

Aid and Attendance: The Invisible VA Program

A press release was recently issued by the Secretary of Veterans Affairs as follows:



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News Release

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Secretary Nicholson: VA Reaches Out to Veterans and Spouses

“Aid and Attendance” an Under-Used Benefit

WASHINGTON – The Department of Veterans Affairs (VA) is reaching out to inform wartime veterans and surviving spouses of deceased wartime veterans about an under-used, special monthly pension benefit called Aid and Attendance.

“Veterans have earned this benefit by their service to our nation,” said Secretary of Veterans Affairs Jim Nicholson. “We want to ensure that every veteran or surviving spouse who qualifies has the chance to apply.”

Although this is not a new program, not everyone is aware of his or her potential eligibility. The Aid and Attendance pension benefit may be available to wartime veterans and surviving spouses who have in-home care or who live in nursing-homes or assisted-living facilities.

Many elderly veterans and surviving spouses whose incomes are above the congressionally mandated legal limit for a VA pension may still be eligible for the special monthly Aid and Attendance benefit if they have large medical expenses, including nursing home expenses, for which they do not receive reimbursement.

To qualify, claimants must be incapable of self support and in need of regular personal assistance.

The basic criteria for the Aid and Attendance benefit include the inability to feed oneself, to dress and undress without assistance, or to take care of one’s own bodily needs. People who are

bedridden or need help to adjust special prosthetic or orthopedic devices may also be eligible, as well as those who have a physical or mental injury or illness that requires regular assistance to protect them from hazards or dangers in their daily environment.

For a wartime veteran or surviving spouse to qualify for this special monthly pension, the veteran must have served at least 90 days of active military service, one day of which was during a period of war, and be discharged under conditions other than dishonorable.

Wartime veterans who entered active duty on or after September 8, 1980, (October 16, 1981, for officers) must have completed at least 24 continuous months of military service or the period for which they were ordered to active duty.

If all requirements are met, VA determines eligibility for the Aid and Attendance benefit by adjusting for un-reimbursed medical expenses from the veteran’s or surviving spouse’s total household income. If the remaining income amount falls below the annual income threshold for the Aid and Attendance benefit, VA pays the difference between the claimant’s household income and the Aid and Attendance threshold.

The Aid and Attendance income threshold for a veteran without dependents is now \$18,234 annually. The threshold increases to \$21,615 if a veteran has one dependent, and by \$1,866 for each additional dependent. The annual Aid and Attendance threshold for a surviving spouse alone is \$11,715. This threshold increases to \$13,976 if there is one dependent child, and by \$1,866 for each additional child.

Additional information and assistance in applying for the Aid and Attendance benefit may be obtained by calling 1-800-827-1000. Applications may be submitted on-line at <http://vabenefits.vba.va.gov/vonapp/main.asp>. Information is also available on the Internet at www.va.gov or from any local veterans service organization.

What does this mean for your clients? It means a potential income benefit that can help your client pay for home care and assisted living care. The benefit for the Veteran can be more than \$1,500 monthly and the benefit for the spouse of a deceased Veteran can be more than \$950 monthly. As the benefit may be available for the Veteran and the spouse of a deceased Veteran, I will use Veteran/spouse/disabled person interchangeably throughout this article. This program is means tested. Like many other programs from the

Veterans Administration, this program is not “transparent.” For example, there is no chart that states the amount of assets the Veteran or the Veteran’s spouse may have and still qualify for this program. It is determined on a “case by case” basis. However, if you learn to navigate the system, the benefit to your client can make the difference between getting proper assistance and not getting proper assistance.

The following are the requirements to qualify for this non-service related disability pension program:

- 1) Service Requirement: The Veteran must have:
 - a. served active duty for ninety (90) days (however, the Veteran need not have served in theater, just during the war, except for (iii) below).
 - b. at least one (1) day of the ninety (90) days must be between the following dates:
 - i. 12/7/41 – 12/31/46
 - ii. 7/27/50 – 12/31/55
 - iii. 2/28/61 – 8/4/64 (if served in Vietnam in theater)
 - iv. 8/5/64 – 5/7/75
 - v. (different requirements after 1980), and
 - c. not been dishonorably discharged.

Note that the spouse or child of a deceased Veteran may also be entitled to benefits.

