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“Duty to Assist”: VA’s Obligation to Help Veterans Develop Claims for Benefits.

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11.0—Veterans' claims.

The U.S. Department of Veterans Affairs (VA) has a formal obligation to help veterans develop their claims for VA benefits.³ This “duty to assist” requires VA to gather information and evidence that may help support the veteran’s claim, such as service personnel records, service medical records, and VA medical records. VA must make “reasonable efforts” to obtain such information; if VA determines that the evidence does not exist or that it has exhausted reasonable efforts to locate it, then VA has a duty to notify the veteran.⁴

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³ 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(c) (2023); see VA’s DUTY TO ASSIST, <https://www.va.gov/resources/vas-duty-to-assist/> (last visited Feb. 16, 2024).

⁴ 38 U.S.C. § 5103A(b)(2)(A), (B); 38 C.F.R. § 3.159(c).

The Appeals Modernization Act and VA's Duty to Assist

VA's duty to assist has changed slightly over the years. This is due to the VA claims and appeals system changing with the Veterans Appeals Improvement and Modernization Act of 2017, also known as the Appeals Modernization Act (AMA).⁵

In the updated system, there are three avenues a veteran may choose when appealing a VA decision. These avenues are as follows:

- **Higher-Level Review:** In this avenue, a senior VA employee reviews the initial claim.⁶
- **Supplemental Claim Submission:** If a veteran chooses to submit a supplemental claim, then they will also submit new and relevant evidence for review.⁷
- **Notice of Disagreement:** The veteran must file this notice with the Board of Veterans' Appeals.⁸

Under the AMA system, VA's duty to assist applies *only* to **initial claims** and **supplemental claims**.⁹ Additionally, its duty to assist encompasses the following two actions: "duty to notify" and "requesting relevant evidence."¹⁰

VA's Duty to Notify

VA must inform veterans about what evidence is needed to prove service connection.¹¹ For example, a veteran may need to submit

⁵ VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017, PL 115-55, August 23, 2017, 131 Stat 1105.

⁶ 38 U.S.C. § 5104B(a), (c); 38 C.F.R. § 3.2601 (2023)(e),(g) (2023); see VETERANS BENEFITS ADMINISTRATION APPEALS MODERNIZATION, <https://benefits.va.gov/benefits/appeals.asp> (last visited Feb. 16, 2024).

⁷ 38 U.S.C. § 5108(a),(b); 38 C.F.R. § 3.2501(a)(1) (2023); see VETERANS BENEFITS ADMINISTRATION APPEALS MODERNIZATION, <https://benefits.va.gov/benefits/appeals.asp> (last visited Feb. 16, 2024).

⁸ 38 U.S.C. § 7105(a), (b)(a)(A); 38 C.F.R. § 20.201 (2023); see VETERANS BENEFITS ADMINISTRATION APPEALS MODERNIZATION, <https://benefits.va.gov/benefits/appeals.asp> (last visited Feb. 16, 2024).

⁹ 38 U.S.C. § 5103A(b); 38 C.F.R. § 3.159(c).

¹⁰ 38 U.S.C. § 5103; 38 C.F.R. § 3.159(b)(1) (2023) (explaining VA's duty to notify a Claimant).

¹¹ 38 U.S.C. § 5103A(b); 38 C.F.R. § 3.159(c).

documents showing a current diagnosis or in-service event; if a veteran is missing these key documents, then VA is required to tell them.

Moreover, VA must notify veterans what evidence the veteran must locate versus what VA will obtain on their behalf.¹² After VA determines that a claim may be processed, then they should inform the veteran of additional information that may help their claim be approved.¹³

Finally, if VA cannot collect the records on behalf of the veterans after reasonable efforts to do so, then they must tell the veteran that it is now the veteran's responsibility.¹⁴

VA's Duty to Request Relevant Evidence

To substantiate a claim, VA must request evidence and any other relevant documents on behalf of the veteran.¹⁵ These documents may include:

- VA medical records
- Service personnel records
- Service medical records
- A Compensation and Pension (C&P) exam
- Any other government or private records that may contain relevant information¹⁶

Veterans should provide as much information as they can. If possible, they should also identify any records that they need assistance obtaining. When VA has sufficient information to locate the required documents, then they must make a reasonable effort to secure them.¹⁷

¹² *Id.*

¹³ *Id.*

¹⁴ 38 U.S.C. § 5103A(a)(2), (b)(2); 38 C.F.R. § 3.159(d), (e) (2023).

