

VA Certification Training



Overview

- Representation before VA
- Ethics in representation
- Basic eligibility for VA benefits
- Disability compensation
- Pension
- DIC/survivors' benefits
- Claims procedures
- Right to appeal

Department of Veterans' Affairs (VA)

- Cabinet level Agency that provides healthcare, benefits, and compensation to veterans and their dependents
- Secretary, Doug Collins
- Three components:
 - Veterans' Health Administration (VHA)
 - **Veterans' Benefits Administration (VBA)**
 - National Cemetery Administration (NCA)

VHA

The Veterans Health Administration is America's largest integrated health care system, providing care at 1,380 health care facilities, including 170 medical centers and 1,193 outpatient sites to over 9.1 million veterans enrolled in the VA health care program



VBA

- The Veterans Benefits Administration provides financial and other forms of assistance to veterans and their dependents

Benefits administered by VBA

- Veterans' benefits
 - Compensation
 - Pension
 - Education
 - Adaptive Equipment
 - Vocational Rehabilitation
 - VA Home Loans
 - VA Life Insurance
 - Survivors' Benefits



Total Recipients

Compensation – Number of service-connected compensation and DIC benefit recipients at the end of fiscal year 2023	6,159,448
Pension – Number of non-service-connected disability Veteran and survivor pension recipients at the end of fiscal year 2023	262,932
Fiduciary – Number of beneficiaries who received services from VA’s fiduciary program during fiscal year 2023	104,209
Education – Number of beneficiaries participating in education programs during fiscal year 2023	862,750
Insurance – Number of lives insured at the end of fiscal year 2023	5,554,764
Home Loan Guaranty – Number of loans guaranteed during fiscal year 2023	400,695
Veteran Readiness and Employment – Number of participants during fiscal year 2023	131,179



Agency Level

Regional Offices

- 56 VA Regional Offices within the United States, Puerto Rico, and the Philippines
- Handles claims adjudication
- Undersecretary of Benefits, Paul Lawrence

Board of Veterans' Appeals

- Located in Washington, D.C.
- Directed by Chairman, ????
- Veterans Law Judges



Appellate Review

- Court of Appeals for Veterans' Claims (CAVC)
 - Article 1 Court
 - Washington, D.C., but authorized to sit anywhere in the U.S.
 - Exclusive jurisdiction over decisions by BVA
 - Authorized 7 permanent active Judges and two additional judges as part of a temporary expansion provision.
 - Term of 15 years with option to agree to be available for recall as Senior Judge



Representation at the Agency

- **Accreditation is required** by both attorneys and non-attorneys
 - Cannot charge for filing of initial claim
 - Must be **accredited**, even if pro bono
 - Non-attorneys must pass an examination in addition to completing application
- Accreditation must be renewed annually and includes CLE requirements
- Application form for Accreditation – VA Form 21a
 - <https://www.va.gov/vaforms/va/pdf/VA21a.pdf>



Representation at the Agency

- Once accredited, you may represent a Veteran at the agency
- Submit VA form 21-22a
- If you are representing a Veteran for a fee and want the VA to withhold your “reasonable fee” - you will also need to file your fee agreement with the Office of General Counsel (OGC)



Attorney Representation for Fee

- Withholding fee agreement: VA withholds attorney fee from retroactive award and pays the attorney fee directly to the attorney. Must be filed with the agency of original jurisdiction (the Regional Office) within 30 days of the agreement being signed
 - Withholding fee agreements have to be for 20% of retro award or less to be valid
- Non-withholding fee agreement: the full amount of a retroactive award is released to the veteran and the veteran pays the attorney the fee. Must be filed with the Office of General Counsel (OGC) within 30 days of the agreement being signed



Attorney Representation for Fee

Tex. R. Disc. Prof'l Cond. 1.04 - Fees

(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.



Accreditation Issues

- Watch out for unaccredited claims consultants
- VA OGC website to confirm someone is accredited
 - <https://www.va.gov/ogc/apps/accreditation/index.asp>
- What should Veteran do if harmed by unaccredited rep/consultant?
 - File complaint with OGC
 - File complaint with FTC
 - Reach out to congressional representative



Representation at Court

- Admission to Court of Appeals for Veteran's Claims
 - Application for Admission
 - Certificate of Good Standing
 - Application available online at http://www.uscourts.cavc.gov/documents/Form46A_02-12_.pdf



Basic Standards of Conduct

VA-accredited individuals providing VA claims assistance shall:

- Faithfully execute their duties on behalf of a VA claimant;
- Be truthful in their dealings with claimants and VA;
- Provide claimants with competent representation before VA;
and
- Act with reasonable diligence and promptness in representing claimants.
- 38 C.F.R. §§ 14.632 (a) & (b).



Basic Standards of Conduct

VA-accredited individuals providing VA claims assistance shall *not*:

- Violate the standards of conduct set forth in 38 C.F.R. § 14.632.
- Circumvent the rules of conduct through the actions of another.
- Enter into an agreement for, charge, solicit, or receive a fee that is clearly unreasonable or otherwise prohibited by law or regulation.
- Solicit, receive, or enter into agreements for gifts related to representation provided before an agency of original jurisdiction has issued a decision on a claim or claims.



Basic Standards of Conduct

VA-accredited individuals providing VA claims assistance shall *not*:

- Delay, without good cause, the processing of a claim at any stage of the administrative process.
- Mislead, , threaten, coerce, or deceive a claimant regarding benefits or other rights under programs administered by VA.
- Engage in, or counsel or advise a claimant to engage in, acts or behavior prejudicial to the fair and orderly conduct of administrative proceedings before VA.
- Disclose, without the claimant's authorization, any information provided by VA for purposes of representation.
- Engage in any other unlawful or unethical conduct.



Establishing and Maintaining Competency

38 U.S.C. § 5904(b)(3)

The Secretary ... may suspend or exclude from further practice before the Department any agent or attorney recognized under this section if the Secretary finds that such agent or attorney ... is incompetent; ...



Establishing and Maintaining Competency

38 C.F.R. § 14.633(d)(1)

Accreditation **shall** be canceled “when the GC finds that the performance of [a representative] demonstrates a lack of the degree of competency necessary to adequately prepare, present, and prosecute claims for veteran’s benefits.”



Establishing and Maintaining Competency

What is “competent representation”?

- 38 C.F.R. §14.632 (b)(1) - Competent representation requires the knowledge, skill, thoroughness, and preparation necessary for the representation. This includes understanding the issues of fact and law relevant to the claim as well as the applicable provisions of title 38, United States Code, and title 38, Code of Federal Regulations.
- Tex. R. Disc. Prof'l Cond. 1.01 Competent and Diligent Representation










Establishing and Maintaining Competency

<https://www.va.gov/ogc/accreditation.asp>

Attorneys, Agents, and VSO Representatives

| Accreditation and Recognition Search | Recognition of Organizations | Accreditation FAQs |

Fact Sheets:

- [Applying for Accreditation as an Attorney or Agent](#) 
- [Standards of Conduct](#) 
- [How to Challenge a Fee](#) 
- [How to File a Complaint Regarding Representation](#) 
- [Enforcement Authority](#) 
- [The Pension Program and Representation](#) 
- [How to Select a Representative](#) 

Acting with Reasonable Diligence

What is “reasonable diligence”?

- 38 C.F.R. §14.632 (b)(2) - “Representatives must “act with reasonable diligence and promptness in representing claimants. This includes responding promptly to VA requests for information or assisting a claimant in responding promptly to VA requests for information.”
- “A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when [an advocate] overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the [advocate’s] trustworthiness.”
ABA Model Rule 1.3 Comment [3]



Acting with Reasonable Diligence

What is “reasonable diligence”?

- Comment 6 – “Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer. A lawyer's workload should be controlled so that each matter can be handled with diligence and competence. As provided in paragraph (a), an incompetent lawyer is subject to discipline.” Tex. R. Disc. Prof'l Cond. 1.01
Competent and Diligent Representation



Meritorious Claims

- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous. Tex. R. Disc. Prof'l Cond. 3.01.
- Comment 1 – *“The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. ...”*



Communication

Tex. R. Disc. Prof'l Cond. 1.03 – Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Managing Veterans' Expectations

What can you do to improve communication with Veterans in an ethically responsible, effective way and reduce frustration due to administrative action/inaction often outside our control?



Managing Veterans' Expectations

Set communication expectations from the beginning of representation.

- **How** will you primarily communicate? Phone, email, secure portal, mail
- **Who** will be involved in that communication? Staff/other representatives, Veteran's family members/friends. 38 C.F.R. § 14.632(c)(10) (An individual providing representation on a particular claim under §14.630, representative, agent, or attorney shall not: ... Disclose, without the claimant's authorization, any information provided by VA for purposes of representation.)
- When they can expect to hear from you
- When you expect to hear from them



Managing Veterans' Expectations

What about challenging/difficult clients?

- Not all challenging clients are difficult.
- A client may be challenging for their knowledge level, high expectations, etc., while a difficult client lacks respect, may be hostile, or even abusive.
- You are not “stuck” with difficult clients. You control the representation; you’re the professional expert. The client controls the goal; you control how you go about achieving it.



Managing Veterans' Expectations

What about challenging/difficult clients?

- 38 C.F.R. § 14.631 (c) – governs withdrawal at the agency level. A representative “may withdraw ... if such withdrawal would not adversely impact the claimant’s interests.”
- 38 C.F.R. § 20.6 – withdrawal at the Board.
- Tex. R. Disc. Prof’l Cond. 1.16 - Declining or Terminating Representation



Interactions with the VA

- Assume that **everything** you put in writing, and everything that is said at a recorded and transcribed hearing, **will be read by a Judge.**
- Judges and other decision-makers in the system “are more likely to be impressed by an advocate who is courteous and respectful to the decision-maker, opposing counsel, the litigants, and the legal process.” Kevin Dubose & Jonathan E. Smaby, *The Power of Professionalism: Civility as a Strategy for Effective Advocacy*, 79 Tex. B.J. 432, 433 (2016).



Interactions with the VA

- “...good manners, disciplined behavior and civility—by whatever name—are the lubricants that prevent lawsuits from turning into combat.”
- “[L]awyers who know how to think but have not learned how to behave are [a] menace and a liability, not an asset, to the administration of justice.” Chief Justice Burger, *Excerpts From the Chief Justice’s Speech on the Need for Civility*, N.Y. Times, May 19, 1971, at 28.

Interactions with the VA

38 U.S.C. § 5904(b)(3)

The Secretary...may suspend or exclude from further practice before the Department any agent or attorney recognized under this section if the Secretary finds that such agent or attorney—

- (1) has engaged in any unlawful, unprofessional, or dishonest practice;
- (2) has been guilty of disreputable conduct; ...



Practice tips

- Make sure you are competent before worrying about building your caseload or taking on cases.
- Manage your caseload to preserve your own health and sanity.
- Talk with your Veteran/client.
- Manage your Veteran/client's expectations.
- Protect your Veteran/clients' privacy – and make sure your client understands potential risks of disclosure.
- Know when and how to withdraw representation at the RO and Board.
- Be a good human.



Overview – Compensation



New compensation recipients and estimated annual payments – during FY 2023

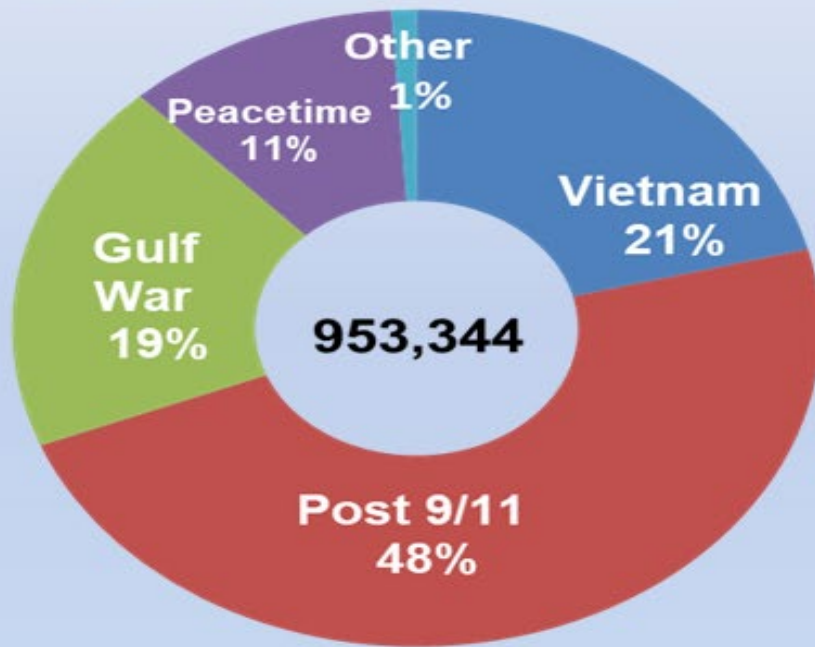
Benefit program	Number of recipients	Estimated average individual amount paid annually	Estimated total amount paid annually
Veterans Compensation	366,973	\$16,743	\$6.14 Billion
Survivors DIC ³	45,070	\$19,943	\$898.8 Million
Total:	412,043	\$17,093	\$7.04 Billion

All compensation recipients and payments – end of FY 2023

Benefit program	Number of recipients	Estimated average individual amount paid annually	Estimated total amount paid annually
Veterans Compensation	5,662,273	\$23,505	\$133.09 Billion
Survivors DIC	497,175	\$19,789	\$9.84 Billion
Total:	6,159,448	\$23,205	\$142.93 Billion

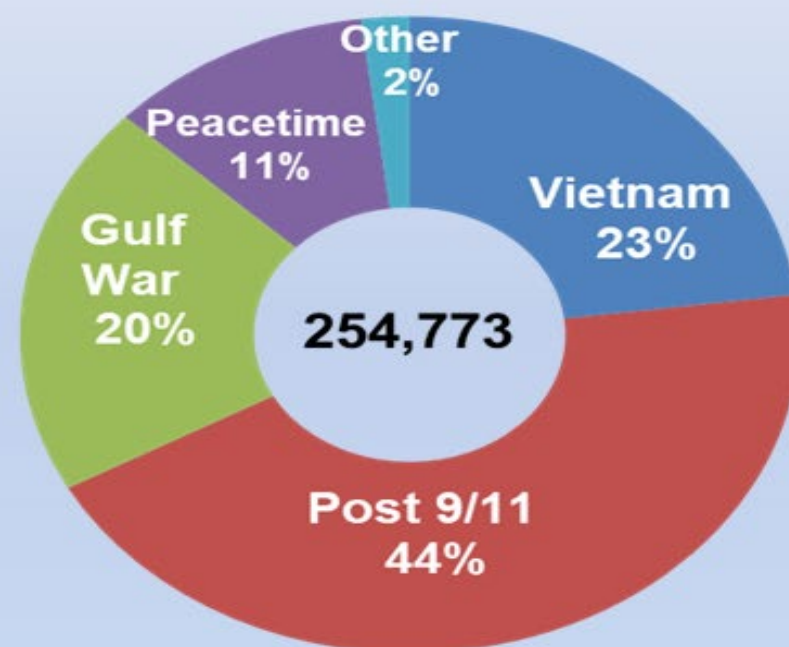
Characteristics of Claims

Total Pending Claims



Data as of: 02/01/25

Total Backlogged Claims



Backlog: Claims pending longer than 125 days

Service-connected disability compensation

The term “service-connected” means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, air, or space service.