- 2) Medical/Disability Requirement and Benefit Amount. Typically, the family physician will fill out a Statement in Support of Claim on VA Form 21-4138. It is strongly suggested that you request the physician to be realistic and make an exhaustive list of the applicant’s maladies, disabilities and inability to perform activities of daily living. The doctor should be directed not to make an optimistic appraisal of the disabled’s health.
 - a. If the **Veteran** is at least sixty-five (65) years old, no disability is required for a pension benefit. The maximum annual benefit amount for the Veteran (no dependents and no disabilities) is \$10,929.
 - b. If the **Veteran** is at least sixty-five (65) years old, and needs Aid and Attendance: The maximum annual benefit amount for the Veteran (no dependents) is \$18,234. Aid and Attendance is defined as follows:
 - i. The veteran requires the aid of another person in order to perform personal functions required in everyday living, such as bathing, feeding, dressing, attending to the wants of nature, adjusting prosthetic devices, or protecting himself/herself from the hazards of his/her daily environment, OR,
 - ii. The veteran is bedridden, in that his/her disability or disabilities requires that he/she remain in bed apart from any prescribed course of convalescence or treatment, OR,
 - iii. The veteran is a patient in a nursing home due to mental or physical incapacity, OR,
 - iv. The veteran is blind, or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less.
 - c. If the **Veteran** is at least sixty-five (65) years old and is Housebound: The maximum annual benefit amount for the Veteran (no dependents) is \$13,356. Housebound is defined as follows:
 - i. The veteran has a single permanent disability evaluated as 100-percent disabling AND, due to such disability, he/she is permanently and substantially confined to his/her immediate premises, OR,
 - ii. The veteran has a single permanent disability evaluated as 100-percent disabling AND, another disability, or disabilities, evaluated as 60 percent or more disabling.
 - d. If the **Veteran** is under sixty-five (65) years old and is permanently and totally disabled, not due to the Veteran’s own willful misconduct, he or she may also be entitled to benefits.

Source: Improved Disability Pension Rate Table - Effective 12/1/06
<http://www.vba.va.gov/bln/21/Rates/pen01.htm>

- e. If the deceased Veteran's **spouse** (unremarried) requires Aid and Attendance: The maximum annual benefit amount for the Veteran's spouse (no dependents) is \$11,715. Aid and Attendance is defined the same as in (b) above.
- f. If the deceased Veteran's **spouse** (unremarried) is Housebound: The maximum annual benefit amount for the Veteran's spouse (no dependents) is \$8,957. Housebound is defined as follows:
 - i. The claimant is substantially confined to his/her immediate premises because of permanent disability.
- g. The **child** of a deceased Veteran may be entitled to benefits if he/she is: under 18, **or** in school **and** under 23, **or** was incapable of self support before the age of 18.

Source: Improved Disability Pension Rate Table Spouse and Child - Effective 12/1/06
<http://www.vba.va.gov/bln/21/Rates/pen02.htm>

3) Income Requirement/Limitation:

- a. If the Veteran or the deceased Veteran's spouse receives any income during the year, that income is counted (some exclusions apply, for example S.S.I. is not included in the income calculation, see 38 CFR §3.272). The benefit amount is income dependant. To the extent that the Veteran's income is below the benefit amount, the VA will provide a benefit equal to the difference between the benefit and the income earned. Therefore, if the monthly benefit amount is \$1,500 and the Veteran's income is \$700, the pension benefit paid will equal \$800 per month.
- b. A key to this requirement is that medical expenses may be deducted from income if they are greater than five (5%) percent of the maximum benefit amount. Therefore, under the example in (a) above, if the cost of custodial care for the Veteran is \$1,000 per month and the Veteran's income is \$700 per month, the Veteran would be entitled to the full maximum pension benefit. One caveat: the Veteran must prove actual amounts paid. Therefore, those amounts paid "under the table" to caregivers will not count. Additionally, the Veteran must rely on the assisted living facility's statement of what it considers the Veteran's "medical cost of care." This can be substantially lower than the actual cost. Medical expenses should be listed on the Medical Expense Report, VA Form 21-8416.

See 38 CFR §3.272.

4) Asset Limitation. This is the biggest difficulty in getting your client approved for the benefit because the asset test is not transparent. It is determined on a case by case basis.

