EXPLANATORY STATEMENT

Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011

Authority

The *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (the Determination) is made under subsection 26(1) of the *Social Security Act 1991* (the Act), as inserted by item 2 in Schedule 3 to the *Social Security and Other Legislation Amendment Act 2011*. Under subsection 26(1) of the Act, the Minister has the power, by legislative instrument, to determine tables relating to the assessment of work-related impairment for disability support pension (Impairment Tables). Under subsection 26(3) of the Act, the Minister's power also extends to determining rules that are to be complied with in applying the Impairment Tables. Under subsections 26(2) and (4), the instrument may contain such ancillary or incidental provisions relating to the Impairment Tables and the rules as the Minister considers appropriate.

Background

Disability support pension is intended to provide income support to people who, because of an ongoing physical, intellectual or psychiatric impairment are prevented from working or from being re-trained for work.

The revision of the Impairment Tables was announced by the Government in the 2009-10 Budget. It is an important element of the Government's reforms to disability support pension to make it simpler, fairer and sustainable for those who need it.

Under section 94 of the Act, one of the criteria that a person must meet to be qualified for disability support pension is that their impairment (unless permanently blind) is of 20 points or more under the Impairment Tables (paragraph 94(1)(b)).

Prior to Amendments made by the *Social Security and Other Legislation Amendment Act 2011*, the Impairment Tables, for that purpose, were at Schedule 1B to the Act. The Impairment Tables were last reviewed in 1993. The removal of the Impairment Tables from Schedule 1B to the Act and their placement in a legislative instrument will enable the Impairment Tables to be updated more regularly in response to developments in medical or rehabilitation science and practice.

The Impairment Tables as contained in this Determination have resulted from a comprehensive review of the current Impairment Tables. The review was overseen by an Advisory Committee, comprising medical and allied health experts and disability advocates, who provided advice on updating the Impairment Tables.

The Department of Families, Housing, Community Services and Indigenous Affairs has consulted widely on the new Impairment Tables (as set in more detail under the Consultation heading below).

Explanation and effect of provisions

Part 1 (sections 1 to 4) of the Determination sets out certain preliminary matters.

Section 1 sets out how the Determination is to be cited and its name.

Section 2 provides for the time at which the Determination commences. This provision has been designed to ensure that the Determination comes into effect immediately after the commencement of Schedule 3 of the *Social Security and Other Legislation Amendment Act 2011*, which has inserted, into the Act, the Minister's power to make the Determination. That Schedule is to commence on 1 January 2012 (see section 2 of the *Social Security and Other Legislation Amendment Act 2011*).

Section 3 contains definitions of certain terms that are used throughout the rules (in Part 2 of the Determination) and the Impairment Tables (in Part 3 of the Determination).

The term ***allied health practitioner***, has been defined to refer to certain health practitioners, who while not medical practitioners, have qualifications relevant to assessing certain impairments or providing corroborating evidence (for example physiotherapists, occupational therapists or exercise physiologists under Tables 2 and 3).

The term ***appropriately qualified medical practitioner*** has been defined to mean a medical practitioner (as defined in subsection 23(1) of the Act) whose qualifications and practice are relevant to diagnosing a particular condition.

The term ***condition*** has been defined to clarify that, wherever occurring in the Determination, a "condition" must be a medical condition and not any other kind of condition.

The term ***descriptor*** has been defined to clarify that a "descriptor" is the information set out under the column headed "Descriptors" in each Impairment Table which describes the level of functional impact resulting from a condition.

The term ***health professional*** has been defined to mean a person whose profession is in the health sector and includes an appropriately qualified medical practitioner and an allied health practitioner (both of which are also defined).

The term ***impairment*** has been defined to clarify that an impairment, being a loss of functional capacity, must impair a person's ability to work and is not intended to have the broader natural meaning of that term. This is to reflect

Explanatory Statement to F2011L02716

the general purpose of the Impairment Tables, which is to assess the impact of a person's impairments on their ability to work.

The term ***impairment rating*** has been defined to mean the number in the column in each Impairment Table headed "Points" corresponding to a descriptor.

The term ***Tables*** means the tables relating to the assessment of work-related impairment for disability support pension which are set out in Part 3 of the Determination.

The term ***treating doctor*** has been defined to mean the medical practitioner who has, or has had, the responsibility for the treatment of a condition of the person whose impairment is being assessed under the Impairment Tables.

Section 4 indicates the structure of the Determination, stating that Part 2 contains rules to be complied with in applying the Impairment Tables for the purposes of subsection 26(3) of the Act and that Part 3 contains the Impairment Tables themselves, including introductions for each Table, which also contain rules for their application.

