IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

THOMAS SMITH,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-4730
	)	
DENIS MCDONOUGH, Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

OPPOSITION TO MOTION TO STRIKE SECTION II OF THE PROPOSED SUBSTITUTE APPELLANT'S SEPTEMBER 14, 2022, RESPONSE TO COURT ORDER

Proposed Substitute Appellant respectfully responds to, and opposes, the motion to strike Section II of our response to the Court's September 7, 2022, Order.

I. The Documents Provided to the Court Were Responsive to the Court's September 7, 2022, Order.

The Supplemental Submission in response to the Court's Order provided the two documents that were requested by the Court. The Veterans Administration (VA) does not dispute that Exhibit 1 is responsive to the Court's Order. It is the District of Columbia's appointment of Ms. Karen Hicks as the Personal Representative of the estate or her father, veteran Thomas Smith. However, the VA's motion indicates that there is a dispute over the second document – a copy of the appointment of Ms. Hicks as the claimant's representative.

The second document, Form 21-22a executed by Ms. Hicks, was filed within one year of Mr. Smith's death on May 15, 2019. The document is stamp marked received by the VA's Regional Office in Roanoke, Virginia, on January 24, 2020. The VA argues that this document is not responsive to the Court's Order because the VA contends that Ms. Hicks instead should have filed Form 21P-534EZ to apply for accrued benefits.[1] The dispute over this document illustrates why it was appropriate to provide not only the requested document, but also an explanation of the relevance of that document. In that context, it is noteworthy that the VA never said anything to Ms. Hicks or her counsel in response to the filing of Form 21-22a. Nor did the VA ever dispute that this was the appropriate form to preserve the claim of her father ***until more than a year had passed*** since his death.[2] The flaw in the VA's argument was discussed in Section II of our Supplemental Submission, where we explained that the VA cannot, on one hand, argue that one-time Specially Adaptive Housing (SAH) reimbursement claims are not "accrued" benefits, but on the other, argue that Ms. Hicks instead should have filed a different form expressly applicable only to "accrued" benefits. The VA, moreover, never explained why it believed Ms. Hicks should have restarted the claim process by filing an "accrued" benefits claim with the Regional Office when the Regional Office had six times rejected the claim, the

[1] Appellee's Motion to Strike at 2 n.1.

[2] See Exhibit 11, attached to September 14, 2022, Supplemental Submission.

Board of Veterans' Appeals had twice rejected the claim, and the claim is now the subject of an appeal pending in this Court. Restarting the claim process before the Regional Office would have accomplished nothing other than delaying the time for resolving the ongoing dispute in this Court.

II. The Facts and Legal Analysis Presented in the Disputed Section II Are Important to Ensure That the Questions Presented by the Court in its August 22, 2022, Order and During the September 6, 2022, Oral Argument Have Been Fully and Fairly Addressed Before the Court Issues its Decision.

This case presents important and novel legal issues about the standards for substituting a party seeking to prosecute a claim for non-accrued benefits. All of the information presented in Section II of the Supplemental Submission is intended to provide a more complete record for resolving those issues. By seeking to strike that part of our filing, the VA would have the Court decide this case without the benefit of a more robust account of the relevant documents, facts, and law.

The first question addressed in Section II was whether the 2008 rating decision denying SAH benefits can be challenged because no appeal to the Board of Veterans' Appeals was taken within one year from the date of the decision. That question is an appropriate subject for additional briefing because it was not briefed before oral argument. It was first raised in the Court's August 22, 2022, Order. Because no part of the 2008 decision was part of the record on appeal, the Supplemental Submission attached a letter from the VA describing the decision. A full copy of the 2008

