

SERVICE CONNECTED COMPENSATION

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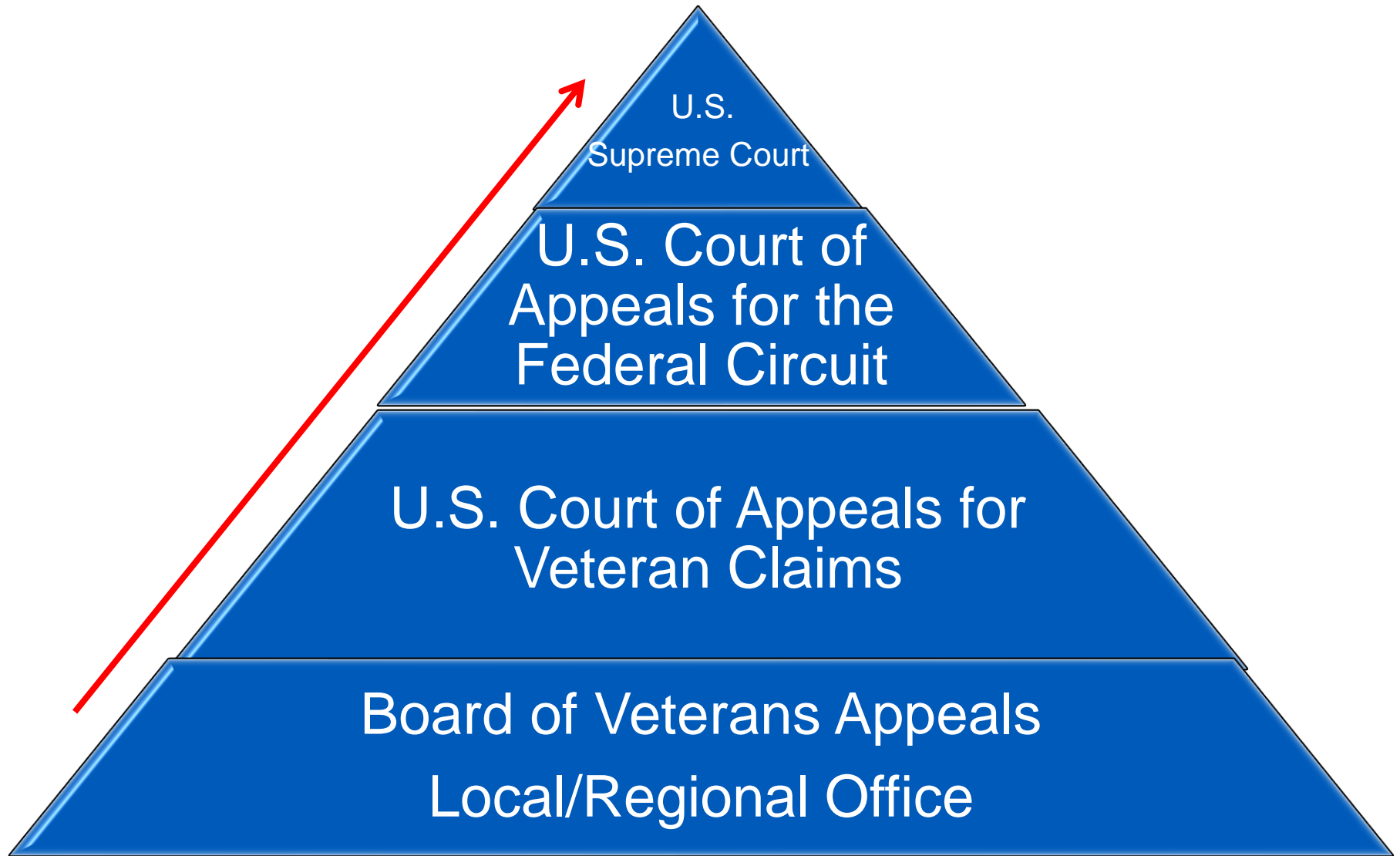




Presentation Topics:

- Basic Eligibility Requirements and Initial Consideration
- Types of Potential Benefits
- Applying for Service-Connected Compensation
- Appealing a Denial of Benefits (Appeal Reform)
- Determining the Degree of Disability
- Determine the Monetary Amount Assigned to the Disability
- Determining the Effective Date for an Award of Benefits
- Military Sexual Trauma Claims

Benefits Claims Hierarchy





Definition of a Veteran - Who Is a Veteran?

