[2015] AATA 404

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| Division | **GENERAL ADMINISTRATIVE DIVISION** |
| File Number(s) | 2013/1269; 2013/1270 |
| Re | Philip Maloney |
|  | APPLICANT |
| And |  |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **Deputy President J W Constance** |
| Date | **5 June 2015** |
| Place | **Sydney** |

The decision of the Veterans’ Review Board, dated 14 November 2012, that Mr Maloney is not entitled to payment of the pension at either the special rate or the intermediate rate, is affirmed.

...............................**[sgd]**.........................................

**Deputy President J W Constance**

Catchwords

VETERANS’ ENTITLEMENTS – pension – special rate of pension – whether incapacity from accepted conditions of itself alone renders applicant totally or permanently incapacitated – non-accepted conditions of obesity and sleep apnoea – time out of workforce and age relevant

VETERANS’ ENTITLEMENTS – pension – intermediate rate of pension – whether incapacity from accepted conditions of itself alone renders applicant incapable of working part-time or intermittently – whether accepted conditions alone prevent from continuing to undertake remunerative work

Legislation

Veterans’ Entitlements Act 1986 (Cth) ss 19, 23, 24, 28

Cases

Byrne v Repatriation Commission [2001] FCA 1134

Chambers v Repatriation Commission (1995) 55 FCR 9

Flentjar v Repatriation Commission (1997) 48 ALD 1

Repatriation Commission v Hendy (2002) 76 ALD 47

Repatriation Commission v Richmond [2014] FCAFC 124

Richmond v Repatriation Commission [2014] FCA 272

Smith v Repatriation Commission [2014] FCAFC 53

Willis v Repatriation Commission [2012] FCA 399

# REASONS FOR DECISION

**Deputy President J W Constance**

# introduction

1. Mr Maloney was born in 1952. He served in the Royal Australian Navy from 1969 until 1982. After completing his training he served as an Ordinary Seaman Cook. By the end of his Navy career he had achieved the rank of Leading Seaman. In 1972, he served on the HMAS Sydney when it was engaged in the Vietnam War.
2. The Repatriation Commission has accepted that Mr Maloney suffers from a number of medical conditions arising from his military service. As a result, Mr Maloney is currently in receipt of a disability pension at 100 per cent of the general rate. The pension is payable in accordance with the provisions of the *Veterans’ Entitlements Act 1986* (Cth).
3. On 5 January 2011, Mr Maloney lodged an application for the acceptance of several additional conditions as being war-caused and an increase in the rate at which his pension was payable. The Repatriation Commission accepted that the conditions of lumbar spondylosis and gastro-oesophageal reflux disease were war-caused but refused to increase the rate of pension.
4. This decision was appealed to the Veterans’ Review Board by Mr Maloney. The Board set aside the decision and decided that Mr Maloney suffered the following conditions which were also war-caused:
* post-traumatic stress disorder;
* alcohol dependence; and
* depression.
1. Mr Maloney’s application for payment of the pension at the Special Rate was refused. The rate of pension was continued at 100 per cent of the General Rate.
2. Mr Maloney has applied to the Tribunal for a review of decision of the Veterans’ Review Board. For the reasons which follow, the decision under review will be affirmed.

**BACKGROUND**

1. After leaving the Navy, Mr Maloney readily obtained employment as a cook and later as a chef in various clubs. His employment in some of these positions was terminated by reason of his inappropriate attitude to his employers and fellow-staff.
2. From approximately 1984 until 1996, Mr Maloney worked in several used car sales businesses. In one business he was promoted to the position of car sales manager. He left this position after a disagreement with the owner.
3. In about 1987 he took a position as a cook in a large hospital. About 18 months later he again obtained a position selling used cars. He changed jobs a number of times; some changes were as a result of his employment being terminated by reason of his behaviour.
4. Mr Maloney’s last employment was as a Used Car Sales Manager at a car dealership. His employment was terminated in 1996 because of what Mr Maloney describes as his *“aggressive nature towards staff and my abrupt and occasionally rude treatment of customers…”.[[1]](#footnote-1)* He has not been employed since. He last sought employment in 1997.

