#### Department of Veterans Affairs M21-1, Part III, Subpart v

**Veterans Benefits Administration December 3, 2015**

**Washington, DC 20420**

#### Key Changes

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| Changes Included in This Revision | The table below describes the changes included in this revision of Veterans Benefits Manual M21-1, Part III, “General Claims Process,” Subpart v, “General Authorization Issues and Claimant Notification.”***Notes***: * Unless otherwise noted, the term “claims folder” refers to the official, numbered, Department of Veterans Affairs (VA) repository – whether paper or electronic – for all documentation relating to claims that a Veteran and/or his/her survivors file with VA.
* Minor editorial changes have also been made to
* add new references, and
* bring the document into conformance with M21-1 standards.
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| Reason(s) for the Change | Citation |
| * To add that VA may apportion benefits to a dependent, even though the dependent is not on the beneficiary’s award, as long as the dependent’s relationship is properly established.
* To clarify that VA cannot add a dependent to the award unless the beneficiary submits the appropriate form.
* To add an example of the aforementioned scenario.
 | [M21-1, Part III, Subpart v, Chapter 3, Section A, Topic 1, Block e](#_e.__Who)[(III.v.3.A.1.e)](#_e.__Who) |
| * To clarify that apportionments cannot be paid for a child adopted out of the Veteran’s family except in certain limited situations when the beneficiary is receiving Veterans Pension.
* To delete information that VA may apportion the amount of additional dependency allowance for a child adopted out of the Veteran’s family.
 | [III.v.3.A.1.f](#_f.__When) |
| * To add exception that in certain cases when reductions are warranted due to incarceration, benefits that were unavailable for apportionment prior to incarceration due to recoupment of separation pay will be available for apportionment during incarceration.
 | [III.v.3.A.4.a](#_a.__Effect) |

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| Rescissions | None |

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| Authority | By Direction of the Under Secretary for Benefits |

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| Signature | Thomas J. Murphy, DirectorCompensation Service |

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| Distribution | LOCAL REPRODUCTION AUTHORIZED |

## Section A. Apportionment Process

#### Overview

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| In This Section | This section contains the following topics: |

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| Topic | Topic Name |
| 1 | General Information on Apportionments |
| 2 | Developing an Apportionment Claim |
| 3 | Deciding an Apportionment Claim and Notification of a Decision on an Apportionment Claim |
| 4 | Handling a Claim for Apportionment When a Veteran Is Receiving Less Than All of the Benefits Payable Because of an Offset or Withholding |

#### 1. General Information on Apportionments

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| Introduction | This topic contains general information on apportionments, including* overview of the apportionment process
* apportionment of a competent primary beneficiary’s benefits
* creating a *Request for Apportionment Application Letter*
* text that a *Request for Apportionment Application Letter* must contain
* who may receive an apportionment of a competent primary beneficiary’s benefits
* when an apportionment is not payable
* child apportionees that go on active duty
* handling a beneficiary’s assertion that a child does not meet the definition of a child under 38 CFR 3.57
* apportionment of survivors benefits
* references to information about special apportionment cases
* restriction on the concurrent payment of education benefits and apportioned benefits, and
* disclosing information in the claims folder to the primary beneficiary and/or claimant.
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| Change Date | December 3, 2015 |

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| a. Overview of the Apportionment Process | When the Department of Veterans Affairs (VA) receives a claim for an apportionment of a primary beneficiary’s benefits, VA must develop for evidence, decide whether to award or deny the apportionment claim, and notify the primary beneficiary and claimant of the decision. Additionally, in some cases, VA must offset or withhold part or all of the apportioned award. |

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| b. Apportionment of a Competent Primary Beneficiary’s Benefits | In order for a claimant to receive an apportionment of a competent primary beneficiary’s benefits, the claimant must * file a claim on *VA Form 21-0788, Information Regarding Apportionment of Beneficiary’s Award*, and
* demonstrate a need for benefits, per the requirements of [38 CFR 3.451](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1451&rgn=div8), or
* live apart from the Veteran and not receive a reasonable level of support, as stated in [38 CFR 3.450](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1450&rgn=div8).

If the requirements above are met and the primary beneficiary will *not* suffer undue hardship, VA may authorize an apportionment of the primary beneficiary’s benefits to be paid to the claimant.***Important***: * VA’s primary obligation is to the Veteran. Even if the claimant demonstrates a need, VA may ***not*** impose undue hardship on the Veteran.
* If a claimant requests an apportionment on anything other than a *VA Form 21-0788*,
* treat the correspondence as a request for an application, and
* follow the instructions in M21-1, Part III, Subpart v, 3.A.1.c.
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| c. Creating a Request for Apportionment Application Letter  | Follow the steps in the table below when creating a *Request for Apportionment Application Letter*.  |

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| Step | Action |
| 1 | Establish end product (EP) 400 with the claim label *Request for Application*. |
| 2 | Copy all of the text from the letter shown in M21-1, Part III, Subpart iii, 3.A.1.d. |
| 3 | Paste the text from step 2 into a blank letter. |
| 4 | Print and mail the letter to the claimant and, if necessary, his/her authorized representative. |
| 5 | Clear the EP 400. |
| 6 | Does the Veteran from whose benefits the claimant is seeking an apportionment have an electronic claims folder (eFolder) *only*?* If *yes*, proceed to the next step.
* If *no*,
* file the letter in the Veteran’s paper claims folder, and
* proceed no further.
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| 7 | Access the Veteran’s eFolder in the Veterans Benefits Management System (VBMS). |
| 8 | Click on the arrow to the right of the ACTIONS field. |
| 9 | Select *Upload Document* from the drop-down menu. |
| 10 | Update the fields that appear with the entries described in the table below.

