VeRBosity Volume 18 No. 4

## Contents

October - December 2002



## Editor's notes

This edition of *VeRBosity* contains reports on 12 Federal Court decisions relating to veterans' matters handed down in the period from October to December 2002. There are also reports on a decision of the Federal Magistrates Court and on selected AAT decisions.

Information is also included about Statements of Principles issued recently by the Repatriation Medical Authority and matters currently under formal investigation.

The Clarke Report into Veterans' Entitlements has been released and is available on the Internet at:

http://www.veteransreview.gov.au

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Members and friends of the Veterans' Review Board were saddened to hear of the death of Major General Ross Buchan AO on 7 February 2003. Ross was a Services Member of the VRB based in Sydney from late 1991 to 1994. He had served with the Australian Army Training Team in Vietnam from 1966 to 1967 and was mentioned in despatches. He brought broad experience of the military to his work on the VRB and is remembered with warmth and affection.

Robert Kennedy
Editor

# General Information

*Media Release by the Hon Danna Vale, Minister for Veterans' Affairs*
*18 December 2002*

**VIETNAM WATER CONTAMINATION STUDY RELEASED**

The Federal Government will ask the Repatriation Medical Authority to review its principles for veteran compensation claims for exposure to dioxins, after a study found that Royal Australian Navy and some Australian Army personnel serving in Vietnam may have been exposed to dioxins through contaminated drinking water.

The Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, Danna Vale, said she had also asked the Department of Veterans' Affairs to undertake further research into the study findings, using the results in the current Vietnam Veterans Mortality and Cancer Incidence Study.

"The Government commissioned the study in response to concerns from Navy veterans following the 1997 Vietnam Veterans Mortality Study, which showed an elevated mortality rate among RAN personnel, particularly RAN Logistic Support personnel," the Minister said.

"Herbicide exposure through the evaporative water distillation processes used on ships while in Vietnamese waters was identified as one potential cause. Tests by the National Research Centre on Environmental Toxicology have now shown that dioxins can pass through the evaporative distillation process.

"If contaminated water were used in this process, the study indicates it is likely that the consumption of drinking water exposed personnel to dioxin levels that exceeded safe levels proposed by the National Health and Medical Research Council.

"This is a matter of concern to the Government in fulfilling our commitment to care for those who served during the Vietnam War. It potentially affects not only Navy veterans but those who served on Army small ships or travelled as passengers from Vietnam on *HMAS Sydney*."

Minister Vale said she had received the assurance of the Chief of Navy, Vice Admiral Chris Ritchie, that it was unlikely that the problems that may have been experienced in Vietnam would occur now.

"The majority of RAN ships are now fitted with alternative desalination units and, in any case, current operating procedures require that, under ordinary circumstances, production of water for domestic use is not to be undertaken in estuaries, or in seawater which is likely to be contaminated."

Navy continues to refine its potable water standards and to assess the effectiveness of its desalination equipment.

Minister Vale said all Australians who served in Vietnam were already entitled to treatment and compensation for war-caused conditions related to exposure to dioxins. She encouraged veterans who believed they might need assistance for such conditions to contact the Department of Veterans' Affairs on 133 254.

"These results may have implications for the Statements of Principles that govern determination of the links between wartime service and these conditions," Minister Vale said.

"I have asked that the study findings be referred to the independent Repatriation

Medical Authority to consider whether any changes are necessary to these Principles," Minister Vale said.

"The findings will be taken into account in the latest mortality study of Vietnam veterans, which is also investigating rates of cancer among Australians who served in Vietnam.

"Health research is a vital part of meeting the health care needs of our veterans. Considerable effort has gone into researching the health of Vietnam veterans in particular and these findings add significantly to the scientific knowledge available to help provide the support they need.

"This research has always been conducted with strong support from the veteran community and I would like to express my appreciation to the many Vietnam veterans who assisted this study," the Minister said.

"The findings of the study are available on the Department of Veterans' Affairs website at www.dva.gov.au."

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*Extract from Media Release by the Attorney-General, the Hon Daryl Williams AM QC MP*
*6 February 2003*

**IMPROVING THE FEDERAL MERITS REVIEW TRIBUNAL SYSTEM**

The Attorney-General has announced that the Government remains committed to improving the federal merits review tribunal system. In 2000, the Government introduced the *Administrative Review Tribunal Bill*, which would have replaced the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal with a single, independent tribunal. In light of opposition in the Senate, the Government will not seek to introduce the Administrative Review Tribunal legislation in the current Parliament. However, the Government remains convinced that amalgamation of the tribunals will provide real benefits for people seeking administrative review of government decisions and will investigate options for amalgamation in the future.

The Attorney-General said:

> "In the interim, we will undertake sensible reform of the existing tribunals on an individual basis. As a starting point, I propose to reform the Administrative Appeals Tribunal (AAT). While details of the amendments are being settled, areas of amendment could include procedures of the tribunal, constitutional requirements and allowing greater use of ordinary members.
>
> The AAT performs an important role in the Government's commitment to provide a fairer and more effective merits review system that strives to deliver administrative justice to individuals and a high standard of government decision-making. The AAT must be able to deliver informal, fast and fair merits review, unfettered by costly and legalistic procedures.
>
> The Government's reforms are aimed at enabling the AAT to flexibly manage its workload and to ensure that reviews are conducted as efficiently as possible."

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# Administrative Appeals Tribunal

## Re H Fairweather and Repatriation Commission

Carstairs

[2002] AATA 916
11 October 2002

***Whether death war-caused – clinical onset of ischaemic heart disease – cigarette smoking***

Mrs Fairweather applied to the Tribunal for review of a decision that the death of her husband was not related to his war service. He had served in the Pacific theatre during World War 2 and this constituted operational service in terms of the *VE Act*.

The veteran's death certificate indicated that he died of systemic amyloidosis, renal failure, cardiac failure and peritonitis. Amyloidosis is a disorder that results from the abnormal deposition of amyloid protein in various tissues and organs of the body which can result in abnormal functioning of the organs. The most commonly affected organs are the heart, kidneys, nervous system and gastro-intestinal tract. Amyloidosis was diagnosed in 1996 and he died in 1997.

Mrs Fairweather submitted that her husband's death may have been due to ischaemic heart disease (IHD) that could be related to a war-caused smoking habit. She met her husband in 1947 and gave evidence that he had commenced smoking during his service. He continued to smoke at work until ceasing in 1984 and began to experience breathlessness in about 1989.

Mrs Fairweather sought to rely on factors 5(e) and (h) of the Statement of Principles (No 38 of 1999) which relate to smoking one to five pack years of cigarettes within five years of clinical onset of ischaemic heart disease or five to 20 pack years within 15 years of clinical onset, or inability to undertake physical activity for at least the five years immediately before clinical onset.

**Medical evidence**

Dr Collins, forensic pathologist was of the opinion that echocardiogram (ECG) findings did not establish amyloid involvement of the heart and were consistent with coronary artery disease. He thought that there were three possibilities: an ischaemic heart involvement that contributed to congestive cardiac failure which contributed to death; or amyloid involvement in the heart; or both. He admitted that there was no evidence indicating that ischaemic heart disease was a stronger probability than amyloid involvement of the heart. He said that it is possible to have *asymptomatic ischaemic heart disease*, which does not present with any signs or symptoms.

Professor Cade gave evidence that although IHD may have been present, an ECG disclosed that the veteran's heart disease was caused by an infiltrative cardiomyopathy, which was typical of amyloid involvement of the heart, and inconsistent with IHD as the cause.

Professor Fox stated that there were no clinical grounds for a diagnosis of IHD and such a diagnosis was speculative. He added that there was no definable "clinical onset" of that condition in this case.

**Tribunal's conclusions**

The Tribunal followed the four step process set down in *Deledio's* case (1998). It also referred to *Repatriation Commission v Cornelius* (2002) 18 *VeRBosity* 52 where the Court said that "clinical onset" is when there is some feature or symptom which enables a medical practitioner to say that the veteran had a disease at that time. The Tribunal concluded:

> "The medical evidence was that if the veteran had ischaemic heart disease at all, it was clinically silent. … Therefore, it is not open to the Tribunal to find *clinical onset*, in the absence of clinical symptoms of the condition. There is no medical evidence of the condition being present which would enable a medical practitioner to say that the veteran had ischaemic heart disease.
>
> For this reason, the Tribunal finds that the hypothesis connecting the condition with the circumstances of the particular service rendered by the veteran is not a reasonable one. The hypothesis does not fit, that is to say, is not consistent with the template to be found in the SoP as both factor 5(e) and 5(h) require *clinical onset* as part of the hypothesis. The third step in *Deledio* is not met and the claim relating the veteran's death to possible ischaemic heart disease and smoking on service must fail."

**Formal decision**

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

**[Ed: This case illustrates the difficulties that can arise in determining the clinical onset of a disease or cause of death, particularly where a condition is clinically silent or asymptomatic. The recent decision of the Full Federal Court in *Lees v Repatriation Commission* (2002) (18 *VeRBosity* 109) provides an authoritative approach to ascertaining clinical onset.]**

## Re K G Gregson and Repatriation Commission

J Handley

[2002] AATA 934
16 October 2002

***Post traumatic stress disorder – experiencing a severe stressor – shots fired at watchtower & listening to field radio broadcast***

Mr Gregson applied to the Tribunal for review of a decision that his post traumatic stress disorder was not war-caused. He served in Vietnam from 4 August 1971 to 29 January 1972 with 110 Signal Squadron. He contended that his PTSD was due to four incidents in Vietnam.

The first incident was in September 1971 when he overheard a skirmish between Australian troops and Viet Cong by radio equipment in the communications centre. He described what he heard as being chaotic, with persons speaking in an agitated and alarmed state. He said that he was shocked by what he heard and felt helpless, fearful and apprehensive.

The second incident was when he was on watchtower duty at Vung Tau and heard a rifle shot which he believed was fired in his direction.

Two other incidents involved being airlifted out of Nui Dat base by helicopter and being engaged in a clearing patrol outside the perimeter fence.

**Statement of Principles**

The Statement of Principles in respect of PTSD (No 3 of 1999 as amended) includes as a factor related to service:

> "(a) experiencing a severe stressor prior to the clinical onset of post traumatic stress disorder;"

The expression "experiencing a severe stressor" is defined at paragraph 8 as follows:

> **" 'experiencing a severe stressor'** means the person experienced, witnessed, or was confronted with an event or events that involved actual or threat of death or serious injury, or a threat to the person's, or another person's, physical integrity.
>
> In the setting of service in the Defence Forces, or other service where the *Veterans' Entitlements Act* applies, events that qualify as severe stressors include:
>
> (i) threat of serious injury or death; or
>
> (ii) engagement with the enemy; or
>
> (iii) witnessing casualties or participation in or observation of casualty clearance, atrocities or abusive violence;".

