

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

RICARDO D. STAFFORD,)	
Appellant,)	
)	
vs.)	Vet. App. No. 18-4520
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Appellee.)	

APPELLANT’S NOTICE PURSUANT TO *SOLZE V. SHINSEKI*

In accordance with the “duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision,” *Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013), counsel for the Appellant apprises the Court of VA action.

On February 28, 2020, the VA Regional Office issued a supplemental statement of the case in which it denied Mr. Stafford entitlement to TDIU under 38 C.F.R. § 4.16(b) prior to April 17, 2012. *See* Exhibit. In the SSOC, the RO found that Mr. Stafford’s case did not present “an exceptional or unusual disability picture as to render impractical the application of the regular schedular standards,” nor did the record show that his “service[-]connected disabilities prevent[ed] all types of gainful activity.” *Id.* at 6; *cf.* 38 C.F.R. § 4.16(a) (2019) (“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.”). The RO noted, “We received a decision from Director of Compensation Service, dated

November 18, 2019, denying the issue of entitlement to TDIU prior to April 17, 2012.” Exhibit at 6.

Accordingly, pursuant to this Court’s holding in *Solze*, counsel for Appellant hereby advises the Court of this development. *Solze*, 26 Vet.App. at 301.

Respectfully submitted,

/s/ April Donahower

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EXHIBIT

DEPARTMENT OF VETERANS AFFAIRS
DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration

February 28, 2020

RICARDO D. STAFFORD

In Reply Refer To:

RICARDO D. STAFFORD

Dear RICARDO D. STAFFORD:

Enclosed is a “Supplemental Statement of the Case” (SSOC). It is not a decision on any new issues, but is intended to inform you of any material changes in, or additions to, the information contained in the “Statement of the Case” (SOC) that we previously sent to you. The following information will help you decide how to respond. We encourage you to discuss this with your representative, if you have one.

Your appeal was previously remanded by the Board of Veterans’ Appeals (“Board”) for further development, which has been completed. Before returning your appeal to the Board, we are giving you a period of time to respond with additional comments or evidence. Please note that a response at this time is optional and is not required to continue your appeal.

- If you wish to respond, you have 30 days from the date of this letter to respond. There is no special form to use. You can simply write to us and tell us in your own words what you disagree with in this SSOC and why.
- If you do not wish to respond, and you do not want us to wait for the 30 days to expire, you can write to us and let us know that. If you do not respond, the Board will consider what you have already submitted in deciding your appeal.

On August 23, 2017, the President signed into law the Veterans Appeals Improvement and Modernization Act of 2017 (Appeals Modernization Act), creating a modernized review system for claims and appeals. The modernized appeals system took effect on February 19, 2019, and provides streamlined choices for seeking review of your VA claim decision. You are eligible to opt-in to this new process based on your receipt of this Statement of the Case or Supplemental Statement of the Case. If you continue to disagree with our decision, please refer to the enclosed fact sheet for a more thorough explanation of your decision review options and submission deadlines should you decide to opt-in. If you wish to remain in the legacy process, please follow the instructions above regarding actions required to request further review of your appeal.

We hope that the above information is helpful.

Sincerely yours,

Regional Office Director

Regional Office Director

Enclosure(s): • SSOC Notice Response

- [VA Modernized Decision Review System SOC/SSOC Opt-In Fact Sheet](#)
- [VA Form 20-0998, Your Rights to Seek Further Review of Our Decision](#)
- Where to Send Your Written Correspondence

CC: ROBERT V CHISHOLM

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ISSUE:

1. Entitlement to an increased evaluation in excess of 10 percent for intervertebral disc syndrome (IVDS), to include extraschedular consideration.
2. Entitlement to an increased evaluation in excess of 10 percent for right knee medial meniscal tear with osteoarthritis.
3. Entitlement to an increased evaluation in excess of 10 percent for hypertension.
4. Entitlement to a total disability evaluation based on unemployability due to service-connected disability (TDIU) for the period prior to April 17, 2012

EVIDENCE:

- Board of Veterans' Appeals decision and remand dated July 13, 2018
- VA form 27-0820 Report of General Information dated October 18, 2018
- Rating decision dated November 30, 2018 and February 22, 2019
- Refer the issue of entitlement to TDIU prior to April 17, 2012 to the Director of the Compensation Service for extraschedular consideration under 38 C.F.R. § 4.16 (b), dated September 4, 2019
- VA Miami records from August 30, 2019 to September 12, 2019, received September 12, 2019
- VA Miami records from September 12, 2019 to November 22, 2019, received December 13, 2019
- VA Miami records from May 4, 2000 to April 11, 2009, received December 13, 2019
- Decision from Director of Compensation Service, dated November 18, 2019
- Statement from attorney dated January 24, 2020

ADJUDICATIVE ACTIONS:

- 07-13-2018 The appeal was remanded by the Board of Veterans' Appeals for action.
- 02-28-2020 The veteran was furnished a Supplemental Statement of the Case outlining actions taken on the claim.

