



**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM

**HOW INVOLVEMENT  
WITH THE  
CRIMINAL JUSTICE  
SYSTEM IMPACTS VA  
BENEFITS**

# AGENDA



- **A look at the numbers...**
- **Fugitive Felon Status**
- **Benefits for Incarcerated Veterans (and Duty to Assist)**
- **Apportionment**
- **Restoring Benefits After Release**
- **Useful Practice Tips for advocating for Justice Involved Veterans**

# JUSTICE-INVOLVED VETERANS



- **Definition: Former service members who have been detained by or are under the supervision of the criminal justice system**
  - [www.research.va.gov/currents/0918-VA-researcher-examines-Vets-who-collide-with-criminal-justice-system.cfm#](http://www.research.va.gov/currents/0918-VA-researcher-examines-Vets-who-collide-with-criminal-justice-system.cfm#)

# A LOOK AT THE NUMBERS...



- Percentage of the prison population that identifies as a veteran is about the same as the percentage of veterans in the general population (5% in Federal prisons, 8% in State prisons)
- **2021 Census – 6.4% of the U.S. population is veterans**

## But...

- ACLU.org – News and Commentary- Our Veterans Need Support, Not Incarceration
- <https://bjs.ojp.gov/library/publications/veterans-prison-survey-prison-inmates-2016> (Veterans in Prison: Survey of Prison Inmates)

# A LOOK AT THE NUMBERS...



- Almost 1/3 of America's war veterans have been arrested or booked into jail – double the rate among civilians
- **Veterans with PTSD are 60% more likely to be incarcerated than those without it and more likely to have a substance use disorder, which can lead to incarceration**
- **Over half of veterans in the Criminal Justice System have mental health or substance use disorders**
  - ACLU.org – News and Commentary- Our Veterans Need Support, Not Incarceration
  - <https://bjs.ojp.gov/library/publications/veterans-prison-survey-prison-inmates-2016> (Veterans in Prison: Survey of Prison Inmates)

# FUGITIVE FELONS



# **FUGITIVE FELONS**

## **38 U.S.C. § 5313B**



- **Prohibition on providing certain benefits with respect to persons who are fugitive felons**
- **Went into effect on 12/27/2001 with passage of The Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103**

# **FUGITIVE FELONS**

## **38 U.S.C. § 5313B**



- The term “fugitive felon” means a person who is a fugitive by reason of:
  1. Fleeing to avoid prosecution, custody, or confinement after conviction for a felony or an attempt to commit a felony (under the law of the place from which the person flees);or
  2. Violating a condition of probation or parole imposed for commission of a felony under federal or state law
- 38 C.F.R. § 3.665(n)(2)



# FUGITIVE FELON BENEFITS



- VA compensation and pension are not payable on behalf of a veteran for any period during which he or she is a fugitive felon
  - 38 C.F.R. § 3.665 (e)(1), (n)
- Other VA Benefits are also terminated, including health care, education, VR&E, and life insurance
  - 38 U.S.C. § 5313B(c) 38 C.F.R. §§ 3.665(n), 3.666(e), 21.3135(j), 21.4135(n), and 21.7135(aa)

# FUGITIVE FELON CLAIMS



VA instructs its adjudicators to:

- **Take no action on new claims or HLR requests**
- **Discontinue development on and cancel any pending claims or requests for HLRs**
- **Disallow any claims for increased benefits, but**
- **Continue processing any pending legacy appeals**
  - **Manual M21-1, XIV.8.2.e (change date Aug. 3, 2023)**

# FUGITIVE FELON OFFENSE CODES



- Before June 2014, VA assumed that anyone with an active felony arrest warrant was a fugitive, regardless of fleeing status
- In 2014, VBA determined that one of the following codes must be associated with the check of the National Crime Information Center (NCI) – Fed. Gov't database for crime-related info
  - VBA Letter 20-14-09

# FUGITIVE FELON OFFENSE CODES



- 4901 – Escape
- 4902 – Flight to Avoid (prosecution, confinement)
- 4999 – Flight-Escape
- 5011 – Parole Violation
- 5012 – Probation Violation
- 8101 - Juvenile Offender, Abscond While on Parole
- 8102 – Juvenile Offender, Abscond While on Probation

# FUGITIVE FELON MATCHING SYSTEM



- Matching System agreements exist between OIG and law enforcement agencies
- OIG periodically sends lists of veterans receiving benefits who match with requirements of fugitive felon to VA and will thereafter provide support in determining legal status
- VA is then responsible for processing these lists
  - Manual M21-1, XIV.8.1.d

