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# Addressing Subsequently Raised IU

**Target Audience:** Decision Review Operations Center (DROC) Management and Quality Review Teams (QRT), Decision Review Officers (DRO), Rating Veterans Service Representatives (RVSR), Veterans Service Representatives (VSR), and Claims Assistants (CA)

**Presenter:** Drew Martin, Management and Program Analyst, OAR

**References:**

* M21-5, 7.G.1.i, *Subsequently Raised IU*
* M21-1, VIII.iv.3.C, *IU Rating and Decision Review*

When the Board of Veterans’ Appeals (Board) is reviewing an appeal, they may determine if the issue of IU is reasonably raised by the record and either remand the case back to the Veterans Benefit Administration (VBA) or grant entitlement to IU, per the *Rice v. Shinseki* Court decision.

If the Board determines that entitlement to IU is reasonably raised by the record and issues a decision remanding or granting IU, then the DROC is responsible for completing all development actions and issuing a decision regarding entitlement to IU.

In cases where entitlement to IU is remanded by the Board, the DROC will conduct all necessary development for entitlement to IU, including a request for *VA Form 21-8940, Veteran's Application for Increased Compensation of Disability Based on Unemployability*.When development is complete, the issue of IU will be addressed in a rating decision with notification provided to the Veteran.

**Note:** If entitlement to IU is denied in the rating decision, the issue will need to be further addressed in a Supplemental Statement of the Case (SSOC) and returned to the Board.

If entitlement to IU is granted by the Board, the DROC will review the file to determine if a *VA Form 21-8940*, is already in the evidence. If a *VA Form 21-8940* is not of record, a request will be made for the Veteran to complete and return the form.

If a *VA Form 21-8940* is of record, or one is received following completion of development, the Board's grant of IU should be implemented in a rating decision with notification provided to the Veteran.

If the Veteran fails to complete and return *VA Form 21-8940***,** and there is no evidence of record showing employment, implement the Board's decision granting entitlement to IU in a rating decision, assigning the applicable effective date based on the available evidence of record.

**Note:** If the Veteran fails to complete and return the *VA Form 21-8940*, and the evidence of record shows the Veteran is currently employed, the DROC will send the remand**,** and attach the evidence of employment**,** to the OAR Program Administration mailbox. OAR will review the remand, along with the evidence and submit to the Board if necessary.

# PACT ACT and Liberalizing Legislation

**Target Audience:** Decision Review Operations Center (DROC) Management and Quality Review Teams (QRT), Decision Review Officers (DRO), Rating Veterans Service Representatives (RVSR), Veterans Service Representatives (VSR)

**Presenter:** Lynn Rowzee, Management and Program Analyst, Office of Administrative Review

**References:**

* 38 U.S.C. § 5110(g) – *Effective dates of awards*
* 38 C.F.R. § 3.114, *Effective date of award*
* M21-1,V.ii.4.A.6.b, *Definition: Liberalizing Law*
* M21-1,V.ii.4.A.6.c, *Significance of Changes of Law*
* M21-1,V.ii.4.A.6.g, *Statutory Eligibility Requirements for Retroactive Awards Under 38 CFR 3.114*
* M21-1,V.ii.4.A.6.h, *Regulatory Eligibility Requirements for Retroactive Awards Under 38 CFR 3.114*
* M21-1,V.ii.4.A.2, *Applicability of Intent to File (ITF) on Effective Date Assignment*
* [Interim Guidance: Notice of Exception to Date of Receipt Rule (with Effective Date Examples)](https://vbaw.vba.va.gov/bl/21/Interim%20Guidance%20-%20Notice%20of%20exception%20to%20date%20of%20receipt%20rule.pdf)
* PACT Act Implementation SOP

The PACT Act, signed into law on August 10, 2022, established substantial legislative changes for the VA, and is considered a liberalizing law. When awarding claims based on a newly added presumptive or an expanded authority under the PACT Act, decision-makers must apply the provisions of 38 C.F.R. § 3.114(a) to the effective date or dates assigned.

