

Notre Dame Law School

## NDLScholarship

---

Indiana Continuing Legal Education Forum  
2021

Indiana Continuing Legal Education Forum

---

1-1-2021

### Representing Clients on VA Benefits

Indiana Continuing Legal Education Forum (ICLEF)

Follow this and additional works at: [https://scholarship.law.nd.edu/iclef\\_2021](https://scholarship.law.nd.edu/iclef_2021)

---

#### Recommended Citation

Indiana Continuing Legal Education Forum (ICLEF), "Representing Clients on VA Benefits" (2021). *Indiana Continuing Legal Education Forum 2021*. 50.  
[https://scholarship.law.nd.edu/iclef\\_2021/50](https://scholarship.law.nd.edu/iclef_2021/50)

This Article is brought to you for free and open access by the Indiana Continuing Legal Education Forum at NDLScholarship. It has been accepted for inclusion in Indiana Continuing Legal Education Forum 2021 by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# Representing Clients on VA Benefits

May 26, 2021

## Index

---

ICLEF Electronic Publications. . . . .	5
MANUAL - Representing Clients on VA Benefits May 26, 2021. . . . .	6
Agenda. . . . .	9
Faculty. . . . .	10
Faculty bios. . . . .	11
Table of Contents. . . . .	14
Section-1-Tamatha-A-Stevens. . . . .	19
Section 1 - Tamatha A. Stevens. . . . .	19
Section 1 Table of Contents. . . . .	21
Introduction and Accreditation. . . . .	22
A. Introduction. . . . .	22
1. VA Administrative Structure. . . . .	24
2. Adjudicative structure. . . . .	26
3. Applicable laws. . . . .	26
B. Accreditation. . . . .	28
1. Application. . . . .	28
2. Denial of Application. . . . .	29
3. Initial CLE. . . . .	29
4. Annual Certification. . . . .	30
5. Continuing CLE requirements. . . . .	30
Representing a Client before the VA. . . . .	32
A. Fee requirements. . . . .	32
1. Representation before VARO or BVA. . . . .	32
2. Representation before CAVC. . . . .	35
B. Engagement Letter/Fee Agreement. . . . .	36
C. Pre-consultation. . . . .	39
D. Filing Your "Appearance". . . . .	40
F. Your Right to Withdraw. . . . .	43
PowerPoint - Accreditation With The Veterans Administration. . . . .	44
Why Accreditation?. . . . .	45
VA Standard of Conduct. . . . .	46
VA Standard of Conduct: Prohibited:. . . . .	47
What happens if you violate theStandard of Conduct:. . . . .	50
Complaints. . . . .	51
Who Are You Serving?. . . . .	52
Numbers of Wartime Veterans:. . . . .	53
VBA (Veterans Benefit Administration. . . . .	55
VHA Veterans Health Administration. . . . .	56
Adjudicative Structure. . . . .	57
Applicable Laws. . . . .	58
Accreditation. . . . .	59
Attorney Accreditation. . . . .	60
Fees Liberated. . . . .	61
Fee Types Allowed. . . . .	62
New Fee Rules Effective February 19, 2019. . . . .	63
Fee Totals. . . . .	64
Chronology of Fees. . . . .	65
Pre-Consultation Fees. . . . .	66
Fees from Disinterested Party?. . . . .	67
Fees During Claims Process. . . . .	68
Fees after Adverse Action. . . . .	69
CAVC Fees. . . . .	70
Engagement Letter/Fee Agreement Contents. . . . .	71
Filing & Review. . . . .	72
Filing, of all things, the Claim. . . . .	73

# Representing Clients on VA Benefits

May 26, 2021

## Index

---

Section-2-Jeffery-D-Stinson. . . . .	75
Section 2 Table of Contents. . . . .	77
I. Basic Eligibility for Benefits. . . . .	79
A. Type of Discharge. . . . .	79
B. Active Service Requirement. . . . .	82
C. Length of Service Requirement. . . . .	83
II. Compensation for Service-connected Disability. . . . .	83
A. Current Disability. . . . .	84
B. In Service Occurrence. . . . .	85
C. Service Connection. . . . .	87
D. Willful Misconduct. . . . .	88
E. Ratings. . . . .	88
F. Notice Requirements. . . . .	89
G. Employability Claim. . . . .	89
H. Special Situations. . . . .	90
I. Special Monthly Compensation. . . . .	91
J. Claims to Increase a Veteran's Ratings. . . . .	92
K. Reducing a Veteran's Ratings. . . . .	92
L. Severing the Service Connection. . . . .	93
III. Health Care Offered Through the VA. . . . .	94
A. Priority Groups. . . . .	94
B. Services Available. . . . .	96
IV. Burial Benefits. . . . .	101
V. Family Member Benefits. . . . .	102
A. Qualifying Family Member. . . . .	102
B. Benefits Payable to a Child of a Veteran. . . . .	104
C. Survivor Benefits. . . . .	105
VI. Education Benefits. . . . .	108
VII. CHAMPVA. . . . .	108
ICLEF VA 2021.pdf. . . . .	108
Veterans with VA-related service-connected disabilities 50% or more disabling. . . . .	94
Veterans determined by VA to be unemployable due to service-connected conditions. . . . .	94
Veterans with VA-rated service-connected disabilities 30% or 40% disabling. . . . .	94
Veterans who are former Prisoners of War (POWs). . . . .	94
Veterans awarded a Purple Heart medal. . . . .	94
Veterans whose discharge was for a disability that was incurred or aggravated in the line of duty. . . . .	94
Veterans with VA-rated service-connected disabilities 10% or 20% disabling. . . . .	95
Veterans awarded special eligibility classification under 38 USC 1151 ("benefits for individuals disabled by treatment or voc. . . . .	95
Veterans awarded the Medal of Honor (MOH). . . . .	95
Veterans who are receiving aid and attendance or housebound benefits from VA. . . . .	95
Veterans who have been determined by VA to be catastrophically disabled. . . . .	95
Nonservice-connected Veterans and noncompensable service-connected Veterans rated 0% disabled by VA with annual income below . . . . .	95
Veterans receiving VA pension benefits. . . . .	95
Veterans eligible for Medicaid programs . . . . .	95
Variety of very special circumstances including possible radiation and Agent Orange exposure. . . . .	95
Veterans with gross household income below the geographically-adjusted income limits (GMT) for their resident location and wh. . . . .	95
Veterans with gross household income above the VA and the geographically-adjusted income limits for their resident location a. . . . .	95
Veterans eligible for enrollment. . . . .	96
Noncompensable 0% service-connected. . . . .	96
Hospital, outpatient medical, dental, pharmacy and prosthetic services. . . . .	96
Domiciliary, nursing home, and community-based residential care. . . . .	96
Sexual trauma counseling. . . . .	96
Specialized health care for women veterans. . . . .	96
Health and rehabilitation programs for homeless veterans. . . . .	96
Readjustment counseling. . . . .	96

# Representing Clients on VA Benefits

May 26, 2021

## Index

---

Alcohol and drug dependency treatment. . . . .	96
Mileage reimbursement. . . . .	96
Special transportation. . . . .	96
Lodging. . . . .	96
Medical equipment. . . . .	96
Medical evaluation for disorders associated with military service in the Gulf War, or treatment for exposure to Agent Orange. . . . .	96
Any veteran in need of nursing home care for a service-connected disability. . . . .	97
Any veteran with a combined service-connected disability rating of 70% or more who is in need of nursing home care. . . . .	97
Any veteran with disability rating of 60% or more deemed unemployable or rated permanently & totally disabled. . . . .	97
VA will provide nursing home care to others if space and resources are available. . . . .	97
Validly married before 1/1/1957, OR. . . . .	107
Was married to a service member who died on active duty, OR. . . . .	107
Married the veteran within 15 years of discharge in which the disease or injury that caused the veteran's death began or was. . . . .	107
Was married to the veteran for at least one year, OR. . . . .	107
Had a child with the veteran, AND. . . . .	107
Cohabitated continuously until the veteran's death, AND. . . . .	107
Is not currently remarried. . . . .	107
Unmarried, and. . . . .	107
Under the age of 18. . . . .	107
Who before 18 became permanently incapable of self-support. . . . .	107
OR who, after the age of 18 and until 23 is pursuing a course of instruction at an approved education institution, AND. . . . .	108
is a legitimate child, legally adopted child, a stepchild who is a member of a veteran's household, or a child acknowledged b. . . . .	108
PowerPoint - Basic Eligibility for Benefits, Compensation for Service Connected Disability, Long Term Care Benefits, and Family Mem	109
Basic Eligibility-Opening the Door for Benefits. . . . .	110
Basic Eligibility for Benefits-Type of Discharge. . . . .	111
Basic Eligibility for Benefits-Active Service Requirement. . . . .	114
Compensation for Service-Connected Disability. . . . .	116
Service-Connected Disability-Current Disability. . . . .	119
Service-Connected Disability-In Service Occurrence. . . . .	120
Service-Connected Disability-Service Connection. . . . .	121
Service-Connected Disability-Notice Requirements. . . . .	122
Service-Connected Disability-Ratings. . . . .	123
Service-Connected Disability-Special Circumstances (Shortcuts). . . . .	125
Service-Connected Disability-Special Monthly Compensation. . . . .	126
Service-Connected Disability-Claim to Increase Ratings. . . . .	128
Service-Connected Disability-Reducing a Rating. . . . .	129
Service-Connected Disability-Severing Service Connection. . . . .	130
Long Term Care Offered Through VA. . . . .	131
Domiciliary, Nursing Home, Community Based Residential Care. . . . .	133
Extended Care Benefits. . . . .	136
Burial Benefits. . . . .	137
Family Member Benefits. . . . .	138
Family Member Benefits-Surviving Spouse. . . . .	139
Family Member Benefits-Child. . . . .	140
Family Member Benefits-Accrued Benefits. . . . .	142
Family Member Benefits-Dependency and Indemnity Compensation (DIC). . . . .	143
Family Member Benefits-Education Benefits. . . . .	145
Family Member Benefits-Health Insurance. . . . .	146
Section-3-Connie-L-Bauswell. . . . .	148
Section 3 - Connie L. Bauswell. . . . .	148
Section-4-Tamatha-A-Stevens. . . . .	151
Section 4 - Tamatha A. Stevens, CELA. . . . .	151
Section 4 Table of Contents. . . . .	153
VA Presentation 2021 - Appeals v2.pdf. . . . .	153
I. The New Modernized Review System for Unfavorable Decisions. . . . .	155

# Representing Clients on VA Benefits

May 26, 2021

## Index

---

1. What Is an Unfavorable Decision? .....	155
2. Why a New Modernized Appeal Process Was Needed. ....	156
3. New System v. Old System. ....	156
II. Using the New Modernized Review System for Unfavorable Decisions. ....	158
1. Electing Review and Effective Dates. ....	159
a) Higher-Level Review. ....	159
b) Supplemental Claim. ....	160
c) Board of Veteran Appeals Review. ....	164
i. Agency Review: Appeals where the claimant is asking the Board to review the same evidence presented to the agency of original jurisdiction. ....	165
ii. Additional Evidence: Appeals where the claimant is not requesting a hearing, but does want to submit evidence.. ....	165
iii. Hearing: Appeals where the claimant is requesting a Hearing. ....	165
The hope is that these separate dockets will allow the Board to more efficiently and effectively manage distinctly different types of work. ....	165
2. Legacy Claims and Their Appeals. ....	166
3. Forms to Use. ....	166
4. Filing a Claim, Effective Date of Award and Duty to Assist. ....	167
5. Issues within a Claim. ....	167
6. Decision Notice. ....	168
7. Closing the Evidentiary Record. ....	168
PowerPoint - Unfavorable Decisions and The New Review Process. ....	170
The Veteran Appeals Improvement and Modernization Act of 2017. ....	171
New System v. Old System. ....	172
Electing Review. ....	173
Legacy Claims & Appeals. ....	174
Forms. ....	175
Issues within a Claim. ....	176
Decision Notices. ....	177
Closing the Evidentiary Record. ....	178



## ICLEF Electronic Publications

*Feature Release 4.1*

August 2020

To get the most out of your *ICLEF Electronic Publication*, download this material to your PC and use Adobe Acrobat® to open the document. The most current version of the Adobe® software may be found and installed by clicking on one of the following links for either the free [Adobe Acrobat Reader®](#) or the full retail version of [Adobe Acrobat®](#).

Feature list:

1. **Searchable** – All ICLEF Electronic Publications are word searchable. To begin your search, click on the “spyglass” icon at the top of the page while using the Adobe® software.
1. **Bookmarks** – Once the publication is opened using the Adobe Acrobat® software a list of bookmarks will be found in a column located on the left side of the page. Click on a bookmark to advance to that place in the document.
2. **Hypertext Links** – All of the hypertext links provided by our authors are active in the document. Simply click on them to navigate to the information.
3. **Book Index** – We are adding an INDEX at the beginning of each of our publications. The INDEX provides “jump links” to the portion of the publication you wish to review. Simply left click on a topic / listing within the INDEX page(s) to go to that topic within the materials. To return to the INDEX page either select the “INDEX” bookmark from the top left column or right-click with the mouse within the publication and select the words “*Previous View*” to return to the spot within the INDEX page where you began your search.

Please feel free to contact ICLEF with additional suggestions on ways we may further improve our electronic publications. Thank you.

Indiana Continuing Legal Education Forum (ICLEF)

230 East Ohio Street, Suite 300

Indianapolis, Indiana 46204

Ph: 317-637-9102 // Fax: 317-633-8780 // email: [iclef@iclef.org](mailto:iclef@iclef.org)

URL: <https://iclef.org>



# **REPRESENTING CLIENTS ON VA BENEFITS**

May 26, 2021

[www.ICLEF.ORG](http://www.ICLEF.ORG)

*Copyright 2021 by Indiana Continuing Legal Education Forum*

## **DISCLAIMER**

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

The Indiana Continuing Legal Education Forum and contributing authors hereby disclaim any and all responsibility or liability, which may be asserted or claimed arising from or claimed to have arisen from reliance upon the procedures and information or utilization of the forms set forth in this manual, by the attorney or non-attorney.

Attendance of ICLEF presentations does not qualify a registrant as an expert or specialist in any discipline of the practice of law. The ICLEF logo is a registered trademark and use of the trademark without ICLEF's express written permission is prohibited. ICLEF does not certify its registrants as specialists or expert practitioners of law. ICLEF is an equal opportunity provider of continuing legal education that does not discriminate on the basis of gender, race, age, creed, handicap, color or national origin. ICLEF reserves the right to refuse to admit any person or to eject any person, whose conduct is perceived to be physically or emotionally threatening, disruptive or disrespectful of ICLEF registrants, faculty or staff.



# INDIANA CONTINUING LEGAL EDUCATION FORUM

## OFFICERS

**TERESA L. TODD**

President

**LYNNETTE GRAY**

Vice President

**HON. ANDREW R. BLOCH**

Secretary

**SARAH L. BLAKE**

Treasurer

**ALAN M. HUX**

Appointed Member

**LINDA K. MEIER**

Appointed Member

## DIRECTORS

James H. Austen

Sarah L. Blake

Hon. Andrew R. Bloch

Melanie M. Dunajeski

Mark A. Foster

Lynnette Gray

Alan M. Hux

Dr. Michael J. Jenuwine

Dean Jonna Kane MacDougall

Thomas A. Massey

Linda K. Meier

Richard S. Pitts

Jeffrey P. Smith

Teresa L. Todd

Inge Van der Cruysse

## ICLEF

**SCOTT E. KING**

Executive Director

James R. Whitesell  
Senior Program Director

Jeffrey A. Lawson  
Program Director

**REPRESENTING CLIENTS ON  
VA BENEFITS**



**Agenda**

- 8:30 A.M. Registration and Coffee
- 8:55 A.M. Welcome and Course Objectives
- 9:00 A.M. Representing a Client before the VA  
- *Tamatha A. Stevens*  
- Accreditation requirements - Pre-Consultation  
- Fee requirements - Filing the claim  
- Engagement letter
- 9:40 A.M. Basic Eligibility for Benefits  
- *Jeffery D. Stinson*  
- Compensation for Service-Connected Disability  
- Family Member Benefits  
- Qualifying Family Members  
- Benefits Payable to a Child of a Veteran  
- Survivor Benefits  
- Education Benefits
- 10:30 A.M. Coffee Break
- 10:45 A.M. Pensions and Claims Procedures  
- *Connie L. Bauswell*  
- Eligibility  
- Spouse and Dependents  
- Rates  
- Determining assets  
- Determining income and benefits  
Claims Procedures  
- Compensation  
- Dependency  
- Pension
- 11:55 A.M. Appeal Rights  
- *Tamatha A. Stevens*  
- Reopening a claim  
- Notice of disagreement  
- Board of Veteran's Appeals  
- Court of Veteran's Appeals
- 12:15 P.M. Program Adjourns

May 26, 2021

[www.ICLEF.ORG](http://www.ICLEF.ORG)

**REPRESENTING CLIENTS ON  
VA BENEFITS**

**Faculty**



**Ms. Connie L. Bauswell**

Certified as an Elder Law Attorney by the National Elder Law Foundation  
The Law Office of Connie L. Bauswell, LLC  
57 Franklin Street, Suite 203  
Valparaiso, IN 46383  
ph: (219) 548-0980  
e-mail: [conniebauswell@me.com](mailto:conniebauswell@me.com)

**Ms. Tamatha A. Stevens**

Certified Elder Law Attorney by the National Elder Law Foundation  
Accredited Attorney with the Department of Veteran Affairs  
Stevens & Associates, PC  
3755 East 82nd Street, Suite 200  
Indianapolis, IN 46240  
ph: (317) 915-9900  
e-mail: [tstevens@stevenslawyers.com](mailto:tstevens@stevenslawyers.com)

**Mr. Jeffery D. Stinson**

Stinson Law Firm, LLC  
1980 East 116th Street, Suite 125  
Carmel, IN 46032  
ph: (317) 622-8181  
e-mail: [jstinson@stinsonelderlaw.com](mailto:jstinson@stinsonelderlaw.com)

May 26, 2021

[www.ICLEF.ORG](http://www.ICLEF.ORG)

**Tamatha A. Stevens**

Stevens & Associates, PC, Indianapolis



After an award-winning performance in law school at Indiana University in which she received deans honors and graduated cum laude, *Tamatha Stevens* followed her academic career, which included clerkships in the legal departments of Eli Lilly and Company and Ameritech, with decade of experience in the Indiana Tax Court and other law firms. She then set out to establish something completely different - Stevens & Associates offers families and businesses a personalized, caring law practice that emphasizes relationships, integrity and understanding.

