Individual Unemployability

Trainee Handout

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Objectives

* Identify a claim for Individual Unemployability
* Develop for the evidence required for Individual Unemployability
* Overview of the examination requirements for Individual Unemployability

References

* [38 CFR 4.16, Total Disability Ratings for Compensaton Based on Unemployability of the Individual](http://www.ecfr.gov/cgi-bin/text-idx?SID=01ef04ddd83f729bc3d41eba9c66d00a&mc=true&node=se38.1.4_116&rgn=div8)
* [M21-1, Part IV, Subpart ii, Chapter 2. F, Compensation Based on Individual Unemployability (IU)](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/portal.html?encodedHash=%23!agent%2Fportal%2F554400000001034%2Farticle%2F554400000014564%2FM21-1-Part-IV-Subpart-ii-Chapter-2-Section-F-Compensation-Based-on-Individual-Unemployability-IU)
* [M21-1, Part III, Subpart ii, Chapter 2.C, Informal Claims Received Prior to March 24, 2015, Intent to File (ITF) and Requests for Applications](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/portal.html?encodedHash=%23!agent%2Fportal%2F554400000001034%2Farticle%2F554400000014115%2FM21-1-Part-III-Subpart-ii-Chapter-2-Section-C-Informal-Claims-Received-Prior-to-March-24-2015-Communication-of-an-Intent-to-File-ITF-and-Requests-for-an-Application)

Topic 1: Eligibility Requirements

**What is Individual Unemployability**

Being *unemployable* and being *unemployed* are not synonymous for the purpose of determining entitlement to an IU rating under [38 CFR 4.16](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=d41946f98bf9198830e44d3ec683521d&ty=HTML&h=L&r=SECTION&n=se38.1.4_116).

A Veteran may be unemployed and even have a history of unemployment from several jobs, but not be incapable of substantially gainful employment (unemployable).  Unemployment can be due to economic factors, work performance issues, or other reasons and not necessarily related to being unable to secure or follow substantially gainful employment due to SC disability.

A Veteran might also be unemployed from one job due to a SC disability, but still be capable of securing or following another substantially gainful occupation.

*Substantially gainful employment* is defined as employment at which non-disabled individuals earn their livelihood with earnings comparable to the particular occupation in the community where the Veteran resides.  It suggests a living wage.

Substantially gainful employment is

* competitive (not protected) employment, and with
* earnings exceeding the amount established by the U.S. Department of Commerce, U.S. Census Bureau, as the poverty threshold for one person.

**Establishing Entitlement to IU**

To establish entitlement to a total disability rating for compensation based on individual unemployability, the Veteran must be unemployable in fact (unable to secure or follow substantially gainful employment) by reason of service-connected (SC) disability *and* *either*

* meet the schedular requirements of [38 CFR 4.16](http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=d41946f98bf9198830e44d3ec683521d&ty=HTML&h=L&r=SECTION&n=se38.1.4_116)(a), or
* have an extra-schedular individual uemployability (IU) evaluation, under the provisions of [38 CFR 4.16(b),](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.5&idno=38#se38.1.4_116) approved by Compensation Service (211B).

***Note***: IU is also referred to as *total disability based on individual unemployability* (TDIU).

Topic 2: Evidence Requirements

**General Evidence Requirements**

A decision concerning entitlement to an IU evaluation is based on a review of all available evidence, which should be sufficient to evaluate the

* current severity of the service connected (SC) disability(ies) that the Veteran states and/or the evidence indicates prevent(s) substantially gainful employment
* the impact of SC disability(ies) upon employability, and
* employment status.

Forward a [VA Form 21-8940*,* *Veteran’s Application for Increased Compensation based on Unemployability*](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf), to the Veteran if a request for IU is

* expressly raised by the Veteran, or
* reasonably raised by the evidence of record.

***Important***:

* Any written communication indicating a Veteran is unable to work because of SC disability(ies) may establish the inference of IU, such that the Department of Veterans Affairs (VA) will solicit a claim.
* A Veteran’s statement of having been terminated from his or her employment may only reasonably raise a claim for IU if the Veteran indicates that termination was due to a SC disability.

