Diminished Earning Capacity Determination

Issuing Authority: Director General, Policy and Research
Effective Date: 1 April 2024
Document ID: 1971

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Purpose

This policy describes the requirements and considerations for determining whether a Veteran has or continues to have a diminished earnings capacity (DEC) for suitable and gainful employment. This diminished capacity must be due to the health problem(s) resulting primarily from service for which the Veteran has been made eligible for the Income Replacement Benefit and / or the Rehabilitation Services and Vocational Assistance Program (Rehabilitation Program) under the *Veterans Well-being Act* (VWA).

Authority

Subsections 10(1), 11(1) and 18(5), 18(7), 18(8) of the *Veterans Well-being Act* (VWA).

Policy

General

1. As of April 1, 2019, Veterans eligible for the Rehabilitation Program for health problems resulting primary from service will have a DEC determination by VAC.
2. On or after April 1, 2019, VAC may determine that a Veteran has a DEC due to impacts from health problems not resulting primarily from service, but is deemed eligible for rehabilitation services, when the

following criteria are met:

a. the Veteran made an application under section 9 of the VWA prior to April 1, 2019; and
b. the Veteran is subject to an IRB transition provisions << see Income Replacement Benefit - Transition Policy >>.

This DEC determination is completed for IRB purposes only. Spouses and CLPs will not be eligible for vocational assistance or rehabilitation services based on this DEC determination.

3. For those Veterans who are eligible under Section 9 between April 1, 2019 and March 31, 2024, VAC does not need to determine that a Veteran has a DEC due to impacts from health problems not resulting primarily from service or when the Veteran made an application under section 9 of the VWA prior to April 1, 2019; and an Earnings Loss Benefit was not payable to the Veteran on March 31, 2019.
4. VAC will decide based on the Veteran's circumstances when the Veteran will undergo a DEC determination.
5. Under the VWA, DEC determinations are conducted for the following purposes:
    a. to provide access to the Rehabilitation Services and Vocational Assistance program for a Veteran's spouse or common-law partner (CLP) under section 11 of the Act (for more details see Rehabilitation Services and Vocational Assistance – Eligibility and Application Requirements policy); or
    b. to provide continued access to the IRB under section 18(7) of the Act who may have the career progression factor applied in the calculation of their IRB per subsection 19(3) of the Act (for more details see the Income Replacement Benefit policy).
6. For the purposes of access to the Rehabilitation Program for a spouse or CLP under section 11 of the VWA, all Veterans who:
    a. are eligible for the Rehabilitation Program under section 8 of the VWA (i.e., have at least one health problem resulting primarily from service that is creating a barrier to re-establishment); and
    b. have a rehabilitation plan for the health problem(s),

    will have a DEC determination regardless of age prior to the completion of their rehabilitation plan. The DEC determination in these instances may be conducted as part of the rehabilitation assessment under 10(1) of the Act, if a DEC has not been determined for IRB purposes.

7. For the purposes of determining the continued IRB under subsection 18(7) of the VWA and potential application of the career progression factor under subsection 19(3) of the Act, all Veterans who:
    a. are entitled to the IRB under section 18 of the VWA; and
    b. have a rehabilitation plan for the health problem(s),

    will have a DEC determination prior to age 65 or prior to the completion of their rehabilitation plan, whichever comes first. DEC determinations will not be made after the Veteran reaches the age of 65 for IRB purposes unless the reasons for delay are reasonable in the circumstances (see paragraph 20 for more details).

8. Per section 77 of the VWA, VAC will undertake DEC determinations as expeditiously as possible given the Veteran's circumstance. For more information, please refer to the section within this policy When to Initiate a DEC Determination.
9. VAC will not undertake a DEC determination for Veterans in the following circumstances:
    a. the rehabilitation plan has been cancelled, including Veterans who choose to stop participating in their rehabilitation plan (referred to as a withdrawal); or

b. the rehabilitation plan has been completed due to the Veteran's death.

For more information with respect to cancellations and completions please refer to the Rehabilitation Services and Vocational Assistance Plan - Assessment, Plan Development and Implementation policy.

