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Editor's notes

This edition of *VeRBosity* contains reports on three Federal Court decisions relating to veterans' matters, handed down in the period from 1 January 1996 to 30 April 1996. *Sutherland's* case dealt with the powers of the AAT to consider whether an injury was war-caused when considering the applicant's eligibility for Special rate pension under the *VE Act*. The Court held that although the AAT was not authorised to consider whether the applicant's spinal injury was war-caused, it was required to treat incapacity from the injury as not war-caused for the purposes of assessing the correct rate of pension. *Buckingham* and *Clark* involved the application of provisions relating to Intermediate rate pension.

This edition also includes reports on selected VRB and AAT decisions handed down in the period from January to April 1996.

Robert Kennedy
Editor

Selected Decisions of the Veterans' Review Board

Entitlement - Non-Hodgkin's Lymphoma - exposure to possible carcinogens on service - Statements of Principles

V95/1604
Edwards, Hughes & Turner

9 February 1996

The veteran applied to the Board for review of a decision of the Repatriation Commission which rejected his claim for non-Hodgkin's lymphoma and inguinal hernia on the right side.

He had served in the Royal Australian Navy from 30 January 1945 to 6 December 1948, as well as from 25 June 1951 to 1 September 1983, rendering operational service in Korea and in Vietnam. He rendered eligible defence service from 7 December 1972 to 1 September 1983.

Sub-sections 120(1) and (3) of the *VE Act* applied in respect of the veteran's operational service. Therefore, the Board was required to find that the claimed conditions were war-caused unless it was satisfied beyond reasonable doubt that there was no sufficient ground for making that finding.

The originating claim was lodged after 1 June 1994, and so section 120A of the Act also had to be applied. This meant that the reasonableness of any hypotheses in respect of the claimed conditions had to be assessed in accordance with Statements of Principles No 79 of 1994 (non-Hodgkin's lymphoma) and No 29 of 1994 as amended by No 227 of 1995 (inguinal hernia).

In respect of his eligible defence service, sub-section 120(4) of the *VE Act* required the Board to decide all relevant matters to its reasonable satisfaction, and in accordance with section 120B, Statements of Principles No 80 of 1994 (non-Hodgkin's lymphoma) and No 30 of 1994 as amended by No 228 of 1995 (inguinal hernia) were applicable.

Submissions

The advocate conceded that as the originating claim was made after 1 June 1994, the Statements of Principles had to be applied. However, he submitted that during the veteran's service of some thirty-six years in the Navy, he was constantly exposed to lubricating oils and detergents, including in vapour form, to the extent that even the drinking water was polluted by oil floating on top. The advocate also pointed to a medical report which supported the relationship between exposure to lubricating oils and detergents and the development of non-Hodgkin's lymphoma and which also pointed to carcinogens to which the veteran could have been exposed in Vietnam.

The Statement of Principles relevant to non-Hodgkin's lymphoma and operational service contains the following minimum factors:

- being exposed to herbicides in Vietnam before the clinical onset of non-Hodgkin's lymphoma;
- in the case of adult T-cell leukaemia/lymphoma only, being infected with HTLV-1 before the

clinical onset of non-Hodgkin's lymphoma;

- being infected with HIV before the clinical onset of non-Hodgkin's lymphoma;
- having received a course of immunosuppressive drugs before the clinical onset of non-Hodgkin's lymphoma; or
- inability to obtain appropriate clinical management for the non-Hodgkin's lymphoma.

The Board pointed out during the course of the hearing that it had no discretion as to whether or not it was bound by the relevant Statements of Principles. The Board said that no matter how detailed a medical report was, nor how eminent the specialist providing the report might be, if the claim was made after 1 June 1994, the Board was obliged to apply any relevant Statements of Principles. The Board had no power to effect changes to the Statements of Principles.

The advocate conceded that none of the criteria set out in the Statements of Principles in respect of inguinal hernia were met in this case.

The Board concluded:

> "In the case of each of the claimed conditions there are Repatriation Medical Authority Statements of Principles in relation to both the veteran's eligible war service, his operational service after World War 2, and his defence service. Unfortunately for the veteran, the criteria laid down in those Statements of Principles for acceptance of either or both of the claimed conditions have not been fulfilled."

Formal decision

The Board affirmed the decision that the veteran's non-Hodgkin's lymphoma and inguinal hernia on the right side were not war-caused or defence-caused.

Entitlement - Non-Hodgkin's Lymphoma - malarial infection on service - pre 1 June 1994 claim

V94/1795
Cooke, Chapman & Turner

16 February 1996

The veteran applied to the Board for review of a decision of the Repatriation Commission that rejected his claim for non-Hodgkin's lymphoma.

He had served in the Australian Army from 25 June 1940 to 12 April 1946 in Australia, the Middle East and New Guinea. The whole of his service constituted eligible war service, including operational service.

The Board pointed out that sub-sections 120(1) and 120(3) of the *VE Act* applied, and that the Board was required to find that the veteran's non-Hodgkin's lymphoma was war-caused unless it was satisfied beyond reasonable doubt that there was no sufficient ground for making that finding. The Board then proceeded to discuss the meaning of the "reasonable hypothesis" provisions which had been considered by the High Court in *Bushell* v *Repatriation Commission* (1992) 109 ALR 30. The Board noted that the joint judgement of Mason CJ, Deane and McHugh JJ set down some of the important principles:

- the material will raise a reasonable hypothesis within the meaning of sub-section 120(3) if the material points to some fact or facts ('the raised facts') which support the hypothesis and if the hypothesis can be regarded as reasonable if the raised facts are true; and

- the case must be rare where it can be said that a hypothesis, based on the raised facts, is unreasonable when it is put forward by a medical practitioner who is eminent in the relevant field of knowledge - conflict with other medical opinions is not sufficient to reject a hypothesis as unreasonable.

Submissions

The advocate submitted that the veteran's non-Hodgkin's lymphoma should be accepted as war-caused because the veteran had suffered from malaria on service. He referred the Board to a medical report dated 13 June 1995 by Dr J F Stewart, in which the concluding paragraph read:

> "In my opinion therefore there is evidence that (the veteran's) previous malarial infection does increase his risk of developing non-Hodgkin's lymphoma and I therefore suggest that this is an allowable disability related to his previous war service."

The advocate also referred to another case in which a Board panel had accepted evidence from Dr Stewart that if a veteran did suffer from malaria, this would increase his risk of developing non-Hodgkin's lymphoma.

In its consideration of the application, the Board noted that the initiating claim was made before 1 June 1994 and therefore did not come within the ambit of the Repatriation Medical Authority Statements of Principles. The Board then proceeded to examine the material to see if a reasonable hypothesis was raised. The Board said:

> "The Board notes that Dr John F Stewart who is a specialist eminent in the field, has stated that the veteran's previous malarial infection does increase the risk of developing non-Hodgkin's lymphoma. The Board accepts that this provides the basis for a reasonable hypothesis within the meaning of sub-section 120(3). Accordingly, the Board turned to the application of sub-section 120(1) to determine whether it could accept sufficient of the facts as are necessary to support the raised hypothesis."

The Board found that the service documents established that the applicant had been treated in hospital for malaria during the course of his war service. The Board said:

> "Accordingly, the Board finds that no fact necessary to support the hypothesis is disproved beyond reasonable doubt and no other fact inconsistent with the hypothesis is proved beyond reasonable doubt. The hypothesis is therefore not disproved beyond reasonable doubt and the veteran's claim must succeed."

Formal decision

The Board set aside the decision under review and substituted its decision that the veteran's non-Hodgkin's lymphoma was war-caused in terms of section 9 of the Act.

