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DEPARTMENT OF VETERANS AFFAIRS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
U.S. HOUSE OF REPRESENTATIVES**

**"DISCUSSING VA'S TOTAL DISABILITY RATING BASED ON INDIVIDUAL
UNEMPLOYABILITY (TDIU) BENEFIT FOR TODAY'S VETERANS"**

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Good morning, Chairman Luttrell, Ranking Member Pappas, and Members of the Subcommittee. Thank you for the opportunity to appear before you today to discuss the Department of Veterans Affairs' (VA) individual unemployability (IU) benefit. With me today are Nick Pamperin, Executive Director, Veteran Readiness & Employment (VR&E) Service, Veterans Benefits Administration (VBA), and David Barrans, Chief Counsel, Office of General Counsel.

Overview

The IU benefit fills a critical gap when the VA Schedule for Rating Disabilities (VASRD) does not fully address the impact of service-connected disability in a Veteran's circumstances. The intent of the VASRD is to fairly compensate Veterans for injuries incurred or as the result of their military service. To the extent those disabilities impair earning capacity of the average Veteran, the VASRD nonetheless cannot always adequately compensate an individual Veteran in their specific circumstances. IU is an important provision that enables VA to address this, such as when a Veteran's specific impairment does not meet the disability rating criteria for a schedular 100% evaluation, yet there is sufficient evidence of the Veteran's inability to obtain or maintain gainful employment. A qualified Veteran would be compensated at the 100% evaluation rate utilizing VA's IU authority. In fiscal year (FY) 2023, VA provided over \$7 billion in IU benefits to 377,108 beneficiaries and saw a 21.7% increase in IU beneficiaries over the past 10 years (2013-2023).

A Rating Veterans Service Representative (RVSR) assigns IU ratings when the evidence of record shows a Veteran has a minimum combined evaluation criteria of a single service-connected disability rated at 60% disabling or more, or has 2 or more disabilities at a combined evaluation of 70% or more with at least 1 service-connected condition rated at 40% or more, and, in the judgment of the decision-maker based on the evidence of record, is not able to obtain or maintain substantially gainful employment due solely to service-connected disability(ies). In exceptional circumstances, claims processors may refer cases that fail to meet the minimum combined evaluation criteria to the Executive Director of Compensation Service for consideration of an IU rating on an extra-schedular basis.

Authority and Historical Background

Section 1155 of title 38, United States Code, charges the Secretary with responsibility for developing and applying a disability rating schedule, known as the VASRD, that is based, "as far as practicable," upon the average impairments of earning capacity resulting from service-connected disabilities. The IU benefit has a long history in regulation. In 1925, the VASRD provided the first definition of total disability. Total disability was defined as an impairment of mind or body that is sufficient to render it impossible for the average person to follow a substantially gainful occupation. In the following decades, the regulations regarding IU have been updated numerous times to clarify eligibility requirements. Per current 38 C.F.R. § 4.16, total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgement of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

Eligibility Criteria

Under current regulations, Veterans who are unable to secure or follow a substantially gainful occupation due to their service-connected disabilities may be eligible for IU. Generally, IU eligibility is established if a Veteran has either 1 service-connected disability rated at 60% or more, or a single service-connected disability rated at 40% or more with other service-connected disabilities that combine to equal or exceed 70%. The single 60% or 40% disability may be established based upon disabilities of 1 or both upper or lower extremities, disabilities resulting from common etiology or a single accident, disabilities affecting a single body system, multiple injuries incurred in action, or multiple disabilities incurred as a prisoner of war.

When deciding if a Veteran is entitled to IU, VA reviews all available evidence and considers the current severity of the service-connected disability(ies) that prevent substantially gainful employment; the impact of the service-connected disability(ies) upon employability; and employment status. Claims processors consider economic and non-economic factors impacting employability, including but not limited to evidence concerning the Veteran's current employment status, past employment history, educational/training history, and functional impairment arising from service-connected disabilities.

A request for a total disability evaluation based on IU, whether expressly raised by the Veteran or reasonably raised by the record, is not a separate claim for benefits. Rather, the IU claim involves an attempt to obtain an appropriate rating for a disability or disabilities, either as part of the initial adjudication of a claim or as part of a claim for increased compensation if the disability upon which IU is based has already been found to be service connected.

While a substantially complete VA Form 21-8940, Veteran's Application for Increased Compensation based on Unemployability, is necessary to provide VA with information needed to substantiate entitlement to IU, it is not necessary to raise the issue of IU. This form is required to establish entitlement to IU because it gathers relevant and necessary information regarding a claimant's disabilities and employment and educational histories. This form requires the Veteran to furnish an employment history for the 5-year period preceding the date on which the Veteran last worked. The form concludes with a

series of sworn certification statements, and in endorsing it, a Veteran thereby attests to their employment status and signals understanding of the IU benefit's incompatibility with substantially gainful work. As part of the development of claims involving IU, VA contacts the Veteran's noted employers and asks them to provide information concerning the Veteran's employment history, including the dates of employment, the type of work performed, and the reasons for termination of employment if the Veteran is not currently working.

