

(16) Trainee Handout

**TRAINING FOR VSO LESSON SIXTEEN  
THE APPEALS PROCESS**

**PREREQUISITE TRAINING** Prior to this training you should have completed all the development lessons in the Service Officer Training package.

**PURPOSE OF LESSON** The purpose of this lesson is to present material so that, at the completion of the lesson, you will be able to:

- Identify when an appeal can be filed.
- Identify the steps in the appeal process and when the appellant needs to take action.
- Assist their clients in completing a Notice of Disagreement and Statement of Appeal that satisfies the requirements of the law.
- Determine when it is in the appellant's best interest to request a hearing, what type of hearing to request, and what to expect at a hearing.

**TIME REQUIRED** 2.5 hours

**INSTRUCTIONAL METHOD** Participatory discussion and practical exercise

**MATERIALS/ TRAINING AIDS** Classroom or private area where a discussion may be held. Chairs and writing surfaces are required.

Large writing surface such as—easel pad, chalkboard, dry erase board, overhead projector, etc., with appropriate markers, or computer with projection equipment and PowerPoint software.

- This lesson's PowerPoint presentation
- *Trainee Handouts for this lesson*
- Sufficient copies of VA Form 9, *Appeal to Board of Veterans' Appeals* for each student, if possible.

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### WHEN YOU CAN FILE AN APPEAL

Despite your best efforts, not every claim you file will be granted to the claimant's satisfaction. When a claim is denied, and you believe the denial is wrong, you can advise your client to file an appeal. But before you head down that path, there are other options you can take, and they may be a better choice for your client.

Do You have an Issue That Should Be Appealed?: Appeals can only be taken on final decisions by the agency of original jurisdiction, usually the Regional Office (RO). A proposed action cannot be appealed until it becomes final. If your client receives a letter saying the VA is proposing to reduce the evaluation of a service-connected disability, you cannot appeal this proposed action. If you do, your client will only get a letter advising him/her that the appeal has been rejected and they will have to file again after the proposed action is completed.

Every final action should include a letter advising the claimant of the decision and include a notice of appeal rights. If the letter went to the claimant's last known address and was returned to the VA as undeliverable, the VA still considers "constructive notice" to have been given. VA will exercise due diligence in review of records and alternative sources to locate current address for forwarding notice. The appeal process must begin within one year of the date of notice or the decision becomes final and cannot be appealed. If the notice of appeal rights was not part of the letter or enclosed as an attachment, the appeal period is to remain open until the claimant receives the notice.

Just about anything in the RO's decision can be appealed. For example, if the RO decision grants service connection for a particular condition, the evaluation and/or effective date could be appealed. Medical decisions made by a health care professional (doctor, nurse, etc.) cannot be appealed, but that's just about the only exclusion.

Appeal vs. new evidence: When the decision is made, your client will get a copy of the narrative of the decision explaining why the decision was reached. Read it over, and if it appears that the decision can be overturned by supplying missing evidence, getting the evidence is the better path to take. For example, your client applied for service connection for hearing loss, but did not furnish a statement about the acoustic trauma he/she experienced in service, and the claim was denied without a VA examination. Help your client complete a statement about how he/she was exposed to loud noises in service and ask for a VA examination. This is a simple example, but it is a good practice to think of ways to get the benefit without having to go through the appeal process.

What is the Issue, and Can Your Client Prevail on Appeal?: As we learned in the lesson on non-original claims, if the reopened claim is denied for lack of new and material evidence, that will be the only issue that can be appealed. The BVA generally has about a 20% allowance rate; thus, most appeals are eventually denied. The threshold for reopening claims on new and material evidence is quite low. BVA has often applied the regulation very liberally to reopen such claims. The VSO's paramount duty here is the protection of the veteran's appellate rights. The proper course of action would be to file the NOD and then continue obtaining the evidence.

