

TRAINING MODULE 4
Study Plan
SERVICE CONNECTED
DISABILITY COMPENSATION

Objective:

To learn how 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 Part 3, §§ 3.301–3.385; § 3.800; §§ 3.951-3.957; Part 4.

Adjudication Manual 21-1, Part VI; Part 1, Appendix B.

Adjudication Manual M21-1MR (Manual Rewrite), Subpart IV; Part 4, Subparts II and III.

VA Pamphlet, 80-05-1, Federal Benefits for Veterans and Dependents.

Instructions:

Study the assigned reference materials to learn how service connection may be established for various conditions and what are the bases for payment of disability compensation. Although the program is called “Compensation and Pension,” be careful not to confuse the different types of benefits. Pay very careful attention to the information given in the initial application for compensation, as that will be the basis for development of the claim.

Summary:

1. Service Connection:

Service connection is the relationship of a particular disabling condition to the veteran’s service. This is accomplished by showing that the condition began during service (incurrence), or that a pre-existing condition was made permanently worse than it would have otherwise been (aggravation), or by the application of certain statutory presumptions. The following paragraphs detail the four ways to accomplish service connection for a disabling condition(s).

Formal application for service-connected disability compensation is made by submitting a completed VA Form 21-526, *Veteran’s Application for Compensation or Pension*, together with appropriate medical and other supporting evidence. Under certain circumstances, an application for service-connected compensation may also be an application for nonservice-connected disability pension, if the veteran served during a wartime period and completes the portions of the application pertaining to total disability and to family income and net worth.

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A. Direct:

An incurred disability may have been directly caused by service (e.g., a combat wound), or it may be the remote result of some incident of service (e.g., cancer due to asbestos exposure), or it may have simply begun coincident with service (e.g., 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.

B. 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 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 be rebutted by clear and convincing evidence that a condition existed before the veteran entered service.

For conditions which first appear after entering service, the veteran is presumed to have been in sound condition at the time of entry into service except for those conditions actually noted on the entrance examination (this does not include conditions recorded by history only). This presumption of soundness may be rebutted by clear and convincing evidence that the particular condition existed before the veteran entered service and was not aggravated by service.

Service connection based on either incurrence or aggravation during service is called **direct** service connection. Direct service connection may only be established for a chronic or permanent disability. This can be established in several ways:

- (1) The conditions listed in 38 CFR § 3.309(a) are chronic by definition, as a matter of law—if one of these conditions is properly diagnosed in service, then it does not matter how long after service the veteran first claims service connection or how long after service the condition again becomes manifest; it is considered to be the same condition as was shown in service, unless the current condition is clearly shown to be of intercurrent origin. [38 CFR § 3.303(b)]
- (2) Some disabilities are by their very nature permanent, such as amputations or scars from burns, combat wounds or surgical procedures.
- (3) Continuity and chronicity may be factually established, by repeated episodes or recurrences of the condition during and/or after service. The longer the interval between service and the time the veteran claims service connection, the greater the evidence of continuity and chronicity required.
- (4) In all other cases, there must be medical evidence or a professional opinion linking or relating the current condition(s) to the disease, injury, or incident in service (the "nexus").

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C. 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 (generally, one year) after service, even though there is no evidence of the disease during service. Chronic diseases shown before service, but not during service, may be presumed to have been aggravated by service if they then become manifest to a compensable degree within the specified time periods. In addition, specified diseases are presumed to be the result of certain incidents of service (prisoner of war, participation in "radiation-risk" activities, herbicide exposure) if they become manifest to a compensable degree at any time after service (lifetime presumption). Other presumptive periods are specified for undiagnosed illnesses associated with service in the Persian Gulf area (until September 30, 2011), and for certain diseases associated with herbicide exposure (one year after leaving Vietnam for chloracne, Porphyria cutanea tarda, and peripheral neuropathy). [38 CFR § 3.307(a)] These presumptions are intended to be liberalizing features, to allow service connection when the evidence would not otherwise support it.