# legislation

1. Part II of the V*eterans’ Entitlements Act 1986*, which includes sections 12 to 34 inclusive,provides for *“Pensions, other than service pensions, for veterans and their dependants”.* The pension which is being paid to Mr Maloney is payable in accordance with this Part.
2. Section 15 permits a veteran who is in receipt of a pension under Part II to apply for an increase in the rate of the pension on the ground that his/her incapacity has increased since the pension was assessed or last assessed.
3. In determining whether a veteran is eligible for an increase in the rate of pension payable, section 19 of the Act provides that the veteran’s entitlement is to be assessed with respect to any circumstance that occurs within the *assessment period*. The assessment period runs fromthe date of the application for an increase in the pension (in this case 5 January 2011) up to the decision of this Tribunal.[[2]](#footnote-2) As stated by Buchanan J in *Smith and Repatriation Commission:*[[3]](#footnote-3)

The assessment period commences on the date an application is made and concludes when the decision is made. This means that the entitlement of the veteran is not to be judged only at the time that the application is made. The position must be assessed by reference to any relevant circumstance which occurs up to the time of decision. The entitlement may increase or decrease during that period, but provided that a pension was payable at some time during the assessment period a veteran will receive either the intermediate rate or the special rate, whichever is applicable, or in the case that both are applicable, whichever is the most recently applicable.

1. Section 19 sets out the manner in which applications are to be dealt with. In particular, subsection 19(5B) requires applications to be assessed in accordance with the relevant sections, which include:
* Section 22 General rate of pension and extreme disablement adjustment;
* Section 23 Intermediate rate of pension
* Section 24 Special rate of pension.
1. As Mr Maloney is seeking an increase in his pension from the general rate to the special rate, it is necessary to determine whether he meets the requirements of section 24. If he does not, it will be necessary to decide whether he is entitled to an increase to the intermediate rate in accordance with section 23.
2. I will set out the relevant provisions of sections 23 and 24 when I come to consider the application of each section.

**PART A**

# Is Mr Maloney entitled to payment of the pension at the special rate (s.24)?

1. The Commission concedes that Mr Maloney meets the requirements of subparagraphs (aa), (aab) and (a) of subsection 24(1) of the Act. In brief these requirements are that:
* he is a veteran who has made an application under section 15 for an increase in the rate of a pension he is receiving;
* he had not turned 65 when the application for an increase was made; and
* the degree of his incapacity from war-caused injury or war caused disease, or both, has been determined to be at least 70%.

I am satisfied on the facts before me that these are proper concessions.

1. Further requirements for eligibility for payment at the special rate are set out in subsection 24(1)(b) and subsection 24(1)(c). The Commission argues that Mr Maloney does not satisfy the requirements of either of these paragraphs.

# Does Mr Maloney meet the requirements of subsection 24(1)(b)?

1. Subsection 24(1)(b) provides:
2. This section applies to a veteran if:

……

(b) the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) is totally and permanently incapacitated, that is to say, the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran)'s incapacity from war-caused [injury](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5d.html#injury) or war-caused [disease](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5d.html#disease), or both, is of such a nature as, of itself alone, to render the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) incapable of undertaking [remunerative work](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5q.html#remunerative_work) for periods aggregating more than 8 hours per week.

1. Section 28 sets out the matters to be taken into account in applying the provisions of subsection 24(1)(b). The section provides:

In determining, for the purposes of paragraph 23(1)(b) or 24(1)(b), whether a veteran who is incapacitated from war-caused injury or war-caused disease, or both, is incapable of undertaking remunerative work …… the Commission shall have regard to the following matters only:

(a) the vocational, trade and professional skills, qualifications and experience of the veteran;

(b) the kinds of remunerative work which a person with the skills, qualifications and experience referred to in paragraph (a) might reasonably undertake; and

(c) the degree to which the physical or mental impairment of the veteran as a result of the injury or disease, or both, has reduced his or her capacity to undertake the kinds of remunerative work referred to in paragraph (b).

1. The effect of s 28 is to exclude all other factors from consideration in determining whether the Applicant satisfies subsection 24(1)(b).[[4]](#footnote-4)
2. At present the following conditions suffered by Mr Maloney have been accepted as war-caused:
* alcohol dependence;
* gastro-oesophageal reflux disease;
* generalised anxiety disorder;
* hypertension
* ischaemic heart disease;
* lumbar spondylosis;
* major depression;
* post-traumatic stress disorder;
* sensori-neural deafness.
1. Mr Maloney argues that these accepted conditions render him incapable of undertaking remunerative work for more than eight hours per week and that therefore he is *“totally and permanently incapacitated”* within the meaning of subsection 24(1)(b).

