


NVLSP

THE MODERNIZED VA REVIEW SYSTEM



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Agenda

- Initial matters
 - Background, applicability, RO hearings, types of claims, rating decisions
- Higher-level review
- Supplemental claim
- BVA appeal
- Other Issues
 - Switching review options, increased rating claims, CAR pilot, simultaneously contested claims


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INITIAL MATTERS


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Background

- 8/2017: The Veterans Appeals Improvement and Modernization Act of 2017 (AMA) became law
- 1/18/2019: VA published final rule
 - VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019)
- 2/19/2019: AMA went into effect


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Applicability

- Claims for which notice of decision provided by AOJ on or after 2/19/2019
 - “initial” decision on claim for a particular benefit
 - decision on reopened claim
 - decision denying CUE claim
 - Only HLR or BVA review of CUE denials permitted
- Claims in RAMP (opted in by 2/15/2019)


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Applicability

- “Legacy” opt-ins
 - W/in 60 days after SOC or SSOC issued on or after 2/19/2019
 - Use VA forms for new review/appeal options
 - Check “Opt In from SOC/SSOC”
 - W/in 1 yr of RD issued before 2/19/2019
 - Only supplemental claim option

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Applicability

- Other claims remain in “legacy” appeal system
 - Notice of decision issued prior to 2/19/2019
 - Claims currently in “legacy” appeals system
- VA running two different appeals systems until legacy claims are exhausted
 - ~28,000 legacy appeals at ROs (9/17/2022)
 - ~64,000 legacy appeals at BVA (9/11/2022)

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Type of Claims Under AMA

- VA claims that can be filed as of 2/19/2019:
 - Initial claim
 - Benefit not previously requested
 - Increased Rating
 - Supplemental claim
 - For benefit previously denied (replaces “reopened” claim)
 - CUE claim

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Regional Office Hearings

- Claimants entitled to RO hearing on any issue involved in a claim only **before** VA issues notice of a decision on:
 - initial claim
 - supplemental claim
- Submit request for RO hearing **in writing** if claimant wants to present testimony/evidence to VA in person

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Changes to Rating Decisions

- Decisions more detailed. Notice Letter + RD must include:
 - Issues adjudicated
 - Summary of evidence considered
 - Summary of applicable laws and regs
 - Favorable findings
 - Claim elements not met
 - Criteria to grant SC or next higher rating
 - How to obtain / access evidence considered
 - Review options


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Favorable Findings

- If VA (including BVA) makes a finding favorable to claimant, it is binding on all later adjudications unless there is “clear and unmistakable evidence” to rebut it
 - “Finding” is a conclusion by a VA adjudicator concerning the issue under review on:
 - A question of fact
 - An application of law to facts


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Favorable Findings

- Favorable finding rules only apply to claims subject to AMA, even if VA issued appellate decision on or after 2/19/2019
 - SOCs, SSOCs, and BVA decisions on legacy claims do not need to provide notice of favorable findings
 - Findings in these decisions that may be favorable are not binding on subsequent adjudicators
 - *Mattox v. McDonough*, 34 Vet. App. 61 (2021)


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3 Options to Challenge RO Decision

1. Higher-level review by RO/AOJ
2. Supplemental claim w/ new and “relevant” evidence
3. BVA appeal by filing NOD


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3 Options to Challenge RO Decision

- Claimant may choose different review “lane” for different “issues”
 - Issue = adjudication of a specific entitlement
 - Ex: SC for knee disability and SC for PTSD are different “issues”
 - Ex: Effective date and disability rating for SC knee disability are part of same “issue”


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3 Options to Challenge RO Decision

- Advocate should analyze issues separately to determine best option for each
- List each issue on the appropriate review/appeal form and file before deadline
 - Different review/appeal requests for different issues decided in same RD can be filed simultaneously or at different times

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3 Options to Challenge RO Decision

Main consideration in choosing type of review:


Which option gives the claimant the best chance of success at the earliest date?

