



Military-Veterans Advocacy, Inc.
Post Office Box 5235
Slidell, Louisiana 70469-5235

John B. Wells
Commander USN (Ret)
Executive Director

Admitted to practice:
Louisiana
Pennsylvania
District of Columbia

April 24, 2016

United States Senate Committee on Veterans' Affairs
412 Russell Senate Office
Washington, D.C. 20510

Re: Proposed VA Legislation Concerning Appellate Procedures

Per your request, I have reviewed the proposed legislation offered by the Department of Veterans Affairs to revise appellate procedures. In general, it appears that the agency is attempting to make it easier on themselves at the expense of the veteran. The proposed legislation will deprive veterans of important due process rights. Given that the Congress has historically dictated that the benefits system should be veteran friendly and non-adversarial, the VA's proposal engenders deep concern on the part of Military-Veterans Advocacy (MVA).

The VA proposal seems to limit the entire appellate review to the original record submitted to the agency. While this is common in Administrative Procedures Act reviews, it is not appropriate here. Unlike most administrative hearings, attorneys are not able to engage in paid representation, even if the veteran so desires, until the initial denial has been received. This effectively leaves the veteran without legal representation. Secondly, the system as it currently exists (and would exist under the proposed legislation) does not allow for any discovery. As a result, information and witnesses are discovered throughout the process. Finally, attorneys and appellate level VSOs are trained to prepare a proper record which often results in the discovery and production of new evidence. MVA's comments on the legislation, attached hereto, allow for evidence to be submitted at all stages of the proceeding. It further requires the VA, as part of their duty to assist, to provide reasonable discovery. This would include contact information for decision makers and medical referrals, to allow the veteran to conduct an interview. At the discretion of the veteran the interview could be recorded or otherwise transcribed to be used at the hearing.

VA's proposal also tries to deprive the veteran of the opportunity to have a hearing or submit supplemental evidence. The VA proposal requires the veteran to affirmatively request a hearing and the right to submit additional evidence. This proposal is contrary to the "pro-veteran" approach that Congress has always required. VA forms are often technical and confusing to the veteran and to some service officers. Too often, veterans may fail to request a hearing or the right to submit additional evidence because of a lack of understanding of the form.

Waiver through inattention or misunderstanding should never be allowed and the default should be in favor of a hearing and the ability to submit additional evidence. While an affirmative waiver should be allowed for both the hearing and additional evidence, the waiver should be knowing and voluntary.

Any waiver should not be required in the notice of disagreement. It is too early in the process. The veteran may well have not secured legal help at that point and additional issues may not have been developed and additional evidence may not have been discovered or constructed. Often attorneys will be able to secure affidavits in support of claims or identify additional issues. A premature waiver would severely limit the attorney or other representative in pursuing the appeal. If a veteran presented to an attorney after having waived his right to a hearing or to submit additional evidence, it is unlikely that the attorney will take the case. If appellate rights are waived in the notice of disagreement, then attorneys must be allowed to charge a fair fee at the initial claim stage.

Additionally, the VA seems fascinated by their own forms. Unfortunately their forms are written by attorneys or professional bureaucrats without considering the needs of the veteran or even the adjudicator in mind. The VA is demanding information not required in state or federal notices of appeal. Any writing that provides identifying information of the veteran, the date of the initial denial and the identification of the representative should be sufficient to generate the initial statement of the case. No special writing or form should be required. After receiving the statement of the case, the veteran is in a better position to ascertain whether an affirmative waiver is appropriate.

Nor should the veteran be required to provide specific allegations of errors in fact or law. This information is not required in judicial notices of appeal. Most veterans cannot provide such detailed information, especially at such an early stage in the proceeding. The VA seems to be trying to hold the veteran to the standards of an attorney by applying requirements that exceed those found in judicial proceedings. This process was designed to be non-adversarial but the VA is trying to adopt strict technical rules that hamper the veteran's ability to present his or her case. Given the lack of discovery, factual and legal issues may be developed after the notice of disagreement is filed.

A veteran should never be deprived of the right to submit additional evidence to the higher level review at the Agency of Original Jurisdiction. Once the initial denial has been made the veteran may choose to hire an attorney. At this point a significant amount of evidence may be generated. As an example, MVA has a large library of evidence on the Blue Water Navy issue. Additionally, VA routinely obtains affidavits from the veteran's family and friends to establish the nexus between the disability and military service. Often that information is missing from the original claim. Trained attorneys often develop supplemental evidence that could

Legislative Text:

SEC. XXX. APPEALS REFORM

(a) Section 101 of title 38, United States Code, is amended by adding at the end the following new paragraph:

“(34) The term “Agency of Original Jurisdiction” means the activity which entered the original determination with regard to a claim for benefits under this title.”.