- a. The VA's website states:

Net worth means the net value of the assets of the veteran and his or her dependents. It includes such assets as bank accounts, stocks, bonds, mutual funds and any property other than the veteran's residence and a reasonable lot area. There is no set limit on how much net worth a veteran and his dependents can have, but net worth cannot be excessive. The decision as to whether a claimant's net worth is excessive depends on the facts of each individual case. All net worth should be reported and the VA will determine if a claimant's assets are sufficiently large that the claimant could live off these assets for a reasonable period of time. VA's needs-based programs are not intended to protect substantial assets or build up an estate for the benefit of heirs. See <http://www.vba.va.gov/bln/21/pension/vetpen.htm#7>.

Experience in the application process tells that the amount of assets allowed is very limited and is based on what a person of the age and health of the applicant would need. Clearly, the lower the net worth, the more likely the applicant will be approved for benefits. Unlike Medical Assistance where the program takes great pains to reveal and penalize gifts, this VA program has no look-back period. This opens the door to gifting strategies. However, gifting may have many unintended consequences. First and foremost, if the applicant needs Medical Assistance Long Term Care benefits in the future, these gifts will serve as a penalty and may prevent the applicant from receiving these benefits. Gifts may be returned to mitigate the penalty period.

However, many more problems exist if the gift recipient (usually a child) wants to preserve a gift in the event the disabled parent needs to qualify for Medical Assistance:

- 1) A falling out between the gift recipient and the disabled person.
- 2) The gift recipient feeling the need to spend the gift on a new pool.
- 3) The gift recipient incurring a liability or substantial debt leading to the gift being levied upon.
- 4) A commingling of the gift with marital assets and a subsequent divorce.
- 5) The death of the gift recipient and a distribution to (nair-do-wells).
- 6) Usually the gift recipient is not excited about paying taxes on the income produced on a gift that may be returned.

One solution to the above problem is for the gift recipient to create an irrevocable special needs trust for the benefit of the disabled applicant and place some or all of the gifted funds into the trust. This does raise the issue of a Medicaid Qualifying (disqualifying) Trust and step transaction doctrine (the step transaction doctrine being used first in IRS cases stating that if several steps are taken in succession to avoid a tax, the IRS can collapse the steps to deny the tax benefit). Remember, however, this trust is not being created in an effort to transfer money to qualify a disabled person for Medical Assistance. In fact, because the trust is being used to cure the ills listed in 1-6 of the paragraph above, it can be used as an argument that it was not in any way for Medical Assistance purposes. The Irrevocable Trust does cure many of the ills listed above:

- 1) The Trust can only be used for the benefit of the disabled person.
- 2) The Trust is asset protected from the creditors of the disabled person and the gift recipient.
- 3) Succession planning is included in the Trust in the event of the gift recipient's demise or incapacity.
- 4) The Trust, while being irrevocable, is terminable in the event that it prevents the disabled person from qualifying for government programs (Medical Assistance). In the event it terminates, the money passes back to the gift recipient and the gift recipient can return funds to the disabled person to spend down.
- 5) As long as the income of the Trust is used for the benefit of the disabled person in the year the income was created, it will be taxed to the disabled person. Otherwise, unused income will be taxed to the Grantor (as the Trust is a Grantor Trust).

Of course, the gifting and special needs trust is not a panacea for all the problems associated with the VA benefit and Medical Assistance. The client must be aware that the trust may need to be terminated if Medical Assistance is required. Also, the VA may decide to inquire as to past transfers or argue the Trust is an asset of the disabled person. Moreover, even if the gift is made five (5) years before Medical Assistance is required, Medical Assistance may argue that the assets are still available to the disabled person and must be spent down. Even though these problems exist, the benefit can be so substantial that the client may make the informed decision that taking steps to qualify for the VA benefit takes priority. No matter what, the VA benefit should be on practitioner's radar screens, even though it is a stealth program. For more information, see the below forms.

The application form for the Veteran:

[VETERAN'S APPLICATION FOR COMPENSATION AND/OR PENSION, VA Form 21-526] can be found at: <http://www.vba.va.gov/pubs/forms/VBA-21-526-ARE.pdf>.

The application form for the deceased Veteran's Spouse and Child:

[FOR APPLICATION FOR DEPENDENCY AND INDEMNITY COMPENSATION, DEATH PENSION AND ACCRUED BENEFITS BY A SURVIVING SPOUSE OR CHILD (INCLUDING DEATH COMPENSATION IF APPLICABLE)VA FORM 21-534] can be found at <http://www.vba.va.gov/pubs/forms/vba-21-534.pdf>.