

MILITARY LAW REVIEW

Volume 214

Winter 2012

BEYOND “T.B.D.”: UNDERSTANDING VA’S EVALUATION OF A FORMER SERVICEMEMBER’S BENEFIT ELIGIBILITY FOLLOWING INVOLUNTARY OR PUNITIVE DISCHARGE FROM THE ARMED FORCES

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VI. Independent Basis for VA Benefits Eligibility: Military Sexual Trauma

A. Background

According to former Secretary of Defense Leon Panetta and Chairman of the Joint Chiefs of Staff Martin E. Dempsey, sexual assault within the military is “a serious problem that needs to be addressed.”⁴¹² In justifying a “zero tolerance” policy against sexual assault, military leadership states that sexual assault “is an affront to the basic American values we defend, and may degrade military readiness, subvert strategic goodwill, and forever change the lives of victims and their families.”⁴¹³ Unfortunately, the manner in which sexual assault impacts its victims leads to difficulty in understanding the scope of the crime.

Multiple studies confirm that sexual assault is “a crime that is significantly underreported, both within and outside of the Military Services.”⁴¹⁴ It is estimated that in Fiscal Year 2010, 19,000 servicemembers were victims of sexual assault.⁴¹⁵ DoD estimates that only approximately 14 percent of servicemember victims of sexual assault reported the crime.⁴¹⁶ VA studies and screenings also indicate the depth and breadth of sexual assault within the military. A recent VA study indicates “[a]bout half of women sent to Iraq or Afghanistan report being sexually harassed, and nearly one in four says she was sexually assaulted. . . .”⁴¹⁷ In addition, VA screenings demonstrate that one out of five female veterans enrolled in the Veterans Health Administration responded “yes” when screened for Military Sexual Trauma, or MST.⁴¹⁸

⁴¹² Lisa Daniel, *Panetta, Dempsey Announce Initiatives to Stop Sexual Assault*, AMERICAN FORCES PRESS SERVICE, Apr. 16, 2012, available at <http://www.defense.gov/news/newsarticle.aspx?id=67954>.

⁴¹³ U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2011, at 1 (Apr. 2012).

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 28.

⁴¹⁶ *Id.*

⁴¹⁷ Gregg Zoroya, *Study: Sex Assault More Common Than DoD Says*, USA TODAY (Dec. 27, 2012), available at <http://www.marinecorpstimes.com/news/2012/12/gannett-va-study-says-sex-assault-more-common-than-pentagon-reports-122712/>.

⁴¹⁸ U.S. DEP’T OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL, HEALTHCARE INSPECTION, INPATIENT AND RESIDENTIAL PROGRAMS FOR FEMALE VETERANS WITH MENTAL HEALTH CONDITIONS RELATED TO MILITARY SEXUAL TRAUMA, at i (Dec. 5, 2012). For a definition of MST, see *infra* notes 425–26 and accompanying text.

Servicemember victims of sexual assault have cited numerous reasons for not reporting sexual assault to the chain of command. These reasons include, “(1) the belief that nothing would be done; (2) fear of ostracism, harassment, or ridicule by peers; and (3) the belief that their peers would gossip about the incident.”⁴¹⁹ In addition, many sexual assault victims “commented that they would not report a sexual assault because of concern about being disciplined for collateral misconduct.”⁴²⁰

Congress and VA have studied the issue of military sexual trauma (MST) for over two decades.⁴²¹ In 1992, Congress authorized VA to provide counseling and treatment to female veteran victims of MST.⁴²² In 1994, male veteran victims of MST were included.⁴²³ In 2010, VHA Directive 2010-033 expanded the program to provide “counseling, care, and services to Veterans and certain other Servicemembers who may not have Veterans status, but who experienced sexual trauma while serving on active duty or active duty for training.”⁴²⁴ In other words, all victims of MST are now potentially eligible for VA counseling, care, and services.

B. Current VA Policy

VA’s provision of counseling and treatment for sexual trauma victims is pursuant to a unique statute that is interpreted broadly. Title 38 U.S.C. § 1720D(a)(1) serves the dual purpose of outlining the scope of the program and defining MST. It reads

The Secretary shall operate a program under which the Secretary provides counseling an appropriate care and services to veterans who the Secretary determines

⁴¹⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-1013T, *MILITARY PERSONNEL: PRELIMINARY OBSERVATIONS ON DOD’S AND THE COAST GUARD’S SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAMS* 14 (2008).

