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Tech Tips: Audio Issues During the Live Webinar

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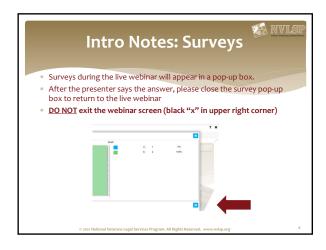
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Rick Spataro



- Director of Training and Publications
- Has practiced Veterans Law since 2004 at CAVC, Federal Circuit, and BVA
- Editor of The Veterans Benefits Manual

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* Initial Steps * Legal Research Basics * Writing * IRAC * Writing Tips * Hearings



* Determine which claims to file with VA * Interview client * Review recent medical records – private and VA * Review STRs / SPRs

* Identify Vet's current disabilities: diagnoses and symptoms not associated w/ a diagnosis * When did symptoms begin? * Identify details of service * Did Vet serve during wartime? * Did Vet have service that would qualify for special presumption (Vietnam, Gulf War, POW, etc.)?

New Claims



- * Identify in-service events, diseases, injuries that might be related to current disabilities
- * Ask about continuity of symptoms
- * Ask about finances (pension)
- * Inquire about benefits Vet may not be aware of education, VR&E, health care, etc.

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New Claims



- * You are the expert ask questions and advise about VA claims that should be filed
- * Helpful tool for comp and pension claims
- * Free NVLSP VA Benefit Identifier App

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NVLSP



VA Benefit Identifier

- Questionnaire/App: Helps Vets and VSOs figure out what SC disability benefits or NSC pension benefits they might be entitled to.
- * 3 WAYS to Access:

NVLSP Website





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Appeals / Reviews



- * Review c-file
- * Follow procedural history of claims
 - * Legacy RD, NOD, SOC, VAF9, SSOCs, BVA decision / remand
 - * AMA RD, Review Request Forms (Supplemental Claim, HLR request, NOD), HLR decision, BVA decision / remand

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Appeals / Reviews



- * Ensure you identify all claims/issues that need to be addressed in written argument or at hearing
- * Don't rely on VA's characterization of the issues

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Legal Research Basics

Legal Research

- rcn
- * In researching a particular topic, an advocate may find pertinent authorities in many places. Where do you start?
- * The key is to find the correct legal authority that applies to the facts of your case.



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Survey #1



- * Which legal authority carries the most weight?
- A. CAVC decisions
- B. Congressional statutes
- C. VA regulations
- D. Manual M21-1 provisions

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Answer



B

Statutes – laws enacted by Congress

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How do I research?

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- * Start with the VBM (eBook or paper copy)
- * Read section on topic to get an understanding of the important rules
- * For a deeper understanding, or to explore details not discussed in VBM, I read the controlling statutes, court decisions, VA regulations, etc. cited in the VBM

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Veterans Benefits Manual (VBM)

- * Written by NVLSP attorneys w/ info about VA benefits & advocacy advice
- * 21 Chapters
- * Focus: SC disability comp, NSC pension, DIC, death pension



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* 21 Chapters (divided into 7 parts): * * Part I Disability Benefits for Veterans * Basic Eligibility * SC Compensation * 1151 Benefits * Rating of Disabilities, including increases and reductions * NSC Pension * Part II VA Benefits for Family Members, including VA Death Benefits

* Part IV VA Health Care & Other VA Benefits (burial, education, VR&E, home loans, special allowances, life insurance) * Part V VA Claims & Appeals Process; Common VA errors and How to Correct them

* Parts of VBM (cont.) * Part VI Advocacy on Behalf of VA Claimants (reviewing VA claims files; Effective advocacy before VA; How to obtain military records and info to substantiate a claim) * Part VII Correction of Military records (Practice before DRBs and BCMR/BCNR; Military disability benefits)

VBM Will Answer Most Questions an Advocate Will Have

- * VBM is current as of June 1 of each year new edition is released annually in Sept/Oct
- * VBM does <u>not</u> describe rules for all VA benefits programs & services
- * Even for the benefits programs the VBM focuses on, an exhaustive analysis of all issues would require another volume

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VBM eBook Searchable Databases

- * CAVC decisions cited in the VBM
- * Federal Circuit decisions cited in the VBM
- * Supreme Court and other court decisions cited in the VBM
- * Relevant statutes from Title 38 of the U.S. Code (38 U.S.C.)
- * Title 38 of the Code of Federal Regulations (38 C.F.R.)

