

Determining Intermediate and Special Rate Cases

Changes to delegated authority

The Repatriation Commission has decided to withdraw its universal delegations for Claims Assessors at the APS5 level to determine a rate of disability pension. The delegations have been re-issued with the change that Intermediate and Special Rate are to be determined by a senior delegate at the APS6 level or higher. See Instrument Volume 1/01/04, Delegation of Powers and Functions of the Repatriation Commission (attached).

With the exception of this class of cases, delegates at the APS5 level have the same delegations as before.

Background

A recent examination of the files of Special Rate veterans with psychiatric disabilities suggested that existing policy and guidelines relating to the determination of Special Rate cases are not being applied correctly in all cases.

The Commission is concerned that decision making in this area is of the highest standard.

The Repatriation Commission has therefore decided that Team Leaders or Managers at the APS6 level or higher are to determine all decisions where Intermediate or Special Rate (both TTI and TPI) is under consideration.

This Instruction does not direct or suggest any particular outcome for a decision. Rather it is directed towards ensuring that these decisions are made by an experienced and senior officer to ensure both consistency and transparency in the decision making process.

Why not simply have pre-decision checks?

The Commission has considered the alternative possibility of instituting pre-decision checks by a senior officer, however legal advice indicates that pre-decision checks of determinations prepared by Claims Assessors may offend against the requirement that a decision maker must exercise an independent discretion, rather than acting on the instructions of others (s.5(2)(e) of the *Administrative Decisions (Judicial Review) Act 1977*).

Procedures

Henceforth, Intermediate and Special Rate decisions (whether granted or refused) are to be made by senior delegates (Team Leaders or Managers) **in their own names**.

Thus the standard procedure for these cases would be:

- The Claims Assessor investigates the claim and writes up the recommended decision;
- The Team Leader/Manager considers the recommended decision and the evidence; and
- The Team Leader/Manager either sends the matter back to the Claims Assessor for further investigation or proceeds to make a determination in accordance with current policy and guidelines.

The Team Leader/Manager may decide to undertake their own further investigation.

Under this system, improved quality of Intermediate and Special Rate decisions is expected.

Mark Johnson
Branch Head
Disability Compensation
31 March 2004



COMMONWEALTH OF AUSTRALIA

VETERANS' ENTITLEMENTS ACT 1986

DELEGATION OF POWERS AND FUNCTIONS
OF THE REPATRIATION COMMISSION

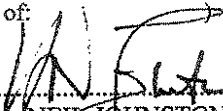
The Repatriation Commission, having exercised its power under subsection 213 of the *Veterans' Entitlements Act 1986* (the Act) to delegate its powers under section 21A, paragraph 24(2)(b) and section 25 of the Act to persons appointed or engaged under the *Public Service Act 1999* who are at any time exercising or performing the duties of an APS Level 5 (DVA Band 2) in the National or any State Office of the Department of Veterans' Affairs, now hereby exercises its said power under section 213 of the Act to:

- (a) revoke all such delegations; and
- (b) subject to (c) delegate to all such persons its powers in section 19 of the Act.
- (c) such persons shall not be empowered to exercise the power in subsection 19(5B) of the Act in any circumstances when such an exercise of the power concerns sections 23, 24, or 25 of the Act.

This instrument will take effect upon its execution.

Dated 31 March 2004

The Seal of the
Repatriation Commission)
was affixed hereto in the)
presence of:)


NEIL JOHNSTON
PRESIDENT


IAN CAMPBELL
DEPUTY PRESIDENT


SIMON HARRINGTON
COMMISSIONER

REPATRIATION COMMISSION GUIDELINES

These Guidelines are not directives and should not be used as a substitute for the proper application of the law to the particular circumstances of each case.

The Guidelines set out the Repatriation Commission's position on determining whether impairment affecting ability to work should be considered permanent or temporary. They are based on the words of the legislation. The Guidelines indicate the way in which the Commission believes the legislation should be applied.

PERMANENT VS TEMPORARY INCAPACITY IN DECISIONS ON SPECIAL RATE OR TEMPORARY SPECIAL RATE

Purpose

To clarify the circumstances under which inability to work due to incapacity from accepted conditions may be considered temporary rather than permanent for the purposes of determining a veteran's eligibility for a Temporary Special Rate or Special Rate pension.

Background

A recent examination of the files of Special Rate veterans with psychiatric disabilities has led the Commission to review past guidance to delegates on the determination of permanent as compared with temporary incapacity.

A previous Advisory No 10/2000 indicated that "permanency (of incapacity) should be conceded unless the weight of evidence points to the probability of an improvement".

