



THE VETERANS CONSORTIUM  
PRO BONO PROGRAM

***THANK YOU!***



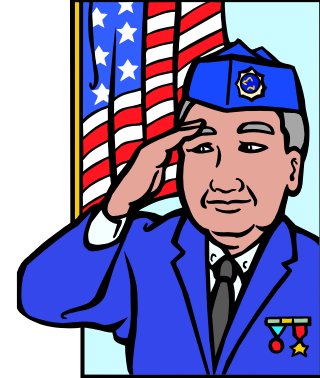
THE VETERANS CONSORTIUM  
PRO BONO PROGRAM

**PROVIDING PRO BONO  
REPRESENTATION  
BEFORE THE  
U.S. COURT OF APPEALS FOR  
VETERANS CLAIMS**



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**VA CLAIMS  
&  
APPELLATE PROCESS**



# THE SYSTEM

- Veteran Files Claim ↔ VA Regional Office
- Appeals to Board of Veterans Appeals ↗
- Appeal to US Court of Appeals for Veterans Claims  
↕ ★
- Appeals to US Court of Appeals for the Federal Circuit  
↓

# CLAIMS PROCESS AT VARO

- Representation at VAROs—claimants overwhelmingly represented by lay persons (veterans service officers)
- Process Begins with Receipt of Claim at RO—58 ROs across country (plus 1 Appeals Management Center (AMC))
- A claimant must use a standard form to begin the claims process. Informal and Inferred claims have been drastically changed.

# CLAIMS PROCESS AT VARO

- **Prior to March 24, 2015, the VA claims process allowed for the following types of claims:**
  - Formal Claim
  - Informal Claim
- **Scope of a Claim – the scope of a claim may be broader than what a veteran explicitly requested. This is particularly true for psychiatric disabilities such as PTSD.**

# CLAIMS PROCESS AT VARO

- ROs--changing the model used to process claims (older model-- Claims Process Improvement (CPI) model)
- ROs use new operating model that has different “processing lanes” depending on whether claim is simple or complex
- ROs using new programs in claims processing – for example, **the “Fully Developed Claim” program**

# CLAIMS PROCESS AT VARO

- **Case is Referred to RO Rating Specialist**
- **VA does following:**
  - **Gives claimant notice of evidence needed to prove entitlement**
  - **Develops Claim (duty to assist)**
  - **Makes Decision**



# CLAIMS PROCESS AT VARO

- Claimant Receives Either Award Letter or Denial Letter & copy of “Rating Decision”
- Note: new process—vet may not be given copy of rating decision—just notice of decision
- Notice of decision Must Include:
  - Reasons for Decision
  - List of Evidence Considered by VA
  - Notice of Procedural & Appellate Rights

# ADMINISTRATIVE APPEALS PROCESS

- Assume Vet Denied
- To Initiate Appeal file Notice of Disagreement (NOD). NOD must -
  - Express Disagreement w/ Decision
  - In Writing
  - Filed with RO
  - Filed w/in 1 Year of Date of Mailing of RO Notice Letter & Decision
  - Filed by Claimant or Rep
- Effective March 24, 2015 – must use NOD form

# WHEN NOD FILED, CLAIMANT MAY REQUEST DE NOVO REVIEW

- Right to De Novo Review of RO Decision
- Done by Decision Review Officer or DRO who reviews facts & evidence & may conduct informal hearing.
- DRO not allowed to retract favorable finding (w/ one exception—CUE)
- Appeal proceeds as usual after DRO Decision (unless claim granted)
- DRO may grant benefit or issue Statement of the Case (**SOC**)

# BOARD OF VETERANS' APPEALS

- Appeal perfected by vet filing VA Form 9 at Regional Office
- Deadline: 60 Days from date of SOC or remainder of 1 yr period to file NOD
- On Form 9--claimant *should* allege factual & legal errors
  - Can argue New Theories
  - New Claims for Different Benefits will be referred to RO

# **BOARD OF VETERANS APPEALS**

- **BVA is Final Arbiter within the VA Appellate Process**
- **Appeals assigned to Single Board Member**
- **Can have a hearing (at the BVA in Washington DC or via videoconference hearing (months) or travel board hearing (YEARS))**

# **BVA JURISDICTION**

- **BVA Has Jurisdiction Over:**
  - All Q's on VA Benefits Claims
  - Q's Relating to NODs & Form 9s
  - Q's on Health Care entitlement (but not Q's about treatment decisions)
  - CUE Motions & Motions for Recon (discussed later)

# BVA DECISION

- BVA decision must contain written statement of:
  - Findings
  - Conclusions
  - Reasons or Bases for findings & conclusions on all material issues of fact & law presented

# CLAIMANT'S BURDENS

- Application must be “substantially complete”
- Obligated to Submit Information and/or Evidence requested by VA
- Submit “Reasonably Possible” Claim in order to receive assistance from VA



# VA DUTIES

- **Consider All Legal Theories reasonably raised**
- **Notify of Info and/or Evid Needed to substantiate claim**
- **Duty to Assist (in certain cases)**
  - Obtaining Relevant Records (VA, federal, private)
  - Providing Med Exam and Getting Med Op on Linkage
- **Consider Entire Record & All Evid & Applicable Laws & Regs**

# VA DUTIES

- **Use Correct Standard of Proof**
  - **Benefit of the Doubt**
  - **Reasonable Doubt, Grant Benefit**
  - **Approx. balance of pos & neg evid, Grant Benefit**
  - **Tie Goes to the Runner**



