

Mr. Rick Surratt, Deputy National Legislative Director, Disabled American Veterans

STATEMENT OF
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BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
OCTOBER 27, 2005

Mr. Chairman and members of the Committee:

In response to your invitation to testify, I am pleased to appear before the Committee to present the views of the Disabled American Veterans (DAV) on the question of how well the system of veterans benefits of the Department of Veterans Affairs (VA) is serving veterans deemed to be unemployable. In this regard, the Committee observes that VA's Departmental Strategic Goal 1 is to "[r]estore the capability of veterans with disabilities to the greatest extent possible, and improve the quality of their lives and that of their families.?" In view of the trend of increasing numbers of veterans deemed totally disabled by reason of unemployability, the Committee indicates it will examine this component of the compensation program as well as address the question of whether the VA's Vocational Rehabilitation and Employment Program is being used to its optimum.

For those veterans who are in fact unable to work because of service-connected disabilities but whose disabilities do not meet the requirements for a total rating under VA's regular rating schedule criteria, VA has special provisions for awarding total disability ratings. Such ratings are said to be "extra-schedular."

Congress delegated to the Secretary of Veterans Affairs the authority to adopt and apply a schedule for rating disabilities. For purposes of compensation payments, the schedule provides for gradation of disability in increments of 10 percent, ranging from 10 percent to 90 percent for partial disability, with 100 percent for total disability. The ratings are to be based, "as far as practicable, upon the average impairments of earning capacity" in civil occupations resulting from disability. "Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation.?" However, it is the "established policy of [VA] that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled.?" Therefore, "[t]otal disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.?" Accordingly, total ratings are authorized "for any disability or combination of disabilities for which the Schedule for Rating Disabilities prescribes a 100 percent evaluation or, with less disability" that renders the veteran, in his or her individual circumstances, unable to follow a substantially gainful

occupation. In short, VA may find a veteran's disability to be total either on a schedular basis or due to individual unemployability (IU or sometimes TDIU).

The distinction between total disability on a schedular basis and total disability based on IU is that total disability on a schedular basis is founded on an "average person" standard, as are all regular schedular ratings, while unemployability ratings are based on the impact of the disability in the individual's own circumstances.

Average earning capacity, or average person, is a standard or a single value used to represent a broad universe of persons. Like an average, or arithmetic mean, it is approximately the middle position in a data set or intermediate between the two ends or extremes on a scale. Thus, roughly half of workers have lower earning capacity and roughly half have higher earning capacity than the average, and earning capacity is tied primarily to educational and vocational backgrounds. Consequently, while the concept of average impairment in earning capacity is the basis underlying the various percentage evaluations provided for given levels of disability in the rating schedule, unemployability determinations are not based on average impairment and must, therefore, take into account the disability as it affects the individual's ability to follow a substantially gainful occupation in light of his or her attained work skills and educational background. Unemployability ratings recognize that individuals may be totally disabled for work with less disability than that which would be necessary to totally disable the average person. Sometimes, the extent of disability depends more largely upon the affected individual than upon the character of the disability. For example, the loss of both legs might totally disable a common laborer with little education while it would have relatively less effect upon the earning capacity of an accountant.

Though IU is an exception to the average person standard in that the average person would be deemed totally disabled when the 100 percent schedular criteria are met, IU is not available for unusual circumstances only. An IU rating is based upon a regular variation in the effect of disability given the veteran's educational and vocational background. Given that roughly half of all disabled veterans will be more impaired by a disability than the average veteran, it is understandable that many will be totally disabled by diseases or injuries rated less than 100 percent under schedular criteria. In addition, many disabilities that can be totally disabling for some have maximum schedular ratings of less than 100 percent.

The number of veterans rated totally disabled for IU has increased over the past several years, but that is somewhat consistent with a pattern of higher numbers of more seriously disabled veterans in the veteran population. As a prerequisite for an IU rating, a veteran generally must have disability rated 60 percent or higher under the terms of the rating schedule. During fiscal years (FYs) 2000 to 2004, the number of veterans with 60 percent ratings increased by 31 percent. The number of veterans rated 70 percent increased by 60 percent; veterans rated 80 percent increased by 75 percent; and veterans rated 90 percent increased by 91 percent. During the same period, veterans rated total due to IU increased 78 percent. In FY 2004, approximately 438,000 veterans were seriously disabled enough to meet the schedular prerequisite for an IU rating, compared with approximately 286,000 in FY 2000.

In addition to higher numbers of veterans potentially eligible for IU, an aging veteran population also may account in part for increased numbers of veterans who are unemployable. Progressive

or degenerative conditions worsen with age. Disabled Vietnam veterans, who make up our largest single group of disabled veterans by period of service and whose disabilities are on average rated higher than their counterparts from other periods of service, had an estimated median age of 57.4 years at the end of FY 2004.

