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- Prior tenure at NVLSP was from 1998-2015, and served as Staff Attorney, Senior Staff Attorney, and then Director of Training and Publications
- Previously worked at BCMR of the Coast Guard, BVA, and SSA

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OVERVIEW

- VA Reexaminations
- Rating Reduction Rules / Protections
- Severance of SC Rules / Protections
- VA Procedures to Reduce/Sever
- Remedy for VA Errors
- Hypos
- Advocacy Advice

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VA REEXAMINATIONS



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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





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VA REEXAMINATIONS



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- **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



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VA REEXAMINATIONS


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- 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-I, IV.ii.1.A.1.c (change date Mar. 13, 2024)

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VA REEXAMINATIONS


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- *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

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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

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VA REEXAMINATIONS



- VA will probably NOT reexamine Vet if (cont'd):
 - 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)

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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

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MISSING A SCHEDULED REEXAM
38 C.F.R. § 3.655(c)

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

haha you missed it

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MISSING A SCHEDULED REEXAM
38 C.F.R. § 3.655(c)

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- 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

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MISSING A SCHEDULED REEXAM
38 C.F.R. § 3.655(c)

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- If VA does not provide Vet advance notice 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

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MISSING A SCHEDULED REEXAM

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

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MISSING A SCHEDULED REEXAM

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

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RATING REDUCTIONS AND SEVERANCE

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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

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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 (and SC statuses) are protected from reduction (or severance)

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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 (for severance – more on this later)

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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



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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

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CALCULATING TIME PERIODS FOR PROTECTIONS



- 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

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CALCULATING TIME PERIODS FOR PROTECTIONS



- 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

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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

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HYPOTHESIS



- Vet had 20% ratings for arthritis in both knees for two years
- VA conducted an exam which showed improved ROM from earlier exam. Vet had flare-ups of pain, but examiner was unable to say without speculation whether flare-ups caused functional loss
- VA reduced rating to 10% in each knee based on the exam

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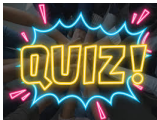
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SURVEY #1

• Was the rating reduction proper?


A. Yes

B. No



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ANSWER



• 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

• Court ordered VA to retroactively reinstate Vet's 20% ratings in both knees

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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 sustained improvement in the disability

• 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

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SIMON V. WILKIE,
30 VET. APP. 403 (2018)




• Issue:

- Do the 5 year rating protection rules in § 3.344(a) apply only to ratings that remain at precisely the same percentage for 5 years or more, or can they be applied to the lowest rating assigned during a 5-year period?

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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 issued rating decision reduced PTSD rating to 30% because disability appeared to be improving, effective 1/1970
- 8/1974: VA PTSD exam: “functioning rather adequately”

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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, arguing
 - 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%


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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

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SIMON V. WILKIE 

- CAVC affirmed BVA decision, holding:
 - 5-year requirement can't 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

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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

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RATINGS IN EFFECT FOR 20 YEARS 38 C.F.R. § 3.951(b)



- Example: If Vet is granted comp based on 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 applies even to rating levels assigned retroactively because a previous final decision is revised based on CUE

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RATING REDUCTIONS AND STAGED RATINGS



- If Vet has staged ratings, this can lead to various protections coming into play
- Hypo 2:
 - 2004: VA granted SC for PTSD at 30%
 - 2015: VA increased rating to 50%
 - 2021: VA increased rating to 70%
 - 2025: VA proposes to reduce PTSD rating

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SURVEY #2





- What rules apply?
 - 20-year protection rules
 - 5-year protection rules
 - Rules for ratings in effect < 5 years
 - All of the above

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ANSWER

- 20 year protection rules apply to 30% rating
- 5 year protection rules apply to 50% rating (arguably)
- General rating reduction rules for ratings in effect < 5 years apply to 70% rating

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SURVEY #3





TAKE THE QUIZ

- What would VA have to show to reduce the rating below 70%?

