

Decision Assessment Document
Rice v. Shinseki, May 6, 2009, 22 Vet.App. 447
U.S. Court of Appeals for Veterans Claims (Court)

What the case is about:

The Court held that a request for a total disability evaluation on the basis of individual unemployability (TDIU), whether expressly raised by the veteran or reasonably raised by the record, is not a separate claim for benefits, but involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of the initial adjudication of a claim or, as part of a claim for increased compensation if entitlement to the disability upon which TDIU is based has already been found to be service connected. The Court concluded that there is no freestanding TDIU claim.

The Court also held that if new evidence of unemployability related to the underlying condition is submitted within the one-year appeal period following the adjudication of an initial claim or a claim for increase, VA is required to consider the applicability of [38 C.F.R. § 3.156\(b\)](#) in determining the effective date of the grant of the benefit.

Impact on VBA:

C&P Service will be issuing guidance concerning TDIU claims in view of the Court's holding in *Rice*. We also anticipate that Manual changes will be forthcoming as well.

Summary of the facts and Court's reasons:

The regional office (RO), in January 2001, granted service connection for post traumatic stress disorder (PTSD) with a 30 percent evaluation effective December 23, 1998 (date of claim). The veteran filed an application for TDIU benefits, [VA Form 21-8940](#), on March 27, 2001. He submitted documents in June 2001 that included another VA Form 21-8940, requested entitlement to TDIU benefits effective December 23, 1998, and that his claim be considered under [38 C.F.R. §§ 3.340\(a\)](#) and [4.16\(b\)](#), and included a Notice of Disagreement (NOD) concerning the 30 percent evaluation.

In May 2002, the RO granted a 70 percent evaluation for PTSD, effective December 23, 1998, and a TDIU evaluation effective November 1, 2000. The effective date for the TDIU evaluation was based upon “the day after full-time employment ceased” as shown by the unemployability application and in a Social Security decision. The veteran filed a NOD with the decision, seeking an earlier effective date for the TDIU evaluation. He also indicated that a total disability rating was not granted from December 23, 1998, and asserted that he was therefore entitled to a Statement of the Case (SOC) regarding his NOD with the original 30 percent rating in order to perfect an appeal to the Board of Veterans’ Appeals (Board). In April 2004, the RO issued an SOC that denied an earlier effective date for the TDIU evaluation. The veteran presented to the Board issues of entitlement to a higher initial disability rating for PTSD and entitlement to an earlier effective date for TDIU in his Substantive Appeal.

The Board, in January 2006, denied entitlement to an earlier effective date for TDIU and remanded the PTSD evaluation issue for VCAA notice compliance and issuance of a SOC.

The veteran argued that the Board erred by considering the effective date issue for PTSD prior to completing the development and adjudication of his claim for a higher initial rating for PTSD. He argued that the issues were inextricably intertwined because if he were granted a 100 percent disability rating for PTSD as a result of the Board’s remand of the issue, such action would moot his appeal of the effective date for TDIU. He also contended that the submission of evidence regarding unemployability within one year of the RO’s initial grant of service connection for PTSD should have been associated with that claim and not have been rated a new claim for TDIU.

The Court agreed with the veteran that his request for TDIU should be considered part of the determination of the appropriate disability rating in the adjudication of his claim for disability compensation for PTSD, rather than as a freestanding claim for a separate benefit.

The Court held that a request for TDIU, either expressly raised by the veteran or reasonably raised by the record, is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of an initial adjudication of a claim or, if a disability upon which entitlement to TDIU is based is already service connected, as part of a claim for increased compensation. The Court explained that the distinction between the two is important for purposes of assigning an effective date for an award of compensation, as different

statutory and regulatory provisions apply depending on whether the claim is an original claim or one for increased compensation.

Note: Generally in an original claim, the effective date can be no earlier than the date of claim. See [38 U.S.C § 5110\(a\)](#). However, the effective date for an increased rating claim may date back as much as one year before the date of the claim for increase if it is factually “ascertainable that an increase in disability had occurred” within that timeframe. See [38 U.S.C. § 5110\(b\)\(2\)](#) .

The Court held that [38 C.F.R. § 3.156\(b\)](#) is applicable to the assignment of the effective date for a TDIU award, as part of the initial disability rating or as a claim for increased compensation. VA must consider any new and material evidence received during the one-year appeal period following an RO decision “as having been filed in connection with the claim which was pending at the beginning of the appeal period.” Thus, if VA incorrectly described evidence as a new claim for increase, rather than as part of a pending claim for an initial rating, the veteran would be deprived of the benefit of the application of § 3.156(b) in determining an effective date.

The Court explained that, in the context of TDIU, new evidence of unemployability related to the underlying condition submitted within one years of the assignment of an initial rating that is less than the maximum sought may constitute new and material evidence under § 3.156(b). The Court held that when entitlement to TDIU is raised during the adjudicatory process for the underlying disability or during the administrative appeal of the initial rating assigned for that disability, it is part of the claim for benefits for the underlying disability.

The Court found that the veteran submitted evidence of unemployability at the same time he appealed the initial disability rating for PTSD; therefore, because he was challenging the initial disability rating assigned for the disability upon which he based his assertion of unemployability (PTSD), in this case, the determination of whether he is entitled to TDIU, including the effective date of the award, is part and parcel of the determination of the initial disability rating for PTSD. Note: The Court declined to decide whether, in a case where TDIU is a part of a claim for an increased disability rating, the issue of TDIU would be inextricably intertwined with any determination regarding the proper schedular rating of the underlying

disability or disabilities.

The Court concluded that the Board erred by not considering § 3.156(b), as the veteran had submitted evidence of unemployability along with his NOD as to the initial rating assigned, in June 2001, well before the expiration of the one-year appeal period. The veteran's submission of evidence of unemployability based on PTSD within the one-year period was, as a matter of law, new and material evidence under § 3.156(b). The Board should have treated the evidence as if it had been submitted in connection with the veteran's December 1998 claim for compensation for PTSD. Because the Court held that consideration of entitlement to TDIU in a case where the assignment of the initial disability rating is on direct appeal is part of the consideration of the proper initial disability rating, the Court concluded that the Board erred in analyzing the matter under section 5110(b)(2) and [38 C.F.R. § 3.400\(o\)\(1\)](#).

In light of the Court's holding regarding the proper assertions of entitlement to TDIU when the initial disability rating remains at issue, the Court concluded that the Board erred when it did not also remand the matter of the proper effective date for the TDIU award when it remanded the issue of the proper disability rating for the underlying disability (PTSD). The Court directed that the Board review the evidence of record and consider, if necessary, the application of staged ratings. The Court vacated the Board's January 2006 decision denying entitlement to an effective date earlier than November 1, 2000, for TDIU and remanded for readjudication consistent with its opinion.

References:

CAVC case number: No. 06-1445

<http://www.uscourts.cavc.gov/documents/Rice-1445.pdf>