

Office of Administrative Review (OAR)

Quality Call Bulletin

June 2021

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BOARD OF VETERANS' APPEALS REMAND DEVELOPMENT

Target Audience: Decision Review Operations Center (DROC) Quality Review Teams (QRT) and Management

Presenter: Bryan Yost, Program Analyst, OAR Program Administration

References:

38 C.F.R. §20.802, *Remand for correction of error*
38 C.F.R. §20.904, *Remand or referral for further action*
Stegall v. West, 11 Vet.App. 268 (1998)
M21-5 7.G.3.c, *Requirements for Expeditious Processing of Remands*
M21-5 7.G.3.g, *Stegall Remands*
M21-5 7.G.4.a, *Developing Evidence in Remands.*

Developing Evidence in Remands:

M21-5 7.G.4.a, *Developing Evidence in Remands:*

Follow the Board's detailed development instructions when developing evidence for a remand by ensuring all requested actions have been accomplished in compliance with the remand.

As stated in this reference, when the Board of Veterans' Appeals (BVA) issues a remand, Veterans Benefits Administration (VBA) is required to comply with the development instructions as much as possible, unless VBA is able to grant the benefit sought, to the maximum extent possible, prior to completing all of the directed development. VBA is also required to follow these directions in the order directed by the remand as some of the development depends upon completion of earlier steps in the remand, e.g. obtaining all VA treatment records prior to developing for a medical opinion.

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Stegall Remands:

M21-5 7.G.3.g, *Stegall Remands*:

When the Regional Office (RO) or DROC fails to comply with multiple remand orders before an appeal is recertified to the Board, the appeal is remanded back to VBA for action and such cases are designated in VACOLS as *Stegall*.

VA must ensure compliance with the terms and conditions set forth in remand orders from both the Court of Appeals for Veterans' Claims (CAVC) and BVA.

When VBA does not substantially comply with the orders in a CAVC or BVA remand, then BVA will remand the appeal back to VBA to comply with the previous remand orders. Note CAVC may impose sanctions on VBA if it determines VBA did not make a reasonable effort to expeditiously comply with the remands.

Summary:

- Substantially comply with remands, unless you can grant the benefit sought to the maximum extent possible.
- Do not return the appeal to BVA until VBA has substantially complied with remand orders.
- Failure to do so can result in court ordered sanctions against VA.

INFORMAL CONFERENCES: DOCUMENTING CONTACT

Target Audience: DROC QRTs and Management

Presenter: Ambria Davis, Management and Program Analyst, OAR Program Administration

References:

- M21-1 III.iii.1.B.1.d, *Claims Development by E-Mail, Telephone, and Electronic Means*
- M21-5 5.3.e, *Unsuccessful Initial Attempts to Contact the Requesters*
- M21-5 5.3.f, *Unsuccessful Second Attempts to Contact the Requesters*
- M21-5 5.3.g, *Actions to Take After Successful Contact*

Documenting Contact:

M21-1 III.iii.1.B.1.d, *Claims Development by E-Mail, Telephone, and Electronic Means*: VA strongly encourages, when appropriate, claims development by e-mail, telephone, and electronic submission of evidence.

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The Office of Administrative Review (OAR) reminds personnel of the requirement to document contact with claimants and/or their representative on VA Form 27-0820, *Report of General Information*. Contact made for clarification and development must be documented on the VA Form 27-0820.

Document informal conferences on the *Higher-Level Review (HLR) Informal Conference Worksheet*. VA personnel will document successful and unsuccessful contacts for informal conferences on VA Form 27-0820.

Summary:

- VA should develop, when appropriate, by email, telephone and electronic submission.
- Document contact with claimants and/or their representatives on a VA Form 27-0820.
- When attempting to schedule an informal conference, document all contacts on a VA Form 27-0820.
- Document successfully held informal conferences on the *HLR Informal Conference Worksheet*.

