

Office of Administrative Review (OAR)

Quality Call Bulletin

August 2020

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NATIONAL ERROR EXAMPLES

Target Audience: DROC QRTs and Management

Presenter: James Fogg, Program Analyst, OAR

Previously, OAR presented the top 3 error categories for rating and authorization. This information can be found on the Director's Dashboard on the OAR Quality Metrics webpage at: https://vbaw.vba.va.gov/OAR/Quality_Metrics.asp. Effective August 2020, OAR will present examples of errors called during national OAR reviews of the DROCs.

National Authorization Error Example:

Error: Failure to list favorable findings.

Background Information: Non-rating Higher-Level Review (HLR) denied entitlement to an earlier effective date for adding a school child.

OAR cited the following error:

The HLR failed to list favorable findings (FF). Each notice of a decision affecting benefits must address any findings made by the adjudicator that are favorable to the claimant (M21-1 III.iv.2.B.5.b). 38 CFR §3.104(c)

Per 38 CFR §3.103(f), *Notification of decisions*,

Written notification must include in the notice letter or enclosures or a combination thereof, all of the following elements:

(4): A listing of any findings made by the adjudicator that are favorable to the claimant under 3.104(c)

Although the decision maker did not cite any FFs, the evidence showed:

VA Form 21-674, *Report of School Attendance* was received 1/10/20 for the school child which showed 8/28/19 as the beginning date of the last term.

As there were findings favorable to the claimant, the decision maker is required to list FFs.

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National Rating Error Example:

Error: Failed to address unclaimed issues within scope of claim.

Background Information: HLR rating decision (RD) granted service connection (SC) for right thumb arthritis and continued the previous denial of SC for bilateral hearing loss. A Hearing Loss Disability Benefits Questionnaire (DBQ) related tinnitus to military noise exposure. A Hand DBQ related a right thumb scar to the right thumb claim.

OAR cited the following errors:

HLR failed to address the unclaimed issues of SC for tinnitus and right thumb scar. The Veteran claimed SC for hearing loss. A Hearing Loss DBQ related tinnitus to military noise exposure. A Hand DBQ related the right thumb scar to the claimed fingers fracture. When preparing a RD, the decision maker must recognize and/or decide all issues and claims (M21-1 III.iv.6.B.1.a). 38 CFR §3.155(d)(2); M21-1 III.iv.4.D.2.a; III.iv.6.B.1.c

38 CFR §3.155(d)(2), *Scope of claim*, states, in part:

VA will also consider all lay and medical evidence of record in order to adjudicate entitlement to any additional benefits for complications of the claimed condition.

M21-1 III.iv.4.D.2.a, *Sympathetic Reading of Hearing Loss Claims*, states, in part:

In cases where the claim is phrased as a claim for SC for “hearing loss” (or similar wording) and other lay or medical evidence raises the issue of tinnitus *and* establishes entitlement to SC, consider the issue of tinnitus as within scope of the claim for hearing loss.

M21-1 III.iv.6.B.1.c, *Definition and Example: Issues Within Scope*, states, in part:

An **issue within scope** is one that is not explicitly identified by the claimant but is identified upon review of the claims folder during the decision-making process for an expressly claimed issue. It encompasses such things as entitlement to additional benefits for complications of an expressly claimed condition.

In this case the Veteran specifically claimed SC for hearing loss and a finger condition. The evidence did not support a grant of SC for hearing loss but did support a grant of SC for tinnitus. Additionally, the evidence supported a grant of SC for right thumb scar secondary to the right thumb fracture. VA regulations and policy require decision makers to recognize unclaimed disabilities within the scope of claimed disabilities and grant them when the evidence supports a grant of the unclaimed disabilities.

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DROC QRT QUESTIONS SUBMITTED IN ADVANCE

Target Audience: DROC QRTs and Management

Presenter: James Fogg, Program Analyst, OAR

OAR received multiple questions in advance of the August Quality Call.

1. Do the procedures for deferring unclaimed total disability based on individual unemployability (TDIU) on the RD apply to a HLR decision returning unclaimed TDIU?

