VeRBosity Volume 17 No. 3

Contents

July - September 2001

Editor's notes

This edition of *VeRBosity* contains reports on eleven Federal Court decisions relating to veterans' matters handed down in the period from July to September 2001.

The cases of *Rickaby* and *Whitbourne* included examination of the correct approach to be adopted in "reasonable hypothesis" cases. In *Gorton* and *Williams* the Full Court clarified the approach to be adopted when a Statement of Principles is amended or revoked during the review process. *Carter, Counsel* and *Byrne* all relate to aspects of the Special rate.

This edition includes reports on selected AAT decisions handed down in the period from July to September 2001. Information is also included about Statements of Principles issued recently by the Repatriation Medical Authority and matters currently under formal investigation.

Robert Kennedy
Editor

General Information

New Minister for Veterans' Affairs

Following the recent Federal election, the Hon Danna Vale MP, Member for Hughes (NSW) was appointed as the Minister for Veterans' Affairs and Minister Assisting the Minister for Defence.

Mrs Vale said after her appointment:

> "I am honoured to have been asked by the Prime Minister to assume the position of Minister for Veterans' Affairs and Minister Assisting the Minister for Defence.
>
> It is truly a privilege to serve those who have previously served and those who are currently serving. I will work hard to represent these men and women so valued by our nation and to keep their interests at heart."

Qualifications and occupation before entering Federal Parliament

Mrs Vale graduated in Arts and Law from Sydney University. She was a full-time mother from 1965-84 and a full-time wife, mother and student from 1984-88. She worked as a solicitor from 1988-96.

Mrs Vale was first elected to the House of Representatives in the seat of Hughes in the southern outskirts of Sydney in 1996. Her electorate includes the Lucas Heights Research Laboratories and the Holsworthy Army base.

House Committee service

House of Representatives Standing Committees on Family and Community Affairs from 29 May 1996 to 27 November 1997; Communications, Transport and Microeconomic Reform from 9 October 1996 to 17 October 1996; Legal and Constitutional Affairs from 29 September 1997.

In announcing his new Ministry, the Prime Minister indicated that the Hon Bruce Scott MP was not included in the Ministry due to a reduction in the proportion of National Party Ministers. The Prime Minister expressed the gratitude of the Government for his excellent work as Minister for Veterans' Affairs and Minister Assisting the Minister for Defence.

Administrative Appeals Tribunal

Re R P Magill and Repatriation Commission

Beddoe

Q1999/759
2 July 2001

Special rate - voluntary early retirement - alone test not satisfied

Mr Magill applied to the Tribunal for review of decisions concerning his incapacity from war-caused conditions. At the hearing, the Repatriation Commission conceded that his post traumatic stress disorder and psychoactive substance abuse or dependence should be accepted as war-caused conditions and that his incapacity should be assessed at 100% of the General rate.

At issue was whether Mr Magill qualified for the Special rate in terms of s 24(1)(c), which provides that section 24 will apply to a veteran if the veteran is, by reason of incapacity from war-caused injury and/or disease alone, prevented from undertaking remunerative work that the veteran was undertaking and is, by reason thereof, suffering a loss of remuneration that the veteran would not be suffering if the veteran were free of that incapacity.

Under s 24(2)(b), if the veteran's incapacity is the substantial cause of his or her inability to obtain work, the veteran shall be treated as having been prevented by reason of that incapacity from continuing to undertake remunerative work that the veteran was undertaking.

Background

Mr Magill was aged 62 years at the date of the claim. After his discharge from the RAAF in 1978, he was employed in security work with the Queensland Government. He took on increased responsibilities over the years and became officer-in-charge of security at the Courts complex. He had difficulty coping with the stresses of his supervisory responsibilities due to alcohol dependence and asked to be relieved of his responsibilities as officer-in-charge. This request was refused. He then sought and was granted voluntary early retirement and ceased work in November 1997. At the time of his retirement he was not being treated by a psychiatrist.

Mr Magill told the Tribunal that he sought security type work with other employers without success. He was subsequently advised by his psychiatrist that he should not be working. He claimed that his non war-caused ankle and bronchitis problems did not affect his ability to work but admitted that he would be unable to chase a person.

Tribunal's conclusions

The Tribunal found that the veteran was reluctant to take on additional responsibility in his work, hence his decision to accept the offer of voluntary early retirement. On the veteran's own evidence, he became dissatisfied with his employment because of increasing responsibility. This was before the diagnosis and treatment of his post traumatic stress disorder. In the Tribunal's view, his decision to accept early retirement to avoid additional responsibility precluded a finding that s 24(1)(c) was satisfied unless that

decision could be attributed to war-caused disabilities.

The Tribunal concluded that s 24(2)(b) did not assist Mr Magill. The Tribunal said:

> "In the result, I am satisfied, on the balance of probabilities, that the applicant decided to accept the offer of early retirement from his employment by the Queensland Government and also decided to retire from the workforce unless employment to his liking became available. I accept that the applicant made enquiries about employment but I am not satisfied that those enquiries extended beyond that, i.e. they were simply enquiries which do not satisfy me that the applicant was genuinely seeking to engage in remunerative work.
>
> Further the offer of voluntary early retirement accepted by the applicant cannot be ignored when considering the alone test in paragraph 24(1)(c). There is no evidence that it was the undiagnosed condition of post traumatic stress disorder together with, or without, the other accepted disabilities that alone prevented the applicant continuing to undertake remunerative work. The offer of early voluntary retirement at age 62 is, by itself, a relevant causative factor brought about by the applicant's desire to avoid increased responsibilities. The war-caused disabilities were also, as between them, factors of varying importance in the decision to accept early retirement and the decision to seek to avoid the additional responsibilities.
>
> I am not satisfied however that it was the war-caused disabilities alone, which prevented the applicant undertaking remunerative employment. He had maintained employment for many years with those disabilities. By January 1998 there was the concomitant factor of the acceptance of early retirement which has satisfied me that the alone test in paragraph 24(1)(c) was not satisfied at the time of application."

Formal decision

The Tribunal determined that Mr Magill did not qualify for Special rate pension.

[Ed: Mr Magill has lodged an appeal to the Federal Court.]

Re H F West and Repatriation Commission

Cunningham

T2000/160
13 July 2001

Widow's pension - meaning of continuous full-time service

Mrs Evans applied to the Tribunal for review of a decision refusing a claim for war widow's pension in relation to the death of her late husband. The applicant was the executrix of Mrs Evans' estate and under s 126 of the *VE Act* was treated as the claimant.

The veteran served in the Australian Army for various periods from 1940 to 1943, but did not serve outside Australia. It was accepted that the veteran had rendered eligible war service. One of the issues for determination was the length of the period of eligible war service.

The Repatriation Commission contended that the period of service was between 1 October 1941 and 4 January 1942, a period of some 96 days, and that only this period could be accepted as "continuous full-time service".

The Commission also submitted that the veteran's service from 4 January 1942 was with the Reserve service and could

not be regarded as full-time service within the meaning of the Act.

Continuous full-time service

The veteran's eligibility was dependent upon that service being "continuous full-time service" within the meaning of s 7(1)(c) of the Act.

The late veteran died from acute renal failure due to ischaemic cardiomyopathy. The issue for determination was whether the Tribunal could be satisfied on the balance of probabilities that his smoking habit was increased or aggravated by his period of service. The Tribunal observed that if the period of eligible service was only 3 months, it would be more difficult to substantiate a connection between service and his smoking habit.

The Tribunal was referred to an article by Mr B Topperwien where it was stated in referring to the fact that there is no reference to service on a continuous basis in the *Defence Act* in relation to Citizen Forces:

> "Nevertheless, it is reasonable to assume that a person who was rendering service in the Citizen Forces on a continuous basis, and that was his only 'employment', would have been regarded as rendering 'continuous full-time service'. In order to recognise part-time service rendered during World War 2, provision was made in the VEA to deem certain service to be 'continuous full-time service' while that service was being rendered."

The article also referred to the provision contained in paragraph 5R(1)(b) where the Minister may, by notice in writing published in the *Gazette*, make a determination that a person while rendering relevant service, was rendering continuous full-time service.