38 U.S.C. § 101 (16).



What's the benefit?

Compensation is a monthly tax-free benefit payment to Veterans who got sick, were injured while serving in the military, or whose service made an existing condition worse. Disabilities may be physical or mental. There is no requirement that disabilities develop *during* service.

<https://www.va.gov/disability/>



CK

Other Benefits

- SC can also provide increased access to healthcare
- Potential death benefits for surviving spouse or children
- Special Home Adaptation (SHA)/Specially Adapted Housing (SAH)
- Dependents Educational Assistance (DEA)
- Special Monthly Compensation (SMC)
- Recognition



Basic Entitlement

For disability resulting from **personal injury suffered** or **disease** contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, air, or space service, during a period of war, the United States will pay to any veteran thus disabled and who was **discharged or released under conditions other than dishonorable** from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but **no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.**

38 U.S.C. § 1110.



Basic entitlement

Veteran status - 38 U.S.C. §101 (2)

- a person who served in the active military, naval, or air services,
- who was discharged or released under conditions other than dishonorable.



Active Service Requirements

VA defines “active duty” as any period of active duty for training during which the individual concerned was disabled from a disease or injury incurred or aggravated in line of duty.” 38 C.F.R. § 3.6 (a).

- Examples of “active duty” include full-time duty in the Armed Forces; attendance at preparatory schools of the U.S. Air Force, Military, or Naval Academy; authorized travel to and from such duty or service; etc. 38 C.F.R. § 3.6 (b).
- An example of “active duty for training” includes full time duty in the Armed Forces performed by Reserves for training purposes. 38 C.F.R. § 3.6 (c).
 - Special rules for National Guard and reservists – <https://cck-law.com/blog/va-benefits-for-national-guard-and-reserve-members/#active-guard-reserve-members>



Character of Discharge

Discharge “under conditions other than dishonorable” for VA purposes.

Types:

- Honorable discharge (HD)
- Discharge under honorable conditions (UHC) or general discharge (GD)
- Discharge under other than honorable conditions (OTH) or undesirable discharge (UD)
- Bad conduct discharge (BCD)
- Dishonorable discharge (DD)

NOTE: Bad discharge from one period does not necessarily preclude benefits for a disability stemming from a period of service with a good discharge.



Line of Duty

- This phrase means that an injury or disease was incurred in or aggravated during a period of active service, unless the injury or disease is the result of a veteran's own willful misconduct or abuse of alcohol or drugs. 38 C.F.R. § 3.1 (m).
- If the service department finds that the injury or disease occurred in the line of duty, then that finding is binding on the VA, "unless it is patently inconsistent with the requirements of laws administered by the Department of Veterans Affairs." 38 C.F.R. § 3.1 (m)

38 C.F.R. § 3.301 (a)



Line of Duty

Example:



Photo Credit: An Air Force special tactics operator executes a military free fall jump near Alcantarilla Air Base, Spain, July 26, 2022.
<https://www.defense.gov/Multimedia/Photos/igphoto/2003049927/>

Line of Duty

But
also...



Photo Credit: Airmen and soldiers play soccer with residents of Chabelley Village in Djibouti, June 9, 2022.
<https://www.defense.gov/Multimedia/Photos/igphoto/2003019553/>



Willful Misconduct

- An act involving conscious wrongdoing or known prohibited action.
- Most common examples are alcohol and drug abuse.
- A finding by a service department that an injury disease or death was not due to willful misconduct will be binding on the VA “unless it is patently inconsistent with the requirements of laws administered by the Department of Veterans Affairs.”

38 C.F.R. § 3.1 (n); *see also* 38 C.F.R. § 3.301 (c).



Direct Service Connection

Elements:

- Current disability
- Medical or, in certain circumstances, lay evidence of incurrence or aggravation of a disease or injury in service
- Nexus between the in-service injury or disease and the current disability

38 U.S.C. § 1110; 38 C.F.R. § 3.1(k); *Hickson v. West*, 12 Vet.App. 247 (1999).



Medical evidence of a current disability

- “[D]isability’ in § 1110 refers to the functional impairment of earning capacity, not the underlying cause of said disability.”
- “[P]ain is an impairment because it diminishes the body’s ability to function, and that pain need not be diagnosed as connected to a current underlying condition to function as an impairment.”

Saunders v. Wilkie, 866 F.3d 1356, 1363-64 (Fed. Cir. 2018).



Are all disabilities fair game?

- No. Developmental or congenital defects cannot be service connected. See 38 C.F.R. § 3.303 (c). “Congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency...” *Id.*
- **BUT** congenital or developmental disease capable of getting worse may be service connected. *Quirin v. Shinseki*, 22 Vet.App. 390, 394 (2009).

O’Bryan v. McDonald, 771 F.3d 1376, 1379 (Fed. Cir. 2014).



Medical evidence of a current disability

- A disability is “current” if it manifested at any time during the pendency of the claim, but if it resolved prior to submitting a claim it is not current. *McClain v. Nicholson*, 21 Vet.App. 319 (2007).
- A Veteran does not necessarily have to have evidence of the claimed condition diagnosed during service. See 38 C.F.R. § 3.303(d); see also *Cosman v. Principi*, 3 Vet.App. 503 (1992).



Medical evidence of a current disability

Evidence of a disability or diagnosis can be shown by:

- Service medical records
- VAMC treatment records or VA examinations
- Private treatment records



Evidence of incurrence or aggravation of a disease or injury **in service**

- Must not be during a period of service which is dishonorable.
- Must not be due to one's own misconduct such as during commission of a crime or substance use.
- May be on duty or off duty, but "in line of duty."
- Evidence of an injury or disease in service can be shown by
 - Service medical records
 - Service personnel records
 - Private (non-military) treatment records
 - "Verified" stressor (See 38 C.F.R. § 3.304(f))
 - Behavioral issues



Presumption of Soundness

If no preexisting defects or disabilities noted at enlistment, “the government must show clear and unmistakable evidence of **both** a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness...” *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

38 U.S.C. § 1111; 38 C.F.R. § 3.304(b) .



Aggravation

When a condition is *noted upon entry*, a preexisting injury or disease will be considered to have been aggravated by active military, naval, air, or space service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease. 38 U.S.C. § 1153.

- The burden to establish worsening is on the veteran but, if the veteran shows it got worse in service, the burden then shifts to the government to show the increase in disability severity was due to the natural progression of the disease. 38 C.F.R. § 3.306.



Special Rule for Combat Veterans

“Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation.”

38 C.F.R. § 3.304(d); 38 U.S.C. § 1154(b).



Direct Service Connection

Medical evidence of a nexus

- Standard of proof is “at least as likely as not.”
- Nexus will usually be established by a VA examination or a private medical opinion.
 - Lay evidence may be able to establish a nexus depending largely on the disability and the Veteran’s combat status. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009).
 - “Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation.” 38 C.F.R. § 3.304(d).



Secondary Service Connection

A “...disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition.”

38 C.F.R. § 3.310



Secondary Service Connection

- Even if a condition cannot be service-connected itself such as primary alcohol or drug use and *obesity, it may be used to establish service connection as an intermediate step if it results from a service-connected condition.
- * See *Marcelino v. Shulkin*, 29 Vet.App. 155 (2018) but see *Larson v. McDonough*, 10 F.4th 1325 (Fed. Cir. 2021).



Aggravation by Service-Connected Condition

- Any increase in severity of a nonservice-connected disease or injury [i.e., aggravation] that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected. 38 C.F.R. § 3.310(b); *Allen v. Brown*, 7 Vet.App. 439, 448 (1995).
 - VA will not concede that a nonservice-connected disease or injury was aggravated by a service-connected disease or injury unless the baseline level of severity of the nonservice-connected disease or injury is established by medical evidence created before the onset of aggravation or by the earliest medical evidence created at any time between the onset of aggravation and the receipt of medical evidence establishing the current level of severity of the nonservice-connected disease or injury. 38 C.F.R. § 3.310 (b).



Presumptive Service Connection

Relevant regulations

- 38 C.F.R. § 3.307 - chronic, tropical, or prisoner-of-war related disease, exposure to certain herbicide agents, or exposure to contaminants in the water supply at Camp Lejeune
- 38 C.F.R. § 3.309 – diseases subject to presumptive service connection
- 38 C.F.R. § 3.317 – Persian Gulf
- Other regulations include § 3.311 (ionizing radiation), § 3.316 (mustard gas and Lewisite), § 3.318 (amyotrophic lateral sclerosis), § 3.320 (fine particulate matter)







Presumptive Service Connection Chronic Diseases

- 38 C.F.R. § 3.307 (a)(3).
 - Hansen's disease (leprosy) and tuberculosis must manifest to a degree of 10% or more within 3 years from the date of separation.
 - Multiple sclerosis must manifest to a degree of 10% or more within 7 years from the date of separation.
- 38 C.F.R. § 3.309(a) - Specifically listed disease manifests to a degree of 10% or more within 1 year from the date of separation
 - Examples: arthritis, diabetes mellitus, leukemia, myasthenia gravis, organic disease of the nervous system, etc.

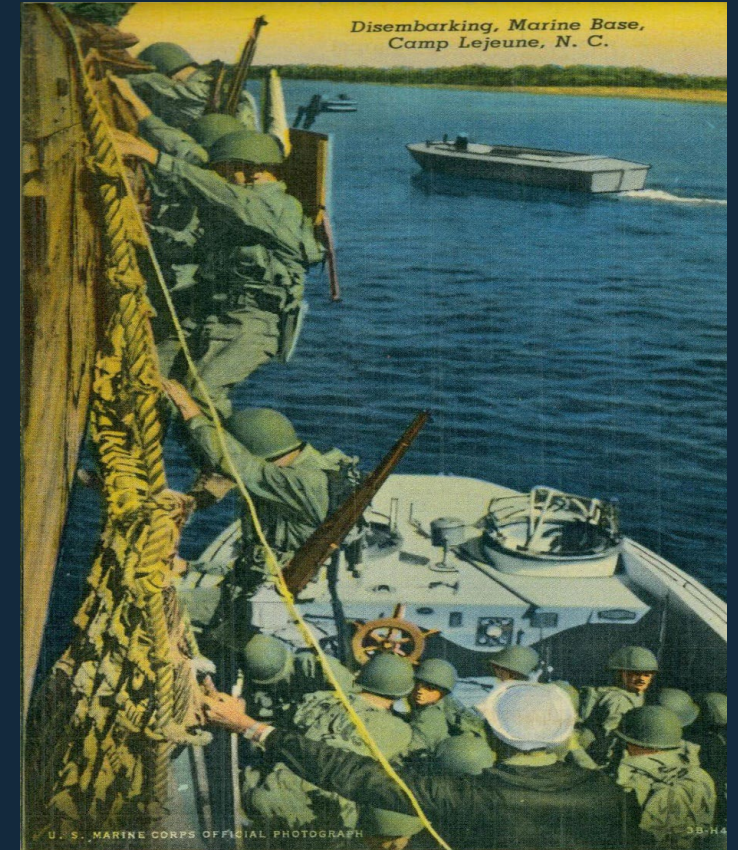


Presumptive Service Connection Categories

Presumptions for Service Connection Related to Toxic Exposures		Relevant Code Sections
	Burn Pits and other Toxins (BPOT)	38 U.S.C. § 1119 Presumptions of Toxic Exposure 38 U.S.C. § 1120 Presumption of Service Connection for Certain Diseases Associated with Exposure to BPOT
	Persian Gulf War Veterans	38 U.S.C. § 1117 Compensation for Disabilities Occurring in Persian Gulf War Veterans
	Herbicide Agent Exposure	38 U.S.C. § 1116 Presumptions of Service Connection for Diseases Associated with Exposure to Certain Herbicide Agents
	Ionizing Radiation Exposure	38 U.S.C. § 1112(c)

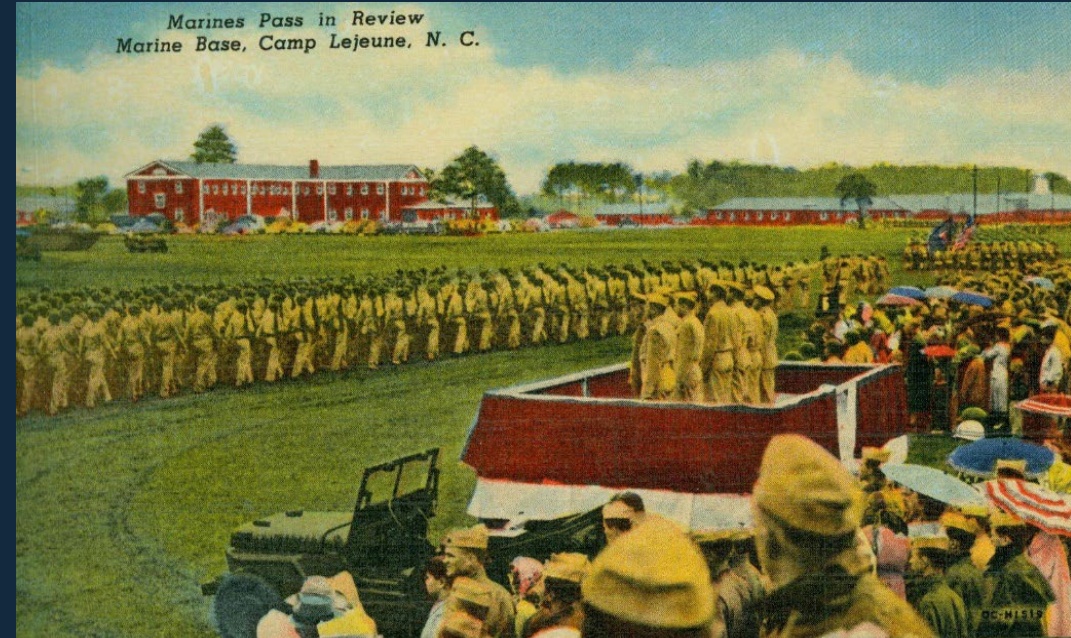
Presumptive Service Connection Camp Lejeune

- Due to contaminants in the water on base, Veterans, former Reservists, and former National Guard members, who served at Camp Lejeune for no less than 30 days (consecutive or non-consecutive), from August 1, 1953 through December 31, 1987, may be eligible for service connection of certain conditions on a presumptive basis
- Effective March 14, 2017



Presumptive Service Connection Camp Lejeune

- Veterans who served at Camp Lejeune for at least 30 days (consecutive or nonconsecutive) between August 1, 1953 and December 31, 1987 are presumed to be exposed to contaminated water.
- Service connection will be granted on a presumptive basis when a Veteran who meets the above criteria is also diagnosed with one of the diseases listed under 38 C.F.R. § 3.309(f).



