

What is this thing called a Notice of Disagreement? It must be pretty important as it is needed to appeal a case and it is only after it is filed that fees may be charged. The Notice of Disagreement (NOD) is filed after the claimant receives an unfavorable Rating Decision (RD) from the Regional Office (RO). It is mandatory and you cannot get around filing one. 38C.F.R. §20.201.

### **NOTICE OF DISAGREEMENT – NOTICE OF INTENT TO APPEAL**

The NOD is addressed to and sent to the Appeals Team. But what do I put in the NOD? To answer this, you need to look at what generates the need for an NOD, namely, the Rating Decision (RD).

The RO will generate two separate documents when it issues a RD. They are the: Notice Letter and Rating Decision.

### **NOTICE LETTER**

The VA is mandated to give written notification to the claimant **and** his representative of an adverse decision on any claim. 38 U.S.C. §5104; 38 C.F.R. §3.103(h). It is the **date of the Notice Letter** which begins the one year period for filing a timely NOD. The VA is required to advise the claimant of his appellate rights in the Notice Letter and if the Notice Letter does not specifically advise the claimant of his appellate rights, the time to file the NOD is tolled. You may get veterans who bring in a RD telling them they did not file a timely NOD or they may bring in a RD that is over one year old and ask you for help. You may be able to salvage the case if the Notice Letter does not advise him of his appellate rights. If your client says he was never sent a copy of the RD, get the claims folder and see if the Notice Letter was sent to the claimant's correct address, including zip code. If not, the claim is still open. If the claimant had a representative at the time the Notice Letter was issued and a copy was not sent to the representative, then the claim remains open. 38 U.S.C. §5104; 38 C.F.R. §3.103(b)(f). The RO has the discretion to extend the period in which an NOD must be filed if good cause is shown, but since the BVA can second-guess the RO, don't risk it. Simply file the NOD.

### **RATING DECISION**

This document is the basis for your appeal. Any RD on a claim for service-connection determines three (3) issues: 1. Service-connection; 2. Percentage of Disability; and, 3. Effective Date.

In reviewing the RD, check to make sure the RD **decided all claims**, direct or inferred. One of the traps the VA has laid out for veterans and their untrained representatives is the "**deemed denied**" doctrine. In the case of *Deshotel v. Nicholson*, 457.F.3<sup>rd</sup> 1258, 1261 (Fed. Cir. 2006), the Court holds that when the veteran files more than one claim with the RO at the same time and the RO's decision acts on only one and does not address the other, the second claim is "deemed denied" and the appeal period starts to run when the RD is issued.

The VA also is charged with considering all possible ways for which a veteran may be entitled to service-connected benefits, e.g., maybe it was not PTSD, but rather a generalized anxiety disorder that began in the service. 38C.F.R. §3.303-3.313 (2007).

Did the VA comply with its duty to notify and assist the veteran before issuing its decision? 38 U.S.C. §5103A and 38 C.F.R. §3.159 (2007).

Does it appear the Rating Specialist reviewed and considered all evidence submitted and in the claims folder? The usual mistake is that the Rating Specialist will consider the unfavorable parts of the examination (VAX) a/k/a compensation and pension (C&P) examination as if they emanated from the oracle at Delphi, ignoring the favorable parts of the report, favorable medical evidence, the veteran's statements and lay evidence.

Another common mistake is that the Rating Specialist will trade in his white shirt and skinny tie for a stethoscope, white coat with his name monogrammed on it and play doctor. The Rating Specialists are not allowed to make their own medical decisions. Medical opinions are necessary to establish a medical fact.

### **NOTICE OF DISAGREEMENT**

There is no special VA form for a NOD. It must be a written communication from the veteran or his representative. (Query: Is an e-mail sufficient?) It must be sent to the RO that issued the adverse RD. (What about brokered cases?) It must be filed within one year from the date on the Notice Letter. There is no special language required, but after the case of *Gallegos v. Principi*, 283 F. 3<sup>rd</sup> 1309 (Fed. Cir.), cert. denied 537 U.S. 1071 (2002), I always entitle mine in bold type.

