Veterans Administration Aid and Attendance Pension Developments

I. Proposed Changes To The VA Pension Rules.

A. The aid and attendance allowance provides benefits for war era veterans and their surviving spouses who require the regular attendance of another person to assist in at least two of the daily activities of living such as eating, bathing, dressing and undressing, transferring, and the needs of nature.

1. The VA pension program is a non-service connected pension which is means-tested and requires meeting the following requirements:

a. The veteran must be age 65 or older, or permanently and totally disabled for a reason not due to the veteran's own willful misconduct;

b. There is no age requirement for a surviving spouse to qualify for a widow's pension;

c. The veteran must have been discharged from service under conditions other than dishonorable;

d. Certain service requirements must have been met:

(1) The majority of applicants for this pension benefit entered active duty prior to September 7, 1980;

(2) The result of this is that the veteran must have served at least 90 days of active military service, one day of which was during wartime;

e. Net worth must not be excessive; and

f. Countable family income must be below a yearly limit.

These materials will not address "compensation," i.e., the disability compensation to which a veteran may be entitled if the veteran obtained an injury or disease while on

active duty, if the injury was a result of service or was exacerbated by service (see 38 U.S.C. § 101(13); 38 C.F.R. § 3.4). Entitlement to service-connected pension is not barred by the veteran's employment and not affected by earned or unearned income or the value of the veteran's net worth, and the disability compensation is tax-free.

2. The reference to "Aid and Attendance" is in fact a misnomer, since "Aid and Attendance" and "House Bound" are actually additional monetary allowances provided with the pension if the recipient of pension moneys needs the regular aid and attendance of another person or is considered house bound.

   a. Aid and Attendance assistance allowances are also available for service-connected disabilities ("disability compensation") and to a spouse of a service-connected disabled veteran, and an Aid and Attendance allowance is also available to a surviving spouse of a veteran if the surviving spouse is receiving DIC ("Dependents Indemnity Compensation").

   b. There are numerous monetary levels of Aid and Attendance or House Bound allowances available with non-service connected and service-connected disability programs for veterans or their surviving spouses.

   c. There are, essentially, three types of special monthly pension to offset the cost of necessary health care:

      (1) Low income pension (this is the VAs equivalent of SSI - the claimant must meet all of the applicable criteria and have limited income and assets).

      (2) House Bound - available to a veteran or widow(er) of a veteran who is determined to be disabled and is essentially confined to the home);

see 38 U.S.C. § 1502(c) (this requires a single permanent disability rated as 100 percent under the VA schedule and confined to the dwelling, or a 100 percent disability with another 60 percent disability, regardless of whether or not the person is confined to the dwelling).

(3) Aid and Attendance - available to a veteran or widow(er) of a veteran who is blind, living in a nursing home, or needs regular assistance with at least two activities of daily living (walking, bathing, dressing, incontinence care, or eating), or needs regular supervision due to cognitive decline.

3. Pension is based on a maximum yearly income amount called the "Maximum Annual Pension Rate" (MAPR).

   a. The claimant (including both the husband and wife that constitutes a household) must be making less than this amount in order to qualify for the benefit.

   b. The benefit is the difference between this MAPR and the combined gross household income reduced for medical costs and adjusted by a five percent deductible.

   c. This adjusted income is called the "Income for VA Purposes" (IVAP).

   d. If the veteran or spouse has a need for the aid and attendance of another person, then the MAPR is higher.

   e. If the veteran has no need of the aid and attendance of another person, the veteran's income must be very small in order to meet the income test.