Presumptive Service Connection Camp Lejeune

Presumptive Disabilities for Camp Lejeune - 38 C.F.R §3.309(f)

- (1) Kidney cancer
- (2) Liver cancer
- (3) Non-Hodgkin's lymphoma
- (4) Adult leukemia
- (5) Multiple myeloma
- (6) Parkinson's disease
- (7) Aplastic anemia and other myelodysplastic syndromes
- (8) Bladder cancer

The Presumption was established effective 3/14/17, and VA will only grant service connection on a presumptive basis from 3/14/17. Prior to that date, the presumption does not apply, but a Veteran may still qualify for benefits on an alternate basis.



Presumptive Service Connection Persian Gulf

- Those who served in the Southwest Asia theater of operations during the Persian Gulf War (90s and 2000-10s)
- The Southwest Asia theater of operations refers to Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations.
- Note: PACT Act expands PGW definition to include Afghanistan, Israel, Egypt, Turkey, Syria, Jordan



Presumptive Service Connection Persian Gulf

- Disabilities under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317
 - Undiagnosed Illnesses
 - Medically unexplained chronic multisymptom illnesses (MUCMI)

* This training will not cover infectious diseases, but they are contained in 38 C.F.R. § 3.317(c)(2)



Presumptive Service Connection Persian Gulf – Undiagnosed Illness

Elements:

- Objective manifestations
- Signs and symptoms
- Chronic
- Cannot be attributed to a known clinical diagnosis by history, physical examination, and laboratory tests
- Began during service in Southwest Asia or manifested to 10 percent or more under the rating schedule within presumptive period
- NOTE: PACT Act says “manifests to any degree at any time”



Presumptive Service Connection Persian Gulf - MUCMI

Elements:

- Medically diagnosed
- Without conclusive pathophysiology and conclusive etiology
- Overlapping signs and symptoms
- Began in Southwest Asia or manifested to 10 percent or more under rating schedule within presumptive period



Presumptive Service Connection Persian Gulf

Some diseases specifically included in the regulation:

- Chronic Fatigue Syndrome
- Fibromyalgia
- Irritable Bowel Syndrome
- Functional gastrointestinal disorders (FGIDs)

Presumptive Service Connection Persian Gulf – Particulate Matter



- Chronic asthma, rhinitis, or sinusitis that manifested within 10 years of a qualifying period of military service.
- Service in the Southwest Asia theater of operations between August 2, 1990, and the present.
- Service in Afghanistan, Uzbekistan, Syria, or Djibouti between September 19, 2001, and the present.

Service members assigned to the Combined Joint Task Force-Horn brace for a wall of dirt and rocks created by the prop wash from a Marine Corps CH-53E helicopter as it takes off from a dry lake bed during a search and rescue exercise, Grand Bara, Djibouti, April 23, 2009.

<https://www.defense.gov/Multimedia/Photos/igphoto/2001996743/>



Presumptive Service Connection Herbicide Agents

VA presumes that specified conditions are linked to exposure to herbicides including Agent Orange in service:

- in the Republic of Vietnam between January 9, 1962 and May 7, 1975
- on or near the Korean demilitarized zone (DMZ) between September 1, 1967 and August 31, 1971
- Active duty and reservist personnel who had regular contact with C-123 aircraft between 1969 and 1986



Presumptive Service Connection Herbicide Agents (prior to PACT Act)

AL Amyloidosis	Non-Hodgkin's Lymphoma
Chronic B-cell leukemias	Parkinson's Disease
Chloracne	Peripheral Neuropathy, Early-Onset
Diabetes Mellitus Type 2	Porphyria Cutanea Tarda
Hodgkin's Disease	Prostate Cancer
Ischemic Heart Disease	Respiratory Cancers
Multiple Myeloma	Soft Tissue Sarcomas
Parkinsonism	Bladder Cancer
Hypothyroidism	



Blue Water Navy Vietnam Veterans Act of 2019

Extended the presumption of service connection to veterans who served offshore within twelve nautical miles seaward of the demarcation line of Vietnam between 1962 and 1975.



PACT Act

The PACT Act was signed into law on August 10, 2022. The legislation provides improved benefits and health care to veterans suffering from disease associated with various toxic exposure, including Agent Orange in Thailand and burn pits throughout Southwest Asia, as well as expand exposure-related research, resources, and training. VA began processing PACT Act claims at-large in January 2023.



PACT Act

- The bill defines **toxic exposed veterans** as those who participated in a toxic exposure risk activity while serving active duty, active duty for training, or inactive duty training.
- Expands presumptions related to **Agent Orange exposure** to include **Thailand, Cambodia, Laos, Guam, American Samoa, and Johnston Atoll** as locations where **in VA will concede Agent Orange exposure**.
- Adds **23 burn pit and toxic exposure-related conditions** to VA's list of service presumptions.
- Possible retroactive benefits for DIC claimants related to these conditions.



The PACT Act

- Expands presumptions for radiation-exposed veterans at certain locations/during certain years.
- Creates a federal cause of action for service members and their families who served/lived at Camp Lejeune during the recognized period of water contamination.
- Expands VA health care eligibility to post-9/11 combat veterans, which is estimated to include more than 5 million toxic-exposed veterans.
- Creates a framework for the establishment of future presumptions of service connection related to toxic exposure.



Expanded diseases associated with herbicide exposure under PACT

- Monoclonal gammopathy of undetermined significance
- Hypertension
 - Note: VA will award retroactive effective dates for hypertension and monoclonal gammopathy of undetermined significance *only* to claimants for DIC.
 - The text of the PACT Act specifically exempts these conditions from existing court orders, precluding *Nehmer* reconsideration.



Additional Locations for Presumed Herbicide Exposure under PACT

- Thailand, at any United States or Royal Thai base beginning on Jan. 9, 1962, and ending on June 30, 1976, without regard to where on the base the veteran was located or what military job specialty the veteran performed.
 - Note: This is a LONGER period of time than Veterans who were “boots on the ground” in Vietnam by over a year (that period ends on 5/7/75)
- **Laos** from Dec. 1, 1965, to Sept. 30, 1969
- **Cambodia** at Mimot or Krek, Kampong Cham Province during the period beginning on Apr. 16, 1969, and ending on Apr. 30, 1969
- **Guam** or **American Samoa**, or in the territorial waters thereof, during the period beginning on Jan. 9, 1962, and ending on Jul. 31, 1980.
- Served on **Johnston Atoll** or on a ship that called at Johnston Atoll during the period beginning on Jan. 1, 1972, and ending on Sept. 30, 1977.



Presumption of Toxic Exposure

- VA will presume that any 'covered veteran' was exposed to the substances, chemicals, and airborne hazards identified in the statute.
- The Secretary must establish and maintain a list of chemicals/hazards that the Secretary and DoD deem appropriate.
- Sub-regulatory guidance indicates that BPOT (Burn Pit and other Toxins) sources include:
 - Dust storms and other wind-borne suspension of organic and inorganic particles,
 - Diesel engine emissions from generators and military vehicles,
 - Burn pit emissions, and
 - Industrial pollutants.



Burn Pit Exposure: Covered Veterans under PACT

A veteran who on or after August 2, 1990, performed active military, naval, air, or space service, while assigned to a duty station, including the airspace above:

- Bahrain
- Iraq
- Kuwait
- Oman
- Qatar
- Saudi Arabia
- Somalia
- United Arab Emirates; or



Covered Veterans

A veteran who, on or after September 11, 2001, performed active military, naval, air, or space service, while assigned to a duty station, including the airspace above:

- Afghanistan
- Djibouti
- Egypt
- Jordan
- Lebanon
- Syria
- Yemen
- Uzbekistan



PACT Act

The following conditions have been added to the presumptive list for “covered veterans,” effective August 10, 2022.

Asthma	Kidney cancer	Granulomatous disease
Head cancer (of any type)	Brain Cancer	Interstitial lung disease
Neck cancer (of any type)	Melanoma	pleuritis
Respiratory cancer (of any type)	Pancreatic cancer	Pulmonary fibrosis
Gastrointestinal cancer (of any type)	Chronic bronchitis	Sarcoidosis
Reproductive cancer (of any type)	COPD	Chronic sinusitis
Lymphoma cancer (of any type)	Constrictive bronchiolitis or obliterative bronchiolitis	Chronic rhinitis
Lymphomatic cancer (of any type)	Emphysema	Glioblastoma



Presumptions for PGW Veterans

The term “Persian Gulf veteran,” as used in 38 C.F.R. § 3.317 for presumptions related to undiagnosed illnesses and MUCMIs, now includes veterans who served on active duty during the PGW in:

- Afghanistan
- Israel
- Egypt
- Turkey
- Syria
- Jordan

The bill also amends 38 U.S.C. § 1117 to remove the requirement that a qualifying chronic disability claimed due to PGW service becomes manifest to a compensable degree during the presumptive PGW period, and now only requires that it became manifest to any degree at any time.



Presumptions for Radiation-Exposed Veterans

Under 38 U.S.C. § 1112, the term “radiation-exposed veteran” means a veteran who participated in a **radiation-risk activity** while on active duty or during a period of active duty for training or inactive duty training.



Radiation-Risk Activity

- Cleanup of Enewetak Atoll during the period beginning on January 1, 1977, and ending on December 31, 1980.” 38 U.S.C. § 1112 (c)(3)(B)(v).
- Onsite participation in the response effort following the collision of a United States Air Force B-52 bomber and refueling plane that caused the release of four thermonuclear weapons in the vicinity of Palomares, Spain, during the period beginning January 17, 1966, and ending March 31, 1967. § 1112 (c)(3)(B)(vi).
- Onsite participation in the response effort following the on-board fire and crash of a United States Air Force B-52 bomber that caused the release of four thermonuclear weapons in the vicinity of Thule Air Force Base, Greenland, during the period beginning January 21, 1968, and ending September 25, 1968. § 1112 (c)(3)(B)(vii).



Toxic Exposure Risk Activity (TERA) procedures for non-presumptive claims

- Under U.S.C. § 1168, a VA examination and medical nexus opinion **must** be provided in TERA cases when evidence is not sufficient to establish service connection, unless an exception applies, before VA may deny the PACT-related claim.
- What does this mean?: VA will likely need to order examinations in cases where they would not have done so previously.



38 U.S.C. § 1151 - Benefits for persons disabled by treatment or vocational rehabilitation

A disability or death can be compensated as if it were a service-connected disability or death if

- Disability or death was caused by hospital care, medical or surgical treatment, or examination in “facilities over which the Secretary has direct jurisdiction.” 38 U.S.C. § 1701 (3)(A).
 - carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault
 - event not reasonably foreseeable
- Disability or death was proximately caused by the provision of training and rehabilitation services by the Secretary (including Chapter 31 VR&E), or by participation in a program (known as a “compensated work therapy program”) under 38 U.S.C. §1718.

Note: there is an offset if awarded settlement/compromise in a civil suit.



Service Connection is granted – now what?

“Downstream” Elements

- Disability rating (38 U.S.C. §§ 1114, 1155; 38 C.F.R., Part 4)
- Effective date (38 U.S.C. § 5110; 38 C.F.R. § 3.400)
- Extraschedular rating (38 C.F.R. § 3.321)
- TDIU (38 C.F.R. § 4.16)



Non Service-Connected (NSC) Pension

Needs-based program based on wartime service, NSC disability or age, and low net worth. 38 CFR § 3.3(a). The Veteran must meet one of the following criteria:

- Age 65 or older, or
- Have a permanent and total non service-connected disability, that is not the result of his willful misconduct, that will continue throughout the Veteran's lifetime, and prevents the Veteran from sustaining employment, or
- Reside in a nursing home, or
- Receive Social Security Disability benefits.



Non Service-Connected (NSC) Pension

The Veteran must also meet certain service criteria:

- The Veteran must not have been dishonorably discharged; and
- If on active duty before September 8, 1980, must have served at least 90 days of active duty, with 1 active-duty day during a period of wartime; or
- If on active duty as an enlisted person after September 7, 1980, must have served at least 24 months or the full period for which you were called or ordered to active duty, with at least 1 day during wartime, or
- If an officer and started on active duty after October 16, 1981, and didn't previously serve on active duty for at least 24 months.