Ministerial determination

The Tribunal was provided with a copy of the Minister's determination dated 18 December 1987 stating that the *VE Act* shall apply to persons who serve with the Citizen Military Force or the Volunteer Defence Corps on a part-time basis during any period of such service as if that person was while rendering service during World War 2 deemed to be rendering continuous full-time service for the purposes of the Act.

The Commission contended that the veteran's Reserve service was not full-time service and therefore could not be regarded as "continuous full-time service" within the meaning of the Act.

The Tribunal considered these contentions to be inconsistent with the determination of the Minister that persons serving with the Citizen Military Force (which includes the Reserve Force) on a part-time basis should be deemed to be rendering continuous full-time service for the purposes of the Act. The Tribunal determined that the veteran rendered continuous full-time service between 1 October 1941 and 17 August 1943. It found further that his smoking habit which led to his death from ischaemic heart disease was war-caused.

Formal decision

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

Re L J Reidlinger and Repatriation Commission

Beddoe

Q1998/563
2 August 2001

Inability to obtain appropriate clinical management - failure to diagnose

Mr Reidlinger applied for review of a decision of the Commission refusing his claim for Meniere's disease as a defence-caused disease. He served in the RAAF and had eligible defence service from 7 December 1972 until 30 September 1974.

Submissions

Mr Reidlinger contended that he first contracted Meniere's disease in 1971 when he had an attack of vertigo in Darwin whilst in the RAAF and at that time, he should have been started on a low salt diet and prescribed diuretics. His Meniere's disease was not diagnosed until about 1990.

The applicant argued that the failure of the RAAF to correctly diagnose and treat the Meniere's disease had exacerbated his symptoms. He argued that appropriate medical treatment might have prevented the full extent of his eventual hearing loss.

The applicant relied on *Johnston v The Commonwealth* (1982) 150 CLR 331 to support his submission that the failure to diagnose his condition itself constituted aggravation and lack of appropriate medical management. In *Johnston's* case, Gibbs CJ, Mason, Murphy and Wilson JJ found that:

> "Whatever might have been the course of events if [the applicant] had remained a civilian, it seems plain to us, on the basis of the findings of the Tribunal, that the **course taken by the disease between 1970 and 1974** was a direct consequence of the failure in 1970 to diagnose its presence and thereafter to provide appropriate treatment. That failure occurred in the course of his employment and in our opinion was related directly to it. No further conclusion is necessary to establish that the employment was a contributing factor to the aggravation of the disease." [emphasis added]

The Commission submitted that Meniere's disease was not the cause of the applicant's hearing loss but rather it was due to post traumatic endolymphatic hydrops which was a result of head injuries he suffered at 17 years of age. Furthermore that there was no evidence to support the contention that the applicant had not received appropriate clinical management for the condition during his eligible service, whether it was called Meniere's disease or post traumatic endolymphatic hydrops.

Tribunal's conclusions

The Tribunal was satisfied that the applicant's current condition should be diagnosed as Meniere's disease. In the relevant SoP (No 258 of 1995), the only factor was:

> "(a) inability to obtain appropriate clinical management for Meniere's disease"

The Tribunal was satisfied that on occasions after the incident in 1971, the applicant reported various symptoms of vertigo, dizziness and fullness of the ears. However, evidence in the medical reports did not lead the Tribunal to find that those symptoms could easily have been diagnosed as Meniere's disease.

The Tribunal found that given the length of time it took a specialist to diagnose the disease, it was not the case that a simple or singular procedure would have detected the disease.

The Tribunal found that the failure to diagnose the applicant in the circumstances of the case did not constitute inappropriate clinical management. There was no material which raised the issue of hypothetical inability to obtain appropriate clinical management contributing to or aggravating Meniere's disease, if it was already in existence during service, as required in terms of s 70(5)(d) of the *VE Act*.

Formal decision

The Tribunal affirmed the decision that Mr Reidlinger's Meniere's disease was not defence-caused.

Re D F Turner and Repatriation Commission

Estcourt

T2000/155
10 August 2001

Cerebrovascular accident - panic disorder - whether assumptions may be made

Mr Turner applied for review of a decision that his cerebrovascular accident was not war-caused. He contended that he had operational service during World War 2 and that he suffered from panic disorder before the clinical onset of the cerebrovascular accident.

Operational service

Mr Turner claimed that he rendered operational service at Merauke in Dutch New Guinea. He claimed that he went by barge with supplies from Horn Island in the Torres Strait to Merauke. The reason for the transfer of supplies was the "old boys network". He said that he went to Merauke with about 10 other members of his unit and spent about 3 - 4 weeks there, doing everything, including guard duty. He returned to Horn Island from Merauke by barge.

The Repatriation Commission disputed Mr Turner's claim that he had rendered operational service. Colonel Underwood gave evidence that research carried out at the Australian War Memorial and the National Archives of Australia, in particular the war diaries of the 74th Australian Anti-Aircraft Searchlight Battery and the 76th Australian Mobile Searchlight Battery, disclosed no record of exchange of personnel between the two batteries. Col Underwood accepted the possibility that the transfer to Merauke could have occurred.

The Tribunal was satisfied that Mr Turner had operational service at Merauke and thus, the whole of his service was treated as operational service.

Panic disorder

Mr Turner's counsel submitted that the applicant had a psychiatric condition which was first treated on service. Counsel accepted that there was no direct medical evidence that, in fact, the applicant had a panic disorder prior to his cerebrovascular accident. He submitted however, that given all the medical evidence and the applicant's treatment since 1946, for the purposes of the hypothesis it could be assumed that his condition became so serious that, in fact, one of the elements in it was panic disorder.

The Repatriation Commission submitted that the evidence did not establish that the applicant suffered from a panic disorder, as defined in the Statement of Principles, before the clinical onset of his cerebrovascular accident.

The Tribunal concluded that in the absence of anything in the material pointing to the existence of a panic disorder, it was not possible to assume that the applicant suffered from such a disorder before the clinical onset of

cerebrovascular accident. Although he had some anxiety conditions after the war, the Tribunal could not assume that the applicant suffered from "recurrent unexpected panic attacks followed by at least one month of persistent concern about having another panic attack, worry about possible implications or consequences of the panic attacks or a significant behavioural change related to the panic attacks".

Formal decision

The Tribunal affirmed the decision that Mr Turner's cerebrovascular accident was not war-caused.

[Ed: Mr Turner has lodged an appeal to the Federal Court.]

Re T M Nolan and Repatriation Commission

Sassella & Lynch

N2000/628
16 August 2001

Hypertension - alcohol abuse or dependence - defence service culture of drinking

Mr Nolan applied for review of a decision that his hypertension was not war-caused. He contended that hypertension was related to stressful service in Vietnam which led to alcohol abuse or dependence. He had operational service on two tours of duty in Vietnam in 1970 and 1972. He also had eligible defence service after 1972. He was first diagnosed with hypertension in 1981.

Alcohol consumption

Mr Nolan told the Tribunal that he started drinking alcohol before enlisting at the age of 17. In Vietnam, he was employed on small ships defence and had access to alcohol only on shore leave. His consumption of alcohol was heavier during his second tour in 1972. After his return to Australia, his drinking increased further and in 1975, he became president of the mess committee.

In 1978, he was promoted to sergeant and was expected to be seen in the mess. He would drink at lunchtime and after work. He could take a six-pack back with him to work after lunch. He might not return to work after lunch on a Wednesday or Friday, or both. A pattern of conduct might have involved a number of soldiers buying a six-pack each and drinking until 3.00 pm and then returning to the bar for more before travelling home. He belonged to a car pool. The passengers could stop off at a pub on the way home and stay until closing. He sometimes drove home while under the influence of alcohol.

