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## **Veterans Affairs: The Appeal Process for Veterans' Claims**

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# Veterans Affairs: The Appeal Process for Veterans' Claims

## Summary

Congress, through the United States Department of Veterans Affairs (VA), provides a variety of benefits and services to veterans and to certain members of their families. These benefits range from health care and related services to burial benefits. The veteran's basic eligibility for these programs and services is usually determined by the local VA office. Veterans not satisfied with the VA's decision(s) may wish to have them reviewed and may appeal the decision(s). This report traces the various steps involved in the appeal process — starting with the original application for benefits and concluding with an appeal to the U.S. Supreme Court. A flow chart outlining all of the steps in the appeal process is provided.

Following the filing of the initial appeal, the local VA office will either allow or disallow the claim. If the veteran/claimant wishes to appeal, a written request for appeal must be filed and various time deadlines and other requirements must be met prior to the case being considered by the Board of Veterans' Appeals (BVA). The appeal before the BVA may be a hearing at the local VA office by a traveling Board member; a hearing at the BVA office in Washington, DC; or a videoconference hearing at the local VA office. Various filing requirements and time limits must be met by the veteran/claimant in his/her appeal. There are specific guidelines for a person representing a veteran before the BVA. Legislative proposals were introduced in the 109<sup>th</sup> Congress that would change the traditional guidelines for veterans' representation.

The veteran/claimant may appeal the decision of the BVA to the Court of Appeals for Veterans Claims (CAVC), which is an independent federal court and not part of the VA. The decision of the CAVC may be appealed by either the veteran/claimant or the VA to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), an Article III court that sits in Washington, DC and has exclusive jurisdiction to hear cases challenging CAVC rulings. Decisions of the Federal Circuit may be appealed to the U.S. Supreme Court, which has final jurisdiction.

The VA has various statutory obligations to assist the veteran in the preparation of his/her application for benefits and any subsequent appeal(s). Among these obligations are assistance in the preparation of the initial application; provision of various records; medical exams; and other related issues. Certain legal and factual presumptions are established by statute that may be favorable to the veteran's claim. These issues are examined in the appendix to this report.

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# Veterans Affairs: The Appeal Process for Veterans' Claims

## Introduction

### Veterans' Benefits

Congress, through the United States Department of Veterans Affairs (VA) provides a broad variety of benefits and services to veterans and certain members of their families.<sup>1</sup> Among the benefits that the VA extends to veterans are various types of health care and related services, such as nursing homes, clinics, and medical centers; various types of financial benefits, including disability compensation and pensions; education, vocational training, and related career assistance; home financing; life insurance; burial benefits; and benefits for certain family survivors.<sup>2</sup>

The veteran's basic eligibility for these various services and programs is usually determined by the local VA office.<sup>3</sup> Various criteria must be met in order for the

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<sup>1</sup> See generally *Federal Benefits for Veterans and Dependents*, published by the Department of Veterans Affairs (2005 edition), available online at [[http://www1.va.gov/opa/vadocs/current\\_benefits.htm](http://www1.va.gov/opa/vadocs/current_benefits.htm)]. See CRS Report RL33113, *Veterans Affairs: Basic Eligibility for Disability Programs*, by Douglas Reid Weimer. This report deals with the fundamental requirements for disability benefit programs. See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, by Douglas Reid Weimer. This report discusses various aspects of disability compensation, a monthly cash benefit program for veterans currently impaired from past service-connected activities.

<sup>2</sup> See CRS Report RL33323 at 1-2.

<sup>3</sup> The *local VA office* is defined by the VA as "any local office of the Department of Veterans Affairs where claims for VA benefits are received and determined." This is usually a VA Regional Office or an administrative office at a VA medical center. The legal term for such an office is the "agency of original jurisdiction." A VA *Regional Office* is one of 58 VA regional offices located throughout the United States and its territories, and it is at these offices where most claims for VA benefits are filed and determined. *Thus, all Regional Offices are considered to be "local offices," but the concept of "local office" may also include administrative offices located at VA medical centers.* Therefore, all Regional Offices are "local offices," but not all "local offices" are Regional Offices. See *Board of Veterans' Appeals, Understanding the Appeal Process*, published by the Department of Veterans Affairs; VA Pamphlet 01-00-1 (Jan. 2000) at 38-39 (cited to afterward as "Understanding"). See [<http://www.va.gov/vbs/bva/pamphlet.htm>] for the publication online. Go to the website and click on "Understanding the Appeal Process."

veteran to be eligible for VA benefits and the local VA office scrutinizes the veteran's claim before determining eligibility.<sup>4</sup>

## Appeals from the Local VA Office Decisions

Veterans not satisfied with the decisions made by the local VA office on their claims or benefits may wish to have the decisions reviewed on appeal.<sup>5</sup> The VA has stated that the two most common types of appeals are 1) the denial of benefits for a disability that the veteran believes is service-connected; and 2) the veteran believes that his/her disability is more severe than the VA has rated it.<sup>6</sup> The first issue involves *disability compensation*, which is a monthly cash benefit for veterans currently impaired from past service-connected activities.<sup>7</sup> The second issue involves the VA's *rating of the severity of the veteran's disability* — which is directly related to the amount of monthly disability compensation (a cash payment) the veteran receives.<sup>8</sup> While these two issues seem to be the most prevalent types of appeals, nearly any decision made by the local VA office concerning veterans' benefits may be appealed.<sup>9</sup>

An appeal of the local VA office's decision may be made to 1) the local VA office (which made the original decision) and/or 2) the Board of Veterans' Appeals (BVA), which is discussed below. The findings of the BVA may be appealed to the U.S. Court of Veterans Claims. Subsequent appeals may be made to the U.S. Court of Appeals for the Federal Circuit and ultimately to the U.S. Supreme Court.

## The Appeal Process

### Flow Chart of the Various Steps in the Appeal Process

The appeal process consists of several steps. The following flow chart provides a simplified outline of the steps that must be taken by the veteran in his/her appeal. Each step is discussed in detail in the text following the chart.

