NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

RECENT COURT DECISIONS VETERANS' ADVOCATES NEED TO KNOW ABOUT

JULY 2024 - NOVEMBER 2024

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TODAY'S AGENDA/OVERVIEW

- *Lewis v. McDonough* (Fed. Cir.)
  - Whether the RO's failure to make certain required findings in a rating reduction decision renders the decision *void*, if the BVA later makes those required findings?
- *Love v. McDonough* (Fed. Cir.)
  - Whether the procedural protections for reducing stabilized ratings apply to the reduction of a rating for prostate cancer?

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TODAY'S AGENDA/OVERVIEW

- *Smith v. McDonough* (Fed. Cir.)
  - Whether the CAVC may make an initial determination as to whether an individual is an eligible accrued-benefits claimant who may be substituted for a deceased CAVC appellant?
- *Bolds v. McDonough* (CAVC)
  - Whether the AMA's evidence submission rules for BVA appeals can be waived by language in a joint motion for remand?

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TODAY'S AGENDA/OVERVIEW

- *Cardoza v. McDonough* (CAVC)
  - Whether a BVA letter notifying an appellant that his appeal was dismissed and refusing to docket the appeal is a decision that can be appealed to the CAVC?
- *Cooper v. McDonough* (CAVC)
  - Whether a BVA order remanding a claim subject to the AMA is a final decision that can be appealed to the CAVC, because the remanded claim will not automatically return to the BVA?

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TODAY'S AGENDA/OVERVIEW

- *De Hart v. McDonough* (CAVC)
  - Whether separately rated neurological complications of a spinal disability, such as radiculopathy, always remain part of the underlying spinal disability claim for appellate purposes?
- *Laska v. McDonough* (CAVC)
  - Must a veteran show the need for a "higher-level of care" to qualify for SMC(t) (for residuals of traumatic brain injury)?

TODAY'S AGENDA/OVERVIEW

- *Phillips v. McDonough* (CAVC)
  - Whether the BVA can assign an effective date for TDIU based on a pending claim that is not before the BVA?
- *Spigner v. McDonough* (CAVC)
  - When BVA reschedules on its own accord a hearing for an AMA appeal, whether it must consider evidence received within 90 days after originally scheduled hearing, but before the date of the rescheduled hearing?

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECISIONS

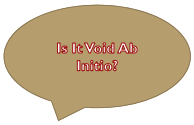
Lewis v. McDonough

110 F. 4th 1273 (Fed. Cir. 2024)

Decided: August 1, 2024

Lewis v. McDonough

- **Issue:**
  - Whether the failure of the RO to make explicit findings required by 38 C.F.R. § 3.344(a) renders the RO's rating reduction decision *void ab initio*, if the BVA later makes those findings?



Lewis v. McDonough

- **Relevant Law**
  - A decision proposing a lower evaluation must "be prepared setting forth all material facts and reasons."
    - 38 C.F.R. § 3.105(3)
  - For ratings that have been maintained for five years or more, the evidence must make it reasonably certain that the improvement will be maintained under the ordinary conditions of daily life.
    - 38 C.F.R. § 3.344

Lewis v. McDonough

- **Relevant Law**
  - If the Board fails to make the required findings supporting a reduction in rating under 38 C.F.R. § 3.344, the RO's reduction is *void ab initio*
    - *Brown v. Brown*, 5 Vet. App. 413 (1993)
    - *Stern v. McDonough*, 34 Vet. App. 51 (2021)

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Lewis v. McDonough

- **Facts**
  - Mr. Lewis, an Army veteran, receives SC compensation for PTSD based on his experiences in the Korean War
  - In 2009, VA increased his PTSD rating from 30% to 70%
  - In a July 2016 rating decision, the VARO reduced his rating back to 30%, based on a Sept. 2015 VA exam and Oct. 2015 outpatient treatment records
  - Mr. Lewis timely appealed the 2016 RO decision to the Board

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Lewis v. McDonough

- **Facts (cont'd)**
  - BVA affirmed RO's decision
  - CAVC remanded twice: first, for failure to consider favorable evidence, then returned it a second time for failure to follow first remand order
  - While at BVA on the second remand, Mr. Lewis made a new argument: the RO failed to make the finding that improvement of his PTSD could be sustained under the ordinary conditions of life, as required by 38 C.F.R. § 3.344; therefore, the decision should be voided and his rating restored

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Lewis v. McDonough

- Facts (cont'd)
  - BVA did not dispute that the RO had not articulated the finding required by 38 C.F.R. § 3.344.
  - However, BVA found that the record showed that Mr. Lewis's condition "materially improved under the ordinary conditions of life," and warranted the reduction
  - The CAVC affirmed, finding that nothing in § 3.344 requires the RO to issue certain findings in reduction cases first "lest the reduction have no effect," and that BVA made the required findings in its decision
  - Mr. Lewis appealed to the Fed. Cir.

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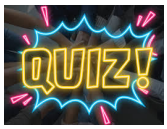
SURVEY #1

Should the reduction be voided and the 70% rating be reinstated because the RO did not articulate the findings specified by regulation?

A. Yes

B. No

C. I'm not sure



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ANSWER

No!

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Lewis v. McDonough

- **Federal Circuit's Holding:**
  - Although the RO did not make the required findings under 38 C.F.R. §§ 3.105(e) and 3.344(a) in its rating decision, BVA made the required findings in its March 2021 decision
    - The Board acts on behalf of the Sec'y in making the ultimate decision on claims. Neither *Brown* nor *Stern* held that the Board could not cure a deficiency in an RO decision.
  - Affirmed CAVC's decision affirming the Board.

ADVOCACY ADVICE

- Vets should challenge a proposal to decrease a rating (and request a hearing) by submitting supporting evidence and argument *before* the RO issues the decision implementing the reduction
  - Vet usually has a better chance preventing a reduction from being implemented in the first place than getting a reduction decision overturned on review
  - If Vet's condition has improved, but under conditions that are arguably not "ordinary," explain why it is not reasonably certain that the improvement will be maintained under the ordinary conditions of daily life and work

Love v. McDonough

106 F.4th 1361 (Fed. Cir. 2024)

Decided: July 11, 2024

Love v. McDonough

- **Issue:**
  - Whether the general provisions of 38 C.F.R. § 3.344 for reducing stabilized ratings apply to ratings for prostate cancer?

Love v. McDonough

- **Relevant Law**
  - A decision proposing a lower evaluation must "be prepared setting forth all material facts and reasons." The veteran shall be given 60 days for presentation of evidence as to why rating should not be reduced.
    - 38 C.F.R. § 3.105(e)
  - For ratings that have been maintained for five years or more, the evidence must make it reasonably certain that the improvement will be maintained under the ordinary conditions of daily life.
    - 38 C.F.R. § 3.344

Love v. McDonough

- **Relevant Law**
  - 38 C.F.R. § 4.115b, DC 7528 - Malignant neoplasms of the genitourinary system……**100%**
    - Note—Following the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure, the rating of 100 percent shall continue with a mandatory VA examination at the expiration of six months. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local reoccurrence or metastasis, rate on residuals as voiding dysfunction or renal dysfunction, whichever is predominant.

Love v. McDonough

- **Relevant Law**
  - DC 7528 provides step-by-step instruction as to how prostate cancer and its residuals are to be rated
  - Rating reduction protections for total disability ratings in 38 C.F.R. § 3.343 do not apply to the discontinuance of a 100% rating under the procedures set out in the note to DC 7528
    - *Foster v. McDonough*, 34 Vet. App. 338 (2021)

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Love v. McDonough

- **Facts**
  - Mr. Love served in the Army from 1968 to 1971. He was diagnosed with prostate cancer related to exposure to Agent Orange in Vietnam. In 2006, he was granted a rating of 100%, effective Sept. 2005.
  - In Feb. 2007, rating was decreased to 20% following treatment
  - In 2009, rating was again increased to 100%, because Mr. Love's cancer had reoccurred and he was receiving active treatment.

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Love v. McDonough

- **Facts (cont'd)**
  - In Feb. 2019, after a 2018 VA exam finding cancer was in remission following treatment, VA proposed to decrease rating to 20%.
  - Mr. Love argued the proposed decrease did not comply with the protections for stabilized ratings set forth in § 3.344
  - In Sept. 2019, VA issued decision decreasing rating, effective Dec. 1, 2019
  - Vet appealed to BVA

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Love v. McDonough

- **Facts (cont'd)**
  - BVA found that decision decreasing rating for prostate cancer was "procedural in nature" and that § 3.344 did not apply. BVA further found that Mr. Love's symptoms were consistent with a rating of 20% under DC 7528.
  - Mr. Love appealed BVA's decision to the CAVC, which affirmed the Board. Vet then appealed to the Federal Circuit.

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Love v. McDonough

- **Federal Circuit's Holding:**
  - Affirmed CAVC, holding that the procedural protections for stabilized ratings in 38 C.F.R. § 3.344 do not apply to disabilities rated under DC 7528 for prostate cancer (just as the procedural protections for total ratings in § 3.343 do not apply)
    - Note accompanying DC 7528 specifically describes how a change in rating under that section is to occur
    - Because DC 7528 provides its own specific criteria for reduction of a 100% rating, that provision controls, and must be followed

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ADVOCACY ADVICE

- **Vet should carefully document residual symptoms of prostate cancer so that he will get the highest possible rating. If cancer is in remission, Vet will not be entitled to 100% rating under DC 7528, regardless of the amount of time the disability has been rated at 100%**
- **Instructions for when an evaluation shall be decreased that are specific to the DC at issue will prevail over general rating reduction rules**
  - CAVC does not have jurisdiction to hear challenges to the rating schedule
  - Under DC 7528, Vet should seek review of decrease in rating if current residual symptoms can support a higher rating
    - Also consider secondary SC for mental health disabilities, SMC for loss of use of a creative organ, etc.

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Smith v. McDonough,

112 F. 4th 1357 (Fed. Cir. 2024)

Decided: August 28, 2024

Smith v. McDonough

- **Issue:**
  - Whether CAVC may make an initial determination as to whether an individual is an eligible accrued-benefits claimant who may be substituted for a deceased CAVC appellant?

Smith v. McDonough

- **Relevant Law**
  - Qualified persons may recover periodic monetary benefits that were due and unpaid at the time of a veteran's death (accrued benefits)
    - 38 U.S.C. § 5121
  - If a claimant dies while a claim for a VA benefit, or an appeal of a decision on such a claim, is pending, a person who would be eligible to receive accrued benefits may file a request to be substituted as the claimant within one year after the date of the claimant's death
    - 38 U.S.C. § 5121A

Smith v. McDonough

- **Relevant Law**
  - CAVC is not permitted to make initial (de novo) factual findings
    - 38 U.S.C. § 7261(c)
  - Prior to granting a motion to substitute at the CAVC, the VA must determine if the movant is eligible to substitute
    - *Breedlove v. Shinseki*, 24 Vet. App. 7 (2010)

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Smith v. McDonough

- **Facts**
  - Mr. Smith had a SC low back disability and often used "spa therapy" to treat the condition
  - In 2007, he sought Special Adapted Housing (SAH) benefits in order to build a home spa. Before he received the VA decision denying his claim, he had an outbuilding for the spa built.
  - He later filed a claim for reimbursement which VA denied and he appealed, eventually reaching the CAVC in 2018
  - Prior to CAVC briefing, Mr. Smith died

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Smith v. McDonough

- **Facts (cont'd)**
  - After Mr. Smith's death, CAVC issued Order to Show Cause why it should not dismiss the appeal (routine procedure). Mr. Smith's daughter, Karen Hicks, responded to the Order, requesting that Mr. Smith's adult children (including her) be substituted and the appeal continue
  - CAVC denied request and dismissed the appeal, holding that Ms. Hicks failed to meet any of the possible legal standards for substitution, primarily because she did not apply for a VA determination of her eligibility as an accrued-benefits claimant within one year of Mr. Smith's death

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Smith v. McDonough

- **Federal Circuit's Holding**
  - Fed. Cir. rejected Ms. Hicks's argument that CAVC should have made a finding on whether she was a proper accrued-benefits claimant on its own, without first seeking a determination from the VA
    - CAVC is not permitted to make findings of fact in the first instance (de novo)
    - Eligibility to substitute as an accrued-benefits claimant is a fact-intensive inquiry that CAVC is not permitted to make
  - CAVC correctly found nunc pro tunc substitution not appropriate, because Vet died before case submitted to CAVC

Smith v. McDonough

- **Federal Circuit's Holding**
  - Rejected Ms. Hicks's argument that CAVC erred in holding that she could not be substituted under 38 C.F.R. § 36.4406(c), which requires requests for SAH reimbursement to be filed w/in one year of learning of Vet's death
    - CAVC's interpretation of reg as requiring Ms. Hicks to have filed a reimbursement request within one year of Vet's death was not erroneous
    - Even though Vet filed original reimbursement request with VA; Vet provided documentation of costs to VA before death; and VA had notice that Ms. Hicks was the Vet's estate's court-appointed representative, Ms. Hicks never filed reimbursement request

ADVOCACY ADVICE

- All requests for substitution must be filed with **the VA** within one year of the claimant's death, even if the case is on appeal at the CAVC when the claimant dies
- If death occurs when case is at CAVC, appellant's counsel should:
  1. File a notice of death with the CAVC
  2. File a motion for a stay of proceedings at CAVC, pending a motion for substitution at CAVC
  3. Ensure appropriate survivor files substitution request with VA
  4. File a motion for substitution with the CAVC
- Requests for substitution should be made regardless of whether periodic or non-period benefits are being sought

U.S. COURT OF APPEALS FOR VETERANS CLAIMS CASES

Bolds v. McDonough

37 Vet. App. 359 (2024)

Decided: July 11, 2024

Bolds v. McDonough

- **Issue:**
  - Whether AMA's evidence submission rules for BVA appeals in 38 U.S.C. § 7113(b) and 38 C.F.R. § 20.202(b) can be waived by language in a joint motion for partial remand (JMPR)?

Bolds v. McDonough

- **Relevant Law:**
  - Under the AMA, for appeals in the BVA hearing docket, the evidentiary record is limited to evidence submitted at the time of AOJ decision and within a 90-day window beginning on the date of the scheduled BVA hearing
    - 38 U.S.C. § 7113(b); 38 C.F.R. § 20.302(a)

Bolds v. McDonough

- **Facts**
  - In Feb. 2019, Ms. Bolds filed a claim for SC pelvic pain, precancerous cells, intrauterine growth restriction, miscarriage, endometriosis, and other conditions
  - In May 2019, the RO denied her claims
  - Ms. Bolds appealed to the BVA and elected the hearing lane; after testifying at a hearing, the Board continued the denial of her claims
  - Ms. Bolds appealed to the CAVC

Bolds v. McDonough

- **Facts (cont'd)**
  - In Dec. 2021, the parties filed a JMPR, agreeing that
    - BVA erred by failing to discuss potentially favorable evidence
    - Ms. Bolds could submit additional evidence on remand when the case returned to the Board's hearing docket
  - After CAVC granted the JMPR, BVA notified Vet that she was free to submit new argument, but not new evidence, as the evidentiary window had closed
  - In Jan. 2022, Ms. Bolds submitted additional evidence to BVA
  - In Apr. 2022, BVA continued its denial, explaining that it couldn't consider the evidence Ms. Bolds submitted in Jan. 2022, because it was outside the evidentiary windows

Bolds v. McDonough

- **Appellant's arguments**
  - BVA legally erred in failing to consider the evidence she submitted to the Court following remand, and its error affected her procedural rights
  - The Secretary was authorized to enter into an agreement as part of the JMPR that allowed her to submit additional evidence to the Board
  - The Secretary should be bound by the JMPR, rather than by general evidentiary rules, and Vet was being denied her benefit to the duly negotiated JMPR, as well as her right to due process

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Bolds v. McDonough

- **Secretary's arguments**
  - BVA was prohibited by statute and regulation from considering evidence submitted after the CAVC remand
  - The language in the JMPR is void and not enforceable; the Secretary's mistake in inserting boilerplate language does not create a substantive right in violation of statute and regulation
  - Vet failed to carry her burden of showing prejudicial error in the alleged failure of the Secretary to comply with the remand, because she could file a supplemental claim with the evidence

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Bolds v. McDonough

- **CAVC's Decision:**
  - Parties, including the Sec'y, are generally permitted to waive statutes intended for their benefit, unless there is a clear prohibition on doing so
    - *Janssen v. Principi*, 15 Vet. App. 370, 374 (2001); *Shutte v. Thompson*, 82 U.S. 151, 159 (1872)
  - The evidentiary limits contained in the statute and regulation at issue are claims processing rules that were not intended to carry jurisdictional consequences
  - The JMPR was a clear and valid waiver of the evidentiary rules and should be enforced

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Bolds v. McDonough

- **CAVC's Decision (cont'd):**
  - BVA's failure to consider the evidence submitted on remand was prejudicial
    - "The availability of supplemental claims is not the panacea for all Board procedural errors that the Secretary suggests. Prejudice is established by demonstrating a disruption of the essential fairness of the adjudication, either by showing an error that prevented the claimant from effectively participating in the adjudicative process or that affected or could have affected the outcome of a decision. *Simmons v. Wilkie*, 30 Vet. App. 267, 279 (2018), *aff'd*, 964 F.3d 1381 (Fed. Cir. 2020). That is the case here."
  - Reversed BVA's finding that it was precluded from considering the evidence submitted on remand

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ADVOCACY ADVICE

- **If BVA doesn't substantially comply with the terms of a JMR, appeal to the CAVC**
  - Board Members (VLJs) cannot ignore the terms of a JMR simply because they think the terms are contrary to law or that the VA OGC attorney who agreed to the JMR or CAVC overstepped their authority
  - A remand by the CAVC (including through an order granting a JMR) imposes upon the Secretary a concomitant duty to ensure compliance with the terms of the remand
    - *Stegall v. West*, 11 Vet. App. 268, 271 (1998)

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ADVOCACY ADVICE

- **VA is no longer likely to agree to include language permitting evidence submission in a JMR/JMPR for AMA cases (and likely hasn't done so recently), but be on the lookout for JMRs filed in 2020-2023 that may have included such language**
  - If JMR/JMPR included that language and BVA refused to consider such evidence submitted on remand, BVA erred
- **VA can waive enforcement of procedural rules, such as claims processing rules, in contexts other than a JMR, such as by accepting certain filings submitted on a wrong form or past a deadline**
  - For waiver to be valid, VA must (1) possess the procedural right; (2) have knowledge of that right; and (3) intend, voluntarily and freely, to relinquish or surrender that right

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Cardoza v. McDonough

37 Vet. App. 407 (2024)

Decided: July 10, 2024

Cardoza v. McDonough

- **Issue:**
  - Whether a BVA letter notifying an appellant that his appeal was dismissed and refusing to docket the appeal is a final decision that can be appealed to the CAVC?

Cardoza v. McDonough

- **Relevant Law**
  - A "final decision" of the Board shall include:
    1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record;
    2) a general statement—
       A. reflecting whether evidence was not considered in making the decision because the evidence was received at a time when not permitted under 38 U.S.C. § 7113; and
       B. noting such options as may be available for having the evidence considered by the VA; and
    3) an order granting appropriate relief or denying relief
  - 38 U.S.C. § 7104(d)

Cardoza v. McDonough

- **Facts**
  - June 2019: RO grants SC for PTSD
  - Mar. 2020: Vet files HLR w/ rating
  - Apr. 2020: Vet files NOD w/ effective date
  - May 2020: BVA Vice Chairman sent letter informing Vet that because he had requested HLR for the issue (PTSD) on the NOD form, BVA could not review his case, as only one review option can be chosen for each issue
  - Vet appealed May 2020 letter to CAVC
  - Sec'y filed motion to dismiss, arguing that the BVA letter was not a final decision over which CAVC had jurisdiction

Cardoza v. McDonough

- **CAVC Decision**
  - CAVC had jurisdiction to consider the appeal
  - By refusing to docket the Form 10182 seeking an earlier effective date, the BVA denied an earlier effective date; this had the same impact as dismissing the appeal, rendering the effective date assigned in the June 2019 rating decision final
  - The Board's letter is a final decision under 38 U.S.C. § 7104(d), because the letter: (1) was in writing; (2) contained BVA's finding and conclusion—that the Board could not process the appeal; (3) contained a statement of reasons or bases explaining that Appellant could choose only one review option per issue; and (4) denied an earlier effective date by refusing to docket his appeal.

ADVOCACY ADVICE

- Carefully review any communication from BVA in response to Form 10182. Any written communication that says an appeal will not be processed or is being rejected can likely be appealed to CAVC.
- The test as to whether a communication is appealable is whether the BVA action effectively denies the claim
  - But just because CAVC may have jurisdiction to review a letter as a final decision of BVA, doesn't mean CAVC can't ultimately affirm that decision as a valid dismissal/denial, as it may eventually do in Mr. Cardoza's case
    - Claimants are actually prohibited from concurrently pursuing two lanes of administrative review for the claim or issue
      - 38 U.S.C. § 5103C(a)(2)(A); 38 C.F.R. § 3.2500(b); *see Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, 7 F.4th 1110, 1142 (Fed. Cir. 2021)

Cooper v. McDonough

Vet. App No. 23-5963

Decided: September 18, 2024

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Cooper v. McDonough

- **Issue:**
  - Whether a BVA remand of a claim subject to the AMA is a final decision that can be appealed to the CAVC, since the remanded claim will not automatically return to the BVA?

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Cooper v. McDonough

- **Relevant Law**
  - CAVC has exclusive jurisdiction to review decisions from the BVA that are adverse to the appellant and final—not tentative or interlocutory
    - 38 U.S.C. §§ 7252(a); 7266(a)
  - A BVA remand order is "in the nature of a preliminary order" and "does not constitute a final decision of the Board"
    - 38 C.F.R. § 20.1100(b) (2024)
  - All questions in a matter which under 38 U.S.C. § 511(a) is subject to decision by the Sec'y shall be subject to one review on appeal to the Sec'y. Final decisions on such appeals shall be made by the BVA.
    - 38 U.S.C. § 7104(a)

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Cooper v. McDonough

- **Facts**
  - July 2023: CAVC granted JMR for Vet's claims for increased initial rating for prostate cancer; earlier effective dates for SC for prostate cancer and diabetes; and earlier effective date for SMC for loss of use of a creative organ, all of which were subject to the AMA
  - When claims returned to BVA, it remanded them to the RO for an addendum medical opinion and to complete further work to determine date of declassification of a report relevant to the assignment of the effective dates
  - Mr. Cooper appealed the Remand Order to the CAVC and the Secretary moved to dismiss

Cooper v. McDonough

- **Appellant's Argument**
  - The AMA fundamentally altered the nature of Board remands so that they no longer are preliminary orders under 38 C.F.R. § 20.1100(b) and CAVC has jurisdiction to review them
  - Because when BVA remands AMA claims to the RO, they do not automatically return to the Board if the RO continues the denials, a BVA remand acts as the terminal event to his "one review on appeal" (38 U.S.C. §7104(a)) and constitutes a final agency decision.
    - *Maggitt v. West*, 202 F.3d 1370, 1376 (Fed. Cir. 2018)

Cooper v. McDonough

- **Secretary's Argument**
  - Caselaw has long held that a BVA remand is interlocutory in nature and not reviewable by the Court. This did not change under AMA. "[A] nonfinal remand order is not a decision for purposes of section 7252."
    - *Gardner-Dickson v. Wilkie*, 33 Vet. App. 50, 56 (2020), *aff'd sub nom. Gardner-Dickson v. McDonough*, No. 2021-1462, 2021 U.S. App. LEXIS 33000 (Fed. Cir. Nov. 5, 2021)

Cooper v. McDonough

- **CAVC Decision**
  - Dismissed the appeal
  - Although a remanded AMA claim doesn't automatically return to BVA, the claimant has a right to appeal a decision on the claim and return that claim to BVA repeatedly, so long as the claimant continuously pursues the claim
  - Congress didn't change CAVC's jurisdictional statutes under the AMA. A remand is non-final and requires future litigation; it does not involve grant or denial of a claim; and except for delay, is non-adverse. Therefore, a remand order cannot be appealed.
  - If there are unduly repetitive remands, the claimant may file a petition for extraordinary relief under the All Writs Act

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Cooper v. McDonough

- **Advocacy Advice**
  - If a claimant thinks the evidence of record is sufficient to grant the claim and is unhappy with a BVA order remanding a claim for additional development / correction of a duty to assist error, unfortunately, the claimant cannot appeal the BVA remand order to the CAVC.
  - But, if BVA repeatedly (and unnecessarily) remands a claim to the RO, the claimant should consider filing with the CAVC a petition for a writ of mandamus ordering BVA to issue a final decision
  - If BVA remands a claim to the RO, it is treated like a supplemental claim and the claimant can submit new evidence, so a BVA remand may be to the claimant's advantage if new supporting evidence can be obtained

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De Hart v. McDonough

37 Vet. App. 371

Decided: July 23, 2024

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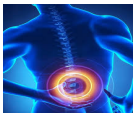
De Hart v. McDonough

- **Issue**
  - Whether separately rated neurological complications of a spinal disability, such as radiculopathy, always remain part of the underlying spinal disability claim for appellate purposes?



De Hart v. McDonough

- **Relevant Law**
  - Once a claim is filed, VA will consider all lay and medical evidence of record for entitlement to benefits for the claimed condition, as well as any additional benefits for complications of the claimed condition, including those identified by the rating criteria for that condition.
    - 38 C.F.R. § 3.155(d)(2)
  - "Evaluate any associated objective neurologic abnormalities [of a spine disability], including, but not limited to, bowel or bladder impairment, separately, under an appropriate diagnostic code."
    - 38 C.F.R. § 4.71a, General Rating Formula for Diseases and Injuries of the Spine, Note 1

De Hart v. McDonough

- **Facts**
  - In 2008, Ms. De Hart applied for SC for "Grade II Spondylosis L5-S1," a spine condition
  - She underwent a VA exam, during which examiner noted, "spondylolisthesis with low back and radiating pain to the right leg. Evidence of S1 radiculopathy."
  - In Dec. 2008, VARO issued rating decision which granted SC and issued rating of 0% under DC 5329 (lumbar spondylolisthesis)
  - Vet appealed rating to BVA
  - While appeal was pending, RO ordered new spine exam, and increased rating to 10%, effective 4/2016

De Hart v. McDonough

- **Facts (cont'd)**
  - 2017: BVA remanded claim for higher ratings of spine condition
  - 3/2019: VA examiner diagnosed moderate bilateral lower extremity radiculopathy, which was a progression of Vet's back disability
  - 9/2019 RO decision:
    1. Increased rating for lumbar spondylolisthesis to 20%, effective 3/2019
    2. Granted SC for radiculopathy of each leg as secondary to lumbar spondylolisthesis at 20% for each leg, effective 3/2019

De Hart v. McDonough

- **Facts (cont'd)**
  - Spine condition rating automatically returned to BVA
  - 6/2021 BVA decision:
    - Continued ratings previously assigned for spine
    - Noted that "the RO assigned separate ratings for right and left lower extremity radiculopathies in a September 2019 rating decision related to the lumbar spine disability. The evidence of record does not indicate the presence of any additional objective abnormalities for which a separate rating is warranted."
    - Did not further discuss any aspect of Vet's radiculopathies or list those issues among the issues considered
  - Ms. De Hart appealed to CAVC

De Hart v. McDonough

- **Appellant's arguments**
  - The right leg radiculopathy effective date was part of the spine appeal that returned to BVA, such that BVA should have addressed it in its decision
  - CAVC held in *Chavis v. McDonough* that neurological abnormalities should always be considered as part of underlying spine claim, including on appeal. Even if *Chavis* was fact specific, that is how it should be interpreted universally under 38 C.F.R. § 3.155(d)(2), regardless of whether neurological complications were claimed.
  - All aspects of spine-related complications remain part and parcel of the claim and "travel" with the claim on appeal
  - BVA was obligated to address the neurological claims based on the 2009 NOD; the RO's later award of separate ratings for radiculopathy did not remove the issue from appellate status because it wasn't a full grant of benefits

De Hart v. McDonough

- **Secretary's Argument**
  - The Court is *Chavis* was "careful to limit its holding to the unique factual and legal circumstances of Mr. Chavis's case."
  - Prior Court decisions establish that an NOD as to an upstream issue cannot place a downstream issue into appellate status, *i.e.*, "NOD cannot express disagreement with an issue that has not been decided"
  - Neurological complications cannot remain part of underlying spine claim in perpetuity; once they are identified and adjudicated, a separate NOD must be filed for those claims to initiate appellate proceedings

De Hart v. McDonough

- **CAVC Decision**
  - Although neurological complications secondary to a spine condition must be considered and properly compensated by VA when they are raised by a veteran or reasonably raised by the record, they do not, as a matter of law, remain part of the spine claim once they have been separately addressed and adjudicated in a VA decision
  - Once radiculopathy is recognized by VA as a distinct SC disability with its own rating criteria, it is subject to the same general rules that would govern any other separately adjudicated issue and must be separately appealed.
  - Because Ms. De Hart did not file an NOD as to the effective date for her radiculopathy assigned by the RO in its decision, the issue was not before the Board and the Board had no obligation to address it

De Hart v. McDonough

- **CAVC Decision (cont'd)**
  - Judge Jaquith issued a dissenting opinion, in which he opined that the majority had, in effect, overruled the earlier panel decision in *Chavis*, which can only be done by the CAVC en banc. He believed that the case should have been returned to the Board to consider the radiculopathy claims.
  - **NOTE:** Case has been appealed to the Federal Circuit, so . . .

De Hart v. McDonough

NVLSP

- **Advocacy Advice**
  - Even if different manifestations of a disability might be considered part of a claim for VA benefits for a single overarching condition (back condition, knee condition, TBI, etc.), once VA treats those different manifestations as distinct disabilities covered by different diagnostic codes (in either granting or denying benefits), to be safe, treat each of those distinct disabilities accordingly for purposes of seeking review/appeal or increased ratings
    - Very important when the distinct manifestations involve different body systems (e.g., neurological vs. musculoskeletal)
    - Check the rating decision code sheet to see if VA treats a manifestation of a general condition as a distinct disability
    - Separately list each condition associated with its own DC on any review request form (HLR, Supp. Claim, NOD) or IR claim

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SURVEY #2

NVLSP

- **Vet filed a claim for SC for a neck disability. VA granted SC for cervical spine DJD at 10%, RUE neuropathy at 10%, and LUE neuropathy at 10%. He thinks the assigned ratings are too low. What should he do?**
  - A. File claims for increased rating for all three ratings
  - B. Seek review of the "neck disability" rating, since it is broad enough to cover DJD and neuropathy
  - C. Seek review of the "cervical spine DJD, RUE neuropathy, and LUE neuropathy" ratings
  - D. Any of the above approaches will work

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ANSWER

NVLSP

- **<u>NOTE</u>: Claim for increased rating should be made if any of the conditions worsen *<u>after</u>* the date of rating decision**

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Laska v. McDonough

Vet. App. No. 22-1018

Decided: September 6, 2024

Laska v. McDonough

- **Issue:**
  - What level of care for service-connected TBI does a Veteran need to qualify for SMC(t) ?

Laska v. McDonough

- **Relevant Statute (SMC/SMC(t))**
  - Special monthly compensation (SMC) is available to veterans whose service-connected disabilities present hardships beyond what is contemplated by the schedule for rating disabilities.
    - 38 U.S.C. § 1114(k)-(t)
  - Vet entitled to SMC(t) if, as the result of SC disability, Vet "is in need of regular aid and attendance for the residuals of traumatic brain injury," is not eligible for SMC(r)(2), and "in the absence of such regular aid and attendance would require hospitalization, nursing home care, or other residential institutional care"
    - 38 U.S.C. § 1114(t)

Laska v. McDonough

- **Relevant Regulation (SMC(t))**
  - A veteran is entitled to the higher level aid and attendance allowance authorized by § 3.350(j) [SMC(t)] in lieu of the regular aid and attendance allowance when all of the following conditions are met:
    - As a result of SC residuals of TBI, the veteran meets the requirements for entitlement to the regular aid and attendance allowance ….
    - As a result of SC residuals of TBI, the veteran needs a **"higher level of care"** … than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care the veteran would require hospitalization, nursing home care, or other residential institutional care
      - 38 C.F.R. § 3.352(b)(2) (emphasis added)

Laska v. McDonough

- **Relevant Regulation (Regular A&A)**
  - The following will be accorded consideration in determining the need for regular aid and attendance: inability of claimant to dress or undress [self], or to keep [self] ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); inability of claimant to feed [self] through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment. . . . It is only necessary that the evidence establish that the veteran is so helpless as to need regular aid and attendance, not that there be a constant need. . . .
    - 38 C.F.R. § 3.352(a)

Laska v. McDonough

- **Relevant Regulation (Higher-Level Care)**
  - Need for a higher level of care shall be considered to be need for personal health-care services provided on a daily basis in the veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional. Personal health-care services include (but are not limited to) such services as physical therapy, administration of injections, placement of indwelling catheters, and the changing of sterile dressings, or like functions which require professional health-care training or the regular supervision of a trained health-care professional to perform. A licensed health-care professional includes (but is not limited to) a doctor of medicine or osteopathy, a registered nurse, a licensed practical nurse, or a physical therapist licensed to practice by a State or political subdivision thereof.
    - 38 C.F.R. § 3.352(b)(3)

Laska v. McDonough

- **Facts**
  - Veteran Haskell sustained a head injury in 1967 while serving in the U.S. Marine Corps in Vietnam
  - He was awarded SC for encephalopathy with left cerebellar dysfunction and loss of part of the skull with retained metallic bodies. He was awarded SMC due to being permanently housebound and based on the need for regular aid and attendance.
  - In May 2017, he filed claim for SC for TBI with a report from neurologist that stated he needed regular supervision by health care professionals
  - VA medical examiner stated that it would be "speculative" to opine about the level of care Mr. Haskell required, despite reports from his wife and a nurse that he needed supervision and could not leave the house without someone accompanying him.

Laska v. McDonough

- **Facts (cont'd)**
  - In 2017, VA continued 100% rating for encephalopathy as a residual of TBI, but denied SMC(t)
  - After appeal to BVA, remands, and exams, BVA determined that Mr. Haskell required regular aid and attendance, but not at-home, daily, personal services provided by a licensed healthcare professional or under the supervision of a licensed healthcare professional. Because he had not shown the need for both A&A and higher-level care as required by § 3.352(b)(2), BVA denied SMC(t).
  - Mr. Haskell appealed to CAVC, but died while appeal was pending. His wife, Margaret Laska, substituted for him.

Laska v. McDonough

- **Parties' Arguments**
  - Appellant argued that the plain language of 38 U.S.C. § 1114(t) does not require a need for higher-level care. The implementing regulation, 38 C.F.R. § 3.352(b)(2), exceeds its authorizing statute; "regular aid and attendance" must carry the same meaning in §§ 1114(l) and (t).
  - Secretary argued that § 1114(t) is not clear on its face and § 3.352(b)(2) validly defines the required level of care. § 1114(t) contemplates higher level of care by referring to "residential institutional care."

Laska v. McDonough

- **CAVC Decision**
  - The plain language of 38 U.S.C. § 1114(t) specifies that the requisite level of care for entitlement to SMC(t) is the need for regular aid and attendance
  - The VA regulation 38 C.F.R. § 3.352(b)(2) requires the higher level of care described in 38 U.S.C. § 1114(r)(2)
  - Because the regulation conflicts with the statute, the regulation is invalid
  - The Court reversed the Board and remanded the Veteran's claim for adjudication under the plain meaning of the statute.

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Laska v. McDonough

- **Advocacy Advice**
  - If VA previously denied entitlement to SMC(t) because Vet's TBI required only regular A&A, but not a "higher level of care":
    - If denial less than 1 year ago, request HLR or direct BVA appeal and cite *Laska*
    - If denial more than 1 year ago, file supplemental claim and cite *Laska*
      - **If supplemental clam granted, then consider asserting CUE with previous denial**
  - Note: Vet must still show the need for hospitalization, nursing home care, or other residential institutional care w/out regular A&A

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Phillips v. McDonough

37 Vet. App. 394 (2024)

Decided: July 30, 2024

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Phillips v. McDonough

- **Issue:**
  - Whether the Board can assign an effective date for TDIU based on a separate pending claim that is not before the BVA?

Phillips v. McDonough

- **Relevant Law**
  - The effective date for an increase in disability compensation is the "[e]arliest date 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, otherwise, date of receipt of claim. …"
    - 38 C.F.R. § 3.400(o)(2)
  - TDIU is not a separate claim, but a rating option available when the record indicates evidence of unemployability
    - *Rice v. Shinseki*, 22 Vet. App. 447, 453-54 (2009)

Phillips v. McDonough

- **Facts**
  - 8/2002 – Mr. Phillips filed a claim for SC for skin conditions that remains pending today
    - 7/25/2023: Board 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 currently pending before BVA in separate appeal
  - 5/2020 – RD granted SC for PTSD, including depression and anxiety, with a 70% rating, effective 11/25/2009

Phillips v. McDonough

- **Facts (cont'd)**
  - 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
  - 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
  - 4/2022 – BVA (1) denied an effective date prior to 4/2021 for 100% PTSD rating; (2) granted TDIU effective 4/2020

Phillips v. McDonough

- **Parties' Arguments**
  - Vet argued that BVA erred because it failed to address whether he was entitled to TDIU as early as (1) 2009 on a schedular basis (eff. date of 70% PTSD rating); (2) 2002 on an extra-schedular basis, the eff. date of SC for skin disabilities, because TDIU was reasonably raised as part of skin claims
  - Sec'y argued that BVA correctly assigned eff. date of 4/2020 to TDIU, because claim before BVA stemmed from 4/2021 application. Sec'y also argued that the holding in *Rice* didn't apply to AMA claims.

Phillips v. McDonough

- **CAVC Decision - Affirmance**
  - 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

Phillips v. McDonough

- **CAVC Decision**
  - Although Mr. Phillips could receive a total rating as part of his pending claims other than those included in the 4/2021 application, BVA could not "rope in those separately pending claims when adjudicating the increased rating claim on appeal," because TDIU is not its own standalone claim
  - The potential effective date for TDIU depends on the date of the underlying claim for SC or increase the VA is then adjudicating–in this case 4/2021; Mr. Phillips had appealed only PTSD and TDIU, not the skin condition
  - Whether Vet can receive TDIU back to 2002 remains "live" before VA, as part of the separately pending skin rating appeal

Phillips v. McDonough

- **CAVC Dissent (Chief Judge Bartley):**
  - Majority opinion will require vets post-AMA "to appeal rating decisions they actually agree with to protect their earliest effective date for TDIU, clogging an already overstretched VA claims process… ."
  - Majority opinion is contrary to the Court's intention when it decided *Rice*, *i.e.*, that a Veteran's potential effective date for TDIU is the date of the claim for service connection, and not limited to one year before the Veteran submitted his TDIU application.
  - At the very least, the majority should have remanded TDIU as inextricably intertwined with the claim for an increased skin disability rating that was pending before VA
  - NOTE: Mr. Phillips has requested full court review of the panel decision, so stay tuned…

Phillips v. McDonough

- **Advocacy Advice**
  - If seeking TDIU, be sure to continuously pursue (by Supp. Claim, HLR, or BVA appeal) all issues (disability claims) that may in any way contribute to the Vet's unemployability, even if the veteran has a separately pending TDIU / increased rating claim and the schedular rating for the disability is correct
    - Argue that TDIU is warranted due at least in part to the disability that is the subject of each claim
    - This will help preserve the earliest possible effective date for TDIU

Spigner v. McDonough

Vet. App. No. 22-2636

Decided: Nov. 7, 2024

Spigner v. McDonough

- **Issue:**
  - When BVA reschedules on its own accord a hearing for an AMA appeal, whether it must consider evidence received within 90 days after the originally scheduled hearing, but before the date of the rescheduled hearing?

Spigner v. McDonough

- **Relevant Law**
  - For AMA appeals in which the appellant requests a BVA hearing, the evidentiary record before the Board is limited to evidence of record at time of the RO decision and evidence the appellant submits at the hearing or within 90 days following the hearing
    - 38 U.S.C. § 7113(b); 38 C.F.R. § 20.302(a)
  - If an appellant does not appear at a scheduled BVA hearing, and the hearing is not rescheduled subject to 38 C.F.R. § 20.704(d), BVA's decision will be based on review of the evidence of record at the time of the RO decision and evidence submitted by the appellant or representative w/in 90 days following the date of the scheduled hearing
    - 38 C.F.R. § 20.302(c)

Spigner v. McDonough

- **Relevant Law**
  - If an appellant fails to appear for a scheduled Board hearing, the appellant may move for a new Board hearing upon a showing of good cause; otherwise, the appeal will be decided as if the hearing request had been withdrawn
    - 38 C.F.R. § 20.704(d)

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Spigner v. McDonough

- **Relevant Procedural History**
  - Mr. Spigner appealed a 12/2015 decision and later opted into RAMP, selecting HLR lane
  - 7/2018: RO issued HLR decision continuing to deny claims
  - Vet appealed to BVA, choosing hearing lane
  - 3/2021: BVA notified Vet that hearing was scheduled for 5/25/2021
  - 5/25/2021 hearing was postponed due to scheduling conflict (unclear which party had the conflict)

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Spigner v. McDonough

- **Relevant Procedural History (cont'd):**
  - 6/2021: VA notified Vet of new hearing date of 8/18/2021 and stated that he could submit new evidence at the hearing or w/in 90 days after the scheduled hearing date, and provided the evidence submission rules for when hearing is withdrawn by the appellant or missed
  - 8/18/2021: Hearing postponed because Vet did not receive scheduling notice from VA mailing contractor; VA notified Vet that hearing was rescheduled to 10/5/2021, repeating language contained in 6/2021 letter regarding submission of new evidence
  - 9/29/2021: Vet submitted additional evidence in support of claims

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Spigner v. McDonough

- **Relevant Procedural History (cont'd):**
  - 10/5/2021: Vet afforded BVA hearing. Board member stated that "a bunch" of prior treatment records had been submitted by Vet during the week before the hearing and could not be considered by BVA unless the Vet resubmitted them within the next 90 days
  - Vet didn't resubmit any evidence
  - 3/2022: BVA issued decision denying claims, concluding that it lacked legal authority to review evidence submitted after the RAMP election and outside the 90-day period following the 10/5/2021 hearing

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Spigner v. McDonough

- **Parties' Arguments**
  - Vet argued that under regulations related to rescheduling BVA hearings, the Board should have considered the evidence submitted on 9/29/2021, because that date was within 90 days of the 8/18/2021 scheduled hearing, which did not occur
  - Sec'y argued that the Board correctly applied 38 U.S.C. § 7113(b) and 38 C.F.R. § 20.302(a), which create a bright line rule governing how and when an appellant may submit evidence to the Board in the context of a BVA hearing in an AMA appeal, and that there are no exceptions

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Spigner v. McDonough

- **CAVC Decision**
  - BVA erred in denying Vet's claims, because it refused to consider Sept. 2021 evidentiary submissions
    - Because BVA rescheduled the 8/18/2021 hearing on its own accord without a request from the Vet, the rescheduling was NOT consistent with a withdrawal request based on failure to appear for a scheduled hearing under § 20.704(d); therefore, § 20.302(c) controlled the evidentiary record
    - 38 C.F.R. § 20.302(c) required BVA in this case to base its review on the evidence of record at the time of the RO decision and evidence submitted by the appellant with 90 days following the date of the *scheduled* (i.e., 8/18/2021) hearing

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Spigner v. McDonough

- **Advocacy Advice**
  - It is generally best to follow the most conservative (*i.e.*, least favorable to you) rules on timing of submission of evidence. Although in this case BVA erred, it would have been better to resubmit the evidence w/in 90 days after the date the hearing occurred, as the Board directed the Vet to do. It would have been considered by the Board sooner and without the need for a CAVC appeal.
  - If an appellant submits evidence outside an applicable evidentiary window, it should be resubmitted during the window to ensure it is considered by BVA
  - But, when BVA reschedules a hearing on its own accord, ensure BVA considers any evidence submitted by the appellant within 90 days after the date the hearing was originally scheduled to be held, even if it was submitted before the hearing occurred

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