

VA Ready to Impose a 3 year look back period for gifts...

By Julian E. Gray, CELA
January 2014

While only a small percentage of the millions of veterans and their families utilize the Aid and Attendance benefit offered by the Department of Veterans Affairs, it is clearly a useful program for those in need of medically related assistance with their activities of daily living. While this program is financially “means” tested, there is currently no penalty for applicants who divested themselves of their assets and subsequently applied for benefits. Because of perceived abuse of the program generated by a Government Accounting Office (GAO) report, a bill was introduced into the U.S. Congress in 2012 (S. 3270) which imposed a 3 year “lookback” period for uncompensated transfers prior to the filing of the VA application. This bill did not get traction but was replaced in 2013 by a new bill which contains similar provisions (H.R. 2189). This new bill passed the House of Representatives on October 28, 2013 and was referred to the Senate for review. So, while most bills take time to become actual law, it appears from the movement of these similar bills that legislation may be forthcoming in 2014 which will drastically affect those veterans and their family members who utilize the VA pension/aid & attendance benefit. However, there appear to be some benefits for those applicants seeking disability Compensation through the VA.

The language contained in H.R. 2189, if made into law, will provide the following changes, some of which are better than others:

1. **Improvement of Claims Processing** – A commission will be appointed to address the issue of claims backlog (Section 101). Anyone who has dealt with the VA can understand the frustration with delays in processing claims and communication on the status of a pending claim. While some claims are resolved in 30 days, the average is usually many months. This legislation mandates reporting to the Secretary of the VA that all claims will be approved or denied with 125 days of application (Section 102). While 4 months is not exactly fast, at least it gives the applicant some hope as to when he may hear some news from the VA, good or bad.

In an effort to keep applicants informed of pending claims without waiting on hold on the telephone for lengthy periods of time (or being able to get through at all), Section 107 of the bill directs the Secretary to maintain on the VA website publicly accessible information concerning pending and completed claims of compensation for a veteran’s service-connected disability or death.

- Pension (“a.k.a. Aid & Attendance”)** – Section 202 of the bill provides that if a veteran eligible for a pension for service or for a non-service-connected disability, or the spouse of such veteran, disposes of a resource that was part of such veteran's estate for less than its fair market value within three years before applying for such pension, the Secretary shall deny or discontinue the pension payment for months beginning on the date of such disposition and ending when the uncompensated value of such resource is reached. This language appears to mean that the VA pension program will soon review financial transactions of an applicant much like the Medicaid long term care services program (i.e. nursing home care). Given the budget constraints on government, it was inevitable that this gifting loophole would close.

So, assuming H.R. 2189 becomes the law (or something similarly drafted), how will it affect applicants for VA pension/aid & attendance? While the details of the implementation of this new rule are still forming, you can anticipate the VA looking to the rules utilized by the Centers for Medicare and Medicaid Services (CMS), which currently imposes a 5 year lookback period for asset transfers prior to application for long term care benefits. If so, the applicant (or spouse/widow) will have to provide 3 years of all financial records (bank statements, IRA's, CD's, stocks, mutual funds, annuities, bonds, etc.) to the VA at the time of application to be reviewed for “gifts”.

If uncompensated transfers are discovered in the financial review, assuming the Medicaid format rules are used, then a penalty divisor will be divided into the value of the uncompensated transfer(s) to determine the period of ineligibility for benefits. For illustrative purposes, Pennsylvania currently penalizes a Medicaid applicant 1 month of care coverage for about every \$8,000 given away during the 5 years preceding the application. This is based on the average cost of nursing home care in the Commonwealth. In contrast, it appears that the measuring device to be used by the VA in arriving at its penalty divisor will depend upon the current maximum pension with aid & attendance benefit (for a married Veteran in 2014 that's slightly over \$2,000/month). Using that logic, a gift will create 4 times the penalty period for the VA benefit than the Medicaid benefit. Some simple math will tell you that if an applicant gives away more than \$72,000 (36 months x \$2,000), he would probably be better off just waiting 3 years to apply for VA benefits and not have to even disclose the gift in month 37. While there will probably be exceptions and planning techniques to counter the imposition of transfer penalties, the existence of this new rule should not be ignored.

A side effect of a proposed 3 year look back rule is that it may actually delay the processing of VA claims. The VA already has a notorious reputation related to the backlog of claims. The claims processors are not currently reviewing 3 years of financial records on each claim. Imagine the increased work force needed by the VA to review these records. Once again, in comparison to Pennsylvania's Medicaid program, there are 67 counties (most of which are handling Medicaid application review). However, the VA currently has only 2 offices reviewing claims in Pennsylvania – Pittsburgh and Philadelphia. It seems that if the VA is

going to begin reviewing years of financials for each applicant, it may want to consider beefing up its workforce or further delay the claims process.

So when might all this take place? Never? Not likely. As stated previously, given the status of our economy, aging population and political pressure to eliminate “gaming” the system, it is inevitable that the VA will impose a financial lookback period for applicants. The most recent version of the legislation would direct the implementation of the review period one year after the passage of the law. Therefore, at the earliest you can expect sometime in the first half of 2015. That said, the bill also currently provides for the “grandfathering” of applications made *prior* to the implementation of the new rule. Those wishing to take advantage of the closing loophole may want to investigate their options quickly.