An examination of recent cases indicates that this is being interpreted by some delegates as meaning that an opinion of a specialist that a veteran:

- **may** be able to return to work after a period of time, or
- **should** be re-assessed for their ability to work at some future time

falls short of stating that the veteran will **probably** be able to return to work after a stated period and that, short of this degree of certainty, he/she should be granted Special Rate.

It is the Commission's view that the legislation provides an evidence-based test to determine whether a veteran's incapacity to work more than 8 hours per week is permanent and that there is no legal presumption that can be applied in favour of either permanent or temporary incapacity.

A decision maker is required to properly investigate a claim and to apply the correct legislative test. The Commission reminds its delegates that the standard of proof required in determining assessment of rates of pension, including the Special and Intermediate Rates, is reasonable satisfaction or, as more commonly known, the balance of probabilities.

As stated in Commission Guideline CM5011, *Special Rate of Pension*:

For the 'degree of incapacity' to be permanent, it must be likely to continue indefinitely.

If the evidence is not clear, then a decision maker should seek further clarification from the author of any medical reports or seek a second opinion.

If, after giving due weight to the medical evidence available (including the specialist's report) there is a reasonable basis for doubt as to whether the incapacity is likely to be permanent, then a grant of Temporary Special Rate should be made.

Action

On the evidence of recent cases, it is not unusual for a specialist to be less than precise regarding the likelihood of future employability. If the delegate is not satisfied that the specialist has adequately addressed this point, it requires clarification.

Notwithstanding that a grant of Special Rate may allow other benefits to be granted (eg, Invalidity Service Pension), these possibilities **are not** relevant considerations in the assessment of the appropriate rate of disability pension.

It should be noted in this regard that the Government's decision to introduce a Defence Force Income Support Allowance (DFISA) means that veterans who are granted a Temporary Special Rate pension and obtain income support from Centrelink will receive broadly comparable benefits to veterans who receive both Special Rate and Service Pension.

S24 determinations are to be made **only** on the basis of the criteria stated in the VEA. If a veteran fulfils each of the criteria set down in S24, then he or she should be granted a Special Rate pension. Otherwise such a grant would be an unlawful one.

If a decision is made to grant Temporary Special Rate pension, a review period should be set. It would be unusual for this period to be longer than 2 years. Assessments that indicate the need for repeated reviews should be subject to particularly close examination.

Neil Johnston
PRESIDENT
31 March 2004

REPATRIATION COMMISSION GUIDELINES

These Guidelines are not directives and should not be used as a substitute for the proper application of the law to the particular circumstances of each case.

The Guidelines set out the Repatriation Commission's position on investigating and determining claims involving more than one psychiatric diagnosis. They are based on the words of the legislation. The Guidelines indicate the way in which the Commission believes the legislation should be applied.

DEALING WITH CO-MORBID PSYCHIATRIC CONDITIONS

Background

A recent examination of the files of veterans with psychiatric disabilities showed that the treatment of co-morbid psychiatric conditions is not consistent across State Offices.

The Repatriation Commission has directed that policy advice clarifying the method of dealing with co-morbid psychiatric conditions be circulated to its delegates.

The Issues

The examination of cases with co-morbid psychiatric conditions highlighted two main areas of concern relating to possible subsequent eligibility for Special Rate consideration:

- Entitlement issues relating to the application of S24(1)(c) of the VEA which deals with the 'alone' test; and
- Assessment issues relating to S24(1)(a)(i), which specifies the minimum degree of service-related incapacity which must exist before Special Rate pension can be granted.

Entitlement issues

A veteran may submit a claim for a specific psychiatric condition (eg PTSD) or for the more general 'emotional and behavioural disorder'.

In most cases, the claimed condition has not yet been diagnosed by a clinical psychiatrist in accordance with the "Diagnostic Guidelines for Psychiatric Assessment and Reports for the Department of Veterans' Affairs".

The veteran is then sent to a clinical psychiatrist for diagnosis and assessment of his psychiatric condition.

The psychiatrist frequently diagnoses more than one psychiatric condition, which may or may not include the original claimed condition. For example, a veteran who claims for PTSD may be diagnosed with PTSD **plus** depressive disorder **plus** alcohol abuse.

In all cases where more than one psychiatric disorder is diagnosed, the VEA requires that each diagnosed condition BE INVESTIGATED AND DETERMINED SEPARATELY.

This investigation and determination should be carried out in accordance with Departmental Guidelines as set out in "The Second Opinion Protocol – Administrative Processes – Psychiatric Cases".

If this approach is **not** taken, in any subsequent consideration of eligibility for an Above General Rate pension it may be difficult to make due allowance for the 'alone' test in S24(1)(c) of the VEA and a decision to grant an Above General Rate pension may be made unlawfully.