decision is attached as Attachment 2 to this Opposition. The Supplemental Submission also collected all of the subsequent decisions (which already were in the record on appeal) in one place to explain why Ms. Hicks cannot be barred from challenging the denial of SAH benefits. The 2008 Regional Office decision offers only a conclusion without any supporting rationale for denying the veteran's claim for SAH benefits. An appeal of that decision would have accomplished nothing because the veteran needed to present more evidence and legal analysis for the Regional Office to have a reasoned basis for a decision on the claim. That is why the veteran elected to follow the other course of action suggested in the decision by making several additional offers of proof to support his claim, as is evidenced by the subsequent decisions on February 1, 2011 (Exhibit 4), January 12, 2012 (Exhibit 5), March 10, 2012 (Exhibit 6), February 7, 2014 (Exhibit 7), and March 11, 2015 (Exhibit 8). Exhibits to the Supplemental Submission, listed in Attachment 1. These documents show how Mr. Smith's claim was evolving and eventually reached the point where a timely appeal was taken to the Board of Veterans' Appeals, and thereafter a timely appeal was taken to this Court. All the Regional Office decisions made after 2008 say nothing to indicate that the time for challenging the denial of SAH benefits had expired in 2009. Many of those decisions expressly state that the claim was considered "reopened." Indeed, if the claim could not have been appealed following the 2008 decision, and was not, in fact, "reopened," then it would have

made no sense for the Regional Office on five subsequent occasions to consider that claim in light of new evidence and new legal arguments.

The second topic addressed in the Supplemental Submission is whether the VA fulfilled its obligation to assist the veteran. The discussion of this topic is appropriate because this issue also was not briefed by either side prior to the oral argument, and it was first raised by the Court during oral argument. It is also directly relevant to the Court's September 7, 2022, Order. That Order specifically instructed counsel to file a copy of "*any* form requesting a determination of Ms. Hicks' eligibility as an accrued benefits claimant that was submitted to the VA after Mr. Smith's death." What happened after Form 21-22a was filed is directly relevant to the issue of whether the VA violated its duty to assist the veteran in the development of a claim for benefits.[3] First, the VA never, in the year after Mr. Smith's death, advised Ms. Hicks that the form she submitted was deficient in any way. Second, the only responses the VA gave to Mr. Smith in the year after his death were two notices declaring that his "accrued" benefits would be terminated. See Exhibits 9 and 10 referenced in Attachment 1. (Those documents also were submitted by the

[3] The Form 21-22a submitted by Ms. Hicks notified the VA that she sought to be treated as the substitute claimant. This is "any" form, and it is related to the Court's instruction because it is entitled "Appointment of Individual as Claimant's Representative." See Exhibit 2 to Supplemental Submission. Whether it is the form the VA believes should have been filed does not refute the fact that it was the form referenced by counsel for Ms. Hicks during oral argument, and it is a proper response to the Court's Order.

VA in response to the Court's September 7, 2022, Order.) Finally, Form 21-22a should be read in conjunction with the email exchange included as Exhibit 11 to the Supplemental Submission. The email exchange, which occurred more than one year after Mr. Smith had died, reveals that counsel for the VA took the position that Ms. Hicks needed to file an accrued benefits claim with the Regional Office to qualify as a substitute plaintiff – even though the VA took a contrary position in this Court, arguing that a claim for SAH benefits is not an "accrued" benefits claim.[4] Particularly troubling is the fact that counsel for the VA waited until *more than a year* from Mr. Smith's death to take the position that the claim was not timely because it was not filed *within a year* of Mr. Smith's death.[5] The form submitted on behalf of Ms. Hicks, together with the email exchange, thus establishes that insofar

[4] Appellee's Response to the Court's November 18, 2019, Order at 2-3; Appellee's Response to the Court's March 13, 2020, Order Regarding Appellant's Motion to Substitute at 3-4.

