

**UNDERSTANDING AID AND ATTENDANCE:  
CONFLICTS BETWEEN PLANNING FOR VETERAN'S DISABILITY  
PENSION AND PLANNING FOR MEDICAID**

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**I. OVERVIEW OF VA BENEFITS FOR DISABLED VETERANS**

**A. VA Disability Compensation**

1. Disability Compensation is for "Service Connected" conditions
2. Disability Compensation is analogous to Workers Compensation
3. Compensation is NOT means-tested
4. Surviving Spouse/Dependents may be eligible for Dependency and Indemnity Compensation (DIC)

**B. VA Disability Pension**

1. Disability Pension is available to certain wartime veterans for Non-Service Connected conditions
2. Disability Pension provides supplemental income to disabled or older veterans with relatively low income
3. Disability Pension is analogous to SSI
4. Disability Pension is means-tested

**C. Compensation vs. Pension**

1. Some veterans could be eligible for both benefits but cannot receive both at the same time. The veteran can choose either benefit.
2. Additional allowance for "Aid and attendance" can be added to Compensation.
3. Both benefits are TAX-FREE (IRC §140(a)(3)).

**D. Different Terms for Disability Pension**

1. Special Monthly Pension / Improved Monthly Pension (for veterans and dependents)
2. Death Pension (for surviving spouse and dependents)
3. "Aid & Attendance" is often used in place of Disability Pension, but actually refers to an increased allowance based on higher disability rating/level of care requirement

\* Certified as an Elder Law Attorney by the National Elder Law Foundation. There is no procedure in Virginia for approving certifying organizations.

## II. What is Aid & Attendance?

### A. Disability Pension provides benefits for certain veterans and surviving spouses (or other dependents) who:

1. are 65 or older;
2. are blind;
3. require the regular attendance of another person to assist in activities of daily living (ADLs);
4. reside in a nursing home; or
5. reside in an assisted living facility

### B. How Much is the Benefit?

1. In 2012, Aid & Attendance can provide up to:
  - a) \$1,021 to \$1,703 per month to a veteran
  - b) \$684 to \$1,094 per month to a surviving spouse
  - c) \$1,337 to \$2,019 per month to a veteran & spouse
2. The benefit is based on net monthly income and the veteran's level of care

### C. Eligibility Criteria

1. Proof of Service / Discharge Papers
2. Medical Evaluation from a physician
3. Net Worth Limitations
4. Net Income Limitations

### D. Proof of Service (DD-214)

1. DD-214 is the most common form for providing proof of military service and discharge
2. Veterans can obtain records at:  
<http://www.archives.gov/veterans/evetrecs/index.html>

### E. Wartime Veterans are Eligible

1. The applicable veteran must have:
  - a) Been on Active Duty for at least 90 continuous days (24 continuous months if entered active duty after 9/8/80 for enlisted, 10/16/81 for officers) (exceptions for award of Purple Heart, death and disability)
  - b) One day of which was "during a period of War" (this doesn't mean "in combat")
  - c) Received Discharge under conditions other than dishonorable
2. Applicable Regulations can be found at:
  - a) 38 CFR § 3.1(d)
  - b) M21-1MR III, ii, 6.2 and 6.3
  - c) M21-1MR V, i, 1.2a
  - d) 38 CFR § 3.12(a)(1)

#### **F. Non-Military Wartime Service**

There are many WWII-era service organizations whose members may also qualify for “wartime service” for purposes of the Disability Pension, if they received a discharge by the Secretary of Defense (e.g. Merchant Marines, Women’s Army Auxiliary Corps). See 38 CFR § 3.7.

#### **G. Age / Disability Criteria**

1. In addition to the Wartime Service requirement, the veteran must be:
  - a) permanently and totally disabled, **OR**
  - b) Age 65 or older

#### **H. Death Pension**

1. Deceased veteran would have met wartime service eligibility criteria
2. No requirement for veteran to have been 65 or spouse to be 65 before application
3. No need for total disability if veteran died before age 65
4. Death Pension benefit is approximately 65% of the amount of the veteran’s pension
5. Unremarried surviving spouse may be any age
  - a) Married at least one year prior to death, or married before or during veteran’s service, or have a child from marriage
  - b) Living with veteran at time of death, unless veteran was living in a facility for health reasons
  - c) Married before
    - (1) 1/1/57 for WWII veteran
    - (2) 2/1/65 for Korean war veteran
    - (3) 5/8/1985 for Vietnam war veteran
  - d) Applicable Regulations can be found at 38 CFR § 3.50-55
6. Dependent Child must be:
  - a) Under 18; or
  - b) In school and under 23; or
  - c) Disabled and disability began before age 18

#### **I. Definition of Housebound**

1. Substantially confined to home or premise
  - a) claimant does not need to be unable to ever leave the house, just unable to leave the house in order to earn a living
  - b) Due to disability or disabilities
  - c) Reasonably certain to last for life
2. Applicable Regulations can be found at:
  - a) 38 CFR § 1521(e)
  - b) 38 CFR § 3.351
  - c) M21-1MR III, ii, A.5.b.

