 1, Section D.



# Requesting Supplemental Claim Hearing

- No specific VA form is required to request a Supplemental Claim hearing.
- VA procedures say the request may be in **writing, by email, by telephone, or in person.**
- If you are going to submit the request in writing, then submit a Statement in Support of Claim.

## SECTION II: REMARKS

*(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary)*

[Full name], VA claims file [number], requests a hearing before their supplemental claim is adjudicated. The Veteran would like a hearing [in person at their local RO / by videoconference].


# Board Hearing



- Board hearings are held before VA employees called “Veterans Law Judges” (VLJs) who decide Veterans’ appeals.
- These are formal hearings, and a transcript is created and saved for the record.
- Veteran must attend.
- Can submit new evidence at the hearing, or within 90 days after.

# Selecting Board Hearings

- Board hearings are only available on the hearing docket.
- Must be selected as Box 10C on VA Form 10182, plus check one of the three boxes below 10C.
- Current wait time is several years

PART II - BOARD REVIEW OPTION <i>(Check only one)</i>	
10. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. <i>(For additional explanation of your options, please see the attached information and instructions.)</i>	
<input type="checkbox"/>	10A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. <i>(Choosing this option often results in the Board issuing its decision most quickly.)</i>
<input type="checkbox"/>	10B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will submit to the Board with my VA Form 10182 or within the 90 days of the Board's receipt of my VA Form 10182. <i>(Choosing this option will extend the time it takes for the Board to decide your appeal.)</i>
	<input type="checkbox"/> 10C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. I want the hearing type below: <i>(Choosing this option will extend the time it takes for the Board to decide your appeal.)</i>
	<input type="checkbox"/> Central Office Hearing <i>(I will attend in person in Washington, DC)</i>
	<input type="checkbox"/> Videoconference Hearing <i>(I will go to a Regional Office)</i>
	<input type="checkbox"/> Virtual Telehearing <i>(I will attend using an internet-connected device) (Important: Provide your e-mail address and Representative in Part I)</i>

# VA Hearings Recap

## Higher-Level Review

- Informal Conference.
- Must be requested on VA Form 20-0996.
- Can be representative only.
- No new evidence.
- No transcript.

## Supplemental Claim

- No required form to request, recommend using VA Form 21-4138 with the VA Form 20-0995.
- Veteran must participate.
- Can submit new evidence.
- Transcript added to the claims file.

## Board Appeal

- Select Hearing Docket on VA Form 10182.
- Veteran must participate.
- Can submit new evidence during hearing, or up to 90 days after.
- Transcript added to claims file.

# The Purpose of a Hearing

- The purpose of both regional office and Board hearings is to
  - Present evidence
  - Present arguments
- The Veteran may have witnesses present.
- Hearings are meant to be non-adversarial. The rater or Board member *may not* cross-examine the Veteran or a witness.
- Hearings will generally not be allowed just for the advocate to present argument. Submit arguments in writing!
- A transcript of the hearing is added to VBMS.



# Poll Question

Do you think Veterans who attend a VA hearing have a higher chance of winning their claims?

**A. Yes**

**B. No**

**C. No impact**





# Question Answer



- **Yes**, Veterans who attend a hearing have a higher chance of winning their VA claim.
  - For Fiscal Year 2024, Veterans who attended a Board hearing had at least part of their claims granted **46%** of the time.
  - The grant rate for all Legacy appeals was **35%** and all AMA appeals was **38%**.



# Why Choose a Hearing?



- The Veteran wants to speak with the person who will decide their claim.
- There are certain issues where a Veteran's personal testimony might be useful.
- Statistically higher grant rate.
- Importantly, there is a **significant delay** to attending a Board hearing.

# Issues Where Hearings Could Help

- If there are questions of the Veteran's credibility, the Veteran's statements at a hearing could clear up any inconsistencies.
  - Inconsistent lay statements.
  - Lay statements that don't match other records.
- If the historical record is scant or missing, the Veteran can fill in any gaps.
- For ratings issues, the Veteran can describe the functional impairment of their disability.
  - DBQs don't capture a lot of information.
  - Effects of the disability on the Veteran's ability to work.

# VSO Preparation for a Hearing

- Review the evidence to see if there are any gaps to be filled.
- Review previous decisions (if any) to see why the claim was denied.
- Identify the evidence that needs to be presented.
- Prepare the Veteran for the hearing.



# Before Hearing: Contact Veteran

- Contact the Veteran at least one week before the scheduled hearing and confirm they plan to attend.
- Confirm the issues on appeal so evidence and arguments can be well prepared.
- If the Veteran does not want to attend a hearing then inform VA right away so they can continue adjudicating the Veteran's claim.



# Before the Hearing: Prepare Arguments



- Review the evidence of the claim before the hearing, such as:
  - Evidence for each of the three elements of service connection.
  - Evidence the Veteran meets the criteria for higher ratings.
- Spot any gaps in the evidence. How can the Veteran's testimony help fill those gaps so VA can give the Veteran a favorable decision?



# Before the Hearing: Prep the Veteran

- Before the hearing, speak with the Veteran to set expectations and explain the process.
- Veterans can be anxious about attending hearings, so stress that it will be informal and relaxed.
- Tell the Veteran what questions you will be asking and why. You should generally know how the Veteran will respond.
- Prepare a signal for the Veterans to let them know they are going off-topic or providing unnecessary details.



# Hearing Game Plan

- Go issue by issue, one at a time.
- Provide VA a “roadmap” of the argument.
- Start with what is not in dispute.
- Make sure every element is covered.
- Explain what you want VA to do.
- Ask the rater for questions after each issue.
- **Let the Veteran do the testifying.**  
Your job is to link everything together for the rater or judge.

## **Advocacy Tip:**

People often think in terms of stories. Help the Veteran tell a clear, understandable story with a beginning, middle, and end that will make the VA rater or judge **want** to grant the Veteran's claim!



# Evidence for Service Connection Claims

- What evidence do you have that goes to *each* element of service connection?
- What elements do you think might be in dispute?
- Is evidence for any disputed element already in the record?
- If not, can the disputed element be proven with the Veteran's lay testimony?
- If not, can the disputed element be proven with evidence the Veteran can obtain?
- If not, can the disputed element be proven with evidence that VA can obtain through the duty to assist?

**Advocacy Tip:** Where would the Veteran's testimony be most useful?

# Evidence for Increased Ratings Claims

- What is the current rating?
- What Diagnostic Code (DC) was used?
- What are the criteria for a higher rating under this DC?
- Does the Veteran have any symptoms not contemplated by this DC?
- Should entitlement to TDIU be considered?
- Should special monthly compensation (SMC) be considered?
- Is a new examination needed?
  - Have the Veteran's symptoms worsened?
  - Was the last exam inadequate?

**Advocacy tip:**  
Where is the  
Veteran's testimony  
most useful?

# How to Address Unfavorable Evidence

## Negative Medical Opinions

- VA will rely on a negative C&P examination.
- Explain why the examination is inadequate and request a new examination.
- Identify what facts you want the examiner to address in a new exam.
- Refer to Lesson 9 for strategies.

## Post-Service Injuries

- VA might link the Veteran's condition to a post-service injury instead of an in-service injury.
- Describe symptoms or treatment before the post-service injury.
- Describe the severity of the post-service injury.
- Ask for a new examination, if necessary.

## Inconsistent Statements

- VA might state that the Veteran has offered inconsistent statements.
- Are the inconsistent details of minor importance? Are the overall statements consistent?
- Were the Veteran's statements accurately recorded or transcribed?



# Writing Arguments

# Learning Objectives

Learn the basic rules for writing effective arguments:

- Learn the goal of effective written advocacy.
- Understanding VA adjudicators.
- Learn the **IRAC** argument structure.
- Learn principles and rules of effective persuasive writing.

# Effective Advocacy

**Effective advocacy works backward from the desired result!**

- **Goal:** Have the adjudicator grant the desired result.
- **Goal:** Have the adjudicator find the facts necessary to meet the legal elements necessary to grant that result.
- **Goal:** Present the evidence in format that makes it as easy as possible to identify the evidence proving the necessary facts.
- **Goal:** Identify and organize the evidence that needs to be understood by the adjudicator.

# Understanding VA Adjudicators

- VA adjudicators must:
  - Find information in the claims file.
  - Write an analysis of how the law applies to that information.



**VA adjudicators are looking to minimize the time and the effort needed to decide a Veteran's claim.**



# Understanding VA Adjudicators

- VA adjudicators get in trouble when a decision lacks support.
- VBMS presents work in a way that makes it easy to overlook favorable information.
  - Inaccurate labels.
  - Decisions prepopulated from flawed DBQs.



**Overlooked information already in VBMS is the most common reason for erroneous VA denials of Veteran claims.**

# Understanding Your Job as Advocate

- Guide VA staff to the information they need to grant the Veteran's claim.
- Offer a useful analysis of that information, which VA staff can adopt to award the best possible outcome for the Veteran.



**You are trying to minimize the effort the VA adjudicator needs to expend to decide a case in a favorable way.**

# Effective Writing

**“The goal of writing is not to make it possible to understand your point, but to make it impossible to misunderstand your point.” - *Unknown***



# What is this?

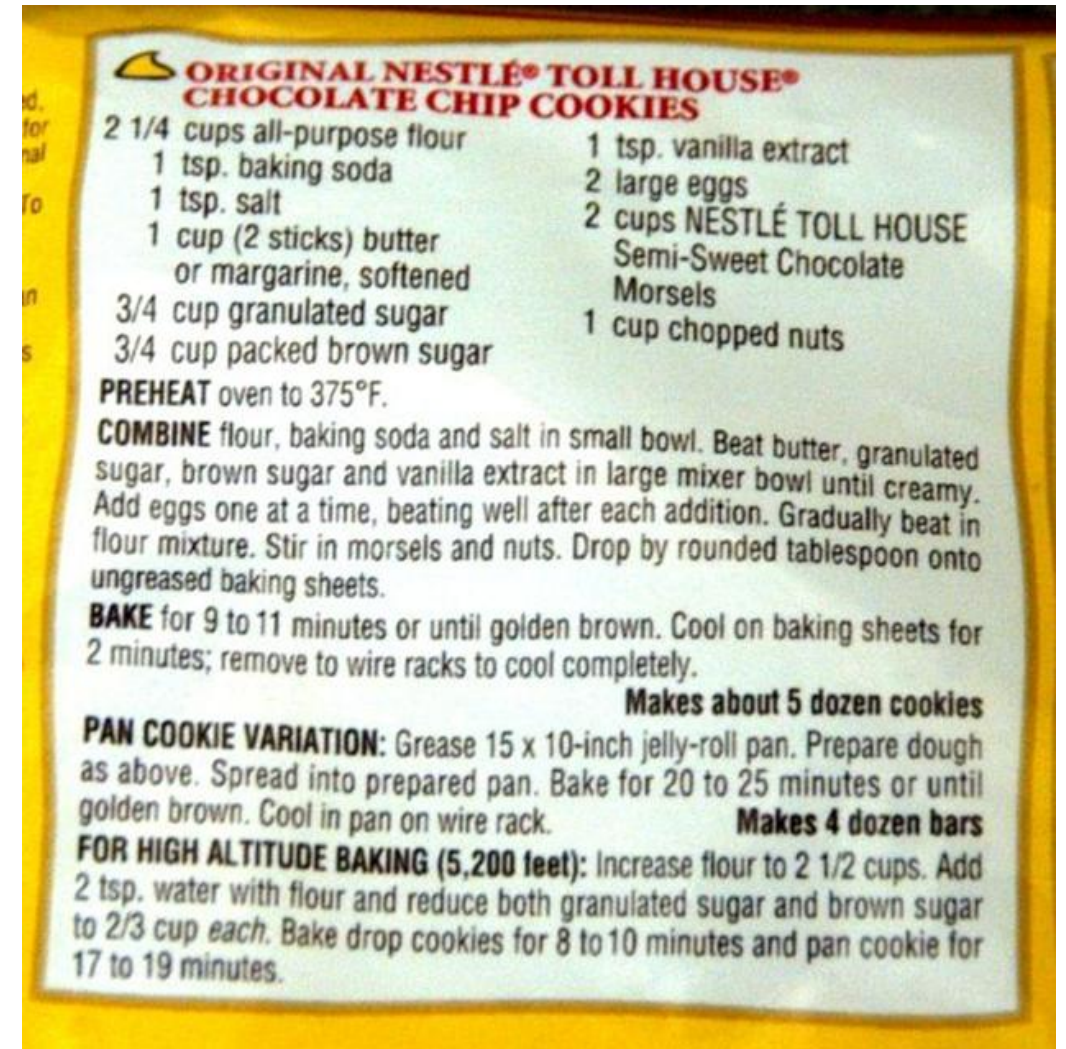
You should be done nine to eleven minutes after you finish preparation. Start with a small sized bowl. Insert some flour and baking soda. The flour should be two and a quarter cups. A teaspoon of soda is right. Then add the same amount of salt. Combine 1 cup of butter with  $\frac{3}{4}$  of a cup of sugar and a similar amount of brown sugar. Add as much vanilla extract as salt. These ingredients should be mixed until creamy in a different bowl than the flour. Add 2 eggs. Mix more and then mix flour into bigger bowl. Add chocolate chips. Once combined, divide into small balls and place on baking sheet. Be sure you warmed oven to three hundred seventy-five degrees. Insert for nine to eleven minutes. When cookies are golden brown, remove and let cool for at least 120 seconds. Enjoy!



