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OVERVIEW OF VA BENEFITS AND SOCIAL SECURITY DISABILITY (SSD) BENEFITS

VA BENEFITS

Veterans and their families should be aware of the various benefits that may be available to them through the United States Department of Veterans Affairs ("VA").

I. GENERAL HEALTH AND OTHER PROGRAMS

The VA offers many special programs for veterans, among which are the following:

- Benefits for returning veterans:
 - Health care for 5 years following discharge
 - Dental care for service-related conditions
 - Coordination of services for the severely ill or disabled and their families
 - Various other services, such as home loans, vocational rehabilitation and education programs
- Special programs and initiatives for homeless veterans
- Special programs to assist minority veterans in obtaining benefits
- Benefits for survivors of veterans who have died in service and after service
- Special programs for women veterans and for veteran business owners.¹

Health care services are also provided through the Veterans Health Administration branch of the VA.

II. MONETARY BENEFIT PROGRAMS

In addition, monetary benefit programs are available through the Veteran's Benefits Administration branch of the VA. These monetary benefit programs are separated into benefits for (1) service-connected disabilities and (2) non-service-connected disabilities.

¹ www.va.gov.

The primary benefit for service-connected disabilities is the VA “compensation” benefit; the primary benefit for non-service-connected disabilities is the VA “pension” benefit. A veteran is prohibited from receiving compensation benefits and pension benefits concurrently.²

A. SERVICE-CONNECTED DISABILITIES:

1. Compensation for Service-Connected Disabilities.

VA “compensation” is a disability benefits program that provides monthly monetary payments to compensate veterans for service-connected disabilities. Pursuant to 38 U.S.C. §1110,

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

Thus, the general eligibility requirements for VA disability compensation are: (1) that the veteran’s injury or disease was suffered or aggravated in the line of duty; (2) that the veteran was discharged or released under conditions other than dishonorable; and (3) that the disability did not result from the veteran’s own willful misconduct, or abuse of alcohol or drugs.

If the veteran is found eligible, basic benefits are paid based upon how severely the veteran is disabled, and on whether the veteran has a spouse, children or dependent parents.³ An additional compensation amount is given when the veteran’s spouse is determined to require Aid and Assistance.⁴

The VA assigns a disability “rating” to the disabled veteran, using a statutory ratings schedule, based on what it calculates is the impairment of a veteran’s civilian earning capacity resulting from the disability.⁵ The Secretary adopts “a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity

² 38 U.S.C. §5304(a).

³ www.vba.va.gov/bln/21/compensation/index.htm.

⁴ www.vba.va.gov/bln/21/Rates/comp01.htm.

⁵ 38 U.S.C. §1155.

resulting from such injuries in civil occupations.”⁶ The ratings range from 0% to 100%, in increments of 10%. The veteran’s monthly compensation is based on this rating. By way of example, as of December 1, 2008, an eligible single veteran with no dependents would be eligible for compensation ranging from \$123 per month, for a 10% disability, to \$2,673, for a 100% disability.⁷

In addition to the basic disability compensation, a “special monthly compensation” (“SMC”), with a higher compensation rate than the compensation for a 100% rating, may be available for certain severely disabled veterans.⁸

2. Dependency and Indemnity Compensation (“DIC”).

DIC is a form of compensation paid to a veteran’s surviving spouse, children and parents, where the veteran is deceased as a result of service-connected conditions.⁹ DIC is defined as “a monthly payment made by the Secretary to a surviving spouse, child, or parent (A) because of a service-connected death occurring after December 31, 1956, or (B) pursuant to the election of a surviving spouse, child, or parent, in the case of such a death occurring before January 1, 1957.”¹⁰

B. NON-SERVICE-CONNECTED DISABILITIES:

Improved Pension / Special Monthly Pension (“SMP”):

The Special Monthly Pension is a disability benefits program available to compensate veterans for non-service-connected disabilities. Like the VA compensation program, the pension program is based upon disability. However, unlike the VA compensation program, the pension program is also based on income and need, and the veteran’s disability must be total and permanent (but need not be “service-connected”). The VA “improved pension” provides a “Special Monthly Pension” (“SMP”) to veterans or their widow(er)s.¹¹

There are three (3) types of SMP: (1) the basic pension, (2) “Housebound” benefits and (3) “Aid and Attendance” benefits.

⁶ Id.

⁷ www.vba.va.gov/bln/21/Rates/comp01.htm.

⁸ 38 U.S.C. §1114.

⁹ 38 U.S.C. §1310.

¹⁰ 38 U.S.C. §1101(14).

¹¹ Prior versions of the pension program, referred to as “Old-Law Pension” and “Section 306 Pension”, are not discussed here.