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| Field | Entry |
| SUBJECT | Leave blank. |
| CATEGORY TYPE | *Correspondence - Miscellaneous: Report of Contact* |
| SOURCE | *VBMS* |
| ASSOCIATE TO | *EP 400 Request for Application* |
| DATE OF RECEIPT | Date of receipt of the request for an apportionment |

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| d. Text That a Request for Apportionment Application Letter Must Contain | Create a *Request for Apportionment Application Letter* using the text below in the body of the letter. |

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| Dear **[Enter claimant’s first and last name.]**:We received your correspondence indicating that you would like to file a claim for an apportionment. VA regulations now require all claims to be submitted on a standardized form.**What Should You Do?**In order for us to begin processing your apportionment claim, you must submit a *VA Form 21-0788, Information Regarding Apportionment of Beneficiary’s Award.* We will take no further action until we receive your completed application. To locate the appropriate form(s), please visit the following web site: [www.va.gov/vaforms](http://www.va.gov/vaforms).**If You Have Questions or Need Assistance****[Add the domestic or foreign address table.]****[Add the Veterans Service Organization (VSO) paragraph.]**Thank you,Regional Office DirectorEnclosure(s): Where to Send Your Written Correspondence |

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| e. Who May Receive an Apportionment of a Competent Primary Beneficiary’s Benefits | An apportionment may be paid to* an estranged spouse and child
* children in an estranged spouse’s custody
* a child or children not living with the primary beneficiary or surviving spouse and to whom the primary beneficiary or surviving spouse is not reasonably contributing, or
* a dependent parent (in compensation cases).

***Important***: VA may apportion benefits to a dependent, even if the dependent is not on the beneficiary’s award, as long as the dependent’s relationship to the Veteran, on whose service the award is based, is properly established. However, VA cannot add such dependent to the award unless the beneficiary submits the appropriate form. ***Example***: Veteran is receiving compensation as a *single Veteran* evaluated as 50 percent disabling. An ex-wife submits a claim for an apportionment on behalf of her 10-year old boy in her custody. She submits a certified birth certificate showing the Veteran is in fact the biological father of the child. ***Analysis***: Even though the child is not established on the Veteran’s award, and regardless whether the Veteran submits the appropriate form to add the child to his award, VA may apportion benefits for the child because the relationship to the Veteran is properly established and there is no indication the child has been adopted out of the Veteran’s family. ***References***: For more information on* establishing a relationship, see M21-1, Part III, Subpart iii, 5.A
* forms claimants must use to add a dependent to their award, see M21-1, Part III, Subpart iii, 5.A.4.a, and
* the definition of child adopted out of the Veteran’s family, see M21-1, Part III, Subpart iii, 5.G.5.a.
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| f. When an Apportionment Is Not Payable | The table below contains a description of the circumstances under which [38 CFR 3.458](http://www.ecfr.gov/cgi-bin/text-idx?SID=cbdb3f6a0183779ee5e0fa4d7c4f8119&node=se38.1.3_1458&rgn=div8) prohibits the apportioning of a primary beneficiary’s benefits.  |

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| **Circumstance** | **Additional Information** |
| * The total benefit payable to the primary beneficiary is so small that it does not allow payment of a reasonable amount to any apportionee.
* The amount available for apportionment from the primary beneficiary’s benefits would constitute a payment so small to the apportionee, with little or no mitigation of the apportionee’s need.
 | * [38 CFR 3.458](http://www.ecfr.gov/cgi-bin/text-idx?SID=cbdb3f6a0183779ee5e0fa4d7c4f8119&node=se38.1.3_1458&rgn=div8) requires a subjective assessment of the apportionment’s impact on the *claimant’s* financial status.
* [38 CFR 3.451](http://www.ecfr.gov/cgi-bin/text-idx?SID=cbdb3f6a0183779ee5e0fa4d7c4f8119&node=se38.1.3_1451&rgn=div8) suggests that apportionment of less than 20 percent of a Veteran’s benefits may ***not*** constitute a “reasonable amount.”
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| The Veteran’s spouse, who is requesting an apportionment, has been found guilty of conjugal infidelity by a court having proper jurisdiction. | --- |
| The Veteran’s spouse, who is requesting an apportionment, has lived with another person and held himself/herself out openly to the public to be the spouse of another person.***Exception***: The spouse entered into the relationship with the other person in good faith, believing that the marriage to the Veteran had been legally terminated. Under this set of circumstances, however, VA may apportion benefits to the spouse *only if** there has been a reconciliation between the Veteran and his/her spouse, and
* later the Veteran and his/her spouse become estranged.
 | * A Veteran who is estranged but not divorced from his/her spouse remains entitled to benefits as a married Veteran, as long as he/she knows the whereabouts of the estranged spouse and, in pension cases, is contributing to the spouse’s support.
* Special attention must be paid to claims for apportionment from an estranged spouse or a spouse for whom the Veteran is not receiving additional benefits, as it could adversely affect the rate of the Veteran’s benefits, as explained in M21-1, Part V, Subpart iii, 1.F.2.n.
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| The child of the Veteran has been adopted out of the Veteran’s family..***Exception***: In certain limited situations, VA may apportion Veterans Pension for a child who has been adopted out of the Veteran’s family. | * [38 CFR 3.458(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=cbdb3f6a0183779ee5e0fa4d7c4f8119&node=se38.1.3_1458&rgn=div8) prohibits the

