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Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility

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Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility

Abstract

[Excerpt] This report discusses the discharge or separation requirement for veteran status or, more specifically, how the VA assesses character of service to determine whether a former service member's separation from the military can be considered other than dishonorable. In some instances, the military characterization of discharge is relatively uncomplicated, creating a binding entitlement to VA benefits (i.e., an honorable or general discharge [under honorable conditions]), assuming the individual meets other eligibility requirements for veteran status. However, if the characterization of discharge may preclude access to veteran's benefits, the VA must develop the case, through an assessment of service records and other evidence related to a claimant's time in the military. This report includes a hypothetical example (in Appendix C) illustrating the complexities associated with making character of service determinations by the VA.

Keywords

veteran's benefits, eligibility, military discharge, Veteran's Administration

Comments

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Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility

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Summary

The Department of Veterans Affairs (VA) offers a broad range of benefits to veterans of the U.S. Armed Forces and to certain members of their families; however, a claimant must meet the basic eligibility criteria. A benefit claimant must prove that he or she meets the statutory definition of a “veteran,” which includes (1) service in the active military (i.e., Army, Navy, Air Force, Marine Corps, Coast Guard) or commissioned officers of the Public Health Service (PHS), and National Oceanic and Atmospheric Administration (NOAA); (2) minimum length of service requirements; and (3) discharge or separation from military service under conditions “other than dishonorable.”

This report focuses on the discharge or separation requirement for veteran status or, more specifically, how the VA determines that a former servicemember’s military service can be characterized as under conditions other than dishonorable. The conditions surrounding a servicemember’s discharge from the military can have important implications for his or her ability to subsequently claim entitlement to a host of benefits provided through the VA. The VA may deny benefits to former servicemembers whose military separation is characterized as “other than honorable” (OTH) or if they have received a punitive discharge adjudicated by a court-martial. In addition, certain types of misconduct could create a legal bar to receiving veterans’ benefits.

The VA generally accepts discharges that are characterized as “honorable” or “general” (under honorable conditions) for purposes of veterans’ benefits. Such discharges generally *do not* disqualify a veteran for a wide range of VA benefits, including disability compensation and pension, health care services, educational assistance, vocational rehabilitation and employment services, home loan guaranty, and memorial and burial services. However, for purposes of the Montgomery GI Bill and the Post-9/11 GI Bill, a veteran must have received an honorable discharge. Furthermore, with certain exceptions, VA health care will be furnished for any disability incurred in or aggravated during a period of service terminated by a discharge under OTH conditions.

However, an adverse discharge may preclude a former servicemember from receiving one or more VA benefits based on a complex set of statutory and regulatory restrictions. In these instances, the VA must develop the *character of service*, through an assessment of facts and other evidence related to a claimant’s time in the military, to determine whether his or her military service meets the general statutory and regulatory criteria for entitlement to veterans’ benefits.

This report primarily focuses on the VA adjudication process for claimants who—as a result of an adverse discharge—are entitled to a character of service determination resulting in either a favorable finding of “other than dishonorable” service or an unfavorable finding of “dishonorable” service for the purposes of VA benefits. This report does not address Department of Defense (DOD) policy on military discharge procedures aside from descriptions of how military discharges impact the potential receipt of veterans’ benefits. Although a former servicemember may also exercise the right to seek redress through the Discharge Review Board (DRB) or the Board for Correction for Military/Naval Records (BCM/NV) of his or her military department, the VA has *no* involvement in DOD administrative remedies and therefore a discussion of DOD-related discharge issues is outside the scope of this report. Situations where policy or program overlap occurs between the VA and DOD are addressed where appropriate.

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Introduction

Recent legal events related to Vietnam-era servicemembers who received an “other than honorable” (OTH) discharge (commonly referred to as an “undesirable” or “bad paper” discharge) from the military have drawn the attention of Congress due to the impact that OTH discharges may have on restricting eligibility for veterans’ benefits.

On March 3, 2014, a group of veterans, assisted by the Yale Law School Veterans Legal Services Clinic, filed a class action lawsuit on behalf of Vietnam servicemembers who received OTH discharges due to misconduct that—the servicemembers contend—was related to undiagnosed post-traumatic stress disorder (PTSD).¹ The plaintiffs sued the Secretaries of the Army, Navy, and Air Force alleging violations of the Administrative Procedure Act during the review of petitions to the Boards for Correction of Military/Naval Records (BCM/NR) requesting an “upgrade” in discharge status. An upgrade to an honorable or general discharge (under honorable conditions) would allow some Vietnam-era servicemembers with OTH discharges to establish basic eligibility for veterans’ benefits.²

In response to the class action, then-Secretary of Defense Chuck Hagel issued a September 3, 2014, memorandum to the Secretaries of the military departments providing supplemental policy guidance for the BCM/NR to give “liberal consideration” to petitions for changes in discharge status.³ The guidance “... is intended to ease the application process ... and assist the Boards in reaching fair and consistent results” for PTSD-related cases involving former servicemembers petitioning the BCM/NR for redress.⁴

Although the Department of Veterans Affairs (VA) is not party to the lawsuit, in a process known as a *character of service* determination, the VA plays a separate, but related, role in assessing entitlement to veterans’ benefits for individuals whose character of discharge does not *automatically* meet basic eligibility criteria.

The circumstances surrounding a servicemember’s discharge from the military have implications for his or her ability to claim entitlement to a wide range of gratuitous benefits administered by

¹ *Monk v. Mabus*, Case 3:14-CV-00260 (U.S. District Court for the District of Connecticut 2014). Post-Traumatic Stress Disorder (PTSD) is a mental health condition that can manifest as a psychological response to a traumatic event. PTSD did not gain clinical recognition until after the Vietnam War. Currently, if a servicemember facing an OTH discharge reasonably alleges to be suffering from PTSD, the military must provide a medical examination to that person. A resulting diagnosis of PTSD can then be taken into consideration when determining the servicemember’s discharge status and subsequent eligibility for veterans’ benefits (10 U.S.C. §1177).

² Each respective military department’s Discharge Review Board (DRB) or the Boards for Correction of Military/Naval Records (BCM/NV) provides potential recourse to former servicemembers who petition the boards. Each board is authorized to (1) review the relevant evidence provided by former servicemembers contesting the contents of their service records, and (2) apply retroactive upgrades to the discharge status or other correction(s).

³ See *Memorandum to Secretaries of the Military Departments* available on the Department of Defense (DOD) website at <http://www.defense.gov/news/OSD009883-14.pdf> and *Monk v. Mabus*, Civil Action No. 3:14-CV-00260 (WWE) (U.S. District Court for District of Connecticut 2014).

⁴ This report describes the impact of a military discharge on eligibility for veterans’ benefits, but does not address DOD policy on military discharge procedures. Although a former servicemember may seek a discharge upgrade through a DRB or the BCM/NV, the VA has no involvement in DOD administrative remedies. Therefore, a discussion of DOD-related discharge issues is outside the scope of this report.

the VA, including service-connected disability compensation, health care, education assistance, non-service-connected pension, burial benefits, housing benefits, and vocational rehabilitation, among others. To meet basic eligibility criteria for veterans' benefits, the former servicemember must first establish "veteran" status. Specifically, the individual must meet certain active duty service requirements and minimum length-of-service requirements, and have a discharge or separation from the military under conditions that are "other than dishonorable." Entitlement to veterans' benefits is generally denied to former servicemembers who do not meet the statutory definition of a veteran.⁵

This report discusses the discharge or separation requirement for veteran status or, more specifically, how the VA assesses character of service to determine whether a former servicemember's separation from the military can be considered other than dishonorable. In some instances, the military characterization of discharge is relatively uncomplicated, creating a binding entitlement to VA benefits (i.e., an honorable or general discharge [under honorable conditions]), assuming the individual meets other eligibility requirements for veteran status. However, if the characterization of discharge may preclude access to veteran's benefits, the VA must develop the case, through an assessment of service records and other evidence related to a claimant's time in the military. This report includes a hypothetical example (in **Appendix C**) illustrating the complexities associated with making character of service determinations by the VA.

Veterans' Benefits Claims Process

The initial step in filing a claim, for example, for VA disability compensation or pension benefits, is to submit an application either through the VA's online system or a completed *VA Form 21-526* to a local VA regional office in person or by mail. Currently, a former servicemember does not need to submit a completed form to initiate a claim for veterans' benefits, because the VA accepts informal claims that include "[a]ny communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant, [or] his or her duly authorized representative."⁶

VA "Duty to Assist"

Under the duty to assist provisions,⁷ the VA is required to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a

⁵ For more information on establishing "veteran" status see CRS Report R42324, *Who is a "Veteran"?—Basic Eligibility for Veterans' Benefits*, by Umar Moulta-Ali.

