Cases noted in VeRBosity Volume 10 No 1

Veterans' Review Board

Administrative Appeals Tribunal

Federal Court of Australia

Editor's notes

This edition of *VeRBosity* contains reports on Court decisions relating to veterans' matters and selected Board and Tribunal decisions handed down in the period from 1 January to 30 April 1994. During that period, the Federal Court handed down five decisions on matters which were previously heard by the Board.

The cases of *McMahon* and *Gleeson* were concerned with the application of the "reasonable hypothesis" standard of proof in those cases. In *Levi*, the Federal Court considered the meaning of subsection 9(3) of the *VE Act* relating to a "serious breach of discipline". *Thomas* was concerned with the assessment of incapacity under transitional provisions relating to the commencement of the *VE Act* in 1986. *Delkou's* case involved an application under the *AD(JR) Act* for an extension of time in which to lodge an appeal to the Federal Court.

Robert Kennedy
Editor

Selected Decisions of the Veterans' Review Board

War Widow's pension - Date of effect

V93/1026

Kenny, Logan & Purcell

4 February 1994

The applicant appealed to the Board for a review of the date of effect of a decision which determined that a widow's pension was payable from the first pension pay day on or after 5 July 1992.

A formal claim was received by the Department on 24 December 1992. However, the Department had treated an earlier request on 5 October 1992 for eligibility for medical treatment for the widow as an informal claim.

The Board noted section 20 of the *VE Act*:

"20. (1) Where a claim in accordance with section 14 for a pension is granted, the Commission may, subject to this Act, approve payment of the pension from and including a date not earlier than 3 months before the date on which the claim for a pension, in accordance with a form approved for the purposes of paragraph 14(3)(a) was received at an office of the Department in Australia.

(2) Where-

(a) a person makes a claim for a pension in writing, but otherwise than in accordance with a form approved for the purposes of paragraph 14(3)(a);

(b) the person subsequently makes a claim for the pension in accordance with a form so approved -

(i) at a time when the person had not been notified by the Department in writing that it would be necessary to make the claim in accordance with a form so approved; or

(ii) within 3 months after the person had been so notified; and

(c) a pension is granted to the person upon consideration of that claim in accordance with a form so approved,

the Commission may, subject to this Act, approve payment of the pension from and including a date not earlier than 3 months before the date on which the claim referred to in paragraph (a) was received at an office of the Department in Australia.

(3) Nothing in this section empowers the Commission to approve payment of a pension to a person from a date before the person became eligible to be granted the pension."

The Board then said:

"... the delegate selected a date of effect for payment of the widow's pension by reference to the informal claim of 5 October 1992. The earliest date which could have been set was a date 3 months prior to the lodgement of that informal claim viz. 5 July 1992.

...

Whilst accepting that an informal claim had been lodged on 5 October 1992, the applicant referred the Board to an earlier claim to accept the veteran's death as being war-caused

which was lodged on 19 February 1985. That claim was investigated and the decision made by the Commission on 10 May 1985. It was determined that, on the evidence available at that time, the veteran's death was not war-caused. A review of that decision was sought and determined by the Veterans' Review Board on 22 March 1989. The Board affirmed the primary decision. No further review were sought of that decision at any time. It was submitted by the applicant that 'the claim' which should be considered for the purposes of determining a date of effect was the claim lodged on 19 February 1985."

The Board continued:

"We are reasonably satisfied that the matter falls for determination under the terms of subsection 20(2). In that provision, the term 'claim' appears on five occasions. We are reasonably satisfied that the term, as it is used, is a reference to the same claim throughout the provision. The need for consistency in meaning being attributed to a particular word in the same section was commented upon by Hodges J in *Craig, Williamson Pty Ltd v Barrowcliff* (1915) VLR 450:

> 'I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words whenever those words occur in that document, and that that applies especially to an Act of Parliament, and with especial force to words contained in the same section of an Act. There ought to be very strong reasons present before the Court holds that words in one part of a section have a different meaning from the same words appearing in another part of the same section.' (at 452)

The last part of subsection 20(2) provides that the Commission may approve payment of the pension from and including a date not earlier than three months before the date on which 'the claim referred to in paragraph (a)' was received at an office of the Department in Australia. The claim referred to in paragraph 20(2)(a) can only apply to the informal claim lodged, in this case, on 5 October 1992. We are of that opinion because the terms of subsection 20(2) do not apply unless the requirement in paragraph 20(2)(c) is met. This requires that the pension be granted to the person after consideration of that claim. The only claim which was granted in this case was the one that was initiated by the lodgement of the informal application on 5 October 1992. The earlier claim, lodged in 1985, did not lead to the granting of a pension. As noted above, that earlier application was rejected at both the primary level and by the Veterans' Review Board. Further review options were not taken up in respect of that matter and we are reasonably satisfied that the failure to take the claim further had the result of extinguishing the first claim. Nothing more would have occurred in this case but for the lodgement of the further claim on 5 October 1992 and it was that claim which resulted in the granting of the pension and it is that claim which is referred to in subsection 20(2) as marking a date which sets the parameters for calculating the date of commencement for payment of pension.

We also note the terms of subsection 20(3) which provides that the Commission is not empowered by the

Act to approve payment of pension to a person from a date before the person became eligible to a grant of the pension. That date of eligibility, calculated in accordance with subsection 20(2), is a date not earlier than three months prior to the lodgement of the claim on 5 October 1992.

In this case, as outlined above, subsection 20(2) is of relevance. During the hearing, the applicant's submissions were made on the basis of the terms of subsection 20(1). That provision applies where the first step taken by an applicant is the lodgement of a formal claim, ie. one utilizing an approved form. As noted above, the first step in the process which led to the granting of the widow's pension in this case was the lodging of an informal claim. However, we are reasonably satisfied that the approach we have adopted in respect of subsection 20(2) is exactly the same as that which applies under subsection 20(1). It is the claim which leads to the grant of pension which provides a date from which can be calculated the earliest date for the payment of a pension."

Formal decision

The Board affirmed the decision under review that pension was payable from and including the first pension payday on or after 5 July 1992.

War Widow's pension - smoking - death

T93/0201

O'Leary & Darlington

14 March 1994

The applicant appealed to the Board for review of a decision that her husband's death, on 4 March 1993 at the age of 72 years, was not war-caused. The cause of death was certified to be gastrointestinal haemorrhage, duodenal ulcer, general debility, uraemia, and chronic obstructive airways disease.

The veteran served in the Royal Australian Air Force from 1941 to 1946. He served overseas and in Australia and this period constitutes eligible war service including operational service.

From the applicant's representative and the documentary evidence, a link between the veteran's service and his death was raised, all related directly or indirectly to the veteran having had a war-caused smoking habit.

The Board noted that on a questionnaire dated 21 April 1987 the veteran stated that he began smoking at the age of 20 during service in the Air Force, however in a letter from Dr Edwards, the veteran's LMO, it states that:

> "... told me he joined the RAAF when 20 years old. He was then an occasional smoker, 2/week as he was a bike rider. He commenced smoking on service particularly while away overseas. He was discharged a heavy smoker and quickly increased rate to 60-80/day".

When the Board asked the applicant when her husband increased his smoking to about 20 cigarettes a day, she stated that this was after service and "after he finished his Tech course and went to the Railways".

The Board said:

> "From what the advocate stated in her closing submission, when invited to indicate what hypothesis was being

put forward the Board dealt with the matter on the basis that it was being argued that the accepted bronchitis disease involved treatment with medication which contributed to the development of a duodenal ulcer which haemorrhaged, causing death. In the alternative, the Board considered whether there was a duodenal ulcer caused directly by war service as well, of course, as whether death was contributed to by bronchitis or chronic obstructive airways disease.

The fact that there is an accepted disability which is regarded as a causal factor in another disease or injury or, as in this case, death, is no more than an evidentiary element when causation is being considered. That much is clear from a line of cases which have dealt with this issue. In other words a later decision maker is not bound by a previous determining authority's decision to accept something as war-caused and can look at the matter afresh in the light of the evidence before it. This does not mean that the earlier decision is invalid if the later decision maker comes to a different conclusion. It simply means that the whole causation question needs to be answered by reference to all the currently available evidence. This issue has been discussed at some length in *Langley v Repatriation Commission* (1993) 115 ALR 51 and the Court by majority, upheld the established principle.

In the matter before it, the Board is faced with evidence about the veteran's smoking which is contradictory in two ways. The veteran himself gave different versions of his smoking habit. He was not to be criticised for this, given that in 1987 it had become widely known, especially in the veteran community, that since the decision in the *Repatriation Commission v Law* (1981) 147 CLR 635 anyone who could causally implicate their eligible war service in the commencement, entrenchment or aggravation of a smoking habit thereby in effect earned entitlement to medical treatment and pension for any one or more of a steadily growing list of diseases.

