



**VIETNAM VETERANS
ASSOCIATION OF AUSTRALIA**

**SUBMISSION TO THE REVIEW COMMITTEE OF THE
VETERANS' ENTITLEMENT ACT**

Part 9

GENERAL COMPENSATION ISSUES

19 April 2002

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GENERAL COMPENSATION ISSUES

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GENERAL COMPENSATION ISSUES

Introduction

Aim This paper will focus upon issues that arise from the compensatory areas within the Veterans' Entitlements Act 1986 (Cth.)("the Act"). These are general issues of compensation not dealt with in previous VVAA papers.

Organisation The VVAA submission considers these issues under the following headings

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GENERAL COMPENSATION ISSUES

Pension vs Compensation

The issue Regular payments made by the Department of Veterans' Affairs (DVA) to veterans or widows as a result of war-caused death, injury or illness are termed '*pensions*'. The payments are in fact made in respect of **compensation** for such war-caused death, injury or illness. The difference in terminology may appear insignificant or trivial to the non-veteran, and it is the cause of considerable angst within the veteran community.

Definitions The Merriam-Webster¹ dictionary definition of "pension" as:
(1) a fixed sum paid regularly to a person: **a archaic** (2) a gratuity granted (as by a government) as a favor or reward; (3) one paid under given conditions to a person following retirement from service or to surviving dependents

The Collins English Dictionary² goes further, with one definition including the words "*any regular payment made on charitable grounds, by way of patronage or in recognition of merit, service etc.*"

Merriam-Webster defines "compensation (after dealing with the correction of an organic defect or loss by increased functioning of another organ) as:

- (1) something that constitutes an equivalent or recompense <age has its *compensations*>
- (2) : payment to unemployed or injured workers or their dependents.

Collins on the other hand defines "compensation" as:

- (1) the act or process of making amends for something.
 - (2) something given as reparation for loss, injury, etc; indemnity.
-

Discussion The differences may be small, but in terms of self-esteem, there is considerable argument to be made that the Veterans' Entitlement Act is about compensation, not about pensions. The biggest argument is in fact one of self-image, with many, particularly younger veterans, not wanting to see themselves as "pensioned off". The terminology is very important to them.

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¹ Merriam-Webster Online Dictionary, <http://www.m-w.com/cgi-bin/dictionary> accessed 29 April 2002

² Collins Dictionary of the English Language, Hanks P, (ed) , Collins Sydney, Auckland, Glasgow, 1979

GENERAL COMPENSATION ISSUES

Pension vs Compensation, Continued

Conclusion

The following payments should be redesignated as compensatory payments and not pensions, in the examples shown:

Examples	
Current	Proposed
Disability Pension	Disability Compensation Payment (DCP)
Above General Rate Pension	Above General Rate Compensation Payment (AGRC)
War Widow(er)s Pension	War Widow(er)s Compensation Payment

The VVAA proposes that the nomenclature of the Service Pension remain as it is, because this is not a compensatory payment.

GENERAL COMPENSATION ISSUES

Injury/Disease

Issue The definitions of disease and injury within the Act are incomplete to an extent that disadvantages veterans, particularly when existing injuries or illness are aggravated by accepted injuries or illness, or by the treatment thereof.

Definitions of “disease” The VEA (s5D) defines “disease” as:

- (a.) “Any physical or mental *ailment, disorder, defect or morbid condition* whether of sudden onset or gradual development; or
- (b.) the recurrence of such ailment, disorder, defect or morbid condition; but does not include:
- (c.) The aggravation of such an ailment, disorder defect or morbid condition; or
- (d.) a temporary departure from:
 - (i) the normal physiological state; or
 - (ii) the accepted ranges of physiological or biochemical measures that results from normal physiological stress (for example exercise or alcohol)...”

Definition of “injury” The VEA (s5D) defines “injury” as:
“...any physical or mental injury (including the recurrence of a physical or mental injury) but does not include:

- (a) a disease; or
- (b) the aggravation of a physical or mental injury”

Definition of “blindness” The VEA (s5D) defines “blinded in an eye” as:

- (a) the person has lost the eye; or
- (b) in the opinion of the commission, the eyesight of the person in that eye is so defective that the person has no useful sight in that eye.”

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GENERAL COMPENSATION ISSUES

Injury/Disease, Continued

Cause or effect, injury or disease?

