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VA Improved Pension Benefits and Medicaid Budgeting

By Anthony Szczygiel

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A. Introduction

This article analyzes the Medicaid budgeting of your client's Department of Veterans Affairs Improved Pension (VA Improved Pension).¹ The VA Improved Pension is a cash benefit for veterans who have reached age 65, or who have a nonservice-connected disability, and for their surviving spouse.² Federal law excludes significant portions of the VA Improved Pension from countable income for Medicaid purposes. The exclusions include the \$90 reduced pension, the pension generated by unreimbursed medical expenses and the enhancements for veterans who are housebound or in need of aid and attendance. Several significant legal issues regarding the Medicaid treatment of VA Improved Pension benefits remain unresolved. Administrative advocacy and/or litigation may clarify these issues.

Unfortunately, the special benefit of the VA Improved Pension intended by federal policy makers is often unfulfilled. First, many eligible veterans and dependents are unaware of the VA Improved Pension and how it can help with their medical expenses.

Thus, they do not apply for the benefit.³ Well over half of New York State's elderly male population are veterans.⁴ Further, and very important to the qualifying criteria for the VA Improved Pension, almost all these veterans served during a period of war.⁵ Less than 4 percent of these veterans are receiving a VA Improved Pension.⁶ The number of female veterans, age 65 and over, is relatively small.⁷ Thus, the VA Improved Pension dependents' and survivors benefits are important for older women. Here again, few receive these benefits⁸

Second, the Medicaid-exempt portions of the VA Improved Pension are not self-evident. New York Medicaid examiners are supposed to screen all applicants for possible DVA benefits.⁹ However, Medicaid examiners may not be aware of the preferential treatment of the VA Improved Pension. The Department of Veterans Affairs and Medicaid speak different administrative languages. Further, New York's Medicaid program provides scant guidance on these benefits. To make matters more challenging, some authority contains dated policy that is no longer correct. A VA beneficiary may need an advocate to translate the VA Improved Pension benefit into a Medicaid disregard.

B. VA Improved Pension

The Winter 2003 *Elder Law Attorney* presented several informative articles regarding benefits the Department of Veterans Affairs (DVA) can provide our clients.¹⁰ As Alice Reiter Feld points out, the VA Improved Pension is especially important to the long-term care needs of veterans and dependents. The VA Improved Pension can help a veteran private pay for care and services that other insurance programs do not cover, such as an assisted living facility, prescription drugs and home health aides.¹¹

1. Who Is Eligible?

The VA Improved Pension is available only to a wartime veteran¹² or a wartime veteran's surviving spouse.¹³ Any wartime veteran who reaches age 65 may qualify for the VA Improved Pension, without regard to his disability.¹⁴ The DVA defines "a patient in a nursing home for long-term care because of disability" as permanently and totally disabled.¹⁵ For other veterans under age 65, the DVA disability standard is more inclusive than that used in determining eligibility for Social Security or SSI disability benefits.¹⁶ The veteran's surviving spouse can qualify for the pension even if the veteran was not disabled.

The DVA has unusual statutory and regulatory provisions that provide favorable treatment to applicants. The veteran needs only one day of active duty during a period of war, with a total service time of at least 90 days. The broadly defined periods of war reflect the generous spirit behind the program.¹⁷ Further, the active service includes time in reserve units and as cadets or midshipmen.¹⁸

2. How Is the Benefit Calculated?

The VA Improved Pension is SSI on steroids. Like SSI, the VA Improved Pension is a needs-based supplement to other family income for an elderly or disabled person who has limited resources and income. However, Congress designed the VA Improved Pension to be better than other public assistance.¹⁹ The one-person resource level is not specified in the law or regulations but appears to be approximately \$80,000, disregarding the home.²⁰

The VA Improved Pension benefit is set at the difference between the family's countable income and the maximum pension rate.²¹ The VA Improved Pension should bring the 2005 income of an eligible no dependents up to \$846/month

(\$10,162/year), after medical expenses. This income deduction for unreimbursed medical expenses (UME) can let the veteran recover most out-of-pocket family medical expenses up to the maximum rate.²²