Entitlement - meniscus injury right knee - Military Compensation Scheme

Q95/1556
Miller, Muir & Lane

22 February 1996

The applicant sought review of a decision of the Repatriation Commission which determined that meniscal lesion of the right knee was not related to his eligible defence service.

The applicant enlisted in the Army on 17 June 1986 and was still serving. The Board said:

> "For the purposes of the Act the member has rendered 'defence service' in the Australian Army from 17 June 1986 to 6 April 1994 except for the period of his eligible 'peacekeeping service' which was from 14 March 1993 to 7 October 1993, in Cambodia.
>
> Because the member enlisted after 22 May 1986 and remains a serving member after 6 April 1994, if the injury claimed occurred, or disease claimed was contracted, on or after 7 April 1994 the member is not eligible to press the claim pursuant to the provisions of the *Veterans' Entitlements Act*. That member must proceed with his claim pursuant to the provisions of the *Military Compensation Act 1994* : see section 68 of the Act."

The Board proceeded to discuss the standard of proof set out in sub-sections 120(2) and 120(3) of the Act in respect of peacekeeping service, and that contained in sub-section 120(4) of the Act in respect of non-operational defence service.

Submissions

In his initial claim, the applicant attributed his meniscus lesion right knee to an injury which occurred whilst he was playing sport in 1995. In his application for review, he referred to an earlier injury in 1991.

The Board found that there was no medical evidence that the applicant suffered an injury to his right knee at any time during his eight months peacekeeping service in Cambodia, and that there was no evidence that there was any worsening of a pre-existing right knee injury during peacekeeping service.

The Board determined that the material did not raise a reasonable hypothesis within the meaning of sub-section 120(3), and that for the purposes of sub-section 120(2), there was no sufficient ground for determining that the meniscus lesion of the right knee was defence-caused, through peacekeeping service in Cambodia.

The Board also found that whilst the applicant had suffered injuries to the right knee in 1991 and in 1995, the medical evidence indicated that it was the latter injury which resulted in the development of the meniscus lesion of the right knee. The Board said:

> "This opinion is confirmed by both Dr C Blenkin, the attending Orthopaedic Surgeon and Dr J Chik the Acting Senior Medical Officer, Benefits, who both refer to the 'positive McMurrays sign' in 1995 indicating a meniscal tear. Such a sign or factor was not evident at the time of the 1991 incident."

The Board added:

> "However, in this case, the Board cannot make a finding regarding a

connection between the member's service career after 6 April 1994 and his present meniscus lesion of the right knee.

As a result of the proclamation of the *Military Compensation Act 1994* on 7 April 1994, as set out earlier, the member, who enlisted after 22 May 1986, is not entitled to make a claim under the terms of the *Veterans' Entitlements Act 1986*, where the initiating injury occurred on or after the date of that proclamation, 7 April 1994."

The Board found that it had no jurisdiction to deal with the injury which it decided was suffered after 6 June 1994. The Board continued:

"Recourse for that injury must be sought under the terms of the *Military Compensation Act 1994*.

Otherwise the Board is reasonably satisfied that the member's meniscal lesion was not caused by his period of 'defence service' ending on 6 April 1994."

Formal decision

The Board affirmed the decision under review.

Entitlement - date of effect of decision

Q95/1673
Kenny, Greville & Walsh

27 March 1996

On 31 July 1995, the Repatriation Commission decided that the veteran's chronic airflow limitation and bilateral sensori-neural hearing loss were war-caused diseases under section 9 of the *VE Act*. The effective date of this decision was set as 15 May 1994. Later, on 3 August 1995, the Repatriation Commission reviewed the earlier decision under section 31 of the Act, and set 8 December 1994 as the effective date from which chronic airflow limitation and bilateral sensori-neural hearing loss were recognised as war-caused diseases.

The veteran applied to the Board for review of the decision of the Repatriation Commission of 3 August 1995.

Veteran's case

On 15 August 1994, the veteran lodged with the Department of Veterans' Affairs an application for increase in pension in respect of several conditions which had been accepted as being war-caused. Attached to the application was a detailed letter in which the veteran made reference to other disabilities. This letter was treated as an informal claim for acceptance of chronic airflow limitation and bilateral sensori-neural hearing loss as war-caused. The veteran effectively contended that 15 May 1994 was the appropriate date of effect for recognition of these diseases as war-caused.

The Board said:

"Under sub-section 14(3) of the Act, a claim for pension must be in writing and in accordance with a specified form approved by the Commission. The letter referring to the various conditions received by the Department on 15 August 1994 did not constitute such a claim. Indeed, no formal claim answering the

requirements of sub-section 14(3) was received until 8 March 1995. It would seem that this delay was brought about by the absence of the veteran's local medical officer from Australia and his unavailability to provide medical support for the application."

The Board pointed out that the date of operation of a grant of claim for pension is set in accordance with the terms of section 20 of the *VE Act* which reads:

"**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 said that if the initial claim on 15 August 1994 had met the requirements of sub-section 14(3), the relevant date of effect would have been 15 May 1994, being the date three months prior to the lodgement of the document. However, no formal claim was lodged until more than three months after that date, and the terms of sub-section 20(2) of the Act were not satisfied. No formal claim was lodged until 8 March 1995, and the calculation of the date of operation of a grant of claim for pension had to be made in accordance with sub-section 20(1), ie. from 8 December 1994. That was the decision made by the delegate in the section 31 review process. The Board was reasonably satisfied that 8 December 1994 was the earliest date which could be set under the Act.

Formal decision

The Board affirmed the decision under review.

Selected Decisions of the Administrative Appeals Tribunal

Varicose eczema with ulceration - varicose veins - whether reasonable hypothesis - *VE Act*, s 120(3)

Re W R Dunstone and Repatriation Commission
Forrest, Ermert & Re

V94/0200 17 January 1996

Mr Dunstone applied for review of a decision that "varicose eczema with ulceration" and "varicose veins" were not war-caused within the meaning of section 9 of the *VE Act*. He had served in the Army from 1940 to 1944, in Australia and in the Middle East. The Tribunal was required to apply the "reasonable hypothesis" provisions in ss 120(1) and (3) of the *VE Act* which were considered by the High Court in *Bushell v Repatriation Commission* (8 *VeRBosity* 2), and in *Byrnes v Repatriation Commission* (9 *VeRBosity* 83).

The Tribunal pointed out that in *Byrnes*, the High Court set out an authoritative statement of the steps to be taken in applying section 120:

> "The position may be summarized as follows: (1) First, sub-s (3) of s 120 is applied: do all or some of the facts raised by the material before the Commission give rise to a reasonable hypothesis connecting the veteran's injury with war service? The hypothesis will not be reasonable if it is contrary to known scientific facts or is obviously fanciful or untenable. If the hypothesis is not reasonable, the claim fails. Proof of facts is not in issue at this point. (2) If a reasonable hypothesis is established, sub-s (1) of s 120 is applied. The claim will succeed unless: (a) one or more of the facts necessary to support the hypothesis are disproved beyond reasonable doubt; or (b) the truth of another fact in the material, which is inconsistent with the hypothesis, is proved beyond reasonable doubt, thus disproving, beyond reasonable doubt, the hypothesis."

Mr Dunstone's evidence was that he first developed cramps, pains and bad aches in the legs during his time as a machine gunner in the Middle East. Symptoms were not eased by Quinine tablets. In about 1970, he was diagnosed with varicose ulceration, varicose eczema and varicose veins. For the next twenty years, the varicose ulcers needed to be dressed and bandaged two or three times a day. The varicose veins were successfully removed by a vascular surgeon in 1992, and the varicose ulcers then healed under the care of a dermatologist.