Sometimes claims are denied for reasons that cannot possibly be overcome. For example, if your veteran was denied pension because he did not have wartime service, no amount of argument on appeal will overturn the denial. With this said, always remember that it is the veteran's claim,

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not yours, and if, after your explanation and advice, they still want to appeal, you should not refuse to help them. Your organization may have guidance on how you are expected to handle appeals that are not likely to be productive, so check with them about the limits of assistance you are expected to provide.

### The Appeals Process

If you and your client have reviewed the decision from the RO, and feel like an appeal is the proper path to take, you should do so. This is path of a typical, simple appeal.

Stage	Who Is Responsible	Action
1	Appellant or accredited representative	Files a Notice of Disagreement (NOD) in response to a Department of Veterans Affairs (VA) decision regarding his/her benefit claim.
2	<ul style="list-style-type: none"> <li>• Claims Assistant, or</li> <li>• Veterans Service Representative (VSR) at the RO</li> </ul>	<ul style="list-style-type: none"> <li>• Accepts the NOD if it does not need further clarification, such as clarifying which issues are being appealed when a decision contains multiple issues</li> <li>• Establishes a Veterans Appeal Control and Locator System (VACOLS) record, and</li> <li>• Gives the appellant the option to elect (if the election is <i>not</i> received with the NOD) the               <ul style="list-style-type: none"> <li>– Post Decision Review Process, or</li> <li>– appellate review process without DRO review.</li> </ul> </li> </ul>
3	Appellant or accredited representative	<p>Elects either the:</p> <ul style="list-style-type: none"> <li>• DRO review process, or</li> <li>• Traditional appellate review process without DRO review.</li> </ul> <p><i>Note:</i> If the appellant does not elect the DRO review process on the NOD or within 60 days of VA notification of the right to this process, the appeal proceeds in accordance with the traditional appellate review process.</p>

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4	<ul style="list-style-type: none"> <li>• VSR</li> <li>• RVSR, or</li> <li>• DRO at the RO</li> </ul>	<p>Conducts one of the following review processes based on the appellant's choice:</p> <ul style="list-style-type: none"> <li>• DRO review process, or</li> <li>• traditional appellate review process without DRO review.</li> </ul>
5	<ul style="list-style-type: none"> <li>• VSR</li> <li>• RVSR, or</li> <li>• DRO at the RO</li> </ul>	<p>Does the review warrant a change to the decision on appeal?</p> <ul style="list-style-type: none"> <li>• If <i>yes</i> on all issues, includes a complete statement of facts in the new decision with any discussion needed to clearly show the basis for the allowance.</li> <li>• If <i>yes</i> on only some issues, <ul style="list-style-type: none"> <li>– issues a Statement of the Case (SOC) confirming the decision on appeal and explaining the reasons for the VA decision, and</li> <li>– sends <i>VA Form 9, Appeal to Board of Veterans' Appeals</i>, to the appellant.</li> </ul> </li> <li>• If <i>no</i> <ul style="list-style-type: none"> <li>– issues an SOC confirming the decision on appeal and explaining the reasons for the VA decision, and</li> <li>– sends <i>VA Form 9, Appeal to Board of Veterans' Appeals</i>, to the appellant.</li> </ul> </li> </ul>
6	Appellant or accredited representative	<ul style="list-style-type: none"> <li>• Returns <i>VA Form 9</i> or a substantive appeal in lieu of <i>VA Form 9</i> within applicable time frames, and</li> <li>• May elect one of the following types of Board of Veterans' Appeals (BVA) hearings: <ul style="list-style-type: none"> <li>– Travel board</li> <li>– Videoconference, or</li> <li>– In person in Washington, DC, or</li> </ul> </li> <li>• May elect a local hearing before regional office (RO) personnel.</li> </ul>

