Rating Reductions

Trainee Handout

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Objectives

* Define Due Process
* Identify the circumstances in which Due Process is required
* Identify the circumstances in which Due Process is not required when reducing or terminating benefits.
* Recognize the rules and regulations surrounding paragraph 28
* Recognize the rules and regulations surrounding paragraph 29
* Recognize the rules and regulations surrounding paragraph 30

References

* [38 CFR 3.103 - Procedural due process & appellate rights](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_103.htm)
* [38 CFR 3.105 - Revision of decisions](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_105.htm)
* [38 CFR 3.655 - Failure to report for DVA examination](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_655.htm)
* [38 CFR 3.500 - 3.505 - Reductions and Discontinuances](http://vbaw.vba.va.gov/bl/21/publicat/Regs/Part3/3_500.htm)
* [M21-1, Part I, Chapter 2, Due process](http://vbaw.vba.va.gov/BL/21/M21/content/contents.asp?address=M21-1MRI)
* [M21-1, Part III, Subpart iv, 8, Competency, Due process, and Protected Ratings](http://vbaw.vba.va.gov/BL/21/M21/content/contents.asp?address=M21-1MRIII)
* [M21-1, Part IV. Subpart ii.2.F, Compensation Based on Individual Unemployability (IU)](http://vbaw.vba.va.gov/BL/21/M21/content/infomap.asp?address=M21-1MRIV.ii.2.F.28)
* [M21-1, Part IV, Subpart ii, 3.B, Failure to Report for Review Examination](http://vbaw.vba.va.gov/BL/21/M21/content/infomap.asp?address=M21-1MRIV.ii.3.B.6)

Topic 1: Due Process Procedures

**Defition of Due Process**

*The idea that laws and legal proceedings must be fair. The Constitution guarantees that the government cannot take away a person’s basic rights to ‘life, liberty or property, without due process of law.’*

* “No person shall be deprived of life, liberty or property without due process of law.” Fifth Amendment
* Generally, the VA must send the beneficiary and his/her representative (if any) a notice of proposed adverse action prior to taking any unfavorable action affecting his/her benefits, including:
	+ reductions
	+ suspension, or
	+ terminations

### 38 CFR 3.103 Procedural due process and appellate rights

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 of representation.

This is especially true concerning the possible reduction or termination of benefits. Every decision made, whether a Rating decision or Administrative Decision, must include a VA Form *4107, Your Rights To Appeal Our Decision*.

Due process in the administration of VA Benefits informs the beneficiary of a proposed adverse action that could reduce or terminate benefits, and provides the beneficiary with the opportunity to:

* provide additional evidence to contest the action, and/or
* hold a hearing before VA decision-makers.

In most instances, due process applies when VA proposes to reduce or terminate a benefit. In a few situations, such as a character of discharge determination, due process applies before VA determines eligibility for benefits.

Exception: Upon the death of a beneficiary, notification prior to termination of the award is not required.

### 38 CFR 3.105 Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge ([§3.500(b)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/3_500.htm#b)); there is 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 ([§3.114](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/3_114.htm)); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards.

1. *Error.*
2. *Difference of opinion*
3. *Character of Discharge (Not a Rating Decision)*
4. *Severance of service connection*
5. *Reduction in evaluation-compensation*
6. *Reduction in evaluation – pension*
7. *Reduction in evaluation—monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam Veterans*
8. *Other reductions/discontinuances*
9. *Predetermination hearings*
	* Review Norton v Principi, No 03-7217 concerning 38 CFR 3.105

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| Proposed Rating or Administrative ActionA notice of proposed adverse action is also required when benefits are being reduced or terminated based on rating or administrative action.The table below lists examples of cases where benefits may possibly be reduced based on a rating activity or an administrative decision.