## Evidence of Mr Maloney

1. Mr Maloney provided a statement dated 30 October 2013[[5]](#footnote-5) and gave evidence.
2. Since leaving the Navy, Mr Maloney has had numerous jobs. He has not been able to hold down any one job for an extended period of time. The longest he remained in one position was approximately three years. From the time he left the Navy until he ceased work in 1996, he was employed in 20 different positions. Most of the positions he held were terminated as a result his aggressive and threatening behaviour towards staff and customers. On occasions he voluntarily left his employment as a result of altercations with his employer.
3. Mr Maloney has been the subject of Apprehended Violence Orders, the last of which was current from November 2011 until February 2014. That order was taken out after an incident between Mr Maloney and his former partner when she told him that she wished to terminate their relationship. As result of a very high level of intoxication, Mr Maloney has no memory of the events that allegedly took place.
4. After he was dismissed from his last job in 1996 Mr Maloney endeavoured to gain further employment. He formed the view that employers were not prepared to engage him, either because he had a heart condition or because of his aggressive and abusive nature. The motor industry in the Newcastle area is *“a very close-knit industry”.[[6]](#footnote-6)* In the opinion of Mr Maloney, his reputation as an aggressive and possibly violent person with a heart condition prevented his being employed.
5. At different times since 1997, Mr Maloney has been a member of three different motorcycle groups. He ceased to be a member of the third of those groups in May 2014. Mr Maloney continues to own and ride a motor bike.
6. When he gave evidence before the Veterans’ Review Board in November 2012, Mr Maloney agreed that he was obese. The following exchange then took place:

Mr Young [Board Member]: Okay. Would that fact – if you are able to work, with that fact have any – play any part in you being able to work, do you believe?

Mr Maloney: Yes.

Mr Mitchell:[Mr Maloney’s representative] I don’t if he’s answering the question properly. Why did – sorry. Could I just talked over – you can hear me talking – what they’re saying, do you believe, is it your opinion, light, today – can you still work, with the fact that you have obesity, just like you did years ago? That’s what they’re asking you. Sorry to talk over you then.

Mr Maloney: Yes.[[7]](#footnote-7)

When he gave evidence before me, Mr Maloney said that he had misunderstood the question put to him by the Board Member.

## Evidence of Dr Dinnen, Consultant Psychiatrist

1. In March 2014, Dr Dinnen assessed Mr Maloney at the request of his Solicitors. He provided a report dated 5 March 2014[[8]](#footnote-8) and gave evidence.
2. In the opinion of Dr Dinnen, Mr Maloney is incapable of undertaking any employment for more than eight hours per week. He stated in his report that:

In my view the history is consistent and indicates that because of in particular his alcohol abuse and his irritability and aggression, which I believe are psychiatrically determined, he has no ongoing capacity for employment.

In my view his accepted disabilities are the substantial cause for him remaining out of the work force since 1996.

Dr Dinnen believes Mr Maloney would experience the same behavioural problems as in the past, should he attempt to resume any form of employment. In his opinion, Mr Maloney’s alcohol use, nightmares, anxiety, feelings of aggression, and his depressive symptoms had persisted after he ceased employment.

## Evidence of Dr Rosenthal, Specialist Occupational Physician

1. Dr Rosenthal examined Mr Maloney for the purpose of these proceedings. He provided a report dated 23 July 2013[[9]](#footnote-9) and gave evidence.
2. Dr Rosenthal is of the opinion that Mr Maloney is precluded from working more than eight hours per week in work that he is qualified to undertake. He is of the view that there are two conditions causing a significant impact on Mr Maloney’s ability to work – his psychological state and his lumbar spondylosis.

## Evidence of Dr Chase, Occupational Physician

1. Dr Chase assessed Mr Maloney on 1 August 2013 at the request of the Commission. He provided reports dated 13 August 2013[[10]](#footnote-10) and 13 November 2013[[11]](#footnote-11) and gave evidence.
2. Dr Chase reported, in part:

There are very significant discrepancies between Mr Maloney’s reported disabilities and his low lifestyle ratings. There are inconsistencies between the level of reported back pain and the physical examination. There are discrepancies between his reported loss of range of motion in his neck and his abilities to ride a motorbike without any difficulty. All of these suggest to me that Mr Maloney has better work capacity than he alleges. When one considers his recreational activities and his activities of daily living he has very significant physical capacity. He does not describe any current psychiatric difficulties getting on with his club mates or remaining family. However he has clearly found it very difficult to get along with work colleagues and this is a major barrier to any attempted return to work or retraining.

However, Dr Chase also expressed the opinion that Mr Maloney’s *“inability to get along with people would result in substantial difficulty for him to work as a cook or car salesman.” [[12]](#footnote-12)*

## Report of Dr Altman, Consultant Psychiatrist

1. In September 2011, Mr Maloney was referred to Dr Altman for assessment.[[13]](#footnote-13)
2. On 14 February 2012, Dr Altman reported, in part:

... in my opinion as a result of his Vietnam war experience and the incident which occurred on return from Vietnam ... Mr Maloney suffers from a severe chronic Post-traumatic Stress Disorder with an associated Major Depression and Alcohol Dependence. …… Furthermore in my opinion as result of the above mentioned psychiatric disorders alone he is totally and permanently unfit to work and in my opinion he should be placed on the ”T & PI” Disability Pension. In my opinion he is not well enough to work eight or more hours per week.[[14]](#footnote-14)

