VeRBosity Volume 20 No. 2

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Editor's notes

On 1 July 2004, the *Military Rehabilitation and Compensation Act 2004* (MRCA) and the *Military Rehabilitation and Compensation* (*Consequential and Transitional Provisions*) *Act 2004* commenced. One effect of this new legislation is to have a cut off date of 30 June 2004 for eligible service under the VEA and the *Safety, Rehabilitation and Compensation Act 1988* (SRCA). That is, anything arising out of service rendered *after* that date will come under the MRCA rather than the VEA or SRCA. The VEA and SRCA will continue to apply to eligible service rendered *before* 1 July 2004.

The VRB is able to review most decisions under the MRCA. However, a claimant has the choice of applying to the VRB for a review (within 12 months) or seeking a 'reconsideration' by another delegate (within 30 days). If the claimant asks for a 'reconsideration', he or she cannot then seek review by the VRB, and if the claimant applies to the VRB he or she cannot then seek a 'reconsideration'. There is a right of appeal to the AAT from a VRB or a 'reconsideration' decision.

A more detailed article on the MRCA will appear in the next edition of *VeRBosity*.

Bruce Topperwien
Editor

This edition of *VeRBosity* contains reports of all 6 Federal Court and 5 Federal Magistrates Court judgments in veterans' matters received in April to June 2004 as well as 5 selected AAT decisions handed down in the same period. There is an index of all AAT and Court cases received in this period and information on recent Statements of Principles determined, and current investigations of, the Repatriation Medical Authority.

Questions & Answers

The VRB encourages applicants and their representatives to contact their local VRB Registrar to discuss any issues relating to their cases. If you have any questions particularly concerning the *Veterans' Entitlements Act 1986* (the VEA) you can telephone the NSW Registrar, Peter Godwin, on **1300 135 574** from anywhere in Australia at the cost of a local call.

Special rate eligibility for incapacity from defence-caused disabilities

Question: According to section 24, the incapacity that results in eligibility for the special rate of pension must be due to 'war-caused' injuries or diseases. Does this mean that people with defence-caused injuries and diseases cannot qualify for the special rate?

Answer: No, people with defence-caused injuries and diseases *can* qualify for the special rate of disability pension.

Part II of the Act is concerned with war-caused injury, disease or death, and Part IV is concerned with defence-caused injury, disease or death. However, all the *assessment* provisions in the Act are located in Part II, and not in Part IV.

So while section 24 (and most of the other sections in Part II concerning assessment of disability pension) refer only to 'war-caused' injuries and diseases, section 73 (which is in Part IV) makes it clear that those provisions apply equally to defence-caused injuries and diseases.

Section 73 says that, where it says, 'war-caused', it is to be read as 'defence-caused', and where it says, 'veteran', it is to be read as 'a member of the Forces' or 'a member of a Peacekeeping Force' when dealing with matters under Part IV of the Act.

Completing claim forms

Question: As a pensions officer I help claimants complete claim forms and lifestyle questionnaires. It is usually easier for me to write down the answers to the questions on the forms than to get the claimants to write it themselves, but I have been told that this is not a good idea. Why?

Answer: While it is often simpler for you to complete the claim form, you do so at the risk of your reputation and that of your organisation.

If statements made in your handwriting are later shown to be false or misleading it is often the claimant's excuse that the detail was inserted by the pensions officer and the claimant signed the form without properly reading or understanding it. There are a number of such instances in AAT cases available to the public on the Internet. Some of these name the pensions officers who wrote the allegedly false information on the claim form. While not all such excuses are believed, mud has a tendency to stick, and pensions officers may have their reputations adversely affected.

If claim forms and other similar documents are completed by claimants in their own handwriting, claimants become more clearly responsible for their own claim and the potential for risk to reputation or criminal liability (see s 208 of the VEA) of pensions officers is reduced.

No doubt there will be occasions where, because the claimant is incapable of completing the claim form in their own hand, you will have to do it for them. In such instances your standard practice should be to read each answer back to the claimant and ask them to tell you if it is not entirely accurate or if it includes an exaggeration of the facts.

Administrative Appeals Tribunal

Re Easterbrook and Repatriation Commission

Bell

[2004] AATA 506
20 May 2004

Special rate – whether worked in the same profession, trade, employment, vocation or calling for continuous period of 10 years – different business activities

The main issue in this case was whether Mr Easterbrook met the test in s24(2A)(g)(ii), namely, whether when he stopped undertaking his last paid work he had worked for a continuous period of at least 10 years on his own account in that profession, trade, employment, vocation or calling, commencing before he turned 65 years. He turned 65 in 1988.

In 1980, Mr Easterbrook leased land and built a golf course and driving range. He was responsible for the design and construction of buildings and earthworks. He operated the golf course and driving range. He also produced a golf instruction video. In 1984 he went to the USA for 2 months to coach golf, and returned to the USA annually for that purpose until 1987 when he underwent heart surgery. After convalescence he went back to the USA to teach but found that he kept forgetting things.

He continued to run the golf course but the labouring was getting very difficult to do. He ceased operating the golf course in 1997 and sold the assets of the golf course.

When he closed the golf course he remained living on the property and worked on an interactive golf instruction system. He had had this idea in about 1983, but it was too expensive to develop at that time. He began to take steps to apply for a patent in 1990, and this was achieved in 1998 or 1999.

In 1998 he leased a large hall and installed and operated a driving range. He also set up his interactive training system and operated again as a sole trader under the trademark, 'Graphic Golf Academy'. In 1999 he gave this up due to his disabilities.

Mr Easterbrook's taxation returns for 1997, 1998 and 1999 described his business activity respectively as, 'golf club operation (except hospitality)', 'golf coaching service', and 'golf instruction and practice centre'.

The Tribunal considered the Federal Court cases of *Thomson* [2000] FCA 204 and *White* [2001] FCA 1585 and said:

> [36] I consider that the decisions outlined above indicate a requirement for particularity, not of job, or, in the case of a self employed person, business entity, but of nature of profession, trade, employment, vocation or calling. This, in turn, requires an examination of the activity engaged in by the Applicant and the skills and experience required of the Applicant in that activity. The Applicant's last paid work, or his last activity, was the operation of the Graphic Golf Academy.
>
> [37] It is clear that golf is a common thread running throughout the Applicant's work from at least 1980. His work in operating and maintaining Yallah Park Golf Course, his work teaching golfing technique and his work operating the Graphic Golf

academy all concerned golf and were sited within the golf industry.

[38] However, the emphasis in each of these strands of activity within the golf industry was markedly different and utilised significantly different experience and skills. In the operation and maintenance of the golf course, the Applicant brought to bear, on his own evidence, his experience as a landscaper and his own labour in that respect and ran a club which collected fees from members. As a golf teacher, the Applicant brought to bear his skills in the game of golf and his ability to teach those skills. As an operator of the Graphic Golf Academy, the Applicant brought to bear his skills in the game of golf and his knowledge of the video based technology and method used in the interactive system he invented. Although all centred on golf, these activities, and the skills required to pursue them, are very different.

