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Overview of the Appeal Process for Veterans' Claims

Abstract

[Excerpt] The Department of Veterans Affairs (VA) provides an array of benefits to veterans and to certain members of their families. These benefits include, but are not limited to, disability compensation, education and training benefits, dependent and survivor benefits, medical treatment, life insurance and burial benefits, and home loan guaranty.¹ In order to apply for these benefits, in most circumstances, the claimant will send an application to his or her local VA office. The local VA Regional Office (RO) will review the application and make an initial determination as to whether the claimant is entitled to the benefit. If, after the local VA makes a determination on the claim, the claimant is not satisfied with the results, he or she has the right to appeal that decision. This report provides an overview of the VA appeal process from the first stages of the appeal through review by the Supreme Court of the United States.

Keywords

veterans benefits, Department of Veterans Affairs, VA, claims, appeals

Comments

Suggested Citation

Mason, R. C. (2016). *Overview of the appeal process for veterans' claims* (CRS Report R42609). Washington, DC: Congressional Research Service.



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Overview of the Appeal Process for Veterans' Claims

R. Chuck Mason

Legislative Attorney

September 19, 2016

Congressional Research Service

7-5700

www.crs.gov

R42609

Summary

Congress, through the U.S. Department of Veterans Affairs (VA), provides a variety of benefits and services to veterans and to certain members of their families. These benefits include disability compensation and pensions, education benefits, survivor benefits, medical treatment, life insurance, vocational rehabilitation, and burial and memorial benefits. In order to receive these benefits, a veteran (or an eligible family member) must apply for them by submitting the necessary information to a local VA office. The local VA office will make an initial determination on the application for benefits. Any veteran who is not satisfied with the local VA's determination is permitted to appeal the decision. This report provides a step-by-step breakdown of the appeal process for veterans' claims.

When making an appeal on an initial determination, the claimant may choose to proceed with the traditional review process or may choose to have a Decision Review Officer (DRO) at the local VA office review the case. In the event the veteran opts for a DRO review and is not satisfied with the result, the claimant may still avail himself/herself of the traditional process and appeal to the Board of Veterans' Appeals (BVA). The local VA office will prepare the claim file for the appeal and provide the claimant with a blank VA Form 9—a form that must be completed to make an appeal to the BVA. Claimants must follow specific procedures to request the appeal and must meet certain deadlines for submitting the proper information.

The claimant may choose to have a hearing with the BVA during the appeal process. There are three different types of hearings that the claimant may choose (1) an in-person hearing with a BVA member, held in Washington, DC; (2) an in-person hearing with a BVA member, held at a local VA office; or (3) a teleconference hearing. The hearings with the BVA are informal and nonadversarial in nature. The claimant will be given the opportunity to explain the reasons for the appeal and to submit additional evidence during the hearing. The claimant may be represented during the appeal process.

After the BVA reaches a decision on the appeal, there are further options the claimant may pursue if he or she is still not satisfied with the BVA decision. A claimant may file a notice of appeal with the Court of Appeals for Veterans Claims (CAVC). The CAVC, an Article I court, has exclusive jurisdiction to review decisions of the BVA. A claimant must submit a notice of appeal within 120 days of receiving the decision from the BVA. However, the Supreme Court in *Henderson v. Shinseki* clarified that the 120-day deadline is not a "jurisdictional" deadline. Therefore, an appeal to the CAVC will not necessarily be dismissed for missing the deadline. However, the claimant must have a good reason for filing late, such as an inability to meet the deadline due to mental incapacity.

The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has exclusive jurisdiction to hear appeals from a CAVC decision. The Federal Circuit provides the last appeal of right during the appeal process. If either party is dissatisfied with the ruling from the Federal Circuit, an appeal may be made to the Supreme Court of the United States. The Supreme Court does not have to hear the case and may deny certiorari. If the Supreme Court decides to hear the case, any decision reached by the Court is final.

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Introduction

The Department of Veterans Affairs (VA) provides an array of benefits to veterans and to certain members of their families. These benefits include, but are not limited to, disability compensation, education and training benefits, dependent and survivor benefits, medical treatment, life insurance and burial benefits, and home loan guaranty.¹ In order to apply for these benefits, in most circumstances, the claimant will send an application to his or her local VA office. The local VA Regional Office (RO) will review the application and make an initial determination as to whether the claimant is entitled to the benefit. If, after the local VA makes a determination on the claim, the claimant is not satisfied with the results, he or she has the right to appeal that decision. This report provides an overview of the VA appeal process from the first stages of the appeal through review by the Supreme Court of the United States.

The introduction to this report will discuss the types of decisions that can be appealed, introduce the various actors in the appeal process, briefly describe the two avenues for appeal within the VA, and address the rights of a claimant to be represented during the appeal process. The report will then provide a step-by-step breakdown of the appeal process within the Department of Veterans Affairs followed by a description of further judicial review from the Court of Appeals for Veterans Claims, the U.S. Court of Appeals for the Federal Circuit, and the Supreme Court of the United States.

Filing the *Original* Claim for Benefits at the VA

In order to apply for VA benefits, an applicant must file a claim at the local VA office, VA medical facility, or online at the VA's eBenefits website (www.ebenefits.va.gov).² Veterans Service Organizations (VSO) are available to provide assistance with applying for benefits.³

Once the VA has received a completed application for benefits, the VA will review the claim and determine whether to allow or deny the claim. The VA will mail the determination to the claimant. If the claimant is not satisfied with the VA's determination, he or she may appeal the decision.

What Can Be Appealed?

