## Chapter 4. Regional Office (RO) Hearings

#### 1. General Information on Hearings

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| Introduction | This topic contains general information on hearings requested and/or conducted in connection with RO adjudication, including   * definition of a hearing * purpose of a hearing * definition of testimony * definition of argument * who conducts hearings * definition of original determinative authority * policy applications of the original determinative authority concept * hearing by an employee who did not participate in the prior decision * who must make a decision on a hearing * procedure if the hearing official cannot make the subsequent decision * RO responsibility for hearing administration * requesting, canceling, or rescheduling hearings * who conducts hearings for employee-claimants and Veterans Service Officer (VSO)-claimants * where to hold a hearing * hearing facility requirements * end product (EP) code for formal hearings, and * attendance at hearings. |

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| a. Definition: Hearing | A ***hearing*** is a formal, recorded proceeding wherein a party presents sworn or affirmed testimony, other evidence, and/or argument relevant to an issue pending adjudication before the decision maker.  Department of Veterans Affairs (VA) regional office (RO) hearings can be pre-determination or post-determination.   * Pre-determination RO hearings are on matters related to an adjudicative issue that is pending an initial decision. * Post-determination or post-decisional RO hearings are on matters related to an adjudicated issue (on which an initial decision has been made). They can be conducted in connection with * cases on appeal, and * non-appeal cases for which * the claimant seeks reconsideration of some portion of a decision but does not want to initiate an appeal, or * in connection with a proposed reduction or termination, the claimant or beneficiary requested a pre-decisional hearing but the hearing request was not timely.   ***Reference***: For more information on the regulatory requirements for a hearing, see [38 CFR 3.103(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=daf55667b17b22594bf37857515b4f87&mc=true&node=se38.1.3_1103&rgn=div8). |

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| b. Purpose of an RO Hearing | The purposes of an RO hearing include   * to satisfy the claimant or beneficiary’s due process right to a requested hearing * to provide a claimant or beneficiary with the opportunity to present, in person, evidence material to the issue(s) including * his/her own testimony * testimony of witnesses, and/or * other evidence (exhibits) * to provide a claimant or beneficiary (and/or his or her representative) an opportunity to present argument on the hearing issue(s), or * to emphasize the credibility of testimonial evidence through the personal presentation of testimony before the decision maker.   ***Note***: Do not schedule a hearing solely for a representative to offer arguments, absent a witness to offer testimony. Arguments can be presented in writing or in an informal conference.  ***References***: For more information on   * Board of Veteran Appeals (BVA) Travel Board and video hearings, see M21-1, Part I, 5.H, and * informal conferences, see M21-1, Part I, 5.C.5. |

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| c. Definition: Testimony | ***Testimony*** refers to a person recounting factual matters he or she experienced and/or offering opinions premised upon other facts. It usually denotes a sworn or affirmed evidentiary use in an adjudication context.  Typical subjects of testimony for purposes of the VA include history/onset of an injury or disease, treatment in service and/or thereafter, current symptoms, and physical capabilities and employment.  Hearing testimony is predominately oral. Written testimonial evidence includes affidavits or other certified statements, or transcripts from another proceeding. |

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| d. Definition: Argument | ***Argument*** is an effort to establish a point by a course of reasoning. There is legal argument, factual argument, and argument on how the law applies to fact. For example, a claimant and his representative might make arguments that   * certain items of evidence are competent, credible and probative, and establish facts * established facts meet the legal requirements for a benefit * the evidence is in relative balance regarding a point such that the benefit of the doubt may be applied * a regulatory term has a particular meaning, or * a particular case is precedential.   Forms of argument at a hearing include verbal statements made by the claimant/beneficiary or representative in an introductory or closing statement, a written contention, or a brief filed at the hearing. |

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| e. Who Conducts Hearings | RO management assigns hearing duties for RO hearings. Decision Review Officers (DROs) will typically conduct all hearings requested in connection with the appeals assigned to them subject to regulatory provisions.  VA’s due process regulation, [38 CFR 3.103](http://www.ecfr.gov/cgi-bin/text-idx?SID=fb6d5e02996f229227593ea52da3e105&mc=true&node=se38.1.3_1103&rgn=div8), provides only that all hearings must be conducted by an employee with original determinative authority over the issue(s).  Moreover, [38 CFR 3.103](http://www.ecfr.gov/cgi-bin/text-idx?SID=fb6d5e02996f229227593ea52da3e105&mc=true&node=se38.1.3_1103&rgn=div8), provides that hearings held in connection with proposed adverse actions and appeals can only be conducted by employees who did not participate in the proposed action or decision appealed.  ***Important***: In the appeal hearing context, this principle only means that the hearing official cannot have participated in the decision with which the notice of disagreement (NOD) was filed (the “decision appealed”). It does not require a hearing requested after an appeal decision is made (for example a Statement of the Case (SOC) at the NOD stage or a Supplemental Statement of the Case (SSOC) at the substantive appeal stage) to be conducted by a second appeals staff member.  ***Note***: BVA hearings conducted by Veterans Law Judges are covered under M21-1, Part I, 5.H. |

