



PTSD and TDIU

The *Morris* Case and
Exploring What Constitutes
a Reasonably Raised TDIU
Claim

Hypo Facts

- Vet filed a claim for an increased rating for PTSD, which was rated 50% disabling.
- May 2008 VA treatment records: Vet had Global Assessment of Functioning (GAF) score of 41

Hypo Facts

- February 2009 VA treatment records
 - Vet said he had been unable to sleep since 2003
 - Vet reported:
 - Irritability
 - Social withdrawal
 - Anger
 - Experiencing nightmares of in-service stressor 3-4 times a week

Hypo Facts

- July 2009 VA treatment records
 - Vet found to be:
 - Isolative
 - Hypervigilant
 - Easily startled
 - Vet reported hearing voices

Hypo Facts

- Sept. 2009 letter from Vet's therapist
 - Vet suffered from moderate to severe PTSD
 - His ability to function is limited in all spheres of his life (social, occupational, and within the family).
 - He is not working
 - If employed, he would rapidly decompensate due to the pressure associated even under the most accommodating conditions.

Hypo Facts

- Symptoms included:
 1. Intrusive thoughts and nightmares about the incident
 2. Difficulty concentrating
 3. Short term memory problems
 4. Only sleeping 4 hours a night and waking up every 2 hours due to anxiety
 5. Irritability with anger outbursts
 6. Pervasive sense of doom
- Vet had few friends, lacked social contact, and avoided crowds

Hypo Facts

- January 2015 VAMC records
 - “Pervasive deterioration of functioning” in major areas of life that led to:
 1. A series of suicidal thoughts
 2. Difficulties with concentration and memory
 3. Propensity to socially isolate himself from others
 4. Persistent intrusive memories
 5. Disruptive sleep pattern accompanied by violent nightmares, hypervigilance, explosive anger, and frequent audio and visual flashbacks

Hypo Facts

- Vet has had a difficult time breaking the habit of constantly checking doors and windows at night
- GAF=48
- March 2016 VA exam
 - PTSD led to occupational and social impairment with reduced reliability and productivity
 - Vet reported chronic irritability and frequent verbal outbursts
 - Frequently walked around home at night when he could not sleep to be protective

Hypo Facts

- July 2016 BVA decision
 - Jan. 2015 Vet Center letter indicates that Vet complained of suicidal/homicidal ideation at some point, but denied an active plan, and he had previously denied suicidal/homicidal ideation, and had denied suicidal/homicidal ideations thereafter.
 - Thus, the Vet's symptoms are not of the frequency, severity, and duration as contemplated in a 70 percent or higher rating.

Hypo Facts

- GAF scores range from 41 to 48 and do not merit the assignment of a 70 percent or higher rating, as such a rating requires a more severe impairment manifesting in deficiencies in reality testing as well as major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood or impairment in reality testing.”
- While the Vet was unemployed during the period of appeal, VA examiners determined that this was due to the Vet’s physical disabilities and not solely due to his psychiatric disability.

Mental Condition Rating Criteria

- 70%: Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood
- 100%: Total occupational and social impairment

Mental Condition Rating Criteria: 70% Symptoms (examples)

- Suicidal ideation
- Obsessional rituals which interfere with routine activities
- Speech intermittently illogical, obscure, or irrelevant
- Near-continuous panic or depression affecting the ability to function independently, appropriately & effectively
- Impaired impulse control
- Spatial disorientation
- Neglect of personal appearance & hygiene
- Difficulty in adapting to stressful circumstances
- Inability to establish and maintain effective relationships

Mental Condition Rating Criteria: 100% Symptoms (examples)

- Gross impairment in thought processes or communication
- Persistent delusions or hallucinations
- Grossly inappropriate behavior
- Persistent danger of hurting self or others
- Intermittent inability to perform activities of daily living
- Disorientation of time or place
- Memory loss for names of close relatives, own occupation, or own name

What did the VA do
wrong?

Hypo – Advocate's Arguments

- VA appeared to be requiring some actual impairment in reality testing in order for the Vet to receive an increased rating
- The 70 percent rating criteria does not include symptoms related to reality testing
- While the 100 percent rating criteria does include symptoms related to reality testing (delusions, hallucinations, gross impairment of thought), these symptoms are not required for a Vet to receive a 100 percent rating.