What is clear from the veteran's own evidence is that he did not begin to smoke during service. He told Dr Edwards that at 20 on enlistment he was already a smoker. For how long is not known. In the initial response to the 1987 Smoking Questionnaire the veteran stated that his wife, the present applicant, could substantiate the information he gave. She has not done so in her evidence to the Board. Instead she gave evidence which contradicted that of the veteran.

The applicant's evidence, which was given in a frank and straightforward manner, satisfied the Board beyond reasonable doubt that there was no significant increase in the veteran's smoking habit following service. Her evidence pointed strongly to the post service period and the veteran's work as the cause for the increase in the veteran's smoking. She indicated quite clearly that an increase in the veteran's smoking came 'after he finished his Tech. course and went to the Railways', not when he left the RAAF."

The Board then concluded:

"... although the Board accepts that eligible war service was inherently stressful there is no evidence before it

going to show that the veteran's service was severely stressful to him. It is of significance in this regard to note that the veteran did not claim such stress in 1987 to the Departmental Officer with whom he discussed his smoking history. Nor did the veteran when talking to Dr Edwards in 1987 implicate service causally in his claimed smoking increase at the time of discharge.

In terms of subsection 120(3) and by reference to the rules in *Bushell (8 VeRBosity 2)* and *Byrnes* the evidence can only be said to have initially raised several reasonable hypotheses based on the accepted bronchitis disease and medication for it, cigarette smoking and severe stress. For the reasons given above, however, the Board is satisfied beyond reasonable doubt that it cannot accept sufficient of the facts as are necessary to support the raised hypotheses. It follows that the Board is satisfied beyond reasonable doubt, for the purposes of subsection 120(1), that there is no sufficient ground for determining that the veteran's death was war-caused."

Formal decision

The Board affirmed the decision under review.

Entitlement - aggravation - failure to diagnose condition and commence treatment

N93/1930

Marsh, Cross & Davoren

30 March 1994

The member appealed to the Board for review of a decision which determined that his compulsive personality disorder with secondary anxiety was not defence-caused.

The member served in the Royal Australian Navy from 8 April 1971 and is still serving. His defence service as defined in the *VE Act* is from 7 December 1972. The member has also had peace-keeping service in Somalia comprising 89 days in the period December 1992 to April 1993.

The Board said:

> "Given the nature of the condition claimed, the history associated with the condition and the basis of the claim, that is aggravation of a condition through failure to diagnose and treat the condition in 1973, the Board determined to apply subsection 120(4) of the Act in reaching its decision - that is, the Board must decide all relevant matters to its reasonable satisfaction."

The advocate submitted that the member's claimed condition was aggravated by the circumstances and conditions of his defence service, in that following the first manifestation of the condition and its symptoms, in 1973, the Navy did not diagnose the condition and commence treatment in a timely or proper manner. In support of this, she drew on evidence provided by the member, in Service Medical Records, and by a Dr Whelton in a letter dated 14 December 1993.

Dr Whelton detailed the member's medical history leading to treatment, advised of the diagnosis made and concluded his letter with the following comment:

> "He considers that a lot of his problem was due to the fact that he was not

attended to soon enough following the onset of his symptoms. He said that there was about a 4 month lapse between the incident on board the ship and his referral to the psychiatrist. During that time he was attended to by the P.O. medic and his medical officer and tranquillizers were prescribed. He has no problem with treatment administered to him by his various attending psychiatrists.

My treatment of him has consisted of consultations now at about 3 monthly intervals. He is maintained on a small dose of Anafranil the specific treatment now available for obsessive/compulsive disorder. He is likely to need to remain on this long term."

In answer to questions by the Board as to the initial medical treatment after the final onset of an episode of panic and anxiety, the member advised that he reported to the ship medic. He did not believe there was a medical officer on board his ship at the time, but was uncertain of this fact. However as the ship was in port at the time he was able to see a Navy doctor within 2 days of the first attack. He had a couple of subsequent visits to Navy medical officers for the condition, was prescribed Valium and kept on full duties. He remained on board when his ship made a visit to New Zealand about this time. Treatment with Valium continued until 5 December 1973 when he was referred by a Navy doctor for psychiatric assessment. This referral outlined the problems and stated: "I believe that Valium is not the answer, and that he needs counselling. "

Initial psychiatric assessment and treatment was conducted in *HMAS Penguin* and the member commenced on routine medications. He was discharged to full duty, Category A, on 22 March 1974, after a period of leave and psychiatric review of treatment, but was to continue prescribed medication. Although medication has been changed over the years, the member continues on medication for the condition.

The member further advised that following the initial problems in 1973, he did not seek to be given shore duties, nor did any medical officer, including treating psychiatrists, suggest that he cease service on ships. The condition continues to affect him, with more significant symptoms developing whilst on ships, with major problems on three or four occasions since 1974.

When the Board asked whether the member had considered leaving the Navy because of the problem, the member stated that he was not going to let the condition rule his life. He has maintained the appropriate medical category rating for sea duties throughout his career and has continued to serve at sea without restriction. The Board said that the Navy obviously considered the member medically fit for service in Somalia. Throughout his service, he has had to take prescribed medication for this disorder. Despite this problem, the member had pursued a successful career in his chosen area of naval service.

The Board said:

"Having examined the background of the claimed condition, and the impact on the member's service career, the Board turned to the basis for the claim, that is aggravation. The Board was unable to locate evidence to support the contention that, but for the member's service in the Navy, the condition would not have arisen, nor

were the member and his advocate able to provide evidence to this effect. His treating psychiatrists do not address this aspect in their reports.

The next aspect for the Board's consideration was whether the Navy medical services had acted promptly and properly in their treatment of the member's problem from the time of the first manifestation. The member advised that the first anxiety attack was in September 1973. He reported to the ship's medical attendant and was sent to a naval medical officer within 2 days. A number of follow-up consultations with naval medical officers followed, Valium was provided, and the member was assessed as fit for continuation of sea duties. His ship made a brief visit to New Zealand about this time and he served in the crew. On 5 December 1973, a Navy doctor referred the member for psychiatric treatment, as mentioned earlier. The first psychiatric report was prepared on 21 January 1974. He responded well to treatment and counselling and returned to full duties on 4 March 1974. At the time the member was 18 years of age.

The Board was of the opinion that the actions of the Navy medical staff in this sequence of events displayed sensible medical practice particularly for such a young sailor. He was seen within 2 days of the initial incident by a medical officer. He was assessed as being fit for sea duties, had a number of consultations with Navy doctors and was prescribed Valium for the condition. The member did not seek to be relieved from sea service because of the problem, and the evidence is that he accepted the Valium treatment and continued with his duties. He obviously continued to have difficulties and was referred for psychiatric examination about 3 months from the time of the initial anxiety attack. The Board can well understand the medical approach in this case, a very young sailor of 18 years with a problem that the Navy general practitioners assessed as one to be treated conservatively, rather than precipitate psychiatric examination as a first step.

The first entry of a general practitioner finding a problem severe enough to warrant psychiatric referral occurred within 3 months of the first anxiety attack. This does not appear to be an undue delay in treatment or diagnosis, nor is there evidence to suggest improper medical practice by the Navy. In these circumstances the Board was unable to find evidence to support the contention that a delay of 4 months in diagnosis of the condition claimed and commencement of treatment constituted an aggravation of the condition.

In summary the Board found no evidence that the claimed condition was aggravated by the conditions and circumstances of the member's defence service, or that the condition would not have arisen but for the conditions and circumstances of that service."

Formal decision

The Board affirmed the decision under review.

Entitlement - unknown primary cancer - smoking

Q92/1297
Q93/0764

Miller, Muir & Bell

19 April 1994

The Board heard applications for review of two decisions which determined that

metastatic adenocarcinoma of unknown primary and the death of the veteran were not war-caused.

The veteran died on 24 September 1992 from metastatic adenocarcinoma of unknown primary.

The veteran served in the Australian Army from 25 November 1946 to 12 November 1948. During this period he served in Japan and that service is recognised as operational service. The Board was required to determine both claims according to the standard of proof and tests contained in sub-sections 120(1) and 120(3) of the *VE Act*.

It was contended that a service induced smoking habit led to the development of the veteran's terminal illness - the metastatic cancer, which originated from a primary that was a gastric adenocarcinoma. The Board said that if the primary site was unequivocally identified as the colon, then the contended hypothesis failed because there was no support for the proposition that smoking can lead to cancer of the colon. On the other hand it was accepted that smoking is associated with a higher incidence of death from stomach cancer compared with the death rate for victims of stomach cancer who did not smoke.

The Repatriation Commission made a decision based on the assumption that the primary site of the terminal cancer was the colon. The death certificate also recorded that the likely primary site was the colon.

The Board noted:

> "The late veteran's treating doctor - Dr D Nichol, in a report dated 16 November 1993, suggested that the likely primary site was the gastric region - the veteran's stomach. He stated the symptoms and signs exhibited by the veteran were consistent with a gastric cancer and to this end referred to a pathologist's report which states 'secondary gastric adenocarcinoma'.

