I. Background

Our country has a long tradition of caring for those who served in our military. The Plymouth Colony in 1636 passed a law to provide for a soldier maimed from battle to be “maintained competently for the rest of his life at the expense of the public treasury.” President Lincoln, in his second inaugural address, affirmed the government’s obligation to care for those injured during the Civil War and to provide for the families of those who perished on the battlefield. Lincoln’s words, “to care for him who shall have borne the battle, and his widow, and his orphan,” became the VA motto in 1959. In furtherance of its obligation, Congress created the Veterans Administration in 1930 but later elevated this agency to cabinet-level status in 1989.

Congress has created a federal benefits program for military veterans that is unique in several regards, most notably in that the process is informal, has a low evidentiary threshold, is often ex parte, and is professed to be paternalistic, pro-claimant, and nonadversarial in recognition of the status long-afforded veterans in this country. As one federal court observed, VA benefits flow “to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.” Bailey v West, 160 F.3d 1360, 1370 (Fed Cir 1998).

Today there are approximately 21,973,000 military veterans in the United States, though the number of veterans has been declining since 1985. For fiscal year 2014, VA received $153.9 billion to provide a wide scope of benefits to our veterans, survivors and certain dependents that include disability compensation, vocational rehabilitation, pension, life insurance, burial, education, and other benefits. A significant portion of its budget, $57.88 billion, goes to providing low or no cost health care to our veterans. See Exhibit 1. Approximately 3.88 million veterans receive disability compensation currently, which is a 60% increase since 1990. Unfortunately, the process to obtain these benefits typically involves a long and tortuous trail, fraught with unnecessary delays and a high error rate at every stage of the process.

This presentation will focus primarily on disability compensation benefits and the appeal of VA’s denial of benefits. Throughout this document various VA and other government forms will be referenced. These forms are often fillable and are available at VA’s website: http://www4.va.gov/vaforms/default.asp.

II. Eligibility for VA Disability Compensation

A claim for VA disability compensation has five common elements:

1) status as a veteran;
2) existence of a disability;
3) connection between the veteran’s service and the disability;
4) degree of the disability; and
5) effective date of the disability.
See Collaro v. West, 136 F.3d 1304, 1308 (Fed. Cir. 1998). Each element must be established for a grant of disability compensation to be awarded.

The standard of proof applicable to VA claims is the benefit of the doubt and is outlined in 38 U.S.C. § 5107(b). Under this section, when there is “an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter,” VA shall give the benefit of the doubt to the veteran (emphasis added). This standard of proof is lower than the “preponderance of the evidence” standard usually applied for conventional administrative claims. See Steadman v SEC, 450 U.S. 91 (1981).

Successfully relating a disability to military service is described as “service connection.” Service connection connotes many factors but basically means that the facts, as shown by the evidence, establish that a particular injury or disease resulting in disability was incurred incident with service in the Armed Forces. 38 C.F.R. § 3.303(a). An injury or disease that results from the willful misconduct of the veteran will be a bar to VA benefits. Willful misconduct includes an “act involving conscious wrongdoing or known prohibited action” that involves “deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.” 38 C.F.R. § 3.1(n). Once a disability has been related to service, the individual may be eligible for disability compensation.

1. **Veteran Status**

   As a threshold matter, eligibility for VA benefits hinges on an individual having veteran status. A veteran is defined by statute to be “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” See 38 U.S.C. § 101(2). Military service not only includes duty with the U.S. Air Force, Army, Navy, Marine Corps, and Coast Guard, but also service with the Public Health Service, National Oceanic and Atmospheric Administration, and Environmental Science Services Administration, as well as certain soldiers/guerillas from the Philippines who served under American forces in World War II. See 38 U.S.C. § 101(2)

   Veterans who do not have an honorable discharge or one under honorable conditions will likely face problems obtaining benefits from VA. Certain discharges, as due to the action of a general court-martial or status as a conscientious objector or deserter, among others, are a bar to VA benefits by statute. As a practical matter, veterans denied benefits by VA on the basis of the character of their discharge have a very poor prognosis for success. Former military members may seek a review of their discharge by applying to the Board for Correction of Military Records established for each branch of service. This avenue also has unlikely chance for success especially if the individual was represented by legal counsel prior to discharge. For additional information, see http://boards.law.af.mil.

2. **Existence of a disability**

   A claim for disability compensation requires the presence of a medical condition as diagnosed by a licensed medical practitioner, which includes medical and osteopathic physicians, physician assistants, nurse practitioners, chiropractors, optometrists, psychologists, and podiatrists, among others. Some conditions, as hearing loss, have additional qualifications to meet in terms of symptom severity before VA deems the condition to be disabling. In the event
a disability worsens, or lessens, in severity during the pendency of the claim adjudication process, the VA is required to stage the ratings to reflect the degree of disability at various times since the claim was filed. Compensation is based upon the degree of disability as determined by VA upon application of its regulation. This is discussed further below.

3. **Connection of disability to service**

Linking a disability to service can be established through five different avenues:

- Direct service connection
- Aggravation of a pre-existing condition
- Legal presumption
- Secondary service connection
- VA negligence

A. **Direct service connection**. Service connection will be established as directly due to service when the claimant established a medical diagnosis of a disability, evidence of an incurrence or aggravation of a disease or injury in service, and medical evidence of a nexus between the in-service injury or disease and the current disability. See 38 U.S.C. § 1110.

The medically diagnosed disability must have had its onset while the veteran was performing military service and cannot be due to his/her misconduct. Some conditions, as hearing loss, may have a delayed onset of symptoms and the event in service (hazardous noise exposure) must be established. Establishing the onset of the disability in service can be challenging as records may be incomplete, lost or destroyed. The National Archives and Records Administration is the official depository for records of former military service members. One site, the National Personnel Records Center (NPRC), is located in St. Louis, Missouri, and experienced a devastating fire in July 1973. As a result of the fire, approximately 80 percent of the Army records and 75 percent of the Air Force records were destroyed. VA has a duty to assist veterans obtain relevant records and this duty is heightened for records of these fire cases. Notwithstanding VA’s duty to obtain records, it is prudent for the practitioner to request records from NPRC directly. Requests must be specific (for example, all personnel records to include performance ratings, disciplinary actions, duty assignments, etc.) and submitted utilizing a SF 180, Request Pertaining to Military Records. For additional information and to obtain the request form, consult the NPRC website, http://www.archives.gov/veterans.

Military outpatient treatment records are normally not available from NPRC as they have been provided to VA. Hospitalization records, however, can be obtained from NPRC but must be requested with as much specificity as you can i.e., military base or deployed location, date of treatment, branch of service, etc. Note that to establish the onset of a psychiatric disability in service it may be necessary to rely on personnel records that depict behavioral changes as shown in performance appraisals or disciplinary actions. Often the service member is disciplined or released from service for the good of the military, without determining whether a psychiatric basis exists for the behavior, so medical records may not exist to support the claim.

In addition, it may be necessary to obtain military records to verify where the veteran was assigned and what occurred during his assignment. These records include military unit histories, morning reports, ship logs, and military pay records (to demonstrate hostile pay, aircrew duties, etc.). VA has a duty to obtain these records as well but they must be specifically tasked by the claimant by providing relevant information to locate these federal records. It is often best to attempt to obtain the necessary information directly from the agency involved.
Mistakes are often made by VA wherein service numbers, the full name of the veteran, relevant dates, etc. are misrepresented so it is important to scrutinize VA’s attempts should they indicate records are not available.

Perhaps the most important, yet difficult to obtain, element of a claim is the medical nexus opinion that links the current disability with the event in service. VA is statutorily obligated to obtain a medical examination or opinion when necessary to make a decision on a claim. 38 U.S.C. § 5103A(a). In fact, the statute only excuses VA from making reasonable efforts to provide such assistance when “no reasonable possibility exists that such assistance would aid in substantiating the claim.” Wood v. Peak, 520 F.3d 1345, 1347-48 (Fed. Cir. 2008). The claimant cannot rely upon the VA examiner to make the link in many cases. For whatever reason, VA examiners are often more critical against the claimant. Unfortunately, many claimants’ only source of medical care is through VA and they lack the funds to pay for a private opinion. Consequently, a veteran’s chances for success in a claim can be limited. Many times, even if the veteran has a private physician, that physician is not willing to render an opinion perhaps because they misunderstand the VA adjudication system. VA will not depose or otherwise impose on the private physician so there really is no hardship risk to the provider for offering assistance.

It should be pointed out that one of the most common reasons for a remand is because VA failed to perform an adequate examination, known as a compensation and pension (C&P) examination. A medical opinion, whether from VA or a private physician, must meet certain criteria to have probative value. To be adequate, a medical opinion should contain a sound analysis of how the facts led to the conclusion. A medical opinion will be deemed adequate if it is based upon consideration of the veteran’s prior medical history and also describes the disability in sufficient detail so that the Board’s “evaluation of the claimed disability will be a fully informed one.” Ardison v. Brown, 6 Vet. App. 405, 407 (1994) (quoting Green v. Derwinski, 1 Vet. App. 121, 124 (1991)); see also Floyd v. Brown, 9 Vet. App. 88, 93 (1996). To be adequate, a medical opinion must not only state a conclusion as to the etiology of a medical condition, but must also support that conclusion with sufficient rationale and explanation. See Stefl v. Nicholson, 21 Vet. App. 120, 124 (2007). The Court in Stefl explained that some types of information that a doctor might discuss in supporting his or her opinion, “include, but are not limited to, why the examiner finds cited studies persuasive or unpersuasive, whether the veteran has other risk factors for developing the claimed condition, and whether the claimed condition has manifested itself in an unusual manner.” Id. (citing Claiborne v. Nicholson, 19 Vet. App. 181, 186 (2005)). “The medical examination must consider the records of prior medical examinations and treatment in order to assure a fully informed examination.” Caffrey v. Brown, 6 Vet. App. 377, 381 (1994).

