

Accessing VA Resources

PLI – March 22, 2017

**VETERAN
ADVOCACY
PROJECT** URBAN
JUSTICE
CENTER

Agenda

1. Eligibility

- Discharges and consequences
- Avenues for relief

2. Health Care

- Groups
- Basic package
- Programs

3. Benefits

- Disability Compensation
- Pension
- Survivors' benefits

4. Fiduciaries

- Appointment
- Rules
- Appeal

Benefits through the VA

Burial
Benefits

Long
term
care

Medical care

GI : Montgomery
& Post-9/11

SSVF

“Voc
Rehab”
(VR&E)

Caretaker
benefits

Disability
Compensation

HUD-
VASH

Public (cash)
Assistance

Supportive
Housing

VA
Pension

Aid &
Attendance

DEA

Home
Loan
Guaranty

Survivors
Benefits

Medicaid

Special
Monthly
Compensation

Food
Stamps

Medicare

Readjustment
Counseling

Dependency &
Indemnity
Compensation

SSI

Prescriptions

Life
Insurance

Clothing
Allowance

Unemployment
compensation

Compensated
Work Therapy

AND
MORE...

Home &
Vehicle
Modification

**VETERAN
ADVOCACY
PROJECT**

Discharges

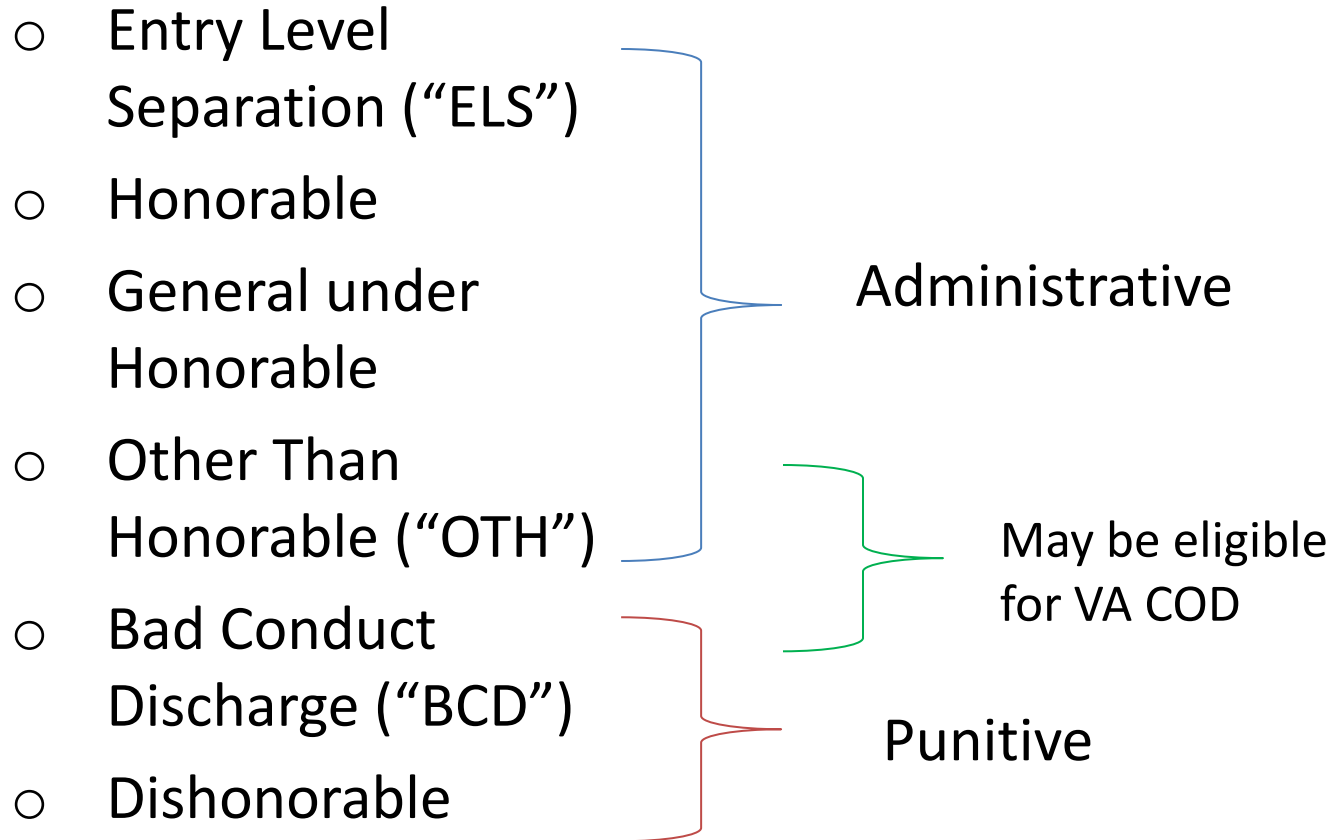
DD 214 information:

- Basic biographical data
- Dates of service
- Character of Service
- Awards/Medals
- Special Training
- Rank
- Separation Code
- Narrative Reason for Discharge
- Reentry Code

[illegible]

SERVICEMEMBERS MAY HAVE MORE THAN ONE DD214

Discharges



Discharges

- Determine eligibility for benefits & healthcare; bad discharges are often a serious barrier to employment; stigma follows the veteran for life
- Over-simplified breakdown of benefits:
 - Honorable = full benefits
 - General (under whatever conditions) = no GI Benefits
 - Other Than Honorable (“OTH”) = VA will make a characterization of discharge determination (bars to VA medical and benefits)
 - Bad Conduct Discharge (“BCD”) = no medical, benefits possible through characterization of discharge determination if result of a special court-martial, not general
 - Dishonorable = no benefits, medical only with insanity finding

Discharge Advocacy & Upgrade

Avenues:

- **VA:** Characterization of Discharge/Service
(not an upgrade!)
- **DRB:** Discharge Review Boards
- **BCMR:** Boards for Correction of Military Records

Discharge Advocacy

- **VA discretion – OTHs and some BCDs**
 - **OTH is NOT an automatic “no”** despite what a veteran may hear/be told, even at a VHA facility
 - There are bars to benefits & health care, but the VBA will review **entirety** of servicemember’s record to make a **Character of Service /Character of Discharge** determination **38 CFR § 3.12**
 - Insanity exception. 38 USC § 5303(b), 38 § CFR 3.12 (b), 38 CFR § 3.354
 - Prepare client that VA may send a decision that says honorable/dishonorable for VA purposes
- **Form:** Just like any VA claim
 - Regional Office, Board of Veterans Appeals, etc.
 - Representative **MUST BE ACCREDITED**
 - Great resource: “Beyond TBD,” 214 MIL L REV 1 (2012)

Discharge Advocacy

PARAPHRASE of part of 38 CFR § 3.12 (listing of bars)

(c) Benefits are not payable [*if the servicemember was discharged*] ...

(1) As a conscientious objector

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that ...

(6) [*OTH for AWOL over 180 days, unless there are compelling circumstances...*]

(d) A discharge [*for anything listed here*] is considered ... under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude...includes, generally, conviction of a felony.

(4) Willful and persistent misconduct...[*a small offense with a good record is okay*]

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. ...

Discharge Upgrade

DRB: *DD Form 293*, DoDI 1332.28, 10 U.S.C. § 1553, 32 C.F.R. § 70.9

- Power to upgrade discharges except those awarded by general court-martial
 - Can upgrade & change the reason (sep. code or “SPN”)
 - Cannot change reenlistment codes or modify content of records
- Basis: equity & propriety (fairness & legal/technical sufficiency); clemency
 - Show: “substantial credible evidence”
- 15 year SOL
- Board is five officers. Must have majority vote of board
- Veteran deployed + PTSD and/or TBI = physician, psychiatrist, or psychologist must be voting member of board, 10 USC § 1553(d)(1)

