

# **VA APPEALS MODERNIZATION OVERVIEW**

**Texas Military and Veterans Law Section  
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# Overview

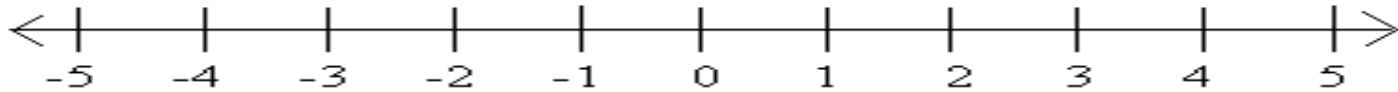
- **Background information re: Veterans Appeals Improvement and Modernization Act of 2017, P.L. 115-55**
- **Analysis of new/revised statutes and regulations**

# **Veterans Appeals Improvement and Modernization Act of 2017, P.L. 115-55**

- **HOW DID WE GET HERE?**
- **Original VA framework modified through stakeholder feedback and advocacy. Bill signed in Aug. 2017:**  
<https://www.congress.gov/115/plaws/publ55/PLAW-115publ55.pdf>.
- **VA issued proposed regs in Aug. 2018; final regs in Jan. 2019;** <https://www.govinfo.gov/content/pkg/FR-2019-01-18/pdf/2018-28350.pdf>.
- **EFFECTIVE DATE: FEBRUARY 19, 2019**

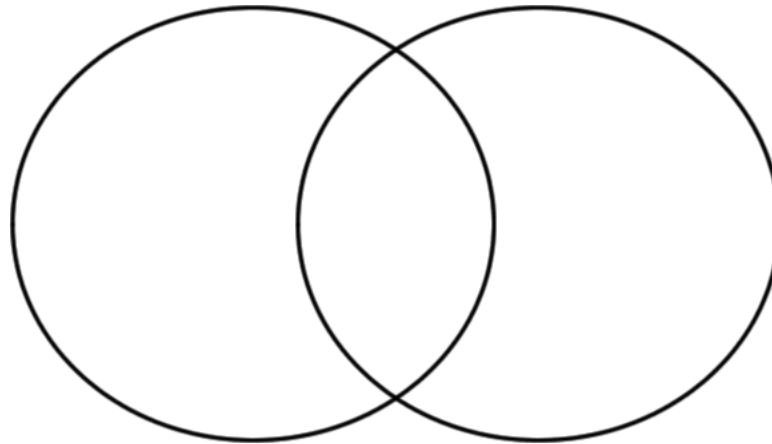
# Legacy System v. AMA Scheme

**Legacy System: Linear; moving back and forth**



# Legacy System v. AMA Scheme

## AMA Scheme: Circular



# Overall AMA Scheme

- **Provides review choices**
- **Reduces effective date traps**
- **Timeliness goals established in AMA, e.g., 125 days for VA decision; 365 days for BVA direct review – but no statute or regulation controls**

