

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

JAMES M. KERNZ,)	
Appellant,)	
)	
v.)	Vet. App. No. 20-2365
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
Appellee.)	

NOTICE OF CLARIFICATION AND INFORMATION

Appellee, Denis McDonough, Secretary of Veterans Affairs, hereby seeks to clarify a statement made by the undersigned at oral argument on March 29, 2022, and provide related information sought by the Court. See Oral Argument (OA) at 23:15-29:37;
<https://www.youtube.com/watch?v=dqBHabRI3Uw>.

After consultation with the Board of Veterans Appeals (Board), the Board's amended timeliness notice letter, implemented on March 23, 2021, provides *only two* options to challenge the Board's *initial* timeliness determination of a submitted VA Form 10182. Those two options are: (1) request a time extension from the Board for good cause under 38 C.F.R. § 20.203(c); or (2) submit argument to be considered by a Veterans Law Judge (VLJ) in determining the timeliness of the submitted VA Form 10182. See, e.g., Exhibit A. If a claimant believes there was a calculation error, that error can be raised under the second option by submitting argument to be considered by a VLJ. The Board has confirmed that a claimant who pursues either of these options and receives an

adverse result will receive a *final* decision of the Board on the question of timeliness consistent with 38 U.S.C. § 7104(d). But if the Board determines that good cause exists or the VA Form 10182 was otherwise timely, the claimant's appeal will be properly docketed at the Board.

Standalone recalculation requests are only provided under the Board's August 23, 2021, Notice for possible calculation errors that may have occurred in issuing the prior version of its timeliness notice letter between February 19, 2019, and March 23, 2021. See Secretary's Response to Court's June 11, 2021, Order, at 2-3; 7. If a recalculation request results in a determination that the submitted VA Form 10182 is still untimely, the claimant will be notified of the option to request a time extension from the Board for good cause under 38 C.F.R. § 20.203(c). See, e.g., Exhibit B. But if the recalculation request results in a determination that the submitted VA Form 10182 was timely, then the Board will docket the claimant's appeal in the same position if not for any calculation error. The Board has confirmed that these recalculation requests are conducted by a team of attorneys working under the supervision of a VLJ. The Board has also confirmed that—notwithstanding the March 1, 2022, deadline in its August 2021 Notice, which was intended to encourage responses to the Notice—it will continue to honor future recalculation requests for timeliness notice letters issued between February 19, 2019, and March 23, 2021.

WHEREFORE, Appellee respectfully submits this Notice.

Respectfully submitted,

RICHARD A. SAUBER

General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ Megan C. Kral

MEGAN C. KRAL

Deputy Chief Counsel

/s/ Nicholas R. Esterman

NICHOLAS R. ESTERMAN

Senior Appellate Attorney

Office of General Counsel (027K/N)

U.S. Department of Veterans Affairs

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Washington, DC 20420

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Counsel for the Secretary

EXHIBIT A



**DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC**

In Reply Refer To: 014/BR/#
VA File Number

Date: March 30, 2022

John A. Appellant
Street Address
City, State Zip

Dear [Full Name]:

The Board of Veterans' Appeals received your [date] Board Appeal request (VA Form 10182). However, your request identified issues that are no longer eligible for appeal in the modernized review system created by the Appeals Modernization Act (AMA).

For the issues identified in your [date] Board Appeal request (VA Form 10182), you received a [date] Statement of the Case (SOC). Because this SOC was issued on or after February 19, 2019, you had the ability to opt-in to the modernized review system:

- within 60 days of the date on the SOC letter; or
- within one year of the date of the VA decision you are appealing, whichever is later.

[More than 60 days has passed since the date on the SOC letter or more than one year has passed since the date of the VA decision you are appealing for the issues of [list ineligible issues]]. Because the time limit has passed, the Board cannot process your appeal of those issues in the modernized system.

What if I need more time to file my VA Form 10182 or wish to submit argument that my VA Form 10182 is timely?