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HIGHER-LEVEL REVIEW

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Option 1: Higher-Level Review

- De novo review by “experienced” AOJ adjudicator who did not participate in prior decision
- Can grant benefit based on:
 - Error in prior decision
 - Difference of opinion




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Option 1: Higher-Level Review

- Filing deadline: **1 year** from notice of AOJ decision
- VA Form 20-0996, Decision Review Request: Higher-Level Review
- Cannot file for denial of simultaneously contested claim


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Option 1: Higher-Level Review

- Conducted at Seattle or St. Pete DROC
 - May also occur at RO that handles claims requiring special processing
 - Different RO than made prior decision, but can request same RO


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Option 1: Higher-Level Review

- HLR cannot consider new evidence
 - Record limited to evidence of record as of date AOJ issued notice of decision under review


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Option 1: Higher-Level Review

- Evidence = Info with bearing on the validity of factual questions / elements of claim, such as:
 - Medical treatment records
 - Medical opinions
 - Medical treatises / studies
 - Lay statements about events, injuries, symptoms
 - Military records
 - SSA or other gov't records
 - Financial info


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Option 1: Higher-Level Review

- Evidence "constructively" in record
 - In VA control/custody, but not before adjudicator
 - Is relevant and reasonably connected to claim
 - Examples:
 - VA treatment record, if adjudicator has sufficient info to indicate that record exists and to locate it
 - Evidence received by VA, but not uploaded to VBMS
 - HLR will return case to VSR for consideration of evidence, unless max benefit can be granted


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Option 1: Higher-Level Review

- Max benefit =
 - Disability comp: highest schedular eval for issue
 - Ancillary benefits: granting of benefit sought
 - Pension/DIC: granting of highest benefit available

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Option 1: Higher-Level Review

- Advocacy advice:
 - Include statement with initial claim:

“The veteran receives ongoing medical care through the VA health care system for [claimed disability], including at [list facilities]. Please obtain an up-to-date copy of [his/her] VA treatment records from these facilities immediately prior to making a decision on this claim.”


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Option 1: Higher-Level Review

- Law ≠ Evidence
 - Statutes, regulations, caselaw, M21-1 provisions
- Argument ≠ Evidence
 - Attempt to persuade someone to a particular view or belief using reason or fact
 - Explanation of errors of fact or law in RD
 - Explanation of why law supports claim, based on the evidence (facts) of record at time of RD


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Option 1: Higher-Level Review

- HLR can consider written argument
 - “A claimant or representative may properly add, and the reviewer may properly consider, new argument to pinpoint or highlight VA’s potential misreading of facts, or its potential misapplication of law to the facts that the evidentiary record has already established.”
 - Manual M21-5, 5.4.d (change date Feb. 3, 2022)
- Submit on/with VAF 20-0996, if possible


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Option 1: Higher-Level Review

- Label as **“Argument for Consideration by Higher-Level Reviewer”**
- Only refer to evidence of record and relevant law
- Include the following intro:
 - This submission does not contain any new evidence in support of the veteran’s claim. It solely provides argument about why the regional office (RO) erred in denying the claim, and is based on only the evidence in the claims file at the time the RO issued notice of the decision being reviewed.


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Option 1: Higher-Level Review

- Informal conference
 - Can request on VAF 20-0996
 - VA will contact rep (or claimant) 2x by telephone to try to schedule
 - St. Pete DROC may send email or text msg w/ hyperlink to schedule conference
 - VSO may not be copied, so advise Vet to contact you before responding
 - Will be scheduled w/in 7 bus. days of contact
 - Conducted by telephone (usually)


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Option 1: Higher-Level Review

- Informal conference is not a “hearing”!
- Cannot supplement record with testimony / evidence
- Purpose is to ID errors of fact or law in prior decision


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Option 1: Higher-Level Review

- Advice for informal conference
 - Review claims file in advance and be ready to say precisely what is wrong with the rating decision
 - Prepare notes/outline for all arguments
 - Remember, you can only present argument, not new evidence
- Be prepared for the call at least 30 minutes prior to scheduled time


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Option 1: Higher-Level Review

- Duty to assist does not apply, but if HLR identifies DTA error committed by AOJ:
 - If max benefit can be granted, HLR ignores
 - If max benefit cannot be granted:
 - HLR returns claim to AOJ for expedited correction and readjudication
 - Evidence received after prior decision can be considered
 - Claim will not return to HLR unless claimant submits new request for HLR review of new decision


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Option 1: Higher-Level Review