# **AMA Statutory Highlights**

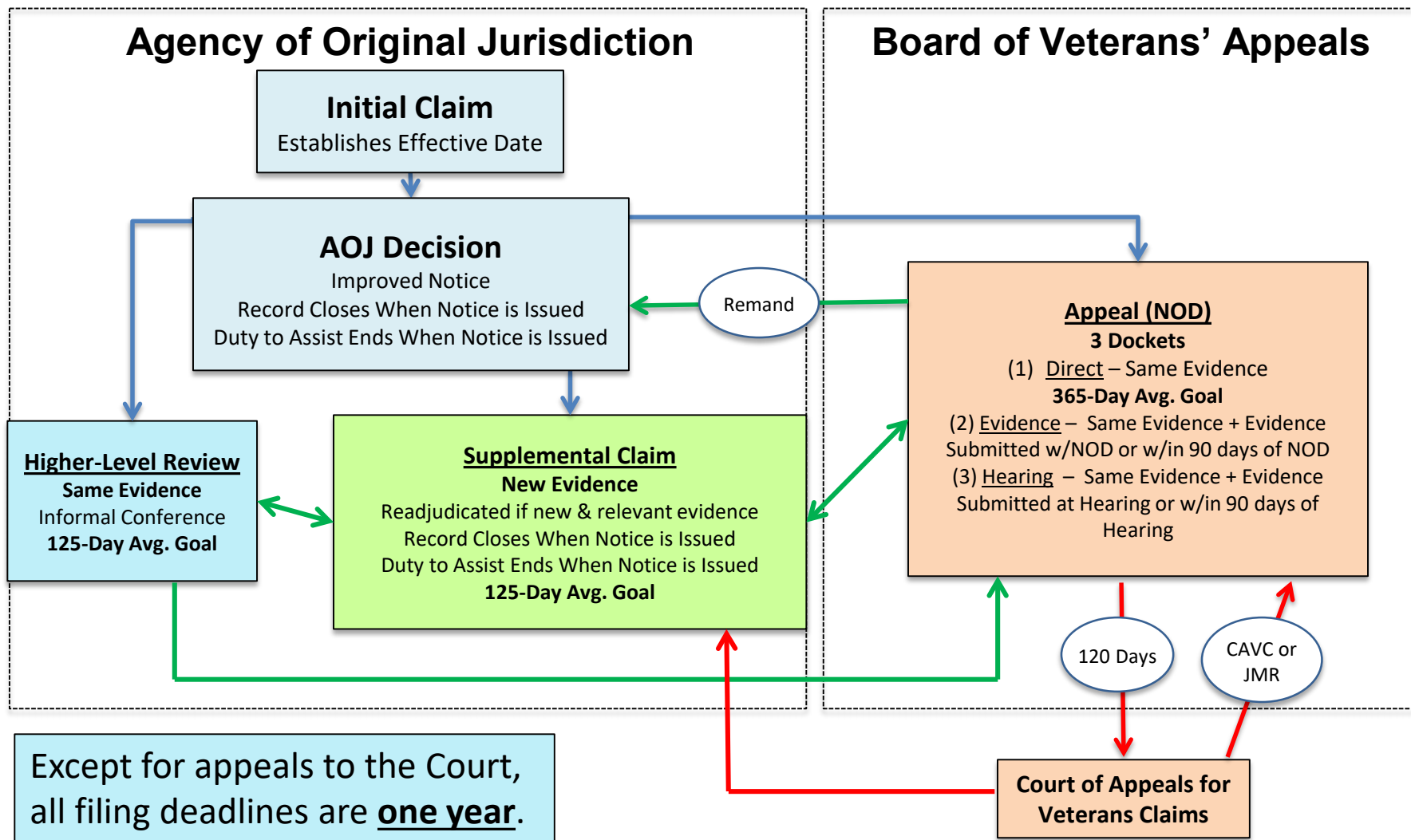
- **Ability to preserve original effective date within one year after denial by RO, BVA, or CAVC. *See* 38 U.S.C. 5110.**
- **If the year after the notice of decision expires, the effective date for a SC filed thereafter "will be fixed in accordance with the date entitlement arose, but will not be earlier than the date of receipt of the supplemental claim." *See* 38 U.S.C. 5110.**
- **New and relevant evidence standard. 38 U.S.C. 5108.**

# **AMA Statutory Highlights**

- **Enhanced decision notice. *See* 38 U.S.C 5104.**
- **Binding nature of favorable findings. *See* 38 U.S.C. 5104A.**
- **Addition of review options before VA. *See* 38 U.S.C. 5104C.**
  - **Higher level review (HLR). *See* 38 U.S.C. 5104B.**
  - **Supplemental claim (SC) with new and relevant evidence. *See* 38 U.S.C. 5108.**
  - **Appeal – notice of disagreement (NOD) filed directly to BVA. *See* 38 U.S.C. 7105.**



# Appeals Modernization Act



Choose **VA**

**VA**



U.S. Department  
of Veterans Affairs

# Definition of claim

**A *claim* is "written or electronic communication requesting a determination of entitlement or evidencing a belief in entitlement" to a specific benefit on the proper form. 38 C.F.R. 3.1(p).**

**VA defines two major categories of claims:**

- **initial**
- **supplemental**

# Initial v. Supplemental Claim

- An *initial* claim is “any complete claim, other than a supplemental claim, for a benefit on a form prescribed by the Secretary . . . .” 38 C.F.R. 3.1(p)(1).
  - An *original* claim is “the first initial claim for one or more benefits received by VA.” *Id.*
  - *Initial* claims also include:
    - Claim requesting s/c for a disability or grant of a new benefit. *Id.* at (i).
    - Claim for increased rating/rate of benefit paid based on a change/worsening in condition or circumstance since last decision. *Id.* at (ii).