According to a review of studies conducted under VA contract by Economic Systems, Inc., the increase in the number of veterans on the compensation rolls is consistent with a national trend of an increase in the number of disabled persons:

Most sources indicate that the number of disabled in the U.S. general population has been increasing as the U.S. population is aging. For example, the number of disabled workers and their dependents receiving [benefits from the] Social Security Administration's (SSA) Social Security Disability Insurance (SSDI) program increased significantly from 2.7 million in 1970 to 7.6 million in 2003. This is important as SSDI has a restrictive definition of disability (i.e., only those workers who are unable to perform any substantial gainful activity are eligible). Meanwhile, SSDI disability rates among the adult population (16 to 64 years old) have almost doubled from 2.2 percent in 1970 to 4.0 percent in 2003.

. . . . The total number of veterans receiving disability compensation payments from VA has increased only slightly from 2.07 million in 1955 to 2.09 million in 1970 to 2.49 million in 2003. However, the percentage of veterans receiving VA disability compensation has risen from 7.6 percent in 1970 to 10.0 percent in 2003. Compared to the percent of U.S. population 16 to 64 years of age on SSDI rolls (4% in 2003), [the] VA disability rate, in absolute terms, is higher but in terms of the rate of increase in disability rate from 1970 to 2003, it is the same as SSDI.

According to the 1990 Census, there were 12.8 million individuals (aged 16-64) with work related disability (i.e., limitation in a person's ability to work due to a chronic health condition or impairment). Slightly over one-half (51.5%) of them reported themselves severely disabled (LaPlante, 1993). There was a significant increase in both figures in the 2000 census. Of the 21.3 million who reported to have a work related disability 65.8 percent claimed a severe disability (Census 2000).

Of course, the comparison above is between totally disabled workers and all disabled veterans.

An increasing prevalence of service-connected posttraumatic stress disorder (PTSD) and other mental disorders among veterans may also account for the increase in IU ratings. Under its ? General Rating Formula for Mental Disorders,? the VA rating schedule provides for six different evaluations: 0 percent, 10 percent, 30 percent, 50 percent, 70 percent, and 100 percent. To be rated 100 percent on a schedular basis under this formula, a veteran must meet the pertinent criteria from among the following:

Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

Needless to say, a person who has a mental condition meeting these criteria would have impairment well beyond a level that would remove any possibility working. Such person would be profoundly disabled and nearly helpless or helpless. Few veterans will meet these criteria.

Now consider the criteria a disabled a veteran must meet to be rated 70 percent, the only rating that meets the schedular prerequisite for IU.

Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a work like setting); inability to establish and maintain effective relationships.

Few veterans will be able to work with such marked symptoms. If they are to be adequately compensated, IU is their only resort. Under the general rating formula in effect prior to the total restructuring in 1996, any veteran unable to work because of a service-connected mental disorder was deemed totally disabled under the schedular criteria. Section 4.16(c) of title 38, Code of Federal Regulations, provided that the IU provisions of § 4.16(a) did not apply to mental disorders:

The provisions of paragraph (a) of this section are not for application in cases in which the only compensable service-connected disability is a mental disorder assigned a 70 percent evaluation, and such mental disorder precludes a veteran from securing or following a substantially gainful occupation. In such cases, the mental disorder shall be assigned a 100 percent schedular evaluation under the appropriate diagnostic code.

Paragraph (c) was removed with the promulgation of the new general rating formula for mental disorders. Because that is no longer the rule under the current rating formula, all the ratings that would have been 100 percent on a schedular basis under this special rule now are on the basis of IU, which naturally caused an increase in the number of veterans rated IU. That effect is magnified by the increasing prevalence of mental disorders among veterans. PTSD accounts for 44.6 percent of all service-connected mental disorders.

Among all veterans, PTSD is the seventh most prevalent service-connected disability. Among the group most affected, Vietnam veterans, it is the second most prevalent disability.

The availability of judicial review of VA decisions has also probably been a factor in the number of allowances of claims for IU. The Court of Appeals for Veterans Claims, formerly the Court of Veterans Appeals, has been particularly critical of adjudication practices that led to arbitrary denials of IU. The Court has also held that VA cannot ignore the issue of entitlement to IU when it is presented in the record. The Court has rejected as arbitrary VA's practice of denying IU on the catchall unsupported conclusion that, despite severe disabilities, the veteran "can perform some kind of work.?" The Court has rejected denials based on inadequately developed records. The courts have also held that, where the record in a claim for increased compensation includes

evidence of unemployability due to the service-connected disability, the law requires VA to consider entitlement to IU though the veteran may not have expressly claimed a total rating on that basis.

