

**Department of
Veterans Affairs**

Memorandum

Date: November 25, 2005 VAOPGCPREC 5-2005

From: General Counsel (022)

Subj: Eligibility for a "Temporary" Total Disability Rating Based on Individual Unemployability—38 C.F.R. § 4.16(b)

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

May the Department of Veterans Affairs award a total disability rating based on "temporary" individual unemployability under 38 C.F.R. § 4.16(b)?

COMMENTS:

1. The question presented arises in the context of a decision issued by the Court of Appeals for Veterans Claims (CAVC) in the case of Warn v. Principi, Vet. App. No. 02-15, 2003 U.S. App. Vet. Claims LEXIS 255 (Mar. 20, 2003), vacating a decision of the Board of Veterans' Appeals (Board) and remanding to the Board for further adjudication. The question concerns the following facts. On March 16, 2000, the veteran was admitted to a Department of Veterans Affairs (VA) Medical Center (VAMC) for treatment of his service-connected leg injury, residuals of severe fractures of his right tibia and fibula. The VAMC orthopedic and infectious disease staffs diagnosed chronic osteomyelitis¹ and treated the veteran with antibiotics. On March 22, 2000, the veteran was discharged from the VAMC with a one-week course of oral antibiotics and instructions for obtaining a follow-up orthopedics examination. The treatment plan called for continuing clinical observation of the veteran and a bone biopsy if his pain persisted. On March 27, 2000, VA received the veteran's claim for a total disability rating based upon his March 2000 hospitalization and treatment of osteomyelitis. The veteran reported, "I am on crutches and am temporarily unable to work. My prognosis involves at the least the potential for future surgery to remove the infected bone and bone grafting, and at the most, amputation of the affected area."

2. After experiencing further problems, the veteran was readmitted to the VAMC on May 17, 2000, and underwent surgical removal of affected tissue. He was discharged after a few days and returned to a course of oral antibiotics with follow-up examinations. During a June 7, 2000, follow-up examination, VAMC personnel noted that the infection

¹ An inflammation of bone caused by a pyogenic (pus producing) organism. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1201 (28th ed. 1994).

had reemerged and that the veteran was again experiencing severe pain. He was readmitted to the VAMC and, on June 13, 2000, underwent a below-the-knee amputation.

3. An August 2, 2000, rating decision awarded the veteran a total disability rating for convalescence under 38 C.F.R. § 4.30, effective June 7, 2000. That decision continued a 30 percent evaluation of the veteran's disability for the period prior to June 7, 2000, but, effective November 1, 2000, terminated the total disability rating and granted a 40 percent evaluation for the amputation. An October 2000 rating decision awarded the veteran an earlier effective date of May 17, 2000, for his total disability rating for convalescence. The veteran disagreed with the October 2000 decision and asserted that he was entitled to a total disability rating for convalescence effective March 16, 2000, because he was unable to work after that date. His later submissions in support of this contention included the statement of his supervisor that he was unable to perform his duties from March 16, 2000, to October 11, 2000, due to his leg condition. The record does not indicate whether the veteran was otherwise employed and earned any income from work during that period. The Board determined that the veteran was not entitled to an effective date earlier than May 17, 2000, and the veteran appealed that decision to the CAVC.

4. On appeal to the CAVC, the veteran argued that the Board should have referred his claim for an earlier effective date to the Director of VA's Compensation and Pension Service for consideration of entitlement to a total disability rating based on individual unemployability (TDIU) under 38 C.F.R. § 4.16(b). Warn, 2003 U.S. App. Vet. Claims LEXIS 255, at *4. Noting that the Board did not consider TDIU in its decision, the court vacated that decision and remanded the case to the Board for further adjudication to address the question of "whether the regulations that govern TDIU contemplate a temporary total evaluation based solely on temporary unemployability due to a service-connected disability." Warn, at *7. On remand to the Board, the question has arisen whether, under 38 C.F.R. § 4.16(b), the Board may award the veteran a "temporary" TDIU rating for the period from March 16, 2000 to May 17, 2000. ²

5. As explained in greater detail below, we conclude that 38 C.F.R. § 4.16(b) permits the award of a total disability rating based on temporary (i.e., non-permanent) inability to follow a substantially gainful occupation. We further conclude, however, that an inability to work for temporary periods does not necessarily establish an inability to follow a substantially gainful occupation for purposes of VA regulations, because brief periods of incapacity that would require time off from work would not necessarily preclude a veteran from obtaining or holding employment and earning a reasonable income from such employment. In determining whether an individual is unable to follow a substantially gainful occupation, VA must consider a number of factors, including the frequency and duration of periods of incapacity or time lost from work due to disability, the veteran's employment history and current employment status, and the veteran's

² The term "temporary" is ordinarily understood to refer to something that is not permanent. See WEBSTER'S THIRD NEW INT'L DICTIONARY 2353 (1976) (listing "impermanent" as a synonym for "temporary").

annual income from employment, if any. The determination as to whether a temporary period of inability to work actually precludes the veteran from securing and following a substantially gainful occupation must be made on a case-by-case basis.