# What was that?

- That was the Nestle Toll House chocolate chip cookie recipe.
  - The information was the same.
  - The presentation was horrible.

**How information is presented has a tremendous affect on how well it is understood.**



# IRAC - The Recipe for Legal Writing

- **Issue** - What is the point that this case turns upon?
- **Rule** - What is the rule governing this case?
- **Application** - How does that rule apply to the facts of this case?
- **Conclusion** - What is the outcome of the issue identified at the beginning?



# IRAC – Example Case #1

**(I)** The issue in this appeal is whether Gerald I. Joseph's undisputed tinnitus is related to service.

**(R)** Tinnitus is a chronic condition that is presumptively related to service if a Veteran has had symptoms since service.

**(A)** In this case, Gerald submitted a written statement on August 4, 2013, explaining that he has had tinnitus ever since he worked in the engine room of a destroyer. He never reported it in service or for years afterward because other sailors told him this was normal.

**(C)** Therefore, his claim should be granted because his tinnitus manifested in service and he has had it ever since.



# IRAC – Example Case #2

## **Issue I:** Service Connection

**Rule I:** (1) Current Condition; (2) in-service event; (3) nexus

### **Application I:**

#### **Issue A:** Current Condition

**Rule A:** Undiagnosed pain can be a disability under *Saunders v. Wilkie*.

**Application A:** This Veteran reports back pain that causes functional limitations.

**Conclusion A:** The Veteran has a current condition.

#### **Issue B:** In-service event

**Rule B:** An in-service event can be proven by credible post-service testimony.

**Application B:** The Veteran has consistently reported injuring his back in a fall in service.

**Conclusion B:** That fall was an event in-service.

#### **Issue C:** Nexus

**Rule C:** A nexus can be proven with the opinion from a competent professional.

**Application C:** The Veteran's doctor has opined that his pain is related to his in-service fall.

**Conclusion C:** There is a nexus between his condition and the in-service event

**Conclusion I:** Grant Service Connection to the Veteran for his back pain.

# Approaching Writing

- What is the single biggest problem in communication?
- **“The single biggest problem in communication is the illusion that it has taken place.”** *–George Bernard Shaw*

**You can *never* blame the audience for failing to understand you.**



# The Bus Driver Problem

Let's say you are a bus driver. In the morning, the bus starts empty. At the first stop, three people get on. At the second stop, two people get on. No one is at the third stop. At the fourth stop, one person gets on and three people get off. At the fifth stop, you are five minutes behind schedule. Two people get on; one person gets off. At the sixth stop, four people get off and one person gets on.





# The Bus Driver Problem



What is the bus driver's name?

# The Bus Driver Problem

- Let's say **you are a bus driver**. In the morning, the bus starts empty. At the first stop, three people get on. At the second stop, two people get on. No one is at the third stop. At the fourth stop, one person gets on and three people get off. At the fifth stop, you are five minutes behind schedule. Two people get on; one person gets off. At the sixth stop, four people get off and one person gets on.



# Writing Rule 1: Roadmap

**Set up why information matters before you present it!**

- Retaining information requires context.
- Don't surprise the reader.
- Build trust in your competence by setting expectations and then meeting them.





# Rule 2: Identify the Key Documents

**Finding the evidence is more important than spinning it.**

- Highlighting the key documents is what helps the most.
- Include the specific date and label that appears in VBMS.
- Overlooked lay statements and private evidence are the most common keys to winning.





# Rule 3: Tell a Story

**Human beings think in stories to make decisions.**



- Start at the beginning.
- Signal jumps in time.
- Tell VA what symptoms the Veteran has and when they began.

# Rule 4: Keep it Short

## Don't bury the lede!

- Place important information at the top.
- Short sentences.
- Short paragraphs.
- No extraneous words.



# Rule 5: Avoid Unnecessary Modifiers

- Cases turn on nouns and verbs.
- Even subjective standards focus on nouns and verbs in application.

**Unnecessary modifiers are an unnecessary chance for the adjudicator to disagree with you.**



# Final Tip

- Government documents are ***not*** protected by copyright.
- If you copy boilerplate from ***good*** VA decisions, it makes it easy for VA to copy from you.

**Plagiarism of VA decisions is a virtue, not a crime.**



- This presentation is complete.
- A PDF version of these slides will be provided to you at the conclusion of the course for future reference.



# How Federal Court Decisions Assist Our Veterans

<https://calvets.participoll.com/>



# Polling Test Question



<https://calvets.participoll.com/>

When a Veteran prevails at the Court of Appeals for Veterans Claims, who normally covers their legal bills?

- A. The Veteran**
- B. Their VSO**
- C. VA**
- D. Their attorney**
- E. The court**





# Polling Test Answer

## C. VA

- Under the Equal Access to Justice Act (EAJA), VA pays the attorney fees in most circumstances when a Veteran wins some form of relief from the CAVC.
- The payment does not come from the Veteran's VA benefit.



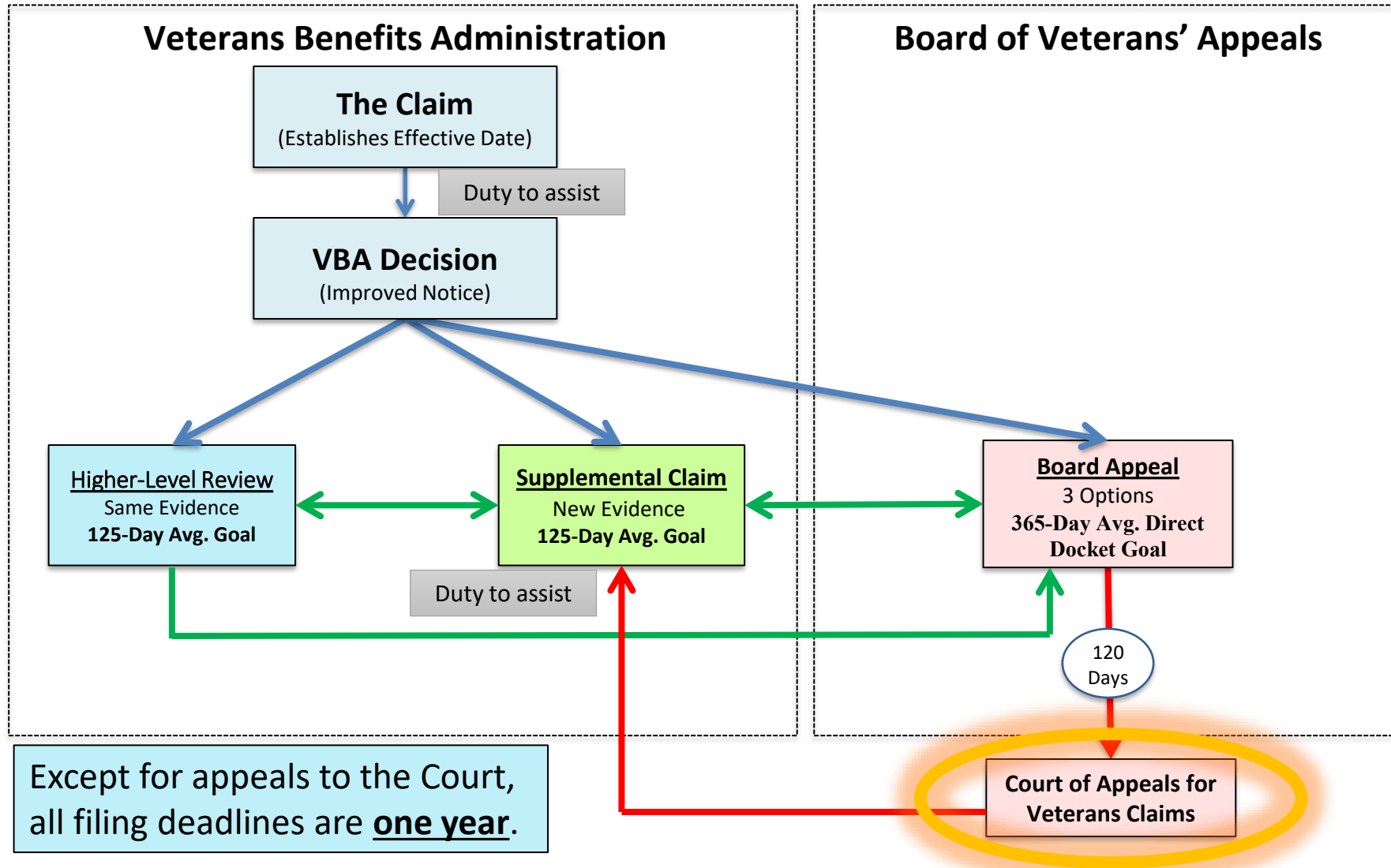
Source: GAO File Photo.

# Learning Objectives

Learn about the history and role of the Court of Appeals for Veterans Claims (CAVC).

- Learn about how the CAVC fits into the VA claim appeal system.
- Learn about how the CAVC makes decisions on claims.
- Learn about how the role of the CAVC changes under Appeals Modernization.
- Learn about the process for CalVet cases that go to CAVC and then return to the Board.

# Basic AMA Design



# What is the Veterans Court?

- The Court of Appeals for Veterans Claims (CAVC or Veterans Court) was created in 1988 to review decisions from the Board.
- The Court is ***not*** part of VA.
- In 2024, the Court disposed of 7,862 cases.
- **83%** were remanded and sent back to the Board due to one or more VA errors.



Federal Court



VA

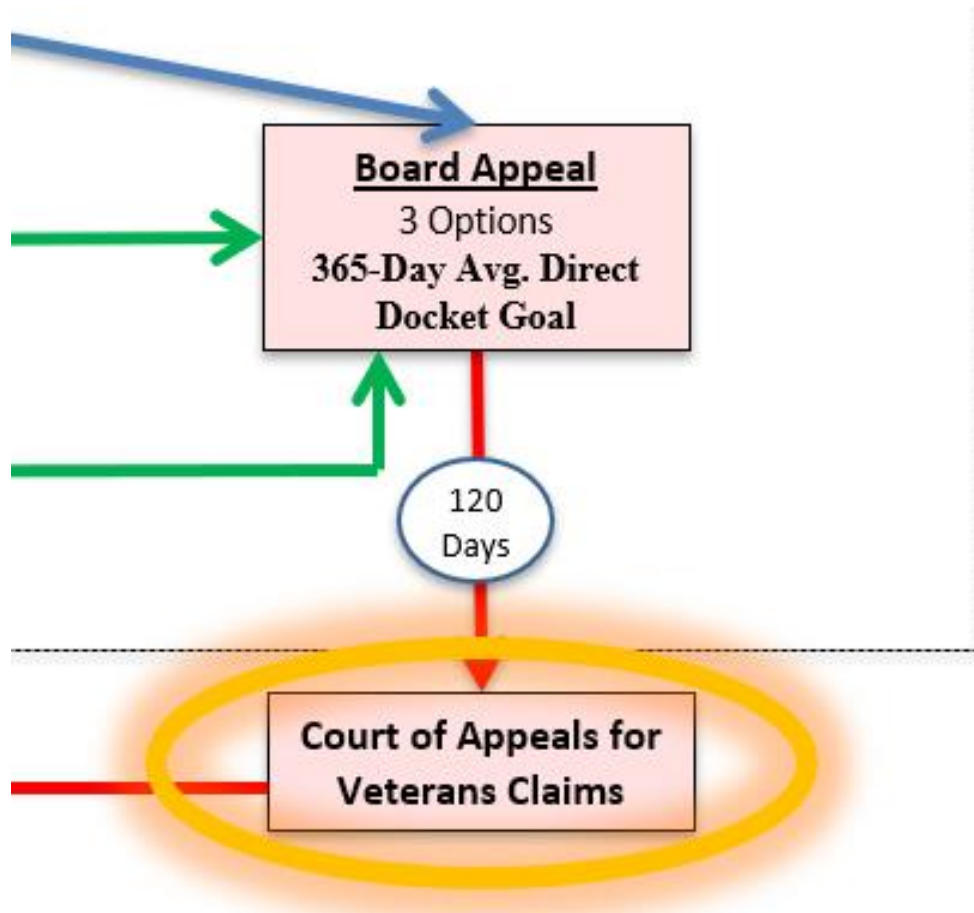
# What Mistakes Does the Court Find?

