DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, DC 20420

Date: August 2, 2024

In Reply Refer To:
Policy Letter 24-01

Executive Director (00)

All VBA Regional Offices, Decision Review Operations Centers, and Pension Management Centers

Subject

Guidance for processing claims involving character of discharge determinations.

Purpose

This policy letter provides information and claims processing guidance to Regional Offices (ROs), Decision Review Operations Centers (DROCs), and Pension Management Centers (PMCs) when making COD determinations for former Service members (FSMs). This guidance also applies to survivor benefit claims when a character of discharge (COD) determination is needed.

Interim guidance was released to the field on April 26, 2024. Effective August 5, 2024, that document is rescinded, and this policy letter and its appendices are applicable until further notice.

Note: These temporary procedures supersede any conflicting procedure-manual (M21-1) guidance, including - but not limited to - the following citations:

- M21-1 X.iv.1.A.1.l (example only)
- M21-1 X.iv.1.A.1.k (do not use this template)
- M21-1 X.iv.1.A.2.a
- M21-1 X.iv.1.A.3.a-e

Background

VA's final rule (AQ95), *Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge*, became effective on June 25, 2024. The final rule:

- Removes the bar for aggravated homosexual acts.

- Refines the definition of willful and persistent misconduct for more objective application.
- Adds a compelling-circumstances exception and outlines factors that can mitigate the regulatory bars of moral turpitude and willful-and-persistent misconduct; and
- Provides additional compelling circumstances that can mitigate the statutory bar of Absent Without Leave (AWOL) for 180 days or more.

In addition to the changes in the regulatory text, the preamble to the final rule clarifies evidentiary considerations for when regulatory bars should be applied:

- The regulatory bars shall only be applied when they are clearly supported by the military record.
- The benefit of the doubt will be resolved in favor of the FSM under the Department of Veterans Affairs' (VA's) authority in 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102.
- The regulatory bars shall only be applied if the misconduct underlying the bar formed the basis of the discharge.
    - If the military decided that the misconduct did not preclude continued service, then it also should not preclude benefits eligibility. This limitation will prevent conduct unrelated to the basis of the discharge from contributing to a bar to benefits.

***Note*:** Although not specifically stated in the final rule, the above evidentiary considerations apply to both regulatory AND statutory bars.

While drafting the proposed regulation as well as the final rule, VA continuously engaged with the Department of Defense (DoD), multiple Veterans Service Organizations, and various Veteran advocate groups and considered their feedback in the drafting of the final regulation.

VA recognizes that there is a relationship between dishonorable service and VA benefits eligibility, as reflected in Congress's enactment of 38 U.S.C. § 101(2). VA also recognizes that character-of-service determinations remain DoD's responsibility, and upgrades are available from the Military Departments. However, VA has a separate and distinct purpose to determine eligibility for Veterans' benefits. Even if DoD has a different approach to or framework for characterizing the service of its FSMs, VA maintains its authority to determine COD for purposes of VA benefits eligibility.

The final rule respects the Military Departments' concerns regarding the impact changes that the COD-determination process would have on their ability to maintain good order and discipline among their troops. VA sought to strike a balance between bestowing benefits to those who have earned them, even those whose service was not without blemish, and limiting benefits for those whose service involved serious misconduct.

Overall, under this new rule, more FSMs will be eligible for benefits than under the prior 38 CFR 3.12(d). However, a favorable COD determination under this rule does not

result in blanket eligibility for all VA benefits or a change in DoD's discharge characterization. Rather, certain VA benefits have specific eligibility requirements as it pertains to COD. For example, education assistance under the Montgomery GI Bill program or Post-9/11 GI Bill program is available only for periods of service resulting in an "honorable" discharge (*see* 38 U.S.C. §§ 3011(a)(3)(B) and 38 C.F.R. § 3.315(c)(1). Therefore, FSMs who do not receive an Honorable discharge from DoD are ineligible for the VA education benefit.

Moreover, while relaxing the bars to eligibility, this final rule does not extend VA benefits eligibility to all FSMs. FSMs who do not meet the criteria for benefits eligibility may be entitled to certain critical benefits to address the harms caused by their military service, such as mental health and substance use care, emergent suicide care, and medical care in emergency situations, as discussed below.

