

Chapter Five.

Explaining the VA Claims and Appeals Process

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Introduction

To avoid any unpleasant surprises, when seeking compensation or pension from the VA, you should have an understanding of the claims and appeals process. This chapter should give veterans and eligible dependents a basic overview of the claims and appeals process for VA benefits. Beyond the claims for federal benefits that are discussed here, veterans should know that many states provide their own benefits to veterans. To learn more about state benefits, contact your state or county department of veterans affairs.

EDITOR'S NOTE: This chapter contains a lot of details on how veterans claims and appeals are processed. We are not saying that veterans who are represented by a service representative (sometimes called a "service officer") or attorney need to memorize all these details. Veterans should rely on their rep or attorney to know the details. Still, veterans will benefit from reading through the chapter and getting an idea of the deadlines and other complexities involved.

You should know that the amount of evidence that you need to win a claim for VA benefits is relatively low. Television has made everyone familiar with the standard of proof in a criminal case, which is typically that the evidence shows guilt “beyond a reasonable doubt.” Another common standard of proof is the “preponderance of evidence” standard often used in civil lawsuits, with the winner being the side with the most favorable evidence. In claims for veterans benefits, the VA can deny a claim only if the preponderance of evidence weighs against the claim. If the evidence is even, creating an equal balance for and against the claim, the claim must be granted. This is sometimes called the “benefit of the doubt” rule because where the evidence is even, the veteran gets the “benefit of the doubt” and wins.

When a claim is first filed, it is received and decided by the local VA Regional Office (VARO). Each state usually has its own VARO, but some larger states have more than one. You can find which VARO will process your claim at the VA’s Web site, www.va.gov, by clicking on a link called “Find a Facility.” If your claim is granted at any point during the claims or appeal process, you should start to receive the benefits that have been granted. If your claim is fully granted, the claims process ends for that particular claim. If the VARO denies your claim, you may wish to appeal.

The first level of appeal is to the Board of Veterans’ Appeals (BVA or Board) and if the claim is not satisfied at the BVA level, you may appeal to the U.S. Court of Appeals for Veterans Claims (CAVC). It is important to keep in mind that throughout the process, there are rules that govern when to file, how to file, and what evidence is required to win your claim. These rules, which will be explored later in this chapter, not only apply to you as the claimant, but some of them apply to the VA as well. This means that you may have grounds to appeal a negative decision when the VA does not uphold its end of the bargain by providing you with certain notice and information. It also means that you could lose your case for failing to follow the proper procedure. In addition to the system of appeals, there are several steps that you may take to have your claim reviewed outside of the traditional appeals process. Such steps include requesting review by the VARO or the BVA of their own negative decisions.

Representation

The first thing that you should know about the VA claims process is that it is complicated and confusing and can be frustrating. Therefore we highly recommend that claimants seek assistance from a county, state, or national

veterans service organization. National organizations include but are by no means limited to The American Legion, AMVETS, the Disabled American Veterans, the Military Order of the Purple Heart, the Veterans of Foreign Wars, and Vietnam Veterans of America. Contact one of these organizations (see the appendix at the end of this book for contact information) and ask to be referred to a service representative (also called a “service officer”) employed by the organization. Service reps will assist you without charge.

Not all veterans seeking something from the VA are making claims for benefits, but if you are doing so, you can be represented by a service rep but can choose instead to be represented by an agent or an attorney. An “agent” is a layperson who is permitted (recognized) by the VA to represent claimants seeking VA benefits. Agents and attorneys may, in certain circumstances, charge a fee for their services. Service representatives may never charge fees. We suggest that veterans and other claimants seeking VA benefits first contact a service representative, because they do not charge a fee and because lawyers and agents are less likely to get involved at the beginning of a claim because they are not permitted to charge a fee until the claim is first denied. The terminology can be confusing, and we will confuse you further by explaining that anyone representing you may correctly or incorrectly be called your “representative” or your “advocate.”

If you choose an organization (through its service rep / service officer) to represent you, you or your representative must complete and file (with a VA Regional Office) a VA Form 21-22, “Appointment of Veterans Service Organization as Claimant’s Representative.” This form will notify the VA that you are officially represented by a veterans service organization. Attorneys and agents (these people do not work for service organizations), must file VA Form 21-22a to be accepted by the VA as the holder of the claimant’s power of attorney (POA).

