(VSR VIP Post-D) Due Process

Trainee Handout

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Objectives

This lesson is intended to teach the rules and regulatory requirements for adverse actions involving VA benefits. At the end of this course, you will be able to:

* Summarize adverse action, due process, contemporaneous notice, and final action
* Distinguish when due process is required and when contemporaneous notice is appropriate
* Identify the end product (EP) control and suspense period for due process
* Outline the process requirements when a hearing is requested
* Describe the required components of a notice of proposed adverse action, contemporaneous notice, and final decision notice

References

* [38 CFR 3.103, Procedural due process and appellate rights.](https://www.ecfr.gov/cgi-bin/text-idx?SID=7d356f5e5159b6d911e25a58d5d6ca7e&node=se38.1.3_1103&rgn=div8)
* [38 CFR 3.105, Revision of decisions.](https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=2c250771afe303e2c2e6abc18d90bf5e&mc=true&r=SECTION&n=se38.1.3_1105)
* [38 CFR 3.110, Computation of time limit.](https://www.ecfr.gov/cgi-bin/text-idx?SID=1d475a06174c2964db5df67a7e6469c0&node=se38.1.3_1110&rgn=div8)
* [38 CFR 3.159, Department of Veterans Affairs assistance in developing claims.](https://www.ecfr.gov/cgi-bin/text-idx?SID=ba722fb8bb24998f9eac841269b1d257&mc=true&node=se38.1.3_1159&rgn=div8)
* [38 CFR 3.217, Submission of statements or information affecting entitlement to benefits](https://www.ecfr.gov/cgi-bin/text-idx?SID=32b0ff839338b735ba55f80ff41487c5&mc=true&node=se38.1.3_1217&rgn=div8)
* [38 CFR 3.500-505, Reductions and Discontinuances](https://www.ecfr.gov/cgi-bin/text-idx?SID=89a210b6f8738c4fa13db242491be8df&mc=true&node=sg38.1.3_1461.sg15&rgn=div7)
* [M21-1, Part I, Chapter 2, Due Process](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/topic/554400000003064/Chapter-02-Due-Process)
* [M21-1, Part I, Chapter 4, Regional Office (RO) Hearings](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/topic/554400000003066/Chapter-04-Regional-Office-RO-Hearings)
* [M21-1, Part III, Subpart ii, 3.B.3.a, Establishing Requests for a Hearing](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014123/M21-1,-Part-III,-Subpart-ii,-Chapter-3,-Section-B---Claims-Establishment#3)
* [M21-1, Part III, Subpart iii, 1.B, Evidence Requested From the Claimant](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014152/M21-1-Part-III-Subpart-iii-Chapter-1-Section-B-Evidence-Requested-From-the-Claimant)
* [M21-1, Part III, Subpart iv, 8, Competency, Due Process and Protected Ratings](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/topic/554400000003100/Chapter-08-Competency-Due-Process-and-Protected-Ratings)
* [M21-1, Part III, Subpart v, 2, Decision Authorization and Notification](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/topic/554400000003103/Chapter-02-Decision-Authorization-and-Notification)
* [M21-1, Part IV, Subpart ii, 3, Authorization Issues and Claimant Notification](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/topic/554400000003145/Chapter-03-Authorization-Issues-and-Claimant-Notification)

Topic 1: Adverse Actions & Due Process

Origin of Due Process

Due Process stems from the Fifth Amendment of the U.S. Constitution, which states:

***“No person shall be deprived of life, liberty or property without due process of law.”***

A Due Process letter is formally referred to as a Notice of Proposed Adverse Action, but may sometimes be informally referred to as:

* Due Process letter
* Predetermination letter
* Proposal letter

A Contemporaneous Notice is another kind of notification used to inform a beneficiary of a change in benefits, however, does so without the requirement of Due Process. This will be addressed in more detail in this topic.

**Due Process**

Due process in the administration of Department of Veterans Affairs (VA) benefits informs the beneficiary of a proposed adverse action that could reduce or terminate benefits, and provides the beneficiary with the opportunity to:

* provide additional evidence to contest the action, and/or
* hold a hearing before VA decision-makers.

In most instances, due process applies when VA proposes to reduce or terminate a benefit.  In a few situations, such as a character of discharge determination, due process applies before VA determines eligibility for benefits.