# FUGITIVE FELON PROCESS



- Notice of adverse action sent and 60 days to respond with evidence or request a hearing
- Date benefits will be suspended will be the later of:
  - the date of the warrant, or
  - 12/27/2001 (when 38 U.S.C. § 5313B went into effect)

# FUGITIVE FELON PROCESS



- The proposed adverse action letter must include the following info about the warrant:
  - **name and telephone number of the warrant agency**
  - **warrant number**
  - **date of warrant, and**
  - **warrant offense description and/or code**
    - **Manual M21-1, XIV 8.2.b (change date Aug. 3, 2023)**

# FUGITIVE FELON



- Evidence to submit showing veteran was not in fugitive felon status:
  - **copy of a court order that clears or vacates the warrant w/in 30 days of issuance**
  - evidence that a court specifically determined the warrant was void from its inception because of mistaken identity or a defect in the warrant



# FUGITIVE FELON



- Evidence to submit showing veteran was not in fugitive felon status (cont'd):
  - **states or uses the terminology “nunc pro tunc,” which means the court order applies retroactively to correct an earlier court order, or**
  - **a police report or statement from the SSA or other gov’t agency, a bank, or other reporting agency that supports a claim of identity theft**
    - **Manual M21-1, XIV 8.2.b (change date Aug 3, 2023)**

# FUGITIVE FELON

## WHEN A WARRANT IS CLEARED



- “In most cases in which a warrant is dismissed, recalled, or quashed, a valid warrant was still pending through the date the warrant was cleared.”
- **“VA benefits are subject to adjustment from the warrant date (or the effective date of 38 U.S.C. § 5313B) until the date the warrant was recalled, dismissed, or quashed.”**
  - Manual M21-1, XIV.8.2.h (change date Aug. 3, 2023)

# HYP0 #1



- A felony arrest warrant is issued for Vet on 3/3/2023
- **Court clears the warrant 3 weeks later on 3/24/2023**
- On 4/25/2023, a computer match shows the issuance of a felony arrest warrant for this Vet with a “Flight Escape” code
- **VA eventually sends Vet a notice of adverse action which Vet receives on 5/30/2023**

# SURVEY #1



- **Why is the veteran not considered a fugitive felon for purposes of VA benefit suspension?**
  - A. The code associated with the warrant was 'Flight Escape,' which is not one of the required codes
  - B. The warrant was cleared w/in 30 days of issuance
  - C. Veteran received notice the warrant was issued more than 30 days after the warrant was issued
  - D. VA sent the proposal of adverse action more than 30 days after notice of the warrant

# **SURVEY #1**

## **ANSWER**



# **B**

- The warrant was cleared w/in 30 days of issuance
- **A copy of a court order that clears or vacates the warrant within 30 days of issuance will not trigger a fugitive felon process for VA purposes**

# FUGITIVE FELON OIG REPORT



VA OIG 21-002401-190, Aug. 3, 2022

- **VBA did not process felony referrals from 2012 and 2013**
- **VBA did not process 46% of felony referrals sent by the OIG in 2019 and 2020**
- **Due process notices did not comply with VBA policies and procedures**



# **INCARCERATED VETERANS VA BENEFITS**

# INCARCERATION AND BENEFITS



- Congress has greatly restricted and, in some cases, eliminated, the amounts of VA benefits and manner in which they may be paid while the veteran, dependent, or survivor entitled to these benefits is incarcerated for a felony



# FELONY DEFINITION



- “Felony” is any offense punishable by death or imprisonment for a term exceeding one year, unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction
  - 38 C.F.R. § 3.655(b)
- **But, “felony” includes a high misdemeanor under the laws of a state which characterizes as high misdemeanors offenses that would be felony offenses under Federal law**
  - 38 C.F.R. § 3.655(n)(3)

# FELONIES/MISDEMEANORS



- Felony examples: kidnapping, home burglary, murder
  - Usually min. of one year of imprisonment
- Misdemeanor examples: DUI, simple assault, disorderly conduct
  - Usually 1 year or less imprisonment
- Sentencing and grades/classes/degrees vary by state
- Some crimes may be classified as a misdemeanor OR felony, depending on location, so when assisting a Vet, be sure to identify what the conviction is for/how it is defined

