Representing Service Members and Veterans: Benefits Training
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PART 2

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PART 2

- Non-Service Connected Pension
- Effective Dates for Award of Benefits
- Survivor Benefits
- Application for Benefits and Initial Administrative Appeal
- Board of Veterans Appeals
- Court of Appeals for Veterans Claims
Non-Service Connected Pension Benefits
Eligibility

Wartime service
Honorable service
Over 65 or Permanently and Totally disabled
Served requisite Active Duty
Income limited
Net worth not excessive
Wartime Service

World War II: December 7, 1941 – December 31, 1946


Persian Gulf War: August 2, 1990 – date to be prescribed by Presidential proclamation.
Honorable service

Discharged under conditions other than dishonorable

See Part I
Over 65 or Permanently and Totally Disabled

Veteran suffering from a permanent disability which would render it impossible for the average person to follow a substantially gainful occupation

Presumed P&T disabled:
- Over 65
- In nursing home for long term care
- SSA
Served Requisite AD

Enlisted before September 8, 1980: Must have 90 days of active service, 1 day during a period of war

On or after September 8, 1980: 24 months of continuous active duty, 1 day during a period of war
Income Limited

• Demonstrate Need: income cannot exceed MAPR

• All income is included unless specifically excluded:
  – Welfare payments, SSI
  – Profit from sale of primary home
<table>
<thead>
<tr>
<th>Maximum Annual Pension Rate (MAPR) Category</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>If you are a veteran...</td>
<td>Your yearly income must be less than...</td>
</tr>
<tr>
<td>Without Spouse or Child</td>
<td>$12,907</td>
</tr>
<tr>
<td>With One Dependent</td>
<td>$16,902</td>
</tr>
<tr>
<td>Housebound Without Dependents</td>
<td>$15,773</td>
</tr>
<tr>
<td>Housebound With One Dependent</td>
<td>$19,770</td>
</tr>
<tr>
<td>A&amp;A Without Dependents</td>
<td>$21,531</td>
</tr>
<tr>
<td>A&amp;A With One Dependent</td>
<td>$25,525</td>
</tr>
<tr>
<td>Two Vets Married to Each Other</td>
<td>$16,902</td>
</tr>
<tr>
<td>Two Vets Married to Each Other One H/B</td>
<td>$19,770</td>
</tr>
<tr>
<td>Two Vets Married to Each Other Both H/B</td>
<td>$22,634</td>
</tr>
<tr>
<td>Two Vets Married to Each Other One A/A</td>
<td>$25,525</td>
</tr>
<tr>
<td>Two Vets Married to Each Other One A/A One H/B</td>
<td>$28,385</td>
</tr>
<tr>
<td>Two Vets Married to Each Other Both A/A</td>
<td>$34,153</td>
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<tr>
<td><strong>Add</strong> for Early War Veteran (Mexican Border Period or WW1) to any category above</td>
<td>$2,932</td>
</tr>
<tr>
<td><strong>Add</strong> for Each Additional Child to any category above</td>
<td>$2,205</td>
</tr>
</tbody>
</table>

To be deducted, medical expenses must exceed 5% of MAPR, or, $645
The Formula Used to Calculate Improved Pension

• Simple Income Example:

The current MAPR for a single vet, is $12,907 and income is $7,000, his VA pension will be $5,907 annually
The Formula Used to Calculate Improved Pension Deducting Medical Expenses

- **Unreimbursed medical expenses** (UME), in excess of 5% of MAPR, may **reduce** your countable income.