6. Disability ratings generally are based upon the "average impairment in earning capacity" that results from a particular disability rather than upon factors unique to each particular claimant. 38 C.F.R. § 4.15. The ratings contained in VA's Schedule for Rating Disabilities (rating schedule) in part 4 of title 38, Code of Federal Regulations generally "are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses." 38 C.F.R. § 4.1. However, "[i]t is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled." 38 C.F.R. § 4.16(b). Accordingly, "[t]otal disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is . . . unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a); see also 38 C.F.R. §§ 3.340, 3.341. In determining eligibility for such TDIU ratings, VA may consider individual characteristics that prevent ordinary success in overcoming a disability. 38 C.F.R. § 4.15. The General Counsel has issued several opinions addressing the standards for awarding TDIU ratings. See VAOPGCPREC 6-99; VAOPGCPREC 13-97; VAOPGCPREC 06-96; VAOPGCPREC 75-91. However, this office has not previously addressed the issue of whether a TDIU rating may be awarded based on a temporary inability to secure or follow substantially gainful employment. To answer that question we turn to the plain language of the applicable regulations.

7. VA's regulations plainly provide that TDIU ratings may be assigned for compensation purposes without regard to whether the total disability is permanent in nature. Section 3.340(a)(1)³ of title 38, Code of Federal Regulations, states:

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. Total disability may or may not be permanent. Total ratings will not be assigned, generally, for temporary exacerbations or acute infectious diseases except where specifically prescribed by the schedule.

(Emphasis added.) Further, 38 C.F.R. § 4.15 distinguishes between "total disability" and "permanent total disability" in the following manner:

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*,

³ Section 3.340(a) sets forth principles applicable to total disability ratings assigned either under VA's rating schedule or on the basis of TDIU. See 38 C.F.R. § 3.340(a)(2).

That permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person.

The significance of the distinction between “total disability” and “permanent total disability” is made apparent by 38 C.F.R. §§ 3.341 and 4.16, which authorize VA to assign “total disability ratings” for purposes of service-connected disability compensation, and 38 C.F.R. §§ 3.342 and 4.17, which authorize VA to assign “permanent and total disability ratings” for purposes of nonservice-connected pension. The provision in 38 C.F.R. §§ 3.342 and 4.17 for “permanent” total disability implements the statutory requirement that pension be paid only if a veteran is “permanently and totally disabled.” 38 U.S.C. § 1521(a). The absence of any similar requirement in 38 C.F.R. §§ 3.341 and 4.16 for “permanent” total disability clearly indicates that VA did not intend to require a finding of permanence as a condition of entitlement to a TDIU rating for compensation purposes. Russello v. United States, 464 U.S. 16, 23 (1983) (“where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); Smith v. Brown, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (rules of statutory construction apply equally to interpretation of regulations). Accordingly, we conclude that 38 C.F.R. § 4.16 permits VA to award TDIU ratings based on temporary (i.e., non-permanent) inability to follow a substantially gainful occupation.

8. As noted above, the third sentence of 38 C.F.R. § 3.340(a)(1) states that “[t]otal ratings will not be assigned, generally, for temporary exacerbations or acute infectious diseases except where specifically prescribed by the schedule.” We do not construe this provision as reflecting any intent to preclude TDIU ratings for temporary inability to secure or follow a substantially gainful occupation. Rather, when viewed in the context of the surrounding regulatory provisions, it is most reasonably construed to reflect the principle that temporary exacerbations or acute infectious diseases do not necessarily produce “total disability” or inability to “follow a substantially gainful occupation.” The first two sentences of section 3.340(a)(1) define “total disability” as an “impairment of mind or body . . . sufficient to render it impossible for the average person to follow a substantially gainful occupation,” and provide that such total disability “may or may not be permanent.” Notably, the third sentence of section 3.340(a)(1) refers to “temporary exacerbations” rather than to “temporary total disability” or to “temporary inability to follow a substantially gainful occupation,” and we believe the different terminology used in that sentence is significant. Accordingly, we believe the third sentence of section 3.340(a)(1) is most logically read as indicating that “temporary exacerbations or acute infectious diseases” do not alone establish an inability to follow a substantially gainful occupation. As explained below, that principle is fully consistent with other VA regulations and with the view that TDIU ratings may be granted for temporary inability to follow a substantially gainful occupation.

9. VA regulations do not fully explain the meaning of the phrase “unable to . . . follow a substantially gainful occupation.” The term “occupation” is commonly defined to mean “a craft, trade, profession or other means of earning a living.” WEBSTER’S THIRD NEW

INT'L DICTIONARY 1560 (1976). The term "substantially gainful" implies a minimum level of earnings, as indicated by 38 C.F.R. § 4.16(a), which states, in pertinent part:

Marginal employment shall not be considered substantially gainful employment. For purposes of this section, marginal employment generally shall be deemed to exist 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 (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. Consideration shall be given in all claims to the nature of the employment and the reason for termination.

