

38 CFR 4.16, Total Disability Ratings based on Unemployability (IU)

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VA



U.S. Department
of Veterans Affairs

TDIU Objectives

- Define Individual Unemployability (TDIU)
- Eligibility criteria
- Extra Schedular Consideration
- Define Substantially Gainful Employment
- Define Protective Environment
- Other important factors to consider with unemployability
 - Housebound
 - Annual Verification

References

- 38 CFR 4.16, Total Disability Ratings for Compensation Based on Unemployability of the Individual
- 38 CFR 4.18, Unemployability
- M21-1MR, Part IV, Subpart ii, Chapter 2, Section F, Compensation Based on Individual Unemployability

Definition of TDIU

- Unemployability (38 CFR 4.18): A veteran may be considered as unemployable upon termination of employment which was provided on account of disability, or in which special consideration was given on account of the same, when it is satisfactorily shown that he or she is unable to secure further employment... However, consideration is to be given to the circumstances of employment in individual claims, and, if the employment was only occasional, intermittent, tryout or unsuccessful, or eventually terminated on account of the disability, present unemployability may be attributed to the static disability...

Definition of TDIU

Unemployability (38 CFR 4.16a): Total disability ratings for compensation may be assigned, where the schedular rating is less than total, 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: *Provided*

Definition of TDIU

Unemployability (38 CFR 4.16a):

- If there is only one such disability, this disability shall be ratable at 60 percent or more
- If there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more.

Definition of TDIU

Unemployability (38 CFR 4.16a):

For the purpose of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability:

- (1) Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable,
- (2) disabilities resulting from 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.

Definition of TDIU

Unemployability (38 CFR 4.16a):

Marginal employment shall not be considered substantially gainful employment.

- For purposes of this section, marginal employment generally shall be deemed to exist when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person.
- Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual income exceeds the poverty threshold. Consideration shall be given in all claims to the nature of the employment and the reason for termination.

Extra-schedular

Unemployability (38 CFR 4.16b): It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled. Therefore, rating boards should submit to the Director, Compensation Service, for **extra-schedular consideration** all cases of veterans who are unemployable by reason of service-connected disabilities, but who fail to meet the percentage standards set forth in paragraph (a) of this section.

- The rating board will include a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue.

How to claim TDIU

- A substantially complete VA Form 21-8940 is **required** to establish entitlement to IU because it gathers relevant and indispensable information regarding a claimant's disabilities and employment and educational histories.
- If IU is raised and the Veteran fails to complete and return VA Form 21-8940, VA must make a decision on the issue of IU in a rating decision based on the available evidence of record and may deny entitlement.
- VA Form 21-8940 requires the Veteran to furnish an employment history for the **last five years** that he or she worked. Information is contained in Blocks 14 and 15 of the VA Form 21-8940.
 - **Note:** The minimum required work history, for the purpose of requesting employment information from the Veteran's employer(s), must include the last year of employment.
 - Development for VA Form(s) 21-4192, Request for Employment Information in Connection with Claim for Disability Benefit, is routinely initiated at the time a claim for IU is received

Disability or Disabilities causing Unemployability

- As part of a substantially complete application for IU, VA requires the claimant with multiple SC disabilities to specify at least one disability he or she believes causes the unemployability.
- VA will address the evaluation of all SC disabilities claimed to cause unemployability as a part of the claim for entitlement to IU.

Note: Unemployed is not synonymous with unemployability

Supporting Evidence for TDIU

- Federal Records
 - VA Treatment
 - Vet Center Treatment
 - Social Security Administration
 - Vocational Rehabilitation Records
- Private Treatment Records
- Employment Records
- Lay Testimony

Employment Considerations

Substantially Gainful Employment: Employment at which non-disabled individuals earn their livelihood with earnings comparable to the particular occupation in the community where the resident resides

- Competitive Employment
- Earnings exceeding the amount established as the poverty threshold for one person
 - <http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html>.

Self Employment: Requires additional development to establish the degree to which a SC disability has impaired the Veteran's ability to engage in self-employment. Request the Veteran furnish:

- Types of work performed
- Number of hours worked per week
- Amount of time lost in the previous 12 months due to SC disabilities

Employment Considerations

Tightly Held Corporation: A ***tightly held corporation*** (or closely held corporation) is usually a family corporation. A corporation bearing the Veteran's name is usually indicative of a tightly held corporation.

