Temporary Payment of Pension at the Special Rate

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Abstract: The temporary special rate applies if the person would meet the tests in s 24 but that instead of the relevant incapacity lasting indefinitely (ie, being permanent), it will only last for a particular time (ie, being temporary).

The temporary special rate applies for blinded incapacity as well as incapacity for remunerative work.

When the incapacity relates to remunerative work, it applies to the tests in s 24(1)(b) and (c).

The temporary special rate is not preserved by s 24A if circumstances change.

Certain benefits provided to pensioners receiving the permanent special rate are not provided to those on the temporary rate.

Incapacity will be temporary if there is treatment reasonably available that is likely to restore the person’s capacity for relevant remunerative work.

While age is not usually a relevant factor, it might affect the nature of the evidence on which a decision is made.

Expert evidence should be obtained to help decide questions including the nature and effect of the incapacity and its likely duration.

The decision-maker must decide the period of temporary incapacity and should set a rate to which the pension will reduce when that period ends.
Subsection 25(1) provides that temporary payment of pension at the special rate applies if a person is temporarily incapacitated from war-caused or defence-caused injury or disease and he or she would meet the criteria in section 24 for the special rate of pension if the temporary incapacity were permanent.

Thus the only difference in criteria between the two pension rates is the likely duration of the incapacity. While usually this test relates to the question whether a person is temporarily incapacitated for the purposes of the different kinds of remunerative work referred to in s 24(1)(b) and (c), it also applies to the ‘blinded’ test in s 24(3). Thus if a person is temporarily blinded in both eyes as a consequence of accepted disabilities, the temporary special rate applies.

**Eligibility for other benefits**

Persons paid the temporary special rate of pension receive the same amount of pension per fortnight as those who receive the permanent special rate. However, they do not receive the same range of benefits applicable to those on the permanent rate. Benefits for which they are not eligible include access for their children to the veterans’ children education scheme, GST exempt motor vehicles, eligibility for automatic war widows and orphans pensions in the event of their death, and various State government, utility and transport concessions. A determination of temporary incapacity is also likely to mean that a claim for invalidity service pension (and thus partner service pension) would be refused.

While persons receiving the temporary special rate of pension are eligible for medical treatment for any injury or disease whether service-related or not, they might still want to maintain private health insurance for their partner (who would not be eligible for partner service pension) and for themselves because of the possibility that their pension may be reduced to below 100% of the general rate at some time in the future, at which time they would lose their right to treatment for anything but their accepted disabilities.

The veterans’ vocational and rehabilitation scheme is potentially available for any pensioner, whatever rate they receive, but the income protection element of the scheme for disability pensioners applies only to those on the permanent special rate or the intermediate rate.

Thus, while the rates of pension are identical, there are significant additional benefits available to persons on the permanent special rate of pension.

Nevertheless, the availability or otherwise of these benefits is not a relevant matter in considering the proper rate of pension.

**Temporary or permanent**

The words ‘temporary’ and ‘permanent’ take their meaning from the context in which they appear. In the context of sections 24 and 25, it appears that ‘permanent’ means that the relevant incapacity is likely to continue indefinitely,

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and ‘temporary’ means that the incapacity is likely to continue for a limited period that may be reasonably estimated. This is the approach that the Repatriation Commission has applied in issuing guidelines to its delegates, and it is consistent with social security case law concerning invalid pensions. There is no veterans’ case law that specifically deals with this question.

In *Re Tiknaz and Director-General of Social Security*, the Tribunal said:

In the context of ss.23 and 24 of the *Social Services Act 1947*, the word ‘permanent’ does not refer to an incurable condition but rather to one that is static or constant, one that will not persist only for a temporary period, one that will persist at least for an indefinite time in the future. A person who is temporarily incapacitated is entitled to a Sickness Benefit. He is entitled to an Invalid Pension if he is permanently incapacitated. In the context, the word ‘permanent’ does not refer to a condition which will necessarily continue for the remainder of the person’s life. It refers to a condition which is established and continuing, a condition which is not temporary or transitory. See *Henriksen v Grafton Hotel Ltd.* [1942] 2 KB 184 at 196, *Applegate v Federal Commissioner of Taxation*, 18 ALR 459 at 463, the remarks of Mr A N Hall and Dr M Glick in *Re Panke and Director-General of Social Services* (delivered 23 July 1981), paragraph 50, and the remarks of Mr E Smith, Dr M Glick and Mr W B Tickle in *Re Bradley and Director-General of Social Services* (delivered 19 August 1981), paragraphs 37 and 38.

The Full Federal Court, in *McDonald v Director-General of Social Security*, agreed with this passage from *Re Tiknaz*. Woodward J said:

In my view the true test of a permanent, as distinct from temporary, incapacity is whether in the light of the available evidence, it is more likely than not that the incapacity will persist in the foreseeable future. (Cf. *Re Tiknaz and Director-General of Social Services* (1981) 4 ALN N44.)

