

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

<b>FRANK L. ROBINSON, III,</b>	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. <b>14-3006</b>
	)	
<b>ROBERT A. MCDONALD,</b>	)	
Secretary of Veterans Affairs,	)	
Respondent.	)	

**SECRETARY’S RESPONSE TO PETITION  
FOR EXTRAORDINARY RELIEF**

Pursuant to U.S. Vet. App. R. 21(b), and the Court’s September 30, 2014, order, Respondent, Secretary of Veterans Affairs (Secretary), hereby answers the petition for extraordinary relief filed on September 10, 2014. For the reasons set forth below, the Court should dismiss the petition as moot.

This Court has held where the particular relief sought by a petitioner has been afforded, the petition is moot. See *Chandler v. Brown*, 10 Vet.App. 175, 177 (1997) (citing *Mokal v. Derwinski*, 1 Vet.App. 12 (1990)); see also *Thomas v. Brown*, 9 Vet.App. 269, 270 (1996) (per curium order) (dismissing cases as moot because relief sought, issuance of Statements of the Case (SOCs), had been accomplished without need for resort to Court); *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (“When there is no case or controversy, or when a once live case or controversy becomes moot, the Court lacks jurisdiction.”).

Here, a Statement of the Case (SOC) was issued on September 24, 2014 (Attachment), regarding Petitioner’s December 2011 notice of disagreement<sup>1</sup>. Given that this was the relief sought by Petitioner, issuance of an extraordinary writ is not warranted, and the Court should dismiss the petition as moot. *Thomas*, 9 Vet.App. at 270.

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<sup>1</sup> The undersigned provided a courtesy copy of the SOC to Petitioner’s representative via e-mail on September 26, 2014.

**WHEREFORE**, the Secretary responds to the petition for extraordinary relief and the Court's order, and for the foregoing reasons respectfully requests that the Court deny the petition.

Respectfully submitted,

**TAMMY L. KENNEDY**  
Acting General Counsel

**MARY ANN FLYNN**  
Assistant General Counsel

/s/ Michael A. Carr  
**MICHAEL A. CARR**  
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/s/ Donald M. Street  
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For the Secretary of Veterans Affairs

**DEPARTMENT OF VETERANS AFFAIRS**  
**Evidence Intake Center**  
**PO Box 4444**  
**Newnan, GA 30271-0020**

September 24, 2014

FRANK L ROBINSON III  
7677 63RD STREET N  
APT 8A  
PINELLAS PARK FL 33781

In Reply Refer To:  
317/VSC/APPEALS/AC  
[REDACTED]  
FRANK L ROBINSON III

Dear Mr. Robinson:

You have filed a Notice of Disagreement with our action. This is the first step in appealing to the Board of Veterans' Appeals (BVA). This letter and enclosures contain very important information concerning your appeal.

**Statement of the Case**

We have enclosed a Statement of the Case, a summary of the law and evidence concerning your claim. This summary will help you to make the best argument to the BVA on why you think our decision should be changed.

**What You Need To Do**

To complete your appeal, you must file a formal appeal. We have enclosed VA Form 9, Appeal to the Board of Veterans' Appeals, which you may use to complete your appeal. We will gladly explain the form if you have questions. Your appeal should address:

- the benefit you want
- the facts in the Statement of the Case with which you disagree; and
- the errors that you believe we made in applying the law.

**When You Need To Do It**

You must file your appeal with this office within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed. **If we do not hear from you within this period, we will close your case.** If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires. See item 5 of the instructions in VA Form 9, Appeal to Board of Veterans' Appeals.

## Hearings

You may have a hearing before we send your case to the BVA. If you tell us that you want a hearing, we will arrange a time and a place for the hearing. VA will provide the hearing room, the hearing official, and a transcript of the hearing for the record. VA cannot pay any other expenses of the hearing. You may **also** have a hearing before the BVA, as noted on the enclosed VA Form 9, Appeal to the Board of Veterans' Appeals. **Do not delay filing your appeal if you request a hearing. Your request for a hearing does not extend the time to file your appeal.**

## Representation

If you do not have a representative, it is not too late to choose one. An accredited representative of a recognized service organization may represent you in your claim for VA benefits without charge. An accredited attorney or an accredited agent may also represent you before VA, and may charge you a fee for services performed after the filing of a notice of disagreement. In certain cases, VA will pay your accredited agent or attorney directly from your past due benefits. For more information on the accreditation process and fee agreements (including filing requirements), you and/or your representative should review 38 U.S.C. § 5904 and 38 C.F.R. § 14.636 and VA's website at <http://www.va.gov/ogc/accreditation.asp>. You can find the necessary power of attorney forms on this website, or if you ask us, we can send you the forms. You can also find the names of accredited attorneys, agents and service organization representatives on this website.

## What We Will Do

After we receive your appeal, we will send your case to the BVA in Washington, DC for a decision. The BVA will base its decision on an independent review of the entire record, including the transcript of the hearing, if you have a hearing.

Sincerely yours,

*RO DIRECTOR*

RO DIRECTOR  
VA REGIONAL OFFICE

Enclosure(s): VA Form 9

CC: CHISHOLM, CHISHOLM & KILPATRICK LLP

# ATTACHMENT

<b>Statement of the Case</b>		<i>Department of Veterans Affairs</i> <i>Regional Office</i>		Page 1 09/24/2014
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**ISSUE:**

1. Entitlement to an effective date prior to October 23, 2003, for the grant of service connection for psychosis, mood disorder, and post traumatic stress disorder.
2. Entitlement to an evaluation in excess of 30 percent for psychosis, mood disorder, and post traumatic stress disorder effective October 23, 2003. Entitlement to an evaluation in excess of 70 percent for psychosis, mood disorder, and post traumatic stress disorder prior to December 29, 2004. Entitlement to 100 percent evaluation for psychosis, mood disorder, and post traumatic stress disorder prior to March 18, 2009.
3. Entitlement for an effective date prior to December 29, 2004, for the grant of entitlement to individual unemployability.

