

## Part 3: Chapter 2 - Administrative Procedures

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## SUBCHAPTER I. MISCELLANEOUS ADMINISTRATIVE PROCEDURES

### 2.01 ADMINISTRATIVE DECISIONS

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There are times when a Veterans Claims Examiner (VCE) or other appropriate employee will need to prepare an administrative decision to make a final decision regarding a claim. An administrative decision is when the Regional Processing Office (RPO) receives additional evidence to change an original determination made on a claim.

*NOTE: When an administrative decision has been made, that decision is binding, unless reversed on the basis of new evidence or clear and unmistakable error.*

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### 2.02 ERRONEOUS PAYMENTS DUE TO ADMINISTRATIVE ERROR

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**a. Background.** When it is discovered a claimant has been awarded erroneous benefits because of administrative error, an adjustment will be made in accordance with the appropriate VA regulation. In most situations, this means the VCEs should reduce or terminate benefits as of the date of last payment.

**b. Definition. *Administrative errors*** occur when VA pays benefits to a beneficiary in an amount that exceeds his/her entitlement due to actions on the part of VA usually, but not always, due to a misapplication of the law.

Administrative error occurs when a decision made by a VA employee or military agency (i.e. government liability) caused the student to receive benefits to which he/she was not entitled. Administrative error is different from requests for equitable relief discussed later in this chapter. To fully understand when erroneous payments should be considered administrative error, a review of definitions is needed.

Term	Definition
Commission	<b>Commission</b> occurs when the claimant knowingly takes a wrongful action. An example includes a claimant who verifies his attendance monthly as 12 hours when only enrolled for 6 hours.
Omission	<b>Omission</b> occurs when the claimant has not taken an action or has left something out. An Chapter 33 claimant failed to notify VA when he reduced from 12 hours to 6 hours after drc continued to accept education benefits at the full time level.
Administrative Error	<b>Administrative errors</b> occur when VA pays benefits to a beneficiary in an amount <b>due to</b> usually, but not always, due to a misapplication of the law.  Administrative errors include errors in judgement on the part of VA employees.
Fraud	<b>Fraud</b> is wrongful deception intended to result in financial or personal gain. It occurs either commission or omission by the beneficiary.

c. If the payment of erroneous benefits is due to commission or omission, the VCE should adjust the award on a **supplemental end product** and send a decision letter to the claimant.

d. If the payment of erroneous benefits cannot be contributed to **an act of commission or omission on the part of the claimant**, it is administrative error and the procedures herein must be followed.

**NOTE:** Fraud is discussed in greater detail in Part X, Chapter 6. If fraud is suspected, notify the Education Officer immediately for additional instructions.

**e. Pertinent Regulations.** Each education benefit has specific regulations which cover administrative error:

(1) [38 CFR 21.9635](#) (r) (1) and (2) covers 38 USC Chapter 33.

(2) [38 CFR 21.7135\(v\)\(2\)](#). This regulation covers 38 U.S.C. chapter 30.

(3) [38 CFR 21.4135\(p\)\(2\)](#). This regulation covers 38 U.S.C. chapters 32 and 35 and provides for reduction or termination of payment in "an erroneous award due solely to administrative error by VA or error in judgment by VA." An administrative error by DOD (Department of Defense) or DHS (the Department of Homeland Security) cannot be considered under this regulation.

**NOTE:** [38 CFR 21.5130\(d\)](#) which covers 38 U.S.C. chapter 32, cross references [38 CFR 21.4135](#) for the purpose of determining discontinuance dates.

(4) [38 CFR 21.7635\(q\) \(2\)](#). This regulation covers 10 U.S.C. chapter 1606 and provides for the reduction or termination of payment "when an administrative error or error in judgment by VA, DOD, or DOT is the sole cause of an erroneous award." Consideration of administrative error on the part of VA, DOD, or DOT is allowed by specific reference. Also, the error must have been the sole cause of the overpayment.

(5) 38 USC 5112(b) states: (in regard to effective dates of reductions and discontinuances)

- (9) by reason of an **erroneous** award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, shall be the effective date of the award; and
- (10) by reason of an **erroneous** award based solely on administrative error or error in judgment shall be the date of last payment.

**f. Examples When Administrative Error Applies.** When benefits are erroneously paid because of an administrative error by VA or an error in judgment by VA (or by DOD or DHS), the administrative error rule will apply. The law supports if VA enters an erroneous award based on error in judgment, the proper termination date is DLP and should be considered Administrative error. The preponderance of evidence that the claimant "should have known" is lacking. VA created the error. VA is responsible.

This list is **not** an all-inclusive but should serve as a guide

- (1) VA awards benefits and then realizes the student was not eligible for those benefits based on erroneous information supplied by DOD or DHS. An example would include an incorrect character of service supplied by DOD.
- (2) The claimant was in a service academy and VA counted that service toward eligibility and awarded benefits. Typically this service should have been excluded from an eligibility determination. (Exceptions are granted for certain members of the United States Coast Guard Academy, see Procedural Advisory: Entry of an Excluded Period of Service for Coast Guard Commissioning Following Service Academy Graduation in the LTS dated August 17, 2015).
- (3) The student received benefits in excess of 48 months (or 81 months as appropriate). This is generally caused when a VCE fails to input prior VA training under any other education benefit.
- (4) A kicker paid erroneously to a student who was not entitled. An example of this is DOD informed VA of the kicker or the VCE input the wrong kicker code. Both examples are considered administrative error, whether notification to the claimant has occurred.
- (5) A VCE included a period of non-qualifying service in the original eligibility determination. An example of non-qualifying service is including Initial Active Duty Training (IADT) instead of excluding it.
- (6) The automated computer processing involving a change of rates resulting in payment of more than the proper amount.
  - a. Incorrect Cost-of-Living-Adjustment (COLA) increase in a system such as BDN or LTS pays the incorrect amount.
  - b. A geographic location change for an educational institution that results in an incorrect Zip Code paid since the inception of a claim. The result may yield either a higher or lower Monthly Housing Allowance (MHA) rate in LTS.
- (7) VA awards transferred benefits to a child and realizes later that the child is a Ward or Foster Child and not eligible for benefits.