In accordance with those standards, we believe that the phrase "unable to . . . follow a substantially gainful occupation" is most naturally construed to refer to an inability to pursue the means of earning a reasonable living. Under this standard, not every period of inability to work would establish an inability to pursue a substantially gainful occupation. In view of the availability of medical leave, leaves of absence, and other routine accommodations for periods of incapacity, it is reasonable to conclude that some periods of incapacity or time lost from work would not preclude a veteran from securing or maintaining substantially gainful employment. This conclusion is consistent with the statement in 38 C.F.R. § 4.1 that the ratings specified in VA's rating schedule generally "are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses." The fact that the schedular ratings are intended to compensate for considerable periods of time lost from work strongly suggests that VA does not intend to authorize an extraschedular TDIU rating for each individual period of time lost from work without regard to the frequency and duration of such periods and their overall effect on the veteran's employability.

10. VA regulations suggest that the determination as to a veteran's ability or inability to follow a substantially gainful occupation must be based upon consideration of such factors as the frequency and duration of any episodes of incapacity, the veteran's employment history and current employment status, and the veteran's annual income from employment, if any. As noted above, 38 U.S.C. § 4.16(a)⁴ provides that, when a veteran is actually employed, the nature of the employment and the extent of annual

⁴ Section 4.16(a) authorizes a VA rating agency to award a TDIU rating where the veteran's service-connected disabilities are rated at or above specified schedular evaluations. Section 4.16(b) provides that the rating agency may recommend a TDIU rating to the Director of the Compensation and Pension Service where those minimum schedular ratings are not met. However, insofar as section 4.16(a) and (b) discuss factors that may establish a veteran's unemployability, we believe those considerations would be relevant to a determination of unemployability under the procedures specified in either paragraph (a) or (b).

earnings from such employment are relevant in determining whether the veteran is able to follow a substantially gainful occupation. See Faust v. West, 13 Vet. App. 342, 355-56 (2000) (holding that a veteran employed in an occupation that "provides annual income that exceeds the poverty threshold for one person" is engaged in a "substantially gainful occupation"). Section 4.16(b) of title 38, Code of Federal Regulations, provides that, when a VA rating agency recommends a TDIU rating to the Director of VA's Compensation and Pension Service, it shall include "a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue." Section 3.340(a)(3) of title 38, Code of Federal Regulations, authorizes VA to grant "[r]atings of total disability on history" where a veteran's disability previously met the requirements for a total rating (schedular or TDIU) and, although the disability has improved, VA determines that the veteran will be unable to effect an adjustment into a substantially gainful occupation. Section 3.340(a)(3)(iii) specifies that, in making such determinations, "[d]ue consideration will be given to the frequency and duration of totally incapacitating exacerbations since incurrence of the original disease or injury, and to periods of hospitalization for treatment in determining whether the average person could have reestablished himself or herself in a substantially gainful occupation."

11. The above-referenced regulations indicate that the determination of inability to follow a substantially gainful occupation requires a fact-specific determination based on consideration of several factors. The effect of temporary periods of total incapacity for work is clearly a factor that may bear upon that determination, but such temporary periods of incapacity do not alone establish an inability to follow a substantially gainful occupation. Depending upon the facts of each individual case, a period of incapacity lasting for days, weeks, or even months would not necessarily render the veteran unable to pursue a substantially gainful occupation if, for example, the veteran was capable of retaining employment and earning considerable income despite being unable to work for a certain period. Accordingly, although 38 C.F.R. § 4.16 permits VA to assign TDIU ratings based on temporary (i.e., non-permanent) inability to pursue a substantially gainful occupation, not every period of temporary incapacity for work will warrant a TDIU rating.⁵

12. In discussing the relevance of annual income under 38 C.F.R. § 4.16, we do not intend to suggest that a TDIU rating would be warranted only for periods of incapacity lasting 12 months or more. It certainly may be reasonable to find that a shorter period of incapacity has precluded a particular veteran from following a substantially gainful occupation. Under current law, it is not possible to identify a generally-applicable minimum period of incapacity that will be sufficient to render a veteran unable to follow a substantially gainful occupation. Rather, that determination must be based on the facts of each individual case, taking into account such factors as the frequency and duration of periods of incapacity or time lost from work due to disability, the veteran's

⁵ VA regulations at 38 C.F.R. §§ 4.29 and 4.30 authorize temporary total ratings for certain periods in which a veteran is hospitalized for service-connected disability and certain periods of convalescence following treatment for service-connected disability.

employment history and current employment status, and the veteran's annual income from employment, if any.

HELD:

Section 4.16 of title 38, Code of Federal Regulations, authorizes the Department of Veterans Affairs to assign a total rating based on individual unemployability (TDIU rating) based upon a veteran's temporary (i.e., non-permanent) inability to follow a substantially gainful occupation. However, not every period of inability to work will establish an inability to follow a substantially gainful occupation warranting a TDIU rating, because it may be possible to secure and retain employment and to earn significant income despite occasional periods of incapacity. VA must make determinations regarding ability or inability to follow a substantially gainful occupation on a case-by-case basis, taking into account such factors as the frequency and duration of periods of incapacity or time lost from work due to disability, the veteran's employment history and current employment status, and the veteran's annual income from employment, if any.

Tim S. McClain

Attachment: C-file