The diseases to which presumptions may be applied are listed in 38 CFR § 3.309 (§ 3.317 for Gulf War undiagnosed illnesses). The various time limits for manifestation of presumptive diseases are listed under 38 CFR § 3.307(a). **ONLY THE DISEASES SPECIFICALLY LISTED, AND NO OTHERS**, are subject to a presumption of service connection. These presumptions may be rebutted by affirmative evidence showing that the disease being claimed was either due to intercurrent causes or could not have had its inception within the specified time frame(s), or, if the disease pre-existed service, that any increase in its severity was due to its natural progress.

What is "Presumptive" Service Connection?

VA *presumes* that specific disabilities diagnosed in certain veterans were caused by their military service. VA does this because of the unique circumstances of their military service. If one of these conditions is diagnosed in a veteran in one of these groups, VA presumes that the circumstances of his/her service caused the condition, and disability compensation can be awarded.

What Conditions are "Presumed" to be Caused by Military Service?

Veterans in the groups identified below: Entitlement to disability compensation may be presumed under the circumstances described and for the conditions listed.

Veterans within one year of release from active duty: Individuals diagnosed with chronic diseases (such as arthritis, diabetes, or hypertension) are encouraged to apply for disability compensation.

Veterans deployed to the Southwest Asia Theater of Operations from August 2, 1990, to July 31, 1991: Individuals diagnosed with amyotrophic lateral sclerosis (ALS)/Lou Gehrig's disease are encouraged to apply for disability compensation.

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Former Prisoners of War	Vietnam Veterans (Exposed to Agent Orange)	Atomic Veterans (Exposed to Ionizing Radiation)	Gulf War Veterans (Undiagnosed Illness)
<p>(1) Imprisoned for any Length of time, <i>and</i> Disability at least 10 Percent disabling:</p> <ul style="list-style-type: none"> • Psychosis • Any of the anxiety states • dysthymic disorder • Organic residuals of frostbite • Post-traumatic osteoarthritis • Heart disease or hypertensive vascular disease and their complications • Stroke and it residuals <p>(2) Imprisoned for at Lease 30 days, <i>and</i> Disability at lease 10 Percent disabling:</p> <ul style="list-style-type: none"> • Avitaminosis • Beriberi • Chronic dysentery • Helminthiasis • Malnutrition (including optic atrophy) • Pellagra • And other nutritional deficiency • Irritable bowel syndrome • Peptic ulcer disease • Peripheral neuropathy • Cirrhosis of the liver 	<p>Served in the Republic of Vietnam between 1/9/62 and 5/7/75:</p> <ul style="list-style-type: none"> • Chloracne or other acneform disease similar to Chloracne* • Porphyria cutanea tarda* • Soft-tissue sarcoma (other than osteosarcoma, kaposi's sarcoma or mesothelioma) • Hodgkin's disease • Multiple myeloma • Respiratory cancers (lung, bronchus, larynx, trachea) • Non-Hodgkin's lymphoma • Prostate cancer • Acute and subacute peripheral neuropathy* • Type 2 diabetes • Chronic lymphocytic leukemia <p>*Must become manifest to A degree of 10 percent or More within a year after the last date on which the veteran was exposed to an Herbicide agent during Active military, naval, or air Service.</p>	<p>Participated in atmospheric nuclear testing; occupied or was a POW in Hiroshima or Nagasaki; service before 2/1/92 at a diffusion plant in Paducah, KY, Portsmouth, OH, or Oak Ridge, TN or service before 1/1/74 at Amchitka Island, AK:</p> <ul style="list-style-type: none"> • All forms of leukemia (except for chronic lymphocytic leukemia) • Cancer of the thyroid, breast, pharynx, esophagus, stomach, small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary tract (renal pelves, ureter, urinary bladder and urethra), brain, bone, lung, colon, ovary • Bronchiole-alveolar carcinoma • Multiple myeloma • Lymphomas (other than Hodgkin's disease) • Primary liver cancer (except if cirrhosis or hepatitis B is indicated) 	<p>Served in the Southwest Asia Theater of Operations during the Gulf War with condition at least 10 percent disabling by 12/31/11. Included are medically unexplained chronic multi-symptom illnesses defined by a cluster of signs or symptoms that have existed for six months or more, such as:</p> <ul style="list-style-type: none"> • Chronic fatigue syndrome • Fibromyalgia • Irritable bowel syndrome • Any diagnosed or undiagnosed illness that the Secretary of Veteran Affairs determines warrants a presumption of service connection <p>Signs or symptoms of an undiagnosed illness include: Fatigue, skin symptoms, headaches, muscle pain, joint pain, neurological symptoms, respiratory symptoms, sleep disturbance, GI symptoms, cardiovascular symptoms, weight loss, menstrual disorders</p>

