

Office of Administrative Review (OAR)

Quality Call Bulletin

January 2021

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DROC QRT QUESTIONS SUBMITTED IN ADVANCE

Target Audience: DROC QRTs and Management

Presenter: Bryan Yost, Program Analyst, OAR

1. Should the HLR DRO consider alternative theories of entitlement raised after the decision under review, in accordance with December 2019 AMO Quality Call, or should alternative theories of entitlement be considered a supplemental claim, in accordance with M21-1 III.ii.2.D.1.b, *Definition: Same or Similar Benefit on Same or Similar Basis?*

Response: The HLR DRO should consider alternative theories of entitlement, raised after the decision under review, during the HLR in accordance with the December 2019 AMO Quality Call as these alternative theories are not new evidence or attempts to submit a supplemental claim.

M21-1 III.ii.2.B.1.m, *Considering Unclaimed Theories of SC*, states, in part:

A claim for SC encompasses all potential theories of SC, whether claimed or unclaimed. A denial of SC is a denial for all potential theories, whether specifically addressed in the rating or not.

M21-5 5.4.b, *Informal Conference: Attempts to Introduce New Evidence*, states, in part:

If the requester or representative submits an argument in reference to evidence that was of record at the time of the decision under review, then it can be considered by the reviewer.

M21-5 5.4.d, *Differentiating Between Argument and Evidence*, states, in part:

Argument is the attempt to persuade someone to a particular view or belief using reason and facts. A claimant or representative may properly add, and the reviewer may properly consider, new argument to pinpoint or highlight VA's potential misreading of facts, or its potential misapplication of law to the facts that the

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evidentiary record has already established.

The Veteran, or their representative, is not attempting to introduce new evidence to be reviewed when they propose a theory of entitlement that was not expressly addressed by the previous decision. They are requesting that VA expressly address a theory that has already been denied, implicitly, by the decision under review.

OAR notes that M21-1 III.ii.2.D.1.b, *Definition: Same or Similar Benefit on Same or Similar Basis*, states, in part:

Important: In claims for compensation, a claim based on a new theory of SC is a supplemental claim. A new theory of SC (for example, when direct SC was previously denied, and secondary SC is now claimed) is sufficient new and relevant evidence to satisfy the evidentiary threshold discussed in M21-1 III.ii.2.D.1.e, *Requirement for Potentially New Evidence*.

M21-1 III.ii.2.D.1.b does not apply to a request for Higher-Level Review as this is a request to review a decision using the evidence that was already of record and then make a decision based upon that evidence or to develop for evidence that VA should have developed for prior to the decision under review. A supplemental claim is a request to review a previously denied claim based upon evidence that was not previously of record, which may include directing VA to new evidence. An argument is not new evidence

2. When considering the criteria for the Amputation Rule, does the Raw Percentage apply?

Response: No, the raw percentage does not apply.

38 C.F.R. §4.68, *Amputation Rule*, states, in part:

The combined rating for disabilities of an extremity shall not exceed the rating for the amputation at the elective level, were amputation to be performed.

M21-1 III.iv.6.D.6.c, *Amputation Rule Template*, states, in part:

Use the amputation rule template to list the disabilities and evaluations included in the application of the amputation rule.

Show the actual combined evaluation of all disability of the affected extremity, as well as the schedular evaluation associated with amputation of the extremity at the elective level.

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When applying the amputation rule the decision maker must establish the evaluation for each specific disability of the extremity to which the amputation rule applies. Then, using the *Combined Ratings Table* in 38 C.F.R. §4.25, the decision maker will determine the combined evaluation of all of these disabilities of the extremity to which the amputation rule applies. The raw percentage is only used to determine the combined evaluation of these disabilities.