Terminology

VA received feedback from stakeholders (including Veterans themselves) that the term "dishonorable for VA purposes" may be triggering, has negative connotations, and is somewhat ambiguous because it can be interpreted in multiple ways depending on the context. Based on this feedback, VA will begin using new terminology in our COD determination process, including in COD letters and in the decision selections in VBMS-A. However, because these changes in terminology will require various system updates, there will be an interim period where the old terminology will still be present in certain systems and letters. In the end, the updated decision selections in VBMS-A will be more granular, identifying the specific bar applied and when compelling circumstances or an insanity determination were applied. While VA works through the required system updates, please refer to the following table, which compares the old terminology with the new terminology.

Old Terminology	New Terminology	Decision
Honorable for VA Purposes	Eligible Veteran	• No bar to benefits found, or • A statutory or regulatory bar would apply but for compelling circumstances 38 C.F.R. § 3.12(e) under or insanity causing discharge under 38 C.F.R. § 3.354.

Dishonorable for VA Purposes – Chapter 17 Eligible	Eligible FSM – Ch 17 only	A regulatory bar to benefits exists but the FSM is eligible to Ch 17 pursuant to 38 C.F.R. § 3.360.
Dishonorable for VA Purposes – Chapter 17	Ineligible FSM	A statutory bar or BCD with a regulatory bar.
Ineligible		Makes the FSM ineligible, even to Chapter 17.

Character of Discharge Determinations

To establish Veteran status – and basic eligibility for VA benefits that require Veteran status – an FSM must have had active military, naval, air, or space service (active service), and a discharge or release from that service "under conditions other than dishonorable." When a discharge for a period of service does not meet that standard, there is no basic eligibility to VA benefits requiring Veteran status based on that service. *See* M21-1 X.iv.1.A.1.a. ***Note*** that an FSM who does not attain Veteran status due to COD is potentially still eligible to Chapter 17 health care under 38 C.F.R. § 3.360. *See* M21-1 X.iv.1.B.1.

The chart below provides additional information on benefit eligibility based on various discharge characterizations.

Important:

- This chart summarizes how VA considers Character of Discharge in the administration of various benefit programs.
- Even with a less than honorable discharge, Veterans may be able to access some VA benefits. We encourage all Veterans to apply and allow VA to make an eligibility determination.
- A "Veteran" for VA purposes is an individual who has:
  - qualifying military service (type and length of service), and
  - a discharge or release under conditions other than dishonorable
- Certain benefits have length of service and other specific requirements in addition to the Character of Discharge.

Assessing whether COD is a barrier to basic eligibility to some or all VA benefits, and whether a formal administrative decision regarding COD must be issued, requires review of the procedural or factual posture and the characterization and reasons for the FSM's discharge, separation, or release from a period of active service provided by the service branch.

As noted in M21-1 X.iv.1.A.1.d, the issue of COD may be raised, and a COD determination may be necessary, in the following procedural postures:

- A claim is filed for Veterans Benefit Administration (VBA) benefits such as compensation or pension.
- A claim for benefits is filed with another VA administration such as the Veterans Health Administration (VHA).
- An FSM requests that VBA make a COD determination without filing a claim as authorized by 38 U.S.C. § 5303B.
- An FSM or survivor requests, or there are otherwise grounds for, revision of a previous final COD determination (grounds for revision include new and relevant evidence, clear and unmistakable error (CUE) or a change of law (M21-1 X.iv.1.A.1.r).

If the service branch characterizes service as "honorable" or "general – under honorable conditions" or issues an entry-level separation, claims processors should generally accept that there was a "discharge or release under conditions other than dishonorable" and a COD determination is not required. See M21-1 X.iv.1.A.1.f for exceptions. Conversely, when there is a discharge characterization listed in M21-1 X.iv.1.A.1.e, such as "other than honorable" (OTH), "bad conduct discharge" (BCD), and "dishonorable") or a separation reason is listed as a statutory bar to benefits a COD determination is generally necessary.

Note: In assessing whether a COD determination is required, there are numerous exceptions and other considerations. *See* M21-1, X.iv.1.A.1.d-g for a detailed discussion.

When a COD determination is required, it is documented as an administrative decision (see M21-1 X.v.1.C and M21-1 X.iv.1.A.1.b). An updated template for a COD administrative decision is included in this policy letter. The determination procedure consists of providing advance notice that a COD determination will be issued, developing for and analyzing discharge documents and all other records bearing on the facts and circumstances of the discharge, assessing whether the FSM's conduct for the period of service matches statutory and regulatory criteria defining bars to benefits and considering other criteria in M21-1 X.iv.1.A and B as applicable, and then completing and releasing an approved administrative decision (M21-1 X.iv.1.A.1.h). With the publication of the final rule, there are now six statutory bars and four regulatory bars to benefits. The revisions to the criteria for bars to benefits will be discussed further in this

policy letter below.

