

# HOW TO PROPERLY ANALYZE THE COMBINED IMPACT OF DISABILITIES TO OBTAIN TDIU



# Introduction – What we will cover

- This training covers situations in which a veteran has more than one service-connected disabilities and is seeking a Total Disability Rating Based Upon Individual Unemployability (IU or TDIU).
- We will discuss two significant Court cases regarding whether the VA must conduct a combined assessment examination/opinion in such cases.
- We will also provide advocacy advice as to how to analyze a TDIU claim involving multiple SC disabilities.

# Relevant Law – *Geib* and *Floore*

- *Geib*: U.S. Court of Appeals for the Federal Circuit holds that VA is not required under the duty to assist to obtain a single medical opinion addressing the combined impact of all service-connected disabilities. 38 C.F.R. § 4.16(a).
- *Floore*: U.S. Court of Appeals for Veterans Claims (CAVC or Court) holds that although a combined-effects medical examination report/opinion is not required per se by statute, regulation, or policy, the Board of Veterans' Appeals (BVA or Board) is required to explain its decision regarding the combined effects of multiple disabilities.



# *GEIB v. SHINSEKI,* 733 F.3d 1350 (Fed. Cir. 2013)

- WWII veteran
- Suffers from multiple disabilities connected to WWII service
  - Frostbite
  - Hearing loss (artillery shell exploded in close proximity)
  - Tinnitus
- Effective Feb. 2005 - vet's combined evaluation was **70%**



# *GEIB v. SHINSEKI,* BACKGROUND

- April 2007: vet applied for TDIU
- Before 1984: worked as a supervisor in the carpet industry
- Aug. 1984 – Aug. 1989: vet worked as a self-employed carpet consultant (prior to becoming disabled)
- High school education and some industrial engineering courses between 1947 and 1951



# *GEIB v. SHINSEKI,* BACKGROUND

- BVA remanded the case to the RO to provide the vet with medical exams and re-adjudicate the TDIU claim
- April 2010: RO ordered (1) a cold weather exam to address severity of vet's bilateral trench foot, and (2) an audiological exam to evaluate his hearing impairment
- RO requested that each examiner describe “the extent of functional impairment due to the veteran’s service-connected **disability(ies)** and how that impairment impacts on physical and sedentary employment.”



# *GEIB v. SHINSEKI,* AUDIO EXAMINATION (May 2010)

- Audiologist confirmed vet suffered from hearing loss and tinnitus, with “poor” speech recognition in both ears
- Audiologist opined that vet’s hearing loss and tinnitus **do not prevent** him from seeking or maintaining gainful physical or sedentary employment within his community



# *GEIB v. SHINSEKI,* TRENCH FOOT EXAM (June 2010)

- At the trench foot exam, vet reported that his trench foot did not affect his prior job as a supervisor because he was able to sit at a desk, but that he was unable to **walk more than several miles** as a result of his condition.
- The medical examiner confirmed that vet suffered from trench foot and osteoarthritis.
- Examiner opined that the vet's employment would be affected by his trench foot, but he should be able to obtain and maintain gainful employment at a sedentary job.

# *GEIB v. SHINSEKI,* RO DECISION

- Dec. 2010: RO increased vet's hearing evaluation from 50% to 80% based on audio evaluation
  - Vet's combined disability rating increased to 90%
- The RO denied the TDIU claim



# *GEIB v. SHINSEKI,* BOARD OF VETERANS' APPEALS

- BVA determined that vet was not entitled to TDIU
  - The Board found that the medical evaluations indicated that vet “would be employable in the type of sedentary position that he had previously held”
  - Although it recognized that vet’s disabilities “do affect his employability,” the Board concluded that they “do not prevent him from being employed, and therefore entitlement to a TDIU is not warranted.”



# *GEIB v. SHINSEKI,* THE CAVC

- The CAVC affirmed the Board's decision
  - The Court rejected vet's argument that BVA was required to obtain a single medical opinion that addressed the impact of all his SC disabilities on employability
  - The Court further found that
    - BVA provided adequate rationale, and
    - BVA properly considered the combined effect of both medical evaluations when it concluded that vet was capable of sedentary employment



## *GEIB v. SHINSEKI,* THE CAVC

- The Court also found that the medical exams were adequate because they sufficiently described the impact of vet's hearing and trench foot conditions so as to allow the Board to make an informed decision regarding entitlement to TDIU.
- Vet appealed the CAVC decision to the Federal Circuit



# *GEIB v. SHINSEKI,* FEDERAL CIRCUIT DECISION

- *The Law-*
  - 38 C.F.R. § 4.15: VA may assign a total disability rating where the degree of impairment renders it impossible for the average person to maintain a substantially gainful occupation.
  - 38 C.F.R. § 4.16(a): Vet who suffers from 2 or more SC disabilities is entitled to be considered for total disability if at least 1 disability is 40% or more, and additional disability brings the combined rating to 70% or more.



