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Protected VA Disability Ratings: Statutory and Regulatory Limits on Rating Reductions

By Bradley W. Hennings[1] and Robert Chisholm[2]

11.0—Veterans' claims.

Introduction

A VA disability rating is not permanent simply because VA assigned it. VA may reexamine a veteran, propose a lower evaluation, and reduce monthly compensation if it finds that a service-connected condition has improved.[3] Congress and VA have, however, adopted rules that limit when VA may reexamine a veteran, when it may reduce a rating, and what it must show before doing so. *See* 38 C.F.R. § 3.105(e).[4]

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[1] BA 1997 George Washington University, MS 2001 Stevens Institute of Technology, JD 2006 Rutgers University School of Law. Mr. Hennings joined Chisholm Chisholm & Kilpatrick as an attorney in January 2018 and currently serves as a Partner in the firm. His practice focuses on the U.S. Department of Veterans Affairs (VA) and the U.S. Court of Appeals for Veterans Claims. Immediately prior to joining CCK Law, Mr. Hennings served as a Veterans Law Judge at the U.S. Department of Veterans Affairs, Board of Veterans' Appeals (BVA). Mr. Hennings' full biography may be found at cck-law.com/lawyers/bradley-w-hennings. To learn more about CCK Law, a national law firm focused on veterans disability appeals, visit cck-law.com.

[2] BA 1984 Boston College, JD 1988 Boston University School of Law. Mr. Chisholm is a Founding Partner of Chisholm Chisholm & Kilpatrick, a national law firm focused on veterans disability appeals. His law practice focuses on representing disabled veterans in the United States Court of Appeals for Veterans Claims and before the Department of Veterans Affairs. As a veterans lawyer, Mr. Chisholm has been representing disabled veterans since 1990. During his extensive career, he has represented veterans before the Board of Veterans' Appeals, the Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Federal Circuit. Mr. Chisholm is a founding member of the United States Court of Appeals for Veterans Claims Bar Association and served as President of that organization for the year 2002–2003. Mr. Chisholm served as the President of the National Organization of Veterans' Advocates from 1999 to 2004. In 2016, the United States Court of Appeals for Veterans Claims (CAVC) awarded Mr. Chisholm the Hart T. Mankin Distinguished Service Award in recognition of his 25 years of outstanding service to the Court. Mr. Chisholm has served as appellant's lead counsel in over 7,500 cases before the CAVC. His full biography may be found at cck-law.com/lawyers/robert-v-chisholm. To learn more about CCK Law, a national law firm focused on veterans disability appeals, visit cck-law.com.

[3] U.S. Department of Veterans Affairs, *About VA Disability Ratings*, available at https://www.va.gov/disability/about-disability-ratings/.

[4] 38 C.F.R. § 3.105, available at https://www.law.cornell.edu/cfr/text/38/3.105.



These rules are often grouped under the label "protected ratings," but the label obscures real differences. Some protections fix the level of a rating, some protect service connection itself, and others limit only routine reexaminations. Their sources are scattered across statutes, regulations, and case law. This article collects the principal protections, explains what each does and does not prevent, and describes the procedure VA must follow when a rating is not protected.

I. When and Why VA Reexamines a Rating

VA reexamines a disability when it needs to verify that the disability continues to exist or to confirm its current severity. 38 C.F.R. § 3.327(a). Reexamination is generally required if a disability is likely to have improved, or if the evidence shows a material change in the disability or suggests that the current rating may be incorrect. *Id.*[5] After an examination, VA schedules a reexamination, if one is in order, no sooner than two years and no later than five years afterward, unless another period is specified elsewhere in the regulations. 38 C.F.R. § 3.327(b)(1).

Two events often start the reduction process: a scheduled reexamination and the receipt of new medical evidence indicating a change in the condition, including findings from an examination conducted for a different claim. Records showing that a veteran's cancer has entered remission, for example, may lead VA to reexamine that condition. Because compensation is meant to reflect the current level of severity, improvement generally results in a lower rating and lower monthly compensation.