Example:
- Single Vet w/ Income of $10,000
- $2,000 in UME
- 5% of MAPR ($12,907) = $645.35
- Reduce income by $1,354.65 ($2,000 - $645.35) = $8,645.35
- Pension w/o UME = $242.25 month
- Pension w/ UME = $355.14 Month
Net Worth

• No precise figure exists; rule of thumb: $80,000.
• Calculated as market value, less all encumbrances, of all real and personal property, excluding the person's dwelling, and personal effects.
Failing to Report Income

- If a veteran fails to report income or underreports income to the VA, a debt may be created. This debt is usually referred to as an overpayment.
If VA Determines there is an Overpayment

• Dispute Validity or Amount of Debt
  – No deadline for submitting this dispute
  – However, if it is done within 30 days collection will be stayed

• Request a Waiver of Collection
  – Must be submitted within 180 days of notice
  – May not waive the debt, if there is any indication of fraud or bad faith
Effective Dates for Awards of Benefits
The effective date for original and reopened claims is the later date of which:

1. VA receives the claim; OR
2. Date of entitlement to the benefit “arose.”
Awards made prior March 24, 2015

• Date VA received formal or informal claim.
• Informal claim
  1) An indication of an intent to apply for benefits
  2) Identified the benefit sought
Awards made after March 24, 2015

- VA eliminated claimant’s ability to file an informal claim
- Replaced with “Intent to File”
  - 21-0966
  - Must file formal claim (21-526) w/1 year of intent to file
  - Date is date received Intent to File
Example:

- Intent to file received April 1, 2015
- VA claims form received December 14, 2015
- Effective date April 1, 2015
Determining the Date Entitlement “Arose”

• “Date entitlement arose” is the initial date on which it appears the claimant satisfied all of the substantive criteria for entitlement to the benefit.

Example:
• December 1, 2015 Vet files a claim asking for service-connection for PTSD
• Evidence does not support that Vet has PTSD
• On March 1, 2015 veteran receives first diagnosis of PTSD
• Effective date is March 1, 2015 (unless medical opinion states he had PTSD prior)
PTSD: The date entitlement arose is generally the first medical diagnosis of PTSD unless a medical opinion states that the veteran suffered PTSD prior to the date of the first diagnosis.
Special Rules Resulting in Earlier Effective Dates

Exceptions to general rule on effective dates

- Claims based on Clear and Unmistakable Error (CUE)
- Compensation claims received within 1 year of discharge from military
- Death compensation claims received within 1 year of veteran’s death
Death and Indemnity Compensation (DIC)

And other family member benefits
Overview of DIC

- A monthly compensation for qualifying surviving spouses or dependent children if a veteran’s death was due to a service-connected condition.
  - May be confused with death pension (non-service-connected death).
Eligible Survivors

• Surviving Spouse
  – Must have been married to the Vet for 1 year prior to death (exceptions apply)
  – Continuous Cohabitation
  – Not currently remarried
  – Not intentionally or wrongfully caused death of the veteran

• Surviving child
  – Biological, adopted, or stepchild
  – Under 18 or 18-23 and attending school
  – Or helpless child

• Surviving parents (limited circumstances)
  – Income limitations
DIC: Service-Connected Requirements

1. Service-connected disability was principal or contributory cause of death
2. Death in service
3. Death due to a disability not service-connected prior to death but in fact connected to service
4. 10 year rule: Vet was in receipt of or entitled to receive 100% rating for a service-connected disability for 10 years preceding death
5. 5 Year rule: Vet was receiving compensation for a service-connected condition which was totally disabling for five-years between discharge and death
6. POW rule: Former POW was receiving compensation for 100% disability for at least one year prior to death
Death Pension Requirements

1. Eligible surviving spouse or guardian of surviving child
2. Vet had 90 days of active duty, at least 1 day during a period of war
3. If vet enlisted on or after September 8, 1980 must complete a continuous period of active duty for at least 24 months
4. Discharged under conditions other than dishonorable
5. Needs based
Substitution

• Allows a surviving spouse or child to be substituted as the veteran for purposes of processing the claim to complete
  – Veteran must have claim pending before death
  – Substitution must be requested within one year of veteran’s death

• If successful, substitute claimant are entitled to the entire amount of benefits that would have been paid had death not occurred
Application for Benefits & Initial Administrative Appeal
A. Overview of the VARO

• An initial application for benefits is filed with the “Agency of Original Jurisdiction,” or Regional Office (RO).