[5] Email exchange dated June 11, 2020, Exhibit 11 to Supplemental Submission; Appellee's Response to the Court's October 5, 2020, Order Regarding Appellant's Motion to Substitute at 2-5. The VA overlooks the fact that it was told Form 21-22a was submitted only if necessary to preserve a claim for SAH benefits. Email exchange dated June 11, 2020, Exhibit 11 to Supplemental Submission. Ms. Hicks never conceded that her claim needed to be refiled with the Regional Office and always maintained that the issue of substitution properly could be decided by this Court without a prior determination of her eligibility to serve as a substitute. The Court is aware of the relevant SAH statute and regulations, the appointment of Ms. Hicks as the Personal Representative of her father's estate, and the undisputed facts recited in her affidavit establishing her standing to prosecute her father's claim. The matter of her eligibility to serve as a substitute is ripe for a decision by this Court.

as there was a claim to be pursued at the Regional Office following the veteran's death, the VA did not discharge its obligation under 38 U.S.C. § 5103A to assist with the development of that claim.[6]

The third and fourth topics address a related question posed by this Court in its August 22, 2022, Order. There, the Court instructed the parties to discuss *Padgett*, *Suguitan*, *Pekular*, and related cases insofar as they apply to nunc pro tunc relief for a non-accrued claim. We respectfully submit that how these cases treat the "zone of no substitution" scenarios for "accrued benefits" and for "non-accrued benefits" is at the heart of this case. Given the complexity of the cases to be analyzed, we respectfully submit that the parties should be given the opportunity to present more discussion than was contained in the filings before the August 22, 2022, Order was issued, and more than what could have been discussed in the limited time available for argument, given all of the other questions that had to be discussed at that time. We would have no objection to affording the VA an opportunity to

[6] The obligation to assist the veteran develop his or her claim generally does not apply when the claim is pending before one of the appellate tribunals. 38 U.S.C. § 5103A. However, the obligation at issue here concerns the VA's failure at the Regional Office level to say or do anything in response to the filing of the substitution form at a time when its counsel knew Ms. Hicks was seeking to serve as the substitute for her father's claim. Given that no assistance was offered by the Regional Office or any counsel for the VA at any time after the veteran's death to explain the process to be followed to preserve a claim that Ms. Hicks clearly notified the VA she intended to prosecute, there should be no dispute that the obligation to assist the veteran was violated.

respond to our recent discussion of these cases. Indeed, we would want to hear from the VA why it believes the existing cases should be read to endorse the application of a "zone of no substitution" (i.e., the time between a Board of Veterans' Appeals decision and full briefing on the merits in this Court) for "non-accrued" benefit claims when Congress determined that it was unfair to retain that "zone" for "accrued" benefit claims. If it was clearly desirable and equitable to remove that zone for accrued benefit claims, then why should it not also be removed – whether as a matter of statutory or regulatory interpretation or by invoking the Court's equitable powers to grant nunc pro tunc relief – for non-accrued benefit claims? Why should it matter if a properly filed claim for non-accrued benefits was fully briefed, or not, before this Court for the substitute to proceed with the deceased veteran's claim? And why should claimants like Ms. Hicks be penalized for allegedly failing to follow a claim procedure for "accrued" claims when the VA has taken the position that she does not have such a claim?

The last issue addressed in Section II discusses the role equitable factors should play in the standard for substitution that is adopted by the Court. The Supplemental Submission points out that most of the relevant equities are described in the four affidavits that are part of the existing record. See documents cited in Attachment 1, Exhibits 12-15. An additional equitable factor is the VA's decision to wait for more than a year before arguing that Ms. Hicks' claim was untimely even

though it had notice that a substitution would be sought soon after Mr. Smith's death, and that a substitution Form 21-22a was filed *within* one year after his death. The VA objects to the inclusion of the email exchange attached as Exhibit 11 to the Supplemental Submission possibly because that exchange could be read to show how the VA was setting a trap for allowing Ms. Hicks' claim to expire before it could be challenged in this Court. In the email, the VA states that it checked, as a "courtesy," with the Regional Office to "confirm" whether an accrued benefits claim had been filed by Ms. Hicks. But that was not done until more than a year has passed since Mr. Smith's death, even though the VA was put on notice long before a year had passed since her father's death that Ms. Hicks intended to prosecute her father's claim for SAH benefits and was doing so in this Court. Consequently, the VA's tactical decision to wait until after it believed that the clock ran out on Ms. Hicks' claim before publicly announcing that position could be an important equitable factor for deciding whether substitution should be granted.

