Pension and fiduciary service

PMC VSR Intermediate Core Course
Phase 5: Proficiency Development
Part 2: Process a Claim

Request Appointment of Fiduciary for Incompetency Claims

Trainee Guide

November 2024

Request Appointment of Fiduciary for Incompetency Claims Lesson Overview

| Topic | Description |
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| Time Estimate: | 2 hours |
| Purpose of the Lesson: | This lesson is part of the entry-level curriculum Core Course for PMC VSRs. The purpose of this lesson is to prepare PMC VSRs to recognize indicators of incompetency and process the claim accordingly. |
| Prerequisite Training Requirements: | Prior to taking the Request Appointment of Fiduciary for Incompetency Claims lesson, trainees must complete PMC VSR Core Course Phases 1–4, Phase 5, Part 1.a-d.  |
| Target Audience: | This lesson is for entry-level PMC VSRs. |
| Lesson References: | * M21-1 X.ii.6.A.3.a (Making Initial Competency Determinations Based on Medical Evidence)
* M21-1 X.ii.6.A.5.c (Procedures for Payee Found Incompetent by Court Decree or Court Appointment of a Fiduciary by Reason of Incompetency)
* M21-1 X.ii.6.C.1.a (Circumstances Under Which It Is Appropriate to Request the Appointment (Certification) of a Fiduciary)
* M21-1 X.ii.6.C.1.c (Preparing VA Form 21-592 to Request the Appointment of a Fiduciary)
* M21-1 X.ii.6.C.1.d (Hub Jurisdictions and Contact Information)
* M21-1 X.ii.6.D.2.a (Sources of Competency and Incompetency Determinations)
* M21-1 X.ii.6.D.2.b (Processing Medical Evidence of Incompetency That Does Not Involve a Judicial Determination)
* M21-1 X.ii.6.D.2.c (Claimants Who Become Entitled to Benefits Before the Rating Activity Makes a Final Determination Regarding Competency)
* M21-1 X.ii.6.D.2.e (Processing a Court Appointment of a Fiduciary Without a Judicial Determination of Incompetency)
* M21-1 X.ii.6.D.2.f (Processing a Court Decree of Incompetency or Court Appointment of a Fiduciary by Reason of Incompetency)
* M21-1 X.ii.6.D.2.g (Processing a Judicial Determination of Incompetency Regarding a Veteran)
* M21-1 X.ii.6.D.2.h (Processing a Judicial Determination of Incompetency Regarding a Parent, Surviving Spouse, or Adult Child)
* M21-1 X.ii.6.D.2.i (Processing Evidence That a Child Beneficiary Is Permanently Incapable of Self-Support)
* M21-1 X.ii.6.D.3 (Due Process Requirements for Incompetency Determinations)
* M21-1 X.ii.6.D.3.h (Processing a Beneficiary’s Request for a Hearing)
* M21-1 X.ii.6.D.4.a (Effect of the Brady Act on Incompetent Beneficiaries)
* M21-1 X.ii.6.D.4.b (Notifying Affected Beneficiaries)
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| Knowledge Check: | Phase 5.2 Request for Appointment of Fiduciary for Incompetency Claims |
| Technical Competence: | * Program Benefits and Eligibility (PMC VSR)
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| Lesson Objectives: | By the end of this lesson, you should be able to:* Understand the role of the regional office (RO) in requesting appointment of a fiduciary for an incompetency claim
* Understand how and when to forward an incompetency claim to the Hub of jurisdiction
* Recognize incompetency indicators
* Identify the elements of the proposed notice of incompetency rating
* Present proper notification of the Brady Act
* Process award
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| What You Need: | * Trainee Guide
* Access to VBA intranet
* Pen and paper or access to an electronic whiteboard
* Access to the following job aids from VSR Assistant:
	+ **Prepare the Decision Notice** job aid
	+ **Notification Language job aid**
	+ **Due Process job aid**
	+ **Develop for Missing Information/Evidence** job
	+ **End Product (EP) Codes** job aid
	+ **Ready to Rate** job aid
	+ **Request Appointment of a Fiduciary** job aid
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| PowerPoint Slides | Notes |
| --- | --- |
| **Request Appointment of Fiduciary for Incompetency Claims** |  |
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 |  |
| **Why Knowing When to Appoint a Fiduciary is Important**Appointment of a fiduciary is necessary when benefits are payable to a beneficiary who is:* Rated incompetent by VA
* Under legal disability
* A minor
 |  |
| **Definitions (1 of 2)*** **Fiduciary Appointment** is the appointment of a fiduciary, by the Hub Manager, for a beneficiary who has been rated as being unable to manage his or her VA benefits, has been determined by a court with jurisdiction as being unable to manage his or her financial affairs, or has not reached age of majority.
* **Mental Incompetency** refers to a mentally incompetent person who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.
* The term***guardian***, for Fiduciary Program purposes, applies to a court-appointed guardian, conservator, trustee, committee or other term used to denote a court-appointed responsibility for another person and/or property.
 |  |
| **When to Address Competency*** Competency must be addressed in cases where a mental condition is initially evaluated as totally disabling or when the total evaluation is continued in a rating decision, which includes:
	+ when individual employability is awarded or continued on the basis of a single mental health disability, and
	+ when assigning or continuing a temporary total evaluation for a mental disorder under [38 CFR 4.29](http://www.ecfr.gov/cgi-bin/text-idx?SID=fb2fa87e2740e7b548397ebe1093bf66&node=se38.1.4_129&rgn=div8)
 |  |
| **Decree by Court*** A payee may be considered to have had notice and hearing under the laws of the State so that additional notice and hearing are not required when
	+ the payee has been found by a court of jurisdiction to be incompetent, or
	+ a court having jurisdiction has appointed a guardian by reason of incompetency for a payee
 |  |
| **Jurisdiction of Competency Determinations (1 of 2)*** If an initial competency determination is needed, and there is no court decree of incompetency or court appointment of a fiduciary, the rating activity at the station of origination has sole authority to make the original competency determination.
* If an initial competency determination is needed and either a court decree of incompetency or court appointment of a fiduciary has been received, a proposal of incompetency (due process) is not required.
	+ The station of origination completes a final competency determination for the Veteran or non-Veteran
	+ Cases are referred to the fiduciary Hub for appointment of a fiduciary
 |  |
| **Jurisdiction of Competency Determinations (2 of 2)*** If a finding of incompetency has been proposed regardless of whether VA received additional medical or non-medical evidence conflicting with the proposal of incompetency, or a request for a hearing, the Fiduciary Service Representative (FSR) has the authority to
	+ Finalize the competency determination and conduct a hearing if requested
* If a legacy appeal is received regarding a final competency determination the PMC associated with the beneficiary’s home address has jurisdiction over the legacy appeal.
* If a supplemental claim is received after a final competency determination the PMC rating activity has the authority to make the competency determination.
 |  |
| **Indicators of Incompetency** * Receipt of VA Form 21-2680, Examination for Housebound Status or Permanent Need for Regular Aid and Attendance
* Court documents stating the beneficiary has been found to be incompetent (rare)
* Refer the claim to the rating activity if there is indication of incompetency

