

# Office of Administrative Review (OAR)

## Quality Call Bulletin

### September 2020

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#### NATIONAL ERROR EXAMPLES

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**Target Audience:** DROC QRTs and Management

**Presenter:** James Fogg, Program Analyst, OAR

**National Authorization Error Example:**

Error: Development letter addressing 5103 (if applicable) and evidence requirement for claimed issues, not sent.

Background Information: Non-rating higher-level review (HLR) did not identify a duty to assist (DTA) error for failure to develop for the starting date of a semester for a school child.

OAR cited the following error:

VA did not develop to obtain the exact date of the Spring 2019 semester. The Veteran submitted a school child claim more than one year after the child's 18th birthday. VA regulations state we can add the school child from any term that starts within one year of the date of claim. The calendar for the Fall 2019 through Summer 2020 terms was uploaded. However, there was no attempt to contact the school by phone to obtain the dates of the Spring 2019 semester and VA did not develop to the Veteran for the start date of the Spring 2019 semester. The HLR did not identify this DTA error. 38 CFR 3.667; M21-1 III.iii.6.A.2.b; III.iii.6.B.1.c; M21-5 5.5.a

Per 38 CFR 3.667, *School Attendance*:

- (1) Pension or compensation may be paid from a child's 18th birthday based upon school attendance if the child was at that time pursuing a course of instruction at an approved educational institution and a claim for such benefits is filed within 1 year from the child's 18th birthday.
- (2) Pension or compensation based upon a course of instruction at an approved educational institution which was begun after a child's 18th birthday may be paid from the commencement of the course if a claim is filed within 1 year from that date.

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Per M21-1 III.iii.6.A.2.b, *Means for Determining the Date a School Session Began*:

If entitlement to additional benefits for a school child begins on the date a given school session begins, and the date the school session began is not of record, attempt to obtain the date by:

- contacting the school, or
- accessing the school calendar that most schools post on their website.

Per M21-1 III.iii.6.B.1.c, *Effective Date of Payment if VA Receives a Claim One Year or More After a Child Turns 18*:

If VA receives a claim for additional benefits based on school attendance one year or more after a child turns 18, pay the additional benefits effective the first day of the month following the month school attendance began, *as long as*:

- VA receives the claim within one year of the date school attendance began, and
- the child did *not* turn 23 before school attendance began.

Per M21-5 5.5.a, *Definition: DTA Errors*:

A **DTA error** is a failure during the processing of the reviewed decision (e.g., rating decision, SOC, etc.) to properly apply the provisions of 38 CFR 3.159 for gathering evidence. The reviewer must return the issue(s) for development, unless he/she can grant the claimant the maximum benefit.

VA regulations and policy require VA to notify the claimant of the evidence required for the claimed issue and to develop for this required evidence. In this case, the HLR decisionmaker should have identified the DTA error, specifically not developing for the start date of the Spring 2019 semester.

#### **National Rating Error Example:**

Error: Decisionmaker considered and/or listed evidence received after the record closed for a HLR.

Background Information: HLR rating decision (RD) considered VA Medical Center (VAMC) treatment records not considered by the RD under review.

OAR cited the following error:

HLR RD listed and considered evidence received after the evidentiary record closed. VBMS shows that VAMC treatment records for a period prior to the RD under review were associated with the eFolder after the date of the notification letter of the RD under review. The Evidence section of the HLR RD listed these treatment records. The Evidence section is a listing of each piece of evidence considered in arriving at the decision. VA cannot consider any evidence that was not of record at the time of the contested decision. 38 CFR 3.2601(f); M21-1 III.iv.6.C.4.a; M21-5 5.1.c

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Per 38 CFR 3.2601(f), *Evidentiary record*:

The evidentiary record in a higher-level review is limited to the evidence of record as of the date the agency of original jurisdiction issued notice of the prior decision under review and the higher-level adjudicator may not consider additional evidence.

Per M21-1 III.iv.6.C.4.a, *Overview of the Evidence Section of a Rating Decision*:

The Evidence section is a listing of each piece of evidence considered in arriving at the decision.

Per M21-5 5.1.c, *Restrictions of HLRs*:

The evidentiary record is closed in HLRs as of the date of the decision notice of the issue receiving review. VA cannot consider any evidence that was not of record at the time of the contested decision.

VA regulations and policy do not allow HLR decisionmakers to consider evidence that VBA received after the evidentiary record closed. In this case the VAMC records considered by the HLR RD were not listed as evidence in the RD under HLR. Therefore, the HLR decisionmaker cannot consider these records as evidence while performing the HLR.

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## COVID-19 INTERIM GUIDANCE UPDATES

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**Target Audience:** DROC QRTs and Management

**Presenter:** Bryan Yost, Program Analyst, OAR

Compensation Service, Pension and Fiduciary Service and OAR updated Policy Letter (PL) 20-02 to further clarify how claims adjudicators should apply a postmark date of mail for date of claim purposes and how to -manage illegible or otherwise unreadable postmarks. The updated PL addresses the handling of un-postmarked mail accompanied by affirmative evidence if it was transmitted after February 29, 2020.

- If the correspondence has no postmark but does have a VA date stamp or Claims Intake Center COVID-19 watermark dated between March 1, 2020 to August 26, 2020, then consider it to have been received on February 29, 2020
- If the correspondence has no postmark but does have a VA date stamp or Claims Intake Center COVID-19 watermark dated on or after August 27, 2020, then consider it to have been received ten (10) calendar days prior to the date stamp or watermark. Consider this type of correspondence as being received by VA ten (10) calendar days prior to the scan date, which should be the date shown on the date stamp or watermark.

