

# A Day in the Life of a BVA Board Member (Veterans Law Judge)

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# A Day in The Life

Musica & Poeta di JOHN LENNON and PAUL McCARTNEY



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# Agenda

What this lecture covers:

- Who are the Board's Veterans Law Judges (VLJs) and how are they selected?
  - Criteria and selection process.
  - What the VLJ corps actually looks like
- What is the day-to-day of a VLJ?
  - What the VLJs are doing all day
- Advocacy tips before the BVA
  - Thoughts about what the two topics above mean for client advocacy



# Before we get started:

- This will be a description of what generally happens, as well as my specific experiences
- BVA decisions are non-precedential
- VLJs have autonomy in interpreting the law and case disposition.



# Board of Veterans' Appeals

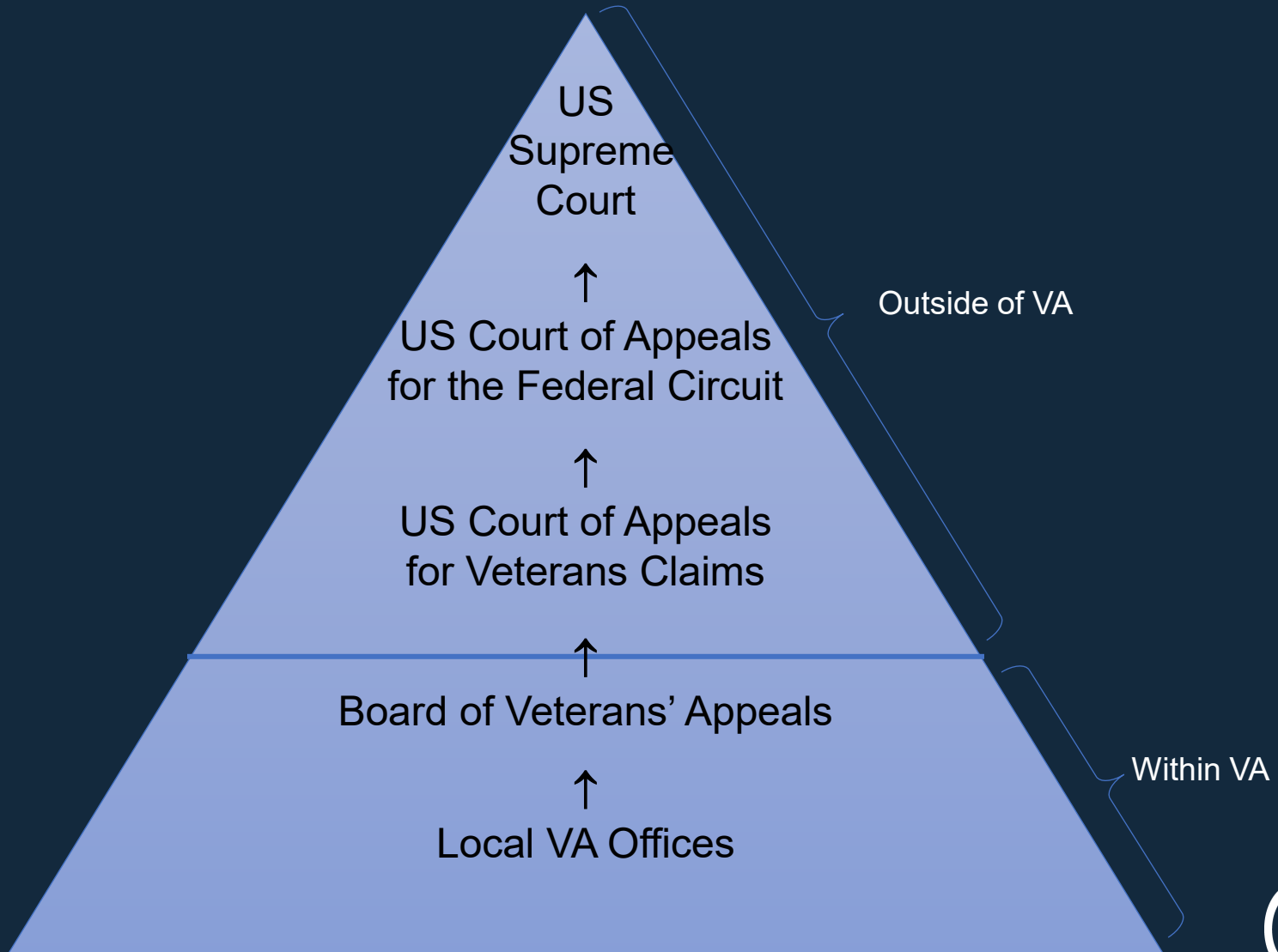
## Mission

“. . . to conduct hearings and dispose of appeals properly before the Board in a timely manner.” 38 U.S.C. § 7101(a).

