

CHANGES TO THE VA PENSION RULES

Effective October 18, 2018

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Style note: The word "Veteran" is capitalized throughout, regardless of whether it is capitalized in the rules.

Introduction

On January 23, 2015, the Department of Veterans Affairs (VA) published a comprehensive set of rules that would amend 38 CFR Part 3. Part 3 covers net worth, asset transfers and income exclusions for needs-based benefits. The stated purpose of the proposed change was to "maintain the integrity of the pension program and to implement recent statutory changes" and to "respond to recent recommendations made by the Government Accountability Office (GAO), to maintain the integrity of VA's needs-based benefit programs, and to clarify and address issues necessary for the consistent adjudication of pension and parents' dependency and indemnity compensation claims."¹

On September 18, 2018, the VA published its final rules. While retaining the lookback and penalty period, the final rules addressed some inconsistencies and some unfair provisions contained in the original proposed rules.

The final rules

¹ Federal Register RIN2900-A073, Summary.

The stated purpose of the final rules remained the same: “maintain the integrity of the pension program and to implement recent statutory changes” and to “respond to recent recommendations made by the Government Accountability Office (GAO), to maintain the integrity of VA’s needs-based benefit programs, and to clarify and address issues necessary for the consistent adjudication of pension and parents’ dependency and indemnity compensation claims.”

The changes are quite comprehensive and touch on a number of areas including net worth, asset transfers, medical expenses and income deductions. This paper will focus on those areas affecting eligibility for pension programs.

Net worth

Proposed rule 38 CFR §3.274(a) and (b) would impose a limit on net worth equal to the maximum community spouse resource allowance for Medicaid purposes on the effective date of the final rule.² In 2018 this number is \$123,600. This amount would increase by the same percentage as the cost-of-living increase for Social Security benefits. The current net worth limits can be found on the VA website, www.benefits.va.gov/pension/. Net worth is defined as “the sum of a claimant’s or beneficiary’s assets and annual income.”³

As noted in the definition of net worth, annual income is added to a claimant’s assets to come up with a total net worth number. The example provided in 3.275(b)(4) states, “For purposes of this example, presume the net worth limit is \$123,600. The claimant’s assets total \$117,000 and annual income is \$9,000.

² Federal Register RIN2900-A073, 38 CFR §3.274(a)

³ 38 CFR §3.274(b)(1)

Therefore, adding the claimant's annual income to assets produces net worth of \$126,000. This amount exceeds the net worth limit."

A Veteran's assets are defined to include the assets of the Veteran as well as the assets of his or her spouse.⁴ A surviving spouse's assets only include the assets of the surviving spouse.⁵ The VA will not consider a child to be a dependent child of the Veteran or surviving spouse if the child's net worth exceeds the net worth limit.⁶ A child whose net worth exceeds the limit is referred to as a "potential dependent child."⁷ A "dependent child" is a one for whom a Veteran or surviving spouse is entitled to an increased maximum annual pension rate.⁸ However a dependent child's net worth consists of the child's income and assets, along with the income of the Veteran or surviving spouse.⁹

When net worth is calculated

The VA will calculate a claimant's net income as of the date of: the original pension claim; at the date of a new pension claim after a period of non-entitlement; upon a request to establish a new dependent; or after receiving information that a claimant's net worth has changed.¹⁰

Decreasing net worth

There are three ways net worth may be decreased: the assets decrease; annual income decreases; or both decrease. Assets decrease when a Veteran,

⁴ 38 CFR §3.274(c)(1)

⁵ 38 CFR §3.274(c)(2)

⁶ 38 CFR §3.274(d)

⁷ 38 CFR §3.274(d)(1)(ii)

⁸ 38 CFR §3.274(d)(1)(i)

⁹ 38 CFR §3.274(d)(2)-(4)

¹⁰ 38 CFR §3.274(e)

surviving spouse, child or someone acting on their behalf spends their assets on “any item or items purchase for which fair market value is received” unless the items purchased are part of their net worth.¹¹

If there are allowable exclusions to income, the VA will apply those first to decrease annual income. If there are additional expenses that are appropriate to deduct from income, then those expenses may be used to reduce the assets.

