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Chapter 2
VETERAN'S RIGHTS, RESPONSIBILITIES AND DUE PROCESS

2.01 Introduction

The scope of this chapter includes a description of Veterans' rights and responsibilities, information on providing notification of rights to a Veteran, due process, adverse action notification, award action, and duty to assist. This chapter also contains the statutory and regulatory provisions covering subject matter related to Veterans' rights, responsibilities and due process under Chapter 31.

2.02 References and Resources
(Change Date February 19, 2019)

- Laws: 38 United States Code (U.S.C.) 3697A
 38 U.S.C. 5103A
 38 U.S.C. 5103A
 38 U.S.C. 5112
 38 U.S.C. 5113
 Freedom of Information Act (FOIA)
 Privacy Act of 1974
 Public Law (PL) 112-154
 Veterans Claims Assistance Act (VCAA)
- Regulations: 38 Code of Federal Regulations (CFR) 3.103
 38 CFR 21.324
 38 CFR 21.420
- VA Forms (VAF): VAF 21-4142, Authorization and Consent To Release
 Information to the Department Of Veterans Affairs
 VAF 28-8739a, Protection of Privacy Information Statement
 VAF 28-0800, Vocational Rehabilitation and Employment
 (VR&E) Program Orientation
 VAF 20-0998, Your Rights to Seek Further Review of our
 Decision (Note - this form replaced all versions of VAF 4107
 effective February 19, 2019)
 VAF 3288, Request for and Consent to Release of
 Information from Claimant's Records
- Websites: www.foia.va.gov/FOIA_Fee_info.asp
 www.foia.va.gov/FOIA_Offices.asp
 www.foia.va.gov

2.03 Providing General Notice of Rights and Responsibilities

A Vocational Rehabilitation Counselor (VRC) or Employment Coordinator (EC) (also referred to as case manager) is responsible for providing the general notice of rights and responsibilities to Veterans.

- a. During the initial interview, the VRC or EC will take the following actions:
 1. Inform the Veteran of his/her rights and responsibilities.
 2. Provide the Veteran with a copy of the signed VAF 28-0800, Vocational Rehabilitation and Employment (VR&E) Program Orientation.
 3. Inform the Veteran of current or future determinations that may affect his/her receipt of benefits and services.
- b. Veterans requesting or receiving benefits or services under the following chapters are entitled to notification:
 1. Chapter 18 – Benefits for Children of Vietnam Veterans and Certain Other Veterans.
 2. Chapter 31 - Vocational Rehabilitation and Employment.
 3. Chapter 35 - Survivors' and Dependents' Educational Assistance.
 4. Chapter 36 – Educational and Vocational Counseling (38 U.S.C. 3697A)
- c. Definition of Terms

Whenever the term "Veteran" is used in the discussion of the rehabilitation planning process, this term also includes a court-appointed legal custodian or guardian of the Veteran. Similarly, the term "child" or "dependent" includes a parent of a minor child or a court-appointed legal guardian or custodian. A determination of incompetence solely for the purposes of appointing a fiduciary to handle a Veteran's or an adult dependent's VA payments does not by itself mean that the Veteran or adult dependent is not competent to apply for and receive VR&E benefits. On the other hand, if a court with proper jurisdiction has appointed a guardian or custodian, then the case manager must develop the rehabilitation plan in cooperation with the guardian or custodian. Similarly, a parent must assist in the development of and sign any plan developed for a minor child.

2.04 Requirements Regarding the Privacy Act Statement and Freedom of Information Act (FOIA)

a. Privacy Act Statement

The privacy act statement informs the Veteran and/or guardian that the information he/she provides will not be used for any other purpose and that responses may be disclosed outside the VA only if the disclosure is authorized under the Privacy Act of 1974. During the initial meeting, the case manager will provide VAF 28-8739a, Protection of Privacy Information Statement (see Appendix O, VA Forms), explain the purpose of it and obtain an appropriate signature from the Veteran or guardian. The case manager must file VAF 28-8739a in the VR&E record, and ensure the Veteran and/or guardian receives a signed copy of the form.

b. Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA) is a federal law that gives United States citizens the right to access government information upon request. It is the VA's policy to release information to the fullest extent of the law provided there is no foreseeable harm associated with the release.

c. Requesting Records Under FOIA

Individuals may request records under FOIA by following these steps:

1. Direct the individual to the VA FOIA website at www.foia.va.gov.
2. Ensure the request is in writing and signed by the person submitting the request.
3. Describe the records so that they may be located with a reasonable amount of effort.
4. State the requestor's willingness to pay applicable fees or provide a justification to support a fee waiver. For information on fees, go to www.foia.va.gov/FOIA_Fee_info.asp.
5. Include a daytime telephone number.

