

Office of Administrative Review (OAR)

Quality Call Bulletin

July 2021

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38 C.F.R. §3.311 AND RADIATION GRANTS

Target Audience: Decision Review Operations Center (DROC) Quality Review Teams (QRT), Management, Veterans Service Representatives (VSR), Rating Veterans Service Representatives (RVSR), and Decision Review Officers (DRO)

Presenter: James Fogg, Program Analyst, OAR Program Administration

References:

- 38 C.F.R. §3.307, *Presumptive service connection for chronic, tropical or prisoner-of-war related disease, disease associated with exposure to certain herbicide agents, or disease associated with exposure to contaminants in the water supply at Camp Lejeune; wartime and service on or after January 1, 1947*
- 38 C.F.R. §3.309, *Disease subject to presumptive service connection*
- 38 C.F.R. §3.311, *Claims based on exposure to ionizing radiation*
- M21-1 IV.ii.1.C.1, *Claims for Service Connection (SC) for Disabilities Resulting from Ionizing Radiation Exposure under 38 CFR §3.311: Development*
- M21-1 IV.ii.2.C.1.a, *Provisions of PL 98-542*
- M21-1 IV.ii.2.C.1.e, *List of Radiogenic Disabilities Under 38 CFR §3.311*

Erroneous Grants:

Compensation Service (CS) performed a review of grants of service connection in claims involving exposure to ionizing radiation. They reviewed 11 rating decisions granting service connection between the period from October 2020 and April 2021. 5 of the 11 (45%) contained erroneous grants. CS informed OAR errors made by DROCs involved medical opinions, specifically granting service connection based upon medical opinions that generally lacked review of the level of Roentgen Equivalent Man (REM) exposure.

Examples:

- Granted service connection (SC) for prostate cancer.
 - While it is considered a “radiogenic disease,” prostate cancer is not a

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- presumptive condition for radiation purposes.
- The specific error in this case was the use of presumptive basis for granting SC.
- Granted SC for tonsillar cancer.
 - No radiation dose estimate was received.
 - Medical opinion did not consider level of exposure.
- Granted SC for hypertension.
 - Medical opinion did not mention level of exposure.
 - Exposure in service (0.59 REMs) did not meet the level cited in study (50-200 REMs).
- Granted SC for right knee sarcoma.
 - Veterans Health Administration (VHA), in 2017, and CS, in 2018, provided negative opinions.
 - Medical opinion referenced UpToDate, however the UpToDate article noted no evidence of increased sarcoma risk in patients treated with lower dose (<14 to 15 Grays (Gy)).
 - Exposure in service was 0.6 REMs, which is a fraction of 15 Gy. One Gy is the international system of units and is the equivalent of 100 Radiation Absorbed Does ([RADS](#)). RADS and REMS are roughly equivalent.
 - Medical opinion did not note the Veteran's exposure level.
- Granted SC for prostate cancer.
 - No radiation dose estimate was received.
 - Medical opinion did not consider level of exposure.
 - Medical opinion did not provide a rationale

38 C.F.R §3.311:

In accordance with 38 C.F.R. §3.311, *Claims based on exposure to ionizing radiation*, prior to granting a claim for SC for a condition claimed to have been caused by exposure to ionizing radiation, the decision maker must:

- Develop for the amount of radiation to which the Veteran claimed, i.e. dose information.
- Develop for an assessment of the size and nature of the radiation exposure, i.e. dose assessment.
- Refer to the Undersecretary for Benefits (USB) for further consideration if the following criteria are met:
 - Veteran was exposed to ionizing radiation.
 - Veteran subsequently developed a radiogenic disease.
 - May consider a disease not listed in this regulation if the claimant cites or submits competent scientific or medical evidence the claimed condition is a radiogenic disease
 - Developed a radiogenic disease within the specified suspense period.
- The USB may refer claim to the Undersecretary for Health (USH) for advisory

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medical opinion.