After the VA Regional Office mails the claimant an initial determination, the claimant may initiate the appeal process. The claimant will be notified of the right to appeal when the initial determination is issued.⁴ The claimant is permitted to appeal any decision reached on a claim for benefits.⁵ The BVA's regulations, at 38 C.F.R. §20.101(a), provide a long, but not exhaustive, list of the types of decisions that can be appealed to the BVA, including decisions related to service-connected disability benefits, benefits for survivors, education assistance benefits, and burial benefits. A claimant can appeal a partial or complete denial of a claim.

¹ The Veterans Administration website provides comprehensive information on the benefits available to veterans. See Department of Veterans Affairs, Benefits and Services Available, <http://www.va.gov/opa/newtova.asp>.

² See BOARD OF VETERANS' APPEALS, VA PAMPHLET 01-15-02B, HOW DO I APPEAL?, at 4 (2015), available at http://www.bva.va.gov/How_Do_I_Appeal.asp.

³ *Id.* at 1. See also <http://www.va.gov/vso>.

⁴ 38 U.S.C. §7105; 38 C.F.R. §19.25. See <http://www.va.gov/vaforms/va/pdf/VA4107.pdf>.

⁵ 38 U.S.C. §511(a), 7104(a); 38 C.F.R. §20.101(a).

Furthermore, if a claimant successfully receives a benefit from the RO, the claimant may still appeal the amount awarded. For example, if an RO determines that a veteran is entitled to a 30% disability rating, but the claimant believes that percentage should be higher, the determination may also be appealed.⁶

Although a claimant may appeal determinations related to eligibility for hospitalization, outpatient treatment, and access to medical devices, a claimant is not permitted to appeal certain medical determinations made by medical providers. For example, a veteran is not permitted to appeal a physician's decision to prescribe or not to prescribe certain drugs or specific treatments.⁷ The Board does not have jurisdiction over these types of claims.

Two Types of Appeals

When making an appeal on an initial determination, the claimant may choose to proceed with the traditional method of review or may choose to have a Decision Review Officer (DRO) review the case. Both forms of review are discussed in detail in this report. Briefly stated, under the traditional review process, the local VA office will review the claim folder to ensure that there are no obvious errors in the claim, prepare the case for review, and send the case to the Board of Veterans' Appeals (BVA). The BVA will then provide a *de novo* review of the case and reach a determination.

Under DRO review, a Decision Review Officer, at the local VA office making the initial determination, will review the claim folder *de novo*. After reviewing the claim, the DRO will make a supplemental determination. Seeking DRO review does not preclude the claimant from pursuing the traditional review process. If the claimant is not satisfied with the DRO's decision, the claimant may proceed with the traditional review process and have the appeal heard by the BVA.

Who Handles Veterans' Appeals?

During the appeal process for veterans' claims, various different officials will handle the claim. This section provides a brief introduction to the decision makers who will potentially review an appeal.

Decision Review Officer

Each VA Regional Office has at least one Decision Review Officer on staff. The DRO is a "senior technical expert who is responsible for holding post-decisional hearings and processing appeals."⁸ A DRO may hear any appeal that may be heard by the Board of Veterans' Appeals. During DRO review, a DRO will review the claim *de novo*—that is, a new and complete review of the appealed issue with no deference given to the decision being appealed.⁹ The DRO may not revise the initial decision "in a manner that is less advantageous to the claimant" unless the DRO finds an instance of "clear and unmistakable error."¹⁰ In order to have an appeal reviewed by a DRO,

⁶ See Board of Veterans' Appeals, VA Pamphlet 01-00-1, Understanding the Appeals Process, at 7 (2000), available at <http://www.ptsdmanual.com/y2000.pdf>.

⁷ 38 C.F.R. §20.101(b).

⁸ Department of Veterans Affairs, Decision Review Officer (DRO) Review Process, M21-1MR, Part I, Chapter 5, Section A (2016), available at <http://www.knowva.ebenefits.va.gov/>.

⁹ 38 C.F.R. §3.2600.

¹⁰ 38 C.F.R. §§3.2600(d), 3.2600(e).

the claimant must ask to take DRO review. Otherwise, the traditional form of review, directly through the Board of Veterans' Appeals, will proceed.¹¹ If a claimant opts for DRO review, the claimant may still have the BVA review the claim if the DRO's decision is not favorable to the claimant.¹²

The Board of Veterans' Appeals

When a claimant is not satisfied with the initial determination on the application for benefits, an appeal can be made to the Board of Veterans' Appeals (BVA or Board).¹³ The BVA is part of the Department of Veterans Affairs, located in Washington, DC, and makes the final determination on an appeal within the VA. The Board consists of experienced attorneys in the field of veterans law. Board members are appointed by the Secretary of the VA, with the approval of the President.¹⁴ As of 2015, the Board consisted of 63 members.¹⁵ These Board members make the ultimate conclusion on appeals within the VA. The BVA also employs staff attorneys that assist the Board members while preparing a decision for a claim, much like a clerk for a judge.¹⁶ The BVA has a significant work load—in the 2015 fiscal year (FY), the BVA received and docketed 69,957 appeals.¹⁷ The BVA expects that number to climb to 88,183 for FY2016.¹⁸

The Court of Appeals for Veterans Claims

If a claimant is not satisfied with the decision from the BVA, the claimant has the option of appealing to the Court of Appeals for Veterans Claims (CAVC).¹⁹ The CAVC is an Article I court, established by Congress, which has exclusive jurisdiction over appeals from the BVA.²⁰ The Court is authorized seven permanent judges and two additional judges as part of a temporary expansion provision.²¹ The VA's General Counsel will defend the BVA decision before the court.²² In FY2015 the CAVC received 4,506 appeals.²³

The Court of Appeals for the Federal Circuit

If the claimant is dissatisfied with the determination reached by the CAVC, the claimant may appeal the decision to the Court of Appeals for the Federal Circuit (Federal Circuit).²⁴ The scope

¹¹ 38 C.F.R. §3.2600(b).