DVA increases the pension benefit if the household includes a spouse or child. They enhance the benefit level also if the veteran needs extra help with his care. These enhancements can dramatically increase the VA Improved Pension payment. For example, the 2005 maximum rate for a married veteran in need of "Aid and Attendance" almost doubles to \$1,674/month (\$20,099/year).²³

DVA reduces the pension to \$90/month for single veterans and surviving spouses when they are in a nursing home and covered by Medicaid.²⁴

Practice tip: You can screen clients for VA Improved Pension eligibility (once you know their age, financial information, medical needs and expenses) by asking three questions:

1. Did you or your spouse serve in the Uni- formed Services?
2. If so, what were the dates of service?
3. Was the discharge other than dishonorable?²⁵

C. Medicaid Exclusions for the VA Improved Pension

The VA Improved Pension can continue to be a valuable benefit even after the veteran or dependent applies for Medicaid. Your client can use the VA Improved Pension as unrestricted income while on Medicaid to the extent the benefits fall into the three categories listed below. In addition, Medicaid will disregard retroactive awards of the benefits generat- ed by UME and the extra help enhancements in the month of receipt and the following month.²⁶

1. Reduced VA Improved Pension for an Institutionalized Veteran on Medicaid

The DVA reduces the pension to \$90/month for a veteran with no dependents who is in a nursing home and covered by Medicaid. The VA Improved Pension is reduced after the month of admission.²⁷

Federal law allows the VA Improved Pension-eli- gible veteran residing in a nursing home to keep the \$90 reduced pension in addition to New York Medic- aid’s \$50 personal needs allowance (PNA).²⁸ The CMS State Medicaid Manual reiterates that:

The limited VA pension, up to the amount of \$90, is not counted as income in the eligibility or post- eligi- bility process . . . There is no interac- tion between the reduced pension and the personal needs allowance.²⁹

New York’s Medicaid Reference Guide (MRG) agrees the reduced VA Improved Pension is an income disregard and Medicaid cannot apply that toward the cost of chronic care.³⁰ Effectively, a nurs- ing home resident on Medicaid who receives the reduced pension has \$140/month as spending money.

Oddly, New York’s Medicaid statute states that the reduced \$90/month VA Improved Pension replaces the \$50/month personal needs allowance.³¹ This policy contradicts federal law, and was based on early guidance from HCFA that has since changed, as reflected above.³² Advocates need to ensure that their local district is following the federal rule on the reduced VA Improved Pension.

2. VA Improved Pension Generated by “Unreimbursed Medical Expenses”

The list of income deductions applied in calculat- ing the VA Improved Pension benefit is slightly short- er than that in SSI or Medicaid.³³ The most significant deduction is for UME³⁴—out-of-pocket family med- ical expenses that exceed 5 percent of a pension rate.³⁵ The pension rate used for this purpose includes the increased pension for family members but excludes the enhancements for aid and atten- dance or being housebound.³⁶ That means the 2005 UME threshold for all single veterans is \$508, and for a married veteran with no other dependents, \$665.

UME include health insurance premiums, deductibles and co-pays, and also services not cov- ered by insurance. Higher income veterans who have been ineligible for the VA Improved Pension may become eligible when long-term care costs reduce their countable income and resources to VA Improved Pension levels.

SSI and SSI-related Medicaid exclude from income the portion of the VA Improved Pension resulting from UME.³⁷ Before Medicaid approval, the entire pension amount received by a veteran may result from UME. Once on Medicaid, the unreim- bursed expenses are limited to the NAMI and the medical services not covered by Medicaid. Medicaid will not count any of the VA Improved Pension gen- erated by UME as income, nor apply it to the cost of care.³⁸ Thus, the VA Improved Pension reimburses the veteran for out-of-pocket medical expenses, including NAMI payments.

