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# UNEMPLOYABILITY DETERMINATIONS IN COMPENSATION CASES

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## FOREWORD

The following are the U.S. Department of Veterans Affairs Central Office's instructions to VA Regional Offices concerning Individual Unemployability in compensation claims. By understanding these provisions and the intricacies of claims development, Veterans Service Officers may better development claims for expeditious adjudication.



# • UNEMPLOYABILITY DETERMINATIONS IN COMPENSATION CASES

## *INDIVIDUAL UNEMPLOYABILITY*

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### REQUIREMENTS:

To establish entitlement to total compensation benefits because of individual unemployability, a veteran must claim to be unable to secure or retain employment by reason of service-connected disability. The veteran must complete VA Form 21-8940, "Veteran's Application for Increased Compensation Based on Unemployability"; meet the schedular requirements of 38 CFR 4.16 or have an extra-schedular evaluation approved by Central Office (212C); and be unemployable in fact by reason of service-connected disability. The rating activity must consider both the veteran's current physical condition and employment status when rating claims for total compensation because of individual unemployability. Do not defer a decision as to the schedular degree of disability pending receipt of evidence sufficient to adjudicate the issue of individual unemployability.

### JURISDICTION:

A veteran must specifically claim individual unemployability by completing VA Form 21-8940. It is the duty of the rating specialist to identify claims in which the veteran may be entitled to this benefit. If the rating specialist identifies potential entitlement to a total disability evaluation based on individual unemployability, the rating specialist shall request VA Form 21-8940 be sent to the veteran with an explanation that entitlement to compensation at the 100 percent rate may be payable if the veteran is unable to secure and follow a substantially gainful occupation because of service-connected disabilities.

## *EVIDENCE REQUIREMENTS*

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Use the veteran's application on VA Form 21-8940 as the basis for development of evidence to support the claim for individual unemployability. When rating claims for total benefits because of individual unemployability, ensure the evidence is adequate to evaluate both the veteran's current degree of disability and employment status. Develop all required evidence concurrently.

## **MEDICAL:**

Evidence sufficient to support a current evaluation of the extent of all of the veteran's disabilities must be of record. The evidence shall reflect the veteran's condition within the past 12 months and include, but need not be limited to, results of VA examination, hospital reports, or outpatient treatment records. If the medical evidence of record is incomplete or inconsistent, schedule a general medical examination. Request special tests only when required for proper evaluation of the degree of severity of relevant disabilities.

## **EMPLOYMENT:**

VA Form 21-8940 requires the veteran to furnish an employment history for the 5-year period preceding the date on which the veteran claims to have become too disabled to work and for the entire time after that date. It is essential that VA Form 21-8940 contain the work history. In addition, request each employer during the 12-month period prior to the date the veteran last worked to complete and return a VA Form 21-4192, "Request for Employment Information in Connection With Claim for Disability Benefits." Forms indicating only that the veteran retired will routinely require additional development to obtain information as to whether the veteran's retirement was by reason of disability, and if so, the nature of the disability for which retired.

## **SOCIAL SECURITY DISABILITY RECORDS:**

If available evidence is insufficient to award individual unemployability benefits and the record shows that the veteran is receiving Social Security benefits because of disability, complete copies of the SSA records must be obtained and considered.

## **VOCATIONAL REHABILITATION RECORDS:**

- ◆ Vocational rehabilitation records must be obtained and considered in individual unemployability claims whenever there is indication that training was not found to be medically feasible. Also, vocational rehabilitation records should be reviewed if there is an indication that a veteran's attempt to be trained was unsuccessful.
- ◆ The fact that a veteran either is participating in a program of rehabilitation or has completed such a program and is "rehabilitated" will not preclude a grant of total benefits because of individual unemployability. Deny claims or reduce awards only if the facts demonstrate that the veteran is not precluded from obtaining

employment by reason of service-connected disability or has in fact obtained gainful employment.