### **NOTICE OF DISAGREEMENT – NOTICE OF INTENT TO APPEAL**

The *Gallegos* case basically held that if the veteran, although they indicated that they disagreed with the Decision, did not indicate that they intended to appeal it was not a valid NOD. The VA is supposed to liberally construe correspondence when trying to determine if a statement is, indeed, a NOD. *Anderson v. Principi*, 18 Vet. App. 371 (2004). This case can be useful when trying to convince the RO that a letter from the veteran was an NOD to secure an earlier Effective Date. If the RD addresses multiple issues, the NOD should identify those issues with which the veteran disagrees. If the veteran's NOD is deficient in any way, the RO is required to ask for clarification. 38 C.F.R. §19.26 (2007), but all too frequently, the RO simply issues a Statement of Case (SOC) telling the veteran the NOD was not sufficient. It should be noted that it is the date of the NOD that triggers entitlement to fees. If the NOD is on or after June 20, 2007, the advocate may enter in to a lawful fee agreement.

When should I file the NOD? Yesterday, if possible! With the claims backlog and the VA considering appeals in the order of the filing of the NOD, the sooner the better.

Do I even file an NOD? If the veteran comes to you without a winnable case, I contend it is not only fool-hardy to file an NOD, but also unethical. Many times you do a real service to a

veteran who has been lead to believe for decades he has a winnable case by simply telling him what the law requires for him to win and the fact that he does not have the evidence necessary to win. Many veterans do not realize that in order to get service-connected benefits you have to prove that the condition began in the service.

Do I file a detailed or generic NOD? I prefer a short, but detailed NOD. Let the RO know you understand the issues, what evidence supports your arguments and what relief you want. If you are faced with an appeal deadline approaching, do not have the claims folder or enough evidence yet to make a detailed argument, go ahead and file a generic NOD but tell the RO you will supplement it when you receive the necessary documentation – **AND THEN DO IT!** Be aware of a recent CAVC case, *Robinson v. Mansfield*, decided adversely to a veteran which basically said there was "issue exhaustion" in VA law and that a veteran represented by an attorney or agent at the agency is held to a higher standard of care in complying with VA laws and regulations than one who is *pro se*. That case will be going up to the Federal Circuit.

Do I select the Traditional Appeal Process (TAP) or Decision Review Officer Process (DRO)? The TAP results in a Rating Specialist or DRO issuing a Statement of the Case (SOC) based on the evidence as it stood at the issuance of the RD. It is not a *de Novo* review.

I use the TAP when:

1. It is a novel question of law that will wind up at the BVA and probably CAVC.
2. I have already been through all the DRO's on previous appeals.
3. It's a certain RO loser, e.g., the DRO would have to make a tough, but legal call that is against the established *perceived* law, e.g., award IU when the veteran is only 50% disabled for PTSD.
4. No additional evidence is needed.
5. RO's reputation.
6. It is a faster track to the BVA.

The DRO, *de Novo* review allows the DRO to review and consider all relevant evidence *de Novo*, giving no deference to the RO. They may develop evidence, order exams, hold informal conferences, or conduct a personal hearing. 38 C.F.R. §3.2600(a)(c) (2007). I use the DRO process:

1. If I have evidence to submit.
2. If I have an argument to submit.
3. If I want a hearing.
4. If I am familiar with the DRO's.
5. A possibility of an informal hearing.

In my NOD I will put in **bold** type the type of review that I want. This saves several months of processing time as then the RO does not have to send out a letter asking which type of appeal process I want and I also do not run the risk of forgetting to make the election within the appropriate time frame. Namely, sixty (60) days after receiving the election letter.

## DEVELOPMENT LETTERS

The filing of the NOD fires up the RO's word processor and they start spitting out correspondence right and left. The Development Letter (Dev L) purports to say what the claimant needs to do to win, but, in reality it is usually simply a form letter filled with meaningless generalities. In the VA's defense, I am more Dev L's where they specifically tell the veteran what is needed to win, so be sure to read them carefully, even though your first instinct is to file them away. The Dev L also gives you sixty (60) days (usually) to respond. Do not ignore the Dev L deadline. If you do not respond you will see a line in the unfavorable RD as follows: "We sent you a letter dated September 8, 2007, telling you what we needed in your claim. Since we did not hear from either you or your representative, we are denying your claim."