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| --- | --- |
| **Example CaseExample Case** | **ReferenceReference** |
| Reduction in evaluation of a service-connected disability | M21-1MR, Part IV, Subpart ii, 3.A.3 |
| Discontinuance of unemployability | M21-1MR, Part IV, Subpart ii, 3.A.3.b |
| Severance of service-connection | M21-1MR, Part IV, Subpart ii, 3.A.2 |
| Benefits erroneously awarded because of :* an administrative error, or
* error in judgment
 | M21-1MR, Part III, Subpart v, 1.I.36 |

 |
| In accordance with M21-1MR Part III, Subpart iv, 8.B.6, prepare a proposed rating before:* Reducing a benefit
* Severing service connection
* Determining incompetency for payment purposes

The key is to write the proposed and final rating so there is a clear distinction between the proposed rating decision and the final rating decision. The narrative of both proposed and final rating decisions may be provided to the claimants as attachments to the notification letters, as an alternative to incorporating the narrative into the body of the letter.* If the facts contained in the proposed rating decision are complete, they do not need to be repeated in the final decision.
* Reference the proposed rating decision by citing its date

The due process period:* Allow 60 days following notification of the proposed reduction/termination
	+ This allows for receipt of additional evidence from the beneficiary
	+ If the beneficiary requests a hearing within 30 days, then you must provide them the opportunity to present oral testimony and any additional evidence they might have at the time the hearing is held.

Be advised that if you receive a notice of disagreement (NOD) with the **proposed** reduction/termination, this is not considered a valid NOD and thus should not be accepted as such.Once the due process period has expired, review the evidence submitted (if any) and prepare a final rating decision.* If the beneficiary requests a hearing, you must provide him or her the opportunity to submit evidence by way of the hearing
* The final rating decision must contain:
	+ a complete statement of the facts, and clear and concise reasons and basis upon which the favorable or unfavorable action is predicated, or
	+ such discussion as is necessary to indicate clearly the basis for the changed decision.
* If no new evidence is received, or the submitted evidence does not change the proposed action then:
	+ prepare a final rating decision implementing the proposal, and
	+ notify the beneficiary of the decision

Note: The RVSR has full authority to make new decisions as warranted upon receipt of **new evidence** submitted after promulgation of a proposed rating. The proposal is based on the evidence of record at the time of the proposal and is binding with respect to that evidence only. |

Topic 2: Rating Actions Requiring Due Process

For VA benefit purposes, due process procedures will be needed to be followed before a rating action can take place. These circumstances include:

1. reduction following the prestabilization period
2. reduction following hospitalization/convalescence, under certain circumstances
3. reduction when it is indicated the disability has gotten better
4. other rating actions that need due process procedures

### Preservation of disability ratings.

Care must be exercised to avoid violation of the provisions of 38 CFR 3.951 and 38 CFR 3.952 for compensation and pension benefits

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* Do NOT reduce an individual disability evaluation that had been continuously rated at or above the current level for 20 years or more except in cases of fraud per 38 CFR 3.951.
* Measure the 20 year period from the earliest effective date of the combined or individual evaluations.

Note: for purposes of determining whether benefits were received for a continuous period of 20 years, include periods during which recoupment or deduction applied to an award.

### Other Topics Specific To Due Process

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| Due Process in Incompetency Determinations | M21-1MR, Part III, Subpart iv, 8.A.3 |
| Reduction Due to Administrative Error | M21-1MR, Part III, Subpart v, 1.I.2.b |
| Reduction in Compensation Due to Error in Determination | M21-1MR, Part IV, Subpart ii, 3.A.2 |
| “Not Permanent and total (PT)” and “No Longer Entitled to Special Monthly Pension (SMP)” cases | M21-1MR, Part V, Subpart iii, 4.1 |
| Review of A&A Entitlement Following Discharge from Nursing Home | M21-1MR, Part III, Subpart iv, 8.D.5.g |
| Notice of Hospitalizations/Nursing Home Status Received after Discharge From Facility | M21-1MR, Part III, Subpart v, 6.C.4 |

### Protected Ratings (38 CFR 3.952)

Ratings under the Schedule of Disability Ratings, 1925, which were the basis of compensation on April 1, 1946, are subject to modification only when a change in physical or mental condition would have required a reduction under the 1925 schedule, or an increased evaluation has been assigned under the Schedule for Rating Disabilities, 1945 (loose-leaf edition), after which time all evaluations will be under the 1945 schedule (loose-leaf edition) only. Such increased evaluations must be of an other than temporary nature (due to hospitalization, surgery, etc.).

When a temporary evaluation is involved, the 1925 schedule evaluation will be restored after the period of increase has elapsed unless the permanent residuals would have required reduction under that schedule, or unless an increased evaluation would be assignable under a 1945 schedule (loose-leaf edition) rating. In any instance where the changed condition represents an increased degree of disability under either rating schedule but the evaluation provided by the 1945 schedule (loose-leaf edition) is less than the evaluation in effect under the 1925 schedule on April 1, 1946, the 1925 schedule evaluation and award are protected.

