Key Concepts in Veterans Law and An Overview of the Board of Veterans' Appeals (Board)

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Agenda

- **Part I—Key Concepts in Veterans Law**
  - Service Connection
  - Other Matters—Competency, Credibility, and Lay Evidence
  - Remands
- **Part II—The Board of Veterans' Appeals, An Overview**
- **Part III—Board Hearing Process Overview**

The Road to Service Connection: Key Themes

- ✓There are **basic eligibility** requirements for VA disability benefits
- ✓There are **multiple elements** that are required to establish entitlement to service connection
- ✓There are **multiple ways** (i.e., theories of entitlement) to establish entitlement to service connection

SC
Established!

Service Connection

- ✓ Qualifying service (basic eligibility)
- ✓ Current disability (element)
- ✓ In-service injury or disease or aggravation of such (element)
- ✓ Nexus between the current disability and the in-service disease or injury (element)

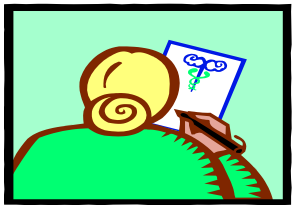
What is Qualifying Service?

- Claimant must be a "veteran" (or a dependent of a "veteran")
  - A "veteran" is a person with "**active military . . . service**" and who was discharged "under conditions **other than dishonorable**."

- "Active military service" includes:
  - Active Duty
  - Active Duty for Training (ACDUTRA)
  - Inactive Duty for Training (INACDUTRA)
    - Source to establish "active military service"—service department records
    - VA is bound by service department findings

Current Disability

- Competent evidence of a current disability
  - e.g., medical diagnosis by a variety of professionals, to include MDs, nurses, chiropractors, social workers, psychologists and others with specialized knowledge, education, experience or training to render them qualified to provide a diagnosis
    - VA or private medical records
    - Letters or statements by physicians
  - Disabilities capable of lay observation—if a disability is the type that can be observed by a lay person (e.g., varicose veins, tinnitus), then a separate medical diagnosis *may not be required*
- A disability that resolves during the appeal period may still be service connected



Not a Current Disability

- Pain without a diagnosed or identifiable underlying malady or condition does not constitute a disability, but it may be adequate to trigger the need for a VA examination.

- Congenital diseases, but not defects, are considered disabilities. A medical opinion may be required to determine whether a condition is properly classified as a congenital disease or defect.

Current Disability (contd.)

- VA's duty to assist a Veteran by affording an opportunity for a VA examination

- Low threshold to trigger this duty to assist
  - *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006)
    - (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability
    - (2) evidence establishing that an event, injury, or disease occurred in service
    - (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with service

Issue: What Current Disability is the Veteran Claiming?

- Some claimants may not possess the necessary knowledge to describe accurately to VA what disease or injury is being claimed
  - e.g., "I have a leg disorder"
    - *Does this mean arthritis? sciatica? rash?*

- VA may thus have to determine the disability being claimed
  - *Clemons v. Shinseki*, 23 Vet. App. 1 (2009)
    - VA should *not* limit review only to the diagnosis alleged by the claimant
    - Instead, VA consideration should include all diagnoses which may reasonably be encompassed by several factors including: the claimant's description of the claim; the symptoms the claimant describes; and the information the claimant submits or that the Secretary obtains in support of the claim
  - **VA's duty to fully and sympathetically develop a claim to its optimum and to determine all potential claims raised by the evidence**

In-service Incurrence of a Disease or Injury

- Medical or lay evidence of an in-service event/injury/disease
  - Documented event or treatment in service records
  - Veteran's description of symptoms
  - Buddy statements/statements from family members
  - Letters written during service describing the event/injury/disease
  - Newspaper articles
- Missing service records (1973 Fire at National Personnel Records Center in St. Louis)
  - VA's heightened duty to assist –VA must obtain unit records and research unit histories

In-service Injury or Disease

- May be reflected in a veteran's service treatment records.
- Even if there is no medical evidence of a particular injury or disease in service, a veteran is competent to report such disease or injury and a determination needs to be made as to whether any such report is credible. *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007); *Buchanan v. Nicholson,* 451 F.3d 1331, 1337 (Fed. Cir. 2006).

In-service Injury or Disease

- If a veteran engaged in combat, lay evidence that an injury or disease was incurred in service will be accepted as sufficient proof of an in-service disease or injury if such evidence is consistent with the circumstances, conditions, or hardships, of the veteran's service.
- 38 U.S.C.A. § 1154(b).

Nexus (“the link”)

- Connection between current disability and in-service incident

- Competing Medical Opinions
  - VA must consider probative weight of opinions
    - Knowledge/expertise
    - Whether claims file was reviewed
    - Thoroughness of opinion/rationale

Nexus

- The nexus element is also satisfied if there is medical evidence or credible lay evidence of a continuity of symptomatology. Continuity of symptomatology is established if
  - (1) there is evidence that a condition was noted in service (need only be evidence of a symptom in service and does not require an actual diagnosis);
  - (2) there is evidence of post-service continuity of the same symptomatology; and
  - (3) there is medical or, in certain circumstances, lay evidence that the post-service symptomatology is related to the present disability.

