

COMPENSATION AND REHABILITATION – *VETERANS' ENTITLEMENTS ACT 1986*¹

Introduction

Following on from my introductory article in Winter 2011's *Wings*, I'll address some of the key provisions of the *Veterans' Entitlement Act 1986* (VEA) in this article.

Each claim is determined by a Delegate of the Repatriation Commissioner (a Claims Officer within the Department of Veterans' Affairs), individually, on its merits, and within the provisions of the current VEA (which is amended from time to time). Therefore, please regard this article as an overview – the complexity of the VEA does not allow all its provisions, as they may relate to your circumstances, to be addressed in a short article.

Before starting to prepare a claim, I strongly advise that you have the support of a trained and authorised Pension Officer or Advocate. (Practitioner's indemnification requires that their training is current, they are practicing at the level to which they are trained, and are authorised by an Ex-Service Organisation to practice.) The Division Secretary or Welfare Officer in your State can help you locate a qualified practitioner.

Eligibility - Who is Covered by the VEA?

The VEA specifies who is covered by its provisions (viz, who is *eligible* to claim under the VEA). Broadly, those covered include:

- **Members of the Defence Force.** A *Member of the Defence Force* is a person (including someone who has died) who had three years peacetime *continuous, full-time service* (CFTS) in the RAN, Army or RAAF between 7 December 1972 and 7 April 1994. Periods of AWOL, detention, or leave without pay are not counted as *effective service*.
- **Veterans.** A *veteran* is a person who served in an operational area (viz, was exposed to the enemy) during both World Wars, Korea, the Malayan Emergency and Confrontation in Malaysia, Vietnam, North East Thailand, and many post-1998 deployments (a number of which involved service with the forces of another country). Your supporting practitioner will have full list of the campaigns that accrue *operational service*.
- **Member of a Peacekeeping Force.** To be a *Member of a Peacekeeping Force* you will have served outside Australia as an Australian member of a Peacekeeping Force, or in an Australian peacekeeping contingent. Some members of a peacekeeping force also rendered operational service and are therefore also *veterans*.
- **Dependants of veterans and members.** Where a *veteran* or *member's* death was war or defence-caused, the widow(er) or partner and the orphans are eligible to claim pension entitlements under the VEA. If the veteran was a POW or suffering a level of disability that attracted a Special Rate Pension or the Extreme Disablement Adjustment (see below), the surviving spouse/partner will automatically receive a War Widow(er)'s Pension, and dependant children an Orphan's Pension. Incidentally, recipients of a War Widow(er)'s or Orphan's Pension also receive a Gold Card - for an orphan, until 16 years of age, or 25 if still a fulltime student.

- People Subject to a Ministerial Determination. From time to time the Minister for Veterans Affairs makes a determination that certain people who were not members of the Defence Force but were employed by the Commonwealth are covered by the VEA. Examples include war artists, photographers and correspondents, entertainers, and Red Cross and Salvation Army members.

This all seems pretty cut and dried; however, there are a few wrinkles:

- Pre-7 December 1972 Service. Provided your period of service was effective and unbroken and continued past 7 December 1972 (the Start Date of the VEA), service before that date will contribute to the three-year CFTS requirement.
- Pre-1986 Service. A member of the Defence Force who enlisted before the Commencement Date of the VEA (22 May 1986) and has unbroken service until after its Termination Date (7 April 1994), can claim under the VEA for war-caused injury, disease or death until 30 June 2004. (These veterans are also eligible to claim under the MRCA 2004 for the period 7 April 1994 to 30 June 2004.)
- Medical Discharge. If you were discharged on medical grounds between the Start and Termination Dates of the VEA before you had accrued three years continuous full-time service you are still deemed to be a *member* of the Defence Force and therefore eligible to claim under the VEA.

Fact Sheet DP07 provides more detail on Eligibility (see the Winter 2011 issue of *Wings* (page 54) to find how to access the < Fact Sheets > link on the DVA website. (As that article says, just search for < Department of Veterans' Affairs > in your favourite browser, and open the DVA homepage.)

Liability - What does the VEA require be established?

The Commonwealth, as your employer, has an obligation to provide a *safe* workplace. If you are injured, suffer disease and/or die **as a result of your service**, the Commonwealth is liable under the VEA to compensate you and/or your dependants and to provide other benefits. This is **the** key provision. It is not sufficient that you have an injury or disease, or to have died. For a claim to be successful, you **must** establish at the applicable standard of proof, that the injury, disease and/or death **is related to** your service. Let's have a quick look at the standards of proof.

Needless-to-say defence, and especially war, service bring with them risks that are not encountered in almost any other occupation. The standards of proof that will be applied by the DVA Claims Officer reflect this reality. Two standards of proof are used:

- Reasonable Hypothesis. Where an injury, disease or death is suffered by a *veteran* (viz, a claimant with operational service), your claim will be subject to the *reasonable hypothesis* standard of proof. If you establish a causal relationship, your injury, disease or death is deemed to have been *war-caused*. As the level of risk in a war zone is much greater than other occupations, a so-called *reverse standard of proof* is applied: the VEA requires that the Delegate accept the existence of a causal relationship unless satisfied that the hypothesis you put forward is not reasonable.
- Balance of Probabilities. Where an injury, disease or death is suffered by a *member* of the Defence Force (viz, on peacetime service), it is subject to the *balance of probabilities* standard of proof. This is the standard of proof applied by civil court of law. The VEA requires that the Delegate determine whether *it is more probable than*

not that the injury, disease or death was caused by your service. If your claim establishes a causal relationship, your injury, disease and/or death is deemed to have been *defence-caused*.

