

**Pension & Fiduciary Service**

**Inquiry Response Highlights**

**August 2020**

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# **Pension Management Center Related Inquiries**

# COLA Withholding on Child's Hardship Exclusion

**Target Audience**: PMC Claims Processors

**Question**: The PMC would like to request guidance on how to properly process the Cost of Living Adjustment Withholding within VBMS-A under M21-1 V.iii.1.H.2.c for cases where there is a child’s hardship exclusion included. The issue we are seeing is that the COLA protection procedures per M21-1 V.iii.1.H.2.c. will not work (withholding under Pension/Continued Rate COLA) once the hardship exclusion increased the IVAP, even without updating SSA income. In order to work around this issue, we used “Add to Gross Rate” in order to protect the COLA.

**P&F Response**: There are rare instances where replacing the gross rate is the only viable option to pay the correct rate. P&F Service agrees with your statement that the “add to gross rate” work around is needed for the example provided. M21-1, Part V, Subpart iii, 1.H.2.c will be updated to reflect this guidance.

As a reminder, the M21-1, Adjudication Procedures Manual, serves as a general guide for processing and adjudicating claims. It is a set of general guidelines designed to provide procedures for the most common situations that arise in the claims process and is not designed to provide policies or procedures for every possible scenario. Users need to apply guidance in the M21-1 on a case-by-case basis, using sound judgment based on the law and basic adjudication principles.

**Result:** M21-1, Part V, Subpart iii, 1.H.2.c will be updated to reflect this guidance.

# Willful Misconduct

**Target Audience**: PMC Claims Processors

**Background:** It appears the PMCs interpret 38 CFR 3.301 differently as it relates to willful misconduct determination requirements when it involves drug and/or alcohol use. The St. Paul is seeking further clarification as to when a willful misconduct determination must be completed.

**Question 1**:  The interpretation of 38 CFR 3.301, is that a service-connected condition cannot lead to an act of willful misconduct. A death from drug and/or alcohol abuse does not automatically require a willful misconduct determination when the Veteran has a history of service-connected mental health and substance use, is this correct?

**P&F Response 1:** P&F does not concur with this broad interpretation of 38 CFR 3.301.  The regulation states that direct service-connection (SC) may only be granted when a disability or cause of death was incurred or aggravated in line of duty, and not the result of the Veteran’s own willful misconduct or the result of his or her abuse of alcohol or drugs. (Authority: 38 USC 105).  The governing regulation for granting SC death is 38 CFR 3.312.  Claims processors should apply guidance provided in the M21-1 on a case-by-case basis, using sound judgment based on the law and basic adjudication principles.

**Question 2:**  It is understood that there are situations requiring a willful misconduct determination; however, not all cases that involve a death from alcohol or drug use require this determination, is this correct?

**P&F Response 2:**  That is correct, not all cases that involve alcohol or drug use require a willful misconduct determination.  M21-1 Part III, Subpart v,1.D.1.c provides circumstances when willful misconduct determinations should not be made.  It states: In general, accept service department findings of no misconduct as conclusive unless there is a preponderance of evidence to the contrary.  The principles stated in M21-1, III.v.1.D.6.c regarding circumstances in which line of duty (LOD) should not routinely be questioned also apply to willful misconduct. 38 CFR 3.301 differentiates between when to require a willful misconduct determination in cases that involve a death from alcohol or drug use, stating that an isolated and infrequent use of drugs by itself will not be considered willful misconduct; however, the progressive and frequent use of drugs to the point of addiction will be considered willful misconduct. Further, organic diseases and disabilities which are a secondary result of the chronic use of alcohol or drugs will not be considered willful misconduct.

**Question 3:** We are seeking to confirm rating activity is necessary by an RVSR when making this service-connected death determination prior to a VSR completing a willful misconduct administrative decision.  St. Paul PMC is adhering to M21-1 III.v.1.D.6.b. and M21-1, Part III, Subpart v, 1.D.4.e.  It appears PMCs differ within this area and do not require rating activity prior to an administrative determination.

**P&F Response 3:** M21-1 III.v.1.D.4.e describes the circumstances that require rating activity for willful misconduct determinations involving substance abuse.  P&F does not concur with your opinion that rating activity is necessary for all willful misconduct administrative decisions.

As a reminder, the M21-1 serves as a general guide for processing and adjudicating claims is not designed to provide policies or procedures for every possible scenario.  Users will need to apply guidance in the M21-1 on a case-by-case basis, using sound judgment based on the law and basic adjudication principles.

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**Result:** Clarification provided.

# Questions for P&F Service

**Target Audience**: PMC Claims Processors

**Background:** The St. Paul PMC would like to request additional guidance on Nehmer claims and associated payouts which are not the jurisdiction of PMCs.

**Question 1**: PMCs receive quarterly emails from Mr. Nichols instructing us to process Nehmer claims for payees identified by the NVLSP group.  Please clarify if we should request reassignment of these tasks to the Philadelphia VSC, based on the OFO-NWQ routing rules implemented on January 6, 2020.

**P&F Response 1**: Please reassign Nehmer claims for payees identified by the NVLSP group per the OFO-NWQ routing rules implemented on January 6, 2020.  Mr. Nichols has been instructed not to forward these tasks to the PMCs.

**Question 2**:

1. M21-1 VIII.5.17.g and h, applies to *claims* pending at death and both references list the exception for inextricably intertwined issues.  M21-1 VIII.5.17.e applies to *legacy appeals* pending at death and does not list an exception for inextricably intertwined issues.  Based on the omission of the exception in M21-1 VIII.5.17.e, and the instructions listed in step 5 to process the EP 140/020, we interpret this to mean the EP 140/020 should *not* remain pending.  Please clarify the instructions in M21-1 VIII.5.17.e if our interpretation is incorrect.
2. If the exceptions listed in M21-1 VIII.5.17.g and h also apply to legacy appeals, we recommend the following process:
   1. If the EP 140/020 is inextricably intertwined legacy appeal pending with a PMC:
      1. Add tracked item to EP 140/020 with (at least) a 60-day suspense and allow EP 140/020 to recall
      2. When distributed to a PMC, continue to extend the suspense until legacy appeal is processed or moved into historical status
      3. Manually request the EP 140/020 when legacy appeal is ready to process
   2. If the EP 140/020 is inextricably intertwined with a legacy appeal pending with BVA:
      1. Add tracked item to EP 140/020 with (at least) a 60-day suspense and allow EP 140/020 to recall
      2. When distributed to a PMC
         1. If the Board has decided the appeal, process the EP 140/020
         2. If the Board has not decided the appeal, extend the suspense and allow EP 140/020 to recall

**P&F Response 2:** The exception noted in M21-1 Part VIII, 5.17.g and h also applies to legacy appeals and AMA BVA appeals.  The manual will be updated to include the exception in M21-1 Part VIII, 5.17.e and f.

**Result:** Clarification provided.

# **Fiduciary HUB Related Inquiries**

# Questions Regarding CBI Mitigation Memo Policy

**Target Audience**: Fiduciary Hub personnel

**Background:** P&F provided the Fiduciary Hubs a Policy Memo titled CLEAR Batch Run Field Action Clarification and Interim Guidance on Criminal

Background Inquiries for Proposed Fiduciaries.

The memo contained a CLEAR Batch Run section which contained the following guidance on Spouse fiduciaries:

* Spouse fiduciaries with a red risk score due to verifiable joint bankruptcy recorded on the CBI.
  + The case can be mitigated if
    - the beneficiary is a co-petitioner on the bankruptcy, and
    - removal of the score associated with the bankruptcy would result in a yellow risk score or better.
* Spouse fiduciaries with a red or yellow risk score and the VA benefit is 10% or at the $90 rate.
  + All spouse fiduciary cases with this benefit type can be mitigated regardless of the risk score.

**Question 1**:  Is the above cited guidance also applicable to non-CLEAR Batch report standard IA/SIA cases?

**P&F Response 1**:  Yes, the above cited guidance is applicable to non-CLEAR Batch report standard IA/SIA cases.

**Question 2**:  Is the above cited guidance only applicable to CLEAR Batch report cases?

**P&F Response 2**:  No, the above cited guidance is not only applicable to CLEAR Batch report cases

**Result:** Clarification provided.

# **P&F Service Information**

# P&F Service Contact Information

Policy and Procedure questions from the PMCs or Fiduciary Hubs should be submitted to P&F Service at [VAVBAWAS/CO/P&F POL & PROC](mailto:PFPOLPROC.VBACO@va.gov) by the Quality Review coach or PMC/Fiduciary HUB Division Management.

P&F Service would like to remind you that all inquiries sent to the Policy and Procedures Mailbox must include the references previously researched, key words or phrases used to search in CPKM. P&F Service is available to assist when there is confusion about a certain policy or procedure, however, PMCs and Fiduciary Hubs are required to research and attempt to resolve the issue before sending the question to the P&F Service Policy and Procedures Mailbox. Additionally, including all words used to search topics in CPKM will allow P&F Service to add those search words into CPKM if they were not already in the metadata for a certain manual reference.

Training and Quality questions can be directed to: [VAVBAWAS/CO/P&F TNG QUAL OVRST](mailto:PFTNGQUALOVRST.VBACO@va.gov).

Systems-related questions can be directed to: [VAVBAWAS/CO/P&F BUS MGMT](mailto:PFBUSMGMT.VBAVACO@va.gov).

# Disclaimer

Please note that all responses provided are for informational purposes only. If changes to the M21-1 Adjudication Procedures Manual or Fiduciary Program Manual (FPM) are needed, they are made in conjunction with the response. The M21-1 and FPM supersede any inquiry response.