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# **SERVICE-CONNECTED (“SC”) DISABILITY COMPENSATION**

# **ENTITLEMENT TO COMPENSATION: GENERAL REQUIREMENTS**

- Entitled to comp for disabilities *incurred in or aggravated during active military, naval, or air service*
- Service Dept findings binding on VA
  - Service records authoritative of whether individual served & dates of service
  - **HENCE IMPORTANCE OF DISCHARGE UPGRADE**

# **ENTITLEMENT TO COMPENSATION: GENERAL REQUIREMENTS**

- **2 Major VA Disability Benefits**
  - **SC compensation**
  - **Needs-based, non-SC pension**

# **ENTITLEMENT TO COMPENSATION: GENERAL REQUIREMENTS**

- **5 Elements of Disability Comp Claim**
  - **Veteran Status**
  - **Existence of current disability**
  - **Connection between service & disability**
    - **NEXUS**
  - **Degree of disability**
  - **Effective Date of benefits**

## **FIRST OF THREE REQUIREMENTS: EVIDENCE OF CURRENT DISABILITY**

- Record must contain diagnosis by medical professional
- Claimant must have the disability at time of filing or during pendency of claim
  - Disability may resolve prior to adjudication
- **VA has duty to assist** – may be obligated to provide free VA exam

## **SECOND OF THREE REQUIREMENTS: EVIDENCE OF INCIDENT, INJURY, OR EVENT**

- Great weight on vet's military personnel, medical records
- Must consider lay evidence
  - No requirement injury be confirmed in military records
- Relaxed evidentiary standard for combat vets



# **THIRD OF THREE REQUIREMENTS: FIVE THEORIES OF NEXUS**

- **Direct Service Connection**
- **Aggravation**
- **Statutory Presumption**
- **Secondarily**
- **Caused by VA Medical Treatment or Vocational Rehabilitation**

# FIVE WAYS TO ESTABLISH SERVICE CONNECTION

- VA must consider all 5 theories when adjudicating claim for SC
- Must make *reasonable efforts to assist in development*, unless no reasonable possibility assistance would aid in substantiating claim

## **FIRST THEORY:**

### **DIRECT SERVICE-CONNECTION**

- **STR's may show manifestation or diagnosis of condition in service**
- **Or, medical opinion may demonstrate that incident in service caused vet to eventually suffer from disability**

# **FIRST THEORY:**

## **DIRECT SERVICE-CONNECTION**

- **Delayed Direct SC**
- **SC established if event (no manifestation) in service caused vet to suffer disability/disease years later**
- **Usually requires medical opinion linking incident in service to current disability**

# **FIRST THEORY:**

## **DIRECT SERVICE-CONNECTION**

- **Chronicity and Continuity**
  - *Chronic Conditions* - if condition shown in service determined "chronic" (lasting, of long duration) subsequent manifestations of same at *any* later date are SC unless clearly attributable to intervening causes

# **FIRST THEORY:**

## **DIRECT SERVICE-CONNECTION**

- **Chronicity and Continuity**
  - *Continuity of Symptoms* - required only where condition *noted* during service (or in presumptive period) not shown to be chronic.... (very useful in obtaining a favorable medical opinion)
  - Where condition is one “as to which a lay person’s observation is competent,” medical evidence of “noting” not necessarily required
  - Where condition noted during service considered “**acute**” (having short course) not chronic, in most cases claimant needs medical evidence linking current condition to acute service condition

## **SECOND THEORY:** **AGGRAVATION**

- If vet shows worsening of condition that pre-existed service—"presumption of aggravation" applies
- burden shifts to VA to show no aggravation (by showing "increase in disability due to natural progress of disease")
- Clear and unmistakable evidence required to rebut pres. of aggravation

## **SECOND THEORY:** **AGGRAVATION**

- **Presumption of Soundness** - Unless entry exam indicates otherwise, VA required to presume vet in sound condition when entered service
- **Rebutting P/S:** VA must show clear & unmistakable evidence that condition pre-existed service & not aggravated during service



## **THIRD THEORY:**

# **STATUTORY PRESUMPTION**

- **Chronic and Tropical Diseases:**
- **Must manifest to a degree of 10% (lay evidence can be sufficient within one year)**
- **Does not require medical dx within 1 year of discharge**
- **Chronic diseases – arthritis, psychosis, some cancers, and others (§ 3.309(a))**

## **THIRD THEORY:** **STATUTORY PRESUMPTION**

- Presumption of SC may be rebutted by affirmative evidence to the contrary, or
- evidence establishing post-service intercurrent injury/disease that is a recognized cause of the disease

## **THIRD THEORY:**

# **STATUTORY PRESUMPTION**

- **POWs**: manifestation of diseases common among prisoners of war (POWs)
- Must manifest to degree of 10%
- Examples: psychosis, anxiety, depression, post-traumatic osteoarthritis
- Full list at 38 CFR 3.309(c)

## **THIRD THEORY:**

# **STATUTORY PRESUMPTION**

- **Gulf War presumption**
- **must manifest to degree of 10% before 12/31/16**
  - **Medically unexplained chronic multisymptom illness (such as CFS, fibromyalgia, functional gastrointestinal disorders) or**
  - **chronic undiagnosed illness manifested by signs or symptoms**
  - **Infectious diseases such as West Nile virus, visceral leishmaniasis, malaria**

