

Legal Research for Lay Advocates and Effective Written and Oral Advocacy Before VA

AGENDA

- * Initial Steps
- * Legal Research for Lay Advocates
- * Writing
 - * IRAC
 - * Writing Tips
- * Hearings





Initial Steps

New Claims

- * Determine which claims to file with VA
 - * Interview client
 - * Review recent medical records – private and VA
 - * Review STRs / SPRs

New Claims

- * Identify Vet's current disabilities: diagnoses and symptoms not associated w/ a diagnosis
 - * When did symptoms begin?
- * Identify details of service
 - * Did Vet serve during wartime?
 - * Did Vet have service that would qualify for special presumption?

New Claims

- * Identify in-service events, diseases, injuries that might be related to current disabilities
- * Ask about continuity of symptoms
- * Ask about finances (pension)
- * Inquire about benefits Vet may not be aware of – education, VR&E, health care, etc.

New Claims

- * You are the expert – ask questions and advise about VA claims that should be filed
- * Helpful tool for comp and pension claims
 - * **Free NVLSP VA Benefit Identifier App**

VA Benefit Identifier

* **Questionnaire/App:** Helps Vets and VSOs figure out what SC disability benefits or NSC pension benefits they might be entitled to.

* **3 WAYS to Access:**

NVLSP Website



Appeals / Reviews

- * Review c-file
- * Follow procedural history of claims
 - * Legacy – RD, NOD, SOC, VAF9, SSOCs
 - * AMA – RD, review request forms (Supplemental Claim, HLR request, NOD)

Appeals / Reviews

- * Ensure you identify all claims/issues that need to be addressed in written argument
- * Don't rely on VA's characterization of the issues