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<sup>4</sup> See CRS Report RL33323 at 2-7.

<sup>5</sup> *How Do I Appeal?*, published by the Board of Veterans Appeals, Department of Veterans Affairs; VA Pamphlet 10 — 2-02A (April 2002) at 1 (cited to afterward as "*How Do I Appeal?*"). See [<http://www.va.gov/vbs/bva/pamphlet.htm>]. Go to the website and click on "How Do I Appeal?" for an online copy of the pamphlet.

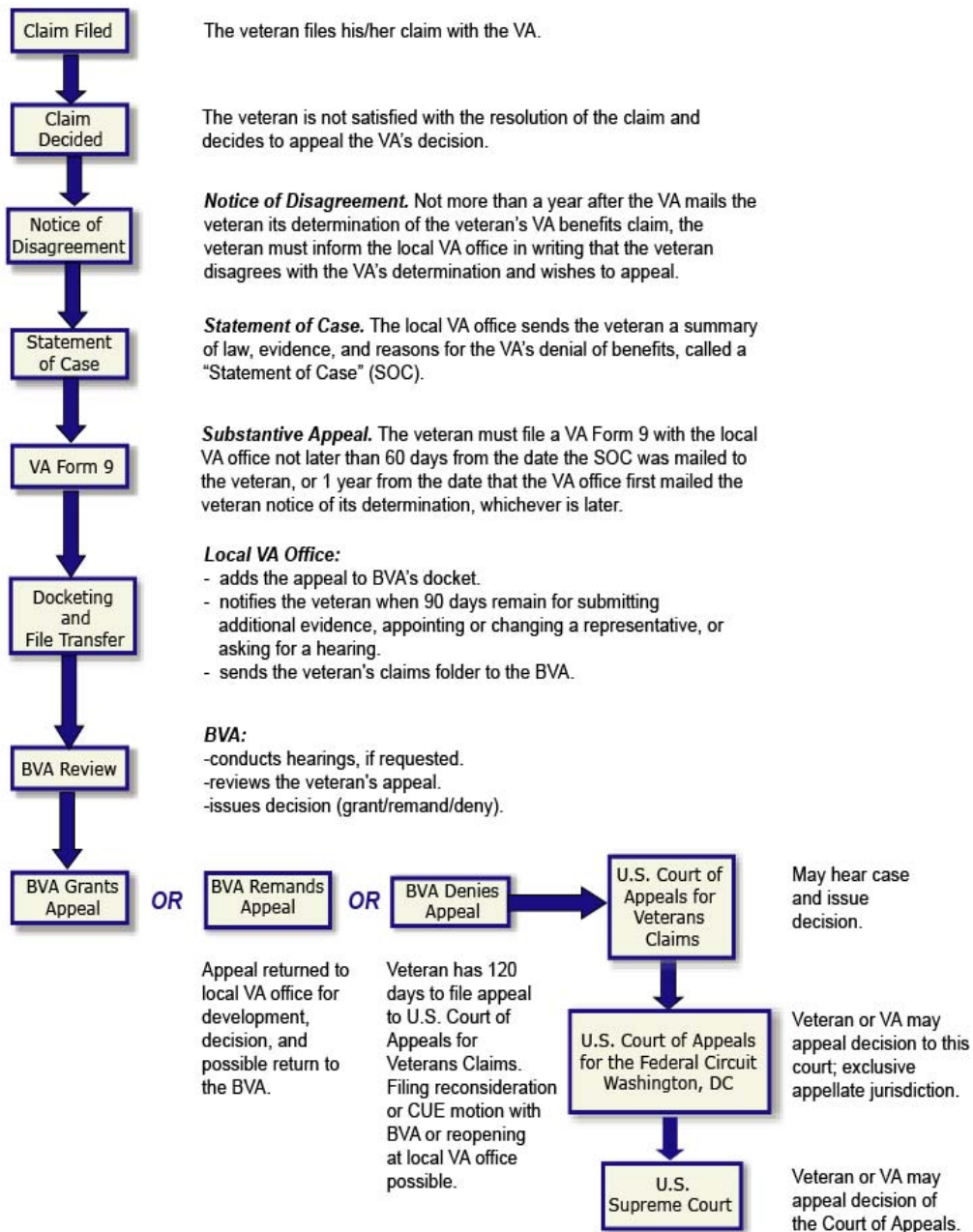
<sup>6</sup> *Id.*

<sup>7</sup> See CRS Report RL33323 at 2-5.

<sup>8</sup> *Id.* at 7-10. For instance, the local VA office may determine that the veteran is 10% disabled, while the veteran believes that he/she is 40% disabled.

<sup>9</sup> See *How Do I Appeal?* at 1. For example, a veteran may appeal a denial of education benefits made by the local VA office.

Figure 1. Appeal Process



Source: Adapted from charts at *How Do I Appeal?* at 2 and *Understanding* at 32.

Note: These filing time limits apply in most cases. However, they do not apply to "simultaneously contested claims," when more than one person is trying to receive benefits that only one person is entitled to, such as life insurance proceeds. See *Understanding* at 11.

## Filing the *Original* Claim for Benefits at the VA

In order to apply for VA benefits, the veteran must file a claim at the local VA office or VA medical facility.<sup>10</sup> A claim for benefits may also be filed on-line.<sup>11</sup> The claim must specifically state the requested benefit(s).<sup>12</sup> Assistance to the veteran during the application process may be provided by representatives from Veterans Service Organizations (VSOs)<sup>13</sup> and/or by other persons or agents.<sup>14</sup> The VSOs have staff located at most local VA offices.