## Evidence of Dr Smith, Consultant Psychiatrist

1. Dr Smith assessed Mr Maloney on 13 December 2013 at the request of the Department. He provided reports dated 19 December 2013[[15]](#footnote-15) and 20 December 2013[[16]](#footnote-16) and gave evidence.
2. On 19 December 2013, Dr Smith reported, in part:

It is my opinion that Mr Maloney’s psychiatric disability would not be obvious to a prospective employer. I would add the important caveat that if he was in an intoxicated state when being interviewed this would be readily apparent to a prospective employer. In all probability and whilst under the influence of alcohol he would display inappropriate behaviour including irritability and overt aggressivity.

Mr Maloney relinquished work because by his own account he was irritable and agitated in his interaction with work colleagues.

It is my opinion that Mr Maloney would have the capacity to work if he were motivated to relinquish his alcohol excess. Motivation for doing so however remains poor. Accordingly his capacity to work is limited based upon his Alcohol Abuse Disorder.

## Consideration

1. On the basis of the evidence of Mr Maloney, I am satisfied that he has the vocational, trade and professional skills, qualifications and experience of a cook and chef (including acting in a managing position), a car salesman and car sales manager.
2. Further, I am satisfied that a person with the skills, qualifications and experience referred to above might reasonably undertake the kind of remunerative work which Mr Maloney has previously undertaken.
3. In considering the degree to which Mr Maloney’s accepted conditions have reduced his capacity to undertake the remunerative work referred to above, I have taken into account his evidence together with that of the medical practitioners to whose evidence I have referred.
4. Having considered all of the evidence, I am satisfied that the conditions of lumbar spondylosis, post-traumatic stress disorder and alcohol dependence are of such a nature as, of themselves alone, to render Mr Maloney incapable of undertaking remunerative work for periods aggregating more than eight hours per week. The weight of evidence tends to strongly support this view.
5. Dr Dinnen, Dr Rosenthal and Dr Altman are all of the opinion that Mr Maloney’s conditions of post-traumatic stress disorder and depression prevent his being gainfully employed. Whilst Dr Chase is of the opinion that Mr Maloney’s physical disabilities are not as severe as he suggests, he is of the view that Mr Maloney’s inability to get along with people would result in substantial difficulty in his returning to the type of work which he might otherwise reasonably undertake. Dr Smith identified Mr Maloney’s alcohol dependence as limiting his capacity to work.
6. I am satisfied that Mr Maloney meets the requirements of subsection 24(1)(b).

#  Does Mr Maloney meet the requirements of subsection 24(1)(c)?

1. Subsection 24(1)(c) provides:
2. This section applies to a veteran if:

……

(c) the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) is, by reason of incapacity from that war-caused [injury](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5d.html#injury) or war-caused [disease](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5d.html#disease), or both, alone, prevented from continuing to undertake [remunerative work](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5q.html#remunerative_work) that the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own [account](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5q.html#account), that the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) would not be suffering if the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) were free of that incapacity…

1. Subsection 24(2) provides:

For the purposes of paragraph (1)(c):

(a) a veteran who is incapacitated from war-caused injury or war-caused disease, or both, shall not be taken to be suffering a loss of salary or wages, or of earnings on his or her own account, by reason of that incapacity if:

(i) the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both;or

(ii) the veteran is incapacitated, or prevented, from engaging in remunerative work for some other reason; and

(b) where a veteran, not being a veteran who has attained the age of 65 years, who has not been engaged in remunerative work satisfies the Commission that he or she has been genuinely seeking to engage in remunerative work, that he or she would, but for that incapacity, be continuing so to seek to engage in remunerative work and that that incapacity is the substantial cause of his or her inability to obtain remunerative work in which to engage, the veteran shall be treated as having been prevented, by reason of that incapacity, from continuing to undertake remunerative work that the veteran was undertaking.

1. In *Smith v Repatriation Commission*,*[[17]](#footnote-17)* the Full Court said in relation to section 24 that:

Section 24(1)(b) and (c), when read together, state a composite test containing a series of conditions. First, s 24(1)(b) requires that a veteran be rendered, by the war-related incapacity alone, incapable of working more than 8 hours per week. Secondly, **s 24(1)(c) requires that the veteran be prevented, by that incapacity alone (i.e. not for other reasons) from continuing earlier remunerative work. Thirdly, s 24(1)(c) requires that prevention for that reason from continuing that work be the cause of a loss of earnings. Fourthly, s 24(1)(c) requires that the loss of earnings would not be suffered but for the incapacity.**