⁴²⁰ *Id.*

⁴²¹ For a more in-depth history of how VA has provided treatment for sexual assault victims, see Brianne Ogilvie & Emily Tamlyn, *Coming Full Circle: How VBA Can Complement Recent Changes in DoD and VHA Policy Regarding Military Sexual Trauma*, 4 VET. L. REV. 1, 15-7 (2012).

⁴²² Pub. L. No. 102-585, § 102, 106 Stat. 4943, 4945-6 (codified at 38 U.S.C. § 1720D).

⁴²³ Pub. L. No. 103-452, § 101, 108 Stat. 4783, 4783-84 (codified at 38 U.S.C. § 1712 and 38 U.S.C. § 1720D).

⁴²⁴ U.S. DEP’T OF VET. AFFAIRS, VHA DIR. 2010-033, *MILITARY SEXUAL TRAUMA (MST) PROGRAMMING* para. 2a (July 14, 2010) [hereinafter VHA DIR. 2010-033].

require such counseling and care and services to overcome psychological trauma, which in the judgment of a mental health professional employed by the Department, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty or active duty for training.⁴²⁵

Sexual harassment is defined as “repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character.”⁴²⁶

Importantly, VA interprets this statute very broadly. As stated in VHA Directive 2010-033, “It is VHA policy to provide Veterans and eligible individuals who report having experienced MST with free care for all physical and mental health conditions determined by their VA provider to be related to the experiences of MST.”⁴²⁷ Understanding the terms within this policy is necessary to understand its wide scope.

The term “eligible individuals” makes this directive unique, as it creates one of the few situations for which VA benefit eligibility may not hinge on veteran status.⁴²⁸ Despite the statutory authorization containing the term “veteran,” VA has implemented the statute more broadly.

For purposes of this Directive, “eligible individual” means someone without Veteran status who experienced sexual trauma as described in subparagraph 2a while on active duty or active duty for training. Because eligibility accrues as a result of events incurred in service and is not dependent on length of service some individuals may be eligible for MST-related care even if they do not have Veteran status.⁴²⁹

The policy also states,

Veterans and eligible individuals who report experiences of MST, but who are deemed ineligible for other VA

⁴²⁵ 38 U.S.C.A. § 1720D(a) (2010).

⁴²⁶ *Id.* § 1720D(f).

⁴²⁷ VHA DIR. 2010-033, *supra* note 424, para. 3.

⁴²⁸ *See infra* Part II (discussing the impact of veteran status).

⁴²⁹ VHA DIR. 2010-033, *supra* note 424, para. 2b.

health care benefits or enrollment, may be provided MST-related care only. This benefit extends to Reservists and members of the National Guard who were activated to full-time duty states in the Armed Forces. Veterans and eligible individuals who received an “other than honorable” discharge may be able to receive free MST-related care with the Veterans Benefits Administration (VBA) Regional Office approval.⁴³⁰

The policy does not explain its use of the words “may be able” and “may be eligible.” The overarching policy statement does not qualify eligibility for “eligible individuals.”⁴³¹ Until clarifying case law or policy guidance is available, practitioners should advise potentially eligible victims of MST to apply for benefits. Ironically, despite the seemingly permissive language that could prevent those without veteran status from receiving benefits, the actual claim for benefits appears, upon first glance, appears to be simpler than many other VA claims.

Those “who report having experienced MST” are eligible and the usual prerequisites do not apply. The injuries do not have to be adjudicated as service-connected,⁴³² and the minimum-service requirement is completely inapplicable.⁴³³ There is also no requirement to file a disability claim.⁴³⁴ More importantly, those applying for MST-related counseling, care, and services do not need to “provide evidence of the sexual trauma.”⁴³⁵ So long as a VA mental health professional determines that physical or mental trauma resulted from MST, the former servicemember could be eligible for MST-related care.⁴³⁶

The broad nature in which VA has recently interpreted the controlling statute appears to recognize the reality that hinging eligibility

⁴³⁰ *Id.*

⁴³¹ *See* note 427 and accompanying text.

