DEPARTMENT OF VETERANS AFFAIRS
VETERANS BENEFITS ADMINISTRATION
REGIONAL OFFICE

[redacted]

VA File Number
[redacted]

Represented By:
DISABLED AMERICAN VETERANS
Rating Decision
10/28/2020

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. We received your request for a Higher Level Review on June 6, 2020. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

Please note: The evidentiary record closed as of the date of notice of our prior decision. VA received additional evidence after the record closed that was not considered as part of this decision. If you would like VA to consider this evidence, you may submit a supplemental claim at any time; however, VA must receive your application within one year of the date of notice of this decision to preserve your right to receive the maximum possible benefit. (38 CFR 3.2500)

DECISION

1. Entitlement to individual unemployability is granted effective September 5, 2017.

2. Basic eligibility to Dependents' Educational Assistance is established from September 5, 2017.

2.760 oz 624185-O02-0374809 0000262 0006177 I=000000

3. Evaluation of radiculopathy of right upper extremity, which is currently 20 percent disabling, is continued.

4. Evaluation of degenerative disc and joint disease, cervical spine (previously rated as injury, cervical spine, with limitation of motion), which is currently 30 percent disabling, is continued.

EVIDENCE

- Higher Level Review Informal Conference dated October 24, 2020.
- VA Form 21-4192, Request For Employment Information in Connection With Claim For Disability Benefits, Laboratory Corporation of American, received May 12, 2003, and December 3, 2009
- Rating decision dated April 27, 2020, with notification letter dated April 28, 2020.
- 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
- Correspondence from Veteran regarding a clear and unmistakable error, received August 26, 2019
- Rating Decision dated July 12, 2019, with notification letter dated July 16, 2019, denied entitlement to individual unemployability.
- VA treatment records from Salisbury VA Medical Center dated August 2008 to December 2019
- VA Form 20-0995, Supplemental Claim Application, received January 16, 2020
- VA Form 21-4138, Statement in Support of Claim, received January 16, 2020
- VA Form 27-0820 Report of General Information, dated February 18, 2020
- Social Security Administration Records, received February 25, 2020
- VA contract exam, Mental disorders DBQ dated March 3, 2020, conducted by Laurie A. Bizzell, Ph.D., San Antonio, TX.
- VA contract examination, Scars/Disfigurement DBQ dated March 5, 2020, conducted by Eric M. Lewandowski, MD., San Antonio, TX.
- VA contract exam, Back (Thoracolumbar Spine) Conditions DBQ dated March 5, 2020, conducted by Eric M. Lewandowski
- VA contract examination, Neck (Cervical Spine) Conditions DBQ dated March 5, 2020, conducted by Eric M. Lewandowski, MD., San Antonio, TX.
- VA contract examination Addendum from Eric M. Lewandowski, M.D., VES Clinician, San Antonio, TX, regarding Peripheral Nerves DBQ dated March 5, 2020, and addendum dated April 2, 2020
- VA Form 27-0820 Report of General Information, received April 23, 2020
- Letter dated December 18, 2018, from VA Vocational Rehabilitation and Employment Division reports you are unable to work and that your SCDs are permanent in nature.
- Earnings Records from Social Security Administration reporting earned income from 1975 to 2019.
- VA Form 20-0996, Decision Review Request - Higher Level Review, received December 10, 2019
- Letter from you dated August 20, 2019, regarding CUE for IU denied on rating decision dated July 12, 2019.

