

Appeals Modernization Act: Promise vs. Reality

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Roadmap

- Why did VA reform its appeals system?
- How is the AMA supposed to work?
- How is the AMA actually working?
- Does the reformed system live up to VA's promises?
- As an advocate, how can I help my clients navigate this system?



Key VA Law Concepts

- **Service-connected benefit:** a monthly compensation benefit paid to veterans who develop a disability during active duty military service. To prove service connection, veterans must show :
 - A current disability (VA is usually looking for a medical diagnosis)
 - Some in-service onset or event
 - A link between the two
- **Effective date:** the date from which VA grants service-connected benefits, which is the later of either:
 - The date that entitlement arose (like the date of onset of a disability), *or*
 - The date of a claim for the benefit at issue
- **Increased rating:** an increase in the schedular rating assigned (anywhere from 0 to 100 in 10-point increments) to a service-connected disability. Higher ratings mean increased monthly compensation for that disability.



Key VA Law Concepts

- **The VA system is pro-veteran and non-adversarial.**
 - Standard of proof: whether the evidence is in approximate balance that a grant is warranted, see 38 U.S.C. § 5701.
 - VA must investigate and adjudicate all potential avenues of entitlement, whether explicitly raised or reasonably raised by the record.
 - VA has a duty to assist claimants in seeking and obtaining any evidence that could help substantiate their claims, see 38 U.S.C. § 5103A.

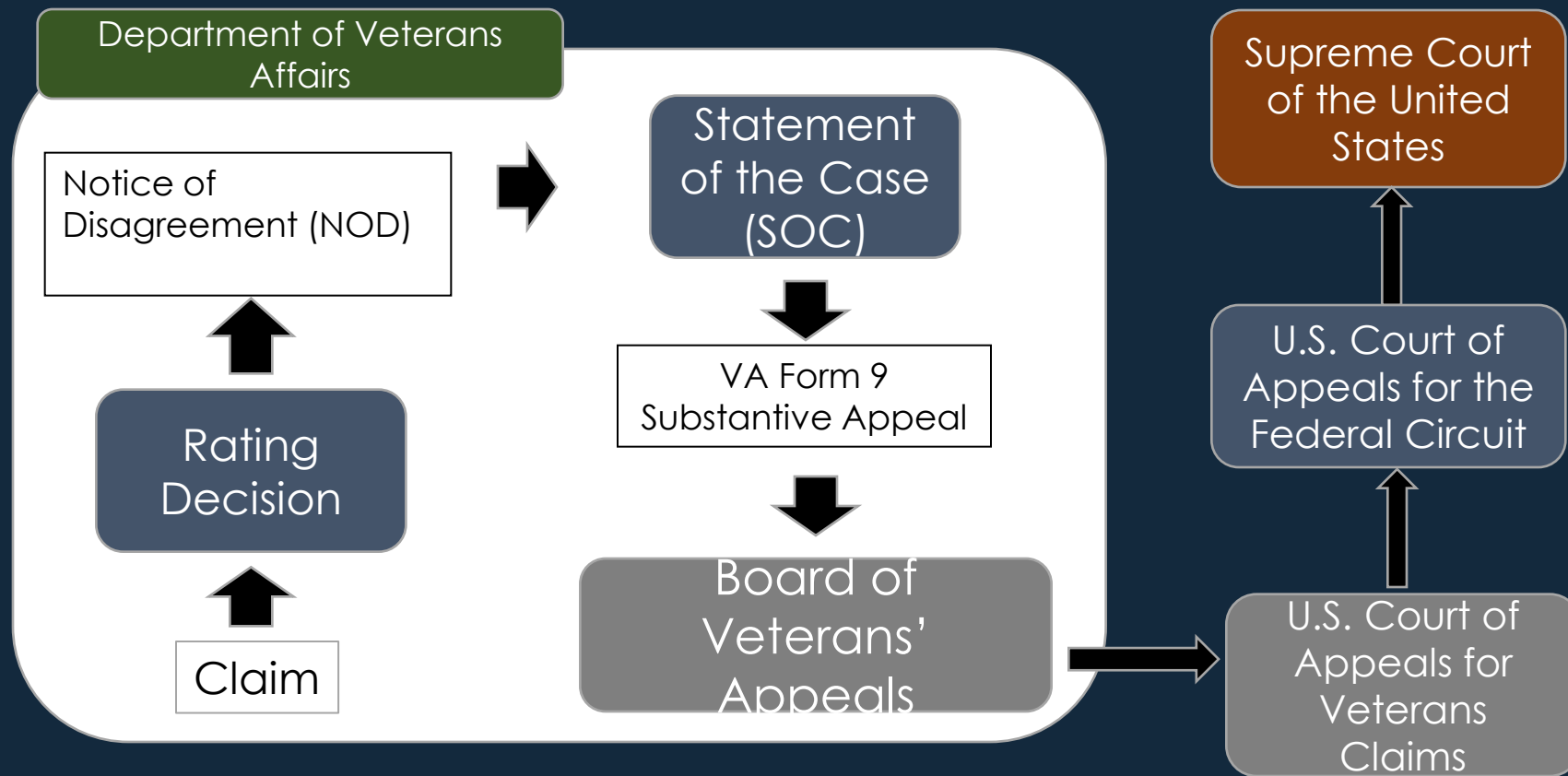


Why did VA reform its appeals system?

- The pre-AMA appeals system is referred to as the Legacy system.
- Legacy had problems:
 - A linear, one-size-fits-all appeals track
 - One choice, no control
 - Excessive delays



Why did VA reform its appeals system?



Why did VA reform its appeals system?

Legacy's procedural steps

- **Claim** (required to be filed on VA Form 21-526 or 21-526EZ)
 - VCAA notice from VA, signaling that VA is conducting development on the claim
 - Opportunity for claimant to submit records or evidence
- **Rating decision (RD)**
 - Can grant, deny, defer (for more development), or reject the claim
- **Notice of Disagreement (NOD)**
 - Must be filed within a year of the rating decision
 - Claimant may choose traditional review or decision review officer (DRO) review



Why did VA reform its appeals system?

