Serve all who Served:
Fixes to the DVA’s eligibility criteria for servicemembers discharged for misconduct

Summary

- The Department of Veterans Affairs (DVA) decides who is a veteran. Those who are denied veteran status receive little or no DVA support.
- 117,000 Americans discharged from active service since 2001 are not recognized as veterans by the DVA.
- 15% of exclusions are based on mandatory criteria set by statute. The remainder of exclusions are based on discretionary criteria established by the DVA.
- The DVA’s standards for evaluating eligibility do not consider: length of service; hardship service; combat service; existence of in-service disabilities; mental health conditions less than “insanity”; mitigating or extenuating circumstances.
- These servicemembers are twice as likely to commit suicide and twice as likely to be homeless than others.
- The DVA does not grant tentative eligibility while making eligibility decisions.
- The DVA has rulemaking authority to correct shortcomings in its eligibility criteria and to provide tentative eligibility.
**Introduction**

There is a common misperception that all servicemembers earn access to medical care, homeless veteran shelters, disability compensation or other DVA support. This is not the case. The DVA excludes hundreds of thousands of servicemembers from services, due to their discharge characterization and events that happened in service. This affects servicemembers with deployment and combat service, with mental or physical disabilities from service, and servicemembers experiencing homelessness or at risk of suicide.

The DVA’s eligibility criteria fail to consider a number of factors that are clearly relevant: whether the person had mental health problems in service; the duration and quality of prior service; whether there were any personal problems that affect their ability to conform to military discipline. In volunteering to serve in the military, these young men and women accepted sacrifice and the risk of serious, even mortal trauma. Only the most egregious cases of truly dishonorable service should justify denying them recognition of their service.

The DVA’s procedure for determining eligibility creates unnecessary obstacles to care, particularly for veterans whose military service itself has resulted in traumatic brain injury, PTSD, and other mental health consequences. The DVA should be determining basic eligibility for services promptly, efficiently, and sympathetically.

The following material describes the DVA’s current eligibility rules, points out the areas where the DVA has authority to change its rules, and suggests areas where simple rule changes could streamline access to services for veterans in need.

**Analysis of DVA eligibility criteria based on character of discharge**

The DVA decides whether a servicemember’s conduct makes them ineligible for recognition as a veteran and for DVA services. There are two categories of exclusions that might leave a servicemember ineligible. One contains exclusions mandated by statute. The second contains discretionary exclusions created by the DVA itself.
**Exclusions mandated by statute**

Congress listed six types of misconduct that make servicemembers ineligible for DVA benefits.² These affect a relatively small number of people: 15% of FY2011 misconduct discharges would be barred from DVA services under these criteria.³

These statutory bars use specific language that is subject to little or no interpretation: for example, discharge by general court martial, discharge for desertion, or resignation by an officer for the good of the service. There is one statutory exclusion that includes a vague term that the DVA has discretion to define. Congress requires the DVA to exclude servicemembers who were AWOL for more than 180 days unless there were “compelling circumstances” to justify the absence.⁴ The DVA has defined “compelling circumstances” to include a range of mitigating factors such as duration of service, quality of service, disabilities, personal stressors, and the age of the servicemember at the time.⁵ This mitigating factors analysis does not apply to any other statutory bar. There is no opportunity to consider overall service for other the bars.

Congress created an exception to these bars where the servicemember was “insane” at the time of the misconduct.⁶ The DVA’s definition of “insanity” potentially includes mental illness such as post-traumatic stress disorder,⁷ and it has been used to excuse the misconduct of servicemembers whose behavior was symptomatic of undiagnosed PTSD.⁸ However, this is a very limited basis for considering mental health in service. First, it requires that a medical doctor state that the veteran was “insane” in service,⁹ even though this is not a clinically approved diagnostic term.¹⁰ Swords to Plowshares has not found a doctor willing to provide a diagnosis of “insanity” for veterans we work with. Furthermore, the veteran must specifically state that they were “insane” in order to have the exception considered.¹¹ This is unlikely to occur in cases of post-traumatic stress or traumatic brain injury, as veterans do not typically describe those conditions in

