[2015] AATA 349

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| Division | **Veterans' Appeals Division** |
| File Number(s) | 2014/1469 |
| Re | Robert Harris |
|  | APPLICANT |
| And | Repatriation Commission |
|  | RESPONDENT |

# Decision

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| Tribunal | **Senior Member Bernard J McCabe** |
| Date | **21 May 2015** |
| Place | **Brisbane** |

The decision under review is affirmed.

............................[Sgd]............................................

**Senior Member Bernard J McCabe**

# Catchwords

VETERANS’ ENTITLEMENTS – intermediate rate of pension – assessment of whether incapacity arising from war-caused condition alone prevents continuance of remunerative work

# Legislation

Veterans’ Entitlements Act 1986 (Cth) ss 23(1), 23(1)-(3), 24

# REASONS FOR DECISION

**Senior Member Bernard J McCabe**

**21 May 2015**

# introduction

1. Mr Robert Harris has applied for an increase in the rate of the disability pension he is paid under the *Veterans’ Entitlements Act 1986* (Cth) (“the Act”). He says he should be paid at the *intermediate rate* pursuant to s 23 of the Act. (He originally sought a pension paid at the special rate pursuant to s 24, but his solicitor conceded at the hearing that it was impossible to satisfy the requirements for that pension.)
2. The applicant suffers from a number of health conditions, and he has not worked since 2012. The Repatriation Commission accepts some of Mr Harris’s conditions are related to the circumstances of his service in the Army between 1972 and 1992. But the Commission says other conditions and factors are playing a role in Mr Harris’s cessation of work.
3. I am satisfied Mr Harris is unable to satisfy the requirements of s 23 of the Act. I explain my reasons below.

## Mr Harris’s work history

1. The applicant had worked as a butcher then a storeman when he served in the Army. He was promoted to sergeant although his personnel records show a number of disciplinary infractions, several of which appear to be connected with heavy drinking.[[1]](#footnote-1) When he was discharged in 1992, he took a holiday before working as a part-time cleaner at an Army barracks. In 1996 he commenced work on a full-time basis at a factory/warehouse making optical products. It was essentially process work, although in time he became a quality controller. He said in his oral evidence that he decided to leave that workplace in 2006 when the company came under new management, and there was a dispute over his appropriate rate of pay in light of experience.
2. Mr Harris began working for a butchery in Keperra in 2006. It was a part-time role: he delivered products from the shop each weekday morning on a run that lasted about three hours. In his oral evidence, he said he was content working on that basis; the combination of his wages from the job, the Defence Force Retirement and Death Benefits (DFRDB) pension he received after military service and his wife’s wages meant he could live comfortably.
3. Notes from the applicant’s general practitioner in May 2012 record Mr Harris saying he was considering retirement.[[2]](#footnote-2) He was experiencing ongoing problems with his right knee at the time. He had a total right knee replacement on 16 July 2012. The applicant said in his oral evidence that before the surgery, he agreed with his employer that he would give up his job, and he helped to find his replacement. Under cross-examination, the applicant said he could not recall whether it was his intention to retire from the workforce at that point, but he agreed at a minimum that he had no immediate plans to return to work. He said he probably wanted to see how things went with his knee before making a decision.
4. Mr Harris has not worked since he resigned from Keperra Meats. He has recovered from the right knee replacement surgery. While he still occasionally experiences some aches and numbness, he agreed in cross-examination that the surgery was a success. His left knee became symptomatic while he was recovering. He said he persevered with left knee pain before undergoing a total left knee replacement on 7 December 2014. He is still recovering from that procedure. While he said the recovery process appears to be slower, there is no reason at this point to assume he will not, in fact, recover.
5. The applicant’s knee conditions are accepted. So is his lumbar condition. He said the back and knee conditions keep him from returning to the workforce. He pointed out he cannot stand or walk far. He added that he is not well-educated, so working in an office environment is not an option. He also said he cannot undertake activities around the house. But he has not been completely incapacitated: he continued playing golf at least twice a week up until the surgery in December 2014, although he used a cart to get around the course. He agreed he may yet return to the golf course when he his left knee recovers. He was also able to undertake a motoring holiday in Britain with his wife for two months last year.
6. The applicant suffers from a number of other health conditions, including hypertension and diabetes, which he said are well-controlled with medication. But the report of Dr Home, an occupational physician engaged by the respondent, concludes the medical evidence discloses at least three non-accepted conditions contribute to Mr Harris’s inability to work. In that report dated 5 December 2014, Dr Home refers to the applicant’s:
* Untreated obstructive sleep apnoea;
* Heavy drinking; and
* Moderate severity chronic airways disease in combination with moderate obesity.
1. The applicant said in his oral evidence that he recently began using a CPAP machine for his sleep apnoea. He denied the condition impacted on his ability or willingness to work. He also said he had cut back on his drinking from 10-15 schooners a day[[3]](#footnote-3) to about 6-7 schooners each day. He added that he could cut back drinking still further when he wanted to: he said he did not drink any beer while travelling in the United Kingdom last year. He agreed in his oral evidence that he had experienced shortness of breath although he did not accept it was a serious problem. Dr Home added in his 5 December 2014 report that he thought the diabetes and hypertension conditions “do contribute materially to his inability to continue to engage in his former paid work for more than 8 hours per week”. He concluded the non-accepted health conditions “would cause a work incapacity even if he was not incapacitated by his service relate knee complaints.”[[4]](#footnote-4)
2. I have no difficulty accepting Mr Harris is currently unable to work as a storeman/delivery driver/process worker while he is recuperating from his left knee surgery. While it is unlikely that he would return to driving a delivery vehicle, it is unclear from his oral evidence whether the knee condition on its own would prevent him from doing other kinds of work in which he previously engaged, like process work, once his recuperation is complete.
3. Mr Harris became emotional when questioned about his ability to return to work and explained it was unlikely he could undertake paid employment when he was unable to assist at home. It was obvious from his answers that he is a proud man, and that he felt embarrassment and perhaps guilt in the face of his predicament. I formed the distinct impression from his evidence that Mr Harris had self-confidence issues which played a role in his ongoing absence from the workforce. He added that his wife had recently retired and received a payout so the couple were more comfortable. He made it clear he wants to retire and spend time with his wife.