Given the low evidentiary level needed to succeed in VA claims, it is only necessary for a physician to opine that the veteran’s disability is “as likely as not” related to military service. It is preferable, if the physician is so willing, to have a statement that “it is more likely than not” that the veteran’s disability is related to service. Opinions which expresses a link between the veteran’s service and a claimed disorder in terms like “may” implies that the link “may or may not” be present, and is too speculative to establish a medical nexus for purposes of service connection. See Bostain v. West, 11 Vet. App. 124, 127-28 (1998) (quoting Obert v. Brown, 5 Vet. App. 30, 33 (1993)); see also Warren v. Brown, 6 Vet. App. 4, 6 (1993) (doctor’s statement framed in terms such as “could have been” is not probative); Tirpak v. Derwinski, 2 Vet. App. 609, 611 (1992) (“may or may not” language by physician is too speculative). In addition, a

**B. Aggravation of pre-existing condition.** Compensation can be granted for a disability that, while noted at service entry, permanently increased during service beyond the natural progression of the condition. 38 U.S.C. § 1153. The will require a medical opinion to demonstrate such permanent worsening. To rebut this claim, VA must present clear and unmistakable evidence to establish the natural progression.

**C. Legal presumptions.** In several instances a veteran’s burden for establishing service connection is lessened through statutory presumptions. Veterans claiming entitlement to service connection first and foremost benefit from the legal presumption that the claimant is presumed to have been in sound condition when “examined, accepted and enrolled for service,” except for defects noted at time of service entry. 38 U.S.C. §1132. To be eligible for this presumption, the veteran must have served six months or more of active duty. This presumption may be rebutted by clear and unmistakable evidence that the disease or defect existed prior to service and that the disease or defect was not aggravated by service. 38 CFR 3.304(b). A medical opinion is necessary for VA to rebut this presumption.

Conditions entitled to legal presumptions include certain tropical and chronic conditions, disease related to ionizing radiation exposure, disease due to exposure to herbicides, specifically Agent Orange, conditions related to being a prisoner of war, and certain undiagnosed conditions related to service in the Persian Gulf War. 38 C.F.R. §§ 3.309(a)-(e), 3.317. The most common presumptions encountered related to Vietnam service and include diabetes type II, prostate and respiratory cancers, ischemic heart disease, Parkinson’s disease and some others deemed as secondary to Agent Orange exposure. To be entitled to this presumption the veteran must have served “in-country”, which includes service on the lands of Vietnam or the inland waters. Service in the “blue” waters offshore will not suffice without demonstrating that the naval vessel anchored off the shore of Vietnam and that the veteran did, in fact, go ashore. VA maintains a list of ships known to have anchored off shore and this list is known to change so VA’s website should be visited for current information. See [http://www.benefits.va.gov/persona/veteran-vietnam.asp](http://www.benefits.va.gov/persona/veteran-vietnam.asp). To succeed will require that the veteran submit lay statements of going on shore and/or obtain military records, as deck logs, to show travel of personnel to shore. Further, VA has recognized other sites of exposure, including specific areas of bases in Thailand, in the Korean demilitarized zone, from contact outside of Vietnam with C-123 aircraft used to spray Agent Orange, and various storage sites and testing areas around the world. This list can change so it pays to consult VA’s website.

In addition, a special presumption applies to veterans who incur an illness or are injured during combat. The allegation that a claimed condition was incurred during combat must be accepted by VA if consistent with the “circumstances, conditions, or hardships of such service.” 38 U.S.C. § 1154(b). Further, “the law specifically provides that service connection may be proven by satisfactory lay evidence, without the support of official records.” See *Sheets v Derwinski*, 2 Vet App 512, 515 (1992) (emphasis in original). Clear and convincing evidence to the contrary is necessary for VA to rebut this presumption. 38 U.S.C. § 1154(b).
D. **Secondary service connection.** Secondary service connection can be established through competent medical evidence that demonstrates a certain disability was either caused or aggravated by a service connected disability. These include such disabilities as kidney or liver toxicity secondary to medication used to treat a service related condition, depression as a result of service related condition, complications of diabetes as peripheral neuropathy, etc.

E. **VA Negligence.** There are two potential routes for a veteran to pursue if an injury results from VA health care. The first route is an administrative claim under 38 U.S.C. § 1151 for disabilities or death that result from VA “carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault in furnishing the care, treatment, or examination”, 38 U.S.C. § 1151(a)(1)(A); or an event not reasonably foreseeable, 38 U.S.C. § 1151(a)(1)(B); or if informed consent was not obtained, 38 C.F.R. § 17.32(d)(1). There is no statute of limitations for applying and, if granted, any resultant disability will be treated by VA as if service connected.

The second means is through the filing of a federal tort claim “within two years after such claim accrues.” 28 U.S.C. § 2401(b). This topic is beyond the scope of this article. While claims can be filed using both means, an offset of compensation can be imposed should both claims succeed.

III. **Disability Evaluation**

A. **Degree of disability.** VA employs a rating schedule that is outlined in Part IV of Title 38 of its regulations. The disability rating assigned is intended to represent, as far as practicable, the “average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civilian occupations.” 38 C.F.R. § 4.1. Disabilities are generally rated on a scale of zero (noncompensable) to 100 percent (totally disabled), in increments of ten percent, with compensation paid accordingly. See [http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp](http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp) for a complete rating schedule. See Exhibit 3 for disability rate examples. VA will conduct a compensation and pension (C&P) examination to ascertain the symptoms and limitations that are used by raters to assign disability ratings. VA identifies particular disabilities by diagnostic codes (DC) and each DC has specific criteria established that correlates to a percentage level of impairment. For instance DC 6260, Tinnitus, recurrent, would be 10% disabling; DC 7122, Cold injury residuals, with arthralgia or other pain, numbness, or cold sensitivity would be 10% disabling; and DC 7354, Hepatitis C, with near constant debilitating symptoms (such as fatigue, malaise, nausea, vomiting, anorexia, arthralgia, and right upper quadrant pain), would rate at 100%. By regulation, VA is not permitted to consider age in evaluating a disability. 38 C.F.R. § 4.19. If a disability condition is not identified by a specific DC, then VA can rate under a closed related disease or injury so long as the functions and anatomical location and symptomatology are analogous.

Veterans may be rated for more than one service related disability but the corresponding percentages are not simply added together. Instead, VA employs anti-pyramiding provisions that preclude overcompensating for multiple disabilities. 38 C.F.R. § 4.125. This results, for example, in a veteran rated 60% who has another condition that is 10% disabling will have a total rating of 60% for payment purposes. The essence of this rule is this is that for a veteran rated as 60% disabled, he/she has a residual function of 40%. The additional disability of 10% is
based upon the residual function, which results in $10\% \times 40\% = 4$. $60 + 4 = 64$, which is not sufficient for VA to round up to 70%.

Additional compensation is allowed for dependents of veterans once the veteran is rated at 30% or more.

B. **Total disability due to individual unemployability (TDIU).** A veteran is eligible for a total disability rating, even though not rated 100% by the VA rating schedule, when there is present “any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation.” 38 CFR § 4.15. The inability to be gainfully employed must be solely on the bases of the veteran’s service connected disabilities. Age is not a factor. To qualify, the veteran must be unemployable and be rated as 60% disabled or more for one disability. Alternatively, the veteran can have a total rating of 70% disabled but must have one disability rated at 40% or more. Certain conditions may be added together to achieve the 40% minimum rating. See 38 C.F.R. § 4.16. There are instances where a claimant may still be employed but eligible for TDIU, as where the veteran works in a sheltered work environment or where the income earned is below the national poverty level, which for 2014 is $11,670 annually for a single person. It should be noted that VA can also find unemployability under what is known as an extraschedular basis. See 38 C.F.R.§ 4.16b. As a practical matter, this rarely succeeds and does not merit much discussion, except that VA’s failure to properly consider this basis is a frequent reason for a remand.

To have TDIU considered, use VA form 21-8940, Veteran’s Claim for Increased Compensation Based on Unemployability, for consideration of this benefit. In developing this entitlement, VA will likely obtain Social Security earnings record to show income earned. VA fails in most instances to understand that a claim for TDIU is not a separate claim. Rather, it is part of any claim for increased compensation when unemployability is either raised by the veteran or reasonably raised by the record. Rice v Shinseki, 22 Vet. App. 447, 453 (2009). It is important to note that the effective date for TDIU can be as early as one year prior to when this benefit was claimed. 38 C.F.R. § 3.400(o)(2).

C. **Effective date of the disability.** The date the application is received by VA determines the effective date for any benefits ultimately awarded. In nearly every instance, the effective date of the award “shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.” 38 U.S.C. § 5110(a). This applies to most initial claims, claims to reopen, and dependent claims. The effective date for a claim for increased compensation (to include unemployability), however, is the earliest date at which it is factually ascertainable that an increase occurred, up to one year prior to the date of application. See 38 U.S.C. § 5110(b)(1)(3). In addition, as a recent incentive for veterans to submit a fully developed original claim, VA may award an effective date of up to one year earlier than the date of application. See 38 U.S.C. § 5110 (b)(2)(A).