Entitlements - What Benefits are Available?

Once the Delegate is satisfied that a causal relationship exists, he/she will determine the level of compensation to which you or your eligible dependants are entitled. In essence, the benefits provided are intended to enable you or them to lead a life that is as fulfilling as possible, given your physical and material circumstances. In brief the VEA provides for the following benefits:

- Pensions.
- Health Care.
- Allowances.

As pointed out in my introductory article, in addition, a range of other home modification and household services are available, albeit that some are outside the provisions of the VEA. The Welfare Officer at your Branch or local Ex-Service Organisation can guide your access to other benefits to which you may be entitled.

Pensions

The range of pensions covered by the VEA include the following:

- Disability Pensions. The level of Disability Pension that you will receive will depend on your level of *incapacity* – this is a combination of the level of disability that your injury or disease causes and the consequential effects on your quality of life. As mentioned in Winter 2011's *Wings* (page 56), the Delegate will use GARP to ascertain the level of incapacity you are suffering. If your level of incapacity is not severe and you are leading a reasonably normal life, you will receive a Disability Pension at, or at a percentage of, the General Rate. On the other hand, if your incapacity is severe, seriously diminishes your quality of life and, crucially, **prevents** you from working, you will be compensated at the Special Rate. Depending on the nature of your incapacity you will be deemed *totally and permanently incapacitated* (TPI), or *temporarily totally incapacitated* (TTI) or, if less severely incapacitated and able to undertake some paid work at the *Intermediate Rate*. Understandably, the Special Rate Pension is significantly greater than the Standard Rate – the ratio is around 3:1. It is crucial to note that, normally, you can only claim for a pension at the Special Rate before your 65th birthday. If your level of incapacity did not become significant until later in life, a disability pension is possible at the Extreme Disability Adjustment (EDA) rate. I strongly advise WWII, Korea and Vietnam veterans to explore submitting a claim for EDA as you become housebound. Fact Sheets that provide more detail follow:

DP 28 – General Rate

DP 29 – Special and Intermediate Rate

DP 30 – Extreme Disablement Adjustment

DP 71 – Additional Disability Pension for Specific Disabilities

IS 30 – Pension Rates, Limits and Allowances Summary

- Service and Partner Service Pensions. Eligible *veterans* qualify for a Service Pension (SP) and their spouse/partner a Partner Service Pension (PSP). Each is means tested; however, income from your Disability Pension is excluded. On the other hand, any superannuation, DFRDB and rental income reduces the amount received through a SP and PSP. Eligibility for a SP may be on the grounds of disability or age. A disability-based SP is payable as soon as the veteran is unable to work, whereas an age-based SP is payable at 60 years of age. This is advantageous - it is 5 years before a Centrelink age pension. Fact Sheets that provide more detail follow:

IS 01 – Service Pension Overview
 IS 02 – How to Claim a Service Pension
 IS 44 – Age/Invalidity Service Pension
 IS 45 – Partner Service Pension
 IS 21 – Service Pension and DSS Age Pension Rates

- War Widow(er)'s Pension. As the name suggests, a War Widow(er)'s Pension is normally payable only to the dependant spouse/partner of a *veteran* **and** the veteran's death was war-caused. There are, however, some exceptions. Where, before death, a *member* of the Defence Force or a Peacekeeping Force was a POW on active service, or in receipt of a Disability Pension at the Special Rate for TPI/TTI/IR or blindness, or receiving an EDA, or was a double amputee, and death was **not** war-caused, the dependant spouse/partner may be entitled to a War Widow(er)'s Pension. (Fact Sheet DP 60 provides more detail on War Widow(er)'s Pension.)
- Orphan's Pension. To be eligible for an Orphan's Pension a child must be the child of a veteran **and** not being maintained by a parent, be the parent natural, adoptive or step. (Fact Sheet DP 60 provides more detail on Orphans' Pension.)

This discussion of War Widow(er) and Orphans' Pensions may appear to make eligibility pretty cut and dried. In reality, it is not that so straightforward. There are many conditions that can affect eligibility and, even when eligible, the level of pension that is payable. Again, I strongly advise that you prepare your dependants for your demise, if imminent, by seeking the support of a Pension or Welfare Officer or Advocate.

Medical Treatment

The VEA provides for two levels of health care. The level of benefit is marked by the *Repatriation Health Card* that DVA issues you.