[39] The Respondent submitted that the difference between working 'outside' in relation to the golf course and working 'inside' in relation to the Graphic Golf Academy was significant. I consider that it is not the environment in which the work was done for each of these endeavours that is significant but rather the presence of a large component of skilled physical work, including top dressing, mowing, spraying and caring for shrubs and trees, required to maintain the golf course grounds and the absence of that component in relation to the Applicant's last paid work, that is, the Graphic Golf Academy.

[40] The Applicant submitted that a constant throughout the relevant period was his teaching (although, I note the Applicant's evidence that he had to cease his teaching in the US after his heart surgery because he could no longer remember things) and further submitted that the operation of the interactive system amounted to teaching in that it provided instruction in golf. However, even if I were to accept that, there is no evidence that during the period between the closure of the golf course, where the Applicant taught golf technique, and the opening of the Graphic Golf Academy the Applicant continued to teach golf technique. Indeed the Applicant's evidence was that during this period he concerned himself with the selling off of the golf course's assets and the finalisation and implementation of the interactive system. He made no mention in his evidence of teaching golf technique in that period. This is also supported by the Applicant's answers on his claim for age pension to the effect that he had ceased work and did not conduct a business. This is a significant break in continuation of the 'profession, trade, employment, vocation or calling' of teaching golf and serves to interrupt any continuity, over a 10 year period leading back from his last paid work (the Graphic Golf Academy) in 1999.

[41] I am therefore not satisfied that the time spent by the Applicant in the period between the closure of the golf course and the opening of the Graphic Golf Academy can be characterised as 'teaching golf technique', even if the operation of the Graphic Golf Academy can be so characterised.

[42] I am also mindful of the evidence of Mr Menzies that the businesses styled 'Yallah Golf Club' and 'Graphic Golf Academy' are separate businesses conducting different activities. However, I consider that it is the activities, in terms of his 'profession, trade, employment, vocation or calling', of the Applicant, rather than the business vehicles used by him, that are most important

in the application of section 24(2A)(g).

[43] Given that the Applicant is required, by the terms of section 24(2A), to satisfy all of the paragraphs in that provision, he therefore does not qualify to receive pension at the Special rate

Formal decision

The Tribunal affirmed the decision under review.

Re Thatcher and Repatriation Commission

Jarvis

[2004] AATA 519
21 May 2004

Special rate – type of remunerative work the veteran had been undertaking – whether real or substantive work

Mr Thatcher had a long career in the printing industry, but left that work after a disagreement concerning work practices. He then undertook a number of unskilled labouring, cleaning, maintenance and handyman jobs. In December 2001, after being approached by Mr Thatcher's son, a crash repairer offered Mr Thatcher a job, which he took.

Mr Thatcher worked for 2 days before the Christmas shutdown period, and resumed on 2 January 2002. He then admitted himself into hospital from 6-31 January for his war-caused PTSD. Upon discharge he was on medication but resumed work for the crash repairer, completing several shifts until 25 February 2002 when he was found wandering around the workshop in a bewildered and disoriented state caused by his medication. His employer then terminated his employment. The employer gave evidence that he could not continue to employ Mr Thatcher because of the effects of his medication, but he now employs someone else to carry out Mr Thatcher's previous duties.

The Commission argued that it could not be said that Mr Thatcher had been prevented from continuing to undertake the kind of work he had been undertaking by reason of his incapacity from war-caused disease alone because the crash repair work could not be classified as real or substantive 'remunerative work' for the purposes of s24(1)(c) given its short duration and small amount of remuneration received. The Tribunal rejected that argument and said:

> [37] In the present matter, the respondent contends that the last work of the applicant, namely employment with Christies Beach Crash Repairs, was too brief and brought the applicant too little income to amount to substantial remunerative work. … I find that the applicant's work with Christies Beach Crash Repairs was remunerative work under s 24(1)(c), and was sufficient to ground an entitlement under that provision, for the following reasons:
>
> (a) the applicant commenced employment with Christies Beach Crash Repairs on the understanding that he would engage in ongoing employment of 10 hours per week;
>
> (b) the applicant had an intention to increase his hours and thus, his earnings, from Christies Beach Crash Repairs;
>
> (c) the applicant would have continued to receive stable earnings of $100 per week and did, in fact, receive $450 for the 45 hours he is recorded as having completed;
>
> (d) Mr Nash [the owner of the crash repairs] clearly intended to employ, and continue to employ, someone in the applicant's position as evidenced

by [the] subsequent employment of a university student;

(e) according to the evidence of Mr Nash and the applicant, the applicant was effectively undertaking his work at Christies Beach Crash Repairs until the time when he was affected by his medication, and the work he did was not insubstantial or trivial; and

(f) unlike the applicant in *Forrester*, the position previously held by the applicant with Christies Beach Crash Repairs was not of a kind that was subject to 'drying up' in the normal course of events.

The Tribunal found that it was only the applicant's war-caused PTSD and the medication used to treat that disease that rendered him incapable of continuing the kind of work he had been undertaking.

Formal decision

The Tribunal set aside the decision under review and assessed pension at the special rate.

Re Van Heteren and Repatriation Commission

Jarvis

[2004] AATA 661
25 June 2004

Refusal to undergo medical examination – information from examination likely to affect the decision – power of Tribunal – deferral of consideration of application

In 2003, the Federal Court remitted this matter to the Tribunal to be reheard and decided again as the Tribunal had made an error of law in its previous decision (see (2003) 19 *VeRBosity* 87). In the course of preparing for the rehearing, the Commission advised Mr Van Heteren that it required him to be examined by a consultant psychiatrist and an occupational physician. Mr Van Heteren objected to this, and so the Commission obtained a directions hearing before the Tribunal for a direction concerning the effect of s 19A of the VEA.

Section 19A provides that if a claimant refuses to undergo a medical examination, the Commission may defer consideration of the claim until the claimant undergoes the examination, and that if, at the end of 6 months he or she still has not done so, the claim is deemed to have been refused.

The Tribunal considered the issues that it would have to consider in the rehearing of the application and noted, in particular, that s 19 provides that the assessment period does not end until the date of the Tribunal's decision and that medical evidence that was before the Tribunal at the first hearing was no longer up-to-date.

The Tribunal noted that while the Commission had conceded the applicant could meet the test in s 24(1)(b), this did not mean that the medical evidence relating to that issue was relevant to the issue in s 24(1)(c), and that obtaining an updated psychiatric report would provide information likely to affect the Tribunal's decision.

Formal direction

The Tribunal directed that the proposed medical examinations 'are examinations likely to affect the Tribunal's decision on the rehearing of the applicant's claim, and so if the veteran were to refuse to undergo those examinations the Tribunal would exercise the power under s19A(1) of the VE Act to defer further consideration of the claim until the applicant had undergone the examinations.'

