



NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

Complicated Effective Date Issues



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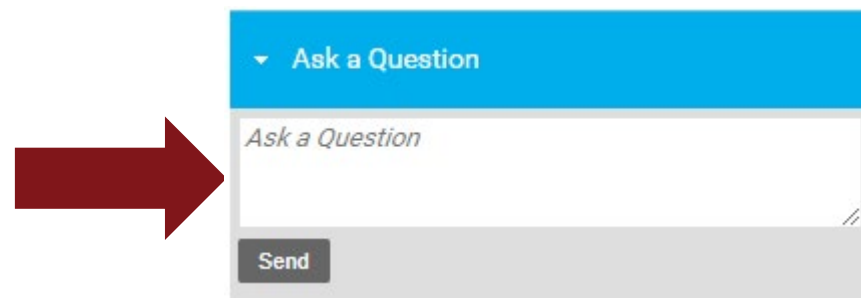
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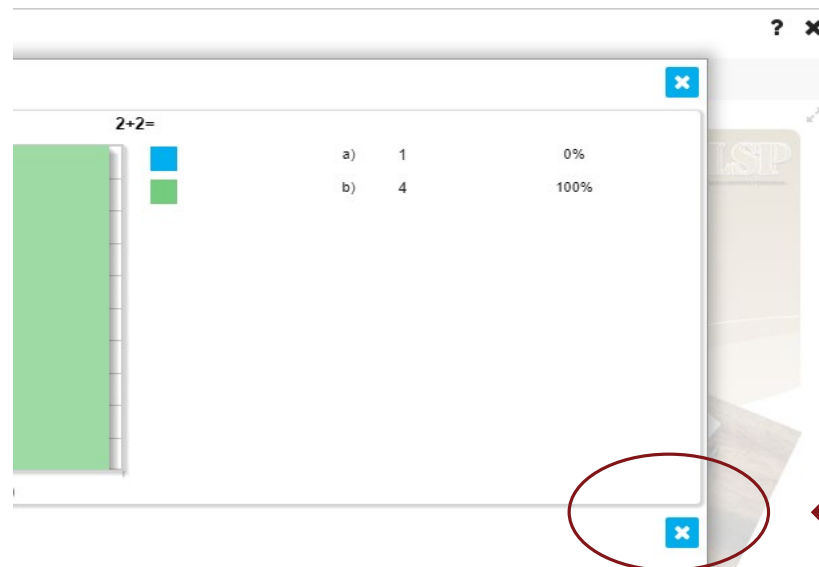
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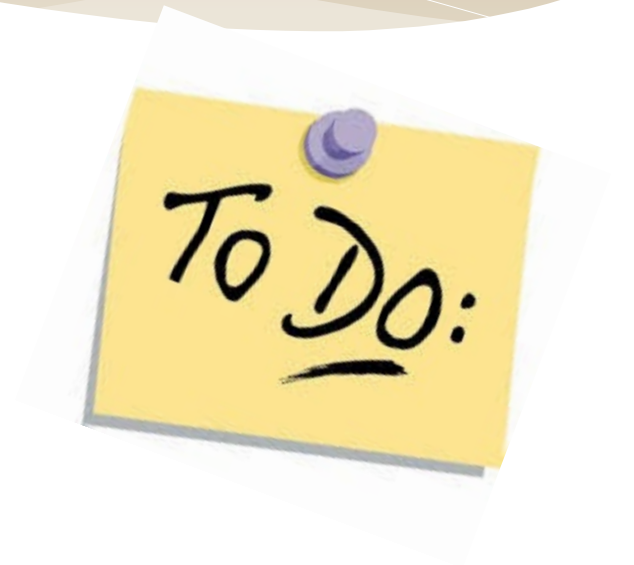
Alexis Ivory

- * **Staff Attorney, NVLSP Training Dept. & Lawyers Serving Warriors**
- * **Previously served as Counsel to Board of Veterans' Appeals**
- * **Helped develop NVLSP's VA Benefit Identifier App**



To Do

- * **General rules for initial claims**
- * **Claims under 38 C.F.R. § 3.156(c)**
- * **AMA Claims**
- * **Reopened claims**
- * **Increased rating claims**
- * **Unadjudicated claims**
- * **Nehmer claims**
- * **Blue Water Navy Claims**
- * **CUE claims**
- * **TDIU**



WHAT IS THE EFFECTIVE DATE?



What is an “Effective Date”?

- * **The effective date is the date from which VA benefits are paid.**





General Rules for Service Connection Claims

- * Unless specifically provided otherwise, the effective date of an award based on a claim for service connection shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore.**

*** 38 U.S.C. § 5110**

General Rules for Service Connection Claims

This means that the effective date of an award of SC disability compensation based on an initial claim is the LATER of:

- * The date of receipt of the original claim, or
- * The date the entitlement arose
- * 38 C.F.R. § 3.400

General Rules for Service Connection Claims

- * **Date of Claim:** The date VA receives the claim, physically or electronically, not the date the Vet signed or sent the claim
- * **Check the date stamp / electronic proof of receipt!**





General Rules for Service Connection Claims

*** Exception: Claims received within one year of separation from service are treated as if received the day following separation**

* 38 C.F.R. § 3.400(b)(2)



General Rules for Service Connection Claims

- * **Exception: Intent to File (ITF).** It allows a claimant to protect the effective date by filing a complete claim within one year of the ITF.

