

**TRAINING MODULE 3**  
**Study Plan**  
**DUTY TO ASSIST & CLAIM DEVELOPMENT**

**Objective:**

To learn the various classes and types of Compensation and Pension claims, and the extent and limitations of VA's duty to assist a claimant with his or her claim.

**References:**

Title 38, U.S. Code, Section 5103.

38 Code of Federal Regulations Part 3, §§ 3.1– 3.160.

Adjudication Manual M21-1, Part IV, Chapter 19; M21-1MR, Part I, Chapter 1.

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

**Instructions:**

Study the assigned reference materials to learn the basic initial requirements for the different types of claims. To distinguish between the DVA's and claimant's responsibilities in locating evidence from sources to support each claim. To give careful attention to the information listed in the initial application for benefits, as that will form the primary basis for development of the claim.

**Summary:**

**1. Background:**

Over the years VA's responsibility to assist its claimants has undergone many changes. Initially, there were no statutory definitions or instructions regarding duty to assist, but by tradition VA would assist any applicant who had status as a proper claimant to establish all aspects of his or her claim, in preparation for a decision on the merits of the claim. The only requirement was that there had to be "a reasonable probability of a valid claim." However, there were no definitions nor clear instructions as to what this phrase meant, or what the limits of assistance were. In general, VA would assist the veteran at every step of the claims procedure, although the degree of assistance provided tended to vary widely from time to time and place to place.

The situation changed radically with the passage of the Veterans' Judicial Review Act in 1988. In addition to establishing a Court of Veterans' Appeals (now the U.S. Court of Appeals for Veterans' Claims), the law added a new section 5107 to 38 US Code, which read in pertinent part: "...a person who submits a claim for benefits...shall have the burden of submitting evidence sufficient to justify a belief...that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim."

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Subsequently, a considerable body of case law grew up around the questions of the definition of a “well-grounded claim,” and whether VA could assist a claimant to develop evidence regarding the claim before the claim had been “well-grounded.” The court consistently ruled that VA could not assist claimants unless and until the claim was determined to be well-grounded. In *Morton v. West*, 12 Vet.App. 477 (1999), the court reiterated its position that VA had *no* authority to assist a claimant absent a well-grounded claim, and threatened VA with sanctions if the agency did not cease providing *any* assistance beyond verification of service and requesting service medical records before the claim was determined to be well-grounded.

The stated rationale for this position was that the well-grounded requirement served as a “gatekeeper,” weeding out those claims that were so lacking in merit that there was no possibility they could be allowed, and thus conserving scarce agency resources. In reality, however, the opposite result actually obtained—determining “well-groundedness” was in effect a secondary adjudication of the claim, separate and distinct from a decision on its merits. A finding that a claim was not well-grounded could be appealed, thus expending additional agency resources and causing a decision on the substantive issues in the claim to be even further delayed.

In response to the *Morton* decision, in November 2000 Congress passed the Veterans Claims Assistance Act of 2000 (VCAA). This Act repealed the “well-grounded” requirement for claims, restated VA’s duty to assist the claimant to develop all evidence pertinent to the claim, and required VA to inform the claimant at each step of the claims process as to what VA will do and what the claimant must do to develop evidence sufficient to determine the merits of the claim.

#### 2. Status of Claimant:

The VA claims process is a multi-step operation. Before the merits of a claim can be decided, several initial points must first be determined: (1) Does the claimant have status? (2) What kind of claim is being presented? and finally, (3) What are the issues being claimed?

An applicant is a person who *applies for* (a benefit); a claimant is a person who *claims* (a benefit). The difference between them is one of **status**. Persons with status for VA claims purposes are:

- Veterans;
- Spouses (or surviving spouses);
- Children;
- Parents.

An applicant must attain status as one or another of the above classes before he or she is a claimant. The definitions of a veteran, spouse, child, and parent are given in Training Module 2 and are set out in 38 CFR § 3.1 and elsewhere. Requirements for status as a veteran are listed in 38 CFR §§ 3.6 and 3.7; the evidence required for recognition as a spouse, child, or parent is listed in 38 CFR §§ 3.50–3.60 and §§ 3.204–3.212.