**EVIDENCE:**

- Rating Decision dated August 14, 1991, and evidence cited therein
- Notification letter to appellant dated August 16, 1991
- Statement of the Case dated November 21, 1991, and evidence cited therein
- Hearing Officer's Decision dated December 26, 1991, and evidence cited therein
- Board of Veterans Appeals Decision dated March 29, 1993, Docket No. 92-09 785, and evidence cited therein
- Rating Decision dated September 3, 1993, and evidence cited therein
- Notification letter to appellant dated November 22, 1993
- Rating Decision dated November 8, 1994, and evidence cited therein
- Notification letter to appellant dated December 1, 1994
- Rating Decision dated July 24, 1995, and evidence cited therein
- Notification letter to appellant dated August 3, 1995
- Statement of the Case dated August 22, 1995, and evidence cited therein
- Rating Decision dated February 25, 2004, and evidence cited therein
- Notification letter to appellant dated March 15, 2004
- Rating Decision dated July 30, 2004, and evidence cited therein
- Notification letter to appellant dated August 2, 2004
- Board of Veterans Appeals Decision dated December 10, 2010, Docket No. 99-13 785, and evidence cited therein
- Field Examiner's Report dated July 16, 2010
- Examination report from Fort Myers VA Outpatient Clinic dated May 11, 2011
- Statement from private attorney received December 28, 2011
- VA Form 21-4138, Statement in Support of Claim, received June 17, 2014
- Treatment reports from Tampa VA Healthcare System dated October 18, 2002 through January 16, 2009

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- Treatment reports from Bay Pines VA Healthcare System dated May 17, 2004 through September 23, 2014

### **ADJUDICATIVE ACTIONS:**

Military Service: Army from March 11, 1980 through April 1, 1983

- 10-23-2003 Claim received.
- 04-27-2004 Claim received.
- 01-04-2011 Claim considered based on all the evidence of record.
- 01-05-2011 Claimant notified of decision.
- 12-28-2011 Notice of Disagreement received.
- 02-03-2012 Appeal Election Letter sent to the appellant.
- 02-21-2012 Traditional appeal process election received from appellant.

### **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.

#### **§ 19.31 Supplemental statement of the case.**

(a) *Purpose and limitations.* A “Supplemental Statement of the Case,” so identified, is a document prepared by the agency of original jurisdiction to inform the appellant of any material changes in, or additions to, the information included in the Statement of the Case or any prior Supplemental Statement of the Case. In no case will a Supplemental Statement of the Case be used to announce decisions by the agency of original jurisdiction on issues not previously addressed in the Statement of the Case, or to respond to a notice of disagreement on newly appealed issues that were not addressed in the Statement of the Case. The agency of original jurisdiction will respond to notices of disagreement on newly appealed issues not addressed in the Statement of the Case using the procedures in §§19.29 and 19.30 of this part (relating to statements of the case).

(b) *When furnished.* The agency of original jurisdiction will furnish the appellant and his or her representative, if any, a Supplemental Statement of the Case if:

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(1) The agency of original jurisdiction receives additional pertinent evidence after a Statement of the Case or the most recent Supplemental Statement of the Case has been issued and before the appeal is certified to the Board of Veterans' Appeals and the appellate record is transferred to the Board;

(2) A material defect in the Statement of the Case or a prior Supplemental statement of the Case is discovered; or

(3) For any other reason the Statement of the Case or a prior Supplemental Statement of the Case is inadequate.

(c) *Pursuant to remand from the Board.* The agency of original jurisdiction will issue a Supplemental Statement of the Case if, pursuant to a remand by the Board, it develops the evidence or cures a procedural defect, unless:

(1) The only purpose of the remand is to assemble records previously considered by the agency of original jurisdiction and properly discussed in a prior Statement of the Case or Supplemental Statement of the Case; or

(2) The Board specifies in the remand that a Supplemental Statement of the Case is not required. (Authority: 38 U.S.C. 7105(d)).

### **§19.32 Closing of appeal for failure to respond to Statement of the Case.**

The agency of original jurisdiction may close the appeal without notice to an appellant or his or her representative for failure to respond to a Statement of the Case within the period allowed. However, if a Substantive Appeal is subsequently received within the 1-year appeal period (60-day appeal period for simultaneously contested claims), the appeal will be considered to be reactivated. (Authority: 38 U.S.C. 7105(d)(3))

### **§19.33 Timely filing of Notice of Disagreement or Substantive Appeal questioned within the agency of original jurisdiction.**

If, within the agency of original jurisdiction, there is a question as to the timely filing of a Notice of Disagreement or Substantive Appeal, the procedures for an administrative appeal must be followed. (Authority: 38 U.S.C. 7105, 7106)

### **§ 20.302 Rule 302. Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.**

(a) *Notice of Disagreement.* Except in the case of simultaneously contested claims, a claimant, or his or her representative, must file a Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date that that agency mails notice of the determination to him or her. Otherwise, that determination will become final. The date of mailing



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the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.

(Authority: 38 U.S.C. 7105(b)(1))

(b) *Substantive Appeal* —(1) *General*. Except in the case of simultaneously contested claims, a Substantive Appeal must be filed within 60 days from the date that the agency of original jurisdiction mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later. The date of mailing of the Statement of the Case will be presumed to be the same as the date of the Statement of the Case and the date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed.

(2) *Special rule in certain cases where additional evidence is submitted*. Except in the case of simultaneously contested claims, if (i) a claimant submits additional evidence within 1 year of the date of mailing of the notification of the determination being appealed, and (ii) that evidence requires, in accordance with §19.31 of this title, that the claimant be furnished a Supplemental Statement of the Case, then the time to submit a Substantive Appeal shall end not sooner than 60 days after such Supplemental Statement of the Case is mailed to the appellant, even if the 60-day period extends beyond the expiration of the 1-year appeal period.

(Authority: 38 U.S.C. 7105 (b)(1), (d)(3).)

(c) *Response to Supplemental Statement of the Case*. Where a Supplemental Statement of the Case is furnished, a period of 30 days from the date of mailing of the Supplemental Statement of the Case will be allowed for response. The date of mailing of the Supplemental Statement of the Case will be presumed to be the same as the date of the Supplemental Statement of the Case for purposes of determining whether a response has been timely filed. Provided a Substantive Appeal has been timely filed in accordance with paragraph (b) of this section, the response to a Supplemental Statement of the Case is optional and is not required for the perfection of an appeal.

(Authority: 38 U.S.C. 7105(d)(3))

[57 FR 4109, Feb. 3, 1992; as amended at 66 FR 50318, Oct. 3, 2001; 68 FR 64806, Nov. 17, 2003; 73 FR 40748, July 16, 2008]

### **§3.102 (new) Reasonable doubt.**

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual

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conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. (Authority: 38 U.S.C. 501(a))

[29 FR 1462, Jan. 29, 1964, as amended at 29 FR 7547, June 12, 1964; 56 FR 65845, December 19, 1991]

### **§3.159 (05/08) Department of Veterans Affairs Assistance in Developing Claims**

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence. (1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in

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this paragraph referred to as the “notice”). In the notice VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice. If the claimant has not responded to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice, VA must readjudicate the claim.

(Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information.

(Authority: 38 U.S.C. 5102(b), 5103A(3))

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

- (i) Upon receipt of a Notice of Disagreement; or
- (ii) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(c) VA's duty to assist claimants in obtaining evidence. Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request

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and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment

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at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §3.309, §3.313, §3.316, and §3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured.

(Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

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- (1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;
- (2) Claims that are inherently incredible or clearly lack merit; and
- (3) An application requesting a benefit to which the claimant is not entitled as a matter of law.

(Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records. (1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

- (i) The identity of the records VA was unable to obtain;
- (ii) An explanation of the efforts VA made to obtain the records;
- (iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and
- (iv) A notice that the claimant is ultimately responsible for providing the evidence.
- (2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA.

(Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any.

(Authority: 38 U.S.C. 5102(b), 5103(a))



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(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations.

(Authority: 38 U.S.C. 5103A(g))

### **38 USC Sec 5107 (03/02) Claimant responsibility; benefit of the doubt**

(a) CLAIMANT RESPONSIBILITY- Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) BENEFIT OF THE DOUBT- The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

#### **§3.104 Finality of decisions.**

(a) The decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in §3.105 of this part.

(b) Current determinations of line of duty, character of discharge, relationship, dependency, domestic relations questions, homicide, and findings of fact of death or presumptions of death made in accordance with existing instructions, and by application of the same criteria and based on the same facts, by either an Adjudication activity or an Insurance activity are binding one upon the other in the absence of clear and unmistakable error.

#### **§4.1 Essentials of evaluative rating**

This 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. The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations. Generally, the degrees of disability specified are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability. For the application of this schedule, accurate and fully

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descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition. Over a period of many years, a veteran's disability claim may require reratings in accordance with changes in laws, medical knowledge and his or her physical or mental condition. It is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history.

#### **§4.2 Interpretation of examination reports**

Different examiners, at different times, will not describe the same disability in the same language. Features of the disability which must have persisted unchanged may be overlooked or a change for the better or worse may not be accurately appreciated or described. It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present. Each disability must be considered from the point of view of the veteran working or seeking work. If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.

#### **§4.7 Higher of two evaluations.**

Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned.

#### **§3.157 Report of examination or hospitalization as claim for increase or to reopen.**

(a) General. Effective date of pension or compensation benefits, if otherwise in order, will be the date of receipt of a claim or the date when entitlement arose, whichever is the later. A report of examination or hospitalization which meets the requirements of this section will be accepted as an informal claim for benefits under an existing law or for benefits under a liberalizing law or Department of Veterans Affairs issue, if the report relates to a disability which may establish entitlement. Acceptance of a report of examination or treatment as a claim for increase or to reopen is subject to the requirements of §3.114 with respect to action on Department of Veterans Affairs initiative or at the request of the claimant and the payment of retroactive benefits from the date of the report or for a period of 1 year prior to the date of receipt of the report. (Authority: 38 U.S.C. 5110(a))

(b) Claim. Once a formal claim for pension or compensation has been allowed or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree, receipt of one of the following will be accepted as an informal claim for increased benefits or an informal claim to reopen. In addition, receipt of one of the following



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will be accepted as an informal claim in the case of a retired member of a uniformed service whose formal claim for pension or compensation has been disallowed because of receipt of retirement pay. The evidence listed will also be accepted as an informal claim for pension previously denied for the reason the disability was not permanently and totally disabling.

(1) Report of examination or hospitalization by Department of Veterans Affairs or uniformed services. The date of outpatient or hospital examination or date of admission to a VA or uniformed services hospital will be accepted as the date of receipt of a claim. The date of a uniformed service examination which is the basis for granting severance pay to a former member of the Armed Forces on the temporary disability retired list will be accepted as the date of receipt of claim. The date of admission to a non-VA hospital where a veteran was maintained at VA expense will be accepted as the date of receipt of a claim, if VA maintenance was previously authorized; but if VA maintenance was authorized subsequent to admission, the date VA received notice of admission will be accepted. The provisions of this paragraph apply only when such reports relate to examination or treatment of a disability for which service-connection has previously been established or when a claim specifying the benefit sought is received within one year from the date of such examination, treatment or hospital admission. (Authority: 38 U.S.C. 501(a))

(2) Evidence from a private physician or layman. The date of receipt of such evidence will be accepted when the evidence furnished by or in behalf of the claimant is within the competence of the physician or lay person and shows the reasonable probability of entitlement to benefits.

(3) State and other institutions. When submitted by or on behalf of the veteran and entitlement is shown, date of receipt by the Department of Veterans Affairs of examination reports, clinical records, and transcripts of records will be accepted as the date of receipt of a claim if received from State, county, municipal, recognized private institutions, or other Government hospitals (except those described in paragraph (b)(1) of this section). These records must be authenticated by an appropriate official of the institution. Benefits will be granted if the records are adequate for rating purposes; otherwise findings will be verified by official examination. Reports received from private institutions not listed by the American Hospital Association must be certified by the Chief Medical Officer of the Department of Veterans Affairs or physician designee.

### **§3.321 General rating considerations.**

(a) Use of rating schedule. The 1945 Schedule for Rating Disabilities will be used for evaluating the degree of disabilities in claims for disability compensation, disability and death pension, and in eligibility determinations. The provisions contained in the rating schedule will represent as far as can practicably be determined, the average impairment in earning capacity in civil occupations resulting from disability. (Authority: 38 U.S.C. 1155)

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## (b) Exceptional cases:

(1) Compensation. 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 Chief Benefits Director 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.

**§3.400 (10-06) General (all)**

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later.

(Authority: 38 U.S.C. 5110(a))

(a) Unless specifically provided. On basis of facts found.

(b) Disability benefits-(1) Disability pension ( 3.3). An award of disability pension may not be effective prior to the date entitlement arose.

(i) Claims received prior to October 1, 1984. Date of receipt of claim or date on which the veteran became permanently and totally disabled, if claim is filed within one year from such date, whichever is to the advantage of the veteran.

(ii) Claims received on or after October 1, 1984. (A) Except as provided in paragraph (b)(1)(ii)(B) of this section, date of receipt of claim.

(B) If, within one year from the date on which the veteran became permanently and totally disabled, the veteran files a claim for a retroactive award and establishes that a physical or mental disability, which was not the result of the veteran's own willful misconduct, was so incapacitating that it prevented him or her from filing a disability pension claim for at least the first 30 days immediately following the date on which the veteran became permanently and totally disabled, the disability pension award may be effective from the date of receipt of claim or the date on which the veteran became permanently and totally disabled, whichever is to the advantage of the veteran. While rating board judgment must be applied to the facts and circumstances of each case, extensive hospitalization will generally qualify as sufficiently incapacitating to have prevented the filing of a claim. For the purposes of this subparagraph, the presumptive provisions of 3.342(a) do not apply.