The Statements of Principles applied by the Tribunal (Nos 83 and 84 of 1995), included as a factor related to service:

> "(b) suffering from psychoactive substance abuse involving daily consumption of alcohol before and continuing at least until the accurate determination of hypertension;"

The term "psychoactive substance abuse and dependence" was defined as meaning:

> "a maladaptive pattern of use, as derived from DSM-IV, attracting ICD code 303 or 304, that is indicated by either:
>
> (a) continued use of the substance despite knowledge of having a persistent or recurrent social, occupational, psychological or physical problem that is caused or exacerbated by use of the substance; or
>
> (b) recurrent use of the substance when use is physically hazardous (for example, driving while intoxicated);"

Tribunal's conclusions

The Tribunal concluded that Mr Nolan's alcohol abuse or dependence which commenced in 1975 was not caused by his operational service in Vietnam. It then considered whether his alcohol abuse or dependence could be related to his eligible defence service after 1972.

The Tribunal was reasonably satisfied that the definition of "psychoactive substance abuse and dependence" in SoP 84 of 1995 was satisfied in this case. The Tribunal found that the date of onset of his psychoactive substance abuse and dependence was 1978, or some time prior to that date. The Tribunal found further that he suffered from psychoactive substance abuse and dependence when his hypertension was accurately determined in 1981.

The Tribunal concluded that Mr Nolan's hypertension was causally related to his defence service due to alcohol abuse or dependence. It said on this point:

> "In summary, the Applicant's evidence of the culture of which he was a part in the 1970s, a culture in which lunchtime drinking, afternoons off because of drinking, a culture in which a sergeant is expected to be seen in the mess where drinking takes place, is sufficient to satisfy the Tribunal that it was the conditions of his service that fostered Mr Nolan's psychoactive substance abuse and dependence."

Formal decision

The Tribunal set aside the decision under review and substituted its decision that Mr Nolan's hypertension was defence-caused.

Federal Court of Australia

Grundman v Repatriation Commission

Gray J

FCA 892
12 July 2001

General rate - two assessment periods - failure to assess rate of pension - substantial justice

Mr Grundman's widow appealed to the Federal Court against a decision of the Tribunal concerning assessment of pension. Mr Grundman died in January 1999. At the time of his death, two applications for review were pending at the Tribunal. The assessment period in respect of the first application was from 29 April 1993 to 3 July 1994. The second application related to the period from 4 July 1994 until his death.

The Repatriation Commission assessed Mr Grundman's incapacity at 50% of the General rate in the first assessment period and at 80% in the second period. The increase in pension resulted from the acceptance of post traumatic stress disorder as war-caused. The Tribunal affirmed both decisions under review on the basis that he was ineligible for the Special rate and the Extreme Disablement Adjustment. He was last employed some 18 years before lodging his claim in 1993.

Court's conclusions

Gray J noted that the Tribunal recognised the need to determine the correct rate of pension for both assessment periods but had failed determine pension at the General rate in the first period. This constituted an error of law and the matter was remitted to the Tribunal to assess pension in respect of the first assessment period, from 29 April 1993 until 3 July 1994.

In relation to the second assessment period from 4 July 1994 onwards, the Tribunal found that Mr Grundman was ineligible for the Special rate as he was not prevented from continuing to undertake remunerative work because of war-caused disabilities alone.

Gray J said that the Tribunal was correct in recognising that being over the age of 65 was not determinative of eligibility for the Special rate. The Tribunal had rejected evidence suggesting that the veteran would have continued working but this was a question of fact not reviewable by the Court. Gray J concluded that there was no error of law shown in respect of the Special rate, and dismissed the appeal in this regard.

Substantial justice

Gray J rejected an argument that the Tribunal had failed to apply correctly s 119(1)(g), which requires the Repatriation Commission (and the AAT) to act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities. Gray J said on this point:

> "Counsel for the applicant suggested that the requirement to act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities, in some way required the AAT to take a more benevolent view of the applicant's case than it would otherwise have done. This argument has been put many times. It has been rejected just as many times. Examples are gathered in the judgment of Wilcox J in *Kumar v Immigration Review Tribunal* (1992)

> 36 FCR 544 at 554 - 556. To them might be added *Repatriation Commission v Flentjar* (1997) 47 ALD 67, at 72 - 73 in which Spender J cited *Thanh Phat Ma v Billings* (1997) 142 ALR 158 at 164, before pointing out that s 119 does not permit the Tribunal to disregard the statutory criteria for the grant of a pension at the Special rate. It cannot be suggested that s 119(1)(g) is intended to provide an easy route to a favourable decision for a veteran, any more than it could be suggested that the provision was intended to provide such an easy route for the Repatriation Commission. The argument should be put to rest entirely."

Formal decision

The Court set aside the Tribunal's decision and remitted the matter to the Tribunal for assessment of pension in respect of the period from 29 April 1993 to 3 July 1994. The Court dismissed Mrs Grundman's appeal in all other respects.

Rickaby v Repatriation Commission

Conti J

FCA 971
25 July 2001

Cervical spondylosis - trauma to spine - whether AAT made factual findings

Mr Rickaby appealed to the Federal Court against a decision of the Tribunal that his cervical spondylosis and lumbar spondylosis were not war-caused. His claim was related to service in the Army which included operational service in Vietnam from November 1967 to November 1968.

He claimed that prior to departing for Vietnam, he injured his back and neck during infantry training. While in Vietnam, he broke his nose on two occasions and injured his neck while playing rugby with other Army personnel.

The Tribunal said that the material raised two hypotheses. The first was that the veteran injured his cervical spine during training and this was aggravated by the incident in Vietnam in which he broke his nose. The second was that he sustained trauma to his cervical spine when he broke his nose.

The Tribunal concluded that the two hypotheses did not satisfy the requirement in the SoP that:

> "acute symptoms and signs last for a period of at least one week immediately after the injury occurs, unless medical intervention has occurred."

The Tribunal found that the injuries were insufficient to constitute a "trauma" to the cervical spine under the SoP and the hypotheses were not reasonable.

Submissions

Mr Rickaby's counsel submitted that the Tribunal had failed to follow the four step procedure laid down by the Full Court in *Repatriation Commission v Deledio* (1998) (14 *VeRBosity* 45).

[**Ed:** The **first** step is to determine whether the material points to a hypothesis connecting the injury, disease or death with the circumstances of service. No question of fact finding arises at this stage. The **second** step is to ascertain whether there is a SoP in force in respect of the relevant injury. The **third** step is to consider whether the hypothesis raised is reasonable in terms of the template in the SoP. The **final** step is whether the decision-maker is satisfied beyond reasonable doubt that the injury, disease or death is not war-caused. It is

only at this stage that fact finding is required.]

Counsel submitted that in considering whether a hypothesis had been raised in respect of cervical spondylosis, the Tribunal had wrongly engaged in fact finding at the third step of the *Deledio* process.

Court's conclusions

Conti J observed that the AAT was required to address, in conformity with the third step enunciated in *Deledio*, whether the material placed before it pointed in favour of some fact or facts which supported the hypothesis advanced by the veteran of connection of his cervical spondylosis with his operational service in Vietnam.

Conti J concluded that the Tribunal had erred in law by failing to follow the *Deledio* process. He said:

> "In substance and reality, the decision of the AAT did not undertake the formation of an opinion as to whether the material placed before it raised a 'reasonable hypothesis' as required by s 120(3), but instead the decision strayed into an exercise comprising essentially the fact finding process stipulated by s 120(1) before completing the determination, according to law, of the issue as to satisfaction of the hypothesis postulated by the SoP, and in particular that critical aspect thereof comprising '...where such acute symptoms and signs last for a period of at least one week immediately after the injury occurs...'. Put another way, the decision of the AAT in substance and reality launched into impermissible fact finding upon the material before it, without first determining whether any of such material was capable of supporting the hypothesis the subject of the applicable SoP."

Conti J rejected a submission that the Tribunal had made similar errors of law in relation to lumbar spondylosis.

Formal decision

The Court set aside the Tribunal's decision in respect of cervical spondylosis and remitted the matter to the Tribunal for rehearing. The Court dismissed Mr Rickaby's appeal in respect of lumbar spondylosis.

