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Contents
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Editor's notes

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

There are also reports on several decisions of the Federal Magistrates Court.

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

Readers may be interested in information about the committee of review of veterans' entitlements which was announced recently and is due to report to the Minister for Veterans' Affairs before the end of 2002.

Robert Kennedy
Editor

General Information

Media Release 8 February 2002

INDEPENDENT COMMITTEE TO REVIEW VETERANS' ENTITLEMENTS

The Federal Government has appointed a former Supreme Court judge, a senior RAAF officer and Vietnam veteran and a former Commonwealth Department head to conduct an independent review of perceived anomalies in the access to veterans' entitlements, the Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, Danna Vale, announced today.

Minister Vale said the *Review of Veterans' Entitlements* was a key commitment in the Coalition Government's 2001 election platform for the veteran community.

> "The Government has recognised concerns in sections of the veteran community that some ex-servicemen and women may be denied access missing out on to entitlements because of perceived anomalies in the *Veterans' Entitlements Act 1986*," she said.
>
> "There also are ongoing concerns about the adequacy of benefits and support available for veterans receiving the T&PI Totally and Permanently Incapacitated (T&PI) rate and other rates of veteran disability pension.
>
> The independent committee will hear submissions on this range of these issues and make recommendations on areas that may need to be addressed in line with the Government's commitment to providing fair, consistent and appropriate benefits to Australia's veterans."

Minister Vale said the committee would be chaired by Justice John Clarke QC, a former judge of the NSW Supreme Court and the Court of Appeal. The other two members are former Vice-Chief of the Australian Defence Force, Air Marshal Douglas Riding AO DFC, and the former Secretary of the Department of Family and Community Services, Dr David Rosalky.

> "The *Veterans' Entitlements Act* is based on a number of core principles including the determination of qualifying service and veterans' benefits for those who have suffered special deprivations and pressures when confronting the enemy. These principles have been supported by successive governments," Minister Vale said.
>
> "The committee will examine the history and current interpretation of eligibility criteria for qualifying service, which entitles veterans to apply for a range of benefits, including the service pension.
>
> This will include perceived anomalies that may be raised by groups including some World War 2 personnel who did not serve outside Australia, veterans of the British Commonwealth Occupation Force in Japan, participants in the British atomic testing program in Australia and SAS Regiment personnel involved in counter-terrorist and special recovery training.
>
> In relation to the T&PI and other disability pensions, the committee will consider the appropriateness of current benefits and the extent to which the medical, social and vocational rehabilitation needs of

compensation pensioners are being met.

It will make recommendations on possible improvements in benefits and support programs to address any identified deficiencies, including the potential to restructure benefits and programs in order to fund any reforms."

The Minister said the committee would hear submissions from interested parties on all issues and urged members of the veteran community to give their support to the review.

"The committee will report in November, enabling the Government to consider its recommendations in the context of the 2003-2004 May 2003 Budget," she said.

Terms of Reference

The Government is committed to providing fair, consistent and appropriate benefits to Australia's veterans.

Against this background, the committee will review and make recommendations on:

- the current policy relating to eligibility for access to VEA benefits and Qualifying Service under the VEA; and
- the benefits available to disability compensation pensioners under the VEA.

The review will:

Access to VEA benefits and Qualifying Service

- Consider the historical context and current interpretation of the provisions for Qualifying Service having regard to relevant Parliamentary statements and the position reached by the Courts;
- Consider perceived anomalies with eligibility for access to VEA benefits and Qualifying Service that might be raised by some World War 2 veterans, veterans of the British Commonwealth Occupation Forces in Japan, Australian participants in British Atomic testing in Australia, Australian service personnel engaged in counter terrorist and special recovery training and other interested parties; and
- Recommend possible changes to address any anomalies and to facilitate the equitable and efficient administration of the VEA.

Special Rate and other Rates of Disability Pensions

- Document and examine past and current disability compensation pension and related benefits available to veterans under the VEA;
- Consider submissions made by interested parties as to the structure and appropriateness of those pensions and benefits;
- Consider the extent to which the medical, social and vocational rehabilitation needs of compensation pensioners are being adequately met; and
- Make recommendations on possible improvements in benefits and support programs to address any identified deficiencies, including the potential to restructure benefits and programs in order to assist the funding of desired reforms.

Conduct of Review

In examining issues and developing options, the committee should plan to seek submissions from and meet with veteran organisations and other interested parties at the appropriate time.

In its deliberations the committee will need to bear in mind the commitment of the Government to responsible economic management.

Administrative Appeals Tribunal

Re T Cornelius and Repatriation Commission

Bell

N2000/1621
26 October 2001

Carpal tunnel syndrome – date of clinical onset

Mr Cornelius applied for review of a decision that his carpal tunnel syndrome of both wrists was not war-caused. He had operational service in Vietnam in 1968-69.

Mr Cornelius was engaged in general engineering in Vietnam in relation to plant, including large vehicles and machinery and the repair of small arms. He spent approximately eight days per month working on small arms. This work involved stripping arms by removing the component parts and rebuilding and then going through the cocking process. He used screwdrivers and other tools in order to disassemble the arms and undertook a rapid forwards and backwards movement cocking and re-cocking the arms.

In relation to general engineering, which he undertook on almost a daily basis, he worked on plant including hydraulic systems on bulldozers and cutting blades on other machines. He used heavy tools together with some lighter tools like screwdrivers, spanners and wrenches. He told the Tribunal that he noticed a pain in each wrist after approximately five to six months. After his return from Vietnam, he experienced occasional pain in the wrists. The wrist pain flared up again in 1993. He had not had a problem prior to that in 6½ years.

Clinical onset

Mr Cornelius sought to rely on factor 5(a) of Statement of Principles (No 71 of 1997) which states:

> "(a) performing repetitive activities with the affected hand for at least two hours each day, for at least 65 days, all within a period of 120 consecutive days, and where **the repetitive activities have not ceased more than 30 days before the clinical onset** of carpal tunnel syndrome;" (emphasis added)

The Commission submitted that this factor was quite specific and that the veteran could not satisfy its requirements in terms of either duration or clinical onset. It submitted that clinical onset of his condition was in 1993 when he was referred to a specialist.

Tribunal's conclusions

The Tribunal concluded that the veteran's work in Vietnam both on small arms and servicing heavy equipment constituted "repetitive activities" for the purposes of the SoP factor.

On the issue of clinical onset, the Tribunal referred to *Re Robertson and Repatriation Commission* (1998) in which the Tribunal said:

> "… we consider that there is a clinical onset of a disease, either when a person becomes aware of some feature or symptom which enables a doctor to say the disease was present at that time, or when a finding is made on investigation which is indicative to a doctor of the disease being present at that time."

The Tribunal concluded that there was material to support the contention that the clinical onset of his carpal tunnel syndrome was some five months after his arrival in Vietnam. Given that it was contended that these symptoms persisted until he left Vietnam, and that he continued to perform repetitive activities during the entire period of his service in Vietnam, the requirement in factor 5(a) of the SoP that "the repetitive activities have not ceased more than 30 days before the clinical onset of carpal tunnel syndrome" was satisfied in terms of the veteran's hypothesis. The Tribunal did not consider that his failure to communicate his stated symptoms to a doctor prior to 1993 established, beyond reasonable doubt, the absence of those symptoms.

Formal decision

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

[Ed: The Repatriation Commission has lodged an appeal to the Federal Court on the issue of clinical onset.]

Re P Jolly and Repatriation Commission

Bullock & Thorpe

N2000/973
14 November 2001

Non-Hodgkin's lymphoma – Helicobacter pylori infection

Mrs Jolly applied for review of a decision that the death of her late husband was not war-caused. The cause of his death was a cardiac arrest arising out of the rapid progression of a lymphoma.

It was submitted that during war service, Mr Jolly had been infected by *Helicobacter pylori* which led to a lymphoma of the stomach and eventually to his death.

It was also submitted that Mr Jolly had a war-caused smoking habit which led to his developing ischaemic heart disease which then led to his death. The Tribunal did not accept on the material that his smoking habit continued to within 15 years of the onset of ischaemic heart disease.

Lymphoma hypothesis

The Statement of Principles applied by the Tribunal (No 69 of 1997) includes as a factor related to service:

> "(f) for primary B-cell lymphoma of the stomach only, contracting *Helicobacter pylori* infection before the clinical onset of non-Hodgkin's lymphoma;"

Dr Katelaris, consultant gastro-enterologist, expressed the opinion that Mr Jolly had a number of risk factors which indicated that he had an *Helicobacter pylori* infection. Statistical analysis suggested the high likelihood of infection with *Helicobacter pylori* given his age cohorts and the fact that he served in the Middle East and the South Pacific which made it highly likely that he was infected. Also, the results of a barium meal in 1990 indicated that he had a past duodenal ulcer. There was also evidence that Mr Jolly had gastric problems including bloating, flatulence and gastric-type pain for which he used a white liquid, thought to be an antacid. All this material strongly pointed to the presence of *Helicobacter pylori* infection in this case.