Mr Dunstone stated that he took up the habits of smoking and drinking during war service due to a combination of boredom, availability, and a need to relieve stress. He considerably reduced his alcohol intake on medical advice in 1968, and he ceased a very heavy smoking habit in 1983 following an operation to remove a bowel polyp. His weight gradually increased after 1983 from 12½ stone to 17 stone.

Medical evidence

Dr Edward Cole, consultant psychiatrist, gave evidence that he considered that Mr Dunstone suffered from post traumatic stress disorder following war experiences, that his continued smoking and drinking after the war were attributable to PTSD, and

that he drank and smoked more heavily than he would have done without PTSD. He said that it is well recognised that people who stop smoking not uncommonly start to eat excessively as a result of nervous tension and therefore gain weight.

Mr Donald Macleish, general and vascular surgeon, acknowledged that in most cases the cause of varicose veins is unknown. He could not give a cause for Mr Dunstone's varicose veins, and the directly resulting varicose eczema and varicose ulceration. He did not believe that varicose veins caused the symptoms which Mr Dunstone said he experienced in the legs while in the Army. He could not see any scientific evidence and could not postulate a hypothesis to suggest that war conditions would aggravate varicose veins in a person with a predisposition to developing them.

Mr Macleish discussed the physiology of pressures in veins in the legs, and acknowledged that there was about a 15% aggravation of pressure in veins due to obesity, and that this particularly affected the gaiter area. He concluded that there was a small connection between obesity and varicose veins.

Tribunal's findings

The Tribunal found that Mr Dunstone had a service-related smoking and drinking habit, drinking heavily until 1968 when his alcohol consumption markedly decreased, and smoking heavily until 1983 when he stopped smoking. The Tribunal also found that Mr Dunstone began to overeat and gain weight after 1983, which Dr Cole regarded as consistent with post traumatic stress disorder suffered following war experiences and to which his smoking and drinking habits were attributable.

The Tribunal referred to *Repatriation Commission v Law* (1981) 147 CLR 635 in which Aickin J (with whom Gibbs CJ, Stephen and Mason JJ agreed) approved the view of the Full Court of the Federal Court as to the construction of the expressions "arising out of" and "attributable to". It is sufficient if the cause was one of a number of causes provided that it was a contributing cause.

In finding the existence of a reasonable hypothesis, the Tribunal said that the effect of the legislation was to require some causal connection between the claimed disabilities and the veteran's war service, but war service did not have to be the direct cause. Although the medical evidence established that the direct cause of the veteran's varicose veins was not obesity, there was a connection, albeit small, between obesity and varicose veins. The Tribunal found that the evidence of Dr Cole established a sufficient nexus between obesity and war service.

On all the evidence and material before it, the Tribunal was not satisfied beyond reasonable doubt that there was no sufficient ground for determining that the claimed diseases were war-caused.

Formal decision

The Tribunal set aside the decision under review and decided that Mr Dunstone's varicose eczema with ulceration and varicose veins were war-caused.

Death - Non-Hodgkin's Lymphoma - whether reasonable hypothesis - relevance of Statements of Principles

Re D R Warner and Repatriation Commission
Hallowes

V93/1043 18 January 1996

Mrs Warner lodged an application for review of a decision that the death of her late husband was not war-caused. Mr Warner had died on 1 December 1989 aged 72 years due to non-Hodgkin's lymphoma.

At the commencement of the hearing, the Repatriation Commission's representative drew the Tribunal's attention to a Statement of Principles, Instrument No 79 of 1994, concerning non-Hodgkin's lymphoma, made pursuant to subsection 196B(2) of the Act. None of the factors set out in the Statement of Principles which must exist before it can be said that a reasonable hypothesis has been raised connecting non-Hodgkin's lymphoma with the circumstances of service existed in this case. The applicant's claim, however, had been made before 1 June 1994 and the Statement of Principles was not binding on the Tribunal in this particular case.

Mrs Warner's representative submitted to the Tribunal that the Statement of Principles was not relevant to her application, and that if the Tribunal was to find that it was relevant, the "doctors who produced it" must be made available for cross-examination. The Commission's representative sought to rely on the Statement of Principles as an advisory opinion to assist the Tribunal in evaluating the hypotheses put forward by the applicant. No further submissions were made with respect to the Statements of Principles.

The Tribunal decided to place little weight on the Statement of Principles with respect to non-Hodgkin's lymphoma in this case.

Service illness

Mr Warner rendered operational service in World War 2, in Australia and in the Middle East. The applicant contended that there was a reasonable hypothesis that Mr Warner suffered from a residual intra-peritoneal infection resulting from abdominal sepsis which acted as a source of chronic immuno-stimulation and "would be a co-determinant of the fatal intra-abdominal lymphoma", which became evident clinically in 1989 and caused the veteran's death. Alternatively, it was contended that Mr Warner may have suffered from typhoid which would have stimulated his immune system and that treatment with chloramphenicol may have contributed to the development of lymphoma as a haematological complication.

The applicant, who married the veteran in November 1942, gave evidence that her husband had told her that he had been ill on board ship when returning to Australia from Palestine. He was taken ashore at Adelaide and was hospitalised in March 1942. He was again admitted to hospital, this time in Perth in May 1942. Between 1942 and 1945, Mr Warner had continued to complain of stomach pain for which he underwent eight operations.

The Tribunal referred to service medical records, and to a medical report by Dr Mackay dated

17 January 1995, which summarised the several operations undergone by the veteran during service for drainage of an abdominal abscess, as well as the non-surgical treatment of intestinal obstruction.

Medical evidence

Dr C Minty, who had practised as a clinical oncologist, was of the opinion that Mr Warner had died of typhoid infection acquired in Palestine. He gave evidence that typhoid would stimulate the immune system and that treatment with chloramphenicol may have contributed to the development of lymphoma as a late haematological complication.

Dr Mackay hypothesised that Mr Warner developed an infected appendix with abscess formation and that it was not until removal of the appendix after several surgical procedures that the infection resolved. He reported that lymphoma is a cancer of lymphocytes whose proliferation would be maintained by exposure to any persistent antigenic stimulus including chronic infection. This may be a co-determinant, in company with other as yet undefined determiners, culminating in the eventual malignant transformation of the B-lymphocytes. Dr Mackay gave evidence that there are four separate situations of documented chronic stimulation of B-lymphocytes in particular diseases with a higher than expected frequency of lymphoma. Dr Mackay was of the opinion that the applicant's case would be strengthened if there was evidence of an ongoing infection after 1945.

Professor Fox was of the opinion that Mr Warner had suffered from classic appendicitis during the 1940s. He was of the view that Dr Mackay's hypothesis with respect to prolonged antigenic stimulation was not reasonable, and said that whilst incidents of chronic infections have decreased dramatically, non-Hodgkin's lymphoma has become more common. In countries where chronic infections remain common, there is a lower incidence of non-Hodgkin's lymphoma than in countries with little evidence of chronic infections. Professor Fox said that possible explanations for the increased incidence of non-Hodgkin's lymphoma had been noted to include exposure to viruses, radiation, nutrition and pesticides. Professor Fox said that there was no mention in the literature of chronic infections resulting from bacteria, from which Mr Warner suffered during the 1940s, as being a possible cause. The Tribunal reported that:

> "In oral evidence to the Tribunal Professor Fox said that many years ago antecedent illness which may have preceded non-Hodgkin's lymphoma were investigated to establish whether or not there was a link. On an epidemiological basis, no link has been found. The hypothesis, originally investigated by Dr Metcalf, has been retracted by Dr Metcalf because no lymphoma was ever developed in animal studies after chronic stimulation to the immune system. The negative results in animal studies meant that there has been no exploration in the human system to test the original hypothesis."

Professor Fox said that epidemiologists are no longer pursuing the line of enquiry that people with chronic infections develop non-Hodgkin's lymphoma as there is "no link whatsoever".

