



COMBATING RATING REDUCTIONS

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OVERVIEW

- VA Reexaminations
- Rating reductions and severance
- Advocacy Advice

VA REEXAMINATIONS

- Reexaminations To Determine Degree of Disability (38 C.F.R. § 3.327)
 - To ensure that vets receiving disability compensation still qualify for their rating, the VA can require them to be:
 - Reexamined by a VA doctor, OR
 - Observed in a VA hospital
 - Generally, VA will require a reexamination if there is evidence that a disability:
 - Has significantly changed since the last exam, or
 - Is likely to improve

VA REEXAMINATIONS

- When it is determined a routine future examination is needed, reexaminations are typically scheduled 5 years from the last exam. *See VA Fast Letter 10-14 Revised (July 29, 2010)*

- The 5 year rule applies to routine reexaminations, with the following exceptions:
 1. Prestabilization ratings under 38 C.F.R. § 3.327(b)(1);
 2. Discharge from military service due to a mental disorder caused by traumatic stress under 38 C.F.R. § 4.129
 3. Malignancies that require reevaluation 6 months following cessation of treatment for active disease
 4. Any other future exams required under other sections of 38 C.F.R. Part 3 and Part 4

VA REEXAMINATIONS

- VA reviews the reexamination report and then decides whether to change the disability eval
- VA will probably not reexamine a vet if:
 - The disability is static
 - Symptoms have not significantly changed for 5 years or longer
 - A disability from a disease is permanent and not likely to improve

VA REEXAMINATIONS

- He/she is over 55 years old
- The minimum disability rating is already assigned
- The overall combined rating would not be affected if the individual rating for a disability was reduced

VA REEXAMINATIONS

- If a veteran is scheduled for a reexamination, his/her advocate may want to consider contacting the VA and requesting that it reconsiders its decision to schedule the examination
 - Argue that the vet fits into one of the categories where a reexamination is not appropriate

MISSING A SCHEDULED REEXAMINATION (38 C.F.R. § 3.655(C))

- VA must properly notify vets about scheduled reexaminations
- VA can stop or reduce a vet's benefits if he/she misses a reexamination without good cause

MISSING A SCHEDULED REEXAMINATION (38 C.F.R. § 3.655(C))

- Generally, VA must give notice that states:
 - Benefits will be reduced or stopped unless, within 60 days, the vet:
 - 1) Is reexamined by the VA, OR
 - 2) Provides evidence that proves continued entitlement to the rating in question
 - If a reexamination is required for a claim for increased benefits, VA may deny the claim without considering any evidence

MISSING A SCHEDULED REEXAMINATION (38 C.F.R. § 3.655(C))

- If the claimant is not provided advance notice by the VA of a scheduled examination, he or she may have a defense to any adverse action taken by VA
- If there is not a copy of a notification letter in the vet's claims file, the representative should ask the VA to void the rating reduction or severance of service connection

MISSING A SCHEDULED REEXAMINATION (38 C.F.R. § 3.655(C))

- Good cause for missing a reexamination:
 - If a vet has a good reason for missing an exam or hospital observation, VA will reschedule without negative consequences
 - The vet must notify the VA of his/her inability to attend the examination
 - VA determines on a case-by-case basis whether the vet had good cause to miss the examination (ex. illness of claimant, death of family member)

MISSING A SCHEDULED REEXAMINATION (38 C.F.R. § 3.655(C))

- VA will take immediate action to stop or reduce a vet's benefits if he/she:
 - Does not explain why he/she missed a reexamination
 - Misses a rescheduled reexamination, after missing the first examination without a good reason

MISSING A SCHEDULED REEXAMINATION (38 C.F.R. § 3.655(C))

- Vets do not have the right to have someone observe a VA exam
 - Refusing to be examined unless an observer is present is treated as if the vet missed the exam without good cause

RATING REDUCTIONS AND SEVERANCE

- VA may be able to reduce compensation payments or sever service connection in some cases
 - VA must comply with certain rules guiding reduction and severance

RATING REDUCTIONS AND SEVERANCE

- VA has the burden to prove improvement by preponderance of the evidence
- Do not let the VA turn it around and put the burden on the veteran
- Some ratings or service connection statuses are *protected* from reduction or severance

OVERVIEW OF SERVICE CONNECTION AND RATING PROTECTIONS

- Service Connection: 10 years or more
- Classes of ratings (different rules depending on the class)
 - Ratings in effect for 20 years or more
 - Ratings in effect for 5-20 years
 - Ratings in effect for fewer than 5 years
 - 100% or total ratings (including TDIU)

