



# Veterans Affairs: The Appeal Process for Veterans' Claims

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## Summary

Congress, through the United States Department of Veterans Affairs (VA), provides a variety of benefits and services to veterans and to certain members of their families. These benefits range from health care and related services to burial benefits. The veteran's basic eligibility for these programs and services is usually determined by the local VA office. Veterans not satisfied with the VA's decision(s) may wish to have them reviewed and may appeal the decision(s). This report traces the various steps involved in the appeal process—starting with the original application for benefits and concluding with an appeal to the U.S. Supreme Court. A flow chart outlining all of the steps in the appeal process is provided.

Following the filing of the initial appeal, the local VA office will either allow or disallow the claim. If the veteran/claimant wishes to appeal, a written request for appeal must be filed and various time deadlines and other requirements must be met prior to the case being considered by the Board of Veterans' Appeals (BVA). The appeal before the BVA may be a hearing at the local VA office by a traveling Board member; a hearing at the BVA office in Washington, DC; or a videoconference hearing at the local VA office. There are specific guidelines for a person representing a veteran before the BVA. Legislation enacted in the 109<sup>th</sup> Congress changed traditional guidelines to allow for legal representation for veterans throughout the administrative appeals process.

The veteran/claimant may appeal the decision of the BVA to the Court of Appeals for Veterans Claims (CAVC), which is an independent federal court and not part of the VA. The decision of the CAVC may be appealed by either the veteran/claimant or the VA to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), an Article III court that sits in Washington, DC and has exclusive jurisdiction to hear cases challenging CAVC rulings. Decisions of the Federal Circuit may be appealed to the U.S. Supreme Court, which has final jurisdiction.

The VA has various statutory obligations to assist the veteran in the preparation of his/her application for benefits and any subsequent appeal(s). Among these obligations are assistance in the preparation of the initial application; provision of various records; medical exams; and other related issues. Certain legal and factual presumptions are established by statute that may be favorable to the veteran's claim. These issues are examined in **Appendix A** of this report.

Legislation introduced in the 111<sup>th</sup> Congress concerning the appeal process is summarized in **Appendix B**. Legislation that was considered in the 110<sup>th</sup> Congress concerning the appeal process is summarized in **Appendix C**. Although this legislation was not enacted into law, it is expected that similar legislation concerning the appeal process may be introduced in the 111<sup>th</sup> Congress. This report will be updated to reflect legislative activity as it occurs.

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## Introduction

### Veterans' Benefits

Congress, through the United States Department of Veterans Affairs (VA), provides a broad variety of benefits and services to veterans and certain members of their families.<sup>1</sup> Among the benefits that the VA extends to veterans are various types of health care and related services, such as nursing homes, clinics, and medical centers; various types of financial benefits, including disability compensation and pensions; education, vocational training, and related career assistance; home financing; life insurance; burial benefits; and benefits for certain family survivors.<sup>2</sup>

The veteran's basic eligibility for these various services and programs is usually determined by the local VA office.<sup>3</sup> Various criteria must be met in order for the veteran to be eligible for VA benefits, and the local VA office scrutinizes the veteran's claim before determining eligibility.<sup>4</sup>

### Appeals from the Local VA Office Decisions

Veterans not satisfied with the decisions made by the local VA office on their claims or benefits may wish to have the decisions reviewed on appeal.<sup>5</sup> The VA has stated that the two most common types of appeals concern 1) the VA's denial of benefits for a disability that the veteran believes is service-connected; and 2) the VA's rating a disability as less severe than the veteran believes is warranted.<sup>6</sup> The first issue involves *disability compensation*, which is a monthly cash benefit for veterans currently impaired from past service-connected activities.<sup>7</sup> The second issue

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<sup>1</sup> See generally *Federal Benefits for Veterans and Dependents*, published by the Department of Veterans Affairs (2008 edition), available online at <http://www1.va.gov/opa/vadocs/fedben.pdf>. See CRS Report RL33113, *Veterans Affairs: Basic Eligibility for Disability Benefit Programs*, by Douglas Reid Weimer. This report deals with the fundamental requirements for disability benefit programs. See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, by Douglas Reid Weimer. This report discusses various aspects of disability compensation, a monthly cash benefit program for veterans currently impaired from past service-connected activities.

<sup>2</sup> See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities* for an overview of the disability benefit programs.

<sup>3</sup> The *local VA office* is defined by the VA as "any local office of the Department of Veterans Affairs where claims for VA benefits are received and determined." This is usually a VA Regional Office or an administrative office at a VA medical center. The legal term for such an office is the "agency of original jurisdiction." A VA *Regional Office* is one of 58 VA regional offices located throughout the United States and its territories, and it is at these offices where most claims for VA benefits are filed and determined. *Thus, all Regional Offices are considered to be "local offices," but the concept of "local office" may also include administrative offices located at VA medical centers.* Therefore, all Regional Offices are "local offices," but not all "local offices" are Regional Offices. See *Board of Veterans' Appeals, Understanding the Appeal Process*, published by the Department of Veterans Affairs; VA Pamphlet 01-00-1 (January 2000) at 38-39 (cited to afterward as "Understanding"). See <http://www.va.gov/vbs/bva/y2000.pdf> for the publication online. Go to the website and click on "Understanding the Appeal Process." It should be noted that sometimes this link does not work.

<sup>4</sup> See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*.

<sup>5</sup> *How Do I Appeal?*, published by the Board of Veterans Appeals, Department of Veterans Affairs; VA Pamphlet 1-02-02A (April 2002) at 1 (cited to afterward as "*How Do I Appeal?*"). See <http://www.va.gov/vbs/bva/pamphlet.htm>. Go to the website and click on "How Do I Appeal?" for an online copy of the pamphlet.

<sup>6</sup> *Id.*

<sup>7</sup> See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities* at 1.

involves the VA's *rating of the severity of the veteran's disability*—which is directly related to the amount of monthly disability compensation (a cash payment) the veteran receives.<sup>8</sup> While these two issues seem to be the most prevalent types of appeals, nearly any decision made by the local VA office concerning veterans' benefits may be appealed.<sup>9</sup>

An appeal of the local VA office's decision may be made to 1) the local VA office (which made the original decision) and/or 2) the Board of Veterans' Appeals (BVA), which is discussed below. The findings of the BVA may be appealed to the U.S. Court of Veterans Claims. Subsequent appeals may be made to the U.S. Court of Appeals for the Federal Circuit and ultimately to the U.S. Supreme Court.