• There are 58 Regional Offices (RO or VARO) located around the country.
SUBMITTING A BENEFITS CLAIM AT THE VARO

A. Overview of the VARO

- The VA is unique because in many federal agencies the substantive rules that govern the adjudication of a particular matter are the same for each level of appeal within the agency, but this is not the case at the VA.
  - The VA does not follow a strict system of *res judicata*.
  - Each claim/veteran is decided on its own merits.

- The VAROs are primarily bound by four sources:
  1. The *VA Adjudication Procedures Manual, Manual M21-1*;
  2. Applicable statutes and case law;
  3. VA regulations; and
  4. Precedent Opinions of the VA General Counsel.
SUBMITTING A BENEFITS CLAIM AT THE VARO

A. Overview of the VARO

There are three types of claims that can be filed at a VARO:

1. New or Original Claims
   - 38 C.F.R. § 3.155(a) (2010);

2. Reopened Claims Filed After a Final VA Denial
   - 38 C.F.R. § 3.151(a) (2010); and

3. Claims for Revision of a Previous Final RO Decision Based on Clear & Unmistakable Error.
B. Types of Claims Filed at the VARO

1. New or Original Claims

- Each different type of injury, disease or disability that is the subject of a request for benefits involves a new, different claim.

- This type of claim primarily pertains to benefits never requested and increases in a disability ratings.

- It is advantageous for a claimant to have a claim categorized as “new” or “original” because:
  1. The VA is required to decide all new or original claims on the merits;
  2. The VA is not allowed to place any weight on a previous denial; and
  3. The VA is not allowed to require the claimant to submit new and material evidence.
B. Types of Claims Filed at the VARO

2. Reopened Claims Filed After a Final VA Denial

- “Final denial” means the previous denial was unsuccessfully appealed to the highest level of appeal possible for that particular matter. *Or the veteran missed an appeal deadline.*

- A “reopened claim” is a claim for a VA benefit that is filed after the VA issues a final denial of a claim requesting the same benefit. A reopened claim is subject to a threshold requirement that the claimant submits “new and material evidence.” 38 C.F.R. § 3.156(a)
B. Types of Claims Filed at the VARO

3. Claims for Revision of a Previous Final RO Decision based on Clear & Unmistakable Error (CUE)

- These claims are considered an original claim rather than a reopened one because the claim is being revised to conform to the true state of the facts or the law that existed at the time of the original jurisdiction.

- The VA regards this type of error as very rare and it is difficult to win. Must show:
  - Known facts were not before the adjudicator or law incorrectly applied, and
  - error based on the record and law existing at that time, and
  - had the error not been made, outcome would have been manifestly different
SUBMITTING A BENEFITS CLAIM AT THE VARO
B. Types of Claims Filed at the VARO

BEFORE 2015, the original adjudication process begins at the RO with one of the following three types of claims:

2. **Formal**, 38 C.F.R. § 3.151(a) (2010).
   - VA Form 21-526
3. **Inferred**
   - Claims not directly raised by the claimant but reasonably raised by the claimant’s record generally require evidence of a veteran’s intent to seek benefits.
AFTER 2015 (revisions to 38 CFR 3.155, eff. March 24, 2015)

1. Intent to file a claim form – preserves earlier effective date, can be filed electronically, by submitting a form (21-0966) in person or by fax, or by calling and talking to a VA employee

2. **Complete claims** – must be filed within one year of the intent to file to preserve date, includes 3.160 requirements – see form 526EZ

3. Incomplete claims – VA will send a letter stating what is missing; must be completed within one year of VA receiving the incomplete form. 3.155(c)
C. Duties Owed by the VARO

1. After reviewing the file the VARO has a duty to notify the claimant of:
   a) Evidence necessary to prove the claim;
   b) Information needed to prove the claim; and
   c) Information VA will attempt to obtain on its own.

