

## DISABILITY PENSION SYSTEM REVIEW – May 2018

Experiences by a Veteran when applying for a review of his Disability Pension DP under the Veterans' Entitlements Act 1986 (VEA), identified a system that abuses the VEA's legislation, mistreats Veterans, and distorts factual evidence during the review process. In general, the DP system enables the Department of Veteran Affairs (DVA) and the Veterans Review Board (VRB) to make assessment errors of law or evidential fact, and avoid accepting or correcting errors under VEA Sec 31, commonly referred to the 'merits review process'.

The merits review process is where a review of a DP Decision is not done by the Decision Maker, but directly referred to a higher level for review by a delegate not involved in the original decision; e.g. a DVA Decision is reviewed by the VRB, the VRB Decision is reviewed by the Administrative Appeal Tribunal (AAT), and the AAT Decision by the High Court. The process was meant to be used by 'clients', but instead is controlled and enforced on the Veteran at the will of the DVA and the VRB.

In enforcing the Veteran into the merits review process, errors at one level are discarded and replaced by the findings from another assessment at the next higher level, which may also include new evidence, so the terms of assessment are changed at each level and the assessment may have new errors. It does not allow the Veteran any opportunity to seek a review of the original Decision at the level where it occurred, particularly where correction of errors would invalidate the Decision.

To demonstrate the problems and assessment errors in the DP system under the merits review process, the following Brief of an actual DP Case Study is supplied. The Study has principally become a cause for Veterans, and the Veteran writer strongly believes it is worthy of a joint investigation by DVA and the VRB, as well as the Productivity Commission.

### CASE STUDY REPORT - BRIEF

This Case Study Report (CSR) relates to a DVA Application in Apr 2015 to review a DP which resulted in a 3 stage assessment, two by DVA and one by the VRB. The second DVA assessment was a Special Rate Pension (SRP) assessment where a simple but significant error was made in the Veteran's employment record, with the SRP not being approved.

The Applicant is a Veteran who continued a working life after 20 years military service, by tolerating disabilities incurred in Vietnam. He was granted a DP in 1979. The review Application in the Case Study was the third. Two previous reviews resulted in increased payments due to increased aggravation of disabilities. All Applications were submitted without Advocate assistance. His expectation was a further increase in his DP, nothing more or less, but what eventuated was nonsensical as follows.

### Assessment Stages and Issues

- Aug 08 Veteran ceased paid private engineering contracting and consulting work.
- Jun 14 Veteran ceased unpaid work as MD of a non-trading R&D business.
- Apr 15 Veteran submits Application for Disability Pension review under VEA Sec 23.
- Jun 15 DVA Decision: DP increase, SRP refused: employment not continuous under VEA Sec 24(2A)(2g); ask VRB for review.
  - *The DP Application was extended to a SRP assessment with evidence based solely on that submitted for a DP.*
  - *DVA made a significant error of fact in its SRP assessment of the Veteran's employment record, which if corrected would have resulted in its Decision being overturned and the SRP being approved.*
  - *DVA invoked the Merits review process to immediately pass any review to the VRB without an internal review.*
- Jun 15 At this stage Veteran was satisfied with DP increase but requested DVA correct his employment record.
- Jun 15 DVA placed employment request on file (no action).
  - *DVA failed to use its discretion to internally review a faulty Decision under VEA Sec 31.*
- Jun 15 Veteran submits VRB Application to correct employment record and adds consideration for SRP.
  - *DVA intervened in Merits review process and suggests VRB conduct a review of DVA Decision and SRP based on employment at the time the Veteran ceased work.*
  - *DVA and VRB accepts previous DP employment and medical evidence, compiled by DVA in a VEA Sec 137 Report, as being sufficient for a SRP assessment, and failed to determine the need or seek further evidence.*
- Dec 15 VRB Hearing.
- Dec 15 Veteran's letter to VRB complaining of conduct of VRB Hearing, and requests review of Factsheet DP29.
  - *Degrading and humiliating treatment of Veteran conducted under a formal Court Room Hearing, with no practical means for Veteran to present further documented evidence for discussion.*
- Dec 15 VRB Decision: SRP refused - incapacities not preventing work VEA Sec 24(2A)(d); apply to AAT for review.
  - *Contradicting DVA and VRB Decisions and Reasons for refusal of SRP.*
  - *VRB corrects employment record.*
  - *VRB errors in assessment process and procedures against those stated in the VEA*
  - *VRB Findings and decisions not based on factual evidence, or relating to all 8 VEA Sec 24(2A) criteria.*

