



NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

TDIU: THE BASICS, MARGINAL/ PROTECTED EMPLOYMENT, SEDENTARY EMPLOYMENT, AND OTHER ISSUES

TOPICS TO COVER:

- Basics of TDIU
 - General Principles
- When to Raise TDIU
- Substantial Gainful Employment
 - Marginal Employment
 - Protected Employment
- Sedentary Employment
- Special Monthly Compensation
- Income Verification



THE BASICS OF TDIU

GENERAL PRINCIPLES

- TDIU may be assigned where Vet who fails to meet the criteria for a 100% rating under VA's Rating Schedule is unable to secure substantially gainful employment due to SC disabilities
 - 38 C.F.R. § 4.16
- Vets who receive TDIU get paid as if their disability rating is 100%, even though their actual disability rating is below 100%

GENERAL PRINCIPLES

- TDIU ratings consider the effect that SC disabilities have on a particular Vet's ability to work
- Claim for TDIU is based on an acknowledgment that even though a rating less than 100% under the Rating Schedule may be correct objectively, there are *subjective* factors that warrant a 100% rating based on Vet's particular case

TDIU VS. VASRD

- Rating Schedule is based on “average impairment” of Vet’s occupational earning capacity
- TDIU is based on a PARTICULAR Vet’s ability to work

TWO WAYS TO QUALIFY FOR TDIU

- There are two ways to obtain TDIU:
 - “Schedular” TDIU
 - 38 C.F.R. § 4.16(a)
 - “Extraschedular” TDIU
 - 38 C.F.R. § 4.16(b)
- If Vet can’t work due to SC disabilities, Vet entitled to TDIU!



SCHEDULAR TDIU STEP

- Does Vet have a sufficient disability rating to qualify for TDIU under § 4.16(a)?
 - ONE SC disability rated 60% or higher; OR
 - MULTIPLE SC disabilities, with at least one rated 40% or higher AND a combined rating of 70% or higher

SCHEDULAR TDIU “ONE DISABILITY”

1. Disabilities 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

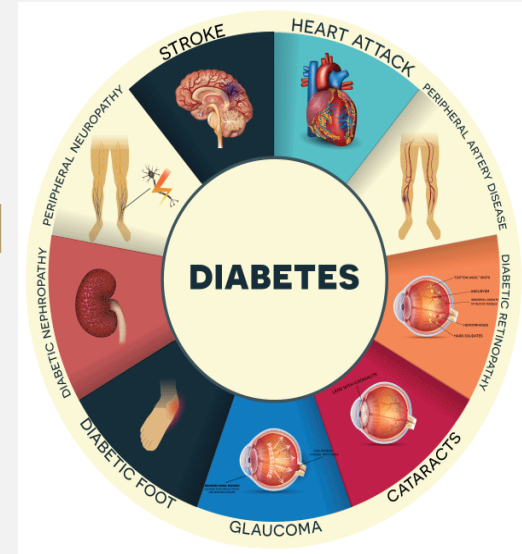


SCHEDULAR TDIU “ONE DISABILITY”

3. Disabilities affecting a single body system, *e.g.*, orthopedic, digestive, respiratory, etc.
4. Multiple injuries incurred in action
5. Multiple disabilities incurred as a POW

HYPO

- **Vet rated:**
 - 40% for Diabetes Mellitus
 - 10% for Erectile Dysfunction sec to DM
 - 10% for Peripheral Neuropathy of the right lower extremity sec to DM
 - 10% for Peripheral Neuropathy of the left lower extremity sec to DM



- **Combined evaluation = 60%**

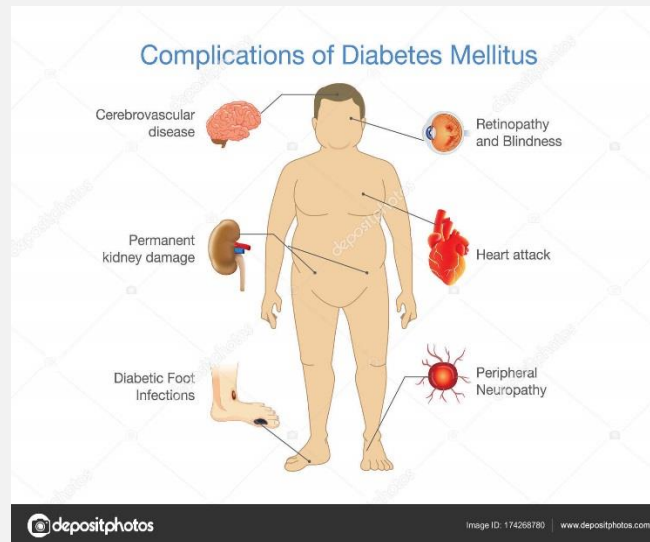
POLL #1

- Does Vet meet the requirements for schedular TDIU?
 - A. No, not one disability at 60%
 - B. No, not one disability at 40%
 - C. Yes, related disabilities combine to 60%
 - D. No, combined rating not 70%

