

TRAINING MODULE 17

Study Plan Appellate Processing

Objective:

To learn how to assist a claimant to appeal the denial of a VA benefit, and to become familiar with the procedures for such actions, including submitting appeals to the U.S. Court of Appeals for Veterans Claims.

References:

Title 38, U.S. Code, Chapters 59, 71 and 72.

38 Code of Federal Regulations, Part 3, §§ 3.102–3.105 and § 3.2600; Parts 19 and 20.

Adjudication Manual M21-1MR, Part 1, Chapter 5.

VA Pamphlets: 01-00-1, *Understanding the Appeal Process*;

01-02-02A, *How Do I Appeal?*;

80-05-1, *Federal Benefits for Veterans and Dependents*.

Instructions:

Study the assigned reference materials to learn how to submit a timely and proper Notice of Disagreement and Substantive Appeal, and how to advise claimant on the correct procedures and assist with the proper development and presentation of the claim.

Summary:

Any unfavorable adjudicative decision by the Department of Veterans Affairs (VA) may be appealed to the Board of Veterans Appeals, and if the denial continues, to the U.S. Court of Appeals for Veterans Claims (previously called the Court of Veterans Appeals). An adjudicative decision is one which establishes or denies eligibility to a VA benefit, such as service connection for a disability, eligibility for dental treatment, monthly rate of education assistance, waiver of overpayment, etc. A professional decision that a veteran should be given one type of medical treatment rather than some other is not an *adjudicative* decision, and is not appealable through these channels.

An appeal is defined as a timely filed written Notice of Disagreement from a VA decision and, after a Statement of the Case has been furnished, a timely filed Substantive Appeal. A claimant generally has one year from the date of the letter notifying him or her of the denial of a benefit to submit a Notice of Disagreement; otherwise, that decision becomes final. The only requirements for a Notice of Disagreement are that it must be in writing, it must be addressed to the activity or operating element of VA which made the adverse decision, and it must be worded so it may reasonably be construed as a desire for appellate review. It is not necessary to say why the claimant is dissatisfied or to make any specific contentions on the Notice of Disagreement. If multiple issues were decided and the claimant disagrees with some but not all of the decisions, the Notice of Disagreement should specify which decisions are being contested. If it is not clear which decisions are being disagreed with, the claimant may be asked to be more specific.

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There is a class of decisions which have a shorter appeal period. These are called "simultaneously contested claims," and involve cases where there are two or more claimants for a single set of benefits, and a grant of one claim necessarily means a denial of the other claim or a reduction in benefits for the other party.

Examples would be when there are two contending claimants, each claiming to be the veteran's legal surviving spouse; or when there is a claim by a dependent for an apportioned share of the veteran's (or other beneficiary's) award, and regardless of the outcome, the unsuccessful party contests the decision. In these cases, the unsuccessful claimant must submit a Notice of Disagreement within 60 days from the date of adverse notice; otherwise, that decision becomes final.

For certain Notices of Disagreement, the claimant and/or representative may request a *de novo* review of the decision by a local Decision Review Officer (DRO) as a first step in the appeal process. This procedure is generally restricted to those issues governed by 38 CFR, Part 3 (primarily Compensation and Pension claims; although issues governed by Part 3 which affect eligibility for other benefits, such as character of discharge, minimum active duty service requirements, recognition of dependents, etc., are also included).

To obtain a DRO review, the claimant and/or representative must request it. When a claimant and/or representative submits a Notice of Disagreement and does not specify if DRO review is desired, VA is required to ask the claimant whether he or she wishes such review. The claimant is allowed 60 days to respond. This 60-day period may not be extended. If the claimant or representative does not request DRO review within 60 days after the date VA mails notice of eligibility for such review, the Notice of Disagreement will be processed in the traditional manner, as described below. Only one DRO review is allowed for each issue being contested.

