

VETERANS LAW

Appeals



“To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors.”



Appeals

Scenario:

- Claim developed and filed by VSO or Veteran
- VA development
- Claim fully or partially denied
- Now what?





Appeals



- You must do two things:
 1. Assess the validity of the claim and sufficiency of the evidence; and
 2. Review for potential VA errors
 - Did VA meet its duty to assist the veteran?
 - Were C&P exams adequate to render a decision?
 - Did VA properly evaluate the evidence?
 - Did VA adequately explain the reasons for their denial?
 - Proper effective date assigned?
- If the VA erred, you must appeal to the appropriate forum and within the specified timeline



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Appeals

- Legacy Appeals
 - Process on Remand
- AMA Appeals
 - How to Review a Case
 - Forum Election
 - Drafting IHPs
 - Hearings
 - Remands
- CAVC / NVLSP Role





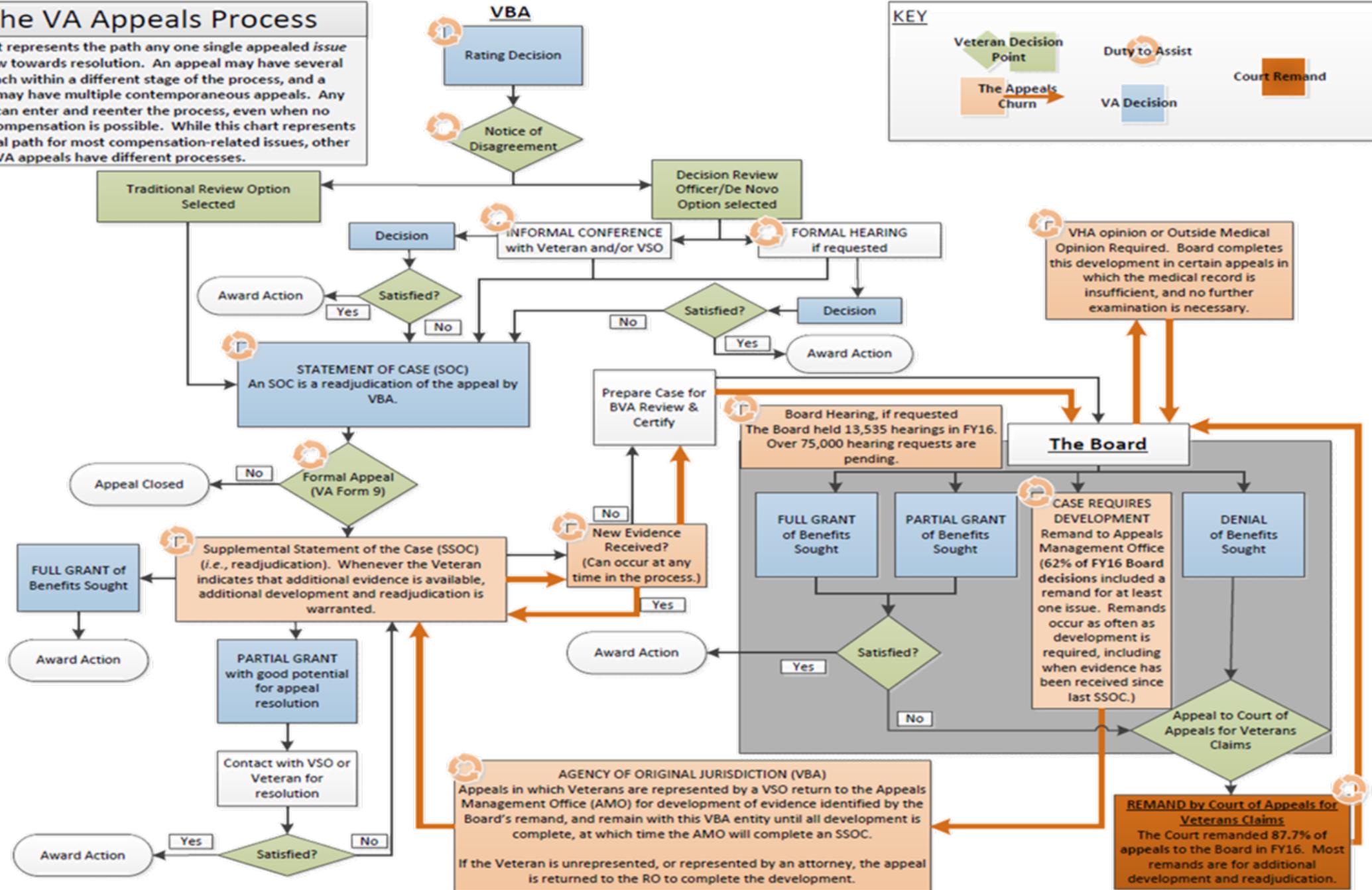
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The VA Appeals Process

This chart represents the path any one single appealed issue can follow towards resolution. An appeal may have several issues, each within a different stage of the process, and a Veteran may have multiple contemporaneous appeals. Any Veteran can enter and reenter the process, even when no further compensation is possible. While this chart represents the typical path for most compensation-related issues, other types of VA appeals have different processes.

KEY

- Veteran Decision Point
- Duty to Assist
- The Appeals Churn
- VA Decision
- Court Remand





Legacy Appeals

Legacy Appeals

- Pre-Feb 2019 appeals
- 35K-40K (FY24) legacy appeals remaining at VBA, VHA and BVA
 - Goal is 12K by the end of FY26
- Currently distributed between BVA and on remand to the Regional Office

* FY24 BVA Annual Report



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Legacy Appeals

When at the Regional Office on Remand -

- No New Evidence to Submit
 - RO fixes error and issues a decision/SSOC
 - **Automatically returns** to the BVA unless Veteran withdraws
- When New Evidence Exists
 - RO evaluates and issues a rating and/or an SSOC
 - **Automatically returns** to the BVA unless Veteran waives
 - 30 days to add additional evidence or argument



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Legacy Appeals

- **New RO decision and any evidence returns to BVA**
- **Grant, deny or remand back to VBA**
 - **BVA Grant – back to the RO for rating and effective date**
 - **Assuming a grant of SC, implementing rating and effective date is now under AMA**
 - **Partial grant – ensure SSOC issued + case returned to BVA**
- **Denial – Veteran accepts loss or appeals to CAVC**
- **Remand – Veteran can submit new evidence**
 - **Newly discovered records, new lay evidence, new medical opinions/records**
 - **No SOL, but earlier is better**



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Appeals Reform



H.R. 2288, the "Veterans Appeals Improvement and Modernization Act of 2017," which provides comprehensive reform of the Department of Veterans Affairs benefits claims appeals process.



Appeals Modernization Act

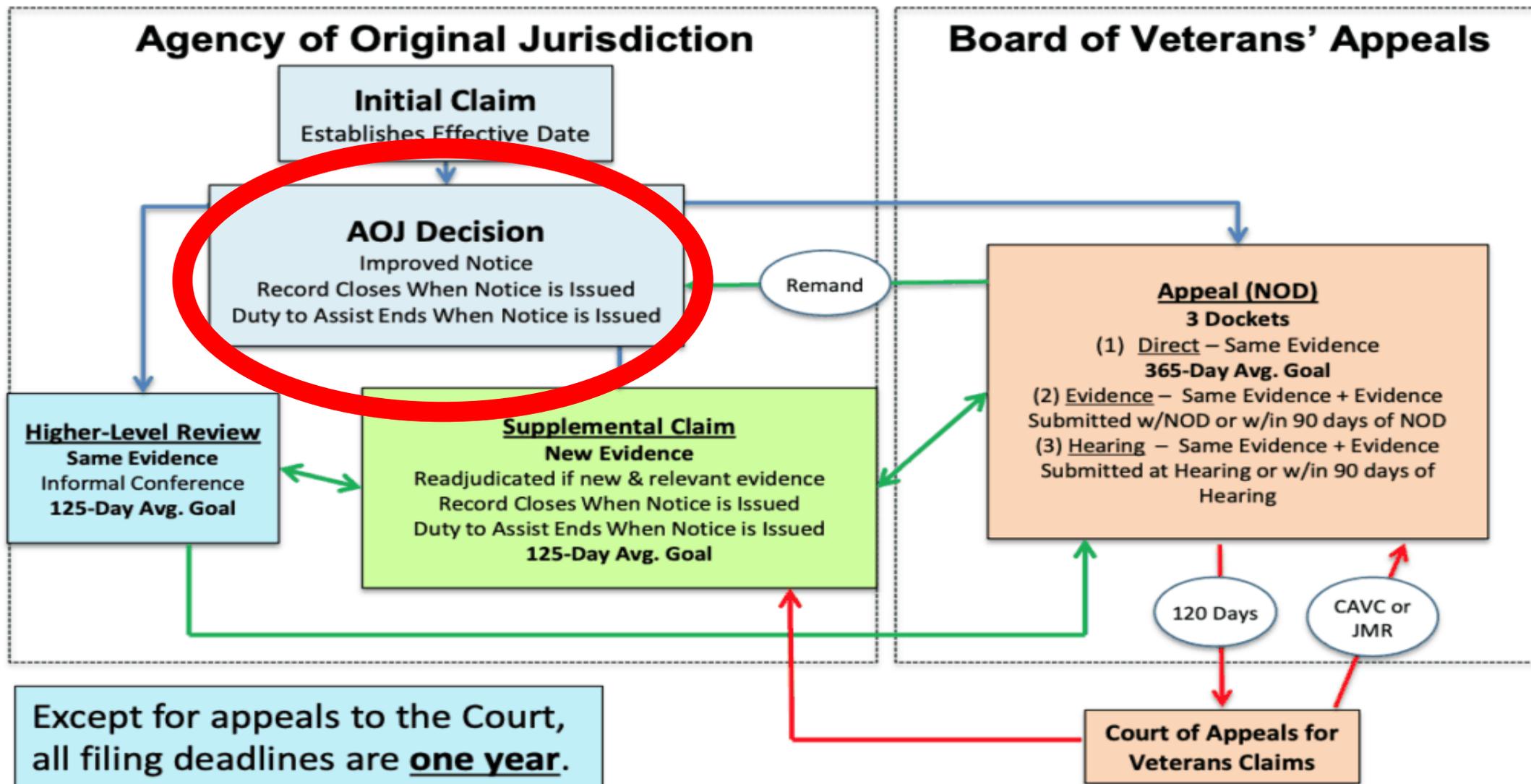
- Signed 2017 / Implemented Feb 2019
 - RAMP began 1 Nov 2017
 - Issue: Open record vs perceived speed
- All post-Feb 2019 appeals are under the AMA
 - VA goal was decision within 125 days of appeal
- Still a very complicated process
- Food for Thought: Does the AMA favor the Veteran or VA?