Part 2 sets out rules which are to be complied with in applying the Impairment Tables under subsection 26(3) of the Act.

Section 5 instructs that in applying the Impairment Tables regard must be had to the following principles: (a) unless otherwise authorised by law, they are only to be applied to assess whether a person satisfies the qualification requirement in paragraph 94(1)(b) of the Act (which is the requirement that a person's impairment is of 20 points or more); (b) they are "function based rather than diagnosis based" in the sense that their focus is on assessing the functional impact of a person's impairment; (c) they describe functional activities, abilities, symptoms and limitations; and (d) they are designed to assign ratings to determine the level of functional impact of the impairment (resulting from a condition) and not to "assess" conditions.

This section also contains rules about the scaling system and descriptors used in the Impairment Tables and how to apply these rules.

Section 6 sets out rules for assessing the level of functional impairment and assigning impairment ratings, including an assessment of functional impact of pain. **Subsection 6(1)** clarifies that a person's impairment must be assessed taking into account the person's abilities and not what they choose to do or not to do or what they are accustomed to having another person do for them in spite of their potential capability to do those things. **Subsection 6(2)** is a rule stating that the Tables may only be applied to a person's impairment after the person's medical history has been considered, to ensure that such history is taken into account in determining ratings in accordance with the Impairment Tables.

Subsection 6(3) is a rule stating that an impairment rating can only be assigned to an impairment, if the person's condition causing that impairment is permanent (in line with subsection 6(4)) and the impairment that results from that condition is, in light of the available evidence, more likely than not to persist for longer than two years. This means that if a person's condition causing impairment is not "permanent", the impairment resulting from this condition cannot be assigned an impairment rating. This rule also means that even if a person's condition causing the relevant impairment is "permanent" but the impairment resulting from that condition is not likely to last for more than two years, the impairment cannot receive a rating under the Impairment Tables.

Subsection 6(4) clarifies the meaning of ***permanent*** for the purposes of subsection 6(3). A condition is permanent if it has been fully diagnosed by an appropriately qualified medical practitioner (as defined in section 3), has been fully treated and fully stabilised (within the meaning of subsections 6(5) and (6)) and the condition, is more likely than not, in light of available evidence, to persist for more than two years.

Under **subsection 6(5)**, in determining whether a condition is fully diagnosed and fully treated, it is to be considered: whether there is corroborating evidence of the condition; what treatment or rehabilitation has occurred in relation to the condition; and whether treatment is continuing or is planned in the next two years.

Subsection 6(6) defines "fully stabilised" for the purposes of paragraph 6(4)(c) and subsection 11(4) (which refers to "stabilised" in the context of fluctuating or episodic conditions). The condition is fully stabilised where a person has undertaken reasonable treatment for the condition, and it is considered that any further reasonable treatment is unlikely to result in significant functional improvement to a level enabling the person to undertake work in the next two years.

The condition can also be considered fully stabilised where a person has not undertaken reasonable treatment and either: significant functional improvement to a level enabling the person to undertake work in the next two years is not expected to result even if the person undertakes reasonable treatment; or there is a medical or other compelling reason for the person not to undertake reasonable treatment.

Subsection 6(7) sets out what the term ***reasonable treatment*** means in the context of subsection 6(6). Reasonable treatment must be available at a location reasonably accessible to the person, be at a reasonable cost, reliably be expected to result in a substantial improvement in functional capacity, be of the type regularly undertaken or performed, have a high success rate and carry a low risk to the person.

Subsection 6(8) is intended to reinforce the distinction between a condition and any resulting impairment (with only the latter capable of being assigned a rating under the Impairment Tables). The provision states that the presence

of a diagnosed condition does not necessarily mean that there will be an impairment to which an impairment rating may be assigned.

Subsection 6(9) deals with assessing impairment related to pain and clarifies that, where chronic pain is a fully diagnosed condition, the resulting impairment should be assessed under the Impairment Table appropriate to the bodily function affected.

Section 7 sets out a rule in relation to information that must be taken into account in applying the Impairment Tables, which includes the information provided by the health professionals specified in the introductions to the Impairment Tables in Part 3, any additional medical or work capacity information that may be available and the information that is required to be taken into account under the Tables themselves (including as specified in the introductions).

In assigning a rating, **subsection 7(2)** is a rule that a person may be asked to demonstrate abilities described in the Impairment Tables (for example, holding, picking up or using the various objects referred to in certain descriptors in Table 2).