⁶ 38 C.F.R. §3.155. On September 25, 2014, the VA promulgated final rules that are to eliminate informal claims starting March 24, 2015. At that time, the VA is to only accept claims filed electronically or locally using one of two standard forms: (1) VA Form 21-0966 (Intent to File), which allows a former servicemember to initiate a claim while gathering additional evidence to support the claim, or (2) VA Form 21-526EZ, which is used to file the actual claim (79 F.R. 57660).

⁷ See CRS Report R43740, *Veterans' Benefits: The Department of Veterans Affairs and the Duty to Assist Claimants*, by Daniel T. Shedd.

law administered by the Secretary [of Veterans Affairs].”⁸ Former servicemembers can also receive free assistance in filing claims through a certified veterans service organization (VSO).⁹

After the VA receives a complete or substantially complete application for benefits,¹⁰ it is required to assist in the development of the claim. The Veterans Claims Assistance Act of 2000 (VCAA)¹¹ requires the VA to notify the claimant of any information or medical or lay evidence that is needed to substantiate the claim.¹²

The VA is also obligated to inform the claimant about information it will attempt to obtain on the claimant’s behalf and which information or evidence the claimant will be required to provide.¹³ Furthermore, the VA, when adjudicating any claim for benefits, is obligated to give the claimant the “benefit of the doubt” when there is “an approximate balance of positive and negative evidence regarding” any claim,¹⁴ and must consider legal theories that a claimant fails to raise if it would help substantiate a claim for benefits.¹⁵ However, if the claimant does not respond to the VA’s notice within one year, then “no benefit may be paid or furnished by reason of the claimant’s application.”¹⁶ The application is no longer valid and the claimant must re-file for benefits with the VA.

Establishing “Veteran” Status

Veteran status forms the basis for eligibility for all VA benefits. The VA predicates access to benefits based on a former servicemember meeting the statutory criteria for a veteran, without which, they would generally be barred from benefits.¹⁷ Although veteran status can be demonstrated through a number of pathways, a former servicemember must meet three primary criteria:

⁸ 38 U.S.C. §5103A(a)(1); 38 C.F.R. §3.159(c)(1).

⁹ Certain veterans service organizations (VSOs) have been congressionally chartered, which means they are federally recognized or approved by the VA Secretary for purposes of preparation, presentation, and prosecution of claims under laws administered by the VA. A directory of chartered and unchartered VSOs can be found on the VA website at <http://www.va.gov/vso/>.

¹⁰ A “substantially complete” application includes “the claimant’s name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant’s signature; and in claims for nonservice-connected disability or death pension and parents’ dependency and indemnity compensation, a statement of income.” 38 C.F.R. §3.159(a)(3).

¹¹ P.L. 106-475, 114 Stat. 2096 (2000).

¹² 38 U.S.C. §5103(a); 38 C.F.R. §3.159(b).

¹³ 38 U.S.C. §5103(a); 38 C.F.R. §3.159(b); *see also infra* section on VA’s obligation to obtain certain records on behalf of the claimant.

¹⁴ 38 U.S.C. §5107.

¹⁵ 38 C.F.R. §3.103(a).

¹⁶ 38 U.S.C. §5103(b).

¹⁷ Former servicemembers that are barred from VA benefits due to an inability to meet the statutory criteria for veteran status, are still eligible for the VA program that allows conversion from Servicemembers Group Life Insurance (SGLI) to Veterans Group Life Insurance (VGLI). See CRS Report R41435, *Veterans’ Benefits: Current Life Insurance Programs*, by Umar Moulta-Ali.

1. full-time active duty (other than active duty for training) military service (i.e., Army, Navy, Air Force, Marine Corps, Coast Guard) or commissioned officers of the Public Health Service (PHS), and National Oceanic and Atmospheric Administration (NOAA) or its predecessor, the Environmental Science Services Administration;
2. 24 months of continuous service, or the full period for which the servicemember was called to duty if activated for less than 24 months (applicable to enlistments after September 7, 1980); and
3. discharge or separation from the military under conditions other than dishonorable.¹⁸

Active Service Criteria for Veteran Status

An applicant must have “active military, naval, or air service” to be considered a veteran for most VA benefits.¹⁹ However, not all types of service are considered active military service for this purpose.²⁰

In general, active service means full-time service, other than active duty for training, as a member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or as a commissioned officer of the Public Health Service, the National Oceanic and Atmospheric Administration, or its predecessor, the Environmental Science Services Administration.

Active service *includes* a period of active duty for training during which the person was disabled or died from an injury or disease incurred or aggravated in the line of duty²¹ and any period of inactive duty for training during which the person was disabled or died from an injury incurred or aggravated in the line of duty or from certain health conditions incurred during the training.²²

Additional circumstances of service, and whether they are deemed to be active military service, are set out in statute.²³ For example, if on authorized travel to and from the performance of active

¹⁸ 38 U.S.C. §101(2); 38 C.F.R. §3.1(d).

¹⁹ 38 U.S.C. §101(2); 38 C.F.R. §3.12(a).

²⁰ For example, National Guard and Reserve duty may not be considered active service unless an individual performing this duty was disabled or died from a disease or injury incurred or aggravated in the line of duty (38 U.S.C. §101(24); 38 C.F.R. §3.6(a)).

²¹ Active duty for training is a tour of active duty that is used for training members of reserve and other components to fill the Armed Forces during time of war or national emergency. Active duty for training has been determined to mean (1) full-time duty for training performed by reservists [38 U.S.C. §101(22)(A); 38 C.F.R. §3.6(c)(1)]; (2) full-time duty for training purposes as a commissioned officer in the Reserved Corps of the Public Health Service [38 U.S.C. §101(22)(B); 38 C.F.R. §3.6(c)(2)]; (3) full-time training duty by members of the Air or Army National Guard of any state [38 U.S.C. §101(22)(C); 38 C.F.R. §3.6(c)(3)]; (4) duty by members of the Senior ROTC program on field training or a practice cruise [38 U.S.C. §101(22)(D); 38 C.F.R. §3.6(c)(4)]; and (5) authorized travel to and from duty for training [38 U.S.C. §101(22)(E); 38 C.F.R. §3.6(c)(6)].

²² 38 U.S.C. §101(24). Inactive duty for training has been defined to mean (1) duty, other than full-time duty, for reservists [38 U.S.C. §101(23)(A); 38 C.F.R. §3.6(d)(1)]; (2) other duties authorized for Reservists performed on a voluntary basis [38 U.S.C. §101(23)(B); 38 C.F.R. §3.6(d)(2)]; (3) training (other than active duty for training) by a member of, or applicant for membership in, Senior ROTC [38 U.S.C. §101(23)(C); 38 C.F.R. §3.6(d)(3)]; and (4) for the members of the Air or Army National Guard of any state, such training means duty other than full-time duty [38 U.S.C. §101(23); 38 C.F.R. §3.6(d)(4)].

²³ 38 U.S.C. §§101, 106.

duty training or inactive duty for training, a person is disabled or dies while proceeding directly to or returning from such duty, the duty will be considered to be active duty for training or inactive duty for training.²⁴

The determination of whether a claimant has met the “active service” requirement may not be a simple process. It is possible that the claimant and the VA may have to scrutinize the claimant’s service record(s) to determine whether the claimant’s service fits into one of the many categories of active service, or whether an exception has been made for his or her service, so that it is considered to be active service for the purposes of veterans’ benefits. In addition, if a claimant has more than one period of service, this may further complicate the determination.

Length-of-Service Criteria for Veteran Status

Prior to September 8, 1980, there was no minimum length of service necessary to be considered a veteran for most VA benefits. However, for an individual who enlisted after September 7, 1980, certain minimum length-of-service requirements must be met.²⁵ The general requirement is either 24 months of continuous active duty or the “full period” for which the servicemember was called or ordered to active duty.²⁶

Several exceptions exist to this general rule. For example, service-connected disability compensation benefits are exempt from the minimum active duty requirements. Thus, a veteran with a disease or injury incurred or aggravated during active service would generally be able to receive service-connected compensation for his or her condition or disability.²⁷ Other exceptions to the minimum service requirements include claims for VA life insurance benefits,²⁸ hardship discharges,²⁹ and retirements or separations resulting from a service-related disability.³⁰

If the former servicemember does not fall within the 24 months of active duty or the full period of active duty, or within one of the statutory exceptions, then the claimant has not completed a minimum period of active duty and is “not eligible for any benefit under Title 38, United States Code or under any law administered by the Department of Veterans Affairs based on that period of active service.”³¹

Discharge Criteria for Veteran Status

The statutory definition of veteran also requires that the servicemember be discharged or released from military service under conditions other than dishonorable.³² The military characterization of

²⁴ 38 U.S.C. §106(d); 38 C.F.R. §3.6(e).

