

# CHAPTER 19

## STUDY PLAN

# VA CHARACTER OF DISCHARGE DETERMINATIONS

## OBJECTIVE

To understand who is eligible for a Character of Discharge determination, when the VA performs the determination, and how to advocate for a favorable outcome.

## REFERENCES

- 38 United States Code § 5303
- 38 Code of Federal Regulations, §§ 3.12, 3.360, 3.354, 17.34
- Adjudication Manual (Manual Rewrite), Part III, Subpart v, Chapter 1, § B
- Veterans Benefits Manual, §§2.2.3 - 2.2.3.5
- VA Fact Sheet IB 10-448, *Other Than Honorable Discharges: Impact on Eligibility for VA Healthcare Benefits* (June 18, 2013)

## GENERAL

As discussed in the “*Eligibility*” section of Chapter 5, *Service-Connected Disability Compensation*, only veterans discharged under “conditions other than dishonorable” are eligible for veterans’ benefits. The VA defines a veteran as “a person who served in the **active** military, naval, or air service and who was discharged or released under conditions *other than dishonorable*.” (38 C.F.R. § 3.12.) The VA has decided that certain discharges will be considered to be honorable, and others will be considered to be dishonorable. There are also those veterans with discharges who need a **Character of Discharge determination**

(COD) in order for the VA to decide their eligibility. Please see the following chart for details:

CHARACTER OF MILITARY SERVICE	HOW THE VA INTERPRETS THAT FOR BENEFITS PURPOSES
Honorable	Honorable
General (Under Honorable Conditions)	Honorable
Uncharacterized (for Entry Level Separation)	Honorable
Uncharacterized (for Void or Erroneous Enlistment, or Dropped from Rolls)	VA must do COD
Other Than Honorable	VA must do COD
Bad Conduct (via special court-martial)	VA must do COD
Bad Conduct (via general court-martial)	Dishonorable
Dishonorable	Dishonorable

A character of discharge determination is a non-rating decision that VA must make in order to discern whether certain veterans and other applicants (spouse, dependent children, etc.) are eligible for VA benefits based on the veteran's character of military service. A favorable COD does *not* change the veteran's discharge status; it simply grants the veteran baseline eligibility for benefits. If a veteran wants to change her or his discharge status, she or he must request a **discharge upgrade**. Discharge upgrades will be discussed in Chapter 20, *Discharge Upgrades and Corrections of Military Records*.



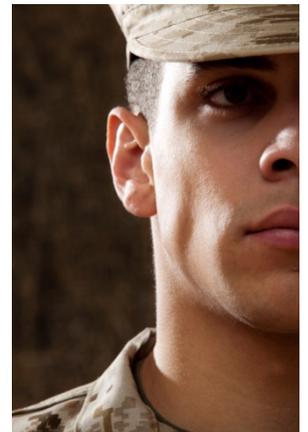
## BARS TO VA BENEFITS PER 38

### C.F.R. § 3.12(C)

Section 3.12 of the Code of Federal Regulations details a number of bars to benefits. Two of the most common bars to payment of benefits are

- By reason of a **general court-martial**;
- By reason of a discharge under other than honorable conditions issued as a result of an **AWOL for a continuous period of at least 180 days**. Note, however, this is a **conditional bar** *only*. This bar to benefits can be waived if there are compelling circumstances, such as the following:
  - Length and character of service aside from the absence was honest, faithful, and meritorious, and of benefit to the country;
  - Reasons for going AWOL include family emergencies or obligations which are evaluated in terms of the person's age, cultural background, educational level, and judgmental maturity. Hardship incurred during overseas service or as a result of combat or other service-incurred disability is sympathetically and carefully considered in evaluating the person's state of mind;
  - A valid legal defense exists for the absence which would have precluded conviction for AWOL under the Uniform Code of Military Justice. (38 C.F.R. § 3.12(c)(6).)