No issue with this provision.

(b) Section 5103 of title 38, United States Code, is amended—

(1) in subsection (a)(2)(B)(i) by—

(A) (A) striking “, a claim for reopening a prior decision on a claim, or a claim for an increase in benefits;” and inserting “or a supplemental claim;”; and No issue with this provision.

(B)

(2) in subsection (b) by—

(A) adding at the end the following new paragraph:

“(6) Nothing in this section shall require notice to be sent for a supplemental claim that is filed within the time frame set forth in subsections (a)(2)(B) and (a)(2)(D) of section 5110 of this title.”. Do not concur. Many of the veterans are not well trained in the law. The same holds true for the VSOs. Notifications prevent the veteran from being deprived of his claim because of a lack of understanding of the system.

(c) Section 5103A(f) of title 38, United States Code, is amended to read as follows:

“(f) Rule With Respect to Disallowed Claims.— Nothing in this section shall be construed to require the Secretary to readjudicate a claim that has been disallowed except when new and relevant evidence is presented or secured, as described in section 5108 of this title, or when higher-level review by the Agency of Original Jurisdiction is requested in accordance with section 5104B of this title.” or when the veteran can show that the original adjudication constituted clear and unmistakable error.

Formatted: Font: (Default) Arial

Formatted: List Paragraph, Numbered + Level: 1 + Numbering Style: A, B, C, ... + Start at: 1 + Alignment: Left + Aligned at: 0.5" + Indent at: 0.77"

(d) Chapter 51 of title 38, United States Code, is amended by adding the following new sections:

“§ 5103B. Duration of duty to assist

The Secretary’s duty to assist under section 5103A of this title shall terminate, with respect to any particular claim, at the time the claimant is provided notice of the Agency of Original Jurisdiction’s decision with respect to such claim under section 5104 of this title.”; Do not concur. The discovery process, which is very difficult in this system, results in information constantly being produced. As an example, I have DRO hearings and even BVA hearings scheduled although I have not received the Claims file. Additionally, once attorneys get involved, and currently they cannot get involved until the initial denial, there is often a request for additional information. The duty to assist should continue throughout the appeals process.

§ 5103 C. Discovery.

Upon request by the veteran or his or her representative, the Secretary, as part of his duty to assist, shall provide the following within 60 days of the request:

- (a) Veteran’s Claims File
- (b) Copy of the pertinent parts of all documents used in adjudicating the claims. If a document more than 10 pages is provided, all pages that were considered are appropriately marked.
- (c) Contact information for the person adjudicating the claim
- (d) Contact information and curriculum vitae of any medical professional conducting a Compensation and Pension examination.
- (e) A copy of any other document in the possession of Secretary requested by the veteran.
- (f) A copy of any other document in the possession of any Department of the United States requested by the veteran.
- (g) Copies of any and all documents including but not limited to correspondence, both paper and electronic, between any employees of the Secretary or between an employee of the Secretary and any other person concerning the case. (Ongoing requirement)

“§ 5104A. Binding nature of favorable findings

Any finding favorable to the claimant as described in section 5104(b)(4) of this title shall be binding on all subsequent adjudicators within the Department, unless clear and convincing evidence is shown to the contrary to rebut such favorable finding.”; and No issue with this provision.

“§ 5104B. Higher-level review by the Agency of Original Jurisdiction

(a) IN GENERAL. The claimant may request a review of the decision of the Agency of Original Jurisdiction by a higher-level adjudicator within the Agency of Original Jurisdiction.

(b) TIME AND MANNER OF REQUEST. A request for higher-level review by the Agency of Original Jurisdiction must be in writing in the form prescribed by the Secretary, and made within one year of the notice of the Agency of Original Jurisdiction's decision. Such request may specifically indicate whether such review is requested by a higher-level adjudicator at the same office within the Agency of Original Jurisdiction or by an adjudicator at a different office of the Agency of Original Jurisdiction. No issue with this provision.

(c) DECISION. Notice of a higher-level review decision under this section shall be provided in writing.

