



The Appeals Process & Hearings

By: David Huntimer



WHAT TO DO IF A BENEFITS CLAIM IS DENIED

- If a VA benefits claim is denied, the claimant has the right to appeal the decision
- Currently, there are 3 decision review options to choose from which will be discussed later in this class
- Prior to the current appeals process (AMA), the Legacy Appeals process was in effect which offered a more limited approach to appeals



EXAMPLES OF APPEALABLE DECISIONS

- Character of Discharge/Status as a veteran
- Service connection
- Rating percentage
- Effective date
- Dependency & Indemnity Compensation
- Waiver of overpayment
- Entitlement to special monthly compensation/pension



ACTIONS THAT CAN NOT BE APPEALED

- Proposed actions – the most common are reductions of ratings and ratings of incompetency
- Proposed actions are not a “*final*” decision - All final decisions should include appeal rights in notification letter



What are Legacy Appeals?

- Legacy appeals pertain to claims that were decided prior to February 19, 2019, when the Appeals Modernization Act (AMA) became effective
- The claimant must not have opted-in to the Rapid Appeals Modernization Program (RAMP)
- If the claim was decided on 2/19/19 or later or if the claimant participated in RAMP, legacy appeals no longer apply; instead they fall under the Appeals Modernization Act (AMA)



APPEAL TIMELINES

- Indication that the veteran disagrees with a decision must be filed within **ONE YEAR** from the date of the decision notification for all claims, other than contested claims **38 CFR 19.52(a)**
- If it is time stamped within the appeal period – it is considered **TIMELY. (This is postmark or received at the VA, NOT when it is received at the claims office)**
- For appeal periods ending on weekends or holidays, the next working day marks the end of the appeal period **38 CFR 20.110(b)**



BOARD OF VETERANS APPEALS DECISION OUTCOMES

Once a hearing is held or an appeals consultant prepares a brief, the Board will review the appeal and issue a decision

- “Grant” means an issue was granted in full
- “Remand” means development needed, sent back to RO/AMO for development and new decision
 - If legacy appeal, and SSOC is issued, appeal will return to the BVA
 - If modernized appeal, new rating decision will be issued, veteran can choose from three options
- “Deny” self-explanatory: options for challenging the denial are explained on the following slide



CHALLENGING A DECISION BY THE BOARD OF VETERANS APPEALS

- **Appeal to the Court of Appeals for Veterans Claims (CAVC):**
 - **120 day deadline from decision notice to file NOA with the Court**
 - Federal Court: service officers cannot represent unless they are also attorneys barred/admitted at the CAVC
 - Suggest veteran obtain veterans benefits lawyer –provide contact info for Bergmann & Moore and Veterans Consortium Pro Bono Program but do not recommend a specific lawyer. Unlike at the VA where lawyers usually charge veteran a fee, many lawyers will represent for free at CAVC – attorney fees paid by government if successful (EAJA)