# CONVICTION DEFINITION



- A “conviction” occurs when the accused is found— or pleads—guilty, regardless of the manner of sentencing
  - *Mulder v. McDonald*, 805 F.3d 1342 (Fed. Cir. 2015)
- Once a beneficiary is convicted, VA may apply the statute; VA is not required to wait until the claimant has exhausted all of his or her post-conviction appeals and receives a “final” conviction
  - 38 U.S.C. § 5313(a)(1); 38 C.F.R. § 3.665(a)
  - *Wilson v. Gibson*, 753 F.3d 1363, 1367 (Fed. Cir. 2014)

# CHARGES V. CONVICTION



- Unless they are a fugitive felon, a veteran must be **CONVICTED** of a crime before benefits are impacted
- **A veteran could be arrested and held in a penal institution awaiting trial and still be receiving and entitled to full benefits**

# INCARCERATION DEFINITION



- The following do not constitute “incarceration”:
  1. **Confinement in a mental institution, even if the commitment was due to a judgment that the individual was not guilty of felony charges “by reason of insanity”**
    - *Philbrook v. McDonough*, 15 F.4th 1117 (Fed. Cir. 2021); VA Gen. Coun. Prec. 3-90 (Mar. 20, 1990)
  2. **Participation in a work release program or residence in a halfway house pending completion of a full sentence**
    - 38 U.S.C.S. § 5313(a)(2); 38 C.F.R. § 3.665(b)

# INCARCERATION DEFINITION



- The following do not constitute “incarceration” (cont’d):

### **3. Incarceration in a foreign prison**

- VA Gen. Coun. Prec. 10-2001 (May 24, 2001)

### **4. A felony conviction resulting in a sentence of “community control with conditions”**

- VA Gen. Coun. Prec. 59-91 (June 24, 1991)

# THE GENERAL RULE

## 38 C.F.R. § 3.655(a)



- Who: Any person specified in paragraph (c) of this section who is incarcerated
- Where: in a federal, state, or local penal institution
- When: in excess of 60 days for
- What: conviction of a felony
- will not be paid compensation in excess of the amount specified in paragraph (d) of this section beginning on the 61st day of incarceration

# 38 C.F.R. § 3.665(c) APPLICABILITY



1. A person serving a period of incarceration for conviction of a felony committed after 10/7/1980
2. A person serving a period of incarceration after 9/30/1980 (regardless of when the felony was committed) when:
  - The person was incarcerated on 10/1/1980; and
  - An award of compensation is approved after 9/30/1980
3. A veteran who, on 10/7/1980, was incarcerated in a federal, state, or local penal institution for a felony committed before that date, and who remains so incarcerated for a conviction of that felony as of 12/27/2001



# **38 C.F.R. § 3.665(d)**

## **AMOUNT PAYABLE DURING INCARCERATION**



- **If Vet's combined SC disability rating is 20% or more, Vet will receive payment at the 10% disability rate**
  - **Ex: Single Vet is rated at 40% and receiving \$731.86 per month before incarceration. As of 61<sup>st</sup> day of incarceration for conviction of a felony, Vet will receive \$165.92 (10% rate).**
- **If Vet's combined SC disability rating is 10%, Vet will receive payment at half of the 10% disability rate**
  - **Ex: Vet is rated at 10% and receiving \$165.92 per month before incarceration. As of 61<sup>st</sup> day of incarceration for conviction of a felony, payment will be reduced to \$82.96.**

# DISABILITY COMPENSATION APPLICATIONS AND APPEALS



- The limitation in the payment does NOT lower the veteran's SC disability rating level (just amount paid)
- Initial applications, increases, appeals, etc. can continually be pursued (with exceptions for TDIU)

# BENEFITS GENERALLY RESTORATION OF BENEFITS



- Upon release from incarceration, the payment amount returns to the level for the actual disability rating
- ***Conviction overturned on appeal.*** If a conviction is overturned on appeal, any compensation withheld as a result of incarceration for the conviction (less the amount of any apportionment) shall be restored to the beneficiary (must notify VA within a year)
  - 38 C.F.R. § 3.665(m)

# DISCONTINUED BENEFITS: PENSION



- Unlike disability compensation, VA completely stops pension payments to incarcerated beneficiaries effective the 61<sup>st</sup> day of imprisonment
- VA pension benefits are stopped for any type of conviction that results in incarceration, whether the offense is a misdemeanor or a felony
  - 38 C.F.R. § 3.666