Form:

- Documentary Review (a brief & evidence)
- Personal Appearance (“two bites of same apple”): better chance statistically
- Appeal under APA, six years, 28 USC § 2401

Discharge Upgrade

BCMR: *DD Form 149*, DoDI 1332.41, 10 U.S.C. § 1552

- Power to upgrade, change reenlistment codes, discharge date, change discharge to medical/disability retirement, modify or add to contents of records—anything except overturn court-martial conviction
- Basis: injustice & error (unfairness & procedural error); clemency
 - Bound by precedent: *Wilhelmus v. Geren*
- 3 year SOL (from date of “discovery of alleged error or injustice” and can be waived “in the interest of justice”)
- Made up of high-ranking civilian employees

Form

- Brief with evidence
- Only in D.C. and *rarely* grant in-person appearances
- Request reconsideration with new and material evidence
- Appeal under APA, 6 years

Possible Reasons for Upgrade

Department of Defense Instruction (DODI) 1332.28

DRB: Propriety and Equity/ BCMR: Error and Injustice

- **Propriety or Error:** Administrative Error (n.b. conduct a thorough review of veteran's personnel file).
- **Equity or Injustice:** Changes in Policies and Procedures (e.g. Don't Ask, Don't Tell)
- **Equity or Injustice:** Total Capabilities. Whether the veteran was able to serve satisfactorily taking into account age, education, aptitude, and other variables.
- **Equity or Injustice:** Family and Personal Problems. Matters in extenuation or mitigation of the reason for the discharge that may have affected the applicants ability to serve satisfactorily.
- **Equity or Injustice:** Discrimination; Arbitrary or Capricious Action.

Department of Veterans Affairs

- Veterans Health Administration
- Veterans Benefits Administration
- National Cemetery Administration