Legacy's procedural steps (continued)

- **Statement of the Case (SOC)**
 - Continues the denials in the prior rating decision
 - Includes more citations to regulations, law, and sometimes evidence than the prior rating decision
- **VA Form 9/Substantive Appeal to the Board**
 - Must be filed within 60 days of SOC or within one year of prior rating decision
- **Board of Veterans' Appeals (BVA) decision**
 - If adverse, appeal to U.S. Court of Appeals for Veterans Claims (CAVC) must be filed within 120 days of BVA decision



Why did VA reform its appeals system?

- In 2015, the Veterans Benefits Administration (VBA) had 425,000 appeals for compensation benefits pending.
- The average wait time was estimated to be **three 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.



Why did VA reform its appeals system?

- In March 2017, the U.S. GAO identified Legacy delays:
 - **Regional Offices were taking 419 days to issue an SOC in response to an NOD.**
 - *Remember: the SOC is simply the same denial as the underlying RD on appeal, with added citations.*
 - **Regional Offices were taking 537 days to certify a VA Form 9 /Substantive Appeal to the Board.**
 - *Certification is a merely ministerial act. Godsey v. Wilkie, 30 Vet.App. 207 (2019).*

Source: March
2017 Government
Accountability
Office (GAO)
Report 17-234



Why did VA reform its appeals system?

- In March 2017, the U.S. GAO identified Legacy delays:
 - **The Board was taking 222 days after certification to simply place the appeal on its docket.**
 - **The Board was taking 270 days after docketing to make a decision.**
- These delays averaged to 1,448 days of waiting for veterans. Something had to be done.

Source: March
2017 Government
Accountability
Office (GAO)
Report 17-234



Why did VA reform its appeals system?



- Congress passed the AMA “to expedite VA’s appeals process.”
H.R. Rep. No. 115-135, at 2 (2017).
- Support for the legislation highlighted how it would not only “efficiently and effectively resolve backlogged claims” but also “prevent this kind of backlog from happening in the future.”¹⁶³
Cong. Rec. H4417-03 (daily ed. May 22, 2017).
- VA knew that it would have to perform a balancing act: Congress required the Secretary to confirm that VA could “timely address appeals under the new appeals system” and “on legacy claims.”
Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, § 2(x)(1)(B)(i)(II), 131 Stat. 1105, 1115.

Why did VA reform its appeals system?

- There were reservations: in a March 2018 report, the GAO cautioned that “VA’s appeals plan does not fully articulate how the agency will monitor whether resources are being appropriately devoted to both the new and legacy appeals process[es] An appeals plan that does not specifically articulate how VA will manage the two processes in parallel exposes the agency to risk that veterans with appeals in the legacy process may experience significant delays . . . or vice versa.” March 2018 GAO Report 18-352.



Why did VA reform its appeals system?

- **Rapid Appeals Modernization Program (RAMP):** a pilot program (test run) that permitted certain claimants to opt in and test new features of the AMA.
- RAMP was open to invitees only in November 2017 and to all claimants by April 2018.

We are contacting you to inform you of a new program, known as the *Rapid Appeals Modernization Program* (RAMP) that allows you to "opt-in" to the new claims and appeals process before the law goes into full effect. **At this time, participation in this program is by individual invitation only.** Choosing to "opt-in" to RAMP may lead to an earlier resolution of your claim and/or appeal. This program will not affect or change your potential effective date. You may take advantage of this program by sending us the enclosed RAMP Opt-in Election document. If a Veterans Service Organization (VSO), attorney, or agent represents you, you should contact them for assistance in making a decision.



Why did VA reform its appeals system?

- Ultimately, VA promised that the AMA would:
 - Modernize the claims and appeals process
 - Include three decision review options for disagreements with benefits decisions
 - Require improved notification of VA decisions
 - Provide earlier claim resolution
 - Ensure the earliest effective date possible

