

The Honorable Daniel L. Cooper, Under Secretary for Benefits, Department of Veterans Affairs - accompanied by: Ms. Renee Szybala, Director, Compensation and Pension Service; Mrs. Judith Caden, Director, Vocational Rehabilitation and Employment Service Director; Dr. Patrick Joyce, Chief of Occupational Health, Washington VA Medical Center

STATEMENT OF  
THE HONORABLE DANIEL L. COOPER  
UNDER SECRETARY FOR BENEFITS  
DEPARTMENT OF VETERANS AFFAIRS  
BEFORE THE  
SENATE COMMITTEE ON VETERANS' AFFAIRS

OCTOBER 27, 2005

Mr. Chairman and members of the Committee: Thank you for the opportunity to review with you the issue of Individual Unemployability (IU). I will discuss what IU is, its history, the criteria used to determine eligibility, the number of veterans receiving IU benefits, the May 2005 study by the Inspector General (IG) of state variances in average annual compensation, and other issues. I am pleased to be accompanied by Ms. Renée Szybala, Director of VA's Compensation and Pension Service, and Ms. Judith Caden, Director of VA's Vocational Rehabilitation and Employment Service.

#### What Is IU

Individual Unemployability or IU is the basis on which the Department of Veterans Affairs pays service-connected disability compensation at the rate payable for a 100-percent evaluation to qualified veterans with combined evaluations that are less than 100 percent. Regional office decision-makers assign IU ratings when veterans meet minimum combined evaluation criteria and, in the judgment of the rating official(s), are unemployable due solely to their service-connected conditions. In exceptional circumstances, regional offices may refer cases that fail to meet the minimum combined evaluation criteria to the Director of the Compensation and Pension Service for consideration of an IU rating.

#### Authority

Section 1155 of title 38, United States Code, charges the Secretary with responsibility for developing and applying a disability rating schedule that is based, "as far as practicable," upon the average impairments of earning capacity resulting from service-connected disabilities. Recognizing that the intent of the rating schedule is to fairly compensate veterans for their disabilities to the extent to which they impair earning capacity of the average veteran, the schedule none-the-less cannot always adequately compensate an individual veteran in his or her particular circumstance. To address the inevitable situations where the schedule does not adequately address a particular fact pattern, the schedule adopted by the Secretary provides both IU and extra-schedular provisions.

#### Brief History of IU

In 1925, the Schedule for Rating Disabilities 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 1934, total disability was expanded to provide that total disability ratings may be assigned without regard to the specific provisions of the rating schedule when the veteran is, in the judgment of the rating agency, unable to follow a substantially gainful occupation as a result of the veteran's disabilities. To be eligible for consideration for IU benefits, the schedule required that a veteran have a single 70 percent evaluation or, if the veteran had multiple service-connected conditions, that the minimum combined evaluation be 80 percent with at least one disability considered 60 percent disabling.

In 1941, the minimum requirements for consideration for IU entitlement were revised to today's standard of 60 percent for a single disability or a combined 70 percent evaluation with at least one 40 percent disability.

Throughout the rating schedule, a 60 percent evaluation or higher reflects significant disability. A 40 percent evaluation assigned to a condition generally reflects a serious handicap. Therefore, when multiple service-connected conditions are involved, the higher 70 percent minimum combined evaluation is reasonable to allow for the interplay of multiple disabilities.

The 1945 rating schedule established that age was not to be considered a factor in evaluating service-connected disability, and that entitlement to IU could not be based on advancing age or additional non-service-connected disability.

Under VA regulations, if a veteran's earned income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person, currently \$9,570, the veteran is only marginally employed, and marginal employment does not qualify as substantially gainful employment. Also, the U.S. Court of Appeals for Veterans Claims held in *Faust v. West* that employment that provides annual income exceeding the poverty threshold for one person, irrespective of the number of hours or days actually worked and without regard to the veteran's annual earned income prior to the award of the IU rating, constitutes "actual employability."