- Effective date if claim granted: date of original claim (usually)
- If HLR continues denial, to preserve date of original claim as effective date for potential benefits, claimant has **1 year** to:
 - File supplemental claim, or
 - Appeal to BVA


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Option 1: Higher-Level Review 

- Pros:
 - More experienced adjudicator
 - Fast decision
 - 43 days on avg (as of 8/31/2022)
- Cons:
 - Can't submit new evidence




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Option 1: Higher-Level Review 


- When to choose HLR:
 - Evidence:
 - No new evidence needed, or
 - DTA error
 - Rating decision contained error of fact or law
 - Ex: RO missed key piece of evidence
 - Evidence nearly balanced

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SUPPLEMENTAL CLAIM


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Option 2: Supplemental Claim

- Supplemental claims can be filed to:
 - Continuously pursue a claim that was **denied in the past year** and preserve the effective date of the claim
 - 38 U.S.C. § 5104C(a)
 - Attempt to obtain benefits that were previously denied in a **VA decision that has become final**
 - Applies to past denials of claims for the same or a similar benefit on the same or a similar basis
 - Starts new claim stream
 - Replaces reopened claims
 - 38 U.S.C. § 5104C(b)


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Option 2: Supplemental Claim

- Filing deadline: None, but to preserve effective date of claim, must file w/in **1 year** of previous denial
- VA Form 20-0995, Decision Review Request: Supplemental Claim
- Cannot file for CUE denial or simultaneously contested claim


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Option 2: Supplemental Claim

- ITFs now apply at least to § 5104C(b) supplemental claims (those filed after decision became final)
 - 38 C.F.R. § 3.155 preamble, which excluded supplemental claims from the ITF framework, is invalid
 - *Military-Veterans Advocacy v. Sec'y of VA*, 7 F.4th 1110 (Fed. Cir. 2021)
- You can file ITF for supplemental claim
 - ITF will protect the effective date
 - Helpful if you aren't sure if VA previously denied the benefit
 - Extra time to obtain/identify new and relevant evidence


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Option 2: Supplemental Claim

- A claimant may file a supplemental claim while simultaneously pursuing an appeal of a BVA denial of the same claim at CAVC, Fed. Circuit, or Supreme Court
 - 38 C.F.R. § 3.2500(b), which bars filing a supplemental claim when the claim is pending before a federal court, is invalid
 - 38 U.S.C. § 5104C(a) only bars concurrent lanes of VA review
 - *Military-Veterans Advocacy v. Sec'y of VA*, 7 F.4th 1110 (Fed. Cir. 2021)
- May result in earlier grant of benefits
- But, grant of supplemental claim may moot court case, allowing VA to avoid judicial review of certain issues


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Option 2: Supplemental Claim

- Supplemental claim will be considered complete and filed if claimant:
 - Submits potentially new evidence, OR
 - IDs new evidence for VA to obtain
 - Triggers DTA in the gathering of evidence


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Option 2: Supplemental Claim

- If claim incomplete:
 - VA must notify claimant and rep of needed info
 - If complete form rcvd w/in 60 days, VA will consider it filed as of date of receipt of incomplete claim


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Option 2: Supplemental Claim

- AOJ will readjudicate issue if there is “new and relevant” evidence
 - **Relevant evidence:**
 - evidence that tends to prove or disprove a matter in issue
 - Includes evidence that raises new theory of entitlement
- NOT higher threshold than “new and material”
- After finding N&R evidence, VA considers both new and old evidence during readjudication


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Option 2: Supplemental Claim

- Some evidence VA considers “new and relevant”:
 - Mere contention of a new theory of entitlement not previously addressed
 - **Evidence affirming prior favorable findings**
 - Doesn't need to prove previously unsubstantiated matter
 - Manual M21-1, X.ii.2.A.2.c (change date Sept. 12, 2022)
 - Statement that Vet will attend VA exam that was previously missed


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Option 2: Supplemental Claim

- When determining if there is “new and relevant” evidence, VA will consider:
 - Evidence submitted by claimant
 - VA treatment records and other evidence reasonably identified by claimant
 - Evidence rcvd after notice of prior decision while record was closed
 - Evidence constructively part of prior record


