Tuesday, September 8, 2020

Director, Office of Regulation Policy and Management (00REG)
Department of Veterans Affairs
810 Vermont Avenue NW, Room 1064
Washington, DC 20420

Submitted electronically via Regulations.gov

Re: RIN 2900–AQ95—Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge

The American Psychological Association (APA) appreciates the opportunity to comment on the Department of Veterans Affairs (VA) proposed rule that would modify the regulatory bars to benefits for veterans with “bad paper” or “other-than-honorable” (OTH) discharges. While this rule represents a step in the right direction toward improving access to much-needed VA benefits for former servicemembers with OTH discharges, there is still more VA must do to ensure that these veterans are appropriately compensated for conditions incurred during or aggravated by their service to our nation.

Summary of APA recommendations:

1. APA recommends that VA clarify in the final rule that the list of “mental impairments” described in Section 3.12(e)(2)(i) is not exhaustive and that additional types of “mental impairments” should be considered when determining whether a veteran meets the “compelling circumstances” standard.
2. APA supports removing “homosexual” from VA’s definition of former servicemembers who would be barred from receiving VA benefits.
3. APA recommends extending tentative health care eligibility to OTH veterans as their character of service determination is taking place, allowing these veterans to access comprehensive VHA care.

APA applauds the Department’s decision to include consideration of “compelling circumstances” when assessing whether VA’s regulatory bars to benefits would apply in a given situation. As laid out in the proposed rule, these compelling circumstances would include various mental and behavioral health conditions, physical health conditions, sexual abuse or assault, combat-related hardship, age, cultural background, education level and judgmental maturity, among other considerations. Allowing VA to consider these “compelling circumstances” grants
OTH veterans with an untreated or under-treated condition that may have led to misconduct an opportunity to plead their case with either historical or current evidence of a past mental impairment or other circumstances that may have led to the OTH discharge.

Many former servicemembers with OTH discharges were separated based on misconduct that may have occurred due to an underlying mental or behavioral health condition. A 2017 Government Accountability Office (GAO) report found that “62 percent of servicemembers separated for misconduct from fiscal years 2011 through 2015 had been diagnosed within the 2 years prior to separation with post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), or certain other conditions that could be associated with misconduct.”1 It is vitally important for VA to consider these and other compelling circumstances when making a character of discharge determination for OTH veterans.

APA is concerned, however, about the list of conditions classified as “mental impairments” under Section 3.12(e)(2)(i) of the proposed rule. The list is incomplete and does not reflect other conditions that may also have led to behavioral problems. Because the proposed rule defines only eight specific conditions as “mental impairments” [PTSD, depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, and cognitive disabilities], many OTH veterans with other mental or behavioral health conditions will continue to be unduly excluded from claiming benefits. Studies have shown that OTH veterans are significantly more likely than their non-OTH veteran counterparts to experience mental and behavioral health issues other than these eight specific impairments, including personality disorders, suicidal ideation and psychotic disorders.2,3 In addition, many OTH veterans served at a time when less was known about these diagnoses amongst the scientific community; some of the listed conditions did not get recognition under their current names4 until the 1980s and as a result the overall prevalence of these diagnoses was relatively rare at the time. 5

APA is concerned that, under the proposed rule, these veterans will be improperly excluded during their character of discharge determination because they lack the specific diagnosis required by the regulation. **APA recommends that VA clarify in the final rule that the list of

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“mental impairments” described in Section 3.12(e)(2)(i) is not exhaustive and that additional types of “mental impairments” should be considered when determining whether a veteran meets the “compelling circumstances” standard.

To that end, APA recommends the revision of Section 3.12(e)(2)(i) to state the following:

“Mental impairment at the time of the prolonged AWOL or misconduct, to include a clinical diagnosis of, or evidence that could later be medically determined to demonstrate existence of, posttraumatic stress disorder (PTSD), depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, cognitive disabilities, co-morbid conditions (i.e., substance use disorder and other mental disorders), or any other mental or behavioral health condition at the time of the prolonged AWOL or misconduct.

APA applauds the VA for its removal of “homosexual acts” as a regulatory bar to benefits under this proposed rule. The historical ban on benefits for gay, lesbian, or bisexual veterans is rooted in bigotry and homophobia, which has no place in a modern VA. Over time, the rule has evolved from categorically disallowing benefits for “generally, homosexual acts” to “homosexual acts involving aggravating circumstances” to the current proposed rule, which excludes the word “homosexual” from the latter phrase altogether. By making this small change, the VA is appropriately placing the focus on whether the veteran committed rape, sexual assault, or some other aggravated sexual act, and not on the veteran’s sexual orientation. As a result, this proposed rule eliminates any possibility of the VA denying benefits to an otherwise eligible veteran solely because of the veteran’s sexual orientation. APA supports removing “homosexual” from VA’s definition of former servicemembers who would be barred from receiving VA benefits.

According to VA estimates, there are over 500,000 veterans with OTH discharges, approximately 100,000 of whom served after 9/11; PTSD and traumatic brain injury are considered the “signature injuries” of the post-9/11 conflicts, and both conditions are included in the proposed rule’s list of “mental impairments”. These veterans deserve to have their benefit applications reviewed and “compelling circumstances” considered, which this rule partially addresses. However, these veterans require immediate access to health care while their applications are pending. Veterans with honorable or general discharges seeking care through the Veterans Health Administration (VHA) must first enroll, and can be granted tentative eligibility for VHA care while their enrollment eligibility is under consideration if they apply for enrollment within 6 months of being discharged. The same is not true for veterans with an OTH

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discharge. These veterans are more likely to lack access to health care than their non-OTH veteran counterparts, are more likely to experience homelessness, and are more likely to suffer from a mental health condition\(^9\)\(^,\)\(^10\). While the Consolidated Appropriations Act of 2018 (P.L. 115-141\(^11\)) included a statutory change allowing OTH veterans access to emergent mental health care was a step in the right direction, many OTH veterans require ongoing, comprehensive mental health care that is not covered in the new law’s 90-day eligibility window.\(^12\)

Denying OTH veterans access to medical care pending their eligibility determination is inconsistent with VA’s current policies concerning other veterans who are awaiting the finalization of their enrollment, and could have disastrous impacts on the physical and mental health of OTH veterans. It takes months or even years for VA to finalize character of discharge determinations for OTH veterans, who, during that time, are often going untreated. As stated previously, OTH veterans are more likely than non-OTH veterans to have underlying mental and physical health conditions and lack health insurance, meaning they are even more vulnerable to the negative impacts of delayed care. Nearly every medical condition – cancer\(^13\), diabetes\(^14\), schizophrenia\(^15\), heart disease\(^16\), pelvic inflammatory disease\(^17\), peptic ulcers\(^18\) – is worsened by


\(^12\) Tsai, at fn9.


delaying appropriate care. A recent study\(^\text{19}\) of veterans utilizing VA geriatric outpatient care found that even a short delay in care can increase mortality and negative outcomes. APA recommends extending tentative health care eligibility to OTH veterans as their character of service determination is taking place, allowing these veterans to access comprehensive VHA care.

The changes laid out in this proposed rule represent an important first step towards allowing veterans with OTH discharges to access the benefits and health care they have earned through service. Allowing the VA to consider compelling circumstances, including mental health conditions, and removing discriminatory language barring eligibility due to “homosexual acts” is a good start towards expanding access to much-needed care for many OTH veterans. APA recommends additional changes that will enable more OTH veterans to access care, including clarifying what “mental impairments” are considered “compelling circumstances” that explain or give context to specified instances of AWOL or misconduct, and granting tentative health care eligibility to OTH veterans while their character of discharge review is pending. Many OTH veterans served this nation with great courage and sacrifice, and some were discharged inappropriately due to a mental or physical condition caused or aggravated by their service. It is paramount that VA grant these veterans the benefit of the doubt and take the veteran’s entire clinical picture into account when thoroughly and fairly adjudicating their character of discharge claims. These veterans deserve no less from the nation they signed up to defend.

APA again thanks you for the opportunity to comment on this important change in VA policy. If APA can be of any further assistance, please contact Sophie Friedl, Director of Congressional and Federal Affairs, at SFriedl@apa.org.

Sincerely,

Katherine B. McGuire
Chief Advocacy Officer