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7	<ul style="list-style-type: none"> <li>• VSR</li> <li>• RVSR, or</li> <li>• DRO at the RO</li> </ul>	<ul style="list-style-type: none"> <li>• Sends a Supplemental Statement of the Case (SSOC) to the appellant if             <ul style="list-style-type: none"> <li>– VA receives additional evidence, and</li> <li>– the appellant does not receive a complete grant of benefits on appeal, and</li> </ul> </li> <li>• Gives the appellant 60 days to reply before the appeal is sent to BVA.</li> </ul> <p><i>Note 1:</i> If none of the above applies, proceed to Step 9.</p> <p><i>Note 2:</i> No reply is necessary from the appellant once VA receives a substantive appeal</p> <p><i>Note 3:</i> If an SSOC is sent before the substantive appeal or VA Form 9 is received, the appellant has the later of either</p> <ul style="list-style-type: none"> <li>• 60 days from the mailing of the SSOC, or</li> <li>• the remainder of the one-year period from the date of the original letter of notification</li> </ul> <p>to submit the VA Form 9.</p>
8	<ul style="list-style-type: none"> <li>• DRO</li> <li>• RVSR, or</li> <li>• Veterans Service Center Manager (VSCM) designee</li> </ul>	Certifies the case to BVA.
9	Claims Assistant	Transfers the claims folder to BVA.
10	BVA	Either <ul style="list-style-type: none"> <li>• issues a decision confirming or revising the original decision, or</li> <li>• remands the case to the RO for additional action.</li> </ul>

If BVA remands the appeal for additional development, specific instructions will be given to the agency of original jurisdiction (the RO) to obtain evidence BVA believes is relevant to the issues on appeal. When the RO gets the evidence and evaluates it, they can grant the benefit or go back to Step 5 and resume the process. The appellant does not need to furnish another Form 9, Statement of Appeal, but can reply to the SSOC if they wish.

As you can see from this chart, there are three steps at which the appellant and his/her representative must act on the appeal; the Notice of Disagreement (NOD), the election of the

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Decision Review Officer (DRO) or traditional review process and the *VA Form 9, Appeal to Board of Veterans' Appeals*. Because these are the steps where your assistance can have the greatest impact for your clients, we will go over each of these in greater detail.

The Notice of Disagreement (NOD): The law (38 CFR 20.201) defines the Notice of Disagreement as:

A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result will constitute a Notice of Disagreement. While special wording is not required, the Notice of Disagreement must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review. If the agency of original jurisdiction gave notice that adjudicative determinations were made on several issues at the same time, the specific determinations with which the claimant disagrees must be identified. For example, if service connection was denied for two disabilities and the claimant wishes to appeal the denial of service connection with respect to only one of the disabilities, the Notice of Disagreement must make that clear.

If you assist your client in writing the NOD, begin by making it clear that:

1. The statement is intended to be an NOD; simply say “this is a Notice of Disagreement with your decision of XX-XX-XXXX.” If you are disagreeing with more than one issue, list each issue separately.
2. Be specific about which part of the decision you are disagreeing with. For example “We disagree with the 30% evaluation assigned for the heart condition”. Remember, anything you do not specifically disagree with will not be included in the appeal. If you have multiple issues, list each one separately and clearly.
3. State how you would like the appeal resolved. In the example used above, you can continue the statement with, “We believe a 60% evaluation is warranted”.
4. You can state argument at this point if you wish, but it is not required. In the example used above, state “ His private physician shows an ejection fraction of 50% which is sufficient to warrant a 60% evaluation”.
5. If you have new evidence that would help the issue on appeal, include it with the NOD. If the new evidence will get the veteran the benefit he/she seeks, the need for an appeal becomes moot, and everyone goes away happy.

If the issues on the NOD are not clear to the VA, we will ask for clarification. Your client will be notified when the NOD has been accepted.

Election of the Decision Review Officer (DRO) Process or the Traditional Process: The “DRO process” means that the NOD will go directly to the DRO who will give the case a “de novo (as new) review”. This means the DRO will look at the entire case top to bottom with new eyes and if he/she believes the benefit should be granted can do so immediately. The DRO can do this based on the evidence already in the file or can order new evidence. If they cannot grant the benefit, they will write the Statement of the Case (SOC). The DRO cannot reduce benefits unless a clear and unmistakable error is found. The traditional process skips the DRO review and the appeal goes to an SOC immediately.