¹² 38 C.F.R. §3.2600(f).

¹³ 38 U.S.C. §7104(a).

¹⁴ 38 U.S.C. §7101A.

¹⁵ BOARD OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2015, at 22 (2016), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf.

¹⁶ See Board of Veterans' Appeals, VA Pamphlet 01-00-1, Understanding the Appeals Process, at 6 (2000), available at <http://www.ptsdmanual.com/y2000.pdf>.

¹⁷ BOARD OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2015, at 17 (2016), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf.

¹⁸ *Id.* at 20.

¹⁹ 38 U.S.C. §§7252, 7266.

²⁰ 38 U.S.C. §§7251–7252.

²¹ 38 U.S.C. §7253.

²² See 38 U.S.C. §7263.

²³ UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: FISCAL YEAR 2015, at 1 (2016), available at <https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf>.

²⁴ 38 U.S.C. §7292.

of review on veterans' appeals provided by the Federal Circuit is limited by statute. The Federal Circuit can set aside regulations that are arbitrary or capricious, unconstitutional, in excess of statutory jurisdiction, or procedurally deficient.²⁵ Generally, the Federal Circuit is not permitted to review any challenge to a factual determination, or a “challenge to a law or regulation as applied to the facts of a particular case.”²⁶ The Federal Circuit provides the last appeal of right for claimants appealing decisions made by the BVA.

The Supreme Court of the United States

Finally, if the claimant is still not satisfied by the decision reached by the Court of Appeals for the Federal Circuit, the claimant may petition the Supreme Court for certiorari.²⁷ The Supreme Court may or may not decide to hear the case—the claimant is not guaranteed to have the Supreme Court hear the appeal. If the Supreme Court grants certiorari (hears the case), any decision provided by the Supreme Court is final.

Legal Representation

The VA has established that a claimant “will be accorded full right to representation in all stages of an appeal by a recognized organization, attorney, agent, or other authorized person.”²⁸ The VA sets out certain requirements that a representative must meet in order to assist a claimant during the appeal process.²⁹ The VA strongly encourages claimants to seek representation and a vast majority of claimants are represented.³⁰ Claimants, however, are not required to have representation in the appeal process and may represent themselves.

Veterans Service Organizations (VSO) may provide trained representatives to the claimant free of charge.³¹ The vast majority of claimants are represented by VSO representatives—in 2000, the BVA noted that approximately 85% of claimants were represented by a VSO.³²

Other claimants elect to hire an attorney or a recognized “agent” to represent them during the appeal. Attorneys and recognized agents, however, may charge for their services rendered.³³ Regulations provide that fees “may be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases.”³⁴ Fees must be reasonable, and fee agreements must be filed with the VA Office of the General Counsel.³⁵

²⁵ 38 U.S.C. §7292(d)(1).

²⁶ 38 U.S.C. §7292(d)(2).

²⁷ 38 U.S.C. §7292(c).

²⁸ 38 C.F.R. §20.600.

²⁹ 38 C.F.R. §14.629.

³⁰ See Board of Veterans' Appeals, VA Pamphlet 01-00-1, Understanding the Appeals Process, at 12 (2000), available at <http://www.ptsdmanual.com/y2000.pdf>.

³¹ 38 C.F.R. §14.636(b) (stating that recognized organizations “are not permitted to receive fees”).

³² See Board of Veterans' Appeals, VA Pamphlet 01-00-1, Understanding the Appeals Process, at 12 (2000), available at <http://www.ptsdmanual.com/y2000.pdf>.

³³ 38 C.F.R. §14.636(b) (stating that “only accredited agents and attorneys may receive fees from claimants ... for their services provided in connection with representation”).

³⁴ 38 C.F.R. §14.636(e).

³⁵ *Id.*; 38 C.F.R. §14.636(g)(3).

Veterans must fill out VA Form 21-22 if they wish to be represented by a VSO or fill out VA Form 21-22a if they wish to have an attorney or authorized agent provide representation.³⁶

VA's Duty to Assist Claimants

The VA has various legal obligations to assist the claimant and to ensure that a proper claim for benefits is filed. These obligations include assisting the claimant to obtain evidence,³⁷ ensuring the claimant has the necessary forms and instructions,³⁸ and notifying the claimant if additional information is needed.³⁹

Federal regulations further require the VA to render a “decision which grants every benefit that can be supported in law while protecting the interests of the Government.”⁴⁰ Therefore, the VA is obligated to consider every legal theory that could support a claim for benefits. Finally, the VA is obligated to weigh evidence in favor of the claimant when reaching its determination. Under 38 U.S.C. §5107(b), “[w]hen 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.” Therefore, in order to deny a claim for benefits, the preponderance of the evidence must show that the claimant should not be entitled to the benefits sought.

