

**Office of the Chairman
Board of Veterans' Appeals
Washington, DC 20420**



Date: May 11, 2010

**MEMORANDUM
NO. 01-10-18**

SUBJ: PROCEDURES FOR VACATING A BOARD DECISION

1. REFERENCES

- a. 38 U.S.C. § 7104(a) (West 2002).
- b. 38 C.F.R. § 20.904 (2009).

2. PURPOSE

The purpose of this Memorandum is to set forth procedures for vacating a Board of Veterans' Appeals (Board) decision. For purposes of this Memorandum, the terms "Order to Vacate" and "Vacatur" are used interchangeably.

3. BACKGROUND

A Board decision may be vacated at any time upon request of the appellant or his or her representative, or on the Board's own motion, if the appellant was denied due process or was allowed benefits based upon false or fraudulent evidence. 38 C.F.R. § 20.904. Denial of due process is conceded when the appellant was denied his or her right to representation through the action or inaction of VA personnel, or where there was a prejudicial failure to afford the appellant a personal hearing. *Id.* Depending on the facts of the case, denial of due process may also include a failure to consider relevant evidence that was constructively in the Board's possession, or a failure to consider a request for an extension of time to submit additional evidence. Finally, another common basis for vacating and dismissing an appeal is either where the Board learns, after issuing a decision on the merits, that the appellant had died prior to the issuance of that decision,

or where the appellant dies while the appeal of the Board's decision is pending before the United States Court of Appeals for Veterans Claims (CAVC or Court) and the Court vacates the Board's decision and remands the matter for the Board to dismiss the appeal due to the appellant's death.

NOTE: Vacatur is Distinguishable from Reconsideration. The *grounds for vacating* a Board decision are limited to a denial of due process and an allowance based on false or fraudulent evidence. 38 C.F.R. § 20.904. A Board decision may be vacated by the same Veterans Law Judge who signed the prior decision. The *grounds for reconsideration* of a Board decision include obvious error of fact or law, discovery of new and material evidence in the form of relevant records or reports of the service department, or upon allegation of an allowance of benefits that was materially influenced by false or fraudulent evidence. 38 C.F.R. § 20.1000. Rulings on motions for reconsideration, unlike motions for vacatur, are done by the Chairman or his or her designee, as appropriate. *Id.* § 20.1001(c); *see* §§ 19.11(a), 19.14(a). Please be aware of the distinction so that proper action is taken in a case.

4. TYPES OF VACATUR

a. **General.** The Board's policy is to adjudicate in a single document all issues over which the Board has jurisdiction in an individual case. *See* BVA Directive 8430, Paragraph 14(a). Depending on the factual circumstances, a Board decision may be vacated by issuing an Order to Vacate as a stand-alone document, with no immediate readjudication of the case. Conversely, the facts may warrant vacating a Board decision and simultaneously issuing a new decision and/or remand, *in the same document*. Each type of vacatur is explained below.

b. **Order to Vacate without an Immediate Accompanying Adjudication.** If an appellant has been denied due process as described in 38 C.F.R. § 20.904, an Order to Vacate issued as a stand-alone document may be appropriate when the Board will not be readjudicating the case until a later date due to the need to afford the claimant an opportunity to submit additional evidence or argument, to clarify representation, to attend a scheduled hearing, or to address some other due process matter.

Example 1. An Order to Vacate without an accompanying adjudication may be appropriate if the Board failed to recognize the appellant's request for extra time to secure representation prior to the Board issuing its decision. In this example, the Board may need to issue an Order to Vacate, and provide the appellant a period of time (such as

30 or 60 days) to secure valid representation. After that process concludes, the Board would then proceed to adjudicate the pending appeal. *See ¶5b.*