Response: Yes. The Decision Review Officer (DRO) will complete VA Form 20-0999, *Higher-Level Review Return*. If the DRO decides at least one other issue using a RD, he/she should also include the paragraph described in M21-5, 5.5.d, *Returning DTA Errors for Correction*, which informs the Veteran of the returned issue.

2. Do the procedures for denying deferred unclaimed TDIU on the RD apply to an HLR Return denial of returned unclaimed TDIU?

Response: Yes. Even if the Veteran failed to formally claim TDIU (the evidence reasonably raising the issue) and failed to return VA Form 21-8940, *Veteran's Application for Increased Compensation Based on Unemployability*, VA should formalize and finalize the denial in a RD. See the second note in M21-1, IV.ii.2.F.2.n, *Handling Deferred Reasonably Raised IU Claims*.

3. What is the correct Rating Veterans Service Representative (RVSR) task error to call when reviewing a deferral only?

Response: The manual provides two instances in which the reviewer can call an error when a deferral is involved, under Task 10 or Task 6.

Generally, cite deferral specific questions under Task 10, unless, as an exception to the rule, when completing a denial or confirming and continuing (C&C) a previous decision while simultaneously completing a deferral, which the reviewer can cite under Task 6.

Use Task 10 to evaluate the use or misuse of deferrals. Task 10 specifically addresses whether, or not, the decision-maker completed and properly recorded all deferrals. This task requires the reviewer to evaluate questions related to overdevelopment or development of records, deferral finalization, and order of operations not followed.

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Additionally, when the reviewer cites items in this category, the items must be clearly erroneous, and the reviewer may not cite the item based upon a difference of opinion over evidence required to decide a claim. M21-5 3.A.10.a, *RVSR Task Based Quality Review Checklist*

Cite deferral errors under Task 6 when the decisionmaker incorrectly completed a denial and/or C&C, while simultaneously completing a deferral on other issues for further development and without a grant or increase. In this circumstance, the reviewer will cite a Task 6 error for the improper denial of SC for issues previously established as SC on the RD Code Sheet. In addition, Task 6 also incorporates issues taken up on a Statement of the Case (SOC) or Supplemental Statement of the Case (SSOC), for which no appeal was filed. M21-5 3.A.10.a, *RVSR Task Based Quality Review Checklist*

4. Is the DRO required to pull the additional FFs noted on a RD dated 10/05/19 forward or not because the evidentiary record is closed as the date of the RD on review, 7/15/19?

Response: Yes. The DRO is required to pull the additional FFs for the most recent RD involving this issue. An HLR consists of review of the issue(s) identified by requesters on a complete VA Form 20-0996, *Decision Review Request: Higher-Level Review*. All FFs identified for that issue are binding upon the DRO, unless overturned due to clear and unmistakable error (CUE), even if a RD subsequent to the RD identified on the VA Form 20-0996 identifies the FF. M21-5 5.1.a, *Definition: Higher-Level Reviews*; M21-5 5.2.a, *Definition: Complete Request*

5. Are presumptive SC FFs required when the RD includes a denial of presumptive SC?

Response: FFs depend entirely on the evidence in each case, as not all claims for presumptive SC will exhibit the same fact pattern. The FFs drop-down menu includes *Incurrence, Nexus, and Diagnosis*, but the applicability of such FFs is dependent on the specific facts of the case.

6. Do we send the HLR Duty to Assist (DTA) letter if there is no interaction with the Veteran?

a. *Prior to the update, we sent the HLR DTA letter if we ordered an exam. AMO clarified, subsequently, that if only asking for medical opinion, addendum, or clarification (no Veteran interaction), we did not need to send the HLR DTA letter. After the update (currently) the manual reads that we send the letter for exams or clarifying opinions. Please clarify this change.*

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Response: In accordance with M21-5, 5.5.e, *Handling DTA Errors*, if the reviewer does not direct any other development to the Veteran, the claims processor will send the *DTA Error* letter. (Remember that VHA or the examination contractor sends a letter to the Veteran when it schedules an examination). The inclusion of “requesting an exam or clarifying a medical opinion” in M21-5 5.5.e, *Handling DTA Errors*, is meant as an example rather than an all-inclusive list. As multiple letters to the Veteran can be confusing, when requesting additional information, claims processors will insert the additional text as directed in step 4, in the development letter.

b. Please clarify if the language in the HLR DTA letter from Letter Creator is sufficient as provided, or if we should add the additional language in Step 4 to the existing HLR DTA letter from Letter Creator.