We respectfully submit that Section II of the Supplemental Submission was intended to provide a more complete record for answering important questions posed by the Court that either were not briefed or not fully addressed at oral argument. Accordingly, we request the Court to deny the motion to strike and instruct the VA to file a response explaining whether it disagrees with the positions taken in the Supplemental Submission.

Respectfully submitted,

Dated: October 5, 2022

/s/ Jeffrey N. Martin
Jeffrey N. Martin
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Counsel for Proposed Substitute Appellant

Attachment 1

List of Exhibits to September 14, 2022, Supplemental Submission

Ex. No.	Exhibit	Location
1	October 20, 2021, D.C. Superior Court Probate Division Abbreviated Probate Order appointing Karen Hicks personal representative of estate	Submitted on September 6, 2022
2	January 22, 2020, Form 21-22a notifying Department of Veterans Affairs that Karen Hicks appeared as the claimant	Submitted on September 6, 2022
3	June 23, 2008, rating decision	Not part of record
4	February 1, 2011, Regional Office letter	Record pages 1925-1932, 1941-1972
5	January 12, 2012, Regional Office letter	Record pages 1734-1743
6	March 10, 2012, rating decision	Record pages 1269-1290
7	February 7, 2014, Statement of the Case	Record pages 1053-1076, 1077-1101
8	March 11, 2015, Supplemental Statement of the Case	Record pages 379-383, 461-463, 535-539, 551-556
9	June 25, 2019, VA letter addressed to Estate of Thomas Smith advising that payment of benefits would be suspended effective July 1, 2019	Exhibit 1 to 06/11/2020 Response / Opposition by Appellee to Court's March 13, 2020, Order
10	July 2, 2019, VA letter addressed to Estate of Thomas Smith stating that benefit payments were discontinued as of May 1, 2019	Exhibit 2 to 06/11/2020 Response / Opposition by Appellee to Court's March 13, 2020, Order
11	June 11, 2020, email exchange between counsel for Appellant and counsel for Appellee	Not in record
12	February 23, 2010, Affidavit of Thomas Smith, Sr.	Supp. Record pages 661-662, 736-737
13	April 9, 2015, Affidavit of Thomas Smith, Sr. in Support of Appeal	Supp. Record pages 664-445, 739-740
14	June 13, 2017, Affidavit of Thomas Smith, Sr. in Support of Appeal	Supp Record pages 684-687, 759-762
15	January 22, 2020, Affidavit of Karen Hicks	Attachment to 01/22/2020 Motion of Appellant to Substitute Party

Attachment 2
June 23, 2008, Rating Decision
(Exhibit 3 to the September 14, 2022, Supplemental Submission)

DEPARTMENT OF VETERANS AFFAIRS
VA Regional Office
1722 I St., N.W.
Washington DC 20421

JUN 2 3 2008

In Reply Refer To: 314/211post
CSS 577 50 1514
SMITH, Thomas

THOMAS SMITH
5432 CALL PLACE SE
WASHINGTON DC 20019

Dear Mr. Smith:

We made a decision on your claim for an increase in your service connected compensation received on May 8, 2007.

This letter tells you what we decided. It includes a copy of our rating decision that gives the evidence used and reasons for our decision. We have also included information about what to do if you disagree with our decision, and who to contact if you have questions or need assistance.

What Did We Decide?

We determined that the following service connected condition(s) hasn't/haven't changed:

Medical Description	Percent (%) Assigned
epididymitis left scrotum	10%

The claim for service connection for cervical condition remains denied because the evidence submitted is not new and material.

Entitlement to special home adaptation is not established.

Entitlement to specially adapted housing is not established.

Your compensation payment will continue unchanged.

We have enclosed a copy of your Rating Decision for your review. It provides a detailed explanation of our decision, the evidence considered, and the reasons for our decision. Your Rating Decision and this letter constitute our decision based on your claim received on May 8, 2007. It represents all claims we understood to be specifically made, implied, or inferred in that claim.

What Is New and Material Evidence?

New evidence, including written or oral statements, is evidence we haven't considered before. Information that supports the same point as earlier evidence is not considered new.