- Note the recent case *Walker v. Shinseki,* 708 F.3d 1331 (Fed. Cir. 2013) which limited continuity of symptomatology under 38 C.F.R. § 3.303(b) to diseases listed in 38 C.F.R. § 3.309(a).

Other "Roads" or Theories of Entitlement

- *Aggravation of a Pre-Service (i.e., pre-existing) Disorder*
  - "Aggravation" means a permanent worsening beyond natural progression
  - Must be more than a temporary flare-up

Aggravation (contd.)

- ***KEY: "Noted" on service entry vs. NOT "Noted"***

- If the condition was "noted" on service entry examination, then presumption of aggravation attaches
  - if condition increased in severity during active service, then VA will consider it to have been aggravated by service (unless specific finding that the increase in disability was due to natural progress of disease)

Service Entry Examination

*Defective hearing on examination

Aggravation (contd.)

- If the condition was ***NOT* "noted"** on service entry examination, then Veteran presumed to have been in sound condition upon entry
- If presumed sound on entry, then direct service connection may be established
  - Only way to rebut soundness presumption—VA must show by clear and unmistakable (i.e., undebatable) evidence BOTH that (1) the injury/disease existed before entry *and* (2) that it was not aggravated by service (HIGH Standard). *See Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

Service Entry Examination

*Normal hearing on examination

Aggravation

- A pre-existing injury or disease is considered to have been aggravated by active service where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

- Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during, and subsequent to service.

Other "Roads" or Theories of Entitlement

Presumptions

- Disability *not* diagnosed during active service, but it is presumed to be related to active service because it arose within a specified time period after discharge

- Congress has directed that certain diseases shall be presumed to be service connected (unless there is affirmative evidence that it is *not* related to service)
  - Theory behind presumptions—idea that the designated disease that first manifested post-service probably had its beginnings during service because of the nature of that identified disease

Presumptions (contd).

- Presumptive Diseases (full list: 38 C.F.R. § 3.309)
  - Chronic diseases
    - e.g., hypertension, diabetes mellitus, tuberculosis
  - Tropical diseases
    - e.g.: cholera, malaria, yellow fever
  - Diseases of Former POWs
    - e.g.: beriberi, cirrhosis, IBS, chronic dysentery
  - Radiogenic diseases—must have participated in a “radiation-risk activity”
    - e.g.: leukemia, various cancers
  - Diseases associated with Agent Orange Exposure
    - ex: chloracne, various cancers
  - Amyotrophic lateral sclerosis (*see* 38 C.F.R. § 3.118)

Presumptions (cont.)

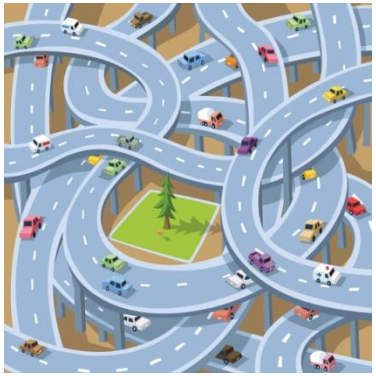
- Diseases associated with exposure to mustard gas or Lewisite (38 C.F.R. § 3.316).
- Undiagnosed illness/infectious diseases in “Persian Gulf veterans,” as that term is defined by regulation (38 C.F.R. § 3.317).
- Amyotrophic Lateral Sclerosis (38 C.F.R. § 3.318).
- Tuberculosis disease (38 C.F.R. § 3.371).

Presumptions (contd.)

- Presumptive Periods
  - Typically must manifest within 1-year of discharge (i.e., some chronic and tropical diseases)
  - Some may manifest at any time after discharge (i.e., former POWs)

- *NOTE* : If a Veteran cannot establish service connection on a presumptive basis, s/he may still establish service connection under another theory!

Other "Roads" or Theories of Entitlement



Secondary Service Connection

- A disability that is proximately due to or the result of an already service connected disability
  - ex: peripheral neuropathy secondary to service connected diabetes mellitus

or

a disability that is aggravated (made worse) by a service-connected disability. *Allen v. Brown*, 7 Vet. App. 439 (1995); 38 C.F.R. § 3.310.

Secondary Service Connection (contd.)

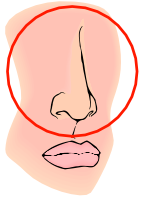
- Elements:
  - An already service connected disability
  - A second disorder
  - Medical evidence of a nexus between the service connected disability and the creation of or aggravation of the second disorder

Secondary Service Connection (contd.)

- For claims filed after October 10, 2006, aggravation by a service-connected disability is not conceded unless a baseline for the claimed disability can be established prior to any aggravation.
- 38 C.F.R. § 3.310(b).

Other Matters

- Competency
  - Medical evidence - requires proper knowledge, skills or specialized training
  - Lay evidence
    - must have personal knowledge of matter derived from his/her own senses
    - competent testimony is thus limited to that which the witness has actually observed, and is within the realm of his personal knowledge



The Nose

The Palm

Lay Evidence

- **What is lay evidence?** – Any written or verbal evidence from someone who does not have expertise in a relevant profession, such as medical or legal training, or other specialized training or expertise.
  - If the lay evidence relates to a matter that would require **medical expertise**, you need to assess whether the lay provider has any specialized training or expertise (such as being a doctor, nurse, etc.)

