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Discussion & Questions

VETERANS LAW

TDIU Ratings



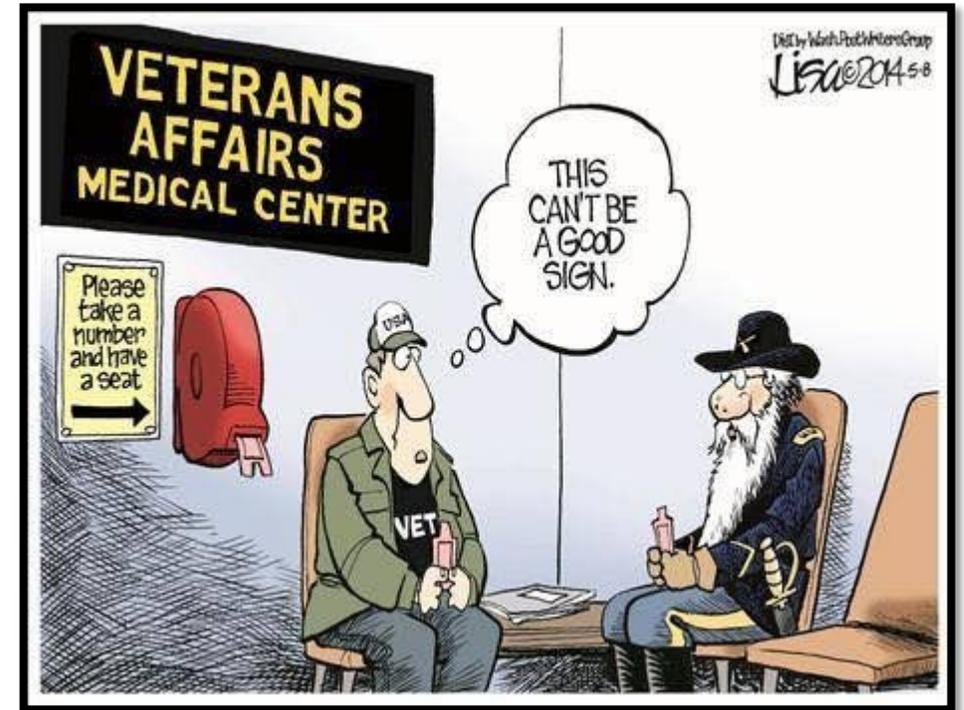
“To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors”



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Topics

- Basics of TDIU
- Substantially Gainful Employment
- Protected Employment
- Sedentary Employment
- Developing TDIU Claims
- Effective Dates
- TDIU and Incarceration





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General Principles

- TDIU may be assigned where Vet who fails to meet the criteria for a 100% rating under VA's Rating Schedule is unable to secure substantially gainful employment due to SC disabilities
 - **38 C.F.R. § 4.16**
- Vets who receive TDIU get paid as if their disability rating is 100%, even though their schedular disability rating is below 100%



General Principles

- TDIU ratings consider the effect that SC disabilities have on a particular Vet's ability to work
- Claim for TDIU is based on an acknowledgment that even though a rating less than 100% under the Rating Schedule may be correct objectively, there are *subjective* factors that warrant a *total* rating based on Vet's particular case



TDIU versus VA Rating Schedule

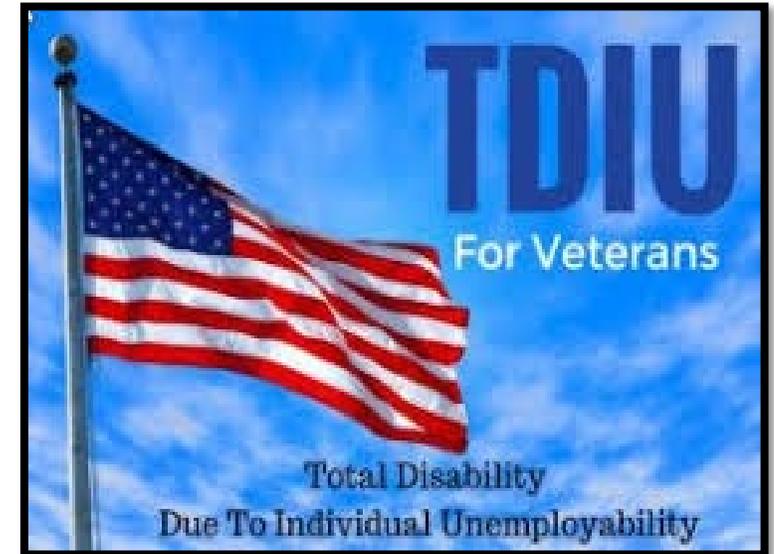
- Rating Schedule is based on “average impairment” of Vet’s occupational earning capacity
- TDIU is based on a PARTICULAR Vet’s ability to work



