[2014] AATA 264

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| Division | **VETERANS' APPEALS DIVISION** |
| File Number | 2013/3476 |
| Re |  |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

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| Tribunal | **Dr M Denovan, Member** |
| Date | **2 May 2014** |
| Place | **Brisbane** |

The Tribunal affirms the decision under review.

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**Dr M Denovan, Member**

**CATCHWORDS**

VETERANS' AFFAIRS – Benefits and entitlements – Eligibility for pension – No connection between eligible defence service and condition – No entitlement to pension – Decision under review affirmed

**LEGISLATION**

Veterans’ Entitlement Act 1986 (Cth) ss 120(4), 120B

**SECONDARY MATERIALS**

Statement of Principles concerning Osteoarthritis: No. 14 of 2010 (as amended by Instrument 36 of 2011)

# REASONS FOR DECISION

**Dr M Denovan, Member**

**2 May 2014**

1. The applicant in these proceedings is Mr Howard Turner. Mr Turner served in the
Royal Australian Navy from 3 January 1972 until 25 February 1978. He has eligible defence service from 7 December 1972 until his discharge. He has been diagnosed with osteoarthritis of both knees. Mr Turner says this condition is linked to his service in the Royal Australian Navy, by way of lifting he was required to perform during his service as a bandsman. He has sought medical treatment and pension for incapacity from the condition under the *Veterans’ Entitlement Act 1986* (Cth) on that basis.
2. His claim was refused by a delegate of the Repatriation Commission in a decision dated 21 August 2012 and also by the Veterans’ Review Board in a decision dated 3 June 2013. On 16 July 2013 Mr Turner applied to this Tribunal for a review of the decision.
3. The question for me is whether there is, with reference to the relevant Statement of Principles, a connection between Mr Turner’s bilateral knee osteoarthritis and his defence service.
4. Mr Turner’s case can be outlined as follows. Mr Turner mainly played the Cornet, Bugle and Acoustic and Electric Piano in his role as bandsman. He was based both on land bases and on ships during his service, and he travelled all over the world performing in bands giving concerts. As part of his job he was required to carry, load and unload music equipment, chairs and stands for sheet music. Some of the musical instruments, like the Timpani drums and the piano, were very heavy. He estimates the piano weighed
70 kilograms alone without the speakers, which weighed an additional 35 kilograms. When based on a ship he was required to move the instruments and associated equipment up to four times a day.
5. Mr Turner also had to assist from time to time with general ship duties, including the loading and unloading of consumable stores such as bulk food stuff, sacks of potatoes, cartons of fresh fruit and vegetables, cartons of canned foods and frozen meat. He also assisted with the loading and unloading of technical equipment and spare parts of various sizes and weights. He was deployed to Darwin to help with the aftermath of Cyclone Tracy. He was required to assist with the loading and unloading of emergency equipment, water, tents and clothing, and was also required to assist with the cleaning up of the debris. Mr Turner cannot remember exactly how long he assisted in the clean up. He estimates that for at least 20 days he spent 10 hours a day going from street to street and supermarket to supermarket removing debris and loading it on to tip trucks. He was required to pick up tree logs, concrete rubble, sheets of roofing iron, building products, furniture, white goods and bulk stores. He estimates that he would have performed
80 lifts a day of 35 kilograms or more.
6. The relevant Instrument for the applicant’s conditions and eligible defence service is the “Statement of Principles concerning Osteoarthritis: No. 14 of 2010” (“the SoP”) as amended by Instrument 36 of 2011. Mr Hornby, for the applicant, said that Mr Turner is relying on a factor, at cl 6(m)(i) of the SoP, which reads:

(m) for osteoarthritis of a join of the lower limb only,

(i) lifting loads of at least 35 kilograms while bearing weight through the affected joint to a cumulative total of at least 168 000 kilograms within any 10 year period before the clinical onset of osteoarthritis in that joint, and where the clinical onset of osteoarthritis in that joint occurs within the 25 years following that period;

Also relevant is factor cl 6(m)(ii), which is identical but for the fact that it refers to the carrying of loads rather than the lifting.