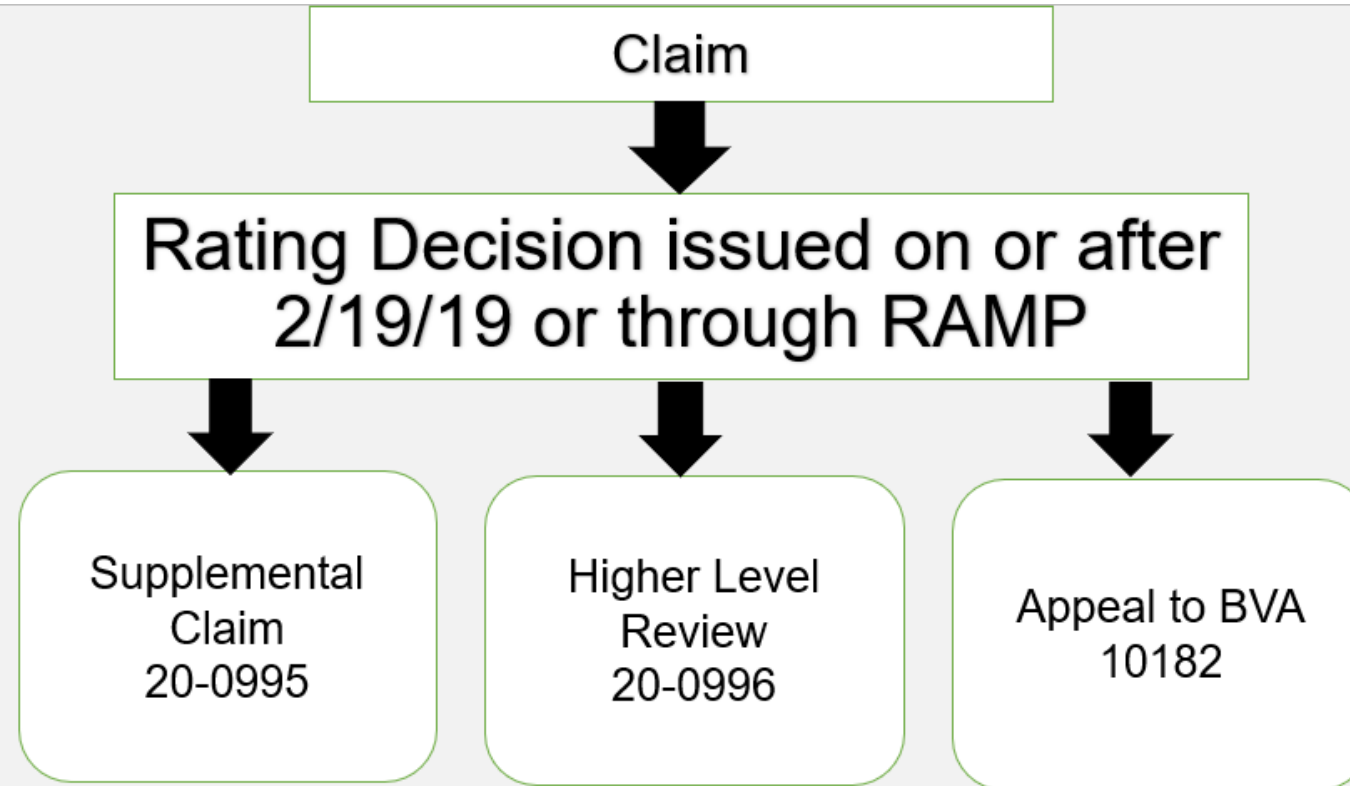


Appeals Process

APPEALS MODERNIZATION ACT



AMA Decision Review Options



1 year time limit from date of notice of decision for all filing options to protect effective date. Supplemental can be filed anytime but will lose effective date if filed after 1 year.



“Closing the record”

Under AMA, the evidentiary record that VA is obligated to consider “closes” at the time of the rating decision

- Evidence submitted *after* the rating decision will not be automatically considered: must select decision review option that allows submission of evidence
- Evidence submitted *before* the rating decision but not considered by VA: select decision review option based on the same evidence to have it considered
 - Creates quality feedback mechanism: if claim granted based on same evidence, there was an error



Closing the record and VA's Duty to Assist

- VA's duty to assist is only triggered by evidence submitted before the initial claim **OR** before each supplemental claim decision.
- If VA did not take adequate steps to assist veteran, it can be raised through higher level review or BVA
 - VA will return to supplemental claim lane or BVA will remand for additional development if VA did not comply with duty to assist **38 CFR 3.159(c)**
 - If additional evidence is submitted at BVA (through evidence only or hearing dockets), it will not trigger the duty to assist, but VA can still grant or deny based on the additional evidence.



AMA: 3 Decision Review Options

38 CFR 3.2500

- Supplemental Claims (Form 20-0995)
 - Higher Level Review (Form 20-0996)
 - Board of Veterans Appeals (Form 10-182)
-
- Claimants can pursue only one decision review option at a time for the same claimed issue
 - There are no limits to the number of times a veteran may pursue a claimed issue



AMA: Supplemental Claims

38 CFR 3.2501

- Requesting a new rating decision from VA based on the submission of **“New and Relevant”** evidence (Form 20-0995)
- If filed within one year of VA issuing a rating decision, Board of Veterans Appeals Decision, or CAVC Decision, protects effective date of claim
- Claimants can perpetually file supplemental claims on the same issue, provided they satisfy the **“New and Relevant”** criteria
- Submission of new and relevant evidence triggers duty to assist
- Can also be used for denial based on missed C&P exam as long as there is an explained reason for the missed exam.



