

NEW RULES TRANSFORM VA PENSION BENEFITS

Lori A. Leu, CELA
Leu & Peirce, PLLC
Plano, Texas
lleu@leulawfirm.com

On September 18, 2018, the Department of Veterans Affairs (the “VA”) published a final rule, bringing sweeping changes to the VA pension program, which helps eligible wartime Veterans and their survivors, primarily surviving spouses, pay for long-term care.¹ The final rule, entitled “Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits,” was designed to improve the integrity of the pension program by addressing inconsistencies in the handling of claims and putting a stop to the targeting of Veterans by “pension poachers” who were taking advantage of Veterans and their families. The changes go into effect October 18, 2018, and will dramatically impact the ability of a Veteran or a surviving spouse to qualify for VA pension benefit payments.

Like Medicaid, the VA pension program is a needs-based program, taking into account assets and income to determine eligibility. However, unlike Medicaid and other public benefit programs, there have been no fixed asset or income levels for qualification. For asset eligibility, a VA caseworker has exercised discretion by considering the life expectancy and expected rate of depletion of the assets owned by the Veteran or surviving spouse. If the VA caseworker reached the subjective determination that the assets were sufficiently low to indicate that the Veteran or surviving spouse would be unable to pay for health care needs, the caseworker would then analyze the sufficiency of income. The amount of the pension benefit payment was determined by deducting the family’s monthly recurring medical and other health care expenses from the family’s

¹ 83 Fed. Reg. 47,246 (Sept. 18, 2018).

monthly recurring income, but with no clear guidelines regarding the type of expenses that could be included. This method of relying on the discretion of a VA caseworker created uncertainty when planning for VA pension benefits and inconsistency in the adjudication of claims for VA pension benefits.

Also unlike Medicaid, which has a five-year look-back period, the prior regulations had no look-back period to prohibit the transfer of assets. Under the Medicaid rule, if any assets are transferred for less than fair market value for the purpose of qualifying for Medicaid benefits within five years of the filing of the Medicaid application, the applicant will be penalized. The lack of a similar look-back period for VA pension benefits has resulted in an industry of individuals who market financial products to Veterans, regardless of the Veteran's need for the pension benefits. In some cases, the result has been not only the purchase of an unnecessary annuity, but disqualification from Medicaid benefits when the Veteran was not advised on the effect such a purchase would have on Medicaid qualification.

VA PENSION PROGRAM BASICS

The VA pension benefit is a non-service connected disability pension that is federally funded and regulated. The Veteran must meet the following basic eligibility requirements:

- Discharged from the service under other than dishonorable conditions;
- Served 90 days or more of active duty,² with at least one day during an Eligible Wartime Period;³

² Veterans who entered active duty after September 7, 1980, must also have served at least 24 months of active duty, or if less, have completed their entire tour of active duty.

³ The Eligible Wartime Periods are as follows:

- Mexican Border Period (May 9, 1916 – April 5, 1917, for veterans who served in Mexico, on its borders, or adjacent waters)
- World War I (April 6, 1917 – November 11, 1918)
- World War II (December 7, 1941 – December 31, 1946)
- Korean conflict (June 27, 1950 – January 31, 1955)
- Vietnam era (August 5, 1964 – May 7, 1975, except for veterans who served in the Republic of Vietnam, whose period begins February 28, 1961)
- Gulf War (August 2, 1990 – through a future date to be set by law or Presidential Proclamation)

- Aged 65 or older, totally disabled, blind, patient in a nursing home, or receiving Social Security disability benefits; and
- Meet the net worth requirements.

A surviving spouse must meet the additional requirements of having been married to the Veteran when the Veteran died and not having remarried.

There are three levels of payments, depending on need, including the Basic Service Pension, Housebound, and Aid & Attendance. Eligibility for the Basic Service Pension requires that the Veteran or surviving spouse meet the basic eligibility requirements. These individuals would still have the ability to handle many of their needs, but their unreimbursed medical expenses are high enough that they need some additional assistance. Individuals who are considered Housebound are those who, in addition to qualifying for the basic pension benefit, are substantially confined to their home because of a permanent disability. These individuals may still be able to attend to many of their needs at home, but they are unable to transport themselves out of the home without assistance. The highest level of benefit, known as Aid & Attendance, is for individuals who, in addition to qualifying for the basic pension benefit, require the assistance of another person to perform at least two activities of daily living, are bedridden, are a patient in a nursing home due to a mental or physical incapacity, or are blind. For 2018, the maximum monthly benefit amounts are as follows:

	<u>Single Veteran</u>	<u>Married Veteran</u>	<u>Surviving Spouse</u>
Basic Service Pension	\$1,097	\$1,436	\$735
Housebound	\$1,340	\$1,680	\$899
Aid & Attendance	\$1,830	\$2,169	\$1,176

The benefit levels increase in accordance with Social Security cost-of-living increases. Unlike Medicaid benefits, the VA pension benefit is paid directly to the Veteran or surviving spouse as reimbursement for medical and other health care, rather than to a health care provider.