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Two Ways to Obtain TDIU

- There are two ways to obtain TDIU
 - “Schedular” TDIU
 - 38 C.F.R. § 4.16(a)
 - “Extraschedular” TDIU
 - 38 C.F.R. § 4.16(b)



- If Vet can't work due to SC disabilities, Vet entitled to TDIU!



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Schedular TDIU – Step 1

- Does Vet have a sufficient disability rating to qualify for TDIU under § 4.16(a)?
 - ONE SC disability rated 60% or higher; OR
 - MULTIPLE SC disabilities, with at least one rated 40% or higher AND a combined rating of 70% or higher



Schedular TDIU – “One” Disability

1. Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor
2. Disabilities resulting from a common etiology or a single accident
3. Disabilities affecting a single body system, *e.g.*, orthopedic, digestive, respiratory, etc.
4. Multiple injuries incurred in action
5. Multiple disabilities incurred as a POW



Schedular TDIU – Step 2

- VA determines whether Vet is prevented from securing or following a “substantially gainful occupation” due to SC disabilities
 - If Vet unable to secure substantial gainful employment due to SC disabilities, then TDIU granted
 - Can be based on the combined effects of any/all SC conditions, or based on just one SC condition



Extraschedular TDIU

- If the percentage requirements of 38 C.F.R. § 4.16(a) are not met:
 - VA should consider Vet's eligibility for TDIU under § 4.16(b)
 - All Vets who are unemployable because of SC disabilities shall be rated totally disabled



§ 3.321(b)(1) versus § 4.16(b)

- 38 C.F.R. § 3.321(b)(1) (extraschedular rating for single disability):
 - Where schedular evaluations are found to be inadequate
 - Frequent hospitalizations or marked interference with employment
- 38 C.F.R. § 4.16(b) (extraschedular TDIU)
 - Unable to secure and follow a substantially gainful occupation by reason of SC disabilities
- Don't let VA confuse these standards!



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Factors VA can consider

- Effect SC disabilities have on Vet's ability to work
 - Sometimes because of the combination of SC disabilities
 - If so, VA must discuss the combined effects of Vet's multiple SC disabilities
 - *Floore v. Shinseki*, 26 Vet. App. 376, 381-82 (2013)
 - *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013)



Factors VA can consider

- Educational Background
 - *Pederson v. McDonald*, 27 Vet. App. 276 (2015)
- Occupational Background
 - *Cathell v. Brown*, 8 Vet. App. 539, 544 (1995)



Factors VA cannot consider

- Vet's age
- Effect of NSC disabilities on Vet's ability to work
- Reason Vet left prior employment
 - If Vet left prior employment because of retirement or other reason unrelated to SC disabilities, BVA cannot deny solely for that reason
 - Relevant inquiry is whether SC disabilities currently render Vet unemployable
 - *Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993)



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Temporary TDIU

- “Temporary” TDIU is available based on a Vet’s temporary (i.e., non-permanent) inability to secure or follow a substantially gainful occupation:
 - Not every period of inability to work will establish an inability to follow a substantially gainful occupation warranting TDIU, because it may be possible to secure and follow employment and to earn significant income despite occasional periods of incapacity
 - VA must take into account such factors as the frequency and duration of periods of incapacity or time lost from work due to disability, the Vet’s employment history and current employment status, and the Vet’s annual income from employment
 - **VA Gen. Coun. Prec. 05-2005 (Nov. 25, 2005)**