- **Duty to Assist:** the Court reviews Board decisions to ensure that VA has fulfilled its duty to assist.
- **Reasons and Bases:** the Court reviews Board decisions to ensure that the Board's reasoning allows the Veteran to understand the precise basis for the Board's decision.





# How to Appeal to the Court



- **Denials** can be appealed.
- **Grants and Remands** cannot be appealed.
- A "Notice of Appeal" must be submitted to the Court within **120 days** of the Board's decision.
- Filing fee of \$50 can be waived.
- Legal representation is highly recommended.



# What Happens at the Court?

## **Joint Motion for Remand (JMR):**

- No Judge
- After informal discussions, VA and Appellant agree on VA error and enter JMR.
- Board decision is vacated (erased) and case is sent back to Board with instructions.

## **Memorandum Decision:**

- Single Judge
- VA and Appellant each write formal legal briefs, and Judge explains which argument was more convincing.
- Decision is limited to that appeal, and not binding on VA.

## **Panel Decision:**

- Three or more Judges
- If the issues involve a new question of law, then a *panel* of judges makes a decision.
- Any legal decisions will be binding on all future decisions of VA & the Court.

# Possible Outcomes at the Court

## Affirm

- The Court can “affirm” the Board decision (i.e. the Board’s decision was correct).
- The Veteran’s claim remains **denied**.

## Remand

- If the Board committed an error, the denial will be erased (“vacated”) and returned to the Board for a new decision.
- The Veteran has another chance to prevail before the Board.

## Reversal

- The Board’s decision was “clearly erroneous.”
- The Veteran’s claim is granted.
- Very rare!

# What Happens After an Affirmance?

- If the Court affirms the Board's decision, then the Veteran loses the claim. (The Court is saying that the Board denial was correct).
- Under the legacy system a Veteran has to attempt to reopen the claim with "new and material evidence."
- Under the legacy system, the original date of claim is **lost** because the Court's decision is a final decision on the claim.



# Major Change Under AMA

- Under AMA, if a Veteran loses at the Court, then the Veteran may file a Supplemental Claim with a Regional Office containing new and relevant evidence (VA Form 20-0995).
- The Supplemental Claim is considered part of the same claim stream, so the Court decision is ***not*** a barrier to an earlier effective date.
- To preserve the effective date of the claim, the Supplemental Claim must be filed with VA ***within one year*** of the Court decision.



# Why Appeal to the Court?

With the option to continuously file Supplemental Claims, why consider appealing to the Court?

- Complicated duty to assist issues: the Board is hesitant to find that VA examinations are inadequate.
- Erroneous credibility findings: once the Board has said the Veteran is not credible, it is very hard to change the outcome.
- Discussions regarding how evidence is weighed: the Board often fails to provide adequate reasons for discounting positive evidence.

**In many cases, VA will only change its mind if the Court explains why VA is looking at the case incorrectly!**

# The Importance of the Court

The Court decides complicated questions of law, often in favor of Veterans:

- *Smith* — requires VA examiners to explicitly consider lay statements.
- *Beaudette* — held that denials of caregiver benefits are reviewable.
- *Cardoza* — held that the Board's refusal to docket an NOD is a reviewable decision.

**These positive outcomes happened because a Veteran appealed to the Court.**



# CalVet and the Court

- Every CalVet Board decision containing a less than fully favorable claim is reviewed by two B&M attorneys for VA errors.
- If an error is identified, the Veteran/claimant is offered free representation before the Court.
- The Veteran signs a limited power of attorney with B&M for representation before the Court.

# Upon a Decision from the Court...

- The Court decision or the Joint Motion for Remand will describe VA errors in the Board's decision that must be corrected.
- Not every VA error spotted by B&M will be listed in the Remand:
  - Court decisions will only discuss VA errors necessary to support the Court's decision.
  - For JMRs, VA will usually not agree to every error presented.

# *After* a Decision from the Court...

- The Veteran receives a closing memo from B&M describing the outcome of the Court case and a copy of all litigation materials.
- Power of Attorney for appealed claims reverts to CalVet.
  - B&M is never POA for claims not before the Court.



# When a Case Goes Back to Board

- The Veteran is informed that the Board will render a new decision based on the Court's instructions.
- The Veteran and CalVet have another opportunity to argue to the Board.
- The Board will issue a new decision that addresses the errors noted by the Court.
- If additional development is needed, then the Board will remand the case to the Veterans Benefits Administration (VBA).

# Where Do Board Remands Go?

- The Office of Administrative Review (OAR) at VBA handles Board remands.
- *Legacy Appeals:*
  - Handled by Washington, D.C., Decision Review Operations Center (DROC).
  - If still denied, then the claim returns to the Board for a new decision.
  - Another Board denial can be appealed to the Court.
- *Appeals Modernization Act remands:*
  - Handled by Seattle and St. Petersburg DROCs.
  - The claim is *not* automatically returned to the Board. The Veteran must submit another review request to dispute VA's decision.







# Recent Court Opinions: March-May 2025

<https://calvets.participoll.com/>



# Learning Objectives

- **Learn about important developments in the law.**
  - Learn about some **recent court decisions.**
  - Learn about some **recent regulatory changes.**
  - Review a **recent memorandum decision** of the CAVC.

***Ingram v. Collins***  
\_\_\_\_ Vet.App. \_\_\_\_  
2025 U.S. App. Vet.  
Claims LEXIS 327  
(Mar. 12, 2025)



Veteran Carlton Ingram applied for increased ratings for his back and left ankle. His medical records indicate that he takes a variety of prescription medications to alleviate his pain and inflammation of these joints. The Board rated his conditions based upon an examination that considered only the severity of his condition while taking these medications. Should the Board have evaluated based upon how bad his conditions would be if he were not taking those medications?

**A. No. Ratings are based only upon the observed effect of a disability.**

**B. Yes. Ratings should not consider the effect of medication on a disability unless the diagnostic codes specifically says so.**



# Ingram v. Collins

**B. Yes. Ratings should not consider the effect of medication on a disability unless the diagnostic codes specifically says so.**

- The CAVC held that the default rule, which it had announced in cases more than a decade ago, applies to ratings of orthopedic conditions.
- Nothing in the diagnostic codes for orthopedic conditions mentions medications.
- The Court also held that a VA examination should seek information on the Veteran's unmedicated state just as it must for flare ups under *Sharp v. Shinseki*.

**You should NOT suggest that a Veteran stop taking medication in order to get a higher rating!**

# Ingram Argument

[Veteran's name]'s service-connected [state specific joint] disability is significantly worse when he/she does not take his/her prescribed medication to treat the condition. This condition must be rated based upon the severity of the condition in an unmedicated state. See *Ingram v. Collins*, \_\_ Vet.App. \_\_\_, 2025 U.S. App. Vet. Claims LEXIS 327 (Mar. 12, 2025). The Veteran's condition is significantly worse when not medicated as indicated by [describe evidence]. Therefore, his condition needs to be rated based the severity in an unmedicated state.



***Chisholm v. Collins***  
\_\_\_\_ Vet.App. \_\_\_\_  
2025 U.S. App. Vet.  
Claims LEXIS 336  
(Mar. 13, 2025)



Mr. Sutton filed for increased ratings for his service connected disabilities in 2019. After an initial denial, his Higher-Level Review was denied in 2021. Within one year, he filed a VA Form 21-8940 TDIU application, which was eventually granted. Can he be awarded TDIU back to the date of his original 2019 claim for increased ratings.

**A. No. He did not file a Supplemental Claim within one year of the 2021 HLR decision.**

**B. Yes. His Form 21-8940 counts as a Supplemental Claim because a Supplemental Claim does not need to be on the specific Supplemental Claim form.**



# *Chisholm v. Collins*

- B. Yes. His Form 21-8940 counts as a Supplemental Claim because a Supplemental Claim does not need to be on the specific Supplemental Claim form.**
- This case is not named after the Veteran because it was decided as part of fee dispute between VA and his attorney.
  - The CAVC concluded that “while a supplemental claim needs to be filed on a form prescribed by the Secretary, it doesn’t need to be filed on a supplemental claim form.”
  - Furthermore, it held that because TDIU is not a separate claim but just another way to seek a higher rating, when adjudicating TDIU “if VA sees that the veteran's schedular rating for those disabilities may need to be increased, it needs to address that.”

# Chisholm Argument – TDIU Form

In this case, Veteran [name] was granted an effective date of [date] for his/her award of TDIU. This date was based upon the date that VA received his/her Form 21-8940. However, that application for TDIU was filed within a year of [describe the prior decision] and was a Supplemental Claim continuously pursuing benefits for the underlying condition<sup>s</sup>. The Court of Appeals for Veterans Claims (CAVC) has held that that “while a supplemental claim needs to be filed on a form prescribed by the Secretary, it doesn’t need to be filed on a supplemental claim form” and, therefore, an application for TDIU is a Supplemental Claim when filed within one year of a prior decision. See *Chisholm v. Collins*, \_\_\_ Vet. App. \_\_\_, \_\_\_, slip op. at 1, No. 22-7028 (Mar. 13, 2025). Accordingly, the proper effective date for this award is the date is [date], the date that [Mr./Ms. name] began pursuing compensation for this/these condition<sup>s</sup>.

# Chisholm Argument – Other Form

In this case, Veteran [name] was granted an effective date of [date] for his/her award of [describe]. This date was based upon the date that VA received his/her Form 20-0995 Supplemental Claim. However, prior to that date, on [date] he/she submitted the claim on a Form [526EZ/other identified form]. The Court of Appeals for Veterans Claims (CAVC) has held that that “while a supplemental claim needs to be filed on a form prescribed by the Secretary, it doesn’t need to be filed on a supplemental claim form.” See *Chisholm v. Collins*, \_\_\_ Vet. App. \_\_\_, \_\_\_, slip op. at 1, No. 22-7028 (Mar. 13, 2025). Accordingly, VA erred in rejecting the original form and the proper effective date for this award is [date].

***Smith v. Collins***  
133 F.4th 1059  
(Fed. Cir. 2025)





Veteran George Smith sought service connection for PTSD, but died before VA finished processing the claim. His adult son, Joshua substituted into the claim, which was ultimately granted by VA. Joshua sought the entire award of retroactive benefits payable to his father. How much of the award is he entitled to receive?

- A. None. Adult children are not entitled to any benefits after a Veteran dies.**
- B. The entire award. A person who is substituted into the claim of a deceased veteran stands in their shoes.**
- C. Only so much as necessary to cover any costs of the Veteran's last sickness and burial covered by Joshua.**



# *Smith v. Collins*

- C. Only so much as necessary to cover any costs of the Veteran's last sickness and burial covered by Joshua.**
- The Federal Circuit held that the creation of the ability to substitute into a deceased Veteran's claim did not change the law as to what amount of benefits could be collected by a survivor.
- Adult children generally are limited to a portion of a retroactive award sufficient to cover any costs of the Veteran's last sickness and burial that they personally paid for.

***Amezquita v.  
Collins***  
135 F.4th 1369  
(Fed. Cir. 2025)



Prior to enlisting, Veteran Edward Amezquita had surgery to repair his shoulder after a car accident. His entrance physical noted the surgery but listed his shoulder as asymptomatic. After service, Mr. Amezquita applied for service connection for a shoulder disability. Does the presumption of sound condition apply to his claim?

**A. Yes. Even though he had no symptoms, the condition was still noted on his entrance physical.**

**B. No. If the service member is not experiencing any symptoms then--by definition--they do not have a condition at the time they entered service.**



# *Amezquita v. Collins*

- A. Yes. Even though he had no symptoms, the condition was still noted on his entrance physical.**
- The Federal Circuit rejected the argument that only conditions that have some kind of active symptom count as preexisting conditions.
  - Therefore, the burden is on the Veteran to prove that his condition was made worse by his service.

***Loyd v. Collins***  
\_\_\_\_ Vet.App. \_\_\_\_  
2025 U.S. App. Vet.  
Claims LEXIS 614  
(May 8, 2025)





Veteran Marvin Loyd sought service connection for an eye condition as secondary to a service-connected stroke. After his claim was denied, he filed a Supplemental Claim. However, the regional office determined that there was no new and relevant evidence to reopen the claim. Mr. Loyd then appealed that decision to the Board. What issue is before the Board?