Supplemental Claims: New and Relevant Evidence

What is “*New and Relevant?*” - 3.2501(a)(1)

- “New” means it is not already in the veteran’s claim file
- “Relevant” means it is pertinent to the benefit sought and reason benefit was previously denied (even if not favorable to claimant: lower threshold than “material”)
- Example:

Red Foreman is claiming his diagnosed ischemic heart disease is the result of exposure to herbicides while serving in Korea in 1970. His claim for service connection was denied because his military service records did not indicate that he served in a unit in or near the Korean demilitarized zone. VA concedes that he has a diagnosis of ischemic heart disease.



Supplemental Claims: New and Relevant Evidence

Which of these are “*New and Relevant?*” (*assume not in file*)

- Buddy statements from those who supervised Mr. Foreman while serving in Korea and witnessed him on the DMZ.
- Doctor’s notes confirming that Mr. Foreman has a diagnosis for ischemic heart disease
- Spouse statement documenting the effects of ischemic heart disease on Mr. Foreman’s daily life
- Photos of Mr. Foreman in Korea alongside defoliated areas or signs/landmarks indicating he was physically present at the DMZ



Supplemental Claims: New and Relevant Evidence

- This Evidence discussion can be applied to appeals and to new cases.
- When submitting articles, they need to be the entire research article, not just a link. The VA has a duty to look at all evidence but that does not carry over into looking up or researching non-submitted evidence.
- BVA cases are not precedent setting. Only Court of Appeals cases set precedent.



Supplemental Claims: New and Relevant Evidence

Citation Nr: 1218529

Decision Date: 05/24/12 Archive Date: 06/07/12

DOCKET NO. 09-11 749) DATE
)
)

On appeal from the
Department of Veterans Affairs Regional Office in St. Paul, Minnesota

THE ISSUE

Entitlement to service connection for bilateral hearing loss.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Michael Holincheck, Counsel



Supplemental Claims: New and Relevant Evidence

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-6125

WAYNE CALHOUN, APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided January 9, 2024)

Megan M. Ellis, then of San Diego, California, currently of West Warwick, Rhode Island, was on the brief for the appellant.

Catherine C. Mitrano, General Counsel; *Mary Ann Flynn*, Chief Counsel; *Carolyn F. Washington*, Deputy Chief Counsel; and *Carrie E. Ferrando*, all of Washington, D.C., were on the brief for the appellee.

Before BARTLEY, *Chief Judge*, and PIETSCH and TOTH, *Judges*.

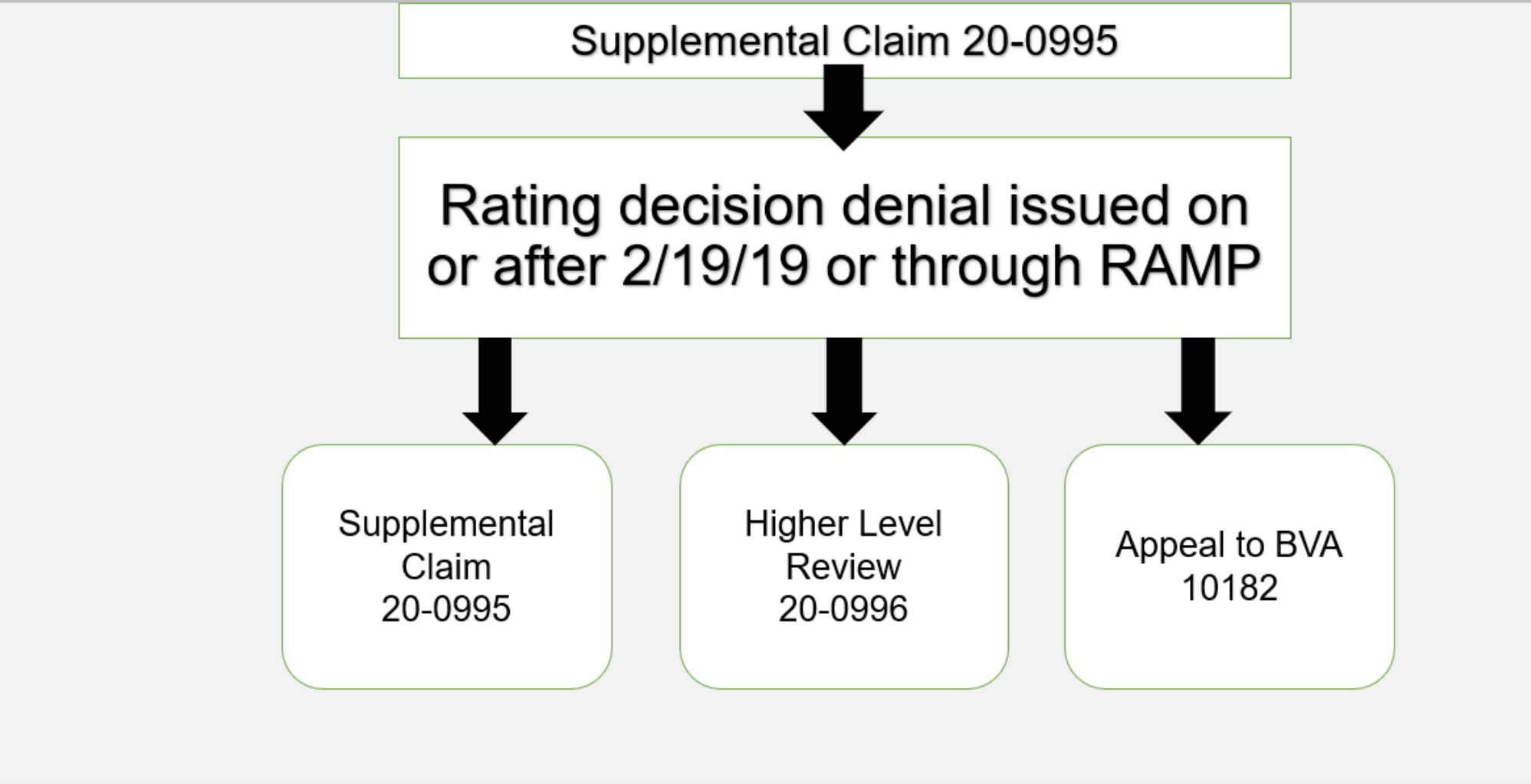
BARTLEY, *Chief Judge*: Veteran Wayne Calhoun appeals through counsel the portion of