## Jurisdiction

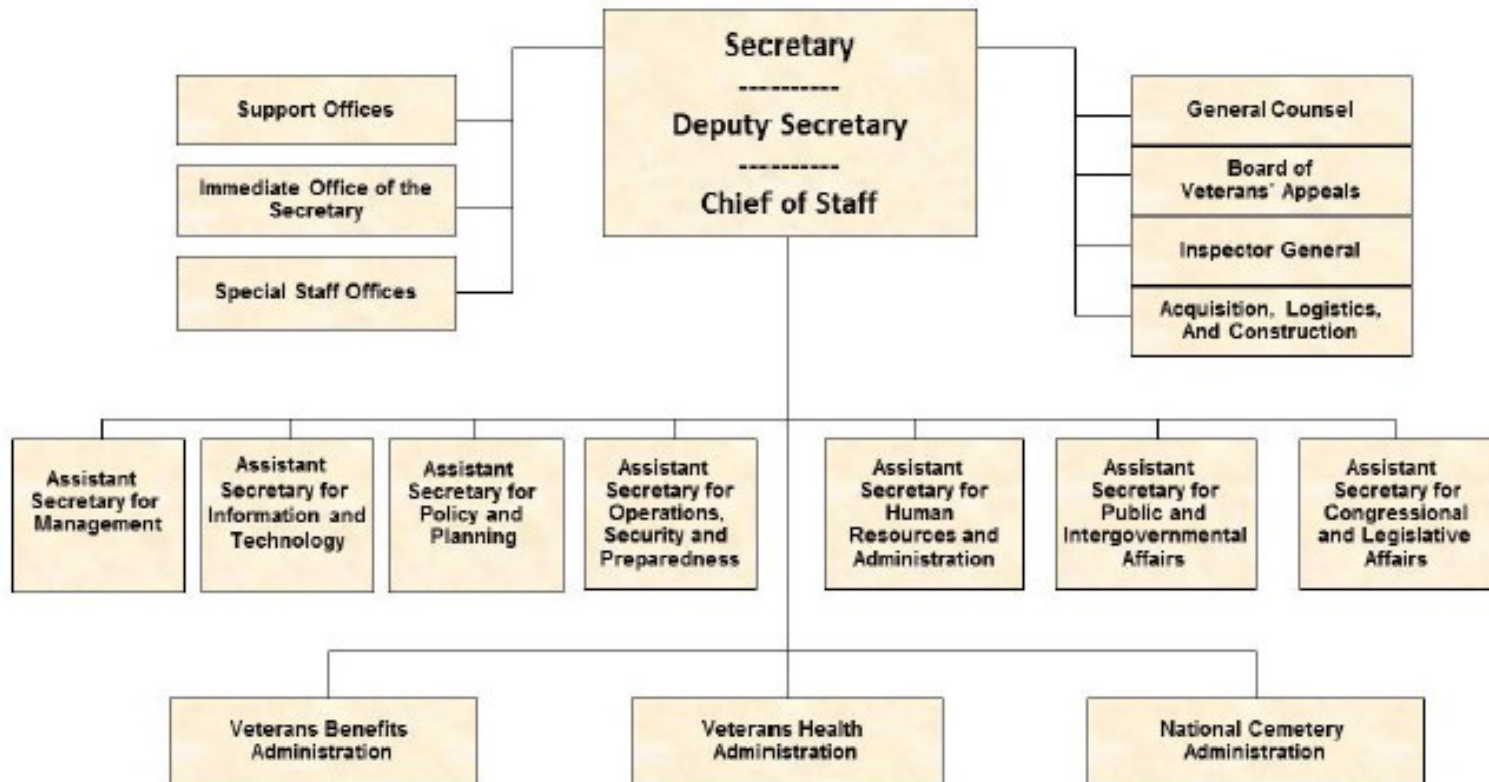
“All questions in a matter which . . . is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board.” 38 U.S.C. § 7104(a).