Response to Dev L : If you do not have the c-file and you need it, ask for an extension of time to a Date Certain, calendar it and keep on the RO for the c-file.

: If you have additional evidence in hand, respond, even if only partially. Update as evidence is received.

: Is use the Dev L as another opportunity to make an argument.

Importance of Dev L : This triggers you to begin work in earnest, if you have not already.

: Call the client

- Find out if any treatment.
  - Get records.
- Find out if witnesses.
  - Get statements.
- Find out if any additional evidence.
  - Get it.

: Review file to:

- Narrow issues
- Determine evidence needed
- **See what needs to be explained away**
- 8940 on file?
- 686c on file?

You have diligently done your work and eventually the RO responds to your NOD.

What do they send?

## STATEMENT OF THE CASE

You tried your best, but the RO just issued a Statement of Case (SOC) indicating the claim is denied. Technically it is not a "Decision" as its only function is to tell you the status of the case, but every client thinks it is a decision, so you might as well also.

The SOC consists of a lot of pages, most of which is simply a waste of our natural timber land. The first page or two give a lot of information. Look down to where it says: "Claimant Notified of Decision" – This date is important as you have up to one year from this date to perfect the appeal by filing a VA Form 9 which normally only has a sixty (60) day statute of limitation. You will see "Evidence Considered" – Make sure you have it all and request an updated c-file. You then have a plethora of pages in which the RO simply puts in the statutes and regulations it considers relevant to the case. Although quite boring, when starting out in this field, it is a quick way to familiarize yourself with the relevant law. You then pass on to the section entitled "Reasons and Bases" which is where they explain why they did what they did. This is usually just a cut and paste from the RD since this is usually not a *de Novo* review.

Some of the SOC's can be tricky to interpret. They appear to be denials, but buried in the language is a notice of an upcoming favorable decision. It should be pointed out that if the SOC finds that there should be an increased rating, it will not be the final say-so as a Rating Decision has to issue setting the percentage, effective date and payment rate.

Once you get the SOC you need to immediately once again begin to assess your case. You need to do the same analysis you do when you get the RD. "Is everything already of record so that I need nothing to get a favorable decision?" "Is there evidence/argument that needs to be submitted to enhance the chance of success?" If you answer the second question in the affirmative, you have come to a very important "fork in the road." You need to make a decision that will be based on your knowledge of the case, the likelihood of success at the RO, and the need for a quick trip to the BVA. It is a decision that usually runs counter to your intuitive instincts. It is what, back in my trial lawyer days, we called "woodshedding the evidence." Basically, that means making a conscious decision not to send in evidence to the RO in response to the SOC. Why? Due to a new animal...

**SUPPLEMENTAL STATEMENT OF THE CASE**

This little puppy is rarely discussed and when you receive the first one, panic may set in. Actually, it is of little importance. Let me explain. It is defined in 38 C.F.R. §19.31. It is used whenever the RO gets "additional pertinent evidence" after the SOC is issued. A response to the SOC is optional, unless you have not yet filed the substantive appeal in a VA Form 9. If you have not yet filed the VA Form 9, the issuance of an SSOC does mean your original sixty (60) day time period within which to file the VA Form 9 is extended as to any issue the SOC covered. I do my level best not to get an SSOC as it simply delays the case going to the BVA. Below I have listed two separate timelines. I believe this illustrates my point.

<u>Case #1</u>	<u>Case #2</u>
RD	RD
NOD	NOD
SOC	SOC
VA9	VA9
+ Get new evidence	+ Get new evidence (woodshed)
+ Send evidence to RO	Case certified to BVA
+ "VA time" passes	Evidence sent to BVA
SSOC issues	
Case certified to the BVA	

The SSOC simply delays things.