## **The Appeal Process**

### **Flow Chart of the Various Steps in the Appeal Process**

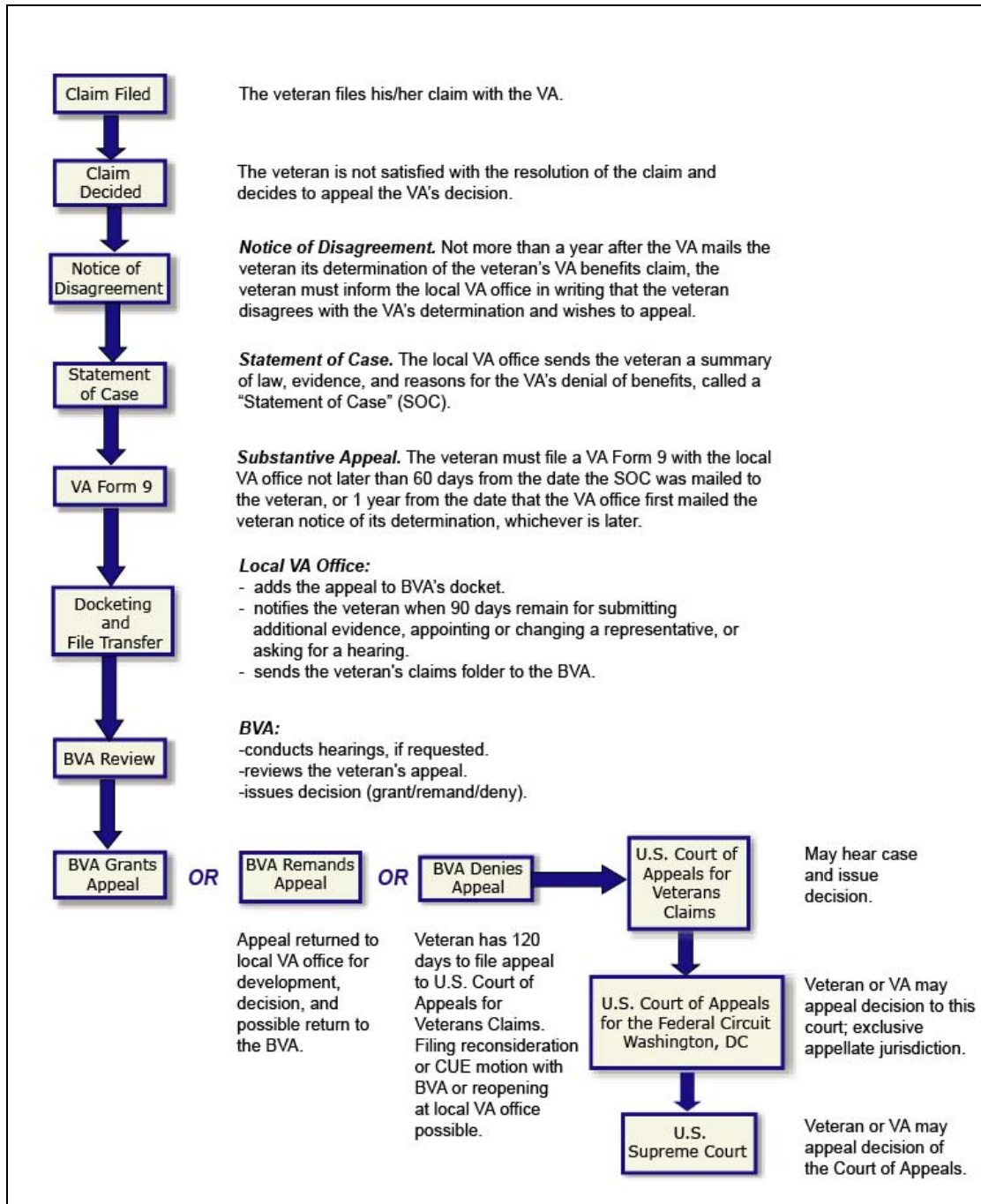
The appeal process consists of several steps. The following flow chart provides a simplified outline of the steps that must be taken by the veteran in an appeal. Each step is discussed in detail in the text following the chart.

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<sup>8</sup> *Id.* at 7-10. For instance, the local VA office may determine that the veteran is 10% disabled, while the veteran believes that he/she is 40% disabled.

<sup>9</sup> See *How Do I Appeal?* at 1. For example, a veteran may appeal a denial of education benefits made by the local VA office.

Figure 1. Appeal Process



**Source:** Adapted from charts at *How Do I Appeal?* at 2 and *Understanding* at 32.

**Note:** These filing time limits apply in most cases. However, they do not apply to "simultaneously contested claims," when more than one person is trying to receive benefits that only one person is entitled to, such as life insurance proceeds. See *Understanding* at 11.

## Filing the *Original* Claim for Benefits at the VA

In order to apply for VA benefits, the veteran must file a claim at the local VA office or VA medical facility.<sup>10</sup> A claim for benefits may also be filed on-line.<sup>11</sup> The claim must specifically state the requested benefit(s).<sup>12</sup> Assistance to the veteran during the application process may be provided by representatives from Veterans Service Organizations (VSOs)<sup>13</sup> and/or by other persons or agents.<sup>14</sup> The VSOs have staff located at most local VA offices.

In addition to assistance that may be provided by the VSOs or other agents, the VA is obligated by statute and regulation to provide certain assistance to the claimant during the original claim procedure and during any subsequent appeal(s). Such assistance may involve locating and producing records and providing medical examinations. Certain presumptions relating to medical conditions are also mandated by statute. These obligations and presumptions are summarized in **Appendix A** of this report.<sup>15</sup>

Following receipt of the veteran's claim for benefits, the local VA office will review the claim and make a decision about the claim(s).<sup>16</sup> The local VA office will either allow or deny the claim.<sup>17</sup> Where relevant, the local VA office may also rate (on a percentage basis) the veteran's degree of service-connected disability.<sup>18</sup> The local VA office's determination will be mailed to the veteran.<sup>19</sup> If the veteran is not satisfied with the local VA office decision, the veteran may appeal.

## The Appeal: The First Steps

An appeal<sup>20</sup> is a request for a review of a local VA determination<sup>21</sup> on a claim for benefits.<sup>22</sup> Anyone who has filed a claim for benefits with the VA and has received a determination from a

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<sup>10</sup> The *local VA office* is defined by the VA as "any local office of the Department of Veterans Affairs where claims for VA benefits are received and determined." See discussion at note 3.

<sup>11</sup> See *How Do I Appeal?* at 3. File the claim at <http://www.vba.va.gov/vonapp>. This is the Veterans ON-line APPLICATION (VONAPP) website. It should be noted that sometimes this website is not functional.

<sup>12</sup> Such benefits might relate to medical care, disability compensation, or educational benefits.

<sup>13</sup> Such organizations are the American Legion, the Disabled American Veterans, and other veterans' groups.

<sup>14</sup> See *How Do I Appeal?* at 3.

<sup>15</sup> See discussion at **Appendix A**.

<sup>16</sup> See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, at 1-2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 7-10.

<sup>19</sup> See *How Do I Appeal?* at 3.

<sup>20</sup> See 38 C.F.R. § 20.200. What Constitutes An Appeal. "An appeal consists of a timely filed Notice of Disagreement in writing and, after a Statement of the Case has been furnished, a timely filed Substantive Appeal."

<sup>21</sup> See *Understanding* at 6. Most local determinations are made by the local VA office. However, some determinations made by VA medical facilities, such as eligibility for medical treatment, may also be appealed.

<sup>22</sup> 38 U.S.C. § 511(a) outlines the authority of the Secretary of the VA to make decisions regarding benefits for veterans.



local VA office is eligible to appeal a complete or a partial denial of a claim.<sup>23</sup> The veteran may also appeal the level of benefit granted.<sup>24</sup>

### **Time Limit**

The veteran seeking a review of the local VA office decision (called “the appellant”) has one year from the date on which the local VA office mails the appellant its initial determination of the claim to appeal. After one year, the local VA office determination is considered final and cannot be appealed unless there is proof of clear and unmistakable error on the part of the VA.<sup>25</sup>

### **The Notice of Disagreement (NOD)<sup>26</sup>**

There is no special form needed to initiate the appeal process. The appellant need only submit a written statement disagreeing with the local VA office’s claim determination and stating the veteran’s wish to appeal the claim determination. This statement is called the Notice of Disagreement (NOD).<sup>27</sup>

### **Appeal to the Local VA Office**

The NOD is filed with the same local VA office that made the decision being appealed,<sup>28</sup> as this is the location of the appellant’s claims file or claims folder,<sup>29</sup> unless the appellant has moved. After the NOD is filed, the appellant may request that a Decision Review Officer (DRO) from the local VA office review the claims file. The DROs provide a second review of the entire file and may also hold a personal hearing on the claim.<sup>30</sup>

### **The Statement of the Case**

At this point, the local VA office will either allow or not allow the claim. If the claim is disallowed, the local VA office will prepare and send to the appellant a Statement of Case (SOC) and a blank VA Form 9 to be used for continuation of the appeal. The SOC summarizes the submitted evidence, the relevant laws, and regulations and provides the local VA office’s reasons for disallowing the claim.<sup>31</sup>

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<sup>23</sup> Again, see *Understanding* at 6. Most local determinations are made by the local VA office. However, some determinations made by VA medical facilities, such as eligibility for medical treatment, may also be appealed.

<sup>24</sup> For example, a veteran may be determined to be 20% disabled, but the veteran may believe that he/she is 40% disabled and appeal.

<sup>25</sup> See *Understanding* at 6-7.

<sup>26</sup> See 38 C.F.R. § 20.201.

<sup>27</sup> See *Understanding* at 39.

<sup>28</sup> 38 C.F.R. § 20.300.

<sup>29</sup> For the purpose of this report, the appellant’s records will be referred to as “claims file.”

