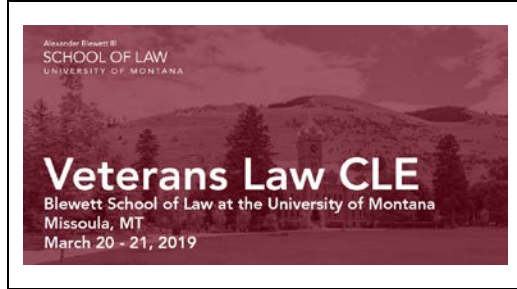


Slide 1



Slide 2

Credits

- Slides modified from presentation by:
 - The Honorable Michael Allen, U.S. Court of Appeals for Veterans Claims
 - Professor Stacy-Rae Simcox, Director, Veterans Advocacy Clinic, Veterans Law Institute, Stetson University College of Law

Slide 3

Panelists

- Chief Judge Robert Davis, U.S. Court of Appeals for Veterans Claims
- Amy Odom, President, USCAVC Bar Association
- Ken Walsh, Dep't Veterans Affairs Office of General Counsel
- Prof. Hillary Wandler, ABIII School of Law

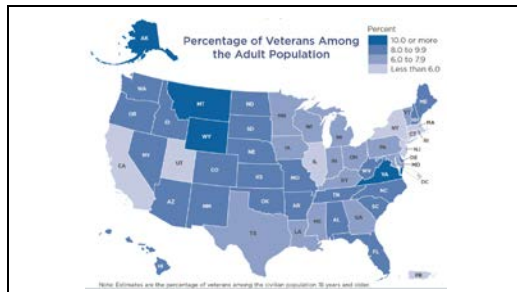
Slide 4

Veteran Population

Over 19 million
living veterans in USA

4.8 million
veterans receiving disability compensation

Slide 5



Slide 6

Wait Time for Initial Decision (from va.gov)

How long does it take VA to make a decision?

125.7 days

Average number of days to complete disability-related claims in February 2019

The amount of time it takes to review your claim depends on:

- The type of claim you filed
- How many injuries or disabilities you claimed and how complex they are
- How long it takes us to collect the evidence needed to decide your claim

Slide 7

Organization of VA:
Administrative System & Judicial Review

Slide 8

Department of Veterans Affairs

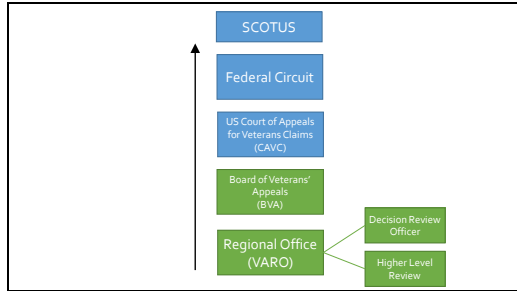
- Executive Branch/Cabinet level agency
- Three main components
 - Veterans Health Administration (VAMC)
 - Veterans Benefits Administration
 - Memorial Affairs/National Cemeteries

Slide 9

Department of Veterans Affairs

- Agency of original jurisdiction for claims = VA Regional Office
 - Known as the "RO" or "VARO"
 - 56 VAROs
- At the VA a "No" is almost never an absolute "No"
 - Different members of the agency can make different decisions and overturn a previous decision
- Claimant does not carry the burden alone

Slide 10



Slide 11

VA Benefits

- Medical care (VHA)
- Home loan guarantees
- Educational assistance
- Survivor benefits
- Pension for indigent wartime veterans
- Disability compensation
 - Monthly nontaxable check
 - For current disabilities connected to the veteran's military service

Slide 12

**Representation Before VA:
Accreditation and Ethics**

38 U.S.C. Ch. 59

Slide 13

Representation before VA: Accreditation

- Two steps to qualify for representing Veterans before the VA:
 - Accreditation by filing an application with the OGC
 - 3-hour CLE covering all of the topics required within 1 year
- Continuing Mandatory CLE requirement every two years

Slide 14

Representation before VA: Authorization

- A power of attorney authorizing an individual or veterans service organization is generally accomplished by filing VA Form 21-22a.
- Staff, paralegals, interns, etc. may "assist in the preparation, presentation, or prosecution of a claim."
 - Claimant must authorize them by name and clearly authorize them to have access to applicable VA records to give staff the ability to communicate about a claim.