The VA recently changed a rule that prohibited veterans from hiring attorneys until after the Board of Veterans’ Appeals had issued a negative decision. Now veterans may hire attorneys to represent them in an appeal at a much earlier stage in the VA adjudication process. Attorneys (or agents) can now be hired once the claimant receives his or her first negative decision from the VA Regional Office (VARO). A negative decision by the BVA is one that partly or fully denies a veteran’s appeal and a negative decision by a VARO is one that partly or fully denies a veteran’s claim.

Applying For Benefits

Time is of great importance when applying for VA benefits. This is because if the claim is successful, the VA usually grants benefits back to the date when the VA first received notice of the claim. To start a claim, you should send a signed and dated letter to the local VARO as soon as you realize that a possible claim for benefits exists. The letter should state “I apply for [identify the desired benefit], and any other benefits that I may be entitled to. Additional documentation will be submitted.” This letter is considered an informal claim and if the claim is eventually granted, the benefits may be paid back to the date when the VARO received it. Remember, it is not necessary to gather all of the evidence needed to win your claim prior to applying for benefits.

Once the VA receives the informal claim for VA benefits, if it is the first time that you have filed for this VA benefit, the VA will respond by sending a formal application form, VA Form 21-526, “Application for Compensation and Pension.” This form must be completed within a year from the date when the VA Form 21-526 was mailed to you. If you do not submit the VA Form 21-526 by the one-year deadline, the effective date for any award of benefits will be the date on which the VA finally receives the form but if you submit the form before the deadline, the effective date will be the date that the VA received the informal claim.

VA forms should be filled out to the best of your knowledge and the particular benefit you are seeking should be identified on the form. You have the right to review your military service records and other VA records before completing the application. Of course, an advocate should help you complete the form and review all written documents prior to submitting them to the VA. Recently, the VA began offering veterans the option to electronically file their claims for VA benefits. The program, “Veterans On-line Application” (VONAPP), may be accessed through the VA’s Web site, www.va.gov. However, certain claims cannot yet be applied for online, including claims for an increase in service-connected disability rating. Surviving spouses, dependents, and reservists also may not be able to apply for pension online.

The VA is required by law to notify you and your representative if your application form is incomplete. The VA will not assist you in gathering evidence or schedule any necessary medical examinations until you submit the missing information.

Claims

There are three different types of claims: a new or original claim; a claim for revision of a previous final decision based on clear and unmistakable error (CUE); and a reopened claim. The type of claim affects the decision-making process used by the VA to develop and decide the claim. For example, a reopened claim will be considered only after the claimant presents “new and material” evidence. This requirement does not apply to a new or original claim.

A new or original claim can take many forms. Obviously, the first time you apply for a benefit, you have a new and original claim. Also, the VA treats claims for service connection for a new condition as new and original claims. Claims for an increase in disability rating and all claims for non-service-connected pension are also adjudicated by the VA as new claims. Claims for increased disability ratings are new because they are based on a current contention that the service-connected disability has increased in severity. Claims for non-service-connected pension benefits are considered new even if a veteran’s previous request for pension benefits was denied. This is because pension is based on current income and current disability and a veteran’s income and disabilities may change over time.

A claim that the VARO made a clear and unmistakable error (CUE) in a previous rating decision is considered an original claim, because the VA is correcting a prior decision rather than reopening it. The VA describes CUE as occurring when either the VA decision-maker did not know the correct facts of the case when making the decision or the VA decision-maker incorrectly applied the law to the facts. A CUE is the type of error that is not debatable and had the error not been present, the outcome would have been different. To base a claim on CUE, you must specifically state when and how the CUE occurred. It is not enough to simply claim that the VA was wrong. Also, you should be aware that the VA does not consider a CUE claim to be an “application claim for benefits.” Because of this, the Veterans Claims Assistance Act of 2000 (VCAA) requiring the VA to assist claimants, does not apply to CUE claims. CUE claims are unusual because winning one allows you to receive an earlier effective date. A decision to reverse or change a previous decision based on CUE “has the same effect as if the decision had been made on the date of the prior decision.” This means that the effective date that would have been given to the previously denied claim had it been granted actually becomes the effective date. There is no time limit for requesting review of a previous decision for CUE, and a denial of a CUE claim may be appealed.

When a veteran seeks a new decision on a claim that was previously denied, the claim is considered a reopened claim. The three types of claims that can be reopened are claims for service connection of a veteran's disability, claims filed by a surviving family member for service-connected death compensation, and claims for burial benefits. A veteran should consider reopening a claim if he or she previously failed to submit important evidence or if the VA wrongly denied the previous claim. Reopened claims may be helpful to establish entitlement to benefits when a veteran failed to appeal a negative decision before the deadline. However, in order to get the earliest possible effective date for payment, you should always attempt to timely appeal your case rather than waiting to reopen the claim. You may attempt to reopen a claim at any time after it has been finally denied and there is no limit on the number of times that you can file to reopen a claim.

