



**NVLSP**  
NATIONAL VETERANS LEGAL SERVICES PROGRAM



Department of  
**Veterans Services**

# **RATING REDUCTIONS AND SEVERANCE OF SERVICE CONNECTION**

# OVERVIEW



- VA Reexaminations
- Rating Reduction Rules / Protections
- Severance of SC Rules / Protections
- VA Procedures
- Hypos
- Advocacy Advice



# VA REEXAMINATIONS



# VA REEXAMINATIONS



- **Reexaminations To Determine Degree of Disability (38 C.F.R. § 3.327)**
  - To ensure Vets receiving disability comp still qualify for their rating, VA can require them to be:
    - Reexamined by a VA doctor, OR
    - Observed in a VA hospital



# VA REEXAMINATIONS



- **Reexaminations To Determine Degree of Disability (38 C.F.R. § 3.327)**
  - Generally, VA will require a reexamination if there is evidence that a disability:
    - Has significantly changed since the last exam, or
    - Is likely to improve



# VA REEXAMINATIONS



- When VA determines that a routine future exam is needed to monitor for anticipated improvement in an SC condition, reexaminations are typically scheduled 3 years from the date of the most recent rating decision on the issue
  - Manual M21-1, III.iv.3.B.2.c (change date Dec. 19, 2017)
- In the past, this was a 5-year requirement

# VA REEXAMINATIONS



- *Some exceptions to the 3-year re-exam rule:*
  - Malignancies that require reevaluation 6 months following cessation of treatment for active disease
  - Discharge from military service due to a mental disorder caused by traumatic stress under 38 C.F.R. § 4.129
    - Vet initially assigned at least a 50% rating and exam is scheduled w/in 6 months of discharge

# VA REEXAMINATIONS



- VA reviews the reexamination report and then decides whether to change the disability rating
- VA will probably NOT reexamine Vet if:
  - A disability from a disease is permanent and not likely to improve
  - Symptoms have not significantly changed for 5 years or longer



# VA REEXAMINATIONS



- VA will probably NOT reexamine Vet if (cont.):
  - Vet is over 55 years old
  - Minimum disability rating is assigned
  - Combined rating would not be affected if rating for the individual disability was reduced
- 38 C.F.R. § 3.327(b)

# VA REEXAMINATIONS



- If Vet in one of these situations is scheduled for a reexam, contact VA and request that it reconsider its decision to schedule the exam
- Argue that the Vet fits into one of the categories where a reexam is not appropriate

# MISSING A SCHEDULED REEXAMINATION 38 C.F.R. § 3.655(C)



- VA must properly notify Vets about scheduled reexaminations
- VA can stop or reduce a Vet's benefits for missing a reexamination without good cause



# MISSING A SCHEDULED REEXAMINATION 38 C.F.R. § 3.655(C)



- VA must give notice stating:
  - Benefits will be reduced or stopped unless, w/in 60 days, Vet:
    - Is willing to report for VA exam, OR
    - Provides evidence that proves continued entitlement to the rating
  - If reexamination is required for a claim for increased benefits, VA may deny the claim without considering any evidence

# MISSING A SCHEDULED REEXAMINATION 38 C.F.R. § 3.655(C)



- If Vet is not provided advance notice by VA of a scheduled exam, Vet may have a defense to any adverse action taken by VA
- If there is not a copy of a notification letter in VBMS (or it is incorrectly addressed), ask VA to void the reduction or severance of SC

# MISSING A SCHEDULED REEXAMINATION 38 C.F.R. § 3.655(C)



- Good cause for missing a reexamination
  - If Vet has a good reason for missing an exam or hospital observation, VA will reschedule without negative consequences
  - Vet must notify VA of inability to attend exam
  - VA determines good cause on a case-by-case basis
    - Illness of claimant,
    - Death of family member
    - Other good reason

# MISSING A SCHEDULED REEXAMINATION 38 C.F.R. § 3.655(C)



- VA will take immediate action to stop or reduce Vet's benefits if Vet:
  - Does not provide explanation for missing reexamination
  - Misses a rescheduled reexamination, after missing the first exam without good cause