Slide 15

Representation before VA: Scope

- Power of attorney extends to all aspects of the claimants entitlement to benefits and remains in effect until specifically revoked.
 - Representatives can limit the scope to a particular claim.
- Withdrawal. Different rules depending on status of claim (i.e. pre-appeal v. post appeal)

Slide 16

Representation before VA: VA Duties

- Pro-claimant nature of the VA imposes upon the VA a "duty to assist" claimants.
- Duty to assist has been clarified to include:
 - Duty to notify claimant of information necessary to complete application
 - Duty to consider all legal theories upon which the claim could be granted
 - Duty to obtain evidence

Slide 17

Representation before VA: Conduct

- Attorneys must adhere to applicable professional and ethical standards governing the practice of law.
- The VA can terminate accreditation if a representative knowingly submits a frivolous claim, issue or argument.

Slide 18

**Representation Before VA:
Fact Investigation**

Obtaining Military and Medical Records for a Veteran

Slide 19

Obtaining Records



Slide 20

Representation before VA: Obtaining Records

- Relevant records include:
 - Official Military Personnel File (OMPF)
 - Medical records (inpatient/outpatient)
 - VA Claims File

Slide 21

Representation before VA: Obtaining Records

- OMPF and active duty inpatient and outpatient records may be obtained by filing an SF-180, Request Pertaining to Military Records.
 - Type of record
 - Branch of service
 - Date of discharge
- All Branches have different places they are holding records depending on year of discharge

Slide 22

Representation before VA: Obtaining Records

- VA Claims File ("C-File")
 - Obtained by a FOIA request with the appropriate Regional Office
- Should have
 - copies of all correspondence between the VA and Claimant,
 - all records obtained by the VA,
 - and all medical evaluations of the Veteran conducted on behalf of the VA

Slide 23

Representation before VA:
Who is an eligible "veteran?"

Slide 24

Who is a Veteran? Four Requirements

1. Requirement of Veteran Status
2. Active Military, Naval or Air Service Requirement
3. Discharge Requirement
4. Length of Service Requirement

Slide 25

Basic Eligibility for Benefits: Veteran Status

- Who is a veteran?
 - Served in the active military, naval, or air service, and
 - Discharged or released therefrom under conditions other than dishonorable

Slide 26

Basic Eligibility for Benefits: Active Service

- Active duty:
 - Active troops
 - Reservists/National Guard:
 - Any period of active duty for training during which the individual was disabled or died from disease or injury incurred or aggravated in line or duty (Title 38 status)


Slide 27

Basic Eligibility for Benefits: Discharges

- To be eligible for benefits, a Veteran must have a discharge under: "other than dishonorable conditions"

Slide 28

What is a Discharge?



Slide 29

What is a Discharge?

- The end of Active Service
 - Includes:
 - Active Duty
 - Active Training
 - Note: National Guard service only counts when it is federal service!
 - Service while on duty for your state will not apply

Slide 30

How Does a Servicemember Prove Discharge?

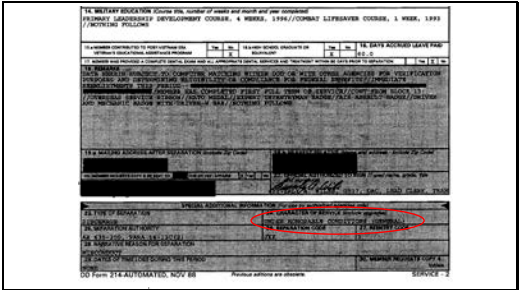
- DD-214
 - "Certificate of Release or Discharge from Active Duty"
 - Began to issue in 1950
 - 1940's-1950 = "WD AGO" (War Department Adjutant General) Forms and the NAVPERS (Naval Personnel) discharge documents
 - Short Form vs Long Form

Slide 31

The DD-214

- What's on it?
 - Biographical information
 - Verifies complete span of time served on active duty
 - Lists MOS (Military Occupational Specialty)
 - Overseas service
 - Awards
 - Rank
 - Character of Discharge
 - Reason for Discharge

Slide 32



Slide 33

How Many Discharges Can One Servicemember Have?

