

THE VA PENSION BENEFIT

WHAT EVERY PRACTITIONER SHOULD KNOW

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The U.S. Department of Veterans Affairs (VA) offers several benefits to service men and women including healthcare, education, insurance, and burial. However, one little-known or often misunderstood benefit is the pension. The VA pension is a means-tested income benefit for veterans, or their surviving spouses, who meet certain age or non-service connected disability requirements. On September 18, 2018, the VA issued Final Rule Number 8320-01, RIN 2900-AO73, which went into effect on October 18, 2018. This Rule establishes new requirements for evaluating net worth, medical expense deductions, and asset transfers. This Article will serve as a primer on the VA pension benefit as well as an update and summary of the new Rule.

Who is Eligible?

The VA pension is available to veterans or surviving spouses (claimant) of limited income and resources. To be eligible, the veteran must: 1) have been discharged from service under other than dishonorable conditions; and, 2) have served 90 days or more of active duty with at least one day during a period of war time.¹ Furthermore, the veteran must be aged 65 or older or permanently and totally disabled (non-service connected disability). Receipt of Social Security disability benefits is sufficient to prove total disability prior to age 65. A surviving spouse can qualify at any age and the surviving spouse is not required to be disabled; however, the surviving spouse must have been married to the veteran at the time of the veteran's death, lived continuously with the veteran prior to his/her death, and must be single at the time of application (and cannot have remarried prior to November 1, 1990).

Finally, as a means-tested benefit, the claimant is also required to have income

below the maximum annual pension rate (MAPR);² and, as of October 18, 2018, have net worth less than the Community Spouse Resource Allowance (CSRA), which is currently \$123,600.

How to Calculate Income?

The total amount of pension payable to a claimant is based on the income of the claimant's household (including both spouses as part of the "household") reduced by certain unreimbursed medical expenses. 38 CFR § 3.271 defines income as: "payments of any kind from any source shall be counted as income during the 12-month annualization period in which received unless specifically excluded under 3.272." To be eligible for pension, the veteran or surviving spouse must have income below the MAPR; however, the VA will allow certain unreimbursed medical expenses to be deducted in order to reduce countable income.

The MAPR begins with a base rate and then increases depending on the number of dependents and whether the claimant is housebound or in need of aid and attendance (claimant must require assistance with at least two activities of daily living (ADLs) to be approved for an aid and attendance rating). As an example, a single veteran can receive between \$13,166 and \$21,962 annually depending on his/her rating. This amount will increase based on the number of dependents. A surviving spouse without a dependent can expect to receive between \$8,830 and \$14,113 annually.

The pension benefit amount is the difference of the "countable" income and the MAPR. Countable income is determined by adding the household's income and then deducting a portion of unreimbursed medical expenses (UME). UMES in excess of 5% of the MAPR are deductible. As an example, if Joe is an

unmarried veteran who requires aid and attendance (assistance with 2-ADLS), his MAPR is \$21,962. Therefore, Joe can deduct UMES in excess of \$1,098 annually ($\$21,962 \times 0.05$). Joe's annual income is \$36,000. Joe's annual UMES (including memory care) are \$60,000. Joe can deduct UMES up to \$58,902 from his income of \$36,000 resulting in his monthly income being considered \$0. In this case, Joe would therefore be entitled to the full MAPR of \$21,962.

How to Calculate Net Worth?

As of October 18, 2018, the net worth limit is equal to the CSRA, which is currently \$123,600.³ This amount will increase by the same percentage as the Social Security's cost of living increase. To determine a claimant's net worth, the VA will consider the fair market value of all non-exempt property owned by the claimant and his/her spouse, less mortgages or other encumbrances. Exempt property includes the residence and up to two acres, family transportation vehicles, personal effects used on a regular basis, and prepaid funeral and burial lots. Any trust, annuity, or other asset where the claimant retains the ability to liquidate, is considered a non-exempt asset.

Under the new Rule, net worth is calculated by adding all countable assets to the annual gross household income less allowable net unreimbursed medical expenses. Joe has \$120,000 in countable assets. He has gross annual income of \$36,000 and his allowable net UMES are \$58,902. Adding annual income to assets results in a net worth of \$156,000 which exceeds the net worth limitation for pension. However, the VA would consider Joe's income to be zero because his UMES exceed his income and thus his net worth is \$120,000. Joe's net worth is within the allowable limit and Joe is entitled to the pension.

Changes Effective October 18, 2018.

Under the new Rule, the primary residence is exempt; however, the allowable lot size cannot exceed two acres unless the additional acreage is not marketable.⁴ If the personal residence is sold, the net proceeds will be counted as an asset unless the proceeds are used to buy another residence within the same calendar year.⁵ The primary residence remains exempt even if the claimant is residing somewhere other than the home.⁶ In addition, the VA will exempt family transportation vehicles and personal effects "suitable to and consistent with a reasonable mode of life."⁷

In addition to establishing a net worth limit of \$123,600, the new Rule also establishes a penalty period for asset transfers made within the thirty-six (36) month period preceding an application for pension. Prior to October 18, 2018, there was no penalty period for assets transferred from a claimant prior to filing a pension application. Pursuant to 38 CFR § 3.276, there is now a penalty period for transferring a "covered asset." A covered asset is an asset that: 1) was part of the claimant's net worth; 2) was transferred for less than fair market value; and, 3) if not transferred would have caused or partially caused the claimant's net worth to exceed the net worth limit within the 36 months preceding an application for pension. If other than covered assets are gifted, there will be no penalty period. As an example, if Joe's net worth is \$120,000 on November 1, 2018, and he gifts \$20,000 to his friend on November 15, 2018, he will be eligible for the pension in November because Joe's net worth was within the VA eligibility limits prior to the gift.

When a gift of a covered asset is made within 36 months preceding a pension application, the transfer will incur a penalty period. Example: Joe's net worth is \$120,000 on November 15th. However, Joe gifted \$30,000 to a friend on November 1, 2018. Joe applies for pension on November 15, 2018. If the \$30,000 hadn't been gifted prior to the application, Joe's net worth would have been \$150,000 and he would not have been eligible for the pension. The covered asset amount is the difference between Joe's net worth of \$150,000 and the CSRA of \$123,600 or \$26,400. This gift of \$26,400 will incur a penalty and therefore Joe will not be eligible for the pension during the penalty period. The penalty period is based on the MAPR for a married veteran who needs aid and

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attendance (currently \$2,169 per month) rounded down to the nearest whole number. Therefore, Joe's gift of a covered asset in the amount of \$26,400 will result in a penalty period of 12 months (\$26,400/\$2,169). The penalty period begins the month after the transfer is made and therefore Joe will be eligible for the pension in December 2019.

There are some exceptions to the transfer rules, including those made as a result of fraud or unfair business practices. There is also an exemption for transfers to a trust established for a child incapable of self-support prior to age 18. Further, claimants can consider a partial or complete return of a gift in order to gain eligibility.

Because of the rule changes, there will be new and different planning strategies available to clients. Therefore, it is imperative that you familiarize yourself with the new rules and/or you refer your clients to an attorney accredited with the Veterans Administration for further assistance.

¹ Eligible Wartime periods can be found at: <https://www.benefits.va.gov/pension/wartimeperiod.asp>

² A Pension Rate Table can be found at: https://www.benefits.va.gov/pension/current_rates_veteran_pen.asp or see 38 CFR § 3.23.

³ 38 CFR § 3.274 (a) and (b)

⁴ 38 CFR § 3.275(b)

⁵ Id.

⁶ Id.

⁷ Id.



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