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# Obstructive Sleep Apnea: Evaluations and Effective Dates

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

**Presenter:** Bryan Yost, Senior Management and Program Analyst, OAR

**References:**

* 38 C.F.R. § 4.97, *Schedule of ratings—respiratory system*
* 38 C.F.R. § 3.400, *Effective Dates, General*
* § 4.1, *Essentials of evaluative rating.*
* § 4.3, *Resolution of reasonable doubt.*
* M21-1, V.iii.4.A.2.a., *Sleep Apnea and Sleep Studies*
* M21-1, V.ii.4.A.1., *General Guidance on Assignment of Effective Dates*
* M21-1 V.ii.4.A.1.a., *Gathering Evidence for Effective Date Determinations*
* M21-1 V.ii.4.A.1.b., *General Effective Date Rule*
* M21- V.ii.4.A.1.c., *Definition: Date Entitlement Arose*
* M21-1 V.ii.4.A.1.d., *Determining the Applicable Date of Claim for Effective Date Purposes*
* M21-1 V.ii.4.A.1.e., *Determining Whether Date of Claim or Date Entitlement Arose Is Later*
* M21-1, V.ii.4.A.6.o., *Example of Staged Rating Impacted by 38 CFR 3.114*
* M21-1, V.ii.3.C.1.b., *Subthreshold Diagnoses*
* M21-1, V.ii.1.A.2.g., *Absence of Evidence*
* M21-1, V.ii.1.A.2.h*., Court Holdings on Negative or Absent Evidence*
* Fenderson v. West, Jan 20, 1999, 12 Vet.App. 119 (1999)

DROC management reported that RQRSs have conflicting interpretations of M21-1, Part V, Subpart iii.4.A.2.a. RQRSs are not on the same page when it comes to effective dates for and evaluations of sleep apnea. OAR was asked to provide clarification on a scenario and address whether any of three commonly identified interpretations rise to the level of a critical error.

Receipt of medical evidence disclosing a diagnosis of sleep apnea without confirmation by a sleep study is sufficient to trigger the duty to assist for scheduling an examination if the other provisions of 38 CFR 3.159(c)(4) have been satisfied. However, such evidence is not sufficient to award service connection (SC) for sleep apnea. When clinical examination leads to the conclusion that symptoms of sleep apnea are present, the subsequent diagnosis of sleep apnea must be confirmed by sleep study for compensation purposes.

Do not establish SC for sleep apnea that has not been confirmed by a sleep study.

However, if clinical indicators of sleep apnea are not found on examination, a sleep study is not required to rule out the sleep apnea diagnosis.

**SCENERIO:** A Veteran files a substantially complete claim for sleep apnea on June 1, 2017. He reports persistent fatigue since service, and his VA medical records show he must take daily naps due to poor sleep.

We receive private medical records showing a sleep study diagnosing sleep apnea completed on January 2, 2018. The Veteran was recommended treatment with CPAP.

Rating Decision dated April 15, 2018, denied SC for sleep apnea as unrelated to service and the Veteran timely filed a legacy appeal. The Board subsequently granted SC for sleep apnea.

**Interpretation A:** Some interpret the reference to mean we cannot grant SC prior to the date of a sleep study. Therefore, in this scenario, we could not grant SC for sleep apnea until 01/02/18, the date of the sleep study showing sleep apnea.

**Interpretation B**: Others interpret the reference as meaning we must verify a diagnosis via a sleep study, but we are not limited to granting SC from the date of the sleep study. In their interpretation of this scenario, we would grant 30% from 06/01/17, date of receipt of claim, and 50% from 01/02/18, the date of the sleep study showing the need for a breathing assistance device.

**Interpretation C:** Still others believe we can justify a 50% grant all the way back to 06/01/17, the date of claim, because the sleep study itself did not cause sleep apnea or the need for a CPAP. The argument here is that the Veteran already had sleep apnea and would have needed a CPAP when his claim was filed; he just needed the sleep study to confirm it.

**Of the provided interpretations for the scenario, Interpretation A is the only answer that is clearly and unmistakably in error**. There is nothing within the manual reference to support that the existence of a sleep apnea disability starts from the date of a sleep study. Rather, the sleep study confirms the diagnosis. The scenario provided a claim of sleep apnea and reporting of symptoms consistent with the diagnosis at least as early as the DOC.

