

# VA CLAIMS AND APPEALS MODERNIZATION



# Agenda

- Background
- Applicability of AMA
- Types of claims under the AMA
- Changes to Rating Decisions
- AMA review options – HLR, Supp. Claim, BVA
- Switching review options
- Increased rating claims
- Simultaneously contested claims

# Background

- 8/2017: The Veterans Appeals Improvement and Modernization Act of 2017 (AMA) became law
- 8/10/2018: VA published proposed rule
- 1/18/2019: VA published final rule
  - VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019)
- 2/19/2019: AMA went into effect
  - NOT 2/14/2019 as VA expected

# Key Features of New Appeals Process

- Rating decisions more detailed
- Claimants have more options to challenge rating decision
- No SOC, SSOC, VAF 9, VAF 8
- Favorable effective date rules
- Changes in applicability of duty to assist

# Applicability

- Claims for which notice of decision provided by AOJ on or after 2/19/2019
  - “initial” decision on claim for a particular benefit
  - decision on reopened claim
  - decision denying CUE claim
    - Only HLR or BVA review of CUE denials permitted
- Claims in RAMP (opted in by 2/15/2019)

# Applicability

- “Legacy” opt-ins
  - W/in 60 days after SOC or SSOC issued on or after 2/19/2019
    - Use VA forms for new review/appeal options
      - Check “Opt In from SOC/SSOC”
  - W/in 1 yr of RD issued before 2/19/2019
    - Only supplemental claim option

# Applicability

- Other claims remain in “legacy” appeal system
  - ▣ Notice of decision issued prior to 2/19/2019
  - ▣ Claims currently in “legacy” appeals system
- VA will be running two different appeals systems until legacy claims are exhausted

# Question?

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Can claimant with 2/15/19  
SOC opt in to AMA?



# Answer

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**NO**

# Type of Claims Under AMA

- VA claims that can be filed as of 2/19/2019:
  - Initial claim
    - Benefit not previously requested
    - Increased Rating
  - Supplemental claim
    - For benefit previously denied (replaces “reopened” claim)
  - CUE claim

# Regional Office Hearings

- Claimants entitled to RO hearing on any issue involved in a claim only **before** VA issues notice of a decision on:
  - initial claim
  - supplemental claim
- Submit request for RO hearing in writing if claimant wants to present testimony/evidence to VA in person

# Changes to Rating Decisions

- Decisions more detailed. Notice Letter + RD must include:
  - Issues adjudicated
  - Summary of evidence considered
  - Summary of applicable laws and regs
  - Favorable findings
  - Claim elements not met
  - Criteria to grant SC or next higher rating
  - How to obtain / access evidence considered
  - Review options

# Favorable Findings

- If VA makes a finding favorable to claimant, it is binding on all later adjudications unless there is “clear and unmistakable evidence” to rebut it
  
- “Finding” is a conclusion by a VA adjudicator concerning the issue under review on:
  - A question of fact
  
  - An application of law to facts

# 3 Options to Challenge RO Decision

1. Higher-level review by RO/AOJ
2. Supplemental claim w/ new and “relevant” evidence
3. BVA appeal by filing NOD

# 3 Options to Challenge RO Decision

- Claimant may choose different review “lane” for different “issues”
  - Issue = adjudication of a specific entitlement
    - Ex: SC for knee disability and SC for PTSD are different “issues”
    - Ex: Effective date and disability rating for SC knee disability are part of same “issue”

# 3 Options to Challenge RO Decision

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Main consideration in choosing type of review:

Which option gives the claimant the best chance of success at the earliest date?