Section 8 sets out information that is not to be taken into account in applying the Impairment Tables. Under this section, symptoms reported by a person in relation to their condition can only be taken into account where there is corroborating evidence and, unless required under the Impairment Tables, the impact of non-medical factors such as age, gender, level of education, social or domestic situation must not be taken into account.

Section 9 is a rule which clarifies how to assess a person where they usually use certain aids and equipment (assistive technology) to assist with their impairment. The rule states that a person’s functional abilities are to be assessed when using or wearing any aids or equipment (assistive technology) that the person has (in their possession) and usually uses.

Section 10 contains rules for selecting the applicable Impairment Table and assessing impairments. To select a Table, the following steps are required: identify the loss of function; refer to the Table related to the function affected; and then identify the correct impairment rating by reference to the descriptors in the Impairment Table. To avoid doubt, a Table specific to the impairment being rated must always be used unless the instructions in a Table specify otherwise.

Subsections 10(3), (4), (5) and **(6)** all contain rules to reinforce that the Impairment Tables are designed to assess impairment and not conditions. Where a single condition causes multiple impairments, those impairments should be assessed separately. Where multiple conditions cause a common impairment, that impairment is to be assessed under a single Table.

Subsections 11(1) and **(2)** are rules to clarify that only the impairment ratings given in the Impairment Tables can be assigned (and not an in-between

rating). These provisions also contain rules for how to decide between ratings when descriptors for different impairment ratings appear to apply.

Subsection 11(3) clarifies that, when assessing whether a person can perform an activity described in a descriptor, the descriptor applies where the person can do that activity on a repetitive or habitual basis and not only once or rarely.

Subsection 11(4) addresses how to take into account impairments that arise on a fluctuating or episodic basis. When assessing impairments of such nature, an impairment rating must be assigned that is reflective of the person's overall functional ability, taking into account the severity and frequency of the episodes or fluctuations as appropriate.

Subsection 11(5) provides that, to avoid doubt, where a person's diagnosed condition results in no impairment, the impairment should be assessed as having no functional impact and a zero rating should be assigned.

Part 3 of this Determination sets out the tables relating to the assessment of work-related impairment for disability support pension for the purposes of subsection 26(1) of the Act.

Each individual Impairment Table contains a set of instructions for applying that specific Table for the purposes of subsection 26(3) of the Act.

Typically, these instructions, which are set out in the introduction to each Impairment Table: specify body functions to which that Impairment Table should be applied; specify which health professionals can diagnose or assess conditions causing functional impairment to be assessed under that Table; instruct that self-report of symptoms (by the person who is being assessed) is to be supported by corroborating evidence; and provide examples of corroborating evidence that can be taken into account when applying that Impairment Table and who can provide it.

Examples of corroborating evidence in the introduction to each Impairment Table include information about the type of evidence that can be taken into account and, where appropriate, an indication of the diagnoses of conditions that are commonly associated with an impairment to be assessed under that Impairment Table.

Each Impairment Table contains descriptors which describe the level of functional impact of impairment assessed under that Impairment Table and the corresponding impairment rating expressed in points. The rating system is standardised across the Impairment Tables as follows: no functional impact equals an impairment rating of zero points, mild functional impact equals an impairment rating of 5 points, moderate functional impact equals an impairment rating of 10 points, severe functional impact equals an impairment rating of 20 points and an extreme functional impact equals an impairment rating of 30 points.

This Determination contains the following Impairment Tables:

Table 1 – Functions requiring Physical Exertion and Stamina which is to be used to assess functional impact of impairment, resulting from certain conditions, on activities requiring physical exertion or stamina.

Table 2 – Upper Limb Function which is to be used to assess functional impact of impairment, resulting from certain conditions, on activities using hands and arms.

Table 3 – Lower Limb Function which is to be used to assess functional impact of impairment, resulting from certain conditions, on activities using, or requiring the use of, legs or feet.

Table 4 – Spinal Function which is to be used to assess functional impact of impairment, resulting from certain conditions, on activities involving spinal function such as bending or turning the back, trunk or neck. This Table also instructs that it should be used only if the impairment being assessed clearly results from spinal conditions.

Table 5 – Mental Health Function which is to be used to assess functional impact of impairment due to a mental health condition (including recurring episodes of mental health impairment).

In recognising specific characteristics of mental health conditions and the resulting impairments, this Table contains specific instructions that in assessing mental health impairments, a number of factors should be taken into account, including: that a person may not have good self-awareness of their mental health impairment or may not be able to accurately describe its effects and that the signs and symptoms of mental health impairment may vary over time.