# *GEIB v. SHINSEKI,* FEDERAL CIRCUIT DECISION

- *The Law-*
  - 38 C.F.R. § 4.16(b): vet who fails to meet these percentage standards may still qualify for an “extra-schedular” TDIU rating if the VA determines the vet is unable to secure employment by reason of his or her SC disabilities



# *GEIB v. SHINSEKI,* FEDERAL CIRCUIT DECISION

- *Vet's Argument-*
  - Vet argued that where a vet has multiple SC disabilities, VA must obtain a **single medical opinion** addressing the aggregate effect of all disabilities on employability
  - Vet argued VA must provide “full statement as to the veteran’s service-connected disabilities, employment history, education and vocational attainment and all other factors having a bearing on the issue.” 38 C.F.R. § 4.16(b)



# *GEIB v. SHINSEKI,* FEDERAL CIRCUIT DECISION

- *Vet's Argument-*
  - Vet contended that, when a medical opinion does not address all these factors, the VA may not fill in the gaps by providing its own “expert” opinion regarding the combined effect of the vet’s disabilities.



# *GEIB v. SHINSEKI,* FEDERAL CIRCUIT DECISION

- The Federal Circuit agreed with the CAVC that the VA is **not** required to obtain a single medical opinion that addressed the impact of all SC disabilities on the vet's ability to engage in substantially gainful employment.
- Although the VA is expected to give full consideration to “the effect of combinations of disability,” 38 C.F.R. § 4.15, **neither the statute nor the relevant regulations require the combined effect to be assessed by a medical expert.**



# *GEIB v. SHINSEKI,* FEDERAL CIRCUIT DECISION

- Applicable regulations place responsibility for the ultimate TDIU determination on the VA, not a medical examiner. *See* 38 C.F.R. § 4.16(a).
- VA is expected to give full consideration to “the effect of combinations of disability.” 38 C.F.R. § 4.15.
- Where neither the RO nor BVA addresses the aggregate effect of multiple SC disabilities, the record is not adequate to enable the vet to understand the precise basis for the decision on a TDIU claim and facilitate review. *See Young v. Shinseki*, 22 Vet.App. 461, 466-68 (2009).



# *GEIB v. SHINSEKI,* FEDERAL CIRCUIT DECISION

- In this case, the BVA's analysis was sufficient
  - CAVC found the exams were adequate and BVA considered both exams in assessing the combined effect of vet's disabilities.
- Vet failed to assert that it was clearly erroneous for BVA to conclude that both exams indicated that he would be employable in the type of sedentary position that he had previously held



# *GEIB v. SHINSEKI,* FEDERAL CIRCUIT'S CONCLUSION

- Federal Circuit held that CAVC correctly concluded that BVA's decision was adequate to facilitate review and inform vet of the reason for denying his TDIU claim
- Federal Circuit did not perceive a legal error in the proceedings, and therefore affirmed



# *FLOORE v. SHINSEKI*

## 26 Vet.App. 376 (2013)

- Claim involved TDIU entitlement due to multiple service-connected disabilities.
- Vet served from Oct. 1963 – Nov. 1966, and had 90% combined rating due to multiple SC disabilities
- Vet argued that, for a claimant with multiple SC disabilities, a medical opinion addressing the combined effects of all SC disabilities is required.
- Vet also argued that BVA inadequately explained why it denied TDIU entitlement.



# *FLOORE v. SHINSEKI*

## BVA DECISION ON APPEAL

- BVA found that vet met percentage rating requirements for TDIU in 38 C.F.R. § 4.16(a), but found that vet's SC disabilities did not render him unemployable.



# *FLOORE v. SHINSEKI*

## ARGUMENTS BEFORE CAVC

- Vet argued that combined-effects medical exam or opinion was necessary to render proper decision.
- Vet also argued that the BVA:
  - (1) provided no statement of reasons or bases for its determination that a combined-effect medical examination report was not required; and
  - (2) provided inadequate analysis as to why it determined that his SC disabilities did not prevent him from obtaining substantially gainful employment.



# *FLOORE v. SHINSEKI*

## CAVC ANALYSIS

- CAVC held that the need for a combined-effects medical examination report or opinion with regard to multiple-disability TDIU entitlement is to be determined on a case-by-case basis, and depends on the evidence of record at the time of decision by the RO or BVA

# *FLOORE v. SHINSEKI*

## CAVC ANALYSIS

- Combined-effects medical examination report or opinion is not required per se by statute, regulation, or policy to properly decide entitlement to TDIU for a veteran with multiple service-connected disabilities
- However, the BVA must adequately explain how the evidence supports the finding that the combined effects of multiple disabilities do not prevent substantially gainful employment. 38 U.S.C. § 7104(d)(1); *Beaty v. Brown*, 6 Vet.App. 532, 537 (1994).