Example from 3.274(f)(1)(3): Net worth limit is \$123,600. MAPR is \$12,000. Claimant’s assets total \$115,000, and annual income is \$9,000. Total net worth: \$124,000. However, the claimant is a patient in a nursing home and pays out of pocket fees of \$29,000 per year. Claimant’s unreimbursed medical expenses total \$29,000, which exceeds the 5% deductible of the MAPR, or \$600. The projected expenditures that exceed 5% of the MAPT (here, \$28,400) are deducted from annual income, which is now zero. The claimant’s net worth is now \$115,000 as there is no countable income to add to it.¹²

Effective dates of pension entitlement following a denial or reduction based on excessive net worth

The effective date of pension entitlement is the day net worth ceases to exceed the limit, provided the claimant submits a certified statement that net worth has decreased, and the VA has received the statement within 1 year after its decision notice (unless an appeal was made).¹³

¹¹ 38 CFR §3.274(f)(1) *This is a change from the proposed rule which allowed a decrease only for payment of basic living expenses like food, shelter, clothing or health care, or on education or vocational rehabilitation.*

¹² 38 CFR §3.274(f)(3)

¹³ 38 CFR §3.274(g)(2)

Effective date for a denial, reduction or discontinuance due to excessive net worth

The effective date of entitlement or increased entitlement is the day net worth is no longer excessive.¹⁴ To get this effective date, the claimant has to provide a certified statement that net worth has decreased and the VA must receive it before the claim has been finally adjudicated. Otherwise the effective date is the date a new pension claim is received by the VA.

When an increase in a beneficiary's net worth results in a reduction or discontinuance of benefits, the effective date of the reduction or discontinuance is the last day of the calendar year in which net worth exceeds the limit.¹⁵ If net worth decreases below the limit before the end of the calendar year, pension benefits will not be reduced or discontinued on the basis of excessive net worth.¹⁶

There are additional rules that pertain to reduction based on a dependent child's excessive net worth that are not discussed in detail here but can be found at 38 CFR §3.274(h)(2)(i)(2).

Determining the asset amount for pension net worth

38 CFR §3.275 contains a number of modified or new definitions. Subsection (a) contains a new definition for the term "assets." Assets are defined as "fair market value of all property than an individual owns, including all real and personal property, unless excluded under paragraph (b) of this section, less the amount of mortgages or other encumbrances specific to the mortgaged or encumbered

¹⁴ 38 CFR §3.274(g)(2)

¹⁵ 38 CFR §3.274(h)(1)

¹⁶ 38 CFR §3.274(h)(2)

property. VA will consider the terms of the recorded deed or other evidence of title to be proof of ownership of a particular asset.”

New definition for “residential lot area”

The residential lot area under the proposed rules would not exceed 2 acres unless the additional acreage is not marketable.¹⁷

Exclusions from the definition of “assets”

The primary residence remains excluded from the definition of assets, and if sold, the proceeds will not count if used to purchase another residence within the same calendar year as the sale.¹⁸ If the claimant is not residing in the personal residence it will still be excluded.¹⁹ Personal mortgages on the primary residence will not reduce the value of any assets.²⁰ If the residential lot area exceeds 2 acres, then the value of the additional land above the 2 acres is included in the asset calculation.

Personal effects “suitable to and consistent with a reasonable mode of life” will be excluded from the total asset value.²¹ The rule notes appliances and family transportation vehicles as examples.

Other exclusions include Radian Exposure Compensation Act payments, Ricky Ray Hemophilia Relief Fund payments, Energy Employees Occupational

¹⁷ 38 CFR §3.275(a)(3)

¹⁸ 38 CFR §3.275(b)(1)

¹⁹ 38 CFR §3.275(b)(ii)

²⁰ 38 CFR §3.275(b)(1)(i)

²¹ 38 CFR §3.275(b)(2).

Illness Compensation Program payments, payments to Aleuts and other items listed in 38 CFR §3.279.²²

Asset Transfers and Penalty Periods

38 CFR §3.276 discusses the new transfer rules and penalty periods that will be imposed for transfers made prior to applying for VA pension.

Assets subject to a transfer penalty

Only those “covered assets” that are transferred will be subject to a penalty period. A “covered asset” is defined as an asset that “was part of the claimant’s net worth, was transferred for less than fair market value, and if not transferred, would have caused or partially caused the claimant’s net worth to exceed the net worth limit...”²³ Therefore, only the amount transferred in excess of the net worth provisions will be subject to a penalty.