In addition to assistance that may be provided by the VSOs or other agents, the VA is obligated by statute and regulation to provide certain assistance to the claimant during the original claim procedure and during any subsequent appeal(s). Such assistance many involve locating and producing records and providing medical examinations. Certain presumptions relating to medical conditions are also mandated by statute. These obligations and presumptions are summarized in the Appendix to this report.<sup>15</sup>

Following receipt of the veteran's claim for benefits, the local VA office will review the claim and make a decision about the claim(s).<sup>16</sup> The local VA office will either allow or deny the claim.<sup>17</sup> Where relevant, the local VA office may also rate (on a percentage basis) the veteran's degree of service-connected disability.<sup>18</sup> The local VA office's determination will be mailed to the veteran.<sup>19</sup> If the veteran is not satisfied with the local VA office decision, the veteran may appeal.

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<sup>10</sup> See note 3.

<sup>11</sup> See *How Do I Appeal* at 3. File at [<http://www.vba.va.gov>].

<sup>12</sup> Such benefits might relate to medical care, disability compensation, or educational benefits.

<sup>13</sup> Such organizations are the American Legion, the Disabled American Veterans, and other veterans' groups.

<sup>14</sup> See *How Do I Appeal?* at 3.

<sup>15</sup> See discussion at Appendix.

<sup>16</sup> See CRS Report RL33323 at 2-7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 7-10.

<sup>19</sup> See *How Do I Appeal?* at 3.



## The Appeal: The First Steps

An appeal<sup>20</sup> is a request for a review of a local VA determination<sup>21</sup> on a claim for benefits.<sup>22</sup> Anyone who has filed a claim for benefits with the VA and has received a determination from a local VA office is eligible to appeal a complete or a partial denial of a claim.<sup>23</sup> The veteran may also appeal the level of benefit granted.<sup>24</sup>

**Time Limit.** The veteran seeking a review of the local VA office decision (called “the appellant”) has one year from the date on which the local VA office mails the appellant its initial determination of the claim to appeal. After one year, the local VA office determination is considered final and cannot be appealed unless there is proof of clear and unmistakable error on the part of the VA.<sup>25</sup>

**The Notice of Disagreement (NOD).**<sup>26</sup> There is no special form needed to initiate the appeal process. The appellant need only submit a written statement disagreeing with the local VA office’s claim determination and stating the veteran’s wish to appeal the claim determination. This statement is called the Notice of Disagreement (NOD).<sup>27</sup>

**Appeal to the Local VA Office.** The NOD is filed with the same local VA office that made the decision being appealed,<sup>28</sup> as this is the location of the appellant’s claims file or claims folder,<sup>29</sup> unless the appellant has moved. After the NOD is filed, the appellant may request that his/her claims file be reviewed by a Decision Review Officer (DRO) from the local VA office. The DROs provide a second review of the entire file and may also hold a personal hearing on the claim.<sup>30</sup>

<sup>20</sup> See 38 C.F.R. § 20.200. What Constitutes An Appeal. “An appeal consists of a timely filed Notice of Disagreement in writing and, after a Statement of the Case has been furnished, a timely filed Substantive Appeal.”

<sup>21</sup> See *Understanding* at 6. Most local determinations are made by the local VA office. However, some determinations made by VA medical facilities, such as eligibility for medical treatment, may also be appealed.

<sup>22</sup> 38 U.S.C. § 511(a) outlines the authority of the Secretary of the VA to make decisions regarding benefits for veterans.

<sup>23</sup> See note 21.

<sup>24</sup> For example, a veteran may be determined to be 20% disabled and the veteran may believe that he/she is 40% disabled and appeal.

<sup>25</sup> See *Understanding* at 6-7.

<sup>26</sup> See 38 C.F.R. § 20.201.

<sup>27</sup> See *Understanding* at 39.

<sup>28</sup> 38 C.F.R. § 20.300.

<sup>29</sup> For the purpose of this report, the appellant’s records will be referred to as “claims file.”

<sup>30</sup> See *How Do I Appeal?* at 4.

**The Statement of the Case.** At this point, the local VA office will either allow or not allow the claim. If the claim is disallowed, the local VA office will prepare and send to the appellant a Statement of Case (SOC) and a blank VA Form 9 to be used for continuation of the appeal. The SOC summarizes the submitted evidence and the relevant laws and regulations and provides the local VA office's reasons for making its determination and disallowing the claim.<sup>31</sup>

**VA Form 9 and the Substantive Appeal.**<sup>32</sup> To continue an appeal, the appellant must fill out and return the VA Form 9 — the Substantive Appeal — to the local VA office. Form 9 is available on-line.<sup>33</sup> The appellant must state the requested benefit, any mistakes in the SOC, and indicate whether a personal hearing is requested.<sup>34</sup> The Form 9 becomes part of the claims folder and is the basis for adding the appeal to the Board of Veterans Appeals docket. Specific provisions exist for the withdrawal of the appeal.<sup>35</sup>

**Supplemental Statement of Case.**<sup>36</sup> If the appellant submits new evidence or information, the local VA office will prepare a Supplemental Statement of Case (SSOC). The SSOC is similar to the SOC and includes the newly submitted information.<sup>37</sup> The appellant has sixty days from the date the SSOC was mailed to submit, in writing, any matter in dispute on the SSOC.

**Time Limitation.**<sup>38</sup> The local VA office must receive the VA Form 9 within sixty days from the date that the VA mailed the SOC (or SSOC) or within one year of the date that the original decision denying the claim, whichever date is later.<sup>39</sup>

**Withdrawal of Issue(s).** If the appellant does not wish the Board of Veterans Appeals to examine an issue that is contained in the SOC or the SSOC, the appellant may state on Form 9 that the appellant is withdrawing the issue(s) on the appeal.<sup>40</sup>

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<sup>31</sup> See *Understanding* at 8-9.

<sup>32</sup> 38 C.F.R. § 20.202.

<sup>33</sup> See [<http://www.vba.va.gov>].

<sup>34</sup> A personal hearing must be requested. Without such a request, the BVA will review the claims file and the VA Form 9 and make a decision without meeting or speaking with the appellant and his/her representative.

<sup>35</sup> 38 C.F.R. § 20.204.

<sup>36</sup> 38 C.F.R. § 20.302(b), (c).

<sup>37</sup> See *Understanding* at 40-41.