#### **SELF-EMPLOYMENT OR TIGHTLY HELD CORPORATION:**

- ◆ Development to produce evidence necessary to establish the degree to which service-connected conditions have impaired the veteran's ability to engage in self-employment must generally be more extensive than development where the veteran worked for others. Request the veteran to furnish a statement as to types of work performed, amount of time lost in the previous 12 months due to service-connected disabilities, and number of hours worked per week.
- ◆ In the case of a self-employed person, the issue for consideration is the relationship between the frequency and type of service performed by the veteran for the business and the veteran's net and gross earnings for the past 12 months. Low gross earnings tend to support a finding of marginal employment, especially when considered with the amount of time lost from work due to service-connected disablement. Low net earnings, on the other hand, must be considered in connection with gross income. High gross income tends to indicate that the veteran is capable of engaging in a substantially gainful occupation. Inability to make a profit is not synonymous with the inability to engage in substantially gainful employment.
- ◆ A tightly or closely held corporation is usually a family corporation. If the veteran's name is the same as the corporation's, consider the possibility of a tightly held corporation. Since the veteran may control the amount of wages paid to himself/herself, do not make a finding of marginal employment solely on the basis of low wages. If reported wages appear low for the work performed, request a field examination to determine the veteran's relationship to the corporation and corporate earnings. The issue for consideration is whether the frequency and type of service performed by the veteran equates to substantially gainful employment. In this regard, evidence that the veteran received or was entitled to receive other remuneration from the corporation, such as stock dividends or loans must be considered.

## ***RATING PRACTICES AND PROCEDURES:***

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### **RATING CONSIDERATION:**

Consider the following factors when rating claims for total benefits because of individual unemployability:

Make a decision as to whether the veteran meets the requirements for a schedular 100 percent evaluation before considering the issue of individual unemployability.

- ◆ Verify that the disability requirements set out in 38 CFR 4.16 are met. If the veteran claims to be unable to obtain or retain employment because of a service-connected psychiatric disability and employment is actually precluded for this reason, assign a 100 percent schedular evaluation (38 CFR 4.16(c)). If the veteran specifically claims individual unemployability and any of the requirements of 38 CFR 4.16 are not met, the rating should be formally coded to indicate denial of individual unemployability. If the veteran disagrees with the decision, the Statement of the Case should cite the relevant portion of 38 CFR 4.16 as the authority for the denial.
- ◆ Usually the evidence must establish that the service-connected conditions have precluded employment continuously since date of incurrence or the date the service-connected condition reached a static level of disability.
- ◆ Establish individual employability on a factual basis. Do not presume individual unemployability.
- ◆ Apply the concept of average impairment in earning capacity to determinations of the percentage of disability, not to determinations as to entitlement to total compensation because of individual unemployability.
- ◆ The terms "unemployability" and "unemployable" are not synonymous for compensation purposes. A veteran may be unemployed or unemployable for a variety of reasons. A determination as to entitlement to total benefits because of individual unemployability is appropriate only when a veteran's unemployability is a result of service-connected disabilities.
- ◆ When considering the issue of entitlement to total compensation benefits because of individual unemployability, substantially gainful employment is defined as that which is ordinarily followed by the nondisabled to earn their livelihood with earnings common to the particular occupation in the community where the veteran resides.
- ◆ In an individual unemployability determination, marginal employment shall not be considered substantially gainful employment. Marginal



employment exists when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. Marginal employment may also be held to exist, on a facts found basis (which includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual income exceeds the poverty threshold. Consider the nature of the employment and the reason for termination in all claims. (38 CER 4.16)

- ◆ The Bureau of the Census revises the poverty thresholds annually. VBA will publish notices in the Federal Register.
- ◆ If a veteran's income exceeds the poverty threshold, a finding of marginal employment is not precluded if the veteran did not actually earn the income. (For example, a veteran suffers an increase in severity of a service-connected disability. He applies for individual unemployability benefits even though he is still employed at his former salary. His employer reports that the veteran has been given light "make work" jobs but is not actually earning his salary.) Employment in a sheltered workshop is generally marginal employment.
- ◆ Determine whether the severity of the service-connected conditions precludes the veteran from obtaining or retaining substantially gainful employment. Identify and isolate the effects of extraneous factors such as age, nonservice-connected conditions, intercurrent injuries, availability of work, or voluntary withdrawal from the labor market when determining whether a veteran is unemployable solely by reason of service-connected disability. Include sufficient data in the reasons and bases section of the rating to provide the reasoning behind the decision, either favorable or unfavorable, and to justify the conclusion.

#### PREPARATION OF RATINGS:

- ◆ If schedular requirements are met but individual unemployability is denied, the reasons and bases portion of the rating must provide an explanation of all pertinent subsidiary determinations. (See 38 CFR 4.16 and 4.18.)
- ◆ When a veteran is considered unemployable due to nonservice-connected factors, an explanation of the reasons for this decision must be included. In addition the rating specialist must also set forth its reasoning for finding that service-connected disabilities do not cause unemployability without regard to nonservice-connected conditions.