There is no regulatory definition of the phrase date entitlement arose. However, in Wright v. Gober, 10 Vet.App. 343 (1997), the phrase "date entitlement arose" was found to be similar to the phrase "facts found." This case, along with the regulatory context, strongly suggest that the date entitlement arose is the date on which the facts in the case demonstrate that the entitling criteria are first met.

For Interpretations B & C, both interpretations correctly grant service connection from the date of claim. They correctly interpret the reference as meaning we must verify a diagnosis by way of a sleep study, but we are not limited to granting service connection from the date of the sleep study.

38 C.F.R § 4.1 Essentials of evaluative rating, notes that “it is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history.” Based on the incomplete set of facts in the provided scenario, **neither Interpretation B or C would be considered clearly and unmistakably erroneous**.

Based on our defined policy to administer the law under a broad interpretation, consistent, however, with the facts shown in every case, Interpretation C provides the most sound reasoning and application based on the limited information provided in the scenario.

It was noted that the Veteran reports persistent fatigue since service and his VA medical records show he must take daily naps due to poor sleep, which tends to support the staged rating in Interpretation B, however, it is not known whether there is additional evidence ruling out the need for CPAP prior to the sleep study.

M21-1 V.ii.4.A.6.o is an example of a staged rating impacted by 3.114, and although it is not exactly relevant to the scenario, it does tend to provide additional support for Interpretation B.

* Staged ratings are defined as separate ratings that can be assigned for separate periods of time based on the facts found. Fenderson v. West, Jan 20, 1999, 12 Vet.App. 119 (1999)
* A staged rating is required when the evidence of record clearly and convincingly establishes that the Veteran did not have symptoms/disease adequate to satisfy the criteria during the initial period.
* When applying the general rule, the assignment of an effective date based on date entitlement arose being later than the date of receipt of the claim is only appropriate when the evidence clearly establishes that the entitling criteria were not met as of the date of receipt of the claim (M21-1;V.ii.4.A.1.e).
* The absence of evidence on a particular question cannot be construed as substantive negative evidence against a claimant unless there is a foundation in the record that demonstrates that such silence has a tendency to prove or disprove a relevant fact (M21-1 V.ii.1.A.2.g).

# Invalid HLR Request and EP 400 DOC

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

**Presenter:** Katrina Ice, Management and Program Analyst, OAR

**References:**

* M21-1 II.iii.1.A.4.c., *Determining the Proper DOC for Claims Establishment Purposes*
* M21-4 B.1.c., *Correct Date of Claim*
* M21-4 B.2., *400 - Correspondence and Information Actions*
* M21-5 4.2.f., *Ineligible HLR Reasons*

When VA receives a higher-level review (HLR) request that is found to be invalid, ineligible, or not timely, subsequent communication is necessary to convey the determination on that application.

Specifically, VA must receive a completed VA Form 20-0996 within one year of the notification letter for a decision made on or after 02/19/2019. When the review request is not timely received, establishment of EP400 is required to control for informing the claimant of the determination of untimeliness as indicated by and within the HLR Not Timely letter. After sending the letter, the EP400 is required to be closed.

As the EP 400 is established to address a specific determination about prescribed VA Form 20-0996, the date of claim (DOC) is contingent upon receipt of that form. The DOC for end product establishment purposes is the earliest date any VA facility received the prescribed claim form (in this case, VA Form 20-0996).

Example: VA Form 20-0996 is received on 08/15/2023 disagreeing with a rating decision dated 05/10/2022. The notification letter for that decision is dated 05/12/2022. The VA Form 20-0996 was not received within the year mandated to be eligible for higher-level review. The HLR Not Timely letter is required per M21-5 4.2.f., Ineligible HLR Reasons. That reference indicates that if the HLR is received outside of one year of the decision, then send the letter titled HLR Not Timely. In this scenario, the date of claim on the established 400 should be 08/15/2023 to account for the fact that the form establishing that action was received by the VA on 08/15/2023.

In summary, the indications within M21-4 Appendix state to “establish EP 400 with the date the application was received” and that “the date of claim (DOC) is the earliest date the claim or information is received in any Department of Veterans Affairs (VA) facility.”