NEW 20-0995



Post-Supplemental Claim Decision Review Options





Higher Level Review

38 CFR 3.2601

- Veteran requests “de novo” review of rating decision by a higher authority
- Review is solely on evidence of record – cannot submit additional evidence
- Decisions can be overturned based on difference of opinion or CUE
- Can only be requested within one year of a notice of a rating decision
- An informal conference with the reviewer can be requested



Higher Level Review

When to use

- Decision will be much quicker than an appeal to the BVA
- When you can articulate with the evidence of file that the rater made an error
- Side Caveat: A rater can go with what a C&P examiner recommends, or they can go one up or one down on the percentage. A rater can also deny even if the Examiner gives a positive exam. They need to articulate why they did in the decision narrative



Higher Level Review Example

Example:

- Johnny Utah claimed service connection for fibromyalgia related to service in Southwest Asia in 2005. He was diagnosed with fibromyalgia in 2011, three years after he separated from the military. Johnny completed an exam for fibromyalgia that sufficiently demonstrates his current level of impairment and the DBQ is in his record, along with his service records and his 2011 diagnosis.
- However, VA denied service connection based on the lack of a diagnosis of fibromyalgia while in service.
- What are some reasons Johnny might consider Higher Level Review?



Higher Level Review Example

Why could Johnny request *HLR*?

- Fibromyalgia is a presumptive condition for Southwest Asia service
- Johnny's military record indicates that he has qualifying Southwest Asia service in Iraq in 2011
- Johnny has a current diagnosis of fibromyalgia present for more than six months
- VA misinterpreted the presumption, which dictates that the condition must have emerged while serving in Southwest Asia OR by December 21, 2021.



