### Section E. Other Due Process Concerns

#### Overview

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| In This Section | This section contains the following topics: |

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| Topic | Topic Name |
| 1 (old 16) | Failure to Report for Examination Under 38 CFR 3.655(c) |
| 2 (old 17) | Severance of Service Connection |
| 3 (old 18) | Reversal of Prior Determinations Related to Character of Discharge, Line of Duty, or Willful Misconduct. |

#### 1. Failure to Report for Examination Under 38 CFR 3.655(c)

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| Introduction | This topic contains information about * handling failure to report for an examination on continuing entitlement
* addressing absence of good cause in the rating decision
* addressing the issue of static disabilities in the rating decision
* rating considerations for the proposed decision
* possible scenarios after the proposed decision is sent out
* finalizing the proposed rating action, and
* handling failure to report for examination by a Veteran receiving pension.
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| Change Date | May 20, 2015 |

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| a. Handling Failure to Report for an Examination on Continuing Entitlement | Under [38 CFR 3.655(c)(2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1655&rgn=div8), reduction or termination of VA benefits is for consideration when a Veteran fails to report without good cause for a reexamination on an issue of continued entitlement to a benefit. ***Example***: The Veterans fails to report without good cause for a routine future examination scheduled to assess improvement in a service connected (SC) back strain. However, the regulation requires due process before finalizing adverse action. This includes:* a notice of proposed action
* a 60 day period to indicate willingness to report for a reexamination or to present evidence that payment for the disability (or disabilities) for which the reexamination was scheduled should not be discontinued or reduced, and
* the opportunity to request a hearing.

***Important***: Prior to initiating action, ensure that* good cause was not furnished as a reason for failing to report, and
* the disability scheduled for reexamination
* is not static, or
* the disability for which the examination was scheduled is not protected under [38 CFR 3.951 (b)](http://www.ecfr.gov/cgi-bin/text-idx?SID=f0e9c482b557c237095744c488c4a30b&node=se38.1.3_1951&rgn=div8) or [38 CFR 3.957](http://www.ecfr.gov/cgi-bin/text-idx?SID=047865a889fe9d0b18ed61feb8342e21&node=se38.1.3_1957&rgn=div8).

***References***: For more information on * failure to report for an examination, see M21-1, Part IV, Subpart ii, 3.B and M21-1, Part III, Subpart iv, 3.B.2.g
* VA’s duty to assist with providing exams, see M21-1, Part I, 1. C.3
* good cause for not reporting to an examination, see M21-1, Part I,1.C.3, and
* submission of other evidence as good cause for failure to report for an examination, see [*Kowalski v. Nicholson*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmk)*,* 19 Vet.App. 171, 179 (2005).
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| b. Addressing Absence of Good Cause in the Rating Decision  | In every case where a Veteran fails to report for an examination, the rating decision must document VA’s attempts to examine the Veteran and address the issue of good cause. Use the table below to determine how to address the issue of a Veteran’s failure to report for an examination *without* good cause.  |

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| If the Veteran offered … | Then state in the decision narrative … |
| a reason that does not constitute as *good cause* | specifically why this does not constitute good cause under [38 CFR 3.655(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1655&rgn=div8) |
| no reason for failure to report | that the evidence of record showed no good cause for the failure to report. |

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| c. Addressing the Issue of Static Disabilities in the Rating Decision  | When a Veteran fails to report for an examination without good cause, the rating activity must review the claims folder for information about the other service connected disabilities.  |

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| **If there is/are ...** | **Then ...** |
| no static or protected disability/ies | propose reduction of the evaluation assigned for the disability(ies) under review. State in the decision narrative that “*the Veteran failed to report for a review examination, and there is/are no static disability(ie*s)”.  |
| static or protected disability/ies | provide the proposed new or continuing evaluations for all disabilities considered, and the proposed combined evaluation. |

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| ***Reference***: For a definition of static disability, see M21-1, Part IV, Subpart ii, 3.B. |

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| **d. Rating Considerations for the Proposed Decision**  | As required by [38 CFR 3.655(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1655&rgn=div8), a pre-determination notice should be furnished to the Veteran after it is determined that a reduction or termination of a service connected disability is in order. The rating decision should * review any current medical evidence of record in the claims folder
* discuss all evidence on file that pertains to the disability under review
* include the proposed new or continuing disability evaluation(s) for all disabilities under review, and
* provide a proposed combined evaluation for all SC disabilities.