Legal Research for Lay Advocates

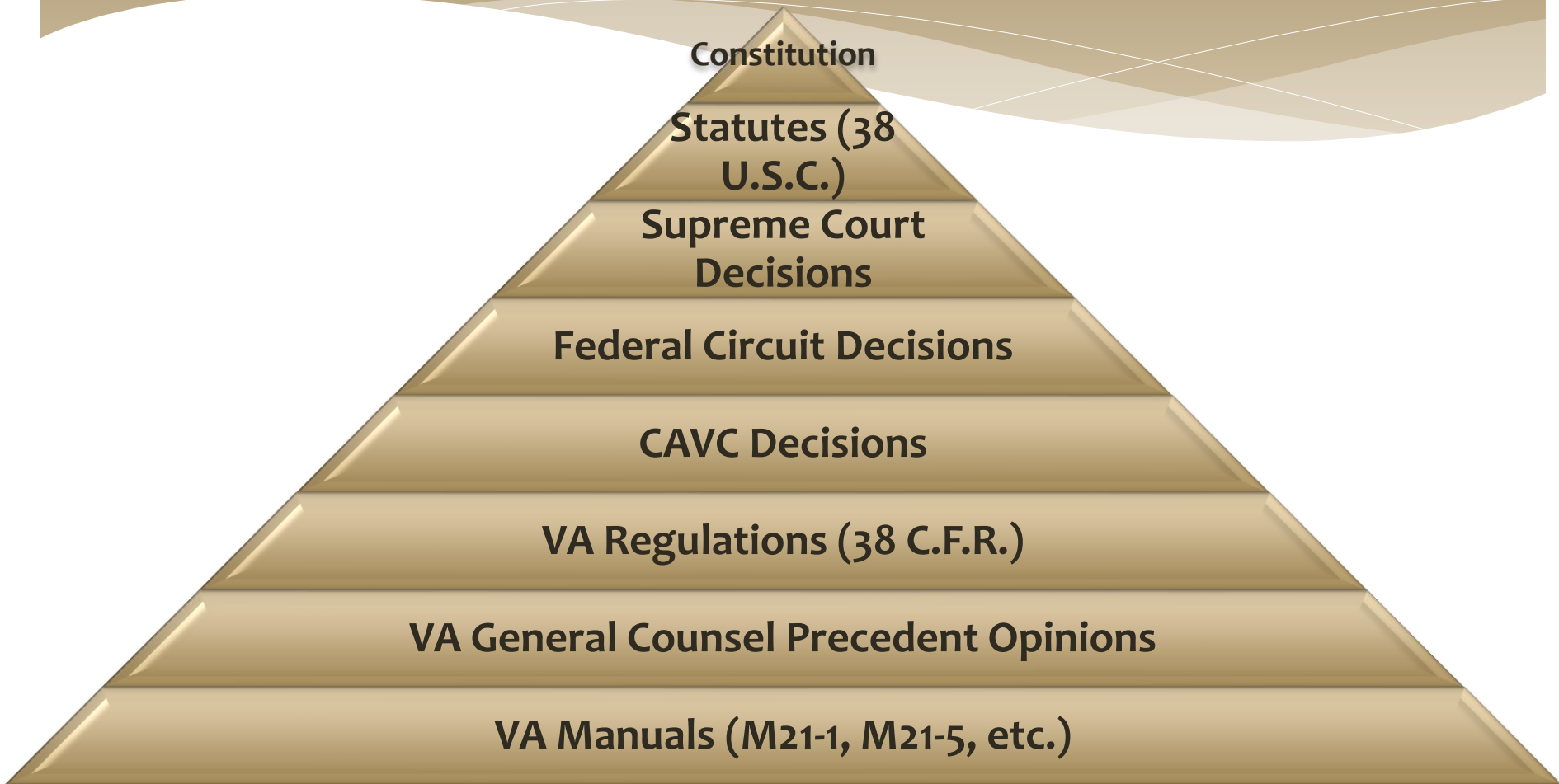


Legal Research

- * In researching a particular topic, an advocate may find pertinent authorities in many places. Where do you start?
- * The goal is to find the correct legal authority, and apply the law to the facts specific to your case



Sources / Order of Authority



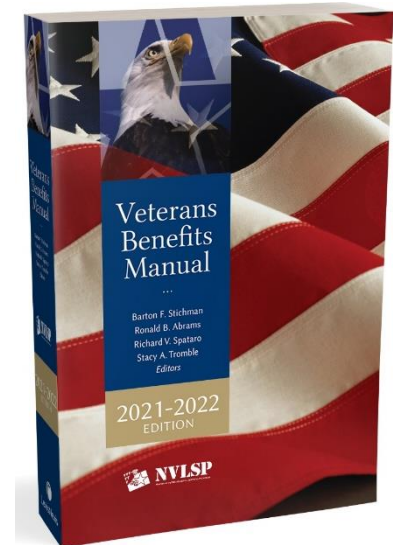
How do I research?

- * Start with the VBM (eBook or paper copy)
- * Read section on topic to get an understanding of the important rules
- * For a deeper understanding, or to explore details not discussed in VBM, read the controlling statutes, court decisions, VA regulations, etc. cited in the VBM

Veterans Benefits Manual (VBM)



- * Written by NVLSP attorneys w/ info about VA benefits & advocacy advice
- * 21 Chapters
- * Focus: SC disability comp, NSC pension, DIC, death pension
- * Current as of June 1 of each year – new edition released annually in Sept/Oct



VBM Organization

- * Divided into 7 parts:

- * Part I **Disability Benefits for Veterans**

- * Basic Eligibility

- * SC Compensation

- * 1151 Benefits

- * Rating of Disabilities, including increases and reductions

- * NSC Pension

- * Part II **VA Benefits for Family Members, including VA death benefits**

VBM Organization

* Parts of VBM (cont.)

- * Part III **Effective date rules & other special rules (limits on duplication of benefits, CRSC, CRDP, incarceration, overpayments, incompetency)**
- * Part IV **VA health care & other VA benefits (burial, education, VR&E, home loans, special allowances, life insurance)**
- * Part V **VA Claims & Appeals Process; Common VA errors and How to Correct them**

VBM Organization

* Parts of VBM (cont.)