- **Symptoms vs. Diagnoses** - Veterans can generally report information as to symptoms experienced, but not diagnoses (*unless* he or she is a trained medical professional).

- If **lay evidence** relates to ***symptomatology***, it almost always will be competent evidence, as a lay person can report symptoms that he or she personally experiences, such as pain, limitation of motion, etc.
  - For service connection cases, lay evidence may raise a potential continuity of symptomatology issue to address both in terms of deciding whether an examination or opinion must be provided or obtained, and in deciding the claim on the merits.

Lay Evidence - <u>not</u> competent to report:

- Cancers
- Cause of Death
- Bronchial Asthma
- Meniere's Disease
- Rheumatic Fever
- Chondromalacia
- Disk Herniation
- Diagnosis of any other medical condition that requires specialized training to diagnose

Lay Evidence - competent to report:

- Asthma Symptoms
- Tinnitus
- Headaches, dizziness, etc.
- Pain in feet; Flat Feet (Pes Planus)
- Knee Symptoms
- Dislocated Shoulder & Broken Leg
- Hip Disorder with Rotated Foot
- Varicose Veins
- Psychiatric Symptoms (Paranoid Schizophrenia)
- Fall Injury/Trauma
- Some Skin Disorders (such as a rash)
- Frostbite Residuals

Other Matters (contd.)

- Credibility
  - VA considers all statements made in the context of entire record
  - Some credibility factors:
    - *Internal consistency or lack thereof*
    - *Facial plausibility*
    - *Consistency with other evidence submitted on behalf of the claimant*
    - *Demeanor of witness (if hearing held)*
    - *Bias*
    - *Character*

Other Matters (contd.)

- VA must consider the competency **and** credibility of lay evidence as it relates to all necessary elements and evidentiary hurdles in establishing a claim for benefits, to include:
  - Current diagnosis
  - Nexus
  - Continuity of symptoms
  - Occurrence of an event in service
  - Combat or other circumstances of service

Remands

Why May the Board Remand?

- Change in Law or Regulation
- Inadequate or Incomplete Development
- Due Process issues

Where Board Remands Go

- AMC – Appeals Management Center
- RO – Regional Offices
- VAMC (VHA) – VA Medical Centers
- NCA – National Cemetery Administration

Common Categories of Remands

- Due Process/Procedure
  - *Stegall* violation, *Manlincon*, hearing request, inextricably intertwined issues
- VCAA Notice
  - Secondary service connection, new & material (*Kent*), death notice (*Hupp*)
- Proper Development
  - Private treatment records, VA treatment records, Social Security records, medical examinations or opinions, inadequate examinations

Stegall

- A previous remand confers on the claimant, as a matter of law, the right to compliance with the remand orders
  - *Stegall v. West,* 11 Vet. App. 268 (1998)

- There must be *substantial compliance* with the previous remand orders
  - *D'Aries v. Peake*, 22 Vet. App. 97 (2008)

Manlincon

- The general practice is to remand for a Statement of the Case where the Veteran filed a timely Notice of Disagreement, but no Statement of the Case has been issued
  - *Manlincon v. West*, 12 Vet. App. 238, 240-41 (1999)
  - 38 C.F.R. § 19.9

New Evidence Received but Not Considered by AOJ

- Pertinent, non-duplicative, evidence received at the Board or at the RO after the last SOC (or SSOC) must be first considered by the RO ***unless*** there is a waiver of RO consideration
  - 38 C.F.R. §§ 19.37(a), 20.1304(c)

- *Change in law* – Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012
  - 38 U.S.C. § 7105(e)(1) (effective 180 days after 8/6/12)
  - Where new evidence has been submitted, the Board may consider it in the first instance ***unless*** there is a request for RO review
    - **Applicable only where VA-9 filed on or after effective date (2/2/13)**

Inextricably Intertwined Issues

- Arise when the Veteran has at least two issues pending and one cannot be decided without another being decided as well
  - *Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991)
  - *Tyrues v. Shinseki*, 23 Vet. App. 166, 177 (2009)

Common Remands for Errors in VCAA Notice

- Theories of entitlement that Veteran has raised (i.e., secondary service connection)

- The elements of a SC PTSD claim based on personal assault require a specialized notice letter
  - 38 C.F.R. § 3.304(f)(5)
  - This informs the Veteran that there are different ways to substantiate his or her claim as many times assaults are not reported or recorded in treatment records

- Particular requirements for Cause of Death claims
  - *Hupp v. Nicholson*, 21 Vet. App. 342, 352-353 (2007), *rev'd on other grounds*, *Hupp v. Shinseki*, 329 Fed. Appx. 277 (Fed. Cir. May 19, 2009)

- Particular requirements for new and material claims
  - *Kent v. Nicholson*, 20 Vet. App. 1, 10-11 (2006)

Remands for Additional Development

- Notification of Inability to Obtain Records
- Federal Records
- Reasonable Efforts to Obtain Private Records
- Examinations

VA Notification of Inability to Obtain Records

- RO must notify the Veteran that it was unable to obtain federal or private treatment records
  - 38 C.F.R. § 3.159(e)

Obtaining Federal Records

- VA efforts to obtain federal records ***must* continue** until the records are obtained ***unless*** it is reasonably certain that such records ***do not exist*** **or** that further efforts to obtain those records would be ***futile***.
  - 38 U.S.C. § 5103A(b)(3)

- **Constructive receipt of VA records—**VA is in ***constructive possession*** of all VA generated records.
  - *Bell v. Derwinski*, 2 Vet. App. 611, 612-13 (1992).