- VA Form 20-0995, Decision Review Request - Supplemental Claims, received June 5, 2019
- Rating decision dated May 9, 2019, with notification letter dated May 10, 2019.
- VA Form 20-0996, Decision Review Request - Higher Level Review, received April 8, 2019
- Rating Decision dated March 6, 2019, with notification letter dated March 18, 2019.
- VA contract examination, Back (Thoracolumbar Spine) DBQ dated February 21, 2019, conducted by Deborah R. Reece, PA-C, Winston-Salem, NC.
- VA contract examination, Neck (Cervical Spine) DBQ dated February 21, 2019, conducted by Deborah R. Reece, PA-C, Winston-Salem, NC.
- Psychiatric Information Request, Mildred A. Hall Rehabilitation Counselor dated November 6, 2018, received February 14, 2019.
- RAMP Appeal Withdrawal Letter, dated January 11, 2019
- Work Guidelines Form completed by Vasudha Jain, NPI dated November 7, 2018, received November 13, 2018, regarding VA Vocational Rehabilitation eligibility.
- Rating Decision dated July 6, 2018, with notification letter dated July 16, 2018
- Supplemental Statement of the Case dated July 6, 2018.
- Ramp Opt-In Election received May 24, 2018.
- RAMP Opt-In Notice, dated May 1, 2018
- Private Consultation Reports and Operative Report from Neurosurgical Associates of Carolinas, PA, and Forsyth Medical Center, Dr. William Bell, dated June 28, 2010, to January 21, 2011, received October 19, 2017.
- Copies of service treatment records and personnel records for the period October 27, 1981, to October 26, 1984, received October 12, 2017.
- VA contract examination, Back (Thoracolumbar Spine) DBQ dated September 5, 2017, conducted by Deborah R. Reece, PA-C, Winston Salem, NC.
- VA contract examination, Peripheral Nerves Conditions DBQ dated September 5, 2017, conducted by Deborah R. Reece, PA-C, Winston Salem, NC.
- VA contract examination, Headaches DBQ dated September 5, 2017, conducted by Deborah R. Reece, PA-C, Winston Salem, NC.
- VA contract examination, Mental Disorders DBQ dated September 7, 2017, conducted by David L. Mount, Psy.D., Psychologist, Winston Salem NC.
- VA contract examination, Neck (Cervical Spine) DBQ dated September 5, 2017, conducted by Deborah R. Reece, PA-C, Winston Salem, NC.
- VA treatment records from Durham VA Medical Center dated June 2006 to November 21, 2016.
- Board of Veteran's Appeals Remand dated August 8, 2017.
- Statement form Paul Freer, LMBT dated July 25, 2016, received August 1, 2016.
- Board of Veterans Appeals Hearing Transcript dated July 8, 2016.
- VA treatment record dated February 24, 2015, at Tampa VA Medical Center.
- Supplemental Statement of the Case dated February 10, 2016.
- Rating decision dated February 10, 2016, with notification letter dated February 23, 2016.
- Service treatment records for the period October 27, 1981, to October 26, 1984, received September 10, 2015
- VA examinations at Salem VA Medical Center dated July 22, 2013, for Back DBQ; Neck DBQ, Headaches DBQ and Mental Disorders.
- VA Form 9, Appeal to Board of Veterans Appeals received November 22, 2011.
- Buddy statement from mother, [redacted] received November 22, 2011.
- Statement of the Case dated October 24, 2011.
- Notice of Disagreement received September 1, 2010, with Disabled American Veterans

2.700 oz 624188-C02-0/3748097 0000282 0006179 I=000000

statement received September 8, 2010, clarifying all issues.
- Rating Decision dated August 16, 2010, with notification letter dated August 17, 2010.
- VA examination Addendums regarding assessment of ability to function in an occupational environment, Mental Disorders; Neurological Disorders; and Spine dated May 14, 2010, at Salem VA Medical Center.
- VA Form 21-4138, Statement in Support of Claim, received October 20, 2009
- VA Mental Disorders, Neurological Disorders; Peripheral Nerves, and Spine Examinations, dated July 24, 2009, at Salem VA Medical Center.
- VA Form 21-4138, Statement in Support of Claim, received July 16, 2009
- Social Security Administration Disability Findings of Fact and Conclusions of Law received July 1, 2009.
- Request for reconsideration for individual unemployability received June 15, 2009.
- Rating Decision dated July 22, 2008, with notification letter dated July 30, 2008.
- Buddy statement from Naomi Finley, co-worker, received February 26, 2008.
- Buddy statement from co-worker, Manisha Abhyankar, received February 26, 2008
- VA Form 21-8940, Veteran's Application For Increased Compensation Based On Unemployability, received December 26, 2007, July 16, 2009, and January 16, 2020
- Rating Decision dated June 20, 2003, with notification letter dated June 24, 2003.

REASONS FOR DECISION

1. Entitlement to individual unemployability.

Entitlement to individual unemployability is granted because you are unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. (38 CFR 4.16)

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. (38 CFR 4.16)

Entitlement to individual unemployability is granted effective September 5, 2017, the date of the VA contract examinations that report your service connected disabilities impact your ability to work. Although you have continuously prosecuted your claim since December 26, 2007, a review of the evidence prior to the VA examination dated September 5, 2017, does not indicate your service connected chronic adjustment disorder with depression; your degenerative disc disease of lumbar spine and cervical spine with radiculopathy of bilateral upper extremities and

headaches impact your ability to work. This is based on a review of all of the VA treatment records, and VA examinations as well as private treatment records. Although you were granted entitlement to Social Security Administration disability benefits effective June 19, 2005, the preponderance of evidence reviewed does not support entitlement to individual unemployability.