The VA regulations limiting who can help Veterans or their survivors obtain assistance with preparing for and filing claims for pension benefits will not change under the new rules. Individuals must be accredited by the VA to assist a claimant in the preparation, presentation, and prosecution of a claim for VA benefits.⁴ The VA accredits only (1) representatives of VA-recognized veterans service organizations, (2) independent claims agents, and (3) private attorneys.⁵ In general, even if accredited, the VA prohibits an individual from charging the Veteran a fee for the preparation and presentation of a VA claim (gathering the information necessary to file the claim, completing the claim application, submitting claim information to the VA, and communicating with the VA on behalf of the claimant). A disinterested third party can pay a fee if the third party would not benefit financially from the successful outcome of the claim.

Those accredited individuals who have been assisting with claims for VA pension benefits, as well as those who have “assisted” without meeting the accreditation requirements, need to pay particular attention to the changes. The new net worth calculation and planning options will be very different from the prior regulations. Therefore, anyone who assists with or advises regarding VA pension benefits after October 18, 2018, should ensure they are well-versed in the new rules. If not, and prior steps are followed in advising the Veteran regarding spend downs, the advice may constitute “fraud, misrepresentation, or unfair business practices,” which would need to be

⁴ There is a one-time exception for individuals who seek to assist only one claimant for one application. Typically, that applies to family members who are helping their loved one with the application and do not intend to help anyone else file claims.

⁵ A list of accredited representatives, agents, and attorneys can be found at www.va.gov/ogc/apps/accreditation/index.asp.

reported to the applicable licensing agencies to avoid the imposition of a transfer penalty on the Veteran or surviving spouse applicant. Because one of the reasons for the new rules was to stop the “poaching” by some in the financial industry who were targeting Veterans, using the VA pension program as a marketing tool to convince Veterans to transfer assets when they were not in financial need of the program, it is unlikely the VA will offer any sort of transition period.⁶

The recently enacted changes are comprehensive and will transform the landscape of VA pension benefit planning, providing clear guidelines to ensure consistency and predictability. The following is a summary of key areas of the new rules that will affect eligibility for VA pension benefits.

VA PENSION PROGRAM CHANGES

A. Net Worth

Under the new rules, net worth calculations are no longer focused on life expectancy or rate of depletion of assets. Instead, the starting point is the maximum community spouse resource allowance under the Medicaid rules, which is the maximum amount a community spouse can retain in assets to allow the institutionalized spouse to qualify for Medicaid benefits. For 2018, that amount is \$123,600.⁷ If Social Security benefits receive a cost-of-living increase for 2019, the \$123,600 net worth limit will be increased in the same percentage.⁸ The probable effect of this change will be to allow more claimants to qualify than in the past. Previously, there was no set amount for the maximum assets a Veteran or surviving spouse could retain, but it was understood that few claims were approved if the claimant owned countable assets in an amount greater than

⁶ Annuities and trusts have been considered the primary tools of more than 200 organizations identified by the U.S. Government Accountability Office as manipulating assets to reduce a claimant’s net worth. 83 Fed. Reg. 47,246 (Sept. 18, 2018).

⁷ 38 CFR §3.274(a).

⁸ *Id.*

\$80,000. Further, because the caseworker performed a subjective determination of the amount of assets needed for the Veteran's remaining life expectancy, applications were often denied when the claimant owned assets valued much less than \$80,000.

Net worth will be defined as the sum of the claimant's assets and annual income.⁹ The term "claimant" includes the applicant (Veteran or surviving spouse), a dependent spouse, and any dependent children.¹⁰ Thus, for purposes of asset and income calculations, the application must include assets and income in the individual or joint names of the applicant (Veteran or surviving spouse), the dependent spouse, and any dependent children. Net worth will be calculated as of the date of receipt of (1) an original pension claim, (2) a new pension claim after a period of non-entitlement, (3) a request to establish a new dependent, or (4) information that net worth has increased or decreased.¹¹ If net worth increases after the granting of pension benefits, any reduction or discontinuance of benefits will be effective the last day of the calendar year in which net worth exceeds the limit.¹²

B. Asset Calculation

Assets are defined to mean the fair market value of all property that a claimant owns, including all real and personal property, unless excluded, less the amount of mortgages or other encumbrances specific to the property.¹³ Similar to the prior regulations, the following assets are excluded from the calculation of net worth:¹⁴

- Primary residence – The value of the primary residence (regardless of the amount)

⁹ 38 C.F.R. §3.274(b)(1).