***Note***: Do not include an effective date of the proposed reduction or termination. |

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| **e. Possible Scenarios After the Proposed Decision Is Sent Out** | See the table below for action to take based on response received or no response during the due process period.  |

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| **If ...** | **Then ...** |
| within 30 days the Veteran requests a hearing | defer any further rating action until after the hearing, and transcript is reviewed as additional evidence. |
| a hearing is requested after 30 days, but before the proposed date of reduction | prepare a subsequent rating decision finalizing the proposed decision, at the same time the hearing is being scheduled.***Exception***: Evidence is received which warrants a different determination. |
| the Veteran is willing to report for an examination | defer any rating action pending results of the examination. |
| no response is received after 60 days | prepare a rating decision finalizing the proposed action.***Reference***: For more information on authorization action in cases of reduction or discontinuance for failure to report for review examination, see M21-1, Part IV, Subpart ii, 3.B. |

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| **f. Finalizing the Proposed Rating Action** | After expiration of the 60 day period, a rating decision is warranted to finalize the proposed decision. |

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| **If ...** | **Then ...** |
| no additional evidence was received, or if the Veteran fails to report for the rescheduled examination | restate the evidence reviewed, the previously proposed disability evaluation or decision, and effective date of reduction (date of last payment). |
| additional evidence was received, to include report of a rescheduled examination or hearing transcript | review the evidence to determine the level of disability supported.* If the evidence supports the proposed evaluation or higher, indicate the final evaluation and discuss the basis for the decision.
* If the evidence supports a lower evaluation than what was proposed, another proposed decision notification is in order .

***Note:*** For pension purposes, review evidence and assign an evaluation to each current disability. If criteria for permanent and total disability is not met, prepare a rating decision finalizing discontinuance of pension, to include any applicable special monthly pension (SMP) benefit. |

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| ***Notes***:* code all disabilities with their new, continuing, and combined evaluations
* include noncompensable SC disabilities
* consider a compensable rating under [38 CFR 3.324,](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1324&rgn=div8) if applicable, and
* use the effective date the award will be reduced as the effective date for the new combined evaluation.
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| ***Reference***: For more information on authorization action in cases of reduction or discontinuance for failure to report for review examination see, M21-1, Part IV, Subpart ii, 3.B. |

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| g. Handling Failure to Report for Examination by a Veteran Receiving Pension | A Veteran receiving pension, by definition, has been rated permanently and totally disabled.However, if a reason to review eligibility does come up and the Veteran fails to report for the examination, review available medical evidence of record to determine continued eligibility. This includes entitlement to SMP. Use the table below to determine which action to take based on review of the available medical evidence of record. |

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| If ... | Then prepare a... |
| the Veteran does not continue to meet the criteria for permanent and total disability | “*failure to report*”rating andnotice of proposed adverse action as required by M21-1, Part III, Subpart iv, 8.E.1. |
| the Veteran continues to meet the criteria for permanent and total disability | rating showing the disabilities at the static level. |

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| ***Note***: Each known disability has to be reviewed for the purpose of updating evaluations assigned and determining if the criteria for permanent and total disability continues to be met.***Reference***: For more information on final action after the due process period see M21-1, Part III, Subpart iv, 8.E.1.f |

