

Claims Process and Right to Appeal



Claims Process Overview

- Background
- Legacy
- AMA
- Appellate review

Where are we and how did we get here?

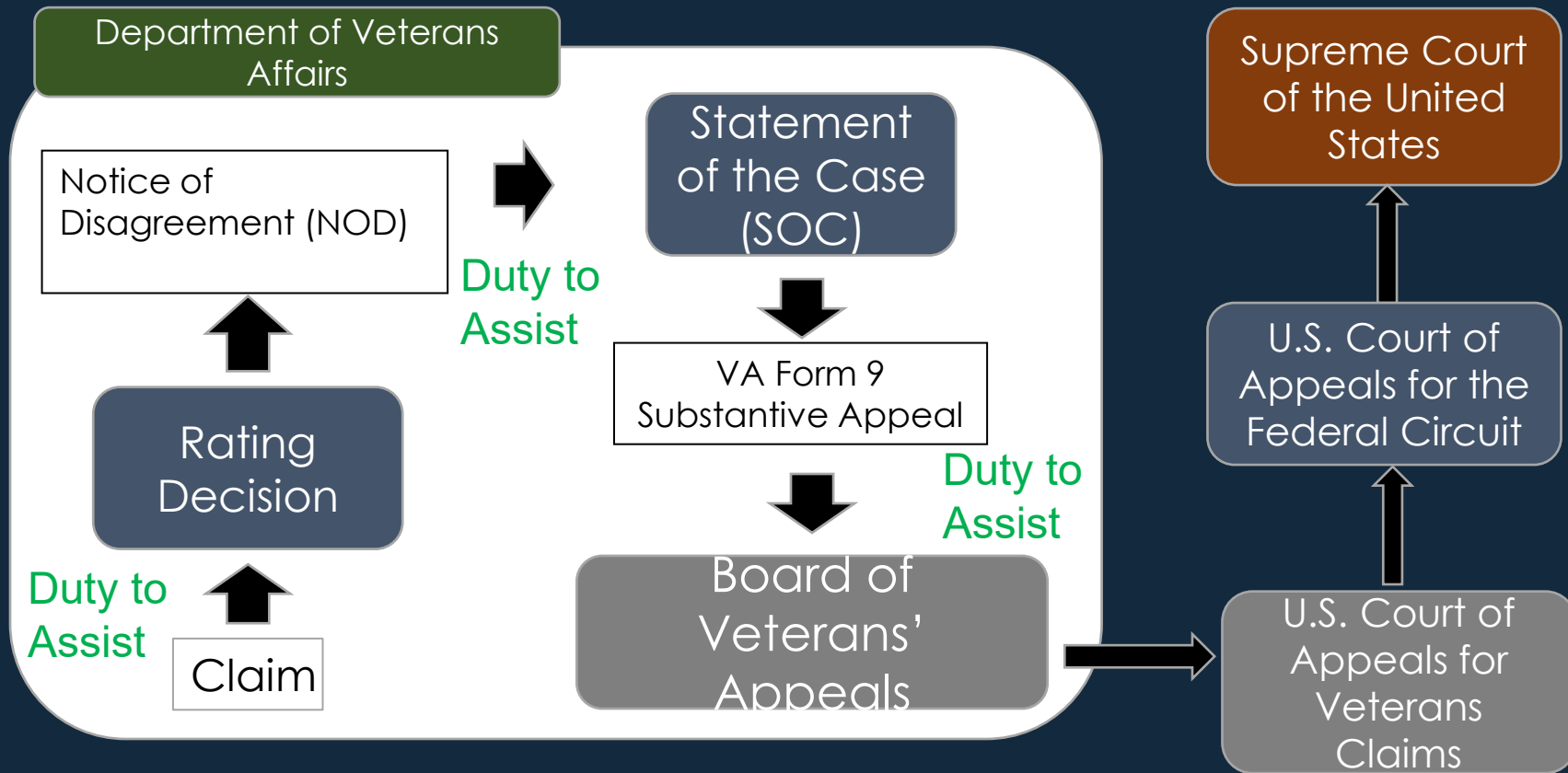
- One system for claims/appeals
- Excessive delays
- Congress passes the Veteran Appeals Improvement and Modernization Act (AMA)
- VA has been running two appeal systems since February, 19, 2019, and continues to work to move toward one system, the Modernized system (AMA)



Legacy Appeals System



Legacy Appeals System



VA's Duty to Assist

- VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(c)
- May include obtaining records & providing a medical examination



LEGACY SYSTEM: Procedural Steps

- Application (Claim filed on required VA Form 21-526)
 - VCAA Notice
 - Submission of records or evidence
- Rating Decision
- NOD – must be filed 1 year from RD
 - Traditional Review or DRO
- Statement of the Case
- Appeal to BVA (VA Form 9) - Must be filed w/in 60 days or remainder of 1 year from RD
- Board Decision
- Notice of Appeal (CAVC) - Must be filed w/in 120 days from BVA decision



Legacy Claim for Benefits

- Intent to File a Claim - 38 C.F.R. § 3.155
 - Preserves effective date for up to 1 year
 - Can be filed in 3 ways:
 - Saved electronic application
 - ITF Claim form submission – VA Form 21-0966
 - Oral intent communicated to designated VA personnel and recorded in writing
- Claim/Application for benefits
 - Required VA Form 21-526/21-526EZ



Legacy System – Claim Denied

- If a claimant received an adverse decision from the VARO and wanted to appeal, s/he was required to file a Notice of Disagreement to initiate the appeal process
- Must be filed on VA Form 21-0958
- Within 1 year of date of RO Decision notice letter
- Send NOD to the Evidence Intake Center (EIC)



What the NOD Should Include

Basic

- Date of the Rating Decision the Veteran is appealing
- The specific claims and/or issues from the Rating Decision with which the Veteran disagrees
- Reasoning for Veteran's disagreement
- Decision review type (DRO or Traditional)



What the NOD Should Include

Additional Evidence

- Previously unconsidered service records (medical, personnel or others, such as deck logs)
- Relevant medical records
- Medical/Expert opinions
- Credible lay evidence
- Other corroborating evidence



What Happened After the NOD was Filed?

