

The Black Hole of VA Adjudication Success & Setbacks Under the AMA

Amy Kretkowski & Amy Odom



Veterans Clinic

School of Law

University of Missouri

It's a Mad, Mad, Mad, Mad, AMA World

- “And so, with the AMA ‘a whole new world began in the VA benefits adjudication system.’” *Andrews v. McDonough*, 34 Vet.App. 151, 156-57 (2021) (quoting NVLSP’s Veterans Benefits Manual § 12.1.1 (2020-2021 ed.)).

AMA Decision Review Process as of February 19, 2019

Veterans Benefits Administration

- The Claim
 - Establishes effective date
 - Duty to assist applies
- VBA issues decision
- **One year deadline for ALL appeal options**

Appeal Options (VBA)

- Higher Level Review (20-0996)
 - No new evidence
 - Can submit argument
 - Can have informal conference
- Supplemental Claim (20-0995)
 - Can submit new evidence
 - DTA applies

Appeal to BVA

- Notice of Disagreement (10182)
 - Direct Review (no new evidence, but can submit argument)
 - Evidence Review (new evidence, within 90 days)
 - Hearing (can submit evidence up to 90 days after hearing)

AMA Statutory Highlights

- Ability to preserve original effective date within one year after denial by RO, BVA, or CAVC. 38 U.S.C. § 5110(a)(2).
- New and ***relevant*** evidence standard. 38 U.S.C. § 5108.
- Enhanced decision notice. 38 U.S.C. § 5104(b).
- Favorable findings are binding on “all subsequent adjudicators ... unless clear and convincing evidence is shown to the contrary to rebut such favorable finding.” 38 U.S.C. § 5104A.

AMA Statutory Highlights

- New appeal options. 38 U.S.C. § 5104C.
 - Higher level review (HLR). 38 U.S.C. § 5104B.
 - Supplemental claim (SC) with new and relevant evidence. 38 U.S.C. § 5108.
 - Notice of Disagreement (NOD) filed directly with BVA. 38 U.S.C. § 7105.
 - Deadline for all options: one year from the date of the decision.

Higher Level Review

- HLR is a *de novo* review based on evidence before VBA at time of original decision. 38 C.F.R. § 3.2601(f).
- No new evidence will be considered. 38 C.F.R. § 3.2601(i).
- Decision must indicate if any evidence was not considered (because it was submitted after the record closed) and how it can be considered on further review. 38 C.F.R. § 3.2601(k).

Higher Level Review

- HLR is conducted by experienced adjudicator who ***did not participate in prior decision*** – usually from a different office.
- You can request ***same office review*** and VA will grant that request absent good cause to deny. 38 C.F.R. § 3.2601(e).
- You can request ***informal conference*** “to identify any errors of law or fact in a prior decision based on the record at the time the decision was issued.” 38 C.F.R. § 3.2601(h).

When to Choose Higher Level Review

- CLEAR error. Common errors include:
 - Assigning wrong effective date (particularly re: TDIU)
 - Failure to consider alternative diagnostic code or evidence supporting higher rating
 - Failure to consider favorable evidence of record
 - Failure to consider alternative/reasonably raised theory of entitlement
 - Failure to adjudicate or defer expressly raised claim
 - Clearly misapplying the law.

Supplemental Claim

- 38 U.S.C. § 5108. If new and relevant evidence is presented or secured with respect to a supplemental claim, the Secretary shall readjudicate the claim taking into consideration all the evidence of record.
- 38 C.F.R. § 3.2501(a)(1) The new and relevant standard will **not** impose a higher evidentiary threshold than the previous new and material evidence standard under §3.156(a).
- Relevant evidence is information that **tends to prove or disprove** a matter at issue in a claim. Relevant evidence includes evidence that **raises a theory of entitlement** that was not previously addressed

Separating Issues

- Claimant can take different issues into different review options in the new system. 38 U.S.C. § 5104C(2)(C).
- Example: VA denies service connection for PTSD; increased rating for right knee disability; declines to reopen claim for right shoulder disability. Veteran can
 - Request HLR on PTSD issue
 - Submit Supplemental Claim with NRE for knee
 - Appeal shoulder to the Board with NOD.