3. VA Improved Pension Enhancements for Being “Housebound” or “In Need of Aid and Attendance”

DVA enhances the VA Improved Pension benefit for eligible veterans who are “housebound” and for those “in need of regular aid and attendance.”³⁹

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A veteran is permanently housebound when the veteran is “substantially confined to such veteran’s house . . . or immediate premises due to a disability or disabilities which it is reasonably certain will remain throughout such veteran’s lifetime.”⁴⁰

A veteran is considered in need of regular aid and attendance if the person is

- (1) a patient in a nursing home (broadly defined by the DVA to include an ALF); or
- (2) helpless or blind, or so nearly helpless or blind as to need or require the regular aid and atten- dance of another person.⁴¹

The person’s inability to perform one or more activi- ties of daily living (ADLs) will be considered in deter- mining his

need of "aid and attendance."⁴²

The 2005 maximum rate for a "housebound" veteran is the basic VA Improved Pension increased by \$188/month (\$2,257/year). A disabled veteran in need of "aid and attendance" gets an additional \$566/month (\$6,793/year) added to the basic VA Improved Pension maximum rates. Thus, a single veteran in need of aid and attendance has a maximum rate of \$1,412/month (\$16,955/year.)⁴³ As we will see below, these enhancements are invisible to the trained Medicaid examiner's eye.

SSI and SSI-related Medicaid exclude the VA Improved Pension enhancements for being "housebound" or "in need of aid and attendance" in both the eligibility and post-eligibility budgeting.⁴⁴

Practice tip: The DVA award letter likely will not specify the various components of the Improved Pension benefit. You need to show the Medicaid examiner the portion(s) of the Improved Pension that:

1. represents dependents' benefits,
2. results from unusual medical expenses (UME) and
3. is the housebound or Aid and Attendance allowance.

D. Unexplored Territory with VA Benefits

1. Should Medicaid Disregard the Entire VA Improved Pension?⁴⁵

New York's Medicaid rules identify income that is not available for determining eligibility.⁴⁶ One section instructs Medicaid to disregard income in the form of "regular cash assistance payments based on need and furnished as supplemental income by the Federal government, a state or political subdivision."⁴⁷

The VA Improved Pension falls squarely within the definition of regular cash assistance disregarded by this regulation. As explained above, the VA Improved Pension is

- a) a regular payment, issued monthly;
- b) cash assistance based on need;⁴⁸
- c) furnished as supplemental income by the United States government.

Congress created the VA Improved Pension to ensure that elderly or disabled individuals who served in the United States armed forces can live above the poverty level.⁴⁹ The legislative history of the Act makes clear that they designed the new benefit

- a) to assure a level of income above minimum subsistence amounts allowing veterans to live out their lives with dignity,
- b) to prevent veterans and their families from having to turn to welfare assistance,
- c) to provide the greatest pension to those with the greatest need.⁵⁰

This congressional policy and legislative intent conflict with using that needs-based assistance to supplement the Medicaid program, rather than the veterans' income.

2. Will the DVA Apportion the VA Improved Pension for the Benefit of the Community Spouse?

Veterans get increased pension benefits if the veteran has a dependent. SSI and SSI-related Medicaid will not count the dependent's portion as that of the SSI or SSI-related Medicaid participant.⁵¹

The DVA can apportion the veteran's portion of the VA Improved Pension, that is, send the check out in the name of a spouse or a child.⁵² The basic requirements are that

- a) the veteran is not residing with the spouse or child, and
- b) the veteran is not reasonably discharging his or her responsibility for support.

Additionally, the DVA can "specially apportion" the VA improved Pension "where hardship is shown to exist."⁵³

The standard apportionment conditions usually are not met in the case of an institutionalized spouse. The DVA considers a veteran to be living with a spouse, even though they reside apart, unless they are estranged.⁵⁴

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The "special apportionment" may be of help in both the nursing home and home care situations. The DVA may be persuaded to issue a check to the spouse for some or all of the VA Improved Pension. Medicaid treats the apportioned benefit as income of the spouse or child and not a support payment from the veteran.⁵⁵

3. DVA Payments and the Anti-alienation Provisions

Language very similar to the anti-alienation provisions of the Social Security Act protects VA Improved Pension benefits.⁵⁶ *Robbins v. DeBuono*⁵⁷ overturned the New York Medicaid budgeting rule dictating that the institutionalized spouse had to use his or her Social Security to support the community spouse. The Court held that such budgeting of an institutionalized spouse's Social Security benefits was "other legal process," alienating the benefits in contravention to the statute. This decision provided a way to avoid New York Medicaid's income-first budgeting, at least in part.

