

Basics of VA Benefits

David Godfrey, ABA Commission on Law & Aging;
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Rick Jurgens & Jessica Hiemenz
National Consumer Law Center

National Elder Rights Training Project for the National Legal Resource Center.
Sponsorship for this Webinar is provided by the National Consumer Law
Center, ABA Commission on Law and Aging, and a grant from the
Administration on Aging.

April 13, 2011

NLRC

Providing Legal Support to the
Aging Advocacy Network

- <http://www.nlrc.aoa.gov/>
- Collaboration developed by the Administration on Aging between the National Consumer Law Center, National Senior Citizens Law Center, American Bar Association Commission on Law and Aging, Center for Elder Rights Advocacy, and the Center for Social Gerontology
- See upcoming trainings, conferences, and webinars
- Request a training
- Request consulting
- Request technical assistance
- Access articles and resources

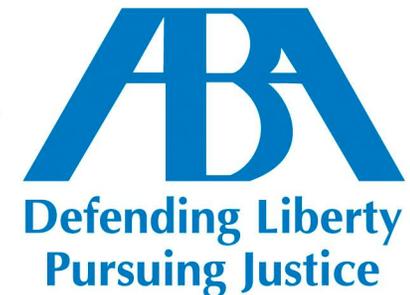
Presenter – David Godfrey

- Is a senior attorney at the ABA Commission on Law and Aging.
- He is responsible for the ABA's role in the Administration on Aging funded National Legal Resource Center.
- Prior to joining the Commission he was responsible for elder law programming at Access to Justice Foundation in Kentucky.



Presenter – Carrie Weletz

- Prior to joining Bergmann & Moore, her legal practice centered on insurance litigation, workers' compensation claims and toxic torts.
- Carrie Weletz has been a staff attorney at Bergmann & Moore, LLC, a law firm specializing in representing Veterans before and against the VA, since 2007.
- In April 2010, she was awarded an Outstanding Volunteer of the Year award from the Homeless Persons Representation Project for her work training pro bono attorneys to represent Veterans before VA.