D. **Claims for increase ratings.** A veteran may submit a claim to VA at any time requesting additional compensation on the basis a service connected condition has worsened. Use VA form 21-256b, Veteran’s Supplemental Claim for Compensation, to apply. The claimant should also submit a statement from his/her physician, if possible, describing the level of disability in clinical terms. A written statement indicating how the disability has worsened should also be provided by the veteran indicating how the symptoms impact the claimant’s occupational and social
activities and how the symptoms may worsen (repeated use, weather changes, etc.). Veterans should be counseled to maintain a log of symptoms, including flare-ups, to discuss at the VA medical examination. In addition, a list of tasks should be identified by the veteran that he/she can no longer do or can only do with difficulty. Too often the VA examiner will ask the veteran how he or she is doing and the response may be simply “fine.” And too often little inquiry is made about symptomatology and function beyond what is visible during the examination.

E. **Special monthly compensation.** Additional compensation is available, beyond what the rating schedule affords, for veterans who suffer certain severe disabilities. See 38 U.S.C. § 1114(k)–(s). Such disabilities include the anatomical loss or loss of use of both feet or hands, both arms or legs, or a creative organ, or who are blind, and others. These special rates also include veterans who are permanently bedridden or are in need of regular aid and attendance. For instance, the loss of both hands is entitled to monthly compensation of $3,925 under 38 U.S.C. § 1114(m).

**IV. Dependent’s Benefits**

A number of benefits are available to qualifying survivors of veterans, which includes spouses as well as dependent minor children and parents. These benefits will be only touched on briefly here. See 38 U.S.C. § 5101(b). These benefits are dependent are several factors. As a threshold matter, the veteran must qualify for benefits, and not be barred due to the characterization of his military discharge. In addition, any benefits are derivative of the claimant’s relationship to the veteran so a spouse would have to demonstrate a valid marriage. Additional qualifications apply. See 38 C.F.R. § 3.50 et seq.

A. **Dependants Indemnity Compensation (DIC).** A qualifying surviving spouse of a veteran may obtain DIC if the death of the veteran was due to a service connected disability. There is no time limit to apply for this benefit. Even if the veteran had not established service connection for the cause of death condition, it is still possible to establish entitlement to DIC by establishing that the condition at issue is entitled to be considered service connected and then by establishing that the claimed condition was the principal or a contributory cause of the veteran’s death. See 38 C.F.R. § 3.312. DIC compensation is $1,233.23 per month in 2014. Additional benefits are available as well in special circumstances. See 38 U.S.C. §§ 1311(a)-(f).

B. **Accrued Benefits.** A qualifying survivor of a veteran is eligible to obtain VA compensation owing to the veteran at the time of his/her death, but were not paid. Some others, as those who bore the final expenses of the veteran and certain creditors, are entitled to this benefit as well. See 38 U.S.C. § 5121. Use VA form 21-601 to apply. To succeed there must have been a claim pending or favorably decided but unpaid. A claim for accrued benefits must be filed within one year of the veteran’s death. This claim, however, will be decided only on evidence of record at the time of the veteran’s death, which may limit the claim’s potential for success.

C. **Substitution.** A qualifying survivor may be substituted for the deceased veteran by applying. VA form 21-0847, Request for Substitution of Claimant Upon Death of Claimant, is used for this purpose. This form must be submitted within one year of the veteran’s death. The
distinct advantage of this approach is that, unlike an accrued benefit claims, the substituted claimant may submit new evidence to further develop the case. This can be critical if the veteran died without medical evidence of record relating death to a service connected disability. VA promulgated regulations on substitution in September 2014.

V. VA Claims Process

Obtaining benefits from VA requires that a claim be submitted in the format prescribed, which requires the claim be in writing in most instances and, often via a specific VA form. 38 U.S.C. § 5101. VA claim forms are available on its website. See www.va.gov. VA is converting to a paperless system, the Veterans Benefits Management System (VBMS) and claimants are encouraged to apply online.

A. VA Statutory Duties. In most instances the claimant has the initial “responsibility to present and support a claim for benefits under laws administered” by VA. 38 U.S.C. § 5107(a). Thereafter, VA has a statutory duty to provide proper notice to the claimant and to assist the claimant in developing the claim. These duties were significantly expanded by the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat 2096 (2000), and apply to nearly all claims filed, unless “no reasonable possibility exists that such assistance would aid in substantiating the claim.” 38 U.S.C. § 5103A(a)(2).

1. VA duty to provide notice. Under the statute VA must inform the claimant of any information and medical or lay evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; and (3) that the claimant is expected to provide. Quartuccio v. Principi, 16 Vet. App. 183 (2002). This notice must be provided prior to an initial unfavorable decision on a claim by the RO. Mayfield v. Nicholson, 444 F.3d 1328 (Fed. Cir. 2006); Pelegrini v. Principi, 18 Vet. App. 112 (2004). “Notice means written notice sent to a claimant or payee at his or her latest address of record.” 38 C.F.R. § 3.1(q). Further, the notice requirements of the VCAA apply to all five elements of a service-connection claim, including: (1) veteran status; (2) existence of a disability; (3) a connection between the veteran’s service and the disability; (4) degree of disability; and (5) effective date of the disability. See Dingess/Hartman v. Nicholson, 19 Vet. App. 473 (2006).

2. VA duty to assist. It is well-settled that VA has a duty to assist a claimant “in obtaining evidence necessary to substantiate the claimant’s claim for a benefit under a law administered by the Secretary.” 38 U.S.C. § 5103A; see Schafrath v. Derwinski, 1 Vet. App. 589, 593 (1991) (“Because of the nonadversarial nature of VA proceedings, VA is statutorily required[] … to assist each claimant in developing the facts of his or her claim.”).

a. Duty provide a medical examination or opinion. The duty to assist includes, inter alia, “providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.” 38 U.S.C. § 5103A(d)(1); 38 C.F.R. § 3.159(c). This requirement is not absolute. When assessing the need for a medical opinion, VA must consider whether the evidence of record indicates that a claimed disability “may be

It is important to obtain a copy of the VA medical examination or opinion to verify the information relied upon by VA, determine if the examination was adequate, and verify that it is factually correct. On occasion, a veteran’s statements can be misconstrued and require clarification or rebuttal. It is important to identify these deficiencies early and preserve the issue for appeal. If a medical opinion is not favorable, it is prudent to obtain a private medical opinion that rebuts the VA examiner’s conclusions and supports the veteran’s claim.

b. **Duty to obtain records.** VA also has an affirmative duty to develop the veteran’s claim by obtaining records relevant to the claim but this duty has certain limits. *See Loving v. Nicholson*, 19 Vet. App. 96, 102 (2005) (holding that VA’s duty to assist includes making reasonable efforts to obtain relevant records that Appellant has adequately identified). When the Secretary is searching for records maintained by a Federal agency, the search “shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.” 38 U.S.C. § 5103A(b)(3). To fulfill its duty to assist, VA is required to “make reasonable efforts to obtain relevant records,” whether or not those records are in the possession of the federal government or private individual or entity so long as the claimant “adequately identifies” the records. 38 U.S.C. § 5103A(b)(2); 38 C.F.R. § 3.159(c)(1), (2). It is important to scrutinize VA’s efforts at obtaining records to insure completeness of the record. It is not uncommon that VA will either misspell the veteran’s name or provide erroneous service information such that the attempt for records will result in a negative response.

3. **Duty to develop.** VA has a duty to "give a sympathetic reading to the veteran's filings to determine all claims for recovery supported by a liberal construction of those allegations." *See Szemraj v. Principi*, 357 F.3d 1370, 1376 (Fed. Cir. 2004); *see also Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (the Secretary has the duty to "fully and sympathetically develop the [veteran's] claim to its optimum before deciding it on the merits."). Furthermore, the Board is required to construe arguments raised in a substantive appeal in a liberal manner to determine whether they raise issues on appeal. *See EF v. Derwinski*, 1 Vet. App. 324, 326 (1990) (VA must liberally read all documents or oral testimony submitted prior to the BVA decision to include all issues presented). This Court has held that the Board “must review all issues which are reasonably raised from a liberal reading of the appellant’s substantive appeal.” *Mingo v. Derwinski*, 2 Vet. App. 51, 54 (1992). The Board may not ignore or disregard a claim merely because the veteran did not expressly raise the appropriate legal provision that corresponds to the benefit sought. *Akles v. Derwinski*, 1 Vet. App. 118, 121 (1991); *Sondel v. Brown*, 6 Vet. App. 218, 220 (1994) (“The indication need not be express or highly detailed; it must only reasonably raise the issue.”).

The court has pointed out that there is a difference between the duty to assist and the duty to sympathetically develop a claim. *Roberson v. Principi*, 251 F.3d 1378 (2001). The Federal Circuit noted in *Roberson*, that “developing a claim ‘to its optimum’ must include determining all potential claims raised by the evidence and applying all relevant law and regulation raised by that evidence regardless of how the claim is identified.” *Roberson, supra* at 1383 (citing *Hodge v. West*, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998)).
Despite VA’s statutory duties, a claimant is well-served to attempt to independently obtain all records relevant to his claim, whether in federal or private custody. VA frequently failed to fulfill this duty, which forms the basis frequently for remands for additional development. Unfortunately, considerable time is lost while additional efforts are undertaken that should have been accomplished initially. Practitioners are cautioned to raise all claims having legal merit and identify any due process or duty to assist violations as early as possible in the appeal process. Judicial review of an appeal will likely not be sympathetic to new claims/allegations of error not timely raised to permit administrative review.