Changing Review Options

- Claimant can change review option ***within one year*** of the initial decision. 38 C.F.R. § 3.2500(e)(1).
- Claimant may change review option to Supp Claim ***after*** one year **IF** VA grants extension for good cause under 38 C.F.R. 3.109(b) and the Supp Claim is received within the extension period. 38 C.F.R. 3.2500(e)(2).

Options for Review of Decision

- What are options **after HLR** Decision?
 - File Supp Claim with new and relevant evidence.
 - File NOD directly to BVA.
- What are options **after Supp Claim** Decision?
 - File request for HLR.
 - File Supp Claim with new and relevant evidence.
 - File NOD directly to BVA.

Which Board Docket to Choose?

Direct

- *When to choose:* If you think a mistake was made.
- *What happens:* VLJ reviews the same record & makes new decision. No new evidence added.
- *How long:* 365 days (goal).

Evidence

- *When to choose:* If you have new evidence.
- *What happens:* 90 days to submit new evidence. VLJ reviews record + new evidence, issues decision.
- *How long:* Over 365 days.

Hearing

- *When to choose:* If you want a hearing before VLJ.
- *What happens:* You will WAIT. Can submit additional evidence up to 90 days after hearing.
- *How long:* Forever.

Board Remands – Legacy v. AMA

Legacy

- *Remand for:*
 - DTA error that occurred at any time during the pendency of appeal.
 - AOJ issues new decision.
 - Unless fully granted, AOJ issues SSOC and appeal is returned to Board with same docket number.

AMA

- *Remand for:*
 - DTA error that occurred **before** the AOJ issued the decision on appeal.
 - Board cannot request VHA or independent medical opinion.
 - Appeal is **not** automatically returned to Board following action on remand.

DTA Errors

- A DTA error remanded by the Board ***reopens the record*** and any evidence previously submitted to the AOJ or associated with the claims file while the record was closed (i.e., after the notice of decision is issued) ***will become part of the evidentiary record*** to be considered by the AOJ upon readjudication.

Remands No Longer Returned to the Board

- A case will no longer be returned automatically to the Board following completed remand by AOJ **unless the claimant files a new NOD.**
- These cases will be docketed in the order in which the most recent NOD was received (i.e., Veteran **loses** original place on docket).
- Can file a Supplemental Claim or HLR instead of NOD.
- NOTE: If the AOJ denies benefits or does not give the veteran the highest rating, AOJ **should** issue SSOC.

Options for Review of BVA, CAVC Decisions

- What are options **after BVA** decision?
 - File Supp Claim with new and relevant evidence within one year of BVA decision to preserve effective date.
 - File NOA to CAVC (within 120 days).
- What are options **after CAVC** decision?
 - File Supp Claim with new and relevant evidence within one year of CAVC decision.
 - File appeal to Federal Circuit.

**Noteworthy CAFC & CAVC Opinions following the
Veterans Appeals Improvement and Modernization Act (AMA)**



Mil.-Veterans Advoc. v. Sec. of Veterans Affairs, 7 F.4th 1110 (Fed. Cir. 2021)

- Veterans' service organizations, law firm, and one individual veteran petitioned for review of several VA regulations that implemented Veterans Appeals Improvement and Modernization Act (AMA), including:
 - 38 C.F.R. § 14.636(c)(1)(i) - limiting when a veteran's representative may charge fees for work on supplemental claims
 - § 3.2500(b) - barring the filing of a supplemental claim when adjudication of the same claim is pending before a federal court
 - § 3.155 - excluding supplemental claims from the intent-to-file framework



***Mil.-Veterans Advoc. v. Sec. of Veterans Affairs*, 7 F.4th 1110 (Fed. Cir. 2021)**

- Issue: Validity of §§ 14.636(c)(1)(i), 3.2500(b), and 3.155
- Holding: all three regulatory provisions that MVA and PVA have standing to challenge are invalid.

***Mil.-Veterans Advoc. v. Sec. of Veterans Affairs*, 7 F.4th 1110 (Fed. Cir. 2021)**

What this means for you in practice:

- Veterans' attorneys can now charge a fee on a supplemental claim.
- Veterans can file a supplemental claim while the appeal of that same issue is pending before the CAVC or CAFC.
- Intent to File applies to supplemental claims.

