

Veterans Pension Benefits and the Interaction with Medicaid Eligibility

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I. INTRODUCTION

This paper is intended to provide information and guidance to the Elder Law Attorney in planning for clients who may or may not need to qualify for Medicaid benefits in the future, but who currently seek to qualify for Veterans Pension Benefits. The law concerning Veterans Pension Benefits is complex and requires intense study to understand. This paper attempts to inform Elder Law Attorneys of the threshold issues involved in advising a client with the primary goal of obtaining Pension Benefits and the secondary goal of qualifying for Medicaid long-term care benefits. The author cautions any advocate against representation of such a client unless the attorney has done the required study to become proficient in the laws and regulations concerning Veterans Pension Benefits *and* the laws and regulations of the Medicaid program.

This article assumes that the reader is familiar with Medicaid law and no explanation is undertaken regarding the Medicaid side of this equation. When comparisons are made between the two programs, it will not include a comprehensive analysis of the Medicaid rules except when necessary to understand the context of the information concerning the Pension Benefits rules.

The benefits discussed herein will only involve Veterans Pension Benefits and no attempt will be made to apply these techniques to Veterans Disability Benefit claims. Disability Compensation (Compensation) is a benefit that provides income to a veteran to help replace lost income due to an inability to earn a living as a result of an injury or disability that was caused or aggravated by service in the military. Both Compensation and Pension are disability income programs but they are very different in the eligibility criteria and the possible income they provide to the applicant. This paper only addresses Pension benefits.

The term Pension Benefits is the correct name for the program that is commonly referred to as "Aid and Attendance." The actual "Aid and Attendance Benefit" is an enhancement to the basic pension benefit for certain veterans who qualify. However, Aid and Attendance is the name most commonly used when referring to this type of VA Pension benefit.

II. VA PENSION EXPLAINED

The Veterans Pension benefit regulations are found at 38 C.F.R. § 3.3. VA Pension is available to veterans who have served during a war, who are no longer able to work, and who have a limited income. Veterans Pension is a check or pension benefit that is typically paid on a monthly basis. Many veterans are unaware that they may be eligible for pension benefits if they are 65 years of age or older and on a limited income.

The pension benefit regulations include eligibility requirements for veterans serving all the way back to the Spanish American War (1898). This benefit is referred to as a benefit payable by the Department of Veterans Affairs to veterans of a period or periods of war because of nonservice-connected disability or age. Benefits can also be paid to a surviving spouse or child of a veteran because of a non-service connected death of a veteran.¹ The benefits available to most veterans today are called "Improved Pension." There are two other programs called Old-Law Pension and Section 306 Pension. These programs are limited to claims filed before 1960 and 1978 respectively and will not be discussed in this paper.

A. Aid and Attendance and Housebound Ratings

In addition to a monthly pension check, the Improved Pension program provides veterans with payments entitled Special Monthly Pension (SMP) when the veteran requires additional care. There are two types of SMP available. The first is referred to as "housebound" benefits and the other is called "Aid and Attendance" benefits. The VA pays SMP to veterans to offset the cost of necessary healthcare expenses. The VA definition of healthcare expenses is quite expansive as will be discussed later in this paper.²

The requirement of needing "aid" includes persons who need the aid of another person in order to perform personal functions required in everyday living, such as bathing, feeding, dressing, toileting, adjusting prosthetic devices, or protecting himself or herself from the hazards of his or her daily environment. This includes persons who are bedridden, in that his or her disability or disabilities require that they remain in bed apart from any prescribed course of convalescence or treatment. The person may be blind, or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less. Aid and Attendance benefits are available to any veteran living in a nursing home without further proof of the need for "aid."³

Like an Aid and Attendance rating, a housebound rating grants a payment in addition to the regular VA pension. A veteran may be eligible for a housebound rating when (i) the veteran has a permanent disability evaluated at 100-percent disabling and due to such disability, he or she is permanently and substantially confined to his or her immediate premises, or (ii) the veteran has a single permanent disability evaluation as 100-percent disabling and, another disability, or disabilities, evaluated as 60 percent or more disabling. A veteran cannot receive both Aid and Attendance and Housebound benefits at the same time.