There is evidence available where a world-renowned expert supported a proposition put forward by a veteran's advocate, but the SoP system prevented that evidence being brought forward. This has been discussed in Part 8 of the VVAA submission.

It is difficult to determine if 'obesity', 'stress' or 'smoking' are injuries or diseases because they imply cause rather than effect, and the latter is necessary to fulfil the 'ailment or condition' presumption. On the other hand, the VVAA believes that there are circumstances where these conditions may be identified as effects. There are other possibly claimable conditions, which are similarly on the margins. Conversely, ingrown toenails, myopia and astigmatism are arguably neither an injury nor a disease – and yet there are SoPs.

Conditions and their sequelae

An area worthy of some investigation is the distinction between conditions and their sequelae, as compared with the definition of the latter as separate conditions. The distinction has ramifications in terms of the maintenance of claims and limits to the acceptance of conditions.

S9 of the Act allows for three ways of connection. These are an event or 'occurrence' during eligible service, a condition that arose out of or attributable to eligible service and the permanent aggravation of a pre existing condition. The main issues at large in this area concern the level of connection (i.e. more than *dei minimus*), the temporary as compared with permanent presence of a condition and as to the sufficiency of causation itself i.e. more than a temporal connection. If there are any anomalies they would be for legitimate claims that fall outside of these three categories and the VEA committee may wish to investigate whether there are any such situations.

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GENERAL COMPENSATION ISSUES

Injury/Disease, Continued

Conclusion	<p>The VVAA is of the view that there are issues here that should be the subject of review, and that these include:</p> <ul style="list-style-type: none">• the inclusion of obesity as a disease;• the inclusion of stress as a disease;• the need for an objective test for blindness; and• greater consideration of sequelae – abnormal bodily conditions or diseases related to or arising from a pre-existing disease.
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GENERAL COMPENSATION ISSUES

Assessment

Requirement s19(5) of the Act requires the Commission to assess the relevant rate at which pension is payable and includes use of the- Guide to the Assessment of Rates of Veterans Pensions (5 Edition). The assessment period is that period between the lodgement of a claim and the date of determination.

Discussion Some veterans are reluctant to put their existing entitlement at risk by submitting a claim for a new injury or illness and having that existing entitlement re-assessed. The more desperate a veteran's current financial situation, the more unlikely they are to submit an additional claim. This appears to be an outcome that is contrary to the intent of the legislation.

Conclusion The VVAA is of the view that there are assessment issues that need to be reviewed. This includes the introduction of the option when submitting a new claim to declare existing accepted injury or illness exempt from review on the basis that it has not deteriorated or improved.

GENERAL COMPENSATION ISSUES

Special Rate Anomalies

Time out of the workforce, capacity, loss and genuinely seeking work

The VVAA considers that the Above General Rate provisions within the legislation are unnecessarily complex, have required considerable modification through case law and create anomalies in their application.

Sections 23, 24, 25 and 28, the above general rate sections of the Act have been litigated continuously for a lengthy period and the complicated case law that has developed has led to considerable difficulty for both decision makers and claimants alike. Anomalies are not an unexpected result of a complex set of rules and specific areas still have unsettled legal principles.

Examples are the variable interpretation of the definitions of 'capacity', 'genuinely seeking', 'loss' and the application of the time out of the workforce concept. Section 28 refers to capacity to undertake remunerative work and decision makers have continued to struggle with a 'reasonableness' based standard. The Courts have interpreted the legislation to mean that an account of capacity is limited to the elements contained in the Section, summarised as 'skills, qualifications and experience'. This implies that the Government of the day intended that the actual situation of the veteran was to be excluded, however this is an anomaly given the removal of the practical reality of a veteran's situation.

Where a veteran is unable to continue working because of war caused injury or disease; for many reasons only some of which may be within his control, he may take some time to reach the S.24(1)(a) threshold 70% rate for consideration of the above general rate. If during this process his time out of the workforce is of some length, then the way the legislation is framed in terms of the assessment period means that the 'time' itself becomes a relevant consideration for failure of the S.24(1)(b) 'alone' test. This presents a clearly anomalous situation for a veteran.

The S.24(1)(c) test for 'loss' is sufficiently complicated to be prone to anomalous results. An example of some of the relevant areas of contention follows.

