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

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INTRODUCTION

- Schedular ratings
  - “Average impairment” of occupational earning capacity
  - 100% schedular 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 cannot 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!