# DISCONTINUED BENEFITS: PENSION



- When a Vet is entitled to both SC compensation and NSC pension, and receiving pension as the higher benefit, compensation shall be awarded as of the 61st day of imprisonment, in lieu of the pension
- **But, if Vet has a spouse or child, Vet will be notified of the effect electing compensation will have on the amount payable through apportionment. Change in award to compensation will take place after Vet makes decision to change to compensation.**
  - 38 C.F.R. § 3.666(d)

# DISCONTINUED BENEFITS: PENSION



- Like disability compensation, NSC pension otherwise payable to the incarcerated beneficiary may be apportioned to family members
- The effective dates of termination and resumption of pension payments are the same as those for compensation
  - 38 C.F.R. § 3.666

# HYP0 #2



- A single veteran is receiving \$550 in VA NSC pension, and has a SC rating of 30% (\$508.05/month)
- Because pension is the greater benefit, Vet receives \$550 a month
- Vet is subsequently incarcerated for conviction of a misdemeanor

# SURVEY #2



- How much in VA benefits will the veteran receive on the 61<sup>st</sup> day of incarceration?
  - A. Nothing
  - B. Half the 10% SC rate
  - C. The 10% SC rate
  - D. The 30% SC rate



# **SURVEY #2**

## **ANSWER**



# **D**

- **The 30% SC rate**
- **On the 61<sup>st</sup> day of imprisonment, VA is required to change the benefit to SC compensation, as it is now the higher of the two benefits. Because the incarceration is for a misdemeanor, rather than a felony, the compensation benefits are not reduced further**
- **If incarceration had been for a felony, payment would be reduced to the 10% SC rate**

# SPECIAL ISSUE: TDIU



- A Vet who has been awarded TDIU *prior* to incarceration is subject to the normal reduction (payment at 10% rate)
- There is no requirement to *discontinue* TDIU solely because a Vet is incarcerated and, thereby, removed from the work-possible environment (VAOPGCPREC 13-97)

## BUT....

- The *assignment* of TDIU or *reinstatement* of a prior TDIU award, is prohibited during a period of incarceration
  - 38 C.F.R. § 3.341(b)

# **BENEFITS: VA HEALTH CARE**



- Incarcerated Vets do not forfeit their eligibility for VA health care; BUT
- **VA may not provide hospital and outpatient care to an incarcerated Vet who is an inmate in an institution of another gov't agency when that agency has a duty to give the care or services**
- This does not apply to Vets who are released from a prison or jail into a temporary housing program (such as a community residential re-entry center or halfway house)
  - 38 C.F.R. § 17.38(c)(5)

# BENEFITS

## VR&E



- **Full benefits**
  - If incarcerated for something other than a felony
  - If in a work-release program or half-way house (residential re-entry centers), regardless of whether the conviction was for a felony
- **No subsistence benefits**
  - If incarcerated for a felony, VA may pay all or part of tuition, fees, books, supplies, and equipment, **UNLESS** another federal or local program pays these costs in full
  - 38 C.F.R. § 21.276

# **VA'S DUTY TO ASSIST INCARCERATED VETERANS**

# DUTY TO ASSIST WHILE INCARCERATED



- VA's duty to assist, 38 U.S.C. § 5103A, applies to incarcerated veterans and includes obtaining:
  - **Medical exams for compensation claims**
  - **Private medical records, whether at the prison facility or somewhere else**
  - **Records for compensation claims**

# DUTY TO ASSIST WHILE INCARCERATED - EXAMS



- ROs must document all efforts made to schedule an exam, including identifying and requesting the assistance of the appropriate prison officials
- **VHA compensation clinics and VBA contract exam vendors are required to provide documentation that they have made substantial attempts to schedule and conduct the exam, and exhausted all possible avenues for obtaining access to the incarcerated veteran for the exam**
  - Manual M21-1, IV.i.2.E.2.d (change date May 20, 2020)

# DUTY TO ASSIST WHILE INCARCERATED - EXAMS



- If all efforts are exhausted, Vet's inability to attend = failure to report
  - Manual M21-1, IV.i.2.E.2.d (change date May 20, 2020)



# **DUTY TO ASSIST**

## ***WOOD V. DERWINSKI***



- CAVC noted that in deciding claims for incarcerated Vets, VA adjudicators should **“tailor their assistance to the peculiar circumstances of confinement,”** because **“[s]uch individuals are entitled to the same care and consideration given to their fellow veterans”**
  - 1 Vet. App. 190, 193 (1991)

