Changes to VA Aid & Attendance Benefits

By Melissa Morales

As of October 18, 2018, the U.S. Department of Veterans Affairs (VA) released the final changes to its VA pension benefit plan. The changes present a unique challenge to Elder Law attorneys that will affect the area of VA planning. As most have feared, the VA decided to implement a “look-back” period for transfers of covered assets and assess a penalty period for transferring of those assets. However, despite the public disapproval of the new changes, the VA has provided attorneys and claimants with more guidance that will prove to be beneficial when VA planning. The new rules have established a Bright-Line Net Maximum Community Spouse Resource Allowance (CSRA) amount; it also provides guidelines for what is considered income for VA purposes and what constitutes deductible medical expenses. These changes were effective as of October 18, 2018 and are not retroactive for claims made before that date. This article will explore the various changes that present distinctive challenges to claimants. It will also explore how these guidelines can be used to provide more guidance for attorneys and claimants when planning for VA benefits and how VA benefits affect former spouses of veterans.

Income for VA Purposes:

The new rules provides guidance for what is included and excluded for income purposes for the VA (IVAP). The VA will exclude the following from a claimant’s income: (1) Veterans’ benefits from States and municipalities (up to $5,000 per year);¹ (2) income tax returns;² (3) reimbursement payment for loss such as an insurance settlement for casualty losses, an accident, theft etc.;³ (4) and certain statutory exclusions.⁴

Assets:

When considering a claimant’s assets, the VA will evaluate all of the claimant’s assets and their spouse’s assets, if married. If the claimant is a surviving spouse, their assets alone will be evaluated.⁵ If the claimant is a veteran that is legally separated, the VA may count the spouse’s assets. It is likely that the veteran will not want the VA to consider spouse’s assets as it may disqualify them from receiving benefits. However, the veteran may avoid counting their spouse’s assets if they notify the VA in writing that they are separated and financially independent from

¹ 38 CFR §3.272 (k)
² 38 CFR §3.272 (r)
³ 38 CFR §3.272 (s)
⁴ 38 CFR §3.272 (t)
⁵ 38 CFR §3.274 (c)(2)
one another. The veteran may provide the VA with evidence of their single-filing-tax-return, utilities that are solely in their name, etc.

In addition, the VA will not consider the claimant’s primary residence will not be considered as an asset and they not deduct the amount of any mortgages or encumbrances on the claimant’s primary residence. If the claimant’s primary residence is sold, the proceeds must be used to buy a new residence within the same calendar year to avoid being counted as an asset. A claimant who does not reside in their primary home, but receives a rental income from their primary residence, will still enjoy the benefit of their primary residence not being considered an asset. However, the rental income will be counted as income for VA purposes.

Claimants who reside in a facility such as at nursing homes, medical foster homes, a family member’s home, or any other facility where they are in health care or custodial care are also excluded from having their primary home considered as an asset. Other values such as family transportation and appliances are also excluded as assets.

Net Worth

The new rule establishes that benefits shall be denied or discontinued if the Community Spouse Resource Allowance (CSRA) exceeds the Medicaid limit of $123,600. A claimant’s net worth is defined as the sum of the claimants’ or beneficiary’s assets and annual income. The VA calculates net worth when the VA has received: (1) the original claim; (2) a new claim made after a period of non-entitlement; (3) a request to establish a new dependent, or (4) receipt of information by VA that a claimant’s net worth has changed.

Decreasing a Claimant’s Net Worth

Under the new rule, a claimant’s net worth may be decreased in three different ways; through a claimant’s annual income, assets or a combination of both. For the decrease of their net worth to be valid, the claimant, a child, or someone acting on their behalf must decrease the net worth. The net worth may be spent on any item or service of “fair market value” for the benefit of the claimant, a child, relative (household member) of the claimant or child.

Look-Back Period:

One of the central most controversial changes to VA Pension benefits in 2018 is the newly established look-back period for VA Pension claims. As of October 18, 2018, the VA will

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6 38 CFR §3.275
7 38 CFR §3.274 (a) and (b)
8 38 CFR §3.274 (e)
9 38 CFR §3.274 (f)
10 Id. at (f)(1)
11 38 CFR § 3.276 (a)(7)
automatically look back 36-months immediately preceding the date in which the claim was received, for transfers of covered assets the claimant may have made. This does not include transfers made prior to the new established rule date.