⁴³² VHA DIR. 2010-033, *supra* note 424, para. 2a (“VA has determined that because VA provides sexual trauma counseling and care pursuant to 38 U.S.C. Section 1720D only for sexual trauma-related disabilities that are incurred in service, there are no requirements for the condition to be adjudicated as service connected.”).

⁴³³ *Id.* (“Length of service or income eligibility requirements do not apply in order to receive this benefit.”).

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ While the statutory definition of MST ties counseling and care to “psychological trauma,” VHA Directive 2010-033 implements the statute to include care for both “physical and mental health conditions.” *See id.*

for MST-related care on veteran status could contribute to the problems related to the underreporting of sexual assault cases. There are numerous reasons why victims of military sexual assault do not report the crime,⁴³⁷ Specifically, some victims worry that reporting the incident will also subject them to discipline, as an investigation into the sexual assault may also uncover misconduct by the victim.⁴³⁸ “Fear over being punished for wrongdoing can keep victims from reporting sexual assault or make them hesitant to fully disclose details of the event to investigators.”⁴³⁹ By not making veteran status a prerequisite to receiving MST-related treatment, VA appears to have recognized the reality that MST victims deserve treatment regardless of any collateral misconduct. Unfortunately, it has often proven difficult to implement even the best of intentions.

Despite the broad way in which VA appears to interpret the statute, some assert that MST victims have faced significant difficulty in obtaining MST-related benefits because of a purported “far greater burden of proof than other VA claimants diagnosed with the same mental illnesses.”⁴⁴⁰ One such former servicemember is Ruth Moore. During congressional testimony in 2012, Ms. Moore explained how her personality disorder-based separation for borderline personality disorder precluded her from receiving benefits.⁴⁴¹ After 23 years of pursuing benefits, she was subsequently granted service connection and rated as 100 percent disabled.⁴⁴² Ms. Moore states that part of the difficulty she faced in obtaining benefits “was the difficulty in proving her mental health issues were the result of sexual assault that occurred while she was in the military.”⁴⁴³ Critics assert, “Survivors of military sexual assault and sexual harassment are betrayed twice: first by the military who all

⁴³⁷ For an in-depth discussion of the barriers to reporting sexual assault, see U.S. DEP’T OF DEF., DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES (Dec. 2009).

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ Service Women’s Action Network, Landmark Legislation Introduced on VA Disability Claims for Military Sexual Assault Victims (Feb. 13, 2013), *available at* <http://servicewomen.org/wp-content/uploads/2013/02/RuthMooreActpressrelease.pdf>.

⁴⁴¹ Rick Maze, *Bill: Help Sex Assault Victims Get VA Benefits*, ARMY TIMES, Feb. 11, 2013, *available at* <http://www.armytimes.com/news/2013/02/military-sexual-assault-victims-benefits-service-connection-021113w/>. Separation because a personality disorder will often preclude a former servicemember from receiving VA benefits, as personality disorders, along with mental retardation, “are not diseases or injuries for compensation purposes, and, except as provided in [38 C.F.R. § 3.310(a)], disability resulting from them may not be service-connected. 38 C.F.R. § 4.127 (2012).

⁴⁴² Maze, *supra* note 441.

⁴⁴³ *Id.*

too often fails to support the victim; and by the VA which has for years systematically rejected MST disability claims based on this unequal and unfair regulation.”⁴⁴⁴

Consequently, Senator Jon Testor of Montana, a member of the Senate Committee on Veterans Affairs, and Congresswoman Chellie Pingree, a member of the House Committee on Armed Services, proposed the Ruth Moore Act of 2013, a bill designed to improve the evaluation procedures used in adjudicating MST-related claims.⁴⁴⁵ Under this proposal, official records will not be required to prove an MST-related claim. “Veterans who say they were victims of military-related sexual trauma would have their claim accepted if a mental health professional says their condition is consistent with sexual trauma and their claims are not rebutted by evidence.”⁴⁴⁶ All reasonable doubts would be resolved in favor of the claimant.⁴⁴⁷ At the time of publication, this proposed legislation has not been enacted, but its introduction and support reflect a growing awareness of the need for prompt MST treatment.

