



Serving Veterans

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The Clients, Opportunities and Barriers

In June of 1968, while I was beginning my last summer as a student, Yoshio was arriving in Vietnam as an infantryman assigned to the Chu Lai area north of Saigon. He had been born and raised on the windward side of Oahu in a town named Kailua where I am privileged to live today. His parents were Japanese Americans and he attended public school in Kailua. Upon graduation from high school in 1966, Yoshio joined the National Guard. Soon after enlisting, his battalion was unexpectedly activated and sent to Vietnam. Five months after leaving Hawai'i for his very first time, five armed sappers who were trying to infiltrate his base camp confronted him at night. He killed two of them with his bayonet. His buddy who was armed with a machine gun killed the other three. Yoshiro suffered from a deep knife wound to his leg and was awarded the Purple Heart. On that day, his life was unconditionally altered in the most profound of ways.



Shortly after President Nixon was elected, the National Guard units serving in Vietnam were deactivated and Yoshio was sent home. He found a job as a clerk for the federal government. For the next thirty-five years he served in that capacity in a variety of federal agencies in Hawai'i. He was married in 1988. During these years, he suffered from a deep and continuous malaise. He was in constant fear of others while at the same time suffering from a deep sense of guilt. He had great difficulty in cultivating friendships and suffered in almost all social situations. He preferred to remain mostly by himself. He often contemplated suicide. Yoshiro sought psychiatric counseling for the first time in 1974 and has continued counseling ever since.

In 2004, Yoshiro and his wife left their apartment because they could no longer afford the significant rent increases demanded by their landlord. He took an early retirement from the federal government and received

\$1,200 per month in pension. He and his wife began living in their van during the day and in a homeless shelter at night. His wife became seriously mentally ill and refused to leave the van or seek help under any circumstance. Yoshio began again to contemplate suicide. He applied for Veterans Administration (VA) Disability Compensation in 2006 and requested a disability rating of 100%. His claim was based upon a finding by his treating psychiatrist that he has been suffering from a severe case of Post Traumatic Stress Disorder (PTSD) since returning from Vietnam. The VA agreed but assigned him only a 30 % rating for his disability, which provided him with payments of \$336 per month. He appealed this rating and was the very first veteran who sought our program's help with his appeal. If successful, Yoshiro will be entitled to receive \$2,527 per month. Combined with the \$1,200 per month in federal pension benefits, Yoshiro and his wife will have an *annual permanent annual income of \$44,725*. Their lives will be indescribably altered both by the income as well as the ability to understand and deal with Yoshiro's persistent malaise.

Although unique to Yoshiro, his story will be familiar to all who help their local homeless communities across America. According to the VA, Hawai'i is the home of approximately 102,000 veterans. Soldiers returning from the recent wars in Iraq and Afghanistan have suffered considerable trauma. While most veterans have successfully integrated back into society after discharge, others have not been so fortunate.

During the past fifteen years, Hawai'i has been faced with an alarming rise in the number of residents being forced from acceptable housing options onto our streets or beaches. Recently, a national study found that approximately 25% of those living without homes are veterans. That finding was particularly disturbing given the importance of the contributions veterans have and are making to our nation's safety, as well as the enormous personal sacrifices that they and their families have endured.

Fortunately, the benefits and services that veterans are entitled through the federally funded VA are excellent tools for homeless veterans seeking to re-build their lives, provided they are able to access them. These benefits and services include:

- Rehabilitation for veterans with service related injuries
- Educational assistance for veterans, their survivors and dependents
- Loans for housing or a small business
- An automobile, or adaptive equipment for disabled veterans
- Job counseling, training and placement services
- Compensation payments for service related disabilities
- Pension payments for non-service related disabilities
- Medical care
- Shelter and recovery programs
- Transfer of some cash benefits to dependents, if a veteran receiving benefits becomes incarcerated

Unfortunately, this array of benefits and services provided by the VA are not readily available to homeless veterans unless they successfully complete a complicated and very lengthy application/appeal process. Maneuvering through the VA bureaucracy is usually a lengthy and often arduous procedure, which can present an insurmountable obstacle for veterans struggling with homelessness. Difficulties navigating the VA system are further exacerbated by medical, mental health and substance abuse problems. Although no study has been made in Hawai'i of the mental and physical problems being encountered by our state's homeless veterans, one has been completed in Los Angeles that may help in understanding their needs. That study indicated that among homeless veterans accessing the VA Greater Los Angeles Healthcare System in 2005, 64% indicated a substance abuse problem, 48% had a serious psychiatric disorder and 52% reported a serious medical problem. Additionally, mistrust of government agencies often hampers a homeless veteran's ability to pursue VA benefits on his or her own.