ANSWER

C

- Disabilities have a common etiology, thus qualify as “one disability” rated at least 60% disabling



SCHEDULAR TDIU

STEP 2

- VA determines whether Vet is prevented from securing or following a “substantially gainful occupation” due to SC disabilities
- **If Vet unable to secure substantial gainful employment due to SC disabilities, then TDIU granted**

EXTRASCHEDULAR TDIU

- If the percentage requirements of 38 C.F.R. § 4.16(a) are not met:
 - VA should consider Vet's eligibility for TDIU under § 4.16(b)
 - All Vets who are unemployable because of SC disabilities shall be rated totally disabled

EXTRASCHEDULAR TDIU

- If Vet appears to be unemployable due to SC conditions, but does not meet the percentage requirements of § 4.16(a), VA is to submit the claim to the Director, Compensation Service, for extraschedular consideration
- VA should provide the Director with a full statement as to Vet's SC disabilities, employment history, educational and vocational attainment, and all other factors having a bearing on the issue

RAY V. WILKIE

- **CAVC held:**
 - BVA's initial finding that extraschedular referral is warranted is a factual one that does not bind the Board if claim returns
 - Threshold for referral is lower than for granting claim
 - Referral occurs when there is evidence that Vet may be unable to secure or follow substantially gainful occupation
 - If BVA denies TDIU when claim returns, it must provide adequate reasons or bases for deviating from its earlier referral decision
 - *Ray v. Wilkie*, 31 Vet. App. 58 (2019)

§ 3.321(b)(1)
VS.
§ 4.16(b)

- **§ 3.321(b)(1) (extraschedular rating for single disability):**
 - Where schedular evaluations are found to be inadequate
 - Frequent hospitalizations or marked interference with employment
- **§ 4.16(b) (extraschedular TDIU)**
 - Unable to secure and follow a substantially gainful occupation by reason of SC disabilities
- **Don't let VA confuse these standards!**

FACTORS VA CAN CONSIDER

- Educational background
 - *Pederson v. McDonald*, 27 Vet. App. 276 (2015)
- Occupational background
 - *Cathell v. Brown*, 8 Vet. App. 539, 544 (1995)



FACTORS VA CAN CONSIDER

- **Effect SC disabilities have on Vet's ability to work**
 - Sometimes it is because of the combination of SC disabilities
 - If so, VA must discuss the combined effects of Vet's multiple SC disabilities
 - *Floore v. Shinseki*, 26 Vet. App. 376, 381-82 (2013)
 - *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013)

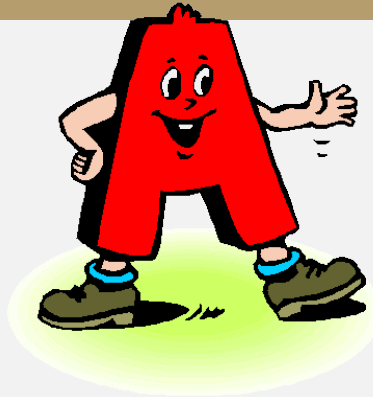
HYPO

- Vet had high school education and labor-intensive work history
- VA exam stated Vet was capable of sedentary work
- BVA denied TDIU because “while his education and work experience may limit his employment opportunities, it does not seem that the lack of a college degree would preclude him from all sedentary employment.”
- At CAVC, Vet argued that BVA failed to adequately consider his high school education and labor-intensive work history in evaluating TDIU

POLL #2

- **Was BVA's reason for denial adequate?**
 - A. Yes, Vet did not point to any evidence
 - B. No, it should have discussed Vet's history
 - C. Not sure

ANSWER



- Vet did not point to any evidence that his education and employment history would preclude less than marginal employment
- Court rejected Vet's argument that a college degree was a prerequisite to sedentary employment, and that BVA was required to suggest what types of sedentary employment Vet was capable of obtaining

ADVOCACY ADVICE

- Submit argument/evidence explaining how Vet's educational and occupational history, when viewed with particular SC disabilities, would preclude substantially gainful employment
- Submit lay evidence outlining educational and occupational limitations relevant to types of jobs for which he would be qualified
- A professional opinion, especially one from a vocational expert, is usually helpful

FACTORS VA CANNOT CONSIDER

- Vet's age
- Effect of NSC disabilities on Vet's ability to work



FACTORS VA CANNOT CONSIDER

- Reason Vet left prior employment
 - If Vet left prior employment because of retirement or other reason unrelated to SC disabilities, Board cannot deny solely for that reason
 - Relevant inquiry is whether SC disabilities currently render Vet unemployable
 - *Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993)

HYPO

- 2015 – Vet retired based on age
- 2021 – RO grants SC for PTSD at 70%
- 2021 – RO denied TDIU because Vet retired due to age and was not SC at time of retirement. RO also noted Vet was 80



POLL #3

- Is the TDIU denial correct?
 - A. No, all that matters is current severity
 - B. Yes, Vet not SC for PTSD in 2015
 - C. Yes, retirement not due to disability
 - D. Yes, he was 80

ANSWER



- All that matters is whether Vet cannot work now due to SC disabilities
- Age and reasons why he left employment are not relevant

CLAIMS FOR TDIU



ADVOCACY ADVICE

- Find out if Vet is working in a substantial & gainful job
- If not, find out if a case can be made that Vet is unable to obtain or maintain substantial gainful occupation due to SC conditions



WHEN MUST VA ADDRESS TDIU?

