## 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 | See Page |
| [16](#Topic16) | Failure to Report for Examination Under 38 CFR 3.655 | 8-E-2 |
| [17](#Topic17) | Severance of Service Connection | 8-E-5 |
| [18](#Topic18) | Reversal of Prior Determinations Related to Character of Discharge, Line of Duty, or Willful Misconduct. | 8-E-9 |

#### 16. Failure to Report for Examination Under 38 CFR 3.655

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| Introduction | This topic contains information about * [handling failure to report for an examination with good cause](#a16)
* [considering static disabilities when a Veteran fails to report without good cause](#b16)
* [addressing the issue of good cause when a Veteran fails to repor](#c16)t
* [handling failure to report for examination by a Veteran receiving pension](#d16), and
* [handling failure to respond to a notice of proposed adverse action](#e16).
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| Change Date | September 16, 2014 |

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| a. Handling Failure to Report for Examination With Good Cause | A Veteran may fail to report for a VA examination, or a scheduled hospitalization for observation and examination, in connection with a running compensation or pension award. If he/she furnishes a good reason for missing the examination, defer adverse action and reschedule the examination.Good cause for not reporting to an examination includes, but is not limited to* illness or hospitalization of the claimant,
* serious illness or death of an immediate family member
* weather related impediments, or
* a previously scheduled/paid for commitment such as a vacation.

***Examples*:** The situations below may be considered examples of good cause* The Veteran indicates he is unable to report to his examination because he currently has the flu.
* The Veteran was out of town on a three-week vacation when the examination was scheduled and notification sent.

Authorization notifies the Veteran that failure to report for the *re*scheduled examination is cause for *immediate* termination or reduction of payment.***References***: For information on * VA’s duty to assist with providing exams, see M21-1MR, Part I, 1. C.7, and
* whether the submission of other evidence by a claimant alleged to be adequate for rating purposes must be accepted 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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16. Failure to Report for Examination Under 38 CFR 3.655, Continued

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| b. Considering Static Disabilities When a Veteran Fails to Report Without Good Cause | When a Veteran fails to report for an examination without good cause, the rating activity must review the claims folder for static disabilities. On the rating decision * if there are
* no static disabilities, state in the *Reasons for Decision* “the Veteran failed to report for a review examination, and there are no static disabilities,” or
* static disabilities, provide the proposed new or continuing evaluations for all disabilities considered and the proposed combined evaluation, and
* do *not* enter the effective date of the proposed reduction or termination.

***Note***: Static disabilities include disabilities* protected under [38 CFR 3.951(b)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_950.DOC) and [38 CFR 3.952](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_952.DOC), and
* for which no examination was scheduled or will be scheduled.

Reference: For more information on a Veteran’s failure to report for an examination, see M21-1MR, Part III, Subpart iv, 3.B.15.e. |

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| c. Addressing the Issue of Good Cause When a Veteran Fails to Report  | 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 Reasons for Decision … |
| some excuse or justification for failure to report | specifically why this does not constitute “good cause” under [38 CFR 3.655(a)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_655.DOC). |
| no excuse or justification for failure to report | that the evidence of record showed no good cause for the failure to report. |

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| d. Handling Failure to Report for Examination by a Veteran Receiving Pension | Use the table below if a Veteran is rated permanently and totally disabled for pension purposes and fails to report for a scheduled review examination. |

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| If … | Then prepare a … |
| the Veteran does not continue to be permanently and totally disabled | “*failure to report*”rating andnotice of proposed adverse action as required by M21-1MR, Part III, Subpart iv, 8.E.16.b. |
| the Veteran remains permanently and totally disabled | rating showing the disabilities at the static level. |

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| ***Note***: If there is no response within 60 days, the case is sent to authorization for appropriate action. |