**EXCEPTION:** If, as a result of administrative error, the claimant is willing to return all or a part of the amount considered administrative error, the VCE should establish a debt in the appropriate system and allow the repayment. However, the full amount of administrative error needs to be included on the spreadsheet and/or a decision must be completed as explained below.

**g. Examples When Administrative Error Does Not Apply.** Examples where administrative error does not apply include:

- (1) The student fails to notify VA of a change in training time including reductions and terminations.
- (2) The student fails to notify VA when a spouse remarries and he or she loses eligibility for Chapter 33 Fry Scholarship or Chapter 35.

(3) The student fails to notify VA he/she has returned to Active Duty Status and accepts payment as a Veteran.

(4) When a school is potentially liable for any overpayment. This is commonly referred to as Potential School Liability. Refer to [Part 1, Chapter 7](#).

**h. Administrative Error Procedures.** When it is discovered an administrative error has occurred, the award will be reduced or terminated effective DLP (Date of Last Payment) in accordance with one of the regulations previously cited. The VCE should **flash** the TIMS folder to ensure the administrative error is noticed and no additional payments are released regarding this error. Awards prepared as a result administrative error must be second signed by a Senior Veterans Claims Examiner or higher level of authority.

For non-chapter 33 benefits, VCEs must process an amended award using End Reason Code 39 to update the master record. VCEs should do this whether the master record is in active status or NOT.

For Chapter 33 benefits, when eligibility has changed but the claimant remains entitled to benefits (i.e. change in percentage), LTS will made the adjustments from inception anytime there is a change in service data. A work product should be created with the necessary adjustment with the "Authorize with No Payments" option selected. This allows LTS to calculate the total amount of the administrative error without causing an overpayment against the claimant. Subsequent awards would then calculate at the correct eligibility level.

In Chapter 33 cases in which the claimant is not eligible, to avoid future awards to be processed, LTS should be terminated from inception with the "Authorize with No Payments" option selected. This allows LTS to calculate the total amount of the administrative error without causing any overpayments against the claimant.

**i. Requirements for Decisions and Tracking.** All administrative error determinations must be logged on the spreadsheet the Quality Assurance (QA) team has provided. The spreadsheet serves as the internal control. Requirements for a written decisions and approval requirement for written decision will be as follows:

#### **Chapter 1606, 1607, 32**

If the amount of the administrative error is less than \$15,000, no written decision required. Error must be logged on QA spreadsheet. Approval of the administrative error must be done by no lower than a Section Chief via a note in the TIMS folder. The note should include the period covered (beginning and end dates) for the administrative error, approved amount of the administrative error and the reason for the administrative error.

If the amount of the administrative error is equal to or greater than \$15,000 but less than \$50,000, a written decision is required (see Figure 2.01). Concurrence of the administrative error must be done by Section Chief and Education Officer with final approval by the Assistant Director.

If the amount of the administrative decision is equal to or greater than \$50,000, a written decision is required. In this situation, the decision will be prepared by a VCE, recommended by a Section Chief, concurred by the Education Officer and forwarded to Education Service for approval by the Director of Education Service, or his designee. These administrative decisions should be forwarded in an email message to the Quality Assurance Team (222B).

#### **Chapter 30, 33 & 35**

If the amount of the administrative error is less than \$20,000, no written decision required. Error must be logged on QA spreadsheet. Approval of the administrative error may be done by no lower than a Section Chief via a note in the TIMS folder. The note should include the period covered (beginning and end dates) for the

administrative error, approved amount of the administrative error and the reason for the administrative error.

If the amount of the administrative error is equal to or greater than \$20,000 but less than \$50,000, a written decision is required (see Figure 2.01). Concurrence of the administrative error must be done by Section Chief and Education Officer with final approval by the Assistant Director.

If the amount of the administrative decision is equal to or greater than \$50,000; a written decision is required. In this situation, the decision will be prepared by a VCE, recommended by a Section Chief, concurred by the Education Officer and forwarded to Education Service for approval by the Director of Education Service, or his designee. These administrative decisions should be forwarded in an email message to the Quality Assurance Team (222B).

**EXCEPTION:** While DOD error is considered government liability, if the RPO can confirm the error was **solely** the fault of DOD and not VA, the decision template will not have to be completed or submitted no matter the amount of the administrative error. The administrative award action must be completed and the amount must be submitted on the spreadsheet by a Section Chief or higher level of management along with the appropriate notes in the TIMS folder. All aspects of this administrative error must be followed with the exception of the completion of the decision template.

**j. Filing Copy of Administrative Decision.** A signed copy of the written decision will be filed in the claimant's TIMS folder. There is no longer a requirement for a copy of the administrative decision to be retained in the front office for a year. The decision regarding who updates the spreadsheet may be determined by local RPO. However, the RPO training coordinator and quality team need to routinely review all administrative error decisions and provide timely appropriate training when trends emerge.

**k. Award Signatures.** All administrative error decisions are required to have two levels of approval on the prepared award. All of these awards must have a second signature by a Senior VCE or higher level of authority. The authorizer of the award will ensure a copy of the award is placed in the claimant's TIMS folder. A copy of the letter to the claimant regarding the administrative error decision will also be captured into TIMS.

**l. Charging Entitlement.** For the purposes of administrative error, a claimant should not have entitlement charged when administrative error has been determined.

(1) For Non-Chapter 33 benefits, on the M23 screen, the VCE should use the CORR command and select the Cum Restore field. Care should be taken to ensure only the entitlement used for the period of the administrative error decision is restored.

(2) For Chapter 33 benefits, as stated previously, when the VCE selects "Authorize with No Payment" option, this would allow the entitlement to be restored.

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## 2.03 ADMINISTRATIVE PROVISIONS OF THE CFR (CODE OF FEDERAL REGULATIONS)

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This paragraph cross-references or summarizes certain "administrative" provisions of the CFR.

