

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

JUSTIN D. GRAY,)	
)	
Petitioner,)	
)	
v.)	Vet. App. No. 22-3933
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Respondent.)	

DECLARATION OF CHRISTOPHER A. SANTORO

I, Christopher A. Santoro, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury the following:

1. I am Deputy Vice Chairman of the Board of Veterans' Appeals (Board), in the Department of Veterans Affairs (VA) and, as such, I am among those responsible for the control and supervision of the administrative appeals operations at the Board. The information contained in this declaration is based on a review of the information available in the Veterans Appeals Control and Locator System (VACOLS) (the Board's computerized tracking system) and Petitioner's claims file, accessible to VA staff through the Veterans Benefits Management System (VBMS).
2. This declaration is provided in response to an October 18, 2022, Order of the United States Court of Appeals for Veterans Claims (Court) directing the Secretary to file a response to the Petition.
3. On December 24, 2018, Petitioner filed a VA Form 9, Appeal to Board of Veterans' Appeals (hereinafter, "VA Form 9"), perfecting his appeal of a November 21, 2018, statement of the case (SOC) that continued the denial of entitlement to service connection for diabetes mellitus, type II. Petitioner indicated on his VA Form 9 that he did not want a Board hearing. *See Exhibits A and B.*
4. On May 12, 2020, the Agency of Original Jurisdiction (AOJ) certified Petitioner's appeal to the Board. *See Exhibit C.*

5. A May 15, 2020, AOJ letter notified Petitioner his appeal was certified to the Board. *See* Exhibit D.
6. A May 24, 2020, Board letter notified Petitioner that his appeal was placed on the Board's docket. *See* Exhibit E.
7. A February 8, 2022, letter from Petitioner's representative requests an update as to when Petitioner's appeal will be adjudicated. *See* Exhibit F.
8. A February 17, 2022, VA Form 119, Report of Contact (hereinafter, "Report of Contact"), documents a telephone conversation between Petitioner's representative and Board staff where Petitioner's representative was notified that Petitioner's appeal is awaiting review by a Veterans Law Judge (VLJ). *See* Exhibit G.
9. A June 27, 2022, Report of Contact documents a telephone conversation between Petitioner's representative and Board staff where Petitioner's representative was notified that Petitioner's appeal is awaiting review by a VLJ. *See* Exhibit H.
10. A printout of the VACOLS records reflects that Petitioner's active appeal has a February 6, 2019, docket date with an assigned docket number of 19-03 277, and is in Location 81, meaning that Petitioner's appeal is awaiting assignment to a VLJ for adjudication. *See* Exhibit I.
11. To date, the Board has not received a motion from Petitioner requesting that his appeal be advanced on the docket (AOD).
12. In September 2022, the "Appeals Metrics" page on the Board's website noted a "Current Legacy Docket Date" of "Up to Sept 2019." *See* Exhibit J.
13. The September 2019 docket date is the median docket date for non-hearing legacy appeals awaiting distribution to a VLJ for adjudication. As such, approximately one half of non-hearing legacy appeals awaiting distribution have a docket date in or prior to September 2019, and approximately one half of non-hearing legacy appeals awaiting distribution have a docket date in or after September 2019.
14. The "Up to Sept 2019" docket date does not mean that all legacy appeals with docket dates through September 2019 are eligible for distribution based on docket order.
15. Based on the Board's Annual Report for Fiscal Year (FY) 2021, there were nearly 60,000 non-hearing legacy appeals pending at the Board as of

September 30, 2021.¹ In terms of the median docket date, this means that of the non-hearing legacy appeals pending at the end of Fiscal Year 2021, nearly 30,000 appeals had docket dates in or prior to September 2019 and nearly 30,000 appeals had docket dates in or after September 2019. *See* Exhibit K.

16. The Board’s “Appeals Metrics” page was recently retitled “Decision wait times,” and was updated to provide Veterans and appellants with more clarity and transparency as to the factors that impact appeals processing time at the Board. *See* Exhibit L.
17. Although legacy appeals are generally decided in the order in which they are received, there are exceptions. For example, cases that have been advanced on the docket (AOD) or remanded back to the Board by the Court receive expedited status and are not decided in docket order. 38 U.S.C. § 7107; 38 C.F.R. § 20.902.
18. Legacy appeals returned to the Board either from the Court or the AOJ maintain their original docket numbers. *See* 38 C.F.R. § 20.902(a)(1), (d).
19. The Board receives numerous appeals back from the AOJ on a daily basis. For example, in the third quarter for Fiscal Year 2022 alone, the Board received 9,502 legacy remands. For reference, the Board decided 18,466 legacy appeals during that same period. *See* Exhibit M.
20. In terms of Petitioner’s appeal, if a legacy appeal with a VA Form 9 receipt date earlier than December 24, 2018, is returned to the Board from the AOJ or the Court, that case would be placed ahead of Petitioner’s appeal in docket order. Similarly, if a legacy appeal with a VA Form 9 receipt date after Petitioner’s is granted AOD status, that will cause non-AOD cases, like Petitioner’s, to move down in docket order. This illustrates the non-static nature of docket date and docket order, as a legacy appeal’s place in line is constantly in flux due to factors such as new grants of AOD status and legacy appeals being returned to the Board.
21. The Petitioner has submitted a list of 1,043 cases that were dispatched by the Board with more recent docket dates than the Petitioner’s and that were not granted AOD status or remanded by the Court. Of these appeals, 292 were distributed by the Board’s case distribution system and 751 were distributed manually. Of the 292 distributed by the case distribution system, 241 were hearing cases. Of the 751 distributed manually, 161 were

¹ This number was calculated by subtracting 32,574 legacy appeals pending at the end of FY 2021 (Figure 8) from 92,461, the total number of legacy appeals pending before the Board at the end of FY 2021 (Figure 3).

- withdrawal dismissals, 181 were death dismissals, 2 were vacatur, 79 were Specialty Case Team (SCT) appeals (appeals involving complex or rarely seen issues worked by subject matter experts) and 164 were One-Touch appeals (appeals where the VLJ determines the case can be decided immediately following the hearing without waiting for the transcript).
22. Prior to October 2022, the Board's case distribution system distributed legacy appeals in the following order: (1) AOD; (2) post-Court remands; (3) appeals where a hearing had been held; and (4) all other appeals. This means that legacy cases where a hearing had been held were being distributed before some non-hearing cases with an earlier docket date. This was modified in September and October 2022, explained in further detail below.
 23. Prior to October 2022, amended docket number appeals (where the docket number included an "A" at the end) were showing up in the system as not having a docket number, and were therefore distributed ahead of non-hearing cases, including 18 of the 51 non-hearing legacy appeals distributed by the case distribution system. This was modified in September and October 2022, explained in further detail below.
 24. In September and October 2022, changes were implemented to simplify the case distribution system. Currently, cases that have been granted AOD status or returned from the Court are prioritized and distributed first. After that, appeals will be distributed based on the order in which the VA Form 9 (in legacy appeals) or VA Form 10182 (in Appeals Modernization Act appeals) was received.
 25. The case distribution system distributed an additional 197 appeals, or approximately 0.3% of the current legacy inventory, ahead of Petitioner's for reasons not immediately apparent.
 26. Some SCT cases had been distributed manually out of docket order, but that is no longer the case. Previously, legacy SCT appeals were marked with an issue-specific code and distributed manually based on the median docket date for non-hearing legacy appeals. Legacy SCT appeals are now distributed by the case distribution system based on when the VA Form 9 was received, similar to other legacy appeals, and will be moved to the SCT only after distribution.
 27. Some One-Touch appeals were distributed manually out of docket order, but that is no longer the case. The One-Touch Program Standard Operating Procedure (Exhibit N) provided that that the Board should "Ensure that the case is within the Board's working docket range or advanced on the

Board's docket pursuant to law." However, the Board became aware that a limited number of cases were distributed out of docket order. Effective October 31, 2022, the One Touch Program ended and the SOP was rescinded.

28. The Board processes dismissals as soon as they are identified. These are not decisions on the merits, but rather are a jurisdictional determination. Timely processing of dismissals is necessary for substitution requests to be processed and, in AMA, to allow timely processing of lane switches initiated by Veterans and appellants.
29. It is acknowledged that the docket date of February 6, 2019, for the Petitioner's appeal is not consistent with the VA Form 9 receipt date of December 24, 2018. Generally, the legacy docket date is based on the date that the VA Form 9 is input into VACOLS, as long as it is input into VACOLS within 60 days of receipt of the VA Form 9. This recognizes that it was not always practicable, or even possible, to input the VA Form 9 into VACOLS the same day it was received. If the VA Form 9 was input into VACOLS more than 60 days after receipt, the docket date and number were amended to be based on VA Form 9 receipt date so as not to significantly impact the order in which the appeal would be distributed by the Board (indicated by the "A" designation at the end of some legacy docket numbers). However, as the Board now distributes legacy appeals based on VA Form 9 receipt date, and not docket number (which was based on when the VA Form 9 was input into VACOLS), the difference between the VA Form 9 receipt date and docket date/docket number in the instant matter will not impact when it is distributed for consideration by a VLJ. Distribution in the legacy system based on the VA Form 9 date ensures that the Board is deciding appeals in the order in which they are received.
30. Attached is Petitioner's December 24, 2018, VA Form 9 and accompanying brief, with enclosures omitted (Exhibit A); the November 21, 2018, SOC (Exhibit B); the AOJ's May 12, 2020, VA Form 8, Certification of Appeal (Exhibit C); the AOJ's May 15, 2020, letter (Exhibit D); the Board's May 24, 2020, letter (Exhibit E); Petitioner's representative's February 8, 2022, letter (Exhibit F); the February 17, 2022, Report of Contact (Exhibit G); the June 27, 2022, Report of Contact (Exhibit H); a printout of the VACOLS screens for Petitioner's active appeal, with a red circle around the current location in the top image, and the docket number and docket date highlighted in the bottom image (Exhibit I); a printout of the Board's "Appeal Metrics" page, last accessed on September 20, 2022, with a red box around the "Current Legacy Docket Date" (Exhibit J); a copy of the Board's Annual Report for FY 2021 (Exhibit K); a printout of the

Board's "Decision wait times" page, last accessed on October 25, 2022 (Exhibit L); a copy of the Chairman's Quarterly Report for the third quarter of FY 2022 (Exhibit M); and the One-Touch Program Standard Operating Procedure (Exhibit N).

I certify under the penalty of perjury that the foregoing is true and correct.

Executed on the 31st day of October 2022.

A handwritten signature in black ink, appearing to read "Christopher A. Santoro", with a stylized flourish at the end.

CHRISTOPHER A. SANTORO

EXHIBIT A

CHISHOLM CHISHOLM & KILPATRICK LTD

ATTORNEYS AT LAW



**PLEASE UPLOAD AS ONE DOCUMENT AND LABEL AS VA 9
APPEAL**

Fax Cover Sheet

DATE: December 24, 2018
FROM: Chisholm Chisholm & Kilpatrick LTD
TO: Evidence Intake Center
FAX: 844-822-5246
RE: Justin D. Gray
[REDACTED]

Number of pages (including cover sheet): 188

MESSAGE: Please see the attached document(s).

CONFIDENTIALITY STATEMENT

This facsimile transmission and the accompanying documents contain legally privileged confidential information. The information is intended only for the use of the recipient named above. If you are not an intended recipient, you are hereby notified that any disclosure, copying, distribution or exploitation of or the taking of any action in reliance on, the contents of this facsimile is strictly prohibited. If you have received this facsimile in error, please notify us immediately by telephone to arrange for return of the original documents to us at our expense.

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CALL (401) 331-6300.

CHISHOLM CHISHOLM & KILPATRICK LTD

ATTORNEYS AT LAW



December 24, 2018

Department of Veterans Affairs
Evidence Intake Center
P.O. Box 4444
Janesville, WI 53547

RE: Justin D. Gray
[REDACTED]

To Whom It May Concern:

The Veteran disagrees with the Statement of the Case ("SOC") dated November 21, 2018 and is filing this **Substantive Appeal**. The Veteran is continuing to seek entitlement to service connection for diabetes mellitus type II. The Veteran does not want a hearing in this matter.

The claim for service connection for diabetes is based on exposure to toxins while serving at Fort McClellan, Alabama, including herbicide agents. Mr. Gray was stationed at Fort McClellan during the year 1989 for basic training. Please find enclosed the following documents:

1. Report on herbicide use at Fort McClellan by Hannah Mathers, PhD ("Mathers Report")
2. Statement from Justin D. Gray, detailing his service at Fort McClellan.
3. Combined Environmental Exposure Report for Fort McClellan, Alabama.
4. Army Supply Bulletin (SB 3-40).
5. Federal Specification for 2,4,5-T & 1960 amendment.
6. 1966 Cage Experiments in Snow and Choccolocco Creeks
7. 1970 Report on PCB content of Choccolocco Creek Fish
8. LV-9 herbicide Label (2,4,5-T)
9. Hoelon herbicide label (2,4-D)
10. Trimec Herbicide label (2,4-D)
11. EBS, Vol. I, p5-37, 5-101
12. EBS, Vol. II, pB-52, B-69, B-71, E-3, E-4-6, E-10
13. Alvin Young 1980 report
14. 24D.245T USDA Reg No
15. 911 Part15_Appendix_H_VOL2 FM Jan 1977 interview

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16. Army Chemical Corps Study 2016
17. Herbicide Blue at Davis-Monthan
18. Young to Mrs. Cleary
19. VAs DOD monographs

FACTUAL & PROCEDURAL HISTORY

The Veteran filed an intent to file on January 20, 2017 and then a claim for diabetes mellitus due to exposure, on February 16, 2017. On June 22, 2017, VA issued a rating decision that denied service connection for diabetes.

As stated in the decision, VA denied the claim because the condition was not shown to be related to Mr. Gray's military service. The Veteran filed a timely appeal on August 7, 2017. The SOC dated November 21, 2018 was issued, and this Substantive Appeal follows.

The Veteran served on Fort McClellan in 1989 for basic training, as well as for advanced individual training. *See* affidavit. Mr. Gray noted to have spent a lot of his time doing physical training in and around the base, as well as organized running activities at night. The Veteran explained that this training required him to make a lot of contact with the ground by crawling and rolling. He also participated in land navigation courses which required that he spend time in the surrounding woods for a few days at a time. During field exercises, the Veteran was also out in open fields on the base for extended periods. Further, the Veteran stated that during his weapons training he frequently made close contact with the ground, as well. Thus, the Veteran asserted exposure to herbicide agents, polychlorinated biphenyls ("PCBs") and ionizing radiation.

Do NOT interpret this as a claim based on exposure to "Agent Orange" or to VA's fictitious term of "tactical herbicide." Instead, this claim is based, in part, on exposure to "herbicide agents" as expressly defined in VA's regulation explained below. VA's regulations, including their controlling statute, never use the terms "Agent Orange" or "tactical herbicides."

ARGUMENT

The evidence establishes the Veteran's exposure to the herbicide agents in question.

Please find the attached report titled "Likelihood of exposure to herbicide agents used in the Vietnam War by Veterans who served on Fort McClellan (FTMC) in Anniston, AL." By Dr. Hannah Mathers. Dr. Mathers is an environmental scientist and former Tenured, Full Professor in the Department of Horticulture and Crop Science at Ohio State University. In preparing her Report, Dr. Mathers reviewed, *inter alia*, the Fort McClellan Environmental Baseline Survey in its

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entirety. She thus had access to all the currently available, contemporaneous records on the herbicides used on FTMC, including the quantities and years of use.

In concluding her expert opinion, Dr. Mathers unequivocally states: “It is my professional opinion as a weed scientist, that it is more likely than not; in fact, it is to a reasonable degree of certainty, that those serving and/or living at FTMC between 1974-1976 were exposed to the herbicide agents discussed herein—the same ones used in Vietnam.” Mathers Report, pg. 12. Moreover, she goes on to state those exposed at FTMC “more likely received a greater exposure to the contaminants” (such as TCDD) than even those with Vietnam service, especially “anyone undergoing any kind of military training conducted outdoors.” *Id*

Dr. Mathers provides an excellent rationale that is fully supported by the record. For example, she states that “when comparing the total amount of active ingredients used of the herbicides in question, to the land mass in question, there was approximately 13.23 times more herbicides used on FTMC than in Vietnam.” *Id* She explains how the herbicides were used at approximately “13 times their labelled rates” and that such use “certainly does not follow manufacturers’ instructions.” The expert opinion is amplified further in that the use of such a large quantity of herbicides were used in only a three-year period, and in that period, enough herbicide agents were used to cover each mile on the base more than 1,900 times.

This evidence should irrefutably establish the Veteran’s exposure to herbicide agents. Considering the large herbicide quantities used, even those serving on the base years after 1977 would have been exposed, especially if undergoing outdoor military training as discussed in the Report, and especially since the record shows such herbicide use continued throughout the 1980s, albeit at unknown usage rates.

Benefit of the doubt

VA need only find exposure “as likely as not” occurred. Requiring proof beyond equipoise violates the law. 38 U.S.C. § 1154(a). The original Dioxin Exposures Act expressly provides the Veteran with the benefit of the doubt regarding exposure. 38 U.S.C. § 1154(a). Section 1154(a) requires that in *each case* where a veteran is seeking service connection for *any disability*, due consideration shall be given to the places, types, and circumstances of the veteran’s service. Section 1154(a) expressly includes consideration of claims in accordance with Veterans’ Dioxin and Radiation Exposures Compensation Standards Act of 1984, Pub. L. 98-542, § 5, 98 Stat. 2725 (1984). Section 5 states that VA is to “ensure that . . . the policy of the United States described in section 2(13) is carried out.” *Id* Section 2(13) states:

It has always been the policy of the Veterans’ Administration and is the policy of the

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United States, with respect to individual claims for service connection of diseases and disabilities, that when, after consideration of all evidence and material of record, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of a claim, the benefit of the doubt in resolving each such issue shall be given to the claimant.

Id. at § 2; *see also* 38 U.S.C. § 5107; 38 C.F.R. § 3.102. Public Law 98-542 further states:

[A] requirement that a claimant filing a claim based upon a veteran's exposure to a herbicide containing dioxin . . . *may not be required to produce evidence substantiating the veteran's exposure during active military, naval, or air service if the information in the veteran's service records and other records of the Department of Defense is not inconsistent with the claim that the veteran was present where and when the claimed exposure occurred.*

Pub. L. 98-542, § 5(b)(3)(B) (emphases added). VA cannot require the Veteran to satisfy a burden of proof beyond the benefit of the doubt burden. Rather, he or she is only required to produce evidence that is "*not inconsistent with the claim that the veteran was present where and when the claimed exposure occurred.*" *Id.*

For the following reasons, VA should afford the benefit of the doubt and concede exposure to herbicide agents during the Veteran's service at Fort McClellan and then award the benefits sought on appeal.

Fort McClellan History

Fort McClellan ("FTMC"), located in Calhoun County, Alabama, served as an active duty Army installation from 1917 to 1998. The base was comprised of three main parts: Main Post, which is located to the north-west of the city of Anniston and occupied 19,000 acres; and Pelham Range, which is located a few miles away on the east side of Anniston and occupied 22,000 acres used for training; and the Choccolocco Corridor, which occupies 4,500 acres and connects the main post to the Talladega National Forest.

The firing ranges within the Main Post were located north, east, and south of the developed area towards the Choccolocco Mountains. Pelham Range was a training ground used for a wide range of activities, from small arms training to tank artillery training, and for chemical, biological and radiological warfare and decontamination training.

Fort McClellan had numerous missions. Three of FTMC's primary missions were to house and

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support the U.S. Army's Military Police and Chemical School's training center and the training brigade. The Army Chemical School operated on FTMC from 1951 until 1999, except for a brief period in the 1980s when it was relocated to Aberdeen, Maryland. The Women's Army Corps ("WAC") School was founded at FTMC in September 1952, and FTMC became the permanent home of the U.S. Women's Army Corps Center and then remained its home until the Corps was retired in 1977.

The U.S. Army Combat Developments Command Chemical Biological-Radiological Agency moved to FTMC from 1962 to 1973. To meet requirements for the Vietnam War, an Advanced Individual Training Infantry Brigade was activated in 1966. The Base has also been home to various Army Recruit Training Centers throughout the years. At the time of closure, Fort McClellan was home to the Army Chemical School, the Army Military Police School, and the Army Training Brigade.

Anniston, AL and Monsanto History

The city of Anniston Alabama is listed on the Environmental Protection Agency ("EPA") "National Priorities List" due to polychlorinated biphenyl ("PCB") contamination. PCBs are considered a probable carcinogen and have been found to cause skin-irritation, liver damage, neurobehavioral and immunological changes, and other health problems. When PCBs are released into the environment, they can be transferred long distances in the air, dissolve in water, and disperse downstream. PCBs remain in the environment for long periods of time, especially in soil and sediment, and can be transferred to humans by consuming water and food, such as fish, animals, and dairy products. Production of PCBs was made illegal in the U.S. in 1977.

The vast majority of PCBs in the Anniston area were released from the operation of the former Monsanto Company's Anniston PCB manufacturing plant. The Monsanto Company, which later spun off into Solutia Inc. (collectively "Monsanto"), manufactured organic chemicals for use in herbicides and other products. The company began producing PCBs in 1929, and continued to do so until 1971. The company disposed of hazardous waste in two landfills located on the plant property and also in the surrounding creeks.

According to the EPA, the primary exposure areas include not only the Monsanto plant, but also adjacent residential and commercial properties, as well the downstream waterways and floodplains of Snow Creek and Choccolocco Creek. In their *Final Pathways Analysis Report* from December 2009, the EPA stated there were a number of recreational areas along the Choccolocco Creek and forested areas that provide attractive habitat for various recreational activities including hiking, fishing, canoeing, wading, etc. The report also stated that the flood plain was a common area for hunting, and that "[s]ediment and surface water exposure may occur along the riverbank or in

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shallow areas of the Creek during recreational activities such as fishing, canoeing, swimming or wading.” Also, “[a]nglers, farmers, and hunters and their families may be exposed to Site contaminants from consumption of fish caught in the Creek, crops and other agricultural products raised in the floodplain.”

There are multiple examples that illustrate high levels of contamination, some of which are beyond alarming. In October 1969, numerous fish were collected from various locations in Choccolocco Creek and measured for PCB content. Nearly 100% of the fish inspected revealed PCBs extremely far above safe levels set at the time. The highest was a Blacktail Shiner measuring an astonishing 37,800 parts per million (PPM). (See attached report dated August 6, 1970). Approximately half of all fish tested positive for PCB contents ranging in the thousands of PPM—many approaching 10,000 PPM and others higher than 10,000. Putting this in perspective, the FDA allowable limit for PCBs in fish was only 5 PPM.

The above test results were not at all isolated events. In October 1966, caging experiments were conducted with fish in multiple waterways around Anniston (25 fish per location), meaning live fish were placed in various waterways (for up to 48 hrs). Their reactions to the water were then studied. (*i.e.*, did they survive, did they die, become sick, etc). At some locations, all 25 fish died well under the 48-hr mark. However, in one location, “all 25 fish lost equilibrium and turned on their side in 10 seconds and all were dead in 3 ½ minutes.” The gills of these fish immediately assumed a flared position and blood hemorrhaged from the gills after 3 minutes. (See attached report dated November 2, 1966).

The spread of PCBs was not merely contained in the flood plain area of the Choccolocco Creek or its tributaries. In fact, PCBs were detected throughout the city of Anniston. In 1991, the EPA collected soil samples at over 400 properties in the city of Anniston, of which 99 percent tested positive for PCBs. While tests were apparently not conducted on FTMC property, some of the positive tests were collected on the south-eastern perimeter of FTMC’s Pelham Range. A September 2011 Interim Record of Decision from the EPA states that airborne PCBs were detected in varying concentrations downwind from the Monsanto Plant. In fact, a February 1998 study suggested a high likelihood of airborne dispersion of PCBs had occurred historically. According to the study, the air in west Anniston was highly contaminated compared to other cities. The examiner also “tested local tree bark and found further evidence of ongoing atmospheric releases of PCB.” The examiner stated that analysis of the tree bark suggested airborne distribution of PCBs had been occurring for a number of years, and opined that the source of the airborne PCBs was the “off-gasses” produced by the Monsanto plant landfills.

In 2003, the CDC’s Agency for Toxic Substances and Disease Registry (“ATSDR”) funded a health study of Anniston residents. The serum PCB levels in 758 Anniston residents, ages 19–93

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years, ranged from 0.1 to 170.4 ng/g (ppb), with a median of 3.2 ng/g.¹ According to ATSDR, that the average PCB concentration in U.S. residents that are not unusually exposed is between 0.9 and 1.5 ng/g. Thus, the median range for Anniston residents is more than twice that of average levels in non-exposed groups, far higher in some cases.²

Another study of Anniston residents published in *Environmental Health* 2013 concluded that higher levels of persistent organic pollutants, such as chlorinated PCBs and other chlorinated compounds (*i.e.*, hexachlorobenzene, chlordane, etc., all used and produced at the plant) resulted in elevated serum lipids and that risk of cardiovascular disease and obesity after exposure to PCBs and chlorinated pesticides is in part, a consequence of the elevated serum lipids resulting from exposure.³ See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3893492/>.

Many soldiers stationed at Fort McClellan lived off post in the City of Anniston. According to a January 2000 Army Community Relations Plan, “Fort McClellan historically contributed significantly to the population of Anniston and surrounding areas.” The plan acknowledged, “[i]t is general knowledge that Fort McClellan has been a significant factor in the economic viability of the city of Anniston and Calhoun County and the influx of military service people and their families have helped define the community.”

In 2003, the Monsanto Company agreed to a \$700 million settlement in two lawsuits filed by about 21,000 Anniston residents. \$600 million of the settlement was set aside to reimburse the Anniston residents for personal damages. Monsanto also agreed to conduct court supervised remediation of the PCB- contaminated areas, and establish medical clinics to provide low-income residents with health screenings and drug prescription benefits. FTMC and its personnel were not included in the lawsuit.

Herbicide Agents and Fort McClellan

VA has determined that presumptive service connection based on exposure to an herbicide agent is warranted for any disability where VA has found a positive association between the disability and exposure to the agent. The presumption is *not* limited to Vietnam and/or Vietnam era Veterans

¹ Goncharov A, Bloom M, Pavuk M, Birman I, Carpenter DO: Blood pressure and hypertension in relation to levels of serum polychlorinated biphenyls in residents of Anniston, Alabama. *J Hypertens* 2010, 28:2053–2060.

² ATSDR (Agency for Toxic Substances and Disease Registry): Toxicological Profile of Polychlorinated Biphenyls. US Department of Health and Human Services; 2000:765.

³ Aminov, Zafar et al. “Analysis of the Effects of Exposure to Polychlorinated Biphenyls and Chlorinated Pesticides on Serum Lipid Levels in Residents of Anniston, Alabama.” *Environmental Health* 12 (2013): 108. PMC. Web. 18 Feb. 2017.

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for the reasons that follow.

This is illustrated first by VA's regulation titled "Disease associated with exposure to certain herbicide agents." 38 C.F.R. § 3.309(e). The regulation states in part: "If a veteran was exposed to an *herbicide agent* during active military, naval, or air service, the following diseases shall be service-connected if the requirements of § 3.307(a)(6) are met," *Id.* (emphasis added). The remainder of the regulation lists the particular diseases associated with herbicide agents. The plain language of the regulation is clear in that it only requires exposure to an herbicide agent "during active military, naval, or air service."

The next step is to review the requirements at 38 C.F.R. § 3.307(a)(6). This regulation ("Diseases associated with exposure to certain herbicide agents.") defines "herbicide agent" as follows: "For the purposes of this section, the term 'herbicide agent' means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram." 38 C.F.R. § 3.307(a)(6)(i); *see* 38 U.S.C. § 1116. VA's M21-1 Manual also recognizes these exact chemicals as herbicide agents. M21-1.IV.ii.2.C.3.b. Thus, exposure to any of these chemicals during service satisfies the exposure element of 38 C.F.R. § 3.309(e).

The Secretary of VA has also acknowledged that a veteran "who did not serve in the Republic of Vietnam, but was exposed to an herbicide agent defined in 38 C.F.R. § 3.307(a)(6) during active military service, has a disease on the list of diseases subject to presumptive service connection, VA will presume that the disease is due to the exposure to herbicides." *Disease Associated With Exposure to Certain Herbicide Agents*: 66 FR 23166-01. Thus, a veteran not entitled to a presumption of exposure may still factually demonstrate he/she was as likely as not exposed to an herbicide agent in a claim for benefits. *See* 38 C.F.R. § 3.303(d); *Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed.Cir.1994).

Evidence of herbicide use on FTMC dates back to the late 1950s when the military began testing herbicide agents for use in tactical environments. A 2012 report on Fort Detrick's herbicide program states the Fort Detrick Crops Division "schedule of major investigations" from October 1956 through June 1957 included plans for a "massive release of pure agent trials" at Avon Park, FL "and additional screening and development trials at Fort McClellan, among other tests."⁴

⁴ Archives Search Report Findings for Field Testing of 2,4,5-T and Other Herbicides: Fort Detrick. 4 April 2012. Prepared for the U.S. Army Environmental Command & U.S. Army Garrison Fort Detrick by the U.S. Army Corps of Engineers St. Louis District.
<http://www.detrick.army.mil/responsible/ArchivalReport2012.pdf>

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In fact, forms of 2,4,5-T, undiluted with 2,4-D (as in Herbicide Orange) were available in the Federal Supply System as so-called “commercial” herbicides. See SB 3-40 (attached). The Environmental Baseline Survey (“EBS”) on VA’s Public Health website “Military Exposures – Potential Exposure at Fort McClellan” proves that herbicide agents as defined in 38 C.F.R. § 3.307(a)(6) and its controlling statute were in fact used routinely on Fort McClellan. The EBS was issued because the Base Realignment and Closure Commission selected the base in 1995 for closure. It is an official record and is also posted on VA’s Public health website.⁵ This evidence confirms the use and storage of herbicide agents listed in 38 C.F.R. § 3.307 on Fort McClellan.

Herbicide Orange was a 50:50 mixture of the liquid ester forms 2,4-D and 2,4,5-T. The herbicide 2,4,5-T, and all 2,4,5-T based herbicides, was contaminated with 2,3,7,8-TCDD, the most potent dioxin on the planet. Prior to the use of Herbicide Orange, various esters of 2,4,5-T also comprised Herbicides Pink, Purple, and Green. Herbicide Blue was cacodylic acid (also known as Ansul 138 and Phytar 560), which was comprised of a high level of arsenic. Herbicide White was a 4:1 mixture of 2,4-D and Picloram (also known as Tordon 101).

The EBS is primarily comprised of numerous individual reports issued at various intervals of FTMC’s operation. Thus, some gaps in the historical record do exist. Nonetheless, when considered in its totality, the EBS illustrates a consistent use of the qualifying herbicide agents throughout the 1970s and 1980s, and well into the 1990s. Still other records show these herbicides were most likely used in the late 1950s through the 1960s as well. The following relevant information is found in the EBS.

Cited from a 1977 report by the Army Toxic and Hazardous Materials Agency (USATHAMA), FTMC used 1,800 gallons of 2,4,5-T in 1974 and 10,000 gallons in 1976. This particular herbicide agent was the source of the dioxin contaminant TCDD. EBS, Vol. II, p E-10.

The base used 8,000 gallons of Silvex in 1974; 18,480 gallons of Silvex in 1975, and 41,460 gallons of Silvex in 1976. *Id.* Silvex, or 2,4,5-TP, is a 2,4,5-T-based herbicide agent and was contaminated with TCDD just as was 2,4,5-T. Subsequently, use of Silvex was banned in 1985 along with all uses of 2,4,5-T due to the TCDD contamination. See *Chem. Eng. News*, 1985, 63 (12), p 6. However, this was not before years of use throughout FTMC.

The base also used 7,200 gallons of 2,4-D in 1974, 6,000 gallons in 1975, and 4,800 gallons in 1976. EBS, Vol. II, p E-10. The herbicide agent 2,4,-D comprised the other 50 percent by

⁵ <http://www.publichealth.va.gov/exposures/fort-mcclellan/index.asp> (See e.g., Environmental Baseline Survey Vols I & II).

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volume of Agent Orange.

Further, the base used 4,000 gallons of Picloram in 1975, in addition to 20,300 gallons of Tordon 101, both of which are essentially Agent White. *Id.* Specifically, Tordon 101 is a mixture of Picloram and 2,4-D. This herbicide agent mix *is* Agent White. In other words, Tordon 101 and Agent White are interchangeable terms referring to the same herbicide. The Picloram in Agent White was also contaminated with hexachlorobenzene and nitrosamines, both known carcinogens. Hexachlorobenzene was banned in the U.S. in 1966 and has been banned globally by the Stockholm Convention on Persistent Organic Pollutants.

The evidence above unequivocally proves that herbicide agents lists at 38 C.F.R. § 3.307 were in widespread throughout FTMC and its ranges. The amount of herbicides used only from 1974 through 1976 totaled 138,040 gallons, or 2,505.8 55-gallon barrels. This was enough to spray every square mile on FTMC a staggering 1,941.49 times. *See Mathers Report*, pg 12.

Another later report contains a 1980 list of herbicides and pesticides that were being used on FTMC. EBS, Vol. II, p E-10. This list also states some items were being stored for future disposal, although the list does not state which were merely being stored. However, the list contains mostly pesticides (i.e., insecticides). We can draw a logical conclusion regarding which chemicals were being stored for disposal. For example, some of the insecticides on hand were organochlorine pesticides/insecticides, such as DDT. DDT was banned in the U.S. as an agricultural insecticide in 1972. *See U.S. EPA History Office: DDT Regulatory History: A Brief Survey (to 1975)*. It has since been banned worldwide under the Stockholm Convention on Persistent Organic Pollutants.

By 1980, none of the herbicides on the 1980 list had been completely banned in the U.S. Thus, there was no logical reason to store them for disposal. The 1980 list of herbicides is otherwise noteworthy however. For example, the 1980 list contains 275 gallons of DED-WEED LV 9 under Federal Stock Number ("FSN") 6840-00-577-4201. (*See e.g.*, Fort Detrick Archives Report). This herbicide agent is an isooctyl liquid ester of 2,4,5-T at 6 lbs of acid per gallon, or 83.5%. This FSN is for 55-gallon drums. Again, 2,4,5-T was used in Agent Orange. *See Fort Detrick Archive Report*, p. E-2. The list contains another 96 gallons of DED WEED LV 9 (2,4,5-T) under FSN 6840-00-582-4810,⁶ and another 145 gallons of Silvex (discussed above). *Id.* Among other herbicides still, the 1980 list also shows that FTMC had 2,005 pounds of Tordon 10k pellets and 300 gallons of Tordon 101 mixture. *Id.* Again, this is Agent White.

Some herbicides of interest were still used in the 1990s. A 1992 pesticide/herbicide inventory list

⁶ The different FSN likely denotes a 5-gallon drum.

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shows an approximate 40 gallons of 2,4,-D on hand, among others (EBS, Vol. II, p E-4-6) and an unknown amount in a 1994 inventory (EBS, Vol. II, p E-3).

Part of the EBS includes a November 1995 and January 1996 interview by John Herbert of “Luke Owens.” Mr. Owens was a FTMC “building and grounds, land management” employee beginning in 1981. *See* EBS, Vol. II, p B-69. The interview notes that “facility wide application” of “compounds used before (prior to 1991) include . . . Tordon.” *Id* at B-71. As noted above, Tordon and Agent White used in Vietnam are synonymous. They contain Picloram and 2,4-D as listed in 38 C.F.R. § 3.307(a)(6). Further, in an April 1996 interview of “Ralph Johnson,” a forester who worked on FTMC from 1960 to 1987, Mr. Johnson states that he, *inter alia*, “maintained fire lanes throughout all of Main Post, Pelham Range, and Choccolocco Corridor.” EBS, Vol. II, p B-52. He stated that he “used a lot of Tordon in the form of both liquid and pellets.” *Id*. He further stated that the “forestry staff used decontamination trucks to apply liquid pesticides and herbicides.” *Id*.