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| f. Definition: Original Determinative Authority | ***Original determinative authority*** means, with respect to RO hearings, that in assigning hearing duties, RO management will assign a hearing to a person with the appropriate job title and decision making authority to render a decision on the issue that is the subject of the hearing. |

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| g. Policy Applications of the Original Determinative Authority Concept | The following are policy applications of the *original determinative authority* concept in [38 CFR 3.103(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=fb6d5e02996f229227593ea52da3e105&mc=true&node=se38.1.3_1103&rgn=div8).   * At the NOD stage of an appeal where *de novo* review is required * A Rating Veterans Service Representative (RVSR) assigned appeals duties may not conduct the hearing because an RVSR is not authorized to perform a *de novo* review. * A DRO must typically serve as the hearing official because, apart from the Veterans Service Center Manager (VSCM) or Pension Management Center Manager (PMCM), only a DRO may perform a *de novo* review. * At the substantive appeal stage of an appeal, either a DRO or an RVSR assigned appeals duties may potentially conduct a hearing because on most issues either an RVSR or a DRO will be qualified to issue the decision. * Pre-determination hearings on a rating issue may be conducted by an RVSR or a DRO. * Post-decisional non-appeal hearings may be conducted by an RVSR or DRO. * In some categories of cases, there are a limited number of staff members authorized to make a decision. In such cases, only the designated authorized staff members can conduct hearings. For example, limited staff members access those cases designated as sensitive or Former Prisoner of War (FPOW). * In any case where more than one person is assigned to hold a hearing, at least one hearing official must have the authority to make a decision on all issues without a concurring signature. * A Veterans Service Representative (VSR) or Senior VSR can conduct a hearing in connection with a non-rating determination.   ***Reference***: For more information on predetermination hearings, see [38 CFR 3.105(i)](http://www.ecfr.gov/cgi-bin/text-idx?SID=fb6d5e02996f229227593ea52da3e105&mc=true&node=se38.1.3_1105&rgn=div8). |

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| h. Hearing by an Employee who did not Participate in the Prior Decision | The phrase ***did not participate in the proposed action or the decision being appealed*** means the hearing officer did not   * issue the decision under his/her sole signature, or * second sign the decision.   ***Explanation***: This is to assure the claimant/beneficiary or appellant that the hearing official will not have pre-judged the issue. |

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| i. Who Must Make the Decision on a Hearing | The hearing official must issue the subsequent decision based on the hearing testimony.  ***Rationale***: A key facet of the hearing due process right is the right to present testimony *in person before the decision make*r. The in-person interaction gives the hearing official the ability to observe the appearance and demeanor of the witness, which may emphasize or highlight the credibility of that evidence among any conflicting evidence of record. |

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| j. Procedure if the Hearing Official Cannot Make the Subsequent Decision | In some cases the hearing official may not be available to make the subsequent decision. For example, an employee may   * receive a promotion to management * transfer to a different office in VA, or * retire.   In such a case, notify the claimant/beneficiary that   * the hearing official is not available to make the decision, and * he/she must elect one of the following options: * appear at another hearing before a new hearing official, or * proceed without a new hearing; the decision maker will review the prior hearing transcript in rendering the decision.   ***Notes***:   * Notification can be oral or in writing. However, in the event of oral communication document the conversation with *VA Form 27-0820, Report of General Information,* and send a copy to the representative if one exists. * Although in the second option the claimant/beneficiary loses the potential for personal interaction with the decision maker, this is at his/her election, evidence is generally taken at face value and a witness should only be found lacking in credibility as provided in M21-1, Part III, Subpart iv, 5.2.b. * In the case where another decision maker is assigned and makes a decision based on the hearing transcript, that decision maker must * have original determinative authority over the issues, and * not have participated in the prior decision (in connection with an appeal or proposed adverse action). |