Non Service-Connected (NSC) Pension

The Veteran must also meet income/net worth requirements:

- Currently, the net worth limit (assets and annual income) for eligibility is \$159,240. 38 U.S.C. § 3.275
- If eligible, pension amount will be the difference between countable income and Maximum Annual Pension Rate (MAPR)
- Countable income - is how much the Veteran earns, including salary, investment, and retirement payments, and some income from dependents.
- MAPR – is maximum amount of pension payable to the Veteran based on base amount plus any additional allowances for dependents, Aid and Attendance, or Housebound benefits. 38 U.S.C. § 3.271



MAPR

For Veterans with no dependents:

If you have no dependents and...	Your MAPR amount is (in U.S. \$)
You don't qualify for Housebound or Aid and Attendance benefits	16,965
You qualify for Housebound benefits	20,732
You qualify for Aid and Attendance benefits	28,300

MAPR

For Veterans with at least 1 dependent spouse or child:

If you have 1 dependent and...	Your MAPR amount is (in U.S. \$)
You don't qualify for Housebound or Aid and Attendance benefits	22,216
You qualify for Housebound benefits	25,982
You qualify for Aid and Attendance benefits	33,548

MAPR

For 2 Veterans who are married to each other:

If you're 2 Veterans who are married to each other and...	Your MAPR amount is (in U.S. \$)
Neither of you qualifies for Housebound or Aid and Attendance benefits	22,216
One of you qualifies for Housebound benefits	25,982
Both of you qualify for Housebound benefits	29,747
One of you qualifies for Aid and Attendance benefits	33,548
One of you qualifies for Housebound benefits and one of you qualifies for Aid and Attendance benefits	37,305
Both of you qualify for Aid and Attendance benefits	44,886



Non Service-Connected (NSC) Pension

- Current pension rates can be found at <https://www.va.gov/pension/veterans-pension-rates/>
- Additional Allowances:
 - Dependent Children
 - Aid and Attendance – If the Veteran has a disability and needs help with regular daily activities (like eating, bathing, or dressing), they may be entitled to an additional monthly amount
 - Housebound – If the Veteran cannot leave their house due to a disability, they may be eligible for an additional amount



Non Service-Connected (NSC) Pension

How to Apply –

- VA Form 21P-527EZ



Survivor's Pension

38 U.S.C. § 3.3(b) - Also known as the “death pension,” it is a tax-free benefit for low-income, un-remarried surviving spouse (or unmarried children) of a deceased veteran *with* wartime service. See <https://www.va.gov/pension/eligibility/>

- For service on or before September 7, 1980, the veteran served at least 90 days of active military service, with at least one day during a wartime period; or
- For service after September 7, 1980, the veteran served at least 24 months or the full period for which called or ordered to active duty, with at least one day during a wartime period; and
- Discharged from service under other than dishonorable conditions.



Survivor's Pension

- Surviving spouse's yearly family income and net worth meet certain limits set by Congress.
- Currently, the net worth limit (assets and annual income) for eligibility is \$159,240. 38 U.S.C. § 3.275
- If eligible, pension amount will be the difference between countable income and Maximum Annual Pension Rate (MAPR)
- Countable income - is how much the survivor earns, including salary, investment, and retirement payments, and any income from dependents.
- MAPR – is maximum amount of pension payable to the survivor based on base amount plus any additional allowances for dependents, Aid and Attendance, or Housebound benefits. 38 U.S.C. § 3.271



DIC/Survivors' Benefits

- Available to eligible survivors of legally-defined Veterans
- Eligibility determined by Veteran's service-connected disability status and/or the financial status of the survivor



Dependency and Indemnity Compensation (DIC)

Tax-free monthly benefit paid to eligible survivors of Veterans who:

- died while on active duty, active duty training, or inactive duty training; or
- died due to (or, at least in part, due to) a service-connected condition; or
- were entitled to receive VA disability compensation for a totally disabling condition at the time of death.



DIC – Death from a Service-Connected Disability

Service-connected disability was either the principal or a contributory cause of death - 38 C.F.R. § 3.312(a)

- Principal cause – when the SC disability "singly or jointly with some other condition, was the immediate or underlying cause of death or was etiologically related thereto." - 38 C.F.R. § 3.312(b)
- Contributory cause – SC disability must have "contributed substantially or materially" to death, "combined to cause death," or "aided or lent assistance to the production of death." 38 C.F.R. § 3.312(c)(1)
- Noticeably absent from the regulations is a requirement that the SC disability be on the death certificate



DIC – Veterans Rated Totally Disabled

38 C.F.R. § 3.22 – If a veteran dies of non service-connected causes, VA will pay DIC benefits to the eligible survivor if:

- Death was not the result of the veteran's willful misconduct, and
- At the time of death, the veteran was receiving, or was entitled to receive, compensation for service-connected disability that was:
 - Rated by VA as totally disabling for a continuous period of at least 10 years immediately preceding death;
 - Rated by VA as totally disabling continuously since the veteran's release from active duty and for at least 5 years immediately preceding death; or
 - Rated by VA as totally disabling for a continuous period of not less than one year immediately preceding death, if the veteran was a former prisoner of war.
 - 38 C.F.R. § 3.22(c) - "rated by VA as totally disabling" includes total disability ratings based on unemployability



DIC – Qualifying Surviving Spouses

38 C.F.R. § 3.50 defines “spouse” and “surviving spouse”

- (a) *Spouse*. “Spouse” means a person of the opposite sex whose marriage to the veteran meets the requirements of § 3.1 (j) (valid under the law of the place the parties resided at the time marriage or when the right to benefits accrued).

- (b) *Surviving spouse*. Except as provided in § 3.52 (marriages “deemed valid), “surviving spouse” means a person of the opposite sex whose marriage to meets the requirements of § 3.1 (j) and who was the spouse of the veteran at the time of the veteran’s death and:

- (1) Who lived with the veteran continuously from the date of marriage to the date of the veteran’s death except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse; and

- (2) Except as provided in § 3.55, has not remarried or has not since the death of the veteran and after September 19, 1962, lived with another person of the opposite sex and held himself or herself out openly to the public to be the spouse of such other person.



DIC – Same-Sex Spouses

- VBA Letter 20–15–16 - recognized that same-sex marriages will be accepted in benefit determinations without regard to a Veteran's state of residence. This guidance remains in effect.
- Instruction 01-22, “Instruction of the Secretary and General Policy Statement on the Administration of Benefits for Particular Same-Sex Surviving Spouses”



DIC – Continuous Cohabitation

38 C.F.R. § 3.53

- The continuous cohabitation requirement from the date of marriage to the date of death of the veteran will be considered as having been met when the evidence shows that any separation was due to the misconduct of, or procured by, the veteran without the fault of the surviving spouse.
- Temporary separations, including those caused for the time being through fault of either party, will not break the continuity of the cohabitation.
- The statement of the surviving spouse as to the reason for the separation will be accepted in the absence of contradictory information.
- Separation by mutual consent for purposes of convenience, health, business, or any other reason which did not show an intent on the part of the surviving spouse to desert the veteran, will not be considered as breaking continuous cohabitation



DIC – Remarriage

- 38 C.F.R. § 3.50 – To qualify as a surviving spouse, a person must remain unmarried, unless:
- The remarriage ended in death, divorce, or annulment.
- The surviving spouse remarries on or after attaining age 57, and on or after December 16, 2003.
- The surviving spouse remarries on or after attaining age 55, and on or after January 5, 2021.



DIC – Qualifying Surviving Spouses

Also, the surviving spouse must have:

- Married the veteran before January 1, 1957, or
- Married the Veteran or service member within 15 years of their discharge from the period of military service during which the qualifying illness or injury started or got worse, or
- Been married to the Veteran or service member for at least 1 year, or
- Had a child with the Veteran or service member, not currently be remarried, and have either lived with the Veteran or service member without a break until their death or, if separated, have not been at fault for the separation
- 38 C.F.R. § 3.54



DIC – Compensation Rates for Surviving Spouses

- Available at <https://www.va.gov/disability/survivor-dic-rates/>. For 2025, the fixed monthly DIC rate is \$1653.07.
- Additional Allowances:
 - Dependent Children - \$409.53 each
 - Transitional Benefit – The surviving spouse has 1 or more children who are under 18, additional \$350.00 for the first 2 years after the Veteran's death
 - 8x8 Rule - If the veteran was rated totally disabled for 8 continuous years immediately before death, and the spouse was married to the veteran for those 8 years, the spouse is entitled to an additional \$351.02
 - Aid and Attendance – If the surviving spouse has a disability and needs help with regular daily activities (like eating, bathing, or dressing), they may be entitled to an additional \$409.53
 - Housebound – If the surviving spouse cannot leave their house due to a disability, they may be eligible for an additional \$191.85.
- 38 C.F.R. § 3.10



DIC – Additional Benefits for Surviving Spouses

- Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA). 38 C.F.R. § 17.271
- Dependents Educational Assistance (DEA). 38 C.F.R. § 3.807
- Burial Benefits. 38 C.F.R. § 3.1703



DIC – Surviving Children

Surviving children may qualify if:

- Not married, and
- Aren't included in the surviving spouse's compensation, and
- Are under 18 (or 23, if attending school at an approved educational institution)
 - “Helpless Child” exception:
 - 18 or older
 - diagnosed with a mental/physical disability before the age of 18 that leaves them with a permanent incapacity for self-support
- 38 U.S.C. §§ 1313, 1314



DIC – Surviving Parent

A natural, adoptive, or foster parent may qualify for DIC benefits if:

- Income falls below a certain amount, see <https://www.va.gov/disability/parent-dic-rates/>
- The service member died from an injury or illness while on active duty or in the line of duty while on active duty for training, or
- The service member died from an injury or certain illnesses in the line of duty while on inactive training, or
- The Veteran died from a service-connected illness or injury
- 38 U.S.C. § 1315



Survivors' Benefits – How to Apply

- VA Form 21P-534EZ – surviving spouses and children.
- VA Form 21P-535



Accrued Benefits

Accrued benefits are benefits that were due to the Veteran prior to death but that were not paid prior to death. Potential entitlement for a survivor generally arises when:

- A claim for benefits was pending at the time of death.
- A decision on the claim was made prior to the Veteran's death, but the appeal period had not expired at the time of the Veteran's death
- A claim for a recurring benefit had been allowed, but the beneficiary died before the award was made
- 38 U.S.C. § 3.1000



Accrued Benefits

Substitution -

- If a claimant dies during a pending claim or appeal, someone eligible to receive accrued benefits can act as substitute to complete the claim.
- VA must receive a substitution claim within one year of the original claimant's death. If the substitute dies, the next substitute has one year from the original substitute's death to file a claim.
- Eligible substitutes are surviving spouses, children, and dependent parents (generally the same eligibility requirements for receiving DIC/survivors' pension)
- VA Form 21P-534EZ/21P-535 - Also covers claims for accrued benefits



Claims Process and Right to Appeal



Claims Process Overview

- Background
- Legacy (brief overview)
- AMA
- Appellate review

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.



Where are we and how did we get here?

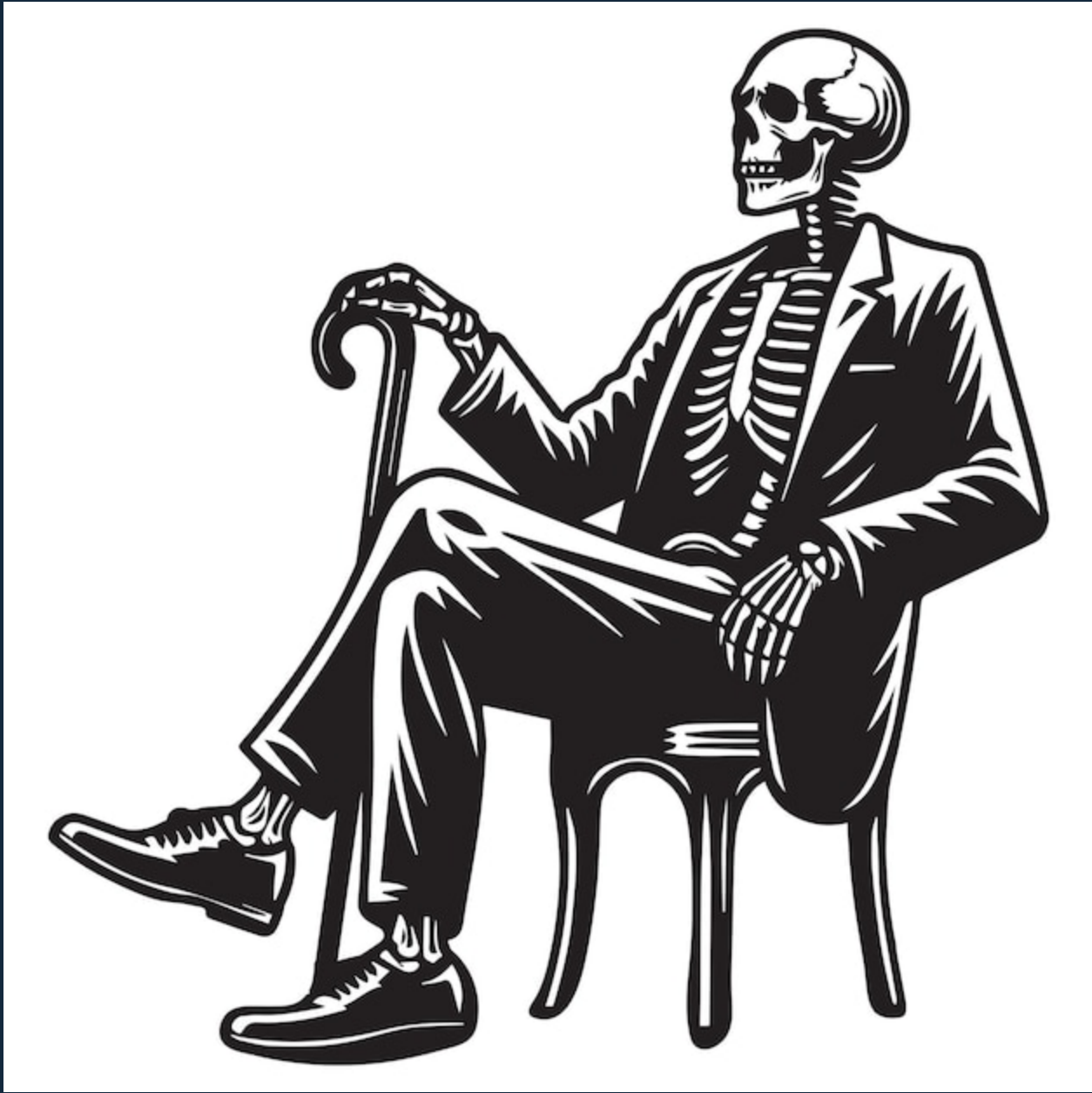
- One system for claims/appeals
- Excessive delays
- Congress passes the Veteran Appeals Improvement and Modernization Act (AMA)
- VA has been running two appeal systems since February 19, 2019, and continues to work to move toward one system, the Modernized system (AMA)

The Two Systems – Legacy and AMA

- Legacy - applies to appeals from rating decisions dated prior to February 19, 2019
- One, linear path
- Excessive delays

... How bad was it???????