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Appeals Modernization Act



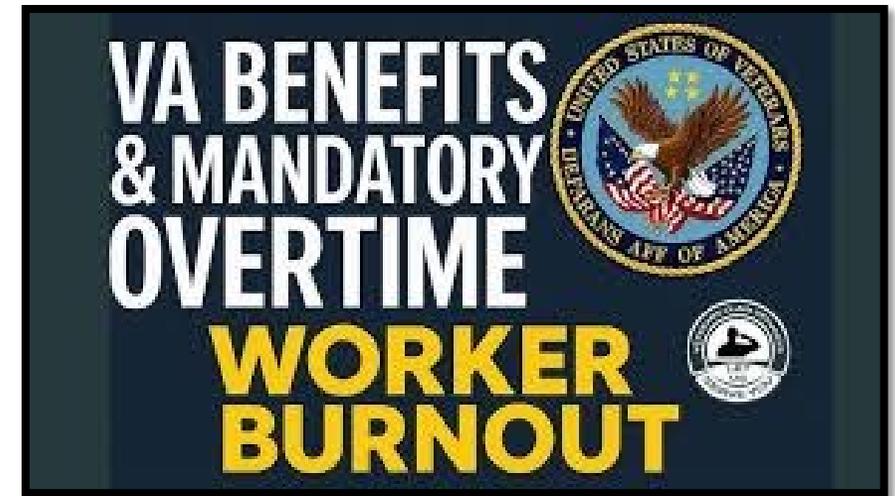


Problem at the AOJ



VA Raters (RVSRs):

- High turnover rate
 - Low Pay
 - Mandatory Overtime Reinstated
- Strict adherence to the M21-1
- Lack of access to OGC
- Overwhelmed by the workload
 - 576,874 pending claims (EOY25)
 - 105,716 claim backlog (125 days++)
 - Avg of 15,000 new claims per month





How to Review Your Case for Appeal





How to Review a Case for Appeal

- As discussed in “Intro to Appeals,” you must assess the validity of the claim and review for VA errors
 - Was the claim properly filed and supported by the evidence?
 - Did VA meet its duty to assist the veteran?
 - Were C&P exams adequate to render a decision?
 - Did VA properly evaluate the evidence?
 - Did VA adequately explain the reasons for their denial?
 - Proper effective date assigned?
- If the VA erred, you must appeal to the appropriate forum and within the specified timeline
- Some examples of common VA errors ...



How to Review a Case for Appeal – Common VA Errors

- **Failure to address all theories of entitlement**
- VA sometimes fails to address and develop theories of entitlement
 - “Although there may be multiple theories or means of establishing entitlement to a benefit for a disability, if the theories all pertain to the same benefit for the same disability, they constitute the same claim.”
Robinson v. Mansfield, 21 Vet. App. 545 (2007)

For example – for SC claim, the five (5) theories of SC are:

- Direct
- Aggravation
- Presumption
- Secondary
- Caused by negligent VA medical treatment, VR&E, or CWT



How to Review a Case for Appeal – Common VA Errors

Failure to address reasonably raised issues/claims

- VA sometimes fails to address and develop reasonably raised claims/issues within the scope of the claim, as required by 38 C.F.R. § 3.155(d)(2), such as:
 - Unclaimed complications of claimed condition (secondary SC)
 - TDIU (especially extraschedular TDIU)
 - *Rice v. Shinseki*, 22 Vet. App. 447 (2009); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)
 - SMC(s)
 - Not developing TDIU based on 1 disability
 - SMC based on loss of use
 - High levels of SMC



How to Review a Case for Appeal – Common VA Errors

Failure to address reasonably raised issues/claims

- Although VA is responsible for addressing all reasonably raised theories and related claims, you don't want to “hide the ball” from VA
 - Explicitly state each theory of entitlement
 - Alert VA to any matters related to the claim, such as possible entitlement to SMC or TDIU



How to Review a Case for Appeal – Common VA Errors

Failure to address lay statements

- Lay evidence is one type of evidence that must be considered, if submitted, when a Vet seeks disability benefits
 - *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006)
 - *Barr v. Nicholson*, 21 Vet. App. 303 (2007): examiner's opinion inadequate because he did not indicate whether he considered Vet's assertions of continuous symptoms



How to Review a Case for Appeal – Common VA Errors

Failure to address lay statements

- VA must consider lay statements that are relevant to a claim
- ROs often ignore or reject lay statements critical to a claim, because they are not documented in official records
 - Corroboration usually not required if Vet competent to provide the evidence



How to Review a Case for Appeal – Common VA Errors

Failure to address lay statements

- For VA to reject lay evidence, it usually must find it to be not credible
 - **Must adequately explain why, too!**
- If you receive a rating decision in which the rater ignored or erroneously rejected relevant lay evidence, request HLR or appeal to BVA



How to Review a Case for Appeal – Common VA Errors

Failure to address lay statements

- Lay evidence can be relevant to:
 - Establishing in-service incident
 - Establishing continuity of symptoms
 - Establishing current disability (ex: tinnitus)
 - Triggering duty to assist:
 - VA medical exam/opinion
 - Obtaining records
 - Showing severity of disability



How to Review a Case for Appeal – Common VA Errors

Failure to consider effects of medication

- VA may not deny entitlement to a higher rating on the basis of relief provided by medication when those effects are not specifically contemplated by the rating criteria
 - *Jones v. Shinseki*, 26 Vet. App. 56 (2012)



How to Review a Case for Appeal – Common VA Errors

Failure to consider effects of medication

- If a DC **does not specifically** contemplate the effects of medication, VA is required to discount the ameliorative effects of medication when assigning a rating
 - Ex: GERD (hiatal hernia), musculoskeletal conditions
- If a DC **does specifically** contemplate the effects of medication, then VA can rate the condition based on its severity when Vet is medicated
 - Ex: hypertension, most heart diseases, mental disorders, diabetes



How to Review a Case for Appeal – Common VA Errors

Failure to consider effects of medication - advice

- Review the DC at issue for any reference to medication
- If a DC **does not specifically** mention anything about medication, VA is required to discount the favorable effects of medication
 - Argue that VA must rate condition based on how bad it would be w/out medication, and obtain a medical opinion if necessary
 - Point to evidence in the record showing the severity when Vet is not medicated
 - Submit lay statements about symptoms when Vet is off meds



How to Review a Case for Appeal – Common VA Errors

Inadequate VA exams

- Once VA undertakes the effort to provide an exam when developing a service connection claim, even if not statutorily obligated to do so, it must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided.
 - *Barr v. Nicholson*, 21 Vet. App. 303 (2007)



How to Review a Case for Appeal – Common VA Errors

Inadequate VA exams

- A VERY common reason for remands by the BVA and the CAVC is that VA failed to provide the claimant with an adequate medical exam or opinion
- As an advocate, you can save your Vet a substantial amount of time in the VA claim process if you spot inadequacies in a VA exam and bring them to VA's attention immediately



How to Review a Case for Appeal – Common VA Errors

Inadequate VA exams

- It is vital that you get your objection to the VA exam on record by submitting a written statement outlining why the exam is inadequate
 - Statement does not need to be long to be effective



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The Examiner is Not Qualified

- This may occur when a VA medical examination or opinion is provided by a medical health professional who is not a doctor or does not specialize in the type of disease or disorder in question.
- For example, a podiatrist performs a VA PTSD examination. Or it may be more nuanced – a family practice physician performs a skin examination.
- Check the BVA remand instructions or examination worksheet – if a particular specialty is required, point it out.



The Examiner Fails to Provide a Rationale for a Conclusion

- A medical examination must contain not only clear conclusion with supporting data, but also a reasoned medical explanation connecting the two.
 - *See Stefl v. Nicholson*, 21 Vet. App. 120, 124 (“[A] medical opinion...must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions.”); *see also Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008) (“Neither a VA medical examination report nor a private medical opinion is entitled to any weight in a service-connection or rating context if it contains only data and conclusions.”).



The Examiner Decides Non-Medical Facts

- Medical examiners may not decide the veracity of non-medical facts.
- For example – if a veteran is seeking service connection for PTSD and the VA has not made a finding about whether the alleged errors have occurred, it is error for the medical examiners to conclude the stressors did *not* occur.
- Doctor: “I served at the same forward operating as this veteran and we never had like he claims.” Wrong!





The Examiner Decides Non-Medical Facts



- *See Sizemore v. Principi*, 18 Vet. App. 264, 275 (2004) (“To the extent that the examining psychiatrist is expressing an opinion on whether the appellant’s claimed in-service stressors have been substantiated, that is a matter for determination by the Board and not a medical matter.”).
- In *Sizemore*, the examiner stated, “it seems a bit unusual that an artillery man would have personally killed eleven enemy soldiers unless they were being over run.”
- The CAVC ordered another examination “to remove whatever taint there may be from this psychiatrist’s overreaching in his report.”



The Examiner Decides Non-Medical Facts

- **Takeaway:** Look closely at the VA examination report to make sure that the examiner did not **overstep and decide non-medical facts**. If the examiner did overstep, raise the issue as soon as possible. Provide a sufficient amount of detail to explain what the examiner did incorrectly, and why it matters.



The Examiner Relies on an Inaccurate Factual Premise

- A medical opinion is inadequate if it is based on an **inaccurate factual premise**. *See Reonal v. Brown*, 5 Vet. App. 458, 460-61 (1993).
- For example – an examiner might conduct an incomplete review of the STRs and conclude that the record contains only one instance of back pain when, in fact, the STRs reveal complaints/treatment for back pain on six occasions.
- The examiner’s negative nexus opinion would be inadequate because it was based on an incorrect premise about the veteran’s medical history.



The Examiner Relies on an Inaccurate Factual Premise

- Another example – examiner bases their negative opinion on medical evidence belonging to another veteran, which had been misfiled.
- **Takeaways:** Make sure that any **facts** recited by an examiner are indeed **accurate**. If you find that the examiner relied on either incomplete (or inaccurate facts), point it out at the earliest stage possible.
- Similarly, make sure that any private medical opinions are based on an accurate history.



The Examiner Gives an Inconclusive Opinion without Explanation

- A medical opinion is inadequate if the examiner claims to be unable to provide a nexus opinion without “resorting to **speculation**,” and (1) the examiner fails to explain *why* an opinion would be speculative, *and* (2) the basis for this statement is not otherwise apparent from the record.
 - *See Jones v. Shinseki*, 23 Vet. App. 382, 390-91 (2010) (“The phrase ‘without resort to speculation’ should reflect the limitations of knowledge in the medical community at large and not those of a particular examiner.”).