- VA processed the NOD and asked which type of appellate review the Veteran desired— de novo by a Decision Review Officer (DRO) or traditional appeal process
- VA issued a Statement of the Case or a Rating Decision



Traditional Process

- Veteran submitted NOD to the adverse Rating Decision
- RO issued Statement of the Case
 - If Statement of the Case continued the denial, Veteran could appeal to the BVA



Types of Appeals: DRO Process

- Veteran elected the Decision Review Officer (DRO) Process
 - The DRO was not involved in the initial decision
 - The DRO could make a determination favorable to the Veteran
 - If DRO issued a Statement of the Case continuing the denial, Veteran could appeal to the BVA



Statement of the Case

(Page 1 of 12)

Statement of the Case	<i>Department of Veterans Affairs</i> <i>VA Regional Office and Insurance Center</i>	Page 1 01/05/2011
NAME OF VETERAN [REDACTED]	VA FILE NUMBER [REDACTED]	SOCIAL SECURITY # [REDACTED]

ISSUE:

Service connection for Posttraumatic Stress Disorder

EVIDENCE:

- VA Form 21-526, Application for Compensation and/or Pension received May 11, 2009
- VA Form 21-4138, Statement in Support of Claim received May 11, 2009
- VA Duty to Assist Letter dated December 11, 2009
- VA Duty to Assist Letter dated March 16, 2010
- VA Duty to Assist Letter dated June 4, 2010
- Rating Decisions dated September 29, 2008, April 23, 2009, and September 1, 2009 (to include evidence contained therein) are incorporated here by reference
- Statement from [REDACTED], PHD, LCSW, received January 15, 2010, and resubmitted May 28, 2010
- Veterans service treatment records from June 24, 1974 through June 5, 1975
- VA Form 21-4138, Statement in Support of Claim received May 28, 2010
- Statement from Camden County Office of Veterans Affairs received January 15, 2010 and resubmitted May 28, 2010

ADJUDICATIVE ACTIONS:

Military Service 6/24/74 to 6/6/75 Under Honorable Conditions

07-25-2008	Claim received
09-29-2008	Claim considered based on all the evidence of record
09-30-2008	Claimant notified of decision
01-12-2009	Claim received
04-23-2009	Claim considered based on all the evidence of record
04-24-2009	Claimant notified of decision
05-11-2009	Claim received
09-01-2009	Claim considered based on all the evidence of record
09-02-2009	Claimant notified of decision



Statement of the Case

(Page 12 of 12)

Statement of the Case		<i>Department of Veterans Affairs</i> <i>VA Regional Office and Insurance Center</i>		Page 12 01/05/2011
NAME OF VETERAN	VA FILE NUMBER	SOCIAL SECURITY AIR	POA	
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	

The previous denial of service connection for Posttraumatic Stress Disorder is confirmed and continued.

REASONS AND BASES.

Service connection for post-traumatic stress disorder requires medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed in-service stressor actually occurred, and a link established by medical evidence, between current symptomatology and the claimed in-service stressor. A diagnosis of posttraumatic stress disorder must meet all diagnostic criteria as stated in the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

Rating Decisions dated September 29, 2008, April 23, 2009, and September 1, 2009 denied entitlement to service connection for PTSD based on military sexual trauma/personal assault. Evidence reviewed and considered in that decision, as well as the reasons for that decision are incorporated herein by reference. While the available evidence shows treatment for post-traumatic stress disorder, there is no evidence supporting the assertion that this disability is the result of an in-service event.

We received the type-written statement from [REDACTED] that you had complained about being raped in the military in 1974 and were unusually withdrawn. This correspondence is unsigned and provides no additional information concerning the actual in-service event. It is therefore not deemed corroborating evidence that you were exposed to a particularly stressful event during military service. Because the evidence does not allow us to concede the occurrence of the in-service stressor, the claim remains denied.

[REDACTED]



How to Appeal the SOC

- File VA Form 9 – The Substantive Appeal
- Filed via the Evidence Intake Center
- Must be filed within 60 days of mailing of SOC or within remainder of 1-year period of mailing of notice of initial rating decision, whichever period ends later
 - In the Form 9, the Veteran selects type of hearing/whether to waive a hearing
 - 3 types of hearings: BVA Hearing in Washington D.C., Travel Board Hearing at the local Regional Office, or Live Video-Conference Hearing



After Filing Form 9

- Certification of Appeal
- Notice of Docketing
- Hearing/Brief
- BVA Decision



BVA Decision

- Grant
 - RO issues Rating Decision to implement grant which includes assigning a rating and/or effective date where necessary
- Remand to RO with instructions for further development
 - RO will make a new decision and issue either a RD or SSOC
- Denial
- Referral of unadjudicated claim(s)
- Some combination



Appeal to Court of Appeals for Veterans' Claims (CAVC)

- File Notice of Appeal within 120 days
- Veteran may appear pro se or with representation
- CAVC cannot consider new evidence- will only consider the Record Before the Agency (RBA)
 - 38 U.S.C. § 7261
 - If the CAVC remands to the BVA in Legacy, then new evidence may be submitted



How to Appeal the CAVC Decision

- If the CAVC affirms the decision of the BVA, the Veteran has 60 days to file an appeal to the Federal Circuit
- If the Federal Circuit affirms the decision of the CAVC, the Veteran can apply to the Supreme Court of the United States for Certiorari



Average Timeframes

- A March 2017 U.S. Government Accountability Office report found, on average:
 - Regional Offices take 419 days from receipt of an NOD to issuance of an SOC
 - 537 days after receiving a VA Form 9 Appeal, the perfected appeal is certified to the Board
 - 222 days after certification, the appeal is placed on the Board's docket
 - Once docketed, it is 270 days before the Board issues a decision on the appeal

Source: GAO-17-234, VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions



Appeals Backlog

- In 2015, VA's Veterans Benefits Administration (VBA) had 425,000 appeals for compensation benefits pending.
- The average wait time was estimated to be 3 years for a Veteran's appeal to be adjudicated.
- Appeals were increasing at a rate of 20% every year.
 - At this rate, by 2026, the average wait time in the legacy system was projected to rise to eight and a half years.