# **Initial v. Supplemental Claim**

***A supplemental claim is “any complete claim for a VA benefit on an application form prescribed by the Secretary where an initial or supplemental claim for the same or similar benefit on the same or similar basis was previously decided. 38 U.S.C. 101(36); 38 C.F.R. 3.1(p)(2). See also 38 C.F.R. 3.2501.***

# **Initial v. Supplemental Claim**

- **Relevant commentary at 84 FR 139**
  - **“VA includes claim for increase in the definition of an initial claim to clarify to claimants that a claim for increase is based on a change or worsening in condition or circumstance since a prior VA decision and not based on disagreement with that decision.”**
  - **Provides reference to 3.151(c) to address definition of issue v. claim. An issue “refers to a distinct determination of entitlement to a benefit” and “claim is a request for review one or more issues.”**

# How to File a Claim

- **Complete claim required; generally considered filed as of date of receipt by VA. 38 C.F.R. 3.155(d)(1).**
- **If supplemental claim not complete, Secretary will notify claimant and representative of what information is needed; if complete claim received within 60 days of notice of incomplete claim, will be considered filed as of date of receipt of incomplete claim. *Id.* at (d)(1)(i).**

# How to File a Claim

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# How to File a Claim

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- **If supplemental claim not complete, Secretary will notify claimant/rep of information needed; if complete claim received within 60 days of notice, it will be considered filed as of date of receipt of incomplete claim. *Id.* at (d)(1)(i).**
- **See discussion of intent to file for other claims. *Id.* at (d)(1)(ii).**



# **VA's Duty to Assist**

- **Applies when:**
  - **Complete initial claim is filed.**
  - **Complete supplemental claim is filed (you must provide new and relevant evidence or identify it).**  
***See 38 U.S.C. 5103A(e).***
  - **When claim is returned due to DTA error.**  
***See 38 U.S.C. 5103A(e).***

# **VA's Duty to Assist in Developing Claim**

- **When complete/substantially complete initial or supplemental claim filed, VA will notify claimant of information/evidence necessary to substantiate claim. 38 C.F.R. 3.159(b)(1).**
- **If provided within year, VA must readjudicate.**
- **Notice not required**
  - **Upon receipt of SC w/in year of notice of prior decision**
  - **Upon receipt of HLR**
  - **Upon receipt of NOD**
  - **If no entitlement as matter of law**
  - **38 C.F.R. 3.159(b)(3)**

# VA's Duty to Assist in Obtaining Evidence

- **“When a claim is returned for readjudication by a higher-level adjudicator or the Board after a duty to assist error, the agency of original jurisdiction has a duty to correct **any** other duty to assist errors **not** identified by the higher-level adjudicator or the Board.”**  
**38 C.F.R. 3.159(c).**

# Submission of Evidence

- **General rule: “VA will include in the record, any evidence whether documentary, testimonial, or in other form, submitted by the claimant in support of a pending claim and any issue, contention, or argument a claimant may offer with respect to a claim” until the notice of decision. 38 C.F.R. 3.103(c)(1).**
- **Evidentiary record closes after initial decision. 38 C.F.R. 3.103(c)(2).**

# Submission of Evidence

- **Agency of original jurisdiction (AOJ) “will not consider, or take any other action on evidence that is submitted by the claimant, associated with the claims file, or constructively received by VA” as described in (c)(2)(iii) after the notice of decision.**
- **Evidence received after decision can be considered:**
  - **under 3.156(c);**
  - **when pending readjudication after duty to assist (DTA) error during HLR or BVA appeal**

# Submission of Evidence

- **Relevant commentary at 84 FR 139**
  - **VA will NOT “notify a claimant every time the claimant submits evidence during a period when the record is closed.”**
  - **In initial or subsequent decision, VA “will inform the claimant “generally” if evidence was received that was not considered.**

# **Submission of Evidence**

- **Relevant commentary at 84 FR 140**
  - **Furthermore, statute does not require notice of evidence not considered.**
  - **“Requiring VA to notify claimants each time evidence is submitted out of time or list or summarize such evidence individually in review decisions would dilute much of the administrative value of having a closed record following the initial decision.”**