²⁵ Servicemembers who entered on active duty after October 16, 1981, and had not: (1) previously completed a continuous period of active duty of at least 24 months, nor (2) been discharged or released from active duty under 10 U.S.C. §1171 are also subject to the minimum length-of-service requirement for veteran status.

²⁶ 38 U.S.C. §5303A(b); 38 C.F.R. §3.12a(a)(1).

²⁷ 38 U.S.C. §5303A(b)(3)(C); 38 C.F.R. §3.12a(d)(4).

²⁸ 38 U.S.C. §5303A(b)(3)(E); 38 C.F.R. §3.12a(d)(5).

²⁹ 38 U.S.C. §5303A(b)(3)(A); 38 C.F.R. §3.12a(d)(1).

³⁰ 38 U.S.C. §5303A(b)(3)(B); 38 C.F.R. §3.12a(d)(2).

³¹ 38 U.S.C. §5303A(b)(1); 38 C.F.R. §3.12a(b).

³² 38 U.S.C. §101(2); 38 C.F.R. §3.12(a).

discharge generally falls into one of five categories: (1) honorable, (2) general (under honorable conditions), (3) other than honorable (OTH), (4) bad conduct (adjudicated by a general court-martial or a special court-martial), and (5) dishonorable. See a description of the discharge categories in **Appendix A**. The military character of discharge is typically included in the former servicemember's DD-214 or other discharge paperwork.³³ Assuming a former servicemember meets the active duty and length-of-service requirements for veteran status as discussed above, the character of his or her discharge will impact eligibility for VA benefits in one of three ways. The VA is to

- determine that the former servicemember is *eligible* for benefits,
- determine that the former servicemember is *not eligible* for benefits, or
- develop the case (i.e., assess the character of service) to make an eligibility determination.

Military service characterized as honorable or general (under honorable conditions) is generally binding on the VA for the purposes of veterans' benefit eligibility, and former servicemembers will typically be awarded benefits for which they are entitled, regardless of the reason for separation.

Servicemembers receiving a bad conduct discharge by a general court-martial³⁴ or a dishonorable³⁵ discharge are legally barred from receiving veterans' benefits unless, during the course of developing the character of service, the VA determines that they were insane at the time of the offense that led to the discharge or if eligibility for benefits can be established based on a prior period of other than dishonorable service.³⁶

If the military service is characterized as OTH³⁷ or a bad conduct discharge by a special court-martial, it is necessary for the VA to develop a formal character of service determination for potential eligibility for benefits.

Table 1 illustrates basic eligibility criteria for common VA benefits based on a former servicemember's character of discharge.

³³ The *DD Form 214*, "Certificate of Release or Discharge from Active Duty," is issued by the Department of Defense upon the servicemember's retirement, separation, or discharge from the active duty military.

³⁴ According to VA's Adjudication Procedures Manual, "even if a [*bad conduct discharge*] is determined to be honorable for VA purposes, the service member is not eligible for health care. This is the only circumstance in which a service member may be found to have service connected disabilities but not be eligible for health care." (M21-1MR, Part III, Subpart v, Chapter 1, Section B, 1-B-18).

³⁵ A "dismissal" is the functional equivalent of a dishonorable discharge for officers. See **Appendix A**.

³⁶ See section "Exceptions to Legal Bars to VA Benefits" in this CRS report.

³⁷ Effective October 8, 1977, any serviceperson who is discharged under other than honorable conditions is eligible for the health care and related benefits for any service-connected disability, provided that he or she was not discharged (1) by reason of a bad conduct discharge or (2) under one of the statutory bars of 38 CFR 3.12(c) [see 38 U.S.C. Chapter 17].

Table I. Eligibility for Common VA Benefits by Military Character of Discharge

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

Source: Congressional Research Service (CRS) using data from the Naval Justice School study guide.

Notes: COS = Character of Service.

This chart shows general eligibility for benefits based on the characterization of military discharge and assumes a servicemember meets all other requirements for “veteran” status, including active duty and length of service requirements. This chart does not indicate any other eligibility criteria that may be required for a particular benefit listed (e.g., to receive disability compensation benefits, a veteran must first establish veteran status in addition to having a current disability that is connected to an injury or illness incurred or aggravated during a qualifying period of military service).

- a. Only former servicemembers whose discharge from the military is characterized as honorable are eligible for the Presidential Memorial Certificate (a burial benefit), and education assistance through the Montgomery and Post-9/11 GI Bills. See CRS Report R42785, *GI Bills Enacted Prior to 2008 and Related Veterans’ Educational Assistance Programs: A Primer*, and CRS Report R42755, *The Post-9/11 Veterans Educational Assistance Act of 2008 (Post-9/11 GI Bill): Primer and Issues*, both by Cassandra Dortch.
- b. Former servicemembers whose discharge from the military is characterized as bad-conduct adjudicated by general court-martial or under dishonorable conditions are legally barred from receiving VA benefits unless the VA finds that the servicemember was insane at the time of the offense that led to the bar or if eligibility for VA benefits can be established based on a prior period of other than dishonorable service. See the “Exceptions to Legal Bars to VA Benefits,” below.
- c. A former servicemember with an OTH discharge as a result of a *regulatory* bar will be limited to receiving VA health care services only for the treatment of a disability that is connected to an injury or illness incurred or aggravated during the relevant period of military service. However, an OTH discharge as a result of a *statutory* bar will prohibit the former servicemember from receiving any VA health care services based on the relevant period of service (P.L. 95-126). See **Appendix B**. Furthermore, according to VA’s *Adjudication Procedures Manual*, “even if a [bad conduct discharge] is determined to be honorable for VA purposes, the service member is not eligible for health care. This is the only circumstance in which a service

member may be found to have service connected disabilities but not be eligible for health care.” (M21-1MR, Part III, Subpart v, Chapter I, Section B, I-B-18).

- d. For veterans not eligible for education assistance, opportunities for postsecondary education may be available through the VA Vocational Rehabilitation Program. For more information see CRS Report RL34627, *Veterans' Benefits: The Vocational Rehabilitation and Employment Program*, by Benjamin Collins.

Comparison of Military Character of Discharge and VA Character of Service

Characterization of service is distinct from the military in that the VA has *no* authority to change or upgrade a military discharge.³⁸ The VA is limited to reviewing the relevant evidence to determine whether the former servicemember’s record meets VA criteria for the awarding of veterans’ benefits. The determination is bound by two outcomes: a finding that the record of service is (1) other than dishonorable (a favorable outcome) or (2) dishonorable (an unfavorable outcome).

In determining potential eligibility for veteran’s benefits, the VA adheres to a separate set of statutory and regulatory criteria than the military and considers mitigating factors that may have led to an adverse discharge, such as insanity. Character of service determinations are case-by-case, based on service records and other evidence related to the former servicemember’s time in the military. The outcome is not always predictable and does not always directly correspond to a specific military discharge characterization.

Conditions that Create a Legal Bar to VA Benefits

Congress has established that certain characterizations of service will preclude a former servicemember from receiving VA benefits. In addition, Congress has delegated to the Secretary of the VA the authority to promulgate regulations establishing additional circumstances that could bar receipt of VA benefits.³⁹ Collectively, these are known as legal bars. Legal bars to veterans’ benefits will not apply if the VA finds that the former servicemember was insane at the time of the offense that led to the OTH discharge.⁴⁰ In addition, a former servicemember may qualify for veterans’ benefits based on a prior period of other than dishonorable service. See the “Exceptions to Legal Bars to VA Benefits” section below.

Statutory Bars to VA Benefits

Benefits may be barred to servicemembers who receive an OTH discharge as a result of the following conditions: (1) conscientious objection with refusal to perform duty, (2) sentencing by a general court-martial, (3) resignation by an officer for the “good of the service,” (4) deserters, (5) an alien during a period of hostilities in which the servicemember requested release, and (6)

³⁸ For the purposes of this CRS Report, *character of service* is used to describe the VA process for benefit eligibility determination, which we distinguish from the character of discharge that describes the nature of a servicemember’s separation from the military. However, the VA Adjudication Procedures Manual Rewrite (M21-1MR) uses these terms interchangeably.

³⁹ 38 C.F.R. §3.12.

⁴⁰ Under 38 C.F.R. §3.12(e), an honorable discharge or general discharge (under honorable conditions) issued through Boards for Correction of Military/Naval Records (BCM/NR) sets aside any prior statutory or regulatory bars to benefits.

absence without official leave (AWOL). Statutory bars will deprive the claimant of any VA benefits.⁴¹ For a description of the statutory bars to VA benefits, see **Table B-1** in **Appendix B**.

Regulatory Bars to VA Benefits

In addition, benefits may also be barred to servicemembers who receive an OTH discharge as a result of the following conditions: (1) acceptance of an OTH discharge to escape trial by general court-martial, (2) mutiny or spying, (3) an offense involving moral turpitude, (4) willful and persistent misconduct, and (5) certain homosexual acts involving aggravating circumstances. For a description of the regulatory bars to VA benefits, see **Table B-2** in **Appendix B**.

Exceptions to Legal Bars to VA Benefits

Certain exceptions permit the awarding of veterans' benefits, even if a statutory or regulatory bar would ordinarily prohibit access. If the VA determines that the claimant was insane at the time of the offense leading up to the discharge, the claimant may be granted veterans' benefits. There does not need to be a direct connection between the insanity and any misconduct that led to the punitive discharge. In addition, the VA may grant benefit eligibility based on a prior period of other than dishonorable service for individuals with two or more periods of service.

Insanity at the Time of Offense

If the VA finds evidence of insanity while developing the character of service, it will further develop the case to identify records that may indicate whether the misconduct that led to the adverse discharge was the result of insanity. The VA defines an insane person as

one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustments to the social customs of the community in which he resides.⁴²

The issue of insanity must emerge from the facts, circumstances, and evidence surrounding the case or by the claimant or claimant's representative. If the VA is alerted to the issue of possible insanity, the agency is obligated to develop evidence that may support this claim under its duty to

⁴¹ Former servicemembers that are barred from VA benefits due to a legal bar are still eligible for the VA program that allows conversion from Servicemembers Group Life Insurance (SGLI) to Veterans Group Life Insurance (VGLI). See CRS Report R41435, *Veterans' Benefits: Current Life Insurance Programs*, by Umar Moulta-Ali.

⁴² 38 C.F.R. §3.354(a). The definition of *insanity* highlights the differing standards used by the military and the VA for similar terminology. The VA regulatory definition of insanity is less restrictive than the definition used by the military justice system, which states that "*(i) is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts ...*" [18 U.S.C. §17(a)]. Because of the differing standards, it is possible that a former servicemember found to be sane during a court-martial proceeding, could be found to be insane for the purposes of VA benefits.

assist provision.⁴³ A formal rating decision will be required, with full and complete development of all relevant available and obtainable records, which may include administrative records, legal records, and a medical opinion on the servicemember's sanity at the time of the offense. However, a claimant is not specifically required to demonstrate insanity through medical or legal determinations.

Prior Period of Other than Dishonorable Service

Under 38 C.F.R. §3.13, a former servicemember may be entitled to certain VA benefits based on a prior period of honorable service for the purposes of VA benefits, even if his or her most recent discharge is characterized as dishonorable.⁴⁴ For example, a former servicemember who is separated from a second period of service with an OTH discharge would be precluded from receiving education assistance benefits such as the Post-9/11 GI Bill. However, if the servicemember has a prior period of qualifying honorable service, the VA could predicate the awarding of Post-9/11 GI Bill benefits based on that prior enlistment period.

VA Character of Service Determination Process

If the characterization of a former servicemember's discharge comes into question during the claims process for veterans' benefits, the regional offices of the Veterans Benefits Administration (VBA), a sub-agency of the VA, are tasked with developing the character of service to make a basic eligibility determination.⁴⁵

The VA will “... request the facts and circumstances surrounding the claimant's discharge prior to making a formal decision,”⁴⁶ which entails a comprehensive review of the entire period of the claimant's enlistment(s) to assess the quality of the service and to determine whether the individual is deserving of veterans benefits. In making the determination, the VA will generally review personnel files provided by the claimant's military branch, service treatment records, records of any court-martial proceedings (if applicable), and statements, documents, or other information submitted by the claimant.

VA Duty to Assist in Developing Character of Service

As mentioned earlier, once a former servicemember has filed an application for benefits with the VA, the agency has a unique obligation to the claimant when adjudicating the claim—the VA has a duty to assist the claimant throughout the claims process.⁴⁷ This duty to assist includes

⁴³ 38 U.S.C. §§5102, 5103, 5103A.

⁴⁴ A complete and separate period of service is defined as a break in service greater than one day (M21-1MR, Part III, Subpart v, ch.1 §B).

⁴⁵ According to the VA Adjudication Procedures Manual Rewrite, “It is *not necessary* to make a [character of service] determination for VA claims purpose before the claimant applies to a VBA and places the matter at issue ...” (M21-1MR, Part III, Subpart v, ch.1, §B).

⁴⁶ M21-1MR, Part III, Subpart v, ch.1, §B.

⁴⁷ 38 U.S.C. §§5102, 5103, 5103A.

obligations to ensure that a claimant's file is complete, seek evidence and records substantiating the claim, and provide medical examinations under certain circumstances.⁴⁸

VA Notice and Fact-Finding Process

For cases requiring a character of service determination, a team at a VA Regional Office (VARO) becomes responsible for developing evidence and preparing administrative decisions for these cases. The VARO is to provide the claimant with advance notice of the need to conduct the determination. The notice explains reasons why a determination is necessary (e.g., the claimant's records indicate an OTH discharge). The notice would also include the criteria and applicable VA regulations to be used in the determination process. In addition, the VA is to provide information outlining the claimant's legal and procedural rights including the right to (1) legal representation; (2) an in-person hearing; and (3) submit any relevant evidence, contention, or argument.⁴⁹

The VA notice would also explain the implications of an unfavorable determination, including benefits for which the claimant may be deprived. The claimant has 60 days to respond to the VA if he or she intends to submit additional evidence or needs additional time "for presentation of his/her case."⁵⁰

The VA is to then request a complete summary of the facts, circumstances, and legal proceedings that are relevant to the discharge from the claimant's service department.⁵¹ In the event that a military department provides only limited information on the facts and circumstances, the VA is to make a determination using all of the evidence available. The evidence would be applied to a series of statutes and regulations to determine whether the former servicemember's service can be characterized as other than dishonorable for the purposes of veterans' benefits.

Following a review of the facts, if the VA finds in favor of the claimant that the character of service is other than dishonorable, this will bestow "veteran" status and basic eligibility for full VA benefits (except for certain education assistance benefits), assuming active duty service and length-of-service criteria are also met.

However, if the outcome is an unfavorable finding of dishonorable service, the VA is to notify the claimant of the effect on his or her entitlement to VA benefits, which will generally deprive the former servicemember of any VA benefits (except for the SGLI to VGLI conversion), pending the outcome of any subsequent appeals as discussed in the "Appealing an Unfavorable VA Determination" section below. Any notification of an unfavorable determination would also include information on how the former servicemember can seek a review of his or her discharge through the military department.

A former servicemember's first contact with the VA may come many years after military separation and the individual may be unaware of the specific role that discharge status plays in determining eligibility. For example, consider the hypothetical case of a former soldier, Specialist

⁴⁸ A 2009 Court of Appeals for Veterans Claims (CAVC) decision effectively extended the duty to assist provision to claims involving the "critical element" of veteran status. See *Gardner v. Shinseki*, 22 Vet. App. 415, 418 (2009).

⁴⁹ M21-1MR, Part III, Subpart v, ch. 1, §A, 1-A-13.

⁵⁰ *Ibid.*

⁵¹ Discharge proceedings for a dishonorable discharge only requested if the former servicemember's sanity is at issue.

(SPC) Mallone, as described in **Appendix C**.⁵² The applied example draws from a 2012 Military Law Review article that assesses the interaction between character of discharge and VA character of service decisions. The article also addresses factors that may affect the outcome of a VA determination, including the development of service records, advocacy by a representative for the former servicemember, and a former servicemember's willingness to appeal a VA decision.

The Impact of Military Discharges on VA Health Care

The Veterans Health Administration (VHA) of the VA operates the nation's largest integrated direct health care delivery system. Eligible veterans receive health care and counseling services through 150 VA Medical Centers (hospitals), 830 community-based outpatient clinics (CBOCs),⁵³ 136 community-living centers, and 300 Vet Centers. Generally, veterans are required to be enrolled in the VA health care system to obtain health care services.⁵⁴ Veterans who are enrolled have access to a comprehensive medical benefits package that includes a range of outpatient and inpatient services.⁵⁵ Once enrolled, the veteran remains enrolled in the health care system and may access health care services at any VA medical facility. VHA's health care system manages the enrollment of veterans based on priority categories (Priority Groups).⁵⁶ Veterans are not required to be enrolled to receive readjustment counseling services through Vet Centers.⁵⁷

Similar to other benefits and services provided by the VA, eligibility for VA health care is based primarily on veteran status.⁵⁸ To reiterate, veteran status is established by the former servicemember meeting three primary criteria:

1. full-time active duty (other than active duty for training) military service (i.e., Army, Navy, Air Force, Marine Corps, Coast Guard) or commissioned officers of the Public Health Service, and National Oceanic and Atmospheric Administration or its predecessor, the Environmental Science Services Administration;

⁵² The hypothetical examples used in this report are for illustrative purposes only to demonstrate how the character of service process can play out in one situation. The VA develops characterizations case-by-case, so the conditions surrounding a former servicemember's discharge, the types of evidence gathered, and the ultimate outcome will vary depending upon the individual circumstances.

⁵³ Community-Based Outpatient Clinic (CBOC) is a VA-operated, VA-funded (through a contract), or VA-reimbursed site of care, which is located separate from a VA medical facility. A CBOC can provide primary, specialty, subspecialty, mental health, or any combination of health care delivery services that can be appropriately provided in an outpatient setting.

⁵⁴ Some veterans are not required to enroll to receive hospital and outpatient care. 38 C.F.R. §17.37.

⁵⁵ 38 C.F.R. §17.38.

⁵⁶ For more in-depth information on enrollment in the VA health care system, see CRS Report R42747, *Health Care for Veterans: Answers to Frequently Asked Questions*, by Sidath Viranga Panangala and Erin Bagalman.

⁵⁷ Readjustment counseling services offered at Vet Centers may address problems such as war-related psychological readjustment, PTSD counseling, family or relationship problems, lack of adequate employment or career goals, social isolation, homelessness and lack of adequate resources, and other psychological problems such as depression or substance use disorders. Vet Centers also provide military-related sexual trauma counseling, bereavement counseling, employment counseling and job referrals, preventive health care information, and referrals to other VA and non-VA medical care.

⁵⁸ See the "Establishing "Veteran" Status" section in this CRS Report.

2. minimum active duty requirement of 24 months of service or the period called to service if activated for less than 24 months—Reservists and National Guard members called to active duty by a federal order (for other than training purposes) and completing the full call-up period would qualify;
3. discharge or release from active military service under conditions other than dishonorable—VA accepts discharges that are characterized as honorable or general (under honorable conditions), as other than dishonorable for VA benefit purposes.⁵⁹

Once these three criteria are met a veteran may enroll in the VA health care system. A veteran who does not receive an honorable or general discharge (under honorable conditions) from the military may still receive health care services from the VHA. It should be noted that a veteran's character of discharge under OTH conditions is not the same as dishonorable and does not deprive the veteran of all benefits. If a veteran received an OTH discharge that is determined to fall under a *regulatory bar*,⁶⁰ the veteran will still be eligible to receive care for a disability or illness determined to be incurred or aggravated during active service (see **Figure 1**).⁶¹ However, a veteran with an OTH discharge that is determined to fall under a *statutory bar*⁶² for VA benefits or discharged by reason of a *bad conduct discharge*, would not be eligible for VA health care for that same period of service.⁶³ Veterans with multiple periods of service may be eligible for VA health care services based on a prior period of other than dishonorable service.⁶⁴

Eligibility for Medical Care Tentatively Approved on Prima Facie Evidence

In some cases VHA could provide treatment to a former servicemember, even if their character of discharge is at issue, based on prima facie eligibility. If treatment based on prima facie eligibility is initially authorized by VHA, VHA prepares *VA Form 10-7131, Exchange of Beneficiary Information and Request for Administrative and Adjudicative Action* and annotates it with "Medical care being authorized for (condition) on prima facie evidence of eligibility," and forwards the completed form along with a copy of the VA examination, hospital report, or outpatient treatment report, as applicable, to the Veterans Service Center (VSC) of the VBA office with claims folder jurisdiction.

⁵⁹ 38 U.S.C. §101(2); 38 C.F.R. §3.1(d).

⁶⁰ See the list of regulatory bars at 38 CFR 3.12(d) and **Table B-2**.

⁶¹ Effective October 1977 (P.L. 95-126). When Congress passed P.L. 95-126, Congress recognized the "strong moral obligation of the Federal Government to provide treatment of for service-connected disabilities" See, U.S. Congress, Senate Committee on Veterans' Affairs, *Eligibility for Veterans Benefits Pursuant to Vietnam Era Discharge Upgrading*, report to accompany S. 1307, 95th Cong., 1st sess., June 28, 1977, p. 18.

⁶² See the statutory bars at 38 U.S.C. 5303(a) and **Table B-1**.

⁶³ According to VA's *Adjudication Procedures Manual*, "even if a [*bad conduct discharge*] is determined to be honorable for VA purposes, the service member is not eligible for health care. This is the only circumstance in which a service member may be found to have service connected disabilities but not be eligible for health care." (M21-1MR, Part III, Subpart v, Chapter 1, Section B, 1-B-18).

⁶⁴ Major John W. Brooker, Major Evan R. Seamone, and Leslie C. Rogall, "Beyond 'T.B.D.': Understanding VA's Evaluation of A Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces," *Military Law Review*, vol. 214 (winter 2012), p50.

Upon receipt of *VA Form 10-7131*, the VSC is to determine if the claimant's character discharge is favorable, or if eligibility for VA health care services is found to exist. The case is then referred to the rating activity for preparation of the memorandum rating. Upon review of the memorandum rating from the rating activity, the "Remarks" section of Part II of *VA Form 10-7131* is completed to show the following: "The individual (is) (is not) entitled to health care under Section 1710 of Title 38, U.S. Code [VA health care] for any disabilities determined to be service connected. (List the SC [service connected] disabilities) is/are service connected."⁶⁵

Military Sexual Trauma Exception

There is a specific exception with regard to discharge status and eligibility for VA health care for servicemembers who have experienced military sexual trauma (MST). According to statute, MST is defined as "psychological trauma, which, in the judgment of a mental health professional employed by the Department [VHA], resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment while the veteran was serving on active duty or active duty for training." Furthermore, sexual harassment is defined as "repeated, unsolicited verbal or physical contact of a sexual nature which is threatening in character."⁶⁶ Until the enactment of the Veterans Access, Choice, and Accountability Act of 2014 (P.L. 113-146 as amended by P.L. 113-175 and P.L. 113-235) VHA policy interpreted this statute very broadly, and for VHA purposes of MST, VHA defined an

"Eligible individual" as someone without veteran status who experienced sexual trauma ... while on active duty or active duty for training. Because eligibility accrues as a result of events incurred in service and is not dependent on length of service some individuals may be eligible for MST-related care even if they do not have veteran status... This benefit extends to Reservists and members of the National Guard who were activated to full-time duty status in the Armed Forces. Veterans and eligible individuals who received an "other than honorable" discharge may be able to receive free MST-related care with the Veterans Benefits Administration (VBA) Regional Office approval.⁶⁷

The Veterans Access, Choice, and Accountability Act of 2014 amended the existing treatment authority and further broadened VHA's interpretation to also allow former servicemembers who experienced sexual trauma while serving on *inactive duty training* (i.e., reservists and members of the National Guard performing weekend drills) access to free MST-related health care.⁶⁸

Accordingly, veterans are *not* required to be enrolled in VA's health care system to be eligible to receive MST-related counseling and care. In addition, veterans do not need to have a VA service-connected disability rating or other documentation that the MST experience occurred to receive VA health care services. All VA health care services (inpatient, outpatient, and pharmaceutical

⁶⁵ Source: M21-1MR, Part III, Subpart v, ch. 7, §A, p.7-A-11.

⁶⁶ 38 U.S.C. §1720D.

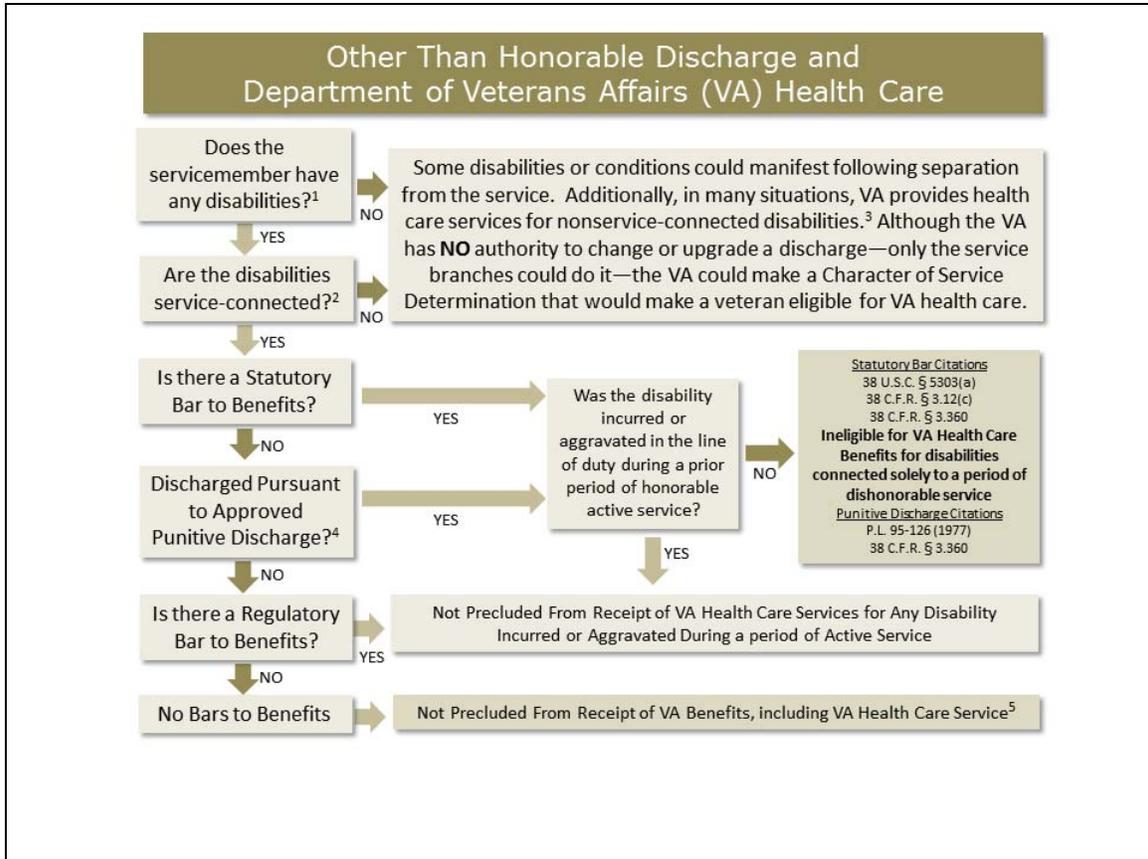
⁶⁷ Department of Veterans Affairs, Veterans Health Administration, VHA Directive 2010-033, *Military Sexual Trauma (MST) Programming*, July 14, 2010.