Whenever the VA reaches a determination, both on the initial application and on appeal, the VA must provide notice of the decision and “an explanation of the procedure for obtaining review of the decision.”⁴¹

The VA Appeal Process

Notice of Disagreement

After a claimant has received an initial determination from the local RO, an unsatisfied claimant may initiate the appeal process. In order to begin the appeal, the claimant must first submit a Notice of Disagreement (NOD).⁴² The NOD is the first step in notifying the VA that a claimant wishes to appeal a decision. Claimants must file an NOD on a standardized form, when that form is provided to the claimant by the VA.⁴³ However, if the VA does not provide an NOD form to a claimant, then the VA would accept a traditional NOD.⁴⁴ The claimant should be specific about whether the entire decision is being appealed or only part of the decision is being appealed.⁴⁵ Also, at this stage of the appeal process, a claimant may make a request to undergo DRO review, instead of taking the traditional review straight to the BVA.⁴⁶

³⁶ 38 C.F.R. §14.631.

³⁷ 38 U.S.C. §5103A.

³⁸ 38 U.S.C. §5102 (stating that forms must be provided free of charge).

³⁹ 38 U.S.C. §§5102(b), 5103(a).

⁴⁰ 38 C.F.R. §3.103(a).

⁴¹ 38 U.S.C. §5104(a).

⁴² 38 U.S.C. §7105(a).

⁴³ 38 C.F.R. §20.201(a).

⁴⁴ 38 C.F.R. §20.201(b).

⁴⁵ 38 C.F.R. §20.201(a).

⁴⁶ 38 C.F.R. 3.2600(b). Note, that the claimant may undergo DRO review and still proceed to the traditional review by the BVA if the claimant is not satisfied with the DRO decision.

Where and When to Send the NOD

In most circumstances, the NOD must be sent to the local office that made the initial determination.⁴⁷ However, if the claimant's records have been moved to a different VA office, the NOD should be submitted to the new local VA office handling the claim.⁴⁸ The NOD must be submitted within one year from when the local VA office mails the initial determination.⁴⁹ After one year has passed, the decision is deemed to be final, except in rare circumstances.⁵⁰

DRO Review and Statement of the Case

If the claimant decides to pursue the traditional review process, either a Rating Veterans Service Representative (RSVR) or a DRO⁵¹ will reexamine the claim file and determine whether additional review or development is warranted.⁵² If the claimant requests DRO review, the DRO will begin to look over the claim again from scratch. Under DRO review, the DRO will review the claim *de novo*—that is, they will provide no deference to the initial decision reached by the VA.⁵³ In this form of review, there does not need to be any new evidence nor any clear and unmistakable error for the DRO to overturn the initial decision. The DRO may not revise the initial decision “in a manner that is less advantageous to the claimant” unless the DRO finds an instance of “clear and unmistakable error.”⁵⁴ The DRO may hold informal conferences as well as formal hearings with the claimant regarding the claim.⁵⁵ After reviewing the claim, the DRO will send a new decision to the claimant along with “a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.”⁵⁶

Regardless of whether the claimant elects DRO review or the traditional review, the reviewer will make a decision to allow or deny the claim. If the reviewer allows the claim, then the claimant has won his appeal and the appeal process ends.⁵⁷ If the reviewer decides not to grant the claimant's request for benefits, then he will send a notice to the claimant and the claimant may continue with the appeal process. When the VA provides the claimant with notice stating that the claim will be denied, it will also provide the claimant with a Statement of the Case (SOC).⁵⁸ The SOC is a document that summarizes the evidence, laws, and regulations that were used to make a determination in the claim and explains why the VA reached the decision.⁵⁹ The local VA office will also send a blank VA Form 9—Appeal to Board of Veterans' Appeals—which must be filled out and returned to continue the appeal process.⁶⁰

⁴⁷ 38 C.F.R. §20.300.

⁴⁸ *Id.*

⁴⁹ 38 U.S.C. §7105(b)(1); 38 C.F.R. §20.302.

⁵⁰ *Id.*

⁵¹ *See supra* note 8.

⁵² 38 C.F.R. §19.24.

⁵³ 38 C.F.R. §3.2600(a).

⁵⁴ 38 C.F.R. §§3.2600(d), 3.2600(e).

⁵⁵ 38 C.F.R. §3.2600(b).

⁵⁶ 38 C.F.R. §3.2600(d).

⁵⁷ 38 C.F.R. §19.24.

⁵⁸ 38 U.S.C. §7105(d); 38 C.F.R. §§3.2600(f), 19.26(d).

⁵⁹ 38 C.F.R. §19.29.

⁶⁰ 38 C.F.R. §19.30(b).

The Substantive Appeal: VA Form 9

The VA will send the claimant a blank VA Form 9 along with the SOC. The VA Form 9 must be filled out to continue the appeal process.⁶¹ The claimant has 60 days from when the SOC was mailed or one year from when the initial determination was mailed, whichever period ends later, to submit the VA Form 9 to the local VA office.⁶² The claimant may seek a deadline extension for submitting the VA Form 9, but must show good cause by providing an explanation for why the additional time is needed.⁶³

When filling out the form, the claimant will have the opportunity to state whether he/she wishes to have a hearing with the BVA, to point out any mistakes that were made on the SOC, and to establish why the claimant believes the VA made an incorrect decision when determining the claim. The form provides detailed instructions for properly completing the substantive appeal.⁶⁴ The claimant may add new evidence when the VA Form 9 is submitted to the VA office.⁶⁵ If the VA office receives any new evidence from the claimant, the VA office will prepare a Supplemental Statement of the Case (SSOC) and mail it to the claimant.⁶⁶ The claimant will then have 30 days to notify the VA office of any mistakes found in the SSOC.⁶⁷

Once the VA Form 9 has been completed and submitted, the claimant has fulfilled his obligations for filing the appeal.⁶⁸ The local VA office will certify the case to the BVA after it receives the completed VA Form 9.⁶⁹

BVA Docket and Docket Number

Once the case has been certified to the BVA, the BVA will then give the claim a docket number. The claim will be heard in the order in which it was received, as the BVA is obligated by law to hear claims on a first come, first served bases.⁷⁰ A claimant may file “a motion to advance on the docket” in order to have their case heard more quickly.⁷¹ However, these motions are only granted under rare circumstances—the claimant will have to provide the BVA, in writing, a strong reason for moving the claim up on the docket, such as an imminent foreclosure, bankruptcy, or terminal illness.⁷² The claimant should also provide any evidence of such a situation to the BVA at the time the motion is filed.

