

# Office of Administrative Review (OAR)

## Quality Call Bulletin

### November 2020

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#### TABLE OF CONTENTS

DROC QRT Questions Submitted in Advance.....	1
Citing Relevant Laws and Regulations.....	2
National Error Examples .....	3
Internal Electronic Communication Between VBA and the Board .....	4

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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. Should the DROC establish the EP 290 as a running end-product while the memo is sent to finance to withhold fees, or should the DROC take a one-time credit for the EP 290 in SHARE, after the DROC establishes the EP 400? If the EP 290 is a running end-product, what tracked items should the DROC establish with this EP 290 and how should the DROC list these tracked items?

**Response:** The DROC should take a one-time credit for the EP 290 after establishing the EP 400. See steps 5 and 6 of M21-1 I.3.C.4.a, *Process for Consideration of Direct Payment of Fees*.

2. If QMS pulls a rating decision that was corrected by a RVSR, following a RQRS identifying an error that was concurred following peer review, but the corrected rating decision is incorrect, should the RQRS call a critical or non-critical error on the correction error?

**Response:** If the correction would have been considered a critical error if it had been identified during the initial review, then the error is still critical. If the correction would not have been considered a critical error during the initial review, then the error is not critical. The fact that the correction was based upon a previous error identified by a RQRS does not absolve the correction of being erroneous.

3. Is it appropriate to deselect a RVSR/DRO review in QMS when the transaction date is different from the actual date of the rating decision in VBMS? For example, the transaction date is July 15, 2020, but the Rating Decision's date is July 17, 2020. How can the QRS be certain that the action for review will not be selected again based on the actual, i.e. subsequent transaction, date?

# Office of Administrative Review (OAR)

## Quality Call Bulletin

### November 2020

**Response:** No, it is not always appropriate to deselect a RVSR or DRO review in QMS when the transaction date is different from the actual date of the rating decision in VBMS. The QRS should validate there are no other decisions or actions, for example a deferral or exam request, available for quality review. M21-5, 3.A.4.c, *Deselections*, states every effort will be made to perform a quality review on all cases identified either via ASPEN or QMS. However, in rare instances, a review may not be appropriate. In these rare instances, the QRS will propose to deselect the case. If there is no corresponding decision or action subject to review, then the QRS should propose to deselect the review.

As there is no corresponding decision or action subject to review on July 15, 2020, as noted in the example, the QRS should propose to deselect the review. It is possible the subsequent transaction of July 17, 2020 will be randomly pulled and the QRS should conduct a valid quality review on that transaction.

4. Are claim processors required to provide justification for suspense updates when updating/extending the suspense of tracked items specifically for vendor exams due to COVID-19 that have the special issue of Force Majeure?

**Response:** No. If the case is still affected by COVID-19 restrictions and, as such, VA still can't schedule the vendor exam, a justification would not be required. The special issue indicates why no development can be completed. The DROC may enter a VBMS note, but this is not required.

## **CITING RELEVANT LAWS AND REGULATIONS**

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**Target Audience:** DROC QRTs and Management

**Presenter:** Chelsey Kondrak, Senior Management & Program Analyst, OAR

Per 38 CFR 3.103(f), notification of decisions must include a summary of the laws and regulations **applicable** to the claim.

Employees should avoid citing laws and regulations that are not relevant to the issue under decision.

Listing too many or irrelevant laws and regulations should not be cited as an error; however, the QRS should provide a comment to the employee.

Compensation Service and OAR continue to monitor these scenarios.

Employees should continue to use the evaluation builder and canned text in VBMS-R as

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# Office of Administrative Review (OAR)

## Quality Call Bulletin

### November 2020

most generated text within the system already includes the applicable law and/or regulation.

To assist with this process, decision makers should refer to the [VA Schedule for Rating Disabilities](#), other available regulations on [eCFR.gov](#), the [Applicable Laws and Regulations – Citations \(DOC\)](#) guide, as well as AMA training materials.

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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: Higher-Level Review (HLR) informal conference not held when requested or attempts to schedule not documented properly.

OAR cited the following error:

Procedures for attempting to schedule the informal conference were not properly followed. Both attempts were executed on the same day. M21-5 5.3.e & f

M21-5 5.3.e, *Unsuccessful Initial Attempts to Contact the Requesters*, states, in part: If the reviewer or Informal Conference Coordinator cannot contact the claimant or representative on the first attempt, VA will:

- Add the date of the first attempt to the existing informal conference tracked item under Follow Up 1, and
- Diary the EP 030 for three business days.

M21-5 5.3.f, *Unsuccessful Second Attempts to Contact the Requesters* states, in part: If VA receives no response within three business days, make a second and last attempt to schedule the informal conference.

VA regulations and policy require VA to document the actions taken to attempt to schedule an informal conference when requested with an HLR.

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

Error: Insufficient VA examination/medical opinion.

OAR cited the following error:

HLR rating decision (RD) failed to return the issue of the Veteran's service-connected left knee disability evaluation for readjudication based on an error in the duty to assist. The RD under HLR failed to obtain clarification and/or re-examination of an

# Office of Administrative Review (OAR)

## Quality Call Bulletin

### November 2020

insufficient Knee and Lower Leg Conditions DBQ prior to deciding the claim. The required medical opinion on repeated use over time was insufficient for rating purposes because the examiner's conclusion was not adequately justified and implied a general lack of knowledge or an aversion to opining on matters beyond direct observation. M21-1 III.iv.3.D.2.r; III.iv.3.D.4.g; III.iv.4.A.1.j; M21-5 5.5.a

M21-1 III.iv.3.D.2.r, *Examiner Statements That an Opinion Would Be Speculative*, states, in part:

The medical opinion may be insufficient for rating purposes if an examiner's conclusion implies a general lack of knowledge or aversion to opining on matters beyond direct observation. In such instances, seek clarification of the conclusion.

M21-5 5.5.a, *Definition: DTA Errors*, states, in part:

An HLR may identify a deficiency in VA fulfilling its duty to assist (DTA) the claimant in obtaining evidence relevant to the decision under review. A DTA error is a failure during the processing of the reviewed decision to properly apply the provision of 38 CFR 3.159, *Department of Veterans Affairs assistance in developing claims*, 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 the Higher-Level Reviewer to return a review when there is a duty to assist error in the decision under review and the reviewer cannot assign the maximum benefit. In this case the RD under HLR was issued prior to returning an insufficient medical opinion, which was a duty to assist error. The reviewer should have returned this review to correct this duty to assist error as the maximum benefit was not granted.

## INTERNAL ELECTRONIC COMMUNICATION BETWEEN VBA AND THE BOARD

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**Target Audience:** DROC QRTs and Management

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

OAR has identified instances of internal processing emails between VBA and the Board regarding case-related AMA matters being uploaded to Veterans' claims files. Generally, internal processing emails should not be uploaded into claims files. If processing notes or clarification of procedural action is warranted, a permanent note will be added to the claims file in VBMS. A permanent note in the claims file provides clear documentation outlining any corrective action that is available to adjudicators and quality review. This practice also avoids the complications associated with uploading internal processing emails directly to claims files that may include VA employees' personal information including names, phone numbers, and direct email addresses.