Removal of Aggravated Homosexual Acts Regulatory Bar

The final rule removes the bar for "homosexual acts involving aggravating circumstances or other factors affecting the performance of duty." Therefore, this bar can no longer be applied for COD determinations. However, while this is no longer a bar to benefits, some sexual misconduct may be associated with willful-and-persistent misconduct or moral turpitude (for more information see *Willful and Persistent Misconduct* and the *An Offense Involving Moral Turpitude* sections of this policy letter).

When considering associated misconduct under willful misconduct or moral turpitude, VA should still refer to the September 17, 2021, Secretary of VA memorandum guidance titled *Benefits Eligibility for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) Former Service Members Directive* (refer to Appendix G), which states that "VA adjudicators shall find that all discharged service members whose separation was due to sexual orientation, gender identity, or human immunodeficiency virus (HIV) status are considered 'Veterans' who are eligible for VA benefits; so long as the record does not implicate a statutory or regulatory bar to benefits. When evaluating the basis of discharge, VA adjudicators shall consider the claimant's statements asserting discharge was based on LGBTQ+ identity and/or HIV status may constitute sufficient evidence for purposes of demonstrating that there is no factual basis for a statutory or regulatory bar to benefits. When there is conflicting evidence, VA adjudicators must consider all evidence of record, but may, as appropriate in a case, find the claimant's lay statement more credible or probative than other evidence of record."

Biologically non-conforming gender identity; lesbian, gay, bisexual, non-binary, or other sexual identity or orientation; and positive HIV status, in and of themselves, are not disqualifying for VA purposes.

As explained in M21-1 X.iv.1.A.1.h, COD determinations are made based on all the evidence in VA's possession and claims processors must resolve any reasonable doubt in the favor of the claimant. Discharges for homosexuality, gender identity, or positive HIV status might not explicitly mention these as a basis, and development for facts and circumstances might not yield detailed information. In those cases, accept the claimant's statements or testimony regarding reasons for the discharge, if credible, and resolve any reasonable doubt in favor of the claimant.

For more information on how to address previous unfavorable decisions (to include those that previously applied this regulatory bar), see the *Previous Unfavorable Decision* section of this policy letter.

Application of the Regulatory and Statutory Bars and Consideration of Reasonable Doubt

When determining if a regulatory or statutory bar applies, claims processors must consider whether reasonable doubt applies. Per the existing regulation 38 C.F,R. § 3.102, it is VA's defined and consistently applied policy to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or ***any other point***, such doubt will be resolved in favor of the claimant.

Claims processors must consider reasonable doubt throughout the COD determination process when weighing evidence (M21-1, X.iv.1.A.1.h; X.v.1.C.2.a; V.ii.1.A.1.j; V.ii.1.A.5.d-f).

Claims processors may apply the bars ***ONLY*** if:

- The misconduct leading to the discharge is clearly supported by the military record (provided by military source).
- The evidence in favor of applying the bar outweighs the evidence against applying the bar, consistent with the facts shown in the case as described in 38 C.F.R. § 3.102; and
- Misconduct relating to the bar formed the basis for the discharge.

Claims processors may ***NOT*** apply the bars if:

- There is an approximate balance of positive and negative (equipoise) evidence as to whether to apply the bar (38 C.F.R. § 3.102); or
- The misconduct at issue is not clearly supported by military record or was not the basis for the discharge from service.
    - Reasonable doubt should be considered for this evidence as well.
    - Reasonable doubt should be considered for every element of the COD decision, not just the overall determination of whether a bar applies.

Discharge in lieu of trial by General Court-Martial

As stated in the proposed rulemaking, VA will replace the term "undesirable discharge" in current 38 C.F.R. § 3.12(d)(1) with "a discharge under other than honorable conditions or its equivalent" to conform to the terminology that has been used since 1977 (*see* Public Law 95-126 (1977)). VA also replaced the phrase "to escape" in current 38 C.F.R. § 3.12(d)(1) with "in lieu of" to conform to the terminology that service departments currently use and to avoid ascribing motivation or stigma to a FSM's decision to accept a discharge rather than to proceed to trial by a general court-martial. Under the updated language, this bar should only be explored if the discharge reason was "discharge in lieu of court-martial." Once that is determined, VA must find evidence in the military record that the FSM accepted the discharge under other-than-honorable conditions, or its equivalent, in lieu of trial by ***only*** a general court-martial.

Note: Evidence that the acceptance was in lieu of a summary or special court-martial is not a regulatory bar. If there is any question about whether a discharge was in lieu of general court-martial or a different kind of court-martial, VA will consider all appropriate records and apply reasonable doubt.

When an FSM was discharged in lieu of court-martial, but the evidence is unclear regarding the type of court-martial and this bar is not applied, claims processors should consider whether the misconduct leading to the discharge would fall under the moral turpitude or willful-and-persistent-misconduct regulatory bars.

Willful and persistent misconduct

As noted in the proposed rule, *willful misconduct* is already defined in 38 C.F.R. § 3.1(n) as "an act involving conscious wrongdoing or known prohibited action" that must involve "deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences."

To apply the bar, there must be evidence of *persistence* as follows:

- Instances of minor misconduct occurring within two years of each other; or
- An instance of minor misconduct occurring within two years of more serious misconduct; or
- Instances of more serious misconduct occurring within five years of each other.

No single instance of misconduct may support the application of the willful and persistent misconduct.

When assessing persistence, only instances of misconduct *found in the military record* which formed the basis for the discharge from service will be considered. If the misconduct is **not** the basis of the discharge, it may **not** be used to support the bar. If the evidence is unclear as to this point, consider reasonable doubt.

***Note*:** As noted in the final rule, VA now considers multiple offenses that originate from a single event or circumstance (*e.g.,* attempted robbery leading to fleeing and then leading to resisting arrest) as only one "instance" of misconduct.

Minor misconduct is defined as misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge (DD) **or** confinement for longer than one year if tried by general court-martial.

This information can be found in Appendix 12 of the Manual for Courts-Martial[1] (MCM) based on the article number as well as the title of the offense. The Maximum Punishment Chart in Appendix 12 is a quick reference for identifying the article, offense, discharge, and confinement requirements. Claims processors must always use the most

current version of the MCM.

***Example*:** If the offense was "drunk on duty," that would fall under Article 112: Drunkenness and other incapacitation offenses. This offense is found on page 585 of Appendix 12 of the Manual for Courts-Martial. Appendix 12 reflects that the maximum punishment for Article 112 is **not** a dishonorable discharge (which would be annotated "DD" in the discharge column) and **not** confinement for longer than one year if tried by GCM (the period of confinement is annotated under the confinement column as nine months (see snippet below). Thus, this particular offense **meets** the regulatory definition of **minor misconduct**. This analysis is required for each offense (if there are multiple).

[1] MCM (2024 ed) - TOC no index.pdf (defense.gov)

APPENDIX 12

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
	More than $1,000	DD, BCD	5 yrs.	Total
109a	Mail matter: Wrongful taking, opening, etc.	DD, BCD	5 yrs.	Total
110	Improper hazarding of vessel or aircraft			
	Willfully and wrongfully	Death, DD, BCD	Life[4]	Total
	Negligently	DD, BCD	2 yrs.	Total
111	Leaving scene of vehicle accident	BCD	6 mos.	Total
112	Drunkenness and other incapacitation offenses			
	Drunk on duty	BCD	9 mos.	Total
	Incapacitation for duty from drunkenness or drug use	None	3 mos.	2/3 3 mos.
	Drunk prisoner	None	3 mos.	2/3 3 mos.

To make a finding of minor misconduct and consider that instance in the *persistence* analysis, requires evidence that:

- The documented instance of willful misconduct formed the basis for the discharge. (If the misconduct is **not** the basis of the discharge, it may **not** be used to support the bar. If the evidence is unclear as to this point, consider reasonable doubt.)
- The documented instance of willful misconduct is one for which the maximum sentence imposable pursuant to the Manual for Courts-Martial (MCM (2024 ed) - TOC no index.pdf (defense.gov)) is **not** dishonorable discharge or confinement for longer than one year if tried by general court-martial.

Willful misconduct not meeting the definition of minor misconduct which formed the basis for the discharge would be considered "more serious misconduct" for the purpose of the *persistence* analysis.

Examples of minor misconduct include, but are not limited to:

- Article 86: *Failure to go, Going from appointed place of duty*
- Article 87a: *Resisting or Flight from apprehension*
- Article 91: *Showing contempt or disrespect a warrant officer, superior*

noncommissioned or petty officer, or other noncommissioned or petty officers
- Article 95a: *Disrespect toward sentinel or lookout*
- Article 112: *Drunkenness or other incapacitation offenses*
- Article 121: *Larceny or wrongful appropriation with property value of $1,000 or less*

Note: Consensual sexual contact between service members of equal station is not willful and persistent misconduct for VA purposes. Discharges based on gender or sexual identity or positive human immunodeficiency virus (HIV) status are not appropriately barred under willful and persistent misconduct (M21-1 X.iv.1.A.3.d).

The evidence documenting the bar must be listed (in the ***evidence*** and the ***reasons and bases*** sections) in the administrative decision.

An offense involving moral turpitude

The AQ95 proposed rule included a definition of moral turpitude consistent with VAOPGC 06-87.

The final rule states:

> *Given that the definition of moral turpitude [MT] under* VAOPGC 06-87 *requires a willful act that gravely violates accepted moral standards, it is difficult to imagine that minor misconduct—misconduct for which the maximum punishment is not longer than one year confinement—could ever meet that definition. This accords with common Federal appellate court decisions interpreting the term in other contexts. Garcia-Martinez v. Barr, 921 F.3d 674, 676 (7th Cir. 2019) (MT "shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general"); Escobar v. Lynch, 846 F.3d 1019, 1023 (9th Cir. 2017) (MT "is generally a crime that (1) is vile, base, or depraved and* (2) violates accepted moral standards").

VAOPGC 06-87 is still the controlling definition for benefits purposes.

Moral turpitude *is* a willful act that:
- gravely violates accepted moral standards; AND
- is committed without justification or legal excuse; AND
- is expected to cause harm or loss to person or property.

The following all meet the definition of moral turpitude. This is a non-exclusive list.
- A felony conviction from either a state or federal (civilian) court, but not including a military court-martial. ***Note:*** Discharge or release as part of a sentence of a general court-martial is a statutory bar to benefits.
- Acts consistent with commission of murder, rape, arson, burglary, larceny,

trafficking illegal drugs or forgery.
- An act that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.

Note: While obtaining a final conviction may be necessary for the military to confine a Service member, it is **not** necessary for VA's purposes of evaluating the character of an FSM's discharge. If the offense is clearly established by the record (after applying the benefit of the doubt to the advantage of the FSM), VA may conclude that offense was committed. This is also supported by VAOPGC 06-87.

As stated in the final rule, given that the definition of moral turpitude under VAOPGC 06-87 requires a willful act that gravely violates accepted moral standards, it is difficult to imagine that minor misconduct—misconduct for which the maximum punishment is not longer than one year confinement—could ever meet that definition. This is consistent with common Federal appellate court decisions interpreting the term in other contexts.

The following are examples that do ***not*** meet the definition of moral turpitude because they are not expected to cause harm or loss to person or property. Some of the below are not specifically listed in the MCM; where listed, the maximum punishment would not be dishonorable discharge or more than one year confinement; therefore, the offense could be considered *minor misconduct*.
- Parking tickets.
- Being intoxicated in public without harm to another or the service, including Article 112.
- Article 86: Failure to go to duty station.
- Article 86: AWOL of 30 days or less.

Note: Consensual sexual contact between service members of equal station is not moral turpitude for VA purposes. Discharges based on gender or sexual identity or positive HIV status are not appropriately barred under moral turpitude (M21-1 X.iv.1.A.3.c).

Although not considered minor misconduct under the Uniform Code of Military Justice (UCMJ), the below conduct which does not involve physical harm to another person or property are also examples (non-exclusive) of offenses not considered moral turpitude:
- One-time marijuana use, which has no federal criminal penalty (*see* 21 U.S.C. § 844a(a)) and is legal in many states.
    - Although the maximum punishment would be more than one year confinement under Article 112a (and thus does not meet the requirement for minor misconduct), this would also not be considered willful and persistent misconduct because it does **not** meet the definition of persistent (only a one-time use).
    - One-time use of other drugs should be considered on a case-by-case

basis under the general requirements of a finding of moral turpitude.

- Adultery
  - Extramarital sexual contact under Article 134 requires maximum punishment of DD and one year confinement, so is not minor misconduct.

Necessary evidentiary findings to apply moral turpitude

To support a moral turpitude bar, the development activity must specifically find and document evidence of the following in the ***evidence*** and ***reasons and bases*** sections of the administrative decision:

- The offense constituting moral turpitude would result in more than one year of confinement under the MCM, Appendix 12, and is thus not minor misconduct;[2]

[2] MCM (2024 ed) - TOC no index.pdf (defense.gov)

- The moral turpitude offense led to the discharge; AND
- The evidence in support of the bar outweighs the evidence against applying the bar after considering reasonable doubt.

The following are examples that **do** meet the definition of moral turpitude because all three elements above have been met:

- Robbery (when military records confirm the conduct led to the discharge without reasonable doubt, *see* Article 122);
- Assault with a loaded firearm (when military records confirm the conduct led to the discharge without reasonable doubt, *see* Article 128).

