PART 1

Introduction

I. Introduction to Representing Veterans Before the Court of Appeals for Veterans Claims

The United States Court of Appeals for Veterans Claims (CAVC) has exclusive jurisdiction to hear appeals from decisions by the Department of Veterans Affairs Board of Veterans’ Appeals (the Board). Claimants for VA benefits start their claims at a VA Regional Office, generally located in the state where the claimant resides. Claimants who disagree with the findings of the Regional Office may appeal to the Board and eventually, if necessary, to the CAVC. The CAVC may not directly review a rating decision issued by a Regional Office.

The CAVC frequently hears appeals involving claims for service connection of a disability, increased disability ratings, compensation for medical malpractice, and compensation to the surviving spouse of a veteran who had a service-connected disability. Other less common claims include those for education or home loan benefits, specially adapted housing or adaptive equipment for cars, and waiver of overpayments made by the VA.

A. What Does It Mean to Be a “Veteran”? 

Most claimants must be veterans. Colloquially, a veteran is someone who served on active duty in the Armed Forces of the United States.¹

¹. Active duty means full-time service, other than active duty for training or reserve service, as a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, or as a commissioned officer of the Public Health Service, Environmental Science Services Administration, or National Oceanic and Atmospheric Administration, or its predecessor, the Coast and Geodetic Survey. See 38 U.S.C. § 101(21).
For the purpose of determining whether a person is a veteran entitled to claim benefits from the VA, however, not everyone who served in the Armed Forces is a veteran. A successful claimant must generally be a former member of the Armed Forces who was discharged under conditions other than dishonorable. 38 C.F.R. § 3.1 (2011). In other words, those persons discharged under dishonorable or bad-conduct discharges may be barred from collecting VA benefits. Otherwise eligible veterans who are in prison may have their benefits reduced.

Others entitled to claim certain benefits include the veteran’s spouse, dependent children, and, in some cases, dependent parents. The terms “veteran,” “child,” “surviving spouse,” and “parent,” among many others, are defined in 38 U.S.C. § 102.2

B. What Does It Mean to Be a “Disabled Veteran”?

Most appeals are filed by veterans who are disabled as a result of their military service. Many appeals arise as a result of VA decisions denying that a disability is “service connected.” “Service connected” simply means that a disability or death resulted from an injury or disease, 38 U.S.C. § 1110, or the aggravation of an injury or disease, 38 U.S.C. § 1153, incurred in the line of duty during active, as opposed to reserve, military service. Other common appeals result from claims by veterans to whom the VA has already awarded service connection and who are seeking higher disability ratings.

C. To What Type of “Benefits” Might a Disabled Veteran Be Entitled?

The law provides many potential benefits for veterans, as well as dependents and survivors of veterans. A veteran may qualify for monthly, tax-free, monetary benefits, depending on the degree of the disability or disabilities and the number of a veteran’s dependents. Veterans with certain severe disabilities may be eligible for additional

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2. In the context of this book, the term “veteran” will be used, but also refers to these other types of petitioners, including a deceased veteran’s spouse or dependent children.
special monthly compensation at rates that may exceed that paid for total disability. 38 U.S.C. § 1114(k)–(t). Also, the VA is required to provide medical care for all service-connected disabilities, including medications. If a veteran is 50 percent or more disabled, then the VA is required to provide the veteran with medical care for all conditions, whether or not service connected.

A surviving spouse, child, or parent may be entitled to Dependency and Indemnity Compensation (DIC). See, e.g., 38 U.S.C. §§ 1311, 1313, 1315. DIC is a monthly cash payment.

A veteran permanently and totally disabled or the spouse or child of a veteran may also be entitled to educational assistance from the VA. See, e.g., 38 U.S.C. § 3510.

D. Why Practice This Type of Law?

There are a number of reasons lawyers may be interested in appeals to the CAVC. First, helping veterans and their families may be personally rewarding. In addition, VA disability claims are somewhat similar to Social Security claims and may provide an opportunity to expand an existing practice. Moreover, this type of work can satisfy pro bono obligations, because many veterans and their families are economically disadvantaged. Finally, attorneys may earn fees from the VA under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, or from the veterans themselves.

E. Scope of CAVC Rules (Rule 1)³

The court has statutory authority to adopt its own rules known as Local Rules. 38 U.S.C. § 7264. Practice before the court is not governed by the Federal Rules of Appellate Procedure.

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³ All Rules are references to the CAVC Local Rules (Vet. App. R.).
II. Some Common Types of Cases

A. Service Connection for a Disability

The VA recognizes two types of service connection: direct and by aggravation.

1. DIRECT SERVICE CONNECTION

Direct service connection is the more common type of service-connection claim. Direct service connection means that the veteran has a disability related to an injury or disease incurred during active duty military service. 38 U.S.C. § 1110. There are three elements that generally must be proven in order to establish direct service connection for a disability:

   1. in-service incurrence of an injury or disease;
   2. the existence of a present disability; and
   3. a nexus between the injury or disease and the disability.


2. SERVICE CONNECTION BY AGGRAVATION

Service connection by aggravation allows an injury or disease that preexisted the veteran’s military service to be service connected. The veteran’s preexisting disability must have been noted—that is, actually found as opposed to reported as history, 38 C.F.R. § 3.304 (2011)—on the report of the veteran’s examination upon entering military service. Service connection based on in-service aggravation will be awarded when the record shows that the preexisting disability underwent a permanent increase in severity during service. See Beverly v. Brown, 9 Vet. App. 402, 405 (1996).

B. Increased Rating for a Disability Already Service Connected

When the VA grants service connection for a disability, it also determines a disability rating. There are eleven disability ratings, from 0 to 100 percent in 10-percent increments. 38 U.S.C. § 1114; 38 C.F.R.
§ 4.31 (2011) (establishing a 0-percent evaluation). If the severity of a veteran’s disability increases after the VA awards service connection, the veteran is entitled to claim a higher rating.