Carter v Repatriation Commission

Branson J

FCA 992
30 July 2001

Special rate - last paid work - contract work as accountant

Mr Carter appealed to the Federal Court against the Tribunal's decision that he did not qualify for the Special rate. He was affected by a number of war-caused orthopaedic conditions and post traumatic stress disorder. As he was over the age of 65, he was required to satisfy s 24(2A)(g) of the *VE Act* which provides:

> "(g) when the veteran stopped undertaking his or her last paid work, the veteran:
>
> (i) if he or she was then working as an employee of another person—had been working for that person, or for that person and any predecessor or predecessors of that person; or
>
> (ii) if he or she was then working on his or her own account in any profession, trade, employment, vocation or calling—had been so working in that profession, trade, employment, vocation or calling;

> for a continuous period of at least 10 years that began before the veteran turned 65;"

Mr Carter was self-employed as an accountant in a partnership until July 1989 when he sold his share in the practice. From June 1990 to June 1995, he worked with NZI on a contract basis as an auditor. This involved an average of less than 8 hours work per week.

The Tribunal found that the "last paid work" undertaken by Mr Carter was the audit work with NZI. He did not work for approximately 12 months from the time he sold his share of the accountancy practice until he commenced the contract work. The audit work could not be disregarded as paid work on the basis that it was *de minimus* in nature. Accordingly, the Tribunal concluded that he had not been engaged in his last paid work for at least 10 years that began prior to his 65th birthday and did not satisfy s 24(2A)(g).

Submissions

On appeal, Mr Carter submitted that it was not open to the Tribunal to find that his "last paid work" within the meaning of s 24(2A)(d) was his casual contract audit work as that work was performed for less than 8 hours per week. It was argued that, as s 24(1)(b) of the *VE Act* equates total and permanent incapacity with an incapacity to undertake remunerative work for periods aggregating more than 8 hours per week, s 24(2A)(d) must be addressing work which employs a capacity exceeding an aggregate of 8 hours per week. It was said to follow that the date "when the veteran stopped undertaking" this work within the meaning of s 24(2A)(g) must be the date when work above the 8 hour threshold ceased.

The Repatriation Commission submitted that s 24(1)(b) could not be read into s 24(2A)(d) so as to define "last paid work".

Court's conclusion

Branson J said that the real issue was whether, on the proper construction of subs 24(2A) of the *VE Act*, the time when Mr Carter stopped undertaking his "last paid work" was when he stopped working as a partner in his accounting practice or when he ceased to undertake contract work with NZI. If it was when he stopped working as a partner in his accountancy practice, he had at that time been working on his own account in the accounting profession for a continuous period of at least 10 years that began before he turned 65 years of age. However, if it was when he ceased to undertake contract work with NZI, he had not at that time been working on his own account in the accounting profession for a period of at least 10 years because he had not worked at all for approximately 12 months following the dissolution of his partnership.

Branson J rejected Mr Carter's submission that "last paid work" in terms of s 24(2A)(g) means work undertaken for more than 8 hours per week on average. Her Honour said that this construction would involve a significant rewriting of the paragraphs.

Branson J concluded that Mr Carter stopped undertaking his "last paid work" for the purposes of subs 24(2A) of the *VE Act* when he ceased undertaking contract work with NZI. Her Honour said:

> "When Mr Carter, in June 1995, stopped undertaking his "last paid work", namely his contract work with NZI, he had not then been working on his own account in the accounting profession for a continuous period of at least 10 years. Mr Carter had, as the Tribunal found, not worked at all in the period of approximately twelve months which followed the dissolution of his partnership in 1989. This break in Mr Carter's working life broke the continuity of his work in the

accounting profession with the result that when he ceased to undertake contract work with NZI he had only been working in the accounting profession for a continuous period of five years. This period did not begin before he turned sixty-five years of age.

The Tribunal was thus right to conclude that Mr Carter is not eligible for pension at the special rate for which s 24 of the Act provides as he does not satisfy the criterion of eligibility contained in par 24(2A)(g) of the Act."

Formal decision

The Court dismissed Mr Carter's appeal.

Counsel v Repatriation Commission

Moore J

FCA 1032
1 August 2001

Special rate - farming business - no loss of earnings

Mr Counsel appealed to the Federal Court against the Tribunal's decision that he did not qualify for the Special rate. (See 17 *VeRBosity* 33). He had owned a farm in partnership with his wife from 1980 to 1993. Part of the farm was sold in 1988 due to his declining health.

Partnership tax returns for the period 1986 to 1993 indicated that the farm made a small profit in only one year. The essential issue was whether Mr Counsel had suffered a loss of earnings due to his war-caused disabilities in terms of section 24(2A)(e) of the *VE Act* which provides:

"because the veteran is so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her own account, that he or she would not be suffering if he or she were free from that incapacity;"

The Tribunal found that Mr Counsel had not suffered a loss of earnings due to his war-caused disabilities as the farm had always operated at a loss, apart from making a small profit in one year. The Tribunal said "earnings" means **net** earnings, namely gross earnings less deduction of expenses.

Loss of earnings

Mr Counsel submitted that the Tribunal had made two errors of law. First, it had erred by construing "loss of earnings" as requiring a loss of net earnings.

Moore J said that the meaning of the expression "earnings on his or her own account" in s 24(2A)(e) has to be ascertained having regard to the statutory context in which the expression appears. The reference to "earnings" in s 24(2A)(e) and "salary or wages" in the same paragraph concern the product of "remunerative work" in paragraph 24(2A)(d). Whether work is "remunerative work" in turn depends on whether it is substantial and successful. (See *Sheehy v Repatriation Commission* (1996) (137 ALR 223).

Moore J observed that if the Tribunal was indicating that, as a matter of law, it was bound to assess loss of earnings by reference only to net earnings of the partnership, it would reveal an error of law because s 24(2A)(e) does not require that earnings be assessed on that basis only. However, the better view was that the Tribunal adopted the approach it did having regard to the limited material before it concerning the business. The approach it took was available having regard to the generality of the language used in s 24(2A)(e). The Tribunal's adoption of this approach did not reveal legal error.

Hypothetical earnings

Mr Counsel's second submission was that the Tribunal had failed to consider his hypothetical earnings - that is, what his financial position might have been had he not suffered from war-caused disabilities.

Moore J observed that in some circumstances, the Tribunal may be required to consider whether an unprofitable business might have been profitable but for the effect of war-caused disabilities.

Moore J did not accept that the Tribunal had erred in this regard. Mr Counsel had not raised the possibility that the farm would have been profitable but for his deteriorating health which led to him selling part of the property in 1988. In these circumstances, the Tribunal had not erred in failing to consider his hypothetical earnings.

Formal decision

The Court dismissed Mr Counsel's appeal.

Byrne v Repatriation Commission

Gyles J

FCA 1134
17 August 2001

Special rate - substantial cause of inability to obtain remunerative work

Mr Byrne appealed to the Federal Court against the Tribunal's decision that he did not qualify for the Special rate. He had the following war-caused disabilities:

- post traumatic stress disorder with alcohol abuse;
- bilateral sensorineural hearing loss;
- osteoarthrosis of right and left knees; and
- sleep apnoea.

Mr Byrne and his wife moved to a property near Kempsey in 1981. He worked as a mail contractor from 1983 to 1992 but had to give it up due to physical difficulties. He then undertook training as a welder and panel beater but was unable to obtain employment in the Kempsey area.

The Tribunal found that Mr Byrne's war-caused disabilities were not the "substantial cause" of his inability to obtain remunerative work, in terms of s 24(2)(b) of the *VE Act*. Other major factors were his age, time out of the work force and the high level of unemployment in the area around Kempsey.

Appeal grounds

Mr Byrne submitted that the Tribunal had erred in law in its application of s 24(2)(b) in that:

1. the Tribunal addressed whether his "war-caused **disabilities"**, as distinct from his "**incapacity from war-caused injury and disease"**, were the substantial cause of his inability to obtain remunerative work;
2. the Tribunal weighed factors which were part of, or a consequence of, his incapacity from war-caused disease against, rather than in favour of, his satisfaction of that requirement - namely, his location in an area having a high level of unemployment and his time out of the work force; and
3. the Tribunal failed to address the hypothetical position that he would have been in in relation to obtaining remunerative work if he had not been incapacitated by war-caused injury or disease.