- Consider:
 - Probable dose (dose type, rate, and duration)
 - Relative sensitivity of the involved tissue
 - Veteran's gender and pertinent family history
 - Veteran's age at time of exposure
 - Time-lapse between exposure and onset of disease and
 - Extent to which exposure to radiation, or other carcinogens, outside of service, may have contributed to development of the disease
- The USB provides advisory opinion and refers claim back to the regional office for adjudication.

Job Aid:

CS has drafted a Radiation Job Aid that is intended as an aid to help process radiation claims. This proposed job aid does not supersede, nor replace, VBA's adjudication manual. This job aid specifically:

- Notes M21-1 requires the evidence to show the claimant alleges the disability is due to radiation before VBA undertakes radiation development (see M21-1 IV.ii.1.C.2.a-d)
- Directs the RO/DROC to see M21-1 IV.ii.1.B (for claims involving 38 C.F.R. §3.309(d)) and M21-1 IV.ii.1.C (for claims involving 38 C.F.R. §3.311)

There have been no changes in who is responsible for the development of radiation claims. The Jackson RO continues to be the special mission site for radiation claims and should continue to complete the development for initial radiation claims.

PUBLIC LAW (PL) 116-283: THREE NEW HERBICIDE PRESUMPTIVE CONDITIONS

Target Audience: DROC QRTs, Management, VSRs, RVSRs, and DROs

Presenter: James Fogg, Program Analyst, OAR Program Administration

References:

PL 116-283, *William M. Thornberry National Defense Authorization Act for Fiscal Year 2021*

38 U.S.C. §1116(a)(2), *Presumptions of service connection for diseases associated with exposure to certain herbicide agents; presumption of exposure for Veterans who served in the Republic of Vietnam*

38 U.S.C. §5103, *Notice to claimants of required information and evidence*

38 C.F.R. §3.114, *Change of law or Department of Veterans Affairs issue*

38 C.F.R. §3.307, *Presumptive service connection for chronic, tropical, or prisoner-of-war related disease, disease associated with exposure to certain herbicide agents, or disease associated with exposure to contaminants in the water supply at Camp*

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Lejeune; wartime and service on or after January 1, 1947
38 C.F.R. §3.309, *Disease subject to presumptive service connection*
38 C.F.R. §3.816, *Awards under the Nehmer Court Orders for disability or death caused by a condition presumptively associated with herbicide exposure*
VBA Letter 20-21-07, *Processing Guidance for Claims and Appeals for New Agent Orange Presumptive Conditions*
M21-1 III.iv.6.C.7, *Long-Form Rating Narrative*
M21-1 IV.ii.1.H, *Developing Claims for Service Connection (SC) Based on Herbicide Exposure*
M21-1 IV.ii.2.C.3, *SC for Disabilities Resulting From Exposure to Certain Herbicide Agents or Based on Service in the RVN*
M21-4 Appendix C, *Index of Claim Attributes*
Nehmer SOP

Public Law (PL) 116-283:

PL 116-283 added three new diseases to the list of conditions presumptively associated with exposure to herbicide agents.

- Bladder cancer (DC 7528)
- Hypothyroidism (DC 7903), and
- Parkinsonism or Parkinson-like symptoms (DC 8099-8004)

The change in law went into effect January 1, 2021. VBA began processing claims involving these conditions June 21, 2021. VBA will apply the *Nehmer* provisions, per 38 C.F.R. §3.816, to these 3 new Agent Orange presumptive conditions.

Claims Identification and Establishment:

- VBA conducted a data review to search for Veteran files and has auto established an End Product (EP) 688.
- DROC processing locations:
 - *Nehmer* AMA: St. Petersburg DROC
 - *Nehmer* Legacy: DROC DC
- DROC processing locations will complete all portions of the claims process (development, rating, and promulgation/authorization).
- Training was conducted, via Adobe Captivate Prime, from June 14, 2021 to June 18, 2021. Specific employees are designated to process NDAA workload; these employees were automatically enrolled in Course 4570454: *Public Law 116-283: Three New Agent Orange Presumptive Conditions*. If you are a designated processor for this workload and you were not enrolled in this course, or were unable to complete this course, contact your training manager.
- Claims are being distributed to the *Nehmer* DROC processing sites under one of the following claim labels:

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- 688 FY21 NDAA Companion *Nehmer* Review, or
- 688 FY21 NDAA Appeals *Nehmer* Review

The claim label “688 FY21 NDAA Companion *Nehmer* Review” will be used when at least one of the three new presumptive conditions is at issue and there is a higher-level review (EP 030). For EP 040s, please refer to Appendix A of VBA Letter 20-21-07 to determine the appropriate *Nehmer* claim label. The claim label “688 FY21 NDAA Appeals *Nehmer* Review” will be used when at least one of the three new presumptive conditions is at issue on a legacy appeal (EP 170 or 070). Please note, accurate claim labels are critical for accurate NWQ routing.

Manual Claims Establishment for Supplemental Claims, HLRs and Legacy Appeals:

For claims where an EP 688 has not been auto-established:

- Attach the “FY21 NDAA AO Presumptive” special issue to the contention(s).
 - If “VACO Special Issue 7” is attached to the claim, remove it.
 - Ensure any other required corporate flash or special issue is affixed per M21-4 Appendix C, to include any required for Blue Water Navy (BWN) processing/routing.
- If *Nehmer* applies, then establish a separate EP 688 with the appropriate date of claim and claim label. Attach the “FY21 NDAA AO Presumptive” special issue to the contention(s).
 - If the only contention(s) are for the three new presumptive conditions, then affix the “*Nehmer* Companion Hold” special issue to the contention(s), otherwise do not affix this special issue.
- If *Nehmer* does not apply, then do not establish a separate EP 688 or remove the “FY21 NDAA AO Presumptive” special issue and attach “*Nehmer* Processing Not Applicable” special issue to the contention(s). Adjudicate the supplemental claim, HLR or legacy appeal using the original EP.

Development Guidance:

VA’s current notice provided in accordance with 38 U.S.C. §5103 is sufficient to provide general information for these claims, including what evidence is necessary.

If specific development for the three new presumptive conditions is necessary, ensure any free text development actions properly address these presumptive conditions.

For claims currently pending involving all identified potential *Nehmer* class members with

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an address of record, send the Initial *Nehmer* Notice upon establishment of the EP 688. Claims processors should not include the “AO–*not a recognized condition*” paragraph or the MAP-D “AO – *SC Death, Nexus, Vietnam Service*” paragraph simply because the conditions are not currently listed under §3.309(e). VBA intends to publish an update to 38 C.F.R. §3.309(e), adding these three new conditions to the regulation.

See M21-1 IV.ii.1.H for additional guidance on developing claims for disabilities resulting from exposure to herbicides, including under the *Nehmer* stipulation.

Rating Guidance:

Apply regular rating principles when evaluating the three new presumptive conditions.

Use the following diagnostic codes (DC) for the three new presumptive conditions:

- DC 7528 for bladder cancer,
- DC 7903 for hypothyroidism, and
- DC 8099-8004 for Parkinsonism or Parkinson-like symptoms, rating it analogous to paralysis agitans (Parkinson’s disease is currently rated under this code)
 - For additional DC Guidance with Parkinsonism or Parkinson-like symptoms, refer to the *Suggested Diagnostic Codes for Parkinson’s disease, Multiple Sclerosis (MS), and Amyotrophic Lateral Sclerosis (ALS)* guide on the [Compensation Service Job Aids page](#), located at: <https://vbaw.vba.va.gov/bl/21/rating/rat00.htm>

When *Nehmer* does not apply, liberalizing law **does** apply.

- Claims received within a year of January 1, 2021, where entitlement existed prior to this date, will be granted effective January 1, 2021, date of change in law.

VBA added fragment updates during the June 20, 2021 VBMS-R update for these three new presumptive conditions. They are also located on the [VBMS-R Standard Data \(Fragment\) Updates Webpage](#) (<https://vbaw.vba.va.gov/bl/21/rating/rat08.htm>).

For inquiries about this update or to submit a fragment enhancement request, please email CSSystemsRequest.VBACO@va.gov.