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No presumptions may be invoked on the basis of the degree of advancement of the disease when first definitely found (after the presumptive period) to establish that the disease was present to the required extent during the applicable presumptive period. [38 CFR § 3.307(c)] This does not mean that the disease must be *diagnosed* during the presumptive period, only that there is acceptable evidence of characteristic manifestations of the disease to the required degree, followed without an unreasonable lapse of time by a definitive diagnosis. (Note, however, that the degree of advancement of a condition at the time it is first found *may* be a basis for finding that the condition was present but unrecognized while the veteran was still on active duty.)

D. Secondary:

Secondary service connection may be established for a new condition, which is directly and proximately caused by an established service connected condition. Under certain circumstances, secondary service connection may be established for a non-service connected condition that is aggravated beyond its normal progression by a service connected condition.

There are special rules for establishing service connection for a hearing loss. Notwithstanding that no hearing loss is shown on entrance examination, and that while on active duty the veteran is diagnosed as having a hearing loss, service connection still may not be established for that hearing loss unless and until it meets the minimum levels set out in 38 CFR 3.385.

Service connection may not be established for transitory illnesses or superficial injuries, which resolve or heal with no ascertainable chronic or permanent residuals. [38 CFR § 3.303(b)] Similarly, service connection may not be established for congenital or developmental defects such as a personality disorder or simple refractive error of the eye. [38 CFR §§ 3.303(c), 4.9] Service connection by aggravation may not be established if the pre-existing condition does not become *permanently* worse during or after service, except for conditions which become symptomatic during or immediately following combat or internment as a prisoner of war. [38 CFR § 3.306(b)(2)] Remedial treatment in service for a pre-existing condition will not establish service connection unless the treatment is unsuccessful or otherwise aggravates the condition. [38 CFR § 3.306(b)(1)] Service connection may not be established for any disease or injury which is not incurred or aggravated in line of duty, or which is either the direct or the remote result of the veteran's own willful misconduct. [38 CFR § 3.301(a)]

There is no minimum length of service required to establish direct service connection by incurrence or aggravation. Presumptive service connection for a chronic or tropical disease requires that the veteran have at least 90 consecutive days of active service during a wartime period or after January 31, 1946. [38 CFR § 3.307(a)(1)] Presumptions based on status as a prisoner of war require that the veteran have been held captive for at least 30 days, except for mental or emotional disorders (not dementias), residuals of frostbite, post-traumatic arthritis, hypertensive cardiovascular disease and atherosclerotic cardiovascular disease and their complications, including stroke, congestive heart failure, etc., which have no minimum length of captivity requirement. [38 CFR § 3.309(c)] Other presumptions require affirmative evidence that the veteran met (or meets) specific requirements such as to exposure, service at specified locales during specified times, etc.

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When service connection has been established for a condition under any provision of applicable law, including the provisions described above, such service connection may not be removed (severed) unless evidence clearly shows that the establishment of service connection was clearly and unmistakably erroneous, and that the continuation of service connection cannot be maintained or supported under any reasonable theory (the burden of proof being on the government). [38 CFR § 3.105(d)] When service connection for any condition has been in effect for ten years, it becomes protected and may not be severed for any reason whatsoever, except upon a showing that it was based on fraud, or a showing that the veteran did not have the requisite service or character of discharge. [38 CFR § 3.957]

2. Compensation:

Disability compensation is the monthly monetary benefit payable for service connected disabilities. Compensation rates are not income-based, but are determined by the level of impairment in accordance with the Schedule for Rating Disabilities (38 CFR, Part 4). There are eleven possible levels of disability assignable for any condition, from 0% to 100%, in 10% increments. Each listed degree of severity is 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. When a disability has been evaluated at or above any given level for twenty years or more, the evaluation is protected and may not be reduced below that level for any reason other than a showing that it was based upon fraud. [38 CFR § 3.951]

If there is more than one service connected condition, the percentages are not added together to determine the overall degree of disability. Rather, they are combined in accordance with the combined ratings table set out 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. If the veteran's spouse is disabled and in need of aid and attendance, additional amounts above the regular rates may be payable. Additional amounts may also be payable for the veteran's child or children up to age 18, or beyond age 18 if the child is attending an approved school (up to age 23), or if the child became disabled and permanently incapable of self-support (helpless) before age 18. Additional amounts may also be payable if the veteran's parents are dependent on the veteran for support.