The current impact of *Robbins* is uncertain. The State Department of Health has rescinded its policy of adhering to the *Robbins* decision.⁵⁸ The ultimate outcome of that controversy should apply equally to the VA Improved Pension benefits.

E. Conclusion

Elderly veterans and their families may receive significant help through the VA Improved Pension. These benefits are underused and underappreciated. Advocates can help to rectify this problem and see that the congressional intent to help these individuals is fulfilled.

Endnotes

1. 38 U.S.C. § 1501–1543 (2004).
2. 38 U.S.C. §§ 1513, 1521 and 1541.
3. Twenty-six million veterans, along with their dependents, are potentially eligible for VA services and benefits. In 2000, the DVA was paying a pension to only 364,220 recipients. See Disability/Type of Major Disability and Pension by Period of Service, September 30, 2000, available at http://www.va.gov/vetdata/ProgramStatics/stat_app00/Table%2014.xls.
4. The 2000 U.S. Census identified 559,121 veterans in New York out of the total elderly male population of 973,945. See Data Table, Veteran Population in the U.S. and Puerto Rico sorted by Age, by Sex, by State, available at <http://www.va.gov/vetdata/Census2000/index.htm>.
5. Over 544,000 veterans, out of 577,702 veterans (male and female) age 65 and older and living in New York, served in World War II and/or the Korean Conflict. Compare Data Table, Veteran Population in the U.S. and Puerto Rico sorted by Period of Service, by State with Data Table, Veteran Population in the U.S. and Puerto Rico sorted by Age, by Sex, by State, available at <http://www.va.gov/vetdata/Census2000/index.htm>.
6. In 2000, about 17,900 New York veterans were receiving a DVA pension. See DVA Estimated Selected Expenditures by State, FY 2000, Table 22, Living Veterans in New York State receiving Pension for Nonservice-connected disabilities available at http://www.va.gov/vetdata/ProgramStatics/stat_app00/Table%2022.xls.
7. The 2000 U.S. Census identified 18,581 Female veterans, age 65 and over, in New York State. See Data Table, Veteran Population in the U.S. and Puerto Rico sorted by Age, by Sex, by State, available at <http://www.va.gov/vetdata/Census2000/index.htm>.
8. In 2000, about 14,482 survivors were receiving a DVA pension, compared to 17,900 living veterans. See DVA Estimated Selected Expenditures by State, FY 2000, Table 22, Living Veterans in New York State receiving Pension for Nonservice-connected disabilities, available at http://www.va.gov/vetdata/ProgramStatics/stat_app00/Table%2022.xls.
9. 93 ADM-21 (August 1993).
10. See 13 NYSBA *Elder Law Attorney* (Winter 2003). See also *Federal Benefits For Veterans And Dependents* (2005 Ed.), available at <http://www1.va.gov/opa/vadocs/fedben.pdf>. (providing helpful information on the wide variety of DVA benefits); <http://www.va.gov> (the DVA's home page).
11. Alice Reiter Feld, Non-Service Connected Veterans Benefits for the Elderly and Disabled, 13 NYSBA *Elder Law Attorney* 14 (Winter 2003) (hereafter, "Feld").
12. 38 U.S.C. § 1521(a) (2004), 38 C.F.R. § 3.3(a)(3) (2004). The DVA provides cash payments to other categories of individuals, such as compensation for veterans with service-connected disabilities (38 U.S.C. §§ 1101 et seq.) and Dependency Indemnity Compensation (DIC) to surviving spouse, child(ren) or parents of deceased veterans (38 U.S.C. § 1315). These payments are not disregarding for Medicaid purposes.
13. 38 U.S.C. § 1541 (2004). The statute expands eligibility to the surviving spouse of a veteran who had two years of active service, even if not during a period of war. 38 U.S.C. § 1541(h).
14. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 8002 had eliminated the statutory definition in 38 U.S.C. § 1502 that a veteran would be considered permanently and totally disabled simply by reaching age 65. Congress reestablished eligibility for aged veterans in 2001, Pub. L. No. 107-103, Sec. 207 (Dec. 27, 2001) (adding new section, 38 U.S.C. § 1513, with an effective date of September 17, 2001).
15. Pub. L. No. 107-103, Sec. 206(a) (Dec. 27, 2001) (rewriting 38 U.S.C. § 1502(a)).
16. See 38 U.S.C. § 1502(a)(2-4) (A Social Security disability finding satisfies the criteria, but so does a DVA finding of unemployment due to a disability that would render "the average person" unable to follow a substantially gainful occupation, as well as specified diseases and disorders); 38 C.F.R. § 3.3(a)(3)(vi)(B).
17. 38 U.S.C. § 101(8) (2004) (defining World War II, for purposes of qualifying for benefits, as ending on December 31, 1946); *Id.* at § 101(9) (defining the "Korean Conflict," though never formally declared a war by Congress, as lasting from June 27, 1950 until January 31, 1955); *Id.* at § 101(29) (defining the "Vietnam era" as August 5, 1964 to May 7, 1975, but veterans who served in the Republic of Vietnam as early as February 28, 1961 get wartime credit.); *Id.* at § 101(33) (The "Persian Gulf War" period started on August 2, 1990, and no end has yet been prescribed.). See also 38 U.S.C. § 1501(4) (defining a "period of war" for pension eligibility by the definitions above.).
18. Active service is defined to include the Armed Forces reserve units, commissioned officers of the Public Health Service, the