Material means the evidence applies to the specific issue you are claiming.

What You Should Do If You Disagree With Our Decision.

If you do not agree with our decision, you should write and tell us why. You have *one year from the date of this letter to appeal the decision.* The enclosed *VA Form 4107, "Your Rights to Appeal Our Decision,"* explains your right to appeal.

Do You Have Questions Or Need Assistance?

If you have any questions, you may contact us by telephone, e-mail, or letter.

If you	Here is what to do.
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.
Use the Internet	Send electronic inquiries through the Internet at https://iris.va.gov.
Write	Put your full name and VA file number on the letter. Please send all correspondence to the address at the top of this letter.

In all cases, be sure to refer to your VA file number 577 50 1514.

If you are looking for general information about benefits and eligibility, you should visit our website at https://www.va.gov, or search the Frequently Asked Questions (FAQs) at https://iris.va.gov.

CSS 577 50 1514
Smith, Thomas

We sent a copy of this letter to your representative, Disabled American Veterans, whom you can also contact if you have questions or need assistance.

Sincerely yours,

J. Ogbonna

J. Ogbonna
Veterans Service Center Manager

Contact us at: https://iris.va.gov

Enclosure(s): Rating Decision Dated June 23, 2008
VA Form 4107

cc: DAV

314/12post/176/smit514.doc/183/jnw

DEPARTMENT OF VETERANS AFFAIRS
Washington Regional Office
1722 I Street NW
Washington DC 20421-1111

Thomas Smith

VA File Number
577 50 1514

Represented by:
DISABLED AMERICAN VETERANS

Rating Decision
June 23, 2008

INTRODUCTION

The records reflect that you are a veteran of the Vietnam Era and Peacetime. You served in the Air Force from October 9, 1957 to July 31, 1978. You filed a claim for increased evaluation that was received on May 8, 2007. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1 . Evaluation of epididymitis left scrotum, which is currently 10 percent disabling, is continued.

2 . The claim for service connection for cervical condition remains denied because the evidence submitted is not new and material.

3 . Entitlement to special home adaptation is not established

4 . Entitlement to specially adapted housing is not established.

EVIDENCE

- VA Form 21-4138, Statement in Support of Claim received May 8, 2007
- Letter from Dr. Albert dated July 23, 2003
- Information on Spa Therapy
- Note from Dr. Albert regarding Spa Therapy dated May 23, 2003
- Treatment reports, Washington VA Medical Center, from February 2007 to May 2008. Reports prior to February 2007 are of record.
- VA Form 119, Report of Contact, dated June 25, 2007
- Our letters in which we notified you of our duty to assist you and requested evidence to support your claim dated June 25, 2007 and August 9, 2007
- VA examination, Washington VA Medical Center, dated July 11, 2007
- Letter from Dr. Albert received July 30, 2007

REASONS FOR DECISION

1. Evaluation of epididymitis left scrotum currently evaluated as 10 percent disabling.

The evaluation of epididymitis left scrotum is continued as 10 percent disabling. {38 CFR 3.321(a); 38 CFR 3.321(b)(1)}

At your VA examination you stated you continue to have frequent left inguinal and scrotal pain. The pain is not testicular, it is inguinal with radiation to the scrotom. The examination revealed normal testes with the head of the epididymitis somewhat tender, but otherwise unremarkable. The examiner noted a left inguinal hernia. He stated your recurring left inguinal and scrotal pain appears to be due to the left inguinal hernia and you were referred to your primary care physician.

An evaluation of 10 percent is assigned if there is a showing of long-term drug therapy, one or two hospitalizations per year, or intermittent intensive management. A higher evaluation of 30 percent is not warranted unless there is poor renal function or evidence demonstrates recurrent symptomatic infection requiring drainage or hospitalization greater than two times per year, or continuous intensive management.

2. Service connection for cervical condition.

A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decision makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor

redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

Although the evidence from Washington VA Medical Center submitted in connection with the current claim has not been previously considered, it is not material evidence because it does not relate to an unestablished fact necessary to substantiate the claim and does not raise a reasonable possibility of substantiating the claim.