Note: This is a non-exclusive list.

Compelling Circumstances Exception

Compelling circumstances must be considered if the FSM was discharged for AWOL for a continuous period of at least 180 days and for offenses involving moral turpitude and/or willful and persistent misconduct.

As stated in the final rule, there are some FSMs whose service, while not without blemish, was generally of benefit to this Nation and therefore have earned the status of "Veteran" and the benefits to which Veterans are entitled. There are also FSMs whose service to our nation placed them in high-risk situations that could lead to injuries or other circumstances that increase risk for behaviors or conduct that military commanders deem inappropriate. In addition, the compelling circumstances exception is designed to counter the possibility that certain military branches may have favored particular types of discharges during particular periods of time, including different periods of war.

Because compelling circumstances are only considered after the claim's processor

determines the criteria to apply the AWOL, moral turpitude, or willful misconduct bars were met, the first step is to determine if the bar applies as described in the above sections. If yes, then the second step is to determine if compelling circumstances exist to mitigate the application of the bar.

The following must be considered and documented in the ***evidence*** and the ***reasons and bases*** sections of the administrative decision:

- Length and character of service -- exclusive of the period of prolonged AWOL or misconduct -- that is of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation.
- Mental or cognitive impairment at the time of the prolonged AWOL or misconduct.
    - Including clinical diagnoses of any mental health disability, such as congenital conditions, substance abuse, and/or or cognitive disabilities.
    - Evidence that may be medically determined to demonstrate existence of any mental health disability, including congenital conditions, substance abuse, and/or or cognitive disabilities.
        - ***Note*****:** Mental or cognitive impairment need not be service connected or subject to compensable service connection to be considered as a compelling circumstance to excuse the prolonged AWOL or misconduct. Hence, neurodevelopmental conditions, such as attention deficit hyperactivity disorder (ADHD) or personality disorders, may excuse prolonged AWOL or misconduct even if no VA benefits can be awarded for the same condition. Additionally, mental, or cognitive impairment does not necessarily indicate an insanity decision is required.
- Physical health, to include physical trauma and any side effects of medication.
- Combat-related or overseas related hardship.
- Sexual abuse/assault.
- Duress, coercion, or desperation.
- Family obligations or comparable obligations to third parties.
- Age, education, cultural background, and judgmental maturity.
- Whether a valid legal defense (for substantive issue of absence or misconduct) would have precluded a conviction for AWOL, moral turpitude, or misconduct under the UCMJ. A valid legal defense is simply a persuasive argument that, if tried under the UCMJ, there would have been a finding of not guilty on the alleged misconduct (a trial need not be involved). A determination on this basis is made based upon the evidentiary findings of the claim processor. (*See* the ***Required Evidentiary Findings*** section below.)
    - Misconduct is generally considered to include moral turpitude for purposes of this defense.
    - Examples of a valid legal defense include, but are not limited to:
        - An alibi for the alleged crime.
        - Entrapment into committing the alleged crime.

- Necessity for committing the alleged crime.
- Constitutional due process violations.

***Note*:** The defense cannot consist of procedures, technicalities, or formalities, including failure to object to evidentiary findings.

Racial bias and/or discrimination

Although not specifically listed in the regulatory text, claims processors must consider discrimination alleged by an FSM in the compelling circumstances analysis. As stated in the final rule, should the evidence establish discrimination as a factor in discharge, including, but not limited to, discrimination based on race or sex, the compelling circumstances exception allows VA to adjudicate a favorable COD determination. It is not necessary for an FSM to specify under which compelling circumstance category any alleged discrimination would fall. Claims processors should broadly consider any such allegations.

Examples:

- If the FSM claims racial bias caused an OTH discharge for only minor misconduct, VA must consider whether the service was otherwise honest, faithful, and meritorious despite minor misconduct.
- If the FSM claims the misconduct was spurred by or an attempt to avoid racial discrimination, VA must consider that in duress or desperation or cultural background.

Required evidentiary findings

Once the criteria for a regulatory bar are met and VA turns to the compelling circumstances analysis of 38 C.F.R. § 3.12(e) all lay, medical, and military information relevant to the alleged compelling circumstance must be considered, in accordance with 38 U.S.C. § 5107(b).

A lay statement must be considered along with all other evidence of record and is not required to be corroborated by the military records because the reasonable doubt doctrine is applicable even in the absence of official records.

VA acknowledges that in some cases there will not be evidence in the military records to corroborate a FSM's account of compelling circumstances. That does not preclude a credible lay statement from being sufficient to prove a compelling circumstance.

A FSM's lay statement *alone* may be sufficient to prove a compelling circumstance if the claims processor finds the statement credible, after considering:

- Plausibility of the statement on its face,
- Consistency with other evidence, and

- Internal consistency.

If the claims processor rejects the lay statement as evidence of compelling circumstances, the reasoning, specifically including the above factors, must be documented in the ***reasons and bases*** section of the administrative decision. The claims processor must explain why any of the above factors resulted in the rejection of the lay statement.

Example of an insufficient evidentiary finding:

- The lay statement is rejected because it is inconsistent with other evidence.

  Note: This is insufficient as it does not explain why it is inconsistent with other evidence or identify the evidence.

Example of sufficient evidentiary finding:

The evidence did not persuasively establish that compelling circumstances existed to mitigate the conduct. You provided a statement indicating that you were AWOL because you attended a family member's funeral. However, you also submitted a newspaper clipping showing the family member passed away 10 years prior to the date of the AWOL offense. As the lay statement is inconsistent with other evidence, it is not sufficient to apply the compelling circumstances exception to your misconduct.

Previous Unfavorable Decisions

Any FSM with a prior unfavorable COD determination (to include the no longer used undesirable discharge), may request a new COD determination under new 38 C.F.R. §3.12. Where the prior unfavorable COD determination was adjudicated prior to the effective date of the final rule any new request for a COD determination (whether submitted with a claim or not) will be adjudicated without the need for new and relevant evidence. Although most paper VA claims files have been scanned into VBMS, many older paper VA claims files are still located in VA Federal Record Centers (FRCs) and have not yet been scanned into VBMS. Since many of these FSM's records were stored at FRCs (prior to scanning efforts into VBMS), take the following actions in M21-1, Part II.ii.3.2.c., to ensure all paper records are scanned into VBMS before making a COD determination or redetermination.

***Note*:** Do not overturn a previous 'favorable' COD determination simply because it may now constitute a bar under the new regulation. For example, if a previous COD decision stated there was not willful and persistent misconduct and the FSM later applies for another VA benefit, do not reevaluate their misconduct today under the new guidance regarding what constitutes willful and persistent misconduct; rather, the previous positive finding adjudicated under the old regulation is still binding.

Public Law 115-141 created 38 U.S.C. § 5303B, which permits an FSM to request a COD determination without filing a claim. There is no prescribed form for a FSM to request the new COD determination (M21-1 X.iv.1.A.1.d). If a freestanding request for a new COD determination (on a *VA Form 21-4138*, letter, etc.) is received, adjudicate the COD. If a favorable decision is made, review for any previously denied claim(s) based on that period, then *invite* a claim(s) for those issues.

Do not re-adjudicate the previously claimed issues without a claim. If the FSM responds and claims a previously denied issue, the new COD decision is considered new and relevant evidence to support a decision on the merits of the supplemental claim.

If any claim is submitted and there is a previous unfavorable COD decision for the applicable period of service, VA must make a new COD determination because it is raised by the evidence of record. In other words, this is a two-step process. Claims processors must first consider whether, based on the regulatory change, there is a basis to issue a favorable COD decision. If the COD decision is favorable, development should be conducted based on any new, not previously adjudicated claims at issue and sent to the rating activity for determination. The rating activity should make decisions based on the *Effective Dates* sections below.

The file should also be reviewed to determine whether any previously denied claims originated during the period of service for which the FSM is now deemed a Veteran. If so, invite a claim for such issues.

***Note*:** This regulatory change does not provide grounds for clear and unmistakable error (CUE) in prior COD determinations. Although this final rule departs from VA's prior approach to COD, that does not render VA's prior regulation unlawful and a change in law cannot support a claim of CUE. Accordingly, prior final decisions are not subject to revision for CUE based on the new rulemaking. However, CUE in prior COD determinations on bases other than a change in regulation must be considered on a case-by-case basis.

Effective Dates

Per M21-1 V.ii.4.A.1.a, the assignment of an effective date is an integral part of the decision-making process as it establishes the date from which entitlement to benefits begins. Assignment of effective dates for the purposes of payment of benefits is directed in statute at 38 U.S.C. § 5110 and regulated by 38 C.F.R. § 3.400. Effective date determinations are made based on facts gathered during review of the evidence.

The general rule is that the effective date is assigned based on the date of receipt of claim or the date entitlement arose, whichever is later. Before applying the general rule,

however, all information gathered during evidence review must be considered to determine whether a more specific effective date rule applies (*see* M21-1 V.ii.4.A.1.b).

The June 25, 2024, revision to 38 C.F.R. § 3.12 is considered to be liberalizing law. Per M21-1 V.ii.4.A.6.a, a ***liberalizing law*** is one that brings about a substantive change in the law creating a new and different entitlement to a benefit. As such, for benefits granted based on a COD determination completed on or after June 25, 2024, an effective date under 38 C.F.R. § 3.114(a) must be considered.

To be eligible for an effective date under 38 C.F.R. § 3.114 (due to the new 38 C.F.R. § 3.12), an FSM must have been discharged prior to June 25, 2024. Any FSM discharged on or after June 25, 2024, is not eligible for an effective date under 38 C.F.R. § 3.114, because the discharge occurred after the date of the law change.

For those claimants found eligible for benefits under the new 38 C.F.R. § 3.12 and eligible for an effective date under 38 C.F.R. § 3.114 based on the rule as described above, the effective date is governed by 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114 as follows:

(1) If a claim is received within one year from the effective date of this liberalizing law, benefits may be authorized from the effective date of the law (June 25, 2024).

(2) If a claim is received more than one year after the effective date of this liberalizing law, benefits may be authorized for a period of one year prior to the date of receipt of such request.

As discussed in M21-1 V.ii.4.A.6.d, under 38 C.F.R. § 3.114(a), VA may award retroactive benefits if the claimant had potential entitlement at the time the liberalizing law or regulation became effective. This applies to:

- Cases involving pending or previously denied claims; and
- Original claims filed after the change in law.

Temporary Procedures/Additional Enclosures

- **Appendix A: Instructions for Determining Whether New/Updated Advance Notice is Required**
- **Appendix B: Instructions for Issuing COD Decisions and Notification Letters**
- **Appendix C: Advance Notice Templates**
- **Appendix D: COD Determination Template**
- **Appendix E: Decision Notice Templates**
    - ***Note*:** Claims processors **MUST** use the letters and templates in Appendices C through E, and **not** the COD letters or Decision Notification

Letters that currently exist in VBMS-Core, Letters User Interface (UI), or PCGL.

- **Appendix F: Manual for Courts-Martial, Appendix 12**
- **Appendix G: SecVA Memorandum on Benefits Eligibility for Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ+) Former Service Members**

Contact for Help/Questions

Questions concerning this policy letter should be directed to the Compensation Service Policy Staff via e-mail at: 211_Policy.VBAVACO@va.gov.

Submit questions concerning survivor benefit claims to Pension and Fiduciary Service at PFPOLPROC.VBACO@va.gov.

Submit questions to the Office of Administrative Review on legacy appeals and higher-level reviews to oaradmin.vbawas@va.gov.

Submit questions to the Office of Field Operations on operational issues to OFO.VBACO@va.gov.

Beth Murphy
Executive Director, Compensation Service

Dr. Nilijah Carter
Executive Director, Pension and Fiduciary Service

J. Andrew Lindstrom
Acting Executive Director, Office of Administrative Review

Appendix A: Instructions for Determining Whether New/Updated Advance Notice is Required

Available on the Character of Discharge Resource Page.

Appendix B: Instructions for Issuing COD Decisions and Notification Letters

Available on the Character of Discharge Resource Page.

Appendix C – Advance Notice Templates

- New COD Advanced Notice letter with Representative
- New COD Advanced Noticed without Representative

Appendix D – COD Determination Template

- COD Determination Template

Appendix E - Decision Notice Templates

COD - Eligible All; One Period of Service	• Only has one period of service. • When found eligible for VA purposes.
COD - Ineligible All; One Period of Service	• Only has one period of service. • When found ineligible for VA purposes.
COD - CH17 Only; One Period of Service	• Only has one period of service. • Eligible for Ch. 17 only.
COD - Conditional Discharge; CH17	• Has more than one period of service. • Eligible for one period of service • Ch. 17 only for one of the periods of service.
COD - Conditional Discharge; No CH17	• Has more than one period of service. • Eligible for one period of service. • Ineligible one period of service.

Appendix F – Manual for Courts-Martial, Appendix 12

- Manual for Courts-Martial, Appendix 12: Maximum Punishment Chart

The highlighted portions of this chart indicate examples of what may constitute minor misconduct. This is not an all-inclusive list. ***Note***: Claims processors must always utilize the most current version of the MCM.

Appendix G – SecVA Memorandum on Benefits Eligibility for Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ+) Former Service Members