- **VA must address TDIU, when it is either:**
 - Expressly claimed; or
 - Reasonably raised by the record
- **A “claim” for TDIU can be either:**
 - A free-standing claim; or
 - Part of a claim for increase for a specific SC condition or conditions

EXPLICIT TDIU CLAIM

- TDIU claim can be made by filing VA Form 21-8940, *Veteran's Application for Increased Compensation Based on Unemployability*.
- VA will almost always require that this form be submitted before it adjudicates a TDIU claim, so advocates can save time in the claims process by submitting the form as early as possible

WHEN CAN TDIU BE RAISED?

- A claim for a TDIU is also deemed to have been submitted as part of any claim for a higher initial rating or an increased rating, when evidence of unemployability related to the underlying condition is submitted during the pendency of the claim
 - *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)
 - *Rice v. Shinseki*, 22 Vet. App. 447 (2009)

WHAT CONSTITUTES A REASONABLY RAISED TDIU CLAIM?

- TDIU claim would be reasonably raised if Vet's c-file contained any of the following:
 - Letter from a psychiatrist stating that SC PTSD symptoms prevent Vet from getting and keeping a job
 - Statement from most recent employer that explains the reasons Vet was fired, and it is apparent those reasons are related to Vet's SC condition(s)
 - VA exam report stating Vet's SC condition(s) prevent him from working full-time

HYPO

- Vet has not worked in the last 3 years
- Vet is SC for the following conditions:
 - PTSD at 50%
 - Back condition at 20%
 - Left knee condition at 20%
 - Tinnitus at 10%



POLL #4

Is entitlement to TDIU reasonably raised based on the previous facts alone?

- A. Yes, TDIU is always reasonably raised if Vet unemployed
- B. Yes, because Vet meets criteria for schedular TDIU
- C. No, there is no evidence connecting unemployment to SC conditions
- D. Not sure

ANSWER



- TDIU would not be reasonably raised, because there is no evidence indicating Vet's unemployment is related to SC conditions
- There is a difference between being unemployed and unemployability
 - **Vet may be able to work, but chooses not to**

WHAT CONSTITUTES A REASONABLY RAISED TDIU CLAIM?

- *Manual M21-1* provides more narrow guidance on a reasonably raised TDIU claim:
 - Vet's SC rating meets the minimum schedular criteria found in 38 C.F.R. § 4.16(a), and
 - There is current evidence of unemployability due to SC disability(ies) in the c-file or under VA control
 - Manual M21-1, VIII.iv.3.B.1.f (change date July 29, 2021)
- "Requirement" that Vet meet percentage requirements for schedular TDIU under § 4.16(a) is NOT supported by case law or VA General Counsel precedent opinions

WHAT CONSTITUTES A REASONABLY RAISED TDIU CLAIM?

- “once a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the VA must consider TDIU.”
 - *Roberson v. Principi*, 251 F.3d 1378, 1380 (Fed. Cir. 2001)
- “A claim to TDIU benefits is not a free-standing claim that must be pled with specificity; it is implicitly raised whenever a *pro se* veteran, who presents cogent evidence of unemployability, seeks to obtain a higher disability rating.”
 - *Comer v. Peake*, 552 F.3d 1362 (Fed. Cir. 2009)

ADVOCACY ADVICE

- If a Vet wishes to file for TDIU, and already meets the percentage requirements of 38 C.F.R. § 4.16(a), the Vet should explicitly raise the issue
- However, if Vet does not meet the requirements for schedular TDIU, and would have to pursue his or her claim under § 4.16(b), whether to explicitly raise the issue of TDIU is a strategic decision that Vet and representative should discuss

ADVOCACY ADVICE

- Vet's claim for increased rating or SC for a new disability should protect the effective date for a TDIU award under both §§ 4.16(a) and (b), as long as Vet submits evidence that reasonably or explicitly raises a TDIU claim during the pendency of that claim, and the claimed disability contributes to unemployability
- Vet may want to wait until VA issues rating decision, then file review request/appeal arguing that a higher rating, including TDIU, is warranted

WHAT IF.....

- During the pendency of an appeal of an increased rating claim, the Vet is granted TDIU for part of the period on appeal?

Can the Board decide TDIU for the other part of the period on appeal?