#### Number of IU Beneficiaries

The number of veterans rated totally disabled based on IU has more than doubled in the past six years from 97,275 veterans in 1999 to over 221,000 veterans today.

There is no single clear explanation for the increase in IU ratings over the last six years. However, the rise has occurred concurrent with other significant changes. Since September 30, 1999, the number of veterans receiving compensation has increased from 2,252,980 to 2,636,979 at the end of fiscal year 2005. This increase of 383,999 veterans represents a 17 percent rise in the number of veterans receiving compensation. There has also been an increase in the average combined disability evaluation over the same period. At the end of 1999, 57 percent of all veterans receiving compensation had combined evaluations of 30 percent or less. Today it is 46 percent. The percent of veterans with combined evaluations of 60 percent disability or more has increased from 17 percent at the end of 1999 to the current 29 percent. An interplay of advancing age, diabetes, and various presumptions of service connection for cancers associated

with herbicide and radiation, as well as a significant increase in the number of veterans awarded service-connection for PTSD, account for a substantial portion of the increase.

Recent court decisions have also had an impact on IU ratings. For example, in 1999, the U.S. Court of Appeals for Veterans Claims in *Norris v. West* held that VA must infer a claim for IU if the veteran files a claim for increased disability, meets the schedular minimum combined evaluation criteria, and there is evidence of inability to engage in substantially gainful employment due to service-connected disability.

#### Interplay with Vocational Rehabilitation and Employment (VR&E)

In its September 1987 report, "Improving the Integrity of VA's Unemployability Compensation Program," the then General Accounting Office (GAO) recommended that VA revise its regulations to require that all veterans applying for a total disability rating based on IU be referred for a vocational rehabilitation evaluation.

VA does not currently require an employment assessment by VR&E program staff as part of the IU entitlement determination. If the Secretary decided to require an employment assessment in connection with determining a veteran's entitlement to IU, VA would first promulgate regulations defining the scope, purpose, and criteria for conducting such an assessment, and the manner in which VA would implement such assessments.

A veteran's participation in a program of rehabilitation, education, or training does not preclude a total disability rating based on IU. Veterans with compensable service-connected disabilities, including those with IU ratings, may be entitled to receive vocational rehabilitation benefits under the VR&E program (chapter 31, title 38, United States Code). VA also may not deny a veteran's IU claim on the basis that he or she is participating in a Veterans Health Administration (VHA) program of therapeutic and rehabilitative services, or consider therapeutic and rehabilitative activities as evidence of a veteran's ability to secure or follow a substantially gainful occupation. Our regulations allow a veteran receiving IU benefits to work 12 consecutive months in substantially gainful employment before any change is made in the IU determination.

#### Additional Benefits

A total disability rating based on IU can result in eligibility for additional benefits for a veteran's dependents and survivors. Educational benefits for the veteran's spouse and eligible children are available under the Survivors' and Dependents' Educational Assistance Program (title 38, United States Code, Chapter 35). The Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) provides reimbursement to eligible dependents for most medical expenses, provided that they are not also eligible for health care benefits provided by the Department of Defense. To be eligible for both of these benefits, the veteran's IU determination must be considered permanent. Permanency for eligibility to Chapter 35 and CHAMPVA requires that there not be a future examination scheduled.

#### Application Process

In most cases, to be considered for IU benefits, a veteran must apply. However, in the *Norris* case mentioned earlier, the court held that a veteran need not apply for IU for a claim for IU to be inferred. Thus, VA is required to consider the issue in certain circumstances, even if the veteran

did not explicitly apply for an IU rating. Recent guidance to the field directed that, once an IU claim is inferred, an application must be sent to the veteran for completion in order to obtain the essential information requested on the application form. The form asks the veteran to furnish an employment history for the five-year period preceding the date on which the veteran became unemployable, as well as from that date to the date of application.