Example in 38 CFR §3.276(a)(3)(i): The net worth limit is \$123,600. A claimant has total assets of \$115,900 and his annual income is zero. The claimant, prior to applying for benefits, gave \$30,000 to a friend. Had the claimant not previously transferred the \$30,000, his net worth would have been \$145,900 and his assets would have exceeded the net worth limits. The “covered asset” amount is \$22,300 (the amount subject to a penalty) as this represents that amount by which the claimant’s net worth would have exceeded the limit due to the covered asset.²⁴

Fair market value is defined as the price a willing buyer would pay and a willing seller would sell for. The VA will use “best available information” to

²² 38 CFR §3.275(b)(4)-(7)

²³ 38 CFR §3.276(a)(2)

²⁴ 38 CFR §3.276(a)(3)(i)

determine fair market value, including appraisals, public records, inspections and market value of similar property if applicable.²⁵

A transfer for less than fair market value includes the sale, gift or exchange of an asset for less than fair market value, or the transfer or purchase of any financial instrument that reduces net worth and “would not be in the claimant’s financial interest but for the claimant’s attempt to qualify for VA pension,” including the purchase of an annuity.²⁶

An annuity is defined as “a financial instrument that provides income over a defined period of time for an initial payment of principal.”²⁷ A trust is “a legal instrument by which an individual (the grantor) transfers property to an individual or an entity (the trustee), who manages the property according to the terms of the trust, whether for the grantor’s own benefit or for the benefit of another individual.”²⁸ For purposes of calculating a penalty period, “uncompensated value” means the difference between the fair market value of an asset and the amount received. With regard to transfers to a trust, annuity or other financial instrument or investment, “uncompensated value” means the amount transferred.²⁹ **This means any asset that is converted into an annuity will incur a transfer penalty.**

Lookback period

²⁵ 38 CFR §3.276(a)(4)

²⁶ 38 CFR §3.276 (a)(5)

²⁷ 38 CFR §3.276 (a)(5)(ii)(A) *Specific reference to a trust was included here in the original rules. In the final rules it was removed and the definition of trust was kept as a separate definition.*

²⁸ 38 CFR §3.276 (a)(5)(ii)(B)

²⁹ 38 CFR §3.276 (a)(6) *This definition was expanded in the final rule to address trusts, annuities and other financial instruments.*

The lookback period for all transfers is 36 months immediately preceding the date the VA receives an original pension claim or a new pension claim after a period of non-entitlement.³⁰ **This definition does not include any transfers prior to October 18, 2018.**

General statement of policy

38 CFR §3.276(a)(8)(b) provides a statement on the VA's policy about transferring covered assets. "VA pension is a needs-based benefit and is not intended to preserve the estates of individuals who have the means to support themselves. Accordingly, a claimant may not create pension entitlement by transferring covered assets. VA will review the terms and conditions of asset transfers made during the 36-month lookback period to determine whether the transfer constituted a transfer of a covered asset. However, VA will disregard asset transfers made before October 18, 2018. In accordance with 3.277(a), for any asset transfer, VA may require a claimant to provide evidence such as a Federal income tax return transcript, the terms of a gift, trust, or annuity, or the terms of a recorded deed or other evidence of title."

Exceptions to transfer penalty

The result of fraud or unfair business practice. If a claimant transferred an asset as the result of fraud, misrepresentation, or unfair business practice "related to the sale or marketing of financial products or services for purposes of establish entitlement to VA pension", it will not be considered a covered asset and will not be

³⁰ 38 CFR §3.276 (a)(7)

penalized. Evidence must be provided to support the assertion, which could include a complaint filed with the proper authorities.³¹

Transfers to certain trusts. A Veteran, a Veteran's spouse, or the surviving spouse of a Veteran may transfer assets to a trust established on behalf of a child if the VA has rated the child incapable of self-support pursuant to 38 CFR §3.36 AND there is no circumstance where the trust assets can benefit the Veteran, the Veteran's spouse or the Veteran's surviving spouse.³²

Calculation of the penalty period

There is a 5-year limit on any penalty imposed.³³ To calculate the penalty, the maximum annual pension rate for pension with an aid and attendance allowance with one dependent will be used for Veterans and surviving spouses who apply.³⁴ The monthly rate is figured by dividing the maximum annual amount by 12 and rounding down to the nearest whole dollar.

