

## Chapter 4

### VA Appeal Process

#### **Suicide Prevention:**

If you, or someone you love is struggling with feelings of helplessness or thoughts of suicide, you are not alone, and help is available.

VCL: Dial 988 and then Press 1

Referral list of VA resources: go to [va.gov](http://va.gov) and type "Suicide Prevention" in the search bar

#### **Introduction:**

You have the legal right to disagree with any decision the VA makes about your claim.

There are several options to appeal a VA decision, but you can only choose one option at a time.

For each type of appeal discussed during the podcast, you MUST fill out a different application form! You may not use the 526EZ form to file these types of claims. If you use the incorrect form, your appeal will not be accepted, and you will be directed to use the correct form. This will slow down the processing of your claim.

VA Form 20-0998 is an instructional flow chart which describes all of the appeal types. This form is on the [VeteransAccessProject.org](http://VeteransAccessProject.org) website and also available at [va.gov](http://va.gov).

For each of the appeal processes, you have one year from the date of the decision that you are appealing. If your appeal is successful, you will maintain the earliest effective date.

There is the ability to re-open a previously denied contention with a Supplemental claim (more than one year after the decision was made), but the effective date will likely be the date of the new supplemental claim.

The order we are discussing these types of appeals is not necessarily the order that should be attempted. This is not a "1, 2, 3 process", it is an "A, B or C" appeal choice. The circumstances of each individual claim will dictate which type of appeal is appropriate. A VSO is the best person to advise you as to which type of appeal is the most appropriate for you.

With any type of appeal, keep a copy of all forms and any evidence that you submit. Submit all evidence to the processing center listed on your decision notice. Be sure to send it trackable/certified.

## **Higher Level Review**

This is the correct method of appeal when you believe the VA made a mistake in its determination of your claim. Specifically, it is the situation when the VA and/or the VA examiner had all the information needed when they made the decision, but they either discounted the information, didn't notice the information, or they made a "clear and unmistakable error" and therefore did not make the correct decision.

A Clear and Unmistakable Error (referred to as CUE) involves a situation when the correct facts were known and, based on that and current legislation and VA guidelines, the decision was not applied correctly.

In this situation, you are asking the VA to make new decision with all the evidence that you had previously provided to them.

Requesting a Higher-Level Review will cause your claim to be referred to a senior VA rater who will review all previous evidence and the decision that was made. This process for a Higher-Level Review takes an average of four months or more. The effective date will be the effective date which should have been granted originally.

You may request an informal conference with the senior rater prior to their decision, in order to identify the specific errors in your case. If you choose this option, it is highly recommended you have your VSO on the call as well.

To request a Higher-Level review: fill out VA Form 20-0996: Decision Review Request: Higher-Level Review. This form is on the VeteransAccessProject.org website and also available at [va.gov](http://va.gov).

### **How to fill out the Higher-Level Review form**

**\*\*Higher Level Review cannot be used to appeal a previously determined higher level review or a Board of Veterans Appeals case.**

#### **Section 1: Veterans Identification Information**

Make sure it matches your address on file.

If you are homeless or at risk, they will prioritize processing your claim. Mark the circle in item 6 if that is the case. If there is another reason that your appeal needs to be processed quickly, you can fill out form 20-10207. It needs to be for a reason such as terminal illness, eviction or hospitalization for that to be considered.

## Section 2: Claimants Identification Info (if other than vet)

This is only to be filled out if someone is filing a claim instead of the veteran (often the veteran's surviving dependents).

## Section 3: Benefit Type

You can only select one option in this section. For our purposes, it is usually either Compensation or Pension. You can use this form to appeal multiple issues from multiple decisions, but only from one category (i.e. Compensation OR Pension).

## Section 4: Optional Informal Conference

Fill this section out if you or your representative want to have a phone conversation with a senior rater, as we described before. You will mark which hours are best to call you to schedule that meeting. You can also have your VSO take that call (recommended). The VA will only call twice to schedule, and if they don't connect after the second attempt, they will skip the conference and continue on with the Higher Level Review.

If you would rather send in a written statement of explanation describing the mistake that was made (written by either you or your VSO), you may do that instead and send the statement with the 20-0996 form. Remember that this type of appeal will not consider new evidence. You will only be describing the error that you believe occurred.

## Section 5: Issues for higher level review

In order to fill this section out, have your decision notification letter(s) available to refer to.

In this section you will be describing the mistake you believe was made.

Enter each issue that you are contesting as well as the date of each decision.

## Section 6: Certification and Signature

Sign and date in INK.