apportioning of benefits when the child has been adopted out of the Veteran’s family.* See M21-1, Part III, Subpart

iii, 5.G.5.d regarding the effect of adoption on a Veteran’s entitlement to Veterans Pension.* [VAOPGCPREC 16-94](http://www.va.gov/ogc/precedentopinions.asp) describes

conditions that may warrant an apportionment of Veterans Pension for a child adopted out of the Veteran’s family. * [38 CFR 3.58](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=93ca3d872fe30ef6c4f9ef3467239222&mc=true&r=SECTION&n=se38.1.3_158) prohibits payment of
* dependency allowance for compensation for a child adopted out of the Veteran’s family.See M21-1, Part III, Subpart iii, 5.G.5 for more information

about a child adopted out of the Veteran’s family. |

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| ***Note***: According to [38 CFR 3.450(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9789ea05df0b943f14e6129f4f94085&node=se38.1.3_1450&rgn=div8), a claim for an apportionment must be submitted by or on behalf of a dependent for whom the primary beneficiary is ***not*** providing reasonable support. VA does not apportion benefits to a dependent as a convenience on the part of the primary beneficiary. Per [38 CFR 3.106](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9789ea05df0b943f14e6129f4f94085&node=se38.1.3_1106&rgn=div8), the primary beneficiary may *not* request a portion of his or her benefits ***not*** be paid in order to allocate those benefits to another person. |

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| **g. Child-Apportionees That Go on Active Duty** | Discontinue an apportionment for a child that goes on active duty, ***unless*** the child is in the custody of an estranged spouse.When the apportionment ends, continue paying additional benefits for the child to the primary beneficiary until the child turns 18. ***Note***: For the purpose of this block, a “primary beneficiary” includes the fiduciary of a child that is not in the custody of the surviving spouse whose benefits VA is apportioning for the child.***Reference***: For more information about apportionments for children that go on active duty, see* [38 CFR 3.458(e)](http://www.ecfr.gov/cgi-bin/text-idx?SID=34816bf7cbc0d8d7d01f1ba124beabb3&mc=true&node=se38.1.3_1458&rgn=div8), and
* [38 CFR 3.503(a)(2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=34816bf7cbc0d8d7d01f1ba124beabb3&mc=true&node=se38.1.3_1503&rgn=div8).
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| h. Handling a Beneficiary’s Assertion That a Child Does Not Meet the Definition of a Child Under 38 CFR 3.57 | If VA is apportioning benefits to or for a child, and the primary beneficiary asserts the child does not meet the definition of “child” under [38 CFR 3.57](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9789ea05df0b943f14e6129f4f94085&node=se38.1.3_157&rgn=div8), follow the instructions in M21-1, Part III, Subpart v, 3.B.4.g.***Example***: A male Veteran submits a statement asserting that he did not father a child to whom VA is apportioning the Veteran’s benefits.If a claim for an apportionment involving a child is pending, and the beneficiary from whose benefits an apportionment may be paid asserts the child does not meet the definition of “child” under [38 CFR 3.57](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9789ea05df0b943f14e6129f4f94085&node=se38.1.3_157&rgn=div8), follow the instructions in the table below. |

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| Step | Action |
| 1 | Is additional evidence required to establish that the child cannot be recognized as a child for VA purposes?* If *yes*, proceed to the next step.
* If *no*, proceed to Step 5.

***Examples***: * Additional evidence might be required if the only evidence of record is a statement from a male Veteran that he did not father a child-apportionee.
* Additional evidence might *not* be required if the evidence of record includes the results of a paternity test.
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| 2 | Ask the beneficiary to provide additional evidence that supports his/her assertion. Allow the beneficiary 30 days to respond. |
| 3 | Did the beneficiary respond within 30 days?* If *yes*, proceed to the next step.
* If *no*,
* continue processing the claim for apportionment, and
* disregard the remaining steps in this table.
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| 4 | Did the beneficiary provide evidence that is sufficient to establish that the child in question does not meet the definition of “child” under [38 CFR 3.57](http://www.ecfr.gov/cgi-bin/text-idx?SID=d9789ea05df0b943f14e6129f4f94085&node=se38.1.3_157&rgn=div8)?* If *yes*, proceed to the next step.
* If *no*,
* continue processing the claim for apportionment, and
* disregard the remaining steps in this table.
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| 5 | Deny the claim for apportionment of benefits to or for the child. |
| 6 | Notify both the beneficiary and claimant of the decision, according to the instructions in M21-1, Part III, Subpart v, 3.A.3.j. |

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| i. Apportionment of Survivors Benefits | In addition to Veterans disability benefits, VA may also apportion survivors benefits (if the evidence of record supports such an action).The provisions in M21-1, Part III, Subpart v, 3.A.3 for awarding or denying an apportionment claim and notifying the primary beneficiary and claimant apply equally to Survivors Pension cases. M21-1, Part III, Subpart v, 3.C.1 outlines special provisions for handling apportionments in other death cases.***Notes***:* According to M21-1, Part IV, Subpart iii, 3.C.1.a, VA may pay survivors benefits to children of a Veteran, as an apportionment, pending resolution of a surviving spouse’s eligibility.
* According to M21-1, Part V, Subpart iii, 1.E.4.a, children not in custody of the surviving spouse are not eligible for an apportionment, but may be entitled to Survivor’s Pension in their own right.