Court's conclusions

Gyles J accepted Mr Byrne's submission that the Tribunal had found that his PTSD had been a cause of his move to Kempsey. His Honour observed that a consequence of incapacity resulting from war-caused injury or disease could hardly be counted as a factor against the applicant under s 24(2)(b) when considering the effect of that incapacity upon obtaining employment.

Gyles J concluded that the Tribunal had misdirected itself as to the proper application of s 24(2)(b). He said that the issue is not limited to why a person is in fact unable to obtain employment in the particular place, although that may be relevant. In order to judge the effect of the relevant incapacity, it is necessary to compare the position of the applicant as he is with the position he would be in without the relevant incapacity. The Tribunal had failed to address this hypothetical situation.

Formal decision

The Court allowed Mr Byrne's appeal and remitted the matter to the Tribunal for rehearing.

Repatriation Commission v Swinden

Ryan J

FCA 1147
20 August 2001

Entitlement - diverticular disease of colon - whether aggravation by service - low dietary fibre

The Repatriation Commission appealed to the Federal Court against the Tribunal's decision that Mr Swinden's diverticular disease of the colon was war-caused.

Service diet

Mr Swinden served in the Army from 1942 to 1946 and this period constituted operational service. He told the Tribunal that during this time he ate lots of stews, custards and stewed apple, and occasional roast lamb or mutton. Breakfast often consisted of powdered scrambled eggs and sometimes porridge. He consumed a great deal of liver at one stage. Also, while in Borneo, he ate toasted white bread, meat and vegetable rations reconstituted in hot water, and probably wheat cereal. However, there were no fresh vegetables or fruit. During training exercises and bivouacs, he ate bully beef.

Mr Swinden was hospitalised for one week during service with a gastric condition. After the war, he had intermittent bouts of diarrhoea and other gastric problems. He was first diagnosed with diverticular disease of the colon in 1987.

The Statement of Principles applied by the Tribunal (No 67 of 1994) included as a factor related to service:

> "(b) changing to a diet lower in dietary fibre more than three months before the clinical worsening of diverticular disease of the colon;"

Clause 3 of the SoP stipulates that this factor only applies where the person's diverticular disease of the colon was contracted **prior** to a period, or part of a period, of service to which the factor is related.

Court's conclusions

On appeal, the Commission submitted that the Tribunal had failed to consider essential elements of the SoP - in particular, whether the veteran had contracted diverticular disease **before** he entered the Army and switched to a diet with less fibre. Further, the hypothesis accepted by the Tribunal was not premised on the proposition that his time

in the Army had materially contributed to or aggravated the diverticular disease. Therefore, the hypothesis was not consistent with the SoP and was not reasonable.

Ryan J agreed that the Tribunal had failed to make a finding of material fact as to whether the veteran had contracted the disease before his Army service. This failure to make an essential finding of fact constituted an error of law.

Ryan J did not accept other grounds argued by the Commission - that there was no material before the Tribunal supporting the hypothesis and that the Tribunal had failed to provide adequate reasons for its decision.

Formal decision

The Court allowed the Repatriation Commission's appeal and remitted the matter to the Tribunal for rehearing.

Repatriation Commission v Gorton

Heerey, Emmett & Allsop JJ

FCA 1194
29 August 2001

Hypertension - daily consumption of alcohol - which SoP to apply

The Repatriation Commission appealed to the Full Court against the decision of Stone J allowing Mr Gorton's appeal. (See 17 *VeRBosity* 17).

Mr Gorton claimed that his hypertension with left ventricular hypertrophy was war-caused. He contended that his hypertension resulted from alcohol abuse caused by stress during his navy service.

The AAT found that the hypothesis relating to stress was not reasonable as there was no objective stressor on service. It also found that the veteran did not satisfy the requirement in the Statement of Principles for "daily consumption of alcohol" prior to onset of hypertension. Stone J allowed Mr Gorton's appeal and remitted the matter to the AAT for rehearing.

Stone J had distinguished the Full Court's decision in *Repatriation Commission v Keeley* (16 *VeRBosity* 40) where it was held that an applicant at the AAT had an "accrued right" to have the matter determined in terms of the SoP in force at the time of the Commission's decision. Her Honour held that the AAT was required to consider Mr Gorton's application in terms of the **current** SoP (No 25 of 1999) unless the earlier SoP (No 83 of 1995) was more favourable. Her Honour also held that the AAT had erred by finding that SoP 83 of 1995 required consumption of alcohol literally every day for an unspecified period.

Should *Keeley* be reconsidered?

On appeal to the Full Court, the Commission invited the Court to reconsider the decision in *Keeley*. In the present case, the SoP in force at the time of the AAT's decision was more favourable to the applicant than that in force at the time of the Commission's decision.

Heerey J cited previous authorities that a Full Court should generally follow an earlier Full Court decision unless that decision is clearly erroneous. It is not sufficient that a later Full Court merely has a different view of the law. There were a number of reasons for not departing from that practice in this case. They included the fact that special leave to appeal to the High Court in *Keeley* was refused and that the Commission was in the position to secure legislative amendments if it considered that the decision operated against the public interest.

Allsop J (with whom Emmett J agreed) differed from the Full Court in *Keeley* as

to the role of the SoPs. His Honour said that SoPs are designed to reflect up to date medicine and science and that only the **current** SoP should be applied by the Commission or the AAT. He disagreed with the Full Court that SoPs affect accrued rights. However, for the reasons cited by Heerey J, he agreed that the decision in *Keeley* should be followed and applied.

Which SoP applies?

The Full Court agreed with Stone J that the correct approach is for the AAT to apply the SoP in force at the time of the review unless the former SoP is more favourable.

Heerey J said that the correct procedure where a SoP is revoked by another SoP which is in force at the time of the AAT decision is as follows:

> "The starting point is that the AAT must consider the reasonableness of the hypothesis advanced by reference to the SoP which 'is in force': s 120A(3); see s 43 *AAT Act*. If the current SoP 'upholds' the claimant's hypothesis then the AAT moves, pursuant to s 120(1), to consider whether it has been disproved beyond reasonable doubt.
>
> If, however, the current SoP does not uphold the hypothesis, the claimant may then contend, pursuant to *Keeley*, that he or she has an accrued right under the earlier SoP. If that contention is accepted then again the hypothesis has to be disproved beyond reasonable doubt under s 120(1)."

Allsop and Emmett JJ agreed that the AAT was bound to apply the SoP in force at the time of the review. Allsop J observed:

> "*Keeley* did not decide that a SoP current at the date of the Tribunal's review undertaken pursuant to s 175 of the Act and s 43 of the *AAT Act* was not to be applied if it had not been in force at the time of the Commission's decision. Subsection 120A(3) makes it clearly compulsory for the Commission to examine the current SoP. In exercising the review under s 43 of the *AAT Act* I see no reason why the direction under subs 120A(3) does not bind the Tribunal. The only additional factor which the Tribunal must consider, if it comes to a view that the application of the current SoP leads to a conclusion that the injury, disease or death was not service caused, is that the claimant *also* has an accrued right to have his or her position judged by reference to the SoP in force at the date of the Commission's decision by force of the decision in *Keeley*."

Daily consumption of alcohol

The Full Court agreed with Stone J that the term "daily consumption of alcohol" in the SoP does not require a veteran to drink every day without exception.

Formal decision

The Full Court dismissed the Repatriation Commission's appeal.

Repatriation Commission v Williams

Heerey, Emmett & Allsop JJ

FCA 1195
29 August 2001

Coronary atherosclerosis - smoking - which SoP to apply

The Repatriation Commission appealed to the Full Court against the decision of Wilcox J allowing Mrs Williams' appeal and remitting the matter to the AAT for rehearing. His Honour followed the approach adopted by Stone J in *Gorton's*

case and held that Mrs Williams was entitled to rely on a later, more favourable Statement of Principles. (See 17 *VeRBosity* 49). This appeal was heard together with *Gorton's* case as it raised the same issue.