The penalty begins the first day of the month following the transfer. If more than one transfer was made the penalty begins the first day of month following the last transfer.³⁵ Entitlement to pension will begin the last day of the last penalty period month, with payment to begin the following month.³⁶

Recalculation based on error or cure.

³¹ 38 CFR §3.276(a)(8)(c)

³² 38 CFR §3.276(a)(8)(d)

³³ *The proposed rules had a 10-year limit.*

³⁴ 38 CFR §3.276(e)(1) *The proposed rules would have only allowed for the MAPR for one dependent to be used for married claimants, while surviving spouses would have had to use the MAPR for a surviving spouse with no dependent.*

³⁵ 38 CFR §3.276 (e)(2)

³⁶ 38 CFR §3.276 (a)(7)(e)(3)

A penalty will only be recalculated if the original calculation was erroneous, or if the transferred assets were returned to the claimant before the date of the claim or within 60 days of the VA notifying the claimant of the penalty period.³⁷ This evidence must be received not later than 90 days after the notice of decision. Once the assets are returned, the penalty period will be removed. *Id.* The rules allow for a full or partial cure.

Medical Expenses That May Be Deducted From Income

The proposed and final rules undertook defining deductible medical expenses, as there was previously no statutory definitions for the purpose of VA pension. The definitions are found at 38 CFR §3.278(b).

The final rules expanded the definition of Activities of Daily Living (ADLs) to add “ambulating within the home or living area.”³⁸ Instrumental activities of daily living (IADL) includes “independent living activities, such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes.”³⁹

Under 38 CFR §3.278(c), medical expenses for VA purposes are those that are “medically necessary; that improve a disabled individual’s functioning; or that prevent, slow, or ease an individual’s functional decline.”⁴⁰ This section continues to specifically identify medical expenses that meet the above definition.

³⁷ 38 CFR §3.276(e)(5) *The proposed rule only allowed a recalculation within 30 days of the claim, and only allowed 60 days for evidence to be received.*

³⁸ 38 CFR §3.278(b)(2)

³⁹ 38 CFR §3.278(b)(3)

⁴⁰ *The language, “prevent, slow, or ease an individual’s functional decline” was not in the proposed rules and was added as a result of public comments.*

1. Health care provider payments. Services must be performed within the scope of the provider's professional capacity.
2. Medications, medical supplies, medical equipment, medical food, vitamins and supplements. Prescriptions are recognized under this section as valid medical expenses, as are non-prescription medications obtained lawfully. Medically necessary food, vitamins and supplements are also recognized as long as prescribed by a health care provider authorized to write the prescription.
3. Adaptive equipment. Along with adaptive services, payments for service animals are included under this section, including veterinary care. However non-prescription food, boarding, grooming or other routine expenses are not recognized as a medical expense.
4. Transportation expenses. Mileage and public transportation expenses are included as long as the transportation is for medical purposes. Mileage for a privately owned vehicle is based on the reimbursement rate specified by the United States General Services Administration.
5. Health insurance premiums. Payments for long-term care insurance premiums are included, as well as health insurance and Medicare premiums for parts B and D.
6. Smoking cessation products.

7. Institutional forms of care and in-home care. Hospital charges, nursing home charges, medical foster home charges and inpatient treatment centers are allowable expenses, including the cost of meals and lodging. Payment for in-home care to assist with ADLs and IADLs will be considered valid medical expenses as long as health care or custodial care is provided.⁴¹

More on home care and assisted living

In-home care for a claimant who has not been rated in need of aid and attendance or housebound must be from a licensed health care provider before it can be deducted from income as a medical expense, unless a physician, physician assistant or other qualified medical professional states in writing that the claimant requires the health care or custodial care provide by the in-home attendant.⁴²

Care facilities other than nursing homes.