- A. Only the issue of whether the Supplemental Claim was supported by new and relevant evidence.**
- B. The merits of whether his eye condition should be granted service connection.**



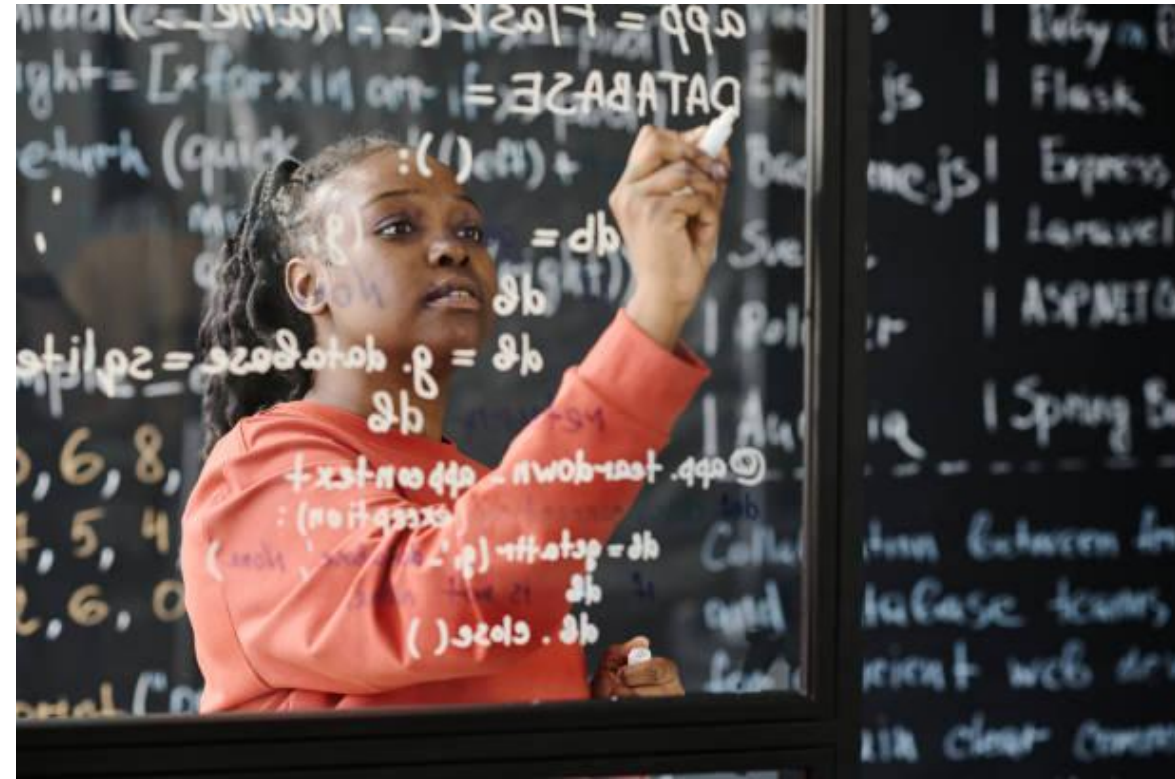
# *Loyd v. Collins*

## **A. Only the issue of whether the Supplemental Claim was supported by new and relevant evidence.**

- The CAVC held that an appeal of a denial of reopening is focused only on the issue of whether the claim should have been readjudicated.
- The Court also noted that it may be true—as it was in the legacy system—that if the Board grants readjudication then it must remand for a decision on the merits.

**The opinion indicates that the Secretary conceded that continuous pursuit would still apply after a denial of readjudication!**

***Perkins v. Collins***  
 \_\_\_ Vet.App. \_\_\_  
 2025 U.S. App. Vet  
 Claims LEXIS 558  
 (May 16, 2025)



# *Rudisill v. McDonough*

**23 months because there is a separate, 48-month cap on combined benefits.**

- Veterans who **qualify for both** the Montgomery G.I. Bill and the Post-9/11 G.I. Bill education benefits through separate periods of service may use either one, in any order, up to a total 48-month aggregate cap.
- This was a hard case because there are many educational benefits statutes passed at different times that have conflicting language about how to combine eligibility.

The Montgomery G.I. Bill requires two years of service. The Post-9/11 G.I. Bill requires three years of service. Veteran Kassidy Perkins served in the Air Force for six years from 2014 to 2020. She applies for a total of 48 months of educational benefits under the Rudisill decision. Can she receive 48 months of benefits?

- A. Yes because she served long enough to qualify for both benefits without double counting any of her years of service.**
- B. No. Rudisill applies only to Veterans like Mr. Rudisill who had multiple periods of service, each with a separate DD-214.**



# Perkins v. Collins

**A. Yes because she served long enough to qualify for both benefits without double counting any of her years of service.**

- The CAVC held that the Supreme Court's decision applies to any Veteran with enough service to qualify for both benefits.
- VA's implementation plan is based upon its narrow reading of *Rudisill*.



# *Perkins v. Collins*

**Yes because she served long enough to qualify for both benefits without double counting any of her years of service.**

- The CAVC held that the Supreme Court's decision applies to any Veteran with enough service to qualify for both benefits.
- VA's implementation plan is based upon its narrow reading of *Rudisill*.

**It is quite possible VA will appeal this decision!**





# Regulation Update

<https://calvets.participoll.com/>



# Learning Objectives

Learn about all relevant changes to law and regulations regarding VA benefits in the past year. There have been no law changes, so we will focus on regulations.

- Quickly review how regulations are created.
- Briefly highlight a couple proposed rules published by VA this year but not yet finalized.
- Learn about changes to VA regulations in the past year.

# Question

How many final or proposed rules did VA published in the Federal Register between August 1, 2023, and August 1, 2024?

- A. Less than 25**
- B. Between 25 and 50**
- C. Between 50 and 75**
- D. More than 100**



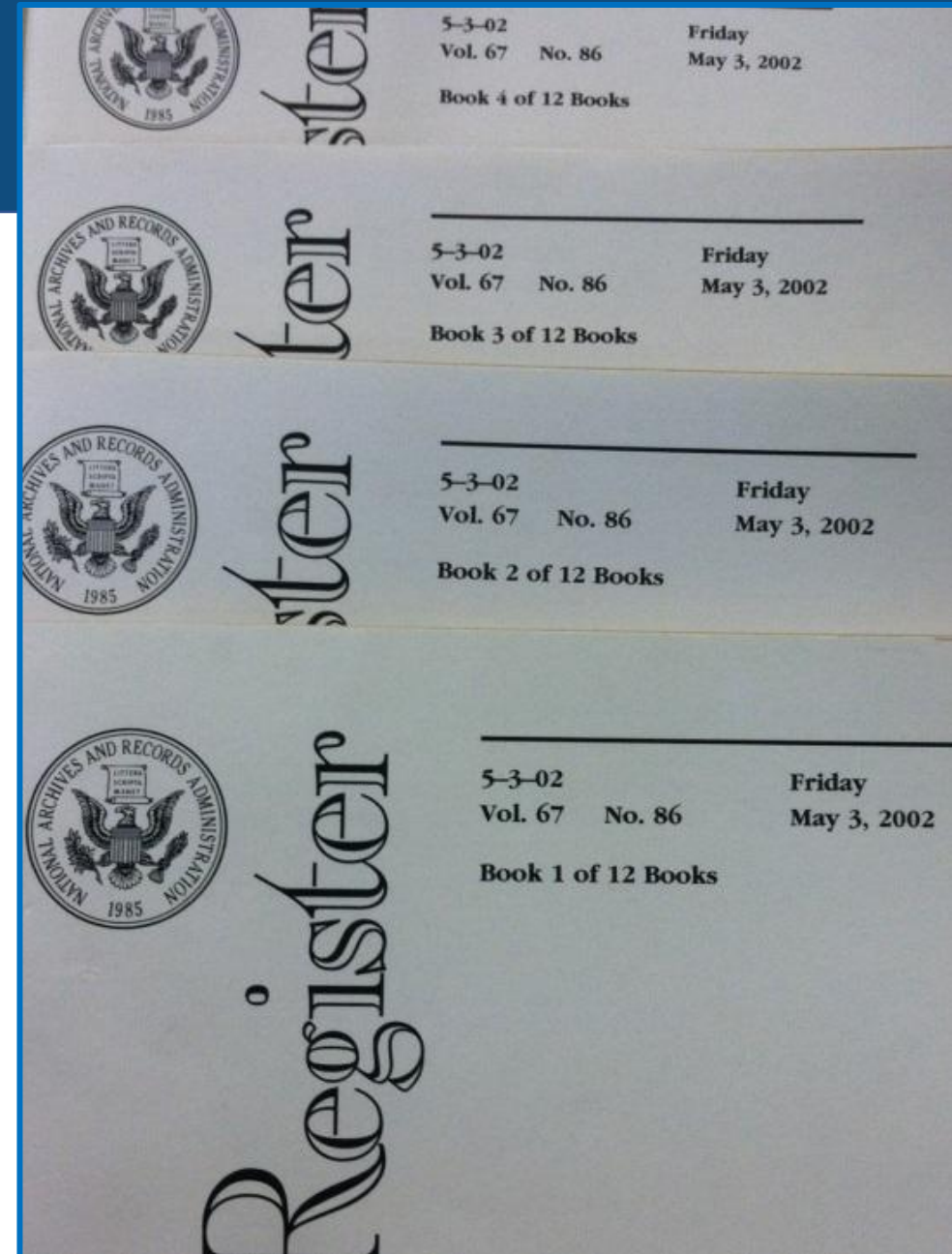
# Answer

## C. Between 50 and 75

Between August 1, 2023, and August 1, 2024, VA published **54** proposed and final rules in the **Federal Register**.

- This means VA considered changing their own rules at least ***once per week***.

**Advocacy Tip:** Make sure you and your team monitor and communicate changes and updates to VA's rules.





# Process Overview

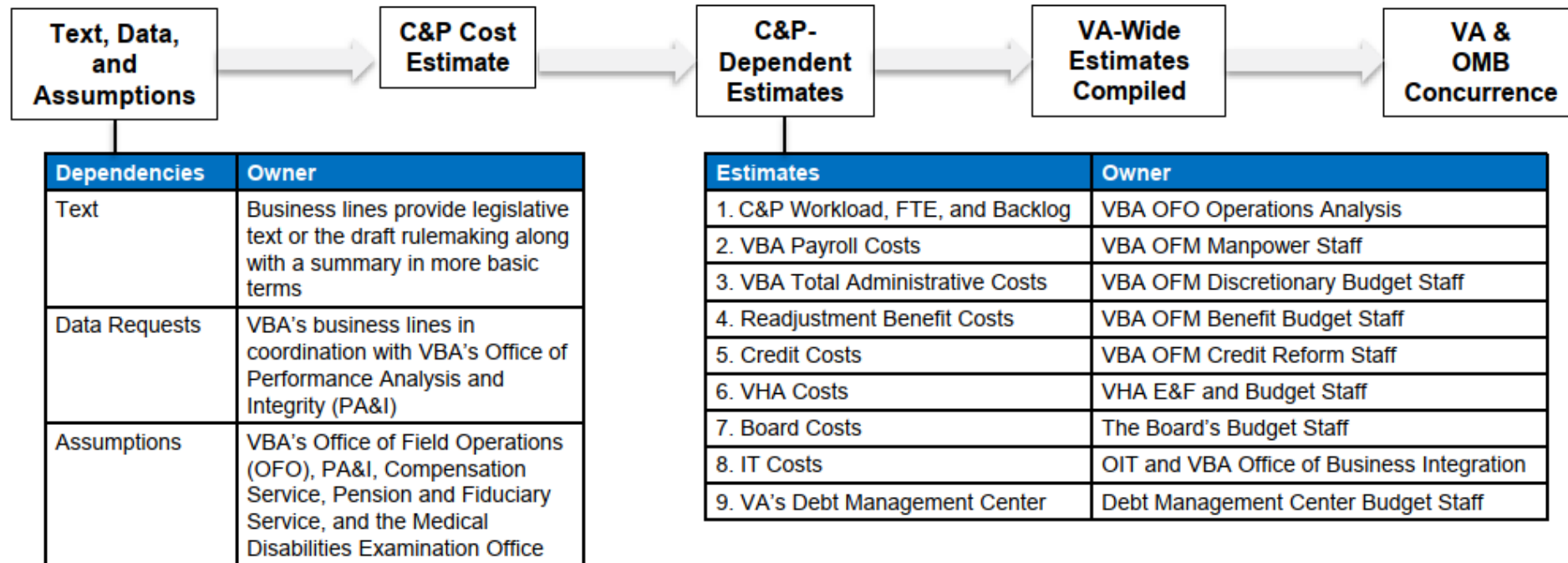
- The agency drafts new regulations, or an amendment to an existing regulation.
  - The agency's draft regulations are sent to the White House/OMB for approval.
- The Proposed Rule is published in the Federal Register.
  - The public can voice their opinion in the "notice and comment" period.
- The agency publishes a Final Rule.
  - The agency responds to all received comments.
  - The new regs/amendments are published in the next Code of Federal Regulations (C.F.R.)