¹⁰ 38 C.F.R. §3.275(a)(2).

¹¹ 38 C.F.R. §3.274(e).

¹² 38 C.F.R. §3.274(h).

¹³ 38 C.F.R. §3.275(a)(1).

¹⁴ The following are also excluded: Radiation Exposure Compensation Act payments, Ricky Ray Hemophilia Relief Fund payments, Energy Employees Occupational Illness Compensation Program payments, payments to Aleuts, and other statutory exclusions. 38 C.F.R. §3.275(b)(3) – (7).

is excluded from the asset calculation, including the residential lot area, which is defined to include only 2 acres, unless the additional acreage is not marketable.¹⁵ A mortgage or other encumbrance on the primary residence will not be deducted from the asset calculation,¹⁶ because the primary residence is not included in that calculation. The primary residence will still be excluded, even if rented,¹⁷ so long as the claimant resides in a nursing home or other care facility, or the home of a family member for the purposes of obtaining health care or custodial care.¹⁸ If the primary residence is sold, the proceeds will be included in the asset calculation to the extent not reinvested in another primary residence within the same calendar year.¹⁹

- Personal Effects – The value of personal effects consistent with a reasonable mode of life, including appliances and family transportation vehicles, is excluded from the asset calculation.²⁰

C. Asset Transfers

The amount of assets included in the net worth calculation can be reduced by purchasing items or services for the Veteran, spouse, or other relative of the Veteran within the same household.²¹ If fair market value is not received for an asset, a transfer penalty may apply. The VA will assess a penalty period if a claimant transfers a “covered asset” within 36 months of filing a claim. This is one of the most anticipated changes of these new rules. Previously, there was no “look-back period” for VA pension applications. Although the VA prohibited transfers for the

¹⁵ 38 C.F.R. §3.275(a)(3), (b)(1).

¹⁶ 38 C.F.R. §3.275(b)(1)(i).

¹⁷ However, rental income will be included in the annual income calculation. 38 C.F.R. §3.275(b)(1)(i).

¹⁸ 38 C.F.R. §3.275(b)(1)(ii).

¹⁹ 38 C.F.R. §3.275(b)(1).

²⁰ 38 C.F.R. §3.274(b)(2).

²¹ 38 C.F.R. §3.275(f)(1).

purpose of qualifying for the VA pension program, there was no question on the application that elicited that information. The new rules create a 36-month look-back period beginning on the date the VA receives the claim for pension benefits.²² If a “covered asset” is transferred out of the Veteran’s name within the 36-month look-back period, a penalty period of up to five years will be imposed. Importantly, transfers made prior to the effective date of October 18, 2018, will not be penalized, regardless of whether a claim for benefits has been filed.

This new definition of “covered asset” is unique in the public benefits realm. “Covered asset” will mean an asset that (1) was part of the claimant’s net worth, (2) was transferred for less than fair market value, and (3) if not transferred, would have participated in causing the claimant’s net worth to be greater than the limit (\$123,600 during 2018).²³ Thus, if a claimant has less than \$123,600 in net worth, the claimant can transfer assets for less than fair market value without any penalty, because such transfers would not cause the claimant’s net worth to drop below the limit. Likewise, because the primary residence is excluded from the calculation of net worth and, thus, is not a covered asset, the claimant should retain the ability to transfer the primary residence at any time, before or after the filing of the application for pension benefits, without penalty.

The new rules specifically identify transfers to irrevocable trusts and purchases of annuities as transfers for less than fair market value. Transfers of covered assets into any financial instrument or investment will now result in a transfer penalty, unless the claimant retains the ability to liquidate the entire balance of the asset for the claimant’s benefit, in which case the asset remains included in net worth.²⁴ Transfers of covered assets into a revocable living trust would be acceptable, because the asset remains part of the claimant’s net worth. Transfers of covered assets

²² 38 C.F.R. §3.276(a)(7).

²³ 38 C.F.R. §3.276(a)(2).

²⁴ 38 C.F.R. §3.276(a)(5).

into an irrevocable trust, an annuity, or any other vehicle that removes the claimant's ability to access and liquidate the entire balance for the claimant's benefit (without payment of fees or withdrawal penalties) will result in a transfer penalty.