(1) Pension:

The pension is a monthly benefit paid to veterans (or eligible surviving spouses¹²) who have limited or no income. A veteran cannot receive both a pension and service-related compensation simultaneously; if the veteran is eligible under both programs, the VA will pay whichever of the two benefits is the greater amount.¹³

According to the Department of Veterans Affairs website, pension “is a benefit paid to wartime veterans who have limited or no income, and who are age 65 or older, or, if under 65, who are permanently and totally disabled.”¹⁴ “Pension” is defined in the United States Code as “a monthly or other periodic payment made by the Secretary to a veteran because of service, age, or non-service-connected disability, or to a surviving spouse or child of a veteran because of the non-service-connected death of a veteran.”¹⁵

To qualify, the veteran must be discharged under other than dishonorable conditions; must have wartime service (in general, for those entering military service before September 7, 1980, consisting of at least 90 days of active service, one day of which was during a war-time period); must have limited or no income; and must be age 65 or older, or be permanently and totally disabled.¹⁶

A person is considered “permanently and totally disabled” if the person is any one of the following:

- (1) A patient in a nursing home for long-term care because of disability.
- (2) Disabled, as determined by the Commissioner of Social Security for purposes of any benefits administered by the Commissioner.
- (3) Unemployable as a result of disability reasonably certain to continue throughout the life of the person.
- (4) Suffering from--
 - (A) any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation, but only if it is reasonably certain that such disability will continue throughout the life of the person; or
 - (B) any disease or disorder determined by the Secretary to be of such a nature or extent as to justify a determination that persons suffering therefrom are permanently and totally disabled.¹⁷

¹² 38 U.S.C. §1541.

¹³ www.vba.va.gov/bln/21/pension/vetpen.htm.

¹⁴ *Id.*

¹⁵ 38 U.S.C. §101(15).

¹⁶ www.vba.va.gov/bln/21/pension/vetpen.htm.

¹⁷ 38 U.S.C. §1502(a).

With respect to income eligibility, the person's countable family income must be below a yearly limit set by Congress.¹⁸ "Countable" income includes income from most sources, including "earnings, disability and retirement payments, interest and dividends, and net income from farming or business."¹⁹

However, exclusions to "countable" income include public assistance, such as Supplemental Security Income ("SSI").²⁰ Although the VA presumes that a veteran's child's income is available to or for the veteran, it may grant an exception to this presumption in cases of hardship.²¹

By way of example, as of December 1, 2008, the income eligibility limit (also called the "Maximum Annual Pension Rate," or "MAPR") for a single veteran without children is less than \$11,830.00.²² Medical expenses may be deducted from countable income if they exceed 5% of the income limit (or \$591.00, for the single veteran without children).²³

The veteran's net worth, or the net value of the assets of the veteran and his/her dependents, is also considered by the VA and, although there is no specified resource limit, net worth cannot be "excessive."²⁴

Notably, veterans who do not initially qualify may reapply if they have unreimbursed medical expenses that bring their countable income below the annual income limit.²⁵

Once pension eligibility is established, the monthly pension amount is calculated as the difference between the veteran's countable family income and the annual pension limit (the MAPR), payable in monthly installments.²⁶

In addition to the basic pension, more severely disabled veterans may also qualify for Aid and Attendance or Housebound benefits. Aid and Attendance and Housebound benefits are not available to those who are not eligible for the pension.²⁷ Although Aid and Attendance and Housebound benefits are available in addition to the basic pension, a veteran cannot receive both Aid and Attendance and Housebound benefits concurrently.

¹⁸ www.vba.va.gov/bln/21/pension/vetpen.htm.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² www.vba.va.gov/bln/21/rates/pen01.htm.

²³ Id.

²⁴ www.vba.va.gov/bln/21/pension/vetpen.htm.

²⁵ Id.

²⁶ www/vba.va.gov/bln/21/pension/pencalc.htm.

²⁷ www.vba.va.gov/bln/21/pension/vetpen.htm.