Applying what was said by the High Court in the cases of *Bushell* and *Byrnes*, the Tribunal found that

Dr Minty's hypothesis with respect to Mr Warner suffering from typhoid was too tenuous and it was speculative. The hypothesis found no support with Dr Mackay and Professor Fox, with Dr Mackay stating that chloramphenicol was unavailable for treatment between 1942 and 1945. The Tribunal was satisfied beyond reasonable doubt that there was no ground for making a determination linking typhoid and its treatment with the veteran's death. The evidence established that the veteran's appendix was the source of infection on service.

The Tribunal also found that the hypothesis put forward by Dr Mackay was too tenuous. The material did not point to Mr Warner suffering ongoing infections after 1945, and the infection from which the veteran suffered in the 1940s did not fall within the four separate situations outlined by Dr Mackay of documented chronic stimulation of B-lymphocytes in particular diseases with a higher than expected frequency of lymphoma. The Tribunal said that it is speculative to suggest that a genetic error occurred as a result of the infection suffered by the veteran during service which many years later contributed to the development of his lymphoma. There was therefore no reasonable hypothesis within the meaning of subsection 120(3) of the *VE Act*.

Formal decision

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

[Ed: Mrs Warner has lodged an appeal to the Federal Court against the Tribunal's decision.]

Death - leiomyosarcoma - whether reasonable hypothesis - operation of sections 120(1) and (3) *VE Act*

Re M T Boundy
and Repatriation Commission
Gibbs, Campbell, Woodard

V94/0938 14 February 1996

Mrs Boundy applied for a review of the decision that the death of her husband was not war-caused within the meaning of section 8 of the *VE Act*.

Mr Boundy, who was born in 1920, rendered operational service in the Army from 31 October 1941 to 6 March 1946. He died on 10 December 1987, the cause of death being secondary leiomyosarcoma (six months), leiomyosarcoma bowel (two years).

Mrs Boundy contended that the whole of the material before the Tribunal raised a reasonable hypothesis that the development of the veteran's leiomyosarcoma was linked to his war-caused smoking habit. It was also contended that Mr Boundy suffered from cardiovascular and/or respiratory diseases which may have hastened death, and which would have resulted from the adverse effects of cigarette smoking.

Evidence

It was not disputed that Mr Boundy had a service influenced smoking habit, nor was it disputed that he continued to smoke following his discharge from the Army.

Professor Kune, Emeritus Professor of Surgery at the University of Melbourne, reported that leiomyosarcoma of the large bowel is a

rare condition which has not been well studied as to its causes. The veteran's leiomyosarcoma of the rectum was first diagnosed in 1983, and he underwent surgery for the disease on three occasions. Professor Kune set out various factors that have been noted as having possible associations with sarcomas in general, including tobacco consumption. He stated that smoking has been associated with a number of malignant tumours, and it is now considered that certain malignant tumours can occur in relation to previous smoking at sites different from the actual exposure. Professor Kune stated his view that the scientific evidence was sufficient to raise a reasonable hypothesis that the leiomyosarcoma of the rectum was caused by Mr Boundy's smoking.

Professor Kune, in oral evidence, acknowledged that the evidence that tobacco consumption causes soft tissue sarcoma is weak, and is based on two recently published studies by Zahm and others. He said that there are certain problems with both studies. There is no dose-response gradient, nor is there a consistency in terms of current users and past users. Compounding factors have not been tested. The evidence, while weak, was not zero, and he agreed with the conclusion of Zahm and her co-workers that the association with cigarette smoking was unexpected and should be investigated in other studies.

It was Professor Kune's view that based on what is known about the way tobacco acts in giving rise to malignant tumours at sites different from the actual point of intake, it is biologically plausible that this occurs in exactly the same way for soft tissue sarcoma.

Dr R B Collins, consultant pathologist and consultant forensic pathologist, who agreed generally with the causes of death as stated in the Death Registration, also considered it likely that the final or immediate conditions which precipitated death were related to a respiratory tract infection (broncho/lobar pneumonia), in association with liver failure. Dr Collins referred to a report that had been prepared by Mr Boundy's treating general practitioner that, in the last few days of his life, the veteran had suffered from a chest infection in association with liver failure. He expressed the view that Mr Boundy's smoking history would have diminished his ability to combat the contraction of an infection.

Professor R M Fox, Director of Clinical Haematology and Medical Oncology at the Royal Melbourne Hospital, reported that a large number of epidemiological surveys which have been carried out attempting to link smoking with various cancers have failed to show any link between the development of soft tissue sarcoma and smoking. He also referred to the two Zahm papers, and expressed the view that the only material pointing to a hypothesis connecting smoking with the development of soft tissue sarcoma is "the rather broad" statement of Professor Kune, based on the 1992 Zahm paper. It was Professor Fox's view that it is not possible to make a hypothesis given the fact that smokers of long duration do not have an increased risk of developing soft tissue sarcoma. In fact they have a decreased risk.

In addressing Dr Collins' proposition, Professor Fox said:

> "While I believe Dr Collins' hypothesis is well meaning, it

unfortunately betrays a lack of understanding of the processes of death associated with patients who are dying in fact from liver metastases. Of course patients do die with liver failure.

As well in advanced malignancies, patients also as a terminal process usually have an associated bronchopneumonia as part of the agonal event. It could be that if Mr Boundy had underlying lung disease, then the process of the terminal bronchopneumonia may have been speeded up by a few hours or even possibly a couple of days. Of course this is absolutely irrelevant to the underlying matter at hand, the cause of his death which was the underlying liver metastases due to the tumour which lead eventually to liver failure. Of course patients with this condition are often comatose in the last few days and have an associated bronchopneumonia."

In a report dated 18 July 1995, Mr Boundy's general practitioner (Dr Lees) stated that the veteran had attended his practice from at least 1977, and that upon a review of about thirty consultations, there was no reference to heart or lung disease, either acute or chronic. It was his view that "neither heart nor lung disease significantly contributed to his death except as a final event which put him out of his distress".

Legislative background

The Tribunal pointed out that the meaning of the terms "arose out of" and "attributable to" has been held to be very wide. The Tribunal also referred to *Doolette* v *Repatriation Commission* (1990) 21 ALD 489 where the Federal Court (O'Loughlin J) held that:

"If death is hastened because of the accelerated progress of a disease, which acceleration was itself caused by a war-caused condition, the proper conclusion would be that death was attributable to war service."

The Tribunal also referred to the High Court decision in *Bushell* v *Repatriation Commission* (1992) 109 ALR 30, and *Byrnes* v *Repatriation Commission* (1993) 116 ALR 210. In *Bushell,* Mason CJ, Deane and McHugh JJ, in a joint judgement, said when discussing the relationship between section 120(1) and section 120(3):

"... s 120(3) is not exhaustive of the content of s 120(1). Subsection (3) is concerned with whether 'the material' raises a reasonable hypothesis that the relevant injury, disease or death was connected with the service of the veteran. It is not concerned with conflicts in the material, whether they be of opinion or fact. The purpose of subs (3), as demonstrated by its terms and its history, is to ensure that a claim to which s 120 applies is not met unless there is some material which raises the relevant causal hypothesis. ...

The material will raise a reasonable hypothesis within the meaning of s 120(3) if the material points to some fact or facts ('the raised facts') which support the hypothesis and if the hypothesis can be regarded as reasonable if the raised facts are true."

The majority in *Bushell* said at p 35:

"The use of the terms 'the material' and 'raise' strongly suggests that subs (3) is not concerned with the proof or satisfaction of a claim but with whether there is some 'material'

> which calls for a determination under s 120(1)."