# Submission of Evidence

- **Relevant commentary at 84 FR 141**
  - **Discussion of constructive receipt.**
  - **Documents created while record closed do not become part of record by virtue of constructive receipt.**
  - **If document created while record open identified as constructively received, record can be corrected similar to DTA error. Supplemental claim permitted.**



# Hearings

- **Hearings are permitted upon request “on any issue involved in a claim within the purview of part 3 . . . before VA issues notice of a decision on an initial or supplemental claim.” 38 C.F.R. 3.103(d).**
- **Where?**
  - **VA field office with original jurisdiction;**
  - **VA office nearest claimant’s home with adjudicative functions or videoconference capabilities; and**
  - **any other VA facility/federal bldg. having suitable facilities (at VA discretion)**

# Hearings

- **Who?**
  - **Employee with original determinative authority; if hearing on proposed adverse action, can have employee who did not make original decision**
- **How?**
  - **Claimant to appear in person; can produce witnesses, but must be present; not solely for representative**
  - **Hearing officer must explain issues/evidence; questions are to explore basis for claim, not to refute/discredit**

# Decision Notice Requirements

- **The statute requires specific notice provisions. 38 U.S.C. 5104(b); *see also* 38 C.F.R. 3.103(f)(1)-(8).**

# **Decision Notice Requirements**

**Decision notices must contain the following 8 items:**

- **Identification of issues adjudicated;**
- **Summary of evidence considered;**
- **Summary of applicable laws and regs;**
- **Identification of favorable findings;**
- **For denied claims, identification of elements not satisfied leading to the denial;**
- **If applicable, identification of criteria to grant service connection or next higher rating;**
- **Explanation of how to obtain/access evidence used in making decision;**
- **Summary of further review options.**

# **Favorable Findings**

- **Any finding favorable to the claimant made by either VA/BVA is binding on all subsequent VA/BVA adjudicators “unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding.” 38 C.F.R. 3.104(c).**
- **A finding is defined as “a conclusion either on a question of fact or on an application of law to facts made by an adjudicator concerning the issue(s) under review.” *Id.***

# Options for Review of Decisions

- **What are options after HLR Decision?**
  - **File SC with new and relevant evidence.**
  - **File NOD directly to BVA.**
- **What are options after SC Decision?**
  - **File request for HLR.**
  - **File SC with new and relevant evidence.**
  - **File NOD directly to BVA.**

# Options for Review of Decisions

- **What are options after BVA decision?**
  - **File SC with new and relevant evidence.**
  - **File NOA to CAVC (within 120 days).**
- **What are options after CAVC decision?**
  - **File SC with new and relevant evidence.**
  - **File appeal to Federal Circuit (60 days from date of CAVC judgment).**

# What is Higher Level Review (HLR)?

**38 U.S.C. 5104B - Higher-level review by the agency of original jurisdiction.**

- ***Applicability:*** Applies to all claims under the modernized review system except simultaneously contested claim. 38 C.F.R. 3.2601(a).
- ***Format:*** Complete request must be submitted on a form prescribed by the Secretary. 38 C.F.R. 3.2601(b).
- ***When:*** Request for higher-level review must be received by VA within one year of the date the VA issues notice of decision. 38 C.F.R. 3.2601(d).



# What is Higher Level Review (HLR)?

- **Definition:** Higher-level review (HLR) is a *de novo* review based on evidence before VBA at time of original decision. 38 C.F.R. 3.2601(f). No new evidence will be considered. 38 C.F.R. 3.2601(i). Decision must indicate if any evidence was not considered and how it can be considered on further review. 38 C.F.R. 3.2601(k).
- **Who:** Experienced adjudicator who did not participate in prior decision will conduct HLR. Selection of adjudicator at VA's discretion; generally will be from another RO (unless a specialty case handled at specific RO). You can request same office review and VA will grant that request in absence of good cause to deny. 38 C.F.R. 3.2601(e).

# What is Higher Level Review (HLR)?

- ***Difference of opinion:*** HLR can grant benefit based on difference of opinion, but will not revise decision “in a manner that is less advantageous . . . based solely on a difference of opinion.” 38 C.F.R. 3.2601(j). Bound by favorable findings, but can reverse/revise to veteran’s disadvantage if finds CUE.
- ***Ordering development/duty to assist errors:*** Adjudicator cannot order additional development unless it is required to correct duty to assist errors. 38 C.F.R. 3.2601(f); (g).
- ***VA must expedite although they declined to define it:*** When sent back for correction of errors, VA “will expeditiously readjudicate the claim in accordance with 38 U.S.C. 5109B.” 38 C.F.R. 3.2601(g).

