

# VA Claims Appeals

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# Presenting



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# Presenting



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# The Appellate Landscape



Choose VA

VA



U.S. Department of Veterans Affairs

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# The VA Appellate Process: Legacy system

- Appeals Process

- Legacy system: Appeals of decisions prior to Feb. 19, 2019



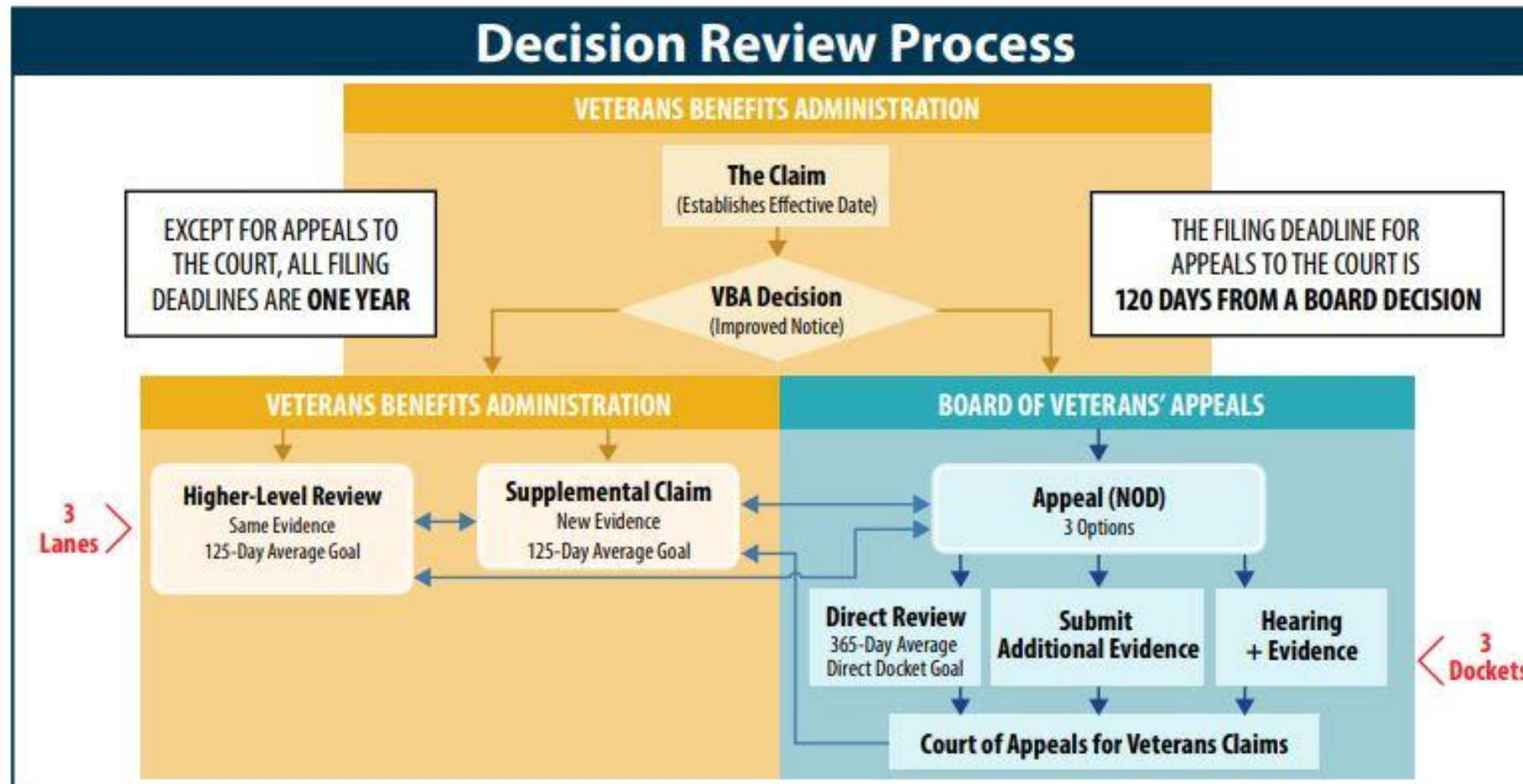
- Streamlined, but lengthy process.