**Service connection.  (38 CFR 3.957)**

### Service connection for any disability or death granted or continued under title 38, United States Code, 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. The 10-year period will be computed from the effective date of the Department of Veterans Affairs finding of service connection to the effective date of the rating decision severing service connection, after compliance with [§3.105(d)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/3_105.htm#d). The protection afforded in this section extends to claims for dependency and indemnity compensation or death compensation.

**When a disability improves (38 CFR 3.344)**

Certain disabilities will gradually improve. In order for the disability evaluations to be reduced however, the entire record of medical examinations and medical history must be reviewed.

These can include: treatment of intercurrent diseases and exacerbations, including hospital reports, bedside examinations, examinations by designated physicians, and examinations in the absence of, or without taking full advantage of, laboratory facilities and the cooperation of specialists in related lines.

Ratings on account of diseases subject to temporary or episodic improvement, e.g., manic depressive or other psychotic reaction, epilepsy, psychoneurotic reaction, arteriosclerotic heart disease, bronchial asthma, gastric or duodenal ulcer, many skin diseases, etc., will not be reduced on any one examination, except in those instances where all the evidence of record clearly warrants the conclusion that sustained improvement has been demonstrated.

Ratings on account of diseases that become comparatively symptom free (findings absent) after prolonged rest, e.g. residuals of phlebitis, arteriosclerotic heart disease, etc., will not be reduced on examinations reflecting the results of bed rest.

Rating boards encountering a change of diagnosis will exercise caution in the determination as to whether a change in diagnosis represents no more than a progression of an earlier diagnosis, an error in prior diagnosis or possibly a disease entity independent of the service-connected disability. When the new diagnosis reflects mental deficiency or personality disorder only, the possibility of only temporary remission of a super-imposed psychiatric disease will be borne in mind.

If doubt remains, after according due consideration to all the evidence developed by the several items discussed in paragraph (a) of this section, the rating agency will continue the rating in effect, citing the former diagnosis with the new diagnosis in parentheses, and following the appropriate code there will be added the reference “Rating continued pending reexamination \_\_\_ months from this date, §3.344.” The rating agency will determine on the basis of the facts in each individual case whether 18, 24 or 30 months will be allowed to elapse prior to reexamination.

The provisions of the prior paragraphs apply to ratings which have continued for long periods at the same level (5 years or more). They do not apply to disabilities which have not become stabilized and are likely to improve. Reexaminations disclosing improvement, physical or mental, in these disabilities will warrant reduction in rating.

Keep in mind those rating decisions that have been in place 20 years or more.

### Review Faust v West, No 98-100 concerning when a disability improves.

### 38 CFR 3.655 Failure to report for Department of Veterans Affairs examination.

When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination and a claimant, without good cause, fails to report for such examination, or reexamination, action shall be taken.

### 38 CFR 3.353 Determinations of incompetency and competency

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(a) *Definition of mental incompetency.* A mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.

(b) *Authority.*

(1) Rating agencies have sole authority to make official determinations of competency and incompetency for purposes of: insurance (38 U.S.C. 1922) and, subject to [§13.56](http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_38/38cfr13_00.html) of this chapter, disbursement of benefits. Such determinations are final and binding on field stations for these purposes.

(c) *Medical opinion.* 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. Considerations of medical opinions will be in accordance with the principles in paragraph [(a)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/#a) of this section. Determinations relative to incompetency should be based upon all evidence of record and there should be a consistent relationship between the percentage of disability, facts relating to commitment or hospitalization and the holding of incompetency.

(d) *Presumption in favor of competency.* 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 (see [§3.102](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/3_102.htm) on reasonable doubt).

(e) *Due process for incompetency issues*. Whenever it is proposed to make an incompetency determination, the beneficiary will be notified of the proposed action and of the right to a hearing as provided in [§3.103](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/3_103.htm). Such notice is not necessary if the beneficiary has been declared incompetent by a court of competent jurisdiction or if a guardian has been appointed for the beneficiary based upon a court finding of incompetency. If a hearing is requested it must be held prior to a rating decision of incompetency. Failure or refusal of the beneficiary after proper notice to request or cooperate in such a hearing will not preclude a rating decision based on the evidence of record. (Authority: 38 U.S.C. 501(a))

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| **Reduction of an evaluation based on Clear and Unmistakable Error** When the reduction or discontinuance of a Veteran’s compensation results from a finding of a clear and unmistakable error (CUE) in the determination of the disability evaluation, the rating activity prepares a rating that:* proposes the change
* cites all material facts and justification for the proposed action, and
* includes the proposed evaluation of the disability in question and proposed combined evaluation, if applicable.