In 1989, building 598 burned to the ground. The building housed herbicides at the time it burned. The barrels burst and FTMC's Fire Department allowed the fire to consume those chemicals. Trees near the pavement adjacent to the building died shortly afterward. EBS, Vol. I, p 5-37. Among other items, the building contained 120 gallons of 2,4-D and 70 gallons of Tordon 101 (Agent White). *Id* at 5-101.

This evidence further refutes VA's long-held position that “routine base maintenance activities” were only performed by use of a commercial herbicide that do *not* satisfy the § 3.307 requirements. In fact, the exact opposite is true. Consistent with the evidence above, in approximately September 1958, 2,4,5-T was adopted for use by the government under Specification O-H-210a and Federal Stock Number (FSN) 6840-577-4201 for a 55-gallon drum, and then later under FSN 6840-616-9159 for a five-gallon can. (This was following an Interim Fed. Spec O-H-00210 in July 1957) *See* Fed. Spec. O-H-210a (attached). As a Chemical Corps requirement, these were “expandable supply items to be available to all users” meaning they “were meant for use by facility engineers as an herbicide for grounds keeping (i.e., brush and weed control).”⁷ The regular use of such herbicides on FTMC is wholly consistent with these policies. The herbicide 2,4,5-T (undiluted with 2,4-D as used in Agent Orange) had even higher concentrations of the contaminant TCDD than did Agent Orange, and it was expressly approved for routine base maintenance activities.

The Board should *NOT* be persuaded by VA's development, such as to the “Agent Orange Mailbox” (“AO mailbox”). The RO receives a negative response from the AO mailbox that is

⁷ *See* Fort Detrick Archives Report, *supra*

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nothing more than stock language, word for word in fact, that VA's Policy Staff in Compensation Service has been using for a number of years for any "Agent Orange" inquiry that does not fit into their predetermined list of "official" places that "tactical" herbicides were used.⁸

Moreover, the canned response continues the unlawful distinction between tactical and commercial herbicides. The relevant inquiry is whether a Veteran was as likely as not exposed to an "herbicide agent" as defined by law. 38 C.F.R. § 3.307(a)(6)(i); *see* 38 U.S.C. § 1116; M21-1.IV.ii.2.C.3.b. VA cannot use a distinction that exists in neither statute nor regulation to defeat a claim. The terms tactical herbicides and commercial herbicide simply do not exist in a statute or regulation. Therefore, any such distinction is an extra criterion in violation of the plain reading of the law. *See Drosky v. Brown*, 10 Vet.App. 251, 255 (1997); *Massey v. Brown*, 7 Vet.App. 204, 208 (1994) (explaining that consideration of factors outside the criteria provided by the regulations is error as a matter of law).

VA's canned response from the AO mailbox is also based on a report that inherently has no credibility. Thus, by extension, the AO mailbox response has no credibility. For example, the response states, "the Department of Defense (DoD) has provided Compensation Service with a listing of locations outside Vietnam and the Korean DMZ where Agent Orange was used, tested, or stored." This "listing" from DoD is actually a 2006 report produced on contract by Alvin Young. *See The History of the US Department of Defense Programs for the Testing, Evaluation, and Storage of Tactical Herbicides*, December 2006 (Alvin Young, Ph.D.). (hereafter "Young Report" or "Report"). (attached)

The Report is purposely limited in scope to what Dr. Young considers a "tactical" herbicide. At the outset, this eliminates from his research any herbicide agent that satisfies the criteria in 38 C.F.R. § 3.307 but that Dr. Young does not consider "tactical." In this respect, vital information lacking in the report cannot be measured. The Report repeatedly references the U.S. Army's Chemical Corp, and its "laboratories" division at Ft. Detrick, but is devoid of any reference to FTMC, which was the actual home of the Army Chemical Corp and its Training Center.

Dr. Young explained in his Report that in 1966, "the US Army deployed the first (of 22) Army Chemical Corps units to South Vietnam." (Young Report, pg. 9). He correctly explains that these units were "responsible for the storage, handling, mixing, and application of . . . herbicides by the U.S. Army." *Id.* Dr. Young then states that "[t]he training of the Army Chemical Corps personnel to handle herbicides was the responsibility of the Army Chemical Corps Training Center at Fort Leonard Wood, Missouri." *Id.*, (emphasis added). **This is incorrect. The Chemical Corp Training Center was located at FTMC. It was not *re*-located to Fort Leonard Wood**

⁸ The AO mailbox is an email address monitored by the Policy Staff in Compensation Service.

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until 1999 after Ft. McClellan closed.⁹

This coincides with the 2012 report on the Army's herbicide program that states the Fort Detrick Crops Division "schedule of major investigations" from October 1956 through June 1957 included plans for a "massive release of pure agent trials" at Avon Park, FL "**and additional screening and development trials at Fort McClellan, among other tests.**"¹⁰ This may also account for the large quantities of 2,4,5-T; 2,4-D; and, Picloram/Tordon 101 still being used on the base throughout the 1970s and even beyond. This is also consistent with a January 25, 1977 interview of FTMC's Assistant Post Forester (attached) wherein the forester listed part of his duties involved "**vegetation manipulation for Army training**" and also stated the following herbicide were used: "Tordon 101 [pichloric acid] and Tordon 110, and 2,4-D and 2,4,5-T."

This is further validated by VA's own research published in the Journal of Occupational and Environmental Medicine.¹¹ ("JOM Report") (*see attached*). While this study obviously focused on the risk of developing hypertension, the content of the study is applicable to the Veteran's case and to FTMC in general. This study analyzed health data from over 3,000 Army Chemical Corps veterans during the Vietnam War. Again, FTMC was home to the Army Chemical Corps, as is noted in the JOM Report. Out of this number of Army Chemical Corps veterans, approximately 1,477 went to Vietnam, and approximately 1,609 did not.

An important aspect of the JOM Report is not only was the Vietnam group divided between those who sprayed herbicides and those who did not, but the non-Vietnam group was also divided between those who sprayed herbicides and those who did not. In fact, 450 of the non-Vietnam group reported spraying herbicides despite not having served in Vietnam. *See JOM Report at 1131.* Out of the four groups, the report states that prevalence of hypertension was "highest among Vietnam sprayers (81.6%) followed by non-Vietnam sprayers (77.4%)." *Id.* at 1130. Likewise, the odds ratio of developing hypertension "for those with no Vietnam service . . . was still significantly elevated [when] comparing sprayers and nonsprayers." *Id.* This shows that non-Vietnam veterans *who served on FTMC* used the same herbicides as those in Vietnam.

The Young Report does discuss the development of the herbicides known by military code as Pink, Purple, Orange, White, Blue, and Green. These appear to be the only herbicides Dr. Young

⁹ http://www.mcclellan.army.mil/Info.asp?article_id=2

¹⁰ Archives Search Report Findings for Field Testing of 2,4,5-T and Other Herbicides: Fort Detrick. 4 April 2012. Prepared for the U.S. Army Environmental Command & U.S. Army Garrison Fort Detrick by the U.S. Army Corps of Engineers St. Louis District.
<http://www.detrack.army.mil/responsible/ArchivalReport2012.pdf>

¹¹ Cypel S., et al. (2016). *Herbicide Exposure, Vietnam Service, and Hypertension Risk in Army Chemical Corps Veterans*. Journal of Occupational and Environmental Medicine. 2016 Nov; 58(11):1127-1136.

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considers “tactical.” The Report list 32 “DoD Tactical Herbicide Sites.” This is the same list as on VA’s Agent Orange website and is the same list VA refers to in its AO mailbox responses. Prior to listing these sites, Dr. Young fervently attempts to explain how only certain military authorities were authorized to obtain “tactical” herbicides, and even then for the limited use of “combat military operations in Vietnam, or by Department of State approval as used in Korea adjacent to the Demilitarized Zone in 1968.” (Young Report at 12).

In reference to “Tactical” herbicide outside these areas, Dr. Young states that no documents “indicated the herbicides used in Guam, or CONUS military installations were ‘tactical herbicides’, rather, the available documents confirmed that all pesticides used in these locations and other US Department of Defense installations world wide were those commercially available and approved by AFPCB.” *Id* Not only is this unsupported, it is inaccurate.

The attached November 10, 1977 “Trip Report – Davis-Monthan AFB AZ” shows that then Capt. Alvin Young travelled to Davis-Monthan AFB to assist the 355th Civil Engineer Squadron (CES) in the field application of “Herbicide Blue.” The military shipped thirteen 55-gallon drums of Herbicide Blue (Agent Blue) from Johnston Island to Davis-Monthan AFB. Agent Blue contained 134,000 ppm of arsenic; thus, it could not be burned at sea with the remaining stockpile of Agent Orange from Johnston Island. This Herbicide Blue was dispersed in the “Aircraft Storage Area.” (Aka, the Aircraft Museum). More interesting, however, is that the report confirms the 355th CES had actually been using Agent Blue as a contact herbicide on the base **“for vegetation control since 1973.”**

This refutes Dr. Young’s assertion in his report that base civil engineers could not obtain such herbicides. In fact, herbicide operations had already ceased in Vietnam when the Civil Engineer Squadron at Davis-Monthan started using one of the same herbicides for the next four years. Moreover, Dr. Young did not even list in his report Davis-Monthan AFB as one if the “DoD Tactical Herbicide Sites” despite that fact that he was in part personally involved with the dumping of such “tactical” herbicide at that CONUS Base. What’s more, in a handwritten note from Maj. Charles Thalken to Capt. Young attached to the Trip Report, Maj. Thalken states that there is “one more sheet some place that came from a special meeting in Washington giving permission to use this material at various specified bases.” He goes on to state, “I can’t find it however at the moment. Don’t think it is that important right now.”

In further attempts to draw more distinctions between tactical and commercial herbicides, Dr. Young repeatedly asserts that the “selection and use of tactical herbicides were exempt from USDA [now EPA] regulatory oversight.” Attached you will find two Monsanto Herbicide labels. One is for a mixture of n-butyl esters of 2,4-D and 2,4,5-T; specifically 47.6 percent of 2,4-D and 50 percent of 2,4,5-T. In other words, this is Agent Orange without the orange stipe. In addition,

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it has USDA Reg No 524-150. The other label is for a herbicide formulation as follows: 50% n-butyl ester of 2,4-D, 30% n-butyl ester of 2,4,5-T & 20% iso-butyl ester of 2,4,5-T. In other words, this is Agent Purple. It too has a USDA Reg No of 542-149. These and other labels can be found on the EPA's website.¹²

Despite his current attempts at distinguishing tactical and commercial herbicides, this was not always the case. Enclosed is a letter from the U.S. Department of Agriculture's National Agricultural Library, Special Collections, Alvin L. Young Collection on Agent Orange entitled "Letter: to Mrs. Cleary from Alvin L. Young Regarding Use of Herbicides in Southeast Asia." (<http://specialcollections.nal.usda.gov/sites/specialcollections.nal.usda.gov/files/04222.pdf>) (last visited March 7, 2016).

Dr. Young's letter, contemporaneous with the Vietnam War, states, "Aerial spray of herbicides has been conducted in Southeast Asia since January 1962, as of 31 December 1967, 2,214,600 acres have been treated." His letter details routine use of Agent Orange to clear weed and plant growth in Southeast Asian countries. He also states that the "chemical herbicides which are being used by the Republic of Vietnam . . . have been used commonly in the United States and other countries for the past 15 years by farmers, ranchers and home owners. *Id.*

This is by no means the only attempt at revisionist history. Dr. Young never refers to herbicides used in Vietnam as "tactical" in his earlier work, just the opposite in fact. For example, in a 1980 report, he stated that "[b]y early fall, 1961, 18 different aerial spray tests (defoliation and anticrop) had been conducted with various formulations of commercially-available herbicides" in reference to missions in Vietnam.¹³ He further stated that the choice of these herbicides was based upon the "chemicals that had had considerable research, proven performance, and practical background at that period in time." Such factors as "availability in large quantity, [and] costs" were also considered. *Id.* Ultimately, using herbicides in a tactical environment and then calling it a "tactical herbicide" does not magically change the herbicide's active ingredient, chemical structure or toxicity.

Dr. Young also goes to great lengths to continue his distinction by asserting tactical herbicide were different because they were developed under "military specifications." He explains how the Armed Forces Pest Control Board required "all DoD agencies to use pesticide formulations that had 'Federal Specifications' . . . approved by the Pesticides Regulation Branch of USDA (now EPA)." He explained that "federal specifications" are used when a formulation has "uses in

¹² See https://www3.epa.gov/pesticides/chem_search/ppls/000524-00149-19691215.pdf

¹³ Alvin L. Young, *Use of Herbicides in South Vietnam 1961-1967*, Educational Conference on Herbicide Orange, 2 (May 28-30, 1980).

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civilian agencies” and that “DoD’s ‘Tactical Herbicides’ were exempt from this approval and oversight process.” He goes on to state that “Tactical Herbicides” were required to meet “Military Specifications” and that, such specifications were “used when the need for the material is confined to a specific military operation.” All of this is incorrect.

First, not all of the so called “tactical herbicides” even had military specifications. For example, neither Herbicides Blue nor White had military specifications. *See Army Supply Bulletin*. The only military specifications for Agents Blue and White were for the 55-gallon barrels in which they were delivered to Vietnam. In fact, in his own book, *The history, Use, Disposition and Environmental Fate of Agent Orange* (2009) ISBN: 978-0-387-87485-2, Dr. Young states that the “first Herbicide Blue was a powdered form of a commercial formulation of cacodylic acid known as ‘Ansar 138.’” He then states that in 1965, the first liquid formulation of Herbicide Blue was “a commercial product developed by Ansul Company as identified as Phytar 560.”

Second, even though military specifications were eventually developed for Agent Orange, (*See id*, MIL-H-51147 for the 2,4-D component & MIL-H-51148 for the 2,4,5-T component) it nonetheless had a federal specification as well (6840-929-9095), which was even printed on the Agent Orange barrels. What’s more, even some far more common herbicides, such as Fenuron, diuron, and Monuron, also had military specifications, but no one has asserted they are “tactical” herbicides. Dr. Young also provides no support whatsoever for the assertion that items with military specifications are confined to a specific military operations. Military specifications do help achieve standardization objectives and assist in reliable procurement of materials, but they are not operationally specific.

There are other inconsistencies in the actual list of “DoD Tactical Herbicide Sites.” For example, when discussing herbicide tests in Kauai Hawaii from 1967 to 1968, the Young Report states that both “Blue (Phytar 560G) and White (Tordon 101)” were evaluated in those tests along with 2,4,5-T and Silvex. Silvex, Tordon 101, and 2,4,5-T were used extensively on FTMC. Surely, VA cannot assert these are tactical herbicides when officially tested by DoD, but then are commercial herbicide when used on FTMC.

Another way to illustrate this is to review the attached Army Supply Bulletin. For example, it denotes that Agent White is “Tordon 101.” (*See att. SB 3-40 at 4*). However, it is only Agent White when ordered in the 55-gallon drums. *Id*. The *exact* same herbicide could have also been ordered in a 5-gallon drum. The 5-gallon drum is not referred to as Agent White. *Id*. This shows that VA’s unlawful distinction between tactical and commercial herbicides is a smoke-screen. It is an illusion.

The above information is proof that evidence on which VA relies is inherently unreliable and

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should be considered invalid for use in deciding disability claims based on exposure to herbicide agents outside Vietnam and the Korean DMZ. The evidence is irrefutable. Nearly every herbicide agent listed in 38 C.F.R. § 3.307(a)(6) was used throughout the Main Post, Pelham Range, and Choccolocco Corridor of FTMC. These herbicide agents were used spanning the course of decades. The evidence here necessarily dictates the VA concede the Veteran was factually exposed to these herbicides.

The Board has already admitted that herbicides used on FTMC are indeed the covered herbicides listed in 38 C.F.R. § 3.307(a)(6).

In a recent case before the Board (Docket No. 15-43 958) that was partially based herbicide exposure at FTMC, the Board made an admission that “the chemical composition of the herbicides and toxic chemicals used and stored at Fort McClellan, . . . were identical to the herbicides used in Vietnam and chemicals found in the drinking water at Camp Lejeune.” See Board decision at 4.

We realize one Board decision has no binding effect on another Board decision. The Board is to nonetheless strive for uniformity. Thus, VA should do so here because the admission noted above applies to all veterans with FTMC service because the admission is specific to the Base itself, and the herbicides used on the base, instead of to a particular Veteran. In other words, if the herbicides used on FTMC were “identical to those used in Vietnam” for the appellant in Docket No. 15-43 958, then they are for the case at hand as well.

The persistence of 2,3,7,8-TCDD (Dioxin)

Although 2,4,5-T and its proverbial cousin Silvex, each contaminated with TCDD, were possibly not used after 1985, (if FTMC personnel adhered to the 1985 EPA restriction on all 2,4,5-T based herbicides) exposure to these particular agents could still occur. Considerable research has been conducted on the environmental fate and persistence of TCDD. When TCDD penetrates the ground surface, it can remain stationary for an indefinite period. It persists in the soil for years. When TCDD contacts plant roots, the plants become contaminated. See Institute of Medicine (IOM), 1994 Agent Orange Report, pg. 228. The IOM's Agent Orange Report is VA's own pinnacle of research used to establish presumptive service connection for diseases.

Dioxin (TCDD) arises during the hydrolysis of tetrachlorobenzene to form 2,4,5-trichlorophenol, the industrial precursor of 2,4,5-T. TCDD is a solid that is insoluble in water and slightly soluble in fats or hydrocarbons. It decays slowly in the soil under normal environmental conditions, which indicates that “its potential hazards may be very persistent.” 1994 IOM Report, pg. 28. Trichlorophenol is also used in the production of some PCBs.

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There are numerous examples of the lasting effects of this agent. Dioxins (and PCBs) were among organochlorines measured by researchers in food samples gathered in 2002 around Bien Hoa City, Vietnam, about 32 km north of Ho Chi Minh City (formerly Saigon). Marked increases in, *inter alia*, TCDD concentrations were found in ducks, chickens, and fish. The study showed that food was to be responsible for the increase in TCDD in residents of Bien Hoa City, even though the original herbicide containing the TCDD (2,4,5-T in Agent Orange) was used 30-40 years before sampling. See 2010 IOM Report, pg. 186.

Still other examples exist. Researchers examined the correlations of dioxin concentrations in soil, sediment, and human breast milk in an area of Vietnam that had been sprayed with herbicide agents during the Vietnam War; Cam Chinh commune in Quang Tri province; a control site that was not sprayed; and, Cam Phue commune in Ha Tinh province. Soil and sediment samples were taken randomly throughout Cam Chinh commune and analyzed for PCDDs and PCDFs (dioxins and furans). Breast milk samples were taken from lactating mothers 20-40 years old who lived in two communes (86 in Cam Chinh commune and 71 in Cam Phuc commune) in September 2002-July 2003. The mean dioxin concentrations in soil and breast milk in the sprayed area **"were significantly higher than those in the non-sprayed areas."** 2010 IOM Report 186-87. This only represents a small portion of evidence showing TCDD's long environmental fate. The same is true for FTMC. This acknowledgement is already incorporated into practice through the mandates of 38 U.S.C. § 1116. For example, the historical legislative and research record very clearly shows that Congress knew that no herbicide agents were used tactically in Vietnam past 1971, and that most use was stopped in 1970. Yet, in light of this knowledge, Congress nonetheless ensured the presumption of exposure remained in place until 1975.

VA has acknowledged the same persistence in its regulations at 38 C.F.R. § 3.307, but did so without a congressional mandate. VA specifically created a "factual presumption" based on "scientific understanding of the potential latent effects of herbicide exposure" when it recognized exposure of Veterans who came into contact with C-123 aircraft, even if such contact was more than 10 years after the aircraft were used for herbicide missions. *Presumption of Herbicide Exposure and Presumption of Disability During Service for Reservists Presumed Exposed to Herbicide*, 80 FR 35246-01; 38 C.F.R. § 3.307(a)(6)(v).

As late as 1999, soil samples from various locations around the base were still contaminated with TCDD. For example, it was found in soil samples near the Chemical Waste Storage Area. One soil sample from a depth of only 0 to 1 ft. (meaning a surface sample) in June 1999 was positive for TCDD at a level of 1.81E-05 (= .0000181) measured in milligrams per kilogram (mg/kg). While that may seem small, remember we are talking about the most potent dioxin on the planet. To put this in perspective, ATSDR has set an "acute-duration" oral limit of .0002 micrograms (ug/day); an "intermediate-duration" of .00002 ug/day; and a "chronic-duration" of .000001 ug/day. See

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<https://www.atsdr.cdc.gov/toxprofiles/tp104-c7.pdf>.

Thus, after converting milligrams to micrograms, the amount of TCDD measured at a single surface site in June 1999, 15 years after 2,4,5-T based herbicides were restricted from use, was 90.5 times higher than the “acute” oral limit; 905 times higher than the “intermediate” limit; and 5e10 (or 50 billion) times higher than the chronic limit. Yet, even at these small amounts, these levels of exposure still produced adverse effects in test animals. *Id*

The evidence the Veteran has produced in this case greatly exceeds the standard of proof VA has established in some of its own presumptive regulations. Here, the Veteran has produced proof that herbicide agents listed in 38 C.F.R. § 3.307(a)(6) were indeed widely used throughout FTMC while he served on the base. However, the law only requires the evidence be in equipoise before VA factually concedes exposure. We only ask the Board not to hold the Veteran to a standard higher than the law requires.

For the foregoing reasons, VA should afford the benefit of the doubt and concede exposure to herbicide agents during the Veteran’s service at Fort McClellan and then award the benefits sought on appeal.

Very truly yours,



Robert V. Chisholm
VA POA #00R

/tf/td

Enclosure: VA Form 9 Appeal

cc: Justin D. Gray

Substantive Appeal



Department of Veterans Affairs

APPEAL TO BOARD OF VETERANS' APPEALS

IMPORTANT: Read the attached instructions before you fill out this form. VA also encourages you to get assistance from your representative in filling out this form.

1. NAME OF VETERAN (Last Name, First Name, Middle Initial)	2. CLAIM FILE NO. (Include prefix)	3. INSURANCE FILE NO., OR LOAN NO.
Gray Justin D.		

4. I AM THE
<input type="checkbox"/> VETERAN <input type="checkbox"/> VETERAN'S WIDOWER <input type="checkbox"/> VETERAN'S CHILD <input type="checkbox"/> VETERAN'S PARENT <input checked="" type="checkbox"/> OTHER (Specify) Representative

5. TELEPHONE NUMBERS		6. MY ADDRESS IS: (Number & Street or Post Office Box, City, State & ZIP Code)
A. HOME (Include Area Code)	B. WORK (Include Area Code)	
401-331-6300	401-331-6300	
7. IF I AM NOT THE VETERAN, MY NAME IS: (Last Name, First Name, Middle Initial)		One Turks Head Place Suite 1100 Providence, RI 02903
Robert V. Chisholm		

8. THESE ARE THE ISSUES I WANT TO APPEAL TO THE BOARD: (Be sure to read the information about this block in paragraph 6 of the attached instructions.)	
A. <input type="checkbox"/> I HAVE READ THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENT OF THE CASE I RECEIVED. I AM ONLY APPEALING THESE ISSUES: (List below.)	
B. <input checked="" type="checkbox"/> I WANT TO APPEAL ALL OF THE ISSUES LISTED ON THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENT OF THE CASE THAT MY LOCAL VA OFFICE SENT TO ME.	

9. HERE IS WHY I THINK THAT VA DECIDED MY CASE INCORRECTLY: (Be sure to read the information about this block in paragraph 6 of the attached instructions.)	
Please see attached letter from representative.	
(Continue on the back, or attach sheets of paper, if you need more space.)	

10. OPTIONAL BOARD HEARING	
<p>IMPORTANT: Read the information about this block in paragraph 6 of the attached instructions. This block is used to request an optional Board of Veterans' Appeals (Board) hearing. DO NOT USE THIS FORM TO REQUEST A HEARING BEFORE VA REGIONAL OFFICE PERSONNEL.</p> <p>Check one (and only one) of the following boxes:</p>	
A. <input checked="" type="checkbox"/> I DO NOT WANT AN OPTIONAL BOARD HEARING. (Choosing this option often results in the Board issuing its decision most quickly. If you choose, you may write down what you would say at a hearing and submit it directly to the Board.)	
I WANT AN OPTIONAL BOARD HEARING:	
B. <input type="checkbox"/> BY LIVE VIDEOCONFERENCE AT A LOCAL VA OFFICE. (Choosing this option will add delay to issuance of a Board decision.)	
C. <input type="checkbox"/> IN WASHINGTON, DC. (Choosing this option will add delay to issuance of a Board decision.)	
D. <input type="checkbox"/> AT A LOCAL VA OFFICE.* (Choosing this option will add significant delay to issuance of a Board decision.) *This option is not available at the Washington, DC, or Baltimore, MD, Regional Offices.	

11. SIGNATURE OF PERSON MAKING THIS APPEAL	12. DATE (MM/DD/YYYY)	13. SIGNATURE OF APPOINTED REPRESENTATIVE, IF ANY (Not required if signed by appellant. See paragraph 6 of the instructions.)	14. DATE (MM/DD/YYYY)
			12.24.2018

EXHIBIT B



DEPARTMENT OF VETERANS AFFAIRS

November 21, 2018

JUSTIN D GRAY
1820 IDLEWILD DR APT
A6
RENO NV 89509

In reply, refer to:
354/adjkandr
File Number: 5 [REDACTED]
JUSTIN GRAY

Dear JUSTIN GRAY:

You have filed a Notice of Disagreement with our action. This is the first step in appealing to the Board of Veterans' Appeals (BVA). This letter and enclosures contain very important information concerning your appeal.

Statement of the Case

We have enclosed a Statement of the Case, a summary of the law and evidence concerning your claim. This summary will help you to make the best argument to the BVA on why you think our decision should be changed.

What You Need To Do

To complete your appeal, you must file a formal appeal. We have enclosed VA Form 9, *Appeal to the Board of Veterans' Appeals*, which you may use to complete your appeal. We will gladly explain the form if you have questions. Your appeal should address:

- the benefit you want
- the facts in the Statement of the Case with which you disagree; and
- the errors that you believe we made in applying the law.

When You Need To Do It

You must file your appeal with this office within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed. **If we do not hear from you within this period, we will close your case.** If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires. See item 5 of the instructions in VA Form 9, *Appeal to Board of Veterans' Appeals*.

Hearings

You may have a hearing before we send your case to the BVA. If you tell us that you want a hearing, we will arrange a time and a place for the hearing. VA will provide the hearing room, the hearing official, and a transcript of the hearing for the record. VA cannot pay any other expenses of the hearing. You may **also** have a hearing before the BVA, as noted on the enclosed VA Form 9, *Appeal to the Board of Veterans' Appeals*. **Do not delay filing your appeal if you request a hearing. Your request for a hearing does not extend the time to file your appeal.**

Representation

If you do not have a representative, it is not too late to choose one. An accredited representative of a recognized service organization may represent you in your claim for VA benefits without charge. An accredited attorney or an accredited agent may also represent you before VA, and may charge you a fee for services performed after the filing of a notice of disagreement. In certain cases, VA will pay your accredited agent or attorney directly from your past due benefits. For more information on the accreditation process and fee agreements (including filing requirements), you and/or your representative should review 38 U.S.C. § 5904 and 38 C.F.R. § 14.636 and VA's website at <http://www.va.gov/ogc/accreditation.asp>. You can find the necessary power of attorney forms on this website, or if you ask us, we can send you the forms. You can also find the names of accredited attorneys, agents and service organization representatives on this website.

What We Will Do

After we receive your appeal, we will send your case to the BVA in Washington, DC for a decision. The BVA will base its decision on an independent review of the entire record, including the transcript of the hearing, if you have a hearing.

If You Have Questions or Need Assistance

If you have any questions or need assistance with this claim, 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 Federal number is 711.
Use the Internet	Send electronic inquiries through the Internet at https://iris.custhelp.com/ .
Write	VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate

File Number: [REDACTED]
GRAY, JUSTIN D

If you	Here is what to do.
	address listed on the attached <i>Where to Send Your Written Correspondence</i> chart, below.

In all cases, be sure to refer to your VA file number [REDACTED]

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

We sent a copy of this letter to ROBERT V CHISHOLM because you appointed them as your representative. If you have questions or need assistance, you can also contact them.

Thank you for your service,

VA Regional Office Director

Regional Office Director

Enclosure(s): Where to Send Written Correspondence
VA Form 9

cc: ROBERT V CHISHOLM
Chisholm Chisholm & Kilpatrick Ltd.
ONE TURKS HEAR PLACE SUITE 1100
PROVIDENCE, RI 02903

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ISSUE:

1. Service connection for type II diabetes mellitus as a result of exposure to herbicides, mustard gas, and ionizing radiation.

EVIDENCE:

- VA letter to you dated May 17, 2017, requesting you to provide details and evidence regarding your mustard gas and radiation exposure
- Standard 5103 Notice, dated February 27, 2017
- Service Treatment Records, received September 6, 1996, and February 9, 2017, for the period from June 9, 1989 through August 23, 1996
- Section (§) 5103 Notice Response, received April 7, 2017
- VA Form 21-526, Veteran's Application for Compensation and/or Pension, received February 21, 2017
- VA Form 21-0966, Intent To File A Claim For Compensation and/or Pension, or Survivors Pension and/or DIC, received January 23, 2017
- VA letter to you dated March 6, 2017, requesting evidence regarding your claim based on herbicide exposure
- VA Form 27-0820 Report of General Information, Dated June 21, 2017
- Combined Environmental Exposure Report for Fort McClellan received May 30, 2017
- We have been unable to obtain records from the Reno VAMC for the period January 1, 2014, to April 8, 2014. We have determined that these records do not exist. We will now make a decision based on the evidence of record.
- VAMC (Veterans Affairs Medical Center) treatment records, VAMC Reno, dated April 8, 2014, through July 23, 2015
- Letters, Chisholm Chisholm & Kilpatrick Attorneys at Law, dated February 16, 2017, and May 25, 2017
- Service Personnel Records, received March 4, 2017, for the period from June 9, 1989 through August 23, 1996
- VA Form 21-0961 Rating Decision/Administrative Decision/Formal Finding, dated April 19, 2017
- Public Health article on Fort McClellan received March 4, 2017

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- VA rating decision dated June 22, 2017
- Notice of decision dated June 27, 2017
- VA Form 21-0958 Notice of Disagreement received August 10, 2017
- DRO Process Explanation letter dated August 15, 2017
- Request for status of Notice Of Disagreement from the Offices of Robert Chisholm, received February 7, 2018, May 7, 2018 and August 7, 2018

ADJUDICATIVE ACTIONS:

02/21/2017	Claim received.
06/22/2017	Claim considered based on all the evidence of record.
06/27/2017	Claimant notified of decision.
08/10/2017	Notice of Disagreement received.
08/10/2017	De Novo Review election received from appellant.
11/21/2018	De Novo Review performed based on all the evidence of record.

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol "§" denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement of all veteran benefits.

38 USC Section 5107 (03/02) - Claimant responsibility; benefit of the doubt

(a) CLAIMANT RESPONSIBILITY- Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) BENEFIT OF THE DOUBT- The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When 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.

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§19.32 - Closing of appeal for failure to respond to Statement of the Case.

The agency of original jurisdiction may close the appeal without notice to an appellant or his or her representative for failure to respond to a Statement of the Case within the period allowed. However, if a Substantive Appeal is subsequently received within the 1-year appeal period (60-day appeal period for simultaneously contested claims), the appeal will be considered to be reactivated. (Authority: 38 U.S.C. 7105(d)(3))

§20.302 Rule 302. (07/08) - Time limit for filing...

(a) Notice of Disagreement. Except in the case of simultaneously contested claims, a claimant, or his or her representative, must file a Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date that that agency mails notice of the determination to him or her. Otherwise, that determination will become final. The date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed. (Authority: 38 U.S.C. 7105(b)(1))

(b) Substantive Appeal.

(1) General. Except in the case of simultaneously contested claims, a Substantive Appeal must be filed within 60 days from the date that the agency of original jurisdiction mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later. The date of mailing of the Statement of the Case will be presumed to be the same as the date of the Statement of the Case and the date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.

(2) Special rule in certain cases where additional evidence is submitted. Except in the case of simultaneously contested claims, if (i) a claimant submits additional evidence within 1 year of the date of mailing of the notification of the determination being appealed, and (ii) that evidence requires, in accordance with §19.31 of this title, that the claimant be furnished a Supplemental Statement of the Case, then the time to submit a Substantive Appeal shall end not sooner than 60 days after such Supplemental Statement of the Case is mailed to the appellant, even if the 60-day period extends beyond the expiration of the 1-year appeal period. (Authority: 38 U.S.C. 7105(b)(1), (d)(3).)

(c) Response to Supplemental Statement of the Case. Where a Supplemental Statement of the Case is furnished, a period of 30 days from the date of mailing of the Supplemental Statement of the Case will be allowed for response. The date of mailing of the Supplemental Statement of the

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Case will be presumed to be the same as the date of the Supplemental Statement of the Case for purposes of determining whether a response has been timely filed. Provided a Substantive Appeal has been timely filed in accordance with paragraph (b) of this section, the response to a Supplemental Statement of the Case is optional and is not required for the perfection of an appeal. (Authority: 38 U.S.C. 7105(d)(3))

§3.102 (New) - Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. (Authority: 38 U.S.C. 501(a))

§3.103 - Procedural due process and appellate rights.

(a) Statement of policy. Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

(b) The right to notice:

(1) General. Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the

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necessary procedures and time limits, to initiate an appeal of the decision.

(2) Advance notice and opportunity for hearing. Except as otherwise provided in paragraph (b)(3) of this section, no award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) Exceptions. In lieu of advance notice and opportunity for a hearing, VA will send a written notice to the beneficiary or his or her fiduciary at the same time it takes an adverse action under the following circumstances:

(i) An adverse action based solely on factual and unambiguous information or statements as to income, net worth, or dependency or marital status that the beneficiary or his or her fiduciary provided to VA in writing or orally (under the procedures set forth in Sec. 3.217(b)), with knowledge or notice that such information would be used to calculate benefit amounts.

(ii) An adverse action based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report.

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(iv) An adverse action based upon a written and signed statement provided by the beneficiary to VA renouncing VA benefits (see §3.106 on renouncement).

(v) An adverse action based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension (see §3.654 regarding active service pay).

(vi) An adverse action based upon a garnishment order issued under 42 U.S.C. 659(a).
(Authority: 38 U.S.C. 501(a))

(4) Restoration of benefits. VA will restore retroactively benefits that were reduced, terminated, or otherwise adversely affected based on oral information or statements if within 30 days of the date on which VA issues the notification of adverse action the beneficiary or his or her fiduciary asserts that the adverse action was based upon information or statements that were inaccurate or upon information that was not provided by the beneficiary or his or her fiduciary. This will not

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preclude VA from taking subsequent action that adversely affects benefits.

(c) The right to a hearing.

(1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in §20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more VA employees having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The purpose of a hearing is to permit the claimant to introduce into the record, in person, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record. (Authority: 38 U.S.C. 501(a))

(d) Submission of evidence. Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) The right to representation. Subject to the provisions of §§14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

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(f) Notification of decisions. The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting relief. All notifications will advise the claimant of the reason for the decision; the date the decision will be effective; the right to a hearing subject to paragraph (c) of this section; the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal; and the periods in which an appeal must be initiated and perfected (See part 20 of this chapter, on appeals). Further, any notice that VA has denied a benefit sought will include a summary of the evidence considered. (Authority: 38 U.S.C. 501, 1115, 1506, 5104.)

§3.104 (05/2001) - Finality of decisions.

(a) A decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in §3.105 and §3.2600 of this part.