- Many remands

- Must go to the Court of Appeals for Veterans Claims to keep your claim alive if the Board does not find in your favor

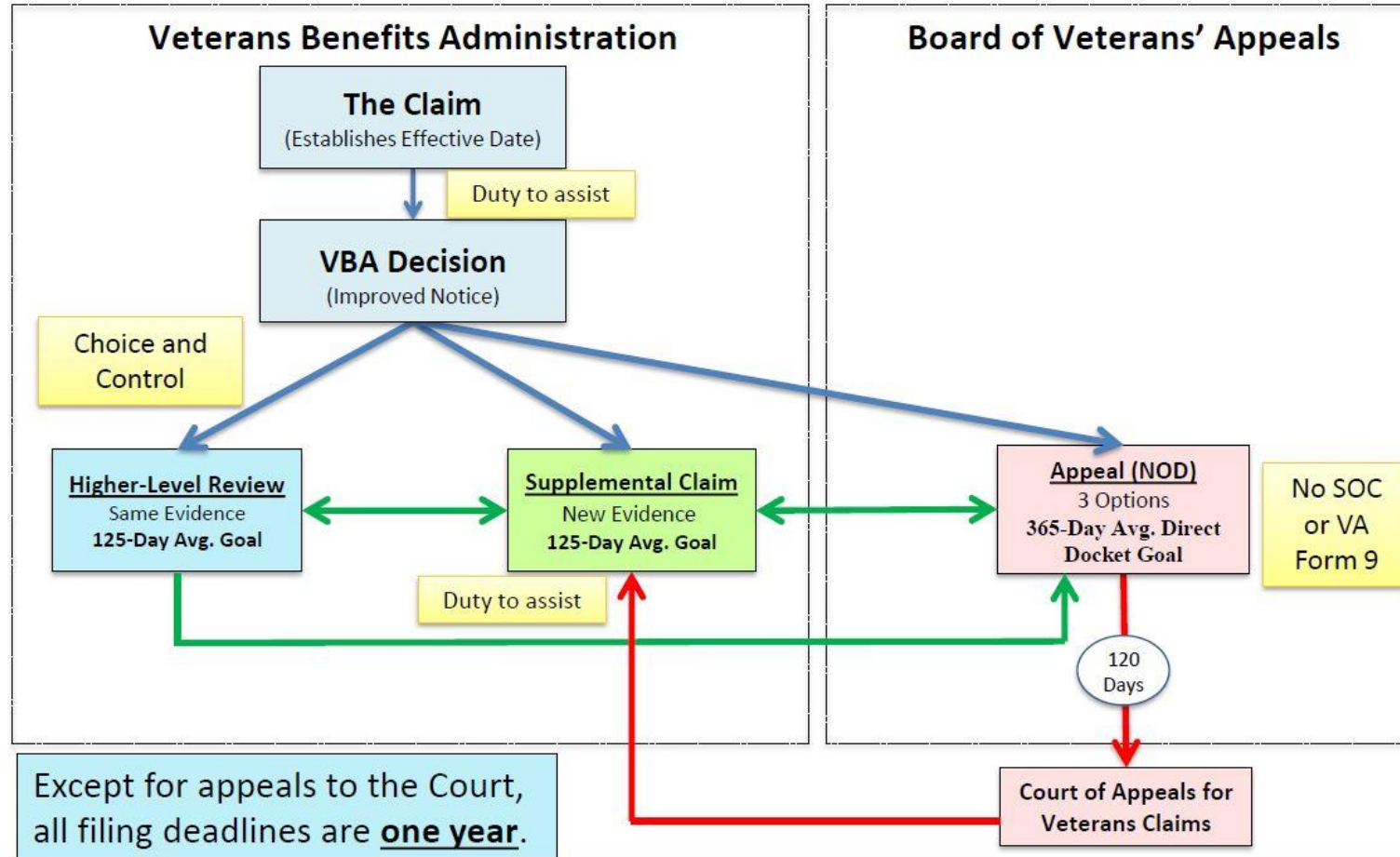
- Would then have to file a new claim, with a new effective date.

