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## Unsung Survivors: VA Advocacy for the Spouses, Widows, and Children of Elderly Veterans

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## UNSUNG SURVIVORS: VA ADVOCACY FOR THE SPOUSES, WIDOWS, AND CHILDREN OF ELDERLY VETERANS

Craig M. Kabatchnick\* & Jonathan B. Kelly

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\* This article is dedicated to my son Ryan, whose untimely death has taught us that family must come first; and to Dean Pamela S. Glean and the Clinical Legal Education Program at NCCU.

Professor Craig M. Kabatchnick is Director of the Veterans Law Program at North Carolina Central University School of Law, where he teaches Veterans Law Clinic I & II. From 1984 to 1990 he practiced with his late father Neil B. Kabatchnick, before the Boards for Correction of Military Records within the various military departments in matters involving administrative military personnel law. He co-authored an article entitled Practice Before the Boards for Correction of Military Records Within the Various Military Departments, 33 FED. BAR NEWS & J. 17, 17-21, 44 (cited as a reference in 10 U.S.C. §1552a). Professor Kabatchnick represented the United States Department of Veteran Affairs from 1990 to 1995 as an Appellate Attorney, Senior Appellate Attorney and Associate Special Assistant on the Appellate Litigation Staff Group, Office of the General Counsel, United States Department of Veterans Affairs before the United States Court of Appeals for Veterans Claims in over 300 cases. From 1995 to present he has advocated for veterans rights and played a critical role in the VA claims adjudication process. Professor Kabatchnick has written three other articles for the Marquette Elder's Advisor: PTSD and Its Effects on Elderly, Minority, and Female Veterans, 10 MARQ. ELDER'S ADVISOR 269 (2009); The TBI Impact: The Truth About Traumatic Brain Injuries and Their Indeterminate Effects on Elderly, Minority, and Female Veterans of All Wars, 11 MARQ. ELDER'S ADVISOR 81 (2009); and Obstacles Faced by the Elderly Veteran in the VA Claims Adjudication Process, 12 MARQ. ELDER'S ADVISOR 185 (2010) Special thanks to Leah Solari, a military spouse, for her dedicated research throughout the drafting of this article. Leah is the daughter of NCCU beloved law professor Frances "Patti" Solari Bynum and a proud mother.

## FORWARD

*By Dean Pamela S. Glean  
North Carolina Central University School of Law*

*The Clinical Legal Education Program of North Carolina Central University School of Law is committed to producing excellent attorneys who are sensitive to addressing the needs of people and communities that are traditionally underserved and underrepresented by the legal profession. Through a diverse body of clinical courses, we offer students the opportunity to pursue justice in a variety of legal disciplines. **We teach students to respect the legal process and the dignity of every client, regardless of their station in life. We believe that sensitizing future lawyers to the importance of serving these clients advances fairness and equity in the justice system,** founding principles of NCCU School of Law.*

So is the mission of the clinical program at North Carolina Central University (NCCU) School of Law. The mission is a living document that guides us to re-create the program as the needs of the community and the demands of the students dictate. It is built on the overall working mission of the law school that has resulted in a student body that is attentive to issues of access to justice for poor and underrepresented communities. Many students state that they chose to attend NCCU Law because of the learning opportunities the comprehensive clinical program provides. The current program consists of twelve distinct clinics, nine that provide direct legal services to the underserved communities in the Durham, North Carolina area and beyond. We have in-house programs for Civil Litigation, Criminal Defense, Domestic Violence, Family Law, Juvenile Law, IP (Trademark), Low Income Taxpayer, Small Business and Community Development, and Veterans Law.<sup>1</sup>

The Veterans Law Clinic at NCCU School of Law began in

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1. NCCU also offers externship programs for Public Interest and Criminal Prosecution. We also have a General Externship Program that provides opportunities for judicial clerkships and corporate law.

2006 as a pro bono project supervised by the chief author of this article, Craig M. Kabatchnick. I was introduced to Craig by The Honorable Robinson Everett, former Chief Judge for the United States Court of Military Appeals (now the Court of Appeals for the Armed Forces). Judge Everett served as counsel to a subcommittee of the United States Senate Committee on the Judiciary, whose work led to the enactment of the Military Justice Act of 1968.<sup>2</sup> When we met, Craig was working with Judge Everett at his law firm in Durham, North Carolina.

Craig's background is impressive. His professional career began when he joined his recently deceased father, Neil B. Kabatchnick, a nationally recognized expert in administrative military personnel matters, to form a military personnel and veterans' affairs law firm. Craig left his father's firm in 1990 to serve in the Department of Veterans Affairs (VA) Office of General Counsel as Appellate Attorney, Senior Appellate Attorney, and Associate Special Assistant in the Appellate Litigation Staff Group (027), handling over 300 cases concerning the review of VA rating decisions and the claims adjudication process.

Craig has been candid about his work with the VA. He will admit that he became frustrated with many of the policies and procedures utilized to thwart the efforts of the veterans to obtain benefits in a timely manner, saying that he "witnessed first-hand a 'flawed' veterans' benefits system that infringes veterans' rights to legal assistance, creates undue delays in the appeals process and frequently denies veterans the benefits they are entitled to receive."<sup>3</sup>

The practical effect of many of those policies caused veterans and their families to fight for decades for the benefits they lawfully deserved. The son of a veteran, Craig is passionate about the legal, medical, and social plight of all veterans. The

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2. Judge Robinson O. Everett '59, DUKE LAW FACULTY, <http://www.law.duke.edu/everett/story> (last visited May 17, 2012).

3. Veterans Law Project at N.C. Central University's Law School Leads the Battle After the Battle, ALL BUSINESS, <http://www.allbusiness.com/legal/legal-services-lawyers/11996646-1.html#ixzz1jYyVhIZE> (last visited January 19, 2012).

clinic mission statement drew him to NCCU where he began a pro bono project while working at Everett & Everett.

The response to the Veterans Law Project was overwhelming. It attracted law students who were veterans or who had family members who had been embroiled in legal battles with the VA for many years. It also attracted clients. The government support structure that was in place at the time did not work well for many veterans. Veterans law is a specialized area of administrative law. There was a dearth of attorneys who were familiar with this area of the law, and government regulations placed a fee limitation on attorneys that made learning veterans law an unattractive business proposition.<sup>4</sup> The result was another battle for these veterans—one that they fought alone. Their adversary was their own government, and the fight was overwhelming for many of them. Many did not live to complete the battle and passed their dulled swords to their survivors, creating an ironic reality: at one side of the table, our veteran law students, interviewing those on the other side, the widows and children of deceased veterans.

In 2006, our minds were focused on the war in Iraq and the potential for a simultaneous war in Afghanistan. We wanted a program in place that would provide free legal advocacy for the soldiers in those conflicts who were returning home with complicated physical and mental health issues. However, the veterans who sought our assistance in surprising numbers were those who fought in the early wars: World War II, the Korean War, and the war in Vietnam. One of our clients was the family member of a veteran of World War I; yes, the first one. Another client filed her original claim approximately twenty-five years ago, with no decision. The Veterans Law Clinic obtained benefits for this woman in two years. What a difference legal advocacy makes!