1. For either of the relevant factors in the SoP to be satisfied, the clinical onset of osteoarthritis of the knees must have occurred within the 25 years following the end of the 10 year period in which Mr Turner performed the lifting said to have caused the condition. Mr Turner does not claim to have performed any significant lifting after his service, so the ten-year period commenced around the time Mr Turner enlisted, and ended in early 1982. Mr Williams, for the respondent, contends that the first time
Mr Turner was diagnosed with osteoarthritis was in 2008. He contends that the clinical onset of the condition was not within the 25 years following the ten-year lifting period. Mr Williams relies on the definition of osteoarthritis in the SoP, which requires both radiological proof of the condition in combination with symptoms, including pain, in order for a diagnosis to be made. Mr Hornby contends that clinical onset need not be the first time a person consults a doctor for a particular condition. He referred me to the definition of clinical onset published by the Repatriation Medical Authority, the decision of Senior Member Kenny in *Richards v Repatriation Commission*[[1]](#footnote-1) and also to the report of Dr P Vecchio.
2. Before I can determine if a factor in the SoP is satisfied, I must be reasonably satisfied that the SoP is actually relevant to the claim and I must also be reasonably satisfied that the applicant is suffering from the condition, as defined in the SoP. In this case, that includes a requirement that there is radiological evidence of the condition, which there is. General practitioner, Dr Whillans, and consultant physician in rheumatology,
Dr Vecchio, have both provided a diagnosis of osteoarthritis in the knees. They estimate the clinical onset to be 2002, and prior to 2001 respectively. Before a doctor can estimate the date of clinical onset, he or she must diagnose the condition. In the case of osteoarthritis, that requires radiological investigations. That does not mean that a doctor cannot state that the clinical onset of a condition predated the first radiological investigation that demonstrates the condition. Doctors use their medical experience and knowledge to estimate the date of clinical onset. It may be clear to a doctor based on the severity of the pathology demonstrated radiologically, and the history provided by the patient, that a condition such as osteoarthritis had a clinical onset that long pre-dated the first radiological investigation.
3. In his report dated 10 December 2012, Dr Vecchio stated that Mr Turner’s condition of osteoarthritis of the knees was definitely diagnosed in 2001, but present years prior.
Dr Vecchio based his opinion on the history of pain, and presentation to the general practitioner with that pain, provided by Mr Turner. Dr Vecchio also had radiological reports of investigations performed on Mr Turner’s knees (not all available to this Tribunal). Mr Williams points out that the contemporaneous medical evidence does not support the history of pain given to Dr Vecchio by Mr Turner, upon which he relied to estimate the date of clinical onset. That contemporaneous medical evidence from
Mr Turner’s general practitioner indicates that Mr Turner did not complain of symptoms, thought to be due to osteoarthritis, until 2008. Mr Williams further contends that although there was a finding of osteoarthritis in a radiological report in 2001, that appears to be an incidental finding as the investigation was performed when Mr Turner suffered some trauma, and at the time Mr Turner was not complaining of symptoms that were thought to be attributable to osteoarthritis by the doctor.
4. Although I agree the contemporaneous evidence is very slim, I accept that many general practitioners make extremely brief notes, and do not always document every thing the patient complains about at every presentation. In the medical report prepared in relation to the claim, Dr Whillans indicated that the fall Mr Turner suffered in 2002 aggravated his osteoarthritis, and as a consequence he has been on anti-inflammatory drugs to treat the condition until this day. On the basis of the medical evidence before me, I am reasonably satisfied that Mr Turner suffers from bilateral osteoarthritis, and the clinical onset of this condition was in 2002 or earlier. That means the requirement of the factor that the clinical onset of the condition be within 25 years of the ten-year period in which Mr Turner performed the lifting said to have be responsible is satisfied.
5. I must be reasonably satisfied that during his service Mr Turner lifted or carried weights to a cumulative total of 168,000 kilograms during a ten year period. During his time on land and on ship Mr Turner explained that the entire band was responsible for moving the instruments, chairs and equipment on a daily basis. There were very few items described by Mr Turner that would have weighed 35kgs or more. Mr Turner’s evidence was that it was usual for more than one person to assist with the movement of those items, so in effect, the load performed by each person was less than 35kg. Mr Turner stated that when he performed in concerts, it was usual for 5 members to be rostered on to the set up.
As there were 20-25 other members, Mr Turner would have been required to assist in one out of every 4-5 set-ups, and at those times he had the assistance of 4 other men. It is unlikely that there would have been a need for any man to individually lift a load of
35 kilograms or greater, or for his shared load to be that weight. If Mr Turner did perform lifts of items of 35 kilograms or greater, it was not the norm, and certainly would not have been cumulatively significant.
6. Although Mr Turner no doubt contributed to the clean-up post Cyclone Tracy, he is uncertain how long he performed these duties. He has stated in his written evidence that it was for a three-week period, so I am prepared to accept he worked for a total of
20 days, even though he told me he recalled having weekends off. Mr Turner told me he worked in a group, mostly with the other band members he usually served with.
More than one man lifted heavy items. Mr Turner told me he was not assigned to any specific areas, or assigned to lift particular items. The group were allocated an area each day, and they threw away whatever rubbish was there. As well as heavy items, much of the rubbish was light and medium weight items. I accept that Mr Turner would have made a few lifts of 35kilograms or greater during that time, however I do not believe the cumulative total of those lifts (both alone and when part of a group lift), would have been more than 350 a day, or 7,000 kilograms in total, well below the 168,000 kilograms necessary to satisfy the factor in the SoP. There is no objective evidence to support
Mr Turner’s contention that he lifted or carried a cumulative total of 168,000 kilograms or more during any ten-year period.

# CONCLUSION

1. I am not satisfied there is a connection between Mr Turner’s condition of bilateral knee osteoarthritis and his eligible defence service.

# DECISION

1. The Tribunal affirms the decision under review.

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| I certify that the preceding 14 (fourteen) paragraphs are a true copy of the reasons for the decision herein of Dr M Denovan, Member |

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Dated

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| Date of hearing | **24 March 2014** |
| Advocate for the Applicant | **Tony Hornby, Veterans' Support Centre** |
| Solicitors for the Respondent | **Bruce Williams, Department of Veterans' Affairs** |

1. [2012] AATA 308. [↑](#footnote-ref-1)