¹⁵ 38 U.S.C. § 5103A(b); 38 C.F.R. § 3.159(c).

¹⁶ 38 U.S.C. § 5103A; 38 C.F.R. § 21.1032(b) (2023) (describing generally the categories of records VA may request).

¹⁷ 38 U.S.C. § 5103A(b); 38 C.F.R. § 3.159(c).

Additionally, VA will need to request a veteran's permission to acquire certain records, so veterans should look out for these requests.¹⁸ For example, to obtain medical documents from private physicians, VA uses Form 21-4142.

When Is Duty to Assist Forfeited?

The VA's duty to assist applies to the initial claim and supplemental claims.¹⁹ However, it does not apply to the Board of Veterans' Appeals (Board).²⁰ As such, the Board no longer has an obligation to remand decisions in order to develop additional evidence for the claim.

However, the Board may discover that a VA Regional Office made a **duty-to-assist error**.²¹ In this situation, the Board can remand the case and instruct the Regional Office to correct the error.²²

VA is also not required to assist veterans in gathering evidence in a Higher-Level Review.²³ Like the Board review process, a Higher-Level Review looks at the following:

- Whether the previous decision was adequate
- Whether the Regional Office fulfilled its duty to assist
- Whether there was any duty-to-assist error that could have led to a denial²⁴

¹⁸ 38 U.S.C. § 5103A(b); 38 C.F.R. § 3.159(c)(1)(ii) (explaining "the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.").

¹⁹ 38 U.S.C. § 5103A(b); 38 C.F.R. § 3.159(c).

²⁰ 38 U.S.C. § 5103A(e)(2); see VA'S DUTY TO ASSIST, <https://www.va.gov/resources/vas-duty-to-assist/> (last visited Feb. 16, 2024) (explaining when the Board discovers a DTA error, the Board will remand the case back to the regional office which made the error.).

²¹ 38 U.S.C. § 5103A(f)(1).

²² See *id.*

²³ VA'S DUTY TO ASSIST, <https://www.va.gov/decision-reviews/higher-level-review/> (last visited Feb. 14, 2023) (describing that if a Higher-Level Reviewer discovers an error, they will "close the review and open a new claim to gather the missing evidence[]" but will not seek the evidence themselves.).

²⁴ See 38 U.S.C. § 5104B.

Additionally, in some cases a veteran may decide to reopen a previously denied claim. For the duty to assist to become applicable, the veteran must first provide new and relevant evidence.²⁵

Duty-to-Assist Errors

As mentioned earlier, VA may commit a “duty-to-assist error.”²⁶ This occurs when VA does not make a reasonable effort in its duty to assist. Veterans may receive a notice when a duty-to-assist error is detected. This notice will say that their claim is being deferred for additional development. As mentioned in the previous section, the Board may remand a VA decision if it discovers a duty-to-assist error.

Moreover, the duty-to-assist error must be **pre-decisional**.²⁷ This means it must have occurred before the Agency of Original Jurisdiction (e.g., Regional Office) adjudication on appeal.²⁸ In short, whatever evidence is already on file before the initial decision is the only evidence that may be reviewed due to a duty-to-assist error.²⁹

For example, if a Regional Office denies a claim because it did not receive a medical opinion, and the reason it did not receive this medical opinion is because the veteran waited until *after* a rating decision to explain their service-related symptoms, then under AMA, this is not a duty-to-assist error.

²⁵ 38 U.S.C. § 5108; 38 C.F.R. § 3.2501(a)(1) (2023) (defining new evidence as “evidence not previously part of the actual record before agency adjudicator[,]” and relevant evidence as “information that tends to prove or disprove a matter at issue in a claim.”).

²⁶ VA’S DUTY TO ASSIST, <https://www.va.gov/resources/vas-duty-to-assist/> (last visited Feb. 16, 2024).

²⁷ 38 U.S.C. § 5103A(f)(2)(A); 38 C.F.R. § 3.159(c).

²⁸ 38 U.S.C. § 5103A(f)(2)(A) (“If the Board... identifies or learns of an error on the part of the [Regional Office]” regarding the duty to assist, then the Board is mandated by statute to “remand the claim to the agency of original jurisdiction for correction of such error and readjudication.”).