The rating activity may reverse a previous award of service connection under 38 CFR 3.105(d) if it finds that service connection was awarded based on CUE. Basically, this means the original grant had no plausible basis in the law or particular facts of the case. The error must be undebatable and not a mere difference in judgment between the decision-makers. |
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| **Individual Unemployability**For those Veterans receiving Individual Unemployability (IU) benefits, a VA Form 21-4140, Employment Questionnaire, is sent to them once a year for validation of their continued unemployability. If they do not return the form, a write out or a generated VETSNET 800 Series Work Item is received by the Regional Office and due process procedures are initiated for termination of entitlement to Individual Unemployability and possibly Chapter 35 benefits. Once the form is returned, the entitlement is resumed as before, as long as it is received within one year of the notification and shows continued unemployability.Special Monthly CompensationSpecial monthly compensation, especially housebound benefits, can be awarded to those Veterans who are receiving benefits with one disability rated as 100 percent disabling and additional service-connected disability or disabilities independently rated as 60 percent disabling or higher separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems. There will be times when you may be required to initiate due process procedures for cases involving special monthly compensation. |

**38 CFR 4.28 Prestabilization (Paragraph 28)**

Prestabilization ratings are for assignment in the immediate postdischarge period. They will continue for a 12-month period following discharge from service. However, prestabilization ratings may be changed to a regular schedular total rating or one authorizing a greater benefit at any time. In each prestabilization rating an examination will be requested to be accomplished not earlier than 6 months nor more than 12 months following discharge. These rating decision are reserved for those Veterans that are considered seriously injured (SI) or very seriously injured (VSI). The following ratings may be assigned, in lieu of ratings prescribed elsewhere, under the conditions stated for disability from any disease or injury.

The prestabilization rating is not to be assigned in any case in which a total rating is immediately assignable under the regular provisions of the schedule or on the basis of individual unemployability.

Note: If a total disability rating is granted with no future examination, remember to consider Chapter 35 benefits as well.

The prestabilization 50-percent rating is not to be used in any case in which a rating of 50-percent or more is immediately assignable under the regular provisions.

### 38 CFR 4.29 Ratings for service-connected disabilities requiring hospital treatment or observation.  (Paragraph 29)

A total disability rating (100 percent) will be assigned without regard to other provisions of the rating schedule when it is established that a service-connected disability has required hospital treatment in a Department of Veterans Affairs or an approved hospital for a period in excess of 21 days or *hospital observation at Department of Veterans Affairs expense* for a service-connected disability for a period in excess of 21 days.

**Note:** The hospitalization must be due to a service-connected disability.

Normally, a reduction in the total rating will not be subject to 38 CFR 3.105(e) of this chapter. There may be times when cases are not properly tracked and due process procedures will then need to be initiated.

The assignment of a total disability rating on the basis of hospital treatment or observation will not preclude the assignment of a total disability rating otherwise in order under other provisions of the rating schedule, and consideration will be given to the propriety of such a rating in all instances and to the propriety of its continuance after discharge. Particular attention, with a view to proper rating under the rating schedule, is to be given to the claims of Veterans discharged from hospital, regardless of length of hospitalization, with indications on the final summary of expected confinement to bed or house, or to inability to work with requirement of frequent care of physician or nurse at home.

Reminders:

* The total hospital rating if convalescence is required may be continued for periods of 1, 2, or 3 months in addition to the period.
* Extension of periods of 1, 2, or 3 months beyond the initial 3 months may be made upon approval of the Veterans Service Center Manager. (Authority: 38 U.S.C. 1155)
* If the Veteran is discharged prior to the required number of days, but needs post-hospital care/prolonged convalescence, refer the case to Director of Compensation and Pension Service.

### 38 CFR 4.30 Convalescent ratings.

A total disability rating (100 percent) will be assigned without regard to other provisions of the rating schedule when it is established by report at hospital discharge (regular discharge or release to non-bed care) or outpatient release that entitlement is warranted under paragraph [(a)(1)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a1), [(2)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a2), or [(3)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a3) of this section.