Use the table below to determine the proper course of action to take in developing reasonably raised claims of IU:

|  |  |
| --- | --- |
| If the claim that prompted the reasonably raised inference of IU was submitted…… | **Then send a…..** |
| on a VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits, received within the last year | Subsequent development letter, using the Unemployability-21-8940 needed development action |
| * on a non-EZ form, or * more than one year prior to the date action is being taken | Section 5103 notice, enclosing VA Form 21-8940 for completion |

Topic 3: Claims Processing

**VA Form 21-8940**

A substantially complete [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf), *Veteran’s Application for Increased Compensation based on Unemployability*, is ***required*** to establish entitlement to IU because it gathers relevant and indispensable information regarding a claimant’s disabilities and employment and educational histories. The form concludes with a series of sworn certification statements, and in endorsing it, a Veteran

* attests to his/her employment status, and
* signals understanding of the IU benefit’s incompatibility with substantially gainful work.

A properly signed and executed [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf) enables VA to gather the information necessary to determine the Veteran’s entitlement to IU and recover IU compensation that is later discovered to have been awarded on fraudulent terms.

While a substantially complete [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf)is necessary to provide VA with information needed to substantiate entitlement to IU, it is *not* necessary to *raise* the issue of IU.  VA must make a decision on IU when the issue is

* explicitly raised by the Veteran, or
* reasonably raised by the evidence of record.

If IU is raised and the Veteran fails to complete and return [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf), VA must make a decision on the issue of IU based on the available evidence of record and may deny entitlement as described in [M21-1, Part IV, Subpart ii, 2.F.4.j](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#4j). “Reasons for Denying IU Claims”

***Important***:

* If the issue of IU is raised by the Veteran or reasonably raised by the evidence of record and the only [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf) of record was received as part of a finally adjudicated claim, a new [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf) must be provided to the Veteran.
* A [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf) must be signed by the Veteran and not a third party source such as a power of attorney (POA).

**VA Form 21-4192**

Use the table below to request [VA Form(s) 21-4192*, Request for Employment Information in Connection with Claim for Disability Benefit*](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf), for the Veteran’s last year of employment *even if* the Veteran has not worked for five years or more.

***Exceptions***:

* Do *not* send the [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf)to the Veteran’s last employer if the evidence of record is sufficient to award increased compensation based on IU and the Veteran has returned a substantially complete [VA Form 21-8940](http://www.vba.va.gov/pubs/forms/VBA-21-8940-ARE.pdf) indicating he/she is unemployed.
* Do *not* send the [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf) to a previous employer if the Veteran states that the employer is no longer in business or other evidence indicates the business is closed.

|  |  |
| --- | --- |
| **Step** | **Action** |
| 1 | * Send a [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf) to the former employer(s) for which the Veteran worked during his last year of employment. * At the same time, send a copy of [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf) to the Veteran and request that his/her previous employer complete and return the form. |
| 2 | Was a completed [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf) received from the Veteran’s employer(s) within 15 days?   * If *yes*, refer the claim to the rating activity. * If *no*, proceed to Step 3. |
| 3 | * Send a follow-up request to the employer(s) for [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf), allowing an additional 15 days for response, and * Notify the Veteran that it is ultimately the Veteran’s responsibility to obtain this information. |

***Notes***:

* If the information on [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf) only states that the Veteran retired, then request additional information as to whether the Veteran’s retirement was by reason of disability. If so, ask the employer to identify the nature of the disability for which the Veteran was retired.
* Do not deny an IU claim solely because an employer failed to return a completed [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf)*.*
* If the Veteran worked for a federal agency, we would treat the [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf) development as a request for federal records and follow the guidelines prescribed under [M21-1, Part III, Subpart iii, 1.C.2.b](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014156/M21-1, Part III, Subpart iii, Chapter 1, Section C - Requesting Evidence From Sources Other Than the Claimant). “Standard Procedure for Requesting Records From a Federal Entity”

If an employer responds to the [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf) by providing a web site that does not provide all of the required information in the form, we must follow-up with the employer and again request that the [VA Form 21-4192](http://www.vba.va.gov/pubs/forms/VBA-21-4192-ARE.pdf) be completed, allowing an additional 10 days for response.

