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10/07/2020

Re: [REDACTED]
In reply to: 372/212C dated 9/17/2020

Request For Revision of 10/02/2020 Rating
Decision under M 21-1 III.iv.7.B,3(a)

Vietnam Veteran [REDACTED] through counsel, requests a reconsideration or revision of the illegal rating reduction of TDIU to 90% dated 10/02/2020 and notification letter dated 10/06/2020.

Facts

1. 9/22/2018—Veteran files VA Form 526b requesting TDIU under marginal sheltered family employment.
2. 12/31/2018—TDIU granted effective 9/22/2018 based on marginal sheltered family employment.
3. 9/17/2020--Proposal to reduce TDIU to 90% schedular based on sustained employment during the previous calendar year mailed to client. COVID response times slowed mail.

4. 9/27/2020--Veteran responds electronically to proposal to reduce within 30 days with requested VAF 21-4138 and completed VAF 21-4140 showing he has no income or, if he did, it was in the context of marginal employment in a sheltered work environment such as a family owned business as reported in the 9/22/2018 application on VA Form 21-526b.
5. 9/28/2020--VBMS shows receipt and upload of documents from Veteran [REDACTED] well within the requested 60-day period. VA 21-4138 clearly and unmistakably states Veteran requests a predetermination hearing under 38 CFR §3.105(i) (2020).
6. 10/02/2020 Rating decision reduces Veteran from TDIU to 90% schedular based under authority of §§3.105(e); 3.343(c)(2); 3.501(f); 4.16(a).
7. 10/06/2020—notification letter reducing Veteran from TDIU to 90% schedular mailed after an intervening period of only 19 days from date of proposal to reduce.

Legal Standard of Review

The Secretary's lead off cite refers to §3.105(e) as his authority to reduce the Veteran's rating. The regulation clearly and unmistakably affords the Veteran 60 days for presentation of additional evidence.

(e) Reduction in evaluation - compensation. Where the reduction in evaluation of a service-connected disability or employability status is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that compensation payments should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which a

60-day period from the date of notice to the beneficiary of the final rating action expires. (emphasis added) §3.105(e) (2020) (Authority: 38 U.S.C. 5112(b)(6))

Additionally, §3.105(i)(1) is unequivocal in stating a predetermination hearing request must be received within 30 days from the day of the notice.

(i) Predetermination hearings.

(1) In the advance written notice concerning proposed actions under paragraphs (d) through (h) of this section, the beneficiary will be informed that he or she will have an opportunity for a predetermination hearing, **provided that a request for such a hearing is received by VA within 30 days from the date of the notice.** If a timely request is received, VA will notify the beneficiary in writing of the time and place of the hearing at least 10 days in advance of the scheduled hearing date. The 10 day advance notice may be waived by agreement between VA and the beneficiary or representative. The hearing will be conducted by VA personnel who did not participate in the proposed adverse action and who will bear the decision-making responsibility. If a predetermination hearing is timely requested, benefit payments shall be continued at the previously established level pending a final determination concerning the proposed action. (emphasis added) §3.105(i)(1) (2020) (Authority: 38 U.S.C. §5112))

Further, §3.105(i)(2)(i) states that the rating reduction final action shall be 60 days from the date of the notice (9/17/2020 in the instant case):

(i) Where reduction or discontinuance was proposed under the provisions of paragraph (d) or (e) of this section, **the effective date of final action shall be the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final action expires.** (emphasis added). §3.105(i)(2)(i) (2020).

Secondly, the Veteran presumes the Secretary relies on §3.343(c)(2) as his authority to reduce his rating because he alleges the Veteran has engaged in a substantially gainful occupation for over a year:

(2) If a veteran with a total disability rating for compensation purposes based on individual unemployability begins to engage in a substantially gainful occupation during the period beginning after January 1, 1985, the veteran's rating may not be reduced solely on the basis of having secured and followed such substantially gainful occupation **unless the veteran maintains the occupation for a period of 12 consecutive months.** For purposes of this subparagraph, temporary interruptions in employment which are of short duration shall not be considered breaks in otherwise continuous employment. (emphasis added) §3.343(c)(2)(2020); 38 U.S.C. §1163(a)

Thirdly, the Secretary contends he relies on §3.501(f) for his authority to terminate Veteran's entitlement to TDIU on the next succeeding monthly payment in violation of the strictures of 3.105(e) solely based on a failure to return an employment questionnaire:

(f) Employment questionnaire, failure to return.

Reduce award to the amount payable for the schedular evaluation shown in the current rating as of the day following the date of last payment. §3.501(f) (2020)

Lastly, the Secretary cites to §4.16(a) for his authority to reduce the Veteran's TDIU entitlement to 90% schedular. However, §4.16(a) also includes the following:

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. (emphasis added) §4.16(a) (Authority: 38 U.S.C. §501)

Violation of Due Process

Veteran [REDACTED] avers his right to due process under §3.103(b)(3) has clearly been abridged. The Veteran timely expressed disagreement with the reduction decision thus abating the reduction until a predetermination hearing can be scheduled as provided for in §3.105(i)(2)(i). His VA Form 21-4138, in the very first introductory paragraph, on page one requested this very predetermination hearing in no uncertain terms.

"I disagree with this proposal and request a Pre-determination hearing."

