

The Impact of Non-Exertional Limitations in TDIU Cases

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This article provides insight regarding the impact of non-exertional limitations in TDIU claims and how vocational experts approach these cases. Non-exertional limitations impacting concentration, memory, judgement, independent thinking, and interaction with others, as examples, can markedly impair an individual's vocational functioning and can build the foundation for a favorable TDIU decision.

The U.S. Department of Veterans Affairs Compensation Manual¹ notes physical ability includes functions that are exertional, and/or non-exertional and factors that are relevant include:

- Physical impairments (lifting, bending, sitting, standing, walking, climbing, grasping, typing, reaching, seeing, and/or hearing); and
- Mental limitations (memory, concentration, ability to adapt to change, handle work-place stress, get along with co-workers, and/or demonstrate reliability and productivity)

Non-exertional, or “mental limitations,” can have a significant impact on an individual’s ability to be a gainful wage earner. Although disabilities such as psychiatric conditions and TBI can be “invisible,” they have the potential to markedly impact an individual’s daily functioning and subsequently their ability to obtain and sustain gainful employment. The vocational impact of mental limitations can be a “gray area,” especially compared to physical limitations that can clearly define an individual’s capacity to lift, carry, sit, stand, walk, etc. Although not always clearly defined and oftentimes “invisible,” non-exertional impairments can have a significant vocational impact. Vocational experts are qualified to utilize a combination of available published governmental data and literature, labor market sampling, and professional expertise to opine on how non-exertional limitations noted within evidence of record can functionally impact an individual in the competitive workforce.

¹ M21-1 manual IV.ii.2.F.1.j. (Limitation of Ability in IU Determinations)

Employers expect their staff will maintain consistent attendance free from excessive absences, tardiness, early departures, and unscheduled breaks. Based on labor market research and analysis of published data, we opine most employers do not tolerate one or more unscheduled absences on a consecutive month basis. More specifically, the U.S. Department of Labor Bureau of Labor Statistics Employee Benefits Survey (March 2020 Estimates through the National Compensation Survey) notes, “...for 68 percent of workers with paid sick leave, sick leave plans provide a fixed number of days per year with an average of 8 days available for their use...” across all years of service. Employers also expect workers will produce a certain, minimal amount of work each shift to meet productivity and pace expectations. Generally, most employers will not tolerate time off task beyond 10% of a workday. Ongoing tardiness and early departures from work sites are also not tolerated in the competitive workforce.

Significant impairments in concentration and memory can markedly impact a veteran’s ability to meet these standards of productivity and reliability in competitive employment. The inability to adapt to change and handle workplace stress further contributes to these mental limitations. Distressing psychiatric symptoms can markedly impact a veteran’s ability to sustain concentration and attend to work tasks. For example, a veteran with major depressive disorder may have significant difficulty presenting to work consistently and adhering to a traditional work schedule due to significantly impaired motivation and depressed mood. A veteran with anxiety disorder may have difficulty concentrating on work tasks due to intrusive thoughts and require regular unscheduled breaks to decompress for an undeterminable amount of time. A veteran with significant PTSD and a history of flashbacks and dissociation may require redirection and prompting to get through a workday. A veteran with panic disorder might leave their workstation entirely during a panic attack.

A veteran with a significant physical condition can also have coinciding mental limitations. For example, an individual with a service-connected back condition may require unscheduled breaks to alter position or recline in attempt to alleviate pain. Moreover, the distracting nature of the pain itself likely further impacts concentration.

Veterans with concentration, cognitive, and memory limitations can also be limited in their ability to initiate tasks independently, recall instructions, and perform multi-step tasks, which are requirements of all competitive employment. In many cases where severe mental limitations are supported by a veteran’s record, we can contend the veteran would necessitate additional supervision, prompting, redirection, reminders, repetition of instructions, and de-escalation, which is not conducive to a productive work environment. Veterans with demonstrated concentration and memory impairments, in addition to difficulty adapting to change and handling workplace stressors, are likely incapable of sustaining the mental demands of even mundane, unskilled employment.

Employees are also required to maintain appropriate, courteous, and professional communication in a workplace. When a veteran exhibits symptoms such as unprovoked irritability, angry outbursts, or impaired judgment due to service-connected conditions, they might have a history of inappropriate behavior or interactions in a workplace, in addition to

interpersonal issues in their personal lives. Angry outbursts or altercations in a workplace are grounds for immediate disciplinary action and oftentimes termination. Additionally, a tendency to isolate or withdraw is also not tolerated, as all jobs require some level of interaction with others, especially supervisors. If a veteran is unable to appropriately and effectively interact with coworkers, supervisors, and the general public, they will be unable to meet the communicative and behavioral standards required to sustain gainful employment.

Mental limitations can be just as debilitating in a workplace as physical impairments. Impairments in concentration, memory, productivity, pace, reliability, in addition to significant social limitations, are not tolerated in the competitive workforce. In combination with utilizing available published governmental data and literature, which can be unclearly defined and limited, vocational consultants routinely conduct labor market research, discussing the impact of non-exertional limitations with employers and their tolerances for absences and productivity. Vocational experts maintain the industrial knowledge required to make a compelling case as to how mental limitations markedly impact an individual's ability to obtain and sustain substantially gainful employment.

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