Office of the Secretary

Office of the Inspector General

Office of Small and Disadvantaged Business Utilization

Office of Employment Discrimination Complain Adjudication

Center for Women Veterans

Center for Minority Veterans

Office of the General Counsel

Board of Veteran's Appeals

Acquisition, Logistics, and Construction

Advisory Committee Management Office

Veterans Service Organization Liaison

Federal Recovery Coordination Office

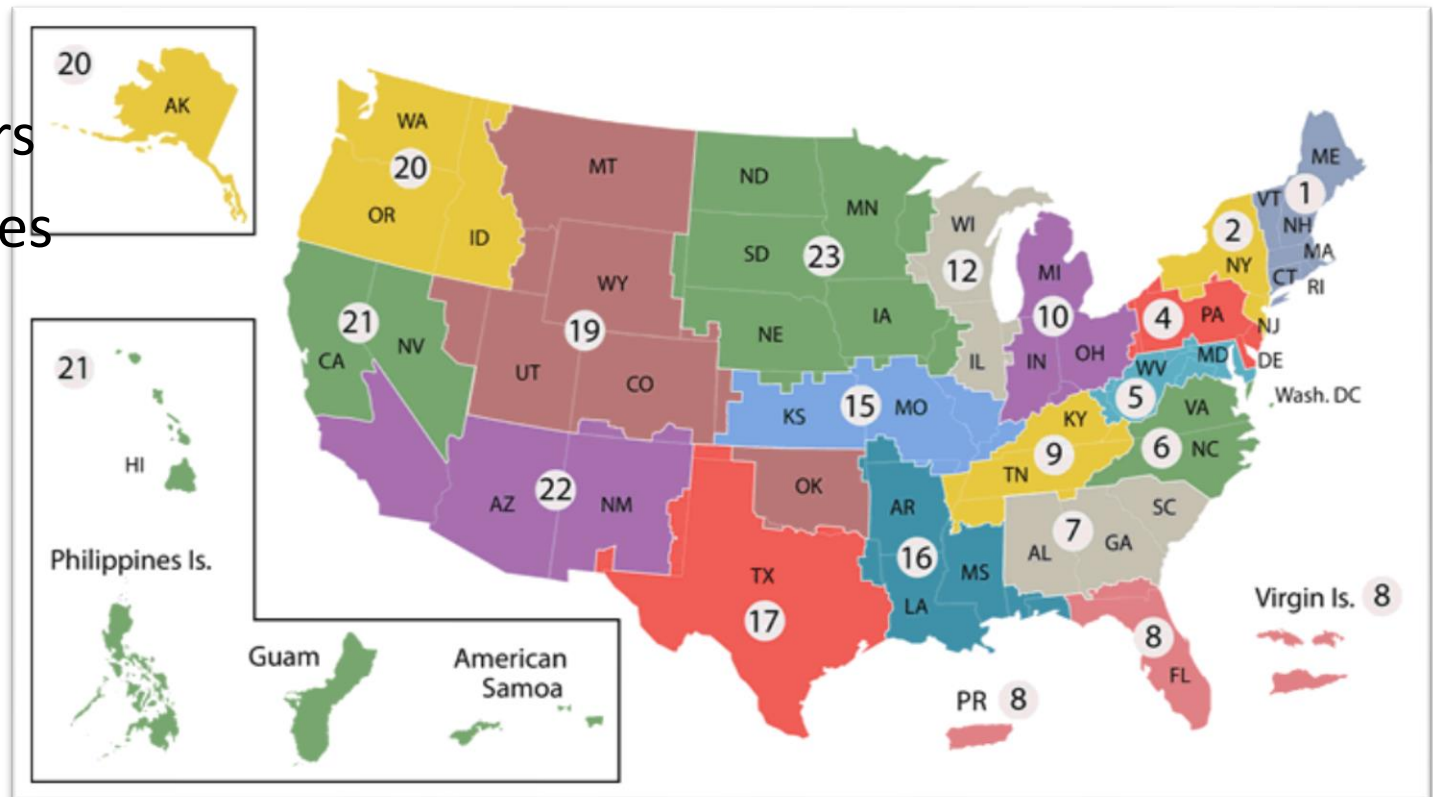
NGO Gateway Initiative Office

Office of Regulation, Policy and Management

Center for...

VA Health Care

- 23 VISNs (Veterans Integrated Service Network): Now consolidated to 18.
- Within each VISN are medical centers (VAMCs) where a vet can go to enroll
- Clinics
- Vet centers
- 1,700+ sites



VA Health Care

- **Medical Package:**

- preventative care, vaccinations, certain disease/condition screenings such as prostate cancer, geriatrics program, social work services, etc.
- Priority Groups for eligibility determinations made by HEC in Atlanta

- **Eligibility**

1. Discharge status

- Honorable, General
- OTH & BCDs (no general court martial) determined “honorable for VA purposes” (COD process)

2. Time

- If an enlisted veteran served after September 7, 1980, then needs to have served 24 continuous months or full time called to active duty (exceptions for hardship and service-connected disability)
- Members of National Guard or Reserve are eligible if:
 - called to active duty by federal order (Title 10, *active duty OTHER THAN FOR TRAINING*) and
 - completed the full period for which they were called or ordered to active duty (some exceptions...)

VA Health Care

- **MyVA:** trust, customer experience, Veterans Experience offices
- **Veterans Choice Program:** 30 day wait or more than 40 miles from VA treatment...
- **Telehealth Services:** devices in home for monitoring health, video conference, etc.
- **Commission on Care:** recommendations for change
- **My HealtheVet:** online access to VA health records and healthcare team
- **Registries:** free exams and information
- **Millennium Health Care and Benefits Act**
 - Many requirements to be covered under this statute for emergency care outside of the VA (38 U.S.C. § 1725)
 - Common problem for recently enrolled veterans: they are not “active Department health-care participant[s]” within last 24 months

VA Benefits

Disability Compensation

Components:

1. In service incident, injury, illness
 2. Current disability
 3. Nexus between the current disability and the in-service event
- “in-service” can be someone playing basketball while on active duty
 - the event can be the aggravation of a condition that already exists
 - the nexus is where people lose their claims