Reports from the VA indicate that applications for benefits take an average of 177 days until an initial decision is reached. If this decision is unfavorable, the veteran may file an appeal that may take up to two additional years to decide. The report verifies that approximately 56% of the denials were reversed after appeal to the Board of Veterans' Appeals. Quality and comprehensive advocacy is usually necessary to assist

many homeless veterans access the VA benefits and services they are entitled to and desperately need if they are to begin improving their lives.

The Law

There are two primary income programs that benefit veterans who are disabled or elderly. They are the Disability Compensation and Pension Benefits programs. Both provide eligible vets with a continuous source of income once eligibility is determined.

Veterans Disability Compensation

Disability Compensation is a monetary monthly benefit paid to veterans who are disabled by an injury or illness that was incurred or aggravated during active military service. Disability compensation varies with the degree of disability and the number of veteran's dependents. In general, veterans are entitled to disability compensation if:

- They were discharged or released from service under conditions *other than dishonorable*;
- Their disease or injury was incurred or *aggravated* in the line of duty; and
- The disability is not the result of their *own willful misuse* or abuse of drugs or alcohol.

Disability compensation benefits are not "*needs based*" and therefore neither eligibility for compensation nor the amount of monthly compensation received are affected by other income received or property owned by the veteran.

Other than Dishonorable

There are essentially five types of discharge issued by the military services. Those veterans with (1) honorable discharges or (2) discharges under honorable conditions are usually eligible for compensation payments. Veterans with (3) bad conduct discharges and (4) discharges under less than honorable conditions may be ineligible depending upon the particular facts involved in the discharge. Veterans with a (5) dishonorable discharge are usually ineligible for compensation payments.

In the Line of Duty

This phrase means that an injury or disease must be incurred or aggravated during a period of active service. The VA and the courts have long held that "in the line of duty" covers *anything* that occurred during the period that began with induction into the military service and ending with discharge. There is no require-

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ment of a connection between the medical condition and performance of military duties; only a time-based connection between the medical condition and the period of military service.

Disability

To be entitled to compensation the veteran must prove that he or she has a current disability and that the disability is the result of something that happened while they were in service. The disease, injury or event does not have to be directly related to military service as long as it happened during their period of service. If a veteran had a disease or injury prior to joining the military, the veteran may still be entitled to service-related compensation payments if the preexisting condition was aggravated during military service.

Service Connection

There are a number of ways to prove a linkage between a current disability and an event, injury or disease that occurred during military service. In addition, certain veterans are eligible for compensation payments based on an assumption that their disability is service connected. These include veterans who have been exposed to Agent Orange or other pesticides, exposed to radiation, suffer from certain tropical diseases and Gulf War veterans who have certain chronic unexplained disabilities.

Willful Misconduct

This phrase means “an act involving conscious wrongdoing or known prohibited action.” Alcohol and/or drug abuse, which is secondary to a service-connected medical condition, may not be considered as an exclusion to the receipt of compensation payments.

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Rate of Compensation Payments

Once a service related connection is established, the VA will assign a disability rating to the disease or illness. The current compensation rates of payments are:

Veteran's Disability Rating	Monthly Payment
10%	\$117
20%	\$230
30%	\$356
40%	\$512
50%	\$728
60%	\$921
70%	\$1,161
80%	\$1,349
90%	\$1,517
100%	\$2,527

These rates may be higher if the veteran is eligible for combat-related special compensation. The VA's assignment of a disability rating may be challenged if the veteran believes the rate has been set lower than warranted by the disability. In addition, a 100% rating may be assigned where a veteran established a 60% rating for one illness or a combined rating of 70% for two or more disabilities and can show they are unemployable. This is called total disability rating based on an individual's unemployability (TDIU). A determination of a particular veteran's eligibility for TDIU is considered within the context of a veteran's capabilities regardless of whether an average person could be considered employable under the same circumstances.

Veterans Pension Benefits

The VA pension benefits are designed to supplement the income of disabled veterans who had to give up career opportunities while they served their country in times of war.

The eligibility criteria for pension benefits require that the veteran:

- Be discharged under *other than dishonorable conditions*.
- Have served actively served for specific time periods during a *designated period of war*.
- Have limited income and a net worth not sufficient to provide adequate maintenance.
- Be *totally and permanently disabled or over 65* at the time of the application for a pension.
- If totally and permanently disabled, the disability must not be due to willful conduct.

Income and Asset Limits

The VA pension benefits program is a needs based program. If an otherwise eligible veteran’s countable income exceeds the maximum annual pension rate, the veteran will not receive any benefits. If the eligible veteran’s countable income does not exceed the annual pension rate, the VA will reduce the pension rate dollar for dollar by the amount of the veteran’s countable income to determine the amount of veterans pension benefits provided.

The veteran’s net worth also can affect eligibility for pension benefits. A number of factors are considered including whether property can be easily converted to cash; the veteran’s life expectancy; the number of dependants the veteran has; and the potential rate of depletion of the assets including for unusual medical expenses. Except for very old age, the VA usually does not deny claims where the net worth is under \$80,000.

Disability and Age

The veteran will be considered permanently and totally disabled if the veteran is any of the following:

- A patient in a nursing home for long term care because of a disability.
- Disabled as determined by the Social Security Administration.
- Unemployable as a result of a disability reasonably certain to continue throughout the life of the veteran.
- Suffering from (A) any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation but only if it is reasonably certain that such disability will continue throughout the life of the veteran; or (B) any disease or disorder determined by the Secretary to be of such a nature or extent as to justify a determination that persons suffering from the disease are permanently or totally disabled.

Since 2001, no disability rating has been required when a veteran 65 or over applies for pension benefits because veterans aged 65 and over are conclusively presumed to be permanently and totally disabled for pension purposes.

Willful Misconduct

Willful misconduct is defined as involving “deliberate or intentional wrongdoing with knowledge of or wanton disregard of its probable consequences.” Regulations also indicate that willful misconduct is an act involving conscious wrongdoing or known prohibited action. Acting unwisely does not amount to willful

misconduct. There is a “presumption” that an injury or death suffered while an individual is on active service is “incurred in the line of duty” and is not the result of willful misconduct. There are a variety of specific regulations that address the effect of alcoholism and drug abuse on eligibility for pension benefits. Alcohol and/or drug abuse, which is secondary to a service-connected medical condition, may not be considered as an exclusion to the receipt of pension benefits.

Current Pension Rates

Veterans without a spouse or children	\$11,181
Veterans with one dependant	\$14,643
Veterans housebound without dependants	\$13,644
Veterans housebound with one dependent	\$17,126
Veterans needing regular aid and assistance, no dependants	\$18,654
Veterans needing regular aid and assistance, one dependant	\$22,113
Increase for each dependant child	\$1,909

The Funding

This is the easy part. A project that provides advocacy services to disabled veterans is not only a natural for foundation funding but quite politically compelling. For those who remember the atmosphere surrounding vets returning from Vietnam, like Yoshio, the current national sense of honor and responsibility to help injured vets today is both refreshing and startling. Foundations prize new projects that are an innovative fill, a recognized and compelling community need and have the potential to create long term funding streams to support and expand the work. In almost every part of our nation, a project focusing on serving the various advocacy needs of veterans will be considered as politically popular, held in high merit, and certainly innovative. Perhaps most importantly from a foundation’s perspective, the project will become self-funding in the future if the project successfully represents veterans in Disability Compensation appeals.

Until July of 2007, the VA permitted a total payment to an advocate of \$15 for successfully representing a veteran in an appeal. The VA adopted this level of permissible compensation shortly after the end of the Civil War. Many believe the prime motivation for the VA continuing this low rate of permissible compensation for the next 133 years was to limit the availability of advocates involved in the system and leave the VA unrestricted in their decision-making. After recent Congressional intervention, the VA changed the rules to closely replicate the fee structure permitted for ad-

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vocates involved in the Social Security Administration SSDI and SSI process. Currently, the VA rules permit advocates to receive up to 30% of the retroactive award provided to a successful veteran. A compensation rate in a client retainer of 20% is automatically presumed to be permissible while the VA may approve a rate between 20% and 30% after review. Our program in Hawai'i has set a rate of 15% for our clients. Since appeals can take anywhere between a year and 5 years to resolve, we anticipate that fees sufficient to support present costs will begin to be recovered in about 1 ½ years. Once the funding stream begins, it should not only be sufficient to support the present costs of the effort but likely will provide increased and economically stable funding to expand the project. Foundations in Hawai'i have provided two years worth of start up costs to fund our effort until fees begin to be recovered for our successful appeals.

For those programs who are burdened with the Legal Services Corporation (LSC) regulations restricting the receipt of such attorney's fees (See Regulation 1642), an affiliate 501(c)(3) corporation can easily be created which conforms to the requirements of LSC regulation 1610 for separate space, and a partial (not total) separation of staff. Successful models exist throughout the nation for those inclined to some degree of creativity. Our program in Hawai'i, Lawyers for Equal Justice (www.lejhawaii.org) is one.

The Staffing, Training and Support

Staffing a veterans project is not much different than staffing other benefit programs for low income clients. The VA rules permit lawyers and paralegals that have been certified by the VA to practice within the agency's various levels of review. Paralegals must take a test administered by VA to become certified but Lawyers admitted to any state bar are automatically certified once application has been received.

Training is available through an excellent, thorough and well-organized veterans benefits manual produced by the National Veterans Legal Services Program (NVLS) located in Washington, D.C. The program also produces a 6-hour training DVD and a trainer's guide that accompanies the DVD. Their website (www.nvlsp.org) contains information on various resources available for support and training as well as links to partner organizations. The National Organization of Veterans Advocates, Inc. (NOVA) is a national bar as-

sociation dedicated to supporting advocates engaged in a VA practice. Their website (www.vetadvocates.com) has some good information on VA benefits issues. NOVA also has training videos and sponsors two annual conferences that provide significant opportunities for advocates to meet their peers while receiving excellent training. NOVA sponsors an extremely useful listserv message board as well as arranges peer support relationships.

The Politics

As with every community, successfully advocating for veterans requires a certain degree of political awareness. Most areas of the country have at least one veterans service organization such as the Veterans of Foreign Wars (VFW) or the Disabled American Veterans (DAV) that receive funding from the VA to assist veterans complete their initial applications for benefits. These organizations occasionally assist veterans on appeals but usually do not have the time or funding to provide significant attention to those veterans who are in the appeal stage. These organizations are essential partners who often are in the best position to make referrals to your project of vets who have strong claims. You are advised to think carefully through your initial contact with these organizations and tailor your approach to one that will maximize your own effort as legitimate and solely interested in developing strong partnerships for the mutual benefits of each organization and their veteran clients.

Just as important is your project's interaction with your VA Regional Office (RO) that will process the initial applications and first stage of the appeal process. It will be very likely that they have had little, if any, contact with advocates representing vets during the appeal stage. Their interest is to process each appeal with as little time wasted (or spent) on the appeal. It will be your task to develop a working relationship with your RO so that the appeal process will be as speedy, as well as productive, as possible. The same approach as used with the local service organizations will produce the greatest chance of success. Try to fashion a win-win for both sides. For example, although a veteran is entitled to a complete set of their claims file from the RO, there is little to help enforce a time frame for the RO to act on these requests. The RO's are understaffed and some claims files contain well over 1000 pages. One compromise is to structure an agreement with the RO allows you an opportunity to review the file at the RO without your client and to scan or selectively indicate the pages

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from the file you need. It seems like a simple solution but remember, you are dealing with a bureaucracy that is overwhelmed with work and bound by a rather rigid set of operating principles which has not had a lot of experience with dealing with informed advocates.

The Rewards

I am fortunate to have found myself in the position of representing veterans this late in my legal services career. My personal inspiration comes from two places. The first is from the work of Rick Little, who created the Bill Smith Homeless Veterans project in Los Angeles. Rick single-handedly has been representing veterans on LA's skid row for the past 6 years. He was one of the first public interest advocates to become deeply involved in representing veterans who were challenging by themselves wrongful denials of benefits by the VA. He is one of my heroes. The second inspiration comes from our clients, most of who have served in the military during the war in Vietnam. Upon graduation from law school in 1969, I joined legal services for the poor as a Vista Volunteer lawyer in Atlanta, Georgia. It was a time in which the war was raging through its darkest moments and many of our veteran clients made a conscious choice to serve our country in Vietnam. Our program's Veterans Project has unintentionally created a way for us to personally honor the sacrifices made by those who were injured, often permanently, in service to America during those difficult years.

- 1 Victor Geminiani is the Executive Director of Lawyers for Equal Justice (LEJ) in Hawaii. LEJ (www.lejhawaii.org) is a nonprofit legal aid program that engages in class actions litigation and policy advocacy directed at systematic reform in low-income communities. LEJ also represents individuals who are asserting rights for VA and/or Social Security benefits. He is a founding board member and past Chairperson of the Management Information Exchange. He has also served as the Executive Director of the Western Massachusetts Legal Services Program, the Legal Services of Northern California, the Legal Aid Foundation of Los Angeles and the Legal Aid Society of Hawaii as well as the Regional Director of the Legal Service Corporation responsible for overseeing the 75 LSC funded programs in the ten south eastern states. Victor may be reached at victor@lejhawaii.org.