10. Veterans, whose rehabilitation plans have been cancelled prior to a DEC determination, will have to re-establish eligibility for the Rehabilitation Program for a health problem resulting primarily for service under section 8 of the Act. This will include participating in assessments under section 10 of the VWA and the development and possible implementation of a potential Rehabilitation Plan in order to have a DEC determination.
11. In cases where a Veteran's IRB has been cancelled, the Veteran, prior to age 65, will have to re-establish eligibility for IRB for a health problem resulting primarily from service, and participate in the rehabilitation assessment and plan development process as outlined in paragraph 10 in order to have a DEC. For more information with respect to IRB cancellation please refer to the Income Replacement Benefit policy.
12. For the purposes of identifying suitable and gainful employment in a DEC determination when a Veteran is not eligible for IRB, VAC may determine an imputed income comparable to the amount that would have been used for IRB purposes had the Veteran been eligible for the benefit. The calculation is not necessary, if VAC can reasonably determine that the Veteran has a DEC due to impacts of eligible health problems (for more details see section within this policy for Evidence Required).

Eligible Health Problems considered in a DEC Determination

13. Health problem(s) leading to a DEC must be permanent, meaning that the health problem is expected to persist indefinitely and limit earnings capacity despite rehabilitation. Although the signs and symptoms of the health problem may wax and wane over time, the health problem(s) is permanent if further improvement is not anticipated.
14. For the purposes of:
    a. spouses' or CLPs' eligibility to VAC's Rehabilitation Program a Veteran's DEC determination must be the result of impacts caused by the physical or mental health problem(s) eligible per section 8 of the VWA, where the health problem(s) results primarily from service and creates a barrier(s) to re-establishment in civilian life; or
    b. the continuation of the IRB for the life of the Veteran and potential application of a career progression factor in the benefit's calculation, a DEC determination must be the result of impacts caused by the physical or mental health problem(s) eligible per section 18 of the VWA, where the health problem(s) results primarily from service and creates a barrier(s) to re-establishment in civilian life.
15. In cases where the Veteran presents with more than one health problem (at least one eligible and one non-eligible) and there is uncertainty regarding which health problem is creating the impacts causing the DEC, VAC should obtain medical, psychological and/or vocational assessments as required to identify, which problem is causing the DEC.
16. In circumstances, where despite medical/psychosocial/vocational assessment, it is not possible to separate the impacts of the health problems, a Veteran's DEC may be attributed to:
    a. the eligible health problem(s), if the DEC is more likely than not due to the eligible health problem(s);
    b. the eligible heath problem(s) in accordance with section 2.1 of the VWA, if the DEC is equally due to eligible and non-eligible health problems; or
    c. the non-eligible health problem(s) (examples provided in paragraph 17), if the DEC is more likely than not due to these non-eligible health problem(s).

17. Examples of non-eligible health problem(s) could include the following:
    a. determined on or after April 1, 2019, as not eligible for either Rehabilitation Program or IRB under sections 8 or 18 of the Act as a health problem(s) resulting primarily from service; or
    b. determined on or after April 1, 2019, as eligible for medical and psycho-social rehabilitation services under section 9 of the VWA - medically released Veteran for a health problem(s) not resulting primarily from service; or
    c. experiencing impacts to their overall health but there was never a Rehabilitation Program and/or IRB decision for the health problem(s).

When to initiate a DEC Determination

18. For Veterans identified in paragraphs 6 and 7 of this policy, a DEC determination may be initiated by VAC at any time during the Veteran's participation in a rehabilitation plan and should be made in one or more of the following circumstances:
    a. the Veteran has no vocational needs and is suitably, gainfully employed or may be suitably, gainfully employed;
    b. the Veteran has an approved Rehabilitation Plan targeted at suitable, gainful employment;
    c. the Veteran has chosen, despite having capacity for suitable gainful employment, an occupational goal which, although suitable, will not remunerate at the gainful level;
    d. the Veteran's vocational assessment provides evidence that the Veteran will not have the capacity for suitable, gainful employment, even with vocational rehabilitation services. This may be at the point of initial assessment or subsequently determined during the course of vocational rehabilitation;
    e. medical and/or psychosocial assessment/evidence provided by the Veteran's treating clinicians establish that the nature of the Veteran's eligible health problem(s) is such that, even if all reasonable medical and psycho-social rehabilitation efforts are exhausted, the Veteran cannot/will not be able to participate in vocational rehabilitation;
    f. the Veteran has been determined 'totally disabled' with CAF LTD and/or in receipt of the Canadian Pension Plan disability benefit;
    g. the Veteran eligible for IRB is approaching their 65th birthday; or,
    h. evidence confirms the Veteran's ineligible health problem(s) is preventing the Veteran from participating in vocational rehabilitation services, or participating to the extent to achieve suitable gainful employment. This would include health problems for which the Veteran has not applied.
19. In some cases the medical, psycho-social and/or vocational assessments from the respective rehabilitation providers may not provide clear evidence as to whether the Veteran will have the potential to obtain suitable and gainful employment. In these circumstances, VAC may delay initiating a DEC determination until:
    a. after reasonable rehabilitation efforts have been undertaken; or
    b. it becomes evident that regardless of effort, the Veteran will not have the capacity to engage in suitable and gainful employment.
20. For IRB purposes, DEC determinations need to be rendered before the Veteran attains the age of 65 or prior to the completion of their rehabilitation plan for the eligible health problem(s), whichever comes first. In certain circumstances, VAC may complete a DEC determination after the Veteran reaches the age of 65, if the reasons for delay are reasonable in the circumstances. Evidence that substantiates the reasons for the delay must be provided to VAC. Examples of reasonable delays include, but are not limited to:
    a. VAC has initiated an earnings capacity assessment and is awaiting evidence or is in the process of finalizing the decision; or

