

# How to Handle Informal and Inferred Claims that were Submitted Prior to the Regulation Change

# Overview

- We will discuss:
  - The VA's changing policy regarding inferred claims
  - Handling informal and inferred claims submitted prior to 3/24/15
    - Including inferred claims that are ready to service-connect and rate and claims that need additional evidentiary development
  - Handling informal and inferred claims submitted on or after 3/24/15

# The VA's Changing Policy Regarding Inferred Claims

- Over the years, the VA has changed its policy from what was once a liberal approach to inferred claims to the current policy which has practically whittled away the concept of inferred claims altogether

# The VA's Changing Policy Regarding Inferred Claims

- From March 28, 1985 up until the early 1990s, the *VA Adjudication Procedures Manual M21-1* Section 46.02 stated: “All disabilities claimed will be given consideration as to service connection and [be coded as a disability rating on VA Form 21-6796.] [Any additional] disabilities [noted] will [be] coded, except:
  - Acute transitory conditions that leave no residuals
  - Noncompensable residuals of venereal disease

# The VA's Changing Policy Regarding Inferred Claims

- Disabilities noted only on the induction examination, or conditions recorded by history only
- Disabilities found by authorization to have not been incurred ‘in line of duty’”

# The VA's Changing Policy Regarding Inferred Claims

- Before the VA's regulation change, the *VA Adjudication Procedures Manual M21-MR* stated:
  - “When preparing a rating decision, the Rating Veterans Service Representative (RVSR) must recognize, develop, clarify and/or decide all issues and claims, whether they are expressly claimed issues, reasonably raised claims, or unclaimed issues and ancillary benefits.”
- Part III, subpart iv, 6.B.2.a (last updated Aug. 3, 2011)

# The VA's Changing Policy Regarding Inferred Claims

- The *Manual M21-MR* also noted that:
  - “A claim, whether formal or informal, must show an intent to file for a benefit and identify the benefit sought.”
- Part III, subpart iv, 6.B.2.a (last updated Aug. 3, 2011)

# The VA's Changing Policy Regarding Inferred Claims

- After the regulation change, the *Manual M21-MR* still said the VA must decide all claims, “whether they are expressly claimed, reasonably raised, or unclaimed subordinate issues and ancillary benefits”
- The VA, however, provided the following notes:
  - “A claim is defined as the submission of a Department of Veterans Affairs (VA) prescribed application, whether paper or electronic, that identifies the Veteran or claimant, if not the Veteran, as well as the specific benefit sought.”

# The VA's Changing Policy Regarding Inferred Claims

- VA notes continued:
  - “Reasonably raised issues encompass additional benefits for complications of the claimed condition, including those identified by the rating criteria for that condition in 38 CFR Part 4”

# The VA's Changing Policy Regarding Inferred Claims

- VA notes continued:
  - “VA will put at issue for adjudication any ancillary benefit(s) or other unclaimed subordinate issues not expressly raised by the claimant that are related and arise as a result of the adjudication of a claimed issue”
- *Manual M21-MR*, Part III, subpart iv, 6.B.1.a (last updated June 30, 2015)

## Informal Claims Filed Prior to 3/24/15

- The *Manual M21-1MR* explicitly states that the VA should still recognize an informal claim if it was received prior to March 24, 2015 (Part III, subpart ii, 2.C.1.a (last updated July 15, 2015))

## Inferred Claims Filed Prior to 3/24/15

- In contrast, neither the *Manual M21-1MR* nor the new regulations discuss whether an inferred claim should be adjudicated if the claim was filed prior to March 24, 2015
- While the VA has not explicitly addressed how it will handle inferred claims that were received prior to 3/24/15, NVLSP thinks advocates should argue that the VA is obligated to treat inferred claims the way it treats informal claims

# Inferred Claims Filed Prior to 3/24/15

## ▫ Example

- March 23, 2015: veteran submitted claim for tinnitus
- July 2015: while adjudicating the tinnitus claim, the VA noticed that the veteran's service treatment records showed that both of his legs were amputated in service
- Since this claim was submitted prior to March 24, 2015, the old VA rules and directives should apply and the VA should treat the veteran's legs condition as an inferred claim and grant service connection for his amputated legs

# Informal Claims and Inferred Claims Filed Prior to March 24, 2015

- Advocates need to be very cautious of situations like the previous example because it is likely that some VA adjudicators will fail to recognize (and fail to adjudicate) informal or inferred claims that were received prior to March 24, 2015
- Therefore, file a formal claim as soon as possible.
  - If the RO fails to grant the correct effective date, that decision should be appealed to the Board of Veterans' Appeals.

# Two Major Types of Inferred Claims

- Claims that are ready to service-connect and rate without any additional evidence
- Claims that are reasonably raised by the evidence of record, but need more evidence to service-connect and/or rate

# Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

## ▫ Example

- 2007: veteran was discharged
- April 2010: veteran filed a claim for the residuals of a wound to her right arm
- September 2010: RO granted service connection for the scar, but ignored the fact that the veteran's service treatment records showed that she lost both of her legs in-service

# Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

- **Example (continued)**
  - April 2015: veteran filed a claim for her left elbow condition
  - July 2015: RO denied the claim for her left elbow condition and did not address the veteran's in-service loss of both legs

# Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

- What should the advocate do?