Admitted to practice law before the United States Supreme Court, both the Northern and Southern Federal District Courts in Indiana, and all Indiana state courts, Tamatha is also accredited by the Department of Veterans Affairs to practice within its realm assisting our Veterans and their families. Tamatha additionally holds the title of Certified Elder Law Attorney by the National Elder Law Foundation. She is a current and former member of the American Bar Association, Indiana Bar Association, Indianapolis Bar Association, Probate & Real Property Bar Section, Elder Law Bar Section, Indiana NAELA Bar, National Academy of Elder Lawyers (NAELA), National Association of Women Business Owners, National Health Lawyers Association, National Planned Giving Committed, Indiana Planned Giving Committee, Estate Planning Council of Indianapolis, Inc., Indiana Leadership Forum, and many other professional organizations. She is a current or former Board Member to the Indiana Zoological Society, Planned Giving Committee, Joy's House Adult Day, HealthNet, PrimeLife Enrichment, Indiana NAELA, St. Joseph Institute for the Deaf and Hard of Hearing, KidsFirst Foundation. She is a member of Northview Christian Church and is active there and in other social and charitable community affiliations.



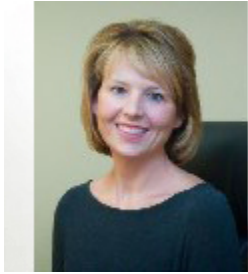
Since 1998, Jeffery Stinson has worked in the areas of elder law and special needs law. When he passed the bar in 2002, he focused his practice on elder law, estate planning, long term care planning, Medicaid planning, Veteran's Affairs benefits planning, special needs planning, guardianships, and estate administration and has maintained that focus throughout his career.

Jeff is a 1998 graduate of Indiana University-Purdue University Indianapolis where he received his Bachelor of Science degree in Criminal Justice with Highest Distinction. Jeff graduated from the Indiana University School of Law-Indianapolis in 2002. He is a member of the National Academy of Elder Law Attorneys (NAELA) and the Indiana State Bar Association. He is a Past President of the Indiana Chapter of NAELA and past Chair of the Elder Law Section of the Indiana State Bar Association. Jeff was named Outstanding Member of the Indiana Chapter of the National Academy of Elder Law Attorneys in 2010. Jeff has also been Certified as an Elder Law Attorney (CELA) by the National Elder Law Foundation, a distinction held by only a handful of lawyers in Indiana. In 2010, 2011, 2012, 2013, 2014, 2015, and 2016, Jeff was named as one of the State's "Rising Stars" in *Super Lawyer* magazine. In 2018, 2019, 2020, and 2021, Jeff was named as one of the State's "Super Lawyers" in *Super Lawyer* magazine. Jeff enjoys educating both clients and the public at large regarding issues affecting the elderly and disabled and speaks regularly. He is a frequent speaker at the Indiana Continuing Legal Education Forum's annual *Elder Law Institute* and has also presented multiple other continuing legal education courses.

He and his wife, Jennifer, have two young children, Josie and Jonah.

**Connie L. Bauswell**

The Law Office of Connie L. Bauswell, LLC, Valparaiso



*Connie L. Bauswell* practices in the areas of elder law, estate planning and administration, veteran's benefits, and special needs planning. Connie is a member of the National Academy of Elder Law Attorneys (NAELA). As a NAELA member, Connie served on the Professionalism and Ethics Committee, which is revised NAELA's Aspirational Standards. She is also an active member of the Indiana Chapter of NAELA, serving as a board of director for several years and as the Indiana Chapter President for 2013-2014. Connie is a member of the Special Needs Alliance, which is an invitation-only national network of lawyers dedicated to disability and public benefits law.

Connie is a member of the Elder Law Section (Vice Chair for 2016-2017; Committee Chair, Education Committee 2016-2017; and Secretary-Treasurer for 2015-2016), the Probate, Trust and Real Property Section of the Indiana State Bar Association, the Porter County Bar Association, and Lake County Bar Association. She is a charter member of ElderCounsel. In addition, she is a graduate of the Veterans Benefits Institute. She serves on the Board of Directors of the National Elder Law Foundation, the only national certifying program for elder law and special needs attorneys.

Connie received her B.A. in Politics from the University of Dallas, magna cum laude. In 1996, Connie received her Juris Doctorate from the Indiana University Maurer School of Law. In May 2012, Connie earned her LL.M. in Elder Law, with Distinction, from Stetson University College of Law. In addition, she has earned the designation of CELA, which means she is "Certified as an Elder Law Attorney by the National Elder Law Foundation". She is also an Adjunct Professor at Valparaiso University School of Law, where she teaches Elder Law.

Connie practices law at the Law Office of Connie L. Bauswell, which has offices in Valparaiso and Schererville. She can be reached at 219-548-0980 or [connie@conniebauswell.com](mailto:connie@conniebauswell.com). Connie welcomes invitations to speak on a variety of topics related to her practice.

# **Table of Contents**

## Section One

### **Representing a Client Before the VA..... Tamatha A. Stevens**

<b>Introduction and Accreditation.....</b>	<b>1</b>
A. Introduction .....	1
1. VA Administrative Structure.....	3
2. Adjudicative Structure .....	5
3. Applicable Laws .....	5
B. Accreditation .....	7
1. Application .....	7
2. Denial of Application.....	8
3. Initial CLE .....	8
4. Annual Certification .....	9
5. Continuing CLE Requirements .....	9
<b>Representing a Client Before the VA .....</b>	<b>11</b>
A. Fee Requirements.....	11
1. Representation Before VARO or BVA .....	11
2. Representation Before CAVC.....	14
B. Engagement Letter/Fee Agreement.....	15
C. Pre-consultation .....	18
D. Filing Your “Appearance” .....	19
F. Your Right to Withdraw .....	22



## Section Two

### **Basic Eligibility for Benefits, Compensation for Service Connected Disability, Long Term Care Benefits, and Family Member Benefits.....**

**Jeffery D. Stinson**

<b>Basic Eligibility for Benefits.....</b>	<b>1</b>
Type of Discharge.....	1
Active Service Requirement.....	4
Length of Service Requirement.....	5
<b>Compensation for Service-connected Disability .....</b>	<b>5</b>
Current Disability.....	6
In Service Occurrence.....	7
Service Connection .....	9
Willful Misconduct.....	10
Ratings .....	10
Notice Requirements.....	11
Employability Claim.....	11
Special Situations.....	12
Special Monthly Compensation.....	13
Claims to Increase a Veteran's Ratings .....	14
Reducing a Veteran's Ratings.....	14
Severing the Service Connection .....	15
<b>Health Care Offered through the VA .....</b>	<b>16</b>
Priority Groups.....	16
Services Available .....	18
<b>Burial Benefits.....</b>	<b>22</b>
<b>Family Member Benefits .....</b>	<b>23</b>

## Section Three

**Pensions & Claim Procedures..... Connie L. Bauswell**

## Section Four

### Unfavorable Decisions and The New Review Process.....Tamatha A. Stevens, CELA

<b>I.</b>	<b>The New Modernized Review System for Unfavorable Decisions.....</b>	<b>2</b>
1.	What Is an Unfavorable Decision? .....	2
2.	Why a New Modernized Appeal Process Was Needed.....	3
3.	New System v. Old System .....	3
<b>II.</b>	<b>Using the New Modernized Review System for Unfavorable Decisions .....</b>	<b>5</b>
1.	Electing Review and Effective Dates .....	6
2.	Legacy Claims and Their Appeals.....	13
3.	Forms to Use.....	13
4.	Filing a Claim, Effective Date of Award and Duty to Assist .....	13
5.	Issues within a Claim.....	14
6.	Decision Notice .....	15
7.	Closing the Evidentiary Record.....	15

# **Section One**

# **Representing a Client Before the VA**

**Tamatha A. Stevens**

Certified Elder Law Attorney by the National Elder Law Foundation

Accredited Attorney with the Department of Veteran Affairs

Stevens & Associates, PC

Indianapolis, Indiana

## Section One

### **Representing a Client Before the VA..... Tamatha A. Stevens**

<b>Introduction and Accreditation .....</b>	<b>1</b>
A. Introduction.....	1
1. VA Administrative Structure .....	3
2. Adjudicative Structure .....	5
3. Applicable Laws.....	5
B. Accreditation.....	7
1. Application .....	7
2. Denial of Application .....	8
3. Initial CLE .....	8
4. Annual Certification.....	9
5. Continuing CLE Requirements .....	9
<b>Representing a Client Before the VA.....</b>	<b>11</b>
A. Fee Requirements .....	11
1. Representation Before VARO or BVA .....	11
2. Representation Before CAVC .....	14
B. Engagement Letter/Fee Agreement .....	15
C. Pre-consultation.....	18
D. Filing Your “Appearance” .....	19
F. Your Right to Withdraw.....	22

## **Introduction and Accreditation**

### **A. Introduction**

The Department of Veterans Affairs requires that any person or entity that provides specific benefit qualification or entitlement advice be ‘accredited’ with them. The Accreditation requirement stemmed from the need to ensure that Veterans have qualified and competent representation. VA accreditation is for the sole and limited purpose of preparing, presenting, and prosecuting claims before the VA. VA benefits are becoming more widely known and sought after. The Department of Veterans Affairs population projection is as of 2021 there are 18.4 million total veterans and around 6 million surviving spouses. With 5.5 million compensation beneficiaries and 400,000 pension beneficiaries including survivors’ pensions. The VBA annual benefits budget to veterans and survivors through compensation, pension and DIC is \$133.8 billion for 2021. The VA’s budget has grown at twice the rate of inflation each year. In Indiana alone in 2017, we have 427,328 veterans with 313,151 of those veterans being wartime veterans. Indiana’s break down is 16,833 WWII veterans, 35,449 Korean veterans, 140,859 Vietnam veterans, and 127,849 Gulf War veterans. These Indiana numbers are just veterans and do not include surviving spouses or dependent minor and adult “helpless” (aka dependent) adult children. Indiana is ranked 16<sup>th</sup> in the number of total wartime and peacetime veterans. The national average benefit per veteran is \$6,088.

The Persian Gulf War officially commenced on August 2, 1990 and has continued ever since. The VA changed the service requirements for these later Gulf War veterans lengthening the service requirement from 90 days to 24 months with one day during a period of war in order to receive “pension” benefits. The VA terminology differs from traditional terminology. Pension is

used to describe a retirement pension from service where a serviceman or woman is credited with 30 years of service (deployed active services in combat areas earns a veteran double service credit). Pension is also used for the long-term care cash benefit that many veterans are seeking often called “Aid and Attendance Pension”. The real name of this benefit is a Low Income Pension with Aid and Attendance. Compensation is used to define the disability pay provided to veterans whose disability is caused by or aggravated by their service.

*Every elder and estate planning attorney should become aware of the various VA programs as they will be impacting or potentially impacting the lives of so many of our Hoosier veterans, their surviving spouses, and their minor or dependent adult children.*

The VA, assisted living facilities (and many independent living facilities), financial advisors, veteran service organizations, attorneys and even veterans and surviving spouses are making the VA pension benefits known to other veterans and surviving spouses. In 2009, when President Obama took office, 11,000 veteran applications were pending longer than 1 year. In 2014, 245,000 veteran applications were pending longer than 1 year. In 2015, 900,000 applications are currently pending. The first quarter of 2015 marks a 50% increase from prior years filing. Logically, the processing time for the increased number of applications has also been lengthened. The average wait time for benefits is 273 for pre-Gulf War veterans claims, 316-327 days for Gulf War veterans claims and higher wait times in large metropolis areas such as 642 days in New York, 619 in Los Angeles, and 542 days in Chicago. According to VA spokesperson Joshua Taylor, the stated goal of the VA is to process claims within four months of filing.



Despite the increase in claims and the delay in processing, the VA's answer was to spend four years and \$537,000,000 on a new online computer system to process claims, but yet 97% of all claims are still filed via paper rather than online. The VA did hire 300 additional claim representatives over this time, but his increase has not allowed the VA to keep pace with the increased number of claims filed.

Lawyer involvement has increased the success at the appeal level but Cindy Indof, head of VA appeals in Columbia SC said that she is still seeing the same information having been requested and provided 2 and 3 times over in the appeal files as the current VA system rewards claims representative for sending requests but apparently not for actually reviewing the documentation in the file. Appeal success rates have continued to increase over the past decade, but still less than fifty percent (50%) of the appeals brought are successful. Before discussing appeals, it is helpful to lay out the VA Administrative Structure and Accreditation Requirements.

#### 1. VA Administrative Structure.

The Veterans Administration is the second largest department in the federal government. VA administrative structure,<sup>1</sup> in somewhat oversimplified form to limit details to what is relevant to most attorneys, generally consists of:

- a. Office of the Secretary.* The Secretary is appointed by the President of the United States and has overall responsibility for running the Veterans Administration. The Secretary of Veterans Affairs is Robert A. McDonald.<sup>2</sup>

---

<sup>1</sup> Appendix 1.2.

<sup>2</sup> <http://www.va.gov/opa/bios/secretary.asp>

**b. *Office of the General Counsel.*** The General Counsel of the Veterans Administration also is appointed by the president. The General Counsel serves as chief legal officer on all matters of law, litigation and legislation, overseeing a staff of roughly 450 attorneys as of last report. The mission of the Office of the General Counsel, often referred to as "OGC," is to identify and meet the legal needs of the Department of Veterans Affairs. Its primary objective is to ensure the just and faithful execution of the laws, regulations and policies that the secretary has responsibility for administering.

The current General Counsel is Leigh A. Bradley.<sup>3</sup>

**c. *Veterans Benefits Administration (VBA).*** The VBA provides an integrated program of veterans benefits including:

- (i) Compensation (for service-connected disabilities)
- (ii) Pension (for non-service connected disabilities)
- (iii) Burial benefits
- (iv) Rehabilitation assistance; education and training
- (v) Home loans
- (vi) Insurance

**d. *Veterans Health Administration (VHA).*** VHA operates and maintains the nationwide network of Veterans Administration medical centers, research centers, and information resource centers.

**e. *National Cemetery Administration***

- (i) Some veterans also are eligible for burial allowances. If a veteran is buried in a national cemetery, spouses and dependents are entitled to burial with the veteran. The name and birth and death dates of the spouse or dependent will be inscribed on the veterans headstone. Eligible spouses and dependents may be buried even if they predeceased the veteran.

---

<sup>3</sup> [http://www.va.gov/opa/bios/bio\\_bradley.asp](http://www.va.gov/opa/bios/bio_bradley.asp)

(ii) Private Cemetery System. If a veteran is buried in a private cemetery, here she is entitled to a government headstone or marker, a burial flag, and a Presidential memorial certificate at no cost to the family. Some veterans may also be eligible for burial allowances.

(iii) Eligibility. Eligibility is based on multiple factors which are delineated at [http://www.cem.va.gov/burial\\_benefits/eligible.asp](http://www.cem.va.gov/burial_benefits/eligible.asp).

## 2. Adjudicative structure

The VA basically has a two-tier internal administrative process for dealing with claims:

- a) A Veterans Administration Regional Office (V ARO) renders the initial decision, appealable to
- b) The Board of Veterans Appeals (BVA).

BVA denials may be appealed to what now is called the US Court of Appeals for Veterans Claims (CAVC), the first level beyond the VA's two internal tiers, and may be further appealed to the US Court of Appeals for the Federal Circuit.<sup>4</sup>

## 3. Applicable laws

For adjudication of VA claims, there are four primary sources of applicable law.

- a) Title 38 of the United States Code
- b) 38 Code of Federal Regulations (particularly Part 3)

---

<sup>4</sup> VBM §1.1 (2009 Ed.). Barton F. Stichman, one of the Editors of the VBM, published a scholarly article, *The Impact Of The Veterans' Judicial Review Act On The Federal Circuit*, 41 AMERICAN UNIVERSITY LAW REVIEW 855 (1992) (<http://www.wcl.american.edu/journal/lawrev/41/stichman.pdf?rd=1>)

c) M21-1 and M21-MR Adjudication Manuals<sup>5</sup> (analogous, in organization and importance, to Indiana's Program Policy Manual for Medicaid and other FSSA programs).

d) General Counsel Opinions are quite important in Veterans Administration practice. The written legal opinions of the General Counsel are precedent in adjudications and appeals involving veterans' benefits under laws administered by the Veterans Administration. They are conclusive as to all VA officials and employees not only in the matter at issue (law of the case) but also in future adjudications and appeals (in the absence of a change in controlling statute or regulation, court decisions or superseding written legal opinion).

Many of the applicable laws are available at the Veterans Administration's "Web Automated Reference Materials System" (W ARMS).<sup>6</sup> Others may be available through the Office of the General Counsel.<sup>7</sup> The VETERANS BENEFITS MANUAL from Lexis-Nexis is offered optionally in a set with complete FEDERAL VETERANS LAWS, RULES AND REGULATIONS (and on CD-ROM in yet another option).

Representation of the claimant can be by:<sup>8</sup>

- a) The Claimant himself
- b) A Veterans Benefits counselor on behalf of the claimant
- c) A Veterans Service Organization accredited through the VA- *e.g.*, American Legion, Disabled American Veterans (DAV), Veterans of Foreign Wars (VFW) - varying from geographic area to area.<sup>9</sup>

---

<sup>5</sup> [http://www.warms.vba.va.gov/M21\\_1\\_MR.html](http://www.warms.vba.va.gov/M21_1_MR.html)

<sup>6</sup> [http://www.warms.vba.va.gov/m21\\_1.html](http://www.warms.vba.va.gov/m21_1.html)

<sup>7</sup> <http://www.va.gov/ogc/precedentopinions.asp>

<sup>8</sup> *See generally* 38 USC §5901

<sup>9</sup> 38 USC§ 5902; 38 CFR §14.628

- d) An agent accredited by the VA;<sup>10</sup>
- e) An attorney-in-fact for a single representation<sup>11</sup> (typically, a child or relative)
- f) An attorney at law in good standing with the state bar and accredited by the VA.

## **B. Accreditation**

No individual, however, may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits as an agent or attorney unless he or she has first been accredited by the VA.<sup>12</sup>

### **1. Application**

Attorneys who wish to be accredited to practice before the Veterans Administration must be members in good standing of a state bar. As of mid-2008, they also must be accredited and have their standing certified annually.<sup>13</sup> Initial certification is reasonably easy for an attorney who is a member in good standing of the State Bar. An attorney applies for accreditation on Form 21a.<sup>14</sup> within one year after accreditation, attorneys must complete 3 hours of continuing legal education and then an additional 3 hours for every subsequent 2 year period.<sup>15</sup> The Veterans Administration establishes the requirements for those CLE hours, and this program is intended to satisfy those requirements.

Accredited attorneys are not the only players on the VA field, however. Recognized veterans service organizations may request that the VA accredit officers of the organization for representing claimants of VA benefits. Separate accreditation requirements apply to such lay

---

<sup>10</sup> 38 USC §5903; 38 CFR §14.629(b)(1)(i)

<sup>11</sup> 38 CFR §14.630

<sup>12</sup> 38 USC §5901; 38 CFR §14.629(b)

<sup>13</sup> 38 C.F.R. §14.629(b).