**The operation of s 24(1)(c) is capable of being informed by the provisions of s 24(2)…** (emphasis added).

1. The Full Federal Court in *Flentjar v Repatriation Commission*[[18]](#footnote-18) stated that subsection 24(1) (c) requires consideration of four issues:
2. *What was the relevant "remunerative work that the veteran was undertaking" within the meaning of s 24(1)(c) of the Act?*
3. *Is the veteran, by reason of war-caused injury or war-caused disease, or both, prevented from continuing to undertake that work?*
4. *If the answer to question 2 is yes, is the war-caused injury or war-caused disease, or both, the only factor or factors preventing the veteran from continuing to undertake that work?*
5. *If the answers to questions 2 and 3 are, in each case, yes, is the veteran by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that he would not be suffering if he were free of that incapacity?*
6. In *Repatriation Commission v Richmond*,[[19]](#footnote-19) the Full Court of the Federal Court warned that the application of subsection 24(1)(c) "*is not to be ascertained by construing the words in the authorities as if they were the words of the statute*". However, with this in mind, the questions set out in *Flentjar v Repatriation Commission* are appropriate to determine the issues in this matter.

## What was the relevant remunerative work that Mr Maloney was undertaking?

1. On the basis of the evidence of Mr Maloney, I am satisfied that that the relevant work he was undertaking was that of a cook, chef, car salesman and car sales manager.

## Is Mr Maloney, by reason of his war-caused injury and war-caused diseases prevented from undertaking that work?

1. For the reasons stated above I am satisfied that by reason of his war-caused injury and war-caused diseases, Mr Maloney is prevented from undertaking the work specified.

## Are the war-caused injury and war-caused diseases the only factors preventing Mr Maloney from continuing to undertake that work?

### The evidence of Mr Maloney

1. Mr Maloney suffers from sleep apnoea and is obese. He has suffered from these conditions during the whole of the assessment period. His sleep apnoea, however, is under control. He said that *“the obesity and sleep apnoea have never affected my work. I mean, I’ve always been fairly big.”[[20]](#footnote-20)*
2. I have earlier referred to Mr Maloney’s evidence to the Veterans’ Review Board that his obesity would play a part in his ability to work (see paragraph 29 of these reasons) and that he says that he misunderstood the question being put to him on that occasion. In giving evidence before me, he said that he did not think that the sleep apnoea would have an impact on him if he was at work.[[21]](#footnote-21)
3. On 29 October 2010, Mr Maloney completed a Lifestyle Questionnaire[[22]](#footnote-22) which he submitted to the Commission. At the time, he was seeking to have a number of conditions, including sleep apnoea and obesity, accepted as being war-caused.
4. At paragraph 38 of the Questionnaire, Mr Maloney answered the question *“Did your disabilities stop you working in any way?”*  as follows:

I was having problems talking to the public while I was a car salesman. Now I am unable to work because of my sleep apnoea, obesity, lower back pain, reflux disease and other accepted conditions.” [[23]](#footnote-23)

Later in the Questionnaire he stated:

Sleep Apnoea causes me to fall asleep at any time, every time I sit down to watch TV off I go. This is another reason why I have no social life, as I never know when I am going to need a sleep.

……

With all these conditions combined with my IHD [ischaemic heart disease] , Hypertension, Obesity and alcohol dependence makes it impossible to be able to work, and sometimes wonder about ending it all.[[24]](#footnote-24)

1. Mr Maloney said that, at the time, he was trying to have his sleep apnoea and obesity accepted as being war-caused. He said that he claimed that they affected his ability to work *“on the advice of the advocate and as he’s saying he’s trying to get me – get these conditions accepted, so on the advice of the applicant* [sic]*, I went along with what he said.” [[25]](#footnote-25)*
2. Until he stopped working in 1996, Mr Maloney liked to work and if he experienced any difficulty he would move on and find another job. He attempted to find employment for about 12 months after he ceased work in 1996.[[26]](#footnote-26)
3. Mr Maloney agreed that he is not prepared to move from the Newcastle area to seek work. He also agreed that his age and lack of computer skills would affect his ability to gain employment.[[27]](#footnote-27)

### The evidence of Dr Rosenthal

1. Although, as previously noted, Dr Rosenthal is of the opinion that Mr Maloney’s psychological condition and his lumbar spondylosis are the significant factors preventing him from working, he agreed that the *“daytime drowsiness”*,*[[28]](#footnote-28)* resulting from sleep apnoea,reported to him by Mr Maloney could impact on his working. Dr Rosenthal also agreed that the time Mr Maloney has been out of the workforce and his lack of computer skills would have some effect on his ability to return to work now.

