

# **Disability Compensation**



**North Dakota Department of Veterans Affairs**

# Objective

- To assist a veteran with a claim for service-connected disability or other compensation, and to become familiar with the references used in these types of cases.

# References

- Title 38, U.S. Code, Chapter 11
- 38 Code of Federal Regulations
- Adjudication Manual 21-1MR Part 3, Subpart IV
- M21-1MR Part 3, Subpart V, Ch. 4, Section B
- M21-1MR Part 4, Subpart II, Ch. 1 and 2
- VA Pamphlet, Federal Benefits for Veterans and Survivors
- [http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ss/#!/portal/5544000000001018/topic/5544000000004049/M21-1-Adjudication-Procedures-Manual](http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!/portal/5544000000001018/topic/5544000000004049/M21-1-Adjudication-Procedures-Manual)

# Service Connection

- Service connection is the relationship of a particular disabling condition to the veteran's service.
  - Condition began during service (incurrence)
  - Aggravation of a Pre-Existing Condition
  - Presumptive Condition



# Direct

- Directly caused by service
  - (i.e., a combat wound)
- Remote result of some incident of service
  - (i.e., cancer due to asbestos exposure)
- Begun coincident with service
  - (i.e., diabetes).
- *\*It is not required that the condition be shown in the service records, only that the evidence taken as a whole shows that the condition must have begun during service, or was the result of service or some incident thereof.*

# Aggravation

- A pre-existing disability, which becomes permanently worse during service, will be held to have been aggravated by service unless there is a specific finding that the increased severity is the result of the condition's natural progress.
  - the degree of severity of the condition at the time the veteran entered service must be determined
  - That evaluation is then deducted from the current evaluation and the difference is the degree of aggravation
  - If the pre-service degree of severity cannot be determined, no deduction is made. Also, if the condition is currently evaluated as 100% disabling no deduction is made.
- The veteran is presumed to be in sound condition at the time of entry into service except for conditions noted on the entrance examination.
  - This presumption may only be rebutted by clear and convincing evidence that a condition existed before the veteran entered service.

# Presumption

- Certain chronic and tropical diseases will be presumed to have begun during service if they become manifest to a compensable degree within a specified time.
- Specified diseases are presumed to be the result of certain incidents of service if they become compensable at any time after service. ★
- ONLY DISEASES SPECIFICALLY LISTED, AND NO OTHERS, are subject to presumptions of service connection.
  - 38 CFR 3.309
    - 1 Year (Chronic)
    - Tropical
    - POW
    - Radiation
    - Herbicide (Agent Orange)
  - 38 CFR 3.317 (Persian Gulf)

# Secondary

- Directly and proximately caused by an established service-connected condition
  - Peripheral Neuropathy 2<sup>nd</sup> to Diabetes
- May be established for a NSC condition that is aggravated beyond its normal progression by a SC condition
  - NSC Ankle aggravated by SC Knee



# Issues Not Covered

- Service connection may not be established for
  - Transitory illnesses or superficial injuries
    - No permanent or chronic residuals
  - Congenital or developmental defects
    - Personality disorder
    - Simple refractive error of the eye.



# Issues Not Covered

- Aggravation may not be established if the pre-existing condition does not become permanently worse during service.
- Remedial treatment for a pre-existing condition will not establish service connection unless the treatment is unsuccessful or otherwise aggravates the condition.

# Issues Not Covered

## ■ Willful Misconduct

- Willful misconduct is an act involving conscious wrongdoing or known prohibited action. A wrongful act is either inherently wrong in itself, or forbidden by law.
- Willful misconduct involves deliberate or intentional wrongdoing with knowledge of, or wanton and reckless disregard of, its probable consequences.
- Note: Mere technical violation of police regulations or ordinances does not necessarily constitute willful misconduct.

# Time Limits

- There is no minimum length of service required to establish direct service connection by incurrence or aggravation
- Presumptive conditions have requirements dependent on the specific disability or disease
  - Minimum Exposure (POW Tropical)
  - Maximum Incubation Periods (MS)
  - Location (Agent Orange/Gulf War)

# Compensation

- Disability compensation is determined by the level of impairment in accordance with the Schedule for Rating Disabilities (38 CFR, Part 4).
- Ratings from 0% to 100%, in 10% increments.
- Based on the average impairment of earning capacity for a person with that condition at that level of symptomatology.
- The veteran's age is not considered in this determination.
- [http://www.benefits.va.gov/compensation/resources\\_comp01.asp](http://www.benefits.va.gov/compensation/resources_comp01.asp)



# Combined Ratings

- If there is more than one service-connected condition, the percentages are combined in accordance with the combined ratings table in 38 CFR § 4.25.
- If the combined evaluation is 30% or greater, additional rates of compensation may be payable for the veteran's dependents
- [http://www.ecfr.gov/cgi-bin/text-idx?SID=01ef04ddd83f729bc3d41eba9c66d00a&mc=true&node=se38.1.4\\_125&rqn=div8](http://www.ecfr.gov/cgi-bin/text-idx?SID=01ef04ddd83f729bc3d41eba9c66d00a&mc=true&node=se38.1.4_125&rqn=div8)



# Bilateral Factor

- If a veteran has multiple SC conditions involving paired extremities or skeletal muscles
  - The combined evaluation for only those conditions is first found, before considering any other condition(s)
  - 10% is then added (not combined) to that combined evaluation
- Remaining service-connected conditions are then combined with that total in the usual manner.
- The bilateral factor is not for application if the veteran is otherwise ratable at 100%; however, it may be used to reach an overall combined 100% rating.