<sup>30</sup> See *How Do I Appeal?* at 4.

<sup>31</sup> See *Understanding* at 8-9.

## VA Form 9 and the Substantive Appeal <sup>32</sup>

To continue an appeal, the appellant must fill out and return the VA Form 9—the Substantive Appeal—to the local VA office. Form 9 is available on-line.<sup>33</sup> The appellant must state the requested benefit, any mistakes in the SOC, and indicate whether a personal hearing is requested.<sup>34</sup> The Form 9 becomes part of the claims folder and is the basis for adding the appeal to the Board of Veterans Appeals docket. Specific provisions exist for withdrawing the appeal.<sup>35</sup>

## Supplemental Statement of Case <sup>36</sup>

If the appellant submits new evidence or information, the local VA office will prepare a Supplemental Statement of Case (SSOC). The SSOC is similar to the SOC and includes the newly submitted information.<sup>37</sup> The appellant has 60 days from the date the SSOC was mailed to submit, in writing, any matter in dispute on the SSOC.

## Time Limitation <sup>38</sup>

The local VA office must receive the VA Form 9 within 60 days from the date that the VA mailed the SOC (or SSOC) or within one year of the date that the original decision denying the claim, whichever date is later.<sup>39</sup>

## Withdrawal of Issue(s)

If the appellant does not wish the Board of Veterans Appeals to examine an issue that is contained in the SOC or the SSOC, the appellant may state on Form 9 that the appellant is withdrawing the issue(s) on the appeal.<sup>40</sup>

## Issues Related to the Appeal Process

### Filing Extensions <sup>41</sup>

An appellant may request an extension of the 60-day filing period for filing a Substantive Appeal or the 60-day period to respond to a Supplemental Statement of the Case.<sup>42</sup> The appellant makes

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<sup>32</sup> 38 C.F.R. § 20.202.

<sup>33</sup> See <http://www.vba.va.gov>. Go to the website, then go to “Board of Veterans’ Appeals,” then go to “VA Forms,” (in the lower right hand corner) then type in VA9.

<sup>34</sup> A personal hearing must be requested. Without such a request, the BVA will review the claims file and the VA Form 9 and make a decision without meeting or speaking with the appellant and his/her representative.

<sup>35</sup> 38 C.F.R. § 20.204.

<sup>36</sup> 38 C.F.R. § 20.302(b), (c).

<sup>37</sup> See *Understanding* at 40-41.

<sup>38</sup> 38 C.F.R. § 20.302.

<sup>39</sup> *Id.* See *How Do I Appeal?* at 6.

<sup>40</sup> See *Understanding* at 10.

<sup>41</sup> 38 C.F.R. § 20.303.

<sup>42</sup> 38 U.S.C § 5105(d)(3); 38 C.F.R. § 20.303.

this request in writing to the local VA office handling the appeal. The appellant needs to explain to the VA local office why extra time is needed to file.

### **Representation for the Appeal** <sup>43</sup>

The appellant may represent him/herself at the appeal. However, the VA has reported that about 90 percent of appeals heard before the Board of Veterans Appeals (BVA) have some third-party representation.<sup>44</sup>

There are three different categories of representatives that the appellant may engage. The first includes representatives of the VSO or from the state or local veterans' office. Usually, the representatives from the VSOs and the government veterans' offices do not charge for their services.<sup>45</sup> Second, the VA recognizes certain "agents" who are able to represent appellants and who are certified by the VA.<sup>46</sup> Third, the appellant may engage a lawyer for representation.<sup>47</sup>

The appellant must complete a **VA Form 21-22** to authorize representation by a VSO or a related entity on the appeal.<sup>48</sup> The appellant must complete a **VA Form 21-22a** to authorize representation by a recognized agent<sup>49</sup> or a lawyer for his/her appeal.<sup>50</sup> An appellant is limited to one representative recognized by the BVA.<sup>51</sup>

### **Attorney Representation: Recent Legislation**

The Veterans Benefits, Health Care, and Information Technology Act of 2006,<sup>52</sup> enacted in the 109<sup>th</sup> Congress, modified attorney participation in the appeal process. The act also requires the Secretary of the VA to provide additional qualifications and standards for agents and attorneys who represent veterans before the VA, including standards that deal with (1) training and character and (2) fee criteria and limitations. The Secretary is authorized to charge and collect fees from the agents or attorneys to be used for administrative expenses for veterans' benefits programs. The following grounds for suspension of agents or attorneys are provided in the act: presenting frivolous claims, prior suspensions, charging excessive or unreasonable fees, or failure to comply with the Secretary's regulations.

The legislation significantly broadens opportunities for legal representation during administrative appeals. Previously, an attorney could not represent a veteran for a fee until the BVA made a final decision.<sup>53</sup> This had the effect of excluding an attorney from the process until all of the

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<sup>43</sup> See in general, 38 C.F.R. § 20.600. Some legislation proposed in the 110<sup>th</sup> Congress, discussed below, would have changed the representation available to appellants.

<sup>44</sup> See *Understanding* at 12.

<sup>45</sup> See *Understanding* at 12.

<sup>46</sup> 38 U.S.C. § 5904; 38 C.F.R. § 20.604.

<sup>47</sup> 38 C.F.R. § 20.603.

<sup>48</sup> 38 C.F.R. § 20.602. See note 33.

<sup>49</sup> 38 C.F.R. § 20.604.

<sup>50</sup> 38 C.F.R. § 20.603. See note 33.

<sup>51</sup> See *Understanding* at 12.

<sup>52</sup> P.L. 109-461, Title I.

<sup>53</sup> See **Figure 1**. Appeal Process at 3.

administrative appeals had been exhausted. The act now permits an attorney to enter the appeal process at a much earlier date—after the veteran has received a decision on his or her claim from the VA and decides to appeal this initial decision administratively through the filing of a NOD.<sup>54</sup> An attorney may now provide representation for a fee after the NOD is filed. The act requires the Secretary to provide Congress with an evaluation of the effect of the new system of representation not later than 42 months after the date of enactment. The Secretary is also authorized to review fee agreements, and the Secretary may order a reduction in an agreed upon fee if the Secretary finds the fee excessive or unreasonable. The Secretary's decision may be reviewed by the BVA, which is authorized to make the final review of the issue.<sup>55</sup>

Broadening attorney participation in the veterans' appeal process has been somewhat controversial. Opposition has focused on attorneys' fees and the possibility of additional delays in the appeal process. On March 5, 2007, Representative Ron Lewis introduced H.R. 1318,<sup>56</sup> which, if enacted, would repeal the authority for certain agent or attorney representation in veterans' benefit cases before the VA. In effect, the bill would restore the process that existed prior to the enactment of the 2006 law and would permit representation only after the BVA renders a final decision in the case. The bill has been referred to the House Committee on Veterans' Affairs and referred to the Subcommittee on Disability Assistance and Memorial Affairs. The bill never emerged from committee consideration in the 110<sup>th</sup> Congress.

### **Information for the Appeal**

Should new evidence or medical proof supporting the appellant's claim arise during the appeal process, the evidence should be submitted to the VA. If the appellant's claims file is at the local VA office and the new evidence is sent there, the VA local office will send the appellant an SSOC if it does not allow the claim after reviewing the new evidence. The new evidence will be added to the claims file and considered during the appeal process.<sup>57</sup>

### **Location of the VA Form 9**

After the Form 9 is filed, it becomes part of the claims file and serves as the basis for the appeal to the BVA. The Form 9, as part of the claims file, will be sent by the local VA office to the BVA and will be reviewed later by the BVA when the BVA considers the appeal and reviews the entire claims file.

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<sup>54</sup> *Id.*

<sup>55</sup> 38 U.S.C. § 7104.

<sup>56</sup> 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007).

<sup>57</sup> See *Understanding* at 13-14.

