



# Veteran's Advocate Training Program 2024

Program made possible through the generous support of Thomas M. French



# Introduction to VA Law and Benefits: Advocating for Veterans With Disabilities

## Outline

Who qualifies as a veteran?

Eligibility

Bad Paper

Establishing Service Connection



# Who Qualifies as a Veteran?

“[a] person who served in active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable.”

38 U.S.C. § 101(2)

38 C.F.R. § 3.1(d)

**Anyone can apply for VA benefits – but to qualify, must be a “veteran” or the dependent or survivor of a “veteran”.**

**Service in one of the six branches, service as a Reserve of one of those branches, service as a member of Air or Army National Guard (when under Title 10 or 32 of the U.S. Code).**

**“Active” includes active duty in the Armed Forces. Reserves or National Guard who served on active duty.**

**“[O]ther than dishonorable”, for the purposes of the VA means no statutory or regulatory bars to VA benefits are present.**

**Length of service requirement unless service connected.**

**VA language different than language used by military to characterize a person's discharge**

## Military Discharge Characterizations

### Administrative

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Honorable

General (Under Honorable Conditions)

Other Than Honorable (OTH)

### Punitive

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Bad Conduct Discharge (BCD)

Dishonorable Discharge/Dismissal

### Non-Characterized

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Entry Level Separation

Void Enlistment or Induction

Dropped from Rolls

**VA language different than language used by military to characterize a person's discharge**

## Military Discharge Characterizations

Types of Service Characterizations				
Administrative (Separation Process)			Punitive (Court-Martial)	
Honorable	General or Under Honorable Conditions	Other Than Honorable	Bad Conduct Discharge	Dismissal or Dishonorable Discharge
VA Presumption of Eligibility			VA Presumption of Ineligibility	

## VA language different than language used by military to characterize a person's discharge

### Military Discharge Characterizations

**Honorable:** You are eligible for VA health care, disability benefits, and GI Bill education benefits.

**General Under Honorable:** You are eligible for VA health care & disability benefits.

**Other Than Honorable:** You will need to ask for a discharge upgrade (federal) or Character of Service determination (local VA regional office) in order to be eligible for health care & disability benefits. There are some exceptions if you have been diagnosed with PTSD or other mental health disorders due to your time in service.

**Bad Conduct/Dishonorable:** Not eligible for any VA benefits without a discharge upgrade.

**Uncharacterized:** Neither positive nor negative. Usually means service was not long enough to characterize the type of discharge.



# Discharges

VA Benefit	Military Character of Discharge					
	Honorable <sup>a</sup>	General	Other than Honorable	Bad-Conduct (Court-Martial)		Dishonorable <sup>b</sup>
				Special	General <sup>b</sup>	
<b>Disability Compensation</b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible
<b>Health Care<sup>c</sup></b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible
<b>Dependency and Indemnity Compensation</b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible
<b>Education Assistance<sup>d</sup></b>	eligible	not eligible	not eligible	not eligible	not eligible	not eligible
<b>Survivor Pension</b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible
<b>Burial Benefits</b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible
<b>Special Housing</b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible
<b>Vocational Rehabilitation<sup>d</sup></b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible
<b>Disabled Automotive</b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible
<b>Reenlistment Rights</b>	eligible	eligible	COS determination	COS determination	not eligible	not eligible

## VA language different than language used by military to characterize a person's discharge

### VA Discharge Characterizations

Regardless of military's characterization, a statute may "bar all rights of such person under the laws administered by the Secretary..." – 38 U.S.C. § 5303(a) – even if honorable or under honorable conditions Congress may have barred benefits.

#### Statutory Bars

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Conscientious Objector

Sentence of General Court-Martial

Officer Resigning for Good of Service

Desertion

OTH from AWOL – 180 Days

After determining whether any statutory bars, VA will review under its own regulatory criteria whether a discharge was issued under dishonorable conditions – 38 C.F.R. § 3.12 (dishonorable for VA purposes)

#### Regulatory Bars

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Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by GCM  
Mutiny or Spying

Offense Involving Moral Turpitude

Willful and Persistent Misconduct



# Character of Discharge Determination - 38 CFR 3.12

The VA cannot upgrade a discharge, but it may rule on a case-by-case basis that the circumstances surrounding the veteran's service should allow a grant of VA benefits despite an "undesirable" discharge or discharge "under other than honorable conditions." This VA process is called a "character of discharge determination."

## **Threshold Consideration**

VA Benefits typically available to honorable or general under honorable, but may not to undesirable

## **Review for Statutory**

Possible that a general or honorable could be subject to statutory bar

## **Apply for Benefits**

State why the veteran should be eligible for benefits – in service PTSD or TBI – aside from misconduct service was "honest, faithful, and meritorious."

## **VA will obtain military records**

Advocates should fill in the gaps

## **Does not change DD214**

May wish to pursue discharge upgrade through branch of service

# Character of Discharge Determination - Update

In July 2020, the VA proposed amending its regulation regarding COD determinations. VA decided to expand VA benefits eligibility, bring more consistency to adjudications of benefits eligibility, and ensure COD determinations consider all pertinent factors.

## **Holistic analysis with deterrent effect**

Military departments concerned that too much leniency would reduce deterrent effect – VA will take a more objective view on a case-by-case basis – reasonable doubt in favor of veteran

## **Moral Turpitude**

Removes “homosexual acts” as bar – outdated and unnecessary

## **Compelling Circumstances**

Consider whether the service actually rendered the service dishonorable – VA will length and character of service, mental and cognitive impairment, physical health, combat-related hardship, whether the person was the survivor of sexual abuse/assault or discrimination, and more

# Discharge Upgrade

An honorable discharge is commonly regarded as indicating acceptable, rather than exemplary service – anything less than honorable is viewed as derogatory, and inevitably stigmatizes the recipient.





# Discharge Upgrade

A discharge upgrade can help a veteran access important VA benefits, services, and care.

## Discharge Upgrade Process

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES. THIS IS AN IMPORTANT RECORD. SAFEGUARD IT. ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID.

**CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY**  
This Report Contains Information Subject to the Privacy Act of 1974, As Amended.

1. NAME (Last, First, Middle) **S** 2. DEPARTMENT, COMPONENT AND BRANCH 3. SOCIAL SECURITY NUMBER

4a. GRADE, RATE OR RANK 4b. PAY GRADE 5. DATE OF BIRTH (YYYYMMDD) 6. RESERVE OBLIGATION TERMINATION DATE (YYYYMMDD)

7a. PLACE OF ENTRY INTO ACTIVE DUTY **S** 7b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known)

8a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND **S** 8b. STATION WHERE SEPARATED

9. COMMAND TO WHICH TRANSFERRED 10. SGLI COVERAGE  NONE AMOUNT: \$

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and dates covering periods of one or more years.) **A**

12. RECORD OF SERVICE

a. DATE ENTERED AS THIS PERIOD	YEAR(S)	MONTH(S)	DAY(S)
b. SEPARATION DATE THIS PERIOD			
c. NET ACTIVE SERVICE THIS PERIOD			
d. TOTAL PRIOR ACTIVE SERVICE			
e. TOTAL PRIOR REACTIVE SERVICE			
f. FOREIGN SERVICE			
g. SEA SERVICE			
h. INITIAL ENTRY TRAINING			
i. EFFECTIVE DATE OF PAY GRADE			

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (List period of award) **M**

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)

15a. COMMISSIONED THROUGH SERVICE ACADEMY  YES  NO  
 15b. COMMISSIONED THROUGH ROTC SCHOLARSHIP (10 USC Sec. 2407a)  YES  NO  
 16. ENLISTED UNDER LOAN REPAYMENT PROGRAM (10 USC Chap. 105) (If Yes, ( ) of appointment)  YES  NO

17. DAYS ACCRUED LEAVE PAID 17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION  YES  NO

18. REMARKS

The information contained herein is subject to computer matching within the Department of Defense or with any other Federal or non-Federal agency for verification purposes and to determine eligibility for, and/or continued compliance with, the requirements of a Federal benefit program.

19a. MAILING ADDRESS AFTER SEPARATION (include ZIP Code) 19b. NEAREST RELATIVE (Name and address - include ZIP Code)

20. MEMBER REQUESTS COPY 6 BE SENT TO (Specify state/locality) OFFICE OF VETERANS AFFAIRS  YES  NO  
 21. MEMBER REQUESTS COPY 3 BE SENT TO THE CENTRAL OFFICE OF THE DEPARTMENT OF VETERANS AFFAIRS (WASHINGTON, DC)  YES  NO

21a. MEMBER SIGNATURE **E** 21b. DATE (YYYYMMDD) 22a. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title, signature) 22b. DATE (YYYYMMDD)

**SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)**

23. TYPE OF SEPARATION 24. CHARACTER OF SERVICE (Include upgrades)

25. SEPARATION AUTHORITY 26. SEPARATION CODE 27. REENTRY CODE

28. NARRATIVE REASON FOR SEPARATION

29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD) 30. MEMBER REQUESTS COPY 4 (Initial)

DD FORM 214, AUG 2009 PREVIOUS EDITION IS OBSOLETE. MEMBER - 4

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MEMBER - 4

## Reading a DD-214

- 23. Type of Separation - Discharge, administrative separation or other types
- 24. Character of Service - Types of military discharges (e.g., honorable, dishonorable, etc.)
- 25. Separation Authority - The regulations justifying the separation.
- 26. Separation Code - Google "separation codes"
- 27. Reentry Code - Enlisted eligibility for re-entry to military service.
- 28. Narrative Reason for Separation - brief explanation for the reasons leaving military service.

# Discharge Upgrade

A discharge upgrade can change the “character of service”, separation authority, reenlistment code, and/or narrative reason shown on the veteran’s DD-214 discharge certificate.

## **Where to apply?**

Each branch has their own DRBs and BCMR, Navy and Marines have joint DRB and a BCNR. DRBs can upgrade discharge unless from General Court Martial. Can change reason. Anything else to BCMR or BCNR.

BCMR and BCNR will not review something DRB can do, unless deadline has passed.

DRB – SOL 15 years from date of discharge.

BCMR and BCNR – 3 years from the date veteran discovers the “error or injustice” – liberally waived. Generally, if 15 years has passed, apply to the BCMR or BCNR.

# Discharge Upgrade

A discharge upgrade can change the “character of service”, separation authority, reenlistment code, and/or narrative reason shown on the veteran’s DD-214 discharge certificate.

## **Argue for relief**

DRB – Equity (fairness) and propriety (legal error)

Fairness may turn on a change in policies, or personal or family problems or discrimination that affected ability to serve

Propriety turns on the military not following its own rules. There is, however, a presumption of regularity.

BCMR and BCNR – Injustice and error

Injustice is similar to DRB’s equity – turns on fairness.

Error is similar to DRB’s propriety – turns on some illegality.



# Discharge Upgrade

A discharge upgrade can change the “character of service”, separation authority, reenlistment code, and/or narrative reason shown on the veteran’s DD-214 discharge certificate.

## Use DoD Memoranda

Hagel Memo – liberal consideration for discharges based on TBI and PTSD.

Kurta Memo - Boards must sympathetically consider applications based on all mental health conditions including PTSD, TBI, and also those based on sexual assault/harassment.

Kurta asks four questions:

1. Did the veteran have a condition or experience that may excuse or mitigate the discharge?
2. Did that condition exist/experience occur during military service?
3. Does that condition or experience actually excuse or mitigate the discharge?
4. Does that condition or experience outweigh the discharge?

## VA offers two major disability benefit programs for veterans: service-connected disability pension and non-service-connected disability pension

### Compensation and Pension Benefits

#### Compensation

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Eligible if discharged or released under conditions other than dishonorable  
38 U.S.C. § 101(2); 38 C.F.R. § 3.19

Disease or injury was incurred or aggravated in the line of duty  
38 U.S.C. § 1110, 1131; 38 C.F.R. § 3.4

Not a result of own willful misconduct  
38 U.S.C. § 1110, 1131; 38 C.F.R. § 3.301

#### Pension

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Wartime Service

Low Income

Total and Permanent Disability

## **VA uses a traditional five-step process to adjudicate claims for service-connected disability compensation benefits**

### **Adjudication Process at the VA Regional Office**

1. VA determines whether veteran eligible to receive VA benefits.
2. VA determines whether its statutory duty to assist a claimant in proving the claim has been triggered, and, if so, the VA assists the claimant in gathering the necessary evidence.
3. VA takes all action necessary to satisfy its statutory duty to assist – whether the veteran qualifies for disability compensation.
4. If service-connection established, VA determines the severity of the disability and assigns a percentage evaluation from 0 to 100 based on the schedule for rating disabilities.
5. VA sets an effective date for the award of service-connected disability compensation.



# Disability Compensation – Service Connection

VA disability compensation offers a monthly tax-free payment to Veterans who got sick or injured while serving in the military and to Veterans whose service made an existing condition worse.



**A veteran seeking service-connected compensation must satisfy three fundamental requirements.**

## The *Caluza* Elements

### Current Disability

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Diagnosis or Symptoms

Must be Current

Residuals

### In-Service

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In-service incident

Evidence that cause of disease,  
injury, or event occurred in-  
service

Not the result of willful  
misconduct

### Nexus

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Link between current disease  
and in-service incident

Could be pre-existing

Could be secondary

Could be a result of treatment  
from the VA

# Service-Connected Compensation

There must be competent evidence that the veteran currently has a particular disability.

## **Current Disability**

Functional Loss- Disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. 38 C.F.R. § 4.40

Disability- "disability" means a disease, injury, or other physical or mental defect. 38 U.S.C. § 1701

Claimant doesn't have to be the one to submit evidence – statements about recurrent and persistent symptoms – will be enough to trigger VA's DTA.

Competent evidence is required – does not have to have a specific medical diagnosis, but must be described as specifically as possible.



# Service-Connected Compensation

Medical or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury.

## **In-Service incident**

Claimant must submit evidence to prove that the disease, injury, or event that caused or aggravated the current disability did actually happen in service.

Must have at least enough evidence to show a 50% chance that the disease, injury, or event that allegedly precipitated the current disability actually happened during service.

# Service-Connected Compensation

Demonstrate that there is a nexus between current disability and the precipitating disease, injury, or event that occurred during the period of military service.

## **Nexus**

Can be shown by a direct causative link between the current disability and something occurred in service.

The disability preexisted, but was aggravated or became worse during service.

The disability did not manifest itself during service, but is presumed to have started or be connected to something that happened during service (presumptive SC).

The disability is caused or aggravated by a primary medical condition and that condition is itself connected to the period of military service (secondary SC).

The disability is the consequence of an injury caused by VA health care, VA training and rehabilitation services, or participation in a VA compensated worth therapy program.





Questions?