**Experiencing a severe stressor**

The Tribunal noted that the words "experienced", "witnessed" and "confronted" in the definition *"experiencing a severe stressor"* were discussed by the Tribunal in *Re Slattery and Repatriation Commission* (1998) (14 *VeRBosity* 36). The Tribunal found:

> "The word 'witnessed' suggests that the person was present at the event involving real or present (ie. actual) or threatened death. The word 'experienced' suggests that the person observed or encountered such an event and the word 'confronted' that he or she was faced with such an event."

The Tribunal observed in Mr Gregson's case that those definitions were valid but too narrow. The Macquarie Dictionary defines *"experience"* as:

> "(i) a particular instance of personally encountering or undergoing something;
>
> (ii) the process or fact of personally observing, encountering, or undergoing something;
>
> (iii) knowledge or practical wisdom gained from what one has observed, encountered or undergone;
>
> (iv) to have experience of; meet with; undergo; feel."

The word *"witness"* is defined as:

> "(i) to see or know by personal presence and perception;
>
> (ii) to be present at (an occurrence) as a formal witness or otherwise;
>
> (iii) to be at the scene of;
>
> (iv) one who, being present, personally sees or perceives a thing; a beholder, spectator or eyewitness."

The word *"confront"* is defined as:

> "(i) to stand or come in front of; stand or meet facing; stand in the way of;
>
> (ii) to face in hostility or defiance; oppose;
>
> (iii) to set face to face."

The Shorter Oxford Dictionary offers a more expansive definition of *"experience"* by referring to *"(ii) to have experience of; to feel, suffer, undergo"*.

**Tribunal's conclusions**

The Commission conceded the diagnosis of post traumatic stress disorder. The only issue therefore was whether Mr Gregson had "experienced a severe stressor" in Vietnam.

In relation to the incident when he overheard a skirmish between Australian troops and Viet Cong by radio, there was evidence before the Tribunal concerning

Operation Ivanhoe in which 5 allied troops were killed in action and 24 were wounded on 21-22 September 1971.

The Tribunal was satisfied that the incident was during that operation and that he experienced a severe stressor. The Tribunal found that he experienced, witnessed, and confronted events that involved actual or threat of death or serious injury.

The Tribunal was also satisfied that he experienced a severe stressor in the incident in which he was shot at while on watchtower duty. The Tribunal found that this incident occurred as described and that he was threatened with death or serious injury.

The Tribunal concluded that the other two incidents were insufficient to have led him to experience a severe stressor.

**Formal decision**

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

## Re J Cummins and Repatriation Commission

Christie

[2002] AATA 1142
6 November 2002

### *Death – ischaemic heart disease & hypertension – salt ingestion related to service*

Mrs Cummins applied for review of a decision that the death of her late husband was not war-caused. The issue for the Tribunal was whether the late veteran's death was causally related to the circumstances of his war service. This involved consideration of the connection between his operational service, ischaemic heart disease, cerebrovascular accident, hypertension and salt intake.

Mrs Cummins told the Tribunal that her late husband used a great deal of salt in his meals and always covered the food on his plate with salt before tasting it. She thought that the amount of salt he applied to his meals was excessive. In addition, he would add salt to cheese. When asked about his salt usage, he replied that he had consumed salt during the war in high amounts and had been told that it was good for him. As a result, he would not reduce his use of salt.

The onset of the late veteran's hypertension was in about 1970. It was submitted that his hypertension caused, or contributed to a myocardial infarction and cerebrovascular accident which in turn, caused or contributed to his death. The hypothesis was that the late veteran's hypertension was caused or contributed to by his consumption of salt and that his intake of salt was service-related. It was contended that any consideration of the contribution of operational service to a post-service increase in salt consumption did not require the **whole** of the increase to be service-related.

A report by Dr J Kenardy on salt intake and preference was in evidence at the Tribunal. Dr Kenardy concluded that salt consumption is not an addiction but can be habit forming.

The Statement of Principles for hypertension (No 31 of 2001) includes as a factor related to service:

> "5(c) ingesting at least 12 grams (200 mmol) of salt supplements per day on average for a continuous period of at least six months immediately before the clinical onset of hypertension;"

**Tribunal's findings**

The Tribunal made the following findings in support of its conclusion that factor 5(c) was satisfied:

(a) that the pattern of salt intake by Mr Cummins increased following enlistment because of exposure to regular, high daily intakes of *"salt supplements"* (salt tablets) during operational service;

(b) that this high salt intake continued after service, through salt added to food when cooking or eating, as a result of acquiring a taste for salt that arose from his regular pattern of salt intake in the form of salt tablets during service;

(c) that his consumption of high amounts of *"salt supplements"* continued throughout the post-service period; and

(d) that the daily pattern of intake and amount (12g/day) continued for a continuous period of at least six months before the clinical onset of hypertension in 1970.

As to whether the late veteran's salt ingestion was "related to service" in terms of the SoP, the Tribunal followed the decision of Emmett J in *Kattenberg v Repatriation Commission* [2002] FCA 412 (18 *VeRBosity* 41) where it was held that the meaning of "related to service" in a SoP is the same as in s 196B(14). Thus, a factor will be related to service if there is shown to be a causal or contributory relationship between the specified factor and service, **or if the factor would not have occurred but for the rendering of that service**." (emphasis added).

The Tribunal concluded that the late Mr Cummins acquired a taste for salt by reason of his Army service. Moreover, prior to operational service he consumed salt but in smaller quantities relative to consumption during service. After operational service, he continued to consume high amounts of *"salt supplements"* that were at least 12g per day throughout the post-service period. His hypertension was causally contributed to by increased consumption of salt that would not have occurred but for him rendering operational service. The Tribunal concluded that as both the ischaemic heart disease and hypertension SoPs were satisfied, there were sufficient grounds for determining that there was a connection between his ischaemic heart disease, hypertension and his operational service and that his 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 V Audet and Repatriation Commission

Bullock & Campbell

[2002] AATA 1220
25 November 2002

***Death of veteran from prostate cancer – whether accelerated by chronic obstructive airways disease***

Mrs Audet applied for review of a decision that the death of her late husband was not war-caused. The certified cause of his death at the age of 84 years was metastatic carcinoma of prostate. He had rendered eligible war service in Australia during World War 2.

Mrs Audet contended that her late husband's accepted condition of chronic obstructive airways disease contributed in a significant way by bringing about his death prematurely.

There was medical evidence before the Tribunal that the late veteran suffered from bronchial problems for many years including bouts of acute bronchitis and asthma. Medical opinion by Dr Miller, physician was that although he would have died from prostate cancer eventually, his death was accelerated due to bronchial problems. Dr Levi, oncologist was of the opinion that the cause of death was metastatic cancer of the prostate with the terminal event being right-sided bronchopneumonia. He agreed that bronchopneumonia was present at the time of death but was not the specific cause of death. Rather, it was part of the terminal sequence of events.

The Tribunal was referred to several Federal Court decisions. In *Langley v Repatriation Commission* (1993) 115 ALR 51, the Full Court found that if a disease contracted by a veteran is accelerated, whether that acceleration is little or considerable, the disease is worsened as a result of attribution to war service. In *Doolette and Repatriation Commission* (1990) 21 ALD 489, O'Loughlin J found that if death was caused because of the accelerated progress of a disease, and the acceleration was caused by a war-caused condition, the proper conclusion would be that death was contributed to by war service.

**Tribunal's conclusions**

The Tribunal found that Mr Audet had severe chronic obstructive airways disease which led directly to his admission to hospital. Although there was a major contribution to his death from cancer of the prostate, his death was accelerated by chronic obstructive airways disease. In terms of s 8(1)(b) of the *VE Act,* his death therefore arose out of or was attributable to his eligible war service.

The Tribunal rejected a submission that s 8(1)(f) was applicable, saying that it requires a more direct and causal relationship than was evident in this case. Mrs Audet had submitted that the "injury or disease from which the veteran died" was previously accepted as war-caused.

The Commission contended that the words "from which" in s 8(1)(f) require that the veteran died from a condition, which is a more direct causal test than that expressed in the words "arose out of" or was "attributable to" and require a proximate relationship between the accepted disability and the veteran's death. In this case, the veteran did not die from the accepted condition of chronic obstructive airways disease. The Tribunal agreed that s 8(1)(f) was not applicable in this case.

**Formal decision**

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

## Re R J Nolan and Repatriation Commission

McCabe

[2002] AATA 1253
6 December 2002

***Widower's pension – member of same-sex couple***

Mr Nolan applied for a pension as the widower of a Mr Wardrop, a veteran who had died on 27 June 2001. Mr Nolan and Mr Wardrop had been partners in a domestic relationship for about 25 years.

The Repatriation Commission refused the claim on the basis that a member of a same-sex couple is not eligible to receive a widower's pension under the *VE Act*.

The VRB affirmed the decision and he then applied to the AAT.

Section 14(1) of the *VE Act* provides that a person may apply for a pension if he or she "is a veteran, or a dependant of a deceased veteran". The definition of "dependent" in s 11 includes a widow or widower of the veteran (other than a widow or a widower who marries or re-marries).

Section 5E(1) defines "widower" as:

> "(a) a man who was a partner of a woman immediately before she died; or
>
> (b) a man who was legally married to a woman, but living separately and apart from her on a permanent basis, immediately before she died."

The Tribunal noted that Mr Nolan did not qualify as a "widower", as a person cannot be the widower of a partner of the same sex. As he was not a *"person living with a person **of the opposite sex**"*, he was not a "partner" for the purposes of s 5E(2)(b).

**Submissions**

Mr Nolan did not dispute that he was ineligible for a pension if the words of the *VE Act* are read in isolation. He argued that the requirement that he be the partner of a person of the opposite sex was inconsistent with the *Sex Discrimination Act 1984* (SDA), which prohibits discrimination on the ground of sex.

**Tribunal's conclusions**

The Tribunal said that it could not declare an Act invalid as that would amount to an exercise of the judicial power of the Commonwealth. It was still necessary for the Tribunal to identify and apply the law in the course of making or reviewing an administrative decision.

The Tribunal accepted that the *VE Act* requirement that a person either be married to a veteran or, if unmarried, be the partner of a veteran of the opposite sex, is discriminatory within the meaning of s 5 of the SDA. That did not mean that the provisions of the *VE Act* gave way to the SDA. It was clearly intended that the *VE Act* was an exception to the SDA.

This argument was also considered by the Human Rights and Equal Opportunity Commission in *Ward and Repatriation Commission* [1997] HREOCA 19. The Commission reached the same conclusion as the Tribunal on this point.