The High Court in *Byrnes* said at p 214:

> "The statement in *Bushell* that the material must point to some fact or facts which support the hypothesis means no more than that the material before the Commission must raise some fact or facts which give rise to the hypothesis. When that fact or those facts have been identified, the question for determination is whether the hypothesis is reasonable."

In *Lowerson v Repatriation Commission* (1994) 19 AAR 488, the Full Court of the Federal Court (Einfeld and Beazley JJ) said at p 497:

> "One of the problems to have arisen in the very difficult task of interpreting s 120 is the concept of 'facts' which do or do not exist. It is at least confusing, if not more, to speak of a true or false (or untrue) 'fact'. What is really being referred to is evidentiary material, in an administrative law sense, which suggests a particular factual conclusion. It is this material which may be shown to be true or untrue in the exercise to be performed under subs (1); that is, to adapt the language of *Byrnes*, a piece of factual material needed to sustain the hypothesis may be disproved, or the truth of a necessary fact inconsistent with the hypothesis may be proved, beyond a reasonable doubt. It is in this context that what are to be treated as the raised facts is such an important issue in this case."

The Tribunal referred to the Full Federal Court decision *Owens v Repatriation Commission* (1995) 38 ALD 481. In that case, Einfeld J (in the majority with Drummond J) said that although some evidentiary material may tend to disprove a hypothesis, that of itself will not be sufficient to make a hypothesis untenable. Evidence of that kind was relevant only to the issue of whether the hypotheses were negatived beyond reasonable doubt. The raised facts in the test in section 120(3) are those which support the hypothesis, not all the material presented on the subject under consideration. Drummond J considered the meaning of the requirement that to be reasonable under section 120(3), a hypothesis must not be contrary to proved scientific facts or to the known phenomena of nature. A fact will be proved or be a known phenomenon of nature only if it is so notorious as to be the subject of judicial notice at common law or a fact of the kind covered by the *Evidence Act 1995 (Cwlth)* s 144, that is, a fact not reasonably open to question and which need not be proved by evidence.

The Tribunal then identified the task under section 120(3) as that of examining the whole of the material before it, the purpose being to establish whether all or some of the facts raised by the material pointed to a hypothesis which was reasonable, connecting the veteran's disability with war service. The Tribunal said that in many instances, only some of the facts raised by the material will give rise to such a hypothesis. Those facts become the relevant facts to be addressed by the decision-maker in determining whether, under section 120(3), there is a hypothesis which is reasonable. Due regard must also be had to the whole of the material presented, but only for the purpose of establishing whether the hypothesis is

contrary to proven scientific facts or to the known phenomena of nature, or whether it is obviously fanciful, impossible, incredible or not tenable or too remote or too tenuous.

Tribunal's findings

The Tribunal found that whilst it could be said that the cause, nature and extent of Mr Boundy's smoking habit pointed to a hypothesis connecting his death with the circumstances of his war service, and whilst Professor Kune is eminent in the relevant field of knowledge, the hypothesis must be regarded as too remote and therefore not reasonable. The 1989 Zahm study showed a statistically significant association between soft tissue sarcoma and the chewing of tobacco, but not with cigarette smoking, and it was Professor Kune's evidence that the use of non-filtered cigarettes was of no greater significance than the use of filtered cigarettes. The authors of the 1992 Zahm study raised doubts as to the significance of their findings. The Tribunal said that the material did no more than suggest a "mere theoretical possibility" that it is biologically plausible that tobacco gives rise to the development of soft tissue sarcoma. Finally, the Tribunal found that there was no evidence that Mr Boundy suffered from heart or lung disease and the second hypothesis was also therefore not reasonable.

Formal decision

The Tribunal affirmed the decision that the death of Mr Boundy was not war-caused.

[Ed: Mrs Boundy has lodged an appeal to the Federal Court against the Tribunal's decision.]

Entitlement - whether a "*member of the Forces*" - *VE Act*, section 69 - whether Tribunal can substitute or alter reasons for discharge

Re T C Graham and Repatriation Commission

Handley

V93/1277 — 7 March 1996

Mr Graham applied for review of a decision that he was not eligible to claim pension under the *Veterans' Entitlements Act* by reason of him not being a member of the Forces pursuant to sections 68 and 69 of the Act.

Section 68 of the Act defines "member of the Forces" as:

> "means a person to whom this Part applies by virtue of section 69;"

Section 69 relevantly says:

> "**69.**(1) Subject to this section, where a person:
>
> (a)has served in the Defence Force for a continuous period that commenced on or after 7 December 1972 and before the terminating date; or
>
> ...
>
> this Part applies to the person:
>
> ...
>
> (d)*if*:
>
> (i)the person has served as a member of the Defence Force under an engagement to serve for a period of continuous full-time service of not less than 3 years; and
>
> (ii)the person's service as such a member was terminated before the

person had completed 3 years' effective full-time service as a member of the Defence Force, but after 6 December 1972, by reason of the person's death or the person's discharge on the ground of invalidity or physical or mental incapacity to perform duties;"

Mr Graham had served in the Royal Australian Navy between 24 January 1973 and 25 July 1974, a period less than three years. Naval records disclosed that the reason given for his discharge was "unsuitable" although Naval records lodged with the Tribunal indicated that Mr Graham had applied for "free discharge" prior to 1 November 1973.

Submissions

The issue for determination was whether the Tribunal could go behind the stated reasons for Mr Graham's discharge for the purposes of qualifying under the *VE Act*. It was acknowledged that the Tribunal could not go behind the reasons for discharge as stated for the purposes of the *Naval Defence Act 1910*, and it was also agreed that the reasons for discharge under that legislation were not capable of being reviewed. It was, however, submitted that Mr Graham was entitled to go behind the stated reasons for discharge in order to determine qualification under section 69(1)(d) of the *VE Act* on the grounds of invalidity or physical or mental incapacity to perform duties.

It was contended that whilst the *Naval Defence Act 1910* and the *Naval Forces Regulations 1969* provided a basis and reasons for discharge of a "sailor" before the expiration of an engaged period of service, the language of the regulations in effect prohibited a sailor ever being discharged on the ground of invalidity or physical or mental incapacity to perform duties. It was argued that physical or mental incapacity to perform duties is not a ground for discharge but rather an explanation for a ground of discharge. In order to determine the real reasons for discharge, there needed to be an examination of the relevant events leading up to discharge, thereby going behind the actual stated reasons. In making this submission, the applicant relied on the decisions in *Re Medcalf and Department of Veterans' Affairs* (1991) 23 ALD 502 and *Re Gransbury and Repatriation Commission* (1993) 29 ALD 877.

The Repatriation Commission's representative argued that the Tribunal could not go behind the stated reasons for discharge. He submitted that the Tribunal could not make a finding that Mr Graham was discharged for reasons specified in section 69 *VE Act*. He said that an option open to Mr Graham was to request the Chief of Naval Staff to substitute another reason for discharge pursuant to section 30(2) of the *Naval Defence Act*. He referred to the use of the words "terminate" and "discharge" in subsection 69(1)(d)(ii). A person being discharged, he said, was to be read in the context of a person whose services were terminated. Mr Graham's services were terminated because he was "unsuitable". He was not discharged on the ground of invalidity or physical or mental incapacity to perform duties. He said that the language of section 69 *VE Act* was linked to sections in other legislation dealing with members of the Defence Force where particular reasons for discharge are recorded. Those reasons are consistent with a

process of termination of service developed by the Defence Force and reflect the true reasons for discharge.