***Reference***: For more information on the apportionment of survivors benefits, see* [38 CFR 3.450](http://www.ecfr.gov/cgi-bin/text-idx?SID=20cc9451b1b18e7340cf57664648510f&node=se38.1.3_1450&rgn=div8) (general apportionment regulations)
* [38 CFR 3.451](http://www.ecfr.gov/cgi-bin/text-idx?SID=20cc9451b1b18e7340cf57664648510f&node=se38.1.3_1451&rgn=div8) (special apportionments)
* [38 CFR 3.459](http://www.ecfr.gov/cgi-bin/text-idx?SID=456a8f29bfdff39a4bb6306377587f59&node=se38.1.3_1459&rgn=div8) (death compensation)
* [38 CFR 3.460](http://www.ecfr.gov/cgi-bin/text-idx?SID=456a8f29bfdff39a4bb6306377587f59&node=se38.1.3_1460&rgn=div8) (Survivors Pension)
* [38 CFR 3.461](http://www.ecfr.gov/cgi-bin/text-idx?SID=456a8f29bfdff39a4bb6306377587f59&node=se38.1.3_1461&rgn=div8)  (Dependency and Indemnity Compensation (DIC)), and
* [38 CFR 3.400(e)](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1400&rgn=div8) (effective dates for apportionment awards).
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| j. References to Information About Special Apportionment Cases | Subject to the restrictions of [38 CFR 3.458](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1458&rgn=div8), all or part of a primary beneficiary’s benefits may be apportioned in the special cases listed in the table below. |

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| If the case involves … | Then refer to … |
| an incompetent Veteran | * M21-1, Part III, Subpart v, 3.C.2, and
* M21-1, Part III, Subpart v, 9.B.5.d.
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| a Veteran who has disappeared | M21-1, Part III, Subpart vi, 8.2, 3, and 4. |
| an incarcerated Veteran | M21-1, Part III, Subpart v, 8.B. |
| an incarcerated surviving spouse  | M21-1, Part III, Subpart v, 8.C. |
| forfeiture | M21-1, Part III, Subpart vi, 5.B.2.g.  |

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| k. Restriction on the Concurrent Payment of Education Benefits and Apportioned Benefits | Use the table below to determine if the payment of VA education benefits (under [38 U.S.C. Chapter 33](https://www.law.cornell.edu/uscode/text/38/part-III/chapter-33) or [Chapter 35](https://www.law.cornell.edu/uscode/text/38/part-III/chapter-35)) to an apportionee precludes him/her from receiving an apportionment of the primary beneficiary’s benefits. |

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| If the apportionee is a … | Then the payment of VA education benefits … | Reference |
| spouse | does *not* prohibit the spouse from concurrently receiving an apportionment of a Veteran’s benefits. | See* M21-1, Part III, Subpart iii, 6.B.2.a and c
* [38 CFR 3.707(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1707&rgn=div8), and
* [38 CFR 21.3023(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=37ac22fc0bff253caefe8dd745e01997&mc=true&node=se38.2.21_13023&rgn=div8).
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| * child under age 18, or
* child age 18 or older who is permanently incapable of self-support
 | does *not* prohibit the child from concurrently receiving an apportionment of the primary beneficiary’s benefits, if the individual case warrants this action.***Note***: A special restorative training allowance may also be paid concurrently with compensation, DIC, or pension. | See* M21-1, Part III, Subpart iii, 6.B.2.a and c, and
* [38 CFR 21.3023(b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=37ac22fc0bff253caefe8dd745e01997&mc=true&node=se38.2.21_13023&rgn=div8).
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| child age 18 or older who is capable of self-support | prohibits the child from concurrently receiving an apportionment of the primary beneficiary’s benefits.***Note***: The child must elect which benefit he/she wants to receive. If the child elects VA education benefits, he/she is no longer eligible for an apportionment of the primary beneficiary’s benefits.***Exception***: There is ***no*** prohibition for the concurrent payment of an apportionment and VA education benefits under [38 U.S.C. 3319](https://www.law.cornell.edu/uscode/text/38/3319). There is also no prohibition if * the education benefit is payable under [38 U.S.C. 3311](http://www.law.cornell.edu/uscode/text/38/3311), ***and***
* the Veteran on whose death the education benefit is based died *prior* to August 1, 2011.
 | See* M21-1, Part III, Subpart iii, 6.B.2.a and c
* M21-1, Part III, Subpart iii, 6.B.3.b, and
* [38 CFR 21.3023(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=37ac22fc0bff253caefe8dd745e01997&mc=true&node=se38.2.21_13023&rgn=div8).
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| l. Disclosing Information in the Claims Folder to the Primary Beneficiary and/or Claimant | Upon request of either of the following individuals, disclose information in the claims folder that affects the payment or potential payment to a claimant for apportionment:* the primary beneficiary, and/or
* the claimant for an apportionment of the primary beneficiary’s benefits.

However, when the Privacy Act forbids a total disclosure of correspondence or other submissions from either party to the other, separately furnish the information that is vital to the decision to be made.***Example***: “Information that is vital to the decision” usually includes the income and expenses of each party. |

#### 2. Developing an Apportionment Claim

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| Introduction | This topic contains information on developing for evidence in order to make a decision as to whether an apportionment is appropriate, including* determining whether a bar to apportionment exists
* actions to take when no bar to apportionment exists
* estimating the amount of benefits VA should withhold for an apportionment
* required evidence from the primary beneficiary and claimant
* time limits for responding to a VA request for evidence/information from the primary beneficiary and claimant
* establishing the estimated withholding, and
* handling a request for a hearing.
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| Change Date | July 5, 2015 |

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| a. Determining Whether a Bar to Apportionment Exists | Upon receipt of a claim for apportionment, * establish EP 130 under the claimant’s name, and
* determine whether there is a bar to the apportionment.

***Reference***: Bars to apportionments are discussed in* [38 CFR 3.458](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1458&rgn=div8)
* M21-1, Part III, Subpart v, 3.A.1.f, and
* M21-1, Part III, Subpart v, 3.A.4.a.
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| b. Actions to Take When No Bar to Apportionment Exists | If there is *no* bar to apportionment, * establish EP 600 under the primary beneficiary’s name, with a suspense date that expires 65 days in the future
* follow the instructions in M21-1, Part III, Subpart v, 3.A.2.c, and
* send development letters that request the evidence/information described in M21-1, Part III, Subpart v, 3.A.2.d to the
* primary beneficiary, and
* apportionment claimant.

***Note***: Do not deny a claim for apportionment *without undertaking development* simply because the Veteran has only a 10- or 20-percent disability rating. Without knowing the income and expenses of the claimant and the Veteran, it is practically impossible to determine whether a reasonable amount of benefits may be apportioned to the claimant. |

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| c. Estimating the Amount of Benefits VA Should Withhold for an Apportionment | Before taking the actions described in the remaining blocks of this topic, it is necessary to *estimate* the amount of benefits VA should apportion to the claimant. As discussed in M21-1, Part III, Subpart v, 3.A.2.f, the estimated amount of the apportionment will tentatively be withheld from the primary beneficiary’s award pending a *final* decision on the apportionment claim.Veteran Service Representatives (VSRs) must make the estimate described in the above paragraph *without* the benefit of the additional evidence and information they request from the claimant and primary beneficiary as they follow the instructions in M21-1, Part III, Subpart v, 3.A.2.d and e.When making the estimate, a VSR must* consider the additional amount VA pays the primary beneficiary for dependents
* apply the provisions of [38 CFR 3.451](http://www.ecfr.gov/cgi-bin/text-idx?SID=b20dc93c45e15acb7f1d85131542335c&mc=true&node=se38.1.3_1451&rgn=div8), which recommends apportionments in an amount between 20 percent and 50 percent of a Veteran’s benefits, and
* bear in mind that when making a *final* decision on an apportionment claim, the VSR may only apportion an amount that is *equal to or less than* the estimated amount. The VSR may ***not*** apportion a *greater* amount without
* issuing *another* notice of proposed adverse action to the primary beneficiary, and
* allowing the primary beneficiary 65 days to respond.

***Reference***: For information on making a final decision on an apportionment claim, see M21-1, Part III, Subpart v, 3.A.3.a. |

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| d. Required Evidence From the Primary Beneficiary and Claimant | When undertaking development for an apportionment claim, send *VA Form 21-0788* for completion to both the primary beneficiary and the claimant (or the claimant’s custodian, if applicable).Add additional information and/or requests to the letter that accompanies the form, as described in the table below. |

|  |  |
| --- | --- |
| Recipient | Additional Information/Requests |
| primary beneficiary | * Inform the beneficiary of the allegations of need that the claimant made.
* Ask the beneficiary to explain any hardship he/she would suffer if VA granted an apportionment.
* Inform the beneficiary that if he/she is *not* contributing to the support of the claimant, the beneficiary must explain why he/she is making no contributions.

***Notes***:* If the beneficiary is providing no support and fails to provide an explanation for not doing so, make a decision that is based on the other evidence of record.
* If a conflict arises regarding the amount of support the primary beneficiary provides to the claimant, ask the primary beneficiary to submit proof of his/her contributions, such as cancelled checks and/or receipts.
 |
| claimant (or claimant’s custodian, if applicable) | Ask the recipient to describe what hardships the claimant would suffer if VA denied the apportionment. |

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| ***Notes***: * Once completed, *VA Form 21-0788* provides VA with information about the net worth and monthly income and expenses of the
* primary beneficiary
* claimant, and
* claimant’s custodian, if applicable.
* Consider individual *household* income and expenses when determining
* whether an apportionment would create a financial hardship on the primary beneficiary, and
* whether the claimant has a financial need for the apportionment and, if so, the amount of benefits VA should apportion.

***Reference***: For more information about the evidence VA considers when deciding an apportionment claim, see [38 CFR 3.451](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1451&rgn=div8). |

|  |  |
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| e. Time Limits for Responding to a VA Request for Evidence/Information From the Primary Beneficiary and Claimant | Concurrent with the actions described in M21-1, Part III, Subpart v, 3.A.2.d, notify* the claimant that he or she must respond within 30 days
* the primary beneficiary that he or she must respond within 60 days, and
* both the claimant and primary beneficiary that a decision will be made after expiration of the specified time limit based on the evidence of record, unless an extension of the time limit is required for good cause.

In addition, inform the *primary beneficiary** of the amount and effective date of any interim withholding
* of the statutory authority for granting an apportionment ([38 U.S.C. 5307](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00005307----000-.html))
* of the effective date from which an apportionment may be made on the basis of the pending claim ([38 CFR 3.400(e)](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1400&rgn=div8)), and
* that the amount of his/her award will be reduced by the monthly amount of the apportionment authorized.

***Note***: Consider the following when choosing an effective date under [38 CFR 3.400(e)](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1400&rgn=div8):* The granting of an apportionment on an ***original claim*** occurs when VA receives the request for an apportionment ***before*** it begins paying disability or survivors benefits to the primary beneficiary.
* The granting of an apportionment on an ***other-than-original claim*** occurs when VA receives the request for an apportionment ***after*** it begins paying disability or survivors benefits to the primary beneficiary.
 |

|  |  |
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| f. Establishing the Estimated Withholding | After taking the actions described in the previous blocks of this topic, amend the primary beneficiary’s award by establishing a withholding of the *estimated* amount of the apportionment, effective the first of the month following the month in which the primary beneficiary’s response period (for the notice described in M21-1, Part III, Subpart v, 3.A.2.d and e) ends.***Example***: An estranged spouse files an apportionment claim on April 17. The development letters are released on May 22. The withholding is effective August 1.***Note***: *Do not* change the dependency status in the corporate record until final action is taken to grant the apportionment.***Reference***: For detailed instructions on processing awards and adjustments in* VETSNET, see the [*VETSNET Awards User Guide*](http://vbaw.vba.va.gov/bl/21/Systems/awards.htm), or
* VBMS-Awards, see the [*VBMS-Awards User Guide*](http://vbaw.vba.va.gov/VBMS/Resources_Technical_Information.asp).
 |

|  |  |
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| g. Handling a Request for a Hearing | If, within 30 days of the release of the notice of VA’s proposal to withhold benefits from a primary beneficiary’s award, the primary beneficiary requests a hearing, and a final decision cannot be made before the end of the 65-day control period, amend the effective date of the withholding so that payments to the primary beneficiary are not reduced until after a final decision on the apportionment claim is made.***Note***: Since a hearing is a form of development for evidence in conjunction with a claim, leave the EP 130 and EP 600 pending until the final decision is made. |

#### 3. Deciding an Apportionment Claim and Notification of a Decision on an Apportionment Claim

|  |  |
| --- | --- |
| Introduction | This topic contains information on deciding an apportionment claim and notifying the primary beneficiary and the claimant of the decision, including* actions to take upon expiration of the claimant’s 30-day response period
* considering evidence received after a decision
* determining the amount of an apportionment
* preparing *VA Form 21-441, Special Apportionment Decision,* for a favorable or unfavorable apportionment decision
* effect of deferred awards on pending apportionment claims
* determining the effective date of an apportionment and the appropriate award action to take after making an apportionment decision
* rounding the apportioned amount
* distributing the available amount for an institutionalized Veteran
* effect of rate changes on the primary award
* notifying the primary beneficiary and claimant of the apportionment decision, and
* responding to a notice of disagreement (NOD) with an apportionment decision.
 |

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| Change Date | July 5, 2015 |

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| a. Actions to Take Upon Expiration of the Claimant’s 30-Day Response Period | Follow the instructions in the table below after the claimant’s 30-day response period expires. |

|  |  |
| --- | --- |
| If the claimant... | Then make an administrative decision... |
| responds within 30 days, but the evidence fails to demonstrate a hardship on the part of the claimant | * based on the claimant’s response and any other pertinent evidence of record
* deny the pending claim
* clear the pending EPs, and
* send notification of the decision to the claimant and beneficiary.
 |
| does not respond within 30 days and/or the evidence of record fails to demonstrate a hardship on the part of the claimant | * based on the evidence of record
* deny the pending claim
* clear the pending EPs, and
* send notification of the decision to the claimant and beneficiary.
 |
| furnishes evidence of a hardship but payment of an apportionment will create a hardship for the beneficiary (Veteran or surviving spouse) | * based on
* the evidence received (if *both* parties respond within 65 days), or
* the evidence of record (if only one or *neither* party responds within 65 days)
* deny the pending claim
* clear the pending EPs, and
* send notification of the decision to the claimant and beneficiary.
 |
| furnishes evidence of a hardship and the evidence of record fails to demonstrate a hardship on the part of the beneficiary (Veteran or surviving spouse) | * based on
* the evidence received (if *both* parties respond within 65 days), or
* the evidence of record (if only one or *neither* party responds within 65 days)
* grant the pending claim
* clear the pending EPs, and
* send notification of the decision to the claimant and beneficiary.
 |

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| ***Note***: VA may pay an apportionment to a claimant *before* expiration of the 65-day period referenced in the table above as long as doing so will not adversely impact benefits to which the beneficiary (Veteran or surviving spouse) is entitled.  |

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| --- | --- |
| b. Considering Evidence Received After a Decision | There is a 60-day appeal period following the date of notification of an apportionment decision. * If additional evidence is received more than 60 days after the date of notification of the apportionment decision, handle that evidence as a new claim.
* If evidence is received *within* the 65-day due process period, handle it according to the instructions in the table below.
 |

|  |  |
| --- | --- |
| If VA received the evidence ... | Then ... |
| *after* a decision is made, but *before* the expiration of the 65-day due process period, and the evidence will change the outcome of the decision | prepare a new apportionment decision to include the additional evidence. |
| *after* a decision is made, but *before* the expiration of the 65-day due process period, and the evidence does *not* change the outcome of the decision | * annotate the evidence to reflect that it does not affect the decision, and
* mention the additional evidence in the apportionment award notification.

***Note***: To annotate the evidence in VBMS, add the annotation in the SUBJECT field under DOCUMENT PROPERTIES. |

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| --- |
| ***Reference***: For more information on handling a notice of disagreement (NOD) with an apportionment decision, see M21-1, Part III, Subpart v, 3.A.3.k. |

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| c. Determining the Amount of an Apportionment | After making a decision to apportion benefits, determine the amount to apportion from an equitable assessment of any hardship or demonstrated need on the part of the primary beneficiary and the claimant. Consider such factors as * the amount of VA benefits available
* other resources and income of the primary beneficiary and the claimant, and
* special needs of the primary beneficiary and the claimant.

Consider the criteria in the table below when evaluating an apportionment claim under different benefit programs. |

|  |  |
| --- | --- |
| Benefit Program | Criteria |
| compensationand Survivors Pension | [38 CFR 3.451](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1451&rgn=div8)***Authority***: See [38 CFR 3.453](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1453&rgn=div8) and [3.460](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1460&rgn=div8) |
| Veterans Pension | * [38 CFR 3.450](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1450&rgn=div8), or
* [38 CFR 3.451](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1451&rgn=div8)

***Note***: Court of Appeals for Veterans Claims (CAVC) decision in [*Hall v. Brown*, No. 92-532](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmh) distinguishes adjudication under one regulation as being independent of the other regulation. This decision did not identify a need for hardship to apportion Veterans Pension. |
| DIC | * [38 CFR 3.461(b)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1461&rgn=div8), or
* [38 CFR 3.451](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1451&rgn=div8)
 |
| Veterans Pension adjusted for a hospitalized or incompetent Veteran | [38 CFR 3.454](http://www.ecfr.gov/cgi-bin/text-idx?SID=926227a2ecb1501c57cd717feb59b407&node=se38.1.3_1454&rgn=div8) |

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| ***Important***: When the primary beneficiary is receiving additional benefits for dependents, and the evidence shows he/she is not reasonably contributing to their support, hardship for the primary beneficiary would *not* normally result from apportionment of the additional amount payable for such dependents. |

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| --- | --- |
| d. Preparing VA Form 21-441 for a Favorable or Unfavorable Apportionment Decision | Document both favorable and unfavorable decisions on claims for apportionment using *VA Form 21-441, Special Apportionment Decision,* or other administrative decision format for the approval of an authorizer in accordance with M21-1, Part III, Subpart v, 1.A.3.***Exception***: When a fiduciary has been appointed or designated for the Veteran, the fiduciary activity recommendation is sufficient authority for an apportionment. If the claims folder contains significant information that was not considered, the fiduciary activity should review the information prior to the award. |

|  |  |
| --- | --- |
| e. Effect of Deferred Awards on Pending Apportionment Claims | Use the table below to determine what award actions may be taken while one or more awards are deferred. |

|  |  |
| --- | --- |
| If an award is deferred for … | Then process the … |
| one or more pending apportionment claims | primary beneficiary’s award for the required withheld amount either* alone, or
* with the award to any other apportionee.

***Note***: The pending apportionee award may be processed at any time after the primary beneficiary’s corporate record is established, without the need to process another primary beneficiary award. |
| an incompetent primary beneficiary due to the appointment of a fiduciary | apportionee’s award immediately. |

|  |  |
| --- | --- |
| f. Determining the Effective Date of an Apportionment and the Appropriate Award Action to Take After Making an Apportionment Decision | After making an apportionment decision, use the table below to determine the* effective date for the apportioned award, and
* appropriate award action to take.
 |

|  |  |
| --- | --- |
| If the apportionment is … | Then … |
| granted, and the primary beneficiary’s award was running at the time the apportionment claim was received | * retroactively adjust the award of the primary beneficiary effective the first day of the month after the date the apportionment claim was received, creating any resulting overpayment against the primary beneficiary, and
* make the apportionee award effective from the first day of the month after the date the apportionment claim was received.

***Reference***: For more information on the actions described in the bullets above, see* [38 CFR 3.400(e)](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1400&rgn=div8), and
* [38 CFR 3.650](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1650&rgn=div8).
 |
| granted, and the apportionment claim was received with or before the primary beneficiary’s original claim  | pay the apportionment on the basis of the facts found.***Note***: Payment of the apportionment may be from the same effective date as the effective date of the primary beneficiary’s award. |
| granted and the apportioned amount is *greater* than the withheld amount  | * pay the apportionment for the amount previously withheld
* determine the additional amount to be apportioned, as well as the effective date, and
* send the primary beneficiary a notice of proposed adverse action covering the additional amount.
 |
| denied | immediately restore all funds in withholding to the primary beneficiary. |

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| g. Rounding the Apportioned Amount | Round apportioned amounts to even dollars. Per [38 CFR 3.112](http://www.ecfr.gov/cgi-bin/text-idx?SID=48f97b240e806ed8bbd55c7e6c515550&node=se38.1.3_1112&rgn=div8), if the amount to be shared by two or more apportionees involves a fraction of one cent, disregard the fractional amount even though the total of the apportionees’ shares is less than the amount withheld. |

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| --- | --- |
| h. Distributing the Available Amount for an Institutionalized Veteran | The table below describes the distribution of the total amount available to the primary beneficiary for an institutionalized primary beneficiary. |

|  |  |  |
| --- | --- | --- |
| When … | And … | Then … |
| an institutionalized Veteran is to be paid only a portion of the total award | less than the full balance is apportioned to a dependent | withhold the difference between the total award and the monthly rate payable on behalf of the Veteran. |

|  |
| --- |
| ***Note***: The situation described in this block may be encountered in the case of a claim for apportionment from a parent or estranged spouse, while the Veteran resides in a VA nursing home or domiciliary. ***Reference***: For more information concerning adjustments due to hospitalization, see * M21-1, Part III, Subpart v, 6.B, and
* [38 CFR 3.551(e)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=926227a2ecb1501c57cd717feb59b407&node=se38.1.3_1551&rgn=div8).
 |

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| i. Effect of Rate Changes on the Primary Award | A Veteran’s award may be subject to future rate changes that will not be reflected in an apportionee’s award.***Example***: The Veteran’s award (total award) will be prospectively reduced from 100 percent to 80 percent. However, there is no change in the apportioned amount.An apportionee award must not provide for any future rate change for any period beyond the last future rate provided for by the Veteran’s award. |