- * Part VI **Advocacy on Behalf of VA Claimants (reviewing VA claims files; Effective advocacy before VA; How to obtain military records and info to substantiate a claim)**
- * Part VII **Military Compensation; Retirement Pay; CRSC & CRDP; Practice before DRBs and BCMR/BCNR**

VBM eBook Searchable Databases



- * CAVC decisions cited in the VBM
- * Federal Circuit decisions cited in the VBM
- * Supreme Court and other court decisions cited in the VBM
- * Relevant statutes from Title 38 of the U.S. Code (38 U.S.C.)
- * Title 38 of the Code of Federal Regulations (38 C.F.R.)

Statutes

- * Statutes – found in Title 38 of the U.S. Code (38 U.S.C.)
- * Laws, passed by Congress and signed by the President (or passed over Presidential veto), that bind VA

Statutes

* Where to find statutes:

- * VBM companion – *Federal Veterans Laws, Rules and Regulations* (paper or eBook)
- * Cornell Law School Legal Information Institute – www.law.cornell.edu/uscode/text/38
- * FindLaw – codes.findlaw.com/us/title-38-veterans-benefits/
- * Local law school library

Court Decisions

- * Court decisions involving veterans law are generally issued by the following Courts:
 - * **U.S. Court of Appeals for Veterans Claims**
 - * **U.S. Court of Appeals for the Federal Circuit**
 - * **U.S. Supreme Court**

Court Decisions

- * Precedential Court decisions are binding on VA
- * Non-precedential decisions (**Memorandum Decisions** or **Mem Decs**) are not binding, but may persuade VA adjudicators or point you to the precedential decisions that are controlling
- * Important court decisions are analyzed and explained in the VBM

Court Decisions

- * Where to find court decisions:
 - * VBM eBook contains decisions cited in the VBM
 - * Supreme Court – www.supremecourt.gov/
 - * Federal Circuit – www.ca9c.uscourts.gov/opinions-orders
 - * CAVC website has precedential CAVC decisions by year (www.uscourts.cavc.gov/opinions.php) and a searchable database (<http://search.uscourts.cavc.gov/>)



UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Chief Judge
Margaret Bartley
Clerk of the Court
Gregory O. Block

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Welcome

The United States Court of Appeals for Veterans Claims is a national court of record, established under Article I of the Constitution of the United States. The Court has exclusive jurisdiction to provide judicial review of final decisions of the Board of Veterans' Appeals, an entity within the Department of Veterans Affairs.

The Court provides veterans an impartial judicial forum for review of administrative decisions by the Board of Veterans' Appeals that are adverse to the veteran-appellant's claim of entitlement to benefits for service-connected disabilities, survivor benefits and other benefits such as education payments and waiver of indebtedness. In furtherance of its mission, the Court also seeks to help ensure that all veterans have access to the Court and to promote public trust and confidence in the Court.

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Chief Judge
Robert N. Davis
Clerk of the Court
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Announcements

In the News

Learn more...

Misc Order 11-19

The Honorable
Frank Q. Nebeker
Courtroom

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Search Decisions

Regulations

- * Title 38 of the U.S. Code of Federal Regulations (38 C.F.R.)
- * VA Regulations are issued by Secretary of Veterans Affairs
- * Includes the VA Schedule for Rating Disabilities (Part 4)
- * Are binding on VA, but must be consistent with statutes
- * Are initially published in Federal Register (as proposed or interim final rules, and then as final rules)

Regulations



- * Where to find VA regs:

- * VBM companion *Federal Veterans Laws, Rules and Regulations* (paper or eBook)

- * Electronic Code of Federal Regulations – www.ecfr.gov

- * GovInfo – www.govinfo.gov/help/cfr

- * Cornell Law School Legal Information Institute – www.law.cornell.edu/cfr/text/38

- * VA's website – www.knowva.ebenefits.va.gov

Regulations

- * Federal Register is found at www.federalregister.gov
- * Older versions can be found at VA or law school libraries



VA General Counsel Precedent Opinions



- * Address specific legal questions (usually posed by BVA Chairman)
- * Binding on RO and BVA, but not CAVC
- * Most recent one issued in 12/2019
- * Example:
 - * **VA Gen. Coun. Prec. Op. 23-97 – Multiple Ratings for Knee Disabilities**
- * www.va.gov/ogc/precedentopinions.asp

I AM A...