# **RATING REDUCTIONS AND SEVERANCE**



# RATING REDUCTIONS AND SEVERANCE



- VA may be able to reduce compensation payments or sever service connection in some cases
- VA must comply with certain rules guiding reduction and severance

# RATING REDUCTION RULES



- VA has the burden of proof and must show that the condition has improved by the preponderance of the evidence (51% probability)
- Do not let VA put the burden on the Vet
- Some ratings or SC statuses are protected from reduction or severance

# OVERVIEW OF PROTECTIONS



- Ratings in effect less than 5 years
- Ratings in effect for 5-20 years
- Ratings in effect for 20 years or more
- 100% ratings (including TDIU)
- SC for 10 years

# CALCULATING TIME PERIODS FOR PROTECTIONS



- Time periods are computed from the effective date of the evaluation/grant of service connection to the effective date of actual reduction/severance
  - *Brown v. Brown*, 5 Vet.App. 413 (1993)
  - 38 C.F.R. §§ 3.344(c), 3.951(b), 3.957



# CALCULATING TIME PERIODS FOR PROTECTIONS



- Generally, before reduction/severance becomes effective, VA must:
  - Issue a proposed rating reduction giving the Vet 60 days to submit evidence showing rating should not be reduced / severed
  - Issue a rating decision finalizing the reduced rating, which becomes effective 60 days after notice of the decision

# CALCULATING TIME PERIODS FOR PROTECTED RATINGS



- The effective date for rating reduction / severance usually can be no earlier than 120 days after VA's proposal
- In most cases, it will probably take longer:
  - Add time for hearing, if requested
  - Add time for consideration of Vet's evidence
  - Add time for VA slowness

# CALCULATING TIME PERIODS FOR PROTECTED RATINGS



- Due to these delays, VA proposal and rating decision finalizing the decision may occur before a certain protection period is triggered, but the effective date of reduction/severance may be after the protection kicks in
- If so, VA may need to:
  - **Revise proposed rating reduction / severance to account for proper protection**
  - **Apply proper protection prospectively**

# REDUCTION OF NON-PROTECTED RATINGS



- Ratings in effect less than 5 years / less than 100%
  - Any reduction must be based on a review of the entire history of the disability
  - VA must determine whether there has been an actual change in the disability
  - Any improvement must reflect an improvement in the Vet's ability to function under the ordinary conditions of life and work
  - VA cannot reduce benefits based on exams that are not thorough



# RATINGS IN EFFECT AT LEAST 5 YEARS 38 C.F.R. § 3.344



- Ratings unchanged for at least 5 years are “stabilized”
- VA cannot reduce a stabilized rating unless all evidence in the c-file shows the disability has permanently improved
- VA cannot reduce a rating based on an exam less thorough than the one used to grant the rating
- VA cannot reduce a rating if the improvement is temporary or cannot be maintained while Vet is working or actively seeking work

# SIMON V. WILKIE

## 30 VET. APP. 403 (2018)



### Issue:

- Do the 5 year rating protection rules in 38 C.F.R. § 3.344(a) apply only to ratings that remain at precisely the same percentage for 5 years or more?

# SIMON V. WILKIE



- 1/1968 PEB: Vet unable to perform duties due to PTSD
- 2/1968: Vet discharged from the military
- 3/1968: RO granted SC for PTSD with a 50% rating, effective 3/1/1968
- 7/1969: VA PTSD exam
- 10/1969: RO reduced PTSD rating to 30% because disability appeared to be improving
- 8/1974: VA PTSD exam: “functioning rather adequately”

# SIMON V. WILKIE



- 1974: RO reduced PTSD rating from 30% to 10%, effective 12/1/1974, because “the current exam shows a good industrial and social adjustment.”
- 2014: Vet claimed CUE in 1974 decision:
  - Had rating of at least 30% longer than 5 years
  - VA did not afford him the protections of § 3.344 when it reduced rating below 30%