3. Entitlement to a special home adaptation grant.

A certificate of eligibility for assistance in acquiring necessary special home adaptations may be issued when the veteran has a service-connected condition which is either due to blindness in both eyes with 5/200 visual acuity or less, or includes the anatomical loss or loss of use of both hands. Entitlement to special home adaptation grant is not established because neither of the required conditions is shown. {38 CFR 3.809(a)}

Dr. Albert stated in a letter received July 30, 2007 that you would benefit from a specialized whirlpool spa. A Washington VA Medical Center Physical Therapy record on September 18, 2007 noted your degenerative joint disease of the cervical and lumbosacral spine. You have been in rehab and aquatic therapy in the past. Use of the spa was recommended.

4. Entitlement to specially adapted housing.

A certificate of eligibility for assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a) may be extended when the veteran is permanently disabled from one of the following conditions which is the result of injury or disease incurred in or aggravated during active military service, or for which the veteran is entitled to receive compensation under 38 U.S.C. 1151: the loss, or loss of use, of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair; blindness in both eyes, having only light perception, plus the anatomical loss or loss of use of one lower extremity; the loss or loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair; or the loss or loss of use of one lower extremity together with the loss of use of one upper extremity which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair. Entitlement to special housing assistance is not established because a qualifying disability is not found. {38 CFR 3.809}

Dr. Albert stated in a letter received July 30, 2007 that you would benefit from a specialized whirlpool spa. A Washington VA Medical Center Physical Therapy record on September 18, 2007 noted your degenerative joint disease of the cervical and lumbosacral spine. You have been in rehab and aquatic therapy in the past. Use of the spa was recommended.

Entitlement to special housing assistance is denied because your condition does not meet the criteria listed above.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

After careful and compassionate consideration, a decision has been reached on your claim. If we were not able to grant some or all of the VA benefits you asked for, this form will explain what you can do if you disagree with our decision. If you do not agree with our decision, you may:

- appeal to the Board of Veterans' Appeals (the Board) by telling us you disagree with our decision
- give us evidence we do not already have that may lead us to change our decision

This form will tell you how to appeal to the Board and how to send us more evidence. You can do either one or both of these things.

NOTE: Please direct all new evidence to the address at the top of our letter. Do not send evidence directly to the Board until you receive written notice from the Board that they received your appeal.

WHAT IS AN APPEAL TO THE BOARD OF VETERANS' APPEALS?

An appeal is your formal request that the Board review the evidence in your VA file and review the law that applies to your appeal. The Board can either agree with our decision or change it. The Board can also send your file back to us for more processing before the Board makes its decision.

HOW CAN I APPEAL THE DECISION?

How do I start my appeal? To begin your appeal, write us a letter telling us you disagree with our decision. This letter is called your "Notice of Disagreement." If we denied more than one claim for a benefit (for example, if you claimed compensation for three disabilities and we denied two of them), please tell us in your letter which claims you are appealing. ***Send your Notice of Disagreement to the address at the top of our letter.***

What happens after VA receives my Notice of Disagreement? We will either grant your claim or send you a Statement of the Case. A Statement of the Case describes the facts, laws, regulations, and reasons that we used to make our decision. We will also send you a VA Form 9, "Appeal to Board of Veterans' Appeals," with the Statement of the Case. You must complete this VA Form 9 and return it to us if you want to continue your appeal.

How long do I have to start my appeal? You have one year to appeal our decision. ***Your*** letter saying that you disagree with our decision must be postmarked (or received by us) within one year from the date of ***our*** letter denying you the benefit. In most cases, you cannot appeal a decision after this one-year period has ended.

What happens if I do not start my appeal on time? If you do not start your appeal on time, our decision will become final. Once our decision is final, you cannot get the VA benefit we denied unless you either:

- show that we were clearly wrong to deny the benefit ***or***
- send us new evidence that relates to the reason we denied your claim

Can I get a hearing with the Board? Yes. If you decide to appeal, the Board will give you a hearing if you want one. The VA Form 9 we will send you with the Statement of the Case has complete information about the kinds of hearings the Board offers and convenient check boxes for requesting a Board hearing. The Board does not require you to have a hearing. It is your choice.