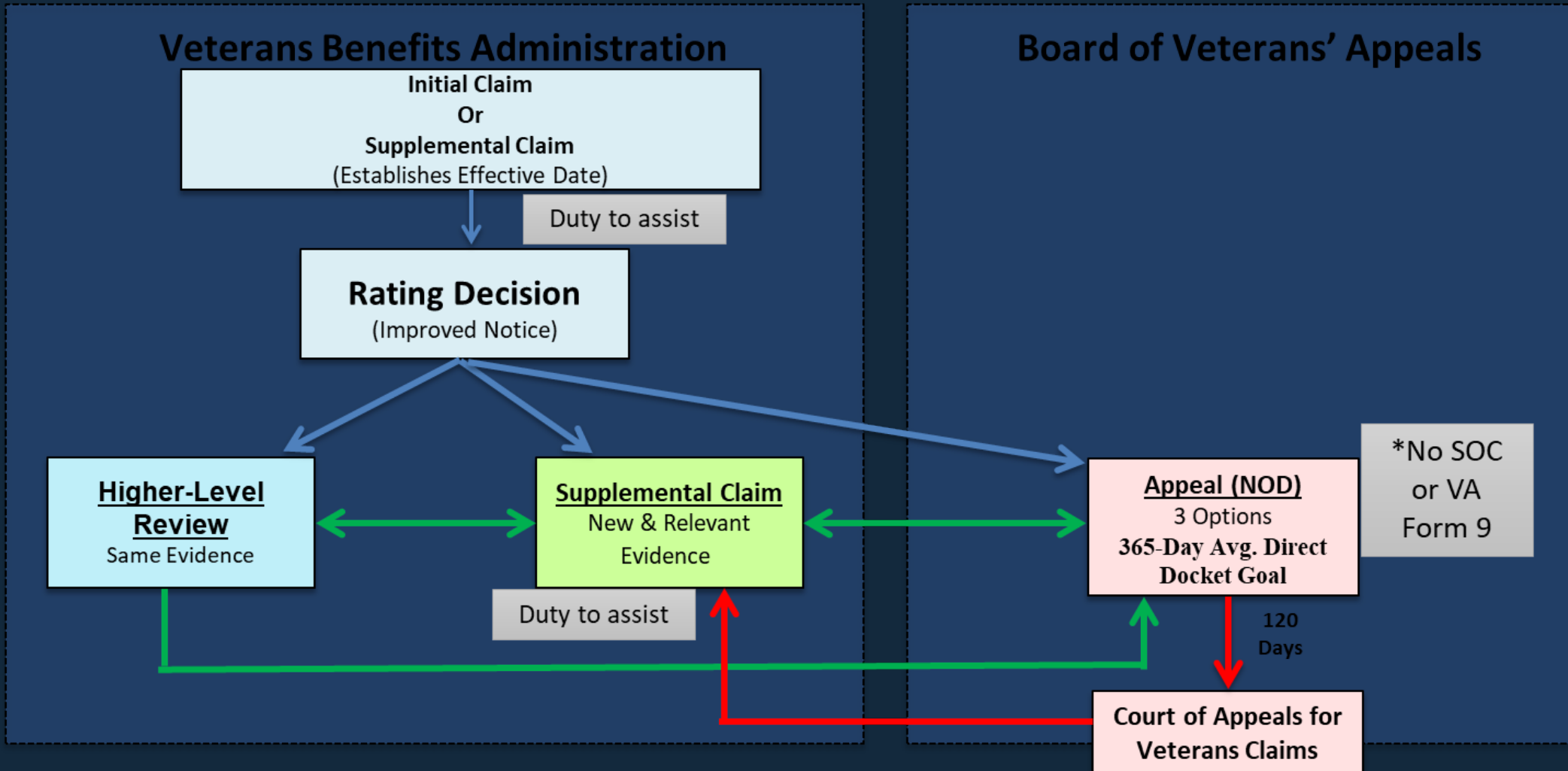


How is the AMA supposed to work?

- On February 19, 2019, AMA officially took effect. Any rating decision issued on or after this date is governed by the AMA.
- Claimants who were already pursuing Legacy issues could (and can) opt into the AMA after the issuance of an SOC or SSOC. However, claimants cannot keep Legacy status once the RO issued a rating decision on their appeal on or after February 19, 2019.



How is the AMA supposed to work?



Except for appeals to the CAVC, all filing deadlines are **one year**.



How is the AMA supposed to work?

- Filing an initial claim for an issue that has never been decided before:
 - Submit an intent to file (VA Form 21-0966) to preserve an effective date, as long as you submit a claim within a year of your ITF.
 - Complete a **claim** application using VA Form 21-526EZ.
- Filing a claim for an issue denied more than a year prior:
 - Submit an intent to file to preserve an effective date, as long as you submit a claim within a year of your ITF.
 - Complete a **supplemental claim** application.
 - Include new and relevant evidence (attached to or identified in the application).



How is the AMA supposed to work?

Appeal options at the RO

- Higher level review (HLR) appeal
 - *De novo* review of the claim by a senior claims adjudicator
 - Closed record (no new evidence allowed)
 - Duty to assist errors lead to deferrals into the supplemental claim lane (more on that later)
 - Informal conference option
 - Must use VA Form 20-0996
 - Timeliness goal: 125 days
 - See 38 C.F.R. § 3.2601



How is the AMA supposed to work?

Appeal options at the RO

- Supplemental claim appeal
 - Must be accompanied by new and relevant evidence
 - New evidence: evidence not actually part of the record before Agency adjudicators when the issue was last decided
 - Relevant evidence: evidence that tends to prove or disprove a matter at issue in a claim, including evidence that raises a theory of entitlement that was not previously addressed
 - Duty to assist applies
 - Must use VA Form 20-0995
 - Timeliness goal: 125 days
 - See 38 C.F.R. § 3.2501



How is the AMA supposed to work?

Appeal options at the RO

What constitutes new and relevant evidence? Just about anything:

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



How is the AMA supposed to work?

Appeal options at the RO

Supplemental Claim

- New and relevant evidence is required, and record is open.
- Duty to assist applies, and VA will assist in gathering new and relevant evidence.
- Effective date for benefits protected if appeal is submitted within one year of decision

Higher-Level Review

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



How is the AMA supposed to work?