A further hypothesis by Dr Katelaris and conceded as a possibility by Professor Levi, consultant physician, was that the primary lymphoma occurred as a small B-cell lymphoma in the stomach which transformed later to a more aggressive lesion which extended from the stomach

upwards into the oesophagus. Professor Levi conceded that this was a very real possibility, as lymphomas in the oesophagus are rare.

Tribunal's conclusions

The Tribunal concluded that the material available to it, particularly the opinion of Dr Katelaris concerning the presence of *Helicobacter pylori* infection, raised a reasonable hypothesis in terms of subsection 120(3) of the *VE Act.*

The Tribunal found that the barium meal undertaken in 1990 indicated a past duodenal ulcer. Further, Mr Jolly experienced bloating, flatulence and gastric-type pain for which he took a white liquid considered to be an antacid. All these facts pointed to *Helicobacter pylori* infection and there were no facts to dispute this beyond reasonable doubt.

In relation to whether or not the lymphoma was in the stomach, the Tribunal noted that Mr Jolly was diagnosed very late in the course of his illness and shortly before his death. The endoscopic examination was difficult because of his extensive coughing, in addition to the presence of retained gastric material obscuring full disclosure of the tumour. Endoscopic examination pointed to the lesion at a site in the oesophagus.

The Tribunal was not satisfied beyond reasonable doubt that the primary lymphoma was in the oesophagus, noting the very real and not fanciful possibility that the more likely course of this disease was that a primary lymphoma commenced in the stomach. This primary lymphoma in the stomach then transformed into the more aggressive tumour which was at a late stage discovered in the oesophagus.

The Tribunal was not satisfied beyond reasonable doubt, for the purposes of subsection 120(1) of the Act, that there was no sufficient ground for determining that Mr Jolly's death 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 A Ault and Repatriation Commission

Bell

N1999/254
30 November 2001

Death of veteran - Statements of Principles - chain of causation

Mrs Ault applied for review of a decision that the death of her late husband was not war-caused. Mr Ault had rendered operational service in World War 2. He died from non-Hodgkin's lymphoma.

Submissions

Mrs Ault did not contend that her husband's non-Hodgkin's lymphoma was related to war service. She submitted that his death was contributed to by pneumonia, which was in turn contributed to by chronic bronchitis. His chronic bronchitis was accepted as war-caused prior to the introduction of Statements of Principles.

It was common ground that the veteran's chronic bronchitis would not satisfy any of the factors required by the Statements of Principles. Mrs Ault referred to the decision of the Tribunal in *Re Etheridge and Repatriation Commission* (1998) which she submitted was authority for the proposition that, where pneumonia is a proximate cause of death, because there is no SoP for pneumonia, the Tribunal should go directly to subsections 120(3) and (1) of the *VE Act*.

The Commission submitted that it was open to the Tribunal to redetermine each causal link in a chain of causation between the circumstances of service and the veteran's disability or death, notwithstanding that a disability in that causal chain has previously been accepted as war-caused. The Commission referred to several decisions of the Full Federal Court: *Langley v Repatriation Commission* (1993) in this respect, and *McKenna v Repatriation Commission* (1999) and *Ogston v Repatriation Commission* (1999) in relation to the submission that if a SoP is relevant to a sub-hypothesis within the overall hypothesis said to connect service and injury, disease or death, then the hypothesis will not be reasonable unless the sub-hypothesis fits the template of that SoP.

Tribunal's conclusions

The Tribunal concluded that the earlier decision in *Re Etheridge* could be distinguished from the circumstances of this case. The submission that the SoP concerning chronic bronchitis had no application in this case was at odds with the view of the Full Federal Court in *McKenna* that:

> "A complex hypothesis (i.e. one comprising more than one element or part) can be no stronger than each of its elements or parts."

The Tribunal concluded that the decision in *McKenna* required compliance by the sub-hypothesis concerning chronic bronchitis with the relevant SoP. Its failure to do so rendered it, and therefore the overall hypothesis, not reasonable within the meaning of the *VE Act*.

Formal decision

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

[Ed: Mrs Ault has lodged an appeal to the Federal Court.]

Re J Temple and Repatriation Commission

Friedman

V2000/1342
30 November 2001

Carotid artery disease & CVA - meaning of clinical onset

Mr Temple applied to the Tribunal for review of a decision that his cerebral ischaemia was not war-caused. He served in the Australian Army from 1941 to 1946 and had operational service. Before his Army service he was a non-smoker and an active sportsman. After he joined the Army, he commenced smoking and increased his consumption to 20 cigarettes per day under stressful conditions in New Guinea, eventually increasing to 30 per day. He ceased smoking in 1979.

In May 1999, Mr Temple suffered a stroke which left him paralysed in the right side of his body. After treatment and surgery he made a good recovery. The issue in terms of the relevant Statement of Principles was whether "clinical onset" of his cerebral ischaemia had occurred within 15 years of cessation of smoking.

Clinical onset

There is no definition of the term "clinical onset" in the SoPs. In *Re Robertson* (1998) the Tribunal, after considering a number of expert medical opinions as to the meaning of the term "clinical onset", said:

> "… we consider that there is a clinical onset of a disease, either when a person becomes aware of some feature or symptom which enables a doctor to say the disease was present at that time, or when a finding is made on investigation which is indicative to a doctor of the disease being present at that time."

The Tribunal in *Re McLeod-Dryden* (1998) followed this reasoning:

> "We consider that the term 'clinical onset' means the onset of symptoms which a medical practitioner would diagnose as attributable to the relevant condition."

In *Re Witten* (1998) (14 *VeRBosity* 89), the Tribunal reviewed earlier decisions and adopted the definition of "clinical onset" as set out in *Re McLeod-Dryden*. The Tribunal concluded:

> "A disorder may not, in fact, have been diagnosed during the relevant period … but, with the benefit of hindsight and taking into account symptoms described by a veteran, it would need to be possible for a medical practitioner to express the opinion that the described symptoms established the clinical onset of the disorder during the relevant period."

Submissions

Mr Temple's counsel submitted that clinical onset of cerebral ischaemia had occurred within 15 years of cessation of smoking. It was submitted that if he had been tested within the 15-year period, stenosis or narrowing of the carotid artery would have been evident.

The Repatriation Commission submitted that clinical onset of cerebral ischaemia was when the symptoms became manifest, that is, the date of the stroke in 1999.

Tribunal's conclusion

The Tribunal accepted a medical opinion that, with the benefit of hindsight, the evidence indicated that atherosclerosis had been developing for many years prior to clinical events, so that atherosclerosis would have been present within 15 years after the veteran stopped smoking in 1979. Substantial occlusion or narrowing of the arteries would have occurred in this period. It accepted the medical evidence that his smoking was a critical factor in acceleration of the underlying process and risk of eventual development of a clinical abnormality.

Formal decision

The Tribunal set aside the decision under review and substituted its decision that Mr Temple's carotid arterial disease and cerebrovascular accident were war-caused.

Federal Court of Australia

Repatriation Commission v Budworth

Ryan, Marshall & Conti JJ

FCA 1421
10 October 2001

Entitlement - standard of proof as to diagnosis and causation

The Repatriation Commission appealed to the Full Court against the decision of Madgwick J concerning the standard of proof to be applied in determining whether or not Mr Budworth was suffering from post traumatic stress disorder. (See 17 *VeRBosity* 19)

Mr Budworth had submitted that the Tribunal applied the wrong standard of proof in determining whether or not he had a disease for which he was entitled to receive a pension. He contended that the Tribunal erroneously applied the civil standard of proof prescribed in s 120(4) of the *VE Act*, rather than the "reverse criminal" standard in s 120(1).

It had previously been thought that the decision of the Full Court in *Repatriation Commission v Cooke* (1998) (14 *VeRBosity* 100), which decided that the standard of proof to be applied in determining whether a veteran suffers from a claimed disease is "reasonable satisfaction", had resolved this issue.

Madgwick J at first instance noted that it is sometimes difficult to determine whether a matter is one of diagnosis or of causation. Where questions of causation are bound up in the question of diagnosis of a particular disease, the reverse criminal standard should be applied if on the balance of probabilities the decision-maker finds that ***a*** disease exists. In this case, the Tribunal accepted that the veteran had some sort of mental disorder. Having found that he suffered some sort of mental ailment, it should have determined issues of causation on the "reverse criminal" standard in s 120(1).

