

# Office of Administrative Review (OAR)

## Quality Call Bulletin

### December 2022

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#### Pension Reductions Based on Social Security (SS) Cost of Living Adjustments (COLA)

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**Target Audience:** Decision Review Operations Center (DROC) Management and Quality Review Teams (QRT) and Veterans Service Representatives (VSR)

**Presenter:** Suzi Ribish, Management and Program Analyst, OAR Program Administration (PA)

**References:**

- 38 C.F.R. §3.27, *Automatic adjustment of benefit rates*
- 38 C.F.R. §3.31, *Commencement of the period of payment*
- M21-1 IX.iii.1.E.6.e, *Counting Recurring Income*
- M21-1 IX.iii.1.H.3, *Cost-of-Living Adjustments (COLAs)*
- M21-1 X.v.2.C, *Cost-of-Living Adjustment (COLA)*
- *VBMS Awards User Guide*

**Normal Impact of SS COLA**

With the month of December upon us, OAR is providing some general reminders about COLAs as they pertain to pension processing.

Normally a SS COLA adjustment will not reduce the rate of current-law pension because the current-law pension maximum annual pension rate (MAPR) always increases at the same time and percentage as the rate of SS, per 38 C.F.R. §3.27, *Automatic adjustment of benefit rates*. If the SS COLA does not reduce the rate of current-law pension, count the increased rate of SS from the effective date of the COLA (generally December 1<sup>st</sup>).

This is an *exception* to the general end-of-the-month rule to count increased income from the first day of the month following the month in which the pensioner receives it.

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**Example:** A Veteran is receiving current-law pension based on SS of \$5,000 per year (monthly pension rate is \$637). Effective December 1, 2020, the rate of SS goes up to \$5,205 as a result of the COLA. Pay \$638 per month based on IVAP of \$5,205 from December 1, 2020.

This is considered a “normal” COLA adjustment since the monthly pension rate increased on December 1, 2020.

#### **Pension Rate Reduction Due to SS COLA**

If a SS COLA adjustment results in a decrease in the rate of current-law pension, decrease the pension rate effective the first of the month following the effective date of the COLA/MAPR increase (often referred to as a deferred COLA or protected COLA). We will never allow a SS COLA increase to create a reduction in the rate of pension payable effective 12/01/YY.

Note: If deductible expenses for the calendar year associated with the COLA are projected to increase the rate of pension payable, then carry forward the previous year’s pension payment rate until February 1.

**Example:** Effective January 1, 2019, the Veteran’s monthly pension rate is \$622. You input the new SS rate effective December 1, 2019, and the monthly pension rate is decreased to \$620. Do “Protected COLA” guidelines apply?

Yes, in this case you cannot pay the reduced rate of pension on December 1, 2019.

Instead: Continue to pay monthly pension rate of \$622 effective 12-01-19 and pay reduced monthly rate of \$620 effective 01-01-20.

#### **Pension Rate Reductions Due to SS COLA Processing on Running Awards**

If the adjustment will result in reduction of a *running* award, VA must furnish notice of proposed adverse action for the reduction.

Do not adjust the award until at least 60 days after the notice of proposed adverse action is sent to the beneficiary, *unless the beneficiary requests the reduction*.

We encourage you to call the beneficiary and request permission to count the correct SS rate on the award immediately to eliminate the need to send due process.

When adjusting the award, use withholding reason, *Pension/Continued Rate COLA*, while processing the award adjustment in the Veterans Benefits Management System – Awards (VBMS-Awards).

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#### **SS COLA on Original, New, or Suspended Awards**

The DROCs will likely, most frequently encounter new or reopened pension awards. However, there are instances where the DROCs will need to make adjustments on running awards.

As a reminder, M21-1 IX.iii.1.H.3.h, *Original, New, or Suspended Awards*, states: “If the Social Security or other benefit program COLA occurs before an original or new award is processed or when an award is in suspense, no notice of proposed adverse action for a reduction is required.”

If there is no running award prior to your action, you do not need to issue due process if the SS COLA increase causes a reduction in the rate of pension payable.

