Veterans Benefits Overview

• Yelena Duterte
  ydutert@jmls.edu
  312-360-2656
Roadmap

• Basic Eligibility Requirements and Initial Considerations
• Service-Connected Disability Benefits
• Establishing Disability Percentage Ratings
• Non-Service Connected Pension
• Survivor Benefits
• Appeal Process
Veterans Benefits Manual


If you would like to purchase any additional copies:
http://www.nvlsp.org/Publications/Bookstore/Manuals/vetbenefitmanual.htm
Benefits Claims Hierarchy

Supreme Court

US Court of Appeals for the Federal Circuit

US Court of Appeals for Veteran Claims

Board of Veteran Appeals

Regional Office
Basic Eligibility Requirements & Initial Considerations
DEFINITION OF A VETERAN

A. Who Is a Veteran?

• “A person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C.S. § 101(2); 38 C.F.R. § 3.1(d) (2011).
A. Character Of Discharge

• In order to satisfy the definition of a veteran, that individual must have been discharged or released from military service “under conditions less than dishonorable.” 38 C.F.R. § 3.12(a) (2011)

B. Types Of Discharge

1. Honorable discharge (“HD”);
2. Discharge under honorable conditions (“UHC”), or general discharge (“GD”);
3. Discharge under other than honorable conditions (“OTH”), or undesirable discharge (“UD”);
4. Bad conduct discharge (“BCD”);
5. Dishonorable discharge (“DD”) or a dismissal, the later in the case of an officer.
C. Which Discharges Meet The Eligibility Requirements?

1. HD & UHC meet the eligibility requirement.
2. DD disqualify a veteran for benefits.
3. BCD & OTH may or may not make a claimant ineligible.
   1. Dishonorable conditions if conduct upon which the discharged was based fits into one of several categories. 38 C.F.R. § 3.12(d) (2011).
      1. Offenses of moral turpitude (usually felonies)
      2. Taking a discharge to avoid a courts martial
4. Discharge Upgrades.
ACTIVE SERVICE REQUIREMENTS

A. “Active Military, Naval, Or Air Service”
   • Active military, naval, or air service is also required to qualify as a veteran for purposes of VA benefits.

B. What Does Active Service Include?
   1. Active Duty.
   2. Training, when injury incurred or was aggravated.
   3. Reserve and National Guard when called to serve on federal active duty.
Establishing Service Connected Disability Benefits
Important Definitions: “Service Connected”
• For the VA to find a disability or death to be service connected, it must determined that the disability or death was incurred or aggravated during active service in line of duty, or that the death resulted from a disability that was incurred or aggravated in line of duty during active military service.
COMPENSATION REQUIREMENTS

A veteran seeking service connected disability compensation must satisfy three fundamental requirements before the VA will grant compensation benefits.


2. In-service occurrence or aggravation of a disease or injury.

3. Link or nexus between the in-service occurrence and current disability
COMPENSATION REQUIREMENTS

B. Evidence Of Current Disability

• The first requirement for a grant of service connected disability compensation is “competent evidence” that the veteran currently has a particular disability. 38 U.S.C. §§ 1110, 1131 (2011).

• Such as:
  ▫ Letter or statement from a VA official or private physician;
  ▫ Evidence in the veteran’s service medical and treatment records; and/or
  ▫ Evidence from medical textbooks, treatises or journals.
C. Evidence Of An In-service Occurrence Or Aggravation

- The second requirement for service connected disability compensation is “medical, or in certain circumstances, lay evidence of in service occurrence or aggravation of a disease or injury.”

- The disease, injury, or event does not have to be directly related to military duties as long as it happened between the day the veteran entered service and the day the veteran was discharged.
C. Evidence Of An In-service Occurrence Or Aggravation

- Lay evidence may be considered and will be sufficient evidence when the issue relates to an observable event.

Types of lay evidence include:
- Veterans own statements describing the injury/event;
- “Buddy statements”;
- Newspaper articles; and/or
- Letters to/from family and friends.
D. Nexus Between In-service And Current Disability

- **Medical Evidence to Satisfy the Nexus Requirement**
  - A claimant will satisfy the requirement of competent nexus evidence by obtaining a letter or statement from a private physician or VA physician that expressly connects the veteran’s disability or death to the occurrence or aggravation of a disease or injury in service or to an event in service.