- “A person who served in the active military, naval, or air service, and who is discharged or released therefrom under conditions other than dishonorable.”

38 U.S.C.S. §101(2); 38 C.F.R. §3.1(d) (2013).

- Active Duty, Active Duty for Training, Inactive Duty for Training

“Military, Naval, or Air Service”

- Conventional active military service in one of the six branches of the U.S. Armed Forces
- Also includes service as a member of the Reserves or National Guard

What Does Active Service Include?

- Active Duty in one of the six branches of the U.S. Armed Forces
- Training (IDT, ADT) when the injury was incurred or aggravated
- Reservist called to active duty
- National Guard member when called to serve on federal active duty under Title 10

Character of Discharge

- In order to satisfy the definition of a veteran, that individual must have been discharged or released from military service “under conditions other than dishonorable.” 38 C.F.R. § 3.12(a) (2013)

Types of Discharge

- Honorable discharge (“HD”)
- Discharge under honorable conditions or general discharge (“GD”)
- Discharge under other than honorable conditions (“OTH”) or undesirable discharge (“UD”)
- Bad conduct discharge (“BCD”) – Court-martial
- Dishonorable discharge (“DD”) or a dismissal, in the case of an officer – Court-martial

Simplified breakdown of eligibility for benefits:

- **Honorable** = full benefits
- **Under Honorable Conditions (General)** = SC Comp, but no GI Bill Benefits
- **Other than Honorable (“OTH”)** = Usually bars you from “Veteran” status (bars to VA medical and benefits); VA may make a characterization of discharge determination
- **Bad Conduct Discharge (“BCD”)** = No medical, benefits possible through characterization of discharge determination if result of a special court-martial
- **Dishonorable** = No benefits, medical (potential exception – insanity finding)

What is Willful Misconduct?

- An act involving conscious wrongdoing or known prohibited action. It involves a deliberate or intentional wrongdoing with knowing of or wanton and reckless disregard of its probable consequence. 38 C.F.R. § 3.1(n); 38 C.F.R. § 3.1 (n)(1) (2013)
 - Shooting yourself in the foot
 - Alcohol or Substance Abuse not secondary to PTSD or other SC conditions

Impact of Willful Misconduct Finding

- An injury or disease that was direct result of willful misconduct is not compensable. 38 USCS 1521(a); 38 C.F.R. § 3.301(b) (2013)

Examples – Willful Misconduct

- Alcohol abuse is willful misconduct. 38 C.F.R. § 3.301(c)(2) (2013)
- Drug abuse is willful misconduct. 38 C.F.R. § 3.301(d) (2013)
- Residuals of venereal disease is not willful misconduct. 38 C.F.R. § 3.301(c)(1) (2013)
- Suicide is not considered willful misconduct, so long as the deceased veteran was not of sound mind at the time of the suicide. 38 C.F.R. § 3.302(a)(b) (2013)

Who can represent a veteran?

Accreditation Requirements:

- Attorney or VSO
- Must be registered with Department of VA to represent Veterans
 - Member of a State Bar (Attorneys)
 - Apply for Accreditation (VA Form 21a) – email to OGC
 - CLE Requirement
 - Certificate of Good Standing (Annually for Attorneys)
- VA Form 21-22a Appointment of Individual as Claimant's Representative (POA)
 - Pay attention to where you sign

“Service-Connected”

- For the VA to find a disability or death to be service-connected, it must be determined that the disability or death was incurred or aggravated during active service in line of duty, or that the death resulted from a disability that was incurred or aggravated in the line of duty during active military service.
 - 38 U.S.C. § 101(16)

Basic *Prima Facie* Case

A veteran seeking service-connected disability compensation must satisfy three fundamental requirements before the VA will grant compensation benefits for a traditional claim.

