



Lesson 16

Total Disability Based on Individual Unemployability

The American Legion DSO School

March 2022

Lesson 16 Learning Objectives

Learn the requirements for Total Disability Based on Individual Unemployability (TDIU).

- Distinguish between **schedular** and **extraschedular** TDIU.
- Distinguish between unemployability and unemployment.
- Learn about how to establish a claim for TDIU.

Quiz

Click the **Quiz** button to edit this object

Poll Question (This does not count towards your grade)

How much more does a single Veteran with no dependents receive per month from VA for TDIU then a single Veteran rated at 90%?

- \$ 958.44
- \$ 152.64
- \$1,333.54
- \$ 467.39

Poll Answer

\$1,333.54

TDIU is a significant benefit for Veterans.

VA Rating	Monthly Rate ¹ 12/1/2021
10	\$ 152.64
20	\$ 301.74
30	\$ 467.39
40	\$ 673.28
50	\$ 958.44
60	\$ 1,214.03
70	\$ 1,529.95
80	\$ 1,778.43
90	\$ 1,998.52
100	\$ 3,332.06

¹For a single Veteran with no dependents

VA's Policy on Total Disability

*"Total disability will be considered to exist when there is present any **impairment of mind or body** which is sufficient to **render it impossible for** the average person to follow a substantially **gainful occupation**; provided...(that) the impairment is reasonably certain to continue **throughout the life** of the disabled person."*

38 C.F.R. § 4.15.

Total Disability Based on Individual Unemployability

- If the Veteran's combined schedular rating is **less than 100%**, BUT
- If the Veteran's service-connected disabilities render the Veteran **unemployable**,
- Then VA may assign a **total disability rating** for compensation purposes. 38 C.F.R. § 4.16.

Note: VA will only consider a Veteran's service-connected disabilities.

TDIU Eligibility: Scheduling

“Scheduling” TDIU threshold eligibility requirements at 38 C.F.R. § 4.16(a):

- One service-connected disability rated at **60%** disabling or more,

- or -

- Multiple service-connected disabilities **combining to 70%** or greater level of impairment, with at least **one disability rated at 40%** or more.

TDIU Eligibility: Scheduling, cont.

For the purposes of TDIU,
Multiple service-connected
disabilities resulting from:

- **one** common cause, or
- **one** single accident

Are considered as **one**
disability for meeting the
60% or 40% schedular
thresholds.



Quiz

Click the **Quiz** button to edit this object

Poll question (this does not count towards your grade)

Veteran Robert suffered a fall and landed hard on his back while in the Marine Corps. As a result of that accident, he receives a 40% rating for his back plus a separate 10% rating for bilateral sciatic nerve impairment in each leg.

Are his service-connected conditions "one disability" for TDIU purposes?

- No
- Yes

Poll Answer

Yes

Because Robert's back and bilateral sciatic nerve ratings are all due to the single accident in service, they are considered as one disability for meeting schedular TDIU eligibility.

These facts come from *Moody v. Wilkie*, 30 Vet. App. 329 (2018).

Quiz

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Poll Question (this does not count towards your grade)

Veteran Robert receives a 40% rating for his back plus separate 10% ratings for bilateral sciatic nerve impairment in each leg. His ratings are considered as "one disability" for TDIU.

Does he meet the requirements for schedular TDIU?

(Reminder: One disability rated 60% or more OR combined rating of 70% with one disability rated 40% or more)

- Yes: Because $40\% + 10\% + 10\% = 60\%$, she has one disability rated 60%
- No: Using the Combined Ratings Table her aggregate rating is 50%

Poll Answer

No: Using the Combined Ratings Table her aggregate rating is 50%

Even as “one disability,” Roberts’s ratings must be combined using the Combined Ratings Table, rather than added. 38 C.F.R. § 4.25

Under the Combined Ratings Table, he has one disability rated at 50%, which does not meet the schedular TDIU requirements. These facts also come from *Moody v. Wilkie*, 30 Vet. App. 329 (2018).

TDIU Eligibility: Extraschedular

“Extraschedular” TDIU is available for Veterans who do not satisfy the schedular criteria. 38 C.F.R. § 4.16(b).

- It is VA policy to rate a Veteran 100% whenever a Veteran is unemployable.
 - If the Veteran is unemployable due to service-connected disabilities, but the Veteran is not rated high enough, then
 - The Veteran’s case must be referred to the Director, Compensation Service, in Washington, D.C. (VA Central Office) for extraschedular consideration.