VA Benefits

Disability Compensation

- Based on a percent rating in increments of 10, 0-100
 - 0 % rating is useful
- Range: \$133.57 - \$2,915.55 per month for single veteran
 - Additional amount added for children, spouse, & dependent parents
- Nothing to do with ability to work in fact. Can be 100% and fully employed
- Immune “from taxation, claims of creditors, attachment, levy, and seizure”
38 U.S.C. § 5301
- Family Law: VA benefits “go with the veteran” but that does not mean the income cannot be considered by a judge in determining support.
 - *Rose v. Rose*, 481 U.S. 619 (1987)
 - Apportionment

VA Benefits

Disability Compensation

- Individual Unemployability (IU)
 - Must have service-connected:
 - at least one condition rated at 60% OR
 - At least two conditions with at least one at 40% or more and with a combined rating of 70% (in VA math...)
 - Must not be able to maintain “substantially gainful employment” --ie, odd jobs and marginal employment are okay.
- Special Monthly Compensation
 - Veterans: “SMC” is an additional cash amount for a specific disability such as loss of limb, certain organs, etc.
- VA Math: Ratings are calculated in descending order multiplying, subtracting, and rounding.

VA Benefits

VA Pension

- “Pension” may be confusing -- may be referred to as “VA disability,” “non service-connected,” etc.
 - \$ 1,072 per month (more with dependents)
- Eligibility. Must have all three:
 1. Served “90 consecutive days” with at least 1 day in a period of war, as defined by statute
 - If served after 9/8/80 for enlisted, 10/16/81 for officers, minimum service requirement is 24 continuous months or the full period called to active service (under Title 10)
 - 38 USC § 1521(j)
 2. Disabled OR over 65, 38 USC § 1513
 3. Low income (Maximum Annual Pension Rate – “MAPR”. A little over \$12K per year right now)

VA Benefits



- Make sure veteran is NOT receiving VA Pension & SSI impermissibly
 - Veterans likely to be forced to PAY BACK an “overpayment”
- If a veteran is on SSI and getting a supplement from the VA to match the total allowable Pension amount, that’s okay. Example:
 - \$670 SSI
 - \$384 VA Pension

VA Benefits

Survivors' Benefits

DIC = Dependency Indemnity Compensation

- Veteran died while on active duty or death resulted from S-C injury/disease OR whose death was from a non-S-C disability (VA Pension) that was rated as totally disabling for 10 yrs immediately before death OR... *it goes on...*
- Rate (vet's death on or after 1/1/93) surviving spouse of an E1: \$1,257.95
 - + \$267.12 if vet totally disabled 8 yrs prior to death & spouse was with vet all 8 yrs
 - + \$311.64 for helpless child
 - + for Aid & Attendance or Housebound
 - Parent/Child rate is different
- WHO IS ELIGIBLE? Married spouse, dependent children, surviving parents. (Spouse note: separated, had a child together, etc. , determination is VERY COMPLICATED)

VA Benefits

Survivors' Benefits

Survivors' Pension (aka "Improved Death Pension")