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Veterans' Benefits Advocacy

Disability Compensation
Training

Organization of the VA and Reviewing Courts

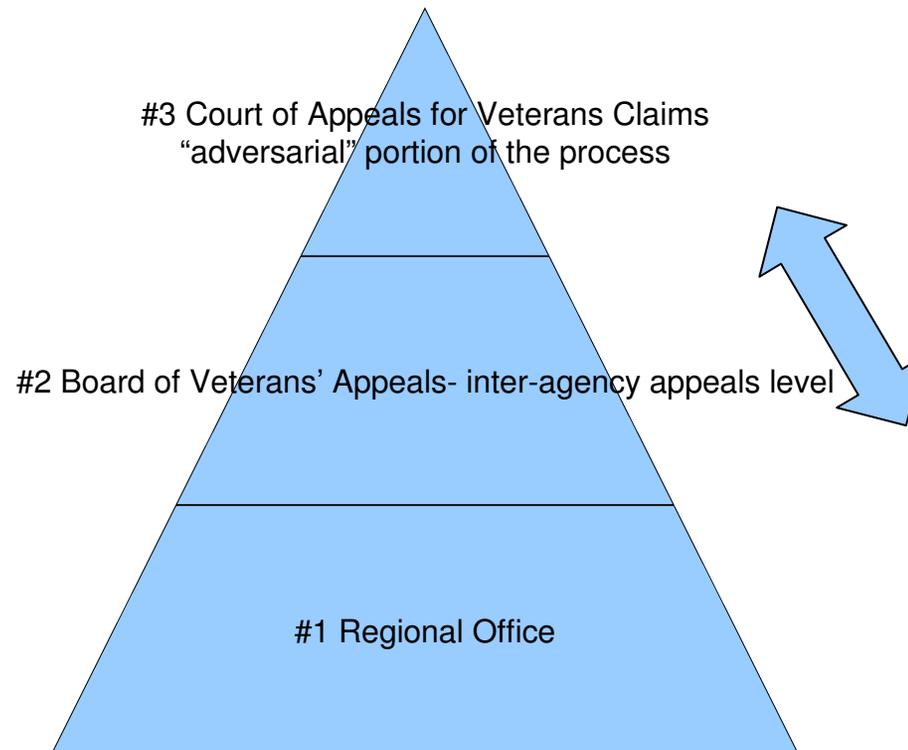
Veterans Health Administration

- VHA is the division of the VA that deals directly with healthcare. It is the largest healthcare system in the U.S.
- As part of the benefits process, VA Medical Centers (VAMCs) may conduct exams on Veterans to determine levels of disability. These are called Compensation and Pension Exams (“Comp & Pen” or “C&P”). - Not always helpful to a Veterans claim.
 - If possible, send updated and past medical records to the RO to be added to the C-File before it gets sent to VAMC
 - Interactive map of facilities online:
 - http://www2.va.gov/directory/guide/division_flash.asp?dnum=1
- Attempt to get a medical opinion from the clients VA doctor.

Veterans Benefits Administration (VBA)

- Part of the VA dealing with disability benefits, dependents' and survivors' benefits and other monetary benefits.
- Applicable regulations located at 38 C.F.R., Parts 3 & 4. Can find these regulations easily online at www.gpoaccess.gov
- Applying for benefits at the local regional office (RO), regardless of success of application, results in the creation of a claims file (C-file) that can almost always be found at the RO with medical and administrative records within. There is at least one RO in each state where a Veteran can apply for benefits.
- VA estimates that in 2011 Veterans will file approximately 1,319,000 new claims (a 30% increase from 2009)!

The Stages of a Claim



Board of Veterans Appeals (BVA)

- Inter-agency appellate tribunal. Jurisdiction through 38 U.S.C. § 7104, Practice and Procedure at 38 C.F.R. Parts 19 & 20. This is the “final” adjudicative body within VA.
- Bound by opinions of the VA Office of General Counsel. BVA may not hear new evidence not originally submitted to the RO, so it is **important to waive RO consideration** of any new evidence to avoid a remand.

Reaching the BVA

1. A Notice of Disagreement (NOD) must be filed, in writing by the claimant or representative **within a year** of a negative/partially negative decision (rating decision).
2. RO issues a Statement of Case (SOC)
 - No regulated timeframe, but usually within a year of NOD.
 - Once the SOC is issued, claimant has 60 days to file the **substantive appeal** (usually on VA Form 9-but not required).
 - After this, the case is certified to the BVA, the RO sends notification to the claimant that file has been transferred. The backlog at BVA for decisions after an appeal is received is approximately 12-14 months.

BVA options

- The BVA offers three different forums for hearings (which are not mandatory to get a BVA decision).
 1. Local RO with the BVA's Travel Board
 2. Washington, D.C. BVA office
 3. Video conference with BVA in Washington, D.C.
- Even before BVA though, if a claim is denied at the RO, a review and/or conference with a Decision Review Officer can be requested.
 - This does not preclude an appeal, it is just one more level of review.
 - This step is De Novo, and does not affect the status of claims before the BVA
 - A hearing request at any level generally adds a considerable amount of time to the length of the appeals process.

U.S. Court of Appeals for Veterans' Claims (CAVC)

- Unfavorable decision from the BVA may be appealed to the CAVC.
 - Court is independent from VA, established in 1988.
 - Prior to this, the VA was the only federal agency not reviewable by a separate federal tribunal.

Once denied by BVA, claimant must submit an appeal to the Court (NOA), or a Motion for Reconsideration with the BVA within 120 days.

- If the Motion is denied (which most are), claimant has another 120 days from the date of denial to appeal to CAVC

CAVC

- CAVC has authority to review BVA decision under factual findings, but much more common to remand under procedural violations.
- If a Veteran desires to appeal a CAVC decision the next step is to the Federal District Court in Washington, D.C, then to the U.S. Supreme Court.