A veteran should report for a scheduled reexamination. If a claimant fails without good cause to report, VA must issue a pretermination notice, and payment for the disability may then be discontinued or,

[5] 38 C.F.R. § 3.327, available at https://www.law.cornell.edu/cfr/text/38/3.327. *See also* CCK Law, available at https://cck-law.com/blog/va-disability-reexaminations-and-reevaluations/.

where part 4 establishes a minimum evaluation or the rating is protected under 38 C.F.R. § 3.951(b), reduced to that lower evaluation. 38 C.F.R. § 3.655(c).[6]

II. General Requirements for Any Rating Reduction

Regardless of how long a rating has been in effect, VA may not reduce it without meeting general requirements. In *Brown v. Brown*, the Court of Appeals for Veterans Claims held that, in any rating-reduction case, VA must determine not only that the disability has actually improved but also that the improvement reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work. 5 Vet. App. 413, 420–21 (1993). VA bears the burden of establishing that improvement. *Id.* at 421.

VA must also follow the notice procedures of 38 C.F.R. § 3.105(e), discussed in Part VI below. A readjustment of the rating schedule is not itself grounds for reducing an existing rating unless medical evidence establishes that the disability has actually improved. 38 C.F.R. § 3.951(a). Heightened protections attach to ratings that satisfy the time-based rules described next.

III. Time-Based Protections

Three protections turn on how long a rating or a grant of service connection has been in place. Each counts time differently, and each protects something different.

A. The 5-Year Rule: Stabilized Ratings

A rating that has continued at the same level for five years or more is treated as stabilized and receives heightened procedural protection

[6] 38 C.F.R. § 3.655, available at https://www.law.cornell.edu/cfr/text/38/3.655.

against reduction. 38 C.F.R. § 3.344(c).[7] The Federal Circuit has held that the five-year period is a definition rather than a guideline, so a rating unchanged for less than five years does not qualify. *Hanser v. McDonough*, 56 F.4th 967, 972–74 (Fed. Cir. 2022).[8]

For a stabilized rating, VA must review the entire record of examinations and the medical-industrial history to decide whether the recent examination is full and complete. An examination less full and complete than the one on which payments were authorized or continued cannot support a reduction. 38 C.F.R. § 3.344(a). For diseases subject to temporary or episodic improvement, VA may not reduce a rating on any one examination unless all of the evidence clearly shows that sustained improvement has been demonstrated. *Id.* Ratings for conditions that become comparatively symptom free after prolonged rest likewise cannot be reduced on examinations reflecting the results of bed rest. *Id.*

Even where material improvement is clear, VA must consider whether the evidence makes it reasonably certain that the improvement will be maintained under the ordinary conditions of life. *Id.* If doubt remains, VA continues the rating and schedules a reexamination. 38 C.F.R. § 3.344(b).

The protection has limits. Paragraphs (a) and (b) of § 3.344 do not apply to disabilities that have not become stabilized and are likely to improve. 38 C.F.R. § 3.344(c). The Federal Circuit has acknowledged possible ambiguity where a rating has been unchanged for five years but the underlying disability remains unstable, and it left that question open.

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[7] 38 C.F.R. § 3.344, available at https://www.law.cornell.edu/cfr/text/38/3.344. *See also* CCK Law, available at https://cck-law.com/blog/what-is-the-va-disability-5-year-rule/.

[8] *Hanser v. McDonough*, No. 2021-1974 (Fed. Cir. Dec. 21, 2022), available at https://www.cafc.uscourts.gov/opinions-orders/21-1974.OPINION.12-21-2022_2051407.pdf.

B. The 10-Year Rule: Protected Service Connection

Service connection that has been in effect for 10 or more years may not be severed unless the original grant was based on fraud or military records clearly show that the person did not have the requisite service or character of discharge. 38 U.S.C. § 1159; 38 C.F.R. § 3.957.[9] The 10 years are computed from the effective date of VA's finding of service connection to the effective date of the rating decision severing it. 38 C.F.R. § 3.957.

The rule protects service connection, not the evaluation assigned to the disability. A veteran whose service connection is protected may still face a lower rating if the disability improves, subject to the other protections discussed in this article. Because a rating can fall to a noncompensable level, the 10-year rule alone does not guarantee continued payment.

C. The 20-Year Rule: Protected Rating Levels

A disability that has been continuously rated at or above any evaluation for 20 or more years will not be reduced to less than that evaluation unless the rating was based on fraud. 38 U.S.C. § 110; 38 C.F.R. § 3.951(b).[10] The 20 years are computed from the effective date of the evaluation to the effective date of the reduction. 38 C.F.R. § 3.951(b).