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| k. RO Responsibility for Hearing Administration | Each RO designates a person responsible for   * scheduling hearings * coordinating the hearing schedule * contacting the claimants and representatives, and * maintaining hearing records (including all scheduling records).   ***Reference***: For information on the RO’s responsibilities in organizing and managing BVA Travel Board and video hearings, see M21-1, Part I, 5.H. |

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| l. Requesting, Canceling, or Rescheduling Hearings | A claimant may request, cancel or reschedule a hearing in writing, by e-mail, by fax, by telephone, or in person. If this is done by telephone or in person, the employee receiving the request should promptly complete a *VA Form 27-0820* to document the request.  The hearing officer or other decision maker, a supervisor, or the VSCM may decide whether the stated reason for not reporting to a scheduled hearing constitutes good cause. Indefinite delays should be avoided in the absence of good cause.  ***References***: For more information on   * EP credit for hearings, including cancellation of a hearing, see M21-4, Appendix B * rescheduling a hearing that was terminated for inappropriate behavior by a hearing attendee, see M21-1, Part I, 4.2.e, or * good cause considerations and final action following the result of a scheduled predetermination hearing, see * [38 CFR 3.105(i)(2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=fb6d5e02996f229227593ea52da3e105&mc=true&node=se38.1.3_1105&rgn=div8), and * M21-1, Part I, 2.C.3.e and f. |

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| m. Who Conducts Hearings for Employee-Claimants and VSO-Claimants | Use the table below to determine who conducts hearings for employee-claimants and Veterans Service Officer (VSO)-claimants. |

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| If the hearing is requested by ... | Then an... |
| an RO employee-claimant | employee at the station of jurisdiction (SOJ) over claims from the employee-claimant’s home station, or the Restricted-Access Claims Center (RACC)   * conducts the hearing, and * makes the decision.   ***Notes***:   * The hearing at the SOJ or RACC will be conducted by videoconference unless the employee-claimant wishes to travel to the SOJ or RACC for a personal hearing at his/her own expense. * The employee-claimant may elect to have an in-person hearing conducted by an RO employee at the employee-claimant’s home station (the employing RO) in lieu of a video hearing or travel to the SOJ or RACC. However * ***A home station employee may not make a decision on a claim of an RO employee-claimant***. * The employee-claimant must be informed (and agree in writing) that by this election he/she waives the right to a decision made by the hearing official. Retain this waiver in the claims folder. * The hearing official at the home station will send a transcript and any other evidence obtained to the SOJ or RACC. * An employee of the SOJ or RACC will make the decision based on the transcript and other evidence of record. |
| VSO-claimant | employee at the SOJ or RACC   * conducts the hearing, and * makes the decision.   ***Notes***:   * The hearing at the SOJ or RACC will be conducted by videoconference unless the VSO-claimant wishes to travel to the SOJ or RACC for a personal hearing at his/her own expense. * The VSO-claimant may elect to have an in-person hearing conducted by an employee at the VSO-claimant’s home station in lieu of a video hearing or travel to the SOJ or RACC. However * ***A home station employee may not make a decision on a claim of a VSO who represents claimants/beneficiaries before that RO***. * The VSO-claimant must be informed (and agree in writing) that by this election he/she waives the right to a decision made by the hearing official. Retain this waiver in the claims folder. * The hearing official at the home station will send a transcript and any evidence to the SOJ or RACC. * an employee of the SOJ or RACC will make the decision based on the transcript and other evidence of record. |

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| ***Note***: VSOs who represent claimants before an RO fall under the same claim handling jurisdictional policies that apply to employee-claimants.  ***Reference***: For more information on jurisdiction and transfer, see M21-1, Part III, Subpart ii, 5. |

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| n. Where to Hold a Hearing | Hold hearings at the SOJ.  ***Exceptions***:   * In the case of employee-claimants and VSO-claimants, hold hearings as provided in M21-1, Part I, 4.1.m. * A hearing may be held at another RO that is nearer to the claimant’s residence with the following qualifications: * *This hearing should be before a hearing official at the SOJ via video conference whenever possible*. * In the event that a video conference hearing is not available, the hearing may be conducted by a hearing official at the RO nearer to the claimant’s residence. However in such cases * *The claim remains under the jurisdiction of the SOJ and the decision must be made by the SOJ*. * The claimant must be informed (and agree in writing) that he/she waives the right to have the decision made by the hearing official. Retain this waiver in the claims folder. * The hearing official will send a transcript of the proceedings and any other evidence obtained to the SOJ. * An employee of the SOJ will make the decision based on the transcript and other evidence of record. * Subject to available resources, and at the option of VA, a formal hearing may be held at any other VA facility or Federal building where suitable hearing facilities are available. This hearing will be conducted by an employee of the SOJ. |