(b) Current determinations of line of duty, character of discharge, relationship, dependency, domestic relations questions, homicide, and findings of fact of death or presumptions of death made in accordance with existing instructions, and by application of the same criteria and based on the same facts, by either an Adjudication activity or an Insurance activity are binding one upon the other in the absence of clear and unmistakable error.

[29 FR 1462, Jan. 29, 1964, as amended at 29 FR 7547, June 12, 1964; 56 FR 65846, Dec. 19, 1991; 66 FR 21874, May 2, 2001]

§3.109 - Time limit.

(a) Notice of time limit for filing evidence.

(1) If a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application. If the evidence is not received within 1 year from the date of such notification, pension, compensation, or dependency and indemnity compensation may not be paid by reason of that application (38 U.S.C. 5103(a)). Information concerning the whereabouts of a person who has filed claim is not considered evidence.

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(2) The provisions of this paragraph are applicable to original applications, formal or informal, and to applications for increased benefits by reason of increased disability, age, or the existence of a dependent and to applications for reopening or resumption of payments. If substantiating evidence is required with respect to the veracity of a witness or the authenticity of documentary evidence timely filed, there will be allowed for the submission of such evidence 1 year from the date of the request therefor. However, any evidence to enlarge the proofs and evidence originally submitted is not so included.

(b) Extension of time limit. Time limits within which claimants or beneficiaries are required to act to perfect a claim or challenge an adverse VA decision may be extended for good cause shown. Where an extension is requested after expiration of a time limit, the action required of the claimant or beneficiary must be taken concurrent with or prior to the filing of a request for extension of the time limit, and good cause must be shown as to why the required action could not have been taken during the original time period and could not have been taken sooner than it was. Denials of time limit extensions are separately appealable issues. (Authority: 38 U.S.C. 501(a))

§3.159 (05/08) - Department of Veterans Affairs assistance in developing claims.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

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(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence. (1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the notice). In the notice VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice. If the claimant has not responded to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice, VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information.

(Authority: 38 U.S.C. 5102(b), 5103A(3))

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

- (i) Upon receipt of a Notice of Disagreement; or
- (ii) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(c) VA's duty to assist claimants in obtaining evidence. Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

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(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

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(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §3.309, §3.313, §3.316, and §3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured.

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(Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

- (1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;
- (2) Claims that are inherently incredible or clearly lack merit; and
- (3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records. (1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

- (i) The identity of the records VA was unable to obtain;
- (ii) An explanation of the efforts VA made to obtain the records;
- (iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and
- (iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records.

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If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))

(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations.

(Authority: 38 U.S.C. 5103A(g))

§3.2600 - Review of benefit claims decisions.

(a) A claimant who has filed a timely Notice of Disagreement with a decision of an agency of original jurisdiction on a benefit claim has a right to a review of that decision under this section. The review will be conducted by an Adjudication Officer, Veterans Service Center Manager, or Decision Review Officer, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

(b) Unless the claimant has requested review under this section with his or her Notice of Disagreement, VA will, upon receipt of the Notice of Disagreement, notify the claimant in writing of his or her right to a review under this section. To obtain such a review, the claimant must request it not later than 60 days after the date VA mails the notice. This 60-day time limit may not be extended. If the claimant fails to request review under this section not later than 60 days after the date VA mails the notice, VA will proceed with the traditional appellate process by issuing a Statement of the Case. A claimant may not have more than one review under this section of the same decision.

(c) The reviewer may conduct whatever development he or she considers necessary to resolve

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any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under §3.103(c).

(d) The reviewer may grant a benefit sought in the claim notwithstanding §3.105(b), but, except as provided in paragraph (e) of this section, may not revise the decision in a manner that is less advantageous to the claimant than the decision under review. A review decision made under this section will include 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.

(e) Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see §3.105(a)).

(f) Review under this section does not limit the appeal rights of a claimant. Unless a claimant withdraws his or her Notice of Disagreement as a result of this review process, VA will proceed with the traditional appellate process by issuing a Statement of the Case.

(g) This section applies to all claims in which a Notice of Disagreement is filed on or after June 1, 2001. (Authority: 38 U.S.C. 5109A and 7105(d))

§3.303(a) - Principles relating to service connection. (General)

(a) General. Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions. Each disabling condition shown by a veteran's service records, or for which he seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

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§3.303(b) - Principles relating to service connection.

Chronicity and continuity. With chronic disease shown as such in service (or within the presumptive period under §3.307) so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clearcut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "Chronic." When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity. Continuity of symptomatology is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim.

§3.303(c) - Principles relating to service connection congenital/developmental conditions

(c) Preservice disabilities noted in service. There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. Consequently with notation or discovery during service of such residual conditions (scars; fibrosis of the lungs; atrophies following disease of the central or peripheral nervous system; healed fractures; absent, displaced or resected parts of organs; supernumerary parts; congenital malformations or hemorrhoidal tags or tabs, etc.) with no evidence of the pertinent antecedent active disease or injury during service the conclusion must be that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close thereto that the disease could not have originated in so short a period will establish preservice existence thereof. Conditions of an infectious nature are to be considered with regard to the circumstances of the infection and if manifested in less than the respective incubation periods after reporting for duty, they will be held to have preexisted service. In the field of mental disorders, personality disorders which are characterized by developmental defects or pathological trends in the personality structure manifested by a lifelong pattern of action or behavior, chronic psychoneurosis of long duration or other psychiatric symptomatology shown to have existed prior to service with the same manifestations during service, which were the basis of the service diagnosis will be accepted as showing preservice origin. Congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of

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applicable legislation.

§3.304(a), (b), and (c) - Direct service connection; wartime and peacetime.

(a) General. The basic considerations relating to service connection are stated in §3.303. The criteria in this section apply only to disabilities which may have resulted from service in a period of war or service rendered on or after January 1, 1947.

(b) Presumption of soundness. The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto and was not aggravated by such service. Only such conditions as are recorded in examination reports are to be considered as noted. (Authority: 38 U.S.C. 1111)

(1) History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof.

(2) History conforming to accepted medical principles should be given due consideration, in conjunction with basic clinical data, and be accorded probative value consistent with accepted medical and evidentiary principles in relation to value consistent with accepted medical evidence relating to incurrence, symptoms and course of the injury or disease, including official and other records made prior to, during or subsequent to service, together with all other lay and medical evidence concerning the inception, development and manifestations of the particular condition will be taken into full account.

(3) Signed statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact. Other evidence will be considered as though such statement were not of record. (Authority: 10 U.S.C. 1219)

(c) Development. The development of evidence in connection with claims for service connection will be accomplished when deemed necessary but it should not be undertaken when evidence present is sufficient for this determination. In initially rating disability of record at the time of

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discharge, the records of the service department, including the reports of examination at enlistment and the clinical records during service, will ordinarily suffice. Rating of combat injuries or other conditions which obviously had their inception in service may be accomplished pending receipt of copy of the examination at enlistment and all other service records.

§3.304(d) - Direct service connection; wartime and peacetime. (Combat)

(d) Combat. Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation. (Authority: 38 U.S.C. 1154(b))

§3.307 (effective 09-2013) - Presumptive conditions for wartime and service on or after January 1, 1947.

(a) General. A chronic, tropical, prisoner of war related disease, or a disease associated with exposure to certain herbicide agents listed in §3.309 will be considered to have been incurred in service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service. No condition other than one listed in §3.309(a) will be considered chronic.

(1) Service. The veteran must have served 90 days or more during a war period or after December 31, 1946. The requirement of 90 days' service means active, continuous service within or extending into or beyond a war period or which began before and extended beyond December 31, 1946, or began after that date. Any period of service is sufficient for the purpose of establishing the presumptive service connection of a specified disease under the conditions listed in §3.309(c) and (e).

(2) Separation from service. For the purpose of paragraph (a)(3) and (4) of this section the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period. In claims based on service on or after January 1, 1947, the date of separation will be the date of discharge or release from the period of service on which the claim is based.

(3) Chronic disease. The disease must have become manifest to a degree of 10 percent or more within 1 year (for Hansen's disease (leprosy) and tuberculosis, within 3 years; multiple sclerosis, within 7 years) from the date of separation from service as specified in paragraph (a)(2) of this section.

(4) Tropical disease. The disease must have become manifest to a degree of 10 percent or more within 1 year from date of separation from service as specified in paragraph (a)(2) of this section, or at a time when standard accepted treatises indicate that the incubation period

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commenced during such service. The resultant disorders or diseases originating because of therapy administered in connection with a tropical disease or as a preventative may also be service connected. (Authority: 38 U.S.C. 1112)

(5) Diseases specific as to former prisoners of war. The diseases listed in §3.309(c) shall have become manifest to a degree of 10 percent or more at any time after discharge or release from active service. (Authority: 38 U.S.C. 1112)

(6) Diseases associated with exposure to certain herbicide agents.

(i) For the purposes of this section, the term herbicide agent means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram. (Authority: 38 U.S.C. 1116(a)(4))

(ii) The diseases listed at §3.309(e) shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne or other acneform disease consistent with chloracne, porphyria cutanea tarda, and early-onset peripheral neuropathy shall have become manifest to a degree of 10 percent or more within a year, and respiratory cancers within 30 years, after the last date on which the veteran was exposed to an herbicide agent during active military, naval, or air service.

(iii) A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and has a disease listed at §3.309(e) shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall be the last date on which he or she served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. (Authority: 38 U.S.C. 501(a) and 1116(a)(3))

(iv) A veteran who, during active military, naval, or air service, served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. See also 38 CFR 3.814(c)(2). (Authority: 38 U.S.C. 501(a), 1116(a)(3), and 1821)

(b) Evidentiary basis. The factual basis may be established by medical evidence, competent lay evidence or both. Medical evidence should set forth the physical findings and symptomatology elicited by examination within the applicable period. Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion. The chronicity and continuity factors outlined in §3.303(b) will be considered. The diseases listed in §3.309(a) will be accepted as chronic, even though diagnosed as acute because of insidious inception and chronic development, except:

(1) Where they result from intercurrent causes, for example, cerebral hemorrhage due to

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injury, or active nephritis or acute endocarditis due to intercurrent infection (with or without identification of the pathogenic micro-organism); or

(2) Where a disease is the result of drug ingestion or a complication of some other condition not related to service. Thus, leukemia will be accepted as a chronic disease whether diagnosed as acute or chronic. Unless the clinical picture is clear otherwise, consideration will be given as to whether an acute condition is an exacerbation of a chronic disease. (Authority: 38 U.S.C. 1112)

(c) Prohibition of certain presumptions. No presumptions may be invoked on the basis of advancement of the disease when first definitely diagnosed for the purpose of showing its existence to a degree of 10 percent within the applicable period. This will not be interpreted as requiring that the disease be diagnosed in the presumptive period, but only that there be then shown by acceptable medical or lay evidence characteristic manifestations of the disease to the required degree, followed without unreasonable time lapse by definite diagnosis. Symptomatology shown in the prescribed period may have no particular significance when first observed, but in the light of subsequent developments it may gain considerable significance. Cases in which a chronic condition is shown to exist within a short time following the applicable presumptive period, but without evidence of manifestations within the period, should be developed to determine whether there was symptomatology which in retrospect may be identified and evaluated as manifestation of the chronic disease to the required 10-percent degree.

(d) Rebuttal of service incurrence or aggravation.

(1) Evidence which may be considered in rebuttal of service incurrence of a disease listed in §3.309 will be any evidence of a nature usually accepted as competent to indicate the time of existence or inception of disease, and medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease. The expression "affirmative evidence to the contrary" will not be taken to require a conclusive showing, but such showing as would, in sound medical reasoning and in the consideration of all evidence of record, support a conclusion that the disease was not incurred in service. As to tropical diseases the fact that the veteran had no service in a locality having a high incidence of the disease may be considered as evidence to rebut the presumption, as may residence during the period in question in a region where the particular disease is endemic. The known incubation periods of tropical diseases should be used as a factor in rebuttal of presumptive service connection as showing inception before or after service.

(2) The presumption of aggravation provided in this section may be rebutted by affirmative evidence that the preexisting condition was not aggravated by service, which may include affirmative evidence that any increase in disability was due to an intercurrent disease or injury suffered after separation from service or evidence sufficient, under §3.306 of this part, to show that the increase in disability was due to the natural progress of the preexisting condition. (Authority: 38 U.S.C 1113 and 1153)

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§3.309(a) (effective 11/07/02) - Disease subject to presumptive service connection

(a) Chronic diseases. The following diseases shall be granted service connection although not otherwise established as incurred in or aggravated by service if manifested to a compensable degree within the applicable time limits under §3.307 following service in a period of war or following peacetime service on or after January 1, 1947, provided the rebuttable presumption provisions of §3.307 are also satisfied.

- Anemia, primary.
- Arteriosclerosis.
- Arthritis.
- Atrophy, Progressive muscular.
- Brain hemorrhage.
- Brain thrombosis.
- Bronchiectasis.
- Calculi of the kidney, bladder, or gallbladder.

Cardiovascular-renal disease, including hypertension. (This term applies to combination involvement of the type of arteriosclerosis, nephritis, and organic heart disease, and since hypertension is an early symptom long preceding the development of those diseases in their more obvious forms, a disabling hypertension within the 1-year period will be given the same benefit of service connection as any of the chronic diseases listed.)

- Cirrhosis of the liver.
- Coccidioidomycosis.
- Diabetes mellitus.
- Encephalitis lethargica residuals.
- Endocarditis. (This term covers all forms of valvular heart disease.)
- Endocrinopathies.
- Epilepsies.
- Hansen's disease.
- Hodgkin's disease.
- Leukemia.
- Lupus erythematosus, systemic.
- Myasthenia gravis.
- Myelitis.
- Myocarditis.
- Nephritis.
- Other organic diseases of the nervous system.
- Osteitis deformans (Paget's disease).
- Osteomalacia.
- Palsy, bulbar.
- Paralysis agitans.

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Psychoses.
 Purpura idiopathic, hemorrhagic.
 Raynaud's disease.
 Sarcoidosis.
 Scleroderma.
 Sclerosis, amyotrophic lateral.
 Sclerosis, multiple.
 Syringomyelia.
 Thromboangiitis obliterans (Buerger's disease).
 Tuberculosis, active.

Tumors, malignant, or of the brain or spinal cord or peripheral nerves.

Ulcers, peptic (gastric or duodenal) (A proper diagnosis of gastric or duodenal ulcer (peptic ulcer) is to be considered established if it represents a medically sound interpretation of sufficient clinical findings warranting such diagnosis and provides an adequate basis for a differential diagnosis from other conditions with like symptomatology; in short, where the preponderance of evidence indicates gastric or duodenal ulcer (peptic ulcer). Whenever possible, of course, laboratory findings should be used in corroboration of the clinical data.

§3.309(d) (08/06) - Disease subject to presumptive service connection.

(d) Diseases specific to radiation-exposed veterans. (1) The diseases listed in paragraph (d)(2) of this section shall be service-connected if they become manifest in a radiation-exposed veteran as defined in paragraph (d)(3) of this section, provided the rebuttable presumption provisions of §3.307 of this part are also satisfied.

(2) The diseases referred to in paragraph (d)(1) of this section are the following:

- (i) Leukemia (other than chronic lymphocytic leukemia).
- (ii) Cancer of the thyroid.
- (iii) Cancer of the breast.
- (iv) Cancer of the pharynx.
- (v) Cancer of the esophagus.
- (vi) Cancer of the stomach.
- (vii) Cancer of the small intestine.
- (viii) Cancer of the pancreas.
- (ix) Multiple myeloma.
- (x) Lymphomas (except Hodgkin's disease).
- (xi) Cancer of the bile ducts.
- (xii) Cancer of the gall bladder.
- (xiii) Primary liver cancer (except if cirrhosis or hepatitis B is indicated).
- (xiv) Cancer of the salivary gland.

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- (xv) Cancer of the urinary tract.
- (xvi) Bronchiolo-alveolar carcinoma.
- (xvii) Cancer of the bone.
- (xviii) Cancer of the brain.
- (xix) Cancer of the colon.
- (xx) Cancer of the lung.
- (xxi) Cancer of the ovary.

Note: For the purposes of this section, the term "urinary tract" means the kidneys, renal pelves, ureters, urinary bladder, and urethra.

(Authority: 38 U.S.C. 1112(c)(2))

(3) For purposes of this section:

(i) The term radiation-exposed veteran means either a veteran who while serving on active duty, or an individual who while a member of a reserve component of the Armed Forces during a period of active duty for training or inactive duty training, participated in a radiation-risk activity.

(ii) The term radiation-risk activity means:

(A) Onsite participation in a test involving the atmospheric detonation of a nuclear device.

(B) The occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period beginning on August 6, 1945, and ending on July 1, 1946.

(C) Internment as a prisoner of war in Japan (or service on active duty in Japan immediately following such internment) during World War II which resulted in an opportunity for exposure to ionizing radiation comparable to that of the United States occupation forces in Hiroshima or Nagasaki, Japan, during the period beginning on August 6, 1945, and ending on July 1, 1946.

(D)(1) Service in which the service member was, as part of his or her official military duties, present during a total of at least 250 days before February 1, 1992, on the grounds of a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, if, during such service the veteran:

(i) Was monitored for each of the 250 days of such service through the use of dosimetry badges for exposure at the plant of the external parts of veteran's body to radiation; or

(ii) Served for each of the 250 days of such service in a position that had exposures comparable to a job that is or was monitored through the use of dosimetry badges; or

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(2) Service before January 1, 1974, on Amchitka Island, Alaska, if, during such service, the veteran was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests.

(3) For purposes of paragraph (d)(3)(ii)(D)(1) of this section, the term "day" refers to all or any portion of a calendar day.

(E) Service in a capacity which, if performed as an employee of the Department of Energy, would qualify the individual for inclusion as a member of the Special Exposure Cohort under section 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 7384i(14)).

(iii) The term atmospheric detonation includes underwater nuclear detonations.

(iv) The term onsite participation means:

(A) During the official operational period of an atmospheric nuclear test, presence at the test site, or performance of official military duties in connection with ships, aircraft or other equipment used in direct support of the nuclear test.

(B) During the six month period following the official operational period of an atmospheric nuclear test, presence at the test site or other test staging area to perform official military duties in connection with completion of projects related to the nuclear test including decontamination of equipment used during the nuclear test.

(C) Service as a member of the garrison or maintenance forces on Eniwetok during the periods June 21, 1951, through July 1, 1952, August 7, 1956, through August 7, 1957, or November 1, 1958, through April 30, 1959.

(D) Assignment to official military duties at Naval Shipyards involving the decontamination of ships that participated in Operation Crossroads.

(v) For tests conducted by the United States, the term operational period means:

(A) For Operation TRINITY the period July 16, 1945 through August 6, 1945.

(B) For Operation CROSSROADS the period July 1, 1946 through August 31, 1946.

(C) For Operation SANDSTONE the period April 15, 1948 through May 20, 1948.

(D) For Operation RANGER the period January 27, 1951 through February 6, 1951.

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- (E) For Operation GREENHOUSE the period April 8, 1951 through June 20, 1951.
- (F) For Operation BUSTER-JANGLE the period October 22, 1951 through December 20, 1951.
- (G) For Operation TUMBLER-SNAPPER the period April 1, 1952 through June 20, 1952.
- (H) For Operation IVY the period November 1, 1952 through December 31, 1952.
- (I) For Operation UPSHOT-KNOTHOLE the period March 17, 1953 through June 20, 1953.
- (J) For Operation CASTLE the period March 1, 1954 through May 31, 1954.
- (K) For Operation TEAPOT the period February 18, 1955 through June 10, 1955.
- (L) For Operation WIGWAM the period May 14, 1955 through May 15, 1955.
- (M) For Operation REDWING the period May 5, 1956 through August 6, 1956.
- (N) For Operation PLUMBBOB the period May 28, 1957 through October 22, 1957.
- (O) For Operation HARDTACK I the period April 28, 1958 through October 31, 1958.
- (P) For Operation ARGUS the period August 27, 1958 through September 10, 1958.
- (Q) For Operation HARDTACK II the period September 19, 1958 through October 31, 1958.
- (R) For Operation DOMINIC I the period April 25, 1962 through December 31, 1962.
- (S) For Operation DOMINIC II/PLOWSHARE the period July 6, 1962 through August 15, 1962.
- (vi) The term "occupation of Hiroshima or Nagasaki, Japan, by United States forces" means official military duties within 10 miles of the city limits of either Hiroshima or Nagasaki, Japan, which were required to perform or support military occupation functions such as occupation of territory, control of the population, stabilization of the government, demilitarization of the Japanese military, rehabilitation of the infrastructure or deactivation and conversion of war plants or materials.
- (vii) Former prisoners of war who had an opportunity for exposure to ionizing radiation comparable to that of veterans who participated in the occupation of Hiroshima or Nagasaki,

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Japan, by United States forces shall include those who, at any time during the period August 6, 1945, through July 1, 1946:

(A) Were interned within 75 miles of the city limits of Hiroshima or within 150 miles of the city limits of Nagasaki, or

(B) Can affirmatively show they worked within the areas set forth in paragraph (d)(3)(vii)(A) of this section although not interned within those areas, or

(C) Served immediately following internment in a capacity which satisfies the definition in paragraph (d)(3)(vi) of this section, or

(D) Were repatriated through the port of Nagasaki.

(Authority: 38 U.S.C. 1110, 1112, 1131)

§3.309(e) (effective 09-2013) - Disease subject to presumptive service connection

Disease associated with exposure to certain herbicide agents. If a veteran was exposed to an herbicide agent during active military, naval, or air service, the following diseases shall be service-connected if the requirements of §3.307(a)(6) are met even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of §3.307(d) are also satisfied.

AL amyloidosis

Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes)

Chloracne or other acneform disease consistent with chloracne

Hodgkin's disease

Ischemic heart disease (including, but not limited to, acute, subacute, and old myocardial infarction; atherosclerotic cardiovascular disease including coronary artery disease (including coronary spasm) and coronary bypass surgery; and stable, unstable and Prinzmetal's angina)

All chronic B-cell leukemias (including, but not limited to, hairy-cell leukemia and chronic lymphocytic leukemia)

Multiple myeloma

Non-Hodgkin's lymphoma

Early-onset peripheral neuropathy

Porphyria cutanea tarda

Prostate cancer

Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea)

Soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma,

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or mesothelioma)

Note 1: The term soft-tissue sarcoma includes the following:

- Adult fibrosarcoma
- Dermatofibrosarcoma protuberans
- Malignant fibrous histiocytoma
- Liposarcoma
- Leiomyosarcoma
- Epithelioid leiomyosarcoma (malignant leiomyoblastoma)
- Rhabdomyosarcoma
- Ectomesenchymoma
- Angiosarcoma (hemangiosarcoma and lymphangiosarcoma)
- Proliferating (systemic) angioendotheliomatosis
- Malignant glomus tumor
- Malignant hemangiopericytoma
- Synovial sarcoma (malignant synovioma)
- Malignant giant cell tumor of tendon sheath
- Malignant schwannoma, including malignant schwannoma with rhabdomyoblastic differentiation (malignant Triton tumor), glandular and epithelioid
- malignant schwannomas
- Malignant mesenchymoma
- Malignant granular cell tumor
- Alveolar soft part sarcoma
- Epithelioid sarcoma
- Clear cell sarcoma of tendons and aponeuroses
- Extraskeletal Ewing's sarcoma
- Congenital and infantile fibrosarcoma
- Malignant ganglioneuroma

Note 2: For purposes of this section, the term ischemic heart disease does not include hypertension or peripheral manifestations of arteriosclerosis such as peripheral vascular disease or stroke, or any other condition that does not qualify within the generally accepted medical definition of Ischemic heart disease.

(Authority: 38 U.S.C. 501(a) and 1112(b))

§3.311(New) - Claims based on exposure to ionizing radiation.

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(a) Determinations of exposure and dose:

(1) Dose assessment. In all claims in which it is established that a radiogenic disease first became manifest after service and was not manifest to a compensable degree within any applicable presumptive period as specified in §3.307 or §3.309, and it is contended the disease is a result of exposure to ionizing radiation in service, an assessment will be made as to the size and nature of the radiation dose or doses. When dose estimates provided pursuant to paragraph (a)(2) of this section are reported as a range of doses to which a veteran may have been exposed, exposure at the highest level of the dose range reported will be presumed. (Authority: 38 U.S.C. 501(a))

(2) Request for dose information. Where necessary pursuant to paragraph (a)(1) of this section, dose information will be requested as follows:

(i) Atmospheric nuclear weapons test participation claims. In claims based upon participation in atmospheric nuclear testing, dose data will in all cases be requested from the appropriate office of the Department of Defense.

(ii) Hiroshima and Nagasaki occupation claims. In all claims based on participation in the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, dose data will be requested from the Department of Defense.

(iii) Other exposure claims. In all other claims involving radiation exposure, a request will be made for any available records concerning the veteran's exposure to radiation. These records normally include but may not be limited to the veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained, service medical records, and other records which may contain information pertaining to the veteran's radiation dose in service. All such records will be forwarded to the Under Secretary for Health, who will be responsible for preparation of a dose estimate, to the extent feasible, based on available methodologies.

(3) Referral to independent expert. When necessary to reconcile a material difference between an estimate of dose, from a credible source, submitted by or on behalf of a claimant, and dose data derived from official military records, the estimates and supporting documentation shall be referred to an independent expert, selected by the Director of the National Institutes of Health, who shall prepare a separate radiation dose estimate for consideration in adjudication of the claim. For purposes of this paragraph:

(i) The difference between the claimant's estimate and dose data derived from official military records shall ordinarily be considered material if one estimate is at least double the other estimate.

(ii) A dose estimate shall be considered from a "credible source" if prepared by a person or persons certified by an appropriate professional body in the field of health physics, nuclear

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medicine or radiology and if based on analysis of the facts and circumstances of the particular claim.

(4) Exposure. In cases described in paragraph (a)(2)(i) and (ii) of this section:

(i) If military records do not establish presence at or absence from a site at which exposure to radiation is claimed to have occurred, the veteran's presence at the site will be conceded.

(ii) Neither the veteran nor the veteran's survivors may be required to produce evidence substantiating exposure if the information in the veteran's service records or other records maintained by the Department of Defense is consistent with the claim that the veteran was present where and when the claimed exposure occurred.

(b) Initial review of claims.

(1) When it is determined:

(i) A veteran was exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, Japan from September 1945 until July 1946 or other activities as claimed;

(ii) The veteran subsequently developed a radiogenic disease; and

(iii) Such disease first became manifest within the period specified in paragraph (b)(5) of this section; before its adjudication the claim will be referred to the Under Secretary for Benefits for further consideration in accordance with paragraph (c) of this section. If any of the foregoing 3 requirements has not been met, it shall not be determined that a disease has resulted from exposure to ionizing radiation under such circumstances.

(2) For purposes of this section the term "radiogenic disease" means a disease that may be induced by ionizing radiation and shall include the following:

(i) All forms of leukemia except chronic lymphatic (lymphocytic) leukemia;

(ii) Thyroid cancer;

(iii) Breast cancer;

(iv) Lung cancer;

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- (v) Bone cancer;
- (vi) Liver cancer;
- (vii) Skin cancer;
- (viii) Esophageal cancer;
- (ix) Stomach cancer;
- (x) Colon cancer;
- (xi) Pancreatic cancer;
- (xii) Kidney cancer;
- (xiii) Urinary bladder cancer;
- (xiv) Salivary gland cancer;
- (xv) Multiple myeloma;
- (xvi) Posterior subcapsular cataracts;
- (xvii) Non-malignant thyroid nodular disease;
- (xviii) Ovarian cancer;
- (xix) Parathyroid adenoma;
- (xx) Tumors of the brain and central nervous system;
- (xxi) Cancer of the rectum;
- (xxii) Lymphomas other than Hodgkin's disease;
- (xxiii) Prostate cancer; and

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(xxiv) Any other cancer.

(Authority: 38 U.S.C. 501(a))

(3) Public Law 98-542 requires VA to determine whether sound medical and scientific evidence supports establishing a rule identifying polycythemia vera as a radiogenic disease. VA has determined that sound medical and scientific evidence does not support including polycythemia vera on the list of known radiogenic diseases in this regulation. Even so, VA will consider a claim based on the assertion that polycythemia vera is a radiogenic disease under the provisions of paragraph (b)(4) of this section. (Authority: Pub. L. 98- 542, section 5(b)(2)(A)(i), (iii)).

(4) If a claim is based on a disease other than one of those listed in paragraph (b)(2) of this section, VA shall nevertheless consider the claim under the provisions of this section provided that the claimant has cited or submitted competent scientific or medical evidence that the claimed condition is a radiogenic disease.

(5) For the purposes of paragraph (b)(1) of this section:

(i) Bone cancer must become manifest within 30 years after exposure;

(ii) Leukemia may become manifest at any time after exposure;

(iii) Posterior subcapsular cataracts must become manifest 6 months or more after exposure; and

(iv) Other diseases specified in paragraph (b)(2) of this section must become manifest 5 years or more after exposure. (Authority: 38 U.S.C. 501(a); Pub. L. 98-542)

(c) Review by Under Secretary for Benefits.

(1) When a claim is forwarded for review pursuant to paragraph (b)(1) of this section, the Under Secretary for Benefits shall consider the claim with reference to the factors specified in paragraph (e) of this section and may request an advisory medical opinion from the Under Secretary for Health.

(i) If after such consideration the Under Secretary for Benefits is convinced sound scientific and medical evidence supports the conclusion it is at least as likely as not the veteran's disease resulted from exposure to radiation in service, the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing. The Under Secretary for Benefits shall set forth the rationale for this conclusion, including an evaluation of the claim under the applicable factors specified in paragraph (e) of this section.

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(ii) If the Under Secretary for Benefits determines there is no reasonable possibility that the veteran's disease resulted from radiation exposure in service the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing, setting forth the rationale for this conclusion.

(2) If the Under Secretary for Benefits, after considering any opinion of the Under Secretary for Health, is unable to conclude whether it is at least as likely as not or that there is no reasonable possibility, the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall refer the matter to an outside consultant in accordance with paragraph (d) of this section.

(3) For purposes of paragraph (c)(1) of this section, "sound scientific evidence" means observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, and "sound medical evidence" means observations, findings, or conclusions which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

(d) Referral to outside consultants.

(1) Referrals pursuant to paragraph (c) of this section shall be to consultants selected by the Under Secretary for Health from outside VA, upon the recommendation of the Director of the National Cancer Institute. The consultant will be asked to evaluate the claim and provide an opinion as to the likelihood the disease is a result of exposure as claimed.

(2) The request for opinion shall be in writing and shall include a description of:

(i) The disease, including the specific cell type and stage, if known, and when the disease first became manifest;

(ii) The circumstances, including date, of the veteran's exposure;

(iii) The veteran's age, gender, and pertinent family history;

(iv) The veteran's history of exposure to known carcinogens, occupationally or otherwise;

(v) Evidence of any other effects radiation exposure may have had on the veteran; and

(vi) Any other information relevant to determination of causation of the veteran's disease.

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The Under Secretary for Benefits shall forward, with the request, copies of pertinent medical records and, where available, dose assessments from official sources, from credible sources as defined in paragraph (a)(3)(ii) of this section, and from an independent expert pursuant to paragraph (a)(3) of this section.

(3) The consultant shall evaluate the claim under the factors specified in paragraph (e) of this section and respond in writing, stating whether it is either likely, unlikely, or approximately as likely as not the veteran's disease resulted from exposure to ionizing radiation in service. The response shall set forth the rationale for the consultant's conclusion, including the consultant's evaluation under the applicable factors specified in paragraph (e) of this section. The Under Secretary for Benefits shall review the consultant's response and transmit it with any comments to the regional office of jurisdiction for use in adjudication of the claim.

(e) Factors for consideration. Factors to be considered in determining whether a veteran's disease resulted from exposure to ionizing radiation in service include:

(1) The probable dose, in terms of dose type, rate and duration as a factor in inducing the disease, taking into account any known limitations in the dosimetry devices employed in its measurement or the methodologies employed in its estimation;

(2) The relative sensitivity of the involved tissue to induction, by ionizing radiation, of the specific pathology;

(3) The veteran's gender and pertinent family history;

(4) The veteran's age at time of exposure;

(5) The time-lapse between exposure and onset of the disease; and

(6) The extent to which exposure to radiation, or other carcinogens, outside of service may have contributed to development of the disease.

(f) Adjudication of claim. The determination of service connection will be made under the generally applicable provisions of this part, giving due consideration to all evidence of record, including any opinion provided by the Under Secretary for Health or an outside consultant, and to the evaluations published pursuant to §1.17 of this title. With regard to any issue material to consideration of a claim, the provisions of §3.102 of this title apply.

(g) Willful misconduct and supervening cause. In no case will service connection be established if the disease is due to the veteran's own willful misconduct, or if there is affirmative evidence to

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establish that a supervening, nonservice-related condition or event is more likely the cause of the disease.

§3.316 - Claims based on chronic effects of exposure to mustard gas

(a) Except as provided in paragraph (b) of this section, exposure to the specified vesicant agents during active military service under the circumstances described below together with the subsequent development of any of the indicated conditions is sufficient to establish service connection for that condition:

(1) Full-body exposure to nitrogen or sulfur mustard during active military service together with the subsequent development of chronic conjunctivitis, keratitis, corneal opacities, scar formation, or the following cancers: Nasopharyngeal; laryngeal; lung (except mesothelioma); or squamous cell carcinoma of the skin.

(2) Full-body exposure to nitrogen or sulfur mustard or Lewisite during active military service together with the subsequent development of a chronic form of laryngitis, bronchitis, emphysema, asthma or chronic obstructive pulmonary disease.

(3) Full-body exposure to nitrogen mustard during active military service together with the subsequent development of acute nonlymphocytic leukemia.

(b) Service connection will not be established under this section if the claimed condition is due to the veteran's own willful misconduct (See §3.301(c)) or there is affirmative evidence that establishes a nonservice-related supervening condition or event as the cause of the claimed condition (See §3.303).

VA, in determining all claims for benefits that have been reasonably raised by the filings and evidence, has applied the benefit-of-the-doubt and liberally and sympathetically reviewed all submissions in writing from the Veteran as well as all evidence of record.

A complete review of all evidence submitted with the initial claim as well as evidence submitted during the appeal process has been accomplished. Under 38 CFR §3.2600, the above noted issues have been re-adjudicated based on a de novo review of the evidence contained in the claims folder.

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DECISION:

1. Service connection for type II diabetes mellitus is denied.

REASONS AND BASES:

1. A claim for service connection for diabetes mellitus, type II, due to herbicide or chemical or radiation exposure was received February 21, 2017. Following development for military personnel records, service treatment records, current medical records and Mustard gas and radiation exposure, service connection was denied by VA rating decision dated June 22, 2017. You were notified of the decision on June 27, 2017 and your Notice of Disagreement (NOD) was received on August 10, 2017.

You requested a Decision Review Officer (DRO) review your claim. Please be advised that a DRO reviewed all of the evidence in your claims file, to include the evidence considered in the prior decision as well as all evidence received since that decision. This review was given without consideration to the prior decision.

Service connection may be granted on a presumptive basis for type II diabetes mellitus if this condition is manifested to a compensable degree (severe enough to be evaluated at least 10 percent disabling) within 1 year after military discharge.
The evidence does not show an event, disease or injury in service.

Service connection may be granted for a condition diagnosed after military discharge provided evidence establishes that the condition was caused by service or it is presumed by law to be service connected. If service connection is granted on the basis of a relationship to radiation exposure during military service, available evidence must demonstrate that the veteran was exposed to radiation during the course of his service, and that a disease associated with such exposure resulted.

Full-body exposure to nitrogen or sulfur mustard, or Lewisite during active military service together with the later development of any of the following conditions is sufficient to establish service connection for that condition: chronic conjunctivitis, keratitis, corneal opacities, scar formation, or the following cancers: nasopharyngeal; laryngeal; lung (except mesothelioma); or squamous cell carcinoma of the skin; or a chronic form of laryngitis, bronchitis, emphysema, asthma, or chronic obstructive pulmonary disease or for acute nonlymphocytic leukemia.