C. Practical Advice

Commanders, judge advocates, and all who work with MST victims must educate them, from the first steps in the process, of their potential eligibility for MST-related benefits through VA. While some claim that obtaining such benefits has been difficult, the prospect of pending and future legislation may make the road to benefits easier to navigate. Additionally, MST victims can obtain assistance from most VSOs to navigate what can be a confusing or frustrating process.⁴⁴⁸ This assistance is available to victims from the beginning, as VSOs will assist a victim with filing a claim. Because MST-related care does not hinge on veteran status, MST victims with even the most unfavorable types and

⁴⁴⁴ Karen McVeigh, *Military Sexual Assault Victims Hope Bill Fixes ‘Unfair and Broken’ VA System*, THE GUARDIAN, Feb. 13, 2013, available at <http://www.guardian.co.uk/world/2013/feb/13/us-military-rape-victims-bill>.

⁴⁴⁵ Ruth Moore Act of 2013, S. 294, 113th Cong. (2013).

⁴⁴⁶ Maze, *supra* note 441.

⁴⁴⁷ *Id.*

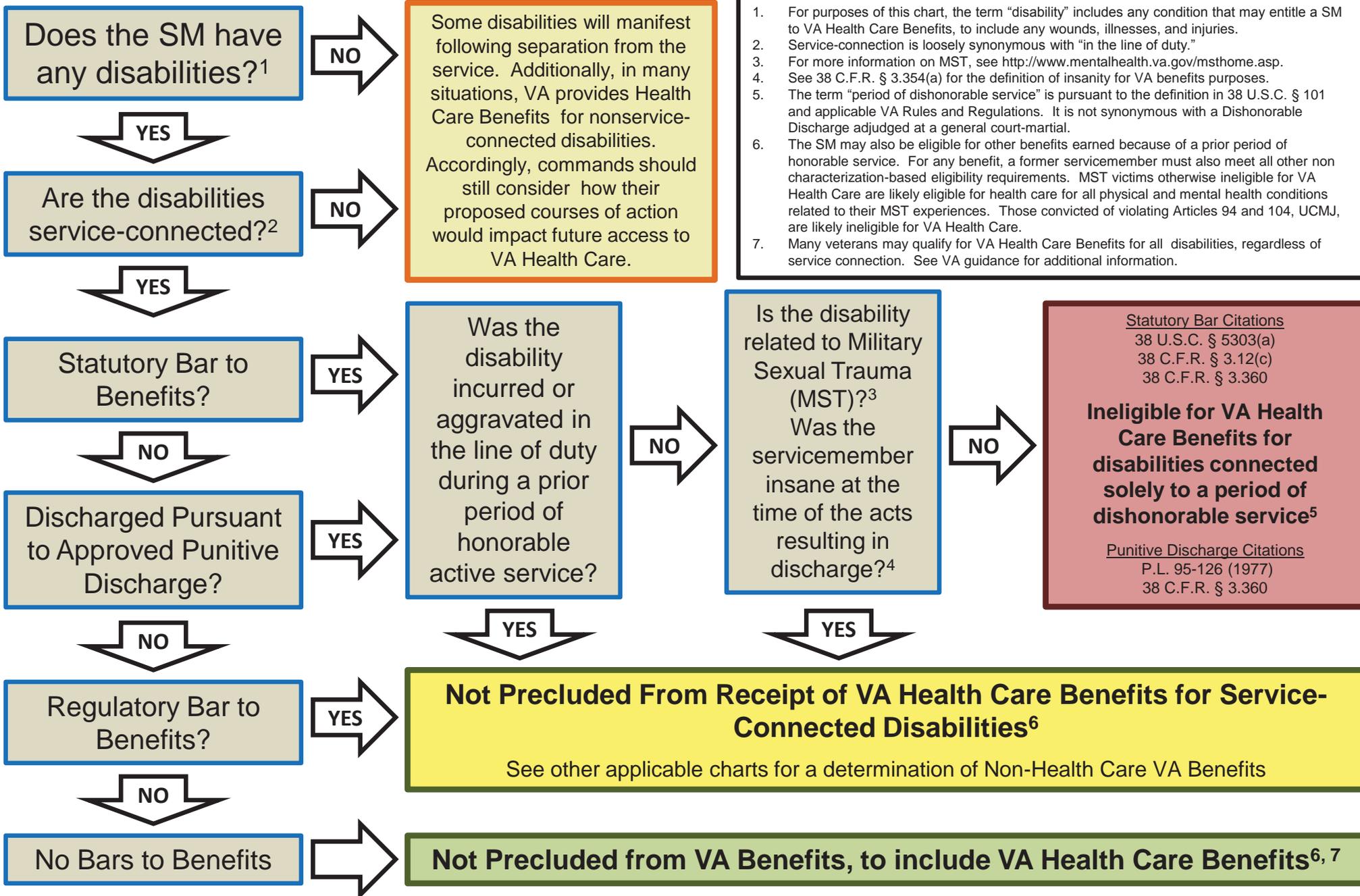
⁴⁴⁸ Disabled American Veterans (DAV), a congressionally chartered VSO, assisted Ms. Moore with her case. Rick Maze, *Bill: Help Sex Assault Victims Get VA Benefits*, ARMY TIMES, Feb. 11, 2013, available at <http://www.armytimes.com/news/2013/02/military-sexual-assault-victims-benefits-service-connection-021113w/>. For assistance in locating VSO help, see *infra* app. M.