Hypo – Advocate's Arguments

- VA failed to adequately consider evidence which showed the PTSD was more severe than a 50 percent rating
- Sept. 2009 letter (“His ability to function is limited in all spheres of his life (social, occupational, and within the family)”)
- Jan. 2015 VAMC records (Vet has a “pervasive deterioration of functioning” in major areas of his life)

Hypo – Advocate's Arguments

- VA did not adequately consider evidence of symptoms that warrant a higher rating
- Suicidal ideation (an active plan is not required, as the Court said in *Bankhead*)
- Difficulty breaking out of the habit of constantly checking doors and windows at night = obsessional rituals which interfere with routine activities

Hypo – Advocate's Arguments

- Frequent verbal outbursts = impaired impulse control
- Vet would “rapidly decompensate” due to the pressures associated with a job = difficulty in adapting to stressful circumstances
- Vet's GAF scores = signify serious symptoms and serious occupational and social impairment

Hypo – Advocate's Arguments

- VA failed to adequately address TDIU given the evidence of record
 - Vet is not currently working
 - Statements of record suggest unemployability
 - “His ability to function is limited in all spheres of his life (social, occupational, and within the family).”
 - “If employed, this Vet would rapidly decompensate due to the pressure associated even under the most accommodating conditions.”

Advocacy Tips (rating mental conditions)

- Do not let VA read requirements into the Rating Schedule that do not exist
 - If VA appears to do this in a rating decision, file a notice of disagreement
- This also goes for VA examiners
 - Sometimes examiners base their conclusion on the level of occupational and social impairment on an absence of symptoms

Advocacy Tips (rating mental conditions)

- For example, an examiner may say:
 - The Vet's PTSD causes occupational and social impairment with reduced reliability and productivity. While the Vet does exhibit suicidal ideation and impaired impulse control, he does not exhibit spatial disorientation, intermittently illogical or obscure speech, or near continuous panic or depression. Therefore, the Vet does not have occupational and social impairment, with deficiencies in most areas, such as work, school, and family relations

Advocacy Tips (rating mental conditions)

- In this case, advocates should cite to *Mauerhan v. Principi*, 16 Vet. App. 436 (2002), and state that the Vet does not need all (or any) of the symptoms listed in the rating criteria for a 70 percent rating
- Argue that, despite the examiner's opinion, the Vet's suicidal ideation and impaired impulse control leads to occupational and social impairment with deficiencies in most areas of the Vet's life
- If possible, provide as many examples as you can of these deficiencies

What's Wrong with this Medical Opinion?

- “In conclusion, the Vet’s major depressive disorder causes occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks. This level of occupational and social impairment is based on the Vet having the following symptoms: anxiety, chronic sleep impairment, disturbances of motivation and mood, difficulty in establishing and maintaining effective work and social relationships, and impaired impulse control.”

What's Wrong with this Medical Opinion?

- The examiner suggests the Vet's mental condition only warrants a rating of 30%, but 3 of the 5 symptoms on which the opinion is based are indicative of a higher level of occupational & social impairment
- This is another example where the advocate should argue that despite the examiner's opinion, VA should grant a higher rating based on his/her symptoms and how those symptoms are indicative of a higher level of occupational and social impairment

Advocacy Tips (rating mental conditions)

- If a Vet has a symptom or behavior that is analogous to a symptom in the criteria for a higher rating, “connect the dots” for VA (do not rely on VA to do this on its own.
- For example, if a Vet is rated 50% for a mental condition and is always getting into physical and verbal altercations, argue that this constitutes “impaired impulse control” which suggests a 70% rating.

Advocacy Tips (for TDIU)

- Find out whether the Vet is working (either through review of the claims file or by talking with the Vet)
- If the Vet is not working, find out whether a case can be made that the Vet is unable to work due to his or her service-connected conditions

Advocacy Tips (for TDIU)

- How to determine whether a Vet may be unable to work due to SC conditions
 - Talk to the Vet
 - Review medical records and exams for info about Vet's occupational impairment and limitations
 - Review lay statements from Vet and others that discuss symptoms of the SC conditions and how those symptoms affect the Vet's ability to work

When Does the VA have to Address TDIU?