Full Court's conclusion

The Full Court overturned Madgwick J's decision on the appropriate standard of proof in determining whether a claimed injury or disease exists. The Full Court held that:

> "Counsel for Mr Budworth argued that *Cooke* was incorrectly decided or clearly wrong and invited us not to follow it. We decline to take that course because we find the reasoning in *Cooke* persuasive. In our view, s 120(1) of the Act assumes the existence of a relevant injury or disease and provides a standard of proof for the determination of whether that injury or disease was war-caused. When the Commission, or the AAT on review, is required to determine whether a veteran is suffering from the claimed injury or disease, that issue must be decided to the 'reasonable satisfaction' of the decision maker in accordance with s 120(4) of the Act." (paragraph 15)

The Full Court cited with approval the statements of Weinberg J in *Repatriation Commission v Gosewinckel* (1999) 59 ALD 690 which contained an analysis of why *Cooke* was correctly decided. The Court also cited with approval a statement by Whitlam J in *Benjamin* where his Honour questioned the decisions in both *Budworth* and *Meehan.* At paragraph 20 of the decision, the Full Court concluded:

> "We regard *Cooke* as decisive of the critical issue on this appeal, namely what standard of proof is to be applied when determining whether a claimed injury or disease exists."

Other errors of law

The Full Court upheld the decision of Madgwick J to remit the matter to the Tribunal for rehearing on other grounds. The Commission conceded at the hearing that the AAT had made two errors of law:

1. having affirmed the decision cancelling Mr Budworth's entitlement in respect of PTSD, the AAT had erred in failing to consider the exercise of its discretion not to reduce his pension retrospectively; and
2. the AAT had failed to consider whether he suffered from any disease other than PTSD.

Formal decision

The Full Court dismissed the Repatriation Commission's appeal.

[Ed: Mr Budworth has applied for special leave to appeal to the High Court of Australia.]

McLean v Repatriation Commission

Whitlam, Madgwick & Dowsett JJ

FCA 1505
26 October 2001

War widow's pension - tree felling accident - whether reasonable hypothesis that death war-caused

Mrs McLean appealed to the Full Court against the decision of Tamberlin J, dismissing her appeal against a decision of the Tribunal that her late husband's death was not war-caused. (See 17 *VeRBosity* 11)

Mr McLean died in 1953 after being struck by a large rock which became dislodged by a falling tree and rolled down the hillside to where he was standing. He had rendered operational service during World War 2 and the claim was required to be determined in terms of the "reasonable hypothesis" standard of proof in ss 120(1) and (3) of the *VE Act.*

The hypothesis put forward was that Mr McLean suffered from a congenital spinal condition which was made worse by service and as a result, he was unable to move out of the path of the falling rock.

The Tribunal concluded that the material did not point towards the veteran having been aware that the rock was falling nor that he had any warning of the fact. In its view, the hypothesis was too tenuous and was therefore not reasonable.

Court's conclusions

The Full Court concluded that the Tribunal had not erred in law in deciding that the hypothesis was not reasonable. There was no material pointing to any lack of mobility being attributable to the veteran's operational service nor to a lack of mobility having contributed to causing his death. In the Court's view, these matters justified the factual finding that the hypothesis was not reasonable.

The Full Court said:

> "In order that the hypothesis be reasonable, it was only necessary that it not be 'obviously fanciful or untenable' to adopt the wording of *Byrnes*. We accept that this test required that the supporting material point to some fact or facts supporting the hypothesis (*Bushell v Repatriation Commission* (1992) 175 CLR 408 at 414, cited in *Bey* at 372). The hypothesis must be more than a bare possibility. The material

demonstrates that immediately prior to his death the veteran was trying to escape the dangers posed by the falling tree. Any person in that position would have been seeking a position of safety. Although it is unlikely that he or she would consciously have identified all possible sources of danger, it is also unlikely that an experienced timber-getter would have been unaware of the risk that a falling tree might dislodge other trees or rocks. We would think that the objective of such a person in that position would be to get well clear of the whole area or get into some protected position.

In considering whether the material points to the veteran's having failed to find a safe place because of reduced mobility, one must consider many factors. Much would depend upon what was known of the veteran's incapacity and of his actions at the relevant time, particularly the evasive action actually taken by him and the extent by which he failed to attain a position of safety. The possibility of an error of judgment, perhaps because he was not aware of the falling rock, might also be relevant. The Tribunal appears to have considered all relevant matters and to have concluded that there was 'no evidence pointing to (the veteran's) mobility or otherwise being a relevant factor'. This view was clearly open."

Formal decision

The Full Court dismissed Mrs McLean's appeal.

Fuss v Repatriation Commission

Wilcox J

FCA 1529
2 November 2001

Entitlement - death from metastatic carcinoma of unknown primary - H pylori infection

Mrs Fuss appealed to the Federal Court against a decision of the Tribunal which determined that the death of her late husband was not war-caused. Mr Fuss rendered operational service in Morotai during World War 2. He died in 1998 from metastatic adenocarcinoma of unknown primary. Although no primary site of the carcinoma was established, it was suggested as being large intestine, stomach, pancreas or prostate.

The Statement of Principles concerning malignant neoplasm of the stomach (No 67 of 1997) included as a factor related to service:

"(b) for carcinoma of the fundus, body, antrum or pylorus of the stomach only,

(i) contracting *Helicobacter pylori* infection at least ten years before the clinical onset of malignant neoplasm of the stomach;"

Dr P Katelaris, a clinical gastro-enterologist, put forward the hypothesis at the Tribunal that the late veteran while serving in Morotai became infected with *H pylori*, which later in his life caused the development of a gastric adeno-carcinoma, which metastasised to the liver causing his death. He acknowledged that there was no direct evidence that the veteran suffered from *H pylori* infection or stomach cancer. However, Mr Fuss was diagnosed in 1992 with a duodenal ulcer and there is a significant association

(90% or more) between duodenal ulceration and *H pylori* infection.

The Tribunal noted that there were two elements to the hypothesis. The first was that the veteran contracted *H pylori* infection at least ten years before the clinical onset of malignant neoplasm of the stomach. The second was that the stomach was the primary site.

The Tribunal rejected the hypothesis because of the absence of particular facts that would "allow the Tribunal to establish" the elements of the hypothesis. As a consequence, the hypothesis was too remote and/or too tenuous.

Submissions

Mrs Fuss's counsel submitted that the Tribunal had erred in law in the approach that it adopted in considering the hypothesis. He submitted that the main error was in failing to distinguish between the question whether the facts assumed in the hypothesis were established and the question whether the hypothesis was reasonable. He said it was erroneous for the Tribunal to hold a hypothesis to be unreasonable simply because it depended upon a prior hypothesis.

The hypothesis assumed that the primary carcinoma was gastric adenocarcinoma. A number of medical witnesses agreed that it was a possibility that the stomach was the primary site although there was no positive evidence. Counsel submitted that it was not open to the Tribunal to find that the facts did not point to Mr Fuss contracting *H pylori* in Morotai and to the primary cancer being in the stomach.

Court's conclusion

Wilcox J agreed that the Tribunal had erred in law in its approach to the hypothesis in this case. His Honour said that following the enactment of s 120A, for a hypothesis to be a "reasonable hypothesis" within the meaning of s 120(3) of the Act, the factors specified in any relevant Statement of Principles must be pointed to by the facts before the Commission (or Tribunal), even though not proved upon the balance of probabilities.

Wilcox J said that in using the word "establish" in relation to the two elements of the hypothesis, it seemed that the Tribunal was asking itself whether there was material that made good, or proved the correctness of, the elements of the hypothesis. His Honour concluded:

> "… the present Tribunal's repeated use of the word 'establish' reflects an error of substance, not merely loose expression of a permissible approach. I say this because it is apparent that the hypothesis advanced by Dr Katelaris was rejected, not because it was 'fanciful or unreal' (to use the language of *East*) or because it was inconsistent with known facts, but because the Tribunal was not satisfied about the factual foundation for the hypothesis. In requiring to be affirmatively satisfied of the truth of the facts assumed by Dr Katelaris, the Tribunal erred in law."

Formal decision

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

White v Repatriation Commission

Conti J

FCA 1585
9 November 2001

Special rate - last paid work

Mr White appealed to the Federal Court against a decision in which the Tribunal determined that he was ineligible for the Special rate. As he was over the age of

65 years, the issue was whether he was prevented, by war-caused incapacity alone, from continuing to undertake his "last paid work" that began before he turned 65. It was also required in terms of s 24(2A)(g) that he had worked either as an employee of another person or on his own account for a continuous period of at least 10 years that began before he turned 65.

