

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.**



**Statement for the Record**

**Before the**

**House Committee on Veterans' Affairs  
Subcommittee on Disability Assistance and Memorial Affairs**

**Oversight Hearing**

**Does a Total Disability Rating Based on Individual Unemployability (TDIU)  
Properly Compensate Today's Veterans?**

**June 12, 2024**

Chairman Luttrell, Ranking Member Pappas, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to offer our views on the important benefit of total disability based on individual unemployability (TDIU).

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents over 850 accredited attorneys, agents, and qualified members assisting tens of thousands of our nation's military veterans, families, survivors, and caregivers seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for persons seeking VA benefits.

NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC), U.S. Court of Appeals for the Federal Circuit (Federal Circuit), and the Supreme Court of the United States. Many landmark cases implicating TDIU benefits have been litigated by NOVA members.

As an organization, NOVA advances important cases and files amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011) (amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review); *Buffington v. McDonough*, No. 21-972 (February 7, 2022) (amicus in support of petition for writ of certiorari before U.S. Supreme Court); *Van Dermark v. McDonough*, No. 23-178 (September 25, 2023) (amicus in support of petition for writ of certiorari before U.S. Supreme Court). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. NOVA also advocates for laws to improve the VA disability claims and appeals process.

## Does a Total Disability Rating Based on Individual Unemployability (TDIU) Properly Compensate Today's Veterans?

### History of TDIU and Current Entitlement Criteria

Although there is no express statutory authority for TDIU, VA has long recognized the importance of this benefit for veterans who are unable to secure and maintain gainful employment due to service-connected disabilities. The first VA rating schedule published in 1925 set forth the purpose of disability ratings and planted the seed for the TDIU benefit:

The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury. *The bureau in adopting the schedule of ratings of reduction in earning capacity shall consider the impairment in ability to secure employment, which results from such injury.*

*The U.S. Veterans Bureau Schedule of Disability Ratings 9 (1925) (based upon The World War Veterans' Act, 1924, as amended) (emphasis added).*

TDIU was formally added to the 1933 rating schedule and defined as follows: "Total disability shall exist when there is (or are) present any impairment(s) of mind or body which is (or are) sufficient to render it impossible for the average person to follow a substantially gainful occupation." Amendments were made in 1945 to establish that age may not be considered a factor in evaluating service-connected disability and TDIU could not be based on advancing age or additional, nonservice-connected disability.

In 1963, this guidance was codified at 38 C.F.R. § 4.16(a), with the concept of marginal employment added in 1990. In 1975, subsection (b) was added to allow for evaluation on an extraschedular basis.

Currently, section 4.16(a) states:

**(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 disability 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. 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, 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.

Over the years, the CAVC and Federal Circuit have weighed in extensively on this benefit. Both courts have emphasized that TDIU is more tailored to an individual than a 100-percent schedular rating. *See, e.g., Smith v. Shinseki*, 647 F.3d 1380 (2011) (whether jobs exist in the economy for the veteran is not the standard; whether the veteran is capable of performing the “physical and mental acts requirement by employment” is the standard, citing *Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993)); *Parker v. Brown*, 7 Vet.App. 116, 118 (1994) (TDIU claim based on acknowledgment that, “even though a rating less than 100% under the rating schedule may be correct, objectively, there are subjective factors that may permit assigning a 100% rating to a particular veteran under particular facts, notwithstanding the putative correctness of the objective rating”).

Furthermore, the courts have discussed and clarified numerous concepts related to TDIU. *Faust v. West*, 13 Vet.App. 342 (2000) (substantially gainful occupation); *Ortiz-Valles v. McDonald*, 28 Vet.App. 65 (2016) (substantially gainful occupation and substantially gainful employment); *Ray v. Wilkie*, 31 Vet.App. 58 (2019) (addressing economic and noneconomic components of substantially gainful occupation); *LaBruzza v. McDonough*, 37 Vet.App. 111 (2024) (employment in a protected environment).