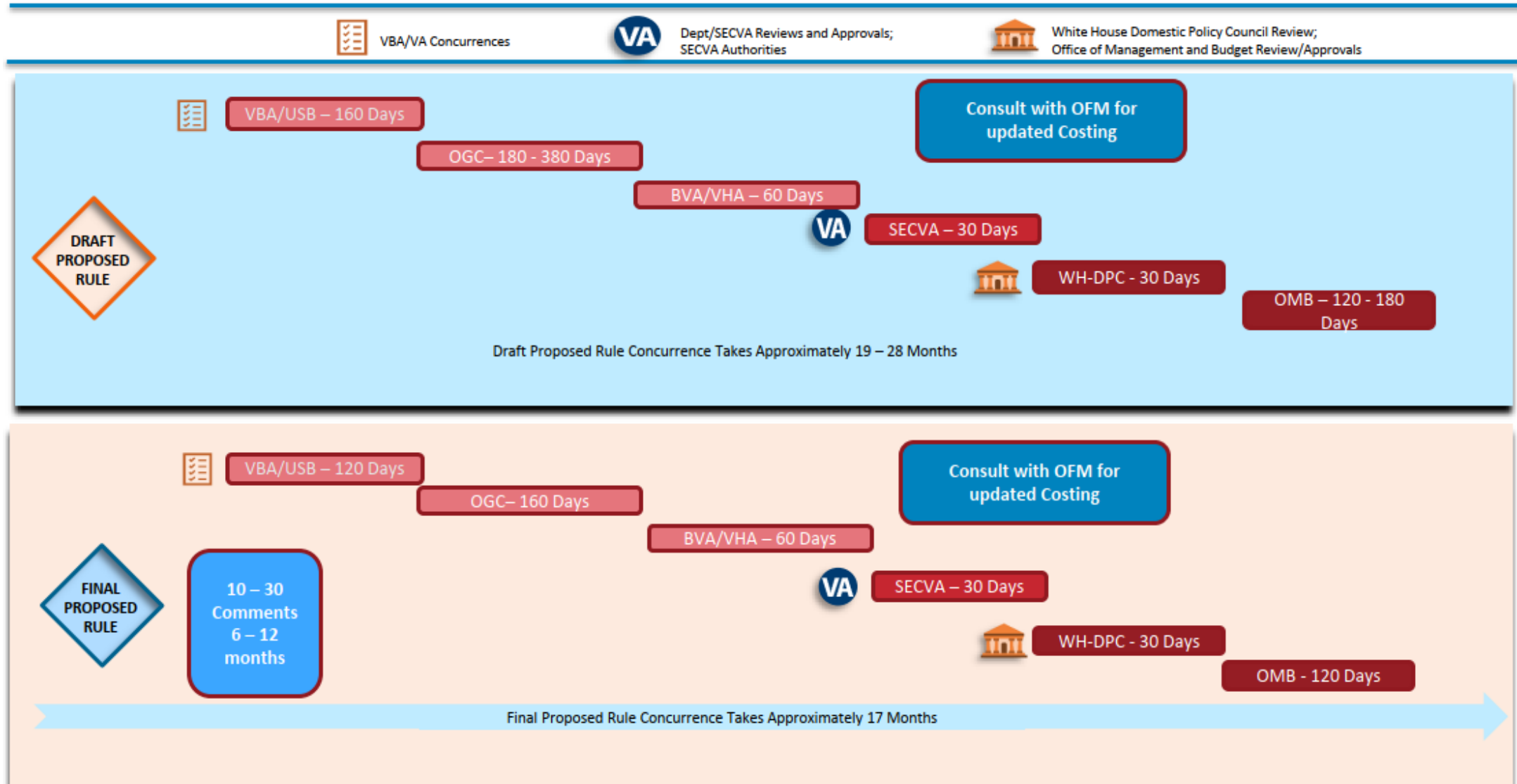
# Cost Estimate

- A key piece of White House/OMB approval depends on the estimated cost of the proposed rule.
- This chart details VBA's process for estimating costs.

## VBA's Cost Estimate Process



# Internal VA Concurrence Process



# Final Rule - Exception to the Bilateral Factor

# Bilateral Factor § 4.26

- Functions to provide Veteran with a higher combined rating if the Veteran receives compensable ratings for both arms or legs.
- Applies if Veteran receives a compensable rating for both arms, both legs, or “paired skeletal muscles.”
  - Here “arms” and “legs” refers to whole extremity.
  - For example, if the Veteran is rated for her right hip and left foot, she receives a rating for “both legs” and therefore the bilateral factor applies.

Table I—Combined Ratings Table

[10 combined with 10 is 19]

	10	20	30	40	50	60	70	80	90
19	27	35	43	51	60	68	76	84	92
20	28	36	44	52	60	68	76	84	92
21	29	37	45	53	61	68	76	84	92
22	30	38	45	53	61	69	77	84	92
23	31	38	46	54	62	69	77	85	92
24	32	39	47	54	62	70	77	85	92
25	33	40	48	55	63	70	78	85	93
26	33	41	48	56	63	70	78	85	93
27	34	42	49	56	64	71	78	85	93
28	35	42	50	57	64	71	78	86	93
29	36	43	50	57	65	72	79	86	93
30	37	44	51	58	65	72	79	86	93
31	38	45	52	59	66	72	79	86	93
32	39	46	52	59	66	73	80	86	93
33	40	46	53	60	67	73	80	87	93
34	41	47	54	60	67	74	80	87	93
35	42	48	55	61	68	74	81	87	94

# Bilateral Factor § 4.26 – How Applies

- If applies, **combine** the ratings for the right and left sides as normal. Then **add** 10 percent of the resulting combined value.
- Bilateral factor applies before other combined ratings and **only applies once**.
- Combine all qualifying bilateral factor ratings together first, then add 10% of the resulting value.
- Bilateral ratings are then treated as one disability for purposes of combining with other ratings.



# Bilateral Factor

## § 4.26 Bilateral factor.

Except as provided in paragraph (d) of this section, when a partial disability results from disease or injury of both arms, or of both legs, or of paired skeletal muscles, the ratings for the disabilities of the right and left sides will be combined as usual, and 10 percent of this value will be added (*i.e.*, not combined) before proceeding with further combinations, or converting to degree of disability. The bilateral factor will be applied to such bilateral disabilities before other combinations are carried out and the rating for such disabilities including the bilateral factor in this section will be treated as one disability for the purpose of arranging in order of severity and for all further combinations. For example, with disabilities evaluated at 60 percent, 20 percent, 10 percent and 10 percent (with the two 10 percent evaluations being bilateral disabilities), the order of severity would be 60, 21 and 20. The 60 and 21 combine to 68 percent and the 68 and 20 combine to 74 percent, converted to 70 percent as the final degree of disability.

- (a) **Definitions.** The use of the terms "arms" and "legs" is not intended to distinguish between the arm, forearm and hand, or the thigh, leg, and foot, but relates to the upper extremities and lower extremities as a whole. Thus with a compensable disability of the right thigh, for example, amputation, and one of the left foot, for example, pes planus, the bilateral factor applies, and similarly whenever there are compensable disabilities affecting use of paired extremities regardless of location or specified type of impairment.
- (b) **Procedure for four affected extremities.** The correct procedure when applying the bilateral factor to disabilities affecting both upper extremities and both lower extremities is to combine the ratings of the disabilities affecting the 4 extremities in the order of their individual severity and apply the bilateral factor by adding, not combining, 10 percent of the combined value thus attained.
- (c) **Applicability.** The bilateral factor is not applicable unless there is partial disability of compensable degree in each of 2 paired extremities, or paired skeletal muscles.
- (d) **Exception.** In cases where the combined evaluation is lower than what could be achieved by not including one or more bilateral disabilities in the bilateral factor calculation, those bilateral disabilities will be removed from the bilateral factor calculation and combined separately, to achieve the combined evaluation most favorable to the veteran.

- On [December 27, 2023](#) VA published a final rule fixing that in certain situations applying the bilateral factor would actually result in a lower overall rating.
  - Arises most often if the Veteran's overall combined rating is in the low 90s percent.
- Fixed by adding a new paragraph (d) to § 4.26 saying if the bilateral factor results in a lower overall rating then it doesn't apply.
- Effective April 16, 2023.

# Example of Bilateral Factor Fix

- Example: Veteran has a combined 93 rating plus two 10% ratings that would qualify for the bilateral factor.
- Applying the bilateral factor:
  - 10 combined with 10 is 19, add 1.9 under the bilateral factor for rating of 21, rounded to 20.
  - 93 combined with 20 is 94 – which results in a combined total rating of 90%
- No bilateral factor:
  - 93 and 10 combine to 94
  - 94 and 10 combine to 95 - which results in a combined total rating of 100%.

# Final Rule – Character of Discharge

# Character of Discharge

32361	
Rules and Regulations	Federal Register
	Vol. 89, No. 82
	Friday, April 26, 2024
<p>This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.</p> <p>The Code of Federal Regulations is sold by the Superintendent of Documents.</p> <p><b>DEPARTMENT OF VETERANS AFFAIRS</b></p> <p><b>38 CFR Part 3</b></p> <p><b>RIN 2900-AQ95</b></p> <p><b>Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge</b></p> <p><b>AGENCY:</b> Department of Veterans Affairs.</p> <p><b>ACTION:</b> Final rule.</p> <p><b>SUMMARY:</b> In a document published in the <i>Federal Register</i> on July 10, 2020, the Department of Veterans Affairs (VA) proposed to amend its regulation regarding character of discharge (COD) determinations. After considering public comments, VA has decided to finalize its proposal with some modifications to expand VA benefits eligibility, bring more consistency to adjudications of benefits eligibility, and ensure COD determinations consider all pertinent factors.</p> <p><b>DATES:</b></p> <p><i>Effective date:</i> This final rule is effective June 25, 2024.</p> <p><i>Applicability date:</i> The provisions of this final rule shall apply to all applications for benefits that are received by VA on or after June 25, 2024, or that are pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit (Federal Circuit) on June 25, 2024.</p> <p><b>FOR FURTHER INFORMATION CONTACT:</b> Robert Parks, Chief, Part 3 Regulations Staff (211C), Compensation Service, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)</p> <p><b>SUPPLEMENTARY INFORMATION:</b></p> <p><b>I. COD Regulatory History</b></p> <p>Eligibility for most VA benefits requires that a former service member (SM) be a “veteran.” “Veteran” status is bestowed to former SMs “who served in</p> <p>the active military, naval, air, or space service, and who [were] discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. 101(2). The term “conditions other than dishonorable” is not a term of art in the military and was chosen by Congress in 1944 to provide VA some discretion with respect to setting the standard for Veteran status and benefits eligibility of former SMs. <i>Garvey v. Wilkie</i>, 972 F.3d 1333, 1337, 1339 (Fed. Cir. 2020). In October 1946, VA codified 38 CFR 2.1064, which reiterated that, for a former SM to obtain benefits, the SM must have been terminated under conditions “other than dishonorable.” VA provided that “dishonorable” discharges included those due to (1) mutiny; (2) spying; or (3) an offense involving moral turpitude or willful and persistent misconduct (terms that originated in Public Law 68–242, section 23, 43 Stat. 613 (1924)). 38 CFR 2.1064(a). VA also considered dishonorable an undesirable discharge to escape trial by general court-martial (GCM) and a discharge due to homosexual acts. 38 CFR 2.1064(c), (d). VA further codified the “statutory bars” found in the Servicemen’s Readjustment Act of 1944, Public Law 78–346, section 300, 58 Stat. 284, which precluded benefits for a person who was (1) discharged or dismissed by GCM; (2) discharged for being a conscientious objector who refused to perform military duties, wear the uniform or comply with lawful orders of competent military authorities; (3) a deserter; or (4) as an officer who resigned for the good of the service. 38 CFR 2.1064(b).</p> <p>Since 1946, 38 CFR 2.1064 and its successors (most notably, current 38 CFR 3.12) have provided the criteria used by VA adjudicators for determining Veteran status and evaluating benefit eligibility for former SMs. Currently, there are six “statutory bars” to benefits for former SMs listed in 38 U.S.C. 5303(a) and reiterated in paragraph (c) of 38 CFR 3.12. In addition, currently, there are five “regulatory bars” to benefits listed in paragraph (d) of 38 CFR 3.12, which states that discharges based on the five listed offenses are “considered to have been issued under dishonorable conditions.” The last update to § 3.12(d) occurred in 1980, more than 40 years ago. The 1980 update provided</p> <p>examples of aggravated homosexual acts. 45 FR 2318 (Jan. 11, 1980).</p> <p>On July 10, 2020, VA published at 85 FR 41471 its proposal to amend its regulation governing COD determinations. Specifically, VA proposed to modify the regulatory standards for discharges considered “dishonorable” for VA benefit eligibility purposes, such as discharges due to “willful and persistent misconduct,” and “homosexual acts involving aggravating circumstances or other factors affecting the performance of duty.” VA also proposed to extend a “compelling circumstances” exception to certain regulatory bars to benefits to ensure consideration of all pertinent factors. In response to the proposed rule, over 70 comments were received. Given the “various and differing” comments received, VA issued a Request for Information (RFI) in September 2021. 86 FR 50513. Specifically, VA asked the public questions about the factors for consideration in a compelling circumstances analysis. Regarding willful and persistent misconduct, the RFI asked whether VA should define “serious misconduct”; whether VA should require misconduct to actually cause harm to person or property; and how VA should define persistence. VA asked about the proposed rule’s definition of moral turpitude. VA asked whether removing the regulatory bars would affect military order and discipline or denigrate others’ honorable service; and what specific changes could be made to the proposed rule to fairly adjudicate the benefits eligibility of historically disadvantaged and vulnerable populations.</p> <p>In response to the RFI, over 45 comments were received. In addition to the proposed rule and the RFI, in October 2021, VA held a two-day listening session to receive oral comments from any member of the public on the RFI questions. Transcripts from the listening session can be found at <a href="https://www.regulations.gov/docket/VA-2020-VBA-0018">https://www.regulations.gov/docket/VA-2020-VBA-0018</a>.</p> <p><b>II. VA’s Decision To Finalize the Proposed Rule With Modifications</b></p> <p>After extensive consideration of this issue and all the comments received, VA has decided to finalize the proposed rule with some modifications. This will expand VA benefits eligibility, bring</p>	