Mr White was a qualified accountant and last undertook remunerative work in November 1995. He was employed as a company secretary from 1960 until 1978 when he resigned as a result of declining health due to war-caused injuries. He and his wife then operated a small farm from 1979 to 1990 and in addition, he did casual accountancy work. In 1991, he commenced employment with an accountancy firm. He also taught part-time at a TAFE college from 1985 to 1993 and at Skillshare from 1994 to 1995.

The Tribunal found that the part-time teaching was work on his own account and that the accountancy work from 1991 to 1993 was as an employee. The Tribunal concluded that he had not undertaken "remunerative work" for a continuous period of 10 years that began before he turned 65 years of age on 13 April 1984, either as an employee or as an independent contractor. He thereby failed to meet the requirements set out in s 24(2A)(g) of the Act. Consequently he did not qualify for a pension at the Special rate.

Submissions

Mr White's counsel submitted that in examining whether he satisfied s 24(2A)(g)(ii) and the continuity test, the Tribunal had erroneously construed it as requiring 10 years continuous remunerative work on his own account.

Court's conclusions

Conti J found that the Tribunal had not erred in law in its consideration of Mr White's application. He said that the continuity test in s 24(2A)(g)(i) focuses upon the need to identify one employer during the statutory 10 year period, subject only to exceptions in the case of a predecessor or predecessors of that employer. This requirement is irrespective (implicitly) of what changes might have occurred in the nature of the business of that employer or its predecessor or predecessors during that period of time. Section 24(2A)(g)(ii) focuses on only one species of profession, trade, employment, vocation or calling worked by a veteran on his or her own account. The expression "employment", as used in sub-paragraph (ii), connotes self-employment only, given the preceding words "working on his or her own account" which control the subsequent words "in any profession, trade, employment, vocation or calling".

Conti J noted that in Mr White's case, there was no continuity of employment either as an employee or on his own account for the requisite 10 year period. Accordingly, he failed to satisfy the requirements of s 24(2A)(g).

Finally, Conti J said that contrary to the Tribunal's finding, there was nothing in the statutory context to exclude from the ambit of the statutory expression "remunerative work" in s 24A, the provision of goods or services received by a veteran that is quantifiable in money.

Formal decision

The Court dismissed Mr White's appeal.

Repatriation Commission v Richardson

Dowsett J

FCA 1626
16 November 2001

Entitlement - review of pension under section 31(6)

The Repatriation Commission appealed to the Federal Court against the Tribunal's decision that the revocation of Mr Richardson's entitlement was beyond its power under the *VE Act.* (See 17 *VeRBosity* 38).

The Commission had determined in 1996 and 1997 that Mr Richardson was suffering from a depressive disorder, post traumatic stress disorder and psychoactive substance abuse which were war-caused. In 1999, following receipt of information from the Army Office, the Commission purported to review its earlier decisions under s 31(6) of the *VE Act* and to revoke the determinations that his depressive disorder, PTSD and psychoactive substance abuse were war-caused. It reduced his rate of pension to 30% of the General rate.

Meaning of s 31(6)

Dowsett J observed that the Tribunal's decision seemed to imply that the Commission may not cancel or vary a pension upon the ground that it no longer considers a relevant condition to have been war-caused. Presumably, this view was based on the fact that the Commission's powers under s 31(6) include only cancelling, suspending or decreasing the pension.

Dowsett J said that the condition precedent to the exercise of the power under s 31(6) is that the Commission must be satisfied that:

- some matter which affects the payment of a pension or allowance was not before the Commission, the Board or the Administrative Appeals Tribunal when the decision to grant, or a decision to vary a pension or allowance was made; and
- having regard to that matter, a pension or allowance should be cancelled or suspended or is being paid at a higher rate than it should be.

He continued:

> "In my view, provided the relevant condition precedent prescribed by s 31(6) is satisfied, the Commission may cancel or vary a pension or allowance upon the ground that it is no longer of the view that a relevant incapacity was war-caused."

Mr Richardson submitted that there was no "matter" which was not before the Commission at the relevant time and that the condition precedent to the exercise of the power under s 31(6) was therefore not satisfied. He asserted that at the time of its decision in January 1998 accepting gastro-oesophageal reflux disease as war-caused, the Commission must have been aware of the Army Office material. Dowsett J said that this decision had nothing to do with whether his depressive disorder, PTSD and psychoactive substance abuse were war-caused.

Court's conclusion

Dowsett J concluded that the Tribunal was wrong in its construction of s 31(6). His Honour said:

> "Should the Commission consider that either the **original** decision to grant the pension or **any** subsequent decision to vary the rate was made without access to relevant material, then it may consider whether or not the pension or allowance should be cancelled, suspended, or the rate reduced. In the present case the

> Commission asserted that the original decision to grant the pension and subsequent decisions to vary the rate (perhaps excluding that of 20 January 1998) were all made in ignorance of the Army Office material. It was open to the Commission to be satisfied that such material affected the payment of the pension, that it was not before it, the Board or the Tribunal when those relevant decisions were made, and that the pension ought to be reduced. If it was so satisfied, then it was entitled to reduce the pension, which is what it purported to do. To the extent that the Tribunal decided to the contrary based upon its construction of subs 31(6), it was in error. The references in the Commission's decision to 'revocation' of earlier decisions explained (perhaps inaccurately) the decision concerning the pension, but only the latter decision had any effect. It was authorized by subs 31(6)."

The Commission also claimed that it was denied procedural fairness in that the Tribunal gave it no notice that it proposed to determine the matter upon that basis, nor an opportunity to be heard concerning it.

The Court found it unnecessary to deal with this ground of appeal in view of its decision on the main issue.

Formal decision

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

Spargo v Repatriation Commission

Spender, Gray & Dowsett JJ

FCA 1763
12 December 2001

Whether operational service - injury in course of journey to Korea - return to Australia without entering operational area

Mr Spargo appealed to the Full Court against the decision of Whitlam J, which allowed the Repatriation Commission's appeal and remitted the matter to the Tribunal for rehearing. Whitlam J held that Mr Spargo was not entitled to a pension under the *VE Act* as he was not rendering operational service in terms of section 6C when he suffered the relevant injury. (See 17 *VeRBosity* 41)

The background to this matter is that Mr Spargo was serving in *HMAS Sydney* when she departed Australia for Korea on 31 August 1951. The ship was allotted for duty in the operational area of Korea from 31 August 1951 to 22 February 1952. He was seriously injured before the ship arrived in Japan. On arrival at Kure in Japan, he was transferred to *HMS Glory* for return to Australia. He arrived back in Australia on 17 October 1951. He did not come within the operational area of Korea which extended 185km from the coast of Korea.

Submissions

The Full Court said that the construction of s 6C depends on the extent to which the deeming provision in s 6C(3) qualifies the provisions of s 6C(1). In its terms, subs (3) provides that, for the purposes of subs (1), a person is "taken to have rendered continuous full-time service in an operational area" during the period specified. In normal circumstances, this period runs from departure from Australia until return to Australia.

Mr Spargo's counsel submitted that the effect of the deeming provision is that a person who has been allotted for duty and has left Australia following that allotment must be regarded as having rendered continuous full-time service in the operational area, even if that person did not in fact render any service in that area.

The Repatriation Commission submitted that subs (3) is intended only to have the effect of extending the period of operational service when actual service was rendered in an operational area. The time spent in travelling to and from the operational area must be regarded as part of the service in the operational area, but only where there has been such service.

Full Court's conclusion

The Full Court observed that each of these constructions was reasonably open. In view of this ambiguity, it was appropriate to have regard to the purpose or object of the *VE Act*. The Court said:

> "It is plain that the purpose or object of s 6C(3) is to extend the benefits of the *VE Act* to service personnel who suffered injury or disease whilst on the way to, or on the way home from, an operational area. It is likely that the thinking behind such an extension has to do with the increased risk to which service personnel were subjected because of having to be on a war footing throughout the journey. It is reasonable to suppose that the normal level of consideration for the individual safety of each serving person is overridden to a degree by the need to be ready for action throughout the whole journey. The expectation of a hostile encounter is increased because the journey is undertaken to enable participation in hostilities."

The Full Court said that reference to the purpose or object of the Act did not resolve the ambiguity in s 6C. The Court then referred to the Explanatory Memorandum to ascertain the meaning of s 6C. The Court said it was plain from the Memorandum accompanying the 1995 Bill that the benefit was intended only to be available to a person who had actually carried out service in an operational area while allotted for duty in that operational area. The Memorandum accompanying the 1997 Bill disclosed the same intention.