- Officers
 - An officer receives a commission from the POTUS to serve.
 - Commissions are indefinite
 - Commissions come with an obligation of service
 - Currently, officers are not automatically discharged at the end of the obligation
 - DD-214 received after separation/discharge/retirement

Slide 34

How Many Discharges Can One Servicemember Have?

- Enlisted
 - Sign a contract for a specific period of obligation
 - ETS ("End of Term of Service")= new contract ("Re-enlistment")
 - For each ETS = new DD-214

Slide 35

How Many Discharges Can One Servicemember Have?

- Reservists
 - Get a DD-214 for each period of active duty (Title 10 status)

Slide 36

Character of Discharge: Administrative

- Honorable
 - Normal
 - Entitled to full benefits
- General
 - Administrative separation
- Other Than Honorable
 - Administrative separation
 - More procedural due process

Slide 37

Character of Discharge: Punitive

- Bad Conduct Discharge (BCD)
 - Punitive discharge
 - Administered by General or Special Courts-Martial
- Dishonorable Discharge (DD)
 - (Dismissal for officers)
 - Punitive discharge
 - Administered by General Courts-Martial
- VA's Eligibility Standard: "other than dishonorable discharge"

Slide 38

VA Benefits Eligibility: Discharges

Automatic Eligibility	Not Automatically Eligible
<ul style="list-style-type: none">• Honorable discharge• General discharge	<ul style="list-style-type: none">• Other than honorable (case-by-case)• Bad conduct discharge• Dishonorable discharge

Slide 39

Basic Eligibility for Benefits:
Statutory Bars to Benefits

- Regardless of discharge characterization
 - Separation as a conscientious objector who refused orders
 - Release by reason of sentence of general court martial
 - Officer resigning for good of service
 - Deserter
 - Alien sought discharge in time of hostility
 - AWOL for 180 days (unless there are compelling circumstances to warrant the prolonged absence)

Slide 40

Basic Eligibility for Benefits:
Upgraded Discharge

- Upgrade by Board for Correction of Military Records (BCMR) to Honorable or General:
 - Allows the benefits normally proscribed under "issued under dishonorable conditions" clause
 - Sets aside statutory bars to benefits
- Upgrade by Discharge Review Board (DRB) to Honorable or General
 - Allows the benefits normally proscribed under "issued under dishonorable conditions" clause
 - BUT not statutory bars to benefits

Slide 41

Basic Eligibility for Benefits:
Length of Service

- Prior to 1980, no minimum length of service requirement
- Since 1980
 - NO length of service requirement for service - connected disability compensation or death benefits
 - Some length of service requirement of pensions and health care

Slide 42

VA BENEFITS:
Pension & Compensation

Introduction to Benefits Provided by Dep't of Veterans Affairs

Slide 43

Pension vs. Compensation: The Basics

Service-connected disability compensation	Non-service-connected disability pension
<ul style="list-style-type: none">• Not needs-based• Need to show:<ul style="list-style-type: none">• Eligibility• Current Disability• Nexus	<ul style="list-style-type: none">• Needs-based• Need to show:<ul style="list-style-type: none">• Low income• Wartime Service• Total and permanent disability

Slide 44

Establishing Entitlement to Disability Compensation

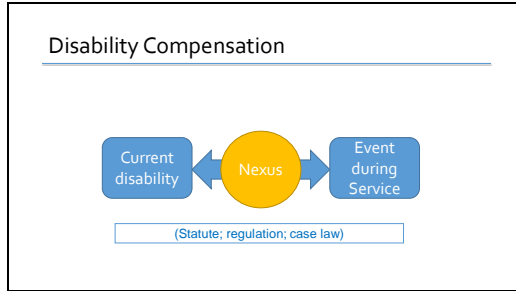
Service-connected disability benefits

Slide 45

Disability Compensation

- To be awarded disability compensation, like other benefits, a claimant must show both:
 - Eligibility for the benefit, and
 - Entitlement to the benefit.