Veterans can reopen a claim that has otherwise been finally denied with "new and material" evidence. The VA defines "new and material" evidence as evidence that was not previously submitted to the VA and relates to an unestablished fact necessary to prove the claim. Simply put, the requirement of new evidence means that the evidence should be different and not overly similar to evidence that was already considered. The requirement of material evidence means that the evidence should raise a reasonable possibility of supporting the claim. Until a claim has been reopened, the VA does not have to schedule a VA examination although it does have to attempt to obtain evidence identified by the claimant. To determine whether evidence is new and material, you and your advocate should review the most recent decision denying the claim. A helpful place to look is in the VARO's statement of the case which should give its reasons for denying the claim. In addition, the VA is required to provide detailed information to claimants who file reopened claims, with the VA explaining why a previous claim was denied and what evidence would, if submitted, qualify as "new and material."

The VA considers two issues in connection with a reopened claim. First, whether the claim should be reopened because the new and material evidence has been submitted. Second, if new and material evidence has been submitted, whether the claimant is entitled to the benefit sought, considering all the new and old evidence and reviewing the case without giving any weight to any previous VA decision denying the claim or to the fact that the VA may have previously disbelieved some of the old evidence.

This two-step analysis shows that even when the VA decides that new and material evidence has been submitted, the claim is not yet won. The VARO may still deny the reopened claim because the VA has determined that all the evidence of record still does not make it as likely as not that the benefit should be granted. Of course, the claimant can appeal both the decision by the VA Regional Office not to reopen the claim because new and material evidence has not been submitted and a decision that the evidence of record still does not support the grant of benefits.

One significant factor in favor of the claimant is that the VA cannot refuse to reopen a claim simply because it does not believe the “new and material” evidence. The VA must treat new evidence as believable; however, you are not out of the woods just yet. Even though the VA must accept the evidence and reopen the claim, the VA ultimately will determine how much weight to give the new evidence when it considers the merits of the reopened claim.

Evidence

Once the claim has been filed, you and your representative should begin to gather evidence to support the claim. Supporting evidence may include private medical records, service medical records, statements from the veteran about symptoms and events, and statements from his or her family and friends.

If the VARO finds that the claim is plausible, the VA must also help you gather evidence. This does not mean that the VARO is granting the claim; it simply means that the VARO believes the claim is plausible. The VA has the responsibility to specifically inform you of the information and evidence that is not in the record but necessary to prove the claim, the information and evidence that the VA will obtain, and the information and evidence that you must submit. The VA may request that you provide any relevant evidence in your possession.

If the VA requests that you provide certain information or evidence, you must submit the information within a year of the date that the VA request was sent. If you do not respond to the VA’s request within thirty days, the VA may decide the claim prior to the expiration of the one-year period. If you later submit the requested information within a year of the VA’s request, the VA must re-decide the case. A few words of caution: even though you have a year to submit requested information, you should submit this information as soon as possible to avoid the premature denial of a claim and even though the VA is required to help gather evidence, you should not just rely on the VA to do so. You and your advocate (your service representative or qualified attorney)

should discuss together what evidence you should obtain and submit to support your claim.

Medical Evidence

You and your advocate (who may be a service representative [also called a “service officer”], an attorney, or an agent) should obtain your medical records from your private doctors and from the VA. It may be helpful to write a list of all of the VA medical hospitals or clinics where you were treated before and after service and of any private doctors whom you saw about the condition. The VA is required by law to make reasonable efforts to obtain relevant records that you identify to the VA and authorize the VA to obtain in connection with a claim. If after reasonable effort, the VA is unable to obtain some of the private records listed, the VA must notify you and your advocate with a description of any further action that will be taken concerning the claim. As for records that are held by federal agencies or departments, the VA is required to continue its efforts to obtain the records unless it is reasonably certain that such records do not exist or further efforts to obtain the records would be useless. The VA’s duty to assist in obtaining records is heightened when federal records, such as a veteran’s service medical records, are lost.

Military medical records or service medical records may be helpful in establishing that the veteran was treated for a problem during service that is linked to the claimed condition. Copies of specific service treatment records may be requested. You have the right to one free copy of your VA claim file (c-file). You should not hesitate to exercise this right, because it allows you to see what information the VA has gathered about the claim and it allows you to double-check that the VA’s records are correct. To obtain a free copy of your claim file, you or your representative should send a letter to the VARO handling the claim stating, “I am exercising my rights under the Privacy Act to obtain a free copy of all my VA records.”