<sup>38</sup> 38 C.F.R. § 20.302.

<sup>39</sup> *Id.* See *How Do I Appeal?* at 6.

<sup>40</sup> See *Understanding* at 10.

## Issues Related to the Appeal Process

**Filing Extensions.**<sup>41</sup> An appellant may request an extension of the sixty day filing period for filing a Substantive Appeal or the sixty day period to respond to a Supplemental Statement of the Case.<sup>42</sup> The appellant makes this request in writing to the local VA office handling the appeal. The appellant needs to explain to the VA local office why extra time is needed to file.

**Representation for the Appeal.**<sup>43</sup> The appellant may represent him/herself at the appeal. However, the VA has reported that about 90 percent of appeals heard before the Board of Veterans Appeals (BVA) have some representation.<sup>44</sup>

There are three different categories of representatives that the appellant may engage. First, is a representative of the VSO or from the state or local veterans' office. Usually, the representatives from the VSOs and the government veterans' offices do not charge for their services.<sup>45</sup> Second, the VA recognizes certain "agents" who are able to represent appellants and who are certified by the VA.<sup>46</sup> Third, the appellant may engage a lawyer for representation.<sup>47</sup> There are strict guidelines as to fees that the lawyers may charge.<sup>48</sup> For example, when an appellant has engaged a lawyer<sup>49</sup> to represent him/her, the total fee payable to the attorney may not exceed twenty percent of the total amount of any past-due benefits awarded on the basis of the claim.<sup>50</sup> Legislation introduced in the 109<sup>th</sup> Congress, the proposed "Veterans' Choice of Representation and Benefits Enhancement Act of 2006,"<sup>51</sup> would remove certain limitations on attorney representation of claimants for veterans' benefits in administrative proceedings before the Department of Veterans Affairs.

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<sup>41</sup> 38 C.F.R. § 20.303.

<sup>42</sup> 38 U.S.C § 5105(d)(3); 38 C.F.R. § 20.303.

<sup>43</sup> See in general, 38 C.F.R. § 20.600. Legislation pending in the 109<sup>th</sup> Congress, discussed below, may change the representation available to appellants.

<sup>44</sup> See *Understanding* at 12.

<sup>45</sup> See *Understanding* at 12.

<sup>46</sup> 38 U.S.C. § 5904; 38 C.F.R. § 20.604.

<sup>47</sup> 38 C.F.R. § 20.603.

<sup>48</sup> 38 U.S.C. § 5904(c)(d); 38 C.F.R. § 20.609.

<sup>49</sup> There is a longstanding misconception that an appellant may not be represented by a lawyer. An appellant may engage a lawyer; however, there are very stringent guidelines about the costs and fees of the legal representation. Hence, as a practical matter it may be difficult for a veteran to actually retain a lawyer to represent him/her during the appeal process.

<sup>50</sup> 38 U.S.C. § 5904(d)(1).

<sup>51</sup> S. 2675, 109<sup>th</sup> Cong., 2d Sess. (2006); H.R. 5549, 109<sup>th</sup> Cong., 2d Sess. (2006). S. 2675 passed the Senate with an amendment on August 4, 2006, and was referred to the Committees on Veterans' Affairs and Financial Services on September 6, 2006. H.R. 5549 was referred to the Committee on Veterans' Affairs on June 7, 2006.

The appellant must complete a VA form 21-22 to authorize representation by a VSO or a related entity on the appeal.<sup>52</sup> The appellant must complete a VA Form 22a to authorize representation by a lawyer<sup>53</sup> or a recognized agent for his/her appeal.<sup>54</sup> The VA has reported that about 85% of the appellants are represented by a VSO or by their state's veterans department.<sup>55</sup> An appellant is limited to one representative recognized by the BVA.<sup>56</sup>

**Information for the Appeal.** Should new evidence or medical proof supporting the appellant's claim arise during the appeal process, the evidence should be submitted to the VA. If the appellant's claims file is at the local VA office and the new evidence is sent there, the VA local office will send the appellant an SSOC if it does not allow the claim after reviewing the new evidence. The new evidence will be added to the claims file and considered during the appeal process.<sup>57</sup>

**Location of the VA Form 9.** After the Form 9 is filed, it becomes part of the claims file and serves as the basis for the appeal to the BVA. The Form 9, as part of the claims file, will be sent by the local VA office to the BVA and will be reviewed later by the BVA when the BVA considers the appeal and reviews the entire claims file.

## The Board of Veterans' Appeals (BVA)

### Organization<sup>58</sup>

Known as the "Gateway to VA Appeals,"<sup>59</sup> the Board of Veterans' Appeals (BVA) is a part of the VA based in Washington, DC.<sup>60</sup> The BVA reviews benefit claims appeals and issues decisions on those appeals. The BVA is composed of "Members of the Board" who are attorneys experienced in veterans' law, appointed by the Secretary of Veterans Affairs and approved by the President of the United States. Staff attorneys, who are designated as Counsel or Associate Counsel, assist

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<sup>52</sup> 38 C.F.R. § 20.602.

<sup>53</sup> 38 C.F.R. § 20.603.

<sup>54</sup> 38 C.F.R. § 20.604.

<sup>55</sup> See *Understanding* at 12.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 13-14.

<sup>58</sup> For a general overview of the BVA, see the website at [<http://www.va.gov/vbs/bva>].

<sup>59</sup> See note 57.

<sup>60</sup> 38 U.S.C. § 7101(a); 38 U.S.C. § 7104.