- Service treatment records may be relevant even in increased rating claims
  - *Moore v. Shinseki*, 555 F.3d 1369, 1372-1375 (Fed. Cir. 2009)

- There is a duty to obtain records in new and material evidence cases where the Veteran is attempting to reopen their claim
  - 38 C.F.R. § 3.159(c)

SSA Records

- Relevant records from the Social Security Administration (SSA) need to be obtained and associated with the claims file
  - *Golz v. Shinseki*, 590 F.3d 1317 (Fed. Cir. 2010)

Missing Service Treatment Records

- When STRs are missing or destroyed, VA has a **heightened duty** to
  - (1) assist a Veteran in developing a claim;
  - (2) consider the applicability of the benefit-of-the-doubt rule; and
  - (3) explain its findings and conclusions.

Obtaining Private Records

- What to look for
  - References to treatment by providers other than at a VA Medical Center (VAMC)
  - The Veteran's identification of private treatment providers at a hearing
  - Notation of private treatment in a VA examination report
  - Signed authorization to release private records to VA

- "Reasonable efforts" to obtain private records

VA's Duty to Obtain Medical Examinations/Opinions

VA's duty to assist requires that a VA medical examination and/or opinion must be provided when there is insufficient medical evidence on file for VA to make a decision on a claim, *and* there is:

(1) competent evidence of a **current disability**, or **persistent or recurrent symptoms** of disability;

(2) evidence that an **event, injury or disease** occurred in service, or during an applicable presumptive period; and

(3) an indication that the disability or symptoms ***may be associated*** with the Veteran's service, or with another service connected condition.

Important Information in Exams or Opinions

- Discussion of lay evidence
- A rational for the opinion expressed
- Indication that the claims file was reviewed
- All theories of entitlement are addressed

Remand Reasons to RO/AMC

- VA medical records
- Current findings (medical examination/opinion)
- No VA examination conducted
- Private medical records
- Social Security records
- Board travel/video hearing
- Adjudicate intertwined issue(s)
- Noncompliance/*Stegall*
- Issue SOC/*Manlincon*

Remand Reasons from CAVC

- Inadequate reasons and bases (i.e., discussion of credibility/evidence)
- Additional development (i.e., medical opinion/examination; obtaining records)
- Application of laws/regulations

Part II
The Board of Veterans' Appeals: An Overview

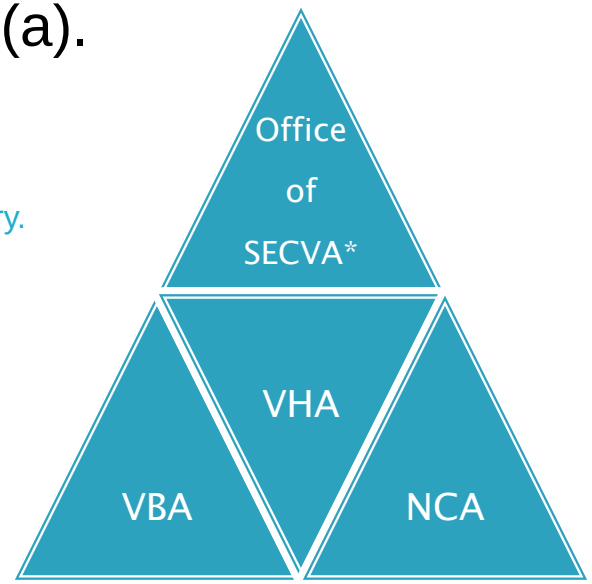
Board of Veterans' Appeals (Board) Mission

". . . to conduct hearings and dispose of appeals properly before the Board in a timely manner." 38 U.S.C. § 7101(a).

Jurisdiction

"All questions in a matter which . . . is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board." 38 U.S.C. § 7104(a).

* The Board is a Staff Organization that reports directly to the Secretary.



Appeals at a Glance

- **Right to Appeal.** Veterans, Dependents of Veterans, and Survivors of Veterans have a ***right to appeal*** all decisions regarding VA benefits.

- **One year to Appeal.** Veterans have ***one year*** to initiate an appeal of a VBA Regional Office (RO) decision.*

- **Multi-Stage VA Appeals System.** Most of the stages for appeals processing occur at the ***VBA RO level***. If the matter is not resolved to the Veteran's satisfaction, the appeal may be transferred to the Board for a final agency decision.