4. Benefit Table.

2015 Maximum Annual Pension Rates (MAPR)
Effective December 1, 2014 - 1.7% Annual Increase

If you are a veteran...	Annual	Monthly
Without Spouse or Child	$12,868	$1,072
No dependents, medical expenses must exceed 5% of MAPR	$ 643	$ 54
With One Dependent	$16,851	$1,404
With dependents, medical expenses must exceed 5% of MAPR	$ 842	$ 70
Housebound Without Dependents	$15,725	$1,310
Housebound With One Dependent	$19,710	$1,642
A&A Without Dependents	$21,466	$1,788
A&A With One Dependent	$25,448	$2,120
Two Vets Married to Each Other	$16,851	$1,404
Two Vets Married to Each Other One H/B	$19,710	$1,642
Two Vets Married to Each Other Both H/B	$22,566	$1,880
Two Vets Married to Each Other One A/A	$25,448	$2,120
Two Vets Married to Each Other One A/A One H/B	$28,300	$2,358
Two Vets Married to Each Other Both A/A	$34,050	$2,837
Add for Mexican Border Period or WW1 to any category above	$ 2,923	$ 243
Add for Each Additional Child to any category above	$ 2,198	$ 183

a. The VA pays the difference between the recipient’s countable income, less allowable deductions, and the applicable limit.

b. The amount might be referred to as the applicable monthly pension allowance.

5. The net worth limit (or the combined net worth limit in the case of a veteran with a spouse) has always been very difficult to quantify.

a. No precise figure exists other than that a formal administrative review is undertaken if the beneficiary has a net worth of $80,000 or more.

(1) There is no specific amount in the regulations.

(2) The veteran's household needs for maintenance are analyzed and weighed against the assets that can be readily converted to cash, and consideration is given to whether the income from that cash will cover the difference in the household income and the cost of medical care over the care recipient's remaining life span.

(3) However, this rule is only a suggestion and the final decision is left to the rating representative.

(4) Consequently, the decision has often been subjective, and in some cases a benefit award has been denied for assets around the $20,000 level, or even less.

(5) Some representatives believe that a reasonable rule of thumb is about $40,000 for a couple and about $20,000 for a single individual.

b. The market value of all real and personal property is taken into account (reduced by any mortgages or other encumbrances, and excluding the value of the single family dwelling unit), and excluding the value of personal effects suitable to and consistent with the veteran's reasonable mode of life.

c. Certain educational expenses and compensatory settlement payments are also excluded.

d. Disclaimers of potential income and transfers of property to a relative in the veteran's household are not recognized as reducing the value of the veteran's assets.

e. Net worth is evaluated based on the liquidity of the property, the veteran's medical needs and life expectancy, and certain needs of family members. 38 C.F.R. §§ 3.274-3.276.

6. The veteran's income currently must be less than the maximum applicable pension rate.

a. Income includes payment of any kind from any source, whether recurring or infrequent.

(1) Receipt of a gift of stock would be considered income.

(2) Winnings from gambling, an inheritance, or receipt of a gift of property would be considered income.

(3) Withdrawals from IRAs, 401(k)s and other retirement accounts are considered income, while the funds left in the IRA or other retirement account is considered an asset.

(4) Social Security income and Social Security Disability income are considered income; income from VA compensation, even though it is exempt from income taxes, is considered income for pension purposes, as is income from DIC.

(5) Generally, income that is not consumed and carried over to the next month becomes an asset.

b. Gross income is considered before any deductions for taxes, business losses, etc.

c. Workers Compensation awards and similar payments are considered income, but adjustment may be made for medical, legal and other expenses incident to the injury or collection of payment.

d. Excluded are SSI, welfare payments, contributed maintenance, the VA pension itself, reimbursement for casualty loss, or profit from the sale of property, amounts in joint bank accounts acquired upon the death of the other joint owner, minimal earnings of a child, hardship exclusion from a child's income, payments under a Domestic Volunteer Service Act program like Foster Grandparents or the Retired Senior Volunteer Program, payments under a Department of Defense survivor benefit annuity, cash surrender value of life insurance, and certain compensatory settlement payments.

e. Accrued interest received on the redemption of United States Savings Bonds is treated as profit on sale and not as income.

f. The sale of property through a private installment contract where the contract is owned by the veteran or a surviving spouse is neither income nor an asset until the principal amount of the loan has been repaid. This is one way in the past that applicants may have been able to convert assets into non-countable assets in order to qualify for the VA pension.

7. A veteran who has no spouse or child and who receives VA domiciliary or nursing home care for more than three months receives a reduced pension of no more than $90 per month. The veteran is not liable to repay amounts received by virtue of the VA's failure to reduce the pension, provided the veteran did not conceal information.