If a DRO review is elected, the DRO will review the claim for correctness and reasonableness. If any additional development is indicated, the DRO will direct that it be done. If the claimant requests it, the DRO may also conduct either a formal hearing or an informal conference on the issue(s). If there is no additional evidence, the DRO may modify or reverse an unfavorable decision based on either a *de novo* review or on clear and unmistakable error. The DRO may not issue a decision less favorable to the claimant than the original (contested) decision, unless the original decision was clearly erroneous. If the DRO review results in anything less than a full grant of the benefit(s) being sought and the claimant or representative does not withdraw the Notice of Disagreement, appellate processing then proceeds in the usual manner, as described below.

For decisions not subject to DRO review, or if the claimant does not wish DRO review (or does not answer the letter asking if a DRO review is wanted), when a valid Notice of Disagreement is received the responsible VA activity, called the Agency of Original Jurisdiction (AOJ) is obliged to review and reconsider the decision for correctness and to determine if any further development is necessary, and if so, to do it. After this review, if the full benefit being sought is still not granted, VA will then furnish a Statement of the Case to the claimant and his or her representative (if any). If more than one VA element was involved in the unfavorable decision, the activity which notified the claimant of the denial has primary responsibility for the SOC.

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The SOC will contain a recitation of the evidence considered in the decision, a recitation of the laws and regulations applicable to the decision, a statement of the decision, and a discussion of the reasons and bases why the rules applied to this evidence did not permit the benefit being sought to be granted.

The claimant then has 60 days or the remainder of the one-year appeal period, whichever is later, to submit a Substantive Appeal (VA Form 9, *Appeal to the Board of Veterans' Appeals*, or the equivalent written statement) on the issue(s) covered; otherwise, the decision becomes final. **HOWEVER**, if the appealed issue is a simultaneously contested claim, the appealing party must submit the Substantive Appeal within 30 days from the date the Statement of the Case is furnished; if not, the appeal is not timely perfected and the decision becomes final.

A Supplemental Statement of the Case (SSOC) will be furnished if additional evidence is considered after the original SOC has been sent; if an amended decision has been made granting part but not all of the benefit(s) being sought; or if there was any material defect in the original SOC. The SSOC has the same elements as the original SOC. If the original appeal period had not expired when the additional evidence was considered, the claimant and representative (if any) will be furnished another VA Form 9 and allowed another 60 days (30 days for appeals on simultaneously contested claims) or to the end of the appeal period, whichever is later, for response. If additional issues are raised which were not covered in the original SOC, a new SOC (with another VA Form 9) will be issued regarding those additional issues. Return of this additional VA Form 9 is subject to the same time limits as the original Substantive Appeal.

The Substantive Appeal must make specific contentions relating to errors of fact or law made by VA in reaching the decision(s) being appealed. To the extent feasible, it should relate to specific points in the Statement(s) of the Case. The Board of Veterans' Appeals (BVA) may dismiss any appeal that does not make specific contentions; however, they will construe the record in a liberal manner to determine if the requirement has been met. Once the Substantive Appeal has been returned, the appeal has been "perfected," and the appellant is not required to take any further actions except to cooperate with any additional development deemed necessary.

The AOJ will again review the evidentiary record for completeness and to make sure that all due process requirements have been observed. If these reviews result in a SSOC, the appellant and representative (if any) will be given an additional 60 days to make any further response desired. However, once the Substantive Appeal on each issue has been submitted, any further response is optional and is not required to continue the appeal. If there is a representative, the representative will be invited to make a final argument. The AOJ will then certify that the appeal is ready for BVA review, and forward the complete record to them.

The appellant and representative (if any) will be notified when BVA receives the appeal, and will be allowed a period of up to 90 days to submit any additional evidence desired or to request a personal hearing (if not already done), or to request a change in representation. (Note that most veterans' service organizations have strict rules against accepting appointment as representative during an ongoing appeal.)

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BVA considers appeals in the order of receipt; however, an appeal may be moved to the head of the pending queue (advanced on the docket) if sufficient cause is shown. "Sufficient cause" would include terminal or serious illness of the appellant, advanced age of the appellant (over age 75), extreme financial hardship of the appellant, etc. Advancement on the docket must be requested in writing by either the appellant or the representative, and must state the reason(s) for the request.

