



THE VETERANS CONSORTIUM
PRO BONO PROGRAM

U.S. MILITARY DISCHARGE UPGRADES

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Entitlement to Veterans Benefits

- **Statutory Authority contained in 38 U.S.C. “Veterans Benefits”**
- **Definition of a “Veteran” 38 USC 101 (2)**
“a person who served in the active military, naval or air service, and who was discharged or released therefrom under conditions other than dishonorable “
- **Requires minimum 24 months continuous active duty service**

Entitlement to Veterans Benefits

– Types of Discharges

- **Administrative**

- *Honorable Discharge*
- *General Discharge* (under honorable conditions)
- *Other Than Honorable Discharge* (formerly “*Undesirable Discharge*”)

- **Punitive**

- *Bad Conduct Discharge*
 - » Sentence by Special or General Court Martial
- *Dishonorable Discharge*
 - » Sentence by General Court Martial
- *Dismissal*
 - » Officer Only Sentence by General Court Martial

- **Uncharacterized** (generally less than 6 months service)

Entitlement to Veterans Benefits

- **Honorable Discharge**
 - Normal end of active service or medical - Officer and Enlisted
- **General Discharge**
 - Normal end of active service or medical - Enlisted only with less than stellar record
- **Other Than Honorable** (*formerly “Undesirable Discharge”*)
 - Each Service has its own applicable regulations and process
 - Result of Commander’s action to terminate active duty
 - Generally involves separations for misconduct.
 - Reasons include:
 - » In Lieu of Trial by Court-Martial
 - » Fraudulent Entry into the Naval Service
 - » Minor Disciplinary Infractions, Pattern of Misconduct
 - » Commission of a Serious Offense, Civilian Conviction
 - » Drug Abuse, Drug and Alcohol Rehab Failure
 - » Unsatisfactory Performance, Physical Fitness Assessment Failure

Entitlement to Veterans Benefits

- **Statutory Benefit Entitlement**
 - **Honorable Discharge**
 - **General Discharge**
 - **Any discharge under ‘honorable conditions’**

- **Presumption of no Benefit Entitlement**
 - **Other Than Honorable**
 - **Bad Conduct Discharge**
 - **Dishonorable Discharge**
 - **Dismissal**

Paths to VA Benefits

- **Honorable or General Discharge**
- **Upgrade of Discharge**
 - **Changes discharge type and character**
 - **Two forums**
 - **Service Discharge Review Boards**
 - **Boards for Correction of Military Records**
- **VA “Character of Discharge” Review**
 - **Leaves discharge intact**
 - **Provides benefits based on VA review**

Service Discharge Review Boards

- **Separate Boards exist for Air Force, Army, Navy and Marine Corps and Coast Guard**
- **Purpose is to “correct injustice or inequity in discharge issued”**
- **Can Review and Upgrade any administrative separation and Bad Conduct Discharge from Special Court Martial (only for ‘clemency’)**
- **Cannot review discharge from General Court Martial**
- **Cannot revoke any discharge**

Service Discharge Review Boards

- **Must Apply within 15 years of Discharge**
- **Composed of Five Senior Commissioned Officers – Vote of Three to Change**
- **Veteran can request a “Documentary Record Review” and then a “Personal Appearance Hearing”**
- **Must allege**
 - **“Inequity” – departure from service traditions and standards or**
 - **“Impropriety” – legal or factual errors in process**
- **NDRB current processing time 14+ months**

Boards for Correction of Military Records

- **Each service secretary establishes Board under 10 USC 1552**
 - “to correct an error or remove an injustice”
- **Generally senior civilian officials of the department**
- **May review any discharge or dismissal**
- **Can hear appeal of Discharge Review Board**
- **Must apply within *three years* of discovery of error or injustice (may be waived)**
- **Generally a record review**
- **BCNR reviews about 270 discharges per month – each case 12+ months**

Judicial Review of Board Actions

- **Appeal either to Court of Federal Claims or local District Court (28 U.S. Code § 1346)**
- **Six year statute of limitations from date of discharge**

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“Character of Discharge” Review

- **38 CFR Section 3.12**
 - “(VA benefits) are not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions *other than dishonorable*”
- **VA Regulations state**
 - “A formal COD determination is required when the Veteran’s discharge is one of the following:
 - » An undesirable discharge
 - » An OTH discharge, or
 - » A Bad Conduct Discharge”

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“Character of Discharge” Review

- **38 CFR Section 3.12(c) contains statutory bars to benefits for member who was discharged:**
 - 1) **As a conscientious objector who refused to perform military duties**
 - 2) **By sentence of general court martial**
 - 3) **Resignation of an officer for the good of the service**
 - 4) **As a deserter**
 - 5) **As an alien during a period of hostilities**
 - 6) **As result of absence without official leave (AWOL) of at least 180 days (unless compelling circumstances caused AWOL)**

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“Character of Discharge” Review

- **38 CFR Section 3.12 (d) states if discharge was because of the following it is considered to be ‘dishonorable’**
 - 1) **Acceptance of discharge to escape trial by general court martial**
 - 2) **Mutiny or spying**
 - 3) **Offense of ‘moral turpitude’, includes conviction of a felony**
 - 4) **Willful and persistent misconduct**
 - 5) **Homosexual acts involving aggravating circumstances, including child molestation, prostitution, accompanied by assault and between service members of disparate ranks.**