B. Claim adjudication process.

1. Filing a claim. Claimants can file a written claim to be adjudicated in most cases by the VA Regional Office (RO) in the state where the veteran resides or can apply on line through VBMS. A fully developed claim may be submitted to VA wherein the veteran contends that all evidence is available for a rating. Until recently, correspondence about a claim was sent to the RO handling the claim. VA has changed the procedures and now written correspondence must be sent to designated sites dependent upon the state of residence. See Exhibit 3. Reportedly, this information is being scanned into VBMS and will be adjudicated in most instances by the RO for the veteran’s residence.

After a claim is received and development is complete, VA will issue a rating decision that informs the claimant whether or not the claim was granted and, if granted, the rating and effective date assigned. If the claim is denied, the claimant is provided reasons, albeit too often sparse, for the claim not succeeding and advised of his/her appellate rights. The rating decision becomes final one year following the date the decision is promulgated (the date on the cover letter) unless an appeal is initiated. See 38 C.F.R. § 3.104. It is important to note that legislation has been initiated to reduce the time of appeal from one year to six months.

2. Initiating an appeal. If a claimant disagrees with a rating decision, he/she must provide a written notice of disagreement (NOD) expressing dissatisfaction with the decision and indicating the claimant’s interest in appealing this matter to the Board of Veterans’ Appeals, the final administrative review of a claim. The claimant must be sure to specifically indicate which portions of the decisions are being appealed i.e., the effective date of the grant, the rating assigned, the denial of service connection, etc. The NOD must be filed within one year of the rating decision. Under VA rules, the NOD (and any written document to be filed within a specific time period) will be accepted as being timely filed if the response is postmarked prior to the expiration of the applicable period. 38 C.F.R. § 20.305. VA has developed a form, 21-0958, Notice of Disagreement, for this purpose. Legislation has been introduced, although it is widely opposed, to make use of this form mandatory so this will be an important issue to watch. A veteran can file a NOD through VBMS but caution must be followed as there is no written record of the appeal, which can potentially have catastrophic results on the claim.

The filing of a NOD is an important step in the claims process as that marks the time that a veteran may engage an attorney for a fee. This is explained in greater detail below. With the filing of the NOD, a claimant is faced with a choice of two appeal paths: following the traditional appeal process or electing review by a Decision Review Officer (DRO),
See 38 C.F.R. § 3.2600(b). The traditional process followed by VA is to respond to the veteran’s NOD by providing a statement of the case (SOC). The SOC reiterates the denial but provides multiple pages of boilerplate and verbatim regurgitations of VA regulations, which often transform the rating decision language of perhaps 3-4 pages into a 20 or more page document. The appeal is not, however, perfected at this point and can lapse unless an additional step is undertaken. The veteran must perfect his appeal within 60 days of the SOC being issued, or within the balance of the one year period following the issuing of the rating decision, by filing a VA form 9, Appeal to the Board of Veteran’s Appeals. With this appeal path, the case is certified to the Board of Veterans’ Appeals (Board) for final administrative review. 38 C.F.R. § 19.36.

ELECTING DRO REVIEW IS OFTEN THE BEST OPTION TO TAKE. This entails a de novo review by a senior VA official who usually is quite experienced in deciding claims. Unfortunately, many people elect this path and there are few DROs so this can often add another year or more to the review process. The veteran can elect to have a formal or informal hearing with the DRO, which often can be beneficial in clarifying issues relevant to the appeal. If the DRO grants the claim, a new rating decision should follow. If the DRO continues the claim denial, then a SOC is issued and a response must be made to perfect the appeal by timely submitting a VA form 9.

Once the case is certified, 90 days is provided to submit new evidence or argument. 38 C.F.R. § 20.1304. Following that time, evidence may or may not be considered by the Board. If the RO does consider new evidence and continues to deny the claim, it will issue a supplemental statement of the case (SSOC) to address the new evidence. VA will allow 30 days to respond but a response is not necessary as the appeal is already perfected. It is important to review the SOC and SSOC to determine what evidence was considered for the decision. VA frequently will not consider all of the evidence so it is important to bring that to their attention.

C. Board of Veterans’ Appeals. The Board is the final administrative review. Their review is de novo and they are not bound by the prior determinations as they are a superior body of review. The Board has jurisdiction to review “[a]ll questions of law and fact necessary to a decision” relative to a wide range of VA benefits. 38 C.F.R. § 20.101(a). The Board is in Washington, D.C. and receives nearly 50,000 appeals per year. Historically, the Board remands over 40% of the appeals for additional development, which includes obtaining a medical examination or opinion, redoing an examination, obtaining evidence necessary to decide the case, etc. The path for Board review will add perhaps another 2 years to the review process. In addition, the veteran can request a hearing before the Board member and these are conducted in person at the respective ROs, in D.C., or by video-teleconferencing at the VA RO, with the latter likely being the quickest to obtain. At the Board hearing the claimant can testify as to evidence for which he is competent and new evidence can be submitted for consideration. If the deciding factor in a case is a medical nexus opinion, lay testimony is of little value. Rather, a rebuttal medical statement is necessary and adding further lay submissions, often repeats of what is already in the record, will not pay dividends.

The Chairman of the Board provides annual reports to Congress its activities and statistical reports regarding it productivity. See http://www.bva.va.gov/Chairman_Annual_Rpts.asp.

D. Judicial review. Final agency decisions may be reviewed by the U.S. Court of Appeals for Veterans Claims (CAVC). The Veterans’ Judicial Review Act (VJRA), Pub L No 100-687,
102 Stat 4105 (1988) authorized judicial review of a final adverse VA decision. The VJRA created a new Article I court with exclusive jurisdiction to review final administrative decisions by VA. Further appellate review was instilled in the U.S. Court of Appeals for the Federal Circuit, with ultimate review by the U.S. Supreme Court.

The court became operational in 1989 and is comprised of a chief judge and six judges appointed to office for a 15-year term. 38 U.S.C. § 7253(a), (c). Three additional judges have been added by Congress under a temporary expansion provision. The CAVC has the power “to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.” 38 U.S.C. § 7252(a). In practice, however, a remand is the remedy to expect from the court. Only a timely filed notice of appeal confers jurisdiction on the court to review a final adverse Board decision. If the appeal is properly addressed to the court and mailed before or on the 120th day following the Board decision, it may be accepted for filing. 38 U.S.C. § 7266(a). Equitable tolling of the appeal period is now settled, following the U.S. Supreme Court decision, Henderson v Shinseki, 131 S. Ct. 1197 (2011). The Supreme Court held that the deadline for filing a notice of appeal with the Veterans Court does not have jurisdictional consequence.

The court employs an electronic filing system, which is described in detail at its website, http://www.uscourts.cavc.gov/. The court’s review of a Board decision is limited in several aspects. First, the review is limited to the record of proceedings before the Board at the time of its decision. 38 U.S.C. § 7252(b). The doctrine of exhaustion of administrative remedies is generally applicable to the court and limits its review of claims for benefits or legal issues that were not previously addressed by the Board or claimant during the administrative stage. The doctrine of exhaustion of administrative remedies provides that where an administrative remedy is provided by statute, relief must first be sought by exhausting those remedies before the court may act. McKart v United States, 395 U.S. 185 (1969). It is important, therefore, to submit all necessary evidence and argument to the agency before the record is closed to best position the appeal for judicial review. Nevertheless, the court exercises considerable discretion in its application of issue or claim exhaustion and may or may not review those matters raised in pleadings to the court in the first instance. Maggitt v West, 202 F.3d 1370 (Fed Cir 2000); Moody v Principi, 360 F.3d 1306 (Fed Cir 2004); Bernklau v Principi, 291 F.3d 795 (Fed Cir 2002). The court has considerable discretion to review these matters.

In 2013, 3,531 new cases were filed with the CAVC, with the median time of 189 days between filing and disposition. Approximately 67 percent of the decisions on the merits in 2013 resulted in reversal or vacatur, at least in part, such that remand resulted. This remand level is consistent with most prior years and reflects the high degree of errors committed by the Board in reviewing prior actions.

Fees for representation before the CAVC may be available under the Equal Access to Justice Act (EAJA), pursuant to 28 U.S.C. § 2412 and U.S. Vet.App. Rule 39. To be eligible for fees, the appellant’s net worth cannot exceed $2,000,000 at the time the appeal was filed. In addition, the appellant must demonstrate prevailing party status. See 28 U.S.C. § 2412(d)(1)A); Cullens v Gober, 14 Vet.App. 234, 237 (2001)(en banc); Buckhannon Board &Care Home v W.V Dep’t of Health &Human Res., 532 U.S. 598, 121 S.Ct. 1835, 1839-40, 149 L.Ed.2d 855 (2001)(defining “prevailing party” in certain fee-shifting statues as requiring a “judicially sanctioned change in the legal relationship of the parties” and reiterated that a party is required to “receive at least some relief on the merits”). This Court has further held that “a remand does not constitute ‘some relief on the merits’ unless that remand is predicated upon administrative error.” Sumner v Principi, 15 Vet.App. 256, 265 (2001). The appellant must also specifically allege that
VA’s position was not substantially justified. 28 U.S.C. § 2412(d)(1)(B); see Stillwell v Brown, 6 Vet.App. 291, 302 (1994). Thereafter, the Secretary has the burden of proving that its position was substantially justified both at the adjudication stage (BVA adjudication) as well as in the litigation stage. See Locher v. Brown, 9 Vet.App. 535, 537 (1996). The timing of the filing of the fee application is critical. Without exception it must be filed within 30 days of when the case disposition is final. For a case remanded through a joint motion of the parties, the date the court orders the motion granted is the mandate and the clock begins to run for filing. If the case is remanded through a decision of the court, filing of the EAJA application must occur within 30 days of when the case is final, which is 60 days following the Court’s entry of judgment. The court’s decision is susceptible for reconsideration or panel or full court review within 21 days. The appellant has 60 days following judgment to request review by the U.S. Court of Appeals for the Federal Circuit (CAFC). Success before the CAFC is low because of the high standard of review to which the court is limited.

