

NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

How To Ensure VA Assigns the Correct Effective Date for Benefits

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Presenter:
Alexis Ivory






- * Senior Staff Attorney
NVLSP Training Dep't
Previously served as
Counsel to BVA
- * Helped develop NVLSP's VA
Benefits Identifier App
- * Veterans Benefits Manual
author

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To Do


- * General Rules for Initial Claims
- * Intent to File Exceptions
- * Receipt of Service Dep't Records After Decision
- * Secondary Service Connection Issues
- * Increased Rating Claims
- * TDIU Claims
- * Pact Act Claims
- * Agent Orange Claims
- * Unadjudicated Claims



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WHAT IS THE EFFECTIVE DATE?




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What is an “Effective Date”?

- * The effective date is the date from which VA benefits are paid



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General Rules for Service Connection Claims

*** Unless specifically provided otherwise, the effective date of an award based on a claim for service connection shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore**

*** 38 U.S.C. § 5110**

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General Rules for Service Connection Claims

*** This means that the effective date of an award of SC disability compensation based on an initial claim is the LATER of:**

- * The date of receipt of the original claim, or**
- * The date the entitlement arose**

*** 38 C.F.R. § 3.400**


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General Rules for Service Connection Claims


*** Date of Claim: The date VA receives the claim, physically or electronically, not the date the Vet signed or mailed the claim**

*** Check the date stamp / electronic proof of receipt!**



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General Rules for Service Connection Claims



*** Exception: Intent to File (ITF).** It allows a claimant to protect the effective date by filing a complete initial or supplemental claim within one year of the ITF


*** 38 C.F.R. § 3.155**

*** More to come.....**



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General Rules for Service Connection Claims




*** Exception: Claims received within one year of separation from service** are treated as if received the day following separation

*** 38 U.S.C. § 5110(b)(1); 38 C.F.R. § 3.400(b)(2)**

*** In 2023, the Supreme Court addressed whether section 5110(b)(1) is subject to equitable tolling, such that VA could treat an application filed more than one year after separation as being filed within one year of separation, thus permitting a Vet to potentially recover decades' worth of retroactive benefits**

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Arellano v. McDonough 598 U.S. 1 (2023)




*** Adolfo Arellano served in the Navy from 1977 until his honorable discharge in 1981**

*** In June 2011, he applied for SC disability comp for his psychiatric disorders**

*** RO granted SC for schizoaffective disorder, bipolar type, with PTSD, finding they were related to trauma suffered while serving on an aircraft carrier that collided with another ship**


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Arellano v. McDonough

- * VA assigned an effective date of 6/3/2011, the date it received his claim
- * Vet appealed to BVA, arguing
 - * While he did not submit his application until 2011, the RO should have equitably tolled the one-year time deadline to make his award effective the day after his discharge from service in 1981, or at the latest, to 1/1/1982
 - * He had been too ill to know that he could apply for SC


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Arellano v. McDonough

- * BVA denied Vet’s request for equitable tolling and CAVC affirmed
- * En banc Federal Circuit affirmed CAVC’s judgment but divided equally on the rationale
 - * Half the Court maintained that § 5110(b)(1) was not subject to equitable tolling
 - * The other half reasoned that § 5110(b)(1) was subject to equitable tolling, but tolling was unwarranted in this case


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Arellano v. McDonough

- * Supreme Court started with the presumption that federal statutes of limitations are subject to equitable tolling
- * But, the presumption “can be rebutted, and if equitable tolling is inconsistent with the statutory scheme, courts cannot stop the clock for even the most deserving plaintiff”
- * There was a good reason to conclude that Congress didn’t want the equitable tolling doctrine to apply here: It would depart from the terms that Congress specifically provided
- * The Supreme Court held that § 5110(b)(1) was not subject to equitable tolling

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General Rules for Service Connection Claims

*** Date Entitlement Arose: The initial date the Vet satisfied the substantive criteria for SC. Two considerations:**

- The date the disability first manifested
 - First symptoms that can later be linked to the current disability


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General Rules for Service Connection Claims

- The date entitlement to benefits was authorized by law and regulation:
 - * Ex: Date of a change in law**
 - If the effective date of a favorable VA regulation is July 1, 2025, then the effective date of any benefits granted due to that regulation can't be earlier than July 1, 2025, even if VA received the claim before July 1, 2025
 - * Unless reg (or statute) provided for an earlier effective date**

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General Rules for Service Connection Claims

*** Date of a change in law**

- If Vet satisfied criteria for SC on the effective date of the change in law, but files claim for SC after the effective date of the change, effective date can be up to one year earlier than the date of claim, but in no event earlier than the effective date of the change
- * 38 U.S.C. § 5110(g); 38 C.F.R. § 3.114(a)**


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General Rules for Service Connection Claims

- * **Date of a change in law (example # 1)**
 - * **12/2016: Vet with qualifying service at Camp Lejeune in 1980 diagnosed with kidney cancer**
 - * **3/14/2017: Effective date of Camp Lejeune presumptive SC regulation, which includes kidney cancer**
 - * **If Vet filed claim for SC for kidney cancer on:**
 - * **10/15/2017, effective date for SC = 3/14/2017**
 - * **6/15/2018, effective date for SC = 6/15/2017**


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General Rules for Service Connection Claims