The Tribunal concluded:

> "I have great sympathy for the applicant. The veterans' legislation discriminates against him on the basis of what appear to be irrelevant criteria, notwithstanding the Parliament's express intention to eliminate injustices of this kind. But the legislation says what it says. Until it is changed, the applicant cannot succeed in his claim for a pension."

**Formal decision**

The Tribunal affirmed the decision under review.

# Federal Court of Australia

## Falconer v Repatriation Commission

Tamberlin J

[2002] FCA 1336
30 October 2002

***Ischaemic heart disease & sleep apnoea – whether obesity related to service***

Mr Falconer appealed to the Federal Court against the decision of the Tribunal that his ischaemic heart disease and sleep apnoea were not war-caused. (see 18 *VeRBosity* 70)

Mr Falconer contended that his ischaemic heart disease and sleep apnoea were related to obesity. The issue before the Tribunal was whether his obesity was related to war service.

The relevant factor in the Repatriation Medical Authority's Statement About the Causes of "Being Obese" establishing a causal connection between war service and obesity was factor (a):

> "(a) exposure to an environment which encourages caloric intake, where this caloric intake is excessive for energy needs and **cannot be compensated by adequate physical activity**, and which has resulted in a weight gain of at least 20% of the baseline weight." (emphasis added)

The Tribunal based its decision on a determination that Mr Falconer's obesity was of such a type that it could be compensated for by adequate physical activity, but that he had not undertaken such adequate activity and therefore did not satisfy factor (a). It affirmed the decision that his ischaemic heart disease and sleep apnoea were not war-caused.

**Appeal grounds**

Mr Falconer submitted that the Tribunal had erred by considering itself bound by the RMA's Obesity Statement. It was for the Tribunal to determine whether there was a reasonable hypothesis connecting obesity with the circumstances of his service.

Once the RMA found that obesity was not a "disease" then it had no power to issue a statement as to its "causes" or purport to incorporate that statement in SoPs. By issuing its Obesity Statement in a form and manner for which the *VE Act* made no provision, the RMA implicitly acknowledged that the Statement did not come within its statutory functions.

Furthermore, the Obesity Statement did not comply with the requirement in s 196B for a statement to be based on either the reasonable hypothesis or the reasonable satisfaction standard of proof.

**Court's conclusions**

Tamberlin J rejected the submission that the reference to the Obesity Statement in the SoPs was invalid. He said that the power of the RMA is to determine a Statement of Principles "in respect of injury or disease" which sets out factors that must as a minimum exist. The expression "in respect of the disease" used in conjunction with the expression "factor" is to be read in a broad sense because of the generality of those expressions and the expert nature of the body to which the selection and formulation of factors is entrusted.

Tamberlin J continued:

> "There is a definition of 'disease' in the Statements of Principles which

incorporates by reference selected parts of the Obesity Statement. Therefore, the incorporated description of obesity must be read as forming part of the Statements of Principles which, as the Tribunal has found, do not uphold the hypothesis in respect of either disease. 'Being obese' is not a free standing concept to which a general reference is made in the Obesity Statement. Rather, it is obesity of a particular description which is incorporated as part of the Statements of Principles. Therefore, it is only a certain class or subset of the condition of 'being obese' which is incorporated as a binding Statement of Principles."

**Formal decision**

The Court dismissed Mr Falconer's appeal.

**[Ed: The Repatriation Medical Authority gave notice in the *Gazette* on 28 February 2001 that it intended to investigate whether a Statement of Principles may be determined in respect of obesity. The investigation is still in progress.]**

## Dunlop v Repatriation Commission

Ryan J

[2002] FCA 1400
15 November 2002

***Claim by widow – whether veteran's death by suicide was war-caused***

Mrs Dunlop appealed to the Federal Court against a decision of the Tribunal that the death of her late husband by suicide in 1972 was not war-caused. He had served in the Army during World War 2 including operational service at Merauke in former Dutch New Guinea. Evidence before the Tribunal by a military historian was that in March 1944 when the veteran was transferred to Merauke, the area was generally quiet. Japanese air raids had ceased in 1943. An officer in the veteran's unit was drowned in June 1944. There was nothing in the unit diary entry to indicate that the unit was under attack or in danger at that time.

The Tribunal referred to earlier Court decisions (*East* and *Bey*) which established that a reasonable hypothesis involves more than a mere possibility and must be "pointed to by facts even though not proved upon the balance of probabilities." The Tribunal said that it was not sufficient that the late veteran suffered from depression which probably contributed to his suicide. There was no material pointing to a connection between depression and his war service. The Tribunal concluded that there was no hypothesis connecting his death with war service and affirmed the decision under review.

**Submissions**

Mrs Dunlop's counsel submitted that in its decision, the Tribunal had:

1. failed to apply s 9(1) of the *VE Act*;
2. failed to distinguish operational service from eligible war service;
3. failed to consider all possible connections with war service available under s 8(1);
4. wrongly imposed an evidentiary onus on the applicant;
5. ignored relevant considerations or took into account irrelevant considerations;
6. failed to provide sufficient reasons for its decision;
7. erred in its application of s 120(1) and s 120(3);
8. erred in its application of s 8;

9. failed to properly apply s 119;

10. misapplied s 196B(2);

11. erred in its application of the approach in *Deledio's* case; and

12. wrongly required the applicant to raise a reasonable hypothesis.

**Court's conclusions**

Mrs Dunlop's counsel sought to rely on s 8(1)(f) which provides that a veteran's death shall be taken to be war-caused if:

> "(f) the injury or disease from which the veteran died is an injury or disease that has been determined in accordance with section 9 to have been a war-caused injury or a war-caused disease, as the case may be;"

Ryan J said that s 8(1)(f) applies only to a case in which the death of a veteran has resulted from an injury or disease that has been determined ***before the death*** in accordance with s 9 to have been a war-caused injury or a war-caused disease. If no determination in accordance with s 9 has been made before the death of the veteran, the death shall be taken to have been war-caused only if one of the conditions stipulated in s 8(1)(a) to (e) is satisfied.

In relation to whether there was a reasonable hypothesis in this case, counsel sought to rely on the decision in *Repatriation Commission v Stares* (1996) (12 VeRBosity 47) which held that in some cases, the hypothesis may assume the occurrence or existence of a "fact".

Ryan J noted that in this case, the postulated hypothesis depended on the assumed fact that either or both the veteran's fear of "head hunters" or the death of the officer precipitated the onset of depression which ultimately resulted in his death. Unlike the evidence of Mr Stares' habitual consumption of alcohol immediately after his discharge, the material before the Tribunal in this case did **not** include evidence that the veteran suffered from depression at the time of his return to civilian life. That was a matter which the Tribunal was entitled to take into account as part of all the circumstances bearing on the reasonableness of the hypothesis in question.

Ryan J concluded that the Tribunal had not required the applicant to raise a reasonable hypothesis or to discharge an evidentiary onus. In stating its conclusions, the Tribunal had simply reflected the truism that an applicant must put forward a hypothesis consistent with the material which coherently or reasonably connects the death with the circumstances of the veteran's service.

Ryan J also rejected the other submissions which were described as "earnest and wide-ranging." His Honour found no errors of law in the Tribunal's decision and dismissed the appeal.

**Formal decision**

The Court dismissed Mrs Dunlop's appeal.

**[Ed: Mrs Dunlop has lodged an appeal to the Full Federal Court.]**

## Repatriation Commission v Haskard

Hill J

[2002] FCA 1493
29 November 2002

***Special rate – over 65 provisions – last paid work – VE Act, s 24(2A)(d)***

The Repatriation Commission appealed to the Federal Court against the AAT's decision that Mr Haskard was eligible for pension at the Special rate. As he was over 65, he was required to satisfy the requirements of s 24(2A) of the *VE Act*.

## Background

Mr Haskard is a qualified property valuer. Between February 1984 and September 1989, he was in partnership with his son as the co-owner of a real estate business. He also undertook valuations on his own account. After his son sold the business in September 1989, he worked until December 1990 as the sole director of the purchaser of the business. He was paid $300 per week to attend the business three mornings a week including the maintenance of its trust account. He also undertook valuations on his own account working from home. After resigning as a director of the company in December 1990, he continued to undertake property valuations working from home.

When Mr Haskard first undertook property valuations in 1984, he was doing approximately six per month. However, from 1985, this gradually declined to about three per month and, between 1991 and 2002, he was undertaking only about six valuations a year.

At issue was whether Mr Haskard satisfied s 24(2A)(d) which provides:

> "(d) the veteran is, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake the remunerative work (***last paid work***) that the veteran was last undertaking before he or she made the claim or application;"

The AAT found that Mr Haskard satisfied the requirements of s 24(2A) of the *VE Act*. With regard to s 24(2A)(d), the AAT found that the "last paid work" that he undertook before making his claim was that of a property valuer. He undertook such work on his own account and not as an employee. The AAT construed the wording of paragraph (d) that the veteran is "prevented from continuing to undertake the remunerative work" as meaning that the veteran was unable to continue such work for periods aggregating **more than eight hours per week**. In the AAT's view, the wording of paragraph (d) must be interpreted in the context of other provisions in the section and, in particular, the requirement in s 24(1)(b) that to be qualified for payment of pension at the Special rate, a veteran must be incapable of undertaking remunerative work for periods aggregating more than eight hours per week (s 24(1)(b)).

## Appeal grounds

The Commission submitted on appeal that the provisions of s 24(2A)(d) should be given their ordinary meaning and that the eight hour per week test is irrelevant to that provision. It was submitted that Mr Haskard in the relevant period had undertaken remunerative work as a self-employed valuer. This remunerative work was the "last paid work" to which s 24(2A)(d) referred. He still carried on the work of a self-employed valuer, albeit making only six valuations a year and so it could not be said that his incapacity had **prevented** him from continuing to undertake the last paid work.

This submission was supported by the earlier decision in *Carter v Repatriation Commission* (2001) 33 AAR 343 (17 *VeRBosity* 80), in which Branson J had rejected the interpretation which was adopted by the AAT in Mr Haskard's case. The AAT made no reference to the decision in *Carter* in its reasons.

It was submitted finally that the interpretation of s 24(2A)(d) which Branson J had set out in *Carter* was not only consistent with the language used in the section but also with the history of the legislation. It was said that this history and the policy underlying s 24(2A) was that the Special rate pension was to be available only for an individual who was no longer working and was not to be available to a veteran who continued to

undertake remunerative employment, albeit of such a limited nature as was undertaken by Mr Haskard.

**Court's conclusions**

The Court upheld the Commission's appeal, making a clear distinction between the 'remunerative work' referred to in s 24(1)(b) and that in s 24(2A)(d). Hill J said that there is nothing in s 24(2A)(d) that "goes to the question of capacity to work [the s 24(1)(b) question]. All that is in question is whether the veteran has been **prevented** from continuing to undertake the particular remunerative work that he had undertaken."