Admission to the CAVC is required for practice in that forum and information is available at its website. See www.uscourts.cavc.gov.

E. Exceptions to finality.

1. Claim reopening. If a NOD is not filed within one year of the rating decision or if a VA form 9 was not filed within 60 days of the SOC or within the balance of the one year NOD filing period, the decision becomes final and few exceptions apply to continue the claim. A claimant may reopen a claim finally decided at any time with the filing of new and material evidence. 38 U.S.C. § 5108. After filing a request to reopen, VA must conduct a two-step analysis of the evidence submitted. First, it must determine if the evidence submitted since the last final disallowance is “new and material.” New evidence is evidence not previously submitted to VA. Material evidence is evidence that, “by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim.” 38 C.F.R. § 3.156(a). New and material evidence cannot be “cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought … and must raise a reasonable possibility of substantiating the claim.” Id. Most frequently, the claim was previously denied because there was no favorable medical nexus opinion of record. Consequently, a medical opinion must be submitted in order to reopen the claim. VA’s duty to assist is quite limited in a request to reopen a claim. VA may be required in certain circumstances to provide a medical nexus examination even if the evidence is not sufficient to reopen a claim and trip VA’s duty to assist. Shade v Shinseki, 24 Vet. App. 110 (2010).

Next, if it is determined that the evidence is both new and material, then the claim must be reopened. If the claim is reopened, then VA’s statutory duties to assist again come into play. Thereafter, VA must adjudicate the claim on the merits. Winters v West, 12 Vet. App. 203 (1999). The effective date of any award granted is the date the claim to reopen was filed. 38 U.S.C. §5110(a).

2. Clear and unmistakable error (CUE). An allegation of CUE is a collateral attack on the decision at issue. If successful in the prior decision’s being either reversed or amended. 38 C.F.R. §§ 3.105, 20.1100. CUE requires that either the correct facts, as known at the time, were not before the adjudicator or the law extant at the time was incorrectly applied. Russell v Principi, 3 Vet. App. 310 (1992) (en banc). Claims of CUE must be pled with specificity and
provide persuasive reasons that the result would have been manifestly different but for the error. *Fugo v Brown*, 6 Vet. App. 40, 44 (1993). While CUE claims are frequently raised, in practice they rarely succeed due to the high legal threshold. If successful, the prior decision is thrown out or changed and a significant award of retroactive benefits may result.

VI. Representing Veterans

It was not until Pub L No 109-461, 120 Stat 3403 (2006), was signed into law by President Bush on December 22, 2006, that attorneys and agents (VA-accredited nonattorney practitioners) had the ability to represent VA claimants for a fee. Fee agreements can be entered into after a NOD is filed in a claim. The law also allows VA to collect an assessment fee equal to 5 percent, not to exceed $100, of any fee paid to an attorney out of past-due benefits if VA withholds the fee. VA is empowered to review fee agreements between VA claimants and attorneys for reasonableness. Further, VA is required to establish qualifications and accreditation standards to allow practice before VA and to establish grounds for suspension of practice privileges.

A. Accreditation Requirements. Individuals are precluded from assisting a claimant in the preparation, presentation, and prosecution of claims for VA benefits unless they have first been accredited by VA. See 38 C.F.R. § 14.629(b)(1). Attorneys who are in good standing with a state bar may apply for VA accreditation through the submission of a VA Form 21a, Application for Accreditation as a Claims Agent or Attorney (PoA). This form must be submitted to the Office of General Counsel (022D), 810 Vermont Avenue, NW, Washington, DC 20420. Once accredited, VA then requires attorneys to complete three hours of qualifying continuing legal education during the first 12-month period after initial accreditation. 38 C.F.R. § 14.629(b)(1)(iii). An additional three hours is required not later than three years after initial accreditation and then every two years after that. VA is slowly taking steps to allow attorneys who represent veteran to have access to the client’s VA files through its Stakeholder Enterprise Portal (SEP). VA has yet to release policies or procedures for obtaining this access but the effort is underway and hopefully access will be granted in the near future.

Standards of conduct have been outlined in 38 C.F.R. § 14.632 and include behavior and actions prohibited by the rules of professional conduct in the attorney’s jurisdiction. In addition, provisions for terminating accreditation have been established and include disbarment or suspension by any court, bar, or agency; the charging of an excessive fee; the knowing presentation of a frivolous claim; or as a consequence of an agency determination that the attorney lacks the necessary degree of competency to assist VA claimants. 38 C.F.R. § 14.633.

Representation of a claimant before VA requires completion of a VA Form 21-22a, Appointment of Individual as Claimant’s Representative. See Exhibit 4, with modifications. The appointment form must be filed with the VA regional office where the case is being handled.

B. Fee Agreements. An attorney can represent a claimant for a fee if a NOD has been filed, the attorney is accredited by VA, a PoA has been filed and a valid fee agreement is on file with VA. While hourly and/or flat-fee agreements may be employed by some practitioners, the fee agreement must nevertheless be filed with VA and be subject to the test of reasonableness. The agreement should be filed with the Office of General Counsel (022D) in Washington, DC or
at feeagreements.ogc@va.gov, as well as with the Attorney Fee Coordinator at the VA regional office where the claim is being processed.

The most common approach is for practitioners to seek a fee contingent on the award of past-due benefits. A 20% fee of the past due benefits awarded is considered reasonable and that is the maximum award that VA will withhold. Other contingency agreements exist in practice and fees of up to $33\frac{1}{3}$ % will be found reasonable in most cases, but VA will not withhold the fee. VA will uphold a contingency fee from the amount of past-due benefits awarded and ultimately pay that fee directly to the attorney if the parties so indicate in the agreement filed with VA; however, attorney fees that exceed 20 percent will not be withheld. While a practitioner can elect to not have a fee withheld and rely on collecting that fee from the veteran, the fee agreement must still be filed with VA and the burden for collection rests with the attorney.

C. **Attorney Fee Coordinator.** Each VA Regional Office has an Attorney Fee Coordinator whose job it is to oversee attorney fee agreements and the withholding and disbursing of legal fees. It is important to note, however, that this is an additional duty obligation and the collection of your fees is far from being a priority with this individual in most instances. Some fee coordinators will process the award letter and fee quickly, others not so much. Following the grant of a past-due benefit involving a withholding of attorney fees, the Fee Coordinator issues a decision as to the appropriateness and reasonableness of the fees relative to that claim. The claimant then has 60 days to contest that award before fees are actually processed for release. In practice, this appeal period can be waived by the claimant and the attorney in written statements submitted to the Fee Coordinator. Payment may be anticipated within 45–60 days following the expiration of the appeal period or exercise of appeal waiver by the claimant. The claimant may waive the right to appeal the payment of attorney fees, which can speed up payment. A sample form is provided at Exhibit 5.

D. **Case evaluation.** If an attorney wishes to represent a veteran or other VA claimant for a fee, a threshold determination needs to be whether or not a fee is permitted unless the work is offered on a pro bono basis. While some work on a pro bono basis is desirable, indeed may be required, there nevertheless must be an acceptable balance with fee-generating cases. As a fee is only permitted after a claim is denied, it is important to ascertain that a rating decision has indeed been issued and that an appeal is underway or is possible.

The next level of review looks at the likelihood for success in the claim. Claims to reopen will not work without compelling new medical evidence in most cases. While possible, it is unlikely that the veteran will have the resources to muster such an opinion and it will be costly to obtain. The bigger red flag is with the CUE claims where no new evidence may be submitted. In practice, these rarely are successful. On the other hand, if successful, the cases can result in huge retroactive awards dependent upon when the challenged decision occurred. Careful review of the facts and law is necessary to assess the merits of this particular challenge.

In addition, one has to determine if the appeal has legal merit. Practitioners who prosecute claims without legal merit can risk loss of VA accreditation and sanctions if practicing before CAVC. With experience, a practitioner can assess whether the basis of the claim has merit. Inevitably, medical evidence will be needed linking the claimed disability to the event in service or is needed to assess the severity of the current disability under appeal. Medical opinions are difficult and costly to obtain. If such an opinion seems possible to obtain, then one
has to anticipate the cost. In most cases, this cost must be advanced by the practitioner with the hope of reimbursement if the claim succeeds ultimately.

Next one must calculate the potential retroactive award to be realized. The following are examples of how the retroactive award and fee are computed.

**Example 1.** If a veteran is not presently receiving benefits but has applied for service connection for severe migraine headaches (DC 8100), for instance, there is the potential for receiving a rating of 10, 30 or 50%, depending upon the severity of the symptoms. If the symptoms result in prostrating attacks once per month, then a 30% rating is likely. A single veteran rated at 30% would receive $400.93 per month. If the claim was filed 30 months ago and it is anticipated the appeal will last a year or more, then the retroactive award would be calculated at 42 months x $400.93 and equals $16,839.06. A fee agreement for 20% of the retroactive award would amount to $3,367.81.