B. Monthly Pension Check

The veteran who meets the VA Pension requirements can receive a check almost

always paid on a monthly basis in an amount that will raise the veteran's income up to a certain amount which is determined by Congress. For Improved Pension cases, the level of countable income of the veteran determines the rate of benefits that can be paid. The higher the claimant's countable income, the lower the rate of VA benefits payable.

In plain English, what this means is that a pension (a check payment) is available for veterans who have served at least one day during wartime and who meet the aforementioned requirements. Payments are made to bring the veteran's total income, including other retirement or Social Security income, to a level set by Congress. Un-reimbursed medical expenses may reduce countable income for VA purposes. The veteran must have low income and require the regular aid (help) and attendance (presence) of another person.⁴ *A veteran of wartime service who is 65 years of age or older and who is on a very limited income qualifies for a VA Pension without being disabled.* The surviving spouse (marriage must have ended due to death of veteran) of a pension eligible veteran may also be entitled to pension payments.

A claimant's countable income is also called income for VA Purposes (IVAP).⁵ A veteran's annual pension is calculated by totaling all of his or her countable income. After subtracting any available deductions, the countable income is deducted from the veteran's applicable pension limit. These pension limits are determined by the number of the veteran's dependants and also the veteran's current health condition. After these calculations have been done, the remaining amount is divided by twelve to give the pension amount the veteran will receive monthly. Below is a chart that sets out the countable income limits allowed by VA.

2008 VA Improved Disability Pension Rates

Veteran's Family Situation and Caretaking Needs	Maximum Annual Rate
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Veteran without dependents	\$11,181
Veteran with one dependent	\$14,643
Veteran permanently housebound, no dependents	\$13,644
Veteran permanently housebound, one dependent	\$17,126
Veteran needing regular aid and attendance, no dependents	\$18,654
Veteran needing regular aid and attendance, one dependent	\$22,113

Two veterans married to one another	\$14,643
Increase for each additional dependent child	\$1,909

Additional information can be found in the Compensation and Pension Benefits section of VA's Internet pages at <http://www.vba.va.gov/bln/21/index.htm>.

C. Medications and Health Care

Veterans are also entitled to medications and health care. The VA classifies groups according to a priority system. Based on appropriations from Congress, the VA provides health care services and medications with or without copays to different groups based on the available funding for these programs. Veterans receiving Pension benefits are currently assigned to priority group five. Veterans in this group receive free inpatient and outpatient medical care and long-term care. If the veteran is receiving a pension benefit he or she will not have any copays for medication.⁶ If the veteran meets the additional determination and is entitled to Aid and Attendance, then the veteran will be in priority group four for medical benefits. With this category four classification, Aid and Attendance and housebound eligible veterans receive even greater health benefits.

III. VA PENSION ELIGIBILITY

VA Pension eligibility is vastly different from Medicaid eligibility. Although VA does have asset and income limits, the VA requirements seem to be less stringent. In addition to asset and income limits, to be eligible for VA Pension a veteran must also have been discharged from service under conditions other than dishonorable. The veteran must have served 90 days or more of active duty. At least one day of the veteran's service must have been during a period of war. Finally, the veteran must be permanently and totally disabled or must be age 65 or older.

A. Active Duty and War Time Service Requirements

The aforementioned regulations require that, to be eligible, a veteran serve at least 90 days, one of which was during a posted war. To meet the VA Pension active duty requirement, a veteran must have served at least 90 days. The 90 day requirement does not have to be consecutive days. Typically, active duty does not, however, include time spent for training.

To meet the VA Pension war time requirement, at least one day of the veteran's active duty must have been during a period of war. A veteran must have served at least one day during the following wars: World War II (December 7, 1941 through December 31,

1946); the Korean War (June 27, 1950 through January 31, 1955); the Vietnam Conflict (August 5, 1964 through May 7, 1975 or February 28, 1961, through May 7, 1975 for veterans who served “in country” before August 5, 1964); or the Gulf War (August 2, 1990, through a date which has not yet been determined). Veterans who entered active duty on or after Sept. 8, 1980, or officers who entered active duty on or after Oct. 16, 1981, may have to meet a longer minimum period of active duty. To be eligible for VA Pension, a veteran must meet both the active duty and wartime requirements.