- VA must address TDIU, when it is either:
 - Expressly claimed; or
 - Reasonably raised by the record
- A “claim” for TDIU can be either:
 - Its own free-standing claim; or
 - Part of a claim for increase for a specific service-connected condition or conditions
- See *Rice v. Shinseki*, 22 Vet. App. 447 (2009)

What Constitutes a Reasonably Raised TDIU Claim?

- Would TDIU be reasonably raised based on the following facts alone?
 - Vet has not worked in the last 3 years
 - Vet is SC for the following conditions:
 - PTSD at 50%
 - Back condition at 20%
 - Left knee condition at 10%
 - Tinnitus at 10%

What Constitutes a Reasonably Raised TDIU Claim?

- There is a difference between being unemployed and unemployability.
- TDIU would not be reasonably raised in the previous example because there is no evidence connecting the Vet's unemployment to his SC conditions.
- The Vet may be able to work, but chooses not to because he won the lottery or is retired.

What Constitutes a Reasonably Raised TDIU Claim?

- However, TDIU should be considered reasonably raised and the VA would have to address the issue if the Vet's c-file contained any of the following:
 - A letter from a psychiatrist stating that PTSD symptoms make it impossible for Vet to get and keep a job
 - A statement from his most recent employer that explains the reasons he was fired, and it is apparent those reasons are related to his PTSD
 - A VA exam report stating the Vet's PTSD would prevent him from working full-time

What Constitutes a Reasonably Raised TDIU Claim?

- VA's *Manual M21-1* takes a more narrow view of what constitutes a reasonably raised TDIU claim, under which VA must consider entitlement to TDIU if:
 - Vet's SC rating meets the minimum schedular criteria found in 38 C.F.R. § 4.16(a), and
 - There is current evidence of unemployability due to SC disability(ies) in the Vet's claims folder or under VA control.
- *Manual M21-1*, IV.ii.2.F.2.k (change date Jan. 17, 2017)

What Constitutes a Reasonably Raised TDIU Claim?

- However, this “requirement” that a Vet must meet the percentage requirements for schedular TDIU under 38 C.F.R. § 4.16(a) is not supported by case law or the VA Office of General Counsel.
- The Court of Appeals for the Federal Circuit, in *Roberson v. Principi*, 251 F.3d 1378, 1380 (Fed. Cir. 2001) and *Comer v. Peake*, 552 F.3d 1362 (Fed. Cir. 2009), made no such limitation:

What Constitutes a Reasonably Raised TDIU Claim?

- “We hold that once a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the VA must consider TDIU.” *Roberson*, 251 F.3d at 1380.
- “A claim to TDIU benefits is not a free-standing claim that must be pled with specificity; it is implicitly raised whenever a pro se veteran, who presents cogent evidence of unemployability, seeks to obtain a higher disability rating.” *Comer*, 552 F.3d at 1367.

VA General Counsel Precedent Opinion 06-96

- In determining whether a TDIU claim under section 4.16(b) is raised by the record, the primary consideration is whether the record contains assertions or evidence that the claimant is unable to secure or follow a substantially gainful occupation due to service-connected disabilities.
- In the absence of evidence or an assertion by the claimant that he or she is unemployable due to service-connected disability, VA would not be required to address § 4.16(b).

VA General Counsel Precedent Opinion 06-96

- In cases where there is evidence that the claimant may be unemployable, but it is not clear whether he or she may be unemployable due solely to service-connected conditions, it may be necessary to consider carefully whether the evidence reasonably raises a claim for a TDIU rating under section 4.16(b).

VA General Counsel Precedent Opinion 06-96

- Examples of evidence that could require consideration of TDIU:
 - A physician's statement that Vet is unemployable due to SC disability or disabilities
 - VA documents indicating vocational rehabilitation is not feasible because of Vet's SC disability(ies)
 - Vet's statement that he or she is unable to obtain employment because of SC disability(ies)

What Constitutes a Reasonably Raised TDIU Claim?