Other bars to payment of benefits under 38 C.F.R. § 3.12 include where a service member was discharged or released under the following conditions: *as a conscientious objector who refused to perform military duty, wear the uniform, or comply with orders; resignation by an officer for the good of the service; as a deserter; and as an alien (non U.S. citizen) who requested release during a period of hostilities*. These instances are very rare, and as such, will not be discussed in this chapter.



## **BARS TO VA BENEFITS PER 38 C.F.R. § 3.12(D)**

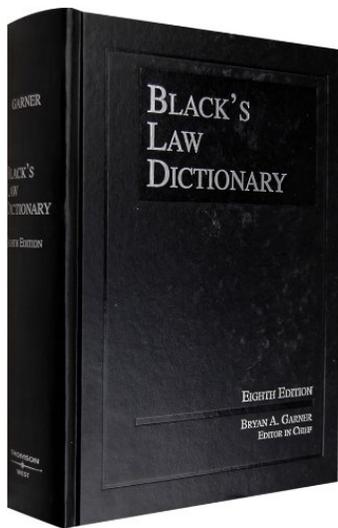
If the discharge or release from the military was due to certain offenses, the VA considers the discharge to have been issued under dishonorable conditions. The following offenses are included:

- Acceptance of an undesirable discharge to **escape trial by general court-martial**;
- Mutiny or spying;
- An **offense involving moral turpitude** which includes, generally, a felony;
- **Willful and persistent misconduct** which does not include a minor offense, if service was otherwise honest, faithful and meritorious. The isolated and infrequent use of drugs by itself will not be considered willful misconduct; however, the progressive and frequent use of drugs to the point of addiction will be considered willful misconduct (38 C.F.R. § 3.302); and
- Homosexual acts involving aggravating circumstances. (38 C.F.R. § 3.12(d).)

A veteran with an honorable or general discharge that committed one of these five offenses may still be eligible for benefits, however.

## MORAL TURPITUDE

“Moral turpitude” is a rather vague term. The regulation states that a felony generally is a crime involving moral turpitude, but that does not provide much guidance. The Adjudication Manual M21-1MR provides no guidance to adjudicators on how to define terms. Black’s Law Dictionary defines it as “conduct that is contrary to justice, honesty, or morality.”



VSRs should argue that the offense(s) committed by the veteran do not fit this description, do not rise to the level of a felony, and/or the veteran was insane at the time the misconduct occurred (more on that below).

## WILLFUL AND PERSISTENT MISCONDUCT

Willful misconduct is generally thought of as misconduct committed voluntarily and intentionally. Yet, the VA doesn't define willful and persistent misconduct, which leaves a lot open to interpretation. Generally, VSRs, should argue that any misconduct was either not persistent, not willful, not misconduct, or that the veteran was insane at the time the offense(s) occurred.

Common sense applies. For example, two instances of misconduct may not be viewed as "persistent," whereas nine instances might be viewed in that manner. On one occasion, the Court of Appeals for Veterans Claims (CAVC) drew a line in the sand and stated that two drug offenses did *not* meet the definition of "persistent" misconduct. (*Pritchard v. Shinseki*, 2009 WL224052 (2009).) This was an "unpublished" decision, which means that *the VBA is not required to abide by it*; however, it can be cited in order to try to persuade the adjudicator to rule in the veteran's favor.

Since there is no other guidance on the meaning of the terms used in the regulations, a good place to turn to is a dictionary. Merriam-Webster's online dictionary defines "**willful**" as "done deliberately" and "**persistent**" as "not stopping or going away" and "continuing beyond the usual, expected, or normal time." Available at: [www.merriam-webster.com/dictionary](http://www.merriam-webster.com/dictionary).

## INSANITY EXCEPTION

If the veteran was found to be "**insane**" at the time of committing any one of the offenses listed in §§ 3.12(c) and (d), he or she will *not* lose VA benefits. An insane person is defined as:

[O]ne who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior, or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted

standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides. (38 C.F.R. § 3.354.)