Unemployability vs Unemployment

Unemployability and unemployment are **not** the same thing.



What is Unemployability?

Two main questions:

- 1. Can the Veteran “secure or follow” a job?**
 - Can they keep a job once hired?
- 2. Does the Veteran have “substantially gainful” employment?**
 - Was there competitive hiring?
 - Is the work full-time or equivalent?
 - Can the Veteran make a living?

Marginal Employment

- Marginal employment is not substantially gainful employment.
- Marginal employment includes Veterans who receive less than the annual poverty threshold.
 - \$13,465 for one person under age 65 for 2020.
- Or, “**facts found**” basis
 - Includes work in “protected environment” like a family business or sheltered workplace.
 - No clear definition.



Quiz

Click the **Quiz** button to edit this object

Poll Question (this does not count towards your grade)

Veteran Eric works full-time as a park ranger, but says that he can only keep his job due to the many accommodations made by his bosses, including: he is assigned only duty stations near restrooms, allowing him 10-15 breaks per day, not requiring him to remain at emergency scenes, and always having another ranger on call in case he needs to leave early due to medical reasons from his service-connected disabilities.

Does Veteran Eric have substantially gainful employment?

- Yes
- No

Poll Answer

Maybe?

These are the facts from *Cantrell v. Shulkin*, 28 Vet.App. 382 (2017). In this case, CAVC held that VA had not provided a clear definition of work “in a protected environment.” The CAVC held VA needs to write a better definition, and suggested they should consider the factors on the last slide, plus the scope of his job duties and responsibilities.

We don't know what VA ultimately decided because once the case leaves the Court it becomes a private record again.

Because the definition of “protected environment” is unclear, this is an area where your advocacy for a Veteran can make a big difference.

TDIU is Individualized



TDIU is an **individualized** determination where VA considers:

- The Veteran's **employment history**:
 - What the Veteran did and tried to do.
 - What the Veteran applied for.
- The Veteran's **education**:
 - Extent of formal schooling.
 - Vocational or specialized skill training.
- VA should **not** consider the Veteran's age, retirement status, or if attending college.

Obtaining TDIU Benefits

VA should consider TDIU whenever evidence suggests the Veteran is unemployable due to service-connected disabilities.

- Court has made clear that TDIU may be a part of **any** claim for benefits.
 - **Inferred** issue if the Veteran did not list TDIU on their VA form.



Obtaining TDIU Benefits

- VA uses a form to expressly raise a claim for TDIU, “Veteran’s Application for Increased Compensation Based on Unemployability,” [VA Form 21-8940](#).
- This form is **not mandatory** to establish TDIU as an issue.
 - As we discussed, can be raised by inferred from the evidence.
- But VA’s adjudication manual says the form is required to establish entitlement to TDIU.
 - [M-21, Part IV.ii.2.F.2.c](#)

Advocacy Tip:

Always submit VA Form 21-8940 in TDIU claims.

VA Form 21-8940

Section I: Complete Boxes 1-7 with Veteran's information.

Box 8: List all conditions that make the Veteran unemployable.

Boxes 9-13: List dates of treatment, name of doctor, and address of facility for all relevant medical treatment.

SECTION I - VETERAN IDENTIFICATION INFORMATION		
<p>NOTE: You can either complete the form online or by hand. If completed by hand print the information requested in ink, neatly, and legibly to expedite processing the form.</p>		
<p>1. NAME OF VETERAN (FIRST, MIDDLE INITIAL, LAST)</p>		
<p>2. VETERAN'S SOCIAL SECURITY NUMBER</p>	<p>3. VA FILE NUMBER</p>	<p>4. DATE OF BIRTH Month - Day - Year</p>
<p>5. MAILING ADDRESS OF VETERAN (No. and street or rural route, city or P.O., State, ZIP Code and Country)</p> <p>No. & Street</p> <p>Apt./Unit Number City</p> <p>State/Province Country ZIP Code/Postal Code</p>		
<p>6. EMAIL ADDRESS (If applicable) <input type="checkbox"/> I agree to receive electronic correspondence from VA in regards to my claim.</p>	<p>7. TELEPHONE NUMBER (Include Area Code)</p> <p>Enter International Phone Number (If applicable)</p>	
SECTION II - DISABILITY AND MEDICAL TREATMENT		
<p>8. WHAT SERVICE-CONNECTED DISABILITY PREVENTS YOU FROM SECURING OR FOLLOWING ANY SUBSTANTIALLY GAINFUL OCCUPATION?</p>	<p>9. HAVE YOU BEEN UNDER A DOCTOR'S CARE AND/OR HOSPITALIZED WITHIN THE PAST 12 MONTHS?</p> <p><input type="radio"/> YES <input type="radio"/> NO</p>	<p>10. DATE(S) OF TREATMENT BY DOCTOR(S) (Go to Item 26 - Remarks - for additional dates)</p> <p>FROM</p> <p>TO</p>
<p>11. NAME AND ADDRESS OF DOCTOR(S)</p>	<p>12. NAME AND ADDRESS OF HOSPITAL</p>	<p>13. DATE(S) OF HOSPITALIZATION (Go to Item 26 - Remarks - for additional dates)</p> <p>FROM</p> <p>TO</p>