- [Effective June 25, 2024](#), VA updated 38 C.F.R. § 3.12 regarding character of discharge determinations.
- VA expanded exceptions to excuse a bar to benefits based upon an unfavorable character of discharge to three significant ways:
  1. Extended the compelling circumstances exception.
  2. Removed the regulatory bar to benefits based on discharges due to homosexual acts involving aggravating circumstances. (VA had not enforced this for years already)
  3. Redefined the definition of “willful and persistent misconduct.”

# Compelling Circumstances Exception

- VA will not pay benefits for Veterans who were involved in an offense involving moral turpitude or willful and persistent misconduct.
- The new rule applies a compelling circumstances exception to both of these categories.
- The factors to consider for compelling circumstances are:

## 38 C.F.R. § 3.12(e)

1. Length of character of service exclusive of the period of misconduct.
2. Reasons for misconduct, including:
  - (i) mental or cognitive impairment; (ii) physical health, (iii) combat-related or overseas-related hardship; (iv) sexual abuse/assault; (v) duress, coercion, or desperation; (vi) family obligations or comparable obligations; and (vii) age, education, cultural background, and judgmental authority
3. Whether a valid legal defense would have precluded a conviction for misconduct under the UCMJ.



# Willful and Persist Misconduct



- VA has also refined the definition of “willful and persistent misconduct” as follows:
  1. Instances of minor misconduct occurring within two years of each other are persistent;
  2. An instance of minor misconduct within two years of more serious misconduct is persistent; and
  3. Instances of more serious misconduct occurring within five years of each other are persistent.
- “Minor misconduct” is defined as misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial would not include a dishonorable discharge or confinement for more than one year if tried by general court-martial.



# Final Rule – Revisions to Rating the Digestive System

# Revisions to Rating Digestive Systems

- All revisions are effective May 19, 2024.
- VA said the overall intent was to create more objective criteria.
- Also added new DCs in line with current medical science.
- Revised most DCs to consider the impact of medication.
- Overall revisions are largely in line with prior ratings, with a few exceptions.

Federal Register / Vol. 89, No. 55 / Wednesday, March 20, 2024 / Rules and Regulations 19735

the safety of the ports and waterways. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition X-RAY based on the trajectory and forecasted storm conditions.

(3) *Port Condition YANKEE*. Affected ports and waterways are closed to all inbound vessel traffic. All oceangoing tank barges and their supporting tugs and all self-propelled oceangoing vessels over 500 GT must have departed the regulated area or received permission to remain in port. The COTP may require additional precautions to ensure the safety of the ports and waterways. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition YANKEE based on the trajectory and forecasted storm conditions.

(4) *Port Condition ZULU*. Cargo operations are suspended, except final preparations that are expressly permitted by the COTP as necessary to ensure the safety of the ports and facilities. Other than vessels designated by the COTP, no vessels may enter, transit, move, or anchor within the regulated area. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition ZULU based on the trajectory and forecasted storm conditions.

(5) *Port Condition RECOVERY*. Designated areas are closed to all vessels. Based on assessments of channel conditions, navigability concerns, and hazards to navigation, the COTP may permit vessel movements with restrictions. Restrictions may include, but are not limited to, preventing, or delaying vessel movements, imposing draft, speed, size, horsepower, daylight restrictions, or directing the use of specific routes. Vessels permitted to transit the regulated area shall comply with the lawful orders or directions given by the COTP or representative.

(6) *Notification*. The Coast Guard will provide notice of where, within the regulated area, a declared Port Condition is to be in effect, via Broadcast Notice to Mariners, Marine Safety Information Bulletins, or by on-scene representatives.

(7) *Exception*. This regulation does not apply to authorized law enforcement agencies operating within the regulated area.

Dated: March 14, 2024.  
**David E. O'Connell**,  
Captain, U.S. Coast Guard, Captain of the  
Port Sector Maryland-National Capital  
Region.  
[FR Doc. 2024-05803 Filed 3-19-24; 8:45 am]  
BILLING CODE 9110-04-P

**DEPARTMENT OF VETERANS AFFAIRS**  
**38 CFR Part 4**  
**RIN 2900-AQ90**

**Schedule for Rating Disabilities: The Digestive System**  
**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Final rule.

**SUMMARY:** This document amends the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD) by revising the portion of the schedule that addresses the Digestive System. The effect of this action is to ensure that the rating schedule uses current medical terminology and provides detailed and updated criteria for evaluation of digestive conditions for disability rating purposes.

**DATES:** This final rule is effective May 19, 2024.

**FOR FURTHER INFORMATION CONTACT:** Ulia Sokol, M.D., M.B.A., Medical Officer, Regulations Staff, (218A), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, 218VASRDPMO.VBACO@va.gov, (202) 461-9700. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:** On January 11, 2022, VA published in the *Federal Register* the proposed rule for Schedule of Rating Disabilities: The Digestive System. See 87 FR 1522. VA received 22 comments during the 60-day comment period, including from two Veterans Service Organizations (Paralyzed Veterans of America and The National Veterans Legal Services Program) and two Veterans advocacy groups (The National Organization of Veterans' Advocates, Inc. and The National Law School Veterans Clinic Consortium). VA appreciates the comments submitted in response to the proposed rule. Based on the rationale stated in the proposed rule and in this document, the proposed rule is adopted as a final rule with minor changes noted below.

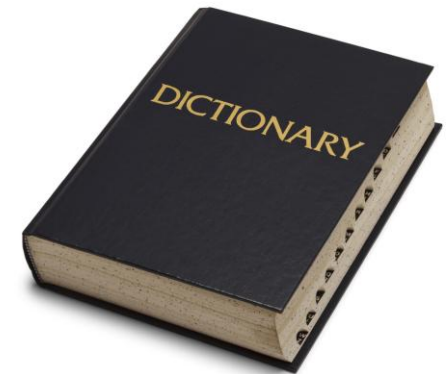
**Severability:** The provisions of the proposed rule are separate and severable from one another, and if any provision is stayed or determined to be invalid, the agency would intend that the remaining provisions continue in effect. VA has carefully considered the requirements of the proposed rule, both individually and in their totality, including their potential costs to the agency and benefit to veterans. In the event a court were to stay or invalidate one or more provisions of this rule as finalized, VA would want the remaining portions of the rule as finalized to remain in full force and legal effect.

**I. Comments of General Support**  
One commenter expressed support for utilizing "undernutrition" instead of "malnutrition" under 38 CFR 4.112. VA thanks this commenter for their input. Another commenter expressed support for the proposed rule because it provides more comprehensive evaluative criteria for those with assisted nutrition devices such as gastrostomy tubes, total parenteral nutrition (TPN) ports, and gastric stimulators. VA thanks this commenter for their support. One commenter expressed support for the change to DC 7326 for Crohn's disease because it comprehensively addresses the symptoms of this disease, its treatment modalities, and functional impairment caused by this disease. VA thanks this commenter for their support. While most commenters generally welcomed modernizing the rating schedule and recognized this effort as a thoroughly-researched undertaking, some commenters shared some concerns with VA. These concerns are addressed in the sections below.

**II. Comments Regarding Coexisting Abdominal Conditions Under § 4.114, Schedule of Ratings—Digestive System**  
Two commenters expressed concern regarding the prohibition of rating coexisting abdominal conditions under 38 CFR 4.113 and 4.114, stating they are too broad in scope. One commenter recommended VA should simply have rating specialists consider the anti-pyramiding principles set out in 38 CFR 4.14. The other commenter suggested that VA specifically reconsider adding the following diagnostic codes to the list of codes that cannot be combined with each other: DC 7303, chronic complications of upper gastrointestinal surgery, DC 7350, liver abscess, DC 7352, pancreas transplant, DC 7355, celiac disease, DC 7356, gastrointestinal dysmotility syndrome, and DC 7357, post pancreaticectomy. It was the commenter's opinion that this approach is restrictive and precludes the ability to maximize benefits for veterans.

# New Definitions

- VA gave new, objective, definitions for several terms used in rating digestive systems:
- **Substantial weight loss:** involuntary loss greater than 20% of baseline weight sustained for three months with diminished quality of self-care or work tasks.
  - Minor weight loss is between 10% and 20%.
- **Baseline weight:**
  - Average weight for two years prior to onset of illness, weight at discharge, or to estimate ideal body weight using the Hamwi formula or BMI table.
- **Total parenteral nutritional support (TPN)**
  - Liquid mixture given directly into blood; bypasses normal digestion
- **Assisted Enteral Nutritional Support**
  - Liquid mixture delivered into the stomach through feeding tube.



# Question: Most Common Digestive Disability

What do you think is the most commonly service-connected disability of the digestive system?

- A. Hemorrhoids**
- B. Hiatal Hernia**
- C. Irritable Bowel Syndrome (IBS)**
- D. None of these**



# Answer – Hiatal Hernia

## B. Hiatal Hernia

Digestive	Hiatal hernia	488,655	34.2%
	Hemorrhoids	313,256	21.9%
	Irritable bowel syndrome	232,738	16.3%
Total most prevalent digestive disabilities		1,034,649	72.4%
All digestive disabilities		1,430,032	

- From [VBA's Annual Report for 2023](#)
- Gastroesophageal reflux disease (GERD) is currently rated by analogy as hiatal hernia.