**Eleoni Israel**

He served as an Army sniper and infantryman in OIF, and performed well enough to be assigned to personal security details for VIPs including Secretary Clinton and Vice President Cheney. He experienced Traumatic Brain Injury and traumas that later led to severe PTSD diagnoses. At a certain point he was unable to continue. He was given an OTH discharge after being cited for minor disciplinary infractions such as failing to stand at parade rest while speaking to an NCO. **Repeatedly denied veteran status, denied health care by VHA.**
terms of “sanity.” Finally, the DVA has proposed to change its regulatory definition of “insanity” to include only conduct that would be criminally insane. This would recognize “insanity” only where there was such “defect of reason” that the person did not “know or understand the nature or consequence of the act, or that what he or she was doing was wrong.” This would prevent the “insanity” exception from applying to many or most cases of operational stress such as post-traumatic stress or traumatic brain injury.

The DVA’s discretionary criteria
The DVA created an additional five exclusions of its own design. The DVA can do this because Congress instructed the DVA to exclude people whose discharge was “under dishonorable conditions,” but Congress gave the DVA no direction on what conduct should be considered “dishonorable.” This gives the DVA had very broad authority to create its own standards by regulation.

These discretionary criteria are responsible for the large majority of exclusions from DVA services. The DVA has denied eligibility in 78% of the cases it has evaluated. As discussed above, the statutory exclusions apply to no more than 15% of servicemembers discharged for misconduct. Therefore at least 63% of servicemembers discharged for misconduct are excluded on the basis of the DVA’s discretionary exclusion criteria.

The DVA created five types of conduct that would lead to an exclusion from DVA services:

- Willful and persistent misconduct. A minor offense may be overlooked if service was otherwise honest, faithful and meritorious.
- An offense involving moral turpitude.
- Aggravated homosexual conduct
- A discharge in lieu of General Court Martial
- Mutiny or spying

**Theodore Wilson**
He volunteered for the Marines and deployed to Vietnam as a combat rifleman. He earned a purple heart, was hospitalized for “nervous shock”, and attempted suicide on his first tour. On his second tour, he had a breakdown and started a fight with MPs. He was given an OTH discharge. Without psychiatric care, he started illegal drug use, and ended up in the criminal justice system. He is now out of prison but homeless. **Denied veteran status by the DVA, denied homeless services.**
Unlike the statutory bars, where the DVA may consider “compelling circumstances” that justify a period of AWOL, nowhere in the DVA’s discretionary criteria is there any opportunity to consider mitigating factors. The Court of Appeals for Veterans Claims has held that this absence must be interpreted as a deliberate choice, and so the DVA is prohibited from considering any mitigating circumstances when evaluating character of service.\(^{23}\)

The discretionary exclusions contain only one limited opportunity to consider overall service. Only the “willful and persistent misconduct” bar includes a provision to consider prior service. This is only available if the misconduct was “a minor offense,” and the standard for “meritorious” service is high: a combat deployment is not inherently meritorious because that is an inherent responsibility of the position.\(^{24}\) This also excludes consideration of other hardship service conditions such as extended on-combat deployments.

The DVA also adopted the same “insanity” exception as applies to the statutory exclusions.\(^{25}\) As discussed above, this is a very limited opportunity to consider whether mental health conditions explain the servicemember’s misconduct. The “willful and persistent misconduct” bar implies an exception if the person’s mental state left them incapable of making “willful” action,\(^{26}\) however this is a very high standard that does not likely encompass most cases of post-traumatic stress or traumatic brain injury. There is no other opportunity to consider mental health conditions at the time of misconduct.
Unlike the statutory criteria, several of the DVA’s criteria are broad and loosely defined. Some of these terms are not explained in regulations or adjudication manuals. For example, how much misconduct should be considered “persistent” is not explained anywhere in regulations, the Adjudication Manual, any Fast Letters or Training Letters, or any Precedential Opinions of the Office of General Counsel. No relevant holdings of the Court of Appeals for Veteran Claims (CAVC) have been incorporated into adjudication manuals. For example, the CAVC has held that two positive drug tests is not “persistent,” and that AWOLs that last less than 8% of the total service period are not persistent, however neither of these holdings appear in any adjudication manuals. In our experience, Regional Office decisions routinely deny eligibility in cases such as these.

**Presumption of ineligibility and obstacles to obtaining an eligibility evaluation**

DVA regulations waive eligibility review for servicemembers with Honorable and General discharge characterizations. Servicemembers with other discharge characterizations are eligible only after an individual review of their service to determine if their access to services is prohibited by one of the mandatory or discretionary bars. These are: veterans with an Other Than Honorable discharge, a Bad Conduct discharge, or a Dishonorable discharge. These discharge characterizations are not eligibility criteria; the DVA only uses them to indicate the cases where eligibility will be an issue to adjudicate. 122,000 servicemembers received these discharges between 2001 and 2013, representing 7% of all servicemembers discharged after the Entry Level period.

These veterans are ineligible for services until the DVA completes an eligibility review. The VHA’s tentative eligibility provision is not available to veterans in this situation. VHA hospitals might choose to extend services on a “humanitarian basis, however this is only

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**Terrance Harvey**

He deployed with the 82nd Airborne for the first Gulf War, where he earned the Combat Infantryman Badge. After his return he started experiencing PTSD. He attempted suicide during service. He felt that he was unable to receive care, and was denied permission to take leave to be cared for by his family. He left anyway, and when he voluntarily returned he was given an OTH discharge. He has attempted suicide twice since separation. Turned away from DVA hospitals, never granted DVA eligibility.
available for emergency services and the servicemembers must pay for the treatment.  

In practice, the large majority of veterans placed in this presumptively-ineligible category never receive an eligibility evaluation from the DVA. Of the 122,000 servicemembers discharged since 2001 who are in this category, the DVA has completed eligibility reviews for only 13,300. This means that almost 89% of veterans discharged for misconduct are denied DVA eligibility without the DVA ever even considering their service.

There are four reasons for why such a low number of veterans receive an eligibility evaluation. First, in our experience most veterans seeking health care benefits are never considered for eligibility. VHA regulations state that when a veteran with a presumptively ineligible discharge seeks health care, the eligibility staff should initiate an internal request for an adjudication by the Regional Office. Instead, our experience is that hospital eligibility staff routinely turn away these servicemembers without initiating this request. Second, veterans seeking homeless housing services from the DVA have no method for requesting an evaluation of eligibility. Third, veterans are often misinformed about the fact that they may potentially be eligible for benefits, and therefore never apply for them. Finally, because Regional Offices place these eligibility evaluations in the Administrative Decision lane, where claims currently take twice as long to complete as other claims, many servicemembers may have applied for benefits and simply waiting for a decision.
DVA regulations exclude highly vulnerable servicemembers

The category of presumptively-ineligible servicemembers include people at elevated risk of suicide, homelessness and incarceration. The denial of medical and mental health care, housing assistance, disability compensation and vocational rehabilitation for these vulnerable veterans is particularly troubling.

Suicide
Veterans with misconduct discharges (OTH, BCD, and DD) are twice as likely to commit suicide as those with Honorable of General discharges. One reason is that the misconduct leading to discharge may be symptomatic of mental health difficulties in service: combat Marines with PTSD diagnoses were 11 times more likely to get misconduct discharges than those without PTSD diagnoses, and 8 times more likely to get misconduct discharges related to drug use. A second contributing factor is that veterans outside of DVA care have a 30% higher rate of suicide than those under DVA care.

Homelessness
Swords to Plowshares operates veteran homeless shelters funded by the DVA and by other sources. Approximately 15% of our occupancy is former servicemembers with OTH, BCD or DD discharges. Other veteran homeless shelter providers have said informally that they have similar levels of occupants with misconduct discharges. Because these characterizations represent only 7% of all characterized discharges, we estimate that veterans with these discharges are approximately twice as likely to be homeless.