- *Misleading quotes and interpretation of supplied evidence.*
  - *Breaches and misquotes of VEA Sections.*
  - *Failure to understand intent, manner and ethics of 'self-employment'.*
  - *VRB invoked the Merits review process to immediately pass any review to the AAT without an internal review.*
- May 17 DVA advises consideration to review Factsheet DP29 was made, but no changes warranted.
- Jun 17 Veteran's DP Complaint to DVA and VRB, combining DP29 review and VRB Hearing issues. cc to AAT.
- Jul 17 Veteran seeks review assistance from local Advocate.
- Jul 17 Veteran submits AAT Application for Review of VRB Decision.
- Jul 17 AAT dismisses Veteran's Application (VRB Lawyers intervene and oppose Applicant's time extension).
- *It is argued that the DP Application remained active from VRB Hearing until AAT Application (being in a state of clarifying DVA's Factsheet DP29) allowing the AAT Application to be accepted on exceptional circumstances.*
- Jul 17 AAT advises Veteran can appeal to High Court.
- *Not an option for pensioned Veteran.*
- Aug 17 Advocate withdraws assistance (none ever provided).
- Aug 17 Veteran updates DVA Complaint to Disability Pension Case Study Report SM01373.
- Oct 17 Veteran forwards CSR to DVA & VRB for review of DP system and requests response.
- *VRB's response (restricted investigation) stated VRB has no powers to overrule VRB Hearing, was VRB biased and protective, unfair, in-conclusive, and other than reinstating Veterans' issues failed to address them.*
  - *As at May 2018, Veteran is still waiting DVA response.*

### **Other Issues & Comments**

1. The CSR is a 17 page document, itemising in detail 27 perceived assessment and procedural issues experienced in the DP system, and states 17 recommendations.
2. There CSR lists 21 VRB Findings with 11 being irrelevant, 5 that relate to VEA Sec 24(2A) criteria that are false, 4 that relate to VEA Sec 24(2A) criteria that are true and meet the criteria, and 1 undetermined.
3. Evidence relates to an incomplete assessment against all 8 VEA Sec 24(2A) criteria by DVA and VRB.
4. The Case Study analysis indicates that DVA and VRB Decisions and Reason for Decision are wrong.
5. By DVA not responding to the Veteran's Complaint or CSR, it indicates it is aware of assessment and procedure errors and is avoiding accepting any responsibility; a common DVA practice to ignore contentious matters in the hope they'll disappear.
6. The existing DP System is outdated and disadvantages the Veteran Community, and abuses the merits review process by not correcting Decision errors at the time and level where occurred.
7. Recent DVA media releases and funding for an alternative dispute resolution and case management system indicates concerns with the DP System, and the CSR should be discussed at the DVA Legislation Review Workshop.

### **ACTION TO BE TAKEN**

To add common sense and logic to the DP system, a recommendation is that legislation be introduced to amend and replace the current merits review process as suggested below. This process may result in reduced referrals to the VRB; but quicker results, increased DVA accountability and reduced Government costs in obtaining correct findings and Decisions will occur.

1. A Claim for a DP, Application for Increase in DP, or subsequent SRP should be identified as separate assessments against appropriate VEA Sections and criteria, and for common use by all delegates.
2. A new VEA Sec be introduced for self-employment definition, conditions and record keeping.
3. A new VEA Sec be introduced to define method of assessment for factual employment and medical evidence, eliminating: assumptions, misinterpretation, biasness, extrapolation of evidence, and misquoting law and fact.
4. A Claim for DP is considered a level 1 law and factual assessment.
5. An application for Increase in DP is considered a level 2 law and factual assessment.
6. An assessment for a subsequent SRP is considered a level 3 law and factual assessment.
7. When an assessed for SRP is determined, then a separate SRP Application is to be forwarded to the Applicant requesting specific additional employment and medical evidence.
8. DVA assess given evidence for each level against all applicable VEA criteria. Where given evidence does not support a criteria, the Applicant is given the opportunity to supply any further evidence for reassessment at that level.
9. When the assessment is finalised, a Decision can be made stating the Reasons for the Decision.
10. The Applicant has the opportunity to question the Decision and use Advocate assistance to seek DVA response.
11. Once DVA responds, the Applicant can accept the Decision or make a Complaint against the Decision to DVA.
12. A SRP Complaint still requires a response from DVA, but DVA can inform the Applicant that the Complaint and response will be forwarded to the VRB for a review at a level 4 law and fact assessment.

The above recommendation is in addition to those 17 recommendations listed in the CSR.