A less venturous opinion was provided by Professor R A Cooke, of the Wesley Centre, Brisbane, in his report, wherein he stated:

> '...I cannot be certain about the site of the primary, but somewhere in the alimentary canal is very likely.'

Thus it must follow that, at this juncture, the Board is confronted with two equally acceptable medical assertions as to the site of the primary. Each opinion, independently, gives rise to different but reasonable hypotheses providing the alleged smoking history is in the material, to which the Board can point, to sustain the contended hypothesis. It must be remembered as was so distinctly stated in the High Court of Australia case *Bushell v Repatriation Commission* (1992)109 ALR 30 *(8 VeRBosity 2)* -

> '.... Conflict with other medical opinions is not sufficient to reject the hypothesis as unreasonable.'

What material identifies the alleged smoking history?

The late veteran enlisted at 18 years of age. In a smoking history questionnaire, dated 14 January 1991, he discloses that he did not smoke before service, but commenced during service and continued after service up to shortly before his death.

There are a number of statements from his sister and two brothers that support the view presented originally by the veteran.

This Board is, therefore, of the opinion that the material raises a reasonable hypothesis connecting the development of the claimed condition and, therefore, the terminal illness, to the circumstances of his war service.

It must be remembered that the fact that there are two views as to the primary site does not, without more, destroy either view. Professor Cooke's report supports both contentions.

Further, in the application of subsection 120(1) of the Act, the Board could not be satisfied, beyond reasonable doubt, given the equivocal nature of the medical evidence, that the contended association, was negated beyond reasonable doubt.

Finally, the additional evidence in the way of statements form the late veteran's siblings, as to his smoking history makes it unavoidable, in the application of sub-section 120(1), to conclude that he had a service related smoking habit."

Formal decision

The Board set aside the decisions under review and determined that the veteran's metastatic adenocarcinoma of unknown primary which caused his death was war-caused.

Selected Decisions of the Administrative Appeals Tribunal

Ischaemic heart disease - smoking habit - minimal contribution

Re R J Prindiville and Repatriation Commission
Barnett, Taylor & Joske

W92/340 14 January 1994

Mr Prindiville applied for review of a decision that his ischaemic heart disease, chronic obstructive airways disease and diabetes mellitus were not war-caused. He served in the RANR from 1950 to 1991 and rendered operational service while serving on board *HMAS Sydney* as a Reserve Officer from 26 March 1968 to 26 April 1968. He contended that his ischaemic heart disease and chronic obstructive airways disease were contributed to by increased smoking during operational service and that his diabetes was related to stress during service.

Evidence of smoking

In relation to ischaemic heart disease and chronic obstructive airways disease, the Tribunal accepted that those conditions were causally connected to the veteran's lifelong habit of smoking since 1952. The issue before the Tribunal was whether his increased smoking during operational service in 1968 was sufficient to have contributed to the onset of those diseases. The Tribunal said in relation to his smoking:

> "The applicant gave evidence of an increased rate of smoking of 40 and even 50 cigarettes a day on various voyages prior to embarking on *HMAS Sydney* for Vietnam. The reasons which he gave for the increase in his smoking while on board varied from boredom to too much responsibility and stress, peer group pressure and the like. He gave somewhat conflicting evidence about whether or not he smoked during night time watches, but it appears from his evidence that boredom, during the time when he was the second officer of the watch, was a major factor for the increase in his shipboard smoking and he claimed that he would smoke about one cigarette every 15 minutes during each watch. It was obvious that no contemporaneous record of smoking levels had been kept during those times and that the evidence the applicant was offering was calculated long after the event by a process of trying to recollect what he had been doing, or when he was likely to have been smoking. Accordingly, the Tribunal is unable to put much reliance on the specific levels of smoking being claimed by the applicant, but it accepts his general statement that when he returned to civilian life his level of smoking dropped significantly."

In relation to stress experienced by the veteran during operational service, the Tribunal observed:

> "The applicant also claims that he felt a high level of stress because of the danger associated with travelling on the naval ship in a combat zone and that this feeling of stress came upon him about two days before the ship arrived at Vung Tau Harbour and lasted for the one day the ship was anchored in the Harbour but then quickly diminished during the next two days as the ship left Vietnam. It was at most therefore, a period of about

five days that the applicant claims to have had an increased level of stress. The applicant said that he felt apprehensive when the ship went to defence stations and black curtains were erected to give the external appearance of invisibility and *HMAS Sydney* was placed on the highest degree of watertight integrity. He claims that when the watertight hatches were closed he was aware all the time he was down below that if a torpedo hit in the compartment that he was in, he would be, as he said, 'history'. He also claims to have felt that he was in danger of being shot by snipers from the shore as he was told that American bombers were applying firebombs to paddyfields nearby to clear out potential snipers. The applicant also said that he was in fear of being attacked by Vietnamese sampans approaching the vessel and potentially firing or throwing grenades on board even though American patrol boats were patrolling around the *HMAS Sydney* to make sure these sampans stayed well away. There is no evidence at all of any continuing stress or anxiety caused to the applicant which can be attributed to those days on board the *HMAS Sydney* and his evidence was not supported by friends, family or psychiatrists. The applicant himself had not claimed to have suffered nightmares or any other symptoms relating back to those days. The Tribunal accepts that he may have suffered a degree of stress at that stage but considers that the effect of that stress did not continue into his civilian life."

The Tribunal was not satisfied that any increase in the veteran's smoking level which might have occurred following his voyage to Vietnam was connected to the stress of that voyage or connected to his operational service in any way. The Tribunal concluded that any contribution of the veteran's operational service to the development of ischaemic heart disease and chronic obstructive airways disease was minimal.

The Tribunal found that Mr Prindiville was suffering from Type 2 diabetes mellitus (maturity onset type) and that there was no medical evidence of a link between diabetes of that type and stress. The Tribunal was satisfied that there was no reasonable hypothesis connecting the veteran's diabetes with the circumstances of his operational service.

Formal decision

The Tribunal affirmed the decision that the veteran's ischaemic heart disease, chronic obstructive airways disease and diabetes mellitus were not war-caused.

Jurisdiction - Administrative Appeals Tribunal - failure by VRB to advise of right of review

Re R J Fletcher and Repatriation Commission
Handley

V93/885 20 January 1994

On 3 July 1992, the VRB decided to affirm a decision of the Repatriation Commission that Mr Fletcher's lumbar spondylosis and carcinoma of the prostate were not war-caused. The Board adjourned the hearing of an application in relation to several other disabilities. The Board's decision was published on 31 July 1992 and a statement of reasons for the decision was sent to the veteran and received by

him several days later. The Board did not inform the veteran of his rights of appeal to the Administrative Appeals Tribunal.

On 2 August 1993, approximately one year later, the VRB wrote to the veteran about his rights of appeal to the AAT. The Board's letter stated in part:

> "I am writing about the Decision and Reasons published on 31 July 1992 which, in part, affirmed the earlier decision of the Repatriation Commission of 6 November 1991 in respect of lumbar spondylosis and carcinoma of prostate with bony metastases.
>
> In the covering letter for these reasons the Board neglected to inform you of your appeal rights to the Administrative Appeals Tribunal in respect of these conditions. As such the statutory three month period for the lodging of appeals will now commence from the date of this letter."

On 1 September 1993, Mr Fletcher lodged an application for review of the Board's decision of 3 July 1992.

Submissions

The matter at issue was whether the AAT had jurisdiction to review the decision that the veteran's carcinoma of the prostate was not war-caused.

The Repatriation Commission submitted that the AAT did not have jurisdiction to review the Board's decision of 3 July 1992 as the application was lodged with the AAT more than twelve months after the terms of the decision were furnished to the veteran. The Commission argued that there was no discretion to extend the time for commencing proceedings before the AAT.

Mr Fletcher's representative submitted that the AAT proceedings had been commenced within time because a decision was "made" only when all of the provisions of sub-section 140(1) of the *VE Act* were complied with, that is, when a decision, statement of reasons and advice of rights of appeal to the AAT were furnished to an applicant. It was submitted that the Tribunal should have regard to section 15AA of the *Acts Interpretation Act 1901* concerning the purpose and object of the *VE Act* and should also take account of the beneficial nature of the legislation in deciding the matter in the veteran's favour.

Right of appeal

The Tribunal said that the advice concerning appeal rights as contained in the Board's letter of 2 August 1993 was wrong. The Tribunal said that the combined effect of sub-section 29(1) of the *AAT Act 1975* and sub-section 176(4) of the *VE Act* is that an application for review by the AAT may be lodged within three months after a decision is furnished to an applicant but the Tribunal has a discretion to extend the time limit where an application is lodged no more than twelve months after the decision has been furnished to the applicant. The Tribunal said that if the decision under review was the Board's decision of 3 July 1992, the veteran's application on 1 September 1993 was clearly out of time and the AAT lacked jurisdiction to review the decision.