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Option 2: Supplemental Claim

- VA will consider new and relevant evidence received:
 - With application, and
 - Any time prior to issuance of decision on the supplemental claim


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Option 2: Supplemental Claim

- If new and relevant evidence not presented or obtained, AOJ will issue decision finding there was insufficient evidence to readjudicate claim
 - Claimant can appeal / request HLR


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Option 2: Supplemental Claim

- Duty to assist applies:
 - After receipt of substantially complete claim, DTA in gathering evidence (documents)
 - After finding of new and relevant evidence, full DTA (including medical exam/opinion)


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Option 2: Supplemental Claim

- Effective date if granted:
 - If filed w/in 1 year of denial: date denied claim was filed (usually)
 - If filed more than 1 year after previous denial: date of supplemental claim
 - Remember, ITF can count as date of supplemental claim


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Option 2: Supplemental Claim


- If supplemental claim denied, to preserve date of claim as effective date for potential benefits, claimant has **1 year** to:
 - Request HLR,
 - File another supplemental claim, or
 - Appeal to BVA

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Option 2: Supplemental Claim

- Pros:
 - Can submit new evidence
 - DTA applies
 - Relatively fast decision
 - 135 days on avg (as of 8/31/2022)
- Cons:
 - Must submit new and relevant evidence
 - Lowest level VA adjudicator




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Option 2: Supplemental Claim


- When to choose supplemental claim:
 - Additional evidence needed to grant claim
 - Vet can get on own
 - Vet can trigger duty to assist

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APPEAL TO BVA

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Option 3: Appeal to BVA

- BVA conducts de novo review
- 3 options / "lanes" at BVA:



 1. HEARING: BVA hearing (can also submit new evidence)
 2. EVIDENCE: Submit new evidence w/out BVA hearing
 3. DIRECT: No hearing and no new evidence


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Option 3: Appeal to BVA

- VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement)
 - Must list the “specific determination” with which the claimant disagrees (construed liberally)
 - Issue
 - Date of decision
 - Must elect lane for review


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Option 3: Appeal to BVA

- VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement) (cont.)
 - Can choose different lanes for different issues
 - Must file different NODs for each different lane


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Option 3: Appeal to BVA

- Filing deadline: 1 year from date of RO or HLR decision
- Must file with BVA
 - Fax: 844-678-8979
 - Mail: Board of Veterans' Appeals
PO Box 27063
Washington, DC 20038
 - Upload: VA's Centralized Mail Portal/QuickSubmit


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Option 3: Appeal to BVA

- BVA will handle unclear or deficient NODs
 - Will notify claimant and request clarification
 - Claimant must respond w/in 1 year of decision on appeal or 60 days of request
 - If not, form will NOT be considered an NOD
 - If clarification provided, NOD will be considered filed on date of clarification, which will also be docket date (and start 90 day clock for submitting evidence if "evidence" lane chosen)


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Option 3: Appeal to BVA

- No limitation on when written **argument** can be submitted to BVA in any lane
 - Any time between NOD and BVA decision
- **Evidence** submission rules differ in each lane
- **Decision** times differ in each lane


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Option 3A: Direct Lane


- BVA will base decision on only evidence of record at time of AOJ decision
 - No evidence rcvd by VA after date of prior decision will be considered

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Option 3A: Direct Lane

- **Pros:**
 - Most experienced VA adjudicator
 - Relatively quick decision – 1 year goal
 - 381 days pending from NOD on avg (8/2022)
 - Quickest route to CAVC
- **Cons:**
 - Can't submit evidence
 - Even if case appealed to CAVC and back at BVA on remand
 - Can't have hearing




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Option 3A: Direct Lane

- **When to choose**
 - More likely to get favorable decision than at RO
 - Complicated facts/law
 - RO erred
 - Evidence of record supports award
 - Want quick BVA decision
 - Not concerned about need to submit new evidence to BVA following possible appeal to CAVC and CAVC remand


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Option 3B: Evidence Lane


- **Claimants can submit evidence:**
 - With NOD; and/or
 - W/in 90 days following BVA's receipt of NOD
- BVA will also consider evidence of record at time of decision on appeal
- BVA will NOT consider evidence rcvd at other times