- ◆ If the veteran is considered employable, the rating specialist need only explain the facts which are pertinent to that conclusion.
- ◆ If schedular requirements are not met, the absence of a basis for extra-schedular submission must be noted. (38 CFR 3.321(b)(1), 4.16(b))
- ◆ Dispose of the issue of Dependents' Educational Assistance (38 U.S.C. chapter 35) whenever individual unemployability is granted and there are eligible or potentially eligible claimants for chapter 35 benefits.

### ***MULTIPLE INJURIES INCURRED IN ACTION OR AS PRISONER OF WAR (POW):***

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In determinations of entitlement to a total disability rating under 38 CFR 4.16, consider multiple injuries incurred in action as one disability. POW status is a continuation of action against the enemy. Therefore, consider multiple disabilities incurred while a POW, and disabilities incurred in action prior to or subsequent to POW status, as one disability.

### ***CLAIMS REQUIRING CENTRAL OFFICE APPROVAL:***

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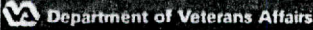
#### **EXTRA-SCHEDULAR:**

Do not hesitate to submit any case to Central Office (212C) for extra-schedular considerations if the evidence of record supports a finding that the veteran is unemployable by reason of service-connected disability but does not meet the schedular requirements of 38 CFR 4.16.

#### **PREPARATION OF MEMORANDUM:**

The memorandum prepared to transmit claims folders to Central Office for review must provide the following:

- ◆ Clear and succinct statements of fact, including medical and lay evidence of symptoms.
- ◆ Discussions of facts with relevant laws and regulations.
- ◆ The issues to be resolved as well as the recommended evaluations.



## VETERAN'S APPLICATION FOR INCREASED COMPENSATION BASED ON UNEMPLOYABILITY

**NOTE:** This is a claim for compensation benefits based on unemployability. When you complete this form you are claiming total disability because of a service-connected disability(ies) which has/have prevented you from securing or following any substantially gainful occupation. Answer all questions fully and accurately.

1. VA FILE NUMBER	2. VETERAN'S SOCIAL SECURITY NUMBER	3. DATE OF BIRTH
4. NAME OF VETERAN (First, Middle, Last) (Type or Print)		5. ADDRESS OF CLAIMANT (No., street or rural route, P.O., city, State and ZIP Code)
6. TELEPHONE NUMBER OF CLAIMANT (Include Area Code)		

### SECTION I - DISABILITY AND MEDICAL TREATMENT

7. WHAT SERVICE-CONNECTED DISABILITY PREVENTS YOU FROM SECURING OR FOLLOWING ANY SUBSTANTIALLY GAINFUL OCCUPATION?	8. HAVE YOU BEEN UNDER A DOCTOR'S CARE AND/OR HOSPITALIZED WITHIN THE PAST 12 MONTHS?  <input type="checkbox"/> YES <input type="checkbox"/> NO	9. DATES OF TREATMENT BY DOCTOR(S)
10. NAME AND ADDRESS OF DOCTOR(S)	11. NAME AND ADDRESS OF HOSPITAL	12. DATES OF HOSPITALIZATION

### SECTION II - EMPLOYMENT STATEMENT

13. DATE YOUR DISABILITY AFFECTED FULL TIME EMPLOYMENT	14. DATE YOU LAST WORKED FULL TIME	15. DATE YOU BECAME TOO DISABLED TO WORK
16A. WHAT IS THE MOST YOU EVER EARNED IN ONE YEAR?	16B. WHAT YEAR	16C. OCCUPATION DURING THAT YEAR

### 17. LIST ALL YOUR EMPLOYMENT INCLUDING SELF-EMPLOYMENT FOR THE LAST FIVE YEARS YOU WORKED

A. NAME AND ADDRESS OF EMPLOYER	B. TYPE OF WORK	C. HOURS PER WEEK	D. DATES OF EMPLOYMENT		TIME LOST FROM ILLNESS	HIGHEST GROSS EARNINGS PER MONTH
			FROM	TO		