## The Board of Veterans' Appeals (BVA)

### Organization<sup>58</sup>

Known as the “Gateway to VA Appeals,”<sup>59</sup> the Board of Veterans' Appeals (BVA) is a part of the VA based in Washington, DC.<sup>60</sup> The BVA reviews benefit claims appeals and issues decisions on those appeals. The BVA is composed of “Members of the Board” who are attorneys experienced in veterans' law, appointed by the Secretary of Veterans Affairs and approved by the President of the United States. Staff attorneys, who are designated as Counsel or Associate Counsel, assist Members of the Board in preparing decisions.<sup>61</sup> The function that they provide is similar to a law clerk who assists a judge in his/her legal capacities.<sup>62</sup>

### The BVA's Docket

#### The BVA Docket and Docket Number

The local VA office will forward the appellant's claims file to the BVA's docket. The law requires that the BVA decide cases on a “first come, first served” basis.<sup>63</sup> Each appellant's case is added to the docket when the VA receives the substantive appeal—VA Form 9—and the claims file from the local VA.<sup>64</sup>

On occasion, the BVA may, on a motion by the appellant, advance the order of a claim on its docket.<sup>65</sup> The appellant must demonstrate compelling need, exceptional circumstances, or proof of hardship.<sup>66</sup> The BVA seldom grants a request for “advancement on the docket,” as the BVA feels that most appeals involve some form of hardship and the BVA wishes to treat all appellants fairly.<sup>67</sup>

### Waiting Time

Once a case/claim has been entered on the BVA's docket, it is uncertain how long it may take for the BVA to reach a decision on the case. The VA has stated that as of the fall of 1999, it took an average of two years from the time a NOD was filed until a final decision was issued.<sup>68</sup> However,

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<sup>58</sup> For a general overview of the BVA, see the website at <http://www.va.gov/vbs/bva>.

<sup>59</sup> *Id.*

<sup>60</sup> 38 U.S.C. § 7101(a); 38 U.S.C. § 7104.

<sup>61</sup> See *Understanding* at 6.

<sup>62</sup> *Id.*

<sup>63</sup> 38 U.S.C. § 7107(a); 38 C.F.R. § 20.900.

<sup>64</sup> See *Understanding* at 15. Each case is assigned a docket number when it is added to the list of cases. The first two numbers are the year in which the case was filed and the remaining numbers indicate the order in which the case was added to that year's list/docket. For example, 05-00111, would indicate the 111<sup>th</sup> claim filed in 2005.

<sup>65</sup> 38 U.S.C. § 7107(a)(92); 38 C.F.R. § 20.900.

<sup>66</sup> For example, terminal illness, bankruptcy, pending eviction, and other hardships.

<sup>67</sup> See *Understanding* at 16.

<sup>68</sup> *Id.*

2005 congressional testimony by the Undersecretary for Benefits of the VA appears to indicate that the decision time has been substantially reduced.<sup>69</sup>

## Personal Hearings

There are two types of personal hearings: a *local VA office hearing*<sup>70</sup> and a *BVA hearing*.

As previously discussed,<sup>71</sup> a local office hearing is held at the local VA office between the appellant and a *hearing officer* from the local VA office staff. Such a hearing is arranged between the appellant and the local VA office. The local VA office may find in favor of the appellant. The appellant may subsequently appeal an adverse finding by the local office hearing through the BVA.

The appellant may present his/her case in person to a member of the BVA. There are three types of BVA hearings: a hearing by a Board member at a the local VA office (Regional Office), called a Travel Board hearing;<sup>72</sup> a hearing at the BVA office in Washington, DC; or a videoconference hearing at the local VA office, if it is equipped for videoconferencing. The VA does not pay the appellant's travel expenses.<sup>73</sup>

## Request for a BVA Hearing

The typical way to request a BVA hearing is for the appellant to indicate on VA Form 9 the type of hearing that the appellant wishes. The appellant may also write to the BVA to request a hearing, indicating whether a hearing is requested at the local level or in Washington, DC.

## Scheduling the BVA Hearing

The schedule of the hearing depends upon the type of hearing requested. The BVA has reported that the Travel Board hearings are usually held as soon as they can be scheduled on the hearing officer's calendar,<sup>74</sup> but that they may be difficult to arrange because of the schedules of the BVA Board members and the accumulation of a sufficient number of appeals to warrant a scheduled visit from a BVA member.<sup>75</sup> Videoconferenced hearings are less complicated to arrange and can be scheduled more quickly than Travel Board hearings, according to the BVA.<sup>76</sup>

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<sup>69</sup> Testimony of Daniel L. Cooper, Undersecretary of Benefits, Department of Veterans Affairs before the Senate Veterans Affairs Committee (May 26, 2005). See <http://www.va.gov/OCA/testimony/svac/05052620.asp>.

<sup>70</sup> This is sometimes called a Regional Office hearing, an RO hearing, or a hearing officer hearing.

<sup>71</sup> See "Appeal to the Local VA Office" on page 6.

<sup>72</sup> See note 3.

<sup>73</sup> See *Understanding* at 18.

<sup>74</sup> *Id.* at 19.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

Hearings that are held at the BVA offices in Washington DC are usually scheduled close to the time when the BVA will consider the case. In 2000, the BVA reported that hearings are scheduled about three months in advance.<sup>77</sup>

## **The Ninety-Day Rule**

The local VA office will notify the appellant by letter when it transfers the claims file to the BVA in Washington, DC. The letter will inform the claimant that the claimant has ninety days from the date of the letter or until the BVA decides the case, whichever comes first, to add additional evidence to the file, request a hearing (if none was selected), and/or select or change representation.<sup>78</sup>

In order for the BVA to accept any of these materials after the expiration of the ninety-day period, the appellant must submit a motion—a written request—asking the BVA to accept the item, even though it is late. The motion must include an explanation of why the item is late and demonstrate why the BVA should accept the item into the claims file.

## **The Appeal at the BVA**

The local VA office will forward the appellant's file to the BVA. The appellant will be notified in writing when the file is officially transferred and received by the BVA.<sup>79</sup> The decision time in the appeal process varies from case to case. After the file is received by the BVA, the appellant's case will then be assigned to a Board member for review. When the docket number for the appeal has been reached, the file will be examined by a Board member and a staff attorney. They will check the file for completeness, review all of the evidence and arguments, the transcript of the local VA hearing, the statement of the appellant's representative (if the appellant has a representative), and any additional information that may be with the claims file.<sup>80</sup> The Board member may request the staff attorney to undertake additional research on the case and prepare recommendations for the review of the Board member. If the appellant requested a BVA hearing, the Board member assigned to the case will conduct the hearing before reaching a decision.

## **Notification of the Board's Decision**

The BVA will issue its decision in writing. The decision may contain legal documents and legal discussions as well as medical discussions. The decision will be mailed to the appellant's home address.<sup>81</sup>

The decision will allow, deny, or remand the claim. If the claim is allowed or denied, the BVA's decision is final. A remand is not a final decision and allows further work on the claim.<sup>82</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> 38 C.F.R. § 20.1304.

<sup>79</sup> See *Understanding* at 21. Appellants may check the status of their files after its transfer by BVA by telephone at 202-565-5436.

<sup>80</sup> *Id.* at 22.

<sup>81</sup> *Id.*

<sup>82</sup> See *How Do I Appeal* at 11.

If the appeal is denied, the BVA will send a copy of the “Notice of Appellate Rights” that describes additional actions that the appellant may choose to pursue.

## **The Remand**

At times, the BVA may review an appeal and determine that the case is not ready for a final decision. The BVA will send the case back to the local VA office with directions as to what should be done. The action of returning the case to the local VA office for additional work is called a remand. It is sometimes described as “additional development.”<sup>83</sup>

After the case has been returned to the local VA office, it will perform the additional work on the file. The local VA office will review the case and issue a new determination. If the local VA office does not allow the claim, it will return the case to the BVA for a final decision. The case keeps its original place on the BVA’s docket, so it is usually reviewed relatively soon after it is returned to the BVA.<sup>84</sup>

Certain cases are remanded because of new rulings by the U.S. Court of Appeals for Veterans Claims or changes in the law. The local VA office will then review them within the context of the new legislation or the court ruling.<sup>85</sup>

## **Additional Appeal Options**

Should the appellant wish to appeal the BVA’s decision, the appellant may appeal to the United States Court of Appeals for Veterans Claims (CAVC), an independent court and not part of the VA.<sup>86</sup> An appellant may also wish to pursue further motions with the BVA.