## **THIRD THEORY:**

# **STATUTORY PRESUMPTION**

- **Radiation-Exposed Veterans:**
- **SC may be granted for radiation-exposed vets suffering from diseases linked to radiation exposure**
- **Full list of diseases is at 38 CFR 3.309(d) and 38 USC 1112(c)**

## **THIRD THEORY:**

# **STATUTORY PRESUMPTION**

- **Exposure to Herbicide Agents (Agent Orange):** SC based on presumption for vets who served in VN, have a listed disease, & meet other requirements as to onset of disease & degree of disability
- **Service in VN** includes service in waters offshore VN (“blue water” Navy vets) only if vet set foot on land, served in brown water or ship docked in VN

## **THIRD THEORY:**

# **STATUTORY PRESUMPTION**

- For success on SC claim via presumption, condition must manifest, not necessarily be diagnosed, within presumptive period
- In most cases, vet must have served on active duty for 90 continuous days to be eligible for SC under presumption
- 90-day requirement does not apply to POW presumptive conditions or herbicide-related presumptive conditions

## **THIRD THEORY:** **STATUTORY PRESUMPTION**

- *VA required to consider direct SC & consider SC under liberalization such as presumptive SC*



## **FOURTH THEORY:**

### **SECONDARY SC**

- Vet may be awarded SC on secondary basis by demonstrating condition is proximately result of, or linked to, SC condition
- If SC condition causes or aggravates secondary condition, secondary condition may be SC
- Vet compensated for % of disability over & above % that existed prior to aggravation
- Not relevant how long after service secondary disorder manifested itself

## **FOURTH THEORY:**

### **SECONDARY**

- **Secondary SC may be established for mental condition caused or aggravated by a SC physical condition**
- **Likewise, secondary SC may be established for physical condition caused by SC mental condition**

# **FIFTH THEORY:**

## **CAUSED BY VA MEDICAL TREATMENT/ VOC REHABILITATION**

- Disability caused by VA medical care or voc rehab may be treated “as if” SC
- **§ 1151** requires either
  - Fault by VA (negligence, lack of proper skill, carelessness, error in judgment) or
  - Accident by VA (lack of foreseeability) or
  - Lack of informed consent

## **FIFTH THEORY:**

### **CAUSED BY VA MEDICAL TREATMENT/VOC REHAB**

- If VA negligence is a factor, claimant can file a claim under Federal Torts Claims Act
- Pursuing both avenues simultaneously is advised
- (Statute of Limitations for FTCA)

# **ASSIGN % OF DISABILITY ONCE SC GRANTED**

- The method of establishing appropriate percentage of disability involves:
  - Establishing appropriate disability evaluation involves application of the VA “rating schedule” set forth in 38 C.F.R. Part 4. Part 4 called *VA RATING SCHEDULE*.
  - Determining symptoms vet is experiencing

## **ASSIGN % OF DISABILITY ONCE SC GRANTED**

- **Comparing symptoms of SC condition against appropriate DC in VA Rating Schedule**
- **There are many diagnostic codes in the VA Rating Schedule**

## **ESTABLISHING APPROPRIATE % OF DISABILITY ONCE SC IS GRANTED**

- If multiple disabilities, % not added but combined via Combined Ratings Table
- Ex: 30% & 20% combine to 40%
- %'s set in increments of 10, may be 0% (called **non-compensable**)
- % of disability designed to reflect average impairment in earning capacity caused by disability.

## **ESTABLISHING APPROPRIATE % OF DISABILITY ONCE SC GRANTED**

- **Rating (*“rating” has several different meanings*)**
  - VA Form (VAF) 21-6796 is a “rating” decision
  - Vet’s SC disabilities are “rated” or evaluated to determine correct % of disability
  - “Rating” may also mean a decision granting or denying a claim for SC
  - VA uses “evaluation” to mean the % of disability assigned



# **ESTABLISHING APPROPRIATE % OF DISABILITY ONCE SC GRANTED**

## **– Combined Evaluation**

- A “combined evaluation” contemplates more than one SC condition
- But it could also mean the total % of disability assigned by VA - even if there is only one SC condition

## **Disability**

- “Disability” is used interchangeably with the term “condition”

## **ESTABLISHING APPROPRIATE % OF DISABILITY ONCE SC GRANTED**

- VA rating schedule has hundreds of **diagnostic codes (DCs)** covering almost all types of diseases and injuries
- Each DC lists several sets of symptoms – with each set matched to a particular disability rating percentage. Not all DCs go up to 100%.
- Ex: DC 5167, loss of use of foot, triggers a 40% evaluation

# **RATES**

- **These rates effective December 1, 2014.**
  - **10% = \$133.17/month**
  - **50% = \$836.13/month (without dependent)**
  - **100% = \$2,906.83/month (without dependent)**
  - **Disability comp not taxable & usually not subject to garnishment or attachment**

# **ELIGIBILITY FOR INCREASED OR SPECIAL MONTHLY COMPENSATION**

- **Special Monthly Compensation, (SMC) compensates veterans for loss of lifestyle**
- **SMC is an add-on to regular comp**
- **While 100% disability evaluation pays \$2,906.83/month, highest level of SMC pays over \$8,300/month**

## **TDIU**

- **Education & occupational history must be discussed**
- **"Marginal employment" not considered SGO**
  - **Marginal employment--vet's earned annual income does not exceed poverty threshold for 1 person**
  - **also, where vet is employed in protected environment like family business**