   The VA must provide this notification upon receipt of a complete or substantially complete application, and before the RO makes an initial adverse decision on the claim.
C. Duties Owed by the VARO, cont’d

2. Duty to Consider All Legal Theories, 38 C.F.R. § 3.103(a)

“It is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government”

• The VA is required to consider all legal theories on which the claim could be granted, regardless of whether the claimant argues or focuses on any particular theory.
C. Duties Owed by the VARO, cont’d

3. Assistance in Obtaining Records, 38 U.S.C. § 5103A(b). Reasonable efforts to obtain public and private records. If unable to find records, VA must notify the claimant of records needed to substantiate the claim.

4. Assistance in Providing a Medical Examination or Obtaining a Medical Opinion in a Disability Compensation Claim, 38 U.S.C. § 5103A(d). VA must provide a thorough and contemporaneous medical examination when the medical evidence is inadequate and obtain a medical specialist or independent medical opinions needed to substantiate a claim.
Fully Developed Claim (FDC)

• FDCs have a lower average wait time than others
• Certain criteria must be met for FDC:
  – Must be a new claim, secondary or increase in disability claim
  – Must have a signed FDC Certification – certifying no more evidence
  – Must submit all relevant private medical records, and identify all VA medical centers where treatment was sought
Disability Benefits Questionnaire

• VA Forms addressing medical conditions that would eliminate the need for physicians to use a lengthy narrative.
• 70 different forms, each addressing different disabilities.
• Can be filled out by private doctors, helps to move a claim along
VARO ADMINISTRATIVE APPEAL

A. Notice of Disagreement (NOD)
B. *De Novo* Review by a Decision Review Officer (DRO)
C. Statement of the Case (SOC)
D. Substantive (Form 9) Appeal
E. SSOC
A. Notice of Disagreement (NOD)

- The deadline to file an NOD is very important; it is within one year from the date of the mailing of the VA notice to the claims of the adverse decision.
  - 38 C.F.R. § 20.302(a)

- The date on the letter notifying the claimant of the decision is considered the “date of mailing” of the notice – form will ask for date of “notification letter.”
  - 38 C.F.R. § 20.302(a)
  - Effective 3/24/2015 – You must use Form 21-0958.
    - fill it out completely – ask for “highest available” and attach a brief explaining why the decision is wrong
VARO ADMINISTRATIVE APPEAL

De Novo Review by a Decision Review Officer (DRO)

- A claimant who files an NOD may obtain *de novo* review of the initial decision, occurring between the filing of the NOD and the VA’s issuance of the Statement of Case.

- The claimant may initiate a *de novo* review by either requesting it in the NOD, or requesting it within 60 days after the VA sends notice of the right to the *de novo* review.

- A *de novo* review by a DRO suspends the traditional appeals process.
VARO ADMINISTRATIVE APPEAL

Statement of the Case (SOC)

Upon receipt of the NOD, the RO must review the claims file and either grant or deny a claim. After reviewing the claims file, and if the denial continues, the RO will issue a Statement of the Case (SOC).

A SOC must contain:

- Summary of the evidence,
- Applicable law and regulations, and
- Reasons for denying the claims with respect to the issues raised by the NOD.
  
  - 38 C.F.R. § 19.29
D. Supplemental Statement of the Case (SSOC)

- Supplemental Statements of the Case
  - When an SOC is “inadequate” for any reason the RO is required to prepare and issue the claimant and the claimant’s advocate a SSOC.
  - An SOC is presumed to be inadequate when “additional pertinent evidence” is received by the RO after the SOC was issued, when a “material defect” is discovered, or if “[f]or any other reason” the SOC or prior SSOC is inadequate.” 38 C.F.R. § 19.31 (2010)
E. Substantive (Form 9) Appeal

- The Form 9 Appeal is an important document, it is the one instance under the VA procedural rules where the veteran’s factual and legal arguments are required to be submitted.

- The veteran must set forth specific arguments relating to the errors of fact or law in the RO’s initial decision denying benefits.