- An actual change in Vet's PTSD
- Sustained improvement in Vet's PTSD
- CUE in the assignment of the rating
- Fraud in the assignment of the rating

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ANSWER

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%

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Quiz!

SURVEY #4

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- What would the VA have to show to reduce the rating below 50%?
 - An actual change in Vet's PTSD
 - Sustained improvement in Vet's PTSD
 - CUE in the assignment of the rating
 - Fraud in the assignment of the rating

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ANSWER

B

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- 50% rating has stabilized, so VA would have to show that all evidence of record establishes that there is sustained improvement in the PTSD to reduce below 50%
 - Arguable, because 50% is not the *current* rating

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Quiz!


SURVEY #5

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- What would the VA have to show to reduce the rating below 30%?
 - An actual change in Vet's PTSD
 - Sustained improvement in Vet's PTSD
 - CUE in the assignment of the rating
 - Fraud in the assignment of the rating

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ANSWER



VA cannot reduce the rating below 30%,
unless there was evidence of fraud

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RATING REDUCTION RULES

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

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RATING REDUCTION RULES

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- 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

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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

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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

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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

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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

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FOSTER V. MCDONOUGH, 34 VET. APP. 338 (2021)



- Issue: Whether, under DC 7528, cessation of a prostate cancer rating of 100% following the end of treatment and a mandatory VA exam 6-months later is “a rating reduction”
- Note to DC 7528 states: “Following the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure, the rating of 100 percent shall continue with a mandatory VA examination at the expiration of six months. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of [38 C.F.R.] § 3.105(e) If there has been no local reoccurrence or metastasis, rate on residuals as voiding dysfunction or renal dysfunction, whichever is predominant.”

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FOSTER V. MCDONOUGH



- CAVC held that BVA did not err when it affirmed discontinuance of the 100% disability rating under the plain terms of DC 7528
- A discontinuance is not a rating reduction in the traditional sense, but is instead part of the initial rating assigned for the condition
- Rating reduction rules of § 3.343, including required showing of material improvement, did not apply because they would render parts of regs redundant
 - DC 7528 provides its own measure of improvement for prostate cancer—cessation of treatment and no cancer recurrence or metastasis based on a mandatory exam

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FOSTER - TAKE AWAY



- If DC has a time requirement for ending a certain rating percentage (namely 100% ratings for various cancers), the discontinuance of that rating is not a "rating reduction"
 - Special rules that apply to rating reductions are not implicated
 - Instead, the rating percentage ends within the time set forth in the DC and, if provided for in the DC, after the Vet is provided notice of the discontinuance and a chance to show that the current rating should be continued
 - VA adjudicators simply need to apply the DC's procedures, including any temporal components, as written
 - Similarly, in *Love v. McDonough*, 106 F.4th 1361 (Fed. Cir. 2024), the Court held that the procedural protections of § 3.344 for stabilized ratings do not apply to DC 7528 and similar DCs

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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

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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

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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%

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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

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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

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SEVERANCE OF SERVICE CONNECTION RULES



- Example 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
 - Ex: Initial dx of a presumptive condition later changed to non-presumptive condition after more thorough testing and examination by specialist

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SEVERANCE OF SERVICE CONNECTION RULES



- If Vet alleged multiple theories of SC, and the theory upon which SC is granted is later found to be erroneous, that does not necessarily prove that maintaining SC is clearly erroneous
- "in considering whether severance of service connection is proper, the Board must address alternative theories of entitlement that are raised by the claimant or reasonably raised by the record. If the Board upholds a severance decision without doing so, it has failed to satisfy the severance standards of § 3.105(d). And this means that the severance is void ab initio."
- *McCauley v. McDonough*, 37 Vet.App. 188 (2024) (VA erred in severing grants of SC based on herbicide exposure after finding Vet did not serve near Vietnam, because VA failed to address Vet's alternate theory that diseases caused by CLCW)