**a. Delegation of Authority.** See [38 CFR 21.4001\(a\)](#).

**b. Finality of Decisions.** See [38 CFR 21.4002](#).

**c. Revision of Decisions.** Existing decisions on education claims may be reversed on the same factual basis only if one of the five conditions listed in [38 CFR 21.4003](#) applies:

(1) Clear and Unmistakable Error ([38 CFR 3.105\(a\)](#)). The RPO may reverse a previous decision at any time if clear and unmistakable error exists. Each reversal made on the basis of clear and

unmistakable error will require an administrative decision. The decision must cite the appropriate regulation and must be certified by the EO or his or her designee to the effect that the entire record has been reviewed and a clear and unmistakable error has been found to exist.

*NOTE: "Decision" refers to any issue which has been adjudicated (e.g., eligibility, training time, effective dates, etc.) It is improper to reverse a previous decision on the same factual basis without following the procedure for clear and unmistakable error. However, a decision may be reversed for one of the reasons in subparagraphs (2) through (5) below.*

(2) Difference of Opinion (38 CFR 3.105(b)). Only the Director of Education Service may reverse an existing decision based on a difference of opinion. If the RPO believes an existing decision may be wrong (but clear and unmistakable error does not exist), the EO may refer the case to Education Service for review under this regulation.

(3) Character of Discharge (38 CFR 3.105(c)). An adjudicative decision as to character of discharge may result in reversal of a prior eligibility determination in an Education case.

(4) Severance of Service Connection (38 CFR 3.105(d)). This applies to chapter 35 eligibility determinations only.

(5) Veteran No Longer Permanently and Totally Disabled (38 CFR 21.4135). This applies to chapter 35 eligibility determinations only.

#### **d. Conflict of Interest**

(1) 38 CFR 21.4005(c) prohibits a VA or an SAA officer or employee from having an interest (e.g., receipt of wages, salary, dividends, profits, gratuities, or services) in any school operated for profit when that school has currently enrolled students who are receiving VA benefits.

(a) VA will immediately dismiss any of its employees from its current office upon discovery of a conflict of interest. 38 CFR 21.4005

(b) VA may discontinue payments to an SAA, and may disapprove courses at the affected school, until such time as the SAA terminates the employment of the individual with an interest in the school.

(2) VA may waive application of this regulation if the evidence shows the relationship between a VA or an SAA employee or officer and a school would not be detrimental to the U.S. Government or to eligible Veterans and reservists. (Waiver requests must be referred to Education Service.)

**e. False or Misleading Statements.** See 38 CFR 21.4006.

**f. Forfeiture.** See 38 CFR 21.4007.

**g. Prevention of Overpayments.** See 38 CFR 21.4008.

**h. Overpayments — Waiver or Recovery.** See 38 CFR 21.4009. Also, see [part I, chapter 7](#), for school liability procedures.

**i. Fraud.** See 38 CFR 3.901 Also, see [M21-1, part IV](#), Also, see [Part X, 6.06](#).

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## **2.04 APPEALS**

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Education Service has determined the following procedures for the use of appeals within the RPOs. Additional guidance may be found in [M21-MR, Part I, chapter 5](#). When questions arise, RPOs should contact Education Service for additional guidance.

All authorization decisions in education matters, including a denial of a claim in which a course or a program of education is not approved, are subject to appeal.

a. **Jurisdiction and Exchanges of Information.** The RPO with jurisdiction over the claim will handle the appeal. In some instances, it may be necessary for the RPO handling the appeal to request information from another RPO. Follow local RPO procedures in transferring TIMS folders to and from RPOs.

**b. Notice of Disagreement (NOD) Received**

(1) A claimant has one year from the date VA mailed the decision to the claimant to submit a Notice of Disagreement

(2) A NOD may be submitted on any form\* but must be received within the one year limit by the claimant or his/her acknowledged representative. If a NOD is received after the one year time limit, be sure to refer to [Part 3, Chapter 3](#) regarding extensions to time limits for good cause. The VCE should deny the acceptance of the NOD and inform the claimant. Be sure to enclose VA Form 4107 since this is an appealable issue. The VCE is authorized to PCLR a supplemental end product for this decision.

\*VA Form 21-0958 is acceptable if the request is for an Education appeal. This form however is not required for a claimant to file a Notice of Disagreement for any Education issue.

(3) If the NOD is received timely, the VCE should review the request and ensure the prior decision was correct or if additional development or action is needed.

- a. If the prior decision was incorrect, the VCE should immediately correct the award and provide a new decision letter. The claimant will be entitled to new appellate rights since a new decision has been completed. The letter to the claimant should explain VA considered his appeal in making this new decision. This is appropriately called a full grant of benefits based on appeal.
- b. If the prior decision was correct, the VCE must prepare a Statement of the Case.

**c. Statement of the Case Preparation.** VCEs should follow SOC Preparation as provided in [Figure 2.02](#). For all Education NODs, SOC requires two signatures of approval. If a VCE prepares the SOC, a Senior VCE or higher official must approve the SOC. If a Senior VCE prepares the SOC, another Senior VCE or higher official must approve the SOC.

**d. Control of Notice of Disagreement.** There are 3 management tools which are used to control the disposition of the Notice of Disagreement.

1. TIMS is used as the claimant's folder. The NOD, as a claim token will remain open until the SOC has been released from the RPO and the appropriate End Product has been cleared. At that time, finishing the claim token is appropriate.

2. In BDN, EPC 270 is the proper BDN control for all Notice of Disagreement issues no matter which benefit. To ensure the RPO and the preparer of the SOC receive appropriate credit for this action, one 270 (or 272) may be PCLR'd once the SOC is released from the station. If the SOC is second signed by a Senior VCE or a person in a production status, a 400 end product worth the weight of the 270 end product at that station is also appropriate.

3. VACOLS. The NOD and SOC must be entered into VACOLS for tracking purposes. At this time, the RPO may determine who is responsible for entering this information. The important factor is it must be entered timely and accurately. All VCEs and Senior VCEs, plus management staff, who process and complete NODs and appellate issues, need access to VACOLS. RPO management must ensure the proper employees have this access.