⁶⁸ For more information see, Department of Veterans Affairs, "Veterans Access, Choice, and Accountability Act of 2014 Military Sexual Trauma," fact sheet, September 2014, <http://www.va.gov/opa/choiceact/documents/Fact-Sheet-Military-Sexual-Trauma.pdf>. Also see, U.S. Congress, Committee on Conference, *Veterans Access, Choice, and Accountability Act of 2014*, conference report to accompany H.R. 3230, 113th Cong., 2nd sess., July 28, 2014, H.Rept. 113-564, p. 71.

services) for physical and mental health conditions related to experiences of MST are provided at no cost to veterans.

The Veterans Access, Choice, and Accountability Act of 2014 also authorized the VA, in consultation with DOD, to provide MST-related health care benefits to servicemembers (including members of the National Guard and Reserves) currently on active duty and individuals who have not yet established veteran status.⁶⁹

Figure 1. Other Than Honorable (OTH) Discharges and VA Health Care Eligibility



Source: CRS based on Appendix G in Major John W. Brooker, Major Evan R. Seamone, and Leslie C. Rogall, “Beyond ‘T.B.D.’: Understanding VA’s Evaluation of A Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces,” *Military Law Review*, vol. 214 (winter 2012), p. 248.

- Notes:**
1. A disability can be any injury or illness that occurred during, or was aggravated by, military service.
 2. The term service-connected means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service (38 U.S.C. §101).
 3. Veterans are eligible for VA health care services for both service and nonservice-connected conditions and illnesses. All health care services provided for service-connected conditions or illnesses are cost free.

⁶⁹ For more information see, Department of Veterans Affairs, “Veterans Access, Choice, and Accountability Act of 2014 Military Sexual Trauma,” fact sheet, September 2014, <http://www.va.gov/opa/choiceact/documents/Fact-Sheet-Military-Sexual-Trauma.pdf>.

4. A punitive discharge is a discharge awarded by sentence of a court martial.
5. Generally, there are some limitations for some VA benefits, for instance, for the purposes of the Montgomery GI Bill and the Post-9/11 GI Bill, a veteran must have received an honorable discharge.

Appealing an Unfavorable VA Determination⁷⁰

The process for appealing a dishonorable character of service determination by the VA is handled in the same manner as other appeals for veterans claims.⁷¹ During the appeal process for veterans' claims, various officials will handle the claim. This section briefly introduces the decision makers who will potentially review an appeal.

Decision Review Officer

Each VA regional office (RO) has at least one decision review officer (DRO) on staff. The DRO is a "senior technical expert who is responsible" for processing appeals made to the RO.⁷² If a claimant elects to undergo a DRO review, the DRO is to review the claim at the RO level, before the appeal reaches the Board of Veterans' Appeals (BVA). During review, a DRO will examine the claim *de novo*—that is, he or she will look at the case anew and afford no deference to the initial determination made by the RO.⁷³ The DRO may not revise the initial decision "in a manner that is less advantageous to the claimant" unless the DRO finds an instance of "clear and unmistakable error."⁷⁴ To have an appeal reviewed by a DRO, the claimant must ask to take DRO review. Otherwise a review, directly through the BVA, will proceed.⁷⁵ If a claimant opts for DRO review, the claimant may still request that the BVA review the claim if the DRO's decision is not favorable to the claimant.⁷⁶

The Board of Veterans' Appeals

When a claimant's application for benefits has been denied, an appeal can be made to the BVA.⁷⁷ The BVA is part of the VA, located in Washington, DC, and makes the final determination on an appeal within the VA. The board consists of experienced attorneys in the field of veterans law. Board members are appointed by the VA Secretary, with the approval of the President.⁷⁸ As of 2012, the board consisted of 64 members.⁷⁹ The BVA also employs staff attorneys that assist the Board members while preparing a decision for a claim, much like a clerk for a judge.⁸⁰

⁷⁰ This portion of the Report was pulled from CRS Report R42609, *Overview of the Appeal Process for Veterans' Claims*, by Daniel T. Shedd.

⁷¹ See CRS Report R42609, *Overview of the Appeal Process for Veterans' Claims*, by Daniel T. Shedd.

⁷² VA, Decision Review Officer (DRO) Review Process, M21-1MR, Part I, Ch. 5, §C at http://www.benefits.va.gov/WARMS/M21_1mr1.asp.

⁷³ 38 C.F.R. §3.2600(a).

⁷⁴ 38 C.F.R. §§3.2600(d), 3.2600(e).

⁷⁵ 38 C.F.R. §3.2600(b).

⁷⁶ 38 C.F.R. §3.2600(f).

⁷⁷ 38 U.S.C. §7104(a).

⁷⁸ 38 U.S.C. §7101A.

⁷⁹ Board of Veterans' Appeals, Report of the Chairman: Fiscal Year 2012 at 19 (2013), at [http://www.bva.va.gov/docs/\(continued...\)](http://www.bva.va.gov/docs/(continued...))

The Court of Appeals for Veterans Claims

If a claimant is not satisfied with the decision from the BVA, the claimant has the option of appealing to the Court of Appeals for Veterans Claims (CAVC).⁸¹ The CAVC is an Article I court, established by Congress, which has exclusive jurisdiction over appeals from the BVA.⁸² Therefore, the CAVC is a separate entity from the VA that reviews BVA decisions. Currently, up to nine judges may sit on the CAVC and review appeals from the BVA.⁸³ The VA's General Counsel will defend the BVA decision before the court.⁸⁴

The Court of Appeals for the Federal Circuit

If the claimant is dissatisfied with the determination reached by the CAVC, the claimant may appeal the decision to the Court of Appeals for the Federal Circuit (Federal Circuit).⁸⁵ The scope of review on veterans' appeals provided by the Federal Circuit is limited by statute. The Federal Circuit can set aside regulations that are arbitrary or capricious, unconstitutional, in excess of statutory jurisdiction, or procedurally deficient.⁸⁶ Generally, the Federal Circuit is not permitted to review any challenge to a factual determination, or a "challenge to a law or regulation as applied to the facts of a particular case."⁸⁷ The Federal Circuit provides the last appeal of right for claimants appealing decisions made by the BVA.

The Supreme Court of the United States

Finally, if the claimant is still not satisfied by the decision reached by the Court of Appeals for the Federal Circuit, the claimant may petition the Supreme Court for certiorari.⁸⁸ The Supreme Court may or may not decide to grant certiorari (hear the case)—the claimant is not guaranteed to have the Supreme Court hear the appeal. If the Supreme Court grants certiorari, any decision provided by the Supreme Court is final.

(...continued)

Chairmans_Annual_Rpts/BVA2012AR.pdf.

⁸⁰ Board of Veterans' Appeals, VA Pamphlet 01-00-1, Understanding the Appeals Process 6 (2000), at <http://www.ptsdmanual.com/y2000.pdf>.

⁸¹ 38 U.S.C. §§7252, 7266.

⁸² 38 U.S.C. §§7251–7252.

⁸³ 38 U.S.C. §7253 (establishing that there may be up to nine judges sitting on the CAVC, if two additional judges are appointed by January 1, 2013).

⁸⁴ See 38 U.S.C. §7263.

⁸⁵ 38 U.S.C. §7292.

⁸⁶ 38 U.S.C. §7292(d)(1).

⁸⁷ 38 U.S.C. §7292(d)(2).

⁸⁸ 38 U.S.C. §7292(c).

Appendix A. Descriptions of Military Character of Discharge

Character of Discharge	Description
Honorable	When the quality of the servicemember's service generally has met the standards of acceptable conduct and performance of duty for military personnel or is otherwise so meritorious that any other characterization would be clearly inappropriate.
General (Under Honorable Conditions)	When a servicemember's service has been honest and faithful, it is appropriate to characterize that service under honorable conditions. Characterization of service as general (under honorable conditions) is warranted when the negative aspects of the servicemember's conduct or performance of duty outweigh positive aspects of the servicemember's conduct or performance of duty as documented in his or her service record.
Other than Honorable (OTH) Conditions	When separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of servicemembers. Or, when separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected of servicemembers. Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death; abuse of a special position of trust; disregard by a superior of customary superior-subordinate relationships; acts or omissions that endanger the security of the United States or the health and welfare of other servicemembers; and deliberate acts or omissions that seriously endanger the health and safety of other persons.
Bad-Conduct (by General Court-Martial and Special Court-Martial)	A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. §201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary.
Dishonorable	A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. A dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civil jurisdictions as felonies, or of offenses of a military nature requiring severe punishment.
Dismissal	Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. A dismissal may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty. <i>Functionally equivalent to a dishonorable discharge.</i>

Source: CRS, using data from the Manual for Courts-Martial United States (2012 edition).

Appendix B. Descriptions of Statutory and Regulatory Bars to VA Benefits

Table B-1. Descriptions of Statutory Bars to VA Benefits

Statutory Bar	Description
Conscientious Objection	<p>A conscientious objection is a “... firm, fixed and sincere objection to participation in war in any form or the bearing of arms, because of religious training and belief” (DOD Instruction 1300.06). A servicemember must request a discharge based on conscientious objector status.</p> <p>This condition is a statutory bar when a conscientious objector <i>refuses to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities.</i></p>
Bad Conduct Discharge by General Court-Martial	<p>Any servicemember discharged by reason of the sentence of a general court-martial.</p>
Officer Resignation	<p>When a commissioned officer or warrant officer resigns for the good of the service, typically in lieu of a general court-martial.</p>
Desertion	<p>(1) Any servicemember who, without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently; quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States [10 U.S.C. §885(a)].</p> <p>(2) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion [10 U.S.C. §885(b)].</p>
Alienage	<p>An alien discharged during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See 38 C.F.R. §3.7(b) for more information.</p>
Absence Without Official Leave (AWOL)/Unauthorized Absence (UA)	<p>Applied to a servicemember with an OTH discharge issued as a result of an AWOL for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if the VA Secretary determines that there are compelling circumstances to warrant the prolonged UA [38 C.F.R. §3.12(c)(6)].</p>

Sources: CRS, using data from 38 U.S.C. §5303(a), 38 C.F.R. §3.12(c), DOD Instruction, and 10 U.S.C. Subchap. X.

Notes: A former servicemember with an OTH discharge as a result of a statutory bar (or a punitive discharge adjudged at a court-martial) is prohibited from receiving VA health care services based on the relevant period of service (P.L. 95-126).

Statutory bars may not preclude a former servicemember from receiving veterans' benefits if the VA finds that he or she was insane at the time of the offense that led to the bar or if eligibility for VA benefits can be established based on a prior period of other than dishonorable service. See the “Exceptions to Legal Bars to VA Benefits” section in this CRS report.

Under 38 C.F.R. §3.12(e) an honorable discharge or general discharge (under honorable conditions) issued through Boards for Correction of Military/Naval Records (BCM/NR) sets aside any prior statutory or regulatory bars to benefits.

Table B-2. Descriptions of Regulatory Bars to VA Benefits

Regulatory Bar	Description
Undesirable Discharge to escape trial by general court-martial	A servicemember who accepts an OTH discharge to avoid a general court-martial.
Mutiny or spying	<p><i>Mutiny:</i> A person refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance with intent to usurp or override lawful military authority (10 U.S.C. §894).</p> <p><i>Spying:</i> Any person who in time of war is found lurking as a spy or acting as a spy in or about anyplace, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death (10 U.S.C. §906).</p>
Offenses involving moral turpitude	Generally includes conviction of a felony.
Willful and persistent misconduct	Includes a discharge under OTH conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.
Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty	Examples include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

Sources: CRS, using data from 38 C.F.R. §3.12(d), and 10 U.S.C. Subchap. X.

Notes: A former servicemember with an OTH discharge as a result of a regulatory bar is *limited* to receiving VA health care services only for the treatment of a disability incurred or aggravated during the relevant period of service (P.L. 95-126).

Regulatory bars may not preclude a former servicemember from receiving veterans' benefits if the VA finds that he or she was insane at the time of the offense that led to the bar or if eligibility for veterans' benefits can be established based on a prior period of other than dishonorable service. See the "Exceptions to Legal Bars to VA Benefits" section in this CRS report.

Under 38 C.F.R. §3.12(e) an honorable discharge or general discharge (under honorable conditions) issued through BCM/NR sets aside any prior statutory or regulatory bars to benefits.

Appendix C. Applied Example: Understanding the Impact of Character of Discharge and VA's Decision⁸⁹

To illustrate the critical importance of the potential impact of an OTH, and VA's determination of eligibility for benefits resulting therefrom, we tell the story of a fictional former soldier, Specialist (SPC) Mallone, who was discharged under Other Than Honorable conditions. Based on the circumstances of his discharge, and the VA rating decision determining his eligibility for VA benefits, the course of his life could take two very different paths.

Specialist Mallone enlisted for a term of three years. Shortly after he reported to his unit, his brigade deployed to Iraq for nine months. While he was not physically wounded during his combat service, SPC Mallone rode in two different convoys in which a lead vehicle was the target of an Improvised Explosive Device (IED). In one incident, three of the occupants sustained severe, but not life threatening, injuries. In a second incident, two of the vehicle's occupants died, and another occupant sustained severe burn injuries. As a medic, SPC Mallone treated these injured comrades, and provided comfort to one of the soldiers in the minutes prior to his passing.

When SPC Mallone returned from Iraq, he began to reflect on the events that occurred during his deployment. As a medic, he was intimately familiar with the post-deployment screening process and deliberately denied any mental health problems when he was screened during his post-deployment surveys and medical examinations.⁹⁰ Within weeks of his return from Iraq, he was arrested twice by civilian law enforcement authorities for driving under the influence (DUI) and for a simple assault that occurred during a bar fight. Shortly after pleading guilty to the assault charge and returning from two weeks of block leave, SPC Mallone tested positive for Marijuana during a properly-performed unit urinalysis.⁹¹ When he learned that he was facing civilian prosecution for his drug use, SPC Mallone admittedly just "wanted out" of the military service. SPC Mallone's unit initiated administrative separation for a pattern of misconduct.⁹² He decided to not fight an administrative separation, despite the fact that he would likely receive an OTH discharge characterization. SPC Mallone unconditionally waived his right to an administrative separation board,⁹³ as his primary concern and motivation was to get out of the Army.

The records pertaining to SPC Mallone's DUI and simple assault arrests were associated with the record of his administrative separation proceedings. SPC Mallone's defense counsel wanted SPC Mallone to self-refer for behavioral health treatment and evaluation, but SPC Mallone resisted. During the medical and mental health examinations pursuant to the administrative separation,⁹⁴ the providers did not document any psychiatric abnormalities, as SPC Mallone steadfastly denied that he had any mental health symptomatology.

After much effort, SPC Mallone's defense counsel was able to convince him to submit a statement for the separation authority to consider. In this statement, SPC Mallone indicated that he had "a lot going on in his head" and that he was "drinking quite a bit to deal with his issues." In particular, but without providing any specific details, Mallone explained that he had cared for wounded and deceased soldiers as a medic. At the time of his separation examination

⁸⁹ The following is excerpted (with changes to the footnotes) from Major John W. Brooker, Major Evan R. Seamone, and Ms. Leslie C. Rogall, "Beyond 'T.B.D.': Understanding VA's Evaluation of Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces," *Military Law Review*, vol. 214 (winter 2012) pp. 36-42.

⁹⁰ The Army uses Deployment Health Assessments (DHAs) to "address physical and behavioral health needs prior to, during and after deployment." See U.S. Department of Army, "Today's Focus: Army Deployment Health Assessments," *STAND-TO!*, March 20, 2012, available at <http://www.army.mil/standto/archive/issue.php?issue=2012-03-20>. The Post-Deployment Health Assessment (PDHA) and Post-Deployment Health Reassessment (PDHRA) are performed after redeployment. *Id.*

⁹¹ Manual for Courts-Martial, United States (2012), Military Rules of Evidence 313. ("An order to produce body fluids, such as urine, is permissible in accordance with this rule.")

⁹² U.S. Department of the Army, *Active Duty Enlisted Administrative Separations*, Reg. 635-200 (June 6, 2005), Rapid Action Revision (RAR) September 6, 2011.

⁹³ *Ibid.* Typically, when the command seeks an OTH separation, a soldier has the right to a separation board.

⁹⁴ *Ibid.*

from service, Mallone continued to deny that he had any mental health issues. Five years after he separated from service, Mallone sought outpatient medical care at a VA Community Based Outpatient Clinic (CBOC).^{95,96}

Path 1: The Effect of a Favorable Discretionary Determination

The Eligibility Office informed him that, due to the fact that he had been discharged under OTH conditions, an administrative decision was necessary in order to determine whether he was eligible for VA benefits. Several months later, the VA regional office issued an administrative decision, which was based on a review of information provided to VA by the Army. In addition, Mallone had submitted copies of documents pertaining to his discharge that he had maintained since his departure from service, to include the statement he had written at the request of his attorney. The adjudicator determined that, despite the Army's characterization of his service as OTH and the determination that he had engaged in a pattern of misconduct, Mallone's service was nonetheless "other than dishonorable" for VA benefits purposes.

In support of this determination, the decision explained that, although the Army had characterized his actions as a pattern of misconduct, the two arrests (without evidence of a conviction for the DUI in the record) and single positive drug test were not "willful and persistent misconduct" such that would be a regulatory bar to VA benefits.⁹⁷ The decision put considerable emphasis on Mallone's statement that he submitted at the time of his administrative separation. The decision interpreted this statement to be an explanation that Mallone had been drinking heavily as a way to deal with his combat experiences, and that his heavy drinking led to at least two of the three instances of misconduct.

Mallone had earned his certification as an Emergency Medical Technician while in the Army, and he was able to obtain employment with a private medical transport company following his discharge. He became increasingly stressed and frequently had flashbacks about the convoy incidents in Iraq while he was on the job. He tried working in a less stressful and lower paying job as a medical technician at a doctor's office, but he eventually quit this job, as well. Shortly after he became unemployed, he was seen by the VA CBOC for a respiratory infection.⁹⁸ At that time, a routine PTSD screening was performed. When the health care provider reported that his PTSD screen was positive, Mallone continued to insist that he was "fine." After significant persuasion by the treatment provider, Mallone reluctantly accepted a referral to visit a psychologist. This psychologist diagnosed PTSD, established a good rapport

⁹⁵ Veterans who served in a theater of combat operations after November 11, 1998 are eligible for VA health care for five years from the most recent day of discharge. VHA provides health care services and community living care for any condition possibly related to the veteran's service in the theater of operations. Combat veterans who were discharged between January 2009 and January 2011, and did not enroll in the VA health care system during their five year period of eligibility have an additional one year to enroll and receive care. The additional one-year eligibility period began February 12, 2015, with the enactment of the Clay Hunt Suicide Prevention for America Veterans Act (H.R. 203; P.L. 114-2).

⁹⁶ Community-Based Outpatient Clinic (CBOC) is a VA-operated, VA-funded (through contract), or VA-reimbursed site of care, which is located separate from a VA medical facility. A CBOC can provide primary, specialty, subspecialty, mental health, or any combination of health care delivery services that can be appropriately provided in an outpatient setting.

⁹⁷ In some cases VHA could provide treatment to a former servicemember, even if their character of discharge is at issue, based on prima facie eligibility. If treatment based on prima facie eligibility is initially authorized by VHA, VHA prepares VA Form 10-7131, Exchange of Beneficiary Information and Request for Administrative and Adjudicative Action and annotates it with "Medical care being authorized for (condition) on prima facie evidence of eligibility," and forwards the completed form along with a copy of the VA examination, hospital report, or outpatient treatment report, as applicable, to the Veterans Service Center (VSC) of the VBA office with claims folder jurisdiction.

Upon receipt of VA Form 10-7131, the VSC will determine if the claimant's character of discharge is favorable, or if eligibility for VA health care services is found to exist. The case is then referred to the rating activity for preparation of the memorandum rating. Upon review of the memorandum rating from the rating activity, the "Remarks" section of Part II of VA Form 10-7131 is completed to show the following: "The individual (is) (is not) entitled to health care under Section 1710 of Title 38, U.S. Code [VA health care] for any disabilities determined to be service connected. (List the SC [service connected] disabilities) is/are service connected." (Source: M21-1MR, Part III, Subpart v, ch. 7, §A, p.7-A-11).

⁹⁸ See Descriptions of Regulatory Bars in **Table B-2**.

with Mallone, and persuaded him to attend counseling on a recurring basis, which helped him improve his outlook on life and motivated him to try to return to work. Mallone soon thereafter filed a claim for service connection for PTSD, which was granted and for which he received a 30 percent rating. Although he was not eligible for the post-9/11 GI Bill due to his lack of honorable service, his 30 percent rating entitled him to Vocational Rehabilitation Benefits, which would give him the training necessary to work in a field other than emergency medicine. Mallone attended college through that program, and he chose to study computer programming, which was a career field that interested him and would allow him to work independently and in an environment that was less stressful than his former position as an Emergency Medical Technician. With the income and stability of a good job, he was able to purchase a home several years later with the assistance of his VA Home Loan Guaranty benefit.

Path 2: The Effect of an Unfavorable Discretionary Determination

Five years after he separated from service, Mallone sought outpatient medical care at a VA CBOC. The Eligibility Office informed him that, due to the fact that he had been discharged under OTH conditions, an administrative decision was necessary in order to determine whether he was eligible for VA benefits. Several months later, the VA regional office issued an administrative decision, which was largely based on a review of Mallone's service personnel records.

The adjudicator reviewed the circumstances surrounding Mallone's discharge under Other Than Honorable conditions and determined that he was discharged as a result of "willful and persistent misconduct," which is a regulatory bar to most VA benefits.⁹⁹ The decision explained that Mallone had engaged in multiple instances of misconduct during service, and that the Army's determination that he had engaged in a pattern of misconduct weighed heavily in its decision. The decision explained that VA considered whether Mallone's combat service in Iraq was a factor in his misconduct during service, but it specifically referenced the multiple examinations that denied any PTSD symptoms and provided normal psychiatric assessments, including at the time of discharge from service. Mallone's statement that he submitted at the time of his administrative separation was also considered, but it was given less probative weight because it was determined to have been submitted in an attempt to avert a potential court-martial. Based on the administrative decision, Mallone was informed that he was not entitled to any VA health care benefits since he did not have any service-connected disabilities. Furthermore, he was informed that he would be ineligible for most VA benefits. Mallone chose not to appeal the decision.

Because Mallone had been certified as an Emergency Medical Technician while in the Army, he was able to obtain employment with a private medical transport company following his discharge. He became increasingly stressed on the job and frequently had flashbacks about the convoy incidents in Iraq while he was on the job. He tried working at a lower paying job as a medical technician at a doctor's office, but he eventually quit this job, as well. Without a job and only trained to work in a career field that unduly stressed him, Mallone returned home to live with his parents, where he would work occasional "odd jobs." Since Mallone was not service connected for any disabilities, he was not eligible for any VA health care treatment and rarely saw a doctor because he did not have any health insurance. Therefore, he never had a PTSD screening that could have led to a diagnosis of and treatment for his PTSD; in fact, he continued to live in denial that he may have PTSD. With dishonorable service for VA purposes, Mallone was ineligible for any disability compensation. As a non-service connected former servicemember with a dishonorable discharge for VA purposes, Mallone was not entitled to Vocational Rehabilitation benefits that would allow him to retrain or provide the funding for him to go back to college. Despite his struggles and lack of steady employment, Mallone was fortunate to have a supportive family that provided a place for him to stay.

The Intersection of the Two Paths

Mallone's service terminated with a discharge under Other Than Honorable conditions based on a pattern of misconduct, and he ultimately bears responsibility for his actions that led to his administrative separation from service. However, the adjudicative process requires VA to consider whether the circumstances of his discharge were nonetheless under other than dishonorable conditions. In the examples provided above, the outcomes and VA benefits that would accompany each determination were very different, but it is important to note that neither VA decision is incorrect; each was a plausible decision based on the available evidence. This fictional case study demonstrates the nature and importance of the benefits that are at stake when VA adjudicates when a discharge

⁹⁹ Ibid.

under Other Than Honorable conditions is considered other than dishonorable for VA purposes. It further exemplifies why a former servicemember's actions during service, and VA's adjudication thereafter, can have lifelong and powerful consequences. This case shows how the same evidence, even when carefully considered, can lead to two very different and equally justifiable outcomes. Further development of the record, advocacy by a representative, and a willingness to appeal VA's decision are undoubtedly factors that can lead to a more favorable outcome for a former servicemember.

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