B. Discharge from Service Requirement

The VA Pension is only available to veterans whose discharge from service was from something other than dishonorable conditions. The military gives a discharge “grade” to each veteran at the time of discharge. There are five grades of discharge. The VA regulations list circumstances in which benefits are not payable to a veteran. As a general rule, honorable and general discharges *qualify* a vet for most benefits while dishonorable discharges disqualify him or her. Thus, the former service member’s grade of discharge is important because it directly impacts the veteran’s benefit eligibility.

C. Aged or Disabled Requirement

VA Pension benefits are available to former service members who are permanently and totally disabled or who are age 65 or older. A veteran is considered permanently and totally disabled for Pension benefit purposes if the veteran is any of the following:

1. A patient in a nursing home for long-term care because of disability;
2. Disabled, as determined by the Commissioner of Social Security for purposes of any benefits administered by the Commissioner;
3. Unemployable as a result of disability reasonably certain to continue throughout the life of the person;
4. Suffering from any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation, but only if it is reasonably certain that such disability will continue throughout the life of the person; or
5. Suffering from any disease or disorder determined by VA to be of such a nature or extent as to justify a determination that persons suffering from that disease or disorder are permanently and totally disabled.⁷

If disabled, it must not be due to the veteran's own willfull misconduct.

VA Pension benefits are available to veterans who are age 65 or older—even if the veteran does not meet the disability requirement detailed above. This is an important eligibility requirement for Elder Law attorneys to share with clients. Many veterans of wartime service are completely unaware of the fact that if they are 65 or older, then they may qualify without being disabled.

D. Income Requirement

The regulations for determining the income of a veteran for pension purposes are found at 38 C.F.R. § 3.271. Essentially, all income of the veteran is considered and the gross amount is included in the calculation of Pension Benefits. The regulations define income as recurring, nonrecurring, or irregular income from any source. This includes salary before any deductions for taxes, insurance, retirement plans, or social security. It also includes income from a business, farm, or profession, as reduced by the necessary operating expenses such as cost of goods sold; expenditures for rent, taxes, and upkeep; or costs of repairs or replacements. The value of an increase in stock inventory of a business is *not* considered income. Income from real or personal property is countable as income to the property's owner. This includes property acquired through purchase, gift, devise, or descent. If property is owned jointly, income of the various owners shall be determined in proportion to shares of ownership of the property. The income of a dependant child is countable to the veteran parent, but there are exceptions for hardship cases. Compensation for personal injury or death is countable as is Workers' Compensation payments and Social Security Disability payments or Railroad Retirement Board payments.

There are exceptions to countable income under the VA Pension benefits eligibility rules. Any Supplemental Security Income payments are excluded, as are any donations from public or private charitable organizations.⁸ The value of maintenance furnished by a relative, friend, or a charitable organization is not considered income.⁹ Payments made on behalf of the veteran for a nursing home stay are not countable. These payments are excluded regardless of who furnished the payment. Reimbursement of any kind for any casualty loss is not countable. The amount to be excluded is not to exceed the greater of the fair market value or the reasonable replacement cost of the property involved at the time immediately preceding the loss.

Profits from the sale of property are not counted as income. Profit realized from the disposition of real or personal property is included as income if the veteran sells the property as part of a regular business. However, if the veteran enters into only an occasional sale, then the income is not countable unless the sale is an installment sale. In installment sales, any payments received until the sales price is recovered are not included as income, but any amounts received which exceed the sales price *are* included regardless of whether they represent principal or interest. This may mean that

the countable income of the veteran is reduced for several years after the sale until the actual sales price is received.¹⁰

Amounts in joint bank accounts and similar institutions acquired by reason of death of the other joint owner are not counted as income.¹¹ However, if the joint account owner transfers or gives an interest to the veteran during the joint owner's lifetime, then the amount is countable as income.¹²