INFORMAL CONFERENCE SPECIAL ISSUE

Target Audience: RVSRs, DROs, DROC QRTs and Management

Presenter: Nate Benco, Program Analyst, OAR

Effective December 14, 2020, VBA has implemented an Informal Conference special issue in VBMS. Per M21-5 5.3.c *Initial Actions*, employees must add an Informal Conference special issue to retain the EP during scheduling to at least one of the pending contentions if the claimant has requested an informal conference. The employee must add an Informal Conference special issue in lieu of the Local Hearing special issue. Adding the Informal Conference special issue allows end users to filter the work queue by special issue to manage which Higher-Level Reviews have an Informal Conference request.

NATIONAL ERROR EXAMPLES

Target Audience: DROC QRTs and Management

Presenter: Bryan Yost, Program Analyst, OAR

National Authorization Error Example:

Error: Was the claimant properly notified?

OAR cited the following error:

The HLR decision denied the request to add the dependents from an earlier effective date. The regulation for effective dates for dependents (38 C.F.R. §3.401) should have been included in the summary of the applicable laws and regulations (38 C.F.R. §3.103(f)).

38 C.F.R. §3.103(f)(3), *Notification of decisions*, states, in part:

Written notification must include in the notice letter or enclosures or a combination thereof a summary of the laws and regulations applicable to the claim.

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M21-1 III.v.2.B.1.b, *Decision Notice Requirements*, states, in part:

After making a decision on a claim, prepare a decision notice that independently, or in combination with its enclosures that summarizes the laws and regulations applicable to the claim.

Regulations and policy require VA to provide a summary of the laws and regulations applicable to the claim. In this case, the decision maker should have inserted the regulation pertaining to effective dates for dependents into the decision to properly address the laws and regulations applicable to this dependency claim.

National Rating Error Example:

Error: Was the decision documentation correct?

OAR cited the following error:

The HLR RD did not provide an explanation of the laws or regulations applicable to the claim. The RD did not list or report any applicable laws and regulations.

38 C.F.R. §3.103(f)(3), *Notification of decisions*, states, in part:

Written notification must include in the notice letter or enclosures or a combination thereof a summary of the laws and regulations applicable to the claim.

M21-1 III.iv.6.C.5.a, *Purpose of the Reasons for Decision* states, in part:

The Reasons for Decision must address the laws and regulations applicable to the claim.

M21-1 III.iv.6.C.5.e, *Using VBMS-R to Produce Text for the Rating Narrative*, states, in part:

System-generated language will typically be sufficient to satisfy the requirement for inclusion of any laws and regulations applicable to the claim. In the event, however, that all applicable laws or regulations are not cited via system automation, identify those outstanding laws or regulations by inserting free-text parenthetical annotations.

Regulations and policy require VA to provide a summary of the laws and regulations applicable to the claim. In this case the DRO should have inserted free-text parenthetical annotations to properly address the laws and regulations applicable to this claim.

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QUESTION FROM THE JANUARY 2021 QUALITY CALL

1. Can you provide further clarification why an alternative theory of entitlement, raised during a Higher-Level Review, would not be considered a supplemental claim and should be considered a duty to assist error? Please provide an example.

Response: The decision under review denied service connection on all bases, although the decision maker only explicitly discussed the theory(ies) raised by the claimant or raised by the facts of the claim.

For example, the Veteran originally claimed service connection for a back condition and right knee condition on a direct basis. The subsequent rating decision denied service connection for lumbar spine strain (claimed as back disability), only discussing denial on a direct basis, and granted service connection for a right knee strain. There is no evidence in the file to suggest that the back condition was caused or aggravated by the knee condition. The Veteran submits a request for a Higher-Level Review of the denial of service connection for lumbar spine strain (claimed as back disability) stating that the back condition is secondary to the now service-connected right knee strain. The Veteran does not state why there is a relationship between the service-connected right knee strain and lumbar spine strain. The evidence of record has not changed, and the initial decision maker would have reviewed the evidence for a possible theory of entitlement not brought at issue by the claimant (in this case, secondary service connection). Based on the theory of entitlement explicitly claimed in the HLR request, the DRO must now render a decision specifically addressing that theory of entitlement. However, because the HLR utilizes the same body of evidence as the original rating decision, it is not a supplemental claim.