Tribunal's conclusion

The Tribunal concluded that although the VRB failed to provide Mr Fletcher

with particulars of his rights of review by the AAT, a decision capable of review by the AAT was made by the Board on 3 July 1992. The Board's decision was said to be "final or operative and determinative" in terms of the test laid down by the High Court in the case of *Australian Broadcasting Tribunal* v *Bond* (1990) 94 ALR 11. The Tribunal was also satisfied that the Board's decision was properly "furnished" to the veteran. The Tribunal said that the VRB has a responsibility to give particulars of rights of review but that the *VE Act* does not impose any consequences for its failure to do so. In the Tribunal's view, the time for lodging an application for review had expired by 1 September 1993.

Formal decision

The Tribunal decided that it had no jurisdiction to hear the veteran's application.

Jurisdiction - application for review by VRB out of time - whether AAT entitled to review

Re T J Bowen and Repatriation Commission
Hallowes

V93/193 7 March 1994

On 20 September 1989, Mr Bowen lodged an application for increase in pension which was refused by the Repatriation Commission on 25 May 1990. The decision was sent to the veteran on 7 June 1990. He lodged an application for review of the Commission's decision on 28 September 1990. The VRB affirmed the Commission's decision without considering whether the application to the VRB was made within the statutory time limit in section 135 of the *VE Act*.

Section 135 of the *VE Act*, so far as relevant, provides:

> **"135.** (5) An application under subsection (1), (2) or (3) to the Board to review a decision of the Commission:
>
> (a) assessing a rate of pension or increased rate of pension;
>
> ...
>
> may be made within 3 months after service on the person to whom the decision relates of a copy of that decision in accordance with subsection 34 (2), but not otherwise."

Mr Bowen applied to the AAT for review of the decision refusing to grant an increase in pension.

Submissions

Mr Bowen's counsel submitted that a directory rather than a mandatory interpretation should be given to section 135 and that the Repatriation Commission had in effect, waived compliance with the statutory time limit under sub-section 135(5) by acquiescing in the VRB hearing the matter and that this raised an estoppel by conduct.

The Tribunal rejected the submission on behalf of the veteran, saying that the use of the term "may" in sub-section 135(5) was facultative, providing permission for veterans to make an application to the VRB for review of a decision of the Commission. It was not mandatory for veterans to make such an application. However, if a veteran did decide to make an

application for review of an assessment decision, it had to be made within three months of service on the veteran of the Commission's decision, but not otherwise. The Tribunal rejected a submission that the phrase "but not otherwise" did no more than enable the Commission to exercise a discretion to prevent review by the VRB if the application was made outside the three month period. The Tribunal followed the decision of the President, (O'Connor J) in *Re Roberts* and *Repatriation Commission* (1992) that the time limits for seeking review under the *VE Act* must be complied with strictly in view of the need for certainty in the decision-making process.

No Jurisdiction

The Tribunal in this case decided that it had no jurisdiction to hear an application for review where the application to the VRB was out of time. The Tribunal held that for Mr Bowen to have satisfied sub-section 135(5), his application had to be forwarded "to" or "at" an office of the Department of Veterans' Affairs. In forwarding his application to his representative, a Mr Horan, on or about 17 August 1990, he did not forward it to "an office of the Department" in terms of sub-section 136(1) of the *VE Act*.

The Tribunal said that if the VRB lacked jurisdiction in the first place, then the Tribunal must also lack jurisdiction to review the merits of the application, regardless of whether the VRB considered the issue of its jurisdiction. The Tribunal was required to determine the question of its own jurisdiction in each case. For the Tribunal to have jurisdiction under sub-section 175(1), the VRB, upon a request for review made under section 135, must have affirmed, varied or set aside a decision by the Commission. If the request was not properly made under section 135, the VRB did not have jurisdiction and neither did the Tribunal.

The Tribunal concluded that it was not open to the Commission to waive compliance with sub-section 135(5) of the *VE Act*, nor was it estopped from raising the issue having failed to do so before the VRB. The Tribunal said that its powers could not be extended in that way, contrary to the express terms of the *VE Act*.

Formal decision

The Tribunal decided that it did not have jurisdiction to review the Commission's decision.

Remunerative work - whether prevented by war-caused disabilities alone - retail menswear business

Re E J Lund and Repatriation Commission
Bulley J, Urquhart & Keane

Q93/315 8 April 1994

The issue in this case was whether Mr Lund satisfied the requirements of section 24(1)(c) of the *VE Act* in order to qualify for pension at the Special rate. The Repatriation Commission contended that he was not eligible for the Special rate on the grounds that his incapacity from war-caused disabilities alone did not prevent him from continuing to undertake remunerative work. The Commission submitted that as at the "application day" in 1991, his age of 70 years and 9 months was a factor preventing him from working.

Background

Mr Lund was born in 1921 and served in the Army during World War 2. In 1960, Mr Lund and his wife bought a menswear business in Nambour in Queensland which they ran together until the shop was sold in 1980. The Tribunal accepted that the business was a very personalised one and that Mr Lund had a strong personal following and was closely involved in community activities in the area. The Tribunal also accepted that Mr Lund loved the work associated with the business and took immense pride in it. The business was profitable over the years.

In 1972, Mr Lund suffered a complete nervous breakdown and was unable to go to work for six months. During that time, his wife ran the business on her own. After that, he was able to work only on a part-time basis because of his nervous condition. His nervous condition continued to deteriorate throughout the 1970's until, in 1980, he and his wife decided to sell the business. Mr Lund did not work after that time. He was granted a service pension on age grounds in 1981.

Mr Lund has war-caused disabilities of chronic post-traumatic stress disorder and bilateral sensori-neural hearing loss. The Repatriation Commission conceded at the Tribunal that he was incapacitated at one hundred per cent of the General rate. Mr Lund contended that he was eligible for the Special rate.

Tribunal's decision

The Tribunal was satisfied that Mr Lund had decided to sell the menswear business in 1980 and to cease work due solely to his war-caused chronic post-traumatic stress disorder. As a result, he had suffered a loss of significant earnings. The Tribunal was also satisfied that he would have wanted to continue in the business but could not handle it because of his nervous condition. In this regard, the Tribunal took account of his continuous employment and good work ethic since the war. His work history supported the proposition that he would have continued to work well after 1980 had it not been for his war-caused disease. The Tribunal said:

> "Mr Lund was in a self-employed situation as distinct from an employer-employee situation, in his menswear partnership business. Thus he was not subject to any usual, accepted or obligated retirement age. He could choose his retirement age at will. He was therefore not subject to constraints in that regard. He could go on to well into his seventies and beyond if he so chose."

The Tribunal concluded that on the application day, 29 November 1991, Mr Lund was, by reason of incapacity from the war-caused disease of chronic post-traumatic stress disorder alone, prevented from continuing to undertake remunerative work that he was undertaking and was by reason thereof, suffering a loss of earnings that he would not have been suffering if he were free of that incapacity.

Formal decision

The Tribunal set aside the decision and substituted its decision that the veteran was eligible for pension at the Special rate.

Colon cancer - nitrates and nitrites in bully beef - high fat diet on service

Re N Brown and Repatriation Commission
Dwyer, Sutherland & Campbell

V93/80 11 April 1994

Mrs Brown applied for review of the decision that her late husband's death from carcinoma of the colon was not war-caused. Mr Brown served in the Army from 1941 to 1945 including operational service, having served overseas in New Guinea and the Solomon Islands for a period of some 18 months.

Medical history

Mrs Brown told the Tribunal that her late husband had said that he was hospitalised several times for diarrhoea and stomach problems while serving overseas. His service records included several reports of diarrhoea, dyspepsia and abdominal discomfort but there were no records of hospitalisation. Mrs Brown also gave evidence that after discharge from the Army, her husband preferred to eat very plain food and she had prepared steamed food and they grew their own fruit and vegetables. He continued to suffer from attacks of diarrhoea from time to time.

The Tribunal found that the late veteran had eaten a high fat diet only while serving in New Guinea for about 18 months.

In about 1980, Mr Brown experienced a lot of stomach pain but his doctor told him "it must be something going around" and the pain gradually subsided. In 1989, he experienced further pain which was thought to be due to a virus. Later the same year, he was admitted to hospital for appendix surgery and the cancer was diagnosed. He died in November 1989 aged 69 years due to carcinoma of the colon.

Hypotheses

Three hypotheses were put forward in support of the claim:

- that the colonic cancer was caused by a high fat diet during service;
- that the cancer was caused by service diet which would have included exposure to nitrosamines from tinned food such as bully beef; or
- that the cancer was due to a long history of gastric problems during and after service.