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From the perspective of the service officer and the appellant, it would nearly always be in the best interest of the appellant to go through the DRO review. If the DRO grants the benefit, the appeal becomes moot. Usually, the DRO review occurs soon after the NOD is filed, while the traditional appeal, if it goes through all the steps shown above, requires more than a year on even the simplest of cases. Of course the choice is up to the client, but we recommend the DRO review process in nearly every case.

You should include a statement indicating your client's choice on the NOD to avoid the added time of a VA letter asking the appellant to choose a process. The request for "de novo review" does not go on VA Form 9.

VA Form 9, Appeal to Board of Veterans' Appeals: After your client receives a Statement of the Case (SOC), they must perfect their appeal by furnishing a completed Form 9. If they do not, the appeal will be closed without further decision. The law (38 CFR 20.202) defines the "Substantive Appeal" as:

A Substantive Appeal consists of a properly completed VA Form 9, "Appeal to Board of Veterans' Appeals," or correspondence containing the necessary information. If the Statement of the Case and any prior Supplemental Statements of the Case addressed several issues, the Substantive Appeal must either indicate that the appeal is being perfected as to all of those issues or must specifically identify the issues appealed. The Substantive Appeal should set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed. To the extent feasible, the argument should be related to specific items in the Statement of the Case and any prior Supplemental Statements of the Case. The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal, but the Board may dismiss any appeal which fails to allege specific error of fact or law in the determination, or determinations, being appealed. The Board will not presume that an appellant agrees with any statement of fact contained in a Statement of the Case or a Supplemental Statement of the Case which is not specifically contested. Proper completion and filing of a Substantive Appeal are the last actions the appellant needs to take to perfect an appeal.

If you help your client complete the Form 9, you must include:

1. A statement addressing each issue on appeal, as listed in the SOC, saying that the appellant wants BVA to review the issue and,
2. A statement of argument addressing why the appellant believes the RO decision is wrong. The argument does not have to be elaborate, but some argument must be made. For example "I believe the decision to grant a 30% evaluation for my heart condition is wrong because I have constant pain in my chest and I can only walk ten minutes before I have to sit down and rest due to the pain". The argument does not have to cite law or specific evidence, but if you have those and they are in your favor, you should do so.

Failure to state an argument as to why the benefit should be granted could result in the Board determining that an adequate statement of appeal is not on record and they will dismiss the appeal without considering the merits; therefore, it is imperative that some statement be made on each issue. The claimant's argument does not have to be on a Form 9, but if you use something else, like a letter, be sure to identify it as "in lieu of VA Form 9".

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The Form 9 includes a choice on whether a hearing is requested, and if so, which kind of hearing. Hearings are discussed below. When you assist the client in completing the Form 9, you must make a choice about a hearing, even if it is to decline a hearing; if no choice is made, the appeal stops and a letter will be sent to the appellant asking them to choose. The choice you make can be changed later and you can ask for a hearing at any time prior to a final decision.

Time limits: Time limits for these actions are set by law. For the NOD, the claimant has one year from the date of the letter from the agency of original jurisdiction, to submit the NOD. (In contested claims, the time limit is 60 days.)

For the Form 9, the claimant has either 60 days from the date of the SOC, or one year from the date of letter from the agency of original jurisdiction, whichever is longer, to submit the Form 9. So, for example, the letter from the RO is dated November 20, 2004, the NOD is sent December 10, 2004, and the SOC is dated January 25, 2005, the claimant has until November 19, 2005 to submit the Form 9.

An extension to these time limits can be requested. The extension can be granted for “good cause”. The request for extension of the time limit must be submitted before the time limit expires.

Remand Decisions: About half of the cases that make it to BVA are remanded by the Board for more evidence. When this occurs the case is typically sent to the Appeals Management Center (AMC) with a set of instructions to follow. The AMC must follow those instructions and make a new decision that includes all the previously considered evidence and the new evidence. A remand decision is not a final decision by the Board. A single case can be remanded multiple times. If your client’s case is remanded, they will get a copy of the remand decision. They should read it over carefully as they may be expected to participate in the gathering of additional evidence, and their cooperation is essential. They may have to come in for another VA examination, in many cases with a specialist.