## **Notice of Appeal**

Usually, the appellant must file the Notice of Appeal with the CAVC within 120 days from the date the BVA’s decision is mailed. (The mailing date is stamped on the front of the BVA’s decision.)

If the appellant filed a motion to reconsider with the BVA within the 120-day time period and that motion was denied, the appellant has a new 120-day period to file the Notice of Appeal with the CAVC.<sup>87</sup> The new 120-day period begins on the date the BVA mails the appellant a letter notifying the appellant that it has denied the motion to reconsider.

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<sup>83</sup> See *Understanding* at 24.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See the CAVC’s website: <http://www.vetapp.uscourts.gov/>.

<sup>87</sup> See *Understanding* at 25-26 for the appropriate addresses to file the Notice of Appeal and a copy of the Notice of Appeal.



## **Motion for Reconsideration**

If the appellant is able to demonstrate that the BVA made an obvious error of fact or of law in its decision, the appellant may file a written “motion to reconsider” the appeal.<sup>88</sup> The appellant may have the VSO representative advise him/her whether to file the motion, and the VSO representative may also provide assistance in its preparation. The motion to reconsider is sent directly to the BVA and not to the local VA office.

The appellant must demonstrate that the BVA made a mistake in law or in fact and that the BVA’s decision would have been different if the mistake had not been made.<sup>89</sup>

## **Reopening the Case**

If the appellant has “new and material” evidence relating to his/her claim, the appellant can request that the case be reopened.<sup>90</sup> In order to be considered “new and material,” the evidence submitted must include information related to the case that was not included in the claims folder when the Board reviewed and decided the case.

To reopen a case, the appellant must submit the new evidence directly to the local VA office and not to the BVA.<sup>91</sup>

## **CUE Motion**

A BVA decision may be reversed or revised if the appellant is able to show that the decision contained “clear and unmistakable error” (CUE).<sup>92</sup> The written request for the BVA to review its decision for CUE is called a motion. CUE motions are filed directly with the BVA and not with the local VA office.

The motion for CUE review must meet various requirements. In order to succeed, the conclusion must be reached that the BVA would have decided the case differently, but for the error. A difference in opinion is not sufficient.<sup>93</sup> If the motion is denied, the appellant cannot request another CUE review. The VA has reported that not many CUE motions are successful.

The appellant may file a motion to review a BVA decision for CUE at any time. However, if the motion for CUE is filed after filing a timely Notice of Appeal with the CAVC (120 days),<sup>94</sup> the BVA will not be able to rule on the CUE motion.<sup>95</sup>

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<sup>88</sup> 38 U.S.C. § 7103; 38 C.F.R. § 20.1000; 38 C.F.R. § 20.1001.

<sup>89</sup> See *Understanding* at 27.

<sup>90</sup> 38 U.S.C. § 5108; 38 U.S.C. § 7104(b); 38 C.F.R. § 3.156; 38 C.F.R. § 20.1105.

<sup>91</sup> See *Understanding* at 27.

<sup>92</sup> 38 U.S.C. § 7111; 38 C.F.R. § 20, subpart O.

<sup>93</sup> *Id.*

<sup>94</sup> See “Nature of Appeal” at 11.

<sup>95</sup> See *Understanding* at 28.

## **Death of the Appellant Before a Decision Issued**

The death of the appellant usually ends the appeal.<sup>96</sup> If the appellant dies, the BVA normally dismisses the appeal without issuing a decision. Any rights of a deceased appellant's survivors are not affected by this action. The survivors may file a claim at the VA regional office (RO) for any benefits to which they may be entitled.<sup>97</sup>

## **Subsequent Judicial Appeals**

The *U.S. Court of Appeals for the Federal Circuit* (Federal Circuit) has exclusive jurisdiction to hear cases involving challenges to VA decisions in an appeal of a CAVC decision and in a direct challenge to VA regulation and VA policies of general applicability.<sup>98</sup> A decision of the CAVC may be appealed to the Federal Circuit by the persons who appealed to the CAVC or by the VA. An appeal to the Federal Circuit must be filed within 60 days of the final CAVC decision. After the Federal Circuit issues a final decision, either the claimant or the VA may petition the U.S. Supreme Court for certiorari (to hear the case) within ninety days of the Federal Circuit's final action.<sup>99</sup> The Supreme Court is the court of last resort and the Supreme Court's decision is final.

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<sup>96</sup> 38 U.S.C. § 7104(a); 38 C.F.R. § 20.1302.

<sup>97</sup> See *Understanding* at 29.

<sup>98</sup> 38 U.S.C. § 7292. See CRS Report RS22561, *Veterans Affairs: The U.S. Court of Appeals for Veterans Claims—Judicial Review of VA Decision Making*, by Douglas Reid Weimer.

<sup>99</sup> 38 U.S.C. § 7292(c).

## Appendix A. Duties and Obligations of the VA to the Claimant/Appellant

### Duties and Obligations of the VA to the Claimant/Appellant<sup>100</sup>

The VA<sup>101</sup> has various legal obligations to a claimant/appellant relating to the completeness of the application for benefits (or a subsequent appeal), the provision of medical and service records, and other issues related to the application/appeals process.

#### Application and Notice of Incomplete Application

The VA is required to provide to any person claiming or applying for any benefit, the “instructions and forms necessary to apply for that benefit.”<sup>102</sup> These materials are to be provided “free of all expense” to the claimant.<sup>103</sup>

If the claimant’s application for a VA benefit is incomplete, the VA is required to notify the claimant of the information that is necessary to complete the application.<sup>104</sup>

#### Required Information and Evidence; and Time Limitation<sup>105</sup>

After the VA receives a complete or a nearly complete application for benefits, the VA is required to notify the claimant of any information or medical or lay evidence that is needed to substantiate the claim.<sup>106</sup> As part of this notification requirement, the VA is required to indicate which information and evidence is to be provided by the claimant and which information the VA will attempt to obtain on the claimant’s behalf to substantiate and complete the claim.

The claimant is required to submit the above-mentioned evidence to substantiate the claim *within one year of the date of the VA’s notification*. If no further evidence is obtained, no benefits will be paid or furnished on this claim.<sup>107</sup>

#### Duty to Assist Claimants: Records

The VA is required to make “reasonable efforts” to assist a claimant in obtaining evidence necessary to substantiate the claim for benefits.<sup>108</sup> However, certain exceptions exist to this

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<sup>100</sup> See CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, by Douglas Reid Weimer.

<sup>101</sup> The statutory language provides that “the Secretary” is required to provide various assistance to the claimant. For the purposes of this summary and for consistency, the term “VA” is used instead.

<sup>102</sup> 38 U.S.C. § 5102(a); 38 C.F.R. § 3.150(a).

<sup>103</sup> 38 U.S.C. § 5102(a).

<sup>104</sup> 38 U.S.C. § 5102(b); 38 C.F.R. § 3.159(b)(2).

<sup>105</sup> These provisions are not applicable for any application or claim for government insurance benefits. 38 U.S.C. § 5103(b)(2).

<sup>106</sup> 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b).

<sup>107</sup> 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b)(1),

requirement. The VA is not required to provide assistance to the claimant if “no reasonable possibility” exists that such assistance would aid in substantiating the claim.<sup>109</sup> The VA may defer providing assistance pending the claimant’s submission of essential information that is missing from the claimant’s application.<sup>110</sup>

### ***Assistance in Obtaining Records***

The VA is required to make “reasonable efforts” to obtain relevant records (including private records) that the claimant adequately identifies to the VA and authorizes the VA to obtain.<sup>111</sup> Federal regulations outline the procedures for obtaining records not in the custody of a federal department or agency<sup>112</sup> and for obtaining records that are in the custody of a federal department or agency.<sup>113</sup> If, after making reasonable efforts, the VA is unable to locate the records, the VA will notify the claimant that it is unable to obtain the records pursuant to this claim.<sup>114</sup> The notification must identify the records being sought, explain the efforts made to obtain the records, and describe any further action to be taken by the VA regarding this claim.<sup>115</sup> The VA’s efforts to obtain records from the federal department or agency must continue until the records are obtained, unless it is reasonably certain that such records do not exist or that further efforts to obtain the records would be futile.<sup>116</sup>

### ***Records for Compensation Claims***

If the case involves a claim for disability compensation, additional assistance in obtaining records is required to be provided.<sup>117</sup> Assistance is to be provided in locating the claimant’s service medical records and other relevant records relating to the claimant’s active military, naval, or air service that are held or maintained by a governmental entity;<sup>118</sup> records of relevant medical treatment or examination at VA health-care facilities;<sup>119</sup> and any other relevant records held by any federal department or agency that the claimant identifies and authorizes the VA to obtain.<sup>120</sup>

### ***Medical Examinations for Compensation Claims***

If the case involves a claim for disability compensation, the VA is required to provide a medical examination or obtain a medical opinion when such an examination or opinion is necessary to

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(...continued)

<sup>108</sup> 38 U.S.C. § 5103A(a)(1); 38 C.F.R. § 3.159(c)(1).