The Tribunal rejected the submission that it was empowered to go behind the stated reasons for Mr Graham's discharge from the Navy for the purposes of the *VE Act*. There was nothing in the *Administrative Appeals Tribunal Act*, the *Veterans' Entitlements Act* or the *Naval Defence Act* which empowers the Tribunal to substitute the reason for discharge. There is nothing which directs the Tribunal to go behind the stated reasons for discharge to determine whether a person is a "member of the Forces". The case of *Medcalf* was not authority for the Tribunal to substitute the reason for discharge, as *Medcalf* had to be looked at upon its own facts. *Gransbury* was a case where the Tribunal found the stated and actual grounds for discharge to be the same.

The Tribunal pointed out that it remained unexplained why Mr Graham had not applied pursuant to section 30(2) of the *Naval Defence Act* to amend the order for discharge. It suggested that Mr Graham should submit any evidence that he has which would permit an amendment of his record of discharge to the Chief of Naval Staff.

<u>Formal decision</u>

The Tribunal affirmed the decision under review. Mr Graham is not a "member of the Forces" for the purposes of the *VE Act*.

Decisions of the Federal Court of Australia

Intermediate rate - *VE Act,* ss 23 & 28 - veteran doing unpaid work - whether incapable of undertaking remunerative work

Repatriation Commission v Buckingham
Ryan J

7 February 1996

The Repatriation Commission lodged an appeal to the Federal Court against a Tribunal decision granting pension to Mr Buckingham at the Intermediate rate. The Tribunal had earlier determined that the veteran's gastro-oesophageal reflux and cervical spondylosis were war-caused. His other war-caused disabilities were conjunctival congestion, bilateral sensori-neural deafness and prolapsed lumbar 4-5 intervertebral disc.

Background

Mr Buckingham served in the Army for 20 years up to 1980. His service included two periods, each of approximately one year, in Vietnam. He sustained injuries in a mine explosion and while playing volleyball in Vietnam. Before joining the Army, he had worked as a food packer, shop assistant and driver. After his discharge, he was employed as a security officer, selling advertising, lawn mowing and as a postman. In the mid 1980's, he became a Christian and undertook Bible studies. He later worked as a property manager doing mainly administrative work for a mission society. The position was unpaid although he received free accommodation for himself and his wife. He spent brief periods in Liberia and Holland. He then worked for three years as a camp caretaker but found the work too difficult and asked to be transferred to a different position. He and his wife were to operate a Christian bookshop in Townsville in return for free accommodation.

Grounds of appeal

The Commission's appeal was based on two grounds:

1. that the Tribunal had erred in law in that it had misconstrued the relevant statutory provisions; and
2. that the Tribunal's findings were not supported by the factual material.

Legislation

The criteria relevant to determining eligibility for the Intermediate rate in this case are set out in paragraphs 23(1)(b) and (c) of the *VE Act* which provide:

> "**23.** (1) 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; and
>
> (c) the veteran is, by reason of incapacity from war-caused injury or war-caused disease, or both, alone, prevented from continuing to undertake remunerative work that the veteran was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own account, that the veteran would not be suffering if the veteran were free from that incapacity;"

Incapacity for remunerative work

The Court noted that section 23(1)(b) requires a veteran seeking to qualify for the Intermediate rate to show that his war-caused incapacity 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. In applying this provision, the Tribunal was required to make its decision in terms three factors set out in section 28 as follows:

> "(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)."

It was submitted by the Commission that the Tribunal had taken into account a matter not enumerated in those paragraphs, namely the state of the employment market.

The Court considered the evidence before the Tribunal in some detail and concluded that the factors in section 28 had been correctly applied in this case. The Court held that the Tribunal's finding that Mr Buckingham could not work for more than half of a normal work load or 20 hours per week was open to the Tribunal on the evidence before it.

Loss of salary or wages

The Commission also submitted that the Tribunal had failed to address the question of whether Mr Buckingham had ceased remunerative work which he had undertaken in the past due to some reason other than his war-caused incapacity. It was submitted that the evidence showed a very significant commitment on the veteran's part to his religious beliefs and activities and that the Tribunal should have considered whether that religious commitment had played a role in his employment choices.

The Court noted that the Tribunal's reasons showed that it was aware of the veteran's religious commitment but that it also had regard to the medical and other evidence. The Court held that there was sufficient evidence before the Tribunal to support its finding that it was the veteran's war-caused incapacity alone and not his religious beliefs which had prompted him to give up the remunerative work that he had been undertaking.

The Court concluded that the Tribunal had not erred in law in deciding that Mr Buckingham was eligible for pension at the Intermediate rate.

Formal decision

The Court dismissed the appeal.

Claim lodged for arthritis of hips and knees - jurisdiction of AAT to review whether arthritis of spine was war-caused

Sutherland v
Repatriation Commission
Jenkinson J

27 February 1996

Mr Sutherland had lodged a claim with the Department of Veterans' Affairs for the acceptance of "arthritis" as war-

caused. He made specific reference to "pain in hip and knee" and the condition was subsequently diagnosed as "osteoarthritis hips and knees". The claim was refused by a delegate of the Repatriation Commission and that decision was affirmed on review by the Veterans' Review Board. The conditions of peripheral vascular disease and sensori-neural hearing loss were accepted by the Commission as war-caused.

When the matter came before the Administrative Appeals Tribunal in November 1993, the Commission conceded that the veteran's osteoarthritis hips and knees were war-caused and the Tribunal proceeded to assess the veteran's pension. The Tribunal determined that Mr Sutherland was not eligible for the Special rate of pension on the basis of a medical report first presented at the Tribunal as to the condition of his spine. Dr Eckersley gave evidence at the Tribunal that severe osteoarthritis of the spine had affected the veteran's ability to undertake remunerative work. The Tribunal said that the veteran's spinal condition, which it said was not war-caused, had played a part in his retirement and decision not to seek other employment. The Tribunal therefore concluded that he did not satisfy the requirements for Special rate pension and assessed his pension at 90% of the General rate.

Grounds of appeal

Mr Sutherland's counsel submitted on appeal that the Tribunal had erred in law in deciding whether his spinal condition was war-caused. Jenkinson J referred to the decision of the Full Federal Court in *Repatriation Commission v Stafford* (1995) (21 AAR 543) which established that the expression "the decision of the Commission that was so affirmed" in section 175(1)(b) of the *VE Act* comprehends only the decisions of the Commission which the Veterans' Review Board was required to review in order to reach its conclusion that the ultimate decision of the Commission should be affirmed.

Jenkinson J continued:

> "There was before the delegate no claim for a pension in respect of any disease of, or any injury to, the applicant's spine. When the ultimate decisions of the Commission were reviewed by the Veterans' Review Board no claim had been made that the applicant had contracted a disease of, or suffered an injury to, his spine that was war-caused. Nor was there any evidence before the Board, so far as appears from the material before the court, that the condition of the applicant's spine was contributing to his incapacity. There is, further, no reference to the applicant's spine in the Board's reasons for its decision. ... All the references to the spine and to back pain in the material before the Tribunal which the material before this court discloses came into existence after the decision of the Board in January 1992. In those circumstances the Tribunal was in my opinion not authorised to consider either the question as to whether the applicant had suffered an injury to, or contracted a disease of, his spine (except in the course, and for the purpose, of determining the rate of pension in accordance with Division 4 of Part II of the Act) or the question whether any such injury or disease was war-caused, as being causally related to his peripheral vascular disease. That conclusion is

> required, in my opinion, by the reasoning of the Full Court in *Stafford's* case. Had a claim for pension been made under section 14 of the Act in respect of incapacity caused by disease of the spine, both questions would have been determinable in accordance with the provisions of sub-sections 120(1) and 120(3) of the Act : see *Preston v Repatriation Commission (1993); Nation v Repatriation Commission* (1993). But it follows from the conclusion I have stated that the Tribunal was required in assessing the appropriate rate of pension to treat incapacity deriving from the condition of the applicant's spine as not from war-caused injury or war-caused disease. The errors of law I have identified did not therefore render erroneous the Tribunal's assessment of the rate of pension."