Example 2. An Order to Vacate without an accompanying adjudication may be appropriate if the Board obtains new evidence that was constructively of record at the time of the prior Board decision, but the evidence was not previously considered by the Agency of Original Jurisdiction (AOJ), and is not accompanied by a waiver of AOJ consideration. In that fact pattern, the Board would have to issue an Order to Vacate as a “stand-alone” adjudication. The Board would then have to send the appellant a waiver solicitation letter. *See* 38 C.F.R. § 20.1304(c). After the response to the letter is received, or the response period expires, the Board would then proceed to adjudicate the pending appeal by either deciding the claim or, if no response or a negative response to the waiver solicitation letter was received, remanding the claim to the AOJ for consideration of the evidence in the first instance. *See ¶5b.*

c. Order to Vacate with an Accompanying Adjudication. If an appellant has been denied due process as described in 38 C.F.R. § 20.904, or died prior to the Board’s decision, but without the Board’s knowledge, an Order to Vacate issued *within the same document* as an accompanying Board adjudication may be appropriate. *See ¶5b.*

Example 1. If the Board issued a decision and subsequently learned that an updated Power of Attorney (POA) had been executed and received by VA **prior** to the Board’s decision, but had not been associated with the claims file, this may be an appropriate reason to vacate the Board decision. Provided that no further development was required, the Board could issue an Order to Vacate and a new decision/remand in the same document, with the correct POA listed. *See ¶5b.*

Example 2. If the Board issued a decision and subsequently obtained relevant evidence that was received by VA prior to the Board’s decision, but had not yet been associated with the claims file at the time the Board decision was issued, this may be an appropriate reason to vacate the Board decision. Provided that no further development or action was required (such as a waiver solicitation), the Board could issue an Order to Vacate and a new decision/remand in the same document. *See ¶5b.*

Example 3. If the Board issued a decision on the merits of an appeal and subsequently learned that the appellant had died prior to the issuance of that decision, this may be an appropriate reason to vacate the Board decision and dismiss the appeal. This can be accomplished by the Board issuing an Order to Vacate and a dismissal in the same document. *See ¶5b.*

5. PROCEDURES FOR BOARD COUNSEL AND VETERANS LAW JUDGES

a. **Jurisdiction Check.** Before vacating a Board decision, Board counsel and Veterans Law Judges (VLJs) should make certain that there are no jurisdictional impediments to issuing a vacatur by performing a Notice of Appeal (NOA) check in accordance with the procedures set forth in ¶7 below. If the appellant has filed an NOA with the Court with respect to the decision that the Board is considering vacating that is currently on appeal to the Court, the Board may not vacate the Board decision because jurisdiction over the case rests with the Court and not the Board. In such case, the counsel or VLJ should contact the supervisory attorney in Litigation Support (01C2) for guidance on how to proceed.

b. **Format.** After confirming that the Board has jurisdiction to issue an Order to Vacate, the guidelines in the following attachments should be used to draft the vacate action.

Attachment A. Guidance for drafting an Order to Vacate without an accompanying adjudication. (See **Vacatur.dot** template on General Templates).

Attachment B. Guidance for drafting an Order to Vacate in the same document as a decision or decision and remand.

Attachment C. Guidance for drafting an Order to Vacate and remand.

Attachment D. Guidance for drafting an Order to Vacate and dismissal for death.

c. **Decision Assignment Sheet (DAS) Work Products.** Upon completion of an Order to Vacate, or a decision containing an Order to Vacate, attorneys should use the “Attorney Check In” program to check the case out to their VLJs as usual, by selecting one of the following work products: (1) Vacatur, (2) Vacate and Decision, (3) Vacate and Remand, (4) Vacate and Decision and Remand, or (5) Vacate and Dismissal. Attorneys should select the appropriate work product and continue with the DAS check out procedure.

d. **DAS Check Out Procedure.** For each issue that is being vacated, the issue must be entered into VACOLS, either at the “Attorney Check In” stage or at the DAS stage. Upon completion of the case, the “5-Vacated” disposition must be selected for each vacated issue. If the vacated issue is being decided, remanded, or dismissed in the **same** document, the issue must be entered into the DAS twice. The system has an automated prompt to assist with this process. The first time the issue is entered into the DAS, the user must select “5 -Vacated” as the disposition in the check out screen. When

the user clicks “Update,” a prompt will state, “You have indicated you are vacating an issue from a prior Board Decision. If you have vacated this issue and are readjudicating it, it should appear twice. Do you want the vacated issue to be automatically created?” If the user clicks “yes,” a duplicate of the issue will be automatically created. The user should select either allowed, denied, remanded, or dismissed, as usual. By completing accurate data entry, the Board will be able to reliably track the number of decisions or issues that are vacated.