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- **Substantially Gainful Employment**
- Protected Employment
- Sedentary Employment
- Developing TDIU Claims
- Effective Dates
- TDIU and Incarceration





What is Substantially Gainful Employment

- VA has not defined substantially gainful employment in the C.F.R.
- Rather, 38 C.F.R. § 4.16(a) states what is NOT substantially gainful employment:
 - **Marginal employment**



Marginal Employment

- What is “marginal employment”?
 - **Vet's annual income does not exceed poverty threshold**
 - Current (2025) poverty threshold for a single person under the age of 65 is \$15,650
 - **Protected employment where Vet’s income is higher than poverty threshold, such as**
 - Family business
 - Sheltered workplace



Marginal Employment

- When addressing “substantially gainful occupation,” VA must look at both economic and noneconomic factors
- Make sure the VA pays attention to all noneconomic factors raised by the evidence
 - *Ray v. Wilkie*, 31 Vet. App. 58 (2019)



Marginal Employment

- **Economic Component**

- An occupation earning more than marginal income (outside of a protected environment) as determined by the U.S. Department of Commerce as the poverty threshold for one person
 - Currently \$15,650 (single person rate)
- Vet's ability to secure or follow employment producing income exceeding the poverty threshold



Marginal Employment

- Attention must be given to:
 - **Vet's history, education, skills, and training**
 - **Whether Vet has the physical ability to perform the type of activities required by the occupation at issue**
 - **Physical ability:** Exertional and non-exertional
 - **Activities:** Sedentary, light, medium, heavy, or very heavy
 - **Relevant factors may include:** Limits on lifting, bending, sitting, standing, and walking and auditory/visual limits



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Marginal Employment

- Attention must be given to (cont.):
 - **Whether Vet has the mental ability perform the activities required by the occupation at issue**
 - **Relevant factors may include limits concerning:**
 - **Memory**
 - **Concentration**
 - **Ability to adapt to change, handle workplace stress, get along with coworkers, and demonstrate reliability and productivity**
- Factors are NOT a checklist – these factors only needs to be considered if raised by evidence of record



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Advocacy Advice

- If Vet not currently working, but evidence suggests Vet may be capable of some work:
 - Search for evidence suggesting Vet would only be capable of marginal employment
 - Develop evidence that Vet only capable of marginal employment (ex. vocational opinion, medical opinion, and/or lay statement describing Vet's physical and mental limitations due to SC conditions)
 - Cite *Ortiz-Valles v. McDonald*, 28 Vet. App. 65 (2016)



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Protected Employment

- The TDIU regulations addressed the concept of a “protected environment” constituting marginal employment, at 38 CFR § 4.16(a) –
 - 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.



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Protected Employment

- Recently, the Veterans Court held in *Labruzzo v. McDonough*, 37 Vet. App. 111 (2024), that the phrase “employment in a protected environment” means –
 - Employment in a lower-income position that, due to the veteran’s service-connected disability or disabilities, is shielded in some respect from competition in the employment market.
 - The Court used the words “in some respect” deliberately to confirm the conclusion that employment need not be *completely* shielded or separated from the employment market to qualify as being in a protected environment.



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Protected Employment

- *Labruzzo* (continued)
 - The Court rejected the Secretary's argument that a protected environment requires evidence of an employer's benevolent intent or motivation for hiring, promoting, or continuing to employ a veteran, finding that although employer intent may bear on the protected environment question, there is no indication in § 4.16(a) that this factor was meant to be decisive.



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Protected Employment

- *Labruzzo* (continued)
 - Court recognized that protected-environment TDIU depends on the facts and “veteran incapable of performing the mental and physical acts required for substantially gainful employment.”
 - The Court cautioned that veterans and their advocates seeking to argue entitlement to TDIU during periods in which the veterans were employed should be prepared to submit sufficient evidence for VA to determine entitlement based on the regulatory considerations discussed in its decision.