# SIMON V. WILKIE



- 2017: BVA found no CUE in 1974 rating decision
  - § 3.344 did not apply to PTSD rating in 1974 because rating did not continue at the same level for 5 years, so it was not stabilized
  - § 3.344 applies when a Vet has the exact same disability rating for at least a 5-year period

# SIMON V. WILKIE



- Was BVA right that § 3.344 did not apply?
  - Yes, 30% rating was in effect less than 5 years
  - No, he was at least 30% for more than 5 years
  - Yes, but because it only applies when disability gets worse (30% to 50%), not improves (50% to 30%)

# SIMON V. WILKIE



- CAVC held:
  - 5-year requirement cannot be met by combining 2 periods with different ratings, regardless of whether the ratings went up or down
  - Rating gets heightened protection only when it has existed at the exact same percentage for at least 5 years

# RATINGS IN EFFECT FOR 20 YEARS

## 38 C.F.R. § 3.951(b)



- If a disability has been continuously rated for at least 20 years, VA cannot reduce the rating below its lowest level during that period
  - **Exception: VA discovers rating based on fraud**



# RATINGS IN EFFECT FOR 20 YEARS

## 38 C.F.R. § 3.951(b)



- Example: If Vet is granted comp based upon an original rating of 30% and for the next 20 years the rating varies between 30% and 100%, the rating cannot then be reduced below 30% in the absence of fraud
- 20 year protection rule applies even to rating levels assigned retroactively because a previous final decision is revised based on CUE

# RATING REDUCTIONS AND STAGED RATINGS



- If Vet has staged ratings, this can lead to various protections coming into play
- Hypo #1:
  - 1997: VA granted SC for PTSD at 30%
  - 2010: VA increased rating to 50%
  - 2016: VA increased rating to 70%

# RATING REDUCTIONS AND STAGED RATINGS



- Hypo #1 (cont.):
  - 2019: VA proposes to reduce PTSD rating
  - What protection rules apply?
    - 20-year and 5-year protections (and general rules for ratings in effect < 5 years)

# RATING REDUCTIONS AND STAGED RATINGS



- Hypo #1 (cont.):
  - What would the VA have to show to reduce the rating below 70%?
    - No protection applies to the 70% rating. But, VA must show that there has been an actual change in Vet's PTSD to reduce below 70%

# RATING REDUCTIONS AND STAGED RATINGS



- Hypo #1 (cont.):
  - What would the VA have to show to reduce the rating below 50%?
    - 50% rating has stabilized, so VA would have to show that all evidence of record establishes that the PTSD has permanently improved to reduce below 50%

# RATING REDUCTIONS AND STAGED RATINGS



- Hypo #1 (cont.):
  - What would the VA have to show to reduce the rating below 30%?
    - VA cannot reduce the rating below 30%, unless there was evidence of fraud

# RATING REDUCTION RULES



- **These principles come from:**
  - *Brown v. Brown*, 5 Vet.App. 413 (1993)
  - *Faust v. West*, 13 Vet.App. 342 (2000)

# RATING REDUCTION RULES



- Relevant VA Regulations (38 C.F.R.):
  - § 4.1: each disability must be viewed in relation to its history
  - § 4.2: disabilities should be considered from the perspective of the Vet working or seeking work



# RATING REDUCTION RULES



- Relevant VA Regulations (38 C.F.R.):
  - § 4.10: evaluation should be based on the limitations the disability imposes on the Vet's ability to function under the ordinary conditions of daily life, including employment
  - § 4.13: changes in a disability rating should be based on an actual change in Vet's condition, and not just a difference in the thoroughness of the exam that was performed

# REDUCTION OF 100% RATINGS

## 38 C.F.R. § 3.343



- VA cannot reduce a total disability rating unless there has been a material (meaningful) improvement of the condition(s) rated 100%
- VA must compare new evidence of the severity of the condition to the evidence last used to grant (or continue) the 100% rating

# REDUCTION OF 100% RATINGS

## 38 C.F.R. § 3.343



- VA cannot reduce the rating unless the condition improved while Vet was working or actively seeking a job
- If material improvement would allow VA to reduce Vet's rating under the VA Rating Schedule, Vet may still qualify for TDIU