**J. “Aid & Attendance” Allowance**

1. In nursing home (or assisted living facility); or
2. Blind or nearly so; or
3. Permanently and totally disabled or age 65 and over, and in regular need of aid & attendance
4. Applicable Regulations can be found at:
  - a) 38 USC § 1502(b)
  - b) M21-1MR, V, ii, 3.1
  - c) M21-1MR, III, ii, 2, A.5.a.

**K. Wartime Service Criteria**

1. **WWI** 6-Apr-1917 through 11-Nov-1918
2. **WWII** 7-Dec-1941 through 31-Dec-1946
3. **Korea** 27-Jun-1950 through 31-Jan-1955
4. **Vietnam** 5-Aug-1964 through 7-May-1975
  - a) Start date of 28-Feb-1961 for veterans who served “in country”
5. **Persian Gulf** 2-Aug-1990 through TBD

**L. Financial Criteria – Assets**

1. Do the veteran’s (and spouse’s) assets, (excluding home and vehicle) exceed the Dept. of Veterans Affairs eligibility worker’s subjective determination of how much money the veteran will need, based on life expectancy and unreimbursed medical expenses?
2. Many VA eligibility worker’s previously applied an easy rule of thumb
  - a) If a Veteran had less than \$50,000, or a Veteran and spouse had less than \$80,000, the asset test was satisfied
  - b) This is NO LONGER the de facto test
3. No benefits when the corpus of the estate is such that, under all circumstances, considering the veteran's and his/her spouse's income, it is reasonable that some part of the corpus of their estates be consumed for the veteran's maintenance (38 USC § 1522(a))

**M. Subjective Considerations**

1. Amount of claimant’s income
2. Whether property can be readily converted into cash at no substantial sacrifice
3. Life expectancy
4. Number of dependents in family
5. Potential rate of depletion of assets
6. Applicable Regulations can be found at 38 CFR § 3.275

**N. Which Assets are considered?**

1. VA considers the Corpus of the Estate, which is 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.”

2. Applicable Regulations can be found at 38 CFR § 3.275 (b)
3. When is the Home Exempt? Is the home still a “dwelling” place if it is no longer being used as such?
4. Joint Assets owned with a non-spouse, who does not reside in the same household with the Veteran or Surviving Spouse, are considered as part of net worth on a pro rata basis to the number of joint owners

**O. Financial Criteria – Income**

1. Eligibility will be established from an income standpoint as long as household countable income is less than the Maximum Allowable Pension Rate (MAPR)
2. MAPR varies based on whether or not there is a “housebound” or “aid and attendance” rating, and whether or not there are any dependents

**P. Income for Veterans Administration Purposes (IVAP)**

1. Payments of any kind from any source
2. Gross amounts
3. Household (veteran, dependent spouse and dependent children)
4. Round down
5. Applicable Regulations can be found at:
  - a) 38 CFR § 3.271
  - b) 38 CFR § 3.23

**Q. Annuities** – Applicable regulations do not specifically address annuities. However, anecdotal evidence suggests the following guidelines:

1. Annuities in payout status count as income, regardless of whether there is a secondary market
2. Deferred annuities count as resources
3. Medicaid Qualifying Annuities may be appropriate, especially in situations where the applicant has negative net income

**R. Items not included in Income**

1. SSI payments
2. Income tax refunds
3. Loans, including reverse mortgages
4. Insurance dividends
5. Life insurance proceeds that represent a return of premiums
6. Profit on sale of property
7. Applicable Regulations can be found at M21-1MR, V, iii, 1, I

**S. Countable Income**

1. Countable Income is determined by deducting the following Unreimbursed, Recurring medical expenses, from monthly income:
  - a) Health Insurance Premiums (including Medicare)
  - b) Prescription Co-Pays
  - c) In-Home Care
    - (1) Provided by licensed health professionals (no rating necessary)