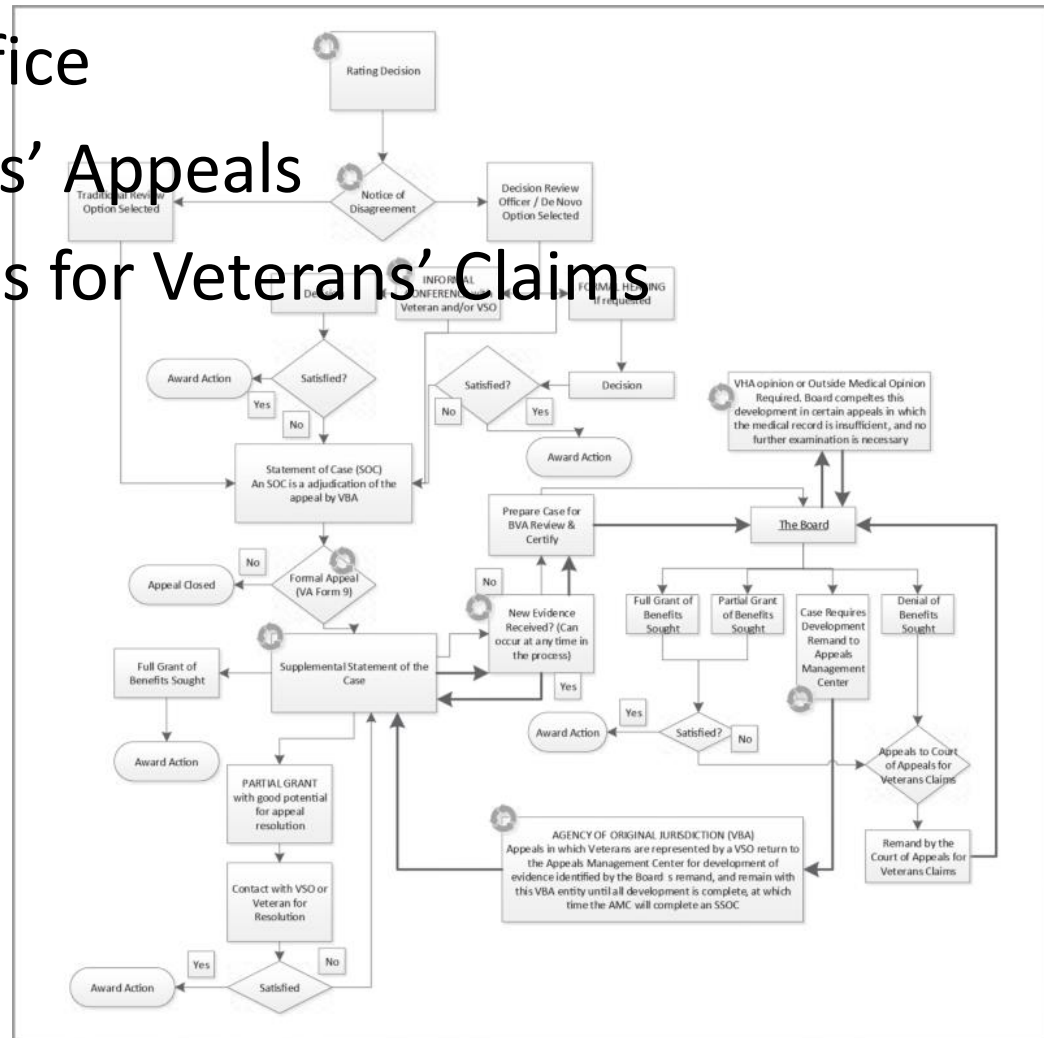
- VA Pension for spouse, dependent children, dependent parents
- Same eligibility standards as Pension (vet had 90 days active duty with 1 in wartime; ALSO note: after 1980: 24 months active duty)
- Maximum Pension for the year - Countable income = benefit paid
 - MAPR 12/1/16: single spouse no children, \$8,656
 - Same rules for unreimbursed medical expenses over 5%, net worth, etc.

Income: Miscellaneous

- **Aid & Attendance**
- **Housebound**
- **Special Monthly Compensation**
- **VA Home Loans**
- **Burial Benefits**
- **Home/Vehicle Modification**
- **Clothing Allowance**
- **and more..**

VA Adjudication

- VARO: VA Regional Office
- BVA: Board of Veterans' Appeals
- CAVC: Court of Appeals for Veterans' Claims
- Federal Circuit
- Supreme Court