- Since the Veteran may control the amount of wages paid to himself/herself, do not make a finding of marginal employment solely on the basis of low wages. A field examination might be requested
- The issue for consideration is whether the frequency and type of service performed by the Veteran equates to substantially gainful employment. Therefore, consideration of evidence that the Veteran received, or was entitled to receive, other remuneration from the corporation, such as stock dividends or loans, in lieu of wages.

National Guard/Reserves: Determine if a medical examiner has indicated if the Veteran is unable to perform his/her military duties due to SC disability, and that the latest STRs are of record (such records may aid in determining if the disability is preventing the Veteran from performing his/her current National Guard or reserve duties)

- If the evidence of record is not sufficient to award increased compensation based on IU, request that the unit commander complete and return [VA Form 21-4192](#).

Employment Considerations

Marginal Employment:

- Veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, U.S. Census Bureau, as the poverty threshold for one person, or
- facts-found basis, and includes, but is not limited to, employment in a protected environment, such as a family business or sheltered workshop, when earned annual income exceeds the poverty threshold.

Important:

- Marginal employment is by definition not substantially gainful employment.
- Do not consider amounts received from participation in the Veterans Health Administration's Compensated Work Therapy Program as income for IU purposes.

Employment Considerations

Marginal Employment:

- If the evidence or facts reflect that a Veteran is **capable only of marginal employment**, then the Veteran is incapable of securing or following a substantially gainful occupation and is therefore entitled to IU **if the Veteran's SC disabilities are the cause of that incapability**.
- When the facts of a case indicate that the Veteran's ability to work might be limited to marginal employment, a rating decision must address whether or not the Veteran is incapable of no more than marginal employment due to an SC disability(ies), even if the Veteran is not employed at the time.

Court Case: *Ortiz-Valles v. McDonald*,

Medical Evidence for IU Claims

A claim for IU must contain sufficient medical evidence to support a current evaluation of the SC disabilities alleged by the claimant to be causing unemployability.

- The evidence should reflect the Veteran's condition within the past 12 months and include, but need not be limited to
- the results of VA examination(s)
- hospital reports, and/or
- outpatient treatment records.

Important: A medical examination is ***not automatically required*** in every IU claim.

VA Examination

- We do not ask the examiner to opine as to whether or not the Veteran is “unemployable” due to his/her SC disabilities. A determination that a Veteran is unemployable is a legal determination that rests solely with the rating activity.
- We instead, request the examiner
 - comment on the Veteran's ability to function in an occupational environment, and
 - describe functional impairment caused solely by the SC disabilities.
 - It is acceptable for an examiner to comment regarding what kind of work tasks or work environments (if any), to include employment that is sedentary in nature and employment requiring physical labor, the Veteran could perform despite his/her SC disability(ies).

Other Considerations for TDIU

- Reasonably Raised Claims: When the evidence reasonably raises the issue of unemployability based on SC disability/ies we are required to develop to the Veteran for a claim.
 - Results in deferral for development of TDIU on rating decision.
- SMC S (housebound rate): 38 USC 1114(s) - A Veteran in receipt of IU benefits may be entitled to special monthly compensation (SMC) at the housebound rate if the evidence shows
 - unemployability is the result of *one* SC disability, and
 - Veteran has additional SC disability(ies) independently rated at least 60-percent disabling, or
 - been determined to be permanently housebound, in fact, as a result of the SC disability that rendered the Veteran unemployable.

Other Considerations for TDIU

- Dependents' Educational Assistance (DEA) under 38 USC Ch 5
 - There is no future examinations (consider TDIU as P&T)
- Monitoring Income for Veterans in Receipt of IU
 - Monitored through a yearly SSA wage data match
 - Earned income over poverty line Hine Info Tech Ctr will send a VA Form 21-4140, Employment Questionnaire to the Veteran for consideration of updated employment information
 - Monitoring is note required
 - when a Veteran has not been identified in SSA data match to have earned income above poverty line
 - Has IU rating in effect for 20 or more continuous years
 - IU rating was replaced with 100% schedular evaluation

*** Failure to complete VA Form 21-4140 can result in proposed and ultimate discontinuance of TDIU entitlement.***

Questions

