

Veterans Appeals Modernization: Choice, Control, and Clarity for Veterans

by Cheryl L. Mason and Elizabeth Murphy

Veterans law is constantly changing—between new statutes, regulations, U.S. Court of Appeals for Veterans Claims (CAVC or Court) precedential opinions, and changes in Veteran demographics, those who practice veterans law are forced to be agile. This agility came into play over the last three years, when the appeals system at the U.S. Department of Veterans Affairs (VA) was completely changed.

Between 2001 and 2017, the number of pending appeals at VA grew approximately 350% to nearly 500,000. Veterans were stuck waiting between three to seven years for a decision from VA. The system was broken. In March of 2016, VA came together with Veteran Service Organizations, representatives of the private bar, and Congressional staff to design a new appeals system that would be quicker, more efficient, and give veterans choice. In August of 2017, President Donald Trump signed the *Veterans Appeals Improvement and Modernization Act* (AMA), the most significant statutory change affecting VA appeals in decades. VA implemented the AMA just 18 months later.¹ Veterans, who before were stuck in a complex process

with no choice but to wait, could now experience a streamlined process. Through modernization of technology and processes, VA replaced the antiquated legacy appeals system with AMA, which offers veterans choice, clarity, and control over their decision review and appeals processes.

To understand the marked difference between AMA and the legacy system, it is best to break down the key players. The Board of Veterans' Appeals (Board) is the VA Secretary's designee to decide appeals. The Board is made up of 102 Veterans Law Judges (VLJs), more than 800 attorneys and nearly 200 administrative and operations staff. Its mission is to hold hearings and issue decisions on appeal from all three administrations: Veterans Benefits Administration (VBA), Veterans Health Administration (VHA), and the National Cemetery Administration (NCA).² VBA, VHA and NCA are considered Agencies of Original Jurisdiction (AOJ) and are where initial claims with VA arise. Under the legacy system, some appeals were controlled by the AOJ before they could arrive at the Board.

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While AMA created a new appeals process at VA, it did not automatically move veterans who had pending appeals in the legacy system into the new system. In effect, it created two appeals streams: the legacy process as described above and the new AMA process. VA still works both appeals simultaneously, but the number of legacy appeals is steadily decreasing.

Notable Changes Under AMA

As described above, the legacy system was complicated and caused veterans to wait years for their decisions. Veterans had little control of what happened to their case in this system and often did not know the status of their case. For example, if veterans wanted to appeal directly to the Board, they would have to first go through a series of gates and often, due to changes in case law, the case would be sent back to the AOJ for further review as a remand. Veterans could also submit evidence up until the time a veteran's decision was mailed out. This further delayed decisions because the additional evidence required review and evaluation, even if the decision was already signed.

AMA addressed this problem by imposing certain time frames within which veterans may submit evidence to the Board. For example, at the Board, veterans may either submit their evidence with the Notice of Disagreement (Form 10182) or at the hearing, or within 90 days following receipt of the Notice of Disagreement (Form 10182) or within 90 days following the hearing.³

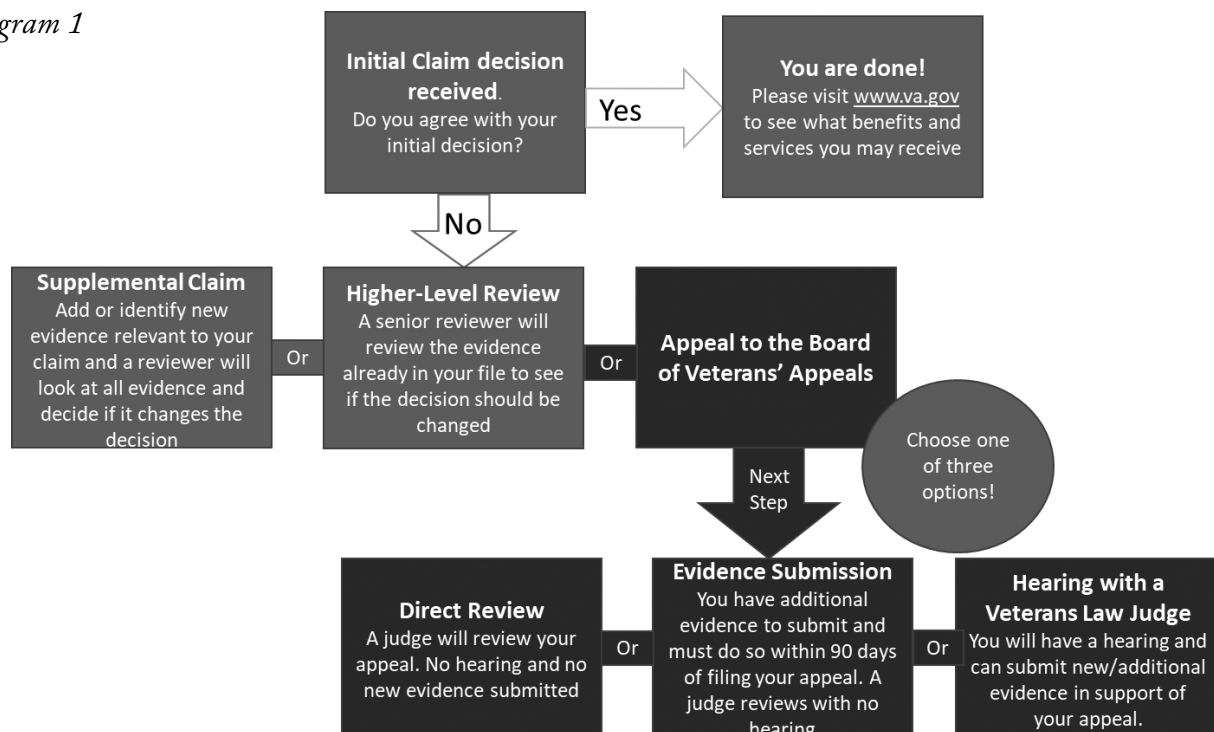
Going hand in hand with continuous evidence submission is the duty to assist. In 2000, Congress enacted the *Veterans*