When determining the correct effective date regarding PACT claims, it is important to take note of the following items:

* Per 38 C.F.R § 3.155(b), an *Intent to File (ITF), VA Form 21-0966*, holds a date of claim for effective date purposes, if VA receives a complete application within 1 year of receipt of the ITF
* On August 8, 2023, VA became aware that there were some issues with submissions on the va.gov website that were causing claimants to receive error messages. As a result, the Under Secretary for Benefits (USB) used authority under 38 C.F.R § 3.1(r) and established an exception to the date of receipt of claim rule which was published in the Federal Register on August 16, 2023. The exception establishes that claims or ITFs for Compensation or DIC received August 9, 2023, through August 14, 2023, will be deemed to have been received on August 8, 2023

To be eligible for a retroactive payment under the provisions of 38 C.F.R § 3.114, the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law (August 10, 2022) and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement.

* 38 C.F.R § 3.114(a)(1) allows for retroactive payment to the date of the law change if the claim was received within one year of the change.
* 38 C.F.R. § 3.114(a)(3) allows for retroactive payment for one year prior to the date of claim if the claim is received more than one year *after* the date of the law change. To be eligible for retroactive payment, the claimant must have met all eligibility criteria for the liberalized benefit on the date of the law change and continuously from that date to the date of claim.
* Claims received or associated with an ITF received on or before August 14, 2023, may be eligible for retroactive payment under 38 C.F.R §3.114(a)(1) if all liberalizing criteria were met on August 10, 2022
* Claims received, or associated with ITFs received, on or after August 15, 2023, may be eligible for retroactive payment under 38 C.F.R. § 3.114(a)(3) if all liberalizing criteria were met on August 10, 2022

**Examples:**

**Scenario 1**: The Veteran served honorably in the Marine Corps and was released from active service on May 29, 1975. VA receives a completed and signed ITF from the Veteran on August 11, 2023. On February 2, 2024, VA receives a completed and signed *VA Form 21-526EZ, Application for Disability Compensation and Related Compensation Benefits*, with a claim for service connection of diabetes mellitus. The Veteran has a diagnosis of diabetes mellitus. Service records verify he served in Laos in 1967. All eligibility criteria were met on or before August 10, 2022, to include diagnosis of diabetes mellitus.

**Effective Date Rationale**: The effective date is August 10, 2022, the date PACT Act was signed into law. The ITF was received August 11, 2023, and is considered received on August 8, 2023, under the “exception to date of receipt rule”. The claim is being considered within 1 year of the enactment of the law and the Veteran met all eligibility criteria for the liberalized benefit on or before the date of the law change (August 10, 2022), so liberalizing legislation under 38 C.F.R. § 3.114(a)(1) allows VA to award benefits from the date of the law change, but not prior to it.

**Scenario 2**: The Veteran served honorably in the Army and was released from active service on April 7, 2017. VA receives a completed and signed ITF on August 15, 2023. On August 14, 2024, VA receives a completed and signed *VA Form 21-526EZ* with a claim for service connection of kidney cancer. The Veteran has a diagnosis of kidney cancer. Service records verify he served in Afghanistan from June 3, 2014, to September 5, 2015. Kidney cancer was first diagnosed on July 4, 2022.

**Effective Date Rationale**: The effective date is August 15, 2022, one year prior to the date of receipt of the ITF. Liberalizing legislation under 38 C.F.R. § 3.114(a)(3) allows VA to assign an effective date one year prior to the date the claim was received, as all eligibility criteria for the liberalized benefit were met on or before the date of the law change, August 10, 2022. An effective date back to August 10, 2022, is not warranted in this scenario because the Veteran did not submit the claim within one year of the law change.

**Scenario 3**: The Veteran served honorably in the Marine Corps and was released from active duty on April 3, 2012. Military personnel records show he had service in Iraq from 2004 to 2005. He had a previously denied claim for chronic fatigue syndrome in 2019 because his symptoms were chronic, but they did not meet the minimum compensable criteria for presumptive service connection. On January 1, 2024, VA receives a completed and signed *VA Form 21-0995, Supplemental Statement of the Case*, with a claim for service connection of chronic fatigue syndrome. The Veteran still has a diagnosis of CFS.