CAVC has determined a veteran will be considered insane if a mental disease caused any of the described behavior. (*Zang v. Brown*, 8 Vet. App. 246, 252-253 (1995).) Whether a person understood right from wrong and was able to understand the effects of his or her behavior on others (a common consideration in criminal law) is *not* pertinent to the finding of insanity here.

## MAKING THE CASE FOR A FAVORABLE COD

In order to prove eligibility for benefits, the veteran must be able to demonstrate that he or she does not fall within any of the bars at § 3.12(c) and that he or she did not commit any of the listed offenses at § 3.12(d). If the veteran was AWOL for 180 days or more (§ 3.12(b)(6)), then he or she must demonstrate that there are compelling circumstances to warrant the prolonged absence as described in subsections (c)(6)( i-iii). Similarly, if the veteran was guilty of willful and persistent misconduct, he or she must show it was a minor offense and service was otherwise honest, faithful and meritorious. If the veteran can prove insanity at the time of the misconduct, then she or he will still be eligible for benefits. What follows is a step-by-step description of the process.

### DID YOU KNOW?

According to the Department of Defense, 274,280 veterans have received less than honorable discharges since 2001.

1. SUBMIT AN APPLICATION FOR A BENEFIT
2. SUBMITTING AN APPLICATION FOR A BENEFIT TRIGGERS THE VA TO CONDUCT A CHARACTER OF DISCHARGE DETERMINATION. ONE CAN REQUEST A CERTIFICATE OF ELIGIBILITY FOR A VA HOME LOAN TO TRIGGER THE DETERMINATION, OR, IF THE BENEFIT REQUESTED IS SERVICE-

CONNECTED DISABILITY COMPENSATION OR NON-SERVICE-CONNECTED PENSION, VSRs SHOULD USE THE APPROPRIATE VA FORMS. IF THE VETERAN IS DEVELOPING FOR RECORDS IN SUPPORT OF HIS DISCHARGE ISSUE, THEN ENCOURAGE VETERAN TO COMPLETE VA FORM 21-0966, *INTENT TO FILE A CLAIM FOR COMPENSATION AND/OR PENSION, SURVIVORS' PENSION OR OTHER BENEFITS*. FILING THE NOTICE OF INTENT PRESERVES THE EFFECTIVE DATE OF THE CLAIM. REQUEST AND REVIEW RECORDS

To assist a veteran, a VSR can order his or her service treatment and personnel records and take note of every instance of misconduct as well as every award and positive performance score. Note any medical or mental health problems that could have affected the individual's behavior at the time of the misconduct.

### 3. DEVELOP OTHER EVIDENCE, AS NEEDED

The veteran may be able to assist you in collecting other helpful evidence, such as tracking down buddies to get their statements, or remembering key events that could assist with factual research.



#### ADVOCACY TIP

If possible, reviewing both service personnel and medical records, as well as any other relevant records, can help a Veteran's Representative determine whether a veteran has a good case for a favorable character of discharge determination.

The veteran should also write a statement explaining what happened, what led to the discharge, and any mitigating facts. In some circumstances, a veteran's PTSD stressor statement can serve the same purpose as a statement in support of a favorable character of discharge determination.

Finally, if possible, have the veteran evaluated by a psychologist or medical doctor to

determine if he or she was insane while in service or incapable of "willful" (or deliberate) conduct due to a mental health condition. This will most likely require talking to the doctor to explain what language is needed in a letter.

#### 4. WRITE AND SUBMIT STATEMENT IN SUPPORT OF THE CLAIM.

Write a statement that argues that the misconduct was neither willful nor persistent as defined by the Merriam Webster or other respected dictionary. If the misconduct involves an arrest or conviction for a crime, argue that it was not a crime involving moral turpitude, that is, that it was not "evil". If the offense was being AWOL for 180 or more days, the advocate should argue that there were compelling reasons for the absence as set forth in the regulation.

Cite helpful evidence that you have collected and reviewed. Also include evidence regarding positive aspects of the veteran's service. Finally, if there were any mitigating factors, include evidence of them.

Submit the statement, along with all relevant evidence, either before or at the same time that you submit the formal application for benefits.