## Section 7: Authorized Representative Signature

To be signed by your representative, if they are filling out the form for you.

## **Supplemental Claim**

If the VA has either rejected your claim, or rated it at an inappropriately low level **AND** you have “new and relevant” information/evidence that was not previously considered and that is important for making the correct decision, then you will need to file a Supplemental Claim.

To file a supplemental claim, you must submit or identify “new and relevant” evidence, which means:

- 1) in order to qualify as **new**, the evidence must **not** have been part of the evidentiary record at the time of the prior decision
- 2) in order to be considered **relevant**, the additional evidence must tend to prove or disprove a matter at issue in the claim

To file supplemental claim, fill out VA form 20-0995: Decision Review Request: Supplemental Claim. This form is on the VeteransAccessProject.org website and also available at va.gov.

Just like your original or new claim, you will have to wait several months to see if the VA changes their decision. If the decision is changed in your favor, the correct rating will be made with the appropriate effective date, hopefully.

If, for any reason in the future, you have additional evidence that you want the VA to consider, you are permitted to request subsequent Supplemental Claims.

### **How to fill out a Supplemental Claim form:**

#### **Part 1: Claimant’s Identifying Information**

Make sure this section matches your address on file.

Make sure you at least fill out your birthday and your SS # or your VA file number. There is a place for both the veterans name and the claimant’s name. If you are the veteran, leave “Claimant Name” blank.

Make sure you only select one type of claim. You will be choosing either Compensation or Pension.

#### **Part 2: Issues for Supplemental Claim**

In order to fill this section out, have your decision notification letter(s) available to refer to.

In this section you will be describing the mistake you believe was made.

List each issue decided by the VA that you would like the VA to review as part of your supplemental claim. Enter the date of each decision with each issue that you are providing new and relevant evidence for.

If you are providing new evidence for a claim for which a decision was made with the BVA or higher, write the date of that decision in 13B and provide a copy of that decision with this form.

### Part 3: New and Relevant Evidence

Item 14: To complete your application, you must submit new and relevant evidence to the VA. If you are submitting this type of claim, you should provide the evidence along with this claim form. Make sure that any evidence you submit has your name and VA file number on EVERY page.

Item 15: If your new and relevant information are records from a VA facility or the DoD, provide the locations of your records and the VA will attempt to access them.

### Part 4: 5103: Notice of Acknowledgement

This is very important! Check the box that says "YES" to verify that you have received this legal notice. If you do not, your claim will be delayed at least a month longer.

### Part 5: Certification and Signature

Item 17a. Either the veteran or your VSO will sign and date in INK.

Item 18: Alternate Signer Certification and Signature

To be filled out only by a family member or court appointed representative if the veteran is unable to sign or incapacitated.

## **Board of Veteran Appeals**

There is a third appeal option, which can be made first, or after an appeal with either of the previously mentioned appeals types. If you are still not getting the correct determination, contact your VSO to help you with an appeal to the Board of Veteran Appeals (BVA). A VSO will help represent your case before the BVA.

It is important to know that a BVA appeal takes a long time, a year or longer, which is why the other two options should be explored first.

The Board of Veterans Appeals is a collection of administrative law judges who work for the VA for the specific purpose of deciding cases on appeal . They are the legal experts who set precedent regarding VA laws and regulations. If you want to file this type of appeal, you have to choose a method of review.

- 1) Direct Review: This is an option that does not require you to submit additional evidence or have a hearing. A judge will review all of the evidence already associated with your claim as well as the VA's current determination. After that, they will make a ruling as to the correctness of your original determination.
- 2) Evidence Submission: This is an option to have "new and relevant" evidence considered by the judge, along with all of the evidence already associated with your claim. The judge would then make that determination based off of the new **and** existing information.
- 3) Hearing: In this circumstance, you are requesting to have a hearing with a Veterans Law Judge. You will be notified, in advance, the date of your hearing and it will likely be held remotely. You absolutely should have your VSO with you for this hearing. The judge will take testimony from you and/or your VSO and also examine any evidence associated with your claim. After that, the judge makes a ruling.

Once the judge makes a determination, it is, essentially, the final determination. The only way to appeal a judge's ruling is to take your case all the way to the US Court of Appeals for Veterans Claims, and after that to the US Supreme Court.

To file a request for a Board of Veterans Appeal, fill out VA Form 10182: Decision Review Request: Board Appeal (Notice of Disagreement). This form is available on the VeteransAccessProject.org website and also available at va.gov.