b. the Veteran is unable to undergo a vocational assessment due to severe illness or the need to care for a severely ill family member or a death of a family member

The appropriate VAC Program Management and Policy area should be consulted on a case-by-case basis, when a DEC decision is to be made post age 65.

21. In the event that a Veteran requests a DEC determination, VAC will consider initiating a determination only if the criteria outlined in paragraphs 18 to 20 of this policy are met.

Evidence Required

22. A DEC determination must be based on objective evidence in relation to the eligible health problem(s) for which rehabilitation services and the IRB have been approved.
23. The Veteran is to undergo a vocational assessment from a vocational rehabilitation provider in order to determine a DEC. A vocational assessment can include functional capacity assessments and employability assessments.
24. The vocational assessment may not be required if medical reports, other records, documents or information (including Canadian Armed Forces - Long Term Disability (CAF-LTD) reports and Canada Pension Plan (CPP) – Disability reports) available to the Department sufficiently demonstrate that:
    a. the Veteran has a DEC due to the severity of their eligible health problem(s) and the Veteran will likely not regain the capacity for suitable gainful employment, even with rehabilitation; or
    b. the Veteran is suitably and gainfully employable and there is no mitigating circumstances (e.g., eligible health problem impacting their employability or functional capacity).
25. The following objective evidence must be considered in a DEC determination:
    a. the prognosis regarding the eligible health problem(s); and
    b. the impact of the eligible health problem(s) on the Veteran's:
    c. functional capacity; and
    d. employability.
26. Where evidence indicates that, with additional medical, psycho-social or vocational rehabilitation, the Veteran could have potential to regain capacity for suitable gainful employment, the Veteran should not be found to have met the criteria for a DEC designation.
27. A Veteran who:
    a. has been found to be "totally disabled" under CAF-LTD; or
    b. was found eligible for CPP-Disability,

    is not automatically considered to have a DEC. Although these programs may provide evidence used as part of a vocational assessment or in lieu of the vocational assessment (see previous paragraph), the Veteran must meet VAC's criteria for a DEC determination.

28. In accordance with subsection 20(1) of the *VWA*, the Department may suspend, and subsequently cancel, an IRB payment if a Veteran refuses to undergo a required medical examination or an assessment to determine if the Veteran has a DEC. See the Income Replacement Benefit policy.
29. Refusal to undergo a required medical exam or an assessment may also be considered as not participating in a rehabilitation plan (see Rehabilitation Services and Vocational Assistance Plan: Assessments, Development and Implementation policy for more details)

Other Factors - DEC Determinations

30. A DEC decision is based on the Veteran's capacity to perform any occupation that would be considered suitable gainful employment, not on the Veteran's choices or preferences, or local labour market conditions. The Veteran's incapacity, despite rehabilitation efforts, must be the result of impacts from physical or mental health problem(s) for which the Veteran is eligible for the Rehabilitation Program under section 8 of the Act or for IRB eligibility under section 18 of the Act (i.e., physical or mental health problem resulting primarily from service that is creating a barrier to re-establishment).
31. Factors such as lack of child care or elder care, family responsibilities or preferred working hours do not form part of the determination of a Veteran's capacity to perform suitable gainful employment.

    For example: A Veteran who has the capacity for suitable gainful employment, but who chooses to work part-time or in less gainful work, would not meet the DEC requirements.

32. Local labour market conditions, including but not limited to the unemployment rate, availability of certain types of jobs, salary levels and language requirements in the region where a Veteran resides, are not considered in the DEC decision.

    For example: A Veteran who has the capacity to work as a mechanic, an occupation which could be considered suitable gainful employment in Canada, would not be determined to have met the criteria for a DEC designation by virtue of the Veteran choosing to live in a region where mechanic salaries are lower and would no longer be gainful.