<sup>14</sup> Appendix 1.1

<sup>15</sup> See discussion below.

advocates. Accredited representatives must either be paid employees or members in good standing of the recognized organization as a threshold qualification.

There are also accredited agents outside of service organizations and outside of the bar. They apply for accreditation on the same VA Form 21a that attorneys use, but unlike attorneys, they must pass a written examination prepared and graded by the VA General Counsel. Non-attorney agents have similar continuing legal education requirements to accredited attorneys.

An individual may be authorized to represent a VA claimant on a one-time basis. Such representatives are usually close family members or friends.

## 2. Denial of Application.

Denial of an application for accreditation may be corrected, as a first resort, by submitting additional information suggested by the reason for disapproval stated in the notice of denial. If the application is again denied, the applicant may appeal the decision in writing to the General Counsel for a final decision, and in turn may appeal denial by the General Counsel to the US District Court under the provisions of the Administrative Procedures Act.<sup>16</sup>

## 3. Initial CLE

Maintaining accreditation is not automatic.

As a further condition of initial accreditation, both agents and attorneys are required to complete 3 hours of qualifying continuing legal education (CLE) during the first 12-month period following the date of initial accreditation by VA. To qualify under this subsection, a CLE course must be approved for a minimum of 3 hours of CLE credit by any State bar association and, at a minimum, must cover the following topics: representation before VA, claims procedures, basic eligibility for VA benefits, right to appeal, disability compensation (38 U.S.C. Chapter 11),

---

<sup>16</sup> 38 C.F.R. §14.629.

dependency and indemnity compensation (38 U.S. C. Chapter 13), and pension (38 U.S.C. Chapter 15). Upon completion of the initial CLE requirement, agents and attorneys shall certify to the Office of the General Counsel in writing that they have completed qualifying CLE. Such certification shall include the title of the CLE, date and time of the CLE, and identification of the CLE provider, and shall be submitted to VA as part of the annual certification prescribed by § 14.629(b)(4).<sup>17</sup>

#### 4. Annual Certification

As a further condition of initial accreditation and annually thereafter, each person seeking accreditation as an agent or attorney shall submit to VA information about any court, bar, or Federal or State agency to which the agent or attorney is admitted to practice or otherwise authorized to appear. Applicants shall provide identification numbers and membership information for each jurisdiction in which the applicant is admitted and a certification that the agent or attorney is in good standing in every jurisdiction in which admitted. After accreditation, agents and attorneys must notify VA within 30 days of any change in their status in any jurisdiction in which they are admitted to appear.<sup>18</sup><sup>31</sup>

#### 5. Continuing CLE requirements

To maintain accreditation, agents and attorneys are required to complete an additional 3 hours of qualifying CLE on veterans benefits law and procedure not later than 3 years from the date of initial accreditation and every 2 years thereafter. To qualify under this subsection, a CLE course must be approved for a minimum of 3 hours of CLE credit by any State bar association.

---

<sup>17</sup> 38 CFR § 14.629(b)(1)(iii). The author recommends that attorneys diary annual certifications and make them proactively by letter until the annual certifications, including reports of initial CLE and continuing CLE thereafter, are formalized with reminders sent by VA, as does not yet appear to have occurred.

<sup>18</sup> 38 CFR § 14.629(b)(4).

Agents and attorneys shall certify completion of the post-accreditation CLE requirement in the same manner as described in § 14.629(b)(1)(iii).<sup>19</sup>

---

<sup>19</sup> 38 CFR § 14.629(b)(1)(iv).



## **Representing a Client before the VA**

A representative or advocate before the Veterans Administration Regional Offices (VARO) and Board of Veteran's Appeals (BVA) is regulated in his or her conduct by VA statutes and regulations, Rules of Professional Conduct (for attorney representatives) and for lay advocates, the rules of the Veterans Service Organization (VSO) for whom they are working. In addition to general ethical/conduct requirements, there are constraints on when and how much attorney can charge fees, formalities including a requirement of a written fee agreement (when fees may be charged), situations in which the VA claims no right to regulate fees at all, and helpful general tips beyond those applicable to administrative advocacy in general.

### **A. Fee requirements**

VA limitations on attorney fees date back to the Civil War. In 1862, wanting to protect veterans from unscrupulous representatives, Congress imposed a \$5 fee limit on attorneys and agents assisting people applying for pension, reenlistment bounty or other military allowance. Two years later, the limit was raised to \$10. And there it remained for 122 years until passage of the Veterans Judicial Review Act (VJRA) in 1988.<sup>1</sup> Thus, unless a veteran found a VSO, found a *pro bono* attorney, or qualified for legal aid clinic or Legal Services Corporation representation, he effectively could not have a representative.

The constitutionality of this arrangement "on its face" was upheld (subject to possible challenge "as applied" to a class of claimants with complex cases).<sup>2</sup>

#### **1. Representation before VARO or BVA.**

---

<sup>1</sup> Stichman&Abrams, VETERANSBENEFITSMANUAL §18.1 (hereafterVBM)

<sup>2</sup> *Walters vV. National Association of Radiation Survivors*, 473 U.S. 305 (1985)

The 1988 VJRA allowed attorneys and agents to charge a reasonable fee if they were retained within one year of a final BV A decision

- to reopen the claim in the VA Regional Office (V ARO),
- to move the Board of Veterans Appeals (BV A) to reconsider its denial, or
- to file a claim for revision of the BVA decision based on clear and unmistakable error.<sup>3</sup>

It also allowed reasonable attorney fees for appeal of BV A decisions to the US Court Of Appeals for Veterans Claims (CAVC).<sup>4</sup>

The Veterans Benefits, Healthcare, and Information Technology Act of 2006 pushed further forward the threshold for attorney fees: a claimant may hire and pay an attorney (or non-attorney agent) for representation before the VA before a final BVA decision if:

- the regional office has denied the claim,
- the claimant has filed a Notice of Disagreement (NOD) on or after June 20, 2007, and
- the representation for which the claim is paying is on the claims that were subject to the Notice of Disagreement.<sup>5</sup>

But the law still prohibits both agents and attorneys from charging a fee until the VA Regional Office has made an initial decision on a claim for VA benefits and the claimant has filed a Notice of Disagreement (NOD).<sup>6</sup> Lawyers may represent a claimant at this stage, but only without charging a fee, which obviously- and probably intentionally- skews representation at the administrative level in favor of VSOs (American Legion, DAV, the Military Order of The Purple

---

<sup>3</sup> See 38 USC §5904(c). See Section 8 of course material for discussion of such "appeals."

<sup>4</sup> See 38 USC §7263.

<sup>5</sup> VBM §1.1

<sup>6</sup> 38 USC §5904(c); 38 C.F.R. §§14.636(c), 20.609.

Heart and VFW) that have trained and hired lay advocates who traditionally have served the majority of claimants without fee.<sup>7</sup>

In 2019, the fee provisions were broadened once again, the AMA now allows accredited attorneys to charge a fee for assistance with claims after the VA has issued a notice of an initial decision on a claim. An initial decision on a claim includes a decision adjudicating a supplemental claim unless the claimant is continuously pursuing the claim by choosing any of the other three procedural options for review. The change to allow fees at an earlier stage of the claims process is significant and meant to encourage earlier involvement of accredited individuals in resolving claims.

If an attorney represents a potential claimant in pre-consultation and planning for eligibility<sup>8</sup> and plans to continue if an NOD is filed, it can be an awkward to step out of the picture during the no-fee hiatus between those points. Many attorneys, for that or other reasons, do proceed *pro bono* through the hiatus. The AMA further address the prohibition against gifts from a VA claimant to a VA accredited individual are not permitted in any situation where a fee could also not be charged.

Fees charged for representation before the VA must be reasonable, but may be based on a fixed fee, hourly rate, or a percentage of benefits recovered, or a combination of these factors.<sup>9</sup> There is a presumption that these which total no more than 20% of any past due benefits are reasonable.<sup>10</sup> Fees greater than one third are presumed unreasonable.<sup>11</sup> Beyond those

---

<sup>7</sup> VBM § 18.1. The legacy of attorney fees having been forbidden for so long, combined with the emergence of VSOs to serve the needs of veterans, seems likely to result in Congressional "favoritism" toward VSOs well into the future- if only so as not to upset the apple cart of expectations built up over such a long period.

<sup>8</sup> See part II( C), *infra*.

<sup>9</sup> 38 CFR 14.636(e); *but see* text at note 33 (disallowing, *inter alia*, contingent fees where there is a disinterested third party attorney fee payer for the claim processing).

<sup>10</sup> 38 USC §5904(a)(5); 38 CFR §14.636(f)

<sup>11</sup> 38 CFR §14.636(e)

presumptions, the criteria for determining a reasonable fee are similar to those set forth in Rule of Professional Conduct 1.5.<sup>12</sup>

There are no statutory restrictions on when or how a representative may require a claimant to reimburse out-of-pocket expenses, but there are some regulations.<sup>13</sup> The basic rule is that the written agreement filed with the office of General Counsel must specify whether and how they will be reimbursed.<sup>14</sup> VA cannot reimburse the attorney or agent directly for expenses from the past due benefits.<sup>15</sup>

An adverse decision on fees may be protested by a request to reconsider, to vacate, to revise based on clear and unmistakable error, or by appeal to the CAVC.<sup>16</sup>

## 2. Representation before CAVC.<sup>17</sup>

If the BVA issues a decision subject to appeal to the CAVC, the claimant may hire an attorney to explore the possibility of appealing and to provide representation before the CAVC. The claimant and attorney are free to negotiate any fee agreement they wish, with only a few restrictions. No prior approval is necessary for the fee agreement to be valid, but a copy must be filed with the CAVC for possible review unless the representation is without charge to the appellant.<sup>18</sup> Any agreement should be filed with the CAVC (because it is not part of the VA) when the attorney files a Notice of Appeal.<sup>19</sup> There is no duty to file the fee agreement *with the VA* unless or until the representation is provided at the BVA or V ARO. Thus, an attorney who first

---

<sup>12</sup> See 38 CFR 14.636(e)(1)- (e)(8)

<sup>13</sup> See 38 CFR §14.637.

<sup>14</sup> See 38 CFR §14.637(b).

<sup>15</sup> See 38 CFR §14.637(b).

<sup>16</sup> See also Section 8, on Appeals generally.

<sup>17</sup> See generally VBM § 18.3

<sup>18</sup> See 38 USC §7263(c)

<sup>19</sup> See 38 USC §7263(c). If the attorney is retained after the filing of the Notice of Appeal, he should file the fee agreement when his Notice of Appearance is filed.

appeared in the CAVC would not necessarily need to file a fee agreement with the VA unless the case was remanded and he wished to continue representation.

## **B. Engagement Letter/Fee Agreement**

All agreements for payment of attorney fees must be in writing and signed by both the attorney and the claimant.<sup>20</sup> The agreement must contain:

- Name of the veteran;
- Name of the claimant is different than the veteran;<sup>21</sup>
- Name of any disinterested third-party payer;<sup>22</sup>
- VA file number (if known);
- Specific terms for determining the amount of fees to be paid;
- Whether the VA is to pay the agent or attorney directly out of past-due benefits.<sup>23</sup>

Since attorneys may represent a potential claimant in pre-consultation<sup>24</sup> and after a NOD is filed, many attorneys proceed *pro bono* at the application stage rather than abandoning or handing off the client to a VSO or other *pro bono* representative temporarily. The engagement letter should be explicit that representation at the application stage is without fee, and sound

---

<sup>20</sup> 38 CFR §14.636(g). Chapter 18 of the VBM includes three Appendices with model fee agreements for representation before the CA VC, CA VC and VA, or VA only. The author suggests that, while technically adequate, these agreements are so "bare bone" that prudence dictates considerably more detailed in an engagement letter or fee agreement. Specifically, because clients frequently confuse the kinds of details that even lawyers have to master slowly, it is prudent for an attorney explicitly to disclaim entitlement to fees for those portions of representation where VA does not allow fees. Of course, if counsel is going to work with a VSO for the portion of the process for which fees may not be charged, it would be prudent to get the client's agreement to that in the written engagement letter or fee agreement as well, much as counsel must get client consent for law students, interns and paralegals to participate in representation, 38 CFR 14.629(b)(3).

<sup>21</sup> This would include not only surviving spouses, but guardians or fiduciaries appointed to act on an individual's behalf.

<sup>22</sup> See text at note 33 for additional requirements if there is a disinterested third-party paying fees.

<sup>23</sup> 38 CFR § 14.636(g). If the agreement does not specify payment from past the benefits, or if it sets a fee greater than 20% of past-due benefits, the attorney is responsible for collecting fees from the claimant without assistance from the VA.

<sup>24</sup> See part II( C), *infra*.

practice management suggests precautions, such separate tracking of time on the VA claim, so as not inadvertently to bill non-billable application time.

Fee agreements for representation before the VA Regional Offices (VAROs) and BVA must be filed with the VA Office of the General Counsel,<sup>25</sup> within thirty days of execution.

The VA can review the agreement for reasonableness either on its own motion or on the motion of the claimant. Different regulations apply to agreements entered into before June 23, 2008 and those entered into after that date.<sup>26</sup> Under the regulations for claims after June 23, 2008, the OGC conducts the review (in other circumstances, the BVA or CAVC may review agreements; VAROs have no authority to review fees), and the reviewer may order a reduction in the fee called for it finds by a preponderance of the evidence, or by clear and convincing evidence in the case of fees *presumed* reasonable, that the fee is in fact unreasonable.<sup>27</sup> A motion for review must be filed within 120 days after the date of the final VA action, and it must be served on the agent or attorney.<sup>28</sup> The motion must include the reasons why the fee called for in the agreement is unreasonable and must be accompanied by all evidence the moving party desires to submit.<sup>29</sup> Either party can file a notice of disagreement with the General Counsel's decision for ultimate review by the BVA.<sup>30</sup>

Authority to review fee agreements now rests with the Secretary of Veterans Affairs.<sup>31</sup> If the agreement calls for fees to be paid directly by the VA from past-due benefits, the representatives must notify the VARO within thirty days as well, providing a copy of the

---

<sup>25</sup> Office of the General Counsel (022D), 810 Vermont Ave., N.W., Washington, DC 20420.

<sup>26</sup> VBM §18.2.5.1

<sup>27</sup> 38 CFR §14.636(i)

<sup>28</sup> 38 CFR §14.636(i)

<sup>29</sup> 38 CFR §14.636(i)

<sup>30</sup> 38 CFR §14.636(i)(3)

<sup>31</sup> 38 USC §5904(c)(3); 38 CFR §14.636(i)

agreement. There is a 20% ceiling on contingent fee agreements in which the fee is to be paid directly to the representatives by the VA.<sup>32</sup>

Restrictions on charging attorney fees do not apply to an attorney or agent who receives fees or a salary from an organization, governmental entity or other truly disinterested third-party representing a claimant or appellant. Few attorneys will find truly disinterested parties willing to pay fees, in all likelihood, but if they do (or think they have), a few other restrictions apply:

- No portion of the fee can be contingent on a favorable resolution;
- A spouse, child, parent, or cohabitants with the claimant or appellant is presumed not to be disinterested, and clear and convincing evidence that the person in question has no financial interest in the success of the claim is required to overcome the presumption;
- The fee agreement may still be required to be filed with the Veterans Administration;
- The agreement shall include or be accompanied by the following statement, signed by the attorney: "I certify that no agreement, oral or otherwise, exists under which the claimant or appellant will provide anything of value to the third party payer in this case in return for payment of my fee or salary, including but not limited to, reimbursement of any fees paid."<sup>33</sup>

Different rules govern attorney fee agreements and practice before the CAVC.<sup>34</sup> There are relatively fewer restrictions on agreements at that level, though the agreement must be filed with the CA VC for possible review unless the representation is *pro bono*. The fee agreement should be

---

<sup>32</sup> 38 CFR 14.636(h)(i). For more details regarding payment of fees by the VA directly to attorneys and agents by deducting the fee from past-due benefits, see VBM §18.4.

<sup>33</sup> It is unclear how attorney would know about an oral or written agreement concocted between the claimant and the purportedly disinterested party without attorney involvement. The maxim that "if it looks too good to be true, it probably is not true" applies to an attorney who thinks he has found a disinterested party to pay his fees for preparing and presenting a specific claim for benefits.

<sup>34</sup> See VBM §18.3

filed at the time the attorney files a Notice of Appeal with the Court or, if the attorney is retained after the Notice of Appeal, when the attorney files a Notice of Appearance.

Finally, there are special rules for offset of fees in instances where the court awards attorney fees and expenses under the Equal Access to Justice Act.<sup>35</sup>

### **C. Pre-consultation**

The VA's authority to regulate attorney-client relationships is limited by statute to

- accreditation for *purposes of preparation, presentation, and prosecution of claims*, and
- reviewing the fees that agents and attorneys charge for representing claimants *in proceedings before the department*.<sup>36</sup>

Attorneys may charge a fee for consultation and planning before the claimant tells the attorney that they want to file a claim for benefits.

That is an important distinction as we try to practice VA law profitably. Attorneys may charge a fee for consultation and planning before a claim for VA benefits is filed. The Veterans Administration General Counsel recognizes the legitimacy of attorney fees for review of records, research, counseling, "and any other assistance that the potential VA claimant might need *short of actually preparing and presenting a specific claim for benefits*." <sup>37</sup>

The phrase "and any other assistance that the potential VA claimant might need short of actually preparing and presenting a specific claim for benefits" is quite important. The eligibility criteria for Aid & Attendance are covered by another presenter in this program. But pre-counseling can include the VA equivalent of "Medicaid planning" -the fruit of lawyerly parsing of eligibility

---

<sup>35</sup> VBM §18.3.4

<sup>36</sup> 38 USC §5904(a), (c).

<sup>37</sup> Letter from Tim S. MacLain to The Honorable Lane Evans, Ranking Democratic Member, Committee on Veterans Affairs, May 24, 2004 (emphasis added). (<http://www.nvlsp.org/Information/ArticleLibrary/images/attomeyfees-LaneEvansdoc.pdf>)



rules and regulations to develop strategies whereby someone who currently is not eligible can be made eligible. The pre-counseling likely will include a fairly sophisticated discussion of eligibility planning alternatives, how pursuing some of them will imperil Medicaid eligibility for five years into the future (and how to minimize the damage), and executing any plan the client adopts. Few lawyers are competent in such counseling, which can be of great financial value to the client.

#### **D. Filing Your “Appearance”**

Claims are filed and adjudicated initially in one of more than 50 Veterans Administration Regional Offices (ROs or VAROs) or in some cases others VA field level offices located around the country.