Claims for Disability Compensation Benefits

Who is a Veteran?

- This is a more complex question than it appears.
- A Veteran is defined by the applicable regulations as:
“a person who served in the active military, naval, or air service, and who was discharged or released there from *under conditions other than dishonorable*”
- Review the clients DD-214 (DoD form) to determine discharge type. Look for multiple periods of service and multiple discharges.

5 Types of discharge

- **Honorable Discharge (HD)**
- **Discharge Under Honorable Conditions (UHC)**, also known as General Discharge
- **Discharge Under Other than Honorable Conditions (OTH)**, also known as UD
- **Bad Conduct Discharge (BCD)**—issued by sentence, special court-martial or
 - General court-martial
- **Dishonorable Discharge (DD)** or, in the case of an officer, a Dismissal

Character of Discharge Determinations/Insanity Exceptions/Upgrades

- Issues will arise in getting benefits for anyone with a UTH, BCD, or DD.
 - These can be overcome with a discharge upgrade (there are specific military attorneys that handle such issues)
- If an upgrade is not an option, one could overcome this with the insanity exception.
 - VA Allows benefits to OTH discharges if it can be shown that the Veteran was insane at the time of the event leading to discharge.

Five Elements of a Claim for Compensation

- Veteran status;
- Existence of a current disability;
- A connection between the Veterans' service and the disability;
- Degree of disability; and
- Effective date of the disability—the date from which benefits are paid
 - *See Dingess v. Nicholson*, 19 Vet.App. 473 (2006).

The 'Theory of the Case' for a Compensation Claim

- There are three key issues at hand (assuming a Veteran's status is established):
 1. Proving an in-service event or condition that caused the disability;
 2. Proving the vet is currently disabled at a compensable level;
 3. Proving there is a connection between these two (i.e. nexus).

Standard of Proof

- As likely as not—general standard
- Benefit of the Doubt
 - “Where there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the [VA] shall give the benefit of the doubt to the claimant”

In Service Event or Condition

- Use Military Personnel Records (MPRs) and Service Medical Records (SMRs/STRs)
 - SMRs are good for direct medical evidence, while MPRs are considered indirect evidence in most circumstances (examples).
 - If the SMR/MPRs do not corroborate a Veteran's testimony, lay evidence such as Veterans and buddy testimony may be used.
 - VA places great weight on the contents of the service medical and personnel records.
- Nearly anything can be construed as an in-service event/condition, ranging from shrapnel wounds to torn ligaments in games played off base—as long as it happened during a Veterans time in active duty (AD) service.
- However, the injury/disease CANNOT be the results of willful misconduct.

In Service event or Condition II

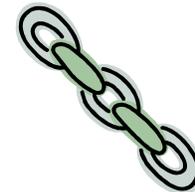
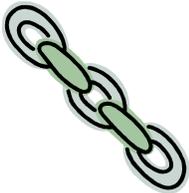
- The VA CANNOT simply deny a claim by asserting that the condition pre-existed service.
- A Veteran has the benefit of the ‘presumption of soundness’ if the VA cannot provide certain documentation detailing a pre-existing condition.

A Current Disability

- A diagnosis of a current disability is needed.
 - Get a medical opinion and diagnosis from a medical professional (an M.D. is not required though)
 - The Vet may be required to attend a C&P exam
 - There is no consistently applied standard which determines when an examination will be scheduled (examinations are usually scheduled for increased rating claims, however).
 - In some cases lay evidence might be sufficient to establish a diagnosis of a condition. *See Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007).
 - Examination worksheets for each types of C&P exam can be found online (this can be helpful since the Veteran will know what to expect <http://www.vba.va.gov/bln/21/benefits/exams/index.htm>)
- A VA Claims adjudicator will determine severity of the Vets current disability (based on the medical evidence/C&P), and rate it per the VA Schedule for Rating Disabilities
 - 38 C.F.R. Part 4

Nexus

- In most cases, one of the following 4 methods will be used to establish a link between the current disability and a service condition/injury. Remember that the standard is **‘as likely as not’**, and typically medical evidence will be needed to establish this link.