VA Form 21-8940 Cont.

SECTION III - EMPLOYMENT STATEMENT		
14. DATE YOUR DISABILITY AFFECTED FULL-TIME EMPLOYMENT Month Day Year □□ - □□ - □□□□	15. DATE YOU LAST WORKED FULL-TIME Month Day Year □□ - □□ - □□□□	16. DATE YOU BECAME TOO DISABLED TO WORK Month Day Year □□ - □□ - □□□□
17A. WHAT IS THE MOST YOU EVER EARNED IN ONE YEAR? \$ □□□□□□	17B. WHAT YEAR? Year □□□□	17C. OCCUPATION DURING THAT YEAR □□□□□□□□
SECTION III - EMPLOYMENT STATEMENT (Continued)		
18. LIST ALL YOUR EMPLOYMENT INCLUDING SELF-EMPLOYMENT FOR THE LAST FIVE YEARS YOU WORKED (Include any military duty including inactive duty for training)		
A. NAME AND ADDRESS OF EMPLOYER (OR UNIT)	B. TYPE OF WORK	C. HOURS PER WEEK
□□□□□□□□□□	□□□□□□□□	□□□□
D. DATES OF EMPLOYMENT		E. TIME LOST FROM ILLNESS
FROM	TO	□□□□
□□ - □□ - □□□□	□□ - □□ - □□□□	F. HIGHEST GROSS EARNINGS PER MONTH \$ □□□□, □□□□
19. IF YOU ARE CURRENTLY SERVING IN THE RESERVE OR NATIONAL GUARD, DOES YOUR SERVICE CONNECTED DISABILITY PREVENT YOU FROM PERFORMING YOUR MILITARY DUTIES? <input type="radio"/> YES <input type="radio"/> NO		
20A. INDICATE YOUR TOTAL EARNED INCOME FOR THE PAST 12 MONTHS \$ □□□□, □□□□	20B. IF PRESENTLY EMPLOYED, INDICATE YOUR CURRENT MONTHLY EARNED INCOME \$ □□□□, □□□□	
21A. DID YOU LEAVE YOUR LAST JOB/SELF-EMPLOYMENT BECAUSE OF YOUR DISABILITY? <input type="radio"/> YES <input type="radio"/> NO (If "Yes," give the facts in Item 26, "Remarks")	21B. DO YOU RECEIVE/EXPECT TO RECEIVE DISABILITY RETIREMENT BENEFITS? <input type="radio"/> YES <input type="radio"/> NO	21C. DO YOU RECEIVE/EXPECT TO RECEIVE WORKERS COMPENSATION BENEFITS? <input type="radio"/> YES <input type="radio"/> NO

Box 14: Date Veteran's disabilities first impacted employment.

Box 15: Date Veteran last worked full-time.

Box 16: Date Veteran became too disabled to work.

Boxes 17A-C: Information on the Veteran's highest paying job.

Section III: List employment from last 5 years Veteran worked.

VA Form 21-8940 Cont.

Box 22: List jobs Veteran has applied for. If no applications, check no.

Box 23: Check the Veteran's highest level of education.

Box 24A: List Veteran's education and training before becoming unemployable.

Box 25A: List Veteran's education and training after becoming unemployable.

