

# SERVICE CONNECTION BASICS

AUGUST 2020

Blair Thompson

Assistant Clinical Professor and Director

Robert W. Entenmann Veterans Law Clinic

Maurice A. Deane School of Law at Hofstra  
University

Samantha Farish

Equal Justice Works Fellow

*Sponsored by Morgan, Lewis & Bockius, LLP*

The Veterans Consortium Pro Bono Program

# AGENDA

- 1) The Structure of VA
- 2) Eligibility for VA Benefits
- 3) The Elements of Service Connection
- 4) Introduction to the Theories of Service Connection
- 5) Statutory Presumptions
- 6) Chronology of a Veteran's Claim at the Department of Veterans Affairs

## THE STRUCTURE OF VA

- I. Office of the Secretary (Executive Branch / Cabinet-level Agency)
  - A. Three Administrations:
    - i. Veterans Health Administration (VHA)
    - ii. Veterans Benefits Administration (VBA)
    - iii. National Cemetery Administration (NCA)
  - B. Board of Veterans' Appeals (BVA)
    - i. Decisions made by Veterans Law Judges and Attorneys.
    - ii. Last level of appeal within the Department.

# THE STRUCTURE OF VA

- Note that the Veterans Health Administration (VHA) and the Veterans Benefits Administration (VBA) are **not** the same.
- Veterans Health Administration (VHA)
  - Largest healthcare system in the U.S., serving approx. 9 million Veterans each year.
  - Composed of:
    - 150 flagship VA Medical Centers;
    - 819 Community-Based Outpatient Clinics;
    - 300 Vet Centers providing counseling, and more.
- Veterans Benefits Administration (VBA)
  - Made up of VA Regional Offices where claims for VA benefits are initially adjudicated.
  - Administers VA benefits, including VA disability compensation, the G.I. Bill and other educational benefits, VA Home Loan, and more.

# ELIGIBILITY FOR VA DISABILITY BENEFITS



VETERAN  
STATUS

- "Veteran" is defined for purposes of VA in 38 U.S.C. § 101(2):
  - "The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions *other than dishonorable.*"

- Eligible for **all** VA benefits:
  - Honorable Discharge
- Not eligible for VA education benefits:
  - General Discharge
- Not eligible for VA education, disability, & other benefits:
  - Other than Honorable (OTH) Discharge
  - Bad Conduct Discharge
  - Dishonorable Discharge



DISCHARGE  
REQUIREMENT

# VA DISABILITY COMPENSATION

# DISABILITY COMPENSATION

- First of all, what is it?
  - VA disability compensation is a tax-free monthly payment made by the government to a Veteran (and / or their dependent(s)) because of service-connected disabilities.
- How big of a payment depends on the *disability rating* (degree of disability) and the number of eligible dependents.

SERVICE CONNECTION

## SERVICE CONNECTION

- In order to obtain VA disability compensation for a particular disability, the Veteran must show that the disability is connected to his or her military service.
- Service connection has three elements:
  - 1) A current disability;
  - 2) An in-service event, injury, or disease;
  - 3) A nexus between the current disability and the in-service event or injury.

## SERVICE CONNECTION

### I) Current Disability

- The Veteran must have a current disability or current disabling residuals.
- In order to show a current disability, the Veteran will need to provide a medical diagnosis from a medical professional or some other person with specialized training that qualifies them to give a medical diagnosis.
- Generally, VA considers "current" to be within the last five years.
- Lay evidence (the Veteran's statement or statements from the Veteran's friends and family) will usually not be sufficient to prove a medical diagnosis.

## SERVICE CONNECTION

### 2) In-Service Event, Injury, or Disease

- Does not have to be directly related to military duties if happened between entry and discharge.
- Generally, a Veteran establishes this element through their military records.
  - Official Military Personnel Records (OMPF)
  - Service Treatment Records (or Service Medical Records)
- The in-service event, injury, or disease may not always be explicit in the military records.
  - For example, symptoms of a disease that is not diagnosed until later; or, in the case of a personal assault, evidence of request for transfer to another duty assignment.

## SERVICE CONNECTION

### 3) Nexus

- There must be a nexus between (1) the Veteran's current disability and (2) the in-service event, injury, or disease.
- Medical evidence of a nexus is **almost always** required to support a Veteran's claim. It is one of the most common reasons for denial.
- Must be competent medical evidence of a nexus.
  - Evidence provided by a person qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.
- The Veteran will generally need to provide a letter or statement from a physician expressly connecting the Veteran's current disability to the in-service event, injury, or disease.