* 38 C.F.R. § 3.155



General Rules for Service Connection Claims

*** Date Entitlement Arose: The initial date the Vet satisfied the substantive criteria for SC. Two considerations:**

1. The date the disability first manifested

*** First symptoms that can later be linked to the current disability**

General Rules for Service Connection Claims

2. The date entitlement to benefits was authorized by law and regulation:
 - * **Ex: Date of a change in law**
 - * If the effective date of a favorable VA regulation is July 1, 2019, then the effective date of any benefits granted due to that regulation can't be earlier than July 1, 2019, even if VA received the claim before July 1, 2019.
 - * **Exception – *Nehmer***

General Rules for Service Connection Claims

* **Date of a change in law**

- * If Vet satisfied criteria for SC on the effective date of the change in law, but files claim for SC after the effective date of the change, effective date can be up to one year earlier than the date of claim, but in no event earlier than the effective date of the change.

General Rules for Service Connection Claims

* **Date of a change in law (example)**

- * 12/2016: Vet with qualifying service at Camp LeJeune in 1980 diagnosed with kidney cancer
- * 3/14/2017: Effective date of Camp LeJeune presumptive SC regulation, which includes kidney cancer
- * If Vet files claim for SC for kidney cancer on:
 - * 10/15/2017, effective date for SC = 3/14/2017
 - * 6/15/2018, effective date for SC = 6/15/2017

New
Service Treatment Records
38 C.F.R. § 3.156 (c)





Newly Obtained Service Department Records

- * If VA receives or associates with the claims file relevant official service department records at any time after VA issues a decision on a claim, VA must reconsider the claim.**
- * If the new decision results in a grant of benefits because of the new service department records, the effective date will be the date the VA received the claim that it previously denied. In other words, VA treats the original claim as if it had been granted, rather than denied.**
- * 38 C.F.R. § 3.156(c)**

Newly Obtained Service Department Records

- * **The record does not need to be one of the Vet's service personnel or medical records. The record does not even need to contain the name of the Vet. Examples include:**
 - * **Military records that do not name the Vet, but corroborate an event the Vet claims to have occurred**
 - * **Unit records, such as those obtained from the JSRRC, that pertain to military experiences claimed by the Vet**

Newly Obtained Service Department Records

- * **This rule does not apply to service department records that VA could not have obtained when it initially decided the claim, because:**
 - * the records did not exist when VA decided the claim, or
 - * the claimant failed to provide sufficient information for VA to identify and obtain the records from the service department, JSRRC, or another official source.
 - * 38 C.F.R. § 3.156(c)(2)

Newly Obtained Service Department Records

- * **Although § 3.156(c)(1) states that a service department record only counts if it existed when VA first decided the claim, this should not be taken literally**
- * **A newly created service department record is considered to have existed when VA first decided the claim, if the new writing is based on analysis of service department records that existed when VA first decided the claim**

Newly Obtained Service Department Records



- * If VA did not ask for, or give the Vet notice that it needed, additional information from the Vet for the service department record to be located, the Vet should argue that § 3.156(c) still applies, because the reason the Vet failed to provide sufficient info was that VA failed to comply with its duty to assist.



Newly Obtained Service Department Records

- * Does § 3.156(c) apply if the new service department records are received after a reopened or supplemental claim has been granted?**

Emerson v. McDonald, 28 Vet. App. 200 (2016)



- * Sept. 2000: Vet filed claim for SC for PTSD
- * Nov. 2000: he submitted a statement describing his service in Vietnam, mentioning that he served as a helicopter door gunner and participated in missions transporting wounded service members to the hospital
- * June 2002 private medical opinion: diagnosed Vet with severe chronic PTSD based on his reports of seeing wounded and dead service members and “seeing tracers coming at him” while on missions as a helicopter crewman



Emerson v. McDonald

- * July 2002: VA requested STRs and verification of some periods of service
- * Aug. 2002: RO sent Vet a stressor statement form to complete since the previously submitted statement was “almost two years old and quite vague”
- * Feb. 2003: RO denied SC for PTSD due to lack of a verified stressor, noting that Vet failed to return the stressor form

Emerson v. McDonald

- * Effective July 12, 2010, VA amended 38 C.F.R. § 3.304(f) to eliminate requirement of stressor corroboration if a VA mental health expert diagnosed PTSD and the stressor was related to fear of hostile military or terrorist activity
- * Aug. 2010: Vet sent VA a statement saying he believed he should be receiving more from VA for his PTSD, which VA interpreted as a request to reopen his SC claim for PTSD



Emerson v. McDonald

- * Jan. 2011: VA examiner noted Vet's reports of having participated in combat as a helicopter door gunner.
- * June 2011: RO granted Vet SC for PTSD effective Aug. 2010
- * Vet filed a timely NOD as to the effective date



Emerson v. McDonald

- * 2012: Vet submitted service department records, including an Air Medal Worksheet that listed the date and duration of completed helicopter missions, and a DA Form 20 that documented his assignments, duties, awards, and campaigns (including the Tet Offensive)
- * July 2012: Vet's attorney raised the applicability of § 3.156(c) at BVA hearing and Vet submitted a statement that raised the issue of applicability of § 3.156(c)
- * May 2014: BVA decision did not assign an earlier effective date or address applicability of § 3.156(c)

Emerson v. McDonald

* At CAVC, Vet argued:

- * BVA erred by failing to apply § 3.156(c)
- * The plain language of § 3.156(c)(1) mandates that VA “reconsider” his claim upon the receipt of official service department records that were not previously associated with the claims file
- * He was prejudiced by BVA's error because § 3.156(c) supported an effective date ten years earlier than the current effective date



Emerson v. McDonald

* CAVC Analysis:

- * BVA was obligated to consider and discuss Vet's entitlement to an earlier effective date under § 3.156(c) because the Vet explicitly raised the issue
- * The purpose of § 3.156(c) is to place a Vet in the position the Vet would have been in had VA considered the relevant service department record before deciding the earlier claim

Emerson v. McDonald

* CAVC Analysis (cont.):

- * To be eligible for reconsideration under § 3.156(c), the service department records must be submitted after VA issues a decision on the claim and they must:
 - * be relevant to the claim;
 - * have been in existence when VA first decided the claim; and
 - * not have been associated with the claims file when VA first decided the claim



Emerson v. McDonald

* CAVC Analysis (cont.):

- * Vet submitted service department records in July 2012, after VA had issued a decision on his claim
- * These records were arguably relevant to his claim, existed at the time VA first decided the claim in 2003, and had not been associated with the claims file when VA first decided the claim

Emerson v. McDonald

* CAVC Holdings:

- * Under § 3.156(c)(1), upon receiving official service department records in 2012, VA was required to reconsider Vet's PTSD claim that was denied in 2003, notwithstanding the fact that SC for PTSD was granted in 2011
- * Because BVA failed to ensure that VA complied with § 3.156(c), the Court vacated the May 2014 BVA decision and remanded the claim for additional development and readjudication



Emerson v. McDonald

* Lessons Learned

- * After a denial, it does not matter when official service department records are received. If the requirements of § 3.156(c)(1) are met, VA must reconsider the original claim, even if service connection has since been granted



IMPORTANT



Emerson v. McDonald

* **Lessons Learned (cont.)**

- * If a Vet has been awarded SC for a disability based on a reopened or supplemental claim, and
- * you find relevant military records that were not in the c-file at the time of an earlier denial of SC for that disability, and
- * those records would have supported an award of SC,
- * You should submit those records to VA and request reconsideration of the original claim and an earlier effective date under § 3.156(c)

VA



U.S. Department
of Veterans Affairs



**VA Appeals
Modernization**

Background

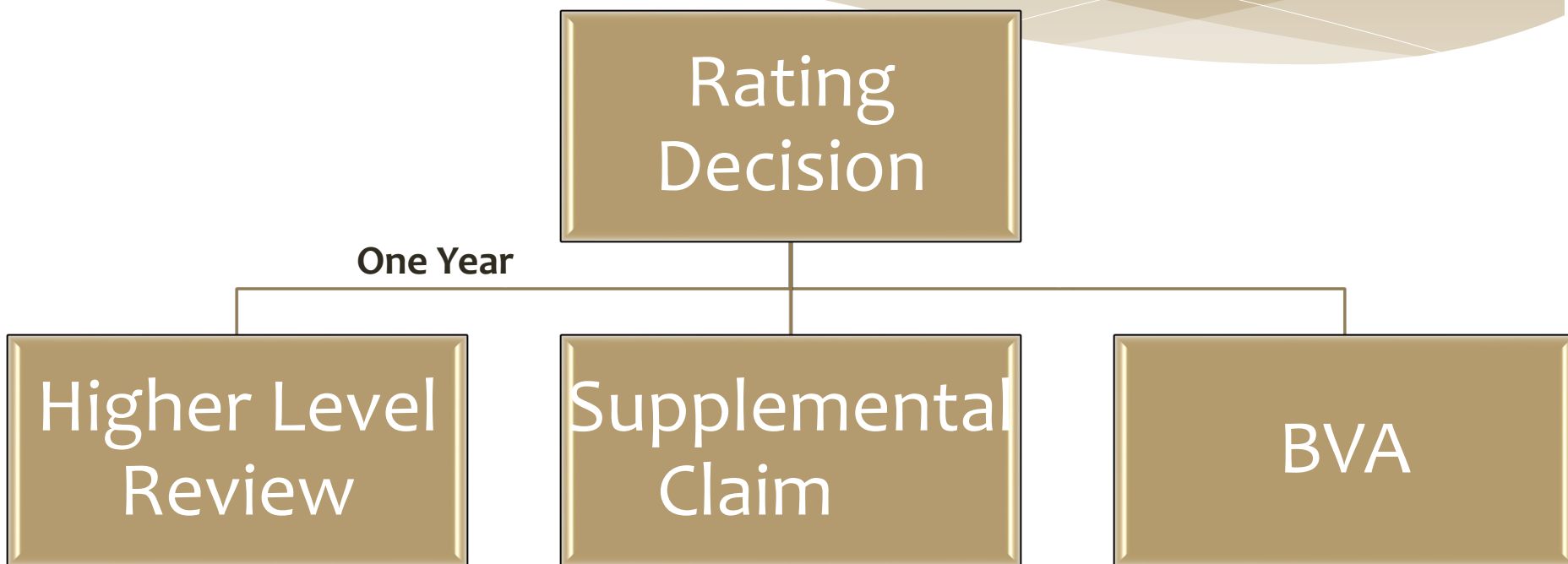
- * **8/2017: The Veterans Appeals Improvement and Modernization Act of 2017 (AMA) became law**
- * **1/18/2019: VA published final rule on AMA**
- * **2/19/2019: AMA went into effect**

Key Feature of Modernized System

*** Favorable effective date rules**



How to Try to Change AMA Decisions





Lane 1: Higher-Level Review

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

Lane 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**
 - * **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**



Lane 2: Supplemental Claim

* **Effective date if granted:**

- * If filed w/in 1 year of denial: date denied claim was filed (or date entitlement arose)
- * If filed more than 1 year after previous denial: date of supplemental claim (or date entitlement arose)