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| o. Hearing Facility Requirements | If RO facilities allow, designate a permanent hearing room. The following requirements apply to hearing facilities:   * Do *not* conduct hearings in a work area, or any location where the witnesses must pass through the a work area with open access to restricted personally identifiable information. * The hearing facility should provide privacy for witness testimony, including walls and a door. * Ensure that the hearing room is clean and straightened for each hearing. * Display the United States flag appropriately. |

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| p. EP Code for Formal Hearings | For information on use of EP 173 or EP 174 for hearings, see M21-4, Appendix B. |

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| q. Attendance at Hearings | Attendance at an RO hearing by the claimant/beneficiary and witnesses on the date and time scheduled is mandatory.  When the claimant fails to report for the hearing without good cause, make a record annotation and update applicable systems indicating that the hearing was canceled for failure to report. Proceed with development or a decision as applicable.  ***Exceptions***: Non-appearance at a scheduled hearing by the claimant/ beneficiary will be excused if   * the hearing was rescheduled or canceled up to the scheduled time of the hearing as provided in M21-1, Part I, 4.1.l * VA mailed the hearing notice to an incorrect address, or * there are extenuating circumstances such as * incapacitation from a serious medical condition * hospitalization * death of an immediate family member, or * incarceration.   ***Reference***: For more information on action to take when a claimant fails to report for a pre-determination hearing without good cause, see   * [38 CFR 3.105 (i)(2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=fb6d5e02996f229227593ea52da3e105&mc=true&node=se38.1.3_1105&rgn=div8), and * M21-1, Part I, 2.C.3.e. |

2. General Conduct for Hearings

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| Introduction | This topic contains information on general conduct for hearings, including   * non-adversarial hearings and questioning witnesses * decorum and appearance of VA personnel * obligation to assist in developing facts * prohibition against conveying an “expected” decision during a hearing, and * inappropriate behavior by hearing attendees. |

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| a. Non-Adversarial Hearings and Questioning Witnesses | The hearing official may question witnesses, structuring all questions to fully explore the basis for claimed entitlement. However, proceedings before VA are non-adversarial in nature. VA does not oppose a claim. Accordingly, the hearing official must ***avoid inappropriate cross-examining style of questioning***.  ***Cross-examination*** denotes supplemental questioning of a witness, called to testify in support of a party, by the advocate of the opposing party for one or more of the following purposes:   * impeachment (discrediting the witness by eliciting facts or opinions that diminish credibility or the weight of evidence offered by the witness) * elicitation of facts or opinions (which may be useful for additional development adverse to the party for whom the witness’s testimony was offered), and * witness control (to prevent explanation or elaboration).   The term also connotes an attacking or aggressive style of questioning with a belligerent/antagonistic, sarcastic or skeptical tone that permits only “yes” or “no” answers.  ***Important***: The fact that an appropriate question by the hearing official may lead to information that results in, or is followed by, testimony that may show an inconsistency or otherwise negatively impact the witness’s credibility or the weight of evidence on a particular manner does not mean that the hearing official engaged in cross-examination or that the testimony is not admissible. This is not *intent* to refute evidence or discredit the claimant’s statements.  ***References***: For more information about   * non-adversarial adjudication, see M21-1, Part III, Subpart iv, 5.10.b, and * decorum during hearings, see M21-1, Part I, 4.2.b. |

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| b. Decorum and Appearance of VA Personnel | When conducting a hearing VA personnel are expected to   * act with decorum, and * present a professional appearance.   ***Decorum*** means that hearing officials must   * treat the claimant, witnesses and representative with courtesy, even when witnesses may be angry, irritable or critical * pay close attention to the proceedings, and * be objective and fair in questioning or comments made during the hearing. * Do not express personal feelings or biases, or allow those to influence the hearing proceedings. * Do not express skepticism, sarcasm or anger in response to testimony. * Do not engage in a cross-examining style of questioning. * Do not give any suggestion of having prejudged the issue.   ***Professional appearance*** must be judged by local office directives for the standard of dress expected for interaction with claimants. Except in the case of unusual or unforeseen circumstances (for example, an employee is assigned the task of holding a priority hearing the same day and an alternative hearing official is not available) casual outfit such as tennis shoes, tee shirts, and jeans, are not acceptable. |