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- (2) Disability compensation-(i) Direct service connection ( 3.4(b)). Day following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later. Separation from service means separation under conditions other than dishonorable from continuous active service which extended from the date the disability was incurred or aggravated.
- (ii) Presumptive service connection ( 3.307, 3.308, 3.309). Date entitlement arose, if claim is received within 1 year after separation from active duty; otherwise date of receipt of claim, or date entitlement arose, whichever is later. Where the requirements for service connection are met during service, the effective date will be the day following separation from service if there was continuous active service following the period of service on which the presumption is based and a claim is received within 1 year after separation from active duty.
- (c) Death benefits-(1) Death in service (38 U.S.C. 5110(j), Pub. L. 87-825) ( 3.4(c), 3.5(b)). First day of the month fixed by the Secretary concerned as the date of actual or presumed death, if claim is received with 1 year after the date the initial report of actual death or finding of presumed death was made; however benefits based on a report of actual death are not payable for any period for which the claimant has received, or is entitled to receive an allowance, allotment, or service pay of the veteran.
- (2) Service-connected death after separation from service (38 U.S.C. 5110(d), Pub. L. 87-825) ( 3.4(c), 3.5(b)). First day of the month in which the veteran's death occurred if claim is received within 1 year after the date of death; otherwise, date of receipt of claim.
- (3) Nonservice-connected death after separation from service. (i) For awards based on claims received prior to October 1, 1984, or on or after December 10, 2004, first day of the month in which the veteran's death occurred if claim is received within one year after the date of death; otherwise, date of receipt of claim.
- (ii) For awards based on claims received between October 1, 1984, and December 9, 2004, first day of the month in which the veteran's death occurred if claim is received within 45 days after the date of death; otherwise, date of receipt of claim.
- (Authority: 38 U.S.C. 5110(d))
- (4) Dependency and indemnity compensation-(i) Deaths prior to January 1, 1957 ( 3.702). Date of receipt of election.
- (ii) Child (38 U.S.C. 5110(e), Pub. L. 87-835). First day of the month in which entitlement arose if claim is received within 1 year after the date of entitlement; otherwise, date of receipt of claim.
- (iii) Deaths on or after May 1, 1957 (in-service waiver cases) ( 3.5(b)(3) and 3.702). Date of receipt of election. (See 3.114(a)).
- (d) [Reserved]
- (e) Apportionment ( 3.450 through 3.461, 3.551). On original claims, in accordance with the facts found. On other than original claims from the first day of the month following the month in which:
- (1) Claim is received for apportionment of a veteran's award, except that where payments to him (her) have been interrupted, apportionment will be effective the day following date of last payment if a claim for apportionment is received within 1 year after that date;

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(2) Notice is received that a child included in the surviving spouse's award is not in the surviving spouse's custody, except that where payments to the surviving spouse have been interrupted, apportionment will be effective the day following date of last payment if such notice is received within 1 year after that date.

(f) Federal employees' compensation cases ( 3.708). Date authorized by applicable law, subject to any payments made by the Office of Workers' Compensation Programs under the Federal Employees' Compensation Act over the same period of time.

(g) Correction of military records (38 U.S.C. 5110(i); Pub. L. 87-825). Where entitlement is established because of the correction, change or modification of a military record, or of a discharge or dismissal, by a Board established under 10 U.S.C. 1552 or 1553, or because of other corrective action by competent military naval, or air authority, the award will be effective from the latest of these dates:

(1) Date application for change, correction, or modification was filed with the service department, in either an original or a disallowed claim;

(2) Date of receipt of claim if claim was disallowed; or

(3) One year prior to date of reopening of disallowed claim.

(h) Difference of opinion ( 3.105). (1) As to decisions not final prior to receipt of an application for reconsideration or to reopen, or prior to reconsideration on Department of Veterans Affairs initiative, the date from which benefits would have been payable if the former decision had been favorable.

(2) As to decisions which have become final (by appellate decision or failure to timely initiate and perfect an appeal) prior to receipt of an application for reconsideration or to reopen, the date of receipt of such application or the date entitlement arose, whichever is later.

(3) As to decisions which have become final (by appellate decision or failure to timely initiate and perfect an appeal) and reconsideration is undertaken solely on Department of Veterans Affairs initiative, the date of Central Office approval authorizing a favorable decision or the date of the favorable Board of Veterans Appeals decision.

(4) Where the initial determination for the purpose of death benefits is favorable, the commencing date will be determined without regard to the fact that the action may reverse, on a difference of opinion, an unfavorable decision for disability purposes by an adjudicative agency other than the Board of Veterans Appeals, which was in effect at the date of the veteran's death.

(i) Disability or death due to hospitalization, etc. (38 U.S.C. 5110(c), (d); Public Law 87-825; 3.358, 3.361, and 3.800.) (1) Disability. Date injury or aggravation was suffered if claim is received within 1 year after that date; otherwise, date of receipt of claim.

(2) Death. First day of month in which the veteran's death occurred if a claim is received within 1 year following the date of death; otherwise, date of receipt of claim.

(j) Election of Department of Veterans Affairs benefits ( 3.700 series). (1) Unless otherwise provided, the date of receipt of election, subject to prior payments.

(2) July 1, 1960, as to pension payable under Pub. L. 86-211, where pension is payable for June 30, 1960, under the law in effect on that date, including an award approved after that date, if the election is filed within (generally) 120 days from date of notice of the award. The award will be subject to prior payments over the same period of time.

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(3) January 1, 1965, as to pension payable under Pub. L. 86-211 (73 Stat. 432) as amended by Pub. L. 88-664 if there was basic eligibility for pension on June 30, 1960, under the law in effect on that date and an election if filed prior to May 1, 1965.

(4) January 1, 1965, as to pension payable under Pub. L. 86-211 (73 Stat. 432) as amended by Pub. L. 88-664 if there was basic eligibility on that date for pension on the basis of service in the Indian wars or Spanish-American War and an election is filed prior to May 1, 1965.

(5) January 1, 1969, as to pension payable under Pub. L. 86-211 (73 Stat. 432), as amended by Pub. L. 90-275 (82 Stat. 64), if there was basic eligibility for pension on June 30, 1960, under the law in effect on that date and an election is filed prior to May 1, 1969.