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The Examiner Gives an Inconclusive Opinion without Explanation

- **Takeaways:** Carefully review an examiner’s opinion to determine if there is sufficient support for their “without resort to speculation” rationale.
- There is a possibility that the examiner is not sufficiently qualified to render an opinion, and that the inconclusive opinion is due to the examiner’s own limitations of knowledge, or lack of qualifications or specialization (see previous slides).
- Point this out to VA at the earliest stage possible, and if possible, refer to existing medical evidence that already provides the nexus opinion.



The Examiner Uses an Improperly High Evidentiary Standard

- Medical examiners are sometimes unfamiliar with the “benefit of the doubt” standard in veterans benefits claims. *See* 38 U.S.C. § 5107(b) (“When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.”).
- VA examiners sometimes – erroneously – require the evidence to meet a higher evidentiary standard, such as “medical certainty.”



The Examiner Does Not Address All Legal Theories

- **Takeaways:** Make sure that the VA examiner addresses all theories of service connection that were claimed.
- If the examiner failed to do so, bring it to the attention of the RO/BVA, and point to favorable evidence supporting the omitted theory (as well as any theories that the examiner already addressed).



“Objective” Evidence of Pain Not Limited to Medical Evidence Alone

- **Observations from a lay person** (such as a spouse or friend) who witnesses a veteran’s painful use of the joint would satisfy the requirement of objective and independent verification of painful motion.
- Objective confirmation of symptoms, including swelling or muscle spasm, would also be sufficient; therefore, if an examiner does not observe painful motion, but notes tenderness or swelling of the joint, or there is other such evidence of record, it should be argued that the minimum disability rating should be assigned under 38 C.F.R. § 4.59.



“Objective” Evidence of Pain Not Limited to Medical Evidence Alone

- **Takeaways:** While this is not technically a VA examination inadequacy, make sure that the VA does not deny a claim due to lack of “objective” evidence of pain found on examination, where there is lay evidence of pain elsewhere in the record.
- Ensure that the record includes statements from the veteran, family members, or friends providing examples of how pain, to include flare-ups, affects the veteran’s functioning.



The Examiner Fails to Address Lay Evidence

- *Barr v. Nicholson*, 21 Vet. App. 303, 310-11 (2007) – the Court found that a medical examination that ignores lay assertions regarding continued symptomatology is inadequate because it fails to take into account the veteran's prior medical history
- *Dalton v. Nicholson*, 21 Vet. App. 23, 39 (2007) – the Court found that a medical examination was inadequate where the examiner “impermissibly ignored the appellant's lay assertions that he sustained a back injury during service”).



The Examiner Fails to Address Lay Evidence

- *Miller v. Wilkie*, 32 Vet. App. 249, 262 (2020) – the Court held that “where the examiner failed to address the veteran's lay evidence and the Board fails to find the veteran not credible or not competent to offer that lay evidence, the proper remedy is for VA to obtain a new examination.”



How to Review a Case for Appeal – Common VA Errors

Inadequate VA exams – Top Five Reasons

1. Examiner did not provide adequate supporting rationale for medical opinion
2. Examiner makes non-medical factual determination
3. Failure to provide rationale as to why it would be “speculative” to provide an opinion
4. Examiner bases opinion on an inaccurate factual premise
5. Examiner fails to address relevant lay statements



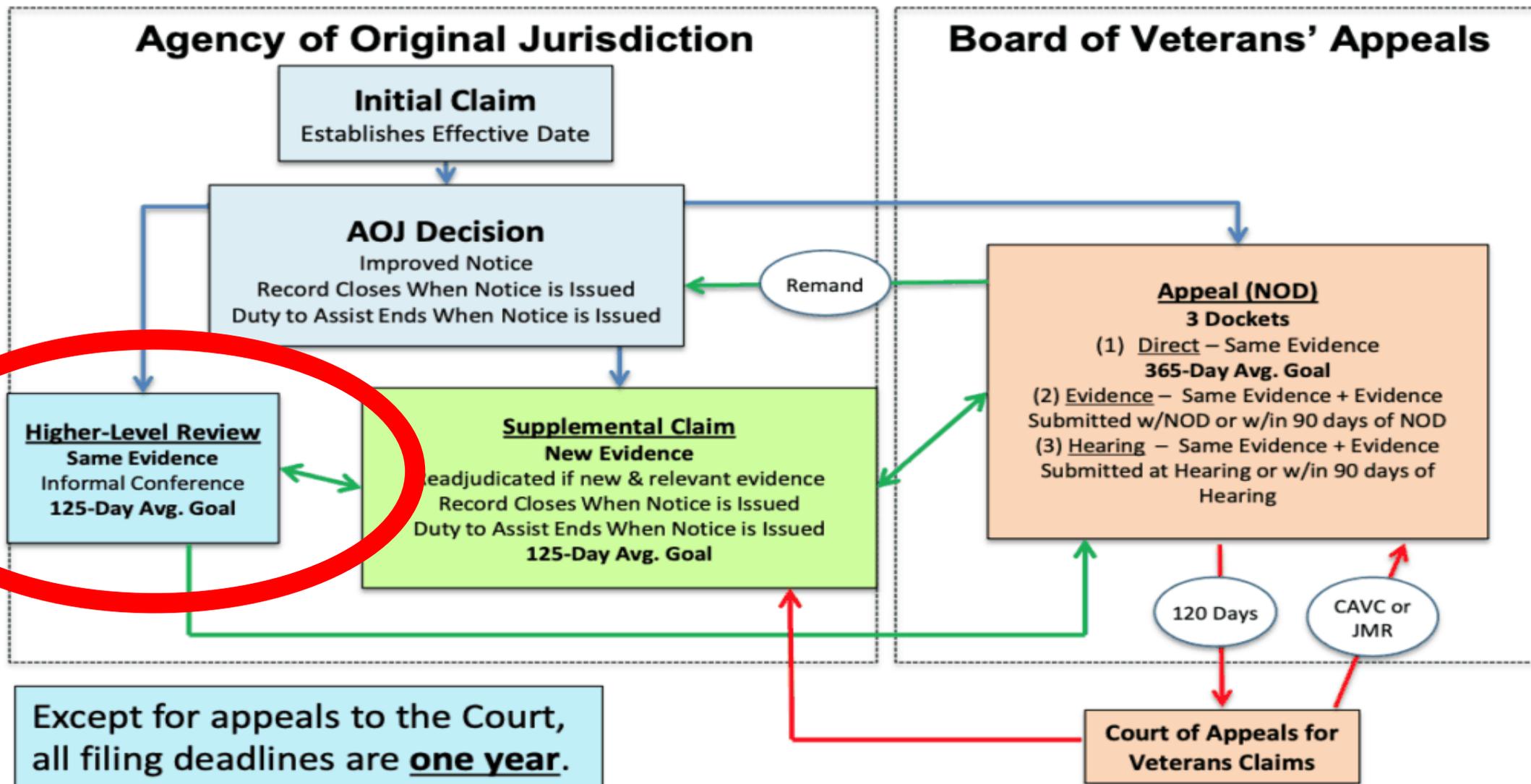
So, Which Forum Should My Veteran Select?





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Appeals Modernization Act





Choice of Forum Under AMA

Higher Level Review – VA Form 20-0996

- SOL is **1 year** from RO decision
- Closed record – no new evidence
- De novo review by a senior rater (Decision Review Officer)
- When to use: Evidence of VA **error is clear** or duty to assist error is evident





Choice of Forum Under AMA

Higher Level Review – VA Form 20-0996

- How to use:
 - Submit a 1-2 page explanation, specifying exactly what you are asking the VA to do – Type “Argument” in top header
- Informal Conference:
 - ID conference participants on form (email/phone)
 - Typically, attorney only
 - VA will schedule time a few days out
 - 20-30 minutes max
 - No new evidence (closed record) – focus on **obvious error**



Choice of Forum Under AMA

Higher Level Review

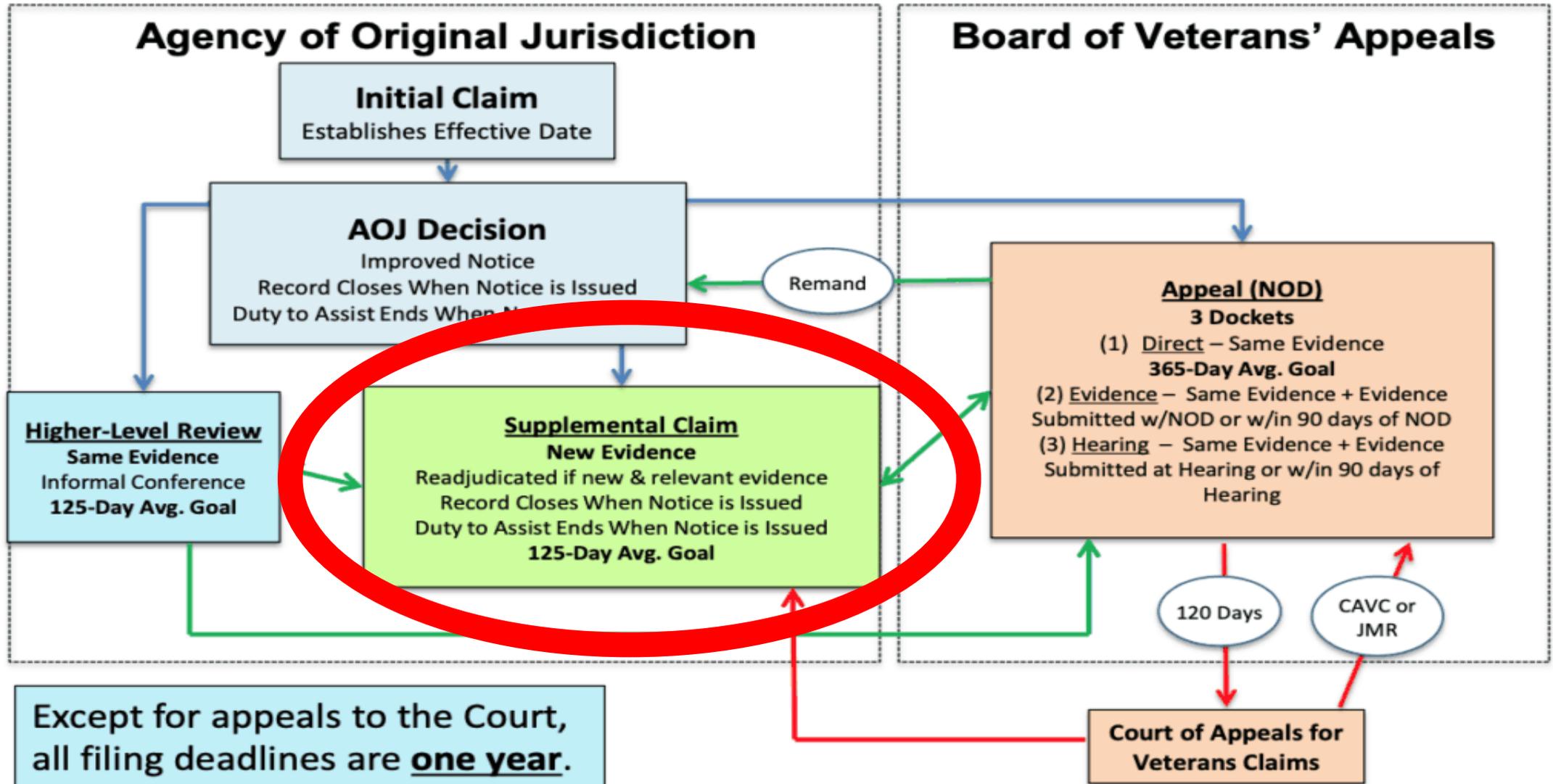
Success Rate:

- VA: "...generally lower than the success rates for some other appeal options like those with evidence submissions or Board of Veterans' Appeals (BVA) hearings"
- Online sources: 10-50% success rate
- Good for obvious errors – missed a favorable finding, ignored a documented diagnosis, typo on effective date



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Appeals Modernization Act





Choice of Forum Under AMA

- **Supplemental Claim - VA Form 20-0995**
 - SOL is **1 year** from RO decision to preserve effective date
 - **Can also file ITF to preserve effective date –**
 - *Military-Veterans Advocacy v. Sec of VA*, 7 F.4 1110 (Fed. Cir. 2021)
 - But remember, Veteran can only have one ITF at a time
 - Record remains **open**
 - When to use: New and relevant evidence
 - Favorable VA exam arrives late
 - New lay statement or private medical records
 - New legal theory – e.g., secondary SC



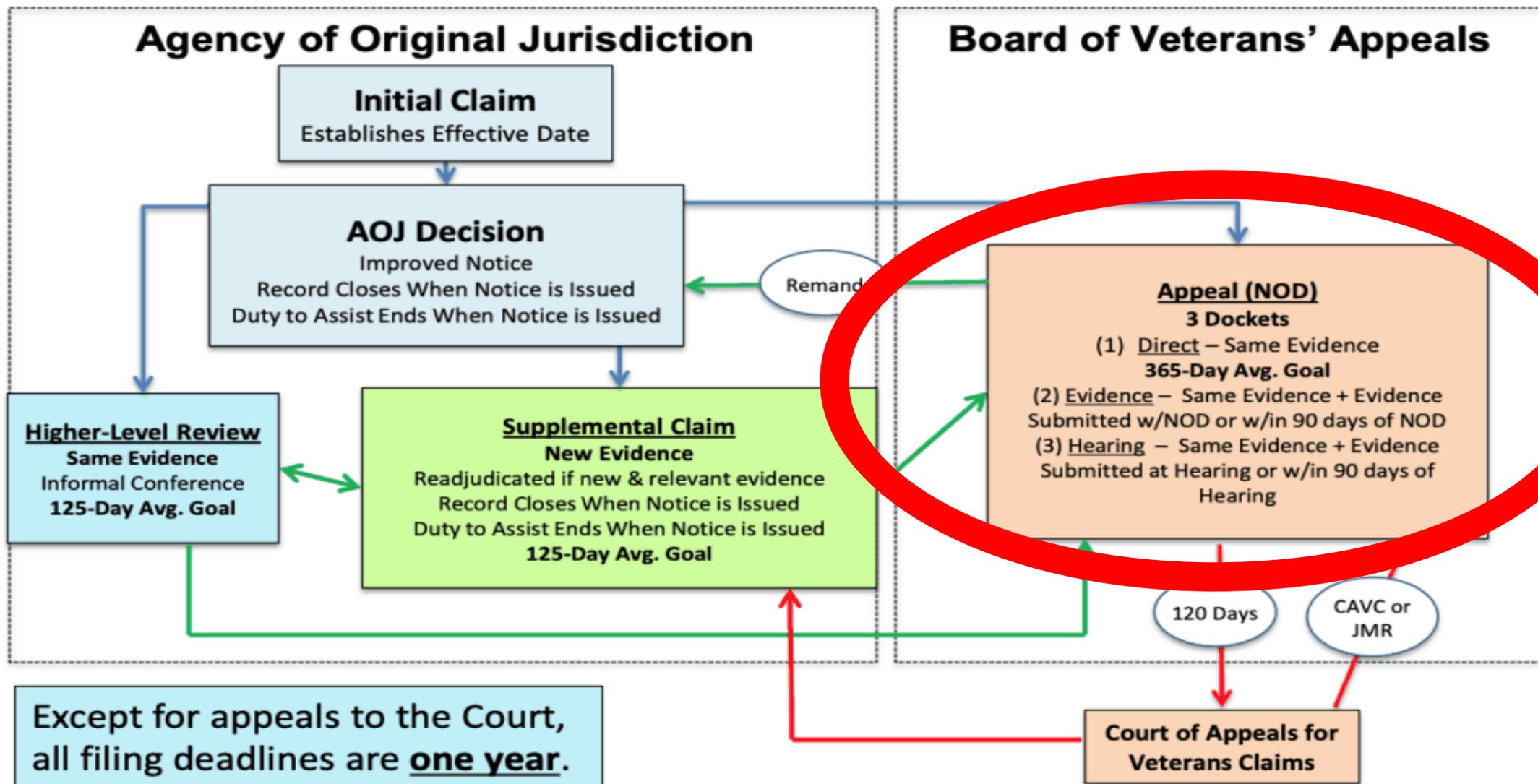
Choice of Forum Under AMA

- **Supplemental Claim-**
 - How to use: VA Form 20-0995
 - Submit or identify new evidence/theory on a VA Form 21-4138
 - Add a 1-3 page explanation
- Could trigger additional development by VA



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Appeals Modernization Act





Board of Veterans Appeals



- Final Agency Decision under the Administrative Procedures Act (APA)
- Administrative Board
- Chairman
- Veterans Law Judges
- Staff Writers
- Non-Adversarial Proceedings





Board of Veterans Appeals



- Veterans Law Judges:

“I have some sympathy for the counterargument that good attorneys can learn any field. That is true in the abstract. But veterans law is not abstract. It is a specialized regulatory scheme built on decades of caselaw from the CAVC and Federal Circuit, layered with M21-1 provisions, medical evidence standards, and procedural requirements that do not map neatly onto anything else in federal administrative law. One retired VLJ described it as more complicated than the tax code. That is not hyperbole. It is an operational reality that shows up in the decision product.”

-Bradley Hennings, Former VLJ (2/19/26)



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Appeals Process

Evidence Only Docket

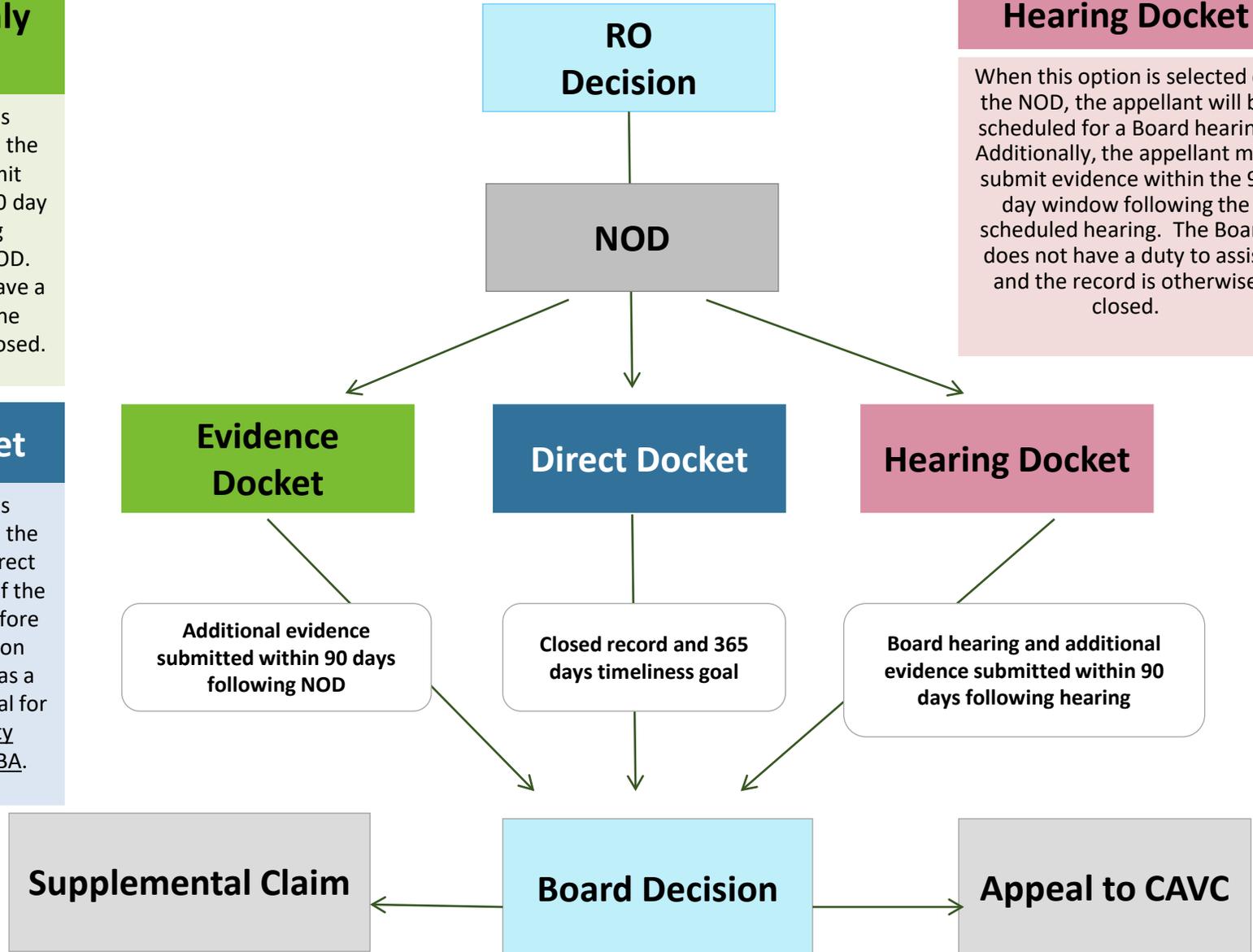
When this option is selected on the NOD, the appellant may submit evidence within the 90 day window following submission of the NOD. The Board does not have a duty to assist and the record is otherwise closed.