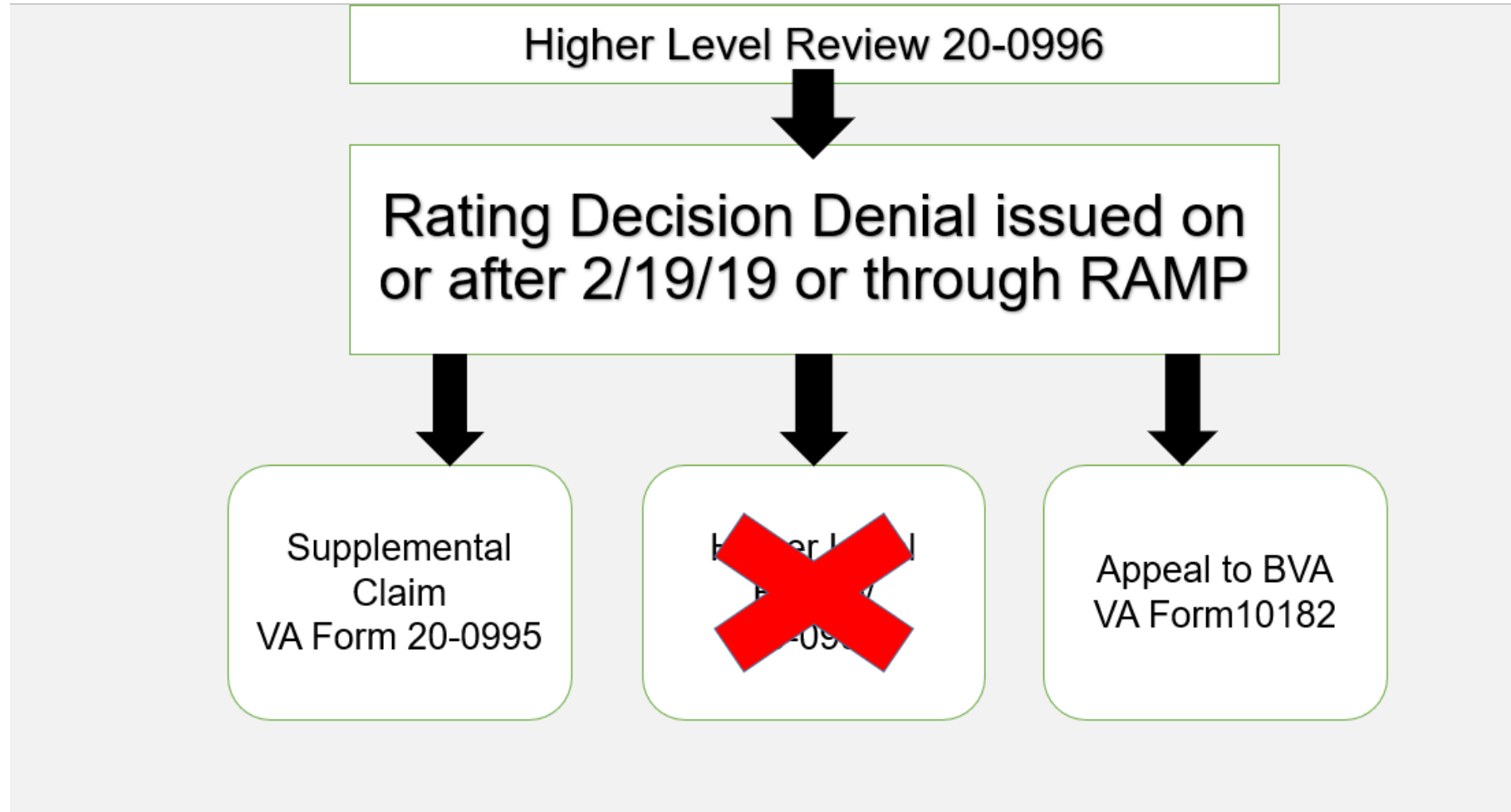
Higher Level Review Decision

38 CFR 3.2601(g), 3.2502

- Decision can deny or confirm and continue benefits
- Decision can grant benefits
- Decision can propose to reduce benefits
- Decision can send claim to supplemental claim lane for additional development



Post- Higher Level Review Decision Review Options





Appeal to Board of Veterans Appeals

38 CFR 20.202

- Under AMA, the NOD (VA Form 10182) is filed *directly* with the BVA
- There are three separate BVA dockets:
 - **Direct Review docket** with no introduction of new evidence
 - **Evidence Only docket** with **limited window introduction of new evidence (90 days after NOD)**
 - **Hearing docket** with **limited window for introduction of new evidence (at hearing or up to 90 days after hearing)**



Tips on VA Form 10182

- Appeals submitted directly to BVA (especially on the direct docket) must be researched fully
- 10182 should have at least a 21-4138 attached with a well thought out argument. (Especially if you are going with Direct Review or Evidence Submission)
- Ensure only one docket option is selected – if you want to select different dockets for different issues, complete separate 10182s.