Nehmer Rating Guidance:

All *Nehmer* decisions must:

- Follow the long-form narrative format,
- Include the required rating narrative elements found in the *Nehmer* Standard Operating Procedure (SOP), and
- Undergo a review by a *Nehmer* rating subject matter expert

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Please see the latest version of the *Nehmer* SOP, located on the Blue Water Navy (BWN) - *Nehmer* - Home (va.gov) page at:
https://vaww.portal2.va.gov/sites/OfficeofFieldOperations/BlueWaterNavyNehmer/_layouts/15/start.aspx#/SitePages/Home.aspx

Nehmer Issues Discovered:

- If VBA discovers *Nehmer* eligibility outside of a *Nehmer* review with a specific Rating EP (such as 687 and 688), then VBA should use an EP 688.
 - If the rating EP includes non-related *Nehmer* contentions:
 - establish a separate EP 688 for the *Nehmer* condition(s) with the appropriate claim label and contention(s) and
 - affix the *FY21 NDAA AO Presumptive* special issue indicator to the contention(s).
 - If all contentions on the existing EP are *Nehmer* related:
 - establish a separate EP 688 with the appropriate claim label and contention(s)
 - affix the *Nehmer Companion Hold* and *FY21 NDAA AO Presumptive* special issue indicators to the contention(s), and
 - the concurrent EP will be held until the EP 688 is ready for processing.
- Ensure any other required corporate flash or special issue is affixed per M21-4 Appendix C.

DECISION REVIEW OPERATIONS CENTER (DROC) LOCAL ERRORS

Target Audience: DROC QRTs and Management

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

Purpose:

The purpose of the review was to determine if Rating Quality Review Specialists (RQRS) at the identified DROC were citing errors correctly, and if not, identify where the DROC should focus when conducting their local quality reviews.

Data Sample and Raw Data:

OAR analysts reviewed 50 Decision Review Officer (DRO) and Rating Veteran Service Representative (RVSR) Individual Quality Reviews (IQR) for the period of October 1, 2020 to March 31, 2021 of which the DROC RQRSS cited no errors.

Data Sample

OAR analyst utilized QMS to identify all DRO and RVSR IQRs for the period identified

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above for the DROC.

OAR drilled down the data and identified 19,007 DRO and RVSR IQRs where the DROC RQRSs cited no errors.

For the sample, OAR identified a random population of 50 IQRs where the DROC RQRSs cited no errors.

Raw Data

OAR analysts conducted a review of 50 IQRs.

OAR cited errors on 14 of the cases; 72% accuracy

From the 14 cases where errors were cited, OAR cited 18 specific errors; 64% accuracy (4 cases contained 2 errors).

Error Trends:

OAR cited most errors (10 of 18) for Checklist question #4 - Were all necessary examinations and medical opinions requested and sufficient?

Specific error descriptors cited include the following:

- The VA medical opinion was insufficient (opinion was requested but not provided).
- The supporting rationale for a required VA medical opinion was incomplete or not supported by the evidence.
- VA medical opinion was needed but was not requested.

Recommendations:

When conducting their local quality reviews, the DROC RQRSs should focus on Checklist question #4 - Were all necessary examinations and medical opinions requested and sufficient?

The DROC RQRSs should focus on the following error descriptors contained under Checklist question #4 when conducting their local quality reviews:

- The VA medical opinion was insufficient (opinion was requested but not provided)
- The supporting rationale for a required VA medical opinion was incomplete or not supported by the evidence
- VA medical opinion was needed but was not requested

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REASONABLY RAISED INDIVIDUAL UNEMPLOYABILITY AND HIGHER-LEVEL REVIEW RETURNS

Target Audience: DROC QRTs, Management, VSRs, RVSRs, and DROs

Presenter: James Fogg, Program Analyst, OAR Program Administration

Scenario:

After performing a higher-level review, the DRO notes an increase of a service-connected (SC) condition is warranted, but not to the schedular maximum. This potential increase would result in the Veteran meeting the schedular requirement for entitlement to total disability based upon individual unemployability (TDIU). Based upon the evidence of record, it appears the Veteran's SC conditions render the Veteran unemployable. However, TDIU is unable to be granted based on the evidence of record. How should the HLR address TDIU?