Re Collier and Repatriation Commission

Dwyer

[2004] AATA 663
28 June 2004

Operational service – voyage between Australian ports but outside Australia – the *Kohn* 'essential character of service' test applied

At the hearing, the Commission indicated that if it were found that Mr Collier had rendered operational service, then in accordance with the relevant Statement of Principles applying to that kind of service, the Commission would concede his osteoarthrosis of the knees was war-caused. Thus, the only issue at the hearing was whether Mr Collier had rendered operational service.

To have rendered 'operational service', Mr Collier would have to have 'rendered continuous full-time service outside Australia' during World War 2. This criterion had previously been discussed by the Federal Court in *Kohn* (1989) 5 *VeRBosity* 108 and *Proctor* (1999) 15 *VeRBosity* 13.

The Tribunal found that Mr Collier was transported in SS *Katoomba* from Sydney to Townsville between 6 May and 15 May 1943 together with his Division and all the signals and construction equipment required to perform their function, which included construction of the relay station at the north of the Cape York peninsula. Their role was to support combat operations in New Guinea by transmitting messages to and from Australian servicemen serving in New Guinea. The Tribunal also found that four ships had been torpedoed by Japanese submarines along the same route taken by SS *Katoomba* during the period of *Katoomba's* voyage.

The Tribunal discussed in some detail the cases of Kohn and Proctor, and concluded:

> [40] … [W]hile approving of the reasoning of Hill J in *Kohn*, the Full Court [in *Proctor*] seems to have emphasised the point made by Hill J that questions of degree are involved in characterising service outside Australia. We must therefore look at the facts in this matter.
>
> [41] We find that Mr Collier's voyage outside Australia lasted 9 days, as established by the service records. We find further, on the basis of Professor McCarthy's reports and evidence, that SS *Katoomba* on that voyage, sailed 20 miles off the coast of Australia, well outside Australian waters, and in a convoy of vessels, because of the perceived danger to vessels travelling alone. We find further that the reason why the voyage took as long as it did was probably because evasive action was taken in that the convoy zig-zagged, rather than sailing in a straight line.
>
> [42] We find further that Japanese submarines were operating in an active fashion in the waters in which SS *Katoomba* was sailing in the period 6 May 1943 to 15 May 1943. Four vessels were sunk between Sydney and Townsville while SS *Katoomba* made its voyage. We find the route taken by SS *Katoomba* was the chosen target area of Japanese submarines, and that the convoy which included SS *Katoomba* faced a high level of probability that it would be attacked. We find that the activity in which Mr Collier's division was engaged at the time was not a training activity, but was to move a signals unit to an area where it was required to support combat operations in New Guinea.
>
> [43] We find that the 'essential character' of the voyage which Mr Collier took on SS *Katoomba* was

that it was a voyage outside Australia, in an area of enemy submarine activity, at a time when vessels were being torpedoed in the same waters in which the vessel was sailing. We find that the purpose of the voyage was to move a signals unit to an area where it was required to support combat operations in New Guinea. We find that the voyage took nine days and SS *Katoomba* was outside Australian waters for the whole of the journey except when leaving and arriving port. We find this matter is distinguishable on the facts from *Kohn*. Mr Kohn seems to have been travelling alone, but Mr Collier was travelling in company with his Division and with all the stores and equipment of his Division. He was not travelling on a training exercise, but for the purpose of establishing a signals unit, where it was required to support combat operations in New Guinea. His voyage was of a longer duration than that of either Mr Proctor or Mr Kohn. He was outside Australian waters and the voyage was a significant episode of service in its own right, not a mere transitory passage outside Australia. As in Proctor there was significant exposure to danger of enemy combat during the voyage. We find the facts in this matter are much closer to those in *Proctor* than to those in *Kohn*.

[44] We find that Mr Collier's nine-day voyage was not brief or transitory and that it did not consist of intermittent movement inside and outside Australia and that, during that voyage, Mr Collier was exposed to the risk of enemy combat. That is clearly demonstrated by the fact that HMAS *Centaur*, which he saw in port, probably in Sydney, and which sailed in the same waters, was torpedoed and sunk while Mr Collier and his Division were sailing on SS *Katoomba*. We find that the essential character of his voyage was similar to that of Mr Proctor. The purpose of his voyage, as part of a move of his whole Division, was to provide signals to support combat operations in New Guinea.

[45] We find that Mr Collier's service during the period of his voyage on SS *Katoomba* was 'continuous full-time service outside Australia'.

Formal decision

Having found that Mr Collier had rendered operational service and, consistent with the Commission's concession, the Tribunal set aside the decision under review and decided that Mr Collier's osteoarthrosis of the knees was war-caused. Pension was assessed at 100% of the general rate.

Re Seale & Healey and Repatriation Commission

Purvis J

[2004] AATA 700
30 June 2004

Whether AAT proceedings should be adjourned pending review of Statement of Principles by RMA

In these two cases, the applicants sought an adjournment of the substantive hearings and for the matters not be listed for hearing on the merits until the RMA has reviewed the Statement of Principles concerning death from malignant neoplasm of the prostate. In each case, the applicant was hopeful that the RMA would insert a factor relating to cigarette smoking.

The Tribunal reviewed the cases on this subject, including *VVAA*(*NSW*) *v Cohen* (1996) 12 *VeRBosity* 88, *Thornton v Repatriation Commission* (1981) 1 RPD 165, *McMillan v Repatriation Commission* (1998) 14 *VeRBosity* 21, and *Beale v*

AAT & Repatriation Commission (1998) 14 *VeRBosity* 22, and said:

> [20] There is however a statutory obligation on the Tribunal to apply the law as it is to facts presented to it at a hearing. There is no obligation on it and indeed it would be wrong for it to take into account 'what is currently being considered' in arriving at a decision. If a decision is imminent which would change the law then in light of the ability of a claimant to benefit from such a change by making a fresh application, a delay might be appropriate. But that is not the position here. A change is by no means certain or imminent.
>
> [21] It is said that there are special circumstances why the Tribunal should await the SoP review namely:
>
> - the reasons that prompted the Vietnam Veterans' Association of Australia N.S.W. Branch to appeal to the New South Wales Supreme Court and the Federal Court and the reasonable hypothesis test that is now properly to be applied in making a SoP determination;
> - the current SoP was made before the Vietnam Veterans' decisions were handed down and were said to have been so made consequent upon there being application of 'a too severe test to a significant body of supportive epidemiological evidence'. It was then considered appropriate for there to be a review by the RMA of the current SoP.
> - the RMA is currently conducting a review and a decision as to whether an amended SoP is appropriate is yet to be made.
>
> [22] It was also submitted that it is a relevant consideration for me to assess the merits of the hypothesis just as the RMA is now doing, this particularly in light of decisions made in 1993 and 1994 by the Tribunal (see *Re Chandler and Repatriation Commission* (1993) 30 ALD 107; *Re McLean, Rimes and Grieve and Repatriation Commission* (1994) 31 ALD 611). I do not accept this submission. It is for the RMA to arrive at a determination, this following compliance with the extensive procedure above detailed. It is not for the Tribunal to consider the possible nature of a determination that might be made. Indeed the very nature of a SoP precludes an independent assessment by the Tribunal being in any way relevant.
>
> [23] Each of the 'special circumstances' relied upon by the Applicant fall within the category of requiring the Tribunal to so consider 'the possible nature of a determination that might be made'. The Tribunal does not accept that it should so speculate.
>
> [24] The Applicant first made claim for a pension in 1999. This claim failed by application of the current SoP. If an adjournment not be granted and she not succeed at a hearing the Applicant is not precluded from making a further claim in the event of the SoP being later amended to include a smoking factor. The only prejudice she would have suffered is a loss in the backdating of her entitlement to February 2001.
>
> [25] The Commission contends that consistent with the intentions of the Act, vis, sections 155AA and section 14(6), (7), matters are to be pursued in a timely manner and if an application is not brought on for hearing within two years without reasonable excuse it may be dismissed. A claimant is not precluded from again applying if there is a change in the law referrable to such a claim.
>
> [26] A SoP has been determined by the RMA in respect of prostate cancer (malignant neoplasm of the prostate).