The Improved Disability Benefits Pension Rate Table in effect as of December 1, 2008²⁸ reflects MAPR rates that vary, depending not only on dependents, but also on whether the veteran qualifies for Aid and Attendance and/or Housebound benefits. Thus, the annual income limit (which is also the amount from which a veteran's countable income is deducted in order to calculate the veteran's benefit amount) is higher for Housebound benefits than for the regular pension; the annual income limit for Aid and Attendance is the highest of the three rates.²⁹

(2) Housebound Benefits:

Housebound benefits are paid in addition to the monthly pension for a veteran (or eligible surviving spouse³⁰) who qualifies for the pension and who:

- (1) has a total permanent disability and, as a result, is permanently and substantially confined to his/her premises; or
- (2) has a total permanent disability plus another disability or disabilities that are 60% or more disabling.³¹

The requirement of being "permanently housebound" is met where the veteran "is substantially confined to such veteran's house (ward or clinical areas, if institutionalized) or immediate premises due to a disability or disabilities which it is reasonably certain will remain throughout such veteran's lifetime."³²

Once housebound eligibility is established, the monthly pension amount is calculated as the difference between the veteran's countable family income and the annual pension limit (the MAPR), which limit is increased above the regular pension rate for those eligible for housebound benefits, payable in monthly installments.³³

²⁸ www.vba.va.gov/bln/21/Rates/pen01.htm.

²⁹ Id.

³⁰ 38 U.S.C. §1541.

³¹ www.vba.va.gov/bln/21/pension/vetpen.htm#7.

³² 38 U.S.C. §1502(c).

³³ www/vba.va.gov/bln/21/pension/pencalc.htm.

(3) Aid and Attendance Benefits:

Aid and Attendance ("A&A") is a benefit that is paid in addition to the monthly pension. A&A is available to a veteran (or eligible surviving spouse³⁴) who qualifies for the pension and who:

- (1) is bedridden, or
- (2) requires the aid of another person to perform activities of daily living, or
- (3) is a nursing home resident, as a result of mental or physical incapacity, or
- (4) is blind or nearly blind in both eyes.³⁵

A person is considered in need of regular aid and attendance if the person is "(1) a patient in a nursing home or (2) blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person."³⁶

Once A&A eligibility is established, the monthly pension amount is calculated as the difference between the veteran's countable family income and the annual pension limit (the MAPR), which limit is increased above the regular pension and housebound rates for those eligible for A&A benefits, payable in monthly installments.³⁷

³⁴ 38 U.S.C. §1541.

³⁵ www.vba.va.gov/bln/21/pension/vetpen.htm#7.

³⁶ 38 U.S.C. §1502(b).

³⁷ www/vba.va.gov/bln/21/pension/pencalc.htm.



SOCIAL SECURITY DISABILITY ("SSD")

Social Security Disability ("SSD") and Supplemental Security Income ("SSI") are two programs available from the Social Security Administration ("SSA") that may play an important role in an elder law practice.

SOCIAL SECURITY DISABILITY ("SSD") BENEFITS

Available to a blind or disabled worker who:

- (1) applies for benefits;
- (2) has not reached full retirement age;
- (3) has sufficient social security earnings to be deemed insured for disability;
- (3) is disabled;
- (4) has been disabled for a 5-month waiting period within the last 17 months prior to the month of application.³⁸

SUPPLEMENTAL SECURITY INCOME ("SSI") BENEFITS:

Available to an aged (65 or older), blind or disabled individual who:

- (1) applies for SSI and all other benefits for which he/she may be entitled;
- (2) is a U.S. resident or qualified alien;
- (3) is not a resident of a public institution;
- (4) meets the income and resource requirements; and
- (5) is not fleeing to avoid prosecution for a felony or violating probation or parole.³⁹

"DISABILITY," DEFINED

Disability for adults is defined as the inability to engage in "substantial gainful activity" (SGA). There must be a physical or mental impairment, or combination of impairments, that can be expected to last for a continuous period of at least 12 months, or result in death.⁴⁰

The Social Security Administration has established certain earnings levels as reasonable signs that a person can perform SGA. For the year 2009, that level, indexed for inflation, is \$980 per month for disabled persons, and \$1,640 per month for a blind person. If one

³⁸ 20 C.F.R. §404.315; 42 U.S.C. §423.

³⁹ 20 C.F.R. §416.202.

⁴⁰ 20 C.F.R. § 416.905.



can potentially earn \$980 or more (or 1,640 or more if blind), then Social Security presumes that that person is able to engage in SGA. The presumed SGA amount is indexed to an annual cost of living allowance and is adjusted in January of each year.

SOCIAL SECURITY RETIREMENT BENEFITS:

Available to worker who has reached retirement age. The normal retirement age varies, depending on the worker's birth date, and benefit amount is based upon the worker's "primary insurance amount ("PIA")" and the age of the applicant.

SPOUSE/FORMER SPOUSE BENEFITS:

Spouses and former spouses of fully ensured workers are entitled to derivative benefits:

1. OLD AGE BENEFITS:

If an insured worker is alive and receiving benefits, benefits based on the worker's earnings records are available to the worker's spouse/former spouse who retires at normal retirement age, or who is otherwise eligible based on his/her status as responsible caregiver of worker's child.