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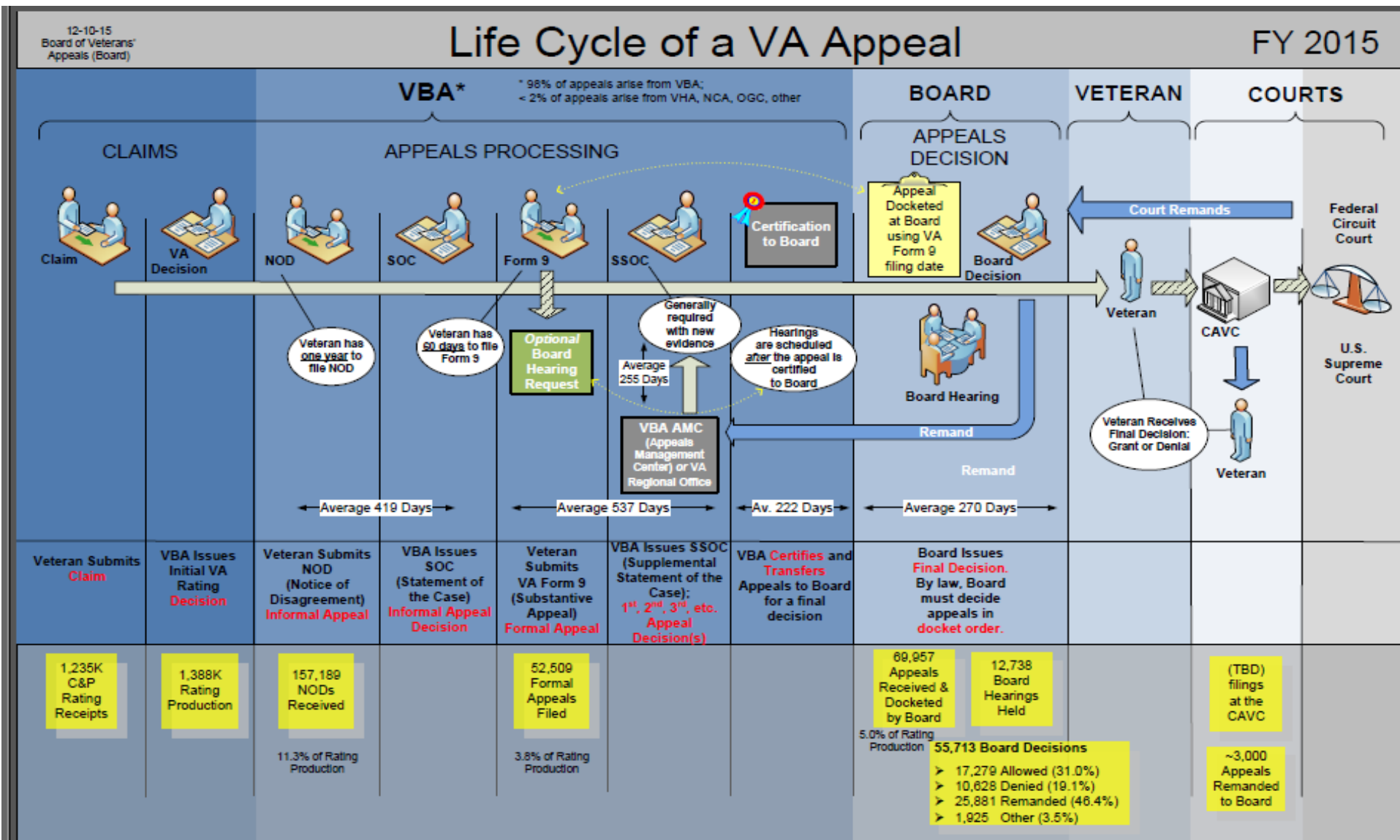
“Character of Discharge” Review

- **The VA DOES NOT make these determinations unless the veteran applies to VA for benefits**
- **VA is responsible for development of all necessary evidence and preparation of administrative decision**

Judicial Review of VA Actions

- **Follows appeal process of any other VA Claim decision**
 - One year to file appeal after VA decision, veteran files “Notice of Disagreement”
 - Appeal through VA Appeals Management Center
 - Board of Veteran Appeals
 - » Part of Department of Veterans Affairs
 - » Cases given *de novo* review by Veterans Law Judges
 - Court of Appeals for Veterans Claims
 - Federal Circuit Court

VA's Appeal Process



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“Character of Discharge” Review

- **“Underserved – How the VA Wrongfully Excludes Veterans with Bad Paper” (*March 2016*) by *Veterans Legal Clinic* at Harvard Law School:**
 - Average time for VA to complete COD determination is in excess of *three years*
 - VA findings were ‘dishonorable’ character about 90% of the time
 - » 70% of ‘dishonorable’ findings were not related to statutory bars
 - Average time for VA Appeal through BVA *3.9 years*
 - Board of Veterans Appeal decisions over past 20 years found ‘dishonorable’ character 87% of the time

Post Traumatic Stress Disorder

- **Growing realization of impact on discharge**
- **PTSD not widely recognized before 1980's**
- **Secretary of Defense issued Memo to Boards Considering Discharge Upgrade Requests involving PTSD Sept 2014**
 - **“Fully and carefully consider every petition”**
 - **Service members records may not contain medical evidence of PTSD**
 - **“Liberal consideration” to be given where service records document PTSD symptoms**

Post Traumatic Stress Disorder

- **“Unfinished Business – Correcting ‘Bad Paper’ for Veterans with PTSD” by *Veterans Legal Clinic* at Yale Law School of Impact of SecDef Memo**
 - Army Board CMR – went from granting 3.7% to granting 45% of requests
 - Grant rate for Vietnam Era Veterans from 5.6% to 59%
 - However:
 - » Tens of thousands of eligible veterans appear not to have submitted for upgrades
 - » DoD has conducted no meaningful public outreach



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