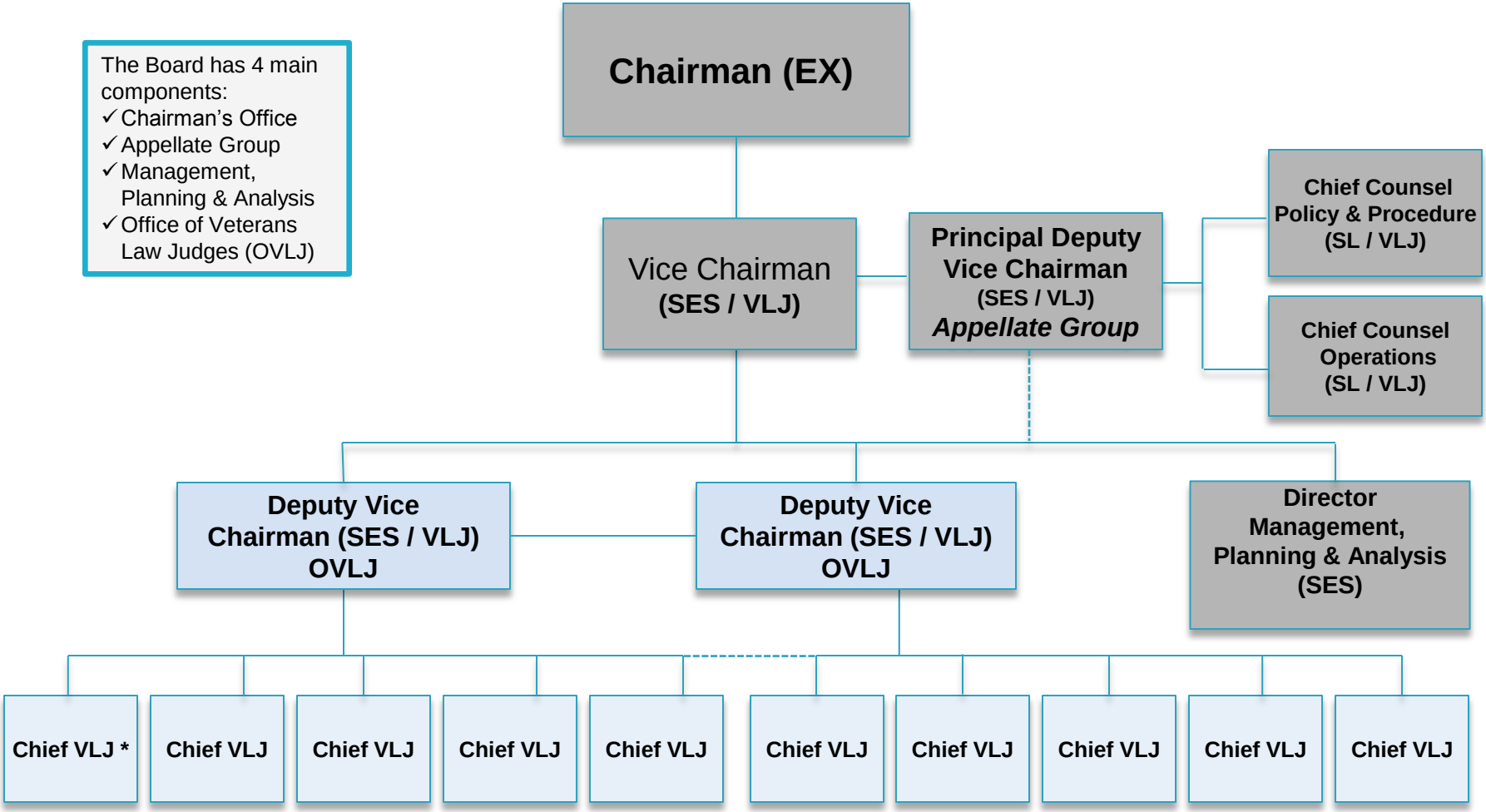
- **Board Review.** The Board conducts a ***de novo review*** of the entire case, meaning that it considers all evidence without deference to factual findings and legal conclusions at the VBA RO level.

- **Federal Court Review.** If a Veteran remains dissatisfied with a Board decision, they may ***appeal outside the Agency*** to the United States Court of Appeals for Veterans Claims (CAVC), the Federal Circuit and ultimately to the United States Supreme Court.

***Approximately 96 percent of the Board's incoming workload comes from VBA; the other 4 percent comes from different sources such as NCA, VHA, and OGC.**

Board Structure

The Board has 4 main components:
- ✓ Chairman's Office
- ✓ Appellate Group
- ✓ Management, Planning & Analysis
- ✓ Office of Veterans Law Judges (OVLJ)



* VLJ = Veterans Law Judge

Note: Chief VLJs supervise VLJs, Senior Counsel (GS-15), and attorneys (GS 9-14)

FY 2013 Performance

- 11,431 Hearings
  - Every VLJ conducts Travel Board hearings in the field, plus additional video hearings and Central Office hearings

- 41,910 Decisions
  - 52 VLJs produce 752 or more decisions each year
  - Attorneys support VLJs; each must produce at least 156 case credits per year