Advocacy Advice – Protected Employment

- A job constitutes protected employment because it is a family business and/or sheltered workshop
- If the Vet is the boss, then they can make accommodations for themselves:
 - Working part time
 - Limited contact with customers
 - Sheltering in the office when a break is needed
 - Hiring manager to run day-to-day operations
 - Forgiveness for temper and getting into conflicts with customers (which would normally result in termination)



Advocacy Advice – Protected Employment

- Examples of employer accommodations:
 - Allowing frequent absences from work
 - Allowing frequent breaks during workday
 - No consequences for poor performance
 - Allowing Vet to have limited interactions with others
 - Treatment different than other employees
- Lay evidence from coworkers/supervisors can be helpful



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Sedentary Employment

- Vets are routinely denied TDIU based on VA medical opinions in which the examiner opines that Veteran is capable of “sedentary” or “light” work
- But the concept of sedentary work is absent from § 4.16
- CAVC addressed this issue in *Withers v. Wilkie*, 30 Vet. App. 139 (2018)



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Sedentary Employment

- CAVC holdings in *Withers*:
 - Before VA can rely on an examiner's finding that a Vet is capable of sedentary work to deny TDIU, it must ensure that the finding is consistent with the medical evidence as a whole.
 - If VA bases denial of TDIU in part on the conclusion that a Vet is capable of sedentary work, then it must explain how it interprets that concept in the context of that case, including how it squares with the Vet's educational and occupational history.
 - Since there's no VA regulation defining "sedentary work," each case is a decided on a case-by-case basis "from the medical and lay evidence presented and in light of each veteran's education, training, and work history."



Advocacy Advice – Sedentary Employment

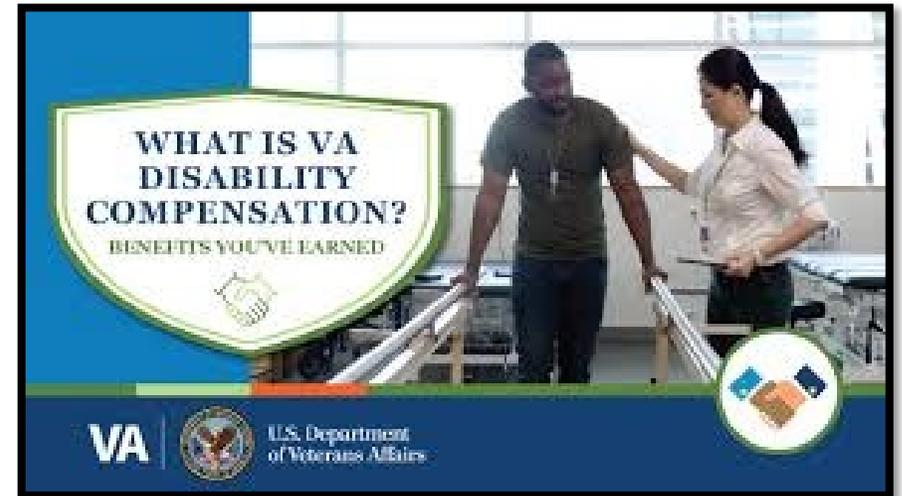
- Submit statements regarding possible education or occupational limitations that could preclude sedentary or light work, such as lack of experience with computers, supervisory work, data entry, customer service, etc.
- Submit statements about difficulties caused by SC psychiatric and physical disabilities related to communication, interacting with others, remaining seated for periods of time, etc.