Refer to [M21-1 I.2.A.1.b – General Information on Due Process](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014071/M21-1-Part-I-Chapter-2-Section-A-General-Information-on-Due-Process#1b)

Adverse Action

An unfavorable action affecting benefits which:

* Reduces the monetary amount of benefits (most common)
* Could bar a claimant, usually the Veteran, from receiving benefits (i.e. Character of Discharge (COD) determination)
* Assigns someone else to control the beneficiary’s money (incompetency)

Examples of Adverse Actions

Some examples of adverse actions include (but are not limited to):

* Character of Discharge (COD) determination
* Rating reduction due to:
  + Improvement of medical condition
  + Failure to report (FTR) for future exam
  + Failure to return VA Form 21-4140, Employment Questionnaire (IU status)
  + Clear and Unmistakable Error (CUE)
* Severance of service connection
* Incompetency determination
* Drill Pay (withhold part of Compensation)
* Return to Active Duty (stop Compensation)
* Loss of dependent
* Failure to return dependency questionnaire
* Whereabouts unknown (stop Compensation)
* Apportionment
* Hospitalization at VA Expense (level of SMC adjusted)
* Benefits erroneously awarded (Administrative Decision needed)
* Starting/restarting recoupment on a running award
* Social Security death match for Veteran’s spouse
* Fugitive Felon
* Incarceration
* Attorney Fee establishment
* Increased income (for Pension)

Refer to [*M21-1 I.2.B.4.a – References for Topics Specific to Due Process*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014072/M21-1-Part-I-Chapter-2-Section-B-Notice-of-Proposed-Adverse-Action#4)

**Third Party Information**

Third party information is any information that is not received from the beneficiary or from the beneficiary’s fiduciary. Written correspondence is considered third party when received without the beneficiary’s signature or the signature of his/her fiduciary.

Due process must be given when the information justifying adverse action is received from a third party.

VA Medical Centers (VAMCs), VA field examiners and other U.S. Federal Government agencies (SSA, DOD, IRS, etc.) are considered Third Party.

Refer to [M21-1 I.2.A.1.d - Definition: Third Party Information](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014071/M21-1-Part-I-Chapter-2-Section-A-General-Information-on-Due-Process#1d) for additional third party information sources.

**Notice of Proposed Adverse Action**

A Notice of Proposed Adverse Action must include the following:

* Statement of proposed decision(s)
* The proposed effective date and proposed rates of payment
* Information on the possible creation of an overpayment (if applicable)
* Detailed reasons for the proposed decision
* The right to present evidence within 60 days, request a personal hearing within 30 days (to extend due process period) and have representation via:
* VA Form 21-0789, Your Rights to Representation and a Hearing, or
* VA Form 21-0790, Your Rights to Representation and a Hearing (Possible Overpayment)

Use PCGL if VBMS-Core does not generate all the correct necessary information (PCGL will be taught in a separate lesson).

Refer to [*M21-1 I.2.B.2.a – Required Elements for Notice of Proposed Adverse Action*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014072/M21-1-Part-I-Chapter-2-Section-B-Notice-of-Proposed-Adverse-Action#2)

The Notice of Proposed Adverse Actionshould be generated in VBMS-Core whenever possible. Examples of these letters available in VBMS include the following:

* *Proposal to Reduce Service-Connected Compensation*
* *Proposal to Reduce – Failure to Report for an Exam*
* *Proposal to Reduce – School Child Verification*
* *Proposal to Reduce – Failure to Submit Dependency Questionnaire*
* *Proposed Incompetency Letter*
* *Character of Discharge Letter*

**Exceptions to Due Process**

* First Party information is received – information received directly from the beneficiary (explained in more detail later in this topic).
* When the combined percentage or the amount of money being paid to the beneficiary will not change because of the adverse action.

**Example**: A rating decision reduces the percentage for Left Knee Instability from 20% to 10%, but the overall combined evaluation remains at 70%.

* Automatic reductions when we already notified the beneficiary of when we granted benefits.
* Temporary grants of 100%
* When minor children turn 18
* When the beneficiary is reported deceased. A notice of death can include the following:
* Telephone call from anyone
* Claim for VA burial or death benefits
* Terminal hospital report
* Death certificate
* Note: in the event of Veteran death, no notice of termination of benefits whatsoever is required (contemporaneous notice or otherwise). [38CFR 3.103(b)(3)(iii)](https://www.ecfr.gov/cgi-bin/text-idx?SID=7d356f5e5159b6d911e25a58d5d6ca7e&node=se38.1.3_1103&rgn=div8)
* A beneficiary’s account is in suspense and information is received that would result in a reduction when the award is resumed.
* A beneficiary’s account is automatically suspended when payments are returned as undeliverable.

**First Party Information**

When information is received directly from the beneficiary (usually the Veteran), the beneficiary’s fiduciary, or a field examiner (when documented on VA Form 27-0820) this is known as **first party information**.

Receiving first party information allows the VA to take immediate adverse action, without due process, because information is received directly from the beneficiary, (or any other designated first party listed above). In these instances, a **contemporaneous notice** is sent instead.

**Note:** Written correspondence must be signed by the beneficiary or their fiduciary to be considered first party information or VA Form 27-0820 (documentation of telephone contact) must be filled out completely to be valid.

**Contemporaneous Notice**

A Contemporaneous Notice is used in lieu of a notice of proposed adverse action, and is similar to a final decision notification letter, as it describes a completed award action, rather than a proposed one.

Refer to [M21-1 I.2.D.1.a – Definition: Contemporaneous Notice](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014074/M21-1-Part-I-Chapter-2-Section-D-Contemporaneous-Notice#1a)

Establishment of an EP 600 is not required, as the adverse action is being taken immediately rather than being proposed. EP controls are discussed in further detail in the next topic.