PROTECTION AFTER 10 YEARS OF SERVICE CONNECTION (38 C.F.R. § 3.957)

- Generally, if a vet has been service-connected for a particular disability for at least 10 years, VA cannot change the service connection status of that disability
- The evaluation may be reduced, but service connection cannot be severed unless service connection was obtained by fraud or it is discovered that the vet lacks the required length or character of service (38 U.S.C. § 6103)

PROTECTION OF RATING EVALUATION AFTER 20 YEARS (38 C.F.R. § 3.951(B))

- Generally, if a disability has been continuously rated for at least 20 years, VA cannot reduce the rating below its lowest level during that period.
- If a disability has been continuously rated at or above a particular rating level for 20 or more years, the VA cannot reduce the rating below that level unless it discovers that the rating was based on fraud

PROTECTION OF RATING EVALUATION AFTER 20 YEARS (38 C.F.R. § 3.951(B))

- For example, if a vet is granted compensation based upon an original rating of 30% and for the next 20 years the rating varies between 30% and 100%, the rating cannot thereafter be reduced below 30% in the absence of fraud
- The 20 year protection rule applies even to rating levels that are assigned retroactively because a previous final decision is revised based on a finding of clear and unmistakable error (CUE)

REDUCTION OF RATINGS IN EFFECT FOR AT LEAST FIVE YEARS (38 C.F.R. § 3.344)

- Ratings unchanged for at least 5 years are “stabilized”
- VA cannot reduce a stabilized rating unless all evidence in the c-file shows the disability has permanently improved
- VA cannot reduce a rating based on an exam less thorough than the one used to grant the rating
- VA cannot reduce a rating if the improvement is temporary or cannot be maintained while the vet is working or actively seeking work

REDUCTION OF RATINGS IN EFFECT FOR AT LEAST FIVE YEARS (38 C.F.R. § 3.344)

- In *Tatum v. Shinseki*, 23 Vet. App. 152 (2009), the CAVC reversed a rating reduction, finding that the Board failed to consider 38 C.F.R. § 3.344 and 4.13 prior to reduction
- Under 38 C.F.R. §3.344, where there is a change in diagnosis the VA should try to maintain stability of disability evaluations, and, where there is doubt as to the change in diagnosis, retain the original diagnosis with the new diagnosis in parentheses.

REDUCTION OF NON-PROTECTED RATINGS

- Any rating reduction must be based on a review of the entire history of the disability
- The VA must determine whether there has been an *actual change* in the disability
- Any improvement must reflect an improvement in the vet's ability to function under the ordinary conditions of life and work
- VA cannot reduce benefits based on exams that are not thorough

REDUCTION OF 100% RATINGS (38 C.F.R. § 3.343(A))

- VA cannot reduce a total disability rating unless there has been a material (meaningful) improvement of the condition(s) rated 100%
- VA must compare new evidence of the severity of the condition to the evidence last used to continue the 100% rating

REDUCTION OF 100% RATINGS (38 C.F.R. § 3.343(A))

- VA cannot reduce the rating unless the condition improved while the vet was working or actively seeking a job
- If material improvement would allow VA to reduce a vet's rating under the VA Rating Schedule, he/she may still qualify for TDIU
 - VA may not reduce TDIU benefits unless there is clear and convincing evidence the vet is actually employable

REVISION OF THE VA RATING SCHEDULE (38 U.S.C. § 1155)

- VA must revise the VA Rating Schedule from time to time
- A rating in effect at the time of a revision cannot be reduced unless the disability has actually improved
- VA must continue to use the old rating criteria until the improvement of the condition would cause a rating reduction under that criteria
- VA will then apply the new rating criteria, even if it would cause a greater reduction than the old criteria

VA VIOLATIONS OF THE RULES

- Generally, if VA does not apply the above reduction rules, a rating reduction is invalid and VA must reinstate the old rating, retroactive to the date of the reduction

VA VIOLATIONS OF THE RULES

- *But see Faust v. West*, 13 Vet. App. 342 (2000):
 - Court upheld a BVA rating reduction that did not discuss the relevant regulations
 - Error was harmless because:
 - i. There was overwhelming evidence the rating was correctly reduced
 - ii. BVA decision contained findings that essentially met the criteria of the regulations

VA PROCEDURES TO REDUCE OR STOP BENEFITS (38 C.F.R. §§ 3.103, 3.105)