⁶¹ 38 U.S.C. §7105(a).

⁶² 38 C.F.R. §20.302(b).

⁶³ 38 C.F.R. §20.303.

⁶⁴ To review a copy of VA Form 9, please see DEPARTMENT OF VETERANS AFFAIRS, APPEAL TO THE BOARD OF VETERANS' APPEALS, VA FORM 9 (2015), available at <http://www.va.gov/vaforms/va/pdf/VA9.pdf>.

⁶⁵ See Board of Veterans' Appeals, VA Pamphlet 01-00-1, Understanding the Appeals Process, at 10 (2000), available at <http://www.ptsdmanual.com/y2000.pdf>.

⁶⁶ 38 C.F.R. §19.31.

⁶⁷ 38 C.F.R. §20.302(c).

⁶⁸ 38 C.F.R. §20.202.

⁶⁹ 38 C.F.R. §19.35.

⁷⁰ 38 U.S.C. §7107(a); 38 C.F.R. §20.900.

⁷¹ 38 U.S.C. §7107(a)(2); 38 C.F.R. §20.900(c).

⁷² *Id.*

Hearings with the BVA

When the claimant submits VA Form 9, the claimant will indicate whether he wishes to have a hearing with a Board member from the BVA. There are three kinds of hearings: (1) an in-person hearing at the local RO; (2) an in-person hearing in Washington, DC; or (3) a teleconference hearing.⁷³ The teleconference hearing takes place at a local VA office, while the Board member is in Washington, DC. The BVA notes that teleconference hearings are typically the fastest to arrange, as they do not require any travel.⁷⁴

Unlike court proceedings, hearings are informal and nonadversarial. The Board member generally will explain how the hearing will take place, ask the claimant to take an oath, and provide the claimant with the opportunity to present any information or evidence that the claimant believes is relevant and material.⁷⁵ The presiding Board member “may set reasonable time limits” for the argument and may exclude evidence that is “not relevant or material to the issue.”⁷⁶ The claimant can be represented at a BVA hearing.⁷⁷ The hearing may be documented in a transcript, which is also added to the file for review by the Board.⁷⁸

Adding Additional Evidence to the Claim File and the 90-Day Rule

A veteran is permitted to submit additional evidence prior to the BVA reviewing the claim file. The claimant may even submit additional evidence at the hearing, if the claimant has elected to have a hearing with a Board member.⁷⁹ Therefore, the claimant should submit any new medical evidence from recent treatments, additional statements, and anything else the claimant believes is material to the claim as soon as the claimant receives it.

If the claimant’s file is still located at the local VA office, any additional evidence should be submitted to that office. At this point, as stated earlier, the local VA office will provide the claimant with a Supplemental Statement of the Case.⁸⁰ As the claim gets close to being considered by the BVA, the local VA office will forward the claim file to the BVA. The local office will send the claimant a notice, informing him/her that the claim file has been transferred to the BVA.⁸¹

The claimant must submit any additional evidence, or a request for a hearing (if the claimant had not already requested one), within 90 days after the BVA has received the claim file, or up until the BVA actually decides the case (whichever comes first).⁸² If the claimant wishes to submit information or evidence after the 90 days have passed, he or she must submit a motion to the

⁷³ 38 C.F.R. §§20.700, 20.705; *see also* BOARD OF VETERANS’ APPEALS, VA PAMPHLET 01-15-02B-02A, HOW DO I APPEAL?, at 9 (2015), *available at* http://www.bva.va.gov/How_Do_I_Appeal.asp.

⁷⁴ *See* BOARD OF VETERANS’ APPEALS, VA PAMPHLET 01-15-02B, HOW DO I APPEAL?, at 9 (2015), *available at* http://www.bva.va.gov/How_Do_I_Appeal.asp.

⁷⁵ BOARD OF VETERANS’ APPEALS, VA PAMPHLET 01-15-02B, HOW DO I APPEAL?, at 10 (2015), *available at* http://www.bva.va.gov/How_Do_I_Appeal.asp.

⁷⁶ 38 C.F.R. §20.700(c).

⁷⁷ *See supra* notes 31-39 and accompanying text.

⁷⁸ 38 C.F.R. §20.714 (noting that transcript will be prepared and put into claims folder if certain conditions are met).

⁷⁹ 38 C.F.R. §20.1304(a).

⁸⁰ 38 C.F.R. §19.31.

⁸¹ 38 C.F.R. §19.36.

⁸² 38 C.F.R. §20.1304(a).