# The VA Appellate Process: Under AMA



Decisions made after Feb. 19, 2019

# New Decision Review Process



Choose VA

VA



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# Which AOJ lane to choose?

	Supplemental Claim	Higher Level Review
When to choose	If your claim needs <b>new evidence</b> .	If you don't need new evidence, but think a <b>mistake</b> was made.
What will happen	The Duty to Assist applies and <b>VA will help</b> you gather the evidence. A new decision will be made looking at the new evidence.	A <b>higher-trained</b> AOJ reviewer will review your claim and make a new decision.  <b>No new evidence</b> will be added.
How long	<b>125 days</b> (on average)	<b>125 days</b> (on average)

\*AOJ= Agency of Original Jurisdiction (VBA, VHA, or NCA)



Choose **VA**

**VA**



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# Which Board docket to choose?

	Direct	Evidence	Hearing
When to choose?	If you think a <b>mistake</b> was made.	If you have <b>new evidence</b> you want a Judge to consider.	If you want a <b>hearing</b> before a Judge.
What will happen?	The Judge will review the same record and make a decision.  <b>No new evidence</b> will be added.	You will have <b>90 days</b> from your NOD to submit new evidence.  The Judge will make a decision considering the evidence you provided.	You will be placed on a list for a hearing before a Judge by videoconference (or in DC).  After your hearing you will have <b>90 days</b> to submit new evidence.  The Judge will make a decision considering the hearing and the evidence you provided.
How long?	<b>365 days</b> (on average)	<b>Over 365 days</b>	Based on availability. Currently the Board has 98 Judges. There are approximately 67,000 Veterans waiting for hearings.



Choose **VA**

**VA**



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# AMA Definitions

- Claim: same as current – request for entitlement to a benefit under DVA laws
- Initial claim: any complete claim, other than a supplemental claim, for a benefit. Includes:
  - Original claim for one or more benefits that is the first complete claim received by VA
  - New claim for SC for a disability or grant of a new benefit
  - Increased rating claim
- Supplemental claim: complete claim for a VA benefit where an initial claim for the same or similar benefit on the same or similar basis was previously decided

# AMA Definitions

- Material evidence still required to reopen legacy claims
- However, claim to reopen decided after effective date of law will be subject to new and relevant standard
- If new and relevant evidence is "presented or secured" prior to a decision AOJ will readjudicate the claim – Supplemental Claim
- Relevant evidence: information that tends to prove or disprove a matter at issue in a claim
  - Includes evidence that raises a theory of entitlement that was not previously addressed

# AMA Rating Decisions

- Any favorable finding made by AOJ or BVA is binding on all subsequent VA and BVA adjudicators
  - Unless rebutted by clear and convincing evidence to the contrary
- Finding means: a conclusion either on a question of fact or on an application of law to facts concerning an issue(s) under review

# AMA Opt-In (All the cool kids are doing it)

- What is it?
  - Effectively withdraws claims from legacy appeals system and into the AMA and all associated rules that go along with that.
- How do I do it?
  - Submit any AMA appeal option within 60 days of a legacy RD at the AOJ.
- Why should I do it?
  - More favorable rules in AMA for supp claims and continual pursuit?
- Why shouldn't I do it?
  - More favorable priority and handling of Legacy claims at AOJ and BVA.

# What kind of service connection?

- Direct
- Secondary
- Aggravation of a EPTS condition
- Aggravation of a non-service connected condition
  - *Spicer* (CAFC) allows for “but-for” causation without a medical opinion.
    - Ex. Service connected cancer treatment delayed treatment of a knee condition which made it worse. Knee SC’d due to aggravation.
  - Medical nexus still easier to get, more likely to be granted.