1. Direct Service Connection

- Most obvious
- Show disability is directly linked to an event that occurred during service.
 - Be wary of using lay statements, the VA is usually skeptical of these. Try not to rely SOLELY on these.
 - Can show through continuity of symptoms or through chronicity.

2. Aggravation

- The Veteran had a pre-existing condition that was made measurably worse by service (more so than natural progression).
- If Veteran shows that a condition preexisted service but was worsened while in service, burden shifts to VA to show a lack of aggravation by establishing that the increase in disability was “due to the natural progression of the disease” 38 U.S.C. § 1153

3. Secondary Service Connection

- Applies when a disability already service-connected by the VA has caused another disability (even if it did not present until after service)
 - Ex. : Veterans service connected disability in left leg caused a limp, now due to the constant limping, the right leg is partially disabled.

4. Presumptive Service Connection

- Permits service connection when a disease or illness is incurred within a specific period of time after service (even if no in-service evidence is available).
 - Chronic disease manifested within one year of discharge—includes conditions such as arteriosclerosis, arthritis, brain hemorrhage, cirrhosis of the liver, diabetes, epilepsy, leukemia, psychosis (e.g. schizophrenia), and malignant tumors (38 C.F.R. § 3.309(a)); manifestation within three years for tuberculosis and Hansen’s disease (leprosy) (38 C.F.R. §§ 3.307 (a)(3), 3,309 (a)); and manifestation within seven years for multiple sclerosis § 3.307 (a)(3).
 - The VA has designated the conditions it will accept for this (the list does change/get additions) and the applicable time periods.

Additional Presumptions

- Tropical diseases
- POWs
- Persian Gulf Veterans
- Radiation-Exposed Veterans
- ALS
- Exposure to Agent Orange
 - See the appropriate regulations for specifics.
 - For certain presumptive disabilities, such as those linked to Agent Orange, the disability does not have to manifest within any particular timeframe in order for it to be service connected.
 - Usually Veteran must have served on active duty for 90 continuous days to be eligible for presumptive SC (although this rule does not apply to POW's or AO exposed Veterans).

5. Caused by VA Treatment or Vocational Rehabilitation

- Also known as an 1151 claim.
- Such a disability will be treated as if it is service connected -38 U.S.C. § 1151.
- Requires fault (negligence, lack of proper skill, carelessness or error in judgment) or accident (unforeseeable event).

Disability Ratings

- Once service connection is granted- establishing the appropriate rating for a disability requires:
 - Determining the appropriate diagnostic code (DC) in the regulations;
 - Determining what symptoms the Veteran has;
 - Comparing the symptoms to the code.
 - Ratings schedule is supposed to reflect the average impairment in earning capacity caused by the disability. 38 C.F.R. § 4.1.
 - To determine what monetary value for each disability rating refer to the current rates online. Ex: currently a 10% rating for a Veteran without a dependent is \$123 per month, 50% is \$770 and 100% is \$2673.

Total Disability Based on Individual Unemployability TDIU or IU

- A Veteran can be granted 100% compensation when “they fail to meet the schedular rating....and is unable to secure a substantially gainful occupation”
 - VA may NOT consider age or non-service connected disabilities, but must consider all service disabilities, education and occupational history.
- Generally, a Veteran needs one service-connected disability at 60% or a combination of disabilities amounting to 70%, but there are exceptions.

Effective Date

- Generally, the effective date of an award is the first day of the month that follows the month in which the claim was received by the VA.
 - The earlier the effective date, the larger the lump sum payment to the Veteran

§3.400 General.