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Slide 47

Disability Compensation: 1. Medical Diagnosis

- Made by a medical professional or some other person with specialized training that qualifies them to give medical diagnosis
- Lay evidence will not normally satisfy

Slide 48

Disability Compensation: 1. Medical Diagnosis

- Must have current disability or current disabling residuals
- May be awarded disability compensation if resolves prior to adjudication

Slide 49

Disability Compensation: 2. In-service Event

- Does not have to be directly related to military duties if happened between entry and discharge
- STANDARD: Evidence in the record demonstrates that it is as likely as not that there was an in-service aggravation of disease/injury
- How do you prove this?

Slide 50

Disability Compensation: 3. Nexus

- Direct causative link between current disability and in-service event
- Aggravation of pre-existing condition
- Presumptive service connection
- Secondary service connection
- Consequence of injury by VA health care

Slide 51

Disability Compensation: 3. Nexus (cont'd)

- Medical evidence of nexus almost always required
 - (Biggest denial basis)
- Competent medical evidence: Evidence provided by a person qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.
- Does not have to be a medical doctor.

Slide 52

Disability Compensation: 3. Nexus (cont'd)

- Satisfying the Nexus requirement:
 - Letter or statement from physician expressly connecting disability to occurrence, aggravation, or event
 - Standard of proof: "As Likely As Not"


Slide 53

Disability Compensation: 3. Nexus (cont'd)

- Standard of proof:
 - "Benefit of the doubt" v. "Reasonable doubt."
 - When reasonable doubt arises regarding service origin, such doubt will be resolved in favor of the claimant.
 - Reasonable doubt – one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim.

Slide 54

Sometimes, the requirements for compensation are hard to prove, so VA created some "short-cuts" called **presumptions**.



Slide 55

Presumptions

- Agent Orange
- Gulf War Syndrome
- Other diseases and situations

Slide 56

Presumptions: Agent Orange

- Presumption applies if you:
 - Served in Vietnam
 - Between Jan. 9, 1962 and May 7, 1975
 - Set foot on land or inland waterways
 - Have one of a list of specified diseases
 - For some diseases, got the disease within 1 year of serving
 - Do NOT need to prove exposure to Agent Orange

Slide 57

Presumptions: Agent Orange

- List of diseases includes:
 - Many types of cancer
 - Lung, prostate, myeloma, leukemia
 - Hodgkins Disease
 - Non-Hodgkins Lymphoma
 - Type 2 Diabetes
 - Many others
 - See <http://www.va.gov/agentorange>

Slide 58

Presumptions: Gulf War Syndrome

- Presumption applies if you:
 - Qualify as a Persian Gulf Veteran
 - Any time after Aug. 2, 1990
 - Served in Iraq, Kuwait, Saudi Arabia, Bahrain, Qatar, UAE, Oman, Gulf of Aden, Gulf of Oman, Persian Gulf, Arabian Sea, Red Sea



Slide 59

Presumptions: Gulf War Syndrome

- Presumption applies if you:
 - Have certain symptoms or conditions
 - Includes any undiagnosed or "medically unexplained" illness
 - Examples: Chronic Fatigue Syndrome, Fibromyalgia, Irritable Bowel Syndrome

Slide 60

Presumptions: For All Veterans

- Tropical Diseases
 - Within 1 year of service
- Tuberculosis
 - Within 3 years after service
- Multiple Sclerosis
 - Within 7 years after service

Slide 61

Presumptions: For Certain Veterans

- Prisoners of War
- Veterans injured in combat
 - Note: If records show you were in combat, do NOT have to prove you were injured
- Veterans exposed to radiation

Slide 62

Disability Compensation: Ratings

- Disability refers to the "average impairment in earning capacity" resulting from the rated condition.
- VA created a schedule of ratings providing for degrees of impairment evaluated from 0 to 100 percent in increments of 10 percent.