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| j. Notifying the Primary Beneficiary and Claimant of the Apportionment Decision | Advise both the primary beneficiary and the claimant of the apportionment decision and furnish them notice of* the effective date of payment, if the apportionment is granted
* the amount of the apportionment, if granted
* the reasons for the decision
* the evidence used to make the decision
* their rights to representation
* the right to present new evidence, including the opportunity for a personal hearing, and
* the right to appeal the decision by filing an NOD *within 60 days* from the date of the decision notice, as provided in
* [38 U.S.C. 7105A](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00007105---A000-.html), and
* [38 CFR 19.100](http://www.ecfr.gov/cgi-bin/text-idx?SID=f045b12172a6cce0c94661ef83a2a1b2&mc=true&node=se38.2.19_1100&rgn=div8), [19.101](http://www.ecfr.gov/cgi-bin/text-idx?SID=f045b12172a6cce0c94661ef83a2a1b2&mc=true&node=se38.2.19_1101&rgn=div8), and [19.102](http://www.ecfr.gov/cgi-bin/text-idx?SID=f045b12172a6cce0c94661ef83a2a1b2&mc=true&node=se38.2.19_1102&rgn=div8),

***Important***: An apportionment claim is considered a contested claim. As such, appellate procedures, as described in M21-1, Part III, Subpart vi, 6.C.6.b, apply. A 60-day time limit, not one year, is provided for submission of an NOD. |

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| k. Responding to an NOD With an Apportionment Decision | When an NOD is received in response to an apportionment decision,* treat it as a contested claim, and
* apply the procedures in M21-1, Part I, 5.B.3.a.
 |

#### 4. Handling a Claim for Apportionment When a Veteran Is Receiving Less Than All of the Benefits Payable Because of an Offset or Withholding

|  |  |
| --- | --- |
| Introduction | This topic contains information on handling a claim for apportionment when a Veteran’s award is subject to offset under 38 U.S.C. 1151 or withholding due to the receipt of separation pay, including* effect of an offset or withholding of a Veteran’s entire award on a claim for apportionment
* actions to take upon receipt of a claim for apportionment when a Veteran’s entire award is being offset or withheld, and
* action to take if only part of a Veteran’s award is being offset or withheld.
 |

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| Change Date |  December 3, 2015 |

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| a. Effect of an Offset or Withholding of a Veteran’s Entire Award on a Claim for Apportionment | In some cases, a Veteran’s total award must be* offset under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), or
* withheld because of the receipt of separation benefits.

In such cases, the Veteran’s award is not subject to apportionment until the offset or withholding ends.***Exception***: In certain cases when reductions are warranted due to incarceration, benefits that were unavailable for apportionment prior to incarceration *due to recoupment of separation pay* **will be** available for apportionment during incarceration. Upon release from incarceration, the total award withholding due to separation pay will be reinstated. ***Reference***: For more information on:* recouping separation benefits, see M21-1, Part III, Subpart v, 4.B, and
* amounts payable during incarceration, see [38 CFR 3.665(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=926227a2ecb1501c57cd717feb59b407&node=se38.1.3_1665&rgn=div8).
 |

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| --- | --- |
| b. Actions to Take Upon Receipt of a Claim for Apportionment When a Veteran’s Entire Award Is Being Offset or Withheld | Follow the steps in the table below upon receipt of an apportionment claim if a Veteran’s entire award is being * offset under [38 U.S.C. 1151](https://www.law.cornell.edu/uscode/text/38/1151), or
* withheld to recoup separation benefits.
 |

|  |  |
| --- | --- |
| Step | Action |
| 1 | Establish a future diary control for 90 days prior to the approximate date the offset or withholding will end to ascertain at that time whether an apportionment is still in order.***Important***: Do not establish an EP.***Reference***: For information on future diaries, see the [*Share User Guide*](http://css.vba.va.gov/SHARE/). |
| 2 | Inform any persons claiming an apportionment of the * reason for the deferral, and
* anticipated length of delay.
 |
| 3 | When the diary matures, establish pending EPs 130 and 600, according to the instructions in M21-1, Part III, Subpart v, 3.A.2.a and b. |
| 4 | Inform the Veteran and the claimant of the* apportionment claim
* evidence needed per M21-1, Part III, Subpart v, 3.A.2.d, and
* right to due process per M21-1, Part III, Subpart v, 3.A.2.e.
 |
| 5 | Establish a withholding in accordance with M21-1, Part III, Subpart v, 3.A.2.f.***Note***: Do not withhold benefits for any period prior to the first day of the month in which the recoupment or offset ended. |

|  |  |
| --- | --- |
| c. Action to Take if Only Part of a Veteran’s Award Is Being Offset or Withheld | In some cases * a Veteran is entitled to benefits for two or more disabilities, and
* the amount to be recouped is only the amount payable for the disability(ies) which resulted in
* an award under [38 U.S.C. 1151](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001151----000-.html), or
* the payment of disability severance pay.

In such cases* determine the amount to be apportioned or withheld on the basis of the balance of compensation payable to the Veteran, not on the basis of the total award, and
* do not make an apportionment if the balance of compensation does not permit payment of a reasonable amount to any apportionee.

***References***: * For information on the recoupment of disability severance pay, see M21-1, Part III, Subpart v, 4.B.3.
* For an interpretation of “reasonable amount,” see M21-1, Part III, Subpart v, 3.A.1.f.
 |