### Consideration

1. In considering this issue, it is important to note that the assessment period in this matter is from 5 January 2011 until the date of the Tribunal’s decision. The question of whether Mr Maloney is prevented from continuing to undertake remunerative work by reason of his war-caused conditions *alone* is to be assessed during this period.
2. With regard to the alone test, in an interpretation approved on appeal by the Full Court, the Federal Court stated in *Richmond v Repatriation Commission*[[29]](#footnote-29):

... if there is a non war-caused factor which prevents, or contributes to preventing, the veteran from continuing to undertake the relevant remunerative work, even if it is only of secondary weight and insufficient in itself to prevent the veteran from continuing, the “alone” test will not be satisfied.

1. The Respondent conceded that there was no clear evidence that Mr Maloney’s conditions of sleep apnoea and obesity played a role in his being prevented from undertaking remunerative work. Both occupational physicians, Dr Chase and Dr Rosenthal did not regard the obesity as of any impact, and Dr Rosenthal only noted that the sleep apnoea could possibly impact on Mr Maloney whilst at work.
2. I am satisfied that during the whole of the assessment period, three related factors contributed to preventing Mr Maloney from undertaking the relevant remunerative work: the time he has spent out of the workforce, his age and his lack of computer skills.[[30]](#footnote-30)
3. At the commencement of the assessment period, Mr Maloney had not worked for some 15 years. Both Dr Rosenthal and Dr Chase accepted that Mr Maloney’s absence from the workforce would play a part in his being unable to undertake remunerative work.
4. Absence from the workforce will not always disentitle an applicant under subsection 24(1)(c). I note the decision of the Federal Court in *Byrne v Repatriation Commission*,[[31]](#footnote-31) in which Gyles J stated in relation to subsection 24(2)(b):

... I agree with the submission by counsel for the applicant that a consequence of incapacity resulting from the war-caused injury or disease can hardly be counted as a factor against the applicant under s 24(2)(b) when considering the effect of that incapacity upon obtaining employment.

The same may be said of the applicant's time out of the workplace. It may be accepted that the AAT were [sic] correct in finding that this would be a factor which increased the difficulty of the applicant in obtaining employment. However, the AAT had found that the consequences of the applicant's war-caused disabilities had had a significant effect upon the applicant's ability to obtain and hold work since at least 1982. There is a certain circularity in saying that failure to work as a consequence of war-caused incapacity destroys the causal connection between the incapacity and a later failure to obtain work.

... In order to judge the effect of the relevant incapacity, it is necessary to compare the position of the applicant as he is with the position he would be in without the relevant incapacity. ...

The Federal Court approved this approach as equally applicable to subsection 24(1)(c) in *Willis v Repatriation Commission*.[[32]](#footnote-32)

1. With this in mind, I am satisfied that Mr Maloney’s absence from the workforce is not a consequence of incapacity arising from his accepted conditions. Despite his conditions, Mr Maloney was able to work consistently up until his last job in 1996. There is no evidence that suggests anything changed in 1996, or that his condition had deteriorated to such an extent that he was then no longer able to work. In fact, the evidence that Mr Maloney continued to apply for work after his last job suggests that he believed that he was still capable of working at this time despite his conditions.
2. Mr Maloney gave evidence that the car sales industry in Newcastle was small and close-knit. He believes that his conduct caused him to develop a reputation that resulted in his being rejected for multiple jobs in 1997.
3. I am not persuaded that this was the reason he could not obtain work. In evidence, Mr Maloney regarded his age as a pivotal reason why he could not find work. At the time he was applying for jobs, Mr Maloney was 45 years old. He stated he had:

... not effectively made the decision [to not work again], but it’s just been a case of, you know, you apply for so many, you get knock backs. You know, do you keep going or do you just go, you know, “I’m too old. I’m on the scrap heap”... back in that day anyone over 40 had trouble getting a job, 40-45. ...”[[33]](#footnote-33)