Claims Assistance Act of 2000 (VCAA).⁴ Under the VCAA, VA had a duty to both notify claimants of any medical or lay evidence necessary to substantiate their claims and the duty to make reasonable efforts to assist claimants in securing evidence to substantiate their claim. This requirement to assist claimants in the development of their claims was charged primarily to AOJs, was extended to the Board, and has been discussed in Federal Circuit court decisions.⁵

Under AMA, the duty to assist exists at the AOJ level with claims submission and review, and the Board was reverted to a completely appellate body.⁶ By law, the Board is the Secretary's designee to be the final tribunal in the Department to decide Departmental appeals, and it did not make sense for an appellate body to have a duty to assist in gathering evidence.⁷ The duty to assist still exists at the point of the initial claim and in the supplemental claim lane and, as described below, veterans can still submit evidence.

Under AMA, veterans are assured that if there was a favorable finding made at some point in the claims, decision review, or appeals processes, that favorable finding could not be overturned in a later review. This is known colloquially as the "favorable finding rule" which states that, "[a]ny finding favorable to the claimant . . . shall be binding on all subsequent adjudicators within the Department, unless clear and convincing evidence is shown to the contrary to rebut such favorable finding."⁸ This rule was generally followed under the legacy system and was codified under AMA.

Diagram 1



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New Choices Under AMA

If a veteran disagrees with their initial decision from VA, he or she must choose one of three decision review lanes to go into: (1) Higher-Level Review; (2) Supplemental Claim (both at the AOJ level); or (3) Appeal directly to the Board. Both the Higher-Level Reviews and Supplemental Claim lanes are being completed on average in less than 125 days. To get to lanes 1 or 2, veterans or their representatives need to file a VA Form 0995 or VA Form 0996. If a veteran chooses the Board lane, he or she must choose between one of three appeal tracks: (a) Direct Review; (b) Evidence Submission; or (c) Hearing with a VLJ. The Direct Review track takes approximately one year to complete, while the evidence and hearing tracks will take more than one year. To appeal to the Board, veterans or their representatives need to file a VA Form 10182 and then select which track they wish to have their appeal adjudicated.

The most common question about AMA is: Which lane is better? In true legal fashion, the answer is, "It depends." The Board created the diagram on the previous page (Diagram 1) to help veterans and their representatives decide which lane is best depending on the facts and circumstances of their case. For example, if a veteran does not have additional evidence and wants a decision as quickly as possible, he or she may choose the higher-level review at the AOJ level (most commonly VBA).

It is important to remember that the veteran can ask for a Higher-Level Review after a Supplemental Claim decision review and the veteran can appeal to the Board if he or she is not satisfied with the Higher-Level Review or Supplemental Claim decision by the AOJ. If the Board wants to come directly to the Board after the initial claim decision by the AOJ, he or she can now do so.

AMA also provided the veteran with the opportunity to split issues into the different lanes, based on whether veteran



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just wanted a review of the initial claims decision or decided to get additional evidence. Also, veterans now have the choice of how to proceed when their appeal is remanded to the AOJ. Once the AOJ decides the remanded appeal, a veteran can choose Higher-Level review, Supplemental Claim review, or again Appeal it back to the Board.