Under the authority granted by the Agent Orange Act of 1991, VA has determined that presumption of service connection based on exposure to herbicides used in Vietnam is not warranted for any conditions other than those for which VA has found a positive association between the condition and such exposure. VA has determined that a positive association exists

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between exposure to herbicides and the subsequent development of the following conditions: AL amyloidosis; chloracne or other acneform disease consistent with chloracne; type 2 diabetes (also known as type II diabetes mellitus or adult-onset diabetes); Hodgkin's disease; ischemic heart disease (including, but not limited to, acute, subacute, and old myocardial infarction, atherosclerotic cardiovascular disease including coronary artery disease, including coronary spasm, and coronary bypass surgery, and stable, unstable and Prinzmetal's angina); all chronic B-cell leukemias (including but not limited to, hairy-cell leukemia and chronic lymphocytic leukemia); multiple myeloma; non-Hodgkin's lymphoma; Parkinson's disease; early-onset peripheral neuropathy; porphyria cutanea tarda (PCT); prostate cancer; respiratory cancers (cancer of the lung, bronchus, larynx, or trachea); and soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). PCT, chloracne, and early-onset peripheral neuropathy are required to become manifest to a compensable degree within one year from last exposure.

Your attorney presented a statement with the NOD, indicating that there was factual evidence of chemical and herbicide exposure during your service at Ft. McClellan, Alabama and that evidence would support a grant of service connection for this condition. The VA has conceded potential exposure to several elements, "to include radioactive compounds, chemical warfare agents and airborne polychlorinated biphenyls. There is further acknowledgement that these compounds have been shown to cause a variety of adverse health effects in human and laboratory animal, however there is no current evidence that exposures of this magnitude have occurred at Ft. McClellan."

Your attorney further indicated that additional evidence would be submitted following the NOD, and while we received correspondence from that office on February 7, 2018, May 7, 2018 and August 7, 2018, requesting the status of the NOD no additional evidence was received.

Service connection for type II diabetes mellitus, remains denied because the evidence fails to show this condition manifested during your military service, to a compensable degree within one year of your separation from military service, or due to exposure to chemical or herbicide agents while at Ft. McClellan.

PREPARED BY adjkandr

APPROVED BY 21-36

EXHIBIT C



1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN GRAY, JUSTIN, D					2. FILE NO. [REDACTED]	
3. NAME OF APPELLANT (If other than veteran)					4. INSURANCE FILE NO. OR LOAN NO. (If pertinent)	
DATES OF PROCEDURAL DOCUMENTS						
5A. DATE OF NOTIFICATION OF ACTION APPEALED 06/27/2017	5B. DATE OF SOC 11/21/2018	5C. DATE OF SUBSTANTIVE APPEAL/FORM 9 12/24/2018	5D. DATE OF SSOC (FIRST)	5E. DATE OF SSOC (SECOND)	5F. DATE OF SSOC (THIRD)	
6. APPELLANT REPRESENTED IN THIS APPEAL BY (Name of organization, attorney or agent) ROBERT V CHISHOLM - Attorney						
7. IF APPLICABLE, WHAT TYPE OF HEARING WAS REQUESTED? <input checked="" type="checkbox"/> A. DECLINED OPTIONAL BOARD HEARING <input type="checkbox"/> C. REQUESTED HEARING IN WASHINGTON, DC <input type="checkbox"/> E. NO HEARING REQUESTED <input type="checkbox"/> B. REQUESTING HEARING BY VIDEOCONFERENCE <input type="checkbox"/> D. REQUESTED HEARING AT A LOCAL VA OFFICE (Travel Board)						
8. REMARKS (Place additional remarks in Box 13, on following page)						
CERTIFICATION: It is hereby certified that all material evidence is of record, that all contentions advanced by and on behalf of the appellant have been considered under all pertinent laws, and the issues determined.						
9. NAME AND LOCATION OF CERTIFYING OFFICE Salt Lake City, UT			10. ORGANIZATIONAL ELEMENT CERTIFYING APPEAL RO41			
11A. SIGNATURE OF CERTIFYING OFFICIAL KARI ROSEN			11B. TITLE DECISION_REVIEW_OFFICER		11C. DATE 05/12/2020	
12A. SIGNATURE OF MEDICAL MEMBER (Insurance use only)			12B. TITLE		12C. DATE	

13. ADDITIONAL REMARKS

EXHIBIT D



DEPARTMENT OF VETERANS AFFAIRS

May 15, 2020

JUSTIN GRAY
1850 IDLEWILD DR
APT A6
RENO, NV 89509

In reply, refer to:
341/JC/1629
File Number: [REDACTED]
JUSTIN GRAY

Dear Mr. GRAY:

We have certified your appeal to the Board of Veterans' Appeals (Board) in Washington, D.C.

Please note that if you requested a Travel Board or Video conference hearing before a Board Veterans Law Judge, the Board will not be able to take any action on your appeal until your hearing is held.

Sincerely yours,

Regional Office Director

cc: ROBERT V CHISHOLM

EXHIBIT E



DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20038

Date: 05/24/20

In Reply Refer To: (0141 A4)
[REDACTED]

JUSTIN D GRAY
1850 IDLEWILD DR
APT 6
RENO , NV 89509

Dear Appellant:

The Board of Veterans' Appeals (Board) has formally placed your appeal on the Board's docket. Depending on several factors, including the docket number assigned to your appeal (generally based upon the date you filed your Form 9), as well as the complexity of legal or medical questions raised by the record, it may take more or less time for the Board to issue a decision in your case.

The Board is required by law (38 U.S.C. § 7107(a)) to review appeals in docket order unless unusual hardship or "other sufficient cause" has been shown to advance a case on the docket. If applicable, you may submit brief, but complete, reasons to the Board for advancing your case on the docket, which **must** include supporting documentation to factually demonstrate reasons for advancement. The following are some examples of unusual hardship or other sufficient causes, along with recommended supporting documentation:

- **Severe financial problems** (bankruptcy petition or home foreclosure notice);
- **Serious illness** (physician's statement documenting serious illness, preferably with clinical findings); or
- **Advanced age of 75 years or more.**

Motions for advancement on the docket, along with supporting documentation, should be submitted to: Director, Office of Management, Planning and Analysis (014), Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Please include your name, the Veteran's name (if different), and your claim number.

Please note that you have **90 days from the date of this letter or until the Board issues a decision in your appeal (whichever comes first)** to request a change in representation or to submit additional argument or evidence, if you elect to do so. Any such request or submission must be sent directly to the Board. *See generally* 38 C.F.R. § 20.1304.

You can check the status of your appeal via eBenefits, www.eBenefits.va.gov. If you do not already have an eBenefits account, please visit the eBenefits website for more information on how to register. You may also contact the Board at (800) 923-8387, from 8:00 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, or via fax at 1-(844) 678-8979. Any questions about factual or legal matters involved in your appeal should be directed to your representative, if you have one.

Sincerely yours,

Kenneth A. Arnold
Deputy Vice Chairman

cc: ROBERT CHISHOLM

EXHIBIT F

CHISHOLM CHISHOLM & KILPATRICK LTD



321 S MAIN ST #200
PROVIDENCE, RI 02903
TELE: 401.331.6300
800.544.9144
FAX: 401.421.3185

February 8, 2022

Chairman (01)
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

Board of Veterans' Appeals
810 Vermont Avenue, NW.
Washington, DC 20420

Re: Justin D. Gray
[REDACTED]

To Whom It May Concern:

Please accept this correspondence pertaining to the December 24, 2018 Substantive VA 9 Appeal filed in response to the November 21, 2018 Statement of the Case. The Veteran continues to seek entitlement to service connection for diabetes mellitus type II. Our office received correspondence on May 24, 2020 confirming that this appeal was certified to the Board. Please be advised that our office submitted previous correspondence regarding this matter on November 9, 2020; February 12, 2021; May 17, 2021; August 20, 2021; and November 15, 2021. At this time, please provide our office with an update as to when this appeal will be adjudicated, as this appeal has been pending for over three years. Thank you for your prompt attention to this matter.

Very truly yours,



Robert V. Chisholm

/af/ka

cc: Justin D. Gray

EXHIBIT G



REPORT OF CONTACT

NOTE: As appropriate, once this form is completed it becomes a permanent record in the veteran's folder. Please do not use a pencil to complete this form.

VA OFFICE Board of Veterans' Appeals	IDENTIFICATION NOS. (C, XC, SS, XSS, V, K, etc.) [REDACTED]
LAST NAME-FIRST NAME-MIDDLE NAME OF VETERAN (Type or print) GRAY, JUSTIN D.	DATE OF CONTACT 02/17/2022
ADDRESS OF VETERAN 1850 IDLEWILD DRIVE, G5 RENO, NV 89509	TELEPHONE NO. OF VETERAN (Include Area Code) (775) 482 4331
PERSON CONTACTED DREW HAZEN-CHISHOLM, CHISHOLM, & KILPATRICK	TYPE OF CONTACT (check one) <input type="checkbox"/> PERSONAL <input checked="" type="checkbox"/> TELEPHONE
ADDRESS OF PERSON CONTACTED 321 S Main St #200 Providence, RI 02903	TELEPHONE NO. OF PERSON CONTACTED (Include Area Code) (401) 331 6300
PERSON WHO CONTACTED YOU	TYPE OF CONTACT (check one) <input type="checkbox"/> PERSONAL <input type="checkbox"/> TELEPHONE
ADDRESS OF PERSON WHO CONTACTED YOU	TELEPHONE NO. OF PERSON WHO CONTACTED YOU (Include area code)

BRIEF STATEMENT OF INFORMATION REQUESTED AND GIVEN (Continue on page 2 if needed)

VACOHILLC2: Contacted Attorney Chisholm office in reference to email sent to CS inbox. The office requested status of the appeal. I explained the appeal is awaiting review by a VLJ. The Board, as required by law, will consider the appeal according to its place on the docket.

DIVISION OR SECTION BVA LIT SUPPORT	EXECUTED BY (Signature and title) VACOHILLC2
--	---

EXHIBIT H



REPORT OF CONTACT

NOTE: As appropriate, once this form is completed it becomes a permanent record in the veteran's folder. Please do not use a pencil to complete this form.

VA OFFICE Board of Veterans' Appeals	IDENTIFICATION NOS. (C, XC, SS, XSS, V, K, etc.) [REDACTED]
LAST NAME-FIRST NAME-MIDDLE NAME OF VETERAN (Type or print) GRAY, JUSTIN DEREK	DATE OF CONTACT 06/27/2022
ADDRESS OF VETERAN 1850 IDLEWILD DRIVE G5 RENO, NV 89509	TELEPHONE NO. OF VETERAN (Include Area Code) (775) 482 4331
PERSON CONTACTED ROBERT V. CHISHOLM-CHISHOLM CHISHOLM & KILPATRICK	TYPE OF CONTACT (check one) <input type="checkbox"/> PERSONAL <input checked="" type="checkbox"/> TELEPHONE
ADDRESS OF PERSON CONTACTED 321 S. MAIN ST., SUITE 200 PROVIDENCE, RI 02903	TELEPHONE NO. OF PERSON CONTACTED (Include Area Code) (401) 331 6300
PERSON WHO CONTACTED YOU	TYPE OF CONTACT (check one) <input type="checkbox"/> PERSONAL <input type="checkbox"/> TELEPHONE
ADDRESS OF PERSON WHO CONTACTED YOU	TELEPHONE NO. OF PERSON WHO CONTACTED YOU (Include area code)

BRIEF STATEMENT OF INFORMATION REQUESTED AND GIVEN (Continue on page 2 if needed)

VACOHILLC2: Contacted Attorney Chisholm office regarding email sent to CS inbox. The office requested status of pending appeal. Direct contact was made and I explained the appeal is awaiting review by a VLJ. The Board, as required by law, will consider the appeal according to its place on the docket. No additional questions was asked and the call properly ended.

DIVISION OR SECTION
BVA LIT SUPPORT

EXECUTED BY (Signature and title)

VACOHILLC2

EXHIBIT I

Appeal Id Query

File Query by

Appeal Id: [REDACTED] Find Id

Last Name: [REDACTED] Find Name

A E P
O C A
D A P

Appeal Id	Name	Status	Dec Date	Disp RO	Cur Loc	A E P	Action
530066457S	GRAY	JUSTIN D ACT		RO41	81	Y 1	- Original

View Appeal

VACOLS Appeal Screen

File Processes Utilities Help

Name: GRAY, JUSTIN D RO: RO41 Status: ACT

CAVC DAS(0) Mail(13) Oth Docs RemRea Issues(1) Hearing Mot CC

Docket Dispatch PriorLocs Address Vet Info Attachment Diary(0)/Opinion(0)

Recvd BVA: 05/24/20 RO: 341 - Salt Lake City 3593400

Type Action: 1 - Original Rep: T - Attorney 00/00/00

Docket Nr: 1903277 02/06/19 Med Facility: [REDACTED]

Hearing Request: 5 - None Remanded to: [REDACTED]

Travel Board Preferences

Video: [REDACTED] Outbased: [REDACTED]

Ready: [REDACTED] Req Date: [REDACTED]

RO Notify: 06/27/17

NOD: 08/10/17 SOC: 11/21/18

Date Form 9: 12/24/18 Cert BVA: 05/12/20

Thurber Ltr: 00/00/00 Prior Dec: 00/00/00

SSOCs(1-5): 00/00/00 00/00/00 00/00/00

00/00/00 00/00/00

Rocket Docket: [REDACTED] [REDACTED]

Current Location: 81 5/24/2020

Reviewed by: LMAIDEN 5/24/2020

Stays: [REDACTED]

Update

EXHIBIT J

Get help from Veterans Crisis Line

LOCATOR

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VA (<http://www.va.gov/>) » Board of Veterans' Appeals (</index.asp>) » Appeals Metrics

Board of Veterans' Appeals

Appeals Metrics

Below are additional detailed appeals metrics reflecting Hearings and Decisions executed through the current fiscal year.

Number of Hearings Pending Through 11 September		
Legacy Appeals	Appeals Modernization Act	
7,577	66,028	
Hearings Offered		
FY22 Goal	36,060	
Hearings Held Through 11 September		
Goal	FY22 Held	FY21 Held
28,000	29,035	23,777
The Board held 29035 this FY to date, which is 56.6% of the 51285 hearings offered this FY.		

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and-your-va-benefits) Pending Appeals' Inventory through 11 September				
Legacy	Direct Review	Evidence	Hearing	
64,181	42,635	27,924	71,781	
Total Pending				
207,521				
Appeals – Average Pending Time (Days) through August 2022				
Legacy Dockets		AMA Dockets		
Original Appeals	Returned Remands	Direct Review	Evidence	Hearing
From Certification	From Returned Receipt	From Notice of Disagreement		
821	383	381	504	578
Decisions Dispatched FY22				
Fiscal Year 2022 Goal			95,373	
Totals through 11 September (Legacy + Appeals Modernization Act)				
FY22 Goal to Date		FY22 Actual	FY21 Actual	
89,139		89,519	93,904	
Subtotals thru Week 11 September				
Legacy	Direct Review	Evidence	Hearing	
67,643	9,618	3,410	8,849	
Appeals Average Days to Complete (Days) thru August 2022				
Legacy Dockets		AMA Dockets		
Original Appeals	Returned Remands	Direct Review	Evidence	Hearing
From Certification	From Returned Receipt	From Notice of Disagreement		
1195	161	363	378	694
Current Legacy Docket Date				
Up to Sept 2019				

return to top ▲

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Health Care:
1-877-222-VETS (8387)

VA Inspector General:
1-800-488-8244

Veterans Crisis Line:
1-800-273-8255 Press 1

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Call: 988 (tel:+988) (Press 1)

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EXHIBIT K



Department of Veterans Affairs (VA)
Board of Veterans' Appeals

Annual Report
Fiscal Year (FY) 2021

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Board Senior Leadership

(as of the end of FY 2021)

Chairman

Cheryl L. Mason

Vice Chairman

Kenneth A. Arnold

Deputy Vice Chairmen

Tamia Gordon Silas V. Darden III

Robert C. Scharnberger Christopher A. Santoro Thomas M. Rodrigues

Chief Counsel

Anthony C. Sciré, Jr

Executive Director

Nina Tann

Veterans Law Judges

Allen, Keith	Haddock, Kristin	Pappas, Michael
Ames, Dorilyn	Hager, Jonathan	Parakkal, Kalpana
Auer, Marjorie	Heneks, Stacey	Parker, Jeffrey
B. Thomas Knope	Herman, Michael	Picton, Cory
Banfield, Kathy	Hindin, Mark	Poulson, Rebecca N.
Barnard, Lisa	Howell, Linda Anne	Rein, Lesley
Blackwelder, Matthew	Hutcheson, John	Reiss, Steven
Brenningmeyer, David	Hwa, Jennifer	Reynolds, Tara
Bruce, Cynthia	Hyland, Marti	Roberts, Harvey
Buck, Bethany	Ishizawar, Amy	Schwartz, Howard
Bush, Sonnet	Jaeger, Anne	Seesel, Holly
Caracciolo, Angeline	Johnson, Dana	Senyk, George
Catino, Theresa	Jones, John	Seppanen, Christopher
Chiappetta, Vincent	Kane, Michelle	Simpson, Alexandra
Chu, Lana	Kennedy, Susan	Skaltsounis, Michael
Clementi, Vito	Kennerly, Karen	Skow, Cynthia
Collins, Laura	Kessel, Ryan	Slabbekorn, Ray
Conner, Kelly	Kilcoyne, Michael	Smith, Tanya
Crawford, Cherry	Kirby, Jennifer	Sorisio, Mary
Crowley, John	Kordich, Kelli	Sorisio, Paul
Cryan, Lauren	Kramer, Jonathan	Spector, Amanda
Dawson, Tiffany	Krembs, Simone	Speranza, Shaun
Deichert, Evan	Lane, Michael	Strommen, Gayle
DiLorenzo, Paula	Larkin, Mary Ellen	Tamlyn, Emily

Doan, Nathaniel	Leboff, Eric	Tenner, Matthew
Donnelly, William	Mackenzie, Andrew	Trueba, Claudia
Donohue, Michael	Mainelli, Anthony	Velez, Estela
Doolittle, John	Marcus, Shereen	Walker, Helena
Feinberg, Rebecca	Martin, Michael	Wasik, Glenn
Fleming, Caroline	Mays, Simone	White, Jennifer
Francis, John	Mincey, Danette	White, Yvette R.
Freeman, Joshua	Moshiashwili, Victoria	Whitehead, DeYvonne
Graham, Mary Caryn	Mullins, Bobby	Wight, David
Gratz, David	Neill, Steven	Zadora, Kristy
Gunn, Kristi	Nichols, Jane	Zissimos, Jessica
Hachey, Donnie	O'Shay, Thomas	

**Department of Veterans Affairs
Board of Veterans' Appeals
FY 2021 Veterans Law Judges**



Introduction

The Board of Veterans' Appeals (Board) is an agency within the Department of Veterans Affairs (VA). Its mission is to conduct hearings and issue timely decisions for Veterans and other appellants in compliance with the law, 38 U.S.C § 7101(a). The Board is responsible for making final decisions on behalf of the Secretary regarding appeals for Veterans' benefits and services from all three Administrations - Veterans Benefits Administration (VBA), Veterans Health Administration (VHA) and National Cemetery Administration (NCA) as well as the Office of General Counsel (OGC) that are presented to the Board for appellate review. The Board's jurisdiction extends to all questions of law or fact in a matter involving a decision by the Secretary under the law that affects a provision of benefits by the Secretary to Veterans, their dependents or their survivors. 38 U.S.C. §§ 511(a); 7104(a). Final decisions on appeals are made by the Board based on the entire record in the proceeding and all applicable provisions of law and regulation. 38 U.S.C. § 7104(a).

The Board is committed to the Department's core values: Integrity, Commitment, Advocacy, Respect and Excellence (ICARE). These values are integral to fulfilling the Board's statutory mission to fully consider and resolve matters raised by Veterans, their dependents or their survivors.

The Board is also dedicated to fulfilling the Secretary's prime directive of providing excellent customer service to Veterans. This includes aligning strategic direction, improved business processes, technology, and data to form a Veteran-centric, results-driven and forward-thinking organization.

After the end of each FY, the Chairman is required to prepare a report on the activities of the Board during that FY and the projected activities of the Board for the current and subsequent FYs. 38 U.S.C. § 7101(d)(1).

This Annual Report includes the following two parts:

- **Part I** provides a discussion of Board activities during FY 2021 and projected activities for FY 2022 and FY 2023; and
- **Part II** provides statistical information related to the Board's activities during FY 2021 and its projected activities for FY 2022 and 2023.

PART I

Activities of the Board of Veterans' Appeals in FY 2021

Mission

The Board was established in 1933 and operates by authority of, and functions pursuant to, chapter 71 of title 38, United States Code. The Board consists of a Chairman, a Vice Chairman and Members sufficient to conduct hearings and decide appeals properly before the Board in a timely manner. 38 U.S.C. § 7101(a). Members of the Board, also known as Veterans Law Judges (VLJ), are appointed by the Secretary with the approval of the President, based on the recommendation of the Chairman. 38 U.S.C. § 7101A(a)(1).

Board Structure in FY 2021

In FY 2021, the Board continued operations in a largely virtual environment, increased Veteran-facing full time equivalent (FTE) staff and continued to improve application of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), which was implemented in FY 2019. The Board expanded the existing leadership structure to enhance greater decision output and accountability within the organization during FY 2021. The Board's organizational structure consisted of four main components: the Office of the Chairman, the Office of Appellate Operations, the Office of the Chief Counsel and the Office of Appellate Support.

The Office of the Chairman is led by the Chairman with the support of the Vice Chairman. The Chairman is appointed by the President for a statutory term of six years and is confirmed by the Senate. The Chairman is directly accountable to the Secretary. 38 U.S.C. § 7101(a). The Vice Chairman is a member of the Senior Executive Service (SES) who is designated by the Secretary and serves as the Board's Chief Operating Officer. *Id.* Both the Chairman and the Vice Chairman are Board Members.

The Vice Chairman oversees the Office of Appellate Operations, the Office of Chief Counsel, the Office of Appellate Support, the Office of the Chief of Staff, the Clerk of the Board and the Office of Budget and Internal Controls. The Office of Appellate Operations is split into five sections, each headed by a Deputy Vice Chairman (DVC), a member of the SES. Each DVC oversaw the appeals adjudication work accomplished by 108 VLJs and over 770 attorneys supporting those judges at the end of FY 2021. See Figure 1 below.

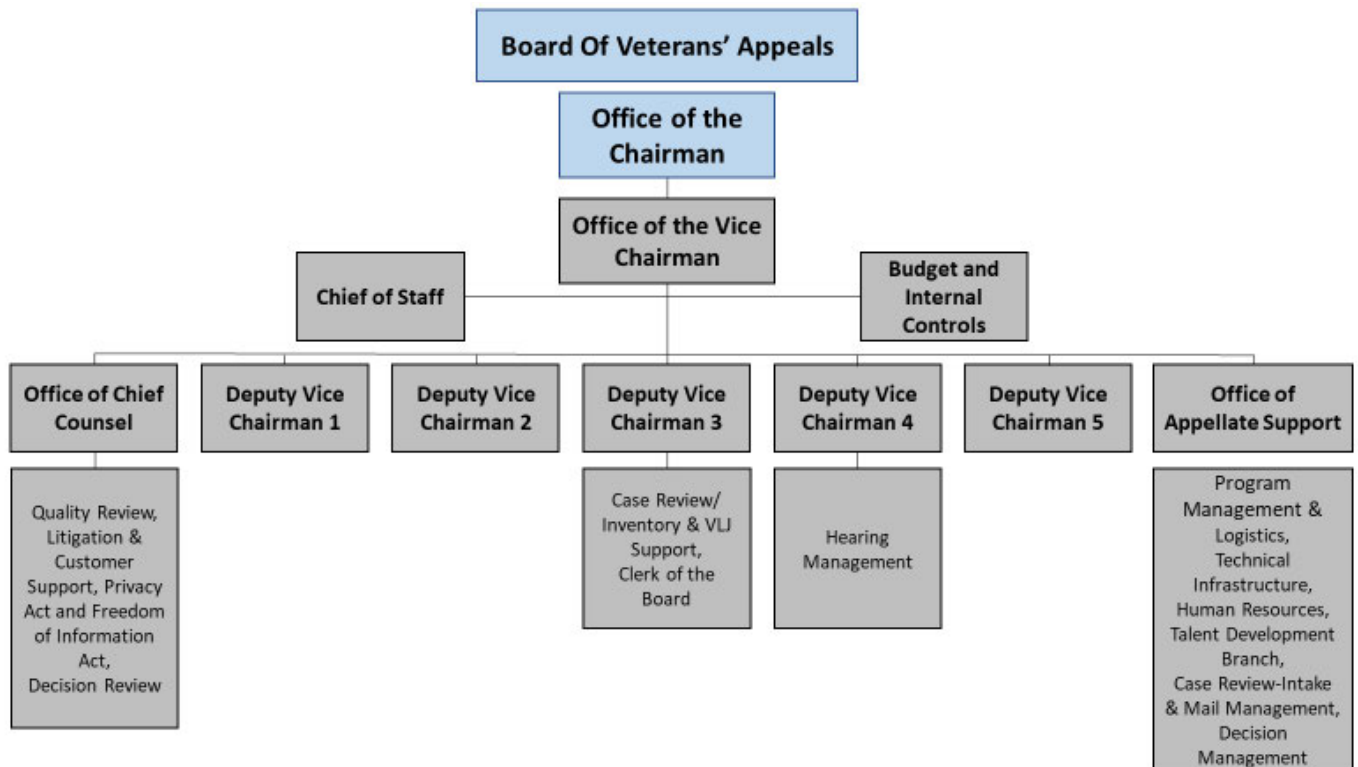


Figure 1. Board's Organizational Structure 2021

The Board's Chief Counsel, a member of the SES, oversees the offices of Quality Review (QR), Litigation Support and Customer Service, Freedom of Information Act and Privacy, as well as Records Management.

The Board's Office of Appellate Support is led by an SES Executive Director who oversees the offices of Talent Development, Program Management and Logistics, Technical Infrastructure, Human Resource liaisons, Case Review/Intake & Mail Management and Decision Management.

FY 2021 – Continued Modernization, Record Hearing Output and Virtual Support

Success at the Board is defined through service, modernization and action. In FY 2021, the Board had continued resolution of legacy appeals, application of the AMA, increases in the number of judges, and continued virtual operations that resulted in significant measurable results for Veterans and their families. The Board also focused efforts on holding a record number of hearings in a largely virtual environment.

In FY 2021, the Board led the Department's legacy resolution plan and reduced the number of legacy appeals in the Department by over 49,348.

Due to the pandemic, the Board started FY 2021 with approximately 98% of employees working virtually. The Board also continued hearing operations within a primarily virtual environment for the first three quarters of the FY to ensure the safety of the Veterans we serve as well as Board employees. Adaption of virtual tele-hearings began six months prior to the start of FY 2021, which allowed the Board time to improve internal processes and coordination with stakeholders. Including a limited number of Travel Boards, which resumed in Quarter 3 (Q3) of FY 2021, the Board offered 42,015 and held a record 23,777 hearings this FY. This represents an approximate 52% increase in hearings held from FY 2020.

Veterans Appeals Improvement and Modernization Act of 2017 (AMA)

Through strong stakeholder collaboration, the Board achieved the successful and on-time implementation of baseline processes, information technology, supporting regulations, operational structure and training required to achieve initial operating capability under the AMA in February 2019. As detailed further below, further modernization efforts continue to improve Veteran-centric approaches as the Board resolves legacy appeals and transitions to AMA-only appeals over the next few years.

AMA Process

AMA created three options, referred to as lanes, for claimants dissatisfied with the initial decisions on their claim. Claimants may seek a higher-level review of the decision based on the same evidence presented to the initial claims processors; they may file a supplemental claim that includes the opportunity to submit additional evidence; or they may appeal directly to the Board.

Veterans appealing to the Board may elect one of three appeal options: 1) a direct review of the evidence that the Agency of Original Jurisdiction (AOJ) considered; 2) an opportunity to submit additional evidence without a hearing; or 3) an opportunity to have a hearing before a VLJ, which includes the opportunity to submit additional evidence.

Figure 2 below further describes the AMA process.

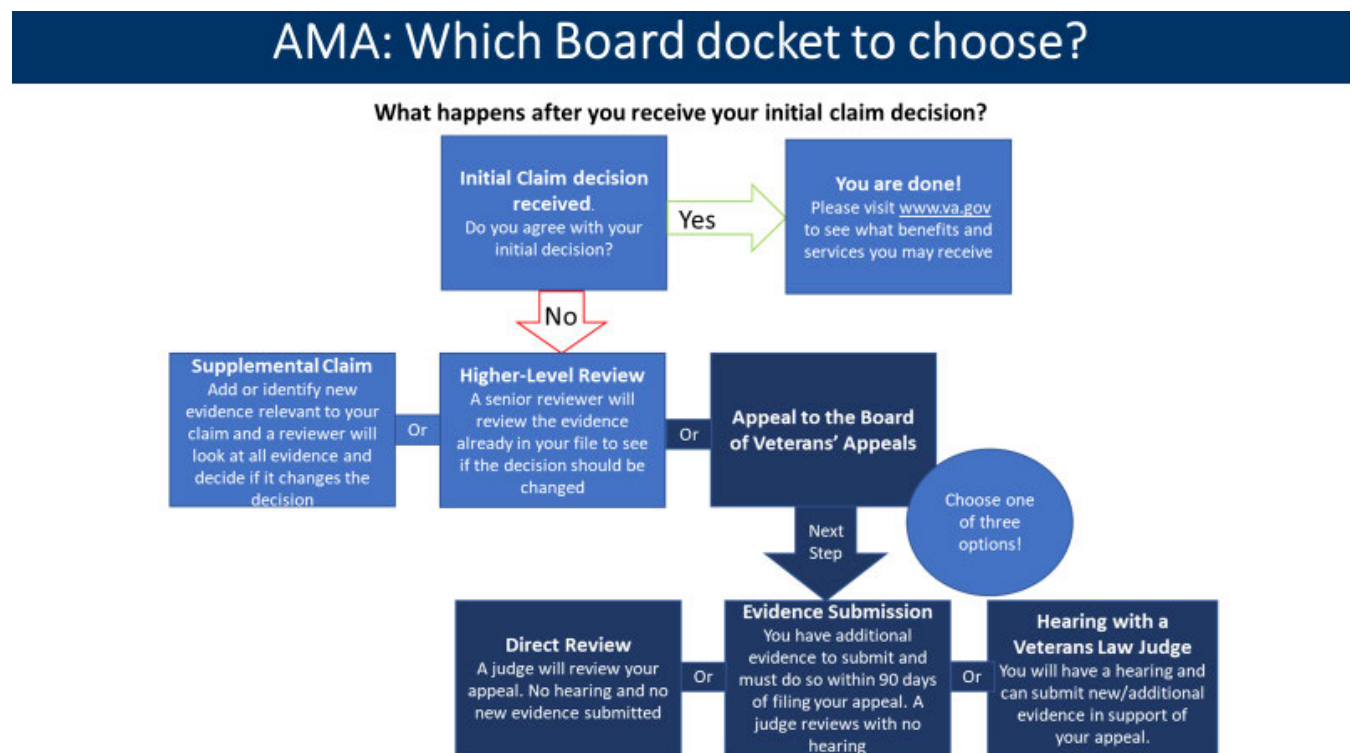


Figure 2. AMA: Which Board Docket to Choose?

AMA Lessons Learned from Stakeholders

The Board conducted significant outreach and coordination with Veterans, Veterans Service Organizations (VSO) and stakeholders to implement AMA and further modernize the appeals process. Significant input was received from VSOs, private representatives and Congressional stakeholders, and the Board incorporated recommendations to help modernize processes and technology. During and after initial implementation, the Board provided targeted AMA trainings, videos, fact sheets and briefings to Veterans and stakeholders. To help communicate both AMA activities and modernization progress, the Board provided regular press releases when significant milestones were met. The Board also sought and disseminated feedback to staff during numerous townhalls and communications over the course of the FY. Seeking and utilizing customer input helped the Board to modernize and make organizational changes in a way that increased choices for Veterans while also improving the quality of services provided.

Although the initial implementation of AMA is complete, significant modernization continued through FY 2021. The Board continues to seek input from stakeholders to help inform Veteran and customer-centric organizational and technological improvements.

FY 2021 Modernization

In FY 2021, the Board took several specific actions to improve customer experience and further modernize business processes, including the following: 1) improving processes, frequency and the customer experience for virtual tele-hearings; 2) providing a virtual environment for Board staff to continue work remotely during Coronavirus Disease 2019 (COVID-19); 3) increasing the overall staff size of attorneys and VLJs who provide Veteran-facing services; 4) increasing VSO and representative information sharing and accountability; 5) continuing the One Touch program; 6) focusing on the reduction of legacy inventory through the Legacy Appeals Resolution Plan; and 7) continuing to drive improved functionality in Casflow.

To support modernization, the Board led and participated in the following activities during FY 2021:

- Held trainings with internal and external stakeholders, including VSOs and representatives, to provide information and guidance on appeals modernization;
- Distributed email communications highlighting important AMA updates, trainings, tips and activities to Board personnel;
- Established a new Training and Development Branch (TDB) this year to ensure that Board employees receive the training needed to provide Veterans with legally accurate and timely decisions;
- Hosted numerous town halls to help communicate with employees regarding changes occurring during COVID-19 and how to best operate in a virtual environment;
- Continued to lead the Department's Legacy Appeals Resolution plan by significantly reducing legacy inventory (approximately 28% reduction VA-wide in FY 2021) and by providing progress updates with VA Administrations and staff offices to ensure appropriate alignment, synchronization and integration of efforts to resolve both legacy appeals and AMA appeals; and
- Continued to collaborate with SharePoint developers to improve the layout and framework of the Board's internal SharePoint site, which houses AMA materials in a central repository.

Legacy Appeals Resolution Plan

VA's Legacy Appeals Resolution Plan includes a prioritized reduction of legacy appeals, informed by continuous stakeholder engagement as well as sound project management practices. The plan has continued to result in a marked reduction in the number of legacy appeals pending in the Department before the Board and in all three Administrations: VBA, VHA and NCA. The plan demonstrated significant progress by reducing the number of pending legacy appeals by approximately 28%, from 174,688 pending at the start of FY 2020, to 125,340 pending at the end of FY 2021.

The Department's goal is to resolve legacy appeals by the end of calendar year (CY) 2022 with the exception of returned remands. However, this may be impacted by longer-lasting effects of COVID-19 such as the reduced ability to conduct in-person hearings at some regional offices (RO), as well as some continued reluctance to opt-into virtual tele-hearings. See Figure 3 below.