This Table also instructs that when assessing mental health conditions which are episodic or fluctuating, the impairment rating must be assigned that reflects the person's overall functional impact, taking into account the severity, duration and frequency of the episodes or fluctuations as appropriate.

Table 6 – Functioning related to Alcohol, Drug and Other Substance Use which is to be used to assess functional impact of impairment resulting from alcohol, drugs or other harmful substance use. This Table also clarifies that the use of alcohol or drugs does not in itself constitute or necessarily indicate permanent impairment.

Table 7 – Brain Function which is to be used to assess functional impact of impairment resulting from a neurological or cognitive condition.

In recognising specific characteristics of neurological and cognitive impairments, this Table contains specific instructions that in assessing such impairments, a number of factors should be taken into account, including that the signs and symptoms of such impairments may vary over time.

This Table also instructs, that when assessing neurological or cognitive impairments resulting from conditions which stabilised as episodic or fluctuating, the rating must be assigned that reflects the person's overall functional impact, taking into account the severity, duration and frequency of the episodes or fluctuations as appropriate.

Table 8 – Communication Function which is to be used to assess functional impact of impairment resulting from certain conditions affecting communication function, that is understanding or producing speech. In order not to disadvantage people from diverse cultural and linguistic backgrounds, this Table clarifies that impairments affecting communication function are assessed in relation to the person's main language. The person's main language is defined as the language that the person most commonly uses.

Table 9 – Intellectual Function which is to be used to assess functional impact of impairment resulting from conditions resulting in low intellectual function (IQ score 70 to 85), where the impairment originated before the person turned 18 years of age.

This Table specifies that an assessment of intellectual function is to be undertaken using certain assessment tools, and how these tools and their scores, are to be applied.

This Table also clarifies that diagnosis of a learning disorder such as dyslexia does not equate to a diagnosis of intellectual disability and that a person with Autism Spectrum Disorder, Fragile X Syndrome or Foetal Alcohol Spectrum Disorder who also has a low IQ, should be assessed under this Table.

Table 10 – Digestive and Reproductive Function which is to be used to assess functional impact of impairment resulting from conditions that affect digestive and reproductive system functions.

Table 11 – Hearing and other Functions of the Ear which is to be used to assess functional impact of impairment resulting from certain conditions on activities involving hearing (communication) function or other functions of the ear. This Table also instructs that it should be applied with the person using any prescribed hearing aid, cochlear implant or other assistive listening device they usually use.

Table 12 – Visual Function which is to be used to assess functional impact of impairment, resulting from certain conditions, on activities involving visual function. This Table also instructs that it should be applied with the person using any visual aids, for example glasses or contact lenses, they usually use.

Table 13 – Continence Function which is to be used to assess functional impact of impairment resulting from certain conditions that affect maintaining continence of the bladder or bowel.

Table 14 – Functions of the Skin which is to be used to assess functional impact of impairment resulting from certain disorders of, or injury to, the skin.

Table 15 – Functions of Consciousness which is to be used to assess functional impact of impairment due to involuntary loss of consciousness or altered state of consciousness resulting from certain conditions.

Consultation

In undertaking the review of the Impairment Tables, a comprehensive consultation process was undertaken with medical and allied health stakeholders, disability and mental health stakeholders, the National Welfare Rights Network, Legal Aid, the Social Security Appeals Tribunal and the Health Professional Advisory Unit within the Department of Human Services. At the commencement of the review process the Advisory Committee sought the views of stakeholders on the current Impairment Tables. Stakeholders were invited to participate in an online process via GovDex, the Government online portal operated by the Australian Government Information Management Office, Department of Finance and Deregulation.

The Advisory Committee considered all comments received while undertaking the review. At the end of the review process the Advisory Committee provided a report to Government which included the recommended revised Impairment Tables. The Minister released the report, including the revised Impairment Tables, for comment on 1 August 2011 on the Department of Families, Housing, Community Services and Indigenous Affairs' website.

The initial stakeholder group was invited to either participate in a series of workshops or provide feedback on the Advisory Committee's recommendations. Workshops were held in Canberra, Sydney, Melbourne and Brisbane. In addition, a number of stakeholder groups took the opportunity to provide direct comments via teleconferencing arrangements. Key issues around the assessment of pain and low intellectual function were successfully resolved while ensuring that the revised Impairment Tables focus more on ability and are consistent with contemporary medical and rehabilitation practice.

Regulatory Impact Analysis

This Determination is not regulatory in nature, will not impact on business activity and will have no, or minimal, compliance costs or competition impact.