## **VA MAY ASSIGN EXTRASCHEDULAR RATING FOR SC DISABILITY**

- VA's C&P Service may approve extraschedular evaluation where exceptional or unusual disability picture
- with related factors such as
- marked interference with employment or
- frequent periods of hospitalization

## **VA MAY REEVALUATE SEVERITY OF SC CONDITION & ASSIGN DIFFERENT % RATING**

- VA may choose to reevaluate SC condition, and if severity has changed, increase or decrease evaluation
- If no change, VA will "confirm and continue" evaluation
- Before assigning different % of disability, VA usually schedules exam
- Vet required to undergo this review exam

# REDUCTION IN EVALUATION

- General Concepts
  - To reduce % of disability, VA has burden of showing SC condition improved & lower % should be assigned
  - issue on appeal to BVA & CAVC is whether reduction was correct -- *NOT* whether vet entitled to increase



# REDUCTION IN EVALUATION

- **General Concepts (cont.)**
  - possible to use non-medical evidence to gauge whether there is "actual change" in disability warranting reduction
  - Medical evidence not always needed
  - Usual remedy where reduction was improper--reinstating previous higher evaluation retro to date of reduction

# **REDUCTION IN EVALUATION**

- **Reduction of Total Schedular Eval**
  - Exam showing "material improvement" under "ordinary conditions of life" required to reduce total schedular (100%) evaluation
  - VA to compare symptoms of next-to-the-last exam report, which formed basis for grant or continuation of total 100% rating, with symptoms of most recent exam

# **REDUCTION IN EVALUATION**

- **Reduction of Grant of IU**
  - To reduce TDIU, "actual employability must be shown by clear and convincing evidence." Burden on VA
  - When TDIU vet begins to engage in SGO, TDIU may not be reduced solely on that basis unless vet maintains occupation for 12 consecutive months

# **REDUCTION IN EVALUATION**

- **Where Rating In Effect for 5 Years or More:**
  - VA may not reduce rating based on 1 exam unless all evidence shows sustained improvement
  - Exam on which reduction is based must be at least as full and complete as exam upon which rating was awarded

# **REDUCTION IN EVALUATION**

- **For any SC eval effective < 5 years:**
  - must be improvement in disability
  - must show improvement in vet's ability to live & work;
  - Entire history of disability must be reviewed, & reduction based upon thorough current exam;
  - Even if disability improved, if there is reasonable doubt do not reduce

# **DEPENDENCY AND INDEMNITY COMPENSATION (DIC)**

## **Dealing with widows**

**Surviving spouse, child or parent is entitled if:**

- **Veteran's death during service**
- **Cause of death is service connected:  
Principal or Contributory cause of death**
- **Vet totally disabled for 10 years before death**

# **DEPENDENCY AND INDEMNITY COMPENSATION (DIC)**

- **Spouse: Valid marriage, at time of death; married for one 1 year, continuous cohabitation. (Common law recognized, about 8-10 states)**
  - Remarriage is a bar until age 57
- **Child: under age 18/23 if pursuing education; Unmarried; Permanently incapacitated before age 18 (Helpless child)**
- **No time limit: If one year, goes back to month after vet died**
  - If beyond one year, date of claim

# **DEPENDENCY AND INDEMNITY COMPENSATION (DIC)**

**CLAIM FOR DIC = CLAIM FOR DEATH PENSION &  
ACCRUED BENEFITS**

**SURVIVOR MAY GET VA MEDICAL OPINION**

**ENTITLED EVEN IF CAUSE OF DEATH NOT SERVICE  
CONNECTED AT TIME OF DEATH (NO CLAIM FILED)**

- **Entitled to DIC if service connection can be made at any time**
- **Pending claim or no claim at all. Even if previously denied – widow gets a new opportunity.**
- **Disability must be primary cause, or jointly with other causes, is the “immediate or underlying cause of death.**



# **DEPENDENCY AND INDEMNITY COMPENSATION (DIC)**

## **DIC RATES FOR SURVIVORS OF VETS TOTALLY DISABLED PRIOR TO DEATH**

- Entitled if totally & continuously disabled for 10 years prior to death
- Entitled if Vet did not meet 10 year period but: CUE in VA claim during life time; Additional evidence which consists of Government Records; Rated for disability, but compensation going to dependents, or being withheld to offset indebtedness; No waiver of retirement pay, separation pay, whereabouts unknown but otherwise entitled, a POW.

# **DEPENDENCY AND INDEMNITY COMPENSATION (DIC)**

## **Other Benefits**

- **ACCRUED BENEFITS (CLAIM FOR BENEFITS FROM CLAIM PENDING AT DEATH)**
- **SUBSTITUTION: Recent change – keeps case alive**



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## **OPTIONS AFTER BVA DENIAL**

## **4 MAJOR OPTIONS**

- **Filing Notice of Appeal w/ CAVC**
  - **120 DAYS!!!!!!**
- **Filing Claim to Reopen at RO**
- **Filing Mot for Recon w/ BVA (.02)**
- **Filing Mot to Revise Previous Final RO/BVA Decision b/c of CUE**

# **MOTION FOR RECON W/ BVA**

- **TWO-STEP DECISION-MAKING PROCESS**
- **STEP ONE: BVA Chairman decides whether to grant reconsideration**

## **3 Grounds for Granting Reconsideration**

- Obvious error of fact or law
- Discovery of new and material service department records
- False/Fraudulent Evidence Submitted on behalf of Appellant