characterizations of discharge should understand their eligibility for MST-related care, as well as their ability to obtain VSO assistance in their cases.

Even with proper education, many who have applied for MST-related care have experienced a long road to benefits. In future cases, part of that road may be shortened by advocates ensuring that MST victims preserve all medical records and documentation made contemporaneously with the MST incident. This is particularly true if the sole basis for VA health care eligibility is status as a MST victim, as the status of efforts to liberalize the rules surrounding MST-related claims for benefits, such as the *Ruth Moore Act of 2013*,⁴⁴⁹ may modify the adjudicatory process for such claims.

⁴⁴⁹ Ruth Moore Act of 2013, S. 294, 113th Cong. (2013).

VA Health Care Benefits Eligibility



1. For purposes of this chart, the term “disability” includes any condition that may entitle a SM to VA Health Care Benefits, to include any wounds, illnesses, and injuries.
2. Service-connection is loosely synonymous with “in the line of duty.”
3. For more information on MST, see <http://www.mentalhealth.va.gov/msthome.asp>.
4. See 38 C.F.R. § 3.354(a) for the definition of insanity for VA benefits purposes.
5. The term “period of dishonorable service” is pursuant to the definition in 38 U.S.C. § 101 and applicable VA Rules and Regulations. It is not synonymous with a Dishonorable Discharge adjudged at a general court-martial.
6. The SM may also be eligible for other benefits earned because of a prior period of honorable service. For any benefit, a former servicemember must also meet all other non characterization-based eligibility requirements. MST victims otherwise ineligible for VA Health Care are likely eligible for health care for all physical and mental health conditions related to their MST experiences. Those convicted of violating Articles 94 and 104, UCMJ, are likely ineligible for VA Health Care.
7. Many veterans may qualify for VA Health Care Benefits for all disabilities, regardless of service connection. See VA guidance for additional information.

Statutory Bar Citations
38 U.S.C. § 5303(a)
38 C.F.R. § 3.12(c)
38 C.F.R. § 3.360

Ineligible for VA Health Care Benefits for disabilities connected solely to a period of dishonorable service⁵

Punitive Discharge Citations
P.L. 95-126 (1977)
38 C.F.R. § 3.360

Not Precluded From Receipt of VA Health Care Benefits for Service-Connected Disabilities⁶

See other applicable charts for a determination of Non-Health Care VA Benefits

Not Precluded from VA Benefits, to include VA Health Care Benefits^{6, 7}

Appendix H
Specific VA Benefits Resources

Appendix H-1
Most Popular Benefits Based on Character of Service

Most Popular Benefits Available for Former Servicemembers Based on Character of Service*

BENEFITS FOR A DISCHARGE UNDER HONORABLE CONDITIONS (GENERAL DISCHARGE)

Dod Benefits:

- Payments for Unused Accrued Leave
- Right to Wear the Uniform
- Armed Forces Retirement Home
- Pre-Separation Counseling
- Dependent Travel and Household Goods Shipment (HHG)
- Member Travel Home and HHG
- Death Gratuity
- Dod Military Funeral Honors
- Retired Pay for Non-Regular service
- Remission of Indebtedness
- Post-service Maternity Care