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. (Authority: 38 U.S.C. 5110(a))

Pension and D.I.C.

● Pensions

- Available to Veterans who served 90+ days, one of which in a designated period of war, and are now entirely disabled.
- For Veterans after Sept. 8, 1980, benefits only available if they completed 24 months of continuous active duty, or the full period for which the Veteran was called or ordered to active duty.
- Just service at a time of war is sufficient—need not be combat.
- Pension is available regardless of the cause/time of the disability—that is it is a “need based” program.

Periods of War

- **Korean Conflict:** 27 June 1950-31 January 1955
- **Vietnam Era, *serving outside Vietnam:*** 5 August 1964-7 May 1975
- **Vietnam Era, *serving in Vietnam:*** 28 February 1961-7 May 1975
- **Gulf War:** August 1990-date yet to be prescribed President or Congress
- **Afghanistan & Gulf War II:** dates yet to be prescribed by President or Congress

Pension II

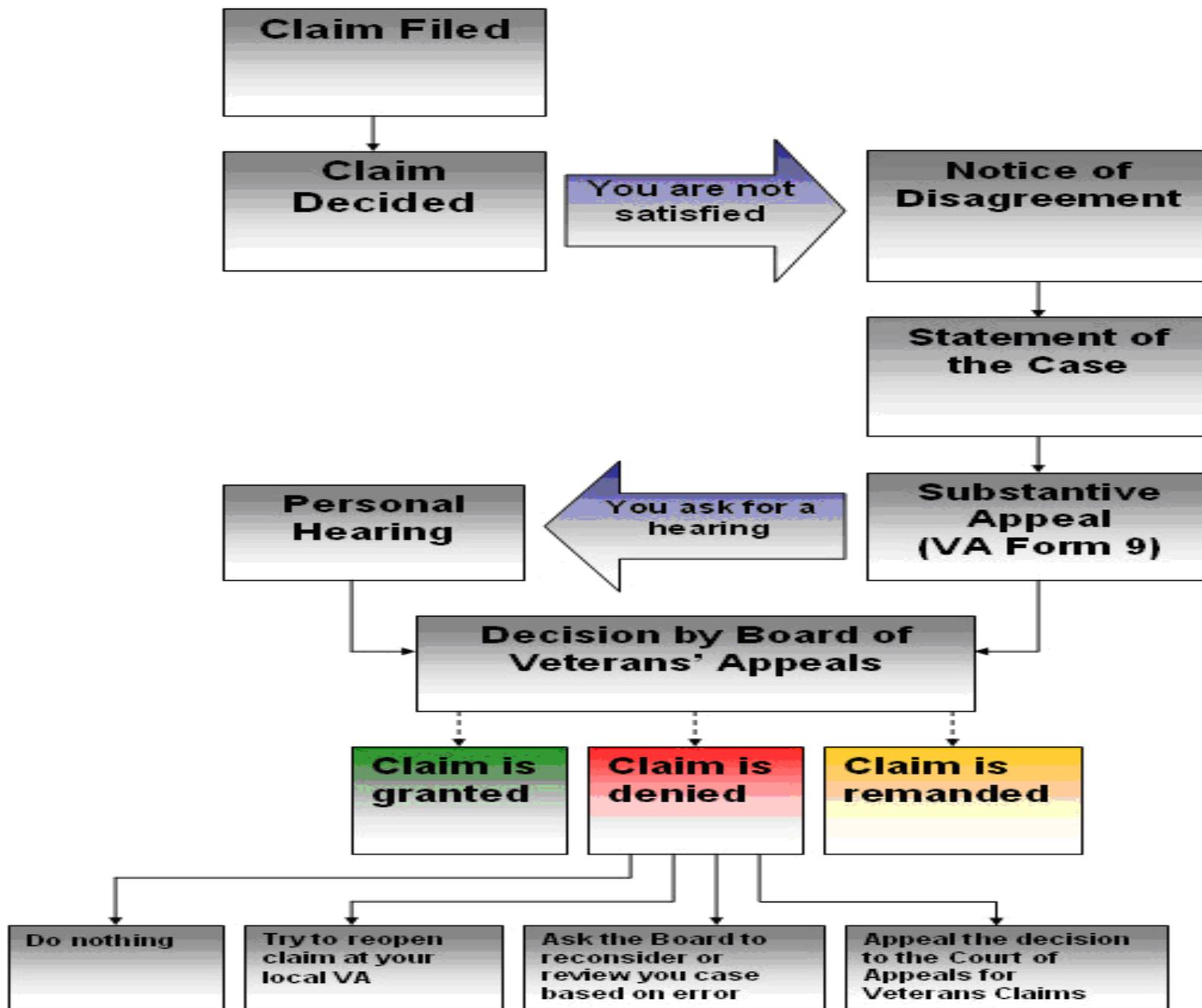
- Since pension is need based, similar to Social Security benefits, in all likelihood, a Veteran cannot receive both simultaneously.
- If Veteran receives a pension and then is later service connected—there will be a deduction/offset of previously paid amounts.