If a veteran has multiple compensable (10% or more) service connected conditions involving both arms or legs, or paired 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, and any other remaining service connected conditions are then combined with that total in the usual manner. This is the "**bilateral factor.**" 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. Also, 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 (see below).

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. [38 CFR § 3.324]

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If service connection is established by aggravation, the degree of severity of the condition at the time the veteran entered service must be determined, if possible. That evaluation is then deducted from the current evaluation, and the resulting 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. [38 CFR §§ 3.322, 4.22]

If a veteran is hospitalized for more than twenty-one days for observation or treatment of a service-connected condition, a temporary 100% rating may be assigned for that condition without regard to other provisions of the *Schedule for Rating Disabilities*, from the date of hospital admission to the last day of the month of hospital discharge. Under certain circumstances, a period of post-hospital convalescence of one, two, or three months may also be assigned. [38 CFR § 4.29]

If a veteran undergoes surgical treatment for a service-connected condition, whether as an inpatient or as an outpatient, or has therapeutic immobilization by cast of one or more joints for a service-connected condition and such treatment or immobilization requires a period of convalescence of one month or more, a temporary 100% rating may be assigned for that condition without regard to other provisions of the *Schedule for Rating Disabilities*, beginning the date of hospital admission or the date the outpatient treatment commenced and extending for a period of convalescence of one, two, or three months, as appropriate. In certain instances, the period of convalescence may be extended, up to a maximum length of twelve months. [38 CFR § 4.30]

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. (See special monthly compensation chart in Module 21 for detailed explanation) Special monthly compensation is also payable if the veteran has one single service connected condition rated 100% disabling plus other, separate, service connected condition(s) independently ratable at 60% or more in combination, or if the veteran is permanently housebound or in need of regular aid and attendance.

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 (individual unemployability) 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 individual unemployability.

The various rates of compensation and special monthly compensation are set out in Adjudication Manual M21-1, Appendix B.

Usually, only service connected disabilities are considered in determining the levels of disability compensation. There are two exceptions: If a veteran has loss or loss of use of paired extremities (arms, legs) or paired organs (eyes, ears, kidneys, lungs), and one extremity or organ is service connected but the other extremity or organ is not service connected (and not the result of willful misconduct), disability compensation is paid as though both were service connected. Since these disabilities are at least in part service connected, the veteran is entitled to all ancillary benefits flowing there from. However, if the veteran receives any payment from a judicial award, settlement, or compromise based on the loss or loss of use of the paired (non-service connected) extremity or organ, the additional portion of compensation based on that loss must be withheld to recover the amount of the award, settlement, or compromise.

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This does not apply to Social Security or Workman's Compensation benefits, even if they were awarded by judicial proceedings.

The second exception is disability compensation under 38 USC 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. Remember, however, that even though compensation is being paid, the condition is in fact not service connected and should not be called such. Except for certain ancillary benefits which specifically require that the qualifying disability have been incurred in or aggravated by military service, disability benefits under these provisions are essentially indistinguishable from service-connected benefits. Compensation for disabilities under Section 1151 may be combined with compensation for any service connected conditions the veteran may also have.

If the veteran is awarded any amount from a judicial judgment, settlement, or compromise for the same condition(s) for which compensation under Section 1151 has been (or will be) authorized, the compensation payable for such condition(s) must be withheld until the full amount of the judgment, settlement, or compromise has been recovered.