OR

Does the Vet need to appeal / seek review of the rating decision that only granted TDIU for part of the period?

HARPER V. WILKIE

- Unless VA grants TDIU for the entire period on appeal, then it is still part of the appeal and BVA has jurisdiction over it
- BVA cannot find that issue is not on appeal because Vet did not appeal/seek review of the effective date assigned in rating decision that granted TDIU
- Check to see if TDIU was granted for the entire appeal period. If not, make sure VA addresses it
 - *Harper v. Wilkie*, 30 Vet. App. 356 (2019)

SUBSTANTIALLY GAINFUL EMPLOYMENT

WHAT IS SUBSTANTIALLY GAINFUL EMPLOYMENT?

- VA has not defined substantially gainful employment in the CFR

NOT DONE
NOT DONE

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- “Unable to secure and follow a substantially gainful occupation” in § 4.16(b) (and by implication § 4.16(a)) has 2 components:

- **Economic component**



- **Non-economic component**

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- **Economic component**

- An occupation earning more than marginal income (outside of a protected environment) as determined by the U.S. Department of Commerce as the poverty threshold for one person

- 2021 poverty threshold for a single person under age 65 is \$13,465



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- **Noneconomic component:**
 - Vet's ability to secure or follow employment producing income exceeding the poverty threshold



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- Attention must be given to:
 - Vet's history, education, skills, and training
 - Whether Vet has the physical ability to perform the type of activities required by the occupation at issue
 - **Physical ability:** exertional and non-exertional
 - **Activities:** sedentary, light, medium, heavy, or very heavy
 - **Relevant factors may include:** Limits on lifting, bending, sitting, standing, walking and auditory/visual limits

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- Attention must be given to (cont.):
 - Whether Vet has the mental ability perform the activities required by the occupation at issue:
 - **Relevant factors may include limits concerning:**
 - Memory
 - Concentration
 - Ability to adapt to change, handle work place stress, get along with coworkers, and demonstrate reliability and productivity

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- Factors are NOT a checklist
- A factor only needs to be considered if raised by evidence of record
 - *Ray v. Wilkie*, 31 Vet. App. 58 (2019)



TAKEAWAY

- When addressing “substantially gainful occupation,” VA must look at both economic and noneconomic factors
- Make sure the VA pays attention to all noneconomic factors raised by the evidence



MARGINAL EMPLOYMENT

- NOT substantially gainful employment:
 1. Vet's annual income does not exceed the poverty threshold
 2. Protected employment where Vet's income is higher than poverty threshold, such as
 - ▶ Family business
 - ▶ Sheltered workplace

QUESTION

- How would a good advocate address the following seemingly unfavorable vocational opinion?
 - “The Vet is currently unemployed and claims he is unable to work due to his SC PTSD. Based on my review of the evidence, I think it is highly likely that the Vet would be able to work, at least on a part-time basis. His PTSD symptoms should not prevent from being able to perform clerical tasks at least 10-15 hours a week.”

ANSWER

- Part time work (10-15 hours a week) ≠ substantial gainful employment
- Argue this opinion supports TDIU claim, as it shows Vet only capable of marginal employment
- VA has argued that it only must consider marginal employment in cases where Vet is actually employed, but CAVC has held that consideration of marginal employment is not limited to cases where Vet is employed
 - *Ortiz-Valles v. McDonald*, 28 Vet. App. 65 (2016)

ADVOCACY ADVICE

- If Vet not currently working, but evidence suggests Vet may be capable of some work:
 - Search for evidence suggesting Vet would only be capable of marginal employment
 - Develop evidence that Vet only capable of marginal employment (ex. vocational opinion, medical opinion, and/or lay statement describing Vet's physical and mental limitations due to SC conditions)
 - Cite *Ortiz-Valles*

PROTECTED EMPLOYMENT

HYPO

- **Vet SC for:**
 - Post-surgery ulcerative colitis
 - Urge incontinence
 - DJD of both hips
 - Hemorrhoids
 - Pouchitis

HYPO

- **Private physician letter:**
 - Vet had loose stools and abdominal discomfort making it difficult to stand or be away from a bathroom for prolonged periods of time
- **VA exam:**
 - Vet reported 6-10 bowel movements per day
 - Had monthly episodes of pouchitis which lasted 3-4 days
 - During episode of pouchitis, had 16-20 bowel movements per day



HYPO



- **VA exam (cont.):**
 - Vet worked full-time as park ranger where he spent most of day in car (salary: \$32,000)
 - He said he was only able to work because he had bathrooms mapped out on his routes (knew location of every restroom in the park)
 - Had to stay home during episodes of pouchitis

HYPO

- **BVA hearing:**

- During pouchitis flare-ups, he would have to change underwear 2-3 times a day
- Had to resign from previous job as highway patrolman due to ulcerative colitis
- At current job, condition prevented him from attending training lunches or doing PT for fear of soiling himself
- Additional symptoms included: abdominal cramping and pain, bloody diarrhea, nausea, vomiting, pulling pain upon physical activity

