[2014] AATA 265

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| Division | **VETERANS' APPEALS DIVISION** |
| File Number | 2013/4265 |
| 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.

.....................Sgd................................................

**Dr M Denovan, Member**

**CATCHWORDS**

PENSIONS AND BENEFITS – Eligibility for Pension Bonus Scheme – Eligibility for service pension (age) – Applications withdrawn due to financial circumstances – Applications resubmitted due to change in financial circumstances – Service pension granted – Application for Pension Bonus Scheme rejected – Decision under review affirmed

**LEGISLATION**

Veterans' Entitlements Act 1986 (Cth) ss 45TS, 45TT, 45TO, 45UL, 57A, 176(4)

**SECONDARY MATERIALS**

The Guide to Social Security Law, Australian Government

# REASONS FOR DECISION

**Dr M Denovan, Member**

**2 May 2014**

# REASONS FOR DECISION

1. Mr John Huxham is the applicant in these proceedings. He is appealing a decision of the Repatriation Commission, which found that he was not eligible for payment of pension bonus. The pension bonus scheme (“PBS”) provides an incentive for older Australians to remain in the workforce and defer age pension. If they meet all eligibility criteria, a
one-off lump sum amount is payable.
2. Mr Huxham made a claim for age service pension (“pension”) and payment of pension bonus on 9 January 2012. A delegate of the respondent advised him that he would not qualify for pension at that time, because his assets were too high, so Mr Huxham decided to withdraw his claim for pension on 20 January 2012.
3. On 26 September 2012 Mr Huxham reapplied for pension. He claims he also reapplied for pension bonus at this time; however the respondent cannot find record of a claim for pension bonus at this time. The respondent rejected the second claim for pension, as the amount of employment income received by Mrs Huxham precluded pension. On
5 October 2012 Mrs Huxham ceased employment and pension to the applicant was granted from this date. Mr Huxham was advised of the decision in a letter dated
14 December 2012. On 3 April 2013 the applicant sought review of that decision. The decision was affirmed on 5 August 2013. Mr Huxham applied to this Tribunal for review on 21 August 2013.

**ISSUES AND LEGISLATION**

1. The law relevant to this matter is set out in the *Veterans’ Entitlement Act 1986* (Cth) (“the Act”).
2. Mr Bruce Williams for the respondent argues that I have no jurisdiction in this matter because Mr Huxham’s application to the Department for review, on 3 April 2013, was out of time. In the alternative, he argues that no application for pension bonus was lodged with the application for pension on 26 September 2012, and that even if one was lodged, Mr Huxham would not be eligible for pension bonus, as he does not meet the work test.
3. Mr Huxham has a number of arguments. He claims that it was not made clear to him that he needed to re-lodge his application for pension bonus, and seeks to rely on the original application he made in January 2012. Whilst he acknowledges that he withdrew his claim for pension in January 2012, he does not believe he withdrew his application for pension bonus at that time. He also claims he lodged a second application for pension bonus in September 2012, when he reapplied for pension. He asked the Tribunal to extend special consideration to him, as he suffers from a number of conditions, including posttraumatic stress disorder.
4. I must decide whether Mr Huxham applied for review of the decision of the respondent dated 14 December 2012 within the appropriate time frame and, if so, whether he satisfies all the requirements to be paid pension bonus.

**CONSIDERATION**

***Did Mr Huxham apply for review of the Respondent’s decision within time to have that decision reviewed?***

1. Mr Huxham’s application for review of the decision that granted pension was received by the Department on 3 April 2013. This is 3 months and 18 days after the date of the decision. The law requires applications for review to be lodged within three months of the applicant receiving the decision.[[1]](#footnote-1) It is well known that extra demands are placed on Australia Post over the Christmas and New Year period. It is also possible that there may have been some delay in posting the notification of the decision to the applicant because of staff shortages and disruptions over the seasonal holidays. I am prepared to accept that Mr Huxham did not receive the letter from the department dated 14 December 2012 before 3 January 2013. I therefore find that his application for review was within the time allowed and he was entitled to have the decision reviewed by the Department. The fact that the Department reviewed the decision suggests they adopted a similar generous approach in determining whether Mr Huxham’s application for review was within time.

***Does Mr Huxham meet all the requirements for pension bonus?***

1. There are a number of eligibility criteria that must be satisfied to qualify for pension bonus. The two criteria that are of relevance in deciding Mr Huxham’s eligibility are whether he lodged his claim appropriately, and whether he satisfies something called the work test.

***Lodgement of claim for pension bonus***

1. There are strict rules relating to the manner and time in which a claim for pension bonus must be lodged. A claim for pension bonus must be lodged at the same time the claim for pension is lodged.
2. The Secretary has the power to accept a PBS claim lodged after a pension claim in very limited circumstances. The Guide to Social Security Law (“the Guide”) provides the following guidance:

**Failure to claim PBS when claiming age pension**

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The Secretary (or delegate) may determine that a claim for pension bonus from a registered member, which was not lodged at the same time as the claim for age pension, will be taken to have been made at the same time as the claim for age pension in the following circumstances:

* if a person makes a claim for age pension, AND
* the Secretary (or his delegate) fails to recognise the person's existing membership in the PBS, AND
* the person receives age pension without regard to any pension bonus that may have been payable to the person, AND
* the person lodges a PBS claim within 2 years of the age pension[[2]](#footnote-2)

Whilst Mr Huxham did indeed lodge both claims at the same time in January 2012, there is some question as to whether he lodged a claim for pension bonus when he lodged his second claim for pension in September 2012. The Respondent cannot find any evidence of an application for pension bonus being made in September 2012.