Normally, a reduction in the total rating will not be subject to [§3.105(e)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/3_105.htm#e) of this chapter. There may be times when time extensions are not properly tracked and due process procedures will then need to be initiated.

Review Felden v West, No 97-52, concerning paragraph 30 benefits

Topic 3: Rating Actions That May Not Require Due Process

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| For VA benefit purposes, due process procedures may not be required under certain circumstances before a rating action can take place. These circumstances include:1. temporary total evaluation due to hospitalization and/or surgery
2. death of the beneficiary
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### 38 CFR 4.30 Convalescent ratings.

A total disability rating (100 percent) will be assigned without regard to other provisions of the rating schedule when it is established by report at hospital discharge (regular discharge or release to non-bed care) or outpatient release that entitlement is warranted under paragraph [(a)(1)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a1), [(2)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a2), or [(3)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a3) of this section.

Effective date is date of hospital admission or outpatient treatment and continuing for a period of 1, 2, or 3 months from the first day of the month following such hospital discharge or outpatient release. The termination of these total ratings will not be subject to [§3.105(e)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/3_105.htm#e) of this chapter. Such total rating will be followed by appropriate schedular evaluations. When the evidence is inadequate to assign a schedular evaluation, a physical examination will be scheduled and considered prior to the termination of a total rating under this section.

Total ratings will be assigned under this section if treatment of a service-connected disability resulted in:

* Surgery necessitating at least one month of convalescence (Effective as to outpatient surgery March 1, 1989.)
* Surgery with severe postoperative residuals such as incompletely healed surgical wounds, stumps of recent amputations, therapeutic immobilization of one major joint or more, application of a body cast, or the necessity for house confinement, or the necessity for continued use of a wheelchair or crutches (regular weight-bearing prohibited). (Effective as to outpatient surgery March 1, 1989.)
* Immobilization by cast, without surgery, of one major joint or more. (Effective as to outpatient treatment March 10, 1976.)

A reduction in the total rating will not be subject to [§3.105(e)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part3/3_105.htm#e) of this chapter. The total rating will be followed by an open rating reflecting the appropriate schedular evaluation; where the evidence is inadequate to assign the schedular evaluation, a physical examination will be scheduled prior to the end of the total rating period.

A total rating under this section will require full justification on the rating sheet and may be extended as follows:

* Extensions of 1, 2, or 3 months beyond the initial 3 months may be made under paragraph [(a)(1)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a1), [(2)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a2), or [(3)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a3) of this section.
* Extensions of 1 or more months up to 6 months beyond the initial 6 months period may be made under paragraph [(a)(2)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a2) or [(3)](http://vbaw.vba.va.gov/bl/21/Publicat/Regs/Part4/#a3) of this section upon approval of the Veterans Service Center Manager. (Authority: 38 U.S.C. 1155)

Note: do not forget about any special monthly compensation benefits the claimant may have been entitled to while receiving the 100 percent evaluation.

Sometimes a Veteran is granted an increased payment for a disability following an event, such as joint replacement or heart attack, for which the rating schedule provides a temporary evaluation for a specified period of time. Ensure the rating decision is specific concerning the dates and circumstances under which the increased evaluation will be reduced. As the Veteran is already fully informed of the date and reason for the adjustment, no notice of proposed adverse action is required before the reduction.

### Reminder: Death of the beneficiary will automatically terminate benefits

No rating action is necessary upon notification of the death of the beneficiary. Benefits will be automatically terminated once the VA receives formal notification.

**Effective dates**

When reducing evaluations or benefits, enure that the reduction is effective the first of the month following 60 days of the notice of the final rating action.

For example, if a final rating decision to reduce an evaluation is prepared in January 2015, the effective date for the reduction would be April 1, 2015.

Attachment A: Synopsis of court cases Referred – Rating Reductions Lesson

Faust v. West, Docket No. 98-100

Facts of the case: the Veteran had been receiving benefits at the 100% schedular rate because he was unemployable due to his posttraumatic stress disorder (PTSD). Official documents received noted the Veteran’s income varied (he was self-employed). The Veteran reported during an examination that he was unable to work more than 2 days a week on average due to his PTSD. The examiner diagnosed the Veteran as continuing to have PTSD and indicated he suffered major impairment in work, mood, and family relations.