- *Disability must be “as likely as not” connected to service.*
Nexus – Four Legal Theories

1. Direct Service Connection.
2. Aggravation.
3. Presumptive Service Connection.
COMPENSATION REQUIREMENTS

D. Nexus Between In-service And Current Disability

1. Direct Service Connection

• The phrase “direct service connection” is generally used to mean that a disease, injury, or event during a veteran's active military service directly caused a current disability.
D. Nexus Between In-service And Current Disability

2. Aggravation

- Compensation, however, may also be paid for disability caused by the aggravation due to service of an injury or disease that existed prior to service.
COMPENSATION REQUIREMENTS

D. Nexus Between In-service And Current Disability

3. Presumptive Service Connection

- The policy behind presumptive service connection is disease that first manifested after service probably had its beginnings during service and, under the circumstances, veterans should not be required to obtain medical evidence of a connection to obtain benefits.

- It is available for:
  - certain chronic diseases,
  - tropical diseases,
  - diseases specific as to former prisoners of war,
  - diseases specific as to radiation-exposed veterans,
  - diseases associated with exposure to certain herbicide agents such as Agent Orange,
  - diseases associated with exposure to mustard gas and Lewisite, and
  - certain diagnosed and undiagnosed illnesses in veterans of the Gulf War.
4. Secondary Service Connection

• A veteran may be awarded service connection on a secondary basis by demonstrating that a condition is proximately the result of, or linked to, a service connected condition.

• If a service connected condition causes or aggravates a second condition, that second condition may be service connected and the veteran may be compensated for the degree of disability that is over and above the degree of disability that existed prior to the aggravation.
The standard of proof that a claimant must satisfy for an award of benefits is commonly called the "benefit of the doubt" standard.

“When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.” 38 U.S.C. 5107(b).

This applies to all elements of service connection.
Establishing Disability Percentage Rating
Rating Schedule

A. Introduction

- Once service connection is established, the VA assigns the appropriate disability rating based on impairment of earning capacity in civil occupations.

- Each disability relates to a series of diagnoses, each with a numerical diagnostic code.

- The degree of disability increases as the severity of the symptomatology becomes greater which will lead to a higher disability percentage rating.
B. VA Procedure

• When evaluating a disability, the rating team examines the veteran’s medical records to ascertain the medical diagnosis for the particular disability.

• The team finds the appropriate diagnostic code for the disability and selects the degree of disability that corresponds with the symptomatology of the veteran’s condition.

• Degree of disability is based on a system of percentages in multiples of 10.
SINGLE FINGER AMPUTATIONS
Major/Minor

5152 Thumb, amputation of:
  With metacarpal resection.............................................................. 40 / 30
  At metacarpophalangeal joint or through proximal phalanx......................... 30 / 20
  At distal joint or through distal phalanx............................................... 20 / 20

5153 Index finger, amputation of
  With metacarpal resection (more than one-half the bone lost).......................... 30 / 20
  Without metacarpal resection, at proximal interphalangeal joint or proximal thereto................................. 20 / 20
  Through middle phalanx or at distal joint................................. 10 / 10

5154 Long finger, amputation of:
  With metacarpal resection (more than one-half the bone lost).......................... 20 / 20
  Without metacarpal resection, at proximal interphalangeal joint or proximal thereto................................. 10 / 10

38 CFR 4.71a (2010).
VA Math

Direct Calculations of Multiple Disabilities

- Veteran has following ratings: 70%, 30%, 20%
- This does not mean the Veteran has a 120% disability rating.
- Instead:
- 1st Rating + ((100% - 1st Rating) x 2nd Rating) = Combined Rating
  - 70% + (30% x 30%) = 79%
    - 79% + (21% x 20%) = 83.2%
Special Evaluation Compensation Categories

**Total Disability Based on Individual Unemployability (TDIU)**

1. The veteran cannot be engaged in and must be unable to engage in a substantially gainful occupation, AND
2. The veteran should have:
   a) One service connected disability rated above 60%, OR
   b) Two or more service connected disabilities, one of which is at least 40% and sufficient additional service connected disabilities to bring it up to a combined rating of 70%.
Later Evaluations of a Service-Connected Condition

A. VA Discretion to Reduce or Increase a Disability Percentage

- The VA, in its discretion, may choose to reevaluate a service connected condition and change the disability rating.
  - 38 C.F.R. § 3.327(a)(2010).

VA can reexamine at any time but reexaminations are generally ordered if evidence indicates a material change in disability since the last evaluation.
  - Usually done 2-5 years within the last evaluation.
Non-Service Connected Pension Benefits
Requirements

(1) wartime service that ultimately results in a discharge under other than dishonorable conditions, (2) permanent and total disability, and (3) demonstrated need. The VA determines need by calculating the income and net worth of the claimant.