(d) EVIDENTIARY RECORD FOR REVIEW. (1) Except as provided in paragraph (2), the evidentiary record before the higher-level reviewer shall be limited to the evidence considered in the Agency of Original Jurisdiction decision being reviewed. This provision does not make a lot of sense because it does not seem to have a good nexus to para 2. That being said, it is a bad provision anyhow and violates the notice and opportunity to be heard provisions of the due process clause. The veteran should ALWAYS have the opportunity to submit materials to the reviewing authority. For example, in blue water cases, often the record is made before I get the case. I have materials showing direct exposure that I need to submit. If I cannot submit it, then the veteran may be denied a potential favorable review. If it is a matter that the Agency of Original Jurisdiction needs to have considered the new evidence, then remand it back to them.

(2) If, during review of the Agency of Original Jurisdiction decision, the higher-level reviewer identifies an error on the part of the Agency of Original Jurisdiction to satisfy its duties under section 5103A of this title, and that error occurred prior to the Agency of Original Jurisdiction decision being reviewed, the higher-level reviewer shall return the claim to correct such error and readjudicate the claim." No issue with this provision.

(e) Section 5104(b) of title 38, United States Code, is amended to read as follows:

"(b) In any case where the Secretary denies a benefit sought, the notice required by subsection (a) shall also include all of the following:

(1) identification of the issues adjudicated;

(2) a summary of the evidence considered by the Secretary to include a listing of every document relied upon. In the instance where the document is more than 10 pages, the summary will include a citation to the proper page number.

(3) a summary of the applicable laws and regulations which will be included in an appendix to the document.;

(4) identification of findings favorable to the claimant;

(5) identification of elements not satisfied leading to the denial;

(6) an explanation of how and where to obtain or access evidence used in making the decision; and

(7) if applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.” . This should include the diagnostic codes used in the determination of the disability percentage and the proper citation to the appropriate section of Part 4 of 38 C.F.R.

(8) the appeal rights of the veteran.

(f) Section 5108 of title 38, United States Code, is amended to read as follows:

“§ 5108. Supplemental claims

If new and relevant evidence is presented or secured with respect to a supplemental claim, or a clear and unmistakable error is identified, or there has been a change in the law or a regulation favorable to the veteran, the Secretary shall readjudicate the claim taking into consideration any evidence added to the record prior to the former disposition of the claim.” . This effectively will allow veterans disabled by toxic exposure to relate back to the date of original submission based on CUE and a change in the law. This would include the C-123 veterans, BWN vets, burn pit victims etc. The burden would still be on the veteran to submit the claim.

(g) Section 5109B of title 38, United States Code, is amended to read as follows:

“The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Agency of Original Jurisdiction of any claim that is remanded by the Board of Veterans' Appeals.”.

(h) Section 5110 of title 38, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

“(a)(1) IN GENERAL. Unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor. Again this creates a problem. Unless the above change is incorporated, passage of S-681 may result in previously denied new claims from commencing at the submission of the supplemental claim. This is what the VA has done with the C-123 veterans.

(2) EFFECT OF CONTINUOUS PURSUIT OF A CLAIM ON EFFECTIVE DATE OF AWARD. For purposes of applying the effective date rules in this section, the date of application shall be considered the date of the filing of the initial application for a benefit provided that the claim is continuously pursued by filing any of the following either alone or in succession:

(A) a request for higher-level review under section 5104B of this title within one year of an Agency of Original Jurisdiction decision;

(B) a supplemental claim under section 5108 of this title within one year of an Agency of Original Jurisdiction decision;

(C) a notice of disagreement within one year of an Agency of Original Jurisdiction decision; or

(D) a supplemental claim under section 5108 of this title within one year of a decision of the Board of Veterans’ ~~Appeals~~. Appeals. Again this provision does not cover CUE or changes in law and regulation. Or for that matter new and material evidence. Supplemental claims should be allowed at any time based on those three criteria.

(3) SUPPLEMENTAL CLAIMS RECEIVED MORE THAN ONE YEAR AFTER AN AGENCY OF ORIGINAL JURISDICTION DECISION OR DECISION BY THE BOARD OF VETERANS’ APPEALS. Except as otherwise provided in this section, for supplemental claims received more than one year after an Agency of Original Jurisdiction decision or a decision by the Board of Veterans’ Appeals, the effective date shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of the supplemental claim.”; and Again this provision does not cover CUE or changes in law and regulation. Or for that matter new and material evidence. Supplemental claims retroactive to the initial submission should be allowed at any time based on those three criteria.

(2) in subsection (i) by—

(A) striking “reopened” and replacing it with “readjudicated”;

(B) striking “material” and replacing it with “relevant”; and

(C) striking “reopening” and replacing it with “readjudication”.