If VA decides a medical examination is necessary to determine whether a Veteran is entitled to IU, an appropriate examination or opinion request is submitted to a Veterans Health Administration medical facility or a VBA contract examination provider. Medical examiners follow the appropriate Disability Benefits Questionnaires to perform a complete and adequate examination for rating purposes, answering all questions, and providing opinions as requested. The medical examiner is requested to comment on the Veteran's ability to function in an occupational environment and describe functional impairment caused solely by the service-connected disabilities.

In some cases, a Veteran's service-connected disability(ies) may improve, but this does not necessarily result in the reduction of the total disability rating based on IU. In such cases, VA regulation [38 C.F.R. § 3.343\(a\)](#) and (c) require that IU ratings will not be reduced, in the absence of clear error, without medical evidence showing material improvement in physical or mental impairment. In all rating reduction cases, a reduction in the evaluation may only be effectuated if the improvement is shown by a thorough examination and evidence of an improvement in the Veteran's ability to function under the ordinary conditions of life, including employment.

Training

To ensure consistent and quality findings of IU, VBA requires completion of standardized training on the subject. VBA requires all Veteran Service Representatives (VSR) and Rating Veteran Service Representatives (RVSR) to complete training on IU claims processing during Virtual and In-Person Progression (VIP) Training. VSRs complete approximately 2 days of IU course work, activities, and simulated cases to include a learning assessment. VIP provides employees with hands-on training, including simulated and live case work training with computer applications, policies, and laws. The training enables VSR employees to define IU and determine eligibility requirements, determine evidence, including medical evidence, required to process claims involving IU, and identify resources available to obtain additional evidence. The training also allows VSRs to list the steps for processing a claim involving IU, identify any ancillary benefits available to the Veteran's dependents, and understand the employment and income verification requirements for Veterans in receipt of IU benefits. Similarly, the VIP training program enables RVSR employees to define IU, define eligibility requirements, determine evidence requirements, determine effective dates, and rate and process IU claims.

Additionally, claim processors are assessed annually through the Competency Based Training System (CBTS). CBTS is designed to identify potential knowledge and skill gaps at the individual level and assign remediation to address the potential gap. Additional national-level curriculum can be delivered at the station level based on individual error trends.

Marginal Employment and Protected Environment

Over the last several years, VA has examined, through various court decisions, studies, and reports completed by stakeholders, if the current IU benefit properly compensates Veterans who are unable to secure and maintain substantially gainful employment because of their service-connected disability(ies). If a Veteran has a service-connected disability(ies) that meets the eligibility criteria and earned income does not exceed the amount established by the U.S. Census Bureau (Department of Commerce) as the poverty threshold for one person, the Veteran is considered only marginally employed and may be entitled to IU. Veterans may also be found to be marginally employed when their income exceeds the poverty threshold if their employment is in a protected environment such as a family business or sheltered workshop. In determining entitlement to IU, marginal employment does not qualify as substantially gainful employment.

Over the last several years, a number of court decisions¹ have found that VA's regulatory definitions of "marginal employment" and "protected environment" lack specificity, and have encouraged VA to engage in rulemaking to better define these terms. In January 2024, the Court of Appeals for Veterans Claims issued a decision in *LaBruzza v. McDonough* (2024 WL 259882) regarding what constitutes a protected environment for purposes of determining entitlement to IU. In that decision, the court concluded that "employment in a protected environment," as used in VA regulations, is unambiguous and means "a lower-income position that, due to the veteran's service-connected disability or disabilities, is shielded in some respect from competition in the employment market."

The court elaborated that common characteristics of employment in a "protected environment" include employment sheltered from the open labor market and employment based on something other than the strict qualifications of the employee. According to the court, protected environments include working situations "shielded, covered, or guarded from an outside source of harm," with the harm being a Veteran's inability to secure or follow a substantially gainful occupation in the open labor market because of service-connected disabilities.

The court cautioned that the "protected environment" exception that allows a finding of entitlement to total disability based on IU when a qualifying Veteran has income exceeding the poverty level must be narrowly read lest it supplant the general rule that annual income, limited by the poverty threshold, is a key criterion for determining IU eligibility. The court recognized that determining whether employment is in a protected environment is highly fact specific and hinges on context. The court also noted that an employee's receipt of reasonable accommodations beyond those legally required by the Americans with Disabilities Act may be indicative of employment in a protected environment. VA currently is drafting guidance for claims processors regarding how to apply this decision and considering whether regulatory updates may be needed considering that decision and others.