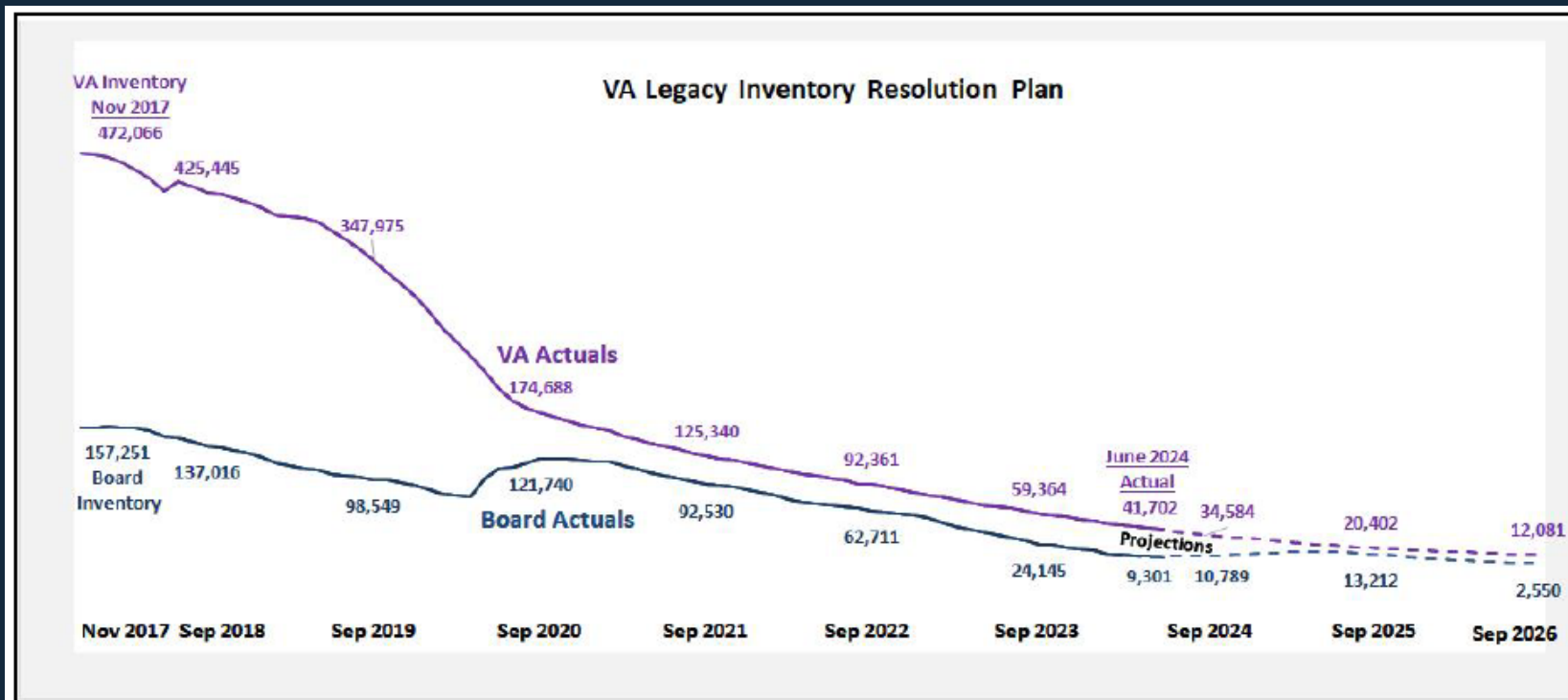


Appeals Modernization Act

- The Veterans Appeals Improvement and Modernization Act of 2017 (“AMA”) became law on August 23, 2017 (Pub L. 115-55).
 - RAMP was the pilot program – ended on February 14, 2019
 - AMA – New decision review process, which features three lanes applies to appeals from rating decisions dated after February 19, 2019
 - “Choice and control”



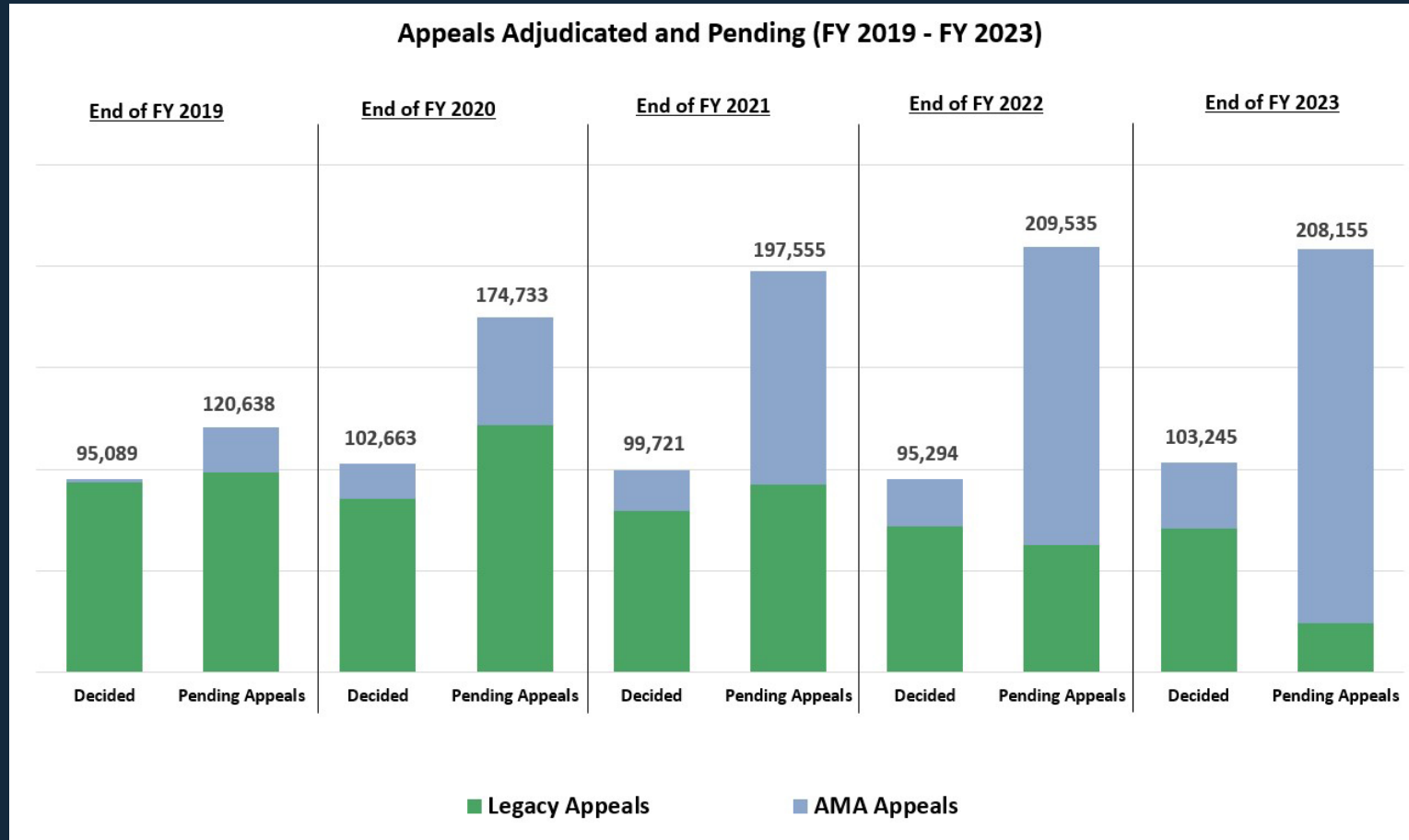
VA Legacy Appeals Inventory



Department of Veterans Affairs Congressionally Mandated Report Periodic Progress Report on Appeals PL 115-55 § 3 August 2024, p. 10.



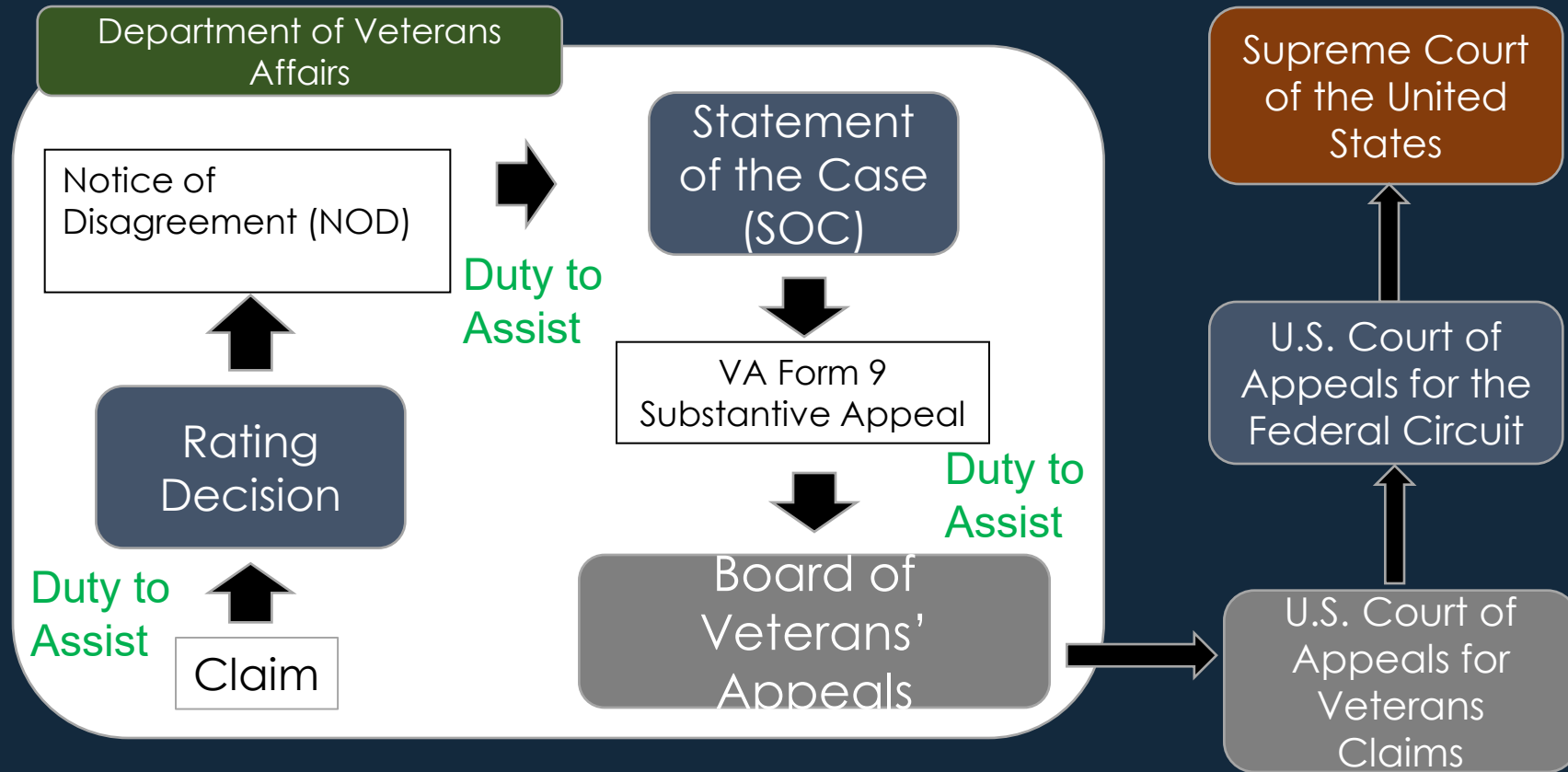
Legacy vs. AMA numbers



Legacy Appeals System



Legacy Appeals System



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



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



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



“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)



Intent to File Claim

- 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
 - Requires VA Form 21-526/21-526EZ or Supplemental Claim form 20-0995



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



Decisions



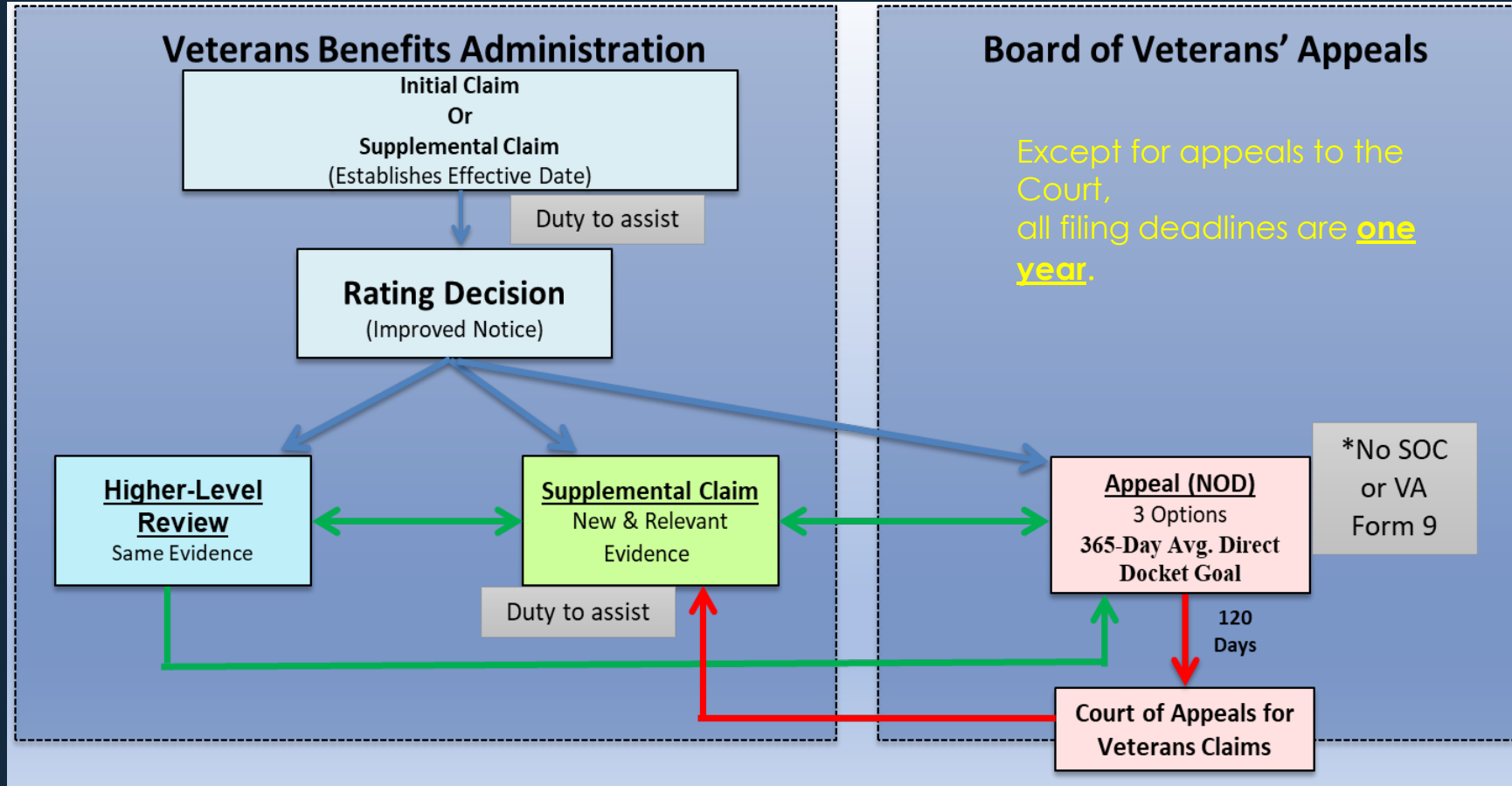
- AMA decision notices are supposed to contain:
 - Identification of the issues adjudicated
 - A summary of the evidence considered
 - An explanation of the laws and regulations applicable to the claim
 - Summary of any findings made by an adjudicator that are favorable to the Veteran
 - Identification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

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).