1. There must be competent evidence of a currently disability;
2. There must be medical, or in certain circumstances, lay evident of in-service occurrence or aggravation of a disease or injury; and
3. There must be competent evidence of a link or nexus between the in-service occurrence or aggravation of a disease or injury and the current disability

- “Benefit of the Doubt” The standard of proof that a claimant must satisfy for an award of benefits is commonly called the “benefit of the doubt” standard
- “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” 38 U.S.C. 5107(b)
- This applies to all elements of service-connection
- “At least as likely as not”

1. Evidence Of Current Disability

- The first requirement for a grant of service-connected disability compensation is “competent evidence” that the veteran currently has a particular disability 38 U.S.C. §§ 1110, 1131
- A medical diagnosis of a disability will be required at some point (Veteran might apply for a knee injury or back injury, which may lead to a diagnosis through the VA Duty to Assist)
- Examples of Evidence:
 - Medical records/statement from a VA official or private physician
 - Evidence in the veteran’s service medical and treatment records
 - Evidence from medical textbooks, treatises or journals
 - Lay person evidence is permissible but carries less weight
- Pain connected to an in-service injury can qualify – recent change

1. Evidence Of Current Disability Continued

- Gulf War Syndrome – Might not actually require a specific diagnosis; sometimes better without one
- For a grant of disability compensation, the VA requires evidence that the veteran had a “presently existing disability” on the date that the veteran filed the claim for compensation benefits or at another point thereafter 155 F. 3d 1353, 1355 (Fed. Cir. 1998)
- Evidence that a veteran had a service-related disability at some point in the past does not satisfy this requirement
- Veteran can receive compensation for a condition that had a delayed onset

- The second requirement for service-connected disability compensation is “medical, or in certain circumstances, lay evidence of in service occurrence or aggravation of a disease or injury”
 - VA must consider lay evidence presented by the veteran
 - VA must consider buddy/family statements
 - VA could find the veteran as not credible
- The disease, injury, or event does not have to be directly related to military duties as long as it happened between the day the veteran entered service and the day the veteran was discharged

- Lay evidence may be considered and will be sufficient evidence when the issue relates to an observable event
- If circumstances raise a medical issue in the case, medical evidence is required
- Types of lay evidence include:
 - Veterans statements describing the injury/event
 - “Buddy statements”
 - Newspaper articles
 - Letters to/from family and friends

Combat Veteran Exception

- Special treatment for combat veterans is mainly contained in two provisions
 - 38 U.S.C. 1154(b)
 - 38 C.F.R. 3.304(d) and (f)
- The VA is required to accept a veteran's lay statement about what happened in service if the event
 - Occurred while the veteran was "engaged in combat with the enemy"
 - Is "consistent with the circumstances, condition, or hardships" of such services
 - There exists no clear convincing evidence to the contrary
 - 38 U.S.C. 1154(b)

Medical Evidence to Satisfy the Nexus Requirement

- A claimant will satisfy the requirement of competent nexus evidence by obtaining a letter or statement from a private physician or VA physician that expressly connects the veteran's disability or death to the occurrence or aggravation of a disease or injury in service or to an event in service

*Disability must be "as likely as not" connected to service

Note: The VA must consider all nexus theories regardless of which one the veteran claims (reasonably raised by the record; not a pleading requirement)

Theories:

1. Direct Service-Connection
2. Aggravation
3. Presumptive Service-Connection
4. Secondary Service-Connection
5. VA Malpractice (Section 1151 Claim) – VA Medical Treatment of Vocational Rehabilitation

1. Direct Service-Connection

- The phrase “direct service-connection” is generally used to mean that a disease, injury, or event during a veteran’s active military service directly caused a current disability
- Service treatment records should contain some evidence

Delayed Direct Service-Connection – Very common

- Veterans may obtain direct service-connection for diseases that are first diagnosed long after the end of their active duty service
- “Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service”
 - 38 C.F.R. § 3.303(d)
- Chronic Conditions – Conditions diagnosed in service, later manifestations of same disease at any later date unless clearly attributable to intervening causes
 - Arthritis or other chronic conditions

2. Aggravation

- Compensation may also be paid for disabilities caused by the aggravation due to service of an injury or disease that existed prior to service
 - 38 U.S.C. § 1110, 1131 (2013)
- Key issue – was anything noted on the original entrance paperwork?
- “Presumption of Soundness” If the condition was not noted, then the Presumption of Soundness applies (rebuttable)
 - 38 U.S.C. § 1111 (2013)