- (2) Provided by Family Members (with Housebound or Aid & Attendance rating)
- d) Assisted Living Facility (with Housebound or Aid & Attendance rating)
- e) Nursing Home fees
- f) What about Independent Living Facilities? See Fast Letter 12-23 (a copy of which is attached), which provides clarification regarding:
  - (1) what constitutes “custodial care” for purposes of determining UMEs;
  - (2) when the cost of room and board in a residential facility is considered a UME; and
  - (3) when the cost of assistance with Instrumental Activities of Daily Living (IADL) constitute a UME.
- 2. Unreimbursed Medical Expenses (UME)
  - a) Think “out of pocket”
  - b) Expenses that were or will be paid by veteran or spouse
  - c) Expenses that were or will be paid for dependent household members
  - d) Must exceed 5% of MAPR (think of this as 5% deductible)
  - e) Applicable Regulations can be found at 38 CFR §§ 3.262 and 3.272
- 3. Projected UME
  - a) Future or projected UME (those to be paid after claim date) must be clear and reasonable
    - (1) Nursing home costs
    - (2) Assisted living costs
    - (3) In-home care costs

**T. Estimating the Pension Benefit**

Family Income	2400
<u>Unreimbursed Medical Expenses</u>	<u>- 3300</u>
Net Income	(900)
Monthly MAPR	2019
<u>Less Countable Income</u>	<u>- 0</u>
Pension Benefit	2019

**U. Additional Benefits of Pension**

- 1. If you qualify for pension, you get VA health care automatically, despite income
- 2. Priority 5 Veterans receive free: Inpatient Care, Outpatient Care and Long Term Care. They Have No Co-Payments for Medical Services at VA facilities
- 3. May qualify for a HISA (Home Improvement) grant
- 4. Prescription drug benefits through VA health care system

**V. Aid & Attendance Benefits Can Pay For:**

- 1. In-Home Care

- a) Including care provided by children
- b) Care plan prescribed by MD, DO, RN, LPN, or Licensed Physical Therapist (38 CFR § 3.352)
- 2. Assisted Living Facility care
- 3. Nursing Home Care

#### **W. Miscellaneous Financial Considerations**

- 1. There are currently no “Lookback Periods” or “Transfer of Asset” Penalties for Aid & Attendance as there are for Medicaid. However, bills have been introduced in Congress that would implement a Lookback Period and Transfer of Asset Penalties similar to Medicaid.
- 2. Although there are currently no “Transfer of Asset” Penalties, if asset transfers are reviewed and the VA determines that an award was based on inaccurate or incomplete information (e.g. VA determines that grantor didn’t relinquish sufficient control), the VA can stop the award from date of inception and require return of benefits
- 3. Excess Resources can be spent down
  - a) Pay down mortgage and other debts
  - b) Pay for goods and services
    - (1) New car
    - (2) Pre-Needs Funeral Contracts
    - (3) Care Agreements
  - c) Transfer assets to appropriate Trusts
    - (1) Special Needs Trusts
    - (2) Irrevocable Trust
    - (3) Veteran and Spouse should NOT be beneficiaries
  - d) Purchase Medicaid Qualifying Annuity
    - (1) Good option if there is negative Net Income
    - (2) Will limit Disability Pension benefit if there is positive Net Income

#### **X. Irrevocable Trust Issues to Consider**

- 1. Income Distribution - Mandatory vs. discretionary
- 2. Limited Power of Appointment
  - a) No gift tax caused by initial transfer of assets
  - b) Gift tax returns dependent upon actual distributions from trust creating completed gifts
  - c) All assets in trust are part of veteran’s estate
  - d) Testamentary LPOA allows veteran to change remainder beneficiaries
- 3. Potential for adjusted basis (up or down) at Grantor’s death
- 4. Potential capital gains exclusion on sale of home
  - a) Grantor Trust only as to capital gains on sale of principal residence
  - b) Capital gain from sale of residence shows up on veteran’s tax return, but it isn’t income for eligibility purposes

5. Income Only Trust
  - a) OK if veteran's income is low enough
  - b) BUT - Might not satisfy relinquishment requirement for VA purposes
  - c) BUT – OGC Opinions have been largely negative regarding use of trusts that in any way benefit the veteran and/or spouse