# **DUTY TO ASSIST**

## ***BOLTON V. BROWN***



- RO denied claim for increased PTSD rating
- BVA remanded for an exam
- VA clinic's chief medical officer wrote that the clinic was unable to find a contract psychiatrist to perform the exam at the prison and prison didn't have a physician who could perform the exam
- RO and BVA again denied claim, with RO noting that exam could not be performed because of Vet's incarceration
- CAVC vacated the BVA decision because BVA "ceased in its quest" to afford the Vet a new exam

# **DUTY TO ASSIST**

## ***BOLTON V. BROWN***



- “Under the unique circumstances presented by this case, where the Secretary has determined that the veteran is not available to participate in a VA examination under regular conditions, and in keeping with the ‘caution’ of *Wood*, ... a remand is required to provide the Secretary with another opportunity to fulfill his statutory duty to assist this appellant in developing the facts of his claim.”
  - 8 Vet. App. 185, 192-197 (1995)

# **DUTY TO ASSIST**

## ***MERCURIO V. NICHOLSON***



- **Following a BVA remand:**
  - **RO contacted prison about exam and was told Vet would not be able to leave, but did not receive a response when asked if an examiner could come to the prison**
  - **VA requested records twice (sent to prison's PO Box), but received no response**
  - **BVA denied Vet's claims**

# **DUTY TO ASSIST**

## ***MERCURIO V. NICHOLSON***



- **Records: CAVC found VA failed to comply with 38 U.S.C. § 5103A(b)(2):**
  - **Notice must (1) identify the records VA was unable to obtain; (2) explain the efforts VA made to obtain those documents; and (3) describe any further action the VA will take with respect to the claim**
- **Exam: CAVC found VA failed to follow up on exam and should determine what state official had authority to respond to its request and obtain a definitive answer from that official**
  - **21 Vet. App. 401 (2006) (single judge, non-precedential)**

# **DUTY TO ASSIST**

## ***MERCURIO V. NICHOLSON***



*“Mercurio reflects that the Court will expect VA to fully comply with the VCAA’s duty to assist in obtaining relevant medical records from the facility where an incarcerated veteran is held, and to work with state or prison officials both in obtaining such records and in providing medical examinations when warranted.”*

- Jonathan Hager, *VA’s Duty to Assist Incarcerated Veterans*, 1 VETERANS L. REV. 231 (2009)

# DUTY TO ASSIST WHILE INCARCERATED



## • Summary

- **VA will assist veterans with obtaining an exam while incarcerated either by sending someone to a facility or bringing them to the exam**
- **VA should fulfill their duties under the VCAA in requesting records**
- **If VA fails to adequately attempt to assist incarcerated veteran, seek review/appeal**



# APPORTIONMENT



# APPORTIONMENT



- Entirely separate legal benefit from the Vet's claim and is NOT automatic
  - VA will alert Vet that benefits may be apportioned and how dependents can apply
  - VA will alert dependents, if aware of their existence and can get their addresses
  - VA will accept apportionment claim from either Vet or family member
    - Manual M21-1, VI.iii.1.B.1.b, 2.b

# APPORTIONMENT ELIGIBLE BENEFITS



- VA benefits that CAN be apportioned
  - Compensation
  - DIC
  - Pension
  - VR&E subsistence, if not incarcerated for a felony
- VA benefits that CANNOT be apportioned
  - Education Subsistence Benefits, unless Chapter 30 rate (Montgomery GI Bill Active Duty)
  - Beneficiary or dependent is a fugitive felon

# COMPENSATION APPORTIONMENT ELIGIBILITY



- **Eligibility:**

- **Relationship:** Spouse, children, or dependent parents
- **Amount Paid:** All or part of the compensation not paid to the incarcerated Vet
- **Individual Need:** Consideration shall be given to
  - Dependent's income and living expenses
  - Amount of compensation available for apportionment
  - Needs and living expenses of other dependents
  - Special needs of any dependent
- 38 C.F.R. § 3.665; Manual M21-1, VI.iii.1.B.2.h (change date Feb. 23, 2022)

# PENSION APPORTIONMENT ELIGIBILITY



- **Eligibility:**
  - **Relationship:** Spouse or children
  - **Dependent must meet the income requirements for Survivor's Pension (without consideration of the Vet's income)**
  - **Amount Paid:** rate payable under death pension law or the rate the veteran was receiving at the time of imprisonment, whichever is less
    - 38 C.F.R. § 3.666; Manual M21-1, VI.iii.1.B.1 (change date Mar. 28, 2018)