# Quality Trend Analysis: FY24 Q1

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

**Presenter:** Holly Backs-Kozlak, Management and Program Analyst, OAR

Compensation Rating National Quality Reviews

* OAR completed 99 reviews during fiscal year FY24 Q1.
* The Rating Benefit Entitlement (BE) accuracy (unweighted) for the review period was 80.1%, while the issue-based accuracy was 89.3%

**Compensation Rating National Quality Reviews FY24 Q1**

|  |  |  |
| --- | --- | --- |
| **Error Category** | **Total Errors** | **Total BE Errors** |
| Question 4: Does the record show VCAA compliant development to obtain all indicated evidence (including a VA exam, if required) prior to deciding the claim? | 10 | 10 |
| Question 7: Are all effective dates affecting payment correct? | 4 | 3 |
| Question 6: Was the percentage evaluation assigned correct (including combined evaluation)? | 3 | 2 |
| Question 1: Were all claimed issues addressed and decided? | 2 | 2 |
| Question 5: Was the grant or denial of all issues correct? | 2 | 2 |
| Question 16: Were Rating Comments correct (end product (EP) under review)? | 4 | 0 |
| **TOTAL** | **25** | **19** |

* Error trend remediations for Question 4 are in development.
* An Effective Date Reference Guide has been created in response to persisting error trends under Question 7.

Compensation Authorization National Quality Reviews

* OAR completed 30 reviews during fiscal year FY24 Q1.
* The Authorization BE accuracy was 100%.

**Compensation Authorization National Quality Reviews FY24 Q1**

|  |  |  |
| --- | --- | --- |
| **Error Category** | **Total Errors** | **Total BE Errors** |
| Task 8: Were all dependency adjustments and/or decisions correct? | 1 | 0 |
| **TOTAL** | **1** | **0** |

Pension Rating National Quality Reviews

* OAR completed 20 reviews for the Seattle DROC during fiscal year FY24 Q1.
* The BE accuracy (unweighted) for the review period was 75.0%, while the issue-based accuracy was 88.4%.

**Pension Rating National Reviews FY24 Q1**

|  |  |  |
| --- | --- | --- |
| **Error Category** | **Total Errors** | **Total BE Errors** |
| Question 4: Does the record show VCAA compliant development to obtain all indicated evidence (including a VA exam, if required) prior to deciding the claim? | 3 | 3 |
| Question 2: Were all inferred and/or ancillary issues addressed? | 1 | 1 |
| Question 5: Was the grant or denial of all issues correct? | 1 | 1 |
| Question 15: Were comments correct (EP not under review)? | 1 | 0 |
| **TOTAL** | **6** | **5** |

Pension Authorization National Quality Reviews

* OAR completed 21 reviews for Seattle DROC during fiscal year FY24 Q1.
* The Authorization BE accuracy was 100% with zero non-critical errors.
* OAR will continue to monitor the pension authorization national quality workload to validate high accuracy rates and/or recommend remediation for identified error trends.

OAR identified effective date errors as a recurring trend in FY22 and FY23.

Remediation: To provide a reference guide to assist identifying recent effectuations of policy, regulations, court cases, etc., that impact effective dates.

Action: [Effective Date Reference Guide](https://vbaw.vba.va.gov/OAR/effective-date-reference-guide.asp)

# Board of Veterans’ Appeals Effectuations

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

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

**References:**

* M21-5, Chapter 4, Section 5.a., *Types of Board Actions*
* M21-5, 4.5.c., *Authority to Implement Board Decisions*
* M21-5, 4.5.d., *Review of Board Actions*
* M21-5, 7.G.1.d., *Determining When an Examination is Needed for Board Grants*
* M21-5, 7.G.1.e., *Reviewing the Claims Folder and/or Implementing the Board Decision*
* M21-5, 7.G.1.g., *Determining the Effective Date for a Grant of Benefits by the Board*

When the Board of Veterans’ Appeals (Board) decides an issue under legacy appeal, the Board returns the claim to the DROC or the RO for review of the claims folder and implementation of the decision, if necessary. If the Board’s decision awards benefit(s), then claims processor(s) must review the decision and take the following actions:

* determine the effective date, if not provided in the Board decision,
* obtain an exam, if necessary, to determine the appropriate current evaluation,
* issue a rating decision addressing the Board grant of benefit(s), and
* route the claim to the authorization activity.

