



DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

September 14, 2010

Director (00/21)
All VA Regional Offices

In Reply Refer To: 211B
Training Letter 10-07

SUBJ: Adjudication of Claims for Total Disability Based on Individual Unemployability (TDIU)

PURPOSE

Our purpose in issuing this training letter is to revise and clarify our policies and procedures concerning the adjudication of TDIU decisions in order to restore the original intention of the TDIU evaluation – accurately, timely, and adequately compensating our Veterans who are unable to be gainfully employed due to service-connected disabilities.

BACKGROUND

VA has a longstanding and well-established policy of granting total disability ratings to Veterans who, due to service-connected disability(ies), are unable to secure and maintain substantially gainful employment even if a Veteran's combined disability evaluation does not result in a total schedular evaluation. The provisions of 38 C.F.R. § 4.16(a) provide the minimal schedular standards for TDIU consideration: if there is one disability, this disability shall be ratable at 60 percent or more; and, if there are two or more disabilities, there must be at least one disability ratable at 40 percent or more and additional disability to bring the combined rating to 70 percent or more. Alternatively, if these schedular requirements are not met, but the evidence shows the Veteran is unemployable due to service-connected disabilities, 38 C.F.R. § 4.16(b) authorizes VA to grant a TDIU evaluation on an extra-schedular basis upon approval by the Director, Compensation and Pension Service.

In recent years, several factors, including internal inconsistencies in developing and adjudicating TDIU decisions and changing policies and procedures issued in response to court decisions addressing the TDIU issue, have led to a conclusion that the TDIU issue requires new guidance. A review of TDIU grants has also revealed that the benefit is, at times, granted on a quasi-automatic basis when the Veteran attains a certain age and/or schedular rating. This practice is not supported by VA regulation or policy.

History of TDIU Evaluations

The regulatory history does not provide an explanation for the creation of TDIU ratings. VA's 1933 Schedule for Rating Disabilities (VASRD) provided the first definition of

total disability as existing “when there is (or are) present any impairment (or impairments) of mind or body which is (or are) sufficient to render it impossible for the average person to follow a substantially gainful occupation.” A 1934 revision of the VASRD provided the first authorization of a TDIU rating, sanctioned total disability ratings “without regard to the specific provisions of the rating schedule if a Veteran with disabilities is unable to secure or follow a substantially gainful occupation as a result of his disabilities.”

In 1941, the Administrator of Veterans Affairs issued an extension of the 1933 VASRD, which provided that total disability ratings may be assigned without regard to the specific provisions of the rating schedule when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of his/her disabilities. The 1941 regulation also provided the current TDIU rating criteria.

The 1945 Schedule for Rating Disabilities established that age may not be considered a factor in evaluating service-connected disability, and that service-connected unemployability could not be based on advancing age or additional (nonservice-connected) disability. (Paragraph 16, General Policy in Rating Disability)

38 C.F.R. § 4.16(a) became effective in March 1963. The regulation was amended in September 1975 to include subsection (b), which authorized a TDIU evaluation on an extra-schedular basis. In March 1989, subsection (c) was added to § 4.16, which directed that if a Veteran was rated 70 percent for a mental disorder that precluded gainful employment, 38 C.F.R. § 4.16(a) was not for application and such Veteran was to be assigned a 100-percent schedular evaluation.

In August 1990, 38 C.F.R. § 4.16(a) was revised to include language that marginal employment would not be considered gainful employment and also provided a definition of what constituted marginal employment. Following VA’s adoption of the fourth edition of the *Diagnostic and Statistical Manual for Mental Disorders*, 38 C.F.R. § 4.16(c) was rescinded in October 1996. The provision was now viewed as being extraneous, as a Veteran with a service-connected mental disorder would not be disadvantaged with the application of the other subsections of 38 C.F.R. § 4.16.

Case Law

The Court of Appeals for Veterans Claims (CAVC) and the Court of Appeals for the Federal Circuit (Federal Circuit) have issued many precedent opinions that have substantively affected Veterans’ rights associated with TDIU evaluations, as well as how VA adjudicates the issue. Below are some of the most pertinent holdings in decisions concerning TDIU from both courts.

Moore v. Derwinski, 1 Vet.App. 83 (1991) The term “substantially gainful occupation” refers to, at a minimum, the ability to earn a living wage.

Wood (Clarence) v. Derwinski, 1 Vet.App. 367 (1991) An application for unemployability compensation is an application for increased compensation within the meaning of 38 U.S.C. § 5110(b)(2).

Blackburn v. Brown, 4 Vet.App. 395 (1993) Entitlement to TDIU compensation must be established solely on the basis of impairment arising from service-connected disabilities.

Hattlestad v. Brown, 5 Vet.App. 524 (1993) In determining entitlement to TDIU evaluations, a clear explanation requires analysis of the current degree of unemployability attributable to the service-connected condition as compared to the degree of unemployability attributable to the non-service connected condition.

Norris v. West, 12 Vet.App. 413 (1999) When VA is considering a rating increase claim from a claimant whose schedular rating meets the minimum criteria of § 4.16(a) and there is evidence of current service-connected unemployability in the claims file or under VA control, evaluation of that rating increase must also include an evaluation of a reasonably raised claim for TDIU.

Faust v. West, 13 Vet.App. 342 (2000) In determining entitlement to a TDIU rating, VA must consider the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. A determination of whether a person is capable of engaging in a substantially gainful occupation must consider both that person's abilities and employment history.

Hurd v. West, 13 Vet.App. 449 (2000) A TDIU claim is a claim for increased compensation, and the effective date rules for increased compensation apply to a TDIU claim.

Roberson v. Principi, 251 F.3d 1378 (2001) Once a Veteran submits evidence of a medical disability, makes a claim for the highest rating possible, and submits evidence of unemployability, the requirement in 38 C.F.R. § 3.155(a) that an informal claim "identify the benefit sought" has been satisfied and VA must consider whether the Veteran is entitled to TDIU.

Bradley v. Peake, 22 Vet.App. 280 (2008) The provisions of 38 U.S.C. § 1114(s) do not limit a "service-connected disability rated as total" to only a schedular 100-percent rating. A TDIU rating may serve as the "total" service-connected disability, if the TDIU entitlement was solely predicated upon a single disability for the purpose of considering entitlement to SMC at the (s) rate.

Comer v. Peake, 552 F.3d 1362, 1367 (Fed. Cir. 2009) A claim for a total disability evaluation due to individual unemployability (TDIU) is implicitly raised whenever a pro se Veteran (unrepresented), who presents cogent evidence of unemployability, seeks to obtain a higher disability rating, regardless of whether the Veteran specifically states that he is seeking TDIU benefits.

Rice v. Shinseki, 22 Vet.App. 447 (2009) A request for a total disability evaluation on the basis of individual unemployability (TDIU), whether expressly raised by the Veteran or reasonably raised by the record, is not a separate claim for benefits, but involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of the initial

adjudication of a claim or as part of a claim for increased compensation, if entitlement to the disability upon which TDIU is based has already been found to be service connected. There is no freestanding TDIU claim.

Processing

VA has historically handled TDIU claims as freestanding claims that were adjudicated separately from other compensation issues in its decisions. However, as a result of the *Rice* decision, a request for TDIU, whether specifically raised by the Veteran or reasonably raised by the evidence of record, is no longer to be considered as a separate claim but will be adjudicated as part of the initial disability rating or as part of a claim for increased compensation.

The current Veterans Claims Assistance Act (VCAA) notice letters used for original disability compensation claims or claims for increased evaluation are sufficient if a request for a TDIU evaluation is introduced. A separate notice letter for a TDIU evaluation is no longer required. If a VA Form 21-8940, *Veteran's Application for Increased Compensation based on Unemployability*, or other submission expressly requests TDIU, this will be considered a claim for increased evaluation in all service-connected disabilities unless TDIU is expressly claimed as being due to one or more specific disabilities. The initial notice letter will provide VCAA compliant information for all service-connected disabilities that are not currently evaluated at the schedular maximum evaluation for that condition.

The principle of staged ratings may be applied in considering the effective date for a TDIU evaluation as either part of the initial disability evaluation or as part of a claim for increase. See *Fenderson v. West*, 12 Vet.App. 119 (1999); *Hart v. Mansfield*, 21 Vet.App. 505 (2007).

VA Forms 21-8940 and 21-4192

Notwithstanding any favorable medical evidence or opinion indicating that the Veteran is unemployable due to service-connected disabilities, a TDIU evaluation may not be granted if the evidence otherwise shows that the Veteran is engaged in, or capable of being engaged in, gainful employment. Accordingly, a VA Form 21-8940, *Veteran's Application for Increased Compensation based on Unemployability*, should still be forwarded to the Veteran if a request for a TDIU evaluation is expressly raised by the Veteran or reasonably raised by the evidence of record.

The VA Form 21-8940 remains an important vehicle for developing the claim and determining entitlement to a TDIU evaluation. However, the determination of an effective date for the establishment of a TDIU evaluation is no longer primarily based upon the date of receipt of the VAF 21-8940, but upon consideration of other factors such as the date of the original claim or claim for increase and the date that the evidence establishes inability to maintain substantially gainful employment due to service-connected disability(ies).

Once the VA Form 21-8940 is received and former employers are identified, then VA Form 21-4192, *Request for Employment Information in Connection with Claim for Disability Benefit*, will be forwarded to the former employers listed on the form. The VA Form 21-4192 requests that the employer provide information about the Veteran's job duties, on-the-job concessions, date of and reason for job termination, etc. A TDIU evaluation should not be denied solely because an employer failed to return a completed VA Form 21-4192.

The VA Form 21-8940, while still important as a development tool, is not required to render a decision concerning whether or not to assign a TDIU evaluation. A decision concerning entitlement to a TDIU evaluation may be rendered without a completed VA Form 21-8940 of record, based on the entire body of evidence available.

Examinations

VA examinations are generally undertaken in conjunction with original disability compensation claims and claims for increase in accordance with VA's statutory duty to assist a Veteran in developing his/her claim. See 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c)(4). In such claims, if a request for a TDIU evaluation is expressly raised by the Veteran or reasonably raised by the evidence of record, a general medical examination is to be scheduled. Specialty examinations (Eye, Audio, Mental, Traumatic Brain Injury, and Dental) may also need to be scheduled. These specialty examinations are only to be ordered when the Veteran is service connected for an eye, audio, mental, or dental condition that is not already at the schedular maximum, even if this condition is not one that the Veteran is claiming as causing his or her unemployability. Additionally, the examiner should be requested to provide an opinion as to whether or not the Veteran's service-connected disability(ies) render him or her unable to secure and maintain substantially gainful employment, to include describing the disabilities' functional impairment and how that impairment impacts on physical and sedentary employment.

In applying the Court's holding in *Bradley*, if the medical evidence is insufficient to render an adjudicative determination as to whether the Veteran's TDIU entitlement solely originates from a single service-connected disability, and there is potential entitlement to SMC at the (s) rate, the VA examination should also include an opinion as to what disability or disabilities render the Veteran unable to secure and maintain substantially gainful employment.

Other TDIU Development Considerations

If the evidence indicates that the Veteran has been seen by the Vocational Rehabilitation and Employment Service (VR&E) or has applied for disability benefits from the Social Security Administration (SSA), these records, to include any decisions and supporting documentation, must be obtained.

The Rating Decision

Although TDIU is no longer a freestanding claim, the determination of entitlement to a TDIU evaluation, raised as part of an original claim or claim for increased evaluation, must still be disposed of as a separate issue in the rating decision.

In assigning the effective date for a TDIU evaluation, the regulations concerning effective dates for original claims and claims for increase – 38 C.F.R. §§ 3.400(b)(2) or (o) – will be applied. Also, when a TDIU evaluation is assigned, the evidentiary record should be carefully reviewed to determine the applicability of 38 C.F.R. § 3.156(b), whether as part of an initial disability rating or as part of a claim for increase. 38 C.F.R. § 3.157 may be applicable in claims for increased evaluation that also raise a request for a TDIU evaluation. (For further guidance, see our Decision Assessment Document in *Rice v. Shinseki*, May 6, 2009).

In compliance with the *Bradley* holding, if TDIU is granted, a determination must also be rendered as to what specific service-connected disability(ies) render the Veteran unemployable. Generally, there would have to be clear and substantial evidence to show that unemployability is caused by a single disability when there are multiple service-connected disabilities. In original disability claims, where service connection is not established for any disability, the issue of entitlement to a TDIU evaluation is rendered moot, unless specifically claimed.

When establishing an end product for TDIU, it will be adjudicated as part of the initial disability rating or as part of a claim for increase. If a claim for TDIU is received after development has been initiated, to include VCAA notification, and a determination of entitlement to service connection for the disability upon which TDIU is based is still pending or has not been found, adjudicate the TDIU issue under the existing end product.

In situations where TDIU is inferred and additional evidence is needed, rate all other claimed issues that can be decided before rendering a decision on TDIU entitlement. Show the issue of potential TDIU entitlement as deferred in the rating decision. Develop the inferred TDIU issue under the existing or appropriate end product, which will remain pending. Send the Veteran a VA Form 21-8940 to complete and return. Every inferred TDIU request that is deferred for additional evidence must be resolved by a formal rating decision after the evidence is received or the notification period expires. See Fast Letter 08-06 (February 27, 2008).

Whenever a rating decision grants TDIU and establishes permanency, it must include the statement, “Basic eligibility under 38 U.S.C. Chapter 35 is established from [date].” This statement is required regardless of whether or not there are potential dependents.

Continuing Requirements for the TDIU Award

As inability to maintain substantially gainful employment constitutes the basic criteria that must be satisfied for a TDIU evaluation, after the initial TDIU grant is awarded, VA must continue to ensure that the Veteran is unemployable.

Therefore, the Veteran must complete and return a VA Form 21-4140, *Employment Questionnaire*, annually for as long as the TDIU evaluation is in effect. Yearly submission of the form is required unless the Veteran is 70 years of age or older, or has been in receipt of a TDIU evaluation for a period of 20 or more consecutive years (See 38 C.F.R. § 3.951(b)), or has been granted a 100-percent schedular evaluation. The form is sent out annually to the Veteran from the Hines Information Technology Center and must be returned to the regional office. It requests that the Veteran report any employment for the past twelve months or certify that no employment has occurred during this period. The VA Form 21-4140 must be returned within 60 days or the Veteran's benefits may be reduced. If the form is returned in a timely manner and shows no employment, then the TDIU evaluation will continue uninterrupted. The VA Form 21-4140 must be returned with the Veteran's signature certifying employment status. A telephone call to the Veteran is not acceptable to certify employment status for TDIU claims.

If the VA Form 21-4140 is timely returned and shows that the Veteran has engaged in employment, VA must determine if the employment is marginal or substantially gainful employment. If the employment is marginal, then TDIU benefits will continue uninterrupted. If the employment is substantially gainful, then VA must consider discontinuing the TDIU evaluation. 38 C.F.R. § 3.343(c)(1) and (2) provide that actual employability must be shown by clear and convincing evidence before the benefit is discontinued. Neither vocational rehabilitation activities nor other therapeutic or rehabilitative pursuits will be considered evidence of renewed employability unless the Veteran's medical condition shows marked improvement. Additionally, if the evidence shows that the Veteran actually is engaged in a substantially gainful occupation, the TDIU evaluation cannot be discontinued unless the Veteran maintains the gainful occupation for a period of 12 consecutive months. See 38 C.F.R. § 3.343(c).

Once this period of sustained employment has been maintained, the Veteran must be provided with due process before the benefit is actually discontinued, as stated at 38 C.F.R. §§ 3.105(e) and 3.501(e)(2). This consists of providing the Veteran with a rating that

- Proposes to discontinue the IU benefit
- Explains the reason for the discontinuance
- States the effective date of the discontinuance, and
- States that the Veteran has 60 days to respond with evidence showing why the discontinuance should not take place.

If the TDIU evaluation is discontinued, the effective date of the discontinuance will be the last day of the month following 60 days from the date the Veteran is notified of the final rating decision. If the VA Form 21-4140 is not returned within the 60 days specified on the form, then the regional office must initiate action to discontinue the TDIU evaluation pursuant to 38 C.F.R. § 3.652(a). Due process must also be provided with a rating decision that proposes to discontinue the TDIU benefit for failure to return the form. If a response is not received within 60 days, then the TDIU evaluation will be discontinued and a rating decision will be sent to the Veteran providing notice of the discontinuance. The effective

date of discontinuance will be the date specified in the rating decision which proposed discontinuance, as described above, or the day following the date of last payment of the TDIU benefit, as specified at § 3.501(f), whichever is later. The Veteran must also be notified that if the form is returned within one year and shows continued unemployability, then the TDIU evaluation may be restored from the date of discontinuance.

VA may also use the income verification match (IVM) to verify continued unemployability. The IVM is a method of comparing a TDIU recipient's earned income, as reported to VA by other federal agencies, with the earned income limits that define marginal employment. If income reports show significant earned income above the poverty threshold, the regional office must undertake development to determine if the Veteran is still unemployable. IVM information does not meet the requirements for a completed VA Form 21-4140 for the purpose of continuing TDIU benefits. A completed VA Form 21-4140 still must be provided by the Veteran for continuation of TDIU benefits.

Another method of monitoring unemployability status among TDIU recipients is through the VA Fiduciary Activity. This service conducts field examinations when it has been notified that a TDIU recipient might be pursuing a substantially gainful occupation. If the field examiner finds evidence of employment or if the Veteran is unwilling to cooperate with the examiner, then the examiner will forward this information to the Rating Activity. A decision must then be made as to whether the TDIU evaluation will be discontinued. The regulatory requirements listed above will be applied to the determination.

As an exception to the aforementioned procedures; if the veteran has certified no employment status in a VA Form 21-4140 and VA obtains credible information indicating that the veteran has engaged in gainful employment, continued entitlement to TDIU benefits may be terminated on the basis of fraud. The due process provisions of § 3.105(e) must still be followed. However, if a finding of fraud is confirmed, the effective date of termination of TDIU benefits will be the day preceding the date that VA received the veteran's VA Form 21-4140 that fraudulently certified continuation of no employment status. See 38 C.F.R. § 3.500(k).

Scenarios

Below are several factual scenarios intended to illustrate how claims involving requests for TDIU evaluations should be developed and rated, as well as the appropriate regulations to be applied in determining the effective date of the TDIU evaluation.

- (1) A Veteran files a claim for service connection for PTSD in January 1999. The RO grants service connection in November 1999 with a 50-percent evaluation. The Veteran files a Notice of Disagreement (NOD) with the evaluation and submits a VAF 21-8940 in February 2000 indicating that he has been unable to work due to PTSD. The RO, in September 2000, grants a 70-percent evaluation for PTSD from January 1999 and also assigns a TDIU evaluation effective January 1999.

In this scenario, the TDIU evaluation is considered as part of the initial disability rating, not a freestanding TDIU claim. 38 C.F.R. § 3.156(b) is applicable as the

Veteran had submitted evidence of unemployability within the appeal period and 38 C.F.R. § 3.400(b)(2) will be applied in determining the effective date of the TDIU evaluation.

- (2) The Veteran has been service connected for several disabilities, to include migraine headaches, since 2001. In March 2006, he/she submits a claim for increased evaluation for migraine headaches, rated 10-percent disabling at the time, stating that the frequency and severity of his migraine headaches have worsened. The RO

issues a decision in December 2006 granting a 50-percent evaluation from March 2006. His/her combined disability evaluation is also increased to 70 percent. The Veteran timely files an NOD in response to the evaluation assigned for migraine headaches and appears before a Decision Review Officer (DRO) in an informal conference. He/she submits a VAF 21-8940, additional medical evidence, and a letter from his/her employer indicating that the Veteran was unable to continue working because he/she missed too much time because of his/her migraine headaches and last worked in March 2006. The DRO, in February 2007, grants a TDIU evaluation effective March 2006.

In this scenario, the TDIU evaluation is considered as part of the claim for increased compensation. 38 C.F.R. § 3.156(b) is applicable as the Veteran had submitted evidence within the appeal period and 38 C.F.R. § 3.400(o) will be applied in determining the effective date. The effective date for the TDIU evaluation will be based upon the date it is factually ascertainable that the Veteran was unable to maintain substantially gainful employment due to his service-connected disability(ies), to include up to one year prior to the date of the March 2006 claim for increased evaluation under § 3.400(o)(2).

- (3) The Veteran is service connected for post traumatic stress disorder (PTSD), rated 50-percent disabling; arthritis of the knees, each rated 10-percent disabling; and several other disabilities that have been assigned noncompensable evaluations. He files a claim for increased evaluation for PTSD, stating that the condition has worsened and that he had to discontinue working due to problems associated with the condition. He submits medical evidence and identifies VA medical records that only concern treatment for PTSD and show difficulty in maintaining employment due to the mental disorder.

A VCAA notice for the PTSD evaluation and TDIU and a VA Form 21-8940 should be forwarded to the Veteran. The notice should not refer to the other service-connected disabilities, as the Veteran specifically indicated that only PTSD has rendered him unemployable. A general medical examination with a special psychiatric examination for PTSD is to be requested. The VA examiner should be requested to render an opinion concerning the effect of PTSD on employability as a request for a TDIU evaluation has been reasonably raised by the Veteran and the evidence of record.

- (4) The Veteran has been service connected for ankylosing spondylitis, rated

60-percent disabling; eczema, rated 30-percent disabling; and hiatal hernia, rated 10-percent disabling, since 2003. In January 2007, he submits a statement indicating that he cannot work due to his service-connected disabilities.

In this scenario, the correct course of action is to send the Veteran a VCAA notice for claims for increased evaluation that pertain to all service-connected disabilities not currently at the schedular maximum evaluation, as the Veteran did not specifically state what service-connected disability(ies) affects his employability.

The Veteran should be scheduled for a general medical examination that also includes an opinion as to whether or not the service-connected disability(ies) render the Veteran unable to secure and maintain substantially gainful employment.

This Training Letter rescinds Training Letter 07-01 (February 21, 2007). M21-MR, IV.ii.2.F will be revised in accordance with this Training Letter.

WHO TO CONTACT FOR HELP

Questions should be e-mailed to VAVBAWAS/CO/21Q&A.

/S/
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