High fat diet

The late veteran's treating surgeon, Dr Hanna provided a written report that in his opinion, it "would be impossible to rule out completely some association" between the veteran's experiences during service and the cancer.

Dr Sullivan, oncologist, wrote that:

> "Carcinoma of the colon is associated with diets high in saturated fats and animal protein in Western communities. The peak of fat intake was reached in the 1940's and 1960's and has since fallen. Nitrosamines are associated with the development of tumours in animals. They are formed under the conditions in which food was tinned for use by service people in WW2. A high saturated fat diet combined with the carcinogenic effect of nitrosamine resulted in the alteration of the bowel mucosa. This instability subsequently resulted in the

development of malignant metastatic cancer 45 years later.

Mr Brown died of metastatic carcinoma of the colon which it is hypothesised developed as a consequence of the carcinogenic nitrosamine exposure and a high saturated fat intake both occurring during his war service."

At the hearing, Dr Sullivan became aware that the veteran's post-war diet was low in animal fats and that the high fat diet had only lasted for 18 months and he conceded that in these circumstances, the hypothesis based on a high fat diet was not reasonable.

Professor Bennett, a surgeon with an interest in colo-rectal disease, agreed that the veteran's short-term exposure to a high fat diet suggested that the cancer was not related to war service.

The Tribunal concluded that the material did not raise a reasonable hypothesis connecting the consumption of a high fat diet over a period of some 18 months with the veteran's death from cancer of the colon.

Consumption of nitrites and nitrates

It was accepted by the Tribunal that the veteran would have ingested nitrites and nitrates as a result of consuming bully beef during service.

Dr Sullivan claimed that medical studies provided support for the hypothesis that the ingestion of nitrosamines could contribute to colon cancer. Dr Sullivan said, however, that the longer the exposure to a carcinogen, the greater the risk and that it was significant that the veteran's diet was not maintained after service.

The Tribunal concluded that the research findings did not support the hypothesis that a short-term dietary intake of nitrites and nitrates was associated with an increased incidence of colon cancer. Further, the Tribunal said that the evidence showed that a high fat/high meat diet had a much lower nitrate content than a balanced Western style diet and service diet would not be expected to lead to the formation of high levels of nitrosamines. The Tribunal said that there was no evidence as to whether additional nitrates in canned bully beef were sufficient to lead to a higher level of nitrates in service diet than in a normal balanced diet. The Tribunal concluded that the medical literature did not support the hypothesis linking dietary intake of nitrites and nitrates with cancer of the colon. The Tribunal said that this hypothesis was "too remote or too tenuous" in terms of the test enunciated by the High Court in *Bushell's* case.

History of gastric trouble

Neither medical witness before the Tribunal supported the hypothesis that service conditions resulting in gastric troubles had damaged the veteran's digestive system to such an extent that it led to the onset of colon cancer in later life. The Tribunal concluded that in the absence of expert evidence in support of this hypothesis, it was not a reasonable hypothesis.

Formal decision

The Tribunal affirmed the decision that the veteran's death was not war-caused.

Creutzfeldt-Jakob disease - malaria and dysentery in New Guinea

Re E N Watson and Repatriation Commission
Gibbs, Sutherland & Ermert

V93/415 27 April 1994

Mr Watson served in the Army from 1939 to 1945 and served overseas in the Middle East and New Guinea. He rendered operational service and had war-caused disabilities of malaria, clinical amoebiasis, psoriasis with pruritus ani and scrotum and retinal vein thrombosis. He had lodged a claim in respect of Alzheimer's disease and the claim was continued after his death by his widow in accordance with section 126 of the *VE Act*.

Medical evidence

Dr Bennett, specialist in infectious diseases, gave evidence on behalf of the applicant and was accepted by the Tribunal as eminent in the field of development of dementia and infectious diseases generally. Dr Bennett said that a diagnosis of Alzheimer's disease could only be established with certainty by microscopic examination which was not carried out in this case. He said that it was "impossible to deny" that Mr Watson had some other disease such as Creutzfeldt-Jakob disease ("CJD") and not Alzheimer's disease ("AD") as recorded.

Dr Bennett said that CJD was one of a number of similar brain diseases referred to as "spongiform encephalopathies" and that there was evidence that such diseases were transmissible. He postulated that the veteran may have come into contact with indigenous persons in New Guinea during World War 2 who were carrying a "prion agent" which could have led to CJD many years later. He thought that as the late veteran contracted malaria and dysentery in New Guinea, his immune system may have been affected and made him more susceptible to the contraction of a prion disease.

Dr Whyte, specialist in Alzheimer's disease, considered it "extremely improbable" that the late veteran suffered from a prion dementia. He described CJD as a rare disease, occurring in about one per million people and typically presenting with a rapidly progressive dementia. Death usually occurs within one year following the onset of clinical symptoms. He said that while transmission of CJD has occurred by direct inoculation, for example, in recipients of infected human pituitary gland extracts or tissue grafts, there is no evidence to suggest that transmission may occur by other means.

In Dr Whyte's view, the late veteran suffered from Alzheimer's disease. It was noted that Mr Watson began to develop significant memory problems in the late 1970's and memory and other cognitive functions continued to deteriorate. The duration of illness was 14 to 16 years, which, in his view, effectively ruled out the possibility of CJD in this case.

Diagnosis

The Tribunal said that the first issue to be decided in this case was whether the diagnosis of Alzheimer's disease was correct. The Tribunal said on this point:

> "In addressing the question of whether Mr. Watson suffered from CJD and not AD, we should also state that we are mindful of *Doolette v*

Repatriation Commission (1990) 21 ALD 489, in which O'Loughlin J said at page 500 that to require a medical state or condition or ailment to 'be proved', immediately raises the question of who must prove it? His Honour went on to say that:

> 'As s.120(6) and the authorities quite clearly show, there is no onus on any party to prove anything. It is true that there would have to be material before the Tribunal sufficient to identify the existence of a war-induced anxiety state and a present state of hypertension, but I am by no means satisfied that the "balance of probabilities" would be the appropriate test. The provisions of s.119(1)(f), (g) and (h) strongly suggest that test would be something less than the "balance of probabilities".'

On the whole of the material before us, approached in the context of section 119 and following *Doolette's* case, we find that the form of dementing illness suffered by Mr. Watson, from which he died, was CJD."

The Tribunal continued:

"Turning to the question of whether the CJD, and therefore the death of the late Mr. Watson was war-caused, we find that the material before us, when again approached in the context of section 119, raises a number of facts, all or some of which give rise to a reasonable hypothesis connecting his disease and death with the circumstances of the particular service rendered by him. The facts may be stated briefly as follows:

- Mr. Watson served in New Guinea as an infantryman in circumstances where it is reasonable to assume that he had a degree of close contact with indigenous people, including highland people.

- At the time Mr. Watson served in New Guinea, prion diseases such as Kuru and CJD were known to occur and to be prevalent.

- Prion diseases are transmissible.

- In the case of CJD, transmission can be by certain medical procedures and familial relationship.

- In most cases, however, CJD occurs sporadically, the mode of transmission being unknown. Various modes of transmission have been suggested, including:

  - ingesting or inhaling the agent;
  - by blood or venereal contact;
  - by inoculation of the agent through skin abrasions;
  - by insect bite;
  - by contact with animals.

- Clinical features of prion disease, such as CJD, do not become evident for perhaps many years after transmission of the agent to the patient.

- Mr. Watson developed dementia many years after his service in New Guinea.

- During his service in New Guinea Mr. Watson contracted malaria and dysentery.

It is our view, and we find, that the hypothesis raised is not contrary to

known scientific facts, nor is it one which is obviously fanciful or untenable. It is our finding that the evidence of Dr. Whyte, both oral and written, does not disprove beyond reasonable doubt any one or more of the facts upon which the hypothesis is raised. We are therefore not satisfied beyond reasonable doubt that there is no sufficient ground for determining that the late Mr. Watson's dementia was a war-caused disease within the meaning of section 9, or that his death was war-caused within the meaning of section 8 of the Act."

Formal decision

The Tribunal set aside the decision under review and substituted its decision that the late veteran's Creutzfeldt-Jakob disease was war-caused and that his death was war-caused.

(Ed: The Repatriation Commission has appealed to the Federal Court against the Tribunal's decision.)

Decisions of the Federal Court of Australia

Serious default, wilful act or serious breach of discipline - heroin addiction - killing of prisoner-of-war

Repatriation Commission v Levi

Einfeld J

11 February 1994

Mr Levi served in South Vietnam as an infantryman from 17 March 1970 to 10 March 1971. While in Vietnam, he started taking heroin and subsequently became addicted. In 1988, he applied for disability pension for heroin addiction, which he contended was due to an anxiety state caused by service. He said that his experiences during service which contributed to that stress included the killing by him of an unarmed wounded pregnant Vietnamese nurse who was a prisoner-of-war, and that he had had nightmares about that event.