## OTHER CONSIDERATIONS

If a veteran served **more than one term of service**, where one term was determined by the VA to be "dishonorable" but the other was "other than dishonorable," the veteran may still be eligible for benefits based on the other than dishonorable period of service. For instance, if an individual signed up for a two year term of service in the Army and received an honorable discharge for that, and then re-enlisted and received a bad conduct by general court martial discharge for the next period of service, he or she can still apply for healthcare, pension,

service-connection, and other VA benefits based on the prior term. Only injuries that occurred or were aggravated during the honorable service can be service-connected, however.

REQUEST FOR REENLISTMENT OR EXTENSION IN THE REGULAR ARMY	
PART OF THE REGULAR ARMY AND THE REGULAR ARMY RESERVE	
SECTION I - SOLDIER'S REQUEST	
1. TO COMRADE CG #: 317076 2R PT #109494, NA 23478	2. FROM SFC STANLEY RAY ROBERTSON 333 44-4750 CG #: 317076 2R PT #109494, NA 23478
3. REQUEST BE AUTHORIZED TO REENLIST	
<input type="checkbox"/> a. REENLIST IN THE ACTIVE COMPONENT <input type="checkbox"/> b. EXTEND MY CURRENT SERVICE FOR THE FOLLOWING PERIOD: _____	
4. ACCUMULATED LEAVE OPTION (When Applicable)	
<input checked="" type="checkbox"/> a. DESIRE TO CASH IN _____ DA _____ DAYS OF ACCUMULATED LEAVE. <input type="checkbox"/> b. DO NOT DESIRE TO CASH IN ACCUMULATED LEAVE. <input type="checkbox"/> c. I AM EXTENDING MY PRESENT ENLISTMENT AND HAVE BEEN COMBINED ON CHARGES IN ACCUMULATED LEAVE.	
5. DATE BY MEY 14	
6. SIGNATURE <i>Stanley R. Robertson</i>	
SECTION II - COMMANDER'S DETERMINATION	
7. COMMANDER'S DETERMINATION OF QUALIFICATION (When Applicable)	
<input checked="" type="checkbox"/> a. SOLDIER IS FULLY QUALIFIED FOR REENLISTMENT. <input type="checkbox"/> b. SOLDIER IS NOT FULLY QUALIFIED AND REQUIRES FURTHER TRAINING (When Applicable). <input type="checkbox"/> c. SOLDIER IS FULLY QUALIFIED, BUT IS NOT RECOMMENDED FOR FURTHER SERVICE (When Applicable).	
8. COMMANDER'S DETERMINATION OF RECOMMENDATION FOR CONTINUED SERVICE WITHIN THE ARMY (When Applicable)	
<input checked="" type="checkbox"/> a. APPROVED <input type="checkbox"/> b. REQUIRES APPROVAL, DOCUMENTS IS ATTACHED <input type="checkbox"/> c. DISAPPROVED <input type="checkbox"/> (1) I DISAPPROVE THE SOLDIER'S REQUEST FOR REENLISTMENT. <input type="checkbox"/> (2) I HAVE INITIATED A BIA TO REENLISTMENT UNDER THE PROVISIONS OF CHAPTER 6, 40 CFR 101.	
9. THIRD PARTY FORM AND SIGNATURE OF COMMANDER	
NAME (Last, First, MI) SSN (Last 4) GRADE POSITION SIGNATURE DATE	
10. DATE BY MEY 14	
11. DATE	
12. DATE	

If the individual enlisted or **reenlisted** before completion of a period of active service and then received a discharge under dishonorable conditions, the VA adjudicator must contact the military branch and ask if the veteran was eligible for complete separation prior to the date of dishonorable discharge. If not, the adjudicator must ask the date on which the claimant completed the period of active service for which he or she was obligated at the time of induction or reenlistment.

**Uncharacterized discharges** are usually treated as other than dishonorable; however, veterans who received such discharges may not meet other requirements (such as minimum active duty) necessary to be eligible for certain benefits.