Types of Board Decisions

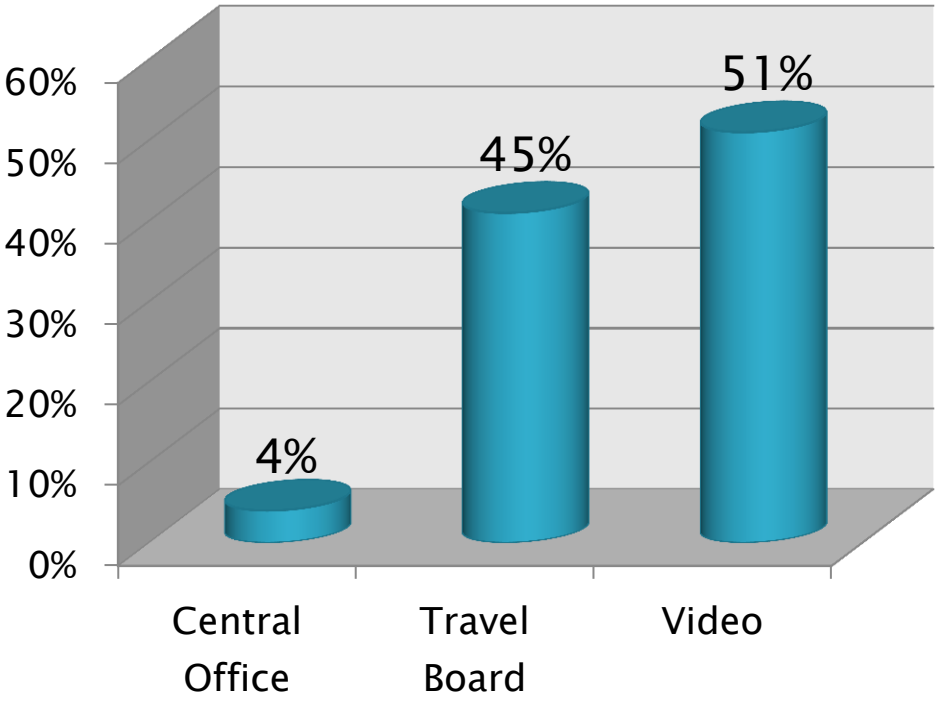
- Decision
  - *De novo* review of entire claims file (i.e., full review of all evidence)
  - Final decision of VA
  - Appealable to the CAVC
  - In FY2013, the Board had a **grant rate of 26.2%** and a **denial rate of 24.2%**

- Remand
  - Directs development by the local field office (most often to VBA's Appeals Management Center (AMC)) in Washington, DC
  - In FY2013, the Board had a **remand rate of 45.6%**

Board Hearings

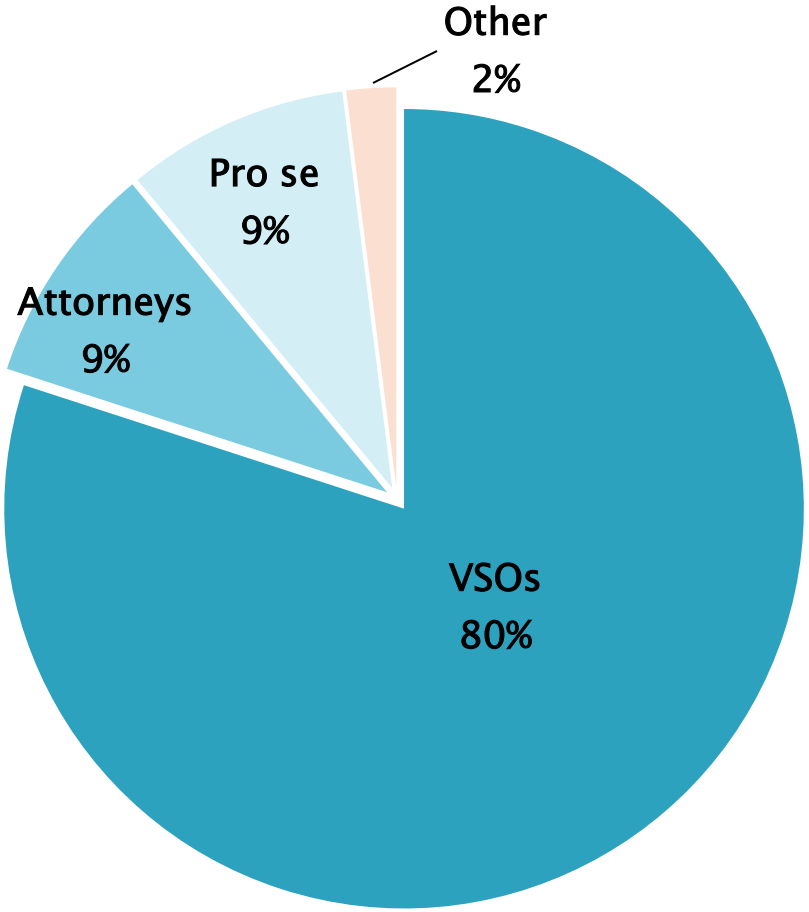
Approximately **25%** of appellants request an optional hearing.

- **Central Office**
  - VLJ & Veteran sit at Board Offices in Washington, DC
- **Travel Board**
  - VLJ & Veteran sit at local RO
- **Video Conference**
  - VLJ sits in DC; Veteran sits at local RO



Representation

- **Veterans Service Organizations (VSOs)**
  - Represent approximately **80%** of appellants before the Board
- **Attorneys**
  - Represent approximately **9%** of appellants before the Board
- **Pro se**
  - Approximately **9%** of appellants before the Board elect to represent themselves



Note: approximately 2% of appellants before the Board are represented by other types of agents.