This test involves two questions. The first is whether it is more likely than not that the disability will terminate (or fall below 85% in the sense referred to above) at some time in the future. Even if the answer to this question is ‘Yes’, I think it would be inaccurate in the context of employment to describe as ‘temporary’ a condition which was likely to last for a number of years. Hence the two elements of degree of likelihood of improvement and time-span for that improvement, should be weighed together in determining what is permanent and what is temporary. The greater the likelihood of substantial improvement and the earlier that it is likely to occur, the more accurate will be a ‘temporary’ label. The longer the period and the less probable the improvement, the more appropriate will be a finding of permanent incapacity.

I do not regard what I have just said as conflicting in any way with the passage from *Re Panke and Director-General of Social Security* (above), quoted by the AAT. The choice is indeed between incapacities ‘likely to last indefinitely’ — meaning for a long and indeterminate time but not necessarily forever — and

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2 Repatriation Commission decisions CM5011, CM5569, and CM5574, which are available on CLIK under ‘Compensation and Support – Reference’.

3 (1981) 4 ALN N44

4 (1984) 1 FCR 354; 6 ALD 6

5 (1984) 1 FCR 354 at p 360
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incapacities ‘likely to last only for a time’ — meaning a time which is predictable and capable of being quantified, though not necessarily with any precision.

Northrop J said

The phrase ‘permanently incapacitated for work’ appears in social welfare legislation which also makes provision for sickness benefits to be paid to a person ‘incapacitated for work’ being ‘an incapacity of a temporary nature’; see s.108 of the Act. A distinction of a temporal nature is thus drawn, even though in this context, of necessity, ‘permanent’ must be limited in time. In some workers’ compensation legislation, another type of social welfare legislation, reference is made to ‘permanent’ disablement. In the context of that type of legislation, the High Court has characterised the concept of ‘permanent’ as being forever. Thus, in Wicks v Union Steamship Company of New Zealand Ltd (1933) 50 C.L.R. 328, the Court comprising Gavan Duffy CJ, Rich, Starke, Dixon, Evatt and McTiernan JJ at pp.338 said:

‘The sub-section then excepted from the limitation cases of permanent and total disablement. The Commission was, therefore, called upon to decide whether the worker had been permanently and totally disabled, an expression which, in our opinion, means physically incapacitated from ever earning by work any part of his livelihood.’

To some extent the absolute nature of ‘forever’ in relation to an incapacity for work is eased by the statement of principles enunciated in Panke’s case, supra, that under the Act, ‘permanent incapacity must be taken to refer to an incapacity which is likely to last indefinitely as opposed to one which is likely to last only for a time’. I agree with the opinion of Woodward J that under the Act the true test of whether incapacity for work is permanent as distinct from being of a temporary nature is whether, in the light of all the evidence and material before the Director-General, or his delegate, or the AAT, the incapacity for work is more likely than not to persist in the foreseeable future.

In deciding whether the relevant incapacity is temporary or permanent, it is important to have a clear focus on the particular aspects of the person’s incapacity that might affect their continued eligibility under section 24 in the foreseeable future.

Medical evidence

Medical opinion, usually from an occupational physician, should take account of the person’s vocational, trade and professional skills, qualifications and experience to identify the kinds of work that someone with those attributes might reasonably undertake, and identify the particular effects, if any, of the person’s accepted disabilities that render the person incapable of performing those kinds of work for more than 8 hours a week (s 24(1)(b)).

Additionally, medical evidence must indicate whether the person is prevented from undertaking, at all, a kind of remunerative work that the person was previously undertaking and that he or she would still be undertaking were it not for the effect of the accepted disabilities: Wright v Repatriation Commission.

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6 (1984) 1 FCR 354 at pp 364-365
7 [2005] FCA 7 at paras [21] and [25]
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The evidence must also indicate whether the person is thereby suffering a loss of salary, wages or earnings on his or her own account (s 24(1)(c)).

Medical evidence should indicate the likely duration of the particular incapacity for the relevant kinds of remunerative work and identify the particular aspects of the person’s incapacity that are likely to improve with treatment or time. Medical opinion should indicate the expected nature and degree of improvement following treatment and over the next few years and its effect on the person’s capacity to undertake the relevant kinds of remunerative work.

If the available medical evidence does not address all these matters, it is important to obtain such evidence from a properly qualified expert, such as an occupational physician. Psychiatrists generally do not have this expertise, but their opinions regarding symptoms, history and progress of the disease, treatment, and prognosis should be provided to occupational physicians to assist them in forming an opinion in relation to the employment effects of psychiatric disease. The occupational physician might be invited to discuss these matters with the psychiatrist before giving an opinion.

Possible medical treatment

In Dragojlovic v Director-General of Social Security, the Federal Court held that a ‘disability which can be relieved by treatment which is reasonably available is not permanent’. However, Smithers J went on to say that ‘where the claimant is a person who actually cannot, for fear, or religious beliefs, for example, or for some other reason of a genuinely compulsive nature, accept that treatment, the question is whether his disability is one which can, in fact, be relieved’.

Therefore, if a person chooses, unreasonably, not to undertake treatment that is likely to restore a capacity for relevant remunerative work, they cannot be said to be permanently incapacitated for remunerative work.