Finally, the courts have made clear that TDIU is not a separate claim for benefits, but arises whenever a veteran expressly or reasonably raises it, as part of an initial claim or a claim for an increased rating. *See, e.g., Rice v. Shinseki*, 22 Vet.App. 447 (2009); *Roberson v. Principi*, 251 F.3d 1378 (2001).

### **Comparison to Social Security Benefits**

Aside from both agencies being tasked with operating a federal disability compensation program, VA and the Social Security Administration (SSA) operate under entirely different statutory schemes with entirely different purposes. As the Federal Circuit noted: “[T]he SSA scheme differs significantly from the VA’s approach.” *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011).

The veterans’ benefits disability scheme was created to provide compensation to those who sacrificed in service to our country. “Congress has expressed special solicitude for the veterans’ cause. . . . A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life.” *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). VA states the purpose of these benefits on its website:

VA disability compensation provides monthly benefits to Veterans in recognition of the effects of disabilities, diseases, or injuries incurred or aggravated during active military service. . . . A tax-free monetary benefit paid to Veterans with disabilities that are the result of a disease or injury incurred or aggravated during active military service.

<https://www.benefits.va.gov/COMPENSATION/types-compensation.asp#:~:text=VA%20disability%20compensation%20provides%20monthly,a%20ggravated%20during%20active%20military%20service.>

By contrast, SSA oversees benefits for all Americans. Through Social Security Disability Insurance, SSA provides benefits for individuals to replace a portion of their salary when disability prevents them from working. The disability does not have to be incurred on the job. Employers and employees contribute to the fund for this benefit through payroll taxes. In addition, Social Security retirement benefits are available to those who have worked for a certain amount of time and contributed through payroll taxes. This benefit is tied to age and not disability.

### **Importance of TDIU Benefit**

The long-standing TDIU benefit is of critical importance to veterans and their families because it allows for individual consideration of the veteran based on his or her unique disability picture and ability to work. In recent years, some entities have suggested

reductions to these benefits, primarily as a cost-savings measure. See, e.g., Congressional Budget Office, *Options for Reducing the Deficit, 2023 to 2032—Volume II: Smaller Reductions* 20-21 (December 2022), <https://www.cbo.gov/system/files/2022-12/58163-budget-options-small-effects.pdf>; U.S. Government Accountability Office, *Veterans' Disability Benefits: VA Can Better Ensure Unemployability Decisions Are Well Supported*, GAO-15-464 (July 2, 2015), <https://www.gao.gov/assets/gao-15-464.pdf>.

NOVA does not support any efforts to reduce the TDIU benefit. Reducing the deficit should not be done on the backs of veterans, families, survivors, and caregivers. Implementing age restrictions or otherwise reducing benefits upon reaching retirement age as defined by SSA would dilute the earned benefits of veterans receiving TDIU. Furthermore, recommendations to reduce or cut TDIU are short sighted. VA compensation is not an insurance or retirement benefit. Many veterans who are in receipt of TDIU have spent long periods of time unemployed or underemployed due to their service-connected disabilities. Therefore, any SSA benefits they may be eligible for or receive are lower than those who have worked their entire adult lives. Likewise, having less time in the workforce means they are far less likely to have benefits enjoyed by other Americans, such as 401k plans. These adverse consequences to their earning potential and security directly result from injuries they incurred during their service to our country.

### **The TDIU Benefit Should Be Codified**

To protect veterans and ensure these benefits are not reduced or eliminated by VA, Congress should codify 38 C.F.R. § 4.16. Any legislation should expressly require VA to consider entitlement to TDIU where the veteran meets the schedular criteria of § 4.16(a) and the record contains evidence of unemployability, per the decision in *Rice v. Shinseki*, 22 Vet.App. 447 (2009); see also *Phillips v. McDonough*, docket no. 22-2575 (oral argument held Jan. 10, 2024) (addressing applicability of *Rice* in the AMA system).

### **CONCLUSION**

Thank you again for allowing us to present our views on this important topic. If you have questions or would like to request additional information, please feel free to contact:

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