Periods of War:

1. World War II: December 7, 1941 – December 31, 1946
The Requirement of Permanent and Total Disability

• Veterans claiming entitlement to pension benefits must be permanently and totally disabled from non-service-connected conditions or a combination of non-service-connected and service-connected conditions. 38 U.S.C.S. § 1521(a); 38 C.F.R. § 3.342(a) (2008).

• Veterans are presumed to be permanently and totally disabled if:
  • 65 years of age or older
  • A patient in a nursing home
The Requirement of Need

- Pension is a needs based program. Even if a veteran satisfies all of the other requirements, if the veteran's countable income exceeds the maximum annual pension rate (MAPR), a claim for improved pension will be denied.*
  
  - MAPR for 2012: $12,256

- In order to establish entitlement to improved pension, the VA considers the claimant's net worth as well as his or her income.

*The MAPR is adjusted to reflect changes in cost of living when social security benefits are adjusted to reflect changes in the cost of living.
Exclusions and Deductions from Income for Improved Pension Purposes

• Sources of income excluded or deducted from income for VA improved pension purposes include*:
  1.) Welfare
  2.) Fire insurance proceeds
  3.) Profit from sale of property
  4.) Funds in joint accounts acquired by death
  5.) Medical Expenses
  6.) Interest accrued on retirement annuity accounts
  7.) Expenses of last illness and burials
  8.) Educational Expenses

* 38 U.S.C.S. § 501(a); 38 C.F.R. § 3.272 (2010).
Information That Must be Provided Annually by Current Improved Pension Beneficiaries

• The VA is authorized to **require** pension applicants and recipients to file annual reports detailing their previous year's income (as well as that of their spouses and dependent children) and estimating anticipated income for the current year. 38 C.F.R. §§ 3.256, 3.277 (2010).

• The VA calls these reports Eligibility Verification Reports (EVRs) and uses them to determine whether applicants and current pension recipients are in fact entitled to the benefits they receive.
Failing to Report Income

• If a veteran fails to report income or underreports income to the VA, a debt may be created. This debt is usually referred to as an overpayment.

• An overpayment may occur when a veteran gets divorced and then forgets to inform the VA of the dissolution.
If VA Determines there is an Overpayment

- Dispute Validity or Amount of Debt
  - No deadline for submitting this dispute
  - However, if it is done within 30 days collection will be stayed

- Request a Waiver of Collection
  - Must be submitted within 180 days of notice
  - May not waive the debt, if there is any indication of fraud or bad faith
Survivor Benefits
Types of Survivor Benefits

- Accrued Benefits / Substitution
- Dependency and Indemnity Compensation (DIC)
- Death Pension
Qualifying Family Relationships

- Surviving Spouse
- Surviving Child
- Surviving Parent
Surviving Child

- Biological, Adopted, Stepchild
- Unmarried
- Qualifying Age
  - Under 18 years of age
  - Between 18-23 if pursuing course of education
    - 38 U.S.C.S. § 104(a)
  - Any age if child became incapable of self-support before reaching the age of 18. “Helpless Child”
    - 38 C.F.R. § 3.315(a) (2010)

See: 38 CFR § 3.57 (2010)
Accrued Benefits

- If a claim for benefits is pending when a claimant dies, and VA later determines that veteran would have been awarded benefits, **survivor** is entitled to “accrued benefits.”
- However, if **Claimant** dies before establishing a right to receive a VA benefit, the claim for the **benefit** dies as well.
Substitution

- If a claim for benefits is pending when the claimant dies and the claimant dies after October 9, 2008, a qualifying surviving family member can request to be substituted for the deceased claimant and continue to pursue the claim.

- Substitution vs. Accrued Benefits
  - Accrued benefits claimant cannot submit any additional evidence
  - Time limits for filing are the same
  - Both require that a claim be “pending”
Dependency and Indemnity Compensation (DIC) and Death Pension

- Available to survivors of veterans whose deaths have been determined to be service connected.
- Eligible Parties:
  - Surviving spouse
  - Surviving child, or
  - Surviving parents
Availability of DIC and Death Compensation

Monthly DIC benefits available in two situations:

- Service-connected death of a veteran
- Veteran had a service-connected disability that was totally disabling for the last 10 years, 5 years, or, in some cases, one year of the veterans’ life.
- 38 U.S.C.S. § 1318
Entitlement to DIC

DIC claims filed after January 21, 2000:

- Veteran must have filed a claim for benefits while alive.
- If no claim was filed while the veteran was alive, there is **no** possibility of DIC benefits for survivors.
  - 38 C.F.R. 3.22 (2007)
  - *NOVA II*, 314 F.3d at 1378
- DIC intended to provide *continued support* to survivors who had become dependent on VA disability compensation during veteran’s lifetime.
Dependency and Indemnity Compensation