38 CFR Section 4.16 Total disability ratings for compensation based on unemployability of the individual.

- (a) Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service connected disabilities: Provided that, if there is only one such disability, this disability shall be ratable at 60 percent or more, and that, if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disabilities to bring the combined rating to 70 percent or more. For the above purpose of one 60 percent disability or one 40 percent disability in combination, the following will be considered as one disability:
- (1) Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable,
 - (2) Disabilities resulting from common etiology or a single accident,
 - (3) Disabilities affecting a single body system, e.g. orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric,
 - (4) Multiple injuries incurred in action, or
 - (5) Multiple disabilities incurred as a prisoner of war.

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It is provided further that the existence or degree of nonservice connected disabilities or previous unemployability status will be disregarded where the percentages referred to in this paragraph for the service connected disability or disabilities are met and in the judgment of the rating agency such service connected disabilities render the veteran unemployable. 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 or 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. (Authority: 38 U.S.C. 501(a))

- (b) It 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. Therefore, rating boards should submit to the Director, Compensation and Pension Service, for extra-schedular consideration all cases of veterans who are unemployable by reason of service connected disabilities, but who fail to meet the percentage standards set forth in paragraph (a) of this section. The rating board will 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.

4.29 Ratings for service connected disabilities requiring hospital treatment or observation.

A total disability rating (100 percent) will be assigned without regard to other provisions of the rating schedule when it is established that a service connected disability has required hospital treatment in a Department of Veterans Affairs or an approved hospital for a period in excess of 21 days or hospital observation at Department of Veterans Affairs expense for a service connected disability for a period in excess of 21 days.

- (a) Subject to the provisions of paragraphs (d), (e), and (f) of this section, this increased rating will be effective the first day of continuous hospitalization and will be terminated effective the last day of the month of hospital discharge (regular discharge or release to non-bed care) or effective the last day of the month of termination of treatment or observation for the service connected disability. A temporary release, which is approved by an attending Department of Veterans Affairs physician as part of the treatment plan, will not be considered an absence.

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- (1) An authorized absence in excess of four days, which begins during the first 21 days of hospitalization, will be regarded as the equivalent of hospital discharge effective the first day of such authorized absence.
An authorized absence of four days or less which results in a total of more than eight days of authorized absence during the first 21 days of hospitalization will be regarded as the equivalent of hospital discharge effective the ninth day of authorized absence.
 - (2) Following a period of hospitalization in excess of 21 days, an authorized absence in excess of 14 days or a third consecutive authorized absence of 14 days will be regarded as the equivalent of hospital discharge and will interrupt hospitalization effective on the last day of the month in which either the authorized absence in excess of 14 days or the third 14 day period begins, except where there is a finding that convalescence is required as provided by paragraph (e) or (f) of this section. The termination of these total ratings will not be subject to 3.105(e) of this chapter.
- (b) Notwithstanding that hospital admission was for disability not connected with service, if during such hospitalization, hospital treatment for a service connected disability is instituted and continued for a period in excess of 21 days, the increase to a total rating will be granted from the first day of such treatment. If service connection for the disability under treatment is granted after hospital admission, the rating will be from the first day of hospitalization if otherwise in order.
 - (c) The assignment of a total disability rating on the basis of hospital treatment or observation will not preclude the assignment of a total disability rating otherwise in order under other provisions of the rating schedule, and consideration will be given to the propriety of such a rating in all instances and to the propriety of its continuance after discharge. Particular attention, with a view to proper rating under the rating schedule, is to be given to the claims of veterans discharged from hospital, regardless of length of hospitalization, with indications on the final summary of expected confinement to bed or house, or to inability to work with requirement of frequent care of physician or nurse at home.
 - (d) On these total ratings Department of Veterans Affairs regulations governing effective dates for increased benefits will control.
 - (e) The total hospital rating if convalescence is required may be continued for periods of one, two or three months in addition to the period provided in paragraph (a) of this section.

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- (f) Extension of periods of one, two or three months beyond the initial three months may be made upon approval of the Adjudication Officer.
- (g) Meritorious claims of veterans who are discharged from the hospital with less than the required number of days but need post-hospital care and a prolonged period of convalescence will be referred to the Director, Compensation and Pension Service, under 3.321(b)(1) of this chapter.