Direct Docket

When this option is selected on the NOD, the appellant receives direct review by the Board of the evidence that was before VBA in the decision on appeal. The Board has a 365-day timeliness goal for this docket. [Quality feedback loop for VBA.](#)

Hearing Docket

When this option is selected on the NOD, the appellant will be scheduled for a Board hearing. Additionally, the appellant may submit evidence within the 90 day window following the scheduled hearing. The Board does not have a duty to assist and the record is otherwise closed.





BVA Thoughts – FY24/25

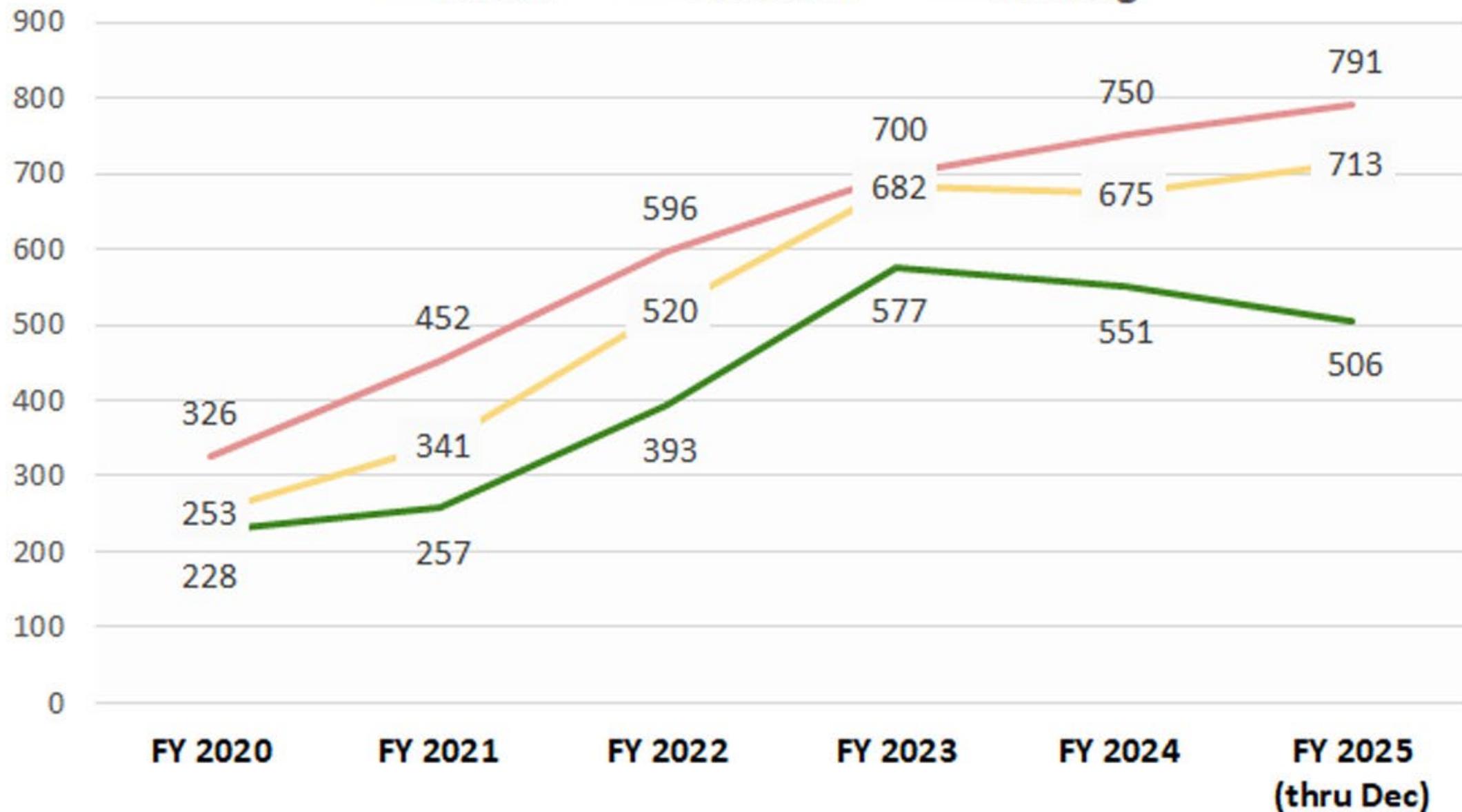


- Backlog: 2.5 years of existing inventory + 10K+ per month
 - 17K Legacy Appeals (1+ years)
 - AOD (Age, Terminal, Financial = 22% of cases)
 - AMA – Approx 3 years
- Direct Review Docket: 46% – 506 days
- Evidence Docket: 21% – 713 days
- Hearing Docket: 33% – 791 days
- 67% of all cases – grants or remands (“RO errors”)
 - 16% denials / 17 dismissed/withdrawal

Average Days Pending for AMA Appeals by Docket

Days Pending

Direct Evidence Hearing





Drafting Appeals





VA Form 10182 (2025)



OMB Approved No. 2900-0674
Respondent Burden: 30 Minutes
Expiration Date: 04/30/2028

  U.S. Department of Veterans Affairs		DECISION REVIEW REQUEST: BOARD APPEAL (NOTICE OF DISAGREEMENT)	
PART I - PERSONAL INFORMATION			
1. VETERAN'S NAME <i>(First, middle initial, last)</i>		2. VETERAN'S FILE NUMBER	3. VETERAN'S DATE OF BIRTH <i>(MM/DD/YYYY)</i>
4. IF I AM NOT THE VETERAN, MY NAME IS <i>(First, middle initial, last)</i>			5. MY DATE OF BIRTH <i>(If I am not the Veteran) (MM/DD/YYYY)</i>
6. MY PREFERRED MAILING ADDRESS <i>(Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)</i>			
<input type="checkbox"/> I AM EXPERIENCING HOMELESSNESS			
7. MY PREFERRED TELEPHONE NUMBER <i>(Include Area Code) (999-999-9999)</i>	8. MY PREFERRED E-MAIL ADDRESS		9. MY REPRESENTATIVE'S NAME



BVA Thoughts



PART II - BOARD REVIEW OPTION *(Check only one)*

10. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. *(For additional explanation of your options, please see the attached information and instructions.)*

- 10A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. *(Choosing this option often results in the Board issuing its decision most quickly.)*
- 10B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will submit to the Board with my VA Form 10182 or within the 90 days of the Board's receipt of my VA Form 10182. *(Choosing this option will extend the time it takes for the Board to decide your appeal.)*
- 10C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. I want the hearing type below: *(Choosing this option will extend the time it takes for the Board to decide your appeal.)*
 - Central Office Hearing *(I will attend in person in Washington, DC)*
 - Videoconference Hearing *(I will go to a Regional Office)*
 - Virtual Telehearing *(I will attend using an internet-connected device) (Important: Provide your e-mail address and Representative in Part I)*

PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD



BVA Thoughts



PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD

11. Please list each issue decided by VA that you would like to appeal. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision and the area of disagreement (*e.g., service connection, disability evaluation, or effective date of award*).

- Check here if you are including a request for an extension of time to file the VA Form 10182 due to good cause and then attach additional sheets explaining why you believe there is good cause for the extension.
- Check here if you are appealing a denial of benefits by the Veterans Health Administration (*VHA*).

A. Specific Issue(s)	B. Date of Decision (MM/DD/YYYY)

C. Additional Issue(s)

- Check here if you attached additional sheets. Include the Veteran's last name and the file number.



Drafting Appeals

- The appeal is the opportunity to present additional argument or evidence (depending on the lane selected), to support the claim
 - Use the opportunity to present the issues and argument and why the Board should grant the benefit
 - Use an attached 21-4138 or draft a short “IHP” on blank paper



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Drafting IHPs

- Drafting IHPs – “Informal Hearing Presentations” – provides the Veteran and advocate the opportunity to explain why the Veteran should receive the benefit sought
 - IHPs do not have to be extensive – it can be a short memorandum explaining the issues before the BVA, what is the relevant rule/standard, an application to the facts of the case, and a conclusion
 - What is the general format for presenting arguments?



Drafting IHPs

- Issue: Identify the issue – what benefit is at stake?
- Rule – Explain the relevant law/procedures
- Application – Apply the law to the facts
- Conclusion – Wrap it up - what are you seeking?



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IHP Tips

– Just a Few Examples

- Don't limit the relief sought – if the evidence supports both direct service connection as well as by presumption, cover both
 - E.g., “Entitlement to service connection for hypertension, to include as due to herbicide exposure”
- Address negative evidence – the BVA will notice it, so it's best not to avoid it
 - E.g., “The negative VA examination dated in November 2022 should not be afforded any weight because the examiner failed to address the lay testimony by the Veteran that he continuously suffered from back pain since active service”



IHP Tips

– Just a Few Examples

- Explain gaps in the evidence – especially for continuity of symptomatology – and tie it with supportive lay or other evidence
 - E.g., “The Veteran did not seek medical treatment for 10 years after service because he had limited health insurance, and he self-treated with medication. See lay statement dated April 1, 2024”



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IHP Tips

– Just a Few Examples

- Make sure to summarize any prior remand instructions or examination instructions – did VA follow them? Why does it matter?
 - E.g., “The Board’s remand called for a medical examination by an orthopedic specialist. However, the examination conducted in April 2024 was performed by a dermatologist. This harmed the Veteran because the dermatologist explained that she was unable to address the nature and extent of flare-ups ‘without resort to speculation’ – had the examiner been better qualified, she may have been able to address the nature and extent of flare-ups”