No issue with this provision

(i) Section 5111(d)(1) of title 38, United States Code, is amended—

(1) by striking “or reopened award;” and replacing it with “award or award based on a supplemental claim;”.

No issue with this provision

(j) Section 5904 of title 38, United States Code, is amended—

(1) in subsection (c)(1) by—

(A) striking “notice of disagreement is filed” and replacing it with “claimant is provided notice of the Agency of Original Jurisdiction’s initial decision under section 5104 of this title”; and

(2) in subsection (c)(2) by—

(A) striking “notice of disagreement is filed” and replacing it with “claimant is provided notice of the Agency of Original Jurisdiction’s initial decision under section 5104 of this title”.

No issue with this section however I do believe paid attorney representation should be allowed at all levels of adjudication.

(k) Section 7101(a) of title 38, United States Code, is amended—

(1) by striking “conduct hearings and” in the third and fifth sentences; and

(2) by striking “conducting hearings and” in the fourth sentence.

Strongly disagree. The deletion of the words “conduct hearings” may be used as a basis to justify the discontinuation of live/teleconference hearings.

Add Section 7101(f) to read as follows:

- (1) Any member of the board conducting hearings shall be a certified Administrative Law Judge.
- (2) Any member of the Board whose decisions shall be remanded by the Court of Appeals for Veterans Claims or higher authority shall not be assigned to any subsequent readjudication.
- (3) When the Court of Veterans Claims or higher authority remands in excess of thirty percent of any decisions of a particular Board member in any given year, that Board member's performance will be reviewed by the Secretary. If performance is found to be deficient the Chairman will recommend probation, suspension or decertification to the Secretary. Remands based on changes in the law or regulation, to include judicial action, shall not be considered in computing the percentage of remands.
- (4) The Chairman in his report to Congress will include a discussion of the number of remands, and actions taken under this paragraph.

Amend Section 7101(c)(1)(A) of Title 38 United States Code by substituting the words "qualified persons" for "employees of the Department."

(l) Section 7103 of title 38, United States Code, is amended—

(1) in subsection (b)(1)(A) by—

(A) striking "heard" and replacing it with "decided"; and

Do not concur with this provision since the veteran should have the opportunity to request a hearing.

(2) in subsection (b)(1)(B) by—

(A) striking "heard" and replacing it with "decided".

Do not concur with this provision since the veteran should have the opportunity to request a hearing.

(m) Section 7104(b) of title 38, United States Code, is amended—

(1) by striking "reopened" and replacing it with "readjudicated".

(n) Section 7105 of title 38, United States Code, is amended—

(1) in subsection (a)—

(A) by striking the first sentence and replacing it with "Appellate review will be initiated by the filing of a notice of disagreement in the form prescribed by the Secretary."; and

Do not concur. Again, there is no need for a special form provided by the Secretary. Often these forms are confusing to veterans and subject to changes without notice. Additionally, this provision seems to delete the requirement for a statement of the case.

(B) by striking “hearing and”;

Do not concur with this provision since the veteran should have the opportunity for a hearing.

(2) by amending subsection (b) to read as follows:

“(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of the mailing of notice of the Agency of Original Jurisdiction’s decision under sections 5104, 5104B, or 5108. A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed. A question as to timeliness or adequacy of the notice of disagreement shall be decided by the Board.

Should also include a provision for electronic filing, ie. Fax and e-mail or on a web site.

(2) Notices of disagreement must be in writing, ~~must set out specific allegations of error of fact or law~~, and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or legal guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim. Notices of disagreement must be filed with the Board.

The stuck part should not be included. Most vets and many VSO cannot provide such detailed information at this early stage of the proceeding. The VA seems to be trying to require judicial standards expected of an attorney in what is supposed to be a non-adversarial matter. Given the lack of discovery, factual and legal issues may be developed after the NOD is filed.

(3) The notice of disagreement shall indicate whether the claimant requests a hearing before the Board, requests an opportunity to submit additional evidence without a Board hearing, or requests review by the Board without a hearing or submission of additional evidence. If the claimant does not expressly request a Board hearing in the notice of disagreement, no Board hearing will be held.”;

Do not concur. The default should always allow the veteran to submit additional evidence or have a hearing. Many vets think of the cost of going to the hearing and are not aware that due to the lack of discovery, additional information may be found that will help their case.

