DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

April 8, 2020

Director (00/21)
VA DROC-DC (397)
Washington, DC

In Reply Refer To: 214D
C[redacted]
[redacted], Lem[redacted]

Subject: Advisory Opinion – Extra-Schedular Consideration under 38 C.F.R. CFR 4.16(b).

Decision: The claim for extra-schedular evaluation under 38 C.F.R. 4.16(b) for Total Disability Individual Unemployability (TDIU) for a period prior to July 10, 2009 is granted. The effective date of this grant is established as September 16, 1985, the day after the Veteran last worked full time. The issue of entitlement to TDIU is addressed and remanded by the Board of Veterans Appeals (BVA) in a decision dated May 11, 2017.

A memo, dated April 6, 2020, requests an administrative review for entitlement to individual unemployability (IU) on an extra-schedular basis under 38 C.F.R. 4.16.(b) prior to July 10, 2009, the effective date of entitlement to IU on a schedular basis (38 C.F.R. 4.16(a)).

The BVA Decision of May 11, 2017, includes the Veteran's claim for TDIU. As such, the BVA took jurisdiction of TDIU on a schedular basis under provisions of 38 C.F.R. 4.16(a) and confirmed an effective date of July 10, 2009, based on the combined service-connected evaluation of 70 percent from that date. A Rating Decision dated May 14, 1987, granted service connection for mixed organic personality syndrome-30 percent disabling from October 11, 1984, and an increased evaluation for bilateral hearing loss-20 percent from October 11, 1984. The Veteran's combined evaluation of 40 percent is effective October 11, 1984. The Veteran was notified of that decision on May 28, 1987. The BVA notes the Veteran filed a claim for TDIU on June 24, 1987, within one year of the May 28, 1987 notification date, that was never adjudicated by the AOJ.

A Rating Decision dated September 1, 2010, granted an increased evaluation of 40 percent for a left facial fracture with traumatic brain injury effective July 10, 2009. That decision Code Sheet shows combined evaluations to be 0 percent from July 20, 1974, 40 percent from October 11, 1984, 50 percent from December 10, 1989, 100 percent from May 8, 1993 (38 CFR 4.29), 30 percent

from June 10, 1993, 50 percent from June 11, 1993, 70 percent from July 10, 2009.

While the evidence of record does not meet the schedular requirements for consideration of TDIU under provisions of 38 C.F.R. 4.16(a) prior to July 10, 2009, the cumulative medical evidence does suggest the Veteran's service-connected conditions prevented him from maintaining substantially gainful employment from at least September 16, 1985, the day after the Veteran's reported date last worked full time. It is noted that part time employment reported from September 16, 1985 to September 14, 1990, date of entitlement to Social Security Disability, produced no more than sheltered employment earnings.

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. The Director of Compensation Service has determined the overall evidence supports the contention that service-connected disabilities or a combination of the effects of those disabilities prevents employment. Entitlement to extra-schedular TDIU benefits is established from September 16, 1985.

/s/
Beth Murphy
Executive Director
Compensation Service