# REDUCTION OF 100% RATINGS

## 38 C.F.R. § 3.343



- VA may not reduce TDIU unless there is clear and convincing evidence Vet is actually employable
- VA cannot reduce TDIU based on Vet securing and following substantially gainful occupation unless Vet maintains the occupation for 12 consecutive months

# REVISION OF RATING SCHEDULE

## 38 U.S.C. § 1155



- VA revises its Rating Schedule from time to time
- A rating in effect at the time of a revision cannot be reduced unless the disability has actually improved
- VA must continue to use the old rating criteria until the improvement of the condition would cause a rating reduction under that criteria
- VA will then apply the new rating criteria, even if it would cause a greater reduction than the old criteria

# EXAMPLE – CHANGES TO VA RATING SCHEDULE



- VA revises the rating criteria for condition Y so that it is less beneficial for Vets:
  - 30% (old criteria) = 20% (new criteria)
  - 20% (old criteria) = 10% (new criteria)
- Vet is SC for condition Y at 30% (old criteria)
- When change in rating criteria goes into effect, Vet will maintain 30% rating

# EXAMPLE – CHANGES TO VA RATING SCHEDULE



- But, if Vet's condition improves to the 20% level under the old criteria:
  - VA can apply the new criteria to his condition
  - Vet's rating will be reduced to 10%

# VA VIOLATIONS OF THE RULES



- If VA does not correctly apply the rules regarding rating reductions, a rating reduction is invalid and VA must reinstate the old rating, retroactive to the date of the reduction



# SEVERANCE OF SERVICE CONNECTION RULES



- Generally, SC (and DIC) can be severed where the grant was:
  - Clearly and unmistakably erroneous
    - 38 C.F.R. § 3.105(d)
  - Due to fraud
  - Clearly illegal

# SEVERANCE OF SERVICE CONNECTION RULES



- Severance based on CUE
  - VA's burden to show that grant was "clearly and unmistakably erroneous"
  - VA can develop and consider new evidence when making this determination

# SEVERANCE OF SERVICE CONNECTION RULES



- Examples of CUE sufficient to sever SC:
  - Change in medical diagnosis, if the examining physician certifies that based on all of the accumulated evidence, the diagnosis on which SC was granted was clearly erroneous
    - Certification must include “a summary of the facts, findings, and reasons” supporting the conclusion

# SEVERANCE OF SERVICE CONNECTION RULES



- Severance due to fraud
  - A person who knowingly makes a false or fraudulent statement concerning any claim for VA benefits forfeits his or her rights to VA benefits.

# SEVERANCE OF SERVICE CONNECTION RULES



- Severance due to fraud
  - VARO must first send claimant written notice:
    1. statement of the specific charges
    2. detailed statement of evidence supporting the charges
    3. notice of the right to submit evidence or a statement in rebuttal or explanation w/in 60 days
    4. citation and discussion of the applicable statute
    5. notice of the right to a hearing and representation by counsel

# SEVERANCE OF SERVICE CONNECTION RULES



- Severance when grant clearly illegal
  - If evidence establishes that grant was clearly illegal, VA can sever
    - Ex: National Guardsmen were not legally entitled to SC for disabilities that resulted from being called into the service of the state of New Mexico, rather than the federal gov't

# PROTECTION: 10 YEARS OF SC

## 38 C.F.R. § 3.957



- If SC for a disability (or DIC) has been in effect for at least 10 years, VA cannot change the SC status of that disability (or sever DIC), unless
  - SC (or DIC) was obtained by fraud
  - VA discovers Vet lacks the required length or character of service
- Evaluation may be reduced, but SC can't be severed



# **VA PROCEDURES TO REDUCE OR SEVER BENEFITS**





# VA PROCEDURES TO REDUCE OR STOP BENEFITS

## 38 C.F.R. §§ 3.103, 3.105

- VA must give Vet prior notice of its intent to stop or reduce benefits
- Vet has 60 days to submit evidence to convince VA to continue the current rating
- Vet has right to a hearing
  - Must request hearing w/in 30 days of VA notice
  - VA can't finalize its decision until after hearing

