DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office

[redacted]

VA File Number
[redacted]

Represented By:
DISABLED AMERICAN VETERANS
Rating Decision
04/27/2020

INTRODUCTION

The records reflect that you are a Veteran of the Peacetime. You served in the Army from October 27, 1981 to October 26, 1985. A special review of your file was mandated on August 26, 2019. Based on the review and the evidence listed below, we have made the following decision(s).

DECISION

1. No revision is warranted in the decision to deny entitlement to Individual Unemployability.

2. Evaluation of degenerative disc disease and spondylosis, lumbar spine, which is currently 40 percent disabling, is continued.

3. Evaluation of chronic adjustment disorder with mixed emotional features/depressed mood, which is currently 70 percent disabling, is continued.

4. Evaluation of degenerative disc and joint disease, cervical spine, status post fusion C5,6,7, which is currently 30 percent disabling, is continued.

5. Evaluation of radiculopathy of left upper extremity, which is currently 20 percent disabling, is continued.

6. Evaluation of radiculopathy of right upper extremity, which is currently evaluated 40 percent disabling, is decreased to 20 percent effective March 5, 2020.

EVIDENCE

- Rating Decision- Narrative with all associated evidence, dated June 20, 2003
- Rating Decision- Narrative with all associated evidence, dated July 22, 2008
- Rating Decision- Narrative with all associated evidence, dated August 16, 2010
- Rating Decision- Narrative with all associated evidence, dated July 6, 2018
- Rating Decision- Narrative with all associated evidence, dated March 9, 2019
- Rating Decision- Narrative with all associated evidence, dated July 12, 2019
- Correspondence from Veteran regarding a clear and unmistakable error, received August 26, 2019
- VA Form 21-526EZ Application for Disability Compensation and Related Compensation Benefits, received December 10, 2019
- VA letter concerning your claim, request for application, dated December 20, 2019
- VA treatment records from Medical Center Salisbury, for period from January 3, 2019 to December 20, 2019, received December 30, 2019
- VA Form 20-0995, Supplemental Claim Application, received January 16, 2020
- VA Form 21-8940, Veteran's Application For Increased Compensation Based On Unemployability, received January 16, 2020
- VA Form 21-4138, Statement in Support of Claim, received January 16, 2020
- VA Form 21-0820 Report of General Information, dated February 18, 2020
- Social Security Administration Records, received February 25, 2020
- Mental disorders Disability Benefit Questionnaire from MSLA, examined March 3, 2020
- Scars Disability Benefit Questionnaire from MSLA, examined March 5, 2020
- Peripheral nerves Disability Benefit Questionnaire from MSLA, examined March 5, 2020
- Back Disability Benefit Questionnaire from MSLA, examined March 5, 2020
- Neck Disability Benefit Questionnaire from MSLA, examined March 5, 2020
- Medical clarification to peripheral nerves Disability Benefit Questionnaire from MSLA, received April 2, 2020
- VA Form 21-0820 Report of General Information, received April 23, 2020
- Medical clarification to peripheral nerves Disability Benefit Questionnaire from MSLA, received April 24, 2020

REASONS FOR DECISION

1. Whether the denial of entitlement to Individual Unemployability was a clear and unmistakable error.

Clear and unmistakable errors are errors that are undebatable, so that it can be said that

reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been. In this case, entitlement to individual unemployability remains denied as the evidence fails to show the previous denial was a clear and unmistakable error. (38 CFR 3.105, 38 CFR 4.16)

Entitlement to individual unemployability remains denied because the evidence does not show that you are unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

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

We have denied individual unemployability for your lumbar spine, cervical spine, bilateral upper extremities, and adjustment disorder because the evidence does not show that you are unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. Additionally, the evidence of record does not show that you terminated your employment due to your service connected disabilities.

A review of your social security administration records note you were denied benefits on January 12, 2006 because the evidence showed your conditions of back, neck, shoulder pain, and depression are not severe enough to be considered disabling.

The evidence does not support a change in our prior decision. Therefore, we are confirming the previous denial of this claim.

Favorable findings identified in this decision:

None.

Laws and regulations applicable to this issue:

38 C.F.R. §3.1 Definitions.
38 C.F.R. §3.105 Revision of Decisions
38 C.F.R. §3.159 Department of Veterans Affairs assistance in developing claims.
38 C.F.R. §3.340 Total and permanent total ratings and unemployability.
38 C.F.R. §3.341 Total disability ratings for compensation purposes.
38 C.F.R. §3.343 Continuance of total disability ratings.
38 C.F.R. §4.16 Total disability ratings for compensation based on unemployability of the individual.

2. Evaluation of degenerative disc disease and spondylosis, lumbar spine currently evaluated as 40 percent disabling.

This condition was previously rated according to disability evaluation criteria which are no longer in effect. Such changes in evaluation criteria cannot be used as grounds for reduction unless medical evidence establishes that the disability to be evaluated has actually improved. This disability has undergone no such improvement and is therefore protected under this provision of the law. (38 CFR 3.951)

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

This condition was previously rated according to disability evaluation criteria which are no longer in effect. Such changes in evaluation criteria cannot be used as grounds for reduction unless medical evidence establishes that the disability to be evaluated has actually improved. This disability has undergone no such improvement and is therefore protected under this provision of the law.

An evaluation of 40 percent is granted for severe limitation of motion of the lumbar spine.