#### 2. Severance of Service Connection

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| Introduction | This topic contains information about severance of service connection, such as * applying 38 CFR 3.105(a) and 38 CFR 3.105(d)
* severing service connection due to diagnosis change
* severing service connection for a psychosis
* handling severance of service connection
* handling multiple issues in cases involving severance of service connection
* handling increases in compensation in cases involving severance of service connection
* preparing the final rating decision in cases involving severance of service connection
* handling severance proposals upon the Veteran’s death, and
* handling severance of clearly illegal grants of service connection.
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| a. Applying 38 CFR 3.105(a) and 38 CFR 3.105(d) | Revision of decisions which are final and binding, to include decisions of service connection, derives from [38 U.S.C. 7111](https://www.law.cornell.edu/uscode/text/38/7111), and implemented in [38 CFR 3.105](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1105&rgn=div8). * Pursuant to [38 CFR 3.105(a)](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1105&rgn=div8), final and binding determinations can be reversed or amended where evidence establishes a clear and unmistakable error.
* Under [38 CFR 3.105(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1105&rgn=div8), subject to limitations in [38 CFR 3.114](http://www.ecfr.gov/cgi-bin/text-idx?SID=f21293705785d67dca2ae25f621da739&mc=true&node=se38.1.3_1114&rgn=div8) and [38 CFR 3.957](http://www.ecfr.gov/cgi-bin/text-idx?SID=f21293705785d67dca2ae25f621da739&mc=true&node=se38.1.3_1957&rgn=div8), service connection cannot be severed unless evidence showing a clear and unmistakable error exists in the prior determination. This includes all evidence of record at the time of the previous decision *and* post-decisional/contemporaneous.

***Exception***: When VA determines that there is no legal entitlement for a previous award of VA benefits (when service connection is clearly illegal), VA is not required to establish that the original decision was clearly and unmistakably erroneous per [38 C.F.R. § 3.105(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1105&rgn=div8) in order to sever service connection. *[Allen and Key v. Nicholson](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm%22%20%5Cl%20%22bma),* 21 Vet. App. 54, 57 (2007).***References***: For more information on * the ten-year protection even when service connection is erroneous, see M21-1, Part III, Subpart iv, 8.C.9
* due process to sever service connection when clearly illegal/without legal entitlement, see M21-1, Part III, Subpart iv, 8.E.2.i, and
* evidence developed subsequent to an award of service connection, see [*Stallworth v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 20 Vet.App. 482,488 (2006), and [*Daniels v. Gober*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmd)*,* 10 Vet.App. 474 (1997).
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| b. Severing Service Connection Due to Diagnosis Change | A change in diagnosis may be accepted as a basis for severance if there is certification that the diagnosis on which service connection was based was clearly erroneous under [38 CFR 3.105(d).](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1105&rgn=div8) |

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| c. Severing Service Connection for a Psychosis | If service connection is severed for a psychosis, make a determination of entitlement under [38 U.S.C. 1702](http://www.law.cornell.edu/uscode/html/uscode38/usc_sec_38_00001702----000-.html). |

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| d. Handling Severance of Service Connection | The table below describes how to handle severing service connection. |

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| Stage | Who is Responsible | Description |
| 1 | Rating Activity  | refers all ratings proposing severance of service connection to the Veterans Service Center Manager (VSCM) for approval or disapproval under [38 CFR 3.105(a).](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1105&rgn=div8) |
| 2 | VSCM | Is the rating approved?* If *yes*
* signs the rating, and
* forwards the rating to authorization.
* If *no*
* clearly marks the rating disapproved
* signs the rating, and
* returns the rating to the rating activity.
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| 3 | Rating Activity  | * revises the rating, if required, to reflect the current evaluation of all SC disabilities, disposing of all other matters at issue
* files the rating in the claims folder, and
* returns the case to the VSCM (step 2).
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| 4 | Authorization Activity | processes the rating decision and adds a clear and unmistakable error (CUE) flash in Share. |

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| e. Handling Multiple Issues in Cases Involving Severance of Service Connection | Prepare a single rating decision identifying both issues if a decision involves severance of service connection for one disability and a reduction of evaluation for another disability.Notify the Veteran concerning both the reduction and the proposed severance.***Reference***: For more information on notifying the Veteran of severance of service connection, see M21-1, Part IV, Subpart ii, 3.A.2. |

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| f. Handling Increases in Compensation in Cases Involving Severance of Service Connection | Award increased compensation if severance of service connection is proposed for one or more disabilities but one or more other disabilities have increased in severity.Notify the Veteran concerning * the proposed severance action
* the increased evaluation, and
* any reduction that will result from the severance action.
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| g. Preparing the Final Rating Decision in Cases Involving Severance of Service Connection | After the 60-day period of notice during which the claimant could have submitted additional evidence, the case is referred to the rating activity for preparation of the final rating severing service connection.Include in the new combined SC evaluation only those evaluations for disabilities that remain SC.***Note***: This will ensure that no retroactive increase or benefit attributable to the severed disability will be awarded after basic entitlement is terminated.Refer the final rating severing service connection to the VSCM or VSCM-designee for approval only if new evidence has been received since the proposed decision was approved.***Reference***: For more information on the effective date of severance of service connection, see [38 CFR 3.500(r).](http://www.ecfr.gov/cgi-bin/text-idx?SID=dc6e272766026dae521eafc4c6778fca&node=se38.1.3_1500&rgn=div8) |

