

Expedited Claims Adjudication Initiative (ECA): A Balancing Act Between Efficiency and Protecting Due Process Rights of Claimants

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INTRODUCTION

The processing of a claim for veterans benefits can take an average of three years to result in a final Board of Veterans' Appeals (BVA or Board) decision. Procedural protections in place that require various statutory and regulatory response periods can sometimes unnecessarily lengthen the time from the date of claim to a final BVA decision. In order to streamline and expedite the claims adjudication system, the Expedited Claims Adjudication Initiative (ECA) was enacted, effective December 5, 2008. This article will explore and provide an introduction to the ECA and the due process rights associated with the claims and appeals process. The authors also are committed to reexamining the ECA in the future to determine whether the ECA, as established, achieved its intended purpose.

I. DUTIES TO NOTIFY AND ASSIST

Once a claim for benefits is received at a Regional Office (RO), the Department of Veterans Affairs (VA's) duties to notify and assist the claimant are triggered pursuant to the Veterans Claims Assistance Act of 2000 (VCAA).³ Under the VCAA, VA has a duty to notify the claimant of any information and evidence needed to substantiate and complete a claim, what part of that evidence is to be provided by the claimant, and what part VA will attempt to obtain for

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³ 38 U.S.C. §§ 5100, 5102-5103A, 5106, 5107, 5126 (2006); *see also* 38 C.F.R. §§ 3.102, 3.159, 3.326(a) (2008).

the claimant.⁴ VA also has a duty to assist the claimant by making reasonable efforts to obtain evidence necessary to substantiate the claim.⁵

Generally, once a VCAA letter is issued to the claimant, he⁶ has up to one year to respond to a VA request for information and evidence necessary to substantiate a claim.⁷ Consequently, the process is reliant on the claimant: (1) submitting evidence in support of a claim; (2) identifying evidence to be retrieved by VA (such as private medical records which require an authorization [VA Form 21-4142]); and/or (3) VA retrieving service treatment and personnel records, VA medical records, and any other Federal department or agency records identified by the claimant (such as Social Security Administration [SSA]) records.⁸ Moreover, VA may have a duty to provide the claimant with a VA examination if such is determined to be warranted.⁹ Dependent on the facts of a particular case, the process can be riddled with exceptions that delay adjudication. Needless to say, while the RO may be able to issue a decision within several months of receipt of the claim, based on the current duties to notify and assist under the VCAA, it can take a year, if not longer, to issue an initial adjudicatory decision.

II. CURRENT TIME FRAMES ON APPEAL

Once a rating decision is issued by the RO, such decision is accompanied by appellate rights. Should the claimant disagree

⁴ 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b)(1); *Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002).

⁵ 38 U.S.C. § 5103A(b); 38 C.F.R. § 3.159(c).

⁶ The authors have elected to use the masculine “he” when referring to the claimant, although the term “claimant” represents both men and women.

⁷ 38 U.S.C. § 5103(b); 38 C.F.R. § 3.159(b)(1) (indicating if the claimant has not responded to the request within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medication examinations or medical opinions).

⁸ 38 C.F.R. § 3.159(c)(1)-(3).

⁹ *Id.* § 3.159(c)(4); *see also* *McLendon v. Nicholson*, 20 Vet. App 79 (2006).

with any portion of the Agency of Original Jurisdiction (AOJ)¹⁰ decision, under the current measures in place, the claimant has a year to appeal to the Board.¹¹ Claimants who appeal an RO determination to the Board can endure a lengthy process. An appeal consists of a timely-filed written Notice of Disagreement (NOD), and after a Statement of the Case (SOC) has been furnished, a timely-filed Substantive Appeal.¹² After the rating decision is issued by the RO, the claimant is given a period of one year to file an NOD.¹³ Once an NOD is received by the RO, the RO issues the claimant an SOC, which contains a summary of the evidence relating to the issues, a summary of the relevant laws and regulations, and a readjudication of the issues.¹⁴ The claimant has 60 days from the date of notice of the SOC to perfect an appeal by filing a VA Form 9 or its equivalent, or the remainder of the one-year period from the date of notice of the rating decision, whichever is longer.¹⁵ If prior to certification to the Board, the claimant submits additional relevant evidence after the SOC, the RO must issue a Supplemental Statement of the Case (SSOC) and re-adjudicate the matter based on the new evidence and the claimant is given an additional 60 days to respond.¹⁶ The case will then be certified to the Board for review.¹⁷

During the course of such appellate process, the claimant also has a right to have an RO hearing and/or Board hearing.¹⁸ Under the current regulations, an RO hearing may be held prior to, or subsequent to, an adjudicatory decision.¹⁹ The claimant may also appear for a hearing before a Veterans Law Judge (VLJ) at the Central Office in Washington D.C., appear for a hearing

¹⁰ In most cases, the AOJ consists of an RO.

¹¹ 38 U.S.C. § 7105.

¹² *Id.*; see also 38 C.F.R. § 20.200.

¹³ 38 U.S.C. § 7105(b)(1)(2); 38 C.F.R. § 20.201.

¹⁴ 38 U.S.C. § 7105(d)(1); 38 C.F.R. §§ 19.29, 19.30.

¹⁵ 38 U.S.C. § 7105(d)(3); 38 C.F.R. § 20.202.

¹⁶ 38 C.F.R. § 19.31.

¹⁷ *Id.* at § 19.35.

¹⁸ 38 U.S.C. § 7107(b); 38 C.F.R. §§ 3.103(c), 20.703.

¹⁹ 38 C.F.R. §§ 3103(c), 3.2600.

before a VLJ at an RO (Travel Board hearing), or appear at a video conference hearing before a VLJ at an RO.²⁰ It can potentially take many months for a hearing to be scheduled in consideration of the number of hearings requested by claimants at a particular RO, and the format requested by a claimant.²¹ Once an appeal is certified to the Board, the Board is required to consider and decide appeals in docket order, with limited exceptions.²²

Per annual reporting, the Board determined the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year.²³ In Fiscal Year (FY) 2008, the time interval from the ROs' receipt of an NOD from a claimant to the issuance of an SOC amounted to an average elapsed processing time of 218 days.²⁴ The average elapsed processing time from the issuance of an SOC to receipt of a Substantive Appeal from the claimant was 43 days.²⁵ The average elapsed processing time from receipt of the Substantive Appeal from the claimant to Certification of the Appeal to the Board from the RO was 563 days.²⁶ Once the Board received a Certified Appeal from the RO, the average elapsed processing time it took for the issuance of a Board decision was 255 days.²⁷ Thus, the issuance of a final Board decision took nearly three years on average in FY 2008.

The reasoning behind such a lengthy appeals process is multi-faceted. One factor for the time interval at the Board is the sheer number of cases that are appealed. In FY 2008, 43,351 new appeals to the Board were filed, and it is estimated by the Board

²⁰ 38 U.S.C. § 7107(b); 38 C.F.R. §§ 20.700 – 20.705.

²¹ BD. OF VETERANS' APPEALS (BVA), REPORT OF THE CHAIRMAN: FISCAL YEAR (FY) 2008, 24 (2009), available at <http://www.va.gov/VetApp/ChairRpt/BVA2008AR.pdf>.

²² 38 U.S.C. § 7107(a).

²³ BVA, REPORT OF THE CHAIRMAN: FY 2008, *supra* note 21, at 19.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

that 48,000 new appeals will be received in 2009.²⁸ There were 60 VLJs and 451 professional, administrative, clerical and other personnel employed by the Board at the end of FY 2008.²⁹ During FY 2008, 43,757 decisions were issued to claimants.³⁰

Another factor that may contribute to an extensive appeals process is the time it takes for proper development to be conducted by VA, including obtaining medical opinions and retrieving relevant information identified by a claimant. If a claimant does not notify VA of relevant evidence until after the RO has issued an initial rating decision or SOC, delays may ensue as the RO must request the evidence and consider it in readjudicating the claim.

Additionally, under the current procedural guidelines in place, VA will hold a claim for a specific number of days to allow claimants to respond to VA's request for information pertaining to a claim. If a claimant has no further information or evidence to submit, but does not notify VA, the claim will remain idle until expiration of the procedural timelines. This results in no benefit to the claimant, as the appellate process is needlessly delayed and extended.

III. THE ECA

In light of the substantial delays associated with the VA claims adjudication and appeals process and the considerable number of appeals that are pending or in the process of being appealed, the ECA was introduced as a two-year pilot program to

²⁸ *Id.* at 18.

²⁹ *Id.* at 19.

³⁰ *Id.* at 24.

launch an initiative for accelerated claims and appeals processing at four RO VA facilities.³¹ The main theme found throughout the ECA regulation is modification of the processing procedures associated with the claims and appeals process.

A. Electing ECA Participation

Once a VA claim for benefits³² is received at one of the participating ROs, the RO will issue correspondence to the claimant inviting him to participate in the ECA.³³ If the claimant agrees to participate, he must do so within 30 days of receiving the invitation, must be represented by a Veterans Service Organization (VSO), an accredited agent, or attorney,³⁴ and both the claimant and

³¹ In the proposed regulation, BVA: Expedited Claims Adjudication Initiative – Pilot Program, 73 Fed. Reg. 20,571-72 (Apr. 16, 2008) (to be codified at 38 C.F.R. §§ 20.1500-10), the four RO facilities selected to participate in such pilot program were located in Nashville, Tennessee, St. Paul, Minnesota, Seattle, Washington and Philadelphia, Pennsylvania. It was explained that sites “were selected as they are all high performing stations with experienced leadership that have successfully handled pilot programs in the past without an adverse impact on customer service or the efficient processing of claims not covered by such programs.” Additionally the stations provide a “diverse cross section of all regional offices in terms of claims volume.” When the rule was enacted at BVA: Expedited Claims Adjudication Initiative, 73 Fed. Reg. 65,726 - 65,735 (Dec. 5, 2008) (to be codified at 38 C.F.R. §§ 20.1500-10), the Lincoln, Nebraska RO replaced the St. Paul, Minnesota, due to increased workload at the St. Paul RO.

³² BVA: Expedited Claims Adjudication Initiative, 73 Fed. Reg. 65,733 (Dec. 5, 2008) (to be codified at 38 C.F.R. § 20.1501); *see also* BVA: Expedited Claims Adjudication Initiative – Pilot Program 73 Fed. Reg. 20571-72 (Apr. 16, 2008) (to be codified at 38 C.F.R. §§ 20.1500-10) (indicating, “[d]ue to the unique procedural nature of the ECA, and the legal and procedural complexities associated with certain types of claims, during the duration of the 2-year pilot program, under proposed § 20.1502(c) participation in the ECA would only be available for claims for disability compensation benefits under 38 CFR parts 3 and 4, excluding matters that involve survivor benefits (such as claims for Dependency and Indemnity compensation, see 38 CFR 3.5, and claims for burial benefits, see 38 CFR 3.1600 through 3.1612) and simultaneously contested claims (including matters related to insurance).”).

³³ 73 Fed. Reg. 65,733 (Dec. 5, 2008) (to be codified at 38 C.F.R. § 20.1503).

³⁴ *Id.* (to be codified at §§ 20.1501, 20.1502) (citing 38 C.F.R. § 14.631(a) in § 20.1501(d), which provides that “[a] power of attorney, executed on either Department of Veterans Affairs Form 21-22 (Appointment of Veterans Service Organizations as Claimant’s Representative) or Department of Veterans Affairs Form 22a (Appointment of Attorney or Agent as Claimant’s Representative), is required to represent a claimant, except when representation is by an attorney who complies with paragraph (b) of this section of when representation by an individual is authorized under § 14.630.”).

representative must complete an ECA Initiative Agreement and Waiver of Rights (ECA Agreement).³⁵

If a claimant decides to participate in the ECA Initiative, then the claimant has essentially agreed to multiple timelines, to forego the current timelines cited above, and to waive procedural safeguards currently in place. Initially, a claimant agrees to promptly identify all relevant evidence, including VA records, non-VA Federal records, and private records. The claimant must also complete the necessary releases.³⁶ A claimant agrees to waive the one-year response period and further agrees to respond to VA's requests for information and evidence within 60 days.³⁷ A claimant also agrees to respond to additional VA requests for evidence within 30 days.³⁸

B. Rating Decision and the NOD

Once a rating decision is issued and the claimant desires to file an NOD, this must be filed within 60 days.³⁹ Under the established laws and regulations, a claimant has the option to have his claim reviewed by a Decision Review Officer (DRO) at the RO.⁴⁰ Under the ECA, however, claimants who file an NOD within 60 days agree to have the decision reviewed by a DRO.⁴¹ If an RO hearing is requested, this will be conducted before a DRO, and only after a decision is rendered, rather than prior to the issuance of an initial adjudicatory decision.⁴² Also, only one RO hearing is permitted, rather than an indefinite number.⁴³

³⁵ *Id.* (to be codified at 38 C.F.R. § 20.1503(b)).

³⁶ *Id.* (to be codified at § 20.1503(d)).

³⁷ *Id.* (to be codified at § 20.1504(a)(1)).

³⁸ *Id.* (to be codified at § 20.1504(a)(2)).

³⁹ *Id.* at 65,734 (to be codified at C.F.R. § 20.1504(a)(4)).

⁴⁰ 38 C.F.R. § 3.2600 (2008).

⁴¹ 73 Fed. Reg. at 65,734 (to be codified at 38 C.F.R. § 20.1505).

⁴² 38 C.F.R. §§ 3.103(c), 3.2600(c); 73 Fed. Reg. at 65,734 (to be codified at 38 C.F.R. § 20.1508(a)(1)).

⁴³ 73 Fed. Reg. at 65,734 (to be codified at 38 C.F.R. § 20.1507(a)(2)).

C. The SOC

The DRO will review all ECA appeals within 30 days, which will result in the issuance of a rating decision if any of the benefits are granted, or an SOC to enable the claimant to perfect an appeal.⁴⁴ Prior to issuing an SOC to the claimant, the DRO must complete Part One of the ECA Appeals Checklist.⁴⁵ This part of the checklist has the DRO specifically determine whether the NOD clearly identified the issues; whether new issues were raised or new evidence identified; whether there was compliance with the duties to assist and notify; whether a VA examination was deemed appropriate; and whether the RO complied with due process requirements in the rating decision and SOC.⁴⁶ The goal of the ECA Appeals Checklist is to ensure that proper development has been conducted prior to responding to the claimant's NOD. This differs from the current measures in place, as generally a checklist is completed only prior to certification to the Board.

D. The Appeal

Once an SOC is issued to the claimant, he agrees to file a Substantive Appeal within 30 days.⁴⁷ Upon receipt of the Substantive Appeal, the RO will certify the claimant's appeal to the Board within 30 days, or within 30 days of receipt of any additional evidence following the Substantive Appeal.⁴⁸ Prior to certification, the RO must complete Part Two of the checklist, which addresses the content of the SOC or SSOC and the substantive appeal.⁴⁹ Within 20 days of completing Part Two of the ECA Appeals Checklist, the RO will refer the claims folder to

⁴⁴ Expedited Claims Adjudication (ECA) Initiative, Veterans Benefit Admin. (VBA) Fast Letter 09-24, 6-7 (June 1, 2009) (on file with authors).

⁴⁵ *Id.* at Enclosure 13, ECA Appeal Checklist.

⁴⁶ *See id.*

⁴⁷ 73 Fed. Reg. at 65,734 (to be codified at 38 C.F.R. § 20.1504(a)(5)).

⁴⁸ *Id.* at 65,734 (to be codified at 38 C.F.R. § 20.1504(b)).

⁴⁹ VBA Fast Letter 09-24, *supra* note 44, at 9.

the claimant's representative for completion of written argument.⁵⁰ Again, the ultimate goal of the formal checklist is to ensure that the RO has taken all necessary steps to provide the Board with an accurate and fully developed record.

If prior to certification the claimant requests a Board hearing, the request will be acknowledged, addressed, and scheduled by the Board.⁵¹ This differs from the current measures in place, wherein the RO acknowledges the request and is involved in the Board hearing scheduling process.⁵² Moreover, after consulting with the claimant and representative, the Board will select the method of conducting such hearing.⁵³ Again, this differs from current measures, wherein a claimant decides unilaterally whether he desires a Central Office, video conference, or Travel Board hearing. Under the ECA, the claimant is also only entitled to one hearing at the Board, on request, instead of an indefinite number of hearings.⁵⁴

E. Certification to the Board

The claimant's appeal is to be certified to the Board within 30 days following receipt of the Substantive Appeal, but no later than 60 days if additional information or evidence is received.⁵⁵ Once a claimant has been notified that his appeal has been certified and transferred to the Board, a claimant has 30 days to submit a request for a personal hearing, notify VA of additional evidence, and/or request a change in representation.⁵⁶ If the claimant submits evidence at any time subsequent to the issuance of the SOC, whether prior to or after certification to the Board, the participant

⁵⁰ *Id.* at 9-10; *see also* VA Form 646.

⁵¹ VBA Fast Letter 09-24, *supra* note 44, at 10.

⁵² *Id.*

⁵³ BVA: Expedited Claims Adjudication Initiative, 73 Fed. Reg. 65,734 (Dec. 5, 2008) (to be codified at 38 C.F.R. § 20.1507(b)(2)).

⁵⁴ *Id.*

⁵⁵ *Id.* (to be codified at 38 C.F.R. § 20.1504(a)(6)); *see also* VBA Fast Letter 09-24, *supra* note 44, at 10.

⁵⁶ 73 Fed. Reg. at 65,734 (to be codified at 38 C.F.R. § 20.1504(a)(6)).

agrees in advance to waive his right to initial review of this evidence by the AOJ.⁵⁷

Finally, once the appeal is certified to the Board, the Board will screen ECA cases to ensure that the record is adequate for the issuance of a final decision.⁵⁸ If in the screening process the record is found to be inadequate, the Board will solicit a waiver from the claimant to review new evidence obtained by VA, seek clarification from the claimant regarding matters such as hearing requests or representation, and complete a Remand if deemed necessary.⁵⁹ If a screened case is determined to be ready for decisional purposes, then the case would be decided in docket order.⁶⁰

F. Filing for an Extension

Extensions of any of the time limits may be granted when the participant demonstrates that there is good cause for the extension.⁶¹ Examples of good cause include, but are not limited to, illness of the participant or the representative of such severity that precludes action during the period, death of an individual representative, illness or incapacity of an individual representative that renders it impractical for a participant to continue with him or her as representative, or withdrawal of an individual representative.⁶² Motions for extension must be filed prior to the expiration of the time period for which a motion is being requested, must be in writing, and must be filed with the participating RO that has jurisdiction over the claim, unless the case has been certified and transferred to the Board, in which case the request must be filed with the Board.⁶³

⁵⁷ *Id.* at 65,734 (to be codified at 38 C.F.R. § 20.1508(b)(2)).

⁵⁸ *Id.* at 65,734 (to be codified at 38 C.F.R. § 20.1506).

⁵⁹ 38 C.F.R. § 19.9 (2008) (indicating a Remand is not a final order).

⁶⁰ 38 C.F.R. § 20.900(c); 73 Fed. Reg. at 65,734 (to be codified at 38 C.F.R. § 20.1506(b)).

⁶¹ 73 Fed. Reg. at 65,735 (to be codified at 38 C.F.R. § 20.1509(e)).

⁶² *Id.*

⁶³ *Id.*

G. Express or Implied Revocation

A participant may revoke participation in the ECA at any time by submitting a revocation request in writing.⁶⁴ The failure of the claimant to meet the terms of the ECA will have the same result as if the participant had expressly revoked participation in the ECA.⁶⁵ Grounds for implied revocation include failure to comply with the time limits imposed by the ECA; failure to waive initial consideration by the RO of evidence obtained following the issuance of the SOC; a request for an extension of time, without good cause; and a request for transfer to a non-participating RO in the ECA program.

IV. EFFICIENCY WHILE PROTECTING DUE PROCESS RIGHTS

The ECA has the potential to substantially shorten the appeals process. If all timelines are properly followed and there is no additional development necessary, the appeals process can be as short as one year, which is significantly shorter than the current average timeframe for an appeal of three years. All claimants desire an efficient, streamlined approach to the claims process, and the ECA allows VA to assess whether allowing a claimant to waive procedural timelines can result in the ultimate issuance of a high quality decision in a shorter period of time. Most importantly, while significantly shortening the appeal process, the claimant's due process rights are still protected.

A. Representation

As detailed, the claimant is required to be represented by a recognized VSO or an accredited attorney or agent at the time he elects to participate in the ECA, although this representation may be changed or revoked at a later time.⁶⁶ This differs from the current

⁶⁴ *Id.* (to be codified at 38 C.F.R. § 20.1509(b)).

⁶⁵ *Id.* (to be codified at 38 C.F.R. § 20.1509(c)).

⁶⁶ *Id.* (to be codified at 38 C.F.R. §§ 20.1501(d), 20.1502(a)).

system wherein claimants may proceed without representation at the time of filing an initial claim and appealing to the Board.

Representation at the time the claimant agrees to participate in the ECA helps ensure that the claimant understands from the outset the nature of filing a VA claim for compensation or increased compensation, and the nature of the ECA, including the shortened timeframes for compliance with an appeal. For purposes of properly informing the claimant, the VSO or attorney is presumed to have basic knowledge and understanding of VA law and procedures and can explain to the claimant the criteria to substantiate a claim and ensure compliance with the timelines, in order to stay within the confines of the ECA.⁶⁷ The VSO or attorney also directly communicates with the claimant and can help the claimant determine if the ECA is in his best interest and relay to VA any desire to withdraw from participation in the ECA. The representative should ensure that the claimant is informed throughout the entire appeals process as to the status of the claim and the responsibilities of the claimant and VA in substantiating the record.

As noted, representation must be selected at the time a claim is filed, or at the time the claimant agrees to participate in the ECA, thus prior to an RO initial adjudicatory decision. A drawback to this requirement, however, is that the regulations prohibit a claimant from hiring a fee-based attorney until after an NOD is filed.⁶⁸ Thus, claimants who desire private representation from the beginning of the claims process and also want to participate in the ECA must forego the advice and representation of a fee-based attorney at the time a claim is initially being developed. Unless a fee-based attorney is willing to forego compensation prior

⁶⁷ See *Overton v. Nicholson*, 20 Vet. App. 427, 438-39 (2006).

⁶⁸ 38 U.S.C. § 5904(c)(1) (indicating that except as provided in paragraph (3), in connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, a fee may not be charged, allowed, or paid for services of agents or attorneys with respect to services provided before the date on which the Board of Veterans' Appeals first makes a final decision in the case).

to the filing of an NOD (which may not prove necessary or desired subsequent to receipt of a rating decision, which may grant the claim in total), a claimant must choose a VSO.

Representation by a VSO is not equivalent to a licensed attorney, as a VSO is generally not trained or licensed to practice law.⁶⁹ An attorney, however, is not considered to be inherently superior to a VSO, as VSO representatives are expected to be familiar with VA law, and provide invaluable assistance to claimants in the unique field of veteran benefits, many of whom have been working in this single field of law for many years.

Moreover, at the time an initial claim for benefits is filed with the RO, there is no expectation that an appellate process is imminent or necessary. It is reasonable to conclude that a VSO will be able to sufficiently guide a claimant through the initial claims process. The prospect of the need to participate in the appellate process only becomes apparent when a claimant receives an RO decision with which disagreement is expressed. Then, at that time, the claimant is free to continue representation with a VSO or change representation to a fee-based private attorney. The withdrawal of representation would be a sufficient basis for a good cause exception under the ECA for an extension of the time limits.⁷⁰

B. VCAA

In addition to having the benefit of being counseled by a representative throughout the claims process, the ECA participant also remains under the safeguards of the VCAA and the current parameters remain in place with regard to VA's duties to notify and assist, albeit in a reduced timeframe. Thus, VA still has to inform the claimant of the evidence necessary to substantiate the particular claim being filed and the respective responsibilities of VA and the

⁶⁹ *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009); *see also* *Cook v. Brown*, 68 F.3d 447, 451 (Fed. Cir. 1995).

⁷⁰ 3 Fed. Reg. at 65,735 (to be codified at 38 C.F.R. § 20.1509(e)).

claimant in substantiating the record.⁷¹ VA is also responsible for obtaining any available Federal records and must make reasonable efforts to retrieve any private records identified by the claimant.⁷² If necessary, the claimant will be provided with a VA examination in order to determine whether the benefits sought are warranted.⁷³ The claimant is also still entitled to a hearing at the RO and at the Board so that he can present the claim in person or via video conference.⁷⁴ By agreeing to participate in the ECA, the claimant is not waiving his rights under the VCAA; there is no additional risk of inadequate evidentiary development.

C. Efficiency without Compromising Quality

VA has a constant goal to have an efficient claims and adjudication process that does not compromise quality of decisions. One effort implemented by the Board to reduce the backlog of appeals and increase efficiency is providing annual Fair Share Production Goals at the beginning of each Fiscal Year. Each VLJ and attorney is required to meet certain case number goals at the end of each week to remain in good standing. Attorneys (but not VLJs) also are eligible to earn certain bonuses at the end of the year, and various incentive awards throughout the year, by going above and beyond the minimum requirements.

Another effort to increase efficiency involves reducing the number of Board Remands to the RO. A Remand increases the timeframe for the issuance of a final Board decision. If a Remand is necessary, the average elapsed processing time the RO takes to comply with such additional development is 136 days.⁷⁵ A case will be remanded for a variety of reasons, to include RO consideration of evidence submitted after certification of the

⁷¹ See 38 U.S.C. § 5103(a) (2006); 38 C.F.R. § 3.159(b)(1) (2008); *Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002).

⁷² See 38 C.F.R. § 3.159(c)(1)-(3).

⁷³ *Id.* at § 3.159(c)(4).

⁷⁴ See 73 Fed. Reg. at 65,734 (to be codified at 38 C.F.R. § 20.1507).

⁷⁵ BVA, REPORT OF THE CHAIRMAN: FY 2008, *supra* note 21, at 19.

appeal, and further development, to include retrieval of medical records or to obtain a VA medical examination that the Board deems necessary prior to the issuance of a final decision. The Board constantly works with the ROs to address the reasons for Remands and methods to reduce the Remand rate. The Board has conducted presentations for ROs on Reasons for Remands in an effort to reduce the number of Remands by having the ROs complete the proper development at the AOJ level. The Board also provides guidance for Board attorneys and VLJs on reducing the number of unnecessary Remands.

Even with these efforts to reduce the backlog of appeals and increase efficiency, a certain amount of time is required to carefully review each claim to ensure that all proper procedures are followed and all relevant laws and regulations are correctly applied. While the volume of cases decided is important, each claimant deserves to have his case carefully reviewed and is entitled to a quality decision at the end of the appeals process.

As the ultimate goal of the ECA is a fast-tracked adjudicatory process, it would be reasonable to be concerned that such efficiency may result in inaccuracy and inadequacy in the decision making process. While efficiency and streamlining the process remain high priorities of the ECA, it appears that the goal of the ECA is not to avoid VA's duties to completely develop the record and provide the claimant with a fair, nonadversarial, and high quality final decision. As detailed, the RO must perform any evidentiary development if the case is sent back by the Board. The Board also must ensure that this development is conducted.⁷⁶ Additionally, the Board remains under the purview of the U.S. Court of Appeals for Veterans Claims to properly provide reasons and bases for any decision rendered.⁷⁷ Therefore, there is still a system of checks and balances in place for any decisions that are appealed through the VA claims process, whether the claim is

⁷⁶ See *Stegall v. West*, 11 Vet. App. 268 (1998).

⁷⁷ See 38 U.S.C. § 7252 (2006).

adjudicated under the ECA or not. Also, the RO and the Board continue to have training and internal quality review procedures to ensure that both organizations are producing quality decisions.

All claimants desire an efficient, streamlined approach to the claims process. A common critique of VA's claims process is that it takes too long. In spite of VA's efforts to impose efficiency standards, a fully developed case is often left idle while the procedural time periods pass, with a claimant unable to waive these procedural protections. The ECA is another example of VA's effort to reduce the time associated with processing appeals. The effort is intended to result in a shorter adjudicatory and appeals process, with the quality of the decisions remaining the same.

D. Voluntary Participation

While the claimant is required to waive rights to certain timeframes at the beginning of the ECA process, the claimant's participation remains strictly voluntary. If at any time during the claims process, the claimant decides that the timelines are too onerous, that he does not want to waive AOJ review of new evidence, or that he wants another hearing, the claimant can revoke participation in the ECA and elect to have his claim adjudicated under the standard claims process.⁷⁸ Also, if the claimant generally fails to comply with the timeframes of the ECA, the claimant will not be penalized. Rather, if the procedures of the ECA are not followed, the result is simply that the claimant will be deemed to have implicitly revoked the agreement to participate in the program, and the claim will then be adjudicated under the regular procedural timeframes.⁷⁹ Thus, the claimant controls his participation in the ECA.

⁷⁸ See 73 Fed. Reg. at 65,734-35 (to be codified at 38 C.F.R. § 20.1509(b)).

⁷⁹ *Id.* at 65,735 (to be codified at 38 C.F.R. § 20.1509(c)).

E. Role of the Claimant

Even though the claimant's due process rights are protected under the ECA, it is clear that the ECA places a high burden on the claimant to act within a regimented and shortened time period. During the comment period for the proposed ECA, it was argued that there was no such requirement placed on VA to speed up its process of making final decisions.⁸⁰ If a claimant elects to participate in the ECA, the claimant agrees to comply with shortened timeframes which, as codified, require the claimant's constant attention to ensure that he is identifying and requesting relevant evidence in support of his claim, and also meeting the shortened submission time limits. As detailed, the claimant must elect to participate in the ECA within 30 days after receipt of such invitation, respond to VCAA notice within 60 days, file an NOD within 60 days, and file a Substantive Appeal within 30 days of receipt of the SOC. The claimant has the dual responsibilities of complying with the ECA requirements and attempting to provide evidence in support of the claim.

While it would be ideal to place equal or greater burdens on VA in the adjudicatory and appeals process, unfortunately, it is not possible under the VA claims process structure. VA is unable to act initially without the claimant identifying the benefit sought with specificity and the grounds for such benefit sought. While it is crucial that VA comply with the duty to notify and assist provisions upon receipt of a claim for compensation, such claim is completely reliant on the claimant identifying relevant medical providers and providing lay statements and testimony in support of a claim. It is the claimant, and not VA, who is in the best position to know whether he has any relevant evidence or information to provide, and/or to know where relevant evidence may be located.

Moreover, the goal of the ECA is for claimants, who are in the unique position to identify evidence, to volunteer to

⁸⁰ See *id.* at 65,728-29.

expedite the time it takes for them to notify VA of this evidence or respond to VA's requests for relevant documents. The goal is not to impose arbitrary timelines on VA adjudicators to conduct the proper development, as they often are not in control of many variables, including the length of time it takes for medical facilities to respond to their requests for evidence, whether the claimant requests a hearing, whether the claimant files additional claims, or whether the claimant submits additional evidence after the claim has already been adjudicated. Likewise, the amount of necessary development in each case, many involving several particularized claims, is largely unknown until a claimant provides the applicable information pertaining to a claim. All of these tasks take time and require further development. In some cases, a longer period of time may be needed to fully assist the claimant and develop the claim, particularly when the case involves a number of claims or highly complex issues (traumatic brain injury, PTSD, disabilities caused by radiation exposure, to name only a few, and at times involving all of the above). If the adjudicators were under strict timelines to finish this development, it is possible that the record would not be fully developed prior to the imposition of the timeline and the claimant's case would consequently be unfairly decided. That would be contrary not only to the ECA but the goal of VA's adjudicatory process as a whole.

F. VA's Role

As an ECA participant, the claimant has the responsibility to respond within shortened timeframes and notify VA of evidence within such constraints; however, the burden is not placed exclusively on the claimant. It is clear that the ECA will not work effectively without placing guidelines and time restrictions on VA. The ECA guidelines leave the RO with less time to completely develop the claim prior to certification to the Board. As previously discussed, VA has committed to a DRO issuing an SOC within 30 days of receipt of an NOD, and certifying the claimant's appeal

within 30 days of receipt of the Substantive Appeal.⁸¹ As noted, under the regular appeals process, the time it takes for the RO to certify the case to the Board after receipt of the substantive appeal on average is approximately 563 days.⁸² Thus, with said timeframes placed on the RO, the ECA measures will most likely have a dramatic effect on the speed in which an ECA claim is certified to the Board when an appeal of an RO determination is needed. Likewise, prior to the issuance of the SOC and certification to the Board, the RO must conduct a review of the claim to ensure that there has been compliance with proper notice, assistance, and development.⁸³

The ECA also places additional burdens on the Board. Upon certification to the Board, such ECA claims will be reviewed again to make a determination as to whether any further notice, assistance, or development is needed.⁸⁴ Additionally, ECA cases will be screened once they arrive at the Board to determine whether all proper development has been accomplished.⁸⁵ This will result in a final decision in a faster manner, as substantial delays often result when it is discovered that a case must be remanded because additional evidence has been submitted without a waiver of RO review, there is a hearing request, or there is a question about representation. The Board also is authorized to seek clarification of these issues pursuant to 38 C.F.R. § 19.9 by soliciting a waiver of RO consideration of evidence, clarifying representation questions, or finding out the claimant's hearing preferences.⁸⁶ This would take place before the case reaches the docket and would thus help to prevent any further delays caused by the additional development once the case reaches the desk of the deciding VLJ.

⁸¹ See *id.* at 65,734 (to be codified at 38 C.F.R. § 20.1504(b)); see VBA Fast Letter 09-24, *supra* note 44, at 6-7, 10.

⁸² BVA, REPORT OF THE CHAIRMAN: FY 2008, *supra* note 21, at 19.

⁸³ See VBA Fast Letter 09-24, *supra* note 44, at 9.

⁸⁴ *Id.*

⁸⁵ The Board's authority under 38 U.S.C. § 7107(f) (2006) allows this.

⁸⁶ See 73 Fed. Reg. at 65,734 (to be codified at 38 C.F.R. § 20.1506).

One of the suggestions during the comment period for the proposed rule was to advance ECA cases on the docket so that they would be decided ahead of cases that are adjudicated through the standard process.⁸⁷ Per regulation, however, the Board is only allowed to advance cases on the docket in certain circumstances, such as when the case involves interpretation of law of general application affecting other claims, when the claimant is seriously ill or is under severe financial hardship, or for other sufficient cause shown.⁸⁸ The Board has limited the number of cases that fall under the category of “other sufficient cause” to those cases where there was some sort of administrative error on the part of VA or where the claimant is age 75 or older.⁸⁹ Thus, allowing ECA cases to be advanced on the docket would not be consistent with VA regulations. Advancing ECA cases on the docket also would not be fair to other claimants who do not have the opportunity to participate in the ECA or to those who choose to participate in the current procedural guidelines. The goal of the ECA is not to punish those who are unable or decline to participate, but to test a system to determine whether shortening periods of time for claimant response/action can be beneficial to veterans.

Once the claim is called up by docket order, the goal is for the claim to be fully developed, resulting in a final Board decision in a vastly shortened period of time. While the greater burden seemingly is placed on the claimant under the ECA, VA has committed to complying with shortened processing periods and ensuring that the claim is fully developed.

G. Avoiding Revocation

A claimant’s failure to comply with the shortened ECA timelines will result in implied revocation of participation in the ECA. As detailed, however, no “penalty” results from any implied

⁸⁷ *Id.* at 65,728.

⁸⁸ 38 U.S.C. § 7107(a)(2).

⁸⁹ *See* 38 C.F.R. § 20.900(c) (2008).

revocation. With implied revocation, the claim will instead be reviewed under the current guidelines resulting in normally a longer processing time. This may result in disappointment to a claimant who had elected to participate in the ECA due to hopes of a speedy adjudicatory and appeals process. The ECA guidelines do not offer any method to reenter the ECA once participation is revoked, implicitly or otherwise. Thus, to avoid an implied revocation, the claimant needs to have a full understanding of the requirements of the ECA, and remain in constant communication with the RO as to any delays in the possible retrieval of relevant medical, lay, or other evidence.

One way to avoid implied revocation is to file for an extension with a good cause prior to expiration of any time limit.⁹⁰ One of the critiques of the ECA during the comment period, however, was that the good cause exceptions that will be accepted for filing an extension are too limited.⁹¹ While there are examples of good cause delineated in the ECA, the list is not exhaustive, as noted in the regulation.⁹² It is up to the claimant and the claimant's representative to test the limits of what is considered "good cause."

CONCLUSION

VA has implemented the ECA in an effort to expedite the claims process, and to resolve appeals in a vastly reduced period of time. While the ECA is focused on expediting the claim and appeals process, the goal is to stay within the confines of VA regulations, including those pertaining to the duties to assist and notify. VA has included provisions within the ECA to protect due process rights of the claimants. In spite of any criticism received, the ECA does not undermine VA's overall goal to best serve our veterans. On the contrary, the ECA reflects the continuing effort to reduce the time it takes for claimants to receive an RO and/or Board decision, when

⁹⁰ See 73 Fed. Reg. at 65,735 (to be codified at 38 C.F.R. § 20.1509(e)).

⁹¹ *Id.* at 65,729-30.

⁹² *Id.* at 65,735 (to be codified at 38 C.F.R. § 20.1509(e)).

needed. With favorable outcomes, the claimant can receive his benefits that much sooner; and with unfavorable outcomes, any uncertainties on how the claim will be adjudicated can be laid to rest at an earlier date allowing the claimant to begin the appeal earlier.

On its face, the ECA appears to successfully maintain the balance of expediting the claims process and protecting claimants' due process rights. While it is clear that the due process rights of the claimant remain intact within the purview of the ECA, it remains to be seen whether the ECA will achieve VA's goal of accelerating and streamlining the claims and appeals process. As it stands now, the ECA is a pilot program that will last for two years. As claims are processed at the RO and the Board, VA will be able to gather statistics to determine whether reducing statutory and regulatory response periods actually does achieve an expedited process and significantly reduces the amount of appeals pending and/or reduces the amount of time it takes to appeal a decision to the Board. VA will then be able to assess whether continuance of the ECA is worthwhile. Thereafter, consideration will need to be given to whether the ECA can effectively be extended to all ROs and to other types of claims for benefits. The authors are committed to revisiting this issue at a later date to evaluate how effectively the ECA has worked at the RO and the Board, and to ascertain whether the ECA, as designed, has proved to be a successful initiative in expediting the claims and appeals process.