Assessment Issues

It can happen that in cases where a veteran is diagnosed with multiple psychiatric conditions, **not all of the diagnosed psychiatric conditions are accepted** as being causally related to VEA service.

In these (admittedly rare) cases, the impairment assessment from the diagnosing psychiatrist may only reflect the veteran's overall psychiatric impairment and an estimation of the relative contribution of each condition may not be provided.

For example, in one case a veteran with no physical disabilities ceased work due to his psychiatric condition. This was subsequently diagnosed as 3 separate conditions. After all 3 were rejected at the primary level, the VRB accepted one psychiatric condition but rejected the other two. The psychiatrist had assessed the overall psychiatric impairment without specifying the relative contribution of each of the 3 co-morbid conditions, and this overall impairment rating was used to assess his eligibility for Special Rate consideration. It is not clear that had the total impairment been attributed to each of the 3 conditions, the veteran would have been granted pension at the Special Rate.

In cases where a veteran has both accepted and non-accepted psychiatric conditions, the total psychiatric impairment assessment should be apportioned appropriately in consultation with the diagnosing and/or assessing psychiatrist.

Neil Johnston
PRESIDENT

31 March 2004

REPATRIATION COMMISSION GUIDELINES

CM5574 - Permanent vs Temporary Incapacity in Decisions on Special Rate or Temporary Special Rate

These Guidelines are not directives and should not be used as a substitute for the proper application of the law to the particular circumstances of each case.

The Guidelines set out the Repatriation Commission's position on determining whether impairment affecting ability to work should be considered permanent or temporary. They are based on the words of the legislation. The Guidelines indicate the way in which the Commission believes the legislation should be applied.

PERMANENT VS TEMPORARY INCAPACITY IN DECISIONS ON SPECIAL RATE OR TEMPORARY SPECIAL RATE

Purpose

To clarify the circumstances under which inability to work due to incapacity from accepted conditions may be considered temporary rather than permanent for the purposes of determining a veteran's eligibility for a temporary special rate or special rate pension.

To provide the Commission's views on the period of temporary payment at the special rate and on setting a reversionary rate at the end of this period.

Background

A recent examination of the files of special rate veterans with psychiatric disabilities has led the Commission to review past guidance to delegates on the determination of permanent as compared with temporary incapacity.

A previous Advisory No 10/2000 indicated that "permanency (of incapacity) should be conceded unless the weight of evidence points to the probability of an improvement".

An examination of recent cases indicates that this is being interpreted by some delegates as meaning that an opinion of a specialist that a veteran:

- **may** be able to return to work after a period of time, or
- **should** be re-assessed for their ability to work at some future time

falls short of stating that the veteran will **probably** be able to return to work after a stated period and that, short of this degree of certainty, he/she should be granted special rate.

It is the Commission's view that the legislation provides an evidence-based test to determine whether a veteran's incapacity to work more than 8 hours per week is permanent and that there is no legal presumption that can be applied in favour of either permanent or temporary incapacity.

A decision maker is required to properly investigate a claim and to apply the correct legislative test. The Commission reminds its delegates that the standard of proof required in determining assessment of rates of pension, including the Special and Intermediate Rates, is reasonable satisfaction or, as more commonly known, the balance of probabilities.

As stated in Commission Guideline CM5011, *Special Rate of Pension*:

For the 'degree of incapacity' to be permanent, it must be likely to continue indefinitely.

If there is a clear expectation of improvement, for example following surgical correction, other treatment or lifestyle change, the degree of incapacity would not be considered permanent. If the evidence is not clear, then a decision maker should seek further clarification from the author of any medical reports or seek a

second opinion.

If, after giving due weight to the medical evidence available (including the specialist's report) there is a reasonable basis for doubt as to whether the incapacity is likely to be permanent, then a grant of temporary special rate should be made.

Setting the period of temporary payment

Subsection 25(1) provides that the Commission shall determine the period during which, in its opinion, that incapacity is likely to continue. This period should be set when a delegate of the Commission makes a decision to grant a disability pension at the temporary special rate.

The period may be as short as several months, but it would be unusual for it to be longer than 2 years. The period should take account of the available medical advice on when the veteran should expect to review their circumstances with their medical adviser. Cases in which there have been repeated grants of disability pension at the temporary special rate should be subject to particularly close examination.

Reversionary Rate following temporary payment

Once the end of the period of temporary payment at the special rate is reached, the legislation is silent on what rate of disability pension should be paid.

The Commission believes that for equity for veterans and for the practical administration of the VEA that when a decision is made to grant temporary payment at the special rate the veteran is also advised of the rate of disability pension that will be paid after the end of the period.