Answer:

In this situation, the DRO has determined, based on the prior evidence of record, a higher evaluation should have been assigned. Moreover, if the correct evaluation would have been assigned, the Veteran would have met the schedular requirements for entitlement to TDIU. In addition, the prior evidence of record requested, or reasonably raised, entitlement to TDIU.

A Duty to Assist (DTA) error may result if the DRO cannot grant the maximum evaluation, including potential entitlement to TDIU, and additional development is warranted. The DRO should:

- Follow the instructions in M21-5 5.2.e *Addressing IU in an HLR*, which include the directions to:
 - Return the underlying service-connected condition(s) responsible for the unemployability under the disposition of "HLR Return DTA Error - Other Records,"
 - Complete the HLR Return form, annotating the reasons for the return and the needed development.

The development will be conducted under an EP 040.

If the DRO can assign the maximum schedular evaluation for the underlying condition, then they should assign the maximum schedular evaluation. Return the issue of TDIU *and* the underlying condition under the DTA error.

These actions will ensure the proper EP 040 is subsequently established. The promulgating VSR will need to add TDIU as an issue to the EP 040 in VBMS.

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An update to the AMA FAQ is pending, and M21-5 Chapter 5, specifically M21-5 5.2.e, *Addressing IU in an HLR*, has been updated.

M21-5 4.5.F DECISION NOTICES AND DOWNSTREAM ISSUES

Target Audience: DROC QRTs, Management, VSRs, RVSRs, and DROs

Presenter: ReEdna Bankhead, Management and Program Analyst, OAR Program Administration

M21-5 4.5.a Types of Board Actions:

- After issuing a decision, the Board of Veterans' Appeals (BVA) returns the claim to Veterans Benefits Administration (VBA) for review of the claims folder and implementation of the decision, if necessary.
 - This process is called effectuating a Board decision.
- When a BVA grant does not prescribe a specific disability evaluation and/or effective date, VBA must review the record and take jurisdiction of these downstream issues.
- [Downstream issues](#) arise as a direct result of a favorable BVA decision on an issue and must be addressed when effectuating the BVA decision.
- Examples of downstream issues include:
 - Disability evaluation
 - Effective date
 - Ancillary benefits
- The decision maker should also see M21-5 7.A.1.f, *Definition: Downstream Issue* and M21-5 7.G.1.g, *Determining the Effective Date for a Grant of Benefits by the Board* for addressing downstream issues.

M21-5 4.5.f Decision Notices:

If BVA grants an issue on appeal and there are downstream issues that VBA must address, then provide the notice as required by M21-5 4.5.f, *Decision Notices*. If BVA issues a remand and VBA subsequently grants that issue, then VBA must provide the appropriate notice, including review rights. **Note:** Because VBA granted this issue, as opposed to BVA granting the issue, VBA is responsible for addressing all issues downstream from their decision as if the issue had not been appealed, which includes providing the appropriate notice.

- When effectuating the BVA decision confers new review rights, consistent with M21-5 7.D.2.h, *When Decisions on Downstream Issues Confer New Review Rights*, these downstream issues are eligible for review under any of the Appeals

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Modernization Act (AMA) three review options.

- The new downstream issues require review rights.
- If only effectuating the BVA decision or rendering a partial decision, review rights are not required.

QUESTIONS FROM THE JULY 2021 QUALITY CALL

1. If a radiation HLR came into the DROC, wouldn't it be transferred back to the Jackson RO, in accordance with M21-5 5.1.d, *Who May Conduct HLRs*?

Response: Yes, as noted in M21-5 5.1.d; “**Normally**, HLR requests for specialized contentions, such as exposure to radiation, should be routed by the National Work Queue (NWQ) to the stations responsible for processing such claims.” However, we have recently observed some inconsistent distribution by the NWQ. Also, as noted in M21-5, 5.1.d, “The Office of Administrative Review (OAR) or the Office of Field Operations (OFO) may occasionally authorize deviations to these routing procedures.”

