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Practical Implications of the AMA — Five Years Later

Chesley Roberts

Deputy Director
Veterans Consortium's Legal Assistance Programs
Washington, DC

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I. Introduction

396. On August 23, 2017, President Trump signed into law the Veterans Appeal Improvement and Modernization Act (Appeals Modernization Act or AMA).² This new law went into effect on February 19, 2019. The AMA is the current statutory framework for claims for benefits and appeals processing with the Department of Veterans Affairs (VA), replacing the previous claims and appeals process referred to as the legacy system.

397. The initial process to file a claim for benefits remains the same. A claimant begins the process by filing a claim with the VA's regional office (RO). When the process is completed, the RO initiates a rating decision notifying the claimant of its decision and reasons for the decision. The changes between legacy and AMA are mostly seen after the VA issues its initial decision at the RO.³

398. Central to the AMA's reform was the ability for claimants to have multiple review options. Claimants may now choose from three procedural lanes to initiate a review of

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- 1 Chesley Roberts serves as the Deputy Director for The Veterans Consortium's Legal Assistance Programs. In her current role, Chesley assists veterans with their claims for VA disability compensation before the Department of Veterans Affairs and the U.S. Court of Appeals for Veterans Claims. Chesley is a graduate of Florida State University (B.S. 2017) and Stetson University College of Law (J.D. 2020). While in law school, Chesley worked at Stetson's Veterans Advocacy Clinic.
 - 2 Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115–55, [131 Stat. 1105](#) (2017).
 - 3 Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115–55, [131 Stat. 1105](#) (2017).

an unfavorable decision, in contrast to the legacy system's single pathway of appealing straight to the Board of Veterans' Appeals (Board).

399. Under the AMA, the three options for review are

1. a supplemental claim,
2. a higher-level review, and
3. an appeal to the Board, by filing a notice of disagreement (NOD).

400. If a claimant chooses to file a NOD, they then can choose which Board docket to initiate the appeal. The three dockets are

1. direct review,
2. an evidence review, or
3. a hearing.⁴

401. Once the Board issues a decision, a claimant may appeal an unfavorable decision to the U.S. Court of Appeals for Veterans Claims (Court). The Court can affirm the Board's decision or vacate the decision and remand the case back to the Board with instructions to fix the error(s).

402. The AMA has not only changed the way VA reviews decisions, but also inadvertently changed how claimants prepare their applications and the way advocates assist claimants. One essential change is the different time periods to submit evidence on appeal. This includes the ability to submit evidence when appealing an unfavorable decision to the Board and the ability to submit evidence when returning to the Board after remand from the Court.

403. This paper will primarily focus on how the AMA changed a claimant's ability to submit evidence on appeal. The first section will explore how a claimant submitted evidence under the legacy system while the second section will explore how a claimant can submit evidence under the AMA. Sections three, four, and five will discuss different advantages and disadvantages claimants are experiencing due to this change under the AMA. This paper is not intended to cover all the advantages and disadvantages, but instead provide an overview on issues that claimants and advocates are experiencing.

4 Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, [131 Stat. 1105](#) (2017).

1. Submitting Evidence Under the Legacy System

404. Under the legacy system, the only way a claimant could initiate an appeal of an unfavorable decision was by filing a NOD and perfecting the appeal by filing a timely substantive appeal. A substantive appeal consisted of properly completing the VA Form 9, and choosing to have a hearing or submit written argument and evidence. Then the claimant would receive a notice with information explaining the claimant could for the “period of 90 days following the mailing of notice that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board, or up to and including the date the appellate decision is promulgated by the Board[.]”⁵

405. Following a remand from the Court, the Board mails a notice to the claimant informing them of their case returning to the Board and additional evidence and argument may be submitted within 90 days from the date on the letter. A claimant, as a right, was entitled to submit additional evidence to the Board during the 90-day period beginning after the mailing of notice that the appellate record has been returned to the Board.⁶

406. In *Quarles v. Derwinski*, the Court stated that on remand “appellant will be free to submit additional evidence and argument on the question at issue[.]”⁷ The Court reiterated this statement in *Kutscherousky v. West* by explaining in every case in which the Court remands to the Board a claimant is entitled to submitted evidence unless the Court specifically provides to the contrary whether or not the Court cites to the precedential order.⁸

2. Submitting Evidence Under the AMA

407. Under the AMA, the claimant’s ability to submit evidence is determined by the docket that is selected. When a claimant files an appeal, they can choose one of the following dockets:

1. direct review,
2. evidence review, or
3. hearing.

5 Veterans’ Judicial Review Act, Pub. L. No. 100–687, [102 Stat. 4105](#) (1988).

6 Veterans’ Judicial Review Act, Pub. L. No. 100–687, [102 Stat. 4105](#) (1988).

7 *Quarles v. Derwinski*, [3 Vet. App. 129](#) (1992).

8 *Kutscherousky v. West*, [12 Vet. App. 369](#) (1999).

408. When a claimant requests a direct review, the evidentiary record before the Board is limited to the evidence of record at the time of the decision of the agency of original jurisdiction (AOJ). When a claimant requests an evidence review, the evidentiary records is limited to

1. any evidence that was submitted with the NOD, or,
2. evidence submitted within 90 days following receipt of the NOD.

409. If the claimant requests a hearing, the evidentiary record is limited to

1. evidence submitted at the hearing, or,
2. evidence submitted within 90 days following the hearing.

410. When comparing this rule to the legacy system, the VA chose to adopt a defined period of time to submit evidence on appeal under the AMA.⁹

411. The AMA does not allow new evidence to be submitted on remand. The Court specifically addressed this issue in *Andrews v. McDonough*. In *Andrews*, the claimant chose the direct review docket, under the AMA, when appealing to the Board. The Court held evidence was not allowed to be submitted on remand because allowing this would “flout Congress’s instruction that ‘the evidentiary records before the Board shall be limited to the evidence of record at the time of the decision of the on appeal.’” The Court further explained to allow anything else would be “making the Board a body that newly develops and adjudicates evidence rather than the appellate body that the AMA was meant to shore up.”

412. While *Andrews* specially addressed the evidentiary window for a direct review docket, when reading sections 38 U.S.C § 7113(b)¹⁰ and (c)¹¹ and 38 C.F.R § 20.801¹², the statutes and regulation do not allow evidence to be submitted on remand, from the Court, for any docket. 38 U.S.C § 7113(b)¹³ states for cases in which a hearing is requested, the evidentiary record before the Board “shall be limited” to the evidence of record at the time of the decision from the AOJ and evidence submitted by at the hearing or within 90 days following the hearing. 38 U.S.C § 7113(c)¹⁴ states for cases in which a hearing is not requested but an opportunity to submit evidence is requested, the evidentiary records before the Board “shall be limited” to the evidence at the time

9 Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115–55, [131 Stat. 1105](#) (2017).

10 [38 U.S.C. § 7113\(b\)](#).

11 [38 U.S.C. § 7113\(c\)](#).

12 [38 C.F.R. § 20.801](#).

13 [38 U.S.C. § 7113\(b\)](#).

14 [38 U.S.C. § 7113\(c\)](#).

of the AOJ decision and evidence submitted with the NOD or within 90 days following receipt of the NOD. Under the AMA, by the time the case returns to the Board, the 90 days to submit evidence are up rendering the evidentiary window closed.

3. Advantage and Disadvantage: A Defined Period to Submit Evidence

413. While the legacy system permitted an open evidentiary record, this was not a perfect system, and claimants experienced issues. Under the legacy system, claimants could submit evidence within 90 days of receiving the notice from the Board or up to the date the Board made a decision, whichever came first.¹⁵ This meant the Board could make a decision prior to the claimant submitting their evidence. An advantage to the set period of time to submit evidence under the AMA is the claimant can submit evidence prior to the Board making a decision.¹⁶

414. In *Costello v. McDonough*, appellant argued the regulation, regarding submitting evidence on appeal in the legacy system, violates a claimant's due process because claimants are not heard when the Board issues a decision before the 90 day window to submit evidence. While the Court disagreed and held the appellant did not show the regulation violated the claimant's constitutional right, this case does show a defined period to submit evidence can be an advantage. During argument, the appellant did express that the VA adopting a defined period to submit evidence under the AMA demonstrates the VA's recognition that there is a "fundamental requirement for a date certain by which a veteran's time to submit evidence and argument expires."¹⁷

415. A disadvantage to the set period to submit evidence is any evidence submitted outside the evidentiary window, no matter how relevant and material it may be, will not be considered unless it is resubmitted at the proper time.

416. In *Cook v. McDonough*, the Court held 38 U.S.C. § 7113(c)(1)¹⁸ and (c)(2)(A)¹⁹ plainly exclude evidence from the evidentiary record before the Board that was submitted during the period of the AOJ decision and the filing of the NOD. Any evidence submitted outside of the evidentiary window will not be considered.²⁰ The only way for the evidence to be considered is for the claimant to resubmit the evidence through

15 Veterans' Judicial Review Act, Pub. L. No. 100-687, [102 Stat. 4105](#) (1988).

16 Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, [131 Stat. 1105](#) (2017).

17 *Costello v. McDonough*, [36 Vet. App. 175](#) (2023).

18 [38 U.S.C. § 7113\(c\)\(1\)](#).

19 [38 U.S.C. § 7113\(c\)\(2\)\(A\)](#).

20 *Cook v. McDonough*, [36 Vet. App. 175](#) (2023).

one of the proper channels. This can negatively impact claimants, especially pro se claimants, because they may not understand they need to resubmit the evidence and will be penalized for this misunderstanding.

417. If evidence is submitted outside of the set window, the Board must inform the claimant, by providing a general statement reflecting whether evidence was not considered because it was received during a time not permitted by section 38 U.S.C § 7113,²¹ and providing options that may be available to have the VA consider the evidence. In *Cook*, the Court clarified that an adequate general statement under subsection 38 U.S.C § 7104(d)(2)²² is one that accurately informs a claimant whether the Board did not consider evidence because it was received during a time not permitted by section 38 U.S.C § 7113(c).²³

418. However, what information the Board must provide in order to meet this requirement has been debated. In *Cook* the Court explained the Board committed a prejudicial error when it provided a “misleadingly inaccurate general statement informing the appellant that it did not consider only evidence received after the 90 days following NOD.” In this case, the Board stated: “[e]vidence was added to the claims file during a period when new evidence was not allowed — after the 90 days following the election of the [e]vidence appeal lane.” This statement was misleading because it led the claimant to believe the Board did consider the evidence that was submitted prior to the start of the 90 days and prevented the claimant from making an informed decision on how to have the VA consider the evidence. In the concurring opinion, Judge Jaquith took this one step further and explained the VA erred by failing to provide notice which explained the evidence the appellant submitted in response to the AOJ’s notice would not be considered unless he resubmitted the evidence with the NOD.²⁴

419. Advocates have argued the Board should be required to provide a more precise statement. For example, in *Monroe v. McDonough*, the appellant argued the Board failed to provide an adequate general statement regarding what evidence was not considered when making a decision because it did not “concretely notify him whether additional evidence was in fact received outside the appropriate evidentiary window and thus not considered by the Board.” In this case, the Board decision stated “if evidence was associated with the claims file during a period of time when additional evidence was not allowed, the Board has not considered it[.]” The Court concluded the Board did not commit an error because the Board accurately set forth the limits of the evidentiary

²¹ 38 U.S.C. § 7113.

²² 38 U.S.C. § 7104(d)(2).

²³ 38 U.S.C. § 7113(c).

²⁴ *Cook v. McDonough*, 36 Vet. App. 175 (2023).

records and current caselaw does not require to explicitly identity the evidence that falls outside of the record.²⁵

420. Just as claimants may not realize evidence needs to be resubmitted to be considered, claimants may not realize what specific evidence needs to be resubmitted. The lack of specificity by the Board in its decision regarding evidence is a disadvantage for claimants.

4. Disadvantage: Inability to Submit Evidence on Remand from the Court

421. Removing the claimant's right to submit evidence on remand has impacted the way claims are handled once a remand has been issued. There may be situations when additional evidence is essential in order for the claimant's claim to be granted, and unless another procedural lane is chosen, such as filing a supplemental claim, the only way to submit new evidence under the AMA is make sure the claim returns to the AOJ to reopen the evidentiary window.

422. The Board's ability to remand the claim for development is limited. The Board will review evidence that was considered by the AOJ, and review any argument submitted on remand, but the Board will not remand the claim further for additional development unless there was an error that occurred at the AOJ during the initial decision.²⁶

423. When at the Court, advocates need to be strategic when arguing for a Board decision to be vacated and the case remanded. When applicable, if the case falls under the AMA, it may be better to argue the AOJ failed in its duty to assist. A duty to assist error by the AOJ would trigger the Board to remand further to fix the error and potentially open the window for the claimant to add additional evidence.

424. It is important to note the appellant could request language, and the Secretary can waive the limitation, to allow the claimants to submit new evidence on remand under the AMA. Parties, including the Secretary, "are generally permitted to waive the application of statutes intended for their benefit" unless there is a specific prohibition against doing so. In *Bolds v. McDonough*, the Court reversed the Board's finding that it could not consider the evidence the appellant submitted following a remand from the Court. In this case, the Joint Motion for Partial Remand (JMPR) included language permitting the appellant to submit additional argument and evidence to the Board. Following a remand from the Court, the Board mailed a notice to the appellant informing

²⁵ *Monroe v. McDonough*, No. 20-6914, 2021 WL 1234567 (Vet. App. June 9, 2021).

²⁶ Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, [131 Stat. 1105](#) (2017).

them their case has returned to the Board and additional argument may be submitted within 90 days from the date on the letter. Due to the language in the JMPR, the appellant submitted new evidence to support their claim. In its decision, the Board explained it could not consider the evidence that was submitted because it was outside of the evidentiary window. The Court held “the Board was not free to sua sponte reinstate the evidence submission limitations that the Secretary waived in the JMPR” and to hold otherwise “would be to allow the Board to unilaterally invalidate the terms of the JMPR, which were negotiated and agreed to by the Secretary and Ms. Bolds which the Court-granted[.]”²⁷

5. Unknown: The Board’s Timing

425. Modernizing the appeals process was a top priority for the VA due to the extreme wait times claimants were experiencing. Before the AMA, claimants were permitted to submit new evidence at any time prior to a final Board decision, often resulting in the Board remanding to the AOJ for further development and readjudication. A criticism of this process was the gathering and readjudication of evidence was adding time to the appeals process, due to the back and forth between the Board and the agency of original jurisdiction. The AMA sought to streamline the claims and appeals process to “ensure veterans receive timely appeals decision in the future.”²⁸

426. Prior to the implementation of the AMA, claimants waited an average of 5 years for a final decision if they chose to appeal to the Board. However, even under the AMA, the average time to wait for decisions is still substantial. Through the end of June 2024, the average days pending for an appeal in direct review was 621 days, the average time for evidence submission docket was 666 days, and for the hearing docket it was 739 days. The VA has explained a reason for a higher-than-expected wait times is due to the amount of appeals still pending in the legacy system.²⁹

427. It is difficult to determine if the AMA has impacted the time a claimant must wait for a decision. In August 2024, the VA released an AMA post-implementation report explaining there were 41,702 pending legacy system appeals within the VA. Once all legacy cases are finalized, and the VA is operating under one system, we may be able to see if the AMA will lead to timely decisions.³⁰

²⁷ *Bolds v. McDonough*, No. 22–2484 (Vet. App. July 11, 2024).

²⁸ Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115–55, 131 Stat. 1105 (2017).

²⁹ U.S. Dep’t of Veterans Affairs, *The Appeals Process: Your Comments and VA’s Plans*, VA NEWS (Mar. 8, 2016).

³⁰ U.S. Dep’t of Veterans Affairs, *Appeals Process Annual Report*, CMR (2024).

II. Conclusion

428. It has been over five years since the implementation of the AMA and everyone, including advocates and the VA, are still trying to understand the nuances of the AMA. “[W]ith the AMA ‘a whole new world began in the VA benefits adjudication system.’”³¹

429. The AMA has made the claims process and appeals system more efficient in some ways, but there are areas that need further improvement. It will be interesting to see how the AMA continues to develop over the next five years.

³¹ *Andrews v. McDonough*, 34 Vet. App. 151 (2021).