Veterans' Pension Program Proposed Changes

By Michael R. Viterna

Our nation's veterans have long-enjoyed a special status that includes entitlement to numerous benefits such as compensation, pension, health care, and much more. In his Second Inaugural Address, President Lincoln committed our nation "to care for him who shall have borne the battle, and his widow, and his orphan." The Department of Veterans Affairs (DVA) is tasked with managing these benefits which, as one federal court observed, flow "to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign"[1] and is operated with paternalist oversight to protect these beneficiaries.

Veterans who have served under other than dishonorable conditions during designated periods of wartime and who are considered totally and permanently disabled are eligible to receive DVA pension if they also meet proscribed income and asset limitations. This basic rate for a single veteran is $12,256 per year but is increased for dependents and can be increased if the veteran is homebound or if in need of the aid and attendance of another. 38 U.S.C. § 1513.

In response to complaints related to the DVA pension program, the Government Accountability Office (GAO) conducted an investigation into possible abuses and released its report on June 6, 2012. [2] The report recommended that Congress should consider establishing a look-back and penalty period for pension claimants who transfer assets for less than fair market value prior to applying, similar to other federally supported means-tested programs. This investigation comes at a time when the DVA pension annual expense has grown last year to $4.3 billion from $3.7 billion in 2007.

On the date the GAO report was released, a hearing was held before the Senate Special Committee on Aging, chaired by Senator Ron Wyden (D-OR). The GAO report, in conjunction with a number of witnesses, combined to outline problems experienced with the pension program as the result of a "growing industry of predatory financial planners and attorneys who are using the Aid and Attendance program to target vulnerable seniors and sell them inappropriate financial instruments." Examples provided included fees being charged up to $10,000 for DVA benefits counseling, that included the establishment of a trust and the purported transfer of over a million dollars in three months to qualify for pension benefits. The so-called "pension poachers," as they were dubbed, soon became the recipients of the wrath of the Committee, and promises for change were quickly made. Unfortunately, practitioners who lend needed legal services to veterans and whose fees comport with the law have been swept into that category in many instances. Bearing that in mind, practitioners should be cognizant of this public characterization and strive to ensure compliance with the law and regulations that can be expected to change.

To better understand this situation, one must also note that limitations have long been imposed on attorneys charging veterans fees related to obtaining DVA benefits. Initially, attorney fees were capped at $5 but were then raised to $10 in 1884, a level maintained until the Veterans Judicial Reform Act, Pub L No 100-687, 102 Stat 4105 (1988), was passed which allowed a veteran under certain circumstances to hire an attorney for a fee. Political pressure mounted to allow veterans to have a choice as to their representation and ultimately, on December 22, 2006, President Bush signed into law Pub L No 109-461, 120 Stat 3403 (2006). This law significantly changed the ability of attorneys and agents (DVA-accredited non-attorney practitioners) to represent DVA claimants for a fee. In May 2008, DVA amended Parts 1, 14, 19, and 20 of Title 38 of the Code of Federal Regulations in response to the change in law. This liberalizing law allows a claimant seeking VA benefits to hire an attorney for a fee in cases where an appeal regarding denial of DVA benefits was filed on or after June 20, 2007, subject to certain additional requirements as outlined in DVA's regulations. In addition, DVA is now empowered to review fee agreements between DVA claimants and attorneys for reasonableness—a fee of 20 percent of a retroactive award is deemed reasonable.

Further, VA has established qualifications and accreditation standards to allow practice before VA and to establish grounds for suspension of practice privileges. *See* 38 U.S.C. § 5907.

As a consequence of the June 6, 2012 hearing and in consideration of the special oversight historically afforded veterans, Senators Ron Wyden (D-OR) and Richard Burr (R-NC) introduced Senate Bill S.3270 that will amend Title 38, United States Code, to require DVA to "consider the resources of individuals applying for pension that were recently disposed of by the individuals for less than fair market value when determining the eligibility of such individuals for such pension, and for other purposes." In that regard, a pension applicant shall be subject to a look-back review as is in place for other means-tested programs, such a Medicaid. This bill would disqualify an otherwise eligible veteran from receiving pension if, within the past 36 months, he or she disposes of covered resources for less than fair market value. This will specifically include the transfer of an asset from the corpus of the veteran's estate into an annuity, trust, or other financial instrument or investment. Moreover, a dependent spouse or child is also precluded from making such a transfer. The standard to be followed is whether DVA "considers that under all the circumstances," if the veteran (or dependent) had not disposed of such resource, would it "be reasonable that the resource (or some portion of the resource) be consumed for the veteran's maintenance."

In its report, GAO also recommended that DVA should (1) request information about asset transfers and other assets and income sources on application, (2) verify financial information during the initial claims process, (3) strengthen coordination with VA's fiduciary program, and (4) provide clearer guidance to claims processors assessing claimants' eligibility. The DVA can be expected to implement changes in line with GAO's recommendations and take additional steps as it deems necessary to improve oversight over the pension program.

As a consequence of the foregoing, practitioners who assist clients to obtain DVA pension benefits should be aware of the present limitations on charging veterans and their dependents for benefit counseling and the application for those benefits. Fees are permitted, however, in the event an adverse decision results and is appealed, but are subject to the additional limitations of reasonableness and DVA accreditation requirements, as outlined in 38 U.S.C. § 5907. NAELA and NOVA have both taken public positions on the need to protect veterans from fraud. Nevertheless, practitioners can expect that regulatory changes will follow that will make applications more complicated and also add delays to the processing of this important benefit.

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[1] *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998).

[2] GAO-12-540, Report to Congressional Requesters, Veterans' Pension Benefits. Improvements Needed to Ensure Only Qualified Veterans and Survivors Receive Benefits, May 2012.

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