- The Form 9 must be submitted within 60 days of the date of the SOC.
The Board of Veterans’ Appeals
The Board of Veterans’ Appeals (BVA)

- The Board of Veterans’ Appeals (BVA) is the second of the two major levels of review of claims within the VA.

- The BVA is the final step of the administrative process before an appeal to the Court of Appeals for Veterans Claims (CAVC).
The Board of Veterans’ Appeals (BVA)

Jurisdiction and Scope of Review

BVA has jurisdiction to review all questions of fact and law regarding claims for VA benefits; BVA decides “claims and issues.”

- “Claims” are requests for particular benefits.
- “Issues” are matters upon which the Board made a final decision. The BVA is required to include a written statement of its finding and conclusions outlining the reasons and bases for them on all material issues of fact and law presented on the record.


BVA does NOT have jurisdiction over medical determinations, such as determinations of the need for, or appropriateness of, specific types of medical care and treatment.

Jurisdiction and Scope of Review

• Each case is considered *de novo* by the BVA. Veterans may present new documentary evidence and/or witnesses before the BVA. 38 U.S.C. § 7104

• The BVA must remand to the agency of original jurisdiction if it needs further evidence or clarification of a procedural defect. 38 C.F.R. §§ 19.9, 20.1304
Hearings

• Claimants have a right to a hearing either before a BVA VLJ sitting in Washington D.C., or before a traveling VLJ at the local RO. 38 C.F.R. § 20.705; 38 C.F.R § 14.628(a)(2)(iv-v)

• Claimants may present testimony and evidence before a VLJ who will decide their appeal. 38 C.F.R. § § 20.706, 20.710
The Board of Veterans’ Appeals (BVA)

BVA Administrative Decisions

- In its decision, the BVA may take one of the following actions:
  1. Allow the benefit sought;
  2. Remand (most common);
  3. Deny; or
  4. Other.

- For further information on all statistical data relating to BVA decisions visit:
  http://www.bva.va.gov/Chairman_Annual_Rpts.asp
The Board of Veterans’ Appeals (BVA)

BVA Administrative Decisions

• The BVA must follow any CAVC decisions that establish a rule of law.

• BVA is also bound to follow applicable statutes, VA regulations and precedent opinions of the VA General Counsel. 38 U.S.C. § 7104(c)
PREPARING WRITTEN ARGUMENTS IN SUPPORT OF A CLAIM

No particular format is required in presenting written arguments. There are, however, some basic guidelines that are common to all good written legal arguments.

1. Identification of the VA benefits sought;
2. Legal requirements - What the law requires the evidence show in order for the claimant to obtain the desired benefits;
3. Application of Law to Fact - Why the evidence of record supports the grant of VA benefits for each benefit sought; and
4. What errors were committed by the VA regional office in the original adjudication of this claim (if there was a prior adjudication).
<table>
<thead>
<tr>
<th>OPTION</th>
<th>DEADLINE FOR EXERCISING OPTION</th>
<th>CAN NEW EVIDENCE BE ADDED?</th>
<th>EFFECTIVE DATE GENERALLY ASSIGNED IF CLAIMANT PREVAILS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeal to CAVC</td>
<td>Appeal must be filed within 120 days of BVA decision</td>
<td>No</td>
<td>Date VA received claim that led to the BVA decision under appeal</td>
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<td>Motion for BVA reconsideration</td>
<td>No time limit²</td>
<td>No, except for service records³</td>
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<td>Motion to vacate a BVA decision</td>
<td>No time limit⁴</td>
<td>Motion to vacate regulation does not address this issue</td>
<td>Date VA received claim that led to the BVA decision subject to the motion to vacate</td>
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<td>Filing a claim for revision of a final BVA decision based upon CUE</td>
<td>No time limit</td>
<td>No</td>
<td>Date VA received claim that led to the BVA decision that allegedly contains CUE</td>
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<td>Filing a Reopened claim with the VARO</td>
<td>No time limit</td>
<td>Yes</td>
<td>Date VA receives reopened claim</td>
</tr>
</tbody>
</table>
Filing a Reopened Claim at the RO

New and Material Evidence

“New” evidence is existing evidence not previously submitted to agency decision makers.
38 C.F.R. § 3.156(a)

This evidence could not have been of record at the time of the last denial and is not merely cumulative of other record evidence.