<sup>109</sup> 38 U.S.C. § 5103A(a)(2); 38 C.F.R. § 3.160(d).

<sup>110</sup> 38 U.S.C. § 5103A(a)(3).

<sup>111</sup> 38 U.S.C. § 5103A(b)(1); 38 C.F.R. § 3.160©).

<sup>112</sup> 38 C.F.R. § 3.159A(c)(1).

<sup>113</sup> 38 C.F.R. § 3.159A(c)(2).

<sup>114</sup> 38 U.S.C. § 5103A(b)(2); 38 C.F.R. § 3.160(e).

<sup>115</sup> *Id.*

<sup>116</sup> 38 U.S.C. § 5103A(b)(3).

<sup>117</sup> 38 U.S.C. § 5103A(c); 38 C.F.R. § 3.159(c)(3).

<sup>118</sup> 38 U.S.C. § 5103A(c)(1).

<sup>119</sup> 38 U.S.C. § 5103A(c)(2).

<sup>120</sup> 38 U.S.C. § 5103A(c)(3).

make a decision on the claim.<sup>121</sup> The VA is required to treat an examination or opinion as necessary if the evidence on the record, taking into consideration all information and lay or medical evidence 1) contains competent evidence that the claimant has a current disability or persistent or recurrent symptoms of disability<sup>122</sup> or 2) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service;<sup>123</sup> but the record does not contain sufficient medical evidence for the VA to make a decision on the claim.<sup>124</sup>

### ***Other Assistance not Precluded***

The statute is not to be construed as precluding the VA from providing such other assistance to a claimant in substantiating a claim as the VA considers appropriate.<sup>125</sup>

### **Decisions and Notices of Decisions**

When the VA makes a decision affecting the provision of benefits to a claimant, the VA is required, on a timely basis, to provide the claimant (and the claimant's representative) notice of the decision.<sup>126</sup> The notice must include an explanation of the procedure for obtaining a review of the decision.<sup>127</sup> If the VA denies a benefit, the notice is required to include a statement of the reason for the decision and a summary of the evidence considered by the VA.<sup>128</sup>

### **VA's Obligation to Assist in the Development of Claims**

Federal regulations require the VA to assist the claimant "in developing the facts pertinent to the claim" and to render a decision that grants every benefit that can be supported in law while protecting the interests of the government.<sup>129</sup> Therefore, the VA has the duty to consider all legal theories upon which the claim could be granted, regardless of whether the claimant argues or focuses on every possible legal theory.

### **Disallowed Claims**

The statute specifically provides that the VA is not required to reopen a claim that has been disallowed except when new and material evidence is presented or secured.<sup>130</sup>

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<sup>121</sup> 38 U.S.C. § 5103A(c)(4); 38 C.F.R. § 3.159(c)(4).

<sup>122</sup> 38 U.S.C. § 5103A(d)(2)(A).

<sup>123</sup> 38 U.S.C. § 5103A(d)(2)(B).

<sup>124</sup> 38 U.S.C. § 5103A(d)(2)(C).

<sup>125</sup> 38 U.S.C. § 5103A(g).

<sup>126</sup> 38 U.S.C. § 5104(a); 38 C.F.R. § 3.103(b).

<sup>127</sup> *Id.*

<sup>128</sup> 38 U.S.C. § 5104(b).

<sup>129</sup> 38 C.F.R. § 3.103(a).

<sup>130</sup> 38 U.S.C. § 5103A(f).

## Reopening Disallowed Claims

If any new or material evidence is presented or secured relating to a claim that has been disallowed, the VA is required to reopen the claim and review the former disposition of the claim.<sup>131</sup>

## Revision of Decisions on Grounds of Clear and Unmistakable Error

A VA decision is subject to revision on the grounds of clear and unmistakable error, as previously discussed.<sup>132</sup> A review to determine whether a clear and unmistakable error exists in a case may be initiated by the VA or upon the request of the claimant.<sup>133</sup> A request for a revision of a VA decision based on clear and unmistakable error may be made at any time after the decision is made.<sup>134</sup> Such a request for a revision shall be submitted to the VA and shall be decided in the same manner as any other claim.<sup>135</sup> If there is evidence to establish the error, the prior decision is reversed or revised.<sup>136</sup> For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error, is treated as if the decision had been made on the date of the prior decision.<sup>137</sup>

## Benefit of the Doubt Standard

The VA is required to consider all information and the legal and medical evidence of record in a case before it with respect to benefits under the laws administered by the VA.<sup>138</sup> When there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the VA “shall give the benefit of the doubt to the claimant.”<sup>139</sup> Regulations provide that when reasonable doubt arises, such doubt will be resolved in favor of the claimant.<sup>140</sup> For instance, the submitted medical evidence generally needs to show that it is as likely as not that there is a connection between the in-service injury, occurrence, or illness and the current disability. Thus, the VA can deny the claim only if the preponderance of the evidence is against the claim.

## Certain Presumptions

In its analysis of certain claims, the VA is required by statute and/or regulation to make certain presumptions.

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<sup>131</sup> 38 U.S.C. § 5108.

<sup>132</sup> 38 U.S.C. § 5109A(a). See discussion at 12.

<sup>133</sup> 38 U.S.C. § 5109A(c).

<sup>134</sup> 38 U.S.C. § 5109A(d).

<sup>135</sup> 38 U.S.C. § 5109A(e).

<sup>136</sup> 38 U.S.C. § 5109(A)(a). See discussion at 12.

<sup>137</sup> 39 U.S.C. § 5109(A)(b).

<sup>138</sup> 38 U.S.C. § 5107(b).

<sup>139</sup> *Id.* See 38 C.F.R. § 3.102.

<sup>140</sup> 38 C.F.R. § 3.102.

### ***Presumption of Medical Soundness***

In evaluating a veteran's claim, the VA generally presumes that the veteran entered the service in sound medical condition.<sup>141</sup> This may assist the veteran in proving a claim by making it difficult for the VA to claim that the condition or disease existed prior to service. However, if the medical impairment was noted at the time of entry into service, the veteran may have to prove that the condition was exacerbated in-service. If the VA is able to prove by "clear and unmistakable evidence" that the disease or injury was in existence prior to service and that it was not worsened during service, the veteran's claim will be denied.

### ***Special Rules for Certain In-Service Occurrences***

Special rules exist under which the VA is required to consider a service-connected problem by presumption. For example, certain diseases associated with exposure to Agent Orange will be presumed to be service-related in the case of Vietnam veterans.<sup>142</sup>

A similar regulation holds that veterans who were held prisoners of war, or who served in combat, can be presumed to have suffered traumatic, stressful events during their military service.<sup>143</sup> Similarly, combat veterans have special rules applicable to them in proving an in-service injury or other incident.<sup>144</sup> Usually, if a combat veteran states that he/she suffered a disease, injury, or other event during the combat, the VA will usually accept that statement as fact. This is the case even if there are no service records to substantiate the claim.

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<sup>141</sup> 38 U.S.C. § 1111.

<sup>142</sup> 38 C.F.R. § 3.307(a)(6)(iii).

<sup>143</sup> 38 C.F.R. § 3.304(f).

<sup>144</sup> 38 U.S.C. § 1154(b); 38 C.F.R. § 3.304(d),(f).