HYPO

- **BVA hearing (cont.):**
 - He was only able to keep his job due to many accommodations made by employer including:
 - **Being assigned only to duty stations near restrooms**
 - **Not being required to remain at emergency scenes**
 - **Always having another ranger on call for him in case he needed to leave work early for medical reasons**

HYPO

- **BVA hearing (cont.)**
 - **Employer accommodations (cont.)**
 - **Had to leave work early about 3 times per month**
 - **Unable to go to work 2-3 times per month**
 - **Switched to night shift due to repeated absences for medical appointments**
 - **Employer stated it would be too costly to employ Vet without these accommodations**

HYPO

- **Vocational opinion:**
 - Vet required 10-15 restroom breaks per workday, lasting 20 mins each
 - Employer gave Vet “full liberty” to take rest breaks as needed (including to lie down to restore Vet’s composure and energy)

HYPO

- **Vocational opinion (cont.):**
 - Vet's job was tantamount to a protected employment situation, because no typical employer can or would allow/accommodate a worker to take over 3 hours per workday for bathroom break purposes
 - It is reasonable for an employer to terminate an employee if off task work exceeds 45-60 mins

HYPOTHESIS

- **Vocational opinion (cont.):**
 - Vet's need for bathroom/rest breaks renders him totally unemployable for any competitive occupation and his present employment situation far exceeds the bounds of typical or normally-expected employer accommodations of a disabled worker
 - Vet's employment situation is an "unprecedented accommodation" and was "completely contingent upon the unprecedented beneficence" of his employer

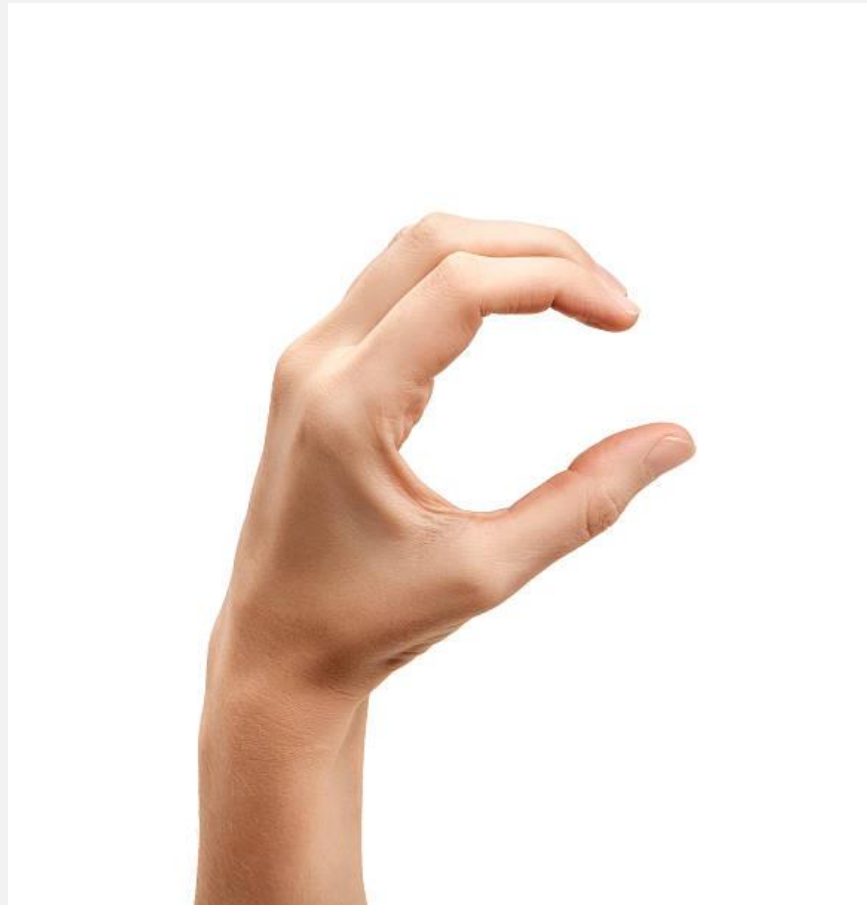
HYPO

- **BVA denied claim, finding:**
 - Vet's employment was not protected (or marginal) because it involved substantial responsibilities (carrying a weapon, driving patrol car, dealing with rule violators) and the employer's accommodations allowed Vet to perform his job successfully and on a full-time basis

POLL #5

- **Based on these facts, do you think the Board's finding regarding protected employment was correct?**
 - A. Yes, employer's accommodations were required by law
 - B. No, these are exceptional accommodations
 - C. No, there is no definition of protected employment
 - D. B and C