“Material” evidence is existing evidence that, by itself or with other evidence, relates to an un-established fact necessary to substantiate the claim and must raise a reasonable possibility of substantiating the claim.
38 C.F.R. § 3.156(a)
ACTIONS AFTER BVA DENIAL

Motions within the BVA

Three types of Motions before the BVA:

1. Motion to Vacate a BVA decision;
2. Motion for Reconsideration of the BVA decision; and
3. Motion to Revise the BVA decision based on Clear and Unmistakable Error (CUE).
A previous BVA decision may be vacated by the BVA at any time upon request of the appellant or on the Board’s own motion, on the following due process grounds:

1. When the appellant was denied its right to representation through action or inaction by VA personnel;
2. When a Statement of the Case was not provided; and
3. When there was prejudicial failure to afford the veteran a personal hearing.

38 C.F.R. § 20.904
ACTIONS AFTER BVA DENIAL

BVA Motions: Reconsideration

Reconsideration of a BVA decision may be accorded at any time upon:

- Allegation of obvious error of fact or law;
- Discovery of new and material evidence in the form of relevant records or reports of the service department concerned; or
- If the BVA grants the benefit sought, the proper effective date is set as if the previous decision had not been rendered.
B. BVA Motions: CUE

*Final BVA decisions* are subject to reversal on the grounds of Clear and Unmistakable Error (CUE) just as Rating Decisions are subject to revision.

- Clear and unmistakable error is a very specific and rare kind of error of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error.

- Generally, either the correct facts, as they were known at the time, were not before the Board, or the statutory and regulatory provisions extant at the time were incorrectly applied.

38 C.F.R § 20.1403
BVA Motions: CUE

The following are **not** clear and unmistakable error:

1. A new medical diagnosis that “corrects” an earlier diagnosis considered in a Board decision;
2. The Secretary’s failure to fulfill the duty to assist; or
3. A disagreement as to how the facts were weighed or evaluated.

38 C.F.R. 20.1403
ACTIONS AFTER BVA DENIAL

BVA Motions: CUE

• Earlier effective date: A decision of the BVA that revises a prior BVA decision on the grounds of CUE has the same effect as if the decision had been made on the date of the prior decision. 38 C.F.R 20.1406.

• Once there is a final decision on a CUE motion, the prior BVA decision on the original issue is no longer subject to revision on the grounds of CUE. 38 C.F.R. 20.1409(c).
BVA Motions: CUE, cont’d

• A prior final BVA decision that was appealed to the CAVC cannot be the subject of a motion for CUE. 38 C.F.R. 20.1400.

• A CUE claim cannot be brought against a final, unappealed RO decision where the BVA has subsequently reopened the claim, considered it de novo, and denied the benefits previously denied in the RO decision.

ACTIONS AFTER BVA DENIAL

Appealing to the CAVC

The CAVC shall have exclusive jurisdiction to review decisions of the BVA. 38 U.S.C. § 7252(a).

- BVA has a duty to notify claimants of the right to appeal to the CAVC; this notice must accompany the decision from the BVA.

- Claimants may appeal final BVA decisions to the CAVC within 120 days after the date on which the notice of the decision is mailed. 38 U.S.C. § 7266(a).
Judicial Review of a Final Board of Veterans Appeals Denial
A. Overview

- The Veterans’ Judicial Review Act of 1998 (VJRA) established the U.S. Court of Veterans Appeals, now called the **U.S. Court of Appeals for Veterans Claims (CAVC)**.
- The CAVC is an Article I Court based in Washington, D.C. and there are currently 14 judges (active and retired).
- The normal judicial term is 15 year terms.
U.S. COURT OF APPEALS FOR VETERANS CLAIMS

B. Rules and Procedures

• The Court’s Rules of Practice and Procedure can be found at: http://www.uscourts.cavc.gov/court_procedures/

• The applicable rules may be suspended to expedite a decision or for good cause. This can occur by the initiative of the court or by motion. U.S. Vet. App. R. 2.