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DEVELOPING TDIU CLAIMS

1. Talk to the Vet
2. When to File TDIU Claim
3. Medical & Vocational Opinions
4. Credibility & Lay Statements





Talk to the Vet

- Find out if Vet is working in a substantial & gainful job
- If not, find out if a case can be made that Vet is unable to obtain or maintain substantially gainful occupation due to SC conditions
 - Remember – just because aren't working doesn't mean they necessarily qualify for TDIU



Talk to the Vet

- Ask Vet about:
 - **Employment history**
 - Why they left their previous jobs
 - How long have they stayed at jobs
 - On what terms did they leave
 - Their evaluations
 - Accommodations made for them
 - **Education and training**
 - **Effects of SC disabilities**





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Talk to the Vet

- Issue is whether Vet cannot work now due to SC disabilities
 - But, if SC disability was a reason the Vet stopped working, it will support TDIU claim
 - Even if disability has improved, would it get worse again if Vet was working?
- Ask if Vet is taking any medication for SC disability
 - See if there are any effects/side effects impacting Vet's employability
 - VA should assess the effects, or side effects, of medication for SC disabilities on Vet's employability. *See Moyer v. Derwinski*, 2 Vet. App. 289, 294 (1992).



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Advocacy Advice

- Submit argument/evidence explaining how Vet's educational and occupational history, when viewed with SC disabilities, would preclude substantially gainful employment
- Submit lay evidence outlining educational and occupational limitations relevant to types of jobs for which Vet would be qualified
- A professional opinion, especially one from a vocational expert, can be helpful



Advocacy Advice

- The simple fact that a Vet may be young, or may be highly-educated, or may have been recently employed, or may have had a long work career are not decisive, and standing alone are insufficient justifications to deny entitlement to TDIU.
 - *See Gleicher v. Derwinski*, 2 Vet. App. 26, 28 (1991).



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When to File TDIU Claim

- VA must address TDIU, when it is either:
 - Expressly claimed; or
 - Reasonably raised by the record
- A “claim” for TDIU can be either:
 - A free-standing claim; or
 - Part of a claim for increase for a specific SC condition or conditions



When to File TDIU Claim

Explicit TDIU Claim

- TDIU claim can be made by filing VA Form 21-8940, Veteran's Application for Increased Compensation Based on Unemployability
 - VA will almost certainly require that this form be submitted before it adjudicates a TDIU claim, so advocates can save time in the claims process by submitting the form as early as possible



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When to File TDIU Claim

When can TDIU be raised?

- A claim for a TDIU is also part of any claim for a higher initial rating or an increased rating when evidence of unemployability related to the underlying condition is submitted during the pendency of the claim
 - *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)
 - *Rice v. Shinseki*, 22 Vet. App. 447 (2009)



Medical and Vocational Opinions

- If a request for a TDIU evaluation is expressly raised by the Vet or reasonably raised by the record, a medical exam or specialty exam will generally be afforded by VA.
- The examiner will be requested to comment on the Vet's ability to function in an occupational environment and describe the functional impairment caused solely by the SC disabilities.
- That medical opinion should be individualized, based on relevant factors, and not be based on whether an average person would be rendered unemployable under the circumstances.
- An exam that relies exclusively on generalizations to support an opinion as to ability to secure or follow a substantially gainful occupation is not adequate.



Credibility and Lay Evidence

- Lay evidence is one type of evidence that must be considered, if submitted, when a Vet seeks disability benefits.
 - *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006)
 - *Barr v. Nicholson*, 21 Vet. App. 303 (2007)



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Credibility and Lay Evidence

- When making TDIU determinations, VA must consider a Vet's work history
- BVA may consider the nature, length, and reason for termination of employment when assessing whether that employment was "in a protected environment"
 - *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006)
 - *Arline v. McDonough*, 34 Vet. App. 238 (2021)



Advocacy Advice – Credibility and Lay Evidence

- If you find evidence showing Vet contradicting self, Vet not putting substantial effort into exams, or other unclear things, submit a statement clarifying discrepancies
- Try to submit additional evidence (evidence of work accommodations/troubles) or buddy statements from coworkers that support Vet's assertions
 - Lay evidence about work background and education (to include educational and occupational limitations), periods of hospitalization, and evidence of impact on the Vet's ability to work, that could be favorable to the TDIU determination, should be submitted



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Effective Dates

Delrio v. Wilkie, 32 Vet. App. 232 (2019)