# Where does the Board fit within VA?

## ORGANIZATION OF THE DEPARTMENT



# Board of Veterans' Appeals Organizational Structure




**Chairman**  
Jaime A. Areizaga

Executive Assistant  
(Vacant)

Strategic Advisor on  
VSO and Representative Affairs  
Advaith Thampi

Strategic Engagement and  
Communications Director  
Jill Snyder



**Vice Chairman**  
Ken Arnold

Chief of Staff  
Nick Uchalik

Executive Assistant  
Margaret Ridgeway

Budget Director  
Katy Reeves

Ombudsman  
Mary Cullinan




**Senior  
Deputy Vice Chairman**  
Chris Santoro



**Deputy Vice Chairman**  
Robert Scharnberger

VACANT  
  
Deputy Vice Chairman



**Deputy Vice Chairman**  
Tom Rodrigues

VACANT  
  
Chief Counsel



**Executive Director**  
Nina Tann

VACANT  
  
Deputy Vice Chairman  
TBD





# Who are the Board's VLJs and how are they selected?



“The Board of Veterans’ Appeals (BVA) is composed of the men and women who possess well-honed Veteran Law skills and share a broad perspective of government and a public service commitment. The Board reviews benefit claims determinations made by local VA offices and issues decision on appeals. The Board members, attorneys experienced in veterans law and in reviewing benefit claims, are the only ones who can issue Board decisions.”



Applicants must have a full seven (7) years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law.

This can include:

- participating in settlement negotiations in advance of hearing cases;
- preparing for hearing and/or trial of cases;
- preparing opinions;
- hearing cases;
- participating in or conducting arbitration, mediation, or other alternative dispute resolution approved by the administrative body; or
- participating in appeals related to the types of cases above.



- Ability to accurately and efficiently analyze, evaluate and resolve independently appeals for veterans benefits.
- Ability to analyze critically a draft appellate decision, submitted by a staff attorney, to ensure a full and complete review of record, an equitable resolution of the questions at issue, and proper application of statutory and regulatory criteria.
- Ability to participate effectively in and conduct personal hearings at Central Office in Washington, DC or at field offices.
- Ability to successfully lead and manage a staff of attorneys who are responsible for submitting tentative decisions/work products to the Decision Team or Appellate Group and meeting with attorneys to review their work and offer suggestions for improvement.
- Ability to work effectively within the Decision Team or Appellate Group in order to meet the assigned productivity goals.



## Evaluations

Step 1: Minimum qualification screening

Step 2: Technical-Specialized screening

Step 3: VA Executive Resources Board (ERB) rating and ranking

Step 4: Structured interviews by the Board of Veterans' Appeals to determine final nominees

Step 5: Nominations by Board Acting Chairman/Executive in Charge (May include additional interviews)

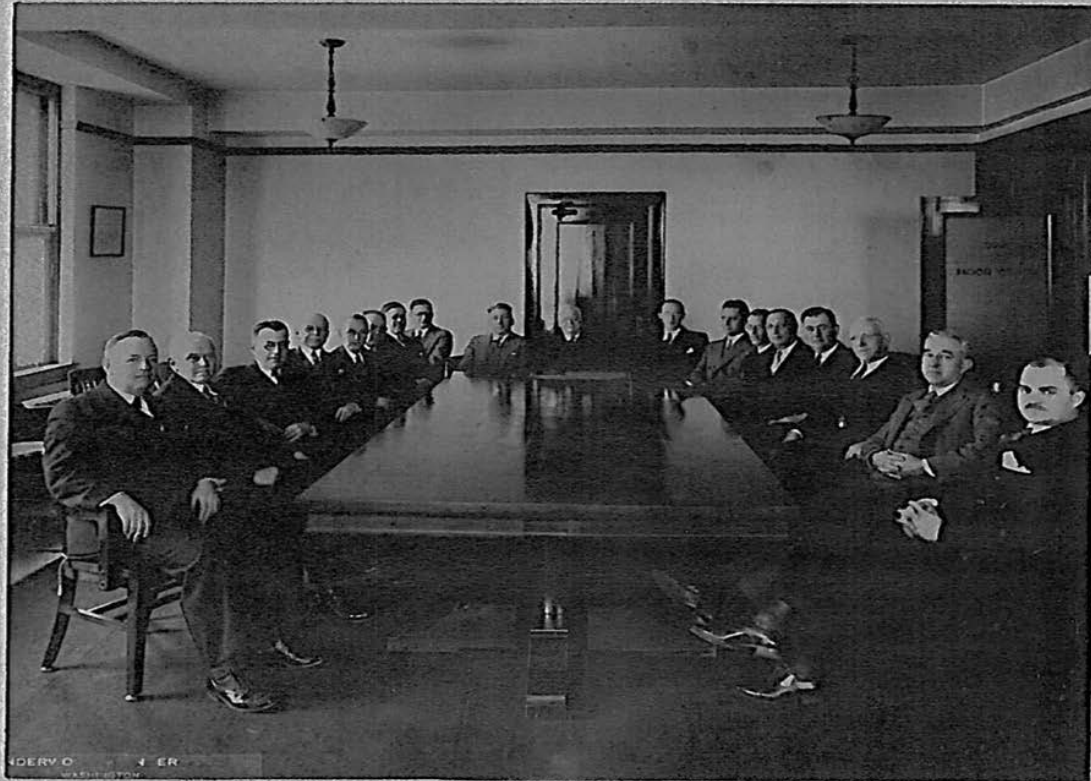
Step 6: Appointment by the Secretary (May include additional interview)