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GENERAL COMPENSATION ISSUES

Special Rate Special Rate Anomalies, Continued

Time out of the workforce, capacity, loss and genuinely seeking work,
continued

The issue arises as to whether a veteran suffered a "loss" of salary or wages by reason of his incapacity from his war-caused disease, that he would not be suffering if he were free of that incapacity, as required by subsection 24(1)(c). If it is accepted that for example a veteran suffered a loss of \$50 a week as a consequence of ceasing his work, this raises the question of whether that is the extent of his loss, and if so, whether it is sufficient to satisfy subsection 24(1)(c).

Dealing with the second question first, one view is that the loss of \$50 a week is not a real or substantial loss. It may be submitted that the veteran's real and substantial loss of earnings arose as a consequence of his incapacity to continue to be engaged in work. Thereafter, the socio economic conditions may prevent him from obtaining suitable employment and receiving reasonable remuneration, and it may also be contended that he made no real effort to seek substantial remunerative employment.

Starcevich and Repatriation Commission (1987) 76 ALR 449 has been cited for guidance as to what is meant by "loss" in section 24. In that case Fox J said (at p. 454): It seems to me that the intention of para. 24(1)(c) is that the applicant must have suffered substantial loss of remuneration consequent alone upon the incapacity referred to in paras. 24(1)(a) and (b). ... the loss must be real, in the sense that the applicant cannot rely upon any remunerative work that he has undertaken in the past, but it would be unnecessarily restrictive to assess the loss by reference only to the last remunerative work undertaken before the applicant's inability to work became complete. In my opinion, a veteran's entitlement to a pension under section 24 may be based on his being prevented from continuing to undertake substantial remunerative work that he has undertaken in the past, even if that work was followed by work of a different type before the veteran ceased work altogether.

According to Fox J para (c) requires the veteran to satisfy three criteria:

the veteran (must be) prevented from continuing to undertake remunerative work that he was undertaking;

condition (1) above (must be) by reason alone of the incapacity, from war-caused injury or war-caused disease (to which s.24(1)(b) relates);

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GENERAL COMPENSATION ISSUES

Special Rate Anomalies, Continued

Time out of the workforce, capacity, loss and genuinely seeking work, continued

by reason of condition (I) above, the veteran (suffers) a loss of salary or wages or earnings on his or her own account.

If the veteran satisfies all three criteria. His loss is "real" in the sense referred to by Fox J. Further, according to Sackvill J in *Repatriation Commission v Sheehy* (1995) 133 ALR 654, Fox J's reference to a "real" loss indicated that he "had in mind remunerative work that had continued for more than a very short period". 'There is nothing in the legislation or the cases cited to me that the remunerative work must be other than part-time, or that loss of salary must arise from incapacity to work other than on a part-time basis. Nothing in the Act suggests the loss has to be substantial or significant' (*Cavell and Repatriation Commission* (AAT 2891, 19 September 1986) per Senior Member McMahon). In any event, whether \$50 a week is a "substantial loss" is a subjective matter. To the veteran it represents 100% of his earnings on his own account.

The "loss" referred to in the Act is not only the financial loss suffered because of the loss of existing employment but also includes the loss caused by the inability to obtain employment (*Banovich v Repatriation Commission* (1986) 69 ALR 395 at 402). Senior Member McMahon (as he then was) stated in *Cavell* at p. 19:

A loss must mean a diminution of what the veteran might reasonably be expected to earn had he not been incapacitated. I see no reason to put an unnecessary gloss upon the Act by requiring the veteran to quantify that loss beyond a certain minimum amount.

It was noted in *Banovich* at 402-3, that: ... a member's loss of particular employment for a reason unrelated to a war disability would never destroy a member's subsequent entitlement to claim a special rate pension; the question would remain, at the relevant date for determination of a claim, whether the member was prevented by his or her war-related incapacity - and by that incapacity alone - from continuing in that field of remuneration activity.

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GENERAL COMPENSATION ISSUES

Special Rate Anomalies, Continued

Application of subsection 24(2)

Para. (b) of subsection 24(2) applies to a veteran under the age of 65 years who has not been engaged in remunerative work. In the case of *Sheehy Sackville J* at 664, pointed out that section 24(1)(c) is satisfied only if the veteran is prevented from continuing to undertake "remunerative work", but that when the veteran is under the age of 65, "it is enough if he or she *is prevented from obtaining* remunerative work by reason of the war-caused incapacity: s.24(2)(b)" (emphasis added). This is consistent with the Minister's Second Reading Speech in which he said: "The special or TPI rate pension was designed for severely disabled veterans of a relatively young age who could never go back to work and could never hope to support themselves or their families or put away money for their old age".

