

Department of Veterans Affairs

§ 13.400

case files, bank statements, accountings, ledgers, check registers, receipts, bills, and any other items necessary to determine that the fiduciary has been acting in the best interest of VA beneficiaries and meeting the responsibilities of fiduciaries prescribed in § 13.140.

(b) *Unscheduled onsite reviews.* The Hub Manager may conduct unscheduled onsite reviews of any fiduciary, regardless of the number of beneficiaries served by the fiduciary or the total amount of VA benefit funds under management by the fiduciary, if:

(1) VA receives from any source credible information that the fiduciary has misused or is misusing VA benefits;

(2) The fiduciary's annual accounting is seriously delinquent. For purposes of this section, *seriously delinquent* means the fiduciary failed to submit the required accounting within 120 days after the ending date of the annual accounting period;

(3) VA receives from any source credible information that the fiduciary is not adequately performing the responsibilities of a fiduciary prescribed in § 13.140; or

(4) The Hub Manager determines that an unscheduled onsite review is necessary to ensure that the fiduciary is acting in the interest of the beneficiary or beneficiaries served by the fiduciary.

(c) *Procedures.* (1) Onsite reviews will consist of the following:

(i) A face-to-face meeting with the fiduciary. In the case of a fiduciary that is an entity, the face-to-face meeting will be with a representative of the entity;

(ii) A review of all relevant records maintained by the fiduciary, including but not limited to case files, bank statements, accountings, ledgers, check registers, receipts, bills, and any other items necessary to determine whether the fiduciary has been acting in the interest of VA beneficiaries; and

(iii) Interviews of beneficiaries, the fiduciary's employees, and other individuals as determined necessary by the Hub Manager.

(2) Not later than 30 days after completing a periodic or unscheduled onsite review, the Hub Manager will provide the fiduciary a written report of VA's findings, recommendations for

correction of deficiencies, requests for additional information, and notice of VA's intent regarding further action.

(3) Unless good cause for an extension is shown, not later than 30 days after the date that VA mails the report prescribed by paragraph (d)(2) of this section, the fiduciary must submit to the fiduciary hub a response to any VA request for additional information or recommendation for corrective action.

(4) The Hub Manager will remove the fiduciary for all VA beneficiaries whom the fiduciary serves if the fiduciary:

(i) Refuses to cooperate with VA during a periodic or unscheduled onsite review,

(ii) Is unable to produce necessary records,

(iii) Fails to respond to a VA request for additional information or recommendation for corrective action, or

(iv) Is found during an onsite review to have misused VA benefits.

(Authority: 38 U.S.C. 501, 5508)

§ 13.400 Misuse of benefits.

(a) *Definition of misuse.* Misuse of benefits by a fiduciary occurs in any case in which the fiduciary receives payment of benefits for the use and benefit of a beneficiary and the beneficiary's dependents, if any, and uses any part of such payment for a use other than the use and benefit of the beneficiary or the beneficiary's dependents. For the purpose of this section, *use and benefit* means any expenditure reasonably intended for the care, support, or maintenance of the beneficiary or the beneficiary's dependents. Such expenditures may include the fiduciary's efforts to improve the beneficiary's standard of living under rules prescribed in this part.

(b) *Misuse determinations.* Upon receipt of information from any source regarding possible misuse of VA benefits by a fiduciary, the Hub Manager may, upon his or her discretion, investigate the matter and issue a misuse determination in writing. This decision will:

(1) Identify the beneficiary,

(2) Identify the fiduciary,

(3) State whether the fiduciary is an individual fiduciary serving 10 or more beneficiaries or a corporation or other

§ 13.400

38 CFR Ch. I (7-1-22 Edition)

entity serving one or more beneficiaries,

(4) Identify the source of the information,

(5) Describe in detail the facts found as a result of the investigation,

(6) State the reasons for the Hub Manager's determination regarding whether the fiduciary misused any part of the beneficiary's benefit paid to the fiduciary, and

(7) If the Hub Manager determines that the fiduciary did misuse any part of the beneficiary's benefit, identify the months in which such misuse occurred.

(c) *Notice.* The Hub Manager will provide written notice of the misuse determination prescribed in paragraph (b) of this section, including a copy of the Hub Manager's written decision, an explanation regarding the reconsideration procedure prescribed in paragraph (d) of this section, and the beneficiary's right to appeal under §13.600, to:

(1) The fiduciary;

(2) The beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agents;

(3) The court of jurisdiction if the fiduciary is also the beneficiary's court-appointed guardian and/or conservator; and

(4) The Director of the Pension and Fiduciary Service.

(d) *Finality and reconsideration of misuse determinations.* (1) The Hub Manager's misuse determination is a final decision, unless:

(i) The Hub Manager receives a written request for reconsideration from the fiduciary or the beneficiary not later than 30 days after the date that the Hub Manager mailed notice of his or her misuse determination; or

(ii) The Hub Manager receives a notice of disagreement from the beneficiary not later than 1 year after the date that the Hub Manager mailed notice of his or her misuse determination.

(2) The fiduciary or the beneficiary may submit additional information pertinent to reconsideration of the misuse determination and not previously considered by the Hub Manager, provided that the additional in-

formation is submitted with the written reconsideration request.

(3) The Hub Manager will close the record regarding reconsideration at the end of the 30-day period described in paragraph (d)(1)(i) of this section and furnish a timely request submitted by the fiduciary or the beneficiary, including any new information, to the Director of the VA Regional Office with jurisdiction over the fiduciary hub for a final decision.

(4) In making the misuse determination on reconsideration, the Regional Office Director's decision will be based upon a review of the information of record as of the date of the Hub Manager's misuse determination and any new information submitted with the request. The decision will:

(i) Identify the beneficiary,

(ii) Identify the fiduciary,

(iii) Identify if the fiduciary is also the beneficiary's court-appointed guardian or conservator,

(iv) Identify the date of the Hub Manager's prior decision,

(v) Describe in detail the facts found as a result of the Director's review of the Hub Manager's decision and any new information submitted with the reconsideration request, and

(vi) State the reasons for the Director's final decision, which may affirm, modify, or overturn the Hub Manager's decision.

(5) The Hub Manager will provide written notice of the Regional Office Director's final decision on reconsideration to:

(i) The fiduciary,

(ii) The beneficiary or the beneficiary's legal guardian, and the beneficiary's accredited representative, attorney, or claims agent;

(iii) The court, if the fiduciary is also the beneficiary's court-appointed guardian or conservator; and

(iv) The Director of the Pension and Fiduciary Service.

(e) *Reporting of misuse.* Except as prescribed in §1.204 of this chapter, which requires VA management officials to promptly report possible criminal matters involving felonies to the VA Office of Inspector General, reporting of misuse cases will occur as follows:

(1) Not later than 30 days after a final determination is made under paragraph

(d) of this section that a fiduciary has misused VA benefits, the Director of the VA Regional Office who has jurisdiction over the fiduciary hub will notify the VA Office of Inspector General for purposes of any further action that the Inspector General deems appropriate under separate authority, and the court of jurisdiction if the fiduciary is also the beneficiary's court-appointed legal guardian and/or conservator.

(2) For purposes of application of § 13.410 regarding reissuance and recoupment of benefits, the Office of Inspector General will advise the Director of the Pension and Fiduciary Service of any final decision regarding prosecution of a fiduciary who misused VA benefits and any final judgment of a court in such a prosecution not later than 30 days after the decision is made or judgment is entered.

(Authority: 38 U.S.C. 501, 5502, 6106)

§ 13.410 Reissuance and recoupment of misused benefits.

(a) *General.* (1) If the Hub Manager or the Regional Office Director upon reconsideration determines that a fiduciary described in paragraph (a)(2) of this section misused any part of a beneficiary's benefit paid to the fiduciary, the Regional Office Director will reissue benefits to the beneficiary's successor fiduciary in an amount equal to the amount of funds misused.

(2) This paragraph (a) applies to a fiduciary that is:

(i) An individual who served 10 or more beneficiaries during any month in which misuse occurred; or

(ii) A corporation or other entity serving one or more beneficiaries.

(b) *Negligence.* In any case in which the Hub Manager or the Regional Office Director upon reconsideration determines that an individual fiduciary who served fewer than 10 beneficiaries during any month in which misuse occurred misused a beneficiary's funds under management by the fiduciary, the Hub Manager will refer the matter to the Director, Pension and Fiduciary Service, for a determination of whether VA negligence caused the misuse. The Regional Office Director will reissue benefits to the beneficiary's successor fiduciary in an amount equal to the

amount of funds misused if the Director of the Pension and Fiduciary Service determines that VA negligence caused the misuse. The Pension and Fiduciary Service Director's negligence determination will be based upon a review of the VA information of record as of the date of the Hub Manager's or Regional Office Director's misuse determination. For purposes of this section, VA negligence causes misuse when:

(1) The Hub Manager failed to properly investigate or monitor the fiduciary; for example, when:

(i) The Hub Manager failed to review the fiduciary's accounting within 60 days after the date on which the accounting was scheduled for review. The date that an accounting is scheduled for review is the date the fiduciary hub receives the accounting;

(ii) The Hub Manager did not decide whether to investigate an allegation of misuse within 60 days of receipt of the allegation;

(iii) After deciding to investigate an allegation of misuse and finding misuse, the Hub Manager failed to initiate action within 60 days of receipt of the misuse allegation to terminate the fiduciary.

(2) Actual negligence by VA is shown. For purposes of this section, *actual negligence* means the Hub Manager's failure to exercise toward a beneficiary in the fiduciary program the care which a reasonable or prudent person would exercise in the circumstances, or the Hub Manager's taking action that a reasonable or prudent person would not take. The Regional Office Director shall reissue benefits based on actual negligence if the Director of the Pension and Fiduciary Service determines that:

(i) The Hub Manager owed a duty to the beneficiary under this part,

(ii) The Hub Manager's action or failure to act was negligent, and

(iii) The Hub Manager's negligence proximately caused the misuse of benefits by the fiduciary. For purposes of this section, *proximate cause* means that the misuse would not have occurred but for the Hub Manager's negligence.

(c) *Recoupment of misused benefits.* In all cases in which the Hub Manager or Regional Office Director upon reconsideration determines that a fiduciary