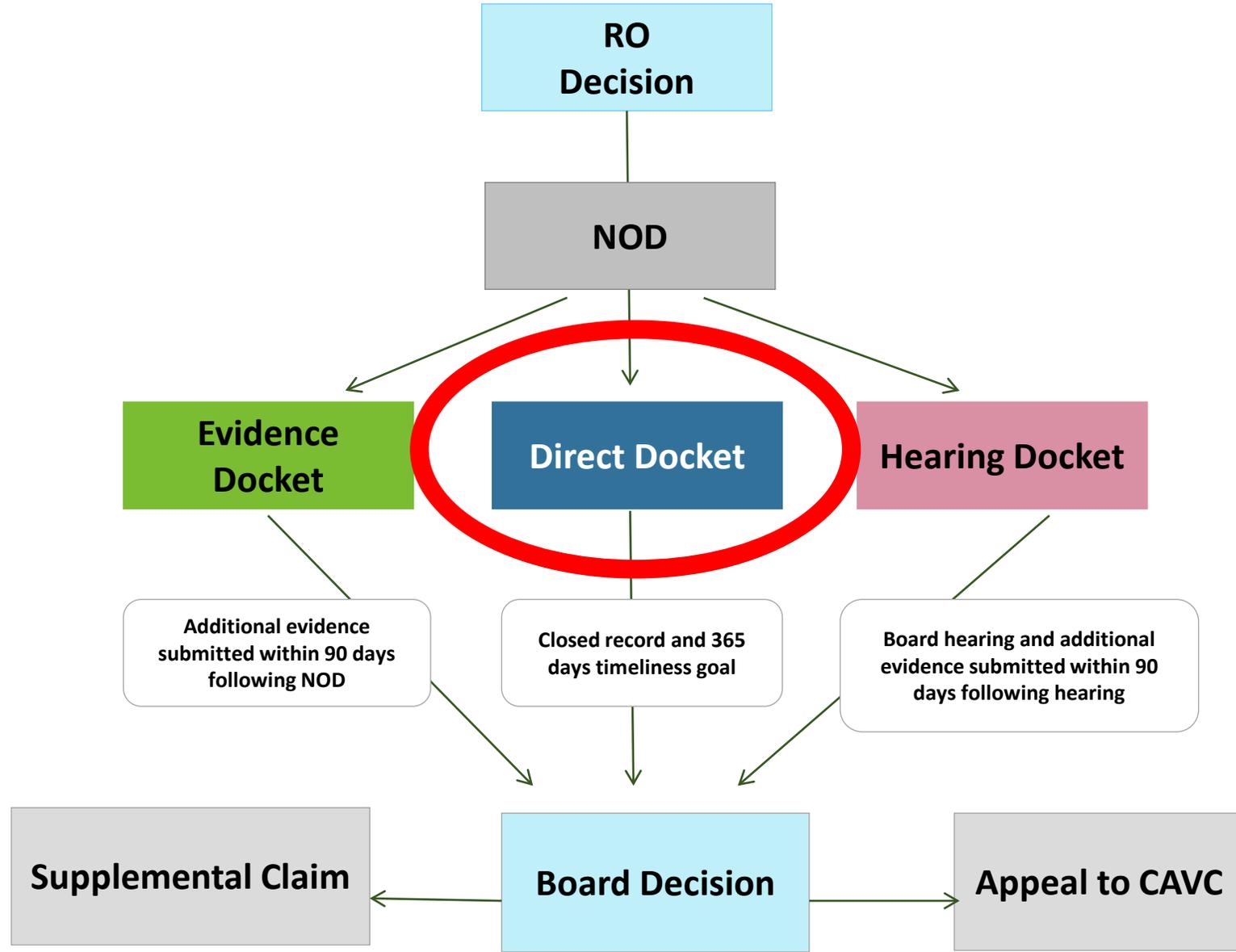
IHP Tips

– Just a Few Examples

- With AMA claims, make sure that any duty to assist errors are tied in to before the RO decision at issue – because under the AMA, the duty to assist is not applicable to the Board (the Board is only tasked with ensuring that the RO complied with the DTA)
 - E.g., “When the RO issued its rating decision in November 2023, it had failed to associate with the file pertinent medical records from the VA Medical Center in Detroit. This harmed the Veteran because the records showed increased back pain (see VA treatment note dated June 1, 2023), which could have better informed the VA examination that was conducted in October 2023”



Appeals Process





Direct Docket



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- 10C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. I want the hearing type below: *(Choosing this option will extend the time it takes for the Board to decide your appeal.)*
 - Central Office Hearing *(I will attend in person in Washington, DC)*
 - Videoconference Hearing *(I will go to a Regional Office)*
 - Virtual Telehearing *(I will attend using an internet-connected device) (Important: Provide your e-mail address and Representative in Part I)*

PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD



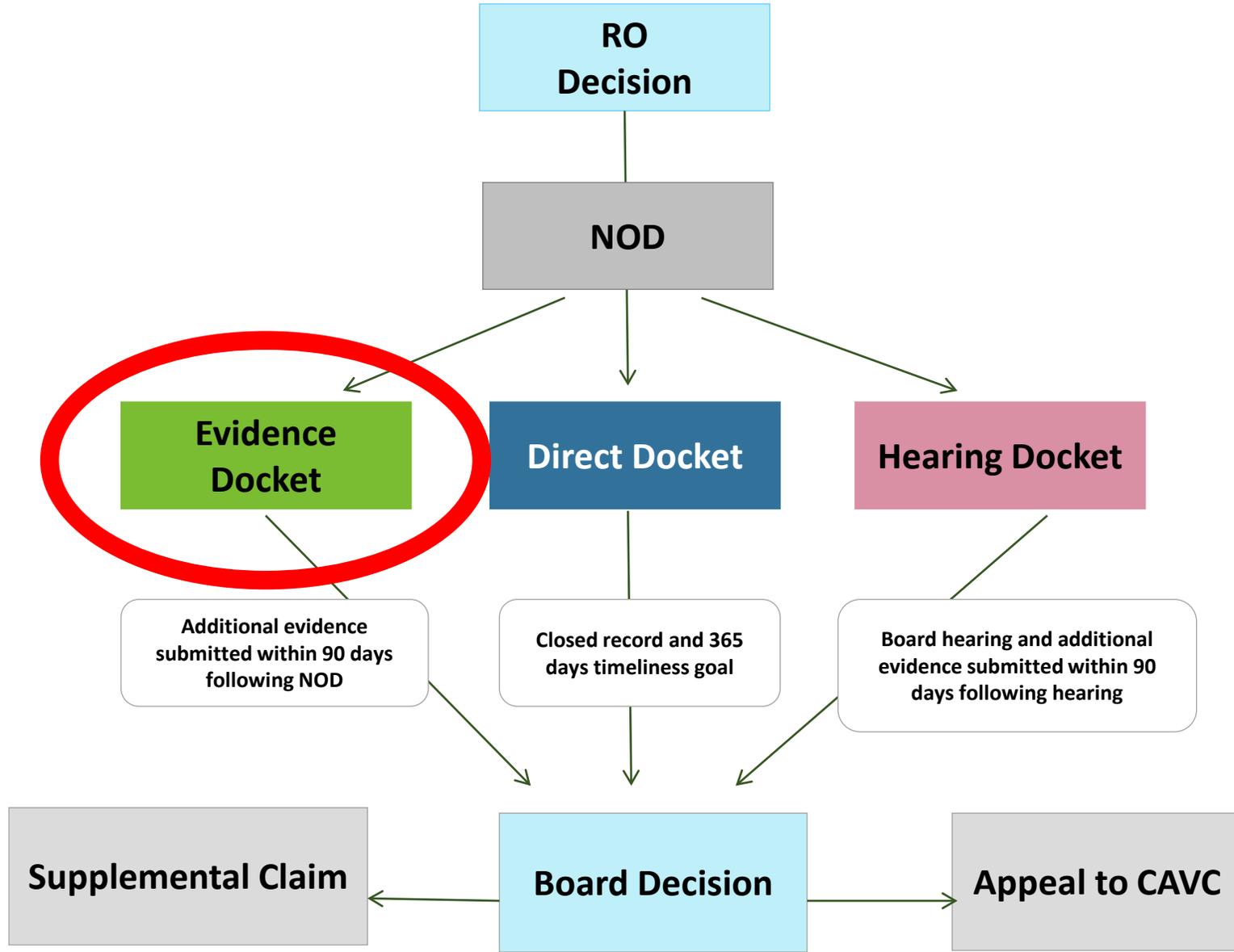
Choice of Forum at BVA



- **Direct Docket – 46%**
 - Closed record – VLJ will review only the evidence in the VBA decision
 - Use when the RO error is obvious – no oral argument needed
 - **Submit an Informal Hearing Presentation (IHP) submit a 2-5 page written brief**
 - FY25 – Taking the Board 506 days to resolve



Appeals Process





Evidence Docket



PART II - BOARD REVIEW OPTION *(Check only one)*

10. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select. *(For additional explanation of your options, please see the attached information and instructions.)*

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PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD



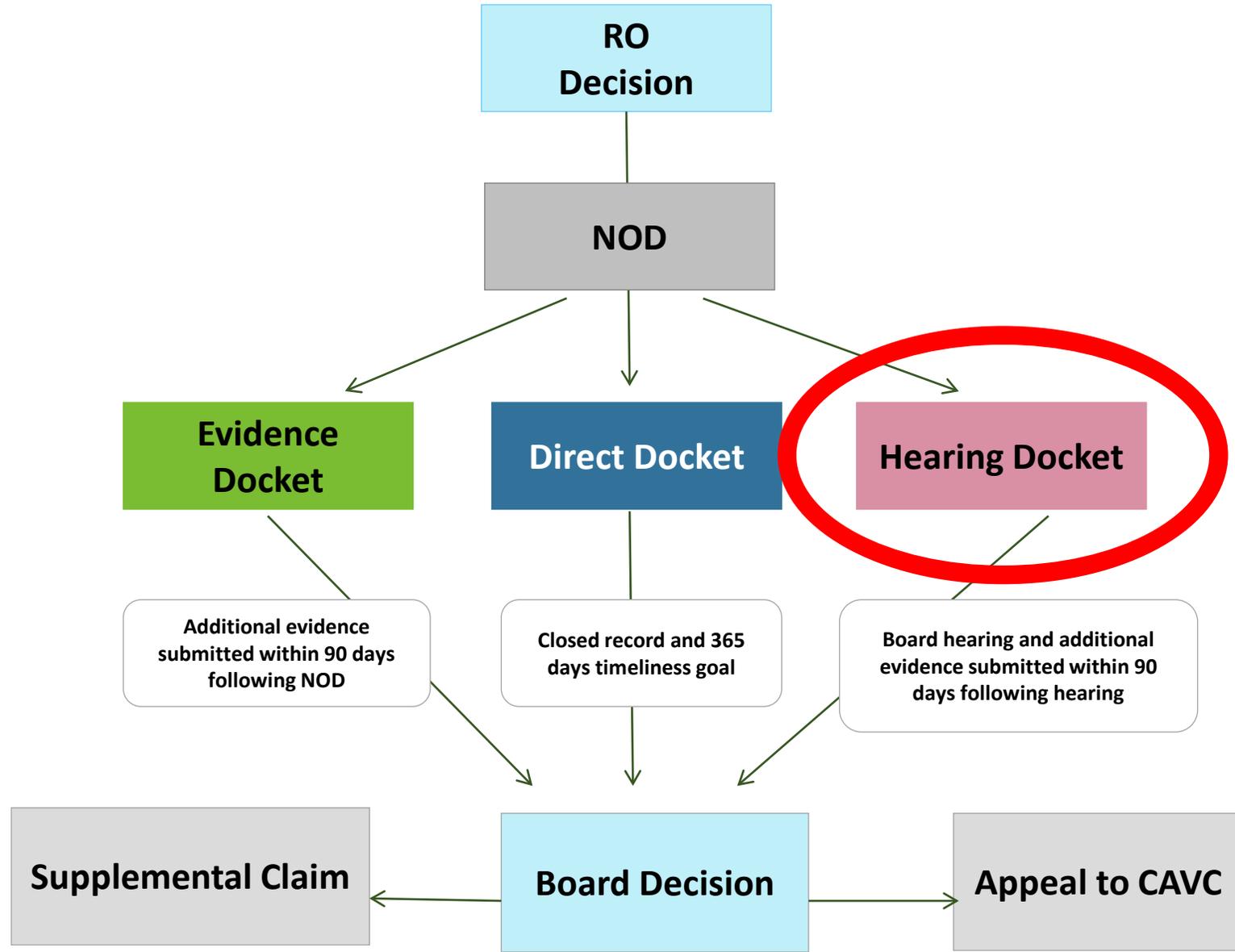
Choice of Forum at BVA



- **Evidence Docket 21%**
 - Submit new and relevant evidence within **90 days** of NOD filing
 - No duty to assist
 - Record is otherwise closed
 - Clear resolution with new evidence
 - **Submit an Informal Hearing Presentation (IHP)**
 - FY25 – Taking the Board 713 days (2 years) to resolve



Appeals Process





Hearing Docket



PART II - BOARD REVIEW OPTION *(Check only one)*

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- 10A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal. *(Choosing this option often results in the Board issuing its decision most quickly.)*
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PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD

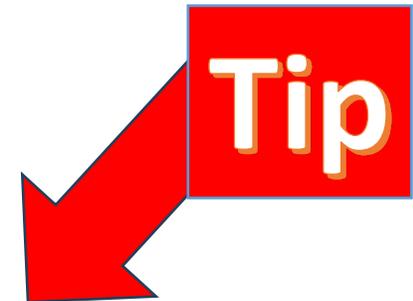


Choice of Forum at BVA



- **Hearing Docket 33%**

- Board will schedule a hearing with a VLJ
- No new evidence before the hearing
- Hearing options (FY24):
 - Central Office (DC): 1.5% (78% success)
 - Video Hearing at RO: 22.5% (80% success)
 - Tele-Hearing: 76% (82% success)
- Submit any new evidence and **a supplemental brief within 90 days of the hearing to summarize evidence and arguments**
- Hearing Judge vs. Signing Judge
- Taking 791 days to complete (FY25)





BVA Hearings





NVLSP

Preparing for the Hearing

- Complete records review
- Manage client expectations – not a trial
- Goals of the hearing – what is the specific issue you are “litigating?”
 - Service connection, effective date, rating percentage?
- Short opening statement to ID the issue and VA error
- Existing evidence you intend to highlight
- New evidence you intend to present
 - **Your Veteran is evidence**
 - Your questions - narrowly tailored to the issue at hand
- Anticipate VLJ questions – rehabilitate Veteran if needed
- Closing argument
- Post-hearing written submission – 90 days



Preparing Your Veterans for their Hearing

- For example, if the claim on appeal is SC for a back condition, and there is already evidence of a current disability, and an in-service event, and the missing piece is nexus – focus on just that at the hearing
 - You can briefly touch on the current disability and in-service event – but keep it brief. E.g., “The rating decision dated May 1, 2023, acknowledged that the Veteran has a current disability, and also acknowledges that there was an in-service low back injury when the Veteran fell off their battle tank during a field maneuver in May 1990. The only issue in contention is the relationship to service, which we will demonstrate today during the Veteran’s testimony.”



Preparing Your Veterans for their Hearing

Walk through the types of questions that you will be asking the Veteran

- Anticipate what questions the Veterans Law Judge is likely to ask. Practice the Veteran's responses
- The VLJ is not supposed to **cross-examine** the Veteran, but be prepared for questions that the VLJ may ask – e.g., “Why didn't you seek treatment for your back for 30 years after service?”
 - Have your Veteran prepared to answer these sort of questions
 - Be prepared to follow the hearing testimony closely – don't just be focused on a “script” - so you may be able to catch any line of questions that you need to address on follow-up questions



Conducting the Hearing

- Make sure the Veteran is in a quiet place for the video hearing (e.g., not in their car or in a store)
- While hearings are not extremely formal, you want to observe a fair amount of decorum – dress appropriately, be mindful of informal language
 - Anything that is said will appear in the hearing transcript – which the BVA judge, as well as eventually a Court judge, may see
 - Refer to the VLJ as “Your Honor,” and **be respectful**



Conducting the Hearing

- The hearing is not the time for your Veteran to “vent” about what the VA has done wrong over the years. Rather, focus on obtaining favorable evidence from the Veteran – e.g., continuity of symptomatology – as to why benefits should be granted. And why any negative evidence should not be afforded probative weight
- Brief opening and closing statements can help frame the testimony



Conducting the Hearing

- During your opening statement, ask the VLJ to suggest the submission of evidence that may be necessary to support the claim
- Rely on alternative arguments – “We believe that the evidence supports the granting of service connection for the Veteran’s low back condition. In the alternative, the Veteran asks that he be afforded another medical opinion that adequately addresses his testimony of continuous symptoms since his active Naval service”



Conducting the Hearing

- Be on the lookout for the VLJ attempting to draw out negative evidence – e.g., “Why didn’t you seek treatment over the years for your PTSD?”
- If your witness didn’t answer the question properly (“I don’t know why”), be prepared to “rehabilitate” your witness through follow-up questions. This is where your advance preparation pays off.
“Leading” questions are OK
 - “Isn’t it true that you didn’t seek treatment for your PTSD because you were concerned that it would jeopardize your career working as a state trooper?”



Conducting the Hearing

- Take good notes, so that you can focus on any missing/important pieces, in a post-hearing memorandum/brief
- **Always** write a post-hearing memo/brief!
 - Summarize your arguments
 - Clearly and concisely explain how the evidence supports service connection or a different rating or effective date





Conducting the Hearing

- After the hearing, submit a post-hearing memorandum/brief
 - It doesn't have to be lengthy
 - The memorandum can tie in the hearing testimony with the evidence of record – and summarize newly-submitted evidence (e.g., new medical evidence)
 - The memorandum needs to be submitted **within 90 days** of the date of the hearing
 - Can waive remainder of time once submitted



BVA Thoughts

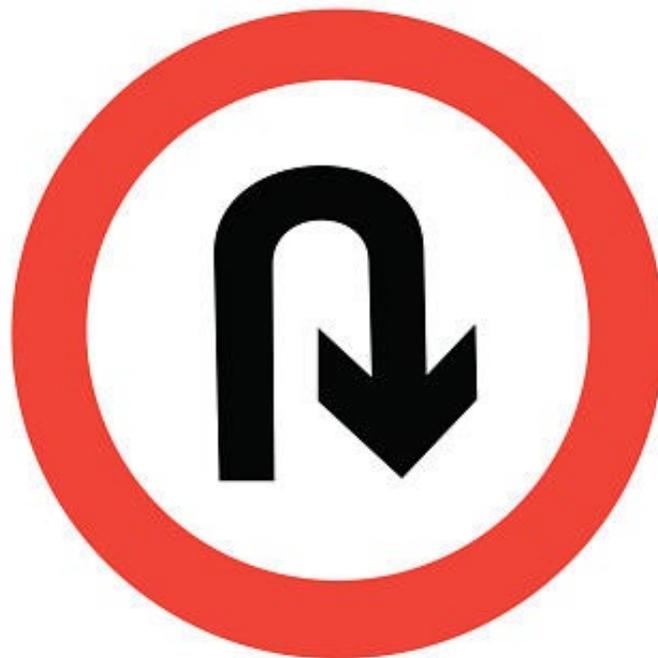


- BVA Decisions:
 - Grant in full or part
 - Deny in full or part
 - Remand back to RO
- Veteran's options when BVA denies in full or part:
 - Supplemental Claim – denial in full or part
 - Appeal to CAVC (even while supplemental claim is pending)



NVLSP

Board Remands





Managing Remands from the BVA

- When the Board issues a decision, it can be....
 - **A grant** – great news! Although if it's less than the full benefit that can be sought on appeal (e.g., grants a 50 percent rating for PTSD, but denies anything higher) – it can be appealed to the Court. Reach out to NVLSP if you have questions regarding Court review. NVLSP reviews every BVA decision (with a partner state POA) granting less than full benefit sought – but if you have a case that you wanted to discuss with us/advise us about, feel free to reach out



Managing Remands from the BVA

- When the Board issues a decision, it can be....
 - **A denial** – again, reach out to NVLSP if you would like to discuss the case with us/advise us
 - **A remand** – this is not a final decision, but there is additional evidentiary or procedural development must be done. The next few slides will discuss managing remands from the BVA
- Some BVA decisions include all three outcomes – grant, denial, remand*



Managing Remands from the BVA

- Unlike older “Legacy” appeals, BVA remands under the AMA system do not automatically return to the Board
- Instead, the Veteran has the same review options as they do with another appeal (HLR, Supplemental, BVA appeal)
- When receiving the remand, it’s a good idea to review the language of the remand so that you can advise the Veteran as to what to expect
 - For example, many remands call for new VA examinations to determine the nature and/or etiology of a disability
 - Many remands also call for additional development – obtaining VA medical records, service records
 - Use the opportunity to explain to the Veteran what to expect, and what he/she can do to assist the process (e.g., report for any scheduled examination, sign releases for VA to obtain records)



Managing Remands from the BVA

- Keep an eye on what takes place on remand, and make sure that the development takes place as directed by the remand
- For example, if the Board ordered that an examination be conducted by a Board-certified orthopedic surgeon, and instead a Family Nurse Practitioner conducts the examination (this is a real case), make sure to point it out – in either a 21-4138 following the examination, or in an HLR request following an unfavorable rating decision
- When reviewing the decision, make sure that the RO followed the terms of the remand
 - If the RO didn't follow the terms of the remand, in your next step (most likely HLR or Board appeal), make sure you point out what the RO did wrong – and **why it matters**