# Option 1: Higher-Level Review

- De novo review by “experienced” AOJ adjudicator who did not participate in prior decision
  
- Can grant benefit based on:
  - ▣ Error in prior decision
  - ▣ Difference of opinion



# Option 1: Higher-Level Review

- ❑ Filing deadline: **1 year** from notice of AOJ decision
- ❑ VA Form 20-0996, Decision Review Request: Higher-Level Review
  - ❑ If form incomplete:
    - ❑ VA must notify claimant and rep of needed info
    - ❑ If complete form rcvd w/in 60 days of notification or before expiration of 1 year filing period, VA will consider it timely

# Option 1: Higher-Level Review

- Conducted at Seattle or St. Pete DROC
  - May also occur at RO that handles claims requiring special processing
  - Different RO than made prior decision, but can request same RO

# Option 1: Higher-Level Review

- HLR cannot consider new evidence
  - ▣ Record limited to evidence of record as of date AOJ issued decision under review
- HLR can consider written argument, but should be on VAF 20-0996
- Unclear how VA will treat written argument submitted separately

# Option 1: Higher-Level Review

- Informal conference
  - Can request on VAF 20-0996
  - VA will contact rep (or claimant) 2x by telephone to try to schedule
  - Will be scheduled w/in 7 bus. days of contact
  - Conducted by telephone (usually)

# Option 1: Higher-Level Review

- Informal conference is not a “hearing”!
  - Cannot supplement record with testimony / evidence
  - Purpose is to ID errors of fact or law in prior decision

# Option 1: Higher-Level Review

- Duty to assist does not apply, but if HLR identifies DTA error committed by AOJ:
  - If max benefit can be granted, HLR ignores
  - If max benefit cannot be granted:
    - HLR returns claim to AOJ for expedited correction and readjudication
      - Evidence received after prior decision can be considered
    - Claim will not return to HLR unless claimant submits new request for HLR review of new decision

# Option 1: Higher-Level Review

- Effective date if claim granted: date of original claim (usually)
- If HLR continues denial, to preserve date of original claim as effective date for potential benefits, claimant has **1 year** to:
  - ▣ File supplemental claim, or
  - ▣ Appeal to BVA



# Option 1: Higher-Level Review

## □ Pros:

- More experienced adjudicator
- Fast decision – 125 days on avg (VA estimate)

## □ Cons

- Can't submit new evidence



# Option 1: Higher-Level Review

- When to choose HLR:
  - Evidence:
    - No new evidence needed, or
    - DTA error
  - Rating decision contained error of fact or law
  - Evidence nearly balanced

# Option 2: Supplemental Claim

- Supplemental claims can be filed to:
  - ▣ Continuously pursue a claim that was **denied in the past year** and preserve the effective date of the claim
  - ▣ Attempt to obtain benefits that were previously denied in a VA **decision that has become final**
    - Applies to past denials of claims for the same or a similar benefit on the same or a similar basis
    - Starts new claim stream
    - Replaces reopened claims

## Option 2: Supplemental Claim

- ❑ Filing deadline: None, but to preserve effective date of claim, must file w/in **1 year** of previous denial
- ❑ VA Form 20-0995, Decision Review Request: Supplemental Claim
- ❑ Cannot file for CUE denial

# Option 2: Supplemental Claim

- ITFs **DO NOT APPLY** to supplemental claims!
  - If you filed an ITF in the past year, intending to later file a complete supplemental/reopened claim for a benefit previously denied, file a supplemental claim for the benefit ASAP!
  - This bad rule applies even if the ITF was filed before the AMA went into effect

# Option 2: Supplemental Claim

- Supplemental claim will be considered complete and filed if claimant:
  - ▣ Submits potentially new evidence, OR
  - ▣ IDs new evidence for VA to obtain
    - Triggers DTA in the gathering of evidence

# Option 2: Supplemental Claim

- If claim incomplete:
  - VA must notify claimant and rep of needed info
  - If complete form rcvd w/in 60 days, VA will consider it filed as of date of receipt of incomplete claim

## Option 2: Supplemental Claim

- AOJ will readjudicate issue if there is “new and relevant” evidence
  - Relevant evidence:
    - evidence that tends to prove or disprove a matter in issue
    - Includes evidence that raises new theory of entitlement
- NOT higher threshold than “new and material”
- After finding N&R evidence, VA consider both new and old evidence during readjudication