- Surviving Spouse is first in line to receive benefits
  - VA will increase benefits to reflect surviving children
  - If surviving spouse does not apply, or if there is no surviving spouse, a qualifying child is next in line to receive DIC benefits.
  - 38 U.S.C.S. § 1313
Entitlement to DIC

Surviving Spouse Can Show:

1. Veteran’s death resulted in whole or in major part from a medical condition that itself is connected to veteran’s military service

OR

2. Veteran had a service-connected disability that was totally disabling for the last 10 years of veteran’s life.

38 C.F.R. § 3.312 (2010)
Death Pension

- When vet is entitled to pension, surviving spouse can also receive pension subject to the same disability and income requirements.
Application for Benefits & Initial Administrative Appeal
SUBMITTING A BENEFITS CLAIM AT THE VARO

A. Overview of the VARO

There are three types of claims that can be filed at a VARO:

1. New or Original Claims
   • 38 C.F.R. § 3.155(a) (2010);

2. Reopened Claims Filed After a Final VA Denial
   • 38 C.F.R. § 3.151(a) (2010); and

3. Claims for Revision of a Previous Final RO Decision Based on Clear & Unmistakable Error.
Fully Developed Claim (FDC)

- FDCs had an average wait time of 117 days for a RO decision, rather than the 262 day average for claims filed outside of FDC.
- Certain criteria must be met for FDC:
  - Must be a new claim, secondary or increase in disability claim
  - Must have a signed FDC Certification signed
  - Must submit all relevant private medical records, and identify all VA medical centers where treatment was sought.
- Earlier Effective Date
  - Veterans who properly file under FDC from August 6, 2013 to August 6, 2014, may receive an earlier effective date of a year earlier, without filing an informal claim to hold the effective date open
Disability Benefits Questionnaire

- VA Forms addressing medical conditions that would eliminate the need for physicians to use a lengthy narrative.
- 70 different forms, each addressing different disabilities.
VARO ADMINISTRATIVE APPEAL

A. Notice of Disagreement (NOD)
B. Statement of the Case (SOC)
C. *De Novo* Review by a Decision Review Officer (DRO)
D. VARO Hearings
E. Substantive (Form 9) Appeal
OVERVIEW OF THE VA ADJUDICATION PROCESS

**ACTIVITY TIME LIMITS**

- Claimant files original claim
- Claimant files reopened claim
- Claimant files claim for revision of previous final RO decision based upon clear and unmistakable error

VA Regional Office mails notice of its decision

Claimant files Notice of Disagreement

(Optional) Claimant requests review of RO decision by a Decision Review Officer (DRO)

VA Regional Office mails DRO's decision

VA Regional Office mails Statement of the Case

Claimant files Substantive Appeal (VA Form 9)

Board of Veterans' Appeals decides case

- Must File Within 1 Year of RO Mailing of Notice of its Decision
- Must Request Within 60 Days of RO Letter Offering DRO Review
- Must File Within 60 Days of Mailing of Statement of the Case or Remainder of 1 Year from Mailing of Notice of Decision, whichever is later
- No Time Limit
The deadline to file an NOD is very important; it is within one year from the date of the mailing of the VA notice to the claims of the adverse decision.

- 38 C.F.R. § 20.302(a) (2010).

The date on the letter notifying the claimant of the decision is considered the “date of mailing” of the notice.

- 38 C.F.R. § 20.302(a) (2010).
VARO ADMINISTRATIVE APPEAL

B. *De Novo* Review by a Decision Review Officer (DRO)

- A claimant who files an NOD may obtain *de novo* review of the initial decision, occurring between the filing of the NOD and the VA’s issuance of the statement of case.

- The claimant may initiate a *de novo* review by either requesting it in the NOD, or requesting it within 60 days after the VA sends notice of the right to the *de novo* review.

- A *de novo* review by a DRO suspends the traditional appeals process.
C. Statement of the Case (SOC)

Upon receipt of the NOD, the RO must review the claims file and either grant or deny a claim. After reviewing the claims file, the RO will issue a Statement of the Case (SOC).

A SOC must contain:

• Summary of the evidence,
• Applicable law and regulations, and
• Reasons for denying the claims with respect to the issues raised by the NOD.
  • 38 C.F.R. § 19.29 (2010)
  • Herndon v. Principi, 311 F.3d 1121, 1124 (Fed. Cir. 2002).
D. Supplemental Statement of the Case (SSOC)

- Supplemental Statements of the Case
  - When an SOC is “inadequate” for any reason the RO is required to prepare and issue the claimant and the claimant’s advocate a SSOC.
  - An SOC is presumed to be inadequate when “additional pertinent evidence” is received by the RO after the SOC was issued, when a “material defect” is discovered, or if “[f]or any other reason” the SOC or prior SSOC is inadequate.” 38 C.F.R. § 19.31 (2010)
The Form 9 Appeal is an important document, it is the one instance under the VA procedural rules where the veteran’s factual and legal arguments are required to be submitted.