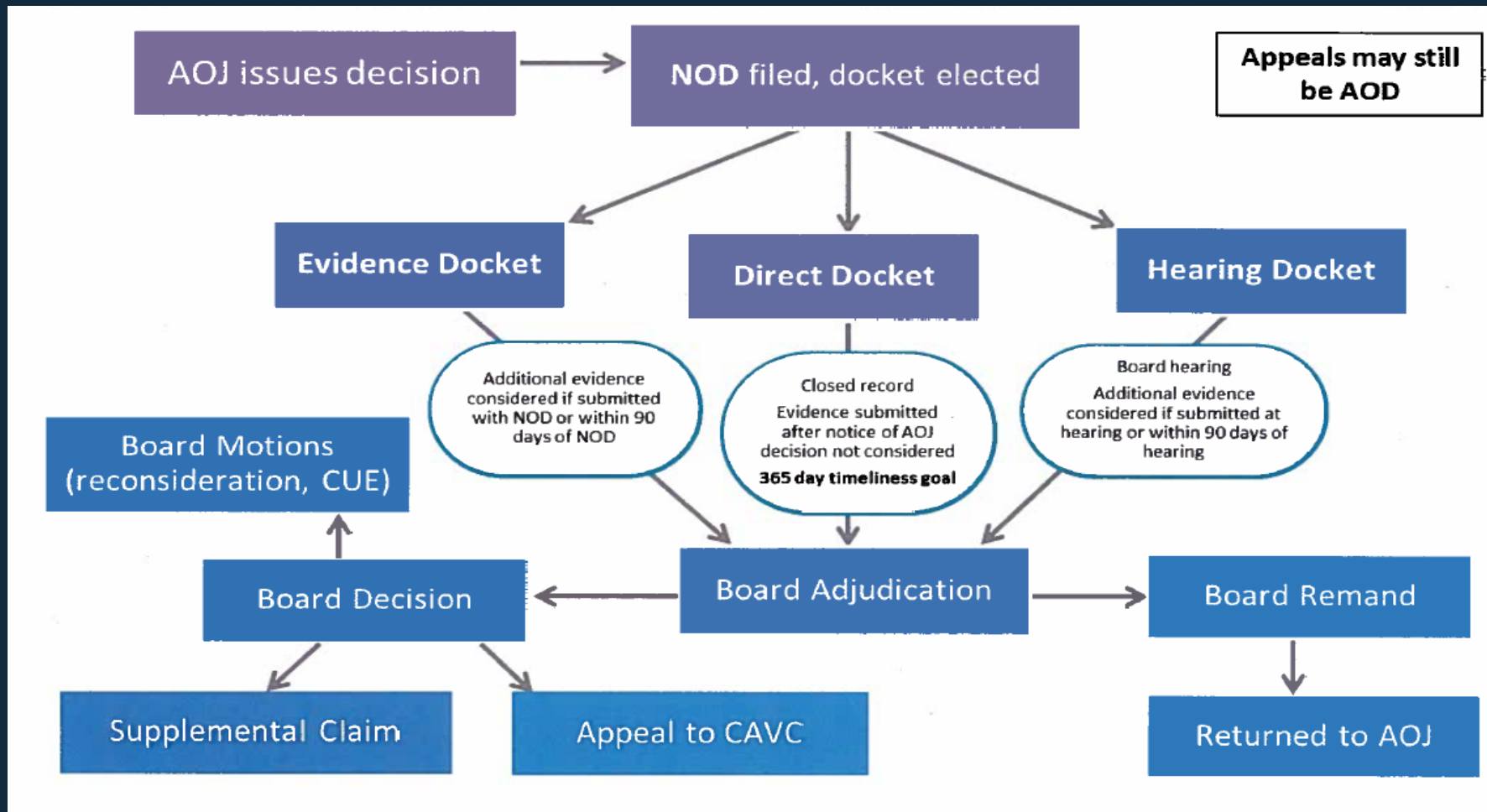
Enhanced Decision Notices

- AMA decisions must include a summary of any findings VA makes that are favorable to the veteran.
- If the RO denies a claim, it must identify the element(s) that still need to be met to warrant a grant (like in service connection cases).
- If the RO denies a claim, it must identify the criteria required to grant the next higher level of compensation.



How is the AMA supposed to work?

The Board's AMA dockets



How is the AMA supposed to work?

The Board's AMA dockets

	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	The Judge will review the same record and make a decision. No new evidence will be added.	You will have 90 days from your NOD to submit any new evidence. The Judge will make a decision considering the evidence you provided.	You will be placed on a list for a hearing before a Judge by videoconference (or in DC). After your hearing you will have 90 days to submit new evidence. The Judge will make decision considering the hearing and the evidence you provided.
How long	365 days (on average)	Over 365 days	Based on availability.



How is the AMA supposed to work?

Advancement at the Board

- You can advance your case on the Board's dockets if you demonstrate good cause. Good cause includes:
 - Age 75+
 - Serious illness
 - Severe financial hardship
- Other sufficient cause that the regulation contemplates:
 - The case involves an interpretation of law of general application that affects other claims.
 - Administrative error resulted in a significant delay in docketing.
 - Administrative necessity

Source: 38 C.F.R. § 20.800(c)



How is the AMA supposed to work?

Process features at the ROs

- Claimants have multiple choices, and there is no longer a one-size-fits-all approach to appealing an adverse RO decision.
 - Two appeal options at the RO (HLR or supplemental claim appeal)
 - Choice of a lane doesn't prohibit choices later (with the exception of the HLR appeal: you cannot seek HLR of an HLR decision)
 - No limit to the number of times a veteran may pursue a claimed issue in any of the given lanes
- Appealing within one year of an RO decision protects your effective date, no matter how many appeals you need to file to get a grant.



How is the AMA supposed to work?

Process features at the Board

- Claimants can appeal BVA denials to the CAVC within 120 days (like Legacy) **or** within a year in the supplemental claim lane (this is a new choice).
- **If the BVA remands an issue, it no longer retains jurisdiction over the issue.**
 - In Legacy, if the Board remanded an issue that the RO later denied, the RO would issue an SSOC effectuating that denial. The issue would then be certified back to the Board, where the claimant would continue to pursue it with the same docket date as the BVA remand, keeping their place in line.
 - In AMA, if the RO denies a remanded issue, there is no automatic certification back to the Board. The claimant must exercise an appropriate AMA appeal choice. If they choose to appeal to BVA, they receive a new docket date . . . and a new place at the back of the line.



How is the AMA supposed to work?

Unfortunate naming conventions

- The Legacy Notice of Disagreement is not the same as the AMA Notice of Disagreement.
- In AMA, the supplemental claim form has two purposes that ROs confuse or conflate:
 - To ask to reopen a claim denied more than a year prior, *and*
 - To timely appeal a rating decision in the supplemental claim lane.



How is the AMA supposed to work?

The evidentiary record

Legacy

- Record does not close until Board decision is issued
- Claimants may submit evidence at almost any point during the appeal period
- See 38 U.S.C. § 7104(d) (requiring the Board to issue decisions responsive to “all material issues of fact and law presented on the record”)

AMA

- Record closes when notice of decision on initial claim is issued
- For a *supplemental claim appeal*, the record includes anything submitted until the date a decision is issued on the appeal.
- For a *higher-level review appeal*, the record closes as of the date of the decision on appeal, and the HLR decision will not consider any evidence submitted after that date.
- At the Board, the record closes when the underlying decision on appeal is issued, except:
 - 90 days to submit evidence after filing an evidence docket NOD
 - 90 days after the hearing date to submit evidence after filing a hearing docket NOD



How is the AMA actually working?

- The RO's timeliness goals are not being met.
 - VA's goal for adjudicating HLR and supplemental claim appeals is 125 days.
 - This goal is not consistently being met.
 - As of last month, over one-fourth of pending claims had been pending for longer than 125 days.