**e. VA Form 9, Appeal to Board of Veterans' Appeals.**

1. An appellant and/or his/her representative must file a substantive appeal in response to a SOC in order to complete the appeal. [VA Form 9, Appeal to Board of Veterans' Appeals](#) is the proper form however, written correspondence containing the necessary information is also acceptable.

2. The substantive appeal *must* include the specific issue(s) appealed, if more than one issue was addressed by the SOC or Supplemental Statements of the Case (SSOCs), and the specific

argument(s) relating to errors made by the agency of original jurisdiction (AOJ) in reaching the decision(s) being appealed, including, but not limited to errors of fact, or errors of law.

3. A substantive appeal must be filed before the later of the following dates:

- The last day of the one year period from the date VA mailed the decision notice of the issue being appealed, or
- 60-days from the date VA mailed the SOC or SSOC.

**Important:** After issuing an SOC or SSOC, VA must provide a claimant with a 60-day period in which to file a substantive appeal. This applies even when the one year appeal period will expire before the 60-day period ends.

**Example:** A claimant submits additional evidence without a substantive appeal on the last day of the one-year appeal period. This evidence requires VA to prepare an SSOC. The time limit for the claimant to file a substantive appeal shall end no sooner than 60-days after the SSOC is mailed to the claimant.

- a. If VA Form 9 is received, and claimant requests a hearing refer to [Part 1, Chapter 4](#).
- b. If VA Form 9 is received and claimant does not request a hearing, review for new evidence. If new evidence is provided, a SSOC is required. Follow the procedures previously provided of the SOC but only provide references regarding the new evidence. Also follow the appropriate control for the SSOC to include clearing the appropriate EPC and updating VACOLS. Once the SSOC is released from the RPO, the preparer is entitled to a second 270 EPC.
- c. If VA Form 9 is received, the claimant does not request hearing, and there is no new evidence provided for his claim, the claim should be certified to go to the Board of Veteran Appeals (see next paragraph).
- d. If VA Form 9 is received after the expiration of the time limit, close out the VACOLS record. VCE should take no further action on the appeal but must inform the appellant and his/her representative, if applicable, that the substantive appeal (VA Form 9) was not timely filed, the prior decision on the contested issue(s) is final, but should enclose VA Form 4107 with this notification as this denial is appealable. VCE is entitled to a supplemental end product for this decision.

#### **f. Certifying the Appeal to Board of Veterans Appeals (BVA)**

1. The Education Officer, or his/her designee (GS-12 or above), is responsible for reviewing all appeals, and certifying the appeal is ready for review by BVA. Proper review of the case includes verification that all issues on appeal have been decided and discussed, and appropriate development has been initiated and properly conducted. If the claimant has a representative, the representative should be issued a VA Form 646 for an additional 10 day comment time. Refer to M21-1 for additional information on this form and process.
2. Certify the appeal after obtaining (or exhausting all efforts to obtain) all available and relevant evidence and making a decision on the issue(s), as required.
3. The appropriate RPO employee must update VACOLS for receipt of a substantive appeal (VA Form 9) and complete the Appeal Certification to BVA Worksheet for paperless appeals. ([Figure 2.04](#))
4. When an education record has been certified as ready for transfer to BVA, a temporary paper claims folder must be prepared. Follow local RPO policy regarding the creation of this folder. This folder must have a completed copy of VA Form 8 (Certification of Appeal) and all other pertinent documents that may be needed to adjudicate any new or supplemental claims received while the claims folder is temporarily transferred to BVA. Before the folder is transferred to BVA, the Appeals Checklist must be completed and filed. ([Figure 2.03](#))

#### **g. BVA Remands**

The BVA may remand the appeal. The preparer of the SOC (if at all possible) will be issued the remand and must complete the remand actions. Often this is additional development as BVA has determined something is missing from the folder. Follow development procedures for Education



benefits as described in [Part 3, Chapter 3](#). Be sure to apply Duty to Assist procedures as appropriate.

Once the issue for which the appeal was remanded, has been resolved, the preparer of the original SOC should prepare a SSOC to claimant. TIMS control should be established for 60 days for control of the SSOC before returning the entire temporary education folder back to BVA. Ensure the TIMS folder has been appropriately updated along with VACOLS. At the time, the folder is returned to BVA, all end products regarding this claim should be completed in BDN.

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## SUBCHAPTER II. REFERRALS TO CENTRAL OFFICE

### 2.05 CENTRAL OFFICE REVIEWS

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#### a. Advisory Opinions.

Advisory opinions provide a source of consistent, reasonable guidance and advice for handling complex or unusual cases. A RPO should request an advisory opinion from Education Service **before** making a formal decision on the point in question. An advisory opinion request is appropriate if doubts regarding the correct application of authorization or other principles or policies exist. An advisory opinion request is appropriate for issues such as school approvals, measurement, compliance, etc. A request for an advisory opinion may be initiated by or with the concurrence of the EO or the CELO.

(1) The request for an advisory opinion must contain the EO's or the CELO's recommendations or comments on the question(s) presented. In addition, the request should contain:

- (a) Background information on the type of claim involved, service data, and other pertinent information.
- (b) Facts relevant to the issue.
- (c) Discussion of the facts, law, regulations, and procedures involved.
- (d) Questions at issue stated clearly and addressing only one issue. If more than one issue is involved, each question should be numbered.

(2) The Advisory Opinion should be sent to [Policy Development and Regulations Team \(225B\)](#) for proper control and distribution regarding the issue. Ensure all necessary information or sources of information accompany the request. Compliance survey reports, approval files, etc. will be scanned or uploaded as appropriate.

#### b. Administrative Reviews

(1) General. An administrative review is a request for reconsideration by Education Service of a *decision already made*. An administrative review provides a binding directive to the RPO. An administrative review will only be issued when the decision is of more than a local significance. A request for an administrative review may come from any internal or external source. These include the claimant, the RPO, the school or training establishment, the SAA, service organizations, recognized attorneys or agents and other accredited representatives, or Education Service.