Members of the Board in preparing decisions.<sup>61</sup> The function that they provide is similar to a law clerk who assists a judge in his/her legal capacities.<sup>62</sup>

## The BVA's Docket

**The BVA Docket and Docket Number.** The local VA office will forward the appellant's claims file to the BVA's docket. The law requires that the BVA decide cases on a "first come, first served" basis.<sup>63</sup> Each appellant's case is added to the docket when the VA receives the substantive appeal — VA Form 9 — and the claims file from the local VA.<sup>64</sup>

On occasion, the BVA may, on a motion by the appellant, advance the order of a claim on its docket.<sup>65</sup> The appellant must demonstrate compelling need, exceptional circumstances, or proof of hardship.<sup>66</sup> The BVA seldom grants a request for "advancement on the docket," as the BVA feels that most appeals involve some form of hardship and the BVA wishes to treat all appellants fairly.<sup>67</sup>

**Waiting Time.** Once a case/claim has been entered on the BVA's docket, it is uncertain how long it may take for the BVA to reach a decision on the case. The VA has stated, that as of the fall of 1999, it took an average of two years from the time a NOD was filed, until a final decision was issued.<sup>68</sup> However, 2005 congressional testimony by the Undersecretary for Benefits of the VA appears to indicate that the decision time has been substantially reduced.<sup>69</sup>

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<sup>61</sup> *Id.* at 36.

<sup>62</sup> *Id.* at 36-37.

<sup>63</sup> 38 U.S.C. § 7107(a); 38 C.F.R. § 20.900.

<sup>64</sup> See *Understanding* at 15. Each case is assigned a docket number when it is added to the list of cases. The first two numbers are the year in which the case was filed and the remaining numbers indicate the order in which the case was added to that year's list/docket. For example, 05-00111, would indicate the 111<sup>th</sup> claim filed in 2005.

<sup>65</sup> 38 U.S.C. § 7107(a)(92); 38 C.F.R. § 20.900.

<sup>66</sup> For example, terminal illness, bankruptcy, pending eviction, and other hardships.

<sup>67</sup> See *Understanding* at 16.

<sup>68</sup> *Id.* at 16.

<sup>69</sup> Testimony of Daniel L. Cooper, Undersecretary of Benefits, Department of Veterans Affairs before the Senate Veterans Affairs Committee (May 26, 2005). See [<http://www.va.gov/OCA/testimony/svac/05052620.asp>].

## Personal Hearings

There are two types of personal hearings: a *local VA office hearing*<sup>70</sup> and a *BVA hearing*.

As previously discussed,<sup>71</sup> a local office hearing is held at the local VA office between the appellant and a *hearing officer* from the local VA office staff. Such a hearing is arranged between the appellant and the local VA office. The local VA office may find in favor of the appellant. The appellant may subsequently appeal the local office hearing through the BVA.

The appellant may present his/her case in person to a member of the BVA. There are three types of BVA hearings: a hearing by a Board member at a the local VA office (Regional Office), called a Travel Board hearing;<sup>72</sup> a hearing at the BVA office in Washington, DC; or a videoconference hearing at the local VA office, if it is equipped for videoconferencing. The VA does not provide travel expenses to the appellant.<sup>73</sup>

### Request for a BVA Hearing

The typical way to request a BVA hearing is for the appellant to indicate on VA Form 9 the type of hearing that the appellant wishes. The appellant may also write to the BVA to request a hearing, indicating whether a hearing is requested at the local level or in Washington, DC.

### Scheduling the BVA Hearing

The schedule of the hearing depends upon the type of hearing requested. The BVA has reported that the Travel Board hearings are usually held as soon as they can be scheduled on the hearing officer's calendar,<sup>74</sup> but that they may be difficult to arrange because of the schedules of the BVA Board members and the accumulation of a sufficient number of appeals to warrant a scheduled visit from a BVA member.<sup>75</sup> Videoconferenced hearings are less complicated to arrange and can be scheduled more quickly than Travel Board hearings, according to the BVA.<sup>76</sup>

Hearings that are held at the BVA offices in Washington DC are usually scheduled close to the time when the BVA will consider the case. In 2000, the BVA

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<sup>70</sup> This is sometimes called a Regional Office hearing, an RO hearing, or a hearing officer hearing.

<sup>71</sup> See "Appeal to the Local VA Office" on page 4.

<sup>72</sup> See note 3.

<sup>73</sup> See *Understanding* at 18.

<sup>74</sup> *Id.* at 19.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

reported that the BVA will schedule a case about three months before the case is reviewed.<sup>77</sup>

## The Ninety Day Rule

The local VA office will notify the appellant by letter when it transfers the claims file to the BVA in Washington, DC. The letter will inform the claimant that the claimant has ninety days from the date of the letter or until the BVA decides the case, whichever comes first, to add additional evidence to the file, request a hearing (if none was selected), and/or select or change representation.<sup>78</sup>

In order for the BVA to accept any of these materials after the expiration of the ninety day period, the appellant must submit a motion — a written request — asking the BVA to accept the item, even though it is late. The motion needs to include an explanation of why the item is late and demonstrate why the BVA should accept the item into the claims file.

## The Appeal at the BVA

The local VA office will forward the appellant's file to the BVA. The appellant will be notified in writing when the file is officially transferred and received by the BVA.<sup>79</sup> The decision time in the appeal process varies from case to case. After the file is received by the BVA, the appellant's case will then be assigned to a Board member for review. When the docket number for the appeal has been reached, the file will be examined by a Board member and a staff attorney. They will check the file for completeness, review all of the evidence and arguments, the transcript of the local VA hearing, the statement of the appellant's representative (if the appellant has a representative), and any additional information that may be with the claims file.<sup>80</sup> The Board member may request the staff attorney to undertake additional research on the case and prepare recommendations for the review of the Board member. If the appellant requested a BVA hearing, the Board member assigned to the case will conduct the hearing before reaching a decision.

Before reaching a decision, the Board member will examine all of the material in the appellant's file, along with the recommendations prepared by the staff attorney. The Board member will then issue a decision on the appeal.<sup>81</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> 38 C.F.R. § 20.1304.

<sup>79</sup> *Id.* Appellants may check the status of their file after its transfer to by BVA by telephone at 202-565-5436.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 23.

