

Slide 1 - Title



Rating Reductions

Compensation Service

September 2020



The slide features a blue background with a subtle pattern of stars and stripes. At the top center is the official seal of the Department of Veterans Affairs, United States of America, which includes an eagle with wings spread, holding an olive branch and arrows, with a shield on its chest. The seal is encircled by the text 'DEPARTMENT OF VETERANS AFFAIRS' and 'UNITED STATES OF AMERICA'. Below the seal, the title 'Rating Reductions' is centered in a large, dark blue font. Underneath the title, the words 'Compensation Service' are positioned on the left and 'September 2020' on the right, both in a smaller dark blue font. At the bottom center, there are two navigation arrows: a grey arrow pointing left and a blue arrow pointing right.

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Objectives

Upon conclusion of the lesson and given the available references, the RVSRs will be able to:

- define due process procedures
- identify the circumstances under which due process issuance is and is not required
- differentiate between rating actions bearing adverse impact(s) on the beneficiary



Notes

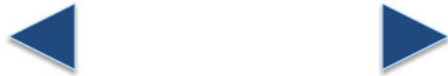
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Motivation

Although it is our continual duty as decision makers to maximize claimants' benefit entitlements and "grant when we can," routine evidentiary review periodically necessitates the revision of previous decisions and assignment of reduced or less advantageous benefits.

This lesson will equip participants with the knowledge needed to properly implement ratings actions to reduce benefits in accordance with existing regulatory and procedural guidance.



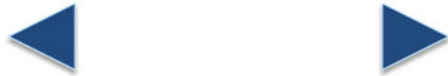
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References

- [§ 3.103 – Procedural due process and other rights](#)
- [§ 3.105 – Revision of decisions](#)
- [§ 3.327 – Reexaminations](#)
- [§ 3.344 – Stabilization of disability evaluations](#)
- [§ 3.400 – General \(Effective dates\)](#)
- [§ 3.500 – General \(Reductions and discontinuances\)](#)
- [§ 3.501 – Veterans \(Reductions and discontinuances\)](#)
- [§ 3.655 – Failure to report for Department of Veterans Affairs examination](#)
- [§ 3.951 – Preservation of disability ratings](#)
- [§ 3.952 – Protected ratings](#)
- [§ 3.957 – Service connection](#)



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References Continued

- [M21-1, Part I, Chapter 2, – Due Process](#)
- [M21-5, Chapter 5 – Higher Level Review \(HLR\) Procedures](#)
- [M21-5, Chapter 6, Section B – Establishing an Appellate Record](#)
- [M21-1, Part III, Subpart iv, Chapter 2, Section B – Revisions of Decisions](#)
- [M21-1, Part III, Subpart iv, Chapter 8 – Competency, Due Process and Protected Ratings](#)
- [M21-1, Part IV, Subpart ii, Chapter 2, Section F – Compensation Based on Individual Unemployability](#)
- [M21-1, Part IV, Subpart ii, Chapter 3, Section A.4. – Reductions in Disability Evaluations Under 38 CFR 3.105\(e\)](#)
- [M21-1, Part IV, Subpart ii, Chapter 3, Section B.3. – Referrals for and Processing of Failure to Report \(FTR\) Rating Decisions](#)
- [RVSR Assistant - RVSR Effective Dates](#)



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Origins of Due Process


The Fifth Amendment to the United States Constitution states,
"No person shall be deprived of life, liberty, or property without due process of law."

This amendment ensures that all citizens have the right of due process.





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Due Process Requirements

- Due process must be provided under the correct provision and include the required elements as specified in [§ 3.103\(b\)](#).
- Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right to representation.
- Decisions to propose reduce a benefit and/or implement a revision of a previous decision must conform to the guidelines outlined in [§ 3.105](#).
- [M21-1, Part III, Subpart iv, Chapter 8, Section B](#), and [M21-1, Part III, Subpart iv, Chapter 8, Section D](#), provide guidance pertaining to due process to include information about proposed rating decisions and reducing awards after due process notification is sent.
- [M21-1, Part I, Chapter 2, Section B](#), outlines when a corrected notice of proposed adverse action is required.



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Predetermination Hearings

- Due process provisions guarantee Veterans' rights to a personal hearing before an unbiased representative.



- If an adverse action is proposed, payments will continue at their current rate if a beneficiary requests a hearing within 30 days of the date the notice of proposed adverse action was sent.