As part of the development of IU claims, field stations are also required to solicit information from each employer during the 12-month period preceding the date the veteran last worked. The employer is asked to provide information concerning the veteran's employment history including the date of employment, the type of work performed, and if the veteran is not currently working, the reasons for termination of employment.

#### Role of the Medical Examiner

If the rating official determines that a medical examination is necessary to determine whether a veteran is entitled to a total disability rating based on IU, an appropriate examination or opinion request is submitted to a VHA medical facility or our contract examination provider.

Medical examiners follow the appropriate worksheets to perform a complete and adequate examination for rating purposes, answering all questions and providing opinions as requested. A diagnosis is to be provided for every condition listed on the examination request. The medical examiner should describe the disability's effect on the veteran's daily activities and ability to work. For IU claims, the examiner should also obtain the veteran's occupational history (i.e., type of occupation, employment dates, wages for last 12 months, and detail any time that was lost from work in past 12-month period).

#### Continued IU Eligibility

Once a veteran is awarded IU benefits and until he or she attains age 70, the veteran is required to submit an annual employment certification. This procedure was resumed in September after having been suspended for approximately six years. The veteran must list all employment for the preceding 12-month period. VA uses the certification to verify continued entitlement to IU benefits. Failure to return the form will cause VA to send the veteran a contemporaneous notice of reduction of the monthly benefit payment to the rate justified by the underlying rating.

VA may schedule a reexamination for any veteran when VA determines there is a need to verify the continued existence or current severity of a disability. Generally, VA requires reexamination if it is likely that a disability has improved or if evidence indicates that a disability has materially changed or that the current rating may be incorrect. Periodic future examinations are not requested if the disability is unlikely to improve, if symptoms have persisted without material improvement for a period of five or more years, where the disability is permanent in character, or in cases where the veteran is age 55 or older. After a veteran has received compensation at any level of disability for 20 years, to include total disability benefits based on IU, that compensation rate is protected.

Veterans receiving IU benefits are subject to VA's annual income verification match (IVM). The IVM uses Internal Revenue Service (IRS) and Social Security Administration (SSA) income records to verify that IU beneficiaries remain below the earnings threshold for entitlement to IU benefits.

## Reviews of VA Claims Processing Related to IU

Former Secretary Anthony J. Principi, in response to media articles about state-to-state variance in average compensation payments to veterans, requested that the VA Inspector General (IG) study the payment variance issue. The IG found that payment variance was affected by several factors including demographic factors and representation by veterans service organizations, as well as the incidence of PTSD and the subsequent award of IU benefits for that condition.

The Government Accountability Office (GAO) also issued a report in 2004 pointing to a need for increased analysis of the consistency of decision-making across regional offices. GAO is currently conducting a study of IU benefit decision-making.

Based on the preliminary findings from these reviews, as well as a significant increase in the number of IU case referrals received in the latest IVM with IRS and SSA, we have been analyzing our existing IU procedures and regulations to determine if changes are needed. As discussed earlier, we have reinstated the annual employment certification for veterans receiving IU benefits. We have also reinforced existing procedural and evidentiary guidelines for IU determinations through conference calls with our field stations and at our recent Veterans Service Center Managers Conference. We will continue to work to provide additional training for our employees, and to identify ways to strengthen and clarify our long-standing procedural requirements and ensure the integrity of this important benefit.

The IU benefit has a long history. It fills a critical gap when the rating schedule fails to fully address the impact of disability in a specific veteran's circumstance. We believe that during this period of conflict and danger for our country, IU continues to be an essential tool in serving America's veterans and fulfilling the country's commitment to them. We at VBA are fully cognizant of this as we work to ensure those who have served this nation are fully compensated for their injuries and assisted in returning to participation in society to the maximum extent possible permitted by their injuries.

Thank you for this opportunity to discuss this important benefit. I would be pleased to address any questions you may have.