

CHAPTER 13

STUDY PLAN

INCARCERATION AND FUGITIVE FELON STATUS

OBJECTIVE

To learn about the rules for incarcerated beneficiaries of VA benefits, and beneficiaries in “fugitive felon” status.

REFERENCES

- Title 38, U.S. Code, Chapters 15 and 53
- Title 38, Code of Federal Regulations, Parts 3 and 4
- Veterans Affairs Op. Gen Couns. Prec. 7-02 (Dec. 3, 2002)
- Adjudication Manual M21-1MR (Manual Rewrite), Parts 3 and 10
- Veterans Benefits Manual, §§ 9.2—9.2.5
- VA Fast Letter 11-22, *Examinations for Incarcerated Veterans and Veterans Health Administration* (September 8, 2011)
- VA Fact Sheet 164-9, *Fugitive Felon Program*
- VA Form 21-0788, *Apportionment of Beneficiary's Award*

SUMMARY

Federal law greatly restricts, and in some cases even terminates, the payment of VA benefits to beneficiaries who are incarcerated or who are in a “fugitive felon” status to avoid arrest,

A veteran does not have to be *actively or intentionally* fleeing prosecution in order to be considered a fugitive felon by the VA.

prosecution, or incarceration for a felony. Whether the benefit is terminated or restricted in some way varies based on the type of VA benefit the beneficiary is receiving.

The VA has specific definitions for the terms “**incarceration**” and “**fugitive felon.**” The VA considers a

veteran to be incarcerated when, following a conviction, they are in custody in a federal, state, or local penal institution, or a penal institution run by a private entity under contract with the federal, state, or local government. Any time spent in custody prior to trial, or during trial, does not count as incarceration for VA purposes.

The VA uses the term **fugitive felon** to refer to three categories of veterans who may be subject to felony prosecution:

1 A veteran who has an outstanding warrant for a felony offense.

2 A veteran violating a condition of probation or parole imposed for commission of a felony. This does not require a felony conviction, if the probation or parole was imposed after the veteran pled *nolo contendere*.

3 A veteran fleeing to avoid prosecution, or custody or confinement after conviction, for an offense, or an attempt to commit an offense, which is a felony under the laws of the place from which the person flees.

VA beneficiaries are required to notify the VA if they become incarcerated. The VA, however, also identifies beneficiaries who are incarcerated or in fugitive felon status via listings received periodically from the U.S. Bureau of Prisons, Social Security Administration matches, and other data matching sources.

REDUCTION OF BENEFITS DURING INCARCERATION

Different VA benefits are affected differently by incarceration. Some are reduced, and others are terminated entirely.

INCARCERATION AND SERVICE-CONNECTED DISABILITY COMPENSATION

If a veteran is incarcerated for **61 days or more** for a **felony**, the amount of service-connected disability compensation they will receive will be severely limited.

The amount the benefit is reduced varies depending on the veteran's disability rating:

- If the veteran is rated at 20% or more disabled, the veteran will only be paid at the 10% level for the duration of their incarceration.
- If the veteran is rated at 10% disabled, the veteran will receive half of the 10% rate.



The reductions take effect after 61 days or more of incarceration. The 61st day is defined as 61 days after guilt is pronounced by a judge or jury and the beneficiary is incarcerated in a penal institution because of the determination of guilt.

This only applies after a conviction of a felony. The VA defines a felony as 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.

Important Note: Even though the rate of compensation a beneficiary receives while incarcerated is reduced, the actual service-connected disability evaluation is not reduced. For example, a veteran who is 100% service-connected will only receive the rate for a 10% service-connected disability while they are incarcerated; however, he/she is still considered as a 100% service-connected veteran. This means the reduction has no permanent effect on their disability evaluation. When they are released, the veteran's monthly payments will return to the 100% payment level so long as they follow the proper procedures upon release (covered in the next section).



ADVOCACY TIP

Information received from these data matching sources is frequently incorrect, resulting in erroneous termination and reduction of benefits. This is especially true for retroactive allegations of overpayment based on periods of incarceration and fugitive felon status. If a beneficiary of VA benefits comes to you with a notice of overpayment based on prior periods of incarceration, or fleeing felon status, it is always a good idea to verify that the alleged dates are accurate. If the dates are not correct, consult Chapter 22 for information on appealing a debt.