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#### **040 End Product (EP) Control Establishment for Duty to Assist (DTA) Errors**

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**Target Audience:** DROC Management, QRT, Decision Review Officers (DRO), Rating Veterans Service Representatives (RVSR), VSRs, and Claims Assistants (CA)

**Presenter:** Christina Ngom, Management and Program Analyst, OAR PA

#### **References:**

- 38 C.F.R. §3.105, *Revision of decisions*
- 38 C.F.R. §3.2500, *Review of decisions*
- 38 C.F.R. §3.2601, *Legacy review of benefit claims decisions*
- M21-5 5.5, *Error in the Duty to Assist*
- M21-4 Appendix B, *End Product Codes*
- [HLR Returns Job Aid](#)

#### **Difference of Opinion v. DTA Error**

Difference of Opinion (DoO): When a reviewer changes a prior decision based on their difference of opinion from the prior adjudicator. The reviewer may *not* use DoO to revise the decision in a manner that is less advantageous to the claimant.

DTA Error: A failure during the processing of the reviewed decision (e.g., rating decision, SOC, etc.) to properly apply the provisions of 38 C.F.R. § 3.159 for gathering evidence. These deficiencies include, but are not limited to, omitting development, or failing to request certain examinations. The reviewer must return the issue(s) for development unless they can grant the claimant the maximum benefit.

Reviewers must ensure that VA complied with its statutory DTA in gathering evidence for the prior (contested) claim. A true error in VA’s duty to assist (DTA) contains two components: VA’s obligation under 38 C.F.R. § 3.159 to assist in obtaining certain evidence and VA’s failure to do so at the time of the prior decision.

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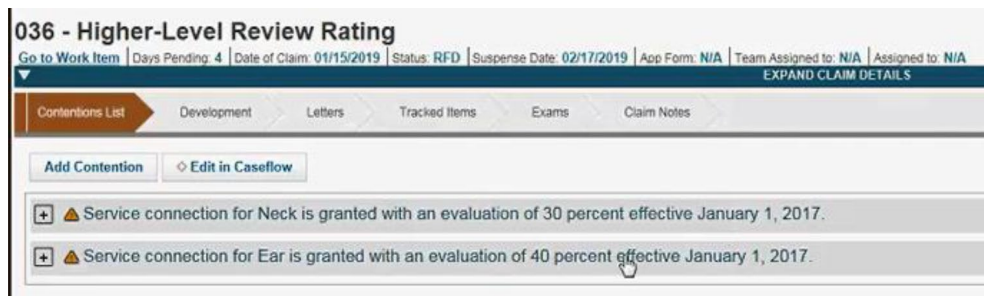
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When conducting the *de novo* review the reviewer may also determine that, while VA correctly performed its DTA in gathering evidence, as a senior reviewer they disagree with the prior adjudicator's decision and have a DoO. In these circumstances, the reviewer may determine there is required development based on DTA or DoO.

Returns for DoO and DTA decision must be issued in the appropriate system for the impacted issue(s) and all other issues (VBMS-R, VBMS-A).

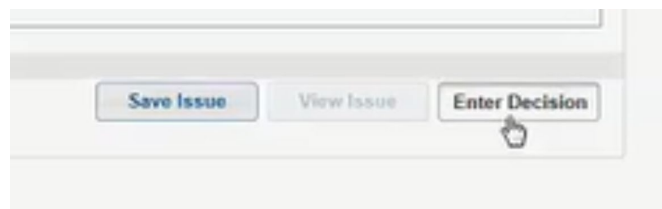
#### VBMS-Rating HLR Dispositions and Returns

Within VBMS the decisionmaker should review from *Claims Details Screen* that all contentions are properly established within Caseflow and are displayed.



#### Handling DTA Errors in VBMS

Step One: On the *Issue Management Screen*, Add the Contention (map to Caseflow contention) and select *Enter Decision*.



Step Two: Select *Disability Decision Information-manual entry* radio button.