* **ITF do not apply to supplemental claims**



Lane 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



Lane 3: Appeal to BVA

- * **Effective date if claim granted: date of claim that resulted in BVA decision (or date entitlement arose)**
- * **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**
- * **Either option preserves date of original claim as effective date for potential benefits**

Additional Effective Date Rule

- * **If CAVC affirms BVA denial of claim (claimant loses):**
 - * Claimant can preserve date of claim that resulted in CAVC decision as effective date for potential benefits by submitting supplemental claim w/in 1 year of CAVC decision
 - * **BUT, cannot file supplemental claim while issue on appeal to Federal Circuit**

REOPENED CLAIMS



Reopened Claims

- * **In the legacy system, a claimant could file a claim to “reopen” a previous claim that had been denied in a VA decision that had become final.**
- * **The VA would readjudicate the merits of that claim if the claimant submitted “new and material” evidence.**
- * **If the RO denied a claim to reopen prior to 2/19/2019, and the claimant appealed, the appeal may be in the legacy system.**
- * **If a claimant filed a claim to reopen prior to 2/19/2019, but the RO decided that claim on or after 2/19/2019, the claim is treated as a supplemental claim in the modernized system**



Reopened Claims

- * **If the reopened claim is granted on appeal, the effective date for benefits will be the later of:**
 - * The date VA received the reopened claim, or
 - * The date the entitlement arose
 - * 38 C.F.R. § 3.400(r)
- * **The effective date for benefits for a reopened claim cannot be the date of receipt of the claim that was previously and finally denied**
 - * *Lalonde v. West*, 12 Vet. App. 377, 382 (1999)



Reopened Claims

- * **SPECIAL RULE:** For claims in the legacy system, if VA received “new and material evidence” after issuing a decision, but prior to expiration of the appeal period (typically 1 year from the date of notice of the rating decision), the new and material evidence is to be considered in connection with the original claim
 - * Even if Vet did not file a legacy NOD
- * If the claim is granted, the effective date will be the date of the claim (or the date entitlement arose), not the date VA received the new and material evidence
 - * 38 C.F.R. §§ 3.156(b), 3.400(q)



Reopened Claims

- * **If new evidence was submitted during the appeal period, the claim remains pending until the RO or BVA expressly decides whether the new evidence is new and material**
- * **If the RO fails to address whether the new evidence is material, and a later claim for the same benefits is denied on the merits without expressly addressing whether the new evidence submitted within the appeal period of the first claim was material, the first claim remains pending**
- * *Beraud v. McDonald*, 766 F.3d 1402 (Fed. Cir. 2014)



Reopened Claims

- * The source of the N&M evidence received w/in the appeal period is irrelevant**
- * It does not matter whether the evidence was sent to VA by the claimant, or by an entity such as the Social Security Administration**

INCREASED RATING CLAIMS



Increased Rating Claims



- * **General Rule on a claim for an increased rating**
- * In general, the effective date for an increased rating will be the later of:
 - * The date of receipt of the claim for the increased rating; or
 - * The date entitlement to the higher rating arose
- * *See 38 C.F.R. § 3.400(o)(1)*

Increased Rating Claims



* **Important exception to the general rule:**

- * If an increase in the severity of the disability occurred in the year prior to the date of the increased rating claim, the effective date for the increased rating can be the date of the increase in disability
- * In other words, up to one year prior to the date of claim!
- * Specifically, “[t]he earliest date as of which it is factually ascertainable based on all evidence of record that an increase in disability had occurred if a complete claim or intent to file a claim is received within 1 year from such date”
- * 38 C.F.R. § 3.400(o)(2)



Poll

*** Can VA's receipt of medical records alone qualify as a claim for an increased rating?**

- A. Yes
- B. No
- C. It depends



Increased Rating Claims



Yes
 No
 It Depends

* **Received prior to 3/24/2015: YES!**

* **Received on or after 3/24/2015: NO!**

Increased Rating Claims Prior to 3/24/2015

- * **Received prior to 3/24/2015: YES!**
- * **If medical records indicate an SC disability worsened**
- * **38 C.F.R. § 3.157 (2014)**

Increased Rating Claims Prior to 3/24/2015



- * **VA/military facility treatment or exam report**
 - * Date of claim = date of record/report
- * **Evidence of admission to non-VA facility at VA expense**
 - * Date of claim = date of admission



Increased Rating Claims Prior to 3/24/2015

- * **Evidence from private physician showing reasonable probability of entitlement to increase**
 - * Date of claim = date of VA receipt of evidence
- * **Exam reports, clinical records, or transcripts of records from non-VA/non-military hospital**
 - * Date of claim = date of VA receipt of evidence



Increased Rating Claims Received on or after 3/24/2015

* Received on or after 3/24/2015: NO

* “When medical records indicate an increase in a disability, receipt of such medical records may be used to establish effective date(s) for retroactive benefits based on facts found of an increase in a disability only if a complete claim or intent to file a claim for an increase is received within 1 year of the date of the report of examination, hospitalization, or medical treatment.”