6. PROCEDURES FOR OFFICE OF MANAGEMENT, PLANNING AND ANALYSIS (MPA)

a. **Jurisdiction Check.** Before dispatching a case containing an Order to Vacate, Board personnel should perform an NOA check in accordance with the procedures set forth in ¶7 below. If the appellant has filed an NOA with the Court with respect to the same decision that the Board is considering vacating and that matter remains before that court or another court on appeal, an Order to Vacate **cannot** be issued because the Board no longer has jurisdiction over the case. In a case where an NOA *has been filed* regarding the decision that the Board is attempting to vacate, MPA personnel must contact the supervisory attorney in Litigation Support (01C2) for guidance on how to proceed.

b. **Dispatch Procedure for an Order to Vacate without an Immediate Accompanying Adjudication.** When an Order to Vacate is issued without an accompanying adjudication decision (*i.e.*, a “stand alone” vacatur) and it is received for dispatch, MPA personnel should dispatch the Order to Vacate and retain the claims folder for further Board action, unless specifically instructed otherwise. If the Board is retaining the claims folder for additional action, MPA personnel should code the matter in VACOLS as a **de novo** action. When the post-vacatur action is completed, the signed decision and the claims folder should be dispatched together. *See* BVA Outcode & Dispatch Procedural Manual.

c. **Dispatch Procedure for an Order to Vacate with an Accompanying Adjudication.** When a case containing a vacatur with an accompanying adjudication is received for dispatch, MPA personnel should enter “vacatur” in the Prior Decision field in VACOLS. They should then select the appropriate “Type Action” for the remainder of the decision and dispatch as a normal decision or remand.

7. NOA CHECK PROCEDURE

Board personnel should follow these steps to determine whether an NOA has been filed on a particular Board decision:

a. **CAVC Website.** Go to the Court's website, located at <http://www.uscourts.cavc.gov>. On the left side menu, click "Case Information" and then "Case Docket Report." Click the top link, for cases that were not closed prior to October 2008.

b. **Search Page.** On the search page, check the box for "Party," enter the appellant's last name, and click "Search." (**Important Note:** While VA tracks all appeals under the name of the Veteran, including for cases involving death benefits brought by a surviving dependent, the Court tracks appeals under the name of the actual appellant. Accordingly, it is absolutely essential to search for any non-Veteran appeals using the name of the appellant or else the search may come up negative when in actuality an appeal has been filed with the Court.)

c. **Name Match.** If a result is returned that matches the appellant's name, click on the docket number above his or her name (*e.g.*, 09-###). Then, click the "Full Docket" button at the top of the page. On the next screen, click "Run Docket Report."

d. **NOA Verification.** Scroll down to see the dates of the NOA and the Board decision to verify whether the appeal was filed on the same Board decision that is being vacated, as opposed to another Board decision.

e. **Questions.** If there is *any question* whatsoever concerning whether an appeal has been filed with the Court, or whether a further appeal has been taken to the United States Court of Appeals for the Federal Circuit, or the United States Supreme Court, it is absolutely essential to contact the supervisory attorney in Litigation Support (01C2) for guidance on how to proceed.

8. RESCISSION

This memorandum is effective until expressly rescinded, modified, or superseded.

James P. Terry
Chairman

DISTRIBUTION: COE (FOR BVA USE ONLY)
Director, Compensation and Pension Service (21)

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ATTACHMENT A:

GUIDANCE FOR DRAFTING A STAND-ALONE ORDER TO VACATE

Use the **Vacatur.dot** template when issuing an Order to Vacate without an accompanying adjudication. If you are using Office 2007, this is located in the “My Templates” tab. After completing the template prompts, enter any necessary introductory text in the Introduction section. In the Order to Vacate section, provide a brief summary of the legal requirements for vacatur and briefly discuss the reasons and bases for why the decision is being vacated.

EXAMPLE:

INTRODUCTION

[Enter introductory text here.]

ORDER TO VACATE

The Board of Veterans’ Appeals (Board) may vacate an appellate decision at any time upon request of the appellant or his or her representative, or on the Board’s own motion, when an appellant has been denied due process of law or when benefits were allowed based on false or fraudulent evidence. 38 U.S.C.A. § 7104(a) (West 2002); 38 C.F.R. § 20.904 (2009).