INFORMAL CONFERENCES: ARGUMENT VERSUS EVIDENCE

Target Audience: DROC QRTs and Management

Presenter: Chanda Plair, Senior Management and Program Analyst, OAR Program Administration

References:

- 38 C.F.R. §3.2601(f), *Higher-level review: Evidentiary record*
- 38 C.F.R. §3.2601(h), *Higher-level review: Informal conferences*
- M21-5 5.3.a, *Definition: Informal Conferences*
- M21-5 5.4.b, *Informal Conference: Attempts to Introduce New Evidence*
- M21-5 5.4.d, *Differentiating Between Argument and Evidence*

Closed Evidentiary Record:

38 C.F.R. §3.2601(f), *Higher-level review: 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.

38 C.F.R. §3.2601(h): *Higher-level review: Informal conferences:*

Informal conference means contact, telephonically, or as otherwise

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determined by VA, for the sole purpose of allowing the claimant or representative to identify any errors of law or fact in a prior decision based on the record at the time the decision was issued.

The evidentiary record, for an HLR, is closed as of the date of notice of the decision under HLR. The HLR adjudicator may not consider evidence submitted after that notification letter, even if submitted during an informal conference.

Argument:

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

The higher-level reviewer should remember that argument is not evidence.

The closed evidentiary record of an HLR precludes the consideration of new evidence, but it permits the consideration of new argument.

However, the HLR adjudicator must remember that argument is not evidence. Evidence is every type of proof offered to establish a fact. 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 review 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 evidentiary record has already established.

Summary:

- Do not consider new evidence during an HLR
- The HLR adjudicator may consider a new argument

HIGHER-LEVEL REVIEW OF A SUPPLEMENTAL CLAIM DECISION FOLLOWING A HIGHER-LEVEL REVIEW RETURN

Target Audience: DROC QRTs and Management

Presenter: James Fogg, Program Analyst, OAR Program Administration

References:

- 38 C.F.R. §3.2500(c)(1) & (2), *Review of decisions: Continuously pursued issues*
- M21-5 4.2.f, *Ineligible HLR Reasons*
- M21-5 5.1.a, *Definition: Higher-Level Reviews*
- M21-5 5.1.c, *Restrictions of HLRs*
- M21-5 5.5.d, *Returning DTA Errors for Correction*

Review Options:

AMA authorizes 3 options to review a decision.

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38 C.F.R. §3.2500(c)(1), *Review of decisions: Continuously pursued issues:*
Following notice of a decision on a supplemental claim, the claimant may file a supplemental claim, request a higher-level review, or appeal to the Board of Veterans' Appeals.

38 C.F.R. §3.2601(h): *Higher-level review: Informal conferences:*
Informal conference means contact, telephonically, or as otherwise determined by VA, for the sole purpose of allowing the claimant or representative to identify any errors of law or fact in a prior decision based on the record at the time the decision was issued.

The claimant may request an appeal, conducted by the Board of Veterans' Appeals. The two options under VBA jurisdiction are to file a supplemental claim or request a higher-level review (HLR).

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

A claimant may not request an HLR of an HLR involving the same issue. VA must make at least one intervening supplemental decision in such circumstances.

VA regulation and policy prohibit requesting an HLR of an issue that was the subject of an earlier HLR. However, the claimant may request and, if the request is timely filed, VA may accept an HLR of an issue if there is a supplemental decision involving that issue following an HLR.

Supplemental Claim Following HLR:

M21-5 5.5.d, *Returning DTA Errors for Correction:*

The return of a request to correct a DTA error concludes the HLR for that issue. VSRs and RVSRs will then treat that issue like a supplemental claim.

M21-5 4.2.f, *Ineligible HLR Reasons:*

Important: An HLR of an issue is complete when the reviewer finds an error in the duty to assist (DTA). Supplemental decisions that correct DTA errors do not themselves constitute HLRs, and so are not precluded by an "HLR of an HLR." Therefore, VA may accept HLRs of decisions returned for development and decided under an EP 040.