INCARCERATION AND DEPENDENCY AND INDEMNITY COMPENSATION (DIC)

The rules for payment of DIC benefits when a surviving dependent beneficiary is incarcerated for **61 days or more** for a **felony** are the same as those for service-connected disability benefits.

NON-SERVICE-CONNECTED PENSION AND INCARCERATION

Unlike the rules for recipients of disability compensation and DIC benefits, the VA **completely terminates** pension benefits to beneficiaries who are incarcerated for **61 days or more**. Additionally, benefits are terminated for incarcerated pension beneficiaries whether they are incarcerated for a **felony or a misdemeanor**.

Once the VA has identified a beneficiary as being incarcerated, the VA will mail a due process letter to the beneficiary informing them that it has received information that he or she is incarcerated and that his or her benefits will be affected effective the 61st day of incarceration. The VA will state that the beneficiary has 60 days to provide the VA with evidence showing that the proposed action should not be taken, and if he or she waits more than 60 days to submit evidence, the evidence will be considered, but the adjustment of benefits will already have gone into effect.



ADVOCACY TIP

Initial claims for benefits and claims for increased ratings may be filed with the VA while the claimant is incarcerated. However, if the VA grants the claim or request for increase, the beneficiary will not receive the benefit until after his or her release. The VA's duty to assist claimants applies to incarcerated veterans the same as it would any other veteran. This includes the duty to make "substantial efforts" to obtain both a, 1) compensation and pension examination for the incarcerated veteran, and 2) the incarcerated veteran's medical records, whether at the prison facility or elsewhere.

APPORTIONMENT OF BENEFITS DURING INCARCERATION

Even though an incarcerated beneficiary of VA benefits receives only a portion or none of his or her benefit while incarcerated, the balance, or the full amount of the benefit, may be "apportioned" to his or her family during the period of incarceration.

For an incarcerated beneficiary of **service-connected disability compensation or DIC benefits**, the remainder of the benefit not received by the beneficiary may be apportioned to his or her family. For example, a service-connected veteran who is rated at 70% disabled can only receive the amount they



would receive if they were rated at 10% while they are incarcerated. However, their family may be apportioned the balance of the compensation benefit while they are incarcerated. The amount apportioned will be determined based on need. In determining "need", factors such as the apportionee claimant's income, living expenses, and any special needs of any dependent(s) will be considered.

Even though an incarcerated **non-service-connected pension** benefit recipient may not receive any benefits while incarcerated, their full benefits may still be apportioned to his family.

Either the beneficiary, **or** the beneficiary's family members may **apply for apportionment** using VA Form 21-0788, *Information Regarding Apportionment of Beneficiary's Award*. An application for apportionment should be made promptly upon incarceration of the beneficiary. Apportionment may not be granted retroactively.

RESUMING BENEFITS UPON RELEASE FROM INCARCERATION

The VA will **not** automatically resume paying benefits at full entitlement once a beneficiary has been released from incarceration. The beneficiary must inform the VA of his or her release by an approved method. A specific VA form is not required to report that the incarceration has ended. The beneficiary may report his/her release in writing, by telephone, email, fax or eBenefits, as well as evidence to support this. Acceptable evidence are the following:

- If released on parole, the beneficiary should get a letter from his or her parole agent showing the dates of incarceration and whether the conviction was for a felony or a misdemeanor. The letter must be on government letterhead, must be signed and dated, and must include the parole agent's phone number. The beneficiary should submit the letter with an original signature, not a copy. Parole agents will sometimes offer to give a beneficiary a "movement history" instead of writing a letter. The VA, however, will rarely—if ever—accept a "movement history" as proof of release.
- If the beneficiary was not released on parole, he or she can contact the jail or prison where they were incarcerated and get a letter identical to the one above signed by a jail or prison official.



FUGITIVE FELONS AND RECEIPT OF VA BENEFITS

As noted above, the VA uses the term "fugitive felon" to refer to three categories of people that may be subject to felony proceedings. It does *not* mean that the person is intentionally trying to escape prosecution.