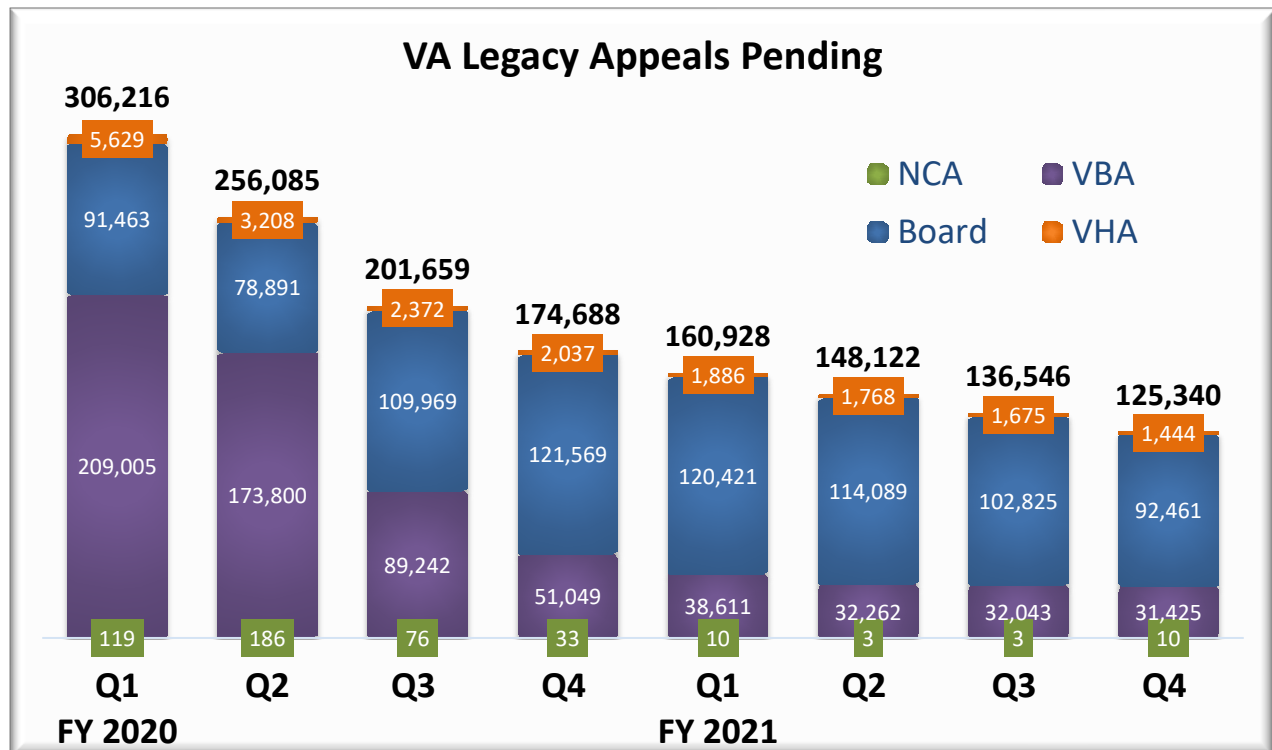


Figure 3. VA Legacy Appeals Pending

The Board continued to prioritize resources to address the pending legacy appeals inventory in FY 2021. The Board dispatched 99,721 decisions in FY 2021, with 79,227 (approximately 79%) of those decisions occurring in the legacy system.

As a result of efforts undertaken for the Legacy Appeals Resolution Plan, VA's total legacy appeals inventory decreased more than 64% in the last two years. VA's total legacy appeals inventory has decreased by approximately 73%, from a high of 472,066 in November 2017, to 125,340 at the end of FY 2021.

Technology

The Board has made significant investments in technology advancement over the last three years and continues to refine, upgrade and transform the business case management system to help deliver people-centric and proactive results for Veterans and staff. In FY 2021, the Board continued to collaborate with the Office of Information Technology (OIT) to implement new capabilities and functionality in Caseflow that directly support AMA, while allowing the Board to continue to focus on drawing down Legacy appeals inventory.

In FY 2021, important new AMA functionality was released. The ability to intake Court of Appeals for Veterans Claims (CAVC) remands, process death dismissals, intake appeals with unrecognized appellants and edit Notices of Disagreement (NOD) are vitally important to the Board's mission and increasingly allow for Veterans' appeals to be more quickly adjudicated.

During the past year, the Board's data analytics team continued using Tableau data visualization software to report on the Board's major business processes. The Board created a report that integrates AMA and Legacy hearing-related information within Tableau and made this hearing data available to all Board users from a single location. The Board's data analytic team has also developed and updated enterprise Tableau reports, such as the following: Hearing Events Report (lists all AMA and Legacy scheduled and postponed hearings along with hearing outcomes), Hearing Events Awaiting Schedule Report (lists all hearing cases that are ready for scheduling), Hearing Pending Cases Report (comprehensive listing of all pending hearings cases at the Board), Case Distribution Report (enables direct monitoring of Legacy and AMA case distributions to VLJs), Legacy Daily Intake Report (provides details on the number of Legacy cases in-taken each day) and the CAVC Remand Status Summary Report (displays relevant data on all CAVC cases remanded to the Board). The Board continues to work closely with OIT to refine and populate a new data repository that will be used to store extracted and transformed Board data. Further, the Board has also made steady progress in refining its data analytics in direct support of VA's goal to move toward a data-driven and evidence-based learning enterprise.

In FY 2021, the Board optimized its use of Microsoft Teams and SharePoint Online as collaboration tools. SharePoint ticketing systems were developed for several organizations at the Board to track and maintain accountability for mission-specific support, requests and issues. The Board also continued to collaborate regularly with OIT to manage and plan for platform and/or system upgrades to mission-critical systems to ensure the organization is continually aligned with the VA enterprise architecture. These upgrades best ensure that the Board's technical infrastructure fully supports a successful business environment while optimizing performance and utilizing the latest available technologies to support Veteran and staff needs.

[Interactive Decision Template \(IDT\), Reporting and Migrations](#)

The Board continued improving its IDT capabilities and further integrated these capabilities into business processes in FY 2021. The IDT, initially launched in FY 2018, replaced the nearly 20-year-old template used to draft Board decisions. The IDT automatically retrieves data from case management software and populates important and relevant language into each appellate decision, allowing attorneys and VLJs to focus their attention on legal research and drafting. The IDT helps encourage consistency across Board decisions as well as the use of clear and concise language to ensure Board decisions are easy to read and understand. The IDT has increased efficiency by automating several steps: 1) creating the final electronically signed decision; 2) retrieving the most current Veteran and representative contact information; 3) generating cover letters and mailing labels; 4) uploading completed copies of the decision to the Veterans Appeals Control and Locator System (VACOLS) and the Veterans Benefits Management System (VBMS); and 5) printing copies for mailing. This automation has helped reduce human error in mailings and the time required to get a signed decision from a VLJ to a Veteran. These innovations significantly contributed to the Board's decision output in FY 2021.

The IDT added capabilities to create and send other written correspondence, such as letters, to Veterans and their representatives. The IDT automatically populates select data (e.g., addresses) to allow for faster and more accurate generation of correspondence. Letters include both individual letters, such as hearing notification letters, and large-target mailings such as mailing Travel Board hearing information to Veterans to notify them about the availability of virtual tele-hearings during COVID-19. In FY 2021, new IDT tools were created in the IDT for the decision management group. The IDT now can be used to perform random quality reviews of the decision dispatch process to ensure accuracy in the finalization and mailing of decisions after judge signature.

The IDT also added a new tool in FY 2021, called Project Stop Light. Project Stop Light uses natural language processing and artificial intelligence to automatically analyze draft decisions for potential problems during the drafting process. Project Stop Light does not replace the good decision-making of judges; rather, it highlights common complex areas for additional attention by a judge. Project Stop Light is designed to grow to allow for additional areas to be highlighted as additional challenges are recognized in the future.

Virtual Tele-hearing Technology

The Board began testing virtual tele-hearing technology in July 2019 to provide Veterans with additional options and access for holding hearings. On April 10, 2020, the President signed the VA Tele-Hearing Modernization Act, making virtual tele-hearings a permanent option for Veterans. Virtual tele-hearings allow Veterans and their representatives to participate in hearings before the Board by voice and video transmission over the Internet. Veterans can use a Wi-Fi-enabled personal cell phone, tablet or computer to participate in a hearing. This technology provides greater access and flexibility, especially for Veterans living in rural locations, because it allows Veterans and VSOs/representatives to participate in the same hearing despite being in different locations.

The Board continued to heavily utilize virtual hearing technology in FY 2021 to provide a safe hearing option for Veterans and staff during COVID-19. Although limited in-person hearings were offered and Travel Boards resumed in Q3 of FY 2021, virtual tele-hearings remained the primary method for Board hearings in FY 2021. See below chart.

Total FY 2021 Virtual Hearings Scheduled:	34,049
Total FY 2021 Virtual Hearings Held:	22,897

The Board currently has the capacity to hold over 1,000 virtual tele-hearings per week and, through improved technical integration and stakeholder support, anticipates significantly expanding this capacity in FY 2022 and beyond.

Clerk of the Board

The Board established the Clerk of the Board in January 2020, to function as an internal Board resource to ensure the proper docketing of AMA appeals and to help the Board staff transition to working only on AMA appeals. The Clerk's Office provides training and guidance for administrative staff charged with docketing AMA appeals, answers complex legal questions from VLJs and counsel related to AMA docketing and jurisdiction, creates AMA letter templates for Board staff and generally assists Board management with AMA execution. The Clerk's Office also works to identify and correct AMA docketing errors, improve Board training around AMA issues and assists VA IT professionals in refining the technological tools used by Board staff to process AMA appeals.

One Touch Program

The Board's One Touch Program improves the timeliness of appeals where a hearing was conducted by streamlining processes. Of the 1,191 appeals adjudicated under this program, approximately 70% resulted in a grant in FY 2021. See Figure 4 below.

Board of Veterans' Appeals One-Touch Appeals by Disposition 10/01/2021 to 09/30/2021	
Disposition	One-Touch Appeals
Pending Dispatch:	1
Allowed:	837
Remanded:	325
Denied:	1
Dismissed/Withdrawn:	26
Dismissed Death:	1
Total:	1,191

Figure 4. One Touch Program FY 2021

Action for Veterans in FY 2021

Decisions

In FY 2021, the Board dispatched 99,721 decisions for Veterans and their families, marking four consecutive years the Board significantly exceeded production goals. The Board not only surpassed its FY 2021 goal of 93,600 decisions by over 6,100 cases, but also reached these goals operating in a 98% virtual environment. Actions to mitigate COVID-19 impacts required budget flexibility to absorb increased costs for cleaning and sanitizing supplies, funding of special authority for a reemployed annuitant and shifting overtime allocation to appellate operations support activities, such as mail-related tasks and case reviews to activate incoming appeals. Despite the continuation of a complex

operating environment from FY 2020, total decisions at the Board continued to exceed yearly goals. See Figure 5 below.

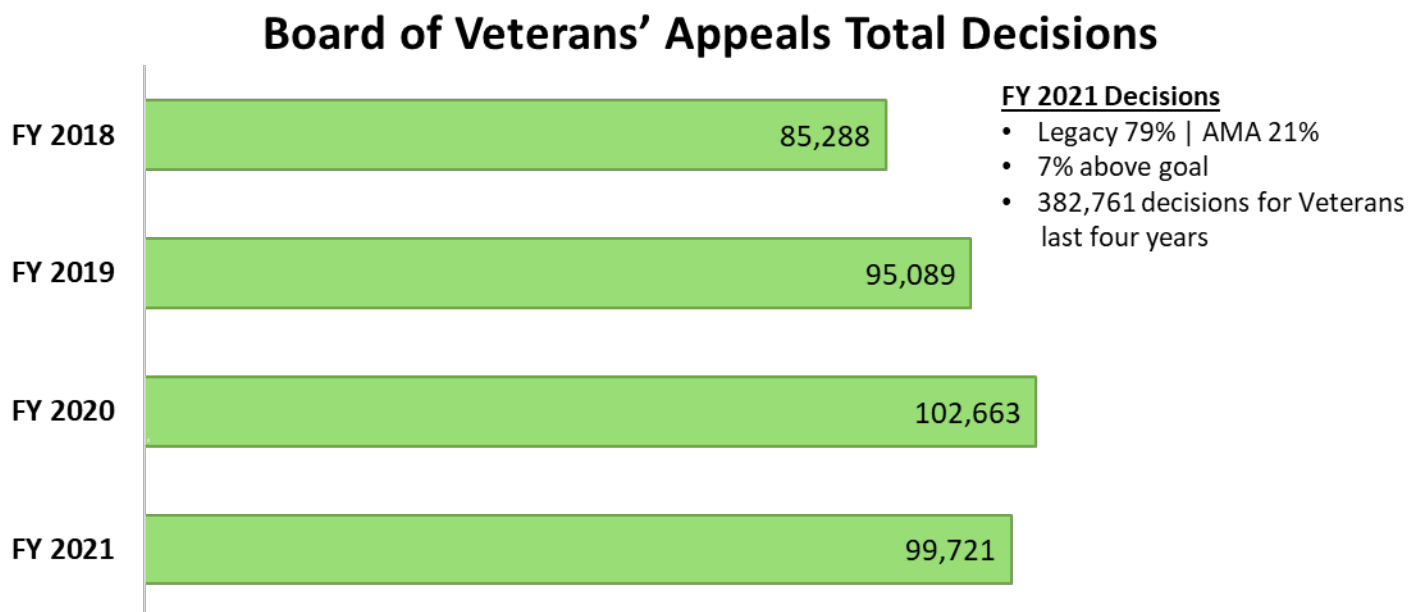


Figure 5. Board of Veterans' Appeals Total Decisions

Hearings

For the first three quarters of FY 2021, hearings were primarily held in a virtual environment, with limited face to face hearings (known as Central Office hearings) and video teleconference (known as Video Hearings) between a VLJ in Washington, DC, and the Veteran and his/her Representative sitting in-person with each other at a separate VA facility. Travel Board hearings, which had temporarily paused due to COVID-19, resumed in Q3 FY 2021. Despite limitations on all types of non-virtual hearings, the Board increased the total number of hearings held from 15,669 in FY 2020 to a total of 23,777 in FY 2021. This resulted in a year-over-year increase of almost 52% of hearings held.

In FY 2021, approximately 57% of all hearings scheduled were held. This figure is up approximately 15% from the FY 2020 rate of 42%. Approximately 30% of hearings were postponed, 10% were canceled and 3% of Board hearings experienced a no show from the appellant. See Figure 6 below.

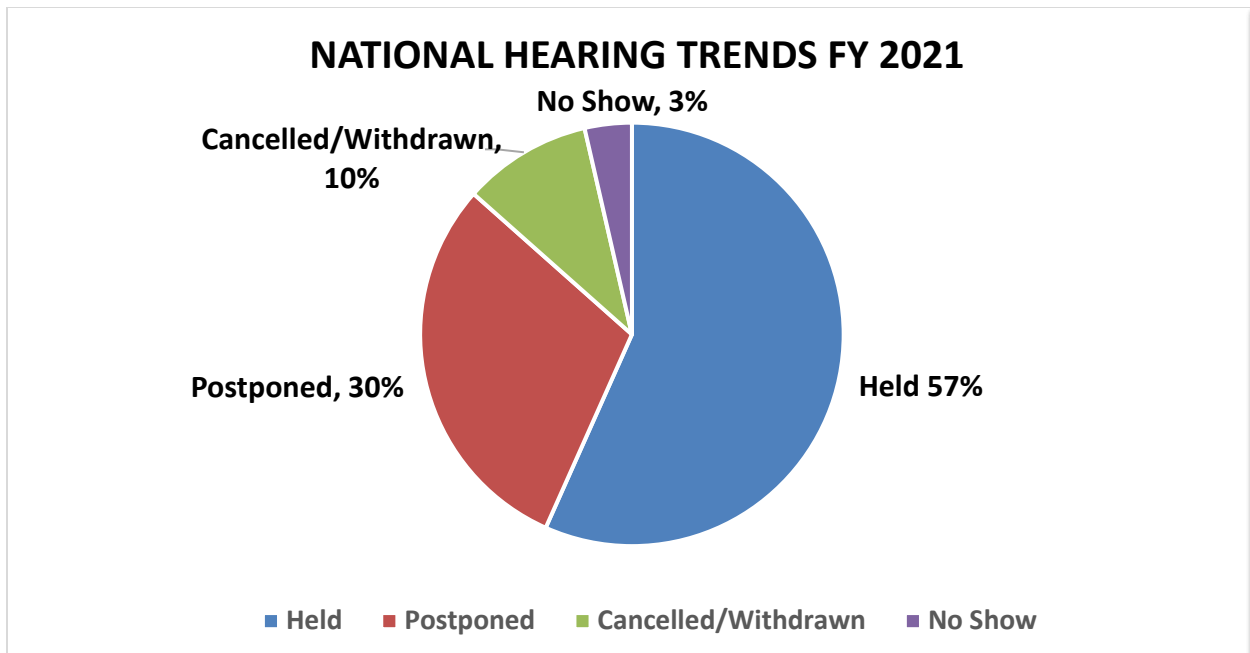


Figure 6. National Hearing Show Rates

The Board reduced the number of pending legacy hearing requests from 55,265 at the start of FY 2021, to 32,574 at the end of September 2021. At the end FY 2021, the Board had 54,750 AMA hearings pending, an increase of 23,166. The reduction in legacy hearings pending, and also the subsequent increase in AMA pending hearings, is the result of a commitment to draw down legacy appeals. As the Board continues resolution of legacy appeals and associated hearing requests, the proportion of AMA hearing requests pending will continue to increase.

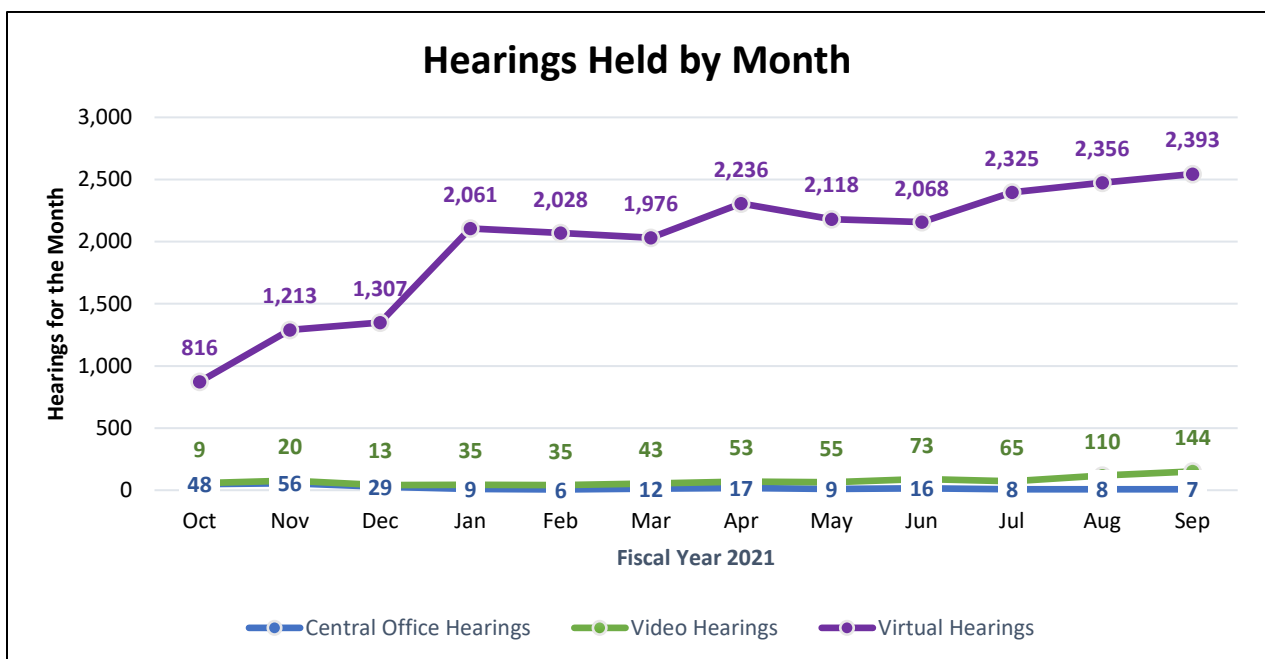


Figure 7. Hearings Held by Month

While the Board did not reach the robust goal to hold 50,000 hearings in FY 2021, it set an all-time record for hearings held and significantly reduced pending legacy hearings in line with legacy drawdown commitments. See Figure 7 above for hearings held per month by each hearing type.

The Board currently receives approximately 2,100 AMA hearing docket appeals per month and the number of AMA Hearing Docket appeals that still require a hearing to be held represents approximately 63% of the total (Legacy and AMA) hearing requests pending. See Figure 8 below.

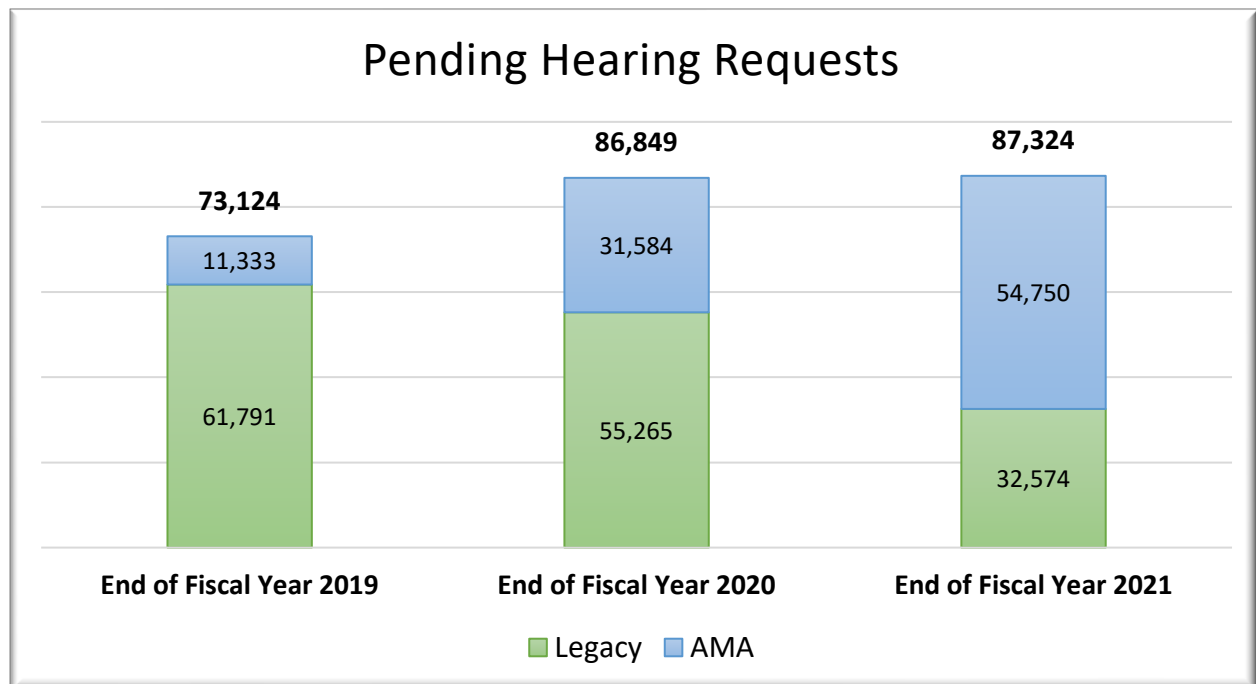


Figure 8. Pending Hearing Requests

Personnel

In response to the Department's commitment to resolve legacy appeals and to maintain timely processing under AMA, including the reduction of legacy hearing inventory, the Board significantly expanded staffing levels during the past few years. The Board attracted and hired talented employees to perform its unique and critically important mission of serving Veterans and pursued innovative hiring practices, such as recruiting on Indeed, using the military spouse hiring authority and hiring recent law school graduates and training them in the specialized field of Veterans' law. These activities resulted in the onboarding of over 103 new personnel to fill mission critical positions, including the hiring of four senior executives. Also, the Board has seen two consecutive years of declining attrition rates, with a 13.4% rate in FY 2019, 10.6% in FY 2020 and 10.1% in FY 2021.

The Board also undertook a significant recruiting and hiring initiative to increase the number of VLJs from 93 to 106 by the end of FY 2021. These efforts allowed the Board

to maintain a high level of production and perform a record number of hearings throughout the year.

In FY 2021, the Board allowed the vast majority of its employees to work remotely or telework. This decision was based on lessons learned during the pandemic and was responsive to employees' requests for improved work/life balance, while ensuring ongoing operational success.

The Board's robust remote/telework policies resulted in stronger recruitment actions and enabled the Board to reduce its workspace. The Board's telework and remote programs improved the recruitment and retention of VLJs, encouraged more competitive and diverse applicants to apply for attorney and administrative positions (including Veterans and military spouses), and helped the Board deliver exceptional service to Veterans and other stakeholders. This also facilitated an approximate 25% reduction in the Board's physical footprint and promoted more agile space management. The Board will continue to offer extensive remote and telework options to support its staff, aid recruitment and retention and reduce costs associated with space. This strategy aims to expand potential recruitment areas, while reducing the Board's leased office space.

Military Spouse Employment

The Board is committed to hiring military spouses. According to the Department of Defense (DoD), military spouses experience a 24% unemployment rate, which is due in part to frequent moves. The Board's military spouse employment initiative and robust telework and remote plans offer military spouses engaging legal employment. The Board is an active member of the DoD Military Spouse Employment Partnership (MSEP). MSEP is a career program that connects military spouses with affiliated employers who have committed to recruit, hire, promote and retain military spouses in fulfilling careers. The Board actively promotes hiring military spouses within VA and across the Federal Government.

The Chairman, as VA's military spouse employment champion, routinely meets with Federal agencies and private sector organizations to discuss the value military spouses bring to the workforce and how organizations can utilize their unique talents and perspectives. As part of this conversation, the Chairman discusses best practices for recruiting, hiring and retaining military spouses. This includes encouraging the use of social media to inform and recruit military spouses using direct hire authority. The Chairman routinely participates in military spouse events, speaks on panels and participates in podcasts, describing her experience as a military spouse and the challenges some spouses may experience finding employment. In May 2021, the Chairman also participated in the Hiring Our Heroes Military Spouse Employment Summit.

Veterans Law Judges (VLJ)

In FY 2021, the Board appointed twenty new VLJs from the most diverse applicant pool in recent memory. Many had proven judicial experience, often as judges with more than one agency, and a diversity of background, culture, experiences and perspectives. More

than half of them are Veterans themselves and virtually all had significant deployment experience. Fifteen of the new VLJs onboarded and began training by the end of FY 2021, the remaining five plan to report in the second quarter of FY 2022.

VLJs have long served as leaders and mentors at the Board. In FY 2021, the Board took the additional step of formalizing the judges' role as supervisors. Each VLJ now performs supervisory duties for non-probationary attorneys on their team, including performing mid-cycle and end-of-year evaluations and making recommendations for promotions.

In FY 2021, the Board also modified the performance standards by which VLJs are rated to align more closely with the Board and judges' principal missions and duties. Judges are now rated annually on legal acumen, docket and case management, hearing management, organizational teamwork and customer satisfaction, and leadership and supervision. These new standards tie directly to the Board's statutory missions of holding hearings and deciding appeals, and emphasize the judges' positions as both leaders and members of the overall Board team.

Space Reduction at 425 I Street

During FY 2021, the Board reduced its leased space by approximately 48,000 rentable square feet. This reduction constitutes a 25% reduction in the physical footprint for the organization. The Board's Program Management and Logistics Branch assessed the amount of space needed to accommodate the Board's post-pandemic workforce, identified space that could quickly and easily be returned to the landlord in accordance with its existing lease, and then worked with Board personnel and third-party contractors to vacate the space—in a record six weeks—by June 6, 2021. Additionally, three co-located VSOs also chose to vacate their office space in FY 2021 in an effort to further modernize their tele-work and remote business practices.

Employee Engagement

The Board is committed to continuously improving its organizational culture and work climate. This past year, the Board strengthened employee engagement through weekly informational emails, mentor/mentee programs, monthly newsletters, virtual and in-person suggestion boxes, implementation of employee-driven suggestions, virtual roundtables, town halls with Board and VA leadership, and weekly small-group discussions that function like open office hours that are hosted individually by the Vice Chairman using virtual technologies. Additionally, the Chairman held award ceremonies to recognize employees for their dedicated service to Veterans, celebrated individuals who went above and beyond their normal duties in service of Veterans and acknowledged attorneys' achievements in decision drafting through writing awards.

Board leadership and employees are actively engaged in improving employee engagement. This year, approximately 74.3% of Board employees completed the All Employee Survey (AES). The Board will utilize the results of the FY 2021 AES survey to improve employee engagement and identify ways to improve personal connections with people, both while they work at home and in the office. Importantly, the Board has been

diligently working to create and improve programs designed to enhance the personal and professional growth of the employees. Specifically, the Board is enhancing and creating robust training programs, exploring the creation of advancement and experiential opportunities, and finding ways to amplify the beneficial effects and messaging of existing Board-sponsored and employee-driven programs with the objective of improving cohesion, mission identification, morale and professional satisfaction.

During the COVID-19 pandemic, Board employees have participated in and connected with one another through virtual events and initiatives, including a wellness challenge, coffee breaks, webinars and leadership discussions. New employees were onboarded and introduced to the Board and its community through virtual orientation, trainings, graduations and team-building activities.

Veterans Service Forum (VSF)

Another example of the Board's engagement is an active partnership with one of the Board's affinity groups, the Veterans Service Forum (VSF). VSF provides information to Board staff about the military experience and helps Board employees keep a "focus on the Veteran." In FY 2021, the VSF hosted a panel of Veterans and Veteran caregivers who discussed their experience accessing VA benefits, and it partnered with Operation Gratitude in a letter-writing campaign for deployed troops. In addition, the VSF designed a 3-part educational series for new attorneys intended to enhance their file review and analytical skills. Topics covered included: a close look at military documents in the claims file, understanding Active Duty for Training and Inactive Duty for Training, and the adjudication of claims related to Military Sexual Trauma. The VSF underwent a complete overhaul of its leadership structure in order to provide Board staff with more opportunities for leadership, public speaking and networking. The VSF remains committed to raising awareness about the mental health challenges faced by Veterans and their families, specifically posttraumatic stress disorder (PTSD) and suicide.

Career Mentoring Program

Board staff are active in the CAVC Bar Association, including drafting case summaries on precedential opinions in Veterans law for the Veterans Law Journal and participating as members of the Board of Governors. In addition, the Board's Career Mentoring Program was used as a framework for the CAVC Bar Association's Board of Governors' mentorship program.

Specialty Case Team

The Specialty Case Team (SCT) is a Board-wide program in which attorneys, who are competitively selected for the position, serve as subject matter experts in one or more rare or complex legal areas within Veterans law. Specially-trained attorneys are critical to ensuring complex cases are handled by experts in the legal nuances of rare or difficult types of cases so that the Board produces the highest quality decisions in the most efficient manner. In FY 2021, SCT attorneys completed approximately 9,600 cases and produced on average nearly 0.5 signed cases more per pay period than a non-SCT attorney. Most significantly, the SCT experts develop procedures and model

language to guide decision drafting so the next generation of attorneys can more easily adapt when reviewing these more complex cases in the future. Capitalizing on their specialized knowledge of claims originating from VHA, the SCT was well positioned to train its attorneys to adjudicate appeals involving benefits under the Program of Comprehensive Assistance for Family Caregivers. The SCT has also brought greater consistency to the adjudication of procedurally challenging cases, such as those involving contested claims. Finally, SCT has assisted other offices within the Board in developing internal appellate procedures that ensure timely and accurate adjudication of specialized appeals that often present unique administrative challenges.

Quality Review

The Board's Office of Quality Review (QR) has a case review system that aims to identify objective errors that fall outside the bounds of judicial discretion in a uniform and consistent manner. Judicial discretion applies to numerous aspects of the decision process. Legitimate differences of opinion as to the outcome of an appeal, the interpretation of the law, the application of the law to the facts, or the assessment of the weight and credibility of the evidence are matters subject to the exercise of judicial discretion and generally do not fall within the definition of "error." To maintain the statistical validity of the case review system, QR is focused on a uniform and consistent approach to identifying potential errors, regardless of the types of cases involved or which VLJs decided the cases. For each error discovered in any Board decision, QR prepares an error memorandum addressed to the signing VLJ and their supervising Deputy Vice Chairman. This memorandum identifies the error type, a detailed explanation to support the identified error and a recommended course of action to remedy the identified error. A VLJ then can agree with the findings of QR and take appropriate action to remedy any identified error or, alternatively, request reconsideration of the error by the Board's Office of Chief Counsel.

QR also reviews outcomes from cases from CAVC and the United States Court of Appeals for the Federal Circuit (Federal Circuit). In FY 2021, the Board issued 99,721 decisions. Generally, approximately 8% to 9% of the Board's decisions are appealed to the CAVC. Of that percentage, many appeals are returned to the Board under Joint Motion for Remand (JMR) orders. A JMR remands the appeal from CAVC back to the Board and includes instructions for VA to follow. QR monitors these JMRs, as well as other CAVC trends. In FY 2021, the Board received approximately 6,300 JMRs from the CAVC.

In FY 2021, the Board continued to challenge employees to maintain high quality levels and achieved an accuracy rating of approximately 92.06% for legacy decisions and approximately 87.48% for AMA decisions.

Training

The Training and Development Branch (TDB) was established in FY 2021 to ensure that Board employees receive professional development and leadership training needed to provide Veterans with legally accurate and timely decisions.

During the first quarter of FY 2021, the TDB completed the last two New Attorney Bootcamp Cohorts and transitioned attorney and judge training to the Office of Appellate Operations. TDB's focus for the remainder of the year was on Professional Development, Supervisory Training, and the Board's new non-supervisory leader development program, Emerging Leaders. In addition, TDB provided training to the Mail Management and Intake Branch to improve the efficiency and accuracy of appeals docketing and mail processing.

During transition of the TDB to the Office of Appellate Operations, the Board began to develop the foundation for a Professional Development Division (PDD). The PDD's mission is to provide initial and ongoing legal training, supervisory training, and leadership and career skill-building training for the Board's attorneys, judges and administrative support staff.

The PDD included the creation and implementation of a New Veterans Law Judge Professional Development program. New VLJs participate in an intensive three-week program that covers substantive law, judicial procedure, and supervisory and leadership topics. In addition, experienced VLJs provided individual mentoring to each new VLJ for six months. The Board successfully executed two separate new VLJ professional development programs last FY for 15 newly appointed VLJs. In addition, the PDD developed a new attorney training program that was used to successfully train 33 new attorneys. New attorneys received intensive one-on-one mentoring and training from experienced attorneys on the basics of Veterans law, drafting appellate decisions and legal research for three months. After this intensive mentoring period, new attorneys met in weekly group training sessions that covered procedure and substantive law, efficiency and career development topics.

To support the Board's mission and employee engagement efforts, the PDD created an Open Door Hours program, which provides a network of over 70 seasoned attorney volunteers who are available to field substantive and procedural questions in support of VLJs and the Board's attorneys. The Open Door Hours program ensures that Board attorneys have an experienced colleague to contact for guidance and support. Question topics presented during Open Door Hours are analyzed and used to inform attorney training topics. In addition, the PDD created a SharePoint site that organized and consolidated Board training and professional development resources to allow attorneys and VLJs to locate key resources more efficiently.

The PDD also provided Board-wide trainings on emerging areas of Veterans law, including changes to the rating criteria for musculoskeletal disabilities, increased ratings for knees, special monthly compensation and efficiency topics. To support experienced attorneys in their career development efforts, the PDD provided Acting VLJ training and mentor training and coaching. In addition, the PDD held multiple supervisory training sessions for new supervisors in both large and small group settings that covered key supervisory topics.

Diversity and Inclusion at the Board

The Board actively supports a number of operational activities to promote diversity and inclusion in the workplace. These activities help build a diverse, high-performing staff who reflect all segments of society. The Board utilizes existing recruitment tools to prioritize the hiring of Veterans and military spouses, establishes diverse selection and interview panels, provides training related to diversity and inclusion, regularly communicates updates to VA policies on diversity and inclusion to all employees, and supports a number of social organizations focused on workplace improvement.

In FY 2021, the Board held trainings on Reasonable Accommodations and Supervisory Labor/Employee Relations, hosted a Senior Leadership Roundtable and a series of listening sessions that addressed issues related to diversity and inclusion, and provided communication initiatives to promote inclusivity and respond to employee concerns. Additionally, the Board highlighted the importance of an inclusive and collaborative work environment in its new, online New Employee Orientation and through the Board's Fall Employee Engagement Fair, which included presentations from a wide variety of Board employee associations on their roles, initiatives and upcoming events. These associations, including the Career Mentoring Program, Team Building Individual Skills Training (TBIST), Diversity and Inclusion (D&I) Committee, BVA LGBTQIA (lesbian, gay, bisexual, transgender, queer, intersex and asexual) and Friends, and Social Networking Group help promote an inclusive workplace that is responsive to diverse perspectives and ideas. Collectively, these initiatives and efforts helped to increase the Board's AES score for workplace diversity acceptance by approximately 0.7 over previously years to reach 4.12 in FY 2021.