Board Review

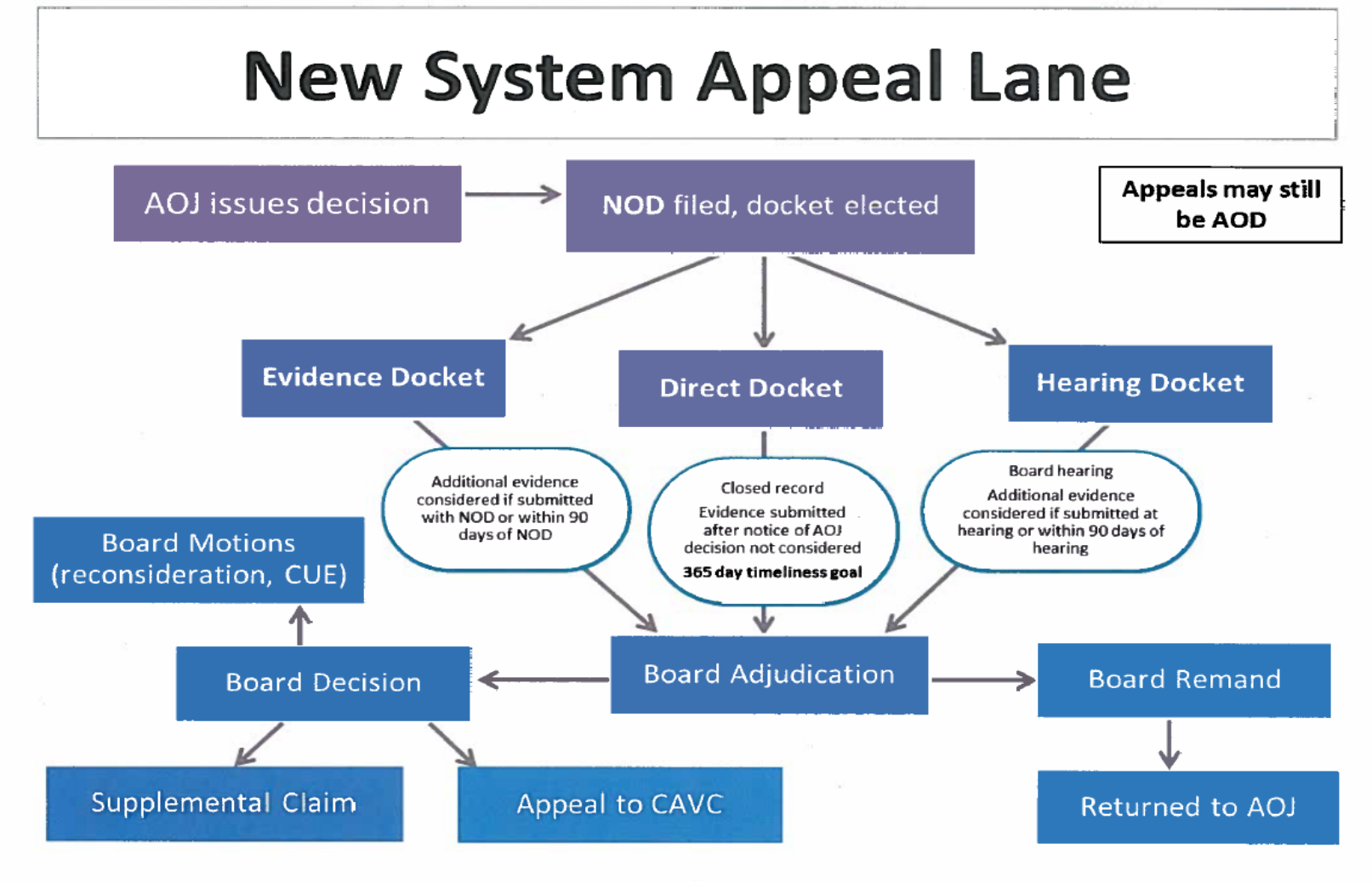
3. Hearing

- 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).



Board Options

New System Appeal Lane



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?

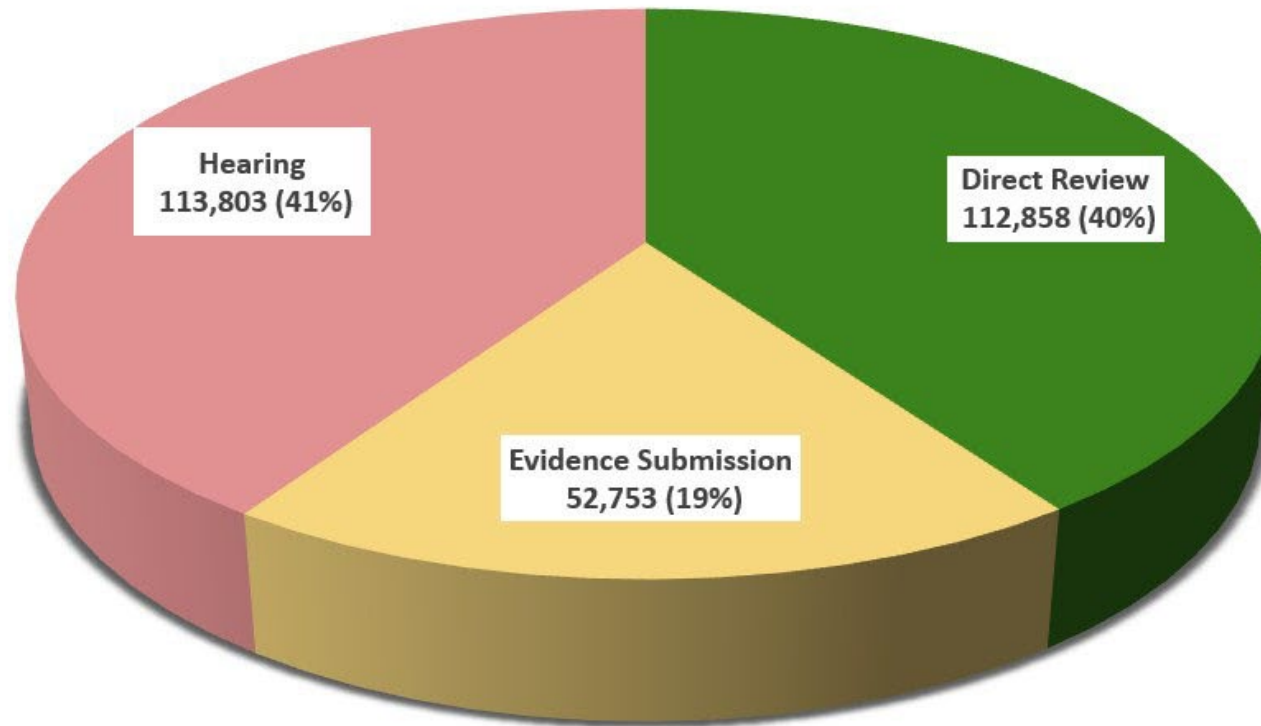
	Direct	Evidence	Hearing
When to choose	If you think a mistake was made.	If you have new evidence you want a Judge to consider.	If you want a hearing before a Judge.
What will happen	The Judge will review the same record and make a decision. No new evidence will be added.	You will have 90 days from your 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.



Which BVA lane are veterans choosing?

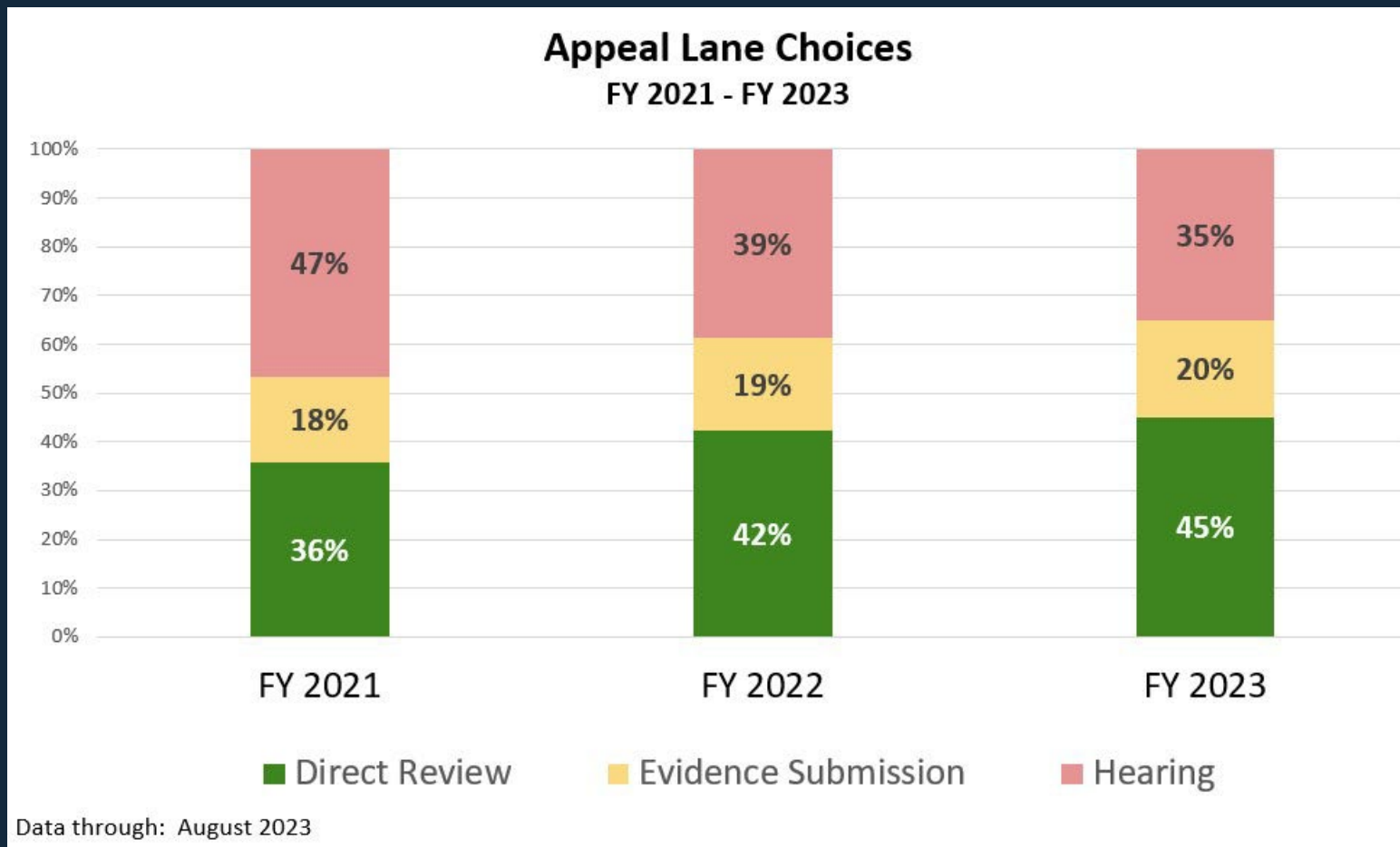
AMA Appeal Lane Choices FY2019 - FY2023

Includes Dispatched and Active Appeals



Data through: September 2023

Which BVA lane are veterans choosing?



Legacy vs. AMA – Comparing the Duty to Assist at the BVA

Example: Joe Veteran files a claim for service connection for fibromyalgia. He does not submit any evidence indicating that his diagnosed fibromyalgia may be related to service. The RO denies the claim based on lack of nexus. The Veteran appeals to the BVA and elects a hearing. During the hearing before the Board, he explains that he began having widespread joint pain in service.



Legacy vs. AMA – Comparing the Duty to Assist at the BVA

- In Legacy – the board would consider the hearing testimony and remand for a medical opinion because the testimony triggers VA's duty to assist.
- In AMA - The Board will consider the hearing testimony but will **not** remand for a medical opinion even though the testimony triggers the VA's duty to assist. Because that evidence was not before the RO when it denied the claim, there was no pre- decisional duty to assist violation, and the Board may only remand for correction of a pre- decisional duty to assist error.