Compensation and Pension Rating Bundle Metrics				
National View				
Reporting through September 21, 2024				
		# Pending	# Pending > 125	% Pending > 125 days
Compensation and Pension Rating Bundle	Total	983,217	237,565	24.2%

Source: Sept. 21, 2024 Monday Morning Workload Reports, available at VA.gov



How is the AMA actually working?

- Complex appeals, like HLRs, have not been always properly assigned to qualified reviewers. In a six-month period from October 2021 to February 2022, 93% of studied complex appeals were decided by unqualified raters.

On October 20, 2021, a veteran received a rating decision regarding the service-connected evaluation of his ALS. The veteran submitted a request for a higher-level review of this rating, which was received on November 9, 2021. On November 17, 2021, a DRO issued an incorrect evaluation. The DRO, who was not designated in the WIT to rate ALS appeals, had not completed any of the mandatory training courses on ALS. The OIG team reviewed the case and found the veteran was entitled to a higher evaluation at an earlier effective date. As a result of the improper decision, there was an underpayment of approximately \$12,900.

Source: Office of Inspector General (OIG) Report #22-01814-36 (Mar. 9, 2023)



How is the AMA actually working?

- ROs are misapplying the new and relevant evidence standard when adjudicating supplemental claims.
- Case example: VA won't accept lay evidence describing the onset of symptoms as new and relevant to the issue of secondary service connection.

Since our last review of your claim, we received your VA Form 20-0995 Decision Review Request: Supplemental Claim along with VA Form 21-4138, Statement in Support of Claim and VAMC treatment records. The Statement in Support of Claim, received June 7, 2022 and VAMC treatment records, submitted in connection with the current claim does not constitute relevant evidence because it does not prove or disprove a matter at issue within your claim.



How is the AMA actually working?

- ROs are improperly rejecting valid appeals. Examples:
 - Rejecting valid HLRs on supplemental claim decisions because an HLR was previously filed in the case
 - Rejecting valid supplemental claims for increased ratings because they were not filed on VA Form 21-526EZ
 - Rejecting appeals raising ancillary issues, like special monthly compensation, because of the lack of a form “claiming” the issue

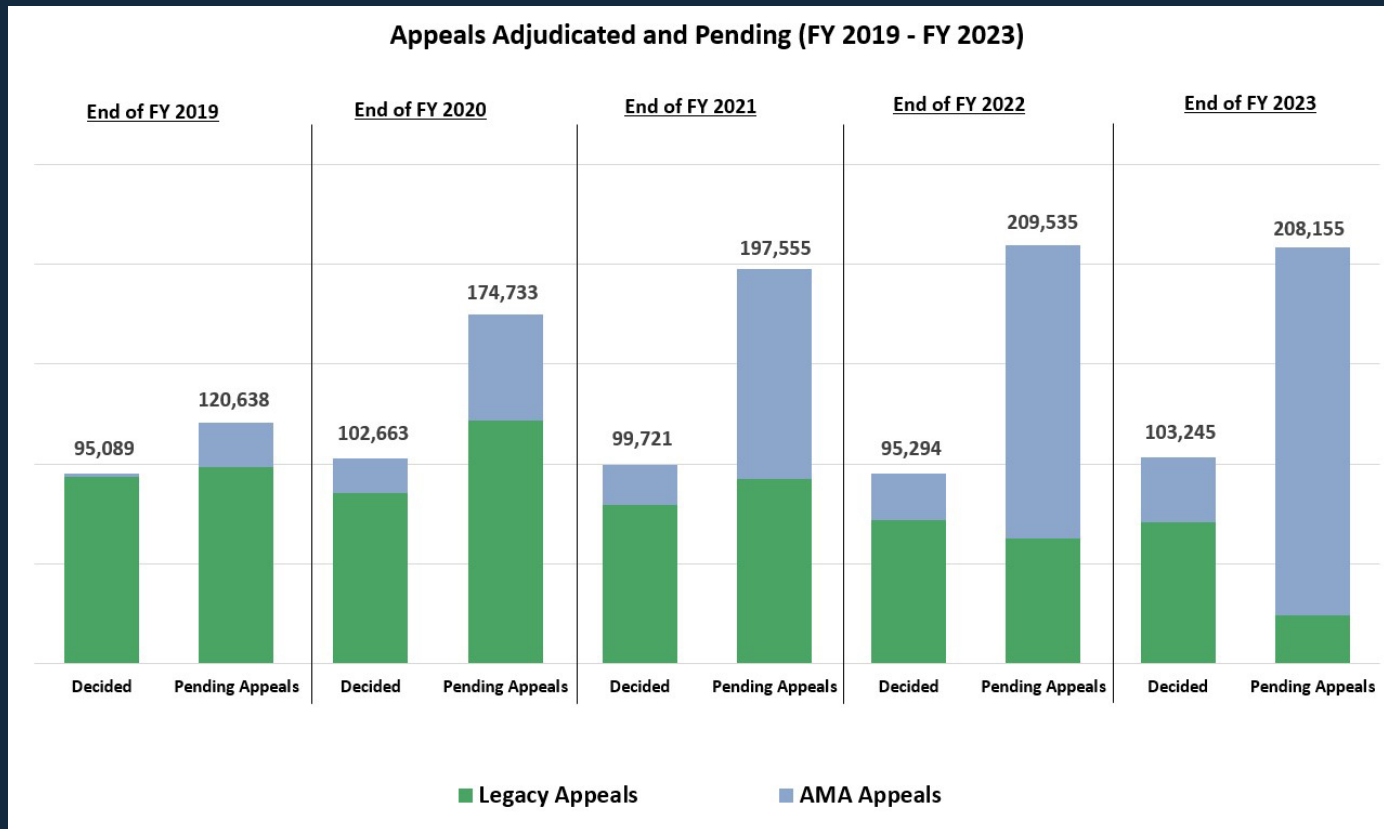


How is the AMA actually working?