**Effective Date Rationale**: The effective date is January 1, 2023, one year prior to the date of receipt of the supplemental claim. Liberalizing legislation under 38 C.F.R. § 3.114(a)(3) allows VA to assign an effective date one year prior to the date the claim was received as all eligibility criteria for the liberalized benefit were met on or before the date of the law change, August 10, 2022. An effective date back to August 10, 2022, is not warranted in this scenario because the Veteran did not submit the claim within one year of the law change. The claim now qualifies for non-compensable service connection because the new PACT Act removed the compensability requirement.

# Temporary Guidance: Complex Medical Opinions Exception

**Target Audience:** Decision Review Operations Center (DROC) Management and Quality Review Teams (QRT), Decision Review Officers (DRO), Rating Veterans Service Representatives (RVSR), Veterans Service Representatives (VSR)

**Presenter:** Korrie Shivers, Senior Management and Program Analyst, OAR

**References:**

* 38 C.F.R. § 20.802, *Remand for Correction of Error*
* M21-1, IV.i.2.A.7.a., *Who May Request a Medical Opinion*
* M21-5, 4.5.a., *Types of Board Actions*
* M21-5, 7.A.1.m., *Definition: Remanded Appeal*

On September 28, 2023, OAR emailed temporary guidance for the jurisdiction of preparing and ordering aggravation medical opinions, to include *Allen* aggravation. This was sent to all DROCs for distribution to employees, QRT, and management staff. At the same time, OAR submitted a manual change request to Compensation Service to add this exception into the pertinent section.

The procedural exception for complex medical opinions is to allow the development activity to prepare and order an aggravation medical opinion, to include *Allen* aggravation, as directed in the remand instructions by the Board. When the Board directs the development for the aggravation opinion, it is no longer classified as a complex medical opinion, as the Board’s involvement in directing the development implies a specific mandate for the medical opinion for evidentiary purposes.

When the remand instructions direct the preparation of the aggravation medical opinion, the development activity can prepare and enter the medical opinion into the appropriate examination-requesting application. This would also include the ordering of associated examinations in support of the aggravation medical opinion.

However, if the development activity finds that the medical opinion is for other complex medical opinion types as listed in relevant M21-1 section, they must refer this to the rating activity for review.

**Please note:** This temporary guidance supersedes the guidance provided in the June 2023 Quality Call on the topic of: *Jurisdiction of Complex Medical Opinion Review*. Again, this is pending a M21-1 update to create the exception for the development activity to prepare Board remanded aggravation medical opinions.

# Questions and Answers

Questions arose during the quality call. We have detailed those items below, with the applicable response.

**Q1:** Was the Temporary Guidance: Complex Medical Opinions Exception directive only provided through email? Or is it documented somewhere on the CPKM/OAR homepage?

**A1:** Based on guidance provided in the September 28, 2023, email, the exception only applies to Board of Veterans Appeals (Board) remands. Specifically provided in the guidance, this procedural exception will allow the development activity to prepare and order, only applies to aggravation medical opinions, to include *Allen* aggravation, as directed in the remand instructions provided by the Board. This guidance does not apply to those instances on the VA Form 20-0999 for a higher-level review (HLR) duty to assist (DTA) returns.

**Q2:** The Temporary Guidance: Complex Medical Opinions Exception language indicates that this exception only applies to Board Remands. If the *VA Form 20-0999, Higher Level Review Return*, states that an aggravation opinion is needed, VSRs should still follow the complex exam procedures, correct?

**A2:** A manual change request has been submitted to Compensation Service to update M21-1, Part IV, Subpart i.2.A.7.a, *Who May Request a Medical Opinion*, to create an exception. For now, the guidance has only been provided through email. The email with guidance was sent to all DROCs on Thursday, September 28, 2023.  Once Compensation Service updates that section, OAR will send a message.