ANSWER



HYPO – RESULT

- CAVC vacated and remanded BVA decision
- Found VA hasn't sufficiently defined "protected employment"
- "The Court simply cannot sanction a statement of reasons or bases that amounts to finding that [Vet] was not employed in a protected environment 'because I say so.' "
- "It is VA's responsibility to define the terms contained within its regulations, and . . . we will give VA the first opportunity to do so."
 - *Cantrell v. Shulkin*, 28 Vet. App. 382 (2017)

ARLINE V. MCDONOUGH, VET. APP. NO. 18-0765 (JULY 1, 2021)

▪ **CAVC wrote:**

- “We referred this case to a panel of the Court . . . to address the meaning of the phrase ‘employment in a protected environment’ in 38 C.F.R. § 4.16(a). Although we have given the Secretary ample opportunity to define this phrase, . . . he has not done so and thus this issue continues to arise. . . . After careful consideration of the record, briefs, and issues presented at oral argument, we must reluctantly leave the definition of that phrase for another day.””

ARLINE V. MCDONOUGH, VET. APP. NO. 18-0765 (JULY 1, 2021)

▪ But...



- In a footnote, the CAVC stated that although they did not reach the question of what “employment in a protected environment” means, “our dissenting colleague sets forth helpful guidance for assessing the meaning of this phrase”
- Judge Bartley gave 3 groups of non-exhaustive factors that she took from the parties’ arguments

1ST GROUP OF FACTORS: THE EMPLOYEE IN THE JOB ITSELF

- **The type and extent of accommodations a Vet receives from an employer may be relevant:**
 - Evidence that a Vet requires substantial accommodations to effectively perform duties suggests a protected environment
 - Evidence of few or less extensive accommodations may weigh against such a finding
 - The magnitude of job responsibilities may bear on that analysis, since some employment is by its nature inconsistent with a finding of a protected employment

2ND GROUP OF FACTORS: THE EMPLOYER

- **Employer behavior or intent toward Vet and employer classification of the position may be relevant:**
 - Employer behavior may indicate Vet is shielded from consequences of non- or poor performance of job duties
 - Employer's benevolent intent in hiring and promoting a Vet
 - But because there may be reasons other than benevolence for providing a protected environment, intent not dispositive
 - Evidence the Vet works for an institutional employer who traditionally provides sheltered employment may indicate a protected environment
 - An employer whose goal of employment is principally charitable or rehabilitative is more likely to offer employment in a protected environment than profit-motivated enterprises

3RD GROUP OF FACTORS: ECONOMIC

- Income above the poverty threshold is not determinative, but
 - High income may counter against a protected environment
 - Income that only marginally exceeds the poverty threshold may indicate a protected environment

ADVOCACY ADVICE

- Try to show that Vet would not be able to maintain employment in a normal setting without the exceptional accommodations made by his/her employer
- Argue that current job is marginal employment if annual income below poverty threshold
- Discuss the 3 groups of factors discussed in Arline dissent
 - **The employee in the job itself**
 - **The employer's behavior, intent, and type of employment**
 - **Economic factor – discuss income, if low**

HYPO

- **11/1968 – 11/1971: Vet served on active duty**
- **SC for PTSD at 70%, symptoms included:**
 - Inability to establish and maintain effective relationships
 - Impaired impulse control
- **1990: Vet opened car wash where he worked long hours to cope with PTSD**

HYPO

- **2/2011: Filed TDIU claim**
 - Previously made \$1,200 - \$1,600 per month, working 60-80 hours a week at his car wash (between \$14,400 - \$19,200 a year)
 - He could no longer work full-time due to PTSD
 - Reported that he often had to shelter in his office and take a break from work

HYPO

- **VA treatment records:**
 - Vet has worked less at car wash business in the last several months because he has experienced problems with both customers and employees
 - He has withdrawn from customer contact due to irritable temper
 - One of his long-time employees asked him to have less contact with customers and staff
 - He has a manager who basically runs the business for him, since he has difficulty working with people due to PTSD

HYPO

- **6/2012 VA Exam:**

- Vet's PTSD symptoms limit his employment abilities to an extent, but do not render him totally incapable of work
- Vet's PTSD has some limiting affect on his work ability due to increased irritability around customers, but it does not render him unemployable if he manages a business with limited customer contact

HYPO

- **What argument would you make in support of a claim for TDIU?**

- **How would you address the VA exam stating Vet is capable of working?**

HYPO – ADVOCACY ARGUMENTS

- **His job constitutes protected employment (both a family business and sheltered workshop)**
- **He is the boss, allowing him to make accommodations for himself:**
 - Working part time
 - Limited contact with customers
 - Sheltering in his office when he needs a break
 - Hiring manager to run day-to-day operations
 - Forgiveness for his temper and getting into conflicts with customers (which would normally result in termination)