# What is Higher Level Review (HLR)?

- ***Hearings/informal conferences:*** There is no authority for hearing under HLR. Claimant or representative can request informal conference, i.e., contact with a claimant’s representative or, if not represented, with the claimant, telephonically, or as otherwise determined by VA, for the sole purpose of allowing the claimant or representative to identify any errors of law or fact in a prior decision based on the record at the time the decision was issued.” 38 C.F.R. 3.2601(h).
- ***Contact:*** VA is supposed to contact upon request. Be aware: “[I]f such reasonable efforts are not successful, a decision may be issued in the absence of an informal conference.” 38 C.F.R. 3.2601(h).

# What are Supplemental Claims?

- **38 U.S.C. 5108 - Supplemental claims.**
- ***Definition:* “[A]ny complete claim for a VA benefit on an application form prescribed by the Secretary where an initial claim for the same or similar benefit on the same or similar basis as previously decided.” 38 U.S.C. 101(36); 38 C.F.R. 3.1(p)(2); 38 C.F.R. 3.2501.**

# What are Supplemental Claims?

- ***New and relevant evidence:*** To successfully file a supplemental claim, there must be new and relevant evidence.
  - **New=not previously part of record before agency.**
  - **Relevant=tends to prove or disprove a matter at issue in a claim.**
  - **New and relevant evidence shall not be construed to impose higher evidentiary threshold than the new and material evidence standard.**

# What are Supplemental Claims?

- *New and relevant evidence (cont.):*
  - Includes evidence that “raises a theory of entitlement that was not previously addressed.” 38 C.F.R. 3.2501(a)(1).
  - If claimant reasonably **identifies** existing records, whether or not in federal custody, the Secretary shall assist in obtaining the records. 38 U.S.C. 5108(b)(1). That assistance is **not** predicated upon a finding that new and relevant evidence has been presented or secured. *Id.* at (2).
  - Once secured, Secretary readjudicates taking into consideration all of the evidence of record. 38 U.S.C. 5108(a).

# What are Supplemental Claims?

- ***Hearings:*** Claimants have the right to request a hearing on any issue before VA issues a decision on an initial or supplemental claim. 38 C.F.R. 3.103(d).
- ***Timing of supplemental claims:*** You must file within a year of a prior decision to preserve original effective date. If you file outside the year period, effective date will be no earlier than date of receipt of the supplemental claim. 38 C.F.R. 3.2500(h).

# Separating Issues

- **You can take different issues into different review options in the new system. See 38 U.S.C. 5104C(2)(C).**
- **“To the extent that a complete claim application encompasses a request for more than one determination of entitlement, each specific entitlement will be adjudicated and is considered a separate issue for purposes of review options” under 38 C.F.R. 3.2500. 38 C.F.R. 3.151(c)(1).**



# Separating Issues

- **Example: If decision adjudicates two service-connected conditions, e.g., s/c for knee and ankle, those are separate issues that can be taken into separate review lanes.**
- **However, different review options may not be selected for specific components of the knee disability claim, e.g., ancillary benefits, whether knee condition occurred in service, or whether current knee condition resulted from a service-connected injury/condition.  
38 C.F.R. 3.151(c)(2).**

# Changing Review Options Before VBA

- **You can withdraw a request for consideration of a HLR or SC claim and change review option as long as it is within the year of the initial decision under review. 38 C.F.R. 3.2500(e)(1).**
- **Claimant may change review option for SC after expiration of one year IF VA grants extension for good cause under 38 C.F.R. 3.109(b) and the SC application is received within the extension period. 38 C.F.R. 3.2500(e)(2).**
- **Concurrent election prohibited. 38 C.F.R. 3.2500(b).**

# **Review by BVA/Filing Appeal - NOD**

- **Appellate review shall be initiated by the filing of a notice of disagreement in the form proscribed by the secretary. *See* 38 U.S.C. 7105(a); 38 C.F.R. 20.202(a) and (d).**
- **Notice of disagreement must identify the specific decision and issue or issues with which the claimant disagrees. *See* 38 C.F.R. 20.202(a).**
- **Notice of disagreement must indicate type of review requested by the Board. *See* 38 C.F.R. 20.202(b).**