Mr Sutherland's counsel also submitted that the claim in respect of "arthritis" had been intended to include all joints of the skeleton. The Court rejected this submission, saying that the claim was limited to the particular joints specified, namely hip and knee.

Cross-appeal by Commission

The Commission submitted that the Tribunal had failed to address whether the application for review to the Tribunal was lodged within time to allow for maximum backdating of increased pension. The Court upheld the Commission's submission on this point and remitted the case to the Tribunal to determine an appropriate date of effect.

Formal decision

The Court dismissed Mr Sutherland's appeal, allowed the Repatriation Commission's cross-appeal and remitted the case to the Tribunal to set a date of effect.

Intermediate Rate - whether veteran ceased work due to war-caused incapacity alone - *VE Act*, ss 23 and 28

Repatriation Commission v Clark

Ryan J

26 April 1996

The Repatriation Commission lodged an appeal to the Federal Court against a Tribunal decision granting pension to Mr Clark at the Intermediate Rate with effect from 1 July 1991. The Tribunal had earlier determined that his chronic anxiety state was war-caused and assessed his pension at 80% of the General rate from 5 November 1989.

Background

Mr Clark was born on 4 May 1925 and served in the Army during World War 2. In his post-service life, he was employed as a shop assistant, spare parts sales assistant, proprietor of a service station, and a hardware sales assistant. His last employment was as a sales assistant with a timber and hardware business from 1986 to June 1991. He ceased employment at the age of 66 years.

Mr Clark's evidence before the Tribunal was that his last employer had opened a small hardware section which he was asked to manage. With the opening of a larger store, Mr Clark resigned from his position because of increasing anxiety. He told the Tribunal that he could not have taken another position without supervisory responsibility had one been offered by his employer because he was 66 and

tired of trying to cope with the anxiety and stress. The veteran thought that he could work "*perhaps a couple of hours a day, three hours a day, some days*" but would not want to be involved any more than that.

Mr Clark's treating doctor, Dr Raine, was of the opinion that the veteran's war-caused incapacity would allow him to work eight hours a week but not twenty hours. The veteran was prescribed medication regularly for many years to help him cope with his anxiety. In oral evidence before the Tribunal, Dr Raine described Mr Clark as a very capable, over-conscientious person who was not handling his work too well in the end.

Dr B Kimbell, psychiatrist, told the Tribunal that he was of the opinion that Mr Clark could not work more than twenty hours a week, even in a less stressful job.

Grounds of appeal

The Commission's appeal was based on the ground that the Tribunal had erred in law because its decision was not supported by the factual material.

Legislation

Eligibility for the Intermediate Rate of pension is defined in section 23(1) *VE Act* which provides, in part, -

> "**23.** (1) 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; and
>
> (c) the veteran is, by reason of incapacity from war-caused injury or war-caused disease, or both, alone, prevented from continuing to undertake remunerative work that the veteran was undertaking and is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own account, that the veteran would not be suffering if the veteran were free from that incapacity;"

Incapacity for remunerative work

The Court stated that section 28 of the *VE Act* gives some guidance as to the meaning of section 23(1)(b) by setting out three factors which must be considered in determining whether a veteran is incapable of undertaking remunerative work for the purposes of that section, namely -

> "(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)."

The Court said that the first of these matters involves an analysis of the facts bearing on the skills and past experience of the veteran. When considering those skills and experience, the effect on the veteran's employment to date by war-caused incapacity is disregarded. The impact

of war-caused incapacity is addressed under paragraph (c), which requires the decision-maker to consider how that incapacity has reduced the veteran's capacity for remunerative work.

The Commission's counsel submitted that there was no evidence before the Tribunal to support a finding that section 23(1)(b) had been satisfied in this case. It was submitted that the application of paragraphs (a) and (b) of section 28 required consideration of his employment as a sales assistant. The effect of war-caused disease on Mr Clark's capacity as a shop assistant in terms of paragraph (c) was argued to be none at all. The Commission argued that there was no evidence that would permit a finding that Mr Clark's anxiety state had made him unable to undertake work as a shop assistant.

The Commission also submitted that the Tribunal had failed to consider whether something other than war-caused incapacity had prompted Mr Clark to cease the remunerative work he had previously undertaken. It was submitted that the inference to be drawn from the evidence was that Mr Clark was not motivated to work indefinitely. Rather, the loss of his wife and daughter had prompted him to revise his earlier plans to retire at age 60.

The Court held that there was sufficient evidence before the Tribunal which entitled it to find that it was the veteran's war-caused incapacity <u>alone</u>, and not age or domestic circumstances, which prompted him to give up remunerative employment of the kind which he had previously undertaken.

The Court concluded that where an evidentiary basis for a finding of fact is discernible, the Tribunal cannot be said to have erred in law in making that finding so as to require correction by the Court.

<u>Formal decision</u>

The Court dismissed the appeal.

Administrative Appeals Tribunal decisions - January to April 1996

Carcinoma

colon
- whether alcohol consumption war-caused

Jacobson A J 12 Mar 1996

hepatocellular carcinoma of liver
- war-caused drinking habit

Hamilton, J P 22 Mar 1996

leimyosarcoma bowel
- smoking

Boundy, M T 14 Feb 1996

malignant fibrous histiocytoma
- shrapnel injury

Bliss, V F 24 Jan 1996

non-Hodgkin's lymphoma
- typhoid infection during service

Warner, D R 18 Jan 1996

prostate cancer
- cigarette smoking

James, C T 14 Mar 1996

- psychiatric condition

White, L V 27 Mar 1996

Cardiovascular disease

aortic stenosis
- rheumatic fever

Jordan, W L 25 Jan 1996
Rose, I G 01 Feb 1996

varicose veins and eczema
- smoking and drinking alcohol due to war service

Dunstone, W R 17 Jan 1996

Date of effect

informal application for pension
- sent to Department by fax

Murphy, W J 29 Mar 1996

war widow's pension
- incorrect advice

Rathbone, P 16 Jan 1996

Death

acute myocarditis
- chronic stress

Hanson, G J 14 Mar 1996

carcinoma of colon
- service diet
- nitrates and nitrites

Pointon E M 16 Apr 1996

cardiovascular disease
- whether smoking war-caused

Lewis, M F 10 Jan 1996

cerebral aneurysm
- lack of proper medical treatment or service

Harding, M 12 Mar 1996

heart condition
- anxiety disorder

Brown, J L 15 Mar 1996

helicopter accident
- possible medical emergency

Watts, E V 27 Mar 1996

hypostatic pneumonia & metastatic prostate carcinoma
- whether IHD & COAD contributed to hypostatic pneumonia

Johnstone, R A 22 Feb 1996

post-operative complications
- whether contribution from cardiovascular disease

O'Donoghue, J T 31 Jan 1996

pulmonary emboli
- varicose veins

Goff, J M 29 Mar 1996

Disability pension

hypertensive heart disease, varicose veins, cataracts, obesity & osteoarthritis hips
- non-operational service

Pavich, C 14 Feb 1996

Entitlement

defence service
- whether a member of the Forces

Graham, T C 07 Mar 1996

Extreme disablement adjustment

whether lifestyle rating sufficient

Searle, RD 10 Apr 1996

General rate pension

orthopaedic conditions assessed GARP IV

Sinclair, M B 26 Apr 1996

Operational service

whether flight outside Australia

Kable, H W 02 Feb 1996

Osteoarthritis

generalised - spine, hands, wrists, knees
- fall on service

Liu, D G 01 Apr 1996

knees and hips
- repeated trauma

Rose, I G 01 Feb 1996

spondyloarthritis of ankle
- whether aggravation on defence service
- adjournment for x-ray