Appeals Reform



Appeals Modernization Act

- The Veterans Appeals Improvement and Modernization Act of 2017 (“AMA”) became law on August 23, 2017 (Pub L. 115-55).
 - RAMP – Trial run? Early in?
 - AMA - New decision review process, which features three lanes, effective February 19, 2019
 - “Choice and control”



“Modernized” VA Appeals System: AMA



AMA – several ways in, no way out

- Opting in from Legacy: Veterans with any pending legacy appeals can only opt into the new system after receipt of:
 - An SOC
 - An SSOC
- Automatically, after 2-19-19 (Rating decision issued or claim filed)



Enhanced Notice

- AMA decision notices are supposed to contain:
 - Identification of the issues adjudicated
 - A summary of the evidence considered
 - An explanation of the laws and regulations applicable to the claim
 - Summary of any findings made by an adjudicator that are favorable to the Veteran
 - Identification of the element(s) required to grant claim that were not met, in the case of a denial decision



Enhanced Notice (continued)

- Identification of the criteria required to grant the next highest level of compensation
- An explanation of how to obtain or access evidence used in making the decision
- A summary of the applicable review options available for the claimant to seek review of the decision



AMA - Filing a Claim

Initial Claim - VA Form 21-526EZ

- Original claim for service connection, not previously denied.
- Claim for IR*, or
- Use of an Intent to File

Supplemental Claim – VA Form 20-0995

- Previously denied
- Requires new and relevant evidence to be attached or identified on the claim
- Use of an Intent to File now allowed
- Claim for IR could also be a supplemental claim

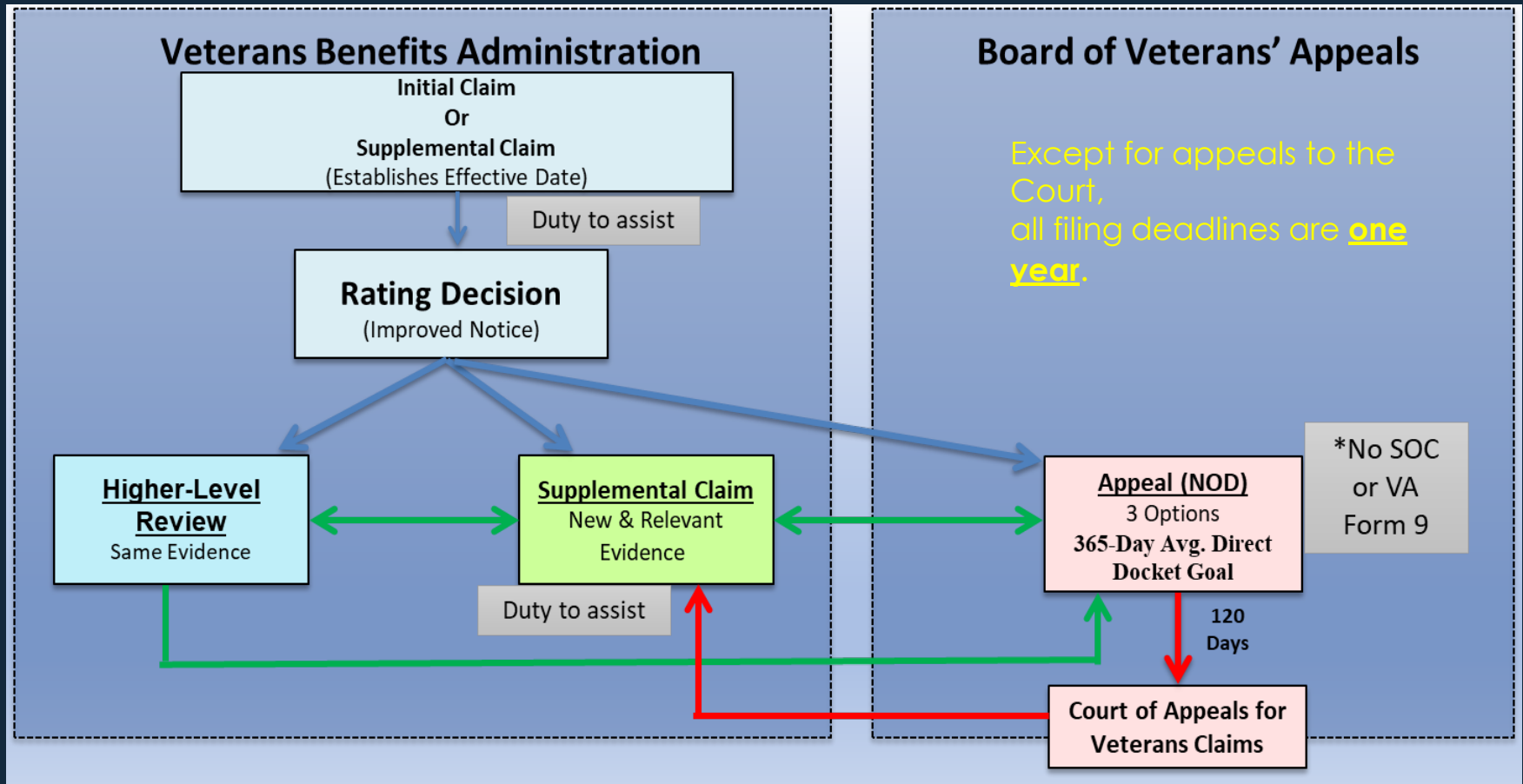


Appeals Reform

- Veterans have up to 3 options when seeking administrative review or appeal of a Rating Decision. 38 U.S.C. § 5104C
 - Supplemental Claim Lane - 38 U.S.C. § 5108
 - Higher-Level Review Lane – 38 U.S.C. 5104B
 - Board Review Lane (3 board options) - 38 U.S.C. § 7105
- Deadline to file any above request is within 1 year of the Rating Decision.