- 1991: Vet diagnosed with fibromyalgia
- 1996: Vet files claim for SC for PTSD
- 2005: VA grants SC for PTSD at 10%; Vet appealed rating to BVA
- 2006: Vet files claim for SC for fibromyalgia
- 2007: VA grants SC for fibromyalgia at 10%, effective 2006
- 2008: Vet files IR claim for fibromyalgia, which is later granted
- 2013: BVA remands reasonably raised TDIU claim



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Effective Dates

Delrio v. Wilkie, 32 Vet. App. 232 (2019)

- 2015: VA increases PTSD rating
- 2016: BVA grants TDIU effective 2015, when Vet first met schedular criteria; remands issue of extraschedular TDIU
- 2017: BVA grants extraschedular TDIU effective 2006, date of SC for fibromyalgia, finding:
 - PTSD and fibromyalgia collectively rendered Vet unemployable
 - PTSD alone didn't render Vet unemployable prior to 2006



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Effective Dates

Delrio v. Wilkie, 32 Vet. App. 232 (2019)

- Vet appealed to CAVC and argued:
 - BVA erred in not considering the effects of his fibromyalgia when assessing his entitlement to TDIU before 2006, because, once VA determined that his fibromyalgia was related to service, the effective date for the grant of SC for that condition became irrelevant and BVA should have addressed whether the symptoms of that now-recognized SC disability contributed to his inability to engage in substantially gainful employment.



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Effective Dates

Delrio v. Wilkie, 32 Vet. App. 232 (2019)

- CAVC disagreed with Vet, holding -
 - The effective date of the grant of SC is relevant to assessing the entitlement to TDIU.
 - The plain language of § 4.16, expressly directs that “the existence or degree of nonservice-connected disabilities . . . will be disregarded” when determining entitlement to TDIU.
 - VA is to disregard the effects of a non-SC disability when considering TDIU, even if the disability is granted SC at a later time.



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TDIU and Incarceration

38 USC § 5313(c)

- The Secretary shall not assign to any veteran a rating of total disability based on the individual unemployability of the veteran resulting from a service-connected disability during any period during which the veteran is incarcerated in a Federal, State, local, or other penal institution or correctional facility for conviction of a felony.
- **Associated regulation: 38 C.F.R. § 3.341(b)**



TDIU and Incarceration

Philbrook v. McDonough, 15 F.4th 1117 (Fed. Cir. 2021)

- 2004: Vet SC for PTSD following separation from service
- 2011: Vet stipulated to a judgment of “guilty except for insanity” in connection with a felony
 - Court ordered Vet to the custody of the Oregon State Hospital “under the jurisdiction of the Psychiatric Security Review Board . . . for care, custody and treatment for a maximum period not to exceed 20 years.”



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TDIU and Incarceration

Philbrook v. McDonough, 15 F.4th 1117 (Fed. Cir. 2021)

- While in custody, Vet applied for TDIU
- RO found PTSD did not entitle him to TDIU because it did not preclude gainful employment
- BVA did not consider facts of his disability in detail, but denied TDIU as a matter of law under 38 U.S.C. § 5313(c) and 38 C.F.R. § 3.341(b), because the Vet was incarcerated in a Federal, State, local, or other penal institution or correctional facility for conviction of a felony
- CAVC affirmed the BVA decision



TDIU and Incarceration

Philbrook v. McDonough, 15 F.4th 1117 (Fed. Cir. 2021)

- Fed. Circ. reversed CAVC’s decision, finding:
 - Congress’s use of the term “other penal institution or correctional facility” referred to private prisons.
 - Vet was not confined to a penal institution or correction facility; rather, he was confined to a mental institution.
 - The term “correctional facility” cannot encompass a hospital that treats civil patients, and a hospital cannot be a correctional facility for some patients and not others.



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TDIU and Incarceration

***Philbrook v. McDonough*, 15 F.4th 1117 (Fed. Cir. 2021)**

- Takeaway:
 - Vets confined to a mental institution are eligible for TDIU, because mental institutions are not “penal institutions or correctional facilities”
 - A mental institution is a hospital for people with mental or emotional problems.
 - Vets are eligible even if they are confined to the mental institution because they pled or were found guilty of a felony “except for insanity.”



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