1. Furthermore, his time outside of the catering industry affected his ability to obtain work as a chef or cook. Mr Maloney stated in evidence that he applied for “*a few cooking jobs too, just to at least get back to work*”.[[34]](#footnote-34) He was not successful in any application. He stated that he believed he could not change industries because the catering industry is constantly changing and “b*y the time I finished in ’96 I hadn’t been in the kitchen for seven or eight years*”.[[35]](#footnote-35)
2. Mr Maloney was unwilling to move to obtain employment. His evidence paints him as an individual who enjoyed working and would relocate for work. Over 14 years, he worked 20 jobs and moved cities in pursuit of work. After 1996, however, Mr Maloney was not willing to relocate. I am not satisfied that this unwillingness was a consequence of his accepted conditions. Mr Maloney had clearly been willing to move for work, despite those conditions, prior to 1996. As noted above, the evidence does not support a contention that his condition had deteriorated to such an extent that work or relocation was not possible.
3. Instead, Mr Maloney appears to have taken a decision to no longer pursue employment. Despite his evidence that that he did not consciously choose to stop looking for work, Mr Maloney’s failure to apply for any jobs in the period immediately after 1997 suggests a decision to no longer work. This was as much a result of his age and his time away from the catering industry, as an unwillingness to do what he had done previously and move cities or towns. Had he not been suffering from his accepted conditions he would still have experienced a substantial period away from the workforce prior to the assessment period.
4. Mr Maloney accepted in evidence that his absence from the workforce would limit his capacity to obtain employment. This was supported both by Dr Rosenthal and Dr Chase. In particular, Mr Maloney offered his lack of computer skills, and the evolution of industry towards technology, as a probable cause of difficulty in obtaining employment. Dr Rosenthal stated that Mr Maloney’s limited experience with computers would “*absolutely”* have an impact on his capacity to work.
5. Mr Maloney’s age is also a relevant factor. As noted by Mr Maloney, his age limited his capacity to obtain work at the age of 45. As he accepted, this would be even more pronounced during the assessment period, which commenced when Mr Maloney was 59 years of age.
6. Given the evidence that Mr Maloney’s absence from the workforce and age would contribute to his being prevented from working, I am not satisfied that Mr Maloney’s accepted conditions alone prevented him from undertaking remunerative work during the assessment period.
7. As Mr Maloney does not meet the requirements of subsection 24(1)(c) of the Act he is not entitled to payment of the pension at the special rate.

PART B

# is mr Maloney entitled to payment of the pension at the intermediate rate (s.23)?

1. Subsections 23(1)(aa), 23(1)(aab) and 23(1)(a) are identical to the corresponding provisions of section 24. As stated in relation to section 24 (see paragraph 17 of these reasons), there is no dispute that Mr Maloney meets these requirements.
2. The issues for determination in relation to eligibility for the intermediate rate are:
3. Does Mr Maloney satisfy the requirements of subsection 23(1)(b)?
4. If so, does he meet the requirements of subsection 23(1)(c)?

# Does Mr Maloney meet the requirements of subsection 23(1)(b)?

1. Subsection 23(1)(b) provides:
2. This section applies to a veteran if:

……

(b) the veteran’s incapacity from war-caused injury or war-caused disease, or both, is, of itself alone, of such a nature as to render the veteran incapable of undertaking remunerative work otherwise than on a part-time basis or intermittently…

1. Section 28, to which I have already referred, is relevant also to the application of subsection 23(1)(b).
2. In *Smith v Repatriation Commission*,[[36]](#footnote-36) the Court stated that where the Tribunal had found that section 24(1)(b) was satisfied “*it must follow that s 23(1)(b) was also satisfied as it is a lesser test directed at a lower entitlement*”.
3. For the reasons stated in relation to the application of subsection 24(1)(b), I am satisfied that Mr Maloney satisfies the requirements of subsection 23(1)(b).

# Does Mr Maloney meet the requirement of subsection 23(1)(c)?

1. Subsection 23(1)(c) provides:
2. This section applies to a veteran if:

……

(c) the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) is, by reason of incapacity from that war-caused [injury](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5d.html#injury) or war-caused [disease](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5d.html#disease), or both, alone, prevented from continuing to undertake [remunerative work](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5q.html#remunerative_work) that the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own [account](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s5q.html#account), that the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) would not be suffering if the [veteran](http://www.austlii.edu.au/au/legis/cth/consol_act/vea1986261/s115a.html#veteran) were free of that incapacity…

1. Subsection 23(1)(c) is in identical terms to subsection 24(1)(c). In *Smith v Repatriation Commission,[[37]](#footnote-37)* Buchanan J discussed whether the operation of the two sections were synonymous, such that an Applicant who failed to satisfy subsection 24(1)(c) would also inevitably fail under subsection 23(1)(c). He stated:

Whatever level of disability applies to a particular veteran, s 24(1)(c) and s 23(1)(c) apply further conditions to be satisfied which are, on the face of it, expressed in the same terms, although s 23(3)(a)(iii) adds a further ingredient to consider. Do s 24(1)(c) and s 23(1)(c) apply the same test at different levels of incapacity, so that a decision about the operation of s 24(1)(c) dictates the result for any possible application of s 23(1)(c)? On this approach, after an initial assessment about whether s 24(1)(b) or s 23(1)(b) applies, a decision-maker need consider only s 23 or s 24 but not both.