Step 7: Interview with someone from WH personnel office

Step 7: Approval by the POTUS



# Board Members in 1933



40ERV O 4 ER  
WASHINGTON

OF VETERANS APPEALS, SWORN IN ON DECEMBER 3, 1933

From left to right: ...

In 1945 General Omar Bradley, then Administrator of Veterans Affairs, recommended to President Truman that vacancies on the Board “should be filled by the appointment of veterans with war-time service because of the character of the work and the constituency served.” President Truman approved this recommendation and [beginning in] September, 1945, the policy of the Administrator [was] to exclude non-veterans from consideration for appointment as associate Board members. Each successive President has approved the names of the veterans submitted by the Administrator.

*Krenzer v. Ford*, 429 F. Supp. 499, 501 (D.D.C. 1977).



- However, in 1977, this policy was found to violate Title VII of the Civil Rights Act of 1964 because it discriminated against women. *Krenzer*, 429 F. Supp. 499 at 502.

VLJs today are a mix of veterans and non-veterans.



# What the VLJ corps looks like now



Department of Veterans Affairs  
Board of Veterans' Appeals



# Managing, mentoring, training, developing and leading staff counsel





Analyzing all previously developed evidence and appraising previous adjudicative processes by the originating agency;

Correlating and resolving conflicting evidence; fully considering all the evidence of record and issuing decisions which are completely independent and final, signed by the Veterans Law Judge and published to the parties in interest without prior review;



- Ruling on motions, as provided by the applicable law and regulations
- Conducting in person or video conferencing hearings

- Determining whether there are other parties with adverse interests who may be joined in a contested appeal
- Recommending to the Chairman that subpoenas be issued or revoked





So what? How does this affect client advocacy?



# Board Member Diversity



# The Golden Rule of Advocacy

*Make it easy to say “yes”*





# Begin with the end

“The record is complete,  
the evidence approximates  
balance (on the non-  
substantiated element)  
and the claim must be granted”

# Focus on the reason for the denial



- Service connection: Service incident? Diagnosis? “Nexus” to service?
- Schedular Rating: Symptom? Laboratory finding?
- Effective Date: How and why does the date go back further?

# The in-service element

- Government records
- 38 U.S.C. 1154(a): “places, types and circumstances of service” by “official history” of unit, medical records,” etc.
- Awards, Decorations, Memorabilia, Photos
- Missing service records (1973 Fire at National Personnel Records Center in St. Louis)
  - VA’s heightened duty to assist and explain. VA must obtain unit records and research unit histories.