1. I am adopting the same approach the service pension review officer took when reviewing the decision. I accept that Mr Huxham made a claim for pension bonus at the same time he applied for pension on 26 September 2012.

***Work Test***

1. To qualify for pension bonus, a person must accrue a minimum of one bonus period whilst they defer age pension. Generally a bonus period runs for one year. To accrue a bonus period, the person must pass a work test for each bonus period that they defer their pension. To pass the work test the person must gainfully work for at least 960 hours during that year,[[3]](#footnote-3) and a pro rata number of hours if the last period of deferral is less than 365 days.[[4]](#footnote-4)
2. Mr Huxham’s first bonus period began on 22 November 2008, after he turned 60 and was eligible to claim age pension. Mr Huxham met the work test for three consecutive years. He retired on 18 November 2011, and from that time on he has not worked, and therefore not met the work test.
3. Once a person ceases to satisfy the work test, they have 13 weeks to claim the pension bonus. The Guide states: [[5]](#footnote-5)

A person who claims Age and PBS and whose claim for Age is rejected cannot receive a bonus EVER unless Age becomes payable within 13 weeks of failing the PBS work test or within 13 weeks of the end of a non-accruing period.

…

A person must claim the pension bonus and age pension within 13 weeks of failing to accrue the further full-year bonus period to quality to receive a bonus. If the pension is NOT payable to the person within this 13 week period then NO bonus is payable to the member - EVER.

Whilst the Guide is not binding on the Tribunal, it will be followed unless there are cogent reasons for not doing so. Mr Huxham became a non-accruing member of the scheme when he ceased work in November 2011.

1. The Act provides for a person to continue as a non-accruing member of PBS if they are not gainfully working, in certain circumstances[[6]](#footnote-6) including sick leave, for a period not exceeding 26 weeks.
2. There is no evidence that Mr Huxham was on sick leave or holiday leave immediately after he ceased work, however even if he was, the maximum period a person can be on leave and still remain a member of PBS is 26 weeks. Non-accruing members must apply for a pension bonus within 13 weeks of ceasing to be a non-accruing member.[[7]](#footnote-7) This means that even if Mr Huxham was a non-accruing member immediately after he ceased work, and remained so for the maximum time allowed, his application for pension bonus needed to be lodged no later than 21 August 2012.
3. Mr Huxham’s first application for pension bonus was in January 2012, some seven months before that final date. The problem for Mr Huxham is that the amount of pension bonus a person is entitled to is relative to the amount of pension they are entitled to. As he was not entitled to receive any pension prior to 5 October 2012, any application for pension bonus before that date would have to be unsuccessful. Mr Huxham did not become eligible for pension, until several weeks after the last day that he was entitled to apply for pension bonus.
4. Mr Huxham argues that his case should be given special consideration as he has severe posttraumatic stress disorder. I have taken a very benevolent approach in deciding whether Mr Huxham lodged his application for review and application for pension bonus within the necessary time frames. There is no discretion in the Act which allows me to ignore the fact that Mr Huxham’s assets and family income precluded him from being eligible for pension when he was eligible to apply for pension bonus.

# conclusion

1. Mr Huxham’s financial circumstances (his assets and wife’s income) precluded him from ever being able to successfully apply for pension bonus within the time allowed by the Act. The time period for applying for pension bonus lapsed prior to him being in a position to successfully apply for pension in October 2012.

**DECISION**

1. The decision under review is affirmed.

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| I certify that the preceding 21 (twenty -one) paragraphs are a true copy of the reasons for the decision herein of Dr M Denovan, Member |

..........................Sgd...........................................

Associate

Dated 2 May 2014

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| Date of hearing | **31 March 2014** |
| Applicant | **In person** |
| Solicitors for the Respondent | **Bruce Williams, Repatriation Commission** |

1. Section 176(4) of the Act. [↑](#footnote-ref-1)
2. Part 3.4.7.80 of the Guide. [↑](#footnote-ref-2)
3. If a person has a partner who is an accruing member of the pension bonus scheme, then they may continue to pass the work test after they cease work, provided their partner is working the required hours to meet the work test: s 45TS of the Act. Due to Mrs Huxham’s age, she was not eligible to be an accruing member during the relevant period. [↑](#footnote-ref-3)
4. Section 45TT of the Act. [↑](#footnote-ref-4)
5. Part 3.4.7.80 of the Guide. [↑](#footnote-ref-5)
6. Section 45TO of the Act. [↑](#footnote-ref-6)
7. Section 45UL(6) of the Act. [↑](#footnote-ref-7)