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| c. Obligation to Assist in Developing Facts | VA is obligated to assist the claimant in developing facts pertinent to the claim. Express an openly positive interest in assisting the claimant and as indicated by the claims folder and the hearing proceedings, make suggestions to the claimant as to the submission of evidence   * that the claimant may have overlooked, and * that would be advantageous to his/her position. |

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| d. Prohibition Against Conveying an “Expected” Decision during a Hearing | The hearing official must not communicate a planned, anticipated or expected decision, or imply that a decision has been reached during the hearing.  If the claimant/beneficiary, representative, or other hearing attendee asks what the decision will be, the hearing officer may say only that the decision will be communicated in writing after all the evidence is obtained and considered. |

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| e. Inappropriate Behavior by Hearing Attendees | The hearing official has discretion to terminate a hearing for inappropriate (abusive, disrespectful, aggressive or violent) behavior by hearing attendees. Such behavior includes, but is not limited to   * repeated interruption of the hearing official * yelling * insults or demeaning/disrespectful comments directed at the hearing official or any other hearing participant * sexual comments directed at the hearing official or any other hearing participant or that does not bear on the issues (for example a sexual assault posttraumatic stress disorder (PTSD) issue) * threatening/menacing behavior, and/or * inappropriate touching, assault or battery.   The table below provides guidance on how the hearing official should respond to inappropriate behavior by hearing attendees. |

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| If ... | Then ... |
| there is any perceived risk of violence/harm to any hearing attendee | * ***follow local office emergency/security procedures***. * In emergent circumstances, the hearing official is not expected to notify the hearing attendees that the hearing is being terminated. |
| behavior from a hearing attendee is   * grossly inappropriate, or * repeatedly inappropriate | * ***follow local office emergency/security procedures if warranted by the facts***. * In non-emergent circumstances, inform the hearing attendees that the hearing is being terminated for inappropriate conduct. |
| inappropriate conduct is not violent or not otherwise grossly inappropriate | * consider giving a warning before terminating the hearing. * Inform the hearing attendees in a courteous manner that * the behavior is inappropriate, and * further instances of inappropriate behavior will result in the hearing being terminated. * If in the judgment of the hearing officer termination is warranted, inform the hearing attendees in a courteous manner that the hearing is terminated for inappropriate conduct. |

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| ***Notes***:   * In exercising discretion over whether to terminate the hearing where inappropriate behavior does not rise to the level of an emergency, the hearing official should keep in mind that for many individuals a hearing is their only exposure to an actual VA employee involved in their claim or appeal. It is understandable that they may be frustrated or angry at the claim process or a decision they have received. They may also have serious disabilities, such as a mental disorder or traumatic brain injury, manifested by social impairment, diminished impulse control, or anger that predisposes them to inappropriate behavior. * In any cases where a hearing is terminated for inappropriate behavior, annotate the claims folder and applicable systems. * In any case where a hearing is terminated for inappropriate behavior, rescheduling will be permitted only upon RO discretion, and rescheduling may be conditioned on the availability of additional security for the hearing. |

#### 3. Scheduling and Preparing for the Hearing

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| Introduction | This topic contains information on   * timely scheduling of hearings * providing advanced notice of hearing, and * preparing for the hearing. |

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| a. Timely Scheduling of Hearings | Schedule hearings within a reasonable amount of time from the date the request is received. For predetermination hearings, schedule the hearing for the earliest possible date (if possible, for no later than 30 days after receipt of the request).  ***Note***: For appeal hearings, the following are all relevant to whether a hearing is scheduled in a reasonable amount of time:   * the stage that the appeal is in (NOD or substantive appeal) * the average pendency of appeals in the stage * the individual’s appellate caseload, or * the existence of older and priority hearing requests to satisfy.   ***Important***: Expedite scheduling of hearings for all cases entitled to priority handling.  ***Reference***: For more information on scheduling BVA hearings, see M21-1, Part I, 5.H. |

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| **b. Providing Advanced Notice of Hearing** | When a beneficiary timely requests a hearing in response to a notice of proposed adverse action, [38 CFR 3.105(i)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=f7bbcdf1dbe8a9630d3ae7528ae4bb72&mc=true&node=se38.1.3_1105&rgn=div8) requires VA to notify the beneficiary in writing of the time and place of the hearing at least 10 days in advance of the scheduled hearing date.  ***Note***: A waiver of the 10-day advance notice is permissible by mutual agreement between VA and the beneficiary, and/or his/her representative (if any).  ***Reference***: For more information on the time limit to request a hearing, see M21-1, Part I, 2.C.3. |