## **Appendix B. Legislation Introduced in the 111<sup>th</sup> Congress**

### **H.R. 32**

H.R. 32 (sponsored by Representative Mike McIntyre),<sup>145</sup> the proposed Veterans Outreach Improvement Act of 2009 would direct the VA to establish, maintain, and modify as necessary procedures for ensuring the effective coordination of outreach activities of the VA between and among the Office of the Secretary, the Office of Public Affairs, the Veterans Health Administration, the Veterans Benefits Administration, and the National Cemetery Administration.

The bill would direct the Secretary to give priority to state and county outreach assistance in locations that have relatively large concentrations of veterans, or are experiencing growth in the veteran population. The bill would also authorize the Secretary to make grants to state or county veterans agencies for state and local outreach services

### **S. 315**

S. 315 (sponsored by Senator Russell D. Feingold),<sup>146</sup> the proposed Veterans Outreach Improvement Act of 2009 would direct the Secretary to establish a separate account for funding outreach activities of the VA and a separate subaccount for the funding of outreach activities of the Veterans Health Administration, the Veterans Benefits Administration, and the National Cemetery Administration.

The bill would direct the Secretary to establish and maintain procedures for ensuring the effective coordination of VA outreach activities between and among such elements, the Office of the Secretary, and the Office of Public Affairs. It would authorize the Secretary to award grants to state and local governments and to nonprofit community-based organizations to carry out programs that offer a high probability of improving veterans' outreach and assistance and appropriate state veterans agencies for such purposes.

It is anticipated that additional legislation will be introduced in the 111<sup>th</sup> Congress which, if enacted, will affect the appeal process. Specifically, it is expected that legislation will be introduced to reduce the claims processing time for the original claim and any subsequent appeals. Such legislation was introduced in the previous Congress. Because at least some of these proposals are likely to resurface in the 111<sup>th</sup> Congress, they are summarized below.

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<sup>145</sup> H.R. 67, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009). The bill was introduced on January 6, 2009 and on the same date was referred to the House Committee on Veterans' Affairs.

<sup>146</sup> S. 315, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009). The bill was introduced on January 26, 2009, and on that date was referred to the Senate Committee on Veterans' Affairs.



## Appendix C. Legislation Considered in the 110<sup>th</sup> Congress

### H.R. 67

H.R. 67 (sponsored by Representative Mike McIntyre),<sup>147</sup> the proposed Veterans Outreach Improvement Act of 2007, would have established procedures for coordinating activities of the VA and various related entities, including the Veterans Health Administration, the Veterans Benefits Administration, and the National Cemetery Administration. The bill would have provided assistance to the states to help carry out veterans benefits and related programs.

Outreach activities would have been funded through a separate appropriation account. The bill defined “outreach” within the context of the legislation as taking steps to provide “information, services and benefits counseling to veterans” and their survivors who may be eligible for such benefits.<sup>148</sup>

### H.R. 653

H.R. 653 (sponsored by Representative Thomas M. Reynolds)<sup>149</sup> would have required the Secretary of Veterans Affairs to accept that an injury or disease is service-connected (if there is no clear and convincing proof to the contrary), based upon the sworn affidavit of a veteran who served in combat on or before July 27, 1953 (prior to or during the Korean War).

### H.R. 1435

H.R. 1435, the proposed Department of Veterans Affairs Claims Backlog Reduction Act of 2007 (sponsored by Representative Joe Baca),<sup>150</sup> if enacted, would have directed the Secretary to conduct a pilot program to reduce the number of pending benefits claims. The bill would have established a three-year pilot program to handle pending veterans' claims in the following states: California, Florida, Ohio, South Carolina, and Texas.<sup>151</sup> The bill outlined the procedures for the development of the claim by the County Veteran Service Officer(s) (CVSO) and the claimant.<sup>152</sup> Under the program, the CVSO would have served as the claimant's advocate in developing and transmitting the claim and would have cooperated with a veterans service organization to develop the claim. Following the completion of the pilot program, the Secretary would have had to report to Congress regarding claims pending reduction, statistics, and other related information.

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<sup>147</sup> H.R. 67, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007). The bill was introduced on January 4, 2007, passed the House on May 23, 2007, and was referred to the Senate Committee on Veterans' Affairs on May 24, 2007.

<sup>148</sup> *Id.*

<sup>149</sup> H.R. 653, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007). The bill was introduced on January 24, 2007, and was referred to the House Subcommittee on Disability Assistance and Memorial Affairs on March 2, 2007.

<sup>150</sup> H.R. 1435, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007). The bill was introduced on March 9, 2007, and referred to the House Committee on Veterans' Affairs on that date. The House Subcommittee on Disability Assistance and Memorial Affairs held hearings on April 17, 2007.

<sup>151</sup> *Id.* § 4.

<sup>152</sup> *Id.* § 4(d).

## **H.R. 1444**

H.R. 1444 (sponsored by Representative John J. Hall),<sup>153</sup> would have directed the Secretary to make interim payments in cases remanded (referred back) to the VA by the BVA or the CAVC if the VA failed to decide the matter within 180 days of remand. If the Secretary did not make a decision within 180 days of the remand, then until the matter is finally decided, the Secretary would have been required to pay an interim benefit of \$500 per month. When a claim was finally decided, and if benefits were awarded, the interim payments would be considered advance benefit payments. If the final decision was not to award benefits, the interim benefits would not have been considered an overpayment.

## **H.R. 1490**

H.R. 1490 (sponsored by Representative Joe Donnelly)<sup>154</sup> would have provided for a presumption of service-connectedness in certain claims for benefits, upon the claimant proving service in a conflict and the nature of the claim, unless the Secretary determined that there is positive evidence to the contrary. The bill would have required the Secretary to award benefits, at a “median level” as determined by the Secretary, immediately upon processing the claim until such time as the appropriate level of benefits was determined.<sup>155</sup> The bill would also provide for the redeployment of VA claims workers freed up by the presumption of service-connectedness to assist veterans with their claims.<sup>156</sup>

## **H.R. 1538**

H.R. 1538 (sponsored by Representative Ike Skelton)<sup>157</sup> would have dealt primarily with improving the management of medical care, personnel actions, and quality of life issues for members of the Armed Forces. However, certain provisions could have also impacted the appeal process. The bill addressed disability evaluations, a study by DOD and the VA concerning their individual evaluation systems, and the possibility of combining the two systems. The bill would also have streamlined record keeping and the transfer of records from DOD to the VA. Some of the bill’s provisions are similar to those of S. 1283, discussed below.

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<sup>153</sup> H.R. 1444, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007). The bill was introduced on March 9, 2007, and referred to the House Committee on Veterans’ Affairs on that date. The House Subcommittee on Disability Assistance and Memorial Affairs held hearings on April 17, 2007.

<sup>154</sup> H.R. 1490, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007). The bill was introduced on March 13, 2007, and referred to the House Committee on Veterans’ Affairs on that date. The House Subcommittee on Disability Assistance and Memorial Affairs held hearings on April 17, 2007.

<sup>155</sup> *Id.* § 1.

<sup>156</sup> *Id.* § 2.

<sup>157</sup> H.R. 1538, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007). The bill was introduced on March 15, 2007, passed the House on March 28, 2007, and passed the Senate with an amendment by Unanimous Consent on July 25, 2007. A message on Senate action was sent to the House on July 26, 2007. On September 5, 2007, the Senate ordered the measure printed as passed.

## **H.R. 2257**

H.R. 2257 (sponsored by Representative Peter Welch)<sup>158</sup> would have required the Secretary of the VA to increase the number of benefits claims representatives. The bill would have required that no fewer than two claims representative be located at each “vet center.”<sup>159</sup>

## **H.R. 2855**

In addition to providing new types of assistance, H.R. 2855 (sponsored by Representative Ciro D. Rodriguez),<sup>160</sup> the proposed Wounded Heroes Bill of Rights Act, would have established a Wounded Heroes Independent Review Board (“Board”) to review certain cases involving members of the Armed Forces or veterans who were severely injured on or after September 11, 2001, while on active duty.<sup>161</sup>

Upon the request of a “Wounded Hero,” the Board would expeditiously review the decision or determination of the VA or other federal department or agency relating to the eligibility for or the scope of benefits, including health care or vocational rehabilitation benefits. Following a review, the Board would render a written advisory opinion relating to such eligibility or provision of such care or benefits.