## SERVICE CONNECTION

### 3) Nexus

- The nexus letter must include the standard of proof.
- Standard of proof: The "benefit of the doubt."
  - When reasonable doubt arises, such doubt will be resolved in favor of the Veteran.
  - If the evidence is in equipoise (50/50), the Veteran's claim for disability compensation should be granted.
  - This is expressed as "as likely as not," or "less likely as not," or "more likely as not."
- See 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102.

# THEORIES OF SERVICE CONNECTION

- Direct Service Connection
- Aggravation of Pre-existing Condition
- Presumptive Service Connection
- Secondary Service Connection
- Consequence of injury by VA healthcare (38 U.S.C. § 1151)

# THEORIES OF SERVICE CONNECTION

- Direct Service Connection
  - Direct causative link between the in-service event or injury and the current disability.
- Hypo:
  - The veteran was a paratrooper in the U.S. Army. He seeks service connection for a knee disability that is a result of frequently jumping out of planes and landing on the ground.

# THEORIES OF SERVICE CONNECTION

- Aggravation:
  - If a particular disability is noted at entry into service, the Veteran cannot argue direct service connection, but may be able to establish an aggravation claim.
  - The Veteran must show that the disability was worsened by military service, and that the worsening was not a natural progression of the disease.
  - If VA can prove that the Veteran's condition would have worsened even without military service, VA can deny the claim.

# THEORIES OF SERVICE CONNECTION

- Secondary Service Connection:
  - When a service-connected (or potentially service-connected) disability leads to another disability.
- Needs three things:
  - Service-connected disability;
  - Another disability related to the service-connected disability;
  - Medical evidence establishing a "nexus" between the two.
- Example:
  - A Vietnam War Veteran has service-connected Type II Diabetes due to Agent Orange exposure. He later develops peripheral neuropathy as a result of the Diabetes. He can apply for disability compensation for peripheral neuropathy on a secondary basis.

# THEORIES OF SERVICE CONNECTION

PRESUMPTIVE SERVICE CONNECTION



ONE WAY TO  
ESTABLISH  
SERVICE  
CONNECTION IS  
VIA A  
**STATUTORY  
PRESUMPTION.**

- A **presumption** is a legal device that operates in absence of proof to require that certain inferences be drawn from available evidence.
- If the veteran meets certain conditions, service connection will be **presumed** without the need to meet all elements.
- *Most* presumptions only require service on active duty for a period of 90 continuous days + the specific conditions outlined in the statute.

**Presumptive Service Connection:**

- Chronic disease—38 C.F.R. § 3.309(a)
- Tropical disease—38 C.F.R. § 3.309(b)
- Prisoners of war—38 C.F.R. § 3.309(c)
- Radiation exposure—38 C.F.R. § 3.309(d)
- Herbicide exposure—38 C.F.R. § 3.309(e)
- Undiagnosed illness/infectious disease—38 C.F.R. § 3.317
- And more.



LIST OF  
STATUTORY  
PRESUMPTIONS

## CHRONIC DISEASES

Diseases Include:

Arthritis

Hypertension

Diabetes mellitus

Hodgkin's disease

Leukemia

Full list found at 38 C.F.R. § 3.309(a).

Tinnitus (when evidence of acoustic trauma) (see *Fountain v. McDonald*, 27 Vet. App. 258, 259 (2015))

- This presumption applies to chronic diseases that develop within certain period of time.
- Unlike many other presumptions, evidence of exposure to certain conditions is not required.
- For most diseases, must manifest to a compensable degree (10 percent) within a year of service.
- A corollary to this presumption is **Continuity of Symptomatology**.
  - This rule (38 C.F.R. § 3.303(b)) allows for a veteran to seek service connection when there is no **diagnosis** of the chronic condition in service, but there *is* evidence of **symptoms** of the chronic condition occurring during service and continuously after service.
    - Can qualify even if there are times when the condition gets better.
    - Does require an eventual diagnosis.
  - Example: veteran suffered from right knee pain during service, and the knee continued to cause her pain in the years after service. Eventually she is diagnosed with **osteoarthritis** after many years. Service connection should be granted based on the continuity of symptomatology.