(6) August 1, 1972, as to pension payable under Pub. L. (73 Stat. 432) as amended by Pub. L. 92-328 (86 Stat. 393) if there was basic eligibility on that date based on death of a veteran of the Spanish-American War and an election is filed prior to December 1, 1972.

(k) Error ( 3.105). Date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision.

(l) Foreign residence. (See 3.653).

(m) Forfeiture ( 3.901, 3.902). Day following date of last payment on award to payee who forfeited.

(n) Guardian. Day following date of last payment to prior payee or fiduciary.

Note: Award to guardian shall include amounts withheld for possible apportionments as well as money in Personal Funds of Patients.

(o) Increases (38 U.S.C. 5110(a) and 5110(b)(2), Pub. L. 94-71, 89 Stat. 395; 3.109, 3.156, 3.157)-(1) General. Except as provided in paragraph (o)(2) of this section and 3.401(b), date of receipt of claim or date entitlement arose, whichever is later. A retroactive increase or additional benefit will not be awarded after basic entitlement has been terminated, such as by severance of service connection.

(2) Disability compensation. Earliest date as of which it is factually ascertainable that an increase in disability had occurred if claim is received within 1 year from such date otherwise, date of receipt of claim.

(p) Liberalizing laws and Department of Veterans Affairs issues. See 3.114.

(q) New and material evidence ( 3.156) other than service department records. (1) Received within appeal period or prior to appellate decision. The effective date will be as though the former decision had not been rendered. See 20.1103, 20.1104 and 20.1304(b)(1) of this chapter.

(2) Received after final disallowance. Date of receipt of new claim or date entitlement arose, whichever is later.

(r) Reopened claims. ( 3.109, 3.156, 3.157, 3.160(e)) Date of receipt of claim or date entitlement arose, whichever is later, except as provided in 20.1304(b)(1) of this chapter.

(Authority: 38 U.S.C. 501)

(s) Renouncement ( 3.106). Except as provided in 3.106(c), date of receipt of new claim.

(t) Whereabouts now known. (See 3.158(c).)

(u) Void, annulled or terminated marriage of a child (38 U.S.C. 5110 (a), (k), (l); Pub. L. 93-527, 88 Stat. 1702; 3.55)-(1) Void. Date the parties ceased to cohabit or date of receipt of claim, whichever is later.

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(2) Annulled. Date the decree of annulment became final if claim is filed within 1 year after that date; otherwise date of receipt of claim.

(3) Death. Date of death if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of 3.55(b) of this part are met. (4) Divorce. Date the decree became final if claim is filed within 1 year of that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of 3.55(b) of this part are met.

(v) Termination of remarriage of surviving spouse (38 U.S.C. 5110(a), (k); 38 U.S.C. 103(d) and 3010(l) effective January 1, 1971; 3.55)-(1) Void. Date the parties ceased to cohabit or date of receipt of claim, whichever is the later.

(2) Annulled. Date the decree of annulment became final if claim is filed within 1 year after that date; otherwise date of receipt of claim.

(3) Death. Date of death if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of 3.55(a) of this part are met.

(4) Divorce. Date the decree became final if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of 3.55(a) of this part are met.

(w) Termination of relationship or conduct resulting in restriction on payment of benefits (38 U.S.C. 5110(m), effective January 1, 1971; 3.50(b)(2) and 3.55). Date of receipt of application filed after termination of relationship and after December 31, 1970. Benefits are not payable unless the provisions of 3.55(a), as applicable, are met.

(x) Effective date of determination of incompetency ( 3.353). Date of rating of incompetency. (Not applicable to an incompetency determination made for insurance purposes under 38 U.S.C. 1922).

(y) Effective date of determination restoring competency ( 3.353). Date shown by evidence of record that competency was regained.

(z) Claims based on service in the Women's Air Forces Service Pilots (WASP), or on service in a similarly situated group (Pub. L. 95-202). (1) Original claim: Date of receipt of claim or date entitlement arose, whichever is later, or as otherwise provided under this section (e.g., paragraph (b)(1) of this section) except that no benefits shall be awarded for any period prior to November 23, 1977.

(2) Reopened claim: Latest of the following dates:

(i) November 23, 1977.

(ii) Date entitlement arose.

(iii) One year prior to date of receipt of reopened claim.

### §3.401 Veterans.

Awards of pension or compensation payable to or for a veteran will be effective as follows:

(a) Aid and attendance and housebound benefits.



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(1) Except as provided in §3.400(o)(2), the date of receipt of claim or date entitlement arose, whichever is later. However, when an award of pension or compensation based on an original or reopened claim is effective for a period prior to the date of receipt of the claim, any additional pension or compensation payable by reason of need for aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established. (Authority: 38 U.S.C. 501(a); 5110(b)(1), (3))

(2) Date of departure from hospital, institution, or domiciliary. (Authority: 38 U.S.C. 501(a))

(3) Spouse, additional compensation for aid and attendance: Date of receipt of claim or date entitlement arose, whichever is later. However, when an award of disability compensation based on an original or reopened claim is effective for a period prior to date of receipt of the claim additional disability compensation payable to a veteran by reason of the veteran's spouse's need for aid and attendance shall also be awarded for any part of the award's retroactive period for which the spouse's entitlement to aid and attendance is established. (Authority: 38 U.S.C. 501(a); 5110(b)(1), (2))

(b) Dependent, additional compensation or pension for. Latest of the following dates:

(1) Date of claim. This term means the following, listed in their order of applicability:

(i) Date of veteran's marriage, or birth of his or her child, or, adoption of a child, if the evidence of the event is received within 1 year of the event otherwise.

(ii) Date notice is received of the dependent's existence, if evidence is received within 1 year of the Department of Veterans Affairs request.

(2) Date dependency arises.

(3) Effective date of the qualifying disability rating provided evidence of dependency is received within 1 year of notification of such rating action. (Authority: 38 U.S.C. 5110(f))

(4) Date of commencement of veteran's award. (Other increases, see §3.400(o). For school attendance see §3.667.) (Authority: 38 U.S.C. 5110 (f), (n))

(c) Divorce of veteran and spouse. See §3.501(d).

(d) Institutional awards (§3.852):

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(1) Chief officer of non-Department of Veterans Affairs hospital or institution. From first day of month in which award is approved or day following date of last payment to veteran, whichever is later.

Note: If apportionment under §§3.452(c) and 3.454 is in order or payment under §3.850(a), Personal Funds of Patients account will not be set up but difference withheld for dependents.