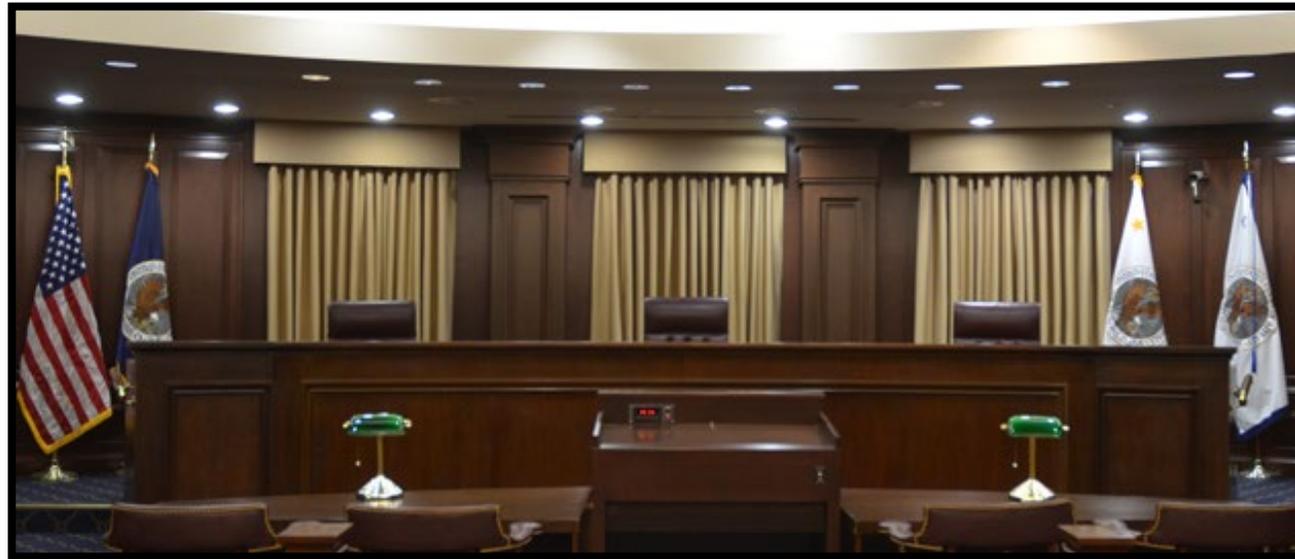
Court of Appeals for Veterans Claims (CAVC)





Court of Appeals for Veterans Claims

- Established in 1988 by the Veterans Judicial Review Act (Reagan)
- 9 active judges plus 9 senior judges
- <https://www.uscourts.cavc.gov/index.php>





Court of Appeals for Veterans Claims

- CAVC has "exclusive jurisdiction to review decisions of the Board" and has the "power to affirm, modify, or reverse" any decision of the Board over which it has jurisdiction or to "remand, as appropriate."
- Adversarial proceedings
 - *Veteran v. Secretary of Veterans Affairs*
 - Veteran represented by attorney (NVLS)
 - Secretary represented by VA/OGC





Court of Appeals for Veterans Claims



- Must have to appeal:
 1. Veteran or family member was denied a benefit by the VA
 - Case was appealed to the Board of Veterans' Appeals and decision grants less than the full benefit
 - Final agency decision by the BVA
 - AND**
 2. Timely Notice of Appeal
 - Received by the Clerk within **120 days** of Board decision
 - Notice of Appeal – Form 1
 - Filing Fee (\$50)(paid by NVLSP) or fee waiver



Court of Appeals for Veterans Claims



- **Final agency decision** by the BVA (not a remand)
 - Rare cases – writ of mandamus (no final decision but Court relies on its potential jurisdiction – e.g., cases involving undue delay)
- Partner states – Board sends the decision directly to NVLSP to review for error – POA = VBMS
- NVLSP finds **error in approximately 25-30%** of all cases reviewed – **OMG!**
- Contacts Veteran by mail/phone to offer representation
- 100% Veteran's choice – 70% elect NVLSP
- **No cost to the Veteran – EVER!**
 - Law firms charge 20-33.3% plus expenses
- Timely process since Notice of Appeal must be received by the Court within 120 days



Court of Appeals for Veterans Claims



- 8,937 appeals filed (12% *pro se*)
- 7862 decisions (7% *pro se* – 550 Veterans)
 - Remanded/Dismissed by Clerk – 6227
 - Remaining 1635 continued to Appeal
 - Single Judge – decision is persuasive, not precedential
 - 1594 non-JMR appeals out of 1635 (97.5% of appeals)
 - 3-Judge Panel – precedent setting
 - 39 non-JMR appeals out of 1635 (2.4% of appeals)
 - Full Court – precedent setting - 2 (.01% of appeals)



Court of Appeals for Veterans Claims



FY24 Stats:

- 27% of decisions affirmed BVA
- 73% of decisions vacated and/or reversed in whole or part
- Further appeal to the U.S. Court of Appeals for the Federal Circuit **within 60 days**
 - Legal issue only





CAVC and Beyond

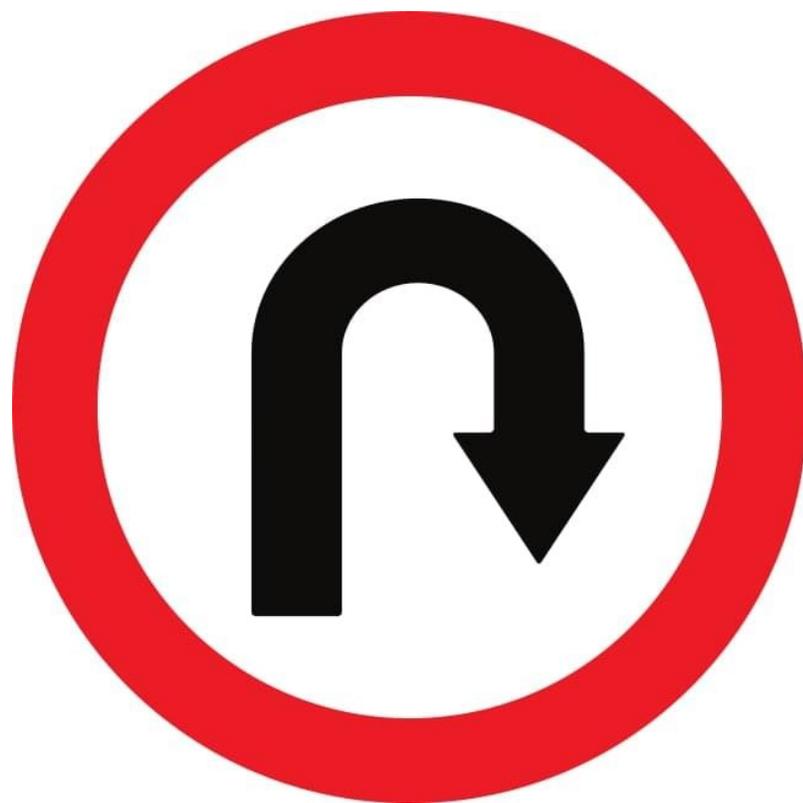
Further appeals to the Supreme Court of the United States





NVLSP

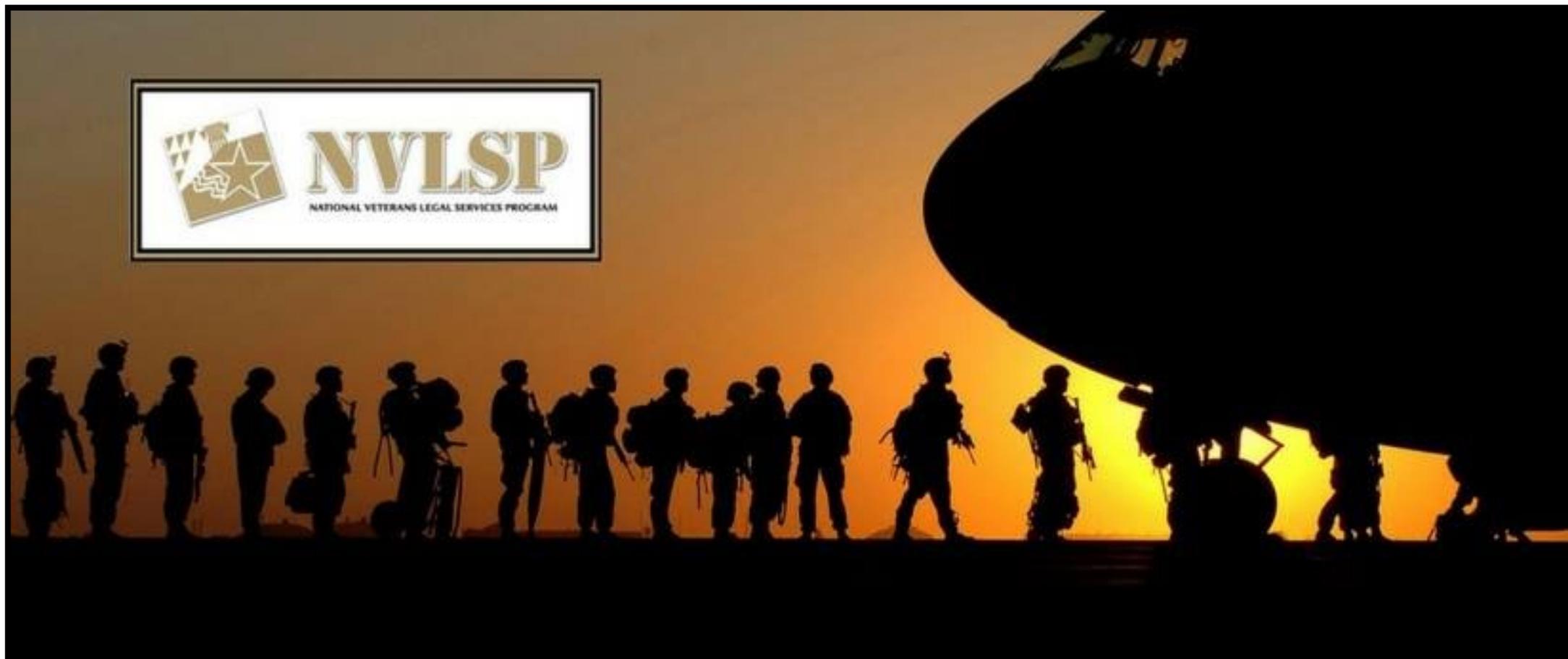
CAVC Remands





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Team Approach





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