# The 3 Obstacles to a Grant



- The UNRECALLED FACT – *i.e.*, when, where, who, why, how
- The UNSUBSTANTIATED allegation
- The UNFOCUSED claimant, witness, clinician, adjudicator

# Dealing with the Unrecalled and Unsubstantiated

“Go to the attic:” In-service letters, certificates of appreciation, photographs, souvenirs, “unofficial” awards

“Find the doctor:” post-service medical reports, bills, prescriptions, *post service employment medicals*, workman’s compensation, social security disability records

Current letters from family, friends, service “buddy statements”



# Why are these valuable?



Prepared at the time, for the purpose of recording the event

# Rating of Service-Connected Disorders

- **Schedular:** Symptoms meet or approximate criteria in 38 CFR, Part 4, Subpart B
- **Extraschedular** (“Exceptional or Unusual Disability Picture” – schedular standards “impractical”): Symptoms cause “related factors as marked interference with employment, frequent periods of hospitalization”



# Advocacy in Rating Cases

- Check the rating schedule – 38 CFR, Part 4
- Track the diagnostic code (“DC”)
- Alternative codes? - assignment of DC is fact specific to the case. *Butts v. Brown*, 5 Vet. App. 532 (1993)
- Total Rating: specifically raise and cite evidence (Social Security? Workman’s Compensation? Unemployment Benefits? Vocational-Rehabilitative Benefits?)





# Focus points

- Deal with the “negative evidence:” why was the claim denied and how should the VLJ consider it?
- Ask for a specific disposition – “A *minimum* 40 percent rating should be granted (not just “a higher rating”)
- Argue for the grant and tell the Board how and why they should do it



# Medical Opinion Evidence



“Qualified, Informed, and Responsive”

# Medical Opinion Evidence

- Medically qualified: e.g., physician specialty? adequate testing?
- Cumulative or corroborative opinions? opportunity to observe?
- Factually informed: e.g., veteran's history (pre-service, service, and post-service medical and relevant non-medical history)? occupational history? substance abuse?
- Responsive to the inquiry - strength of opinion and the why:
- Strength: "was," "could be," "may be;" "could not be ruled out;" "could possibly be related," etc.
- Why? "because I'm a doctor;" "the development of this disorder is consistent with what the veteran describes;" "the current state of medical science supports this connection;" etc.



# Hearings



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# Pre-hearing conference

- Clarify the issues
- Obtain rulings on the admissibility of evidence
- Develop stipulations of fact
- Establish the length of argument that will be permitted
- Take any other steps that will make the hearing itself more efficient and productive

38 C.F.R. § 20.708



# Purpose of Board Hearings: 38 C.F.R. § 20.700(b)

- Purpose of a hearing is for the Board to “receive argument and testimony relevant and material to the appellate issue or issues.” 38 C.F.R. §20.700(b).
- Is it necessary?
  - “A hearing will not normally be scheduled solely for the purpose of receiving argument by a representative. Such argument may be submitted in the form of a written brief.” *Id.*
- In the Legacy system, the VLJ holding the hearing was to be the person deciding the case. In AMA, the VLJ holding the hearing is not necessarily the one to decide the case.



# Nonadversarial Nature of Board Hearings: 38 C.F.R. § 20.700(c)

- Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses, but cross-examination will not be permitted.
- Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained.
- VLJ may set reasonable time limits for argument and may exclude documentary evidence, testimony, and/or argument that is not relevant or material to the issue, or issues, being considered or which is unduly repetitious.



# Law on Board Hearings

Under 38 C.F.R. § 3.103(d)(2), a VLJ has:

- (1) A duty to fully explain the issues on appeal.
- (2) A duty to suggest that a claimant submit evidence on an issue material to substantiating the claim.

*Bryant v. Shinseki*, 23 Vet. App. 488 (2010);  
*Procopio v. Shinseki* 26 Vet. App. 76 (2012)







# EXPLANATION

I demand one

# Hearings

- Practical: cell phones, microphones, rustling of paper
- Brief your client – (what will happen, who's who)
- Rating cases - include lay witnesses (spouse, child, friend, co-worker, etc.)
- Use leading questions
- Openings and closings: focus the VLJ on the disputed element - how do we grant the claim?