Effective Date

33. A DEC determination can only be rendered following the submission and/or collection of the necessary evidence.
34. For the purposes of the Rehabilitation Program, a decision where the Veteran is determined to have a DEC is effective the day the decision is rendered.
35. For the purposes of the IRB, a decision where the Veteran is determined to have a DEC is effective the day the decision is rendered. Where the decision is made after age 65 due to reasonable cause, the DEC determination is deemed to have been made the day before the Veteran's 65th birthday.

Participation in a Rehabilitation Plan Post DEC Determination

36. A Veteran who has been determined to have a DEC may continue to participate in a rehabilitation plan to address their rehabilitation needs. Participation in a rehabilitation plan is not required for IRB entitlement for the life of the Veteran (refer to the Income Replacement Benefit policy for more detail).
37. While a Veteran may be unable to achieve suitable gainful employment due to the Veteran's eligible health problem(s), the Veteran may still have the capacity to earn income to some degree and want to return to the workforce. A Veteran who has been determined to have met the criteria for DEC may be supported in vocational rehabilitation. Refer to the Rehabilitation Services and Vocational Assistance Plan – Assessment, Development and Implementation policy for more details.
38. Where VAC determines that a Veteran would not benefit from vocational rehabilitation due to a DEC determination, the Veteran's spouse/ CLP may become eligible for VAC's Rehabilitation Program. Refer to Rehabilitation Services and Vocational Assistance – Eligibility and Application Requirements policy for more details.

DEC Status – Follow up

39. In cases where a Veteran is determined to have a DEC, VAC may request the Veteran to undergo an examination or assessment to determine if he / she continues to meet the criteria for a DEC.
40. For the Rehabilitation Program purposes, a follow up request can occur at any point while:
    a. the Veteran is participating in their rehabilitation plan as part of the evaluation of their plan; or
    b. the Veteran is being assessed for rehabilitation needs after re-engaging in the Rehabilitation Program for health problems eligible under section 8 of the Act.

    Should the Veteran refuse to comply with the request, VAC may consider cancelling the Veteran's rehabilitation plan. Please refer to the Rehabilitation Services and Vocational Assistance Plan – Assessment, Development and Implementation policy for more detail with respect to assessment, evaluation and cancellation of rehabilitation plans.

41. For IRB purposes, a follow up request may only occur before a Veteran's 65th birthday. After the age of 65, a DEC follow-up determination will not cease the IRB payment per subsection 18(10) of the VWA. Should the Veteran fail before age 65 to comply with any request for an examination or assessment for IRB purposes without reasonable cause, VAC may suspend or cancel the Veteran's IRB in accordance with subsection 20(1) of the VWA (for more details see the Income Replacement Benefit policy).
42. A request for an examination or assessment of the Veteran's DEC status may be made in any of the following circumstances:
    a. the Veteran shows potential for improvement while participating in their rehabilitation plan;
    b. the Veteran is interested in re-engaging in the Rehabilitation Program for health problems eligible under section 8 of the Act;
    c. statements of earnings indicate that a Veteran with a DEC may be gainfully employed recently for two consecutive years;
    d. statements or documents indicating that the Veteran with a DEC has an improved earnings capacity under other third party compensation plans and as defined by the respective plan, such as no longer "totally disabled" under CAF LTD (SISIP) or no longer eligible for Canada Pension Plan Disability or for a long term provincial or federal worker's compensation plan; or
    e. any other evidence that indicates that the Veteran has an improved earnings capacity.
43. If an examination or assessment is determined to be appropriate, the decision maker should consider the results as part of a new DEC determination with respective appeal rights. This new determination will follow the same steps as taken for an initial determination and in accordance with this policy.
44. The new DEC determination may also include eligible health problems that were not considered in the initial DEC determination (e.g., eligibility for health problem was established after the initial DEC determination).
45. If the Veteran is determined to have the capacity for suitable gainful employment, the DEC status should be terminated effective the date of the decision (Refer to Income Replacement Benefit for details of when IRB is payable).

Communication of Decisions

46. All DEC determinations, including follow up decisions, must be communicated to the Veteran in writing, including the reason(s) for the decision, the effective date of the decision and the Veteran's rights for review.

References

Income Replacement Benefit

Rehabilitation Services and Vocational Assistance – Eligibility and Application Requirements

Rehabilitation Services and Vocational Assistance Plan: Assessments, Development and Implementation

Veterans Well-being Act, sections 10, 11 and 20; and subsections 18(5), 18(7), 18(8) and 18(9), 18(10)

Veterans Well-being Regulations, sections 6 and 17.1

Definitions for VAC Rehabilitation and Vocational Services and related compensation benefits