The veteran must set forth specific arguments relating to the errors of fact or law in the RO’s initial decision denying benefits.


The Form 9 must be submitted within 60 days of the date of the SOC or SSOC.
The Board of Veterans’ Appeals
The Board of Veterans’ Appeals (BVA)

A. General Background

- The Board of Veterans’ Appeals (BVA) is the second of the two major levels of review of claims within the VA.

- The BVA is the final step of the administrative process before an appeal to the Court of Appeals for Veterans Claims (CAVC).
The Board of Veterans’ Appeals (BVA)

BVA has jurisdiction to review all questions of fact and law regarding claims for VA benefits; BVA decides “claims and issues.”

- “Claims” are requests for particular benefits.
- “Issues” are matters upon which the Board made a final decision. The BVA is required to include a written statement of its finding and conclusions outlining the rationale or bases for them on all material issues of fact and law presented on the record.


BVA does NOT have jurisdiction over medical determinations, such as determinations of the need for an appropriateness of specific types of medical care and treatment.

The Board of Veterans’ Appeals (BVA)

B. Jurisdiction and Scope of Review

• Each case is considered *de novo* by the BVA. Veterans may present new documentary evidence and/or witnesses before the BVA.

  38 U.S.C. § 7104
  

• The BVA must remand to the agency of original jurisdiction if it needs further evidence or clarification of a procedural defect.

  38 C.F.R. §§ 19.9, 20.1304
The Board of Veterans’ Appeals (BVA)

C. Hearings

- Claimants have a right to a hearing either before a BVA VLJ sitting in Washington D.C., or before a traveling VLJ at the local RO.
  38 C.F.R. § 20.705; 38 C.F.R § 14.628(a)(2)(iv-v)
- Claimants may present testimony and evidence before a VLJ who will decide their appeal.
  38 C.F.R. §§ 20.706, 20.710
The Board of Veterans’ Appeals (BVA)

D. BVA Administrative Decisions

• In handling cases, the BVA may take one of the following actions (2012 data):
  1. Allow the benefit sought 12,585 (28.4%);
  2. Remand 20,299 (45.8%);
  3. Deny 9,957 (22.5%); or
  4. Other 1,459 (3.3%).

 For further information on all statistical data relating to BVA decisions visit:
http://www.bva.va.gov/Chairman_Annual_Rpts.asp
D. BVA Administrative Decisions

- The BVA must follow any CAVC decisions that establish a rule of law.
  - Although the VA may file a petition with the US Court of Appeals for the Federal Circuit to stay the effect of any CAVC decision.  

- BVA is also bound to follow applicable statutes, VA regulations and precedent opinions of the VA General Counsel.  
  38 U.S.C. § 7104(c)
PREPARING WRITTEN ARGUMENTS IN SUPPORT OF A CLAIM

No particular format is required in presenting written arguments. There are, however, some basic guidelines that are common to all good written legal arguments.

1. Identification of the VA benefits sought;
2. Legal requirements - What the law requires the evidence show in order for the claimant to obtain the desired benefits;
3. Application of Law to Fact - Why the evidence of record supports the grant of VA benefits for each benefit sought; and
4. What errors were committed by the VA regional office in the original adjudication of this claim (if there was a prior adjudication).
ACTIONS AFTER BVA DENIAL

D. Appealing to the CAVC

The CAVC shall have exclusive jurisdiction to review decisions of the BVA. 38 U.S.C. § 7252(a).

- BVA has a duty to notify claimants of the right to appeal to the CAVC; this notice must accompany the decision from the BVA.

- Claimants may appeal final BVA decisions to the CAVC within 120 days after the date on which the notice of the decision is mailed. 38 U.S.C. § 7266(a).
ACTIONS AFTER BVA DENIAL

A. Filing a Reopened Claim at the RO

New and Material Evidence

“New” evidence is existing evidence not previously submitted to agency decision makers.
38 C.F.R. § 3.156(a)

This evidence could not have been of record at the time of the last denial and is not merely cumulative of other record evidence. *Evans v. Brown*, 9 Vet.App. 273, 283 (1996).

“Material” evidence is existing evidence that, by itself or with other evidence, relates to an un-established fact necessary to substantiate the claim and must raise a reasonable possibility of substantiating the claim.
38 C.F.R. § 3.156(a)