

Fiduciary Appeal Higher-Level Review	<i>Department of Veterans Affairs</i> <i>Pension and Fiduciary Service</i>	Date
Name of Veteran	Name of Beneficiary	VA File Number

Issue:

Appeal the Hub Manager's misuse determination under § 13.400.

Misuse Process	Response
If the misuse involved annual accountings, were the accounting periods appropriately solicited?	Y/N
Was the misuse investigation of record?	Y/N
Did the misuse investigation include contact with all relevant parties, attempts to contact relevant parties, and demonstrate due diligence, where applicable?	Y/N
Did the misuse determination identify the entire period of misuse?	Y/N
Was the fiduciary removed before completion of the misuse determination, if misuse found?	Y/N
Was the misuse decision based on all information of record at the time of the misuse determination?	Y/N
Were all accountings received and approved before a finding of no misuse completed?	Y/N
Was all income identified and considered when determining the misuse amount, if applicable?	Y/N
Was all evidence of record used to determine the appropriate misuse amount?	Y/N
Was the misuse determination signed by the Fiduciary Hub Manager or appropriate designee?	Y/N

EVIDENCE:

(Detail all evidence relative to the issues considered. In the case of a failure to submit an annual accounting, all attempts to obtain the accounting must be provided as evidence. All evidence relating to the issue on appeal must be documented in this section. If the prompt does not apply, delete it. If there is no prompt for the evidence, add it in the following format: Evidence, any pertinent description, and date MONTH DD, YYYY.)

- Field examination report, dated [MONTH DD, YYYY (field examination appointing the fid)].
- VA Form 21P-4703, signed by [FID NAME], dated [MONTH DD, YYYY].
- Subsequent field examination report, dated [MONTH DD, YYYY].
- Letter requesting the annual accounting for the period ending, [MONTH DD, YYYY], dated [MONTH DD, YYYY].
- Record of telephone call to the fiduciary requesting the accounting for the period ending [MONTH DD, YYYY], dated [MONTH DD YYYY].
- Accounting received for period ending [MONTH DD, YYYY], dated [MONTH DD, YYYY].

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- Letter rejecting accounting for period ending [MONTH DD YYYY], dated [MONTH DD, YYYY].
- Record of telephone call from [PERSON CALLED] alleging misuse of the beneficiary's funds, dated [MONTH DD, YYYY].
- Record of the written allegation received from [PERSON], dated [MONTH DD, YYYY].
- Misuse Allegation Memorandum, dated [MONTH DD, YYYY].
- Misuse Investigative Report, dated [MONTH DD, YYYY].
- Misuse Determination, dated [MONTH DD, YYYY].
- Request for Higher-level review from [BENEFICIARY NAME, or GUARIDAN NAME], dated [MONTH DD, YYYY].

Decision:

VA [correctly/incorrectly] found misuse by your fiduciary, [Mr./Ms. FIDUCIARY NAME] based on 38 CFR 13.400. Therefore, your appeal is [granted/denied].

Statutes, Regulations and Court Decisions:

38 U.S.C. § 5502(a). Payments to and supervision of fiduciaries.

(a)(1) Where it appears to the Secretary that the interest of the beneficiary would be served thereby, payment of benefits under any law administered by the Secretary may be made directly to the beneficiary or to a relative or some other fiduciary for the use and benefit of the beneficiary, regardless of any legal disability on the part of the beneficiary. Where, in the opinion of the Secretary, any fiduciary receiving funds on behalf of a Department beneficiary is acting in such a number of cases as to make it impracticable to conserve properly the estates or to supervise the persons of the beneficiaries, the Secretary may refuse to make future payments in such cases as the Secretary may deem proper.

(2) In a case in which the Secretary determines that a commission is necessary in order to obtain the services of a fiduciary in the best interests of a beneficiary, the Secretary may authorize a fiduciary appointed by the Secretary to obtain from the beneficiary's estate a reasonable commission for fiduciary services rendered, but the commission for any year may not exceed 4 percent of the monetary benefits under laws administered by the Secretary paid on behalf of the beneficiary to the fiduciary during such year. A commission may not be authorized for a fiduciary who receives any other form of remuneration or payment in connection with rendering fiduciary services for benefits under this title on behalf of the beneficiary.

38 U.S.C. § 6101. Misappropriations by Fiduciaries.

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(a) Whoever, being a fiduciary (as defined in section 5506 of this title) for the benefit of a minor, incompetent, or other beneficiary under laws administered by the Secretary, shall lend, borrow, pledge, hypothecate, use, or exchange for other funds or property, except as authorized by law, or embezzle or in any manner misappropriate any such money or property derived therefrom in whole or in part and coming into such fiduciary's control in any manner whatever in the execution of such fiduciary's trust, or under color of such fiduciary's office or service as such fiduciary, shall be fined in accordance with title 18, or imprisoned not more than five years, or both.

(b) Any willful neglect or refusal to make and file proper accountings or reports concerning such money or property as required by law shall be taken to be sufficient evidence prima facie of such embezzlement or misappropriation.

38 U.S.C. § 6106. Misuse of Benefits by Fiduciaries.

(a) Fee Forfeiture in Case of Benefit Misuse by Fiduciaries. A fiduciary may not collect a fee from a beneficiary for any month with respect to which the Secretary or a court of competent jurisdiction has determined that the fiduciary misused all or part of the individual's benefit, and any amount so collected by the fiduciary as a fee for such month shall be treated as a misused part of the individual's benefit.

(b) Misuse of Benefits Defined. For purposes of this chapter, misuse of benefits by a fiduciary occurs in any case in which the fiduciary receives payment, under any of laws administered by the Secretary, for the use and benefit of a beneficiary and uses such payment, or any part thereof, for a use other than for the use and benefit of such beneficiary or that beneficiary's dependents. Retention by a fiduciary of an amount of a benefit payment as a fiduciary fee or commission, or as attorney's fees (including expenses) and court costs, if authorized by the Secretary or a court of competent jurisdiction, shall be considered to be for the use or benefit of such beneficiary.

(c) Regulations. —The Secretary may prescribe by regulation the meaning of the term “use and benefit” for purposes of this section.

38 C.F.R. § 13.280 Accountings.

(a) General. Except as prescribed in paragraph (d) of this section, a fiduciary for a beneficiary must submit to the fiduciary hub with jurisdiction an annual accounting regarding the VA benefit funds under management by the fiduciary for the beneficiary if:

- (1) The amount of VA benefit funds under management for the beneficiary exceeds \$10,000;
- (2) The fiduciary deducts a fee authorized under § 13.220 from the beneficiary's account;

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(3) The beneficiary is being paid VA compensation benefits at a total disability rating (100 percent), whether schedular, extra-schedular, or based on individual unemployability; or

(4) The Hub Manager determines an accounting is necessary to ensure the fiduciary has properly managed the beneficiary's funds.

(b) **Scope of accounting.** For purposes of this section, accounting means the fiduciary's written report regarding the income and funds under management by the fiduciary for the beneficiary during the accounting period prescribed by the Hub Manager. The accounting prescribed by this section pertains to all activity in the beneficiary's accounts, regardless of the source of funds maintained in those accounts. An accounting consists of:

- (1) A beginning inventory or account balance,
- (2) An itemization of income,
- (3) An itemization of expenses,
- (4) An ending inventory or account balance,
- (5) Copies of financial institution documents reflecting receipts, expenditures, and beginning and ending balances, and
- (6) Receipts, when required by the Hub Manager.

(c) **Submission requirements.** Fiduciaries must submit annual accountings to the fiduciary hub as follows:

- (1) The fiduciary must submit accountings on the appropriate VA form not later than 30 days after the end of the accounting period prescribed by the Hub Manager.
- (2) The fiduciary must submit a corrected or supplemental accounting not later than 14 days after the date of VA notice of an accounting discrepancy.

(d) **Exceptions.** The provisions of this section that generally require the submission of an annual accounting do not apply to a fiduciary who is:

- (1) The beneficiary's spouse;
- (2) A chief officer of a Federal institution;
- (3) A chief officer of a non-VA facility receiving benefits for a beneficiary institutionalized in the facility and:
 - (i) The beneficiary's monthly care, maintenance, and personal use expenses equal or exceed the amount of the beneficiary's monthly VA benefit; and
 - (ii) The amount of VA benefit funds under management by the fiduciary does not exceed \$10,000; or

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(4) A fiduciary who receives benefits on behalf of a beneficiary and both permanently resides outside of the United States or in the Commonwealth of Puerto Rico or the Republic of the Philippines, and the fiduciary was appointed outside of the United States or in the Commonwealth of Puerto Rico or the Republic of the Philippines.

(e) Failure to comply with accounting requirements. The Hub Manager will treat any willful neglect or refusal to file proper accountings as prima facie evidence of embezzlement or misappropriation of VA benefits. Such evidence is grounds for starting a misuse investigation under § 13.400.

(Authority: 38 U.S.C. 501, 5502, 5509, 6101)

38 C.F.R. § 13.400 Misuse of benefits.

(a) Definition of misuse. Misuse of benefits by a fiduciary occurs in any case in which the fiduciary receives payment of benefits for the use and benefit of a beneficiary and the beneficiary's dependents, if any, and uses any part of such payment for a use other than the use and benefit of the beneficiary or the beneficiary's dependents. For the purpose of this section, use and benefit means any expenditure reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary's dependents. Such expenditures may include the fiduciary's efforts to improve the beneficiary's standard of living under rules prescribed in this part.

(b) Misuse determinations. Upon receipt of information from any source regarding possible misuse of VA benefits by a fiduciary, the Hub Manager may, upon his or her discretion, investigate the matter and issue a misuse determination in writing. This decision will:

- (1) Identify the beneficiary,
- (2) Identify the fiduciary,
- (3) State whether the fiduciary is an individual fiduciary serving 10 or more beneficiaries or a corporation or other entity serving one or more beneficiaries,
- (4) Identify the source of the information,
- (5) Describe in detail the facts found as a result of the investigation,
- (6) State the reasons for the Hub Manager's determination regarding whether the fiduciary misused any part of the beneficiary's benefit paid to the fiduciary, and
- (7) If the Hub Manager determines that the fiduciary did misuse any part of the beneficiary's benefit, identify the months in which such misuse occurred.

(c) Notice. The Hub Manager will provide written notice of the misuse determination prescribed in paragraph (b) of this section, including a copy of the Hub Manager's written decision, an explanation regarding the reconsideration procedure prescribed in paragraph (d) of this section, and the beneficiary's right to appeal under § 13.600, to:

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- (1) The fiduciary;
- (2) The beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agents;
- (3) The court of jurisdiction if the fiduciary is also the beneficiary's court-appointed guardian and/or conservator; and
- (4) The Director of the Pension and Fiduciary Service.

(d) Finality and reconsideration of misuse determinations.

(1) The Hub Manager's misuse determination is a final decision, unless:

- (i) The Hub Manager receives a written request for reconsideration from the fiduciary or the beneficiary not later than 30 days after the date that the Hub Manager mailed notice of his or her misuse determination; or
- (ii) The Hub Manager receives a notice of disagreement from the beneficiary not later than 1 year after the date that the Hub Manager mailed notice of his or her misuse determination.

(2) The fiduciary or the beneficiary may submit additional information pertinent to reconsideration of the misuse determination and not previously considered by the Hub Manager, provided that the additional information is submitted with the written reconsideration request.

(3) The Hub Manager will close the record regarding reconsideration at the end of the 30-day period described in paragraph (d)(1)(i) of this section and furnish a timely request submitted by the fiduciary or the beneficiary, including any new information, to the Director of the VA Regional Office with jurisdiction over the fiduciary hub for a final decision.

(4) In making the misuse determination on reconsideration, the Regional Office Director's decision will be based upon a review of the information of record as of the date of the Hub Manager's misuse determination and any new information submitted with the request. The decision will:

- (i) Identify the beneficiary,
- (ii) Identify the fiduciary,
- (iii) Identify if the fiduciary is also the beneficiary's court-appointed guardian or conservator,
- (iv) Identify the date of the Hub Manager's prior decision,
- (v) Describe in detail the facts found as a result of the Director's review of the Hub Manager's decision and any new information submitted with the reconsideration request, and

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(vi) State the reasons for the Director's final decision, which may affirm, modify, or overturn the Hub Manager's decision.

(5) The Hub Manager will provide written notice of the Regional Office Director's final decision on reconsideration to:

- (i) The fiduciary,
- (ii) The beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent;
- (iii) The court, if the fiduciary is also the beneficiary's court-appointed guardian or conservator; and
- (iv) The Director of the Pension and Fiduciary Service.

(e) Reporting of misuse. Except as prescribed in § 1.204 of this chapter, which requires VA management officials to promptly report possible criminal matters involving felonies to the VA Office of Inspector General, reporting of misuse cases will occur as follows:

(1) Not later than 30 days after a final determination is made under paragraph (d) of this section that a fiduciary has misused VA benefits, the Director of the VA Regional Office who has jurisdiction over the fiduciary hub will notify the VA Office of Inspector General for purposes of any further action that the Inspector General deems appropriate under separate authority, and the court of jurisdiction if the fiduciary is also the beneficiary's court-appointed legal guardian and/or conservator.

(2) For purposes of application of § 13.410 regarding reissuance and recoupment of benefits, the Office of Inspector General will advise the Director of the Pension and Fiduciary Service of any final decision regarding prosecution of a fiduciary who misused VA benefits and any final judgment of a court in such a prosecution not later than 30 days after the decision is made or judgment is entered.

(Authority: 38 U.S.C. 501, 5502, 6106)

Signature of Reviewer, Position

Date