²⁹ *Id.*

How VA Corrects Duty-to-Assist Errors

A rating decision may be challenged if VA gives an inadequate explanation for failing to help a veteran collect evidence for their claim.³⁰ A Higher-Level Review senior VA employee or the Board can correct these errors by instructing the Regional Office or the Agency of Original Jurisdiction (AOJ) to secure an advisory medical opinion or additional evidence.³¹

However, the appeal is not automatically returned to the Board following development if the Board remands an appeal to correct a duty-to-assist error. The AOJ will instead readjudicate the pending appeal.³² A claimant may, within one year of the AOJ's readjudication, file another Notice of Disagreement.³³ Only in this situation will the appeal be returned to the Board.

The Legacy System

New appeals are exclusively managed under the AMA system, while appeals concerning VA decisions made prior to February 19, 2019, may continue under the legacy VA appeals system.³⁴

Veterans can check the status of their claim via VA to ascertain whether their appeal is proceeding under the legacy or AMA system.³⁵

³⁰ 38 U.S.C. § 5103A(f)(1).

³¹ 38 U.S.C. § 5103A(f)(2)(A), (B).

³² *See id.* (indicating that when a DTA error is discovered, the issue is returned to the AOJ for new adjudication rather than providing that the issue be automatically returned to the higher authority).

³³ 38 U.S.C. § 7105; *see* 38 C.F.R. § 19.21 (2023).

³⁴ VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017, PL 115-55, August 23, 2017, 131 Stat 1105; 38 C.F.R. § 3.2400 (2023); VA DECISION REVIEWS AND APPEALS, <https://www.va.gov/decision-reviews/> (last visited Feb. 16, 2024).

³⁵ VA DECISION REVIEWS AND APPEALS, <https://www.va.gov/decision-reviews/> (last visited Feb. 16, 2024) (providing direct links to Veterans to check the status of their Legacy or AMA appeals).

Additionally, veterans using the legacy system have the option to switch to the new system at specific stages in the process.³⁶

Duty-to-Assist: Legacy vs. AMA

Both the legacy and the reformed AMA system require VA to assist veterans in the development of their claims. However, there are a few key differences between these systems of which veterans should be aware.

One of the main differences with the legacy system is that a veteran is allowed to submit information about their symptoms *after* the rating decision in their Notice of Disagreement or other submissions.³⁷ The Board, to comply with the duty to assist, will then remand the case.³⁸ Under the AMA system, this duty to assist only applies during the initial and supplemental claims.³⁹

Under the legacy system, independent medical opinions (IMOs) are allowed during the Board review.⁴⁰ Therefore, if the Board identifies unanswered medical questions or finds previous examinations insufficient, then it may seek an IMO from a physician specializing in the area relevant to the ongoing appeal.⁴¹ These medical opinions do not require the veteran's attendance at an examination.⁴² Instead, they

³⁶ 38 U.S.C. § 501(a); 38 C.F.R. § 3.2400; see MANAGE A LEGACY VA APPEAL, <https://www.va.gov/decision-reviews/legacy-appeals/> (last accessed Feb. 16, 2024).

³⁷ 38 U.S.C. § 501; 38 C.F.R. § 3.156(b).

³⁸ 38 U.S.C. § 7105(e)(1) (explaining that new evidence received by VA during or after filing of a substantive appeal will be considered by the Board unless the claimant “requests in writing that the [AOJ] initially review such evidence”).

³⁹ 38 U.S.C. § 5103A(b); 38 C.F.R. § 3.159(c).

⁴⁰ 38 U.S.C. § 7109.

⁴¹ See *id.*

⁴² Kaitlyn Degnan, *Independent Private Medical Opinion for Veterans Claims: Do They Help?*, CCK Law, <https://cck-law.com/blog/independent-medical-opinions-for-veterans-claims-do-they-help/> (last visited Feb. 16, 2024) (explaining IMOs requested by the Board are not medical examinations that a Veteran is required to attend).

are reviews of the existing evidence on record. However, IMOs cannot be requested at the Board level within the AMA system.⁴³

Conclusion

The duty to assist is an attempt to put as much as possible of the development burden on VA. However, it is important for veterans to monitor the process, be conscious of potential errors and delays, and respond promptly when VA deems its duty to assist to have expired.

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⁴³ 84 FR 138, 145. (Jan. 18, 2019) (“The AMA repealed 38 U.S.C. 7109, [] IMO’s. This repeal removed the ability for the Board to request IMOs.”).

⁴⁴ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

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