¹ *Ortiz-Valles v. McDonald*, 28 Vet.App. 65 (2016); *Cantrell v. Shulkin*, 28 Vet.App. 382 (2017); *Arline v. McDonough*, 34 Vet. App. 238, 242 (2021)

IU Benefit and Mental Disabilities

On February 15, 2022, VA published a [proposed rule](#) in the Federal Register to amend the portion of the VASRD for evaluation of the impact of mental disorders. The proposed evaluation criteria measures a Veteran's essential ability to participate in a work environment and the impact of the mental disorder on earning capacity via a comprehensive assessment of occupational and social functioning. The proposed new evaluation criteria would more accurately capture the occupational impairment caused by mental disabilities and provide more adequate compensation for the earnings losses experienced by Veterans with service-connected mental disorders. If finalized, the proposed change would help alleviate current disparities with evaluations of mental disability(ies), so that Veterans with such challenges may receive adequate compensation using VASRD criteria, rather than receiving IU.

Verifying Earnings and Employment for Continued IU Eligibility

VA monitors changes in the employability of Veterans receiving IU benefits through a yearly Social Security Administration (SSA) wage data match. If a Veteran is receiving IU and is identified as having verified earned income over the poverty line, VA sends the Veteran a VA Form 21-4140, Employment Questionnaire, with an accompanying VA Form 21-4138, Statement in Support of Claim. The Veteran will be required to identify and explain any earned income on the VA Form 21-4140. In addition to these forms, VA also sends the Veteran a due process notice of proposed adverse action that is sufficient for discontinuation of IU due to any of the following: failure to complete and return the VA Form 21-4140; an insufficient response on the VA Form 21-4140; or a return to gainful employment.

If a Veteran in receipt of IU has been employed for one year or more, VA will consider whether the employment is sustained, gainful employment, or marginal employment, separately from whether the Veteran's condition has improved or not. VA will also determine if an examination is necessary to evaluate employment status or employability. If VA determines gainful employment has been sustained for 1 year or more, VA will discontinue entitlement to IU the last day of the month 60 days after due process notice was provided.

Monitoring changes in employability is not required when the Veteran has not been identified in the SSA data match as having verified earned income above the poverty line; has an IU rating that has been in effect for 20 or more continuous years; or has had an IU rating replaced with a 100% schedular evaluation.

Comparison of Social Security and IU Benefits

An important distinction between the SSA benefit and the VA IU benefit is that SSA disability is based upon the totality of an individual's disabling conditions. In contrast, IU considers only service-connected disabilities. Hence, Veterans who receive SSA disability benefits may not be entitled to IU if their SSA disability determination was based upon any disabling conditions that are not related to the individual's military service. Conversely, Veterans receiving SSA benefits, including SSA retirement benefits earned through payroll

contributions, can still be entitled to IU if they also meet VA's eligibility requirements.

VA does not preclude IU eligibility based upon the age of an eligible Veteran or the fact that they may have retired and/or elected to receive SSA retirement benefits upon reaching their SSA retirement age. Under VA regulations, age cannot be considered as a factor in service-connected claims. Veterans who are 62 or older may therefore be eligible to receive retirement benefits from SSA and VA IU benefits.

VA does not penalize Veterans who are eligible to receive IU compensation based upon their election to receive the SSA retirement benefits they have earned. VA recognizes that some Veterans may prefer to engage in substantially gainful employment beyond an age where they are entitled to draw the SSA retirement benefits they earned but may be unable to do so because of their service-connected disabilities. VA also recognizes that a Veteran's decision to discontinue work and draw SSA retirement benefits they earned may be influenced by the impediments service-connected disabilities impose on their continued ability to perform in their occupations.

The issues of Veterans receiving both IU and SSA benefits and of age as a factor in IU decisions have been raised by various parties over the years. A 2015 report from the U.S. Government Accountability Office (GAO)² on IU included a recommendation that VA study whether age should be considered when deciding if Veterans are unemployable. In October 2017, in response to that recommendation, VA completed such study, which first compared two potential age-specific IU eligibility policies: (1) placing a cap on the age at which Veterans can begin receiving benefits; and (2) placing restrictions on the age for both initial claimants and existing beneficiaries. VA concluded that both alternative eligibility policies would reduce the number of Veterans receiving IU benefits. Upon reviewing the results of the study, VA decided not to make policy changes regarding the IU benefit.