The Commission rejected the veteran's claim for heroin addiction on the basis that it was not stress-related and hence not war-caused. This decision was affirmed by the VRB. When the matter came before the Administrative Appeals Tribunal, the Commission conceded that the veteran's heroin addiction was war-caused but argued that it amounted to a "serious default or wilful act" under section 9(3)(a) of the *VE Act* and a "serious breach of discipline" under section 9(3)(b)(i). The Tribunal found that the addiction did not come within section 9(3) which provides:

> "9. (3) Paragraph (1) (a), (b), (c) or (d) does not apply to an injury suffered, or disease contracted, by a veteran if the injury or disease:
>
> (a) resulted from the veteran's serious default or wilful act; or
>
> (b) arose from:
>
> (i) a serious breach of discipline committed by the veteran; or
>
> (ii) an occurrence that happened while the veteran was committing a serious breach of discipline."

Unlawful killing of nurse

On appeal to the Federal Court, the Commission argued that not only the heroin addiction but also the killing of the nurse came within section 9(3). The second incident, it was argued, was a "serious breach of discipline", in that the veteran should have refused to obey an order to kill the nurse, since only lawful orders needed to be obeyed and that it came within section 9(3) because it was a breach of the *Army Act 1881 (Imp)* or the *Geneva Conventions Act 1957 (Cth)* which set out the rules applying to combatants and civilians during times of war and armed conflict.

Einfeld J rejected the Commission's arguments in relation to both incidents. The Court said that there was no error of law by the Tribunal in not dealing with the issue of whether the killing of the nurse came within the *Army Act* or the *Geneva Conventions Act*, since those propositions were not raised before the Tribunal. Einfeld J said that the Tribunal is not required:

> ".. to go searching for solutions to issues which the parties themselves do not raise or have an opportunity to meet. The Tribunal simply could not operate in such circumstances. Of course if an essential or obvious

> matter is not addressed, a criticism might be appropriate. But if complex and quite remote legal issues not raised at a hearing could form the basis of the judgment, as the Commission has submitted on this appeal should have been the case, the party affected would simply have been deprived of the opportunity of dealing with them, and the whole proceeding would be invalid and abortive."

Einfeld J found that the circumstances of the killing of the nurse did not fall within section 9(3). Einfeld J said:

> "As I read the Act, the parliament intended by section 9(3) to exclude from entitlement to a pension those service personnel who were in a serious or significant way the deliberate creators or knowing authors of their own injuries or diseases; people who contracted their conditions while quite outside their proper functions and activities as members of the Australian armed services; people who brought upon themselves their injuries or diseases by acting in such manifest disregard of their duties as service personnel as to take themselves outside an entitlement to compensation at the hands of Australian taxpayers for injurious events in their war service. On the facts found and evidence accepted by the Tribunal relating to the killing of the nurse, this veteran's circumstances did not in my opinion place him within any such category."

Einfeld J also concluded that since the veteran had never been charged or convicted of offences under either the *Army Act* or the *Geneva Conventions Act*, even if the killing of the nurse was unlawful under those Acts, and since neither the Tribunal nor the Federal Court had jurisdiction under those Acts, it was inappropriate to rely on their provisions to deny his pension. For that reason, there was no error of law by the Tribunal in not making a finding under section 9(3) on that issue. Einfeld J was critical of certain of the Board's findings on matters relating to the veteran's service.

The Court said that the principal issue before the Tribunal was whether the veteran's heroin addiction arose out of events during service, not whether they had in fact occurred, nor whether the veteran should have been convicted of any offence arising out of them.

Heroin addiction

The Commission's second submission related to the heroin-taking and the *Army Act*. It was submitted that the veteran's heroin-taking was an offence because it was a self-inflicted "disease or infirmity" (section 18), which in turn amounted to a "serious default or wilful act" or a "serious breach of discipline" under section 9(3). Since that argument had not been raised before the VRB, and was referred to in only a limited way by the Tribunal, before which there was no submission or evidence on this issue, Einfeld J found that there was no error of law by the Tribunal in not having investigated that possibility.

As to whether the veteran's addiction was itself a serious breach of discipline, serious default or wilful act, Einfeld J noted that under cross-examination, the veteran denied that he knew he was committing a serious breach of military discipline by engaging in drug-taking. The Court referred to documentary evidence at the Tribunal hearing which indicated that the Army's attitude to drug-taking by service personnel in

Vietnam was that while it was a serious matter, drug users were generally not severely punished, discharged from the forces or returned to Australia, nor subjected to any other minimum punishment. There was also no evidence that Mr Levi had been charged with any offence while in Vietnam. Therefore, the Tribunal's finding that the veteran's drug-taking would not have been regarded as a serious breach of discipline, a serious default or a wilful act also did not involve any error of law on the part of the Tribunal.

Formal decision

The Court dismissed the Commission's appeal.

Whether reasonable hypothesis - alcohol consumption and carcinoma

McMahon v Repatriation Commission
Wilcox, Hill & Einfeld JJ

24 February 1994

This was an appeal against a decision of a single judge (see *9 VeRBosity 65*). In that decision, Burchett J had dismissed Mrs McMahon's application for review of a decision of the Commission, affirmed on review by the VRB and the Tribunal, that no reasonable hypothesis had been raised connecting her late husband's death from sarcomatoid hepatocellular carcinoma with his war service.

There was no disagreement that the ingestion of alcohol contributed to the contraction of the cancer. The issue for determination was whether the veteran's alcohol intake after the war was related to his Army service between 1942 and 1946. The case involved consideration of the reasonable hypothesis provisions in sub-sections 120(1) and (3) of the *VE Act*.

Alcohol consumption

Mrs McMahon had submitted that her late husband started drinking alcohol while on service due to stress and that this developed post-war into a habit of drinking alcohol and eventually led to a dependence on alcohol leading to the condition which caused his death. The Full Court said that there was no evidence that the deceased acquired a drinking habit during his service or that the habit he acquired later was caused by stress associated with his war service. When Mrs McMahon first met her husband in 1939, he was only 17 years old and did not drink. She believed he drank although he did not have an alcohol problem when they married in July 1948.

The Full Court held that Burchett J had correctly stated that the question before him was whether it was open to the Tribunal to find that the available material did not raise a reasonable hypothesis of connection. It held that his Honour's conclusions on the evidence were manifestly correct. Assuming that the appeal raised a true question of law, the Full Court found no fault in his Honour's resolution of it.

Formal decision

The Full Court dismissed the appeal.

Extension of time to lodge application for review

Delkou v Repatriation Commission

Beazley J

14 April 1994

Mr Delkou filed an application for an order of review of two decisions of the Repatriation Commission. The first decision, dated 24 July 1986, was a decision to recover an overpayment of pension by way of deductions from his periodical pension payments. The second decision, dated 8 March 1989, was a decision to recover the balance of the overpayment by way of a lump sum deduction from arrears of pension, otherwise payable to Mr Delkou. He alleged that the recovery in both cases was unlawful.

Mr Delkou also filed a notice of motion seeking an order that the time be extended for filing his application with the Federal Court.

Time limits under *AD(JR) Act 1977*

Under section 11(1)(c) and (3) of the *AD(JR) Act*, an application to the Federal Court must be lodged within 28 days after a decision is furnished to the person. The Court has a discretion to extend the time for lodging an application.

Extension of time to appeal

In *Hunter Valley Developments Pty Ltd* v *Minister for Home Affairs and Environment* (1984) 58 ALR 305, Wilcox J summarised the principles to be applied in the Court's exercise of its discretion to extend the time for lodging an application. Considerations relevant to this case were as follows:

- the prima facie time limit specified in section 11 must be observed, unless the applicant gives an acceptable explanation of the delay;
- it is relevant that the actions of the applicant have made the decision-maker aware that the applicant contests the finality of his decision, for example by some non-curial process;
- the question of whether there has been any prejudice to the respondent must be considered; and
- the merits of the substantial application are properly to be taken into account.

Submissions

Mr Delkou submitted that he was entitled to an extension of time for three reasons:

- first, that he had at all times pressed for a resolution of the question whether the respondent was entitled to recover the monies;
- secondly, such delay as there was, was caused by the lack of prompt action by his former solicitors; and
- thirdly, upon receiving advice as to the appropriate course to be taken, his present solicitor had not delayed unreasonably in acting on that advice.

The Repatriation Commission submitted that no acceptable explanation of the delay had been put forward, that the respondent was prejudiced by the delay and that the merits of the application were such that no extension of time should be granted.

Court's decision on extension application

In relation to the grounds argued by Mr Delkou, Beazley J concluded that the mere fact that he had protested over a long period was not sufficient. Her Honour was of the opinion that the extent of the delay, when considered in the light of the statutorily prescribed limit for the commencement of the application, was such that the Court ought not to exercise its discretion in the applicant's favour on the basis that the fault lay with the applicant's former legal advisers. Her Honour concluded that considerable delays on the part of his present solicitor were not explained and that under those circumstances, an extension of time should not be granted.