AMA Review Process



Supplemental Claim Lane

- Case will be reviewed by VA based on additional evidence that is *new and relevant* to the benefits sought. See 38 C.F.R. § 3.2501(a)(1) (eff. Feb. 19, 2019).
- New and relevant evidence
 - New: not previously before the adjudicator.
 - Relevant: the evidence tends to prove or disprove an issue in the case.
 - New theory of entitlement



Supplemental Claim Lane

- **Duty to assist applies.** VA will assist the claimant in obtaining evidence to substantiate the claim, including by assisting the claimant in gathering any evidence that may be new and relevant.
- Continuous vs. non-continuous pursuit
- If new and relevant evidence is presented/secured within the one-year appeal period, the effective date of the claim will be preserved as the date of the underlying (continuously prosecuted) claim.
- Results in a Rating Decision (with the ability to appeal within one year).



Types of New and Relevant Evidence

- VA treatment records
- Private treatment records
- Service records
- Lay evidence
- VA examinations
- Medical journal or treatise/articles
- Newspaper articles
- Medical/vocational expert opinions
- Employment documentation
- VA correspondence/Rating Decision



Higher-Level Review

- The **duty to assist does not apply** to the higher-level review.
- But, when a duty to assist error is noted in the development of the initial *claim*, a higher-level reviewer must return the claim to the supplemental claim lane unless the maximum benefit sought can be granted.
 - i.e. DTA triggering vs. enforcement – See 38 U.S.C. §5103A(e), (f)



Higher-Level Review

- *Can* request an informal conference.
- Results in a Rating Decision (with the ability to appeal within one year). *But* a claimant cannot elect a higher-level review appeal in response to a higher-level review decision.



Comparing AMA RO Lanes

Supplemental Claim Lane

- VA will readjudicate a claim if “new and relevant” evidence is presented or identified with a supplemental claim (open record)
- VA will assist in gathering new and relevant evidence (duty to assist)
- Effective date for benefits protected (submitted within 1 year of decision)
- Replaces “reopening” claims with supplemental claims “new and relevant” evidence

Higher-Level Review Lane

- More experienced VA employee takes a second look at the same evidence (closed record and no duty to assist)
- Option for a one-time telephonic informal conference with the higher-level reviewer to discuss the error in the prior decision
- *De novo* review with full difference of opinion authority
- Duty to assist errors returned to supplemental claim lane for correction



Board Review

- Filing a NOD will now direct an appeal right to the Board of Veterans' Appeals.
 - 1 year deadline to file NOD in response to a rating decision will still apply
- Removes the SOC, VA9, and potential SSOC stages of the legacy system.
- Results in a Board Decision.
- No ongoing jurisdiction after Board remand.
- DTA issues



Board Review

Three options for Board review:

1. Direct review
2. Evidence submission
3. Hearing

Board Review

1. Direct review

- No hearing, no new evidence to submit
- No triggering of DTA, but obligation to remand for correction of DTA errors. See 38 U.S.C. §5103A(e)-(f); 38 C.F.R. §20.802(a)
- Cannot consider evidence submitted after the decision on appeal (rating decision)



Board Review

2. Evidence Submission

- No hearing, submit new evidence only w/in 90 days of NOD
- Must relate to period on appeal (i.e. prior to Rating decision)
- DTA issues - No triggering of DTA, but obligation to remand for correction of DTA errors. See 38 U.S.C. §5103A(e)-(f); 38 C.F.R. §20.802(a). **BUT, the no triggering of DTA with this new evidence raises some interesting questions.**



Board Review

3. Hearing

- Hearing before a Veterans Law Judge, with option to submit new evidence if desired, 90 days after hearing
- Must relate to period on appeal (i.e. prior to Rating decision)
- DTA issues - No triggering of DTA, but obligation to remand for correction of DTA errors. See 38 U.S.C. §5103A(e)-(f); 38 C.F.R. §20.802(a). **BUT, the no triggering of DTA with this new evidence raises some interesting questions.**



Can a Veteran switch lanes?

- Yes, but the effective date is only preserved if the withdrawal of the former lane choice, and selection of a different lane, takes place within 1 year following the notice of decision being issued.
- There *may* be exceptions to this where VA allows a lane change outside of 1 year but prior to a final decision. This is on a case by case basis and good cause must be shown. See 84 Fed. Reg. Vol. 13 (Jan. 18, 2019).



Considerations in which Board docket to choose?