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In addition to the above, a recognized fiduciary for a minor, incompetent, or disabled claimant may present appropriate court or other documents to show parental or fiduciary status. A recognized fiduciary may submit any claim or statement, of any nature, on a claimant's behalf, just as if it were submitted by the claimant. [38 CFR, Part 13]

A claimant's authorized representative may present any standard power of attorney documentation (including VA Form 21-22, *Appointment of Veterans Service Organization as Claimant's Representative*) or, if an actual attorney or a claims agent, either a VA Form 22A, *Appointment of Attorney or Agent as Claimant's Representative*, or a statement of representation on the attorney's office letterhead stationery. There are limitations on the actions an authorized representative may take on a claimant's behalf—in general, a representative may not submit any claim or statement on the claimant's behalf if the claimant's signature is required to certify the information therein. Examples of this would include any original application for disability or death benefits, education benefits, health care benefits, etc., as well as eligibility verification reports (EVRs) for pension or parents' DIC, declarations of marital status (VA Form 21-686c), or financial status statements (VA Form 20-5655). [38 CFR §§ 14.626–14.634]

An applicant must establish status as a claimant by a fair preponderance of evidence—this means that the evidence for status is 50% + 1 in the applicant's favor. **At this point in the process there is NO resolution of reasonable doubt**—the evidence either establishes status or it does not. Further, **unless and until status is established there is NO duty to assist** the applicant (to establish status).

### 3. Types of Claims:

Once the question of status is resolved, the next step is to determine the type and nature of the claim. There are two general classes of claims: those where the veteran is alive, and those where the veteran is deceased. Within these two classes, there are claims for service-connected benefits and claims for nonservice-connected pension. Beyond that, claims are identified according to their type, as set out in 38 CFR § 3.160 and elsewhere. These types of claims are:

- a. **Informal claim**—any written communication or any action indicating an intent to file a claim for benefits. The communication or action may be from or by the claimant, an authorized representative, a member of Congress, or a person acting as next friend, and must reasonably identify the benefit being sought. Once an informal claim has been received or identified, VA must then furnish the claimant with a formal application, if one has not been previously filed; the claimant has one year from that date to return the application. [38 CFR § 3.155] Under certain circumstances, examination or treatment at a VA or uniformed services medical facility, or at a civilian facility under VA or TRICARE contract, may also constitute an informal claim. [38 CFR § 3.157(b)(1)]
- b. **Original claim**—the *very first claim* filed for a class of benefit (i.e., disability benefits or death benefits). An original claim is a formal claim, and *must* be filed on the form prescribed by the Secretary (VA Form 21-526 for disability claims; VA Form 21-534 for death claims from a surviving spouse and/or children; VA Form 21-535 for death claims from the veteran's parents). [38 CFR §§ 3.151(a), 3.152(a)]

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- c. Pending claim—a claim which is awaiting a decision, *or*, a claim on which a decision has been made but the decision is not yet final, either because the time limit for an appeal has not yet elapsed, or because an appeal was taken but the appellate authority has not yet rendered its final decision.
- d. Finally adjudicated claim—a claim on which a decision has been made, and either the claimant has allowed the specified period to pass without appeal, or, if an appeal was taken, the appellate authority has rendered a final decision. It does not matter if the claim was allowed or denied, although the term is most often used in the context of a denied claim.
- e. Reopened claim—a claim where the issue being claimed has been previously denied and such denial has the status of a finally adjudicated claim. To successfully reopen such a claim, the claimant must submit new and material evidence, and such evidence must raise a reasonable probability of a different outcome. [38 CFR § 3.156(a)] The claim may be either formal or informal.
- f. New claim—a non-original disability claim for a condition not previously claimed as service-connected. The claim may be either formal or informal.
- g. Claim for increase—a disability claim for a condition previously established as service-connected, which the veteran requests to have re-evaluated. Also, a disability, death or other claim where the beneficiary is claiming an additional benefit, such as special monthly pension for aid and attendance, or additional allowance because of a dependent.
- h. Special claim—a claim which does not fall under any of the basic categories listed above. The most common of these is a claim for revision of a final decision because of allegation of clear and unmistakable error of fact or law (CUE). [38 CFR § 3.105(a); §§ 20.1400–1411]

Another type of special claim is a simultaneously contested claim. This is a claim where there are two (or more) claimants for the same benefit, and if one person's claim is allowed the other person's claim must necessarily be denied or benefits reduced. The most common examples are: (1) Two claimants, each claiming to be the veteran's legal surviving spouse; and (2) A claim is made for an apportioned share of the veteran's (or other beneficiary's) benefit payments, but whatever the decision, the unsuccessful party contests it. The claim may be original or reopened, formal or informal. See Module 17 for additional information as to appeal periods and time limits for contested claims. [38 CFR §§ 19.100–19.102; 20.500–20.504]

#### 4. Issue Identification:

Although the terms are often used interchangeably, claims and issues are separate and distinct entities. It may help to remember that claims are comprised of issues—for example, an original claim may be for service connection for multiple conditions; each condition being claimed is a separate issue. The evaluation to be assigned for each service-connected condition established is another issue. The veteran might also be claiming additional compensation for dependents—another issue. In addition, the veteran may have also filed an application for Vocational Rehabilitation—yet another issue; and so on, and so on.