The Full Court concluded:

> "The result is that s 6C must be construed as providing that operational service was rendered only by a person who actually rendered service in an operational area, and not by someone injured in the course of a journey towards the operational area, who does not reach that area."

Formal decision

The Full Court dismissed Mr Spargo's appeal.

Hill v Repatriation Commission

von Doussa J

FCA 1775
17 December 2001

Post traumatic stress disorder - whether reasonable hypothesis - psychoactive substance abuse

Mr Hill appealed against a decision of the Tribunal that his post traumatic stress disorder was not war-caused. (See 16 *VeRBosity* 101). He served in the RAN from 1965 to 1978 and had operational service in *HMAS Melbourne* in Vietnamese waters on two occasions

in 1966. He also had eligible defence service from 1972 to 1978.

Mr Hill relied on several incidents during his naval service as having caused or aggravated his PTSD. The first was when he received an electric shock on board *HMAS Melbourne* on 16 March 1966. The second was on 28 April 1966 when a Sea Venom aircraft crashed into the South China Sea. He claimed that he saw a pilot trying to escape through the canopy of the aircraft as it sank. A third incident was in New Guinea shortly before independence when some PNG sailors rioted.

The Tribunal considered that as the electric shock and PNG incident occurred outside periods of eligible service, they were not relevant to Mr Hill's application.

The Tribunal noted that a psychiatrist had made a diagnosis of PTSD. The report stated that the electrocution was "probably the precipitating factor" and the condition had been compounded by other experiences, especially those in the riot in New Guinea.

The Tribunal found that although the material pointed to Mr Hill meeting some of the criteria required for PTSD, it did not point to all of them. There was no material pointing to his PTSD arising out of, or being attributable to the Sea Venom incident which occurred his eligible war service. Therefore, the claim failed at the third stage of the process outlined by the Full Court in *Repatriation Commission v Deledio* (1998).

Errors of law

Von Doussa J identified three errors of law in the approach adopted by the Tribunal. He said:

> "First, I consider that the Tribunal erred at the third stage of the four stage approach in that it engaged upon a fact finding exercise. At the third stage the Tribunal should still be dealing with the hypothesis. Fact finding, insofar as it is necessary, does not arise until the fourth stage. Moreover, in doing so, the Tribunal departed from the requirement of s 120(1) which requires that the Commission (and in turn the Tribunal) shall determine that a disease was a war-caused disease unless it is satisfied, beyond reasonable doubt that there is no sufficient ground for making that determination. Secondly, I consider the truth of the fact about which the Tribunal was satisfied was not a fact inconsistent with the hypothesis that disproved it beyond the reasonable doubt. Thirdly, the Tribunal failed to consider at all the claim based on psychoactive substance abuse or dependence, the SoP requirements for which are considerably less onerous than those for PTSD."

Von Doussa J said that the Tribunal erred in finding that the hypothesis did not fit the requirement of para (a) of the SoP that his response involved "intense fear, helplessness or horror". The hypothesis advanced was that he did suffer an emotion of helplessness that was intense, and sufficiently so to cause him recurrent distressing recollections of the event. As an hypothesis, it fitted the requirement of para (a), and that was sufficient to meet the third stage requirement. It was not until the fourth stage of the *Deledio* process that the Tribunal should have engaged in a fact finding exercise of whether in truth the applicant's emotion of helplessness was "intense".

Von Doussa J concluded that the Tribunal also erred at the fourth stage of the *Deledio* process. The relevant fact in this case would be that the veteran had experienced, witnessed or been confronted with an event that involved actual or threatened death or serious injury, or that the veteran's response involved intense fear, helplessness or

horror. A finding beyond reasonable doubt that there could not have been any person trapped under the canopy of the plane as described by the applicant did not disprove those facts.

Finally, von Doussa J concluded that the Tribunal's failure to address an alternative claim in relation to psychoactive substance abuse also involved an error of law.

Formal decision

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

[Ed: The Repatriation Commission has lodged an appeal to the Full Federal Court.]

Bull v Repatriation Commission

Moore, Emmett & Allsop JJ

FCA 1832
21 December 2001

Entitlement - death due to cerebrovascular accident - alcohol consumption

Mrs Bull appealed to the Full Court against the decision of Gyles J, dismissing her appeal against a decision of the Tribunal that her late husband's death was not war-caused. He had died from a cerebrovascular accident and it was alleged that his death was causally related to war service due to alcohol consumption.

The Tribunal found that there was no evidence that the late veteran suffered from any psychiatric disorder arising from war service or that he drank excessively because of war service. The Tribunal concluded that so much of the hypothesis was "left open" as to make it so tenuous as to be not reasonable. Gyles J found that the Tribunal had not erred in law in the approach it had adopted. (See 17 *VeRBosity* 53).

Submissions

Mrs Bull's counsel submitted that the Tribunal had misapplied the test of whether a reasonable hypothesis had been "raised" on the material before it. On the material before it, it was not open as a matter of law for the Tribunal to come to the opinion that the material did not raise a relevant reasonable hypothesis. This was for two reasons:

- first, material was said not to have been taken into account by the Tribunal and so regard had not been had to *all* the material before it;
- secondly, even if regard had been had to all the material, no tribunal properly understanding its task could have reached the conclusion it did.

Court's conclusion

Emmett and Allsop JJ noted that the correct approach to be adopted was outlined by the Full Court in *East v Repatriation Commission* (1987). The Court said in *East* that a reasonable hypothesis requires more than a possibility, not fanciful or unreal, consistent with the known facts. It is an hypothesis pointed to by the facts, even though not proved upon the balance of probabilities.

Emmett and Allsop JJ said that an hypothesis is a proposition made as a basis for reasoning or a supposition made as a starting point for further investigation from known facts. It is one connecting the death with service. Whether or not the material pointed to or raised a hypothesis connecting war service and drinking in this case was a question of fact. No error of law was disclosed and the appeal should be dismissed.

Moore J agreed that the appeal should be dismissed. He said that the opinion

whether the material raises a reasonable hypothesis in this case involves several elements. One is the consideration of the whole of the material before the Tribunal to identify what facts are raised which bear upon a hypothesis which might apply to the circumstances of the veteran. Another is to ascertain whether the material raises that hypothesis and, if so, whether that hypothesis is reasonable.

Moore J concluded that although the Tribunal had used the language of fact finding in its reasons for decision, it had undertaken the task required in terms of s 120(3). The hypothesis to be reasonable for the purposes of s 120(3) must be one pointed to by the material before the Tribunal.

Formal decision

The Full Court dismissed Mrs Bull's appeal.

[Ed: In *Repatriation Commission v Deledio* (1998), the Full Court said that if there is no Statement of Principles in force, an hypothesis will be taken not to be reasonable. (See 14 *VeRBosity* 45). The Full Court in *Bull* said that *Deledio* was wrong on this point in that it overlooked subs 120A(4). If there is no SoP in force, a claim will be decided by applying s 120 without s 120A having a relevant effect.]

Benjamin v Repatriation Commission

Moore, Emmett & Allsop JJ

FCA 1879
21 December 2001

Entitlement – diagnostic criteria – standard of proof applicable

Mr Benjamin appealed to the Full Court against the decision of Whitlam J, dismissing his appeal against a decision of the Tribunal. (See 17 *VeRBosity* 52). The Tribunal found that his psychoactive substance abuse was war-caused but was not reasonably satisfied that his post traumatic stress disorder was war-caused. It was not satisfied that the circumstances of his service met the requirement of exposure to a "traumatic event" of the kind required by the Statement of Principles for PTSD.

Whitlam J held that the Tribunal had erred in deciding whether the veteran suffered from PTSD solely by reference to the criteria in the SoP. However, this was of no consequence since, in a diagnosis of PTSD, exposure to a "traumatic event" was the primary criterion.

Mr Benjamin also contended that the Tribunal had erred in law by failing to consider whether he had an alternative psychiatric condition to PTSD. Whitlam J held that where the veteran had claimed PTSD, the Tribunal was not required to consider whether he suffered from an alternative psychiatric condition. Whether he suffered from a claimed injury or disease was to be determined in accordance with the balance of probabilities standard of proof.

Psychiatric condition

On appeal to the Full Court, Mr Benjamin submitted that the Tribunal had erred by

failing to consider whether he had a war-caused condition other than PTSD.

The Full Court agreed that as an inquisitorial body, the Tribunal is obliged to make the correct or preferable decision in the case before it. Where a finding is made by the Tribunal that a veteran has contracted a disease, and it would be open to conclude that such a disease may be war-caused, it is incumbent upon it to consider that possibility and make a decision concerning it.

The Full Court concluded that the Tribunal had erred in so far as it failed to consider whether or not the veteran's psychiatric problems might be a "disease" and might be war-caused within the meaning of the *VE Act*.