**Example 2.** If a veteran currently is rated at 70% but is being considered for TDIU, then the potential fee earned is the difference between the two ratings, which amounts to $1,545.84 (the total rate of $2,858.24 - the 70% rate of $1,312.40 per month). Using the same 42 month retroactive scenario results in a past due payment of $69,925.28, with a fee earned of $12,985.06.

**Example 3.** A veteran is currently 60% disabled and has a claim pending for 20% for a knee injury. This veteran currently receives $1,041.39 per month. Applying the anti-pyramiding rules (38 C.F.R. § 4.25), a 20% added to a 60% rating yields a rating of 70%, not 80% as the math would suggest. Consequently, there would be $271.01 difference in pay for the same hypothetical 42 month period, yielding a retroactive award of $11,382.42 and a fee of $2,276.84.

**Example 4.** Most commonly, however, these cases will go on in appellate status for years, resulting in the retroactive award period being 4-8 years or more. In such a case, the potential fees can be rather significant. For instance, a 70% disabled veteran who achieves TDIU after 8 years will receive a retroactive award of $148,400.64.

E. **Case Development.** If the case has the potential for a fee (if that is a determinative factor for the practitioner) and the case has legal merit, then the scope of representation should be considered. In this regard, a practitioner can limit his/her PoA to certain claims and not assist with other claims so long as the client is aware of the limitation and the PoA limits the issues for representation. A letter to the client describing the scope and terms of representation is good practice. A letter declining to represent a client is also good practice.

Once the decision has been made to represent a claimant and as to the specific issues to appeal, the practitioner needs to outline a strategy to make the claim succeed. There is little value in simply appealing a decision without altering the evidentiary balance going forward. In rare circumstances, there is a narrow legal issue in dispute and VA must simply be worn down but in most cases a strategy needs to be developed on how the case is going to succeed if the veteran and practitioner have hopes to be paid. This strategy needs to consider the positive and negative evidence relied upon by VA in its denial and identify what additional evidence is needed. In nearly every instance, the only document available to review is the VA rating
decision or statement of the case. Consequently, a decision needs to be made regarding what additional evidence should be pursued.

The VA at this time maintains mostly paper files, although many are being converted to digit format to be included in VBMS. This paper file is known as the VA claims folder or “c-file.” A threshold question becomes whether or not this file should be acquired, bearing in mind that the RO may not provide this record for many months. A copy of the claims folder is necessary in nearly every case, although the timing of the need must be weighed against the additional time required for the appeal to wait while the file is pursued. For increased rating claims, the appeal is dependent primarily upon medical evidence as to the current disability level, so military records and old VA decisions are not necessary in many cases. Frequently, however, veterans will have several claims pending at one time and may only seek legal assistance for a certain issue(s). Once a PoA is filed, VA assumes the practitioner is representing the veteran as to all issues, unless indicated otherwise. In some instances a claim will lapse and benefits lost while the representative was unaware that a claim was even pending, much less that an appeal deadline had passed. Some practitioners will not represent a veteran until they have had a chance to obtain and review the entire claims folders. The better approach may be to limit representation to the claims agreed upon, obtain the file at a later date, and expand representation accordingly after careful review. Certainly, there is the possibility that a claim was raised but not adjudicated by VA such that it remains pending for years. Without having the record to examine, it is not possible to properly assess the veteran’s case. To request a copy of the claims folder requires a letter to the Privacy Act Department of the respective Regional Office along with a copy of your PoA should be sufficient. Alternatively, use VA form 3288, Request For & Consent to Release of Information From Individual’s Records. The veteran is entitled to one copy of his claims file at no cost, otherwise there will be a nominal fee charged.

Copies of relevant private health care records should be pursued as well as records held by VA medical treatment facilities. Use VA form 10-5354, Request for and Authorization to Release Medical Records or Health Information, for this purpose. The request should be specific in terms of time period covered, services rendered, test results sought, etc. More requests for records are processed rather promptly by VA.

Next, it is necessary to determine whether military personnel records and/or military hospitalization records are necessary for the appeal. Use SF 180, Request Pertaining to Military Records, for this purpose by sending the form to address specified. If a claim deals with the onset of a psychiatric disability while in active military service, it is important to request copies of all disciplinary records including court martial records, if applicable, as well as performance reports and duty assignment sheets. The onset of psychiatric illness is often revealed through behavioral changes that often result in discipline. Too frequently, the military will simply address the behavior and not the cause for the behavior, resulting in military members being released from service either for the good of the service (an administrative discharge) or with a less than honorable discharge. Consequently, there will be no or little evidence of a psychiatric diagnosis while in service, yet a forensic psychiatrist can use this information along with other records to establish that a mental disorder began in service.
If the claim hinges on a veteran’s duty assignment, then military unit records should be obtained. This presumes that the records on file are complete, which is not always the case. For example, a veteran may claim PTSD as due to a terrible accident aboard a Navy ship, yet this information is not contained in the veteran’s records. In that case, the ship’s deck logs should be obtained from the U.S. Navy for the period in question. Another example relates to a veteran who the records reflect a duty assignment in the Vietnam era to a base in Thailand, yet he asserts travel to/from Vietnam. Proving physical presence in Vietnam is necessary for conditions presumptively linked to Agent Orange. Travel orders frequently are not of record. Nevertheless, personnel records could contain performance reports reflecting the veteran’s service in that area. In addition, military unit records could document that the veteran or his unit travelled to Vietnam on temporary duty. Lastly, military pay records can be obtained to demonstrate the receipt of combat pay, which was only payable for duty in Vietnam, aircrew duties over Vietnam, and certain waters offshore. Use Exhibit 6 for an example to request military pay records.

Lay statements should be considered to establish/corroborate facts capable of lay observation. See 38 U.S.C. § 5103A(d)(2) (Secretary is to take into consideration all lay and medical evidence of record, including statements of claimant). Use VA Form 21-4138, Statement in Support of Claim. For instance, if a veteran is claiming the onset of back pain in service that continued even after his discharge, lay witnesses can comment on their observations and related comment/complaints made by the veteran. “[A]s a lay person, [the Veteran] is not qualified to render a medical diagnosis or an opinion concerning medical causation.” Espiritu v. Derwinski, 2 Vet. App. 492, 494 (1992). While the court has found that in some instances lay evidence alone can establish the link for a claimed disability, in practice this is rather unlikely. Nevertheless, Lay assertions may serve to support a claim for service connection by supporting the occurrence of lay-observable events or the presence of disability or symptoms of disability subject to lay observation. 38 U.S.C. § 1153(a); 38 C.F.R. § 3.303(a); Jandreau v. Nicholson, 492 F.3d 1372 (Fed. Cir. 2007); see also Buchanan v. Nicholson, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (addressing lay evidence as potentially competent to support presence of disability even where not corroborated by contemporaneous medical evidence).

Lastly, there must be medical evidence sufficient to support the claim. This, typically, is the weakest link in an appeal unless the veteran has sufficient resources and connections to obtain a comprehensive medical opinion to support his/her claim. If VA has provided a medical opinion against the claim, there is simply no way to succeed on appeal unless that opinion is discredited and a favorable opinion is provided. Raising legal arguments regarding the adequacy of the VA examination/opinion may well result in a remand for a new examination/opinion, but it will not form the basis for a grant of benefits as that is dependent almost universally upon a competent, favorable medical opinion being of record. While the veteran’s private or VA physician be may hesitant to provide a statement, it may be possible to have the practitioner respond to simply questions. For instance, if a veteran alleges that his fall from an aircraft wing 20 years ago in service has led to his degenerative disc disease, the examiner can be asked whether the veteran’s current disability is consistent with the alleged mechanism and date of injury. Again, the opinion must be expressed in terms of “as likely” or “more likely” than not. If the veteran is fortunate enough to have a medical expert opine as to the origin and/or extent of his/her disability, it is important that the physician consider relevant documents of record. For instance, this could include military treatment records, accident
reports, incident records as line-of-duty determinations in service, and any evidence necessary to support an opinion. Consider asking the provider to complete a VA Disability Benefits Questionnaire (DBQ) relevant to the respective disability. See http://www.benefits.va.gov/COMPENSATION/dbq_ListByDBQFormName.asp. At times, medical treatise evidence can help support a claim but it must be related to the particular circumstances of the claimed condition by a medical expert or the evidence will be given little probative value by VA.

VII. Practice Tips

Here are some thoughts on things to do and not to do to help you represent a veteran’s disability compensation appeal:

- Never take a case that lacks legal merit even when the claim has tremendous emotional appeal. The client will never get over losing as the case must have been a winner, or you would not have offered assistance. Worse, a complaint can be filed with VA or with your state bar that you will have to defend.
- Never underestimate what a veteran has been exposed to. The military is notorious for experimenting on our veterans, including exposure to ionizing radiation (the so-called “atomic veterans”), observing untreated syphilis (Tuskegee syphilis experiment 1932-1972), exposure to LSD and other illicit drugs, and others. If the claim includes aliens and time travel, however, it is probably best to withhold representation.
- Never assume VA has obtained all of the relevant records necessary to support a claim. Rather, obtain key records directly from the source to insure accuracy.
- Never assume VA has correctly interpreted its regulations or the law, especially if there has been a recent change in law. Changes in VA processes occur very slowly due to its dependence upon its Adjudication Procedure Manual versus the law.
- Never believe the phrase placed on remands that provides “This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans’ Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C. A. §§ 5109B, 7112 (West Supp. 2009).” In fact, the very opposite is true in nearly every instance. Accordingly, always tell your client this is a fallacy and that VA will get to your remanded claim in due time, but you will prompt them along.
- Never be afraid to tell a claimant that his/her claim lacks legal merit and has no or little chance for success. Too many nonattorney advocates simple encourage veterans to make multiple claims and see what happens. The appeals system is already overloaded and additional frivolous claims adversely impact all claimants.
- Never believe VA when they say a certain task will be completed by a certain date. Better to follow up yourself and be pleasantly surprised.
- Always limit your PoA to certain specific issues if you are uncertain as to the scope of the claims on file with VA.
Always send important correspondence (NOD, VA form 9) and evidence to the claim to VA via certified mail.