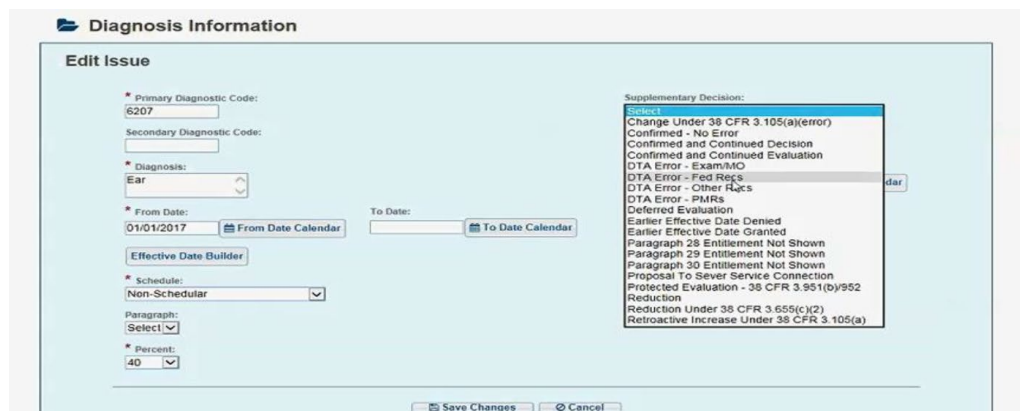


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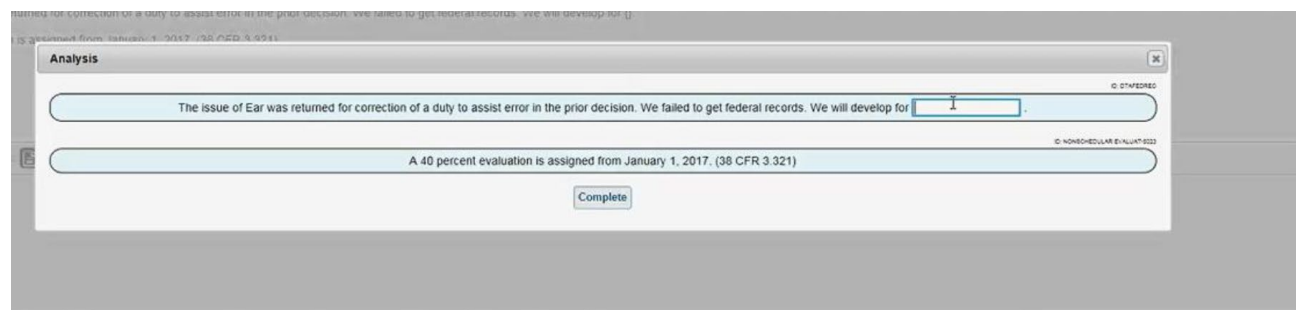
**Step Three:** From the Diagnosis Information Tab, select Edit on the Contentions Block to enter the Supplementary Decision screen.



**Step Four:** Select the appropriate *DTA* selection from the *Supplementary Decision* drop-down menu, based on the development necessary for the current claim.



**Step Five:** The decisionmaker will enter the action needed to complete the *DTA Error* and then build the rating narrative on the *Document Decision Screen* and save. Once all *DTA* decisions have been saved for all contentions using the *Issue Management* screen from the documents tab select *Finalize*.



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#### HLR Dispositions

Select the appropriate *DTA Error* from the *Contention Disposition Information* drop-down menu and complete the rating by selecting *Continue*.

Contention Disposition Information

Please verify disposition for each contention in order to complete rating

Service connection for Neck is granted with an evaluation of 30 percent effective January 1, 2017.:

Service connection for Ear is granted with an evaluation of 40 percent effective January 1, 2017.:

--Select a disposition--

Granted

Denied

DTA Error - Fed Recs

DTA Error - PMRs

DTA Error - Other Recs

DTA Error - Exam/MO

Cancel Continue

#### DTA Error Categories

To ensure proper tracking when entering the Supplemental Decision screen reviewers must categorize errors by the type of development needed.

Error Category	Disposition
DTA for private medical records	<i>DTA - PMRs</i>
DTA for federal records	<i>DTA - Fed Recs</i>
DTA for other records	<i>DTA - Other Recs</i>
DTA for an exam or medical opinion	<i>DTA - Exam/MO</i>
Difference of opinion	<i>Difference of Opinion</i>

#### Final Steps

Complete VA Form 20-0999, *Higher-Level Review Return*, for all issues returned for corrective action and upload the form to the VBMS eFolder.

- Detail the required development action(s) and identify the error categories
- Document any favorable findings
- Once VA clears the EP 030 in VBMS-Awards, Caseflow will automatically establish an EP 040 with the appropriate claim label when a higher-level review (HLR) return is completed

#### EP Control of HLRs

VA continues to track the case and issue development under an 040 EP with a rating or non-rating claim label as it is now treated as a supplemental claim, requiring additional development and evidence.

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Caseflow Intake is used to establish HLRs within VBMS

The development VSR will verify the creation of the appropriate claim label:

- HLR DTA Error – Rating, or
- HLR DTA Error – Non-Rating

OAR is aware of times when Caseflow fails to establish an EP.