Merits of application

In relation to the merits of the substantial application, Beazley J accepted the Repatriation Commission's submission that the lump sum deduction from arrears of pension was authorised by section 205 of the *VE Act* (as amended).

Her Honour also accepted that even if the first decision to recover an overpayment by way of deduction from pension payments was not authorised, it would be open to recover the overpayment under section 55 of the *Veterans' Affairs Legislation Amendment Act 1988*. Her Honour said:

> "The effect of section 55 is that, even if the recovery of the monies, which was in a total amount of approximately $8000, pursuant to the first decision was not authorised, it would now be open to the respondent to recover them. Thus, even if an extension of time was granted, and assuming the applicant was successful on his application, and further assuming that the respondent was required to or otherwise determined it should repay the monies to the applicant, the respondent could then decide to recover the monies under the provisions of section 205."

Accordingly, the Court concluded that no purpose would be served by granting an extension of time for filing the application.

Formal decision

The Court dismissed the notice of motion for an extension of time in which to file the application.

Alcohol-related death - raised facts - whether AAT wrongly rejected uncontradicted or unchallenged evidence

Gleeson v Repatriation Commission

Moore J

14 April 1994

This was an appeal from a decision of the Tribunal that the death of Mr Gleeson was not war-caused. The essential issue before the Tribunal was the relationship between the deceased's drinking and his war service.

Mr Gleeson served in the Army during World War 2 and rendered operational service. He died in 1989 due to renal failure, carcinoma of the large bowel and abdominal metastases. The Repatriation Commission accepted that the late veteran's drinking of alcohol contributed to the bowel cancer but

contended that there was insufficient evidence as to the cause of his drinking to raise a reasonable hypothesis in terms of sub-section 120(3) of the *VE Act*.

Brother's evidence

The late veteran's brother made two statutory declarations which were both before the Tribunal. In the first, he stated that the veteran abstained from alcohol prior to 1937. He said that he transferred to the country in 1937 and joined the AIF in 1940 and did not see much of the family until after the war when he noticed that the veteran was drinking. In a second statutory declaration, he stated that he saw the late veteran for part of the time between 1937 and 1941 when they were both living at home. He could not recall seeing him drinking during that period.

The Tribunal concluded that it could not place any weight on the brother's evidence concerning the late veteran's drinking habits.

Submissions

The applicant submitted to the Court that the Tribunal had wrongly rejected the brother's evidence as it was not challenged or contradicted in the proceedings. The applicant also submitted that by rejecting the brother's evidence, the Tribunal had failed to consider the "*whole of the material before it*" in terms of sub-section 120(3).

Findings of fact

Moore J said that it was the Tribunal's role to make any relevant findings of fact and it was not open to the Court to generally review findings of fact made by the Tribunal unless a finding was vitiated by an error of law.

Referring to previous authoritative decisions, the Court said that this case did not involve a situation where the Tribunal had failed to act on clear and direct evidence establishing a fact in circumstances where there was no evidence tending to disprove that fact. The Court said that the High Court made it clear in the case of *Byrnes v Repatriation Commission* (1993) 116 ALR 210 that there must be facts apparent from the material before the Tribunal that found the hypothesis, if the Tribunal is to form the view that there is a reasonable hypothesis of the type referred to in sub-section 120(3). Moore J referred to the common law principle that where the sole material before a tribunal points in one way, the tribunal should give effect to uncontradicted evidence or should explain why it has rejected the testimony and said:

> "In applying this common law principle when determining whether a reasonable hypothesis exists, there is the risk of obscuring the difference between the task of identifying raised facts and the ultimate proof, or disproof, of those facts. However, if the Tribunal was obliged by operation of that principle to accept evidence as proof of a fact, then it clearly would be obliged to accept the fact as a raised fact. On the other hand, if the Tribunal was entitled, in a way consistent with that principle, to reject uncontradicted evidence in the material when considering whether a fact was proved it might nonetheless be able, for the purposes of s.120(3), to treat the same material as establishing a raised fact.
>
> In this last mentioned situation the obligation of the Tribunal to accept the fact as raised by the material is clearly dependent on the material

itself. Further in reviewing, in an appeal under s.44, the Tribunal's assessment of the material in such a situation by reference to that principle the Court must not lose sight of the Tribunal's statutory role as the decision maker of fact and that the determination of whether an hypothesis is a reasonable one is itself a question of fact committed to the Tribunal - see *Bell v Repatriation Commission* (1992) 26 ALD 545."

Court's conclusion

The Court concluded that the evidence of the late veteran's brother was unclear and was contradicted by expert evidence on alcohol dependency and tolerance to alcohol. Moore J said that the Tribunal had provided, in summary form, an explanation of why it had not accepted the brother's evidence and that explanation had provided a plausible reason why the Tribunal did not accept, as a raised fact, that the deceased did not drink alcohol before his war service. The Court concluded that the manner in which the Tribunal dealt with the evidence did not disclose an error of law.

In relation to the second ground of appeal, the Court said that in deciding to give no weight to the brother's evidence, the Tribunal clearly considered his statutory declarations as part of the material before it. The Court concluded that there was therefore no failure on the part of the Tribunal to consider the whole of the material before it.

Formal decision

The Court dismissed the appeal.

Application of GARP to decisions prior to 1 November 1986 - Special rate

Thomas v Repatriation Commission
Beazley J

29 April 1994

Mr Thomas alleged that the Tribunal had erred in law when it affirmed several decisions of the VRB assessing his rate of pension under the *VE Act*. In the first decision made on 28 August 1987, the VRB assessed the veteran's incapacity at seventy per cent of the General rate from and including 5 March 1982. In a second decision made on 31 August 1989, the VRB assessed the veteran's incapacity at ninety per cent of the General rate from and including 28 August 1987. Mr Thomas contended that he was entitled to pension at the Special rate from 1982 onwards.

Applicant's submissions

Mr Thomas alleged that the Tribunal erred in law in respect of the first decision in three respects:

- first, that it incorrectly considered that it was bound by section 21A of the *VE Act* to apply the currently approved GARP to an assessment of pension effective from 5 March 1982;
- secondly, that it had mistakenly thought that the VRB had applied GARP when adopting the VRB's assessment; and
- thirdly, in that it had failed to properly expose its reasoning process.

First decision

As relevant to the first decision, transitional provisions contained in section 27 of the *Veterans' Entitlements (Transitional Provisions and Consequential Amendments) Act 1986* (as amended) provided that the use of GARP, authorised by section 21A of the *VE Act*, did not apply to a determination of degree of incapacity of a veteran made by the Commission prior to 1 November 1986, unless the Commission was of the opinion that there was sufficient material for it to do so.

Beazley J noted that in *Donnelly* v *Repatriation Commission* (1987) 73 ALR 350, the Full Court of the Federal Court held that the effect of section 27 is that section 21A does not require the Tribunal to apply the provisions of GARP to a decision made by the Commission before 1 November 1986, although the Tribunal was entitled to refer to GARP if this would assist it in the consideration of the matter before it.

Beazley J concluded in this case that the Tribunal wrongly considered that it was bound to apply GARP to the assessment in respect of the first period under review. Accordingly, the Tribunal had erred in law by wrongly applying the provisions of the Act.

Beazley J rejected the Commission's submission that Mr Thomas should not be able to raise on appeal the application of transitional provisions, having failed to do so before the Tribunal, saying that there is no absolute principle that a new issue may not be raised in the Court in appeals under section 44 of the *AAT Act*. Her Honour said:

> "It seems to me, in circumstances where the legal representatives for both parties were acting upon the wrong assumption as to the correct law, and either permitted, or encouraged the Tribunal to apply the wrong statutory provisions, it lies ill in the mouth of the party who urged the wrong course upon the Tribunal to complain that the other party had every opportunity to raise the correct position in the course of the Tribunal hearing. ... In circumstances such as occurred here, where the applicant's case was determined upon the wrong application of the legislation and both parties seemed to have been under a misapprehension of the correct law, the applicant ought to be permitted to raise the issue before this Court."

Second decision

Mr Thomas retired from the Commonwealth Public Service in 1976 on invalidity grounds. He then operated a travel consultancy business on a part-time basis until 1989. The business operated at a loss. He alleged in respect of the second decision that the Tribunal had erred in law in that it had taken into account an irrelevant consideration, namely that the business losses were not due to incapacity from war-caused disease alone but were the result of undue optimism on the part of the veteran that his health would improve, which would permit him to work longer hours in the business.

Beazley J referred to previous authority on the correct application of section 24(1)(c) of the *VE Act* and concluded that the Tribunal had approached the matter in a way which was held to be erroneous in cases such as *Maley* and *Birtles*. Beazley J said that under section 24(1)(c):

"It is necessary to enquire into the hypothetical position which would have obtained if the applicant was not incapacitated due to his war-caused disabilities. The Tribunal failed to carry out this enquiry and thus erred in law in the application of the section."