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



CAVC Practice

- Only final, adverse BVA decisions can be appealed to CAVC
 - No remands
 - Secretary cannot appeal BVA decisions
- Appeal to CAVC must be filed within 120 days of Board decision
 - Equitable tolling available



CAVC Practice

- Article I Federal Court sitting in Washington, DC that is independent of the VA
 - Was created by Veterans' Judicial Review Act in 1988—prior to that date no judicial review
 - Nine judges with terms of 15 years
 - Exclusive jurisdiction over VA benefits decisions
 - Does not conduct trial de novo
 - Decisions are reviewed by United States Court of Appeals for the Federal Circuit



CAVC Practice

- Secretary must serve upon the appellant the Record Before the Agency – a full PDF copy of the record before the Board (usually the full claims file)
 - Must be served within 60 days of docketing notice



CAVC Practice

- Parties participate in an informal mediation process prior to the filing of Appellant's brief (Rule 33 or Pre-Briefing Conference)
- During the conference, the parties will determine whether the appeal can be resolved with a joint motion for remand or joint motion to terminate with stipulated agreement
 - The majority of the Court's cases are resolved via joint motion either during the mediation process or after briefing has begun

CAVC Practice

- Cases that cannot be resolved by an agreement by the parties are briefed and decided in chambers
- Most fully-briefed cases are decided by single judge decisions that have no precedential value
- Some fully-briefed cases are sent to a panel of three judges and scheduled for oral argument
 - Decisions in these cases have precedential value
- Court also sometimes sits en banc



CAVC Practice

Successful appellants can collect attorneys' fees under the Equal Access to Justice Act (EAJA)



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

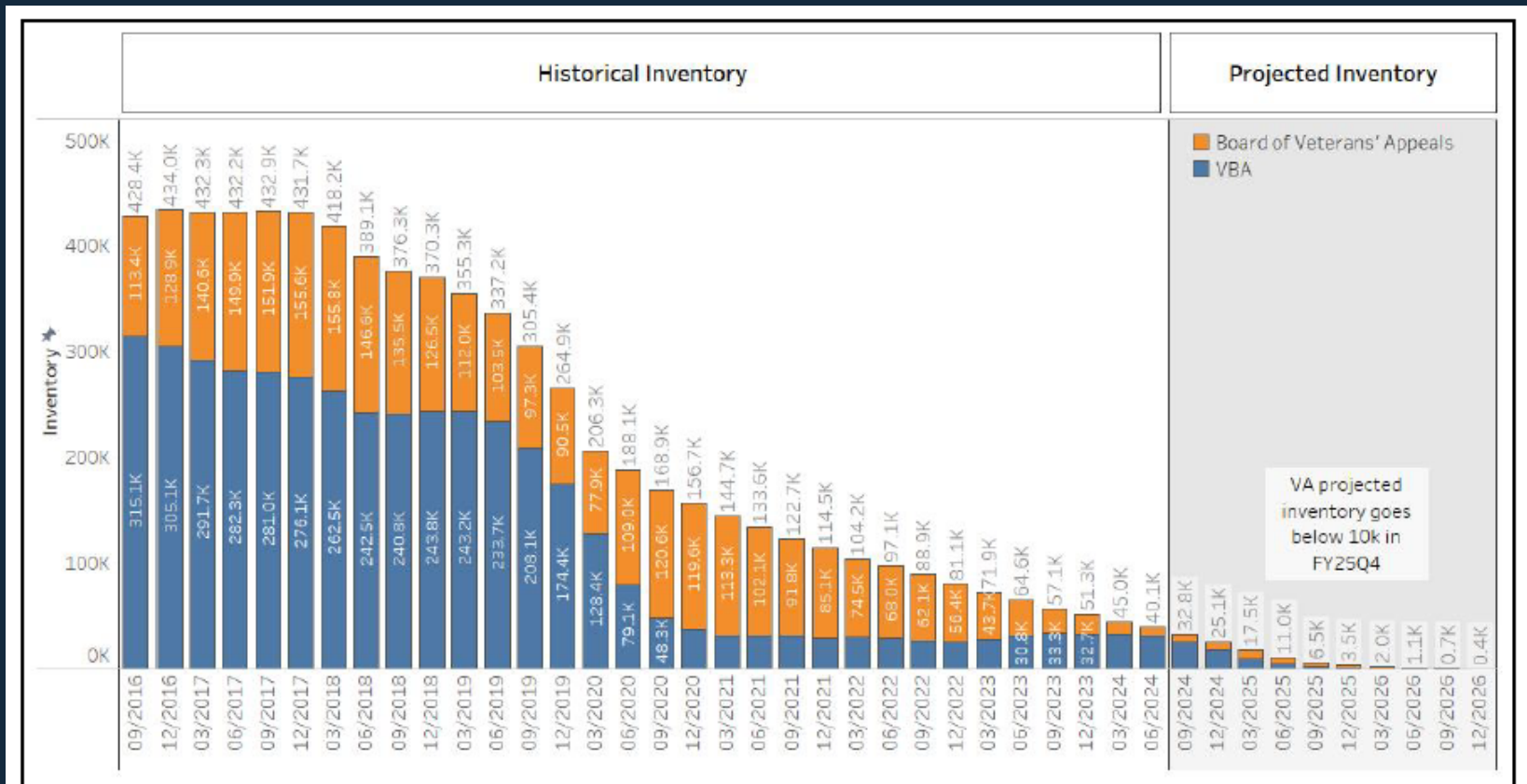


Figure 5. VA Legacy System Appeals Pending, October 2016–June 2024.

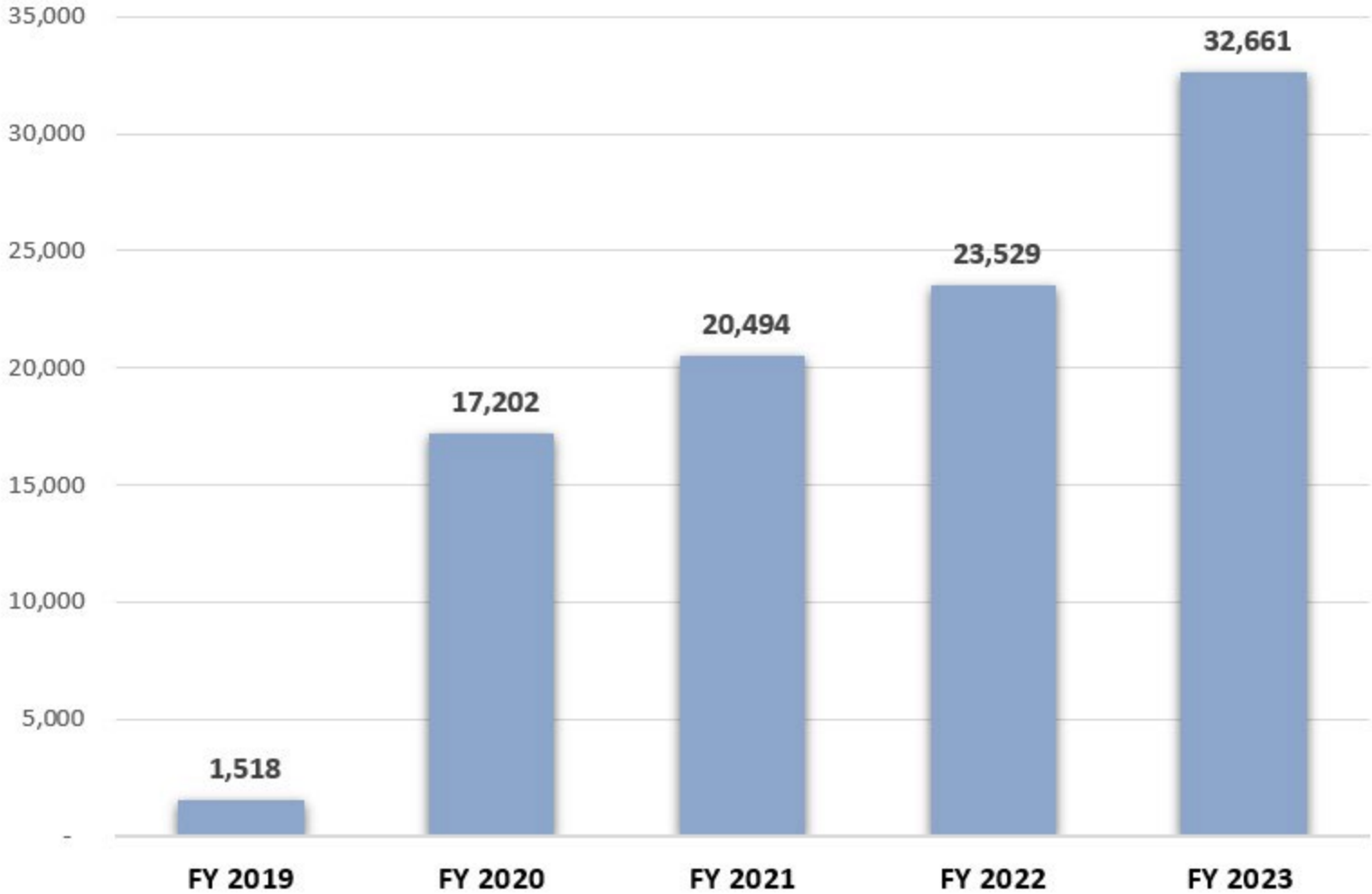
Department of Veterans Affairs Congressionally Mandated Report Periodic Progress Report on Appeals PL 115-55 § 3 August 2024, p. 12.



Meanwhile...



AMA Appeals Decided Past 5 Years



Legacy vs. AMA numbers

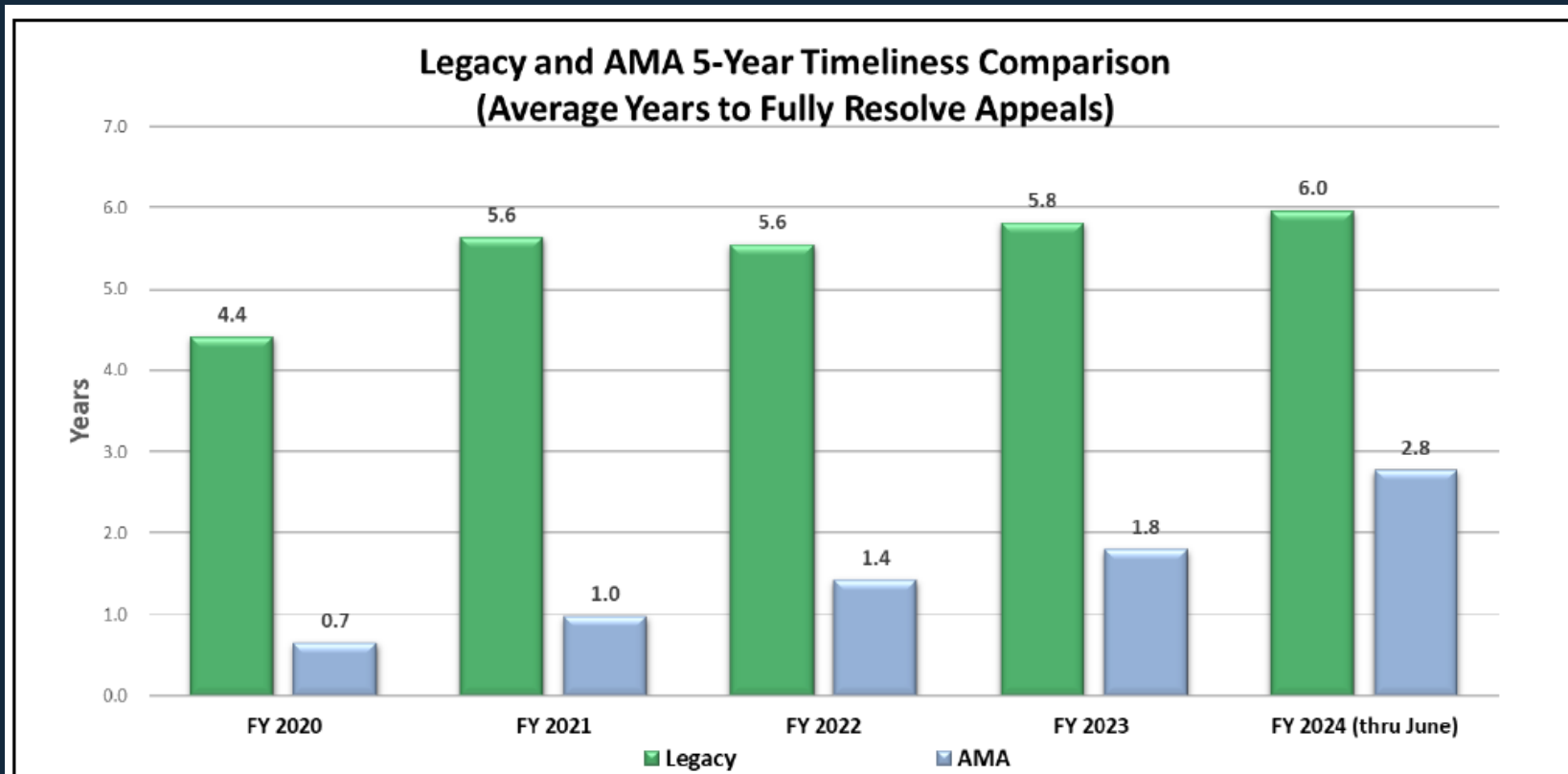


Figure 10. Legacy and AMA 5-Year Timeliness Comparison.