When a person with an OTH or bad conduct (special court-martial) discharge presents at a VA medical facility to receive **healthcare**, he or she is supposed to be placed in a "Pending Verification Status". This person may begin receiving healthcare for any condition, whether service-connected or not. VHA staff are supposed to register the person, and submit a Form 7131, *Exchange of Beneficiary Information and Request for Administrative and Adjudicative Action*, to the Regional Office requesting an administrative decision on character of discharge.

For more on VA healthcare for veterans with OTHs and BCDs (via special court-martial), read the *Eligibility Criteria* section of Chapter 14, *VA HealthCare*.

In the meantime, "tentative" eligibility decisions can be made by VHA staff. Care can be provided if 1) emergency medical care is required or 2) the application for healthcare is submitted within six months of discharge for a period of service that began after September 7, 1980 and the person meets minimum active duty service requirements. If the Regional Office decision is favorable, the person can go on receiving medical care. *If the decision is not favorable, the person is liable for the cost of the care received to that point.*

Notwithstanding the foregoing, an individual with an OTH discharge (but not a bad conduct discharge) is eligible for medical care for any service-connected disabilities, unless they are subject to any of the bars in § 3.12(c). Presumably they are again registered, placed in a

Pending Verification Status, while a Form 7131 is submitted to the Regional Office which then decides whether a condition is service-connected.



## STUDY QUESTIONS

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

1. An individual received a bad conduct discharge by special court martial as a result of going AWOL for 90 days. Is he barred from receiving benefits? (Y/N)

38 C.F.R. § 3.12(c)(6)

2. A veteran with an honorable discharge can be barred from benefits for committing an offense involving moral turpitude. (T/F)

38 C.F.R. §§ 3.12(a), (d)(3)

3. A veteran with an honorable discharge can be barred from benefits if he or she is a noncitizen ("alien") who requested release from service during a time of hostilities. (T/F)

38 C.F.R. § 3.12(c)(5)

4. Which of the following discharges may *not* be considered to have been issued under other than dishonorable conditions:

- a. Bad Conduct by Special Court-Martial
- b. Bad Conduct by General Court-Martial
- c. Undesirable discharge
- d. All of the above.

38 C.F.R. § 3.12

5. A person with a bad conduct discharge (by special court-martial) is eligible for treatment of a service-connected disability, despite a negative character of service determination. (T/F)

38 C.F.R. § 3.12(c)(2)

6. If a deserter was found to be insane at the time of the desertion, he will not be disqualified from receiving VA benefits. (T/F)

38 C.F.R. §§ 3.12(b), (c)(4)

7. If a person guilty of willful and persistent misconduct is found to be insane at the time of the offense, she will not be disqualified from receiving VA benefits. (T/F)

C.F.R. §§ 3.12(b), (d)(4)

**8.** A service member joined the Army for three years in 2000. Before completing three years of service, he re-enlisted. At his fourth year in the Army he was receiving top performance scores and had no misconduct. After that, he started using drugs repeatedly, his performance plummeted, and he was discharged with an other than honorable discharge. The VA determined that his discharge was under dishonorable conditions. Is he eligible to apply for VA pension? (Y/N)

U.S.C. § 101(18)

**9.** When a veteran is discharged as a result of a sentence of general court-martial, the VA considers whether there were family emergencies or obligations that contributed to the behavior that led to the discharge. (T/F)

C.F.R. §§ 3.12(c)(2), (c)(6)(ii)

**10.** An individual entered service in 1991 and completed six months of active duty service of a two year obligation before being discharged with an uncharacterized discharge. Is she or he eligible for VA pension? (Y/N)

C.F.R. §§ 3.12(k), 3.12a(a)(i)

**11.** An individual is discharged with an other than honorable discharge and the VA determines that it was awarded under dishonorable conditions because he was inexcusably AWOL for 200 days. Is he eligible for healthcare for service-connected conditions? (Y/N)

38 C.F.R. §§ 3.12(c)(6), 3.360