Part III
Board Hearing Process: An Overview

Right to a Board Hearing

- A hearing on appeal will be granted if an appellant, or an appellant's representative acting on his or her behalf, expresses a desire to appear in person. 38 C.F.R. § 20.700(a).
- An appellant, or an appellant's representative, may request a hearing before the Board at a Department of Veterans Affairs field facility when submitting the substantive appeal (VA Form 9) or anytime thereafter, subject to the restrictions in Rule 1304 (38 C.F.R. § 20.1304). 38 C.F.R. § 20.703.

Nonadversarial Nature of Board Hearings 38 C.F.R. § 20.700(c)

- Hearings conducted by the Board are ex parte in nature and nonadversarial.
- Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses, *but cross-examination will not be permitted*.
- Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained.
- The presiding VLJ may set reasonable time limits for the presentation of argument and may exclude documentary evidence, testimony, and/or argument that is not relevant or material to the issue, or issues, being considered or which is unduly repetitious.

Witnesses at Board Hearings 38 C.F.R. § 20.710

- The testimony of witnesses, including appellants, will be heard.
- All testimony must be given under oath or affirmation.

Functions of the Presiding VLJ 38 C.F.R. § 20.700

- The presiding VLJ of a hearing panel is responsible for the conduct of the hearing, for the administration of the oath or affirmation, and for ruling on questions of procedure.
- The presiding VLJ will assure that the course of the hearing remains relevant to the issue, or issues, on appeal and that there is no cross-examination of the parties or witnesses.

General Sequence of Events at Hearing

- Pre-Hearing Conference
- Hearing
  - VLJ opening
  - Oath / affirmation
  - Representative's opening statement
  - Representative's questioning
  - VLJ questioning—38 C.F.R. § 3.103(c)(2)
  - Representative's closing statement
  - Adjournment of hearing

Purpose of the Pre-Hearing Conference 38 C.F.R. § 20.708

The purpose of the pre-hearing conference is to

- Clarify the issues to be considered at a hearing on appeal.
- Obtain rulings on the admissibility of evidence.
- Develop stipulations of fact.
- Establish the length of testimony and argument that will be permitted.
- Take any other steps that will make the hearing itself more efficient and productive.

Pre-Hearing Conference—Significant Case Law as to the "Issues" Before the Board

- Significant case law impacting the identification of the issues on appeal before the Board include:
  - *Rice v. Shinseki*, 22 Vet. App. 337 (2009)—TDIU
  - *Clemons v. Shinseki*, 23 Vet. App. 1 (2009)—Service connection generally
  - *Evans v. Shinseki*, 25 Vet. App. 7 (2011)—Impact of selecting box 9A, which indicates that the Veteran wants to appeal all of the issues listed in the Statement of the Case (SOC) and/or Supplemental SOC (SSOC).
  - *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011)—The withdrawal of a claim must be explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant.

Pre-Hearing Conference "Housekeeping Issues"

- Identify the appellant, as well as any of his/her witnesses.
- Go over the basic ground rules for the proceeding, i.e., the likely sequence of events at the hearing.
- Inquire as to whether any new evidence will be submitted.
- Inquire as to whether the appellant would like to request to hold the record open. *See* 38 C.F.R. § 20.709.
- Inquire as to whether there are adequate grounds for advancing the appeal on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (i.e., due to age, financial hardship, or serious illness).

Pre-Hearing Conference: Prior Hearings

- In *Arneson v. Shinseki*, 24 Vet. App. 379, 386 (2011), the CAVC held that a claimant has the right to have the opportunity to testify at a Board hearing before all the VLJs who will decide his appeal.

- This relates to whether the appellant testified at a prior hearing on some or all of the same issues that are currently before the Board.

Law Impacting the Conduct of Board Hearings

- 38 C.F.R. § 3.103(c)(2) imposes two distinct duties on the VLJ:

  (1) A duty to fully explain the issues on appeal.

  (2) A duty to suggest that a claimant submit evidence on an issue material to substantiating the claim.

- *Bryant v. Shinseki*, 23 Vet. App. 488 (2010)

- *Procopio v. Shinseki*, 26 Vet. App. 76 (2012)

38 C.F.R. § 3.103(c)(2)—Submission of Evidence

- In *Procopio*, the VLJ, who agreed to hold the record open for an additional medical nexus opinion, erred in failing to explain that a nexus opinion alone would be insufficient to substantiate the Veteran's claims without evidence of in-service exposure to herbicides.

38 C.F.R. § 3.103(c)(2)—Submission of Evidence

- VLJ's obligation extends to evidence not yet in existence.
- As the Court noted in *Bryant*, in *Sizemore v. Principi,* 18 Vet. App. 264 (2004), a Veteran seeking service connection for post-traumatic stress disorder described at a hearing his experiences in Vietnam. *Id.* at 274.
- The VLJ should have advised the Veteran as to the types of information that may help corroborate his claimed in-service stressors; the VLJ failed to notify him that he could submit corroboration in the form of "buddy statements."

38 C.F.R. § 3.103(c)(2)—Submission of Evidence

- In either a service connection claim or in a claim seeking a higher rating, the VLJ may also inquire as to whether there is any potential evidence that may not yet be in existence that may help substantiate the claim.
- Such evidence may include
  - Medical nexus evidence
  - Lay evidence of the in-service onset of a disability
  - Medical or lay evidence of the current severity of a disability

38 C.F.R. § 3.103(c)(2)

- The VLJ may also inquire as to additional theories of entitlement, including those not raised by the appellant.
- Specifically, in light of the Federal Circuit's decision in *Schroeder v. West*, 212 F. 3d 1265 (Fed. Cir. 2000) and its progeny, VA has an obligation to investigate all theories raised by the record or raised by a sympathetic reading of the claimant's filing.