- VA is assigning the wrong effective dates.
 - Supplemental claim *appeals* are being conflated with *new* supplemental claims for issues denied more than a year prior.
 - These mistakes are happening primarily at the ROs, but also at the Board.
 - These errors are forcing two appeals: one on the merits, and one to obtain the right effective date (doubling the work).

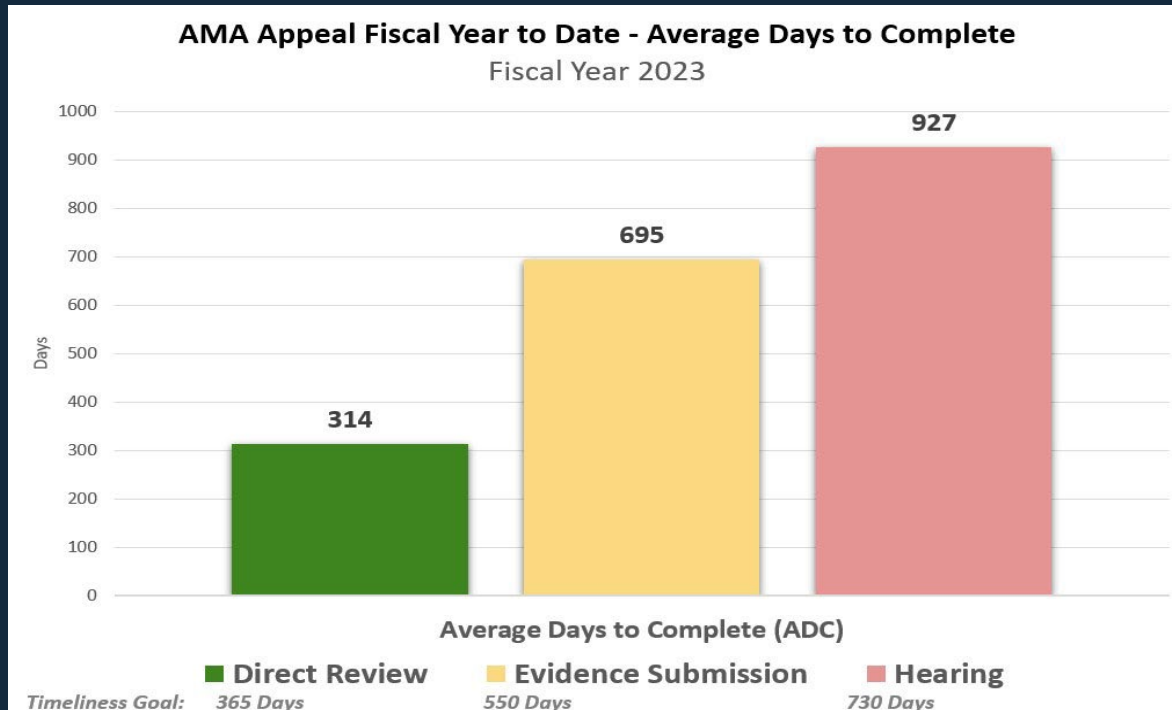


How is the AMA actually working?



- Balancing an inventory of Legacy and AMA appeals has posed challenges at the Board (and delays).
- Even in a record-setting year for decisions made (103k), BVA did not decide half of their total appeals inventory in FY2023, but have done better in 2024.

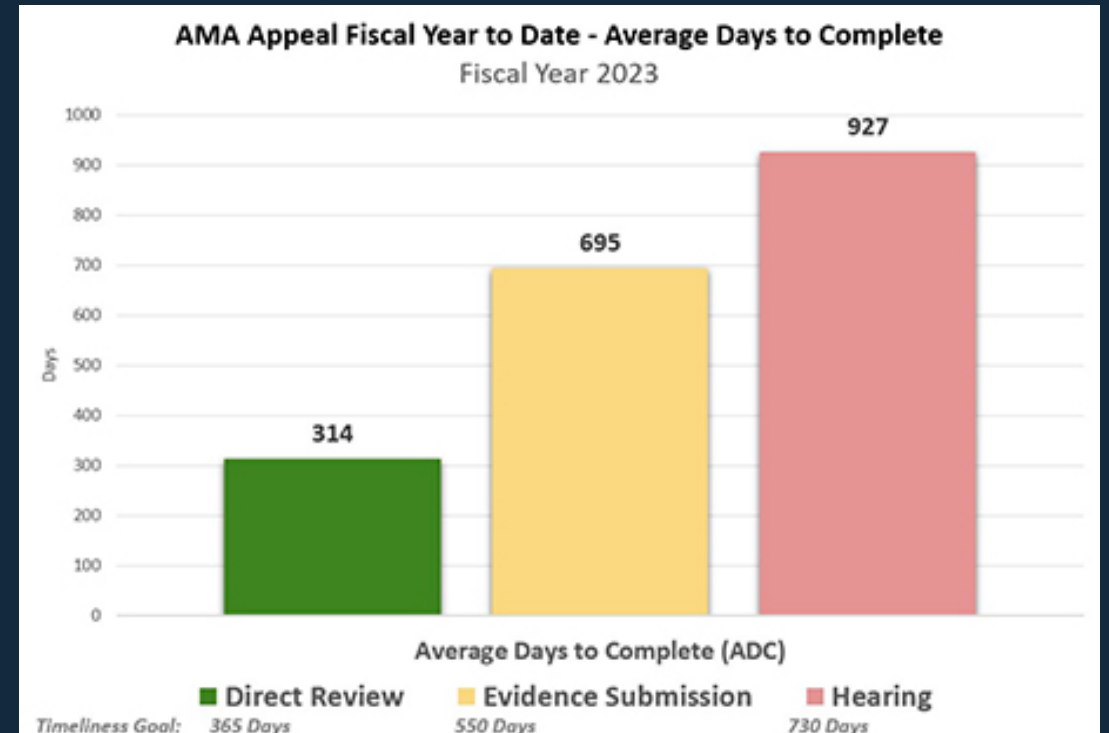
How is the AMA actually working?



- *Remember what the Legacy numbers looked like (that in part precipitated the AMA)?*
 - The Board was taking 222 days after certification to place the appeal on its docket.
 - The Board was taking 270 days after docketing to make a decision.