A Contemporaneous Notice should be generated via VBMS-A using the Redesigned Automated Decision Letter (RADL) process whenever possible and must include the following:

* Identification of the issues decided including new payment rates
* Summary of the evidence considered, and the laws and regulations applicable to the claim
* Statement of effective date(s)
* Detailed reasons for the decision
* Overpayment information (if applicable)
* Explanation of how to obtain or access evidence used to make the decision
* Summary of the applicable review options provided under [38 CFR 3.2500](https://www.ecfr.gov/cgi-bin/text-idx?SID=3967d2b525436657ad0fad655ff65e9c&mc=true&node=se38.1.3_12500&rgn=div8) that allow the claimant to seek further review of the decision (VA Form 20-0998)

**Exception**: Do not enclose VA Form 20-0998 when sending a contemporaneous notice that benefits have been discontinued based on the reported death of the beneficiary.

Refer to [M21-1 I.2.D.3.b – Required Elements for Contemporaneous Notice](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014074/M21-1-Part-I-Chapter-2-Section-D-Contemporaneous-Notice#3b)

Topic 2: Adverse Action Proposal Period

**Suspense Period for Due Process**

The beneficiary is notified that they have **60 days** before adverse action is taken, however a 65-day tracked item is used to compensate for mailing time.

If Due Process expires on a weekend or holiday, extend the tracked item to the next business day.

Adverse action will be delayed if a hearing is requested within 30 days from the date of the notice (or at any time if the issue is incompetency) or if additional development is needed.

**Do not** take adverse action until after the **65th day** following the date of the notice of proposed adverse action.

**Due Process EP Control**

Close the pending EP and establish (CEST) an EP 600 to control for Due Process.

**Note:** If there are additional or unresolved issues associated with the initial EP, do not close it. Leave it open so unresolved issues may be addressed separately.

The date of claim (DOC) for the EP 600 should be the date the EP is established/due process letter is released (VBMS letters are automatically dated the next business day). Ideally, the due process letter should be created and sent the same day the EP is established; however, the letter must be sent within 5 days of EP establishment.

Add the Potential Under/Overpayment special issue if there is a possibility an overpayment. The special issue must be added to each contention which may cause the overpayment. This special issue allows for monitoring of timeliness in completing actions where an overpayment might exist.

**If:** the adverse action proposal period is extended due to:

* required additional development,
* a request for hearing, or
* remailing of the **notice of proposed adverse action** due to an incorrect address,

**Then:** the original EP and DOC continue unchanged while the suspense date is extended.

**Responding to the Beneficiary/Fiduciary**

Take final action if the:

* beneficiary/fiduciary clearly requests immediate action,
* evidence received is insufficient to require further development, or
* there’s no response within 65 days (most common).

**Note:** for rating related proposals, a final rating decision is required in order to reduce or sever service-connected disabilities. For authorization-related proposals (i.e. dependency adjustments) the action can be taken by the VSR without referring to the rating activity.

Schedule a hearing if requested.

Develop to request all relevant evidence identified by the beneficiary or representative during the 60-day response period.

Refer to [M21-1, I.2.C.2 – Responding to the Beneficiary](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014073/M21-1-Part-I-Chapter-2-Section-C-Adverse-Action-Proposal-Period#2)

**Hearing Requested Within 30 Days**

Due process is extended until the hearing is completed and evidence (i.e. transcript) is included in the file.

If requested within 30 days, follow these steps:

1. Select the EP controlling the issue that requires the hearing, and
2. Add the *Local Hearing* special issue indicator to each contention that requires the hearing.
3. Add a tracked item to the EP
4. *Informal Hearing Requested*, or
5. *Formal Hearing Requested*
6. Add a VBMS Note providing details of the hearing request using the format found in [*M21-1 III.ii.3.B.3.a*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014123/M21-1-Part-III-Subpart-ii-Chapter-3-Section-B-Claims-Establishment#3) **– Step 5.**
7. From MANAGE EVIDENCE in the ACTIONS drop-down menu in the PROFILE screen, add each piece of mail or mail packet under the Add Unsolicited tab.

See [*M21-1 I.2.C.3.c* – *Processing an Adverse Action Hearing Request*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014073/M21-1-Part-I-Chapter-2-Section-C-Adverse-Action-Proposal-Period#3c)and [*M21-1 III.ii.3.B.3.a* – *Establishing Requests for a Hearing*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014123/M21-1-Part-III-Subpart-ii-Chapter-3-Section-B-Claims-Establishment#3)  **for more information on hearings requested in response to a due process letter.**

**Hearing Requested After 30 Days**

Proposed action can be taken after 65 days expires; however, a hearing must still be scheduled. If a hearing is requested after 30 days, follow these steps:

1. Finalize the proposed action under EP 600
2. Continue the EP 600 at authorization for the hearing request
3. Add the *Local Hearing* special issue indicator to each contention that requires the hearing
4. Add a tracked item for the type of hearing to the EP 600, and
5. Add a VBMS note detailing the hearing request
6. Confirm the hearing was completed, the transcript is uploaded, and that development was completed
7. Close the tracked item(s)
8. Make a new decision under the EP 600 based on the results of the hearing

See [*M21-1 I.2.C.3.c*  *– Processing an Adverse Action Hearing Request*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014073/M21-1-Part-I-Chapter-2-Section-C-Adverse-Action-Proposal-Period#3a) and [*M21-1 III.ii.3.B.3.a* *– Establishing Requests for a Hearing*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014123/M21-1-Part-III-Subpart-ii-Chapter-3-Section-B-Claims-Establishment#3) **for more information on hearings requested in response to a due process letter.**

Exception for proposed incompetency:

For hearings requested in connection with proposed incompetency, a hearing requested at any time prior to the final rating must be held before final rating action is taken.

Topic 3: Final Action

**When Final Action is Taken**

Take final action when:

* the beneficiary agrees with the adverse action, or
* the due process period has expired, a hearing has not been requested within the first 30 days of the due process period (or at any time before final action for incompetency proposals) and no additional development is needed, or
* a hearing has been conducted and the transcript is included in the file, or
* the beneficiary fails, without good cause, to appear for their hearing.

**Effective Dates for Final Action: Decrease in Combined Rating, Reported Employment, CUEs**

After the 60-day due process (65 day tracked item) expires, a final rating decision reflecting the lower evaluation must be prepared by the rating activity. Most often, a pre-determination VSR will take the action to close the tracked item and update the status of the EP to Ready for Decision (RFD).

The reduced evaluation is effective the first day of the month following a 60-day period after the Veteran is notified of the final rating decision. These 60 days are in addition to the initial 60-day due process period, preventing an overpayment from being created.

Refer to [*M21-1 III.iv.8.D.1.j* – *Determining the Effective Date*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014214/M21-1-Part-III-Subpart-iv-Chapter-8-Section-D-Reductions-in-Awards#1j)

*Example:* A notice of proposed adverse action, dated August 10, 2020, proposed to reduce a SC back condition due to improvement in the condition. The notice received no response. A final rating decision is prepared, dated October 20, 2020. The final decision notice sent to the Veteran is dated October 26, 2020. The effective date of the reduction contained within the rating decision must be January 1, 2021.

*Important:* Take special care when promulgating rating reductions near the end of the month. The final action notification cannot be dated in a different month from the rating decision. For example, a final rating decision dated March 31st will generate a final rating decision reducing an evaluation effective June 1st (first of the month following 60 days). However, if the corresponding decision notice is dated April 1st, the effective date of reduction will be July 1st, which does not match the effective date given on the rating decision. When this happens, the rating decision will need to be returned to the RVSR so that the effective date may be refreshed.

**Effective Dates for Final Action: Failure to Return VA Form 21-4140 & Failure to Report for Future Examination**

Final action effective date of discontinuance/reduction will be the later of the following:

* the date in the *Last Paid Date* field on the *Award Information* tab in *Share*, or
* the date indicated in the notice of proposed adverse action (the first day of the month 60 days after the Veteran is notified of the proposed adverse action).

*Important:* although this should be addressed in the rating decision by the RVSR, the VSR needs to ensure that the correct effective date is used.

No overpayment will be created.

Refer to [*M21-1 III.iv.8.D.1.j* – *Determining the Effective Date*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014214/M21-1-Part-III-Subpart-iv-Chapter-8-Section-D-Reductions-in-Awards#1j)

**Effective Dates for Final Action: Removal of Dependents**

Various effective dates are possible. Additional instruction is provided in the lessons *Effective and Payment Dates*, and *Dependency Effective Dates and Awards*.

Overpayments are possible if the removal of a dependent is a date in the past.

***Example:*** The Veteran’s spouse passed away on February 7, 2020. We are notified of the death on September 22, 2020 via third party information. We send a notice of proposed adverse action dated September 23, 2020. The Veteran never responds to our proposal letter. On November 30, 2020, we take our final action: We remove the spouse from the Veteran’s award effective March 1, 2020 (the end-of-month rule applies, refer to *Dependency Effective Dates and Awards* lesson), which will create an overpayment, and notify the Veteran of our final action.

**Final Decision Notice Requirements**

A Final Decision Notice is similar to a contemporaneous notice, except that it refers to the notice of proposed adverse action in the introduction. It also acknowledges receipt of first party information or states if we did not receive the requested information. A final decision notice must include the following:

* Date of the due process letter
* Identification of the issues decided including new payment rates
* Summary of the evidence considered, and the laws and regulations applicable to the claim
* Statement of effective date(s)
* Detailed reasons for decision
* Overpayment information (if applicable)
* Explanation of how to obtain or access evidence used to make the decision
* Summary of the applicable decision review options that allow the claimant to seek further review of the decision (VA Form 20-0998)

***Note***: There is no need to re-summarize in the final decision notice any evidence referenced in the *notice of proposed adverse action.*

A Final Decision Notice may also be sometimes referred to as:

* Post-Determination letter
* Final Action Letter

Job Aid: Summary of the Types of Notification Concerning Adverse Actions

Two types of notifications are used to inform a beneficiary of adverse actions:

1. A ***Notice of Proposed Adverse Action*** provides **due process** and informs a beneficiary of a **proposed** reduction or termination of benefits.
2. A ***Contemporaneous Notice*** informs a beneficiary of a completed action, rather than a proposed one.

