



A PROCESS IN TRANSITION

The U.S. Department of Veterans Affairs Adjudication System

By Michael R. Viterna

The Department of Veterans Affairs (VA) is responsible for a special federal benefits system that offers many services to eligible military veterans and their qualified beneficiaries,¹ including health care, tax-free monetary payments to veterans disabled during military service, and many other benefits. As one federal court observed, veterans' benefits flow "to a special class of citizens, those who risked harm to serve and defend their country."² To carry out this benefits program, VA requested \$243.3 billion in its 2021 budget proposal to serve approximately 19 million veterans and their eligible dependents.³

AT A GLANCE

Many valuable federal benefits are available for veterans and their eligible dependents — if they can navigate the historically overburdened and archaic application and appeals processes.

The veterans' benefit system is unique in several aspects but is notable for the assistance required in developing a claim by obtaining relevant records and providing a medical examination, when necessary, to decide a claim (the statutory "duty to assist"). Receipt of veterans' benefits, particularly free or low-cost health care and payment of compensation or pension, can significantly improve the quality of a veteran's life. Entitlement to these valuable benefits becomes a hollow promise, however, if the claim adjudication and appeal processes are difficult to navigate and burdened with long delays. The traditional VA appeal process remained unchanged for many years, but several recent significant improvements enacted by Congress are worthy of discussion.

The claims process

In nearly every instance, a claim for benefits begins with a written request decided by a VA regional office (VARO) typically located in the state in which the veteran resides. Since submitted claims were sometimes unclear, which delayed processing, VA sought to formalize its processes in 2015 by requiring veterans to use specific forms for filing claims and pursuing appeals.⁴ With few exceptions, the date VA receives the

claim serves as the effective date for a benefits award if the claim is granted.⁵

Not all claims for benefits are resolved by the VARO to the veteran's satisfaction. Historically, the appeal process began by filing of a notice of disagreement (NOD) within one year of VARO's notice of its decision.⁶ After filing the NOD, the veteran could either request a de novo review by a VA decision review officer or proceed directly to the Board of Veterans' Appeals, which provided the agency's final review.⁷ After filing a NOD, the VARO reexamined the claim and, if it failed to decide the claim more favorably, a statement of the case (SOC)⁸ was issued. If the veteran was still dissatisfied with the decision, VA allowed 60 days or the balance of the one-year period from the date of the initial decision for filing of VA Form 9 to seek appellate review from the board.⁹ Failure to either file the NOD in a timely fashion or file an appeal with the board rendered the decision final.¹⁰ If the veteran wished to seek the same benefits in the future, he or she would have to try to reopen the claim by submitting new and material evidence.¹¹ Reopening the claim, if successful, would result in a new effective date for the award of benefits — the date the claim to reopen was received by VA.¹²

An overburdened system and long delays

For many years, the VA appeal system was burdened by large backlogs, resulting in significant delays. In fiscal year 2015, for instance, the VA had more than 427,000 pending appeals; the average cumulative time for a veteran to receive a final decision from VA was about five years.¹³ It took an average of 419 days after receipt of a NOD for the VARO to issue an SOC.¹⁴ Another 537 days would pass before the appeal was certified by the VARO to the board and, after an additional average of 222 days, the appeal would be docketed at the board, which then led to a decision in approximately 270 days.¹⁵

A system in splendid isolation

Prior to 1988, the board's decisions were final, and veterans would have to reopen the denied claim at the VARO if that same benefit was sought in the future. As the U.S. Court of Appeals for the Federal Circuit noted, prior to that time the VA stood "in splendid isolation as the single federal administrative agency whose major functions were explicitly insulated from judicial review."¹⁶ However, one of the most significant changes in the VA appeals process occurred in 1988 with the passage of the Veterans Judicial Review Act (VJRA) which created the U.S. Court of Appeals for Veterans Claims (CAVC), a special Article I court with exclusive jurisdiction to review final adverse decisions by the board.¹⁷ Following implementation of the VJRA, a denial by the board could be appealed to the CAVC if the appeal was filed within 120 days of the board's decision.¹⁸

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"Hamster wheel" of appeals and remands

Over the past decade, as Vietnam-era veterans aged and veterans of the Iraq and Afghanistan conflicts filed claims, the inventory of initial claims and appeals continued to increase.¹⁹ The backlog of cases on appeal has further exponentially increased due to remands by the board and the CAVC. In 2015, for instance, the board disposed of 55,532 appeals, with 46.5 percent of those appeals remanded back to the agency for additional development.²⁰ That same year, the CAVC docketed 4,030 appeals and remanded in whole or in part approximately 73 percent of the cases back to the board to correct errors.²¹ Those cases on remand that continued denial of benefits often required further remands, adding to the appeal inventory. Veterans' advocates refer to this seemingly endless process of appeals and remands as the "hamster wheel." The broken appeal system was changed significantly by the Appeals Modernization Act of 2017.