The VA examinations dated May 2010 at Salem VA Medical Center, report your service connected disabilities do not impact your ability to secure or sustain gainful employment. The VA examination at Salem VA Medical Center dated July 2013 noted your service connected disabilities minimally impact your ability to work. The VA examination dated September 5, 2017, and VA examinations thereafter, indicate your service connected disabilities impact your ability to work when you combine all of your symptoms from each service connected disability. Based on your profession as a computer programmer and all the symptoms of all of your service connected disabilities combined would impact your ability to secure or sustain gainful employment.

The letter from Vocational Rehabilitation and Employment Division dated December 18, 2018, indicated you are unable to work and that your service connected disabilities are permanent in nature. This is based on the psychiatric information request sheet dated November 6, 2018, and the work guidelines report from Vasudha Jain, NPI, dated November 7, 2018.

After reviewing all of the cited evidence received on or prior to the notification letter dated April 28, 2020, the preponderance of evidence supports entitlement to individual unemployability effective September 5, 2017, the date the evidence as a whole, indicates your service connected disabilities preclude your from securing or sustaining gainful employment.

Laws and Regulations applicable to this issue:

38 CFR §3.102 Reasonable doubt.
38 CFR §3.103 Procedural due process and appellate rights.
38 CFR §3.104 Finality of decisions.
38 CFR §3.105 Revision of decisions.
38 CFR §3.155 How to file a claim.
38 CFR §3.159 Department of Veterans Affairs assistance in developing claims.
38 CFR §3.321 General rating considerations.
38 CFR §3.340 Total and permanent total ratings and unemployability.
38 CFR §3.400 Effective Dates - General.
38 CFR §4.1 Essentials of evaluative rating.
38 CFR §4.15 Total disability ratings.
38 CFR §4.16 Total disability ratings for compensation based on unemployability of the individual.
38 CFR §4.18 Unemployability.
38 CFR §4.2 Interpretation of examination reports.
38 CFR §4.3 Resolution of reasonable doubt.
38 CFR §4.6 Evaluation of evidence.
38 CFR §4.7 Higher of two evaluations.
38 CFR §3.2500 Review of decisions.

2.760 oz 624185-Q02-0/3748097 0000262 0006181 I=000000

38 CFR § 3.2501 - Supplemental claims.
38 CFR 3.2601, Higher-level review
Pub. L. No. 115-55 Veterans Appeals Improvement and Modernization Act of 2017

2. Eligibility to Dependents' Educational Assistance under 38 U.S.C. Chapter 35.

Eligibility to Dependents' Educational Assistance is derived from a veteran who was discharged under other than dishonorable conditions; and, has a permanent and total service-connected disability; or a permanent and total disability was in existence at the time of death; or the veteran died as a result of a service-connected disability. Also, eligibility exists for a serviceperson who died in service. Finally, eligibility can be derived from a service member who, as a member of the armed forces on active duty, has been listed for more than 90 days as: missing in action; captured in line of duty by a hostile force; or forcibly detained or interned in line of duty by a foreign government or power. (38 USC Ch. 35, 38 CFR 3.807)

Basic eligibility to Dependents' Education Assistance is granted as the evidence shows you currently have a total service-connected disability, permanent in nature. (38 USC Chapter 35, 38 CFR 3.807)

An effective date of September 5, 2017, is assigned as this is the date you became permanently and totally disabled due to your service connected disabilities.