Where can I find out more about appealing to the Board?

- You can find a "plain language" booklet, called "How Do I Appeal," on the Internet at: **(http://www.va.gov/vbs/bva/pamphlet.htm.)** The booklet also may be requested by writing to Hearings and Transcription Unit (014HRG), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420.
- You can find the formal rules for appealing to the Board in the Board's Rules of Practice at title 38, Code of Federal Regulations, Part 20. You can find the complete Code of Federal Regulations on the Internet at: **(http://www.access.gpo.gov/nara/cfr.)** A printed copy of the Code of Federal Regulations may be available at your local law library.

(Please continue reading on page 2)

Can I get someone to help me with my appeal to the Board? Yes. You can have a veterans' service organization representative, an attorney-at-law, or an "agent" help you with your appeal. But you are not required to have someone represent you. It is your choice.

- Representatives who work for accredited veterans' service organizations know how to prepare and present claims and will represent you. You can find a listing of these organizations on the Internet at: **http://www.va.gov/vso.**

- A private attorney or an "agent" can also represent you. If applicable, your local bar association may be able to refer you to an attorney with experience in veterans' law. VA only recognizes attorneys who are licensed to practice in the United States or in one of its territories or possessions. An agent is a person who is not a lawyer, but who VA recognizes as being knowledgeable about veterans' law. Contact us if you would like to know if there is a VA accredited agent in your area.

Do I have to pay someone to help me with my appeal to the Board? It depends on who helps you. The following explains the differences.

- Veterans' service organizations will represent you for free.
- Attorneys or agents can charge you for helping you under some circumstances. Paying their fees for helping you with your appeal to the Board is your responsibility. If you do hire an attorney or agent to represent you, one of you must send a copy of any fee agreement to the following address within 30 days from the date the agreement is signed: Office of the Chief Counsel for Policy (01C3), Board of Veterans' Appeals, 810 Vermont Avenue, NW, Washington, DC 20420; facsimile (202) 565-5643.

CAN I GIVE VA ADDITIONAL EVIDENCE?

Yes. You can send us more evidence to support a claim whether or not you appeal to the Board. **If you want to appeal, though, do not forget the one-year time limit!**

If you have more evidence to support a claim, it is in your best interest to give us that evidence as soon as you can. We will consider your evidence and let you know whether it changes our decision. Please keep in mind that we can only consider new evidence that: (1) we have not already seen and (2) relates to your claim. You may give us this evidence either in writing or at a personal hearing.

In writing. To support your claim, you may send documents and written statements to us at the address on the top of our letter. Tell us in a letter how these documents and statements should change our earlier decision.

At a personal hearing. You may request a local hearing with us at any time. This hearing is separate from any Board hearing you might ask for later if you appeal. We do not require you to have one. It is your choice. At this hearing, you may speak, bring witnesses to speak on your behalf, and hand us written evidence. If you want a hearing, send us a letter asking for a hearing. Use the address at the top of our letter. We will then:

- arrange a time and place for the hearing
- provide a room for the hearing
- assign someone to hear your evidence
- make a written record of the hearing

WHAT HAPPENS AFTER I GIVE VA EVIDENCE?

We will review the record of the hearing and other new evidence, together with the evidence we already have. We will then decide if we can grant your claim. If we cannot grant your claim and you appeal, we will send the new evidence and the record of any local hearing to the Board.

CERTIFICATE OF SERVICE

I certify that on October 5, 2022, a true and correct copy of Appellant's Opposition to Motion to Strike Section II of the Proposed Substitute Appellant's September 14, 2022, Response to Court Order was filed through the Court's ECF system, and thereby served on all counsel of record.

/s/ Jeffrey N. Martin
Jeffrey N. Martin

Counsel for Proposed Substitute Appellant