VSOs and Cross-Office Coordination

VSO Coordination and Legacy Appeals Inventory

In FY 2021, the Board continued its significant outreach, training and coordination with VSO partners and also increased activities to encourage accountability.

In FY 2021, the Board:

- Held regular virtual tele-hearing update discussions with all VSOs and representatives and worked in close collaboration with the VSO staff co-located at 425 I Street NW, Washington, DC;
- Performed weekly appeal inventory tracking and review of inventory age information and reported back to each VSO;
- Offered virtual training activities to familiarize VSOs and stakeholders on new hearing technology; and
- Engaged VSOs and stakeholders to improve utilization of existing technology to increase efficiency in business processes.

Legacy appeals inventory with VSOs decreased from the beginning of FY 2021 until March 2021. Inventory increased in March and April, but subsequently decreased each month after, ending the FY at 7,475 legacy appeals pending. The Board's VSO Stakeholder Liaison's appeal inventory tracking report and working relationships with

Board co-located VSOs resulted in the overall decrease of IHP inventory during the FY. See Figure 9 below.

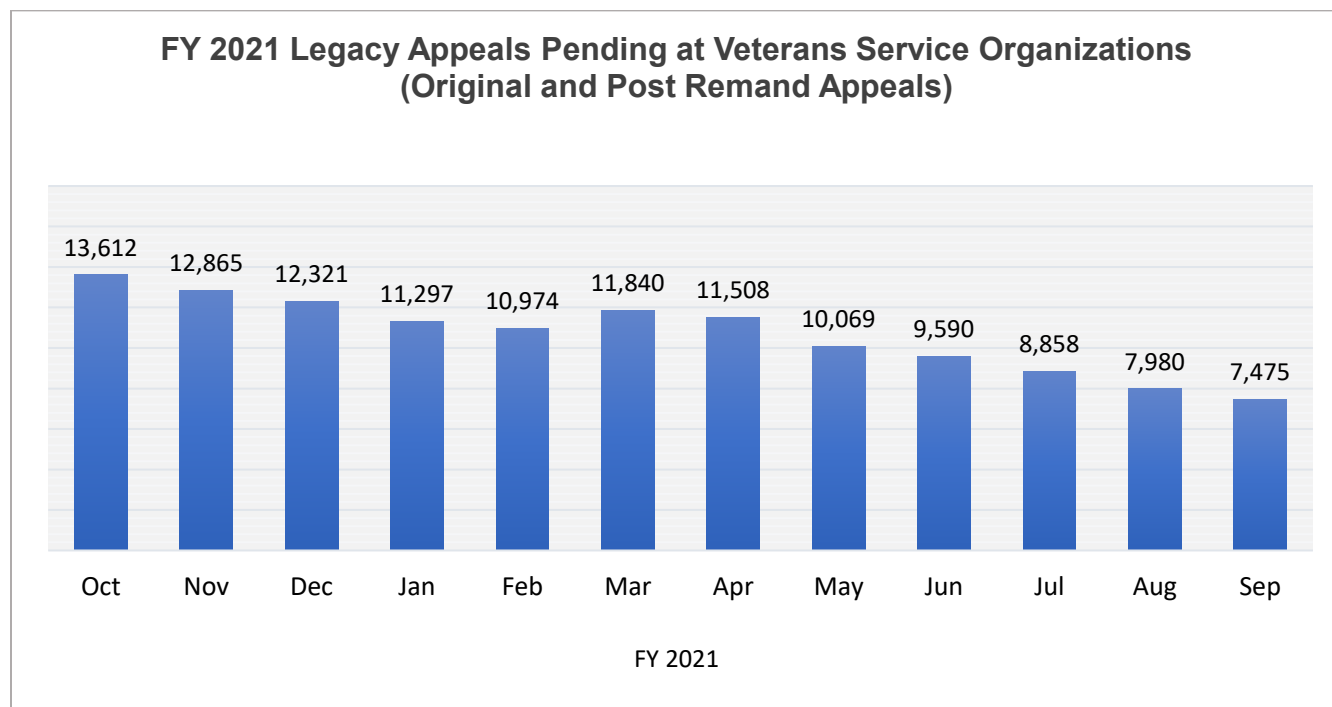


Figure 9. FY 2021 Legacy Appeals Pending at Veterans Service Organizations

Coordination with Administrations and Other Staff Offices

The Board leads VA's appeals modernization process and actively collaborates across the enterprise to better serve Veterans and their families. Partners include, but are not limited to, the following: VBA, VHA, NCA, OGC, OIT, Office of Enterprise Integration (OEI) and Veterans Experience Office (VEO). This active coordination is essential to support efficient VA processes and helps to make the Veteran experience seamless across VA. All VA offices closely collaborated to ensure that legacy and AMA inventory was appropriately tracked and that Veterans continued to have options to safely hold hearings in a virtual environment.

The Board's collaboration with VBA and VHA directly contributed to the reduction of pending appeals inventory throughout the Department by more than 49,348 appeals in FY 2021. The Board championed and now maintains a work group with VA's Office of the Secretary, OEI, VBA, VHA, NCA and OGC to execute the Department's Legacy Appeals Resolution Plan to resolve pending legacy appeals by December 2022, with the exception of a small number of returned remands.

The Board and VHA engaged in a significant effort during FY 2021 to offer early COVID-19 vaccinations to Board frontline workers and judges. This effort resulted in the ability of Board employees who interact with Veterans and participate in stakeholder activities to continue face-to-face operations in a safe work environment. The effort also helped to enable the limited return of Travel Boards in Q4 of FY 2021.

The Board also selected high-performing attorneys, VLJs, and administrative professionals for leadership seminars and programs, such as Leadership VA, the Presidential Management Fellows, VA Congressional Fellows, detail opportunities, and programs offered through the Federal Executive Institute. These robust training programs and courses are an integral part of the Board's commitment to the development of future leaders.

The Board's Strategic Plan and Priorities for FYs 2022 and 2023

FY 2021 was a year of continued innovation at the Board, as COVID-19 necessitated changes for how the Board and other VA offices conduct business. Approximately 98% of Board employees remained in a virtual work environment during the FY, and the hearing process continued to be primarily performed through virtual tele-hearing technology.

Despite ongoing operational changes, the Board continued modernization efforts under AMA, performed a record number of hearings, delivered near-record appeals decision output, refined organizational structures, increased VSO coordination and participation, increased legacy inventory coordination, and improved employee engagement and workforce planning. The impacts of COVID-19, as well as other factors, will continue to shape priorities and the future operating environment in FY 2022 and 2023, as described below.

Increase the Number of Veterans Served and Optimize Accuracy

The Board's goals for FY 2022 are to adjudicate 111,500 appeals for Veterans and hold 50,000 hearings. The Board intends to meet these goals through continued innovations, increased resources and improving our processes and technology.

In FY 2022, the Board will focus on the following: (1) the continued resolution of legacy appeals; (2) holding a higher percentage of scheduled hearings, including virtual tele-hearings; (3) maintaining or improving the quality of both legacy and AMA decisions; (4) establishing the right balance of virtual, traditional office and hybrid work environments that best meets operational goals and supports employees; (5) working all three dockets of AMA cases in a timely manner; and (6) adjudication and tracking of caregiver appeals.

The Board will reach these goals by using a multi-pronged strategic approach and leveraging existing resources by concentrating on the following activities:

► **Timeliness goals for remaining AMA dockets:** The Board released timeliness goals for its two remaining AMA dockets (Evidence Submission and Hearing) in FY 2021. With long-term targets of 365 average days to complete (ADC) for Direct, 550 ADC for Evidence and 730 ADC for Hearing docket appeals, the Board now has timeliness goals for all AMA dockets. Establishing these goals satisfied an open U.S. Government Accountability Office (GAO) High Risk List recommendation (GAO-18-352) and will begin to be monitored and reported monthly as well as through the FY 2022 VA Annual Performance Plan and Review.

► **Internal training:** Actively train staff and VSO partners on AMA and update training activities as new technologies and processes are implemented. Training materials are regularly updated by a core group of subject matter experts on appeals modernization and adapted for how AMA will impact each respective group within the Board. Trainings are provided to all legal and administrative

professionals at the Board.

► **Strengthen partnerships across the VA enterprise:** Continue collaboration with VBA, VHA, OGC, NCA, OIT, OEI, VEO and other internal stakeholders on a formal and frequent basis to collect Veteran feedback and discuss ways to improve the quality of services provided to Veterans.

► **Future of work:** Work with VA stakeholders to identify the best balance of virtual, traditional office and hybrid work environments to meet the mission needs of the Board. The Board will continue to seek employee and stakeholder input to improve working environments for employees and services offered to Veterans. Additionally, the Board will continue re-assessment of the office space footprint for Board employees and co-located VSOs. This assessment will be mission-driven and informed through both needs and stakeholder input.

► **Increase transparency and collaboration with external stakeholders:** During FY 2022, the Board will continue to engage external stakeholders (VSOs and private bar) to help define operational processes to improve efficiency within the appeals process. The Board is actively scheduling a Hearing Summit for FY 2022 Q2 to identify inefficiencies in the hearing process and define joint best practices to ensure representatives and the Board are prepared to hold hearings on the date initially scheduled.

► **Virtual tele-hearings:** The Board fully implemented virtual tele-hearings in FY 2020 and utilized the technology to provide a historic number of hearings in FY 2021. Through increased Veteran awareness, collaboration with VSO partners and refinement of technical solutions with OIT and virtual processes, the Board plans to significantly increase hearing capacity and capability in FY 2022 and FY 2023. The Board has the capacity to hold 50,000 hearings annually to reduce its inventory of nearly 87,324 hearing requests of legacy and AMA appeals. To achieve its hearing scheduling goals, the Board is offering an average of 1,000 hearings per week in FY 2022 through virtual tele-hearings, Central Office hearings, Travel Board hearings and video hearings at ROs.

► **VEText:** The Board will expand the use of existing technology to notify Veterans by text of their upcoming hearings. This technology has the potential to increase show rates for hearings and help provide Veterans with scheduling information in a timely manner.

► **CAVC training initiative to impact trends for court:** The Board is monitoring the outcomes in cases appealed to CAVC and the United States Court of Appeals for the Federal Circuit to improve the quality of its decisions. The Board will continue its collaboration with VA's OGC to provide targeted trainings to VLJs based on trends seen in these court cases.

All these measures help increase the Board's decision output, improve accuracy, foster an environment for collaborative change management on modernization activities and

sustain accountable partnerships across the VA enterprise to better serve Veterans and their families.

Board Organizational Changes FY 2022

In order to provide greater value for Veterans, their families and employees, the Board plans to transition leadership structure in early FY 2022 to better reflect workforce needs. In comparison to the organizational structure in FY 2021 (see Figure 1), two DVCs will report directly to the Senior Deputy Vice Chairman. Additionally, VLJs will return to supervisor status. The Chief Counsel, Chief of Staff, Chief of Budget and Internal Controls, a Deputy Vice Chairman, and an Executive Director will continue to report to the Vice Chairman. See Figure 10 below.

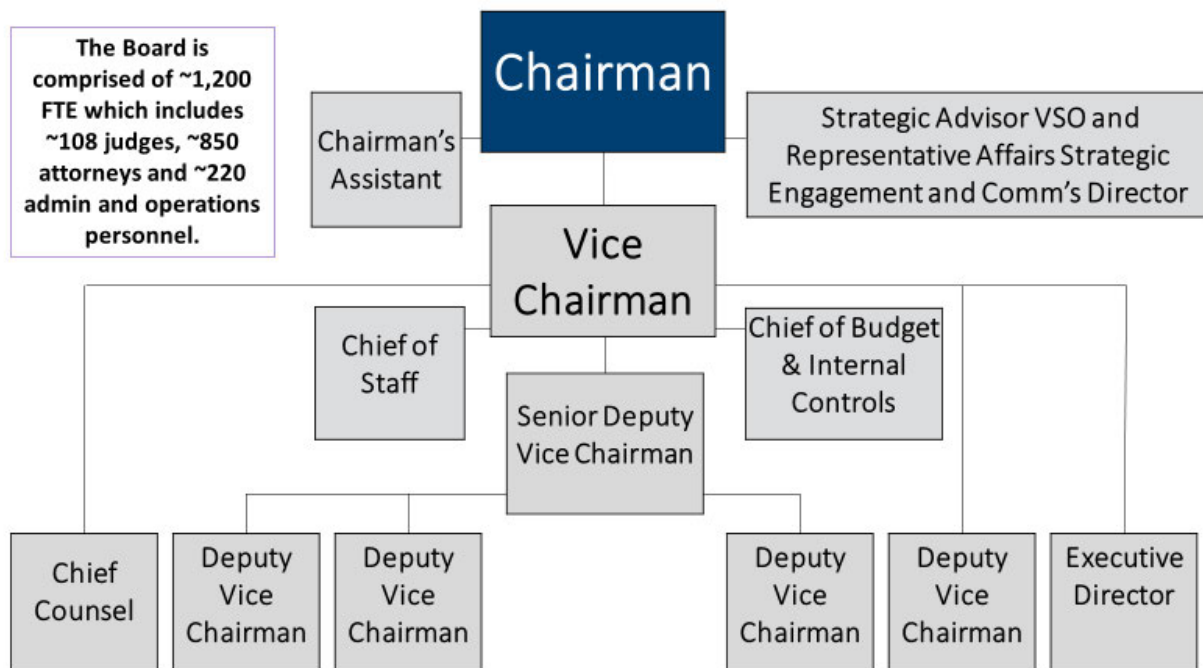


Figure 10. FY 2022 Board Organizational Structure

Veteran-Centric Service Strategy and Efficiencies

In FY 2022, the Board, in alignment with the Secretary's priorities, will continue a proactive and Veteran-centric strategy to increase the number of Veterans served, increase efficiency in the appeals system, improve technology, and leverage intra-Departmental partnerships to improve the Veteran and the employee experience. The Board will continue to reassess its needs to strengthen AMA processes and continue the resolution of legacy appeals inventory.

The Board will also continue to measure Veterans' satisfaction with legacy appeals and AMA appeals by leveraging a robust partnership with the VEO.

Coordinated Resolution of Legacy and AMA Inventory

The Board made considerable progress in FY 2021 to reduce legacy case inventory

both internally and across stakeholders. The Board ended FY 2021 with 197,555 cases pending, 92,530 (47%) of which are legacy appeals and 105,025 (53%) of which are AMA. The total number of AMA appeals pending surpassed Legacy appeals in August 2021, and data trends will likely continue as the closeout of legacy appeals is prioritized. Coordinated resolution of legacy and AMA appeals inventory will continue in FY 2022, and the Board remains on target to complete the majority of legacy appeals by the end of CY 2022.

Technology Enhancements FY 2022

The Board will work with OIT and partners from other Administrations on multiple enterprise wide-enhancements starting in FY 2022, including integrating Caseflow with a future NCA system for processing Higher-Level Reviews (HLR) and Supplemental Claims (SC), as a result of NCA's migration to Memorial Benefits Management System (MBMS); discontinuing use of SSN in accordance with the Consolidated Appropriations Act of 2018; improving e-notifications on appeals status through increased use of VEText, VANotify and VA.gov applications; launching the online Notice of Disagreement form on VA.gov; developing Caseflow enhancements to allow for the auto-establishment of an appeal in Caseflow from Centralized Mail or the VA.gov online NOD submission portal; and integrating Caseflow with future VHA systems used for processing claims and decision reviews.

Employee Engagement

The Board will improve morale by creating an environment that encourages pride in one's work and improve trust by fostering an open and communicative relationship with staff and labor representatives. The Board will continue to evaluate attorney performance standards and work with bargaining unit representatives to ensure work-life balance while serving as many Veterans as possible. The Board will continue to engage employees and monitor improvements in engagement with informal surveys and AES results.

Workforce Planning

The Board continues to attract high-caliber attorneys and administrative professionals to serve VA's mission. It has developed an active workforce plan to facilitate the recruiting, hiring and retaining of new employees. The Board increased its cumulative FTE by approximately 2%, from 1,157 FTE in FY 2020 to 1,182 FTE in FY 2021. FTE increases included the hiring of over 100 new personnel (new hires and backfills due to attrition) to fill mission-critical positions and the hiring of 20 new VLJs during FY 2021.

In FY 2021, the Board fully transitioned to a more balanced and accountable organizational structure, adding 4 additional SES, modernizing the Office of Appellate Support and establishing a new training branch. These changes have positioned the Board to improve resource management, internal coordination and support for staff needs. In FY 2022 and FY 2023, the Board will continue to assess its current organizational structure to maximize employee engagement, accountability, output, flexibility and work-life balance.

PART II

Statistical Data

Beginning with the FY 2019 Annual Report, the Board's statistical data includes appeals from AMA, enacted on August 23, 2017, and effective on February 19, 2019. With AMA implementation, the Board receives legacy and AMA appeals simultaneously and also manages four dockets: 1) legacy appeals; 2) AMA direct review; 3) AMA evidence submission; and 4) AMA appeals with a hearing request.

Unless otherwise notated, all data reported is inclusive of all dockets.

FY 2021 Information

The following information is required by 38 U.S.C. § 7101(d)(2):

38 U.S.C. § 7101(d)(2)(A)

Number of legacy cases formally appealed to the Board (Substantive Appeal (VA Form 9) filed):	1,450
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Number of AMA cases formally docketed by the Board (VA Form 10182):	74,834*
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Number of legacy appeals certified to the Board:	47,853
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*Formally docketed AMA cases (VA Form 10182) do not include approximately 15,000 pieces of mail pending that is categorized as a potentially completed VA Form 10182, approximately 60% of which that will likely result in a docketed case.

38 U.S.C. § 7101(d)(2)(B)

Cases pending (certified) before the Board at the start of FY 2021:	174,733
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Cases pending (certified) before the Board at the end of FY 2021:	197,555
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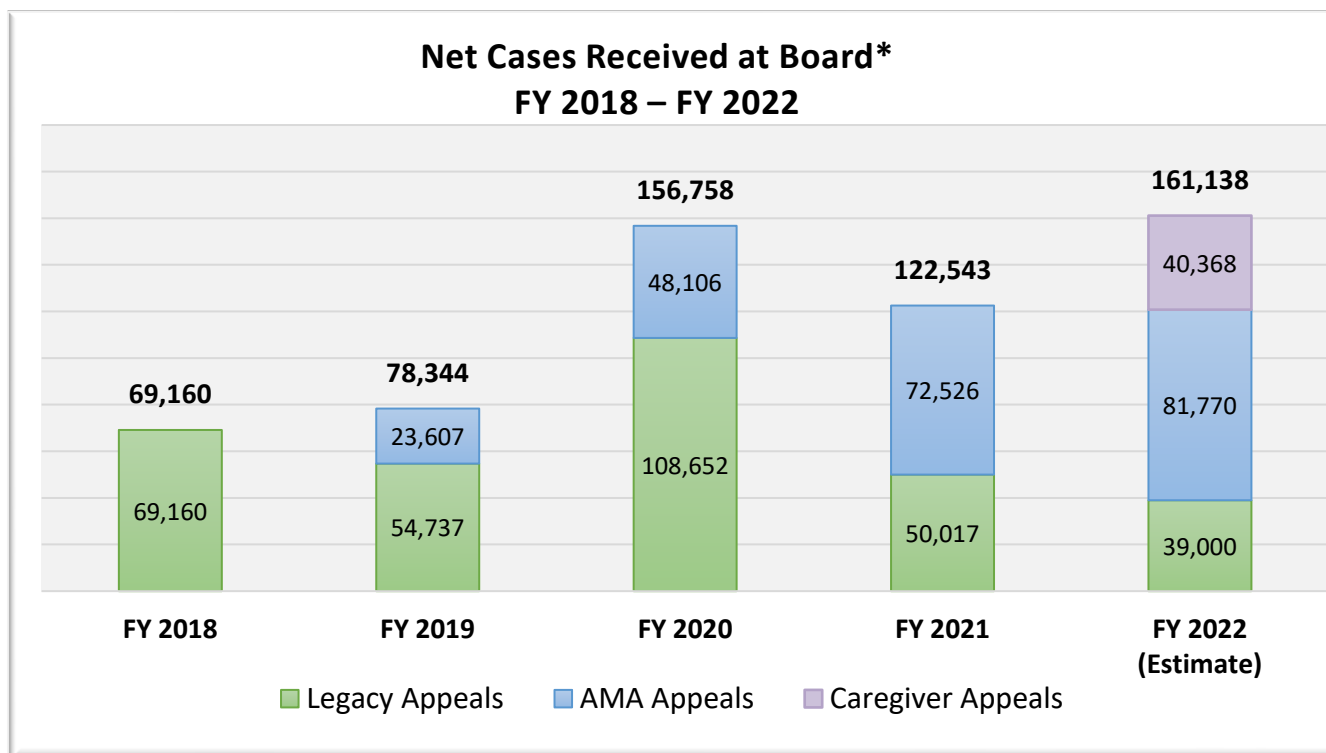
8 U.S.C. § 7101(d)(2)(C)

Number of Substantive Appeals (VA Form 9) filed at the AOJ and cases received at the Board during each of the 36 months preceding FY 2020 as depicted in the chart below as follows:

Substantive Legacy Appeals (VA Form 9) Filed*					Cases Received at Board**			
Month	FY 2018	FY 2019	FY 2020	FY 2021	FY 2018	FY 2019	FY 2020	FY 2021
October	6,339	3,602	3,575	325	7,856	4,896	10,762	10,446
November	6,118	3,408	3,314	239	6,975	3,704	8,407	9,124
December	5,669	3,057	3,710	175	6,137	4,178	8,327	10,474
January	5,870	3,339	4,520	143	7,144	1,751	7,439	12,022
February	5,196	2,669	4,499	117	6,516	1,581	4,819	13,143
March	6,139	2,693	5,837	121	6,254	5,510	8,316	14,778
April	5,368	2,665	5,294	99	6,837	7,762	13,075	9,562
May	5,202	2,748	4,049	38	5,720	7,557	31,956	7,288
June	5,637	2,888	1,988	43	3,069	6,804	22,224	9,727
July	4,387	3,413	547	63	5,048	9,247	12,770	8,624
August	3,973	3,440	439	53	3,824	12,313	13,093	8,305
September	2,934	2,140	309	34	3,780	13,041	15,570	9,050
FY Total	62,832	36,062	38,081	1,450	69,160	78,344	156,758	122,543

* The data is based on when the Form 9 was filed.

** Case receipts include original appeals, remands, non-VBA receipts and cases returned by the CAVC. Starting in FY 2019, AMA cases were included in the number of case receipts.



* Net case receipts include original appeals, remands, non-VBA receipts, cases returned by the CAVC and AMA appeals.

38 U.S.C. § 7101(d)(2)(D)

Legacy Appeals

For legacy appeals decided in FY 2021, the average length of time between the filing of an appeal (i.e., Substantive Appeal (VA Form 9)) at the AOJ and the Board's disposition of the appeal was approximately 2,015 days. This total includes all decision types (original, supplemental, post remand, reconsideration, vacates, de novo, court remand, etc.). This average accounts for the original VA Form 9 date for all decisions regardless of the number of times the appeal was remanded to the AOJ for additional evidentiary requirements. Due to this, it is projected the average processing time will continue to increase as the completion of all legacy appeals continues combined with increasing proportion of returned remands that are decided.

The chart below provides a snapshot of the average processing time within the multi-step legacy appeals process. For example, the average time between when legacy certified appeal was docketed at the Board to disposition was approximately 260 days in FY 2021. Note that the figures below cannot be aggregated, as some of the steps include only the time associated with original appeals.

Legacy Appeals Time Interval	Responsible Party	Average Elapsed Processing Time	
Notice of Disagreement Receipt to Statement of the Case*	VBA**	501 days	AOJ
Statement of the Case Issuance to Substantive Appeal (VA Form 9) Receipt*	Appellant	39 days	
Substantive Appeal (VA Form 9) Receipt to Certification of Appeal*	VBA**	228 days	
From Board Receipt of Certified Appeal to Board Docketing of Appeal*	Board	358 days	Board
Docketing of Certified Appeal to Issuance of Board Decision	Board	260 days	
Average Remand Time Factor	VBA**	429 days	AOJ

* These figures include original appeals only.

** The clear majority of appeals considered by the Board involve claims for disability compensation, and VBA is the responsible party when these appeals are located at the AOJ. However, appeals may also originate with VHA, NCA or OGC.

Appeals Modernization Act Appeals

For AMA, the Board now maintains three separate dockets. The average days to complete those appeals from Notice of Disagreement are included in the table 4 below.

	Direct Review	Evidence	Hearing	Responsible Party
Average Days to Complete AMA Decision from Notice of Disagreement	300	338	547	Board

38 U.S.C. § 7101(d)(2)(E)

The number of members of the Board at the end of FY 2021*: **110**

The number of professional, administrative, clerical and other personnel employed by the Board in terms of FTE at the end of FY 2021: **1,072**
(not including 110 members above)

*Numbers include VLJs on-board, DVCs, Chairman, Vice Chairman and Chief Counsel

38 U.S.C. § 7101(d)(2)(F)

Number of acting members of the Board during FY 2021: **189**

Number of cases in which acting members participated*: **12,246**

38 U.S.C. § 7101(d)(2)(G)

Number of hearings scheduled under such section 7107 (c)(2)(C): **34,049**

Number of hearings canceled under such section 7107 (c)(2)(C): **2,757**

Statistical difference in outcomes between cases heard under section 7107(c)(2)(C) (virtual tele-hearings) and those held at the principal location of the Board (central office) or by picture and voice transmission at a facility of the Department (video tele-conference):

Difference in Case Disposition Outcomes for Cases Upon Which a Hearing Had Been Held*					
Hearing Venue	Allowed	Denied	Remand	Other	Total Cases
Central Office	32%	22%	42%	4%	1,742
Video Tele-Conference	30%	25%	41%	4%	17,771
Virtual	52%	10%	35%	2%	13,215
* The historical reporting system for Board decisions with multiple issues identifies the disposition of an appeal based on the following hierarchy: allowance, remand, denial, or other (i.e., dismissals). When there is more than one disposition involved in a multiple issue appeal, the “reported disposition” for Board Statistical Reports will be categorized based on the disposition hierarchy noted above.					

38 U.S.C. § 7101(c)(2)

The Number of acting members of the Board in terms of FTE employees:

22.3*

* For this report, the number of cases in which acting members participated is defined as the number of dispositions issued by the designated acting members for FY 2021. Derived from the number of days worked by acting members throughout the year (5,399 days) divided by the number of working days in the year (249).

According to 38 U.S.C. § 7101(c)(1), the Chairman of the Board of Veterans’ Appeals has the authority to designate employees of the Department as acting members of the Board. This includes attorneys who may be designated as Acting Veterans Law Judges (AVLJ) to sign decisions when needed. It is in the discretion of the Chairman to designate such employees, based on the needs of the organization. Acting members of the Board may serve no more than 270 days per year (no more than 90 days at a time) and may not exceed 20% of the total number of Board members and acting Board members combined. Additionally, as the Board continues to implement AMA, the Chairman will assess the Board’s needs and adjust the number of AVLJs accordingly.

Projections for FY 2022 and FY 2023

The Board continued to prioritize resources to address pending legacy appeals and AMA inventories in FY 2021 and issued 99,721 decisions for Veterans, exceeding the goal of 93,600 by approximately 7%. For the fourth consecutive year, the Board has surpassed its annual goal and continues to serve Veterans with their appeal decisions.

The Board completed FY 2021 with 197,555 appeals pending adjudication, of which 92,530 are legacy and 105,025 are AMA appeals. The Board has collaborated with VBA and VHA to determine projected claims and subsequent appeals rates in FY 2022 and FY 2023. Based on increased rating claims decisions at VBA, coupled with the establishment of three new presumptive conditions (asthma, rhinitis, and sinusitis) in FY 2021 and the inclusion of preliminary estimates of Caregiver Program appeals impacts, the Board could receive as many as 161,000 appeals in FY 2022 and 192,000 in FY 2023.

The Board anticipates continued receipt of legacy cases going into FY 2022 and FY 2023, as remanded cases that required additional development (by the area of original jurisdiction (AOJ)) are returned to the Board for decision. Historically, approximately 50 to 55% of all Board decisions require a remand to the AOJ for additional development. Estimates from VBA show the Board could receive approximately 39,000 legacy cases in each of FY 2022 and FY 2023.

The Board also projects receipt of approximately 81,770 AMA cases in FY 2022 and another 101,104 in FY 2023. With the option for Veterans to file an appeal directly to the Board still relatively new (implementation effective in FY 2019), the Board continues to monitor Veteran choice and Board resourcing in order to process appeals in a timely manner.

A U.S. Court of Appeals for Veterans Claims decision (*Beaudette v. McDonough*, No. 20-4961) ordered the Secretary of VA to notify claimants of their right to appeal adverse VHA Caregiver Program determinations to the Board. As a result, the Board anticipates receiving as many as 40,368 caregiver appeals in FY 2022 and another 52,043 in FY 2023.

The following information is required by 38 U.S.C. § 7101(d)(3):

38 U.S.C. § 7101(d)(3)(A)

Estimated number of cases that will be appealed to the Board:

FY 2022:	Cases appealed to the Board:	39,000 - Legacy 81,770 - AMA 40,368 - Caregiver
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FY 2023:	Cases appealed to the Board:	39,000 - Legacy 101,104 - AMA 52,043 - Caregiver
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Note: Legacy appeal receipts are contingent upon the rate of certification and transfer of cases by VBA and other AOJs to the Board, as well as Veteran preference for AMA appeals.

Projections include a variety of factors and assumptions that could affect forecasts. The variable assumptions involved in forecasting include refile rate, Board remand rate and production. Any trends identified in these assumptions that lead to changes in the model can affect what is currently being forecasted.

38 U.S.C. § 7101(d)(3)(B)

Evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by 38 U.S.C. § 7101(a):

The indicator used by the Board to forecast its future timeliness of service delivery is the Board's "response time" for appeals. By considering the Board's most recent appeals processing rate and the number of appeals that are currently pending before the Board, the Board response time projects the average time that will be required to render decisions on that group of pending appeals. For response time computation, the term "appeals pending before the Board" includes appeals at the Board (Legacy and AMA) and those that have been certified for Board review.

The following categories are calculated as follows:

$$\frac{\text{FY 2021 decisions (99,721) (divided by)}}{249 \text{ work days}} = \mathbf{400.5 \text{ decisions per work day}}$$

$$\begin{array}{l} \text{Cases pending end of FY 2021 (197,555)} \\ + \text{New cases expected in FY 2022 (161,138)} \end{array} = \mathbf{358,693 \text{ total workload in FY 2022}}$$

$$\frac{\text{Total workload (358,693) (divided by)}}{\text{Decisions per work day (400.5)}} = \mathbf{895.6 \text{ work days}}$$

$$\frac{\text{Workload days (895.6) (divided by)}}{249 \text{ work days per year}} = \mathbf{3.6 \text{ years}}$$

$$\text{Workload years (3.6) x 12 (months)} = \mathbf{43 \text{ months}^*}$$

* 43 months represents the amount of time it would take the Board to decide all appeals (Legacy and AMA) in its projected FY 2021 working inventory (current inventory plus projected receipts in FY 2022).

VA Operations Board Measures

VA implemented the VA Operations Board (VAOB) measures in FY 2019. The VAOB is VA's executive level governance group responsible for tracking performance measures at the operational level and to discuss high-visibility issues, assess program progress, resolve performance problems, and assist leadership in focusing on top priorities and problems within the context of performance, budget and workload results. The following chart represents the Board's performance for VAOB measures in FY 2021, with the exception of its accuracy rate discussed in Section 1.

Board of Veterans' Appeals Veterans Affairs Operations Board Productivity Measure – FY 2021						
Month	Hearings Held	Appeals Decided	Issues Decided	AMA Direct Docket – Average Days to Complete from Notice of Disagreement*	Appeals Decided Per FTE	Legacy Appeals Accuracy Rate
Oct	869	8,051	21,438	307	79	93%
Nov	1,288	6,764	18,787	308	75	91%
Dec	1,349	7,751	20,842	316	74	89%
Jan	2,077	7,537	20,535	317	75	93%
Feb	2,074	8,048	21,718	305	78	82%
Mar	2,033	10,522	28,237	287	82	93%
Apr	2,297	8,851	23,547	287	83	95%
May	2,176	7,846	20,866	276	83	94%
Jun	2,132	8,135	22,401	284	83	94%
Jul	2,372	8,951	24,765	283	84	82%
Aug	2,524	8,532	23,685	307	84	90%
Sep	2,586	8,733	23,864	305	84	98%
Total	23,777	99,721	270,685	300	84	92%
* The Board completed FY 2021 with a cumulative average of 1,182 FTE for the year and 1,185 FTE onboard for the month of September 2021.						