(2) VA Requests. When a request for an administrative review originates at an RPO, the RPO should prepare a letter to the Director, Education Service and route it through the [Policy and Regulations mailbox \(225B\)](#). This letter should contain a comprehensive and detailed discussion on what the request is based. Also, the letter should include the recommendation or comments of the EO or CELO on the issue(s) presented. If the request involves an approval for a school or a

course, the complete record, including the approval folder and the compliance survey file, should accompany the letter.

(3) Non-VA Requests. Non-VA requests must contain a full statement of the reasons for an administrative review. The statement should identify the regulations, instructions, precedents, etc., which have not been properly applied or have been misinterpreted. These non-VA sources should address their requests for administrative review to the Director, Education Service (22). If a non-VA source erroneously addresses a request to an RPO, the RPO should forward it to Education Service with a brief cover letter. The RPO should advise the requesting party of the referral.

Education Service may reject a request for administrative review which is inconsistent with the provisions above or merely affords an additional intermediate step in the appeals process.

(4) Actions taken by Education Service. The decision provided by Education Service will be sent to the RPO Director for written notice to the claimant or the school, or sent directly to the service organization. A copy of the decision and a copy of the notice will be available for review for all four RPOs and a copy filed in the claimant's folder. If the decision issued by Education Service, changes the award of the claimant, the RPO must ensure the claimant's record is properly updated.

c. Difference of Opinion. An RPO may request an administrative determination on a difference of opinion under [38 CFR 3.105\(b\)](#) when the EO or the CELO is of the opinion a reversal of a previous decision is based on a difference of opinion rather than on a finding of clear and unmistakable error.

(1) When submitting a request, the EO or CELO should prepare a memorandum to the Director, Education Service (through the [Policy and Regulations mailbox- 225B](#)), furnishing a complete and comprehensive statement of facts in the case. The memorandum should also include a detailed explanation supporting the conclusion that a revision or amendment of the previous decision is necessary.

(2) Pending resolution of the issue, take no action on the issue in question. When a final decision is received from Education Service, take appropriate action.

**d. Required CO Referrals.** Education Service must be notified or made aware of the following issues. This is not an all-inclusive list:

(1) Notification of a Waiver of Actions Based on Conflict of Interest. Refer to [paragraph 2.03d](#).

(2) School Liability Appeals. See [part I, chapter 7](#) and [38 CFR 21.4009\(h\)](#).

(3) School Closings. Refer to [38 CFR 21.4138\(f\)\(2\)](#).

(4) Approval of Courses Offered by an Agency of the Federal Government. Refer to [38 CFR 21.4150\(f\)](#).

(5) Waiver of the 85-15 Percent Requirement. Refer to [38 CFR 21.4201\(h\)](#).

(6) Review of Decisions by the Committee on Educational Allowances. Refer to [part I, chapter 8, subchapter II](#) and [38 CFR 21.4207](#).

(7) [Waiver of Refund Policy (Non-Accredited Courses)]. Refer to [38 CFR 21.4255\(b\)\(2\)](#).

(8) [Approval of Courses in Foreign Countries. See [38 CFR 21.4260](#).]

(9) [Equitable Relief. See [paragraph 2.06](#) below.

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## 2.06 EQUITABLE RELIEF

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VA may grant equitable relief to a claimant if VA benefits were not provided because of an error (NOT an administrative error) by an employee of the Federal government (38 U.S.C. 503(a)) or for a loss suffered as a result of an erroneous determination by VA (38 U.S.C. 503(b)). The authority to grant or deny equitable relief because of such error rests solely with the Secretary of Veterans Affairs. The Secretary will determine what is equitable based on the facts in the individual case. Equitable relief is a final action and no appellate rights are granted.

a. Equitable relief is a remedy for a claimant resulting from mistakes made in applying rules and regulations that either

- Deprived the claimant of benefits, or
- Caused the claimant to suffer a loss because he she/relies on an erroneous decision.

b. The following two provisions describe the authority of the Secretary of Veterans Affairs to provide equitable relief:

- 38 U.S.C. 503(a) gives the Secretary authority to provide whatever relief is determined equitable if a claimant is denied VA benefits because of an administrative error by the Federal Government or any of its employees, and
- 38 U.S.C. 503(b) gives the Secretary authority to provide equitable relief if a claimant suffered a loss as a result of relying on an erroneous determination by VA.

c. The authority to grant or deny equitable relief rests solely with the Secretary of Veterans Affairs. The Secretary will determine what is equitable based on the facts in the individual case. This decision is final and not subject to appeal to the Board of Veterans Appeals (BVA), the Court of Appeals for Veterans Claims, or any other body.

**NOTE:** RPOs should not accept equitable relief claims from individuals who have an appeal pending or are within the one year window to submit an appeal. If a request for equitable relief is received while an appeal is pending, the VCE must notify the individual that they must wait for the outcome of their appeal to submit the request for equitable relief. If the individual is within the one year window for submitting an appeal, they should be notified that they will lose their appeal rights by moving forward with the equitable relief request. VA will notify an individual that a request to withdraw their appeal must be in writing along with a statement to continue their equitable relief claim.

#### **d. Request for Equitable Relief**

(1) A claim submitted to Education Service for consideration of equitable relief must meet one of the following conditions:

- (a) A request for relief is made by or on behalf of the claimant; or
- (b) Based on the belief that an error occurred, the RPO may submit a claim for equitable relief.

(2) When a claimant specifically requests equitable relief, the claim must be submitted to Education Service for a decision, even if the evidence of record (after proper development) shows there would be an unfavorable decision.

**e. Development for Equitable Relief.** The RPO of jurisdiction must properly and completely develop the claim before submitting it to Education Service, regardless of who initiates the request for consideration of equitable relief no later than 30 days from the date of the initial request from the claimant.

**f. Documentation.** It is important the decision to submit a claim for equitable relief is based on as much complete documentation as possible. This will aid the Secretary of VA in making a proper decision. Education Service will return the case to the RPO if development is not complete. This will delay the decision to the Veteran.