- In summary, while *Manual M21-1* suggests that TDIU can only be reasonably raised when a Vet qualifies for TDIU under 38 C.F.R. § 4.16(a), that is untrue.
- TDIU can be reasonably raised by the record, regardless of the Vet's current disability rating.
- If a VA employee disputes this, refer them to *Roberson, Comer*, and VA General Counsel Precedent Opinion 06-96.

Advocacy Advice

- To avoid what is sometimes a “gray area” of whether a TDIU claim has been reasonably raised, advocates should explicitly raise the issue and encourage the Vet to file a claim for TDIU on the appropriate VA claim form when appropriate.
- Advocates can explicitly raise a TDIU claim by having the Vet submit a statement or the DSO can submit a statement that says the following:

Boilerplate Language for Explicitly Raising the Issue of TDIU

- “For the following service-connected disabilities: (list service-connected disabilities), the Veteran is seeking the maximum evaluations that [he/she] is entitled to under the law. After VA has awarded the maximum evaluations that the Veteran is entitled to for these conditions, if the Veteran’s combined rating is less than 100 percent, the Veteran requests that [he/she] be considered for a Total Disability Rating Based on Individual Unemployability (TDIU) [continued on next slide]

Boilerplate Language for Explicitly Raising the Issue of TDIU

- as the veteran is unable to work due to [his/her] service-connected conditions. See *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009) (“[TDIU] is implicitly raised whenever a veteran, who presents cogent evidence of unemployability, seeks to obtain a higher disability rating”); *Roberson v. Principi*, 251 F.3d 1378, 1380 (Fed. Cir. 2001) (“once a veteran submits evidence of a medical disability and makes a claim for the highest rating possible, and additionally submits evidence of unemployability, the VA must consider . . . TDIU”); *Rice v. Shinseki*, 22 Vet. App. 447, 453 (2009).”

Advocacy Advice

- Alternatively, a TDIU claim can be explicitly raised by filing a VA Form 21-8940, *Veteran's Application for Increased Compensation Based on Unemployability*.
- VA will almost certainly require that this form be submitted before it adjudicates a TDIU claim anyway, so advocates can save time in the claims process by submitting the form as early as possible

Advocacy Advice

- If a Vet wishes to file for TDIU, and already meets the percentage requirements of 38 C.F.R. § 4.16(a), the Vet should always explicitly raise the issue.
- However, if the Vet does not meet the requirements for schedular TDIU, and would have to pursue his or her claim under 38 C.F.R. § 4.16(b), whether to explicitly raise the issue of TDIU is a strategic decision that the Vet and representative should discuss

Advocacy Advice

- VA rarely grants TDIU under 38 C.F.R. § 4.16(b) and may be less likely to grant other claims knowing that Vet is seeking TDIU.
- The Vet may be better off waiting to explicitly claim TDIU, and first try to increase the disability ratings for his or her SC disabilities and/or establish SC for new conditions so that the Vet can potentially be considered for TDIU under § 4.16(a)
- Explain the options to the Vet, and discuss the pros and cons of the different strategies

Advocacy Advice

- Vet's claim for increased rating or SC for a new disability should protect the effective date for a TDIU award under both § 4.16(a) and (b), as long as Vet submits evidence that reasonably or explicitly raises a TDIU claim during the pendency of that claim, and the claimed disability contributes to unemployability.
- Vet may want to wait until VA issues rating decision, then file NOD arguing that a higher rating, including TDIU, is warranted.

Advocacy Advice

- If a Vet has more than one SC condition, when applying for TDIU, an advocate should determine whether the Vet is rendered unemployable by a single SC condition
- If so, make 2 arguments to the VA:
 1. Vet is rendered unemployable by a single SC condition
 2. Alternatively, the combined effects of the SC disabilities renders Vet unemployable

Advocacy Advice

- If VA agrees with the Vet's first argument, Vet may be eligible for SMC(s)
- SMC(s) is paid to Vets who have:
 - One SC disability rated at 100%; and
 - Additional SC disabilities that combine to a rating of at least 60%.
- A single disability rated at 100% does not need to be rated at 100% under the VA Rating Schedule if the single disability alone would prevent the Vet from working.
 - *Bradley v. Peake*, 22 Vet. App. 280 (2008)

Questions?