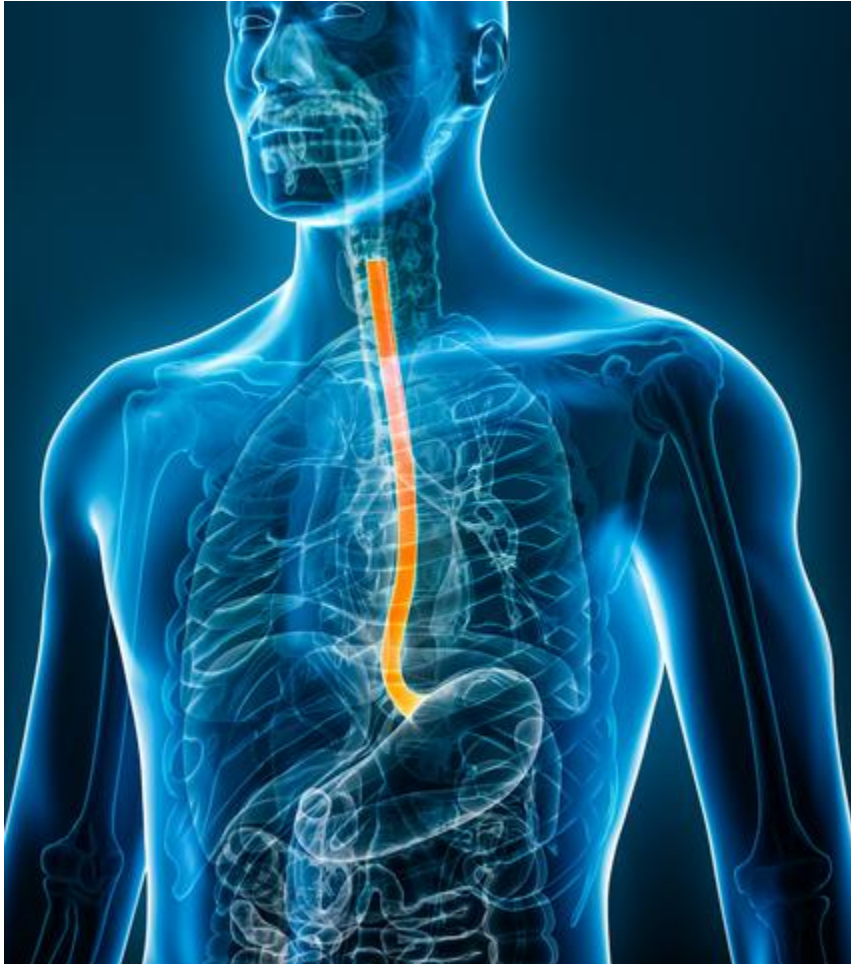
# New DC for GERD - 7206

- 10% for daily medication to control.
- Higher ratings for documented history of recurrent or refractory esophageal stricture causing dysphagia (difficulty swallowing) requiring escalating medical treatment.
- New max 80% if results in aspiration, undernutrition, or substantial weight loss.
- No longer rates based on symptoms of heartburn, etc.
  - **Suspect this will result in lower ratings overall.**

7206 Gastroesophageal reflux disease:	
Documented history of recurrent or refractory esophageal stricture(s) causing dysphagia with at least one of the symptoms present: (1) aspiration, (2) undernutrition, and/or (3) substantial weight loss as defined by § 4.112(a) and treatment with either surgical correction of esophageal stricture(s) or percutaneous esophago-gastrointestinal tube (PEG tube)	80
Documented history of recurrent or refractory esophageal stricture(s) causing dysphagia which requires at least one of the following (1) dilatation 3 or more times per year, (2) dilatation using steroids at least one time per year, or (3) esophageal stent placement	50
Documented history of recurrent esophageal stricture(s) causing dysphagia which requires dilatation no more than 2 times per year	30
Documented history of esophageal stricture(s) that requires daily medications to control dysphagia otherwise asymptomatic	10
Documented history without daily symptoms or requirement for daily medications	0



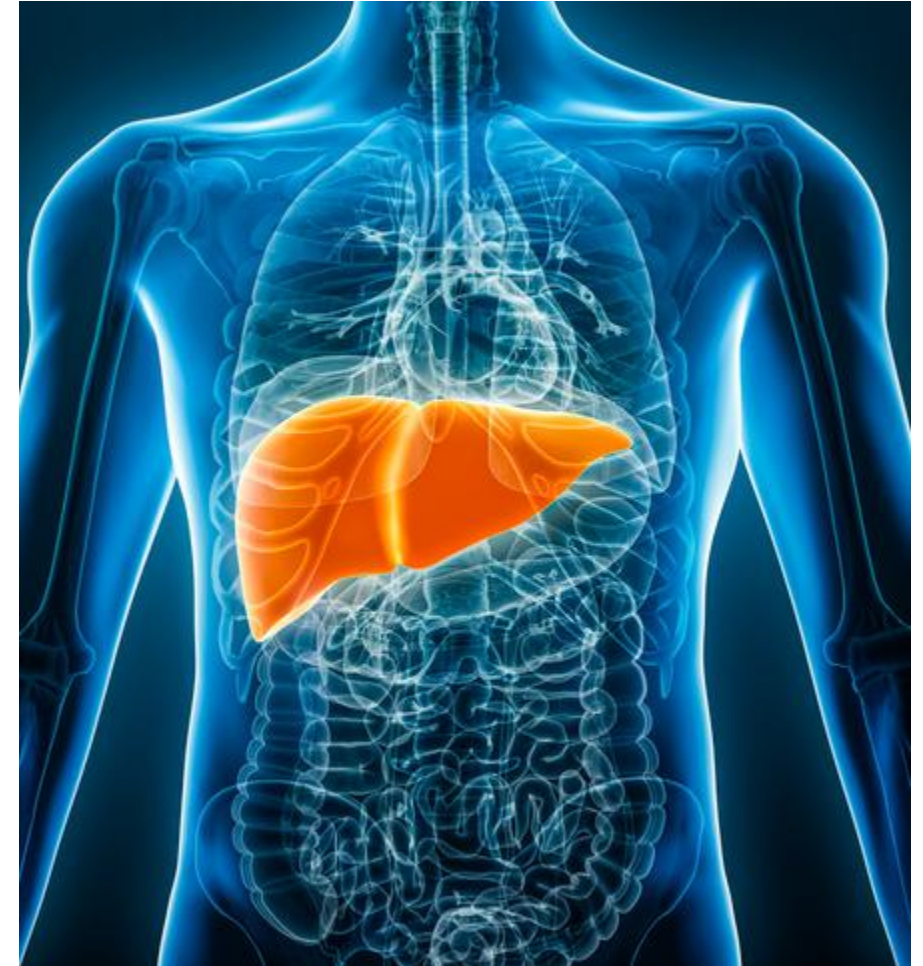
# Other New DCs



- New 7207 for Barrett's Esophagus.
  - VA says intent is to "evaluate Barrett's esophagus based on its progression toward cancer."
- New 7303 for Complications of Upper GI Surgery
  - Includes bariatric surgery.
- New 7355 for Celiac Disease
  - Requires medically prescribed gluten-free diet for 30% minimum rating.

# Notable Revisions to DCs

- Ulcers
  - VA previously rated by location, now will rate all ulcers using DC 7304 for Peptic Ulcer disease.
- Hernia
  - Also revised to rate almost all hernia under DC 7338, except for hiatal hernia which is rated under DC 7346.
- Irritable Bowel Syndrome (IBS)
  - Renamed DC 7319 for IBS and added more objective criteria.
- Liver transplant
  - Added new 60% minimum rating if eligible and awaiting transplant surgery.



# New Gastrointestinal Dysmotility Syndrome

- VA created a new DC 7356 for Gastrointestinal Dysmotility Syndrome
- “A new code to evaluate and track a group of gastrointestinal conditions characterized by chronic or recurrent symptoms that are unexplained by any structural, endoscopic, laboratory, or other objective signs of injury or disease.”
  - Essentially a new DC for Gulf War Syndrome related functional GI disorders.

7356	Gastrointestinal dysmotility syndrome:	
	Requiring complete dependence on total parenteral nutrition (TPN) or continuous tube feeding for nutritional support .....	80
	Requiring intermittent tube feeding for nutritional support; with recurrent emergency treatment for episodes of intestinal obstruction or regurgitation due to poor gastric emptying, abdominal pain, recurrent nausea, or recurrent vomiting .....	50
	With symptoms of chronic intestinal pseudo-obstruction (CIPO) or symptoms of intestinal motility disorder, including but not limited to, abdominal pain, bloating, feeling of epigastric fullness, dyspepsia, nausea and vomiting, regurgitation, constipation, and diarrhea, managed by ambulatory care; and requiring prescribed dietary management or manipulation .....	30
	Intermittent abdominal pain with epigastric fullness associated with bloating; and without evidence of a structural gastrointestinal disease .....	10

# VASRD Status Update

Final Rule Published
Final Rule Drafting
Proposed Rule Drafting

BODY SYSTEM	PROPOSED RULE	FINAL RULE	STATUS
Dental and Oral	07/28/15	08/03/17	Finalized
Eye	06/09/15	08/10/18	Finalized
Gynecological Conditions/Breast	02/27/15	05/09/18	Finalized
Endocrine	07/08/15	11/02/17	Finalized
Skin	08/12/16	07/13/18	Finalized
Hematologic and Lymphatic	08/06/15	10/29/18	Finalized
Infectious Diseases, Immune Disorders/ Nutritional Deficiencies	02/05/19	06/18/19	Finalized
Musculoskeletal	08/01/17	11/30/20	Finalized
Genitourinary	10/15/19	09/30/21	Finalized
Cardiovascular	08/01/19	09/30/21	Finalized
BODY SYSTEM	PROPOSED RULE/*ESTIMATED PROPOSED RULE PUBLICATION DATE	ESTIMATED FINAL RULE PUBLICATION DATE	STATUS
Digestive	01/11/22	May 2024	Final Rule in Veterans Benefits Administration (VBA) concurrence
Respiratory/Ear Nose Throat (ENT)/Audio	02/15/22	August 2024	Final Rule in VBA concurrence
Mental Disorders	02/15/22	August 2024	Final Rule in VBA concurrence
Neurological	*May 2024	TBD:2025	Proposed Rule recently cleared concurrence with VA Office of General Counsel

From VA  
in March  
2024.



# Final Rule – New Burn Pit Presumptive Diseases

# New Burn Pit Presumptives

- The PACT Act of 2022 gave VA authority to add new disabilities to the Burn Pit presumptives.
- In January 2025, VA used this authority to add the following disabilities:
  - Urinary bladder, ureter, and related genitourinary cancers effective January 2, 2025.
  - Acute leukemias, chronic leukemias, multiple myelomas, myelodysplastic syndromes, and myelofibrosis effective January 10, 2025.







# **Process: Evaluation of C&P Examinations**

# Learning Objectives

Learn about VA Compensation and Pension (C&P) examinations and common issues with VA exams.

- Learn about the purpose and use of **C&P nexus exams**.
- Learn about the purpose and use of **C&P rating exams**.
- Learn about common **problems with C&P exams** and strategies for avoiding them.

# Exams and VA's Duty to Assist

VA's Duty to Assist includes providing an **adequate** C&P examination.

- Once VA takes the effort to provide a C&P examination, then the exam must be adequate.
- Whether or not an examination is adequate can be a complicated legal and factual question that will depend on the specific facts of a Veteran's case.



# C&P Nexus Exams



The purpose of a VA C&P ***nexus examination*** is to determine if a Veteran's disability is related to their military service.

- Many Veterans are unable to obtain a private nexus opinion to support their claims, so a VA nexus opinion becomes a vital piece of evidence.

VA decides the majority of claims using nexus opinions, even though there is no strict legal requirement for it.

# Reviewing Nexus Exams



- VA examiners are expert witnesses who provide medical opinions.
  - Is the examiner informed of ***sufficient facts***?
  - Is the opinion supported by ***sufficient reasoning***?
- The final decision on a claim must be made by the VA rater or the Board, ***not*** the examiner.



# Issues with Nexus Exams

- Errors of fact – an opinion based on incorrect facts has no value.
- Errors of reasoning – the examiner must provide the essential rationale for their opinion.
- The failure to provide an adequate exam is a duty to assist error by VA.



**An effective argument identifies and corrects VA's specific problems.**

# C&P Rating Exams



The purpose of a VA C&P rating exam is to confirm the existence and determine the severity of the Veteran's disability.

- VA's criteria for rating disabilities may be:
  - **Objective:** uses a clear standard.
  - **Subjective:** fuzzy or debatable.

**Advocacy Tip:** Knowing the applicable VA standard helps you identify the relevant information for the VA rater.

# Reviewing Rating Exams

- Examiners should consider the Veteran's ability to function under the ordinary conditions of daily life.
  - At work.
  - At home.



# Disability Benefits Questionnaires

- VA exams use VA's Disability Benefits Questionnaires (DBQs) to describe symptoms used to rate a service-connected disability.
- VA DBQs exist to maximize VA automation, not maximize benefits.
- Frequently, an accurate rating requires additional information.

DBQs often do not capture the detailed information necessary to for VA to accurately rate conditions under subjective standards.

**SECTION I - DIAGNOSIS**

DOES THE VETERAN HAVE OR HAS HE OR SHE EVER HAD SLEEP APNEA? ☐ YES ☐ NO

**NOTE:** The diagnosis of sleep apnea must be confirmed by a sleep study; provide sleep study results in Diagnostic testing section. If other respiratory condition is diagnosed, complete the Respiratory and/or Narcology Questionnaire(s) in lieu of this one.