**Requesting an Examination**

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.  An examination is required if the information and evidence of record do not contain sufficient competent medical evidence to decide the claim.

When an examination is indicated, it is normally sufficient to request condition-specific [disability benefits questionnaires](http://www.benefits.va.gov/compensation/dbq_ListByDBQFormName.asp) (DBQs) for the conditions alleged to cause unemployability on the [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf) (for example, Joints, Mental, and Peripheral Nerves DBQs).

Schedule a General Medical DBQ only if the rating activity determines that it is needed to fairly and fully adjudicate the IU claim, such as when the claim is made in connection with original claims for disability compensation or where it is alleged that multiple SC and/or non-service-connected (NSC) disabilities may have an impact on employability. However, do not order examinations for disabilities *not* alleged to cause or contribute to unemployability, even if the Veteran has received a previous award of service connection (SC) for the disabilities.

Do not ask the examiner to opine as to whether or not the Veteran is “unemployable” due to his or her SC disabilities. A determination that a Veteran is unemployable is a legal determination that rests solely with the rating activity.

Instead, request that 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).

**When to Obtain Social Security Administration (SSA) Records**

Obtain and consider complete copies of the Social Security Administration (SSA) decision (awards and denials) and any supporting medical records when

* evidence of record is insufficient to award IU, and
* the Veteran’s claims folder shows that the Veteran has been examined or awarded disability benefits by SSA.

***Notes***:

* Although decisions by SSA regarding a Veteran’s unemployability are not controlling for VA determinations, SSA’s record may indicate the level of impairment of the Veteran’s SC disability.
* When reviewing SSA records, pay close attention to what disability resulted in an award of SSA benefits, and whether that disability is one for which SC been awarded.
* Regional offices (ROs) are not required to request SSA records when a Veteran fails to return the [VA Form 21-8940](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-21-8940-ARE.pdf).

**When to Obtain Vocational Rehabilitation and Employment (VR&E) Records**

When the evidence of record indicates that the Veteran was seen by the Vocational Rehabilitation and Employment Service (VR&E) and evidence of record is insufficient to award IU, obtain and evaluate any records related to this contact.

The VR&E records may

* document the Veteran’s participation in a training program, or
* show that training was not feasible or was unsuccessful.

***Notes***:

* The entire Counseling/Evaluation/Rehabilitation (CER) folder is not necessary to adjudicate IU claims that are processed at the RO. If adjudicating a claim for IU, and the Veteran has an existing VR&E record, request that VR&E provide a completed [*VA Form 28-1902b, Counseling Record – Narrative Report*](http://vbaw.vba.va.gov/bl/20/cio/20s5/forms/VBA-28-1902b-ARE.pdf), in lieu of the entire CER folder. VA Form 28-1902bcontains the necessary information concerning the impact of the Veteran’s SC and NSC conditions on employability.
* If the CER folder has evidentiary value that pertains to the pending claim and there is a need to scan the contents of the folder, send a photocopy of the folder to the scanning vendor and retain the original CER folder and its contents at the RO.
* The Appeals Management Center (AMC) must request that VR&E provide the entire CER folder when adjudicating Board of Veterans’ Appeals (BVA) remands, as BVA is able to contact the RO directly to request upload of the entire CER folder into the Veterans Benefits Management System (VBMS).

Practical Exercise

Directions: Answer each question and review the scenario below to determine what action you would take next in developing the claim.

1. What is required to establish increase compensation based on Individual Unemployability (IU)?
2. What are the schedular requirements for entitlement to IU benefits?
3. Define substanitally gainful employment.
4. Which form is required to establish entitlement to IU?
5. What is the next step the VSR would take once the VA receives a complete work history from the Veteran?
6. A service-connected Veteran submits a claim for IU benefits with a completed VA Form 21-8940. A review of the VA Form 21-8940 shows it is complete, including the addresses of his former employers. A review of the claims folder reveals he is service-connected for post-traumatic stress disorder (PTSD) at 70%. There is no current medical evidence in file.

What would be your next action as the VSR working this claim?

Would you schedule an exam and if so which exam would you schedule?