## The requirements in s 23

1. The Commission concedes the applicant satisfies a number of the requirements in s 23 of the Act. In particular, it agrees ss 23(1)(aa), (aab), and (a)(i) have been met. The Commission contended Mr Harris could still undertake part-time work of the kind he previously undertook for at least 20 hours per week. I do not think I can accept that conclusion in light of the supplementary report of Dr Home.[[5]](#footnote-5) That report makes it clear the applicant’s conditions make him unable to engage in paid work of the kind he had undertaken for more than 8 hours per week. I have no reason to doubt the opinion expressed by Dr Home, who is a well-credentialed expert. Importantly, his report appears to accept in the final full paragraph that the applicant may be incapacitated by his service-related knee complaints to the extent he is unable to work the requisite number of hours because of those conditions alone. If that is so, Mr Harris satisfies s 23(1)(b).
2. Unfortunately Mr Harris is unable to satisfy s 23(1)(c), which sets out the “alone” test. The sub-section provides:

the veteran is, by reason of incapacity from war-caused injury or war-caused disease, or both, alone, prevented from continuing to undertake remunerative work that the veteran was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own account, that the veteran would not be suffering if the veteran were free from that incapacity

1. The sub-section must be read in light of s 23(3). I am satisfied Mr Harris is unable to satisfy the alone test because the evidence from Dr Home in particular establishes the applicant is incapacitated for a range of reasons in addition to (or apart from) his accepted conditions. I would add Dr Home’s conclusions are consistent with my own observation of the applicant in the witness box. Those observations suggest to me the applicant experiences a number of health problems and confidence issues that collectively contribute to his absence from the sort of work he used to do. In any event, it is clear Mr Harris would be suffering a loss of salary or wages even if he was not incapacitated because of his knees.

# conclusion

1. The decision under review is affirmed.

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| I certify that the preceding 16 (sixteen) paragraphs are a true copy of the reasons for the decision herein of Senior Member Bernard J McCabe |

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Dated

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| Date(s) of hearing | **29 April 2015** |
| Solicitors for the Applicant | **Mr J Whitehead** |
| Counsel for the Respondent | **Mr G Purcell, Department of Veterans' Affairs** |

1. Exhibit 1 p 15. [↑](#footnote-ref-1)
2. Exhibit 2 p 15. [↑](#footnote-ref-2)
3. Exhibit 6. [↑](#footnote-ref-3)
4. Exhibit 4. [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)