4.30 Convalescent ratings.

A total disability rating (100 percent) will be assigned without regard to other provisions of the rating schedule when it is established by report at hospital discharge (regular discharge or release to non-bed care) or outpatient release that entitlement is warranted under paragraph (a)(1), (2), or (3) of this section effective the date of hospital admission or outpatient treatment and continuing for a period of one, two or three months from the first day of the month following such hospital discharge or outpatient release. The termination of these total ratings will not be subject to 3.105(e) of this chapter. Such total rating will be followed by appropriate scheduler evaluations. When the evidence is inadequate to assign a scheduler evaluation, a physical examination will be scheduled and considered prior to the termination of a total rating under this section.

- (a) Total ratings will be assigned under this section if treatment of a service connected disability resulted in:
 - (1) Surgery necessitating at least one month of convalescence (effective as to outpatient surgery March 1, 1989.)
 - (2) Surgery with severe postoperative residuals such as incompletely healed surgical wounds, stumps of recent amputations, therapeutic immobilization of one major joint or more, application of a body cast, or the necessity for house confinement, or the necessity for continued use of a wheelchair or crutches (regular weight-bearing prohibited). (Effective as to outpatient surgery March 1, 1989.)
 - (3) Immobilization by cast, without surgery, of one major joint or more. (Effective as to outpatient treatment March 10, 1976.)

A reduction in the total rating will not be subject to 3.105(e) of this chapter. The total rating will be followed by an open rating reflecting the appropriate scheduler evaluation; where the evidence is inadequate to assign the scheduler evaluation, a physical examination will be scheduled prior to the end of the total rating period.

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(b) A total rating under this section will require full justification on the rating sheet and may be extended as follows:

- (1) Extensions of one, two or three months beyond the initial three months may be made under paragraph (a)(1), (2), or (3) of this section.

- (2) Extensions of one or more months up to six months beyond the initial six month period may be made under paragraph (a)(2) or (3) of this section upon approval of the Adjudication Officer.

M21-1, PART IV

SECTIONS 20.39-20.39.1

20.39 SEVERANCE PAY (10 USC 3786) NOT SUBJECT TO RECOUPMENT

Severance pay awarded under 10 USC 3786 (Pub. L. 86-155) is a lump-sum payment to members of the regular establishment who are separated usually due to their failure to qualify for promotion. There is no provision in the law requiring refund of severance pay awarded under this section. This provision of Title 10 was repealed by Public Law 96-513, effective September 15, 1981. Any individual separated after that date who would have been entitled to severance pay under 10 USC 3786 will receive separation pay, subject to recoupment, under 10 USC 1174. See paragraph 20.31a(3).

DISCHARGE REVIEW

There are several means by which injured military personnel may obtain compensation, including disability discharge and retirement programs administered by the service branches and compensation programs administered by the U.S. Department of Veterans Affairs. But since injured personnel (or their families in some instances) will be compelled at a time of great anxiety in their lives to make decisions on matters that have significant long-term consequences, it is very important for injured personnel to understand that waiving certain rights in order to obtain some immediate benefit, such as release from active duty, may not serve their best interests in the long run. There is no need for disabled reservists or National Guard members to rush back to their civilian jobs, which may pay more, since their position is protected by the Veterans Reemployment Rights Act. If necessary, they can keep their options open by requesting excess leave without pay.

Note: For the sake of editorial consistency, the word "service member" and the masculine pronouns "he" and "his" have been used throughout this article; it should be understood that these words are meant to refer to both servicemen and servicewomen.

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Disability Discharge Process

The military disability discharge process is very complicated, and problems that already exist with this process will surely be exacerbated when the service departments have to deal with large numbers of combat-related disabilities. However, the options available to injured and disabled military personnel are clearly set in place.

Provided that their injuries are not the result of their own intentional misconduct or willful neglect (for which disabled service members are promptly discharged without benefits of any kind), 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 (38 C.F.R. Part 4, also used by the service departments);

(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 (most desirable if the individual has been seriously and permanently injured).

Each of these options is discussed in detail, below:

Return to Active Duty

If the service member is injured but recovers sufficiently to return to active duty, he should be sure that he or his family obtains complete copies of the medical records of his injury and how it was treated. Though the injury will be noted in his service record, many of the details of his injury may not appear there. If he should experience any delayed effects of the injury after later release from service, the records he obtains from the hospital or the doctor who treated him will be valuable evidence when he applies for VA disability benefits. Without such records in his file, the service member may even find it difficult to document his injury for the VA.