Un-reimbursed medical expenses will be excluded when all of the following requirements are met. First, they were or will be paid by the veteran or the veteran's spouse for medical expenses of the veteran, spouse, children, parents and other relatives for whom there is a moral or legal obligation of support. Second, they were or will be incurred on behalf of a person who is a member or a constructive member of the veteran's or spouse's household; and finally, they were or will be in excess of five percent of the applicable maximum annual pension rate or rates for the veteran. When calculating the five percent applicable maximum, the VA includes increased pension for family members, but excludes increased pension because of need for Aid and Attendance or being housebound ratings. "Constructive member" means that the expenses can be for a spouse in a nursing home, a child away at school, or a similar situation. The VA refers to this part of the requirements as "the 5% deductible." *This means that the amount of unreimbursed medical expenses that a veteran must pay are deducted from his or her income.*¹³

This is very important for Elder Law attorneys to relay to clients as most clients seeking these benefits will have large medical expenses which can be subtracted from his or her countable income.¹⁴ There are similar exemptions for the income of spouses and children. The costs of nursing home care for a veteran and, in some cases, a spouse can be deductible as medical expenses. The amount of premiums paid for medical, health or hospitalization insurance are deductible as medical expenses as are the costs of Part B Medicare and Part D coverage or Medicare Advantage Plan premiums.¹⁵

If the veteran has been rated as needing aid and attendance or homebound, then the cost of an assisted living facility can be deducted if the veteran requires a protective environment, such as an Alzheimer's patient. Otherwise, only expenses for medical care will be allowed.¹⁶ A deduction for home care costs can be allowed. The rules, however, are complex. Costs for any licensed health care professional are generally allowed.¹⁷

There are additional exemptions and deductions from income for expenses of last illnesses, burials, and just debts. The term "just debts" does not include any debt that is secured by real or personal property.¹⁸ There are also exemptions for certain educational expenses incurred in pursuing a course of education, vocational rehabilitation, or training. This exemption includes amounts paid for tuition, fees, books,

and materials, and in the case of a veteran or surviving spouse in need of regular aid and attendance, un-reimbursed amounts paid for unusual transportation expenses in connection with the pursuit of such educational course. Unusual transportation expenses are those exceeding the reasonable expenses which would have been incurred by a non-disabled person using an appropriate means of transportation (public transportation, if reasonably available).¹⁹

There are many other exemptions, including exemptions for Agent Orange settlement payments, cash surrender value of life insurance which represents a return of insurance premiums, and payments received as compensation under the Victims of Crime Act of 1984.²⁰

Interest on Individual Retirement Accounts is generally not countable if it cannot be withdrawn without incurring a substantial penalty. Once the veteran starts taking withdrawals from the IRA, all of the withdrawal interest and principal are counted as income.²¹

E. Net Worth Requirements

The VA uses the term “Net Worth” to describe the asset level of a person seeking Pension benefits. The term Net Worth is also referred to as “Corpus of the Estate” and defined as the market value, less mortgages or other encumbrances, of all real and personal property owned by the claimant, except the claimant’s dwelling (single-family unit), including a reasonable lot area, and personal effects suitable and consistent with the claimant’s reasonable mode of life.²²

The amount of assets that a veteran can have and qualify for Pension benefits is not set by statute or regulation. The closest thing to any established level for qualification is found in the VA Manual 21-1. The manual requires that a Veteran’s Service Representative must file a formal net worth administrative decision if the veteran has an estate of at least \$80,000.00.²³ Because of this requirement, that amount has become the traditional ceiling for qualification for Pension Benefits.²⁴ This amount is not an absolute bar to eligibility, and benefits can be paid to someone with assets above this level. The analysis that is done by the VA is whether the person’s assets are sufficient to meet the veteran’s needs without assistance from the VA. The Manual also states that Pension is based on need and that there is no need for pension benefits if the veteran’s estate is of such size that it should be used for maintenance.