Select One

- ▶ For Veterans
- ▶ For Family Members & Spouses
- ▶ For Employees
- ▶ For Business
- ▶ Forms & Publications
- ▶ Jobs
- Volunteer or Donate
- Public & Intergovernmental Affairs



VA » Office of General Counsel » Precedent Opinions for 1989 to 2019

Office of General Counsel

Precedent Opinions for 1989 to 2019

Please use the following links to retrieve a list of opinions from that year:

	2019	2018	2017	2015
2014	2012	2011	2010	2009
2008	2007	2006	2005	2004
2003	2002	2001	2000	1999
1998	1997	1996	1995	1994
1993	1992	1991	1990	1989
1987				

RESOURCES

- [Administrative Investigations](#)
- [Accreditation](#)
- [Chief Counsels in the Districts](#)
- [Claims Under the FTCA](#)
- [Gifts to VA](#)
- [HIPAA Information](#)
- [Legal Help for Veterans](#)
- [Precedent Opinions](#)
- [Privacy Act System of Records](#)
- [OGC Opportunities](#)
- [VA Medical Care Recovery](#)
- [38 U.S.C. § 3683 Waiver Requests](#)

VA Manuals

- * VA manuals are available online
 - * www.knowva.ebenefits.va.gov
 - * www.benefits.va.gov/warms
- * The VA Adjudication Procedures Manual M21-1 is probably most relevant to the work of a VSO
 - * **Binding on RO personnel, but not BVA**

VA Manuals

- * **M21-5, Appeals and Reviews (Manual M21-5)**
 - * **General guide for processing legacy appeals for compensation and HLRs under AMA**
 - * **Purpose to summarize/restate in plain language the applicable law, clarify ambiguities, and provide a picture of the adjudication process that is reasonably complete and easy to understand and apply**

 Search

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- Benefits
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Topics

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- Compensation and Pension >
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- Education Service >
- Fiduciary Program >
- Home & Auto >
- Life Insurance >
- Stakeholder Enterprise Portal >
- Veteran Readiness and Employment >

Announcements

- Claim information is not available from this web site**
- Article provides an overview of the features available in this KM solution and basic system navigation guidance.



Most Popular

- M21-1, Part IV, Subpart i, Chapter 2, Section A - Examination Requests Overview**
This section contains information about preparing and submitting requests for VA and/or contract examinations and medical opinions.
- M21-1, Part VIII, Subpart iv, Chapter 1, Section A - General Information and Development for Posttraumatic Stress Disorder (PTSD) Claims**
This section contains guidance on developing claims for service connection for posttraumatic stress disorder (PTSD).
- Appendix B. End Product (EP) Codes**
This section provides general principles for the use of End Products in work measurement including a general definition of date of claim for claims establishment purposes.
- M21-1, Part III, Subpart ii, Chapter 2, Section B - Procedures for Obtaining Service Treatment Records (STRs)**
This chapter provides information on the procedures for requesting service treatment records.



U.S. Department of Veterans Affairs

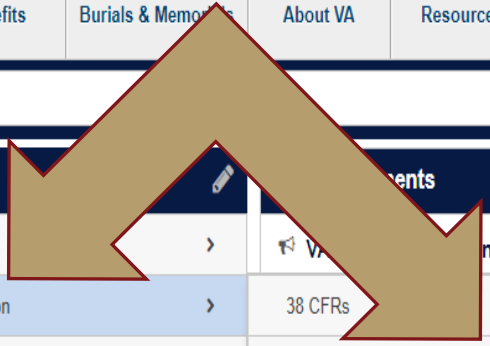

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38 CFRs

M21-1 Adjudication Procedures ...