FY 2021 Appeals Modernization Act Statistics

	Direct Review	Evidence Submission	Hearing	Total
AMA Net Case Receipts	27,815	14,970	29,741	72,526
Pending Inventory of AMA Cases (at end of FY 2021)	26,849	19,818	58,358	105,025
AMA Decisions Dispatched	13,282	3,158	4,054	20,494
Average Days to Complete AMA Decision (from Notice of Disagreement)	300	338	547	355
Number of AMA Issues Decided				
Allowed	6,889	2,164	3,229	12,352
Denied	11,452	2,647	2,358	16,457
Remanded	9,964	2,430	3,621	16,015
Other	2,291	681	1,754	4,726

ADDITIONAL INFORMATION

Number of Legacy Notices of Disagreement Received in the Field				
Month	FY 2018	FY 2019	FY 2020	FY 2021
October	14,431	18,781	2,613	25
November	14,814	16,778	1,989	21
December	13,174	13,533	1,387	13
January	12,773	13,067	1,183	4
February	13,741	12,884	392	4
March	15,177	14,414	58	3
April	13,094	13,378	49	5
May	13,542	10,473	54	3
June	14,041	6,065	33	3
July	34,868	6,729	54	3
August	17,041	6,218	25	2
September	15,512	4,323	17	1
FY Total	192,208	136,643	7,854	87

Legacy Dispositions by Representation FY 2021										
REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent of Total
Agent	627	31.7%	781	39.5%	424	21.4%	146	7.4%	1,978	2.5%
American Legion	3,448	28.4%	5,514	45.5%	2,551	21.0%	608	5.0%	12,121	15.3%
AMVETS	56	34.1%	55	33.5%	37	22.6%	16	9.8%	164	0.2%
Attorney	7,317	39.9%	6,823	37.2%	2,724	14.9%	1,478	8.1%	18,342	23.2%
Disabled American Veterans	4,988	29.7%	6,987	41.5%	4,048	24.1%	799	4.7%	16,822	21.2%
Military Order of the Purple Heart	107	32.7%	108	33.0%	90	27.5%	22	6.7%	327	0.4%
No Representation	1,778	27.3%	2,568	39.4%	1,771	27.2%	406	6.2%	6,523	8.2%
Other	379	31.8%	512	42.9%	233	19.5%	69	5.8%	1,193	1.5%
Paralyzed Veterans of America	61	29.8%	89	43.4%	30	14.6%	25	12.2%	205	0.3%
State Service Organizations	4,266	30.8%	5,413	39.0%	3,369	24.3%	821	5.9%	13,869	17.5%
Veterans of Foreign Wars	1,922	29.7%	2,670	41.3%	1570	24.3%	303	4.7%	6,465	8.2%
Vietnam Veterans of America	326	34.0%	390	40.6%	144	15.0%	100	10.4%	960	1.2%
Wounded Warrior Project	72	27.9%	110	42.6%	68	26.4%	8	3.1%	258	0.3%
GRAND TOTAL	25,347	32.0%	32,020	40.4%	17,059	21.5%	4,801	6.1%	79,227	100.0%

Legacy Dispositions by VA Program FY 2021

REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent of Total
BVA Original Jurisdiction	20	23.0%	1	1.1%	29	33.3%	37	42.5%	87	0.1%
Compensation	24,889	32.2%	31,387	40.6%	16,498	21.3%	4,586	5.9%	77,360	97.6%
Education	38	20.3%	55	29.4%	82	43.9%	12	6.4%	187	0.2%
Fiduciary	0	0.0%	0	0.0%	0	0.0%	1	100.0%	1	0.0%
Insurance	1	9.1%	5	45.5%	4	36.4%	1	9.1%	11	0.0%
Loan Guaranty	2	10.0%	8	40.0%	8	40.0%	2	10.0%	20	0.0%
Medical	91	24.7%	154	41.8%	79	21.5%	44	12.0%	368	0.5%
Multiple Program Areas	197	36.4%	209	38.6%	97	17.9%	38	7.0%	541	0.7%
NCA Burial Benefits	2	20.0%	2	20.0%	5	50.0%	1	10.0%	10	0.0%
Other Program	25	33.3%	23	30.7%	18	24.0%	9	12.0%	75	0.1%
Pension	56	14.0%	113	28.3%	177	44.3%	54	13.5%	400	0.5%
Unspecified Program Area	13	28.9%	5	11.1%	21	46.7%	6	13.3%	45	0.1%
VBA Burial Benefits	5	11.6%	14	32.6%	21	48.8%	3	7.0%	43	0.1%
VR&E	8	10.1%	44	55.7%	20	25.3%	7	8.9%	79	0.1%
GRAND TOTAL	25,347	32.0%	32,020	40.4%	17,059	21.5%	4,801	6.1%	79,227	100.0%

AMA Dispositions by VA Program FY 2021

REPRESENTATION	ALLOWED		REMANDED		DENIED		OTHER		TOTAL	
	No.	Percent	No.	Percent	No.	Percent	No.	Percent	No.	Percent of Total
Compensation	7,531	39.0%	5,431	28.1%	4,531	23.5%	1,819	9.4%	19,312	94.2%
Education	8	11.6%	15	21.7%	39	56.5%	7	10.1%	69	0.3%
Fiduciary	2	12.5%	4	25.0%	3	18.8%	7	43.8%	16	0.1%
Insurance	0	0.0%	1	33.3%	2	66.7%	0	0.0%	3	0.0%
Loan Guaranty	1	33.3%	2	66.7%	0	0.0%	0	0.0%	3	0.0%
Medical	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Multiple Program Areas	29	38.7%	24	32.0%	19	25.3%	3	4.0%	75	0.4%
NCA Burial Benefits	3	21.4%	2	14.3%	8	57.1%	1	7.1%	14	0.1%
Pension	200	25.9%	185	24.0%	322	41.8%	64	8.3%	771	3.8%
VR&E	4	15.4%	11	42.3%	9	34.6%	2	7.7%	26	0.1%
VHA	32	15.6%	53	25.9%	32	15.6%	88	42.9%	205	1.0%
GRAND TOTAL	7,810	38.1%	5,728	27.9%	4,965	24.2%	1,991	9.7%	20,494	100%

Legacy Decisions*					
Fiscal Year	Decisions	Allowed	Remanded	Denied	Other
2018	85,288	35.8%	38.8%	20.9%	4.6%
2019	93,571	35.8%	39.0%	20.8%	4.5%
2020	85,461	33.8%	40.6%	20.3%	5.3%
2021	79,227	32.0%	40.4%	21.5%	6.1%
AMA Decisions*					
Fiscal Year	Decisions	Allowed	Remanded	Denied	Other
2019	1,518	40.2%	26.1%	31.3%	2.4%
2020	17,202	37.0%	28.2%	27.6%	7.2%
2021	20,494	38.1%	27.9%	24.2%	9.7%

* The historical reporting system for Board decisions with multiple issues identifies the disposition of an appeal based on the following hierarchy: allowance, remand, denial, or other (i.e., dismissals). When there is more than one disposition involved in a multiple issue appeal, the “reported disposition” for Board Statistical Reports will be categorized based on the disposition hierarchy noted above.

Legacy Decisions: Revised Decision Hierarchy

The Board has historically used a hierarchy to report legacy appeals decided that identified the disposition of an appeal as either an allowance, remand, denial, or “other” (i.e., a dismissal), based on that hierarchy. This method of reporting did not capture every appeal containing a remanded issue, because those legacy appeals with one or more allowed issue and one or more remanded issue would be counted as an allowance, rather than a remand. The revised method shown below is more precise. One of the reasons statutory reform of the VA appeals process was necessary was due to the continuation of appeals in the system. The open record, ongoing duty to assist, and governing case law often results in appeals being remanded from the Board to the AOJ several times and over the course of many years.

Legacy Decisions - Revised Hierarchy							
Fiscal Year	Decisions	Allowed	Allowed (no remanded issue)	Allowed (with at least one remanded issue)	Remanded	Denied	Other
2021	79,227	25,347	15,346	10,001	32,020	17,059	4,801
Percent	100%	32.0%	19.4%	12.6%	40.4%	21.5%	6.1%

Legacy Issues – Decided						
Fiscal Year	Legacy Issues Decided	Allowed (not new & material)	Allowed (new & material)	Remanded	Denied	Other
2021	221,135	36,381	5,731	95,270	66,211	17,542
Percent	100%	16.5%	2.6%	43.1%	29.9%	7.9%

In FY 2021, the Board dispatched 79,227 legacy appeals. Of those legacy appeals, 15,346 were allowances with no remanded issues, 17,059 were denials and 4,801 were “other” dispositions, such as dismissals, for a total of 37,206 legacy appeals decided with no remanded issues. There were 42,021 legacy appeals decided with at least one

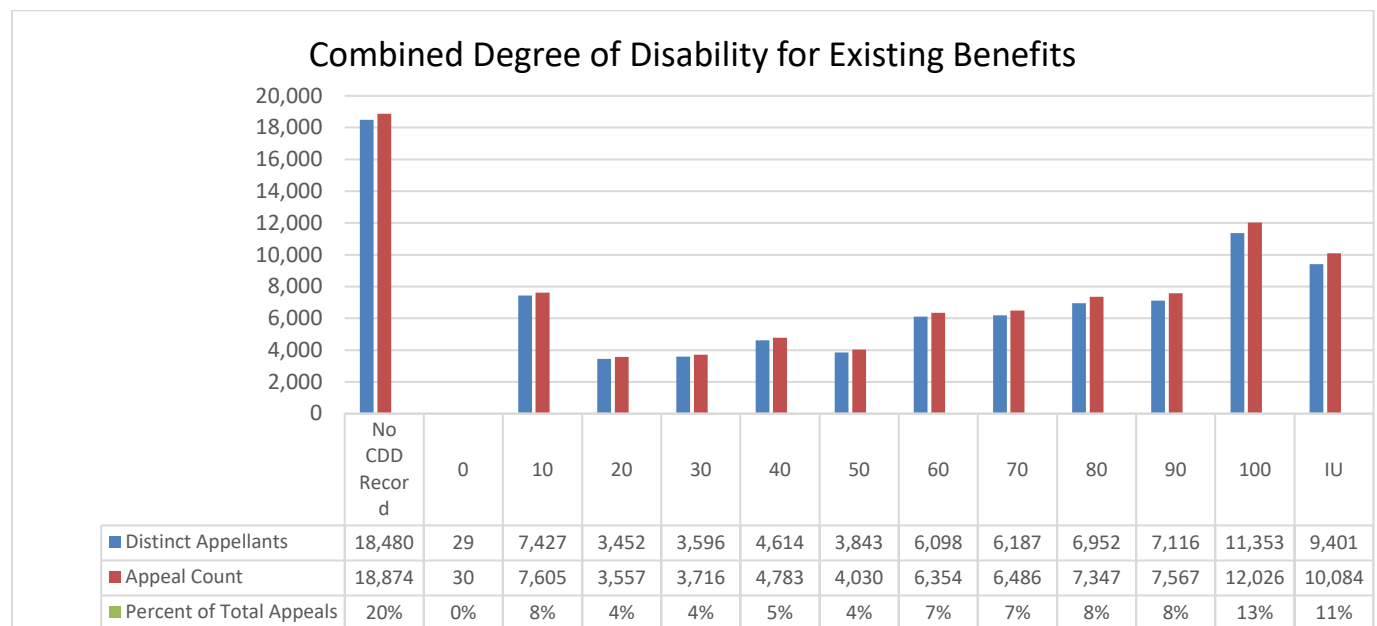
remanded issue (10,001 allowances with at least one remanded issue + 32,020 remands). The number of legacy appeals with at least one remanded issue (42,021), divided by the total number of appeals decided (79,227), results in approximately 53% of cases being remanded to the agency of original jurisdiction.

Combined Degree of Disability for Existing Benefits*

Veterans may receive disability compensation ratings ranging from non-compensable (0%) to 100%. This information in the graph below reflects, at the end of FY 2021, the combined disability rating for Veterans with appeals pending. As of September 30, 2021, the Board's inventory of legacy appeals contained 88,548 total distinct appellants and 92,459 appeals.

This inventory of appeals only counts certified appeals in advanced status, Board active appeals, and remands returned not activated. It does not include action types such as motions for reconsideration, vacates, or Board clear and unmistakable error motions.

Below is a breakdown of these two figures by combined degree of disability.



* Board of Veterans' Appeals pending inventory as of September 30, 2021. Inventory includes appeals that are: certified in advance status; activated at the Board; and remands returned to the Board.

Board Operating Statistics				
	FY 2018	FY 2019	FY 2020	FY 2021
Decisions*	85,288	95,089	102,663	99,721
Legacy cases formally appealed to the Board (Substantive Appeal (VA Form 9 filed))	62,832	36,062	38,081	1,450
Net Cases Received at Board/Certified to the Board**	69,160	78,344	156,758	122,543
Cases Pending***	137,383	120,638	174,733	197,555
Legacy Hearings Held	16,423	22,495	13,686	18,354
AMA Hearings Held	NA	248	1,983	5,423
Total Hearings Held	16,423	22,743	15,669	23,777
Decisions per FTE	92.67	88.26	88.75	84.37
Board FTE	920	1,077	1,157	1,182
Board Cycle Time (Legacy decisions)****	455	440	333	297
Cost per Case	\$1,782	\$1,747	\$1,817	\$2,025
<p>* Decisions includes Legacy and AMA cases starting in FY 2019.</p> <p>** Case receipts include original appeals, remands, CAVC, non-VBA receipts and AMA appeals.</p> <p>*** Pending figures include legacy appeals certified to the Board and docketed AMA appeals.</p> <p>**** The Board's cycle time measures the average time from the date an appeal is certified (VA Form 8) to the Board until a decision is dispatched and excludes the time the case is with a VSO representative for the review and preparation of a written argument.</p>				

STATUTORY REQUIREMENTS

38 U.S.C. § 7101(d)(2)(A): the number of cases appealed to the Board during that year
1,450 - Number of cases formally appealed to the Board (substantive Appeal (VA Form 9) filed)
74,834 - Number of AMA cases formally docketed by the Board (VA Form 10182)
47,853 - Number of legacy appeals certified to the Board
38 U.S.C. § 7101(d)(2)(B): the number of cases pending before the Board at the beginning and at the end of that year
174,733* - Cases pending (certified) before the Board at the start of FY 2021
197,555* - Cases pending (certified) before the Board at the end of FY 2021
38 U.S.C. § 7101(d)(2)(C): the number of such cases which were filed during each of the 36 months preceding the current fiscal year
<p>Substantive Appeals (VA Form 9) Filed in FY 2018 through FY 2020:</p> <p>FY 2018: 62,832</p> <p>FY 2019: 36,062</p> <p>FY 2020: 38,081</p>
<p>Cases Received at the Board during FY 2018 through FY 2020*</p> <p>FY 2018: 69,160</p> <p>FY 2019: 78,344</p> <p>FY 2020: 156,758</p> <p>*Case receipts include original appeals, remands, non-VBA receipts and cases returned by the CAVC. Starting in FY 2019, AMA cases were included in the number of case receipts.</p>
38 U.S.C. § 7101(d)(2)(D): the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year
<p><u>Legacy Appeals:</u> 2,015 days</p> <p><u>AMA Appeals:</u></p> <p>Direct Docket: 300 days</p> <p>Evidence Docket: 338 days</p> <p>Hearing Docket: 547 days</p>
38 U.S.C. § 7101(d)(2)(E): the number of members of the Board at the end of the year and the number of professional, administrative, clerical, stenographic and other personnel employed by the Board at the end of the preceding fiscal year
Members of the Board at the end of FY 2021: 110

The number of professional, administrative, clerical and other personnel employed by the Board in terms of FTEs at the end of FY 2021: 1,072																																			
38 U.S.C. § 7101(d)(2)(F): the number of employees of the Department designated under subsection (c)(1) to serve as acting members of the Board during that year and the number of cases in which each such member participated during that year																																			
Number of acting members of the Board during FY 2021: 189																																			
Number of cases in which acting member participated: 12,246																																			
38 U.S.C. § 7101(d)(2)(G): with respect to hearing scheduled under section 7107(c)(2)(C) of this title (i) the number of hearings scheduled under such section; (ii) the number of hearings under such section that were cancelled; and (iii) any statistical difference in outcomes between cases heard under such section and those held at the principal location of the Board or by picture and voice transmission at a facility of the Department																																			
Number of hearings scheduled: 34,049																																			
Number of hearings that were cancelled: 2,757																																			
Statistical difference in outcomes between cases heard under this section vs other methods:																																			
<table><tr><th colspan="6">Case Disposition Outcomes for Cases Upon Which a Hearing Had Been Held*</th></tr><tr><th>Hearing Venue</th><th>Allowed</th><th>Denied</th><th>Remand</th><th>Other</th><th>Total Cases</th></tr><tr><td>Central Office</td><td>32%</td><td>22%</td><td>42%</td><td>4%</td><td>1,742</td></tr><tr><td>Video Tele-Conference</td><td>30%</td><td>25%</td><td>41%</td><td>4%</td><td>17,771</td></tr><tr><td>Virtual</td><td>52%</td><td>10%</td><td>35%</td><td>2%</td><td>13,215</td></tr></table>						Case Disposition Outcomes for Cases Upon Which a Hearing Had Been Held*						Hearing Venue	Allowed	Denied	Remand	Other	Total Cases	Central Office	32%	22%	42%	4%	1,742	Video Tele-Conference	30%	25%	41%	4%	17,771	Virtual	52%	10%	35%	2%	13,215
Case Disposition Outcomes for Cases Upon Which a Hearing Had Been Held*																																			
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* The historical reporting system for Board decisions with multiple issues identifies the disposition of an appeal based on the following hierarchy: allowance, remand, denial, or other (i.e., dismissals). When there is more than one disposition involved in a multiple issue appeal, the “reported disposition” for Board Statistical Reports will be categorized based on the disposition hierarchy noted above.																																			
38 U.S.C. § 7101(d)(3)(A): an estimate of the number of cases to be appealed to the Board																																			
Estimated number of cases that will be appealed/returned to the Board:																																			
	FY 2022	FY 2023																																	
Legacy:	39,000	39,000																																	
AMA:	81,770	101,104																																	
Caregiver:	40,368	52,043																																	
38 U.S.C. § 7101(c)(2): In terms of full-time employee equivalents, the number of acting members of the Board																																			
Number of acting members of the Board in terms of FTE employees: 22.3 FTE																																			
* According to 38 U.S.C. Section 7101(c)(1), the Chairman of the Board of Veterans’ Appeals has the authority to designate employees of the Department as acting members of the Board. This includes attorneys who may be designated as AVLJ to																																			

sign decisions when needed. It is in the discretion of the Chairman to designate such employees, based on the needs of the organization. Acting members of the Board may serve no more than 270 days per year (no more than 90 days at a time) and may not exceed 20% of the total number of Board members and acting Board members combined. Additionally, as the Board continues to implement AMA, the Chairman will assess the Board's needs and adjust the number of AVLJs accordingly.

** For this report, the number of cases in which acting members participated is defined as the number of dispositions issued by the designated acting members for FY 2021.

*** Derived from the number of days worked by acting members throughout the year (5,399 days) divided by the number of working days in the year (242).

38 U.S.C. § 7101(d)(3)(B): an evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by section 7101(a) of this title [38 USCS § 7101(a)].

The indicator used by the Board to forecast its future timeliness of service delivery is the Board's "response time" on appeals. By considering the Board's most recent appeals processing rate and the number of appeals that are currently pending before the Board, the Board response time projects the average time that will be required to render decisions on that group of pending appeals. For response time computation, the term "appeals pending before the Board" includes appeals at the Board and those that have been certified for Board review.

The following categories are calculated as follows:

FY 2021 decisions (99,721) (divided by)
249 work days = **400.5 decisions per work day**

Cases pending end of FY 2021 (197,555)
+ New cases expected in FY 2022 (161,138) = **358,693 total workload in FY 2022**

Total workload (358,693) (divided by)
Decisions per work day (400.5) = **895.6 work days**

Workload days (895.6) (divided by)
249 work days = **3.6 years**

Workload years (3.6) x 12 (months) = **43 months******

* Includes certified appeals pending in the field awaiting hearings, as well as cases docketed and pending at Board.

** For this report, the number of cases in which acting members participated is defined as the number of dispositions issued by the designated acting members for FY 2021.

*** Appeal receipts are contingent upon the rate of certification and transfer of cases by VBA and other AOJs to the Board, as well as Veteran preference for AMA appeals. With AMA implementation effective February 14, 2019, appeals case receipts projections include both legacy and AMA appeals. Projections include variety of factors and assumptions that could affect forecasts. Variable assumptions involved in forecasting include the refile rate, Board remand rate and production. Any trends identified in these assumptions that lead to changes in the model can affect what is currently being forecasted.

**** 43 months represents the amount of time it would take the Board to decide all appeals (Legacy and AMA) in its projected FY 2022 working inventory (current inventory plus projected receipts in FY 2022).

Department of Veterans Affairs
December 2021

EXHIBIT L

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VA (<http://www.va.gov/>) » Board of Veterans' Appeals (</index.asp>) » Decision wait times

Board of Veterans' Appeals

Decision wait times

On this page:

Workload challenges | Requirement to work cases in docket order | Complexities of two separate appeal systems | Veteran choices under the AMA necessarily influence waiting times | Hearing cases generally take longer because of Judge availability | Board remands of cases for additional case development | Despite wait times, Veteran trust increases during appeal process | Internal review process prior to sending final decisions | Court review of Board decisions

Why does my appeal at the Board of Veterans' Appeals (Board) take so long, and what is the Board doing about it?

The Board understands that many Veterans and appellants have been waiting a long time for a decision. We acknowledge that this wait can be very frustrating and want to explain why getting a Board decision can take a long time, and what options Veterans and appellants have to reduce the time they have to wait for a decision.

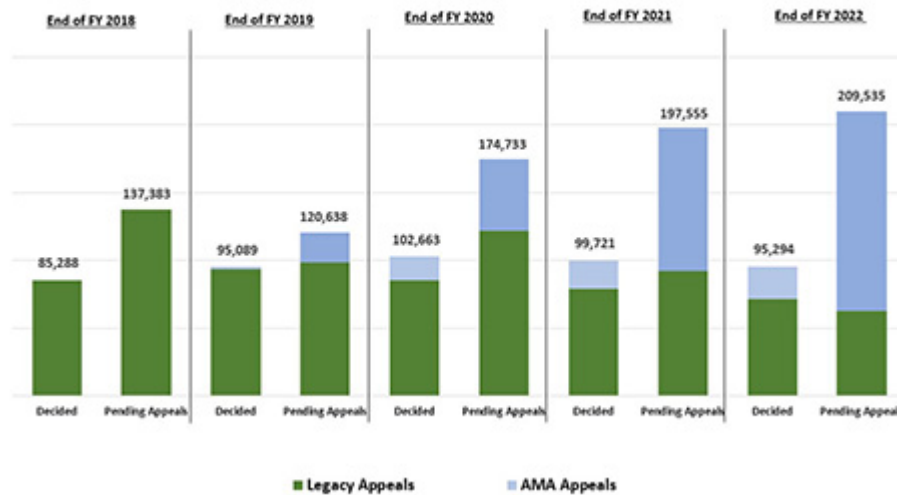
Workload challenges

In recent years, the Board has resolved about 100,000 appeals each year. Despite these high numbers of decisions each year, the Board recognizes there are still approximately 200,000 appeals waiting for a decision. However, this is substantially down from nearly 475,000 appeals waiting for a decision just 5 years ago, which is significant considering an increasing number of Veterans have filed an appeal at the Board in recent years. We have Congress to thank for better resourcing the Board to hire more Veterans Law Judges (VLJ) and supporting counsel and staff to help resolve these appeals.

The Board recognizes that each and every case has a unique set of circumstances that our VLJs carefully evaluate and appropriately resolve according to governing laws and regulations. Below is a five-year trend of workload and decided appeals.

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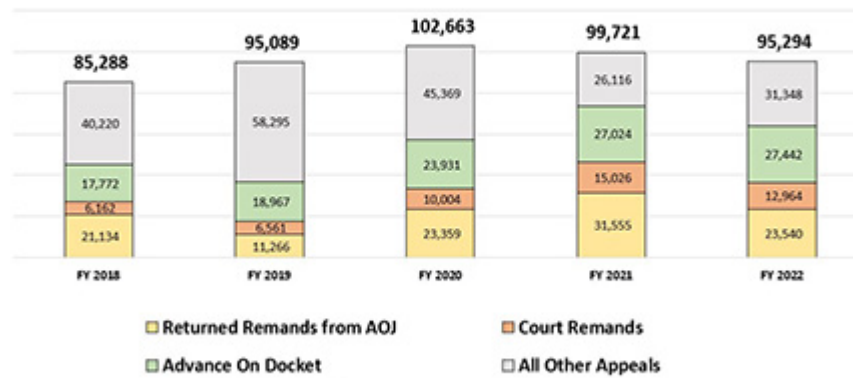
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Requirement to work cases in docket order

By law, the Board must generally decide appeals in the order they are docketed (initially filed) with the Board, except for those cases advanced on the docket for extenuating circumstances set out in statute or cases returned to the Board for expedited processing after remand. More specifically, the docket order addressed in 38 U.S.C. § 7107(a)(1) and maintained by the Board must account for cases that have been advanced on the docket, cases that receive expedited treatment on remand from the United States Court of Appeals for Veterans Claims (Court), cases that have been returned to the Board from the Agency of Original Jurisdiction (e.g., Veterans Benefits Administration, Veterans Health Administration) following remand, and cases that either are awaiting or have had a hearing. Overall, this means cases are generally worked on a first-come, first-served basis. For example, legacy cases either remanded from the Court, or remanded to the Agency by the Board, maintain their original docket numbers upon return to the Board and generally must be expedited ahead of most other cases. Thousands of cases previously adjudicated by the Board are remanded and returned to the Board each year by the Court. These returned cases move ahead of other first-time appeals awaiting adjudication even though these remanded cases usually don't result in a different outcome upon re-adjudication by the Board. As you can see below, advanced on docket cases, Court remands, and returned remands have significantly impacted the composition of Board's annual workload during the past three years:

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and your VA benefits) Breakdown of Appeals Adjudicated FY 2018 - FY 2022



* AOD's that were also CAVC remands were excluded from this total to avoid double counting.

** Legacy Appeals: Returned remands that were also AOD or CAVC remands are excluded from this total to avoid double counting.

[View larger image \(/images/appeals/breakdown-of-appeals-adjudicated-fy2018-fy2022-large.jpg\)](/images/appeals/breakdown-of-appeals-adjudicated-fy2018-fy2022-large.jpg)

When a Veteran files an appeal with the Board, the first thing that happens is the Intake team reviews the appeal to make sure they have all the information they need, and then it is docketed at the Board. The Board may need to complete administrative tasks before the appeal can be worked, such as making sure we have a brief from a Veterans Service Organization or fulfilling any Privacy Act requests. Given the increasing number of appeals filed at the Board and the fact that many may require an administrative task, there is a corresponding increase in the time it takes for any given appeal to come before a VLJ.

Once an appeal is eligible for review based on its place on the docket, it will be assigned to a VLJ. The VLJ assigns the case to an attorney, who reviews the entire file and drafts a decision. The draft is then reviewed for factual accuracy and signed by a VLJ. Many of these appeals involve multiple issues, and the claims files can have thousands of pages of evidence. The Board has a responsibility to review the entire record and write a thorough and well-supported decision; attorneys and Judges consider each appeal carefully, which is why it can take a while to get a decision in certain cases.

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Complexities of two separate appeal systems

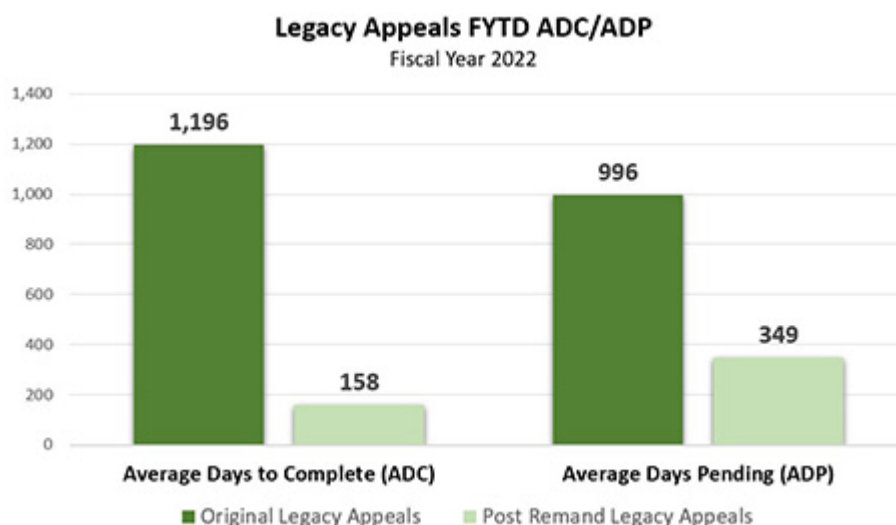
VA understood that the older "legacy" claims and appeals process was slow and confusing, and, in response, Congress passed the Veteran Appeals Improvement and Modernization Act of 2017 (AMA), also known as the modernized review system. You can read the full Public Law (https://uscode.house.gov/statutes/pl/115/55.pdf#:~:text=Public%20Law%20115%E2%80%939355%20115th%20Congress) This new law offers Veterans more choices regarding the type of review they select when they disagree with a VA decision denying a benefit. In addition, the law ensures that Veterans and appellants can preserve the earliest effective date possible by continuously pursuing their claim. This means that as long as a Veteran continuously appeals their claim within the allotted time period, if it is eventually granted, the effective date can go back to the first claim. The AMA allows Veterans and appellants to seek an additional review following a Board decision without going to the United States Court of Appeals for Veterans Claims; rather they can now file a supplemental claim with the VA office that has jurisdiction over the claim and file an appeal with the Board.

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While the AMA was designed to help make the claims and appeals process less cumbersome and more efficient, there are still approximately 97,000 legacy system appeals that generally represent the oldest appeals where Veterans have been waiting the longest for resolution of their appeals.

The requirement to generally decide older legacy appeals first necessarily means it has been taking longer than expected for the Board to fully resolve more recently filed appeals under the AMA. As you can see below, the old legacy system appeals still pending adjudication have been pending for quite some time. However, the second graph demonstrates how diligently the Board has been working to resolve the backlog of these older legacy system appeals during the past 5 years. It is worth noting that contributing to the time it takes for the Board to adjudicate appeals, many legacy cases have been remanded to the Board from the Court or returned to the Board by the initial adjudicating Agency after previous remands from the Board. Due to the nature of those legacy remands, which maintain their original place in line on the Board's docket, the order of cases pending before the Board can fluctuate greatly. In other words, this means that previously adjudicated legacy appeals that were remanded and returned to the Board will generally be distributed for re-adjudication ahead of original appeals that have not been previously before the Board.



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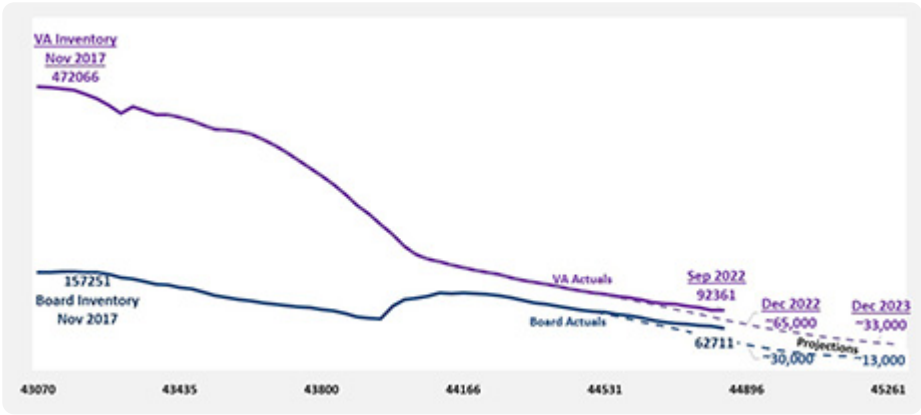
These descriptions help provide some clarity on Average Days Pending (ADP) and Average Days to Complete (ADC) measurements for legacy appeals in the graph above.

Original Legacy Appeals ADC: The average days to complete an original appeal is measured as the average number of days between the date the appeal is certified to the Board by the Agency of Original Jurisdiction (AOJ) and the decision (dispatch) date.

Post Remand Legacy Appeals ADC: The average days to complete a returned remand appeal is measured as the average number of days between the date the returned remand is docketed by the Board and the decision (dispatch) date. CAVC remands are not represented/included in this calculation.

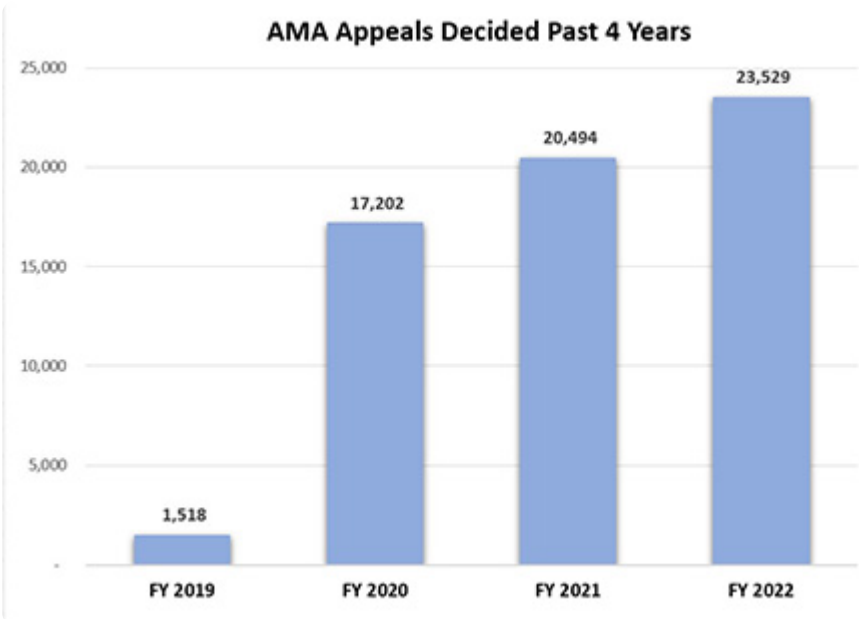
Original Legacy Appeals ADP: The average days pending for original appeals is calculated from the date the appeal is certified to the Board by the Agency of Original Jurisdiction (AOJ) and any given date for appeals currently awaiting a Board decision.

Post Remand Legacy Appeals ADP: The average days pending for returned remand appeals is calculated from the date the returned remand is docketed by the Board and any given date for appeals currently awaiting a Board decision. CAVC remands are not represented/included in this calculation.



[View larger image \(/images/appeals/legacy-drawdown-plan-large.jpg\)](/images/appeals/legacy-drawdown-plan-large.jpg)

A large number of these cases have already undergone at least one Board review and were remanded for further development before returning to the Board. The Board is committed to deciding the remaining legacy appeals consistent with VA's plan to draw down legacy appeals. However, it is important to note that the Board is deciding an ever-increasing number of AMA appeals each year. During the first year after AMA implementation, relatively few AMA cases were decided. Currently, approximately 20-30% of all decided cases are appeals filed under the AMA. The Board anticipates that as the number of legacy appeals decreases and the number of AMA appeals increases, the distribution percentages will correspondingly change.



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and-your-va-benefits)

Veteran choices under the AMA necessarily influence waiting times

The AMA applies to all claims for which VA issues an initial decision on or after February 19, 2019. Previously, in the legacy system, a Veteran or appellant could only appeal an unfavorable decision to the Board. A Veteran can now request review of an unfavorable decision through three different review options, or “lanes:” Higher-Level Review, Supplemental Claim, or appeal to the Board. Board review is only one of three options to request review; it may not be the best option depending on a Veteran’s specific circumstances. Additional information about Higher-Level Review and Supplemental Claims can be found on the Appeals Modernization (<https://www.benefits.va.gov/benefits/appeals.asp>) page. If a Veteran requests Higher-Level Review or files a Supplemental Claim, they can still appeal to the Board if they disagree with the new decision.

As the AMA emphasized, Veteran choice is an important factor in how long it will take to resolve an appeal. For Veterans and appellants choosing to appeal a decision directly to the Board, there are now three different review options, or “dockets,” they can choose from that best meet their unique circumstances:

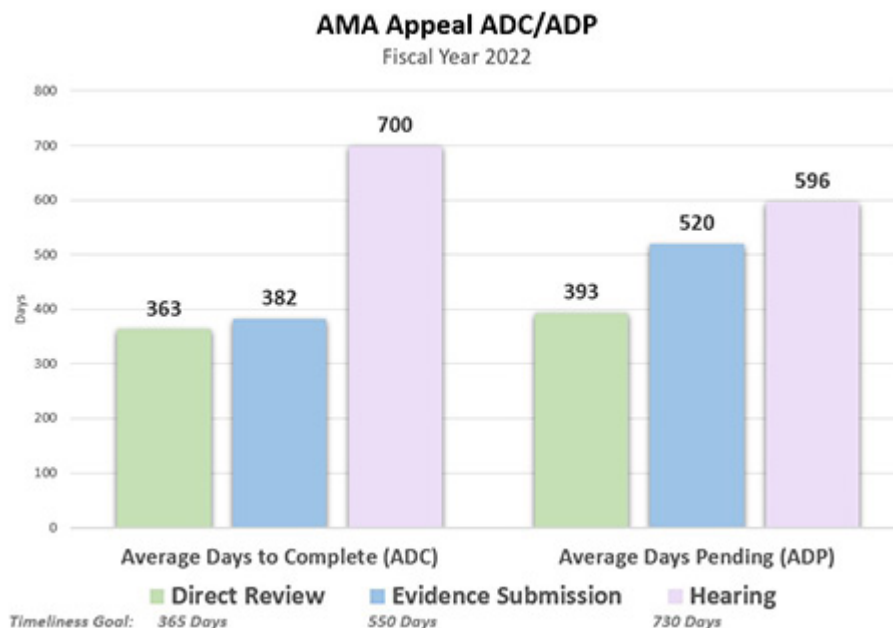
Direct Review docket: The fastest way to receive a decision when a Veteran or appellant believes everything needed to approve their claim is already in the file. The Board will not consider any new evidence, and the VLJ will decide their case based on the evidence in the record at the time of the decision they are appealing.

Evidence Submission docket: Some Veterans know they want or need to add additional evidence into their file for consideration by a VLJ. In that case, the Evidence Submission docket allows for additional evidence to be submitted by the Veteran or their representative within 90 days of appealing to the Board.

Hearing docket: On average, it takes the longest to receive a Board decision for appeals on the Hearing docket. This option is best if a Veteran wants to appear personally before a VLJ. In most cases, this is done over video. However, this option will involve the longest wait time.

View the Choosing a Decision Review Options (<https://www.va.gov/resources/choosing-a-decision-review-option/>) page for more information on choices available to Veterans under the AMA.