# APPORTIONMENT APPLICATION



- VA Form 21-0788, Information Regarding Apportionment of Beneficiary's Award
- Info needed:
  - Monthly income
  - Net worth
  - Monthly living expenses
  - How much the veteran is already contributing
  - If claimant is living with someone else and holding themselves out as their spouse

# APPORTIONMENT APPLICATION



OMB Approved No. 2900-0666  
Respondent Burden: 30 minutes  
Expiration Date: 7/31/2024

**Department of Veterans Affairs**

**INFORMATION REGARDING APPORTIONMENT OF BENEFICIARY'S AWARD**

**VA DATE STAMP**  
(DO NOT WRITE IN THIS SPACE)

**INSTRUCTIONS:** Before completing this form, read the Privacy Act and Respondent Burden on page 2. All or part of a veteran's disability award may be apportioned (paid) to the veteran's spouse, child, or dependent parent. A surviving spouse's award may also be apportioned for the veteran's child or children. If you are certifying that you are married for the purpose of VA benefits, your marriage must be recognized by the place where you and/or your spouse resided at the time of marriage, or where you and/or your spouse resided when you filed your claim (or a later date when you became eligible for benefits) (38 U.S.C. § 103(c)). For additional space, or to describe any financial hardship (not otherwise reflected on this form) you are experiencing or will experience based on the outcome of this claim, use Part III - Remarks. For more information, contact us at <https://vjs.custhelp.va.gov>, or call us toll-free at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal relay number is 711. VA forms are available at [www.va.gov/vaforms](http://www.va.gov/vaforms). After completing the form, mail to: Department of Veterans Affairs, Evidence Intake Center, P.O. Box 4444, Jamesville, WI 53547-4444.

1. VETERAN'S NAME (First, Middle Initial, Last) \_\_\_\_\_

2. VA FILE NUMBER (if known) \_\_\_\_\_  
OCSS: \_\_\_\_\_

3A. PERSON COMPLETING THIS FORM (First, Middle Initial, Last) (if other than veteran) \_\_\_\_\_

3B. MAILING ADDRESS (Number and street or rural route, city or P.O., State and ZIP Code) \_\_\_\_\_

3C. TELEPHONE NUMBER (Include Area Code) \_\_\_\_\_

3D. E-MAIL ADDRESS (If applicable) \_\_\_\_\_

Daytime \_\_\_\_\_ Evening \_\_\_\_\_

4A. WHO ARE YOU REQUESTING AN APPORTIONMENT FOR? (List first, middle initial, and last names) \_\_\_\_\_

4B. WHAT IS HIS/HER RELATIONSHIP TO THE VETERAN? \_\_\_\_\_

5A. HOW MUCH IS THE VETERAN OR VETERAN'S SURVIVING SPOUSE CONTRIBUTING TO THE PERSON(S) FOR WHOM AN APPORTIONMENT IS BEING CLAIMED? \$ \_\_\_\_\_

5B. HOW OFTEN ARE THE CONTRIBUTIONS MADE? \_\_\_\_\_

6. IF THE SPOUSE IS CLAIMING AN APPORTIONMENT, IS HE/SHE LIVING WITH ANOTHER PERSON AND HOLDING HIMSELF/HERSELF OUT OPENLY TO THE PUBLIC AS THE SPOUSE OF THE OTHER PERSON?  
 YES  NO (If "Yes," provide an explanation in Part III - Remarks.)

7. HAS THE VETERAN'S CHILD(REN) BEEN LEGALLY ADOPTED BY ANOTHER PERSON?  
 YES  NO

**PART I - INCOME AND NET WORTH**

Report all income and net worth. Report the gross amounts before you take out deductions for taxes, insurance, etc. If you do not receive income or net worth from a particular source, write "0" or "none" in the space provided. Do not leave the space blank. Note: If you are the veteran or surviving spouse, report only your income and net worth. If you are the claimant or are filing on behalf of the claimant(s), report all income and net worth for all persons for whom an apportionment is being claimed. If you are claiming an apportionment as the custodian of the veteran's child or children, report your income and net worth and the income and net worth of the child(ren).