* 38 C.F.R. § 3.400(o)(2)

Increased Rating Claims and AMA



- * **Claim for an increased rating is an “initial” claim – not a supplemental 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**

Increased Rating Claims and AMA



- * 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**



Example

- * **BVA can only assign a 50% rating, effective 2/1/2019**
 - * Date of increase w/in year prior to claim
 - * Cannot assign a “staged” 70% rating
- * **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 9/1/2019 is irrelevant to appeal**
- * **Vet should have filed another “initial” increased rating claim before 11/1/2021 (w/in one year of increase in severity) to maximize benefits**



Staged Ratings

- * **Since original and increased rating claims can take months or years to adjudicate, staged ratings may be appropriate**
- * **Staged ratings are appropriate for an SC or increased-rating claim when the factual findings show distinct time periods where the service-connected disability exhibits symptoms that would warrant different ratings**
- * *Hart v. Mansfield*, 21 Vet. App. 505 (2007); *Fenderson v. West*, 12 Vet. App. 119 (1999)

Staged Ratings

- * In other words, the effective date for different ratings originating from one claim (initial or increased rating) are based on the dates that medical and lay evidence show that different ratings are warranted under the criteria for the relevant diagnostic code**

Staged Ratings

- * **VA can apply staged ratings for initial claim:**
 - * **SC claim (legacy):** Throughout pendency of claim, even for period on appeal
 - * **SC claim (AMA):** From date of claim to date of first RO decision that assigns disability rating
 - * **IR claim (legacy):** Up to one year prior to date of claim and throughout pendency of claim, even for period on appeal
 - * **IR claim (AMA):** From up to one year prior to date of claim through date of initial RO decision on claim



Poll - Facts

- * **Vet is SC for eczema at 10% (because 15% of his body is affected), effective March 2008**
- * **Jan. 2019: Vet visited dermatologist, who found the eczema now affected 25% of the Vet's body**
 - * This would warrant a 30% rating
- * **Sept. 2019: Vet filed a claim for increase**



Poll

- * What should be the effective date for the Vet's increased rating?**
 - a) January 2018
 - b) September 2018
 - c) January 2019
 - d) September 2019



Poll - Answer



* **January 2019**

* Under 38 C.F.R. § 3.400(o)(2), the effective date for Vet's 30% rating should be January 2019, because he filed a claim for increase within 1 year of the date his condition increased in severity.

Poll - Facts

- * **Vet is SC at 10% for eczema**
- * **May 2018: VA treatment records show Vet's eczema now affected 25% of his body**
- * **Sept. 2019: Vet filed an increased rating claim for eczema**



Poll

- * What should be the effective date for the Vet's increased rating?**
 - a) May 2018
 - b) September 2019
 - c) September 2018
 - d) Not sure



Poll - Answer

B

* **September 2019**

* **Vet is unable to take advantage of the exception in 38 C.F.R. § 3.400(o)(2) because he filed increased rating claim more than one year after increase in the severity**



Poll - Facts

- * **Vet is SC at 10% for eczema**
- * **May 2018: VA treatment records show eczema now affected 25% of his body (enough for 30% rating)**
- * **June 2019: VA treatment records show eczema now affected 30% of his body (enough for 30% rating)**
- * **Sept. 2019: Vet filed increased rating claim for eczema**



Poll

*** What should be the effective date for the Vet's increased rating?**

- a) May 2018
- b) June 2019
- c) September 2019
- d) Not Sure





Poll - Answer



* June 2019 (probably)

- * Even though symptoms severe enough for a 30% rating first occurred more than 1 year prior to the date of claim, there was a further increase w/in the year prior to the claim
- * Under § 3.400(o)(2), the effective date is the earliest date as of which it is “factually ascertainable” that “an increase in disability” occurred, if a claim is received within 1 year from such date
- * The law is not clear on this interpretation, but advocates should appeal or seek review of any decision failing to award an effective date based on a further increase in disability within the year prior to the claim, even if the Vet met the criteria for a higher rating earlier



Poll - Facts

- * **6/1/2016: Vet granted SC for PTSD at 30%**
- * **3/1/2019: Vet files IR claim for PTSD**
- * **9/1/2019: RO denies IR – lack of evidence**
- * **3/1/2020: Vet files NOD – BVA hearing lane**
- * **3/1/2022: Vet submits evidence at BVA hearing showing PTSD satisfied criteria for a 50% rating as of 2/1/2019, and satisfied the criteria for a 70% rating as of 11/1/2020**



Poll

- * **What rating(s) should BVA assign?**
- A. 30% (no increase)
- B. 50% from 2/1/2019
- C. 50% from 2/1/2019 and 70% from 11/1/2020
- D. 70% from 3/1/2020



Poll - Answer



- * **For AMA claims, 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 9/1/2019 is irrelevant to appeal**
- * **Vet should have filed another “initial” increased rating claim before 11/1/2021 (w/in one year of increase in severity) to get earliest effective date for 70% rating**

Unadjudicated Claims



Unadjudicated Claims

- * **Sometimes VA fails to adjudicate a disability claim. Then the claimant files another claim for benefits for the same disability which is granted.**
- * **In this scenario, the effective date for benefits is generally the date VA received the original, unadjudicated claim, assuming the evidence shows that entitlement arose on or before the date of the first claim.**

Unadjudicated Claims

- * **There are several potential obstacles to success when arguing that an earlier effective date is warranted because VA failed to adjudicate or render a final decision on an earlier claim for a disability for which VA ultimately awards SC disability benefits**



Unadjudicated Claims

- * **First, the claimant must be able to show that there was an earlier claim for SC disability benefits for the disability in question**
- * This might be based on the argument that VA was required to infer a claim because of its duty to sympathetically read a claimant's pleadings
- * The content of the record before VA at the time may make it difficult to prove that the claim was reasonably raised by the record



Unadjudicated Claims

- * **Second, the claimant may not be able to persuade VA that the earlier claim remained pending without a final adjudication until VA finally awarded SC based on a subsequent claim**



Unadjudicated Claims

- * **Implicit Denial Rule:** a reasonably raised claim remains pending until there is either recognition of the substance of the claim in a VA decision from which a claimant could deduce that the claim was adjudicated or an explicit adjudication of a subsequent claim for the same disability.
- * Did the earlier VA decision discuss the claim in terms sufficient to put the claimant on notice that it was being considered and rejected, even if the language did not specifically deny the claim?



