

M21-1, Part III, Subpart v, Chapter 9, Section B - Processing Awards to Incompetent Beneficiaries

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Overview

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1. General Authorization Issues in Incompetency Cases

Introduction

This topic contains information on general authorization issues in incompetency cases, including

- indicating incompetency when scheduling a physical examination
- actions to take when an incompetent Veteran fails to report for a routine future examination
- admission of an incompetent Veteran to an institution for medical care, and
- claims from claimants whom VA has determined are incompetent.

Change Date

III.v.9.B.1.a. Indicating Incompetency When Scheduling a Physical Examination	<p>When requesting an examination of an incompetent Veteran,</p> <ul style="list-style-type: none">• indicate in the COMMENTS section of the examination request that the Veterans Benefits Administration has determined the Veteran is incompetent, and• provide (in the same section) the name and address of the Veteran's fiduciary. <p>Reference: For more information on inputting examination requests, see M21-1, Part III, Subpart iv, 3.A.9 and 10.</p>
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III.v.9.B.1.b. Actions to Take When an Incompetent Veteran Fails to Report for a Routine Future Examination	<p>If an incompetent Veteran fails to report for a routine future examination, send</p> <ul style="list-style-type: none">• a notice of proposed adverse action to the Veteran before reducing or suspending his/her benefits• a letter to the fiduciary explaining<ul style="list-style-type: none">◦ that the Veteran failed to report for a Department of Veterans Affairs (VA) examination◦ why the examination was necessary◦ that the Veteran may notify VA that he/she is willing to report for the examination and VA will reschedule it, and◦ that failure to report for the examination could result in a reduction or discontinuation of his/her benefits, and• an e-mail to the fiduciary hub (hub) of jurisdiction that<ul style="list-style-type: none">◦ explains the Veteran has failed to report for an examination, and◦ request assistance in determining whether the Veteran is willing to report for the examination. <p>Reference: For more information on processing a Veteran's failure to report for an examination, see M21-1, Part III, Subpart iv, 8.E.1.</p>
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III.v.9.B.1.c. Admission of an Incompetent Veteran to an Institution for Medical Care	<p>For information on handling cases in which an incompetent Veteran is admitted for medical care to a VA or non-VA institution, see M21-1, Part III, Subpart v, 6.E.</p>
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III.v.9.B.1.d. Claims From Claimants Whom VA Has Determined Are Incompetent	<p>VA must process claims it receives from a claimant whom VA has determined is incompetent, even if VA has appointed the claimant a fiduciary.</p> <p>A VA determination of incompetency under 38 CFR 3.353 constitutes a decision regarding the claimant's ability to manage his/her own affairs, including disbursement of funds. It does not preclude such a claimant from prosecuting a claim for benefits.</p> <p>Reference: For more information on the process for determining whether a beneficiary is competent, see M21-1, Part III, Subpart iv, 8.A.3.</p>
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2. Processing Incompetency Determinations and Authorizing Awards When a Beneficiary's Competency Is at Issue

Introduction	<p>This topic contains information on processing incompetency determinations and authorizing awards when a beneficiary's competency is at issue, including</p> <ul style="list-style-type: none"> • sources of competency and incompetency determinations • processing medical evidence of incompetency that does not involve a judicial determination • claimants who become entitled to benefits before the rating activity makes a final determination regarding competency • actions the authorization activity takes following receipt of a recommendation for payment from a hub • processing <ul style="list-style-type: none"> ◦ a court appointment of a fiduciary without a judicial determination of incompetency ◦ a court decree of incompetency or court appointment of a fiduciary by reason of incompetency ◦ a judicial determination of incompetency regarding a <ul style="list-style-type: none"> ■ Veteran, and ■ parent, surviving spouse, or adult child, and ◦ evidence that a child beneficiary is permanently incapable of self-support, and • authorizing an award for a beneficiary found competent by court decree.
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III.v.9.B.2.a.

Sources of

Competency and

Incompetency

Determinations

Competency and incompetency determinations may be made by

- VA rating decision
- court decree, or
- both a VA rating decision and court decree.

Notes:

- As explained in the remaining blocks of this topic, the procedure for handling a VA rating decision of competency/incompetency differs from the procedure for handling a court decree of competency/incompetency.
- VA is **not** required to recognize a court-appointed fiduciary for purposes associated with the payment of VA benefits.

Reference: For more information on incompetency determinations, see

- M21-1, Part III, Subpart iv, 8.A, and
 - 38 CFR 3.353.
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III.v.9.B.2.b.
Processing
Medical Evidence
of Incompetency
That Does Not
Involve a Judicial
Determination

Follow the instructions in the table below after receiving medical evidence that

- indicates a beneficiary may be incompetent, per 38 CFR 3.353, but
- does **not** involve a judicial determination of incompetency.

Reference: For more information on handling requests for competency determinations *without* medical or a judicial determination regarding a beneficiary's competency, see M21-1, Part III, Subpart iv, 8.A.1.f.

Step	Action
1	Establish an appropriate rating end product (EP) if one is not currently pending.
2	<p>Refer the evidence to the rating activity for a determination as to the beneficiary's competency.</p> <p>Note: If the medical evidence is not adequate for rating purposes, undertake development to obtain additional evidence before referring the case to the rating activity.</p> <p>Reference: For more information on processing evidence of a child's permanent incapacity for self-support, see M21-1, Part III, Subpart iii, 7.1 and 2.</p>
3	<p>If, after reviewing the evidence, the rating activity determines the beneficiary is</p> <ul style="list-style-type: none"> • still competent, <ul style="list-style-type: none"> ◦ annotate the evidence to show it was reviewed but warranted no formal action ◦ clear the EP (unless other rating-related issues are still pending), and ◦ disregard the remaining steps in this table, or • incompetent, the rating activity will prepare a rating decision that proposes a rating of incompetency. Proceed to the next step after the rating activity refers the decision to the authorization activity. <p>Note: If the beneficiary has an electronic claims folder (eFolder), enter annotations in the SUBJECT field of the evidence's document properties, according to the instructions in</p> <ul style="list-style-type: none"> • M21-1, Part III, Subpart ii, 4.H.1.e, and • the Veterans Benefits Management System (VBMS) Job Aid – Editing Document Properties.
4	<p>Prepare a notice of the proposed rating of incompetency in accordance with instructions in M21-1, Part III, Subpart v, 9.B.3.a-e, and send it to the beneficiary.</p> <p>Note: If the beneficiary has a power of attorney (POA), send a copy of the notice to the POA in accordance with the instructions in M21-1, Part I, 3.B.1.</p>

Step	Action
5	<p>Does the rating decision address other issues (beyond the issue of the beneficiary's competency)?</p> <ul style="list-style-type: none"> • If yes, go to the next step. • If <i>no</i>, <ul style="list-style-type: none"> ◦ clear the associated EP, and ◦ go to Step 7.
6	Promulgate and authorize the rating decision.
7	<p>Did the system automatically establish EP 590, <i>Due Process for Incompetency</i>?</p> <ul style="list-style-type: none"> • If yes, go to the next step. • If <i>no</i>, <ul style="list-style-type: none"> ◦ manually establish the EP, and ◦ go to the next step. <p>Note: National Work Queue (NWQ) will transfer the EP 590 automatically to the hub of jurisdiction the following day.</p>
8	Associate the rating decision, decision notice (if applicable), and award document (if applicable) with the claims folder.