Standard of proof

The second issue raised before the Full Court concerned the standard of proof to be adopted by the Tribunal in considering whether any psychiatric problems identified constituted a war-caused disease. The Full Court said that when a decision-maker is required to determine whether a veteran is suffering from a particular injury or disease, that issue must be decided to its reasonable satisfaction in accordance with s 120(4) of the *VE Act* - see *Repatriation Commission v Budworth* (2001).

The Full Court concluded that the Tribunal had correctly applied the standard specified in s 120(4), saying:

> "The first question for the Tribunal will be how to characterise the psychiatric problems exhibited by the veteran. If the Tribunal is satisfied that the symptoms constitute an injury or disease, the second question will be whether there is an SoP in force in respect of the disease. The diagnosis of that disease, and the determination of whether or not there is an SoP in force in respect of that kind of disease, falls for determination according to the standard of proof laid down in s 120(4). …
>
> However, if the Tribunal is reasonably satisfied that the psychiatric problems presently suffered by the veteran fall within an SoP that is in force, it will be necessary to apply s 120(1) as qualified by s 120(3), as that provision is in turn qualified by s 120A(3). If, on the other hand, the Tribunal is not reasonably satisfied that the psychiatric problems presently suffered by the veteran fall within an SoP that is in force, it will be necessary for the Tribunal to determine, on all of the evidence available to it, whether s 120(3) is satisfied, without reference to s 120A(3)."

Formal decision

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

[Ed: Mr Benjamin has applied for special leave to appeal to the High Court on the issue of standard of proof on diagnosis.]

Rendell v Repatriation Commission

French J
FCA 1881
21 December 2001

Assessment - remunerative work - effects of alcohol abuse

Mr Rendell appealed to the Federal Court against a decision of the AAT refusing an increase in pension to the Special rate. He was previously assessed at 100 per cent of the general rate for conditions accepted as war-caused, including:

- ischaemic heart disease
- chronic anxiety state
- post traumatic stress disorder
- irritable bowel syndrome.

Mr Rendell served in the Australian Army from 1964 to 1970. He rendered operational service in Sarawak and Vietnam. He subsequently worked as a plant manager, as a cleaner and in a soft drink delivery franchise. He ceased full-time work in June 1990 and was granted service pension on the grounds of permanent incapacity. He worked part-time as a paving contractor for a few months in 1991 but found the work too strenuous.

Mr Rendell told the Tribunal that he ceased full-time work delivering soft drinks because he got upset with bad debt customers, lack of interest in the job, lack of business experience, irritability and aches and pains. He said that he got on well with ex-Army colleagues but sometimes became irritated with one or two members of his bowling club with whom he had a difference of opinion.

The Tribunal found that Mr Rendell was not prevented by war-caused disabilities alone from continuing to undertake remunerative work, in terms of s 24(1)(c) of the *VE Act*. This was because of the effects of alcohol abuse which was a separate condition that had not been claimed as war-caused. Accordingly, the Tribunal affirmed the decision assessing his disability pension at 100 per cent of the general rate.

Appeal grounds

Mr Rendell's counsel submitted that the Tribunal had made a number of errors of law. He submitted that there was no evidence that alcohol abuse was a distinct disability which affected work capacity in this case.

French J did not accept that there was no evidence to support the Tribunal's finding. He said that the Tribunal was entitled to have regard to the apparent linkage between alcohol abuse, muscle weakness and fatigue and difficulty in engaging in remunerative work in this case. It was also entitled to form its own judgment on Mr Rendell's evidence of his alcohol consumption.

Mr Rendell also submitted that the Tribunal had failed to apply the ameliorating provisions of s 24(2)(b) and whether his PTSD caused incapacity was the substantial (as opposed to the only) cause of his inability to obtain remunerative work.

French J said that the Tribunal was correct in its finding that Mr Rendell did not satisfy the requirements of s 24(1)(c). He said that s 24(2)(b) is ameliorative of s 24(1)(c) and is to be applied where the Tribunal is satisfied that a veteran has been genuinely and actively pursuing remunerative work in the sense of looking to obtain work and that war-caused incapacity is the substantial cause of his inability to obtain it. In this case, the Tribunal's finding of other significant factors being involved in the applicant's failure to continue or resume remunerative work negated the characterisation of his accepted war-caused disabilities, including the PTSD, as the "substantial cause of his … inability to obtain remunerative work".

Finally, Mr Rendell submitted that the Tribunal had unduly focussed on his cessation of work as a soft drink distributor. French J said that the Tribunal's finding was not unduly confined to a specific type of remunerative work that he had done but dealt more generally with the types of work he had done or could do.

Formal decision

The Court dismissed Mr Rendell's appeal.

Federal Magistrates Court of Australia

Hill v Repatriation Commission

McInnis FM

FMCA 83
26 October 2001

Lumbar spondylosis - acute symptoms and signs - wrong Statement of Principles applied

Mr Hill appealed against a decision of the Tribunal that his lumbar spondylosis was not war-caused. He rendered operational service with the RAAF in Malaya from September 1955 to December 1956 and was employed as an electrician. He claimed that he suffered an injury to his back while lifting an electric motor. The person assisting him dropped the other end which meant that he took the full weight of the motor and felt immediate pain across his lower back. The pain continued for 7-8 days but he did not seek medical treatment.

Error of law

It was agreed by both parties on appeal that in deciding that Mr Hill's lumbar spondylosis was not war-caused, the Tribunal had applied the wrong Statement of Principles. Mr Hill submitted that the Tribunal had erred in law in its interpretation of the Full Court's decision in *Repatriation Commission v Keeley* (2000). It had applied the SoP in force at the time of the Commission's decision (No 165 of 1996) rather than the SoP in force at the time of the review.

The Court agreed that in light of two recent decisions of the Full Court in *Repatriation Commission v Gorton* and *Repatriation Commission v Williams*, the Tribunal should have considered the application in terms of the SoP in force at the time of the review (No 27 of 1999). If the application would have failed under the later SoP, it was then necessary to consider the earlier SoP under the "accrued right" recognised in *Keeley's* case.

The Court said that although the Tribunal had erred in law by applying the wrong SoP, it was necessary to consider the terms of both SoPs in order to determine whether applying the correct SoP would have altered the outcome of the case. If the outcome would have been the same, it would be futile to remit the matter to the Tribunal for rehearing.

SoP 165 of 1996 requires "acute symptoms and signs of pain, tenderness, and altered mobility or range of movement of that part of the spine", whereas SoP 27 of 1999 requires "acute symptoms and signs of pain **and** tenderness, and **either** altered mobility or range of movement of the lumbar spine" (emphasis added). Both SoPs require "acute symptoms and signs" of pain and of tenderness.

The Court concluded from its examination that the application of the correct SoP would not have altered the outcome in this case. The Court said that when considering the definition of "trauma to the lumbar spine", the Tribunal was entitled to rely upon the meaning of "acute symptoms and signs" as discussed in *Harris v Repatriation Commission* (2000) (16 *VeRBosity* 75). The reasoning of Finn J in *Harris* has equal application in relation to the definition in SoP 27 of 1999.

The Court also rejected Mr Hill's submissions that the Tribunal had failed to follow the four step approach outlined by the Full Court in *Repatriation Commission v Deledio* (1998) and had failed to provide adequate reasons for its decision.

Formal decision

The Court dismissed Mr Hill's appeal.

Burge v Repatriation Commission

McInnis FM

FMCA 74
26 October 2001

Errors of law - remitted to Tribunal by consent

Mr Burge lodged an appeal against a decision of the Tribunal that his intra-cranial haemorrhage, mild anxiety disorder and varicose veins left leg were not war-caused. He subsequently abandoned his appeal in relation to varicose veins.

The parties submitted that the matter should be remitted by consent to the Tribunal for rehearing.

McInnis FM observed that on appeal, the Court is required to identify the particular error of law made by the Tribunal and said:

> "… when a court is confronted with minutes of proposed orders in the form that requires both the appeal to be allowed and the matter remitted to the AAT for re-hearing according to law, then it is incumbent upon the appellant court to be satisfied that it is appropriate to make the order. Consent to the order does not mean that the order should be automatically made by the court. The process should not be regarded as a mere formality."

Submissions

Mr Burge's counsel submitted that the Tribunal had made a number of errors of law including:

- failure to set out properly the steps to be followed arising from *Deledio's* case;
- failure to set out the appropriate standard of proof which in the case of the diagnosis is on the balance of probabilities and in the case of determining whether the facts at least point to a reasonable hypothesis in a Statement of Principles it is a reverse onus beyond reasonable doubt standard of proof;
- failure to consider applying the more recent and potentially more favourable Statements of Principles, in accordance with *Gorton's* case.