(2) Director of a Department of Veterans Affairs medical center or domiciliary. From day following date of last payment to veteran where veteran previously received payments. On initial or resumed payments from date of entitlement to benefits subject to any amounts payable to or withheld for apportionments for dependents.

(e) Retirement pay (§3.750):

(1) Election. Date of entitlement if timely filed. Subject to prior payments of retirement pay.

(2) Waiver. Day following date of discontinuance or reduction of retirement pay.

(3) Reelection. Day the reelection is received by the Department of Veterans Affairs.

(f) Service pension (§3.3(a)). Date of receipt of claim.

(g) Tuberculosis, special compensation for arrested. As of the date the graduated evaluation of the disability or compensation for that degree of disablement combined with other service-connected disabilities would provide compensation payable at a rate less than \$67. See §3.350(g).

(h) Temporary increase "General Policy in Rating," 1945 Schedule for Rating Disabilities:

(1) Section 4.29 of this chapter. Date of entrance into hospital, after 21 days of continuous hospitalization for treatment.

(2) Section 4.30 of this chapter. Date of entrance into hospital, after discharge from hospitalization (regular or release to non-bed care).

(i) Increased disability pension based on attainment of age 78. First day of the month during which veteran attains age 78.

**§3.655 Failure to report for Department of Veterans Affairs examination.**



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(a) General. When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination and a claimant, without good cause, fails to report for such examination, or reexamination, action shall be taken in accordance with paragraph (b) or (c) of this section as appropriate. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc. For purposes of this section, the terms "examination" and "reexamination" include periods of hospital observation when required by VA.

(b) Original or reopened claim, or claim for increase. When a claimant fails to report for an examination scheduled in conjunction with an original compensation claim, the claim shall be rated based on the evidence of record. When the examination was scheduled in conjunction with any other original claim, a reopened claim for a benefit which was previously disallowed, or a claim for increase, the claim shall be denied.

(c) Running award.

(1) When a claimant fails to report for a reexamination and the issue is continuing entitlement, VA shall issue a pretermination notice advising the payee that payment for the disability or disabilities for which the reexamination was scheduled will be discontinued or, if a minimum evaluation is established in part 4 of this title or there is an evaluation protected under §3.951(b) of this part, reduced to the lower evaluation. Such notice shall also include the prospective date of discontinuance or reduction, the reason therefor and a statement of the claimant's procedural and appellate rights. The claimant shall be allowed 60 days to indicate his or her willingness to report for a reexamination or to present evidence that payment for the disability or disabilities for which the reexamination was scheduled should not be discontinued or reduced.

(2) If there is no response within 60 days, or if the evidence submitted does not establish continued entitlement, payment for such disability or disabilities shall be discontinued or reduced as of the date indicated in the pretermination notice or the date of last payment, whichever is later.

(3) If notice is received that the claimant is willing to report for a reexamination before payment has been discontinued or reduced, action to adjust payment shall be deferred. The reexamination shall be rescheduled and the claimant notified that failure to report for the rescheduled examination shall be cause for immediate discontinuance or reduction of payment. When a claimant fails to report for such rescheduled examination, payment shall be reduced or discontinued as of the date of last payment and shall not be further adjusted until a VA examination has been conducted and the report reviewed.

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(4) If within 30 days of a pretermination notice issued under paragraph (c)(1) of this section the claimant requests a hearing, action to adjust payment shall be deferred as set forth in §3.105(h)(1) of this part. If a hearing is requested more than 30 days after such pretermination notice but before the proposed date of discontinuance or reduction, a hearing shall be scheduled, but payment shall nevertheless be discontinued or reduced as of the date proposed in the pretermination notice or date of last payment, whichever is later, unless information is presented which warrants a different determination. When the claimant has also expressed willingness to report for an examination, however, the provisions of paragraph (c)(3) of this section shall apply. (Authority: 38 U.S.C. 501(a))

#### **§4.15 Total disability ratings**

The ability to overcome the handicap of disability varies widely among individuals. The rating, however, is based primarily upon the average impairment in earning capacity, that is, upon the economic or industrial handicap which must be overcome and not from individual success in overcoming it. However, full consideration must be given to unusual physical or mental effects in individual cases, to peculiar effects of occupational activities, to defects in physical or mental endowment preventing the usual amount of success in overcoming the handicap of disability and to the effect of combinations of disability. Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation; Provided, That permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person. The following will be considered to be permanent total disability: the permanent loss of the use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or permanently bedridden. Other total disability ratings are scheduled in the various bodily systems of this schedule.

#### **§4.16 Total disability ratings for compensation based on unemployability of the individual.**

(a) 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: Provided, That, if there is only one such disability, this disability shall be ratable at 60 percent or more, and that, if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more. For the above purpose of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability:

(1) Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable,

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- (2) Disabilities resulting from common etiology or a single accident,
- (3) Disabilities affecting a single body system, e.g. orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric,
- (4) Multiple injuries incurred in action, or
- (5) Multiple disabilities incurred as a prisoner of war.

It is provided further that the existence or degree of nonservice-connected disabilities or previous unemployability status will be disregarded where the percentages referred to in this paragraph for the service-connected disability or disabilities are met and in the judgment of the rating agency such service-connected disabilities render the veteran unemployable. Marginal employment shall not be considered substantially gainful employment. For purposes of this section, marginal employment generally shall be deemed to exist when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual income exceeds the poverty threshold. Consideration shall be given in all claims to the nature of the employment and the reason for termination. (Authority: 38 U.S.C. 501(a))

(b) It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled. Therefore, rating boards should submit to the Director, Compensation and Pension Service, for extra-schedular consideration all cases of veterans who are unemployable by reason of service-connected disabilities, but who fail to meet the percentage standards set forth in paragraph (a) of this section. The rating board will include a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue.

#### **§4.18 Unemployability**

A veteran may be considered as unemployable upon termination of employment which was provided on account of disability, or in which special consideration was given on account of the same, when it is satisfactorily shown that he or she is unable to secure further employment. With amputations, sequelae of fractures and other residuals of traumatism shown to be of static character, a showing of continuous unemployability from date of incurrence, or the date the condition reached the stabilized level, is a general requirement in order to establish the fact that present unemployability is the result of the disability. However, consideration is to be given to the circumstances of employment in individual claims, and, if the employment was only occasional, intermittent, tryout or unsuccessful, or eventually terminated on account of the disability, present

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unemployability may be attributed to the static disability. Where unemployability for pension previously has been established on the basis of combined service-connected and nonservice-connected disabilities and the service-connected disability or disabilities have increased in severity, §4.16 is for consideration.