As part of the apparent intention to target the "poachers," while not penalizing the Veterans who fall victim to those poachers, the new rules contain an exception for transfers that resulted from "fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension."²⁵ Such transfers will not incur a penalty, if the claimant presents evidence of a complaint filed with State, local, or Federal authorities reporting the incident.²⁶

An important exception that is similar to transfers allowed for other public benefits is the ability to transfer covered assets to a trust established on behalf of a child who the VA has rated as incapable of self-support, so long as there is no possibility for the trust distributions to be used to benefit the claimant.²⁷ Unlike other regulations regarding adult disabled children, though, the VA requires that the child have become permanently incapable of self-support before reaching the age of 18 years.²⁸

D. Transfer Penalties

If a claimant transferred a covered asset during the 36-month look-back period, the VA will assess a penalty period not greater than five years.²⁹ It is important that a penalty period be calculated before a claim is filed to determine the affect it will have on pension benefits. The penalty period begins the first day of the month following the date of the last transfer.³⁰ Thus, if

²⁵ 38 C.F.R. §3.276(c).

²⁶ *Id.*

²⁷ 38 C.F.R. §3.276(d).

²⁸ 38 C.F.R. §§3.276(d), 3.356.

²⁹ 38 C.F.R. §3.276(e).

³⁰ 38 C.F.R. §3.276(e)(2).

the penalty period will exceed the 36-month look-back period, the claim for pension benefits should not be filed until the expiration of the look-back period. Otherwise, the claimant will be penalized longer than necessary for the transfer.

The penalty period is determined by dividing the total value of the covered asset that was transferred by the monthly penalty rate and rounding the result down to the nearest whole number, which will be the total number of months for which the VA will not pay pension benefits.³¹ The monthly penalty rate is the maximum rate for a married Veteran in need of Aid & Attendance.³² For 2018, the monthly penalty rate would be \$2,169. Therefore, as an example, if the value of the covered asset that was transferred was \$20,000, after dividing by \$2,169, the penalty period would be 9 months ($20,000/2,169 = 9.22$).

The penalty period begins on the first day of the month following the date of the transfer.³³ The claimant is not required to take any action to start the penalty period. This differs from penalty periods under Medicaid, which begin on the first day of eligibility for Medicaid benefits. Thus, it would be possible for a transfer to occur within the 36-month look-back period, but for the penalty period to have run prior to the filing of the claim for VA pension benefits. The penalty period ends on the last day of the month of the penalty period, and the claimant is entitled to receive VA pension benefits the first day of the following month.³⁴

The VA will recalculate a penalty period only if the original calculation was shown to be in error, or if the claimant provides evidence of the return of some or all of the covered assets before the filing of the claim or within 60 days after receiving VA notice of the penalty period.³⁵

³¹ 38 C.F.R. §3.276(e).

³² 38 C.F.R. §3.276(e)(1).

³³ 38 C.F.R. §3.276(e)(2).

³⁴ 38 C.F.R. §3.276(e)(3).

³⁵ 38 C.F.R. §3.276(e)(5).

The VA must receive evidence of the return within 90 days after the date of the VA notice.³⁶

E. Reduction of Income

Another way to reduce net worth for purposes of the VA calculation is to reduce income. The amount of income that is included in the net worth calculation can be reduced by the amount of reasonably predictable unreimbursed medical expenses to the extent the total of such expenses exceeds Five (5%) Percent of the applicable maximum annual pension rate for the particular level of benefits.³⁷ Regardless of the amount of the reasonably predictable unreimbursed medical expenses, they can be used only to reduce the income portion of the net worth calculation, not the assets. Further, the medical expenses must be unreimbursed to be deductible from income.³⁸

The items that can be included as reasonably predictable unreimbursed medical expenses under the new rules is broader than was allowed under the prior regulations. The amount to be deducted for allowable medical expenses includes payment for items or services that (1) are medically necessary, (2) improve a disabled individual's functioning, or (3) prevent, slow, or ease an individual's functional decline,³⁹ including, without limitation, the following:

- Care by a health care provider – payments for services performed within the provider's professional capacity.⁴⁰
- Medications, medical supplies, medical equipment, and medical food/vitamins/supplements – payments for lawfully obtained prescriptions and non-prescription medications and supplies, including medically necessary food, vitamins, and supplements directed by a health care provider who is authorized to write

³⁶ *Id.*

³⁷ 38 C.F.R. §§3.274(f)(3), 3.278.

³⁸ 38 C.F.R. §3.278(a).