In 2006, the VA began instructing caseworkers to perform an “age analysis” to determine financial need. The older the person, the fewer assets that he or she may be allowed to retain and still qualify.²⁵ Whether a veteran has excessive net worth is determined on a case-by-case basis. The amount of the claimant’s income is considered along with the following additional factors: (i) whether the property can be

readily converted to cash without substantial sacrifice; (ii) the claimant's life expectancy; (iii) number of dependents; and (iv) the potential rate of depletion of the assets, including unusual medical expenses.²⁶ Assets that are considered include:²⁷

- cash and non-interest bearing bank accounts such as checking accounts
- interest bearing bank accounts such as savings or CDs
- qualified retirement savings such as IRAs, 401(k)s, Keogh plans and so on (income or withdrawals from these accounts are considered income)
- stocks, bonds, mutual funds and other investments
- value of apportioned share of business assets
- net value of apportioned share of rental or investment property which is not the personal residence
- anything else that represents ownership and could be converted into cash.

The value of the veteran's personal effects such as a car, furniture and clothing are excluded. However, personal property that is held for investment purposes such as an antique car or coin collection are included.

IV. INTERACTION OF VA PENSION AND MEDICAID

As a result of The Deficit Reduction Act of 2005, Pub L. No 109-171, many clients who would need Medicaid benefits to help with the cost of long-term care are subject to longer penalties and other difficulties in qualifying for such care. In Texas, the unavailability of Medicaid coverage for home care is a particularly difficult problem for elderly clients who desire to remain at home and avoid nursing home placement. If the client or a spouse is able to meet the basic requirements for VA Pension benefits, then it may be possible to obtain enough monthly income to allow the client to either stay at home and purchase the required care or enter an assisted living facility and avoid nursing home placement. In the past, VA Pension benefits were considered by many advocates to be a polite form of welfare for wartime veterans. This is no longer the case. Because of the high cost of home care, assisted living placement, and the cost of long-term care, many veterans (and surviving spouses) with significant income and assets may become eligible for VA needs-based pension plus Aid and Attendance benefits to cover these costs.²⁸

A. The Big Problem

The big problem for an Elder Law attorney is how to anticipate the impact of planning for a possible Medicaid application in conjunction with planning for VA Pension benefits. The author has researched many publications and articles written by experts in VA law. The VA Pension planning and qualification techniques are different than Medicaid planning and sometimes counter productive to eventual qualification for Medicaid benefits. Most of the Medicaid planning techniques are concrete and objectively

measured: if certain steps are taken according to the law and regulations, then eligibility is assured. *That is not the case in planning for VA Pension benefits. Much of VA benefits planning is subjective in nature.* See the above discussion on the unwritten asset limit for such benefits. Veterans service representatives in different offices are likely to have different criteria for determining what asset levels are acceptable for a claimant.²⁹ Unlike advising clients on steps to qualify for Medicaid benefits, any advice given to an applicant for VA benefits can run headlong into the subjective nature of the requirements for VA benefits. This aspect of planning for VA benefits is foreign to most Elder Law attorneys. It does not mean that such planning should not be undertaken, but potential clients should be fully informed of the potential for unforeseen results. There are, however, several different planning opportunities that are conducive to both Medicaid and VA benefits planning.

B. Income Planning

It is the author's experience that most Elder Law clients will not have any problem with the income requirements of Pension qualification. Most of these clients will be limited to fixed incomes from social security or pensions. If the unreimbursed medical expense deductions are handled correctly, then the countable income of most clients will be reduced below the limit. See the discussion in section III(E) above. Remember that the deduction for Medicare Part B alone is \$96.40 a month. That amount is countable for both spouses if the veteran is married. In addition, the average cost of a Medicare supplement is around \$200.00 a month and for both spouses that would give a total deduction from income of $(2 \times 96.40) + (2 \times 200.00) = \592.80 per month. If the expenses for medications are added, then most clients will be able to qualify for some level of Pension benefit.

C. Paying Family Care givers

For Medicaid planning purposes, hiring and paying a salary to a family member care giver is problematic. However, VA rules specifically allow such payments. This is considered an unreimbursed medical expense and, as such, reduces countable income. Keep in mind that payment of home care expenses for a recipient who is not rated for housebound or Aid and Attendance is not allowed unless the payment is made to a licensed health professional.³⁰ If the person is rated homebound or Aid and Attendance, then payments can be made to nonlicensed care givers, more specifically, family members. VA sets strict requirements on the family care giver arrangement and proper tax reporting is one of the requirements. Although the VA requirements are stringent, this technique is extremely effective in reducing countable income and allowing a client to stay in-home and have a family member provide the necessary care.