19. Veterans' and Survivors' Pension Improvement Act of 1978, Pub. L. No. 95-588 (Nov. 4, 1978). Congress passed the Act with a primary purpose to "assure a level of income above minimum subsistence level allowing veterans and their survivors to live out their lives in dignity"; H.R. Rep. No. 1225, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5585.
 20. The VA Improved Pension may be denied if it "is reasonable that some part of the corpus of such estates be consumed for the veteran's maintenance." 38 U.S.C. § 1522 (2004); 38 C.F.R. § 3.274, 3.75. This, in practice, has translated into about \$80,000 plus the home. *See* Feld, *supra* note 11 at 15.
 21. Countable Family Income excludes welfare benefits (e.g., Supplemental Security Income) 38 C.F.R. § 3.272(a).
 22. *See* 38 U.S.C. § 1503(a)(8); 38 C.F.R. § 3.272(g)(1); Feld, *supra* note 11 at 15. *See also* budgeting examples *available at* <http://www.vba.va.gov/bln/21/Rates/pen01b.htm>.
 23. *See* <http://www.vba.va.gov/bln/21/Rates/>. The VA Improved Pension is paid in 12 equal monthly payments rounded down to the nearest dollar. The maximum annual pension rates are increased annually by the Social Security COLA. 38 U.S.C. § 5312 (2004); P.L. 95-588, Sec. 306.
 24. 38 U.S.C. 5503(d)(2).
 25. 38 U.S.C. § 101(2); 38 C.F.R. § 3.12(d). A discharge for willful and persistent misconduct can disqualify the individual from benefits. *See, e.g., Camarena v. Brown*, 6 Vet. App. 565, 567-68 (1994), *aff'd*, 60 F.3d 843 (Fed. Cir. 1995). There is an appeals process for contesting the character of a discharge. *See* 10 U.S.C. §§ 1552-53 (1994).
 26. New York State's Medicaid Reference Guide (MRG), p. 322. 27. 38 U.S.C. 5503(d)(2).
 28. 38 U.S.C. § 5503(c)(2). "Notwithstanding any provision of title XIX of the Social Security Act [Medicaid], the amount of the payment paid a nursing facility pursuant to a Medicaid plan for services furnished a veteran may not be reduced by any amount of [the reduced \$90] pension permitted to be paid such veteran under paragraph (2) of this subsection." 38 U.S.C. § 5503(c)(3).
 29. CMS State Medicaid Manual, Post-eligibility Treatment of Certain Payments Made by the Department of Veterans Affairs, § 3705(B).
 30. MRG p. 179, 233.
 31. "the personal needs allowance for a person who is a veteran having neither a spouse nor a child, or a surviving spouse of a veteran having no child, who receives a reduced pension from the federal Veterans Administration, and who is a resident of a nursing facility, as defined in section 1919 of the federal social security act, shall be equal to such reduced monthly pension but shall not exceed ninety dollars per month." Social Services Law §366(2)(a)(10)(iii).
 32. New York's Medicaid law reflects the informal HCFA guidance from before the reduced pension was in effect. *See* Reduction of Certain Institutionalized Veterans' Pension Benefits, 91 INF-24, p. 3 (New York State Department of Social Services, April 26, 1991).
 33. *Compare* 38 C.F.R. § 3.272 with 20 C.F.R. §§ 416.1112 and 416.1124.
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34. The DVA previously used the term "unusual medical expenses." *See, e.g., Summy v. Schweiker*, 688 F.2d 1233 (9th Cir. 1982); *Edwards v. Griepentrog*, 783 F.Supp. 522 (D.Nev. 1991). Some SSI and Medicaid references still use that term.
 35. *See* 38 U.S.C. § 1503(a)(8); 38 C.F.R. § 3.272(g)(1); Feld, *supra* note 11 at 15.
 36. 38 C.F.R. § 3.272(g)(1)(iii).
 37. 20 C.F.R. § 416.1103(a)(7); State Medicaid Manual § 3705(A).
 38. New York State's Medicaid Reference Guide (MRG), p. 179, 233.
 39. 38 U.S.C. § 1502; 38 C.F.R. § 3.23.
 40. 38 U.S.C. § 1502(c).
 41. 38 U.S.C. § 1502(b).
 42. 38 C.F.R. § 3.352(a).
 43. *See* Department of Veterans Affairs Cost-of-living Adjustments and Headstone or Marker Allowance Rate, 70 Fed. Reg. 30836 (May 27, 2005). *See also* the DVA's Improved Disability Pension Rate Table, *available at* <http://www.vba.va.gov/bln/21/Rates/pen01.htm>.
 44. 20 C.F.R. § 416.1103(b)(1). The CMS State Medicaid Manual Section 3705, states:
 "A. As of July 1, 1994, neither VA allowances for unusual medical expenses or for Aid and Attendance may be counted as income for eligibility, except as provided in Sec. 3705.C., for post-eligibility purposes, unless you are a State that uses more restrictive eligibility criteria than SSI