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Option 3B: Evidence Lane

- **Pros:**
 - Most experienced VA adjudicator
 - Can submit new evidence
 - Second quickest route to CAVC
- **Cons:**
 - Cannot have hearing
 - Only 90 days from NOD to submit new evidence
 - 2nd slowest AMA option & lower priority than legacy
 - 504 days pending from NOD on avg (8/2022)




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Option 3B: Evidence Lane

- **When to choose:**
 - More likely to get favorable decision than at RO
 - Complicated facts/law
 - Additional evidence will increase chance of success
 - Can get evidence w/in 90 days of filing NOD
 - Timely decision not important to claimant
 - Unless appellant qualifies for AOD


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Option 3C: Hearing Lane

- **Hearings conducted**
 1. At BVA's office in D.C. (Central Office Hearing)
 2. By videoconference
 3. By virtual telehearing
- As of 3/2022, appellants can choose hearing type on NOD
- VLJ conducting hearing not likely same VLJ that will make decision


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Option 3C: Hearing Lane

- Claimants can submit evidence:
 - At hearing
 - W/in 90 days following scheduled hearing (even if claimant does not appear)
 - W/in 90 days of request to withdraw hearing
- BVA will also consider evidence of record at time of decision on appeal
- BVA will NOT consider evidence rcvd at other times


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Option 3C: Hearing Lane

- Pros:
 - Most experienced VA adjudicator
 - Long time to develop needed evidence
 - Opportunity to submit testimony
 - Claims w/ hearing have higher rate of success
- Cons:
 - Longest wait for decision and long wait for hearing
 - 578 days pending from NOD on avg (8/2022)
 - 7,577 legacy & 66,028 AMA hearings pending (9/11/2022)


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Option 3C: Hearing Lane

- When to choose:
 - More likely to get favorable decision than at RO
 - Complicated facts/law
 - Opportunity to testify before VLJ important to claimant
 - Compelling / credible testimony could sway decision
 - Can't get needed evidence w/in 90 days of filing NOD
 - Timely decision not important to claimant
 - Unless appellant qualifies for AOD


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Option 3: Appeal to BVA

- Claimants can switch dockets / review type:
 - Must file new NOD w/in the later of:
 - 1 year after decision being appealed, or
 - 60 days after NOD received by BVA
 - Claimant will keep original docket date
 - Request will be denied if appellant already submitted evidence or testimony


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Option 3: Appeal to BVA

- Duty to Assist does not apply
 - But for DTA errors committed prior to issuance of decision on review:
 - If max benefit can be granted:
 - BVA ignores
 - If max benefit cannot be granted:
 - BVA remands for AOJ for expedited correction of DTA errors and readjudication
 - RO must consider all evidence of record, including evidence rcvd outside evidence submission window


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Option 3: Appeal to BVA

- BVA may also remand for correction of any other error by AOJ in satisfying a regulatory or statutory duty
 - Only required if reasonable possibility correction would aid in substantiating claim
- BVA can remand for advisory medical opinion/IMO


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Option 3: Appeal to BVA

- If remanded claim remains denied in new rating decision, it does not automatically return to BVA
- To continue to pursue claim, claimant must file new NOD, HLR request, or supplemental claim
 - If NOD, new BVA docket # assigned


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Option 3: Appeal to BVA

- BVA decision:
 - Must provide general statement as to whether any evidence was received at a time not permitted
 - Must inform claimant that such evidence was not considered by BVA and explain options to have that evidence reviewed


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Option 3: Appeal to BVA


- Effective date if claim granted: date of original claim (usually)
- If BVA denies claim, claimant can:
 - Appeal to CAVC w/in **120 days** of decision; or
 - File supplemental claim w/in **1 year** of decision; or
 - Pursue both avenues simultaneously
- These options preserve date of **original** claim as effective date for potential benefits

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OTHER ISSUES


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Using Inapplicability of DTA at BVA to Appellant's Advantage

- If RO denies claim based on an adequate negative VA medical opinion and Vet then gets a strong favorable private medical opinion, Vet will want to choose between:
 - Supplemental claim
 - BVA evidence lane
 - BVA hearing lane


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Using Inapplicability of DTA at BVA to Appellant's Advantage