Hill J said that the question to be asked in this case was whether Mr Haskard's last paid work had ceased or whether it had continued. On the facts before the AAT, it had not ceased but continued. All that had happened was that the quantity of work had declined but that did not mean that the work itself had ceased.

Hill J concluded that if the AAT had applied the law correctly, it would not have been open to it to find that Mr Haskard had, in accordance with s 24(2A)(d), been prevented from continuing to undertake the remunerative work he was last undertaking before his application was made.

**Formal decision**

The Court set aside the Tribunal's decision, declaring that s 24(2A) did not apply to Mr Haskard. The matter was remitted to the Tribunal for rehearing.

## Roncevich v Repatriation Commission

Mansfield J

[2002] FCA 1458
2 December 2002

***Knee injury – fall from window following mess function***

Mr Roncevich lodged a further appeal to the Federal Court following the rehearing by the AAT of his application in relation to internal derangement of the left knee. The Federal Court had remitted the matter to the AAT for rehearing. (See 17 *VeRBosity* 88). The AAT again affirmed the decision that his left knee injury was not defence-caused.

The background to this matter is that on the night of 27 February 1986, Mr Roncevich was ironing his clothes for the following day. During the course of ironing he felt an urge to spit. He walked across to an open window, climbed onto a trunk which was just below the window sill, and bent forward to spit out of the window. He over-balanced and fell to the ground below, suffering the left knee injury. He claimed that the main reason for his lack of balance and the consequent fall through the window was the fact that he was inebriated at the time. He had been drinking beer in the sergeants' mess on the ground floor for about four hours before he returned to his room on the first floor.

The AAT heard evidence that Mr Roncevich was not obliged to live on the base. He could have rented civilian quarters if he had wished to do so. In those circumstances, he would not have been required to return to the base until the following day, unless some emergency arose.

It was also not compulsory for him to go to the sergeants' mess on the particular occasion. The evening started after work

at about 4.30pm and ended at about 9.00pm. It was not compulsory to drink alcohol. It was also not compulsory to stay until any specific time. People could excuse themselves if they wished.

The Tribunal found that the only links between the Army and his intoxication were that it occurred on an Army Base and that he and his fellow drinkers were soldiers. The intoxication was not caused by, nor did it arise out of any task that he had to do as a soldier, nor did it arise out of his defence service, nor did it occur in the course of his defence service. Consequently, the knee injury was not caused by defence service, as it did not arise out of his defence service and was not attributable to his defence service, nor was it due to an accident that would not have occurred but for him having rendered defence service.

**Appeal grounds**

Mr Roncevich's counsel submitted on appeal to the Court that the AAT had erred in law in determining that his attendance at the function in the sergeants' mess and that his consumption of alcohol was not sufficiently connected with his defence service, as to bring the knee injury within s 70(5)(a) of the *VE Act,* namely that it arose out of or was attributable to his defence service. He submitted that the AAT had failed to find on the evidence that he was obliged to attend the function so that his knee injury arose out of his defence service.

Mansfield J rejected this, saying that the AAT's finding that Mr Roncevich was not performing defence service by attending the mess function was open to it on the evidence. Further, there was no error in its conclusion that the knee injury did not arise out of and was not attributable to his defence service. Whether the knee injury arose out of his defence service depends upon whether there is a causal connection between defence service and the incapacity from the knee injury: (see *Holthouse v Repatriation Commission* per Davies J (1982) 1 RPD 287 at 288.) If the cause of an injury is the personal or domestic activities of the claimant and defence service provides no more than the circumstances in which the cause operated, then the injury does not arise out of and is not attributable to defence service: (see *Wedderspoon v Minister of Pensions* per Denning J [1947] 1 KB 562 at 563 - 564.)

It was also argued that the AAT had erred in law because it did not conclude, by reference to the applicable Statement of Principles, that the applicant's knee injury was defence-caused. Mansfield J rejected this saying that the Statements of Principles do not relieve the decision maker from the task of addressing whether the connection contemplated by s 70(5)(a) between defence service and injury or incapacity is made out, having regard to the appropriate standard of proof in s 120.

Mr Roncevich submitted further that the AAT had erred in not concluding that the knee injury was deemed by s 70(7) to be defence-caused as the fall would not have happened but for his having rendered defence service. Mansfield J rejected this on the basis that it did not reflect the AAT's findings which were not shown to be erroneous. Clause 4 of the relevant SoP provided that at least one of the factors set out in clause 5 (in this instance, direct trauma to the left knee) "must be related to any relevant service rendered" by the applicant. It left that question of fact to be determined. The AAT's approach did not involve an error of law.

Mansfield J also rejected submissions that the AAT had failed to apply s 119 of the *VE Act* and had failed to provide sufficient reasons for its decision.

**Formal decision**

The Court dismissed Mr Roncevich's appeal.

**[Ed: Mr Roncevich has lodged an appeal to the Full Federal Court.]**

## Repatriation Commission v Thomas

Mansfield J

[2002] FCA 1497
3 December 2002

***Prostate cancer – increase in animal fat consumption – which SoP applies – accrued rights***

The Repatriation Commission appealed to the Federal Court against a decision of the Tribunal which determined that Mr Thomas's malignant neoplasm of the prostate was war-caused. He had rendered operational service during World War 2.

In its decision, the Tribunal applied Statement of Principles No 95 of 1995 as amended by No 191 of 1996. Those SoPs were revoked and replaced by No 84 of 1999 on 17 November 1999, prior to the Tribunal's decision.

Statement of Principles No 95 of 1995 (as amended by No 191 of 1996) included as a factor related to service:

> "(b) increasing animal fat consumption by at least 40%, and to at least 70gm/day for at least 20 years before the clinical onset of malignant neoplasm of the prostate;"

The Tribunal concluded that Mr Thomas had increased his animal fat consumption to the requisite degree as a result of his war service and that he satisfied the SoP factor. It determined that his prostate cancer was war-caused.

**Appeal grounds**

The Commission submitted on appeal that the Tribunal had made two errors of law. The first was that it had erred in law by applying the 1995 SoP as amended by the 1996 SoP. It was contended that, in accordance with the Full Court's decision in *Repatriation Commission v Gorton* (2001) (17 *VeRBosity* 85), the Tribunal should have applied the 1999 SoP. Had it done so, it would not have been satisfied that Mr Thomas had increased his animal fat consumption by at least 40% as a result of his war service.

The second ground of appeal was that the Tribunal had erred in law in its application of the SoPs, in determining that Mr Thomas had increased his animal fat consumption by at least 40% compared to his pre war diet, so as to fit the template prescribed in the 1995 SoP as amended.

**Court's conclusions**

In relation to the first issue, Mansfield J noted that in *Gorton's* case, the Full Court addressed the issue as to which Statement of Principles should be applied by the Tribunal where there has been a change in the applicable SoP between the time of the Commission's decision and the time of the Tribunal's decision. The Full Court held that the Tribunal should first consider the claim by reference to the SoP in force at the time of its decision. If it is of the view that the claim should be refused, it must consider whether, by virtue of the SoP in force at the time of the Commission's decision, there was an "accrued right" which was preserved under that earlier SoP.

It followed that the Tribunal had erred in law by determining that the appropriate Statement of Principles to be addressed first was the 1995 SoP as amended by the 1996 SoP. In accordance with *Gorton* and *Keeley*, it should first have addressed the 1999 SoP. If, having

addressed the 1999 SoP, it did not find that Mr Thomas's circumstances fitted into the template of the 1999 SoP, it should then have considered whether he had an "accrued right" by reason of the application of the 1995 SoP. Mansfield J agreed that the matter should be remitted to the Tribunal for rehearing.

Mansfield J next considered whether any accrued right arose in relation to the SoPs in force at the time of the VRB's decision. He said that Mr Thomas had a right of review by the Board and by the Tribunal by reference to the SoPs in force at the time of the respective reviews. Mr Thomas also had an accrued right, if the application of those SoPs did not result in a favourable determination, to have the Board or the Tribunal (as the case may be) determine the claim by reference to the SoPs in force at the time of the Commission's decision. However, **no** accrued right arose at the Tribunal in relation to the SoPs in force at the time of the VRB's decision.

Mansfield J also agreed with the Commission's second submission that the Tribunal had erred in its application of the SoPs. According to evidence before the Tribunal, the veteran's pre-war daily animal fat consumption under the 1999 SoP was 84.7 gm, and the post war daily consumption was 90.6 gm. Applying the 1995 SoP as amended by the 1996 SoP, the respective figures are 66.6 gm and 79.4 gm. It had taken for the purposes of its consideration the 66.6 gm measure based upon the definition of "animal fat" in the 1995 SoP as amended by the 1996 SoP, and the 90.6 gm based upon the different definition of "animal fat" in the 1999 SoP. This was not comparing like with like. The different definitions of "animal fat" clearly produced different calculations.

**Formal decision**

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

**[Ed: Mr Thomas has lodged an appeal to the Full Federal Court.**

**Instrument No 84 of 1999 has been amended by No 69 of 2002, which inserted a new definition of "animal fat".]**

## Lees v Repatriation Commission

Heerey, Moore & Kiefel JJ

[2002] FCAFC 398
6 December 2002

***Generalised anxiety disorder – meaning of "clinical onset" of disease – whether AAT has an obligation to consider doctor's evidence about what he was told***

Mr Lees appealed against a decision of the Administrative Appeals Tribunal that his generalised anxiety disorder (GAD), alcohol abuse or dependence and gastro-oesophageal reflux were not war-caused. The appeal was heard by a Full Court.

Mr Lees served in the RAN and had several periods of operational service in Vietnamese waters in the years 1969 to 1971, totalling 59 days operational service. He claimed that during his navy service he was exposed to various stressors which led to the development of generalised anxiety disorder.

The Tribunal found that the veteran had experienced a "severe psychosocial stressor" in terms of the SoP while on operational service. It then concluded that there was no material pointing to the clinical onset of his GAD within two years

of his experiencing that stressor, as required by the SoP. The hypothesis therefore was not a reasonable one. The alcohol condition was a sequela of the GAD, and the reflux condition was a sequela of the alcohol condition, therefore those conditions were also not war-caused.

**Appeal grounds**

Mr Lees submitted that the Tribunal erred in interpreting the SoP in that the term "clinical onset" used in SoPs does not mean showing all the required symptoms, but means "commenced the process by which the clinical diagnosis subsequently occurred".

He also submitted that the Tribunal erred in finding that there was no material pointing to the clinical onset of the condition within two years of experiencing the relevant stressors.