D. Gifting Assets

As every Elder Law attorney is aware, gifting of assets for Medicaid purposes is problematic but, nonetheless, gifting assets is allowable under VA rules. The rules governing VA Pension benefits do not penalize gifting of assets when the veteran gives up control of the asset and it is given to a relative outside the veteran's household or to a nonrelative residing in the veteran's household.³¹ There is a penalty for gifting *income*, however.³² Once assets are given away, then any money paid to cover long-term care by another person will not be counted as income to the veteran.³³ The net effect of these rules allows a veteran to gift assets away and not have the assets count against the net worth requirement. The veteran could also have expenses paid by the recipient of the gift and it would not adversely affect eligibility based on assets or income. Gifts of remainder interests in property and retention of a life estate are not effective in reducing a veteran's net worth.³⁴

The subjective nature of the asset rules can make for difficult planning decisions, but the VA has a rule that helps with these decisions. The author refers to this rule as the "if at first you don't succeed rule."³⁵ If a transfer is made and later the service representative officer makes a determination that the net worth is too high, then additional assets can be transferred and the application can be reopened to make another attempt with no penalty.

E. Converting Assets to Income

The method of converting assets to income is one that is well known to most Elder Law attorneys. The purchase of an annuity will convert assets into income. Under the DRA rules, the purchase of an annuity can have impact on later Medicaid qualification. If the DRA requirements are satisfied, however, then assets can be converted to an income stream to reduce the net worth of the veteran.³⁶ By doing so, the Veteran may be able to meet the net worth limits established by VA while also preparing for a future Medicaid application.

F. Joint Accounts

The VA has a rule that is in direct conflict with the Medicaid approach on ownership of joint accounts. The Medicaid rule generally counts all of the assets and income from a joint account as a resource and income of the applicant. The VA does not.³⁷ The VA counts income or assets based on the ownership interest of a joint account. Because there is no penalty under VA rules for gifting, when another person is correctly added to a bank account, then the income and asset values of that account are decreased by one-half. This is another useful tool to achieve VA Pension eligibility, but one that may affect a veteran's future Medicaid application.

VI. Conclusion

The Elder Law attorney who has experience in handling Medicaid cases must be very careful when advising clients concerning qualification for Veterans Pension benefits. Unlike the regulations and requirements of Medicaid, which are, for the most part, based on objective criteria like bank balance amounts and specific income amounts, the Veterans Pension Program has a largely subjective component. If client's accounts are manipulated to change assets to income streams or other techniques utilized to meet the program requirements, there is no assurance that the result will be qualification. Because of the subjective nature of the program, any actions that are irreversible, such as gifting assets, should be carefully considered before being undertaken.

This subjective component and the resulting uncertainty that it produces is something foreign to most advocates dealing with other government programs. Typically, if the client meets the specific asset and income requirements, then that is all that is required. This is not the case with VA Pension benefits. Therefore, the Elder Law attorney must make sure that the client is fully informed of the risks in pursuing any course of action and also that a backup plan exists in case VA Pension benefits are denied. Lastly, no planning should be undertaken to obtain VA Pension benefits without a thorough understanding of the impact on later applications for Medicaid benefits. In most cases even if the VA Pension is granted, typically, it will not be enough to meet the long-term care needs of the client. The client will likely still need to qualify for Medicaid for long-term care at some later time.

However, with these caveats, it is clear that most all elderly clients who are eligible for VA Pension benefits would greatly benefit from this program and have many choices of care and placement that would not be otherwise available without the benefits.

It is, therefore, vitally important that the Elder Law attorney be able to recognize when the client is potentially eligible for these benefits and to have a plan for assisting the client in obtaining these benefits. It is not an area of law that most attorneys will ever choose to represent clients, but it is definitely an area where many elderly clients can obtain benefits which can significantly improve the quality of life for the client and increase the client's ability to control where he or she lives and how he or she receives care to maintain independence.

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