- If Vet files supplemental claim and submits new favorable medical opinion, RO will probably get a new VA medical opinion
 - New VA examiner will probably agree with first VA examiner and provide negative opinion
 - RO will probably deny claim, finding 2 negative opinions carry more weight than 1 favorable opinion

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Using Inapplicability of DTA at BVA to Appellant's Advantage 


- BUT, if Vet appeals to BVA and elects evidence or hearing lane, Vet can submit strong favorable medical opinion, and
 - DTA does not apply and no RO DTA error (negative opinion adequate), so it would be inappropriate to remand for 2nd VA opinion
 - See 38 C.F.R. § 20.802
 - Better chance BVA will find evidence nearly equal and grant claim

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Switching Review Option 


- Claimants may switch between different review options (HLR, Supp Claim, BVA)
 - May withdraw request for certain type of review any time prior to notice of decision
 - If withdrawal occurs w/in 1 year of notice of decision being reviewed, claimant may *timely* elect another review option to preserve date of claim

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Additional Effective Date Rule 

- If CAVC, Federal Circuit, or Supreme Court affirms BVA denial of claim (claimant loses):
 - Claimant can preserve date of **original** claim as effective date for potential benefits by submitting supplemental claim w/in 1 year of court decision


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Increased Rating Claims

- Claim for an increased rating is an “initial” claim
- If RO denies increased rating (or Vet disagrees with initial rating), challenge in AMA system will only address appropriate rating from one year prior to date of claim until date of decision (or just from date of claim if initial rating)
- If disability gets worse after RO decision, Vet must file new increased rating claim
- Vet can have an increased rating claim and multiple appeals of ratings for the same disability, for different periods of time, pending concurrently


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Hypo

- 6/1/2017: Vet granted SC for PTSD at 30%
- 3/1/2021: Vet files IR claim for PTSD
- 9/1/2021: RO denies IR – lack of evidence
- 4/1/2022: Vet files NOD – BVA hearing lane
- 5/1/2024: Vet submits evidence at BVA hearing showing PTSD satisfied criteria for a 50% rating as of 2/1/2021, and satisfied the criteria for a 70% rating as of 11/1/2022


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Poll

- What rating(s) should BVA assign?
 - A. 30% (no increase)
 - B. 50% from 2/1/2021
 - C. 50% from 2/1/2021 and 70% from 11/1/2022
 - D. 50% from 3/1/2021

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Answer

B

- The issue on appeal is the rating from 1 year prior to the date of claim until the date of the RO decision
- Evidence of the severity after 9/1/2021 is irrelevant to appeal
- To maximize benefits, Vet should have filed a new IR claim by 11/1/2023 (w/in one year of increase in severity)


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Claims Accuracy Request (CAR) Pilot

- 4/2021: VA implemented CAR pilot program for expedited review of significantly flawed rating decisions
 - One time request for VA to review a decided issue based on an **obvious and significant** error of fact or law that changed the outcome of the decision, such as
 - Missed issues
 - Erroneous removal of dependent
 - Clearly incorrect effective dates
 - Limited to AMA C&P claims, with some exclusions (BWN, Nehmer, IDES etc.)


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Claims Accuracy Request (CAR) Pilot

- Initially limited to national VSOs, agents, and attorneys, but has expanded to county and state VSOs
- Must request on VAF 20-0996 (HLR form) and write "CAR" prominently on application
 - Must be filed w/in **30 days** of decision notice letter
 - Must describe in Part IV or on separate page the alleged error w/ sufficient specificity to persuade reviewer that outcome would have been different
 - Informal conference not permitted


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Claims Accuracy Request (CAR) Pilot

- If claim deemed ineligible for CAR program, it will be processed as a regular HLR request
- Can't request CAR review of HLR decision or HLR of a CAR decision
- Seattle DROC reviews CAR claims
- Eligible CAR claims:
 - Decided by VA in 20 days on avg
 - 62% are overturned


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Simultaneously Contested Claims

- Special rules for simultaneously contested claims:
 - Review option limited to BVA review
 - No HLR or Supplemental Claim option
 - NOD must be filed w/in 60 days
 - Brief/argument/request for different lane due w/in 30 days after substance of NOD provided to party
 - Favorable findings NOT binding

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Questions?



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