

VA Individual Unemployability

Veterans Service-Connected Compensation
Key Concepts for Vocational Rehabilitation Professionals Working with Disabled Veterans


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Objectives

- Understand VA service connected compensation, and how it is obtained
- Understand VA ratings & TDIU
- Understand what is required to eval. TDIU
- Tips for adding VA claims to your practice




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Veterans – Who Are They?

U.S. Census Bureau: 19.2 million veterans in the U.S. as of September 2019

Over 10% of those are women.

States with the highest number of vets: California (2 million+), Texas and Florida (each with more than 1.7 million)



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Veterans – Who Are They?

- Numbers dropping...the VA estimates that by 2020, there will be 1 million fewer veterans, and by 2043, there will only be 14.5 million vets.
- Of the veterans alive today, the VA reports:
 - 2.7 million are post-9/11 vets, but that number will grow to 4.7 million by 2043;
 - 16.3 million veterans alive today served in wartime;



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U.S. Dept of Veterans Affairs

- 5.8 million served during the Vietnam War Era
- 4.29 million veterans served during peacetime
- 7.2 million served during the Gulf War Era
- 3.2 million served after 9/11
- As of the end of FY 2017, 4.5 million had service-connected disabilities
- 380,000 veterans receiving Individual Unemployability benefits
 - Congressional Budget Office estimates about 180,000 were age 67 or older. That age group has been the largest driver of growth in the program.

NOTE: A veteran receiving 100% compensation or TDIU is paid over \$3,050 per month. Compare that to a veteran receiving 90%, which is paid at \$1,833 per month.



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U.S. Dept of Veterans Affairs

http://www.va.gov/vetdata/veteran_population.asp

- VA's website has a state-by-state breakdown
- Many, many stats



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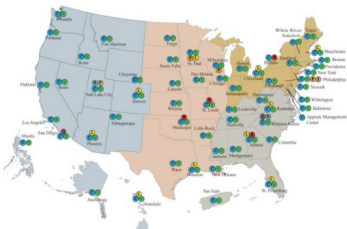
U.S. Dept of Veterans Affairs

- VA administers benefits from 57 Regional Offices around the U.S.
- The VA's two biggest divisions are the Veterans Benefits Administration (VBA) and Veterans Health Administration (VHA).



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U.S. Dept of Veterans Affairs



57 Regional Offices (VBA)

New National Work Queue



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Backdrop: Service-Connection

In the world of VA, Veterans and their attorneys will seek out vocational rehabilitation professionals for:

- 1) Rehab services (though VA usually will provide these); and
- 2) Vocational opinions to support service-connected compensation claims, particularly claims for Total Disability based upon Individual Unemployability.



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VA Claim Flow....kinda

VA Regional Office (RO) decides the initial claim.

Under VA's new Appeals Modernization, the Vet has 3 types of appeal they can file (and they can ultimately do each, if desired):

- HLR – Higher Level Review by the RO (no new evidence)
- Supplemental Claim – Vet submits new evidence to RO
- An appeal to the **Board of Veterans Appeals (BVA)**.

Once BVA decides claim, the vet may seek review by the **Court of Appeals for Veterans Claims**.



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Service-Connection Matters

Because the majority of Veterans and their attorneys will consult you as a Vocational Expert (often abbreviated "VE" in the VA world) for Individual Unemployability claims, you must understand:

1. TDIU may **only** be based on service-connected (SC) claims and related restrictions and limitations;
2. Non-service connected conditions are not in the analysis...you must separate the Restrictions & Limitations related to the SC claims.