Formal decision

The Court decided to remit the matter to the Tribunal for redetermination in accordance with law.

Tribunal Decisions received - January to April 1994

Carcinoma

bladder cancer
- whether smoking habit/ anxiety state war-caused

Ebert, N C 9 March 1994

colon cancer
- nitrates and nitrites in bully beef
- high fat diet on service

Brown, N 11 April 1994

gall bladder cancer
- whether due to Army diet
- non-operational service

Guest, E 10 March 1994

prostate cancer
- war-caused smoking habit

McLean, I L
19 January 1994

Rimes, J D
19 January 1994

Grieve, N M
19 January 1994

renal cell carcinoma
- concession by Repatriation Commission
- whether appropriate to make decision

Higginbotham, G M
4 March 1994

Cardiovascular disease

atherosclerotic heart disease with angina pectoris
- war-caused smoking habit
- non-operational service

Kenney, M F
21 January 1994

cerebral atherosclerosis
- war-caused smoking habit

Robertson, E N
17 January 1994

cerebral haemorrhage
- war-caused smoking habit

Stevens, M J
15 February 1994

essential hypertension
- alcohol consumption
- non-operational service

McPherson, F G
14 January 1994

essential hypertension
- whether due to stressful service in Papua New Guinea
- reasonable hypothesis

Shepherd, J H
18 March 1994

ischaemic heart disease
- smoking habit
- minimal contribution

Prindiville, R J
14 January 1994

ischaemic heart disease
- whether smoking war-caused
- non-operational service

Weeks, J L 25 March 1994

myocardial infarction
- malaria on service

Beament, J G
28 January 1994

Date of effect

Administrative Appeals Tribunal
- estoppel

Saunders, P 28 April 1994

Eligible war service

Permanent Air Force
- when eligible war service ceased

Dixon, W E
14 January 1994

Extreme disablement adjustment

Lifestyle rating

Beckham, R D
10 March 1994

Jurisdiction

Administrative Appeals Tribunal
- failure by VRB to advise of right of review

Fletcher, R J
20 January 1994

application for review by VRB out of time
- whether AAT entitled to review

Bowen, T J 7 March 1994

whether application lodged with AAT
- presumption of postage and delivery

Dellar, R W 22 April 1994

Nervous disorder

depressive illness
- sequelae of war-caused disease
- power to amend diagnosis to include depression

McNabb, E A
4 February 1994

Neurologic disorder

Creutzfeldt-Jakob disease
- malaria and dysentery in New Guinea

Watson, E N 27 April 1994

THE LAST SHILLING

A HISTORY OF REPATRIATION IN AUSTRALIA

by

CLEM LLOYD AND JACQUI REES

MELBOURNE UNIVERSITY PRESS, 1994

Reviewed by: Dr Richard Ely
Department of History
University of Tasmania

This is a careful study of a remarkable Federal government instrumentality. The Repatriation Commission and Department came into being during what might be called the washing-up years of the First World War, 1917-1918.

Impassioned demand for Australians to enlist for military service overseas had been accompanied by a promise - to repay the national debt thereby incurred. Even before the war was 'won' the number of service persons brought back had risen from a trickle to a flood, and that promise was not forgotten. What to do?

Returned soldiers, dependants, and many friends insisted on answers. In the complex and often tense debate which followed one term - hitherto not in common use - came increasingly to express the answer. That term, a dignified Latin-derived one, was 'repatriation'.

But what did it mean. A minimal definition was canvassed - simply bring servicemen back to their homeland. Strenuous rebuttal ensured that repatriation meant much more than that.

Repatriation - the nation's moral debt - should, it came to be agreed, include positive measures to assist able-bodied returnees to re-establish themselves in civil life; it should include ample pensions, re-training and medical care for the disabled; and it should include monetary allowances for dependants (chiefly wives and children).

Today we take for granted that repatriation means all this. But as Lloyd and Rees show, the Australian interpretation of what repatriation means was significantly more generous than the interpretation adopted in most other allied countries - for instance, in Britain, Canada and the United States. Those more generous Australian provisions may reflect the special significance to Australians, and for Australian nationalism, of the 'Great War'.

Implementing the 'Australian' definition, chiefly through the Repatriation Commission and Department, involved breaking sharply with conventional ideas of how a government instrumentality should work. Building the system in post-war years partly reflected a bi-partisan and communal sense of duty. But fear, too, played a part - fear of the civically and economically disruptive potential (both left-wing and right-wing) of a large number of discontented militarily-trained citizens who had learned collective discipline in a hard and efficient school.

The voice of many (never all) ex-servicemen was effectively expressed at government level by the Returned Soldiers and Sailors Imperial League of Australia (which later became the RSL).

Lloyd and Rees explain in a clear and readable way the sheer novelty, by traditional standards, of these arrangements. It was always to be a messy system to the tidy-minded, but its main features were nevertheless set in concrete. A Federal minister presided directly over a Repatriation Department and, ultimately, but at a greater

distance, over a Repatriation Commission. The Department was, as a matter of policy, staffed largely by ex-servicemen. The Commission was empowered to issue regulations and also sat as an entitlement and assessment tribunal to adjudicate claims by ex-servicepersons. Exercising this quasi-judicial function made it a pioneer in the development of Australian administrative law. Ex-servicemen were, of course, prominently represented on the Commission, as well as on Repatriation Boards and committees.

This was, therefore, a structure likely in general to ensure a sympathetic appraisal of complaints and demands of the system's clients; but the authors document a number of cases in which it operated with a moralism many even then saw as harsh - for instance in the many instances in earlier years in which pensions and medical treatment were withheld from soldiers whose disability and illness were ruled to be ultimately caused by venereal disease contracted while on active service.

Another noteworthy feature of the repatriation system was the extensive way it involved the Federal government in welfare provision. Under the original division of powers between states and Commonwealth, the states were responsible for health and education. The repatriation system involved the Commonwealth, in a large-scale way, with both.

In 1921 the Repatriation Department inherited from the Department of Defence its network of hospitals. By then Repatriation was working closely with state authorities to provide vocational retraining for disabled servicemen, and education support for children of the dead and disabled who had served. The Commonwealth, through the Department, also played a large role, in conjunction with the states, in soldier settlement and in financing and building 'homes fit for heroes'. Over 40 000 homes had been built by 1930.

The Department, through ex-service supporters, had political clout. Not surprisingly, the impact of 1930s depression pension cuts fell more lightly on ex-servicemen and repatriation-linked dependants than on others. By 1939, say the authors, 'Repat was an administrative artifact virtually beyond challenge'.

Lloyd and Rees continue the story to the present, tracing, for instance the way in which, in 1947, the system finally came under the operation and discipline of the 'Public Service Act'. It became subject to sustained investigation by the Public Accounts Committee in the 1950s, but largely rode with the punches. It also survived well-publicised 1969 allegations by John Whiting (in *Be in it Mate)* of massive financial rorting at public expense.

But the times they were a'changing. In the early 1970s the headquarters of the Repatriation Department moved from Melbourne to Canberra, and in the new administrative environment - where practically everyone watches practically everyone it was less able to 'run its own game'. In 1976, slightly refurbished, it became the Department of Veterans' Affairs.

Critics of the repatriation system were growing more vociferous. An active Vietnam veterans group claimed to have suffered severe but unrecognized impairment of health through exposure to Agent Orange. Other critics alleged a large blowout in costs of Repatriation General Hospitals. Were they over-servicing? Should they, in the hope of lowering unit costs, be merged with state hospital systems?

A further difficulty flowed from the fact that the highly individuated system of administrative law evolved by the Repatriation Commission did not mesh comfortably with administrative case law as evolved by Federal courts and the High Court. The combination of an expansive High Court definition of the 'onus of proof' in relation to claimed pensionable disabilities (*O'Brien's* case, 1985), and much readier provision of legal aid to claimants, raised in administrative minds, but not those of many potential new claimants, the prospect of a nightmare escalation of costs. The old adjudicative system was remodelled, and old legislation and regulations consolidated. Veterans' Review (as one now may call it) remains, but as an uneasy jurisdiction.

Lloyd and Rees tell an important story with scholarly rigour, verve and (given that their work was financed by the Department of Veterans' Affairs) independence of mind. They do not play the new-fangled game of illustrating and testing administrative theories and models, although much they reveal will be useful to those who do. The greatest weakness is persisting thinness in defining the economic, political, ideological and social context of the tale they tell. The reader is left with a clearer sense of what was happening than why. But they do some things pretty well. They convey a firm sense of the notion that functionaries, as functionaries, are people too. They breathe something like life and energy into the cluster of ideas embraced by the word 'repatriation', and, importantly, do so without much lapse into sentimentality. Their study is a useful contribution to the history of ideas and values in twentieth century Australia.

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