BVA asking for the evidence to be accepted and must show good cause for missing the deadline.⁸³ However, the claimant may present additional evidence during the hearing, even if the hearing is held following the expiration of the 90-day period.⁸⁴

BVA Review of Claim

After the hearing, a Board member and a staff attorney will be assigned to review the claim file. The Board member will ensure the file is complete and evaluate all the evidence, forms, written arguments, and hearing transcripts.⁸⁵ The staff attorney will function similarly to a clerk for a judge and perform any additional research that is necessary.⁸⁶ The staff attorney may also make recommendations for the Board member to review. At this point, the Board member will make a decision on the appeal.⁸⁷

Amount of Time for BVA to Reach a Decision

It is uncertain how long it may take the BVA to reach a decision on an appeal. According to the 2015 BVA's Report of the Chairman, the "average length of time between the filing of an appeal ... and the Board's disposition of the appeal was 1,029 days."⁸⁸

BVA Decisions

The BVA will notify the claimant of its decision by mailing a notice to the claimant's address as listed in the claim file. The notice will state the decision and explain the legal basis for reaching that conclusion.⁸⁹ The BVA will reach one of three decisions.

First, the Board may approve the claim and *grant* the claimant the benefit sought. If the BVA approves the claim, the claimant wins and the appeal is over.

Second, the Board may *remand* the claim. If the Board remands the claim, the Board member has determined that additional information is needed in order to make the proper decision on the appeal.⁹⁰ Upon remand, the claim folder will be returned to the local VA office to perform the additional work needed on the claim.⁹¹ The local VA office, after obtaining the necessary information, will then make another decision on the claim.⁹² If the local VA office still believes that the claim cannot be approved, the local VA office will send the claim folder back to the BVA.⁹³ The claim will maintain its initial place on the BVA docket, so it will be heard by the

⁸³ 38 C.F.R. §20.1304(b).

⁸⁴ 38 C.F.R. §20.1304(a).

⁸⁵ BOARD OF VETERANS' APPEALS, VA PAMPHLET 01-00-1, UNDERSTANDING THE APPEALS PROCESS, at 22 (2000), available at <http://www.ptsdmanual.com/y2000.pdf>.

⁸⁶ *Id.* at 22–23.

⁸⁷ BOARD OF VETERANS' APPEALS, VA PAMPHLET 01-15-02B, HOW DO I APPEAL?, at 10 (2015), available at http://www.bva.va.gov/How_Do_I_Appeal.asp.

⁸⁸ BOARD OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2015, at 21 (2016), available at http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf.

⁸⁹ 38 C.F.R. §19.7.

⁹⁰ 38 C.F.R. §19.9.

⁹¹ 38 C.F.R. §19.38.

⁹² *Id.*

⁹³ *Id.*

Board more quickly upon its return.⁹⁴ The BVA will then review the claim file again and reach a decision.

Third, the BVA may *deny* the claim. If the BVA denies the claim, the Board member has determined that the claimant is not entitled to the compensation or benefit sought. The BVA will provide a statement outlining the claimant's rights and explaining what further steps may be taken to review the decision.⁹⁵ The claimant may continue with the appeal, as discussed below, or accept the BVA's decision.

Reconsideration of BVA Decisions

If a claimant wishes to appeal the BVA's decision, the claimant may make an appeal to the United States Court of Appeals for Veterans Claims (CAVC), discussed below. However, there are also additional motions the claimant may file directly with the BVA in order to have the decision reconsidered.

Motion for Reconsideration

If the claimant is able to demonstrate that the BVA made an obvious error of fact or law in its decision, the claimant may file a "motion to reconsider" with the BVA.⁹⁶ A motion for reconsideration "may be filed at any time."⁹⁷ This motion should be sent directly to the BVA and not to the local VA office.⁹⁸ If the motion is allowed by the BVA, the claimant may request an additional hearing before the Board.⁹⁹ In order to be successful, the claimant must show that the BVA made an obvious error of law or fact, and that the BVA's decision would have been different if the error had not occurred.¹⁰⁰ The Code of Federal Regulations sets forth the information that must be included with the motion in order for the motion to be considered.¹⁰¹

Reopening the Case

The claimant may request to have the case reopened only if the claimant has obtained "new and material" evidence relating to the claim.¹⁰² Evidence will only be considered "new and material" if it relates to the original case and was not included in the claims folder at the time the BVA reviewed the case.¹⁰³ In order to reopen a case, the claimant should submit the new evidence to the local VA office, not to the BVA.¹⁰⁴

⁹⁴ 38 C.F.R. §20.900(a).

⁹⁵ See BOARD OF VETERANS' APPEALS, VA PAMPHLET 01-15-02B, HOW DO I APPEAL?, at 12 (2015), available at http://www.bva.va.gov/How_Do_I_Appeal.asp.

⁹⁶ 38 U.S.C. §7103.

⁹⁷ 38 C.F.R. §20.1001(b).

⁹⁸ *Id.*

⁹⁹ 38 C.F.R. §20.1003.

¹⁰⁰ See BOARD OF VETERANS' APPEALS, VA PAMPHLET 01-00-1, UNDERSTANDING THE APPEALS PROCESS, at 27 (2000), available at <http://www.ptsdmanual.com/y2000.pdf>.

¹⁰¹ 38 C.F.R. §20.1001(a).

¹⁰² 38 U.S.C. §§7104(b), 5108.

¹⁰³ 38 C.F.R. §3.156(a).

¹⁰⁴ See BOARD OF VETERANS' APPEALS, VA PAMPHLET 01-00-1, UNDERSTANDING THE APPEALS PROCESS, at 27 (2000), available at <http://www.ptsdmanual.com/y2000.pdf>.