After being accredited to represent claimants before the VA, an attorney (or other accredited agent) becomes recognized by the VA as the representative of a particular client by a Power of Attorney executed by the claimant, VA Form 21-22a.<sup>38</sup> An engagement letter on letterhead is not an appropriate method of appointing an attorney.<sup>39</sup> Generally, only one representative is authorized to represent a claimant at any one time, and presentation of a new Power of Attorney for a different representative automatically revokes an existing Power of Attorney.<sup>40</sup>

If the attorney appointed as representative is to be assisted by an attorney or staff associated or affiliated with him or her, the claimant must consent in writing.<sup>41</sup> That written consent normally should be by including them on the form 21-22a.<sup>42</sup>

---

<sup>38</sup> See 38 CFR §14.630. VA Forms may be obtained at [http://www.va.gov/vafonns/search\\_action.asp](http://www.va.gov/vafonns/search_action.asp) (current as of April 2, 2011 ). They change often enough that putting them in an Appendix might prove a trap for the unwary.

<sup>39</sup> 38 C.F.R. §14.631(a). *See* 73 Fed. Reg. 29, 852.

<sup>40</sup> 38 C.F. R. §14.631(g).

<sup>41</sup> 38 C.F.R. §20.603(c).

<sup>42</sup> The author's experience has been that VA has been reluctant to recognize the authority of assistants even if they are included.

To establish the earliest effective date, the representative or the claimant should notify the VA in writing that the claimant is seeking all benefits to which he or she may be entitled, specifically including pension, and by asking the VA to provide the appropriate application form. The letter should be considered sufficient to initiate a claim. The letter should include:

1. The Veterans Administration Claim Number or, if not available, the veteran's Social Security number.

E. Gaining Access to VBMS for Accredited Claim Representatives

One of the biggest problems facing the Regional Offices claims processors in the past was the volume of paper-based claims. One disability compensation claim could exceed 2,000 pages of paper. Starting in 2012, the VA began migrating its paper-based claim system to a paperless system. By the end of 2015, they were mostly complete and in 2020 considered itself fully complete. Implementation of the paperless system brought with it the development of the computer database called VBMS, Veterans Benefits Management System. The VA encourages all claimants to use an online application process that creates a personal file in the VBMS. For claimants who still send in paper applications as some are not computer adept, the paper documents are sent to the Evidence Intake Scanning Center in Janesville, WI to be converted into PDF documents that are added to the VA intranet into the VBMS for processing.

In May of 2016, the VA completed implementation of the National Work Queue. While previously a veteran's claim was processed from start to finish at the veteran's local Regional Office of jurisdiction, now a claim is typically processed by multiple regional offices. Very few claims are processed entirely at the veteran's local regional office today, unless the veteran has a documented hardship that may necessitate expediting the claim or face-to-face interaction. The system is meant to streamline the claim process. Online applications can be

made through eBenefits or vets.gov and feed directly into the VBMS through the National Work Queue.

Currently claims for pensions, DIC and accrued benefits must still be submitted as paper applications and scanned in. The majority of these claims are still processed through the St. Paul, Milwaukee and Philadelphia Regional Offices through the VBMS. Occasionally, however, one of these claims may reach other offices where there may be less experience in handling these kinds of applications.

The VA reported that with the VBMS as of November 14, 2017 that:

By centralizing intake of claims, the VA was able to digitalize all claims, not matter how received, creating fully digitalized operating environment allowing claims to be processed easier;

Processed nearly 100% of all compensation claims electronically allowing benefits to be awarded more timely;

Completed 9 million rating and non-rating claims in VBMS and 7 million rating decisions in VBMS since inception;

Scanned 2.9 billion images averaging over 100,000 mail packets per week;

Reduced mail processing time for Reional Offices to under 4 days from 55 days;

Reduced the average time to process a veteran's claim nationally to 113.3 days or a 10.2 day reduction from 2016.

You need access to the VBMS and to your client's files within it. In order to obtain access, you must be accredited and be designated by one or more veterans to represent him or her in pursuing a claim or an appeal. You must complete a background investigation comprised of fingerprinting, OPM background check, complete information security training, complete and

submit VA 20-0344, and sign the Rules of Behavior. Once successfully approved you will be granted access as a POA. To gain access to a veteran's records, a representative must have a personal login under the system. The National Service Desk provides IT support and can be reached 24 hours a day 7 days a week at 1-855-NSD-HELP or 1-855-673-4357.

**F. Your Right to Withdraw.**

The Board of Veterans Appeals rules of practice restrict the right of a representative to withdraw while the case is on appeal to the BVA. Prior to certification of an appeal to the BVA, there is no restriction on withdrawal except that written notice must be provided to the appellant and to the agency of original jurisdiction. After certification of a case to the BVA, the representative must file a motion with the BVA Chairman and show good cause for withdrawal.

# Accreditation With The Veterans Administration



Stevens & Associates<sup>PC</sup>

Estate · Elder · Special Needs · Veterans · Equine

---

# Why Accreditation?

VA accreditation is for the sole purpose of providing representation services to claimants before the VA and does not imply that a representative is qualified to provide financial planning services or is otherwise endorsed by the VA. The VA explicitly prohibits the use of VA accreditation for marketing financial products or promoting a financial services business.

---

---

# VA Standard of Conduct

- Faithfully execute their duties on behalf of the VA claimant;
  - Be truthful in their dealings with claimants and VA;
  - Provide claimants with competent representation before VA; and
  - Act with reasonable diligence and promptness in representing claimants.
-

---

# VA Standard of Conduct: Prohibited:

- Violate the standards of conduct;
  - Circumvent the rules of conduct through the actions of another;
  - Engage in conduct involving fraud, deceit, misrepresentation, or dishonesty;
  - Enter into an agreement for, charge, solicit, or receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation;
-



# VA Standard of Conduct: Prohibited:

- ❑ Solicit, receive or enter into agreements for gifts related to representation provided before an agency of original jurisdiction has issued a decision on a claim or claims a Notice of Disagreement has been filed with respect to that decision.
- ❑ Delay without good cause processing of claim
- ❑ Mislead, threaten, coerce or deceive a claimant regarding benefits;

---

# VA Standard of Conduct: Prohibited:

- Engage in, or counsel or advise a claimant to engage in, acts or behaviors prejudicial to the fair and orderly conduct of administrative proceedings before the VA;
  - Disclose, without the claimant's authorization, any information provided by VA for purposes of representation;
  - Engage in any other unlawful or unethical conduct
-

---

# What happens if you violate the Standard of Conduct:

The VA may suspend or cancel your accreditation.

The VA is also authorized to report the suspension or cancellation to any bar association, court or agency to which you are admitted. Finally, the VA will collaborate with State and Federal enforcement authorities if you violated State or other Federal laws.

---

---

# Complaints

Recently, the VA has received a large number of complaints of abuse by Authorized Representative some of which does not fall succinctly within the VA's jurisdiction to investigate. Complaints against an individual or organization assisting with VA pension benefits are now directed to the Federal Trade Commission's complaint assistant. The Federal Trade Commission will notify the Federal and State law enforcement authorities and the VA accreditation program of all possible action.

---

---

# Who Are You Serving?

- Veterans who served during periods of war as defined by the Department of Veteran Affairs
  - Who were not dishonorably discharged
  - Who serve 90 consecutive days pre-1990 (Gulf War) and 24 consecutive months post-1990
  - Typically those who are disabled or those who need the assistance of another person with ADLs and meet asset and income thresholds.
-

---

# Numbers of Wartime Veterans:

## ■ Nationwide

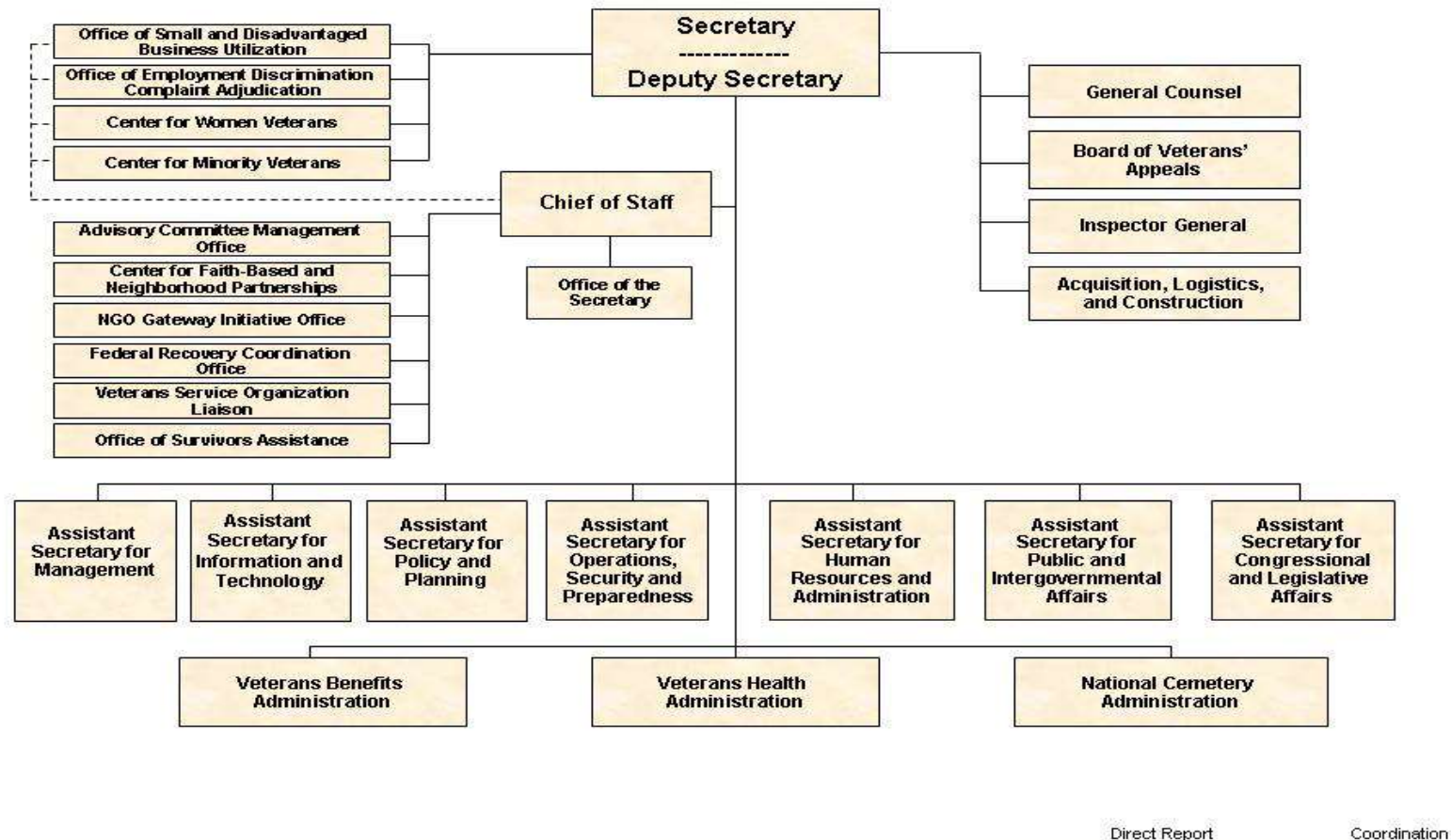
- Gulf War 7,602,375
- Vietnam Era 6,262,436
- Korean Conflict 1,164,774
- World War II 389,292

## ■ Indiana 313,151

- Gulf War 127,849
- Vietnam Era 140,859
- Korean Conflict 35,449
- World War II 16,833

- 
- Excludes surviving spouses and dependent children

# DEPARTMENT OF VETERANS AFFAIRS



June 2009

---

# VBA (Veterans Benefit Administration)

- Compensation (service-connected)
  - *Pension (non-service connected)*
  - Burial benefits
  - Rehabilitation assistance; education and training
  - Home loans
  - Insurance
-



---

# VHA Veterans Health Administration

- Medical Centers
- Research Centers
- Information Resource Centers

---

# Adjudicative Structure

- Veterans Administration Regional Office (VARO)
  - Board of Veterans Appeals (BVA)
  - U.S. Court of Appeals for Veterans Claims (outside VA)
-

---

# Applicable Laws

- Title 38 of the United States Code
  - 38 Code of Federal Regulations (particularly Part 3 for "Pension")
  - M21-1 and M21-MR Adjudication Manuals
  - General Counsel Opinions
-

---

# Accreditation

- Mandatory- attorneys and other agents
  - Initial CLE requirement
  - Continuing CLE requirements
  - Annual Certifications
-

---

# Attorney Accreditation

- Form 21A
  - Self-certification of
    - ❑ Admission to practice before any other court, bar, or State or Federal agency
    - ❑ character and fitness (character and fitness presumed from admission and good standing in State bar)
  - Continuation contingent on initial and continuing CLE
-

---

# Fees Liberated

- VJRA (1988)
    - ❑ If hired w/l 1 year of final BVA decision
    - ❑ To reopen in VARO
    - ❑ To move BVA to reconsider
    - ❑ To file for revision of BVA decision (CUE)
  - Veterans Benefits, Healthcare, and Information
  - Technology (broadened fees further)
    - ❑ Denial by VARO
    - ❑ NOD filed on claim
-

---

# Fee Types Allowed

- Fixed fee
  - Hourly rate
  - Percentage of benefits recovered
  - Combination of those three
-

---

# New Fee Rules Effective February 19, 2019

- 38 CFR 14.636

- Clarifies VA Permitted Attorney Fees For Actions Following An Initial Decision on A Claim, including requests to re-open, increase benefits, or NOD



---

# Fee Totals

- < 20% is reasonable.
  - > 1/3 presumed unreasonable.
  - Regulations on recovery of expenses
    - VA won't reimburse from past benefits
    - Should be covered in fee agreement
-

---

# Chronology of Fees

- Pre-consultation
  - During the claims process
  - After NOD
  - CAVC
-

---

# Pre-Consultation Fees

- No fee regulations for pre-filing consultation
  - VA's accreditation authority limited
    - preparation
    - Presentation
    - Prosecution
    - reviewing fees in *proceedings before the department*
-

# Fees from Disinterested Party?

- No portion contingent on favorable resolution
- Spouse, child, parent, or cohabitants with the claimant or appellant presumed interested
  - Clear and convincing evidence of no financial interest required to overcome presumption
- Filing fee agreement may be required
- Agreement shall include statement of no side agreement that claimant will provide value to third party

---

# Fees During Claims Process

- \$0.00

---

# Fees after Adverse Action

- Veterans Benefits, Healthcare, and Information Technology
  - Denial by VARO
  - NOD filed on claim

---

# CAVC Fees

- Fee agreements largely unregulated
  - No prior approval
  - File fee agreement with Notice of Appeal (or Appearance)
  - If entering representation at appeal, file agreement with BVA or VARO upon remand
-

---

# Engagement Letter/Fee Agreement

## Contents

- Name of the veteran
  - Name of the claimant is different than the veteran
  - Name of any disinterested third-party payer;
  - VA file number
  - Specific terms for determining the amount of fees to be paid
  - Whether the VA is to pay the agent or attorney directly out of past-due benefits
-



# Filing & Review

- Fee Agreements must always be filed with the VARO and BVA and should only also be filed with OGC if you are not seeking direct payment
- File within 30 days of execution
- VA can review for reasonableness
  - On its own motion
  - On motion of claimant
- 20% cap if payable from back benefits

# Filing, of all things, the Claim

- One of 58± VAROs (also, a few VA field offices)
- Power of Attorney executed by claimant (VA Form 21-22a)
  - New 21-22a revokes any existing one
  - Should include authority for work by affiliated attorney or staff
- Third Party Authorization Form 21-0845
  - Can list staff members and family members of the applicant
- File informal claim (Form 21-0966) ASAP to secure early effective date
  - Perfect it by completing VA Form 21-526 or 21-

---

# Thank You



Stevens & Associates<sup>PC</sup>

Estate · Elder · Special Needs · Veterans · Equine

Tamatha A. Stevens, CELA  
3755 E 82<sup>nd</sup> St, Ste 200, Indianapolis, IN 46240  
317.915.9900 . [tstevens@stevenslawyers.com](mailto:tstevens@stevenslawyers.com)

*Information and materials are presented as a public service by the Stevens & Associates PC. This presentation and its materials are general in nature and is not to be taken as legal advice to any particular person. Consult an attorney for specific legal advice for your circumstance.*

---

# **Section Two**

# Basic Eligibility for Benefits, Compensation for Service Connected Disability, Long Term Care Benefits, and Family Member Benefits

Jeffery D. Stinson  
STINSON LAW FIRM, LLC  
1980 East 116<sup>th</sup> Street, Suite 125  
Carmel, Indiana 46032  
(317) 622-8181  
[jstinson@stinsonelderlaw.com](mailto:jstinson@stinsonelderlaw.com)

## Section Two

### **Basic Eligibility for Benefits, Compensation for Service Connected Disability, Long Term Care Benefits, and Family**

**Member Benefits.....Jeffery D. Stinson**

#### **Basic Eligibility for Benefits.....1**

Type of Discharge.....1

Active Service Requirement .....4

Length of Service Requirement .....5

#### **Compensation for Service-connected Disability .....5**

Current Disability.....6

In Service Occurrence.....7

Service Connection .....9

Willful Misconduct .....10

Ratings .....10

Notice Requirements.....11

Employability Claim.....11

Special Situations.....12

Special Monthly Compensation.....13

Claims to Increase a Veteran's Ratings .....14

Reducing a Veteran's Ratings.....14

Severing the Service Connection .....15

#### **Health Care Offered through the VA .....16**

Priority Groups.....16

Services Available .....18

#### **Burial Benefits.....22**

#### **Family Member Benefits .....23**

## *DISCLAIMER*

*Although every effort has been made to obtain the best information available for presentation herein, the reader must recognize that many of the issues in this area as they relate to public benefits, are part of a rapidly changing body of law and administrative interpretation. The author makes no warranties about the legal conclusions stated herein and this is not intended as legal advice to any individual. Application of the principals discussed in this paper to specific cases should only be taken upon the advice of knowledgeable counsel.*

## **I. Basic Eligibility for Benefits**

A variety of benefits are available for veterans and their families from the Department of Veteran's Affairs (VA), from health care benefits to education benefits to burial benefits to cash benefits. Nearly every benefit requires that the veteran meet three basic elements of eligibility – being discharged under conditions other than dishonorable, serving during active duty, and serving a minimum length of time.

### **A. Type of Discharge**

The VA regulations require that the veteran be discharged “under conditions other than dishonorable.” All military branches essentially have five types of discharge – general, honorable, other than dishonorable, bad conduct, and dishonorable. A less common type of discharge is an administrative discharge which occurs if there is an entry level separation (the VA treats this as meeting the “other than dishonorable test”), a void enlistment or induction, or if the veteran is dropped from rolls.

An honorable discharge results in further claim review. A dishonorable discharge results in the claim being denied. For any other type of discharge, the VA will conduct a character of service determination.