## TROPICAL DISEASES

Diseases Include:

Cholera

Dysentery

Filariasis

Malaria

Yellow fever

Full list found at 38 C.F.R. 3.309(b).

- Service connection will be presumed if veteran served in tropical location and is later diagnosed with disease found at 38 C.F.R. § 3.309(b), so long as:
  - 6 months of active, continuous service
  - Condition manifested to a compensable degree
  - Within one year from date of separation from service
    - OR within time indicated by accepted treatises
  - Additionally, any resultant conditions that occur because of therapy administered in connection with such diseases or as a preventative thereof will be service-connected.

## PRISONERS OF WAR

Diseases Include:

Psychosis

Any of the anxiety states

Dysthymic disorder (or depressive neurosis)

Organic residuals of frostbite, if it is determined that the veteran was interned in climatic conditions consistent with the occurrence of frostbite

Post-traumatic osteoarthritis

Certain types of heart disease

Full list found at 38 C.F.R. § 3.309(c)

- Former prisoners of war (POW) are veterans who, during active military service, were forcibly detained or interned in the line of duty by an enemy government or its agents or a hostile force.
- VA states that over 500,000 service members have been captured and held as POWs since the time of the American Revolution.\*
- If a former POW is suffering from one of the listed diseases and it has manifested to a degree of 10 percent *at any time* after serving, the condition will be presumed service-connected.
- Additional diseases are presumed service-connected only if veteran was POW for at least 30 days.

\*This number does not include the 93,000 Americans listed as lost and never recovered.

## RADIATION-EXPOSED VETERANS

Diseases Include:

Leukemia (except chronic lymphocytic leukemia)

Cancers of the bile ducts, bone, brain, breast, colon, esophagus, gall bladder, liver, lung, pancreas, pharynx, ovary, salivary gland, small intestine, stomach, thyroid, and urinary tract

Lymphomas (except Hodgkin's disease)

Multiple myeloma

38 C.F.R. § 3.309(d)

- To be considered a **radiation-exposed veteran**, the individual must have participated in a radiation-risk activity while on active duty.
- Some examples of a **radiation-risk activity**:
  - Onsite participation in an atmospheric nuclear weapons testing
  - Post-war occupation of Hiroshima or Nagasaki
  - Prisoners of war in Japan during World War II
  - Service on grounds of gaseous diffusion plant in Paducah, KY; Portsmouth, OH; or Oak Ridge, TN.

## EXPOSURE TO HERBICIDES

Diseases Include:

Hodgkin's disease

Ischemic heart disease

Multiple Myeloma

Non-Hodgkin's lymphoma

Parkinson's disease

Prostate Cancer

Type II Diabetes Mellitus

Full list at 38 C.F.R. § 3.309(e)

- Exposure to herbicides includes Agent Orange, which was used by the United States military to remove dense foliage that would have otherwise provided enemy cover and also to kill crops.
- If a veteran served in Vietnam during the war, that veteran is presumed to have been exposed to Agent Orange (aka “boots on the ground”).
- Veterans who served on ships in inland waters (such as rivers) receive the presumption, too.
  - Many veterans spent years and years trying to prove that their ship came close enough to shore (in the “brown water”) to also receive the presumption.
- As a result of the Blue Water Navy Vietnam Veterans Act of 2019, veterans who served in the offshore waters of Vietnam are now also presumed to have been exposed.

## EXPOSURE TO HERBICIDES

Diseases Include:

Hodgkin's disease

Ischemic heart disease

Multiple Myeloma

Non-Hodgkin's lymphoma

Parkinson's disease

Prostate Cancer

Type II Diabetes Mellitus

Full list at 38 C.F.R. § 3.309(e)

- Note: herbicide exposure is not limited to service in Vietnam.
- Exposure could also have occurred from:
  - Working as part of the crew operating the C-123 planes that were used to spray Agent Orange
  - Service in or near the Korean demilitarized zone (DMZ) between Sept. 1, 1967, and Aug. 21, 1971
  - Service on a military base in Thailand during the Vietnam War
- Note: there is no requirement that the veteran had lengthy service to receive the presumption.
  - Example: Navy Officer participated as a navigator on a flight to Vietnam that placed him in Da Nang for a few days. *If he can prove he was there, he gets the presumption.*

## UNDIAGNOSED ILLNESS/INFECTIOUS DISEASE

Some of the signs of undiagnosed illness and medically unexplained chronic multisymptom illnesses:

Fatigue

Headaches

Muscle or joint pain

Sleep disturbances

Abnormal weight loss

Full list at 38 C.F.R. § 3.317(b)A

- Applies to Persian Gulf veterans (service in Southwest Asia theater of operations)
  - Commonly referred to as Gulf War syndrome or Gulf War illness – but these are not actual diagnoses.
  - Exposed to a variety of toxic elements: oil well fires, nerve gas agents, pesticides, etc.
- These veterans often suffer from undiagnosed illnesses, medically unexplained chronic multisymptom illnesses (“MUCMI”), and infectious diseases.
  - A MUCMI, unlike an undiagnosed illness, may carry with it an actual diagnosis, such as fibromyalgia. The key is that these are conditions defined by a cluster of signs or symptoms.

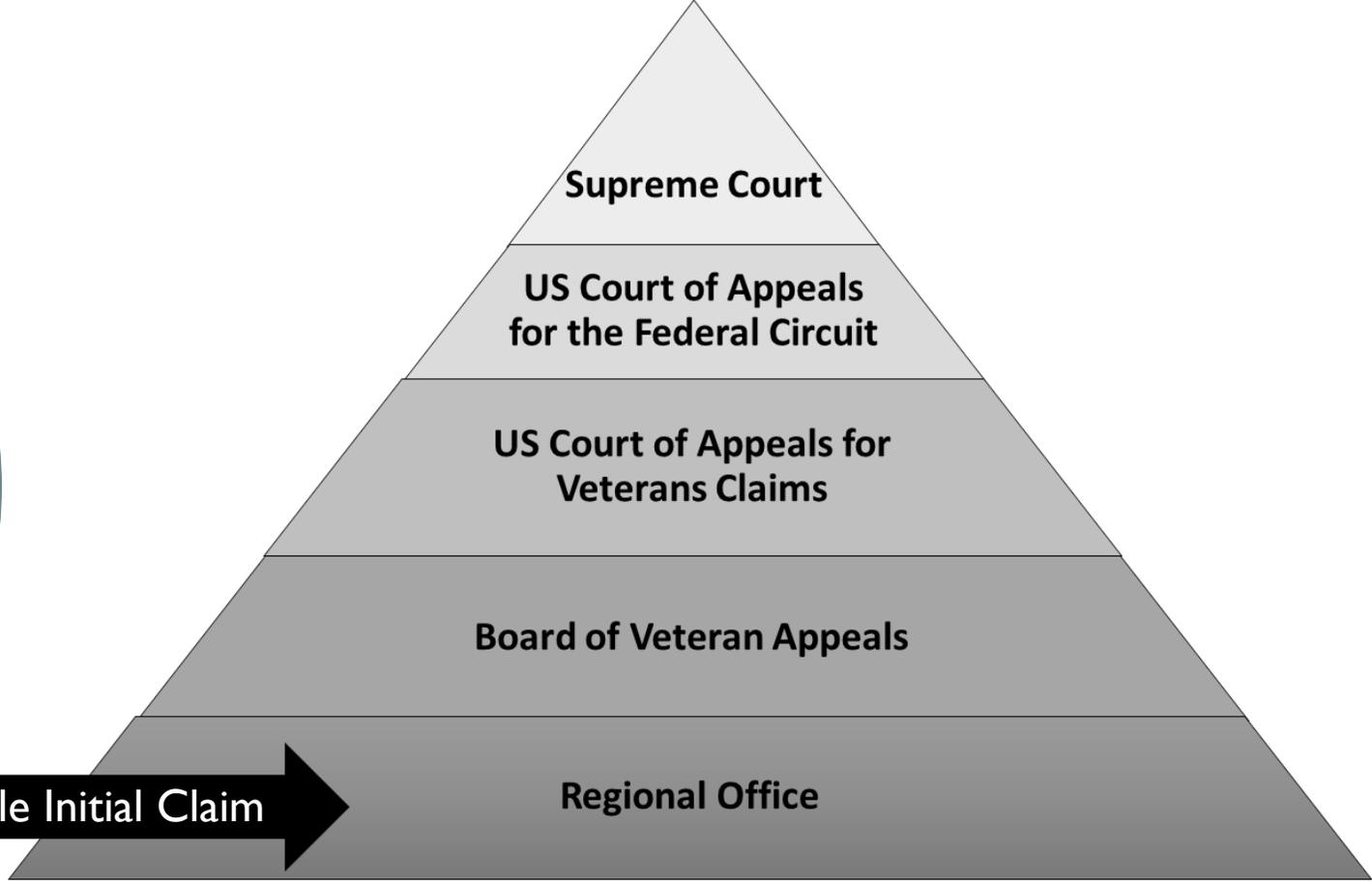


## REBUTTING THE PRESUMPTION

- All presumptions of service connection may be rebutted by affirmative evidence to the contrary or evidence establishing post-service intercurrent injury/disease that is a recognized cause of the disease.
- Example:
  - Veteran diagnosed with diabetes is presumed exposed to herbicides due to Vietnam service. However, a medical opinion shows that veteran uses certain medication with complications that include a diabetic tendency, so VA denies because there is affirmative evidence of a post-service intervening cause.

# CHRONOLOGY OF A CLAIM AT THE DEPARTMENT OF VETERANS AFFAIRS

**CLAIM  
PROGRESSION**



## AN ORIGINAL CLAIM

- An original claim begins with an application for benefits.
- Vast majority of claims concern service-connected disability compensation.
- Other types of claims:
  - G.I. Bill/Vocational Benefits
  - Health Care Reimbursement
  - Survivors benefits
  - Non-Service Connected Pension
  - Increased benefits
  - Earlier Effective Date
  - Reopen a previously closed claim

## AN ORIGINAL CLAIM

The veterans benefit system is “paternalistic” and “pro-claimant.”

- The application, military records, medical records, and any other evidence submitted by the claimant will be reviewed.
- An example of **paternalism** is that VA will be required to assist with gathering some evidence (duty to assist).
- An example of the **pro-claimant** aspect is that when there is an approximate balance of positive and negative evidence, any doubt should be resolved in favor of the claimant.
  - 38 CFR § 3.102.

## APPEALING A REGIONAL OFFICE DECISION

- Once a decision is made on a claim, it can be appealed.
- There are currently two systems in place for appealing a decision from the Regional Office (RO).
- Which system applies depends on when the RO decided the claim.