# Statute Rating

- If a veteran has multiple service-connected conditions with one single condition rated 100% plus other, separate, compensable conditions involving paired extremities or paired skeletal muscles, the bilateral factor may be used to reach an independent combined rating of 60% for entitlement to special monthly compensation (SMC).

# Multiple 0% Ratings

- If a veteran has two or more service-connected conditions, which are each individually rated as non-disabling (0%) but which together clearly interfere with normal employability, compensation may be authorized at the 10% rate, but not in combination with any other rating.

# Special Monthly Compensation

- Additional amounts of special monthly compensation are payable for the anatomical loss or the loss of use of one or both hands, feet, eyes, or other specified parts.
  - 38 CFR 3.350
  - SMC Rates



# 1151 Claim

- **Disability compensation under 38 U.S. Code, Section 1151:**
  - **If a non-service-connected disabling condition is caused by, or aggravated by, VA examination, hospitalization, medical or surgical treatment, or Vocational Rehabilitation, compensation is payable for that condition as though the condition was service-connected.**
  - **Even though compensation is being paid, the condition is in fact NOT SERVICE-CONNECTED and should not be called such.**



# Protected Rates

- A disability which has been continuously rated at or above any evaluation of disability for 20 or more years for compensation purposes under laws administered by the Department of Veterans Affairs will not be reduced to less than such evaluation except upon a showing that such rating was based on fraud.
- Service connection for any disability or death granted or continued under title 38, which has been in effect for 10 or more years will not be severed except upon a showing that the original grant was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge.

# Individual Unemployability (IU)

- Veterans whose combined evaluations are less than 100% may still be rated totally disabled and paid at the 100% rate
  - If they are unable to follow substantially gainful employment (IU) because of their service-connected disabilities.
  - Marginal employment, defined as earned annual income less than the poverty threshold for one person, is not “substantially gainful employment,” and does not preclude a finding of IU.
  - The various rates of compensation and special monthly compensation are set out in Adjudication Manual M21-1, Appendix B.

# Individual Unemployability

- If there is only one such disability, this disability shall be ratable at 60%
- If there are two or more disabilities, there shall be at least one disability ratable at 40% or more, and sufficient additional disability to bring the combined rating to at least 70%
- Consideration shall be given in all claims to the nature of the employment and the reason for termination, (Authority: 38 U.S.C. 501(a)) history, educational and vocational attainment and all other factors having a bearing on the issue.

# Temporary 100% Compensation

## ■ 38 CFR 4.29

- 100% if a service-connected disability has required hospital treatment in a VA or approved hospital for a period in excess of 21 days

## ■ 38 CFR 4.30

- 100% if treatment necessitating at least one month of convalescence
- Surgery with severe postoperative residuals
- Immobilization by cast, without surgery, of one major joint or more
- The necessity for continued use of a wheelchair or crutches (regular weight-bearing prohibited)



# RECOUPMENT

- Severance Pay is a lump-sum payment to Service Members involuntarily separated
- Separation Pay is a lump-sum payment to Service Members voluntarily separated
  - Special Separation Benefit (SSB)
  - Voluntary Separation Incentive (VSI).

EST. 1945



# Disability Discharge

- Military personnel who are disabled while on active duty can be:
- (A) treated and returned to duty, if and when they are fit for duty;
- (B) discharged as medically unfit, with disability severance pay, if the degree of disability is less than 30 percent, according to the VA rating schedule;
- (C) placed on the Temporary Disability Retired List (TDRL) with a temporary rating, to be evaluated later for permanency; or
- (D) medically retired (disability retirement) with a percentage rating, giving them many of the same benefits awarded to regular military retirees.

# Disability Severance Pay

- A service member who has less than 20 years of service and a disability evaluation of less than 30 percent may be discharged as not fit for duty with severance pay, which is paid at separation in a lump sum, based on the basic pay of the service member's current active duty grade.
- VA will not be able to pay any compensation benefits for this disability until the total amount of the compensation benefits, which would have been paid, is equal to the amount of the severance pay.
- An exception to total recoupment of VA compensation is the veteran receives an increase in compensation for same disability at a later date, the VA will only recoup at the original rating.

# **CONFINEMENT IN PENAL INSTITUTIONS**

- **Veterans rated 20% or more are limited to 10% rate**
- **10 percent are limited to one-half of the 10 percent rate.**
- **Beginning on the 61st day of incarceration**
- **The person's dependents may have the right to an apportionment while the beneficiary is incarcerated**

**EST. 1945**

# INTENT TO FILE

- The Intent to File procedure replaced the Informal Claim process to protect the effective date of claim, when the formal claim needs development or if the Veteran has not decided whether to file a claim.
- An ITF should be filed the first time a Veteran visits your office.
- Separate 21-0966 forms must be submitted for Pension and Compensation



# INTENT TO FILE

- Claimants' have one year from the date of the VA Form 21-0966 (per VA Date Stamp) to provide the formal application, thereby protecting the effective date of their claim. Also the VA Form 21-22 must dated and signed **on or before** the date of the informal claim.

# Disability Compensation

## Q & A