Generally, it is helpful in every case of injury for the service member to obtain copies of these records.

Discharge with 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. If the service member's disability was caused by armed conflict or extra-hazardous service, his severance pay does not count as taxable income.

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Although the service member may be eligible for VA compensation benefits for the same disability for which he received his severance pay, the 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.

For example: A veteran has an original rating of 10% and later receives an increase to 20%, the VA will only recoup at the 10% rate and the veteran will receive compensation for the difference. Also, if the veteran is rated totally disabled (100%) for same condition, the VA will stop all recoupment.

Separation with severance pay is tempting to many service members because it gives them an opportunity to leave the service immediately, even if they suspect that their injuries are more than 30 percent disabling.

However, severance pay is a one time, lump-sum payment. Disability retirement provides monthly benefits and may yield higher benefits in the long run. In addition, a higher disability percentage at discharge may improve the service member's chances of obtaining higher VA service connected compensation. Thus, it may be wise for the service member to challenge his disability rating if he thinks it is too low, even though this will mean staying in the military for a longer period of time.

Medical Retirement

A service member who is medically retired (disability retirement) with a disability rating of 30 percent or more will be paid between 30 and 75 percent of his basic pay for the rest of his life. Since he is viewed as a retired service member, he is also entitled to all of the retirement benefits, such as PX privileges and health care, to which other retired military personnel are entitled, plus an income tax exclusion.

Disability retirement pay is calculated in one of two ways, based on the service member's basic pay and either length of service or percentage of disability.

He can choose the method of computation that will give him the highest benefits. In such cases, though the VA is not required to accept the disability evaluation of the service department, the VA does review these decisions after the service member has been retired and accords them some weight.

Personnel are permanently retired on disability if their disabilities are permanent, but when it is not clear whether the disability is permanent, they are placed on the Temporary Disability Retired List (TDRL), with pay based on the degree of disability, and re-evaluated every 18 months. Final decisions are made in such cases after five years. As noted above, permanent disability retirement is usually most desirable if the service member has suffered a serious injury.

PAYMENT OF COMPENSATION DURING CONFINEMENT IN PENAL INSTITUTIONS (38 USC 5313 and 38 CFR 3.665)

- (A) Compensation may not be paid in excess of certain amounts for any person incarcerated in a federal, state or local penal institution for conviction of a felony for any period beginning on the 61st day of incarceration. The person's dependents may have the right to an apportionment while the beneficiary is incarcerated.

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- (B) This restriction in payments applies to persons incarcerated due to conviction of a felony committed after October 7, 1980, or, regardless of when the felony was committed, if the person was incarcerated on October 1, 1980, and if an award of compensation is approved after September 30, 1980.
- (C) Veterans rated 20 percent or more disabled in receipt of compensation are limited to the rate of 10 percent disability. Veterans rated less than 20 percent, 10 percent or special monthly compensation (k) or (q), are limited to one-half of the 10 percent rate.
- (D) All or part of the compensation not paid to an incarcerated veteran may be apportioned to the veteran's spouse, child or children and dependent parents on the basis of individual need. In determining individual need consideration shall be given to such factors as the apportionee claimant's income and living expenses, the amount of compensation available to be apportioned, the needs and living expenses of other apportionee claimants as well as any special needs, if any, of all apportionee claimants.
- (E) Any apportionments will be discontinued and full benefits restored to the beneficiary upon release from incarceration or upon participation in a work release or halfway house program.

