** Advocacy Tip ** Advocates must keep in mind that IVDS in separate spinal segments will be separately evaluated as long as the effect on each segment is clearly distinct.\(^{292}\)

“This means that affected segments may be separately evaluated based on (1) incapacitating episodes; (2) chronic manifestations; or (3) one affected segment may be evaluated based on incapacitating episodes and another segment may be evaluated based on chronic manifestations.”\(^{293}\) Therefore, advocates are urged to pay close attention to the method VA uses to evaluate the disability in order to certify that the results fall in the highest possible rating. In addition, if the veteran has neurological symptoms, advocates must ensure that the neurological symptoms are fully evaluated and described, rated separately and combined with the orthopedic manifestations to ensure the highest possible rating. For example, a veteran might have weakness in the legs as a result of a back disability. Ensure that the leg weakness and instability is evaluated separately from the back pain.

5.3 EXTRASCHEDULAR RATINGS FOR EXCEPTIONAL OR UNUSUAL DISABILITIES

The application of the objective criteria contained in the rating schedule may result in an inadequate evaluation for some veterans. Such an objective process may not sufficiently capture the veteran’s true disability. In recognition of this, the VA allows for an increase in the evaluation of disabilities based on consideration of certain factors that are unique to particular veterans.\(^{294}\)

The Under Secretary for Benefits may approve an extraschedular rating for a veteran “where the schedular evaluations are found to be inadequate” and where “the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.”\(^{295}\)

One question that has arisen is whether the factors specifically identified in § 3.321(b): “frequent periods of hospitalization,” or “marked interference with employment,” are the sole criteria for extraschedular evaluation. So far the CAVC case law has not clearly answered this question.\(^{296}\) Some of the CAVC decisions seem to indicate that the list is exclusive\(^{297}\) while other decisions seem to indicate that it is not an exclusive list.\(^{298}\) Because the case law is not definitive, a veteran may wish to pursue a claim for an extraschedular rating whenever there are circumstances that make the veteran’s case “exceptional” or “unusual,” and worthy of an

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\(^{292}\) 38 C.F.R. § 4.71a, DC 5293 Note 3 (2008).


\(^{294}\) Please note, however, that extraschedular consideration is not based entirely on subjective factors, as discussed by the CAVC in Thun v. Nicholson, 22 Vet. App. 111 (2008).

\(^{295}\) 38 C.F.R. § 3.321(b) (2008). Because the Under Secretary or his or her designees are the proper VA officials who have been given the authority to grant such benefits, the issue must be decided in the first instance by appropriate officials in the RO. However, if the evidence reasonably raises such a claim, and it has not been adjudicated by the RO, the Board of Veterans’ Appeals is obligated to consider the issue and refer it to the appropriate officials at the RO for adjudication. Floyd v. Brown, 9 Vet. App. 88, 95-96 (1996).


extraschedular rating even though the veteran’s case does not include frequent periods of hospitalization or marked interference with employment. Advocates are advised to obtain some medical or vocational evidence to support a veteran’s claim for an extraschedular rating. A treating physician or a vocational expert may be able to provide an opinion illustrating why, in comparison to typical cases, the veteran’s case is unusual or exceptional.299

**Advocacy Tip** In the absence of evidence with regard to frequent periods of hospitalization, advocates should emphasize evidence that is based on individual factors such as work background, education, and any evidence of dramatic impact on the veteran’s ability to work. For example, a veteran with an 8th grade education who has dug ditches all his life and now suffers from a back condition may rate an extraschedular rating.

In Thun v. Nicholson,300 the CAVC analyzed the criteria for when an extraschedular evaluation is implicated. In Thun, the veteran argued that he was entitled to an extraschedular evaluation because his salary was substantially limited by his PTSD and that he was not promoted because of his PTSD. The Court rejected the veteran’s argument that the schedular ratings are inadequate when it failed to compensate the veteran for the “actual individualized income” that was not realized but for that disability. The Court discussed the average impairment of earning capacity standard in the VA rating schedule, stating that “extraschedular consideration cannot be used to undo the approximate nature that results from the rating system based on average impairment of earning capacity authorized by Congress.”301

5.4 TEMPORARY 100 PERCENT DISABILITY RATINGS

There are three types of temporary 100 percent disability ratings that a veteran may be eligible for: (1) convalescent ratings; (2) prestabilization ratings; and (3) hospitalization ratings. These disability ratings are discussed in detail below.302

5.4.1 Temporary 100 Percent Disability Ratings Based on Convalescence (TDCC)

Under certain circumstances a temporary total (100 percent) disability rating will be assigned for a service-connected disability when a medical report establishes that a veteran needs time to convalesce following hospital discharge or outpatient release. There are three circumstances under which a TDCC rating will be issued: (1) the veteran has undergone surgery that requires at

299. In Brambley v. Principi, 17 Vet. App. 20 (2003), the CAVC held that extraschedular consideration requires a “complete picture” of the appellant’s service-connected disabilities and their effect on his employability.


301. 22 Vet. App. at 115-117. The Court also held that it was not necessary that a veteran show interference with obtaining or retaining employment, rather than “marked” interference with employment, since the former would contemplate a total disability rating based on individual unemployability. 22 Vet. App. at 117.

302. A veteran may also be eligible for a temporary 100 percent disability rating by showing “temporary” total disability based on individual unemployability under 38 C.F.R. § 4.16. This issue is discussed in more detail in Section 5.4.1.

303. The medical report establishing the need for convalescence must be issued at or near the time of hospital discharge or outpatient release. 38 C.F.R. § 4.30 (2008); see also Felden v. West, 11 Vet. App. 427, 430 (1998) (medical report issued within a few weeks following discharge satisfied the regulatory requirement that the medical report be issued at or near the time of discharge).

304. There is no minimum time for which a veteran must be hospitalized in order to receive a convalescent rating. 38 C.F.R. § 4.30 (2008).
least one month convalescence; (2) the veteran has undergone surgery that has resulted in severe postoperative residuals; or (3) a major joint of the veteran’s is immobilized by a cast.

If the benefits are granted, they are effective from the date of hospital admission or outpatient treatment and may continue for a period of one to three months from the first day of the month following hospital discharge or outpatient release. Veterans can obtain extensions of their convalescent ratings for up to three months. Further extensions of up to six months may be granted in the discretion of the Adjudication Officer for those veterans who suffer severe postoperative residuals or have a major joint immobilized by a cast. This means that a veteran may receive a TDC rating for up to a year.

The regulations do not define the term convalescence. In Felden v. West, the CAVC rejected the VA’s argument that convalescence meant the time that a veteran is confined to his home following surgery or major joint immobilization. The court did not accept the VA’s argument that recovery necessarily entailed confinement to home. Instead the court adopted the definition of convalescence as it is commonly used within the medical community to mean “the act of regaining or returning to a normal or healthy state” after a surgical operation, or an injury. The CAVC then held that a statement from the veteran’s doctor that he could not return to work for eight weeks was “sufficient to establish that the appellant required eight weeks of convalescence after his surgery.”

Medical evidence is necessary for a veteran to be awarded a convalescent rating or an extension of a convalescent rating. If the discharge report or outpatient release does not specify whether convalescence is needed or the length of convalescence needed, the advocate should ask the veteran’s physician for the information. Some veterans will need a longer convalescence than others. If the physician has not done so already, the advocate might want to ask him or her to base the estimated convalescent period on the individual veteran.

**Advocacy Tip** Convalescent Ratings for Mental Disorders — Veterans with any service-connected mental disorder who are hospitalized continuously for at least six months will receive a convalescent rating of 100 percent (total disability) for at least six months afterward. This convalescent rating is protected under 38 C.F.R. § 3.105(e), which

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305. Section 4.30 gives examples of severe postoperative residuals. They may include “incompletely healed surgical wounds; stumps of recent amputations; therapeutic immobilization of one major joint or more, application of a body cast, or the necessity for house confinement, or the necessity for continued use of a wheelchair or crutches (regular weight-bearing prohibited).” Id. at (a)(2).

306. The veteran does not need to have undergone any type of surgery to qualify for benefits under this criterion. Id. at (a)(3).


308. Id. at (b)(1); see Seals v. Brown, 8 Vet. App. 291, 297 (1995) (Court reversed BVA decision denying request for an extension of a temporary total rating).

309. Id. at (b)(2).


311. Id. at 430.

312. Id.

313. Id. (quoting WEBSTER’S MEDICAL DESK DICTIONARY 606 (1986)).

314. Id. at 431.

provides that the VA must provide the veteran with a 60-day notice of any proposed reduction, and an opportunity to respond prior to the reduction.\textsuperscript{316}

5.4.2 Prestabilization Ratings

A veteran may be assigned a 100 percent rating if he or she suffers from an unstabilized condition that was incurred in service resulting in “severe” disability that makes substantially gainful employment “not feasible or advisable.”\textsuperscript{317} Examples of unstabilized conditions that may warrant such a rating include the following: 1) residuals resulting from a head injury following a car accident in service; and 2) residuals from multiple gunshot wounds incurred while in combat. The VA is prohibited from assigning a total (100 percent) prestabilization rating in any case in which a total rating (100 percent) is immediately assignable under the regular provisions of the rating schedule or on the basis of individual unemployability.\textsuperscript{318}

Prestabilization ratings are to be assigned in the immediate period following discharge from the service and will continue without reduction for a twelve-month period following military discharge.\textsuperscript{319} The VA may change a prestabilization rating to a regular schedular rating “or another one authorizing a greater benefit.” In other words, the VA may change the prestabilization rating if it would result in an increase of benefits to the veteran, but it may not change the rating within this twelve-month period in a way that would reduce benefits to the veteran. For example, if a veteran is receiving a 100 percent prestabilization rating, the VA may change the rating to a regular 100 percent schedular rating or to a TDIU rating. Or in another example, if a veteran is receiving a 50 percent prestabilization rating, the VA may assign the veteran a regular schedular rating of 70 percent. The VA must conduct an examination of the veteran between six and twelve months following military discharge.\textsuperscript{320} If the examination results indicate that the evaluation should be reduced, the VA must continue the higher prestabilization rating to the end of the twelfth month following discharge.\textsuperscript{321}

5.4.3 Total Ratings for Service-Connected Disabilities Requiring Hospitalization

Total ratings are available for periods of hospitalization in excess of 21 days for treatment of a service-connected disability.\textsuperscript{322} Additionally, even though a hospital admission is for a non-service-connected condition, total ratings are payable if during such hospitalization, treatment for a service-connected disability is instituted and continued in excess of 21 days.\textsuperscript{323} The increased rating is effective from the first day of continuous hospitalization and ends effective the last day of the month of hospital discharge.\textsuperscript{324}

\begin{thebibliography}{99}
\bibitem{316} \textit{Id.}
\bibitem{317} 38 C.F.R. § 4.28 (2008). A prestabilization rating of 100 percent or 50 percent may be assigned. \textit{Id.} The 50 percent prestabilization rating is appropriate for an unstabilized condition manifested by “[u]nhealed or incompletely healed wounds or injuries” where “material impairment of employability [is] likely.” \textit{Id.}
\bibitem{318} \textit{Id.} Likewise, a 50 percent prestabilization rating should not be assigned in any case in which an evaluation of 50 percent or higher would otherwise be immediately assignable under the regular provisions of the rating schedule. \textit{Id.}
\bibitem{319} \textit{Id.} Note (1).
\bibitem{320} \textit{Id.}
\bibitem{321} \textit{Id.}
\bibitem{322} 38 C.F.R. § 4.29 (2008).
\bibitem{323} \textit{Id.} § 4.29(b).
\bibitem{324} \textit{Id.} § 4.29(a).
\end{thebibliography}
5.5 TOTAL DISABILITY RATINGS BASED ON INDIVIDUAL UNEMPLOYABILITY

As discussed earlier, the Schedule for Rating Disabilities is comprised of ten grades of disability which are based on “the average impairment” of a veteran’s occupational earning capacity. Under the rating schedule, the highest grade of disability is 100 percent, which means that a veteran is totally disabled. However, under 38 C.F.R. § 4.16, a total disability rating may be assigned where a person who fails to meet the schedular rating percentage is, nevertheless, unable to secure a substantially gainful occupation. TDIU ratings consider the effect that service-connected disabilities have on a particular veteran’s ability to work. Thus, a total (100 percent) rating based on TDIU is more individualized than a schedular (100 percent) rating which is based on the average impairment of earnings. As the Court stated in *Norris v. West*, “[a] claim for TDIU is based on an acknowledgement that even though a rating less than 100 [percent] under the rating schedule may be correct, objectively, there are subjective factors that may permit assigning a 100 [percent] rating to a particular veteran under particular facts.” Therefore, a determination of the veteran’s entitlement to TDIU is considered in the context of the individual veteran’s capabilities regardless of whether an average person would be rendered unemployable under the same circumstances.

“Temporary” total disability ratings based on individual unemployability under 38 C.F.R. § 4.16 are also available to veterans based upon a veteran’s temporary (i.e. non-permanent) inability to secure or follow a substantially gainful occupation. However, not every period of inability to work will establish an inability to follow a substantially gainful occupation warranting a TDIU rating, because it may be possible to secure and retain employment and to earn significant income despite occasional periods of incapacity. VA must make determinations regarding ability or inability to follow a substantially gainful occupation on a case-by-case basis, taking into account such factors as the frequency and duration of periods of incapacity or time lost from work due to disability, the veteran’s employment history and current employment status, and the veteran’s annual income from employment, if any.

**Advocacy Tip** The advocate should write to the VA and request that the VA inform the advocate of the evidence that is needed to substantiate the claim for TDIU. The following language may be used in a letter to the VA:

The Veterans Claims Assistance Act of 2000 (VCAA or Act) was signed into law on November 9, 2000. See Pub. L. No. 106-475, 114 Stat. 2096 (2000). The VCAA requires the

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325. In 2001, the VA proposed significant changes to the requirements for TDIU entitlement. See Fed. Reg. 49886 (Oct. 1, 2001). However, these proposed amendments (which were discussed in detail in prior versions of this Manual), were withdrawn by VA in December 2005. See 70 Fed. Reg. 76221 (Dec. 23, 2005).
327. 38 C.F.R. § 4.16(a) (2008).
328. See Hatlestad (II) v. Derwinski, 3 Vet. App. 213 (1992) (TDIU determinations should be considered in the context of the individual veteran’s vocational capabilities regardless of whether an average person would be rendered unemployable under the same circumstances). See also VA Gen. Coun. Prec. 75-91 (Dec. 27, 1991).
330. Id. at 421 (quoting Parker v. Brown, 7 Vet. App. 116, 118 (1994)).
331. Id.
332. Id.
333. Id.
VA to notify all claimants and the claimants’ representatives of “any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.” In addition, the VA is required to explain to the claimant what evidence the claimant must obtain and what evidence the VA will attempt to obtain. Therefore, please explain to the claimant what types of evidence would help substantiate this claim for TDIU. For example, if information is needed regarding the veteran’s employment and education history, please inform my client what specific information is needed that will assist in proving the veteran’s claim. If a medical opinion is needed, please inform my client what information should be included in the medical opinion.

In some instances, there may be positive and negative evidence in the VA record. If you determine there is negative evidence in this claimant’s record please let my client know what this evidence is and please let us know what types of evidence would tend to rebut this negative evidence and thus substantiate this claim.

5.5.1 The TDIU Requirement That the Veteran Be Unable to Secure a Substantially Gainful Occupation

Currently, VA regulations do not provide a definition of the term “substantially gainful occupation.” The VA has defined “substantially gainful occupation” in its Adjudication Procedures Manual as “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.” Marginal employment is not considered substantially gainful employment. Marginal employment is defined as earned annual income that does not exceed the poverty threshold for one person as established by the U.S. Department of Commerce, Bureau of the Census. Marginal employment can be held to exist in certain circumstances even where the veteran’s earned annual income exceeds the poverty threshold. For example, if a veteran works in a “protected environment” such as a family business or sheltered workshop he is considered to be only marginally employed.

Because VA regulations do not define the term “substantially gainful occupation,” the Court of Appeals for Veterans Claims has had the task of interpreting this regulatory term as part of its review of BVA decisions that have concluded that the veteran is capable of performing a substantially gainful occupation. In *Faust v. West*, the Court adopted a definition of a “substantially gainful occupation.” The Court concluded that a substantially gainful occupation, is “[an occupation] that provides [the veteran with an] annual income that exceeds the poverty threshold for one person, irrespective of the number of hours or days that the veteran actually works . . .”

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335. 38 C.F.R. § 4.16(a) (2008). See also Ferraro v. Derwinski, 1 Vet. App. 326, 332 (1991). Values of the poverty thresholds for the years 1980-2007 for families of different sizes are available on the Census Bureau’s web site. Under the current poverty threshold established by the Bureau of the Census, marginal income for the year 2007 is $10,787. See U.S. Census Bureau web site at http://www.census.gov/hhes/www/poverty/threshld.html. Accordingly, if a veteran earned this amount or less he would not be considered to be engaged in a “substantially gainful occupation.”
336. 13 Vet. App. 342, 356 (2000). In this case, a veteran was challenging a reduction in his TDIU rating for a psychiatric disability pursuant to 38 C.F.R. § 3.343, because the VA concluded that the veteran was capable of engaging in a substantially gainful occupation. In *Bowling v. Principi*, 15 Vet. App. 1, 10 (2001), the CAVC applied the definition of substantially gainful occupation first articulated in *Faust* to a claim for entitlement to TDIU.
In Roberson v. Principi, the Federal Circuit held that the Court of Appeals for Veterans Claims misconstrued the term “substantially gainful occupation” to mean that the veteran had to prove that he was “100% unemployable.” The Court concluded that the plain language of the regulation does not require such a showing. The Court stated that:

[requiring a veteran to prove that he is 100 percent unemployable is different than requiring the veteran to prove that he cannot maintain substantially gainful employment. The use of the word “substantially” suggests an intent to impart flexibility into a determination of the veteran’s overall employability, whereas a requirement that the veteran prove 100 percent unemployability leaves no flexibility. While the term “substantially gainful occupation” may not set a clear numerical standard for determining TDIU, it does indicate an amount less than 100 percent.]

** Advocacy Tip ** If a veteran is employed and earns income that is below the amount that constitutes “substantially gainful employment,” he or she must understand that even though the earned income does not automatically disqualify the veteran from being awarded TDIU benefits because his or her employment is not “substantially gainful employment,” the VA will still evaluate whether the veteran’s employment is proof that the veteran has the capacity for securing a substantially gainful employment. The VA will closely review the nature of the veteran’s employment to determine whether the job that the veteran is performing establishes that he or she has the ability to engage in a job that would produce earnings that would constitute substantially gainful employment.

For example, the VA may consider the number of hours per week the veteran works to determine whether this demonstrates that the veteran has the ability to engage in substantially gainful employment. If the veteran is filing a TDIU claim because of physical disability, then the VA may consider whether the exertional activities performed by the veteran on the job, such as sitting, standing, walking, pushing, pulling, using hands, reaching, lifting and carrying, demonstrate that the veteran has the ability to engage in substantially gainful employment. If the veteran suffers from a mental disability, the VA may consider whether the non-exertional activities performed by the veteran, such as communicating, remembering, following instructions, using judgment, adapting to changes and dealing with people, including supervisors, co-workers, and the public, demonstrate that the veteran has the ability to engage in substantially gainful employment.

Therefore, an employed veteran whose earnings qualify his or her employment as “substantially gainful employment” must be prepared to demonstrate that despite the fact that the veteran is employed, he or she does not have the ability to engage in “substantially gainful employment.” One argument that an advocate may make for a veteran who is partially employed is that the veteran does not have the ability to perform exertional or non-exertional activities with the regularity and for the duration normally required for substantially gainful employment. In other words, the advocate should demonstrate that the

337. 251 F.3d 1378, 1385 (Fed. Cir. 2001).
338. Id.
veteran does not have the ability to perform work with reasonable consistency and for a reasonable time.

5.5.2 The Two-Step Analysis to Qualify for a TDIU Rating

TDIU benefits will be granted “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 service-connected disabilities.” The VA conducts a two-step analysis to determine whether a veteran qualifies for a TDIU rating. First, the VA regulation authorizing TDIU requires that the veteran’s service-connected disabilities satisfy certain percentage rating requirements. If a veteran has only one service-connected disability, this disability must be rated at 60 percent or more. If the veteran has more than one service-connected disability, at least one disability must be rated at 40 percent and the combined disability rating must be 70 percent or more.

For purposes of calculating the percentage requirements of one 60 percent disability, or one 40 percent disability, the VA has devised rules for determining what satisfies the term “one disability.” The following are considered to be one disability: “(1) [dis]abilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor. . . , (2) disabilities resulting from [a] common etiology or a single accident, (3) disabilities affecting a single body system, e.g., orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric, (4) multiple injuries incurred in action, or (5) multiple disabilities incurred as a prisoner of war.” Therefore, if a veteran suffers from several service-connected heart disabilities such as congestive heart failure and hypertension, the rating for these disabilities need only combine to a 60 percent evaluation in order for the veteran to qualify for TDIU under 4.16(a).

If the veteran meets the percentage requirements, set forth above, the VA proceeds to the second step of the TDIU analysis. The VA determines whether the individual veteran is prevented from securing or following a “substantially gainful occupation” because of the service-connected disabilities.

5.5.3 VA Central Office Consideration of TDIU Cases in Which the Veteran’s Rating Does Not Meet the Minimum Schedular Rating Levels

A veteran who does not meet the percentage requirements under the rating schedule described above but who is unable to work due to service-connected disabilities may still be awarded a TDIU rating on an extraschedular basis. The TDIU regulation states that “[i]t is the established policy” of the VA that all veterans who are unemployable because of service-connected disabilities “shall be rated totally disabled.”

The governing norm for granting a TDIU rating on an extraschedular basis is: a finding that the case presents such an exceptional or unusual disability picture with such related factors as marked

340. Id.
342. Id.
343. 38 C.F.R. § 4.16(b) (2008); extraschedular ratings are discussed in Section 5.3.
344. Id.
interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.\textsuperscript{345}

The regulation creates a special procedure for adjudication of these cases. Such cases are referred by the rating activities in the VA regional offices (ROs) to the VA Central Office (VACO) located in Washington, D.C., where the Director of the Compensation and Pension Service, or his or her designee, determines entitlement to this benefit in each case.\textsuperscript{346} The regulation refers to the review conducted by the VACO as “extra-schedular consideration.”\textsuperscript{347} The referral by the rating activity should include “a full statement as to the veteran’s service-connected disabilities, employment history, educational and vocational attainment and all other factors bearing on the issue.”\textsuperscript{348}

**Advocacy Tip** Each case should be individually evaluated by the VA. Therefore, advocates should present factors such as work background, education, periods of hospitalization, and evidence of dramatic impact on the individual veteran’s ability to work, to establish that a veteran should be granted an extraschedular rating of TDIU.\textsuperscript{349} In addition, the authors of this Manual believe that a sympathetic veteran (i.e., decorated war hero, wounded in combat, etc.) may receive more sympathetic treatment from the VA in their highly individualized assessment, thus having a greater chance of being granted TDIU on an extraschedular basis. Therefore, advocates are advised to emphasize individual things about the veteran that make him or her sympathetic.

Presumably, this special procedure exists because these types of cases are so rare; and, in fact, the VACO rarely grants benefits under this provision. In appropriate cases, however, the advocate should not hesitate to request that the RO send a claim to the VACO for consideration of entitlement to a TDIU rating.\textsuperscript{350} If TDIU is an issue in a case, and the veteran does not meet the minimum schedular rating, the VA is required to consider whether the veteran is entitled to TDIU through extraschedular consideration; and if not, the VA must explain its reasons or bases for why it is inapplicable.\textsuperscript{351}

**Advocacy Tip** The CAVC held that it was premature for the Board to decline extraschedular consideration where the record was significantly incomplete as to the issue.

\textsuperscript{345} Brambley v. Principi, 17 Vet. App. at 20; see also 38 C.F.R. § 4.16(b) (2008).
\textsuperscript{346} 38 C.F.R. § 4.16(b) (2008); see Brambley, 17 Vet. App. at 24.
\textsuperscript{347} Id.
\textsuperscript{348} Id.
\textsuperscript{349} See MANUAL M21-1MR, Part VI, subpart ii, 2.F.25.
\textsuperscript{350} 38 C.F.R. § 4.16(b) (2008); See Moyer v. Derwinski, 2 Vet. App. 289, 293-95 (1992) (BVA erred by failing to apply 38 C.F.R. § 3.321(b)(1) and refer claim to VA Central Office for “extra-schedular consideration,” given exceptional circumstances that rendered veteran unemployable).
\textsuperscript{351} Shoemaker v. Derwinski, 3 Vet. App. 248, 255 (1992); Proscelle, 2 Vet. App. at 633-34; Mingo v. Derwinski, 2 Vet. App. 51, 53-54 (1992). In Bowling v. Principi, 15 Vet. App. 1, 10 (2001), the CAVC reversed a BVA determination that the veteran’s case was ineligible for consideration under Section 4.16(b) for referral to the C&P Director. The Court held that “where there is plausible evidence that a claimant is unable to secure and follow a substantially gainful occupation and where the Board has not relied on any affirmative evidence to the contrary, the Court will reverse the Board’s determination, as a matter of law.” Id.
of employability because extraschedular consideration requires a “complete picture” of the appellant’s service-connected disabilities and their effect on his employability.352

5.5.4 Age, Non-Service-Connected Conditions and TDIU

VA regulations prohibit the VA from considering some factors that in actuality are difficult to separate from the analysis of whether a veteran is capable of substantially gainful employment. For example, the VA may not consider the veteran’s age,353 or the veteran’s non-service-connected disabilities.354 Each of these factors may without question contribute to the overall picture of the veteran’s unemployability; however, they must somehow be ignored in making the assessment.

In adjudicating claims for TDIU, the VA must only consider the effects of service-connected disabilities on a veteran’s ability to work.355 For example, if a veteran suffers from arthritis of the lower back that is service-connected and a herniated disc in the cervical spine which is non-service-connected, the VA may only consider the effect of the arthritis on the veteran’s ability to work and it may not consider the effect of the veteran’s non-service-connected herniated disc. Therefore, in support of TDIU claims, advocates should isolate the service-connected conditions and then argue that, at least hypothetically, these could make an individual with the veteran’s background unemployable.

When the VA denies a TDIU claim on the ground that the veteran’s unemployability is not due to the veteran’s service-connected disabilities, it cannot simply state that the veteran’s unemployability is due to non-service-connected conditions rather than service-connected conditions. It is also insufficient for the VA to state that its denial of a TDIU claim is because the veteran’s unemployability is due to the “combined effects” of the non-service-connected and service-connected disabilities.356

The VA must provide a clear explanation of the current degree of unemployability attributable to the service-connected conditions as compared to the degree of unemployability attributable to the non-service-connected conditions.357 If the veteran suffers from both service-connected and non-service-connected disabilities and it is not clear the extent to which the veteran’s service-connected disabilities alone affect his employability, the VA should obtain a medical opinion regarding the degree of disability, if any, that is attributable to the veteran’s service-connected disabilities alone.358

355. Id.
358. See Friscia v. Brown, 7 Vet. App. 294, 297 (1994) (BVA has duty to obtain a medical examination which includes an opinion on the effect the appellant’s service-connected disability, alone, has on his ability to work); Waddell v. Brown, 5 Vet. App. 454, 456 (1993) (in rating increase claim for PTSD, where physicians have diagnosed appellant as having several disorders concurrently, including PTSD, VA “must conduct a thorough examination to determine the degree of appellant’s functional impairment attributable to PTSD”).
5.5.5 Consideration of Educational and Occupational History

The VA must consider the veteran’s educational and occupational history when it is determining whether the veteran’s service-connected disabilities preclude him or her from securing or following substantially gainful employment. The VA may not “merely allude to educational and occupational history, [without] attempt[ing] . . . to relate these factors to the disabilities of the [veteran].”

The CAVC has stated: “[w]here the veteran submits a… claim for a TDIU rating . . . the BVA may not reject that claim without producing evidence, as distinguished from mere conjecture, that the veteran can perform work that would produce sufficient income to be other than marginal.”

**Advocacy Tip** Almost all claims for TDIU would benefit from professional opinion evidence from a vocational expert concerning the veteran’s ability to secure or follow a substantially gainful occupation. This evidence is not required, but generally, a positive vocational opinion greatly increases a veteran’s chances of winning TDIU. Advocates representing veterans claiming TDIU benefits should routinely ask to review or request copies of the veteran’s VA vocational rehabilitation file. A VA vocational rehabilitation assessment that indicates that the veteran cannot be vocationally trained or retrained due to his service-connected disability is positive evidence in a claim for TDIU benefits because it indicates that the veteran is unable to engage in substantially gainful employment.

5.5.6 Static Conditions: Special Problems

When a veteran has a service-connected disability such as an amputation or the residuals of a bone fracture, “a showing of continuous unemployability from date of incurrence, or the date the condition reached the stabilized level, is a general requirement” for convincing the VA that the veteran’s present unemployability resulted from his or her service-connected condition.

Some veterans struggle heroically to work for years before constant pain and stress forces them to stop. If their service-connected conditions remained static (that is, if there was no change in the severity of their disabilities), they could not claim entitlement to TDIU benefits. But if they had given in to their disabilities and had not worked, it is entirely possible that the VA would have granted them TDIU benefits. This rule seems to penalize those people who endure great pain in order to try to function in society. However, two theories are available for an advocate who wishes to obtain IU benefits for this type of veteran:

- The advocate may concede that the evaluation for the veteran’s service-connected condition has not significantly changed in many years and that the veteran is not entitled to a higher evaluation, then argue that these circumstances do not preclude the possibility that the condition has become more severe. For example, the veteran could state that he or she suffers more pain now than before or that the amputation stump causes more difficulty now. Private medical evidence (or any other medical report) showing that the veteran’s

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service-connected condition has increased, even ever so slightly, permits consideration of TDIU.

- In the alternative, the veteran suffering from a severe service-connected condition who has struggled for years to work may have developed a secondary condition, a neurosis, because of the service-connected physical disability. The advocate should tactfully explore this possibility, and if medical evidence reveals the existence of a secondary mental condition, the advocate should file a claim for secondary service connection along with the claim for TDIU benefits. If the VA service-connects the secondary mental disorder, the advocate will have a stronger argument for total disability benefits.

If the veteran first becomes unemployable, not because of a service-connected disability, but because of a combination of service-connected and non-service-connected conditions, the veteran may nevertheless qualify for a 100 percent rating based on TDIU if the service-connected condition later increases in severity. For example, if a veteran has to retire from his job as a bricklayer because of a non-service-connected condition and ten years later his service-connected hypertension causes a severe heart attack that would prevent a person with his education and work experience from working, the veteran should be rated totally disabled based on entitlement to TDIU benefits.364

5.5.7 How to Apply for TDIU

VA Form 21-8940, Application for Increased Compensation Based on Unemployability, is the prescribed form for claiming individual unemployability (TDIU).365 The VA will require that a veteran complete and submit a VA Form 21-8940 before it will formally pay a claim for TDIU benefits. However, a veteran is not required to file this application form before the VA is obligated to consider and adjudicate a TDIU claim. When a veteran files an original claim for evaluation of a disability or a claim for an increase in the evaluation of a disability that has already been rated by the VA, the claimant is generally presumed to be seeking the highest benefit allowable.366 If either claim includes facts that indicate that the veteran is unemployable, the VA is obligated to consider and adjudicate a TDIU claim.367 For example, a veteran files a claim for a rating increase for an anxiety disorder, and included in the evidence in the veteran’s claims file is a statement from a psychiatrist that the veteran’s mental disability precludes him from being able to work. This evidence constitutes an inferred claim. Thus, the VA is obligated to consider and adjudicate the veteran’s entitlement to TDIU.

Advocates should not wait to file claims for TDIU until the VA sends them the application form. The advocate can file an informal claim by simply sending the VA a letter stating that his or her client wishes to be considered for TDIU benefits and asking the VA to send all appropriate forms so that the client’s claim can be perfected.

364. Id.
365. A copy of this form may be found in the Forms Appendix.
367. See Collier v. Derwinski, 2 Vet. App. 247, 251 (1992) (VA was obliged to consider issue of entitlement to TDIU benefits despite the veteran’s not having filed the specific TDIU application form because “he has continually stated that he is unable to work due to his schizophrenia”); Roberson, 251 F.3d at 1384; Norris, 12 Vet. App. at 421.