B. The Veterans Administration (VA) published comprehensive proposed new rules on January 23, 2015 that will (i) establish a new "bright line" net worth limit, (ii) establish a three year "look-back" on transfers of "covered assets" and impose penalties for such transfers, and (iii) revise the rules governing deductibles and unreimbursed medical expenses and income exclusions.

1. The changes are comprehensive and address net worth, asset transfers, medical expenses and income and deductions.

2. The net worth limit will equal the maximum community spouse resource allowance under Medicaid on the effective date of the final rule (currently $119,220).

3. The net worth limit will increase by the same percentage as the cost-of-living increase for Social Security benefits.

4. The VA's Notice of Proposed Rule (NOPR) is available at *https://federalregister.gov/a/2015-00297*.

C. Specific changes.

1. Annual income will be added to a claimant's net worth, which is a change from existing law.

a. If the net worth limit is $119,220, the surviving spouse's annual income is $7,000, and her total assets equal $117,000, adding the spouse's annual

income to her assets produces a net worth of $124,000 which exceeds the net worth limitation.

b. A veteran's assets are defined to include the assets of the veteran as well as the assets of his or her spouse, while a surviving spouse's assets include only the assets of the surviving spouse.

c. Unlike other federal means-based programs (the SSI and Medicaid programs, for example), VA regulations did not previously prescribe clear net worth limits for pension entitlement - the proposed rules will change this by establishing a "bright line" net worth limit.

2. Ways of decreasing net worth:

a. The assets may decrease in value.

b. Annual income may decrease.

c. Both may decrease.

3. Assets decrease permissibly when a veteran, surviving spouse, child or someone acting in their behalf spends their assets on basic living expenses such as food, shelter, clothing, health care, or education or vocational rehabilitation.

a. Allowable deductions from income will be applied first to decrease annual income.

(1) Unreimbursed medical expenses are deducted in calculating the veteran's countable income.

(2) Veterans who would not have previously qualified may become eligible if they incur increased medical, assisted living, and other health care expenses.

(3) Deductible expenses may include home care, medications, health insurance premiums, assisted living payments, and adult daycare and similar facilities.

b. If there are additional expenses that are appropriate to deduct from income, those expenses are permissible reductions in the value of assets.

c. Current regulations do not define or describe what the VA considers to be a medical expense, which would be an allowable deduction from the claimant's countable income to decrease the claimant's income, thereby increasing the claimant's benefit entitlement rate.

(1) The Proposed Rule would define and clarify what the VA considers to be a deductible medical expense.

(2) It provides definitions for several terms, including activities of daily living (ADLs) and incidental activities of daily living (IADLs).

d. "Custodial care" means regular assistance with two or more ADLs or assistance because a person with a mental disorder is unsafe if left alone due to the mental disorder.

e. The new rules would provide that, generally, payments to facilities such as independent living facilities are not medical expenses, nor are payments for assistance with IADLs; however, there would be exceptions for disabled individuals who require health care services or custodial care.

f. There would be a limit on the hourly payment rate that may be deducted for in-home attendance.

4. Exclusions from the definition of "assets."

a. The primary residence remains excluded, and if sold, the proceeds will not count if used to purchase another residence within the same calendar year.

b. In recent years the VA has taken a position that if the home is not being occupied by the veteran or the veteran's spouse, it is no longer an exempt asset.

c. The same net worth limit applies when a surviving spouse is seeking pension benefits.

d. Mortgages on the primary residence will not reduce the value of other assets.

e. Personal effects both suitable to and consistent with a reasonable mode of life will be excluded from total asset value.

5. Asset transfers and penalty periods.

a. These are set out at Proposed Rule 38 C.F.R. §3.276.

b. Only the transfer of "covered" assets will be penalized.

(1) A "covered" asset is defined as an asset that "was part of a 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...".

(2) Therefore, only the amount transferred in excess of the net worth limitation will be subject to a penalty.

(3) The penalty would not be based on the entire amount transferred, but only on the portion that would have caused the net worth to exceed the eligibility limit.