We have assigned a 40 percent evaluation for your degenerative disc disease and spondylosis, lumbar spine (previously rated as lumbosacral strain) based on:
• Forward flexion of the thoracolumbar spine 30 degrees or less

Additional symptom(s) include:
• Combined range of motion of the thoracolumbar spine not greater than 120 degrees
• Forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85degrees
• Muscle spasm not resulting in abnormal gait or abnormal spinal contour
• Painful motion upon examination

The provisions of 38 CFR §4.40 and §4.45 concerning functional loss due to pain, fatigue,

weakness, or lack of endurance, incoordination, and flare-ups, as cited in DeLuca v. Brown and Mitchell v. Shinseki, have been considered and were applied based on additional joint limitation.

A higher evaluation of 50 percent is not warranted for intervertebral disc syndrome (IVDS)unless the evidence shows:
• Unfavorable ankylosis of the entire thoracolumbar spine. (38 CFR 4.71a)

A higher evaluation of 50 percent is not warranted unless there is severe limitation of motion with demonstrable deformity of a vertebral body from fracture. (Historical 38 CFR 4.71a effective prior to September 26, 2003)

Additionally, a higher evaluation of 60 percent is not warranted for intervertebral disc syndrome(IVDS) unless the evidence shows:
• Intervertebral disc syndrome (IVDS) with incapacitating episodes having a total duration of at least six weeks during the past 12 months. (38 CFR 4.71a)

3. Evaluation of chronic adjustment disorder with mixed emotional features/depressed mood currently evaluated as 70 percent disabling.

The evaluation of chronic adjustment disorder with mixed emotional features/depressed mood is continued as 70 percent disabling.

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

The evaluation of adjustment disorder with mixed emotional features/depressed mood is continued as 70 percent disabling as the current evidence fails to show your condition warrants a higher evaluation.

We have assigned a 70 percent evaluation for your chronic adjustment disorder with mixed emotional features/depressed mood based on:
• Forgetting names
• Suspiciousness
• Depressed mood
• Disturbances of motivation and mood
• Mild memory loss
• Forgetting recent events
• Chronic sleep impairment
• Difficulty in understanding complex commands
• Panic attacks (weekly)
• Difficulty in adapting to stressful circumstances

• Difficulty in adapting to work
• Inability to establish and maintain effective relationships
• Panic attacks (less than weekly)
• Difficulty in adapting to a worklike setting
• Anxiety
• Difficulty in establishing and maintaining effective work and social relationships
• Occupational and social impairment with reduced reliability and productivity
• Forgetting directions

The overall evidentiary record shows that the severity of your disability most closely approximates the criteria for a 70 percent disability evaluation.

A higher evaluation of 100 percent is not warranted for chronic adjustment disorder unless the evidence shows 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.

4. Evaluation of degenerative disc and joint disease, cervical spine, status post fusion C5,6,7 currently evaluated as 30 percent disabling.

The evaluation of degenerative disc and joint disease, cervical spine, status post fusion C5,6,7 is continued as 30 percent disabling.

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

The evaluation of degenerative disc and joint disease, cervical spine, status post fusion C5,6,7 is continued as 30 percent disabling as the current evidence fails to show your condition warrants a higher evaluation.

We have assigned a 30 percent evaluation for your degenerative disc and joint disease, cervical spine (previously rated as injury, cervical spine, with limitation of motion) based on:
• Forward flexion of the cervical spine 15 degrees or less

Additional symptom(s) include:

• Combined range of motion of the cervical spine not greater than 170 degrees
• Forward flexion of the cervical spine greater than 30 degrees but not greater than 40 degrees
• Painful motion upon examination

The provisions of 38 CFR §4.40 and §4.45 concerning functional loss due to pain, fatigue, weakness, or lack of endurance, incoordination, and flare-ups, as cited in DeLuca v. Brown and Mitchell v. Shinseki, have been considered and were applied based on additional joint limitation.

A higher evaluation of 40 percent is not warranted for degenerative arthritis of the spine unless the evidence shows:
• Unfavorable ankylosis of the entire cervical spine. (38 CFR 4.124a)

5. Evaluation of radiculopathy of left upper extremity currently evaluated as 20 percent disabling.

The evaluation of radiculopathy of left upper extremity is continued as 20 percent disabling.

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

The evaluation of radiculopathy of left upper extremity is continued as 20 percent disabling as the current evidence fails to show your condition warrants a higher evaluation.

An evaluation of 20 percent is assigned for incomplete paralysis of shoulder and elbow movements which is mild.

A higher evaluation of 30 percent is not warranted unless there is incomplete paralysis of shoulder and elbow movements which is moderate. (38 CFR 4.120, 38 CFR 4.124a)

6. Evaluation of radiculopathy of right upper extremity currently evaluated as 40 percent disabling.

The evaluation of radiculopathy of right upper extremity is decreased to 20 percent effective March 5, 2020. (38 CFR 3.105, 38 CFR 3.501)

Evaluation of radiculopathy of right upper extremity, which is currently evaluated 40 percent disabling, is decreased to 20 percent effective March 5, 2020, the date the VA examination showed your condition improved and warranted the decrease. (38 CFR 3.155, 38 CFR 3.400)

We have assigned a 20 percent evaluation for your radiculopathy of right upper extremity based

on:
• Mild incomplete paralysis of the major extremity (38 CFR 4.124a)

A higher evaluation of 40 percent is not warranted for paralysis of all radicular nerve groups unless the evidence shows nerve damage is moderate. (38 CFR 4.120, 38 CFR 4.124a)

Note: This reduction does not affect your overall combined evaluation of 90 percent.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.