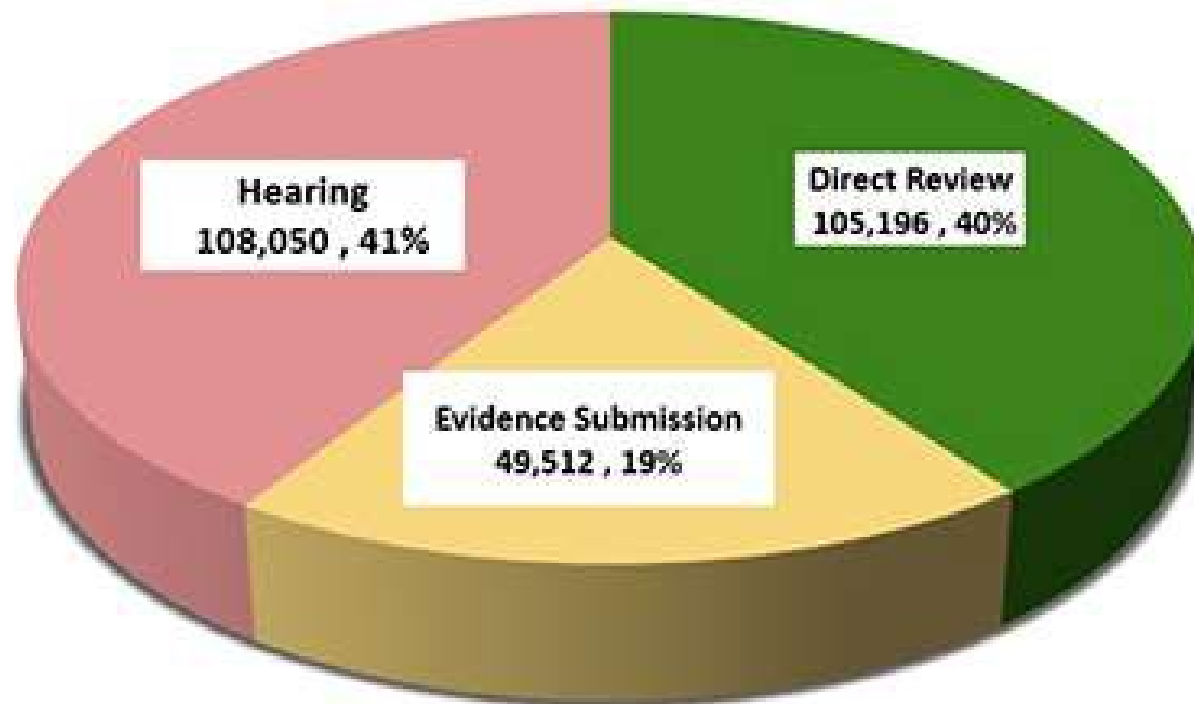
	Direct	Evidence	Hearing
When to choose	If you think a mistake was made.	If you have new evidence you want a Judge to consider.	If you want a hearing before a Judge.
What will happen	<p>The Judge will review the same record and make a decision.</p> <p>No new evidence will be added.</p>	<p>You will have 90 days from your NOD to submit any new evidence.</p> <p>The Judge will make a decision considering the evidence you provided.</p>	<p>You will be placed on a list for a hearing before a Judge by videoconference (or in DC).</p> <p>After your hearing you will have 90 days to submit new evidence.</p> <p>The Judge will make decision considering the hearing and the evidence you provided.</p>
How long	365 days (on average)	Over 365 days	Based on availability.



Which lane are veterans choosing?