Under the Appeals Modernization Act (AMA), the Board forwards two types of actions to the VBA for completion: full grants and remands. For Board full grants, VBA takes the following actions:

* implements the Board decision,
* decides any associated downstream issues, such as effective date and evaluation,
* inputs the award data,
* notifies the appellant, and
* releases any payment.

The Office of Administrative Review (OAR) conducted a special focus review (SFR) on legacy appeals and AMA claims requiring the effectuation of Board decisions.

Purpose: To determine the accuracy of the workload, identify error trends, and implement any needed remediation efforts.

OAR reviewed a random sample of 36 completed legacy appeals and AMA claims for the months of August 2023 – October 2023 with the following rating claim labels:

* Board Grant Rating – 030BGR,
* BVA Grant – 070BVAGR, and
* Remand with BVA Grant (070) – 070RMNDBVAG

Five unique claims under review contained nine benefit entitlement (BE) errors. The claim-based accuracy rate for the review period is 86.1%.

**Compensation Rating Effectuation Errors (August 2023 – October 2023)**

|  |  |  |
| --- | --- | --- |
| **Error Category** | **Total Errors** | **Total BE Errors** |
| Question 7: Are all effective dates affecting payment correct? | 5 | 4 |
| Question 6: Was the percentage evaluation assigned correct (including combined evaluation)? | 3 | 3 |
| Question 4: Does the record show VCAA compliant development to obtain all indicated evidence (including a VA exam, if required) prior to deciding the claim? | 1 | 1 |
| Question 8: Were all payment rates correct? | 1 | 1 |
| Question 9: Was Decision Documentation correct? | 2 | 0 |
| Question 16: Were Rating Comments correct (EP under review)? | 1 | 0 |
| Question 10: Was notification correct? (Notification) | 1 | 0 |
| **Total** | **14** | **9** |

**Recommendation 1:** OAR will present a summary of this report during the March 2024 OAR Quality Call as a refresher training for employees on effectuating Board decisions.

**Target Completion Date**: March 2024

**Recommendation 2**: OAR will continue the SFR and analysis of random samples of AMA claims and legacy appeals requiring effectuation of Board decisions to identify if improvement occurs and/or if additional remediation is necessary.

**Target Completion Date:** September 2024

As part of the fiscal year (FY) 2024 OAR National Training Curriculum (NTC), OAR assigned mandated training on Effective Dates for Compensation (TMS ID 4529866) to OAR RVSRs, Decision Review Officers (DRO), and Rating Quality Review Specialists (RQRS). Upon completion of this training, employees should be able to:

* determine the effective date of entitlement for original claims,
* determine the effective date of entitlement for new claims,
* determine the effective date of entitlement for claims for increase, and
* distinguish the informal date of claim and ITF date.

In FY 2024, OAR initiated its Microlesson and Assessment Program.

This program allows for OAR to have the flexibility to administer pre-tests, microlessons, and post-tests that are specifically targeted to areas identified as needing more training in a timelier manner without contractor dependency.

Like the traditional training development, OAR develops these microlessons and assessments based on identification of error trends and employee and organizational needs.

# Questions and Answers

A question arose during the quality call. We have detailed that item below, with the applicable response.

**Q1:** Should the VSR provide review rights in the notification letter for the below scenarios when the Board issues a grant? Do the below scenarios mean the Board assigned the effective date or is the effective date still a reviewable downstream issue, since the Board did not specify an actual date (e.g., 50% is warranted from January 1, 2024)?

1. Entitlement to a 20% evaluation for the left leg is granted.
2. Entitlement to an initial 50% evaluation is granted for the entire period on appeal.

**A1:** Pursuant to M21-5, Chapter 7, Section G.1.e., Reviewing the Claims Folder and/or Implementing the Board Decision, if the Board’s decision awards benefit(s), then the claims processor must review the decision and determine the effective date in accordance with M21-5, Chapter 7, Section G.1.g., if not provided in the Board decision.

M21-5, Chapter 7, Section G.1.g., Determining the Effective Date for a Grant of Benefits by the Board states “When a Board grant does not prescribe a specific disability evaluation and/or effective date, the RO or DROC must review the appeal record and take jurisdiction of these downstream issues.” Therefore, in accordance with this guidance, the VSR must provide review rights in the notification letter for these scenarios.