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| c. Preparing for the Hearing | To prepare for the hearing, review all of the issues and evidence.  Use the table below to determine how to conduct the review. |

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| If the review disclosed… | Then … |
| a need for additional evidence from a third-party or another issue that should be considered | * request the additional evidence * address the other issue, and * refer the issue to the appropriate activity for development.   ***Note***: Do *not* postpone a hearing for receipt of evidence. |
| non-receipt of the evidence requested | provide the claimant with the standard notification that the evidence was not received.  ***Reference***: For more information on requesting evidence from the claimant and controlling responses, see M21-1, Part III, Subpart iii, 1.B. |

#### 4. Conducting the Hearing

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| Introduction | This topic contains information on   * explaining the proceedings * presence of an attorney * advising the claimant of his/her right to a representative * statement of the issue(s) * administering the oath or affirmation * starting the hearing * gathering testimony and asking questions * alternate order of testimony and questioning * conduct during the testimony, and * ending the hearing. |

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| a. Explaining the Proceedings | Follow the steps in the table below to greet the appellant and explain the proceedings. |

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| Step | Action |
| 1 | * Escort the claimant, witnesses, and his/her representative to the hearing room or appropriate waiting area. * Where witnesses will be present at the hearing, ensure that *VA Form 5571*, *Authorization to Disclose a Record in the Presence of a Third Party* or *VA Form 21-0589*, *Authorization to Disclose a Record in the Presence of a Third Party* (as appropriate) is completed. * Introduce yourself and other VA personnel present, and begin the hearing without delay.   ***Notes***:   * Listen carefully to the correct pronunciation of names. * *VA Form 5571* authorizes VA under the Privacy Act of 1974 to review and discuss VA records on a specified topic relating to the Veteran or claimant in the presence of an accompanying person. * *VA Form 21-0589* permits VA to review and discuss records containing medical treatment for specified conditions in front of named persons. The claimant can include or exclude information on drug abuse, alcoholism or alcohol abuse, human immunodeficiency virus or sickle cell anemia. |
| 2 | Explain the   * nature and purpose of the hearing, and * necessity for and use of recording equipment. |
| 3 | Tell the claimant that a copy of the transcript is   * placed in the claims folder, and * sent to the claimant, if requested. |
| 4 | Tell the claimant and witnesses that they may “go off the record” to   * collect their thoughts, or * clarify any matter. |
| 5 | Explain the necessity of an oath or affirmation. |

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| ***Note***: The above steps may be done before the transcription recording is started. If so, once on the record, briefly state that the matters were discussed beforehand. |

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| b. Presence of an Attorney | When the claimant’s representative is an attorney, emphasize the informal nature of RO hearings, specifically   * that the Federal Rules of Evidence do not apply * that leading questions are permissible, and * that the hearing official may ask questions to clarify testimony or ensure that facts important to the legal standard of entitlement are addressed; the questioning will not constitute cross-examination.   ***Reference***: For more information on guidelines for evaluating evidence, see M21-1, Part III, Subpart iv, 5.1. |

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| c. Advising the Claimant of His/Her Right to a Representative | Follow the steps in the table below when the claimant is not represented by an attorney, VSO, agent, or other third party. |

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| Step | Action |
| 1 | Explain the availability of   * a representative, or * assistance by a member of the RO. |
| 2 | * Inform the claimant that there is * no obligation to join a VSO * no charge for representation, and * advise the claimant that representation is not mandatory. |
| 3 | Did the claimant request a representative?   * If *yes,* * take the claimant and his/her witnesses to the chosen representative * explain the situation to the representative, and * go to Step 4. * If *no*, proceed with the hearing. |
| 4 | * Set a new time for the hearing to begin, and * allow adequate time for the representative to review the evidence. |

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| ***Reference***: For more information on requirements for representation, see M21-1, Part I, 3.A. |

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| d. Statement of the Issue(s) | State the issue(s) in detail before testimony begins. This will not be used to limit the scope of the relevant issue(s) or indicate to the claimant that testimony is to be curtailed.  Ask the claimant and his/her representative if this is their understanding of the issue(s) and clarify any misunderstandings at this time. |