### §3.340 Total and permanent total ratings and unemployability

(a) Total disability ratings:

(1) General. Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation. Total disability may or may not be permanent. Total ratings will not be assigned, generally, for temporary exacerbations or acute infectious diseases except where specifically prescribed by the schedule.

(2) Schedule for rating disabilities. Total ratings are authorized for any disability or combination of disabilities for which the Schedule for Rating Disabilities prescribes a 100 percent evaluation or, with less disability, where the requirements of paragraph 16, page 5 of the rating schedule are present or where, in pension cases, the requirements of paragraph 17, page 5 of the schedule are met.

(3) Ratings of total disability on history. In the case of disabilities which have undergone some recent improvement, a rating of total disability may be made, provided:

(i) That the disability must in the past have been of sufficient severity to warrant a total disability rating;

(ii) That it must have required extended, continuous, or intermittent hospitalization, or have produced total industrial incapacity for at least 1 year, or be subject to recurring, severe, frequent, or prolonged exacerbations; and

(iii) That it must be the opinion of the rating agency that despite the recent improvement of the physical condition, the veteran will be unable to effect an adjustment into a substantially gainful occupation. Due consideration will be given to the frequency and duration of totally incapacitating exacerbations since incurrence of the original disease or injury, and to periods of hospitalization for treatment in determining whether the average person could have reestablished himself or herself in a substantially gainful occupation.

(b) Permanent total disability. Permanence of total disability will be taken to exist when such impairment is reasonably certain to continue throughout the life of the disabled person. The permanent loss or loss of use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or bedridden constitutes permanent total

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disability. Diseases and injuries of long standing which are actually totally incapacitating will be regarded as permanently and totally disabling when the probability of permanent improvement under treatment is remote. Permanent total disability ratings may not be granted as a result of any incapacity from acute infectious disease, accident, or injury, unless there is present one of the recognized combinations or permanent loss of use of extremities or sight, or the person is in the strict sense permanently helpless or bedridden, or when it is reasonably certain that a subsidence of the acute or temporary symptoms will be followed by irreducible totality of disability by way of residuals. The age of the disabled person may be considered in determining permanence.

(c) Insurance ratings. A rating of permanent and total disability for insurance purposes will have no effect on ratings for compensation or pension.

**§3.341 (06/03) Total disability ratings for compensation purposes.**

(a) General. Subject to the limitation in paragraph (b) of this section total-disability compensation ratings may be assigned under the provisions of §3.340. However if the total rating is based on a disability or combination of disabilities for which the Schedule for Rating Disabilities provides an evaluation of less than 100 percent, it must be determined that the service-connected disabilities are sufficient to produce unemployability without regard to advancing age. (Authority: 38 U.S.C. 1155)

(b) Incarcerated veterans. A total rating for compensation purposes based on individual unemployability which would first become effective while a veteran is incarcerated in a Federal, State or local penal institution for conviction of a felony, shall not be assigned during such period of incarceration. However, where a rating for individual unemployability exists prior to incarceration for a felony and routine review is required, the case will be reconsidered to determine if continued eligibility for such rating exists. (Authority: 38 U.S.C. 5313(c))

(c) Program for vocational rehabilitation. Each time a veteran is rated totally disabled on the basis of individual unemployability during the period beginning after January 31, 1985, the Vocational Rehabilitation and Employment Service will be notified so that an evaluation may be offered to determine whether the achievement of a vocational goal by the veteran is reasonably feasible. (Authority: 38 U.S.C. 1163)

**§3.321(b)(1) General rating considerations**

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

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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.

### **38 USC §7105. Filing of notice of disagreement and appeal**

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Secretary.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or legal guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(d)(1) Where the claimant, or the claimant's representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency shall prepare a statement of the case. A statement of the case shall include the following:

(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

(C) The decision on each issue and a summary of the reasons for such decision.



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(2) A statement of the case, as required by this subsection, will not disclose matters that would be contrary to [section 5701 of this title](#) or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

(3) Copies of the “statement of the case” prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans’ Appeals.

(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.

(5) The Board of Veterans’ Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

(e)(1) If, either at the time or after the agency of original jurisdiction receives a substantive appeal, the claimant or the claimant's representative, if any, submits evidence to either the agency of original jurisdiction or the Board of Veterans’ Appeals for consideration in connection with the issue or issues with which disagreement has been expressed, such evidence shall be subject to initial review by the Board unless the claimant or the claimant's representative, as the case may be, requests in writing that the agency of original jurisdiction initially review such evidence.

(2) A request for review of evidence under paragraph (1) shall accompany the submittal of the evidence.

#### **EFFECTIVE DATE OF 2012 AMENDMENT**

Pub. L. 112–154, title V, §501(b), Aug. 6, 2012, 126 Stat. 1190, provided that: “Subsection (e) of such section [38 U.S.C. 7105(e)], as added by subsection (a), shall take effect on the date that is 180 days after the date of the enactment of this Act [Aug. 6, 2012], and shall apply with respect to claims for which a substantive appeal is filed on or after the date that is 180 days after the date of the enactment of this Act.”

#### **§4.130 (9205) Schedule of ratings - mental disorders**

9205 Schizophrenia, residual type; other and unspecified types

SCHIZOPHRENIA AND OTHER PSYCHOTIC DISORDERS

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## GENERAL RATING FORMULA FOR MENTAL DISORDERS

- Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name 100
- Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships 70
- Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships 50
- Occupational and social impairment with occasional decrease in work efficiency and intermittent periods



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of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events) 30

Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication 10

A mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication 0

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**DECISION:**

1. Entitlement to an effective date prior to October 23, 2003, for the grant of service connection for psychosis, mood disorder, and post traumatic stress disorder is denied.
2. Entitlement to an evaluation in excess of 30 percent for psychosis, mood disorder, and post traumatic stress disorder effective October 23, 2003, is denied. Entitlement to an evaluation in excess of 70 percent for psychosis, mood disorder, and post traumatic stress disorder prior to December 29, 2004, is denied. Entitlement to 100 percent evaluation for psychosis, mood disorder, and post traumatic stress disorder prior to March 18, 2009, is denied.
3. Entitlement for an effective date prior to December 29, 2004, for the grant of entitlement to individual unemployability is denied.

**REASONS AND BASES:**

**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.**

**1. Entitlement to an effective date prior to October 23, 2003, for the grant of service connection for psychosis, mood disorder, and post traumatic stress disorder.**

Entitlement to an effective date prior to October 23, 2003, for the grant of service connection for psychosis, mood disorder, and post traumatic stress disorder is denied.

