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THE VETERANS LAW GROUP

**EFFECTIVE REPRESENTATION
AT BOARD & DRO HEARINGS**

RESOURCE GUIDE

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This Guide Contains:

- What are the benefits of a hearing?
- Best cases to request a hearing
- When not to request a hearing
- What to expect at a hearing
- Preparing the veteran and family/others for hearing
- Submitting evidence or argument before and after hearing

QUICK REFERENCE

BOARD VS. DRO HEARINGS

Board	DRO
<i>When a case is at Board of Veterans Affairs</i>	<i>After an NOD has been filed and a Decision Review Officer is elected</i>
<i>MUST request a hearing on Form 9 or thereafter, not automatic</i>	<i>MUST Request hearing</i>
<i>Via Live Video Conference at local Regional Office with Veterans Law Judge in D.C. or Travel Board</i>	<i>At local regional office with Decision Review Officer</i>

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Section 1: What are the Benefits of a Hearing?

You should start with the presumption that most cases would benefit from a hearing. A hearing provides the only opportunity for a face-to-face discussion with the next decision maker on the veteran's case, be it a Decision Review Officer (DRO) or Veterans Law Judge (VLJ). For simplicity, I will refer to these adjudicators as DROs throughout this resource guide. When a hearing is scheduled, your client's case stands out from the rest, plucked from the pile of claim files mounting on a DRO's desk. For the first time, the DRO sees your client as an actual human being, deserving of the DRO's time and attention.

A hearing also allows you, as the veteran's representative, to clearly outline to the DRO the critical issues of the case, an advantage as important as the presentation of the veteran's live testimony. Remember, DROs have a very heavy caseload and therefore cannot spend a lot of time on any one claim. Yet, many cases require a clear understanding of subtle, not-so-obvious facts and principles. If you only present the issues in written format, your arguments may get lost in the flood of paperwork. By discussing your arguments with the DRO at a hearing, you have the opportunity to clarify and emphasize to the DRO what evidence to consider and which issues to decide. As the saying goes: Don't leave anything to chance.

Let's use a hypothetical as an example. You have a veteran with a claim to entitlement to service-connected schizophrenia. You want to prove your client's case based upon a theory of temporal service-connection, that the veteran first manifested his symptoms in-service. You intend to have him testify as to his erratic behavior as the first symptoms of his illness. For claims in general, however, DROs are looking for causation, that is, in-service incidents, causing a veteran's disability or illness. Therefore, in your case, you should state clearly to the DRO that the veteran is seeking service-connection on a theory of temporal service-connection, not causal service-connection. That is, your client first manifested symptoms of schizophrenia in service, not that any in-service incurrence caused his psychiatric disorder. With this clear statement, the DRO will concentrate on the veteran's testimony about in-service onset of symptoms and avoid wasting precious time on irrelevant causation issues.

SECTION 1 SUMMARY:

What are the Benefits of a Hearing?

- Opportunity to talk directly to the next decision maker on the case.
- Veteran become a real person v. one of the many files on the DRO's desk
- VSOs ability to clearly outline critical issues directly to DRO
- Can often glean from DRO what is missing for a positive decision



Section 2: Best Cases to Request a Hearing

In most cases, requesting a hearing is a judgment call, depending upon several factors, some we will discuss later. But, in some cases, a hearing is an absolute must. From my experience, hearings are essential to explain a thin medical record. Let's take an all too common scenario. A veteran injures his back in service from a slip and fall or from picking up a heavy object. His service medical records reflect one or two medical visits and his exit examination has no negative comments about his back. Some ten years after service, he is treated for severe back pain, diagnosed as advanced degenerative disc disease, with radiculopathy. Claimant files a claim for service-connected back disability.

On paper, this claim is going nowhere. The DRO will likely deny service-connection, stating that the veteran had a minor in-service back injury with only short-lived symptoms resolving before military discharge. The DRO will rely upon the service medical records, showing a very brief period of treatment, upon the exit examination showing resolution of symptoms and upon the absence of post-service treatment for ten years showing a lack of nexus between present disability and service.

As a VSO, you know the sparse medical record does not tell the whole story. Your client insists that he had continuous back pain since his in-service accident, telling you a convincing story for why he did not seek more treatment in service and for why he did not seek treatment for his back until ten years after discharge.

First, with respect to his minimal in-service treatment, the veteran says that he is not the type to complain about aches and pains. And, when he sought in-service treatment, the military physician dismissed his condition as a temporary back strain, advising him to take aspirin, ibuprofen or some other over-the-counter pain medication. After two medical visits, the veteran decided that further visits would be a waste of time. As for the exit examination, the veteran did not complain about back pain because he did not want to jeopardize future career opportunities. Specifically, he explains that, if he had complained, it would have been noted in the medical record, making him a liability to any prospective employer. And finally, the client explains that he waited ten years after service to see a physician because he was able to tolerate the pain until then.

This type of case cries out for a hearing, and it will be a hearing all about the veteran's credibility. Your job here, as the veteran's representative, is to safeguard, if not enhance, the credibility of the client's testimony. No doubt, a client's credibility has a lot to do with character and integrity, and these qualities obviously cannot be changed. Nonetheless, you can ensure that a client's good character shines through. For instance, many honest veterans are under the mistaken impression that they should exaggerate important facts in order to emphasize them. As a standard protocol, I tell all my clients not to overstate or embellish the facts. A judge will be far more sympathetic to the veteran if he comes off as a straight shooter.

You can also help your client's credibility by going over the critical facts and events, that is, refreshing his memory. A VSO should also make the veteran go over the relevant history of his case with his wife, family members, fellow service members or anyone else familiar with the critical facts. The more detailed his testimony, the better.

Be sure your client's testimony is consistent with the history asserted in his written statements and noted in medical records and opinions. I have seen too many good cases go sideways because of inconsistent or conflicting histories. This is not a problem of dishonesty. A veteran, or any person for that matter, can easily confuse or forget details in good faith, especially about remote events. Yet, DROs love to exploit these mistakes by citing them as the reason for finding a veteran has poor credibility. A VSO must spend time with the client carefully going over the histories recorded in the relevant documents so that his testimony is consistent with them.

A client's credibility can be strengthened by the corroborating testimony of fellow service members, family members or others who witnessed the relevant circumstances. If these individuals cannot make it to the hearing, then the next best thing is to submit their affidavits and informal statements. An affidavit is nothing more than a written statement, made under oath, alleging the same facts to which the witness would have otherwise testified. Since affidavits are made under oath, they are generally given more weight than informal written statements. Affidavits are easy to prepare. You can find helpful templates on line, and our firm would be happy to share affidavits we have prepared. One important thing: If you plan to offer a fellow service member's testimony or affidavit, be sure to submit his DD 214 form. The DD 214 will verify that the witness and the veteran were fellow soldiers, say, in the same unit, platoon or company and therefore the witness was in a position to observe the relevant events.

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For testimony and affidavits, I believe in the adage: More is better, with one caveat. The witnesses' testimony or affidavits must be consistent with each other and with that of the veteran. If not, they will do more harm than good. The affidavits should be straight to the point, avoid long narratives. Remember, DROs have limited time to review each case.

Finally, at the conclusion of a hearing and assuming the client's testimony went well, I will usually invite the DRO to make an informal credibility determination. I do this by discussing the client's testimony and overall credibility. For example, I will say: "Your honor (and I always address the adjudicators at the hearing as your honor), Mr. Smith has testified under oath with genuineness, candor and sincerity. As you can see, he is an honest and proud veteran, and I would like to know your honor's view of his credibility.

Nine times out of ten, the DRO will agree. This favorable finding of credibility can be used to the veteran's advantage should the veteran need to pursue further appeals.

SECTION 2 SUMMARY:

Best Cases for a Hearing

- When veteran didn't seek treatment for a long period of time after service.
- When supportive testimony from spouse or family member is available, or an affidavit.
- When record shows inconsistencies in symptoms or timing of onset.
- When symptoms on paper don't effectively show DRO the whole picture (i.e. severity or consistency of pain).
- Other cases where credibility is an issue.



Section 3: When Not to Request a Hearing

So far, we have talked about the advantages of a hearing. But, in some cases, it is better to pass on a hearing. For example, clients with dubious credibility or offensive personalities, more often than not, will sabotage their cases by testifying. Don't forget, DROs are people too. If they don't like the veteran, it will often color their view of the case.

Unfortunately, these personality types are just the ones most likely to insist upon a hearing. No matter what, they are obsessed about exercising all their rights, including the right to have a hearing. As a VSO, you must try to convince them against it. This takes delicate diplomacy. You can indicate to the veteran that in your experience, this is not a good case to take to a hearing and that a hearing is just not warranted. Often insisting on a hearing may delay the decision on their case. Typically the veteran wants a decision sooner rather than later.

But what do you do if the client still insists upon a hearing? Again, this is a client who is a credibility problem, having told you different stories or misstated or exaggerated facts. The best way to limit the potential damage of his/her testimony is to ask leading questions, questions calling for yes-or-no answers. It is very important in these situations to properly prepare your clients. I can illustrate this approach by telling you what you should not do. Don't ask a client, call him Mr. Smith, the following question: Mr. Smith, tell us what happened on May 5, 1967? This question calls for a long and open-ended narrative, creating the risk that his testimony will get the dates, circumstances and other details wrong. Instead, ask a question which gives him all the facts. For example: Mr. Smith, you were in the service on May 5, 1967 when you slipped and fell and injured your back. Correct? This approach gives you more control over the veteran's testimony.

Let's turn to another situation where a hearing should not be requested. If you have a case where the record is strongly in your client's favor, say, all the C & P examination reports and service medical records support service-connection, then don't ask for a hearing. There is nothing to be gained by it. Instead, I would request an informal hearing. An informal hearing is a face-to-face meeting with a DRO, without the client's presence. I always ask for them if I do not request a full-fledged hearing. It allows me to point out the relevant facts and the applicable law, ensuring that the DRO understands the case. Don't assume that a DRO will understand your case. I've made that mistake before only to be shocked by a bad decision written by an incompetent DRO. Always ask for an informal hearing.

SECTION 3 SUMMARY:

When NOT to request a Hearing

- Clients with dubious credibility
- Clients with offensive personalities
- Record is strongly in Client's favor (i.e. C&P exam supports service connection and severity)
- Try Informal Hearing

If Client Insists on a Hearing?

- Try to explain why hearing would not be helpful in his case
- Limit damage at hearing by asking leading questions v. open ended.
- Prep the client to keep answers simple and on point



Section 4: What to Expect at a Hearing

Both DRO and BVA Hearings are scheduled by a hearing coordinator at the Regional Office. A letter will be sent to the veteran as well as his/her representative with the date, time and location for the upcoming hearing. Upon receipt of the hearing notice you should contact the veteran to ensure he/she is able to make the hearing. Hearings can be rescheduled, but it is important to notify the VA as soon as possible that hearing needs to be rescheduled.

DRO HEARINGS:

DRO hearings can be either formal or informal hearings. Formal hearings are recorded and informal hearings are more of a discussion with the DRO about the case. Typically the DRO will ask at the beginning of the hearing if you want the hearing to be formal or informal. I have found that often the DRO is more casual and willing to be more open about what they are thinking on the case when it is not being recorded. However, in some cases you may want a written transcript of the hearing. This is a judgment call.

In either case, the hearing is relatively casual in that you are just sitting at a conference table across from the DRO with your client. The veteran and any other person giving testimony will be sworn under oath that the testimony he/she is giving is truthful. If there is any other person present with the veteran, the veteran will need to sign a consent for their presence at the hearing. The DRO will have a consent form available.

There will be an opportunity for the VSO to give an opening statement and then ask questions of the veteran about their case. After your questioning, the DRO may have some questions of their own for the veteran. Your responsibility at that time is to ask any additional follow up questions to clarify to the DRO the testimony. You can often get a feel for where the DRO is going because of their questioning.

BVA HEARINGS with Veteran's Law Judge:

When a case is at the Board of Veterans Appeals, the hearing is before a Veterans Law Judge (VLJ) that is based out of Washington D.C. Unless your BVA Hearing is with the Travel Board, your hearing will be by live videoconference and will still be scheduled by the hearing coordinator at the Regional Office. You will go to the Regional Office with your client and be on videoconference with the VLJ in D.C. The hearing from there is similar to the DRO Hearing. However, there are no "informal hearings at the BVA, all BVA Hearings are recorded. Still BVA hearings are rather casual with no formal rules of evidence.

With either hearing, you will not receive a decision from the DRO or VLJ at the hearing. They will request that a transcript be made of the hearing and will later review it with the file to make their decision. In our experience, a decision should come within 3-6 months of the hearing.

SECTION 4 SUMMARY:

What to Expect at a Hearing

- Notice
- DRO Hearings (formal or informal)
- Testimony & Evidence
- Board Hearings
- No immediate decisions



Section 5: Preparing Veterans & Family for a Hearing

Veterans will naturally be nervous about attending the hearing. I recommend contacting the veteran as soon as a hearing notice is received, first to ensure the veteran is able to make that date and second to start to ease the nerves of the veteran early on. Explaining to the veteran the environment of the hearing (i.e. conference room, not court room) and what to expect at the hearing is helpful in easing these nerves. Additionally, I find it helpful to explain that the hearing is not an adversarial event. While the veteran will be under oath, the DROs/VLJs questioning isn't a cross examination, it is merely to clarify and gather evidence for the record.

Within a week of the hearing, speak with the client again to more thoroughly prepare them for the hearing. You will want to review what disabilities will be discussed. Prepare the veteran for the questions you intend to ask them. Remind them to keep their answers to the point and to the issues on appeal. Often veterans want to tell their whole story with the VA and that can get confusing or frustrating for the DRO. We often also inform the client that if we begin to interrupt them it is to keep them on point and not because we aren't interested in what is being said. We want to keep the DRO focused on the issues that he/she can effect.

In some cases, you may want to ask the veteran to bring their spouse or family member with them to testify as well. This can be very effective in PTSD and other psych issues. Spouses can often give a very real sympathetic picture of the veteran's symptoms and how it effects their lives. In some circumstances we have asked that the veteran not be present in the room for the spouse's testimony. This allows the spouse to speak openly without worry of conflict.

SECTION 5 SUMMARY:

Preparing Veterans & Families

- Ease nervousness
- Explain what to expect
- Prepare them for Testimony
- Reminder no decision made on day of hearing

Section 6: Submitting Evidence or Argument Before and After a Hearing

I think it is always a good idea to submit your evidence a few days before the hearing. Some DROs and VLJs are conscientious and actually read the claims file before the hearing. After reviewing your favorable evidence, these adjudicators will have a more positive view of your case when conducting the hearing. It can take some time for the evidence to get to the DRO therefore you should submit it as early as possible and also take a copy of it to the hearing.

In difficult or complex cases, I recommend submitting a memo or outline of the issues before the hearing. Anything that helps a DRO better understand your evidence and arguments is a plus. All memos or outlines should state at the beginning what your client is seeking. For example: Mr. Smith is entitled to an increased rating for his service-connected PTSD, effective on January 30, 2000. Our office has prepared many such memos, and we would be happy to share them with you.

As for submitting evidence after the hearing, you always want to keep this possibility in mind. At the conclusion of a hearing, I often ask a DRO what additional evidence might help my client's case. Some DROs are frank, even friendly, and will tell you what additional evidence they would like to see. For instance, in a TDIU claim, they might say that the evidence of your client's alleged unemployability is a little thin and that obtaining an independent medical opinion or a vocational expert opinion would be helpful. Other times we provide additional argument or evidence as a result of what occurred in the hearing. If you get a feel from the DRO that they are questioning an in-service incident, you may want to get buddy statements or personnel records to submit to the DRO after the hearing. If you anticipate submitting evidence after the hearing, you should request the DRO to keep the record open for 30-60 days to allow you to submit additional evidence.

SECTION 6 SUMMARY:

Submitting Evidence

- **Before Hearing:** Allows DRO to review argument prior to hearing, but not all will
- **After Hearing:** If additional evidence/argument is needed.

ADDITIONAL RESOURCES:

Case Specific Questions (for VSO):

Mark R. Lippman (mlippman@veteranslaw.com)

Amanda L. Mineer (amineer@veteranslaw.com)

Case Referrals (for veterans):

<http://www.veteranslaw.com/consultation-request>

Toll Free: (888) 811 - 0523

General Resources:

<http://www.veteranslaw.com/>