- “Presumption of Aggravation” The veteran does not have to prove that a particular incident during service caused the increase in disability. The veteran merely must show that the underlying disability worsened during the period of service
 - *Laposky v. Brown*, 4 Vet. App. 331, 334 (1994)
- The increase in disability, however, must be more than a temporary worsening of symptoms for flare-up. It must be non-temporary increase in the severity of the underlying condition itself
 - *Davis v. Pincipi*, 276 F. 3d 1341, 1346-47 (Fed. Cir. 2002)

3. Presumptive Service-Connection

- The policy behind presumptive service-connection is that a disease that first manifested after service probably had its beginnings during service and, under the circumstances, veterans should not be required to obtain medical evidence of a connection to obtain benefits
- Presumption Examples
 - Certain chronic diseases
 - Tropical diseases – Symptoms of Cholera or Malaria manifest to 10% or more within one year of discharge is presumed to be service-connected
 - Diseases specific as to former prisoners of war – POWs are presumed to suffer from increased instances of enumerated illnesses
 - Diseases specific as to radiation-exposed veterans

- Presumption Examples Cont.
 - Radiation – Diseases specific to radiation-exposed veterans
 - Is the condition at least as likely as not caused by radiation?
 - Enumerated list of conditions is available
 - Herbicides and Dioxins – Diseases associated with exposure to certain herbicide agent such as Agent Orange
 - Hundreds of thousands of veterans
 - Presumption is often based on service in a geographical location
 - Certain diagnosed and undiagnosed illnesses in veterans of the Gulf War since 1991 (ongoing), regardless of whether the condition can be diagnosed (enumerated list of symptoms)
 - The VA would prefer a diagnosis because the SM would have to prove that it is SC; with this presumption, no diagnosis is better for the veteran
 - Camp Lejeune Water Contamination (recently expanded)

4. Secondary Service-Connection

- A disability which is proximately due to or the result of a service-connected disease or injury shall be service-connected
 - 38 C.F.R. § 3.310
- Many veterans do not realize that they could be compensated
 - Used the drop down list during application process

5. Injury Caused by VA Medical Treatment or Vocational Rehab (Section 1151)

- Disability caused by VA medical care or vocational rehabilitation may be treated “as if” it is connected to service
- Meant to be an alternative to the Federal Torts Claims Act
- 38 U.S.C. § 1151 requires fault, negligence, lack of proper skill, carelessness, error in judgement, or accident by VA
- If negligence is a factor, the veteran may also file a claim under the Federal Tort Claims Act
 - Both avenues may be pursued simultaneously

Military Sexual Trauma (MST)

- Any stressor or experience, sexual in nature, involving a service member against his or her will
- Not required to be in the LOD (can be off duty involving civilian)
- Might be an issue involving a superior (pressured)
- Might include a quid pro quo
- Service member was unable to consent
- Could involve physical force
- Sexual harassment (including text messages)

Establishing Service-Connection

- Must have an accompanying diagnosis of a medical condition
 - PTSD
 - Anxiety
 - Panic disorder
 - Depression
 - VA will also determine whether additional disabilities apply (DTA)

Elements

1. Evidence of a current diagnosis (not the MST experience)
2. Credible evidence of the stressor (the MST experience)
3. A link or nexus between the diagnosis and stressor

1. Current Diagnosis - MST

- MST-related Diagnosis required
- MST is an experience, not a diagnosis
- Veteran should have a medical diagnosis of a condition that can be attributed to the stressor (the MST)
- Claim broadly (DTA)

2. Credible Supporting Evidence - MST

- Veteran's statement alone is not sufficient
 - VA will consider (1) *whether statement is plausible* and (2) *consistent with other evidence in the record*
- Not required to have reported the incident – cannot be held against the veteran
 - Cannot attack credibility of statement based on failure to report
 - “Markers” Extraneous lay evidence will be considered
 - Enumerated (not exhaustive) in 38 C.F.R. 3.304(f)(5)
 - Records – Police, medical, etc.
 - STD or pregnancy
 - Statements – Friends, family, roommates, clergy (did the veteran confide in somebody? Could have been years after the stressor)
 - Evidence of behavioral changes – depressed, withdrawn, fights
 - Drugs or alcohol abuse
 - Requests for transfer
 - AWOL or unexplained absence
 - Deterioration in work performance

- VA will consider the issue of whether there is a link between the medical diagnosis and the stressor
- Somewhat liberal standard

BREAK

Questions related to
eligibility and initial claims?