The Repatriation Commission conceded that the Tribunal had erred in applying the earlier Statements of Principles. The Court said that the Tribunal had erred in relation to the three grounds set out above and that it was appropriate to remit the matter to the Tribunal for rehearing. The Court rejected several other grounds of appeal.

Formal decision

The Court allowed Mr Burge's appeal and remitted the matter to the Tribunal for rehearing, with the exception that varicose veins left leg was affirmed as not being war-caused.

[Ed: The Repatriation Commission has lodged an appeal to the Federal Court on the ground that McInnis FM erred in law by requiring that SoP factors must be disproved beyond reasonable doubt before a claim may be refused.]

Repatriation Commission v Linton

McInnis FM

FMCA 124
20 December 2001

Entitlement - chronic airflow limitation - errors of law

The Repatriation Commission appealed against the decision of the Tribunal which determined that Mr Linton's chronic airflow limitation was war-caused.

Mr Linton served in the RAN in the Vietnam operational area in *HMAS Sydney* for periods totalling 59 days. The Tribunal found that he was smoking at least 10 pack years before the clinical onset of chronic airflow limitation.

Errors of law

The Commission submitted that the Tribunal had made a number of errors of law in its decision. In particular, the Tribunal had failed to consider whether the hypothesis relating to smoking contained the two elements prescribed by the Statement of Principles.

The first element is that Mr Linton smoked at least 73,000 cigarettes before the clinical onset of his chronic airflow limitation up to and including 1978 as required by the relevant SoP. Secondly, that consumption of cigarettes was related to Mr Linton's operational service as required by the SoP.

It was submitted that for the hypothesis to include those elements the material before the AAT would need to raise or point to each of the two elements identified and only then could it be said that the hypothesis fitted the template of the SoP.

On a proper construction of the SoP, the Tribunal was bound to conclude that chronic airflow limitation was not war-caused in this case. Based on information provided by the veteran, his consumption of cigarettes related to operational service was less than half the level required by the SoP.

Court's conclusions

The Court agreed that the Tribunal had erred in law in its construction of the SoP. The essential issue in this case was whether the veteran's cigarette consumption was "related to" operational service. The Tribunal had failed to consider whether the hypothesis which it identified contained the elements prescribed by the SoP, namely that Mr Linton's consumption of cigarettes prior to the clinical onset of his chronic airflow limitation was related to his operational service.

Therefore, the Tribunal had erred in its construction of both s 120A(3) of the *VE Act* and the relevant SoP for chronic airflow limitation.

The Court also agreed that on a proper construction of the SoP, the Tribunal was bound to conclude that chronic airflow limitation was not war-caused in this case.

Formal decision

The Court set aside the Tribunal's decision and substituted its decision that Mr Linton's chronic airflow limitation was not war-caused.

Ingram v Repatriation Commission

McInnis FM

FMCA 125
20 December 2001

Entitlement – whether death war-caused – smoking – sun exposure

Mrs Ingram appealed against a decision of the Tribunal that the death of her late husband was not war-caused. He was allotted for duty in the Vietnam operational area in *HMAS Vendetta* from 25 May to 11 June 1966 and this constituted operational service. He also had eligible defence service from 7 December 1972 to 6 February 1984. He died in 1993 and the cause of his death was certified as respiratory failure and disseminated malignant melanoma.

As Mrs Ingram's claim was lodged prior to 1 June 1994, it was not required to be determined in accordance with Statements of Principles. She contended that excessive solar exposure had contributed to her husband's death.

The Tribunal concluded that there was no connection between the veteran's death and his **defence** service. On the basis of expert medical opinion, the Tribunal was satisfied that the primary site of the veteran's carcinoma was his lung. Although the Tribunal was satisfied that his smoking was sufficiently heavy and prolonged to have caused carcinoma of the lung or kidney and solar exposure would have caused a melanoma, it found that neither the smoking habit nor the solar exposure was related to his eligible service.

Submissions

Mrs Ingram's counsel submitted that the Tribunal had failed to consider whether the late veteran's smoking was related to operational service. It was also alleged that the Tribunal had failed to apply the correct standard of proof in terms of s 120 of the *VE Act*, particularly in relation to operational service.

Court's conclusions

The Court said that while the Tribunal is inquisitorial, it is not necessarily required to conduct an investigation into an issue which has been disavowed by the applicant and about which there is simply no evidence before the Tribunal. In this case, there was a clear indication that Mrs Ingram was not relying on her late husband's operational service.

The Court said that in circumstances where the applicant was not relying on the operational service, there was also no failure to apply the correct standard of proof. The Tribunal had made no errors of law in its review of Mrs Ingram's application.

Formal decision

The Court dismissed Mrs Ingram's appeal.

Statements of Principles issued by the Repatriation Medical Authority

December 2001 - February 2002

Number of Instrument	Description of Instrument
1 of 2002	Revocation of Statement of Principles (Instrument No.368 of 1995 concerning inflammatory periodontal disease and death from inflammatory periodontal disease), and Determination of Statement of Principles under subsection 196B(2) concerning periodontitis and death from periodontitis
2 of 2002	Revocation of Statement of Principles (Instrument No.369 of 1995 concerning inflammatory periodontal disease and death from inflammatory periodontal disease), and Determination of Statement of Principles under subsection 196B(3) concerning periodontitis and death from periodontitis
3 of 2002	Determination of Statement of Principles under subsection 196B(2) concerning gingivitis and death from gingivitis
4 of 2002	Determination of Statement of Principles under subsection 196B(3) concerning gingivitis and death from gingivitis
5 of 2002	Amendment of Statement of Principles, Instrument No.61 of 2001, under subsection 196B(2) concerning pes planus and death from pes planus
6 of 2002	Amendment of Statement of Principles, Instrument No.62 of 2001, under subsection 196B(3) concerning pes planus and death from pes planus
7 of 2002	Amendment of Statement of Principles, Instrument No.27 of 1994, under subsection 196B(2) concerning tinea and death from tinea
8 of 2002	Amendment of Statement of Principles, Instrument No.28 of 1994, under subsection 196B(3) concerning tinea and death from tinea
9 of 2002	Amendment of Statement of Principles, Instrument No.33 of 1994, under subsection 196B(2) concerning cholelithiasis and death from cholelithiasis
10 of 2002	Amendment of Statement of Principles, Instrument No.34 of 1994, under subsection 196B(3) concerning cholelithiasis and death from cholelithiasis
11 of 2002	Amendment of Statement of Principles, Instrument No.81 of 1995, under subsection 196B(2) concerning trigeminal neuropathy and death from trigeminal neuropathy

12 of 2002	Amendment of Statement of Principles, Instrument No.237 of 1995, under subsection 196B(2) concerning congenital cataract and death from congenital cataract
13 of 2002	Amendment of Statement of Principles, Instrument No.238 of 1995, under subsection 196B(3) concerning congenital cataract and death from congenital cataract
14 of 2002	Amendment of Statement of Principles, Instrument No.344 of 1995, under subsection 196B(2) concerning melioidosis and death from melioidosis
15 of 2002	Amendment of Statement of Principles, Instrument No.345 of 1995, under subsection 196B(3) concerning melioidosis and death from melioidosis
16 of 2002	Amendment of Statement of Principles, Instrument No.97 of 1996, under subsection 196B(2) concerning impotence and death from impotence
17 of 2002	Amendment of Statement of Principles, Instrument No.98 of 1996, under subsection 196B(3) concerning impotence and death from impotence
18 of 2002	Amendment of Statement of Principles, Instrument No.99 of 1996, under subsection 196B(2) concerning sudden unexplained death and death from sudden unexplained death
19 of 2002	Amendment of Statement of Principles, Instrument No.100 of 1996, under subsection 196B(3) concerning sudden unexplained death and death from sudden unexplained death
20 of 2002	Amendment of Statement of Principles, Instrument No.55 of 1997, under subsection 196B(2) concerning malignant neoplasm of the pancreas and death from malignant neoplasm of the pancreas
21 of 2002	Amendment of Statement of Principles, Instrument No.56 of 1997, under subsection 196B(3) concerning malignant neoplasm of the pancreas and death from malignant neoplasm of the pancreas
22 of 2002	Amendment of Statement of Principles, Instrument No.19 of 1998, under subsection 196B(2) concerning cardiomyopathy and death from cardiomyopathy
23 of 2002	Amendment of Statement of Principles, Instrument No.20 of 1998, under subsection 196B(3) concerning cardiomyopathy and death from cardiomyopathy
24 of 2002	Amendment of Statement of Principles, Instrument No.39 of 1998, under subsection 196B(2) concerning renal artery atherosclerotic disease and death from renal artery atherosclerotic disease
25 of 2002	Amendment of Statement of Principles, Instrument No.33 of 1999, under subsection 196B(3) concerning renal artery