If the HLR adjudicator identifies a duty to assist (DTA) error in the decision under review, and they are unable to grant the maximum benefit sought, then the HLR adjudicator must return the issue with a request to correct the DTA error. This concludes the HLR of that issue. VBA will then address this issue in the supplemental claim lane. While VA may not accept a request for an HLR of an issue that was the subject of an earlier HLR, in this case there is an intervening supplemental decision even if an HLR Return generated the

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supplemental decision.

Summary:

- An HLR adjudicator may return an issue affected by a DTA error, which concludes the HLR
- VA treats an issue subject to an HLR Return as a supplemental claim
- VBA may accept an HLR of a supplemental claim

REDESIGN OF APPEALS MODERNIZATION FORMS

Target Audience: DROC QRTs and Management

Presenter: Shireen Lackey, Senior Management and Program Analyst, OAR Operations

Overview:

As part of its commitment to continually review and improve the processes related to the Veterans Appeals Improvement and Modernization Act of 2017, otherwise referred to as AMA, OAR began a project to revise two of the AMA forms.

The two forms which were the focus of the project were the VA Form 20-0996, *Decision Review Request: Higher-Level Review* and the VA Form 20-0998, *Your Right to Seek Review of Our Decision*.

On last month's call, you heard about the updates to the HLR form. During this month's call, OAR presents updates to the review rights form. Additionally, OAR also released an updated version of a third form, VA Form 20-0995, *Decision Review Request: Supplemental Claim*, which will be briefly discussed at the end.

Why a Redesign Was Needed:

VA Form 20-0998, Your Right to Seek Review of Our Decision:

If a claimant disagrees with a decision made by a VA entity, this document provides the claimant with their right to seek review of that decision and explains the 3 available review options.

Following the rollout of the AMA decision review options and the introduction of the original form in January 2019, claimants reported confusion about the review options. They also misunderstood the ability to choose any of the 3 options.

OAR's goal was to:

- create a form which clearly communicated the review options,
- incorporate more visual elements, and
- eliminate any unnecessary or complicated wording.

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Redesign Overview:

The redesign was part of a structured, managed project and data based on feedback sessions with Veterans, VSO representatives, and accredited attorneys drove the changes OAR made to the form.

Through substantive changes, OAR achieved the goal of creating a form which clearly communicates the AMA review options by incorporating visual elements and eliminating unnecessary or complicated wording.

VA Form 20-0998 Redesign Specifics:

Specifically, the improvements OAR made include:

- Using clearer, simpler language while not changing the meaning.
- Shortening the form by eliminating unnecessary information.
- Utilizing a visual display with icons at the top of a chart format to identify the three available review options.
 - Within the chart, each row has a header title that provides a clear description of an important aspect to consider or know about that decision review option.
 - Each column provides information about that specific decision review option presented in a designated, logical order.
- A box below the chart captures the effective date information to ensure claimants see this important information.
- Finally, the second page captures the limitations and exceptions – which are important but apply to a much smaller percentage of the decisions.

VA Form 20-0998 - Title:

The VA logo remains the same. OAR changed the title from “Your Rights” to “Your Right.”

The overview introduces the review options and informs the claimant they may select any option. The information is succinct.

You will note there has been a slight name change for this form from “Your Rights to Seek Further Review of Our Decision” to “Your Right to Seek Review of Our Decision.”

VA Form 20-0998 – First Page:

The form expresses the three options in columns so claimants can see they are equal options. Each column provides information about that decision review option by answering the guiding question on the left.

OAR ordered this form in a logical manner, with questions or headers in the left column as a claimant makes their determination about which option is best for their scenario.

- The first row explains the option by showing what VA does when the claimant selects that option and identifies the responsible VA personnel.
- The second row explains what the claimant agrees to do, or actions they need to

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take, if they select that option - and how VA will assist the claimant with accomplishing it. This row also provides detailed information and nuances specific to the option – such as the informal conference and the three Board dockets.

VA Form 20-0998 – First Page Continued:

Continuing the left-hand column headers/questions:

- The third row provides the goal for completion.
- The fourth row provides the form number and name, as Veterans provided feedback explaining they were confused about which form to use for their selected option.
- The final row provides the options they have if they disagree with the decision on their selected decision review choice.