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| h. Handling Severance Proposals Upon the Veteran’s Death | Upon the Veteran’s death, discontinue all action on severance proposals not finalized, unless the severance would affect death benefits.Proposals initiated but not finalized prior to notice of the Veteran’s death will be reconsidered upon receipt of a claim for death benefits. Take into consideration all available new evidence, such as medical reports of last illness, death certificate, and autopsy report, if indicated.When a claim for death benefits is received* make a proposal to sever service connection, and
* notify the death-benefits claimant of the severance proposal and provide 60 days to submit further evidence, even though the Veteran was given a prior 60-day notice.
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| i. Handling Severance of Clearly Illegal Grants of Service Connection | When an award of service connection was clearly illegal (when there is no legal entitlement)* provide due process under [38 CFR 3.103](http://www.ecfr.gov/cgi-bin/text-idx?SID=b48183cdf37b555e5e7eadadf3c2314e&node=se38.1.3_1103&rgn=div8)
* propose severance
* notify the claimant that there was no legal entitlement to the prior grant of benefits as service connection was clearly illegal
* do not apply the clear and unmistakable error provisions of [38 CFR 3.105(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=016d915589a753ddbf28cacafbe7471e&node=se38.1.3_1105&rgn=div8).

***Example***: Sever service connection as clearly illegal when the beneficiaries had no qualifying active duty to establish basic eligibility to VA benefits.***References***: For more information on lack of legal entitlement, see* [*Allen and Key v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bma)*,* 21 Vet. App. 54, 57 (2007)
* [*Sabonis v. Brown*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bms), 6 Vet.App. 426 (1994), and
* [*Valiao v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmv), 17 Vet.App. 229 (2003).
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#### 3. Reversal of Prior Determinations Related to Character of Discharge, Line of Duty, or Willful Misconduct

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| Introduction | This topic contains information about reversal of prior decisions, such as* Authorization activity jurisdiction in clear and unmistakable error (CUE) cases that sever service connection
* preparing the rating decision, and
* handling cases of disagreement between the authorization and rating activities.
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| a. Authorization Activity Jurisdiction in CUE Cases That Sever Service Connection | Prepare an administrative decision if the authorization activity, rather than the rating activity * has initial jurisdiction of a
* statutory bar to benefits and character-of-discharge determination under M21-1, Part III, Subpart v, 1.B
* line-of-duty determination under M21-1, Part III, Subpart v, 1.D.6, or
* willful misconduct determination under M21-1, Part III, Subpart v, 1.D, and
* finds that there is clear and unmistakable error (CUE) in a prior determination which will result in the severance of service connection.

***Note***: The decision must contain a summary of findings and a statement as to the specific CUE that was identified. ***References***: For more information on * the preparation and approval of authorization determinations, see M21-1, Part III, Subpart v, 1.A.2, and
* CUE, see M21-1, Part IV, Subpart ii, 3.A.2.
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| b. Preparing the Rating Decision | Refer the claims folder, if in order, to the rating activity for appropriate action. This includes the preparation of a rating decision proposing the severance of service connection under [38 CFR 3.105(c)](http://www.ecfr.gov/cgi-bin/text-idx?SID=b48183cdf37b555e5e7eadadf3c2314e&node=se38.1.3_1105&rgn=div8) and [38 CFR 3.105(d)](http://www.ecfr.gov/cgi-bin/text-idx?SID=b48183cdf37b555e5e7eadadf3c2314e&node=se38.1.3_1105&rgn=div8) on the basis of the determination by the authorization activity. |

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| c. Handling Cases of Disagreement Between the Authorization and Rating Activities  | Refer the case by memorandum to the VSCM for resolution of an issue if the rating activity disagrees with the determination by the authorization activity as to character of discharge, line of duty, or willful misconduct. |