- * **Date of a change in law (example # 2)**
 - * **3/14/2017: Effective date of Camp Lejeune presumptive SC regulation, which includes kidney cancer**
 - * **5/1/2017: Vet with qualifying service at Camp Lejeune diagnosed with kidney cancer**
 - * **10/15/2017: Vet files claim for SC for kidney cancer**
 - * **Effective date for SC = 10/15/2017**

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General Rules for DIC Claims

- * **DIC claim filed w/in one year of Vet's death**
 - * **Effective Date = First day of month of Vet's death**
- * **DIC claim filed more than one year after Vet's death**
 - * **Effective Date = Date of claim**
- * **38 C.F.R. § 3.400(c)(2)**

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General Rules for DIC Claims



- * **Application for SSA survivor benefits is also considered an application for VA DIC benefits**
- * **SSA should transmit application and supporting documents to VA, but not always done**
- * **May support EED for DIC if claimant filed earlier SSA survivor benefits claim**
 - * **Notify VA about SSA claim and approx. date filed**
 - * **VA must attempt to obtain docs from SSA, but submit copies in claimant's possession**
- * **38 U.S.C. § 5105; 38 C.F.R. § 3.153**

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General Rules for Clear & Unmistakable Error



- * **A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error.**

* **38 C.F.R. §§ 3.105(a)(1)(i); 20.1403(a)**

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General Rules for Clear & Unmistakable Error




- * **With a CUE claim, the claimant is asking the RO or the BVA to revise a prior final decision because a clear and unmistakable error was made, based on the law and record at the time the earlier decision**
- * **CUE claims are difficult to prove, but when a CUE claim is granted, the effective date awarded is the date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision**

* **38 C.F.R. §§ 3.105(a)(1)(ii), 3.400(k)**

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CUE Effective Date Example

*** Example:**

- * 9/1995: Vet filed SC claim for a back condition
- * 12/1995: RO denied claim
- * 5/2025: Vet seeks revision of 12/1995 decision based on CUE
- * 8/2025: RO finds CUE in 1995 decision
 - * Effective date for SC benefits is 9/1995, entitling Vet to nearly 30 years of retro benefits

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INTENT TO FILE & SUPPLEMENTAL CLAIMS




Department of Veterans Affairs

**INTENT TO FILE A CLAIM FOR COMPENSATION AND/OR PENSION,
OR SURVIVORS PENSION AND/OR DIC**

INSTRUCTIONS: Before completing this form, read the Privacy Act and Respondent Burden on page 2. This form is used to notify VA of your intent to file for the general benefit(s). For more information, contact us online through ASK VA: <https://ask.va.gov/>. Ask us a question online or call us toll-free at 1-800-827-1000 (TTY: 711). VA forms are available at www.va.gov/vaforms.


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Intent to File

- * **Intent to File (ITF) allows a claimant to protect the effective date by filing a complete initial or supplemental claim within one year of the ITF**
- * This applies to first claim for type of benefit identified on ITF that is filed after the ITF
- * 38 C.F.R. § 3.155

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Hypo

- * 10/15/2021: Vet files VA Form 21-526EZ, claiming SC for tremors
- * 1/18/2022: RO denies Vet SC for tremors
- * 12/22/2022: Vet files ITF
- * 1/6/2023: Vet files Supplemental Claim for SC for tremors
- * 8/2023: Rating Decision denies SC for tremors of the bilateral hands

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Hypo

- * 12/13/2023: Vet files
 - * VA Form 20-0996 for HLR of 8/2023 rating decision
 - * VA Form 21-526EZ for increased rating for SC PTSD
- * 4/11/2024: HLR grants SC for Parkinsonism (claimed as tremors), effective 10/15/2021
- * 5/13/2024: RO grants higher 70% rating for PTSD, effective 12/13/2023
- * Are these effective dates correct?

What do you think?

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**Military-Veterans Advocacy (MVA) v.
McDonough,**
7 F.4th 1110 (Fed. Cir. 2021)



* **Fed. Circuit addressed whether the preamble to 38 C.F.R. § 3.155, which excludes supplemental claims from the ITF framework, was consistent with the AMA**

* **§ 3.155 How to file a claim.**

* The following paragraphs describe the manner and methods in which a claim can be initiated and filed. The provisions of this section are applicable to all claims governed by part 3, with the exception that **paragraph (b) of this section, regarding intent to file a claim, does not apply to supplemental claims.**

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MVA v. McDonough



* **VA informed the Court that it planned to propose a regulation to amend § 3.155 to apply the ITF rules to 38 U.S.C. § 5104C(b) supplemental claims (those filed more than 1 year after the previous denial) and asked Fed. Cir. to voluntarily remand the case for VA to complete its rulemaking process**

* **The court denied that request and held that the preamble to § 3.155 was invalid and that ITFs apply to supplemental claims**

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MVA v. McDonough




* **In its holding, the Fed Circuit didn't distinguish between 38 U.S.C. § 5104C(a) supplemental claims (those filed within 1 year of the prior decision and which serve to continuously pursue the denied claim) and 38 U.S.C. § 5104C(b) supplemental claims (those filed more than 1 year after the prior decision and start a new claim stream)**

* **But, its analysis indicated that the holding was probably only meant to apply to § 5104C(b) supplemental claims**

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MVA v. McDonough


*** VA interprets MVA to apply to BOTH types of supplemental claims**

- Manual M21-1, X.II.2.A.2.b, c (change date July 3, 2024)