Slide 63

Disability Compensation: Ratings

- Zero-percent ratings
- Combined ratings. See "Combined Ratings Table," 38 U.S.C.S. § 1155


Slide 64

Entitlement to Pension Benefits
Needs-based non-service-connected disability income

Slide 65

Pension: Low Income

- Countable income does not exceed Maximum Annual Pension Rate
 - What is veteran's net worth?
 - What are the incomes of the veteran, veteran's spouse, and the veteran's dependent children?
- Amount of pension increases with each dependent
- Need is reassessed annually
- Can be for a veteran or the spouse of a deceased veteran.



Slide 66

Surviving Spouse

- Person of any sex who was spouse of veteran at time of veteran's death and lived with veteran continuously from date of marriage to date of veteran's death.
- Surviving Spouse MAY also have to prove one or more of the following:
 1. Married at least one year prior to the veteran's death.
 2. Continuous cohabitation with the veteran during the marriage; and
 3. No remarriage after the Veteran's death.

Slide 67

Non-Service Connected Pension Requirements

(1) wartime service that ultimately results in a discharge under other than dishonorable conditions,
(2) permanent and total disability, and
(3) demonstrated need. The VA determines need by calculating the income and net worth of the claimant.

- Periods of War:
 - 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.
 - Persian Gulf War: August 2, 1990 – date to be prescribed by Presidential proclamation.

Slide 68

Requirement: Wartime Service

- Discharged under conditions other than dishonorable
- Minimum period of service (if enlisted after Sept. 8, 1980 24 mos or the full period for which you called up.)
- PLUS one of the following:
 - Total of 90 days during one or more periods of war
 - 90 or more consecutive days with one day during a period of war
 - At least one day of wartime service resulting in discharge for service-connected disability

Slide 69

Requirement: Permanent and Total Disability

- Permanent = Unlikely veteran's disability will get better over time
- Total = 100% rating
 - Ineligible if veteran has substantial gainful employment
- Veterans 65+ are presumed to be permanently and totally disabled
- Vets in nursing homes (SNFs) qualify/Not ALF
- Disability does NOT have to be service-connected!

Slide 70

The Requirement of Need

- Needs-based program.
- In order to establish entitlement to improved pension, the VA considers the claimant's net worth as well as his or her income.
- Need does not refer to physical disability.

Slide 71

Income Requirement

- If countable income exceeds the maximum annual pension rate (MAPR), a claim for improved pension will be denied.*
 - MAPR for Veteran 2018: \$13,166 [no dependents]
 - MAPR for Spouse 2018: \$8,830 [no dependents]

Slide 72

Exclusions and Deductions from Income for Improved Pension Purposes

- Sources of income excluded and deductions from income for VA improved pension purposes include*:
 - 1.) Welfare
 - 2.) Fire insurance proceeds
 - 3.) Profit from sale of property
 - 4.) Funds in joint accounts acquired by death
 - 5.) Medical Expenses
 - 6.) Interest accrued on retirement annuity accounts
 - 7.) Expenses of last illness and burials
 - 8.) Educational Expenses
- * 38 U.S.C.S. § 501(a); 38 C.F.R. § 3.272

Slide 73

The Formula Used to Calculate Improved Pension

- Simple Income Example:
 - MAPR is \$13,166 a year
 - Veteran income is \$10,000
 - VA pension will be \$3,166 ($\$13,166 - \$10,000 = \$3,166$) paid in monthly installments
- \$263.83/month

Slide 74

The Formula Used to Calculate Improved Pension
Deducting Medical Expenses

- A portion of your unreimbursed medical expenses (what you paid out of pocket after medical insurance pays) may reduce your countable income. If your medical expenses for a year are \$8,000 and your medical insurance pays \$6,000 of that, your unreimbursed medical expense is \$2,000.
- That portion of your unreimbursed medical expenses (\$2,000 in the example above) which is more than 5% of the maximum rate of pension, or \$500 in this example ($\$10,000 \times .05 = \645), may be deducted from your total combined income which then increases the amount VA will pay to you.