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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



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SEVERANCE OF SERVICE CONNECTION RULES



- Severance due to fraud
 - VA (RO/AOJ) 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

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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
 - *Allen v. Nicholson*, 21 Vet. App. 54 (2007)

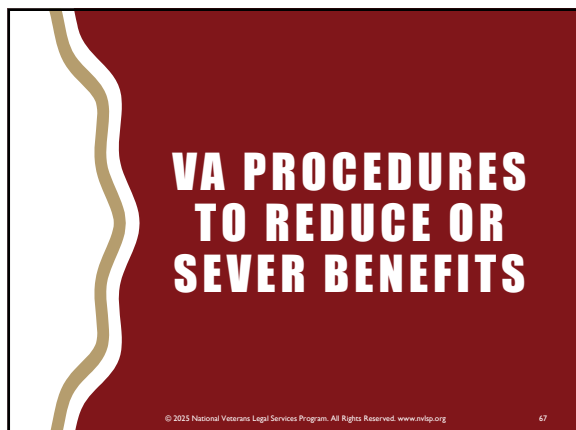
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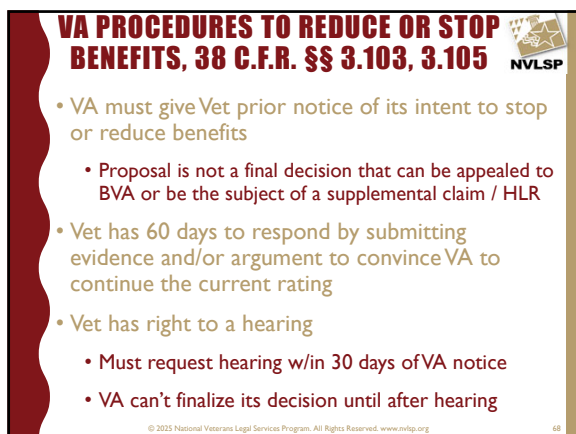
PROTECTION: 10 YEARS OF SC 38 C.F.R. § 3.957

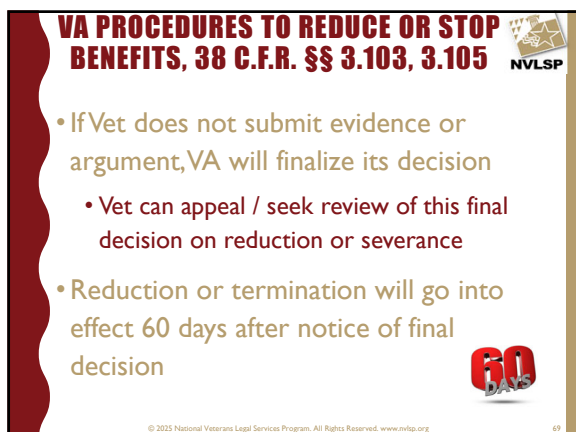


- If SC for a disability (or DIC) has been in effect for at least 10 years, VA cannot change the SC status of that disability (or sever DIC), unless
 - SC (or DIC) was obtained by fraud
 - VA discovers Vet lacks the required length or character of service
- Evaluation may be reduced in accordance with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

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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

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VA PROCEDURES TO REDUCE OR STOP BENEFITS, 38 C.F.R. §§ 3.103, 3.105

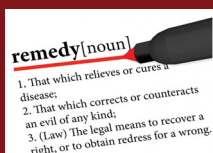


- The initial assignment of staged ratings does not trigger the rating reduction notice provisions, because the Vet is given a disability in excess of the disability rating the Vet had prior to the rating decision
 - *O'Connell v. Nicholson*, 21 Vet.App. 89 (2007)