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4. Craig Kabatchnick, *After the Battles: The Veterans' Battle with the VA*, 35 HUMAN RIGHTS 13, 13 (Spring 2008) available at [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol35\\_2008/human\\_rights\\_spring2008/hr\\_spring08\\_kabatchnick.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol35_2008/human_rights_spring2008/hr_spring08_kabatchnick.html).

How would the VA take care of the soldiers from the current war when so many cases were pending from the earlier wars? Congress had already begun to ask the same question. Shortly after we elevated the one-credit-hour Veterans Law Project to a full-fledged three-credit-hour clinic, Craig was subpoenaed to testify before the subcommittee on Disability Assistance and Memorial Affairs of the United States House of Representatives Veterans Affairs Committee.<sup>5</sup> Their goal was to remove some of the systemic obstacles Craig witnessed while at the United States Department of Veterans Affairs.<sup>6</sup> Despite some positive change in these policies, obstacles still exist, especially for elderly veterans who were discharged from service with illnesses and injuries that originated during the wars in which they served, but remained undiagnosed for years. Other obstacles remain, including:

1. the high number of elderly veterans who suffer from Alzheimer's Disease, Parkinson's Disease, or dementia;
2. a shortage of nursing home and veterans hospital beds, and a complicated system to obtain access to them;
3. the physical, mental, and financial burden of family who provide home care for elderly and ill veterans; and after tackling these and other obstacles, the ultimate insult; and
4. a lack of cemetery space to bury those who have made the ultimate sacrifice for our country.

Yes, our elderly war heroes are many of the underserved of whom we speak in our program's mission statement. NCCU

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5. *Hearing on H.R. 67, H.R. 1435, H.R. 1444, and H.R. 1490 Before the Subcomm. on Disability Assistance and Memorial Affairs of the U.S. H.R. Veterans Affairs Comm., 110th Cong. (2007)* (Witness testimony of Mr. Craig M. Kabatchnick, Supervising Att'y and Dir. of the Veterans L. Project, Adjunct L. Prof., North Carolina Central University School of Law) available at <http://veterans.house.gov/witness-testimony/mr-craig-m-kabatchnick> [hereinafter *Witness Testimony*]; *Hearing on H.R. 67, H.R. 1435, H.R. 1444 and H.R. 1490 Before the Subcomm. on Disability Assistance and Memorial Affairs of the U.S. H.R. Veterans Affairs Comm., 110th Cong. (2007)* available at <http://veterans.house.gov/hearing/legislative-hearing-on-hr-67-hr-1435-hr-1444-hr-1490> [hereinafter *Legislative Hearing*].

6. *Witness Testimony*, *supra* note 5; *Legislative Hearing*, *supra* note 5.

School of Law is proud to have been one of the first of approximately nine veterans law clinical programs among the more than 300 law schools in the nation.<sup>7</sup> The number is growing slowly, but the need for free legal services to veterans is growing at a much faster rate. Private attorneys have begun to represent veterans for a fee, but effective legal advocacy may be worth the price in many situations.

Until then, this article provides a practical roadmap for those who seek to understand the still-complicated claims process our military veterans must navigate to receive their due benefits. And as the country begins to focus on the soldiers who have recently returned from Iraq, NCCU School of Law's Veterans Law Clinic will not forget the sacrifices of our elderly veterans; we will honor them by serving their spouses, widows, and children—the unsung survivors.

## INTRODUCTION

*Let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan.* ~ President Abraham Lincoln<sup>8</sup>

Perhaps the toughest battle facing elderly veterans takes place on American soil. By law, the Department of Veterans Affairs (VA) does not advertise their services.<sup>9</sup> Therefore, obstacles

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7. The American Bar Association website shows that in addition to NCCU Law, the following law schools now have veterans clinics: John Marshall, Marquette, University of Detroit, University of Texas at Austin, Valparaiso, Widener, William and Mary, and Yale. Many other clinical programs cite veterans as clients in their housing clinics. *Directory of Law School Public Interest and Pro Bono Programs*, ABA, <http://apps.americanbar.org/legalservices/probono/lawschools/> (last visited May 17, 2012). See also *Veterans Legal Services Clinic*, YALE LAW SCHOOL, <http://www.law.yale.edu/academics/veteranslegalservicesclinic.htm> (last visited May 17, 2012); *Veterans Legal Support Center*, JOHN MARSHALL LAW SCHOOL, <http://www.jmls.edu/veterans/> (last visited May 17, 2012); *Project Salute*, UNIV. DETROIT MERCY SCHOOL OF LAW, <http://www.law.udmercy.edu/index.php/projectsalute> (last visited May 17, 2012).

8. Second Inaugural Address (March 4, 1865).

9. John Miterko, *The VA's Loophole in the Oath of Office*, THE VVA VETERAN, Sept.–Oct. 2008, available at [http://www.vva.org/veteran/1008/govt\\_affairs.html](http://www.vva.org/veteran/1008/govt_affairs.html).

within the VA claims adjudication process can be an endless fight for veterans of all wars, a fight that often incorporates their spouses, widows, and children. These unsung survivors are left with a battle all their own. "Elderly veterans are encountering specific obstacles with the VA process because 'many veterans don't realize the benefits available to them. Veterans come home from their tour of duty, and they no longer associate themselves with the veterans' community. Some veterans wait 50 years before they seek out VA benefits.'"<sup>10</sup>

This article is intended to educate dependents of living veterans and surviving family members of deceased veterans about certain VA benefits available from the Department of Veterans Affairs, such as accrued benefits, dependency and indemnity compensation (DIC), death compensation, death pension, education, burial benefits, health care for survivors, nursing home care, fee-basis care, VA dental care, and special VA benefits.

It should be noted that before receiving eligibility a qualifying family relationship must be established between the veteran and the dependent or surviving family member. Family members are not entitled to benefits independent of the veteran; entitlement is created through the veteran. However, if a veteran is deceased, entitlement is generally through the surviving spouse.

#### QUALIFYING FAMILY RELATIONSHIP

A veteran can be defined as anyone who has been discharged under conditions "other than dishonorable" from active military, navy, or air force service.<sup>11</sup> Once established, a qualifying family relationship may include a spouse, surviving spouse (widow),

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10. Craig M. Kabatchnick, *Obstacles Faced by the Elderly Veteran in the VA Claims Adjudication Process*, 12 MARQ. ELDER'S ADVISOR 185, 186 (2010) (quoting Valerie Jablow, *Representing Veterans in the Battle for Benefits*, 42 TRIAL 30, 30 (2006) (brackets and ellipses omitted)).

