

DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

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Director (00/21)
All VA Regional Offices and Centers

In Reply Refer To: 211B
Fast Letter 09-33

SUBJ: Special Monthly Compensation at the Statutory Housebound Rate

This letter provides guidance for adjudicating claims involving entitlement to special monthly compensation (SMC) at the housebound rate based on a decision by the U.S. Court of Appeals for Veterans Claims (CAVC or Court) in *Bradley v Peake*.

Background

38 U.S.C. § 1114(s) provides that SMC at the (s) rate will be granted if a veteran has a service-connected disability rated as total, and (1) has additional service-connected disability or disabilities independently ratable at 60 percent or more, or (2) is permanently housebound by reason of a service-connected disability or disabilities. VA's implementing regulation at 38 C.F.R. § 3.350(i) essentially mirrors the statutory language.

Prior to the CAVC's decision in *Bradley v. Peake*, VA excluded a rating of total disability based on individual unemployability (TDIU) as a basis for a grant of SMC at the (s) rate. VA relied upon language in citing VAOPGCPREC 6-99, dated June 7, 1999, in which the General Counsel stated that a TDIU rating takes into account all of a veteran's service-connected disabilities and that considering a TDIU rating and a schedular rating in determining eligibility for SMC would conflict with the requirement for "additional" disability of 60 percent or more by counting the same disability twice.

On November 26, 2008, the Court, in *Bradley v. Peake*, disagreed with VA's interpretation and held that the provisions of section 1114(s) do not limit a "service-connected disability rated as total" to only a schedular 100 percent rating. The Court found the opinion too expansive because it was possible that there would be no duplicate counting of disabilities if a veteran was awarded

TDIU based on a single disability and thereafter received disability ratings for other conditions.

The Court's holding allows a TDIU rating to serve as the "total" service-connected disability, if the TDIU entitlement was solely predicated upon a single disability for the purpose of considering entitlement to SMC at the (s) rate.

The Court held that the requirement for a single "service-connected disability rated as total" cannot be satisfied by a combination of disabilities. Multiple service-connected disabilities that combine to 70 percent or more and establish entitlement to TDIU under 38 C.F.R. § 4.16(a) cannot be treated as a single "service-connected disability rated as total" for purposes of entitlement to SMC at the (s) rate.

New Evidentiary Standard

Based on the Court's decision in *Bradley*, entitlement to SMC at the (s) rate will now be granted for TDIU recipients if the TDIU evaluation was, or can be, predicated upon a single disability and (1) there exists additional disability or disabilities independently ratable at 60 percent or more, or (2) the veteran is permanently housebound by reason of a service-connected disability or disabilities.

For example, a veteran in receipt of TDIU based on a 70 percent evaluation for posttraumatic stress disorder (PTSD) and other service-connected disabilities consisting of a below-the-knee amputation, rated 40 percent disabling; tinnitus, rated 10 percent disabling; and diabetes mellitus, rated 20 percent disabling, would be entitled to SMC at the (s) rate if it is determined that PTSD is the sole cause of the unemployability, as the other disabilities have a combined evaluation of 60 percent.

It is important that, for purposes of section 1114(s)(1), no disability is considered twice to ensure that the prohibition against pyramiding contained in 38 C.F.R. § 4.14 is not violated when determining which disability results in TDIU entitlement and in determining which disability or disabilities satisfy the independent 60 percent evaluation to award SMC at the (s) rate.

However, for purposes of section 1114(s)(2), a disability may be considered in determining TDIU entitlement as well as in determining whether a veteran is permanently housebound as a result of service-connected disability or disabilities because that provision does not specify "*additional* service-connected disability or disabilities" as in section 1114(s)(1).

Accordingly, a determination for entitlement to SMC at the (s) rate must be made in all TDIU cases where potential entitlement to SMC (s) is reasonably raised by the evidence.

Current Status

Regulations and M21-1MR, IV.ii.2.H.46.a will be revised to comply with the Court's decision. In the interim, the Court's holding will be applied to all pending and future claims.

In applying the Court's holding, if the medical evidence is insufficient to render an adjudicative determination as to whether the veteran's TDIU entitlement solely originates from a single service-connected disability, and there is potential entitlement to SMC at the (s) rate, the veteran should be scheduled for a VA examination to include an opinion as to the cause of unemployability.

Questions

Questions concerning this fast letter and other issues related to this issue should be submitted to the VAVBAWAS/CO/21FL mailbox.

/s/

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Director

Compensation & Pension Service