VA Benefits

Handy Forms

- **21-4138**, Statement in Support of Claim: used as a catch-all for anything really. *Ex:* Veteran can request a copy of c-file on this form (VBA)
- **21-5345**, Request for and Authorization To Release Medical Records (VHA) [sort of a VA version of a HIPAA release]
- **3288**, Request for and Consent to Release of Information: used to request documents from a claimant's file (VBA)
- **21-0845**, Authorization to Disclose Personal Information to a Third Party: allows agent to speak to VA (VBA)
- **10-10EZ**, Application for Health Benefits
- **21-22a**, Appoint a Representative: this will cut off any prior rep's access to a claim with no notice, so be extremely careful or the veteran's claim will get sent to the beginning of the process again; requires accreditation
- **21-0781**, Statement in Support of Claim for Service Connection for Post-Traumatic Stress Disorder
- **9**, Notice of Disagreement: this informs the VA Regional Office that you want to appeal a decision to the BVA
- **SF-180**, Request Pertaining to Military Records: use this to get DD-214s, Service Treatment Records (medical), and OMPF (Official Military Personnel File)
- **21-526**, Veteran's Application for Compensation and/or Pension: VSO should assist veteran; almost always will need the following form
- **21-4142**, Authorization and Consent to Release Information to the Department of Veterans Affairs: use this form to authorize providers to send info to the VA as evidence for a claim

VA Fiduciary

Process

- If a vet seems to be unable to manage finances, VA may propose fiduciary
 - Can also be requested: supporting evidence will be considered (medical documentation, court order, etc.)
 - Simple doctor's note in a C&P exam can trigger the VA's proposal.
- Field examination will be conducted to assess the veteran's situation.
- VA will make a decision & notify the veteran in writing.
 - Definition of mental incompetency: a "person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation." 38 C.F.R. § 3.353(a).
 - Standard: medical opinion that is "clear, convincing and leaves no doubt." 38 C.F.R. § 3.353(c).
- Individual has 60 days to submit evidence why they should not have a fiduciary (aside from the traditional appeals process). If the VA affirms their decision an appointment will be made.

Proposed Fiduciary - Investigation: may include credit reports, character witnesses, and criminal background check, depending on the individual

VA Fiduciary - Responsibilities

Ongoing duties and rules

- Decide how to spend the beneficiary's money in way that looks out for his/her wellbeing and keeps the individual in the same standard of living as those with similar resources.
 - Secure housing, groceries, arrange for medical care and mental health treatment
 - Have bills sent to fiduciary directly & pay them on time; manage taxes, insurance needs, and any debts owed the beneficiary; make reasonable, safe investments.
 - Keep separate financial accounts in federally insured banks or credit unions, unless the fiduciary is a spouse, state or local entity, or health care facility.
- Notify VA of any change in vet's circumstance and reply to VA communications regarding an accounting, information for benefits verification, etc.
 - Fiduciary has 30 days to produce all records over the accounting period (VA Form 21P-4706b, *Federal Fiduciary's Account*).
- Report changes in their own contact information and alert the VA if they would like to withdraw due to illness, safety, felony convictions, etc.
- A VA fiduciary has control only over VA benefits—not others. So it is **not** a solution for someone who needs financial management of other resources as well.
 - Other means may be used to establish this financial/legal authority (court appointment, legal custody, etc.). If the fiduciary manages other funds for the beneficiary/veteran then reports on these funds must be made to the VA as well.

VA Fiduciary – Appealing

When to object:

VA has notified of the intent (60 days to submit evidence), within 1 year of the VA's decision of appointment (fiduciary already in place), and any time after that. 38 C.F.R. § 3.103.

- If within 1 year of the decision, like a benefits claim, submit NOD
- If more than 1 year, vet can request a reevaluation. 38 C.F.R. § 3.327(a).
 - This is like the initial appointment process and a new decision will be issued.

NOD

- Explain exactly what they disagree with and why; provide evidence why fiduciary is not needed (a medical opinion is important evidence).
- NOD goes to the regional Fiduciary Hub (or the VARO)
- If the VARO does not agree, a veteran has the right to appeal to the Board of Veterans' Appeals in Washington, D.C.
- The case proceeds similar to a benefits claim appeal.
- Only the beneficiary, usu veteran, has right to appeal. Unless there is a legally appointed person but then you have a tough argument to make