An advisory opinion rendered by the Board would be “considered as evidence” by the BVA and the CAVC in any case with respect to the “Wounded Hero” before the BVA or the CAVC, upon the submission of the opinion by the “Wounded Hero.”<sup>162</sup> An advisory opinion rendered by the Board could not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.<sup>163</sup>

## **H.R. 3047**

H.R. 3047 (sponsored by Representative Doug Lamborn),<sup>164</sup> the proposed Veterans Claims Processing Innovation Act of 2007, would have provided changes to improve the processing of claims for benefits administered by the VA by implementing a work credit system for the BVA.<sup>165</sup> Under this system, a regional office of the BVA would receive work credit for a claim assigned to the regional office when the appellate period for the claim has expired or the BVA had issued a

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<sup>158</sup> H.R. 2257, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007). The bill was introduced on May 9, 2007, and was referred to the House Subcommittee on Disability Assistance and Memorial Affairs on May 11, 2007.

<sup>159</sup> These “centers” provide readjustment counseling and related mental health services to veterans (38 U.S.C. § 1712A(i)(1)).

<sup>160</sup> H.R. 2855, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess (2007). The bill was introduced on June 25, 2007, and referred to the House Subcommittee on Military Personnel, House Subcommittee on Health, and House Ways and Means on that date. On July 25, 2007, the bill was referred to the House Subcommittee on Military Personnel.

<sup>161</sup> H.R. 2855, § 311.

<sup>162</sup> *Id.* § 315(c).

<sup>163</sup> *Id.* § 315(d).

<sup>164</sup> H.R. 3047, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess (2007). The bill was introduced on July 16, 2007, and referred to the House Committee on Veterans' Affairs. On July 23, 2007, it was referred to the House Subcommittee on Disability Assistance and Memorial Affairs. Subcommittee hearings were held on November 8, 2007.

<sup>165</sup> H.R. 3047, § 2

final decision with respect to the claim.<sup>166</sup> The bill would also have implemented the electronic processing of claims for benefits administered by the Secretary of Veterans Affairs (Secretary).<sup>167</sup>

Section 4 of the bill would have provided for the treatment of the beneficiary of a deceased veteran's accrued benefits as the claimant for the purpose of incomplete claims at the time of the death of the veteran.<sup>168</sup> Thus, if a veteran claimant died before completing the submission of a claim for any benefit administered by the Secretary, the person who would have received any accrued benefits due to the veteran would be treated as the claimant for the purpose of completing the submission of the claim.<sup>169</sup>

## **H.R. 5089**

H.R. 5089, (sponsored by Representative John Barrow),<sup>170</sup> proposed to reform the veterans' disability determination process by requiring the Secretary of Veterans Affairs to pay disability compensation to certain veterans based on the concurring diagnosis of two physicians.

## **H.R. 5576**

H.R. 5576 (sponsored by Representative Steve Buyer),<sup>171</sup> the proposed Veterans Claims Backlog Reduction Act of 2008, would have mandated certain criteria for individuals who wish to serve as an agent or an attorney for a veteran in the preparation and presentation of the veteran's benefit claims. The bill would also have required an assessment of ratings specialists and veterans service representatives; a pilot program for claims processing using technology; and other issues relating to reducing the number of pending claims.

## **H.R. 5892**

H.R. 5892 (sponsored by Representative John J. Hall),<sup>172</sup> the proposed Veterans Disability Benefits Claim Modernization Act of 2008 would have required the Secretary to provide assistance to survivors and dependents of deceased veterans concerning benefits and services delivered by the VA. The bill would also have required the Secretary to review the ratings schedule for veterans' disabilities. Other provisions of the bill were directed at reducing the number of claims in processing.

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<sup>166</sup> *Id.* § 2(b). Presumably, this system could monitor and evaluate the workload and productivity of the regional offices of the BVA.

<sup>167</sup> *Id.* § 3.

<sup>168</sup> *Id.* § 4.

<sup>169</sup> *Id.* § 4(a).

<sup>170</sup> H.R. 5089, 110<sup>th</sup> Cong., 2d Sess (2008). The bill was introduced on January 22, 2008, and was referred to the House Committee on Veterans' Affairs on that same date.

<sup>171</sup> H.R. 5576, 110<sup>th</sup> Cong., 2d Sess (2008). The bill was introduced on March 14, 2008 and was referred to the House Subcommittee on Disability Assistance and Memorial Affairs on March 14, 2008.

<sup>172</sup> H.R. 5892, 110<sup>th</sup> Cong., 2d Sess (2008). The bill was introduced on April 24, 2008, and was referred to the Senate Committee on Veterans' Affairs on July 31, 2008.

## **H.R. 6236**

H.R. 6236, (sponsored by Representative Steve Chabot),<sup>173</sup> the proposed Veterans Disability Benefits Claims Modernization Act of 2008 would have required a VA study of the rating system and an advisory committee for the maintenance and readjustment of this schedule. The bill would also have required implementation of certain employment and other practices aimed at improving claims processing efficiency.

## **S. 1283**

S. 1283, (sponsored by Senator Mark Pryor)<sup>174</sup> dealt primarily with improving the management of medical care, personnel actions, and quality of life issues for members of the Armed Forces. However, certain provisions could have impacted the appeal process. Among these issues were evaluation of the disability evaluation system, a study by DOD and the VA concerning their individual evaluation systems, and the possibility of combining the two systems. Some of the bill's provisions are similar to those of H.R. 1538, discussed above.

## **S. 1363**

S. 1363 (sponsored by Senator Hillary Rodham Clinton),<sup>175</sup> the proposed Bridging the Gap for Wounded Warriors Act, planned to improve health care for severely injured members and former members of the armed forces. The bill would have created a Department of Defense-Department of Veterans Affairs Office of Transition ("Office").<sup>176</sup> The functions of this office would have included "developing uniform standards, to be applicable across the military departments and to the Department of Veterans Affairs, for the rating of disabilities incurred or aggravated by members of the Armed Forces during service in the Armed Forces."<sup>177</sup> The bill would also have provided for the reform of the disability ratings systems of the Department of Defense and the Department of Veterans Affairs.<sup>178</sup>

## **S. 2737**

S. 2737 (sponsored by Senator Daniel K. Akaka),<sup>179</sup> the proposed "Veterans' Rating Schedule Review Act" would have amended title 38 of the United States Code to grant jurisdiction to the U.S. Court of Appeals for Veterans Claims to review compliance of ratings for disabilities under

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<sup>173</sup> H.R. 6236, 110<sup>th</sup> Cong., 2d Sess (2008). The bill was introduced on June 11, 2008, and was referred to the House Committee on Veterans' Affairs on the same date.

<sup>174</sup> S. 1283, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess (2007). The bill was introduced on May 3, 2007, and was referred to the Senate Committee on Armed Services on that date.

<sup>175</sup> S. 1363, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. The bill was introduced on May 10, 2007, and referred to the Senate Committee on Armed Services on that date.

<sup>176</sup> S. 1363, § 3.

<sup>177</sup> *Id.* § 3(c)(5).

<sup>178</sup> *Id.* § 4.

<sup>179</sup> S. 2737, 110<sup>th</sup> Cong., 2d Sess (2008). The bill was introduced on March 10, 2008, and was referred to the Senate Committee on Veterans' Affairs on that date.

the schedule of 38 U.S.C. § 1151 with the statutory requirements applicable to entitlement to disability compensation.

## **S. 3419**

S. 3419 (sponsored by Senator Hillary Rodham Clinton),<sup>180</sup> the proposed Veterans Disability Claims Modernization Act of 2008 would have required the VA to provide direct assistance to survivors and dependents of deceased veterans regarding benefits and services delivered by the VA. It would have also required a study and maintenance and readjustment of the rating schedule. Other provisions would have streamlined the claims process with the goal of reducing the number of claims in processing.

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<sup>180</sup> S. 3419, 110<sup>th</sup> Cong., 2d Sess. (2008). The bill was introduced on August 1, 2008, and was referred to the Senate Committee on Veterans' Affairs on that date.