Legacy vs. AMA Numbers – FY 2024

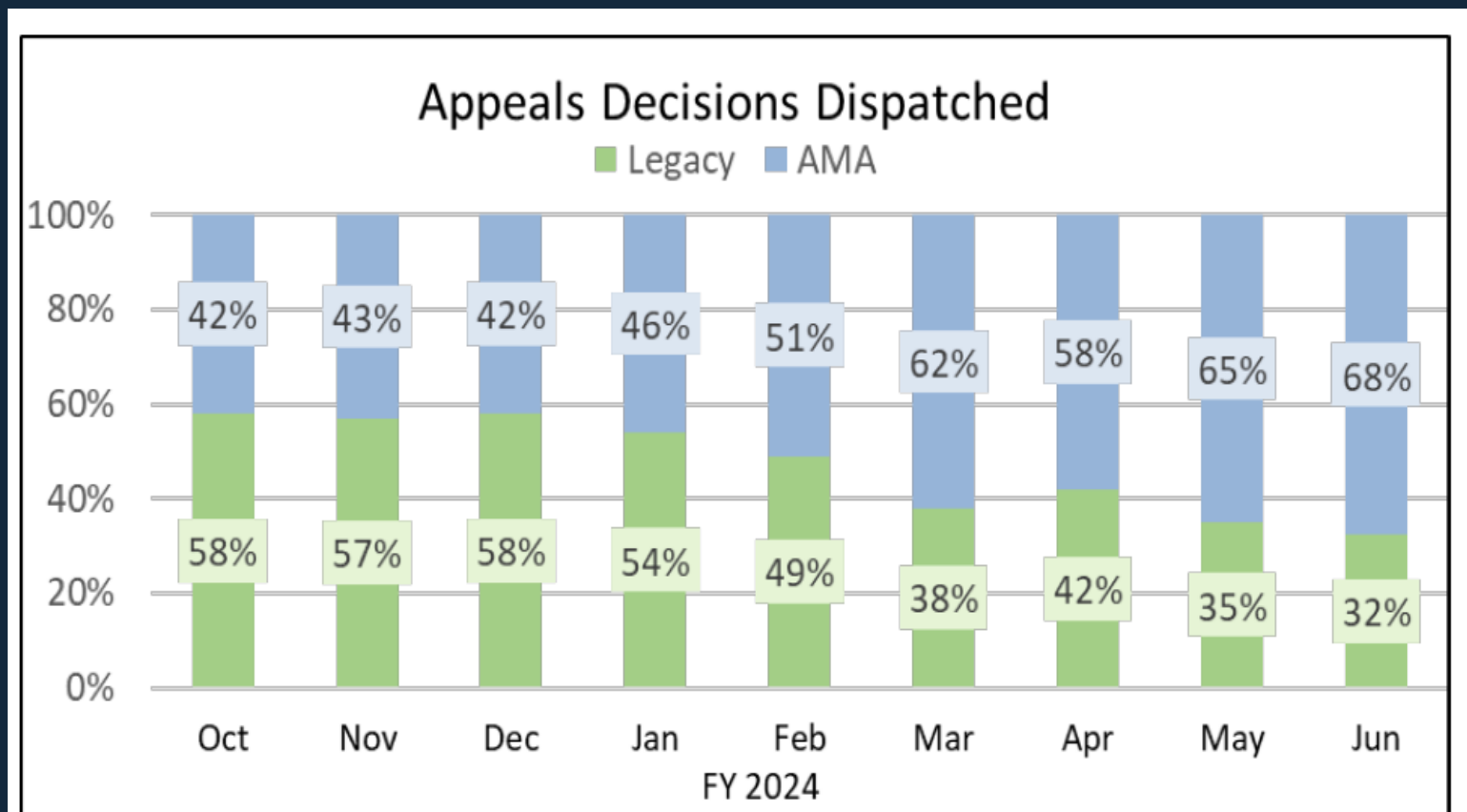
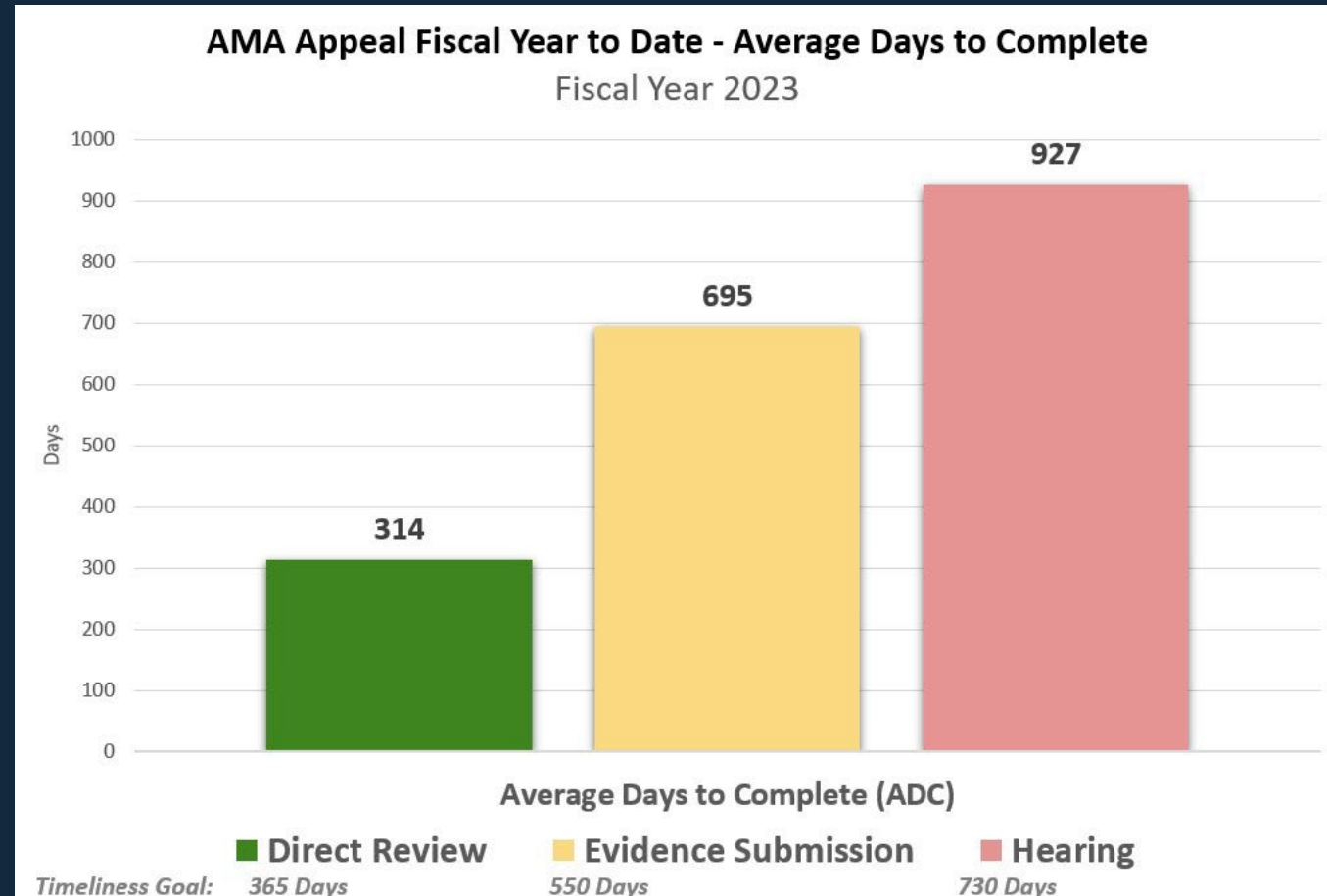


Figure 9. The Ratio of Legacy to AMA Appeals Decided.



Board Delays in AMA

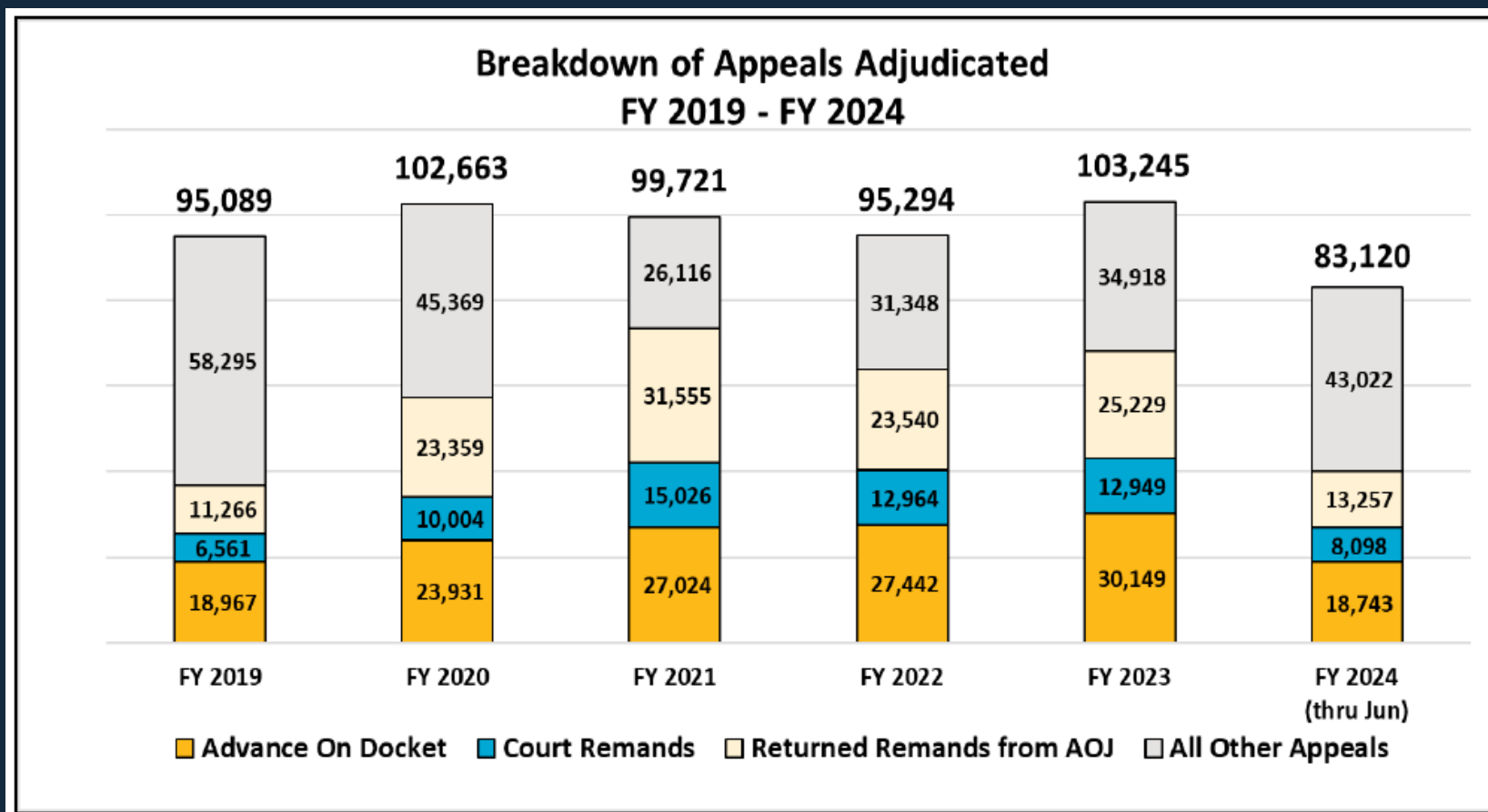


Board Delays in AMA

Average Days to Complete (ADC)	Direct Review	Evidence Submission	Hearing
FY 2023	314	695	927
Percent that qualified for priority processing	82%	60%	54%
FY 2024 (through Q3)	866	1,056	1,089
Percent that qualified for priority processing	36%	24%	39%



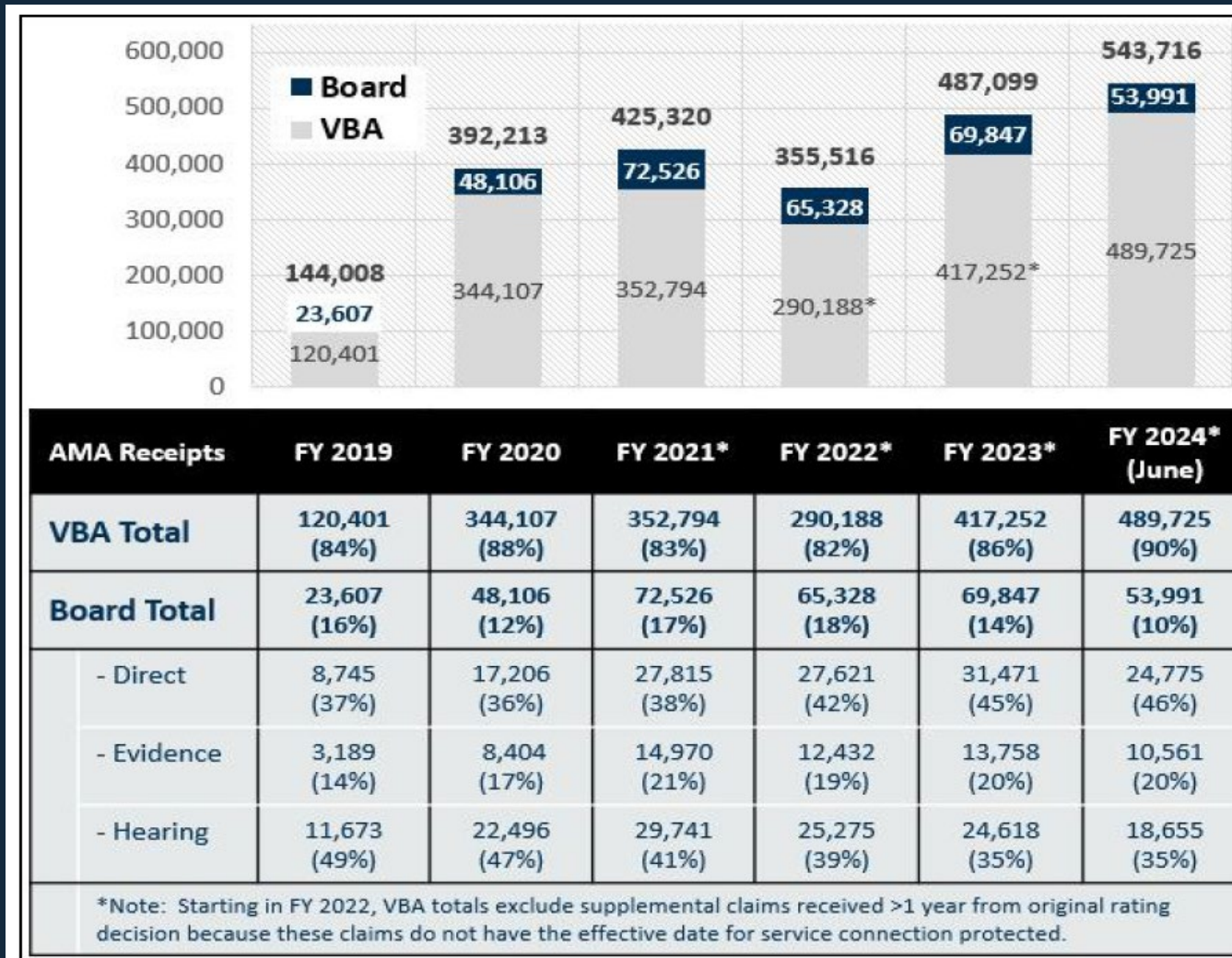
Breakdown of Board Decision Types



Department of Veterans Affairs Congressionally Mandated Report Periodic Progress Report on Appeals PL 115-55 § 3 August 2024, p. 9.



Where are Claimants Seeking Review?



Department of Veterans Affairs Congressionally Mandated Report Periodic Progress Report on Appeals PL 115-55 § 3 August 2024, p. 15.



Questions?

Christine Clemens
Partner
Chisholm Chisholm & Kilpatrick LTD
cclemens@cck-law.com
(401) 314-3805

Brad Hennings
Partner
Chisholm Chisholm & Kilpatrick LTD
bhennings@cck-law.com
(401) 239-0174