AMA Appeal Lane Choices FY2019 - FY2023

Includes Dispatched and Active Appeals



Data through: June 2023

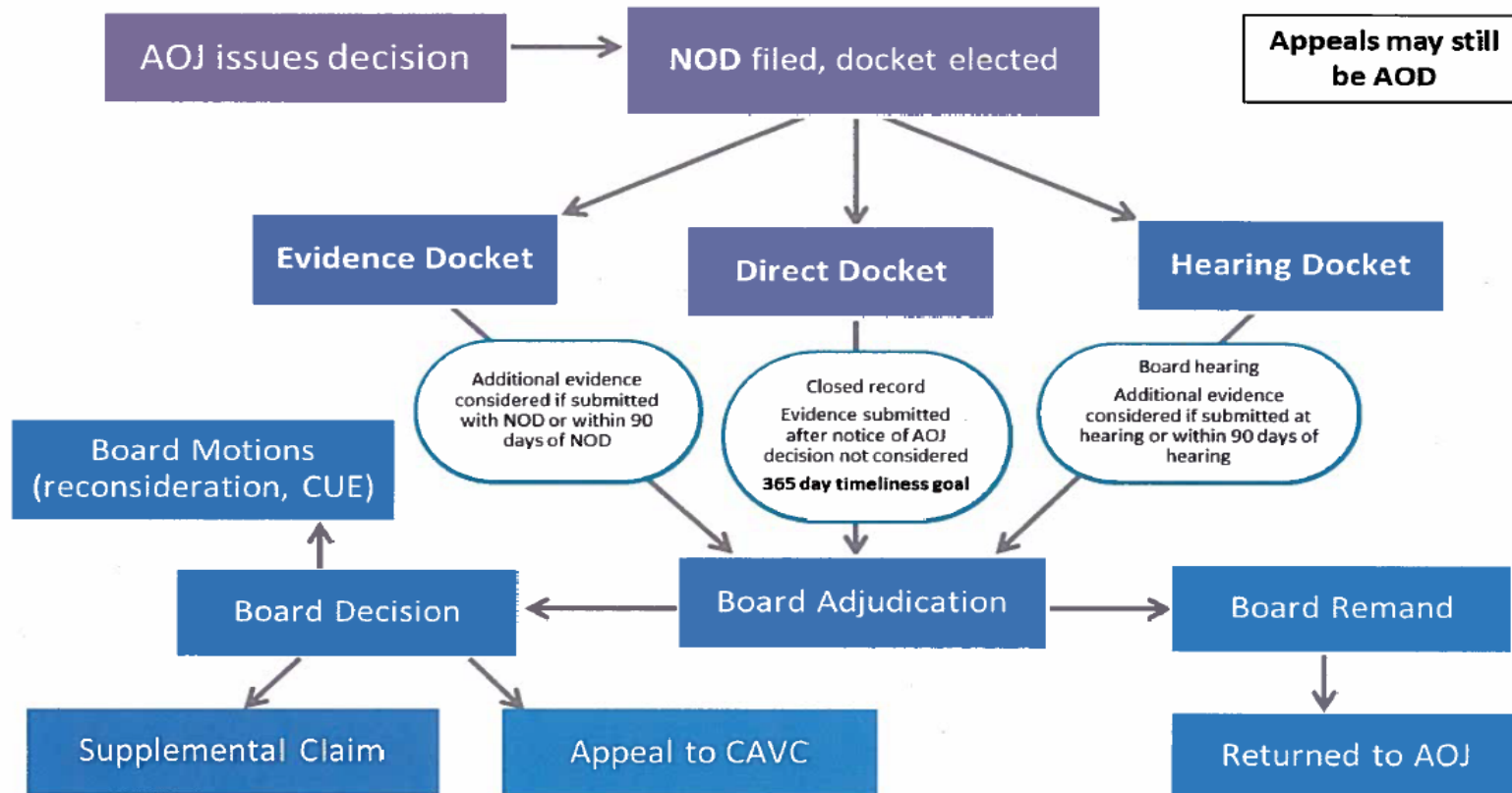
BVA Outcomes

File Date	Docket Type	Allowed, No Remand	Allowed, With Remand	Allowed, No Remand	Denied	Other Disposition	No
8/31/20	Direct						
23	Review	11,899	3,706	13,570	12,284	4,019	14
8/31/20	Evidence						
23	Submission	4,532	1,700	4,480	2,984	1,671	5
8/31/20							
23	<u>Hearing</u>	<u>8,963</u>	<u>3,820</u>	<u>7,796</u>	<u>4,276</u>	<u>5,416</u>	<u>4</u>
	Total:	25,394	9,226	25,846	19,544	11,106	23



Board Options

New System Appeal Lane



Options after a Board denial

- Appeal to CAVC within 120 days
- File a Supplemental Claim within 1 year
- Note: These can be done concurrently (See *MVA v. McDonough*, 7 F. 4th 1110, 1145 (Fed. Cir. 2021)).
- CAVC cannot consider new evidence- will only consider the Record Before the Agency (RBA) – 38 U.S.C. § 7261
 - If the CAVC remands to the BVA in AMA, new evidence may not be submitted for Board consideration



Options after a CAVC denial

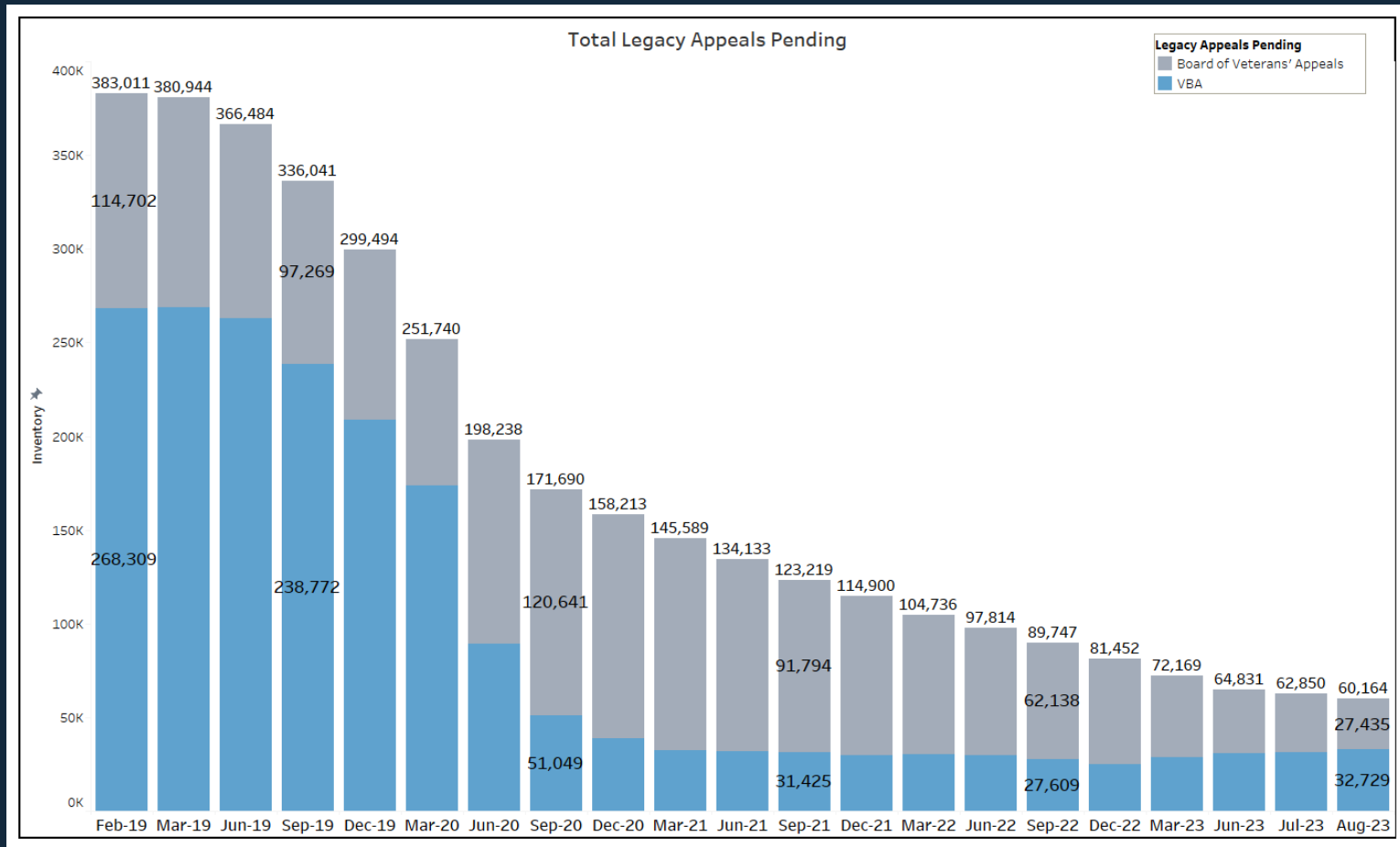
- Appeal to CAFC within 60 days
- File a Supplemental Claim within 1 year
- These can be done concurrently (See *MVA v. McDonough*, 7 F. 4th 1110, 1145 (Fed. Cir. 2021)).



Are we out of the
Legacy woods
yet?