Use the table below to determine what type of notice should be used.

| **If the source of information is from...** | **Then use a ...** |
| --- | --- |
| **First Party:** the Veteran/ beneficiary/fiduciary | **Contemporaneous Notice** to tell the beneficiary that the information he/she submitted has affected entitlement and to what extent.  **References**:  For more information about contemporaneous notices, see  [*M21-1, Part I, 2.D*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014074/M21-1,-Part-I,-Chapter-2,-Section-D---Contemporaneous-Notice) |
| a designated power of attorney (POA) originating from a beneficiary, such as: a Veteran/beneficiary signed document | **Contemporaneous Notice** to tell the beneficiary that the information he/she submitted has affected entitlement and to what extent.  [*M21-1, Part I, 2.D*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014074/M21-1,-Part-I,-Chapter-2,-Section-D---Contemporaneous-Notice) |
| a designated POA submitting information not originating from a beneficiary, such as: a POA signed document | **Notice of Proposed Adverse Action** to provide due process, inform the beneficiary of a proposed change, about the information received, and the effect it may have on his/her benefit.  **Reference**:  For more information on general duties of a POA, refer to:  [*M21-1, Part I, 3.A.4.a*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014076/M21-1,-Part-I,-Chapter-3,-Section-A---General-Information-on-Power-of-Attorney-(POA)#4) |
| any other **third party**  **Reference**:  For more information on third party information, see [M21-1, Part I, 2.A.1.d](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014071/M21-1,-Part-I,-Chapter-2,-Section-A---General-Information-on-Due-Process). | **Notice of Proposed Adverse Action** to provide due process, inform the beneficiary of a proposed change, about the information received, and the effect it may have on his/her benefit.  **References**:  For more information on notices of proposed adverse action, refer to:  [*M21-1, Part I, 2.B*](https://vaww.vrm.km.va.gov/system/templates/selfservice/va_kanew/help/agent/locale/en-US/portal/554400000001034/content/554400000014072/M21-1,-Part-I,-Chapter-2,-Section-B---Notice-of-Proposed-Adverse-Action) |

Attachment A: Proposed Reduction Rating Narrative Sample

**DEPARTMENT OF VETERANS AFFAIRS**

**VA File Number**

**Represented by:**

**AMERICAN LEGION**

**Rating Decision**

**December 02, 2019**

**INTRODUCTION**

The records reflect that you are a Veteran of the Vietnam Era. You served in the Navy from March 31, 1966 to April 7, 1968. We have received a copy of your recent VA examination dated April 24, 2019. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

**DECISION**

Evaluation of prostate cancer; status post radical retro pubic prostatectomy, which is currently 100 percent disabling, is proposed to be decreased to 20 percent.

**EVIDENCE**

* Disability Benefit Questionnaire (prostate cancer), VA Nebraska-Western Iowa Health Care System, April 24, 2019
* VAMC (Veterans Affairs Medical Center) treatment records, VA Nebraska-Western Iowa Health Care System, from November 7, 2008 through February 20, 2019

**REASONS FOR DECISION**

**Evaluation of prostate cancer; status post-radical retro pubic prostatectomy currently evaluated as 100 percent disabling.**

The evaluation of prostate cancer; status post radical retro pubic prostatectomy is proposed to be decreased to 20 percent disabling. {38 CFR 3.105(e)}

The evaluation of prostate cancer; status post radical retro pubic prostatectomy has been evaluated at 100 percent disabling since November 5, 2016, based on evidence showing this condition was active and undergoing continued treatment.

The evaluation of 100 percent is proposed to be decreased to 20 percent disabling, based on your VA examination dated October 24, 2019, the examiner noted that your last antineoplastic treatment was in September 09, 2017 and there was no further treatment scheduled and that this condition is currently in remission.

We have assigned a 20 percent evaluation for your prostate cancer; status post radical retro pubic prostatectomy based on:

•Requiring the wearing of absorbent materials which must be changed less than two times per day

Additional symptom(s) include:

•Inactive disease

A higher evaluation of 30 percent is not warranted for malignant neoplasms of the genitourinary system unless the evidence shows:

•Obstructed voiding symptoms including:

•Urinary retention requiring intermittent or continuous catheterization; or,

•Renal dysfunction symptoms including:•Albumin constant or recurring with hyaline and granular casts or red blood cells; or,

•Hypertension at least 10 percent disabling under diagnostic code 7101; or,

•Slight edema; or,

•Transient edema.