C. Medical Malpractice

If a veteran suffers disability, additional disability, or death as a result of VA hospital care, medical or surgical treatment, or examination, then that additional disability or death may be compensated as if it were service connected. 38 U.S.C. § 1151. The additional disability or death must have resulted from carelessness, negligence, lack of proper skill, error in judgment, or a similar instance of fault on the part of the VA, or the disability may have resulted from an event that was not reasonably foreseeable. Negligence may include the VA’s failure to obtain the patient’s full and informed consent to the treatment or procedure. See 38 U.S.C. § 7331; 38 C.F.R. §§ 3.361(d)(1)(ii), 17.32 (2011).

III. How a Claim Reaches the CAVC

A. Claims Begin at the Department of Veterans Affairs Regional Office

1. REGIONAL OFFICES

The VA has Regional Offices in most states as well as Puerto Rico, Guam, and the Philippines. A case begins when a person files a claim with one of these offices.

The Regional Office initially decides the claim and, if it is granted, makes the initial decision identifying the disability and the appropriate rating for the VA. A veteran who is dissatisfied with the Regional


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4. If a veteran is awarded a “0 percent” disability rating, then the veteran does not receive monetary disability benefits but may be entitled to medical care related to the disability at a VA facility. Two or more service-connected disabilities rated 0 percent disabling may entitle a veteran to a 10 percent rating, 38 C.F.R. § 3.324 (2011).

5. For the address of a Regional Office and directions, see http://www2.va.gov/guide/home.asp. This webpage lists Regional Offices as well as healthcare facilities and cemeteries. The general toll-free telephone number is (800) 827-1000.
Office’s decision on a claim may initiate an administrative appeal to the Board by filing a Notice of Disagreement (NOD). To be timely, the NOD must be filed within one year following the date the claimant is notified of the decision being appealed. After filing the NOD, the veteran may additionally elect to have the decision reviewed at the Regional Office by a Decision Review Officer. This person is usually a senior adjudicator and has the authority to reverse or modify the original decision.

2. FILING A FORM 9
If the veteran does not elect review by the Decision Review Officer or continues to be unsatisfied with the result of that review, the veteran must file a written appeal, known as a Form 9, with the Regional Office.

3. FILING DEADLINE FOR FORM 9
There are three different ways to calculate how much time a claimant has to complete and file a Form 9. The applicable deadline for filing is the one that gives the veteran the most time to file the appeal.

- First, the veteran has one year from the day the Regional Office mailed the notice of the decision being appealed.
- Second, the veteran has 60 days from the day the Regional Office mailed a Statement of the Case (SOC) to the veteran.6
- Finally, in some cases, the Regional Office may have mailed an update to the SOC, called a Supplemental Statement of the Case (SSOC), to the veteran. If that SSOC was provided in response to evidence submitted by or on behalf of the veteran, and the veteran had not already filed a Form 9, then the veteran has at least 60 days from the date the Regional Office mailed the SSOC to file the Form 9, even though the one-year period has already expired. See 38 C.F.R. § 20.302(b)(2) (2011).

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6. An SOC includes a summary of the evidence, citation to pertinent laws and regulations, and a decision on each issue along with a summary of the reasons for each decision. 38 U.S.C. § 7105(d)(1).
Once the Regional Office receives the Form 9, it sends the veteran’s case to the Board.

B. From the Regional Office to the Board

1. STANDARD OF REVIEW
The Board’s standard of review is de novo, meaning that the Board is not required to give any deference to the Regional Office’s decision. The Board’s jurisdiction, however, is appellate, so it reviews decisions made by the Regional Office but will not decide in the first instance issues not addressed by the Regional Office. 38 C.F.R. § 20.101(a) (2011). Board decisions are generally final as of the date stamped on the first page of the decision. See 38 C.F.R. § 20.1100 (2011).

2. ADDITIONAL EVIDENCE
Under some circumstances, the Board may direct that additional evidence be added to the record. 38 C.F.R. § 20.709 (2011).

3. HEARING BEFORE THE BOARD
After the Regional Office sends the case to the Board, the Board will hold a hearing, if one is requested. Moreover, the veteran is entitled to a hearing before the Board so long as the veteran or his or her representative appears. 38 C.F.R. § 20.700 (2011). A transcript of any hearing will be included in the veteran’s VA file. 38 C.F.R. § 20.714 (2011).

C. Appealing a Board Decision to the CAVC
Veterans and other claimants have a statutory right to a CAVC review of a Board decision.

1. DEADLINE FOR FILING A NOTICE OF APPEAL
Any appeal from a Board decision must be filed no later than 120 days after the date stamped on the first page of the Board’s decision. 38 U.S.C. § 7266(a). If the 120th day falls on a weekend or holiday,
the Notice of Appeal is due no later than the prior business day. A Notice of Appeal to the CAVC filed in error with the VA is ineffective. 38 U.S.C. § 7266(a); Rule 4(a). However, the common law “mailbox rule” applies to a notice of appeal properly mailed to the CAVC. Rios v. Nicholson, 490 F.3d 928, 932–32 (Fed. Cir. 2007).

STOP
Extensions of time to file a Notice of Appeal are not permitted.

2. EQUITABLE TOLLING

Checklist for Filing an Appeal. An appeal to the CAVC is possible if the answer to all of the following questions is YES:

- Did the client receive a decision by the Regional Office?
- Did the client file an NOD with the Regional Office within one year following service of the Regional Office’s decision?
- Did the client timely file a VA Form 9?
- Has the Board issued its decision?
- Was the Board’s decision made within the last 120 days?