11. 38 U.S.C. § 101(2) (2006).



child, and/or surviving child.<sup>12</sup>

#### *SPOUSES AND WIDOWS*

For eligibility purposes, spousal designation requires a valid marriage between members of the opposite sex.<sup>13</sup> Same-sex marriage will not qualify a spouse for VA benefits. To qualify as a surviving spouse, the same requirements must be satisfied at the time of death (valid marriage and member of the opposite sex) and, in addition, possibly one or more of the following three requirements: (1) one year of marriage (or deemed valid marriage) to the veteran; (2) continuous cohabitation with the veteran during the marriage or deemed valid marriage; and (3) no remarriage after the veteran's death.<sup>14</sup>

#### *CHILDREN AND SURVIVING CHILDREN*

Children and surviving children must be a biological child, adopted child, or stepchild of the veteran;<sup>15</sup> also, the child must be unmarried.<sup>16</sup> If the benefit(s) sought is educational by category, the child must be between the ages of eighteen and twenty-three,<sup>17</sup> whereas other benefits require the child to be under the age of eighteen.<sup>18</sup>

#### *COMPETENCY*

Competency plays a definitive role in the adjudication process. Incompetency refers to the deficient mental health of an individual, and one adjudicated as such is found to "lack[] the

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12. *Valiao v. Principi*, 17 Vet. App. 229, 231 (2003). A qualifying family relationship may also include dependent parents and surviving parents.

13. 38 U.S.C. § 101(31); *see also* Defense of Marriage Act of 1996 § 3 (codified at 1 U.S.C. § 7).

14. *See* 38 U.S.C. § 101(3).

15. 38 C.F.R. § 3.57 (2011); *see also* § 3.204(a)(2) (outlining required proof and documentation for children).

16. 38 U.S.C. § 101(4)(A); 38 C.F.R. § 3.57.

17. 38 U.S.C. § 101(4)(A)(iii).

18. *E.g.*, § 101(4)(A)(i), (ii).

mental capacity to contract or to manage” finances and responsibilities.<sup>19</sup> An individual is presumed to be competent, and evidence must be presented to prove otherwise—that the person is, in fact, incompetent.<sup>20</sup> Determinations are made at VA Regional Offices and, if it is found that a veteran is incompetent, monetary benefits will be entrusted to a fiduciary.<sup>21</sup> Once appointed, fiduciaries step in the place of the veteran and act in the “best interest” of the veteran (beneficiary) by personally applying for and managing the applicable VA benefits.<sup>22</sup> Challenges to the appointment of a fiduciary can be made to the Board of Veterans Affairs (BVA) and the Court of Appeals for Veteran Claims (CAVC).<sup>23</sup>

### ACCruED BENEFITS

Accrued benefits include any VA benefit that was “due and unpaid” at the death of the veteran.<sup>24</sup> It is a benefit that was already owed at the time of death; therefore it is not considered a death benefit.<sup>25</sup> The surviving spouse is entitled to all accrued benefits and, if no surviving spouse, surviving children will be awarded in equal parts.<sup>26</sup>

When speaking generally about accrued benefits, the relevant date for consideration is October 10, 2008.<sup>27</sup> For veterans who died before October 10, 2008, the general rule is that the claim dies along with the claimant if an award has not been established at the time of death.<sup>28</sup> Survivors are rarely afforded the opportunity to continue the claim. However, it is

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19. 38 C.F.R. § 3.353.

20. *See* § 3.102.

21. *See* 38 U.S.C. §§ 5502, 5507.

22. 38 C.F.R. § 13.58(b)(2)(i).

23. 38 U.S.C. §§ 5502, 7252.

24. § 5121(a).

25. *Sheets v. Nicholson*, 20 Vet. App. 463, 466 (2006).

26. § 5121(a)(2); 38 C.F.R. § 3.1000(a)(1).

27. § 5121A (added Oct. 10, 2008 by the Veterans’ Benefits Improvement Act of 2008, Pub. L. 110-398, §212(a), 122 Stat. 4151 (2008)).

28. *Richard v. West*, 161 F.3d 719, 723 (Fed. Cir. 1998).

possible if the survivor files a claim for the "accrued benefits."<sup>29</sup> In order to prevail, the survivor will need to prove the following: (1) the accrued benefits claimant is the surviving spouse, surviving child,<sup>30</sup> or paid the expenses of the deceased's last sickness and burial;<sup>31</sup> (2) a claim for VA benefits was pending when the potential VA beneficiary died, or the VA benefits were awarded but unpaid at death, or entitlement is shown from an existing rating or decision;<sup>32</sup> (3) the survivor filed an accrued benefits claim within one year of the death;<sup>33</sup> and (4) evidence in the file or in VA's possession at death shows that the deceased was entitled to the benefit.<sup>34</sup>

Survivors of claimants who died after October 10, 2008 stand a greater chance of being awarded benefits and may do so through a substitution process.<sup>35</sup> This will eliminate the need to apply for accrued benefits, as guidelines for the substitution process are far more favorable to the survivor. And although the eligibility requirements are the same, a claim for substitution allows the survivor to continue the claim that the veteran has previously initiated, if done so within one year of death.<sup>36</sup>

It is well worth noting that survivors, even if not eligible for any death benefits (see below), may be entitled to receive the veteran's compensation or pension benefits for the month of death.<sup>37</sup> This is a one-time payment equal to the veteran's last month of eligibility at the time of death.<sup>38</sup> This policy reflects a relatively recent change in law (1997), so it is possible that survivors of elderly veterans, who were once ineligible, may

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29. 38 U.S.C. § 5121.

30. Or the accrued benefits claimant is the surviving dependent parent of the deceased. § 5121(a)(2).

31. § 5121(a)(6).

32. *Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998).

33. 38 U.S.C. § 5121(c).

34. § 5121(a).

35. *Hyatt v. Shinseki*, 566 F.3d 1364, 1371 (Fed. Cir. 2009).

36. § 5121 (a), (c).

37. § 5310(a).

38. § 5310(b).

now be eligible.<sup>39</sup>

#### DEPENDENCY AND INDEMNITY AND DEATH COMPENSATION

Dependency and Indemnity Compensation (DIC) and death compensation are both monthly VA benefits that may be awarded to a survivor for the service-connected<sup>40</sup> death of the veteran.<sup>41</sup> DIC is awarded for the death of veterans occurring on or after January 1, 1957,<sup>42</sup> while death compensation is awarded for deaths occurring before January 1, 1957.<sup>43</sup> Survivors may also be eligible to receive payments, although not service-connected, if the death was caused by negligent VA medical treatment or vocational rehabilitation.<sup>44</sup>

A claim for DIC will also be considered a claim for death pension and accrued benefits, and a claim for death pension will be considered a claim for DIC and accrued benefits.<sup>45</sup> However, death pension cannot be paid to dependent parents.<sup>46</sup> In addition, there are limitations on income and net worth associated with death pension.<sup>47</sup> DIC is paid first to surviving spouses, and then to children if there is no surviving spouse.

DIC rates tend to be higher than death compensation and are, thus, preferable.<sup>48</sup> Concerning elderly veterans, a survivor who qualifies for death compensation may elect to receive DIC instead.<sup>49</sup> However, the survivor will not have the option to revert back to compensation upon election.<sup>50</sup> DIC payments to

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39. See § 5310(b)(2)(A).