*** So, ITF can give claimant an extra year to continuously pursue a claim, if claimant:**

- Submits an ITF within one year of the most recent decision denying the claim, and
- Within one year of filing the ITF, files a supplemental claim that is covered by the ITF, even if the supplemental claim is filed after the one-year period following notice of the decision

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MVA v. McDonough




*** But, this interpretation hurts claimants who:**

- File an ITF, then
- File a § 5104C(a) supplemental claim within one year of the prior denial
 - * ITF is not needed to extend the window for continuously pursuing this claim
- Then file an initial or § 5104C(b) supplemental claim within one year of the ITF
 - * ITF would have served as the claim date for this claim, if it hadn't already been associated with the § 5104C(a) supplemental claim

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Back to the Hypo



*** Under VA's interpretation of MVA, the effective date of 12/13/2023 for the 70% rating for PTSD is correct**

- The 12/22/2022 ITF had already been applied to the 1/6/2023 supplemental claim, which was the first claim filed after submission of the ITF
- According to VA, it doesn't matter that the ITF didn't impact the effective date of the supplemental claim, which was filed within 1 year of the prior denial of SC for tremors and served to continuously pursue that claim

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Advocacy Advice




- * Check whether there is an open ITF when filing any type of supplemental (or initial) claim
 - * If so, be aware that VA will associate the next supplemental or initial claim with the ITF (if filed within 1 year of the ITF)
 - * Consider delaying the filing of a § 5104C(a) supplemental claim until after the filing of an initial or § 5104C(b) supplemental claim, if it would be more beneficial to have the ITF associated with one of the latter types of claims
 - * But also don't miss the 1 year deadline for continuous pursuit through the § 5104C(a) supplemental claim

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Advocacy Advice

- * If VA associates an ITF with a § 5104C(a) supplemental claim that was filed within one year of the prior denial, rather than a later filed initial or § 5104C(b) supplemental claim that would benefit from being associated with the ITF, then appeal to BVA and argue that:
 - * The ITF should be associated with the later claim, and
 - * *MVA v. McDonough* should be interpreted to apply to only § 5104C(b) supplemental claims
- * NVLSP is challenging VA's interpretation in cases currently pending before the CAVC

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New Service Department Records

38 C.F.R. § 3.156(c)



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Newly Obtained Service Department Records



- * If VA receives or associates with the claims file relevant official service dep't records at any time after VA issues a decision on a claim, VA must reconsider the claim
- * If the new decision results in a grant of benefits because of the new service dep't records, the effective date will be the date VA received the claim that it previously denied
- * In other words, VA treats the original claim as if it had been granted, rather than denied
- * 38 C.F.R. § 3.156(c)

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What is a Qualifying Service Department Record?



- * The record does not need to be one of the Vet's service personnel or medical records. The record does not even need to contain the name of the Vet. Examples include:
 - * Military records that do not name the Vet, but corroborate an event the Vet claims to have occurred
 - * Unit records that pertain to military experiences claimed by the Vet

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What is a Qualifying Service Department Record?



- * Examples of qualifying service records that need to be reconsidered:
 - * Declassified records that could not have been obtained because they were classified when VA decided the claim
 - * Records related to a claimed in-service, injury or disease
 - * See Manual M21-1, X.ii.2.B.1.b (change date Sept. 26, 2024)

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What is NOT a Qualifying Service Department Record?

*** Internal VA Memoranda when they**

- * Are produced by a VA employee and not a service department,
- * Merely summarize info that is already of record, and
- * Do not contain new info from official service dep't records

* *Morse v. McDonough*, 994 F.3d 1371 (Fed. Cir. 2021)

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What is “Relevant”?

*** Relevant = must speak to a matter in issue / matter in dispute (an element of the claim unmet in earlier claim)**

*** “Relevant” should be interpreted to mean the same thing as the word “material,” as that term is used in VA’s legacy system to describe the standard that new evidence must meet to reopen a previously denied claim**

* *Kisor v. McDonough*, 995 F.3d 1316 (Fed. Cir. 2021)

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Survey #1

*** In a prior decision denying SC for PTSD, VA conceded that Vet experienced the in-service stressor of witnessing the death of a fellow soldier, but denied the claim due to lack of a PTSD diagnosis. Would a service dep't record not previously in the claims file confirming that the soldier named by the Vet died be “relevant” under § 3.156(c)?**

A. Yes


B. No

C. Maybe

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Answer



- * The record would not be relevant, because VA conceded the fellow soldier's death as an in-service stressor in prior denial
- * The addition of such a record to the claims file would not require VA to reconsider the prior denial under § 3.156(c), even if supplemental claim granted due to a new PTSD diagnosis based on that stressor

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Newly Obtained Service Department Records

- * This rule doesn't apply to service dep't records that VA couldn't have obtained when it initially decided the claim, because:
 - * The records didn't exist when VA decided the claim, or
 - * E.g. modified DD Form 214, corrected military records
 - * The claimant failed to provide sufficient info for VA to identify and obtain the records from the service dep't, VA Records Acquisition and Research (RAR), or another official source
 - * 38 C.F.R. § 3.156(c)(2)

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Newly Obtained Service Department Records

- * Although § 3.156(c)(1) states that a service dep't record only counts if it existed when VA first decided the claim, this should not be taken literally
- * A newly created service dep't record is considered to have existed when VA first decided the claim, if the new writing is based on analysis of service dep't records that existed when VA first decided the claim