MONTHLY INCOME				
SOURCE	VETERAN OR SURVIVING SPOUSE	CUSTODIAN	PERSON APPORTIONMENT IS CLAIMED FOR	PERSON APPORTIONMENT IS CLAIMED FOR
1A. GROSS WAGES FROM ALL EMPLOYMENT	\$	\$	\$	\$
1B. SOCIAL SECURITY				
1C. RETIREMENT OR ANNUITIES				
1D. SUPPLEMENTAL SECURITY INCOME (SSI) / PUBLIC ASSISTANCE				
1E. OTHER INCOME (Show source)				
1F. OTHER INCOME (Show source)				

NET WORTH				
SOURCE	VETERAN OR SURVIVING SPOUSE	CUSTODIAN	PERSON APPORTIONMENT IS CLAIMED FOR	PERSON APPORTIONMENT IS CLAIMED FOR
2A. CASH/NON-INTEREST-BEARING BANK ACCOUNTS	\$	\$	\$	\$
2B. INTEREST-BEARING BANK ACCOUNTS				
2C. IRAS, KEOGH PLANS, ETC.				
2D. STOCKS, BONDS, MUTUAL FUNDS, ETC.				
2E. REAL PROPERTY (Not your home)				
2F. ALL OTHER PROPERTY AND ASSETS				

VA FORM 21-0788 JUL 2021

SUPERSEDES VA FORM 21-0788, MAR 2018.

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**PART II - MONTHLY LIVING EXPENSES**

Show your monthly living expenses, including any monthly installment payments. If you do not have expenses from a particular source, write "0" or "none" in the space provided. Do not leave the space blank.

Note: If you are the veteran or surviving spouse, report only your expenses. If you are the claimant or are filing on behalf of the claimant(s), report expenses for all persons for whom an apportionment is being claimed. If you are claiming an apportionment as the custodian of the veteran's child or children, report your expenses and the expenses of the child(ren).

SOURCE	VETERAN OR SURVIVING SPOUSE	CUSTODIAN	PERSON APPORTIONMENT IS CLAIMED FOR	PERSON APPORTIONMENT IS CLAIMED FOR
1A. RENT OR HOUSE PAYMENT	\$	\$	\$	\$
1B. FOOD				
1C. UTILITIES (Water, gas, electricity)				
1D. TELEPHONE				
1E. CLOTHING				
1F. MEDICAL EXPENSES				
1G. SCHOOL EXPENSES				
1H. OTHER EXPENSES (Show source)				
1I. OTHER EXPENSES (Show source)				

**PART III - REMARKS**

8. REMARKS \_\_\_\_\_

**PART IV - CERTIFICATION AND SIGNATURE**

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

9. SIGNATURE OF VETERAN OR CLAIMANT (Required) \_\_\_\_\_

10. DATE SIGNED (MM/DD/YYYY) \_\_\_\_\_

**PENALTY** - The law provides severe penalties which include fine or imprisonment or both, for the willful submission of any statement or evidence of a material fact, knowing it is false, or fraudulent acceptance of any payment to which you are not entitled.

**PRIVACY ACT INFORMATION** - The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA 21/22/28, Compensation, Pension, Education and Veteran Readiness and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

**RESPONDENT BURDEN** - We need this information to determine whether an apportionment of VA disability or death benefits may be made (38 U.S.C. 5307). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 30 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

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# APPORTIONMENT APPLICATION



- If application received w/in 1 year of VA notification to the potential claimant of right to apportionment, then paid back to the 61<sup>st</sup> day of incarceration
- **If there is an overpayment from continuing to pay Vet when Vet was not eligible for benefits, then payment will be no earlier than the first of the month following the month for which VA last paid the Vet the full rate of compensation**
  - Manual M21-1.VI.iii.1.B.2.d (change date Feb. 23, 2022)

# APPORTIONMENT APPLICATION



- Financial hardship on veteran is **NOT** considered as it would be if veteran was not incarcerated
- **VA will consider whether claimant has a financial need for apportionment**
- Usually won't ask for additional documentation unless something looks inflated on application
- **No notice of proposed adverse action to veteran in these cases**
  - Manual M21-1, VI.iii.1.A.3.a (change date Mar. 21, 2022)



# APPORTIONMENT NOTIFICATION



- When granting an apportionment, VA advises the dependent that the apportionment is *temporary and subject to discontinuation*, without due process, after incarceration ends
  - Manual M21-1, VI.iii.1.B.1.i (change date Mar. 28, 2018)

# APPORTIONMENT PAYMENT



- Apportionment stops when incarceration ends and apportionee is notified of the right to reapply if not living with the veteran
- **No apportionment payable if VA receives notice of incarceration AFTER incarceration has ended, but can be granted only to reduce veteran's overpayment**
  - Manual M21-1, VI.iii.1.B.1.f., 2.e