***Andrews v. McDonough*, 34 Vet.App. 151 (2021)**

- United States Marine Corps Veteran appeals the denial of higher ratings for service-connected knee disabilities to the Board under the AMA.
- He selects the “Direct Review” docket and does not submit any additional evidence.
- At the CAVC, the parties agree that remand is warranted.
- They disagree about including language in the Joint Motion for Remand that would allow the Veteran to submit new evidence.

***Andrews v. McDonough*, 34 Vet.App. 151 (2021)**

- Issue: Under the AMA, can you submit additional evidence if you chose the direct review docket in your appeal to the Board? (i.e., how to apply *Fletcher* and *Kutscherousky* under AMA.)
 - *Fletcher*: A remand is not “merely for the purposes of rewriting the opinion so that it will superficially comply with the ‘reasons or bases’ requirement.” Instead, “[a] remand is meant to entail a critical examination of the justification for the decision. The Court expects that the [Board] will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case.”

***Andrews v. McDonough*, 34 Vet.App. 151 (2021)**

- *Kutscherousky*: “[T]he Board may seek other evidence it considers necessary to the timely resolution of the remanded matter” and “if the Board remands the case to an AOJ, the Board must reiterate the appellant’s foregoing right to submit additional evidence and argument on the remanded matter(s).”
- Holding: The AMA prohibits the submission of additional evidence under the “direct review” docket – even after a remand from the Court – unless the parties agree to it or the Court orders new evidence based on VA’s failure to satisfy its DTA or reliance on inadequate evidence.



Andrews v. McDonough, 34 Vet.App. 151 (2021)

Advocacy Tip: Choose the “evidence review” lane on the Form 10182 unless you are absolutely certain there is no additional evidence to submit.

- But this is still not a guarantee that you can submit evidence on remand from the CAVC
 - Even under the evidence and hearing lanes, there is a deadline for submitting new evidence which will have passed by the time of the CAVC decision
 - Arguably, only an order for a new hearing will reopen the evidence submission period
 - But ... Supplemental Claim? *MVA*?

***Hall v. McDonough*, ___ Vet.App. ___
docket no. 19-8717 (Oct. 18, 2021)**

- 2015 – VA issues regulations requiring all notices of disagreement (NODs) be submitted on specific forms
 - Prior to change, claims and appeals could be submitted in any format
 - Congress codified the form requirement in the AMA
- January 2019 – RO issues a decision in the Legacy system denying several claims and tells him to file an NOD on a specific form for Legacy appeals
- February 2019 – AMA goes into effect and VA publishes on its website a new form specifically for AMA NODs

***Hall v. McDonough*, ___ Vet.App. ___
docket no. 19-8717 (Oct. 18, 2021)**

- February 2019 (same day the AMA goes into effect) – Vet submits NOD on the AMA Form
- April 2019 – Board notifies Vet that it received his NOD and placed it on its docket
- November 2019 – Board issues a decision dismissing appeal for lack of jurisdiction because the Vet submitted the wrong NOD form



***Hall v. McDonough*, ___ Vet.App. ___
docket no. 19-8717 (Oct. 18, 2021)**

- Issues: (1) Is the NOD form requirement a jurisdictional rule or a claim-processing rule that may be waived or forfeited? (2) If it is a claim-processing rule, did the Board waive it when it notified the Vet that it had accepted his NOD?
- Holding: The NOD form requirement is a claim-processing rule—not a jurisdictional requirement—and the Board erred in refusing jurisdiction simply because the NOD was on the wrong form.
 - The Court did not reach the waiver argument. Instead it remanded the appeal for the Board to adjudicate the appeal under the Legacy system or explain why it will reject the appeal under a claim-processing rule rationale.

***Hall v. McDonough*, ___ Vet.App. ___ docket no. 19-8717 (Oct. 18, 2021)**

- Advocacy tip
 - There are a *lot* of forms in AMA. *Hall* says that the forms requirements are claim-processing rules, which means they can all be waived or forfeited and the time period for submitting them can be equitably tolled.
 - Adjudicators generally won't look beyond the four corners of the form in determining the claimant's intent – *Hall* supports that they must
 - EXAMPLE: Vet submits an AMA NOD form and checks the box indicating she wants Direct Review (no new evidence). But she attaches to the form new evidence not previously considered by VA along with argument about why the evidence establishes her claim.
 - *Hall* says the Board's jurisdiction is not defined by the form, so the Board should look beyond the four corners to the claimant's submission and see that although she checked Direct Review, she really wanted Evidence Review