M21-4 Manual

M21-5 Appeals and Reviews

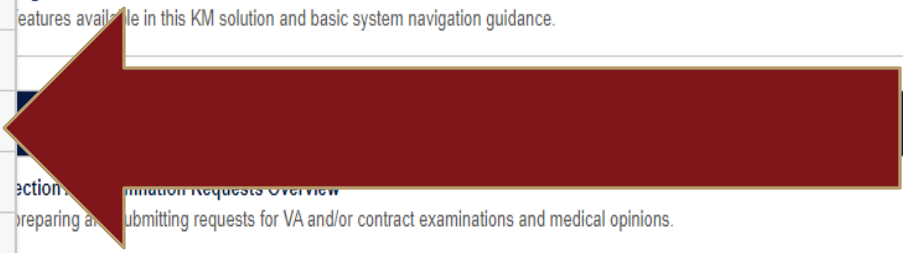
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Knowledge Base
Features available in this KM solution and basic system navigation guidance.

Announcement Requests Overview
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BVA Decisions

- * BVA decisions (going back to 1992) are available online on the BVA website
 - * <https://search.usa.gov/search?affiliate=bvadecisions>
- * BVA decisions are **not precedential**, but can be used for persuasive authority to show how BVA has interpreted a particular reg or handled a case
- * If citing a BVA decision, list docket or citation number and attach it to your submission so it becomes part of the record

Example of Legal Research

- * A Vet has asked that you help him to determine whether to seek review of the RO's denial of an increased rating for hepatitis B



Example of Legal Research

- * Using the search tool for the VBM eBook (or index or table of contents), you find Section 5.2.5, related to the evaluation of hepatitis
- * The section explains the rating criteria, common VA errors when rating hepatitis, and citation to the regulation and diagnostic code, plus relevant Manual M21-1 provisions

Example of Legal Research

- * Go to the C.F.R. to read the specific rating criteria for the diagnostic code to assess:
 1. The criteria for an increased rating; and
 2. Whether the evidence of record (or evidence the Vet can obtain) supports an increased rating
- * Review the results of recent exams
- * Review Vet's lay statement about his symptoms

Example of Legal Research

- * Advocates may also want to check for recent court decisions addressing the proper interpretation of the rating criteria for hepatitis





Writing

When to Present Written Argument

- * With initial claim or before rating decision
- * With supplemental claim or before rating decision
- * With HLR request or before HLR decision
- * To BVA with appeal or before BVA decision
 - * **Any BVA lane in AMA**
 - * **Legacy appeal**

IRAC Strategy for Writing

- * Issue
- * Rule
- * Analysis (or Application)
- * Conclusion



ISSUE

- * State the issue(s) (ex. “Entitlement to service connection for tinnitus”)
- * Also include a brief introduction, listing:
 - * Years of service
 - * Significant awards relevant to the claim or that reflect favorably on Vet (ex. Purple Heart, CIB, Bronze Star)



- * Provide relevant language from statutes, court decisions, regulations, or other authority and cite the authority
- * This is one area of a written submission where using boilerplate is okay



- * Apply the facts of the case to the law
 - * Discuss the evidence showing that all 3 elements of SC have been established, why the Vet meets the criteria for a higher disability rating, or why additional development required under VA's duty to assist
 - * Make sure you address each element of a claim, to include pointing out favorable findings made in prior adjudications

ANALYSIS

- * Questions to consider in Analysis section
 - * What elements have been proven/are undebatable?
 - * Is there an element with only negative evidence?
 - * Is there an absence of evidence on an element?
 - * Is there an element where there is both positive and negative evidence?