Additionally, a higher evaluation of 40 percent is not warranted for malignant neoplasms of the genitourinary system unless the evidence shows:

•Urinary frequency symptoms including:

•Awakening to void five or more times per night; or,

•Daytime voiding interval less than one hour; or,

•Voiding dysfunction symptoms including:

•The wearing of absorbent materials which must be changed two to four times per day is required.

The medical evidence of record did not show that you require regular dialysis, or that this condition precluded more than sedentary activity from one of the following. There was no evidence of persistent edema and albuminuria; or, BUN more than 80mg%; or, creatinine more than 8mg%; or, markedly decreased function of kidney or other organ systems, especially cardiovascular.

Note: Upon notice of this proposal, you will be given 60 days in which to submit evidence of worsening or a more severe disability. If no evidence is received within 60 days, we will make our decision regarding the final reduction. Upon notice of this final decision you will then be given another 60 days prior to the actual reduction taking place. If the proposed action is taken, this will reduce your combined evaluation from 100 percent to 50 percent. However, you will continue to be entitled to special monthly compensation benefits on account of the loss of use of a creative organ.

Laws and Regulations applicable to this issue:

38 CFR §4.115a Ratings of the genitourinary system-dysfunctions

38 CFR §4.115b (7528) Ratings of the genitourinary system-diagnoses

**REFERENCES**

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.

Attachment B: Proposal to Reduce Service-Connected Compensation Sample (Generate in VBMS-Core or PCGL CP1 Pre: 3.105(e) Reduction)

[Please note *inclusion* of due process paragraphs and *VA Form 21-0789* enclosure and exclusion of possible overpayment paragraphs.]

December 02, 2019

In Reply Refer To:

STATION#/SECT/INITIALS

CSS XXX XX XXXX

VETERAN, Joe/Jill

JOE/JILL VETERAN

31 HOPKINS PLZ

BALTIMORE MD 21201

**IMPORTANT — reply needed**

Dear Mr./Ms. Veteran:

We have reviewed medical records concerning your service-connected condition(s) and noted some improvement in your Prostate cancer; status post radical retro pubic prostatectomy. We propose to reduce the prior evaluation of its disabling effect from 100% to 20%. The combined evaluation for all of your service-connected disabilities will drop from 100% to 50%. This proposed action does not affect your entitlement to treatment for service-connected conditions. We propose to reduce your monthly rate of compensation from $3,216.35 to $1,003.74.

**How Did We Make Our Decision?**

We have enclosed a copy of our Rating Decision for your review. It provides a detailed explanation about our proposal, the reason for it, and the evidence considered.

**What Evidence Can You Submit?**

You may submit medical or other evidence to show that we should not make this change. You may submit this evidence in person, through the mail or through your accredited representative. The best type of evidence to submit is a statement from a physician who recently treated or examined you. It should include detailed findings about the condition(s). If we do not receive additional evidence from you within 60 days, we will reduce your evaluation. Reduced payments will begin the first day of the third month following our notice to you of the final decision.

**How to Obtain a Personal Hearing**

If you desire a personal hearing to present evidence or argument on any point in your claim, notify this office and we will arrange a time and place for the hearing. If you want, you may bring witnesses and their testimony will be entered in the record. VA will furnish the hearing room and provide hearing officials. VA cannot pay for any other expenses of the hearing since a personal hearing is held only on your request.

If, within 30 days from the date of this notice, VA receives your hearing request, we will continue payments at the present rate until we have held the hearing and reviewed the testimony. Continuing to receive the current rate of payment until a hearing is conducted could result in the creation of an overpayment, which you must repay. If you request a hearing but wish to minimize any overpayment which could result, you should submit a statement asking that we reduce or suspend your benefits beginning with your next check.

You may request a hearing after 30 days; however, we may continue with our proposed action.

**How to Obtain Representation**

An accredited representative of a Veterans' organization or other service organization recognized by the Secretary of Veterans Affairs may represent you, without charge. An accredited agent or attorney may also represent you. However, under 38 U.S.C. 5904(c), an accredited agent or attorney may only charge you for services performed after the date you file a notice of disagreement. If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action is required on your part.

**If You Have Questions or Need Assistance**

If you have any questions, you may contact us by telephone, e-mail, or letter.

|  |  |
| --- | --- |
| **If you** | **Here is what to do.** |
| Telephone | Call us at 1‑800‑827‑1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711. |
| Use the Internet | Send electronic inquiries through the Internet at https://iris.custhelp.va.gov. |
| Write | VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached *Where to Send Your Written Correspondence*. |

In all cases, be sure to refer to your VA file number XXX XX XXXX.

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

We sent a copy of this letter to your representative, American Legion, whom you can also contact if you have questions or need assistance.