(3) by amending subsection (c) to read as follows:

“(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the Agency of Original Jurisdiction’s action or decision shall become final and the claim will not thereafter be readjudicated or allowed, except as may otherwise be provided by section 5104B or 5108 of this title or regulations not inconsistent with this title.”;

Again, exceptions should be new and material evidence, CUE and a change in law or regulation beneficial to the veteran.

(4) by striking subsections (d)(1) through (d)(5);

This provision virtually repeals the requirement for a Statement of the Case

(5) by adding a new subsection (d) to read as follows:

“The Board of Veterans’ Appeals may dismiss any appeal which fails to allege specific error of fact or law in the decision being appealed.”; and

(6) by striking subsection (e).

Subsection € is important because it allows the veteran to seek an initial review of new evidence by the Board. This is an important step in the process because of the lack of discovery and difficulty in obtaining information from the VA to support the claim.

(o) Section 7105A of title 38, United States Code, is amended—

(1) by amending subsection (b) to read as follows:

“(b) The substance of the notice of disagreement will be communicated to the other party or parties in interest and a period of thirty days will be allowed for filing a brief or argument in response thereto. Such notice shall be forwarded to the last known address of record of the parties concerned, and such action shall constitute sufficient evidence of notice.”.

No issue with this provision.

(p) Strike section 7106 of title 38, United States Code.

This provision seems beneficial to all and its deletion does not seem to be appropriate.

(q) Section 7107 of title 38, United States Code, is amended—

(1) by amending subsection (a) to read as follows:

“(a) DOCKETS—IN GENERAL.—The Board shall maintain two separate dockets. A non-hearing option docket shall be maintained for cases in which no Board hearing is ~~requested~~ required or a board hearing is affirmatively waived and the Board has been notified that no additional evidence will be submitted. A separate and distinct hearing option docket shall be maintained for cases in which a Board hearing is ~~requested required or not waived in the notice of disagreement or in which no Board hearing is requested~~, but if the appellant requests, ~~in the notice of disagreement~~, an opportunity to submit additional evidence. Except as provided in subsection (b), each case before the Board will be decided in regular order according to its respective place on the Board’s non-hearing option docket or the hearing option docket.”;

The default provision should be for a Board hearing and the submission of new evidence.

(2) by amending subsection (b) to read as follows:

“(b) ADVANCEMENT ON THE DOCKET. A case on either the Board’s non-hearing option docket or hearing option docket, may, for cause shown, be advanced on motion for earlier consideration and determination. Any such motion shall set forth succinctly the grounds upon which the motion is based. Such a motion may be granted only—

- (1) if the case involves interpretation of law of general application affecting other claims;
- (2) if the appellant is seriously ill or is under severe financial hardship; or
- (3) for other sufficient cause shown.”;

No issues with this provision.

(3) by amending subsection (c) to read as follows:

“(c) MANNER AND SCHEDULING OF HEARINGS FOR CASES ON BOARD HEARING OPTION DOCKET. (1) For cases on the Board hearing option docket in which a hearing is ~~requested~~ required or not

affirmatively waived in the notice of disagreement, the Board shall notify the appellant whether a Board hearing will be held:

(A) at its principal location, or

(B) by picture and voice transmission at a facility of the Department where the Secretary has provided suitable facilities and equipment to conduct such hearings.

(B) Upon notification of a Board hearing by picture and voice transmission as described in subsection (c)(1)(B) of this section, the appellant may alternatively request a hearing as described in subsection (c)(1)(A) of this section. If so requested, the Board shall grant such request.”; and

(4) By adding the following:

The Board shall, upon request, furnish a copy of the transcript of the hearing and a digital recording of any picture and voice transmission that can be viewed via common commercial means, at no cost to the veteran.

(45) by striking subsections (d) and (e); and redesignating subsection (f) as subsection (d).

This section should be retained. This is especially true when there is a significant backlog as there is now. The Chairman can appoint acting members for up to 90 days (we recommend trained retired Military Judges who can be certified as ALJs). These acting members could easily, and more cheaply, take the docket for veterans in their areas and by working at the local office, help eliminate the backlog.

(r) Strike section 7109 of title 38, United States Code.

This section allows the board to obtain an independent medical evaluation. This would appear to be very helpful in assisting the Board to properly adjudicate the case. There should be the following addition, however.

(d) Upon request, the Board shall provide the veteran or his representative with contact information for the person furnishing the advisory opinion, an opportunity to interview the person and require that the veteran or his representative be provided with the curriculum-vitae of all persons providing said opinion.

(s) Section 7111(e) of title 38, United States Code, is amended—

(1) by striking “merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.”, and replacing it with “merits.”.

