CONDITIONAL DISCHARGES AND ELIGIBILITY FOR VA COMPENSATION BENEFITS

A look at the past, present, and future of 38 U.S.C. § 101(18) and 38 C.F.R. § 3.13(c)
ROADMAP OF DISCUSSION

- Current law and definitions
- History of the law
- Special considerations for Veterans of specific eras
ACKNOWLEDGMENT

• Many of the ideas discussed in this presentation were derived from

BEYOND “T.B.D.”: UNDERSTANDING VA’S EVALUATION OF A FORMER SERVICEMEMBER’S BENEFIT ELIGIBILITY FOLLOWING INVOLUNTARY OR PUNITIVE DISCHARGE FROM THE ARMED FORCES, by Major John W. Booker, Major Evan R. Seamone, & Ms. Leslie C. Rogall
VETERAN STATUS

• Under 38 U.S.C. § 1110, only veterans are entitled to disability compensation

• 38 U.S.C. § 101(2) – defines “veteran”
  ▫ A person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable

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“DISCHARGED OR RELEASED”

38 U.S.C. § 101(18) – defines “discharge or release”

- The satisfactory completion of the period of active . . . service for which the a person was obligated at the time of entry to service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable
“DISCHARGED OR RELEASED”

• In English – if you reenlisted or had another “enlistment,” and the character of your service was not a bar to VA benefits at the time that you would have been discharged but for the reenlistment or other “enlistment,” that counts as a period of service separate and distinct from the reenlistment or other “enlistment”
  ▫ What is another “enlistment” you ask? We’ll get to that...
“DISCHARGED OR RELEASED”

- 38 C.F.R. § 3.13(c) – VA’s regulation
  - Provides that a “conditional discharge” may be viewed as an “unconditional discharge” in certain circumstances

- The term “conditional discharge” really is a misnomer since vet isn’t actually discharged at all

- Although in reenlistment cases, vet may have a DD 214 that states that the discharge is for the sole purpose of immediate reenlistment
“DISCHARGED OR RELEASED”

Must meet three requirements under 38 C.F.R. § 3.13(c):

- The person served in active . . . service for the period of time the person was obligated to serve at the time of entry into service

- The person was not discharged or released . . . at the time of completing that period of obligation due to an intervening enlistment or reenlistment AND
“DISCHARGED OR RELEASED”

- Must meet three requirements under 38 C.F.R. § 3.13(c) (continued):
  - The person would have been eligible for discharge or release under conditions other than dishonorable at that time . . .
“DISCHARGED OR RELEASED”

• In English:
  ▫ You finished the period of service for which you originally signed up
  ▫ The only reason that you were not discharged after you finished that period of service is because you reenlisted or had another “enlistment” AND
  ▫ You would not have been barred from VA benefits had you been discharged at that time
“INTERVENING ENLISTMENT”

• What is an “intervening enlistment”?  
  ▫ Not clear – not defined anywhere in statutes or regulations

  ▫ Possibilities:
    • Involuntary extension
    • Stop Loss
ELIGIBLE FOR DISCHARGE UNDER CONDITIONS OTHER THAN DISHONORABLE

- This is factual finding VA makes in first instance
  - VA will look to see whether the conduct that resulted in the dishonorable discharge began before the first period was completed
    - Example – If vet repeatedly violated UCMJ before finishing his/her original period of service, VA will likely find that vet engaged in willful and persistent misconduct and was therefore ineligible for honorable discharge
EXAMPLE

• Vet enlisted in the Army for a 3-year term on 9/30/1965

• On 3/10/67, vet was honorably discharged for the sole purpose of immediate reenlistment

• Between 5/1/67 and 9/30/68, vet violated the UCMJ six times

• Vet discharged for misconduct on 7/16/69
EXAMPLE (continued)

• VA will likely find that 38 C.F.R. § 3.13(c) does not apply, and the dishonorable discharge applies to the entire period from 9/3/65 through 7/16/69

• The six UCMJ violations prior to the end of his original 3-year enlistment likely constitute willful and persistent misconduct
EXAMPLE (continued)

• Therefore, VA will likely find that he was not eligible for a discharge under conditions other than dishonorable at the time that his original 3-year enlistment would have ended
HISTORY

• Before 1977, you could only have one period of service for VA compensation purposes
  ▫ Didn’t matter if you reenlisted or your enlistment was extended
  ▫ If you were discharged under dishonorable conditions years after completing the period you initially signed up for, that character of discharge was applied to your entire period of service
  ▫ Didn’t matter how good your service was before acts leading to dishonorable discharge
HISTORY

• Congress saw that potentially created unfair situation where veteran was denied VA benefits even though he/she had honorable service for the period that he/she initially signed up for.

• In 1977, Congress amended 38 U.S.C. § 101 to include language recognizing so-called “conditional discharges”.

• In 1978, VA issued 38 C.F.R. § 3.13(c)
HISTORY

• This means that veterans who had conditional discharges and filed claims prior to 1977 that were denied due to character of discharge may now be eligible for VA compensation benefits under the 1977 amendments
SPECIAL CONSIDERATIONS - KOREAN WAR VETERANS

• President Truman ordered the military into Korea on June 27, 1950
• On July 27, 1950, Congress passed a law allowing the President to extend *all* enlistments that were scheduled to expire before July 27, 1951 for one year
• On June 19, 1951, Congress passed a law allowing 1-year extensions of *all* enlistments that had not previously been extended and were set to expire before July 1, 1953
SPECIAL CONSIDERATIONS - KOREAN WAR VETERANS

• So many Korean War veterans had their enlistments involuntarily extended by a year
  ▫ The purpose behind the extensions were to keep the numbers of the largely-volunteer force high during the conflict

• A Korean War veteran’s DD 214 should indicate whether he was subject to an involuntary extension under either law
SPECIAL CONSIDERATIONS - KOREAN WAR VETERANS

• Advocates should argue that these involuntary extensions constitute “intervening enlistments” under 38 C.F.R. § 3.13(c)
  ▫ Should be considered as such since the 1-year involuntary extension can’t be a period of service that the veteran was obligated to serve at the time of enlistment
SPECIAL CONSIDERATIONS - KOREAN WAR VETERANS

• Potential problem: If the veteran’s enlistment contract mentions possibility of an involuntary extension, it may be argued that the extension was indeed included in the period vet was obligated to serve at time of enlistment
  ▫ In many cases, the Korean War vet’s personnel records were destroyed in the 1973 NPRC fire, so advocates should argue that without that contract, vet must be accorded the benefit-of-the-doubt
In 1984, Congress passed a standing law that authorized the President to extend enlistments. Unlike the Korean War-era legislation, the 1984 law did not specify that the extensions must be for only a certain period of time or that the extensions must occur before a certain date. Like the Korean War-era legislation, the 1984 law was meant to prevent the loss of military personnel during a crisis.
SPECIAL CONSIDERATIONS - GULF WAR/OIF/OEF VETERANS

• The extension program created by the 1984 law is commonly known as “Stop Loss”
• Stop Loss was first used during the Persian Gulf War
• Was also used during the Kosovo Air Campaign
• However, was used the most before 2009 during OIF and OEF
  ▫ In 2009, Defense Secretary Gates ordered the military to begin phasing out the use of Stop Loss
• The Army used Stop Loss more than any other service branch
### TABLE - 2008 ARMY STOP LOSS TOTALS

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<th>MONTH</th>
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<th>NATIONAL GUARD</th>
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SPECIAL CONSIDERATIONS - GULF WAR/OIF/OEF VETERANS

- Generally, Stop Loss was applied when a service member’s enlistment was set to expire during any of the following time periods:
  - Up to 90 days before the service member’s unit was to deploy
  - During deployment
  - Up to 90 days after the service member’s deployment ended

- Theoretically, under Stop Loss, a service member’s deployment could be extended for 18 months
SPECIAL CONSIDERATIONS - GULF WAR/OIF/OEF VETERANS

• EXAMPLE
  ▫ Enlistment scheduled to expire on 7/31/2008
  ▫ Unit scheduled to deploy for 12 months on 10/30/2008
  ▫ Enlistment would be extended until 1/30/2009
    • Entire deployment plus 90 days
      • Post-deployment 90 days intended to assist service member in transitioning back to the civilian community
SPECIAL CONSIDERATIONS - GULF WAR/OIF/OEF VETERANS

• Advocates should argue that an involuntary Stop Loss extension is an “intervening enlistment” under 38 C.F.R. § 3.13(c)
  ▫ Should argue that the Stop Loss extension was not included in the period of service that the veteran agreed to serve at the time of enlistment
• POTENTIAL PROBLEM: As of 2006, the law requires that the military clearly explain the Stop Loss program in all enlistment contracts.

Enlistment contracts typically read as follows:

The President may suspend any provision of law relating to my promotion, retirement, or separation from the Armed Forces if he or his designee determines I am essential to the national security of the United States. Such an action may result in an extension, without my consent, of the length of service specified in this agreement. Such an extension is often called a “stop-loss” extension.
SPECIAL CONSIDERATIONS - GULF WAR/OIF/OEF VETERANS

- VA could say that because this language is in the enlistment contract, the vet signed up to serve any Stop Loss extension at the time of enlistment.
  - Advocates should argue that the focus should be on the period of time specified in the contract, and not some unspecified potential extension.
EXAMPLE

• Vet enlists for an 8-year period of service on 9/12/2001

• Vet’s enlistment is set to expire on 9/11/2009

• Vet’s unit is scheduled to deploy to Iraq for the third time on 11/1/2009 for 12 months

• Stop Loss is applied to extend vet’s deployment until 1/20/2011
EXAMPLE (CONT.)

- Vet’s service history is clean until October 2009
- Vet is charged with several UCMJ violations in the month of October 2009
- Vet receives a discharge under other than honorable conditions on 12/1/2009
Advocate should argue that 38 C.F.R. § 3.13(c) applies, and that the period of service from 9/12/2001 until 9/11/2009 is a separate period of service for VA benefits purposes.

Since the conduct leading to the UCMJ charges did not occur until October 2009, it cannot be said that he was not eligible for an honorable discharge on 9/11/2009.
EXAMPLE (CONT.)

• So even if VA finds that his OTH discharge was for willful and persistent misconduct, he should still get VA benefits for disabilities caused by or arising out of his period of service from 9/12/2001 until 9/11/2009 (including his two prior deployments)
QUESTIONS?