Unadjudicated Claims

- * **Another obstacle to an earlier effective date may occur if, between the filing of claim #1 that did not lead to an RO adjudication or a final decision, and a later claim (claim #3) that resulted in an award of benefits, there is an explicit VA final denial of a claim (claim #2) for this same benefit**
- * **The CAVC addressed this in *Juarez v. Peake*, 21 Vet. App. 537 (2008)**



Juarez v. Peake

- * In August 1955, the RO denied Vet's claim for SC for a back condition and sent Vet notice of its decision a day later**
- * Vet asserted that he did not appeal the decision because he did not receive notice of the decision**
- * In March 1996, Vet again applied for SC for his back condition and asserted that he never received notice of an adjudication of the claim he filed in 1954**



Juarez v. Peake

- * **In April 1996 decision (that Vet received), the RO determined that new and material evidence had not been submitted to reopen his claim. RO noted that “service connection for back injury was denied in 8-55” and that there was “no reasonable possibility that the new evidence submitted in connection with the current claim would change our previous decision.”**
- * **Vet filed claim to reopen in Aug. 1997**

Juarez v. Peake

- * **In Aug. 1998, RO granted SC for postoperative spinal stenosis and assigned a 60% rating, effective Aug. 1997**
- * **Vet filed an NOD with the effective date**
- * **In Jan. 2005, BVA denied an earlier effective date because Vet had not appealed the April 1996 RO decision denying his request to reopen his claim and that decision became final**



Juarez v. Peake

- * **BVA noted that the Vet conceded at a 2004 hearing that he had received the RO's April 1996 decision and that VA had received no pertinent communication from the Vet prior to Aug. 1, 1997**
- * **BVA also found that, because he was not notified of the 1955 decision, the 1955 RO decision did not become final until one year after the Vet was notified of the RO's April 1996 rating decision**



Juarez v. Peake

- * **On appeal at the CAVC, the Vet argued that until the RO provides notice of the 1955 decision, the intermediate 1996 denial of reopening for lack of new and material evidence was irrelevant to the continued non-finality of the 1955 decision**
- * **VA countered that the 1996 RO decision cured any lack of notification of the 1955 denial**



Juarez v. Peake

* **CAVC concluded:**

- * The 1996 RO decision determined that the 1955 decision was final as part of its determination that new and material evidence had not been submitted
- * The 1996 RO decision provided notice that SC for the back condition was being denied
- * Vet had the opportunity to appeal the 1996 RO determination on the finality of the 1955 RO decision



Juarez v. Peake

* **Summary:**

- * If the RO never adjudicates or notifies a Vet of a decision on an claim, but
- * Denies a second claim for the disability and notifies the Vet, and the Vet does not appeal
- * The denial of the second claim is essentially considered an adjudication of the first claim
- * The first claim cannot be the basis for an earlier effective date if SC is granted based on a third claim



Juarez v. Peake

* Summary (Cont.):

* BUT, if

- * RO denies the first claim, and the claimant submits a timely NOD, but VA does not issue an SOC (legacy) or decision
- * Vet later files a second claim for SC
- * RO denies a second claim, which the claimant does not appeal
- * Claimant files a third claim, which the RO grants



Juarez v. Peake

* **Summary (cont.):**

* **THEN**

- * Claimant may be entitled to an effective date based on the original claim, because once an NOD has been filed, further RO decisions that do not grant the benefit sought cannot resolve the appeal of the original claim
- * Only a subsequent BVA decision can resolve an appeal that was initiated but not completed

Advocacy Advice

If in assigning an effective date for benefits, VA fails to account for a previous unadjudicated claim for the same benefit (or a decision of which the claimant was not notified), and there was no intervening decision denying the claim, there are two alternative paths that the claimant can pursue to correct this error:

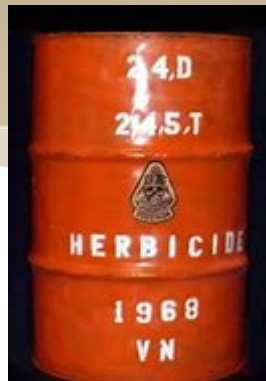
Advocacy Advice

- 1. If error is identified w/in one year of the date VA assigned the erroneous effective date, seek review of or appeal the assigned effective date**
- 2. If the error is identified after the review/appeal period expires, file a claim with the RO arguing that the effective date assigned is the product of clear and unmistakable error (CUE)**

Advocacy Advice

- * If there was a final decision denying a claim sandwiched between the original unadjudicated claim and a later decision granting benefits, it will be difficult to obtain an effective date based on the original claim**
- * The claimant must establish that the decision denying the second claim was a product of CUE**

Nehmer Effective Date Rules



Nehmer Rules

- * **Special effective date rules may apply to Vets who are granted presumptive SC for a disease based on exposure to AO in Vietnam under the Court Orders in the class action *Nehmer v. U.S. Dept. of Veterans Affairs*.**
- * **38 C.F.R. § 3.816**
- * **Special rules do not apply for claims granted due to AO exposure:**
 - * In locations other than RVN
 - * In territorial seas (yet)



Nehmer Rules

* Special effective date rules:

* For all diseases currently on the AO presumptive list (but not those added in the future) VA was required to:

* Identify all Vietnam Vets and their survivors who applied, or who had applications pending for SC based on the disease between 9/25/1985 and the publication date of the regulation adding the disease

Nehmer Rules

* **Special effective date rules:**

- * **Re-decide whether benefits are warranted for the disease under the new regulation, after allowing claimant to add new evidence**
- * **If SC granted, VA must assign an effective date for benefits based on the date of the original claim that was pending or denied on or after 9/25/1985**



Nehmer Rules

* **Example**

- * **Jan. 1990: Vietnam vet filed SC claim for ischemic heart disease (IHD) and claim is denied**
- * **Aug. 2010: VA adds IHD to list of Agent Orange presumptive diseases**
- * **2011: VA readjudicates Vet's IHD claim and grants SC effective Jan. 1990**

Nehmer Rules

* **Special effective date rules:**

- * Under Footnote 1 of the 1991 *Nehmer* Final Stipulation and Order, if Vet filed an SC or pension claim for disability X and, before the claim was finally denied or granted, evidence in the c-file showed that Vet had a disease that was later added to VA's AO presumptive list, then the claim for disability X also counts as a claim for the AO disease

Nehmer Rules

* **Example of FN1 claim:**

- * Vietnam Vet filed SC claim for PTSD in Nov. 1993
- * Vet dx with IHD in June 1994 and dx included in medical records obtained by VA while adjudicating PTSD claim
- * VA granted PTSD claim in 1995
- * Vet filed a SC claim for IHD in May 2007 that was denied
- * **Aug. 2010: VA added IHD to the AO presumptive list**



POLL



- * **What effective date should VA assign for SC for IHD?**
- A. Nov. 1993 (date of PTSD claim)
 - B. June 1994 (date of IHD diagnosis)
 - C. May 2007 (date of formal claim for SC for IHD)
 - D. Aug. 2010 (date IHD added to AO presumptive list)



Nehmer Rules



- * Under FN1, the IHD effective date should go back to June 1994 (date of diagnosis) b/c Vet had a claim pending (1993 PTSD claim) when he was initially diagnosed w/ IHD, and the dx was part of the c-file when VA adjudicated the PTSD claim



Nehmer Rules

- * **If retro benefits are awarded under *Nehmer*, but the Vet or DIC claimant is deceased, VA must pay the retro benefits to the following (in order of priority):**
 - * **Surviving spouse of the claimant**
 - * **Surviving children of the claimant, even if adults**
 - * **Surviving parents of claimant, regardless of dependency or income**
 - * **Estate of the claimant**

Nehmer Rules

- * **If the claimant first filed a claim for service connection of a disease after the disease was added to the AO presumptive list, the special *Nehmer* rules do not apply to the claim**

Nehmer Errors

- * **If you think you have spotted a violation of the *Nehmer* effective date rules, call NVLSP's *Nehmer* hotline at:**

1-855-333-0677



Blue Water Navy



Procopio v. Wilkie

* Holding:

- * The intent of Congress is clear that Vets who served in the 12 nm territorial sea of the Republic of Vietnam are entitled to the presumption of service connection for diseases associated with Agent Orange exposure.

* *Procopio v. Wilkie*, 913 F.3d 1371 (2019)





Post-Procopio

- * **6/25/2019: Blue Water Navy Vietnam Veterans Act of 2019 signed into law, effective 1/1/2020:**
 - * Congress codified holding in *Procopio*
 - * Set precise coordinates for line along RVN coast from which 12nm to be measured
 - * Allows for retro benefits for claims filed 9/25/1985-1/1/2020

Effective Dates Under BWNVVA of 2019



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- * **Effective date can be earlier than 1/1/2020, if:**
 - * Vet or survivor filed claim for SC for covered AO disease on or after 9/25/1985, but before 1/1/2020
 - * Claim was denied because it was not incurred in or aggravated by service
 - * Vet or DIC claimant files supplemental claim for SC of the same disease on or after 1/1/2020
- * **Effective date will be date of earliest claim for disease filed on or after 9/25/1985**

Effective Dates Under BWNVVA of 2019



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- * **What if Vet filed first claim for covered disease before 1/1/2020, and it was pending on that date, but had not been denied by VA?**
- * **VA should base effective date on date of claim, but not yet clear**
- * **Awaiting VA regulations on issue for clarification**



Advocacy Advice

- * **Vets who served in RVN's 12nm territorial sea with prior final denial of AO-related claim should file supplemental claim**
- * **If no prior claim for AO-related disease, file initial claim ASAP!**
- * **If Vet had disease on 1/1/2020, effective date can be up to one year prior to date of claim, but no earlier than 1/1/2020**

Clear and Unmistakable Error (CUE) Claims



CUE Claims

- * **Claims to revise a previous RO or BVA decision based on CUE are the most powerful method for establishing an earlier effective date**
- * **When a CUE claim is granted, the effective date awarded is the date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision**
 - * 38 C.F.R. §§ 3.105(a)(1)(ii), 3.400(k)
- * **But, CUE claims are difficult to win**



CUE Claims

- * **In order to establish CUE, Vet must show that**
 - * either the facts known at the time of the decision being attacked were not before the adjudicator or the law then in effect was incorrectly applied;
 - * an error occurred based on the record and the law that existed at the time; and
 - * had the error not been made, the outcome would have been manifestly different
 - * **Prinkey v. Shinseki, 735 F.3d 1375 (Fed. Cir. 2013)**