**Court's conclusions**

The Full Court did not accept the submission with respect to the meaning of clinical onset. The Court followed *Repatriation Commission v Gosewinkel* (1999) 15 *VeRBosity* 73 in finding that the phrase "clinical onset" in the SoPs means that all of the required symptoms must be displayed, including conditions such as GAD, which may have a gradual onset. This was so because of the wording of the SoPs which define conditions as having a number of symptoms.

With respect to the Tribunal's finding that there was no material pointing to clinical onset within two years, the Court concluded that the Tribunal appeared to have erred in failing to have regard to the history given to one of the doctors, referred to in his report. The Court added that this is not surprising given that no submissions were apparently made to the Tribunal by the appellant's representative. Even so, it was an error.

The Court concluded that the above error was a material one as:

> "(The) evidence may support a conclusion that at least this symptom was present for the requisite period of time. If so it might satisfy the definition of generalised anxiety disorder. … Accordingly it is not possible to say the error is immaterial."

**Formal decision**

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

## Onger v Repatriation Commission

Spender J

[2002] FCA 1525
6 December 2002

***Back condition – diagnosis – whether medical evidence upon which Tribunal relied was highly speculative***

Mr Onger served in the Navy from 1957 to 1976, after which he served in the RAN Reserve. He served in *HMAS Tobruk* as part of the Far East Strategic Reserve and had 6 periods of operational service, totalling 144 days. His operational service included a surveillance operation off the coast of Malaysia, which involved sailing a timber motor fishing boat at night. On or about 15 July 1959, the boat struck a sand bar. In attempts to free it, Mr Onger's lumbar region was hit by the boat and he went under the water. He contended that this event constituted "trauma to the lumbar spine", which led to lumbar spondylosis, and he thus had a war-caused medical condition.

The Tribunal found that Mr Onger suffered from diffuse idiopathic skeletal hyperstenosis (DISH syndrome), an advanced degenerative ligamentous condition involving his lumbar spine. This condition is constitutional in nature and was not caused by anything which happened to him in the Navy.

With respect to aggravation, the Tribunal found that the degree of trauma experienced by Mr Onger in July 1959 did not satisfy the SoP for lumbar spondylosis, nor did it affect his degenerative condition.

**Submissions**

Mr Onger submitted that the Tribunal had failed to adequately address the evidence generally with respect to his condition. Secondly, it was submitted that the Tribunal erred in preferring the evidence of one doctor over another without examining the competing views of the experts including the careful weighing of the strengths and weaknesses of those views.

Spender J rejected both submissions. With respect to the first issue, he said:

> "… the evidence before the Tribunal was insufficient to satisfy the essential requirement concerning trauma to the spine imposed by cl 8 of the SoP relevant to lumbar spondylosis. …
>
> … the Tribunal not only was entitled to find, but would have been perverse not to find, that there was no evidence which satisfied the requirement that there had been demonstrated (the required symptoms)."

With respect to the second issue Spender J said that the Tribunal had the invidious task of making that decision in the circumstance that the Deputy President had not seen either doctor give evidence. That course had the acquiescence of both parties. There was no error in the Tribunal preferring the opinion expressed emphatically by one doctor over another. He continued:

> "The Tribunal was entitled to conclude as it did, that there was a want of compliance with the requirements of the SoP … and its acceptance of the view of (one doctor) provide no basis for appellable review."

**Formal decision**

The Court dismissed the appeal.

## Randall v Repatriation Commission

Heerey J

[2002] FCA 1599
11 December 2002

***Administrative review – power of AAT to review validity of VRB's decision***

Mr Randall appealed to the Federal Court against a decision of the AAT on the assessment of his incapacity from defence-caused conditions. The Repatriation Commission had accepted his adjustment disorder as defence-caused and assessed his incapacity at the Intermediate rate. On review, the VRB set aside the Commission's decision and substituted its decision assessing pension at 100% of the General rate, which is less than the Intermediate rate.

Mr Randall applied to the AAT for review of the VRB's decision. He claimed that the VRB lacked power to reduce his pension from the Intermediate Rate and its decision was therefore a nullity. He also claimed that he was denied natural justice in that he was not warned that his rate of pension might be reduced. He

contended that he qualified for the Special rate.

The AAT said that it was required to stand in the shoes of the decision-maker and to consider the evidence anew and was not required to accept prior determinations. It was not necessary for it to consider whether the VRB had acted appropriately or not. The AAT concluded that Mr Randall was eligible for the Intermediate rate but did not qualify for the Special rate.

**Appeal grounds**

On appeal to the Court, Mr Randall submitted that the AAT had wrongly failed to rule on its two submissions concerning the VRB's decision. Heerey J rejected this, saying:

> "In my opinion it is clear from the decision of the Full Court in *Secretary, Department of Social Security v Alvaro* (1994) 50 FCR 213 at 219 to 220 that an administrative tribunal in the position of the AAT when it is undertaking a review of a decision by another administrative tribunal lower down in the statutory hierarchy does not have the function of reviewing the legal validity of that earlier decision.
>
> The AAT was simply standing in the shoes of the original decision maker. It was no part of its function to embark on a consideration as to whether the decision of the VRB was legally effective. That being so, it seems that the issue of whether or not the applicant was entitled to a Special Rate of pension was squarely before the AAT. It gave consideration to that issue and I see no legal error in its reaching a decision on the evidence that the criteria had not been established."

**Formal decision**

The Court dismissed Mr Randall's appeal.

## Fogarty v Repatriation Commission

Ryan J

[2002] FCA 1541
13 December 2002

***Generalised anxiety disorder – preliminary issue as to existence of disease***

Mr Fogarty appealed against a decision of the Tribunal that his ischaemic heart disease and generalised anxiety disorder were not war-caused. He rendered operational service in the RAN during World War 2. He died prior to the Court hearing and the appeal was continued by his widow.

The Repatriation Commission conceded that the Tribunal had made an error of law in its review of ischaemic heart disease and that that matter should be remitted to the Tribunal for rehearing.

In relation to generalised anxiety disorder, the Tribunal concluded, after an examination of the evidence before it, that it pointed to hypotheses connecting the claimed disability of generalised anxiety disorder with the veteran's war service. The Tribunal noted that the veteran had relied upon factor 1(b) of SoP 48 of 1994, ie "experiencing a stressful event not more than two years before the clinical onset of generalised anxiety disorder."

The Tribunal then proceeded to consider whether the hypotheses were reasonable. It concluded that the hypotheses were not reasonable as they:

> "… do not contain one or more of the factors determined by the RMA in the relevant SoPs, to be the minimum which must exist, and be related to the person's service. … In other words, the hypotheses fail to fit within the 'template', to be found in the

> relevant SoPs, and thus the claims must fail."

The Tribunal then said that although Mr Fogarty experienced stressful service in the Navy, it was of the opinion that he never developed a generalised anxiety disorder as a result of any aspect of his service.

Mrs Fogarty's counsel submitted that the Tribunal had erred in law when it concluded that the hypothesis pointed to by the material was not reasonable.

**Court's conclusions**

Ryan J noted that it is now settled law that a decision-maker must follow the four step process set out by the Full Court in *Repatriation Commission v Deledio* (1998). However, this starts from the premise that the veteran is suffering from a particular disease.

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 terms of s 120(4) of the *VE Act.* (See *Repatriation Commission v Budworth* (2001) (17 *VeRBosity* 109)). It is only after this preliminary question is resolved that the decision-maker proceeds to the four step process in *Deledio.* If the existence of a disease is not in dispute, only the four questions in *Deledio* are relevant and the preliminary issue does not arise.

Ryan J inferred that when the Tribunal arrived at the third step in *Deledio*, (ie whether the hypothesis raised was reasonable in terms of the SoP) there was nothing pointing to an essential element of the SoP and it could therefore not regard the hypothesis as reasonable and so it proceeded no further.

Ryan J concluded that the Tribunal had failed to consider the existence of generalised anxiety disorder as a preliminary issue. Ryan J said:

> "I am not persuaded that the Tribunal ever took the preliminary step of identifying the collection of symptoms of a disease from which the veteran may have suffered. It appears to have treated the existence of any mental disorder as in dispute, but has not properly carried out the exercise described in *Budworth* and *Benjamin* … that is, the Tribunal did not consider the existence of any symptoms of mental disorder and determine to its reasonable satisfaction what symptoms were actually exhibited by the veteran before taking the successive steps described in *Deledio*. Rather, it went straight to the *Deledio* process with the exclusionary criteria of the GAD SoP in mind. That was clearly an error of law."

Ryan J concluded that although the Tribunal erred in law both in failing to have regard to the current "anxiety disorder" SoP (1 of 2000), and in failing to conduct the preliminary inquiry (as it appears that the existence of the claimed mental disorder was in issue), those errors were not material in the result. The appeal in relation to anxiety disorder was therefore dismissed.

**Formal decision**

The Court set aside that part of the Tribunal's decision relating to ischaemic heart disease and remitted the matter to the Tribunal for rehearing. The appeal in relation to generalised anxiety disorder was dismissed.

**[Ed: Mr Fogarty has lodged an appeal to the Full Federal Court.]**

## Johnson v Veterans' Review Board

Mansfield J

[2002] FCA 1543
13 December 2002

***Dismissal of application to VRB – whether delegation of dismissal power valid***

Mr Johnson applied to the Federal Court to challenge the dismissal of his application for review lodged with the Veterans' Review Board.

The background to this matter was that in 1996, Mr Johnson lodged an application for review with the VRB concerning his claim for vertigo and epilepsy. On 19 October 1998, the Registrar of the VRB wrote to him in terms of s 155AA(4) of the *VE Act* requesting that he provide within 28 days a written statement that he was ready to proceed at a hearing or reasons why he was not ready. On 4 February 1999, the Registrar of the VRB sent him a similar notice in terms of s 155AB(4) of the *VE Act.*

In response to the second notice, Mr Johnson sent back a form indicating that he had nominated a representative from the VVAA (SA) to respond to the VRB in relation to the notice. When no response was received from the veteran or his representative within 28 days, the Registrar, as delegate of the Principal Member, dismissed the application pursuant to s 155AB(5) of the *VE Act.*

The AAT subsequently affirmed the decision dismissing Mr Johnson's application to the VRB. (See 16 *VeRBosity* 34).

**Appeal grounds**

Mr Johnson submitted on appeal that:

1. the notices given pursuant to s 155AA(4) on 19 October 1998 and s 155AB(4) on 4 February 1999 were invalid because the first of those notices was not given at a time when it could lawfully have been given; and
2. the notices were not lawfully given because the SA Registrar was not authorised to have given them because he was not a person to whom the power been delegated by the Principal Member of the Board.

**Court's conclusions**

In relation to the first submission, Mr Johnson contended that the Principal Member, having failed to give notice in accordance with s 155AA(4) within a brief time after the "standard review period" on 30 April 1998, was no longer empowered to activate those provisions or to dismiss his claim under s 155AB(5).