Notwithstanding the regulation's instructions in §3.103(d)(2), due process must be accorded a Veteran to provide the requisite information or evidence to rebut the proposal to reduce. In point of fact, the Secretary stated *in haec verba*, on page two of the 9/17/2020 proposal :

"If you do not return the completed VA Form 21-4140 and VA Form 21-4138 within 60 days, we may discontinue your entitlement to IU."
(emphasis in original).

As the sixty days from the 9/17/2020 reduction proposal expires approximately on or about 11/17/2020, the Veteran is at a loss as to why the promulgation of the reduction has occurred so prematurely. If the Secretary believes the submitted Form 21-4140 is remiss or incomplete, due process demands the Veteran be allowed to rectify the submission with the further submittal of new and relevant evidence to comply with the VA process. It should always be remembered that the VA adjudication process is an *ex parte*, nonadversarial, Veteran friendly venue in which to present our claims.

(a) Statement of policy. Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are *ex parte* in nature, and **it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim** and to render a decision which grants every benefit that can

be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3. (emphasis added) §3.103(a) (2020)

The Veteran relies on §3.105(i)(2)(i) as his authority to be given 60 days from 9/17/2020 to rebut the proposal to reduce. He further relies on the clear and unmistakable meaning of §4.16(a) and sheltered family employment. In point of fact, the Veteran submitted a VA Form 21-526b on 9/22/2018 requesting TDIU based entirely on the precept of marginal employment in a sheltered family business. The Secretary, on 12/31/2018, chose 9/22/2018 as the date of entitlement to TDIU. Thus, the Secretary was in constructive possession of the knowledge that the Veteran never sought entitlement prior to 9/22/2018 to TDIU based entirely on his marginal employment in a sheltered family business. See **Bell v. Derwinski**, 2 Vet.App. 611 (1992)(Court held that medical records concerning a claimant which are in VA's possession at the time VA adjudicators render a decision on a claim will be considered to be evidence which was in the record before the adjudicators at the time of the decision, regardless of whether such records were actually before the adjudicators at the time of the decision.

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. (emphasis added)§4.16(a) (2020)

The Veteran has never made any secret of his sheltered family employment. He is clearly unable to be gainfully employed and that is a finding of fact that can only be disturbed by a determination of a Clear and Unmistakable Error on VA's part that resulted in an outcome based decision. See **Medrano v. Nicholson**, 21 Vet. App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

§3.343(c)(2) is inapplicable to the instant case in the context of a marginally employed family member in a sheltered environment. The controlling regulation, in addition to §3.105(e), must always be §4.16(a). The Veteran's award of TDIU is, and has always been, based entirely on this premise. That he can work at all given his severe TBI and PTSD is testimony to his determination to try to be as productive as possible within the confines of his daunting disabilities.

Under the M 21-1 Manual, a practitioner has the ability to correct the record of the client by recourse to Part III, subpart iv, Chapter 7, Section B(3)(a). This provides for the correction of rating decision narratives or code sheets even after promulgation of draft rating decisions have been decided. See **Rosinski v. Wilkie** #17-0678 (2018). (the RO "must . . . correct the Narrative section of a rating decision if after the claimant has been notified of the decision it is discovered that inaccurate information was provided such as service dates or entitlements)); id., sec. B(3)(b) (requiring correction of errors on the rating codesheet); id., sec. B(3)(c) (requiring referral of an erroneous decision "to a decision maker to issue a new decision" once an error has been identified). Adjudicative cure III.iv. 7. B.3.c

Introduction of New and Relevant Evidence

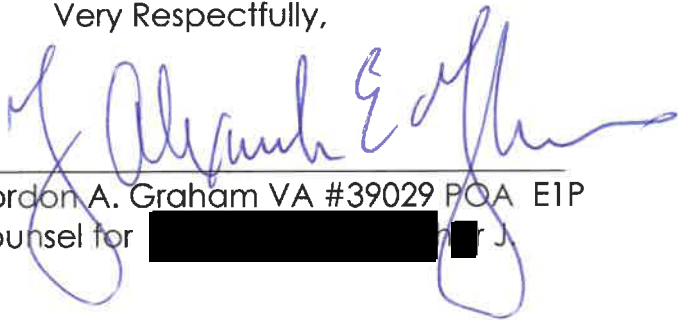
The Veteran now submits a copy of his joint Income Tax return filed with his wife as evidence to rebut the finding that he is engaging in substantial gainful employment as alleged by the Secretary. The Veteran also submits a revised VA Form 21-4140 which corrects any prior deficiency. Veteran [REDACTED]

requests restoration of his TDIU rating as the 10/02/2020 decision is clearly void ab initio by operation of law. As this is not a Motion to Revise a prior final decision under §3.105(a)(1), the duty to assist applies.

Appellant feels the appeal is in equipoise and asks for the time-honored pro-Veteran canon of statutory construction most recently espoused in *Henderson v. Shinseki*, 562 U.S. 428,441 (2011) ("We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.").

The premature rush to reduction of entitlement to TDIU was adversarial in nature and not in keeping with the Secretary's expressed mantra to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government.

Very Respectfully,



Gordon A. Graham VA #39029 POA EIP
Counsel for [REDACTED] J

Attachments:

- 1) IRS forms 1040 (2019) Individual Income Tax Return; 4797 Sale of Business Property (2019); 8995 Qualified Business Income Deduction Simplified Computation; 8829 Worksheet; 4562 Depreciation and Amortization.
- 2) VA Form 21-4140 revised form with additional information requested by the Secretary.