VA PENSION AID AND ATTENDANCE (NEW RULES - OCTOBER 2018)

Veterans Administration Final Rule 8320-01 | RIN 2900-AO73 was released on September 18, 2018, and is set to go into effect on October 18, 2018. This new VA rule establishes new requirements for evaluating Net Worth, Asset Transfers and Income Exclusions for Needs Based Benefits for wartime veterans and their surviving spouses.

The VA final rule begins by defining some terms. But, ultimately, the Department of Veterans Affairs sought to clarify several areas of confusion:

1. Create a Bright-Line Net Worth Asset Test

2. Create a Maximum Community Spouse Resource Allowance

3. Establish a 36 month (three year) look-back period for those who transfer assets during that period, with the presumption that all transfers for less than fair market value were for the purpose of qualify for VA Pension benefits.

4. More clearly set forth which medical expenses would be deducted from countable income to qualify for needs based benefits.

The rule discusses a number of different VA programs, but as an elder law attorney, focusing on qualifying my clients for different government long-term care benefits, this article will be limited to the VA Improved Pension benefit, which is also sometimes referred to as "VA Aid and Attendance."

**Essentials for VA Improved Pension eligibility**

1. Wartime Service during periods of declared war (not necessarily in a theater of war). The benefit is for the veteran, who has been honorably discharged, the veteran's spouse, or the veteran's widow.

2. Medical Necessity (2 [ADLs](https://www.elderneedslaw.com/blog/activities-of-daily-living-and-medicaid-eligibility) – more clearly defined). A new ADL was added, which is for those who need help ambulating in the home/living area.

3. NET WORTH – new definitions of countable assets with penalties for transfer of assets (no more than $123,600 - regardless of single or married) – this is tied to Medicaid CSRA and will increase based on when social security raises a cost of living allowance.  Annual income is included as part of this limit. Certain assets are **exempt** / not counted.

* So add up all countable/non-exempt assets + Annual Income (adjusted gross income) – Subtracted Unreimbursed Medical Expenses (UMEs)
* UME = on-going out of pocket medical expenses (e.g. not covered by health insurance).

4. INCOME – Gross Income minus Deductible **Qualifying Medical Expenses**. The new rule clarifies the allowable qualifying medical expense deductions.

* The goal of the elder care attorney is to try to totally eclipse income with cost of care if possible to get the VA Pension applicant approved for the highest level of improved pension which is known as "VA aid and attendance."

**Qualifying Medical Expense Deductions for VA Aid and Attendance**

Home Health Care without limit on hourly rates (however should be reasonable). Family can be paid for in-home care as long as certified necessary by doctor. Average number of hours per week (assuming a reasonable hourly rate) in a [personal services contract](https://www.elderneedslaw.com/blog/what-is-a-personal-services-contract) should be approved as reasonable by the veteran's physician.

Some meals/lodging if not in nursing home.

* The meals and lodging that are referred to would be part of an independent living environment where the physician has certified that it is the appropriate level of care for the type of assistance that is needed.
* prescriptions/non-prescription medication obtained lawfully
* medically-necessary food/vitamins if prescribed;

Non-medical activities (IADLs) can be provided by home care workers, as long as provided by appropriate provider.

Transportation for health-care purposes;

Service animal costs.

**VA Exempt Assets**

House + 2 acres (regardless of value)…differs from Medicaid

* Additional acreage is excluded if not marketable by itself

All vehicle needed for family transportation…differs from Medicaid which only allows one vehicle or other vehicle over 7 years old. Also cannot go buy a Lamborghini. Trading in F-150 for an Escalade may be deemed excessive.

Personal Effects (the VA doesn't care about your silverware, rugs, appliances, etc...)

**VA Transfer Rule and Gift Penalty Calculation**

As of October 18, 2018, the VA will impose a 36 month look-back period. All funds/assets given away within the look-back period will be presumed to be with the intent of qualifying for VA pension benefits unless the VA pension applicant can show clear and convincing evidence to the contrary.