ANALYSIS

- * **If only negative evidence on element of claim:**
 - * **Look for flaws in evidence and explain why it shouldn't be relied on**
 - * **Make DTA argument**
 - * **Work with claimant to develop or obtain favorable evidence**
- * **If absence of evidence on element of claim:**
 - * **Make DTA argument**
 - * **Work with claimant to develop or obtain favorable evidence**

ANALYSIS

- * If there is both positive and negative evidence on an element of the claim:
 - * Explain why favorable evidence is more probative (build up)
 - * Explain why unfavorable evidence is less probative (knock down)
 - * Argue that, at the very least, the evidence is “nearly equal” – the “benefit of the doubt” rule

CONCLUSION



- * Summarize what it is you are asking the RO or BVA to do (ex. grant service connection, grant increased rating, provide a VA exam, etc.)
- * Can be as short as 1-2 sentences



Writing Tips

Writing Tips

- * If possible, give multiple arguments
 - * Consider different theories of entitlement
 - * Direct, secondary, presumptive, etc.
 - * If there are multiple “good” outcomes, advocate for each outcome in order of what is most preferable
 - * For example, argue that Vet is entitled to a 100% rating, but at the very least, VA should grant a 70% rating; or argue that Vet is entitled to SC, but at the very least, remand for further development is needed)

Writing Tips

- * Remember who your audience is (RO raters, BVA attorneys, Veterans Law Judges)
- * Make their job easy
- * When you reference important evidence, be specific about where they can find it (“On page 12 of the November 12, 2022 VA exam, the examiner stated . . .”)

Writing Tips

- * Avoid boilerplate (except when citing statutes or regs)
- * A written submission that is mostly boilerplate is going to make the person reading it think either (1) you don't know what you are talking about; or (2) you don't think the claimant you are representing has a strong case
- * When you do use boilerplate language, make sure it is relevant and correct

Writing Tips

- * If you cite to a medical treatise/article or other authority (ex: favorable BVA decision in a similar case), attach a copy to your written submission
- * Do not mention statutes, regs, court decisions, or facts that are not relevant to the issues in your brief
- * Proofread, check for correct spelling and grammar, and consider reading the statement out loud to see if it flows
- * **Poor writing reduces persuasiveness**

Writing Tips

* BE CONCISE

- * RO raters and BVA attorneys do not want to read a 10-page brief (especially if the same argument could have been made in 10 sentences)

Writing Tips

- * If claim extremely weak / has no merit, and no VA development or adjudication errors, consider advising claimant to drop it
- * If non-frivolous, submit a “punt” brief / argument:
 - * Identify claim and note Vet’s contentions
 - * Mention Vet’s honorable service and awards
 - * Ask VA to consider evidence of record, give Vet the benefit of the doubt, and grant claim



HEARINGS

Best Practices

General Info

- * VA hearings available at following stages:
 - * Initial claim before RO decision
 - * Supplemental claim (AMA)
 - * BVA
- * HLR informal conferences are NOT “hearings”

General Info

* Types of hearings:

* In-person

- * RO hearings

- * BVA Central Office



* Videoconference

- * Veteran and VSO are at the RO – VLJ is in DC

* Virtual Telehearing

Prepare Ahead of Time!

- * Review relevant VBM sections
- * Read relevant statutes, regs, court decisions, VA manual provisions
- * Know the elements of the claim, so you can obtain effective testimony from the claimant
- * Be familiar with the facts/evidence
 - * Review the file
 - * Speak with the claimant



Prepare Ahead of Time!

- * **Talk to claimant:**
 - * **Explain how the hearing will work**
 - * **Explain it is non-adversarial**
 - * **Go over what you are going to ask**
 - * **Not necessarily specific questions, but what to expect generally and what is important**
 - * **Explain that this is NOT a time to discuss other issues— just those on appeal**
 - * **Ask if they have additional evidence to submit**

Preparing Ahead of Time

- * Outline your hearing plan
 - * Write brief opening and closing statement (more on this later)
 - * Write out questions you plan to ask, or list issues you want to address, based on what you learned from Vet during prep session
 - * Send to Vet
 - * Plug in the relevant pieces of evidence you identified in the record
 - * After Vet answers a question, you can support credibility by pointing out the corroborating evidence of record