#### **Y. Asset Transfer Issues**

1. Applicable Regulations can be found at 38 CFR § 3.276(b)
2. A gift to a household member is not a transfer of assets
3. A gift to a non-household member only reduces net worth if it is clear that the grantor has relinquished all rights of ownership, including the right to control the property
4. A sale of property must be for value, or it is a gift
5. Always consider MEDICAID consequences
6. Transfer to a caretaker child WON'T work (same household)
7. Retained Life Estate WON'T work for non-residence (insufficient relinquishment of control)
8. Grantor Trust WON'T work unless Grantor relinquishes ALL control
9. Limited Power of Appointment WILL work

#### **Z. Is It Worth It?**

1. Run the Numbers
  - a) Assume veteran and spouse would qualify for maximum aid and attendance benefit of \$2,019/month, tax-free
  - b) Assume they have to transfer \$200,000 of excess resources generating \$1000/month taxable income/dividends
  - c) Net Positive Benefit of over \$1000/month

### **III. Effect of Medicaid Eligibility on Disability Pension**

**A. After third calendar month of Medicaid eligibility, VA benefit reduced to \$90 per month, unless veteran has dependents or spouse with sufficient UME**

**B. Represents a “Material Change” that must be reported to the VA**

**C. SSI States vs. 209(b) States**

1. SSI States
  - a) Treat VA benefits as income to beneficiary
  - b) Separates dependent portion and attributes to dependent only
2. 209(b) States
  - a) Virginia Medicaid counts the total pension benefit in excess of \$90/month as income for patient pay when the patient is:

(1) a veteran who does not have a spouse or dependent child, or

- (2) a deceased veteran's surviving spouse who does not have a dependent child
- b) Virginia Medicaid does NOT count any VA pension benefits when the patient is:
  - (1) a veteran who has a spouse or dependent child, or
  - (2) a deceased veteran's surviving spouse who has a dependent child
- c) Applicable Policy can be found at M1470.100 B.1.

#### **IV. Miscellaneous Issues When Planning for VA Disability Pension**

##### **A. Necessary documents:**

1. Discharge/Separation Papers (DD-214)
2. Marriage Certificate & Death Certificate (for surviving spouses)
3. Current Social Security benefit statement and proof of income from other sources (e.g. pension, retirement, annuity, interest, dividends)
4. Current statements for all available financial accounts
5. Court papers verifying appointment as guardian or conservator (if applicant is incapacitated, it will be necessary to have a fiduciary appointed)
6. Proof of Out-of-Pocket Medical Expenses
7. Physician statement: current diagnosis, medical status, prognosis, name and address, ability to care for self, ability to travel unattended, etc.
8. Bank information and Voided Check for Direct Deposit
9. List of hospitals and doctors visited in the past year
10. VA Form 21-526 (Veteran's Application for Benefits)
11. VA Form 21-534 (Surviving Spouse's Application for Benefits)

##### **B. How Long Will it Take?**

1. Expect 6+ months for your application to be processed (compared to 45 days for typical Medicaid application)
2. Complicated financial situations and incorrect or incomplete documentation can cause further delay
3. Benefits are retroactive to the month after application (compared to potential retroactive benefits for the three months prior to Medicaid application)

##### **C. Incapacity Issues**

1. VA has sole authority to determine Incompetency
2. If beneficiary is rated incompetent, VA will appoint a fiduciary
3. Presumption is in favor of competency
4. Have veteran sign documents if physically able
5. Applicable Regulations can be found at 38 CFR § 3.353

##### **D. Communicating with the VA**

1. It's better to call than write

- a) Written communication can actually cause a lengthy suspense of the processing of the claim
2. Use their terms, and cite to the M21-1MR

#### **E. Information Necessary for a Successful Claim**

1. Substantially Complete Claim will include:
  - a) Claimant's name
  - b) Claimant's relationship to veteran
  - c) Sufficient service information to verify service
  - d) The benefit sought
  - e) Statement of income and net worth
  - f) Sufficient medical information to show disability
  - g) Signature of claimant
2. Applicable Regulations can be found at M21-1MR, I, 1, A

#### **F. Formal vs. Informal Claims**

1. Informal claims can be filed to preserve eligibility
  - a) File the appropriate application with as much as possible
  - b) Information necessary for rating and/or substantiating UMEs can be filed after the basic claim
2. Formal claims include all necessary information for VA to rate the claim and process the application without delay
3. Applicable Regulations can be found at 38 CFR § 3.155
4. Applications can now be filed online at <http://vabenefits.vba.va.gov/vonapp/main.asp>

#### **G. Eligibility Verification Report**

1. Pension benefits are subject to annual recertification (similar to Medicaid redetermination), on a calendar year basis
2. VA adjusts benefits for the next year, based on what actually happened the preceding year