The VA will conduct a character of service determination by reviewing the veteran's full service record to determine whether the quality of service was sufficient for benefits to be granted. The VA will find the veteran's discharge to be under dishonorable conditions if any of the following are found: discharge to avoid court martial, mutiny, spying, or offenses involving moral turpitude (including conviction of a felony).<sup>1</sup> In addition, a few situations are a statutory bar to benefits. They are, 180 days continuous

---

<sup>1</sup> 38 CFR §3.12(d)



AWOL unless leave was due to “compelling circumstances”, the veteran was a conscientious objector, the veteran was an officer resigning for the good of the service, the veteran was sentenced in general court martial, the veteran was a deserter, or the veteran was an alien who requested discharge in a time of hostility.<sup>2</sup>

A bar to benefits because of the type of discharge can be overcome by seeking an upgrade in the discharge by the veteran’s respective military branch’s Board of Correction of Military Records (BMCR) or Discharge Review Board (DRB). The VA regional office can also make a favorable determination regarding the veteran’s discharge. An insanity exception is also available to overcome an unfavorable discharge. If the veteran was insane at the time of misconduct which gave rise to the discharge, benefits may still be awarded. An insane person is “one who, while not mentally defective or constitutionally psychopathic. . . exhibits . . . a more or less prolonged deviation from his normal method of behavior.”<sup>3</sup>

**i. Upgrading a Discharge**

A veteran desiring to upgrade his or her discharge has two options. First, the veteran can seek an upgrade through his or her military branch. Second, he or she can seek a favorable determination by the VA.

Each military branch has a Discharge Review Board (DRB) and Board of Correction of Military Records (BCMR). The DRB consists of five high ranking officers. The BCMR consists of three to five civilian employees of the veteran’s respective service branch. A review by a DRB must occur within fifteen years of

---

<sup>2</sup> 38 USC §5303(a); 38 CFR §3.12(c)(1)-(5)

<sup>3</sup> 38 CFR §3.354(a)

the veteran's date of discharge. A review by a BCMR must be conducted within three years of discharge, but this time constraint can be waived upon request. If a discharge is upgraded by a DRB or a BCMR, the effective date of the upgrade usually runs from the date that the discharge was updated. However, if an application for benefits was filed prior to the upgrade, benefits may be awarded by the VA retroactive to the date of application. Therefore, it may be prudent for the claimant to file a claim for benefits and a request for upgraded discharge at the same time. The claimant will apply for an upgraded discharge from a BCMR if the veteran's discharge occurred more than fifteen years ago and will use DD Form 149. If the veteran's discharge was due to one of the statutory bars to benefits or was a result of court martial, the veteran must appeal the discharge to a BCMR using DD Form 149. If a discharge occurred less than 15 years ago and is a general discharge, an other than dishonorable discharge, or a bad conduct discharge which did not result in court martial, the veteran may seek an upgrade through a DRB using DD Form 293.

All hearings to upgrade a discharge through a DRB or BCMR are relatively informal and are held in the Washington, D.C. area. The Air Force and Army have travelling boards, but seeking an upgrade through one of these travelling boards can result in double the processing time. A DRB or BCMR must permit video conferencing when personal appearance is not possible. The veteran may be represented by counsel, but he or she will be questioned directly by board members.

Besides seeking an upgraded discharge from the veteran's military branch, the veteran can also seek an adjudication of discharge from the VA Regional Office. There is no statute of limitations for seeking an adjudication of discharge from a VA Regional Office. However, one is less likely to receive an award than if the veteran seeks an upgraded discharge through his or her service branch. If the VA Regional Office does approve, it does not change the character of the veteran's discharge. Instead, benefits are awarded in spite of the veteran's discharge.

**a. Rules for Two or More Periods of Service**

If a veteran has two or more periods of service, a prior acceptable discharge will not be negated by a subsequent unacceptable discharge unless it is one of the statutory bars to benefits. Likewise, a subsequent acceptable discharge may override a previous unacceptable one.

**B. Active Service Requirement**

The second element of basic eligibility is the active service requirement. The veteran must have served in the active military, naval, or air service. The veteran will meet the active service requirement if he or she served during any period, either active or inactive duty for training, during which the veteran is disabled as a result of an injury which was incurred or was aggravated while on duty.<sup>4</sup> If the veteran served in the National Guard, he or she meets the active service requirement for periods ordered into service by the President.

---

<sup>4</sup> 38 USC §101(21); 38 CFR §3.6(b)

### **C. Length of Service Requirement**

The last element of basic eligibility is the length of service requirement. For any veteran serving after September 8, 1980, he or she must have served 24 continuous months of active duty or the full period which the veteran was called to active duty. This requirement only applies to officers if the officer entered active duty after October 16, 1981 and who had not previously completed any period of 24 months of continuous active duty.

## **II. Compensation for Service-connected Disability**

Veterans who are disabled because of injuries or diseases that happened on active duty, or were made worse by active military service are eligible to received paid compensation from the VA.<sup>5</sup> The term “line of duty” has been broadly interpreted to mean anything that occurred during the time period between the veteran’s induction and discharge.<sup>6</sup> For example, an injury in the line of duty can include incidents or injuries which may have occurred while the veteran was on leave or off base. In addition, the veteran’s medical condition does not need to be directly connected to his or her performance of military duties. Also, a veteran can be compensated for conditions that may not manifest themselves for years after the veteran’s discharge.

Primary requirements for a compensation claim were laid on it *Caluza vs. Brown*,<sup>7</sup> Vet at 498. In *Caluza*, the Court ruled that the veteran must have a current medical diagnosis of an existing disability, present evidence of an in-service occurrence or aggravation, and present medical evidence of a link between the current disability and the in-service connection. These requirements were further interpreted to include the veteran’s status, the existence of a disability,

---

<sup>5</sup> 38 USC §§1110, 1131

<sup>6</sup> 38 CFR §§3.303, 3.304

a connection between the veteran's service and disability, degree of disability, and effective date of disability<sup>7</sup>. The VA primarily uses its traditional four-step process to compensation which is as follows:

- Determine basic eligibility (see preceding section)
- Decide the basic qualifications for disability compensation
- Determine the rating of the disability
- Determine the effective date of compensation

Compensation is a tax-free cash benefit. The veteran must be rated 10% disabled or higher to receive a payment. In general, compensation pays more than pension. Consider the following examples of compensation for disability rated 100% (as of 2021):

Veteran, no dependents	\$3,146.42
Veteran with a spouse	\$3,321.85
Veteran with a spouse and child	\$3,450.32

A veteran who loses specific organs or extremities will qualify for additional compensation.

#### **A. Current Disability**

To receive compensation, the veteran must suffer from a disease or injury contracted while on duty that results in a recurrent impairment or disability to the veteran. This most often requires recent medical evidence to show the existence of a disability as very few disabilities can be proven by lay evidence. If the veteran is filing years after his or her injury, the veteran must submit current medical records plus medical records from his or her time of service. The VA is required to provide the veteran with assistance in

---

<sup>7</sup> *Dingess vs. Nicholsan*, 90 Vet. at 473, 484 (2006).

establishing a medical diagnosis of disability, including providing a free medical exam<sup>8</sup>.

The VA can only refuse a medical exam if there is “no reasonable possibility” that medical evidence would substantiate a claim<sup>9</sup>. Despite the availability of the VA medical exam, though, the applicant should not rely on such an exam only. Private medical records can bolster a claim for benefits or contradict negative findings by the VA examiner.

## **B. In Service Occurrence**

After proving a current disability, the veteran must prove a connection of the presently existing disability to an event which occurred during the veteran’s military service. At a minimum, the veteran must prove that more likely than not that the injury occurred or was aggravated during the veteran’s service. The in service occurrence may be established by lay or medical evidence. Examples include a written statement, letter, or testimony by the veteran on how he or she believes the injury occurred or how it is connected to his or her service; service medical records that document the injury; or statements from fellow service members or family members who may have observed or have other first-hand knowledge of the disease or injury.

The VA must assist the veteran in obtaining evidence to prove an in service occurrence, including medical records from the veteran’s service time or researching the history of the veteran’s service units to determine whether an injury may have occurred.

This is particularly important for veteran’s whose records were destroyed during the 1972

---

<sup>8</sup> 38 USC §5013A

<sup>9</sup> 38 USC §5013A(a)(2)

fire at the National Personnel Records Center in St. Louis Missouri. World War II veterans and veterans of the Korean Conflict were mostly affected by such fire.

The VA may not deny an in service occurrence for a pre-existing condition aggravated by service. The presumption of soundness applies to every veteran where it is assumed that the veteran was examined at enlistment and was free of any conditions other than what was noted at time of enrollment<sup>10</sup>. The presumption will not apply if an aggravated condition was clearly noted at the time of enlistment. The presumption can only be rebutted by the VA by clear and unmistakable evidence that the injury existed before service and was not aggravated by service.

**i. Special Rules for Combat Veterans**

Any veteran who claims to have been injured in combat receives special treatment<sup>11</sup>. The veteran's written statement is sufficient proof of an in service occurrence and can only be rebutted by the VA with clear and convincing evidence. The veteran's service records must corroborate that the veteran saw combat or was assigned to a combat zone or unit engaged in combat. Evidence of in service occurrence can be bolstered by statements from fellow servicemen corroborating the veteran's combat allegation.

Combat veterans suffering from Post Traumatic Stress Disorder have a much lower evidentiary burden. The veteran's written testimony that he or she was in combat, supported by medical records or other evidence, and a current

---

<sup>10</sup> 38 USC §1111.

<sup>11</sup> 38 USC §1154B; 38 CFR §§3.304D, 3.304F

diagnosis of PTSD is all that is required to link the veteran's PTSD to combat duty.

### **C. Service Connection**

There are five ways to show that a current disability is service connected:

- Direct causative link
- Direct aggravation of a pre-existing condition
- Delayed onset condition which is presumed to be connected to an incident that occurred during service
- Current disability which is related to a primary medical condition which is connected to service
- Current disability is a consequence of VA health or other services<sup>12</sup>

The claimant must use competent medical evidence to show connection between the service and disability. Competent medical evidence is evidence “provided by a person who is qualified through education, training, or experience to offer medical diagnosis<sup>13</sup>”. The veteran's service and treatment records during time of service can establish the link between service and disability. However, statements from private or VA physicians to substantiate a claim can be particularly helpful, especially if the condition does not manifest itself until years later.

The VA has a duty to provide a medical exam for a compensation claim unless the claim is a re-opened claim for benefits. Conflicting medical opinions are weighed by the VA Regional Office. The VA will use a reasonable doubt or more likely than not standard to determine whether a disability is connected to service.

---

<sup>12</sup> 38 USC §§1110 through 1131.

<sup>13</sup> 38 CFR §3.159A



#### **D. Willful Misconduct**

If a veteran's injury is the result of willful misconduct, he or she will be prevented from receiving benefits. Willful misconduct is defined as involving "deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences."<sup>14</sup> Alcohol abuse, drug abuse, or contracting a sexually transmitted disease are examples of willful misconduct<sup>15</sup>. However, suicide is not willful misconduct if it can be proven that the veteran was of unsound mind at the time of suicide<sup>16</sup>.

#### **E. Ratings**

The VA uses a rating schedule to determine how disabled a veteran is. The ratings schedule focuses on the effect a disability has on earning capacity. The Lowest rating is 10% and increases by increments of 10 to 100%, which is considered fully disabled. The amount of compensation received by the veteran is determined by his or her rating (*see* <https://www.benefits.va.gov/compensation/rates-index.asp> for 2021 VA compensation rates). The rating schedule for various ailments can be found in Part 4 of Title 38 of the Code of Federal Regulations.

If the veteran has two or more compensable disabilities, the ratings percentages for each disability are not added together; rather, they are combined by using a special ratings table found at 38 CFR §4.25. One uses the table by arranging the percentage of each compensable disability in descending order. For example, if a veteran has two disabilities, which are rated at 30% and 20%, the combined rating (according to the table)

---

<sup>14</sup> 38 CFR §3.1(n)(1)

<sup>15</sup> 38 CFR §3.101

<sup>16</sup> 38 CFR §3.302a

is 44. This will be rounded down to 40%. If the veteran has more than two disabilities, you will need to arrange the disabilities in ascending order and work through each step on the table. For example, if the same veteran has an additional disability rated at 50%, you would take the 44% rating arrived at above and apply that number to the 50% rating to arrive at a rating of 72%, which will be rounded down to 70%. Online calculators are also available to assist in determine the combined rating.

#### **F. Notice Requirements**

The VA is required to notify the veteran, in writing, of any evidence that is necessary to process the claim and to notify the veteran of any evidence the VA will seek to obtain. The veteran has one year from the date of the notice to provide such information. However, the VA may make a determination within that year without waiting for the requested information.

#### **G. Employability Claim**

Besides using the rating system, a veteran can also get 100% compensation by presenting a claim for Total Disability based on Individual Unemployability (TDIU). This is accomplished by the veteran submitting Form 21-8940 or a letter asking to be considered for TDIU and requesting all necessary forms. An award of TDIU may be temporary.

The TDIU eligibility review is a two-step analysis. First, the veteran must have one compensable disability at 60% or higher or two ratable disabilities with at least one 40% or higher and a total combined rating of 70% or higher. In very rare exceptions, the first step can be reviewed by the director of Compensation and Pension Service rather than via the rating system. After the veteran meets the first step, then the VA must

determine that the veteran cannot pursue a “substantial gainful occupation” as a result of the disability. In this step, the VA will only consider service-connected disabilities, not other ailments. The VA will also consider the veteran’s educational and occupation history, but not his or her age.

## **H. Special Situations**

Veterans who suffer from a few particular disorders will have his or her claim processed outside normal procedures and rules for disability compensation. Those disorders are mental illness, post-traumatic stress disorder, Agent Orange exposure, and Gulf War veterans.

A separate rating schedule is for veteran’s suffering from mental illness<sup>17</sup>. The term mental illness is broken down into six categories: schizophrenia and psychotic disorders; delirium, dementia, amnesia and cognitive disorders; anxiety disorders; mood disorders; chronic adjustment disorder; and eating disorders (eating disorders have their own unique rating schedule as well). Mental illness must result in a social or occupational impairment or require continuous medication to qualify for compensation. The veteran’s compensation ratings are based on the level of social or occupational impairment suffered by the veteran.

To receive compensation for post-traumatic stress disorder, the veteran must prove that “more likely than not” there are current medical symptoms, the medical evidence links the symptom to an “in service stressor,” and there is credible evidence of the in service stressor<sup>18</sup>. If the veteran was in combat or a prisoner of war, lay testimony

---

<sup>17</sup> 38 CFR §4.130

<sup>18</sup> 38 CFR §3.304

may establish a causal link if supported by service records as combat is presumed to be an in service stressor. The VA can only find against the veteran if there is “clear and convincing evidence” contradicting the veteran’s testimony.

The VA assumes a veteran was exposed to Agent Orange if the veteran was in active service “in the Republic of Vietnam at some point during the period beginning on January 9, 1962 and ending on May 7, 1975”<sup>19</sup>. Veterans who served in coastal waters fall in this definition if some point of their service involved “duty or visitation in the Republic of Vietnam.” In addition, military units who served in the Korean demilitarized zone during 1968 and 1969 are presumed to have been exposed to Agent Orange.

Gulf War veterans who experience chronic disabilities which cannot be directly connected to active service also qualify for compensation<sup>20</sup>. The veteran must have served in the Persian Gulf after August, 1990. He or she must also be suffering from either an undiagnosed illness or “a medically unexplained chronic multisymptom illness” such as fibromyalgia, chronic fatigue, or irritable bowel syndrome. A list of symptoms which may be used to indicate disability is found at 38 CFR §3.317. To qualify, the veteran must receive at least a 10% disability rating.

#### **I. Special Monthly Compensation**

A special monthly compensation is payable in addition to disability compensation to veterans who lose or lose the use of an anatomical part or have impaired senses. The special monthly compensation is also available for veterans who receive disability compensation and are housebound, in need of aid and attendance, or bedridden.

---

<sup>19</sup> 38 CFR §3.307

<sup>20</sup> 38 USC §1117; 38 CFR §3.317

Special monthly compensation rates are categorized by the letter corresponding to the subparagraph of the United States Code that established the level of compensation, letters k through o, corresponding to 38 USC §1114(k) through (o). The letter the veteran receives is governed by a combination of the veteran's disability rating percentage, which anatomical part is affected, and whether there is any combination of loss of anatomical parts and/or being housebound, in need of aid and attendance, or bedridden.

**J. Claims to Increase a Veteran's Ratings**

There is no formal process to increase a veteran's rating. The veteran simply writes a letter to the VA requesting that his or her disability rating be re-evaluated. The VA will also treat any medical records received, including VA examination reports, as requests to increase a rating.

Despite the informality of the process to increase a rating, the veteran should be prepared to submit medical and lay evidence from personal physicians, social workers, psychiatrists, or other individuals to bolster his or her request.

The effective date of the ratings increase is the later of the date that the claim was received or the date that the entitlement arose.

**K. Reducing a Veteran's Ratings**

If the VA can determine through examination of the veteran's entire record that the veteran has improved, the VA may go through a process to reduce the veteran's rating. However, some veterans will be protected via a higher burden of proof on the VA to make such a reduction. If the veteran's evaluation remained at the same level for at least five years, the VA cannot reduce the veteran's rating unless the veteran's medical records and all other evidence reflect sustained improvement in the veteran's condition.

In addition, if the veteran's rating has been in effect for more than twenty years, the VA may only reduce his or her rating if it can prove that the rating was obtained by fraud. Finally, if the veteran has been rated 100% disabled, the VA must find either a clear error in its previous determination or a material improvement in the veteran's condition which was obtained through the normal conditions of life and that the veteran is able to obtain gainful employment.

The veteran is also protected by the right of due process before a reduced rating can be implemented. The VA must give written notice specific enough to provide the veteran with the ability to understand and respond to the decision and list the evidence which the veteran may obtain to submit to the VA to respond. The veteran will have sixty days to provide evidence needed to rebut the VA's conclusion. If the veteran does not submit additional evidence, the VA will issue its final decision. However, the veteran will have an additional sixty days to submit evidence. The veteran also has the right to a hearing. The hearing must be requested within thirty days of the decision notice. The veteran's matter will be heard by a VA employee who did not participate in the decision. If the veteran requests a hearing, the VA may not implement the reduction until at least sixty days after the final notice which is issued after the hearing is held.

#### **L. Severing the Service Connection**

The VA may only sever the service connection to the veteran's disability if it can prove that the service connection determination was either obtained by fraud or was clearly erroneous based upon all accumulated evidence which was available at the time of the initial determination.

### **III. Health Care Offered Through the VA**

Veterans health care is the largest single provider of medical care in the United States.