HYPO – ADVOCACY ARGUMENTS

- **VA examiner said Vet's PTSD does not render him "totally incapable of work," which does not mean he is capable of substantial gainful employment**
- **Also, if Vet was making \$19,200 a year (at most) while working 60-80 hours a week, how much is he making working just part time?**
- **Argue that current job is marginal employment if annual income below poverty threshold**

ADVOCACY ADVICE – PROTECTED EMPLOYMENT

- **When framing an argument that Vet's job is protected employment, consider:**
 - Hours worked per week
 - Tasks performed
 - Amount of interaction with co-workers, supervisor, and customers
 - Vet's relationship to employer (family, friend, etc.)
 - Did Vet have highly decorated military career and employer employs Vet out of gratitude?
 - Relatively high pay for minimal work
 - Accommodations made for Vet

ADVOCACY ADVICE – PROTECTED EMPLOYMENT

- **Examples of employer accommodations:**
 - Allowing frequent absences from work
 - Allowing frequent breaks during workday
 - No consequences for poor performance
 - Allowing Vet to have limited interactions with others
 - Treatment different than other employees

DEVELOPING EVIDENCE OF PROTECTED EMPLOYMENT

- **Obtain vocational opinion stating Vet's job constitutes protected employment**
- **Resources for finding a vocational expert:**
 - Contact local legal aid office and ask to speak with an attorney who handles SSA disability cases
 - Private attorneys who practice in SSA disability
 - Google search
 - Other VSOs

DEVELOPING EVIDENCE OF PROTECTED EMPLOYMENT

- **Obtain lay statements that detail accommodations made for Vet**
 - From Vet
 - From supervisor or co-workers
- **Search for BVA decisions (especially since Apr. 2017) which have similar facts where BVA concluded Vet's employment was protected**
 - <https://www.index.va.gov/search/va/bva.jsp>

BVA DECISIONS GRANTING TDIU BASED ON PROTECTED EMPLOYMENT

- **Vet hired as a “runner” for friend’s construction company that hired disabled Vets**
- **The friend, knowing Vet’s limitations, created “runner” position specially for Vet, b/c Vet was unable to do other work at the company**
- **“These facts suggest the friend went out of his way to create a specific position for the Veteran outside of the benefit to the company.”**
 - **Citation Number: 1720031; Decision Date: 6/6/2017**

BVA DECISIONS GRANTING TDIU BASED ON PROTECTED EMPLOYMENT

- **Vet hired in 2004 to work full-time selling furniture**
- **In 2008, Vet's health started to decline and the store manager noticed Vet had difficulty picking up small items and he frequently dropped items**
- **Store manager said Vet was a great producer and a valued employee, so they adjusted his work responsibilities and allowed him to only work half the hours normally required**
 - **Citation Number: 1730700; Decision Date: 8/1/2017**

BVA DECISIONS GRANTING TDIU BASED ON PROTECTED EMPLOYMENT

- **Vet owned barber shop, but due to PTSD, he did not enjoy being around loud individuals, and this resulted in a loss of customers and employees**
- **Vet's wife handled the financial affairs of the business, b/c Vet was unable to pay bills and manage money**
- **"Here the testimony and examination reports show the the Veteran has had little actual involvement in his business in recent years and that it has been largely operated by his spouse."**
 - **Citation Number: 1745969; Decision Date: 10/16/2017**

SEDENTARY EMPLOYMENT

SEDENTARY EMPLOYMENT

- Vets are routinely denied TDIU based on VA medical opinions in which the examiner opines that the Vet is capable of “sedentary” or “light” work
- But, the concept of sedentary work is absent from § 4.16
- CAVC addressed this issue in *Withers v. Wilkie*, 30 Vet.App. 139 (2018)

SEDENTARY EMPLOYMENT

- **CAVC holdings in *Withers*:**

- If a Vet's ability to perform sedentary work is a basis for VA's denial of TDIU, the meaning of sedentary work must be determined from the medical opinion in which it is used. VA must explain:
 - the meaning of sedentary work, if not apparent from the discussion of the opinion, and
 - how the concept of sedentary work factors into the Vet's overall disability picture and vocational history, and the Vet's ability to secure or follow a substantially gainful occupation

SEDENTARY EMPLOYMENT

- **CAVC holdings in *Withers*:**
 - When an examiner describes certain types of functional limitations and still opines that a Vet is capable of sedentary work, VA may need to determine whether a common-sense inference can be drawn that the concept of sedentary work, as understood by the examiner, does not encompass the physical or mental acts that the Vet is incapable of performing

SEDENTARY EMPLOYMENT

- **CAVC holdings in *Withers*:**
 - Before VA can rely on an examiner's finding that a Vet is capable of sedentary work to deny TDIU, it must ensure that the finding is consistent with the medical evidence as a whole
 - If VA bases denial of TDIU in part on the conclusion that a Vet is capable of sedentary work, then it must explain how it interprets that concept in the context of that case, including how it squares with the Vet's educational and occupational history

SEDENTARY EMPLOYMENT

- **CAVC noted:**
 - “Unless the concept of sedentary work is clarified through VA’s regulatory process, the meaning and relevance of the term will have to be discerned on a case-by-case basis from the medical and lay evidence presented and in light of each veteran’s education, training, and work history.”

