

HOW TO WIN CLAIMS FOR:
Total Disability Based on
Individual Unemployability (TDIU)

INTRODUCTION

- Scheduling ratings
 - “Average impairment” of occupational earning capacity
 - 100% scheduling rating = totally disabled

INTRODUCTION

- TDIU ratings
 - Doesn't require total disability (100% schedular rating)
 - Contemplate individual circumstances
 - Effect of *vet's* service-connected disabilities on *vet's* ability to work
 - Does not matter whether average person would be rendered unemployable

INTRODUCTION

- 38 C.F.R. § 4.16
 - Subsection (a)
 - Two-step analysis
 - Rating requirements
 - Inability to maintain substantially gainful occupation
 - Subsection (b)
 - Available where vet doesn't meet rating requirements under (a)
 - VA Central Office Consideration of extraschedular TDIU rating

TWO-STEP ANALYSIS UNDER 38 C.F.R. § 4.16(a)

■ STEP ONE

- Whether vet meets rating requirements?

■ STEP TWO

- Whether service-connected disabilities prevent “substantially gainful occupation”?

STEP 1 – RATING REQUIREMENTS

- Vet has only ONE service-connected disability
 - Must have schedular rating of 60%
- Vet has MORE THAN ONE service-connected disability
 - Combined schedular rating of 70%
 - One disability must be rated 40%

STEP 1 – RATING REQUIREMENTS

- When multiple disabilities are considered “one disability” rated 40%
 - One or both upper or lower extremities (including bilateral factor)
 - Common etiology or single accident
 - Single body system (orthopedic, digestive, neuro, etc.)
 - Incurred in action
 - POW

STEP 2 - SUBSTANTIALLY GAINFUL OCCUPATION

- Must show that vet's service-connected disabilities prevent substantially gainful occupation

STEP 2 - SUBSTANTIALLY GAINFUL OCCUPATION

■ DEFINITION (cont.)

■ VA Adjudication Procedures Manual (M21-1MR) definition

- “that which is ordinarily followed by the nondisabled to earn their livelihood with earnings common to the particular occupation in the community where the veteran resides.”

STEP 2 - SUBSTANTIALLY GAINFUL OCCUPATION

■ DEFINITION (cont.)

■ CAVC definition

■ *Faust v. West*

■ “[an occupation] that provides [the veteran with an] annual income that exceeds to poverty threshold for one person, irrespective of the number of hours or days that the veteran actually works”

■ Not the same as “100% unemployable”

STEP 2 - SUBSTANTIALLY GAINFUL OCCUPATION

- DEFINITION (cont.)
 - Not “marginal employment”
 - Income does not exceed poverty threshold
 - “Protected environments”
 - Marginal employment might prove ability to obtain substantially gainful occupation

STEP 2 - SUBSTANTIALLY GAINFUL OCCUPATION

- Medical evidence is required
 - Medical examination/opinion
 - Describing impact of service-connected disabilities on exertional/non-exertional activities
 - Back disorder example
 - Schizophrenia example

TDIU UNDER 38 C.F.R. § 4.16(b)

- Available when vet doesn't meet rating requirements
- Must still show inability to maintain substantially gainful occupation
- RO must refer to VA Central Office in DC
- Director of Compensation and Pension Service decides whether to grant “extraschedular”
TDIU

TDIU UNDER 38 C.F.R. § 4.16(b)

- C&P Director hardly ever grants TDIU under subsection (b)
- Advocates should still request the RO to refer appropriate cases

AGE & NON-SERVICE CONNECTED DISABILITIES

- VA prohibited from considering age and non-service connected disabilities
- Must provide explanation for finding that unemployability is due to non-service connected disabilities
- Cannot deny because unemployability due to “combined effects” of non-service connected and service-connected disabilities

AGE & NON-SERVICE CONNECTED DISABILITIES

- If extent of effect of service-connected as opposed to non-service connected disabilities is unclear, VA must obtain a medical opinion
- If medical evidence shows that effects of service-connected disabilities can not be distinguished from effects of non-service connected disabilities, benefit of the doubt requires unemployability be fully attributed to service-connected disabilities

EDUCATIONAL AND OCCUPATIONAL HISTORY

- VA must consider particular vet's particular educational and occupational history
- Vocational expert opinions are helpful
- Vets who have gone through vocational rehab should already have an opinion
- VA can't deny just because vet is young, highly educated, recently employed, or had a long career

OTHER FACTORS THAT VA WILL NOT CONSIDER

- Lack of training
- State of the economy
- Loss of job because of technological advances
- Loss of job because of employer relocation

SPECIAL ISSUES

■ STATIC CONDITIONS

- Vet has severe disability but continued to work throughout the years
- Vet retires and now claims TDIU
- Two theories:
 - Disability has become more severe
 - Vet has developed a secondary condition
 - VA should make an assessment of the side effects of any medications prescribed for service-connected disability

SPECIAL ISSUES

- SOCIAL SECURITY BENEFITS
 - Vet can receive both social security and VA benefits concurrently
 - Once VA has notice that vet gets social security, it must obtain social security records
 - Except where it's clear from the record that vet gets social security based on non-service connected disabilities

APPLYING FOR TDIU

- Entitlement to TDIU *not* a separate claim
 - Part of determination of appropriate rating
 - VA must consider whenever there is evidence of unemployability, including vet's lay statements
- VA may consider TDIU w/o VA Form 21-8940 filed. Safer to submit one!

TDIU