# Case Law/M21-1 Update

## **X.ii.2.A.2.c – 3.31.23 – Revision Based on Specific Types of Submissions, Including Supplemental Claims; Considering Supplemental Claims; ITFs and Continuous Pursuit in Supplemental Claims**

- Effective July 30, 2021, an ITF filed within one year of notification of a VA decision may operate to maintain continuous pursuit if the ITF is followed by a complete supplemental claim, even if the supplemental claim is filed after the one-year period following notice of a decision.
- ITFs do not apply to other decision review lanes, such as HLRs.
- Prior to July 30, 2021, 38 C.F.R. 3.155 precluded the application of ITFs to supplemental claims. In *Military-Veterans Advocacy v. Secretary of Veterans Affairs*, No. 19-1600 (Fed. Cir. 2021), the court invalidated this portion of VA's regulation. This means an ITF may now be applied to supplemental claims that are not finally adjudicated on or after July 30, 2021.



How does this apply to recently decided appeals?

CUE if outside of appeal window?

## *Held v. McDonough*, no. 21-8048 (1/14/2024)

- Issue: Under what circumstances are representatives entitled to fees on CUEs decided in claimant's favor?
- Holding: Representatives are entitled to fees on successful CUEs that are decided on or after the effective date of the AMA regardless of the date of the decision under collateral attack.
  - The claimant need not have filed an NOD to the legacy decision under collateral attack.
  - Sec. 5904(c) plainly requires only that VA have issued notice of a decision, it does not have any other limitations on fees
    - Reiterated the arguments in *Military Veterans Advocates*, 7 F.4<sup>th</sup> 1110 (Fed. Cir. 2021).
      - Note on fee agreement language being contingent on NOD post 6/19/2007 might invalidate this entitlement.



## *LaBruzza v. McDonough*, no. 21-4467 (1/24/2024)

- Issue: What is “employment in a protected environment” under §4.16?
- Holding: A lower income job that is shielded in some way from competitive work
- Analysis: CAVC used *Kisor*, and revisited *Cantrell v. Shulkin*, which said that “employment in a protected environment” is ambiguous.
  - The Court noted several times that the VA has refused to disseminate an interpretation of the term to adjudicators or otherwise provide any guidance at all as to their standards and requirements.
  - Textual analysis: Unambiguous meaning, it is employment in a lower income position that, due to the veterans service-connected disabilities, is shielded in some respect from competition in the employment market.
    - Fact based inquiry, protections and income vs. average income for that job.

## *Williams v. McDonough*, no. 21-7363 (6/21/2024)

- Issue: Does a BVA decision issued within the sixty days from when the Board received an NOD and short of one year since the AOJ decision violate due process rules and § 20.202(c)(2)?
- Holding: The regulation is clear and allows that time to switch lanes at the BVA if desired. The BVA may not make a decision before the deadline to modify an NOD has run.
  - Secretary argued that the veteran was not harmed because they could submit a Supplemental claim after the Board's decision
    - Court said that a supplemental claim has a New and Relevant evidence standard that the BVA evidence lane does not.
- If you are requesting AOD at the BVA, include a *Williams* waiver so that the decision is not delayed.

*Spicer v. McDonough*, no. 2022-1239 (Fed. Cir. 3/8/2023)

- Issue: Whether but-for causation requirements in § 1110 may encompass situations where a service connected condition impeded treatment of another disability.
- Holding: Yes, but-for causation is broad and contemplates multi-causal links, including action and inaction.
- Analysis: Disability=functional impairment (Saunders), but-for causation is broader than proximate causation and encompasses multi-link causal chains.

*Spicer v. McDonough*, no. 2022-1239 (Fed. Cir. 3/8/2023)

- § 1110 “applies to the natural progression of a condition not caused by a SC’d disability, but that nonetheless would have been less severe were it not for the SC’d disability.
- § 1110 compensates for a worsening of functionality “whether through an inability to treat or a more direct etiological cause”
- Good for intermediate step arguments (Obesity)
- Requires adjudicators to think
  - But will the examiners?

# Questions

- Scenarios?
- Hypotheticals?
- AMA V. Legacy?
- Opting in to AMA?