The good news is that BVA usually remands a case because they are looking for evidence that will give them a basis to change the prior decision. They do not remand if they have enough evidence to uphold it. Often times the new evidence will be enough for the AMC to change the decision without returning it to the Board. If the AMC cannot grant the benefit even after the new evidence is considered, the appellant will be sent a Supplement Statement of the Case (SSOC) and will be given 60 days to respond, if they wish. If the appellant has no additional evidence to submit, they should tell that to VA to waive the 60 day delay.

Acting on Behalf of the Client: The BVA Rules of Practice permit an accredited service officer to act in behalf of their client in nearly any matter before the Board. You can initiate the appeal by sending in the NOD, you can submit the substantive appeal, and request a hearing. A service officer can even withdraw an appeal in behalf of their client. But should you?

Your service organization is likely to have set policies on what a service officer should or should not do in behalf of their clients. Our recommendation is to follow your organization’s guidelines. If there are no guidelines, we recommend that you involve the client whenever possible and

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accept their wishes. It would be a potential mistake to go against a client's express instructions. If your client is incapacitated or otherwise unable to act in their own behalf, consider doing whatever is in their best interest.

If your client has an unusual circumstance that warrants a request for advancement on the docket of BVA, you can make a motion to the Chairman of BVA for such a consideration.

Advancement can be accomplished in only the most worthy of situations, such as terminal illness or extreme hardship. If your organization has an office in BVA, we recommend that you make your request through them. If not, get a copy of the BVA's Rules of Practice and follow them to make your request.

If you work for a service organization in an office inside the RO, you will be given an opportunity to present written argument in behalf of the appellant before the case is certified to BVA. The service organization completes VA Form 646, *Statement of Accredited Representative in Appealed Case* at the RO before the case is certified and transferred to BVA. Your organization will have policies and guidelines for completion of this document. If your organization maintains an office at BVA, that office will also get an opportunity to review the case before BVA reaches a decision.

## Hearings

The appeals process allows the appellant to request a personal hearing at any stage of the process. Let's look at what sort of hearings are available, and when requesting a hearing can be in your client's best interest.

Types of Hearings: Before the appeal is certified to BVA (step 10 above), you can request a hearing at the RO with a Decision Review Officer (DRO). The DRO is empowered to hold the hearing, request additional evidence and overturn the prior decision based on his/her review and the testimony from the hearing. This hearing can be held prior to or after the DRO de novo review and even after the Form 9 is submitted if specifically requested. The advantage of this type of hearing is that it is held at the RO, so usually great distance is not involved, and it can be scheduled quickly, usually in 60 days or less.

Once the appellant completes and submits the Form 9, the case belongs to BVA. The appellant can request a hearing before BVA in Washington DC, a hearing before a travel section of BVA at the RO, or a video hearing is held with the veteran and representative present at the RO and the BVA judge sitting in Washington, D.C. If they request a hearing at BVA, they must travel to Washington for the hearing. If they request a hearing with the traveling section of BVA, the hearing will be held at the RO, but there is usually a substantial wait for these hearings. The waiting time will vary from one RO to another and will depend on when the traveling section was last there. BVA will schedule a traveling section to go to the RO only when enough cases have accumulated to warrant a trip. A video hearing can be conducted from a site closer to the veteran's home, provided there is the required equipment available and time can be scheduled for its' use. Check with your local RO about available sites in your state. Regardless of the type or

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place of the hearing, the travel and any other costs associated with the hearing must be borne by the claimant.

Should the claimant request a hearing?: Appeals are decided on the basis of the evidence and the law. If a personal hearing will add to those in the claimant's behalf, a hearing may help the case. If the evidence and law is overwhelmingly against the claim, a hearing cannot overcome the preponderance of evidence.

For example, the veteran has filed a claim for an increased evaluation of his service connected PTSD, and the rating confirms it at 50% disabling. If the veteran has a compelling story to tell about how his PTSD has affected his life, his ability to work and his ability to get along with his family, and these facts are not part of the discussion on his last VA examination, a personal hearing could help his claim.