- VA must give a vet prior notice of its intent to stop or reduce benefits
- The vet has 60 days to submit evidence to convince VA to continue the current rating
 - The vet has the right to a hearing
 - i. He/she must request the hearing within 30 days of VA's notice
 - ii. VA cannot finalize its decision until after the hearing
- If the vet does not submit evidence, VA will finalize its decision

VA PROCEDURES TO REDUCE OR STOP BENEFITS (38 C.F.R. §§ 3.103, 3.105)

- Reduction or termination will go into effect 60 days after notice of the final decision
- VA does not need to give advance notice of termination or reduction if:
 - The overall amount of compensation would not be reduced by a rating reduction
 - The vet gives VA factual info about income, net worth, dependency or marital status, knowing it will be used to calculate benefits
 - There is reliable evidence the vet has died

EXAMPLE #1

- Veteran had 20 percent ratings for arthritis in both knees for two years before the ratings were reduced to 10 percent in each knee on the basis of an exam
- Exam showed improved range of motion from earlier exam; mentioned pain on range of motion, but did not specify where pain began or whether it caused functional loss

ANSWER #1

- Exam was insufficient under *De Luca v. Brown*, 8 Vet. App. 202 (1995) and *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011)
- Because exam was insufficient, reduction was invalid, and must be reversed
- VA agreed to settlement, and veteran's ratings were retroactively reinstated

EXAMPLE #2

- Veteran had 100 percent rating for psychiatric condition for over ten years
- New exam showed “marked improvement,” though evidence showed vet still could not work
- RO reduced rating to 70%, veteran appealed, BVA framed case as claim for increase and explained why vet no longer met 100% criteria
- Twenty years later, rating increased back to 100%

ANSWER #2

- Exam did not discuss whether “marked improvement” shown in exam was actually “material improvement” in condition
- Exam did not explain whether improvement could be maintained under ordinary conditions of life and work
- Exam did not discuss entire medical history

ANSWER #2

- Reduction decision reversed as product of CUE, 100% reinstated going back twenty years
- Veteran received over \$300,000 in retroactive compensation

EXAMPLE #3

- For the last 6 years, veteran had been service-connected for a mental disorder at 50 percent
- VA scheduled the vet for a reexamination to determine whether the vet's disability rating should be reduced
- VA examiner concluded that vet's mental disorder led to occupational and social impairment with occasional decrease in work efficiency with the following symptoms: depressed mood, chronic sleep impairment, mild memory loss, impaired judgment, and impaired abstract thinking

EXAMPLE #3

- To combat the proposed rating reduction, the vet's representative scheduled the vet to be examined by a private psychiatrist as well
- Private examiner concluded vet's mental disorder caused occupational and social impairment with reduced reliability and productivity with the following symptoms: panic attacks more than once a week, impaired judgment, impaired abstract thinking, depressed mood, and mild memory loss

EXAMPLE #3

- How should the advocate frame their argument?
 - The preponderance of evidence shows that the vet is entitled to a 50% rating, or at the very least, the evidence is in equipoise and the vet should be given the benefit of the doubt; or
 - All of the evidence in the claims file does not support the conclusion that the vet's mental condition has permanently improved, and thus, his or her rating should not be reduced

ANSWER #3

- Remember, the burden is not on the vet, it is on the VA
- Frame the argument around the fact that not all of the evidence supports the conclusion that the vet's mental condition has permanently improved
- Obviously point to the private examination and all of the symptoms that support a 50% rating, but the vet does not have to prove his or her entitlement to the current rating

ADVOCACY ADVICE

- Determine what type of rating it is
 - Over 20 years?
 - Over 5 years?
 - 100%?
 - TDIU?
- Go over rules for each type

ADVOCACY ADVICE

- Check exams very closely
 - Proper tests – Depending on the disability, make sure all the required tests were performed. Check DBQs and VA Clinicians' Guide.
 - Rationale – Make sure the examiner provides a sufficient rationale

ADVOCACY ADVICE

- Check exams very closely
 - *DeLuca/Mitchell* Compliance – Make sure that examination adequately addresses functional loss due to pain as well as flare-ups, etc.
 - Explanation of “material improvement” in light of entire history of disability
 - Explanation of how improvement can be maintained under ordinary conditions of life and work

ADVOCACY ADVICE

- If exam is not sufficient, insist on **reversal** of the decision and **reinstatement** of the higher rating **retroactive** to the date of reduction
- Remember: the burden is on **VA**, **NOT** the veteran

QUESTIONS?