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| e. Handling Failure to Respond to a Notice of Proposed Adverse Action | If the Veteran fails to respond to the notice of proposed adverse action provided under M21-1MR, Part IV, Subpart ii, 3.B, authorization discontinues or reduces the Veteran’s benefits in accordance with [38 CFR 3.655(c)(2)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_655.DOC).After the award has been processed and the Veteran has been informed of the action taken in the decision, prepare a rating decision for those cases in which there are static disabilities.On the decision* code all disabilities with their new, continuing and/or combined evaluations
* include noncompensable service-connected (SC) disabilities
* consider a compensable rating under [38 CFR 3.324](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_323.DOC), if applicable, and
* use the effective date the award was reduced as the effective date of the new combined evaluation based on static and/or protected disabilities.
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#### 17. 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)](#a17)
* [severing service connection due to diagnosis change](#b17)
* [severing service connection for a psychosis](#c17)
* [handling severance of service connection](#d17)
* [handling multiple issues in cases involving severance of service connection](#e17)
* [handling increases in compensation in cases involving severance of service connection](#f17)
* [preparing the final rating decision in cases involving severance of service connection](#g17)
* [handling severance proposals upon the Veteran’s death](#h17), and
* [handling severance of clearly illegal grants of service connection](#i17).
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| Change Date | June 7, 2012 |

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| a. Applying 38 CFR 3.105(a) and 38 CFR 3.105(d) | Do not take action to sever service connection pursuant to [38 CFR 3.105(a)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_105.DOC) and [38 CFR 3.105(d)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_105.DOC) unless all available relevant evidence, including complete service medical data and autopsy findings (if pertinent in death cases)* is of record, and
* shows that establishment was clearly and unmistakably erroneous.

***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.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_105.DOC) in order to sever service connection. [*Allen and Key v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bma)*,* 21 Vet. App. 54, 57 (2007).***References***: For more information on * the ten-year protection even when service connection is erroneous, see M21-1MR, Part III, Subpart iv, 8.C.9, and
* due process to sever service connection when clearly illegal/without legal entitlement see M21-1MR, Part III, Subpart iv, 8.E.17.i.
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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.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_105.DOC). |

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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 USC 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 | RVSR | 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.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_105.DOC). |
| 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 | RVSR | * Revises the rating, if required, to reflect the current evaluation of all SC disabilities and disposing of all other matters at issue
* files the rating in the claims folder, and
* returns the claims folder to the authorization activity.
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| 4 | VSR | 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 M21-1MR, 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 the reduced evaluation after severance of service connection, see [38 CFR 3.500(r)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_500.DOC). |

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17. Severance of Service Connection, Continued

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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, or
* make a proposal to sever service connection only if such a proposal, if finalized, will result in entitlement to a lesser benefit or the complete disallowance of a claim for death benefits.

***Notes***: * Proposals initiated but not finalized prior to notice of the Veteran’s death, upon notice of the Veteran’s death, will be reconsidered *de novo* taking into consideration all available new evidence, such as medical reports of last illness, death certificate, and autopsy report, if indicated.
* The claimant is notified of the severance proposal and given 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)* initiate severance
* do not apply the clear and unmistakable error provisions of [38 CFR 3.105(d](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_105.DOC)), and
* provide due process under [38 CFR 3.103](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_103.DOC)
* notify the claimant that there was no legal entitlement to the prior grant of benefits as service connection was clearly illegal.

***Example***: In [*Allen and Key v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bma)*,* 21 Vet. App. 54, 57 (2007) the court found that service connection was clearly illegal because the appellants were not Veterans. They had no qualifying active duty to establish basic eligibility to VA benefits.***References***: For more information on lack of legal entitlement, see* [*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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#### 18. 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* [jurisdiction in clear and unmistakable error (CUE) cases that sever service connection](#a18)
* [preparing the rating decision](#b18), and
* [handling cases of disagreement between the authorization and rating activities](#c18).
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| Change Date | August 1, 2006 |

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| a. 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 M21-1MR, Part III, Subpart v, 1.B
* line-of-duty determination under M21-1MR, Part III, Subpart v, 1.D.19, or
* willful misconduct determination under M21-1MR, 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 M21-1MR, Part III, Subpart v, 1.A.2, and
* CUE, see M21-1MR, 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 including the preparation of a rating decision proposing the severance of service connection under [38 CFR 3.105(c)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_105.DOC) and [38 CFR 3.105(d)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_105.DOC) 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. |