CUE Claims

* **Example**

- * **Sept. 1989: Vet filed SC claim for a back condition**
- * **Dec. 1989: RO denied claim**
- * **Oct. 2019: 1986 RO decision revised based on CUE**
 - * **Effective date for SC benefits is Sept. 1989, entitling Vet to 30 years of retro benefits**



CUE Claims

- * **How would the VA assign a disability rating for the 30-year period?**
 - * VA must analyze what Vet's disability rating should have been over the past 30 years
 - * Staged ratings may be assigned
 - * Once a CUE claim is granted, new evidence CAN (and should) be added to the record to help the Vet get the highest disability rating warranted



CUE Claims

- * In one case, the CAVC stated that if CUE was found in a 1976 RO decision, VA must “then determine the proper rating for the hypothyroidism at the time of the June 1976 RO decision and subsequently, until the award of service connection in February 1996. Such a determination must take into account the possibility of staged ratings within that 20-year period, and provide the appellant with all appropriate assistance in developing evidence on the rating question.”

* *Hines v. Principi*, 18 Vet. App. 227, 242 (2004)



CUE Claims

- * **“Appropriate assistance in developing evidence on the rating question” could include:**
 - * Obtaining private treatment records covering the period
 - * Obtaining medical records from VA and other government facilities
 - * Providing Vet with a retrospective medical opinion addressing the severity of symptoms during the period
 - * See 38 U.S.C. § 5103A; 38 C.F.R. § 3.159(c)

Advocacy Advice

- * **Types of evidence Vet should add to the record:**
 - * Treatment records from the period in question
 - * A retrospective medical opinion
 - * **Provide examiner with relevant treatment records**
 - * **Provide lay statement(s) about symptoms**
 - * **Ask examiner to opine on whether current symptoms have been present or were worse since effective date**
 - * **Ensure criteria/symptoms in diagnostic code addressed**

Advocacy Advice

- * Lay statements from the Vet and individuals who knew the Vet during the period in question who can testify to how the condition affected the Vet during that time
- * **Include discussion of symptoms listed in DC**
- * **Include effect on ability to work**

Total Disability Ratings Based on Individual Unemployability (TDIU)

Special Effective Date Issue in TDIU Claims



- * **A claim for TDIU is part of any claim for a higher initial rating or an increased rating when evidence of unemployability related to the underlying condition is submitted during the pendency of the claim**
- * ***Rice v. Shinseki*, 22 Vet. App. 447 (2009)**
- * **What happens when VA grants TDIU while a claim for a higher initial / increased rating is pending, but TDIU is effective *after* the date of the pending claim, and Vet does not appeal the TDIU decision?**

Special Effective Date Issue in TDIU Claims



* **Example:**

- * 8/2008 – Vet filed claim for SC for PTSD
- * 12/2008 – RO granted 30% for PTSD; Vet later filed NOD
- * 7/2012 – Board granted 50% for PTSD; Vet appealed
- * 2/2013 – CAVC remanded PTSD rating to BVA
- * 2/2014 – Vet filed a claim for TDIU
- * 8/2014 – RO denied TDIU; no appeal
- * 12/2015 – RO granted 70% PTSD rating effective 12/2015
- * 2/2016 – Vet submitted another TDIU claim
- * 5/2016 – RO awarded TDIU effective 2/2016; no appeal

Special Effective Date Issue in TDIU Claims



* **Example (cont.):**

* **7/2016 – BVA:**

- * Denied PTSD rating in excess of 50% prior to 12/2015
- * Denied PTSD rating in excess of 70% since 12/2015
- * Concluded TDIU prior to 2/2016 was not before the Board because Vet did not appeal 5/2016 RO decision that awarded TDIU

Special Effective Date Issue in TDIU Claims



* **Example (cont.):**

- * **CAVC concluded that Vet's NOD re PTSD rating placed the issue of the appropriate disability evaluation into appellate status**
- * **Since he was not awarded the highest rating possible for PTSD, including TDIU, for the entire appeal period, the issue of entitlement to TDIU prior to 2/2016 remained on appeal**
- * ***Harper v. Wilkie*, 30 Vet. App. 356 (2019)**

Special Effective Date Issue in TDIU Claims



- * Unless VA grants TDIU for the entire period covered by a pending appeal of an initial rating/higher rating claim, the issue of TDIU remains part of the appeal**
- * It does not matter whether the Vet appealed/ sought review of the decision granting TDIU**
- * Check if TDIU was granted for the entire period covered by a pending claim/appeal for a higher rating. If not, make sure VA addresses entitlement to TDIU for the entire period.**

Questions?



Upcoming VSO Webinars



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Dates	Topic	Presenter
March 24 or 25	VA Vocational Rehabilitation Benefits Claims: A Guide for Advocates	Christopher Murray
April 28 or 29	Identifying Duty to Assist Errors: Reasons Why a VA Medical Examination May Be Inadequate	Alexis Ivory
May 19 or 20	The New Wave of Veterans: Helping Post 9/11 Combat Veterans with TBI and PTSD	Helen Chong



Library of Past Webinars

Recorded Webinars are available here (can be viewed for only 72 hours after purchase): <https://productsbynvlsp.org/webinars/>

Recorded Webinar topics include:

- * The New VA Appeals System (Appeals Modernization)**
- * Modernized Claims and Appeals: Supplemental Claims and Recent Developments**
- * New Changes to VA's Non-Service Connected Disability Pension Program**

NVLSP VA Benefit Identifier



- * **Questionnaire/App: Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to.**

- * **3 WAYS to Access:**

[NVLSP Website](#)



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