

(10) TRAINEE HANDOUT

TRAINING FOR VSO LESSON TEN DEPENDENCY – WHO AND HOW?

PREREQUISITE TRAINING

Prior to this lesson, students should have completed the lessons on Introduction to Development, and Developing Original Live Claims.

TOPIC OBJECTIVES

You will:

- Know who can be recognized as a dependent.
- Understand the effect that dependents have on the rate of payment of various VA benefits.
- Understand the different types of evidence that VA may request/require in order to establish a dependent.

TIME REQUIRED

1.25 hours

REFERENCES

- 38 CFR 3.1(j)
- 38 CFR 3.4(b)(2)
- 38 CFR 3.57-3.593
- 38 CFR 3.204-3.211
- M21-1, Part III, Chapters 1,2, and 6
- M21-1, Part IV, Chap. 12-15,16

WHO CAN BE A DEPENDENT?

Spouse: A spouse is a person of the opposite sex married to the veteran through a recognized legal or religious ceremony. 38 CFR 3.1(j) defines marriage as a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued. If a legal marriage cannot be established, then the spouse cannot be recognized.

Child: 38 CFR 3.57 defines a “child” of the veteran as an unmarried person under the age of 18 who is a legitimate child, a child legally adopted before the age of 18 years, an unmarried stepchild who acquired that status before the age of 18 years and who is a member of the veteran's household or was a member of the veteran's household at the time of the veteran's death, or an unmarried illegitimate child. It goes on to say that a child can also be one who is between the ages of 18-22, unmarried and attending school (*referred to as a “school-child”*). Additionally, 38 CFR 3.58 includes as a “child” one who is over the age of 18 and who, prior to

(10) TRAINEE HANDOUT

reaching the age of 18, is found to be permanently incapable of self-support because of physical or mental disability and is unmarried (*Referred to as a "helpless child"*). {**NOTE:** grandchildren may NOT be recognized as dependents unless formally adopted by the veteran or surviving spouse, even if they are living with and totally dependent upon the veteran for support.}

Parent(s): 38 CFR 3.59 defines "parent" as a natural mother or father (including the mother of an illegitimate child or the father of an illegitimate child if the usual family relationship existed), mother or father through adoption, or a person who for a period of not less than 1 year stood in the relationship of a parent to a veteran at any time before his or her entry into active service. It is important to note that only one of each parental line (father and mother) can be recognized in any one case.

DEPENDENCY AND BENEFITS – WHAT HAPPENS?

Compensation: In order for dependents to be a factor in compensation cases, the veteran must have a combined S/C evaluation of at least 30%. Veterans rated at less than 30% are not entitled to additional benefits for dependents. It is important to remember that, in compensation cases, the dependents themselves have no independent entitlement to benefits.

- **Spouse:** Once established as legal spouse, the veteran can receive additional compensation benefits for the spouse even if they don't live together. However, if they are separated, the veteran must know of the whereabouts of the spouse in order to notify the VA of the death or divorce should it occur. If the whereabouts of the spouse are unknown, additional benefits are not payable.
- **Child:** Once established as the child of the veteran, additional compensation benefits are payable whether or not the child resides with the veteran. Child custody is irrelevant, but as in the case of the spouse, the veteran must know of the whereabouts of the child in order to report changes of status to VA.
- **Parent(s):** Once the relationship has been established, the parent(s) must then be found to be "dependent" upon the veteran for support. In this context, dependency can be established either by the income of the parent(s) or by contributions towards their support by the veteran. The income requirements are somewhat low, so it is uncommon for parental income to adversely affect entitlement to additional benefits, but keep in mind that, in order for additional compensation to be payable, the parent(s) must be found to be "dependent".

Pension: As with compensation cases, keep in mind that the dependents in pension cases have no independent entitlement to pension benefits.

- **Spouse:** If the veteran is to receive additional pension benefits for a spouse, they must live together. If they do not, then the veteran **must be** contributing to the spouse's support. Spousal income is included in countable income for benefit calculation unless it is found that the spousal income is not available to the veteran because of separation.

(10) TRAINEE HANDOUT

- **Child:** Similar to the spouse (above). The child must live with the veteran or, if not, the veteran **must be** contributing to the child's support. The child's income is included in countable income for benefit calculation unless the child is not in the veteran's household and the child's income is found to be unavailable to the veteran.
- **Parent(s):** There is no provision for additional pension benefits for parents. However, if the veteran is paying for the parent(s)'s medical expenses, they can be used to reduce countable income in the same fashion as if they were the veteran's.