Virtual Telehearing Preparation



- * Have claimant do a test run with BVA ahead of time
- * The day before the hearing make sure claimant:
 - * **Has the hearing link and possibly resend it**
 - * **Knows to log on 15 minutes before the hearing**
- * Have claimant's phone number handy in case you need to remind Vet to log in or Vet has technical difficulties

At The Hearing

- * Dress professionally (business attire), even for video/virtual hearing
- * Shows you appreciate the importance of the hearing and respect the hearing officer / VLJ
- * Will lend credence / weight to your words
- * Instills confidence in self
- * Encourage client to dress professionally

At The Hearing

* Opening Statement

- * **State the issues – entitlement to SC / increased rating for what disabilities; other VA benefit**
- * **Briefly explain why the benefit is warranted**
 - * Discuss how elements of claim are met
 - * Note prior favorable findings
 - * Note relevant law
- * **If evidence doesn't support award of benefits, explain why additional development required / DTA not satisfied**

At The Hearing

- * Ask questions to elicit testimony in support of claim
 - * In-service event, incident, symptoms
 - * Continuity of symptoms
 - * Current symptoms, functional loss, effect on ability to work
- * Don't waste time on questions about issues for which VA already made favorable findings
- * Ask leading questions
 - * Provide the relevant information in your question and have the claimant provide a "yes" or "no" response

At The Hearing

- * Have a concise summary for the hearing officer/VLJ
- * Submit supporting documents or statements not already of record
- * Ask to keep the record open (30 or 60 days) if you need time to submit additional evidence
- * **For AMA cases at BVA, Vet will automatically have 90 days after date of hearing to submit evidence**

At The Hearing

- * Read the following statement in your closing:
 - * “Section 3.103(d)(2) of Title 38 of the Code of Federal Regulations provides that: ‘It is the responsibility of the VA employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant’s position.’ Therefore, we request that if the evidence of record is not sufficient to grant the claim(s), you advise us if there is additional evidence the claimant should submit that would support his/her position.”

At The Hearing

- * Remember – you control the hearing
- * Preparation is key – don't ask a question if you don't know the answer
- * A hearing is **not** the place for the Vet to vent
- * Be careful of questions the hearing officer may ask. You may need to ask follow-up questions of Vet if Vet provides an answer harmful to his/her case.

At The Hearing

- * If the hearing officer begins to cross-examine Vet, you may need to remind that person of the non-adversarial nature of VA proceedings
- * While you want to come to a hearing well prepared, you also have to be flexible and able to adapt if the hearing does not go as planned (ex: hearing officer interrupts to ask questions you were not anticipating or witness gets nervous and forgets to provide important info)

At The Hearing

- * Try to anticipate any questions the hearing officer may ask the witness (ex. Why did you wait 30 years to file a claim?)
 - * Make sure Vet is prepared for these questions
 - * If Vet has a good answer, then beat hearing officer to the punch and ask the question first

At The Hearing

- * If it would support the claim, have other witnesses provide testimony (spouse, children, friends, etc.)
- * If possible, talk to your witnesses ahead of time and prepare them for the types of questions you will ask
- * Hearings do not have to be long to be effective

When Not to Request a Hearing



- * If you are concerned about your witness not coming off as credible (ex: in prior conversations, your client has contradicted himself) or being belligerent
- * If the issue at hand is purely a matter of law; no clarification of the facts is needed
- * But, since the claimant has the right to a hearing, you must discuss it with him/her prior to withdrawing a hearing request

Higher Level Review Informal Conference



- * Review the claims file and be able to precisely say what is wrong with the rating decision
 - * Prepare notes / outline for all arguments you want to make
 - * Remember, you can only present argument, not any new evidence
 - * Purpose is to ID errors of fact or law in prior decision
- * Be prepared for the call at least 30 minutes prior to scheduled time

Questions?