REDUCTION OF BENEFITS WHILE IN FUGITIVE FELON STATUS

The VA completely **terminates all benefit payments** to a veteran, or survivor of a veteran, while he or she is a fugitive felon. The VA will also terminate all benefits payments to dependents while either the dependent or the veteran is in fugitive felon status.

This rule applies to the following VA benefits:

- Service-connected disability compensation,
- DIC,
- Non-service-connected pension,
- Medical care,
- Life insurance,

- Vocational rehabilitation, and
- Educational benefits.

No **apportionment** is allowed.

If a surviving spouse receiving DIC or improved death pension becomes a fugitive felon, the entire benefit is terminated including any additional benefits that surviving spouse may be receiving for the children of the veteran. The children of the veteran, however, would then have independent eligibility for death pension or DIC benefits. In addition, if a child is receiving DIC or improved death pension, and loses that benefit because the child becomes a fugitive felon, the benefits paid to the veteran's other children would not be adjusted.

Once the VA has identified a beneficiary as being in fugitive felon status, it will mail a letter to the beneficiary informing them of their alleged status and the termination of all VA healthcare and benefits. The VA will state that the beneficiary has **60 days** to provide the VA with evidence that the warrant has been cleared or else it will

terminate all benefits as of the date of the warrant.

If the beneficiary believes that he or she has been identified as being in fugitive felon status incorrectly, he or she must contact the originating agency that issued the warrant to get proof that an error was made (i.e., mistaken identity), that the warrant should be cancelled, that the warrant has been satisfied by his or her arrest or surrender, or that there are other reasons which would resolve the warrant.

RESUMING BENEFITS WHEN A PERSON IS NO LONGER IN FUGITIVE FELON STATUS

A person stops being in fugitive felon status when they are taken into custody, when their warrant is cleared, or when they are no longer violating the terms of their felony probation or parole. They become eligible to receive their full benefits immediately; however, the VA will not resume payments automatically. The veteran must provide evidence that the fugitive

status has been cleared. Uncorroborated statements by the beneficiary, or even an attorney, will not suffice.

When a person is no longer in fugitive felon status, in order to **resume benefits**, he or she must submit official documentation such as a **court order** or a **letter from a warrant agency**.



ADVOCACY TIP

The veteran can also provide the VA with the name, title, and address; or name, title, and telephone number of an official who can verify that he or she is no longer in fugitive status. While the VA will make "reasonable efforts" to contact the official to establish that the beneficiary is no longer in fugitive status, official documentation can be hard to obtain, and VA officials may not pursue the matter until appropriate documentation is received. As such, the beneficiary or his or her advocate should gather the necessary documentation and submit it, to ensure benefits are restored as quickly as possible.



STUDY QUESTIONS

Using the assigned references and reading materials, answer the following questions:

1. A veteran in receipt of 20% SC compensation is convicted of misdemeanor assault and battery, and is sentenced to six months in the county jail. Are their compensation payments subject to reduction because of this? (Y/N)

38 C.F.R. § 3.665
2. A dependent of an incarcerated beneficiary is granted an apportionment. Is the dependent's apportionment affected if the incarcerated beneficiary begins participation in a work release program? (Y/N) 38 C.F.R. § 3.665(h)
3. A veteran recipient of non-service-connected pension has an outstanding warrant for a high misdemeanor under the laws of a state which would be characterized as a felony offense under federal law; however, she never leaves the state in which it is characterized only as a high misdemeanor. Is s/he considered a fugitive felon? (Y/N)

38 C.F.R. § 3.666(e)(3)
4. Can a veteran be awarded a rating of total disability based on individual unemployability resulting from a service-connected disability during any period during which the veteran is incarcerated for conviction of a felony? (Y/N)

38 U.S.C.S. § 5313(c)
5. An incarcerated beneficiary of non-service-connected pension receives 10% of the benefit s/he usually receives starting the 61st day of his or her incarceration for a felony. (T/F)

38 U.S.C.S. § 1505(a)
6. A beneficiary of non-service-connected pension was convicted of a misdemeanor. Since s/he was not convicted of a felony, even if s/he is incarcerated for 61 days of more, their benefits will not be terminated. (T/F)

38 U.S.C.S. § 1505(a)