# Option 2: Supplemental Claim

- Some things VA considers “new and relevant” evidence:
  - ▣ Mere contention of a new theory of entitlement not previously addressed
  - ▣ Evidence affirming prior favorable findings
    - Does not need to prove a previously unsubstantiated matter
  - ▣ Statement that Vet will attend VA exam that was previously missed

## Option 2: Supplemental Claim

- When determining if there is “new and relevant” evidence, VA will consider:
  - Evidence submitted by claimant
  - VA treatment records reasonably identified by claimant
  - Evidence rcvd after notice of prior decision while record was closed
  - Evidence constructively part of prior record
  - Other evidence identified by claimant

## Option 2: Supplemental Claim

- VA will consider new and relevant evidence received:
  - with application, and
  - any time prior to issuance of decision on the supplemental claim

## Option 2: Supplemental Claim

- If new and relevant evidence not presented or obtained, AOJ will issue decision finding there was insufficient evidence to readjudicate claim

# Option 2: Supplemental Claim

- Duty to assist applies:
  - After receipt of substantially complete claim, DTA in gathering evidence (documents)
  - After finding of new and relevant evidence, full DTA (including medical exam/opinion)

# Option 2: Supplemental Claim

- Effective date if granted:
  - ▣ If filed w/in 1 year of denial: date denied claim was filed (usually)
  - ▣ If filed more than 1 year after previous denial: date of supplemental claim

## Option 2: Supplemental Claim

- If supplemental claim denied, to preserve date of claim as effective date for potential benefits, claimant has **1 year** to:
  - Request HLR,
  - File another supplemental claim, or
  - Appeal to BVA

# Option 2: Supplemental Claim

## □ Pros:

- Can submit new evidence
- DTA applies
- Fast decision – 125 days on avg (VA estimate)



## □ Cons:

- Must submit new and relevant evidence
- Lowest level VA adjudicator



# Option 2: Supplemental Claim

- When to choose supplemental claim:
  - ▣ Additional evidence needed to grant claim
    - Vet can get on own
    - Vet can trigger duty to assist

# Option 3: Appeal to BVA

□ BVA conducts de novo review

□ 3 options / “lanes” at BVA:



1. **HEARING:** BVA hearing (can also submit new evidence)
2. **EVIDENCE:** Submit new evidence w/out BVA hearing
3. **DIRECT:** No hearing and no new evidence

# Option 3: Appeal to BVA

- VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement)
  - Must list the “specific determination” with which the claimant disagrees (construed liberally)
    - Issue
    - Date of decision
  - Must elect lane for review

# Option 3: Appeal to BVA

- VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement) (cont.)
  - ▣ Can choose different lanes for different issues
    - Submit different NODs, or
    - Attach page to NOD with explanation

## Option 3: Appeal to BVA

- Filing deadline: **1 year** from date of RO or HLR decision
  
- Must file with BVA
  - Fax: 844-678-8979
  
  - Mail: Board of Veterans' Appeals  
PO Box 27063  
Washington, DC 20038

## Option 3: Appeal to BVA

- BVA will handle unclear or deficient NODs
  - Will notify claimant and request clarification
  - Claimant must respond w/in 1 year of decision on appeal or 60 days of request
    - If not, form will NOT be considered an NOD
    - If clarification provided, NOD will be considered filed on date of clarification, which will also be docket date (and start 90 day clock for submitting evidence if “evidence” lane chosen)

## Option 3: Appeal to BVA

- No limitation on when written **argument** can be submitted to BVA in any lane
  - ▣ Any time between NOD and BVA decision
- **Evidence** submission rules differ in each lane
- **Decision** times differ in each lane

# Option 3A: Direct Lane

- BVA will base decision on only evidence of record at time of AOJ decision
  - ▣ No evidence rcvd by VA after date of prior decision will be considered