Slide 75

The Formula Used to Calculate Improved Pension
Deducting Medical Expenses

- Since the \$2,000 out of pocket expenses is greater than \$500, you may reduce your income by \$1355 ($\$2,000 - \645). So, your income for VA pension purposes is now \$8645.35 ($\$10,000 - \1355).
- Your VA pension would then be \$13,166 (maximum rate for a veteran) minus \$8645 (total income after deducting unreimbursed medical expenses), or \$4,521 for that year.
- \$376.75/month

Slide 76

Net Worth

- Was an arbitrary standard designed to take into account life expectancy, depletion rate of assets, etc...
- Now (EFF DATE: 10/18/18) is pegged to the Medicaid CSRA (community spouse resource allowance)
- 2018: \$123,600

Slide 77

Spending down assets

- May be expended on any item that claimant pays fair market value for that isn't an ASSET.
- Transfers change!!!
 - 36 month look-back period. 5 year max penalty period.
 - Any transfer for less than market value that cannot be liquidated for claimant benefit (irrev. Trust) for an amount that would have made claimant ineligible for pension benefits.
 - Exception: trust for child incapable of self-sufficiency.

Slide 78

Special Monthly Pension (SMP)

- Special Monthly Pension (SMP) is awarded for disability levels exceeding permanent and total disability. There are two types of SMP:
 1. Housebound benefits (HB).
 - also permanently housebound (essentially confined to his or her home).
 - \$16,089 (2018 Veteran alone)/\$10,792 (2018 Spouse alone)
 2. Aid & Attendance (A&A).
 - needs the regular aid and attendance of another person for ADL.
 - \$21,962 (2018 Veteran alone)/\$14,333 (2018 Spouse alone)

Slide 79

Aid & Attendance

- Require the aid of another person in order to perform personal functions required in everyday living such as:
 - Bathing, showering, toileting
 - Feeding (not merely meal preparation)
 - Transferring from bed/chair, overall mobility
 - Incontinence
 - Adjustment of prosthetic
 - Bedridden due to disability
- Patient in a nursing home due to mental or physical incapacity;
- Limited eyesight (blind or very nearly blind)


Slide 80

How to File

- New Pension Claim
- Useful Forms
- VA Form 21-256: Veteran's App. For Compensation or Pension
- VA Form 21-4138: Statement in Support of Claim
- VA Form 21-527EZ: Fully Developed Claim
- VA Form 21-2680: Examination for Housebound Status or Permanent Need for Aid & Attendance
- VA Form 21-0779 (Special Monthly Pension): Request for Nursing Home Info

Slide 81

Where to File



- Philadelphia VA Regional Office
 - PO Box 8079
 - Philadelphia, PA 19105
 - Service Area: Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Vermont, Virginia, West Virginia
- Milwaukee VA Pension Center
 - PO Box 347000
 - Milwaukee, WI 53234-9907
 - Service Area: Alabama, Arkansas, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Ohio, Tennessee, Wisconsin
- St. Paul VA Regional Office
 - Pension Management Center (335/21P)
 - PO Box 11000
 - St. Paul, MN 55111-0000
 - Service Area: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Minnesota, Montana, Nebraska, North Dakota, New Mexico, Nevada, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming

Slide 85

Eligibility

- The Servicemember died while on active duty, active duty for training, or inactive duty training, OR
- The Veteran died from an injury or disease deemed to be related to military service, OR
- The Veteran died from a non service-related injury or disease, but was receiving, OR was entitled to receive, VA Compensation for service-connected disability that was rated as totally disabling
 - For at least 10 years immediately before death, OR
 - Since the Veteran's release from active duty and for at least five years immediately preceding death, OR
 - For at least one year before death if the Veteran was a former prisoner of war who died after September 30, 1999

Slide 86

"We are dealing with veterans, not procedures -- with their problems, not ours."

General of the Army
Omar Bradley, speaking
as Administrator of the
U.S. Veterans Administration
in 1947