## Notification of the Board's Decision

The BVA will issue its decision in writing. The decision may contain legal documents and legal discussions as well as medical discussions. The decision will be mailed to the appellant's home address.<sup>82</sup>

The decision will allow, deny, or remand the claim. If the claim is allowed or denied, the BVA's decision is final. A remand is not a final decision and allows further work on the claim.<sup>83</sup>

If the appeal is denied, the BVA will send a copy of the "Notice of Appellate Rights" that describes additional actions that the appellant may choose to pursue.

## The Remand

At times the BVA may review an appeal and determine that the case is not ready for a final decision. The BVA will send the case back to the local VA office with directions as to what should be done. The action of returning the case to the local VA office for additional work is called a remand. It is sometimes described as "additional development."<sup>84</sup>

After the case has been returned to the local VA office, it will perform the additional work on the file. The local VA office will review the case and issue a new determination. If the local VA office does not allow the claim, it will return the case to the BVA for a final decision. The case keeps its original place on the BVA's docket, so it is usually reviewed relatively soon after it is returned to the BVA.<sup>85</sup>

Certain cases are remanded because of new rulings by the U.S. Court of Appeals for Veterans Claims or changes in the law. The local VA office will then review them within the context of the new legislation or the court ruling.<sup>86</sup>

## Additional Appeal Options

Should the appellant wish to appeal the BVA's decision, the appellant may appeal to the United States Court of Appeals for Veterans Claims (CAVC), an independent court and not part of the VA.<sup>87</sup> An appellant may also wish to pursue further motions with the BVA.

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<sup>82</sup> *Id.*

<sup>83</sup> See *How Do I Appeal* at 11.

<sup>84</sup> See *Understanding* at 24.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See the CAVC's website: [<http://www.vetapp.uscourts.gov/>].



**Notice of Appeal.** Usually, the appellant must file the Notice of Appeal with the CAVC within 120 days from the date the BVA's decision is mailed. (The mailing date is stamped on the front of the BVA's decision.)

If the appellant filed a motion to reconsider with the BVA within the 120 day time period and that motion was denied, the appellant has a new 120 day period to file the Notice of Appeal with the CAVC.<sup>88</sup> The new 120 day period begins on the date the BVA mails the appellant a letter notifying the appellant that it has denied the motion to reconsider.

**Motion for Reconsideration.** If the appellant is able to demonstrate that the BVA made an obvious error of fact or of law in its decision, the appellant may file a written "motion to reconsider" of the appeal.<sup>89</sup> The appellant may have the VSO representative advise him/her whether to file the motion and the VSO representative may also provide assistance in its preparation. The motion to reconsider is sent directly to the BVA and not to the local VA office.

The appellant will need to demonstrate that the BVA made a mistake in law or in fact and that the BVA's decision would have been different if the mistake had not been made.<sup>90</sup>

**Reopening the Case.** If the appellant has "new and material" evidence relating to his/her claim, the appellant can request that the case be opened.<sup>91</sup> In order to be considered "new and material," the evidence submitted needs to include information related to the case that was not included in the claims folder when the Board reviewed and decided the case.

To reopen a case, the appellant must submit the new evidence directly to the local VA office and not to the BVA.<sup>92</sup>

**CUE Motion.** A BVA decision may be reversed or revised if the appellant is able to show that the decision contained "clear and unmistakable error" (CUE).<sup>93</sup> The written request for the BVA to review its decision for CUE is called a motion. CUE motions are filed directly with the BVA and not with the local VA office.

The motion for CUE review must meet various requirements and if the motion is denied, the appellant cannot request another CUE review.<sup>94</sup> The VA has reported that not many CUE motions are successful. In order to succeed, the conclusion must

<sup>88</sup> See *Understanding* at 25-26 for the appropriate addresses to file the Notice of Appeal and a copy of the Notice of Appeal.

<sup>89</sup> 38 U.S.C. § 7103; 38 C.F.R. § 20.1000; 38 C.F.R. § 20.1001.

<sup>90</sup> See *Understanding* at 27.

<sup>91</sup> 38 U.S.C. § 5108; 38 U.S.C. § 7104(b); 38 C.F.R. § 3.156; 38 C.F.R. § 20.1105.

<sup>92</sup> See *Understanding* at 27.

<sup>93</sup> 38 U.S.C. § 7111; 38 C.F.R. § 20, subpart O.

<sup>94</sup> See *Understanding* at 28.

be reached that the BVA would have decided the case differently, but for the error. A difference in opinion is not sufficient.<sup>95</sup>

The appellant may file a motion to review a BVA decision for CUE at any time. However, if the motion for CUE is filed after filing a timely Notice of Appeal with the CAVC (120 days),<sup>96</sup> the BVA will not be able to rule on the CUE motion.<sup>97</sup>

## **Death of the Appellant Before a Decision Issued**

The death of the appellant usually ends the appeal.<sup>98</sup> If the appellant dies, the BVA normally dismisses the appeal without issuing a decision. Any rights of a deceased appellant's survivors are not affected by this action. The survivors may file a claim at the VA regional office (RO) for any benefits to which they may be entitled.<sup>99</sup>

## **Subsequent Judicial Appeals**

The *U.S. Court of Appeals for the Federal Circuit* (Federal Circuit) has exclusive jurisdiction to hear cases involving challenges to VA decisions in an appeal of a CAVC decision and in a direct challenge to VA regulation and VA policies of general applicability.<sup>100</sup> A decision of the CAVC may be appealed to the Federal Circuit by the persons who appealed to the CAVC or by the VA. An appeal to the Federal Circuit must be filed within sixty days of the final CAVC decision. After the Federal Circuit issues a final decision, either the claimant or the VA may petition the U.S. Supreme Court for certiorari (to hear the case) within ninety days of the Federal Circuit's final action.<sup>101</sup> The Supreme Court is the court of last resort and the Supreme Court's decision is final.

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<sup>95</sup> *Id.*

<sup>96</sup> See "Nature of Appeal" at 11.

<sup>97</sup> See *Understanding* at 28.

<sup>98</sup> 38 U.S.C. § 7104(a); 38 C.F.R. § 20.1302.