# Option 3A: Direct Lane

## □ Pros:

- Most experienced VA adjudicator
- Relatively quick decision – 1 year goal
- Quickest route to CAVC

## □ Cons:

- Can't submit evidence
- Can't have hearing



# Option 3A: Direct Lane

- When to choose
  - More likely to get favorable decision than at RO
    - Complicated facts/law
  - RO erred
  - Evidence of record supports award
  - Want quick BVA decision

# Option 3B: Evidence Lane

- Claimants can submit evidence:
  - With NOD; and/or
  - W/in 90 days following BVA's receipt of NOD
- BVA will also consider evidence of record at time of decision on appeal
- BVA will NOT consider evidence rcvd at other times

# Option 3B: Evidence Lane

## □ Pros:

- Most experienced VA adjudicator
- Can submit new evidence
- Second quickest route to CAVC



## □ Cons:

- Cannot have hearing
- Only 90 days from NOD to submit new evidence
- 2<sup>nd</sup> slowest AMA option and lower priority than legacy appeals

# Option 3B: Evidence Lane

- When to choose:
  - More likely to get favorable decision than at RO
    - Complicated facts/law
  - Additional evidence will increase chance of success
  - Can get evidence w/in 90 days of filing NOD
  - Timely decision not important to claimant
    - Unless appellant qualifies for AOD

# Option 3C: Hearing Lane

- Hearings conducted
  1. At BVA's office in D.C., or
  2. By videoconference
- BVA makes initial determination of type of hearing, but shall grant request for other type
- No Travel Board hearings
  - Exception: legacy appeals

# Option 3C: Hearing Lane

- More info on hearings:
  - At least 30 days notice of hearing date
  - Can reschedule up to 2 weeks prior with good cause
  - Generally limited to 30 minutes
  - VLJ conducting hearing not likely same VLJ that will make decision

# Option 3C: Hearing Lane

- Claimants can submit evidence:
  - At hearing
  - W/in 90 days following scheduled hearing (even if claimant does not appear)
  - W/in 90 days of request to withdraw hearing
- BVA will also consider evidence of record at time of decision on appeal
- BVA will NOT consider evidence rcvd at other times



# Option 3C: Hearing Lane

## □ Pros:

- Most experienced VA adjudicator
- Long time to develop needed evidence
- Opportunity to submit testimony

## □ Cons:

- Longest wait for decision (years) and long wait for hearing

# Option 3C: Hearing Lane

- When to choose:
  - ▣ More likely to get favorable decision than at RO
    - Complicated facts/law
  - ▣ Opportunity to testify before VLJ important to claimant
    - Compelling / credible testimony could sway decision
  - ▣ Can't get needed evidence w/in 90 days of filing NOD
  - ▣ Timely decision not important to claimant
    - Unless appellant qualifies for AOD

## Option 3: Appeal to BVA

- Claimants can switch dockets / review type:
  - Must file new NOD w/in the later of:
    - 1 year after decision being appealed, or
    - 60 days after NOD received by BVA
  - Claimant will keep original docket date
  - Request will be denied if appellant already submitted evidence or testimony

# Option 3: Appeal to BVA

- Duty to Assist does not apply
  - But for DTA errors committed prior to issuance of decision on review:
    - ▣ If max benefit can be granted:
      - BVA ignores
    - ▣ If max benefit cannot be granted:
      - BVA remands for AOJ for expedited correction of DTA errors and readjudication
      - RO must consider all evidence of record, including evidence rcvd outside evidence submission window

## Option 3: Appeal to BVA

- BVA may also remand for correction of any other error by AOJ in satisfying a regulatory or statutory duty
- Only required if reasonable possibility correction would aid in substantiating claim
- BVA can remand for advisory medical opinion/IMO

## Option 3: Appeal to BVA

- If remanded claim remains denied in new rating decision, it does not automatically return to BVA
- To continue to pursue claim, claimant must file new NOD, HLR request, or supplemental claim
- If NOD, new BVA docket # assigned

