Important Understandings About VA Disabilities Benefits

By Marcelle C. Quist

All veterans need “Service Connected Conditions with Disability” to receive VA benefits of financial payments and/or medical treatment. 38 CFR Part 4 supplies the bulk of authority for the determination and rating of veterans’ disabilities. However, since the law is about to reach the century mark (it was first created after WWI), its arcane language and foreign concepts often create confusions in the determination of benefits for veterans. It is my intention to demystify the issues.

Service

“Service” to the VA translates to an honorable “period of service.” However, this period does not always require the general minimum of 2 years for VA benefits to be awarded. Often medical discharge or “other periods of service” can affect the veteran’s entitlement to disability benefits. The veteran should always ask the VA for a determination of service, even when the veteran served less than a 2-year period. In addition, while dishonorable service usually cancels VA disability rights, other levels of discharge can also change a veteran’s rights to VA benefits. Again, it is always important to request a determination from the VA for other than honorable discharges that might affect a veteran’s ability to receive benefits. It is imperative to note that all veterans can apply for reinstatement of their benefits, even when they were not honorably discharged.

Connection

“Connection” to service requires a link between the medical condition and the service. In-service disease, illness, injury, or accident indicates a probable service connection but does not always assure benefits to veterans. In addition, post-service medical changes can result in VA service connection with a medical professional determination that the condition is a direct result of the service-connected medical event. However, the simple occurrence of an injury or illness in service is not the only determination of present or future service connection as other intervening events could affect the connection to service. For example, the mere diagnosis of a condition in service may not produce benefits if the condition is determined to be a strictly inherited condition that was not aggravated by service.

Condition

Service-connected “condition” requires that the condition be diagnosed by a medical provider - most often by a doctor. While there are tiny exceptions to every rule and determination, veterans are best served by getting a doctor diagnosis of the claimed condition. Self-reporting conditions is ineffective and often denied. Also, it is important to note that it is not the role or duty of the VA to discover and diagnosis a service-connected condition. Rather, it is the role and duty of the veteran to CLAIM the service connected condition. By its nature, that places the strongest responsibility on the veteran to claim existing documented conditions.

Disability

All VA awards of benefits require the determination of a “disability.” It is never just good enough to have a service-connected condition to receive VA benefits. VA benefits are awarded for service-connected conditions that cause a working disability. In the Congressional promulgated VA Schedule for Rating Disabilities (VASRD), Congress has defined all veterans’ disabilities according to written code. However, the code, first created in 1919 and revised little since 1945, is old and arcane and illogical to today’s society. Until the unlikely event of modernization by Congress, the VA is bound to only apply the principles of the VASRD required “functional loss,” which is defined in 38 CFR § 4.40.

Functional loss.

Disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. It is essential that the examination on which ratings are based adequately portray the anatomical damage, and the functional loss, with respect to all these elements. The functional loss may be due to absence of part, or all, of the necessary bones, joints and muscles, or associated structures, or to deformity, adhesions, defective innervation, or other pathology, or it may be due to pain, supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part which becomes painful on use must be regarded as seriously disabled. A little used part of the musculoskeletal system may be expected to show evidence of disuse, either through atrophy, the condition of the skin, absence of normal callosity or the like. 38 CFR 4.10.

Without functional loss, there can be no determination that the veteran is entitled to a benefit because the service-connected condition has no effect on the veteran’s ability to work. As a work-based determination, veterans’ personal lives are rarely considered. In addition, the amount and type of current, future, or past medical treatment or the number of conditions or diagnoses affecting one area is also rarely considered. The VASRD is complex and confusing and is best interpreted by experts in the field.

Permanent and Temporary Ratings

Generally, all VA awarded ratings are permanent. The one clear exception is the application of 38 CFR § 4.129 for mental health conditions like PTSD that are expected to change over time. Additionally, the VA can also award temporary ratings for disabilities expected to improve, such as post-surgery conditions or “unstable” conditions like cancer.

Health Care Benefits

It is little known that a 50% or greater disability rating automatically places the veteran into VA treatment Group 1. Group 1 grants broad
medical care to veterans for their service and non-service connected conditions, therefore covering almost all of their medical needs at little or no cost.