The thrust of this subsection is to replace the 'alone' test with the more generous ameliorating 'substantial cause' test for veterans under 65 years. A significant problem with the application of this subsection is the drafting of the 'rider' that requires the veteran to have been 'genuinely seeking to engage in remunerative work'. It is the VVAA's submission that if the point of this rider was to ensure that the veteran had the intention to work, the wording is an unreasonable application of this check.

Conclusion

The VVAA contends that there is sufficient evidence of anomalies created through the application of Sections 23, 24, 25 and 28 of the Act for the Committee to consider substantial review of these sections.

The difficulties that these anomalies create apply to both claimants and decision makers at all levels. Departmental Administrative Guidelines are created to try and establish the ground rules, and unless these are also crafted carefully a situation is created where there are opportunities for further complication.

The VVAA concludes that this part of the legislation is long overdue for review, and that this review should have as outcomes the preservation of the beneficial provisions of the legislation and clear demarcation points to assist claimants, veteran and ex-Service representatives and decision-makers.

GENERAL COMPENSATION ISSUES

Allowances

Clothing allowance Accepted disabilities may lead to an abnormal requirement in clothing and footwear, and the contention is that the allowance should compensate for actual expenditure when this occurs. For example, a disability that leads to obesity will lead to increased expenditure on clothing in order for the veteran to lead a 'normal' lifestyle.

Funeral benefit The Association would like to see consideration of a scheme which would permit the recipient of a 100%, Above General Rate Pension or Extreme Disablement Allowance the opportunity to obtain a subsidised, pre-paid funeral entitlement for their spouse or partner. The recipients are not in a position to put aside substantial savings to meet such costs. This benefit should be means-tested and require at least a 50% input from the service pension recipient.

Rent allowance Rent allowance should be NOT counted for the asset test and should be available to veterans who are in rental accommodation and are in receipt of Loss of Earnings Allowance when hospitalised for recognised disabilities or in convalescence. This is justified in that the veteran would not be receiving his normal income and thus an extra financial burden would be placed on the family unit by not having the benefit of this allowance.

Travel allowance Many veterans, and particularly those with accepted psychiatric conditions are in the habit of travelling for at least some period during the year. Such travel exposes them to new environments, increases the opportunity for socialisation, and for many, provides the opportunity to repair relationships with their spouse or partner.

Medical treatment does not (or should not) cease during travel, particularly when counselling or specialist medical treatment are involved. When veterans are away from their normal place of abode, travelling allowance is not payable.

The VVAA considers that this is an issue which should be reviewed, with the aim of establishing procedures which will apply to those not in their usual place of residence, but who are required to travel additional distances in order to obtain treatment.

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GENERAL COMPENSATION ISSUES

Allowances, Continued

**Temporary
incapacity
allowance**

The demands placed upon Australian hospitals today are such that the treatment regimes include rapid discharge from hospital, in some cases as soon as the patient is ambulatory. Much more pressure is put upon the patient's family to provide the recuperative environment at home, rather than in an institution. The entire social and treatment environment has changed dramatically, and the VVAA believes that the 28 day qualification period is not now viable.

The VVAA proposes that the 28 day qualification period be amended to permit the allowance to be paid from the start of hospitalisation to the end of the home-care period.

GENERAL COMPENSATION ISSUES

Recommendations

Recommendations

12. The VVAA recommends that the Veterans' Entitlement Act Review Committee propose in its report that:

- (a) the term "pension" be replaced with "compensation" wherever appropriate within the Act;**
- (b) obesity be declared a disease in the same way as other conditions that result in overweight are diagnosed;**
- (c) stress be declared a condition that is manifested within other diagnosed conditions such as IHD, hypertension and psychiatric conditions;**
- (d) that a defined level of vision loss be used as a test for being "blind";**
- (e) veterans be permitted to flag existing conditions as unchanged and remove them from reassessment when submitting new claims; and**
- (f) that allowances be reviewed to achieve the results listed in this paper.**

13. The VVAA recommends that the Veterans' Entitlement Act Review Committee consider in detail the anomalies created by the application of Sections 9, 23, 24, 25 and 28 of the Act.