1. A claimant must substantiate the contention he or she acted on an incorrect decision made by a VA employee. When developing the facts of such a case, the RPO should follow the procedures outlined below:

- a. Request the claimant to make a statement indicating the following to the best of his/her recollection.
- The claimant must explain what decisions he/she made based on the erroneous decision that caused the loss
  - Anything done to mitigate the loss on the claimant's end.
- b. If financial loss is suffered, the claimant must furnish a statement listing obligated expenses incurred because the claimant relied on the erroneous determination. This should reflect the financial loss related only to his or her educational needs. The claimant must specify the purpose for each of the claimed amounts. This can include, but is not limited to tuition, fees, books, etc. The claimant must also specify the amounts or extent of the financial loss and the period of time in which the amounts were expended.
- c. Additionally, the evidence should include a statement of the costs of tuition and fees charged by the school and a copy of the school's refund policy. The school must verify the actual dates of enrollment. In flight and correspondence cases, the school should include flight certifications or certifications of lessons completed for the period(s) involved.
2. Upon receipt of an equitable relief request and completion of necessary development, the RPO will prepare a cover letter which contains the following:

- Date the request was received
- Facts and circumstances surrounding the alleged error (in chronological order)
- Monetary amount requested by claimant and if applicable, provide a brief summary of benefits potentially due as a result of error.
- Recommendation from the RPO of either approval or denial of request
- Explanation if RPO failed to forward to CO within 30 days of request from Veteran

In addition, the letter must include an executive summary. An example of an executive summary is in Attachment B. Both cover letter and executive summary should be captured in the TIMS folder. The executive summary should be limited to one or two paragraphs to give a brief history of the claim in question.

**Note:** *When determining if a request should be recommended for approval/denial, consideration should be given not just to the fact that an error was committed, but when the claimant was notified of the error and his/her ability to negate/mitigate any potential financial loss (i.e. if the term already started, what is the school's refund policy, etc.). Also, please capture a copy of any calculation worksheets used to compute potential benefits due.*

**g. Submission to Education Service.** When development is completed, the claim will be submitted from the RPO Director and then to the Director of Education Service through the [Quality Assurance Team \(222B\)](#).

The RPO should send an e-mail (attach cover letter & executive summary) to the [Quality Assurance Team \(VAVBAWAS/CO/222B\)](#). The subject line should state "Equitable Relief and the Veteran's initials". The QA team will respond acknowledging receipt of the request. The RPO should ensure the claim token is placed in await mail for 10 days. When the RPO receives an e-mail from the QA team, acknowledging receipt of the Equitable Relief claim, the RPO should put a message in a FLASH and close the claim token.

A future end product should be established 6 months from the date the ER was accepted by the QA team. The end product should be a version of a supplemental end product of the benefit in question (i.e. 352, 212, 252, etc.) If no response is received within 10 days, the RPO should send a follow-up e-mail to the [Quality Assurance Team \(VAVBAWAS/CO/222B\)](#).

Once received in Education Service, the Quality Assurance Team will review and prepare the package for higher level concurrence no later than 10 days from the date received by the RPO.

The Director, Education Service will then review and forward the package to the Office of the Deputy Under Secretary for Economic Opportunity within 7 days who then forwards it to the

Office of the Under Secretary for Benefits (USB). After the review at the USB's office is complete, the packet is forwarded to VA's Office of General Counsel for legal review, and then forwarded to the Office of the Secretary of Veterans Affairs for final signature.

Equitable Relief decision notifications will be e-mailed to the RPO Director with a courtesy copy to the RPO Education Division's mailbox. Once the RPO takes appropriate action, a response should be sent back to the [222B](#) mailbox through the RPO Director's office.

If the RPO does not receive a decision on equitable relief request within 6 months of submission, the RPO should send a status request to [VAVBAWAS/CO/222B](#) with subject line Equitable Relief Status & the Veteran's initials. Remember the control for this is the end product in BDN.

It is the RPO's responsibility to provide a response regarding the final decision of the Equitable Relief to the claimant. In the letter, it is imperative to mention the decision is not subject to appellate review.

**h. Appeals on Equitable Relief Decisions.** The Court of Veterans Appeals confirmed in *Darrow v. Derwinski*, the Board of Veterans Appeals lacks jurisdiction to review equitable relief decisions. There are no statutory or regulatory provisions for appellate review of equitable relief decisions.

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## ATTACHMENT A – Equitable Relief Template (Letterhead)

Date

In Reply Refer To:

3XX/22/  
Director, Education Service (223B)  
Veterans Benefits Administration  
Washington, DC 20420

CSS XXX XX 1234  
VETERAN, O S

Subject: Equitable Relief – **<Insert Client's Name>**

A claim for equitable relief has been filed by **<Insert Client's Name>**, CSS XXX XX 6540. The equitable relief claim was received in VA on **< insert date>**.

The client alleges relief is warranted because **< insert a brief synopsis of why the client feels he/she is entitled to equitable relief>**

**(Example:**

*Client suffered a financial loss in the amount of \$13,917.43 (or whatever the exact amount is) because of an erroneous notification of entitlement.)*

**Fact and Circumstances**

In chronological order list the facts and circumstances relative to the case

**Example:**

1. On September 21, 2009, V1990, Application for VA Education Benefits, was received. Mr. Veteran applied for Chapter 33. On December 2, 2009, VA sent a Certificate of Eligibility notifying Mr. Veteran that he was entitled to 24 months and 18 days at 100% of the benefits payable under the Post-9/11 GI Bill.
2. On April 19, 2013, an Application for Family Member to Use Transferred Benefits, VA Form VE 1990, was received for client's child, Dependent Stephens, to use Post 9/11 GI Bill Benefits (Chapter 33). Upon further review of this claim, it was determined that the previous determination that Mr. Veteran was entitled to 24 months and 18 days at 100% of the benefits payable under the Post 9/11 GI Bill was in error. Mr. Veteran was in fact not entitled under the Post-9/11 GI Bill. Mr. Veteran previously used 37 months and 12 days under Montgomery GI Bill (Chapter 30) and 12 months under Montgomery GI Bill-