40. A service-connected death may be presumed if the injury was completely disabling for ten, five, or one year, depending on the circumstances. 38 U.S.C. § 1318(b).

41. See § 1318.

42. § 1312(a).

43. § 1121.

44. § 1151.

45. See § 1318(e).

46. See § 1318(a), (c), (d).

47. See § 1541.

48. See § 1316(a).

49. § 1317(b). See § 101(14)(B) (defining DIC).

50. See § 1312(b).

surviving spouses begin at a statutory rate of \$1,154 per month.<sup>51</sup> Additional amounts may be considered if applicable.<sup>52</sup> Moreover, survivors may be eligible to receive an amount greater than the statutory rate if the veteran died on or before December 31, 1992.<sup>53</sup>

To receive DIC, qualified survivors can establish a claim by pursuing one of the following criteria: death in service,<sup>54</sup> death due to service-connected disability prior to death, or non-service-connected death after service-connected disability rating prior to death.<sup>55</sup> Interestingly, survivors may even qualify for DIC if the veteran's death was attributed to a smoking-related death, such as emphysema or lung cancer.<sup>56</sup> However, it must be shown that the veteran used tobacco as the result of a disability that was connected to service.<sup>57</sup>

## DEATH PENSION

Survivors may be entitled to monthly benefit payments for the non-service-connected death of the veteran; this is known as death pension.<sup>58</sup> To qualify, the veteran must have served for a minimum of 90 days<sup>59</sup> and been discharged under conditions

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51. *Dependency and Indemnity Compensation (DIC)*, DEPT. VETERAN AFFAIRS, available at <http://www.vba.va.gov/bln/dependents/spouse.htm> (under Benefits Description, click on Dependency Indemnity Compensation) (last visited May 18, 2012).

52. Additional amounts are considered if the surviving spouse has a child (that is also the veteran's child), requires aid, or is permanently housebound. *Id.*; 38 U.S.C. §§ 1311(b)–(c) (2006).

53. § 1311(a)(3).

54. *Myore v. Nicholson*, 489 F.3d 1207, 1212 (Fed. Cir. 2007).

55. *VA Form 21-534: Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable)*, U.S. DEPT. VETERAN AFFAIRS, available at <http://www.vba.va.gov/bln/21/forms.htm> (click "VA Form 21-534") (last visited May 18, 2012). See also 38 U.S.C. § 5103A(a)(1).

56. § 1103.

57. Memorandum from Dept. Veterans Aff. Gen. Counsel to Chairman, Board of Veterans' Appeals (Oct. 28, 2003), at 4, available at [www.va.gov/ogc/docs/2003/PREC6-2003.doc](http://www.va.gov/ogc/docs/2003/PREC6-2003.doc).

58. See 38 U.S.C. § 1541.

59. At least one day must have been during a period of war. § 1521(j).

other than dishonorable.<sup>60</sup> There are three different death pension programs, so survivors must be particularly aware of the differences in order to receive the most beneficial award. The death pension programs include Improved<sup>61</sup>, Section 306, and Old-law.<sup>62</sup> There is no time limit to file a claim for death pension; however, all new claims will be considered only under the Improved Death Pension program.<sup>63</sup>

Improved death pension is considered needs-based; therefore, the award will be reduced by the survivor's countable annual income.<sup>64</sup> Death pension is available for a spouse that was married to the veteran for at least one year prior to death or to survivors who have a child with the veteran, if the one year requirement is not met.<sup>65</sup> If the marriage did not occur before discharge, a survivor may still be eligible but will have to satisfy additional requirements.<sup>66</sup> And death pension benefits can be increased if the surviving spouse requires additional aid<sup>67</sup> and/or is responsible for the care of the veteran's biological or adopted child.<sup>68</sup> Surviving children<sup>69</sup> are eligible to receive death pension benefits if they are not in the legal custody of the surviving spouse or if the spouse is deceased or remarried.<sup>70</sup>

Protected death pension (Section 306 and Old-law) differs slightly in scope. The term "protected" refers to the benefits rate being secured; however, unlike improved death pension, the

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60. See § 1541.

61. *Improved Survivors' (Death) Pension Rate Table*, U.S. DEPT. VETERANS AFF., <http://www.vba.va.gov/bln/21/rates/pen02.htm> (last visited May 18, 2012).

62. *Protected Pension Rate Tables*, U.S. DEPT. VETERANS AFF., <http://www.vba.va.gov/bln/21/rates/pen03.htm> (last visited May 18, 2012).

63. 38 C.F.R. § 3.701 (authorized by 38 U.S.C. § 501); 38 U.S.C. § 1541 (2006 and Supp. IV 2010).

64. 38 C.F.R. § 3.23(b).

65. §§ 3.54(a)(1)–(2).

66. § 3.54(a)(3). For veterans of World War II, the marriage must have occurred before January 1, 1957, and for veterans of the Korean conflict, the marriage must have occurred before February 1, 1965. *Id.*

67. 38 U.S.C. §§ 1541(d)–(e).

68. § 1541(c).

69. Benefits will be paid to the guardian of minor children.

70. See 38 U.S.C. § 1542.

rate will not increase.<sup>71</sup> Old-law pension (awards prior to July 1, 1960) does not consider the net worth of the veteran or survivor when determining eligibility.<sup>72</sup> In addition, income requirements are lower than improved and Section 306.<sup>73</sup> Section 306 (awards between July 1, 1960 and December 31, 1978) altered the VA's previous guidelines for countable income and deductible expenses; however, like Old-law, the monthly payment will be unaffected by changes in the survivor's income (unless the income exceeds the maximum income allowable).<sup>74</sup>

***SPECIAL ALLOWANCES FOR AID AND ATTENDANCE OR  
PERMANENTLY HOUSEBOUND***

For spouses and surviving spouses,<sup>75</sup> it is possible to receive additional allowances for severe disabilities. These benefits are awarded to a qualifying spouse but technically belong to the veteran. One such allowance is for the "aid and attendance" of the spouse and the other is awarded for a spouse who is permanently housebound.<sup>76</sup> Moreover, even if the veteran is no longer living,<sup>77</sup> surviving spouses may still qualify for either allowance; in such instances, the award will be in the form of increased DIC or death pension benefits.<sup>78</sup>

In order to establish a claim for Aid and Assistance, a survivor must establish (through medical evidence) that the survivor is legally blind,<sup>79</sup> in a nursing home due to mental or

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71. 38 C.F.R. § 3.701.

72. See § 3.261.

73. Effective December 1, 2008, income limitations are \$11,780 for the surviving spouse or child and \$16,982 for the surviving spouse with a child or children. *Protected Pensions Rate Tables: Old Law Death Pension*, U.S. DEPT. VETERANS AFF., <http://www.vba.va.gov/BLN/21/Rates/pen0308.htm> (last visited May 18, 2012).

74. Veterans Pension Act of 1959, Pub. L. No. 86-211, 73 Stat. 432 (codified as amended in scattered sections of 38 U.S.C.).