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Revision of Decisions under 38 CFR 3.105

38 CFR 3.105 states, *the effective date of a rating which results in the reduction or discontinuance of an award will be in accordance with the facts found except as provided in § 3.105.*

The provisions of 38 CFR 3.105 do not apply in situations:

- where an award was based on an act of commission or omission by a payee, or with the payee's knowledge
- where there's been a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue
- where the evidence establishes that service connection was clearly illegal



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Proposed Rating Action

Certain types of adverse actions require preparation of a proposed rating decision. Situations requiring a proposed rating include, but are not limited to:


- reduction of evaluation for compensation
- reduction of pension, in certain circumstances
- severance of service connection (SC), or
- determinations of incompetency for payment purposes

***Exception:** Do not prepare a proposed rating decision when the evaluation of a specific disability is reduced, but the total amount of compensation is not reduced. For example, if a reduction in a Veteran's service-connected knee evaluation would not reduce his/her overall combined evaluation, a proposed rating decision is not necessary.*





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Preparing a Proposed Rating Decision

| | |
|--|--|
| <p><u>Reduction for Improvement</u></p> <ul style="list-style-type: none">• § 3.105(e) applies • Proposed rating decision must discuss the:<ul style="list-style-type: none">▪ evidence showing improvement, <i>and</i>▪ proposed evaluation for the disability and combined disability evaluation | <p><u>Reduction for Failure to Report</u></p> <ul style="list-style-type: none">• § 3.655(c) applies • Proposed rating decision must discuss the:<ul style="list-style-type: none">▪ the failure to report for examination▪ whether good cause for failure to report has been shown▪ all evidence pertaining to the disability under review, <i>and</i>▪ the proposed evaluation for the disability and combined disability evaluation |
|--|--|



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Preparing a Proposed Rating Decision Cont'd

Reduction for Improvement

Notice of proposed adverse action will:

- provide a timeline for reduction, stating the reduction will occur the first day of the month following the 60-day notice of the final reduction, **and**
- identify improvement as the reason for the proposed reduction.

Reduction for Failure to Report

Notice of proposed adverse action will:

- provide a timeline for reduction, stating that the reduction will occur following a 60-day period during which additional statements and/or evidence may be submitted,
- identify failure to report as the reason for the proposed adverse action, **and**
- provide the Veteran with information indicating that the examination will be rescheduled if willingness to report is shown.



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Preparing a Proposed Rating Decision Cont'd

Remember, a Veteran may request a hearing within 30 days of the proposed decision. If a hearing request is received within 30 days, a final decision on the proposed action should not be rendered.

Also note, evidence received during the due process period can change the decision. Be sure to review all of the evidence of record prior to rendering a final decision.

The effective date of a reduction can vary depending upon the evidence of record that led to the proposed action. For reductions based on a Veteran's failure to report to an examination, and for reductions based on improvement, be sure to refer to the chart provided in [M21-1, Part III, Subpart iv, Chapter 8, Section B.1.E.](#)



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Higher Level Review (HLR)

- A beneficiary or his/her representative who is dissatisfied with an appealable fiduciary decision may file a request for an HLR.
- The request must be:
 - submitted on a VA Form 20-0996, *Decision Review Request: Higher-level Review*, **and**
 - received within one year of the date of VA's issuance of the notice of the decision.
- Prior to February 19, 2019, HLRs were referred to as Notice of Disagreements (NODs)
- A proposal of adverse action does NOT constitute a final action and, as such, cannot be disputed
- Do not consider a request for an HLR as valid if it is filed prior to notice of a final claim decision. The claimant and any representative will receive an HLR Rejection letter for that issue.



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Rating Reductions


Due process proceedings are needed for:

- A disability or disabilities noted to have improved
 - *Note if a service-connected condition is showing improvement/the need for a reduction, but - even with the reduction of the service-connected condition - the Veteran's overall remains the same, due process is not needed prior to reducing the evaluation of the improved condition.*
- Discontinuance of prestabilization ratings
- Incompetency determinations
- Failure to report for a necessary, routine VA examination
- Reduction/severance due to clear and unmistakable error (CUE)
- Termination of Individual Unemployability (IU) benefits, Chapter 35 Benefits, and/or Special Monthly Compensation (SMC)



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Rating Reductions Cont'd

Issuance of advance notice under due process of law is NOT necessary if current action to reduce one or more evaluations will:

- Neither change the Veteran's overall combined evaluation; NOR
- Adversely affect the rate of payment to which the Veteran was entitled at the time of the rating's preparation.