Non-Dod Benefits:

- Transitional Housing
- Transitional Assistance Management Program (TRICARE)
- Continued Health Care Benefit Program
- Excess Leave/Permissive TDY
- Naturalization through Armed Forces Service
- Civil Service Retirement Credit
- Federal Civil Service Hiring Preference
- Post-secondary Education Readmission
- Department of Education Upward Bound
- Rural Housing Loan preference
- Unemployment Compensation for Ex-Servicemembers
- DOL Priority of Service employment and training
- USERRA Reemployment Rights
- Patriot Express Small Business Loans

HONORABLE DISCHARGE ONLY:

ALL BENEFITS LISTED ELSEWHERE, PLUS:

- Education Benefits Transfer (Dod)
- Montgomery GI Bill (VA)
- Post-9/11 GI Bill (VA)
- Troops to Teachers (Non-VA)

**Minimum active service requirements may apply.*

BENEFITS FOR A DISCHARGE UNDER OTHER THAN HONORABLE CONDITIONS (Entitled to SGL/VGLI conversion; Other VA Benefits Eligibility to be Adjudicated by VA)

- Pre-Separation Counseling
- Member Travel Home and OCONUS HHG
- Dependent Travel and HHG (w/ approval)
- Retired Pay for Non-Regular Service
- Department of Education Upward Bound
- Higher Education Readmission

OTH and BCD (SPCM):
Is discharge considered dishonorable based on a bar to VA benefits?

OTHER THAN HONORABLE OR BCD (SCM) SERVICE ADJUDICATED AS "OTHER THAN DISHONORABLE" OR AN HONORABLE OR GENERAL DISCHARGE

VA BENEFITS:

- Service-Connected Disability Compensation
- Dependency and Indemnity Compensation
- Survivors' and Dependents' Educational Assistance
- Vocational Rehabilitation
- Automobile Allowance
- Clothing Allowance
- Service-Disabled Veterans Life Insurance
- Specially Adapted Housing Grants
- Veterans Mortgage Life Insurance
- Home Loan Guaranty
- Veterans Group Life Insurance (VGLI)
- Non-Service Connected Disability Pension
- Veterans Retraining Assistance Program
- Educational and Vocational Counseling
- Burial in VA National Cemeteries
- Health Care*

(*Also entitled to limited care with a § 3.12(d) benefits bar; No health care is authorized following any BCD)

Non-VA Benefits:

- Dod Death Gratuity
- Patriot Express Small Business Loans
- Rural Housing Loan Preference
- DOL Priority of Service for Employment and Training

BENEFITS FOR A BAD CONDUCT DISCHARGE (SPCM) (Entitled to SGL/VGLI conversion; Other VA Benefits Eligibility to be Adjudicated by VA)

- Pre-Separation Counseling
- Member Travel Home and OCONUS HHG
- Dependent Travel and HHG (w/ approval)
- Department of Education Upward Bound

STATUTORY BARS TO VA BENEFITS
38 U.S.C. 5103(a) AND 38 C.F.R. 3.12(c)

1. Discharge by sentence of a GCM;
2. Discharge as conscientious objector who refused to perform duty, wear uniform, or comply with authority;
3. A deserter;
4. Officer resignation for good of service;
5. Discharged as alien during hostilities;
6. AWOL in excess of 180 days unless VA determines compelling circumstances.

REGULATORY BARS TO VA BENEFITS
38 C.F.R. 3.12(d)

1. Discharge to evade trial by GCM;
2. Mutiny or spying;
3. Moral turpitude;
4. Willful and persistent misconduct;
5. Homosexual acts involving aggravating circumstances or affecting duty.

BAD CONDUCT DISCHARGE (GCM)

- Pre-Separation Counseling
- Member Travel Home and OCONUS HHG
- Dependent Travel Home and HHG (w/ approval)
- Department of Education Upward Bound

NO VA BENEFITS (except for SGL/VGLI conversion)

DISHONORABLE DISCHARGE

- Pre-Separation Counseling
- Member Travel Home and OCONUS HHG
- Dependent Travel and HHG (w/ approval)