Incarceration
38% of prior servicemembers in federal and state prison have less than Honorable discharges. The corresponding figure in the non-incarcerated population is 23%, indicating a 50% higher risk of incarceration among these servicemembers. This figure includes servicemembers with General discharges, who are eligible for VA benefits, and therefore the data does not directly describe the population discussed in this paper.

The DVA's criteria do not meet its public expectations
DVA external communications state that its eligibility rules are more generous than they are. This indicates that its rules do not match its expectations for how this issue should be adjudicated.
The following paragraphs compare public communications from the VA with the actual rules and practices discussed above. The DVA communications draw from two documents: its public fact sheet “Claims For VA Benefits And Character Of Discharge: General Information”; and a presentation delivered to the Senate Veteran Affairs Committee on May 5, 2014, “Impact of Military Discharges on Establishing Status as a Veteran for Title 38 Disability and/or Healthcare Benefits.”

**Issue:** Are mental health conditions such as PTSD and TBI taken into account?

**Public statements:**
- “DVA considers medical issues, such as PTSD and TBI”
- “[T]he impact of disabilities [including post-traumatic stress disorder] may be considered during the analysis of any mitigating or extenuating circumstances that may have contributed to the discharge”

**Current Eligibility criteria:**
- Mental health is considered only if servicemembers state that they were “insane” and obtain a medical opinion diagnosing “insanity.” There is no provision for considering mitigating circumstances.

**Issue:** Is the quality of prior service accounted for, including hardship service such as combat deployments?

**Public statements:**
- “DVA considers ... the overall nature of the quality of service”
- “DVA considers ... performance and accomplishments during service ... and character of service preceding the incidents resulting in discharge”

**Current Eligibility criteria:**
- The quality of prior service is considered only under one of the exclusions (willful and persistent misconduct), only when the misconduct was “minor”, and only if the service was “meritorious.” Combat service that did not also result is special distinction is not “meritorious” because the deployment was merely performing the duties as assigned.

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**Joshua Redmeyer**

He was a Marine rifleman for seven years, he served three combat tours in Iraq and was a sniper instructor after his return. He started using drugs after his third deployment and was discharged for drug use. After separation he became estranged from his wife and children, eventually getting a divorce. He was diagnosed with severe PTSD in 2010. The DVA hospital turned him away without starting an eligibility determination and without offering temporary eligibility.
**Issue: Is the length of service accounted for?**

Public statements:
- “DVA considers… the length of service.”

Current Eligibility criteria:
- There is no criteria for considering length of prior service.

**Issue: Are mitigating factors taken into account?**

Public statements:
- “VA considers... any mitigating or extenuating circumstances presented by the claimant.”
- “VA considers ... any mitigating factors when determining eligibility status.”

Current Eligibility criteria:
- There is no opportunity to consider mitigating circumstances for any discretionary bar.

**Issue: can servicemembers obtain tentative eligibility while the DVA determines eligibility?**

Public statements:
- “The Veteran is given a tentative eligibility for health care until a final determination is made for those who apply within six months of discharge.”

Current Eligibility criteria:
- DVA regulations prohibit granting tentative eligibility to servicemembers when the pending eligibility issue relates to character of discharge.

**Improvements that the DVA can make to its eligibility criteria**

**Improvements to the statutory exclusion criteria**

The DVA cannot modify its statutory criteria. However, the DVA has broad authority to interpret the term “insane” that is used in statute but not defined. The statute was written when the term “insanity” was used to describe a broad range of conditions, and before PTSD and TBI were recognized disorders. Because of advances in diagnostic practices since that time, and disuse of the clinical use of the term “insane”, it would be a reasonable interpretation of the statute to define “insane” in a way that specifically addresses the range of mental health conditions that may interfere with servicemembers’ ability to function in a military
environment. The DVA can both redefine the term and authorize the use of terms other than “insanity” to trigger analysis under this standard.

**Improvements to the discretionary exclusion criteria**

The DVA has full authority to modify, replace or repeal its discretionary exclusion criteria in order to better interpret the statutory requirement for discharges “under conditions other than dishonorable.”

The following changes would ensure that the DVA’s eligibility rules match public expectations and its own public communications:

- Limit the characterizations that are presumptively-ineligible to the punitive discharges (Bad Conduct and Dishonorable).
- Evaluate overall service by balancing the duration and quality of “good service” against the severity and duration of misconduct.
- Create an exception where mental health contributed to the misconduct in service. If the DVA is unable to sufficiently liberalize the standard applied to the statutory exclusion criteria, it should adopt a separate liberalized standard to apply to its discretionary criteria.
- Create a presumption that hardship service, including deployment, outweighs later misconduct for the purposes of determining veteran status.
- Create a presumption of eligibility where mitigating circumstances explain the misconduct in service. This standard could mirror the “compelling circumstances” exception that already exists within the statutory AWOL prohibition, where personal stressors, physical and mental health conditions, and the age of the servicemember are all taken into consideration.

**Improvements to the eligibility determination process**

The DVA has full authority to determine the procedures by which it evaluates eligibility. The following changes would ensure that more servicemembers receive the recognition that they are due and the services that they need:

- Grant tentative eligibility for health care and homeless housing services pending completion of eligibility review.
- Require that the adjudicators consider whether mental health mitigated in-service misconduct whenever the servicemember files a Compensation claim for a mental health disability.
- Create dedicated teams within each Regional Office for deciding these issues rapidly and competently.
- Update the Benefits Adjudication Manual M21-1MR to include eligibility criteria developed by the Court of Appeals for Veterans Claims.
Conclusion

VA medical and mental health care, housing programs, vocational rehabilitation, and disability compensation are intended to support veterans whose service has resulted in trauma, injury and, in the most severe cases, significant diminished capacity. The DVA’s discretionary eligibility criteria are interfering with its stated goals of fairly considering overall service and addressing the veteran suicide, homelessness, and incarceration crises. The DVA should change its eligibility rules to ensure that these veterans get the support they have earned and reduce the administrative burden on the VA, veteran service organizations and these veterans themselves.
1 38 USC 101(2), 38 CFR 3.12. There is only one benefit where statute limits eligibility based on discharge characterization: the GI Bill. For this benefit, veterans must have a fully Honorable discharge from the service. 38 USC 3311(c) (post-9/11 GI Bill); 38 USC 3011(1)(3) (GI Bill). Because the DVA cannot change discharge characterizations, the Department of Defense effectively decides eligibility for GI Bill.

2 38 USC 3505(a), 38 CFR 3.12(c). One statutory term was left undefined, leaving the DVA with the authority to interpret that term. This relates to the “compelling circumstances” that might justify an absence of more than 180 days, defined by the DVA at 38 CRR 3.12(c)(6)(i-iii).

3 There were 8,686 misconduct discharges in FY2011. In that period, there were 726 discharges by General Court-Martial. This corresponds to the statutory bar at 38 CFR 3.12(c)(1) (discharge by General Court-Martial). There were 548 discharges for Interservice Separation Code 1075, “AWOL or Desertion”. This corresponds to the statutory bars at 38 CFR 3.12(c)(4) (discharge for desertion) and 38 CFR 3.12(c)(6) (discharge for AWOL more than 180 days). It is overinclusive because the statutory bar includes an exception for “compelling circumstances,” as discussed infra. The remaining statutory prohibitions are relatively uncommon. Because the second figure is overinclusive, and because the remaining categories of prohibition are rare, it is safe to conclude that the total number of people encompassed by the statutory bars in FY2011 is approximately 1,274, or 15% of all misconduct discharges. This data was obtained from the Annual Report of the Code Committee on Military Justice FY 2011 and from a DOD FOIA response.

4 38 USC 5303(a).

5 38 CFR 3.12(c)(6)(i-iii).

6 38 CFR 3.12(b). This “insanity exception” was included by Congress as an exception to its statutory bars, 38 USC 5303(a). When the DVA adopted that exception by regulation it also applied it to its discretionary exclusions.


10 Medical opinions relating to mental health must apply the diagnostic criteria of the Diagnostic and Statistical Manual 5th Edition. 38 CFR 4.125(a). “Insane” is not a diagnosis in the DSM-5, nor in prior editions.

11 M21-1MR Part III.v.E.1.b


13 See Gardner v Shinseki, 22 Vet. App. 415 (2009), the Court of Appeals of Veterans Claims discussed how the DVA’s current definition of “insanity” is lower than the criminal insanity standard used in the Model Penal Code, which requires inability to understand the consequences of one’s actions.

14 38 CFR 3.12(d)

15 38 USC 101(2).

16 Where a statutory instruction to an executive agency is incomplete or ambiguous, the Agency has authority to adopt interpretations of those terms to guide its actions. Agencies are given broad deference to decide what interpretations to adopt.

17 Data cited in the Congressionally-mandated report Honoring the Call to Duty: Veterans’ Disability Benefits in the 21st Century (October 2007) at 94.

18 38 CFR 3.12(d)(4). The term “willful misconduct” is defined at 38 CFR 3.1(n) and 38 CFR 3.301(c).

20 38 CFR 3.12(d)(5)
21 38 CFR 3.12(d)(1)
22 38 CFR 3.12(d)(2)
24 See e.g., Title Redacted by Agency, 03-09 368, Bd. Vet. App. (June 19, 2009).
25 38 CFR 3.12(b).
28 38 CFR 3.12(a), M21-1MR Part III.v.1.B.5.c. Servicemembers with these characterizations enjoy a rebuttable presumption of honorable service. That presumption may be rebutted in cases when a servicemember received a misconduct discharge but then received a discharge upgrade from the Secretary of Defense based on certain “amnesty” or “automatic” discharge upgrade programs implemented in the 1970s. Congress mandated that the VA may not base its eligibility determination on a DOD discharge characterization issued under those circumstances. 38 USC 5303(e), 38 CFR 3.12(k). The DVA must apply the usual character of service review standards as described in this document. If the DVA finds that the servicemember does not pass the statutory or discretionary bars, their service will be found Dishonorable for VA Purposes and they will be ineligible for most or all benefits.
29 Servicemembers discharged during the first 180 days of service are typically discharged without a characterization. These veterans are eligible for DVA benefits if they meet other eligibility requirements. 38 CFR 3.12(k)(1).
30 VHA Handbook 1601A.02 ¶ 5(a); 38 C.F.R. § 17.34; 78 FR 28140, 28141 (May 14, 2013)(Explaining that only Honorable and General discharges qualify for tentative eligibility because those are the only cases where eligibility “probably will be established.”).
31 38 USC 1784; 38 CFR 17.102(b)(1); VHA Handbook 1601A.01.12.c.
32 Data includes the results of all Character of Discharge decisions for GWOT veterans as of May, 2013. Data provided by BVA Analyst on June 16, 2014.
33 “Eligibility Determinations” VHA Handbook 1601A.02 ¶ 6(3)(c).
34 The Grant and Per Diem (GPD) is implemented by grantees, not by the VA itself. GPD providers must confirm veteran eligibility through the local VHA “GPD Liaison” within three days of the client’s admission. VHA Handbook 1162.01(1) para. 12(f), “Grant and Per Diem Program Program” (July 12, 2013). The GPD Liaison’s role is limited to verifying eligibility status, not adjudicating eligibility. Id., para. 6(e)(2).
35 Data from the DVA ASPIRE Dashboard.
39 The DVA’s policy for eligibility in its GPD program has changed at least twice since January 2014. In its current practice, it is granting eligibility to some servicemembers that are not eligible for VA
benefits according to the criteria discussed in this document. More information on the evolution and current status of GPD eligibility is available from the author.


41 Hereinafter “COD Fact Sheet.” Available at http://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf

42 Hereinafter “SVAC Presentation.” A copy of the presentation was provided to Swords to Plowshares and is available on file with the author.