In 2014, the Congressional Budget Office (CBO) proposed several options to reform the disability compensation program,³ including discontinuing IU benefits when the Veteran reaches SSA's full retirement age. The rationale provided was that most Veterans who are older than SSA's full retirement age would not be in the labor force because of their age and that a lack of earnings among them would probably not be attributable to service-connected disabilities. CBO also noted that Veterans over SSA's retirement age who currently receive IU benefits would likely have income from other sources, including the regular schedular VA disability compensation benefit in addition to SSA retirement benefits. Recently, CBO addressed ending IU payments to disabled Veterans at the full retirement age for Social Security in its options for reducing the deficit, published in December 2022.⁴

VA currently has no plans to limit IU based on age or concurrent receipt of SSA retirement or disability benefits, recognizing that the IU benefit fills a critical gap when the VASRD fails to fully address the impact of disability in a specific Veteran's circumstances.

² <https://www.gao.gov/products/gao-15-464>

³ https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45615-VADisability_OneCol_2.pdf

⁴ https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/45615-VADisability_OneCol_2.pdf

VA Occupational Training and Counseling

The mission of VA's VR&E program is to assist qualified Service members and Veterans with service-connected disability(ies) prepare for, obtain, and maintain suitable employment or maintain a life of independence. VR&E achieves this mission by providing comprehensive vocational counseling services to transitioning Service members and Veterans to ensure goals are suitable and attained.

Eligibility for VR&E benefits is determined for Veterans who received an honorable or other than dishonorable discharge, have a VA service-connected disability rating of at least 10%, and apply for services. Following eligibility, entitlement must be determined and is based on the establishment of a barrier to employment resulting from a service-connected disability(ies). A significant barrier must be established for Veterans rated 10%.

Per 38 U.S.C. § 1163, each time a Veteran is granted payment at the total disability rate based on IU during the period beginning after January 31, 1985, VR&E Service will be notified to provide counseling. This includes information about the VR&E program such as how to apply, eligibility, and services available. When a Veteran in receipt of IU applies to the VR&E program, a feasibility assessment must be completed to determine appropriate services.

In some instances, a Veteran's functional limitations due to disability(ies) impact their ability to participate in a rehabilitation program on a full-time basis. In these circumstances, VR&E offers Reduced Work Tolerance services that are approved when the Veteran's disability conditions prevent the pursuit of full-time training, based on recommendations from a medical provider. The Veteran can then be assisted with obtaining less than full-time employment.

During FY 2023, VA provided VR&E services to 131,179 Veterans and Service members, and 17,135 Veterans have successfully completed their VR&E program. During FY 2023, VBA paid over \$1.6 billion in VR&E benefits. As of May 1, 2024, VR&E has 151,769 Veteran participants with 90,380 enrolled in Long-Term Services, which helps program participants obtain education and training needed to find work in a different field that better suits current abilities and interests of participants.

VR&E Longitudinal Study

The VR&E Longitudinal Study, required by 38 U.S.C. § 3122, follows 3 cohorts of former participants over a 20-year period and details the of self-reported outcomes of those completing the program. The Longitudinal Study provides insight into four major areas: employment, income, home ownership, and use of supplemental programs for VR&E enrolled Veterans. The study finds that the median annual household income of Veterans who successfully complete the program is \$95,000, which is 65% higher than Veterans who did not complete the VR&E program. Additionally, these Veterans have homeownership rates of 76%, which is 15 percentage points higher than Veterans who do not complete the VR&E program. The employment rate for rehabilitated Veterans steadily increased from 45% in FY 2012 (the first year of survey data collection) to 72% 5 years later in FY 2017, and to 75% in FY 2022.

Additional Data

The VA chapter 31 benefit assists Veterans with service-connected disabilities prepare for, find, and keep suitable employment. During the past 5 years, VA received nearly 3,000 applications for VR&E benefits for Veterans in receipt of IU, of which 98% were found entitled to chapter 31 benefits. VR&E Service has seen an average of 549 IU applicants per year for chapter 31 benefits. Since 2020, VA has witnessed the successful rehabilitation of 70 Veterans in receipt of IU cases. It is noteworthy that there has not been a significant disparity in the discontinuance rates between IU cases and the entire VR&E population. Specifically, 1,994 Veterans in receipt of IU cases were discontinued, comprising 66.8% of total cases, a figure quite like the discontinuance rate of the entire chapter 31 Veteran population, which stands at 65.4%. Of these discontinued cases, 92.5% were due to the Veteran choosing not to continue in the program. As of May 13, 2024, VA has 345 VR&E participants with pending IU applications, with 292 in the evaluation and planning status, and 285 actively participating in a rehabilitation plan.

Closing

VA appreciates Congress' continued support in finding ways to improve the services and benefits available to transitioning Service members and Veterans who have challenges preparing for, obtaining, and maintaining gainful employment. VA remains committed to continuing collaboration with you and its stakeholders. Mr. Chairman, this concludes my statement. My colleagues and I would be happy to answer any questions you or other members of the Subcommittee may have.