Schedule for Rating Disabilities – 38 C.F.R. 4

- The VA will review the diagnosis and symptoms and match the symptoms to the percentage
- Hundreds of conditions for thousands of different medical conditions
- VA will assign 0-100% for service-connected conditions
 - Some conditions jump 20-30% at each level (PTSD for example)
 - Some conditions are rated based on objective information (flexion of a joint or measurement of a linear scar)
 - Percentage should reflect the average (objective) impairment caused in earning ability
- Use “VA Math” for multiple service-connected conditions
 - Use the tables or the formula

Rating Schedule

- Once service-connection is established, the VA assigns the appropriate disability rating based on impairment of earning capacity in civilian occupations
- The degree of disability increases as the severity of the symptomatology becomes greater, which results in a higher disability percentage rating (and increase claims)
- When evaluating a disability, the rating team examines the veteran's medical records to ascertain the medical diagnosis for that particular disability
- The team finds the appropriate diagnostic code for the disability and selects the degree of disability that corresponds with the symptomatology of the veteran's condition

8100 Migraine:

- With very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability **50%**
- With characteristics prostrating attacks occurring on an average once a month over last several months **30%**
- With characteristic prostrating attacks averaging one in 2 months over last several months **10%**
- With less frequent attacks **0%**

Direct Calculations of Multiple Disabilities

- Veteran has following ratings: 70%, 50%, 10%
- This does not mean the Veteran has a 110% disability rating
- Instead:
 - *Condition #1*: 70% of 100 is 70 (100-70=30% remaining)
 - *Condition #2*: 50% of 30 is 15 (30-15=15% remaining)
 - *Condition #3*: 10% of 15 is 1.5 (15-1.5=13.5% remaining)
 - 100% - 13.5 = 86.5, rounded to the nearest 10 → 90% rating
- Charts are also listed on the VA website, which become very complicated as the number of conditions increases

Many different forms of additional compensation

- Special Monthly Compensation
 - Highest level can equal more than \$8,000
 - Bedridden
 - Loss of use of limbs
 - Aid and Attendance
 - Blindness
- Common for veterans with MS, but beware of reevaluations

Direct Calculations of Multiple Disabilities

- Anti-pyramiding: Prohibits compensating a veteran more than once for the same disability or manifestation
- To be compensated for two separate ratings resulting from a single injury or disease, veteran must establish that the codes in issue are not duplicative and do not contain overlapping symptomatology
- When there is a question as to which of two evaluations the VA should assign, the VA is required to assign the higher percentage of the two evaluation
 - 38 C.F.R. § 4.7 (2010)

Eligibility

- A veteran may be eligible to collect SC comp at the 100% rate despite not having a scheduler rating of 100%
- The veteran cannot be engaged in and must be unable to engage in a substantially gainful employment (SGO)
- The veteran should have:

a) One service-connected disability rated above 60%

OR

b) Two or more service-connected disabilities, one of which is at least 40% and sufficient additional service-connected disabilities to bring it up to a combined rating of 70% or higher

Substantially Gainful Occupation (SGO)

- CAVC held that a SGO is one that provides annual income that exceeds the federal poverty guidelines for one person under age 65
 - *Faust v. West*, 13 Vet. App. 342, 356 (2000)
- Be careful not to demonstrate the ability to earn more than the poverty threshold (currently around \$13,000 annually)
- VA should consider educational and occupational history

VA may reevaluate and lower the rating

- *Intended* to be difficult for the VA to accomplish
 - The VA must follow the rules closely
 - The VA must schedule a review examination before reducing compensation (Remedy is reinstatement and retro payment)
 - *Usually* involves medical conditions that should be expected to approve
 - VA might have obtained new evidence showing improvement
 - Veteran might have submitted follow-on evidence
 - Spouse occasionally turns on veteran and makes allegations
 - Burden is on the VA to show improvement, not the veteran
 - Veteran must be given notice, opportunity to respond and a hearing.
- Reduction of Total and Permanent requires:
- Examination must show “*material improvement*” under “*ordinary conditions of life*”
 - Change in symptoms alone is not enough