**Covered Asset:**

When determining whether a transfer of assets was allowable within the 36-month-look-back-period, the VA will first determine whether the asset was a covered asset or not. A covered asset is an asset that was (1) part of the claimant’s net worth; (2) the asset was transferred for less than fair market value; and (3) if not transferred, would have caused or partially caused the claimant’s net worth to exceed the allotted limit.\(^{12}\)

An asset that was transferred for less than fair market value is defined as an asset that was (i) sold, conveyed, gifted, or exchanged for an amount less than fair market value; or (ii) a voluntary asset transfer, or purchase of, any financial instrument which reduces the claimant’s net worth unless the claimant is able to establish that he or she has the ability to liquidate the entire balance of asset for their own benefit.\(^{13}\)

The new rule defines Annuities and Trusts as instruments and investments that are considered covered assets. Therefore are classified as transfers for less than market value. However, Annuities or Trusts that allow the claimant to liquidate the entire balance for their own benefit are treated as exempt from the covered assets rule.\(^{14}\)

**Penalty Period:**

The new rule establishes a penalty period for the transfer of covered assets during the 36-month-look-back-period. The VA will assess the penalty period however, it will not to exceed more than five years.\(^ {15}\) If the claimant is barred by the penalty period, the penalty date begins on the first day of the month that follows the date the transfer of covered assets occurred. If there was more than one transfer, the penalty date will start the first day of the month that follows the date of the last transfer of covered assets.\(^ {16}\) Once the penalty period is over, the claimant will have to wait until the last day of the penalty month to receive benefit payment on the first day of the following month. If claimants find themselves in danger of a penalty period, the new rules have provided guidelines on how the claimant may cure or reduce the penalty period.

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\(^{12}\) Id. at (a)(1)-(1)(iii)

\(^{13}\) Id. at (a)(5)(i)-(ii)

\(^{14}\) Id. at (a)(5)(ii)(a)-(b)

\(^{15}\) 38 CFR § 3.276(e)--- see about adding comments.

\(^{16}\) Id.
Curing or mitigating the Penalty Period:

The new rules established guidelines on what the claimant must do to cure or mitigate the assessed penalty period.17 Once the VA has assessed a penalty period, they will not recalculate the penalty period unless: (i) it is established that the penalty period calculation was erroneous; or (ii) The VA allows the claimant to show evidence that the transfer of covered assets in question was returned to the claimant prior to the date of the claim.18 If the claimant asserts that the covered assets were returned prior to the date of the claim or within 60 days of the VA’s notice, the claimant must show evidence of the return no later than 90-days in order to recalculate or eliminate the previously assessed penalty period. 19

Deductible Medical Expenses

Historically, payments made by the claimant for medical expenses must be unreimbursed to count as deductible income for IVAP purposes.20 However, the new rules define what constitutes deductible medical expenses to reduce a claimant’s IVAP.21 Medical expenses for VA purposes are generally for “medically necessary services that improve a disabled individual’s functioning; or prevent, slow, or ease an individual’s functional decline.”22 Approved medical expenses include but are not limited to §3.278 (c)(1) through (7) to name a few; care by a health provider, medications, medical supplies, adaptive equipment, etc. Payments made to hospitals, nursing homes, medical foster homes include the cost of meals and lodging charged by such facilities.23

In addition, the new rules include a section of institutional forms of care and in-home care that the VA did not grant prior to October 18th, 2018.24 This section is important to consider when utilizing Caregiver Agreements, a tool often used when VA pension planning. The new rules further define what Activities of Daily Living (ADLS) and Instrumental Activities of Daily Living mean. ADLS is “the basic self-care activities . . . [that] consist of bathing or showering, dressing, eating, toileting, transferring and ambulating within the home or living area.”25 IADLS means independent living activities such as shopping, food preparation, housekeeping, laundering, managing finances, etc.”26 This section establishes that payments for in-home health care for ADLS and IADLS by an in-home attendant are considered medical expenses. However, the attendant must be considered to be a health care provider and providing health or custodial care, unless; “(i) The disabled individual needs Aid and Attending (which is defined in §3.351 or is housebound); or (2) a physician, physician assistance, certified nurse practitioner or clinical provider (section 1.401(3)(ii)) certified the care.”27

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17 Id. at (e)(5)
18 Id. at (e)(5)(i)-(ii)
19 Id.
20 38 CFR §3.278 (a)
21 Id.
22 Id. at (c)
23 Id. at (d)(1)
24 Id. at (d)
25 Id. at (b)(ii)(2)
26 Id. at (b)(ii)(3)
nurse specialist recommends in writing that the claimant, due to a physical, mental, cognitive, or developmental disorder requires the custodial care of an attendant. 27

Aid and Attendance for Legally Separated or former Spouses

The VA provides Aid and Attendance benefits for the single surviving spouse of veterans who have served on active duty during a war time period for at least 90 days. Generally, Aid and Attendance benefits are discontinued upon divorce or legal separation. However, the VA has been known to award Aid and Attendance benefits to former spouses who can prove through well-documented proof that the basis for the divorce was due to physical abuse or extreme mental cruelty.

Conclusion

As time continues and more claims are filed, granted or denied under these new rules we will learn how the October 2018 changes to the VA Pension Benefit qualifications will effect clients and the area of elder law. The new automatic look-back may seem daunting and may present some issues for attorneys who are assisting their clients in VA planning, however, in the same token, the new changes provide attorneys with more guidance and predictability for their clients. The newly established bright-line asset limits, clearer qualifications for deductible medical expenses, and guidelines on how to mitigate or cure the asset transfer penalty period will allow attorneys to maximize the benefits their clients are entitled to.

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27 Id. at (d)(i)-(ii)