Even though a review of that SoP is in progress section 120A (2) indicates that a decision-maker is to proceed to hear a matter on the basis of the law as it then is.

[27] The Commission further contends that 'the possibility of a change in the law' is an irrelevant consideration to an exercise of the discretion to grant an adjournment. As already indicated I agree with this submission. As the law to be applied in a substantive hearing would be the law in force at the date of a decision such a possible change could not be relevant even if it might confer a benefit not otherwise available to a claimant. The operative words in this context are 'possibility of a change in the law' and the imminence of such a possible change. In the present matter there is no indication from the RMA as to change and there is no indication of any change being imminent. The time for consideration of an amended SoP is uncertain. It is not open to the Tribunal on the basis of the stage reached by the RMA in its consideration to infer that the SoP will or is likely to change. There may well be a further reference to the Specialist Medical Review Council (SMRC).

[28] The *Administrative Appeals Tribunal Act 1975* does require the Tribunal to proceed with as much expedition as the Act and a proper consideration of relevant matters permit. The available discretion is not at large.

[29] The prejudice to the Applicant in the event of the present application proceeding to a hearing and an adverse finding being made and then a favourable decision by the RMA or SMRC in relation to an amended SoP is the loss of the backdating of a benefit. She would still however have to satisfy a decision-maker that the facts of her case fell within the parameters of the then SoP.

[30] The Tribunal is to act upon the law as it is at the time of its decision making. It is not relevant for a Court or the Tribunal to speculate upon the law that might be in the future (see *Thornton* (*supra*) page 292). This is in contradistinction to the situation were a law is being clarified or construed by an appellate body. …

[31] To grant an adjournment in the present matter would be tantamount to seeking to disregard an enactment that presently stands. As I see it, the principle that it is not a proper exercise of the discretion to grant an adjournment on the ground that it is believed that the law may or will be changed in the near or remote future applies to the Tribunal in the exercise of its deliberative function. It is to apply the relevant law. It is bound in its decision making capacity by the law.

Formal decision

The Tribunal refused the applications for adjournment.

Editor: It should be noted that the Principal Member and Registrars of the VRB have tended to regard awaiting the outcome of an RMA investigation as *not* being a 'reasonable explanation' for the purposes of s 155AA if an application is over 2 years old and is still not ready for a hearing.

Federal Court of Australia

Repatriation Commission v Crane

Spender, RD Nicholson & North JJ

[2004] FCAFC 86
5 April 2004

Major depressive disorder – generalised anxiety disorder – exposed to asbestos during operational and other service when serving in HMA Ships – traumatised by watching television program in 1990 concerning risk of mesothelioma from exposure to asbestos – whether psychiatric disorders relevantly related to service

Mr Crane was exposed to asbestos when he served in HMA Ships between 1966 and 1973. His three periods of operational service during 1967 and 1968 totalled 74 days, and his defence service was just over 12 months. His duties included de-lagging asbestos. In 1990 he saw a *60 Minutes* television program concerning asbestos-related illness. Medical evidence was that he developed major depressive disorder and generalised anxiety disorder from watching that television program. The Tribunal accepted that those diseases were related to his service and said:

> The history does not allow separation of the relative effects of periods of exposure to asbestos fibre dust as all periods enumerated were significant, and heavy enough to cause the formation of pleural plaques.

The central legal issue was whether such a circumstance rendered the Commonwealth liable to pay disability pension in respect of those disorders. In dismissing the Commission's appeal, the Court said:

> [74] The Tribunal, in par 17 of its reasons said:
>
> > 'The Tribunal takes the view that the Applicant's service in the Navy, during which time he was exposed to asbestos, made a major contribution to the creation of the severe psychosocial stressor. Without the naval service there would have been no stressor. The severe psychosocial stressor was connected to the Applicant's naval service. It arose out of, or was attributable to his naval service.'
>
> This finding is unremarkable. The anxiety of Mr Crane about asbestosis was related to the entirety of the periods of his naval service, which involved exposure to asbestos dust. The Tribunal tersely concluded:
>
> > '[18] Consequently, the Tribunal finds that the Applicant's major depressive disorder and generalised anxiety disorder are war-caused with effect from 29 February 2000, pursuant to subsection 9(1)(b) of the Act.'
>
> The reference to subsection 9(1)(b) of the Act indicates that the Tribunal found that the major depressive disorder and generalised anxiety disorder arose out of, or was attributable, to eligible war service rendered by Mr Crane.
>
> [75] While it is tersely expressed, the finding in par 12(b) of its reasons, and the conclusions expressed in pars 17 and 18 of the Tribunal's reasoning, indicate that the Tribunal was of the view that his psychiatric condition was attributable to all of his exposure to asbestos during his

service in the Navy, which exposure included exposure during his operational service, exposure during his ineligible service, and whatever exposure there was during his defence service.

[76] The anxiety about asbestosis was therefore attributable, in part, to the operational service rendered by the veteran, which operational service involved exposure to asbestos dust.

Formal decision

The Court dismissed the appeal and ordered the Commission to pay Mr Crane's costs.

Editor: This case illustrates the broader effect of the 'arose out of, or was attributable to' test in s 9(1)(b) compared with the 'but for' test in s 9(1)(d). It certainly could not be said that 'but for' the circumstances of his operational service or defence service the veteran would not have suffered his psychiatric diseases. The evidence appears to have been that he would have suffered them in any event given that he was exposed to asbestos in periods of non-eligible service.

Gerzina v Repatriation Commission

Black CJ, Heerey and Emmett JJ

[2004] FCAFC 96
3 May 2004

Post-traumatic stress disorder – DSM-IV — 'intense … horror'

As a preliminary step in the determination of a claim the decision-maker must determine the kind of injury or disease claimed. The AAT had found that Mr Gerzina did not suffer from post-traumatic stress disorder because he did not satisfy one of the diagnostic criteria specified in DSM-IV (the 4th edition of the *Diagnostic and Statistical Manual*). DSM-IV required that Mr Gerzina's response to the alleged stressor have been one that involved 'intense fear, helplessness, or horror'.