Mrs Williams had claimed that her late husband's death from coronary atherosclerosis resulted from war-caused smoking. The AAT applied SoP No 80 of 1998 as in force at the time of the Commission's decision and decided that his death was not war-caused.

SoP No 80 of 1998 required "smoking at least five cigarettes per day … for a period of at least one year immediately before the clinical onset of ischaemic heart disease". SoP No 38 of 1999 in force at the time of the AAT's decision contained no limitation as to the period of smoking, other than being before the clinical onset of ischaemic heart disease. It was enough that smoking amounted to "one pack year", during the **whole** of a veteran's smoking history.

Full Court's conclusions

The Full Court agreed with Wilcox J at first instance that Mrs Williams was entitled to rely on SoP No 38 of 1999. The Full Court also agreed that the AAT erred in law in requiring that Mrs Williams prove that the late veteran smoked five cigarettes per day in recent years. Heerey J noted that the material before the AAT raised the hypothesis of continued smoking until shortly before his death.

Formal decision

The Full Court dismissed the Repatriation Commission's appeal.

O'Neil v Repatriation Commission

North J

FCA 1492
13 September 2001

Generalised anxiety disorder - experiencing a stressful event - subjective reaction to experience

Mr O'Neil appealed to the Federal Court against a decision of the AAT that his generalised anxiety disorder and associated conditions were not war-caused. He served in the Army in Australia during World War 2 from 14 May 1945 to 4 February 1947. He contended that anxiety and stress during service led to him becoming a heavy drinker. Factors relating to service were the Japanese breakout at Cowra and a massive explosion at Kapooka which killed 25 servicemen.

Under the relevant Statement of Principles (No 49 of 1994), the AAT was required to be satisfied that the veteran had experienced a stressful event not more than one year before the clinical onset of generalised anxiety disorder. The SoP defined a "stressful event" as:

> "an occurrence which evokes feelings of anxiety or stress."

The AAT said that it was required to assess the subjective response of the veteran and also apply an objective test as to whether a stressful event occurred. The AAT accepted that the applicant experienced subjective feelings in relation to events but was satisfied that no stressful event occurred during his service. The Cowra breakout was nine months prior to his arrival and the accident at Kapooka was also prior to his arrival.

Error of law

North J said that the AAT had erred in its application of the SoP. The subject matter is the experience connected with a generalised anxiety disorder. This is something which is peculiarly personal and dependent upon subjective feelings. The task of the AAT in applying the SoP is to hear the evidence generally and determine whether it can be satisfied that the applicant actually subjectively felt anxious or stressed.

North J observed:

> "It is open, of course, for the Tribunal to reject the evidence of the applicant or others that the alleged feelings were in fact experienced. It is also open to the Tribunal to find that whatever feelings were experienced did not amount to the required anxiety or stress. Finally, it is open to the Tribunal to determine that the circumstances did not amount to an occurrence within the meaning of the definition. Beyond considering these matters, there is no other or further function required to be performed by the Tribunal in applying the SoPs."

Formal decision

The Court set aside the Tribunal's decision and remitted the matter to the Tribunal for rehearing.

Roncevich v Repatriation Commission

Von Doussa J

FCA 1320
14 September 2001

Lumbar spondylosis and knee injury - fall from window following mess function

Mr Roncevich appealed to the Federal Court against the Tribunal's decision that his lumbar spondylosis and internal derangement of the left knee were not defence-caused. (See 17 *VeRBosity* 6).

In February 1986, he was required to attend a function at the sergeants' mess after stand down. He consumed alcohol at the function and by the time he left the mess he was intoxicated. He returned to his room upstairs from the sergeants' mess and proceeded to prepare his uniform for the next day. He found it necessary to clear his throat and for this purpose went to the window of his room. In the action of spitting, he overbalanced through the open window and fell to the ground below. He sought medical treatment the following day.

Mr Roncevich sought to rely on paragraph 70(5)(a) of the *VE Act* and submitted that the incident of falling out of the window resulted in injuries which either "arose out of, or was attributable to" his defence service. In the alternative he submitted that his injuries fell within paragraph 70(5)(c) as they would not have occurred "but for" his rendering defence service.

The Tribunal concluded that although the applicant had clearly sustained "trauma" to his back and knee when he fell out of the window, his injuries were not attributable to or otherwise relevantly connected to his defence service.

Commission's concession

On appeal, the Repatriation Commission conceded that the Tribunal had erred on a question of law and consented to the matter being remitted to the Tribunal for rehearing. The concession was on the basis that the Tribunal appeared to apply a more restrictive test by considering whether the applicant's injuries arose "in the course of" his defence service. The Commission did not concede that the applicant's fall "arose out of, or was attributable to" his defence service. The Commission referred to *Holthouse v Repatriation Commission* (1982)

1 RPD 287 in which the Court drew a distinction between matters which are purely personal or private in nature and matters connected with defence service.

Mr Roncevich's counsel submitted that the Court should set aside the decision of the Tribunal and substitute the decision that the two conditions were defence-caused.

The Court noted that the Commission's concession did not lead to the conclusion that applicant's injuries "arose out of, or was attributable to" his defence service in terms of s 70 of the *VE Act*. The Court was not empowered to make factual findings on issues of causation in favour of the applicant which were not made by the Tribunal. The Court concluded that the matter should be remitted to the Tribunal to make the necessary findings of fact in terms of the legislative requirements.

Formal decision

The Court set aside the Tribunal's decision and remitted the matter to the Tribunal for rehearing.

Whitbourne v Repatriation Commission

Beaumont J

FCA 1353
21 September 2001

Entitlement - post traumatic stress disorder, respiratory condition and thoraco-lumbar spondylosis - no error of law

Mr Whitbourne appealed to the Federal Court against the Tribunal's decision that several claimed conditions were not war-caused. He rendered operational service in Vietnam from December 1968 to November 1969.

Post traumatic stress disorder

Mr Whitbourne claimed to be suffering from moderately severe chronic post traumatic stress disorder as a result of stressful experiences in Vietnam. He said that he had to steam clean vehicles which had been damaged by land mines. He also felt threatened by civilians at a garbage dump. The Commission contended that he did not suffer any incapacity from a psychiatric disease.

The Tribunal refused the claim for PTSD because of his failure to satisfy the SoP's prerequisites; first, of "experiencing a stressor" and secondly, of the presence of post traumatic stress disorder. There was no evidence of him experiencing symptoms of PTSD upon his return to Australia, and there was no present psychiatric illness reported by several psychiatrists. The incidents witnessed by him in Vietnam were not life-threatening, nor were they consistent with deep disturbance at the time. There was no feeling of intense fear, helplessness or horror, as required by the SoP.

Mr Whitbourne submitted on appeal that the Tribunal erred in its interpretation of the SoP by finding on the balance of probabilities that no factor in the SoP was raised and that the evidence was not capable of meeting the definition of "experiencing a stressor".

Beaumont J did not accept that the Tribunal had erred in law when it said that it was "not satisfied" that the evidence raised a factor in the SoP. His Honour agreed with the Commission's submission that the applicant's argument sought to draw a "distinction without any real difference".

Respiratory condition

Mr Whitbourne claimed pleural thickening with restrictive lung disease, interstitial peribronchial fibrosis, and mild collapse of right lower lobe of the lung. The Commission contended that he did not

suffer any incapacity from a respiratory disease.

The Tribunal was satisfied that the applicant did not suffer incapacity from any respiratory disease. As there was no incapacity, the Tribunal did not need to consider whether any incapacity was caused by war service.

Mr Whitbourne submitted that the Tribunal had erred by finding that he did not suffer from any respiratory disease on the basis that there was no incapacity from that condition. The Tribunal also erred by finding, on the balance of probabilities, that the pleural plaque was caused by asbestos exposure. This should have been determined on the "reasonable hypothesis" standard in ss 120(1) and (3).

Beaumont J accepted the Commission's submission that pension is payable under Part II of the *VE Act* in respect of particular incapacity. In the absence of being "incapacitated" in terms of s 13(1)(b), a veteran is not eligible for pension. His Honour also accepted that the Tribunal had not erred in finding that the pleural plaque was due to asbestos exposure.