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In addition to adjudicating all issues claimed, VA is also required to adjudicate any issues noted in the record which would be to the claimant's advantage, even though not specifically claimed. Further, VA is required to adjudicate, or to at least consider, any and all issues raised, inferred, or implied by a liberal reading of the record or by the outcome of those issues which were specifically claimed.

The claimant is not required to state the basis for claiming any particular issue—it is VA's responsibility to determine whether eligibility and entitlement to benefits for that issue may be established on *any* basis, and if so, to identify the basis.

#### 5. Duty to Assist and Inform:

The requirements of the VCAA are set out in 38 USC 5103, and are expanded upon in 38 CFR § 3.159. In general, VA has a duty to assist a claimant in obtaining all relevant records, to provide medical examinations, and where appropriate for compensation claims, to obtain medical opinions.

Applications are placed into three categories:

- A complete application is one that is signed by the claimant, contains all required information to identify the claimant, to identify the veteran and verify his/her service data, to identify the claimant's relationship to the veteran (if applicable) and identify the nature and basis for the claim, and is accompanied by sufficient medical and other evidence to make a determination on the merits of the claim, although some further development for substantiation may still be required.
- A substantially complete application is one that contains at least the claimant's name, his or her relationship to the veteran (if applicable); sufficient service data to identify the veteran and verify the claimed service; the benefit being claimed and any medical condition(s) on which it is based; and is signed by the claimant. If the claim is for nonservice-connected pension or for parents' DIC, there must also be a statement of the claimant's family income.
- An incomplete application is one that is lacking in any of the parts for a substantially complete application.

If the application is "incomplete," VA is required to inform the claimant what evidence or information is needed to make the claim complete. In this case, there is no duty to assist until the claimant submits the required evidence or information. An incomplete application is considered to be an informal claim, and the claimant has one year from the date of the VA notice to make the claim complete.

If the application is "complete" or "substantially complete," the duty to assist and inform begins—VA is required to inform the claimant as to any additional information and/or medical or lay evidence that may be necessary to substantiate the claim. VA is further required to inform the claimant which information and evidence VA will obtain, and which information and evidence the claimant is responsible for obtaining.

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If additional information and/or evidence is requested from the claimant, the claimant must respond within thirty (30) days from the date of VA's request or VA may adjudicate the claim based on the information and evidence already of record. In such cases, however, if the claimant then provides the requested information and/or evidence at any time within one year from the date of VA's request, VA will readjudicate the claim as though the previous determination had not been made, unless the claimant has already initiated an appeal of the decision.

Finally, of course, VA is required to inform the claimant of the outcome of the claim (i.e., VA's decision to allow or deny the claim), and all associated appeal rights.

#### 6. Extent of duty to assist:

- a. VA will in *all* cases obtain service medical records, unless the claim is *only* for nonservice-connected pension.
- b. If the claimant provides sufficient information as to their whereabouts, VA will obtain any other records held by the government pertaining to the veteran's military service.
- c. If the claimant provides sufficient information to locate them, VA will obtain the veteran's VA medical records.
- d. If the claimant sufficiently identifies them, VA will obtain any other relevant records held by any Federal department or agency.
- e. If the claimant sufficiently identifies them and provides a valid release satisfactory to the custodian of such records, VA will request records on the claimant's behalf from any private or State or local government source.
- f. VA must make *every possible effort* to obtain relevant records held by any Federal department or agency, unless and until it is reasonably certain that the records do not exist or that continuing efforts to obtain them would be futile. This will generally require a statement from the custodian that the records no longer exist, or that they have been transferred elsewhere.
- g. VA must make *reasonable efforts* to obtain any other (non-Federal) records identified by the claimant as relevant to the claim. This will generally mean one request plus one follow-up request. If, after making reasonable efforts, VA is unable to obtain all of the relevant records, VA must notify the claimant that it has not been able to obtain the specific records sought, and describe any further actions to be taken.
- h. When there is a reasonable possibility that such medical information is necessary to properly decide the claim, VA must provide the claimant with a VA medical examination and/or obtain a medical opinion. However, if the claim is to reopen a previously finally adjudicated issue, a determination as to whether new and material evidence has been submitted must first be made.