(a) This means that some transfers may not create any penalty at all.

(b) A smaller covered asset amount would result in a shorter penalty period.

c. A transfer for less than fair market value includes the sale, gift or exchange of an asset for less than the fair market value, or the transfer to a trust or purchase of any financial instrument that reduces net worth, including the purchase of an annuity.

6. The look-back period for all transfers is 36 months preceding the date the VA receives an original pension claim or a new pension claim after a period of non-entitlement.

a. There is a presumption that an asset transfer made during the 36 month look-back period was for the purpose of decreasing net worth in order to qualify for a VA pension benefit.

b. There is an exception for a transfer by a veteran, the veteran's spouse, or the surviving spouse of a veteran to a trust established for the benefit of a child if (i) the VA has rated the child incapable of self-support pursuant to 38 C.F.R. §3.36, and (ii) there is no circumstance where the trust assets can benefit the veteran, the veteran's spouse or the veteran's surviving spouse.

7. There is a ten year limit on the penalty imposed.

a. To calculate the penalty, the maximum annual pension rate will be used for veterans and surviving spouses who apply.

b. A single veteran would use the aid & attendance allowance amount with no dependants; a married veteran would use the aid & attendance allowance with one dependant; and a surviving spouse would use the aid & attendance allowance amount for a surviving spouse taken from the Death Pension Table.

c. The monthly rate is figured by dividing the maximum annual amount by 12 and rounding down to the nearest whole dollar.

   (1) The formula is similar to that used by the SSI program.

   (2) The pension rate used is referred to as the "maximum annual pension rate" (MAPR), under 38 U.S.C. 1521(d), 1541(d) or 1542 that is in effect as of the date of the pension claim. The penalty is rounded down to the nearest whole dollar.

   (3) The MAPRs are located on the VA's website at *http://www.benefits.va.gov/pension/*.

d. The penalty begins the first day of the month following the transfer.

e. If more than one transfer is made, the penalty begins the first day of the month following the last transfer.

   (1) The penalty will be recalculated if all of the covered assets are returned before the date of the claim or within 30 days after the date of the claim.

   (2) Once calculated, the penalty would be fixed, and return of the covered assets after the 30 day period would not shorten the penalty period.

D. There is very little guidance available from the VA regarding the effect of certain trusts on pension benefits.

1. Office of General Counsel Opinion 33-97.

   a. This opinion clearly states that a transfer to a trust, where the terms of the trust provide for the grantor's support, will cause the trust assets to be counted in the net worth calculation.

   b. In this case, the surviving spouse established an irrevocable trust naming her child as the trustee. The terms of the trust provided in part that "some or all of the income and principal of the trust fund may be paid by the trustee to or for the benefit of only the surviving spouse's "special needs…".

   c. This trust was essentially a self-settled special needs trust, which would likewise not be effective for Medicaid eligibility purposes either unless structured to fall within one of the "safe harbor" rules.

   d. However, a testamentary SNT per OGC 72-90 should be effective except to the extent the trust assets are actually distributed or made available to the veteran.

   e. This opinion stated that the VA should include all of the trust assets in determining net worth if the trust assets are available for use for the claimant's support. In this case, because the trust permits the use of trust assets for the surviving spouse's benefit, all trust assets are deemed to be available and countable in determining net worth.

2. Office of General Counsel Opinion 73-91.

a. This is one of the few favorable OGC opinions related to trusts established by a veteran claimant. While receiving benefits, the veteran received a payout of $80,000 from a life insurance policy of which he was the beneficiary, and also inherited some stock.

b. The veteran proposed to create an irrevocable trust of which the veteran was the trustee and his grandchildren were proposed beneficiaries.

c. Although the inheritance counted as income to the veteran, once the assets were transferred to the trust, the trust corpus was not part of the veteran's countable net worth.

d. Specifically, this opinion determined that assets transferred to an irrevocable trust for the benefit of the veteran's grandchildren, where the veteran is the trustee and has retained no right or interest in the property or the income and cannot exert control over these assets for the veteran's own benefit, would not be counted in determining the veteran's net worth for pension purposes. Further, trust income would not be considered income of the veteran.