Sincerely yours,

RO Director

VA Regional Office

Enclosure(s): Rating Decision

VA Form 21-0789

Where to Send Your Written Correspondence

cc: AL

Attachment C: Rating Reduction Final Decision Sample

**DEPARTMENT OF VETERANS AFFAIRS**

**VA File Number**

**Rating Decision**

**02/13/2020**

**INTRODUCTION**

The records reflect that you are a Veteran of the Vietnam Era. You served in the Navy from March 31, 1966 to April 7, 1968. The prior VA rating decision dated April 29, 2019, proposed to reduce your evaluation for prostate cancer; status post radical retro pubic prostatectomy. Based upon the evidence listed below, we have made the following decision on your claim.

**DECISION**

Evaluation of prostate cancer; status post radical retro pubic prostatectomy, which is currently evaluated 100 percent disabling, is decreased to 20 percent effective May 1, 2020.

**EVIDENCE**

* Disability Benefit Questionnaire (prostate cancer), VA Nebraska-Western Iowa Health Care System, April 24, 2019
* VAMC (Veterans Affairs Medical Center) treatment records, VA Nebraska-Western Iowa Health Care System, from November 7, 2008 through February 20, 2019
* VA notification letter dated December 02, 2019, with enclosed rating decision dated December 02, 2019, detailing proposed reduction, no additional evidence was received from you regarding this letter

**REASONS FOR DECISION**

**Evaluation of prostate cancer; status post radical retro pubic prostatectomy currently evaluated as 100 percent disabling.**

The evaluation of prostate cancer; status post radical retro pubic prostatectomy is decreased to 20 percent effective May 1, 2020, the first day of the third month following notice of this final decision. (38 CFR 3.105, 38 CFR 3.501)

The rating decision dated December 02, 2019 reviewed the findings of the VA examination dated April 24, 2019 and proposed to reduce the evaluation of this condition from 100 percent to 20 percent disabling. On December 02, 2019 you were notified of this proposal.

The evaluation of prostate cancer; status post radical retro pubic prostatectomy has been evaluated at 100 percent disabling since November 5, 2016, based on evidence showing this condition was active and undergoing continued treatment. However, at your VA examination dated April 24, 2019, the examiner noted that your last antineoplastic treatment was in September 09, 2017 and there was no further treatment scheduled and that this condition is currently in remission.

We have not received any response from you with regards to this proposal, nor have we received any additional evidence which would warrant a change in our previous proposal.

We have assigned a 20 percent evaluation for your prostate cancer; status post radical retro pubic prostatectomy based on:

* Requiring the wearing of absorbent materials which must be changed less than two times per day

Additional symptom(s) include:

* Inactive disease

A higher evaluation of 30 percent is not warranted for malignant neoplasms of the genitourinary system unless the evidence shows:

• Obstructed voiding symptoms including:

* Urinary retention requiring intermittent or continuous catheterization; or,

• Renal dysfunction symptoms including:

* Albumin constant or recurring with hyaline and granular casts or red blood cells; or,
* Hypertension at least 10 percent disabling under diagnostic code 7101; or,
* Slight edema; or,
* • Transient edema.

Additionally, a higher evaluation of 40 percent is not warranted for malignant neoplasms of the genitourinary system unless the evidence shows:

• Urinary frequency symptoms including:

* Awakening to void five of more times per night or,
* Daytime voiding interval less than one hour or,

• Voiding dysfunction symptoms including; or:

* The wearing of absorbent materials which must be changed two to four times per day is required.

The medical evidence of record did not show that you require regular dialysis, or that this condition precluded more than sedentary activity from one of the following. There was no evidence of persistent edema and albuminuria; or, BUN more than 80mg%; or, creatinine more than 8mg%; or, markedly decreased function of kidney or other organ systems, especially cardiovascular.

Note: This decision results in a reduction in your overall combined evaluation from 100 percent to 50 percent disabling. However, you will continue to be entitled to special monthly compensation benefits on account of the loss of use of a creative organ.

Laws and Regulations applicable to this issue:

38 CFR §4.115a Ratings of the genitourinary system-dysfunctions 38 CFR §4.115b (7528) Ratings of the genitourinary system-diagnoses

**REFERENCES:**

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, [www.va.gov.](http://www.va.gov/)

Attachment D: Rating Reduction Final Decision Notice Sample (RADL or PCGL CP2 Post: 3.105(e) Reduction)

[Please note *inclusion* of decision review options paragraphs and *VA Form 20-0998* enclosure and *exclusion* of overpayment paragraph – because effective date of change is in the future.]

February 14, 2020

In Reply Refer To:

STATION#/SECT/INITIALS

CSS XXX XX XXXX

VETERAN, Joe/Jill

JOE/JILL VETERAN

31 HOPKINS PL

BALTIMORE MD 21201

Dear Mr./Ms. Veteran:

In our letter of December 02, 2019, we told you our records noted improvement in your service-connected Prostate cancer; status post radical retro pubic prostatectomy. We have reduced the evaluation of its disabling effect from 100% to 20% effective May 1, 2020.

The combined evaluation for all of your service-connected disabilities drops from 100% to 50%.

This action does not affect your entitlement to treatment for service-connected conditions.

