

COMMON VA EFFECTIVE DATE ERRORS

Know the Rules that Will Give the
Earliest Effective Date

(1) Evidence Received Prior to Expiration of Appeal Period

The Effective Date Rule when New &
Material Evidence is Received Prior to
Expiration of Appeal Period

(1) Evidence Received Prior to Expiration of Appeal Period

- 38 C.F.R. § 3.156(b) Pending claim. –
 - (1) When new & material evid submitted
 - (2) received prior to expiration of appeal period, or prior to appellate decision if timely appeal has been filed
 - (3) will be considered as having been filed in connection with claim that was pending at beginning of appeal period

(1) Evidence Received Prior to Expiration of Appeal Period

- Example:
- Claim received on 4/1/09
- RO denies on 7/1/09
- new and material evid submitted 360 days after 7/1/09, on 6/26/10 (5 days before deadline for submitting NOD)
- claim still pending even if the next 5 days go by w/out vet submitting NOD
- If claim ultimately granted, effective date (the claim was received) would be 4/1/09, not 6/26/10, when new and material evid was submitted

(1) Evidence Received Prior to Expiration of Appeal Period

- VA cannot consider 6/26/10 as the effective date
- The 4/1/09 claim did not become final due to the fact that an NOD was not submitted within the one-year time period . The result of submitting new evidence was NOT the filing of a claim to reopen
- Young v. Shinseki, 22 Vet. App. 461 (2009)
- Jennings v. Mansfield, 509 F.3d 1362 (Fed. Cir. 2007)
- Muehl v. West, 13 Vet. App. 159 (1999)

(1) Evidence Received Prior to Expiration of Appeal Period

- Source of new and material evidence is irrelevant.
- For example, if SSA sends records to VA on 6/26/10, 4/1/09 would still be the date the claim was received for effective date purposes.
- If neither an NOD nor new & material evid were submitted before 7/1/10, the 4/1/09 claim would be finally denied
- if new & material evid arrived **after** 7/1/10 and resulted in an award of benefits, effective date would most likely be after 7/1/10
- The new & material evid must be submitted in connection with claim not yet finally decided by RO/BVA

(1) Evidence Received Prior to Expiration of Appeal Period

- New & material evid has no impact on effective date if submitted to VA in connection with a claim that BVA has already denied and pending before the Court)

(2) Service Department Records Received After a Final Denial

- Service Department Records that at least in Part are the Basis of a Grant of Benefits are received by VA any Time after a Final Denial
- 38 C.F.R. § 3.156(c)

(2) Service Department Records Received After Final Denial

- December 1980: Veteran filed claim for SC for PTSD Denied because a VA exam found no PTSD
- Veteran filed NOD; VA issued SOC but vet did not file Form 9; RO decision became final
- 1/25/89: Veteran submitted 2nd application for SC for PTSD. VA told him needs new and material evidence to reopen claim

(2) Service Department Records Received After a Final Denial

- 1991: Vet submitted private medical opinion showing PTSD
- While claim to reopen pending, RRC provided unit records confirming one of vet's claimed stressors
- 2001: VA awarded SC for PTSD, rated 100%, assigned 1/25/89 as effective date of benefits--date veteran filed claim to reopen.

(2) Service Department Records Received After a Final Denial

- Vet appealed effective date, argued initial claim should be reconsidered pursuant to 38 C.F.R. § 3.156(c)—and that would give him effective date earlier than reopening date
- While appeal pending, VA revised section 3.156(c), to clarify the regulation to reflect current practices.
- August 2005: BVA determined that § 3.156(c) did not apply to claim because
 - Unit records from RRC not misplaced or lost records and so reg did not apply
 - no dx of PTSD at time of original 1980 decision

(2) Service Department Records Received After a Final Denial

- **Section 3.156(c) & Misplaced or Corrected Records**
 - does not apply solely to misplaced or corrected records
 - clarifying statement made clear earlier effective date may be assigned under § 3.156(c) when award is based "all or in part" on newly obtained service records.

38 C.F.R. 3.156(c)

- **(c) Service department records.**
- (1) at any time after VA issues a decision on a claim, if VA receives relevant official service department records that existed but had not been in the claims file when VA first decided claim, VA will reconsider the claim. Such records include, but are not limited to:
 - (i) Service records related to claimed in-service event (don't need to mention vet)
 - (ii) Additional service records forwarded by service department any time after VA's original request for service records; and
 - (iii) Declassified records not obtained earlier because records were classified
- (2) Does not apply to records not in existence when VA decided claim or records not obtained b/c vet did not provide enough information

38 CFR 3.156(c)

- (3) Award based all or in part on these records is effective on date entitlement arose or date VA received the previously decided claim, whichever is later
- (4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of these new records must be supported by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, but can't be earlier than date of original claim

(2) Service Department Records Received After a Final Denial

- (A) Applying § 3.156(c) does not depend on whether new service records were corrected records or had been misplaced when original claim filed;
- (B) reg authorizes effective date as early as date of original claim up to date of claim to reopen; and
- (C) When reg applies, retroactive eval of disability is required

(2) Service Department Records Received After a Final Denial

- BVA decided 3.156(c) only applies to misplaced or corrected service dept. records
 - But in 2005 VA stated it did not limit reconsideration to misplaced service dept records

(2) Service Department Records Received After a Final Denial

- BVA decided that 3.156(c) did not apply because RRC records not the type of records covered
 - But in 2005 VA explicitly stated that RRC records are one example of the kinds of records covered under 3.156(c)

(2) Service Department Records Received After a Final Denial

■ Section 3.156(c) & Effective Dates

- The original claim is not just re-opened
- it is reconsidered and serves as the date of claim and earliest date benefits may be granted
- vet could be assigned effective date of original claim or date entitlement arose, whichever is later
- duty to assist requires developing evid of degree of disability from PTSD and developing evid when vet first suffered PTSD or extent he suffered PTSD prior to date of claim to reopen.

(2) Service Department Records Received After a Final Denial

- **Retroactive Evaluation of Disability**
 - Court noted VA's potential obligation to provide retroactive evaluation raised first time at oral argument and should be addressed on remand
 - Court set aside BVA decision and remanded issues for adjudication.

(2) Service Department Records Received After a Final Denial

- May be more applicable to some PTSD claims b/c common practice for DOD to maintain certain service department records that verify stressors
- If service dept records not obtained by VA when it first considered PTSD claim, and VA later receives records that verify claimed stressor, vet may be entitled to EED (even if vet didn't have dx of PTSD when earlier claim decided)

(2) Service Department Records Received After a Final Denial

- Veteran must have previous denial of SC for condition
- Reason for previous final denial does not matter.
- Must be additional “relevant,” “official” service department record “related” to claimed in-service event or injury
- Service department record need not to meet new and material evidence definition of 3.156(a)

(2) Service Department Records Received After a Final Denial

- Service department record must have existed, but not been associated with claims file, when VA first decided claim
- Record must be generated by service department
- No requirement that service department record previously unavailable
- Retroactive Evaluation of Disability Will Be Required if Section 3.156(c) Applies

(2) Service Department Records Received After a Final Denial

- If evidence supports a specific rating over part or the entire period of time, a retroactive evaluation will be assigned
 - “Medical” evidence referenced in reg
 - Lay evidence should be able to substitute (*Buchanan v. Nicholson*)
 - Recommend: Private medical assessment concerning when developed and severity through the years

(3) VA Fails to Inform Claimant of Time Limit for Submission

- The Effective Date Rule when VA Fails to Notify Claimant of the Time Limit for Performing any Required Action
- 38 C.F.R. § 3.110(b)

(3) VA Fails to Inform Claimant of Time Limit for Submission

- (a) In computing the time limit for any action required of a claimant or beneficiary, including the filing of claims or evidence requested by VA, the first day of the specified period will be excluded and the last day included. This rule is applicable in cases in which the time limit expires on a workday. Where the time limit would expire on a Saturday, Sunday, or holiday, the next succeeding workday will be included in the computation.

(3) VA Fails to Inform Claimant of Time Limit for Submission

- (b) The first day of the specified period referred to in paragraph (a) of this section shall be the date of mailing of notification to the claimant or beneficiary of the action required and the time limit therefor. The date of the letter of notification shall be considered the date of mailing for purposes of computing time limits.

(3) VA Fails to Inform Claimant of Time Limit for Submission

- Example:
 - Vet filed an informal claim for SC for PTSD and HL on 1/16/04.
 - RO sent him a letter dated 1/23/04 asking him to complete & return enclosed VA Form 21-526 as soon as possible.
 - The letter did not mention the one-year deadline to complete the form.

(3) VA Fails to Inform Claimant of Time Limit for Submission

- The letter stated: In response to your claim for service connected disabilities dated 1-16-04, we have no record of you filing for any benefits[.] [I]n order for us to process your claim we need for you to complete and return the enclosed VA Form 21-526 as soon as possible, so we may get your claim started.”
- The veteran returned the form on 6/21/06

(3) VA Fails to Inform Claimant of Time Limit for Submission

- RO granted SC for both conditions, effective 6/21/06.
- Vet argued that RO's failure to inform him of the one-year deadline for return of the claim should result in an effective date back to the day his informal claim was received, 1/16/04.
- Board rejected this

(3) VA Fails to Inform Claimant of Time Limit for Submission

- Board said: “The Board acknowledges that it may not have been clear to the veteran that once the RO sent him a VA Form 21-526, that his formal claim had to be received within one year from the date it was sent to the claimant to be considered as filed as of the date of receipt of the Veteran’s informal claim.

(3) VA Fails to Inform Claimant of Time Limit for Submission

- However, his claimed lack of awareness does not provide a legal basis for entitlement.”
- The Board says that under these circumstances, the effective date can be no earlier than 6/06

(3) VA Fails to Inform Claimant of Time Limit for Submission

- 38 CFR 3.155(a) says “Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution.
- If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.”)

(3) VA Fails to Inform Claimant of Time Limit for Submission

- 38 CFR 3.110: “(a) In computing the time limit for any action required of a claimant or beneficiary, including the filing of claims or evidence requested by VA, the first day of the specified period will be excluded and the last day included. . . . (b) The first day of the specified period referred to in paragraph (a) of this section shall be the date of mailing of notification to the claimant or beneficiary **of the action required and the time limit therfor.**”

(3) VA Fails to Inform Claimant of Time Limit for Submission

- The veteran never got a notice that told him the time limit for taking the action required, i.e. filing the 21-526. Therefore, the 1-year time period for taking this action never began

(3) VA Fails to Inform Claimant of Time Limit for Submission

- Recently VA granted the veteran an effective date of 1/16/2004—the date he first filed his informal claims for HL and PTSD

(4) Earlier Effective Date Rule for Some Informal/Inferred Claims

- the existence of an inferred claim for TDIU might entitle vet to an earlier effective date

(4) Earlier Effective Date Rule for Some Informal/Inferred Claims

- 38 CFR 3.155(a) says “Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution.
- If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.”)

(4) Earlier Effective Date Rule for Some Informal/Inferred Claims

- If the VA is required to, but does not, send the vet a TDIU application form, the 1-year period for filing the application form does not begin to run
- The inferred claim submitted prior to the date of a formal TDIU application must be accepted as the date of claim for effective date purposes

(4) Earlier Effective Date Rule for Some Informal/Inferred Claims

- *Servello v. Derwinski*, 3 Vet. App. 196 (1992)
- *Hamilton v. Brown*, 4 Vet. App. 528, 544-45 (1993) (en banc)
- *Quarles v. Derwinski*, 3 Vet. App. 129, 137 (1992)
- But see *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006) (Where vet files more than 1 claim with the RO at the same time, and the RO's decision acts favorably or unfavorably on one of the claims but fails to specifically address the other claim, the second claim is deemed denied, and the appeal period begins to run).

(4) Earlier Effective Date Rule for Some Informal Inferred Claims

- This will work for claims for service connection as well.
- This works for any informal/inferred claim that is filed.

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- Under 38 U.S.C. 5110(a), the effective date of . . . a claim for increase shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor
- There is an exception to this rule

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- Exception is: effective date of a claim for increase is the [e]arliest date as of which it is ascertainable that an increase in disability occurred if claim is received within 1 year from such date
- 38 C.F.R. § 3.400(o)(2) & Dalton v. Nicholson, 21 Vet. App. 23 (2007)

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- 6/95--RO awards SC for PTSD and assigns a 50% disability rating
- In June 1996, March 1997, and February 1998, vet filed claims for an increased disability rating for PTSD
- In 6/98 vet disagreed with the denial of his claims and initiated an appeal
- In April 1999, the Board issued a decision denying an increased disability rating for PTSD. This decision was not appealed & became final

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- 6/00--Vet stated: this is an informal claim for TDIU benefits. I am unable to work b/c of my PTSD and [NSC] back condition
- 7/00—VA C&P Exam (psychiatric)
- Vet said he had had his own auto repair shop until 1994 when he closed it because of his back

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- Dr. reported vet was not involved in combat but was stationed in combat zone--area was under mortar and rocket attack & he often was in fear for his life
- vet gave history of several recurrent dreams, esp. of ammunition dump exploding & impact knocked him into a wall
- diagnosed PTSD, chronic; major depression, recurrent, non-psychotic, severe
- examiner opined "at this point, he does not seem capable of maintaining employment"

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- VA Form 21-8940 received by RO on 11/17/00
- 1/24/01, RO increased PTSD rating to 70% & awarded TDIU eff. 6/20/00
- As to effective date, RO noted: Evidence shows vet has been unable to work since 1994, due to his service connected PTSD. Vet entitled to TDIU effective 6/20/00.

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- On 1/24/02, vet filed an NOD as to effective date assigned
- In 2003, BVA remanded effective date issue
- It then came back up to the Board in 2004

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- vet made 2 arguments as to the effective date of TDIU
- Vet argued: he was entitled to effective date earlier than 6/20/00
- Also, that a claim for TDIU is a claim for increased comp & BVA should have considered section 5110(b)(2)

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- VA agreed that section 5110(b)(2) could apply to the effective date of TDIU, if the TDIU claim arises when there is evidence of SC worsening
- But VA said where a TDIU award is based on employability status and not worsening of the SC disability, section 5110(b)(2) is not relevant

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- CAVC--the exception in section 5110(b)(2) limited to cases where the increase in SC disability precedes claim for increase
- Court noted: VA conceded that vet's TDIU award based in part on worsening of SC PTSD & inability to maintain substantially gainful employment due to PTSD

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- VA argued no factual basis for granting EED b/c medical evid showed that PTSD worsened in 7/00, after the claim for TDIU was filed
- VA also argued vet could not meet criteria for TDIU earlier than the date of his increased schedular rating for PTSD, because he was rated only 50% disabled prior to 6/20/00 (4.16(a) generally requires a single SC disability to be rated at 60% or more for an award of TDIU)

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- will the rule in 5110(b)(2) always apply in a TDIU case? Is TDIU always a claim for increase?
- CAVC--under some circumstances an award of TDIU may not amount to an award of increased comp
- for example, TDIU may be awarded as part of an initial award of disability comp benefits
- But if grant of TDIU is based on inability to secure or follow SGO b/c of an already SC disability, and the VA concedes that TDIU is based in part on the worsening of the SC condition—then is an award of increase

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- Holding: vet awarded TDIU based on an already SC condition that later renders vet unable to secure or follow a substantially gainful occupation . . . Then is entitled to have 5110(b)(2) considered

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- VA required to search record to see whether in the 1-year prior to application there was an increase in disability
- *Scott v. Brown*, 7 Vet. App. 184, 189 (1994)—Board should consider "all the evidence of record" for year preceding claim to see whether disability increased in severity
- an increase in disability can be demonstrated through satisfaction of either or both criteria of 4.16(a)

(5) When SC Disability Worsens w/in 1 Year Prior to Claim for IR

- Even though vet's PTSD increased from 50% to 70% & award of TDIU seemingly was based on the 7/00 VAE . . .
- VA not relieved of its responsibility to review record to see whether increase occurred in the one year prior to the application.
- *Servello v. Derwinski*, 3 Vet. App. 196, 200 (1992)—even though increased rating based on evid submitted after claim for increase, Board erred in not considering evid about status of condition during 1-year period prior to claim

(6) When there is a Liberalizing Change in Law or Regulation

- Special Effective Date Rule under
 - 38 USC 5110(g) and
 - 38 C.F.R. § 3.114
 - When there is a liberalizing change in the law or regulation
 - What is a liberalizing change in law/reg? A change favorable to claimant

(6) When there is a Liberalizing Change in Law or Regulation

- In order to benefit from this rule, vet has to satisfy 4 requirements.
 - 1st requirement: claim must be

(1) claim filed by vet for disability comp or pen

Or

(2) claim for DIC (by surviving family member)

(6) When there is a Liberalizing Change in Law or Regulation

- 2nd requirement

(1) while claim was pending before VA or court

Or

(2) before claim filed, a favorable change in law/reg occurred & claim ultimately granted b/c of change in law/reg

(6) When there is a Liberalizing Change in Law or Regulation

- 3rd Requirement
- favorable change in law/reg accomplished by Congress or VA
- 4th Requirement
- claimant continuously met all criteria for benefit listed in the favorable law/reg during period beginning on effective date of change in law & ending on date claim received by VA

(6) When there is a Liberalizing Change in Law or Regulation

- This rule requires 2 date calculations.
- 1st date: the effective date that Congress or VA assigned to the change in law
- 2nd date: the earlier of 2 two dates:
 - (1) one year before date of filing claim that was granted; or
 - (2) one year before date VA or court made decision awarding benefit.

(6) When there is a Liberalizing Change in Law or Regulation

- The correct effective date is the later of the two dates

(6) When there is a Liberalizing Change in Law or Regulation

- Example:
- Effective date of ALS reg-- 9/23/08
- Vet filed for SC for ALS-- 2/24/09
- VA granted SC for ALS on 5/24/09

(6) When there is a Liberalizing Change in Law or Regulation

- so 1st date is **9/23/08**
- 2nd date is earlier of 2 two dates:
 - (1) one year before date of filing claim that was granted (**2/24/08**)
 - **or**
 - (2) one year before date VA or court made decision awarding benefit (**5/24/08**)
 - Earlier of the 2 two dates is **2/24/08**
 - **Not done yet!!!!**

(6) When there is a Liberalizing Change in Law or Regulation

- The correct effective date is the later of the two dates:
- **9/23/08 OR 2/24/08**
- **Correct effective date is 9/23/08**
- Even though vet did not file until 2/24/09

(7) When Comp Claim received w/in 1 Year of Discharge

- If claim SC received within 1 yr from date of discharge effective date will be the day after discharge
- assuming vet had claimed disability on day after discharge
- 38 U.S.C.S. 5110(b)(1); 38 C.F.R. 3.400(b)(2)(i)

(7) When Comp Claim received w/in 1 Year of Discharge

- fact that discharge or release is due to physical disability is not an informal claim for disability comp (McGee v. Nicholson, 20 Vet. App. 472 (2006))
- Vet A & Vet B both discharged on same day w/ identical disabilities
- Vet A filed for SC comp on the 364th day after discharge
- Vet B did not file w/in one year (either formally or informally) until 367 days after date of discharge

(7) When Comp Claim received w/in 1 Year of Discharge

- VA granted both vets SC but will assign vet A effective date of the day after discharge
- vet B gets an effective date of the date of receipt of claim (367 days after the date of discharge)
- Delay of 3 days cost one years worth of benefits