e. There must be an "...actual relinquishment of rights in the property and income from the property."

f. The facts provided to the General Counsel's office did not state whether the veteran's grandchildren lived with him – a fact noted by General Counsel as one that may have caused a different outcome. Because a transfer to a relative residing in the same household is disregarded, the outcome would likely be different if the beneficiaries of the trust resided with the veteran.

g. This kind of an irrevocable trust established for the benefit of a third party would likewise not affect the Medicaid eligibility of the grantor, although the establishment of the trust and the transfer of assets within five years of the date of the Medicaid application would be penalized, which would result in the Medicaid program not paying for the nursing home care or the otherwise covered waivered services during the applicable Medicaid penalty period. However, the grantor should not be the trustee.

h. The establishment of such a trust would now be subject to a penalty for VA pension qualification purposes.

3. Office of General Counsel Opinion 72-90.

a. In this case the veteran-claimant was the beneficiary of a testamentary trust. The trust provided that the trustee could distribute funds for the veteran’s comfort, but not as a substitute for support and maintenance to which veteran was entitled from other sources.

b. The opinion recognized that the veteran did not hold legal title to or control of the trust property. Thus, only the portion of the trust property, including trust-related income, that has actually been made available for the veteran's use, is, at the time of its allocation, countable for purposes of the income and net-worth provisions in determining pension benefits.

c. Thus, a properly drafted, fully-discretionary third party trust, of which the veteran is a beneficiary, should not affect pension qualification until such time as trust assets have been distributed or made available to the veteran.

d. In the context of Medicaid, all trusts must be examined, including testamentary trusts, to determine whether or not the assets will be deemed to be "available" to the beneficiary.

4. The following would appear to represent a general summary of the current VA trust rules:

   a. A trust established by a third party which provides for the veteran's support, whether established by the veteran's spouse or another third party, would be treated as a resource per OGC Opinion 33-97.

   b. A special needs trust established by a third party, except perhaps the veteran's spouse, should not affect VA pension qualification except to the extent that trust assets are distributed or made available to the veteran.

   c. A revocable trust would disqualify the veteran because the assets would be deemed to be available.

   d. An irrevocable trust established by the veteran or the veteran's spouse, if either of them is a beneficiary, would cause the trust assets to be deemed to be available to the veteran because there would not have been an "actual relinquishment of rights in the property and income from the property" per OGC Opinion 73-91, and would also presumably be subject to a transfer penalty.

   e. A third-party *inter vivos* trust, unless established by the veteran's spouse, should not be treated as a resource except to the extent that the assets are available for the veteran's support, unless assets are actually distributed to or made available to the veteran, per OGC Opinion 72-90.

E. Common planning strategies for VA pension qualification prior to the proposed changes to the VA pension rules included the following:

1. Gifts were commonly made to reduce "excessive" net worth to someone who did not reside with the veteran or the spouse.

2. Immediate single premium annuities were frequently purchased to convert the assets into an income stream having no value for the purpose of calculating net worth.

   a. It was the VA's general unwritten policy to treat the income from single premium annuities as income for VA purposes.

   b. More recently, the VA has taken the position that certain annuities have cash value and have attributed value to such annuities.

3. Transfers to irrevocable trusts were used, which as outlined above, were frequently problematic:

   a. As a general rule, neither the veteran claimant nor his or her spouse may be an income or principal beneficiary of any self-settled trust for VA pension qualification purposes. There must be an "...actual relinquishment of rights in the property and income from the property."

   b. A transferee would occasionally make a "gift-back" of the income from transferred sources, which if it occurred, would cause the income to be countable under 38 C.F.R. 3.271.

   c. If the trust is a "grantor trust" under IRC § 671 through § 678, problems can result because of the matching of income process undertaken by the VA.

(1) Since December 2012, the VA no longer requires eligibility verification reports, and instead now coordinates with the IRS and the SSA to verify continued eligibility for pension benefits.