An appeal transferred to the Federal Magistrates Court had held that the adjective 'intense' qualified not only the word, 'fear', but also 'horror', and that the AAT had not made an error in finding that Mr Gerzina's reaction of horror did not satisfy the diagnostic requirement of 'intense horror'.

Mr Gerzina appealed to the Full Federal Court. The Court held that the interpretation of the criteria in DSM-IV did not raise a question of law. The Court said:

[11] … There was before the Tribunal evidence from appropriately qualified medical specialists, both of whom used DSM-IV as the appropriate framework for making a diagnosis. No other framework or criterion was suggested. It was in this setting that the Tribunal had to reach a conclusion about the question of the appellant's diagnosis. This was a question of fact.

[12] In par 11 of its reasons, when the Tribunal said that it 'must' consider the evidence using the criterion in DSM-IV, we do not think the Tribunal transposed what was a factual criterion into some legal norm. Immediately prior to par 11 the Tribunal had referred to the decision in *Benjamin v Repatriation Commission* [2001] FCA 1879 in which the Full Court explained that although the Statements of Principle ('SoPs') must be used in determining whether or not a disease is war-caused, they are not relevant to the issue of diagnosis of a claimed condition.

[13] In *Benjamin* the Full Court pointed out (at [41]) that although the relevant SoP condition was in the

same terms as DSM-IV it was nevertheless impermissible to use the SoP to determine the question of diagnosis. However, because of the similarity of the definitions in the SoP on the one hand and DSM-IV on the other, the error was of no practical consequence. In that context, therefore, when the Tribunal said that it 'must' use DSM-IV it was simply following the Full Court and looking at DSM-IV rather than the SoP.

[14] In reaching its conclusion about the appellant's entitlement the Tribunal preferred one medical witness over another and in the course of doing so gave a particular meaning to a document – DSM-IV – which is not, and was not treated as, a statutory or quasi-statutory instrument. This was purely a question of fact. The same point was made by Spigelman CJ (with whom Mason P and Meagher JA agreed) in *State of New South Wales v Seedsman* [2000] NSWCA 119 at [114] in the context of a common law claim:

> 'DSM-IV is not a statutory formulation which a court must construe and decide whether the requirements are satisfied. It is, as its title suggests, a 'diagnostic manual' for clinical use. It contains within itself a number of explicit warnings against the kind of use to which the Appellant sought to put it and which emphasise that the criteria are only guidelines for professional judgment.'

[15] We do not think that we need, or should, consider whether the particular construction of DSM-IV criterion (A)(2) the Tribunal took was the appropriate one. In the circumstances of the present case, this was purely a question of fact. Our jurisdiction is confined to dealing with questions of law.

Formal decision

The Court dismissed the appeal. There was no order as to costs.

Editor: This case emphasises the importance of the 'preliminary' step of identifying the 'kind of' injury or disease the subject of the claim. Both the 'kind of' injury or disease and the 'service' rendered are preliminary issues that must be established on the balance of probabilities. Once those issues are established one can then turn to the question of their connection. The standard of proof will then vary according to whether the service was operational, hazardous or peacekeeping on the one hand (reasonable hypothesis / beyond reasonable doubt) and non-operational eligible war service or defence service on the other (reasonable satisfaction / balance of probabilities).

White v Repatriation Commission

Spender J

[2004] FCA 633
24 May 2004

Entitlement – objective and subjective elements of SoP for anxiety disorder

Mr White claimed that he suffered from a psychiatric illness of generalised anxiety disorder with alcohol dependence or abuse. He claimed his disorder arose from two experiences while serving with the Navy. The first, when he had difficulty opening the jammed doors of a landing craft, and the second when he heard scare charges. The Tribunal had found that neither of these experiences amounted to a 'severe psychosocial stressor' and furthermore that the onset of his disorder had not occurred within two

years of experiencing the alleged stressor, as required by SoP No 1 of 2000.

On appeal Mr White argued that the Tribunal erred in focusing on the nature of the stressor rather than the subjective effect of the stressor on Mr White.

Spender J upheld the decision of the Tribunal and stated:

> [30] In my judgment, the definition of severe psychosocial stressor concerns an occurrence that, objectively, is an occurrence the nature of which is such as to evoke feelings of a particular kind in a person exposed to that occurrence and which, subjectively, evokes feelings of substantial distress in the particular person concerned. Both aspects are relevant and necessary.

Spender J rejected the submissions on behalf of Mr White that any event that evokes feelings of substantial distress in a person should satisfy the definition of a 'severe psychosocial stressor'. His Honour noted that the examples given in the SoP of 'severe psychosocial stressor' were 'occurrences, not emotions' and stated:

> [32] … Such a submission, that any occurrence no matter how trivial or innocuous it objectively is, can be a 'serious psychosocial stressor', means that the examples given in the definition of 'severe psychosocial stressor' would be not only irrelevant and devoid of utility, but positively misleading.

Formal decision

The Court dismissed the appeal and ordered Mr White to pay the Commission's costs.

Schulz v Repatriation Commission

Kiefel J

[2004] FCA 718
10 June 2004

Service pension – assets test – family trust – loan to family trust to purchase principal home – whether exempt asset – whether reasonable security of tenure – whether applicant had a valuable interest in the principal home

The applicants, Mr and Mrs Schulz, appealed a decision of the Tribunal that had affirmed a decision of the Commission that they were not eligible to receive service pension because their assets were above the asset limit.

Mr Schulz was the sole director and shareholder of a trustee company and he was also a primary beneficiary in the discretionary trust administered by the company. The trust purchased a property in 1997. The applicants continued to live in another property owned by them until July 2000, when they moved into the trust property. In August 2000 they sold their previous residence and lent the proceeds of that sale to the trust in order that the trust could pay off the money it owed the bank for the purchase of the trust property. The applicants continued to live in the trust property until August 2002, when it was sold. At that time the trust repaid the loan.

While occupying the trust property the applicants notionally paid a weekly rent of $200 per week. It was recorded in the trust accounts as a deduction from the amount owed by the trust to them.

Paragraph 52(1)(b) of the VEA provides:

> (1) In calculating the value of a person's assets for the purposes of the Act … disregard the following:

(b) if the person is a member of a couple – the value of any right or interest of the person in one residence that is the principal home of the person, of the person's partner or of both of them that is a right or interest that gives the person or the person's partner reasonable security of tenure in the home …

The applicant argued that the value of the loan should be exempt because it was used to fund the purchase of their principal home, which was an exempt asset. The court said:

> [8] The Tribunal acknowledged that the applicants had some interest in the property rented arising from the informal lease. Further, it considered that the applicants had security of tenure in the sense that the male applicant controlled the actions of the landlord. The Tribunal was however of the view that the asset in question was the debt due by the Trust to the applicants. Pursuant to the transaction between the Trust and the male applicant the Trust had the monies and he had a right to repayment. It stood separately and apart from any interest on the applicants' part in the house property.
>
> [9] I can detect no error in the Tribunal's reasoning. The rights that the applicants had in the property were those of tenants. They included a right of occupation and ancillary rights. Even if they were secure in their tenancy this could not convert the nature of those rights to an interest of which s 52(1)(b) speaks, namely a valuable interest in the house property itself. The debt due to the Trust was not an asset to which the subsection referred.
>
> [10] The Tribunal also mentioned, in passing, that if the debt had been secured the security arrangement might confer an interest in the property, but that was not the case here. The male applicant submitted that the debt was secured because he controlled matters. The submission misunderstands the nature of a security interest. Further, it would not seem to me that a security interest would come within s 52(1)(b). …

Formal decision

The Court dismissed the appeal.