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REMEDY FOR VA ERRORS



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VA VIOLATIONS OF THE RULES




- **BVA's** failure to observe applicable law regarding reductions and consider all relevant evidence generally renders reduction or severance decisions “**void ab initio**” (void “from the beginning”) and requires that they be set aside as not in accordance with law
- *Brown v. Brown*, 5 Vet. App. 413 (1993)
- *Wilson v. West*, 11 Vet. App. 383 (1998)
- *King v. Shinseki*, 26 Vet. App. 484 (2014)

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VA VIOLATIONS OF THE RULES




- In other words, if **BVA** does not correctly apply the rules regarding rating reductions or severance, the reduction or severance is invalid and VA must reinstate the prior rating / SC / DIC, retroactive to the date of the reduction or severance
- However, if an **RO** reduces a rating without making the specific findings required by 38 C.F.R. § 3.344, but a subsequent BVA decision provides those required findings, the reduction is NOT void
- *Lewis v. McDonough*, 110 F.4th 1273 (Fed. Cir. 2024)

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MORE HYPOS



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HYPOTHESIS #3

- For the last 6 years, Vet SC for a mental health disability at 50%
- VA scheduled reexamination
- VA examiner concluded that the mental condition 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

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HYPOTHESIS #3

- To combat the proposed rating reduction, Vet was 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

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SURVEY #6

- How should you frame your argument?
 - A. The evidence shows that the Vet is entitled to a 50% rating, or at the very least, the evidence is nearly equal and the Vet should be given the benefit of the doubt
 - B. All of the evidence does not support the conclusion that there is sustained improvement of the Vet's condition; thus, his rating should not be reduced

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ANSWER

B

- 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 there is sustained improvement of the mental condition
- 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

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HYPOTHESIS #4

- For the last 5 years, Vet SC for diabetes mellitus based on exposure to herbicides at Eglin Air Force Base
- After Vet filed a claim for increase, VA reviews the record and the adjudicator finds that the evidence demonstrating the Vet's exposure to herbicides was not very strong
- VA proposes severance of SC based on CUE

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HYPOTHESIS #4

- To combat the proposed severance, Vet submits additional evidence of herbicide exposure at Eglin AFB
 - Vet also notes that in the rating decision that granted SC, the RO weighed the conflicting evidence and explicitly afforded Vet the benefit of the doubt
- Vet also asserts that diabetes mellitus was directly related to service, pointing to abnormal blood sugar levels in service

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SURVEY #7



- Regardless of whether VA can review the additional evidence of herbicide exposure, must VA consider the alternative theory of entitlement (i.e., direct SC)?
 - A. Yes – VA is required to consider the alternative theory of entitlement in order to comply with VA's severance standards
 - B. No – because the grant of SC was based on herbicide exposure, VA may only consider theories presented in the original rating decision, because of revisions to the law made by the AMA
 - C. No – because the grant of SC was less than 10 years ago, VA may sever SC based on a difference of opinion

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ANSWER



- VA is required to consider alternative theories of entitlement in a severance action, under *McCauley v. McDonough*, 37 Vet.App. 188 (2024)
- VA can consider new evidence when making its determination
- VA's burden is to show that the grant was "clearly and unmistakably erroneous" – a difference of opinion is not enough to meet this burden

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ADVOCACY ADVICE



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ADVOCACY ADVICE



- When proposal to reduce/sever or decision finalizing reduction/severance occurs before protective period, but reduction/severance is effective on or after protective period, ensure VA considered correct protective rules

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ADVOCACY ADVICE



- Check exams very closely
 - Proper tests: Depending on the disability, make sure all the required tests were performed. Check DBQs.
 - Rationale: Make sure the examiner provides a sufficient rationale
 - DeLuca/Mitchell compliance: Make sure exam adequately addresses functional loss, flare-ups, repeated use

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ADVOCACY ADVICE



- Check exams very closely (cont'd)
 - 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
 - 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

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ADVOCACY ADVICE



- If exam is not sufficient, and VA already implemented reduction, argue reduction should be reversed and reinstatement of the higher rating retroactive to the date of reduction
- Remember: burden is on VA, NOT the Vet

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