The protected level is the lowest evaluation at which the disability was rated during that continuous period. If a veteran's depression was originally rated at 70 percent and fluctuated between 50 and 70 percent over 20 years without falling below 50 percent, VA may not reduce the rating below 50 percent. Even a failure to report for a

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[9] 38 U.S.C. § 1159, available at https://www.govinfo.gov/link/uscode/38/1159; 38 C.F.R. § 3.957, available at https://www.law.cornell.edu/cfr/text/38/3.957. *See also* CCK Law, available at https://cck-law.com/blog/va-disability-10-year-rule/.

[10] 38 U.S.C. § 110, available at https://www.law.cornell.edu/uscode/text/38/110; 38 C.F.R. § 3.951, available at https://www.law.cornell.edu/cfr/text/38/3.951. *See also* CCK Law, available at https://cck-law.com/blog/va-disability-20-year-rule/.

reexamination cannot reduce a rating below a protected evaluation. 38 C.F.R. § 3.655(c)(1).

IV. Limits on Routine Reexamination: The 55-Year-Old Rule

VA's reexamination regulation lists situations in which VA will not schedule a periodic reexamination in a service-connected case: (i) the disability is established as static; (ii) the findings and symptoms have persisted without material improvement for five years or more; (iii) the disability from disease is permanent in character and there is no likelihood of improvement; (iv) the veteran is over 55 years of age, except under unusual circumstances; (v) the rating is a prescribed schedular minimum; or (vi) the combined evaluation would not be affected if a future examination resulted in a lower evaluation for one or more conditions. 38 C.F.R. § 3.327(b)(2).[11]

The age-based provision, commonly called the 55-year-old rule, removes one frequent occasion for a reduction, because reductions ordinarily follow reexamination. The rule has limits, however. It governs periodic reexaminations only. VA may request a reexamination at any time to ensure that a disability is accurately rated, 38 C.F.R. § 3.327(a), and some diagnostic codes themselves require an examination, *see infra* Part V.A. VA's adjudication manual instructs raters not to schedule a reexamination if the veteran will have reached or surpassed age 55 by the time it would be conducted, unless a specific regulation requires it or unusual circumstances compel it. M21-1, pt. IV, subpt. ii, ch. 1, sec. A.

[11] *See* 38 C.F.R. § 3.327, available at https://www.law.cornell.edu/cfr/text/38/3.327. *See also* CCK Law, available at https://cck-law.com/blog/what-is-the-55-year-old-rule/.

V. Total Disability Ratings

A 100 percent schedular rating, a permanent and total designation, and an award of total disability based on individual unemployability (TDIU) are three different things. The protections attached to each differ.

A. 100% Schedular Ratings

A total disability rating generally will not be reduced, absent clear error, without an examination showing material improvement in physical or mental condition. 38 C.F.R. § 3.343(a).[12] VA must evaluate the examination report in conjunction with all of the facts of record. It must consider in particular whether the veteran attained improvement under the ordinary conditions of life, meaning while working or actively seeking work, rather than because symptoms were brought under control by prolonged rest or a regimen that precludes work. *Id.*

This protection does not reach every 100 percent rating. Section 3.343(a) excludes total ratings granted purely because of hospital, surgical, or home treatment, or because of individual unemployability. *Id.* In addition, where a diagnostic code prescribes its own procedure for ending a total rating, that procedure controls. In *Love v. McDonough*, the Federal Circuit held that § 3.344 does not apply to a 100 percent rating for prostate cancer under diagnostic code 7528, because the code requires a mandatory examination after treatment ends and directs that any change be handled under § 3.105(e). No. 2023-1465 (Fed. Cir. July 11, 2024) (following the reasoning of *Foster v. McDonough*, 34 Vet. App. 338 (2021), which reached the same result under § 3.343).[13]

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[12] 38 C.F.R. § 3.343, available at https://www.law.cornell.edu/cfr/text/38/3.343. *See also* CCK Law, available at https://cck-law.com/blog/types-100-percent-va-disability-ratings/.

[13] *Love v. McDonough*, No. 2023-1465 (Fed. Cir. July 11, 2024), available at https://cafc.uscourts.gov/opinions-orders/23-1465.OPINION.7-11-2024_2348372.pdf.