Mansfield J rejected this contention on the basis that it ignored the requirement that the Principal Member (or his delegate) must consider that the applicant **should** be ready to proceed at a hearing.

Mansfield J said:

> "Section 155AA(4) empowers the Board through the Principal Member to initiate the procedures to dismiss the application only at the expiration of the standard review period, but upon its proper construction it does not oblige the Board then to initiate those procedures. The obligation arises only when the standard review period has expired (provided it applies to the application for review) *and* when the subjective view has been formed by the Principal Member or the delegate that the applicant should be ready to proceed at a hearing."

He added that once the obligation arises, it continues until it is implemented. If it is implemented after some delay after the expiration of the standard review period and after the Principal Member considers

that the applicant should be ready to proceed to a hearing, it is nevertheless an appropriate and valid notice under s 155AA(4).

In relation to the second submission, Mr Johnson argued that the delegation of the dismissal powers to Registrars by the former Principal Member of the VRB ceased to have effect when he was replaced by the current Principal Member in 1997. A new instrument of delegation was not issued until 15 January 2001.

Mansfield J also rejected this contention. He said that the delegate is not the agent of the Principal Member but is required to exercise the powers delegated in accordance with the delegate's independent discretion and the provisions of the *VE Act*. He said that the construction contended for by Mr Johnson would produce an "inappropriate and inconvenient result". He concluded that s 166 provides that a delegation continues to have effect notwithstanding that the person occupying the office of Principal Member and who made the delegation has ceased to occupy the office.

**Formal decision**

The Court dismissed Mr Johnson's appeal.

**[Ed: Mr Johnson has lodged an appeal to the Full Federal Court.]**

## Repatriation Commission v Hendy

Whitlam, Emmett & Stone JJ

[2002] FCAFC 424
19 December 2002

***Special rate – whether employment prevented by war-caused disabilities alone***

Mr Hendy had applied for an increase in pension on the basis that his war-caused disabilities had worsened. He contended that he was eligible for pension at the Special rate. His conditions of post traumatic stress disorder with alcohol dependence and bilateral sensorineural hearing loss were previously accepted as war-caused due to his service in the RAN in Vietnam.

Mr Hendy drove a truck for a number of years after leaving the RAN. He then worked as a hotel employee as assistant manager and cellarman. After that, he worked for 9½ years as a cellarman at an RSL club and a further 8 years delivering liquor, before ceasing full-time work in 1995. From November 1995 to July 1996, he worked one or two days per week as a truck driver delivering gardening/landscaping supplies.

The AAT found that it was not his war-caused disabilities **alone** which prevented him from continuing to undertake remunerative work in hotel administration and management and in truck driving and goods delivery, in terms of s 24(1)(c) of the *VE Act.* His non war-caused arthritis of the knee would also have an effect on his capacity to undertake remunerative work that he was previously undertaking. The AAT concluded that labour market factors would restrict his potential for employment as a truck driver making deliveries or as an assistant manager or cellarman in the hotel industry.

Mr Hendy appealed to the Federal Court against the AAT's decision that he was not eligible for the Special rate. Madgwick J set aside the AAT's decision and remitted the matter to the AAT for rehearing. (See 18 *VeRBosity* 47). The Repatriation Commission then appealed to the Full Court against the decision of Madgwick J.

**Appeal grounds**

The Repatriation Commission submitted on appeal that Madgwick J had erred in finding that there was an error of law on the part of the AAT. The Commission submitted that the primary judge erred by:

- substituting an inquiry into the reasons why the veteran left his last job for consideration of whether the requirements of s 24(1)(c) were satisfied during the assessment period, which commenced two years after he left his last job;
- holding that the veteran's non war-caused disability was to be taken into account only if it actually prevented him from continuing his last job;
- holding that the veteran's non war-caused disability was to be taken into account only if he knew of medical opinion about that disability and acted on it;
- holding that only factors that prevented, rather than hindered, the veteran from continuing to undertake remunerative work that he was undertaking are to be taken into account; and
- holding that labour market factors are not to be taken into account under s 24(1)(c) if they are "the mere consequences of a veteran's service-related disability".

**Full Court's conclusions**

The Full Court upheld the Repatriation Commission's appeal. The Full Court observed that on a fair reading of its reasons, the AAT did not treat labour market forces as preventing Mr Hendy from obtaining work simply by reason of his post-traumatic stress disorder or absence from the workforce by reason of that condition. While the evidence concerning the condition of his knee could have supported a different conclusion, the AAT's conclusion was open to it.

The Full Court said that the AAT's task was to assess what the veteran probably would have done, if he had none of his war-caused disabilities during the assessment period. The requirement in s 24(1)(c) to consider *"remunerative work that the veteran was undertaking"* does not mean a particular job with a particular employer but the **substantive** remunerative work that the veteran had undertaken in the past. That is the exercise that the AAT undertook. The AAT was not bound to limit its consideration to the last employment that the veteran actually undertook.

The Full Court also said that in applying s 24(1)(c), decision-makers are required to take into account any factor that plays a part or contributes to a veteran being prevented from continuing to engage in remunerative work. If a period of time elapses after a veteran ceases remunerative work and before the commencement of the assessment period, lack of recent work experience, time out of the workforce and increasing age will be relevant for consideration under s 24(1)(c).

**Formal decision**

The Full Court upheld the Repatriation Commission's appeal and substituted its decision dismissing the appeal against the AAT's decision.

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

## Vietnam Veterans' Association of Australia NSW Branch Inc v Specialist Medical Review Council

Branson, Emmett & Stone JJ

[2002] FCAFC 439
20 December 2002

***Statements of Principles – prostate cancer and smoking – review by Specialist Medical Review Council – whether sound medical-scientific evidence***

The Vietnam Veterans' Association of Australia (NSW) appealed to the Full Court against the decision of Moore J at first instance. (See 18 *VeRBosity* 49). The Specialist Medical Review Council cross-appealed.

The VVAA was seeking to challenge two declarations made on 3 August 2001 by the SMRC that the "sound medical-scientific evidence" available to the RMA was insufficient to justify an amendment to either of Statements of Principles Nos 191 and 192 of 1996. The effect of the declarations was that the SMRC did not accept that there was a connection between smoking and prostate cancer which might create an entitlement to a pension under the *VE Act*. The SMRC said that it was not satisfied on the basis of the material that there was "sufficient evidence of sufficient weight" before it to support a causal link between smoking and prostate cancer.

**Background**

In May 1995, the VVAA applied for review by the SMRC of the Statement of Principles relating to prostate cancer. In January 1996, the SMRC published declarations rejecting the contention that the SoPs should be amended to include smoking as a factor related to service. In December 1996, the RMA amended the SoPs relating to prostate cancer.

In January 1997, the VVAA again applied for review of the SoP relating to prostate cancer on the basis that it had failed to include smoking as a factor related to service. In November 1999, the RMA issued two new SoPs which also did not recognise a connection between smoking and prostate cancer.

**Issues**

The two main issues dealt with by the Full Court on appeal were:

- whether the SMRC has jurisdiction to continue with the review of the contents of a Statement of Principles requested under s 196Y of the *VE Act* where the relevant SoP has been revoked, rather than merely amended; and
- whether, assuming the SMRC had jurisdiction to continue with the review, it misconstrued the test for determining whether a factor should be included in a Statement of Principles determined under s 196B(2).

**Jurisdiction to review revoked SoP**

The judges delivered separate judgments. **Branson J** observed that the information to be reviewed by the SMRC is the information that was available to the RMA when it determined, amended or last amended the Statement of Principles, the content of which is the subject of review. It does not include additional information that may have become available to the RMA when it later decided to revoke the SoP and determine a new SoP.

Branson J concluded that although the matter was not free from doubt, the *VE Act* disclosed a legislative intention that once a Statement of Principles is revoked, any request to the SMRC to

review the contents of that Statement of Principles ceases to have effect.

**Emmett J** noted that the *VE Act* refers to the review by the SMRC of "the **contents** of a Statement of Principles in force". It must be possible for the SMRC to identify the relevant "contents" of the SoP. It follows that in this case, once the SoP was revoked, there was nothing upon which a review could operate and the SMRC was *functus*.

**Stone J** agreed that a request to review a Statement of Principles ceases to have effect once the SoP in force at the time of the request is revoked.

**Test for inclusion of factor in SoP**

The judges agreed that the second issue did not strictly arise. However, they stated their views as the issue was fully argued by the parties.

**Branson J** said that the SMRC in conducting a review under s 196W of a Statement of Principles must take the same steps as the RMA is required to take under section 196B(2). The RMA must, as a first step, identify the pool of "sound medical-scientific evidence" touching on the issue of whether the particular kind of injury, disease or death with which it is concerned can be related to operational service rendered by veterans. Having identified the pool of "sound medical-scientific evidence", the RMA must consider as a second step whether there is "sound medical-scientific evidence" that indicates that the particular kind of injury, disease or death can be related to operational service rendered by veterans.

In this case, it was evident that the SMRC had failed to take the second step. Branson J concluded:

> "While the approach adopted by the SMRC was an understandable approach for an expert body such as the SMRC to adopt, it was not, in my view, the approach mandated by the Act. A clear intention can be discerned in the Act that the burden of proof to be borne by a claimant where the claim arises from the 'operational service' of a veteran is to be an unusually light burden. Sound medical-scientific evidence that indicates, as opposed to leaves open, the relevant possibility was intended to be sufficient."

**Stone J** agreed with Branson J that the SMRC had failed to apply the correct test. Her Honour noted that the obligation on the RMA (and SMRC) is to determine a Statement of Principles if there is any sound medical-scientific evidence that **could** indicate the relevant relationship with service.

**Emmett J** did not agree that the SMRC had misconstrued the test for determining whether a factor should be included in a SoP as to a reasonable hypothesis.

**Formal decision**

The Full Court allowed the VVAA's appeal and substituted its decision that the declaration made by the Specialist Medical Review Council on 3 August 2001 in relation to Statement of Principles No 191 of 1996 was void.

The Full Court dismissed the SMRC's cross-appeal.

# Federal Magistrates Court of Australia

## Sleep v Repatriation Commission

Raphael FM

[2002] FMCA 244
25 October 2002

***Attendant allowance – procedural fairness – no errors of law***

Mr Sleep appealed against the Tribunal's decision refusing his claim for an attendant allowance under the *VE Act.* He was receiving pension at the Special rate in respect of war-caused disabilities including agranulocytosis with chronic neutropaenia and lymphopaenia with CD4 suppression (HIV negative).