#### **A. Priority Groups**

What a veteran pays, and the health care services he or she receives, depends on the priority group to which the veteran is assigned. The priority groups are as follows:

<b>Priority Group 1</b>	<ul style="list-style-type: none"><li>• Veterans with VA-related service-connected disabilities 50% or more disabling</li><li>• Veterans determined by VA to be unemployable due to service-connected conditions</li></ul>
<b>Priority Group 2</b>	<ul style="list-style-type: none"><li>• Veterans with VA-rated service-connected disabilities 30% or 40% disabling</li></ul>
<b>Priority Group 3</b>	<ul style="list-style-type: none"><li>• Veterans who are former Prisoners of War (POWs)</li><li>• Veterans awarded a Purple Heart medal</li><li>• Veterans whose discharge was for a disability that was incurred or aggravated in the line of duty</li><li>• Veterans with VA-rated service-connected disabilities 10% or 20% disabling</li><li>• Veterans awarded special eligibility classification under 38 USC 1151 ("benefits for individuals disabled by treatment or vocational rehabilitation)</li><li>• Veterans awarded the Medal of Honor (MOH)</li></ul>

<b>Priority Group 4</b>	<ul style="list-style-type: none"> <li>• Veterans who are receiving aid and attendance or housebound benefits from VA<sup>21</sup></li> <li>• Veterans who have been determined by VA to be catastrophically disabled</li> </ul>
<b>Priority Group 5</b>	<ul style="list-style-type: none"> <li>• Nonservice-connected Veterans and noncompensable service-connected Veterans rated 0% disabled by VA with annual income below the VA's and geographically (based on your resident zip code) adjusted income limits</li> <li>• Veterans receiving VA pension benefits</li> <li>• Veterans eligible for Medicaid programs</li> </ul>
<b>Priority Group 6</b>	<ul style="list-style-type: none"> <li>• Variety of very special circumstances including possible radiation and Agent Orange exposure</li> </ul>
<b>Priority Group 7</b>	<ul style="list-style-type: none"> <li>• Veterans with gross household income below the geographically-adjusted income limits (GMT) for their resident location and who agree to pay copays</li> </ul>
<b>Priority Group 8</b>	<ul style="list-style-type: none"> <li>• Veterans with gross household income above the VA and the geographically-adjusted income limits for their resident location and who agrees to pay copays</li> <li>• Veterans eligible for enrollment</li> <li>• Noncompensable 0% service-connected</li> </ul>

---

<sup>21</sup> This is a huge benefit for A&A pension recipients as pay no copayments.



An individual can move up the priority list by seeking an increase in his or her disability or apply and receive aid and attendance.

## **B. Services Available**

The VA Health benefit covers a variety of services including:

- Hospital, outpatient medical, dental, pharmacy and prosthetic services
- Domiciliary, nursing home, and community-based residential care
- Sexual trauma counseling
- Specialized health care for women veterans
- Health and rehabilitation programs for homeless veterans
- Readjustment counseling
- Alcohol and drug dependency treatment
- Mileage reimbursement
- Special transportation
- Lodging
- Medical equipment
- Medical evaluation for disorders associated with military service in the Gulf War, or treatment for exposure to Agent Orange, radiation, or other environmental hazard

For a full list of services see <http://www.va.gov/healthbenefits/cost/copays.asp> and <https://www.va.gov/geriatrics/>.

### **i. Pharmacy Services**

Any veteran can qualify for the VA pharmacy benefit. A veteran in Priority Group 1 will have no copayment. A veteran in Priority Groups 2-6 will have a small co-payment.

**ii. Outpatient Medical Services**

In regards to outpatient care, Basic Care Services provided by a primary care clinician cost \$15 per visit. Special Care Services provided by a clinical specialist are \$50 per visit.

**iii. Domiciliary, Nursing Home, and Community-based  
Residential Care**

The VA must provide nursing home care to any of the following veterans:

- Any veteran in need of nursing home care for a service-connected disability
- Any veteran with a combined service-connected disability rating of 70% or more who is in need of nursing home care
- Any veteran with disability rating of 60% or more deemed unemployable or rated permanently & totally disabled
- VA will provide nursing home care to others if space and resources are available

Low income veterans (below the MAPR) are eligible for VA nursing home or care in a community nursing home paid by the VA. Veterans with income over the MAPR are eligible with a copay. Unfortunately, the demand for long term care services under the VA far exceeds the supply. While many veterans are eligible for this benefit, few receive it. Services are awarded to those in higher Priority Groups first. Consequently, those who are in Priority Group 4 or higher are unlikely to receive long term care benefits.

**a. Nursing Home Care under VA**

Nursing home care covered by the VA is provided one of three ways-via a State Veteran's Home, a VA Nursing Home, or a private nursing home that contracts with the VA.

Very few State Veteran's Homes exist. Across the United States there are about 114 of them with only one, the Indiana Veterans Home in Lafayette, Indiana, in Indiana. Most State Veterans Homes provide nursing home care, domiciliary care, hospital care and/or adult day care. Each state can have different eligibility rules for their respective home. Most require a period of residency in the State. The VA will review the veteran's finances before entering the home. While some service-connected veterans will not have a co-payment, most veterans will. For those veterans how have a co-payment, the VA subsidizes a portion of the veteran's cost of care, not to exceed 50% of the total care cost. The veteran is then responsible for the remaining cost of care. Consequently, many veterans will still apply for Medicaid to cover the remaining shortfall. Once the payment to the State Veteran's Home starts it will remain indefinitely as long as the veteran requires the services.

VA Nursing Homes deliver a wide variety of long term care which includes, long term care, hospice care, respite care, and adult day care. A newer initiative by VA nursing homes is the delivery of care via a community living center. The goal of a community living center is to create a home-like environment, using music, natural lighting, intimate

dining areas, and active participation of family members. To qualify for admission to a community living center, the veteran must be medically and psychiatrically stable, service categorized as a short-stay or long-stay and documented accordingly, have his or her anticipated length of stay documented, have his or her anticipated discharged date documented, and have his or her priority established and documented. Admission to a community living center is typically initiated by the veteran's physician who forwards a request to the Chief Medical Administrator of the community living center. The request is then referred to a screening committee. If the veteran is not exempt from a copay for nursing home care, a Form 10-10EC must be completed. A veteran who receives any type of coverage through a VA Nursing Home will be screened under an asset and income test to determine the veteran's co-payment. While some Priority Groups are exempt from co-payment, most veterans will pay a co-payment. The maximum daily co-payment is \$97 (2018). There is no maximum length of stay in a VA Nursing Home. The biggest issue with seeking services in a VA Nursing Home is availability. Very few facilities have space available and priority is given to those in higher Priority Groups.

Besides State Veteran's Homes and VA Nursing Homes, the VA also contracts with private nursing facilities to care for a veteran. Approximately 2500 veterans receive VA covered services through a private facility. The VA will pay the facility on a per diem basis loosely

based on the Medicaid rate plus a variable supplemental amount. Those veterans requiring nursing home care for a service-connected disability or those veterans previously discharged from a VA hospital and are currently receiving home health service from the VA are eligible for direct admission to the private nursing facility at VA expenses. Veterans receiving VA hospital, outpatient, nursing home or domiciliary care or are a current member of the Armed Forces who received DOD hospital care and now need nursing home care (status will change to veteran upon discharge) are eligible to be transferred to a private nursing home paid by the VA. For a veteran with a 70% service-connected disability or a veteran transferred from a VA hospital for a service-connected condition, there is no time limit on the benefit. All other veterans have will receive six months of paid care.

**b. Extended Care**

All veterans enrolled in VA health care can receive extended care benefits. These benefits include<sup>22</sup>:

- Home Based Primary Care
- Skilled Home Health Care
- Homemaker and Home Health Aide Services
- Adult Day Health Care
- Respite Care
- Hospice and Palliative Care

---

<sup>22</sup> See <http://www.va.gov/healthbenefits/cost/copays.asp>

- Remote Monitoring
- Veteran-directed Care

To receive Extended Care benefits the veteran must be eligible for community care and meet the clinical criteria for the service the veteran desires to receive. The service must also be available in the veteran's location. To apply, the veteran needs a medical professional to write a script for the service via VA Form 10-0145-Geriatrics and Extended Care Referral.

Veterans receiving compensation, in need of extended care for a service-connected disability, and veterans below the MAPR can receive services for free. All other veterans will have a copayment for such services<sup>23</sup>.

#### **IV. Burial Benefits**

All veterans, members of the armed forces, and spouses and dependents of an eligible veteran are eligible for burial in a VA national cemetery.

A veteran may receive payment for his or her private funeral in any of the following circumstances:

- Veteran died of a service connected disability
- Veteran was receiving pension or compensation
- Veteran was entitled to receive pension or compensation but decided to reduce military retirement or disability pay

---

<sup>23</sup> <http://www.va.gov/healthbenefits/cost/copays.asp>

- Veteran died in a VA hospital, nursing home under VA contract, or in an approved state nursing home.

The veteran may receive up to \$2,000 for a service related death or up to \$300 for burial and funeral and \$796 for plot internment of non-service related death.

## **V. Family Member Benefits**

### **A. Qualifying Family Member**

To qualify for VA benefits as a family member, the applicant must establish that he or she is married to the veteran, is the surviving spouse of a veteran, child of the veteran, a surviving child of the veteran, a dependent parent, or a surviving parent. *Valiao vs. Principi*, 17 Vet. at 229 (2003).

A spouse is still defined by statute as “a person of the opposite sex who is a wife or husband<sup>24</sup>”. However, following the United States Supreme Court’s ruling in *Obergefell v. Hodges*, 576 US (2015), the VA ceased enforcement of the statutory provision by executive order. VA policy now dictates that same sex marriage is recognized by the VA if it is recognized by the state where the veteran or veteran’s spouse resided at the time of marriage or according to the laws of the place where the couple resided when the right to VA benefits arose. Generally, a written statement is all that is required to prove a valid marriage. However, any of the following, in order of preference, will also prove marriage: a copy of a summary of the public record of marriage; an official report from the service department as to the marriage; an affidavit of a clergy member who officiated the marriage; an original certificate of marriage; an affidavit of eyewitnesses to the marriage; or any other evidence which would support the

---

<sup>24</sup> 38 USC §101(31)

belief that a valid marriage occurred. If the spouse or veteran had been previously divorced, had a prior marriage dissolved, or had a prior marriage annulled, the court decree should be submitted to the VA.

Like the spouse of a veteran, a surviving spouse is still defined as “a person of the opposite sex who was the spouse of the veteran<sup>25</sup>”. Again, though, the ruling in *Oberfelfell v. Hodges*, prohibits the enforcement of this provision and a same sex marriage is similarly recognized as that of the spouse of the living veteran. A surviving spouse, as opposed to the spouse of a living veteran, must also meet other prerequisites before qualifying for benefits. To qualify for Dependency Indemnity Compensation, death compensation, or death pension, the surviving spouse must have been married to the veteran for at least one year unless the marriage occurred before or during the veteran’s service or if a child is born during the term of the marriage. In addition, the surviving spouse either must have continuously cohabitated with the veteran during the marriage or the veteran and spouse must have been living together at the time of the veteran’s death; the surviving spouse and veteran must have been living apart for medial, business or other reasons; or the surviving spouse and veteran must have been living apart at the time of the veteran’s death but the surviving spouse was not materially at fault in the separation. In general, the surviving spouse will lose eligibility if he or she remarries after the veteran’s death. However, the laws regarding remarriage do vary dramatically depending on the type of benefits, the date of the remarriage, the age of the surviving

---

<sup>25</sup> 38 USC §101(3)



spouse, and the date that the relationship was terminated<sup>26</sup>. Also separate rules apply to any remarriages or relationships terminated prior to November of 1990<sup>27</sup>.

To prove that an applicant is the child of the veteran, generally a written statement regarding the child's age, circumstances of birth, and social security number is all that is required. However, the VA can require additional documentation, including: a copy of the public record of birth; a copy of a baptism record; an official report from the service department regarding the birth; an affidavit from the physician in attendance; a copy of notarized Bible or other family record; or affidavits of two or more disinterested persons who can attest to the child's biological relationship to the veteran. If the veteran is the child's mother, no further documentation is needed. However, if the veteran is the child's father, the following will be required: marriage certificate along with birth certificate listing the veteran as the child's father; written acknowledgment signed by the veteran; or judicial decree identifying the veteran as the child's father. For an adopted child to qualify for benefits, he or she must have been adopted by the veteran prior to his or her age 18. In such case, a copy of the adoption decree or placement agreement will be required. Stepchildren of the veteran can also qualify for benefits. Those stepchildren must currently be a resident in the veteran's household in order to obtain benefits and the surviving spouse must show that the child resided in the veteran's household at the time of the veteran's death.

#### **B. Benefits Payable to a Child of a Veteran**

---

<sup>26</sup> See 38 USC §103 and 38 CFR §3.55.

<sup>27</sup> 38 CFR §3.55

Certain benefits are available to children who became permanently and incapable of self-support before age 18. Such children will maintain disabled or helpless child status as long as the child is unmarried, unemployed, incapable of self-support and the determination that the child is incapable of self-support is made by the VA rating agency based on medical evidence.

Children between the ages of 18 and 23 can receive benefits if he or she is pursuing a course of education at an approved education institution as defined by 38 USC §104a.

Benefits will not be paid when the veteran or the veteran's child is a fugitive felon. However, the felon status of one child will not negate the eligibility of the veteran's other children.

### **C. Survivor Benefits**

Surviving spouses or dependent children can be entitled to survivor benefits. In very limited circumstances, a dependent parent or surviving parent may also qualify for such benefits<sup>28</sup>. The survivor benefit that the dependent or surviving member receives depends on the type of benefit the veteran was receiving or was entitled to receive at the time of his or her death.

#### **i. Veteran Claimed Benefits, but Had Not Received Them**

If the veteran had been awarded benefits at his or her death, but the VA had not paid such benefits, qualifying family members will be entitled to those accrued benefits. A qualifying family member is the surviving spouse of the veteran, his or her child, or his or her dependent parent. To receive accrued benefits, there must have been an existing decision or pending claim for benefits

---

<sup>28</sup>See 38 USC §101(5) and 38 USC §1115(1)(D).

at the time of the veteran's death. The qualifying family member must file the claim for accrued benefits within one year of the veteran's death. The VA decision on the accrued benefits award will only be made based on evidence in its file as of the veteran's death. No additional documentation can be added to the veteran's pre-death claim. The amount of the accrued benefit will be those funds which would have been paid to the veteran as of his or her death.

**ii. Dependency and Indemnity Compensation (DIC)**

Dependency and Indemnity Compensation is a monthly benefit paid to the eligible survivors of certain service members or veterans. First, DIC is payable to survivors of a military service member who died while on active duty, active duty for training, or inactive duty training. In such a situation, the service member's death will be presumed to be service connected unless the death was within the first six months of the veteran's service or was the result of suicide. In addition, DIC is payable to the survivors of veterans whose death resulted from a service-related injury or disease. Also, survivors of a veteran whose death resulted from a non-service-related injury or disease, and who was receiving, or was entitled to receive, VA Compensation for service-connected disability that was rated as totally disabling, are entitled to DIC. In such an instance, the veteran must have been receiving VA compensation for the 10 years immediately before his or her death; been receiving VA compensation since release from active duty and for at least five years immediately preceding death; or the veteran must have been receiving VA compensation for at least one year before death if the veteran was a former prisoner of war who died after September 30, 1999.

Dependency and Indemnity Compensation is payable to either the veteran's surviving spouse or dependent child. To qualify, the surviving spouse must meet one of the following requirements:

- Validly married before 1/1/1957, OR
- Was married to a service member who died on active duty, OR
- Married the veteran within 15 years of discharge in which the disease or injury that caused the veteran's death began or was aggravated, OR
- Was married to the veteran for at least one year, OR
- Had a child with the veteran, AND
- Cohabitated continuously until the veteran's death, AND
- Is not currently remarried

For a dependent child to receive benefits, he or she must meet the following criteria:

- Unmarried, and
- Under the age of 18
- Who before 18 became permanently incapable of self-support
- OR who, after the age of 18 and until 23 is pursuing a course of instruction at an approved education institution, AND
- is a legitimate child, legally adopted child, a stepchild who is a member of a veteran's household, or a child acknowledged by the father

An individual may establish eligibility for DIC even if the veteran was not receiving disability compensation and had not established a service connection prior to his or her death. In such a case, the family member must prove the same elements as a veteran filing for compensation in addition to showing service

connected disability was a contributing factor to the death of the veteran. For more information on the amount of DIC payable to survivors see

[https://benefits.va.gov/Compensation/current\\_rates\\_dic.asp](https://benefits.va.gov/Compensation/current_rates_dic.asp).

## **VI. Education Benefits**

Under the Survivor's and Dependent's Educational Assistance Program<sup>29</sup>, certain family members of the veteran can qualify for education assistance. The spouse of a veteran who is permanently or totally disabled, missing in action, a prisoner of war, or is deceased and whose death was service connected or the result of a service-connected disability will qualify. Also, children of a veteran who meet the same criteria as a spouse of a veteran or whose parent is currently on active duty at the time that benefits are sought qualify. Survivors of veterans must make a claim for benefits within ten years of the veteran's death or if the veteran dies while on active duty, within twenty years of the veterans' death. For more information on the education benefits available see <https://www.va.gov/education/survivor-dependent-benefits/>.

## **VII. CHAMPVA**

Health insurance through the VA is available to a spouse or child of a veteran rated totally and permanently disabled with a service-connected disability, a spouse or child of veteran who died from service-connected disability, a spouse or child of veteran who was rated permanently and totally disabled at the time of veteran's death, or a surviving spouse or child of a military member who died in the line of duty. This health insurance program is called CHAMPVA.