	atherosclerotic disease and death from renal artery atherosclerotic disease
26 of 2002	Amendment of Statement of Principles, Instrument No.68 of 1998, under subsection 196B(2) concerning non-aneurysmal aortic atherosclerotic disease and death from non-aneurysmal aortic atherosclerotic disease
27 of 2002	Amendment of Statement of Principles, Instrument No.69 of 1998, under subsection 196B(3) concerning non-aneurysmal aortic atherosclerotic disease and death from non-aneurysmal aortic atherosclerotic disease
28 of 2002	Amendment of Statement of Principles, Instrument No.17 of 1999, under subsection 196B(2) concerning adhesive capsulitis of the shoulder and death from adhesive capsulitis of the shoulder
29 of 2002	Amendment of Statement of Principles, Instrument No.18 of 1999, under subsection 196B(3) concerning adhesive capsulitis of the shoulder and death from adhesive capsulitis of the shoulder
30 of 2002	Amendment of Statement of Principles, Instrument No.52 of 1999, under subsection 196B(2) concerning cerebrovascular accident and death from cerebrovascular accident
31 of 2002	Amendment of Statement of Principles, Instrument No.53 of 1999, under subsection 196B(3) concerning cerebrovascular accident and death from cerebrovascular accident
32 of 2002	Amendment of Statement of Principles, Instrument No.37 of 2001, under subsection 196B(2) concerning acquired cataract and death from acquired cataract
33 of 2002	Amendment of Statement of Principles, Instrument No.38 of 2001, under subsection 196B(3) concerning acquired cataract and death from acquired cataract

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 16 JANUARY 2002

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 myeloid leukaemia [Instrument Nos 7/97 & 8/97]	16-01-02
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
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

Description of disease or injury	Date gazetted
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
Mitral valve prolapse	16-01-02
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 – October to December 2001

Carcinoma

carcinoid tumour & renal cell carcinoma
- smoking
  Bayly, J J 29 Nov 2001

Cardiovascular disease

cardiomyopathy
- alcohol consumption
  Margetts, S A 23 Oct 2001

carotid artery disease
- smoking
  Temple, J 30 Nov 2001

hypertension
- alcohol abuse
  Gibson, R J 15 Oct 2001

hypertension & ischaemic heart disease
- salt ingestion & obesity
  Bracey, J S 10 Dec 2001

ischaemic heart disease
- smoking
  Bracken, T A 30 Nov 2001

varicose veins
- standing for long periods
  Crowley, W M 07 Dec 2001

Cerebrovascular disease

cerebrovascular accident
- smoking
  Temple, J 30 Nov 2001

cerebrovascular disease
- hypertension
  Spencer, G G 04 Oct 2001

Death

carcinoma of colon
- ulcerative colitis
  Sahlqvist, E M 04 Oct 2001

carcinoma of prostate
- animal fat consumption
  Crust, N E 02 Oct 2001
  Allen, K 11 Dec 2001
  Hyde, I N 14 Dec 2001

ischaemic heart disease
- hypertension & obesity
  Chalmers, D G 16 Nov 2001

malignant neoplasm of the oral cavity
- alcohol abuse
  Cody, D M 06 Dec 2001

non-Hodgkin's lymphoma
- chronic bronchitis - chain of causation
  Ault, A 30 Nov 2001
- Helicobacter pylori infection
  Jolly, P 14 Nov 2001

Parkinson's disease & cerebrovascular accident
- anticoagulant therapy
  Clarke, D 12 Nov 2001

reticulum cell sarcoma
- Helicobacter pylori infection
  Graham, M E 06 Dec 2001

Extreme disablement adjustment

lifestyle rating
  Bracken, T A 30 Nov 2001

Gastrointestinal disorder

gastro-oesophageal reflux disease
- smoking
  Bracken, T A 30 Nov 2001

peptic ulcer
- smoking
  Bayly, J J 29 Nov 2001

General rate pension

1998 GARP
  Le Juge Segrais, C 08 Nov 2001

Hepatic disorder

cirrhosis of the liver

- alcohol consumption

Whinnen, D 24 Dec 2001

Jurisdiction

review of entitlement by Commission

- whether *ultra vires*

Gibson, R J 15 Oct 2001

Musculoskeletal disorder

cartilagenous lesions (osteochondroma or soft tissue chondroma)

- trauma - falling down stairs

Faust, B S 28 Nov 2001

Dupuytren's contracture

- heavy alcohol consumption

Crowley, W M 07 Dec 2001

Neurological disorder

carpal tunnel syndrome

- repetitive activities - fitter & turner

Cornelius, T 26 Oct 2001

tension headache

- inability to obtain appropriate clinical management

Kattenberg, R F 29 Nov 2001

Osteoarthrosis

hip

- no trauma

Aitken, H 07 Nov 2001

- trauma - fall from truck

Homewood, S H 05 Dec 2001

knee

- intra-articular fracture & trauma - gas explosion in Vietnam

Connors, B J 29 Oct 2001

- no trauma

Keir, M M 19 Nov 2001

Practice & procedure

withdrawal of application

- reinstatement not granted

Phillips, W H J 15 Nov 2001

Psychiatric disorder

alcohol abuse, depressive disorder & generalised anxiety disorder

- severe stressor - cook in Vung Tau

Spelta, B A 16 Nov 2001

alcohol dependence & generalised anxiety disorder

- severe stressor & experiencing a stressful event

Crowley, W M 07 Dec 2001

depressive disorder

- no diagnosis

Trevillian, L 14 Dec 2001

- severe psychosocial stressor - mine explosion

Arnott, N 24 Oct 2001

- stressor - death of daughter

Keir, M M 19 Nov 2001

- suffering from chronic pain

Kattenberg, R F 29 Nov 2001

depressive disorder & alcohol dependence

- severe psychosocial stressor

Bracken, T A 30 Nov 2001

generalised anxiety disorder

- stressful event - observer in Vietnam

Hurn, K 01 Nov 2001

generalised anxiety disorder & alcohol abuse or dependence

- clinical onset

Gould, R F 12 Oct 2001

generalised anxiety disorder & alcohol dependence

- experiencing a stressor - witnessing casualty

Langfield, J 26 Oct 2001

post traumatic stress disorder

- experiencing a stressor - gunfire & witnessing casualty

Wilson, T C 19 Oct 2001

- experiencing a stressor - Vietnam waters

Arnott, M 05 Dec 2001

post traumatic stress disorder & alcohol abuse

- experiencing a stressor - scare charges at Vung Tau

Gibson, R J 15 Oct 2001

Remunerative work

whether unable to work 8 hours a week

- farmer aged 55

Luelf, D F 05 Dec 2001

- post office contractor

Hermsen, G H 30 Nov 2001

whether prevented by war-caused disabilities alone

- club manager - voluntary redundancy

Masters, B J 09 Nov 2001

- colliery worker - retrenchment

Gibson, R J 15 Oct 2001

- crane driver - voluntary redundancy

Ring, R D 30 Nov 2001

- crane driver - workers compensation for back injury

Crooks, B 07 Nov 2001

- labourer, welder & driver

Downing, M A 27 Nov 2001

- maintenance worker

Head, J 16 Nov 2001

- mill worker - resignation

Soper, G 12 Dec 2001

- motor vehicle dealer - bankruptcy

Langfield, J 26 Oct 2001

- nurse - post-natal depression

Watkin, M E 10 Dec 2001

- supermarket operator

Russell, S S 07 Dec 2001

- warehouse worker - temporary incapacity

Morris, K R 19 Oct 2001

whether prevented from continuing last paid work (over 65)

- fishing business

Webber, F 09 Oct 2001

Respiratory disorder

asthma

- non-antigenic stimuli - welding fumes

Trevillian, L 14 Dec 2001

Spinal disorder

cervical spondylosis

- trauma resulting in permanent ligamentous instability

Downing, M A 27 Nov 2001

cervical & lumbar spondylosis

- trauma - fall from ladder

Kattenberg, R F 29 Nov 2001

intervertebral disc prolapse

- smoking

Kattenberg, R F 29 Nov 2001

intervertebral disc prolapse & lumbar spondylosis

- trauma - heavy lifting

Bracey, J S 10 Dec 2001

lumbar spondylosis

- trauma - fall from truck

Homewood, S H 05 Dec 2001

- trauma - jump from helicopter in Vietnam

Neville, P A 06 Nov 2001

Words and phrases

clinical onset

Temple, J 30 Nov 2001