Dependency and Indemnity Compensation (D.I.C.)

- Compensation is available to survivors of Veterans:
- VA considers the Veteran's death as due to a service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death. **See 38 C.F.R. § 3.312(a).** A principal (primary) cause of death is one that singly or jointly with some other condition was the immediate or underlying cause of death or was etiologically related thereto. **See 38 C.F.R. § 3.312(b).** A contributory cause of death is one that contributed substantially or materially to death, hastened it, or aided or lent assistance to death. **See 38 C.F.R. § 3.312(c).**

DIC continued

- No time limit to file a DIC claim but if it is filed within one year of the Veteran's death and the survivor is granted benefits, retroactive payment will be paid back to the first day of the month following the month in which the Veteran died.
- To qualify as a child or surviving child for VA purpose, the child must be a biological child, adopted child, or a stepchild of the Veteran (39 C.F.R. § 3.57). The child must also be unmarried and either of a qualifying age (under the age of 18 or between the ages of 18 and 23 if pursuing a course of education), or a child who became permanently incapable of self-support before reaching the age of 18.
- Benefits paid to surviving parent of the deceased in limited circumstances. 38 C.F.R. §§ 3.250, 3.251.



Aid & Attendance- General

- **The Aid and Attendance (A&A) Pension provides benefits for veterans and surviving spouses who require the regular attendance of another person to assist in eating, bathing, dressing and undressing or taking care of the needs of nature. It also includes individuals who are blind or a patient in a nursing home because of mental or physical incapacity. Assisted care in an assisting living facility also qualifies.**
- **To qualify for A&A it needs to be established by your physician that you require daily assistance by others to dress, undress, bathing, cooking, eating, taking on or off of prosthetics, leave home etc. You DO NOT have to require assistance with all of these. There simply needs to be adequate medical evidence that you cannot function completely on your own.**
- **The A&A Pension can provide up to \$1,632 per month to a veteran, \$1,055 per month to a surviving spouse, or \$1,949 per month to a couple*.**
- **Eligibility must be proven by filing the proper Veterans Application for Pension or Compensation. Form 21-534 for surviving spouse and 21-526 for Veteran. This application will require a copy of DD-214 or separation papers, Medical Evaluation from a physician, current medical issues, net worth limitations, and net income, along with out-of-pocket Medical Expenses.**
- **A DD-214 is issued to military members upon separation from active service. DD-214s were issued to separated service members beginning in the 1950's. Generally VA will have a copy of the DD-214 if the Veteran at any time filed a claim for benefits. If not most Veterans can get one from the NPRC.**

A&A Continued

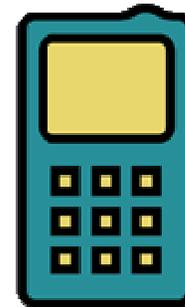
- A veteran cannot receive both Aid and Attendance and Housebound benefits at the same time.
- Run like a general pension program-the Veteran must have served at least 90 days of active duty, with at least one day served during a time of war.
- This is a tax free benefit.
- General Information on Medical Care:
 - VA does not bill Medicare and most older Veterans do have both VA healthcare and Medicare.
 - Best resource to call for information is the Chief Business office of the VHA- 1-877-222-VETS.
 - VA Form 10-10 EZ is general application for healthcare benefits.