---

<sup>29</sup> 38 USC §35

# Basic Eligibility for Benefits, Compensation for Service Connected Disability, Long Term Care Benefits, and Family Member Benefits

Jeffery D. Stinson, CELA\*  
Stinson Law Firm, LLC  
1980 East 116<sup>th</sup> Street, Ste 125  
Carmel, IN 46032  
Phone: 1-317-622-8181  
Email: [jstinson@stinsonelderlaw.com](mailto:jstinson@stinsonelderlaw.com)



*\*Certified as an Elder Law Attorney (CELA) by the National Elder Law Foundation.*

# Basic Eligibility-Opening the Door for Benefits



## Elements of Basic Eligibility

- Type of Discharge
- Active Service Requirement
- Length of Service Requirement

# Basic Eligibility for Benefits- Type of Discharge

- Discharge types:
  - Honorable
  - General
  - Other than dishonorable
  - Bad conduct
  - Dishonorable
  - *Administrative*





# Basic Eligibility for Benefits-

## Type of Discharge

- Character of service determination
  - Is quality of service was sufficient for benefits to be granted?
  - Statutory bars:
    - 180 days AWOL, absent compelling circumstances
    - Conscientious objector
    - Officer resigning for the good of the service
    - General court martial
    - Deserter
    - Alien requesting discharge in time of hostility



# Basic Eligibility for Benefits-

## Type of Discharge

- Upgrading a Discharge
  - Via service branch or VA regional office
- Service branch-two ways
  - Discharge Review Board
  - Board of Correction of Military Records



# Basic Eligibility for Benefits- Active Service Requirement

- Active military, naval, or air service
  - Includes inactive duty for training
  - National Guard troops eligible if ordered into service by the President



# Basic Eligibility for Benefits- Active Service Requirement

- 24 months for continuous active duty or the full period for which the veteran was called to active duty
  - Veterans after 9/8/1980
  - Officers who enter active duty after 10/16/1981 who had not previously completed 24 months of continuous active duty



# Compensation for Service- Connected Disability



# Compensation for Service-Connected Disability

Examples of veteran rated 100% disabled (2021)

Veteran, no dependents	\$3,146.42
Veteran with spouse	\$3,321.85
Veteran with a spouse and child	\$3,450.32





# Compensation for Service-Connected Disability

## ■ Five Elements

- ❑ Veteran's status
- ❑ Existence of a disability
- ❑ Connection between service and disability
- ❑ Degree of disability
- ❑ Effective date of disability



# Service-Connected Disability- Current Disability

- Must suffer from a disease or injury contracted while on duty that results in recurrent impairment or disability
- VA must provide assistance to establish diagnosis, including free examination





# Service-Connected Disability-In Service Occurrence

- Must prove “more likely than not” that the injury occurred or was aggravated during service
- Can establish by lay or medical evidence
- VA must assist in obtaining evidence, including service records
- Presumption of soundness
  - Does not apply if condition noted at enlistment



# Service-Connected Disability- Service Connection

## ■ Five Ways to Prove

- ❑ Direct causative link
- ❑ Direct aggravation of a pre-existing condition
- ❑ Delayed onset condition which is presumed to be connected to an incident that occurred during service
- ❑ Current disability is a consequence of VA health or other services



# Service-Connected Disability- Notice Requirements

- Required to notify veteran of any additional evidence needed to process claim and any evidence that the VA will obtain
- Applicant has one year from date of notice to provide information
- VA may make determination without waiting full year



# Service-Connected Disability- Ratings

- VA uses rating schedule to determine how disabled veteran is
- Ratings start at 10% and increase in increments of 10
- If veteran has two or more compensable disabilities, use table found in federal regulations (don't add)



# Service-Connected Disability- Service Connection

## The Shoulder Girdle and Arm

	Rating	
	Dominant	Nondominant
5301 Group I. <i>Function:</i> Upward rotation of scapula; elevation of arm above shoulder level. <i>Extrinsic muscles of shoulder girdle:</i> (1) Trapezius; (2) levator scapulae; (3) serratus magnus		
Severe	40	30
Moderately Severe	30	20
Moderate	10	10
Slight	0	0
5302 Group II. <i>Function:</i> Depression of arm from vertical overhead to hanging at side (1, 2); downward rotation of scapula (3, 4); 1 and 2 act with Group III in forward and backward swing of arm. <i>Extrinsic muscles of shoulder girdle:</i> (1) <i>Pectoralis major II (costosternal)</i> ; (2) <i>latissimus dorsi and teres major (teres major, although technically an intrinsic muscle, is included with latissimus dorsi)</i> ; (3) <i>pectoralis minor</i> ; (4) <i>rhomboid</i>		
Severe	40	30
Moderately Severe	30	20
Moderate	20	20
Slight	0	0



# Service-Connected Disability-Special Circumstances (Shortcuts)

- Total Disability based on Individual Unemployability (TDIU)
- Mental Illness
- Post Traumatic Stress Disorder
- Agent Orange
- Gulf War
- Radiation





# Service-Connected Disability- Special Monthly Compensation

- Veterans who lose or lose the use of an anatomical part or have impaired senses
- Amount is based on disability rating, which anatomical part is affected, and whether there is any combination of loss of anatomical part or housebound, in need of aid and attendance or bedridden.



# Service-Connected Disability- Special Monthly Compensation

- Receives disability compensation and are housebound, in need of aid and attendance or bedridden





# Service-Connected Disability- Claim to Increase Ratings

- No formal process
- Veteran must write letter to VA asking to have rating re-evaluated
- VA also treats any medical records received or VA examination reports as requests to increase rating.



# Service-Connected Disability- Reducing a Rating

- If VA can determine in examining entire record that the veteran has improved, may proceed to reduce rating.
- VA has higher burden of proof of many situations.
  - Five years-sustained improvement
  - 20 years-fraud
  - 100% disabled-clear error or improvement with occupation



# Service-Connected Disability- Severing Service Connection

- VA must prove that the service connection was either obtained by fraud or clearly erroneous based upon all evidence available at time of initial determination.



# Long Term Care Offered Through VA

- VA is largest single provider of medical care in US.
- Wide array of benefits
- Problem is not with eligibility, but with availability
- Priority Lists



# Long Term Care Offered Through VA

- Pharmacy benefit

- Any veteran can qualify

- No copayment if Priority Group 1

- Small copayment in Priority Groups 2-6



# Domiciliary, Nursing Home, Community Based Residential Care

- VA must provide nursing home care to any of the following veterans:
  - *Any veteran in need of nursing home care for a service-connected disability*
  - *Any veteran with a combined service-connected disability rating of 70% or more who is in need of nursing home care*
  - *Any veteran with disability rating of 60% or more deemed unemployable or rated permanently & totally disabled*





# Domiciliary, Nursing Home, Community Based Residential Care

- VA must provide nursing home care to any of the following veterans:

*VA will provide nursing home care to others if space and resources are available*



# Domiciliary, Nursing Home, Community Based Residential Care

- Long term care providers under VA
  - State Veteran's homes
    - *Very few of them (around 114)*
      - Indiana-Indiana Veterans Home, Lafayette, Indiana
  - VA Nursing Homes
    - Community Living Center
  - VA payments for private nursing homes
    - Approximately 2500 contracts (individuals)
      - Care is in a private facility, VA pays facility.





# Extended Care Benefits

- All veterans enrolled in VA health care can receive.
- Benefits:
  - Home based primary care
  - Skilled home health care
  - Homemaker and home health aide services
  - Adult day care
  - Respite Care
  - Hospice and Palliative Care
  - Remove monitoring
  - Veteran directed care



# Burial Benefits

- All veterans and spouses eligible to be buried in VA national cemetery.
- In some circumstances may receive payment for his or her private funeral.
- Historically this has been a reimbursement to incurred expenses by family.



# Family Member Benefits

- Eligible Family Member
  - Spouse, child, dependent parent
- Types
  - Accrued Benefits
  - Dependency and Indemnity Compensation
  - Education Benefits
  - Health Insurance



# Family Member Benefits- Surviving Spouse

- Surviving spouse must generally show:
  - One year of marriage unless marriage occurred before or during service OR child born during marriage
  - Continuous cohabitation during marriage
    - Living together at time of death
    - Living apart for medical or business reason
    - Spouse not materially at fault for separation
  - No remarriage after veteran's death



# Family Member Benefits-Child

- VA requires written statement of age, circumstances of birth and social security number
- May also request:
  - ❑ Copy of public record of birth
  - ❑ Copy of baptismal record
  - ❑ Copy of official report from service department
  - ❑ Affidavit of attending physician
  - ❑ Copy of notarized bible or other family record
  - ❑ Affidavit of two or more disinterested witnesses



# Family Member Benefits-Child

- Available to child who “became permanently disabled and incapable of self support” prior to age 18
  - Maintains disabled status as long as unmarried unemployed and incapable of self support as determined by VA rating agency
  - If adopted, child must be legally adopted prior to age 18
  - Benefits can be for stepchild, if the child resided in the veteran’s household at time of the veteran’s death.



# Family Member Benefits-Accrued Benefits

- Benefits awarded at death, but not paid.
  - Must be existing decision or pending claim.
- Must file within one year of veteran's death.
- Only made based on evidence in file, cannot submit additional evidence.



# Family Member Benefits- Dependency and Indemnity Compensation (DIC)

- Monthly benefit paid to survivor of:
  - *Veteran whose death resulted from a service-related injury or disease, and who was receiving, or was entitled to receive, VA Compensation for service-connected disability that was rated as totally disabling*
    - *For at least 10 years immediately before death, OR*
    - *Since the veteran's release from active duty and for at least five years immediately preceding death, OR*
    - *For at least one year before death if the veteran was a former prisoner of war who died after September 30, 1999*



# Family Member Benefits- Dependency and Indemnity Compensation (DIC)

- May establish eligibility for DIC even if veteran was not receiving disability compensation and had not established a service connection prior to his or her death.



# Family Member Benefits- Education Benefits

- Spouses entitled to education benefits if married to a veteran who is permanently or totally disabled, missing in action, or a POW.
- Surviving spouse are eligible if veteran's death was service connected or resulted from a service connected disability.
- Children entitled to same benefits as surviving spouse or while parent is on active duty.



# Family Member Benefits-Health Insurance

## ■ CHAMPVA

- *Spouse or child of veteran rated totally and permanently disabled-service-connected*
- *Spouse or child of veteran who died from service connected disability*
- *Spouse or child of veteran who was rated permanently and totally disabled at the time of veteran's death*
- *Surviving spouse or child of a military member who died in the line of duty*

# Thank You



*Information and materials are presented as a public service by the Stinson Law Firm, LLC. This presentation and its materials are general in nature and is not to be taken as legal advice to any particular person. Consult an attorney for specific legal advice for your circumstance.*

Jeffery D. Stinson  
Stinson Law Firm, LLC  
1980 East 116<sup>th</sup> Street, Suite 125  
Carmel, IN 46032  
317 622-8181  
E-mail: [jstinson@stinsonelderlaw.com](mailto:jstinson@stinsonelderlaw.com)

# **Section Three**

# **Pensions & Claim Procedures**

**Connie L. Bauswell**

Certified as an Elder Law Attorney by the National Elder Law Foundation

The Law Office of Connie L. Bauswell, LLC

Valparaiso, Indiana

## **Section Three**

**Pensions & Claim Procedures..... Connie L. Bauswell**

# **Section Four**



## **Unfavorable Decisions and The New Review Process**

Tamatha A. Stevens, CELA  
STEVENS & ASSOCIATES, PC  
3755 E. 82<sup>nd</sup> Street, Suite 200  
Indianapolis, Indiana 46240  
317.915.9900  
[tstevens@stevenslawyers.com](mailto:tstevens@stevenslawyers.com)

## Section Four

### Unfavorable Decisions and The New Review Process.....Tamatha A. Stevens, CELA

<b>I.</b>	<b>The New Modernized Review System for Unfavorable Decisions.....</b>	<b>2</b>
1.	What Is an Unfavorable Decision?.....	2
2.	Why a New Modernized Appeal Process Was Needed.....	3
3.	New System v. Old System .....	3
<b>II.</b>	<b>Using the New Modernized Review System for Unfavorable Decisions .....</b>	<b>5</b>
1.	Electing Review and Effective Dates .....	6
2.	Legacy Claims and Their Appeals.....	13
3.	Forms to Use.....	13
4.	Filing a Claim, Effective Date of Award and Duty to Assist.....	13
5.	Issues within a Claim.....	14
6.	Decision Notice .....	15
7.	Closing the Evidentiary Record.....	15

## *DISCLAIMER*

*Although every effort has been made to obtain the best information available for the presentation herein, the reader must recognize that many of the issues in this area as they relate to public benefits, are part of a rapidly changing body of law and administrative interpretation. The author makes no warranties about the legal conclusions stated herein and this is not intended as legal advice to any individual. Application of the principals discussed in this paper to specific cases should only be taken upon the advice of knowledgeable counsel.*

## **I. The New Modernized Review System for Unfavorable Decisions**

Congress authorized the Veteran Appeals Improvement and Modernization Act of 2017 (“AMA”) to give veterans more options for their appeals and to speed up the appeals process. The AMA was effective February 19, 2019. Appeals under the pre-AMA are referred to as Legacy Appeals. The premise for any appeal requires an unfavorable decision on a veteran’s claim by the VA.

### **1. What Is an Unfavorable Decision?**

The VA’s claims process is nowhere near perfect. In fact, the VA is issuing more and more less than favorable decisions or downright denials than it has in years past. An “unfavorable decision” is the outcome of any claim process where the decision notice is not acceptable to the claimant. It could be a denial or a disability rating that was less than anticipated or a pension benefit that is less than the maximum allowable. The VA deems a reduced award a partial denial.

In the Federal Register dated August 10, 2018, the Department of Veteran Affairs stated that “[m]odernizing the appeals process is a top priority of the VA. In fiscal year (FY) 2017, claimants generally waited less than 125 days for an initial decision on VA disability compensation claims; however, they waited an average of 3 years for a final decision if they chose to appeal an unfavorable decision. Moreover, in FY2017 those claimants who chose to continue their appeal to the Board waited an average of 7 years for a decision from the date that they initiated their appeal, and the Board decision may not have resolved the appeal.” So, what does the new modernized appeal system look like and how does it differ from the prior one?

## **2. Why a New Modernized Appeal Process Was Needed**

The new Modernized Review System was needed to reduce the lengthy processing and appeal timeframes and to get claimants their benefits sooner. The AMA hopes to accomplish this by having more approvals issued earlier at the Regional Office level, and also by greatly simplifying the appeal process.

## **3. New System v. Old System**

**First**, the AMA clearly designates the **development phase** and the VA's duty to assist. The agency of original jurisdiction has a duty to assist in developing evidence in the original or supplemental claim, but once an appeal is made of the original agency decision, the duty to assist generally no longer applies. If the agency of originating jurisdiction is found to have failed in assisting, then the recourse is to remand the matter to the agency of originating jurisdiction for development. No longer is the Board to assist in the development of the claim. This change is intended to reduce the uncertainty caused by the current process in which the appeal is initiated in the agency of original jurisdiction. The appeal is often a many years-long continuation of the claim development process. It clearly places the agency of original jurisdiction in the claims development role to fully develop claims in the set initial processing phase and places the Board as the tribunal being able to decide the merits rather than also developing the claim. The hope is now that full claim development will occur in the context of the initial or supplemental claim processing stage with the agency of original jurisdiction rather than continuing indefinitely through the claim and appeal processing stage.

**Second**, the AMA establishes three avenues for **review** of an unfavorable decision:

- **Higher-level review:** review of the same evidence by a higher-level claims adjudicator in the agency of original jurisdiction;

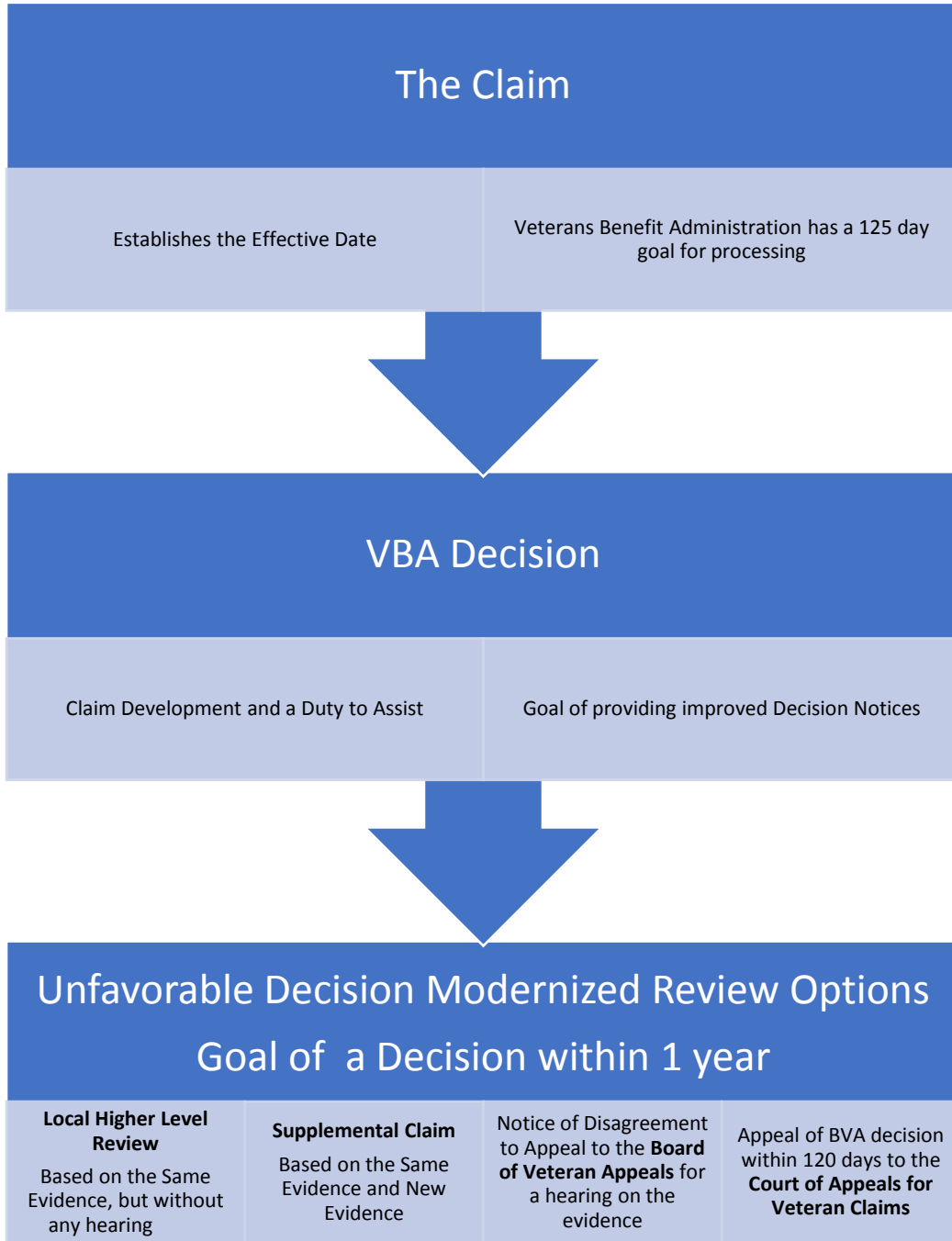
- **Supplemental Claim:** submitting new and relevant evidence with a supplemental claim to the agency of original jurisdiction; and
- **Appeal to the Board:** seeking review by a Veterans Law Judge at the Board by filing a Notice of Disagreement, which the AMA further streamlines into three separate Board dockets based on:
  - Appeals where the claimant has requested a **hearing**,
  - Appeals with no request of hearing, but where the claimant elects to submit other forms of **evidence**; and
  - Appeals where the claimant requests the Board merely **review** the claim on the same evidence that was before the agency of original jurisdiction.

**Third**, the AMA requires claim decision notices to be much clearer and more detailed, hopefully assisting claimants and their representatives to make an informed decision on which review option makes the most sense for them.

**Finally**, the AMA eliminates intermediate and duplicative steps previously required, such as Statements of the Case and the substantive appeal.