## **How to fill out Decision Review Request: Board Appeal form**

As we mentioned, we HIGHLY recommend you have a VSO help you with this type of appeal request.

You can use this form to appeal all or part of the VA decision you received.

### Part 1: Personal Information

Make sure this section matches your address on file.

Make sure you fill out your date of birth and your SS # or VA file number. There is a place for both the veterans name and the claimant's name. If you are the veteran, leave "Claimant Name" blank.

If you are homeless or at risk, they will prioritize processing your claim. Provide a preferred phone number and email address for them to contact you.

### Part 2: Board Review Option

This is a very important part. This is where you will mark which type of Board Review you would like to pursue (A, B or C), as described earlier in this episode.

If you are requesting a hearing, you will need to select the type of hearing you would like.

### Part 3: Specific Issue(s) to be appealed to a veteran's law judge at the Board

In order to fill this section out, have your decision notification letter with you to refer to.

This is where you will be describing the area of disagreement.

Enter the date of each decision for each issue that you are contesting.

Make sure that any evidence you submit has your name and VA file number on EVERY page.

Check the box if you have additional pages.

Have your VSO help you prepare the evidence. Unless you are a lawyer or a doctor, don't expect to win this type of an appeal without a VSO helping you.

### Part 4: Certification and Signature

To be signed by either you or your representative.

Let's consider other elements of your claim that you might want to appeal.

### **Effective dates**

The VA has a legal responsibility to provide the earliest effective date allowed by law or regulation. The effective date is based on when a veteran submits a claim, OR the date of discharge. If the VA gets an **original** claim within one year of the veteran exiting the service, the effective date should be the day after discharge in most cases.

It is common to appeal an effective date which the veteran believes should be earlier.

An example of an appeal for an earlier effective date might include medical evidence the VA overlooked that proves the onset of a condition was earlier than the VA rated it. Another common example is that the VA rater used the date of your VA exam as the effective date, instead of the date the claim was submitted.

For these types of situations, you will want to follow the instructions for a Higher-Level Review.

You can include a letter or form 21-4138 with the appeal form to describe what you believe the effective date should be, and the error. You can have your VSO help you with that letter or write it for you.

### **Extra-schedular ratings**

This is a very rare situation and generally can only be resolved by a judge at the Board of Veteran Appeals.

The VA has The Schedule for Rating Disabilities, which is used to evaluate the amount each disability hinders earning capacity. Recall this was the topic we discussed in Episode 1. The schedular rating is used to determine the percentage level of impairment an individual experiences based on the VA's diagnostic codes and criteria.

**Extra-schedular rating**, is used in exceptional cases for which the schedular evaluation method is inadequate to rate a service-connected disability. The determination for an extra-schedular rating is individualized.

There are two circumstances which usually qualify for an extra-schedular rating.

- 1) The veteran has a condition that they feel is unusual in that it exceeds the qualifications for the maximum rating allowed in the schedule (often more than 100%). This usually involves marked interference with the ability to work and/or multiple hospitalizations.



An example for this is Chron's Disease. The highest rating a person can get for Chron's is 100%. If you feel as though your Chron's causes such a significant disability that you are far more sick than an average 100% rated veteran, you might qualify for an extra-schedular rating.

- 2) The second circumstance is when a veteran is requesting a disability determination for a condition not covered by the VA rating system. The veteran does have an actual disability that is directly related to an incident during honorable service, but the VA has not added the condition to the schedule of covered conditions.

An example of this are conditions that cause increased motion in the wrist. Unlike other joints, there is no Schedular rating for instability in the wrist. A person would have to get an extra-schedular rating for this to be a rated appropriately.

It is uncommon to get an extra-schedular rating. In these rare cases the veteran and/or their VSO will have to present a very strong argument for why this should be determined. Your VSO can tell you if they feel it is worth going through this lengthy process for this additional rating.

You would usually start an Extra-schedular appeal process by first submitting a claim for Increase (described in Episode 3) or with an appeal.

The following is taken from VA regulation on the subject:

***Extra-schedular ratings in unusual cases -***

(1) ***Disability compensation.*** Ratings shall be based, as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice to the exceptional case where the schedular evaluation is inadequate to rate a single service-connected disability, the Director of Compensation Service or his or her delegate is authorized to approve on the basis of the criteria set forth in this paragraph, an extra-schedular evaluation commensurate with the average impairment of earning capacity due exclusively to the disability. The governing norm in these exceptional cases is a finding by the Director of Compensation Service or delegatee that application of the regular schedular standards is impractical because the disability is so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization.