

114TH CONGRESS  
2D SESSION

# S. 3328

To amend title 38, United States Code, to reform the rights and processes relating to appeals of decisions regarding claims for benefits under the laws administered by the Secretary of Veterans Affairs, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14, 2016

Mr. BLUMENTHAL (for himself, Mr. TESTER, Mr. KING, Mr. UDALL, Ms. BALDWIN, Mr. CASEY, Ms. HIRONO, Mr. MANCHIN, Mr. LEAHY, Mrs. MURRAY, Mr. BROWN, and Mr. SANDERS) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

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## A BILL

To amend title 38, United States Code, to reform the rights and processes relating to appeals of decisions regarding claims for benefits under the laws administered by the Secretary of Veterans Affairs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Department of Vet-  
5 erans Affairs Appeals Modernization Act of 2016”.

1 **SEC. 2. REFORM OF RIGHTS AND PROCESSES RELATING TO**  
2 **APPEALS OF DECISIONS REGARDING CLAIMS**  
3 **FOR BENEFITS UNDER LAWS ADMINISTERED**  
4 **BY SECRETARY OF VETERANS AFFAIRS.**

5 (a) DEFINITIONS.—Section 101 of title 38, United  
6 States Code, is amended by adding at the end the fol-  
7 lowing new paragraphs:

8 “(34) The term ‘agency of original jurisdiction’  
9 means the activity which entered the original deter-  
10 mination with regard to a claim for benefits under  
11 laws administered by the Secretary.

12 “(35) The term ‘relevant evidence’ means evi-  
13 dence that tends to prove or disprove a matter in  
14 issue.”.

15 (b) NOTICE REGARDING CLAIMS.—Section 5103(a)  
16 of such title is amended—

17 (1) in paragraph (1), in the first sentence, by  
18 striking “The” and inserting “Except as provided in  
19 paragraph (3), the”;

20 (2) in paragraph (2)(B)(i) by striking “, a  
21 claim for reopening a prior decision on a claim, or  
22 a claim for an increase in benefits;” and inserting  
23 “or a supplemental claim;”; and

24 (3) by adding at the end the following new  
25 paragraph:

1       “(3) The requirement to provide notice under para-  
2 graph (1) shall not apply with respect to a supplemental  
3 claim that is filed within the timeframe set forth in sub-  
4 paragraphs (B) and (D) of section 5110(a)(2) of this  
5 title.”.

6       (c) MODIFICATION OF RULE REGARDING DIS-  
7 ALLOWED CLAIMS.—Section 5103A(f) of such title is  
8 amended—

9           (1) by striking “reopen” and inserting “readju-  
10 dicate”; and

11           (2) by striking “material” and inserting “rel-  
12 evant”.

13       (d) MODIFICATION OF DUTY TO ASSIST CLAIM-  
14 ANTS.—Section 5103A of such title is amended—

15           (1) by redesignating subsections (e) through (g)  
16 as subsections (g) through (i), respectively; and

17           (2) by inserting after subsection (d) the fol-  
18 lowing new subsections:

19       “(e) APPLICABILITY OF DUTY TO ASSIST.—(1) The  
20 Secretary’s duty to assist under this section shall apply  
21 only to a claim, or supplemental claim, for a benefit under  
22 a law administered by the Secretary until the time that  
23 a claimant is provided notice of the agency of original ju-  
24 risdiction’s decision with respect to such claim, or supple-  
25 mental claim, under section 5104 of this title.

1       “(2) The Secretary’s duty to assist under this section  
2 shall not apply to higher-level review by the agency of  
3 original jurisdiction, pursuant to section 5104B of this  
4 title, or to review on appeal by the Board of Veterans’  
5 Appeals.

6       “(f) CORRECTION OF DUTY TO ASSIST ERRORS.—  
7 (1) If, during review of the agency of original jurisdiction  
8 decision under section 5104B of this title, the higher-level  
9 reviewer identifies an error on the part of the agency of  
10 original jurisdiction to satisfy its duties under this section,  
11 and that error occurred prior to the agency of original ju-  
12 risdiction decision being reviewed, unless the claim can be  
13 granted in full, the higher-level reviewer shall return the  
14 claim for correction of such error and readjudication.

15       “(2)(A) If the Board of Veterans’ Appeals, during re-  
16 view on appeal of an agency of original jurisdiction deci-  
17 sion, identifies an error on the part of the agency of origi-  
18 nal jurisdiction to satisfy its duties under this section, and  
19 that error occurred prior to the agency of original jurisdic-  
20 tion decision on appeal, unless the claim can be granted  
21 in full, the Board shall remand the claim to the agency  
22 of original jurisdiction for correction of such error and re-  
23 adjudication.

24       “(B) Remand for correction of such error may in-  
25 clude directing the agency of original jurisdiction to obtain

1 an advisory medical opinion under section 5109 of this  
2 title.”.

3 (e) DECISIONS AND NOTICES OF DECISIONS.—Sub-  
4 section (b) of section 5104 of such title is amended to read  
5 as follows:

6 “(b) In any case where the Secretary denies a benefit  
7 sought, the notice required by subsection (a) shall also in-  
8 clude all of the following:

9 “(1) Identification of the issues adjudicated.

10 “(2) A summary of the evidence considered by  
11 the Secretary.

12 “(3) A summary of the applicable laws and reg-  
13 ulations.

14 “(4) Identification of findings favorable to the  
15 claimant.

16 “(5) Identification of elements not satisfied  
17 leading to the denial.

18 “(6) An explanation of how to obtain or access  
19 evidence used in making the decision.

20 “(7) If applicable, identification of the criteria  
21 that must be satisfied to grant service connection or  
22 the next higher level of compensation.”.

23 (f) BINDING NATURE OF FAVORABLE FINDINGS.—



1           “(b) TIME AND MANNER OF REQUEST.—(1) A re-  
2 quest for higher-level review by the agency of original ju-  
3 risdiction shall be—

4           “(A) in writing in such form as the Secretary  
5 may prescribe; and

6           “(B) made within one year of the notice of the  
7 agency of original jurisdiction’s decision.

8           “(2) Such request may specifically indicate whether  
9 such review is requested by a higher-level adjudicator at  
10 the same office within the agency of original jurisdiction  
11 or by an adjudicator at a different office of the agency  
12 of original jurisdiction.

13           “(c) DECISION.—Notice of a higher-level review deci-  
14 sion under this section shall be provided in writing.

15           “(d) EVIDENTIARY RECORD FOR REVIEW.—The evi-  
16 dentiary record before the higher-level reviewer shall be  
17 limited to the evidence of record in the agency of original  
18 jurisdiction decision being reviewed.

19           “(e) DE NOVO REVIEW.—A review of the decision of  
20 the agency of original jurisdiction by a higher-level adjudi-  
21 cator within the agency of original jurisdiction shall be de  
22 novo.”.

23           (2) CLERICAL AMENDMENT.—The table of sec-  
24 tions at the beginning of chapter 51 of such title, as  
25 amended by subsection (f), is further amended by in-

1       serting after the item relating to section 5104A, as  
2       added by such subsection, the following new item:

“5104B. Higher-level review by the agency of original jurisdiction.”.

3       (h) OPTIONS FOLLOWING DECISION BY AGENCY OF  
4 ORIGINAL JURISDICTION.—

5           (1) IN GENERAL.—Chapter 51 of such title, as  
6       amended by subsection (g), is further amended by  
7       inserting after section 5104B, as added by such sub-  
8       section, the following new section:

9       **“§ 5104C. Options following decision by agency of**  
10           **original jurisdiction**

11       “(a) WITHIN ONE YEAR OF DECISION.—(1) Subject  
12 to paragraph (2), in any case in which the Secretary de-  
13 nies a claim, the claimant may take any of the following  
14 actions on or before the date that is one year after the  
15 date on which the agency of original jurisdiction issues  
16 a decision with respect to that claim:

17           “(A) File a request for higher-level review  
18       under section 5104B of this title.

19           “(B) File a supplemental claim under section  
20       5108 of this title.

21           “(C) File a notice of disagreement under sec-  
22       tion 7105 of this title.

23       “(2)(A) Once a claimant takes an action set forth in  
24 paragraph (1), the claimant may not take another action



1 set forth in that paragraph with respect to such claim  
2 until—

3 “(i) the higher-level review, supplemental claim,  
4 or appeal in connection with the notice of disagree-  
5 ment is adjudicated; or

6 “(ii) the request for higher-level review, supple-  
7 mental claim, or notice of disagreement is with-  
8 drawn.

9 “(B) Nothing in this subsection shall prohibit a  
10 claimant from taking any of the actions set forth in para-  
11 graph (1) in succession with respect to a claim.

12 “(C) Nothing in this subsection shall prohibit a  
13 claimant from taking different actions set forth in para-  
14 graph (1) with respect to different claims.

15 “(b) MORE THAN ONE YEAR AFTER DECISION.—In  
16 any case in which the Secretary denies a claim and more  
17 than one year has passed since the date on which the  
18 agency of original jurisdiction issues a decision with re-  
19 spect to that claim, the claimant may file a supplemental  
20 claim under section 5108 of this title.”.

21 (2) CLERICAL AMENDMENT.—The table of sec-  
22 tions at the beginning of chapter 51 of such title, as  
23 amended by subsection (g), is further amended by  
24 inserting after the item relating to section 5104B, as  
25 added by such subsection, the following new item:

“5104C. Options following decision by agency of original jurisdiction.”.

1 (i) SUPPLEMENTAL CLAIMS.—

2 (1) IN GENERAL.—Section 5108 of such title is  
3 amended to read as follows:

4 **“§ 5108. Supplemental claims**

5 “If new and relevant evidence is presented or secured  
6 with respect to a supplemental claim, the Secretary shall  
7 readjudicate the claim taking into consideration any evi-  
8 dence added to the record prior to the former disposition  
9 of the claim.”.

10 (2) CLERICAL AMENDMENT.—The table of sec-  
11 tions at the beginning of chapter 51 of such title is  
12 amended by striking the item relating to section  
13 5108 and inserting the following new item:

“5108. Supplemental claims.”.

14 (j) REMAND TO OBTAIN ADVISORY MEDICAL OPIN-  
15 ION.—Section 5109 of such title is amended by adding  
16 at the end the following new subsection:

17 “(d)(1) The Board of Veterans’ Appeals may remand  
18 a claim to direct the agency of original jurisdiction to ob-  
19 tain an advisory medical opinion under this section to cor-  
20 rect an error on the part of the agency of original jurisdic-  
21 tion to satisfy its duties under section 5103A of this title  
22 when such error occurred prior to the agency of original  
23 jurisdiction decision on appeal.

1       “(2) The Board’s remand instructions shall include  
2 the questions to be posed to the independent medical ex-  
3 pert providing the advisory medical opinion.”.

4       (k) RESTATEMENT OF REQUIREMENT FOR EXPE-  
5 DITED TREATMENT OF REMANDED CLAIMS.—Section  
6 5109B of such title is amended to read as follows:

7       **“§ 5109B. Expedited treatment of remanded claims**

8       “The Secretary shall take such actions as may be  
9 necessary to provide for the expeditious treatment by the  
10 agency of original jurisdiction of any claim that is re-  
11 manded by the Board of Veterans’ Appeals.”.

12       (l) EFFECTIVE DATES OF AWARDS.—Section 5110 of  
13 title 38, United States Code, is amended—

14               (1) by amending subsection (a) to read as fol-  
15 lows:

16       “(a)(1) Unless specifically provided otherwise in this  
17 chapter, the effective date of an award based on an initial  
18 claim, or a supplemental claim, of compensation, depend-  
19 ency and indemnity compensation, or pension, shall be  
20 fixed in accordance with the facts found, but shall not be  
21 earlier than the date of receipt of application therefor.

22       “(2) For purposes of determining the effective date  
23 of an award under this section, the date of application  
24 shall be considered the date of the filing of the initial ap-

1 plication for a benefit if the claim is continuously pursued  
2 by filing any of the following, either alone or in succession:

3 “(A) A request for higher-level review under  
4 section 5104B of this title on or before the date that  
5 is one year after the date on which the agency of  
6 original jurisdiction issues a decision.

7 “(B) A supplemental claim under section 5108  
8 of this title on or before the date that is one year  
9 after the date on which the agency of original juris-  
10 diction issues a decision.

11 “(C) A notice of disagreement on or before the  
12 date that is one year after the date on which the  
13 agency of original jurisdiction issues a decision.

14 “(D) A supplemental claim under section 5108  
15 of this title on or before the date that is one year  
16 after the date on which the Board of Veterans’ Ap-  
17 peals issues a decision.

18 “(3) Except as otherwise provided in this section, for  
19 supplemental claims received more than one year after the  
20 date on which the agency of original jurisdiction issued  
21 a decision or the Board of Veterans’ Appeals issued a deci-  
22 sion, the effective date shall be fixed in accordance with  
23 the facts found, but shall not be earlier than the date of  
24 receipt of the supplemental claim.”; and

25 (2) in subsection (i), in the first sentence—

1 (A) by striking “reopened” and inserting  
2 “readjudicated”;

3 (B) by striking “material” and inserting  
4 “relevant”; and

5 (C) by striking “reopening” and inserting  
6 “readjudication”.

7 (m) DEFINITION OF AWARD OR INCREASED AWARD  
8 FOR PURPOSES OF PROVISIONS RELATING TO COM-  
9 MENCEMENT OF PERIOD OF PAYMENT.—Section  
10 5111(d)(1) of such title is amended by striking “or re-  
11 opened award” and inserting “award or award based on  
12 a supplemental claim”.

13 (n) MODIFICATION ON LIMITATION ON FEES ALLOW-  
14 ABLE FOR REPRESENTATION.—Section 5904(c) of such  
15 title is amended, in paragraphs (1) and (2), by striking  
16 “notice of disagreement is filed” both places it appears  
17 and inserting “claimant is provided notice of the agency  
18 of original jurisdiction’s initial decision under section 5104  
19 of this title”.

20 (o) CLARIFICATION OF BOARD OF VETERANS’ AP-  
21 PEALS REFERRAL REQUIREMENTS AFTER ORDER FOR  
22 RECONSIDERATION OF DECISIONS.—Section 7103(b)(1)  
23 of title 38, United States Code, is amended by striking  
24 “heard” both places it appears and inserting “decided”.

1 (p) CONFORMING AMENDMENT RELATING TO RE-  
2 ADJUDICATION.—Section 7104(b) of such title is amended  
3 by striking “reopened” and inserting “readjudicated”.

4 (q) MODIFICATION OF PROCEDURES FOR APPEALS  
5 TO BOARD OF VETERANS’ APPEALS.—

6 (1) IN GENERAL.—Section 7105 of title 38,  
7 United States Code, is amended—

8 (A) in subsection (a)—

9 (i) by striking the first sentence and  
10 inserting “Appellate review shall be initi-  
11 ated by the filing of a notice of disagree-  
12 ment in the form prescribed by the Sec-  
13 retary.”; and

14 (ii) by striking “hearing and”;

15 (B) by amending subsection (b) to read as  
16 follows:

17 “(b)(1)(A) Except in the case of simultaneously con-  
18 tested claims, notice of disagreement shall be filed within  
19 one year from the date of the mailing of notice of the deci-  
20 sion of the agency of original jurisdiction pursuant to sec-  
21 tion 5104, 5104B, or 5108 of this title.

22 “(B) A notice of disagreement postmarked before the  
23 expiration of the 1-year period shall be accepted as timely  
24 filed.

1 “(C) A question as to timeliness or adequacy of the  
2 notice of disagreement shall be decided by the Board.

3 “(2)(A) Notices of disagreement shall be in writing,  
4 shall set out specific allegations of error of fact or law,  
5 and may be filed by the claimant, the claimant’s legal  
6 guardian, or such accredited representative, attorney, or  
7 authorized agent as may be selected by the claimant or  
8 legal guardian.

9 “(B) Not more than one recognized organization, at-  
10 torney, or agent may be recognized at any one time in  
11 the prosecution of a claim.

12 “(C) Notices of disagreement shall be filed with the  
13 Board.

14 “(3)(A) The notice of disagreement shall indicate  
15 whether the claimant requests—

16 “(i) a hearing before the Board;

17 “(ii) an opportunity to submit additional evi-  
18 dence without a hearing before the Board; or

19 “(iii) a review by the Board without a hearing  
20 or submission of additional evidence.

21 “(B) If the claimant does not expressly request a  
22 hearing before the Board in the notice of disagreement,  
23 no hearing before the Board shall be held.”;

24 (C) by amending subsection (c) to read as  
25 follows:

1       “(c) If no notice of disagreement is filed in accord-  
 2       ance with this chapter within the prescribed period, the  
 3       action or decision of the agency of original jurisdiction  
 4       shall become final and the claim shall not thereafter be  
 5       readjudicated or allowed, except as may otherwise be pro-  
 6       vided by section 5104B or 5108 of this title or such regu-  
 7       lations as are consistent with this title.”;

8                       (D) by striking subsection (d) and insert-  
 9                       ing the following new subsection (d):

10       “(d) The Board of Veterans’ Appeals may dismiss  
 11       any appeal which fails to allege specific error of fact or  
 12       law in the decision being appealed.”;

13                       (E) by striking subsection (e); and

14                       (F) in the section heading, by striking  
 15       **“notice of disagreement and”**.

16       (2) CLERICAL AMENDMENT.—The table of sec-  
 17       tions at the beginning of chapter 71 of such title is  
 18       amended by striking the item relating to section  
 19       7105 and inserting the following new item:

“7105. Filing of appeal.”.

20       (r) MODIFICATION OF PROCEDURES AND REQUIRE-  
 21       MENTS FOR SIMULTANEOUSLY CONTESTED CLAIMS.—  
 22       Subsection (b) of section 7105A of such title is amended  
 23       to read as follows:

24       “(b)(1) The substance of the notice of disagreement  
 25       shall be communicated to the other party or parties in in-



1 terest and a period of thirty days shall be allowed for filing  
2 a brief or argument in response thereto.

3 “(2) Such notice shall be forwarded to the last known  
4 address of record of the parties concerned, and such action  
5 shall constitute sufficient evidence of notice.”.

6 (s) REPEAL OF PROCEDURES FOR ADMINISTRATIVE  
7 APPEALS.—

8 (1) IN GENERAL.—Chapter 71 of such title is  
9 amended by striking section 7106.

10 (2) CLERICAL AMENDMENT.—The table of sec-  
11 tions at the beginning of chapter 71 of such title is  
12 amended by striking the item relating to section  
13 7106.

14 (t) MODIFICATIONS RELATING TO APPEALS: DOCK-  
15 ETS; HEARINGS.—Section 7107 of such title is amended  
16 to read as follows:

17 **“§ 7107. Appeals: dockets; hearings**

18 “(a) DOCKETS.—(1) The Board shall maintain two  
19 separate dockets as follows:

20 “(A) A non-hearing option docket shall be  
21 maintained for cases in which no Board hearing is  
22 requested and no additional evidence will be sub-  
23 mitted.

24 “(B) A separate and distinct hearing option  
25 docket shall be maintained for cases in which a

1 Board hearing is requested in the notice of disagree-  
2 ment or in which no Board hearing is requested, but  
3 the appellant requests, in the notice of disagreement,  
4 an opportunity to submit additional evidence.

5 “(2) Except as provided in subsection (b), each case  
6 before the Board will be decided in regular order according  
7 to its respective place on the Board’s non-hearing option  
8 docket or the hearing option docket.

9 “(b) ADVANCEMENT ON THE DOCKET.—(1) A case  
10 on either the Board’s non-hearing option docket or hear-  
11 ing option docket may, for cause shown, be advanced on  
12 motion for earlier consideration and determination.

13 “(2) Any such motion shall set forth succinctly the  
14 grounds upon which the motion is based.

15 “(3) Such a motion may be granted only—

16 “(A) if the case involves interpretation of law of  
17 general application affecting other claims;

18 “(B) if the appellant is seriously ill or is under  
19 severe financial hardship; or

20 “(C) for other sufficient cause shown.

21 “(c) MANNER AND SCHEDULING OF HEARINGS FOR  
22 CASES ON BOARD HEARING OPTION DOCKET.—(1) For  
23 cases on the Board hearing option docket in which a hear-  
24 ing is requested in the notice of disagreement, the Board

1 shall notify the appellant whether a Board hearing will  
2 be held—

3           “(A) at its principal location, or

4           “(B) by picture and voice transmission at a fa-  
5           cility of the Department where the Secretary has  
6           provided suitable facilities and equipment to conduct  
7           such hearings.

8           “(2)(A) Upon notification of a Board hearing at the  
9           Board’s principal location as described in subparagraph  
10          (A) of paragraph (1), the appellant may alternatively re-  
11          quest a hearing as described in subparagraph (B) of such  
12          paragraph. If so requested, the Board shall grant such re-  
13          quest.

14          “(B) Upon notification of a Board hearing by picture  
15          and voice transmission as described in subparagraph (B)  
16          of paragraph (1), the appellant may alternatively request  
17          a hearing as described in subparagraph (A) of such para-  
18          graph. If so requested, the Board shall grant such request.

19          “(d) SCREENING OF CASES.—Nothing in this section  
20          shall be construed to preclude the screening of cases for  
21          purposes of—

22                 “(1) determining the adequacy of the record for  
23                 decisional purposes; or



1 is not requested in the notice of disagreement, the evi-  
2 dentiary record before the Board shall be limited to the  
3 evidence of record at the time of the decision of the agency  
4 of original jurisdiction on appeal.

5       “(b) HEARING OPTION DOCKET.—(1)(A) Except as  
6 provided in subparagraph (B) of this paragraph, for cases  
7 on the hearing option docket in which a hearing is re-  
8 quested in the notice of disagreement, the evidentiary  
9 record before the Board shall be limited to the evidence  
10 of record at the time of the decision of the agency of origi-  
11 nal jurisdiction on appeal.

12       “(B) The evidentiary record before the Board for  
13 cases on the hearing option docket in which a hearing is  
14 requested, shall include each of the following, which the  
15 Board shall consider in the first instance:

16           “(i) Evidence submitted by the appellant and  
17 his or her representative, if any, at the Board hear-  
18 ing.

19           “(ii) Evidence submitted by the appellant and  
20 his or her representative, if any, within 90 days fol-  
21 lowing the Board hearing.

22       “(2)(A) Except as provided in subparagraph (B) of  
23 this paragraph, for cases on the hearing option docket in  
24 which a hearing is not requested in the notice of disagree-  
25 ment, the evidentiary record before the Board shall be lim-

1 ited to the evidence considered by the agency of original  
2 jurisdiction in the decision on appeal.

3 “(B) The evidentiary record before the Board for  
4 cases on the hearing option docket in which a hearing is  
5 not requested, shall include each of the following, which  
6 the Board shall consider in the first instance:

7 “(i) Evidence submitted by the appellant and  
8 his or her representative, if any, with the notice of  
9 disagreement.

10 “(ii) Evidence submitted by the appellant and  
11 his or her representative, if any, within 90 days fol-  
12 lowing receipt of the notice of disagreement.”.

13 (2) CLERICAL AMENDMENT.—The table of sec-  
14 tions at the beginning of chapter 71 of such title is  
15 amended by inserting after the item relating to sec-  
16 tion 7112 the following new item:

“7113. Evidentiary record before the Board of Veterans’ Appeals.”.

17 (x) APPLICABILITY.—The amendments made by this  
18 Act shall apply to all claims for which notice of a decision  
19 under section 5104 of title 38, United States Code, is pro-  
20 vided by the Secretary on or after the date that is 540  
21 days after the date of the enactment of this Act.

○