# **MOTION FOR RECON W/ BVA**

- If Chairman denies reconsideration, no judicial review
- If Chairman grants reconsideration:

## **STEP TWO:**

- Previous final BVA decision is vacated
- Case assigned to a BVA panel of 3 judges
- De Novo review of claim

## **COMPARING THE OPTIONS—MOTION FOR BVA RECONSIDERATION**

- **No time limit to file**
- **No time limit on number of times such a motion may be filed**
- **No new evidence can be added, except service department records**
- **Effective date if benefit granted is date VA recvd claim that led to BVA decision that was reconsidered**

# **WHY CUE MOTIONS ARE DIFFICULT TO WIN**

- Error must be “undebatable”
- Error must be outcome determinative
  - This is a burdensome requirement: must show that result would have manifestly been different if not for the alleged error
- Error in weighing the evidence cannot be CUE
- Breach of duty to assist cannot be CUE
- Benefit of Doubt standard does not apply to CUE motions



## **COMPARING THE OPTIONS—APPEAL TO CAVC**

- 120-day time limit to appeal—from date of BVA decision being appealed
- No new evid can be added
- But can add new evidence at VA if Court remands
- Effective Date if claim granted—date VA recvd claim that led to BVA decision under appeal



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# **THE VETERANS CONSORTIUM**

# **PRO BONO PROGRAM**

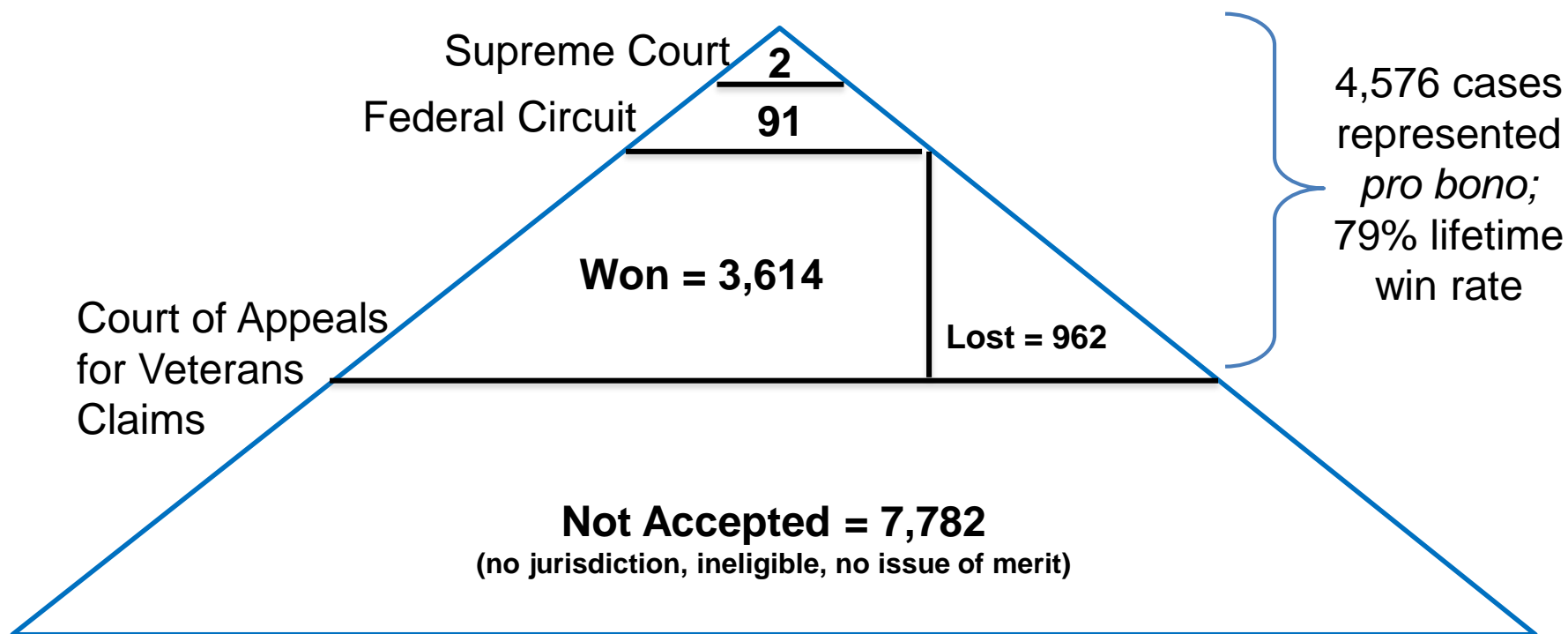
**[WWW.VETSPROBONO.ORG](http://WWW.VETSPROBONO.ORG)**

**1-888-838-7727**

## WHAT DO WE DO?

- We provide all qualifying veterans and their families, caregivers, and survivors, located anywhere in the world, free legal representation at:
  - the Court of Appeals for Veterans Claims
  - the Federal Circuit and Supreme Court as needed
- We assist back at the BVA / RO after a Court decision
- We arrange limited free medical & psych reviews
- We will never ask your veteran or you to pay for legal representation in federal court
- Placed first case in October 1992

## FY1993 – FY2015 TRACK RECORD



12,676 requests for *pro bono* attorney services from FY1993 – FY 2015

# **A YEAR-IN-THE-LIFE OF TVC**

- Approximately 15,000 calls
- More than 27,000 web site hits (74% new visitors)
- Provide advice or information to more than 1,600 veterans, loved ones, and survivors
- Receive 500 to 600 requests to help Vets at the Court
- Train ~ 200 to 250 new volunteer attorneys
- Volunteer attorneys donate more than \$5 to \$6 million in *pro bono* services (> \$88 million since FY1993)