The failure of the EP040 establishment has 3 reasons:

- 1) user not selecting the correct disposition in VBMS-R (need to select the DTA or DoO)
- 2) not promulgated through VBMS-A (this has been noted to not be a frequent issue), and
- 3) system failure which requires contractor intervention which is sometimes due to the user in reason 1.

OAR continues to advise that when the EP040 fails to establish, the user should open a YourIT ticket. If it's an urgent issue, then route through your local management to the [OAR Program Administration Mailbox](#). Caseflow contractors will track the number of issues related and provide resolution.

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### Agent and Attorney Fee (AAF) Manual Updates

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**Target Audience:** DROC Management, QRT, DROs, RVSRs, VSRs, and CAs

**Presenter:** Kat Calvitti, Management and Program Analyst, OAR PA

**References:**

- M21-5, 8.A, *Introduction to Fees*
- M21-5, 8.B, *Processing a Case Seeking Direct Payment of Fees*
- M21-4, Appendix E, *Index of Corporate Flashes and Special Issues*

On November 2, 2022, OAR published updated guidance in M21-5 for processing agent and attorney fee cases and Compensation Service published updated guidance relating to the attorney fee corporate flashes in M21-4, Appendix E.

**Agent/Attorney Fee Flashes**

M21-5, 8.A.2.d, provides guidance for using flashes in agent and attorney fee cases.

Flash Name	Description
Potential Attorney Fee	Use when a fee agreement is received and there is potential for fees.
Private Attorney – Fees Payable	Use when an Agent and Attorney Fee Coordinator (AAFC) determines fees are payable.

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M21-5, 8.A.3.d describes actions to take when a fee agreement is invalid.

It is important that AAFCs utilize the appropriate flashes when reviewing fee agreements to determine the validity. In the most recent update, M21-5, 8.A.2.d and M21-5, 8.A.3.d were updated to instruct AAFCs to add a permanent "Attorney Fee Review" note to the eFolder if the fee agreement is invalid and to remove the *Potential Attorney Fee Flash*; in addition, the requirement to utilize attorney fee specific special issues was removed.

#### Tracked Items

M21-5, 8.B.1.a describes the process when direct payment of fees is potentially allowable.

Tracked Item Name	Description	Initial Suspense	Manual Reference
Attorney Fee	Add after the attorney fee is calculated and the award is generated under the rating <u>end product</u> (EP).	3 days	M21-5, 8.B.1.a.
Attorney Fee	After the authorizer (AAFC) completes necessary actions under the rating EP, the AAFC will establish EP 400 – Attorney Fee Memo and add the Attorney Fee tracked item.	65 days	M21-5, 8.B.1.a.
Attorney Fee	Use when VA has failed to perform financial transactions to make funds available for direct payment of fees (as required) and the failure <u>was asserted</u> or discovered after an awarded non-recurrent payment has already been made to the claimant under EP 600 - Predetermination Notice Non-Rating.	65 days	M21-5, 8.B.6.c
Attorney Fee Release	Add after the 65-day period has expired and the Fee Release Memorandum is sent to Finance.	10 days	M21-5, 8.B.1.a M21-5, 8.B.4.d M21-5, 8.B.4.e

#### Fee Eligibility Decision

M21-5, 8.B.3.a was updated to indicate a fee eligibility decision should *not* be issued if the rating or non-rating decision only denies and/or confirms and continues benefits.

Additionally, a fee eligibility decision should not be issued on an original claim for benefits that is being adjudicated for the first time.



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#### **Finance Activity**

M21-5, 8.B.4.d, was updated to indicate that Finance must upload the SF 1047/Public Voucher or fiscal print to the eFolder (legacy process) or ensure the fiscal print was successfully uploaded into the eFolder when releasing funds for agent or attorney fees when an assessment is required.

#### **Reasonableness Reviews**

M21-5, 8.B.5.g, was updated to reflect using EP 400 – ORR when referring an individual's statement to Office of General Counsel (OGC) for evaluation of whether it meets the requirements for a request for reasonableness review.

The AAFC must change the EP 400-AFM to an EP 400-ORR and close the "Attorney Fee" tracked item previously established to control the 65-day suspense and add a new *Attorney Fee* tracked item with "*referral to OGC*" to the EP 400-ORR in addition to taking all previously required actions.