Laws and Regulations applicable to this issue:

38 CFR §3.102 Reasonable doubt.
38 CFR §3.103 Procedural due process and appellate rights.
38 CFR §3.104 Finality of decisions.
38 CFR §3.105 Revision of decisions.
38 CFR §3.155 How to file a claim.
38 CFR §3.159 Department of Veterans Affairs assistance in developing claims.
38 CFR §3.400 Effective Dates - General.
38 CFR §3.807 Dependents' educational assistance; certification.
38 CFR §3.2500 Review of decisions.
38 CFR § 3.2501 - Supplemental claims.
38 CFR 3.2601, Higher-level review
Pub. L. No. 115-55 Veterans Appeals Improvement and Modernization Act of 2017

3. Evaluation of radiculopathy of right upper extremity currently evaluated as 20 percent disabling.

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

The VA contract examination dated March 5, 2020, as well as the Addendums dated April 2, 2020, and April 23, 2020, report your bilateral ulnar neuropathy is a new and separate diagnosis

not related to your service connected spine condition as the cervical spine is not known to cause ulnar neuropathy which in this case is at the level of the elbow as demonstrated on the EMG. The VA peripheral nerves examination does not reveal any findings other than of the ulnar nerve which is not related to your service connected disability; however, you were only reduced to mild incomplete paralysis of the right upper extremity at 20 percent disabling.

After reviewing all of the cited evidence received on or prior to the notification letter dated April 28, 2020, the findings do not support a higher evaluation than 20 percent for your right upper extremity radiculopathy effective March 5, 2020.

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)

Laws and Regulations applicable to this issue:

38 CFR §3.102 Reasonable doubt.
38 CFR §3.103 Procedural due process and appellate rights.
38 CFR §3.104 Finality of decisions.
38 CFR §3.105 Revision of decisions.
38 CFR §3.155 How to file a claim.
38 CFR §3.159 Department of Veterans Affairs assistance in developing claims.
38 CFR §3.321 General rating considerations.
38 CFR §4.1 Essentials of evaluative rating.
38 CFR §4.2 Interpretation of examination reports.
38 CFR §4.3 Resolution of reasonable doubt.
38 CFR §4.6 Evaluation of evidence.
38 CFR §4.7 Higher of two evaluations.
38 CFR §3.2500 Review of decisions.
38 CFR § 3.2501 - Supplemental claims.
38 CFR 3.2601, Higher-level review
Pub. L. No. 115-55 Veterans Appeals Improvement and Modernization Act of 2017

4. Evaluation of degenerative disc and joint disease, cervical spine (previously rated as injury, cervical spine, with limitation of motion) currently evaluated as 30 percent disabling.

Evaluation of degenerative disc and joint disease, cervical spine (previously rated as injury, cervical spine, with limitation of motion), which is currently 30 percent disabling, is continued.

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

2.700 oz 824186-O02-0/3748097 0000262 0006183 i=000000

higher evaluation.

The VA contract examination dated March 5, 2020, reports diagnosis of degenerative disc and joint disease of the cervical spine, status post fusion of C5, 6, and 7. The examiner reports your condition has stayed the same. The range of motion of the forward flexion is 30 degrees; extension to 30 degrees; left lateral flexion to 30 degrees right lateral rotation to 45 degrees; and left lateral rotation to 55 degrees. Your range of motion itself contribute to functional loss as you are limited in any activity requiring full range of motion of the neck. There is no additional loss of function or range of motion after three repetitions; with repeated use over time; or with flare ups. There was no evidence of muscle spasm or guarding. There is no ankylosis of the spine. The examiner does indicate your cervical spine condition impacts your ability to work.

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)

A disability which has been continuously rated at or above any evaluation for 20 or more years cannot be reduced except upon a showing that such rating was based on fraud. The evaluation of 20 percent disabling for your cervical spine is protected under this provision of the law. (38 CFR 3.951) The current evaluation of 30 percent was effective July 8, 2016, and is not protected under this provision of the law.

Laws and Regulations applicable to this issue:

38 CFR §4.3 Resolution of reasonable doubt.
38 CFR §4.2 Interpretation of examination reports.
38 CFR §4.7 Higher of two evaluations.
38 CFR §4.6 Evaluation of evidence.
38 CFR §3.159 Department of Veterans Affairs assistance in developing claims.
38 CFR §3.155 How to file a claim.
38 CFR §4.1 Essentials of evaluative rating.

38 CFR §3.321 General rating considerations.
38 CFR §3.103 Procedural due process and appellate rights.
38 CFR §3.102 Reasonable doubt.
38 CFR §3.105 Revision of decisions.
38 CFR §3.104 Finality of decisions.
38 CFR §3.2500 Review of decisions.
38 CFR § 3.2501 - Supplemental claims.
38 CFR 3.2601, Higher-level review
Pub. L. No. 115-55 Veterans Appeals Improvement and Modernization Act of 2017

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.

2.700 oz 534188-C02-0/3749087 6000262 6008185 I=000000