**IF YES, PROVIDE ONLY DIAGNOSES THAT PERTAIN TO SLEEP APNEA AND CHECK DIAGNOSTIC TYPE:**

DIAGNOSTIC TYPE	ICD Code	Date of diagnosis
<input type="checkbox"/> OBSTRUCTIVE		
<input type="checkbox"/> CENTRAL		
<input type="checkbox"/> MIXED, COMPONENTS OF BOTH		
<input type="checkbox"/> OTHER SLEEP DISORDER (specify):		

**IF THERE ARE ADDITIONAL DIAGNOSES THAT PERTAIN TO A DIAGNOSIS OF SLEEP APNEA, LIST USING ABOVE FORMAT:**

**SECTION II - MEDICAL HISTORY**

2A. DESCRIBE THE HISTORY (including onset and course) OF THE VETERAN'S SLEEP DISORDER CONDITION (brief summary):

2B. IS CONTINUOUS MEDICATION REQUIRED FOR CONTROL OF A SLEEP DISORDER CONDITION?  
☐ YES ☐ NO (If "Yes," list only those medications required for the veteran's sleep disorder condition):

2C. DOES THE VETERAN REQUIRE THE USE OF A BREATHING ASSISTANCE DEVICE SUCH AS A CONTINUOUS POSITIVE AIRWAY PRESSURE (CPAP) MACHINE?  
☐ YES ☐ NO

**SECTION III - FINDINGS, SIGNS AND SYMPTOMS**

DOES THE VETERAN CURRENTLY HAVE ANY FINDINGS, SIGNS OR SYMPTOMS ATTRIBUTABLE TO SLEEP APNEA?  
☐ YES ☐ NO (If "Yes," check all that apply):

<input type="checkbox"/> Persistent daytime hypersomnolence	<input type="checkbox"/> Cor pulmonale
<input type="checkbox"/> Carbon dioxide retention	<input type="checkbox"/> Requires tracheostomy
<input type="checkbox"/> Chronic respiratory failure	
<input type="checkbox"/> Other, describe:	

**SECTION IV - OTHER PERTINENT PHYSICAL FINDINGS, COMPLICATIONS, CONDITIONS, SIGNS AND/OR SYMPTOMS**

4A. DOES THE VETERAN HAVE ANY OTHER PERTINENT PHYSICAL FINDINGS, COMPLICATIONS, CONDITIONS, SIGNS OR SYMPTOMS RELATED TO ANY CONDITIONS LISTED IN THE DIAGNOSIS SECTION ABOVE?  
☐ YES ☐ NO  
IF YES, DESCRIBE (brief summary):

4B. DOES THE VETERAN HAVE ANY SCARS (surgical or otherwise) RELATED TO ANY CONDITIONS OR TO THE TREATMENT OF ANY CONDITIONS LISTED IN THE DIAGNOSIS SECTION ABOVE?  
☐ YES ☐ NO

IF YES, ARE ANY OF THESE SCARS PAINFUL OR UNSTABLE; HAVE A TOTAL AREA EQUAL TO OR GREATER THAN 30 SQUARE CM (6 square inches); OR ARE LOCATED ON THE HEAD, FACE OR NECK?  
☐ YES ☐ NO

IF YES, ALSO COMPLETE VA FORM 21-686F-1, SCARS/DISFIGUREMENT.  
IF NO, PROVIDE LOCATION AND MEASUREMENTS OF SCAR IN CENTIMETERS.  
LOCATION: \_\_\_\_\_ MEASUREMENTS: length \_\_\_\_\_ cm X width \_\_\_\_\_ cm.

**NOTE:** An "unstable scar" is one where, for any reason, there is frequent loss of covering of the skin over the scar. If there are multiple scars, enter additional locations and measurements in Comment section below. It is not necessary to also complete a Scars DBQ.

4C. COMMENTS, IF ANY:

Sleep Apnea Conditions Disability Benefits Questionnaire  
Released January 2022

Updated on: December 2, 2020 -v28\_2  
Page 2 of 3



# Issues with Rating Exams



- Missing / overlooked information
- Incomplete / misleading information
- Inaccurate information

**Advocacy Tip:** Submit evidence to VA and try to avoid these VA exam issues before they occur.

# Predicting Common Issues

- VA exams might suffer from one of two errors:
  - Mistakes of facts.
  - Mistakes of reasoning.
- You can help the Veteran by preparing evidence to avoid these kinds of errors.





# Errors of Fact

- An examiner's nexus opinion or description of the Veteran's disability must be based on the correct facts.
- A medical opinion based on inaccurate facts has no probative value. *See Reonal v. Brown*, 5 Vet.App. 458 (1993).
- Prepare lay statements or collect medical evidence that describes:
  - The Veteran's in-service accident, injury, or incident (nexus).
  - The onset and/or history of the Veteran's symptoms over time (nexus and rating).
  - The frequency, severity, and duration of the Veteran's symptoms (rating).

# Question 1

Navy Veteran Reginald filed a claim for service connection for a left shoulder condition. He submitted a statement explaining that he hurt his shoulder when he was helping to lower a heavy hatch and the other sailor dropped his side. This stretched the muscles and tendons in Reginald's shoulder. Reginald periodically sought shoulder treatment in the years after service. Service treatment records do not document this injury. VA obtained a medical opinion that recorded Reginald's statements in the medical history section but provided a negative nexus opinion because "there was no objective evidence of residuals within one year after separation." Do you think the doctor's opinion is adequate?

- A. YES, because the doctor recorded Reginald's statements in the medical history.**
- B. NO, because the doctor failed to apply the presumption of soundness.**
- C. YES, because the claim is not corroborated by objective medical evidence.**
- D. NO, because the doctor relied on the "objective" evidence without mentioning the Veteran's statements in the analysis.**



# Answer 1

**D. NO, because the doctor relied on the "objective" evidence without mentioning the Veteran's statements in the analysis.**

- These are the facts of *Smith v. Wilkie*, 32 Vet.App. 332 (2020).
- The CAVC held that a medical opinion that states that it is relying on the "objective" evidence and lack of records to justify its conclusion cannot be assumed to have considered a Veteran's lay statements.

**Advocacy Tip:** Always check to see if the analysis in a VA medical opinion addresses the Veteran's lay statements.

# In-Service Incidents

- Information to consider includes:
  - What happened?
  - When and where did it happen?
  - How was the Veteran injured or exposed to toxins?
  - Did the Veteran receive treatment? When? Where?
  - If the Veteran did not receive treatment, why not?
  - Did the Veteran have symptoms after the incident?
- Evidence can include service records, medical records, pictures, prescriptions, and/or lay statements.

**Advocacy Tip:** Use a Statement in Support of Claim, VA Form 21-4138 to maximize the chance that the statement will not be overlooked.

# Descriptions of Symptoms



- Remember: include key evidence about the Veteran's history of symptoms over time.
- This information goes to both nexus and the rating for a disability.
- Focus on:
  - Frequency,
  - Severity, and
  - Duration of symptoms.

# Gaps in Medical Care

- VA examiners often hold the fact that a Veteran did not seek medical treatment against him or her. Can the Veteran explain why he or she did not seek medical care?
- Lack of medical insurance coverage?
- Too busy with work and/or family?
- Veteran did not think condition was serious – many people seek medical care only after a spouse insists on it.
- Why did the Veteran mention some medical problems to doctors but not others?





# Information about Flare-ups



- For rating issues, information about flare-ups is often overlooked by examiners:
  - Frequency: how often do the flares occur?
  - Duration: how long do the flares last?
  - Severity: what are the symptoms during a flare?
- If the Veteran is not experiencing a flare-up during an exam, a good VA C&P examiner will address the Veteran's statements.

# Question 2

Veteran Moses is service connected for a right knee problem, and he has submitted a claim for an increased rating. He says that during flare-ups his knee is weaker and more unstable. He attends a contract examination, and the contract examiner says this about Moses' flare-ups: "The veteran says that during a flare his knee is weaker and feels unstable. These functional limitations are not productive of a quantitative reduction in range of motion of the right knee during a flare." Do you think the doctor's statement about flare-ups is adequate?

- A. YES, because the examiner is presumed to be competent.**
- B. NO, because the examiner failed to discuss service medical records.**
- C. YES, because the examiner explained why the symptoms did not cause loss of range of motion.**
- D. NO, because the examiner failed to describe additional functional loss in terms of additional loss of range of motion.**



# Answer 2

**C. YES, because the examiner explained why the symptoms did not cause loss of range of motion.**

- This is a tough case that goes ***against*** the Veteran. *Norman v. McDonald*, No. 20-1605 (2021).
- The examiner stated that there was no additional loss of range of motion during a flare-up. The Court reasoned that the examiner provided an adequate explanation for this by discussing the Veteran's actual symptoms.

**Advocacy Tip:** Ensure that the Veteran fully describes all additional functional loss during a flare-up.

# Errors of Reasoning

- It's harder to avoid errors of reasoning, as a VA examiner will render an independent opinion.
- **Minimize** the possibility for VA errors:
  - Be clear to VA about the Veteran's theory of entitlement.
  - Be clear to VA about the Veteran's personal history – inconsistent statements can hurt the Veteran's claim.
  - Submit supporting medical studies and articles to VA as soon as possible.
- Give the examiner fewer chances to misunderstand the Veteran's claim.



# Question 3

Veteran Samantha is seeking service connection for PTSD. She sees a VA counselor for treatment, and a VA psychologist had diagnosed her with PTSD. She attended a contract examination for her claim, and you review the report on VBMS. The contract doctor stated that she did not have PTSD. The doctor noted the diagnosis from the VA doctor but stated that Samantha did not meet the criteria for a PTSD diagnosis. Do you think the doctor's opinion is adequate?

- A. YES, because the doctor addressed the VA psychologist report.**
- B. NO, because the doctor failed to explain how Samantha did not meet the criteria for PTSD.**
- C. YES, because the doctor used the correct DBQ form.**
- D. NO, because the examination was not performed by a VA doctor.**



# Answer 3

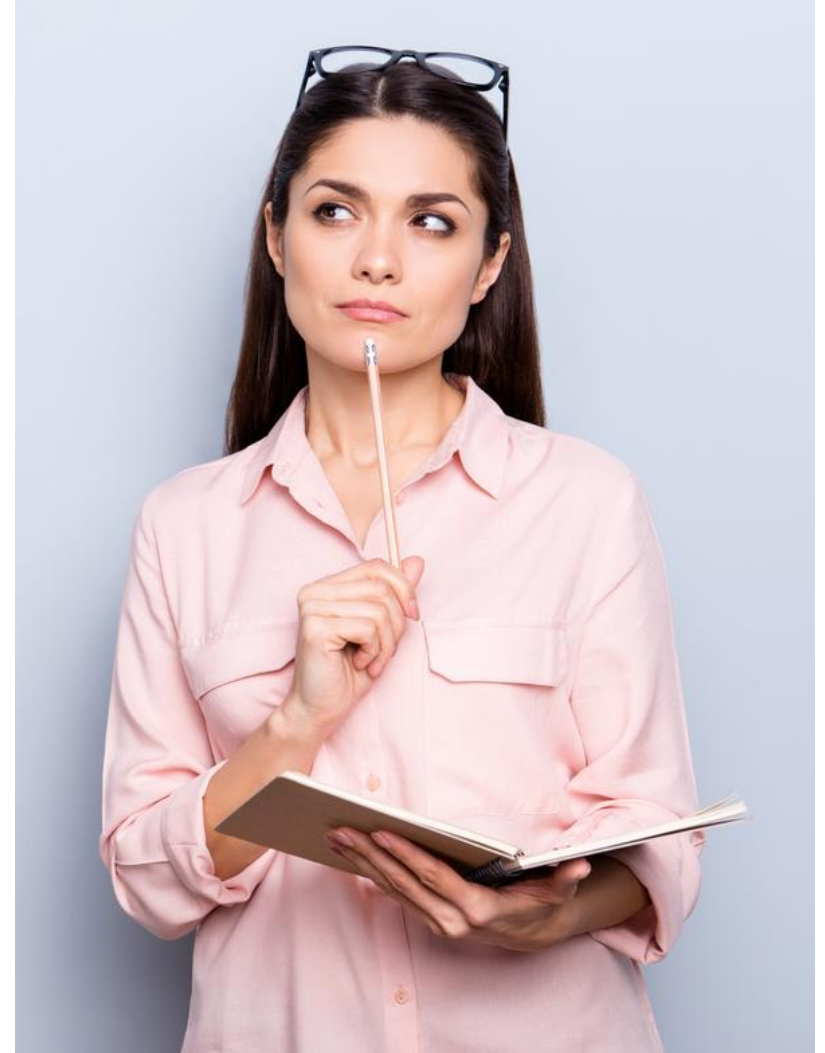
**B. NO, because the doctor failed to explain how Samantha did not meet the criteria for PTSD.**

- This comes from a Court decision, *Ross v. McDonough*, No. 20-7369 (2022).
- The Court said that the opinion was not adequate because the examiner listed facts (the Veteran's medical history) and made a conclusion (she did not have PTSD), but the examiner failed to give a reasoned medical explanation between the two.
- PTSD examinations usually only provide checkboxes for diagnostic criteria. A new VA exam will have to provide a more detailed explanation about the Veteran's symptoms.



# Dealing with Inadequate Exams

- You often won't know if an exam is inadequate until you review VA's rating decision for each condition.
- If possible, carefully read the Veteran's claim file after the exam and review the C&P exam report before VA issues a rating decision.
- Avenues for dispute will depend on if the Veteran needs to submit additional evidence.



- This presentation is complete.
- A PDF version of these slides will be provided to you at the conclusion of the course for future reference.