• Note, special rules relating to the “RBA” and Rule 33 memo and conferencec
U.S. COURT OF APPEALS FOR VETERANS CLAIMS

C. Attorney Representation

- U.S. Vet. App. R. 46 governs representation and admissions of attorneys and law students to practice before the Court.
- The rule contains explicit requirements that must be fulfilled before an attorney or non-attorney can appear before the Court.
- The rules for admission differ greatly according to whether or not the individual is an attorney.
CAVC JURISDICTION

A. Basic Requirements

• The CAVC has exclusive jurisdiction to review BVA decisions. 38 U.S.C. § 7252(a).

• Veterans are the appellants
A. Basic Requirements- Timely NOA

- The 120-day period does not begin to run until two conditions are met:
  1. The BVA mails its decision to the last known address of the claimant; and
  2. If the claimant has a representative, the BVA sends a copy of the decision to the representative “by any means reasonably likely to reach the representative within the same time a copy would be expected to reach the representative if sent by first-class mail.”

*Santoro v. Principi*, 274 F.3d 1366 (Fed Cir. 2001).
CAVC SCOPE OF REVIEW

A. Generally

• The CAVC may only review the documents that were before the BVA.

• Exceptions to this rule include:
  – Documents the Court has constructive knowledge of;
  – Any document within the control of the VA; or
CAVC SCOPE OF REVIEW

A. Generally

- The CAVC may review almost any issue of law that affected the outcome of a case which the CAVC has jurisdiction. 38 U.S.C. § 7361.

- The CAVC is NOT bound by VA regulations, instructions by the VA Secretary or General Counsel opinions.
  - Principles of administrative law still apply
CAVC SCOPE OF REVIEW

B. Findings of Fact

• The CAVC has the authority to hold unlawful, set aside or reverse a VA finding of material fact adverse to a veteran if the finding is **clearly erroneous**.
  – The CAVC must have a definite and firm conviction that a mistake has been committed.
  – The CAVC may not reverse if the evidence is merely plausible.
  – Where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.

*** In *Padgett v. Nicholson*, the CAVC ruled that a BVA finding may be clearly erroneous even if there is some evidence supporting a BVA decision. 19 Vet. App. 84 (2005).
CAVC SCOPE OF REVIEW

C. Issues of Law

• When reviewing issues of law, the Court reviews the agency’s resolution of the issue \textit{de novo}, without giving any deference to the BVA’s view of the law.
• The CAVC may review any issue of law that affected the outcome of a case, even authorities that bind the BVA such as VA General Counsel Opinions. \textit{38 U.S.C. § 7252(a)(3)}. 
CAVC SCOPE OF REVIEW

D. Application of Law to Facts


• Examples:
  – Selection of the incorrect diagnostic code for purposes of rating a veteran’s disability.
  – Determining whether a prior final agency decision contained clear and unmistakable error.
F. Issues Beyond the CAVC Scope

- The Court may not review findings that are favorable to the veteran.
- The VJRA prohibits the Court from reviewing the rating schedule for disabilities.
APPEALS TO THE FEDERAL CIRCUIT

- Appeals of final CAVC decisions to the Federal Circuit must be made within **60 days** of the CAVC judgment entry.
- The Federal Circuit has jurisdiction over all questions of law that were relied upon by the CAVC in making its decision.
- The Federal Circuit reviews questions of law and CAVC interpretations of law and regulations *de novo*.
• Once the Federal Circuit renders a final decision, either the VA or the veteran may petition the U.S. Supreme Court for certiorari within 90 days of the Federal Circuit’s final action. See Scarborough v. Principi, 124 S.Ct. 1856 (2004).