How is the AMA actually working?

- BVA's timeliness estimates are presented in averages, including in letters to veterans who file appeals on the BVA's AMA dockets. But veterans are often unaware that the averages meet in the middle of two extremes: the time it takes to decide a case that has been advanced at the Board, and the time it takes to decide a case that has not.



How is the AMA actually working?

The Board of Veterans' Appeals (Board) received your Board Appeal request (VA Form 10182) on October 2, 2023. Based on the Board appeal option you selected on the form, your appeal has been placed on the Direct Review docket.

What happens next?

Our goal is to decide appeals on the Direct Review docket on average within 365 days of being docketed.

Please keep in mind that by selecting the Direct Review option, the Board can only consider evidence of record at the time of the agency of original jurisdiction decision being appealed.



The same estimate is sent to veterans who are AOD-ed (where the wait time for a decision is four to six months) and who are not (where the wait time is far longer).

How is the AMA actually working?

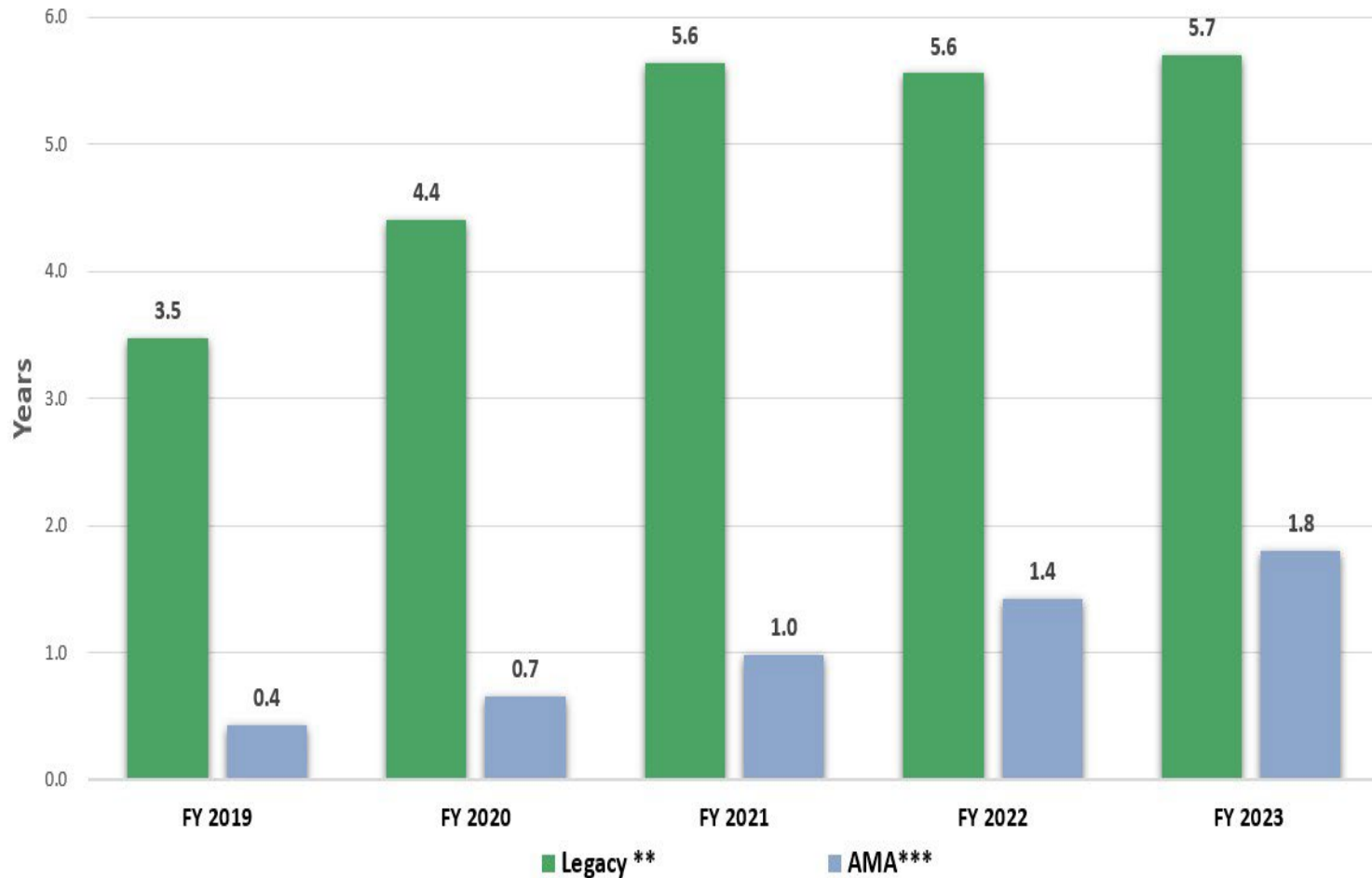
Remember what the RAMP invitation letter said?

We are contacting you to inform you of a new program, known as the *Rapid Appeals Modernization Program* (RAMP) that allows you to "opt-in" to the new claims and appeals process before the law goes into full effect. **At this time, participation in this program is by individual invitation only.** Choosing to "opt-in" to RAMP may lead to an earlier resolution of your claim and/or appeal. This program will not affect or change your potential effective date. You may take advantage of this program by sending us the enclosed RAMP Opt-in Election document. If a Veterans Service Organization (VSO), attorney, or agent represents you, you should contact them for assistance in making a decision.



VA's "funny money" metrics

Legacy and AMA 5-Year Timeliness Comparison
(Average Years to Complete Resolved Appeals)*



*Excludes decisions with remanded issues.