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Knowledge Check

- A review examination shows that a Veteran’s service-connected dermatitis, currently evaluated at 30 percent disabling, now warrants reduction to a 10 percent evaluation. The reduction would have no impact on the overall combined evaluation of 70 percent.
- *Should due process be sent, and if so, when would the benefits be reduced? If due process is not necessary, when would the benefits be reduced? Provide a rationale for your decision.*



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Knowledge Check

- A review examination shows that a Veteran's service-connected dermatitis, currently evaluated at 30 percent disabling, now warrants reduction to a 10 percent evaluation. The reduction would have no impact on the overall combined evaluation of 70 percent.
- *Should due process be sent, and if so, when would the benefits be reduced? If due process is not necessary, when would the benefits be reduced? Provide a rationale for your decision.*



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Regulatory Protection

[§ 3.951 – Preservation of disability ratings](#)

- Revision of the Rating Schedule can't be used as a basis for evaluative reduction.
- Evaluations that have persisted for a duration of **20 years or more** are protected from reduction, absent a finding of fraud.

[§ 3.952 – Protect ratings](#)

- Ratings under the Schedule of Disability Ratings, 1925 will not be modified unless a change in a physical or mental condition would have required a reduction under the 1925 schedule.



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Regulatory Protection Cont'd

[§ 3.957 – Service Connection](#)

- Service connection for any disability or death granted or continued under title 38, U.S.C., which has been in effect for 10 or more years will not be severed except upon a showing that the original grant was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge.



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Stabilization and Sustained Improvement

[§ 3.344 – Stabilization of disability evaluations](#)

Evaluation of fewer than five years duration:

- Current examination showing improvement must be adequate and equally thorough as the original

Evaluation of five years' duration or longer:

- Material or sustained improvement must be shown

Ratings on account of diseases subject to “episodic” improvement (e.g. manic depression, epilepsy, arteriosclerotic heart disease, etc.) will not be reduced on any one examination, except where all the evidence of record clearly demonstrates sustained improvement.



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Reexaminations

§ 3.327 – Reexaminations

For Compensation cases, no periodic future examinations will be requested when any of the following are shown to exist:

- Disability is established as static
- Evidence shows no persistent, material improvement for 5 years or more
- Disability from disease is permanent in nature with no likelihood of improvement
- Veteran is over age 55, except under unusual circumstances
- Evaluation is a prescribed scheduled minimum evaluation
- A combined disability evaluation would not be affected if exam should result in reduced evaluation for one or more conditions



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Incompetency

- Unless the medical evidence is clear, convincing, and leaves no doubt as to the person's incompetency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities
- Where reasonable doubt arises regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, such doubt will be resolved in favor of competency.



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Failure to Report (FTR) for VA Examination

[§ 3.655 – Failure to report for Department of Veterans Affairs Examination](#)


Failure to report for a reexamination for the issue of continuing entitlement:

- Predetermination notice is sent advising that payment for the unexamined disability or disabilities will be discontinued or, if a minimum evaluation is established in part 4 of title 38 or there is an evaluation protected under § 3.951(b) the issue is reduced to the lower evaluation.
- Notice shall also include the prospective date of discontinuance or reduction, the reason, and a statement of procedural and appellate rights.



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Individual Unemployability

Propose to discontinue entitlement to benefits if:

- The Veteran fails to complete VA Form 21-4140, *Employment Questionnaire*.
- Insufficient response on VA Form 21-4140, *Employment Questionnaire*.
- Evidence of record shows that the Veteran has returned to gainful employment as outlined in [M2-1, Part IV, Subpart ii, Chapter 2.F.6.h](#).



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Effective Dates

- Reduction in evaluation – ([§ 3.105\(e\)](#)):
 - Reduce effective the first of the month following 60 days of notice of **final rating** action.
 - e.g. A rating to **finally** reduce an evaluation, prepared on January 15, 2020, would have enforced an effective date of April 1, 2020.
- Exam failure to report (FTR) ([§ 3.655](#)):
 - Reduce as of the **date indicated in the predetermination notice** or the **date of last payment**, whichever is later.
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Effective Dates cont.

