

How to Best Deal with the New NOD Form

Overview

- We will discuss:
 - The old and new rules regarding submitting a Notice of Disagreement (NOD)
 - Advice on completing the NOD form
 - Reconsideration by the Regional Office (RO)

Regulatory Changes to the Appeals Process

- In addition to VA's regulation changes as to how claimants are able to initiate a claim, the VA also made recent changes to the process for initiating an appeal
 - *See* 75 Fed. Reg. 57,660-98 (Sept. 25, 2014)

The Old Rules (Prior to March 24, 2015)

- Requirements to constitute an NOD
 - A written communication from the claimant or his or her representative;
 - An expression of dissatisfaction or disagreement with the RO's decision; and
 - A desire for appellate review
- Claimants were not obligated to file an NOD on a particular form

The New Rules (Effective March 24, 2015)

- If the RO provided a VA Form 21-0958 (Notice of Disagreement) with the copy of its decision
 - The claimant **MUST** use the 21-0958 to file an NOD (38 C.F.R. § 20.201(a)(1))
- If the RO did not provide a copy of the 21-0958 with its decision
 - The old rules apply and the claimant can submit an NOD on any form or piece of paper as long as it expresses disagreement with the RO's decision and a desire for appellate review (38 C.F.R. § 20.201(b))

The New Rules (Effective March 24, 2015)

- Note: according to the Manual M21-MR, Part I, 5.B.3.a (last updated July 24, 2015), these new rules DO NOT apply if the *decision notice letter* was sent prior to March 24, 2015; thus . . .
 - For a rating decision dated 3/20/15 and notice letter dated 3/23/15: old rules apply
 - For a rating decision dated 3/23/15 and notice letter dated 3/24/15: new rules apply

The New Rules (Effective March 24, 2015)

- The claimant still has one year from the date the AOJ mailed its decision to file a timely NOD (38 C.F.R. § 20.302(a))

Presumption Form was Provided

- As long as there is any indication whatsoever in the claimant's file that the NOD form was sent with the RO's decision, there is a presumption that the form was provided

Advice on Completing the VA Form 21-0958

- While claimant is not required to use the Form 21-0958 if the RO did not provide him or her with a copy of this form, NVLSP encourages advocates to always use this form when filing an NOD (even when it is not required)

- Due to the before mentioned presumption, it is difficult to prove a negative (that the form was not provided)
 - Save your time and energy for more important fights and just use the form!

Advice on Completing the VA Form 21-0958

- As with filing a complete claim, advocates should be heavily involved in the completion of the NOD form and should always review the completed NOD before it is submitted to the VA

Advice on Completing the VA Form 21-0958

- Question 8 on the form asks whether the claimant would like to receive a telephone call from a representative at his or her local RO regarding the NOD
 - Advocates should check the “no” box for this question and state “Please call my representative”
 - It is recommended that claimants do not speak with RO employees about their claims without their representative present

Advice on Completing the VA Form 21-0958

- Question 10 on the form asks the claimant to list the specific issue of disagreement, the area of disagreement, and if the area of disagreement involves the evaluation of a veteran's disability, the percentage evaluation sought
- In Column C of this question which asks for the percentage evaluation sought, advocates should write: "the maximum evaluation available under the law"

Advice on Completing the VA Form 21-0958

- If a claimant puts an actual percentage amount in Column C (10%, 20%, 30%, etc.), he or she runs the risk of underevaluating the severity of their condition and thus, not receiving their full entitlement in benefits

Advice on Completing the VA Form 21-0958

- Question 11A allows the claimant to provide an explanation for their disagreement with the AOJ's decision
- NVLSP recommends that the advocate write “please see attached brief” in response to this question and then attach a brief on letterhead or a VA Form 21-4138. If the advocate does not wish to attach a brief, he or she should at least use the space under Question 11A to express the claimant's arguments on appeal.

Advice on Completing the VA Form 21-0958

- Completion of 11A is not mandatory, but highly recommended.
- The brief or statement should include:
 - A full explanation as to why the RO's decision was incorrect
 - The errors of fact or law committed by the RO
 - The additional supportive evidence the advocate is submitting with the NOD form or will submit in the future

Advice on Completing the VA Form 21-0958

- If the claimant or representative is attaching any pages to the Form 21-0958, he or she must check the “yes” box for Question 11B and provide the number of additional pages that are being attached

What Constitutes a Complete Appeals Form?

- Information identifying the claimant
- The claim that the form applies to

What Constitutes a Complete Appeals Form? (continued)

- Any information necessary to identify the specific nature of the disagreement (ex. for compensation claims, is the disagreement over SC, a rating, or an earlier effective date?)
- Claimant (or representative's) signature
 - 38 C.F.R. § 19.24(b)(2)

What if you Submit an Incomplete Appeals Form?

- If a claimant submits an incomplete appeals form, the VA will request clarification from the claimant
 - 38 C.F.R. § 19.24(b)(1)

What if you Submit an Incomplete Appeals Form?

- After the VA sends its request for clarification of the NOD form, the claimant must file a completed version of the correct form within
 - 60 days from the VA's request for clarification; or
 - 1 year from the date the RO mailed its rating decision
 - Whichever is later
- 38 C.F.R. § 19.24(b)(3)

What if you Submit an Incomplete Appeals Form?

- In practice, advocates should never submit an incomplete NOD form
- The one exception is if a claimant comes to you on Day 364 or 365 of the appeal period and you do not have enough time to complete the form
 - In this case, submitting an incomplete NOD form will buy you some extra time

Reconsideration at the RO

- After a claim has been denied by the RO, VA employees love to suggest to claimants that they request reconsideration of the decision (instead of filing an NOD)
- However, consider the following example:

Reconsideration at the RO

- April 1, 2015: vet's claim for PTSD is denied
- May 1, 2015: vet requests reconsideration of the decision following the advice of an RO employee
- April 15, 2016: vet is informed that his claim is still denied after reconsideration

Reconsideration at the RO

- In this scenario, the veteran's claim was not reconsidered by the RO until the one year appeal period had expired
- Because the vet did not file an NOD, the vet could not appeal the April 2015 rating decision after his request for reconsideration was denied

Reconsideration at the RO

- Requesting reconsideration at the RO level *does not* preserve a claimant's right to appeal to the Board of Veterans' Appeals
- Therefore, if you do request reconsideration by the RO, you must be very mindful of when the one year period to file an NOD expires
- If the one year period is about to expire and the RO has not reconsidered and fully granted the claim, file an NOD

Questions?