Smith, G J v Repatriation Commission

Dowsett J

[2004] FCA 743
11 June 2004

Special rate – ceased to engage for some other reason – squash centre – limousine driving – hobby – whether decided to retire

Mr Smith owned and managed various squash centres in Townsville between his discharge from the RAAF in 1973, and 1995, when he sold his squash business and bought a limousine business, which he conducted until 1998.

In 1998 he sold that business to enable his family to move to Brisbane so that his son could further his career as a squash player. There he took a lease of a squash centre, which his family then ran. He had a very limited involvement in it and received no income from it. After purchasing the business Mr Smith discovered that extensive work had to be done to the premises. He was unwilling to it, and the lessor would not do it. In June 2000, the local council closed the centre. In October 2000, Mr Smith returned to Townsville. There he spent several months upgrading his home, and bought cars for himself and his wife.

Mr Smith claimed that he then investigated the possibility of purchasing a squash centre in Townsville but decided he would be unable to run it himself (two of his sons did not return to Townsville with him). He also investigated re-entering the limousine business, but decided that due to his high blood pressure (not an accepted disability) he would not be able to drive for extensive periods. While his blood pressure is now controlled, he said that the medication he took for his accepted anxiety disorder tended to make him feel drunk. Nevertheless, he currently drives two mornings each week a limousine for the person to whom he sold his business in 1998.

The Tribunal found that Mr Smith ceased to engage in work in 1998 for reasons other than his incapacity from war-caused disabilities, and that when he returned to Townsville in 2000, he significantly reduced his capital by upgrading his home and purchasing two cars. He was then aged 62 years. The Tribunal found that he had no intention of getting back into business, but that he had retired and drove limousines for a hobby.

The Court said:

> [20] There is a clear difference between thinking about returning to business and forming the intention to do so. The AAT was satisfied that when the appellant returned to Townsville he had no intention of working. His conduct thereafter was consistent with that state of mind. The AAT's view was fairly available on the evidence, notwithstanding the appellant's claim to have considered returning to business. In any event, the question of his intention was not an ultimate question posed by s 24. However the matter was of evidentiary significance in answering the second question posed by par 24(1)(c) and questions arising pursuant to subs 24(2).

The Court held that the Tribunal had found that Mr Smith had not suffered a loss of earning on his own account 'based on the view that the appellant's decision not to work, rather than his incapacity, was causing his lost earnings, applying s 24(2)(a)(i).' The Court did not find an error of law in that regard and noted, 'It may be that the unfavourable application of s 24(2)(a)(i) rendered consideration of s 24(2)(b) unnecessary.' Nevertheless, the Tribunal considered whether the applicant had genuinely sought remunerative work, and found that he had not done so. The Court held that this finding was open to the Tribunal on the evidence.

Formal decision

The Court dismissed the appeal and ordered Mr Smith to pay the Commission's costs.

Editor: An important aspect of this case was not just that the applicant could not satisfy the Tribunal that he was prevented from continuing to undertake the kind of work he had previously undertaken by reason of his incapacity from war-caused disabilities alone (s 24(1)(c)), but that he had ceased to engage in *any* kind of remunerative work for reasons other than incapacity from his war-caused disabilities (s 24(2)(a)).

The Tribunal identified the kinds of work he had previously undertaken (operating a squash centre or a limousine service) to decide whether the only reason for being prevented from continuing in *either* of those kinds of work was due to his war-caused disabilities. In each instance, it decided there were other reasons as well. It then considered his current situation and found that he had taken steps that effectively took himself into retirement rather than enabled him to return to work. While he was able to do some driving, the Tribunal was satisfied that this was more a

retirement hobby than substantive remunerative work. Thus the Tribunal found that he had ceased to engage in work partly because he had spent much of the funds he would have needed to start up a new business.

The effect of s 24(2)(a) is that if a person ceases to engage in work (that is, they are out of the workforce) for reasons other than incapacity from war-caused disabilities, they are deemed not to suffer a loss of salary, wages or earnings, even if they had been prevented from continuing to undertake a particular kind of work they had previously undertaken by reason of incapacity from war-caused disabilities alone.

Ward v Repatriation Commission

French J

[2004] FCA 796
22 June 2004

Date of effect of grant of claim – numerous previous claims and appeals concerning the same disability – acceptance of claim – application of over-65 special rate tests in recent application

Mr Ward was born in 1926, and served in the Australian Army in World War 2. In 1986 he made a claim for an 'eye injury', claiming to have been struck in the eye by an insect in 1946 and suffered pain in the eye ever since. The claim was rejected, and that decision affirmed by the Board and then the Tribunal. This decision was not appealed to the Court.

A new claim was made in 1991, which was rejected, and that decision affirmed by the Board. The matter was appealed to the Tribunal and by agreement, the condition of right orbital neuralgia was accepted as war-caused with effect from 14 August 1991 and pension assessment remitted to the Commission. Pension was assessed at 40% of the general rate with effect from 22 August 1991.

In 1994, Mr Ward sought an increase in pension and made a claim for depressive disorder. The claim was granted and pension assessed at 50% of the general rate with effect from 23 September 1994.

A further claim for psychoactive substance abuse or dependence and hepatic cirrhosis was made in 1995. The claim was accepted and pension was increased to 100% of the general rate.

In 1996, the Tribunal determined that the date of effect for the original assessment of pension should have been 14 August 1991 rather than 22 August 1991 and varied that decision to that effect. This decision was not appealed to the Court.

In 2000, Mr Ward made a claim for hearing loss with tinnitus, which was accepted, and pension continued at 100% of the general rate. This decision was affirmed by the Board and then by the Tribunal. The Tribunal found that Mr Ward was not eligible for the special rate of pension because he had stopped working before age 65. The Tribunal found that he had a lifestyle rating of 4, and so could not meet the criteria for the extreme disablement adjustment. The Tribunal's decision was appealed to the Court.

On appeal he challenged the date of effect, indicating that it should have been 17 November 1985, being three months before the 1986 claim, and that the over-65 special rate rules should not apply to him. The Court said:

> [28] Mr Ward has made reference in his notice of appeal to the various provisions mentioned in the statutory framework. Although contentions about his entitlement to the intermediate or special rate or the EDA are not expressly raised in his submissions, there was nothing in the

Tribunal's reasons to indicate that there was any error of law in its approach to the question of his entitlement to those particular rates.