The Veterans Appeals Improvement and Modernization Act of 2017

Faced with increasing political pressure, Congress and VA in 2016 sought recommendations for streamlining the appeals process, soliciting input from stakeholders such as veterans' service organizations like the American Legion and Disabled American Veterans and advocate groups like the National Organization of Veterans Advocates. The suggestions led to the Veterans Appeals Improvement and Modernization Act of 2017 (Appeals Modernization Act or AMA).²² The AMA was signed into law in August 2017 by President Trump but did not take

effect until February 2019 to allow VA time to implement the changes and create corresponding regulations.²³

The AMA represents the most significant change to the VA appeal process to date and offers several advantages to veterans. It effectively created two types of appeals: claims decided on or after February 19, 2019, for veterans who had either elected or were otherwise subsumed under the new system, and unresolved claims that were not part of the AMA process (a rating decision that addressed those claims issued before February 19, 2019.) The latter claims are considered part of the legacy system and are not affected by the AMA unless the veteran chooses to opt in to the AMA framework.

Enhanced notice regarding evidence and ability to rely on favorable findings

Under the AMA, the VARO adjudicates original claims but no longer adjudicate appeals of their decisions. Importantly, the AMA enhanced the VARO's duty to provide notice through its initial decision by identifying the issues adjudicated; summarizing the evidence considered and the applicable laws and regulations; identifying findings favorable to the claimant and elements not satisfied; and explaining the criteria that must be satisfied and evidence that must be obtained.²⁴ Perhaps most significant of these changes is the requirement that the VARO identify findings that are favorable to the veteran; future VA adjudicators are bound by these findings²⁵ and the veteran can focus the appeal on refuting unfavorable findings.

Prior to the AMA, VA had a statutory duty to assist veterans in developing claims at all steps in the adjudication. The AMA, however, restricted VA's duty to assist initial or supplemental claims.²⁶ Though the AMA limits the VARO's duty to assist, the board may remand the claim when violations of the duty to assist are discovered such as the failure to obtain relevant records or adequate medical opinions.²⁷ If a veteran is represented by legal counsel, it is important to raise claims related to violations of due process or of VA's duty to assist *prior* to board review as judicial review of these violations, if not previously raised, may not be available. The Federal Circuit has held that the U.S. Court of Appeals no longer has discretion to hear an argument not presented to the board. Rather, "there must [have been] an objection."²⁸

Simplified appeal process with three options

The AMA simplified the appeal process by requiring veterans to initiate further review only once and standardizing the time to respond to an unfavorable decision. The new system eliminates the SOC, filing of VA Form 9, and time delays related to issuing the SOC and later certification to the board. Under the AMA, veterans have one year following a VA decision to pursue any one of three different options: a higher-level review,²⁹ a supplemental claim,³⁰ or an appeal to the board.³¹

Higher-level review

A higher-level review results in a *de novo* review based on the same evidence considered in the initial VA decision. These reviews are conducted at operations centers in Washington, D.C., Seattle, and St. Petersburg, Florida, and may be further appealed to the board. Advocates should carefully consider whether further review based on previously submitted evidence will be beneficial given the additional time incurred. This option is best in cases where the VA committed a duty-to-assist error, overlooked favorable evidence of record that would have resulted in a grant of benefits, or misapplied or ignored relevant law or regulations such that additional review would result in a different decision. While new evidence is not permitted, additional arguments may be submitted.

Supplemental claim

A significant benefit of the AMA process is that it allows a supplemental claim to be filed within one year of an unfavorable decision while preserving the effective date of the claim.³² In most cases, the effective date is the date the claim was filed and represents the date payment of benefits would begin³³ should benefits ultimately be granted; the date the claim is granted may be several years after the effective date. A supplemental claim can be filed following a decision by the higher-level authority, the board, or the CAVC.³⁴ An unsuccessful appeal of a CAVC decision, however, may not be supplemented. As a result of this new option, veterans can keep claims alive indefinitely as long as new and relevant evidence is filed within one year of an adverse decision. In this context, "new" means evidence not part of the record when VA made its decision and "relevant" refers to evidence tending to prove or disprove an issue related to the claim.³⁵ If an initial claim fails because of insufficient evidence, it is often prudent to file a supplemental claim to correct those deficiencies instead of filing a request for higher-level review or appeal to the board.

Board of Veterans' Appeals

The third option to responding to an unfavorable VA decision is seeking board review by filing a NOD.³⁶ This option gives veterans three paths to follow. The first path asks the board to review the claim based on evidence of record at the time of the decision on appeal.³⁷ This is the fastest route to obtaining a new decision, but it does not allow for new evidence to be submitted — only additional argument. The second route allows veterans to submit new evidence within 90 days of filing the NOD,³⁸ and the third option allows veterans to have a hearing before a veterans' law judge at the board and submit new evidence for consideration.³⁹ The board will consider new evidence submitted at the hearing or within the 90-day period after the hearing.⁴⁰

Hearings are typically held via videoconference at a VA facility or at the board's location in Washington, D.C. During the COVID-19 pandemic, however, they're being held virtually before a member of the board via the VA telehealth platform.⁴¹ Selecting a hearing can add considerable delays to the decision process, however, given the high volume of requests and the board's inability to handle the demand. As of the end of November 2020, the board had 87,636 pending hearings.⁴²

The stage at which veterans can seek fee-based legal representation is another change that impacts practitioners. Under the AMA, veterans can hire attorneys for a fee after receiving the initial decision from the VARO.⁴³ Previously, representation for a fee was prohibited until after an NOD was filed.⁴⁴ This change allows representatives to help direct the course of the appeal and hopefully reduces the time for a new decision. Pro bono representation may occur at any stage in the process; however, whether paid or pro bono, attorney representatives must be accredited by VA.