Yates, D P 26 Apr 1996

Psychiatric disorder

Post traumatic stress disorder
- diagnosis varied

Moody, R C 01 Feb 1996

Remunerative work

Intermediate rate
- whether incapable of more than part-time work

Campbell, W A 25 Jan 1996

whether prevented from undertaking remunerative work
- bird breeding activities

Hull, E C 24 Jan 1996

- criminal conviction related to recent employment

Fry, J 04 Mar 1996

whether prevented by war-caused disabilities alone
- carpenter

Jordan, W L 25 Jan 1996

- hospital worker retired aged 65

Doig, R H 30 Jan 1996

whether totally and permanently incapacitated
- retired farmer aged 76

Greer, L 19 Jan 1996

whether unable to work more than 8 hours per week
- entertainer
- travel to venues

Ashby, R K 09 Apr 1996

Solar keratosis

ultraviolet exposure

Graham, W J 12 Jan 1996

Spinal disorder

cervical spondylosis
- fall on service

Hawkins, B A 18 Jan 1996

spondylosis and osteoarthritis
- heavy lifting

Kable, H W 02 Feb 1996

Impressions of Gallipoli
Anzac Day 1996

by Robert Kennedy

To Australia and New Zealand, the landing at Gallipoli on 25 April 1915 marked the start of an arduous 9 month campaign involving the loss of many thousands of their finest young men. The Gallipoli campaign has since taken on a significance for both countries beyond that of an unsuccessful military campaign in a remote part of the world. This was recognised early by the Australian Official Historian, C E W Bean, who wrote that although the expeditionary forces of Australia and New Zealand were only in their infancy, and afterwards fought with success in greater and more costly battles, no campaign was so identified with them as the Gallipoli campaign. He wrote:

> "In no unreal sense it was on the 25th of April 1915, that the consciousness of Australian nationhood was born."

The theme of nation building was taken up at the Australian commemorative service at Lone Pine on Anzac Day 1996, when the former NSW Governor, Rear-Admiral Peter Sinclair, noted that Gallipoli has a very special place in the history of both Australia and New Zealand. He said:

> "For it was here that our soldiers and sailors fought for the first time as Australians and New Zealanders in their own right. For both countries had only achieved nationhood a few years before. Their feats here 81 years ago helped forge the character and identity of our two nations and they created the name 'ANZAC' as a symbol of pride and inspiration.
>
> Of all the locations in the Dardanelles, this spot, Lone Pine, is perhaps of special significance to Australians for our grandfathers and great-grandfathers fought and died here from the very first day and it was here on the 6th of August 1915 that the 1st Australian Division launched a major diversionary attack on heavily fortified Turkish positions. The fighting raged over many months with incomparable savagery and with very heavy losses to both sides. Over 2000 Australians and many more Turkish soldiers were killed in a battlefield here that was less than the size of a cricket pitch. Feats of courage were commonplace."

Rear-Admiral Sinclair observed that the several thousand mainly young Australians present on Anzac Day 1996 did not seek to glorify war by their presence because, he said, Gallipoli exposed war as an obscenity. Rather, they were there to honour the young men of both sides, who fought and died, for the strength of character and human qualities that they displayed. Those attending honoured the courage, loyalty, commitment and mateship that they showed in abundance and which earned the pride and respect of people all over the world.

Impressions of Gallipoli - Anzac Day 1996

To Australians, as well as its significance in nation building, the campaign encapsulates the qualities of stoicism in the face of adversity, mateship and loyalty. The ideal of mateship is perhaps best exemplified in the recognition of a common soldier - Private John Simpson Kirkpatrick, better known as the "man with the donkey" who brought wounded comrades down to the beach with the aid of a small donkey. He was killed during the Turkish counter-attack on 19 May, 25 days after the landing, and his grave at Beach Cemetery is marked by the inscription:

"He gave his life that others may live."

Simpson and his donkey rescuing a wounded soldier
(Australian War Memorial negative number JO6392)

From the beach at Anzac Cove, it is possible to look out to the islands of Imbros and Samothrace in the Aegean which were a familiar sight to the original Anzacs. The distinctive features of the Sphinx are also still evident on the eroded cliffs behind North Beach.

The Anzac battlefield is quite small - less than 3 km long and just over 1 km deep to Quinns Post, the furthest point inland held by the Anzacs. To the northeast of Anzac Cove, the hills rise steeply to form the Sari Bair range. The Anzacs moved up to the

forward area and were supplied with food, water and ammunition via Shrapnel Valley, Monash Valley and Rest Gully. It is possible today to walk down through Monash Valley and Shrapnel Valley to the beach in about an hour.

Troops in Whites Valley relieving Lone Pine garrison
(Australian War Memorial negative number PO188/22/14)

On 25 April each year, the official dawn service is held at the cemetery at Ari Burnu, close to the Anzac landing site. Ceremonies are also held later in the day at each of the national memorials on the peninsula. The Australian memorial at Lone Pine is situated in the largest cemetery in the Anzac area. There is a solitary pine within the grounds, which was grown from a seedling from the original lone pine which grew there before the battles of 1915. The Lone Pine memorial contains the names of 3268 Australian soldiers with no known grave.

The New Zealand memorial at Chunuk Bair is a tall stone pillar surrounded by trees and with a cemetery nearby. The New Zealand memorial contains the names of 852 soldiers who died in the August offensive and whose graves are unknown. From this vantage point, there is a view across the peninsula to the Narrows of the Dardanelles, the objective of the Anzacs.

Impressions of Gallipoli - Anzac Day 1996

The main British memorial, an obelisk over 30 metres high, is at Cape Helles. There are 31 Commonwealth War Graves cemeteries scattered throughout the peninsula close to where the fighting occurred and one French cemetery containing many thousands of graves.

To the modern visitor to the Gallipoli peninsula, there are some obvious differences in the manner in which Turkey and the British allied countries remember their involvement in the bitterly fought campaign of 1915. Today, the Turkish people commemorate 18 March 1915 as the date when they repelled the might of the Royal Navy and its allies which were attempting to force the narrow straits of Çanakkale. Two British and one French battleships were sunk in the straits after striking mines on 18 March. This failure put an end to the British attempt to force the Dardanelles and push on to Constantinople using naval power alone. There are relatively few Turkish cemeteries on the peninsula despite the loss of many tens of thousands of their soldiers. There is an immense Turkish monument at Sedd-el-Bahr on the eastern side of Cape Helles. There are also large inscribed stone monuments and reconstructed trenches at Chunuk Bair. In a sense, the Turks regard the whole peninsula as sacred ground. The figure of a Turkish infantryman has been carved into the hillside above Eceabat at the Narrows on the Dardanelles. Next to it is an inscription, which translated into English reads:

> *"Stop passerby! This earth you tread unawares is where an age sank. Bow and listen, this quiet mound is where the heart of a nation throbs."*

To the Turks, a minor ally of Germany in the First World War, the Gallipoli campaign marked the emergence of Mustafa Kemal Atatürk, a local commander, who played a vital role in organising resistance to the landing on 25 April and to the assault on the heights in August which ended in failure for the British allies. Atatürk was to become the founding president of the Republic of Turkey and held office from 1923 to his death in 1938. His importance in the development of modern Turkey is recognised by the numerous statues and memorials in the Gallipoli area.

At the end of 9 months of bitter fighting at Gallipoli, what the two sides had in common was the death of large numbers of their finest soldiers. This was acknowledged in a moving fashion by the words of Atatürk in 1934, now inscribed in stone on monuments at Anzac Cove and other places, which concludes:

> *"You, the mothers, who sent their sons from far away countries, wipe away your tears. Your sons are now lying in our bosom and are in peace. After having lost their lives on this land they have become our sons as well."*