A current medical examination is often necessary for the VA to determine the severity of a claimed condition and in many instances to determine if a particular disability is linked to service. A medical examination is required by law if after the VA has considered all information and evidence, the file indicates that the disability may be associated with the claimant’s service but the file does not contain sufficient medical evidence for the VA to make a decision on the claim. To increase the likelihood that a medical examination will be granted, veterans may want to submit detailed lay evidence addressing the disability. This may include detailed statements from the claimant, his or her

family, friends, and co-workers regarding how often symptoms occur, the severity of symptoms and their effects on his or her daily life.

Once it has been established that a medical examination is necessary, the VA is required to provide a thorough and current medical examination to the veteran. A VA doctor should review the veteran's entire record, examine the veteran, and give a full report of the veteran's condition. When you go in for an exam, you should ask the VA doctor whether he or she has access to your entire claims file. If the VA doctor does not, you should report this to your advocate. It is also important to remember that the VA doctor is not examining you as your private doctor; he or she is examining you to determine if you are entitled to benefits. Use caution in what you reveal to VA doctors, as potentially harmful statements made in front of a VA doctor could come back to haunt you.

If your claim involves a medical matter and you can afford to see a private doctor, you should do so and request that the doctor write a medical report regarding such matters as the severity of the claimed disability and whether the condition is linked to service. Sometimes it is helpful for your advocate to explain to the private doctor exactly what information is needed and what the VA expects from the examination, so that the doctor knows what to include in the report. Again, you should share the report with your representative prior to submitting it to the VA. If the medical opinion does not support the claim, you are under no legal duty to send it to the VA unless the VA specifically requests it.

Military Personnel Records

Military personnel records are important to the claim. You will need a copy of your discharge form or DD-214 to establish your eligibility for VA benefits. Records of awards, combat medals, and military occupational specialties may be useful to corroborate certain types of disabilities that may have occurred in or from combat, such as physical wounds or Post-Traumatic Stress Disorder (PTSD). A veteran is entitled to one free copy of his or her military personnel records. A letter requesting the records should be sent to the National Personnel Records Center in St. Louis, 9700 Page Blvd.; St. Louis, MO 63132. You can make an online request for your military records at www.vetrecs.archives.gov.

If a veteran learns that his or her records have been destroyed, he or she should request that the VA help rebuild the records. To help with the reconstruction of the records, the veteran should provide details about his or her

military experiences, especially those relating to the claimed condition. You should provide the dates and locations of service, the name of your unit, the names and ranks of commanding officers and fellow servicemembers, and a detailed description of any accident, injury, disease, or treatment you had in service that relates to the claim.

VA Decision Letters

Once the VA decides a claim, it will send you and your representative (service rep, attorney, or agent) a letter notifying you of the decision. If the VARO denies the claim, evaluates a condition at a lower than desired level, or assigns an undeserved effective date, you can appeal or request reconsideration by the VARO. To begin the appeal process, a veteran should, with the help of his or her advocate, file a notice of disagreement (NOD) and request a copy of the rating decision. An NOD can be in the form of a letter to the VA that includes the date of decision and claim number and outlines the reasons that you disagree with the VARO decision and states that an appeal is desired. If the negative decision covered more than one issue, you should specifically state which issue you plan to appeal or that you plan to appeal all issues. The NOD must be mailed to the VA within one year of the date of the VARO's decision letter. There are no extensions to this deadline and you will lose your right to appeal if the deadline is missed. If the VARO's decision becomes final, a veteran can reopen his or her claim, but a showing of new and material evidence may be required. Also, the effective date of the claim will change and the veteran will lose back benefits that he or she would have been eligible for if a timely appeal had been filed.

The VA will respond to an NOD by sending a statement of the case (SOC), which summarizes the evidence considered and the relevant VA law and explains how it came to the decision. The SOC should be mailed with a blank VA Form 9 which is a Substantive Appeal form for the veteran to complete and return. A "Substantive Appeal" is a document containing your arguments as to why the decision you are appealing was wrong. Sometimes the term means Form 9 and sometimes it means the arguments themselves. The veteran should not delay in completing the VA Form 9, because the VA has a long backlog of appeals of VA actions on claims and it may take several years before an appeal is decided by the Board of Veterans' Appeals. Once the VA Form 9 is filed, the case is assigned a number at the Board based on when the Board received the form. Cases are considered in order of the number assigned. The Board may consider a request by the veteran to expedite a case for

earlier consideration, but this is granted only in exceptional cases such as where the veteran is terminally ill.