An alternative approach would accept that a veteran may fail to satisfy the requirements for a special rate of pension under s 24 (even though totally incapacitated for the purpose of s 24(1)(b)), but may nevertheless satisfy the requirement for an intermediate rate of pension under s 23. It seems to me to be possible that a particular fact situation which defeated recognition in accordance with s 24(1)(c) might nevertheless justify recognition under s 23(1)(c). One possibility which comes to mind is where an incapacitated veteran who has managed to work more than half-time despite his or her incapacity, is retrenched (so that s 24(2)(a)(i) applies) and then manages to obtain part-time work but only at, say, 30% or 40% of a full-time load. I can see no immediate reason why the intermediate rate of pension would not be payable in such a case (see, for example, Repatriation Commission v Connell (2011) 197 FCR 228 at [26]-[30]).

1. This is not a case similar to that alluded to by the Federal Court. In this matter, the primary issue being satisfaction of the alone test in the context of a substantial period away from work, the reasons given in relation to the application of section 24(1)(c) are equally applicable to section 23(1)(c).
2. For the reasons stated in relation to the application of subsection 24(1)(c), Mr Maloney does not satisfy the requirements of subsection 23(1)(c). He is not entitled to payment of the pension at the intermediate rate.

# part c

# conclusion

1. For the reasons stated, the decision of the Veterans’ Review Board, made 14 November 2012, that Mr Maloney is not entitled to payment of the pension at either the special rate or the intermediate rate, will be affirmed.

|  |
| --- |
| I certify that the preceding 87 (eighty-seven) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance |

...........................**[sgd]**.............................................

Dated

|  |  |
| --- | --- |
| Date(s) of hearing | **2 October 2014; 26 March 2015** |
| Date final submissions received | **26 March 2015** |
| Counsel for the Applicant | **C Mudge** |
| Solicitors for the Applicant | **KCI Lawyers** |
| Advocate for the Respondent | **T O'Reilly, Department of Veterans' Affairs** |

1. Exhibit A4. [↑](#footnote-ref-1)
2. Subsection 19(9). [↑](#footnote-ref-2)
3. [2014] FCAFC 53, [40]. [↑](#footnote-ref-3)
4. Chambers v Repatriation Commission (1995) 55 FCR 9 at [39]. [↑](#footnote-ref-4)
5. Exhibit A4. [↑](#footnote-ref-5)
6. Exhibit A4 para.8. [↑](#footnote-ref-6)
7. Exhibit A3 p-11. [↑](#footnote-ref-7)
8. Exhibit A5. [↑](#footnote-ref-8)
9. Exhibit A6. [↑](#footnote-ref-9)
10. Exhibit R2. [↑](#footnote-ref-10)
11. Exhibit R3. [↑](#footnote-ref-11)
12. Exhibit R2 p.6. [↑](#footnote-ref-12)
13. Exhibit A2 p.20. [↑](#footnote-ref-13)
14. Exhibit A2 p.5. [↑](#footnote-ref-14)
15. Exhibit R4. [↑](#footnote-ref-15)
16. Exhibit R5. [↑](#footnote-ref-16)
17. Supra. [↑](#footnote-ref-17)
18. (1997) 48 ALD 1, at 4-5. [↑](#footnote-ref-18)
19. [2014] FCAFC 124, at para 50. [↑](#footnote-ref-19)
20. Transcript 02/10/14 p-28. [↑](#footnote-ref-20)
21. Transcript 02/10/14 p-31. [↑](#footnote-ref-21)
22. Exhibit R1 p.10-19. [↑](#footnote-ref-22)
23. Exhibit R1 p. 18. [↑](#footnote-ref-23)
24. Exhibit R1 p.18. [↑](#footnote-ref-24)
25. Transcript 02/10/14 p-42. [↑](#footnote-ref-25)
26. Transcript 02/10/14 [↑](#footnote-ref-26)
27. Transcript 02/10/14 pp.58-59. [↑](#footnote-ref-27)
28. Transcript 02/10/14. [↑](#footnote-ref-28)
29. [2014] FCA 272, at para 108; see also Repatriation Commission v Richmond [2014] FCAFC 124, at para 65. [↑](#footnote-ref-29)
30. Repatriation Commission v Hendy (2002) 76 ALD 47 at para. [37]. [↑](#footnote-ref-30)
31. [2001] FCA 1134, paras 8-10. [↑](#footnote-ref-31)
32. [2012] FCA 399, para 26. [↑](#footnote-ref-32)
33. Transcript, page 59. [↑](#footnote-ref-33)
34. Transcript, page 59. [↑](#footnote-ref-34)
35. Transcript, page 57. [↑](#footnote-ref-35)
36. [2014] FCAFC 53, at para 56. [↑](#footnote-ref-36)
37. [2014] FCAFC 53, at para 56-57. [↑](#footnote-ref-37)