Under the main chart, the form captures effective date information in a black box to ensure claimant's attention is drawn to the 1-year limitation.

- The form outlines the remaining options, if they miss the 1-year limitation, beneath the black box.

VA Form 20-0998 – Second Page:

The second page explains expectations and limitations. This includes contested claims, which have limited options, and insurance decisions, which have an additional option.

OAR finished the form with contact information for OAR's 1-800 number and how to seek assistance from a VSO or accredited representative.

Update to VA Form 20-0995:

OAR reissued VA Form 20-0995, *Decision Review Request: Supplemental Claim*, with a new Office of Management and Budget (OMB) control number and expiration date of April 30, 2024.

The Rework Efficiency Accuracy Landscape (REAL) Team requested a non-substantive edit to the 5103 section of the form.

The new version went live on May 15, 2021.

QUESTIONS FROM THE JUNE 2021 QUALITY CALL

1. If an increased evaluation for a condition, e.g. PTSD, is on HLR and the DRO confirms and continues the evaluation and also returns entitlement to individual unemployability (IU) that's reasonably raised, a decision has never been made for IU, as a DTA error per M21-5 5.2.e, how should the VSR proceed with promulgating this decision? Since PTSD is the only contention under EP 030 HLR, an EP 040 HLR

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DTA Error will not be established for IU following authorization of EP 030. The claims processor cannot add IU as a contention on EP 030 through Caseflow since a decision has never been made on this issue.

Response: M21-5 5.2.e, *Addressing IU in an HLR*, instructs decision makers to return entitlement to individual unemployability (IU) as a duty to assist error (DTA) if it is reasonably raised by the evidentiary record - the theory being that it should have been brought at issue before the higher-level review.

Follow the steps below:

Once the DRO recognizes IU is a reasonably raised issue, take the following steps:

- Step 1: Add IU via Caseflow. This is in addition to adding the issue in VBMS-R.
- If there was a prior IU decision, then select that available decision.
 - If there is no prior IU decision, then add IU in Caseflow as an “unidentified issue.”
- Step 2: If the DRO needs to return IU, then return it with the condition(s) causing/contributing to the unemployability.
- Returning IU with the other condition(s) will ensure the EP040 is automatically established.
 - Even if the DRO grants the maximum evaluation for the underlying condition(s) causing IU, they must return the underlying condition(s) to trigger the establishment of the EP040.
 - The subsequent decision maker will confirm and continue the underlying condition(s) when addressing IU.
- Step 3: Finalize the rating decision but note in the code sheet text box for the Post VSR/Authorizer to add IU once the EP040 is established.

For the Post VSR/Authorizer:

- Step 1: When promulgating the EP030, note whether IU is reasonably raised and review the code sheet text box.
- If the DRO returned IU with other issues identified as DTA errors, then the Post VSR/Authorizer must add IU once the EP040 is established.
 - If the EP040 is not established after 24 hours, open a YourIT ticket and report this to your supervisor who will then send the ticket number to OAR PA for resolution.

2. Regarding remanded appeals. If an applicable law was not provided in the Statement of the Case (SOC) or any Supplemental Statements of the Case (SSOC) that have been completed and the applicable law is not currently listed in VBMS-R, what should the rater do? Is the law not in VBMS-R because it is no longer required?

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Response: OAR is working with our IT partners to identify the impact and possible implementation of the missing laws and regulations within the VBMS Rating Statement of the Case (SOC) Program. As an interim solution, OAR encourages users to use the SOC legacy system to build the document with the appropriate laws and regulations as the legacy SOC builder is editable. We will continue to work with resources available to pursue this requirement, but implementation is dependent on prioritization.

The fact that a law is not in VBMS-R does not mean the law is no longer required. The law may have applied during a period the appeal was pending. Additionally, there are multiple reasons why the law may not be in VBMS-R.