Response: Yes, the current text in the HLR DTA letter is sufficient. Please note that VA only requires the additional text in step 4 of M21-5 5.5.e, *Handling DTA Errors* for subsequent development letters to a Veteran. The HLR DTA letter would not be sent in this situation.

7. How should we process an HLR for an issue that was granted after the evidentiary record closed?

How should an HLR handle an issue on a case that has subsequently been resolved by a RD not part of the evidentiary record? Example: RD dated 3/29/19 denied SC for a cervical spine condition. The veteran was notified on 4/03/19. The veteran submitted a VA Form 20-0995, Decision Review Request: Supplemental Claim, for a cervical spine condition on 5/22/19 and the decision maker granted SC on RD dated 7/31/19. The veteran submits a VA Form 20-0996, Decision Review Request: Higher-Level Review on 2/28/20 for the denial of SC for cervical spine condition with the decision date of 4/03/19. We are unable to reach the Veteran through a phone call and we receive no written notice to withdraw the issue.

Would the DRO address the denial of the cervical spine in their RD and then reference that, after the record closed, there was an additional RD that granted SC, but this information is not within the evidentiary record under review? Or could it be considered ineligible for HLR as the issue has been resolved?

Response: The HLR is now moot. Cancel the EP 030 and establish an EP 400. Inform the Veteran via letter that VA will take no action on the request for review as VA awarded him/her the benefit sought. Refer the claimant to the notification letter sent with the grant.

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8. Does the September 5, 2019 update to M21-1 IX.i.3.1.b, *Eligibility for SAH Grants*, restrict specially adapted housing (SAH) eligibility to Veterans who served after September 1, 2001?

Response: No, M21-1 IX.i.3.1.b, *Eligibility for SAH Grants* does not limit eligibility for assistance in acquiring SAH to a Veteran or active duty service member who served on or after September 11, 2001. The first bullet in this block specifically extends eligibility to such a claimant who has a permanent, but not necessarily total disability, along with other criteria. The update allows VA to determine the claimant is eligible for SAH if they do not have a total disability, but they did serve on or after September 11, 2001, they have a permanent disability that was incurred on or after September 11, 2001, and they have loss or loss of use of one or more lower extremities affecting balance or propulsion so the claimant may not ambulate without the aid of braces, crutches, canes or wheelchair. The second and third bullets continue the previous eligibility criteria in a way that is not contingent on dates of service or incurrence.

9. When will QRS start documenting production in Salesforce?

Response: Currently, there is no timeline for transitioning Quality Review Specialist (QRS) production to Salesforce.

10. Should we overturn current FFs when new evidence has been received?

Response: No, if VA is performing an HLR, then the reviewer cannot consider new evidence. The DROC will notify the claimant of the receipt of evidence received after the evidentiary record closed. The reviewer could overturn the FF through a different review process but not within the HLR.

11. Does VA require a DRO to include laws and regulations in the RD narrative when HLR identifies a DTA error?

Response: No, VA does not require the DRO to include laws and regulations in the RD narrative when a DRO identifies a duty to assist error and completes an HLR return. There is no statutory or regulatory requirement that mandates applicable laws and regulations be listed in a full HLR return notice. The decision notification requirements outlined in 38 CFR §3.103(f), *Notification of decisions*, only apply to “decisions affecting the payment of benefits or granting of relief.”

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QUESTION

Is OAR reversing the prior guidance to Question 10 of the August 2020 OAR Quality Call (Are we required to include laws and regulations in the RD narrative when HLR identifies a DTA error)?

Response: Employees are not required to include laws and regulations in the rating decision narrative when a higher-level reviewer identifies a duty to assist (DTA) error and completes a HLR return. There is no statutory or regulatory requirement that mandates applicable laws and regulations be listed in a full HLR return notice. The decision notification requirements outlined in 38 CFR §3.103(f) only apply to “decisions affecting the payment of benefits or granting of relief.”