CUE Motion

If the appellant believes that the BVA made a crucial error in reaching the decision, the appellant may file a motion with the BVA to revise the determination for “clear and unmistakable error” (CUE).¹⁰⁵ In order to succeed, the BVA must determine that, but for the error, the BVA would have reached a different decision.¹⁰⁶ A mere difference in opinion is not sufficient. Regulations promulgated by the VA provide a few examples of what does *not* constitute a clear and unmistakable error, including a changed medical diagnosis, a changed interpretation of a statute or regulation, or the failure to fulfill the VA’s duty to assist the claimant.¹⁰⁷ This list illustrates the difficulty of establishing a clear and unmistakable error. If a CUE motion is denied, the appellant cannot request another CUE review on the same issue.¹⁰⁸

The claimant may file a CUE motion at any time by sending the motion directly to the BVA.¹⁰⁹ However, if the appellant files a motion for CUE after filing an appeal to the Court of Appeals for Veterans Claims, or if the appellant files an appeal to the Court of Appeals for Veterans Claims prior to the BVA reaching a determination on the motion, the BVA will stay the CUE proceeding until the CAVC appeal has been concluded.¹¹⁰

Appealing a BVA Decision to the Courts

Court of Appeals for Veterans Claims (CAVC)

The Court of Appeals for Veterans Claims, an Article I court, has exclusive jurisdiction over appeals from the Board of Veterans Appeals.¹¹¹ In order to have the CAVC hear an appeal from the BVA, the appellant must submit a notice of appeal to the court within 120 days of the date that the BVA mailed its decision.¹¹² Only the claimant may file an appeal to the CAVC; the VA does not have the right to have a decision of the BVA reviewed.¹¹³

The CAVC will reach its determination by reviewing the record from the BVA and the written arguments provided by the appellant and the VA.¹¹⁴ Although the CAVC is authorized to hear oral arguments, a vast majority of cases are decided without such argument.¹¹⁵ The CAVC is not permitted to review *de novo* a determination of fact made by the BVA.¹¹⁶ Depending on the nature and complexity of the case, either one judge, a panel of three judges or the entire court will render

¹⁰⁵ 38 U.S.C. §7111.

¹⁰⁶ 38 C.F.R. §20.1403(a).

¹⁰⁷ 38 C.F.R. §20.1403(d).

¹⁰⁸ 38 C.F.R. §20.1409(c).

¹⁰⁹ 38 C.F.R. §20.1404(c).

¹¹⁰ 38 C.F.R. §20.1410.

¹¹¹ 38 U.S.C. §§7251–7252.

¹¹² 38 U.S.C. §7266.

¹¹³ 38 U.S.C. §7252.

¹¹⁴ 38 U.S.C. §7261(b).

¹¹⁵ According to the CAVC’s Report for the 2015 fiscal year, 14 oral arguments were heard by the court. UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: FISCAL YEAR 2015, at 4 (2016), available at <https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf>.

¹¹⁶ 38 U.S.C. §7261(c).

a decision on the case.¹¹⁷ In a vast majority of cases, one judge will make a decision on the case.¹¹⁸

If the CAVC rules in favor of the appellant, the case can be remanded to the BVA in order to implement the CAVC's ruling.¹¹⁹ If the CAVC denies the appellant's claim, the appellant may seek further review at the United States Court of Appeals for Federal Claims.¹²⁰ The VA may also appeal a CAVC decision.¹²¹

120-Day Filing Deadline: *Henderson v. Shinseki*

For years, the 120-day deadline was viewed as a procedural requirement, and thus subject to equitable tolling—that is, missing the deadline did not automatically preclude review by the CAVC.¹²² After the Supreme Court decision in *Bowles v. Russell*,¹²³ the CAVC and U.S. Court of Appeals for Federal Claims determined that the deadline was actually a jurisdictional requirement—that is, an appeal made after the deadline could not be heard by the CAVC for any reason.¹²⁴ However, in 2011, the Supreme Court clarified that the CAVC deadline was not jurisdictional and, therefore, an appeal will not necessarily be precluded if the deadline is missed.¹²⁵

In 2001, David Henderson filed a claim with the VA for compensation based on his need for in-home care.¹²⁶ His claim was denied by the VA Regional Office and was subsequently denied by the BVA.¹²⁷ After the BVA denied his claim, Henderson appealed the decision to the CAVC.¹²⁸ However, his notice of appeal was filed 15 days after the 120-day filing deadline had expired.¹²⁹ The CAVC, in a 2-1 decision, relied on the Supreme Court's *Bowles v. Russell* decision and dismissed his appeal for lack of jurisdiction due to the missed deadline.¹³⁰ The Court of Appeals for Federal Claims concurred with the CAVC, noting that the 120-day deadline was jurisdictional, and thus mandatory.¹³¹

¹¹⁷ See 38 U.S.C. §7267; UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: FISCAL YEAR 2015 (2016).

¹¹⁸ According to the CAVC's Annual Report for the 2015 fiscal year, over 1,300 appeals were heard by a single judge, while 26 appeals were heard by a three-judge panel and 5 appeals were heard by the full court. UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: FISCAL YEAR 2015, at 2 (2016).

¹¹⁹ If the CAVC remands the case back to the BVA, the BVA must handle the case "expeditiously ... without regard to its place on the Board's docket." 38 C.F.R. §20.900(d).

¹²⁰ 38 U.S.C. §7292(a).

¹²¹ *Id.*

¹²² *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998).

¹²³ 551 U.S. 205 (2007) (holding, in a case that did not involve a veteran's claim, that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement").

¹²⁴ *Henderson v. Peake*, 22 Vet. App. 217 (2008); *Henderson v. Shinseki*, 589 F.3d 1201 (2009).

¹²⁵ *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011).

¹²⁶ *Id.* at 1201.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Henderson v. Peake*, 22 Vet. App. 217, 221 (2008).

¹³¹ *Henderson v. Shinseki*, 589 F.3d 1201, 1220 (2009).