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Statutes

- * Statutes found in Title 38 of the U.S. Code (38 U.S.C.)
 - * laws, passed by Congress and signed by the President (or enacted with sufficient votes following presidential veto), that bind VA

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Statutes



- * Where to find statutes:
 - * VBM companion Federal Veterans Laws, Rules and Regulations (paper or eBook)
 - * Cornell Law School Legal Information Institute https://www.law.cornell.edu/uscode/text/38
 - * FindLaw https://codes.findlaw.com/us/title-38-veterans-benefits/
 - * Local law school library

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Court Decisions



- * Court decisions involving veterans law are generally issued by the following Courts:
- * U.S. Court of Appeals for Veterans Claims
- * U.S. Court of Appeals for the Federal Circuit
- * U.S. Supreme Court

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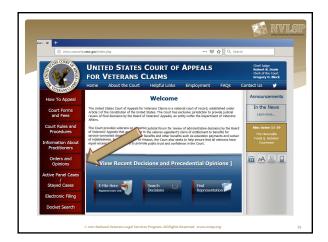
Court Decisions



- * Precedential Court decisions are binding on VA
- Non-precedential decisions (Memorandum Decisions or Mem Decs) are not binding, but may persuade VA adjudicators or point you to the precedential decisions that are controlling
- * Important court decisions are analyzed and explained in the VBM

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* Where to find court decisions: * VBM eBook contains decisions cited in the VBM * Supreme Court – https://www.supremecourt.gov/ * Federal Circuit – http://www.cafc.uscourts.gov/opinionsorders * CAVC website has precedential CAVC decisions by year (http://www.uscourts.cavc.gov/opinions.php) and a searchable database (http://search.uscourts.cavc.gov/)

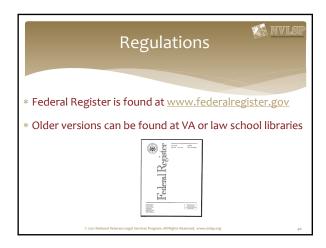


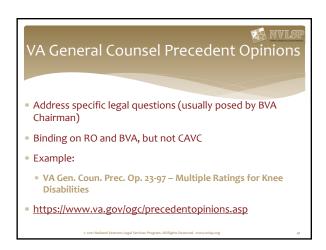




* Title 38 of the U.S. Code of Federal Regulations (38 C.F.R. * VA Regulations are issued by Secretary of Veterans Affairs * Includes the VA Schedule for Rating Disabilities (Part 4) * Regulations are binding on VA, but must be consistent with statutes * Federal Register is where regs are initially published (in proposed and final form)





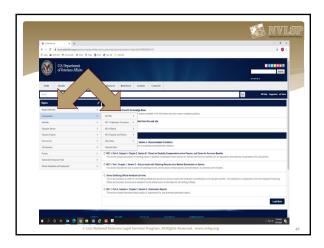




* VA Manuals * VA manuals are available online * www.knowva.ebenefits.va.gov * www.benefits.va.gov/warms * The VA Adjudication Procedures Manual M21-1 is probably most relevant to the work of a VSO * Binding on RO personnel, but not BVA

* M21-5, Appeals and Reviews (Manual M21-5) new in 2019 * General guide for processing legacy appeals for comp and HLRs under AMA * Summarizes/restates in plain language applicable law, clarifies ambiguities, and provide a picture of the adjudication process that is reasonably complete and easy to understand and apply * Some provisions of Manual M21-1 that were related to the processing of legacy appeals for compensation and HLRs under the AMA were moved to Manual M21-5





* BVA decisions (going back to 1992) are available online on the BVA's website * https://www.index.va.gov/search/va/bva.jsp * BVA decisions are not precedential, but can be cited as persuasive authority to show how the BVA has interpreted a particular reg or handled a similar case * If citing a BVA decision, list docket or citation number and attach it to your submission so it becomes part of the record

* A Vet has asked that you help him to determine whether to appeal the RO's denial of an increased rating for hepatitis B

Example of Legal Research

- * Using the search tool for the VBM eBook (or index or table of contents), you find Section 5.2.5, related to the evaluation of hepatitis.
- * The section explains the rating criteria, common VA errors when rating hepatitis, and citation to the regulation and diagnostic code, plus relevant Manual M21-1 provisions

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Example of Legal Research

- * Go to the C.F.R. to identify the specific criteria for an increased rating
- * Look on court websites for recent decisions addressing the proper interpretation of the rating criteria for hepatitis
- * Review Manual M21-1 provisions relevant to the evaluation of hepatitis

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Apply Legal Research

- * Knowing the relevant rules for rating hepatitis, you can determine if the evidence of record supports a higher rating, if additional evidence is needed, and if VA exams were inadequate or VA committed another error in its prior development or adjudication of the claim
- * Review the recent exam reports
- * Review recent treatment records
- * Review the Vet's lay statements about symptoms

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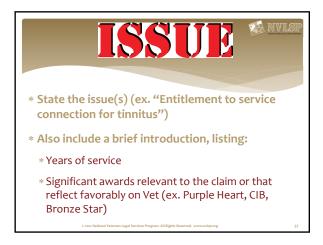
When to Present Written Argument *With initial claim or before rating decision *With supplemental claim or before rating decision

*With HLR request or before HLR decision

* For AMA claims, in what docket can a Vet submit written argument to the BVA? A. Direct Review B. Evidence Submission C. Hearing D. All of the above

* Appellants can always submit written argument to BVA, regardless of BVA docket/lane * Can be submitted any time prior to BVA decision, but should be submitted with NOD or as soon as possible thereafter * Vet can also submit written argument to BVA for legacy appeals * Should submit within 90 days of certification to BVA







- * Provide relevant language from statutes, court decisions, regulations, or other authority and cite the authority
 - *This is one area of a written submission, where using boilerplate is okay



- - * Discuss the evidence showing that all 3 elements of SC have been established, why the Vet meets the criteria for a higher disability rating, or why additional development is required under VA's duty to assist
 - * Make sure you address <u>each</u> element of a claim, to include pointing out favorable findings made in prior adjudications

ANALYSIS



- * Questions to consider in Analysis section
 - * What elements have been proven/are undebatable?
 - * Is there an element with only negative evidence?
 - * Is there an absence of evidence on an element?
 - * Is there an element where there is both positive and negative evidence?

ANALYSIS



- * If only negative evidence on element of claim:
 - * Look for flaws in evidence and explain why it shouldn't be relied on
- * Make DTA argument
- * Work with claimant to develop or obtain favorable evidence
- * If absence of evidence on element of claim:
 - * Make DTA argument
 - * Work with claimant to develop or obtain favorable evidence

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ANALYSIS



- * If there is both positive and negative evidence on an element of the claim:
 - * Explain why favorable evidence is more probative (build up)
 - * Explain why unfavorable evidence is less probative (knock down)
 - * Argue that, at the very least, the evidence is in equipoise the "benefit of the doubt" rule

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- * Summarize what it is you are asking the RO or BVA to do (ex. grant service connection, grant increased rating, provide a VA exam, etc.)
- * Can be as short as 1-2 sentences

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Writing Tips



- * If possible, give multiple arguments
- * Consider different theories of entitlement
- * If there are multiple "good" outcomes, advocate for each outcome in order of what is most preferable
 - * For example, argue that Vet is entitled to a 100% rating, but at the very least, VA should grant an increased rating of 70%; or argue that Vet is entitled to SC, but at the very least, further development is needed)

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Writing Tips



- Remember who your audience is (RO raters, BVA attorneys, Veterans Law Judges)
- * Make their job easy by clearly explaining why claimant is entitled to claimed benefit
- * When you reference important evidence, be specific about where they can find it ("On page 3 of the May 2013 VA PTSD exam report, the examiner stated...")

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Writing Tips



- * Avoid boilerplate language (except when citing statutes or regulations)
- * A written submission that is mostly boilerplate is going to make the person reading it think either (1) you do not know what you are talking about; or (2) you do not think the claimant you are representing has a strong case
- * When you do use boilerplate language, make sure it is relevant <u>and</u> correct

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Writing Tips



- * If you cite to a medical treatise/article or other authority (ex: favorable BVA decision in nearly identical case), attach a copy to your written submission
- * Do not mention statutes, regs, court decisions, or facts that are not relevant to the issues in your brief
- * Proofread, check for correct spelling and grammar, and consider reading the statement out loud to see if it flows
 - * Poor writing reduces persuasiveness

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Writing Tips



* <u>BE CONCISE</u>

* RO / BVA personnel do not want to read a 10 page brief (especially if the same argument could have been made in 10 sentences)

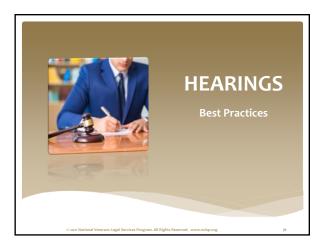
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Writing Tips



- If claim extremely weak / has no merit, and no VA development or adjudication errors, consider advising claimant to drop it
- * If non-frivolous, submit a "punt" brief / argument:
- * Identify claim and note Vet's contentions
- * Mention Vet's honorable service and awards
- * Ask VA to consider evidence of record, give Vet the benefit of the doubt, and grant claim

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Survey #3



- * During which of the following stages is a Vet NOT entitled to a hearing?
- A. Initial claim
- B. Supplemental claim
- C. BVA (hearing lane)
- D. CAVC

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* VA hearings available at following stages: * Initial claim before RO decision * Supplemental claim (AMA) * BVA * DRO (legacy) * Note: Informal conferences before HLR or DRO are not "hearings" * CAVC does not have hearings and rarely holds oral argument



*Review the claims file and be able to precisely say what is wrong with the rating decision *Prepare notes / outline for all arguments you want to raise to higher-level reviewer *Remember, you can only present argument, not any new evidence *Be prepared for the call at least 30 minutes prior to scheduled time

Preparing for BVA Virtual Hearing – Scheduling & Testing Tech

- * BVA scheduler should send an email to Vet and Rep
 - * Sometimes BVA forgets to copy representative, so keep an eye on Caseflow schedule
 - * The scheduler will be listed in the top right corner of the Caseflow notice, by the name of the judge.
- If you see that you are scheduled for a virtual hearing in Caseflow and have not received an email, reach out to the listed scheduler and request it

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Preparing for BVA Virtual Hearing – Scheduling & Testing Tech

- * The scheduling email has a testing link as well as the hearing conference link. Encourage Vet to test connection in advance.
- * If you are particularly concerned about Vet's technology skills, you can set up a 3-way test call in advance with the scheduler.

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Prepare Ahead of Time!

- * Review relevant VBM sections
- Read relevant statutes, regs, court decisions, VA manual provisions
- * Know the elements of the claim, so you can obtain effective testimony from the claimant
- * Be familiar with the facts/evidence
 - * Review the file
 - * Speak with claimant in advance



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Preparing Ahead of Time

- * Confer with claimant in advance
 - * Explain the format of hearing to Vet:
 - * Informal conf. with the VLJ/adjudicator
 - * Start of recording for transcript, oath, or affirmation
 - * Testimony
 - * Sometimes VLJs ask questions and sometimes they don't
 - * Note hearing is non-adversarial
 - * Note that decision not issued same day

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Preparing Ahead of Time

- Particularly if the issue is a mental disorder or involves trauma, prepare Vet for dealing with stress at hearing
- * E.g. "sometimes people get stressed or upset talking about this topic in hearings...."
- * Let Vet know it is okay to take a break during the hearing

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Preparing Ahead of Time

- * Pre-hearing discussion with Vet may be lengthy
 - * Tell Vet the questions you plan to ask
 - * Discussion may lead to new questions
 - * Often Vets will tell you important info not in the record that you would not think to ask about
 - * Discuss how Vet will answer those questions
 - * Focus Vet on relevant info

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Preparing Ahead of Time

* What questions should you ask:

- * If claim to reopen (legacy) or supplemental claim, if necessary, work with Vet to identify testimony that would be new and material/relevant
- * If it is a claim for service connection, ask questions related to any element or elements that VA has not yet conceded

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Preparing Ahead of Time

* What questions should you ask:

- * If claim is for an increased rating, ask Vet about symptoms / impairment listed in rating schedule for higher rating. Then, ask Vet some open-ended questions like, "Are there other ways this disability affects your life and work that we haven't talked about yet?"
- * If negative VA exam is based on incorrect info, ask question to elicit the facts

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Preparing Ahead of Time

- * Try to anticipate any questions that the hearing officer / VLJ may ask the witness (ex. Why did you wait 25 years to file a claim for PTSD?)
- * Prepare Vet for these questions
- * If Vet has a good answer, then beat hearing officer / VLJ to the punch and ask the question first

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Preparing Ahead of Time

- Suggest Vets write an "elevator pitch," i.e. a short statement of the most important things they want to say at the hearing
 - * Review before hearing to ensure statement not harmful to claim
- * VLJs / hearing officers sometimes take over and move the hearing in an unexpected direction, but almost always provide an opportunity at the end for Vets to add anything they might have missed

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Preparing Ahead of Time

* Outline your hearing plan

- * Write brief opening and closing statement (more on this later)
- * Finalize and write out the questions you plan to ask, based on what you learned from Vet during the prep session
 - * Send to the Vet
- * Plug in the relevant pieces of evidence you identified in the record
 - * After Vet answers a question, you can support credibility by pointing out the corroborating evidence of record

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Preparing Ahead of Time

- BVA hearings (in-person and video conf) are usually scheduled for 30 minutes
- * Most hearings should not take this long
- * If there a many issues on appeal and you think you will need more than 30 min, advise BVA hearing branch in advance of hearing
- * Consider requesting a pre-hearing conference to discuss time for hearing, clarify issues, stipulate certain facts, etc.

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At The Hearing



- Dress professionally (business attire), even for video/virtual hearing
 - * Shows you appreciate the importance of the hearing and respect the hearing officer
 - * Will lend credence / weight to your words
 - * Instills confidence in self
- * Encourage client to dress professionally

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At The Hearing



- * Opening Statement
- * State the issues SC / increased rating for what disabilities; other VA benefit
- * Briefly explain why the benefit is warranted
 - * Discuss how elements of claim are met
 - * Note prior favorable findings
 - * Note relevant law
- * If evidence doesn't support award of benefits, explain why additional development required / DTA not satisfied

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At The Hearing



- * Ask questions to elicit testimony in support of claim
- * In-service event, incident, symptoms
- * Continuity of symptoms
- * Current symptoms, functional loss, effect on ability to work
- * Don't waste time on questions about issues for which VA has already made favorable findings (AMA cases)
- * Ask leading questions
- * You provide the relevant information in your question and have the claimant provide a "yes" or "no" response

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At The Hearing



- You may need to ask follow-up questions if Vet has answered in a way that is harmful to case.
- * Ex: VLJ asks Vet why he didn't receive treatment for PTSD for 25 years after service. Vet is nervous, shrugs his shoulders and fails to respond. On follow-up questioning, you ask Vet, "isn't it true that you didn't seek treatment because you were in fear of losing your Police job?" This had been discussed previously, so Vet says "yes" and the hearing is back on track.

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At The Hearing



- * If VLJ / hearing officer begins to cross-examine Vet, you may need to remind that person of the non-adversarial nature of VA proceedings, and possibly terminate the hearing
- While you want to come to a hearing well prepared, you also have to be flexible and able to adapt if the hearing does not go as planned
 - * For example, hearing officer may interrupt to ask questions you were not anticipating or a witness may get nervous and forget to provide important information

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At The Hearing



- Use the hearing plan to the best of your ability, but be flexible. Vets often go off-track, and judges interject.
 - * When this happens, use the hearing plan like a checklist checking off the various important points as they are covered.
 - * At the end, if any points were missed, you can incorporate them into your closing statement.

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At The Hearing



- If it would support the claim at issue, have other witnesses provide testimony at the hearing (spouse, children, friends, etc.)
- * If possible, talk to witnesses ahead of time and prepare them for the questions you will ask them
- * Hearings do not have to be long to be effective

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After the Hearing



- * After hearing ends, let Vet know he/she did well
- * Let Vet know you are available to "debrief"
- If you think additional evidence is needed, talk to Vet about what should be submitted and the plan for submitting it
 - * 90-day deadline for AMA cases
- * Legacy cases ask to keep record open for certain period at hearing or in writing immediately following hearing

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Last Minute Hearing



- * What if you find out at the last minute that you have a hearing for a case you were just assigned?
- * Talk to the claimant about the case
- * Review the pertinent evidence in c-file
- * If you feel that you are inadequately prepared, ask to reschedule the hearing
- * If unable to reschedule the hearing, ask that the record be kept open for further written submission

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When Not to Request a Hearing

- If you are concerned about your witness not coming off as credible (for example, in prior conversations, your client has contradicted himself) or being belligerent
- * If the issue at hand is purely a matter of law; no clarification of the facts is needed
- * But, since the claimant has the right to a hearing, you must discuss it with him/her prior to withdrawing a hearing request

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REMINDERS



- * Remember you control the hearing
- * Preparation is key don't ask a question if you don't know the answer
- * A hearing is <u>not</u> the place for the Vet to vent

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REMINDERS



- * Have a concise summary for the RO adjudicator, DRO, or VLJ
- * Submit supporting documents or statements not already of record.
- * If necessary, ask to keep the record open (30 or 60 days) for submission of additional evidence

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Upcoming Webinars

- APRIL: Understanding Recent Changes to the VA's Rating of Musculoskeletal Disabilities
- * MAY: Establishing Service Connection for Hearing Loss and Tinnitus
- * JUNE: Revisions of VA Decisions Based on Clear and Unmistakable Error

To learn more, click here

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Library of Past Webinars

- * Previous NVLSP webinars are available here
 - * Webinars are available for 72 hours after purchase
 - * Topics include:
 - * The New VA Appeals System (Appeals Modernization)
 - * New Changes to VA's Non-Service Connected Disability Pension Program
 - * VA Benefits for Disabilities Caused by VA Health Care (§ 1151 Claims): The Basics and Important New Developments

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NVLSP * VA Benefit Identifier

- Questionnaire/App: Helps Vets and VSOs figure out what VA service-connected disability benefits or nonservice-connected pension benefits they might be entitled to
- * 3 WAYS to Access:

NVLSP Website





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NVLSP Training Opportunities

- * NVLSP offers private in-person and webinar training tailored to the needs of your organization
- If you are interested in finding out more information, please contact our Director of Training and Publications Rick Spataro, at richard@nvlsp.org

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