Section 98 of the *VE Act* provides as relevant:

> "(2) Where:
>
> (a) a veteran is being paid a pension under Part II in respect of incapacity:
>
> (i) …
>
> (ii) from a war-caused injury or a war-caused disease that has caused a condition **similar in effect or severity to an injury or disease affecting the cerebro-spinal system**; and
>
> (b) the Commission is of the opinion that the veteran has a need for the services of an attendant to assist the veteran;
>
> the Commission may grant to the veteran an allowance, called attendant allowance, … for or towards the cost of the services of an attendant to assist the veteran." (emphasis added)

The Tribunal found that Mr Sleep's war-caused blood disorder was a permanent disability and potentially dangerous because of the risk of infection. Although it required daily care and attention, it had not caused a condition similar in effect or severity to an injury or disease affecting the cerebro-spinal system. Therefore, section 98(2)(a)(ii) was not satisfied.

**Submissions**

Mr Sleep submitted that the Tribunal had erred in law by examining the severity of his condition by reference to the criteria relating to Activities of Daily Living in GARP Chapter 16.

The Court rejected this contention, noting that although the Tribunal appeared to emphasise his capacity to attend to daily needs on the basis of the GARP criteria, it recognised that these were not the sole criteria and considered other matters.

Mr Sleep also submitted that there was insufficient medical evidence before the Tribunal and that it should have sought further evidence before reaching its decision. He suggested that as a result, he was denied procedural fairness.

The Court said that the question of fact for the Tribunal was whether or not his condition was severe enough to be comparable to an injury or disease affecting the cerebro-spinal system. There was no lack of procedural fairness in the way in which this question was dealt with by the Tribunal.

**Formal decision**

The Court dismissed Mr Sleep's appeal.

# Statements of Principles issued by the Repatriation Medical Authority

**December 2002 - February 2003**

| Number of Instrument | Description of Instrument |
|---|---|
| 71 of 2002 | Determination of Statement of Principles under subsection 196B(2) concerning **atrial flutter** and death from atrial flutter. |
| 72 of 2002 | Determination of Statement of Principles under subsection 196B(3) concerning **atrial flutter** and death from atrial flutter. |
| 73 of 2002 | Revocation of Statement of Principles (Instrument No.370 of 1995 concerning dental pulp disease (including pulpal abscess) and death from dental pulp disease (including pulpal abscess) and Determination of Statement of Principles under subsection 196B(2) concerning **dental pulp disease** and death from dental pulp disease. |
| 74 of 2002 | Revocation of Statement of Principles (Instrument No.371 of 1995 concerning dental pulp disease (including pulpal abscess) and death from dental pulp disease (including pulpal abscess) and Determination of Statement of Principles under subsection 196B(3) concerning **dental pulp disease** and death from dental pulp disease. |
| 75 of 2002 | Amendment of Statement of Principles, Instrument No.63 of 2001, under subsection 196B(2) concerning **mesangial IgA glomerulonephritis** and death from mesangial IgA glomerulonephritis. |
| 76 of 2002 | Amendment of Statement of Principles, Instrument No.44 of 2002, under subsection 196B(2) concerning **multiple sclerosis** and death from multiple sclerosis. |
| 77 of 2002 | Amendment of Statement of Principles, Instrument No.46 of 2002, under subsection 196B(2) concerning **lumbar spondylosis** and death from lumbar spondylosis. |
| 78 of 2002 | Amendment of Statement of Principles, Instrument No.47 of 2002, under subsection 196B(3) concerning **lumbar spondylosis** and death from lumbar spondylosis. |
| 79 of 2002 | Amendment of Statement of Principles, Instrument No.48 of 2002, under subsection 196B(2) concerning **thoracic spondylosis** and death from thoracic spondylosis. |
| 80 of 2002 | Amendment of Statement of Principles, Instrument No.49 of 2002, under subsection 196B(3) concerning **thoracic spondylosis** and death from thoracic spondylosis. |
| 81 of 2002 | Amendment of Statement of Principles, Instrument No.50 of 2002, under subsection 196B(2) concerning **cervical spondylosis** and death from cervical spondylosis. |

82 of 2002 Amendment of Statement of Principles, Instrument No.51 of 2002, under subsection 196B(3) concerning **cervical spondylosis** and death from cervical spondylosis.

1 of 2003 Determination of Statement of Principles under subsection 196B(2) concerning **otitis media** and death from otitis media.

2 of 2003 Determination of Statement of Principles under subsection 196B(3) concerning **otitis media** and death from otitis media.

3 of 2003 Revocation of Statement of Principles (Instrument No.65 of 1995, as amended by Instrument No.160 of 1995 concerning **allergic rhinitis** and death from allergic rhinitis), and Determination of Statement of Principles under subsection 196B(2) concerning allergic rhinitis and death from allergic rhinitis.

4 of 2003 Revocation of Statement of Principles (Instrument No.66 of 1995, as amended by Instrument No.161 of 1995 concerning **allergic rhinitis** and death from allergic rhinitis), and Determination of Statement of Principles under subsection 196B(3) concerning allergic rhinitis and death from allergic rhinitis.

**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/

# Specialist Medical Review Council

## Myeloma

On 7 February 2003, the Specialist Medical Review Council issued a declaration in relation to Statement of Principles No 72 of 1999 in respect of **myeloma and death from myeloma**. The Council declared under s 196W(5) of the *VE Act* that it is of the view that the sound medical-scientific evidence available to the RMA at the time it determined the Statement of Principles was insufficient to justify:

(a) an amendment of the Statement of Principles to include as a factor or factors:

(i) parasitic diseases, including malaria;

(ii) antigenic stimulation; or

(iii) parasitic disease, including malaria, precipitating antigenic stimulation; and

(b) any other amendment of the Statement of Principles.

## Malignant neoplasm of the small intestine

On 27 February 2003, the Specialist Medical Review Council issued a declaration in relation to Statement of Principles No 153 of 1996 as amended by No 7 of 1998 in

respect of **malignant neoplasm of the small intestine and death from malignant neoplasm of the small intestine**. The Council declared under s 196W(5) of the *VE Act* that it is of the view that the sound medical-scientific evidence available to the RMA at the time it determined or amended the Statement of Principles was insufficient to justify:

(a) an amendment of the Statement of Principles by including as a factor or factors exposure to:

  (i) barium meal x-rays;

  (ii) peptic ulceration;

  (iii) helicobacter pylori infection;

  (iv) cimetidine and abdominal irritation from numerous medications; and

  (v) exposure to nitrosamines; and

(b) any other amendment of the Statement of Principles.

The Council recommended that the RMA carry out an investigation to find out if there is new information available about:

(a) how malignant neoplasm of the small intestine may be contracted, or death from malignant neoplasm of the small intestine occur; and

(b) the extent to which malignant neoplasm of the small intestine or death from malignant neoplasm of the small intestine may be war-caused or defence-caused

and in particular, to find out if there is sound medical-scientific evidence that indicates that exposure to nitrosamines is a link or element in a reasonable hypothesis connecting operational service to malignant neoplasm of the small intestine and death from malignant neoplasm of the small intestine.

An investigation should take into account the sound medical-scientific evidence previously considered by the RMA together with any new body of sound medical-scientific evidence disclosed by the investigation.

**The SMRC's reasons for decisions can be obtained on request by writing to the Specialist Medical Review Council Secretariat, PO Box 895, Woden ACT 2606 or by telephoning (03) 9284 6784.**

# Repatriation Medical Authority

**CONDITIONS UNDER INVESTIGATION AS AT 5 MARCH 2003**

| Description of disease or injury | Date gazetted |
|---|---|
| Atrial fibrillation<br>[Instrument Nos 9/96 & 10/96] | 19-09-01 |
| Brodie's abscess | 05-03-03 |
| Carotid artery disease<br>[Instrument Nos 346/97 & 347/97] | 28-02-01 |
| Chronic fatigue syndrome<br>[Instrument Nos 90/97 & 91/97] | 19-09-01 |
| Chronic myeloid leukaemia<br>[Instrument Nos 7/97 & 8/97] | 16-01-02 |
| Chronic sinusitis<br>[Instrument Nos 211/95 & 212/95] | 01-08-01 |
| Diabetes mellitus<br>[Instrument Nos 82/99 & 83/99 as amended by Nos 9, 10, 91 & 92/01] | 28-11-01 |
| Endometriosis | 16-10-02 |
| Epilepsy<br>[Instrument Nos 79/96 & 80/96] | 05-03-03 |
| Gastro-oesophageal reflux disease<br>[Instrument Nos 52/02 & 53/02] | 18-12-02 |
| Gulf War syndrome | 17-11-99 |
| Haemorrhoids<br>[Instrument Nos 13/00 & 14/00] | 13-11-02 |

| Description of disease or injury | Date gazetted |
|---|---|
| Hiatus hernia<br>[Instrument Nos 42/99 & 43/99] | 14-08-02 |
| Hypertension [1]<br>[Instrument Nos 31/01 & 32/01] | 24-04-02 |
| Ischaemic heart disease<br>[Instrument Nos 38/99 & 39/99] | 28-11-01 |
| Jakob-Creutzfeldt disease<br>[Instrument Nos 63/95 & 64/95 as amended by Nos 190/95, 49/97 & 50/97] | 18-12-02 |
| Leptospirosis | 05-03-03 |
| Loss of teeth<br>[Instrument Nos 374/95 & 375/95] | 06-03-02 |
| Macular degeneration<br>[Instrument Nos 29/97 & 30/97] | 06-06-01 |
| Malignant neoplasm of the brain<br>[Instrument Nos 40/99 & 41/99] | 10-01-01 |
| Malignant neoplasm of the oral cavity or hypopharynx<br>[Instrument Nos 113/96 & 114/96] | 06-03-02 |
| Malignant neoplasm of the salivary gland<br>[Instrument Nos 25/97 & 26/97] | 06-03-02 |
| Malignant neoplasm of the stomach<br>[Instrument Nos 67/97 & 68/97 as amended by Nos 9/98 & 10/98] | 24-04-02 |
| Malignant neoplasm of the testis and paratesticular tissues<br>[Instrument Nos 3/97 & 4/97] | 14-08-02 |
| Melioidosis<br>[Instrument Nos 344/95 & 345/95 as amended by Nos 14/02 & 15/02] | 29-05-02 |