When an SOC is inadequate because it fails to provide the claimant with enough information as to the reason for the decision, the VARO is required to issue a supplemental statement of case (SSOC). You are not required to respond to the SSOC as long as a Substantive Appeal has already been filed in response to the initial SOC. In fact, you should not respond to the SSOC unless a Substantive Appeal has not yet been filed as to a claim in the SSOC, because such a response could delay the appeal.

Optional Appeal to a Decision Review Officer

If a veteran's claim has been denied, he or she can request review by a Decision Review Officer (DRO). You may include this request in your NOD or request review by a DRO separately. You should know that a DRO cannot change any aspect of the decision that is favorable to you unless it contains a clear and unmistakable error; thus a favorable decision cannot be changed simply because the DRO disagrees with the VARO decision.

The DRO can issue a new decision and can grant all the benefits sought by the veteran. The previous denial should not be considered in the DRO's decision. Instead, the DRO takes a fresh look at the evidence of record and the law. The DRO "review decision" should look very much like a VARO decision. It should include a summary of the evidence, references to pertinent laws, a discussion of how these laws affected the decision, and a summary of the reasons for the decision. If the DRO returns a decision that is unfavorable, you need not restart the appeals process. Unless the claimant withdraws the NOD, the VA will issue an SOC and the claimant will have time to perfect his or her Substantive Appeal.

The claimant may request another DRO review if the first DRO granted service connection (or if service connection was subsequently granted by the VARO) and the claimant desires to appeal another issue, such as the disability rating assigned or the effective date.

VARO Hearings

Before or after completing the Substantive Appeal, you may request a personal hearing at the VARO. Most claimants wait until after an initial VARO denial before requesting a hearing. A personal hearing allows you to meet in person with a VA hearing officer and discuss why the claim should be granted. Usually VARO hearings are held at the VARO that issued the initial decision. If it is

inconvenient for the claimant to travel to the VARO for a hearing, sometimes it is possible to arrange to have the hearing at a closer or more convenient VA facility.

It can be helpful for the hearing officer to actually see the veteran and ask questions about how the veteran copes with a condition. You and your representative should always prepare before going to a VARO hearing. Arguments and evidence in support of the claim should be well organized. The veteran should be prepared to testify and to answer questions that the VA hearing officer will ask. Any witnesses should also be adequately prepared for the hearing. Please take note that if you and your advocate are not properly prepared for the hearing, it may cause the hearing officer to question the credibility of your evidence, which could severely hurt your claim.

Hearings at the VARO are non-adversarial in nature, which means the hearing officer is there to gather information and is not supposed to cross-examine you or your witnesses. There is no set format for a hearing at the VARO and generally the VA allows the claimant and representative to organize the presentation of the hearing. Although the VA has the power to issue subpoenas that require witnesses to appear at hearings and to take affidavits, claimants and their representatives rarely ask that the VA issue subpoenas so the VA rarely uses this authority.

Substantive Appeal

The Substantive Appeal, which is usually filed on a VA Form 9, is extremely important. The claimant must include “specific arguments related to errors of fact or law” in his or her Substantive Appeal. If no hearing is requested, the Substantive Appeal is of even more importance, because it is the claimant’s main opportunity to respond to the VA’s reasoning for its decision to deny the original claim. A Substantive Appeal may be submitted in the form of a detailed letter but it is best to file a Substantive Appeal on a VA Form 9 to avoid confusion. Additional pages may be added to the form if more space is necessary.

The BVA must consider the claimant’s arguments broadly when deciding whether they raise pertinent issues for appeal. This means that the BVA must review all issues which are reasonably raised by the Substantive Appeal (issues that the VA should have identified while adjudicating the claims), other documents, or oral testimony given prior to the BVA decision. If the BVA determines that an appeal is inadequate and should be dismissed, the BVA must advise the claimant and his or her representative of its intentions and

provide a sixty day period for the submission of written argument or request a hearing to present oral argument as to whether the Substantive Appeal was adequate or not.

BVA Jurisdiction

The BVA is the second of two major levels of review of claims within the VA but, unlike the VARO, the BVA is independent of the Veterans Benefits Administration. The BVA has jurisdiction to review an appeal on all questions of fact and law regarding claims for VA benefits. This includes claims of entitlement to service-connected disability compensation and health care, dependency and indemnity compensation for service-connected death, non-service-connected pension benefits, vocational rehabilitation, and education benefits. The BVA is also responsible for deciding matters concerning the award of attorneys' fees for representation before the VA. The BVA caseload is dominated by claims involving service-connected disability claims.