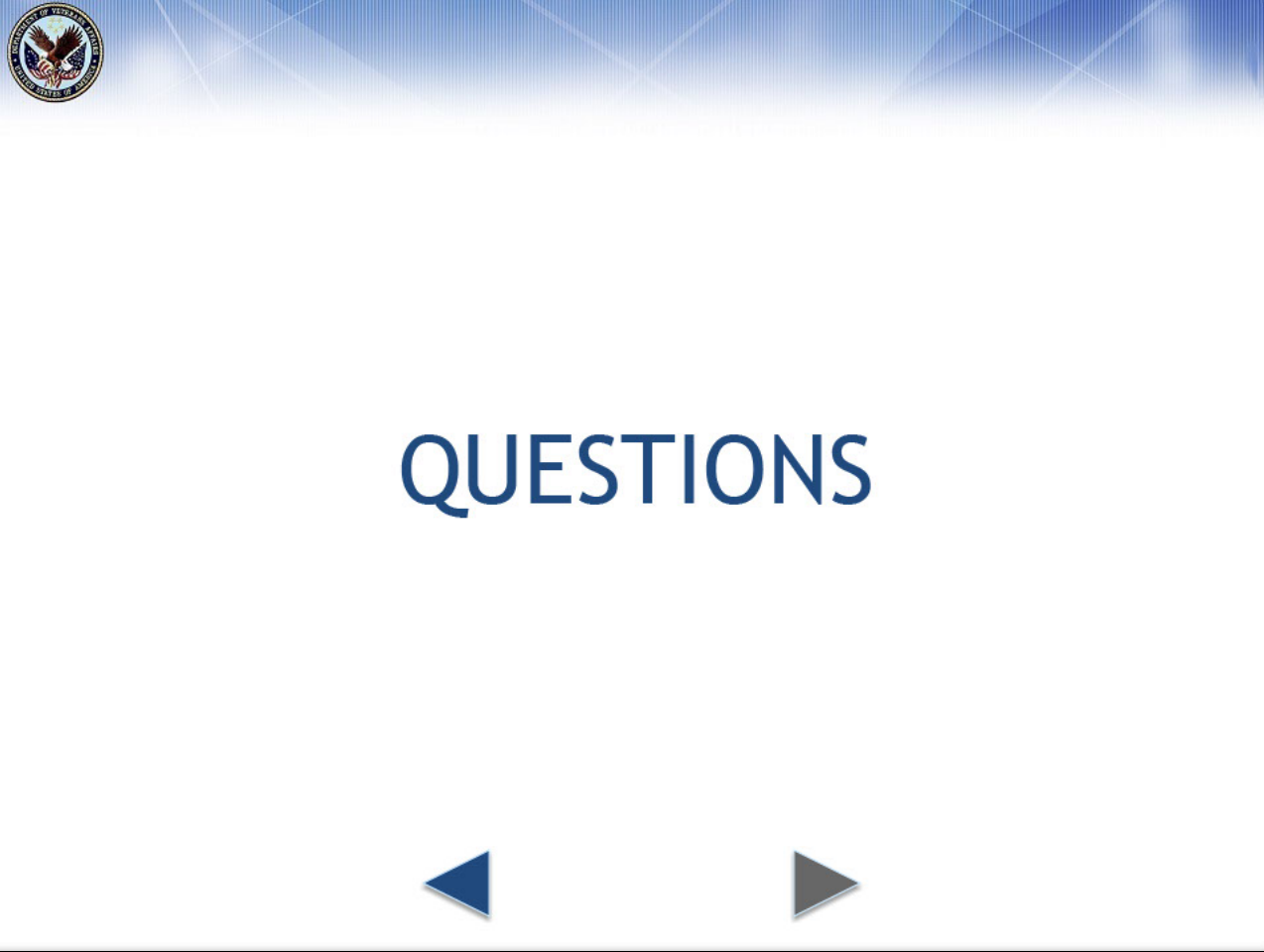
- Failure to return employment questionnaire - VA Form 21-4140, Employment Questionnaire ([38 CFR 3.501\(f\)](#)):
 - Reduce as of the date indicated in the predetermination notice or the date of last payment, whichever is later.

- Incompetency ([38 CFR 3.400\(x\)](#)):
 - Implement effective the date of the final rating's preparation.



Notes

Slide 28 - Questions



The slide features a blue gradient header with a circular logo in the top-left corner. The logo contains an eagle and the text "OFFICE OF VERMONT STATE POLICE". The word "QUESTIONS" is centered in a large, blue, sans-serif font. At the bottom center, there are two navigation arrows: a blue arrow pointing left and a grey arrow pointing right.

Notes