ROUSE V. MCDONOUGH, **34 VET. APP. 43 (2021)**

- **Vet argued that BVA erred by not adopting the definition in SSA regulations for the term “sedentary work”**
 - Employment which involves sitting as much as two-thirds of an 8-hour day, or a little more than 5 hours
- **CAVC reiterated its holding in *Withers* that it could not provide a fixed definition for “sedentary work,” because it does not appear in any statute or regulation related to veterans benefits and so has no independent legal significance**
 - **BVA did not err by not adopting the SSA definition**

SEDENTARY EMPLOYMENT

- **Takeaways:**

- **Appeal/seek review if VA denies TDIU because Vet can perform sedentary work, but does not clearly:**

1. Explain what sedentary employment means in the context of the particular case

- **Meaning should be based on medical evidence of record**

2. Explain how Vet is capable of such sedentary employment based on Vet's educational and occupational history

ADVOCACY ADVICE

- **Submit statements regarding possible education or occupational limitations that could preclude sedentary or light work, such as lack of experience with computers, supervisory work, data entry, customer service, etc.**
- **Submit statements about difficulties caused by SC psychiatric and physical disabilities related to communication, interacting with others, remaining seated for periods of time, etc.**

REMEMBER TO LOOK OUT FOR THIS



SMC(S)

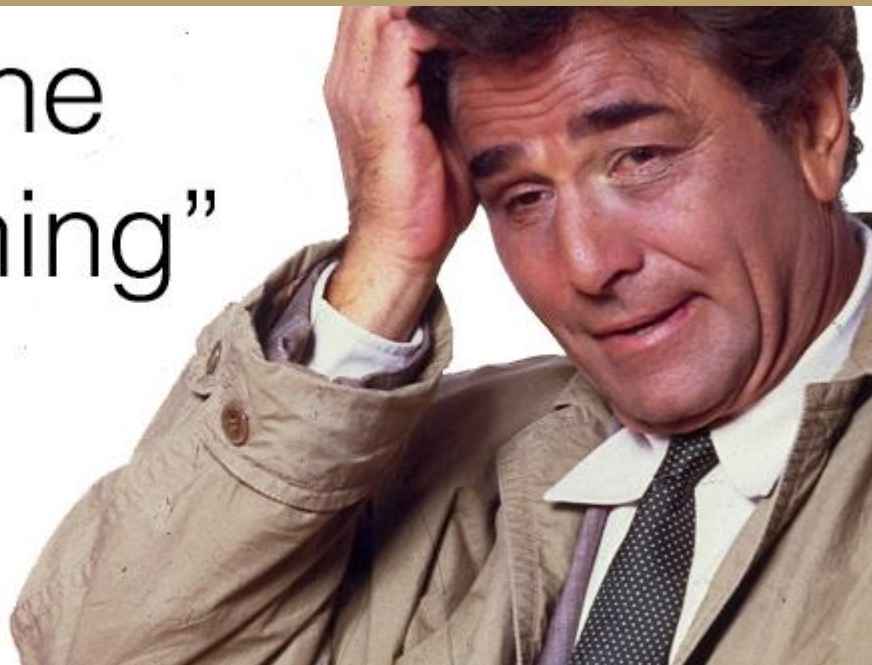
- If one SC condition alone can support TDIU, it counts as single disability rated 100% for SMC(s) purposes
- SMC(s) is available to Vets who have:
 - One SC disability rated 100%; and
 - Additional SC disabilities that combine to at least 60%
- A single disability rated at 100% does not have to be rated at 100% under the Rating Schedule if the single disability alone would prevent Vet from working
 - *Bradley v. Peake*, 22 Vet. App. 280 (2008)

SMC AND TDIU

- “One disability rule” for determining whether multiple disabilities can be considered one disability for purposes of meeting TDIU disability percentage requirements under § 4.16(a) **does not apply** to determination of whether one disability is rated 100% disabling or prevents Vet from working for purposes of SMC(s)
 - **Must be a single service-connected disability!**
 - *Youngblood v Wilkie*, 31 Vet. App. 412 (2019)



“Just one
more thing”



EMPLOYMENT VERIFICATION PROCESS

- **Old Process:**

- Every year VA sent Vet a VA Form 21-4140, *Employment Questionnaire*
- If no response w/in 30 days, VA would propose to discontinue
- If response received, VA would determine the action based on info provided

EMPLOYMENT VERIFICATION PROCESS

- **New Process:**
 - VA uses a data wage match with SSA to identify Vets receiving TDIU who have earned wages above poverty threshold
 - Baseline: poverty threshold of a single Vet under 65
 - Those Vets will get VA Form 21-4140

QUESTIONS?