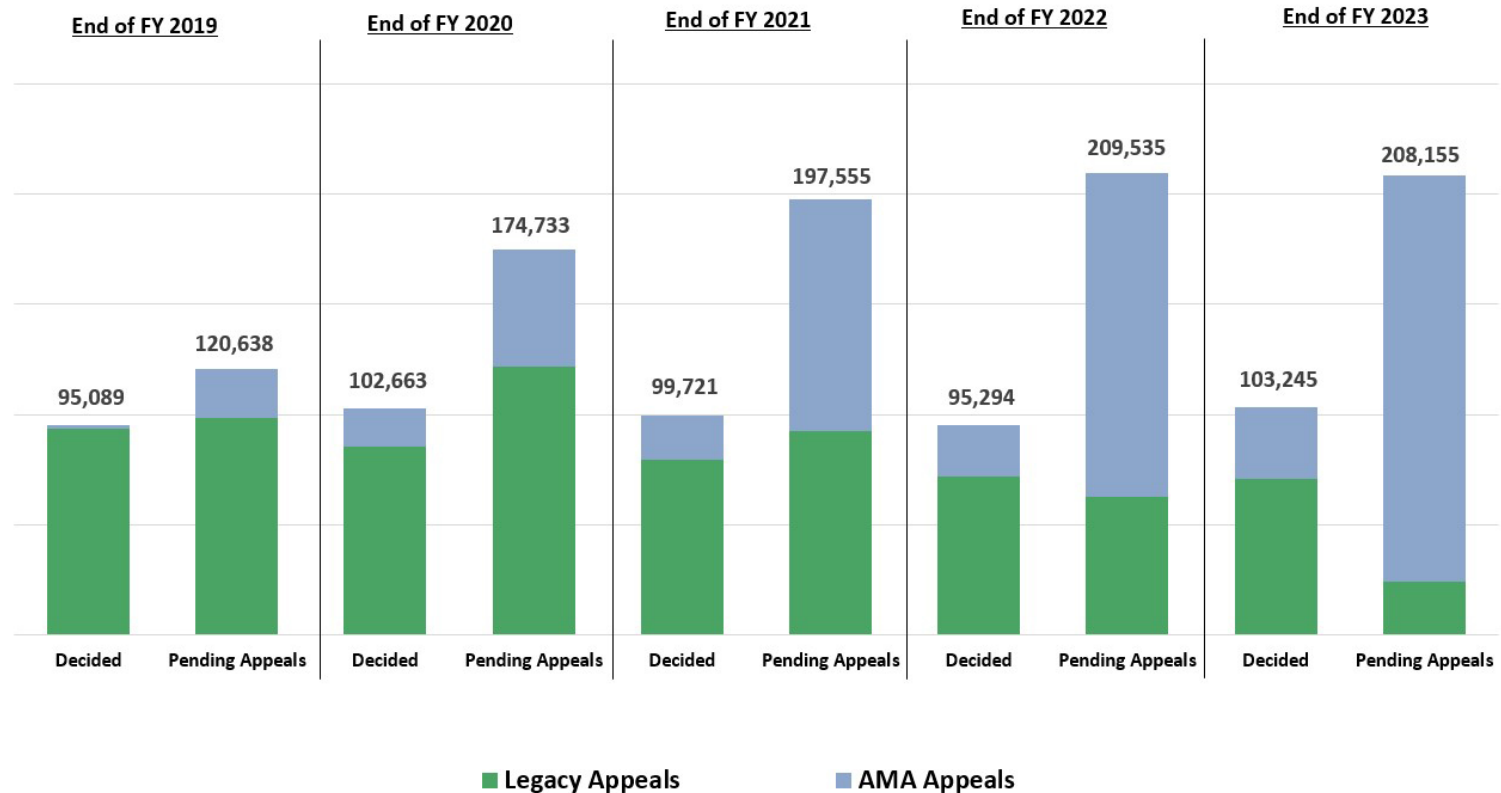
# Hearings – reality for a VLJ

- Even if the VLJ IS the same, they are unlikely to remember the hearing itself and will review the transcript as they would a brief.
- The VLJs are scheduled for between 6-12 hearings a day. For this reason, they may try to move things along or appear disinterested.
- Advantages: VLJ may ask questions directly, personalization of the case.
  - Hearings are helpful when lay testimony is absolutely crucial to the case.
- Disadvantages: Delays in scheduling and transcription, unpredictability, potential travel (and costs of travel for your client), hearing testimony may be redundant to what written testimony is in the record or contradict evidence, client may share information not necessary or not helpful to the case, only allotted one hour for the hearing.



# Adjudicated and Pending Appeals

Appeals Adjudicated and Pending (FY 2019 - FY 2023)



# THE END

QUESTIONS?  
COMMENTS?

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