# Option 3: Appeal to BVA

- BVA decision:
  - Must provide general statement as to whether any evidence was received at a time not permitted
  - Must inform claimant that such evidence was not considered by BVA and explain options to have that evidence reviewed

## Option 3: Appeal to BVA

- Effective date if claim granted: date of original claim (usually)
- If BVA denies claim, claimant can:
  - ▣ Appeal to CAVC w/in **120 days** of decision; or
  - ▣ File supplemental claim w/in **1 year** of decision
- Either option preserves date of **original** claim as effective date for potential benefits



# Hypo #1

- 3/2019: RO denied SC for low back disability
  - Favorable findings of current dx of arthritis and in-service injury
  - Denied due to negative VA nexus opinion
- You think VA nexus opinion was based on incorrect facts
- Vet cannot get a private medical opinion supporting claim

# Hypo #1

- Which review option is best?
  - A. Higher-level review
  - B. Supplemental claim
  - C. BVA direct review
  - D. BVA evidence
  - E. BVA hearing

# Hypo #1 Answer

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**A**

Higher-level review

## Hypo #2

- 3/2019: RO denied SC for low back disability
  - Favorable findings of current dx of arthritis and in-service injury
  - Denied due to negative VA nexus opinion
- You think VA nexus opinion was based on incorrect facts
- Vet has obtained a new favorable nexus opinion from a private doctor

# Hypo #2

- Which review option is best?
  - A. Higher-level review
  - B. Supplemental claim
  - C. BVA direct review
  - D. BVA evidence
  - E. BVA hearing

# Hypo #2 Answer

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**B**

Supplemental Claim

# Switching Review Option

- Claimants may switch between different review options (HLR, Supp Claim, BVA)
  - May withdraw request for certain type of review any time prior to notice of decision
  - If withdrawal occurs w/in 1 year of notice of decision being reviewed, claimant may *timely* elect another review option to preserve date of claim

# Additional Effective Date Rule

- If CAVC affirms BVA denial of claim (claimant loses):
  - Claimant can preserve date of **original** claim as effective date for potential benefits by submitting supplemental claim w/in 1 year of CAVC decision
  - BUT, cannot file supplemental claim while issue on appeal to Federal Circuit



# Increased Rating Claims

- Claim for an increased rating is an “initial” claim
- If RO denies increased rating or Vet disagrees with initial rating, challenge in AMA system will only address appropriate rating from one year prior to date of claim until date of decision
- If disability gets worse after RO decision, Vet must file new increased rating claim
- Vet can have an increased rating claim and multiple appeals of ratings for the same disability, for different periods of time, pending concurrently

## Hypo #3

- 6/1/2016: Vet granted SC for PTSD at 30%
- 3/1/2019: Vet files IR claim for PTSD
- 9/1/2019: RO denies IR – lack of evidence
- 3/1/2020: Vet files NOD – BVA hearing lane
- 3/1/2022: Vet submits evidence at BVA hearing showing PTSD satisfied criteria for a 50% rating as of 2/1/2019, and satisfied the criteria for a 70% rating as of 11/1/2020

# Hypo #3

- What rating(s) should BVA assign?
  - A. 30% (no increase)
  - B. 50% from 2/1/2019
  - C. 50% from 2/1/2019 and 70% from 11/1/2020
  - D. 70% from 3/1/2020

# Answer

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## B

- The issue on appeal is the rating from 1 year prior to the date of claim until the date of the RO decision
- Evidence of the severity after 9/1/2019 is irrelevant to appeal

# Simultaneously Contested Claims

- Special rules for simultaneously contested claims:
  - Review option limited to BVA review
    - No HLR or Supplemental Claim option
  - NOD must be filed w/in 60 days
  - Brief/argument/request for different lane due w/in 30 days after substance of NOD provided to party
  - Favorable findings NOT binding

# Questions?