# VA PROCEDURES TO REDUCE OR STOP BENEFITS

## 38 C.F.R. §§ 3.103, 3.105



- If Vet does not submit evidence, VA will finalize its decision
- Reduction or termination will go into effect 60 days after notice of final decision

# VA PROCEDURES TO REDUCE OR STOP BENEFITS

## 38 C.F.R. §§ 3.103, 3.105



- VA does not need to give advance notice of termination or reduction if:
  - Overall amount of compensation would not change w/ rating reduction
  - Vet gives VA factual info about income, net worth, dependency or marital status, knowing it will be used to calculate benefits
  - There is reliable evidence Vet has died

# MORE HYPOS



# HYP0 #2



- Vet had 20% ratings for arthritis in both knees for two years
- VA conducted an exam which showed improved ROM from earlier exam; mentioned pain on ROM and flare-ups of pain, but did not specify where pain began or whether it caused functional loss
- VA reduced rating to 10% in each knee based on the exam

# OUTCOME #2



- Exam was inadequate because it failed to properly address flare-ups under *DeLuca v. Brown* and *Mitchell v. Shinseki*
- Because exam was inadequate, reduction was invalid
- Vet's 20 percent ratings in both knees were retroactively reinstated

# HYP0 #3



- For the last 6 years, Vet SC for a mental disorder at 50%
- VA scheduled reexamination
- VA examiner concluded that mental disorder caused occupational and social impairment with occasional decrease in work efficiency with the following symptoms: depressed mood; chronic sleep impairment; mild memory loss; impaired judgment; and impaired abstract thinking

# HYP0 #3



- To combat the proposed rating reduction, Vet examined by a private psychiatrist
- Private examiner concluded the mental disorder caused occupational and social impairment with reduced reliability and productivity with the following symptoms: panic attacks more than once a week; impaired judgment; impaired abstract thinking; depressed mood; and mild memory loss



# HYP0 #3



- How should you frame your argument?
  - The evidence shows that the Vet is entitled to a 50% rating, or at the very least, the evidence is equally balanced and the Vet should be given the benefit of the doubt

OR

- All of the evidence in the claims file does not support the conclusion that the Vet's mental condition has permanently improved; thus, his rating should not be reduced

# ANSWER #3



- The burden is not on the Vet, it is on VA
- Frame the argument around the fact that not all of the evidence supports the conclusion that the mental condition has permanently improved
- Address the private exam and the symptoms that support a 50% rating.
  - But remember, Vet does not have to prove entitlement to the current rating

# ADVOCACY ADVICE



# ADVOCACY ADVICE



- Determine what type of rating it is and whether special protection rules apply
  - Over 20 years?
  - Over 5 years?
  - 100%?
  - TDIU?



# ADVOCACY ADVICE



- When proposed reduction/severance rating decision or rating decision finalizing reduction/severance occurs before protective period, but reduction/severance is effective on or after protective period, ensure VA considered correct protective rules

# ADVOCACY ADVICE



- Check exams very closely
  - Proper tests: Depending on the disability, make sure all the required tests were performed. Check DBQs and VA Clinicians' Guide
  - Rationale: Make sure the examiner provides a sufficient rationale

# ADVOCACY ADVICE



- Check exams very closely (cont.)
  - DeLuca/Mitchell Compliance: Make sure exam adequately addresses functional loss, flare-ups, repeated use
  - Explanation of “material improvement” in light of entire history of disability
  - Explanation of how improvement can be maintained under ordinary conditions of life and work

# ADVOCACY ADVICE



- Check exams very closely (cont.)
  - Compare exams used to assign original or most recent rating and exam upon which VA is basing its proposal to reduce
    - Try to find any ways in which new exam is not as thorough as original exam



# ADVOCACY ADVICE



- If exam is not sufficient, and VA already implemented reduction, insist on reversal of the decision and reinstatement of the higher rating retroactive to the date of reduction
- Remember: burden is on VA, NOT the Vet

# QUESTIONS?