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Emerson v. McDonald, 28 Vet. App. 200 (2016)



- * In *Emerson v. McDonald*, CAVC addressed whether § 3.156(c) applies if new relevant service dep't records are received by VA after a reopened or supplemental claim has been granted

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Emerson v. McDonald



- * 9/2000: Vet filed claim for SC for PTSD
- * 11/2000: Vet submitted a statement describing his service in Vietnam, mentioning that he served as a helicopter door gunner and participated in missions transporting wounded service members to the hospital
- * 6/2002 private medical opinion: diagnosed Vet with severe chronic PTSD based on his reports of seeing wounded and dead service members and "seeing tracers coming at him" while on missions as a helicopter crewman

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Emerson v. McDonald



- * 7/2002: VA requested STRs and verification of some periods of service
- * 8/2002: RO sent Vet a stressor statement form to complete, since the previously submitted statement was "almost two years old and quite vague"
- * 2/2003: RO denied SC for PTSD due to lack of a verified stressor, noting that Vet failed to return the stressor form

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Emerson v. McDonald

- * Effective 7/2010, VA amended 38 C.F.R. § 3.304(f) to eliminate requirement of stressor corroboration if a VA mental health expert diagnosed PTSD and the stressor was related to fear of hostile military or terrorist activity
- * 8/2010: Vet sent VA a statement saying he believed he should be receiving more from VA for his PTSD, which VA interpreted as a request to reopen his SC claim for PTSD


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Emerson v. McDonald

- * 1/2011: VA examiner noted Vet's reports of having participated in combat as a helicopter door gunner
- * 6/2011: RO granted Vet SC for PTSD effective 8/2010
- * Vet filed a timely NOD as to the effective date


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Emerson v. McDonald

- * 7/2012: Vet submitted service dep't records, including an Air Medal Worksheet that listed the date and duration of completed helicopter missions and a DA Form 20 that documented his assignments, duties, awards, and campaigns (including the Tet Offensive)
- * 7/2012: Vet's attorney raised the applicability of § 3.156(c) at BVA hearing and Vet submitted a statement that raised the issue of applicability of § 3.156(c)
- * 5/2014: BVA decision did not assign an earlier effective date or address applicability of § 3.156(c)

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Emerson v. McDonald

*** CAVC analysis:**

- * BVA was obligated to consider and discuss Vet's entitlement to an earlier effective date under § 3.156(c), because Vet explicitly raised the issue
- * The purpose of § 3.156(c) is to place Vet in the position the Vet would have been in had VA considered the relevant service dep't record before deciding the earlier claim

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Emerson v. McDonald

*** CAVC analysis (cont'd):**

- * To be eligible for reconsideration under § 3.156(c), the service dep't records must be submitted after VA issues a decision on the claim and they must:
 - * be relevant to the claim;
 - * have been in existence when VA first decided the claim; and
 - * not have been associated with the claims file when VA first decided the claim

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Emerson v. McDonald

*** CAVC analysis (cont'd):**

- * Vet submitted service dep't records in July 2012, after VA had issued a decision on his claim
- * These records were arguably relevant to his claim, existed at the time VA first decided the claim in 2003, and had not been associated with the claims file when VA first decided the claim

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Emerson v. McDonald



* CAVC holdings:

- * Under § 3.156(c)(1), upon receiving official service dep't records in 2012, VA was required to reconsider Vet's PTSD claim that was denied in 2003, notwithstanding the fact that SC for PTSD was granted in 2011
- * Because BVA failed to ensure that VA complied with § 3.156(c), the Court vacated the May 2014 BVA decision and remanded the claim for additional development and readjudication

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Emerson v. McDonald



* TAKEAWAY:

- * After a denial that has become final, it does not matter when official service dep't records are received. If the requirements of § 3.156(c)(1) are met, VA must reconsider the original claim, even if SC has since been granted

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Emerson v. McDonald



* Lessons learned:

- * If a Vet has been awarded SC for a disability based on a reopened or supplemental claim, and
- * You find relevant military records that were not in the c-file at the time of an earlier denial of SC for that disability, and
- * Those records would have supported an award of SC at the time of the original claim,
- * You should submit those records to VA and request reconsideration of the original claim and an earlier effective date under § 3.156(c)

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Secondary Service Connection Issues

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Scope of a Claim

NVLSRP

- Once VA receives a complete claim:
 - VA will consider all lay and medical evidence of record in order to adjudicate entitlement to benefits for the claimed condition as well as entitlement to any additional benefits for complications of the claimed condition, including those identified by the rating criteria for that condition in the VA Schedule for Rating Disabilities
 - VA will adjudicate as part of the claim entitlement to any ancillary benefits that arise as a result of the adjudication decision (SMC, DEA, etc.)
 - 38 C.F.R. § 3.155(d)(2)


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Scope of a Claim

NVLSRP

- If SC is granted for the primary claim or issue for which an ITF has been submitted and SC is granted secondary to the primary claim or issue associated with an ITF, the effective date should be the same as for the primary claim, because it was an entitlement established by the evidence of record and within the scope of the issue or condition listed in the complete claim giving rise to the primary claim
- Ex: If VA awards comp benefits for the primary condition of diabetes and evidence of record shows other conditions are caused by or related to the diabetes, VA would assign an effective date for the secondary conditions as of the date VA awarded SC for the primary condition
- Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57,670 (Sept. 25, 2014)

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Scope of a Claim

*** In other words:**

- * If Vet files a claim for SC for a “back disability,” and evidence VA obtains during adjudication of the claim shows that Vet has left and right lower extremity radiculopathy caused by the back condition, VA must consider the “back disability” claim to include claims for SC for RLE and LLE radiculopathy, even if Vet didn’t list “radiculopathy” on claim form
- * If VA awards SC for the back disability, it must award SC for RLE and LLE radiculopathy and assign effective dates for radiculopathy based on the date of claim for the back disability
- * *DeLisio v. Shinseki*, 25 Vet. App. 45 (2011)

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INCREASED RATING CLAIMS



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Increased Rating Claims

*** General Rule on a claim for an increased rating**


- * In general, the effective date for an increased rating will be the later of:
 - * The date of receipt of the claim for the increased rating; or
 - * The date entitlement to the higher rating arose
- * *See 38 C.F.R. § 3.400(o)(1)*

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Increased Rating Claims



*** Important exception to the general rule:**

- * If an increase in the severity of the disability occurred in the year prior to the date of the increased rating claim, the effective date for the increased rating can be the date of the increase in disability
- * In other words, up to one year prior to the date of claim!
- * Specifically, “[t]he earliest date as of which it is factually ascertainable based on all evidence of record that an increase in disability had occurred if a complete claim or intent to file a claim is received within 1 year from such date”
- * 38 C.F.R. § 3.400(o)(2)

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Hypo

- * 3/2019: Vet granted SC for eczema rated 10% disabling, because 15% of his body is affected
- * 1/2025: Vet visited dermatologist, who found the eczema now affected 25% of Vet’s body
 - * This would warrant a 30% rating
- * 9/2025: Vet filed a claim for increase

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Survey #2




*** What should be the effective date for the Vet’s increased rating?**

- January 2024 (1 year prior to date of tx record)
- September 2024 (1 year prior to date of claim)
- January 2025 (date of tx record)
- September 2025 (date of claim for increase)

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Answer



January 2025

* Under 38 C.F.R. § 3.400(o)(2), the effective date for Vet's 30% rating should be January 2025, because Vet filed a claim for increase w/in 1 year of the date his condition increased in severity

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Hypo

* 3/2019: Vet granted SC for eczema rated 10% disabling, because 15% of his body is affected

* 5/2024: VA treatment records show Vet's eczema affected 25% of his body

* 9/2025: Vet filed an increased rating claim for eczema


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Survey #3

* What should be the effective date for the Vet's increased rating?


- a) May 2024 (date of VA tx record)
- b) September 2024 (1 yr prior to date of claim)
- c) September 2025 (date of claim)



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Answer



September 2025

* Vet is unable to take advantage of the exception in § 3.400(o)(2), because he filed increased rating claim more than one year after increase in the severity

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Hypo

* 3/2019: Vet granted SC for eczema rated 10% disabling, because 15% of his body is affected

* 5/2024: VA treatment records show eczema now affected 25% of his body (enough for 30% rating)

* 6/2025: VA treatment records show eczema now affected 30% of his body (enough for 30% rating)

* 9/2025: Vet filed increased rating claim for eczema

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Survey #4

* What should be the effective date for the Vet's increased rating?

- a) May 2024 (1 year prior to date of VA tx record)
- b) June 2025 (1 year prior to date of 2nd VA tx record)
- c) September 2025 (date of claim)
- d) Not Sure



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Answer

B

*** June 2025 (probably)**

- * Even though symptoms severe enough for a 30% rating first occurred more than 1 year prior to the date of claim, there was a further increase w/in the year prior to the claim
- * Under § 3.400(o)(2), the effective date is the earliest date as of which it is “factually ascertainable” that “an increase in disability” occurred, if a claim is received within 1 year from such date
- * The law is not clear on this interpretation, but advocates should appeal or seek review of any decision failing to award an effective date based on a further increase in disability w/in the year prior to the claim, even if Vet met the criteria for a higher rating earlier

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TDIU CLAIMS & EFFECTIVE DATE ISSUES

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When Must VA Address TDIU?

*** VA must address TDIU, when it is either:**


- * Expressly claimed; or
- * Reasonably raised by the record

*** A “claim” for TDIU can be either:**

- * A free-standing TDIU claim (considered a claim for an increased rating of the disabilities alleged to cause unemployability); or
- * Part of a claim for increase for a specific SC condition or conditions

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When is TDIU Reasonably Raised?



- * A claim for a TDIU is part of any claim for a higher initial rating or an increased rating (or an initial SC claim) when evidence of unemployability related to the underlying condition is submitted during the pendency of the claim
- * *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)
- * *Rice v. Shinseki*, 22 Vet. App. 447 (2009)

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Reasonably Raised TDIU Claim



- * TDIU claim would be reasonably raised if Vet's c-file contained any of the following:
 - * Letter from a psychiatrist stating SC PTSD symptoms prevent Vet from getting and keeping a job
 - * Statement from most recent employer that explains the reasons Vet was fired, and it is apparent those reasons are related to Vet's SC condition(s)
 - * VA exam report stating Vet's SC condition(s) prevent him from working full-time

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What If....



- * During the pendency of a BVA appeal of an increased rating claim, the RO grants TDIU for part of the period on appeal?
 - * Can BVA still decide TDIU for the other part of the period on appeal?

OR

- * Does Vet need to appeal / seek review of the rating decision that granted TDIU for only part of the period (i.e., appeal the TDIU effective date)?

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Harper v. Wilkie 30 Vet. App. 356 (2019)



- * Unless the RO grants TDIU for the entire period on appeal, then it is still part of the BVA appeal and BVA has jurisdiction over it
- * BVA cannot find that the issue is not on appeal because Vet did not appeal/seek review of the effective date assigned in the rating decision that granted TDIU
- * Check if TDIU was granted for the entire appeal period. If not, make sure VA addresses it

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Multiple Claims/ AMA



- * Recently, CAVC considered how *Rice v. Shinseki* interacts with the AMA claims system
- * Specifically, CAVC addressed whether BVA erred when it fixed the effective date of a Vet's TDIU award based on the date he filed a TDIU application, rather than the earlier date he filed an application for a claim that was separately pending, but not before the Board
- * *Phillips v. McDonough*, 37 Vet. App. 394 (2024)

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Phillips v. McDonough 37 Vet. App. 394 (2024)



- * 8/2002: Vet filed a claim for SC for skin conditions that were still pending at the time of the CAVC decision
- * 7/25/2023: BVA granted SC for skin conditions
- * 8/15/2023: RO implemented the grant and assigned a 60% rating for all SC skin conditions, effective 8/2002
- * 12/28/2023: HLR of 8/2023 rating decision granted TDIU effective 11/2009
- * Appeal of TDIU effective date assigned in 12/2023 HLR decision was pending before BVA at time of CAVC decision
- * 5/2020: RD granted SC for PTSD, including depression and anxiety, with a 70% rating, effective 11/25/2009

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Phillips v. McDonough



- * **4/2021:** Vet applied for TDIU and stated his PTSD and skin conditions prevented him from working, and that he hadn't worked since 1978
 - * VA interpreted it as an application for a higher rating for PTSD, as well as TDIU
- * **1/2022:** RO granted 100% rating for PTSD, effective 4/2021; continued skin disability rating; and found TDIU moot
- * **1/2022:** Vet filed NOD with 1/2022 decision, but identified only TDIU and PTSD as the matters he wanted to appeal

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Phillips v. McDonough



- * **4/2022:** BVA...
 - * Denied an effective date prior to 4/7/2021 for a 100% rating for PTSD
 - * Granted TDIU, effective 4/7/2020
- * **Vet appealed to CAVC, arguing that BVA should have discussed arguments made in his 1/2022 NOD that he was entitled to TDIU as early as:**
 - * 11/25/2009, under 38 C.F.R. § 4.16(a)
 - * 8/28/2002, under 38 C.F.R. § 4.16(b)
 - * Argued that TDIU was reasonably raised as part of his skin disability claims

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Phillips v. McDonough



- * **CAVC:**
 - * Reaffirmed central holding in *Rice* that TDIU is a rating option available whenever a claimant attempts to get SC or a higher rating from VA and the record includes evidence of unemployability
 - * Noted parties' agreement that TDIU claim was both part of Vet's
 - * 4/2021 application for TDIU, and
 - * 2002 skin disability claim under *Rice*, since VA learned during that claim that he had difficulties working for years due to his skin condition

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Phillips v. McDonough

* CAVC held that “TDIU is not its own separate benefit that VA can grant or deny unmoored from the underlying service-connection claim or rating... Instead, TDIU is part of that underlying claim—as an option for a potential rating—and the eventual effective date depends on the specific claim VA is then adjudicating.”

* The issue of TDIU before the BVA stemmed from the Vet’s April 2021 TDIU application, rather than his 2002 application related to skin disabilities

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Phillips v. McDonough

* Just because Vet “could also receive a total rating as part of his other pending claims did not mean that [BVA] could rope in those separately pending claims when adjudicating the increased rating claim on appeal in April 2022.”


* “if TDIU were its own standalone claim, then [BVA] would have had to look at when that TDIU claim was first raised to assign the effective date. But Rice tells us that TDIU is not a separate claim.”

* “Rice also tells us that the potential effective date for TDIU will depend on the date of the underlying claim for [SC] or increase.”

* “Here that was April 2021. That is because after VA adjudicated his increased rating claims—for both his skin condition and PTSD, including on the basis of TDIU—Mr. Phillips only appealed PTSD and TDIU to the Board, not his skin condition.”

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EFFECTIVE DATES UNDER THE PACT ACT



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PACT Act Background



* 8/10/2022: President Biden signed into law the “Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022,” AKA the “PACT Act”

* Public Law No. 117-168

* Among other things, it expanded VA benefits for Vets harmed by certain toxic exposures, including:

* Burn Pits

* Agent Orange

* Radiation



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PACT Act Claims



* Although PACT Act provides that, for most Vets, the new presumptions—regarding locations of exposures and service connection of disabilities—would go into effect on various future dates, VA is treating all new presumptions as applicable on **8/10/2022**

* VBA Letter 20-24-06, § 5; VBA Letter 20-24-06, § 5

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PACT Act – SC Claims



* Effective date rules based on date of change in law (discussed earlier) apply

* 38 U.S.C. § 5110(g); 38 C.F.R. § 3.114(a)

* Nothing requires an effective date for SC earlier than the date a presumption of SC is established or modified

* 38 U.S.C. § 5110(g); 38 C.F.R. § 3.114(a)

* Nehmer effective date rules do NOT apply to grants based on new Agent Orange presumptions (new diseases and new AO exposure locations)

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PACT Act – SC Claims

*** Example 1:**

- * 6/1/2020: Covered Vet Abe diagnosed with glioblastoma
- * 8/10/2022: PACT Act creates presumption of SC for glioblastoma for covered Vets
- * 7/25/2023: Abe files initial claim for SC for glioblastoma
- * VA should grant claim and assign effective date of **8/10/2022**



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PACT Act – SC Claims

*** Example 2:**

- * 6/1/2020: Covered Vet Ben diagnosed with emphysema
- * 7/15/2020: Ben files claim for SC for emphysema
- * 11/1/2020: VA denies claim; Ben does not appeal
- * 8/10/2022: PACT Act creates presumption of SC for emphysema for covered Vets
- * 10/15/2024: Ben files supp. claim for SC for emphysema
- * VA should grant claim and assign effective date of **10/15/2023**


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PACT Act – SC Claims

*** Example 3:**

- * 6/1/2020: Vietnam Vet Dan diagnosed with hypertension
- * 7/15/2021: Dan files claim for SC for HTN (argues for direct SC based on favorable medical nexus opinion)
- * 11/1/2021: VA denies claim; Dan appeals to BVA
- * 8/10/2022: PACT Act creates presumption of SC for hypertension for AO-exposed Vets
- * 9/1/2022: Dan files supp. claim for SC for hypertension (based on new presumption)



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PACT Act – SC Claims

*** Example 3 (cont'd):**

- RO should grant SC for HTN based on presumption, effective 8/10/2022**
- BVA should continue to adjudicate issue of direct SC for HTN**
 - Grant of supplemental claim based on new presumption does not moot pre-8/10/2022 claim
 - Johnson v. Collins*, 38 Vet. App. 151 (2025)
 - If evidence supports grant based on theory of direct SC, effective date should be 7/15/2021
 - Even if Vet didn't file supplemental claim, BVA would still need to address both presumptive and direct SC. It would be error for BVA to grant presumptive SC effective 8/10/2022 and not address direct SC for period before 8/10/2022.


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PACT ACT – DIC Claims

- When a law, reg, or court decision/settlement establishes or modifies a presumption of SC, VA must identify all DIC claims that were previously denied that might have been decided differently based on change**
- Claimant can request to have claim reevaluated**
- If DIC now granted, VA must assign effective date as if the new presumption was in effect at the time of the prior DIC claim**
 - 38 U.S.C. § 1305

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PACT ACT – DIC Claims

- Rule applies to presumptions established / modified on or after 8/10/2022, when PACT Act became law**
- There is no time limit for requesting reevaluation of previously denied DIC claim**
- Previously denied claimants should request reevaluation by filing VA Form 21P-534EZ or 21P-535 and checking the following box:**

SECTION VII: DEPENDENCY AND INDEMNITY COMPENSATION (DIC)
(Skip to Section VIII if you are NOT claiming DIC)

7A. WHAT BENEFIT ARE YOU CLAIMING? (Check one)

☐ DIC


DIC under U.S.C. 1151 (Note: DIC under 38 U.S.C. is a rare benefit. Please refer to the Instructions page 3 for guidance on 38 U.S.C. 1151)

☐ DIC


DIC due to claimant election of a re-evaluation of a previously denied claim based on expanded eligibility under the 115-108 PACT Act (Note: Please refer to Instructions page 6 for guidance on PACT Act)

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Survey #5





- * 6/15/2012: Fred, a covered Vet, died from lung cancer
- * 8/20/2012: Widow Emily filed DIC claim, which RO denied
- * 3/31/2025: Emily files new DIC claim requesting reevaluation under the PACT Act
- * What is the correct DIC effective date?
 - A. 6/1/2012 (month Vet died)
 - B. 6/15/2012 (day Vet died)
 - C. 8/20/2012 (date of original DIC claim)
 - D. 8/10/2022 (date of PACT Act)
 - E. 3/31/2025 (date of new DIC claim)



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Answer






- * June 1, 2012 – the first day of the month of the Vet’s death, since the surviving spouse filed her original DIC claim within one year of the Vet’s death, and new claim granted based on PACT Act presumption
- * 38 U.S.C. § 1305; 38 C.F.R. 3.400(c)

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Special Effective Date Rules for Claims Based on Agent Orange Exposure




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Nehmer Rules

- * **Special effective date rules apply to Vets and their survivors who are granted presumptive SC for a disease / cause of death based on exposure to herbicides in Vietnam, including its territorial seas, under Court Orders in *Nehmer v. U.S. Dep't of Veterans Affairs***
 - * Effective date based on date of first claim for the disability that was pending on or filed after 9/25/1985, but before the date the disease was added to the Agent Orange presumptive list
 - * Special rules do not apply to claims granted due to AO exposure in locations other than Vietnam
 - * Rules apply to all diseases added to the AO presumptive list prior to 8/2022 (but NOT those added on or after 8/2022)
 - * See 38 C.F.R. § 3.816


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Nehmer Rules

- * **Under Footnote 1 of the 1991 *Nehmer* Final Stipulation and Order, if Vet filed an SC or pension claim for disability X and, before the claim was finally denied or granted, evidence in the c-file showed that the Vet had a disease that was later added to VA's AO presumptive list, then the claim for disability X, also counts as a claim for the AO disease**
- * **If claimant first filed a claim for SC of the disease (or FN1 claim was filed) after the disease was added to the AO presumptive list, *Nehmer* rules do not apply to the claim**

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Blue Water Navy Vietnam Veterans Act of 2019



- * **6/25/2019: Blue Water Navy Vietnam Veterans Act of 2019 signed into law, effective 1/1/2020:**
 - * Vets who served in the 12 nm territorial sea of the Republic of Vietnam are entitled to the presumption of Agent Orange exposure (codified earlier holding of *Procopio v. Wilkie*)
 - * Allows for retro benefits for claims filed 9/25/1985-1/1/2020
- * **Codified at 38 U.S.C. § 1116A**

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Effective Dates Under BWNVVA of 2019




*** Effective date can be earlier than 1/1/2020, if:**

- * Vet or survivor filed claim for SC for covered AO disease/DIC on or after 9/25/1985, but before 1/1/2020, and
- * Claim was denied, at least in part, because it was not incurred in or aggravated by service, and
- * Vet or DIC claimant files supplemental claim for SC of the same disease on or after 1/1/2020

*** Effective date will be date of earliest claim for disease filed on or after 9/25/1985**

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Blue Water Navy Claims & Nehmer





*** Nehmer rules may apply to claims based on service in territorial seas of RVN**

- * Initial claim (including FN1 claim) must have been filed prior to date disease was added to AO presumptive list
- * Might be more favorable than BWNVVA rules, which do not:
 - * Recognize FN1 claims
 - * Apply to claims filed prior to, but pending on, 9/25/1985
 - * Require payment of benefits to estate (and possibly adult children and non-dependent parents) of deceased claimant


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Unadjudicated Claims






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Unadjudicated Claims

- * Sometimes VA fails to adjudicate a disability claim. Then the claimant files another claim for benefits for the same disability which is granted.
- * In this scenario, the effective date for benefits is generally the date VA received the original, unadjudicated claim, assuming the evidence shows that entitlement arose on or before the date of the first claim.


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Unadjudicated Claims

- * There are several potential obstacles to success when arguing that an earlier effective date is warranted because VA failed to adjudicate or render a final decision on an earlier claim for a disability for which VA ultimately awards SC disability benefits


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Unadjudicated Claims

- * First, the claimant must be able to show that there was an earlier claim for SC disability benefits for the disability in question
 - * This might be based on the argument that VA was required to infer a claim because of its duty to sympathetically read a claimant's pleadings
 - * The content of the record before VA at the time may make it difficult to prove that the claim was reasonably raised by the record


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Unadjudicated Claims

- * Second, the claimant may not be able to persuade VA that the earlier claim remained pending without a final adjudication until VA finally awarded SC based on a subsequent claim


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Unadjudicated Claims

- * **Implicit Denial Rule:** a reasonably raised or explicit claim remains pending until there is either recognition of the substance of the claim in a VA decision from which a claimant could deduce that the claim was adjudicated or an explicit adjudication of a subsequent claim for the same disability.
- * Did the earlier VA decision discuss the claim in terms sufficient to put the claimant on notice that it was being considered and rejected, even if the language did not specifically deny the claim?

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Unadjudicated Claims

- * Another obstacle to an earlier effective date may occur if, between the filing of claim #1 that did not lead to an RO adjudication or a final decision, and a later claim (claim #3) that resulted in an award of benefits, there is an explicit VA final denial of a claim (claim #2) for this same benefit
- * The CAVC addressed this in *Juarez v. Peake*, 21 Vet. App. 537 (2008)

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Takeaways from *Juarez v. Peake*

- * If the RO never adjudicates or notifies a Vet of a decision on an claim, but
- * Denies a second claim for the disability and notifies the Vet, and the Vet does not appeal
- * The denial of the second claim is essentially considered an adjudication of the first claim
- * The first claim cannot be the basis for an earlier effective date if SC is granted based on a third claim

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Takeaways from *Juarez v. Peake*

* **BUT, if**

- * RO denies the first claim, and the claimant submits a timely NOD, but VA does not issue an SOC (legacy) or BVA issue a decision, and
- * Vet later files a second claim for SC, and
- * RO denies a second claim, which the claimant does not appeal, and
- * Claimant files a third claim, which the RO grants

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Takeaways from *Juarez v. Peake*


* **THEN**

- * Claimant may be entitled to an effective date based on the original claim, because once an NOD has been filed, further RO decisions that do not grant the benefit sought cannot resolve the appeal of the original claim
- * Only a subsequent BVA decision can resolve an appeal that was initiated but not completed

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Advocacy Advice




If in assigning an effective date for benefits, VA fails to account for a previous unadjudicated claim for the same benefit (or a decision of which the claimant was not notified), and there was no intervening decision denying the claim, there are two alternative paths that the claimant can pursue to correct this error:

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Advocacy Advice




1. If error is identified w/in one year of the date VA assigned the erroneous effective date, seek review of or appeal the assigned effective date
2. If the error is identified after the review/appeal period expires, file a claim with the RO arguing that the effective date assigned is the product of clear and unmistakable error (CUE)

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Advocacy Advice



- * If there was a final decision denying a claim sandwiched between the original unadjudicated claim and a later decision granting benefits, it will be difficult to obtain an effective date based on the original claim
- * The claimant must establish that the decision denying the second claim was a product of CUE

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