The decisionmaker is required to ensure all laws, applicable and relevant to the specific claim, are included in the decision. This is in accordance with:

- M21-1 III.iv.6.C.5.a, b & e;
- M21-1 III.iv.6.C.6.b, c & e;
- M21-1 III.iv.6.C.7.a & b;
- M21-5 7.D.3.b & c; and
- M21-5 7.D.4.b & d

3. Would it be a critical error if the updated VA Form 20-0998, *Your Right to Seek Review of Our Decision* is not sent to the Veteran/claimant?

Response: Yes, it would be a critical error if the updated VA Form 20-0998 is not sent to the Veteran/claimant. As shown on the VSR Task Based Quality Review Checklist, located in M21-5 6.A.1, *VSR Task Based Quality Review Checklist*, Task 10 asks was the claimant properly notified. One of the error descriptors asks whether the notification letter failed to provide appellate rights, or appellate rights were provided incorrectly.

Failure to provide the updated version of VA Form 20-0998 fails to correctly provide appellate rights. Additionally, the DROC does not need to manually send a VA Form 20-0998. This form is attached to the letters which it should accompany. If the DROC manually sends the form, the DROC should always send the most updated version. The DROC should always go to VA's "[Find a VA Form](#)" page to verify they are using the most updated form and should never save old versions of forms because non-substantive edits are made to forms all the time.

Finally, just a change in the form itself does not entail new guidance or directives. There is no grace period applied following release of a new or updated form. It is still a notification error if you do not send the form or if you send a previous version of the form.

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4. Regarding BVA development, when the Remand requires an addendum, should the case go back to the facility that performed the original exam or a different site for the medical opinion? If the Remand states, "Obtain an addendum opinion from an appropriate clinician regarding the Veteran's low back disorder," does this require going back to the previous examiner or should we just request a new medical opinion?

Response: Unless the BVA Remand directs VBA to obtain an addendum opinion from the same clinician that provided a previous examination or opinion, then VBA is not required to send the claim back to the facility that performed the original exam. This is in accordance with M21-5 7.G.3.g, *Stegall Remands* and M21-5 7.G.4.a, *Developing Evidence in Remands*.

Based upon this, the example provided in the question would not need to go back to the previous examiner and VBA may just request a new medical opinion because this BVA Remand does not direct VBA to obtain an addendum opinion from the previous examiner.

5. Just to clarify, are we now asking HLR decisionmakers to upload both a VA Form 20-0998 and an Informal Conference (IC) Worksheet to document the IC? Or are we still using the VA Form 20-0820 to document the attempts to schedule and the IC Worksheet to document the IC itself?

Response: Whenever the DROC attempts to schedule the IC, whoever makes this attempt must complete and upload the VA Form 20-0998 documenting this attempt, whether it is an initial or second attempt. This complies with M21-5 5.3.e, *Unsuccessful Initial Attempts to Contact the Requesters* and M21-5 5.3.f, *Unsuccessful Second Attempts to Contact the Requesters*. If the decisionmaker does hold the IC, then they must complete and upload the *HLR Informal Conference Worksheet*. This complies with M21-5 5.3.g, *Actions to Take After Successful Contact*.

Based upon these references, it is possible the DROC may need to complete and upload:

- two (2) VA Forms 27-0820, if both attempts to schedule the IC are unsuccessful
- one (1) VA Form 27-0820 and an *HLR Informal Conference Worksheet*, if the DROC is able to schedule an IC following an initial unsuccessful attempt and then a successful attempt, or
- only an *HLR Informal Conference Worksheet*, if the DROC holds the IC during the initial attempt to schedule the IC instead of scheduling the IC for a later date

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6. When sending development letters as part of BVA Remand development, should we use full names, making it as formal as possible, or just put the initials there? That is, should we spell out the names of doctors or use their initials?

Response: The DROC should follow the format used in the BVA Remand and QRT should not cite an error for not using the full name, or not being more formal in a development letter as long as the development letter uses the same format as used in the BVA Remand. It will also not be an error if the DROC does provide the full name or is more formal in the development letter. There is no requirement to provide a more thorough explanation of an individual than what was provided in the BVA Remand.