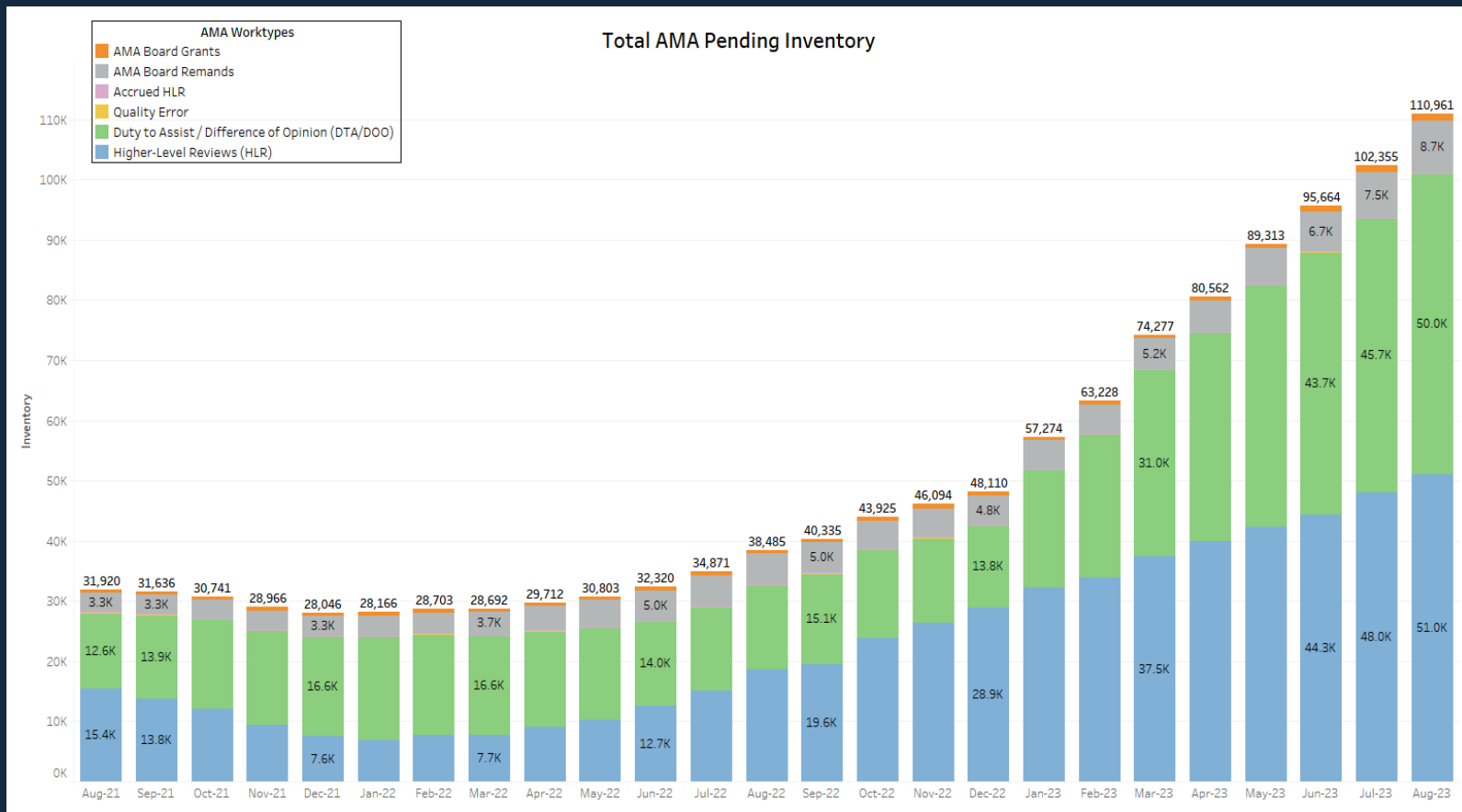
VA Legacy Appeals Inventory



Meanwhile...