 Flowchart listing the steps for appointing a fiduciary for an inocompetency claim. Steps listed from top to bottom: Indicators of incompetency is highlighted Verify proposed incompetency Process award Notify beneficiary |  |
| **VA Form 21-2680: Review of Competency*** When reviewing the competency information on [*VA Form 21-2680*](http://www.vba.va.gov/pubs/forms/VBA-21-2680-ARE.pdf), ensure that the requirements of [38 CFR 3.353(c)](https://www.ecfr.gov/cgi-bin/text-idx?SID=a7f6e52c3a853812cdd9bcc166cf52c5&mc=true&node=se38.1.3_1353&rgn=div8) particularly, as it relates to incompetency must be based on
	+ clear, convincing evidence that leaves no doubt as to the person’s incompetency
	+ all evidence of record, and
	+ a consistent relationship between
		- the percentage of disability**,** and/or
		- facts relating to commitment or hospitalization
 |  |
| **Scenario—Does the Claim Indicate Incompetency?** On February 25, 2021 the Claims Intake Center receives VA Form 21P-527EZ, Application for Pension, and VA Form 21-2680, Examination for Housebound Status or Permanent Need for Regular Aid and Attendance*.* You review VA Form 21P-527EZ and determine that the claim for Pension is substantially complete. When reviewing VA Form 21-2680, you see that the claimant does not have the ability to manage their own financial affairs.**Based on the information submitted, should competency of the claimant be addressed?** |  |
| **When to Request Certification of a Fiduciary (1 of 2)*** Request the appointment (certification) of a fiduciary when benefits are payable to a beneficiary who is
	+ rated incompetent by the Department of Veterans Affairs (VA), including Veterans rated incompetent who are receiving hospital, nursing home, or domiciliary care by VA
	+ under legal disability, or
	+ under the age of majority (a minor), or
	+ the beneficiary is a child who is in the custody of a natural or adoptive parent or stepparent
 |  |
| **When to Request Certification of a Fiduciary (2 of 2)*** When the beneficiary is a child in the custody of a natural or adoptive parent or stepparent, recognize the parent as the custodian for direct payment of monthly benefits but withhold any retroactive payments pending the appointment of a fiduciary.
* Regional offices (ROs) must use a [***VA Form 21-592, Request for Appointment of a Fiduciary, Custodian or Guardian***](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-592-ARE.pdf), to request the appointment of a fiduciary.
 |  |
| **Outdated Fiduciary Appointments*** Do *not* process an award to a guardian or other fiduciary
	+ based on a fiduciary Hub appointment or certification that is more than one year old, and
	+ to whom no payment has been made for one year
* Before the authorization activity may process an award under these circumstances, the Hub must provide either[***VA Form 21P-555, Certificate of Legal Capacity to Receive and Disburse Benefits and Fee Authorization***](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21P-555-ARE.pdf)*,* or other notice showing that the appointment or certification remains in full force and effect
 |  |
| **Practice Exercise: Determining Jurisdiction and Contact Information*** **Instructions**:
	+ Work in groups of two.
	+ Review the chart in **Determining Jurisdiction and Contact Information Worksheet** to determine the Hub of Jurisdiction, Sister Hub, and Contact Information.
	+ Provide a response for each item.
	+ Be prepared to share your responses and rationale with the class.
* **Time allowed: 15 minutes**
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| **Competency: Surviving Spouse/Dependents (1 of 2)*** If there is evidence of incompetency and the claimant is a non-Veteran, such as a surviving spouse, parent, or VA insurance beneficiary
	+ consider competency a rating issue under [**38 CFR 3.353**](http://www.ecfr.gov/cgi-bin/text-idx?SID=fd8d3f4d7e6a5698b75c2553ed05cab4&mc=true&node=se38.1.3_1353&rgn=div8) when there is entitlement to benefits, and
	+ propose a rating on the issue or undertake any required development
 |  |
| **Competency: Surviving Spouse/Dependents (2 of 2)*** Rating action is required when a court of law determines a parent, surviving spouse, or child (who has been found permanently incapable of self-support by rating decision) is incompetent:
	+ send a contemporaneous notice to the beneficiary, and
	+ continue direct payment pending receipt of certification of a fiduciary or other payee from the hub of jurisdiction
 |  |
| **Finding of Incompetency (1 of 3)*** In the absence of clear and convincing evidence to the contrary, presume that a person is competent.
* A finding of incompetency cannot be made without a definite expression by a responsible medical authority unless the medical evidence of record is
	+ clear
	+ convincing, and
	+ leaves no doubt as to the beneficiary’s incompetency
 |  |
| **Finding of Incompetency (2 of 3)*** If a request or evidence showing a change in competency comes from a Veteran or other beneficiary requesting to be rated incompetent or have a fiduciary appointed, and there is no associated medical or court evidence, and there is no EP pending,
	+ Establish the appropriate pension rating EP and establish a contention in VBMS
* If there is an EP pending, control the issue under the rating EP
 |  |
| **Finding of Incompetency (3 of 3)*** If a request or evidence showing a change in competency comes from a third party to have a Veteran or other beneficiary rated incompetent without medical or court evidence, establish and EP400 and review VA treatment record for evidence of incompetency
	+ If records show evidence of incompetency associate the records with the claims folder
	+ Change the EP400 to EP020 or 120, and treat the request as receipt of medical records
 |  |
| **Child Incapable of Self-Support*** If the claimant is a child over the age of 18 and permanently incapable of self-support, the rating activity must resolve the issue of competency for the child because entitlement depends upon permanent incapacity for self-support due to physical or mental disability.
* If incapacity is due to mental disability
	+ consider competency a factor in determining whether the child is permanently incapable of self-support
	+ determine competency under the same criteria applicable to Veterans, and
	+ record the determination in a rating
 |  |
| **When to Suspend*** **Do not** routinely suspend direct payments to a beneficiary pending the development of an issue of incompetency or certification of a fiduciary.
* If evidence indicates that a beneficiary is not receiving or is being deprived of the full benefits being paid, it is possible to withhold payment, **and** request that the Hub provide an expedited appointment of a fiduciary.
* If entitlement to benefits has been established but no payment has been made or if increased benefits are payable, determine whether benefits should be paid directly pending Hub appointment/certification.
 |  |
| **Notice of Proposed Rating of Incompetency*** Notice of a proposed rating of incompetency must include
	+ a copy of the proposed rating decision or a short summary of the facts and evidence of record that supports the finding of incompetency
	+ an explanation of the effect that a finding of incompetency has on the payment of VA benefits
	+ notice that a VA rating of incompetency prevents the beneficiary from purchasing firearms, according to the Brady Act
	+ a statement of the beneficiary’s rightto
		- submit evidence to show why the proposed action should not be taken
		- request a personal hearing to present evidence, and
		- have representation during the hearing, and an indication that the beneficiary has 60 days to respond to the notice
 |  |
| **Waiver of Due Process*** If VA receives a waiver of due process concerning a proposed rating of incompetency
	+ associate the waiver with the beneficiary’s claims folder
	+ close the tracked item used for the due process period under the corresponding EP
	+ notify the hub of jurisdiction by sending an e-mail with the subject line *Due Process Waived- Incompetency Proposal*, and include the following information in the body of the e-mail:
		- the beneficiary’s name and claim number, and
		- the date VA received the waiver
 |  |
| **Understanding the Brady Act (1 of 2)*** The Brady Act of 1993, *Public Law* *103-159*, prohibits the sale of firearms to certain individuals, including beneficiaries the VA determines are incompetent.
* In compliance with this act, VA reports the names of beneficiaries to the Federal Bureau of Investigation (FBI) when
	+ VA has determined that a fiduciary appointment is required because the beneficiary is unable to manage their VA benefits, *and*
	+ An order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction finds that the beneficiary is a danger to self or others
 |  |
| **Understanding the Brady Act (2 of 2)*** The NICS Improvement Amendments Act of 2007 (NIAA) contains an amendment to the Brady Act that obligates VA to provide incompetent beneficiaries the opportunity to request relief from the reporting requirements the Brady Act imposes.
	+ "benefit of the doubt" and "duty to assist" do not apply
	+ requests for relief from the reporting requirements of the Brady Act must be clear and explicit
* Refer beneficiaries that are seeking relief from the prohibition against handling explosives under the Safe Explosives Act of 2003 to the Bureau of Alcohol, Tobacco, Firearms and Explosives website for the [**application to apply for relief of explosives disability**](https://www.atf.gov/explosives/apply-relief-explosives-disability).
 |  |
| **Notification of the Brady Act (1 of 3)*** Beneficiaries determined to be incompetent by VA *must* be notified of the effects of the Brady Act in the
	+ notice of proposed adverse action that VA sends to communicate the rating activity’s proposal of incompetency, and
	+ final/contemporaneous decision notice that VA sends to communicate a final rating of incompetency
 |  |
| **Notification of the Brady Act (2 of 3)*** The following letter types and templates contain text that adequately explains the prohibitions the Brady Act imposes:
	+ PCGL *GP5 Pre:  Incompetency*
	+ PCGL *GP6 Post:  Incompetency*
	+ VBMS *Proposed Incompetency Letter*, and
	+ decision notices for final ratings of incompetency that the Redesigned Automated Decision Letter application in VBMS generates
 |  |
| **Notification of the Brady Act (3 of 3)*** In the event a claims processor uses an alternative correspondence template to prepare notice of a proposed rating of incompetency, the following text must be included in the notice:

*“The Brady Handgun Violence Prevention Act prohibits you from purchasing, possessing, receiving or transporting a firearm or ammunition based upon our determination that you are incompetent to handle your VA funds.  You may be fined and/or imprisoned if you knowingly violate this law.**You may apply to VA for relief of firearms prohibitions imposed by the law by submitting your request to the address at the top of this letter on the enclosed VA Form 21-4138, Statement in Support of Claim.  VA will determine whether such relief is warranted.”* |  |
| **Demonstration—Notification for a Proposed Incompetency Claim*** Instructions:
	+ Access the **Request Appointment of a Fiduciary job, Notification Language job aid, Prepare the Decision Notice job aid, and Due Process job aid** for M21-1 references.
	+ Refer to the job aids as the instructor completes the notification.
* Time allowed: 20 min.
 |  |
| **Restored Competency*** Competency may be restored based upon credible medical or other evidence.
* A determination of restoration of competency rests with the rating activity and not with a medical official or Hub
* [**38 CFR 3.353(c)**](https://www.ecfr.gov/cgi-bin/text-idx?SID=9521b839aa5779bd6697971f80d35f52&mc=true&node=se38.1.3_1353&rgn=div8)mandates a presumption in favor of competency when reasonable doubt arises regarding a beneficiary’s mental capacity to manage their own affairs
 |  |
| **Check the Rating: Competent*** When the evidence shows the Veteran is competent, address the competency determination as part of the narrative within the mental condition issue.
* The following text must be included in the rating narrative, either generated based on decision points or added using the *VA COMPETENT* glossary selection within VBMS - Rating for these cases:
	+ *There is no evidence of record that shows that you are unable to manage your financial affairs.   (38 CFR 3.353)*
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| PowerPoint Slides | Instructor Activities |
| --- | --- |
| **Lesson Summary Review Questions****Time Allowed**: 10 minutes |  |
| **What’s Next?*** Complete TMS Evaluation Request Appointment of Fiduciary for Incompetency Claims using **(TMS# 4408469)**
 |  |