The intent of the Quality Call presentation on 38 C.F.R. §3.311 and Radiation Grants is to highlight and remind DROC employees of the importance of following the established guidance in the regulation and manual when processing claims related to radiation exposure.

2. What if some of the issues causing the need for TDIU are not under the HLR? Are we taking issues not on appeal? If the HLR is only for PTSD, which we are increasing to 70% from 50% and all issues for which the Veteran is service connected are causing the TDIU, do we increase the PTSD and take the other issues not under HLR review, e.g. a knee?

Response: The DROCs are not taking issues not on appeal. The HLR would return the issue that was under review and the issue of TDIU. The supplemental claim will address any disabilities that were not under the HLR as the reasonably raised issue of TDIU is a claim for increase for the issues the Veteran believes causes them to be unemployable.

In the example provided, you would increase the PTSD and return the issue of PTSD and TDIU, not any other conditions believed to cause unemployability unless the Veteran requested an HLR of these other conditions. The supplemental claim will address any disabilities that were not under the HLR as the reasonably raised issue of TDIU is a claim for increase for the issues the Veteran believes causes them to be unemployable.

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3. Even if the HLR cannot assign the maximum evaluation, should they still assign the increase and issue a return?

Response: Yes, even if the HLR cannot assign the maximum evaluation, the HLR should assign the increase and issue an HLR return.

4. How does this guidance concerning an HLR reasonably raising the issue of TDIU align with 38 C.F.R. 3.2601(g)? What seems to be the most in line with 38 C.F.R. 3.2601(g) would be to have the DRO grant the increase as a favorable finding on the [VA Form 20-0999](#), *Higher-Level Review Return*, which would then allow the RVSR to implement it after the DTA return and then develop the EP 040 with the TDIU.

Response: This guidance does not conflict with 38 C.F.R. 3.2601(g). The HLR has determined the decision under review did not assign the correct evaluation for the condition under review. If the reviewed decision had assigned the correct evaluation, then the decision would have reasonably raised the issue of TDIU. Calling a DTA error allows the HLR to return the TDIU issue, which was not previously denied and would not be available to add as a contention. OAR has determined this action is most in line with 38 C.F.R. 3.2601(g).

5. The guidance instructed the promulgating VSR to add TDIU as an issue to the EP 040 in VBMS. Is this a typo and the promulgating VSR should add the issue of TDIU to the EP 030? Please note a VSR promulgating an EP 030 cannot add issues to the EP 040 since it takes 48 hours for the EP 040 to CEST.

Response: This is not a typo, and the promulgating VSR should add the issue of TDIU to the EP 030. If the EP 040 is not established after 24 hours, please open a YourIT ticket and report this to your supervisor who will then send the ticket number to OAR Program Administration for resolution.

6. Are there any other workarounds that would allow the following of April 2021 OAR Symposium IU/HLR Guidance, i.e. DRO grants increase under difference of opinion (DOO) and return just TDIU to EP 040?

Response: OAR has determined this is the best workaround currently available.

7. Should the DROC add the verbiage in M21-5 4.5.f, *Decision Notices* to decision notice letters only for EP 030 Board Grants and not to EP 040 Board DTA Errors?

Response: The DROC should only add the verbiage in M21-5 4.5.f to decision notice letters for EP 030 Board Grants. The DROC should not add this verbiage to letters

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for EP 040 Board DTA Errors. The verbiage in M21-5 Section 4.5 f applies to Board Grants. Per M21-5 Section 4.5.d *Review of Board Actions*, process a grant (decision) of a Board action utilizing EP 030 while the decision maker processes a Remand utilizing EP 040. M21-5 Section 4.5.f instructs each decision, whether rating or non-rating, must include the notice requirements under AMA. Also, after VBA complies with the instructions of the remand, it makes a new decision as appropriate and notifies the appellant. VBA should enclose any rating with the decision notice. If the DROC or RO decided any issue downstream of the Board's grant, such as evaluation or effective date, the DROC or RO should also enclose [VA Form 20-0998](#), *Your Rights to Seek Further Review of Our Decision*. Otherwise, refer the appellant to the review rights provided by the Board.