The final rules provided much more clarification and leniency when it comes to care in a facility other than a nursing home or assisted living facility. 38 CFR §3.278(d)(3) covers care facilities other than nursing homes, and allows a medical expense deduction for care in such a facility that is either provided by the facility, contracted by the facility, obtained by a third-party provider, or provided by family or friends. The provider does not need to be a health care provider if the disabled individual needs aid and attendance or is housebound, or if a qualified medical

⁴¹ *The cap on hourly rates for in-home care was removed in the final rules.*

⁴² *38 CFR §3.278(d)(2) The final rule is more liberal than the proposed rule which would have limited care by an in-home attendant unless rated housebound or in need of aid and attendance.*

professional states in writing that “due to a physical, mental, development, or cognitive disorder, the individual needs to be in a protected environment.”⁴³ Meals and lodging will be deductible medical expenses if the facility provides or contracts for health care or custodial care, or a qualified medical professional states in writing that the individual must reside in the facility to separately contract with a third-party provider to receive health or custodial care or to receive health or custodial care from family or friends, whether paid or unpaid.⁴⁴

Non-medical expenses

Except as noted previously, payments for the following are not medical expenses for VA purposes: General health maintenance expenditures, cosmetic procedures, meals and lodging (except as previously noted), or assistance with IADLs (except as provided above).⁴⁵

Additional Statutory Exclusions From Income

The final rules added a few additional exclusions, and corrected citations to the United States Code (USC). All of the exclusions are listed below, with a notation as to whether the income is also excluded as an asset.

38 CFR §3.279 sets out all statutory exclusions from income or assets.

(a) Compensation or Restitution Payments.

1. Relocation payments. Excluded from income, included as an asset.
2. Crime victim compensation. Excluded from income and as an asset.

⁴³ 38 CFR §3.278(d)(3)(iii)(A)-(B)

⁴⁴ 38 CFR §3.278(d)(3)(iv)(A)-(B)

⁴⁵ 38 CFR §3.278(e) *The proposed rules also included VA fiduciary fees, but this was removed from the final rule.*

3. Restitution to individuals of Japanese ancestry. Excluded from income and as an asset.
4. Victims of Nazi persecution. Excluded from income and as an asset.
5. Agent Orange settlement payments. Excluded from income and as an asset.
6. Chapter 18 benefits. Excluded from income and as an asset.
7. Flood mitigation activities. Excluded from income and as an asset.

(b) Payments to Native Americans.

1. Indian Tribal Judgment Fund distributions. Excluded from income and as an asset.
2. Interests of individual Indians in trust or restricted lands. Excluded from income and as an asset.
3. Per Capita Distributions Act. Excluded from income and as an asset.
4. Submarginal land. Excluded from income and as an asset.
5. Old Age Assistance Claims Settlement Act. Excluded from income and as an asset.
6. Alaska Native Claims Settlement Act. Excluded from income and as an asset.
7. Maine Indian Claims Settlement Act. Excluded from income and as an asset.
8. Cobell Settlement. Excluded from income for one year and as an asset for one year.

(c) Work-Related Payments

1. Workforce investment. Excluded from income and included as an asset.
2. AmeriCorps participants. Excluded from income and included as an asset.

3. Volunteer work. Excluded from income and as an asset.

(d) Miscellaneous Payments.

1. Income tax refunds. Excluded from income and for one year as an asset.

2. Food stamps. Excluded from income and as an asset.

3. Food for children. Excluded from income and as an asset.

4. Child care. Excluded from income and included as an asset.

5. Services for housing recipients. Excluded from income and included as an asset.

6. Home energy assistance. Excluded from income and as an asset.

7. Programs for older Americans. Excluded from income and included as an asset.

8. Student financial aid. Excluded from income and as an asset.

9. Retired Serviceman's Family Protection Plan annuities. Excluded from income and included as an asset.

Waiver of Receipt of Income

Potential income that is not otherwise excluded may not be waived, except in one circumstance. If an individual withdraws a claim for Social Security benefits after a finding of entitlement in order to maintain eligibility for unreduced Social Security benefits after reaching a particular age, this will not be treated as a waiver and income will not be counted.⁴⁶

Amendment to 38 CFR §3.551

⁴⁶ 38 CFR §3.271(i)

38 CFR §3.551(i) now includes a surviving child (in addition to Veterans without a spouse or child or a surviving spouse) as one whose benefits would be reduced to \$90 upon entry into a nursing home and qualifying for Medicaid.

Conclusion

Time is of the essence in notifying clients, potential clients, and referral sources of these changes. The effective date of the new rules is October 18, 2018, which means all planning that includes transfers must be made before that date to avoid the lookback and penalty period rules.

ElderCounsel will be providing education on new opportunities that these rules provide for elder law attorneys and their clients. If you have any questions or wish to be notified up upcoming events, please email info@eldercounsel.com.