22. HAVE YOU TRIED TO OBTAIN EMPLOYMENT SINCE YOU BECAME TOO DISABLED TO WORK?		
<input type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," complete Items 22A, 22B, and 22C)		
22A.	22B.	22C.
NAME AND ADDRESS OF EMPLOYER	TYPE OF WORK	DATE APPLIED
<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	<input type="text"/> <input type="text"/>	<input type="text"/> - <input type="text"/> - <input type="text"/>
SECTION IV - SCHOOLING AND OTHER TRAINING		
23. EDUCATION (Check highest year completed)		
GRADE SCHOOL <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7 <input type="checkbox"/> 8 HIGH SCHOOL <input type="checkbox"/> 9 <input type="checkbox"/> 10 <input type="checkbox"/> 11 <input type="checkbox"/> 12 COLLEGE <input type="checkbox"/> Fresh <input type="checkbox"/> Soph <input type="checkbox"/> Jr <input type="checkbox"/> Sr		
24A. DID YOU HAVE ANY OTHER EDUCATION AND TRAINING BEFORE YOU WERE TOO DISABLED TO WORK?		
<input type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," complete Items 24B and 24C)		
24B. TYPE OF EDUCATION OR TRAINING	24C. DATES OF TRAINING	
	BEGINNING	COMPLETION
<input type="text"/> <input type="text"/>	<input type="text"/> - <input type="text"/> - <input type="text"/>	<input type="text"/> - <input type="text"/> - <input type="text"/>
25A. HAVE YOU HAD ANY EDUCATION AND TRAINING SINCE YOU BECAME TOO DISABLED TO WORK?		
<input type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," complete Items 25B and 25C)		
25B. TYPE OF EDUCATION OR TRAINING	25C. DATES OF TRAINING	
	BEGINNING	COMPLETION
<input type="text"/> <input type="text"/>	<input type="text"/> - <input type="text"/> - <input type="text"/>	<input type="text"/> - <input type="text"/> - <input type="text"/>

VA Form 21-8940 Cont.

Box 27: Veteran signs, not POA. By signing, Veteran is certifying that he/she cannot work and is not working. If the Veteran returns to work they are to inform VA.

Box 28: Date Veteran signed the form.

SECTION IV - AUTHORIZATION, CERTIFICATION, AND SIGNATURE	
<p>AUTHORIZATION FOR RELEASE OF INFORMATION: I authorize the person or entity, including but not limited to any organization, service provider, employer, or Government agency, to give the Department of Veterans Affairs any information about me except protected health information, and I waive any privilege which makes the information confidential.</p> <p>CERTIFICATION OF STATEMENTS: I CERTIFY THAT as a result of my service-connected disabilities, I am unable to secure or follow <i>any</i> substantially gainful occupation and that the statements in this application are true and complete to the best of my knowledge and belief. I understand that these statements will be considered in determining my eligibility for VA benefits based on unemployability because of service-connected disability.</p>	
I UNDERSTAND THAT IF I AM GRANTED SERVICE-CONNECTED TOTAL DISABILITY BENEFITS BASED ON MY UNEMPLOYABILITY, 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.	
27. SIGNATURE OF CLAIMANT <i>(Do Not Print) (Sign in ink)</i>	28. DATE SIGNED
WITNESS TO SIGNATURE OF CLAIMANT IF MADE "X" MARK. NOTE: Signature made by mark must be witnessed by two persons to whom the person making the statement is personally know and the signature and address of such witnesses must be shown below.	
29A. SIGNATURE OF WITNESS <i>(Sign in ink)</i>	29B. ADDRESS OF WITNESS
30A. SIGNATURE OF WITNESS <i>(Sign in ink)</i>	30B. ADDRESS OF WITNESS

Quiz

Click the **Quiz** button to edit this object

Poll Question (This does not count towards your grade)

In which scenario should you ask the Veteran if they are currently working as part of your first meeting?

- Wally - Worsening
- Neville - Never Filed
- Debbie - Disagrees
- All four Veterans
- Diane - Disagrees
- It depends on the facts

Poll Answer

All Four Veterans

TDIU can be raised in any claim, it would help to know the information as soon as possible.

Neville

Never filed



Wally

Worsening



Debbie

Denied before



Diane

Disagrees



TDIU Questions to Ask

Below is a list of suggested questions about TDIU to consider asking a Veteran during your first meeting:

- Currently working?
- How long have they been at their job?
- Income?
- Hours worked?
- Competitively hired?
- Family business?
- Employer Accommodations?
- Responsibilities at work?
- Employment history?
- Education history?
- Physical limitations?
- Mental limitations?

- This presentation is complete.
- A PDF version of these slides will be provided to you at the conclusion of the course for future reference.