If you need more time to file an appeal to the Board in the modernized system, the Board may extend the time to submit a Board Appeal request (VA Form 10182) when good cause has been demonstrated.

If you believe that there is good cause to grant a time extension to submit your Board Appeal request (VA Form 10182) you may request a time extension from the Board. To do so, you must submit your extension request in writing to the Board with an explanation as to why you believe there is good cause. The written extension request must be submitted to the Board by mail or fax as follows:

2.

VETERAN, John A. VA File number

Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038
Fax: 1-844-678-8979

Otherwise, if you believe your Board Appeal request (VA Form 10182) was timely, **you have 60 days from the date of this letter to respond**. If you file a timely response, a Veterans Law Judge will determine whether your appeal was timely. If you do not file a timely response, the Board will consider this matter closed. To respond, you must submit your response in writing to the Board by mail or fax as outlined above.

What if I have questions?

If you have any questions or concerns about this correspondence, please contact your representative (if you have one) or visit **<https://www.va.gov/decision-reviews/get-help-with-review-request/>**. You may also contact VA at **1-800-827-1000** from 8:00 a.m. to 9:00 p.m. (ET), Monday through Friday.

Sincerely,

**Case Review and Intake & Mail Management
Branch**
Board of Veterans' Appeals

[cc: Representative (if any)]

EXHIBIT B



DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC

In Reply Refer To: 014/BR/#
VA File Number

Date: March 30, 2022

John A. Appellant
Street Address
City, State Zip

Dear Full Name:

The Board of Veterans' Appeals (Board) received your DATE request to recalculate the timeliness of your DATE Board Appeal request (VA Form 10182). Upon review of your record and for the reasons outlined below, the Board is unable to process your VA Form 10182.

[For a VA rating decision] You can only request a Board Appeal within one year from the date of the notice of the VA decision. The decision was issued on DATE, and the Board received your VA Form 10182 on DATE. Accordingly, the Board did not receive your VA Form 10182 within the time allowed by law.

[For a SOC or SSOC opt-in] For the issues identified in your DATE Board Appeal request (VA Form 10182), you previously received a DATE Statement of the Case (SOC)/Supplemental Statement of the Case (SSOC). Because this SOC/SSOC was issued on or after February 19, 2019, you had the ability to opt-in to the modernized review system:

- within 60 days of the date on the SOC/SSOC letter; or
- within one year of the date of the notice of the VA decision you are appealing, whichever is later.

The VA decision letter was issued on DATE and the SOC/SSOC was issued on DATE. The Board received your VA Form 10182 on DATE. Accordingly, the Board did not receive your VA Form 10182 within the time allowed by law.

[For a contested claim] You can only request a Board Appeal within 60 days from the date on the VA decision letter as your case involves a simultaneously contested claim. The decision letter was issued on DATE, and the Board received your VA Form 10182 on DATE. Accordingly, the Board did not receive your VA Form 10182 within the time allowed by law.

2.

VETERAN, John A. VA File number

What if I need an extension?

If you need more time to file an appeal to the Board in the modernized system, the Board may extend the time to submit a VA Form 10182 when good cause has been demonstrated.

If you believe that there is good cause to grant a time extension to submit your VA Form 10182 you may request a time extension from the Board. To do so, you must submit your extension request in writing to the Board with an explanation as to why you believe there is good cause. The written extension request must be submitted to the Board by mail or fax as follows:

Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038
Fax: 1-844-678-8979

What if I have questions?

If you have questions or would like more information about requesting a Board Appeal, please contact your representative (if you have one). If you want more information about VA's appeals modernization process, to include all three review lane options, visit www.va.gov/decision-reviews/. You may also contact VA at **1-800-827-1000** from 8:00 a.m. to 9:00 p.m. (ET), Monday through Friday.

Sincerely,

**Case Review and Intake & Mail Management
Branch**
Board of Veterans' Appeals

cc: Representative (if any)