The availability of IU ratings for the many veterans who do not fit into the "average" mold is essential to a fair and complete compensation system. The rules must be designed and the decisions must be made in a manner to result in a fair disposition of this question. As the Court stated, "[i]t is clear that the claimant need not be a total 'basket case' before the courts find that there is an inability to engage in substantial gainful activity. The question must be looked at in a practical manner, and mere theoretical ability to engage in substantial gainful employment is not a sufficient basis to deny benefits. The test is whether a particular job is realistically within the physical and mental capabilities of the claimant.?" Inherently, IU determinations must necessarily rely heavily on subjective data, particularly those involving mental disorders. However, that is unavoidable in the assessment of disability as it affects the individual because, as stated, the same medical condition will affect different individuals quite differently, not only from the standpoint of physical or mental functioning, but also in light of innumerable variables relating to vocational and educational attainments.

A 60 percent or greater disability under the terms of the schedule necessarily means that, for veterans with more demanding occupations, the affected veteran is approaching that minimum level of efficiency or tolerance for the demands or stresses or strains of work which is acceptable to an employer who must confront the realities of a profit-driven, competitive economy. A veteran may struggle and be able to barely satisfy an employer's needs for years and then suddenly be unable to continue meeting those minimum needs due to a gradual progression of his or her disability. A subtle change in the veteran's physical or mental capacity may reduce work attendance or performance to a level that is unacceptable to an employer. It is to be expected that many of these veterans will become unemployable as their disabilities worsen with age. Age, itself is not a factor in the determination, however.

The average impairment standard treats all veterans equally, and although IU is based on the effect of disability on the individual, it too does not discriminate on basis of age. If the total rating is based on IU, "it must be determined that the service-connected disabilities are sufficient to produce unemployability without regard to advancing age.?" The adjudicator is required to determine, without regard to age, whether it is service-connected disability that renders the veteran unemployable. Age must be ignored because compensation is paid for the effects of service-connected disability, not the effects of age.

Unlike VA pension benefits and Social Security disability insurance benefits where age is appropriately considered in determining entitlement, consideration of age as a factor of entitlement in a veteran's compensation claim would be inappropriate. The purpose of veterans' pensions is "relieving distress from disability or destitution among the aging veteran population.?" Pension is by definition a benefit paid to a veteran "because of service, age, or non-service-connected disability.?"

Insurance against disability from any cause is to be distinguished from compensation for disability from military service. Age is a factor in determining entitlement to disability insurance benefits under Social Security laws on the principle that, where a person is unable to perform his

or her customary work, the effects of advancing age reduces a person's ability to adjust to other work for which the person has the necessary skills, education, and physical or mental abilities. The rule states: "we will consider your chronological age in combination with your residual functional capacity, education, and work experience. We will not consider your ability to adjust to other work on the basis of your age alone. In determining the extent to which age affects a person's ability to adjust to other work, we consider advancing age to be an increasingly limiting factor in the person's ability to make such an adjustment. . . ."

Because the purpose of compensation is to make up for the effects of service-connected disability, it should not be tied to factors extraneous to the character of the disability. It would be inappropriate to pay different levels of compensation based on age. It would be inappropriate to deny IU to a younger veteran on the basis of age and award it to an older veteran with the same level of disability, or vice versa.

Total compensation for IU is not a retirement benefit, however. Just as it should not be denied because of age, it should not be awarded because of age. Properly applied, the rules require a factual showing that the disability is such as to be incompatible with substantially gainful employment, irrespective of age. Today, many people work well beyond what was once considered normal retirement age. Typically, VA awards the benefit when disability forces the veteran to terminate employment. To award IU to a veteran age 64 and deny it to a veteran age 66, for example, would be unfair discrimination, disparate treatment of veterans similarly situated, and wholly unjustified from an equitable standpoint. Nonetheless, if Congress or VA chose to make a fundamental change in this compensation principle to allow for the consideration of age in IU claims, as with Social Security disability benefits, such change should make it easier for most veterans to qualify for IU because veterans of service in Vietnam and all earlier periods would be of advanced age. The Social Security Administration's rule provides with respect to a "person of advanced age": "We consider that at advanced age (age 55 or older) age significantly affects a person's ability to adjust to other work. We have special rules for persons of advanced age and for persons in this category who are closely approaching retirement age (age 60-64)."

Under current rules, which do not complicate the decision by applying different rules to different age groups, if a veteran's functional limitations become such that they are incompatible with continuing performance of the veteran's job activities, a factual finding to that effect can be made with an adequately developed record. For decisions on IU, VA should look at the medical evidence, employment evidence, and any available relevant records from the Social Security Administration and VA's Vocational Rehabilitation and Employment Service. Experience has shown that, in many instances, there can be a valid purely medical conclusion that a veteran's disabilities are so severe in their effect upon "ordinary activity" as to obviously be incompatible with all work activities as generally understood and within common knowledge.