- White Card. DVA will issue you with a *Repatriation Health Card for Specific Conditions* (viz, White Card) when you have specific injury/ies or disease(s) that have been accepted as related to your service, entitling you to Commonwealth-funded health care. You will not have to cover the cost of medical services for the injuries/diseases listed on your White Card (see fact Sheet HSV61), but will have to contribute to the cost of pharmaceuticals (see Fact Sheets IS14, IS21, IS22 and DP43). (Could I also redraw your attention to the Winter 2011 *Wings* article, page 56 (**What Support may DVA Provide?**) with respect to treatment for PTSD/anxiety/depression, tuberculosis, and cancer.)
- Gold Card. In the broad, DVA will issue you with a *Repatriation Health Card for All Conditions* (viz, a Gold Card) if you are a WWII veteran over the age 70, and have *qualifying service* (viz, *rendered service that incurred danger from hostile forces*), or receive a Disability Pension at 100% of the General Rate, or receive a Disability Pension at 50% or greater of the General Rate and also receive some part of a Service Pension, or receive a Disability Pension with an additional payment for above,

recipients of a War Widow(er)'s or Orphan's Pension also receive a Gold Card.) It is important to note that you can lose your entitlement to a Gold Card if: (1) your level of incapacity improves to the extent that you no longer receive a Disability Pension at 100% of the General Rate; or (2) if you have received a Gold Card because you receive a Disability Pension at 50% or greater of the General Rate and also receive some part of a Service Pension and your financial circumstances change to the extent that your income or assets cause you to lose the Service Pension. Fact Sheets HSV59 and HSV60 provide more information respectively on eligibility for, and the services accessible through a Gold Card.

Disability Compensation Allowances

There are also a wide range of allowances and other benefits that flow from receiving a disability pension. These include funeral benefits (see Fact Sheets BR 01 and BR02), rent assistance (DP 43, IS 74 and IS 75), vehicle and transport assistance (DP 42, DP 76, DP 78, and DP 79), veterans' children's education (DP 45) and vocational rehabilitation (HSV 108). Again, please obtain a practitioner's advice and/or refer to the Fact Sheets for the other benefits.

Appeal – What if I'm not happy with a Decision?

If you are not satisfied with a Delegate's determination of your claim, the VEA includes a right of appeal. The Veteran's Review Board (VRB), Administrative Appeals Tribunal (AAT) and the Federal Court are, sequentially, the organs to which you may appeal. (See Fact Sheet DP 68 for an introduction to appealing a repatriation decision.)

The Fact Sheets that cover appeal are as follows:

- DP 66 – Rights of Review
- DP 67 – Section 31 Review
- VRB 01 – Veterans' Review Board Overview
- VRB 02 – Representation at VRB Hearings
- VRB 03 – Cosr of VRB Hearings
- VRB 04 - How can I prepare my Entitlement Case
- VRB 05 – Understanding Assessment Cases
- DP 68 – Administrative Appeals Tribunal
- DP 69 – AAT and Legal Aid Contacts

Veteran's Review Board

The VRB comprises a panel of three Members, at least one of whom will have service experience in the ADF. The VEA authorises the VRB to review a Delegate's decision on a primary claim for a pension, an application for an increase in an existing pension or an application for attendance allowance. You must lodge a request for review within 12 months of the date of your receipt of the Delegate's decision; however, you must lodge your appeal within three months to maximise the benefits you will receive if your appeal is successful.

You may represent yourself at a VRB hearing; however, I strongly advise you to seek the support of an Advocate from the moment you receive a Delegate's decision that you consider is unfavourable. To maximise the likelihood of success of your appeal, you will need compelling argument and/or additional medical evidence. Take the time to gather the additional evidence, to ensure your appeal is as tightly argued as possible, and that it meets the standard of proof applicable to your service.

Administrative Appeals Tribunal

If you are not satisfied with the VRB's determination, the VEA provides that you may appeal to the AAT.

Federal Court

Beyond the AAT, only points of law can be appealed. The Federal Court will convene in the first instance as a single judge and, at the next level of appeal, the Full Court comprising three judges. If *special leave* is granted, the final level of appeal is the High Court of Australia.

Legal Support

Although you may seek the support of a non-legally qualified Advocate to represent you at the AAT, you may be well advised to appoint a solicitor. You will certainly need the support of a barrister to present your case to the Federal Court. Subject to means testing, you may be entitled to Legal Aid should you appoint a solicitor and/or barrister

An Additional Thought

A common misconception is that once a Delegate rejects a claim or a request for review by the VRB is unsuccessful, that is the end of the matter. This is not the case. After 12 months, you may lodge a new primary claim for a condition that had previously been rejected by a Delegate. Needless-to-say, for a subsequent primary claim for the same condition to be successful, you will need to provide more compelling evidence of the causal link with your service and/or more supportive medical evidence of the condition than in your original claim.

Conclusion

This article has introduced some of the key considerations and entitlements for which you or your dependents might be eligible under the VEA in the event of your injury, disease or death being service-caused. As the VEA is complex legislation and subject to amendment from time to time, this article cannot be the final word. You should not initiate a claim or appeal without competent support. In the Summer 2011 *Wings*, I will outline the key provisions of the *Safety Rehabilitation and Compensation Act 1988* (SRCA).

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