#### **H. Applicable Laws & Regulations**

1. Title 38, United States Code
2. Title 38, Code of Federal Regulations
3. VA Adjudication Procedure Manual M21-1 available at [www.warms.vba.va.gov/M21\\_1.html](http://www.warms.vba.va.gov/M21_1.html)
4. VA Adjudication Procedure Manual M21-1MR available at [www.warms.vba.va.gov/M21\\_1MR.html#biv](http://www.warms.vba.va.gov/M21_1MR.html#biv)

#### **I. State & County Resources**

1. List of State VA Departments
  - a) [www.nasdva.com](http://www.nasdva.com)
2. National Association of County Veteran Service Officers, Inc.
  - a) [www.nacvso.org](http://www.nacvso.org)

#### **J. Who Can Assist With Claim?**

1. State/county veterans offices
2. Recognized Veterans Service Organizations (VSO)
3. Accredited agents – “No individual may assist claimants in the preparation, presentation, and prosecution of claims for VA benefits as an agent or attorney unless he or she has first been accredited by VA for such purpose.” 38 CFR §§ 14.629 (b)(1).
4. Agents for one claim
5. Attorneys – must apply to become accredited agent and satisfy CLE requirements
  - a) 3 hours of qualifying CLE needed within 12 months of accreditation
  - b) 3 additional hours of qualifying CLE needed within 3 years of initial accreditation, and 3 hours every two years thereafter
  - c) compliance must be certified in writing to the Office of General Counsel
6. Applicable Regulations can be found at 38 CFR §§ 14.628 to 14.631
7. Beware of financial advisors and insurance agents going to ALFs and giving bad advice and wrong information.

**K. Legal Fees**

1. You can’t charge for filing a claim
2. You can charge for pre-filing consultations
3. You can charge for any long-term care planning, asset protection planning or estate planning that you would normally charge for
4. Applicable Regulations can be found at 38 CFR § 20.609(c)(1)(i)

**L. Demographic Considerations**

War Veterans Age 65 & Older & Survivors as a Percent of All People Over 65—2005

Total Living, Age 65 & Older Veterans of Korea, WWII, Vietnam and Gulf War	7,091,000
Surviving Spouses & Other Dependents of Deceased War Veterans (estimated)	4,369,000
Total Elderly Veterans & Surviving Dependents, Potential Pension Beneficiaries	11,460,000
US Population Over 65	34,761,000
Potential Elderly, and Survivor Beneficiaries as a % of Total US Population Over 65	33.0%
Living Veterans Receiving Pension	336,000
Eligible Dependents of Deceased Veterans Receiving Pension	207,000
Total War Veteran Pension Beneficiaries	543,000
% of Elderly & Survivor Potential Beneficiaries Actually Receiving Pension	4.7%

**M. What if your client has been told they don't qualify?**

1. Most eligible veterans and surviving spouses DON'T KNOW THEY'RE ENTITLED!
2. If they don't think they will qualify, make sure they understand the significance of UMEs and net income.
3. Don't assume that VA benefit representatives know about the program or have complete or accurate understanding of the program.

# The Benefits Available

(Rates Effective 12/1/2011)

Table 1:  
Special Monthly Pension Rates  
Paid to veterans age 65 or older OR  
Permanently and Totally Disabled

Situation	Maximum Annual Pension Rate*	Maximum Monthly Check
Permanently and totally disabled veteran	\$12,256	\$1,021
With one dependent	\$16,051	\$1,337
Permanently and totally disabled and also housebound	\$14,978	\$1,248
With one dependent	\$18,773	\$1,564
Permanently and totally disabled and in need of regular aid and attendance	\$20,447	\$1,703
With one dependent	\$24,239	\$2,019
Increase for each additional dependent child	\$2,093	\$174 additional

\* To be deducted, medical expenses must exceed 5% of MAPR

Table 2:  
Death Pension Rates  
Paid to Veteran's Surviving Spouse

Situation	Maximum Annual Pension Rate*	Maximum Monthly Check
Surviving spouse	\$8,219	\$684
With one dependent child	\$10,759	\$896
Surviving spouse is permanently housebound	\$10,046	\$837
With one dependent child	\$12,582	\$1,048
Surviving spouse is in need of "regular aid and attendance"	\$13,138	\$1,094
With one dependent child	\$15,673	\$1,306
For each additional dependent child	\$2,093	\$174 additional
Pension for each surviving child	\$2,093	\$174 additional

\* To be deducted, medical expenses must exceed 5% of MAPR