18. INDICATE YOUR TOTAL EARNED INCOME FOR THE PAST 12 MONTHS \$	19. IF PRESENTLY EMPLOYED, INDICATE YOUR CURRENT MONTHLY EARNED INCOME \$
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20. DID YOU LEAVE YOUR LAST JOB/SELF-EMPLOYMENT BECAUSE OF YOUR DISABILITY? <input type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," give the facts in Item 25)	21. DO YOU RECEIVE/EXPECT TO RECEIVE DISABILITY RETIREMENT BENEFITS? <input type="checkbox"/> YES <input type="checkbox"/> NO	22. DO YOU RECEIVE/EXPECT TO RECEIVE WORKERS COMPENSATION BENEFITS? <input type="checkbox"/> YES <input type="checkbox"/> NO
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23. HAVE YOU TRIED TO OBTAIN EMPLOYMENT SINCE YOU BECAME TOO DISABLED TO WORK?  
 YES  NO (If "Yes," complete Items A, B, and C)

A. NAME AND ADDRESS OF EMPLOYER	B. TYPE OF WORK	C. DATE APPLIED

## SECTION III - SCHOOLING AND OTHER TRAINING

22. EDUCATION (Circle highest year completed)

GRADE SCHOOL 1 2 3 4 5 6 7 8

HIGH SCHOOL 1 2 3 4

COLLEGE 1 2 3 4

23A. DID YOU HAVE ANY OTHER EDUCATION AND TRAINING BEFORE YOU WERE TO DISABLED TO WORK?

 YES  NO (If "Yes," complete Items 23B and 23C)

23B. TYPE OF EDUCATION OR TRAINING

23C. DATES OF TRAINING

BEGINNING

COMPLETION

24A. HAVE YOU HAD ANY EDUCATION AND TRAINING SINCE YOU BECAME TOO DISABLED TO WORK?

 YES  NO (If "Yes," complete Items 24B and 24C)

24B. TYPE OF EDUCATION OR TRAINING

24C. DATES OF TRAINING

BEGINNING

COMPLETION

25. REMARKS

## SECTION IV - AUTHORIZATION, CERTIFICATION, AND SIGNATURE

**AUTHORIZATION FOR RELEASE OF INFORMATION:** I consent that any physician, surgeon, dentist, or hospital that has treated or examined me for any purpose or that I have consulted professionally may furnish to VA and information about myself and I waive any privilege which makes this information confidential.

**CERTIFICATION OF STATEMENTS:** I CERTIFY THAT as a result of my service connected disabilities I am unable to secure or follow any substantially gainful occupation and that the statements in this application are true and complete to the best of my knowledge and belief and understand that these statements will be considered in determining my eligibility for VA benefits based on unemployability because of service-connected disability.

I UNDERSTAND THAT IF I AM GRANTED SERVICE-CONNECTED TOTAL DISABILITY BENEFITS BASED ON MY UNEMPLOYABILITY, THAT I MUST IMMEDIATELY INFORM VA IF I RETURN TO WORK. I ALSO UNDERSTAND THAT TOTAL DISABILITY BENEFITS PAID TO ME AFTER I BEGIN WORK MAY BE CONSIDERED AN OVERPAYMENT REQUIRING REPAYMENT TO VA.

26A. DATE SIGNED

26B. SIGNATURE OF CLAIMANT

**WITNESS TO SIGNATURE OF CLAIMANT IF MADE BY "X" MARK. NOTE:** Signature made by mark must be witnessed by two persons to whom the person making the statement is personally known and the signature and address of such witnesses must be shown below.

27A. SIGNATURE OF WITNESS

27B. ADDRESS OF WITNESS

28A. SIGNATURE OF WITNESS

28B. ADDRESS OF WITNESS

**PENALTY:** The law provides severe penalties which include fine or imprisonment or both for the willful submission of any statement or evidence of a material fact, knowing it to be false or for the fraudulent acceptance of any payment to which you are not entitled.

**PRIVACY ACT NOTICE:** The responses you submit are considered confidential (38 U.S.C. 3301). They may be disclosed outside VA only if the disclosure is authorized by the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22, Compensation, Pension, Education and Rehabilitation Records - VA, published in the Federal Register. The requested information is considered relevant and necessary to determine maximum benefits provided under the law. Information submitted is subject to verification through computer matching programs with other agencies.

**RESPONDENT BURDEN:** Public reporting burden for this collection of information is estimated to average 3/4 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the VA Clearance Officer (723), 810 Vermont Ave., NW, Washington, DC 20420; and to the Office of Management and Budget, Paperwork Reduction Project (2900-0404), Washington, DC 20503. Do NOT send requests for benefits to these addresses.





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