*Selected Reserves (Chapter 1606). A claimant may only receive a total of 48 months and 0 days of full-time benefits for any combination of benefit programs. Since Mr. Veteran had already used over 48 months of education benefits, he was not entitled to benefits under Post 9/11 GI Bill.*

3. *On May 7, 2013, a denial letter was sent to the Veteran's dependent. On May 21, 2013, an enrollment certification was received from George Mason University for enrollment in 12 credits for the term May 20, 2013 through August 8, 2013.) [Input reason or cause for the original decision in the same paragraph when the new informational letter was sent.]*

**(Monetary Amount Requested)**

4. *The claimant has requested relief because she suffered financial loss in the amount of \$13,917.43 because of erroneous notification of eligibility. The requested loss amount includes \$8,084.15 which is the amount of Tuition and Fees owed to George Mason University; \$213.28 which is reimbursement for her books; and \$5,620.00 for housing based on monthly housing allowance of \$1,405.00 for May 2013 through August 2013.*

**Relief Recommended:** We recommend a grant of relief of \$13,917.43, under 38 U.S.C. §503(b). This amount represents the difference between what VA would have paid the Dependent with entitled benefits at the 100-percent benefit level under the Post-9/11 GI Bill.

*If Mrs./Ms. Dependent was entitled to and authorized payments at the 100% benefit level for the term, May 20, 2013 through August 8, 2013, she would have received the following payments:*

*Tuition and Fees: \$ \_\_\_\_\_  
Books and Supplies: \$ \_\_\_\_\_  
Housing for period x/x/xx to x/x/xx: \$ \_\_\_\_\_ (monthly rate = \$ \_\_\_\_\_)*

*Total = \$ \_\_\_\_\_*

**Recommendation**

**Example:**

*Based upon facts and evidence of record, the RPO recommends denial of this request. The veteran and his dependent were notified prior to the start of the term of the erroneous eligibility.*

**To include on the Executive Summary only**

**Prevention of Future Occurrences**

**Example:**

*In order to prevent future occurrences, the Veterans Claims Examiner (VCE) responsible for the error has received refresher training regarding Chapter 30 eligibility requirements. Training was accomplished on July 14, 2014.*

Sincerely

RPO Director

**ATTACHMENT B- Executive Summary** (required for all equitable relief submissions. Try to limit to one or two paragraphs)

Department of Veterans Affairs (VA) incorrectly notified Mr. Veteran that he was eligible for 36 months of benefits under the Post-9/11 GI Bill. Mr. Veteran was no longer eligible to Post-9/11 GI Bill benefits due to receiving 49 months and 12 days of prior education benefits under Chapter 30 and 1606. Individuals eligible for more than one education benefit are limited to a maximum of 48 months of benefits by law. Although Mr. Veteran indicated on his application that he had previously received education benefits, the Veteran Claims Examiner (VCE) failed to consider this fact when awarding Post-9/11 GI Bill benefits. Prior to receipt of the

corrected notice of Post-9/11 GI Bill eligibility from VA, the Veteran's dependent suffered a financial loss due to reliance on the incorrect determination regarding his training program.

**FIGURE 2.01 Admin Error Decision Template**

**Administrative Error Decision**

RPO: Buffalo

CSS: xxx-xx-xxxx

Name: John Q Reservist

**ISSUE:** Is the overpayment of VA education benefits due to an administrative error?

**EVIDENCE:** *(Use all evidence which made the administrative error decision. All evidence must also be captured into the claimant's TIMS folder)*

**DECISION:** Erroneous payment in the amount of \$XXX.XX was due to administrative error. *(state total dollar amount of overpayment. Amount does not need to be broken down here.)* The provisions of *(list the admin error reg that applies here)* apply.

**REASONS AND BASES:** State the reasons and bases for the decision in clear, simple, easy-to-understand terms. Fully describe the reasoning which led to the decision. Generally, identify and paraphrase pertinent information from the available evidence instead of quoting from it at length. Be sure to include what happened and how the overpayment was created, the period of time the veteran was overpaid, and the amounts that add up to the whole overpayment ( i.e break down the overpayment and specify the amount for tuition & fees, books, housing kicker, etc).

**The applicable laws in this case follow: (insert admin error reg here based on benefit type along with all other pertinent regs)**

**21.9635 - Discontinuance dates.**

The effective date of a reduction or discontinuance of educational assistance will be as stated in this section. If more than one type of reduction or discontinuance is involved, VA will reduce or discontinue educational assistance using the earliest of the applicable dates.

*(r) Administrative or payee error.*

(1) When an administrative error or error in judgement by VA, the Department of Defense, or the Department of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, is the sole cause of an erroneous award, the award will be reduced or terminated effective the date of last payment.

**Submitted:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Concur (Section Chief) :** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Concur (Education Officer):** \_\_\_\_\_

**Date:** \_\_\_\_\_

Concur/Approved (Assistant Director): \_\_\_\_\_

Date: \_\_\_\_\_

Approved (Education Service): \_\_\_\_\_

Date: \_\_\_\_\_

**Figure 2.02 SOC format**

The table below describes the sections of an SOC and the actions required when completing each section.