# HOW WE DO IT

- Reach out to Veterans and their Families, Caregivers, and Survivors who have received adverse BVA decisions
- Evaluate cases for *pro bono* placement
- Recruit, train, and mentor volunteer attorneys in veterans law and CAVC practice
- Carefully match clients with volunteers
- Provide Direct Representation for medically complex or time-sensitive cases
- Facilitate law school clinics representation

# **LAW SCHOOL CLINICS: A RESOURCE**

- **Often include law students & professors who are veterans; more than 50 in the U.S.**
- **Offer direct civil legal services**
  - **About 26 have offices in VA Medical Centers**
  - **Some serve focused need (wills, elder law, consumer)**
  - **Others are active in Veterans Treatment Courts**
- **Some can help with disability benefits & appeals, including cases from The Veterans Consortium**

# **THE APPELLANTS**

## **To Qualify for Pro Bono Program Services**

- 1. Veteran**
  - Or a Qualified Family Member**
- 2. Received an adverse BVA decision**
- 3. Meritorious case**
- 4. Financially Qualified**



# THE APPELLANTS

- **Clients might not be combat veterans**
  - **Service-connected disability compensation is available for disabilities “incurred during active service”**
  - **Disabilities may have arisen during peacetime or while off duty (*e.g.*, sports injuries)**
  - **Only non-service-connected pension is limited to those veterans who served during a period of war**

## **MYTH BUSTER QUIZ: TRUE OR FALSE?**

- *Pro bono* means “free” except when I pay 20% after they win = FALSE (free means free)
- My claim is too small = FALSE
- *Pro bono* means you have to be turned down first by a private lawyer = FALSE
- Service Officers can’t refer for legal services = FALSE (Congressional program; not a specific lawyer; volunteers managed by a 501(c)(3) charity)
- It’s too hard to win in federal court = FALSE

# **BVA STATS: FY15**

- **55,713 decisions (project 57,620 in FY16)**
  - **Allow Benefit in 31% of cases (historically ~ 50% include a remand issue)**
  - **Remand in 45.5% of cases (90% of these come back to BVA)**
  - **About 5,000 are appealed to the CAVC**
  - **CAVC remands ~75% to 80% of appeals back to BVA**
- **81,022 Pending as of FY15**



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# **GETTING A CASE FROM THE VETERANS CONSORTIUM**

# OUTREACH TO APPELLANTS

- Outreach to out any Veteran with an adverse BVA decision
- Includes sending information to all *pro se* appellants with cases at the Court
- They return:
  - Request for services
  - Financial qualification questionnaire
  - Retainer agreement

# TVC EVALUATES THE CASE

- Reviews the BVA decision
- Files a motion to stay if needed
- Reviews the Record (RBA)
- Creates a screening memo
  - Factual and legal basis for identified issues
  - A starting place – your evaluation is critical

# **TVC EVALUATES THE CASE (CONTINUED)**

- **Rejects frivolous cases**
  - May refer a case to an experienced volunteer for counseling
- **HELPLINE Project, assists with:**
  - ✓ Informal Brief
  - ✓ Procedural Understanding



# SENDING THE CASE TO YOU

- Ms. Carol Scott will call to offer you a case
- Send comprehensive notification packet to you
- Send your information to the appellant
- Send you resources



***\*\* If you  
can't  
take a  
case  
when we  
call –  
let us  
know! \*\****

## **AND YOU...**

- ✓ **Contact your client!**
  - **Obtain the retainer agreement**
- ✓ **Call your mentor – important resource**
- ✓ **Read the Rules of Practice and E-Filing Rules**
- ✓ **Read through the screening memo and the record**
- ✓ **File your appearance**

# NEED TO KNOW

- **Winning is a relative concept**
  - Making a difference for the vet or their family member(s)
  - Providing pro bono representation
  - A remand is a ‘win’
- **User friendly Court**
  - Appreciates pro bono work
- **Help is here – we want you to succeed**

# RESOURCES FOR YOU

- **Mentor**
- **Website**  
<http://www.vetsprobono.org/attorneys/>
  - Refresher video, sample briefs, pleadings, etc.
- **Books**
  - Veterans Benefits Manual
  - Laws, Rules and Regulations
  - Veterans Appeals Guidebook

# ~ ETHICS ~

- *Competence, Communication, and Counseling\**
- Entitled to professional, competent representation
  - Resources are there for you: Samples, References, Mentors

*Keep your client informed*

*Especially when Court issues decision!*

\* *From Ethical Foundations* by Michael P. Allen

# STANDARD OF REVIEW

- Findings of Law
  - *De novo* Review
- Application of Law to Fact
  - Arbitrary, Capricious Standard of Review



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# **PRACTICE BEFORE THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS**

# **SETTLEMENT ISSUES FACED BY COUNSEL FOR APPELLANT**

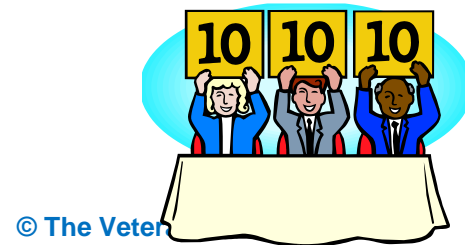
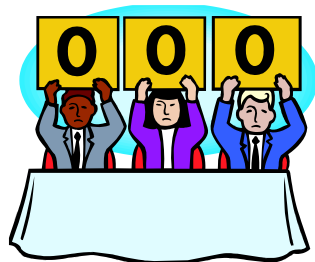
**Common dilemmas when VA offers to  
remand to correct error(s):**

- **Reject offer and try to convince court to reverse BVA decision and award benefits?**
- **Reject offer and try to convince court to remand based on error(s) VA won't concede?**



# THE COURT

- Created in 1988, located in Washington, DC
- Case Load
  - FY2014: 4,100
  - FY2015: ~4,900
- Structure:
  - 8 judges (*CJ Lawrence Hagel, Kasold, Lance, Schoelen, Pietsch, Davis, Bartley & Greenberg*)
  - **Decisions mainly reviews of briefs:** 85% single judge, 15% 3-judge panel or full court; some hearings on the road



# **TWO REQUIREMENTS**

- **Two Requirements to Appeal BVA Decision to the CAVC:**
  1. **Final Decision by the Board**
  2. **Timely Notice of Appeal (NOA)**
    - **Must be Received by CAVC within 120 Days of Mailing of BVA Decision**
    - **Common law mailbox rule & USPS postmark rule**
    - **Equitable tolling is allowed**

# **CAVC REVIEW & BVA RECONSIDERATION**

- **Motion For Recon filed w/ BVA May Affect the 120-Day Appeal Period:**
  - if Motion for Recon filed w/in the 120-day Appeal Period (prior to filing CAVC appeal), a new 120-day Appeal Period begins when BVA acts on Motion for Recon
  - If CAVC Appeal filed & then Motion for Recon filed with BVA, jurisdiction is w/ Court (but Court will stay proceedings pending BVA action or dismiss appeal w/o prejudice to re-filing once BVA acts)



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# **JUDICIAL REVIEW**

before the U.S. Court of  
Appeals for Veterans Claims

# SCOPE OF CAVC REVIEW

- Review based on Record of Proceedings before BVA
- CAVC to decide all relevant Q's of law, interpret constitutional, statutory, & regulatory rules
- determine meaning or applicability of terms of Secretary's action
- compel VA action unlawfully withheld or unreasonably delayed
- hold unlawful and set aside decisions, findings conclusions, rules, & regs that are
  - Arbitrary, Capricious, Abuse of Discretion, or not in Accord w/ Law
  - Contrary to Constitutional Right or Power
  - Exceeds Statutory Authority or Limitations
  - Did not Observe Procedure

# STANDARD OF REVIEW

- Findings of Fact
  - Clearly Erroneous Review
  - CAVC may not review favorable findings of fact made by the BVA.
  - CAVC cannot make initial factual determination even if the record is incontrovertible on the issue involved; factual determinations are to be made by agency fact-finders.

# **SINGLE-JUDGE OR PANEL?**

- **Case Will be Decided by Single Judge if:**
  - Is of Relative Simplicity
  - Does Not Establish a New Rule of Law
  - The Outcome is Not Reasonably Debatable
- **Otherwise, Case Will be Decided by Panel**

# **SINGLE-JUDGE OR PANEL?**

- **Single-Judge Decisions are Not Published and Not Precedential.**
- **FY2014 - only 1.9 percent of 2,036 dispositions issued by CAVC (38 decisions in total) were issued by a three-judge or full panel and are precedential. This does not include Clerk's Orders and denials of panel or full court review.**



# **U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT—JURISDICTION**

- **Federal Circuit Has Jurisdiction Over All Questions of Law**
- ***De novo* Review of Questions of Law**
- **Has Jurisdiction to Review “Free-Standing” Constitutional Issues**
- **Does Not Have Jurisdiction Over Application of Law to Particular Facts**

# **MAY FILE CERT PETITION FOR REVIEW OF FEDERAL CIRCUIT DECISIONS**

- **The veteran or the VA may petition the US Supreme Court to review a Federal Circuit decision that reviewed a CAVC decision**



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**COMMON VA ERRORS  
RAISED, & SETTLEMENT  
ISSUES  
FACED BY COUNSEL**

# **DID VA COMPLY WITH DUTY TO ASSIST?**

- **General Rule: VA Must Make “Reasonable Efforts” to Assist Claimant in Obtaining Necessary Evidence...**

***...Unless* There is “No Reasonable Possibility” that Assistance Would Help Prove Claim**

# **OBTAINING EXISTING RECORDS – COMPENSATION CLAIMS**

- **VA is Required to Try to Obtain:**
  - **Claimant's SMRs & Other Records**
  - **Records of Relevant Medical Treatment at VA Facilities or at VA's expense**
  - **Other Relevant Records Claimant Identifies and Authorizes VA to obtain**

# **ASSISTANCE IN GETTING EXISTING RECORDS**

- **VA Must Make Reasonable Efforts to Obtain Relevant Records That Claimant Identifies**
- **If VA is Unable to Obtain Records, VA Must Notify Claimant & Include Specific Information**
- **VA Must Continue Efforts to Obtain Federal Agency Records Unless Futile**

# VA MEDICAL EXAMS & OPINIONS FOR COMP CLAIMS

Required if:

- Medical diagnosis of current disability or lay evidence of recurrent symptoms; and
- Record *indicates* Disability/Symptoms *May be Associated* with Service; but
- Not Sufficient Med Evidence for VA to Make Decision

# DUTY TO ASSIST: THE BARR RULE

- BVA failure to explain why it rejected favorable lay evidence

If VA provides a medical exam or tries to obtain a medical nexus opinion

Then

VA must obtain an adequate exam/opinion or notify vet why one cannot be provided,

*Regardless whether VA was legally obligated to obtain exam/opinion in the first place*



# **DUTY TO ASSIST FAILURE**

- **Remedy: Vacate BVA Decision and Remand for Further Proceedings**
- **If Remand, Claimant Allowed to Submit Additional Evidence**
- **Remand Preserves Earliest Effective Date of Award of Benefits**

# **BVA DECISION LACKS ADEQUATE “REASONS OR BASES”**

## **4 Common Types of “Reasons or Bases” Errors:**

**Type 1: BVA medical conclusion  
unsupported by medical evidence in the  
record**

**Type 2: BVA failure to explain why  
unfavorable evidence more probative than  
favorable evidence**

## **4 COMMON TYPES OF “REASONS OR BASES” ERRORS**

- **Type 3: BVA failure to explain why it rejected favorable lay evidence. BVA cannot reject favorable lay evidence simply because there is no contemporaneous evidence in record**
- **Type 4: BVA failure to discuss its resolution of all legal issues reasonably raised by the record**

# **COMMON ERRORS IN BVA ANALYSIS OF MEDICAL OPINIONS**

- **Type 3: BVA failure to explain why it rejected favorable lay evidence**
- **BVA relies on negative medical opinion that does not contain Dr.'s rationale**
- **BVA cannot reject medical opinion simply because it was based on what vet told physician, unless BVA rejects credibility of what vet told physician**
- **BVA disfavors positive opinion because it's unclear, without first asking Dr. for clarification**

# **COMMON ERRORS IN BVA ANALYSIS OF MEDICAL OPINIONS**

- **BVA failure to explain why it Rejected favorable lay evidence**
  - ✓ VA Dr: “can’t resolve nexus issue without resort to speculation” → BVA cannot rely on it to deny claim unless physician fully explains why he cannot resolve issue
  - ✓ BVA relies on a negative medical opinion that is based on inaccurate factual premise

# **WHETHER VA STATUTES/REGS/POLICIES WERE VIOLATED/MISAPPLIED**

- **VA Regulations May Violate VA Statutes**
- **If VA Violates or Misapplies Law, Court May Reverse BVA Decision and Remand**
- **Court Usually Vacates and Remands for BVA to apply proper Interpretation of Law**

# IS VA ERROR HARMLESS?

- **CAVC—Must Consider Whether Error by BVA Prejudicial**
- **CAVC may base harmless error decision on its own factual conclusions**
- **CAVC Reviews De Novo a Board Decision on whether error harmless**



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# **ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT (EAJA)**



# **EAJA APPLICATION**

## **Requirements for EAJA Petition:**

- 1. Must Allege that Appellant is Prevailing Party**
- 2. Must File Itemized Statement of Fees & Expenses Sought**
- 3. Must Allege Govt's Position not substantially justified**
- 4. CAVC Must Have Had Subject Matter Jurisdiction Over Lawsuit when appeal filed**

# **EAJA PETITION DEADLINE**

- **Filing Deadline is jurisdictional—if application is late, petition is dismissed--no exceptions**
- **EAJA Application Deadline: 30 days after “final judgment in the action”**
- **“final judgment in the action” is 60 days after CAVC Order entering judgment**
- **EAJA Deadline is 30 days after CAVC Order of settlement or granting JMR**

# **PREVAILING PARTY REQUIREMENT**

**Appellant Considered Prevailing Party if:**

- **Obtains Reversal or Remand; and**
- **CAVC Decision or Order Expressly Predicated on Administrative Error: OR**
- **Secretary acknowledges administrative error in JMR**

## **GOVERNMENT POSITION NOT SUBSTANTIALLY JUSTIFIED**

- For Position of Govt to be Substantially Justified--must have “reasonable basis in law and fact”
- Burden on VA to demonstrate reasonableness of both:
  - Govt position during administrative process; and
  - Govt position during litigation phase

# PREVAILING PARTY (CONT.)

Situations where remand does not make Appellant a PP:

- Remand due to new statute/reg after BVA decision
- Remand due to new case law after BVA decision
- *Maggitt* Remands (Issue is raised for first time on appeal and Court tells BVA to consider issue in the first instance)
- *Harris* Remand (Remand is due to considerations of judicial economy).

## **NET WORTH UNDER \$2 MILLION REQUIREMENT**

- **Counsel States Appellant's Net Worth at the Time of Appeal Less than \$2 Million**
- **Reference Filing of IFP Motion to Waive Filing Fee**
- **File Signed Declaration Stating Net Worth at Time of Appeal less Than \$2 million**

# HOURS COMPENSABLE

- **Standard: hours reasonably expended**
- **Exercise Billing Judgment— eliminate excessive, redundant, unnecessary hours**
- **Unrelated Claims — prevailing party and substantial justification requirements separately apply to each unrelated claim.**
- **If alternative legal theory successful, failure of other theories insufficient for reducing award**

# **TIME RECORDS**

- **Attorneys Required to Keep Contemporaneous Time Records**
- **Document Exactly how Time is Spent**
- **Hours Should be Broken into Small Descriptive Entries**





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**THANK YOU  
FOR SERVING OUR  
VETERANS**