[Briefly discuss reasons and bases for vacatur.]

Accordingly, the [enter date of the decision] Board decision addressing the issue(s) of [enter issue(s)] is vacated.

Veterans Law Judge, Board of Veterans’ Appeals

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ATTACHMENT B:

GUIDANCE FOR DRAFTING A VACATUR AND DECISION OR A VACATUR AND DECISION AND REMAND

Use the **Generic Decision and Remand.dot** template to create an Order to Vacate with an accompanying adjudication. After completing the template, enter findings of fact specific to the decision being vacated and a corresponding conclusion of law. In the Reasons and Bases section of the decision, provide a brief summary of the legal requirements for vacaturs and briefly discuss the reasons and bases for why the decision is being vacated. In the Order, state that the decision is vacated.

EXAMPLE:

INTRODUCTION

[Enter introductory text here.]

FINDINGS OF FACT

1. [Insert finding of fact regarding the decision being vacated; for example, on DATE, the Board issued a decision as to ISSUES].
2. [Insert finding of fact regarding the reason the decision is being vacated; for example, on DATE, the Board discovered evidence relevant to the appeal with an accompanying waiver of AOJ consideration that had not been associated with the claims file at the time the DATE decision was issued].
3. [Insert remaining findings of fact for issues not being vacated and/or those being immediately readjudicated].

CONCLUSIONS OF LAW

1. The [date] Board decision addressing the issue(s) of [enter issue(s)] is vacated. 38 U.S.C.A. § 7104(a)(West 2002); 38 C.F.R. § 20.904 (2009).
2. [Insert remaining conclusions of law for issues not being vacated and/or those being immediately readjudicated].

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ATTACHMENT B (continued):

**GUIDANCE FOR DRAFTING A VACATUR AND DECISION OR A
VACATUR AND DECISION AND REMAND**

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Board may vacate an appellate decision at any time upon request of the appellant or his or her representative, or on the Board's own motion, when an appellant has been denied due process of law or when benefits were allowed based on false or fraudulent evidence. 38 U.S.C.A. § 7104(a)(West 2002); 38 C.F.R. § 20.904 (2009).

[Briefly discuss reasons and bases for vacatur.]

[Proceed with Decision as usual, discussing reasons and bases for issues being decided.]

ORDER

The [date] Board decision addressing the issue(s) of [enter issue(s)] is vacated.

[Insert remainder of Order].

[Insert REMAND section here, if applicable.]

Veterans Law Judge, Board of Veterans' Appeals

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ATTACHMENT C:

GUIDANCE FOR DRAFTING A VACATUR AND REMAND

Use the **Generic Decision and Remand.dot** template and **select Remand** when prompted. Otherwise, the template will generate the two-page appellate rights form, which is not applicable to a remand or a vacate action. Manually enter the headings for Findings of Fact, Conclusions of Law, Reasons and Bases, and Order (before the Remand section). Enter findings of fact specific to the decision being vacated and a corresponding conclusion of law. Provide a brief summary of the legal requirements for vacatur and discuss the reasons and bases for why the decision is being vacated. In the Order section state that the [date] decision is vacated.

EXAMPLE:

INTRODUCTION

[Enter introductory text here.]

FINDINGS OF FACT

1. [Insert fact regarding the decision being vacated; for example, on DATE, the Board issued a decision as to ISSUES].
2. [Insert finding of fact regarding the reason the decision is being vacated; for example, on DATE, the Board discovered evidence relevant to the appeal that had not been associated with the claims file at the time the DATE decision was issued, and for which the appellant had expressly requested AOJ review].

CONCLUSION OF LAW

The [date] Board decision addressing the issue(s) of [enter issue(s)] is vacated. 38 U.S.C.A. § 7104(a)(West 2002); 38 C.F.R. § 20.904 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Board may vacate an appellate decision at any time upon request of the appellant or his or her representative, or on the Board's own motion, when an

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ATTACHMENT C (continued):

GUIDANCE FOR DRAFTING A VACATUR AND REMAND

appellant has been denied due process of law or when benefits were allowed based on false or fraudulent evidence. 38 U.S.C.A. § 7104(a)(West 2002); 38 C.F.R. § 20.904 (2009).