Procurement of Additional Evidence Following a Hearing—38 C.F.R. § 20.709.

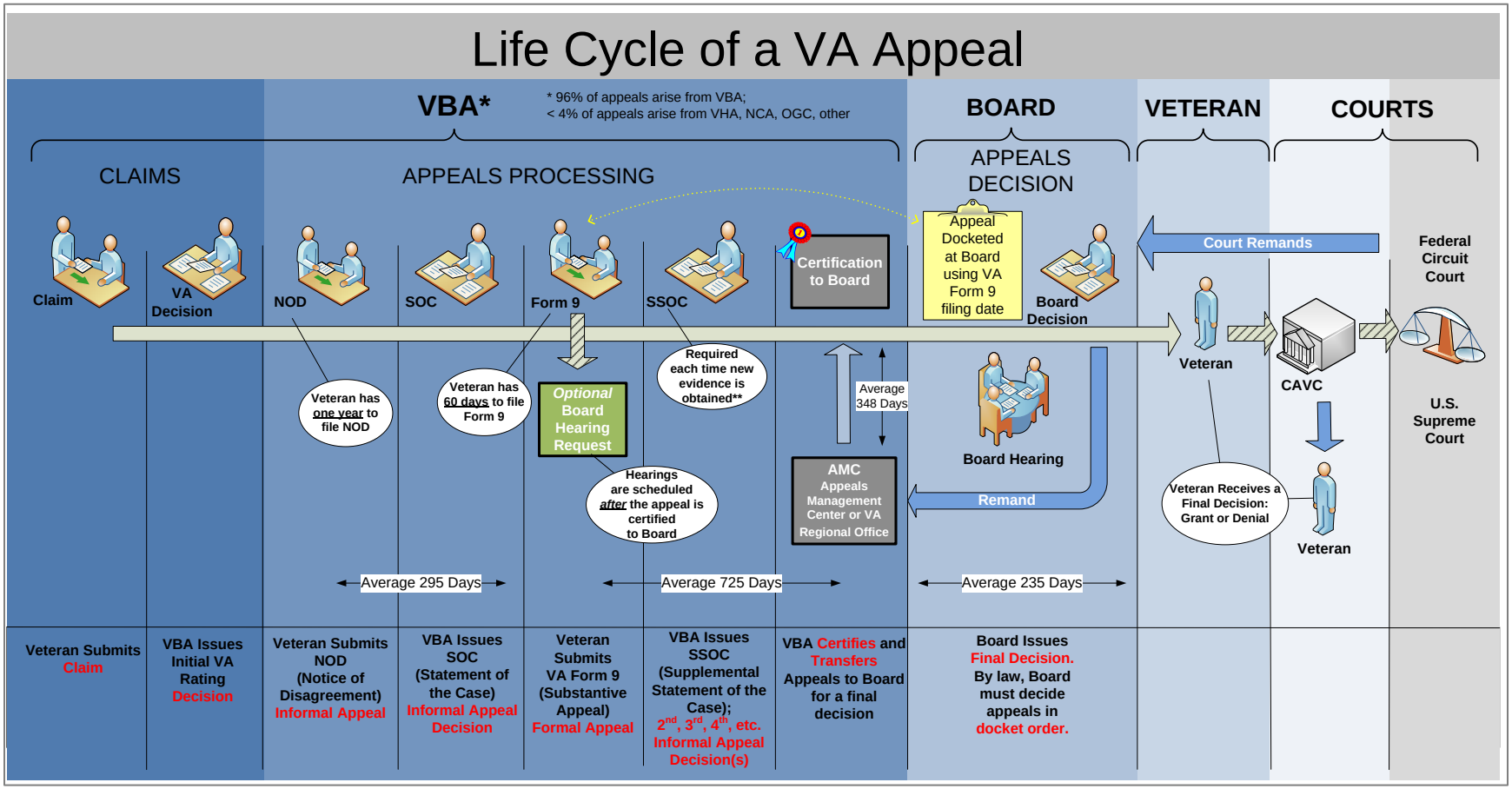
- If it appears during the course of a hearing that additional evidence would assist in the review of the questions at issue, the presiding VLJ may direct that the record be left open so that the appellant and his or her representative may obtain the desired evidence.

- The presiding VLJ will determine the period of time during which the record will stay open, considering the amount of time estimated by the appellant or representative as needed to obtain the evidence and other factors adduced during the hearing.
  - Ordinarily, the period will not exceed 60 days, and will be as short as possible in order that appellate consideration of the case not be unnecessarily delayed.

Conclusion of Hearing

- Following the representative's closing statement, the VLJ will ask the appellant whether he/she is satisfied with the conduct of their hearing.
- The VLJ will express appreciation for his/her appearance.
- The VLJ will then formally adjourn the hearing.

APPENDIX:
Life Cycle of a VA Appeal



Questions and Discussion

References

- United States Code (U.S.C.) Title 38
- Code of Federal Regulations (C.F.R.) Title 38