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#### 7. Limits on duty to assist:

- a. There is no duty to assist an applicant attain status as a proper VA claimant.
- b. There is no duty to assist on an incomplete or an informal claim. However, there *is* a duty to inform the claimant what is needed to make the claim complete, or to provide the claimant with the prescribed form(s) for submitting a formal application.
- c. VA may not obtain any records on the claimant's behalf if a fee is charged for providing such records.
- d. There is no duty to assist if the claimant fails to cooperate by not providing sufficient information to identify and locate relevant records, or fails to supply acceptable authorizations for release of records so that VA can request them.
- e. After making reasonable efforts, if for any reason VA is unable to obtain non-Federal records identified by the claimant, it is the claimant's ultimate responsibility to obtain the records if he or she wishes to have them considered in the decision.
- f. VA is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim (e.g., the claim is inherently incredible, or there is no legal eligibility for the benefit being sought).
- g. Since it is based on the record that existed at the time of the disputed decision, there is no duty to assist on a claim of clear and unmistakable error (CUE). However, if the error was a denial of service connection there *may* be a duty to assist in obtaining evidence to support current and retroactive evaluations.
- h. Duty to assist ends when all of the identified evidence has been obtained, or when sufficient evidence has been obtained to support granting the benefit(s) being sought.

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#### Study Questions:

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

1. For VA benefits purposes, the terms "applicant" and "claimant" are synonymous.
  - a. True
  - b. False
  
2. VA has an absolute duty to assist any person applying for VA benefits to establish both status and eligibility to such benefits.
  - a. True
  - b. False
  
3. Under which of the following circumstances does VA *not* have a duty to assist?
  - a. The applicant is not a veteran, spouse, child, or parent.
  - b. An unsigned application is received from a veteran.
  - c. The veteran fails to sign an authorization for release of records from his private physician when requested by VA.
  - d. All of the above.
  
4. If the claimant describes them sufficiently to identify, VA must make every possible effort to locate and obtain records in the possession of government agencies at any level, unless and until it is determined that the records no longer exist, or that further attempts to obtain them would be futile.
  - a. True
  - b. False

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5. The veteran enlisted on May 15, 1975. He was discharged July 31, 1975 because of an injury during basic training that precluded further military service. He now submits a claim for nonservice-connected pension at age 50. He has been found disabled by reason of cancer by the Social Security Administration. He claims indigence and asks that VA schedule an examination to determine if he is in need of aid and attendance. Is VA required to provide assistance with the claim? Why?
  - a. Yes. The veteran served less than 90 days, but he was discharged for service-connected disability. He meets income and disability requirements for basic pension, so VA has a duty to provide a medical examination for aid and attendance.
  - b. No. The veteran did not serve during a wartime period, so there is no legal eligibility to pension. Without basic eligibility to the benefit being claimed, there is no duty to assist.
  
6. Same fact pattern as the previous question, except the veteran served in 1995 instead of 1975. VA now would be required to provide assistance by scheduling an examination?
  - a. True, for the reasons shown. 62
  - b. False, for the reasons shown.
  
7. A claimant is not required to specify the basis on which benefits are being claimed for a particular issue.
  - a. True
  - b. False

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8. When VA asks a claimant to provide evidence or information needed to decide a claim, the claimant is asked to submit such evidence or information within thirty (30) days. What action(s) will VA take if the claimant does not provide the requested evidence or information until six months later?
  - a. None—the claimant failed to provide the evidence or information requested within the specified time period, so the claim was adjudicated on the basis of the evidence already of record (if any). There is no basis for reopening the issue now except on appeal.
  - b. The claim is considered to be reopened, based on the receipt now of the evidence or information previously requested. If benefits are allowed, they may only be paid from the date the claim was reopened.
  - c. So long as the evidence or information is received within one year from the date VA requested it, the claim will be adjudicated from the beginning. If an unfavorable decision was made based on the evidence or information already of record, the claim will now be re-adjudicated as though the previous decision had not been made. If benefits are allowed, they will be paid from the date appropriate for the entire claim.
  - d. None of the above.
  
9. What is VA's duty to assist on a claim of clear and unmistakable error (CUE)?
  - a. The same as for any other claim—VA must help to obtain any and all relevant evidence identified.
  - b. Assistance is limited to obtaining only such evidence as would confirm that the previous decision was erroneous.
  - c. None—a claim for CUE is limited to the evidence of record at the time the decision was rendered. There is no additional development to be done, so there is no duty to assist.