Rating Decision dated August 14, 1991, denied entitlement to service connection for a nervous condition because the evidence did not show you were diagnosed with psychosis within one year of your separation from service. Your diagnosed adjustment disorder was not considered a ratable condition. You were notified of the decision in letter dated August 16, 1991. This decision was subsequently upheld by Statement of the Case dated November 21, 1991, and Hearing Officer's Decision dated December 26, 1991. The Board of Veterans Appeals upheld the denial of service connection for a psychiatric disorder in their decision dated March 29, 1993.

Rating Decision dated September 3, 1993, denied entitlement to service connection for post traumatic stress disorder because you did not submit any medical evidence showing a diagnosis of post traumatic stress disorder. You were notified of the decision in letter dated November 22, 1993. This decision was confirmed and continued by Rating Decision dated November 8, 1994, and notification letter dated December 1, 1994. The decision was upheld by Statement of the Case dated August 22, 1995. The decision became final on December 1, 1995.

Rating Decision dated July 24, 1995, denied entitlement to service connection for psychosis not otherwise specified because the condition neither occurred in nor was caused by military service.

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There was also no evidence showing your psychosis manifested to a compensable degree within one year of your separation from service. You were notified of this decision in letter dated August 3, 1995. The decision was upheld by Statement of the Case dated August 22, 1995. The decision became final on August 3, 1996.

Your request to reopen your claim for service connection for psychosis was received on October 23, 2003.

Per VA regulation, the effective date for direct service connection will be the date following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later. Separation from service means separation under conditions other than dishonorable from continuous active service which extended from the date the disability was incurred or aggravated.

The effective date for claims that were previously disallowed will be as though the former decision had not been rendered if received within the appeal period or prior to appellate decision. If the claim is received after final disallowance, the effective date will be the date of receipt of new claim or date entitlement arose, whichever is later.

Based on the above regulation, entitlement to an effective date prior to October 23, 2003, which was the date that your request to reopen this claim was received, is denied.

**2. Entitlement to an evaluation in excess of 30 percent for psychosis, mood disorder, and post traumatic stress disorder effective October 23, 2003. Entitlement to an evaluation in excess of 70 percent for psychosis, mood disorder, and post traumatic stress disorder prior to December 29, 2004. Entitlement to 100 percent evaluation for psychosis, mood disorder, and post traumatic stress disorder prior to March 18, 2009.**

Entitlement to an evaluation in excess of 30 percent for psychosis, mood disorder, and post traumatic stress disorder effective October 23, 2003, is denied.

An evaluation of 30 percent is granted whenever there is occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events).

A higher evaluation of 50 percent is not warranted unless there is reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned

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material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships.

Entitlement to an evaluation in excess of 70 percent for psychosis, mood disorder, and post traumatic stress disorder prior to December 29, 2004, is denied.

An evaluation of 70 percent is assigned for occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.

A higher evaluation of 100 percent is not warranted unless there is total occupational and social impairment due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

Entitlement to a 100 percent evaluation for psychosis, mood disorder, and post traumatic stress disorder prior to March 18, 2009, is denied.

Cited VA medical records were reviewed. The records show continuous and frequent treatment for multiple mental disorders since October 2002. Recurring symptoms of depressed mood, anxiety, a sleep impairment, and suspiciousness were noted.

Treatment reports from Brandon Regional Hospital show you were seen in the emergency room for an anxiety attack on November 17, 2004.

Psychiatric evaluation from Dr. R. Chisholm dated December 29, 2004, noted symptoms of hallucinations, violence towards others, anxiety, depression, suicidal and homicidal ideation, impaired speech, and inappropriate and obsessive behaviors.

An examination was conducted at the Fort Myers VA Outpatient Clinic on March 18, 2009, to evaluate your mental disorders. The exam report showed you were alert and oriented throughout the interview. You demonstrated appropriate grooming and a cooperative, guarded attitude. You exhibited an anxious, dysphoric mood and a full, blunted affect. Attention skills were limited. Insight and judgment were intact. There was evidence of moderate memory loss. You reported

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suffering from suicidal ideation, hallucinations, and a sleep impairment. You denied suffering from impaired impulse control, panic attacks, or homicidal ideation. The examiner stated that your psychiatric symptoms caused a total occupational and social impairment.

Additional psychiatric examinations conducted at the Fort Myers VA Outpatient Clinic on May 5, 2010 and May 11, 2011, yielded similar findings.

An evaluation of 30 percent was assigned from October 23, 2003, which was the date of receipt of your claim was received. In the absence of objective medical evidence that shows your mental symptoms caused reduced reliability and productivity, entitlement to an initial evaluation in excess of 30 percent is denied.

An evaluation of 70 percent was assigned from December 29, 2004, which was the date of the psychiatric evaluation from Dr. R. Chisholm that first showed entitlement to this evaluation was warranted. In the absence of objective medical evidence that shows your mental symptoms caused deficiencies in most areas prior to December 29, 2004, entitlement to a 70 percent evaluation prior to that date is denied.

An evaluation of 100 percent is assigned from March 18, 2009, which was the date of the VA examination that firsts showed entitlement to this evaluation was warranted. In the absence of objective medical evidence that shows your mental symptoms caused a total occupational and social impairment prior to March 18, 2009, entitlement to a 100 percent evaluation prior to that date is denied.

**3. Entitlement for an effective date prior to December 29, 2004, for the grant of entitlement to individual unemployability.**

Entitlement for an effective date prior to December 29, 2004, for the grant of entitlement to individual unemployability is denied.

38 CFR 4.16 provides that individual unemployability may be granted where there is one disability evaluated as 60 percent disabling, or two or more disabilities, one of which is 40 percent with a combined evaluation of 70 percent or more. These percentage standards are set aside only when the evidence clearly and factually shows that you have been rendered unemployable solely due to service connected disabilities regardless of their individual and combined percentages. Such cases are submitted to the Director of the Compensation and Pension Service for extra-schedular consideration.

The evaluation of your psychosis, mood disorder, and post traumatic stress disorder was increased to 70 percent effective December 29, 2004. Prior to that date, your psychosis, mood disorder, and post traumatic stress disorder was evaluated as 30 percent disabling. Your other service-connected disability of atrial fibrillation was evaluated as 30 percent disabling. Your combined

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evaluation prior to December 29, 2004, was 50 percent disabling , which did not meet the schedular requirements for entitlement to individual unemployability benefits. This case was not submitted for extra-schedular consideration because the evidence failed to conclusively show that you were unemployable due to service connected disabilities prior to that date.

PREPARED BY \_\_\_\_\_

eSign: certified by A. Carson, DRO