Always provide a copy of your fee agreement to the VA fee coordinator and Office of General Counsel within thirty days of signing or you can learn years later the agreement is not valid and there is no fee forthcoming. Assume VA does not even look at these documents until a grant of benefits is made and the question of an attorney fee is raised.

Always send another copy of your fee agreement to the VA fee coordinator upon learning that a grant of benefits has been made and a fee will be forthcoming. Unless VA is reminded that a fee agreement exists, they often will not withhold the fee and expect the attorney to track down the veteran for payment (although VA is legally bound to pay the fee if they mistakenly distribute the full retroactive amount).

Always carefully review a VA decision to determine if the denial or award is proper, knowing that perhaps 40% of its decision have errors. Evidence will often not be considered, law misapplied, improper effective dates granted, improper DC used, improper ratings assigned, etc.

Always get complete contact and emergency contact information from the veteran to insure timely communications.

Always be nice on the telephone to VA employees, especially the fee coordinator. Better to play nice with them and wonder if they will ever get this claim moving, than to offend them and know the file is now permanently lost and neither you or the veteran will ever get paid.

Always communicate with the veteran in writing or make notes reflecting conversations held as he/she will become increasingly upset that VA is taking years to resolve his/her claim and assert that you did not tell him about the delays inherent with the appeal and the efforts you are expending to move the case forward. Too often, your efforts will be forgotten when a fee is determined and the claimant will question whether an appeal of the fee is justified.

VIII. Summary

The practice of veterans law, while frustrating at times, can be very rewarding in many respects. This is a relatively young area of law with changes to be anticipated, so maintaining currency is critical. The Department of Veterans Affairs is under considerable political and public pressure to resolve claims and provide benefits quickly. At the same time additional burdens have been placed upon VA both in terms of claims filed and additional veteran entitlements that have hampered its efforts, however well-meaning, to fulfill its statutory obligations. There is no better reward than to get survivor benefits for a widow living in poverty or in getting a homeless or near homeless veteran the benefits he/she deserves so as to live in some semblance of comfort. If you served in the military, then you understand some of the challenges that face our veterans. If you have not served, then allow this to be a service to those who did serve. You will not regret it.
IX. References

One of the best references in many instances regarding veterans benefits and compensation claims is the VA website at [www.va.gov](http://www.va.gov). The following should be considered:

National Veterans Legal Services Program (NVLSP)
PO Box 65762
Washington, DC 20035
Ph: 202-265-8305


The Veterans Consortium Pro Bono Program
2101 L Street NW, Suite 420
Washington, DC 20037
Ph: 888-838-7727

The Pro Bono Program began in 1992 and has a dual mission of recruiting and training attorneys in the area of veterans law and providing assistance to unrepresented appellants before the U.S. Court of Appeals for Veterans Claims. Many attorneys began practicing in this area of law because of the training offered by the Pro Bono Program.

The National Organization of Veterans’ Advocates, Inc. (NOVA)
1425 K Street, NW, Suite 350
Washington, DC 20005
Ph: 877-483-8238

NOVA is an association of attorneys and nonattorney practitioners who represent veterans and their dependents in claims for VA benefits. Its purpose is to develop and encourage high standards of service and representation for all persons seeking benefits through the federal veterans benefits system. NOVA provides valuable training for both new and seasoned practitioners.

X. Exhibits

1. VA Benefits and Health Care Utilization fact sheet
2. VA Disability Compensation Schedule example
3. Where to Send VA Correspondence
4. VA form 21-22a, Appoint of Individual as Claimant’s Representation, as modified
5. Sample form for Waiver of Right to Appeal Payment of Attorney Fees
6. Sample form for requesting military pay information from DFAS.
VA Benefits & Health Care Utilization

Number of Veterans Receiving VA Disability Compensation (as of 06/30/14): 3.88 M
Number of Veterans Rated 100% Disabled (as of 06/30/14): 425,951
Number of Veterans Receiving VA Pension (as of 06/30/14): 303,968
Number of Spouses Receiving DIC (as of 06/30/14): 360,226
Number of Total Enrollees in VA Health Care System (FY 13): 8.92 M
Number of Total Unique Patients Treated (FY 13): 6.48 M
Number of Veterans Compensated for PTSD (as of 06/30/14): 683,722
Number of Veterans in Receipt of IU Benefits (as of 06/30/14): 323,489
Number of VA Education Beneficiaries (FY 13): 1.09 M
Number of Life Insurance Policies Supervised and Administered by VA (as of 06/30/14): 6.64 M
Face Amount of Insurance Policies Supervised and Administered by VA (as of 06/30/14): 1.28 T
Number of VA Voc Rehab (Chapter 31) Trainees (FY 13): 67,995
Number of Active VA Home Loan Participants (as of 06/30/14): 2.07 M
Number of Health Care Professionals Rotating Through VA (FY 13): 118,799
Number of OEF/OIF Amputees (as of 07/01/14): 1,648

Source: DVA Information Technology Center; Health Services Training Report; VBA Education Service; VBA Office of Performance Analysis & Integrity; 1 VHA (10A5); 2 DoD. Produced by the National Center for Veterans Analysis and Statistics.

Veterans Demographics
Projected U.S. Veterans Population: 21,973,000 (Female 2,271,000 10%)
Estimated Number of Living WW II Veterans (as of 9/30/2013): 1,246,000
Percentage of Veteran Population 65 or Older: 44.19%
Veteran Population by Race: White 82.7%
Asian/Pacific Islander 1.4%
American Indian/Alaska Natives 0.8%
Black 12.1%
Other 3.0%
Hispanic 6.3%

About VA
Number of VA Employees in Pay Status: 343,798
Number of Full Time VA Employees: 317,514
Number of VA Hospitals: 150
Number of VA Community-Based Outpatient Clinics: 820
Number of VA Vet Centers: 300
Number of VBA Regional Offices: 56
Number of VA National Cemeteries: 131

<table>
<thead>
<tr>
<th>FY13 Appropriations (actual)</th>
<th>FY14 Appropriations (enacted)</th>
<th>FY15 Appropriations (requested)</th>
</tr>
</thead>
<tbody>
<tr>
<td>VA: $133B</td>
<td>VA: $153.9B</td>
<td>VA: $163.9B</td>
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<tr>
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<td>VHA: $57.88B</td>
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<tr>
<td>VBA-GOE: $2.16B</td>
<td>VBA-GOE: $2.47B</td>
<td>VBA-GOE: $2.49B</td>
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<tr>
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<td>NCA: $249M</td>
<td>NCA: $257M</td>
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<td>OIT: $3.52B</td>
<td>OIT: $3.70B</td>
<td>OIT: $3.90B</td>
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</tbody>
</table>

Source: Veteran Population as of 09/30/13; VA Employ Pay Status Count 06/30/14; Veterans Affairs Site Tracking (VAST) 12/31/13; NCA as of 06/30/14; Office of Budget; Health Services Training Report FY 13; Includes MCCF; Medical Care w/MCCF and medical research; Discretionary Spending Only.
## VA Disability Compensation Rate Examples

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<tr>
<th>Status</th>
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<th>20%</th>
<th>30%</th>
<th>40%</th>
<th>50%</th>
<th>60%</th>
<th>70%</th>
<th>80%</th>
<th>90%</th>
<th>100%</th>
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<tr>
<td>Veteran</td>
<td>$130.94</td>
<td>$258.93</td>
<td>$400.93</td>
<td>$577.54</td>
<td>$822.15</td>
<td>$1,041.39</td>
<td>$1,312.40</td>
<td>$1,525.55</td>
<td>$1,714.34</td>
<td>$2,858.24</td>
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<tr>
<td>Veteran w/ spouse</td>
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<td>$448.74</td>
<td>$641.28</td>
<td>$901.83</td>
<td>$1,137.01</td>
<td>$1,423.95</td>
<td>$1,653.04</td>
<td>$1,857.76</td>
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2014 Rates
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<tr>
<th>Location of Residence</th>
<th>Address to Send all Written Correspondence</th>
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</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Department Of Veterans Affairs</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Evidence Intake Center</td>
</tr>
<tr>
<td>Delaware</td>
<td>PO BOX 4444</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Newnan, GA 30271-0020</td>
</tr>
<tr>
<td>Florida</td>
<td>Or fax your information to:</td>
</tr>
<tr>
<td>Georgia</td>
<td>Toll Free: 844-531-7818</td>
</tr>
<tr>
<td>Indiana</td>
<td>Local: 248-524-4260</td>
</tr>
<tr>
<td>Kentucky</td>
<td></td>
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<tr>
<td>Maine</td>
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<td>Marshall Islands</td>
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<td>Federated States of Micronesia</td>
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<tr>
<td>Nebraska</td>
<td>U.S. Virgin Islands</td>
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<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
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</tr>
</tbody>
</table>

Exhibit 3
Department of Veterans Affairs

APPOINTMENT OF INDIVIDUAL AS CLAIMANT'S REPRESENTATIVE

Note - If you would prefer to have a service organization assist you with your claim, you may use VA Form 21-22, "Appointment of Veterans Service Organization As Claimant's Representative."