[Briefly discuss reasons and bases for vacatur.]

ORDER

The [date] Board decision addressing the issue(s) of [enter issue(s)] is vacated.

REMAND

[Body of remand decision.]

Accordingly, the case is REMANDED for the following action:

1. [Remand action paragraphs.]

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2009).

Veterans Law Judge, Board of Veterans' Appeals

(Boilerplate regarding appeals)

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ATTACHMENT D:

GUIDANCE FOR DRAFTING A VACATUR AND DEATH DISMISSAL

Use the **Generic Decision and Remand.dot** template to create an Order to Vacate with an accompanying dismissal. After completing the template, enter findings of fact specific to the decision being vacated and the reason for dismissal, with corresponding conclusions of law. In the Reasons and Bases section of the decision, provide a brief summary of the legal requirements for vacaturs and briefly discuss the reasons and bases for why the decision is being vacated. Also provide a brief summary of the legal requirements for dismissals, and briefly discuss the reasons and bases for the dismissal. In the Order, state that the [date] decision is vacated and that the appeal is dismissed.

EXAMPLE:

FINDINGS OF FACT

1. [Insert fact regarding the decision being vacated; for example, on DATE, the Board issued a decision as to ISSUES].
2. [Insert fact regarding the reason for dismissal; for example, on DATE, the Board was notified by the RO that the Veteran died in MONTH YEAR.]

CONCLUSIONS OF LAW

1. The [date] Board decision addressing the issue(s) of [enter issue(s)] is vacated. 38 U.S.C.A. § 7104(a)(West 2002); 38 C.F.R. § 20.904 (2009).
2. Due to the death of the appellant, the Board has no jurisdiction to adjudicate the merits of the claim at this time. 38 U.S.C.A. § 7104(a) (West 2002); 38 C.F.R. § 20.1302 (2009); *but see* 38 U.S.C. § 5121A.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Board may vacate an appellate decision at any time upon request of the appellant or his or her representative, or on the Board's own motion, when an appellant has been denied due process of law or when benefits were allowed based on false or fraudulent evidence. 38 U.S.C.A. § 7104(a)(West 2002); 38 C.F.R. § 20.904 (2009).

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ATTACHMENT D (continued):

GUIDANCE FOR DRAFTING A VACATUR AND DEATH DISMISSAL

[Briefly discuss reasons and bases for vacatur.]

As a matter of law, appellants' claims do not survive their deaths. *Zevalkink v. Brown*, 102 F.3d 1236, 1243-44 (Fed. Cir. 1996); *Smith v. Brown*, 10 Vet. App. 330, 333-34 (1997); *Landicho v. Brown*, 7 Vet. App. 42, 47 (1994). This appeal on the merits has become moot by virtue of the death of the appellant and must be dismissed for lack of jurisdiction. *See* 38 U.S.C.A. § 7104(a) (West 2002); 38 C.F.R. § 20.1302 (2009). In reaching this determination, the Board intimates no opinion as to the merits of this appeal or to any derivative claim brought by a survivor of the Veteran. 38 C.F.R. § 20.1106 (2009).

[For post October 10, 2008 death, include the following] The Board's dismissal of this appeal does not affect the right of an eligible person to file a request to be substituted as the appellant for purposes of processing the claim to completion. Such request must be filed not later than one year after the date of the appellant's death. *See* Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 212, 122 Stat. 4145, 4151 (2008) (creating new 38 U.S.C. § 5121A, substitution in case of death of a claimant who dies on or after October 10, 2008). As provided for in this new provision, a person eligible for substitution will include "a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title" The Secretary will be issuing regulations governing the rules and procedures for substitution upon death. Until such regulations are issued, an eligible party seeking substitution in an appeal that has been dismissed by the Board due to the death of the claimant should file a request for substitution with the VA regional office (RO) from which the claim originated (listed on the first page of this decision).

ORDER

The [date] Board decision addressing the issue(s) of [enter issue(s)] is vacated.

The appeal is dismissed.

Veterans Law Judge, Board of Veterans' Appeals