No issues with this provision

Add Section (g) to Section 7111 of title 38, United States Code

(g) A change in the interpretation of a statute or regulation which clarifies or explains an existing law or regulation or merely represents the agency's reading of statutes and rules rather than an attempt to make new law or modify existing law is to be considered clear and unmistakable error for purposes of this section.

The above addition is designed to Overrule 38 C.F.R. § 20.1403(e) which reads as follows:

(e) Change in interpretation. Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation.

(t) Chapter 71 of title 38, United States Code, is amended by adding the following new section:

“§ 7113. Evidentiary record before the Board

(a) NON-HEARING OPTION DOCKET.—Except as provided in subsection (c) of this section, for cases in which a Board hearing is not ~~requested~~required or affirmatively waived in the notice of disagreement, the evidentiary record before the Board shall be limited to the evidence considered by the Agency of Original Jurisdiction in the decision on appeal.

Do not concur. Based on the lack of reasonable discovery, and additional information unearthed by attorneys, the veteran should be able to submit evidence as necessary.

(b) HEARING OPTION DOCKET.—(1) HEARING REQUESTED. Except as provided in subsection (c) of this section and subparagraph (A) of this paragraph, for cases on the hearing option docket in which a hearing is requested in the notice of disagreement, the evidentiary record before the Board shall not be limited to the evidence considered by the Agency of Original Jurisdiction in the decision on appeal.

(A) EXCEPTIONS. The evidentiary record before the Board for cases on the hearing option docket in which a hearing is ~~requested~~required or not affirmatively waived, shall include each of the following, which the Board shall consider in the first instance:

(i) Evidence submitted by the appellant and his or her representative, if any, at the Board hearing; and

(ii) Evidence submitted by the appellant and his or her representative, if any, within 90 days following the Board hearing.

(iii) Evidence submitted by the appellant and his or her permanent representative prior to the hearing.

(2) HEARING NOT ~~REQUESTED~~REQUIRED OR AFFIRMATIVELY WAIVED.— Except as provided in subsection (c) of this section and subparagraph (A) of this paragraph, for cases on the hearing option docket in which a hearing is not ~~requested~~required or is affirmatively waived in the notice of disagreement, the evidentiary record before the Board shall be limited to the evidence considered by the Agency of Original Jurisdiction in the decision on appeal.

(A) EXCEPTIONS. The evidentiary record before the Board for cases on the hearing option docket in which a hearing is not requested, shall include each of the following, which the Board shall consider in the first instance:

(i) Evidence submitted by the appellant and his or her representative, if any, with the notice of disagreement; and

(ii) Evidence submitted by the appellant and his or her representative, if any, within 90 days following receipt of the notice of disagreement.

(iii) Evidence submitted by the appellant and his or her permanent representative prior to the hearing.

(c) EVIDENCE ADDED FOLLOWING BOARD REMAND.—If, during review on appeal of a case on either the non-hearing option docket or hearing option docket, the Board identifies an error on the part of the Agency of Original Jurisdiction to satisfy its duties under section 5103A of this title, and that error occurred prior to the Agency of Original Jurisdiction decision on appeal or at the Board of Veterans Appeals, the Board shall remand the claim to the Agency of Original Jurisdiction to correct such error. Thereafter, the Agency of Original Jurisdiction shall readjudicate the claim.”.

(u) CONFORMING AMENDMENT.—The heading of section 7105 is amended by striking “notice of disagreement and”.

(v) CLERICAL AMENDMENTS.—

(1) The table of sections at the beginning of chapter 51 of title 38, United States Code, is amended—

(A) by inserting after the item relating to section 5103A the following new item:

“5103B. Duration of duty to assist.”; and

(B) by inserting after the item relating to section 5104 the following new items:

“5104A. Binding nature of favorable findings.”; and

“5104B. Higher-level review by the Agency of Original Jurisdiction.”.

(2) The item relating to section 5108 in the table of sections at the beginning of chapter 51 of title 38, United States Code, is amended by striking “Reopening disallowed claims.” and replacing it with “Supplemental claims.”;

(3) The table of sections at the beginning of chapter 71 of title 38, United States Code, is amended by—

(A) striking the item relating to section 7106;

(B) striking the item relating to section 7109; and

(C) adding at the end the following new item:

“7113. The evidentiary record before the Board.”; and

(4) The item relating to section 7105 in the table of sections at the beginning of chapter 71 of title 38, United States Code, is amended by striking “notice of disagreement and”.