PRIVACY ACT NOTICE: VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58 VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records-VA, published in the Federal Register. Your obligation to respond is voluntary. However, failure to respond may result in or impede the recognition of your representative and/or identification of claimant's records. Except for information protected by 38 U.S.C. 7332, your information is not protected from redisclosing records. The responses you submit are considered confidential (38 U.S.C. 7501). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to recognize the individuals appointed by claimants to act on their behalf in the preparation, presentation, and prosecution of claims for VA benefits (38 U.S.C. 5902, 5903, and 5904) and for those individuals to accept appointment. We will also use this information to verify consent for disclosure of VA records to the appointed representative (38 U.S.C. 7501(b) and 7332) Title 38, United States Code, allows us to ask for this information. We estimate that claimants and individuals appointed for purposes of representation will each need an average of 5 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. A valid OMB control number can be located on the OMB Internet Page at www.whitehouse.gov/omb/laws/OMBINV_VA.EPA.html#VA. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

| 2. NAME OF CLAIMANT (Veteran, guardian, beneficiary, dependent, or next of kin) | 3. ADDRESS OF CLAIMANT (No. and street or rural route, city or P.O., State and ZIP Code) |
| 4. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN | 5. SERVICE NUMBERS |
| 6. BRANCH OF SERVICE | |
| ☐ ARMY ☐ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD ☐ OTHER (Specify) |
| 7A. NAME OF INDIVIDUAL APPOINTED AS CLAIMANT'S REPRESENTATIVE |
| 7B. INDIVIDUAL IS (check appropriate box) | |
| ☒ ATTORNEY ☐ AGENT ☐ INDIVIDUAL PROVIDING REPRESENTATION UNDER SECTION 14.630 (*See required statement below. Signatures are required in Items 7C and 7D) | ☐ SERVICE ORGANIZATION REPRESENTATIVE (Specify organization below) |

*INDIVIDUALS PROVIDING REPRESENTATION UNDER SECTION 14.630
(Skip to Item 8, if the box for "Individual Providing Representation Under Section 14.630" was not checked in Item 7B)

The appointment of the individual named in Item 7A (the representative) authorizes the individual to represent the claimant named in Item 2 for a particular claim pursuant to the provisions of 38 CFR 14.630. By our signatures below, we, the representative and the claimant, attest that no compensation will be charged or paid for the individual named in Item 7A.

| 7C. SIGNATURE OF REPRESENTATIVE NAMED IN ITEM 7A | DO NOT SIGN IN THIS SPACE |
| 7D. SIGNATURE OF CLAIMANT NAMED IN ITEM 2 | DO NOT SIGN IN THIS SPACE |

8. ADDRESS OF INDIVIDUAL APPOINTED AS CLAIMANT'S REPRESENTATIVE (No. and street or rural route, city or P.O., State, and ZIP code)
9. AUTHORIZATION FOR REPRESENTATIVE’S ACCESS TO RECORDS PROTECTED BY SECTION 7332, TITLE 38, U.S.C.

Unless I check the box below, I do not authorize VA to disclose to the individual named in Item 7A any records that may be in my file relating to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia.

☐ I authorize the VA facility having custody of my VA claimant records to disclose to the individual named in Item 7A all treatment records relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia. Redisclosure of these records by my representative, other than to VA or the Court of Appeals for Veterans Claims, is not authorized without my further written consent. This authorization will remain in effect until the earlier of the following events: (1) I revoke this authorization by filing a written revocation with VA; or (2) I revoke the appointment of the individual named in Item 7A, either by explicit revocation or the appointment of another representative.

10. LIMITATION OF CONSENT. My consent in Item 9 for the disclosure of records relating to treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), or sickle cell anemia is limited as follows:

None

11. AUTHORIZATION FOR REPRESENTATIVE TO ACT ON CLAIMANT’S BEHALF TO CHANGE CLAIMANT’S ADDRESS

Unless I check the box below, I do not authorize the individual named in Item 7A to act on my behalf to change my address in my VA records.

☐ I authorize the individual named in Item 7A to act on my behalf to change my address in my VA records. This authorization does not extend to any other individual without my further written consent. This authorization will remain in effect until the earlier of the following events: (1) I revoke this authorization by filing a written revocation with VA; or (2) I revoke the appointment of the individual named in Item 7A, either by explicit revocation or the appointment of another representative.

CONDITIONS OF APPOINTMENT

I, the claimant named in Item 2, hereby appoint the individual named in Item 7A as my representative to prepare, present, and prosecute my claims for any and all benefits from the Department of Veterans Affairs (VA) based on the service of the veteran named in Item 4. If the individual named in Item 7A is an accredited agent or attorney, the scope of representation provided before VA may be limited by the agent or attorney as indicated below in Item 15. If the individual indicated in Item 7A is providing representation under 14.630, such representation is limited to a particular claim only. I authorize VA to release any and all of my records (other than as provided in Items 9 and 10) to that individual appointed as my representative, and if the individual in Item 7A is an accredited agent or attorney, this authorization includes the following individually named administrative employees of my representative:

Signed and accepted subject to the foregoing conditions.

12. SIGNATURE OF CLAIMANT

13. DATE OF SIGNATURE

14. CLAIMANT’S RELATIONSHIP TO VETERAN

(If other than the veteran)

15. LIMITATIONS ON REPRESENTATION - AGENTS OR ATTORNEYS ONLY

(Unless limited by an agent or attorney, this power of attorney revokes all previously existing powers of attorney)

No limitations.

I also consent that the following staff members employed by ____ Law Firm may assist my attorney in his representation of my claim and, pursuant to 38 C.F.R. § 14/629(c), are permitted to review my VA related records:

16. SIGNATURE OF REPRESENTATIVE

17. DATE OF SIGNATURE

FEES: Section 5904, Title 38, United States Code, contains provisions regarding fees that may be charged, allowed, or paid for services of agents or attorneys in connection with a proceeding before the Department of Veterans Affairs with respect to benefits under laws administered by the Department.

VA Form 21-22a, JUN 2009

Exhibit 4
WAIVER OF RIGHT TO APPEAL PAYMENT OF ATTORNEYS FEES

Veteran: ___________________________  VA File Number ___________________________

Name of Claimant (If other than Veteran) __________________________________________

Name of Attorney/Agent: _________________________________________________________

Recently, the Department of Veterans Affairs informed the above-referenced veteran/claimant, and accredited representative that a net payment of $_________ has been withheld from the Department of Veterans Affairs rating decision dated __________________________ for attorney's fees relating to the claim. The information letter also explained that the veteran and the accredited representative have the right to file a Notice of Disagreement if for any reason the parties disagree with the withheld fee, and the payment of said fee to the accredited representative.

THE FOLLOWING IS A WAIVER OF THE RIGHT TO APPEAL THE PAYMENT OF ATTORNEYS FEES AND A REQUEST THAT THE PAYMENT OF FEES BE IMMEDIATELY ISSUED TO THE ATTORNEY/AGENT.

VETERAN's/CLAIMANT'S WAIVER

I, ___________________________, am aware that the above referenced net payment was set aside for payment of attorney's fees for this claim. I understand that I have a right to file a Notice of Disagreement if I disagree with the payment of the stated fees to my accredited representative identified above. I hereby expressly waive any objection or disagreement with the payment of fees to my accredited representative, and hereby request that payment of fees be made immediately.

________________________________________  ___________________________
Veteran's/Claimant's Signature  Date

ACCRREDITED REPRESENTATIVE'S WAIVER

I, ___________________________, am aware that the above referenced net payment was set aside for payment of attorney's fees for this claim. I understand that I have a right to file a Notice of Disagreement if I disagree with the amount of fees set aside or have any other objection to the assessed fees as stated. I hereby expressly waive any objection or disagreement with the payment of fees to my accredited representative, and hereby request that payment of fees be made immediately.

________________________________________  ___________________________
Accredited Representative's Signature  Date
DFAS-INDIANAPOLIS CENTER
ATTN: DFAS-JBDM/ININ (COL 219R)
8899 East 56th Street
Indianapolis, IN 46249-6540
Phone: 317-510-5352/5349 DSN: 699
Fax: 317-510-1120
317-510-2128
email: dale.wentling@dfas.mil

(Note: If your request is for documentation dated 1994 to present please send request to Fax (317)275-0123,
ATTN: Verification Branch Ms. Cynthia Moore or email to ampo-verify-les@dfas.mil)

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<th>Name:</th>
<th>SSN:</th>
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<tbody>
<tr>
<td>Phone:</td>
<td>Service Number:</td>
</tr>
<tr>
<td>Address:</td>
<td></td>
</tr>
<tr>
<td>Dates of Discharge(s):</td>
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</tbody>
</table>

Reason for Request:

Documents you are Requesting: (circle) LES's Pay Vouchers Others

Time frame of the Documents you are Requesting

**NOTE** Please attach a copy of your Chronological Statement of Retirement Points for requests involving retirement points.

Affiliation for Period of Request: ARMY Reserve National Guard Active Duty
(Circle one)

Unit of Assignment for Period of Request:

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<th>Dates</th>
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</thead>
<tbody>
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<thead>
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<th>Div</th>
<th>City &amp; State</th>
<th>Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Additional Remarks: (continue separate page if required)

Signature of Service Member (Required)
This process may require extensive research please allow 30-60 days to process

Date