As you can see below, the Board’s projections for how quickly AMA cases will be decided stems directly from the choices that Veterans and their representatives decided were best for their individual circumstances.



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View larger image (/images/appeals/ama-appeal-adc-adp-large.jpg))

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These descriptions help provide some clarity on Average Days to Complete (ADC) and Average Days Pending (ADP) measurements for AMA appeals in the graph above.

AMA ADC: The average days to complete an AMA appeal is measured as the average number of days between the date the notice of disagreement (NOD) is received by the Board and the decision (dispatch) date.

AMA ADP: The average days pending for AMA appeals is calculated from the date the NOD is received by the Board and any given date for appeals currently awaiting a Board decision.

Based on current data above, this means that if you file an appeal with the Board on the Direct Review docket, on average, you will get a decision in 356 days. Some Veterans and appellants will get a decision faster than 356 days, some will get a decision in more than 356 days. There are a number of factors that impact how long it will take to get a decision.

Again, the Board is required to decide cases in regular order according to its respective place on the docket; however, there is an exception for cases that have been advanced on the docket, or that have been remanded by the United States Court of Appeals for Veterans Claims. 38 U.S.C. § 7107; 38 C.F.R. § 20.800. As noted above, legacy appeals have older docket dates than many AMA appeals, so these cases are prioritized consistent with VA's goal to draw down the number of legacy cases and decide cases in docket order. The Board may advance a case on the docket in circumstances of advanced age (75 years or older), financial hardship or a serious illness, administrative error, or for other sufficient cause, such as unusual hardship due to a natural disaster. If a Veteran or appellant would like to request that their appeal be advanced on the docket, the instructions are located on our Customer Service (/customerservice.asp) page.

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Hearing cases generally take longer because of Judge availability

As you can see above, cases where a Veteran or appellant requests a hearing take the longest time to receive a decision. If you request a hearing, it can take up to two years to hold a hearing and to get your decision. The reason it is taking the Board so long to resolve appeals in the hearing docket is based on two key factors: (1) The large number of Veterans choosing the hearing lane over other appeal options; and (2) The large number of “no shows” and scheduled hearings that are withdrawn too late to fill the slot with another waiting Veteran.

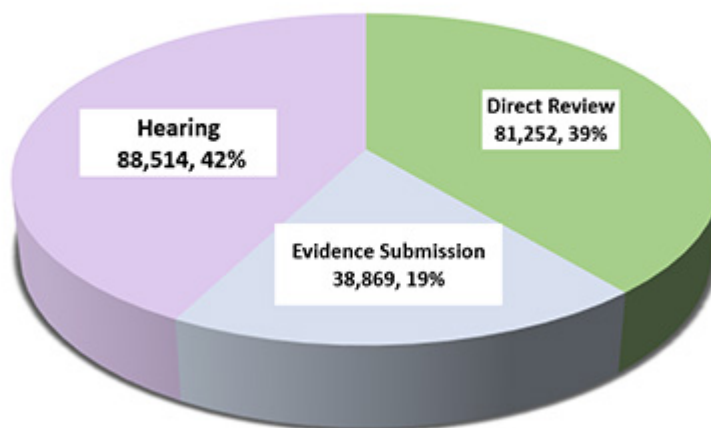
During the first three years after AMA went into effect, nearly 42% of Veterans and their representatives chose to have a hearing with a VLJ prior to the Board rendering a decision.

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AMA Appeal Lane Choices FY2019 - FY2022

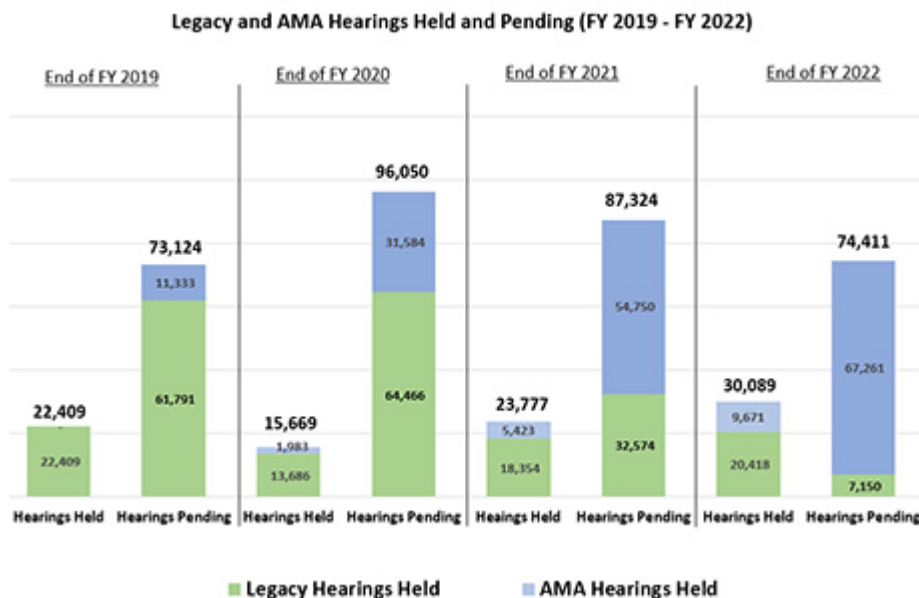
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Includes Dispatched and Active Appeals

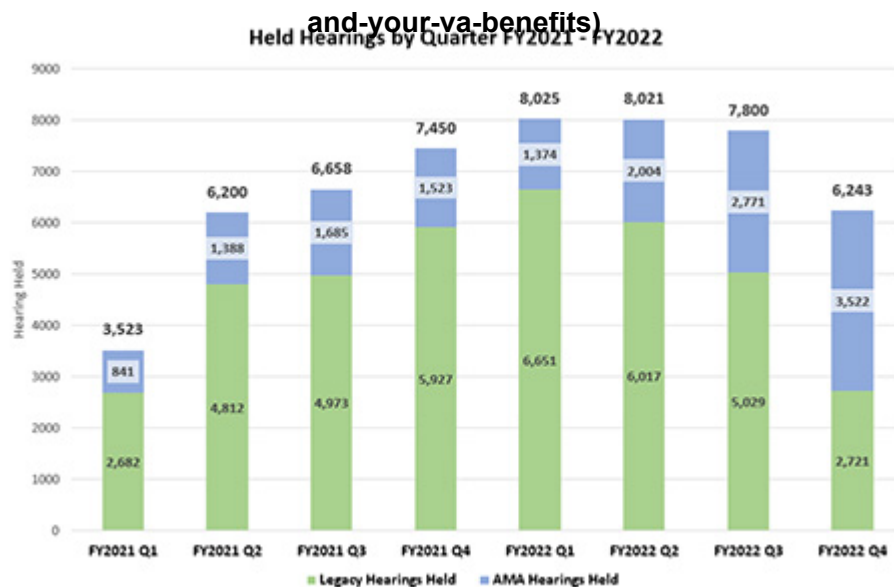


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Because the number of VLJs is limited and each VLJ has only so many hours each day, the Board's published goals for anticipated wait times reflect a careful balance of workload between VLJs holding hearings versus the time VLJ spend reviewing files and issuing written decisions on appeals not involving hearings. This includes AMA cases where Veterans chose the Direct or Evidence Submission dockets described above, where the VLJ is only reviewing the claims file before issuing a decision.



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[View larger image \(/images/appeals/held-hearings-by-quarter-fy2021-fy2022-large.jpg\)](/images/appeals/held-hearings-by-quarter-fy2021-fy2022-large.jpg)

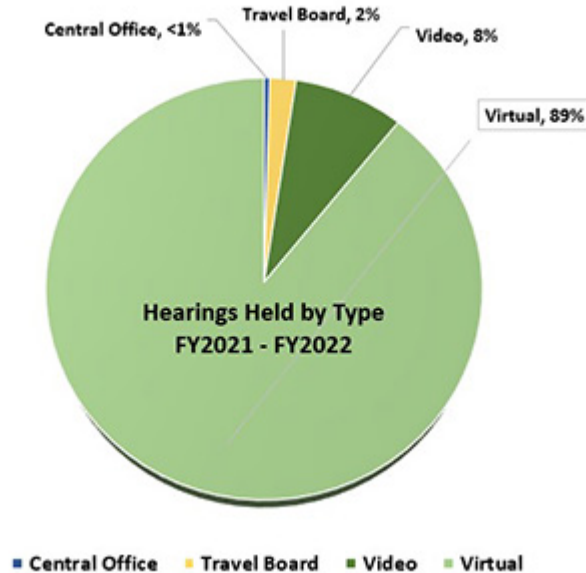
Through several initiatives, the Board has significantly increased the number of hearings it holds each month. From October 1st, 2021 to August 31st, 2022 the average number of hearings held per month increased to around 2,600, an increase by about 900 additional hearings per month. These initiatives include expanded virtual tele-hearing capacity and enhanced hearing capabilities such as more flexible daily dockets, and the ability to quickly convert any previously scheduled hearing type to a virtual tele-hearing; enabling hearing email reminders; restructuring the Board's hearing operations; and increased coordination with Veterans Service Organizations and private representatives. These improvements allowed the Board to provide hearings despite the public health restrictions imposed by the COVID-19 pandemic. The Board acknowledges the long wait time for a hearing, and in 2022, the Board hired 15 new VLJs to help hold more hearings and issue more decisions. The Board's leadership monitors the Board's finite resources in balancing holding Veteran-requested hearings and issuing decisions for Veterans.

If a Veteran or appellant wants to request a hearing, there are several different hearing types available:

Virtual Tele-hearing: You can attend the hearing from anywhere with a Wi-Fi connection using any internet-connected device, such as a cell phone, tablet, or computer. You and your representative can attend virtually from separate locations. No travel is needed.

Videoconference Hearing: You will travel to a VA regional office (RO) for a video hearing with a VLJ. The RO facility will connect you to a video and audio feed to a Board VLJ. Videoconference hearings are open depending on the status of the RO, but due to the COVID-19 pandemic, RO's are still only able to accommodate a limited number of Veterans to make sure everyone is socially distant and safe.

Central Office Hearing: You will travel to Washington, D.C., for an in-person hearing with a VLJ. Again, there is a limited capacity for these hearings to ensure appropriate social distancing and sanitized hearing rooms. If you prefer not to wait, the Board has more openings for virtual tele-hearings.

and-your-va-benefits)

View larger image (/images/appeals/hearing-types-large.jpg)

***Note:** Travel Board Hearings will no longer be offered after resolution of the pending legacy inventory scheduled to achieve functional zero in FY2023.

Average number of days from filing an appeal to hearing held

	Legacy	AMA
Central	2,732	498
Travel	1,903	549
Video	1,870	739
Virtual	1,805	634

As you can see above, the overwhelming majority of hearings the Board currently holds are virtual tele-hearings. This is the fastest way for you to have a hearing. Videoconference hearings and Central Office hearings take significantly longer to schedule than a virtual tele-hearing.

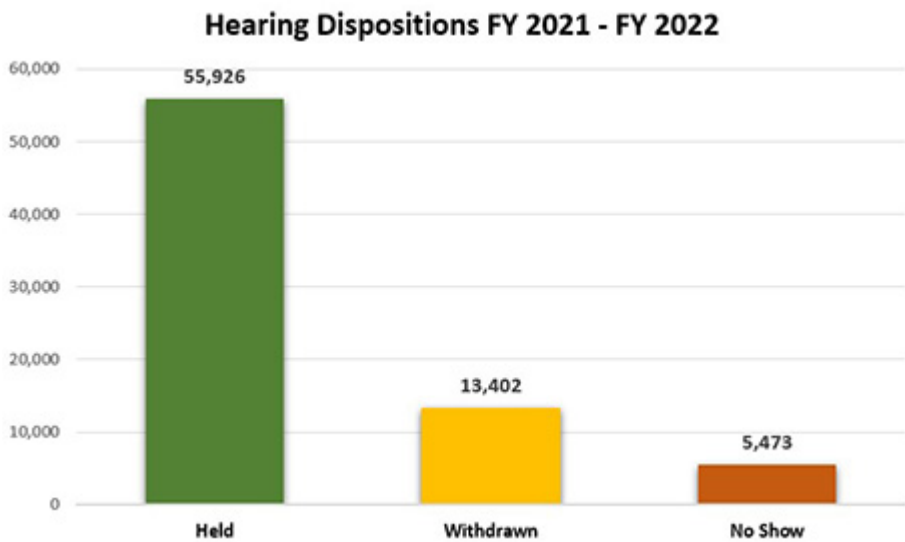
A virtual tele-hearing is almost the same as a videoconference hearing, except a Veteran does not have to travel to an RO and can participate from their cell phone, tablet, or computer.

View additional information (/docs/VirtualHearing_FactSheet.pdf) on virtual tele-hearings, to include how to request a virtual tele-hearing. If you would like to switch your hearing request to a virtual tele-hearing, call your representative and tell them to email the Board (mailto:bvavirtualhearing@va.gov). In addition, representatives with Caseflow access can select a virtual tele-hearing for their client directly through Caseflow.

One important piece of information for Veterans is they may not get a decision immediately after the hearing; it may take up to six months or more to get a decision even after they have appeared at a hearing. This is because the Board is trying to provide hearings as soon as we can, but cases still need to be decided in docket order. If your hearing is held prior to your case being ready to decide based on the docket order, you may have to wait several months before you get a decision.

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It's important to keep in mind there are only so many Veterans Law Judges at the Board and judges are the only ones who can both hold hearings and decide cases. The Board has the capacity to hold approximately 1,000 hearings each week, but most Veterans are represented for free by Veterans Service Organization partners who do not have that same capacity. Additionally, nearly one out of every two scheduled hearings are cancelled or withdrawn with insufficient time to fill that empty slot with another Veteran waiting patiently in line. Worse, the Board's judges spent precious time reviewing case files and preparing for hearings that were not held. The chart below illustrates the ratio of hearings held versus hearings scheduled and highlights the challenge to ensure judge availability is maximized.



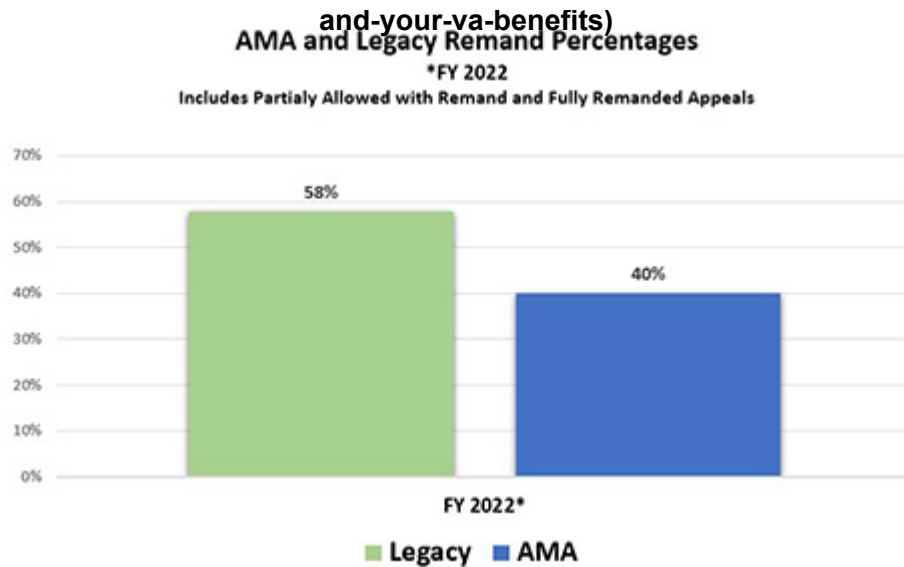
[View larger image \(/images/hearing-disposition-fy2021-fy2022-large.jpg\)](/images/hearing-disposition-fy2021-fy2022-large.jpg)

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Board remands of cases for additional case development

In addition to increased choice and control, the AMA has had other benefits for Veterans and appellants as well. Compared to the legacy system, the percentage of AMA remands has gone down, and the percentage of cases where requested relief is granted is on the rise. This is good news for Veterans and appellants as they are more likely to get a decision in the AMA, and this has decreased the percentage of cases being sent back by the Board to regional offices for development.

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[View larger image \(/images/appeals/ama-and-legacy-remand-percentages-large.jpg\)](/images/appeals/ama-and-legacy-remand-percentages-large.jpg)

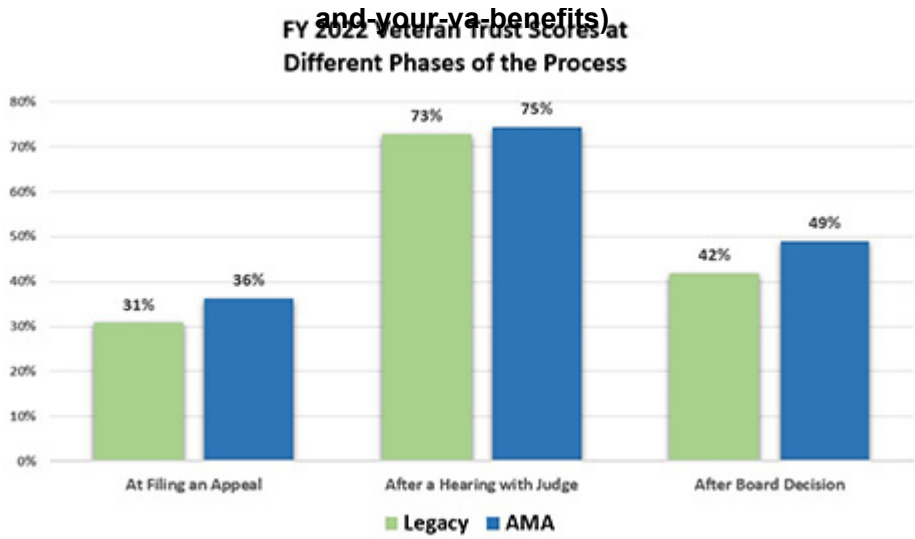
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Despite wait times, Veteran trust increases during appeal process

In addition to working hard to get decisions out to Veterans and appellants, the Board is continually collecting feedback from Veterans and appellants and using it to improve our customer service experience. Specifically, the Board sends surveys to all Veterans to seek their feedback at three stages during the appeal: 1) When the appeal is first docketed at the Board; 2) Immediately after their hearings, if requested; and 3) After they receive the Board's written decision on their appeals.

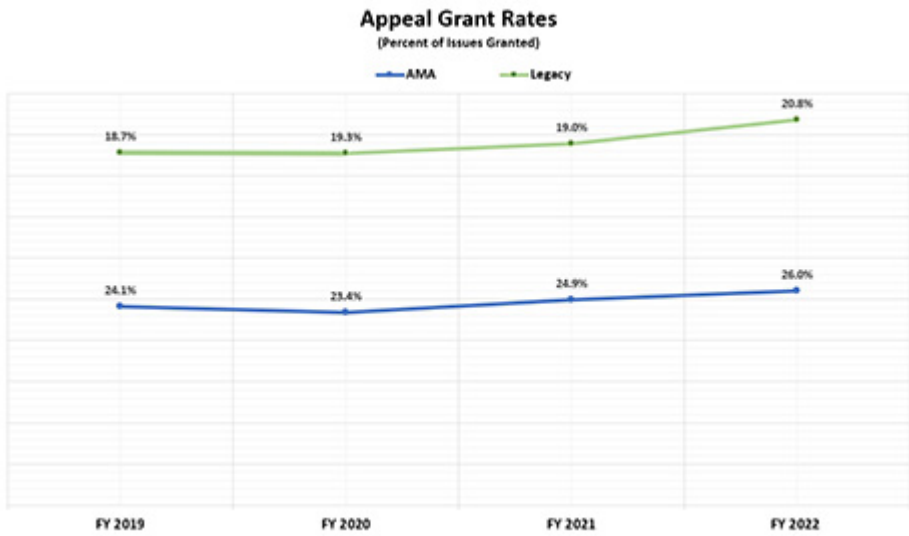
The survey data demonstrates that the Veteran experience during the appeal process is generally positive, with overall trust scores rising approximately 20 percentage points from the time they first file with the Board until after they receive the Board's decision. As shown below, Veteran trust in VA's commitment to them is fairly low when they file their appeals. That's unsurprising considering they are appealing a "no" decision from VA with respect to their claim for benefits and services. However, that score goes up dramatically after a hearing with a Board Veterans Law Judge, which is the first opportunity for many Veterans to hear a first-hand explanation from the judge about why the initial claim was denied and what evidence is needed to support the benefits or services sought.

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[View larger image \(/images/appeals/veteran-trust-scores-at-different-phases-of-the-process-large.jpg\)](/images/appeals/veteran-trust-scores-at-different-phases-of-the-process-large.jpg)

As you can see above, Veterans leave the Board with higher trust levels than they had when they first filed their appeals. While only about half of Veterans agree they “trust” the Board after getting their final decisions, that is far higher than the percentage of those same Veterans who received a “grant” on one or more issues in their appeals, which is about a third of Veterans receiving a decision on their appeal. Below are statistics showing the percentage of “issues” granted in cases coming to the Board in both appeals systems:



[View larger image \(/images/appeals/appeal-grant-rates-percent-of-issues-granted-large.jpg\)](/images/appeals/appeal-grant-rates-percent-of-issues-granted-large.jpg)

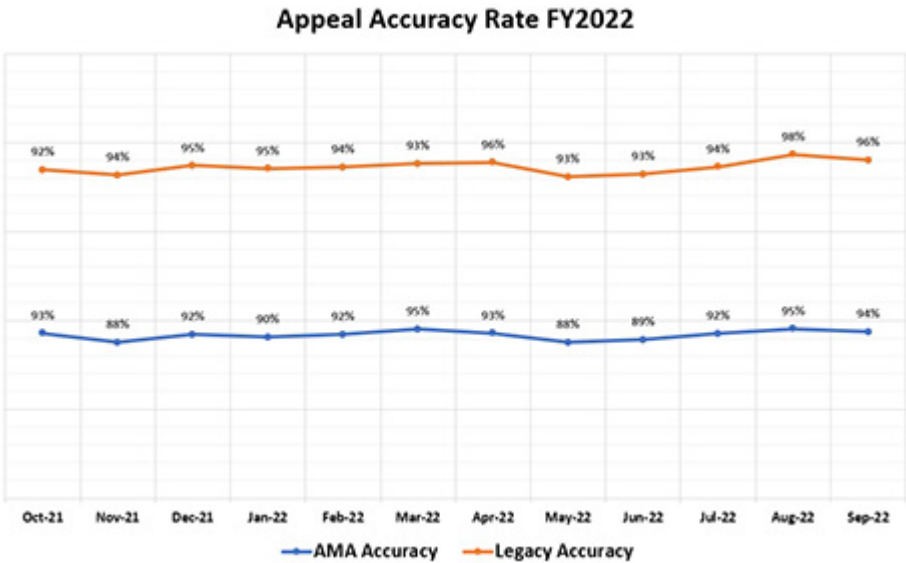
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Internal review process prior to sending final decisions

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Because the Board is resolving such a high volume of pending appeals each year, some external stakeholders have expressed concern that this pace of work at the Board might sacrifice the quality of decision-making by Board judges. However, the Board is committed to ensuring every appeal is decided as efficiently as possible, with a high degree of confidence that the Board’s judges are appropriately resolving appeals in accordance with the law. For example, the Board’s Office of the Chief Counsel has specially trained attorneys meticulously review thousands of judge decisions each year before those decisions are released to the Veteran. To put it bluntly, they identify procedural issues or other potential flaws in these decisions even though those identified issues don’t amount to clear legal error. Indeed, many “errors” identified are actually favorable to the Veteran, such as when a judge is attempting to remand a case for additional development of evidence that might prove helpful to the Veteran, but the law requires the judge to rule only on the evidence before the judge because the evidentiary window is already closed.

Any potential issues or errors found during the review process are called to the attention of the Veteran Law Judge who signed the decision so the judge has the opportunity to revise or improve their decisions. For example, the decision could be remanding an issue to seek additional evidence that might potentially be favorable to the Veteran’s case, but the quality review notes the law doesn’t allow additional case development at that stage of appeal. While not prejudicial to the Veteran’s case, it is still flagged as an “error.” Like an umpire who calls “strikes” with very big “strike zone,” the Board the overwhelming majority of “strikes” called involve circumstances when there is no clear legal error at all. Virtually all errors the Board discovers during its own quality reviews are process or procedural errors. The Board’s independent review process almost hardly ever finds “clear and unmistakable error” that would cause a case to be overturned on appeal. The chart below illustrates the percent of decisions reviewed where no flaws can be found with the judge’s written decision.



[View larger image \(/images/appeals/appeal-accuracy-rate-fy2022-large.jpg\)](/images/appeals/appeal-accuracy-rate-fy2022-large.jpg)

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Court review of Board decisions

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Other stakeholders question the number of Board decisions appealed to the Court of Appeals for Veterans Claims that are remanded to the Board. The Board issues roughly 100,000 decisions each year, it grants relief on 20-30% of the issues that come before the Board in the two appeals systems and remands tens of thousands of cases for further evidence based on VA's duty to assist. Generally, more than 40,000 appeals where full relief was not granted are eligible for appeal each year. Of that number, reports show fewer than 20% of those cases (8,000-9,000) are appealed to the Court each year. In addition, as the Board has decided more cases each year, the percentage of cases that have been appealed to the United States Court of Appeals for Veterans Claims has stayed the same.

Annual reports show the Court reverses very few Board decisions for being "clearly erroneous." More often, Court clerks and VA Office of General Counsel attorneys agree to jointly remand select issues from appealed cases back to the Board so the judge can further explain the reasons and bases supporting the judge's denial. This is not legal error, but rather, the parties attempt to ensure the rationale supporting the Board's decision is more fully articulated to the Veteran and their counsel.

In addition, in the AMA, Veterans and appellants now have an additional method of requesting review of a Board decision other than appealing to the Court of Appeals for Veterans Claims. Veterans can now file a supplemental claim with new and relevant evidence to request review of a Board decision. As long as Veterans continuously appeal their claim within the allotted time period, if it is eventually granted, the effective date can go back to the first claim.

The Board understands that this process can be long and frustrating for Veterans, but we hope that this provides information to explain why your appeal is taking so long, and what VA and the Board is trying to do about it. Additional information can be found on the Appeals Modernization (<https://benefits.va.gov/benefits/appeals.asp>) page.

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RESOURCES

Board of Veterans' Appeals Home Page (</index.asp>)

Decision Wait Times (</decision-wait-times.asp>)

Customer Service (</CustomerService.asp>)

Chairman's Annual Reports to Congress (/Chairman_Annual_Rpts.asp)

Quarterly Reports (/Quarterly_Reports.asp)

Military Spouse Employment (/Military_Spouse_Employment.asp)

Frequently Asked Questions (/Frequently_Asked_questions.asp)

VA Forms (<https://www.va.gov/find-forms/>)

Search Decisions (<https://search.usa.gov/search?affiliate=bvadecisions>)

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844-698-2311 TTY: 711

Benefits:
1-800-827-1000

Health Care:
1-877-222-VETS (8387)

VA Inspector General:
1-800-488-8244

Veterans Crisis Line:
1-800-273-8255 Press 1

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(<https://www.facebook.com/DeptOfVetAffairs>) (<https://twitter.com/DeptOfVetAffairs>) (<https://www.va.gov/vaopablog/>) (<https://www.youtube.com/user/DeptOfVetAffairs>) (<https://www.flickr.com/photos/DeptOfVetAffairs/>)

CONNECT

Veterans Crisis Line: (<https://www.veteranscrisisline.net/>)
Call: 988 (tel:+988) (Press 1)

Social Media



(<https://www.va.gov/vaopablog/>) (<https://www.facebook.com/DeptOfVetAffairs>) (<https://twitter.com/DeptOfVetAffairs>) (<https://www.va.gov/vaopablog/>) (<https://www.youtube.com/user/DeptOfVetAffairs>) (<https://www.instagram.com/DeptOfVetAffairs>)
Complete Directory (<https://www.va.gov/opa/socialmedia.asp>)

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RESOURCES

ADMINISTRATION

U.S. Department of Veterans Affairs | 810 Vermont Avenue, NW Washington DC 20420

Last updated October 18, 2022

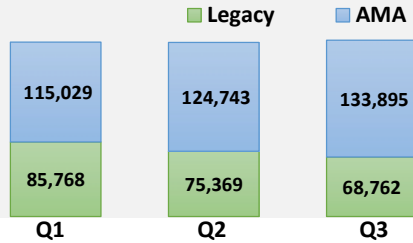
 **Learn what the PACT Act means for your VA benefits »** (<https://www.va.gov/resources/the-pact-act->

EXHIBIT M

Board of Veterans' Appeals - Chairman's Quarterly Report

Quarter 3 - FY 2022

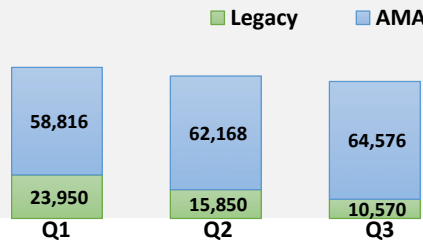
Appeals Pending



Pending at end of quarter

200,797 200,112 202,657

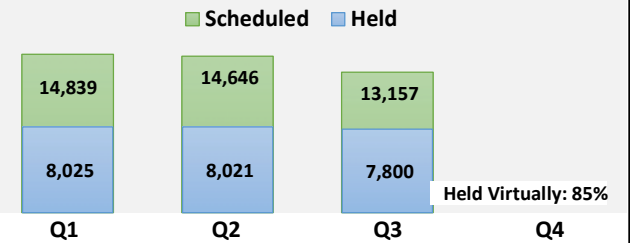
Hearings Pending



Pending at end of quarter

82,766 78,018 75,146

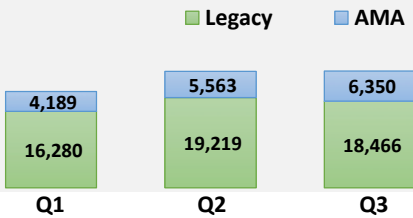
Hearings



FYTD Totals Below

S:	14,839	29,485	42,642
H:	8,025	16,046	23,846

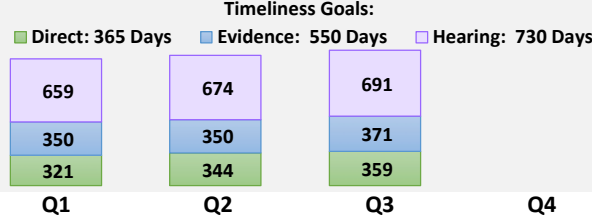
Appeals Decided



FYTD Totals Below

20,469 45,251 70,067

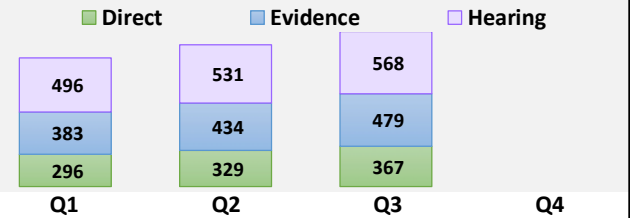
AMA Avg. Days to Complete



FYTD Average Days to Complete (from NoD)

D:	321	344	359
E:	350	350	371
H:	659	674	691

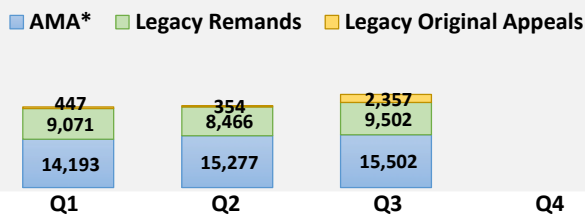
AMA Avg. Days Pending



Average Days Pending (from NoD)

D:	296	329	367
E:	383	434	479
H:	496	531	568

Appeal Receipts



FYTD Totals Below

23,711 47,808 75,169

Dispositions by Issue (FYTD Q3)

	Issues Decided	Grant	Deny	Remand	Other
Legacy Issues	157,219	20%	25%	46%	9%
AMA Direct	16,975	23%	34%	34%	8%
AMA Evidence	6,946	25%	33%	31%	11%
AMA Hearing	15,942	30%	22%	32%	17%
Total	197,082	22%	26%	44%	9%

Dispositions by Hierarchy** (FYTD Q3)

	Appeals Decided	Grant	Deny	Remand	Other
Legacy Appeals	53,965	34%	17%	42%	6%
AMA Direct	7,509	35%	25%	30%	10%
AMA Evidence	2,571	40%	21%	28%	12%
AMA Hearing	6,022	45%	17%	23%	15%
Total	70,067	36%	18%	39%	8%

Data Sources: VACOLS/Caseflow | *Appeal receipts excludes AMA appeals pending intake. | **Disposition of multi-issue decisions allocated in following hierarchy: allowance, remand, denial, other.



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EXHIBIT N

Standard Operating Procedures (SOPs) for Appeals Participating in the “One Touch” Initiative

Objective: Given the Board’s number of cases, it is incumbent on us, as an organization serving our nation’s Veterans, to efficiently adjudicate appeals in which a hearing is held. As such, cases with **clear dispositions** may be decided immediately following the hearing.

The following SOPs shall apply:

- These provisions only apply to cases in which a hearing is held.
- While denials, if as a matter of law (i.e., *Sabonis* denials), are included in the program, if the disposition instead is any other type of denial, then the case does not fall within the parameters of the One-Touch Initiative and you must wait for the transcript.
- If you are briefing a hearing case and you notice the entire appeal has been withdrawn, or that it is a death dismissal, you can assign the case to your attorney directly through DAS as though it were a One-Touch case. Do not email anyone in the hearing branch. Since there is no transcript to create, and no further administrative action required, you can decide the case.
- If you have a case and the claimant is represented by PVA, then PVA must have an opportunity to prepare an IHP even when a hearing was held. Unless PVA waives the opportunity to prepare an IHP, then these cases may not fall within the purview of the One Touch Initiative.
- Ensure that the case is within the Board’s working docket range or advanced on the Board’s docket pursuant to law.
 - Cases outside of the Board’s current docket range may not be adjudicated pursuant to this program.
 1. On your CASEFLOW HEARING PREP docket, type *ONE TOUCH* in the notes section to identify the appeal as an eligible hearing case
 2. “Activate” the case by sending an email to the Hearing Management Branch at the following email address: [REDACTED] his absence, [send](#) an email to the BVA Hearing Team inbox at BVAHearingTeam@va.gov
 - a. Provide: (1) the appellant’s name and (2) the docket number or the case URL
 - b. Indicate that the appeal is to be activated pursuant to the “One Touch” Initiative.
 3. It generally takes 24-48 hours for Caseflow to communicate to VACOLS and charge the case to location 33. After the case is

defaulted to 33 the case will be charged to the Judge (put in his/her Caseflow Queue). Once the case has been activated and assigned to the Veterans Law Judge responsible for holding the hearing, assign the case to the attorney per ordinary SOPs.

4. E-mail the counsel or associate counsel that will be working on the appeal and notify them that the case is being assigned to them pursuant to the "one touch" initiative and indicate the desired disposition.
5. Thereafter, the case shall be processed through Caseflow dispatch in accordance with ordinary SOPs.
6. When checking your case out to BVA dispatch, you will see a One Touch Initiative checkbox on the evaluate attorney screen. Please remember to select this box.
7. For AMA cases, the 90-day evidence window may be waived. Veterans and/or their representatives may waive the remainder of the 90-day evidence window orally at the hearing, or in writing after the hearing.

Additionally, there is now a button on the AMA docket allowing the claimant to waive the 90 additional days following the hearing to submit additional evidence and/or argument.

If you want to mark an AMA case as One Touch, the Veteran would need to waive the evidence window during the hearing. Then the Judge should follow the normal protocol for processing a One Touch case (ie, by emailing [REDACTED], etc.).

NOTE:

Even though it may not be associated with the appellant's claims file at the time of dispatch, hearing transcripts shall still be processed and associated with claims files following a hearing in the ordinary course of business.