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol “§” denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans’ Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.

§4.10 Functional impairment.

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The basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body to function under the ordinary conditions of daily life including employment. Whether the upper or lower extremities, the back or abdominal wall, the eyes or ears, or the cardiovascular, digestive, or other system, or psyche are affected, evaluations are based upon lack of usefulness, of these parts or systems, especially in self-support. This imposes upon the medical examiner the responsibility of furnishing, in addition to the etiological, anatomical, pathological, laboratory and prognostic data required for ordinary medical classification, full description of the effects of disability upon the person's ordinary activity. In this connection, it will be remembered that a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity.

VA, in determining all claims for benefits that have been reasonably raised by the filings and evidence, has applied the benefit-of-the-doubt and liberally and sympathetically reviewed all submissions in writing from the Veteran as well as all evidence of record.

DECISION:

1. Entitlement to an increased evaluation in excess of 10 percent for intervertebral disc syndrome (IVDS), to include extraschedular consideration is denied.
2. Entitlement to an increased evaluation in excess of 10 percent for right knee medial meniscal tear with osteoarthritis is denied.
3. Entitlement to an increased evaluation in excess of 10 percent for hypertension is denied.
4. Entitlement to a total disability evaluation based on unemployability due to service-connected disability (TDIU) for the period prior to April 17, 2012, is denied.

REASONS AND BASES:

1. **Entitlement to an increased evaluation in excess of 10 percent for intervertebral disc syndrome (IVDS), to include extraschedular consideration.**

The Board of Veterans' Appeals (BVA) remanded your case on July 13, 2018. Please refer to the BVA remand for the specific details regarding this issue.

The rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. An increase in the evaluation assigned for a disability is warranted when the average impairment in earning capacity resulting from such diseases and injuries in civil occupations has increased and the disability picture meets the criteria required for a higher rating. (specified under 38 C.F.R. §§ 4.1, 4.7).

Ratings shall be based as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of

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ratings in accordance with experience. To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

The evidence of record does not show that the case presents such an exceptional or unusual disability picture as to render impractical the application of the regular schedular standards. This case has not been submitted for extra-schedular consideration because there are no exceptional factors or circumstances associated with your disablement. For example, the disability has not required frequent periods of hospitalizations, nor does it present marked interference with employment.

We have not received any new and material evidence related to your appeal to consider that would support a change to our previous decision; therefore, there is no indication that you meet criteria for the next higher evaluation.

The criteria for rating diseases and injuries of the spine apply with or without symptoms such as such as pain (whether or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease.

We have continued a 40 percent evaluation for your IVDS based on:
 Unfavorable ankylosis of the entire cervical spine; or, forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine

A higher evaluation of 50 percent is not warranted unless there is unfavorable ankylosis of the entire thoracolumbar spine.

2. Entitlement to an increased evaluation in excess of 10 percent for right knee medial meniscal tear with osteoarthritis.

The Board of Veterans' Appeals (BVA) remanded your case on July 13, 2018. Please refer to the BVA remand for the specific details regarding this issue.

The rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. An increase in the evaluation assigned for a disability is warranted when the average impairment in earning capacity

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resulting from such diseases and injuries in civil occupations has increased and the disability picture meets the criteria required for a higher rating. (specified under 38 C.F.R. §§ 4.1, 4.7).

Ratings shall be based as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

The evidence of record does not show that the case presents such an exceptional or unusual disability picture as to render impractical the application of the regular schedular standards. This case has not been submitted for extra-schedular consideration because there are no exceptional factors or circumstances associated with your disablement. For example, the disability has not required frequent periods of hospitalizations, nor does it present marked interference with employment.

We have not received any new and material evidence related to your appeal to consider that would support a change to our previous decision; therefore, there is no indication that you meet criteria for the next higher evaluation.

We have continued a 10 percent evaluation for your right knee medial meniscal tear with osteoarthritis. A 10 percent is assigned when the record shows recurrent subluxation or lateral instability of the knee which is slight or for leg flexion which is limited to 45 degrees or the leg is limited to 10 degrees or for painful limited motion.

A higher evaluation of 20 percent is not warranted unless there is evidence of moderate recurrent subluxation of the knee or moderate lateral instability of the knee; OR when there is evidence of dislocated semilunar cartilage with frequent episodes of "locking," pain, and effusion into the joint; OR when knee flexion is limited to 30 degrees; OR when the knee extension is limited to 15 degrees; OR when there is impairment of the tibia and fibula with moderate knee or ankle disability.