The regional office of record, noting that the Veteran was self-employed and that he was earning more than marginal income from his business, proposed that his PTSD be reduced to 70% disabling. Six months later, the Veteran’s PTSD was reduced to 70 percent disabling.

ANALYSIS of the case noted the use of non-medical evidence to reduce a rating. Although the Veteran argued that the actual change should be based upon actual examinations, the Court noted there was nothing in the regulations that requires the actual change be measured in terms of medical improvement/medical data.

The Veteran’s 100% disability was in effect for 4 years and 8 months, and the Court noted he did not meet the threshold requirement of 38 CFR 3.344 (c) and that it was not protected by 38 CFR 3.344 (a) or (b).

The Court also defined substantially gainful employment for purposes of 38 CFR 3.343 (c) as employment that provides annual income that exceeds the poverty threshold for one person, irrespective of the number of hours or days that the Veteran actually works and without regard to the Veteran’s earned income prior to having been awarded the 100% rating based on individual unemployability. The Court held that such employment constitutes, as a matter of law, a substantially gainful occupation and thus actual employability for purposes of 38 CFR 3.343 (c). Also, the evidence overwhelmingly shows the regulation afforded him no protection.

Norton v. Principi, No 03-7217

Veteran was awarded entitlement to Individual Unemployability (IU) benefits in 1973. In 1979, Veteran received notice his IU was going to be reduced to a noncompensable evaluation and the IU terminated. Additional evidence was received, however, the noncompensable evaluation was continued. NOD filed and a Statement of the Case issued, with no response received within the 60 day period, and the decision became final. The Veteran reopened his claim, alleging Clear and Unmistakable Error (CUE). BVA found no CUE and CAVC affirmed.

The Veteran stated he never received notice as prescribed by 38 CFR 3.105 (e), because he was never furnished “detailed reasons” for the reduction of his IU rating. The Veteran argued that a third exception to the rule of finality should be recognized to permit reopening of a case when a Veteran received defective notice of a reduction in his disability rating that violates 38 CFR 3.105 (e). The Federal Circuit rejected the argument.

Two exceptions to 38 USC 7105 (c)’s statutory rule of finality: 1) if new and material evidence is presented; and 2) if the former decision is premised on CUE. Failure to comply with the regulation’s notice-related rule does not afford the Veteran an opportunity to vindicate his right to receive “detailed reasons,” nor does it vitiate the finality of an otherwise final decision. In other words, the Veteran received notice of the RO decision, failed to file a timely appeal, and the RO decision became final.

# Felden v. West, No 97-52

Veteran’s service-connected right little finger had an arthroplasty of the proximal interphalangeal joint (Feb). His physician provided that the Veteran would not be able to return to work for at least eight weeks. Subsequent VA examination noted multiple surgeries (unsuccessful) with flexor contrapture (Jun). Surgery in July was performed and the Veteran was denied paragraph 30 benefits in Sept. Hearing Officer confirmed the denial. Additional evidence was received from the Veteran’s physician stating the Veteran was totally disabled for 2 years prior to the right little ring arthroplasty. The Veteran’s physician also provided notes indicating the Veteran could not return to work for a minimum of eight weeks. On appeal, BVA determined Veteran was not entitled to paragraph 30 benefits for the periods following the Feb and Jul surgeries, finding that treatment did not necessitate at least one month of convalescence.

Court of Veterans Appeals noted 38 CFR 4.30 (a)(1) provided a total disability rating will be assigned without regard to other provisions of the Rating Schedule for surgery necessitating at least one month of convalescence. The argument was between whether the convalescence was the time spent at home to recover. The Court noted the term convalescence does not necessarily entail in-home recovery.

The Court held that it was impermissible for the BVA to form its own conclusion that the surgeries did not necessitate at least one month of convalescence (disregarding the physician’s opinion) without supporting medical evidence. The Court found the Veteran was entitled to paragraph 30 benefits following both surgeries.

Note for RVSR – be aware that it is impermissible to reject medical evidence without independent supporting medical evidence.

Practical Exercise

Directions: Given the scenarios below, describe the actions you as the RVSR of record would take.