³⁹ 38 C.F.R. §3.278(c).

⁴⁰ 38 C.F.R. §3.278(c)(1).

prescriptions.⁴¹

- Adaptive equipment – payments for adaptive devices or service animals used to assist with an ongoing disability.⁴²
- Transportation expenses – payments for transportation for medical purposes, including mileage, parking, and tolls for privately owned vehicles.⁴³
- Health insurance premiums – payments for health, medical, hospitalization, and long-term care insurance premiums.⁴⁴
- Smoking cessation products – payments for items and services specifically related to smoking cessation.⁴⁵
- Institutional forms of care and in-home care – payments for the following care (effective October 18, 2018, if not previously granted):⁴⁶
 - Hospitals, nursing homes, medical foster homes,⁴⁷ and inpatient treatment centers, including costs of meals and lodging.⁴⁸
 - In-home care assistance with ADLs⁴⁹ and IADLs⁵⁰ by an in-home attendant, if the attendant also provides health care or custodial care, with payments based on the number of hours worked. The attendant need not be a health care

⁴¹ 38 C.F.R. §3.278(c)(2).

⁴² 38 C.F.R. §3.278(c)(3).

⁴³ 38 C.F.R. §3.278(c)(4).

⁴⁴ 38 C.F.R. §3.278(c)(5).

⁴⁵ 38 C.F.R. §3.278(c)(6).

⁴⁶ 38 C.F.R. §3.278(c), (d).

⁴⁷ A “medical foster home” is defined as a privately owned residence “that offers a non-institutional alternative to nursing home care for Veterans who are unable to live alone safely due to chronic or terminal illness.” 38 C.F.R. §3.278(b)(6).

⁴⁸ 38 C.F.R. §3.278(d)(1).

⁴⁹ ADLs, or “activities of daily living,” are basic self-care activities that include bathing/showering, dressing, eating, toileting, transferring (moving from one position or location to another), and ambulating within the living area. 38 C.F.R. §3.278(b)(2).

⁵⁰ IADLs, or “instrumental activities of daily living,” are independent living activities that include shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes. 38 C.F.R. §3.278(b)(3).

provider if the claimant is Housebound or needs Aid & Attendance, or a health care provider states in writing that the claimant needs the health care or custodial care that the attendant provides.⁵¹

- Care in a facility other than a nursing home can be provided by the facility, a third-party provider, family, or friends, and the provider of the care does not need to be a health care provider. The cost of assistance with ADLs and IADLs can be included as medical expenses, if the claimant is receiving health care or custodial care in the facility and is Housebound or needs Aid & Attendance, or a health care provider states in writing that the claimant needs to be in a protected environment. Payments for meals and lodging can be included if the facility provides or contracts for health care or custodial care for the claimant, or a health care provider states in writing that the claimant must reside in the facility to be able to receive health care or custodial care.⁵² This is an important change in the rules, as it would allow for the inclusion of the cost of an independent living facility within the calculation of unreimbursed medical expenses.

The breadth of the health care services that will be included in the category of reasonably predictable unreimbursed medical expenses will allow for more comprehensive care for Veterans and their surviving spouses, and constitutes a significant change in the VA pension program.

FUTURE OF THE VA PENSION PROGRAM

The immediate future of the VA pension program remains somewhat unclear. For

⁵¹ 38 C.F.R. §3.278(d)(2).

⁵² 38 C.F.R. §3.278(d)(3)

accredited individuals with experience in assisting with VA pension claims, there are questions about technical aspects of the new regulations. The VA attempted to address some of these issues in its response to the comments published in the Federal Register.⁵³ The VA has indicated that it will not review any asset transfers that occurred prior to October 18, 2018. Therefore, current methods of planning may continue until October 17, 2018, so long as all transfers of assets are made by that date. Claimants who were granted pension benefits under the prior regulations will continue to receive those benefits, even if their net worth exceeds the current standards. If, however, they lose those benefits due to some other cause, their eligibility will be evaluated under the new regulations. If an claimant has a pending application, the VA will not deny the application, so long as the claimant is below he net worth limit. And, the VA is not planning to audit any existing benefits.

Although the changes to the VA pension program are sweeping, the new rules are not unwelcomed by the Elder Law community. The changes support a more comprehensive planning approach for long-term care benefits and more stability in the public benefits planning arena.

⁵³ The VA originally published the proposed rule on January 23, 2015. 80 Fed. Reg. 2840. The public comment period ended on March 24, 2015, during which time the VA received more than 850 comments. 83 Fed. Reg. 47,246 (Sept. 18, 2018).