Important: Process an award or award adjustment according to the instructions in M21-1, Part III, Subpart v, 9.B.2.c if, at any point during the process described in the table above, a beneficiary becomes entitled to

- an original award of benefits
- a reinstatement of benefits, or
- an increase in benefits.

Note: If, during the due process period (the 60-day period that follows the date of the notice of the proposed rating of incompetency), VA receives

- evidence regarding the beneficiary's competency, follow the process described in M21-1, Part III, Subpart v, 9.B.3.f, or
 - a request for a hearing, follow the instructions in M21-1, Part III, Subpart v, 9.B.3.h.
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III.v.9.B.2.c. If, at any point during the process described in M21-1, Part III, Subpart v, 9.B.2.b, the rating activity determines a claimant is entitled to an original award of benefits, a reinstatement of benefits, or increased benefits, follow the instructions in the table below.

Claimants

Who Become **Exception:** Under certain circumstances, which should be rare, **not** taking the action described in the table below might be in the beneficiary's best interest. If, for example, the evidence of record shows the beneficiary has a history of giving away all his/her income or spending it on frivolous activities on the same day he/she receives it, it may be in the beneficiary's best interest to withhold benefits until the

Entitled to

Benefits

Before the

Rating Activity

Makes a Final

Determination

Regarding

Competency

- rating activity determines the beneficiary is competent, or
- hub of jurisdiction assigns the beneficiary a fiduciary.

Important: In all cases, withhold all **retroactive** benefits due the beneficiary until the rating activity makes a final decision regarding the beneficiary's competency. If the rating activity ultimately decides the beneficiary is

- *competent*, release all benefits that were withheld while deciding whether the beneficiary was competent, or
- *incompetent*, withhold the retroactive benefits until the hub of jurisdiction assigns the beneficiary a fiduciary.

If the rating activity determined the Veteran is entitled to ...	Then ...
<ul style="list-style-type: none"> • an original award of benefits, or • a reinstatement of benefits 	generate an award, without waiting for resolution of the competency issue, that withholds benefits until the first day of the current month.
increased benefits	process an award adjustment, without waiting for resolution of the competency issue, that withholds the increase in benefits until the date shown in the LAST PAID DATE field on the AWARD INFORMATION tab in Share.

III.v.9.B.2.d.

Actions the
Authorization
Activity Takes

Following
Receipt of a
Recommendation
for Payment
From a Hub

When a hub makes a recommendation for payment, its own authorization activity typically processes the recommendation. When the hub's authorization activity is unable to process such a recommendation, the hub refers the recommendation to a regional office (RO) for processing.

The table below describes the actions ROs must take after receiving a recommendation for payment from a hub.

If the hub ...	Then the RO must ...
<ul style="list-style-type: none"> • concurs with the rating of incompetency • determines that appointment of a fiduciary is appropriate, and • certifies the appointment of a fiduciary by sending <i>VA Form 21P-555, Certificate of Legal Capacity to Receive and Disburse Benefits, and Fee Authorization</i>, to the RO 	<p>release any withheld benefits to the fiduciary in accordance with</p> <ul style="list-style-type: none"> • instructions from the hub, and • the procedures set forth in M21-1, Part III, Subpart v, 9.C.2.b. <p>Notes:</p> <ul style="list-style-type: none"> • If, in addition to releasing withheld benefits, the RO adjusted the beneficiary's award, it must also <ul style="list-style-type: none"> ◦ furnish the certifying hub a copy of the award document, and ◦ notify the beneficiary's fiduciary of the award adjustment and his/her review rights with regard to it, per M21-1, Part I, 2.C.4. • There is no requirement to notify the beneficiary's fiduciary unless the RO adjusted the beneficiary's award.
<ul style="list-style-type: none"> • agrees the beneficiary is incompetent but concludes that reasonable protection of the interests of the beneficiary can be accomplished with follow-up, personal contact, and • furnishes the RO with certification of supervised direct payment (SDP) on <i>VA Form 21P-555</i> 	<p>release any withheld benefits directly to the beneficiary in accordance with</p> <ul style="list-style-type: none"> • instructions from the hub, and • the procedures set forth in M21-1, Part III, Subpart v, 9.B.5. <p>Note: If, in addition to releasing withheld benefits, the RO adjusted the beneficiary's award, it must also</p> <ul style="list-style-type: none"> • furnish the certifying hub a copy of the award document, and • notify the beneficiary of the award adjustment and his/her review rights with regard to it, per M21-1, Part I, 2.C.4.

If the hub ...	Then the RO must ...
<ul style="list-style-type: none"> • concludes the beneficiary is competent to manage the funds payable to him/her, and • furnishes the RO with certification of SDP on VA Form 21P-555 	<p>refer the following to its rating activity:</p> <ul style="list-style-type: none"> • a statement of the finding of competency by the hub, and • all evidence upon which the hub based its conclusion. <p>Result: The rating activity must reassess the issue of competency, per 38 CFR 3.353. If the rating activity decides the beneficiary</p> <ul style="list-style-type: none"> • is <i>competent</i>, the RO must <ul style="list-style-type: none"> ◦ release any withheld benefits directly to the beneficiary ◦ furnish the certifying hub a copy of the award document (only if the RO also adjusted the beneficiary's award), and ◦ notify the beneficiary of the final determination and his/her review rights, per M21-1, Part III, Subpart v, 2.B, or • remains <i>incompetent</i>, the RO must <ul style="list-style-type: none"> ◦ continue the SDP, and ◦ notify the hub of the rating decision. <p>Reference: For more information on the evidentiary requirements for determining whether an incompetent beneficiary has regained competency, see M21-1, Part III, Subpart iv, 8.A.4.d.</p>

Note: If the award of the beneficiary referenced in the table above

- requires adjustment, the RO makes the adjustment under the pending EP 290, or
 - does **not** require adjustment, the RO clears the pending EP 290.
-

III.v.9.B.2.e.
Processing a
Court
Appointment of a
Fiduciary Without
a Judicial
Determination of
Incompetency

Do *not* consider a court appointment of a fiduciary as evidence of incompetence requiring rating action ***unless*** it is also accompanied by either

- a judicial determination of incompetency, such as a court order or decree, or
- medical evidence.

III.v.9.B.2.f.
Processing a
Court Decree of
Incompetency or
Court
Appointment of a
Fiduciary by
Reason of
Incompetency

If VA receives a court decree of incompetency or a court appointment of a fiduciary by reason of a beneficiary's incompetency, it is *unnecessary* to

- prepare a *proposed* rating of incompetency, or
- provide notice of proposed adverse action in the matter of incompetency.

Important: If VA receives a ***judicial determination*** that a

- Veteran is incompetent, follow the instructions in M21-1, Part III, Subpart v, 9.B.2.g, or
- parent, surviving spouse, or adult child is incompetent, follow the instructions in M21-1, Part III, Subpart v, 9.B.2.h.

References: For more information on the

- responsibilities of the rating activity following receipt of a court decree of incompetency, see M21-1, Part III, Subpart iv, 8.A.5, and
- distribution of court documents referenced in this block, see M21-1, Part III, Subpart v, 9.C.2.a.

III.v.9.B.2.g. Judicial findings of a court with regard to the competency of a *Veteran* are ***not*** binding on the rating activity.

Processing a Follow the steps in the table below after receiving a judicial determination of incompetency regarding a Veteran.

Judicial Determination of Incompetency Regarding a Veteran	Step	Who Is Responsible	Action
	1	RO	If the Veteran has been admitted to a hospital for treatment or observation, request medical records from the hospital that would be useful in evaluating the Veteran's competency.
	2	RO	Complete a final rating decision regarding the Veteran's competency.

Step	Who Is Responsible	Action	
3	RO	Follow the instructions in the table below when processing the rating decision referenced in Step 2.	
		If the rating activity determined the Veteran is ...	Then ...
		competent	<ul style="list-style-type: none">• complete any pending award actions• send a decision notice to the Veteran, and• clear the pending EP 020 (or other associated rating EP).
		incompetent	<ul style="list-style-type: none">• complete any pending award actions, withholding any <i>retroactive</i> benefits until the hub of jurisdiction assigns the Veteran a fiduciary• send the Veteran contemporaneous notice that satisfies the requirements of M21-1, Part III, Subpart v, 9.B.4.b• clear the pending EP 020 (or other associated rating EP)• ensure the judicial documents are associated with the claims folder• establish an EP 290, <i>FID-Fiduciary Adjustment</i>, which NWQ will route to the hub of jurisdiction, and• notify the hub of jurisdiction using<ul style="list-style-type: none">◦ VA Form 21-592, <i>Request for Appointment of a Fiduciary, Custodian or Guardian</i>, if the form was not already provided to the hub, or◦ a memorandum or letter, if VA Form 21-592 was previously provided to the hub.

Step	Who Is Responsible	Action
4	RO	<p>Pending certification of a fiduciary or other instructions from the hub, continue any existing</p> <ul style="list-style-type: none"> • apportionments, and • payments VA is making to the Veteran. <p>Reference: For more information on handling a court's appointment of more than one fiduciary, see M21-1, Part III, Subpart v, 9.C.1.b.</p>
5	hub authorization activity	<p>Following receipt of certification,</p> <ul style="list-style-type: none"> • process the payee certification from the <i>VA Form 21P-555</i>, and • forward a copy of the completed <i>VA Form 21P-555</i> to the Insurance Service. <p>Reference: For more information on the actions an RO's authorization activity must take following receipt of a recommendation for payment from a hub, see M21-1, Part III, Subpart v, 9.B.2.d.</p>

III.v.9.B.2.h.
Processing a
Judicial
Determination of
Incompetency
Regarding a
Parent, Surviving
Spouse, or Adult
Child

Rating action is **not** required when a court of law determines a parent, surviving spouse, or adult child is incompetent. When this occurs,

- send a contemporaneous notice to the beneficiary
- provide oral notification of the Brady Handgun Violence Prevention Act (Brady Act) restrictions to the beneficiary, and
- continue direct payment pending receipt of certification of a fiduciary or other payee from the hub of jurisdiction.

III.v.9.B.2.i.	Following receipt of evidence indicating a child beneficiary is permanently incapable of self-support, refer the case to the rating activity for a decision as to whether or not the child
Processing Evidence	<ul style="list-style-type: none"> • was incapable of self-support prior to age 18
That a Child	<ul style="list-style-type: none"> • remains incapable of self-support on a permanent basis, and
Beneficiary Is	<ul style="list-style-type: none"> • is unable to manage his/her own financial affairs.
Permanently	Note: A child may be unable to support him/herself and still be considered competent to handle his/her financial affairs.
Incapable of Self-Support	<p>References: For more information on</p> <ul style="list-style-type: none"> • the actions the authorization activity takes following receipt of a recommendation for payment from a hub, see M21-1, Part III, Subpart v, 9.B.2.d • processing evidence of a child's permanent incapacity for self-support and incompetency, see M21-1, Part III, Subpart iii, 7.1 and 2, and • considering the competency of a child who is incapable of self-support, see M21-1, Part III, Subpart iv, 8.A.2.c.

III.v.9.B.2.j.	If a beneficiary previously held incompetent
Authorizing an	<ul style="list-style-type: none"> • by a court decree <i>only</i>, (not by rating decision) is subsequently found competent by a court decree, <ul style="list-style-type: none"> ◦ initiate direct payment to the beneficiary after a hub certifies the corresponding court proceedings were regular and proper in all respects ◦ annotate the REMARKS section of the amended award to reflect the facts surrounding the restoration of competency, and ◦ e-mail a copy of the award to the hub that supervises the beneficiary's fiduciary, or
Award for a	
Beneficiary	
Found	
Competent by	<ul style="list-style-type: none"> • by a court decree and by VA rating decision, is subsequently found competent by court decree, <ul style="list-style-type: none"> ◦ refer the court decree and any evidence that accompanied it to the rating activity, and ◦ do not initiate direct payment to the beneficiary without approval from the hub.
Court Decree	

Note: If the beneficiary is a child who is incapable of self-support by reason of mental defect, the rating activity must make a new determination as to whether the child remains entitled to VA benefits. Do not defer award action pending this referral to the rating activity.

Reference: For more information on awards to incompetent Veterans who are institutionalized for medical care, see M21-1, Part III, Subpart v, 6.E.1.

3. Due Process Requirements for Incompetency Determinations

Introduction

This topic contains information on due process requirements for incompetency determinations, including

- elements of a notice of a proposed rating of incompetency
- text to include in a notice of a proposed rating of incompetency
- notifying a beneficiary who is under the age of majority
- requirement for oral notification of the beneficiary
- documenting compliance with the requirement for oral notification
- handling evidence VA receives during the due process period
- responding to a beneficiary's request for a hearing
- processing a beneficiary's request for a hearing
- conducting a hearing prior to a final determination
- processing a waiver of due process concerning a proposed rating of incompetency
- proposals on which a beneficiary takes no action, and
- processing a legacy notice of disagreement (NOD) that VA receives after issuing notice of a final rating of incompetency.

December 30, 2020

Change Date

III.v.9.B.3.a.

Elements of a
Notice of a
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 right to
 - 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.

Notes:

- Do **not** include Federal tax information in the notice.
- If a beneficiary requests a hearing at **any** time *before* VA makes a final decision regarding the beneficiary's competency, VA will wait to make a final decision until after it holds the hearing.

References: For more information on the

- text that claims processors must include in a notice of a proposed rating of incompetency, see M21-1, Part III, Subpart v, 9.B.3.b, and
 - Brady Act, see M21-1, Part III, Subpart v, 9.B.4.
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III.v.9.B.3.b. Include the text in the paragraphs below when preparing a notice of a proposed rating of incompetency for a beneficiary who is already receiving VA benefits.

Text to Include
in a Notice of
a Proposed
Rating of
Incompetency

We have received information showing that because of your disabilities you may need help in handling your Department of Veterans Affairs (VA) benefits. We received the information from [name of physician, medical institution, etc.]. The report, dated [date of the report], shows [brief description of the diagnosis and/or findings].

We must decide if you are able to handle your VA benefit payments. We will base our decision on all the evidence we already have and any other evidence you may wish to send us. Before we make a final determination, you have the right to submit any evidence, information, or statement that will present your side of the case.

What We Propose to Do

We propose to rate you incompetent for VA purposes. This means a fiduciary may be appointed to help you manage your VA benefits. Payment of any money due you will be made directly to your fiduciary. This person or institution must use your payments for your benefit and is responsible to VA for their use.

possession, purchase, receipt, or transportation of a firearm. Submit your request on the enclosed VA Form 21-4138, Statement in Support of Claim. VA will determine whether such relief is warranted.

How to Obtain a Personal Hearing

If you desire a personal hearing to present evidence or argument about your ability to handle your VA benefits, notify this office and we will arrange a time and place for the hearing. If you want, you may bring witnesses and their testimony will be entered in the record. VA will furnish the hearing room and provide hearing officials. VA cannot pay any other expenses of the hearing since a personal hearing is held only on your request.

Please notify us as soon as possible if you would like to request a hearing. If VA receives your hearing request prior to the final competency determination, we will continue to send payments to you until we have held the hearing and reviewed the testimony. If no request for hearing is received prior to the final competency determination, a decision will be made based on the evidence of record.

How to Obtain Representation

An accredited representative of a veterans' organization or other service organization recognized by the Secretary of Veterans Affairs may represent you, without charge. An accredited agent or attorney may also represent you. However, under 38 U.S.C. 5904(c), an accredited agent or attorney may only charge you for services performed in support of your decision review, either a notice of disagreement, supplemental claim, or higher-level review. If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action is required on your part.

Important: If the beneficiary is not receiving benefits, based on the *Exception* cited in M21-1, Part III, Subpart v, 9.B.2.c, remove the two paragraphs that discuss the time limit for requesting a hearing.

III.v.9.B.3.c.

Notifying a

Beneficiary Who

Is Under the Age

of Majority

If VA is making payments to the custodian of a beneficiary who is under the age of majority, and a decision regarding the child's competency is needed when the child reaches the age of majority, send notice of a proposed rating of incompetency to

- the current fiduciary that a hub has certified to receive payments for the child, or
- a custodian that is recognized as a parent under 38 U.S.C. 5502(a).

References: For more information on

- a list of the age of majority by State or territory, see M21-1, Part III, Subpart v, 9.C.3.c, and
 - incompetency determinations, see
 - M21-1, Part III, Subpart iv, 8.A, and
 - 38 CFR 3.353.
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III.v.9.B.3.d.

Requirement for

Oral Notification

of the Beneficiary

After sending a notice of a proposed rating of incompetency to a beneficiary, or after receiving a court decree of incompetency or court appointment of a fiduciary by reason of a beneficiary's incompetency, ROs must make reasonable efforts to contact the beneficiary by telephone for the purpose of orally informing him/her of the following:

- a determination of incompetency will prohibit the purchase, possession, receipt, or transportation of a firearm or ammunition
- violation of the prohibition could result in a fine and/or imprisonment, and
- the beneficiary may apply for relief from the referenced prohibition by submitting a request to VA.

Notes:

- Reasonable efforts generally consist of
 - an initial attempt to contact the beneficiary by telephone, using his/her current telephone number, and
 - at least one follow-up attempt, if the initial attempt is unsuccessful.
 - Exercise discretion when discussing the proposed rating with the beneficiary, as this type of notice could be upsetting to him/her.
 - A voice-mail message is **not** considered adequate oral notification.
 - If a current, valid telephone number is not available for the beneficiary, use reasonable efforts to secure one, which may include
 - searching the telephone directory
 - reviewing applicable hospital records, and/or
 - contacting the beneficiary's representative.
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III.v.9.B.3.e. Documenting Compliance With the Requirement for Oral Notification	<p>Document compliance with the requirement to provide the oral notification referenced in M21-1, Part III, Subpart v, 9.B.3.d on <i>VA Form 27-0820, Report of General Information</i>.</p> <p>If initial and follow-up attempts to contact the beneficiary by telephone are <i>unsuccessful</i>, document the actions taken on <i>VA Form 27-0820</i>.</p> <p>Notes:</p> <ul style="list-style-type: none"> • If telephone contact with the beneficiary is made, but oral delivery of the notice is unsuccessful because, for example, the beneficiary is physically or mentally incapacitated, fully explain the circumstances on <i>VA Form 27-0820</i>. • If the beneficiary later reports never receiving or not understanding the initial oral notice, provide it again and document the action on <i>VA Form 27-0820</i>.
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III.v.9.B.3.f. Handling Evidence VA Receives During the Due Process Period	<p>The hub will review the evidence VA receives within 60 days of the date of the notice referenced in M21-1, Part III, Subpart v, 9.B.3.b, and complete the final rating decision, unless one of the exceptions in FPM, Part I, 1.A.2.b applies.</p> <p>Exception: Follow the process outlined in M21-1, Part III, Subpart v, 9.B.3.h, if VA receives evidence regarding a beneficiary's competency in connection with a hearing the beneficiary requested.</p>
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III.v.9.B.3.g. Responding to a Beneficiary's Request for a Hearing	<p>If a beneficiary requests a personal hearing, advise the beneficiary that</p> <ul style="list-style-type: none"> • he/she may bring witnesses to the hearing • witness testimony will be included in the record • he/she may be represented by an <ul style="list-style-type: none"> ◦ accredited representative of a Veterans organization or other service organization recognized by the VA at no charge, or ◦ attorney the beneficiary has appointed, and VA has recognized • VA furnishes the hearing room, provides hearing officials, and prepares the transcript or summary of the proceedings, and • VA cannot pay any other expenses associated with the hearing. <p>Note: If the beneficiary expresses a desire for representation but has not yet designated a representative, help the beneficiary designate a representative by furnishing him/her the appropriate form from among those listed in M21-1, Part I, 3.A.2.c.</p> <p>References: For more information on</p> <ul style="list-style-type: none"> • hearings, see M21-1, Part I, 4, and • a beneficiary's appointment and VA's recognition of an attorney, see M21-1, Part I, 3.A.2.
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III.v.9.B.3.h.

Processing a

Beneficiary's

Request for a

Hearing

The hub will process hearing requests VA receives between the date of the notice referenced in M21-1, Part III, Subpart v, 9.B.3.a, and the date VA makes a final decision regarding the beneficiary's competency, unless one of the exceptions in FPM, Part I, 1.A.2.b applies.

The table below describes the RO's jurisdictions (ROJ's) process for handling a beneficiary's request for a hearing when one of the exceptions in FPM, Part I, 1.A.2.b applies.

Stage	Description	
1	The ROJ follows the instructions in M21-1, Part III, Subpart ii, 3.D.4.a, for establishing control of the hearing request.	
2	The ROJ schedules and holds a hearing according to the instructions in M21-1, Part III, Subpart v, 9.B.3.i.	
3	The ROJ's rating activity makes a final determination regarding the beneficiary's competency.	
4	The ROJ takes the actions described in the table below.	
	If the rating activity determines the beneficiary is ...	Then the authorization activity ...
	competent	<ul style="list-style-type: none">• promulgates the final rating decision• completes any necessary award actions• sends a decision notice to the beneficiary, and• ensures all documentation is associated with the claims folder.
	incompetent	<ul style="list-style-type: none">• promulgates the final rating decision• completes any necessary award actions• sends a decision notice to the beneficiary• completes and uploads VA <i>Form 21-592</i> into the beneficiary's eFolder, and• establishes an EP 290, FID-Fiduciary Adjustment, which NWQ will route to the hub of jurisdiction.

Stage	Description
5	<p>If the rating activity determined the beneficiary is incompetent, the hub of jurisdiction</p> <ul style="list-style-type: none"> • appoints a fiduciary, and • releases any retroactive benefits due the beneficiary, if appropriate.