**Relations to other Disability Benefits**

VA disability ratings are generally not related to any other US government disability benefits like Social Security or state programs. However, many governments and state agencies give additional benefits to veterans with VA ratings. Also, VA awards are not a determination of disability — rather they are a disability rating to determine amount of benefits. VA benefits do not restrict employment and are generally NOT awarded based on financial need. The only exception to this rule is the special determination by the VA for “IU” (Individual Unemployability) which awards disability payments at the 100% value level for a veteran without a 100% disability rating. There is a separate and complicated formula for this determination defined at 38 CFR 4.16 through 4.18.

In my experience, the VA is the best direct source for information and assistance in VA matters. While exceptions will always make the headlines, most VA employees are veterans who embrace their opportunity to assist other veterans. I encourage everyone to seek advice from the VA for their disability needs before seeking outside assistance as it is the VA who truly understand the process.

Upon law school graduation 29 years ago, Marcie Quist clerked for a local District Court Judge before entered private practice in Montana for nine years, mostly in the areas of criminal defense and family law. Upon moving to North Carolina in 1998, Marcie worked for Legal Aid of North Carolina for 10 years before joining the MEB/IDES legal team for the Department of the Army in 2008. In her role as Soldier’s Medical Evaluation Board Counsel at the center of the military universe of Fort Bragg, she believes the most valuable asset of her practice is educating soldiers on the IDES processes and their potential benefits from the Army and VA disability processes.

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### VA Benefits While Incarcerated

**By Tod M. Leaven**

The fact that a veteran has not been a very good boy or good girl since he or she has left the military does not take away the fact that the veteran has served our Country with honor. However, the fact that the veteran ended up incarcerated does mean that the federal, state, or municipal government will be footing the bill for a lot of the veteran’s care and therefore the VA is relieved of some of its duty to provide. Contrary to popular belief, veterans still can apply for and receive VA benefits while incarcerated. What follows is a summary of some of the benefits a veteran may receive and the special rules surrounding them. Because there is a reduction of benefits to some incarcerated veterans and some veterans may be tempted to avoid incarceration by becoming a fugitive, Congress has enacted strict penalties for veterans who the VA designates as fugitive felons.

Disability Compensation and DIC (Dependency and Indemnity Compensation) are significantly limited while in the big house under certain circumstances. 38 U.S.C. § 5313(a) states that

(1) …any person who is entitled to compensation or to dependency and indemnity compensation and who is incarcerated in a Federal, State, local, or other penal institution or correctional facility for a period in excess of sixty days for conviction of a felony shall not be paid such compensation or dependency and indemnity compensation, for the period beginning on the sixty-first day of such incarceration and ending on the day such incarceration ends, in an amount that exceeds—

(A) in the case of a veteran with a service-connected disability rated at 20 percent or more, the rate of compensation payable under section 1114(a) of this title; or

(B) in the case of a veteran with a service-connected disability not rated at 20 percent or more in the case of a surviving spouse, parent, or child, one-half of the rate of compensation payable under section 1114(a) of this title.

The three elements here are that (1) the veteran must be incarcerated, (2) the incarceration must be due to a felony conviction, and (3) he or she must be incarcerated for more than sixty (60) days. If all three of these elements are met, the disability compensation or DIC payments will be reduced to the 10% rate. It is important to note that the disability rating will not be reduced. What is reduced is just the payment received by the veteran. The VA defines the term felony as “any offense punishable by death or imprisonment for a term exceeding 1 year, unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction.” 38 C.F.R. § 3.665(b). This means that even if a state calls a specific crime a felony, it will not trigger this reduction of compensation or DIC pay unless it meets this specific VA definition. The VA defines the sixty-first (61st) day as exactly sixty-one (61) days after the judge or jury pronounces guilt, not sixty-one (61) days after the date of sentencing. See *Mulder v. Gibson*, 27 Vet. App. 10, 18 (2014); VA Gen. Coun. Prec. 3-2005 (Feb. 23, 2005).

If the veteran has a family or dependents, all or a portion of the remaining benefits not paid out to the veteran may be apportioned pursuant to 38 U.S.C. § 5313(b). The VA is required to inform the veteran that his or her dependents’ rights to an apportionment of the veteran’s benefits while he or she is incarcerated. The VA is also supposed to notify the veteran’s dependents if the VA is aware of their existence and can obtain their addresses. This apportionment will be paid out to dependents “on the basis of individual need.” 38 C.F.R. § 3.665(e)(1). In determining need, the VA will weigh the total amount of the veteran’s compensation available to be apportioned, the dependent’s personal income and living expenses, the incomes...