[1] This investigation follows a declaration by the Specialist Medical Review Council under subsection 196W(4) that there is sound medical-scientific evidence to justify amendment of the SoPs for hypertension to include as a factor *"occupational or work related stress consequent upon working in a high demand, low decision latitude or control job".*

| Description of disease or injury | Date gazetted |
|---|---|
| Mitral valve prolapse | 16-01-02 |
| Myeloma<br>[Instrument Nos 72/99 & 73/99] | 19-09-01 |
| Neoplasm of the pituitary gland<br>[Instrument Nos 37/97 & 38/97] | 13-11-02 |
| Non melanotic malignant neoplasm of the skin<br>[Instrument Nos 43/01 & 44/01 as amended by Nos 51/01 & 52/01] | 08-05-02 |
| Non-Hodgkin's lymphoma<br>[Instrument Nos 80/99 & 81/99] | 03-07-02 |
| Obesity | 28-02-01 |
| Osteomyelitis | 05-03-03 |
| Restless legs syndrome | 27-11-02 |
| Rheumatoid arthritis<br>[Instrument Nos 126/96 & 127/96] | 13-11-02 |
| Seizures<br>[Instrument Nos 81/96 & 82/96] | 05-03-03 |
| Spondylolisthesis & spondylolysis<br>[Instrument Nos 15/97 & 16/97] | 05-03-03 |
| Subarachnoid haemorrhage<br>[Instrument Nos 48/99 & 49/99] | 29-05-02 |
| Tinea<br>[Instrument Nos 27/94 & 28/94 as amended by Nos 184/95, 185/95, 7/02 & 8/02] | 29-05-02 |

# Administrative Appeals Tribunal decisions – October to December 2002

## Cardiovascular disease

atrial fibrillation
- whether cardiac disease present
  **Mansfield, Y E** 01 Nov 2002

hypertension
- alcohol dependence or abuse
  **Ritchie, C J** 18 Oct 2002
  **Riordan, L F** 22 Oct 2002

ischaemic heart disease
- hypertension – salt ingestion
  **Beitz, F** 18 Oct 2002
- no disease present following surgery
  **Davy, J H** 06 Nov 2002
- smoking
  **Warden, K** 11 Oct 2002

## Cerebrovascular disease

cerebrovascular accident
- hypertension
  **Riordan, L F** 22 Oct 2002

## Death

amyloidosis & ischaemic heart disease
- smoking
  **Fairweather, H** 11 Oct 2002

carcinoma of colon
- smoking & alcohol
  **Synott, L C** 20 Dec 2002

carcinoma of colorectum
- alcohol dependence or abuse
  **Elson, J** 06 Nov 2002

carcinoma of prostate
- animal fat consumption
  **Mason, U** 23 Dec 2002

carcinoma of prostate & ischaemic heart disease
- animal fat consumption & smoking
  **Sedgwick, B** 01 Nov 2002

cerebrovascular accident
- panic disorder
  **Merry, M** 20 Dec 2002

chronic bronchitis & emphysema
- smoking
  **Higgins, I O M** 01 Nov 2002

chronic obstructive airways disease & carcinoma of prostate
- whether chest infection accelerated death
  **Audet, V** 25 Nov 2002

diabetes mellitus, ischaemic heart disease & atherosclerotic peripheral vascular disease
- whether smoking war-caused
  **Ward, D R** 07 Oct 2002

ischaemic heart disease
- hypertension – salt ingestion
  **Cummins, J** 06 Nov 2002
- obesity
  **Luxton, B** 25 Oct 2002
- sedentary lifestyle due to back condition
  **Williams, N J** 18 Oct 2002
- smoking
  **McLeod, R I** 29 Oct 2002
  **Sillitoe, E M** 07 Nov 2002
  **Lendrum, E R** 23 Dec 2002

motor vehicle accident
- alcohol dependence or abuse
  **Pope, B H** 19 Dec 2002

pulmonary metastases
- squamous cell carcinoma – solar exposure
  **Baker, G I** 19 Nov 2002

reinstatement of pension
- remarried before 1984
  **Clifford, P** 10 Oct 2002
  **Harris, O** 20 Nov 2002

small bowel adenocarcinoma
- whether death hastened by reduced mobility
  **Hancock, A P** 27 Nov 2002

vascular dementia

- hypertension – salt ingestion

**Buckley, V M** 13 Dec 2002

## Dependant

widows pension

- member of same-sex couple

**Nolan, R J** 06 Dec 2002

## Extreme disablement adjustment

lifestyle rating

**Westburgh, E W** 30 Oct 2002
**Thorpe, C G B** 04 Dec 2002
**Evans, R J** 24 Dec 2002

## Gastrointestinal disorder

diverticular disease of colon

- clinical worsening – low dietary fibre

**Swinden, L B** 15 Nov 2002

- low fibre diet

**Fogarty, O M** 02 Oct 2002

## Haematological disorder

aplastic anaemia

- exposure to cordite

**Little, H W** 29 Nov 2002

## Japanese internment

civilian interned in Java during WW2

- whether domiciled in Australia

**Lambert, W H R** 09 Dec 2002

civilians interned in Netherlands East Indies during WW2

- whether domiciled in Australia

**Burgman, I M** 04 Oct 2002
**Levitt, S A** 08 Oct 2002

veteran interned in Changi

- claim as partner of deceased veteran - divorced

**Durbin, I** 08 Oct 2002

## Jurisdiction

assessment

- whether reviewable by AAT

**Griffin, R W** 11 Dec 2002

## Musculoskeletal disorder

ankle fracture

- fall from ladder due to back spasm

**Brown, R D** 10 Oct 2002

## Osteoarthrosis

hips

- trauma – falls on ship

**Polglaze, R** 26 Nov 2002

knee

- trauma – fall from aircraft

**Gavan, N J** 15 Nov 2002

- trauma – meniscal tear

**Solomon, D F** 14 Oct 2002

knees & hips

- disordered joint mechanics & trauma

**Lynch, E R** 15 Nov 2002

shoulder

- trauma – fall from aircraft

**Hawkins, K** 13 Dec 2002

shoulders

- trauma – carrying bren gun

**Taylor, H N** 16 Dec 2002

## Practice & Procedure

Administrative Appeals Tribunal

- application for extension of time

**Phillips, C** 10 Oct 2002

## Psychiatric disorder

alcohol dependence or abuse

- experiencing a severe stressor – aircraft accident

**Hawkins, K** 13 Dec 2002

depressive disorder & alcohol dependence or abuse

- experiencing a severe stressor – tank incident

**Miller, J** 18 Dec 2002

gun phobia & alcohol dependence

- malfunctioning navy gun

**Clark, P R** 14 Nov 2002

post traumatic stress disorder

- experiencing a severe stressor – death of friend in Vietnam

**Boeder, W** 16 Oct 2002

- experiencing a severe stressor – Vietnam service

**Burland, A W** 11 Oct 2002

**Rogers, M** 13 Dec 2002

- experiencing a severe stressor – Vietnam waters

**Eckermann, E J** 25 Oct 2002

- experiencing a severe stressor – Vung Tau harbour

**Prowse, M** 16 Oct 2002

**Fudge, M R** 16 Dec 2002

- experiencing a severe stressor – watchtower duty & hearing field radio in Vietnam

**Gregson, K G** 16 Oct 2002

- experiencing a severe stressor – witnessing casualties in Vietnam

**Cadusch, B V P** 16 Oct 2002

post traumatic stress disorder & alcohol dependence or abuse

- experiencing a severe stressor – sexual assault

**Sly, J** 23 Dec 2002

- experiencing a severe stressor – Vietnam service

**Hoopert, G** 17 Dec 2002

- experiencing a severe stressor – Vung Tau harbour

**Ritchie, C J** 18 Oct 2002

post traumatic stress disorder, alcohol dependence or abuse, panic disorder, generalised anxiety disorder & depressive disorder

- experiencing a severe stressor – Ubon service

**Robinson, G V** 04 Oct 2002

## Remunerative work

economic loss

- business manager

**Forbes, P J** 29 Oct 2002

Intermediate rate

- whether incapable of more than part-time work

**Weir, P M** 07 Nov 2002

substantial cause of inability to obtain

- sales manager

**Corbett, J A** 20 Nov 2002

temporarily incapacitated

- drilling supervisor

**Pawson, R F** 22 Nov 2002

whether genuinely seeking to engage in

- leading hand/supervisor

**Conway, R** 22 Nov 2002

whether prevented by war-caused disabilities alone

- barrister aged 79

**O'Sullivan, L** 21 Nov 2002

- caretaker

**Claxton, W A** 21 Oct 2002

- oil driller

**Lewis, V J** 06 Dec 2002

- railway track inspector

**Warren, T A** 22 Nov 2002

- security officer

**Cooper, H J** 06 Dec 2002

- security officer – voluntary redundancy

**Magill, R P** 08 Nov 2002

- storeman

**Phillips, A J** 22 Nov 2002

- voluntary redundancy

**Meeke, W** 31 Oct 2002

- worm farmer

**Howieson, B** 06 Dec 2002

whether prevented from continuing last paid work (over 65)

- medical researcher

**Rosenthal, H W** 09 Oct 2002

## Spinal disorder

cervical spondylosis

- trauma – fall from aircraft

**Hawkins, K** 13 Dec 2002

- trauma – gym accident

**McGuiness, J** 18 Nov 2002

## Visual disorder



## Words and phrases

## NATIONAL CASE APPRAISAL REGISTRAR

I commenced duty as the National Case Appraisal Registrar (NCAR) in mid-January 2003. The major focus of the position to date has been the examination of a large number of "unrepresented" cases in NSW to assess their readiness to proceed to hearing.

I have found that the majority of these applicants have not provided any additional evidence to support the application for review to the Board, nor have they indicated the grounds on which they dispute the findings of the primary claims assessor. When all that is required is further medical evidence, it is a relatively simple task to explain to an applicant what should be obtained from a local medical officer or specialist. The major difficulty for "unrepresented" applicants, however, arises when a question of statutory interpretation is involved. Issues that have arisen recently include the "clinical onset" of a disease where I had to discuss how the review bodies in this jurisdiction had approached this concept and the nature of the supporting medical evidence which would assist the applicant in meeting these requirements.

The other main duty of my position is to act as Veteran Advocate Liaison officer and this aspect has been most rewarding. I have had a number of discussions with advocates on various matters. The issue of eligibility, particularly involving service outside the major conflicts, is often confusing and I have drawn the attention of advocates to the VRB website at:

http://www.vrb.gov.au/service_eligibility/service.html

where an up to date list of instruments dealing with service in relevant areas can be found. The recent *Clarke Report into Veterans' Entitlements* is also useful in this regard.

Other common questions involve how particular factors in a Statement of Principles have been dealt with in the review system and I have been able to point advocates to relevant decisions in the AAT and the Federal Court to help them in preparing submissions. Many of these decisions are discussed in back issues of *VeRBosity* which are available at www.vrb.gov.au. The interpretation of section 24 of the *Veterans' Entitlements Act 1986* relating to the Special rate is also a recurring theme, as well as the interpretation of many sections of GARP.

I would be pleased to speak with applicants or advocates on any matters they have before the Board. I can be contacted for the cost of a local call from anywhere in Australia on 1300 13 55 74.

Peter Studman