Practice Tips

- **SEND ALL WRITTEN COMMUNICATION TO THE VA RO BY CERTIFIED MAIL WITH RETURN RECEIPTS (or personally deliver and get a stamped copy to verify receipt).**
- Always have handy a copy of the 21-22a if you are sending materials in or making calls on the Veterans behalf.

Contact Information

- Carrie Weletz- Bergmann & Moore LLC
 - 301-986-0843
 - cweletz@vetlawyers.com
 - www.vetlawyers.com



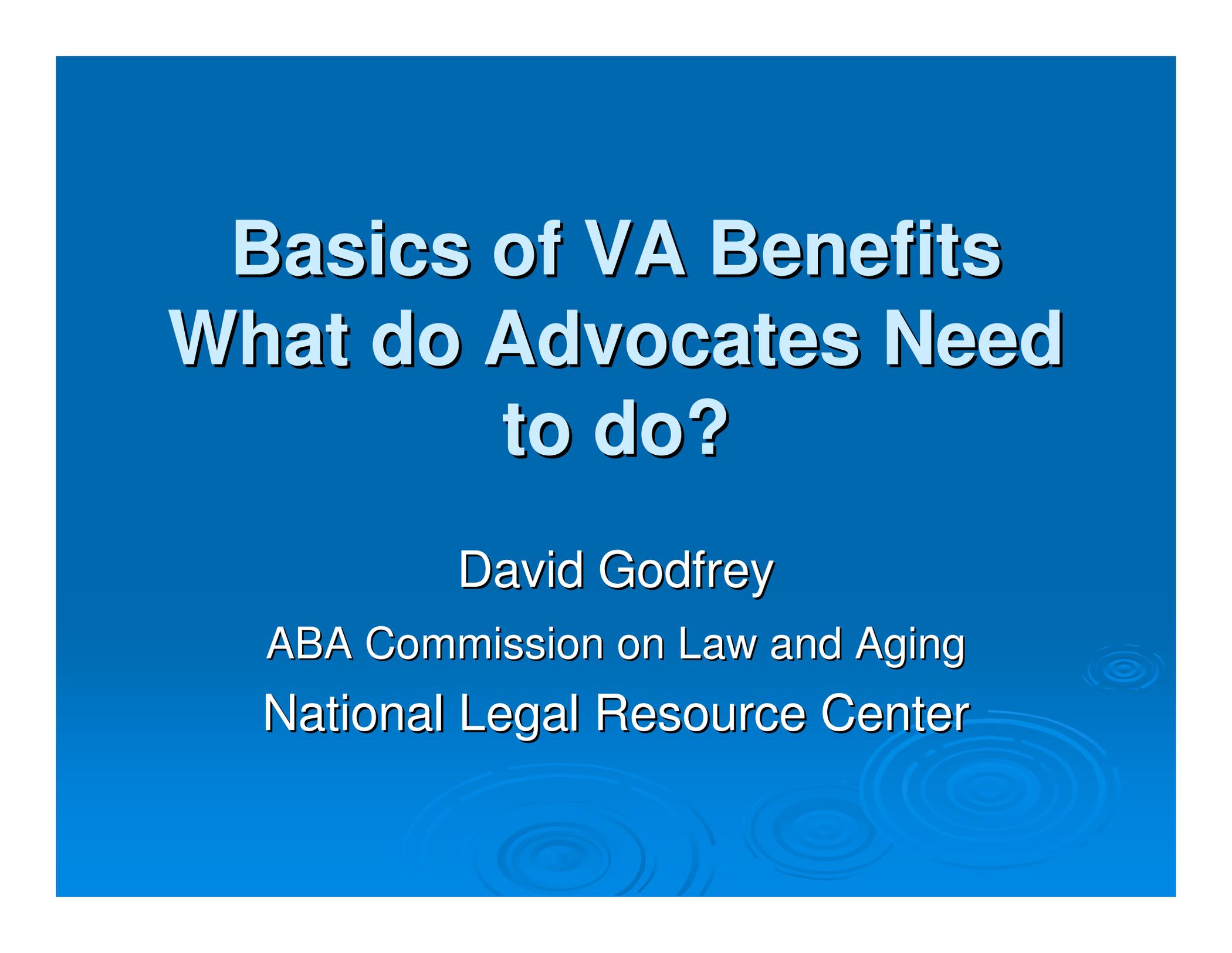
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What do Advocates Need to do?