75. Parents are included as well in the statute.

76. See 38 U.S.C. § 1114(l).

77. If the veteran is living he must be rated with a disability of at least 30 percent. § 1115.

78. See § 1311.

79. See 38 C.F.R. § 3.351(c)(1).

physical incapacity,<sup>80</sup> or so helpless that he or she cannot perform basic life functions.<sup>81</sup> Establishing that a survivor is Permanently Housebound only requires documentation that the spouse is “substantially confined” to his or her residence and that the condition is not likely to improve.<sup>82</sup>

## EDUCATION

### DEA

Survivors of certain veterans may be eligible for educational benefits under the Survivors’ and Dependents’ Educational Assistance Program (DEA), also known as Chapter 35.<sup>83</sup> The purpose of DEA is to provide educational assistance to the children of parent-veterans with service-connected disabilities. Its aim is to “aid[] such children in attaining the educational status which they might normally have aspired to and obtained but for the disability or death of such parent.”<sup>84</sup> Eligible children include those whose parents died either of a service-connected disability<sup>85</sup> or while suffering from a service-connected disability evaluated by the VA as totally and permanently disabling.<sup>86</sup>

In addition, DEA provides educational benefits to spouses and widows “for the purpose of assisting them in preparing to support themselves and their families at a standard of living level which the veteran . . . could have expected to provide for the veteran’s family.”<sup>87</sup> Eligibility requirements for surviving spouses are similar to those of surviving children; however, the requirements for spouses of living veterans allow for circumstances showing that the veteran is missing in action or a

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80. See § 3.351(c)(2).

81. See §§ 3.351(b)(3), 3.352(a).

82. §§ 3.351(e)–(f).

83. 38 U.S.C. § 3500. The provisions are located Chapter 35 under Title 38.

84. *Id.*

85. 38 C.F.R. § 21.3021(a)(1)(i) (2011).

86. § 21.3021(a)(1)(ii). See Section 21.3021 for a complete list of eligibility requirements.

87. 38 U.S.C. § 3500.



prisoner of war.<sup>88</sup>

A significant factor when evaluating DEA claims is known as the "total and permanent" requirement. Although it is not necessary for the survivor to show a 100% disability rated, service-connected injury for eligibility, it is necessary that the VA find the disability to be a "total disability permanent in nature."<sup>89</sup> No DEA benefits will be awarded for a disability that is not total and permanent. Therefore, it is recommended that veterans appeal any award that does not include a total and permanent finding, if such a determination would be consistent with the evidence. Likewise, an eligible child of two veterans, both totally and permanently disabled, may receive two DEA awards concurrently.<sup>90</sup>

### **MGIB**

Perhaps the most popular educational benefit is the Montgomery GI Bill (MGIB). GI Bills entitle veterans to up to thirty-six months of educational benefits after completing the entire enlistment period.<sup>91</sup> And as of December 28, 2001, spouses and children may be eligible to receive a portion of the applicable MGIB, if transferred by an eligible parent or spouse.<sup>92</sup> In order to transfer the GI Bill, service members must show that they have (1) completed six years in the Armed Forces, and (2) agreed to serve at least four more years as a member of the Armed Forces.<sup>93</sup> At any time, the service member may modify or transfer any unused portion of the MGIB.<sup>94</sup> The death of the service member will not affect the rights of the transferee when exercising their right to the educational benefits.<sup>95</sup>

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88. 38 C.F.R. § 21.3021(a)(3)(ii).

89. 38 C.F.R. § 3.807(a)(5)(ii).

90. *Osman v. Peake*, 22 Vet. App. 252, n.7 (2008) (citation omitted).

91. 38 U.S.C. §§ 3001, 3011, 3013.

92. § 3020(a), (c).

93. 38 U.S.C. § 3020(b); *see* 38 C.F.R. § 21.7080.

94. 38 U.S.C. § 3020(f); 38 C.F.R. §§ 20.7080(g)–(h).

95. 38 U.S.C. § 3020(h)(4).

**BURIAL BENEFITS**

Burial Benefits are available for both service-connected death and non-service-connected death.<sup>96</sup> The program extends to include funeral, burial, and memorial services of the veteran. Currently, \$300 will be allowed for funeral and burial expenses<sup>97</sup> for a non-service-related death, and \$700 if the veteran dies while receiving VA hospital, nursing home, or domiciliary care.<sup>98</sup> Eligibility for such allowances belongs to: the creditor who provided services or furnished merchandise in connection with burial, funeral, transportation, plot or interment (such as the funeral home director); the person or persons whose personal funds were used to pay such expenses; or the representative of the estate of the deceased veteran or claimant when the estate funds were used to pay the expenses or the veteran prepaid them.<sup>99</sup>

When death occurs in the line of duty, or if the death is service-connected, the burial allowance increases to up to \$2,000.<sup>100</sup> In order to receive a service-connection determination, the service-connection disability must have directly caused or been a contributing factor of death.<sup>101</sup> However, a survivor is not entitled to the service-connected burial allowance if the veteran is eligible for DIC.<sup>102</sup>

Burial benefits in the national cemetery may be available as well. Such benefits include the gravesite, a headstone or marker, opening and closing of the grave, and perpetual care.<sup>103</sup> Eligible veterans include the following: veterans discharged or separated from active duty under conditions other than dishonorable who

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96. See § 2402.

97. 38 U.S.C. § 2302. The burial allowance will be adjusted each fiscal year based on the Consumer Price Index for the preceding 12 months, beginning in 2013. Veterans Benefits Act of 2010, Pub. L. No. 111-275, § 501, 124 Stat. 2864 (2010).

98. 38 U.S.C. §§ 2303(a)(1)(A)–(2)(A) (2006 and Supp. IV 2010).

99. 38 C.F.R. § 3.1601(a)(1).

100. 38 U.S.C. § 2307.

101. See § 1151.

102. See § 2302(b).

103. See § 2402(1).

completed the required period of service;<sup>104</sup> service members who died in the active military, naval, or air service;<sup>105</sup> persons entitled to retired pay as a result of twenty years' creditable service with a reserve component;<sup>106</sup> a member of a Reserve component of the Armed Forces, or National Guard, whose death occurred under honorable conditions, in certain specified circumstances;<sup>107</sup> certain members of the Reserve Officer's Training Corps whose death occurred under honorable conditions, under certain circumstances;<sup>108</sup> U.S. citizens who served in the armed forces of a government allied with the United States in a war, under certain circumstances;<sup>109</sup> a spouse, surviving spouse, minor child<sup>110</sup> unmarried dependent adult child;<sup>111</sup> and certain Philippine Commonwealth Army veterans who died on or after November 1, 2000, and who meet residency requirements at the time of death.<sup>112</sup>

#### HEALTH CARE FOR SURVIVORS

The VA Civilian Health and Medical Program (CHAMPVA) provides medical assistance for dependents and survivors.<sup>113</sup> CHAMPVA is a cost-sharing program; therefore, CHAMPVA will cover a percentage of the total cost, and the individual is responsible for the remainder.<sup>114</sup> However, CHAMPVA will cover the entire cost for treatments conducted at a VA facility.<sup>115</sup> When the entire cost is not covered, the survivors estimated cost is based on the allowable amount. The allowable amount is a predetermined cost assigned to each treatment individually.

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104. § 2402(2).

105. § 2402(1).

106. See 38 U.S.C. § 2402(7); 10 U.S.C. §§ 12731—12732.

107. 38 U.S.C. § 2402(2).

108. § 2402(3).

109. § 2402(4).

110. § 2402(5).

111. *Id.* Eligible parents are also included.

112. 38 C.F.R. § 38.620(h).

113. See §§ 17.270—.278.

114. 38 C.F.R. § 17.274(a).

115. *Id.*

CHAMPVA will, then, cover approximately seventy-five percent of the allowable cost, and the survivor is responsible for the remaining twenty-five percent.<sup>116</sup>

There are separate eligibility requirements for CHAMPVA, depending on whether the applicant is younger or older than age sixty-five. Of elderly veterans and survivors (ages sixty-five and older), the following are eligible for benefits:<sup>117</sup> individuals not entitled to Medicare Part A; individuals who are entitled to Medicare Part A and enrolled in Medicare Part B; individuals (age sixty-five or older prior to June 5, 2001) who are entitled to Medicare Part A and who have not purchased Medicare Part B; and individuals (age sixty-five or older prior to June 5, 2001) who are entitled to Medicare Part A, have purchased Medicare Part B, and continue to carry Part B.<sup>118</sup>

### NURSING HOME CARE

Nursing home care is one of the primary benefits related to elderly veterans. The VA provides nursing home care for veterans who cannot care for themselves, but who are not so ill that they require hospital care. The two levels of care that are provided at the VA nursing homes are skilled and intermediate.<sup>119</sup> Skilled nursing homes are designed to service a wider and more specialized category of veteran care, while intermediate nursing homes care for veterans who require services less frequently.<sup>120</sup> The VA is required to provide nursing home care for (1) any veteran in need of nursing home care for a service-connected disability, and (2) any veteran with a combined service-connected disability rating of seventy percent or more who is in need of nursing home care.<sup>121</sup>

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116. *A Handbook for the CHAMPVA Program*, DEPT. VETERANS AFF., at 40–41, available at <http://www.va.gov/hac/forbeneficiaries/champva/handbook/chandbook.pdf>.

117. For requirements for those under age 65, see 38 C.F.R. §§ 17.270–.278 .

118. See 38 C.F.R. § 17.271(b).

119. See 38 U.S.C. § 1710A (2006 and Supp. IV 2010).

120. See 38 U.S.C. § 1710A(a).

121. *Id.*

Therefore, veterans with at least seventy percent disability (or service-connected disability) may not need to purchase private, long term care insurance but, instead, may entrust their needs to the VA.

The VA offers three types of nursing home facilities that provide care at no cost to the veteran, or under a partial subsidy by the VA. Community Living Centers (CLCs) are typically found within the VA Medical Centers (VAMC) or somewhere on the campus.<sup>122</sup> Another option, known as Community Nursing Home Care (CNHC), affords veterans the option to receive nursing home care in either a public or private facility at the expense of the VA.<sup>123</sup> There is no limitation on the length of care a veteran is to receive in a CNHC if he or she qualifies under the abovementioned criteria (seventy percent disability rating or service-connected disability).<sup>124</sup> Lastly, veterans may also receive a VA subsidy to receive care from state-operated nursing homes that have been approved by the VA.<sup>125</sup>

#### **STATE OPERATED VETERAN HOMES**

Several states operate homes that provide care for veterans, spouses, and surviving spouses.<sup>126</sup> The types of care at state homes include hospital care, nursing home care, domiciliary care, and adult daycare.<sup>127</sup> Typically, the VA assists the state in paying for the construction of the homes and covers a portion of the veteran's care, known as per diem aid.<sup>128</sup> Per diem consists of two general costs: (1) a per diem rate for indirect costs of care,

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122. *Veterans Administration Community Living Centers*, U.S. DEPT. VETERANS AFF., [http://www.va.gov/GERIATRICS/Veterans\\_Administration\\_Community\\_Living\\_Centers.asp](http://www.va.gov/GERIATRICS/Veterans_Administration_Community_Living_Centers.asp) (last visited May 18, 2012).

123. *Community Nursing Homes*, U.S. DEPT. VETERANS AFF., [http://www.va.gov/GERIATRICS/Guide/LongTermCare/Community\\_Nursing\\_Homes.asp](http://www.va.gov/GERIATRICS/Guide/LongTermCare/Community_Nursing_Homes.asp) (last visited May 18, 2012); 38 U.S.C. § 1720(a).

124. See § 1710A; § 1720(a)(3).

125. See § 1710(a).

126. §§ 8131-8138; *Have You Heard About State Veterans Homes?*, THE ELDERCARE TEAM, <http://www.eldercareteam.com/public/416.cfm> (last visited May 18, 2012).

127. 38 C.F.R. § 52.2; 38 U.S.C. § 8132.

128. 38 C.F.R. §§ 51.10, 52.10, 59.10.

which includes general costs of operation; and (2) a per diem rate for the direct costs of care.<sup>129</sup> The VA will pay the per diem indefinitely if a veteran meets the requirements in his or her particular state, and it is possible that a veteran may be eligible to receive care in a state home for an age-related disability irrespective of service-connection.<sup>130</sup> Per diem increases annually based on a revised payment structure that was enacted in 2009.<sup>131</sup> There are more than 133 state homes in 49 states and Puerto Rico,<sup>132</sup> and during 2005 these state homes provided 6,852,875 days of nursing home care and 1,477,885 days of domiciliary care.<sup>133</sup>

#### LOW INCOME VETERANS

Veterans with income below the maximum annual pension rate (MAPR) will generally qualify for free nursing home care in either a VA facility or community facility.<sup>134</sup> However, veterans with income in excess of the MAPR will be required to pay a copay.<sup>135</sup> In addition, VA pension is reduced to ninety dollars per month if the veteran, surviving spouse, or child (with no dependents) is receiving Medicaid-covered nursing home care.<sup>136</sup> The ninety dollars is then considered for the personal expenses of the veteran, spouse, or child and cannot be counted as income (for Medicaid) or used for the cost of nursing home care.<sup>137</sup> For surviving spouses in Medicaid-covered nursing homes, in order to retain the ninety dollars for personal use, he or she should

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129. § 52.40(b).

130. § 51.10, .50.

131. § 51.40(b).

132. Statistics as of February 13, 2006. *About Us / Who We Are*, NAT'L ASS'N STATE VETERANS HOMES, <http://www.nasvh.org/about/about.cfm>.

133. *Id.*

134. See 38 C.F.R. § 17.111(f)(2). The 2010 and 2011 MAPR for a single veteran with no dependents is \$11,830 and the 2010 and 2011 MAPR for a veteran with one dependent is \$15,493. *Improved Disability Benefits Pension Rate Table – Effective 12/1/09*, U.S. DEPT. VETERANS AFF., <http://www.vba.va.gov/bln/21/rates/pen0109.htm>.

135. 38 C.F.R. § 17.111(b).

136. 38 U.S.C. § 5503(d)(2), (5).

137. See § 5503(d)(3).

elect to receive death pension over DIC if doing so would be beneficial.<sup>138</sup>

### *COPAYMENTS*

Copayments are required for all veterans with income over the MAPR.<sup>139</sup> However, such veterans are still eligible for nursing home care if there is availability and the veteran pays the copay. The maximum daily copayment is ninety-seven dollars.<sup>140</sup> Copays are not required for the following veterans:

(1) a veteran with a compensable service-connected disability; (2) a veteran whose annual income is under the MAPR;<sup>141</sup> (3) a veteran who requires nursing home care for his or her non-compensable zero percent service-connected disability; (4) a veteran whose extended care services began on or before November 30, 1999; (5) veterans authorized to receive care under 38 U.S.C. § 1710(e);<sup>142</sup> (6) a veteran requiring care for treatment of sexual trauma;<sup>143</sup> or (7) a veteran requiring care for certain cancers of the head or neck.<sup>144</sup>

### *VA DOMICILIARY CARE AND RESIDENTIAL REHABILITATION*

VA domiciliary and residential rehabilitation treatment programs (RRTPs) offer cost-free living for veterans who are self-sufficient but require assistance with psychiatric, vocational, or educational rehabilitation. RRTPs are short-term<sup>145</sup> housing

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138. § 1317(b).

139. See 38 U.S.C. § 1710B(c).

140. 38 C.F.R. § 17.111(b)(vii).

141. § 17111(f).

142. *Id.* (referencing qualification under 38 U.S.C. § 1710(e), which qualifies certain Vietnam-era herbicide-exposed veterans, radiation-exposed veterans, Gulf War veterans, or post-Gulf War combat-exposed veterans).

143. *Id.* (referencing authorization under 38 U.S.C. § 1720D, "Counseling and treatment for sexual trauma").

144. *Id.* (referencing authorization under 38 U.S.C. § 1720E, "Nasopharyngeal radium irradiation").

145. See *Marion VA Medical Center: Residential Rehabilitation Treatment Program (RRTP)*, U.S. DEPT. VETERANS AFF., <http://www.marion.va.gov/services/RRTP.asp> (last visited May 18, 2012) ("We anticipate your stay will be 90–120 days, but every Veteran is unique.").

programs that provide food, clothing, and services to veterans.<sup>146</sup> It is possible that veterans will be required to pay a five dollar copayment for utilizing these programs beyond twenty-one days.<sup>147</sup> However, veterans exempt from copayment requirements will more than likely be exempt from the RRTP copay as well.<sup>148</sup>

Program eligibility includes any veteran whose annual income does not exceed the MAPR of a veteran in need of the regular aid and attendance of another, or any veteran determined to have no adequate means of support.<sup>149</sup>

### FEE-BASIS CARE

The VA contracts with non-VA medical facilities to assist in the care for veterans. When this occurs, eligible veterans can receive free medical care known as fee-basis care or contract care.<sup>150</sup> Generally, veterans who are eligible for free medical services or hospital care in a VA facility will also be eligible for the same care and services in a non-VA facility, provided prior authorization is granted.<sup>151</sup> However, if a veteran is not approved for free care and is responsible for copayment, he or she can still receive care in a non-VA facility and pay the copayment to that facility.<sup>152</sup>

Typically, determinations for fee-basis care consider the availability of VA care and the feasibility of utilizing that care; other factors include: the status of the veteran's benefits, the type of medical condition, or the nature of the treatment requested.<sup>153</sup> Specifically, the VA will provide fee-basis care for the treatment of a service-connected disability, a disability for which a veteran was discharged or released from active service, any disability of

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146. 38 C.F.R. § 17.30(b).

147. § 17.111(b).

148. *See* § 17.111(f).

149. § 17.47(b)(2).

150. *See* § 17.52(a).

151. *Id.*

152. *See* 38 C.F.R. § 17.52(b)(2).

153. *See* § 17.52.



a veteran who has been determined to be permanently and totally disabled due to a service-connected condition, or any disability that is determined to be aggravating a service-connected disability.<sup>154</sup>

Proper authorization for fee-basis care must be obtained prior to receiving treatment or within seventy-two hours of receiving treatment.<sup>155</sup> It is critical for veterans to know that if authorization is not obtained within seventy-two hours, any authorization later granted will apply to future services but may not cover the previous care.<sup>156</sup> Both the veteran and family members may request fee-basis care authorization and may do so in person, by mail, or by telephone.<sup>157</sup> Therefore, there is no requirement that the veteran be issued a physical contract when receiving authorization.<sup>158</sup> And if denied, the veteran can appeal the eligibility determination to the BVA<sup>159</sup> and, ultimately, the CAVC.<sup>160</sup>

#### REIMBURSEMENT

Veterans may be reimbursed for medical expenses incurred at a non-VA facility under limited circumstances. Veterans otherwise eligible for free services can avoid paying medical

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154. §§ 17.52(a)(1)(i)–(iv). Other treatments include the following: any disability of a woman veteran, § 17.52(a)(4); any disability of a veteran in Alaska, Hawaii, the Virgin Islands, or other territory of the U.S., § 17.52(a)(6); dental treatment for a veteran who is a former prisoner of war, § 17.52(a)(7); treatment of medical emergencies which develop during authorized travel to the hospital or during authorized travel after hospital discharge, § 17.52(a)(8); diagnostic services for a veteran receiving VA outpatient treatment to obviate the need for hospital admission, § 17.52(a)(9); in an emergency, any disability of a veteran receiving VA contract nursing home care, § 17.52(a)(10); or, in limited cases, diagnostic services and observation and examination in order to determine eligibility for VA benefits or services, § 17.52(a)(11).

155. 38 C.F.R. § 17.54(a) (2011).

156. 38 C.F.R. § 17.54(b).

157. *Cantu v. Principi*, 18 Vet. App. 92, 98–99 (2004) (application for benefits may be “formal or informal, by telephone, telegraph or other communication, made by the veteran or by others in his or her behalf.”) (citing 38 C.F.R. § 17.54(a)).

158. *Id.* at 103.

159. *Meakin v. West*, 11 Vet. App. 183, 187 (1998).