Section	Description	Action
Cover Letter to Applicant	Indicates the appellant's name, address, claim number and representative.	If there is no representative, enter the word "None."
Issue	Identifies the issue(s) covered by the SOC.	If there are multiple issues, state and number each issue.
Evidence	Summarizes all evidence relative to the issues being considered. <i>Example:</i> DD Form 214, VA Form 22-V1990, VA Form 22-1999, etc.	Use short sentences, when appropriate, for clarity and accuracy. <b>Note:</b> You should not list the entire claimant's folder just the documents pertaining to the issue on appeal
Adjudicative Actions	Cites only those authorization actions relevant to the issues raised.	List entries in chronological order.
Pertinent Laws and Regulations	Summarize the provisions in the statute(s) or regulation(s) that govern the decision(s) rendered.	Quote verbatim only those relevant portions of all regulations and U.S.C. sections that are pertinent to the issues.
Decision	State the decision.	If there are multiple issues, number each to correspond to the number shown in the issue section of the SOC.
Reasons for Decision	<ul style="list-style-type: none"> <li>Includes the reasons for the decision</li> <li>explain how the evidence supports the underlying decision</li> <li>state the analysis of the evidence of record under the</li> </ul>	<ul style="list-style-type: none"> <li>Discuss the laws and regulations cited and explain how they relate to the adverse decision</li> <li>address all the appellant's contentions</li> </ul>



	applicable legal principles governing the decision, and <ul style="list-style-type: none"> <li>• indicate why most of the evidence is against the claim.</li> </ul>	<ul style="list-style-type: none"> <li>• attempt to clarify and reduce the reasoning to simple terms so the reader will understand the precise basis for the decision, and</li> <li>• Number the <i>Reasons for Decision</i> to correspond with the issues and decisions.</li> </ul>
Signature and Review	The person who prepared the original SOC must sign it. <b><i>SOCs should always be second signed. The second signature must be a Senior VCE or higher official who is different from the preparer.</i></b> <b><i>**Digital signatures are acceptable</i></b>	Review and sign the SOC. This applies to any SOC, whether prepared by a Veterans Claims Examiner or Senior Veterans Claims Examiner

**FIGURE 2.03 APPEALS CHECKLIST  
APPEAL CERTIFICATION TO BVA WORKSHEET**

**APPEALS CHECKLIST FOR TRANSFERRING CERTIFIED APPEALS TO THE BOARD OF VETERANS' APPEALS (BVA)**

Ensure the following items have been completed prior to transferring to the Board:

\_\_\_\_\_ Ensure that ALL documents (NOD, SOC, Form 9, SSOCs, hearing transcripts, Form 646 (if applicable), Form 8, VA Form 21-22, and other evidence in support of the appeal) have been associated with the file.

\_\_\_\_\_ If the folder is already at BVA, consolidate all documents associated with the additional appeal you are certifying to BVA. Ensure all documents have been scanned into the appropriate TIMS folder.

\_\_\_\_\_ Ensure the appropriate VBA hearing option from VA Form 9 is properly entered and/or updated under the Update Appeal Tab

- Properly code VACOLS with the hearing requested date
- If claimant withdraws the hearing, update the Update Appeal tab in VACOLS to None and annotate appropriately in TIMS

\_\_\_\_\_ Properly update VACOLS by

- Validating all data is properly entered (NOD date, SOC date, Form 9 date, SSOC dates)
- Validating or inputting the certification date on the "DISPATCH" tab

\_\_\_\_\_ Have the entire TIMS folder printed

\_\_\_\_\_ Mail the TIMS folder to AMC through appropriate tracking mail system for control purposes.

\_\_\_\_\_  
Signature of person certifying appeal to BVA and date

\*\*a copy of this should be placed in the TIMS folder

**FIGURE 2.04 Appeals Certification Worksheet**

Ensure a copy of this document in the TIMS folder. Ensure a copy is placed on the left side of the temporary claims folder sent to BVA. Digital signatures are acceptable.

This worksheet is optimized to identify the most common development errors and areas of BVA Remand. It is not to be viewed as all-inclusive of all possible areas of deficiency in all types of claims.

Name of Claimant: \_\_\_\_\_ Claim Number: \_\_\_\_\_  
 Name of Veteran: (if different from claimant) \_\_\_\_\_

POA (if any) (Ensure VA Form 646 is completed) \_\_\_\_\_  
**PROCEDURAL**

Date of decision of appeal: \_\_\_\_\_ Notification date: \_\_\_\_\_  
 Date NOD received: \_\_\_\_\_ NOD timely (Y/N) \_\_\_\_\_  
 SOC date: \_\_\_\_\_ SSOC date: \_\_\_\_\_  
 Date Form 9 Received: \_\_\_\_\_ Was it received timely? (Y/N) \_\_\_\_\_  
 Issue(s) on appeal: (Be specific in this space)

	Yes	No	N/A
Does SOC address all required laws and regulations?			
Hearing requested?			
If yes, was it conducted? Where?			
If no hearing, was VA Form 646 completed if necessary?			
Does last SSOC address all pertinent evidence submitted?			
Were all military service periods verified?			
Were all required Federal records obtained?			

**IS THIS APPEAL READY TO CERTIFY TO BVA?** YES \_\_\_\_\_ NO \_\_\_\_\_  
 If No, what deficiencies exist?

Comments: \_\_\_\_\_  
 Signature/Title of Preparer: \_\_\_\_\_ Date: \_\_\_\_\_  
 Reviewer's Signature/Title: \_\_\_\_\_ Date: \_\_\_\_\_

**FIGURE 2.05. PARAGRAPH FOR APPEAL VS. EQUITABLE RELIEF LETTER**

**Paragraphs for Appeal / Equitable Relief Letter****What You Need to Know**

On (mm-dd-yyyy) we received a request for equitable relief under §503 of title 38, U.S.C for **(free text – reason for Appeal / ER)**. Our records indicate you have filed an appeal with the Board of Veterans Appeals (BVA) regarding the same issue as the requested equitable relief. In order to move forward with your equitable relief request, you first must either let the appeal request be answered or submit a written request to withdraw your appeal to VA before equitable relief can be considered.

Equitable relief is the final administrative decision in this matter, and is not subject to appeal. It is recommended that you allow the BVA to render a decision on your appeal before applying for equitable relief. Decisions made by the BVA may be appealed where-as an equitable relief decision is final. There are no statutory or regulatory provisions for an appellate review of equitable relief decisions.

**What You Should Do**

If you want to keep your appeal open on your claim and continue the process for **(free text – reason for Appeal / ER)**, you need not do anything further. If you wish to withdraw your appeal and move forward with your equitable relief request, please send us in writing that you want to withdraw your appeal, knowing that the equitable relief decision is the final administrative decision in this matter and is not subject to appeal.