A higher evaluation of 30 percent is not warranted unless there is evidence of favorable ankylosis with an angle in full extension, or in slight flexion between 0 and 10 degrees.

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3. Entitlement to an increased evaluation in excess of 10 percent for hypertension.

The Board of Veterans' Appeals (BVA) remanded your case on July 13, 2018. Please refer to the BVA remand for the specific details regarding this issue.

The rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. An increase in the evaluation assigned for a disability is warranted when the average impairment in earning capacity resulting from such diseases and injuries in civil occupations has increased and the disability picture meets the criteria required for a higher rating. (specified under 38 C.F.R. §§ 4.1, 4.7).

Ratings shall be based as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

The evidence of record does not show that the case presents such an exceptional or unusual disability picture as to render impractical the application of the regular schedular standards. This case has not been submitted for extra-schedular consideration because there are no exceptional factors or circumstances associated with your disablement. For example, the disability has not required frequent periods of hospitalizations, nor does it present marked interference with employment.

We have not received any new and material evidence related to your appeal to consider that would support a change to our previous decision; therefore, there is no indication that you meet criteria for the next higher evaluation.

We have continued a 10 percent evaluation for your hypertension based on:
Diastolic pressure predominantly 100 or more, or; systolic pressure predominantly 160 or more, or; minimum evaluation for an individual with a history of diastolic pressure predominantly 100 or more who requires continuous medication for control

A higher evaluation of 20 percent is not warranted unless there is evidence of diastolic pressure predominantly 110 or more, or; systolic pressure predominantly 200 or more.

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4. Entitlement to a total disability evaluation based on unemployability due to service-connected disability (TDIU) for the period prior to April 17, 2012

The Board of Veterans' Appeals (BVA) remanded your case on July 13, 2018. Please refer to the BVA remand for the specific details regarding this issue.

BVA granted entitlement to a total disability (TDIU) evaluation based on unemployability for the period beginning April 17, 2012. BVA directed us to refer the issue of entitlement to TDIU prior to April 17, 2012 to the Director of the Compensation Service for extraschedular consideration under 38 C.F.R. § 4.16 (b).

We received a decision from Director of Compensation Service, dated November 18, 2019, denying the issue of entitlement to TDIU prior to April 17, 2012. We have received and considered the statement from your attorney dated January 24, 2020.

Total disability ratings for compensation based on individual unemployability may be assigned where the schedular rating is less than total if it is found that the disabled person is unable to secure or follow a substantially gainful occupation as a result of 1) a single service-connected disability ratable at 60 percent or more, or 2) as a result of two or more disabilities, provided at least one disability is ratable at 40 percent or more, and there is sufficient additional service-connected disability to bring the combined rating to 70 percent or more. For the purposes of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability: disabilities of one or both upper extremities; or of one or both lower extremities, including the bilateral factor, if applicable; disabilities resulting from common etiology or a single accident; disabilities affecting a single body system (e.g. orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric); multiple injuries incurred in action; or multiple disabilities incurred as a prisoner of war. Prior employment or unemployment status is immaterial if your disabilities render you unemployable (specified under 38 C.F.R. §§ 3.340, 3.341, 3.343, and 4.16).

Prior to April 17, 2012, you did not meet the schedular requirements described above. You reported you last worked full-time on November 17, 2010, as a mail handler for the US Post Office. The evidence of record does not show that the case presents such an exceptional or unusual disability picture as to render impractical the application of the regular schedular standards. The available evidence does not support that your service connected disabilities prevents all types of gainful activity, on an extraschedular basis prior to April 17, 2012.

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PREPARED BY

eSign: certified by vbaphomlaka RVSR

Appellant Name: RICARDO D. STAFFORD

File Number:

SSOC NOTICE RESPONSE

We have provided you with a Supplemental Statement of the Case (SSOC) about the evidence considered in your appeal. You have 30 days from the date of the SSOC within which to submit additional information or evidence. At this time, if you choose to, you may indicate whether you intend to submit additional information or evidence you know about that would help support your appeal.

Your signature on this response will not affect whether or not you are entitled to VA benefits. It will not affect the amount of benefits to which you may be entitled. It will not affect the assistance VA will provide you in obtaining evidence to support your appeal. It also will not affect the date any benefits will begin if your appeal is granted. Your response will let us know whether to return your case to the Board of Veterans' Appeals without waiting the full 30 days.

RESPONSE

I elect *one* of the following:

 I have no other information or evidence to submit. Please return my case to the Board of Veterans' Appeals for further appellate consideration as soon as possible.

 I have more information or evidence to submit in support of my appeal. VA will wait the full 30-day period to give me a chance to submit this information or evidence. I understand that if this evidence is not submitted within the 30-day period, my case will be returned to the Board of Veterans' Appeals.

Appellant/Representative Signature

Date