Spondylosis

Mr Whitbourne claimed that his thoraco-lumbar spondylosis was aggravated by repeated trauma during operational service. He was engaged as a mechanical and electrical engineer repairing guns of tanks and small arms. He was required to lift heavy weights and work in confined spaces. The Commission contended that he did not suffer thoraco-lumbar spondylosis prior to or during operational service and further, that the condition did not meet any factor in the applicable SoP.

The Tribunal concluded that the hypothesis raised by the applicant did not satisfy one or more of the factors in the spondylosis SoPs and that the disease was not war-caused.

Mr Whitbourne submitted that the Tribunal had failed to give reasons as to why the hypothesis raised did not meet the requirements in the SoP.

The Commission submitted that the material questions of fact were set out by the Full Court in *Repatriation Commission v Deledio*. Those questions are:

1. Does all the material before the Tribunal point to a hypothesis connecting the disease with the circumstances of the particular service rendered by the person?
2. (If the answer to question 1 is Yes): Is there a Statement of Principles in force?
3. Does the Tribunal consider that the hypothesis fits the template found in the Statement of Principles? (If the answer is Yes, the Tribunal proceeds to a consideration under s. 120(1). If the answer is No, the claim fails).
4. (If the answer to question 3 is Yes): Is the Tribunal satisfied beyond reasonable doubt that the incapacity did not arise from war-caused disease?

The Commission submitted that the Tribunal had set out its findings on material questions of fact and found that an hypothesis had been raised. It found that there was a relevant SoP in existence, but that the hypothesis did not fit the template set out in the SoP, and therefore the claim failed. The reason why the applicant's hypothesis did not fit the template in the SoP was that the definition of "trauma" was not satisfied. The definition includes a requirement that there be **acute** signs and symptoms which last for a period of "at least one week".

Beaumont J agreed that the Tribunal had not erred in its finding that the hypothesis did not fit the "one week" element in the SoP.

Formal decision

The Court dismissed Mr Whitbourne's appeal.

Statements of Principles issued by the Repatriation Medical Authority

September - November 2001

Number of Instrument	Description of Instrument
65 of 2001	Revocation of Statement of Principles (Instrument No.245 of 1995 concerning motor neuron disease and death from motor neuron disease), and Determination of Statement of Principles under subsection 196B(2) concerning motor neuron disease and death from motor neuron disease
66 of 2001	Revocation of Statement of Principles (Instrument No.246 of 1995 concerning motor neuron disease and death from motor neuron disease), and Determination of Statement of Principles under subsection 196B(3) concerning motor neuron disease and death from motor neuron disease
67 of 2001	Revocation of Statement of Principles (Instrument No.79 of 1995 concerning chronic lymphoid leukaemia and death from chronic lymphoid leukaemia), and Determination of Statement of Principles under subsection 196B(2) concerning chronic lymphoid leukaemia and death from chronic lymphoid leukaemia
68 of 2001	Revocation of Statement of Principles (Instrument No.80 of 1995 concerning chronic lymphoid leukaemia and death from chronic lymphoid leukaemia), and Determination of Statement of Principles under subsection 196B(3) concerning chronic lymphoid leukaemia and death from chronic lymphoid leukaemia
69 of 2001	Revocation of Statement of Principles (Instrument No.13 of 1999 concerning open-angle glaucoma and death from open-angle glaucoma), and Determination of Statement of Principles under subsection 196B(2) concerning open-angle glaucoma and death from open-angle glaucoma
70 of 2001	Revocation of Statement of Principles (Instrument No.14 of 1999 concerning open-angle glaucoma and death from open-angle glaucoma), and Determination of Statement of Principles under subsection 196B(3) concerning open-angle glaucoma and death from open-angle glaucoma
71 of 2001	Revocation of Statement of Principles (Instrument No.85 of 1996 concerning giant cell arteritis and death from giant cell arteritis), and Determination of Statement of Principles under subsection 196B(2) concerning giant cell arteritis and death from giant cell arteritis
72 of 2001	Revocation of Statement of Principles (Instrument No.86 of 1996 concerning giant cell arteritis and death from giant cell arteritis),

	and Determination of Statement of Principles under subsection 196B(3) concerning giant cell arteritis and death from giant cell arteritis
73 of 2001	Revocation of Statement of Principles (Instrument No.292 of 1995 concerning otitis externa and death from otitis externa), and Determination of Statement of Principles under subsection 196B(2) concerning otitis externa and death from otitis externa
74 of 2001	Revocation of Statement of Principles (Instrument No.293 of 1995 concerning otitis externa and death from otitis externa), and Determination of Statement of Principles under subsection 196B(3) concerning otitis externa and death from otitis externa
75 of 2001	Revocation of Statement of Principles (Instrument No.60 of 1999 concerning chronic gastritis and death from chronic gastritis), and Determination of Statement of Principles under subsection 196B(2) concerning chronic gastritis and death from chronic gastritis
76 of 2001	Revocation of Statement of Principles (Instrument No.61 of 1999 concerning chronic gastritis and death from chronic gastritis), and Determination of Statement of Principles under subsection 196B(3) concerning chronic gastritis and death from chronic gastritis
77 of 2001	Revocation of Statement of Principles (Instrument No.27 of 1997 concerning Meniere's disease and death from Meniere's disease), and Determination of Statement of Principles under subsection 196B(2) concerning Meniere's disease and death from Meniere's disease
78 of 2001	Revocation of Statement of Principles (Instrument No.28 of 1997 concerning Meniere's disease and death from Meniere's disease), and Determination of Statement of Principles under subsection 196B(3) concerning Meniere's disease and death from Meniere's disease
79 of 2001	Determination of Statement of Principles under subsection 196B(2) concerning peripheral neuropathy and death from peripheral neuropathy
80 of 2001	Determination of Statement of Principles under subsection 196B(3) concerning peripheral neuropathy and death from peripheral neuropathy
81 of 2001	Revocation of Statements of Principles (Instrument No.41 of 1998 concerning osteoarthrosis and death from osteoarthrosis and Instrument No.19 of 1999 concerning osteoarthrosis and death from osteoarthrosis), and Determination of Statement of Principles under subsection 196B(2) concerning osteoarthrosis and death from osteoarthrosis
82 of 2001	Revocation of Statements of Principles (Instrument No.42 of 1998 concerning osteoarthrosis and death from osteoarthrosis

and Instrument No.20 of 1999 concerning osteoarthrosis and death from osteoarthrosis), and Determination of Statement of Principles under subsection 196B(3) concerning osteoarthrosis and death from osteoarthrosis

83 of 2001 — Revocation of Statement of Principles (Instrument No.77 of 1995 concerning acute lymphoid leukaemia and death from acute lymphoid leukaemia), and Determination of Statement of Principles under subsection 196B(2) concerning acute lymphoid leukaemia and death from acute lymphoid leukaemia

84 of 2001 — Revocation of Statement of Principles (Instrument No.78 of 1995 concerning acute lymphoid leukaemia and death from chronic lymphoid leukaemia), and Determination of Statement of Principles under subsection 196B(3) concerning acute lymphoid leukaemia and death from acute lymphoid leukaemia

85 of 2001 — Revocation of Statements of Principles (Instrument No.59 of 1996 concerning asthma and death from asthma and Instrument No.75 of 1997 concerning asthma and death from asthma), and Determination of Statement of Principles under subsection 196B(2) concerning asthma and death from asthma

86 of 2001 — Revocation of Statements of Principles (Instrument No.60 of 1996 concerning asthma and death from asthma and Instrument No.76 of 1997 concerning asthma and death from asthma), and Determination of Statement of Principles under subsection 196B(3) concerning asthma and death from asthma

87 of 2001 — Revocation of Statement of Principles (Instrument No.107 of 1996 concerning adenocarcinoma of the kidney and death from adenocarcinoma of the kidney), and Determination of Statement of Principles under subsection 196B(2) concerning adenocarcinoma of the kidney and death from adenocarcinoma of the kidney