B. Permanent and Total Disability

A total disability is permanent when the impairment is reasonably certain to continue throughout the life of the disabled person. 38 C.F.R. § 3.340(b).[14] The permanent loss or loss of use of both hands, both feet, or one hand and one foot, the loss of sight of both eyes, and becoming permanently helpless or bedridden constitute permanent total disability. *Id.*

Permanent and total status is not one of the time-based protections described above. VA may reduce a permanent and total rating on a proper showing, although reductions are uncommon. Such a designation does, however, make routine reexamination unlikely, because VA does not schedule periodic reexaminations where a disability is permanent in character with no likelihood of improvement. 38 C.F.R. § 3.327(b)(2)(iii).

C. Total Disability Based on Individual Unemployability

TDIU is a monthly benefit paid at the 100 percent rate to a veteran whose service-connected disabilities prevent securing or following a substantially gainful occupation, even where the combined schedular rating is lower. 38 C.F.R. § 4.16.[15]

In reducing a TDIU rating, VA must follow § 3.105(e) and must exercise caution that actual employability is established by clear and convincing evidence. 38 C.F.R. § 3.343(c)(1). A veteran who secures and follows a substantially gainful occupation after January 1, 1985, may not have the rating reduced solely on that basis unless the veteran maintains the

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[14] 38 C.F.R. § 3.340, available at https://www.law.cornell.edu/cfr/text/38/3.340. *See also* CCK Law, available at https://cck-law.com/blog/faq-friday-permanent-and-total-pt-disability/ and https://cck-law.com/blog/can-va-take-away-100-percent-permanent-and-total-p-and-t-disability/.

[15] 38 C.F.R. § 4.16, available at https://www.law.cornell.edu/cfr/text/38/4.16. *See also* CCK Law, available at https://cck-law.com/benefits/individual-unemployability-tdiu/.

occupation for 12 consecutive months. Temporary interruptions of short duration do not break continuity. 38 C.F.R. § 3.343(c)(2).

Employment counts as substantially gainful only if it is not marginal. Marginal employment generally exists when earned annual income does not exceed the poverty threshold for one person. It may also be found on a facts-found basis, including employment in a protected environment such as a family business or sheltered workshop, even where income exceeds the threshold. 38 C.F.R. § 4.16(a).

VI. Reductions of Unprotected Ratings: Notice, Evidence, and Review

Some service-connected conditions improve over time or with treatment. Where a rating is not protected, VA may reduce it to reflect the current level of disability, but it may not do so without notice. When VA considers a reduction warranted and the lower evaluation would reduce or discontinue compensation, it must prepare proposal of reduction setting forth all material facts and reasons. 38 C.F.R. § 3.105(e).[16] VA then notifies the veteran, furnishes detailed reasons, and allows 60 days to present additional evidence showing that compensation should continue at its present level. *Id.*

The veteran may also request a predetermination hearing if VA receives the request within 30 days of the date of the notice. 38 C.F.R. § 3.105(i)(1). A timely request gives the veteran additional time to submit evidence, but a hearing is not required to contest a proposed reduction. A veteran may instead submit evidence within the 60-day period. *See id.* § 3.105(e), (i).

If VA takes final action after considering the evidence, the reduction takes effect on the last day of the month in which a 60-day period from the date of notice of the final action expires. 38 C.F.R. § 3.105(i)(2). A

[16] *See also* CCK Law, available at https://cck-law.com/blog/what-happens-when-va-proposes-to-reduce-my-disability-rating/.

veteran who receives a final decision reducing a rating may file a Supplemental Claim, request Higher-Level Review, or appeal to the Board of Veterans' Appeals. 38 C.F.R. § 3.2500.[17] Each option is generally subject to a one-year filing period. *See id.*

Conclusion

The protections discussed here operate at different points in the life of a rating. Some limit when VA may reexamine a veteran. Others limit the evidence VA may use to reduce a rating. The 10-year and 20-year rules bar severance of service connection or reduction below a protected level except in cases of fraud or, for service connection, lack of qualifying service. None applies in every case, and each depends on dates, rating history, and the type of rating involved. A practitioner reviewing a proposed reduction should identify the effective date and history of each rating, determine which protections apply, and respond within the 60-day notice period.

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[17] 38 C.F.R. § 3.2500, available at https://www.law.cornell.edu/cfr/text/38/3.2500. *See also* CCK Law, available at https://cck-law.com/blog/how-to-appeal-your-va-claim/.

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