# *FLOORE v. SHINSEKI*

## CAVC ANALYSIS

- Although the BVA recognized that cumulative effects of disabilities can prevent substantially gainful employment, the BVA addressed effects of vet's disabilities individually, and **never explained what the cumulative functional impairment of all his SC disabilities might be and why they do not prevent substantially gainful employment.**

# *FLOORE v. SHINSEKI*

## CAVC ANALYSIS

- The CAVC remanded the matter for further adjudication and with specific direction that BVA explain how the evidence of record supports findings regarding the cumulative effects of all of the vet's SC disabilities on his ability to obtain and maintain substantially gainful employment, or otherwise obtain the evidence necessary to do so.

# *FLOORE v. SHINSEKI*

## Judge Bartley Concurrence

- Judge Bartley wrote separately, stating that where there are multiple compensable disabilities, especially affecting different body systems, an expert opinion on overall functional impairment, including occupational impairment, caused by the combination of SC disabilities is necessary for an adequately reasoned decision regarding TDIU
- Judge Bartley cited 38 C.F.R. § 4.10, Manual M21-1MR (Part I, 1.C.7.c (Mar. 28, 2011)), and VA Training Letter 10-07 (Sept. 14, 2010).

# The Difference Between the Outcomes in *Floore* and *Geib*

- The CAVC remanded the appeal in *Floore* because the BVA never explained (1) what the cumulative functional impairment of all the veteran's service-connected disabilities might be, and (2) why they do not prevent substantially gainful employment.
- On the other hand, in *Geib*, the Federal Circuit found that the BVA's analysis was sufficient. Therefore, the Court affirmed the CAVC's affirmance of the Board's denial.



# Current State of the Law

- Unfortunately, Judge Bartley's interpretation in *Floore*, that a combined examination/opinion is necessary in all cases involving multiple service-connected disabilities (especially involving different body systems), didn't carry the day.
- Knowing the legal landscape is not very veteran-friendly, what can an advocate do?



# Advocacy Advice

## **ANALYZE THE CASE**

- If a veteran has multiple service-connected disabilities, and believes that the combination of disabilities makes him/her unemployable, advocates can help.
- Advocates should review the medical and lay evidence of record and speak with the veteran to determine the combination of disabilities that render the veteran unemployable.
- The following slides will provide an example with advocacy tips.

# Advocacy Advice

## **ANALYZE THE CASE - Example**

- For example, a veteran has a combined disability rating of 70 percent due the following SC disabilities:
  - 1) PTSD – 50%
  - 2) Residuals of a left total knee replacement – 30%
  - 3) Tinnitus – 10%
  - 4) Hearing loss – 10%
- The veteran last worked in the ground crew at an airport.
- The tinnitus and hearing loss do not affect his ability to work (he wore noise-cancelling headphones on the job).

# Advocacy Advice

## **ANALYZE THE CASE - Example**

- However, the veteran's PTSD and knee problems prevented him from performing his job due to flashbacks and an inability to walk any long distances.
- The veteran is 65 years old and also suffers from non-service-connected medical problems (diabetes and arthritis of the cervical spine).

# Advocacy Advice

## **ANALYZE THE CASE - Example**

- What would you do – in this case (or in any combined-impact case)?

# Advocacy Advice

## **OBTAIN LAY STATEMENTS**

- Lay statements – from the veteran, friends, family members, former co-workers - addressing the combined impact of the veteran's disabilities on his/her ability to work, would be helpful.
- These statements help lay the foundation for a favorable medical/vocational opinion.
- Lay statements can be submitted with the VA Form 21-8940.



# Advocacy Advice

## GET YOUR OWN MEDICAL OPINION

- Ideally, an advocate should obtain a private medical examination and opinion, *to include a vocational assessment*, addressing whether the service-connected disabilities alone render the veteran unable to perform substantially gainful employment.
- Advise the private doctor of the standard of proof (at least as likely as not), **and** that age and non-service-connected disabilities should **not** be considered in a TDIU claim.



# Advocacy Advice

## **CAN'T OBTAIN A PRIVATE OPINION?**

- If the advocate cannot obtain a private opinion, the advocate should ask the VA to obtain a combined-assessment medical opinion.
- Under the CAVC's decision in *Floore*, the VA is required to address whether a combined assessment examination/opinion is necessary.
- Therefore, asking for a combined-assessment medical opinion lobs the ball into the VA's court, and forces the VA to respond.



# Advocacy Advice

## **BOILERPLATE**

- If the advocate cannot obtain a private opinion, the advocate should submit a statement saying:

“I assert that the combined impact of my service-connected disabilities alone preclude me from working. I last worked in \_\_\_\_\_. Please obtain a vocational/medical opinion addressing the combined impact of my service-connected disabilities on my ability to work.”

# Advocacy Advice

## **BOILERPLATE (continued)**

- Add to this statement the citations relied upon by Judge Bartley in her concurrence in *Floore*:

“See 38 C.F.R. § 4.10, Manual M21-1MR (Part I, 1.C.7.c (Mar. 28, 2011)), and VA Training Letter 10-07 (Sept. 14, 2010).”



# Questions?