# BARS TO APPORTIONMENT



- **Bars to apportionment include:**
  - **Total benefit is so small it does not allow payment of a reasonable amount to any apportionee**
  - **Spouse has been found guilty of conjugal infidelity by a court**
  - **Spouse has lived with someone else and held themselves out to be their spouse**
  - **Child of Vet was legally adopted by another person**
  - **Apportionment will not be authorized to an estranged spouse unless and until a claim for children is filed on their behalf**
    - **38 C.F.R. § 3.458**

# CONTESTING APPORTIONMENT



- **VA will notify both parties of a decision**
- **VA can take action before the 60-day appeal period expires**
  - Manual M21-1, VI.iii.3.C.2.a (change date Feb. 25, 2019)
- **Either party may appeal the decision, which will be treated as a contested claim**
  - **Both parties have 60 days to appeal to BVA**
    - **This is the only review option available**

# **HYPO #3**



- **Vet with a 100% SC disability rating is incarcerated for a felony**
- **It has been 6 months since the incarceration began**
- **Vet has a dependent spouse**

# SURVEY #3



- Which of the following is true?
  - A. Spouse can apply for apportionment of the entire amount, but Vet must submit the application**
  - B. Vet can receive payment at the 10% rate and spouse can be apportioned the rest**
  - C. Spouse can apply for apportionment of the entire amount and must submit the application**
  - D. Vet is still entitled to the entire amount of compensation because it's only been 6 months since the incarceration began**

# **SURVEY #3**

## **ANSWER**



# **B**

- Vet can receive payment at the 10% rate and the spouse can be apportioned the rest
- **Either spouse or Vet may apply**
- Vets with a 20% SC disability rating or higher can receive payment at the 10% rate after the 61<sup>st</sup> day of incarceration for a felony



# **RESTORING BENEFITS AFTER RELEASE**



# UPON RELEASE....



- “Release from incarceration”: If paroled, participating in a work-release or half-way housing program, and completion of sentence
  - 38 C.F.R. § 3.665(b)
- **Any benefits received by an incarcerated veteran after 60 days of incarceration (beyond what permitted by law) will be considered an overpayment that the veteran must pay back to VA**
- When a veteran’s benefits are restored, any apportionment ends

# UPON RELEASE.... RESTARTING BENEFITS



- No specific form needs to be filed with VA
  - Mail, email, phone call, or claim submission to VA will trigger re-start of benefits
- If re-starting pension, no need to file new report on income and net worth
- If w/in 30 days of release and confirmed by an official source such as a parole board, VA will adjust to reflect the future re-start date
- VA will ask for confirmation of release from an official source in most circumstances
  - Manual M21-1, VI.iii.1.A.5 (change date June 30, 2022)

# UPON RELEASE.... OFFICIAL SOURCES



- Federal, state, and local gov't authorities, such as
  - law enforcement officials
  - officials at correctional facilities
  - prosecutors
  - parole officers
- Federal Bureau of Prisons website [www.bop.gov](http://www.bop.gov)
- Official websites of individual correctional facilities
  - Manual M21-1, VI.iii.1.A.3.b (change date Mar. 21, 2022)

# POTENTIAL OVERPAYMENT



- It is important for Vet to notify VA promptly when period of incarceration has started and ended
  - If notification w/in 1 year of release, regular benefits payments will be resumed at the full rate to which the beneficiary is entitled retroactive to the date of release
  - If notification more than 1 year from release, benefits will be resumed as of the date of receipt of the notice of release
    - Manual M21-1, VI.iii.1.A.5.e (change date June 30, 2022)

# TIPS FOR ASSISTING JUSTICE- INVOLVED VETERANS

# ADVOCACY TIPS



- **Fugitive Felon Status**: VA does not always get this right. If presented with a veteran who has payments stopped or an overpayment due to this status, check court records to make sure it is accurate and follow up with the recommend paperwork.
- **Determining Conviction/Felony/Misdemeanor**: Searching local court dockets may confirm whether case is still in progress, whether there has been a conviction, and whether conviction is for a felony or misdemeanor

# ADVOCACY TIPS



- Follow jail/prison rules for written communication
- You are in the best position as an advocate to ensure VA does not improperly stop (or continue) benefits and to make sure the Vet is getting paid the correct amount
- Assisting an apportionment claimant may be a conflict of interest for a VSO who is representing the Vet
- Ensure VA is fulfilling its duty to assist in terms of records requests and exams

# QUESTIONS ?



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