David Godfrey

ABA Commission on Law and Aging

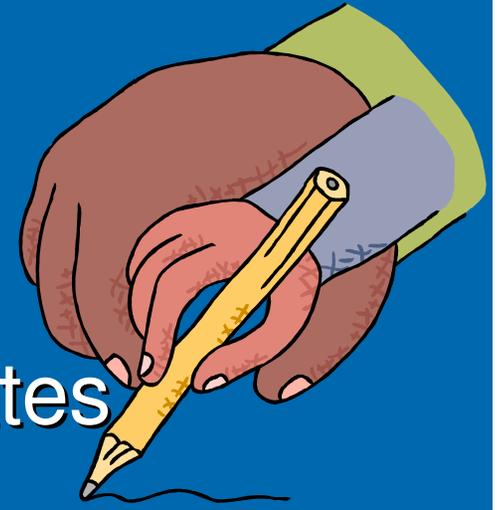
National Legal Resource Center



VA Attorney Accreditation

- Who needs it
- But I am not charging
- Why do you need this
- VA's accreditation authority regulates the conduct of individuals in assisting claimants with the preparation, presentation, and prosecution of claims for benefits and reviewing the fees and expenses charged for representation in proceedings before the Department.





- What about non-attorney advocates
 - Assisting an accredited attorney
 - Paralegals working independently
 - Separate process for non-attorney advocates
- “Without accreditation, an individual may not independently assist claimants in the preparation, presentation, and prosecution of claims for VA benefits.”

Attorney Application Process

➤ <http://www.va.gov/ogc/accreditation.asp>

- [Va Form 21a](#)

- Name
- Work and home address
- Phone numbers email
- Place of birth
- Military service history (if any)
- Employment for past five years
- Education since high school
- Admission to practice – jurisdictions, dates, membership numbers (if any)
- Criminal and disciplinary history
- Disability
- Three character references





- Initial Attorney Accreditation core training requirement
 - Three credit hours
- **A Primer on Veterans Administration Law, Practice and Procedure (DVD-ROM)**
- Product: CECA09PVAD
- Price: free while supplies last
- Order from the ABA Web Store



Post accreditation

- Annual Certification
- Core course before first annual certification
- Three hours of CLE on Veterans Benefits every two years after the initial accreditation



Free CLE Webinars on Representing Veterans Available for Download

- Establishing Service Connection on Disability Claims (Originally presented on 11-10-2010)
- Understanding Discharge Review (Originally presented on 10-27- 2010)
- A Closer Look at the Veterans Administration Schedule for Rating Disabilities (Originally presented on 1-26- 2011)
- http://www.americanbar.org/groups/law_aging/events_cle.html

More on this topic at

- http://www.americanbar.org/content/dam/aba/publications/voice_of_experience/voe_sum10_reprint.authcheckdam.pdf
- http://www.va.gov/ogc/accred_faqs.asp

Questions



Thank You