VA *may* reevaluate and lower the rating of TDIU

- Burden is on the VA to show that the veteran is employable
- Veteran must maintain SGO for at least 12 months before reducing

20-Year Protection

- If rated for 20 years or more, the VA cannot conduct a reevaluation and reduce the rating to any number lower than that of the lowest rating in the past 20 years

5-Year Protection

- If rated for a period of five years, the VA cannot reduce the rating based on a single exam unless all evidence shows sustained improvement

Recent Policy Changes

- Legacy is out as of February 19, 2020
 - Last opportunity to file traditional NOD was February 2020
- Modernization Program is now the only option at the VA
- May appeal to the Court of Appeals for Veterans Claims under certain circumstances

Original Claim

- No current service-connection rating

Increased Claim

- Increase the percentage of an existing SC condition

New Claim

- Add a new condition to the current list of SC conditions

Secondary Claim

- An injury that followed as a result of a SC condition

Supplemental Claim

- Add new and material evidence to a previously denied claim

- Legacy Appeal Process -
<https://www.va.gov/disability/file-an-appeal/>
 - Ended February 19, 2020
- Appeals Modernization Program
 - Supplemental Claim
 - Higher Level Review
 - Board of Veterans Appeals (BVA)

File a Supplemental Claim using VA Form 20-0995

- You can provide additional new and relevant evidence and records for review
- You may request that the VA obtain additional records (DTA)
- No right to an informal conference

Request a Higher Level Review using VA Form 20-0996

- You have no additional evidence to submit
- Cannot request a Higher Level review of a Higher Level review or Board decision
- De Novo review of the evidence on record
- Right to an informal conference
 - Scheduled by telephone or email (sloppy)
 - Can include the veteran
 - Have your talking points prepared
 - Be ready to specify the issues that you want reviewed

May appeal to the BVA from either a Supplement or Higher Level review

- *May* request a hearing and/or submit additional evidence
- Hearing is not required, but is encouraged
- *No duty* to assist with obtaining record at this level, but may be *remanded* for failure to assist at the lower level
- Last opportunity to challenge the competency of the VA medical professional(s)

Opportunity to appeal BVA decision within 120 days

- Similar to other federal courts
- Requires admission (different from accreditation)
- Often remands based on incomplete exams and Duty to Assist Issues
- Try not to focus on “*Reasons or Bases*” arguments – BVA might just rewrite their decision
- Electronic filing
- Potential for oral arguments – **rare**
- <http://m.uscourts.cavc.gov/>

- Appellant files Notice of Appeal
- Should receive the Record Before the Agency (RBA) in about 60 days
 - Dispute or accept
 - Can be about 2,500 pages
- Rule 33 Conference will be scheduled
 - Appellant Attorney filed Rule 33 Statement of the Issues
 - Write the memo so that it can be a cut and paste document
 - Confer and potentially reach a Joint Motion to Remand
- Appellant Brief to be filed within 30 days of the remand
- Appellee Brief filed within 60 days
- Appellant Reply Brief within 60 days (optional)
- Decision is issued
 - Motion for Reconsideration window is 21 days (optional)
- Most decisions are a single judge (persuasive, not controlling)
 - Write everything so it can allow cutting and pasting

DIC Eligibility

- 1st In Line: Surviving spouse without dependent (\$1,154/month)
- 2nd In Line: Surviving dependents
 - <18 or <23 and not in school
 - Split evenly among the dependents
- Cause of death must have been service-connected regardless of whether s/he ever applied for benefits

OR

- Service-connection was 100% for at least 10 years (COD irrelevant)

Survivor Pension Eligibility

- Veteran's death is not required to have been caused by a SC condition
- Veteran must have been totally and permanently disabled (100%)
 - Presumed if over age 65
- Limited income
 - Income of <\$12,907 annually
 - Net worth of <\$80K

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