Conclusion

While the AMA appears to hold some promise for reducing delays inherent in deciding claims for VA benefits, it is still too early to make an accurate assessment of its impact. Any discussion of delays in processing benefit claims is not simply an academic exercise but carries very real implications for potential beneficiaries. These implications were perhaps expressed best in a consolidated federal circuit case dealing with VA delays by Judge Kimberly A. Moore, who stated:

“[T]he men and women in these cases protected this country and the freedoms we hold dear; they were disabled in the service of their country; the least we can do is properly resolve their disability claims so that they have the food and shelter necessary for survival.”⁴⁵ ■



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ENDNOTES

- See generally, US Dep't of Veterans Affairs <<https://www.va.gov/>>. The term "veteran" will be used herein for simplicity to include military veterans and their dependents who are eligible for benefits administered by VA. All websites cited in this article were accessed April 17, 2021.
- Bailey v West*, 160 F3d 1360, 1370 (Fed Cir, 1998).
- FY 2021 Budget Submission: Budget in Brief, Dep't of Veterans Affairs Budget (February 2020), available through <<https://www.va.gov/budget/products.asp>> [<https://perma.cc/Q9KD-AWMD>].
- 38 CFR 3.151(a).
- 38 CFR 3.400.
- 38 USC 7105(a) and 38 USC 7105(b)(1).
- 38 USC 7105(a).
- 38 USC 7105(d)(1) (2018).
- 38 USC 7105(d)(1)(C)(3) (2018).
- 38 USC 511 and 38 USC 7105.
- 38 CFR 3.156.
- 38 CFR 3.400 (2016).
- GAO 17-234, *VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions*, US Gov't Accountability Office (2017), available at <<https://www.gao.gov/products/gao-17-234>> [<https://perma.cc/9FZ7-JY7D>].
- Id.*, p 7.
- Id.*
- Gardner v Brown*, 5 F3d 1456, 1463 (1993) (citing H R Rep No 100-963).
- 38 USC 7251 and 38 USC 7252.
- 38 USC 7266.
- Generally, Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U Miami Nat'l Security & Armed Conflict L Rev 1 (2015), available at <<https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1064&context=umnsac>> [<https://perma.cc/S7A4-UNSZ>].
- Board of Veterans' Appeals Annual Report*, US Dep't of Veterans Affairs (2015), pp 18-19, available at <https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf> [<https://perma.cc/BNS6-KGSL>].
- Annual Report: United States Court of Appeals for Veterans Claims, October 1, 2014 to September 30, 2015*, US Court of Appeals for Veterans Claims (2015), p 1, available at <<http://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf>> [<https://perma.cc/TDG9-AUQJ>].
- Veterans Appeals Improvement and Modernization Act of 2017, Pub L No 115-55, 131 Stat 1105 (2017).
- Id.*
- 38 USC 5104.
- 38 USC 5104(a).
- 38 USC 5103A(e)(1) (2012, 2017).
- 38 USC 5103A(e)(2) (2012, 2017).
- Parks v Shinseki*, 716 F3d 581, 585 (Fed Cir, 2013).
- VA Form 20-0996, US Dep't of Veterans Affairs (2019), available at <<https://www.vba.va.gov/pubs/forms/VBA-20-0996-ARE.pdf>> [<https://perma.cc/K38H-SLQR>].
- VA Form 20-0995, US Dep't of Veterans Affairs (2019), available at <<https://www.va.gov/find-forms/about-form-20-0995/>> [<https://perma.cc/N8DB-CWDZ>].
- VA Form 10182, US Dep't of Veterans Affairs (2019), available at <<https://www.va.gov/vaforms/va/pdf/VA10182.pdf>> [<https://perma.cc/DU6M-9SHH>].
- 38 USC 5109B.
- 38 CFR 3.400.
- 38 USC 5110(a)(2) (2012, 2017).
- 38 USC 5108(a) (2017) and 38 USC 101(35) (2012, 2017).
- The NOD to the board requires filing VA Form 10182 and is different from the NOD used in the legacy system (i.e., VA Form 21-0958).
- 38 USC 7105(b)(3)(c).
- 38 USC 7113(c).
- 38 USC 7105(b)(3)(A).
- 38 USC 7113(b)(1)-(2).
- 38 USC 7107(c).
- See *Appeals Metrics*, Board of Veterans Appeals, US Dep't of Veterans Affairs, available at <https://www.bva.va.gov/Appeals_Metrics.asp> [<https://perma.cc/5Z2E-UCY6>].
- 38 USC 5904(c).
- 38 CFR 14.636 (2016).
- Martin v O'Rourke*, 891 F3d 1338, 1352 (Fed Cir, 2018) (Moore, J, concurring).