**Your Award Amount and Payment Start Date**

Beginning May 01, 2020, your monthly rate is $1,003.74.

You may submit the evidence outlined in our letter of December 02, 2019 at any time and we will reevaluate your claim.

We have enclosed a copy of our Rating Decision for your review. It provides a detailed explanation about our decision, the evidence considered, and the reasons for our decision.

**What You Should Do If You Disagree With Our Decision**

If you do not agree with our decision, you have one year from the date of this letter to select a review option in order to protect your initial filing date for effective date purposes. You must file your request on the required application form for the review option desired. The table below represents the review options and their respective required application form.

|  |  |
| --- | --- |
| **Review Option** | **Required Application Form** |
| **Supplemental Claim** | VA Form 20-0995, Decision Review Request: Supplemental Claim |
| **Higher-Level Review** | VA Form 20-0996, Decision Review Request: Higher-Level Review |
| **Appeal to the Board of Veterans’ Appeals** | VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement) |

Please note: You may not request a higher-level review of a higher-level review decision issued by VA.

The enclosed VA Form 20-0998, "*Your Rights To Seek Further Review Of Our Decision*", explains your options in greater detail and provides instructions on how to request further review. You may download a copy of any of the required application forms noted above by visiting www.va.gov/vaforms/ or you may contact us by telephone at 1-800-827-1000 and we will mail you any form you need.

You can visit va.gov/decision-reviews to learn more about how the decision review process works.

If you would like to obtain or access evidence used in making this decision, please contact us by telephone, email, or letter as noted below letting us know what you would like to obtain. Some evidence may be obtained online by visiting VA.gov.

**What Is eBenefits?**

eBenefits provides electronic resources in a self-service environment to Servicemembers, Veterans, and their families. Use of these resources often helps us serve you faster! Through the eBenefits website you can:

* Submit claims for benefits and/or upload documents directly to the VA
* Request to add or change your dependents
* Update your contact and direct deposit information and view payment history
* Request a Veterans Service Officer to represent you
* Track the status of your claim or appeal
* Obtain verification of your military service, civil service preference, or VA benefits
* And much more!

Enrolling in eBenefits is easy. Just visit www.eBenefits.va.gov for more information. If you submit a claim in the future, consider filing through eBenefits. Filing electronically, especially if you participate in our fully developed claim program, may result in faster decision than if you submit your claim through the mail.

**If You Have Questions or Need Assistance**

If you have any questions, you may contact us by telephone, e-mail, or letter.

|  |  |
| --- | --- |
| **If you** | **Here is what to do.** |
| Telephone | Call us at 1‑800‑827‑1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal number is 711. |
| Use the Internet | Send electronic inquiries through the Internet at https://iris.custhelp.va.gov. |
| Write | VA now uses a centralized mail system. For all written communications, put your full name and VA file number on the letter. Please mail or fax all written correspondence to the appropriate address listed on the attached *Where to Send Your Written Correspondence*. |

In all cases, be sure to refer to your VA file number XXX XX XXXX.

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

We sent a copy of this letter to your representative, American Legion, whom you can also contact if you have questions or need assistance.

Sincerely yours,

RO Director

VA Regional Office

Enclosure(s): Rating Decision

VA Form 20-0998

Where to Send Your Written Correspondence

cc: AL

Practical Exercise

**Instructions:** Answer the following questions.

1. Provide the Manual reference for Due Process procedures.
2. List five instances when we do NOT have to give Due Process before taking adverse action:
3. A Veteran calls in to report that his spouse passed away on May 13, 2021. The VSR confirmed the Veteran’s identity and properly completed a *VA Form 27-0820 Report of General Information* documenting the call.
   1. Was the information received considered first party or third party information?
   2. Which is the appropriate action to take: provide due process, or remove the spouse as a dependent immediately?
   3. What is the effective date of the action?
   4. Which type of notification is sent to the Veteran: Notice of Proposed Adverse Action, or Contemporaneous Notice?
4. VA received a death certificate from an unknown source showing a Veteran’s spouse died in February of 2021. There is no evidence in the file to show the spouse is currently alive. Attempts to reach the Veteran by telephone have been unsuccessful.
   1. Was the information received considered first party or third party information?
   2. Which type of notification must be sent to the Veteran: Notice of Proposed Adverse Action, or Contemporaneous Notice?
   3. If/When action is taken, will an overpayment be generated?
5. VA sent the Veteran a notice of proposed adverse action dated May 23, 2021 proposing to reduce the evaluation for his left knee condition due to improvement in the condition. A written request for a hearing was received on June 11, 2021. Which items should be added to VBMS to indicate a hearing was requested?
6. VA sent the Veteran a notice of proposed adverse action dated March 3, 2021 proposing to reduce a SC back condition due to improvement in the condition. After over 65 days, there was no response to the notice. A final rating decision is prepared by the rating activity on May 25, 2021. You promulgate the rating decision and prepare the final decision notice on May 26, 2021, the final decision notice is dated May 27, 2021. What is the effective date of the reduction?