(2) The VA will most likely assume that income from a "grantor trust" is the veteran's (or the surviving spouse's) income which may terminate or compromise pension benefits as a result.

d. The use of a trust protector can be very helpful for VA pension planning and for other asset protection planning purposes to cure what might otherwise be a defective or faulty arrangement.

4. The major problem created by VA qualification planning in the past was that assets were frequently transferred and then rendered unavailable when Medicaid eligibility became an issue.

a. Although transfers were not penalizable for the purpose of VA qualification, when Medicaid eligibility later became important, those transfers rendered the applicant ineligible for Medicaid if the transfer occurred within the applicable look-back period, which currently is five years.

b. In addition, many of the so-called "financial advisors" involved in this planning utilized either immediate-payment or deferred annuities as a way to "invest" the funds, involving annuity payments or annuity access to the donees of the funds that were transferred in order to qualify for the VA pension benefit.

(1) The annuity would incur commissions that generate fees for the financial facilitator, but the use of an annuity was wholly unnecessary

and did not create any positive benefit in conjunction with the VA qualification plan.

(2) Further, when the parent later required Medicaid, the funds might not be available, or penalties would be incurred when it was necessary to liquidate the annuitized payments and receive the payment based on present value.

c. The plan that I found to be most effective, although complex, involved a transfer by the veteran to the children or to certain family members, who would then establish a separate, third-party trust utilizing the transferred assets.

(1) The trust would be an irrevocable trust established by and for the benefit of the children.

(2) Generally, only income could be distributed to the children, and even then usually only to the extent of the income tax liability incurred by the children. The trust was, essentially, a holding vehicle designed to preserve the assets should they be needed if Medicaid qualification later became an issue.

(3) Limited distributions for the benefit of the parent would be allowed based on entirely discretionary restrictive criteria.

(4) Distributions would generally be in the form of payments made for the benefit of the parent rather than directly to the parent.

(5) The trust, even though irrevocable, would be a "grantor" trust for income tax purposes and the income would be taxable to the children;

the trust would contemplate using the trust funds to pay the children's applicable portion of the tax or to reimburse the children for the taxes incurred.

(6) The trust would include an "escape clause" so that the trust could be undone if it became necessary to do so and found to be in the parent's best interest or if required to assure qualification for Medicaid or other public benefits.

(a) The assets would all be retained and would be traceable.

(b) If the trust was undone, there would be a "gift-back" of the trust assets, thus eliminating the Medicaid penalty, or at least a substantial part of it.

(c) The funds could then be used in the appropriate way, utilizing an appropriate Medicaid qualification strategy, to qualify the parent for Medicaid.

(d) If the trust was established more than five years prior to the Medicaid application, then the transfer would not need to be disclosed.

(e) One issue to be considered is the potential capital gain impact resulting from the transfer of appreciated assets; the donor's basis would become the tax basis of the donee for the purpose of determining capital gain, which would result in potentially taxable capital gain upon the subsequent sale of the gifted property.

(7) This type of plan is complex, but the cost of implementing it is probably less in most instances than even the commission that would be earned from the sale of a typical $100,000 annuity!

F. Summary.

1. The proposed new rules will clarify some issues that currently lead to inconsistent decisions.

2. The rules should reduce claim discretion that often results in unequal treatment.

a. However, the transfer restrictions and resulting penalties will create significant impediments and complexity in regard to filing, processing and qualification.

b. The proposed rules pertaining to annuities and trusts that "would not be in the claimant's financial interest but for the claimant's attempt to qualify..." are vague and potentially problematic.

c. A transfer to an irrevocable income-only trust ("IIOT") would not only be penalizable, but even under the VAs interpretation of existing rules, because the veteran-claimant and/or his or her spouse would be an income beneficiary of the self-settled IIOT, the trust assets would still be treated as available because there was not an "...actual relinquishment of rights in the property and income from the property."

d. For similar reasons, a self-settled "safe harbor" special needs trust would likewise probably be treated as available even if the transfer was not treated as penalizable, which it probably would be unless created by a third party.

e. Veterans will probably need more assistance and pre-eligibility planning in order to qualify for the VA pension.

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