160. *United States Court of Appeals for Veterans Claims: Welcome*, U.S. CT. APP. VETERANS CLAIMS, <http://www.uscourts.cavc.gov> (last visited May 18, 2012).

bills despite not receiving prior authorization.<sup>161</sup> However, it is recommended that authorization be confirmed prior to treatment in order to avoid the possibility for dispute.<sup>162</sup>

Section 1728 under United States Code Title 38 provides that a veteran is entitled to reimbursement for care rendered to the veteran:

(A) for an adjudicated service-connected disability, (B) for a non-service-connected disability associated with and held to be aggravating a service-connected disability, (C) for any disability of a veteran who has a total disability permanent in nature from a service-connected disability or (D) for any illness, injury, or dental condition in the case of a veteran who (i) is a participant in a vocational rehabilitation program (as defined in section 3101(9) of this title [Title 38], and (ii) is medically determined to have been in need of care or treatment to make possible such veteran's entrance into a course of training, or prevent interruption of a course of training, or hasten the return to a course of training which was interrupted because of such illness, injury, or dental condition.<sup>163</sup>

Should the veteran be denied reimbursement under Section 1728, it is possible to receive reimbursement under similar provisions in Section 1725.<sup>164</sup> Also, the VA has the discretion of reimbursing veterans and family members for transportation and lodging associated with medical care.<sup>165</sup>

#### VA DENTAL CARE

Historically, dental care is one of the most difficult benefits to be awarded due to the stringent requirements. However, the following veterans are eligible for free, unrestricted lifetime

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161. 38 U.S.C. §§ 1725, 1728.

162. *E.g.*, *Malone v. Gober*, 10 Vet. App. 539, 543–44 (1997) (holding veteran's widow not eligible for reimbursement of costs of veteran's care because although care was rendered at VA-contracted facility, care was not for service-connected disability nor was it authorized in advance; either reason was sufficient to deny reimbursement).

163. 38 U.S.C. § 1728(a)(2).

164. 38 U.S.C. § 1725 (providing for reimbursement for emergency treatment).

165. § 111; 38 C.F.R. § 70.3.

dental benefits: (1) veterans having a service-connected compensable dental disability or condition;<sup>166</sup> (2) veterans who were prisoners of war detained or interned for any period of time;<sup>167</sup> and (3) service-connected veterans rated totally (100%) disabled.<sup>168</sup>

Veterans who do not meet the abovementioned requirements may still be eligible for dental benefits on a limited basis. They are (1) veterans with a service-connected non-compensable dental condition or disability,<sup>169</sup> and (2) veterans with a service-connected non-compensable dental condition shown to have been in existence at the time of discharge or release from active duty.<sup>170</sup>

Nonetheless, there are a few other general provisions that may entitle a veteran for dental care. They include (1) veterans enrolled and receiving care for a period of sixty consecutive days in a VA domiciliary,<sup>171</sup> (2) veterans with a dental condition professionally determined by the VA to be aggravating a service-connected medical condition;<sup>172</sup> and (3) veterans who have been approved for or are pursuing VA vocational rehabilitation training.<sup>173</sup>

#### **SPECIAL VA BENEFITS FOR THE DISABLED**

There are a number of services and benefits available to elderly veterans; however, lack of transportation has been a continual obstacle for otherwise eligible candidates. Ironically, under certain conditions, the VA will provide disabled veterans with

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166. 38 U.S.C. § 1712(a)(1) (2006). Ratings are under the 9900 diagnostic code series in the Schedule for Rating Disabilities. 38 C.F.R. § 4.150 (2011).

167. 38 U.S.C. § 1712(a)(1)(F); 38 C.F.R. § 17.161(e).

168. 38 U.S.C. § 1712(a)(1)(G).

169. *See* Nielson v. Shinseki, 607 F.3d 802, 808–09, (Fed. Cir. 2010); 38 U.S.C. § 1712(a)(1)(B).

170. *Id.* Application must be made within ninety days of discharge. § 1712(a)(1)(B)(iii).

171. *See* § 1712(a)(1)(H) (permitting dental care “for a veteran otherwise receiving care or services under this chapter.”).

172. 38 U.S.C. § 1712(a)(1)(D).

173. 38 C.F.R. §§ 17.161(i), 17.47(i).

special allowances for things such as clothing and automobiles. Eligible disabilities include the loss or permanent loss of use of one or both feet, or of one or both hands; permanent vision impairment of both eyes;<sup>174</sup> and ankylosis of one or both knees, or of one or both hips.<sup>175</sup>

Since October 1, 2011, the automobile allowance (including adaptive equipment) was increased to \$18,900.<sup>176</sup> Veterans must apply to receive the allowance, but may receive a cost reimbursement if the application is approved after the purchase.<sup>177</sup> In regard to automobiles, adaptive equipment includes a basic automatic transmission as well as “power steering, power brakes, power window[s] and power seats” — and even air conditioning.<sup>178</sup>

Since August 1, 1972, an annual lump-sum clothing allowance is available for disabled veterans whose service-connected disability causes their clothing to wear or tear due to prosthetic or orthopedic devices or a skin condition.<sup>179</sup> Veterans already receiving compensation for the disability only need to apply once, while veterans not receiving compensation (or with temporary disabilities) must reapply annually.<sup>180</sup>

## CONCLUSION

Prosperity should belong to the survivor; the elderly veteran

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174. 38 U.S.C. § 3901(1)(A).

175. For adaptive equipment only. 38 C.F.R. 3.808(b)(4).

176. Veterans Benefits Act of 2010, Pub. L. No. 111-275, § 804, 124 Stat. 2864 (2010).

177. 38 C.F.R. § 17.158(b) (2011).

178. 38 C.F.R. § 3.808(e)(1). These are considered adaptive equipment only: when such equipment is necessary to the health and safety of the veteran and to the safety of others, and special equipment necessary to assist the eligible person into or out of the automobile or other conveyance, regardless of whether the automobile or other conveyance is to be operated by the eligible person or is to be operated for such person by another person.

*Id.*

179. 38 U.S.C. § 1162 (2006).

180. *See id.*; also, VA Form 21-8678, *Application for Annual Clothing Allowance*, U.S. DEPT. VETERANS AFF., available at <http://www.vba.va.gov/pubs/forms/21-8678.pdf>.

should be the adornment of American History. However, according to the *American Journal of Public Health*, there are 1.8 million veterans without health insurance, as well as 3.8 million members of their households.<sup>181</sup> Approximately forty percent of all homeless men are veterans, and there are more than 130,000 homeless veterans<sup>182</sup> on any given night.<sup>183</sup>

The benefits and programs contained in this article by no means represent the full scope of relief available for elderly veterans and survivors. Rather, this article offers a glimpse into the conundrum of statutes and regulations that govern our nation's heroes and attempt to create an acceptable quality of life for many who have already given theirs. But little remains after war, as destruction is the ultimate goal. That which is obtained can be costly, and that which is lost can be priceless. Often the battle shifts, and the impact befalls the survivors. And yet there are survivors, but their invisible victory continues uncelebrated, and unsung.

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181. Steven Reinberg, *Almost 2 Million U.S. Vets Lack Health Insurance*, ABC NEWS, Mar. 24, 2008, at 1-2, <http://abcnews.go.com/Health/Healthday/story?id=4509219>.

182. Men and women.

183. *Homeless Veterans*, NAT'L COALITION FOR THE HOMELESS, <http://www.nationalhomeless.org/factsheets/veterans.html> (Sept. 2009).