<sup>99</sup> See *Understanding* at 29.

<sup>100</sup> 38 U.S.C. § 7292.

<sup>101</sup> 38 U.S.C. § 7292(c).

## Appendix

### Duties and Obligations of the VA to the Claimant/Appellant

#### The Obligations of the VA to the Claimant/Appellant<sup>102</sup>

The VA<sup>103</sup> has various legal obligations to a claimant/appellant relating to the completeness of the application for benefits (or a subsequent appeal), the provision of medical and service records, and other issues related to the application/appeals process.

**Application and Notice of Incomplete Application.** The VA is required to provide to any person claiming or applying for any benefit, the “instructions and forms necessary to apply for that benefit.”<sup>104</sup> These materials are to be provided “free of all expense” to the claimant.<sup>105</sup>

If the claimant’s application for a VA benefit is incomplete, the VA is required to notify the claimant of the information that is necessary to complete the application.<sup>106</sup>

**Required Information and Evidence; and Time Limitation.**<sup>107</sup> After the VA receives a complete or a nearly complete application for benefits, the VA is required to notify the claimant of any information or medical or lay evidence that is needed to substantiate the claim.<sup>108</sup> As part of this notification requirement, the VA is required to indicate which information and evidence is to be provided by the claimant and which information the VA will attempt to obtain on the claimant’s behalf to substantiate and complete the claim.

The claimant is required to submit the above-mentioned evidence to substantiate the claim *within one year of the date of the VA’s notification*. If no further evidence is obtained, no benefits will be paid or furnished on this claim.<sup>109</sup>

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<sup>102</sup> See CRS Report RL33323 at 5-7.

<sup>103</sup> The statutory language provides that “the Secretary” is required to provide various assistance to the claimant. For the purposes of this summary and for consistency, the term “VA” is used instead.

<sup>104</sup> 38 U.S.C. § 5102(a); 38 C.F.R. § 3.150(a).

<sup>105</sup> 38 U.S.C. § 5102(a).

<sup>106</sup> 38 U.S.C. § 5102(b); 38 C.F.R. § 3.159(b)(2).

<sup>107</sup> These provisions are not applicable for any application or claim for government insurance benefits. 38 U.S.C. § 5103(b)(2).

<sup>108</sup> 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b).

<sup>109</sup> 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b)(1),

**Duty to Assist Claimants — Records.** The VA is required to make “reasonable efforts” to assist a claimant in obtaining evidence necessary to substantiate the claim for benefits.<sup>110</sup> However, certain exceptions exist to this requirement. The VA is not required to provide assistance to the claimant if “no reasonable possibility” exists that such assistance would aid in substantiating the claim.<sup>111</sup> The VA may defer providing assistance pending the claimant’s submission of essential information that is missing from the claimant’s application.<sup>112</sup>

**Assistance in Obtaining Records.** The VA is required to make “reasonable efforts” to obtain relevant records (including private records) that the claimant adequately identifies to the VA and authorizes the VA to obtain.<sup>113</sup> Federal regulations outline the procedures for obtaining records not in the custody of a federal department or agency<sup>114</sup> and obtaining records in the custody of a federal department or agency.<sup>115</sup> If after making reasonable efforts, the VA is unable to locate the records, the VA will notify the claimant that the VA is unable to obtain the records pursuant to this claim.<sup>116</sup> The notification is required to identify the records being sought, explain the efforts made to obtain the records, and described any further action to be taken by the VA regarding this claim.<sup>117</sup> It is required that the VA’s efforts to obtain records from the federal department or agency will continue until the records are obtained, unless it is reasonably certain that such records do not exist or that further efforts to obtain the records would be futile.<sup>118</sup>

**Records for Compensation Claims.** If the case involves a claim for disability compensation, additional assistance in obtaining records is required to be provided.<sup>119</sup> Assistance is to be provided in locating the claimant’s service medical records and other relevant records relating to the claimant’s active military, naval, or air service that are held or maintained by a governmental entity;<sup>120</sup> records of relevant medical treatment or examination at VA health-care facilities;<sup>121</sup> and any other

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<sup>110</sup> 38 U.S.C. 5103A(a)(1); 38 C.F.R. § 3.159(c)(1).

<sup>111</sup> 38 U.S.C. § 5103A(a)(2); 38 C.F.R. § 3.160(d).

<sup>112</sup> 38 U.S.C. § 5103A(a)(3).

<sup>113</sup> 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.160©).

<sup>114</sup> 38 C.F.R. § 3.159A(c)(1).

<sup>115</sup> 38 C.F.R. § 3.159A(c)(2).

<sup>116</sup> 38 U.S.C. § 5103A(b)(2); 38 C.F.R. § 3.160(e).

<sup>117</sup> *Id.*

<sup>118</sup> 38 U.S.C. § 5103A(b)(3).

<sup>119</sup> 38 U.S.C. § 5103A(c); 38 C.F.R. § 3.159(c)(3).

<sup>120</sup> 38 U.S.C. § 5103A(c)(1).

<sup>121</sup> 38 U.S.C. § 5103A(c)(2).

relevant records held by any federal department or agency that the claimant identifies and authorizes the VA to obtain.<sup>122</sup>

**Medical Examinations for Compensation Claims.** If the case involves a claim for disability compensation, the VA is required to provide a medical examination or obtain a medical opinion when such an examination or opinion is necessary to make a decision on the claim.<sup>123</sup> The VA is required to treat an examination or opinion as being necessary to make a decision on a claim if the evidence on the record, taking in consideration all information and lay or medical evidence 1) contains competent evidence that the claimant has a current disability or persistent or recurrent symptoms of disability<sup>124</sup> or 2) indicates that the disability or symptoms may be associated with the claimant’s active military, naval, or air service;<sup>125</sup> but does not contain sufficient medical evidence for the VA to make a decision on the claim.<sup>126</sup>

**Disallowed Claims.** The statute specifically provides that the VA is not required to reopen a claim that has been disallowed except when new and material evidence is presented or secured.<sup>127</sup>