88 of 2001 — Revocation of Statement of Principles (Instrument No.108 of 1996 concerning adenocarcinoma of the kidney and death from adenocarcinoma of the kidney), and Determination of Statement of Principles under subsection 196B(3) concerning adenocarcinoma of the kidney and death from adenocarcinoma of the kidney

89 of 2001 — Revocation of Statement of Principles (Instrument No.71 of 1997 concerning carpal tunnel syndrome and death from carpal tunnel syndrome), and Determination of Statement of Principles under subsection 196B(2) concerning carpal tunnel syndrome and death from carpal tunnel syndrome

90 of 2001 — Revocation of Statement of Principles (Instrument No.72 of 1997 concerning carpal tunnel syndrome and death from carpal tunnel

	syndrome), and Determination of Statement of Principles under subsection 196B(3) concerning carpal tunnel syndrome and death from carpal tunnel syndrome
91 of 2001	Amendment of Statement of Principles, Instrument No.82 of 1999, under subsection 196B(2) concerning diabetes mellitus and death from diabetes mellitus
92 of 2001	Amendment of Statement of Principles, Instrument No.83 of 1999, under subsection 196B(3) concerning diabetes mellitus and death from diabetes mellitus

Copies of these instruments can be obtained from:

- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **Repatriation Medical Authority, 4th Floor 127 Creek Street, Brisbane Qld 4000**
- **Department of Veterans' Affairs, PO Box 21, Woden ACT 2606**
- **Department of Veterans' Affairs, 13 Keltie Street, Phillip, ACT 2606**
- **RMA Website: *http://www.rma.gov.au/***

Repatriation Medical Authority

CONDITIONS UNDER INVESTIGATION AS AT 28 NOVEMBER 2001

Description of disease or injury	Date gazetted
Allergic rhinitis [Instrument Nos 65/95 & 66/95 as amended by Nos 160/95 & 161/95]	01-08-01
Atherosclerotic peripheral vascular disease [Instrument Nos 87/95 & 88/95]	25-10-00
Atrial fibrillation [Instrument Nos 9/96 & 10/96]	19-09-01
Carotid artery disease [Instrument Nos 346/97 & 347/97]	28-02-01
Chronic fatigue syndrome [Instrument Nos 90/97 & 91/97]	19-09-01
Chronic sinusitis [Instrument Nos 211/95 & 212/95]	01-08-01
Diabetes mellitus [Instrument Nos 82/99 & 83/99 as amended by Nos 9, 10, 91 & 92/01]	28-11-01
Gastro-oesophageal reflux disease [Instrument Nos 62/99 & 63/99]	28-11-01
Gulf War syndrome	17-11-99
Inflammatory periodontal disease [Instrument Nos 368/95 & 369/95]	25-10-00
Ischaemic heart disease [Instrument Nos 38/99 & 39/99]	28-11-01
Lumbar spondylosis [Instrument Nos 27/99 & 28/99]	04-10-00
Macular degeneration [Instrument Nos 29/97 & 30/97]	06-06-01

Malignant neoplasm of the anus	09-05-01
Malignant neoplasm of the bone or articular cartilage [Instrument Nos 235/95 & 236/95]	19-09-01
Malignant neoplasm of the brain [Instrument Nos 40/99 & 41/99]	10-01-01
Malignant neoplasm of the colon [Instrument Nos 23/96 & 24/96 as amended by Nos 5/98 & 6/98]	10-01-01
Multiple sclerosis [Instrument Nos 170/95 & 171/95]	22-11-00
Myeloma [Instrument Nos 72/99 & 73/99]	19-09-01
Obesity	28-02-01
Osteoporosis [Instrument Nos 61/97 & 62/97]	25-10-00
Parkinson's disease & secondary parkinsonism [Instrument Nos 68/99, 69/99, 70/99 & 71/99]	19-09-01
Psoriasis [Instrument Nos 21/98 & 22/98]	22-03-00

Administrative Appeals Tribunal decisions – July to September 2001

Carcinoma

non-Hodgkin's lymphoma
- exposure to solvents & immunosuppressive drug therapy
  Kay, L W 02 Jul 2001

polycythaemia vera
- inability to obtain appropriate clinical management
  Collins, J 27 Aug 2001

prostate cancer
- animal fat consumption
  Barnes, D M 31 Aug 2001

Cardiovascular disease

aortic atherosclerotic disease
- smoking
  Burrows, T A 07 Sep 2001

constrictive pericarditis & staphylococcal empyema
- viral infection
  Marren, K J 17 Aug 2001

hypertension
- psychoactive substance abuse - PNG air raids
  Carter, R J 24 May 2001
- psychoactive substance abuse - service culture
  Nolan, T M 16 Aug 2001

ischaemic heart disease
- dyslipidaemia - service diet
  Swan, B L 07 Aug 2001
- smoking
  Currie, E K 02 Jul 2001
  Miller, J S 05 Jul 2001

ischaemic heart disease & hypertension
- psychoactive substance abuse - Vung Tau harbour
  Rumel, D J 15 Aug 2001

Cerebrovascular disease

cerebral ischaemia
- smoking
  Burrows, T A 07 Sep 2001

cerebrovascular accident
- panic disorder
  Turner, D F 10 Aug 2001

Death

bowel cancer
- no diagnosis
  Williams, A F 31 Aug 2001

carcinoma of the colon
- alcohol consumption
  Paisley, J M 20 Sep 2001

cerebrovascular accident
- alcohol consumption
  Macdonald, E M 07 Sep 2001

cholangio carcinoma
- amoebic dysentery
  Trevena, M D 10 Aug 2001

ischaemic heart disease
- alcohol, smoking & hypertension
  McLean, R W 12 Jul 2001
- panic disorder
  Sunners, L 20 Sep 2001
- smoking
  West, H F 13 Jul 2001
- smoking increase - Vung Tau
  Austin, L M 18 Sep 2001

respiratory failure & pneumonia
- not due to COAD
  Hughes, A L 05 Sep 2001

Diabetes

immunosuppressive drug therapy
  Kay, L W 02 Jul 2001

post traumatic stress disorder & depressive disorder

- experiencing a stressor - cook at Nui Dat

Burls, P E 13 Jul 2001

- severe stressor - mortar attack at Vung Tau

Groome, A F 19 Sep 2001

Remunerative work

whether prevented by war-caused disabilities alone

- catering manager - voluntary redundancy

McNeany, V 19 Jul 2001

- computer operator - redundancy

Kennedy, L J 26 Jul 2001

- defence employee - redundancy

Howden, S J 18 Sep 2001

- foreman/driver aged 66

Parkinson, T 06 Sep 2001

- general practitioner aged 75

Shortland, G C 03 Sep 2001

- railway manager - redundancy

Buckley, C M 30 Jul 2001

- security guard - retrenchment

Boardman, K 06 Sep 2001

- security officer - voluntary redundancy

Magill, R P 02 Jul 2001

- squash court manager

Aaw, E 12 Sep 2001

- Telstra - voluntary redundancy

Noonan, R F 30 Jul 2001

- warehouse worker & salesman

Rumel, D J 15 Aug 2001

Respiratory disorder

asthma

- diagnosis

Bassett, D A 30 May 2001

chronic bronchitis & emphysema

- no diagnosis

Currie, E K 02 Jul 2001

Spinal disorder

cervical spondylosis

- trauma - fall from ladder

Wendt, R 27 Sep 2001

- trauma - jungle patrols

Foa, N R 28 Aug 2001

cervical spondylosis with intervertebral disc lesion

- trauma - aircraft accident

Saunders, R G 21 Aug 2001

lumbar spondylosis

- no trauma

Boxer, J L 07 Aug 2001

- trauma - bed making in service accommodation

Swan, B L 07 Aug 2001

- trauma - jump from helicopter

Lemon, N 06 Sep 2001

lumbar spondylosis & wedge fracture T11/T12 vertebrae

- trauma - jump from truck in Malaya

Hodder, J L 16 Aug 2001

Words and phrases

clinical onset

Currie, E K 02 Jul 2001

continuous full-time service

West, H F 13 Jul 2001