# APPEALING A REGIONAL OFFICE DECISION

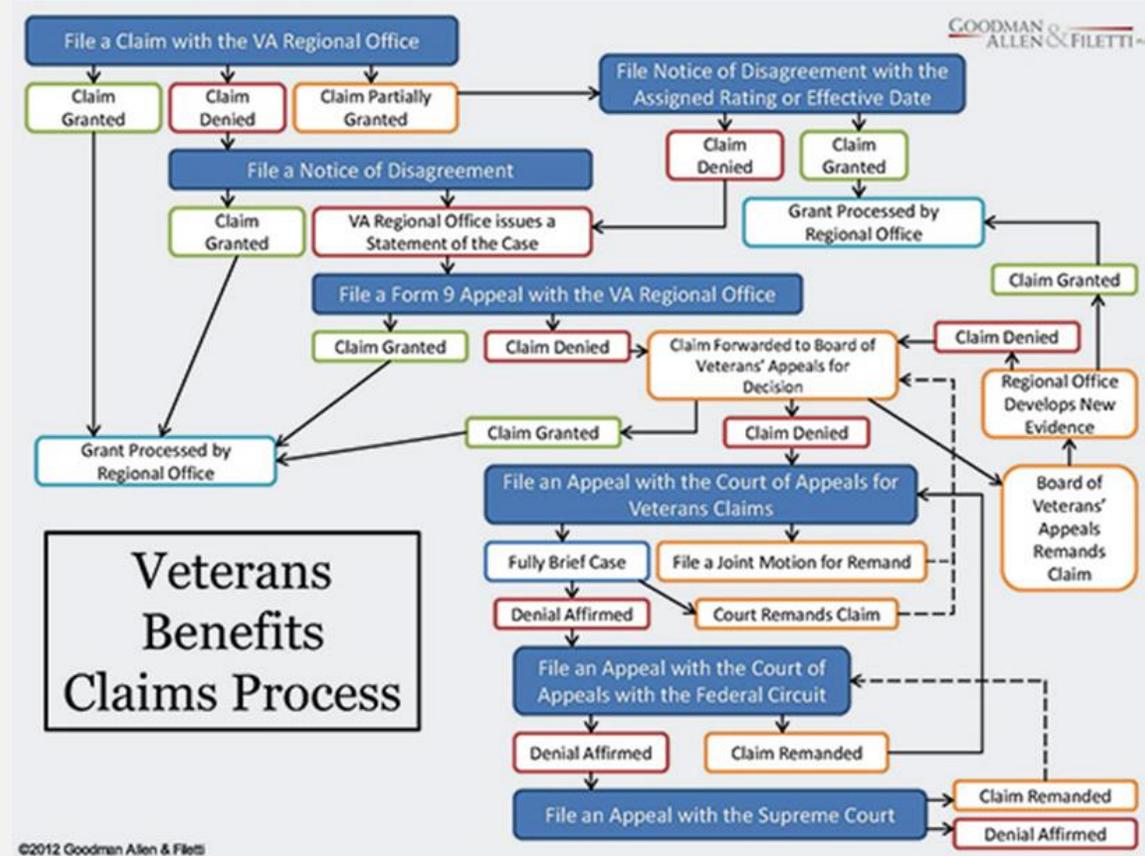
## LEGACY SYSTEM

- Legacy = the old appeal system
- Applies only to cases where VA decision is dated prior to **February 19, 2019**
- As time goes on, the legacy system will become obsolete
- A legacy claimant can opt into the new system in some cases

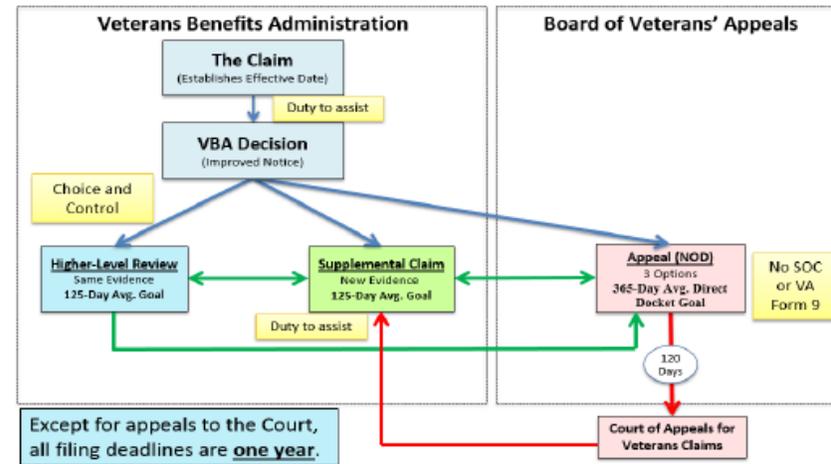
## MODERNIZED SYSTEM

- Implemented by the Veterans Appeals Improvement and Modernization Act of 2017 (Public Law 115-55).
- Dubbed the “AMA”
- Applies to all new claims and initial decisions made on or after **February 19, 2019**
  - “Initial” meaning it does not apply to a Board of Veterans’ Appeals decision made after this date

# LEGACY SYSTEM



# MODERNIZED SYSTEM (“AMA”)

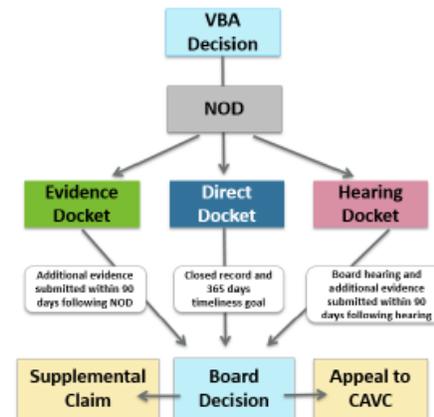


## Evidence Only Docket

When this option is selected on the NOD, the appellant may submit evidence within the 90 day window following submission of the NOD. The Board does not have a duty to assist and the record is otherwise closed.

## Direct Docket

When this option is selected on the NOD, the appellant receives direct review by the Board of the evidence that was before VBA in the decision on appeal. The Board has a 365-day average timeliness goal for this docket.



## Hearing Docket

When this option is selected on the NOD, the appellant will be scheduled for a Board hearing. Additionally, the appellant may submit evidence within the 90 day window following the scheduled hearing. The Board does not have a duty to assist and the record is otherwise closed.

**THANK YOU!**

**QUESTIONS?**

Blair Thompson

[Blair.E.Thompson@hofstra.edu](mailto:Blair.E.Thompson@hofstra.edu)

Samantha Farish

[Samantha.Farish@vetsprobono.org](mailto:Samantha.Farish@vetsprobono.org)