The BVA reviews decisions of the VARO *de novo*; that is, the BVA decides for itself the correct outcome for a claim without giving any weight to how the VARO previously decided the claim. When a claimant appeals to the BVA, often he or she is arguing that the VARO incorrectly denied benefits when benefits should have been granted. However, since claimants are allowed to add evidence to the record to support the claim before a decision is rendered by the BVA, a claimant can win at the BVA even if the VARO was correct to deny the claim, because the new evidence presented to the BVA plus the old evidence may now weigh in favor of the claim. Finally, a claimant may base his or her appeal on the fact that the VARO failed to comply with the notification and assistance provisions of the Veterans Claims Assistance Act of 2000. For example, if the VARO failed to notify the claimant of the evidence necessary to win the claim or failed to obtain evidence concerning the proper issue, the claimant could raise these points in an appeal to the BVA.

When the BVA issues a decision on an appeal, it is required to include a written statement of its findings and conclusions and the reasons for those findings and conclusions on all issues presented on appeal. If the VARO or BVA violates any of its duties, the claimant can remedy the error by appealing to the U.S. Court of Appeals for Veterans Claims.

Hearings at the BVA

In addition to a VARO hearing, a claimant is entitled to a hearing before a member of the BVA. The claimant should discuss with his or her advocate

whether a BVA hearing should be requested. It may be that the hearing will add an unnecessary delay to the case. However, a hearing may be advantageous, since it makes the appeal more personal and allows the Veterans Law Judge to ask questions and identify evidence that is still necessary to the claim. Also, veterans who request hearings usually get more time to submit evidence than those who do not. The VA Form 9 includes a section in which the claimant is asked to indicate whether or not he or she wants a BVA hearing and, if so, what type of hearing. However, a claimant may request a hearing at any time from the filing date of the Substantive Appeal until the end of the ninety days following the filing of the Substantive Appeal.

If a veteran desires a hearing, he or she must choose between a hearing held at the BVA in Washington, D.C., a hearing held at a local VARO whenever a BVA member can travel to hear the case, or in some locations a hearing by videoconference. If a veteran chooses to have the hearing in Washington, D.C., the VA will not pay travel and lodging expenses. If a veteran cannot appear in person for a hearing, his or her representative may submit a written argument for the Board's consideration, which is known as an informal hearing. Claimants who desire a Travel Board hearing must be aware that there may be a significant backlog of hearing requests which may create a long waiting period before the veteran's hearing is scheduled. Once the claimant's hearing has been scheduled, the VARO is required to provide at least a thirty-day notice of the time and location of the hearing.

BVA hearings in Washington, D.C. are held at the BVA's main offices at the Export-Import Bank building. The letter from the BVA notifying claimants of the hearing date will include the BVA's address and directions. The claimant will need to bring identification and pass through a security check when he or she arrives for the hearing. Once the claimant arrives at the BVA for the hearing, he or she will have an opportunity to review the claims file before the hearing.

Videoconference hearings are usually offered only to claimants who request a Travel Board hearing. The VARO usually sends the claimant a letter acknowledging the Travel Board request and may attempt to persuade the claimant to withdraw the request in favor of a videoconference option. A claimant may request a videoconference hearing without waiting to be asked, by including the request in the Substantive Appeal. When a claimant requests a videoconference hearing, he or she gives up the right to another BVA level hearing. A word of caution: it is a good idea to request a videoconference only if you and your representative have gathered all the evidence that you want the

BVA to consider. If additional evidence still needs to be obtained, a request for a videoconference hearing is risky because it puts the case on the fast track and may result in a hearing before the necessary evidence is obtained.

Once a hearing date is set, a claimant may request to change the hearing date. In the case of a Travel Board hearing, the claimant may request a change at any time up to two weeks prior to the scheduled date but the claimant must demonstrate a good reason for the rescheduling. For hearings in Washington, D.C., the claimant must request a change in hearing date within sixty days of the VA hearing notification letter or two weeks prior to the scheduled hearing (whichever date is earlier).

If a claimant fails to show up for a scheduled hearing, he or she will lose the chance for a hearing in the appeal unless the failure to appear was for good cause and the cause of the failure to appear arose under emergency circumstances; that is, it was impossible for the claimant to file a timely request for postponement. A motion for a new hearing must be made in writing and must be filed with the BVA's Director of Management and Administration within fifteen days of the hearing at which the claimant failed to appear.