AMA Cases ... On the Horizon

Victor Manuel Aviles-Rivera v. McDonough, 19-5969

- Served in U.S. Army March 1968 – December 1969
- Served during Vietnam War, presumed exposure to herbicides
- 2013 - Vet files claim for service-connected disability benefits for hypertension
- 2016 – National Academy of Sciences (NAS) says there's limited or suggestive evidence of an association between herbicides and hypertension
- April 2017 – Board remands claim for a VA opinion that considers the NAS report

Victor Manuel Aviles-Rivera v. McDonough, 19-5969

- 2017 – VA examiner says not as likely as not, even considering NAS conclusion
- June 2018 – Veteran opts Legacy appeal into AMA
- November 2018 – NAS determines there is *sufficient* evidence of an association between hypertension and herbicide exposure
- August 2019 – Board denies claim based on 2017 VA opinion



Victor Manuel Aviles-Rivera v. McDonough, 19-5969

- *Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021) – documents over which the Secretary has control, that are dated prior to the Board decision, and that are relevant to the claim are constructively before the Board
 - Includes NAS updates

Victor Manuel Aviles-Rivera v. McDonough, 19-5969

- Issue: Was 2018 NAS Update constructively before the Board?
 - 38 USC 7113 – limits the period during which evidence can be “submitted” to the Board (2018 NAS update was published outside that period here)
 - 38 USC 7104(a) – Board’s decision must be based on all “evidence and information” of record
- Predictions?

Richard Anthony Reittinger v. McDonough, 20-3418

- 1963-1966, served in U.S. Navy
- February 2016, files claims for service connection for (1) heart condition and (2) bilateral upper and lower peripheral neuropathy secondary to Agent Orange exposure
- July 2016, RO denies because evidence does not show “ship entered Vietnam’s inland waterways”
- Appeals denial of service connection for heart condition only. This is a LEGACY appeal.

Richard Anthony Reittinger v. McDonough, 20-3418

RO memo to file finds USS Oriskany was a “Blue Water” Navy ship

AMA takes effect

Jan. 2019

Mar. 2017

19 Feb. 2019

CAFC issues Procopio, extending the presumption of herbicide exposure to Blue Water Navy veterans

Richard Anthony Reittinger v. McDonough, 20-3418

RR submits Supplemental Claim to reopen peripheral neuropathy claims. VA denies.

Blue Water Navy Vietnam Veterans Act of 2019 is signed into law.

20 June 2019

Apr. 2019

25 June 2019

RR appeals denial of service connection for neuropathies to Board – selects DIRECT REVIEW.

Richard Anthony Reittinger v. McDonough, 20-3418

RR submits deck logs showing USS Oriskany within 12 nautical mile territorial sea of RVN during his service.

July 2019

Aug. 2019

VA letter notifies him of “new law,” invites him to submit supplemental claim

Oct. 2019

VA invites him to submit evidence that his ship was in RVN’s inland waterways or that he went ashore. He resubmits deck logs.

Richard Anthony Reittinger v. McDonough, 20-3418

Board notifies him of stay of cases based on alleged herbicide exposure & new law

RR requests reconsideration, submits deck logs again

23 Jan. 2020

Dec. 2019

Feb. 2020

Board denies service connection for heart condition (**LEGACY** appeal)

Richard Anthony Reittinger v. McDonough, 20-3418

Board declines to reopen neuropathy claims & denies (**AMA decision**)

Appeals both the Jan. 2020 LEGACY decision and the Mar. 2020 AMA decision to the CAVC.

Apr. 2020

Mar. 2020

May 2020

Board denies reconsideration of heart condition decision (**LEGACY appeal**)

Richard Anthony Reittinger v. McDonough, 20-3418

Parties settle the heart condition denial (LEGACY), recognizing herbicide exposure

AMA appeal (neuropathies) briefed

Dec. 2020

Nov. 2020

Jan.-July, 2021

RO grants service connection for coronary artery disease related to herbicide exposure

Richard Anthony Reittinger v. McDonough, 20-3418

- Issue: Does the veteran's selection of "direct review" on his appeal to the Board under the AMA preclude the Board from considering new evidence under 38 C.F.R. § 3.156(c)?
- Where we are now: oral argument set for December 8, 2021
- Predictions?

Questions?