However, the VA will not penalize gifts, even within the 36 month look-back period, if the applicant's assets did not exceed the net worth limit ($123,600 as of 2018) to begin with. The VA will impose a penalty period of disqualification only for the transfer of those assets that **exceed** the net-worth limit, prospective from claim date.

• Starts month after transfer is made.

• Cap of 5-years of ineligibility

• Can partially or entirely cure penalty within 90 days of notice of the penalty period. The cure must have been completed before the claim for VA benefits was made or within 60 days after the claim for VA benefits was made (remember, those assets will not be included in the net worth calculation).

• Penalty Divisor: maximum pension rate for a married veteran with non-military spouse (so, as of 2018, $2,169)

**Example of the VA Look-Back Gift Penalty Calculation:**

If applicant has $145,900 in assets (assume this is net worth before the transfer and no income or UMEs). You can subtract the excess resource asset limit ($123,600) = $22,300.

If applicant gifts $30,000, the 30K is not fully subject to the penalty. Rather the penalty will apply only to the $22,300.

• $22,300 / 2,169 = 10.28

• Can round the penalty period down to the nearest full month. So this example would result in a 10 month period of ineligibility.

If you only give away assets within the resource limit, there will be no penalty.

**Some Differences Between Medicaid Planning and VA Aid and Attendance Planning**

The new VA pension benefit rules went into effect on October 18, 2018 changes the way elder care attorneys advise their clients. Ideally, those veterans (or spouses/widows) who live at home or in an assisted living facility would want to qualify for both VA Aid and Attendance Pension benefits and Medicaid long term care benefits to more easily afford long-term care and improve their quality of life. Now different planning strategies are emerging based on the following considerations:

Unlike Medicaid, the VA does not allow for transfers to any kind of [special needs trust](https://www.elderneedslaw.com/articles/special-needs-trust) or pooled special needs trust (exception is if transfer is made to trust f/b/o child who is incapable of self-support).

Unlike Medicaid, transfers to [Single Premium Immediate Annuities](https://www.elderneedslaw.com/articles/medicaid-annuity) (SPIAs - sometimes referred to as a Medicaid Annuity) within last 36 months will cause penalties. Other types of annuities which have cash surrender value will still be treated as an asset for net worth determinations. Income derived from any annuity will be included in the net worth valuation as well.

Unlike Medicaid, VA counts qualified retirement plans (whether they are paying RMDs or not) towards the net worth requirement.

Unlike Medicaid, cannot have joint ownership of assets to make an asset “unavailable.”

Unlike Medicaid, the VA does not restrict the value of the applicant's primary residence.

Unlike Medicaid, the VA does not restrict the number of vehicle (if the vehicle are reasonably needed for transporting the family). Medicaid allows one car of any value (and other cars if older than 7 years), VA might question the reasonableness of selling a $35,000 SUV in favor of an $90,000 souped-up Escalade.

Unlike Medicaid, the VA only penalizes gifts made that are in excess of the CSRA-tied net worth limits made within the past 36 months.

Unlike Medicaid, the VA caps the gift-penalty period to a maximum of 5 years.

**Similarities between VA Planning and Medicaid Planning**

Can still spend down resources as long as the applicant receives fair-market value for products and services (e.g. pre-paid funeral arrangements, home repairs/upgrades, new home, etc….)

Both Medicaid and the VA will disregard personal property/typical household items.

The VA has tied its resource allowance to the maximum Medicaid Community Spouse Resource Allowance (CSRA - $123,600 as of 2018). However, with Medicaid, the CSRA is only available if the Medicaid applicant is married and the spouse does not require Medicaid. The VA uses the same CSRA number regardless of whether the VA benefits applicant is married or the condition of the spouse (the VA's use of the CSRA is more favorable than Medicaid).

Reasonable Personal Services Contracts / Family Caregiver Agreements are useful planning tools. However the VA will require a doctor to confirm the necessity for the care to be provided by a friend or family member.

[Applicable Wartime Periods and other information about VA Pension Benefits](https://www.elderneedslaw.com/what-is-the-va-wartime-pension-benefit-va-aid-and-attendance-benefit)