# **Review by BVA/Filing Appeal - NOD**

- **BVA must construe liberally, but can dismiss appeal that fails to identify specific decision and issue(s) with which claimant disagrees. 38 C.F.R. 20.202(a). However, subsection (f) states BVA must seek clarification when it cannot identify denied issue or issue(s) or review option. 38 C.F.R. 20.202(f).**
- **Notice of disagreement shall be filed with the Board. See 38 U.S.C. 7105(b)(2)(c); 38 C.F.R. 20.203(a).**

# **BVA Review Options**

- ***Direct Review:*** No new evidence; no hearing. Decision will be based on evidence in file. BVA states the goal for decisions in this lane is an average of 365 days. 38 C.F.R. 20.301.
- ***Hearing:*** BVA will consider evidence of record at time of agency decision, evidence submitted at hearing, and evidence submitted within 90 days of hearing. 38 C.F.R. 20.302.
- ***Evidence only:*** BVA will consider evidence of record at time of agency decision and evidence submitted with NOD or within 90 days of filing NOD. If you move to this docket under 20.202, you can submit evidence with 90 days after notification of move. 38 C.F.R. 20.303.

# Changing Review Option at BVA

- ***NOD Modification:*** You can modify NOD within year from date the AOJ mails notice of decision or within 60 days of date BVA received NOD, whichever is later. Request to modify NOD will not be granted if appellant submitted evidence or testimony. 38 C.F.R. 20.202(c)(2).
- ***NOD Withdrawals:*** You can also withdraw the NOD, and it does not preclude you from filing a request in a VBA lane or a new NOD if those are still timely. 38 C.F.R. 20.205(c).
- ***Extensions:*** BVA provides an opportunity to ask for an extension for filing the NOD or for modification based on demonstration of good cause. 38 C.F.R. 20.203(c).

# **BVA Hearings**

- ***Types:*** In-person in DC or video. BVA will schedule but veteran can request different method. No Travel Board hearings. 38 C.F.R. 20.702; 20.703.
- ***Requests for change in date:*** If good cause up to two weeks before scheduled hearing. 38 C.F.R. 20.704(c).
- ***Failure to appear:*** Failure to appear w/o proper postponement request will be treated as withdrawn. Motion for new hearing can be filed within 15 days; must show good cause for why timely request could not have been made; grant at discretion of VLJ scheduled to preside. 38 C.F.R. 20.704(d).
- **You are entitled to notice of not less than 30 days for original hearing date. 38 C.F.R. 20.703(e).**

# **BVA Remands**

- **BVA cannot remand for additional evidentiary development, only for correction of duty to assist error prior to AOJ decision, or failure to comply with other statutory or regulatory duty, “if correction of the error would have a reasonable possibility of aiding in substantiating” the claim. 38 C.F.R. 20.802(a).**
- **BVA will remand to AOJ for advisory medical opinion if duty to assist error may only be corrected by such opinion. Remand will specify questions for expert. 38 C.F.R. 20.802(b).**



# **BVA Remands**

- **BVA will not keep jurisdiction over remanded appeals; a new NOD or other review option must be filed after AOJ decision on remand. AOJ is required to provide expeditious decision on remand. 38 C.F.R. 20.802(c).**

# Forms

- **VA regulations require proper form usage.**
- ***VA Form 20-0998, Your Rights to Seek Further Review of Our Decision:***  
**<https://www.vba.va.gov/pubs/forms/VBA-20-0998-ARE.pdf>**
- ***VA Form 20-0998 is the only form VA intends to send with decisions. They will not be sending supplemental claim, higher-level review or Board appeal (NOD) forms.***

# Forms

- **You can sign these forms for your clients.**
- ***VA Form 20-0995, Decision Review Request: Supplemental Claim:***  
**<https://www.vba.va.gov/pubs/forms/VBA-20-0995-ARE.pdf>**
- ***VA Form 20-0996, Decision Review Request: Higher-Level Review:***  
**<https://www.vba.va.gov/pubs/forms/VBA-20-0996-ARE.pdf>**
- ***VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement):***  
**<https://www.va.gov/vaforms/va/pdf/VA10182.pdf>**

# **PRACTICE REALITIES**

- **Understanding which system applies.**
- **Understanding the differences.**
- **Representation in both legacy appeals and AMA.**
- **Electronic access necessary.**

**QUESTIONS ?????**