If BVA determines that the appeal is not yet ready for review, they will remand it for additional development, observance of due process requirements, etc., as instructed. Under certain circumstances and depending on the specific evidence required, BVA may accomplish the additional development themselves without remanding the appeal:

If BVA determines that the case requires special expertise or involves complex legal issues, they may request an independent (from outside VA) expert medical opinion, or a legal opinion from VA General Counsel. Otherwise, the appeal must generally be remanded. Due to the large number of remanded appeals and the length of time many have been pending due to other workload issues, a separate Appeals Management Center (AMC) has been established for the sole purpose of handling remanded appeals.

When BVA concludes that the appeal is ready for review, they will proceed. Whether BVA's final decision grants the appeal or affirms the denial, the appellant and representative (if any) will be advised in writing of the decision. The notice will include a listing of the issue(s) considered; findings of fact and law; a recitation of the evidence considered; and the reasons and bases for the decision as to each issue. The notice will also include notice of appeal rights to the Court of Appeals for Veterans Claims, including instructions on where and how to file an appeal to the court and the time limit for filing the appeal.

Additional evidence may be submitted by or for the appellant at any point between the time VA first notifies the claimant of its decision and the time BVA notifies the appellant of their decision. ***Remember, however, that submission of additional evidence does NOT extend the time limits for initiating or completing an appeal.*** Since VA is required by law to review and reconsider all decisions for correctness and completeness before proceeding with appellate processing, it is always in the claimant's best interests to word a request for reconsideration as a Notice of Disagreement with intent to appeal if the denial is continued. The claimant's appellate rights must *always* be protected, and observing this procedure will help ensure that the appeal period will not inadvertently be allowed to expire without the claimant having the opportunity to have his or her claim reviewed.

After the appeal has been forwarded to BVA and the 90-day period has elapsed, any additional evidence submitted may not be reviewed by BVA until it has been first reviewed by the AOJ or AMC, unless the appellant or representative specifically waives such review. The waiver must be in writing and must accompany the evidence being submitted. If no waiver is given, BVA will remand the appeal for review of the additional evidence and preparation of a SSOC, if the claim remains denied or if less than all the benefits being sought are granted and the appellant does not withdraw the appeal.

An appellant may request a personal hearing before the BVA at any point in the appeal up to the time BVA issues its decision. The hearing may be held before the Board sitting in Washington, D.C.; before a traveling section of the Board at the Department of Veterans Affairs Regional Office; or by teleconference, with the claimant at a designated VA station and the Board member in Washington, D.C.

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Generally, an appellant will only be scheduled for a hearing once, unless good cause is shown why the hearing should be rescheduled or another hearing is required. As described above, the DRO may also conduct a personal hearing for eligible claimant at the VA Regional Office.

A Notice of Disagreement and a Substantive Appeal may be filed by the claimant or representative, by the claimant's next friend, or, if the claimant is under a disability by a court, by a fiduciary. Even if the claimant is under such disability, VA will still honor and act upon a Notice of Disagreement filed by the claimant if it is otherwise valid.

A Notice of Disagreement may be withdrawn in writing at any time prior to filing the Substantive Appeal, and a Substantive Appeal may be withdrawn in writing at any time before BVA promulgates its decision. Either the claimant or the representative may make the withdrawal. Withdrawal of a Notice of Disagreement or appeal as to any issue(s) does not preclude submitting another Notice of Disagreement on the same issue(s), provided the original one-year time limit to appeal the decision has not expired.

An appellant has 120 days from the date of the unfavorable BVA final decision to file an appeal to the U.S. Court of Appeals for Veterans Claims (CAVC). ***This appeal must be sent directly to the court, NOT to BVA or to any VA office.*** The time limit for filing may not be extended or waived. There is a filing fee, which may be waived. Only the appellant or representative may appeal a BVA decision to the court; the agency may not appeal.