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| e. Administering the Oath or Affirmation | All hearing testimony is to be given under oath or affirmation. Administer the oath or affirmation *before* recording begins.  ***Note***: The DRO or presiding member of the hearing panel has the authority to administer oaths and certify documents as evidenced by *VA Form 4505, Identification Card-Delegation of Authority*.  Follow the steps in the table below to administer the oath or affirmation. |

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| Step | Action |
| 1 | Ask the claimant and his/her witnesses to stand and raise their right hand. |
| 2 | Administer the oath substantially as follows:  “Do you swear (or affirm) the testimony you are about to give will be the truth and nothing but the truth?” |

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| f. Starting the Hearing | The hearing official starts recording the hearing with the opening statement which includes   * the fact that a hearing is being held * the date and time of commencement of the hearing * the name of the hearing official * the names of the claimant/beneficiary and any other witnesses who will testify * the name of the representative (as applicable) * the file number * the fact that the claimant and any witnesses have been duly sworn * a brief statement of issue(s), and * a brief summary of matters discussed before going on the record such as the informal and non-adversarial nature of the proceedings, that the Federal Rules of Evidence do not apply, that the hearing official may ask questions but there will be no cross-examination, or that an unrepresented claimant/beneficiary was advised of the right of representation. |

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| g. Gathering Testimony and Asking Questions | The table below describes how to elicit testimony and ask questions. |

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| Stage | Who is Responsible | Action |
| 1 | Hearing Official | Asks the representative, if present, and/or claimant if he/she desires to make an opening statement.  ***Note***: A representative is allowed to introduce the claimant’s testimony and ask questions about it. |
| 2 | Claimant | Provides testimony. |
| 3 | Hearing Official | Asks questions that   * are consistent with the non-adversarial nature of the hearing, and * elicit all relevant testimony. |
| 4 | Witness(es) | Provides testimony.  ***Note***: Repeat stages three and four for any additional witnesses. |

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| h. Alternate Order of Testimony and Questioning | Some representatives may ask that the witness testify immediately after the claimant and ***before*** questioning. In this circumstance, question the claimant and witness after completion of all testimony.  Before questioning the claimant   * ask if he/she objects to any of the witnesses being present, and * if so, excuse the witness(es). |

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| i. Conduct During Testimony | ***Interrupting the Claimant***  The appropriateness of interrupting the claimant or the witness(es), or suggesting areas that should be further developed during the course of testimony, depends on the individual hearing.  ***Limiting the Witness(es)***  Exercise care and tact in limiting the witness(es) and guard against any suggestion that the testimony is not important.  ***Cross-examination***  While cross-examination should be avoided, it is important that the claimant be questioned sufficiently to elicit all relevant testimony.  ***Reference***: For information on inappropriate conduct by hearing attendees, see M21-1, Part I, 4.2.e. |

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| j. Ending the Hearing | Follow the steps in the table below to end the hearing. |

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| Step | Action |
| 1 | * Give the claimant and his/her representative an opportunity to make a final statement when * testimony is complete, and/or * discussion of any area raised by questioning has been concluded * ask if anyone wishes to add anything, and * identify any evidence referenced in the hearing testimony that * the claimant has agreed to furnish, and/or * VA will attempt to acquire. |
| 2 | Explain VA’s procedures regarding decision notification, specifically that the claimant will not be provided with oral or written notification of the formal written decision until it has been signed and, if necessary, approved. |
| 3 | * Note the time the hearing concludes for the record * have the claimant complete any medical release forms needed to obtain private treatment records, and * escort the claimant and/or witness(es) from the hearing area. |

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| ***Exception***: This procedure is not applicable for termination of the hearing due to inappropriate conduct by hearing attendees per M21-1, Part I, 4.2.e. |

**5. Additional Issues Raised During the Hearing**

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| Introduction | This topic contains information on   * handling additional issues raised during the hearing, and * the action to take when the claimant requests to file an NOD or substantive appeal during the hearing. |

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| Change Date | January 9, 2015 |

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| a. Handling Additional Issues Raised During the Hearing | Properly consider additional issues raised by the claimant or his/her representative during or after the hearing. |

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| b. Action to Take When Claimant Requests to File NOD or Appeal During the Hearing | If the claimant or his/her representative indicates during the hearing that he/she wishes to file an NOD or substantive appeal, provide the claimant with the appropriate form, including   * *VA Form 21-0958, Notice of Disagreement,*, or * *VA Form 9, Appeal to Board of Veterans’ Appeals*.   ***Notes***:   * Encourage the claimant to complete the appropriate form prior to leaving the hearing. * Advise the claimant and representative (if applicable) on the record if there is no appealable decision with which to disagree, or if an SOC has not been issued on any issue in NOD status. * If an NOD or *VA Form 9* is clearly untimely, notify the claimant and representative (if applicable). However, if they wish to file an NOD, a written determination that an NOD or substantive appeal is untimely is a separately appealable issue. |