References: For more information on

- the jurisdiction for
 - individual hubs, see M21-1, Part III, Subpart v, 9.A.1.d, and
 - competency determinations, see M21-1, Part III, Subpart iv, 8.A.1.a
 - where to hold a hearing, see M21-1, Part I, 4.1.n , and
 - processing a legacy notice of disagreement (NOD) that VA receives after notifying a beneficiary of a final rating of incompetency, see M21-1, Part III, Subpart v, 9.B.3.l.

III.v.9.B.3.i.
Conducting a
Hearing Prior to a
Final
Determination

Designated hearing officials conduct hearings in accordance with the instructions in M21-1, Part I, 4.4.

Due to the nature of the hearings referenced in this section, hearing officials must be flexible in allowing a beneficiary's next of kin (or any other person of the beneficiary's choosing) to participate in the hearing on the beneficiary's behalf or to assist the beneficiary during the hearing.

III.v.9.B.3.j.
Processing a
Waiver of Due
Process
Concerning a
Proposed Rating
of Incompetency

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.

Notes:

- VA may accept a beneficiary's waiver of due process by telephone or written notice from the beneficiary or his/her authorized representative.
- The hub will maintain jurisdiction of the pending EP 590.

Reference: For more information on the jurisdiction of individual hubs, see M21-1, Part III, Subpart v, 9.A.1.d.

III.v.9.B.3.k.
Proposals on
Which a
Beneficiary Takes
No Action

If a beneficiary does not respond to notice of a proposed rating of incompetency within 65 days of the date of the notice, the hub of jurisdiction makes a final decision regarding the beneficiary's competency based on the evidence of record.

III.v.9.B.3.l.
Processing a
Legacy NOD
That VA Receives
After Issuing
Notice of a Final
Rating of
Incompetency

The ROJ handles all legacy appeals of incompetency determinations.

If VA receives a legacy NOD after issuing notice of a final rating of incompetency, the ROJ must

- prepare a statement of the case (SOC)
- attach *VA Form 9, Appeal to Board of Veterans' Appeals*, to the SOC, and
- send the SOC to the
 - beneficiary, or fiduciary, if applicable, and
 - beneficiary's or fiduciary's representative.

Important: When preparing the SOC, carefully consider whether the inclusion of certain information could be detrimental to the beneficiary's state of mind. A decision to exclude information on this basis must be supported by a physician's opinion and advice concerning the appropriate way to communicate the information to the beneficiary.

Note: Hubs are responsible for handling all legacy appeals, supplemental claims, and higher-level reviews regarding the selection of a fiduciary.

References: For more information on

- issuing an SOC, see M21-5, Chapter 7, Section D.3, and
- releasing information that may be detrimental to a beneficiary's state of mind, see M21-5, Chapter 7, Section D.1.e.

4. Information About the Brady Act

This topic contains information about the Brady Act, including

Introduction

- effect of the Brady Act on incompetent beneficiaries
- notifying affected beneficiaries
- relief from the Brady Act requirements
- initial steps to take after receipt of a request for relief
- required paragraphs for the National Instant Criminal Background Check System (NICS) relief development letter
- consent form that must accompany the NICS relief development letter
- general information about decisions to grant or deny a request for relief
- evidence claims processors must consider when deciding a request for relief
- circumstances under which claims processors must deny a request for relief
- process for considering a grant of relief, and
- actions to take after making a decision on a request for relief.

February 19, 2019

Change Date

III.v.9.B.4.a.

Effect of the Brady Act on Incompetent Beneficiaries

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 incompetent beneficiaries to the Federal Bureau of Investigations (FBI), which then adds the names to a database called the National Instant Criminal Background Check System (NICS). Gun dealers must check NICS for the name of a potential buyer before selling him/her a firearm.

III.v.9.B.4.b.

Notifying

Affected

Beneficiaries

Affected beneficiaries *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.

The following letter types and templates contain text that adequately explains the prohibitions the Brady Act imposes:

- Personal Computer Generated Letters (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.

In the event a claims processor uses an alternative correspondence template to prepare notice of a proposed rating of incompetency, he/she must include in the notice the following text:

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.

Reference: For more information on the text that must be included in a notice of a proposed rating of incompetency, see M21-1, Part III, Subpart v, 9.B.3.b.

III.v.9.B.4.c.

Relief From the
Brady Act
Requirements

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. The NIAA places the responsibility for administering the relief program on the agency that provided NICS with the name of the individual who is requesting relief.

Because relief from the reporting requirements of the Brady Act is not a benefit under Title 38, principles common to VA's adjudication process, such as "benefit of the doubt" and "duty to assist" (as demonstrated in ordering examinations or securing private medical records) do **not** apply. The burden of proof for these requests resides with the beneficiary, and failure to meet that burden is sufficient reason for denying the request.

Notes:

- Requests for relief from the reporting requirements of the Brady Act must be clear and explicit.
 - Do not infer or interpret a
 - request for relief as a claim for reassessment of the beneficiary's competency, or
 - claim of competency as a request for relief.
 - A grant by VA of a request for relief serves only to lift the prohibition against purchasing, possessing, receiving or transporting a firearm or ammunition under the Brady Act. 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.
-

Follow the steps described in the table below after receipt of a beneficiary's request for relief from the requirements of the Brady Act.

III.v.9.B.4.d.

Initial Steps to
Take After
Receipt of a
Request for
Relief

Step	Action
1	Has VA already determined by rating decision that the beneficiary is incompetent? <ul style="list-style-type: none"> • If yes, go to Step 7. • If <i>no</i>, go to the next step.
2	Is VA using a paper claims folder to process the beneficiary's request? <ul style="list-style-type: none"> • If yes, reverse-file the relief request in the center section of the paper claims folder. • If <i>no</i>, add a note in VBMS that indicates a relief request is pending.
3	<ul style="list-style-type: none"> • Flash the claims folder with an alert that the relief request must be processed after the rating activity determines whether the beneficiary is competent. • Take no further action until the rating activity makes its determination.
4	Did the rating activity determine the beneficiary is incompetent? <ul style="list-style-type: none"> • If yes, go to Step 15. • If <i>no</i>, go to the next step.
5	Ensure the corresponding rating decision contains the following statement under <i>Reasons for Decision</i> : <p><i>We received your request for relief from the Department of Justice reporting requirements contained in the Brady Handgun Violence Prevention Act.</i></p> <p><i>We have determined you can manage your VA benefits.</i></p> <p><i>Therefore, it is not necessary to provide you a decision on your request for relief.</i></p>
6	<ul style="list-style-type: none"> • Associate copies of all documentation related to the request with the beneficiary's claims folder. • Disregard the remaining steps in this table. <p>Note: If VA processed the request using a paper claims folder, file down the referenced documentation on the right flap of the folder.</p>
7	Did VA receive the request for relief along with a decision review request regarding VA's decision that the beneficiary is incompetent? <ul style="list-style-type: none"> • If yes, go to the next step. • If <i>no</i>, go to Step 15.
8	Establish an appropriate EP to control the decision review election.
9	Undertake any necessary or appropriate development to reassess the beneficiary's competency.

Step	Action
10	<p>Is VA using a paper claims folder to process the beneficiary's request?</p> <ul style="list-style-type: none"> • If yes, reverse-file the relief request in the center section of the paper claims folder. • If <i>no</i>, add a note in VBMS that indicates a relief request is pending.
11	<ul style="list-style-type: none"> • Flash the claims folder with an alert that the relief request must be processed as soon as the rating activity determines whether the beneficiary is still incompetent. • Take no further action until the rating activity makes its determination.
12	<p>Did the rating activity determine the beneficiary is still incompetent?</p> <ul style="list-style-type: none"> • If yes, go to Step 15. • If <i>no</i>, go to the next step.
13	<p>Ensure the corresponding rating decision contains the following statement under <i>Reasons for Decision</i>:</p> <p><i>We received your request for relief from the Department of Justice (DoJ) reporting requirements contained in the Brady Handgun Violence Prevention Act.</i></p> <p><i>We have determined you can manage your VA benefits.</i></p> <p><i>Therefore, it is not necessary to provide you a decision on your request for relief.</i></p> <p><i>VA will inform DoJ of your changed status, and DoJ will remove your information from the National Instant Criminal Background Check System.</i></p>

Step	Action
14	<ul style="list-style-type: none"> • Associate copies of all documentation related to the request with the beneficiary's claims folder. • Disregard the remaining steps in this table. <p>Notes:</p> <ul style="list-style-type: none"> • If VA processed the request using a paper claims folder, file down the referenced documentation on the right flap of the claims folder. • Once each month, the Hines Information Technology Center uploads to the FBI Law Enforcement Enterprise Portal a file that identifies those beneficiaries whose prior rating of incompetency VA has changed (by rating decision) during the past month. The FBI typically removes the names of these beneficiaries from NICS within two months. • Contact the NICS point of contact (POC) by e-mail (VAVBAWAS/CO/NICS) for assistance when, for example, <ul style="list-style-type: none"> ◦ VA receives a congressional inquiry regarding a beneficiary whom VA has rated competent but whose name remains on NICS ◦ a beneficiary whom VA has rated competent notifies VA that his/her name remains on NICS, or ◦ a VA employee discovers that the name of a beneficiary whom VA rated competent at least six months ago remains on NICS.
15	Establish EP 290, using the <i>NICS Relief Request</i> claim label.
16	<ul style="list-style-type: none"> • Send the beneficiary a letter containing the <ul style="list-style-type: none"> ◦ paragraphs shown in M21-1, Part III, Subpart v, 9.B.4.e, and ◦ consent form displayed in M21-1, Part III, Subpart v, 9.B.4.f, and • allow 30 days for a response.
17	<p>Did the beneficiary return the signed consent form within 30 days?</p> <ul style="list-style-type: none"> • If yes, go to Step 20. • If <i>no</i>, go to the next step.
18	Deny the beneficiary's request for relief, using the <i>NICS Relief Denial</i> letter in PCGL.
19	<ul style="list-style-type: none"> • Associate copies of all documentation related to the request with the beneficiary's claims folder. • Disregard the remaining steps in this table. <p>Note: If VA processed the request using a paper claims folder, file down the referenced documentation on the right flap of the claims folder.</p>

Step	Action
20	<p>Did the beneficiary provide a statement from his/her primary mental-health physician that assesses the beneficiary's mental health status over the last five years?</p> <ul style="list-style-type: none"> • If yes, go to the next step. • If <i>no</i>, return to Step 18.
21	<p>Did the beneficiary provide evidence of his/her reputation?</p> <ul style="list-style-type: none"> • If yes, go to the next step. • If <i>no</i>, return to Step 18.
22	<p>Follow the instructions in M21-1, Part III, Subpart v, 9.B.4.g to decide whether to grant the beneficiary's request for relief.</p>

III.v.9.B.4.e. If development action is necessary under M21-1, Part III, Subpart v, 9.B.4.d to decide a request for relief from the Brady Act requirements, include the following paragraphs in a letter to the beneficiary.

Required

Paragraphs

for the NICS

Relief

Development

Letter

We received your request for relief from the Department of Justice reporting requirements contained in 18 U.S.C. 922(d)(4) and (g)(4), The Brady Handgun Violence Prevention Act of 1993 (The Brady Act), Public Law 103-159. VA must report to the National Instant Criminal Background Check System (NICS) individuals whom VA determines to be unable to manage their own financial affairs.

Pursuant to 18 U.S.C. 925(c) and 101(c)(2)(A) of the NICS Improvements Amendment Act of 2007, Public Law 110-180, after receiving your request for relief, VA is obligated to decide whether you are eligible to receive relief from the reporting requirements of the Brady Act. This letter contains information about what we will do with your request and what you can do to help us decide it. We may grant relief if clear and convincing evidence shows the circumstances regarding your disability and your record and reputation are such that you are not likely to act in a manner dangerous to yourself or others, and the granting of relief is not contrary to public safety and/or the public interest. In order for us to process your request, you must submit the required evidence outlined below within 30 days from the date of this letter. If we do not receive all of the required evidence, your request for relief will be denied.

What Evidence Should You Provide?

To support your claim for relief, you must submit all of the following evidence:

- A statement from your primary mental-health physician that
 - assesses your mental health status over the last five years
 - addresses whether you
 - currently pose, or have ever posed, a danger to yourself or others, and
 - would pose a danger to yourself or others if allowed to purchase and possess a firearm, and
 - is dated within 90 days prior to your request for relief.
- Medical information addressing the extent of your mental health symptoms and whether or not you are likely to act in a manner dangerous to yourself or to the public.
- Evidence of your reputation, through character witness statements, testimony, or other character evidence. This may include statements from clergy, law enforcement officials, and/or persons that are aware of your reputation in the community and show that the granting of relief would not be contrary to the public interest. (Statements or records from law enforcement officials may be provided by the Federal Bureau of Investigation (FBI); the Bureau of Alcohol, Tobacco, and Firearms (ATF); the Attorney General; or other local law enforcement agencies.)

What Should a Character Witness Statement Include?

The character witness statements referenced above should originate from individuals with whom you have had recent and frequent contact and must contain all of the following elements:

- name, address, and telephone number of the person preparing the statement
- description of the preparer's relationship to you, including an approximate

- account of the frequency with which you and he/she maintain contact, and
- indication as to whether you have a reputation for violence or would pose a danger to yourself or others if permitted to purchase and possess a firearm.

A signed consent form that is attached to this letter that will allow us to procure your criminal history.

You may also submit documentation that a court, board, or commission has found you competent.

Attach the consent form shown below to the NICS relief development letter referenced in M21-1, Part III, Subpart v, 9.B.4.e.

III.v.9.B.4.f.

Consent Form

That Must

Accompany

the NICS

Relief

Development

Letter

Consent for VA to Obtain a Criminal History for the Purpose of NICS Relief

I understand that the Department of Veterans Affairs (VA) may seek to obtain my criminal background history during consideration of my request for relief from the reporting requirements contained in 18 U.S.C. 922(d)(4), The Brady Handgun Violence Prevention Act of 1993, Public Law 103-159, and National Instant Criminal Background Check System (NICS) Improvements Amendment Act of 2007, Public Law 110-180. I consent to VA seeking this information from any and all sources and give permission for the release of my criminal background history and any other associated documents to VA. I further waive my rights under the Privacy Act, 5 U.S.C. 552a(b), with regard to the release of this information to VA from any federal or state agency.

Name: _____

Claim Number: _____

Signature of Veteran: _____

Date: _____

III.v.9.B.4.g.

General

Information About

Decisions

to Grant or Deny

a Request for

Relief

This block contains general information about decisions to grant or deny a request for relief from the requirements of the Brady Act.

- Claims processors are responsible for
 - deciding whether to grant a request for relief, and
 - following the instructions in M21-1, Part III, Subpart v, 1.A.3 for preparing a corresponding administrative decision titled *NICS Relief Request*.
- When deciding a request for relief, claims processors must consider not only the beneficiary's desire to own firearms and/or ammunition, but also the safety of the beneficiary and his/her family and community.
- RO Directors must approve administrative decisions on requests for relief after concurrence by the Veterans Service Center Manager or his/her designee.
- Relief requests are not matters which fall within the scope of Title 38 of the U.S.C.; therefore, decisions that deny relief are **not** subject to review under 38 CFR 3.2500 or by the Board of Veterans' Appeals. They are, however, subject to review in Federal district court. For this reason, all such decisions must contain a detailed explanation of the basis for denial.

Reference: For more information on appellate rights for denials of relief requests, see 18 U.S.C. 925(c).

III.v.9.B.4.h.

Evidence

Claims

Processors

Must

Consider

When

Deciding a

Request for

Relief

Claims processors **must** consider the evidence listed in the table below when deciding whether to grant a request for relief from the reporting requirements of the Brady Act.

The evidence must meet the criteria shown in the table below. If it does not, claims processors must undertake development with the beneficiary and/or source(s) of the evidence to obtain any missing details or information.

Evidence	Criteria the Evidence Must Meet
A current statement from the beneficiary's primary mental-health physician that assesses the beneficiary's current and past mental health status.	<ul style="list-style-type: none">• A physician's statement is considered current if he/she conducted the assessment on which the statement is based within the 90-day period that preceded the beneficiary's request for relief.• The assessment must cover the five-year period that immediately preceded the beneficiary's request for relief.• The physician must provide sufficient detail in his/her statement for VA to determine whether the beneficiary<ul style="list-style-type: none">◦ has ever been a danger to him/herself or others, and◦ would be a danger to him/herself or others if allowed to purchase and possess a firearm.
Evidence regarding the beneficiary's reputation.	<p>Statements regarding the beneficiary's reputation from individuals other than the beneficiary must</p> <ul style="list-style-type: none">• be prepared by someone who<ul style="list-style-type: none">◦ has had recent and frequent contact with the beneficiary, and◦ can credibly attest to the beneficiary's reputation• contain the name, address, and telephone number of the person providing the statement• describe the person's relationship with the beneficiary and the frequency of their contact, and• indicate whether the beneficiary<ul style="list-style-type: none">◦ has a reputation for violence, and◦ would be a danger to him/herself or others if allowed to purchase and possess a firearm.

III.v.9.B.4.i. Circumstances	Claims processors must deny a request for relief from the requirements of the Brady Act if the evidence of record shows the beneficiary would be a danger to him/herself or others if VA granted the request.
Under Which Claims Processors Must Deny a Request for Relief	<p>The evidentiary standard for denying a request for relief is "clear and convincing." This standard is met if any of the following is reflected in the beneficiary's record:</p> <ul style="list-style-type: none"> • an assessment performed by the beneficiary's primary mental-health physician that indicates the beneficiary would be a danger to him/herself or others if VA granted the request • a diagnosis of mental disability with symptoms that include the presence of suicidal or homicidal ideations • a diagnosis of substance abuse with symptoms that would render the beneficiary a danger to him/herself or others • a reputation for violence, which a claims processor has confirmed by personally contacting the person that cited the reputation • conviction of a felony unless the beneficiary presents evidence that, notwithstanding the felony conviction, his/her right to possess a firearm has been restored • conviction of a misdemeanor in the past five years for committing or attempting to commit a violent offense • pending felony or misdemeanor charge for committing or attempting to commit a violent offense, or • a charge for a violent offense that has not been brought to trial because a court, board, or commission has determined the beneficiary lacks the mental capacity to proceed with a trial unless <ul style="list-style-type: none"> ◦ competency has been restored, or ◦ the beneficiary has been rehabilitated through any procedure available under the law.
	<p>Note: A violent offense includes, but is not limited to, menacing, stalking, assault, or battery.</p> <p>Reference: For more information on the clear and convincing evidentiary standard, see M21-1, Part III, Subpart iv, 5.A.1.i.</p> <hr/>

III.v.9.B.4.j.

Process for

Considering a

Grant of

Relief

If clear and convincing evidence to justify denying a request for relief of the requirements of the Brady Act (as discussed in M21-1, Part III, Subpart v, 9.B.4.i) does **not** exist, claims processors must consider granting the request by following the process described in the table below.

Important: The evidentiary standard for granting relief is also "clear and convincing." To meet this standard, the evidence of record must affirmatively, substantially, and specifically show

- the beneficiary is *not* likely to act in a manner dangerous to the public, and
- granting relief will not be contrary to the public interest.

Stage	Description
1	The claims processor refers the beneficiary's case to the rating activity.
2	The rating activity reviews the medical evidence of record to determine whether it contains any indication the beneficiary would be a danger to him/herself or others if VA granted the request.
3	The rating activity <ul style="list-style-type: none">• summarizes the evidence reviewed and documents the conclusion on a <i>VA Form 21-0961, Rating Decision/Administrative Decision/Formal Finding/Statement of the Case (SOC)/Supplemental Statement of the Case (SSOC) (Electronic Signature)</i>, and• returns the case to the claims processor.

Stage	Description
4	<ul style="list-style-type: none"> • If the rating activity determined the beneficiary would be a danger to him/herself or others if VA granted the request, <ul style="list-style-type: none"> ◦ the claims processor prepares an administrative decision that denies the beneficiary's request, and ◦ no further action is needed. • If the rating activity determined there is nothing in the medical evidence of record indicating the beneficiary would be a danger to him/herself or others if VA granted the request, the claims processor e-mails a request for a copy of the beneficiary's criminal history report to the NICS POC, whose e-mail address is VAVBAWAS/CO/NICS. <p>Notes:</p> <ul style="list-style-type: none"> • The e-mail must include <ul style="list-style-type: none"> ◦ an electronic copy of the signed consent form shown in M21-1, Part III, Subpart v, 9.B.4.f ◦ all evidence considered for the possible granting of relief ◦ the beneficiary's name and file number, and ◦ the date VA received the request for relief. • The subject line of the e-mail must read <i>Criminal History Needed</i>. • The NICS POC will <ul style="list-style-type: none"> ◦ review the e-mail and the criminal history, and ◦ contact the claims processor if the POC feels it is necessary to review evidence the RO considered in making its decision.
5	<p>Following receipt of the criminal history report and concurrence from the NICS POC, the claims processor returns the case to the rating activity for reevaluation of the medical evidence in light of the beneficiary's criminal history.</p> <p>Note: Questions regarding the content of criminal history reports may be sent by e-mail to VAVBAWAS/CO/NICS.</p>
6	<p>The rating activity</p> <ul style="list-style-type: none"> • summarizes the evidence it reviewed and documents the conclusion on a <i>VA Form 21-0961</i>, and • returns the case to the claims processor.
7	<p>The claims processor</p> <ul style="list-style-type: none"> • prepares an administrative decision that <ul style="list-style-type: none"> ◦ reflects the determination made by the rating activity ◦ cites all the evidence the claims processor and rating activity considered, and • follows the instructions in M21-1, Part III, Subpart v, 9.B.4.k. <p>Important: The RO Director must sign off on any decision to grant relief.</p>

III.v.9.B.4.k. After making an administrative decision on a request for relief from the requirements of the Brady Act, claims processors must

Actions to

Take After

Making a

Decision on a

Request for

Relief

- clear the pending EP 290
- associate with the beneficiary's claims folder the decision and all evidence/information gathered in connection with it, and
- follow the instructions in the table below.

Note: If VA is using a paper claims folder to process the request for relief, file down the documentation referenced in the preceding paragraph on the right flap of the folder.

If relief is ...	Then the claims processor must ...
denied	notify the beneficiary, using the <i>NICS Relief Denial</i> letter in PCGL.
granted	<ul style="list-style-type: none"> • notify the beneficiary, using the <i>NICS Relief Grant</i> letter in PCGL • e-mail a notice of the grant under the subject heading <i>NICS Relief Grant</i> to VAVBAWAS/CO/NICS, and • include the following information about the beneficiary in the body of the e-mail: <ul style="list-style-type: none"> ◦ name ◦ claim number ◦ Social Security number (if different than the claim number) ◦ date of birth ◦ address ◦ telephone number, and ◦ date of the decision to grant relief. <p>Note: Following receipt of the e-mail, the staff that monitors the NICS mailbox notifies the FBI that VA has granted the beneficiary's request for relief. Within approximately two months of receiving notice, the FBI will remove the beneficiary's name from NICS.</p>

5. SDP

Introduction	<p>This topic contains information on SDP, including</p> <ul style="list-style-type: none"> • authorization of SDP by a hub • confirmation of SDP status following a loss of entitlement • hub responsibilities following the authorization of SDP, and • processing and controlling an SDP award.
Change Date	<p>May 10, 2019</p>
III.v.9.B.5.a. Authorization of SDP by a Hub	<p>Under 38 CFR 13.100, a hub may authorize SDP to</p> <ul style="list-style-type: none"> • Veterans rated incompetent, or • any other adult beneficiary for whom appointment of a fiduciary has been requested based on a VA rating or judicial determination of incompetency. <p>If the hub concludes that such method of payment is consistent with the beneficiary's capacity and affords a reasonable protection of the beneficiary's interests, the hub indicates its authorization of SDP on <i>VA Form 21P-555</i>.</p>
III.v.9.B.5.b. Confirmation of SDP Status Following a Loss of Entitlement	<p>If an incompetent beneficiary loses entitlement to benefits that VA had been paying directly to him/her based on a hub's authorization of SDP, and VA later restores entitlement, do <i>not</i> resume the payment of benefits directly to the beneficiary without concurrence from a hub.</p> <p>If necessary, request a current <i>VA Form 21P-555</i> by:</p> <ul style="list-style-type: none"> • preparing <i>VA Form 21-592</i> according to the instructions in M21-1, Part III, Subpart v, 9.A.1.c • uploading an electronic copy of the form into the beneficiary's eFolder, and • notifying the hub of jurisdiction via e-mail that action is pending on the form.
III.v.9.B.5.c. Hub Responsibilities Following the Authorization of SDP	<p>After a hub authorizes SDP, it is responsible for</p> <ul style="list-style-type: none"> • annotating the award document with the following notation: <i>VA Form 21P-555 [date] supervised direct payment</i>, and • performing the following actions on the 601 CHANGE OF FIDUCIARY screen in Share if the beneficiary is a Veteran: <ul style="list-style-type: none"> ◦ updating the PRINCIPLE GUARDIANSHIP FOLDER LOC screen, and ◦ selecting the SUPERVISED DIRECT PAY radio button.

III.v.9.B.5.d.

Processing and
Controlling an
SDP Award

The table below contains instructions for processing and controlling an SDP award.

Step	Action
1	<p>Process an award that pays the beneficiary the <i>full</i> monthly rate of benefits to which he/she is entitled but withholds all retroactive benefits VA owes the beneficiary. (Payment of less than the full monthly rate is prohibited.)</p> <p>If the beneficiary is an individual receiving benefits under an apportioned award, treat the difference between the monthly benefit VA withheld and the full amount to which the beneficiary is entitled as a withholding on the <i>primary beneficiary's</i> award.</p> <p>Note: Enter the withholding on the OTHER ADJUSTMENTS tab on the AWARD ADJUSTMENTS screen.</p> <p>Reference: For more information about processing withholdings, see the</p> <ul style="list-style-type: none"> • <i>Veterans Service Network (VETSNET) Awards Handbook</i>, or • <i>VBMS-Awards User Guide</i>.
2	Establish a diary that will expire six months after the date of the SDP certification.
3	<p>After the six-month period ends, ask the hub to furnish a certification for release of the withheld benefits to either</p> <ul style="list-style-type: none"> • the beneficiary, or • a fiduciary.
4	<p>Did the hub certify an extension of the period of time during which VA would continue to withhold payment of the retroactive benefits referenced in Step 1?</p> <ul style="list-style-type: none"> • If yes, go to the next step. • If no, <ul style="list-style-type: none"> ◦ release the withheld, retroactive benefits referenced in Step 1, and ◦ disregard the remaining steps in this table.
5	<p>Does the period of time referenced in Step 4 extend beyond the one-year time limit during which VA may withhold the retroactive benefits referenced in Step 1?</p> <ul style="list-style-type: none"> • If yes, <ul style="list-style-type: none"> ◦ continue to withhold the retroactive benefits, and ◦ go to the next step after the one-year time limit expires. • If no, go to the Step 7.
6	Release the withheld, retroactive benefits referenced in Step 1 and disregard the remaining steps in this table.
7	Establish a diary that will expire 30 days before the end of the extended time period referenced in Step 4.

Step	Action
8	<ul style="list-style-type: none"> • After the extended time period referenced in Step 4 ends, ask the hub to furnish a certification for release of the withheld benefits to either <ul style="list-style-type: none"> ◦ the beneficiary, or ◦ a fiduciary. • Return to Step 4 after the hub responds to the request.

Reference: For more information about establishing diaries, see the

- *VBMS-Awards User Guide*
 - *VETSNET Awards Handbook*, or
 - *Share User Guide*.
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6. Processing Rating Decisions That Conclude a Beneficiary VA Previously Rated as Incompetent Is Now Competent

Change Date

December 30, 2020

III.v.9.B.6.a.

Processing Rating Decisions That Conclude a Beneficiary VA Previously Rated Incompetent Is Now Competent

The table below contains instructions for processing rating decisions that conclude a beneficiary VA previously rated incompetent is now competent.

Step	Action
1	Promulgate the rating decision.
2	<p>Notify the beneficiary of the rating decision.</p> <p>Note: If a request for relief from the reporting requirements of the Brady Act is pending, notify the beneficiary that the latest rating decision renders his/her request moot.</p> <p>Reference: For more information about the reporting requirements of the Brady Act, see M21-1, Part III, Subpart v, 9.B.4.</p>
3	<p>Establish EP 290, <i>FID-Fiduciary Adjustment</i>, and NWQ will route the case to the hub of jurisdiction.</p> <p>Note: The hub is responsible for making the necessary updates to Share using the CHANGE OF FIDUCIARY command to ensure all future payments are paid directly to the beneficiary.</p> <p>Reference: For more information on the jurisdiction of individual hubs, see M21-1, Part III, Subpart v, 9.A.1.d.</p>

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https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014276/M21-1-Part-III-Subpart-v-Chapter-9-Section-B-Processing-Awards-to-Incompetent-Beneficiaries#3