At the start of a BVA hearing, the claimant and his or her representative will be called to a hearing room. At this point, the Veterans Law Judge will briefly explain the hearing process, clarify the issues on appeal, and discuss any documentary evidence that will be submitted during the record. This part of the hearing is considered "off the record." The "on the record" portion of the hearing will begin only after the claimant is sworn in. The "on the record" proceedings usually begin with an opening statement by the claimant's representative. After the opening statement, the representative usually asks questions of the claimant and any witnesses, as does the Veterans Law Judge. Finally, the representative usually gives a closing statement summarizing the reasons that the claim should be granted and highlighting the key evidence. At the close of a hearing, the representative should ask that a transcript of the hearing be prepared and a copy sent to both the claimant and his or her representative.

When a claimant submits documents as evidence during a Board hearing, the BVA gives the claimant a choice. The claimant can give up the right to have the regional office consider this new evidence and issue a new VARO decision or the claimant can refuse to give up the right to have the regional office consider the new evidence. Often, claimants have a better chance of success at the BVA than at the VARO, so a decision not to waive the VARO consideration of additional evidence may result in a time-consuming remand (the BVA would

send the case back to the VARO) with no positive effect on the case. Unless the evidence submitted is so strong that it should clearly change the VARO's decision, the veteran should consider waiving the VARO review of the evidence.

During the hearing, the judge may indicate that a particular piece of additional evidence is necessary to the claimant's case. If you do not have this evidence to submit at the hearing, you may request to keep the record open. If the request is granted, the record is usually held open for sixty days or less, giving you time to obtain and submit the evidence.

Board of Veterans Appeals Decisions

An overwhelming number of cases are remanded by the BVA to the VARO. This means that the BVA sends the case back to the VARO, where it will be reconsidered. If a decision is remanded, that does not mean the veteran has lost or won; it simply means that the matter is still being decided. If the BVA decides against the veteran, the veteran has several options for challenging the decision. He or she may request reconsideration by the BVA and he or she may appeal to the U.S. Court of Appeals for Veterans Claims (CAVC). The veteran may reopen the claim at the VARO with new and material evidence, or appeal to the CAVC while reopening the claim with new and material evidence at the same time. The veteran may wish to consult with an attorney when making the decision to appeal to the CAVC.

If you ask the BVA to reconsider a negative decision by filing a motion for reconsideration and the BVA grants the request, the earlier BVA decision is thrown out and the case will be re-heard before a larger panel of BVA members. Once the BVA grants a request for reconsideration, you have sixty days to submit additional evidence. In reconsidering the case, the BVA will look for obvious errors of fact or law to overturn the decision.

You will have 120 days from the date of the BVA decision to appeal a BVA decision to the U.S. Court of Appeals for Veterans Claims (CAVC). If you miss this deadline, you will lose the right to appeal. If you appeal to the CAVC, new evidence will not be allowed. One option is for you to appeal to the CAVC and attempt to reopen the claim at the VARO with new and material evidence at the same time. The advantage of this is that you protect your chance to appeal and win at the CAVC, but if your appeal is denied, you will have established the earliest possible effective date if new evidence later convinces the VARO to award benefits. Another option is to request reconsideration by the BVA within this 120-day time frame. After the BVA

makes its decision on reconsideration, you will have a new 120-day deadline to file a notice of appeal with the CAVC.

Even if the BVA sides with the claimant, finding for example that a condition is service-connected, this does not necessarily mean that the claim process is finished. Often the veteran's file will be sent back to the VARO to decide what rating the condition should be given or what effective date should be granted. If a veteran disagrees with the rating or effective date assigned, he or she may appeal that decision to the BVA as well.

Court of Appeals for Veterans Claims

The U.S. Court of Appeals for Veterans Claims (CAVC) may review decisions of the Board of Veterans' Appeals. It is highly recommended that if a veteran has not hired a lawyer already, he or she does so for an appeal to the CAVC. You may be able to obtain a free lawyer who volunteers his or her time through the Veterans Consortium Pro Bono Program. It is rare to win outright at the CAVC. Often the CAVC will remand (send the case back) to the BVA to develop additional evidence or to hear the case again. A veteran may submit new evidence to the record when it is sent back to the BVA.

A claimant who files a lawsuit in the CAVC is called the "appellant" and the opposing party (always the Secretary of Veterans Affairs) is called the "appellee." Only claimants may appeal cases to the CAVC; the VA cannot appeal a BVA decision to the CAVC. The CAVC cannot lower the benefits that the BVA has already granted and so you should not end up worse off by appealing to the CAVC. One restriction on appellants is that an appeal to the CAVC will not survive if the veteran dies. Usually if a veteran dies while the case is pending on appeal, the appeal is dismissed and the underlying Board and VARO decisions are vacated as well. Surviving family members, however, can file a claim for accrued benefits, as discussed in Chapter 10, "VA Programs for Veterans' Family Members and Survivors."