## II. Using the New Modernized Review System for Unfavorable Decisions

The following chart shows the claim process and new modernized appeal options:



## **1. Electing Review and Effective Dates**

Under the new 38 U.S.C. 5104C, after receiving notice of a decision on an issue, claimants generally have up to one year to submit new and relevant evidence with a supplemental claim, request a higher-level review, or file an appeal to the Board to preserve the effective date associated with their initial claim. A claimant or the claimant's duly appointed representative may withdraw a request for a higher-level review or a supplemental claim at any time prior to the Regional Office issuing notice of its decision. If the withdrawal takes place within the one-year period following the notice of the decision being reviewed, then a claimant may timely elect another review option to continuously pursue the claim and preserve potential entitlement to benefits effective as of the date of the initial claim. If a claimant remains dissatisfied with the decision on review, depending on the type of review requested and ruling by the VA, the claimant would have the option to file another review request. If timely, the VA will consider this to all be a continuously pursued claim and continue to base the effective date of an award on the filing date of the initial claim.

### ***a) Higher-Level Review***

Under the old system, a claimant seeking *de novo* review with a Decision Review Officer ("DRO") could submit new evidence at their Regional Office hearing. Under the new system, the *de novo* review still exists in the Higher-Level Review, but no new evidence is allowed and there is no Regional Office hearing, other than a phone interview with the adjudicator, who may not be the DRO. While the DRO's are the most experienced adjudicators, the assigned adjudicator should still be experienced and able to render a more reasoned, thorough, and reliable decision.

Under the AMA, while no new evidence is allowed, the review does allow for submitting arguments as to why the previous decision was not properly adjudicated including identifying an improper theory of service connection or the failure to examine certain evidence. This phone



conversation with the adjudicator is not required and should always be requested. The VA has designated three locations for Higher-Level Reviews: Seattle, St. Petersburg and Washington DC. In my experience, my clients have been assigned the Washington DC office. Certain restricted claims such as those from VA employees or accredited representatives are assigned to Milwaukee.

Under 38 U.S.C. 5103A(f) if the Higher-Level Review adjudicator discovers a duty to assist error, the claim returns to the original adjudication agency unless the higher-level adjudicator determines that it would be appropriate to grant the maximum benefit for the claim. Maximum benefits are determined for disability compensation as the maximum scheduler evaluation for the issue and for other types of benefits, the granting of the benefits sought. In accordance with 38 U.S.C. 5109B, these remanded cases are to receive expedited processing to correct these types of errors as set forth under 38 CFR 3.252 to Part 3. The effective date is the date of receipt of the initial claim and the agency of original jurisdiction shall retain jurisdiction over the claim.

***b) Supplemental Claim***

The VA has long maintained the practice of allowing claimants to maintain effective dates through the submission of new evidence. The AMA provides the same right, but now rather than providing for automatic re-adjudication, the claimants must submit the new evidence in connection with a choice of review options. The claimant may either file a supplemental claim or a Notice of Disagreement with the Board indicating selection of a docket allowing for the submission of additional evidence. If either filing is completed within the one-year period under the AMA, the original effective date can be retained as long as the new evidence is indeed “new and relevant” and results in a new decision. It hence affords the Veteran more stabs at success. Any number of higher level reviews can be conducted with the same claim as long as new evidence was submitted using the supplemental claim option (i.e. an unfavorable higher level review decision could lead

to a new supplemental claim with new evidence resulting in another unfavorable decision and resulting in a request for a new higher-level review being initiated resulting in another unfavorable decision but perhaps this time leading to an appeal to the BVA with the unfavorable decision which can lead to a new supplemental claim and so forth. An endless cycle is still possible. The cycle applies to all three options and a Board decision is never final until a final adjudication when the one-year period for holding open the effective date expires. The process above could go on indefinitely if “new and relevant” evidence could be continually uncovered. The original effective date is guaranteed throughout this process as long as more than one year does not elapse from any new decisions along the way. You should note, however, that if the VA reaffirms a previous decision that reaffirmation is not a final decision and it does not hold open the effective date by allowing one year from the reaffirmation.

While in theory this could occur, it is not likely to happen. The key to keeping a claim alive is coming up with new and relevant evidence. The supplemental claim (i.e. new evidence) is submitted to the same adjudication team in the Regional Office. It must be accepted by the original adjudication team and then it must be determined to be new and relevant by the original adjudication team. If during the process, the original adjudication team becomes biased against the claimant, they may reject the new evidence. The original adjudicators have no obligation to reopen the file and the claim will die if an appeal is not timely made.

The U.S. Court of Appeals for Veterans Claims in 2009 stated that “new evidence” is defined as “existing evidence not previously submitted to agency decision-makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last

prior final denial of claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.” *Isaac v. Shinseki*, 2009 U.S. App. Vet. Claims Lexis 2021, 7-8 (U.S. App. Vet. Cl. Nov. 18, 2009).

Relevant evidence is a lesser burden than material evidence under the old system. Relevant evidence is any evidence that could be used to prove the claim. Hence, the buddy statement or new medical record that might have been considered redundant and not material under the old appeals system, may now be relevant under the new lesser burden.

The House of Representatives Committee Report (H. Rept. 115-135, May 19, 2017, page 3), shows Congress’s intent “behind the change from material to relevant evidence is to lower the current burden” to have a claim re-adjudicated based on new relevant evidence. This new standard purportedly reduces a claimant’s threshold in identifying or submitting evidence as part of a supplemental claim. Title 38 CFR 3.156(d). Claims that were filed, but not initially adjudicated, prior to the effective date of the AMA will be adjudicated under the more favorable “new and relevant” standard applicable to supplemental claims. In addition, a supplemental claim subject to the more favorable standard may be filed after the effective date of the AMA, even with respect to legacy claims finally adjudicated prior to the effective date of the AMA.

Examples of material evidence under the M21-1 are:

- VA allows a new opinion for Nexus as material,
- A medical report showing the current disability where service connection was denied because the disability did not exist,
- A denial for service connection, as no back injury was incurred in service but the veteran submits a buddy statement with the buddy certifying he witnessed the veteran injured his back,

- A photograph showing evidence of the injury in service.

Examples of where evidence is not new or material:

- A record photocopied from the claims folder that was considered in the previously denied claim;
- A new medical nexus opinion incorporating an inaccurate history. See *Reonal v. Brown*, 5 Vet. App. 458 (1993);
- Written testimony from an eyewitness that is substantially identical to a statement already on file;
- A layperson's assertion about the cause (but not the onset) of a disability, or
- Medical evidence that reveals the existence of a disability when previous evidence already revealed that the disability existed.

If new evidence is relevant to the case, then the VA must accept a supplemental claim with the new evidence and execute its duty to assist to develop for this new evidence. New and relevant evidence may or may not lead to a difference outcome on a previous decision. New and relevant evidence pertains only to reconsideration of the decision. If the new evidence does not change the decision, then the original decision remains.

New evidence is evidence that has not previously been submitted to agency adjudicators. Under the AMA, when new and relevant evidence is presented or secured with respect to the supplemental claim, the agency of original jurisdiction will re-adjudicate the claim taking into consideration all of the evidence of record.

Under the old rules for legacy claims, a claimant may reopen a final adjudicated legacy claim by submitting new and material evidence. Material evidence means existing evidence that by itself or when considered with previous evidence of record relates to an unestablished fact

necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the last prior final denial and must raise a reasonable possibility of substantiating the claim.

M21-1 provides the following steps to evaluate evidence:

1. Determine what facts are required and what standard of proof applies based on the criteria for entitlement to the specific benefits sought and the procedural issues.
2. Determine the probative value of the evidence that bears on the entitlement standard or procedural issue. Determine the competency of the source of the evidence as evidence from a source not having the requisite competency to offer a particular type of evidence has no probative value. Discuss and apply the VA guidance on credibility where there is a reasonable factual basis for questioning believability as evidence that is not believable does not have probative value.
3. Resolve questions of relative weight or persuasiveness when there are various items of evidence that have been determined to have probative value in order to find fact. It is important to explain why certain evidence was accepted as more probative than other evidence especially when giving less value to evidence tending to support the benefit sought by the claimant.
4. Apply the found facts to draw corresponding conclusions of law necessary to support the decision for the benefit sought and the procedural issue.

***c) Board of Veteran Appeals Review***

In an appeal to the Board, the AMA eliminates intermediate and duplicative steps that were previously required, such as the Statement of the Case and the substantive appeal. The AMA allows the Board to maintain three separate dockets for handling appeals:

- i. ***Agency Review:*** Appeals where the claimant is asking the Board to review the same evidence presented to the agency of original jurisdiction.
- ii. ***Additional Evidence:*** Appeals where the claimant is not requesting a hearing, but does want to submit evidence.
- iii. ***Hearing:*** Appeals where the claimant is requesting a Hearing.

The hope is that these separate dockets will allow the Board to more efficiently and effectively manage distinctly different types of work.

In the fiscal year 2020, the Board received 174,733 disability appeal cases and completed 102,663 decisions. Of those decisions, 85,461 were legacy decisions (discussed a little later) and 17,202 were AMA decisions. The Board previously decided 52,661 cases in 2017, 85,288 in 2018, and 95,089 in 2019. The Board scheduled 37,345 hearings and held 15,669 in 2020. The Board approved 33.8% of the legacy appeals and 37% of the AMA appeals. This does not mean that the Board denied the rest. The Board only denied 20.3% of the legacy appeals and 27.6% of the AMA appeals. The vast majority of appeals were remanded, meaning that they were sent to the Regional Office of originating jurisdiction with instructions. The Board remanded 40.6% of the legacy appeals and 28.2% of the AMA appeals. The average time from appeal (not commencement of the claim) and the Board's disposition was 1,583 days, or about 51 months. Remember that the majority were resolved by remand so are still being processed. For veterans who elected a direct review docket under the AMA, the time was shortened to 225 days from NOD to Board decision, 277 days for an evidence docket and 377 for a hearing. Hence, based on last year's processing numbers are indicating that the new modernized process is working to speed up processing.

## **2. Legacy Claims and Their Appeals**

Legacy claims are claims for benefits filed before the inception date of the new system on February 19, 2009. Legacy claims are to be processed under the old rules. Currently, there are hundreds of thousands of Legacy claims continuing to be processed within the VA. When a legacy claim is appealed, the appeal is processed under the old rules. For a brief period in 2018, legacy claims being appealed could opt into the RAMP program. After February 19, 2019, claimants with a legacy claim can no longer opt into the RAMP program, but can opt into the new system after a notice of disagreement and Statement of the Case have been issued. The VA plans to have all currently pending legacy appeals adjudicated by 2022.

The VA has retained 38 CFR Part 19 to preserve and consolidate regulations concerning legacy appeals. Part 19 remains only applicable to legacy appeals. The new appeals are covered by Part 20 as revised to incorporate all of the new changes for the Modernized Review System.

## **3. Forms to Use**

VA Form 20-0995 – Decision Review Request: Supplemental Claim

VA Form 20-0996 – Decision Review Request: Higher-Level Review

VA Form 10182 – Decision Review Request: Board Appeal (Notice of Disagreement)<sup>1</sup>

## **4. Filing a Claim, Effective Date of Award and Duty to Assist**

The VA has the right to require applications for benefits be submitted on the prescribed forms designated by the Department. Those forms can change with updates. It is very important to stay on top of current forms. Currently, applications for Compensation are to be filed with VA Form 21-526EZ. The earlier forms of VA Form 526 are no longer being accepted. Applications

---

<sup>1</sup> These forms must be signed by the claimant or an “alternate signer”. If an alternate signer is signing a form, the form must be accompanied by VA Form 21-0972: Alternate Signer Certification. See 38 U.S.C. 1501.

for Pensions are to be filed with VA Form 21-527EZ and Survivors Pension, DIC and accrued benefits are to be filed on VA Form 21-534EZ. The earlier versions of these forms are also no longer accepted. Each of these forms are used by the VA for an “initial claim” only, not for appeal purposes.

By filing an initial claim, the applicant has one year to complete the missing information. Submitting an Intent to File allows the same one-year extension, except that a substantially complete application must be submitted prior to the end of that year. Failure to meet the foregoing requirements loses the effective date and requires a new application. A substantially complete claim, however, triggers the VA’s duty to assist.

The AMA defines a “claim” as a written or electronic communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the law administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary

The AMA defines “supplemental claim” as any claim for benefits under laws administered by the Secretary filed by a claimant who had previously filed a claim for the same or similar benefits on the same or similar basis. A supplemental claim may be an initial claim that needs to be reevaluated, re-adjudicated or otherwise looked at again. A supplemental claim can also be filed after a finally adjudicated decision, which is a decision made where one year has elapsed and no action has been taken. A claim for secondary disability or a request to increase a benefit is a new claim for benefits and is not a supplemental claim.

## **5. Issues within a Claim**

An “issue” within a claim is defined as an adjudication of a specific entitlement. 38 CFR 3.151(c). As such, the entire claim is appealed, not a particular issue within a claim. Allowing



claims to be splintered into several pieces for review would defeat the intent of the AMA at streamlining the review process and reducing processing times. For example, a decision on the effective date and on the disability rating must be reviewed together not as separate issues.

## **6. Decision Notice**

The AMA idea behind this more detailed notification is to allow the claimant to receive assistance from the VA in developing new evidence or understanding why the evidence did not result in a favorable decision. The VA does still use “Finally Adjudicated Decision” or “Final Decision” for decisions that have become final because the one-year period for responding to any adverse action has expired. Once a final decision is issued, revisiting the final decision requires a supplemental claim with new and material evidence. It does not require a new application, but it will result in a new effective date. The AMA has eliminated the concept of re-opening a claim. This is a significant change.

The Claimant and their representative are entitled to notice of any decision made by the VA affecting the payment of benefits or the granting of relief. Such notice will clearly set forth the identification of the issues adjudicated; a summary of the evidence considered; a summary of the laws and regulations applicable to the claim; a listing of findings made by the adjudicator that are favorable to the claimant; and if denied, then identification of the elements required to grant the claim that were not met, an explanation of how to obtain or access evidence used in making the decision, and a summary of the application review options available to the claimant.

## **7. Closing the Evidentiary Record**

The AMA now clearly closes the evidentiary record at the agency of original jurisdiction when the VA issues notice of a decision on the claim. Evidence includes documentary, testimonial, or in any other form submitted by the claimant in support of a pending claim and any issue,

contention or argument a claimant may offer with respect to a claim received prior to notice of a decision. The agency of original jurisdiction is the party responsible for preparing and closing the evidentiary record.

Once a decision has been made, the agency of original jurisdiction will not consider, or take any more action on evidence that is submitted by a claimant associated with the claims file or constructively received by the VA after the notice of decision on a claim and such evidence will not be considered part of the record at the time of any decision by the agency of original jurisdiction except when:

- The case is remanded for a duty to assist;
- The agency subsequently receives a complete application for supplemental claim; or
- The agency of original jurisdiction receives VA treatment records. VA treatment records are limited to those records within the actual custody of the Veterans Health

Administration and are deemed constructively received by the Veterans Benefits

Administration at the time the Veterans Benefits Administration had knowledge of the existence of said records through information furnished by the claimant sufficient to locate those records.

# Unfavorable Decisions and The New Review Process



Stevens & Associates<sup>PC</sup>

Estate · Elder · Special Needs · Veterans · Equine

---

# The Veteran Appeals Improvement and Modernization Act of 2017

- “AMA”
  - Effective February 19, 2019
  - Provides veterans more options to appeal an unfavorable decision and speeds up appeal process
  - Pre-AMA appeals are known as “Legacy Appeals”
-

# New System v. Old System

## The Claim

Establishes the Effective Date

Veterans Benefit Administration has a 125 day goal for processing



## VBA Decision

Claim Development and a Duty to Assist

Goal of providing improved Decision Notices



## Unfavorable Decision Modernized Review Options

Goal of a Decision within 1 year

### Local Higher Level Review

Based on the Same Evidence, but without any hearing

### Supplemental Claim

Based on the Same Evidence and New Evidence

Notice of Disagreement to Appeal to the **Board of Veteran Appeals** for a hearing on the evidence

Appeal of BVA decision within 120 days to the **Court of Appeals for Veteran Claims**

# Electing Review

Higher-Level Review	Supplemental Claim	Board of Veteran Appeals Review
<ul style="list-style-type: none"><li>• De novo review</li><li>• No new evidence</li><li>• Decision Review Officer –must request a phone interview with adjudicator</li><li>• Effective date: receipt of initial claim</li></ul>	<ul style="list-style-type: none"><li>• New evidence allowed</li><li>• Effective date: receipt of initial claim if evidence is “new and relevant” and results in new decision, otherwise date of supplemental claim</li></ul>	<ul style="list-style-type: none"><li>• Three separate dockets:<ul style="list-style-type: none"><li>• Agency Review</li><li>• Additional Evidence</li><li>• Hearing</li></ul></li><li>• Effective date: receipt of initial claim</li></ul>

---

# Legacy Claims & Appeals

- ❑ Claims filed before February 19, 2009
  - ❑ Appeals for legacy claims are processed under old rules
  - ❑ Claimants can opt into new system after a NOD and Statement of the Case have been issued
-

---

# Forms

- VA Form 20-0995 – Decision Review Request: Supplemental Claim
- VA Form 20-0996 – Decision Review Request: Higher-Level Review
- VA Form 10182 – Decision Review Request: Board Appeal (Notice of Disagreement)

**Note:** These forms must be signed by the claimant or an “alternate signer”. If an alternate signer is signing a form, the form must be accompanied by VA Form 21-0972: Alternate Signer Certification. See 38 U.S.C. 1501 for Alternate Signer requirements.

---



---

# Issues within a Claim

- Issue: an adjudication of a specific entitlement (38 CFR 3.151(c)).
  - A claim in its entirety is appealed, not a specific issue within a claim.
-

---

# Decision Notices

- Notice includes:
    - Identification of issues adjudicated
    - Summary of evidence
    - Summary of applicable laws and regulations
    - Listing of favorable findings
  
  - If a decision is a denial, notice includes:
    - Elements required that were not met
    - Explanation of how to obtain/access evidence used in decision
    - Summary of review options available
-

---

# Closing the Evidentiary Record

- Evidentiary record is closed at agency of original jurisdiction when a notice of decision is issued
  - Agency of original jurisdiction is responsible for closing the record
  - Exceptions for when new evidence will be considered by the Agency after closing:
    - Claim remanded for duty to assist
    - Complete application for supplemental claim received
    - VA treatment records received
-

---

# Thank You



Stevens & Associates<sup>PC</sup>

Estate · Elder · Special Needs · Veterans · Equine

Tamatha A. Stevens, CELA  
3755 E 82<sup>nd</sup> St, Ste. 200, Indianapolis, IN 46240  
317.915.9900 . [tstevens@stevenslawyers.com](mailto:tstevens@stevenslawyers.com)

*Information and materials are presented as a public service by Stevens & Associates PC. This presentation and its materials are general in nature and is not to be taken as legal advice to any particular person. Consult an attorney for specific legal advice for your circumstance.*

---