**Other Assistance not Precluded.** The statute is not to be construed as precluding the VA from providing such other assistance to a claimant in substantiating a claim as the VA considers appropriate.<sup>128</sup>

**Decisions and Notices of Decisions.** When the VA makes a decision affecting the provision of benefits to a claimant, the VA is required, on a timely basis, to provide the claimant (and the claimant’s representative) notice of the decision.<sup>129</sup> The notice must include an explanation of the procedure for obtaining a review of the decision.<sup>130</sup> If the VA denies a benefit, the notice is required to include a statement of the reason for the decision and a summary of the evidence considered by the VA.<sup>131</sup>

**VA’s Obligation to Assist in the Development of Claims.** Federal regulations require the VA to assist the claimant “in developing the facts pertinent to the claim” and to render a decision that grants every benefit that can be supported

<sup>122</sup> 38 U.S.C. § 5103A(c)(3).

<sup>123</sup> 38 U.S.C. § 5103A(c)(4); 38 C.F.R. § 3.159(c)(4).

<sup>124</sup> 38 U.S.C. § 5103A(d)(2)(A).

<sup>125</sup> 38 U.S.C. § 5103A(d)(2)(B).

<sup>126</sup> 38 U.S.C. § 5103A(d)(2)(C).

<sup>127</sup> 38 U.S.C. § 5103A(f).

<sup>128</sup> 38 U.S.C. § 5103A(g).

<sup>129</sup> 38 U.S.C. § 5104(a); 38 C.F.R. § 3.103(b).

<sup>130</sup> *Id.*

<sup>131</sup> 38 U.S.C. § 5104(b).

in law while protecting the interests of the government.<sup>132</sup> Therefore, the VA has the duty to consider all legal theories upon which the claim could be granted,<sup>133</sup> regardless of whether the claimant argues or focuses on every possible legal theory.

**Reopening Disallowed Claims.** If any new or material evidence is presented or secured relating to a claim that has been disallowed, the VA is required to reopen the claim and review the former disposition of the claim.<sup>134</sup>

**Revision of Decisions on Grounds of Clear and Unmistakable Error.** A VA decision is subject to revision on the grounds of clear and unmistakable error, as previously discussed.<sup>135</sup> If there is evidence to establish the error, the prior decision is reversed or revised.<sup>136</sup> For the purposes of authorizing benefits, a rating, or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error, has the effect as if the decision had been made on the date of the prior decision.<sup>137</sup> A review to determine whether a clear and unmistakable error exists in a case may be initiated by the VA or upon the request of the claimant.<sup>138</sup> A request for a revision of a VA decision based on clear and unmistakable error may be made at any time after the decision is made.<sup>139</sup> Such a request for a revision shall be submitted to the VA and shall be decided in the same manner as any other claim.<sup>140</sup>

**Benefit of the Doubt Standard.** The VA is required to consider all information and the legal and medical evidence of record in a case before the VA with respect to benefits under the laws administered by the VA.<sup>141</sup> When there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the VA “shall give the benefit of the doubt to the claimant.”<sup>142</sup> Regulations provide that when reasonable doubt arises, such doubt will be resolved in favor of the claimant.<sup>143</sup> For instance, in order to satisfy this element, the submitted medical evidence generally needs to show that it is as likely as not that there is a connection between the in-service injury, occurrence, or illness and the

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<sup>132</sup> 38 C.F.R. § 3.103(a).

<sup>133</sup> The VA would be required to consider all possible legal theories (e.g., secondary service connection, presumptive service connection, etc.) upon which the claim could be granted.

<sup>134</sup> 38 U.S.C. § 5108.

<sup>135</sup> 38 U.S.C. § 5109A(a). See discussion at 12.

<sup>136</sup> *Id.*

<sup>137</sup> 38 U.S.C. § 5109A(b).

<sup>138</sup> 38 U.S.C. § 5109A(c).

<sup>139</sup> 38 U.S.C. § 5109A(d).

<sup>140</sup> 38 U.S.C. § 5109A(e).

<sup>141</sup> 38 U.S.C. § 5107(b).

<sup>142</sup> *Id.* See 38 C.F.R. § 3.102.

<sup>143</sup> 38 C.F.R. § 3.102.

current disability. Thus, the VA can deny the claim only if the preponderance of the evidence is against the claim.

**Certain Presumptions.** In its analysis of certain claims, the VA is required by statute and/or regulation to make certain presumptions.

***Presumption of Medical Soundness.*** In evaluating a veteran's claim, the VA generally presumes that the veteran entered the service in sound medical condition.<sup>144</sup> This may assist the veteran in proving a claim by making it difficult for the VA to claim that the condition or disease existed prior to service. However, if the medical impairment was noted at the time of entry into service, the veteran may have to prove that the condition was exacerbated in-service. If the VA is able to prove by "clear and unmistakable evidence" that the disease or injury was in existence prior to service, and that it was not worsened during service, the veteran's claim will be denied.

***Special Rules for Certain In-Service Occurrences.*** Special rules exist under which the VA is required to consider a service-connected problem by presumption. For example, certain diseases associated with exposure to Agent Orange will be presumed to be service-related in the case of Vietnam veterans.<sup>145</sup>

A similar regulation holds that veterans who were held prisoners of war, or who served in combat, can be presumed to have suffered traumatic, stressful events during their military service.<sup>146</sup> Similarly, combat veterans have special rules applicable to them in proving an in-service injury or other incident.<sup>147</sup> Usually, if a combat veteran states that he/she suffered a disease, injury, or other event during the combat, the VA will usually accept that statement as fact. This is the case even if there are no service records to substantiate the claim.

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<sup>144</sup> 38 U.S.C. § 1111.

<sup>145</sup> 38 C.F.R. § 3.307(a)(6)(iii).

<sup>146</sup> 38 C.F.R. § 3.304(f).

<sup>147</sup> 38 U.S.C. §§ 1154(b); 38 C.F.R. § 3.304(d),(f).