In an appeal to the CAVC, the appellant must show that the Court has jurisdiction (meaning authority) to hear the case and the appellant must prove his or her case by a "preponderance of the evidence," which means that the greater weight of evidence favors the appellant. If the BVA remands a case to the VARO, the claimant cannot immediately appeal to the CAVC. The claimant must wait until the VARO acts on the remanded claim, the case is returned to the BVA, and the BVA acts on the claim again before he or she may appeal to the CAVC. If the BVA decision resolves some of the claims before it but remands other claims to the VARO, the CAVC determines whether the claims

are “inextricably intertwined.” If they are, the CAVC will not accept the appeal until all of the issues are finally resolved by the BVA. Basically, if the claims are related to each other, they cannot be appealed until a final decision has been reached on all of them. If there is confusion or uncertainty regarding whether a case is reviewable, the best course of action is to file a protective Notice of Appeal (NOA) with the CAVC so that you will not lose your chance to appeal.

If an appeal is not filed in a timely manner, the BVA decision will be considered final unless the claimant can show that the BVA decision was not properly mailed and the BVA cannot show that the claimant received the defectively mailed decision in a timely manner. The CAVC may potentially excuse a failure to file a NOA within the time limit based on fairness and equity under some limited circumstances: if the appellant has been misled or induced by the VA into missing the deadline; if the claimant has actively pursued judicial remedies but misfiled the appeal; if the claimant’s failure to file in a timely manner was the direct result of physical or mental illness that prevented the claimant from engaging in rational thought or deliberate decision-making or rendered the claimant incapable of handling his or her affairs; or if the failure to file was due to extraordinary circumstances beyond the claimant’s control, as long as the claimant exercised due diligence in preserving his or her right to appeal.

In order to qualify as a Notice of Appeal, a document need not be on a particular form but must comply with Rule 3(c) of the Court’s Rules of Practice and Procedure, which can be found on the Court’s website at www.vetapp.gov. This rule specifies that a NOA shall:

1. Show the most recent name, address, and telephone number of the person or persons taking the appeal and the appropriate VA claims file number;
2. Reasonably identify the Board decision being appealed from and be able to be reasonably construed, on its face or from the surrounding circumstances, as expressing an intent to seek Court review of that decision; and
3. If filed by a representative, must be accompanied by a notice of appearance.

The Power and Scope of Review of the CAVC

You may be surprised to learn that the CAVC does not hold a trial when a veteran appeals to it. The CAVC reviews the action of the VA and the record created during the claims process. With few exceptions, this usually means that the CAVC reviews only the evidence that the BVA reviewed. The Court generally does not accept any new evidence.

Once an appeal has been filed, the record on appeal will be developed and transmitted to the CAVC. The Clerk of the CAVC will send a notice requesting that the appellant file a brief. The brief should summarize the issues on appeal and the facts of the case and make an argument as to why the BVA's decision should be reversed. The appellant has sixty days after the date of notice from the Clerk to file this brief. Sixty days later, the VA's brief will be due to the CAVC and the appellant will have fourteen days to submit a reply brief. Sometimes the CAVC will request an oral argument to help clarify the issues but this is not always the case.

When deciding the appeal, the CAVC will consider all relevant questions of law, interpret the law and apply it to the facts. The CAVC can set aside decisions or findings of law when the CAVC determines that the BVA was wrong or that the BVA went beyond the scope of its authority in its decision. The CAVC can review the BVA's factual findings, but the CAVC gives more deference to the Board on findings of fact than on findings of law. The CAVC will reverse the factual findings of the BVA only if it finds that the BVA was "clearly erroneous" in its decision. Some decisions of the CAVC can be appealed to the U.S. Court of Appeals for the Federal Circuit.

The National Veterans Legal Services Program (NVLSP) is an independent, nonprofit, veterans service organization dedicated to ensuring that the U.S. government honors its commitment to our veterans by providing them the federal benefits they have earned through their service to our country. NVLSP accomplishes its mission by:

1. Providing veterans organizations, service officers and attorneys with training and educational publications to enable them to help veterans and their dependents obtain all of the benefits that they deserve.

2. Representing veterans and their dependents who are seeking benefits before the U.S. Department of Veterans Affairs and in court.
3. Placing meritorious cases (especially cases involving claims of servicemembers and veterans of Iraq and Afghanistan) with volunteer *pro bono* attorneys.

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