DIC:

- **Surviving spouse:** Must be established as the legal widow(er) of the veteran, and marriage must have begun at least one year before death. If not living with the veteran at time of death, the cause of separation cannot be the fault of the surviving spouse. If the veteran and spouse were not living together at the time of death, a "continuous cohabitation decision" may be required.
- **Child:** Must be established as a child of the veteran. If living with the surviving spouse (mother/father), the surviving spouse receives additional DIC on that basis. If there is no surviving spouse or the child is not in the custody of the surviving spouse, DIC is paid for the child to the custodian of the child. If over 18 and entitled to DIC, benefits paid directly to the child ("school-child" or "helpless child").
- **Parent(s):** Parent's DIC is similar to pension benefits in that income and net worth (in addition to relationship) determine entitlement. The rate of payment is based on countable income. The income limits are relatively low, so many parents are ineligible on that basis.

Death Pension:

- **Surviving Spouse:** Must be established as the legal widow(er) of the veteran, and marriage must have begun at least one year before death. If not living with the veteran at the time of death, the cause for the separation must not be that of the surviving spouse. If the veteran and spouse were not living together at the time of death, a "continuous cohabitation decision" may be required. Once established, must meet income and net worth requirements; rate of pension is determined by countable income.
- **Child:** Must be established as a child of the veteran. If living with the surviving spouse (mother/father), the spouse's benefits are increased on that basis and the child's income is included as countable income of the surviving spouse. If the child is not living with the surviving spouse, the additional benefits are paid for the child to the custodian of the child. If the child's income is found to be unavailable to the surviving spouse because of the separation, the child's income is not countable to the surviving spouse. Only in cases where there is NO surviving spouse does the child have independent entitlement to death pension benefits. In that circumstance, the child must meet separate income and net worth limits.
- **Parent(s):** There is no provision of the law that would permit payment of any benefits to the parent(s) of a veteran based on NSC death.

(10) TRAINEE HANDOUT

Effective Dates: On original claims, if the dependents are listed on the application, we can include them from the effective date of the award, if otherwise eligible. If the evidence is incomplete and we ask for more evidence, we can add the dependents from the effective date of the award if the evidence is furnished within one year of the date of the letter requesting it. Otherwise the dependents will be added from the date the evidence is received.

If the veteran's compensation increases to an evaluation that includes additional benefits for dependents, he/she will be invited to claim the dependents when the award letter is sent. The veteran has one year to furnish the requested evidence to have the dependents added from the date of the increase. Otherwise, they will be added from the date the evidence is received.

If the veteran has a new dependent, such as the birth of a child, he/she has one year from the date of the event to notify us and we will adjust the benefit from the date of the event. If the evidence is received more than one year after the event, we will adjust the award from the date of the receipt of evidence.

Generally speaking, if a reduction in benefits is required due to the loss of a dependent, they will be removed at the end of the month in which the event occurs. For example, if the veteran's divorce becomes final in June, we will remove the spouse from the award effective July 1. Note that if the veteran was being paid for a spouse and stepchildren as a result of the marriage, the stepchildren will be removed as dependents when the spouse is removed, unless the stepchild remains in the veteran's custody and household.

A Note On Apportionments: Veterans' dependents (spouse, child(ren), or even parent(s)) can, under certain circumstances, request an apportioned share of the veteran's benefits be paid directly to them. In most cases, the request for apportionment will be predicated on the (claimed) non-support of the apportionnee by the veteran. Factors affecting the amount of the benefit apportioned (assuming that the claim for apportionment is granted) include demonstrated need on the part of both parties, the total amount of the benefit payable, and the financial resources of both parties. Remember that the benefits belong to the veteran and are paid to him/her as compensation for disabilities incurred in association with active military service; dependents do not have an inherent right to the benefits. An apportionment will not be granted if doing so will cause a hardship for the veteran. However, apportionments can never be established merely for convenience, such as child support or alimony payments, and decisions on alimony or child support made in a court of local jurisdiction are not binding on the VA.

You need to be aware of the potential for apportionments, and more importantly, how your representative capacity is affected by apportionments. If your organization holds POA for the veteran (hereinafter referred to as the "prime payee") you cannot also represent the apportionnee. Many service organizations will not represent a spouse or anyone else claiming an apportioned share of the veterans benefits. Each VSO should check with their supervisor before assisting in a claim involving apportionments.

If you are representing a veteran whose dependents are claiming an apportioned share of his/her benefits, the veteran will be asked to account for his/her income and expenses. Assist the veteran in honestly reporting them and, if appropriate, furnish evidence that the veteran is contributing to his dependent's support. If the veteran is paying child support or alimony as required by a court decision, it is unlikely that an apportionment will be made.

(10) TRAINEE HANDOUT

TYPES OF EVIDENCE THAT MAY BE REQUIRED IN ORDER TO ESTABLISH DEPENDENCY

For VA benefit purposes, to establish a dependent, you must have three things:

1. Detailed information of the event
2. Detailed information of the relationship
3. Social Security number for each dependent

Currently, VA will generally accept the veteran's sworn statement alone to establish dependency so long as the statement does not conflict with other evidence of record. In other words, if the veteran states that he is married, provides the date (at least month and year) of the marriage, place of marriage (city and state), the full name, date of birth, and most importantly the Social Security number (SSN) of the spouse, VA will recognize the dependent and add the spouse to the award without requesting documentation. Likewise, if the veteran states that he/she has a child, provides the date and place of birth, the child's full name and again, most importantly the child's SSN, VA will recognize the child and add the child to the award without requesting additional documentation or evidence. Situations involving step-children or adopted children routinely require the submission of birth certificates or adoption papers before VA will recognize the dependent, however. In order to recognize a parent, VA requires a copy of the veteran's birth certificate that clearly shows the names of both parents.

The above paragraph pertains only to simple, uncomplicated dependency issues. Keep in mind that VA reserves the right to request documentation of dependency if VA finds conflicting evidence, unclear statements, or any other situation where it feels that documentation is warranted. There are different categories or sources of evidence that can be acceptable proof of dependency when such proof is required.

Please refer to 38 CFR 3.209 as an example of the above. Note the seven (a-g) stated categories of acceptable proof of birth. The point here is that, when a regulation has a list in it, it is almost always a list of precedence, with the first item listed being considered the preferred evidence. However, the preferred evidence is not required if the evidence received is sufficient to prove the essential point. Generally, there is no requirement that the documents submitted to prove dependency be certified copies unless otherwise stated by regulation. However, the copies submitted must be clear copies of the original document(s), free from erasure or correction. Remember that you are NOT permitted to certify copies of dependency documents, and that there are severe penalties for submission of documents to VA that you know are false or fraudulent. It is unwise for claimants to submit originals of birth, death, or marriage certificates (unless specifically requested by VA in rare instances) because of the potential danger of loss or damage in agency processing.

You must remember that VA cannot recognize dependency without the dependent's SSN. If the dependent does not have a SSN, evidence or documentation as to why is required. (e.g., the spouse is a resident alien and thus ineligible for a SSN).

(10) TRAINEE HANDOUT

There are several types of “marriage” in addition to the most common one – the standard legal or religious ceremony. There are tribal marriages, proxy marriages, common-law marriages, to mention just a few. In cases other than the standard legal or religious marriage, VA will require documentation and sometimes additional evidence before the dependent can be recognized. In death cases, VA can “deem” the marriage of a surviving spouse valid following development if the marriage to the veteran can be shown and the surviving spouse was unaware of any prior marriages of the late veteran. Again, in death cases only, VA can overcome the requirement that the surviving spouse lived continuously with the veteran from date of marriage to date of death if, after development, VA finds that the surviving spouse without fault in the separation.

In simple cases of divorce, the veteran’s statement that provides the date (at least month and year) and place (city and state) of the divorce will be accepted as proof of the event. However, in complex cases of multiple marriages/divorces on the part of the veteran and/or current spouse, copies of divorce decrees or orders of annulment will be required by VA before dependency can be established.

Dependents recognized during the veteran’s lifetime routinely carry over in death cases. In other words, if the veteran received additional compensation for a spouse during his lifetime, and that spouse became the surviving spouse upon the veteran’s death and files a claim as such, VA will not require re-submission of proof of dependency except for rare and unusual situations.

THE SERVICE OFFICER’S ROLE IN ESTABLISHING DEPENDENTS FOR VA PURPOSES

Dependency is an issue in nearly every VA claim and should be a routine part of your interview with the claimant. As you can see from above, the rules vary according to the type of benefit claimed. We have included a quick reference guide below. This does not replace the regulations or resolve problem cases, but only provides a “cheat sheet” for reference purposes.

First, you should understand the classes of dependents and who may or may not be considered a dependent. If in doubt, claim the dependent and let the VA sort it out. Send as much documentation as you think we will need in disputed claims.

Inconsistency in reporting dependents causes red flags to go up. If the veteran is claiming “Sally” as his spouse, and the claims file shows he is married to “Jane”, you can be assured that demands for documentation will follow. Incomplete information will cause demands for documentation, especially when the dissolution of prior marriages is hazy. We must be assured that the prior marriage was dissolved BEFORE the current marriage began. We have problems with this more often than you would think. If the veteran can’t give you complete dates and places, start asking for documents; you can be assured we will.

Failure to timely report the loss of a dependent is one of the greatest sources of overpayments in VA benefits. Service officers should stress the importance of timely reporting if the situation with dependents changes. Too often we don’t learn that the veteran has divorced his wife until he tries to claim the new one. Overpayments and unpleasantness will certainly follow. It is simply better for the veteran to inform the VA right away when his/her dependency situation changes. If you are asked to help a veteran report a change, the most expedient way to notify us

(10) TRAINEE HANDOUT

is simply call the toll-free number. In uncomplicated situations, a phone call will be complete and adequate notification.

Nearly every award letter that goes on a claim that has additional money payable for dependents warns the veteran that he/she should notify us if the dependency changes. If the veteran loses a dependent and does not tell us, VA will create the overpayment when we find out. VA will not accept the statement "I didn't know" or any other similar statement as adequate reason to waive the overpayment. The overpayment will be collected from future benefits due, and in many cases, the veteran will receive nothing until the overpayment has been collected. Hardship often results. When this sequence begins, it is too late to help the veteran avoid the consequences. If you can intervene early enough to avoid the overpayment by timely reporting the change in dependency, your client will be better served.

(10) TRAINEE HANDOUT QUICK REFERENCE GUIDE

Type of Dependent

Spouse:

Person of opposite sex married to the veteran through a recognized legal or religious ceremony. Live-in's, "domestic partners", etc., do not count. The two do not have to live together, but must not be "estranged".

Surviving spouse:

See above. Person of opposite sex who was married to the veteran at the time of his/her death. Live-in's, "domestic partners", etc., do not count. They did not have to live together at the time of death, but if separated, the cause for the separation cannot be the surviving spouse.

Parent:

The "natural" or "adopted" mother or father of the veteran; or a person who stood in the relationship of a parent for at least 1 year before his or her entry into active service. Only one of each (father and mother) can be recognized in any one case.

Child:

The natural or adopted unmarried child of a veteran who is under the age of 18; the natural or adopted unmarried child of the veteran's spouse (step-child) who achieved that status prior to the age of 18; an illegitimate child of the veteran who is under the age of 18 and unmarried; an unmarried child or step-child of the veteran who, between the ages of 18-22, is attending school; an unmarried child or step-child of the veteran over the age of 18 who, prior to the age of 18, was found to be permanently incapable of self-support because of physical or mental disability ("helpless child"). In death cases, the step-child relationship or adoption must have been established prior to death and was a member of the veteran's household at time of death.

Dependency and Benefits

Compensation:

Spouse – as long as legally married, spouse does not have to live with veteran; contribution to support irrelevant, however, veteran must know of spouse's whereabouts in order to receive additional compensation benefits. (Reason: must be able to notify VA of her death or divorce.)

Child: Same as above. Child custody irrelevant, however veteran must know of the child's whereabouts in order to receive additional compensation benefits.

Parent: Once relationship has been established, "dependency" can be established based on income of the parent(s) and/or contributions towards support furnished by the veteran. Parent(s) do not have to live with veteran, but veteran must periodically verify continued entitlement, thus have knowledge of the status of the parent(s).

(10) TRAINEE HANDOUT

Pension:

Spouse: Must live together or, if separated, must contribute towards spousal support. Spousal income is countable unless separated and the veteran is found to have no access to spousal income. In that case, spousal income would not count but veteran MUST contribute to spousal support in order to receive additional benefits.

Child: As above. Must either live with veteran (child's income would count) or, if not living with the veteran, the veteran must be contributing to the child's support; child's income would count unless the veteran is found to have no access to child's income.

Parent: No provision for additional pension benefits for dependent parents. However, if the veteran is responsible for and actually pays medical expenses for the parent(s), those medical expenses can be used to reduce countable income as if they were the veteran's.

(Note: In all "live" cases, dependents have no independent entitlement to benefits. The VETERAN receives additional benefits because of the existence of the dependent(s).)

DIC

Surviving spouse: Must be established as legal widow(er) of veteran. If not living with veteran at time of death, cause of separation cannot be that of the surviving spouse.

Child: Must be established as child of veteran. If living with surviving spouse, DIC benefits included with widow(er). If no surviving spouse or not in custody of surviving spouse, benefits payable to child's custodian. If over 18, if entitled to benefits, they are paid direct to child ("helpless" or "school-child").

Parent: Once established as parent, must meet income and net worth limitations similar to (but different amounts) death pension. Rate of payment based on income.

Death Pension

Surviving spouse: Must be established as legal widow(er) of veteran. If not living with veteran at time of death, cause of separation cannot be that of the surviving spouse. Then, must meet income and net worth limits. Rate of pension based on income.

Child: Must be established as child of veteran. If living with surviving spouse, spouse receives additional benefits for child(ren) in his/her award, and child's income is countable. No separate entitlement to child. If no surviving spouse or not living with surviving spouse, benefits paid to custodian of child. Child alone must meet separate income and net worth requirements.

Parent: No provision for payment of any death benefits to the parent of a veteran based on NSC death.