On the other hand, if the veteran has filed a claim for service connection for a heart condition, and his SMR's and current VA examination do not show evidence or diagnosis of a heart condition, it is highly unlikely that anything he can present at a hearing, short of medical evidence, will change the outcome. Most often, you will be faced with appeals that are not as clear-cut as these examples.

The advantage of a hearing is found in a personal presentation the claimant can make that isn't found in the evidence or facts of the case. If the claimant has a compelling story to tell, can tell it well, and it can make a difference in the outcome, you may want to consider recommending a personal hearing. The disadvantage of a hearing is that it delays the appeal process, in some instances for a long period, the claimant must bear the cost and inconvenience of the hearing, and in many claims, will not likely effect the outcome. A personal presentation at a hearing may reverse a judgment decision, but is unlikely to affect a decision based on facts. Probably the best thing you can do for your client is to explain the advantages and disadvantages of a personal hearing to them and let them decide. Again your organization may have specific policies and guidelines on this subject.

Ultimately, it will come down to the client's wishes. If they feel strongly that they want a hearing, even if you think it won't help the case, you should follow their instructions.

Any claimant who has appointed a service organization as their power of attorney can be represented by an accredited service officer from that organization at their hearing. Most organizations appoint experienced service officers to this important task. The claimant can be represented by anyone they wish at a hearing, but it is usually in their best interest to be represented by a VSO. A claimant can have witnesses or others testify in their behalf, but no one can be compelled to testify. Hearings are usually transcribed, and the appellant gets a copy of the transcript.

Failure to Appear for a Hearing: If your client decides to request a hearing, stress to them the importance of making a commitment to attend it. Experience has shown that upwards of 30% of the people who request hearings do not attend. This delays the processing of the appeal. If the claimant has a good reason for not attending, they should contact you as far in advance of the hearing date as possible. If they have good reason, you can then postpone and reschedule the

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hearing. If they do not attend, don't give you prior notice, and don't have a good reason for not attending, another hearing will not be scheduled.

### **The Service Officer's Role in The Appeal Process**

As stated above, the service officer's greatest impact on behalf of their client will be in completing the NOD, the Form 9, and choosing the DRO process or the traditional process. But there are other ways you can help your client.

Remember your duty first and foremost is to protect the appellate rights of the veteran. Your first action should be to file the NOD. Then compile the evidence in support of the veterans claim. Obviously, exceptions are if you can have a face to face with the RVSR or DRO to change the decision. If the claim is allowed at the RO, the NOD becomes moot. The NOD must be filed at the outset in any case where the VSO or veteran believes the decision is wrong, aside from the exceptions mentioned above.

As we noted at the beginning, not every case is best served through the appeals process. If there is an easier or faster way to get the benefit the client is entitled to, take it. Consider new evidence first, or look for any other weakness in the claim and try to fix it. If none of this is available or doesn't work, then consider an appeal.

At times in the appeal process, your client will be required to take some action, such as attend a VA examination. Although it is not required after the substantive appeal or VA Form 9 has been submitted, the appellant has an opportunity to respond to the SSOC's. Even if they have nothing new to add, it is a good idea to respond whenever you can. The Board will consider all the statements you make. However, if they have no additional evidence to submit, they should tell VA to avoid the 60 day response period delay.

At any time during the course of the appeal, if you have new evidence that could impact the issues on appeal, submit it as soon as you can. The facts and evidence in a claim on appeal are not "frozen" and new evidence can be included and considered right up to the final decision by the Board.

The appeal process takes a very long time to work through and typically has long periods where nothing happens punctuated by periods of great activity. Your client must have patience, but be ready to respond whenever needed. Many appeals are never completed because the client either becomes frustrated or loses interest. It is hard to carry the energy from the initial decision for a year or two. Counsel your client to the fact that this will be a long road and they should be prepared to see it through to the end. Remember that a significant number of appeals are ultimately granted, and if your client has a worthy case, the long and difficult process is worthwhile.