The court may only consider the issues, evidence and arguments that BVA reviewed in its decision—no new evidence may be submitted and no new arguments or issues may be raised. The court will uphold BVA if there is any reasonable basis for its decision, unless the court finds an error of fact or law, or finds that BVA's decision was arbitrary and capricious. Either the appellant or VA may appeal the CAVC's decision to the U.S. Court of Appeals for the Federal Circuit, and if still unsuccessful, to the U.S. Supreme Court.

Even though a claimant is entitled to representation by the representative of his or her choice (including an attorney) throughout the entire claims and appeals process, *no fee may be charged* by the attorney or other representative until BVA has made a final decision denying the appeal. At that point, if the appellant wishes to continue pursuing the appeal to the CAVC, he or she may enter into a contingency fee agreement with an attorney for up to 20% of any retroactive benefits initially payable in the event of a favorable decision by the court. This fee agreement is subject to review for correctness and compliance with the law both by BVA and CAVC. If the appellant wins the appeal, the AOJ is responsible for withholding the amount payable to the attorney or other representative from the appellant's retroactive award. In no event may the payment for this purpose be withheld from any portion of any other benefits payable for any period after the date of the decision authorizing such award.

A claimant or representative may request reconsideration of a final BVA decision at any time upon allegation of clear and unmistakable error of fact or law (CUE); discovery of new and material evidence in the form of relevant service records; or allegation of fraud or misrepresentation of evidence which materially influenced the Board's decision. However, if an appeal is pending before the CAVC, BVA may not reconsider its decision unless the court gives it specific permission to do so.

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Study Questions:

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

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

2. Are there special requirements for a N.O.D.?
 - a. It must be in writing, and communicate a desire to appeal the decision.
 - b. It must contain detailed and specific allegations of errors of fact and/or law in the decision.
 - c. It must be submitted on a specific form.
 - d. All of the above

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

4. Any adjudicative decision as to eligibility for a VA benefit by any element of the Department of Veterans Affairs may be appealed.
 - a. True
 - b. False

5. What constitutes an appeal?
 - a. An N.O.D., a Statement of the Case, and a substantive appeal.
 - b. A written N.O.D., a Statement of the Case, and a substantive appeal.
 - c. A timely filed N.O.D., a Statement of the Case, and a written substantive appeal.
 - d. A timely filed written N.O.D., a Statement of the Case, and a timely filed written substantive appeal.

6. A claimant is allowed one personal hearing before BVA during the course of an appeal.
 - a. True
 - b. False

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7. After an initial decision has been made on a claim, submission of additional evidence extends the appeal period on the claim.
 - a. True
 - b. False
8. An appeal which does not allege specific errors of fact or law may be dismissed by BVA.
 - a. True
 - b. False
9. An appeal from a BVA decision must be filed with the U.S. Court of Appeals for Veterans Claims (CAVC) within:
 - a. 60 days after the date of the BVA decision.
 - b. 120 days after the date of the BVA decision.
 - c. Six months after the date of the BVA decision.
 - d. One year after the date of the BVA decision.
10. Following receipt of a Statement of the Case on a contested claim, the claimant must return the substantive appeal (VA Form 9) within what time period to complete the appeal.
 - a. 30 days
 - b. 60 days
 - c. The remainder of the one-year appeal period
 - d. B. or C., whichever is the longer time.
11. When a BVA decision is appealed to the CAVC, the claimant will be given the opportunity to submit any additional evidence desired and to raise any new issues that may have arisen since the BVA made its decision.
 - a. True
 - b. False
12. Where should an appeal to CAVC be sent?
 - a. To the Regional Office having the veteran's claims file.
 - b. To the Board of Veterans' Appeals.
 - c. To the Court of Appeals for Veterans Claims.
 - d. To the Federal Court for the veteran's state.
13. Since VA proceedings are non-adversarial in nature, a claimant may not be represented in them by an attorney unless an appeal is made to CAVC.
 - a. True
 - b. False

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NOTES: