

veteran between six and twelve months following military discharge.¹ 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.²

5.3.3 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.³ 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.⁴ The increased rating is effective from the first day of continuous hospitalization and ends effective the last day of the month of hospital discharge.⁵

5.4 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.⁶ 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.⁷ 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.⁸ As the Court stated in *Norris v. West*,⁹ “[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.”¹⁰ 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.

In October 2001, the VA issued proposed changes to the current TDIU regulations. Among these changes is a proposed amendment to 38 C.F.R. § 4.16(a) that would provide that a TDIU rating may be assigned only if the veteran’s disabilities do not warrant a total schedular rating.¹¹ The VA stated in its comments to the proposed regulations that because TDIU ratings “are intended only to ensure appropriate compensation to persons who are unemployable due to disability but do not meet the schedular requirements for a total disability rating . . . when a veteran is entitled to a total schedular rating, the justification for a total disability rating based on individual unemployability ceases to exist.”¹² Therefore, the VA proposes “to state in § 4.16(a)

1. *Id.*

2. *Id.*

3. 38 C.F.R. § 4.29 (2004).

4. *Id.* § 4.29(b).

5. *Id.* § 4.29(a).

6. 38 C.F.R. § 4.1 (2004).

7. 38 C.F.R. § 4.16(a) (2004).

8. *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).

9. 12 Vet. App. 413 (1999).

10. *Id.* at 421 (quoting *Parker v. Brown*, 7 Vet. App. 116, 118 (1994)).

11. 66 Fed. Reg. 49886, 49887 (Oct. 1, 2001).

12. *Id.*

that a total schedular rating cancels an existing rating that was assigned based on inability to engage in substantially gainful employment.”¹³

For purposes of clarification, the VA also proposes to amend 38 C.F.R. § 4.16(b), to state that a total disability rating based on individual unemployability will not be assigned if the veteran already has a total schedular rating.¹⁴

*** 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 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.

5.4.1 The TDIU Requirement That the Veteran Be Unable to Secure a Substantial Gainful Occupation

Currently, VA regulations do not provide a definition of the term “substantial gainful occupation.” The VA has defined “substantial gainful occupation” in its Adjudication and Procedural 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.”¹⁵ Marginal employment is not considered substantial 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

13. *Id.* Furthermore, the VA stated that “the cancellation of a total rating based on individual unemployability under these circumstances will not result in a reduction of benefits, and the procedural provisions concerning the reduction or discontinuance of benefits are not applicable.” Accordingly, the VA also proposes to amend 38 C.F.R. § 3.343(c) to make clear that the procedural provisions for reduction of benefits do not apply when a total disability rating based on individual unemployability is replaced by a total schedular rating. *Id.*

14. *Id.*

15. MANUAL M21-1, Part VI, ¶ 7.09(7).

Census.¹⁶ 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 "substantial 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 substantial gainful occupation. In *Faust v. West*,¹⁷ 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"

In *Roberson v. Principi*,¹⁸ 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.¹⁹ The Court stated that:

[r]equiring 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.

The VA has issued proposed regulations that would significantly change the adjudication of TDIU claims. The current TDIU regulations use various terms throughout the regulations such as "secure and follow a substantially gainful occupation" "secure or follow a substantially gainful occupation" and "follow a "substantially gainful occupation." The VA proposed to employ a single term, "engage in substantially gainful employment" throughout the TDIU regulations.²⁰ The VA also proposes to define "substantially gainful employment" as "any work that is generally done for pay or profit that the veteran is able to perform with sufficient regularity and duration to provide a reliable source of income."²¹ In the VA comments accompanying the proposed regulations, the VA stated that "this definition takes into account that general abilities and skills are necessary for any type of employment and that in order for employment to be 'substantially gainful,' work must be performed with reasonable consistency and for a reasonable period of time."²²

16. 38 C.F.R. § 4.16(a) (2004); *See also* Ferraro v. Derwinski, 1 Vet. App. 326, 332 (1991). Under the current poverty threshold established by the Bureau of the Census, marginal income for the year 2002 is \$9,359. Accordingly, if a veteran earned this amount or less he would not be considered to be engaged in a "substantial gainful occupation."

17. 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 substantial gainful occupation first articulated in *Faust* to a claim for entitlement to TDIU.

18. 251 F.3d 1378, 1385 (Fed. Cir. 2001).

19. *Id.*

20. 66 Fed. Reg. 49886, 49887 (Oct. 1, 2001).

21. 66 Fed. Reg. 49886, 49889 (Oct. 1, 2001).

22. *Id.*

Under the proposed regulations, if a veteran is employed, “regardless of the nature, duration and regularity of employment activity,” and earns income that is twice the Maximum Annual Pension Rate (MAPR)(under 38 U.S.C.S. § 1521(b) as increased under 38 U.S.C.S. § 5312(a)), for a veteran without dependents, there is an irrebutable presumption that the veteran is capable of engaging in substantial gainful employment.²³ The VA adopted the MAPR as a standard because “it reflects the reasoned judgment of Congress concerning levels of income which are adequate to meet the ordinary needs of individuals with no other income and was designed to create a national minimum standard necessary to meet basic needs.”²⁴ Under the proposed regulations, a veteran who is employed and earns \$19,112.00, in the year 2002, would be considered to be engaging in substantial gainful employment and would not be eligible for TDIU.

The VA also proposes to eliminate “marginal employment” from the regulations. Therefore the exceptions to substantial gainful employment that were embodied in the “marginal employment” regulation would no longer exist. For example, under current regulations, employment is considered “marginal,” and therefore not substantially gainful, even though a veteran’s earnings exceed the established poverty level guideline as long as the veteran is employed in a “protected environment” such as a family business or sheltered workshop. This exception would be eliminated under the proposed regulation.

*** Advocacy Tip ** If a veteran is employed and earns income that is below the amount that constitutes “substantial 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 “substantial gainful employment,” the VA will still evaluate whether the veteran’s employment is proof that the veteran has the capacity for securing a substantial 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 substantial 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 substantial 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 substantial 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 substantial gainful employment.

Therefore, an employed veteran whose earnings do not qualify his or her employment as “substantial gainful employment” must be prepared to demonstrate that despite the fact that

²³. 66 Fed. Reg. 49886, 49892-3 (October 1, 2001) to be codified at 38 C.F.R. § 4.16(c). See Section 6.2.1.5 of this Manual for a discussion of the MAPR.

²⁴. 66 Fed. Reg. 49886, 49889 (October 1, 2001).

the veteran is employed, he or she does not have the ability to engage in “substantial 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 veteran does not have the ability to perform work with reasonable consistency and for a reasonable time.

5.4.2 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.²⁵ If a veteran has only one service-connected disability, this disability must be ratable at 60 percent or more.²⁶ If the veteran has more than one service-connected disability, at least one disability must be ratable at 40 percent and the combined disability rating must be 70 percent or more.²⁷

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) [d]isabilities 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.”²⁸ 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

²⁵ 38 C.F.R. § 4.16(a) (2004).

²⁶ *Id.*

²⁷ *Id.* Under the VA’s proposed TDIU regulations, the VA will retain the current requirement in 38 C.F.R. § 4.16(a) that a veteran who has only one service-connected disability must have a minimum 60 percent evaluation. 66 Fed. Reg. 49886, 49888 (October 1, 2001). However, the VA is also proposing to reduce the threshold for combined ratings for veterans who have multiple service-connected disabilities from 70 percent to 60 percent. *Id.* Additionally, the VA is proposing to eliminate the requirement that one of these disabilities must be rated at least 40 percent disabling. *Id.* The VA explained the reasons for the proposed changes to the regulations:

[M]ultiple service-connected disabilities combining to a 60 percent evaluation are no less likely to result in total disability based on individual unemployability than single service-connected disabilities evaluated as 60 percent or higher. We also believe that disabilities resulting in a combined rating of 60 percent may have approximately the same effect on a veteran’s ability to engage in substantially gainful employment, regardless of whether one of the disabilities is rated at 40 percent or more. The proposed rule would, therefore, apply the same standard to all veterans having a combined rating of 60 percent or more. [*Id.*]

²⁸ 38 C.F.R. § 4.16(a) (2004). Because the proposed rules would eliminate the different percentage thresholds applicable to single disability ratings and combined ratings, the VA has concluded that “there is no need to retain the provisions in current § 4.16(a) stating that certain combinations of disabilities (*e.g.*, multiple disabilities incurred in combat or in a single accident) may be treated as a single disability for purposes of applying those threshold requirements.” *Id.*

from securing or following a “substantially gainful occupation” because of the service-connected disabilities.²⁹

5.4.3 VA Central Office Consideration of TDIU Cases in Which the Veteran’s Rating Does Not Meet the Minimum Scheduling 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.³⁰ 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.”³¹

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 interference with employment or frequent period of hospitalization as to render impractical the application of the regular scheduling standards.³²

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.³³ The regulation refers to the review conducted by the VACO as “extra-schedular consideration.”³⁴ 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.”³⁵

***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.³⁶ 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.*

29. *Id.*

30. 38 C.F.R. §4.16(b) (2004); extraschedular ratings are discussed in Section 5.2 of this Manual.

31. *Id.*

32. *Brambley v. Principi*, 17 Vet. App. at 20; *see also* 38 C.F.R. § 4.16(b) (2004).

33. 38 C.F.R. § 4.16(b) (2004); *see Brambley v. Principi*, 17 Vet. App. at 24.

34. *Id.* Under the VA’s proposed changes to the TDIU regulations, the VA would continue to employ this special procedure of having the rating activity refer cases to the Director of Compensation and Pension for extraschedular consideration when it determines that a veteran who does not meet the percentage requirements for a TDIU rating is nevertheless unable to engage in substantial gainful employment. 66 Fed. Reg. 49886, 49888 (October 1, 2001).

35. *Id.* The proposed regulations require that the extraschedular TDIU rating prepared by the rating activity for the Director of Compensation and Pension’s approval “include a full description of the unusual circumstances that warrant an extraschedular rating and the factors that in the judgment of the rating activity prevent the veteran from engaging in substantially gainful employment.”

36. *See* MANUAL M21-1, Part VI, ¶ 7.07.

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.³⁷ 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.³⁸

***Advocacy Tip** The CAVC has recently held that it was premature for the Board to decline extraschedular consideration where the record was significantly incomplete as to the issue of employability because extraschedular consideration requires a “complete picture” of the appellant’s service connected disabilities and their effect on his employability.³⁹*

5.4.4 Factors the VA Will Consider When Making Its Determination as to Whether a Veteran Is Unable to Engage in Substantial Gainful Employment

Under the proposed TDIU regulations, the VA indicated that a determination as to whether a veteran is unable to engage in substantially gainful employment due to service-connected disability or disabilities will be based upon the veteran’s ability to perform activities “normally required for substantially gainful employment” with “the regularity and for the duration normally required for substantially gainful employment.”⁴⁰

The VA proposes to define the term “activities normally required for substantially gainful employment” to include both exertional and non-exertional activities. Exertional activities, includes, but is not limited to “the ability to sit, stand, walk, push, pull, use hands, reach, lift and carry.”⁴¹ Non-exertional activities, includes, but is not limited to “the ability to communicate, remember, follow instructions, use judgment, adapt to changes and deal with people, including supervisors, co-workers, and the public.”⁴²

The VA is also requiring the award of TDIU benefits to be based, in part, on medical evidence. The VA intends to require specific:

Medical evidence which describes the nature, frequency, severity and duration of symptoms of the service-connected disabilities and the extent to which the veteran’s ability to perform activities normally required for substantially gainful employment is limited solely due to service-connected disabilities.⁴³

This change, if adopted by the VA, would have a significant impact upon the adjudication of TDIU claims. Consequently, this means that in order to establish entitlement to TDIU benefits,

^{37.} 38 C.F.R. § 4.16(b) (2004); *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).

^{38.} *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.*

^{39.} *See Brambley v. Principi*, 17 Vet. App. at 24.

^{40.} 66 Fed. Reg. 49886, 49893 (Oct. 1, 2001) to be codified at 38 C.F.R. § 4.16(d).

^{41.} 66 Fed. Reg. 49886, 49893 (Oct. 1, 2001) to be codified at 38 C.F.R. § 4.16(3)(g)(2)(i).

^{42.} 66 Fed. Reg. 49886, 49893 (Oct. 1, 2001) to be codified at 38 C.F.R. § 4.16 (3)(g)(2)(ii).

^{43.} 66 Fed. Reg. 49886, 49893 (Oct. 1, 2001) to be codified at 38 C.F.R. § 4.16 (d)(1).

veterans would need to submit very specific statements from doctors that not only describe “the nature, frequency, severity and duration of symptoms of the service-connected disabilities” but also discuss the impact that the service-connected condition(s) has on the appellant’s exertional and, if relevant, non-exertional abilities. For example, a veteran who alleges that he is entitled to TDIU benefits because of a service-connected back condition would need to submit a doctor’s statement that includes a description of the impact of the veteran’s service-connected condition on the veteran’s exertional abilities, including “the ability to sit, stand, walk, push, pull, use hands, reach, lift and carry. A veteran who alleges that he is entitled to TDIU benefits because of his service-connected schizophrenia would need to submit a doctor’s statement that includes a description of the impact of his schizophrenia on his non-exertional activities, including “the ability to communicate, remember, follow instructions, use judgment, adapt to changes and deal with people, including supervisors, co-workers, and the public.”⁴⁴ Additionally, a veteran seeking TDIU benefits should attempt to obtain a statement from a doctor that states that the veteran does not have the ability to perform the exertional or non-exertional activities normally required for substantial gainful employment with the regularity and for the duration normally required for substantial gainful employment.

In addition to considering the impact of service-connected conditions on the veteran’s ability to perform activities “normally required for substantially gainful employment,” the VA will also consider other evidence “of unusual limitations imposed by service-connected disabilities, including but not limited to “the nature and unusual frequency of hospitalizations or other required treatment, and unusual effects of required medication.”⁴⁵

5.4.5 Age, Non-Service-Connected Conditions and TDIU

VA regulations prohibit the VA from considering some factors that are difficult to separate from the analysis of whether a veteran is capable of substantial gainful employment. For example, the VA may not consider the veteran’s age,⁴⁶ or the veteran’s non-service-connected disabilities.⁴⁷ 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.⁴⁸ 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 affect of the arthritis on the veteran’s ability to

44. This change would also have an impact on the way in which the VA develops a veteran’s TDIU claim. VA medical examiners who conduct medical examinations for TDIU claims would need to provide medical opinions that not only include a description of “the nature, frequency, severity and duration of symptoms of the service-connected disabilities” but also discuss the impact of the service-connected condition(s) on the appellant’s exertional and, if relevant, non-exertional abilities.

45. 66 Fed. Reg. 49886, 49893 (Oct. 1, 2001) to be codified at 38 C.F.R. § 4.16(d)(2).

46. 38 C.F.R. § 4.19 (2004); *Fluharty v. Derwinski*, 2 Vet. App. 409, 411 (1992). The VA’s proposed revisions to the TDIU regulations continue the prohibition that the VA may not consider the veteran’s age as a factor in determining whether the veteran is unemployable. 66 Fed. Reg. 49886, 49893 (October 1, 2001) to be codified at 38 C.F.R. § 4.16(d)(e)(2).

47. 38 C.F.R. § 4.16(a) (2004). The VA’s proposed revisions to the TDIU regulations continue the prohibition that the VA may not consider a veteran’s non-service-connected conditions as a factor in determining whether the veteran is unemployable. 66 Fed. Reg. 49886, 49893 (October 1, 2001) to be codified at 38 C.F.R. § 4.16(d)(e)(1).

48. *Id.*

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.⁴⁹

The VA must provide a clear explanation of the current degree of unemployability attributable to the service-connected condition as compared to the degree of unemployability attributable to the non-service-connected conditions.⁵⁰ 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.⁵¹

5.4.6 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 substantial gainful employment.⁵² The VA may not "merely allude to educational and occupational history, [without] attempt[ing] . . . to relate these factors to the disabilities of the [veteran]."⁵³

The CAVC has stated: "[w]here the veteran submits a well-grounded 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."⁵⁴

***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*

49. Fluharty v. Derwinski, 2 Vet. App. 409, 412 (1992).

50. Cathell v. Brown, 8 Vet. App. 539, 544 (1995); see also Vettese v. Brown, 7 Vet. App. 31, 35 (1994); Hatlestad v. Brown, 5 Vet. App. 524, 529 (1993).

51. 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").

52. Cathell, 8 Vet. App. at 544.

53. *Id.*; see also Gleicher v. Derwinski, 2 Vet. App. 26, 28 (1991).

54. Beaty v. Brown, 6 Vet. App. 532, 537 (1994).

*his service-connected disability is positive evidence in a claim for TDIU benefits because it indicates that the veteran is unable to engage in substantial gainful employment.*⁵⁵

5.4.7 Other Factors That the VA Proposes to Disregard in Adjudicating TDIU Claims

Under the VA's proposed TDIU regulations, there are certain factors that the VA intends to disregard when adjudicating TDIU claims. These include: "a veteran's training or lack thereof, unless the evidence establishes that the service-connected disability or disabilities would impede further training;"⁵⁶ "the state of the economy in the veteran's community"⁵⁷; and "the fact that the veteran's previous employment has been eliminated due to such factors as technological advances or employer relocation."⁵⁸

5.4.8 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.⁵⁹

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 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.

^{55.} See *Foster v. Principi*, 4 Vet. App. 35 (1993); *Gleicher v. Derwinski*, 2 Vet. App. 26, 27 (1991).

^{56.} 66 Fed. Reg. 49886, 49893 (Oct. 1, 2001) to be codified at 38 C.F.R. § 4.16 (d)(2)(e)(3).

^{57.} 66 Fed. Reg. 49886, 49893 (Oct. 1, 2001) to be codified at 38 C.F.R. § 4.16 (d)(2)(e)(4).

^{58.} 66 Fed. Reg. 49886, 49893 (Oct. 1, 2001) to be codified at 38 C.F.R. § 4.16 (d)(2)(e)(4).

^{59.} 38 C.F.R. § 4.18 (2004).

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.⁶⁰

5.4.9 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).⁶¹ 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.⁶² If either claim includes facts that indicate that the veteran is unemployable, the VA is obligated to consider and adjudicate a TDIU claim.⁶³ For example, a veteran files a claim for a rating increase for an anxiety disorder, 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.

***Advocacy Tip** Some veterans who have inferred claims for TDIU may be entitled to an earlier effective date for their TDIU benefits.⁶⁴ In *Servello v. Derwinski*,⁶⁵ the court held that the existence of an inferred claim for TDIU might have entitled the veteran to an earlier effective date because under 38 U.S.C.S. § 5110(b)(2), the effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability occurred if the application is received within one year from such date. The court reasoned that because under 38 C.F.R. § 3.155(a), the VA was required to, but did not, forward to the veteran a TDIU application form, the one-year filing period for such*

60. *Id.*

61. A copy of this form may be found in the Forms Appendix.

62. See *AB v. Brown*, 6 Vet. App. 35, 38 (1983); see also *Roberson v. Principi*, 251 F.3d 1378, 1383 (Fed. Cir. 2001); *Norris v. West*, 12 Vet. App. 413, 421 (1999).

63. 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.

64. See Section 5.7.2 for a discussion of inferred claims.

65. 3 Vet. App. 196 (1992); see also *Norris v. West*, 12 Vet. App. 413, 420-21 (holding veteran filed an informal claim for TDIU where evidence indicated veteran satisfied criteria under 4.16(a) and there was evidence of current unemployability).

application did not begin to run.⁶⁶ Thus, as a matter of law, 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.

5.4.10 Special Factors That Are Relevant to TDIU Determinations

The following rules and other factors that are especially relevant to TDIU determinations:

- When the VA has been put on notice that the veteran is in receipt of Social Security Administration (SSA) disability benefits, it is obligated to obtain any relevant SSA records, because SSA benefits, which are also based on a determination by SSA that the veteran is unemployable, are relevant to the determination of [the] appellant's ability to secure a substantially gainful occupation under 38 C.F.R. § 4.16;⁶⁷
- The simple fact that a veteran may be young, or may be highly educated, or may have been recently employed, or may have had a long work career are not decisive, and standing alone are insufficient justifications to deny a TDIU claim;⁶⁸
- If the veteran is taking medication to treat the service-connected disability, the VA should make an assessment of the effects, or side effects, of the medication on the veteran's employability;⁶⁹ and
- Because the assessment of the cause of the veteran's unemployability can be difficult in cases in which non-service-connected disabilities and service-connected disabilities are present, the benefit of the doubt doctrine may be especially applicable to TDIU cases.⁷⁰

5.5 SPECIAL MONTHLY COMPENSATION: STATUTORY AWARDS OF COMPENSATION

Special Monthly Compensation (SMC) is a benefit established through statute that is paid in addition to the basic rates of compensation payable under the Schedule for Rating Disabilities.⁷¹ SMC is paid to compensate veterans for service-connected disabilities that involve anatomical loss or loss of use, such as loss of use of a hand or a foot, or impairment of the senses, such as loss of vision or hearing. While the basic rates of compensation are predicated on the average reduction in earning capacity, special monthly compensation benefits are based on noneconomic factors such as personal inconvenience, social inadaptability, or the profound nature of the

^{66.} *Servello*, 3 Vet. App. at 196; *see also* *Hamilton v. Brown*, 4 Vet. App. 528, 544-45 (1993) (en banc); *Quarles v. Derwinski*, 3 Vet. App. 129, 137 (1992); *but see* *Moody v. Principi*, 360 F.3d 1306, 1307 (the effective date of a TDIU award cannot be prior to the date that the first such formal or informal claim was made.)

^{67.} *See* *Baker v. West*, 11 Vet. App. 163, 169 (1998); *Cohen v. Brown*, 10 Vet. App. 128, 151 (1997); *Hayes v. Brown*, 9 Vet. App. 67, 73-74 (1996); *Lind v. Brown*, 3 Vet. App. 493, 494 (1992); *Murincsak*, 2 Vet. App. at 370-72; *Masors*, 2 Vet. App. at 187-88; *Quartuccio v. Principi*, 16 Vet. App. 183 (2002) (VA violated the duty to assist by failing to obtain Social Security records when it had actual notice that vet was receiving Social Security benefits.)

^{68.} *See* *Gleicher v. Derwinski*, 2 Vet. App. 26 (1992).

^{69.} *See* *Moyer v. Derwinski*, 2 Vet. App. 289, 294 (1992); *Mingo*, 2 Vet. App. at 53.

^{70.} *Fluharty*, 2 Vet. App. at 413.

^{71.} 38 U.S.C.S. § 1114.