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- Do not apply this “10-day rule” if it produces a clearly erroneous or inappropriate result, such as assigning a date of receipt earlier than:
  - date of the Veteran’s death in a survivor’s claim, or
  - the date of the VA decision that is the subject of a review request
- If unable to apply the “10-day rule” because it would produce a clearly erroneous or inappropriate result, then treat the correspondence, received without a postmark or date stamp, in accordance with M21-1 III.ii.1.C.1.b, *Handling Documents Processed Without a Date Stamp*.

Please refer to the [Novel Coronavirus Disease \(COVID-19\) Operational Information Page](#) for additional guidance.

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### DROC QRT QUESTIONS SUBMITTED IN ADVANCE

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**Target Audience:** DROC QRTs and Management

**Presenter:** James Fogg, Program Analyst, OAR

1. Will OAR update M21-5 Chapter 3, *Quality Assurance*, to match M21-4 Chapter 6, *Quality Review Team (QRT)* concerning corporate flashes and special issues?

**Response:** Yes. OAR updated M21-5 Chapter 3, *Quality Assurance* on September 1, 2020.

2. Should AQRs use M21-4 or M21-5 when citing Task 11 errors for flashes/special issues?

**Response:** The AQRs will cite M21-5.

3. If the HLR returns all conditions for a difference of opinion, should the VSR follow the instructions in M21-5 5.5.e, *Handling DTA Errors*, as described for HLR DTA errors?

**Response:** Yes, follow the procedures in M21-5 5.5.e, *Handling DTA Errors*, as described for HLR DTA errors when the HLR returns all conditions for a difference of opinion.

4. If the HLR returns all conditions for a difference of opinion, should the DROC send a PCGL without review rights?

**Response:** Yes, step 3 in M21-5 5.5.e, *Handling DTA Errors*, instructs the DROC to send a PCGL letter without decision review rights.

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5. If the HLR returns all conditions for a difference of opinion, should the DROC send an HLR DTA under EP 040?

**Response:** The DROC will send the HLR DTA only if no other development letter is necessary. Refer to M21-5 5.5.e, *Handling DTA Errors*.

6. Should an AQRs call an error if the errors are related to private agent/attorney issues and the cases are not timely referred to an AAFC?

**Response:** Yes, the AQRS will cite a critical error if:

- an authorization or award generation action is pulled for review,
- the case is not properly routed to an AAFC, and
- this results in the failure to pay attorney fees.

7. Should an AQRS call an IQR error (Task 11, S1 error) if the corporate flash “Private Attorney – fees payable,” or “Private Attorney – No Fees Payable,” is applicable, but is either missing or incorrect in the eFolder?

**Response:** Yes, based upon the duties assigned in M21-1 I.3.C.2.b, *AAFC Role and Associated Duties*, the AQRS will cite a Task 11 error if the flashes are not appropriately added to the system.

### **QUESTIONS FROM THE SEPTEMBER 2020 QUALITY CALL**

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1. Regarding question 6 (Should an AQRS call an error if the errors are related to private agent/attorney issues and the cases are not timely referred to an AAFC?), the word "timely" is subjective. Can you provide any guidance on that?

**Response:** The original question from the field used the word “timely.” OAR does not require quality reviewers to cite quality errors based upon the amount of time it takes to complete the next action in processing a claim. OAR directs quality reviewers to review the transactions assigned to them and ensure all appropriate actions have been taken up to that point in the claim.

2. Regarding question 5 (If the HLR returns all conditions for a difference of opinion, should the DROC send an HLR DTA under EP 040?), should the VSR edit the HLR DTA letter to note that the contention was returned for Difference of Opinion and not DTA error?

**Response:** OAR does not require updating the HLR DTA letter. Follow the guidance found in M21-5, Chapter 5, Topic 5, Block e for letters regarding both difference of opinion and duty to assist error returns.

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3. Can you explore how sending a DTA Error letter for a difference of opinion (DoO) return seems to contradict M21-5 5.1.j, *Difference of Opinion vs. Duty to Assist Error*, which says, "The reviewer must return the case for additional development resulting from a DoO using that same VA Form 20-0999. However, this return does not constitute a DTA error as the previous decision was not necessarily incorrect." It seems a DoO doesn't meet the criteria of a DTA error. Please clarify whether a DoO requires the decisionmaker to follow M21-5 5.5.e, *Handling DTA Errors*, procedures for DTA errors.

**Response:** Yes, the decisionmaker must follow the procedures in M21-5 5.5.e, *Handling DTA Errors* when returning the case due to a DoO. While a DoO does not necessarily indicate that the previous decision or development contained an error, the process for return and correction is the same. Until VBMS has the functionality to separately track these returns, follow the guidance in M21-5, Chapter 5, Topic 5, Block e for either a DoO return or for a DTA error return.

4. Can we get further clarification on favorable findings? During the September 2020 Quality Call, OAR stated to list the submitted VA Form 21-674, *Request for Approval of School Attendance*, as a favorable finding. Wouldn't it be better to list the actual findings gleaned from the document?

**Response:** During the September 2020 Quality Call, OAR stated that the decisionmaker should list the information contained in the VA Form 21-674, *Request for Approval of School Attendance*, as a favorable finding. Listing receipt of a form is not considered a favorable finding.