** Legacy ADC = Average time (years) from filing of appeal (VA Form 9) to Board until final Board decision.

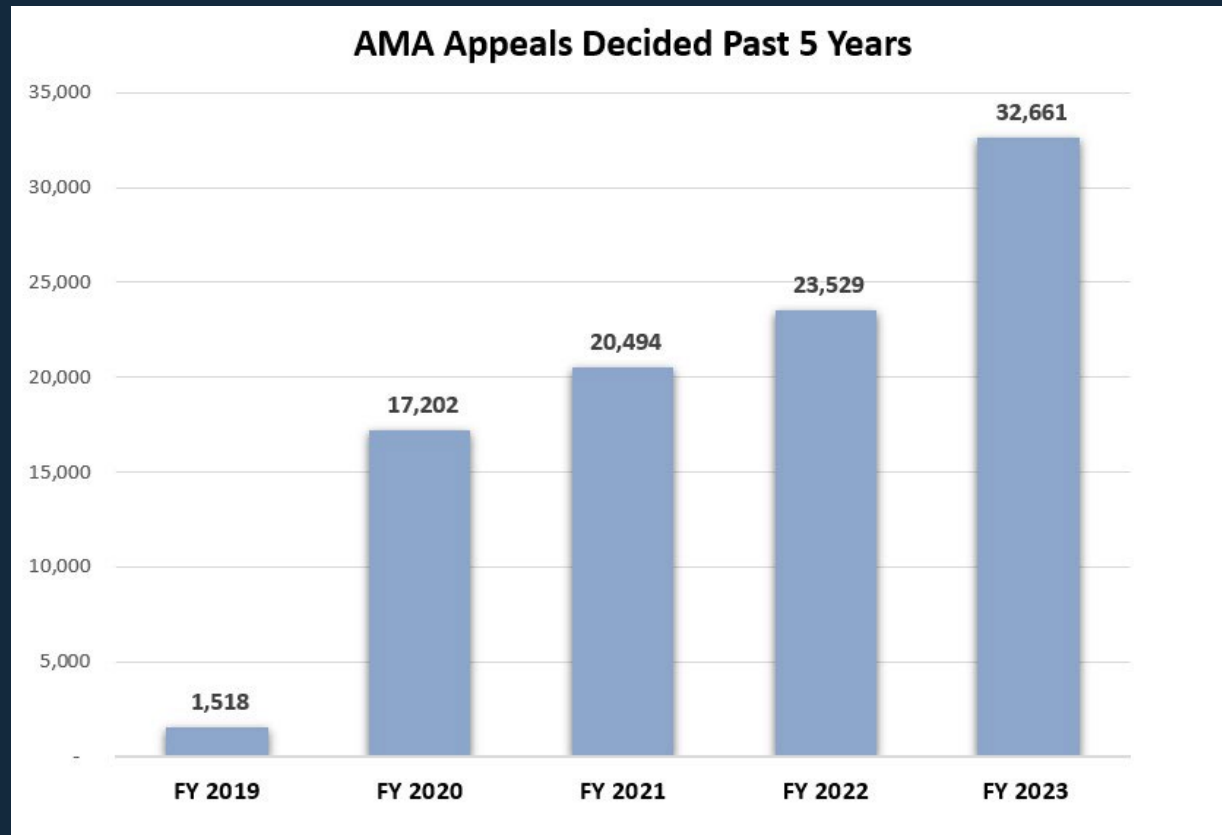
*** AMA ADC = Average time (years) from Notice of Disagreement (VA Form 10182) to Board of Veterans' Appeals until final Board decision

Note: this doesn't tell you how old the appeals pending are



VA's "funny money" metrics

- How does this compare to the number of AMA appeals that came in each year?
- I.e. "more" AMA appeals have been decided each year than the previous year, but how many MORE AMA appeals have been added
- Percentage of Advance on Docket cases (30,149 AOD cases decided in FY 2023)



Does the reformed system live up to VA's promises?

- Remember: VA promised that the AMA would . . .
 - Modernize the claims and appeals process
 - Include three decision review options for disagreements with benefits decisions
 - Require improved notification of VA decisions
 - Provide earlier claim resolution
 - Ensure the earliest effective date possible



Does the reformed system live up to VA's promises?

- Has AMA modernized the claims/appeals process?
- Practice tips:
 - Beware of appeal rejection letters. Even if they are incorrect, they functionally mean that VA is not tracking the appeal or planning to make a decision.
 - Beware of “standard” development. Supplemental claim lane appeals often churn through records requests, examinations, and other development before being decided.



Does the reformed system live up to VA's promises?

- Have decision notifications improved?
- Practice tip: use favorable findings to your advantage.

Does the reformed system live up to VA's promises?

- Are claims being resolved earlier?
- Practice tips:
 - Be aware of the power of the wait time. In the new system, delay factors into appeal options just as much as the merits of the case or the outstanding development needed. Your client will thank you for being mindful of this.
 - Be aware of the AOD rules, see 38 C.F.R. § 20.800(c).



Does the reformed system live up to VA's promises?

- Is VA ensuring that claimants receive the earliest effective date possible?
- Practice tips:
 - Understand that choosing the supplemental claim lane for an appeal could mean a short effective date.
 - We have seen with the implementation of the PACT Act that changes in the law may be applied from incorrect effect dates, too.



Does the reformed system live up to VA's promises?

- Does the AMA afford more choice and control?
- Practice tips:
 - Many of AMA's choices come with closed record implications.
 - While there are more choices in AMA, there are more pitfalls, too, especially for unrepresented claimants.
 - If you choose a timely and appropriate appeal option, VA might still reject it or refuse to recognize it. In these situations, remote electronic access to VA's corporate systems is critical.



How can I help my clients navigate the AMA?

- Stay aware of common mistakes and trends at the Agency.
 - Review wait times when making choices.
 - If VA asks you to submit the wrong form, you might want to submit it anyway.
 - Familiarize yourself with VA's Adjudication Procedures Manual. ROs heavily rely on it.



How can I help my clients navigate the AMA?

- Be resourceful.
 - Join the National Organization of Veterans Advocates (NOVA).
 - Invest in the National Veterans Legal Services Program's (NVLSP) Veterans Benefits Manual (VBM).
 - Bookmark the M21-1 Adjudication Procedures Manual.
 - Join the FBA's Veterans and Military Law Section.



Questions?

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