 C. [the VA allowances may be post-eligibility income for some veterans in State veteran homes.] "
 45. Credit for identifying this issue belongs with William W. Berry, Esq., Legal Services for the Elderly, Disabled, or Disadvantaged of Western New York (Buffalo).
 46. 18 N.Y.C.R.R. § 360-4.6.
 47. 18 N.Y.C.R.R. § 360-4.6(a)(1)(xix).
 48. SSI recognizes that the VA Improved Pension is needs-based. SI00830.302(B)(1).
 49. *See* Veterans' and Survivors' Pension Improvement Act of 1978, PL 95-588 (Nov. 4, 1978).
 50. H.R. Rep. No. 1225, 95th Cong. 2d Sess. 36, reprinted in 1978 U.S. Code Cong. & Admin. News 5585. 51. 20 C.F.R. § 416.1123; 92 ADM-32, p.5. 52. 38 U.S.C. § 5307; 38 C.F.R. § 3.450.
 53. 38 C.F.R. § 3.451.
 54. 38 U.S.C. § 1521(h)(2).
 55. SI 00830.314(C)(1); *see also*, for a community spouse, 42 U.S.C. § 1396r-5(b)(2)(A)(i).
 56. *Compare* 38 U.S.C.A. § 5301 with 42 U.S.C. § 407.
 57. 218 F.3d 197 (2d Cir, 2000).
 58. *See* GIS 05 MA/002 (Jan. 12, 2005), rescinding GIS 00 MA/027.

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