The VA has a decentralized system for handling FOIA requests. All FOIA requests should be addressed directly to any of the approximately 400 geographically dispersed components that may maintain the records the

requestor is seeking.

If the requestor knows the office that maintains the records he/she is seeking, request that he/she send the request to that office or contact the VA Central Office FOIA/Privacy Act Officer at www.foia.va.gov/FOIA_Offices.asp for the custodian of the record.

d. Responding to FOIA Request

After receiving the FOIA request, the Regional Office FOIA officer will request the Veteran's file from VR&E. The VR&E Officer will request clarification from the FOIA officer regarding whether the entire file is needed or just certain information from it. Once that is clarified, the requested information/documents will be taken to the FOIA office. Before providing the information to the FOIA officer, VR&E will make a duplicate copy of file information to continue providing appropriate services to the Veteran.

2.05 Protection of Privacy and Release of Information

a. Protection of Privacy

All files, records, reports and other documents pertaining to any claim filed with the VA are confidential and privileged. The information in the Veteran's VR&E record is developed and maintained to assist the Veteran in obtaining and maintaining suitable employment or Independent Living (IL) services. This information may not be communicated to others, nor may others use it except in the following circumstances:

- To assist the Veteran in completing a comprehensive initial evaluation.
- To assist the Veteran in pursuing his/her rehabilitation program.
- To assist the Veteran in securing and adjusting to employment or rarely, to provide information to protect the Veteran or others from harm.

b. Release of Information to Outside Entities

The case manager may release information regarding a Veteran's disability or rehabilitation program to a vendor or establishment when all of the following conditions are met:

- The case manager asked the vendor or establishment to provide services to the Veteran.

- The information is directly related to the services authorized to the Veteran.
- The Veteran authorized the release of information in writing.
- All Personal Identification Information (PII) must be redacted before providing information except where the Social Security Number (SSN) is used as the student's ID number.

The Veteran may provide signed written authorization or utilize VAF 3288, Request for and Consent to Release of Information from Claimants Records (Appendix O, VA Forms). The authorization will remain in effect for the duration of the Veteran's rehabilitation program unless otherwise indicated.

Note: The case manager must obtain a separate signed release of information prior to releasing information to organizations or individuals not directly involved in providing rehabilitation services.

c. Review of Sensitive Information in Veteran's Record

Sensitive information is defined as information that, if disclosed to the individual, may have a serious adverse effect on the individual's mental or physical health. Such information may require explanation, or interpretation, by an intermediary, or assistance in the information's acceptance and assimilation in order to preclude an adverse impact on an individual's mental or physical health.

When individuals request access to their records (which includes medical, social, and/or psychological information), the VRC must review the record to determine whether the medical and/or psychological information could cause harm to the individual. There will be instances where medical and mental health notes are placed in the VR&E record, however, Compensation and Pension Records Interchange (CAPRI) information should not be in the VR&E record per current VBA policy. If, upon review, the VRC concludes that the information may cause harm, the request and related documents must be referred back to the designated VA medical provider, private physician or mental health provider who prepared the information to determine if the record can be disclosed directly to the individual.

Where denial of a request for access is made, the VRC must fully document in a CWINRS note the justification for making the denial. The note must specifically state that the medical or mental health information was referred back to the VA medical provider, private physician, or mental health provider that prepared the information to determine if it can be provided, and that the information was removed from the VR&E record prior to providing the

Veteran access to the record.

d. Rehabilitation Service Providers

When a case manager releases information to vendors or establishments providing rehabilitation services, he/she must include a written notice that the information is strictly confidential, is furnished solely for the purpose of enabling the vendor or establishment to assist the Veteran in his/her rehabilitation program, and cannot be released to other parties. The Veteran does not have to sign a release when services are being contracted out. However, a release is required when a referral is made to a Disabled Veterans' Outreach Program (DVOP) specialist or Local Veterans' Employment Representative (LVER).

e. Release of Information to Potential Employers

VA and other rehabilitation service providers should release to employers only information that they need to know and only with a signed release from the individual. Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditional pending the results of a medical examination, but only if the examination is required for all employees considering similar jobs.

2.06 Procedures for Providing Due Process

a. Definition of Terms

1. Due Process

Due process in the administration of VA benefits requires that the case manager inform the beneficiary of a proposed adverse action that could reduce, deny, or terminate benefits, and provide the beneficiary with the opportunity to provide additional evidence to contest the action, and/or request a meeting with his/her case manager.

2. Adverse Action

An adverse action denies benefits and/or services, reduces or otherwise lessens benefits or services, or terminates benefits.

b. Entitlement to Notification

The following parties are entitled to notification of any decision made by the

VA that affects the payment of benefits or the granting of relief:

- Beneficiaries
 - Guardians of minor beneficiaries
 - Fiduciaries of Veterans rated or deemed incompetent
 - Beneficiaries' designated representatives
- c. General Notification Requirements for all Decisions Made on a Claim
(Change Date February 19, 2019)

When feasible, the case manager will meet with the Veteran to discuss any adverse actions. However, this personal discussion does not replace the written notification to the Veteran as required by 38 CFR 21.420.

Effective February 19, 2019, every decision letter must include the following elements:

1. Issues adjudicated.
2. Evidence considered.
3. Statutes and regulations considered.
4. Identification of findings favorable to the Veteran.
5. Findings as to which elements have not been satisfied, leading to the denial.
6. Notice of how to obtain a copy or access the evidence used when making the decision.
7. Notice of the criteria that must be satisfied to grant the claim.
8. Notice of appellate rights and all procedures to seek further review.

It is important to note that VAF 20-0998 does not need to be sent with the notice of proposed adverse action. The case manager must only send VAF 20-0998, Your Rights to Seek Further Review of Our Decision (see Appendix O, VA Forms), with the final notice of adverse action once the action has taken place.

d. Types of Notification

1. There are two types of due process notification used to inform a beneficiary of a change in benefits:
 - Changes that do not require notification prior to taking an adverse action, and
 - Changes that require notification prior to taking an adverse action.
2. The notification for an adverse action or proposed adverse action is determined by the following source of information:

(a) Third Party

A notification of a proposed adverse action must be sent to the Veteran to inform him/her of a proposed change in his/her benefits, if the source of information is received from a third party. The letter should advise the Veteran of the information received, explain the effect it may have on his/her benefit, and allow the Veteran to offer evidence or argument that shows why the proposed action should not be taken.

(b) Veteran

A notification for the adverse action must be sent to the Veteran to inform him/her about the change in his/her benefits, if the source of information is the Veteran. The letter should explain that the information he/she submitted has affected his/her entitlement and the extent of the effect. A notice of proposed adverse action may be required. Refer to section 2.06.e to determine when an adverse action does not require prior notification.

For more information on the right to notification, see 38 CFR 3.103 and 38 CFR 21.420.

e. Adverse Actions that Do Not Require Prior Notification

The following instances do not require a notification prior to taking an adverse action. The case manager must take the adverse action immediately and send a written notice to the Veteran with a copy to his/her designated representative.

1. Change in Training Time, Credit Hours

Per 38 CFR 21.420, changes in training time do not require prior notification. The case manager must take the adverse action immediately upon notification of the change. However, the case manager must ensure that all necessary evidence and information from the Veteran and the facility have been reviewed before taking the adverse action.

- (a) If a Veteran notifies his/her case manager of a decrease in course credits with an official school document confirming the decrease and its effective date, the case manager must adjust the Veteran's award, and inform him/her in writing of the reduction in the subsistence allowance (38 CFR 21.324(i)) and evidence to support mitigating circumstances (see M28R.V.B.8 for more information on mitigating circumstances).
- (b) If a Veteran notifies his/her case manager of a decrease in course credits without an official school document confirming the decrease and its effective date, the case manager must contact the facility to verify the change and its effective date, adjust the Veteran's award, and inform the Veteran in writing of the reduction in the subsistence allowance. In addition, the case manager must ensure that the amended certification is obtained from the facility and filed in the Veteran's VR&E record.
- (c) If a facility informs the case manager of a change in training time, with or without confirmation of a change from the Veteran, the case manager must adjust the Veteran's award and inform the Veteran in writing of the reduction in the subsistence allowance. In addition, the case manager must ensure that the amended certification is obtained from the facility and filed in the Veteran's VR&E record.

2. Terminating an Award Upon Notification of Death

A notice of termination of benefits is not required when VA receives evidence that the Veteran has died. Once a notice of death is received, the case manager must immediately terminate the award effective the date of Veteran's death (38 CFR 21.324(b) and M28R.V.B.8).

f. Adverse Actions that Require Prior Notification

1. Benefit Changes Requiring a Notice of Proposed Adverse Action

Generally, the VA must send the Veteran and his/her designated representative (if any), a notice of proposed adverse action prior to taking any unfavorable action affecting the Veteran's benefit, including

discontinuance, rehabilitation and of benefits and/or services.

(a) Discontinuance

The case manager must send the Veteran a letter notifying him/her and his/her designated representative of the interruption when discontinuance is anticipated and interruption of services is required. This notification is required prior to closing the Veteran's case.

(b) Rehabilitation

The case manager must send prior notification to the Veteran and his/her designated representative when rehabilitation closure is proposed as a result of the Veteran's:

- Pursuit of further education, or
- Employment in suitable employment other than the planned goal, or
- When third party information is used and no verification from the Veteran, or
- When all objectives of an IILP have not been achieved.

(c) Reduction in Subsistence Allowance Following the Loss of a Dependent

Where a reduction in subsistence allowance is proposed by reason of information concerning dependency received from a source other than the Veteran, VA will:

- (1) Prepare a proposal for the reduction of subsistence allowance, setting forth material facts and reasons; and
- (2) Notify the Veteran at his/her latest address of record of the proposed action; and
- (3) Furnish detailed reasons for the proposed reduction; and
- (4) Inform the Veteran that he/she has an opportunity for a predetermination hearing, provided that VA receives a request for such a hearing within 30 days from the date of the notice; and
- (5) Give the Veteran 60 days for the presentation of additional evidence to show that the subsistence allowance should be

continued at its present level. (Authority: 38 U.S.C. 5112, 5113).

2. Procedures for Providing Notices of Proposed Adverse Action
(Change Date November 16, 2018)
 - (a) Send the Veteran a notice of proposed adverse action. Follow guidelines specified in this chapter.
 - (b) Establish the proposed adverse action period specifying that the Veteran has 30 days to respond before any adverse action is executed.
 - (c) Respond to the information and/or evidence submitted by the Veteran, if any, during the proposed adverse action period.
 - (d) If the Veteran does not respond to the notification for the proposed adverse action, send final notification of the decision advising the Veteran of the decision and how it affects his/her entitlement to further benefits, the effective date, the detailed reasons for the decision, and his/her appellate rights.
 - (e) If the Veteran does not respond to the notification of proposed adverse action, the VR&E staff member may proceed with the action noted in the decision letter.
3. Due Process Period
(Change Date November 16, 2018)

For a required prior notification, VA must allow at least 30 days for the Veteran to respond before finalizing the adverse action.

2.07 Section 5103 Notice (Formally Known as the VCAA Notice)

a. Background

On November 9, 2000, Congress enacted the Veterans Claims Assistance Act (VCAA) which provided that VA has a duty to assist a claimant who files a substantially complete application in obtaining evidence to substantiate his/her claim before making a decision on the claim. The law eliminated the concept of a well-grounded claim, redefined VA's duty to assist and mandated specific notice requirements.

Public Law (PL) 112-154 amends 38 U.S.C. sections 5103 and 5103A to streamline the VA's duty-to-notify and duty-to-assist responsibilities. This

new law applies to VA's notification and assistance obligations on or after February 2, 2013.

PL 112-154 does not change the content of VA's VCAA notice (now referred to as Section 5103 notice). Instead, it provides VA the authority to engage claimants in taking a more active role in claims development.

b. Elements of the Section 5103 Notice

Section 5103 notification is sent only in cases where VA is considering a denial of benefits sought. The Section 5103 notice must inform the Veteran of the following:

1. What information or medical evidence is needed to substantiate the claim.
2. What evidence and information is to be obtained by the claimant.
3. What evidence is VA's responsibility (VA is required to notify the claimant where it is unable to obtain the relevant records).

In cases where the evidence is sufficient to substantiate the claim and to grant the benefit sought, it is unnecessary to send the Section 5103 notice indicating what it takes to substantiate the claim.

2.08 Duty to Assist Criteria

a. Duty to Obtain Relevant Federal Records

VA's duty to assist includes developing for all relevant records in the custody of a federal department or agency; including VA medical records, service medical records, Social Security Administration records, or evidence from other federal agencies.

Relevancy is determined by what is being considered. Examples include:

- If a case manager is considering a determination of infeasibility due to psychiatric or medical problems, and the Veteran claims to be actively receiving treatment at a VA Medical Center (VAMC), the case manager must obtain copies of the treatment records from the VAMC prior to making a decision on infeasibility.
- If a Veteran with a 10 percent disability rating appears to have an Employment Handicap (EH) but no Serious Employment Handicap (SEH), and the Veteran has a claim pending for increased compensation, the case manager must review all relevant medical records related to the pending

claim for an increase in compensation prior to making a decision on the issue of a SEH.

b. Duty to Obtain Relevant Non-Federal Records

The VA's duty to assist also includes developing for private medical records, employment records, state Workers' Compensation records, educational records, or state rehabilitation agency records.

If necessary, the Veteran can authorize the release of existing records using VAF 21-4142, Authorization And Consent To Release Information to the Department Of Veterans Affairs, (see Appendix O, VA Forms), or in a form acceptable to the person, company, agency, or other custodian holding the records.

If the Veteran does not provide the necessary release, the Veteran can obtain and submit the identified records for consideration.

c. Refrain From or Discontinue Providing Assistance

VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include but are not limited to:

1. The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of Veteran status, or other lack of legal eligibility.
2. Claims that are inherently not credible or clearly lack merit.
3. An application requesting a benefit to which the claimant is not entitled as a matter of law.
4. The claimant's lack of cooperation in providing or requesting information or evidence necessary to substantiate the claim.