APPLICATION PROCESS FOR COMPENSATION

- (A) An original claim can be made formally by completing and submitting to any VA office the VA Form 21-526, Veterans Application for Compensation or Pension, or informally by communicating to the VA a definite intent to apply. (See Module 19, Special Benefits for details on informal claims)
- (B) Once a VA Form 21-526 has been completed and submitted, it is generally not necessary to resubmit this form to obtain further claims action. Any time after submission of a formal claim, the veteran can request reconsideration based on the existence of new and material evidence. Medical evidence should be submitted to indicate a change in the severity of a service connected disability. Other pertinent evidence might take the form of statements (VA Form 21-4138, Statement in Support of Claim), additional history of medical treatment, or record of ability to perform on the job. A request can also be made for consideration for service-connection of disabilities not previously claimed.
- (C) In requesting consideration of a total disability rating based on unemployability, VA Form 21-8940, Veterans Application for Increased Compensation Based on Unemployability, may be used.
- (D) If a claim for disability compensation is made within one year after release from active duty, the effective date of the award will be the date following such release. Claims made after one year from the date of release from active service are generally effective from the first day of the month following the date of receipt of the claim by VA.

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- (F) Compensation may also be paid when injury, either directly or by aggravation, results from submitting to an examination, medical or surgical treatment, hospitalization, or the pursuit of a course of vocational rehabilitation (38 USC Ch 31) under any law administered by VA. (1151 claim).

CLOTHING ALLOWANCE

Veterans who, because of a service connected disability, wear prosthetic devices which may wear out their clothing or who use wheelchairs are eligible for a clothing allowance. (PL 101-237).

Study Questions: Service Connection Disability Compensation

Using the assigned references and reading materials, answer the following questions:

1. Define the term Service Connected Disability:

2. Define the term compensation:

3. List the different ways to establish service connection for a disability:
 - a.
 - b.
 - c.
 - d.

4. What is the minimum combined evaluation for which additional compensation for dependents may be paid? _____%

5. All veterans who served in Vietnam during the Vietnam Era are considered to have been exposed to herbicides.
 - a. True
 - b. False

6. A veteran is rated 30% for a heart condition, 20% for a knee condition, and 10% for hearing loss. His combined evaluation is: _____%

7. Define the term Individual Unemployability:

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8. Compensation rates are income based.

- a. True
- b. False

9. Disability Severance Pay is a lump sum payment made to a service member who has less than 20 years of service and has a disability evaluation of less than 30 percent and is discharged from service as not fit for duty.

- a. True
- b. False

10. Is Disability Severance Pay subject to recoupment? If so, explain how and what agency recoups the money

11. 38 CFR 4.30, Convalescent ratings, stipulates that a total disability rating (100 percent) will be assigned if treatment of a service connected disability resulted in:

- a. _____
- b. _____
- c. _____

12. A veteran in receipt of compensation rated at 50% who has a spouse and two children under 18, will receive what monetary benefit? (no other factors involved) _____

13. Explain what is required to reopen a previously denied service connected claim. Tell what VA Form(s) is required and what supporting documentation.

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14. At what point is a service connected disability rating protected? _____
15. What does a guardsman/reservist have to show for requesting a service connected issue?

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ORIGINAL CLAIM

VA Form 21-22 – Appointment of Veterans Service Organization as Claimant's Representative

VA Form 21-526 – Application for Veterans Compensation/Pension

Certified DD 214

Social Security numbers of all dependents

Current medical evidence to provide nexus/link (if claim filed within one year of discharge, medical evidence not necessary)

Optional documents to submit:

Marriage Certificate

Divorce decrees from all previous marriages for both veteran and spouse

If applicable, death certificate of previous marriages for both veteran and spouse

Birth certificates for all minor children and children over 18 in school

If an unmarried child(ren) over 18 still in school, submit VA Form 21-674 for each child over 18

REOPEN PREVIOUSLY DENIED S/C CLAIM

VA Form 21-4138 – Statement in Support of Claim

New and Material Evidence

Current medical evidence (nexus/link)

If dependency not current or previously established, submit:

VA Form 21-686c – Declaration of Martial Status

Social Security numbers of all dependents

CLAIM FOR INCREASED S/C

VA Form 21-4138

Current medical evidence indicating s/c condition has worsened

If dependency not current or previously established, submit:

VA Form 21-686c

Social Security Numbers of all dependents

CLAIM FOR INDIVIDUAL UNEMPLOYABILITY

VA Form 21-8940 – Application for Individual Unemployability

VA Form 21-4192 – Employer's Statement

VA Form 21-4138

Current Medical Evidence if not already on file

If dependency not current or previously established, submit:

VA Form 21-686c

Social Security Numbers of all dependents