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3 Ways to Service-Connection

- 1) Direct Service Connection
- 2) Presumptive Service Connection
 - Agent Orange
 - WWII radiation exposure
 - ALS
 - Camp Lejeune
 - Certain conditions that manifest within 1 year of separation
- 3) Secondary Service Connection



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Direct Service-Connection

- (1) There must be a current disability - diagnosed by a medical professional.
- (2) There must be evidence by way of military service records of some precipitating disease, injury, or event in service.
- (3) There must be a nexus (a connection or link) between the current disability and the in-service disease, injury or event – medical opinion evidence or records of continuous care



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Service-Connection

- Does not have to be combat related.
- Service-members are in the service 24/7...anything that happens to them during their service can lead to service-connected compensation benefits.
- Disease, injury....any medical condition



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Service-Connection

- Examples of some non-combat related disabilities:
- Military Sexual Trauma (MST)
 - Falling down in one's kitchen and injuring an elbow
 - Car crash injuries
 - Hearing loss / Tinnitus from training
 - Hysterectomy due to uterine cancer or other issue
 - Erectile dysfunction secondary to medication



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Claims for Each Condition

A vet may file one form (now online), but each medical condition is a separate claim.

I have seen vets with 70 claims before.

Not all are decided at the same time.



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Each Condition = 1 Claim



Like trains leaving the station on parallel tracks.



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Claims Not Decided Yet?

- A vet may have several claims pending at different stages of VA's decision process.
- For TDIU, you may **NOT** consider claims that are Not Service Connected (NSC).
- For TDIU, you should NOT consider claims that have not yet been decided unless asked to do so.



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Rating Decision

- Supposed to provide the rationale for why a claim was denied.
- Was SC granted?
- If so, what Rating was assigned?



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Why are Ratings Important?

- Once SC is granted, the Rating granted drive payment.
- The amount of monthly benefits a vet receives is based upon their "combined" VA compensation rating.
 - Disabilities are rated in 10% increments from 0% (non-compensable) to 100% (which pays just over \$3000/month).
 - Payments do not increase in a linear fashion...there are larger jumps from 70%-80%-90%-100% than all lower ratings combined.
 - Combining ratings is not done by addition...50% + 40% + 10% does not equal 100%. VA uses a combining chart that theoretically takes whole body impairment into account.



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VA Ratings - %

- Once SC is granted, a disability Rating granted.
- Percentages are assigned by VA based on Diagnostic Codes (DC) in the Code of Federal Regulations.
- Application of the DC by VA can be very mechanical
- Often, the DC will not encompass all of the symptoms a veteran is experiencing.
- For an example, see the next slide



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Ratings % Based on DC

To evaluate a lumbar spine condition, VA applies the appropriate code (DC 5323-5243), but all are evaluated using this schedule (numbers at far right are the % to be assigned):

Unfavorable ankylosis of the entire spine.....	100
Unfavorable ankylosis of the entire thoracolumbar spine	50
Unfavorable ankylosis of the entire cervical spine; or, forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine	40
Forward flexion of the cervical spine 15 degrees or less; or, favorable ankylosis of the entire cervical spine.....	30



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Ratings % Based on DC

Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, forward flexion of the cervical spine greater than 15 degrees but not greater than 30 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, the combined range of motion of the cervical spine not greater than 170 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis.....



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Ratings % Based on DC

Forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees; or, forward flexion of the cervical spine greater than 30 degrees but not greater than 40 degrees; or, combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees; or, combined range of motion of the cervical spine greater than 170 degrees but not greater than 335 degrees; or, muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour; or, vertebral body fracture with loss of 50 percent or more of the height.....



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Ratings % Based on DC

Thoracolumbar Spine

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Not all DCs are cut & dried:

Compare those to:

8018 Multiple sclerosis (presumptive if w/in 7 years of discharge)Minimum rating	30
OR		
6260 Tinnitus, recurrent		10

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Rating Decisions

You may glean useful information from Rating Decisions.

In 2019, VA passed a new Appeals Modernization program that requires Rating Decisions issued after February 16, 2019 to state various things, but specifically: 1) the reason for the denial, and 2) "favorable findings." The favorable findings are not subject to change, and you can rely upon them as a finding VA has made.

The favorable findings may include limitations and restrictions that are useful in your analysis.

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Ratings Usually Drive TDIU

38 CFR §4.16(a) requires TDIU to be considered where:

- A veteran is unable to “secure or follow” substantial gainful activity due to their service-connected conditions...

AND

- They are rated 60% for 1 condition, OR they have a 70% combined rating with 1 condition at least rated at 40%

However...



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TDIU Must Be Considered...

When a veteran has any service-connected conditions that prevent the veteran from securing or following substantial gainful activity, regardless of the assigned rating.

38 CFR §4.16(b) requires TDIU to be considered, even when the rating percentage requirements of §4.16(a) are not met.

An attorney may request an opinion in this situation, so do not dismiss TDIU based on a lack of rating percentages.



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TDIU Must Be Considered...

In fact, the Veterans Court has ruled that VA must consider TDIU whenever a claim for service connection or request for a higher disability rating is filed and there is evidence indicating that the claimant’s ability to work was “significantly impaired.”



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Let's Unpack the TDIU Reg

"Secure or Follow" = a) get hired, and b) sustain employment

"Substantial Gainful Activity" = very similar to Social Security

- Does not include "sheltered work"
- SGA is essentially anything above "marginal employment"
- Marginal = the poverty line
- Approximately \$1,100 per month
- So, a veteran can work and earn money up to the poverty line each month or work in sheltered employment and still be approved for TDIU



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Unlike SSA, No Job #s

The TDIU regulation does not say anything about a labor market analysis or evaluating whether jobs exists in substantial numbers.

TDIU is all about **ability** to secure and follow work in an occupation that will pay above the poverty line. How many jobs exist in a given region is not part of the inquiry.



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Competitive Employment

- Employment in the national economy that provides a competitive wage when compared to similar occupations while taking into consideration education and/or past experience.
- Usually 40 hours per week
- Requires understanding and following guidelines regarding conduct and performance of specific job tasks associated with an occupation
- Must observe a regular and consistent work schedule as expected by the employer.
- Meet pace and production standards outlined by the employer without special accommodation.
- If the employee cannot perform to required standards, termination results.



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vs. Marginal Employment

- Does not adhere to the standards normally found in competitive employment.
- May not be required to follow the standard guidelines of conduct and performance of performing specific job tasks.
- The employee may not be required to maintain a typical 40-hour work week while observing a regular and consistent work schedule.
- Pace and production demands may be flexible.
- Education and past work experience may flexible.
- Accommodations for disability or other limitations may be provided in this setting.



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Reg. is Silent on Voc. Factors

The TDIU regulation does not say anything about what factors must be evaluated when analyzing whether a veteran can secure or follow an occupation.

VA will typically refer vets to doctors for a physical exam, and those doctors will opine that the vet is capable of "engaging in sedentary employment."

This is insufficient.



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Vocational Factors to Consider

Education & Work Skills - YES:

VA must consider educational and occupational history.

Age - NO

However, age is not a factor to be considered. In fact, if VA takes age into consideration, it's decision will be reversed. For that reason, veterans beyond traditional retirement age may apply for an receive TDIU.



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Vocational Factors to Consider

Any and all barriers to employment that are raised by the record must be considered.

Evaluate both exertional and non-exertional impairments.

Exertional: Difficulty often lies in VA doctors not quantifying impairments. Encourage vets and their attorneys to get Functional Capacity Evaluations



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Exertional Factors

- Sit / Stand / Lift-Push-Pull-Carry / Walk
- Limitation in bending down
- Limitation in using foot pedals
- Limitation in reaching forward or overhead
- Manipulative limitations



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Non-Exertional Factors

- Concentration deficits,
- Inability to focus,
- Memory deficits
- Inability to take criticism (significant in PTSD cases)
- Inability to be around other people
- Inability to accept direction for a superior
- Pain (which may cause both physical and mental limitations)
- Limitations in stooping (bending forward at the waist)



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Non-Exertional Factors

- Balance issues
- Vision limitations (may impact reading, focus, or understanding)
- Problems sleeping and the impact that has on mental acuity
- Fatigue
- Communication limitation



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What Do You Need?

- MUST HAVE: The Claim File (C-File)
- It is the record of all documents and proceedings before the VBA. **You are in the dark without it.**



or



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What Do You Need?

- MUST HAVE: Medical Records
- MUST HAVE: Restriction and Limitation info
- PREFERRED – SHOULD HAVE:
 - Statement from the veteran OR an interview
 - Lay witness statements with examples



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OPINION/REPORT TIPS

- State you analyzed the entire C-File.
- If you reviewed additional medical records, identify them.
- Summarize the relevant records and consider quoting key statements in your report.



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Report Tip 1: SSA Rules

- You may cite to Social Security or state worker’s comp regulations or rules, but you must explain that you are relying upon those as general principles that are accepted in your profession.
- VA is not bound by SSA or state rules.
- However, **state your opinion in terms of being based on general vocational principles, which may be incorporated into SSA law.**
- Cite to texts, journal articles, etc. as support



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Report Tip 2: Secure AND Follow

- Don’t forget, the vet must be able to BOTH “Secure” and “Follow” the occupation.
- Address both. If the vet could get the job, but could not sustain it, explain why.



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Report Tip 3: Attend/On Time

- You must address attendance and punctuality.
- State the acceptable standard tolerance for absences and breaks based on your experience. Cite to the DOL stats and other sources as support.
- Highlight unpredictable symptoms and their impact



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Report Tip 4: Opinion

- You must state an opinion.
- VA verbiage is “at least as likely as not” that...
- That is a 50/50 chance...you may go further:
 “I declare under penalty of perjury that it is my opinion that Mr. Veteran is not capable of securing or following any substantially gainful occupation within a reasonable degree of certainty.”



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Report Tip 5: NSC Claims

- Include a clear statement that you have not considered those claims which are not service connected and why the SC conditions lead you to your conclusion.
- If a TDIU claim is contingent on a Not Service Connected Claim being reversed and service connected, explain why



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Report Tip 6: Your C.V.

- You must attach a current C.V.
- If any government agency ever hired you, highlight that experience.
- You are establishing yourself as an expert, so your experience is crucial....# of years, # of clients, varied experience, etc.



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Report Tip 7: Rationale

- Say “why”
- Without a rationale, VA will ignore you.
- Veterans often win claims because their experts provide a more detailed rationale, citing records and outlining an intelligent and logical explanation.



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Let’s Finish w/ Business

If you do not handle VA cases already, you can easily start within 25 miles of where you live with a simple Google search: “attorneys for disabled veterans near me”

You can do this work nationwide.

Reach out – write, call, email, LinkedIn – and ask for the work.



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Let's Finish w/ Business

Lawyers who handle VA cases belong to:

- National Organization of Veterans Advocates
- State & Local Bar Association "Military Law" Committees and Sections



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Let's Finish w/ Business

What should you expect from the vet?

- Available for a phone interview.
- Willing to complete a questionnaire in advance, if you ask.
- Compliant with your questions.
- Polite (but remember, some have mental impairments)



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Let's Finish w/ Business

What should you expect from attorneys?

- An organized C-File (if not, charge more)
- Willing to make the vet available for interview.
- Available to discuss your report and for feedback.
- Willing to provide you with their theory of the case or a roadmap for what they are asking you to do.
- A willingness to find ways to reduce your time if they ask for discounts for veterans. i.e., ask them if they will provide you with a medical summary in Word format that you can cut/paste into your report...and check it for accuracy.



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Let's Finish w/ Business

What are attorneys expecting?

- Reasonable turnaround time (3-4 weeks)
- Sufficiently detailed reports. While 1-2 pages may get it done, VA rarely seems to rely on short VA reports to carry the day.
- Reports with a good rationale.
- Reports that attack the rationale of the compensation and pension doctor who opined that the vet is able to work.
- Your willingness to consider and incorporate arguments they may have identified.
- Reasonable pricing for the market.



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Let's Finish w/ Business

What are attorneys expecting? (cont.)

- You know that Not Service Connected claims are not be considered and your report states and demonstrates that in your report.
- You address both "secure" and "follow."
- If you cannot provide an opinion supporting TDIU, call....the attorney may not want you to write a report.
- You can explain why a claim with a lesser rating can still prevent working, even though the VA Diagnostic Code does not provide for a greater rating.



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Any Questions?

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