Age

A person’s age, together with their general level of fitness, might play a role in a person’s resilience and capacity to recover from disability, and are matters that should be raised with specialists when seeking an opinion on the nature and duration of a person’s incapacity.

However, in many cases age will not be a relevant factor in deciding whether a person’s incapacity for remunerative work is temporary or permanent. Nevertheless, the younger a person is, the more serious is a label of ‘permanently incapacitated for remunerative work’. As the High Court observed in Briginshaw v Briginshaw, the more serious the matter to be decided, the greater should be the quality of probative evidence on the issue. This does not

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8 (1984) 1 FCR 301 at p 304.

9 (1938) 60 CLR 336
mean that the standard of proof is any different – it is always a question of the decision-maker’s ‘reasonable satisfaction’ – or that there is an onus of proof on one or other party (there is not), but the decision-maker should not decide important and serious questions without having the best evidence that can reasonably be obtained about the issue.

**The period of temporary incapacity**

Subsection 25(1) requires the Commission to determine a period during which the relevant incapacity is likely to continue. This means that the Commission cannot merely fix a commencement date, but must fix an end date for payment at the temporary special rate. The Commission’s guidelines to its delegates indicate that it would be unusual to fix a period of more than 2 years as the period of temporary incapacity.\(^\text{10}\)

While s 25 does not expressly provide that the Commission set a ‘reversion’ rate of pension upon the expiration of the temporary special rate period, it is implicit in the fact that the period must come to an end that the decision-maker should fix such a rate based on what evidence it has at the time of its decision as to the likely degree of incapacity and the rate of pension that is likely to be applicable at that time. As the decision-maker must have evidence indicating that incapacity is likely to improve to a level that would permit engagement in remunerative work at a certain time in the future, medical evidence could also indicate the likely degree of incapacity at that time.

Clearly, the preferable course of action would be to arrange for the person’s pension to be re-assessed close to the end of the period fixed under s 25(1), and a new rate of pension determined or the temporary period extended as envisioned by s 25(3)(b). However, in practice, the Repatriation Commission does not reassess pension when the period of temporary incapacity ends, but pension is automatically reduced to the rate at which the person had previously been receiving pension unless a reversionary rate had been fixed in the decision that assessed pension at the temporary special rate.

The onus is on the pensioner, if he or she believes the rate of pension should be higher than the rate to which the pension will reduce, to lodge an application for increase in pension so that the Commission is required to determine the appropriate rate, whether that rate should be a rate within the general rate, assessment at the permanent special rate or intermediate rate, or a continuation of the temporary special rate. Paragraph 25(3)(b) provides that the Commission can determine a further period that extends beyond an end date that has previously been fixed.

The fact that the onus is on the pensioner to take some action means that the decision-maker should make it clear to the pensioner that their pension will be reduced at the end of the fixed period unless they apply for an increase. This

\(^{10}\) Repatriation Commission decisions CM5569 and CM5574, which are available on CLIK under ‘Compensation and Support – Reference’.
should be done in the decision by setting the rate that will apply at the end of that period, thus indicating clearly that on a set date the rate of pension will reduce to a particular rate.

**Non-preservation of pension**

While s 24A preserves payment of pensions under s 23 and s 24, it does not preserve pensions paid under s 25. So if the person ceases to meet the ‘alone’ test in s 24(1)(c), the person ceases to be eligible for payment under s 25.

If the evidence indicates that the incapacity that prevents the person from continuing to undertake the kind of work the person had been undertaking will be only temporary, then notwithstanding that the person might still meet the tests in s 24(1)(b), the person will cease to be entitled to pension at the temporary special rate.

Similarly, if after pension has been assessed at the temporary rate some other factor begins to play a part in why the person cannot continue to undertake the kind of work he or she had been undertaking, eligibility for pension at the temporary special rate will cease. To this extent the effect of *Repatriation Commission v Smith* has not been legislatively overruled by the enactment in 1987 of s 24A.

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11 A person might not be able to undertake 8 hours a week of remunerative work for which the person has the relevant skills and experience and so meet s 24(1)(b), but if the person is able to continue to undertake any remunerative work at all (even less than 8 hours a week) in the type of work he or she had been undertaking, this will preclude the person from being eligible under s 24(1)(c): see *Wright v Repatriation Commission* [2005] FCA 7 at paras [21] and [25].

12 (1987) 15 FCR 327, 74 ALR 537. Beaumont J (with whom the other judges agreed) said:

‘But, even if that pension had then been granted, it would not, in my view, have been payable for an indefinite period. It was payable on a periodic basis and, in my view, it was intended by the legislature to provide some measure of compensation for continuing economic loss. In other words, a pension at the special rate was not, in my opinion, intended to be payable for the whole of the veteran’s life or indefinitely. A veteran is eligible for it only for so long as he is prevented from undertaking remunerative work by the service disability.’

The effect of this part of the judgment was overturned by section 24A but only in respect of pensions paid under s 23 and s 24, not in respect of pensions paid under s 25.

13 Section 24A was added by the *Social Security and Veterans’ Entitlements Amendment Act (No. 2) 1987* and was made retrospective to 22 May 1986 (the commencement of the *Veterans’ Entitlements Act 1986*).