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- What should the advocate do?
  - File a claim stating that the September 2010 rating decision should be revised based on clear and unmistakable error (CUE)
  - Under the regulations and directives that were in effect at the time of the September 2010 rating decision, the VA had an obligation to recognize the veteran's service treatment records as an inferred claim for her amputated legs

# Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

- What should the advocate do? (continued)
  - The evidence was clear that but for the VA's failure to recognize these records as an inferred claim, she would have been granted service connection
  - Thus, the VA should grant the CUE claim and assign an effective date of April 2010 (the date of the veteran's scar claim) for her bilateral leg condition

# Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

## ▫ Example

- 2007: veteran discharged from service
- April 2010: veteran applied for service connection for a left knee condition
- September 2010: RO granted service connection for her left knee, assigning a 10% rating

# Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

## ▫ Example (continued)

- However, at the time this claim was adjudicated, the veteran's claims file included a statement from a doctor that said he thought the veteran's left knee condition may have caused the veteran's current back condition
- The VA never developed or adjudicated a back condition
- April 2015: veteran applied for an increased rating for her left knee condition

## Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- What should the advocate do when he or she realizes that the VA never developed the claim for the veteran's back condition?

## Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- What should the advocate do when he or she realizes that the VA never developed the claim for the veteran's back condition? (NVLSP recommends following a two-step process)
  - Step 1: file a claim for a back condition (either by immediately submitting an intent to file a claim followed by a complete claim within one year or by immediately submitting a complete claim on a VA Form 21-526EZ)

# Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- It is recommended that advocates do not make any effective date arguments until after the VA adjudicates the claim. The reason for this is that in most instances, any time the issue of retroactive benefits is raised, the advocate better be prepared for a fight from the VA, and this could ultimately hurt the veteran's chances of success on the basic claim.

# Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- Step 2: if the VA grants the claim but does not award April 2010 as the effective date, the advocate should file an NOD arguing that the veteran is entitled to an earlier effective date for her back condition because the inferred claim has been pending since April 2010

# Informal Claims Submitted On or After March 24, 2015

- If a claimant or representative “indicates a desire to file for benefits” through a communication or action to the VA (such as a letter, e-mail, etc.) that does not meet the standards of a complete claim or of an intent to file a claim, the VA will notify the claimant and his or her representative of the information necessary to complete the application form. *See* 38 C.F.R. § 3.155(a).
- However, this communication will **not** preserve an effective date for the claim

# Inferred Claims Filed On or After March 24, 2015

- For inferred claims submitted after the change in regulations, the key question for advocates to ask is:
  - Is the inferred claim **related** to the specific condition claimed by the claimant?

# Inferred Claims Filed On or After March 24, 2015

- If the inferred claim is related to the specific condition claimed, then the VA should still adjudicate the inferred claim (even under the new rules)
- If the inferred claim is not related to the specific condition claimed, then the VA has no obligation to do anything

# Inferred Claims Filed On or After March 24, 2015

- Example 1
  - Vet files service connection claim for hearing loss
  - Vet's STRs show complaints of tinnitus and VA treatment records show that the vet still complains of tinnitus (even though he did not formally file a claim for this condition)
  - *In this case, tinnitus is related to the vet's express claim of hearing loss so the VA should adjudicate a claim for tinnitus even though it was not specifically claimed*

# Inferred Claims Filed On or After March 24, 2015

- Example 2
  - Vet files service connection claim for hearing loss
  - While reviewing the vet's claims file, the VA notices both of the vet's legs were amputated in service
  - ***In most cases, the vet's amputated legs will not be considered related to his or her hearing loss, so the VA will not have to adjudicate the inferred claim***

## Showing that an Inferred Claim is Related to the Specific Condition Claimed

- If the inferred issue was generated by the same event that caused the condition that is the subject of the specific claim, advocates should argue the inferred issue is related to the specific claim
  - In the prior example, if the vet's hearing loss and amputated legs were both caused by the same explosion, you should argue that his amputated legs are related to his claim for hearing loss

## Showing that an Inferred Claim is Related to the Specific Condition Claimed

- If the condition being inferred is arguably part of the specific condition claimed, then the VA should adjudicate the inferred condition as well
- Conditions secondary to the specific condition claimed should be adjudicated by the VA

## Advocacy Advice for Inferred Claims Filed on or after March 24, 2015

- If an advocate spots an inferred claim that is associated with a claim that was filed on or after 3/24/15, the advocate should file an ITF or a complete claim for the inferred condition immediately
- If the Regional Office assigns the incorrect effective date, appeal to the Board of Veterans' Appeals

# Advocacy Advice for Inferred Claims Filed on or after March 24, 2015

- For example:
  - April 2015: vet filed SC claim for hearing loss
  - July 2015: advocate noticed complaints of tinnitus in vet's STRs and immediately files an express claim for tinnitus
  - If the RO assigns an effective date of July 2015 for the vet's tinnitus, appeal to the BVA and argue that the vet's tinnitus is related to his hearing loss claim and thus, the effective date should be April 2015, because the claim has been pending since then

# Questions?