What happens after a Board decision? If a veteran disagrees with a Board decision AMA offers a couple of options. If the veteran disagrees with a Board decision, the veteran has one year to submit new and relevant evidence to the AOJ under the Supplemental Claim lane. If the submitted additional evidence supports the Veteran's claim and results in a favorable decision, the veteran's initial effective date is protected. Instead of filing a Supplemental Claim, a veteran could also file an appeal to U.S. Court of Appeals for Veterans Claims (CAVC) within 120 days. If the veteran disagrees with CAVC's decision, he/she has two options. The veteran again has one year to file new and relevant evidence with the AOJ for review, and if granted, the veteran's initial effective date is preserved. The veteran can also appeal an unfavorable CAVC decision to the Federal Circuit.

Hearings at the Board

As an appellate body, the Board holds non-adversarial hearings with veterans if the veteran chooses to have a hearing. Hearings are opportunities for veterans who believe that their words and story would not have the same impact as a written statement. The Board currently offers three choices for hearings: (1) Central Office (held in Washington, D.C.); (2) Video (VLJ is in D.C., veteran is at a VA facility); and (3) a Virtual tele-hearing.

Virtual tele-hearings offer veterans flexibility, convenience, and access to their Board hearings and is built on the successful VA telehealth platform. Veterans can use their phones, tablets, or computers to log in to their hearings from wherever they are. This technology eliminates the need for veterans having to travel hundreds of miles to the nearest VA facility for their hearings.

The Board began testing virtual tele-hearings in July of 2019 and was ready to transition to a virtual environment when COVID-19 hit. In a matter of weeks, all in-person hearings were suspended, and many were rescheduled to virtual tele-hearings. On April 10, 2020, President Trump signed the *VA Tele-Hearing Modernization Act* making virtual tele-hearings a permanent option for veterans.⁹ To date, the Board has held over 2,600 virtual tele-hearings, and the number is growing.

U.S. Court of Appeals for Veterans Claims (CAVC) Impacts

CAVC was created in 1989 by the *Veterans' Judicial Review Act* and since that time has brought clarification to the area of veterans law.¹⁰ Generally, around 9% of the Board's denials are appealed to the Court. Of that percentage, many appeals are returned to the Board under Joint Motion for Remand (JMR) orders. A JMR is a remanded decision from CAVC back to the Board that includes instructions VA must follow.¹¹ For example, CAVC may instruct VA to obtain updated medical examinations. The remainder of appeals at the Court are decided in primarily single judge non-precedent Court decisions.

If the Court makes a precedent decision, the Board pivots immediately to implement this decision on all its cases. Additionally, the Board monitors the Court's decisions for trends and provides training to its judges and attorney staff. The Board and VA's Office of General Counsel also collaborate to address trends with JMRs.

Conclusion

The AMA signified the most comprehensive appeals reform for veterans in decades. When the AMA was signed into law in August 2017, there were approximately 500,000 pending legacy appeals, primarily at the Board and VBA. Less than three years later, the number of pending legacy appeals is less than 180,000. The Board is simultaneously working legacy and AMA appeals and is delivering results in record numbers: 85,000 decisions in 2018 and 95,000 decisions in 2019. Under AMA, veterans are seeing faster results and are finally able to take their claims review process and appeals into their own hands. 

Endnotes

- ¹ Pub. L. 115-55, 131 Stat. 1105.
- ² 38 U.S.C.S. § 7104(a).
- ³ 38 U.S.C.S. § 7113 (b)(c).
- ⁴ VETERANS CLAIMS ASSISTANCE ACT OF 2000, Pub. L. 106-475, 114 Stat. 2096.
- ⁵ See *Sullivan v. McDonald*, 815 F.3d 786 (Fed. Cir. 2016) (holding VA has a duty to assist in collecting VA medical records, or medical records of examination or treatment at non-VA facilities authorized by VA even if they're not relevant to the claim).
- ⁶ 38 U.S.C.S. § 5103A(e).
- ⁷ 38 U.S.C.S. § 7104(a).
- ⁸ 38 U.S.C.S. § 5104A.
- ⁹ Pub. L. 116-137, 134 Stat. 616.
- ¹⁰ VETERANS' JUDICIAL REVIEW ACT, Pub. L. 100-687, 102 Stat. 4105.
- ¹¹ See *Stegall v. West*, 11 Vet.App. 268, 271 (1998) (stating that a remand by the Court or Board "confers on the Veteran . . . as a matter of law, the right to compliance with the remand orders," and the Board itself errs when it fails to ensure compliance with the terms of such a remand).