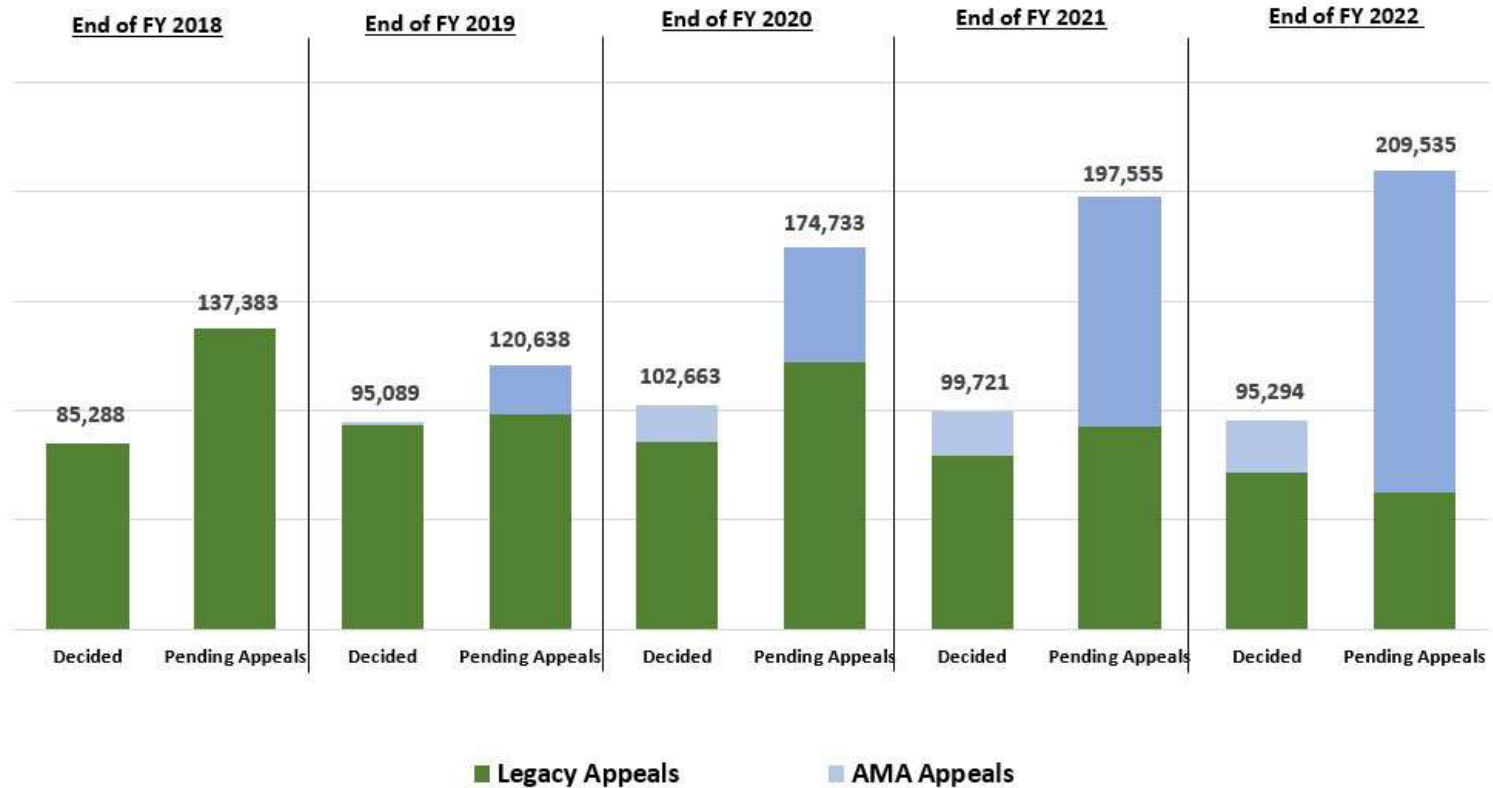


AMA Inventory



Legacy vs. AMA numbers

Appeals Adjudicated and Pending (FY 2018 - FY 2022)



Board Delays in AMA

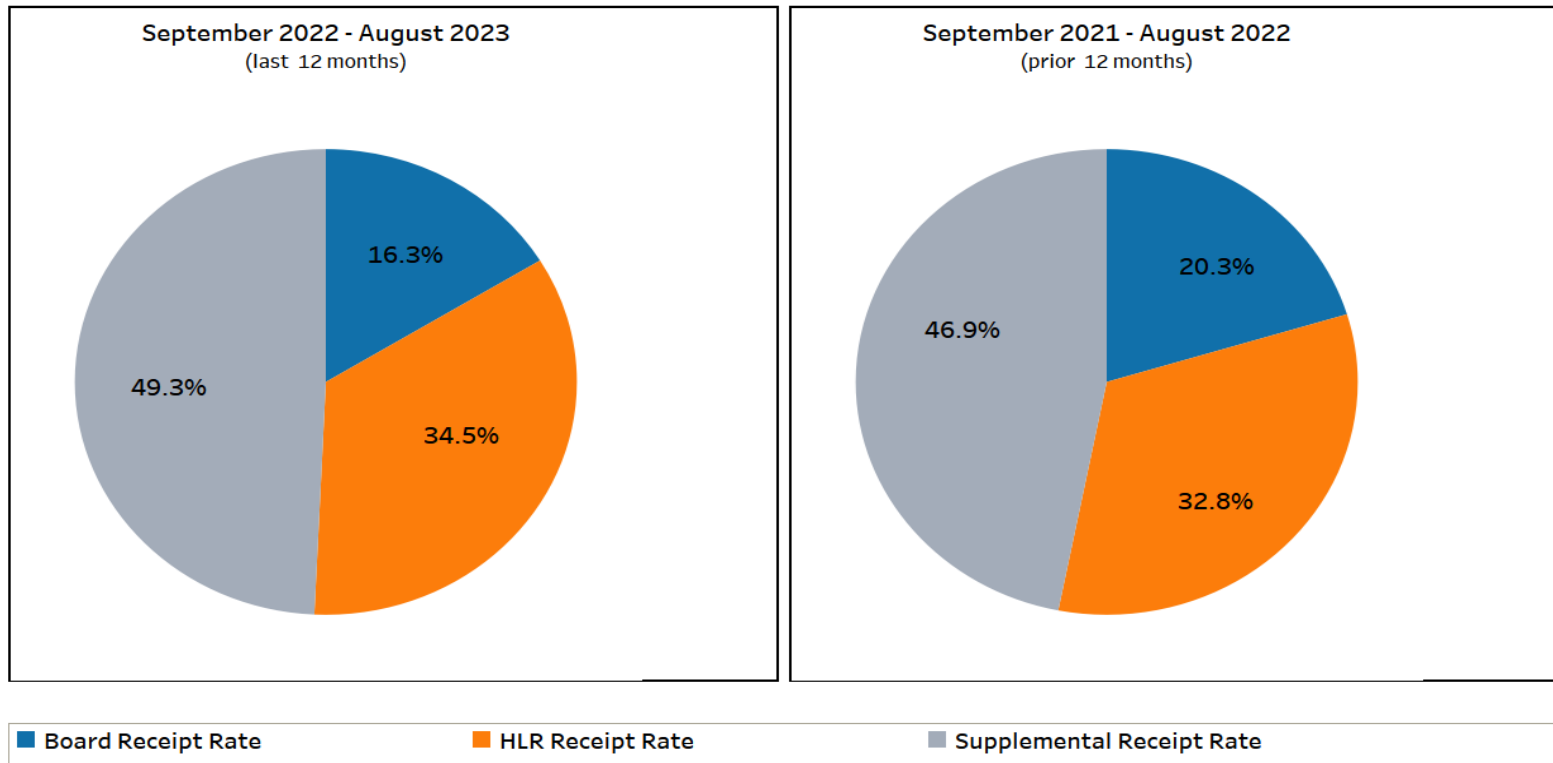
File Date	Docket Type	ADP from	Receipt Date
8/31/2023	Direct Review		562
8/31/2023	Evidence Submission		680
8/31/2023	Hearing		696

As of 8/31/23, 2023 AMA Metric Reports



Where are Claimants seeking Review?

What AMA lane are claimants choosing when they disagree?
Comparison among AMA lanes



Questions?

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