



Special needs require special attorneys.

March 24, 2015

Director
Office of Regulation Policy and Management (O2REG)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington DC 20420

Re: Comments in Response to RIN 2900-AO73, Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits

Dear Director:

As the President of the Special Needs Alliance (SNA), I am writing in response to the Department of Veterans Affairs' proposal to amend its regulations governing entitlement to VA pension.

The SNA is a national, non-profit organization committed to helping individuals with disabilities, their families and the professionals who serve them. Many of our member attorneys have family members with special needs; all of them work regularly with public benefits, guardianship/conservatorships, planning for disabilities and special education issues. We volunteer significant time to the special needs community and advocate for legislative and regulatory change to improve quality of life for individuals with disabilities.

The SNA believes that the VA's proposed rules will unnecessarily limit access to VA pension and harm families that include individuals with disabilities. We ask that you revise the proposed regulations to address these issues. We do not intend to comment on whether the VA has the statutory authority to implement these proposed regulations.

Transfers to Persons with Disabilities and Special Needs Trusts

The proposed rules include an exemption from assessment of an uncompensated transfer penalty for a veteran, a veteran's spouse, or a veteran's surviving spouse to a trust established on behalf of a child of the veteran based on the VA's determination that the child is incapable of self-support under §3.356, and that the distributions from the trust cannot be used to benefit the veteran, the veteran's spouse, or the veteran's surviving spouse. 38 CFR §3.276(d)(1),(2).

This exemption is inadequate in its protection of those with disabilities in a number of ways.

1. In addition to the child of a veteran, it should specifically mention the child of a veteran's spouse.
2. Limitations on distributions from the trust used to benefit the veteran, the veteran's spouse, or the veteran's surviving spouse should specifically exclude payments, if any, to the veteran or veteran's spouse for care rendered to the child or contributions from the child's trust toward shelter and other expenses.

3. The VA should exempt transfers to any trusts allowed under SSI law. The VA should consistently follow its own statements that it draws from SSI law.
4. The VA should adopt SSI provisions as to trusts within which the corpus is not treated as a countable resource. The proposed rule states that when the claimant is a surviving child, then the child's assets are considered a part of net worth in determining eligibility for the benefit. 38 CFR 3.274(c)(3)(ii). It can be presumed that assets in d4a trusts or third party SNTs will be considered assets available to the child. For a claimant who is a person with disabilities, trust corpus must be exempted from net worth.
5. For a child who has a custodian (other than an institution), the guardian should not be included in the definition of the "custodian" and thus have the guardian's assets included.

Annuities

Under the proposed rules, a transfer to an annuity is considered a transfer for less than fair market value, incurring a penalty period. 38 CFR 3.276 (a)(5)(ii)(A). In light of the fact that a structured settlement could be defined as either an "annuity" or "other financial instrument or investment," we disagree with this broad treatment of annuities as uncompensated transfers and request the VA to clarify when fair market value has been received in these circumstances.

Independent Living Facilities

The proposed rules would limit payments made to Independent Living Facilities (ILF) as a deductible medical expense. We believe this will be harmful to many individuals who suffer from mental disorders and often utilize ILFs as a less restrictive environment that does provide regular supervisor. For a person with certain mental disorders, "custodial care" should be considered "medical care," so that payments to ILFs should be included as deductible medical expenses. The proposed regulations are contradictory in that they allow as deductible medical expenses payments to a facility, including meals and lodging, when the primary reason for the veteran or veteran's spouse being in the facility is to receive health care services or custodial care the facility provides. 38 CFR 3.278 (d)(3)(B).

In-home Attendant

The proposed rule outlines provisions for deductible medical expenses, including payment for an in-home attendant, and exceptions to using a "health care provider." The rules should be modified to eliminate the unnecessary and burdensome extra requirement for a "qualified relative" to obtain a statement by a physician or physician assistant that, "due to physical or mental disability, the qualified relative requires the health care services or custodial care that the in-home attendant provides." This is burdensome and potentially demeaning to a person with disabilities.

Sincerely,



Richard A. Courtney, CELA
SNA President