1) Veteran service connected for posttraumatic stress disorder, a lumbosacral strain; a right shoulder condition; and tinnitus. The code sheet is as follows:

**SUBJECT TO COMPENSATION(1. SC)**

|  |  |
| --- | --- |
| 9411 | POSTTRAUMATIC STRESS DISORDER WITH DEPRESSIONService Connected, Vietnam Era30% from 12/24/197150% from 12/01/2001 |
| 5201 | RESIDUALS, RIGHT SHOULDER STRAINService Connected, Vietnam Era10% from 12/24/197120% from 12/01/2001 |

|  |  |
| --- | --- |
| 5237 | LUMBOSACRAL STRAINService Connected, Vietnam Era20% from 12/24/1971 |
| 6260 | TINNITUSService Connected, Vietnam Era0% from 12/24/1971 |

***COMBINED EVALUATION FOR COMPENSATION:***

50% from 12/24/1971

70% from 12/01/2001

Veteran had VA examination that revealed his right shoulder strain could now be rated as 10 percent disabling, and his lumbosacral strain could also be rated as 10 percent disabling, as support by the range of motions noted in the most recent VA examination. The Veteran also complained of tinnitus during the mental examination for the posttraumatic stress disorder, which is noted to have remained at the same level of disability. The claims folder has been forwarded to you for your action. What are you going to do?

2) Veteran is service connected for the following conditions:

**SUBJECT TO COMPENSATION (1. SC)**

|  |  |
| --- | --- |
| 5237 | LUMBOSACRAL STRAINService Connected, Vietnam Era20% from 12/24/1991 |
| 8100 | MIGRAINE HEADACHESService Connected, Peacetime Era10% from 12/24/1991 |

|  |  |
| --- | --- |
| 5257 | RIGHT KNEE STRAINService Connected, Vietnam Era10% from 12/24/1991 |
| 7336 | HEMORRHOIDSService Connected, Vietnam Era0% from 12/24/1971 |

***COMBINED EVALUATION FOR COMPENSATION:***

40% from 12/24/1991

Veteran provides medical evidence that a right total knee arthroplasty (TKA) was performed and we received the claim within the last week. Evidence received included x-ray results showing the TKA was in place. Surgical report noted the completed procedure and discharge summary. You received the claim as ready to rate. What are you going to do with the case.

Note: Use date of surgery as October 5, 2009.

**3) Answer the following questions and indicate your answer.**

a) Veteran is service-connected for arthritis of the left knee and right ankle, both at 10 percent disabling. She undergoes surgery to replace the left knee (TKA). The VA regional office of jurisdiction receives notice of the hospitalization 3 months following her surgery.

A Rating decision granting a 100 percent evaluation for the TKA. Prior to being reduced to 30 percent following the convalescent period, an examination is requested which the Veteran misses.

1. Is due process required prior to the reduction for the left knee TKA?
2. If not, is there anything else we may have to do?

b) The Veteran enters into an inpatient PTSD program mid-month and subsequently graduates 22 days after starting the program. The Regional Office receives notice of the program participation 3 weeks after the Veteran graduated. The Veteran is service connected for PTSD.

1. If the RVSR grants the 100 percent evaluation for the hospitalization due to program participation, does due process have to be proposed?
2. If the Veteran had additional service connected conditions that were found to be 60 percent disabling, and the RVSR granted Housebound, would due process procedures have to take place?

c) A Veteran, who has been receiving a 100 percent evaluation for a single disability (prostate cancer) for the past four years, files a claim for an increased evaluation. A VA examination is requested. The examination report states that the exam was essentially normal. The disability can now be rated as noncompensable.

1. Does due process have to take place?
2. If so, what action would you take?
3. If not, what action would you take?

d) The veteran is service connected for a low back injury, rated as 20 percent disabling. He has filed a claim for increase on February 25, 2004 and August 18, 2009, and has had two examinations, both indicating that his back condition meets the 10 percent criteria. (Range of motion is: forward flexion – 0 to 88 degrees, backward extension – 0 to 30 degrees; bilateral lateral flexion – 0 to 30 degrees; and bilateral lateral rotation – 0 to 30 degrees; no muscle spasm, guarding, or localized tenderness.)

1. Are a reduced rating and due process warranted?
2. If not, why?
3. If so, why?

e) A recently discharged veteran was assigned a 50 percent pre-stabilization rating under paragraph 28. Following examination, the combined total evaluation for his service connected disabilities will be 40 percent disabling.

1. Is due process necessary to reduce him to the combined 40 percent evaluation?
2. What is the number of days between proposed and final determinations?