



**EFFECTIVE REPRESENTATION OF TOTAL
DISABILITY INDIVIDUAL UNEMPLOYABILITY
(TDIU) CLAIMS**

RESOURCE GUIDE

This Guide Contains:

- TDIU Definition
- Eligibility requirements for TDIU
 - 4.16 (a) – Straight TDIU
 - 4.16 (b) – Extra Schedular
- Under-Employed Veterans & TDIU
- Helpful Tips



TDIU Definition

A veteran who is rated at less than 100% overall is paid at a 100% rate because his/her service connected disabilities prohibit the veteran from sustaining gainful employment.



Eligibility for TDIU 38 C.F.R. § 4.16(a)

1. A single service-connected disability rated at 60% or higher, OR;
 2. Two or more service-connected disabilities with at least one disability rated at 40% or higher, AND sufficient additional service-connected disabilities to bring the combined service-connected rating to 70% or higher.
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The law identifies five scenarios where multiple disabilities will be considered as one disability for TDIU purposes.

1) Where there are multiple disabilities of one or both upper or lower extremities:

- Left leg rated at 40% disability and left knee rated at 30% disability.
- These two disabilities should be combined for a single disability rating of 60 percent, thus triggering § 4.16(a).

2) Where there are disabilities resulting from common etiology or a single accident:

- Diabetes mellitus rated at 20% disability, peripheral neuropathy of left and right lower extremity associated with diabetes rated at 20% each.

Because all three disabilities have a common etiology from agent orange exposure, they must be combined as a single disability of 60 percent, triggering the provisions of § 4.16(a).



3) Where the disabilities affect a single body system, e.g., orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric:

- Nonunion of right tibia rated at 40% disability and right ankle ankylosis rated at 20% disability
- These two disabilities should be combined as a single disability of 60 percent, triggering the provisions of § 4.16(a).

4) Where there are multiple injuries in action.

Although the regulation does not define the term “action,” it likely means combat or combat-related action:

- Residuals of shell fragment wound to the right buttock for muscle injury rated at 20% disability, residuals of shell fragment wound to the left buttock rated at 20%, and residuals shell fragment gun shot wound of the left auxillary area at 20% disability.
- All three disabilities must be combined as a single disability of 60 percent disability, triggering the provisions of § 4.16(a).

5) Where there are multiple disabilities incurred as a prisoner of war.

Under this provision, all service-connected disabilities at either the 60 percent or 40 percent in combination meet the requirements.

Effects of Non-Service Connected Disabilities:

- A veteran’s non-service-connected disabilities are irrelevant to the TDIU determination.
- If a veteran is rendered unemployable by the service-connected disabilities, he is entitled to a TDIU rating even though his non-service-connected disability also causes unemployability.
- VA must disregard the non-service-related disabilities, and then develop the record, if necessary, to determine whether the service-connected disabilities, alone, render the veteran unemployable.

What if the Veteran IS Working?

“Marginal employment shall not be considered substantially gainful employment.”

- No VA definition of “substantially gainful employment”
- “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” 38 CFR 4.16(a)
- Poverty Threshold currently about \$12k/year

Ask the Veteran to obtain a print-out of his Social Security Earnings Records

- From SS Administration office
- www.ssa.gov
- Mail Consent of Release of Records form SS-3288 asking for Non-Certified SS Earnings Statement
- Helps prove veteran’s income during relevant periods showing did not exceed poverty threshold
- Get SS Earnings BEFORE completing 21-8940

“Protected Environment”

- Under certain circumstances, a veteran may still be entitled to a TDIU rating even if his or her income exceeds the poverty threshold.
- Special accommodations for the disabled veteran, accommodations not normally found in the general labor market.
- Family business - could not otherwise secure and/or follow substantial gainful employment



Eligibility for TDIU 38 C.F.R. § 4.16 (b) : Extra-Schedular Consideration

“It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow substantially gainful occupation by reason of service-connected shall be rated totally disabled.” 38 CFR § 4.16(b)

VA will refer his case to the Director of the Compensation and Service for a TDIU determination

Director of C & P Service routinely rejects these referrals in terse, poorly-reasoned decisions. Often requires appeal to BVA to be successful.

Laws establishing eligibility for TDIU

38 CFR 4.16 (a)	38 CFR 4.16 (b)
Start Here	Fall back when Vet doesn't qualify under 4.16(a)
<ol style="list-style-type: none"> 1. Requires single disability at 60% or higher; OR 2. Overall of 70% or Higher 	Although, first look for increase of disability to qualify under 4.16(a)
Where we see most success	Often requires appeal to BVA



Helpful Supporting Evidence

If a veteran has been terminated from their former employment for reasons related to service-connected disabilities, the VA MUST consider that in its decision

- Obtain letters or affidavits from former boss and/or former co-workers establishing the service-related reason for the veteran's termination.
- SS Earnings Records
- Testimony at Hearings
- Vocational Experts
- Doctor's supporting letters, indicating veteran cannot work due to PTSD etc.

Helpful Tips for TDIU Cases

TDIU is a Theory to obtain 100% disability, it is not a separate Claim in its Own Right

1. A *claim* is the request for service-connected benefits (i.e. PTSD) or a request for an increased rating.
2. TDIU, on the other hand, is a *theory* to obtain a total disability rating for the *underlying claim* (i.e. PTSD)
3. A veteran need not explicitly request entitlement to TDIU to raise this theory, whereas for a claim a veteran must explicitly request entitlement to benefits.
4. If there is evidence, such as a medical record or report, indicating that the veteran cannot work as a result of his service-related disability(ies), that is sufficient to raise a TDIU issue in support of the underlying claim(s).



Helpful Tips for TDIU Cases

Effective Date of a TDIU Rating is the Date When the Veteran Became Unemployable as a Result of Service-connected Disability.

Determined by two factors:

- the date the current underlying claim (i.e. PTSD) was filed, and
- the date the veteran became unemployable due to service-connected disability.

The appropriate effective date for the TDIU award is the later of the two dates.

VA is now requiring that veterans submit 21-8940 at some point prior to granting a positive TDIU decision.

We have seen many cases where it was denied just because the forms were not submitted.

Can TDIU Be Taken Away?

Yes, but only after the VA determines the veteran has sustained gainful employment

- Veteran will have to submit an Employment Questionnaire (21-4140) every year. Failure to do so may cause cancellation of TDIU

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If a veteran is unemployed or underemployed, check to see if they qualify for TDIU:

- Make sure veteran is eligible due to their S/C Disabilities
- Complete the 21-8940 forms sooner rather than later
- Build evidence, to support TDIU claim
- ALWAYS check the effective date

ADDITIONAL RESOURCES:

Case Specific Questions (for VSO):

Mark R. Lippman (mlippman@veteranslaw.com)

Amanda L. Mineer (amineer@veteranslaw.com)

Case Referrals (for veterans):

<http://www.veteranslaw.com/consultation-request>

Toll Free: (888) 811 - 0523

General Resources:

<http://www.veteranslaw.com/>