This will provide certainty for the veteran so that, depending on their circumstances, they have the opportunity to lodge a further application for either the special rate or some other rate greater than the reversionary rate. Veterans should be told of their entitlement to lodge such an application when advised of temporary payment at the special rate after which the onus is on the veteran to initiate a review in consultation with their medical advisers if that is appropriate.

Action

On the evidence of recent cases, it is not unusual for a specialist to be less than precise regarding the likelihood of future employability. If the delegate is not satisfied that the specialist has adequately addressed this point, it requires clarification.

Notwithstanding that a grant of special rate may allow other benefits to be granted (eg, Invalidity Service Pension), these possibilities **are not** relevant considerations in the assessment of the appropriate rate of disability pension.

It should be noted in this regard that the Government's decision to introduce a Defence Force Income Support Allowance (DFISA) means that veterans who are granted a temporary special rate pension and obtain income support from Centrelink will receive broadly comparable benefits to veterans who receive both special rate and service pension.

S24 determinations are to be made **only** on the basis of the criteria stated in the VEA. If a veteran fulfils each of the criteria set down in S24, then he or she should be granted a special rate pension. Otherwise such a grant would be an unlawful one.

When granting temporary payment at the special rate, a period during which it is to be paid should be determined, a reversionary rate specified, and advice provided that further action concerning the assessment of a rate of pension must be initiated by the veteran.

signed

Neil Johnston
PRESIDENT

8 April 2004

Temporary Rates of Disability Pension

Purpose	<p>This Departmental Instruction outlines the action to take when there is clear evidence that an impairment which results in a grant of a pension under the <i>Veterans' Entitlements Act 1986</i> (VEA) is of a temporary nature.</p> <hr/>
Background	<p>On 8 April 2004, a Repatriation Commission Guideline, "<i>CM5574 - Permanent vs Temporary Incapacity Decisions on Special Rate or Temporary Special Rate</i>", was issued. This guideline clarified the circumstances under which inability to work due to incapacity from an accepted condition may be considered temporary rather than permanent. The Guideline also discussed the process to be used for setting a reversionary rate in these circumstances.</p> <p>Following the release of this Guideline, several State Offices queried whether the Repatriation Commission also has the power to make a grant of Intermediate Rate disability pension for a fixed period of time (ie. on a temporary basis).</p> <hr/>
Legal Advice	<p>Legal Service Group have confirmed that, unlike the provisions of s. 24(1)(b), a veteran could qualify for the Intermediate Rate of disability pension even if the veteran was not suffering from a permanent incapacity. However, once granted a pension at the Intermediate Rate, section 24A states that the pension remains payable at that rate unless the veteran becomes eligible for a Special Rate disability pension or unless s. 24A(1)(a) or (b) apply.</p> <p>Therefore, unlike Special Rate or Temporary Special Rate cases, the Repatriation Commission is unable to grant a disability pension at the Intermediate Rate for a fixed period by applying an automatic reversionary rate when the disability is expected to improve. Any attempt to limit a grant of Intermediate Rate disability pension in this manner would be contrary to s.24A of the VEA.</p> <hr/>
Powers of Review	<p>Section 31(6) of the VEA allows the Repatriation Commission wide ranging powers to review decisions regarding the grant of a disability pension or the rate at which the disability pension should be paid.</p> <p>Section 31(6)(a) enables the Repatriation Commission to cancel, suspend or vary the rate of a pension having regard to any matter affecting the payment of the pension which was not before the decision maker when the decision to grant or vary the amount of pension was made. In addition, s. 31(6)(d) allows the Commission to cancel or vary the rate of pension payable to a veteran on the basis that s.24A is applicable.</p> <hr/>

**Proposed
Action**

On the evidence of recent cases, it is not unusual for a specialist to be less than precise regarding the 'permanency' of an incapacity and any impact on a veteran's future employability.

Where claims assessors are reasonably satisfied that the impairment giving rise to the grant of pension is of a temporary nature, the decision letter detailing the rate of pension granted should include a paragraph stating that a review of the rate of pension will occur on a given date. This includes grants of Intermediate Rate disability pension. Any such review should be conducted under s.31(6) of the VEA and should determine whether the disability pension should remain payable at the rate initially set.

The process of implementing this review is a matter for each individual State but will depend on whether the initial rate set is at the General Rate or Above General Rate of disability pension.

**Effect on the
General Rate of
Disability
Pension**

Where claims assessors are reasonably satisfied that the impairment giving rise to the grant of a General Rate of disability pension is of a temporary nature, a similar review process should also be undertaken.

Carolyn Spiers
Branch Head
Veterans' Compensation Branch