**6. Transcribing the Hearing**

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| Introduction | This topic contains information on transcribing the hearing, including   * preparing the hearing transcript * soliciting the claimant’s permission not to transcribe the hearing * handling the claimant’s waiver of a hearing transcript, and * preparing the transcript for BVA transfer. |

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| Change Date | July 7, 2015 |

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| a. Preparing the Hearing Transcript | Follow local procedures for transcribing hearing transcripts.   * If the hearing transcript is received electronically, upload the document to the electronic claims folder (eFolder) in the Veterans Benefits Management System (VBMS) following the procedures in the [VBMS Job Aid - Adding Documents into VBMS eFolders](http://vbaw.vba.va.gov/VBMS/Resources_Job_Aids.asp), or * if a hard copy hearing transcript is received, send the transcript to the scanning vendor for upload into VBMS. |

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| b. Soliciting the Claimant’s Permission Not to Transcribe the Hearing | In some situations the DRO, or other appointed VA employee who conducted the hearing, determines with reasonable certainty that particular cases will not be referred to BVA.  ***Examples***:   * Cases involving a complete grant of benefits. * Instances in which the claimant is considered likely to withdraw the appeal.   In this situation, solicit the claimant’s permission not to prepare a typed transcript of the hearing. |

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| c. Handling the Claimant’s Waiver of a Hearing Transcript | If the claimant gives his/her permission ***not*** to prepare a typed transcript of the hearing   * ask the claimant to sign the following statement at the hearing: “I hereby waive any requirement that the record of my hearing will be transcribed. A hearing transcript will be prepared if my records are eventually referred to BVA for a decision on this issue,” and * secure any tape recording or electronic record in the claims folder for a period of at least two years after the hearing, at which time it will be recycled or destroyed. |

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| d. Preparing the Transcript for BVA Transfer | If the case is transferred to BVA for consideration of the issue(s) that was the subject of the hearing, ensure a transcription of the hearing is in the claims folder.  ***Reference***: For information on adding the transcript to the eFolder, see M21-1, Part I, 4.6.a. |

#### 7. Reviewing the Evidence of Record

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| Introduction | This topic contains information on reviewing the evidence of record after the conclusion of the hearing, including   * analyzing the testimony for credibility and value * analyzing the competency of witness testimony * requesting corroborative evidence * handling new issues, and * requesting examinations indicated by the hearing evidence. |

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| Change Date | January 9, 2015 |

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| a. Analyzing the Testimony for Credibility and Value | Analyze the credibility and value of testimony presented by the claimant and others who testified on the claimant’s behalf.  ***Note***: Take care to distinguish between testimony and argument.  ***References***: For more information on   * credibility, see M21-1 Part III, Subpart iv, 5.2.b, and * the difference between testimony and argument, see M21-1 Part I, 4.1.c and d. |

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| b. Analyzing the Competency of Witness Testimony | Analyze the competency of the claimant and others who testified on the claimant’s behalf to establish specific factual matters.  ***Reference***: For more information on competent evidence, see M21-1 Part III, Subpart iv, 5.2.c. |

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| c. Requesting Corroborative Evidence | If the claimant identified sources of information or evidence while testifying that corroborates the claim   * attempt to obtain the additional evidence, and * do ***not*** make a final decision on the claim until development has been completed.   ***Example***: The claimant states that he was treated by Dr. John Smith, and Dr. Smith’s report is not in the claims folder. Reasonable efforts must be made to obtain that report before making a decision. |

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| d. Handling New Issues | If during the hearing the claimant raised a new issue(s) separate from the matter that is the subject of the hearing   * refer the issue(s) to the appropriate RO activity for development and decision as applicable, or * in the appeal hearing context, resolve the new issue(s) at the same time as the issue on appeal, if possible.   ***Note***: Do ***not*** delay making a decision on the issue(s) that was the subject of the hearing pending a decision on the new issue(s). |

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| e. Requesting Examinations Indicated by the Hearing Evidence | If, during the course of a hearing or review of the claims folder after the hearing, the hearing official concluded that an examination should have been or should now be ordered based on new evidence, request a VA examination before making a decision. |