The Supreme Court granted certiorari.¹³² The Court reviewed whether “a veteran’s failure to file a notice of appeal within the 120-day period should be regarded as having ‘jurisdictional’ consequences.”¹³³ The Court unanimously determined that the deadline was *not* jurisdictional and that missing the deadline does not necessarily preclude the CAVC from hearing an appeal.¹³⁴ The Court noted that Congress had taken great care to ensure that the system for awarding veterans benefits greatly favors veterans. Thus, the Court determined that Congress did not intend the 120-day deadline to be a jurisdictional rule.¹³⁵ However, the Court did state that the deadline is an “important procedural rule” and remanded the case to the Federal Circuit to determine whether the appellant’s “case falls within any exception to the rule.”¹³⁶ Therefore, although the Court established that the deadline was not mandatory, it provided no guidance for when a case could still be heard even after the deadline was missed.

The CAVC, in *Bove v. Shinseki*, issued a ruling that provides context to when the court would still hear an appeal even after the deadline is missed.¹³⁷ The CAVC, prior to its decision in *Henderson v. Shinseki*, already had a test for determining when equitable tolling would be permissible. Therefore, it returned to its previous jurisprudence on the issue.¹³⁸ It stated,

The doctrine of equitable tolling has generally established parameters, and over time decisions of the Federal Circuit and this Court have addressed those parameters in the context of appeals to this Court. Thus, for example, equitable tolling was not applied when failure to file was due to general negligence or procrastination. Rather, it was applied only when circumstances precluded a timely filing despite the exercise of due diligence, such as (1) a mental illness rendering one incapable of handling one’s own affairs or other extraordinary circumstances beyond one’s control, (2) reliance on the incorrect statement of a VA official, or (3) a misfiling at the regional office or the Board.¹³⁹

The CAVC held that if an appellant accidentally files the notice of appeal at the wrong location—for example, at the BVA instead of with the CAVC—but the notice of appeal is otherwise timely, equitable tolling is appropriate.¹⁴⁰ It also held that, although mental illness can be a reason to find equitable tolling to be appropriate, the appellant must demonstrate that he is actually “*incapable* of functioning or making decisions due to mental illness, that his mental illness prevented him from filing his appeal or seeking the assistance of counsel, or that his mental disabilities were related directly to his untimely filing.”¹⁴¹ Therefore, although the 120-day deadline is not “jurisdictional,” it still precludes review from the CAVC in many circumstances. However, it should be noted, the Federal Circuit overruled *Bove* in *Dixon v. McDonald*.¹⁴²

In *Bove*, the CAVC had held that it had the authority to address untimely filings and equitable tolling *sua sponte*—that is, on its own accord without prompting from either party—and that the

¹³² *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011).

¹³³ *Id.* at 1200.

¹³⁴ *Id.* at 1206.

¹³⁵ *Id.* at 1205–06.

¹³⁶ *Id.* at 1206.

¹³⁷ *Bove v. Shinseki*, 25 Vet. App 136 (2011).

¹³⁸ *Id.* at 143.

¹³⁹ *Id.* at 140.

¹⁴⁰ *Id.* at 143–44.

¹⁴¹ *Id.* at 144.

¹⁴² *Dixon v. McDonald*, 815 F.3d 799 (2016).

120-day time period in which to file an appeal is not subject to waiver or forfeiture by the Secretary.¹⁴³ The Federal Circuit overruled the CAVC with respect to its *sua sponte* authority “to resolve timeliness in the face of the Secretary’s waiver by granting him relief that he explicitly declined to seek.”¹⁴⁴ The Federal Circuit determined that the CAVC’s conclusion was wrong for three reasons: (1) it failed to account for statutory limits to its jurisdiction; (2) it misread Supreme Court precedent; and (3) it misconstrued the relevant policy considerations.¹⁴⁵ Thus, the Federal Circuit held that the CAVC does not have the *sua sponte* authority to grant relief on a non-jurisdictional timeliness defense when the Secretary has waived the defense.¹⁴⁶ However, the first holding in *Bove*, that the 120-day period in which to file an appeal is subject to equitable tolling, was not overruled and remains valid.

Court of Appeals for the Federal Circuit and the Supreme Court

The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has exclusive jurisdiction to hear appeals from a CAVC decision.¹⁴⁷ The Federal Circuit provides the last appeal of right during the appeal process. By statute, the review provided by the Federal Circuit is rather limited. The Federal Circuit is not permitted to review “(A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.”¹⁴⁸ The Federal Circuit can only review actions to see if they are arbitrary or capricious, unconstitutional, in excess of statutory jurisdiction, or procedurally deficient.¹⁴⁹ The Federal Circuit may modify, reverse, or remand decisions by the CAVC, as appropriate.¹⁵⁰ If either party is dissatisfied with the ruling from the Federal Circuit, an appeal may be made to the Supreme Court of the United States. The Supreme Court does not have to hear the case and may deny certiorari. If the Supreme Court decides to hear the case, any decision reached by the Court is final.

Author Contact Information

R. Chuck Mason
Legislative Attorney
rcmason@crs.loc.gov, 7-9294

Acknowledgments

This is an update of a report previously authored by Daniel T. Shedd, a former Legislative Attorney with the Congressional Research Service.

¹⁴³ *Bove* at 139.

¹⁴⁴ *Dixon* at 803.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 805.

¹⁴⁷ 38 U.S.C. §7292.

¹⁴⁸ 38 U.S.C. §7292(d)(2).

¹⁴⁹ 38 U.S.C. §7292(d)(1).

¹⁵⁰ 38 U.S.C. §7292(e).