Clarification of VA Form 10182

- If BVA asks for clarification of the issues or the docket selected on a NOD, claimant has **60 days** or remainder of one year appeal period to respond (whichever is longer)
- This is crucial, because if the claimant does not respond, VA will not establish or will close out the appeal
- **38 CFR 20.202**



Docket Dates

- Once sent to the BVA, the case will receive a docket date which is based on the date the claim is certified to the BVA
- With limited exceptions, the BVA works cases in docket date order
- BVA publishing “appeals metrics” on their public website:
https://www.bva.va.gov/Appeals_Metrics.asp
- AMA allows flexibility in how cases are managed between dockets – not a set ratio of legacy/direct/evidence/hearing



EXPEDITING APPEALS AT THE BOARD OF VETERANS APPEALS

- Advancement on the Docket can be done after the case is “certified” to BVA – call our office and they will file motion if veteran is seriously ill, has severe financial hardship, homelessness, or is of advanced age (75+) and for special circumstances (such as areas affected by severe natural disasters)

38 CFR 20.902 for Legacy (20.800 for AMA)

- If the case is REMANDED back to the Regional Office, the Advancement on the Docket does not follow the case. If the Veteran qualifies under the VA standard, you will need to fill out 20-10207 Priority Processing Request.



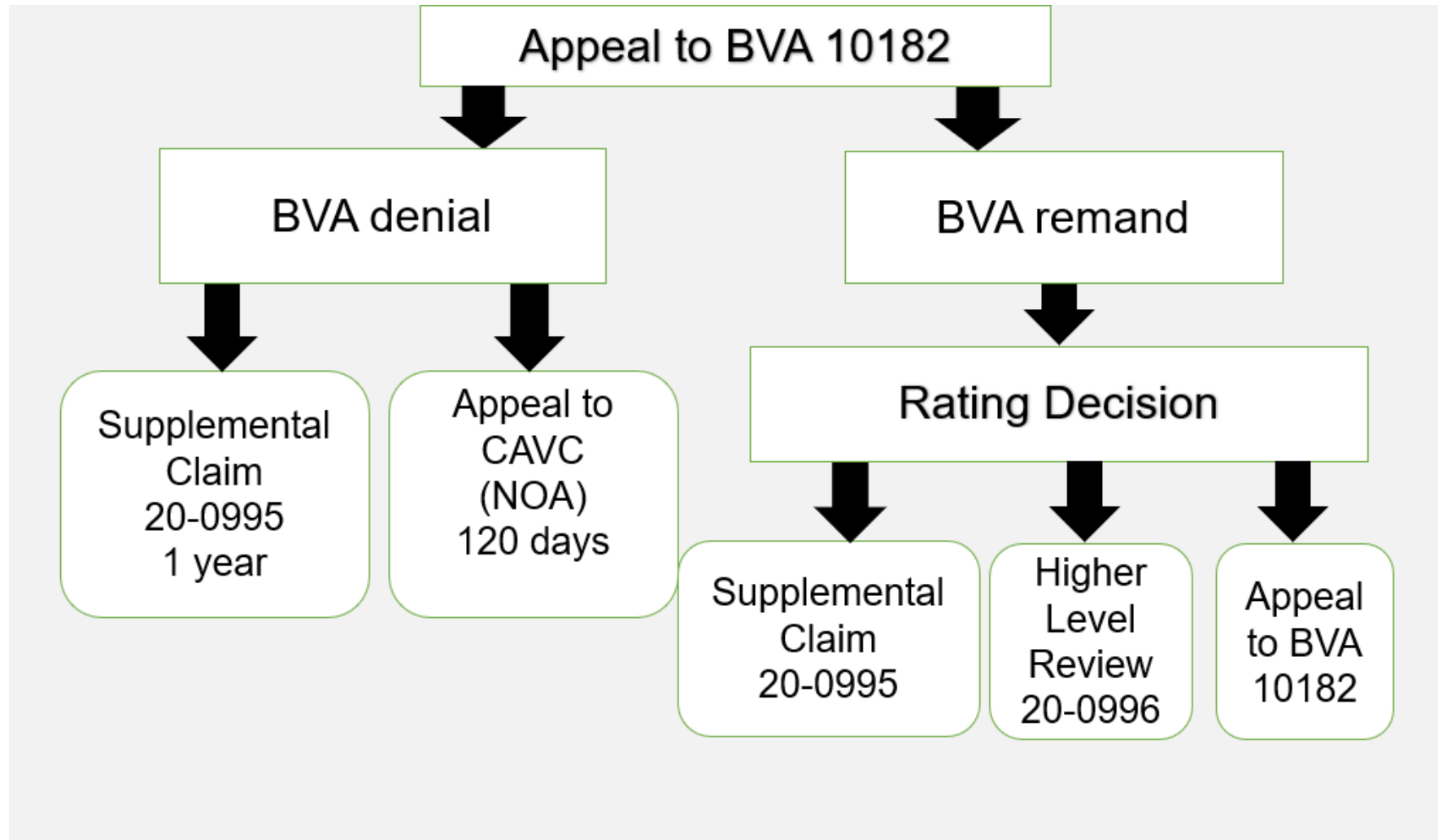
Switching Dockets

You can switch dockets at the BVA by filing a new VA 10182

- Time limit: within original one year from the rating decision, or 60 days after first 10182 filed, whichever is later **(38 CFR 20.202)**
- If switching to evidence only docket, 90 days to submit evidence starts from the date the request to switch dockets is granted
- Once evidence is submitted or a hearing is held, you cannot switch to the direct review docket
 - Why? You have changed the evidentiary record and VA can't "un-see" the evidence or testimony
 - **38 CFR 20.301, 20.302, 20.303**



Post-BVA Appeal Decision Review Options





Issues within a claim or “downstream issues” 38 CFR 3.151

- Just as in the legacy system, if a benefit is granted but has “downstream issues” such as ancillary benefits, effective date or evaluation, you will need to start all over again if you disagree with the downstream issues
- **38 CFR 3.151(c)(2)** states that all downstream issues must be appealed in same lane
 - Example: service connection granted, but you disagree with effective date and evaluation
 - You have all 3 options available for decision review but must choose same option for both effective date and evaluation



HEARINGS

- A hearing is a meeting between a claimant and the VA