2. WIDOW'S/WIDOWER'S BENEFITS:

Available to worker's widow/er based on earnings record of fully insured worker. Benefits are available at the widow/er's retirement at age 60 or above, or earlier if the widow/er is disabled or responsible caregiver of worker's child.

CHILDREN'S BENEFITS:

Available to worker's children, if worker is entitled to retirement/disability benefits, or the worker is deceased and fully insured. Child must be dependent minor child or disabled adult child.

SOCIAL SECURITY AND MEDICARE

Those age 65 and over who are entitled to Social Security Retirement benefits also qualify for Medicare Part A (hospitalization) benefits.

After 24 months of SSD eligibility, individuals who receive SSD are entitled to Medicare Part A, and are eligible for Medicare Part B subject to payment of a premium.

MAJOR DIFFERENCES BETWEEN THE SSD AND SSI PROGRAMS:

- SSD benefits are available only to those with sufficient social security earnings to be deemed “insured” for disability. SSI benefits are not based on insured status or the individual’s earnings. SSI benefits are paid to blind or disabled persons based upon that person’s income and resources.
- Unlike SSD, which is available to those who have not reached the age of retirement, SSI is available not only to the blind and disabled, but also to individuals over age 65.
- **In New Jersey, individuals who receive SSI are also automatically entitled to Medicaid benefits.**
- **After 24 months of SSD eligibility, individuals who receive SSD are entitled to Medicare Part A, and are eligible for Medicare Part B subject to payment of a premium.**

INTERPLAY BETWEEN THE SSD AND SSI PROGRAMS:

- An individual may receive benefits under both SSI and SSD, if he/she qualifies for both.
- The standards for the medical determination of disability are the same for the SSI and SSD programs for adults.
- **Although an SSI recipient may receive up to \$20 per month of unearned income without penalty, any unearned income in excess of \$20 per month will be deducted from the SSI benefit on a dollar-for-dollar basis. Benefits received under SSD are considered “unearned income,” and those monthly benefits decrease the amount of SSI benefits to which the individual is entitled, on a dollar-for-dollar basis.⁴¹ Conceivably, a recipient’s social security benefit could reduce his or her SSI benefit to zero, resulting in a loss of Medicaid benefits.**

THE APPEALS PROCESS:

Levels of appeal from an adverse determination:

1. Reconsideration: A paper review of the file
2. Hearing by an Administrative Law Judge: Hearing, including questioning of witnesses. Most reversals occur at this level.

⁴¹ POMS SI 00830.050; POMS SI 00830.210.



3. Review by the Appeals Council
4. Federal Court review

Forms may be obtained online from www.ssa.gov.

The Hearing: Outline of Testimony

- Personal, educational, literacy/fluency, and mental aptitude background
- Work experience
- Impairment(s), including onset date, symptoms, medical sources consulted
- Current treatments
- Physical limitations
- Environmental restrictions
- Psychiatric limitations
- Pain
- Physical Residual Functional Capacity for various activities
- Daily activities of a typical day
- "Before and After" example of limitations
- Medical doctors
- Demonstrations

DETERMINING DISABILITY:

Disability is determined based upon the sequential analysis set forth in 20 C.F.R. §404.1520. According to the sequential analysis, a determination of disability is based upon a five-part analysis of criteria. The first two criteria are as follows:

- (1) *The claimant is not engaged in "substantial gainful activity" ("SGA"); and*
- (2) *The claimant has a "severe" impairment, which will last at least 12 months (or result in death).*

If the claimant satisfies the above two inquiries, the severity of the impairment is then analyzed as follows:

- (3) *The impairment meets or equals the severity of the listed impairments defined in the medical listing.*

If the answer to this question is in the affirmative, then the claimant is disabled, according to medical listing. Otherwise, the inquiry is as follows:



- (4) *The claimant is unable to perform his/her "past relevant work" ("PRW"); and*
- (5) *The claimant is unable to perform other work within his "residual functional capacity" ("RFC").*

If these latter questions are answered affirmatively, then the claimant is disabled according to vocational factors, even though the claimant has not satisfied the medical listing.

Donald D. Vanarelli, Esq., with offices in Westfield NJ, is a Certified Elder Law Attorney (by NAELA, accredited by the ABA), an Accredited Professional Mediator and an Accredited VA Attorney. Mr. Vanarelli, was selected as a Superlawyer in 2007, 2008 and 2009 and is a founding member of the New Jersey Elder Mediation Center. For more information, contact the Law Office of Donald D. Vanarelli, 908-232-7400 or visit his web site at www.dvanarelli.com.