Though they are imperfect and have been criticized by the Court of Appeals for Veterans Claims and though VA is in the process of revising its rules on IU, we believe the current rules, for the most part, prescribe consideration of the appropriate factors. These decisions do require careful examination of the facts and the exercise of well-informed and well-reasoned judgments. We suspect that most veterans prefer to work if they are able, and experience has shown that VA

adjudicators are not particularly liberal in awarding total ratings on the basis of IU. This is reflected in the many discussions of arbitrary VA denials by the courts.

For these several reasons, the increase in numbers of IU veterans does not signal a failure or fault in the compensation program.

While compensation is an age-neutral benefit, common sense suggests that age should be a factor in determining whether vocational rehabilitation is feasible, for reason that the effects of age diminish human faculties. In addition to making successful rehabilitation for a new vocation more improbable for elderly veterans, the infirmities of age, along with the effects of disabilities 60 percent or greater in degree, may very well cause the veteran to be a hazard to himself or herself and others in some training environments. In addition, unlike the evaluation of disability for compensation purposes where the effects of nonservice-connected disabilities must be disregarded, assessment of a veteran's potential for rehabilitation must take into account the effects of all impairments.

To expect an elderly disabled veteran to embark upon a new career in his or her final years of life is unrealistic. The demands of training may only make the disability worse. To refuse IU to a veteran who uses the good judgment not to undertake such an unwise course would contradict the purpose of veterans benefits. We therefore believe that mandating or pressuring veterans of advanced age to attempt vocational rehabilitation would be ill-advised and would quite probably result in a waste of resources. The option should be left open, to a reasonable age, for those whose individual circumstances make vocational training and regained employability feasible, however.

Rehabilitation potential for younger veterans is a different matter. We suspect that most younger veterans resent the loss of independence and being forced into the role of being disabled. Current law encourages IU veterans to pursue vocational rehabilitation. The law requires VA to notify a veteran awarded total disability for IU of the availability of vocational rehabilitation; the law requires VA to offer the veteran counseling services and the opportunity for evaluation as to whether the achievement of a vocational goal is feasible. Although a veteran might have the potential to perform substantially gainful employment in the future upon successful completion of vocational rehabilitation training, current law recognizes that the veteran and his or her family cannot survive on the level of compensation paid for the existing percentage rating assigned for partial disability while the veteran is training to become employable. Therefore, entry into a program of vocational rehabilitation, by itself, does not cause a termination of TDIU benefits. A veteran who undertakes a program of vocational rehabilitation is not considered "rehabilitated to the point of employability" unless he or she has been "rendered employable in an occupation for which a vocational rehabilitation program has been provided under [chapter 31, of title 38, United States Code]."

In conjunction with its enactment of provisions requiring VA to notify an IU veteran of the availability of vocational rehabilitation, Congress included provisions for a period of "trial work," in which a TDIU rating would not be reduced where a veteran secures and follows a substantially gainful occupation unless the veteran maintains such an occupation for a period of 12 consecutive months. Congress indicated that it considered "it desirable to provide every

reasonable opportunity and encouragement for disabled veterans?including those with very serious handicaps and those determined to be unemployable?to return to work.?

Under VA's Departmental Strategic Goal 1, the first ?objective? of VA's Vocational Rehabilitation and Employment program is to ?[p]rovide all service-disabled veterans with the opportunity to become employable and obtain and maintain suitable employment, while providing special support to veterans with serious employment handicaps.? VA's objective to provide ?all? service-connected disabled veterans with the opportunity to become employable is laudable, but it must be viewed in light of the realities of the challenges associated with retraining veterans of advanced age to a status of ?rehabilitated to the point of employability.? According to VA, achieving that status is challenging even for veterans younger than those with advanced age: ?Achieving suitable employment at age 40 and above is, in itself, a considerable challenge for anyone. Moreover, veterans with disabilities must typically compete for employment against young college graduates, age 22 to 25, who often have not served in the military, who have no dependents, and who have no disabilities.? ?The average age of a program participant is 41 years for male veterans and 37 years for female veterans, while the average age of disabled male and female veterans who complete a VA vocational rehabilitation program by achieving suitable employment is 45 and 39 years respectively.?

VA should be able to provide the Committee more information about the numbers of older veterans who complete a course of vocational rehabilitation and achieve suitable employment. We suspect it is relatively few.

It is unfortunate that the number of unemployable veterans is rising, and perhaps more could be done to keep a portion of these veterans working as they would probably prefer, but the rising number itself does not appear to be a symptom or sign of failure. Rather, it is a reflection of the makeup of the veteran population, the nature and effect of the more prevalent service-connected disabilities, and, perhaps, the improved responsiveness of the claims adjudication system.

We appreciate the Committee's interest in ensuring the effectiveness of programs for disabled veterans, and we appreciate the opportunity to present DAV's views.