- Although many veterans believe that this is their “Day in Court”, hearings are non-adversarial in nature and are intended to help VA reach an accurate decision



During the Hearing - Witnesses

Veterans will often want to bring a witness to their hearing. Witnesses can include:

- Spouse
- Friends
- Doctors
- Other family members

****Lawyers, other representatives, and media members are NOT allowed to be present in the hearing unless they are only acting as a witness****



Cancelling Hearings

- If you are able to get the issue on appeal resolved without having the hearing, by all means do so
- Cancelling the hearing will often allow the claim to be resolved more quickly than if the hearing were to take place
- When cancelling a hearing, be sure to get the request **in writing** from the veteran because cancelling a hearing without written consent is considered withholding evidence!
- There is precise wording that must be used when cancelling a hearing



Withdrawing Appeals

- Any withdrawal *must* be authorized in writing with the veteran's signature.
- **20.205 Rule 205. Withdrawal of appeal.**
- (a) *When and by whom filed.* Only an appellant, or an appellant's authorized representative, may withdraw an appeal. An appeal may be withdrawn as to any or all issues involved in the appeal.
- (b) *Filing* —
- (1) *Content.* Appeal withdrawals must include the name of the veteran, the name of the claimant or appellant if other than the veteran (e.g., a veteran's survivor, a guardian, or a fiduciary appointed to receive VA benefits on an individual's behalf), the applicable Department of Veterans Affairs file number, and a statement that the appeal is withdrawn. If the appeal involves multiple issues, the withdrawal must specify that the appeal is withdrawn in its entirety, or list the issue(s) withdrawn from the appeal.
- (2) *Where to file.* Appeal withdrawals should be filed with the Board.



SUBSTITUTIONS AND APPEALS

38 CFR 3.1010(g)(1)(i)

Substitutions are allowed on *pending* claims and appeals at the time of claimant's death

- Claim is considered pending if within appeal period to file NOD or Form 9
- Time limit is what was remaining at claimant's death

38 CFR 3.1010(g)(1)(ii)

- If the Board issued a final decision on an appeal prior to the claimant's death, the appeal is not pending
- However, survivor may file appeal with CAVC in the claimant's place: CAVC Rule 43



CHANGE OF REPRESENTATION AT BVA

38 CFR 20.1305

- VA allows changes in representation up until 90 days after appeal received by Board of Veterans Appeals
- Any change in representation must be sent to the BVA for approval. They can deny the change and representation will stay
- Remember to ask new veterans to your office if they have any outstanding BVA decisions. If they do, we cannot take POA until that decision process is complete



Questions