[29] The question, agitated by Mr Ward, as to the date from which his pension entitlement took effect, was simply not before the Tribunal. It was not a matter upon which the Tribunal could have made a decision in favour of Mr Ward. The claim made in 1986 upon which he relied had been determined adversely to him by the Commission, the Board and the Tribunal and there was no appeal from that decision. The later claim gave rise to an entitlement based on a new diagnosis of his eye injury. It is understandable that he should feel that this vindicated his original claim. He no doubt regarded the fresh claim, which was ultimately accepted, as a continuation of the one process of attempting to obtain a pension entitlement for a war-caused injury affecting his eyesight.

[30] The decision presently under review however relates entirely to the question of whether he had established, by reason of his hearing loss, an entitlement to more than 100% of the general rate of pension. The factual assessments made by the Tribunal in that regard cannot be impugned in these proceedings. There was no apparent error of law underpinning them. The relevant claim was lodged in August 2000 when Mr Ward was well past the age of 65. Necessary conditions for the application of the special and intermediate rates could not be met. And as to the date from which his general rate entitlement took effect, that was not a matter upon which the Tribunal was empowered to make any decision by way of further backdating beyond August 1991.

Formal decision

The Court dismissed the appeal.

Editor: Mr Ward has lodged an appeal to the Full Federal Court from this judgment.

Federal Magistrates Court

Suckling v Repatriation Commission (No 2)

McInnis FM

[2004] FMCA 247
25 February 2004

Application for magistrate to stand down on ground of apprehension of bias

This matter (designated '(No 2)' because the written reasons for judgment were delivered after the reasons for judgment in the substantive matter) concerned an application by the solicitor for Mrs Suckling for Federal Magistrate McInnis to disqualify himself from hearing the substantive appeal on grounds of ostensible bias.

The first ground was that in other matters heard before McInnis FM in which the Repatriation Commission was a party, those matters had been decided in the Commission's favour. It was argued that the combined effect of those decisions was to indicate an outcome that would be unfavourable to the applicant.

The second ground was that during the course of McInnis FM's previous practice as a barrister he had been instructed by the Australian Government Solicitor in 'compensation matters', and that during the course of his practice he may have had dealings from time to time with counsel representing the Repatriation Commission.

The Court rejected those submissions and said:

> [7] … it is clear to me that a court has a duty to act in accordance with the oath of office. I reject … the suggestion that in this case the court should disqualify itself on the grounds of ostensible bias. The mere fact that during the course of one's practice one might act for and on behalf of parties, in this case the Commonwealth of Australia, in what might loosely be described as 'compensation cases' would not and should not preclude the court from dealing with cases in accordance with the oath of office.
>
> [8] Whilst there may be a perception in the minds of applicants having regard to the background of members of courts for various reasons, that perception alone is not as a matter of law sufficient basis upon which it could be said that a court should disqualify itself from acting in a matter or continuing to hear a matter, and it is clear from the High Court authority in *Re Polites* [(1991) 100 ALR 634] that indeed, in my view, it would be quite erroneous for this court to disqualify itself from the hearing in this matter.
>
> [9] I add that even though in my view it is probably irrelevant, that in my own practice I did not have occasion to act with counsel currently instructed by the Australian Government Solicitor appearing for the respondent and in fact acted on very few occasions in matters concerning the Repatriation Commission.

Formal decision

The Court rejected the application for the Federal Magistrate to disqualify himself.

Suckling v Repatriation Commission (No 1)

McInnis FM

[2004] FMCA 193
8 April 2004

Kind of death – metastatic carcinoma of prostate – whether primary carcinoma in lungs – smoking

The Tribunal had found that the veteran had died from metastatic carcinoma of the prostate, which could not be related to the veteran's service.

For Mrs Suckling, it was argued that the Tribunal should have found, consistent with the evidence of Dr Collins, that it was a reasonable hypothesis that a radiological abnormality in the lungs could have been a primary tumour that subsequently metastasised to the prostate, causing death. It was argued that the Tribunal had made an error of law in preferring the evidence of Professor Fox to that of Dr Collins in that regard, and that it was wrong to do so in step 1 of the *Deledio* process, in which no fact-finding is permitted.

For the Commission, it was argued that there is no requirement in determining the cause of death to begin at step 1 of *Deledio*, but that it is a matter that must be decided on the balance of probabilities.

The Court accepted the Commission's argument, and said:

> The issue of the standard of proof and the task which must be undertaken by the AAT is clear. It must first determine the cause of death. It can do that on the material available to it and is required to do that by applying the standard of reasonable satisfaction. On my reading of the material, the AAT has properly considered all the evidence, including the evidence of Dr Collins. It was open to the tribunal to find with reasonable satisfaction that it preferred in the circumstances the evidence of Professor Fox and to do so in circumstances where it was also able to rely upon the other material to which brief reference has been made, including the lack of radiology of primary carcinoma of the lung, the clinical notes from a number of practitioners and the medical history of obstructive urinary symptoms suffered by the veteran. In those circumstances, in my view, it is incorrect to then find that the tribunal has erred in law by failing to consider the appropriate SoP or by otherwise failing to explore, if indeed it be the case, the appropriate steps set out in *Deledio*.

Formal decision

The Court dismissed the appeal and ordered Mrs Suckling to pay the Commission's costs.

Editor: see editor's note at page 49.

Brand v Repatriation Commission

Phipps FM

[2004] FMCA 270
14 May 2004

Lumbar spondylosis – whether 'acute symptoms and signs' present – incorrect SoP applied – wording of correct SoP made no difference – error of law not affecting the decision

Mr Brand was a radio operator in Vietnam. He said that the rack that the radio was mounted on dug into his back when he jumped out of a helicopter and landed awkwardly. He claimed that his

lumbar spondylosis was caused by that incident.

The Tribunal found that the hypothesis raised by the material before it did not fit the template of the SoP for lumbar spondylosis. The SoP required 'trauma to the lumbar spine'. The Tribunal erroneously considered SoP No 165 of 1996 instead of SoP 27 of 1999. In the first SoP, 'trauma to the lumbar spine' was defined as:

> … an injury to the lumbar spine caused by the force of an extraneous agent that causes the development within 24 hours of the injury being sustained, of acute symptoms and signs of pain, tenderness, and altered mobility or range of movement of part of that part of the spine, and where such acute symptoms and signs last for a period of at least one week immediately after the injury occurs, unless medical intervention has occurred. …

The second SoP defined it as:

> … a discrete injury to the lumbar spine that causes the development within 24 hours of the injury being sustained, of acute symptoms and signs of pain, tenderness, and either altered mobility or range of movement for lumbar spine. The acute symptoms and signs must last for a period of at least seven days following the onset save for where medical intervention for the trauma to the lumbar spine has occurred …

The Court noted:

> [16] The inclusion of the word 'discrete' cannot make a difference in this case. The injury was a discrete injury, caused by a single event when the applicant landed awkwardly. Neither can the exclusion of the reference to an extraneous physical or mechanical agent. There was such an agent; the force of the applicant hitting the ground. One SoP refers to seven days and the other one week. There is no difference.
>
> [17] The particular feature which the Tribunal found was lacking was 'acute symptoms and signs'. …
>
> [18] The words 'acute symptoms and signs' are the same in both definitions but SoP Number 27 includes the word 'either' before 'altered mobility or range of movement'.
>
> [19] The addition of this word seems to do no more than clarify that 'altered mobility' or 'range of movement' are alternatives. But altered mobility or range of movement were not an issue. It was 'acute symptoms and signs' which the Tribunal found were not present. The conclusion that the Tribunal came to is not affected by the SoP it was considering. The relevant parts of each have the same wording, 'acute symptoms and signs'.
>
> [20] In the written submissions on the part of the applicant, it was said that although the changes in the SoP were not substantive, they did make the meeting of the requirements easier and therefore the more favourable SoP should have been applied. That is not so. There is no difference in the wording of the relevant part of each SoP. It was neither easier or harder to meet the relevant requirement.
>
> [21] Applying the wrong SoP is an error of law. But when there is an error of law, a matter will not be remitted when the error of law makes no difference to the result: *Harris v Repatriation Commission* [2000] FCA 873 at [36], Finn J. This principle should be applied in this case.

It was argued for Mr Brand that the Tribunal had erroneously concerned itself with conflicts in the material in deciding whether a reasonable hypothesis was raised. The Court said:

[28] The Tribunal said that there was no evidence of any symptoms suffered being 'acute' for more than a minute or so and referred to the applicant's evidence that the pain was 'very sharp' initially, but during the patrol, which lasted 10-12 days, became 'just niggling pain all the time'.

[29] The Tribunal said that the applicant did not say that the pain remained sharp for at least a week. It referred to his evidence that he took a few seconds before he could move up the hill and said that he gave no evidence of acute signs or symptoms of tenderness. It said that all the applicant said on that issue was that his back was 'pretty sore' camping out at night on the patrol, 'because it got cold at night'.

[30] The Tribunal said that the fact that the applicant did not at any stage seek even a painkiller from the company Medic, and that he was able to complete the patrol without requiring any assistance in carrying his heavy load, also indicated that the requirements of the definition are not raised.

[31] It was submitted that the Tribunal, in assessing the evidence in this way, was concerning itself with conflicts in the material. It was not doing that. The Tribunal recited the evidence of the applicant about relevant symptoms of pain. It then referred to matters which in the applicant's evidence he said did not happen. The Tribunal was not assessing conflicts in the evidence. It was reciting the evidence of the applicant which it stated it accepted. It considered that the evidence did not point to the hypothesis meeting the SoP. In doing that, it took into account things which the applicant said occurred and things which the applicant said did not occur. It did not concern itself with conflicts of evidence and it was not judgmental. It was considering matters relevant to the question of whether there were 'acute symptoms and signs'. Things that do not occur can be relevant just as things that do occur can be.

[32] There is no basis for saying that the Tribunal adopted the wrong approach in determining that the hypothesis did not meet the SoP.

Formal decision

The Court dismissed the appeal.

Stewart v Repatriation Commission

McInnis FM

[2004] FMCA 321
21 May 2004

Entitlement – whether connection between smoking and service – application of* Keenan *and* Tuite *cases

Mr Stewart made a claim to have his carotid arterial disease accepted as war caused. He claimed that smoking was the factor that connected his disease with his service.

The AAT held that on the balance of probabilities Mr Stewart's carotid artery disease was not war-caused as the applicant's smoking was not related to his service. The Tribunal had found that Mr Stewart commenced smoking on his 21st birthday in accordance with a pledge he had made to his father not to smoke earlier. Mr Stewart had made a statement that he started smoking during his service 'due to boredom and peer group pressure.' This evidence was not accepted by the AAT as it was inconsistent with the other material placed before the Tribunal, including statements made by the Applicant to his treating doctors over a number of years.

The Tribunal also noted that there was no identifiable incident during his service that could have caused a level of anxiety that may have led him to smoke.

The applicant appealed to the Federal Court, which transferred the matter to the Federal Magistrates Court.

The applicant argued that the Tribunal erred by considering whether the applicant's smoking commenced because of an incident in his service. Rather, the applicant submitted that the Tribunal needed only to decide whether the disease arose out of or was attributable to his service.

McInnis FM endorsed the AAT's reliance upon the reasoning in *Repatriation Commission v Keenan* and dismissed this ground of appeal on the basis that the Tribunal merely considered a relevant factor. McInnis FM said:

> [42] …The identifiable incident was simply part of the material, in this case psychiatric material, which the AAT properly considered and in making a finding of fact has therefore excluded what may otherwise be an identifiable incident which would assist the applicant. By doing so it has not raised any new tests, but rather simply drawn a conclusion based upon the facts.
>
> [43] On a proper and fair reading of its reasons the AAT was considering whether or not the applicant commenced smoking because he had turned 21 or whether there are other factors, including perhaps an identifiable incident causing a level of anxiety which may have led him to smoke …

The applicant relied upon *Bushell's* case to argue that the Tribunal should have carried out an inquisitorial review and considered the peer pressure on the applicant to smoke, the availability of cigarettes during his service and the duties of the applicant that may have led to him smoking (similar to the matters raised in *Tuite's* case). McInnis FM held:

> [39] … the material before the AAT was sufficient to allow it to at least consider the matters raised by the applicant and to make an assessment of those matters upon the required standard of proof. In my view, that is all that has occurred in this instance and there is no discernible error of law, which would enable this Court to intervene. …
>
> [44] It was submitted that the Tribunal should have not relied upon the decision in *Keenan's* case, but rather considered what the Court had said in the *Tuite* case and should have taken into account circumstances of camp life. In my view, the respondent's submissions that *Keenan's* case is directly on point and properly applied by the AAT is manifestly correct. The issue in *Keenan's* case of whether there was a temporal connection between a person's eligible war service and smoking resulting in circulatory disease would be sufficient for the purposes of s 9(1)(b) and 9(2)(b) of the VE Act is clearly relevant and applicable to the present case.
>
> [45] There was simply little or insufficient evidence upon which the tribunal could rely in the present case of a kind similar to the evidence in *Tuite's* case which would lead to a different outcome. Whilst *Tuite's* case may be relevant in some applications, it is difficult to see on a proper analysis of the issues that were relevant in the present application or that that decision should be preferred over the decision of the Court in *Keenan's* case as both decisions may well be considered relevant to all applications. In the present case no error has been identified in the AAT's reasoning when it applied and followed, as it

was entitled to do, the Court's reasoning in *Keenan's* case. …

Formal decision

The Court dismissed the appeal and ordered Mr Stewart to pay the Commission's costs.

Smith, M J v Repatriation Commission

McInnis FM

[2004] FMCA 368
10 June 2004

Death – cerebrovascular accident – panic disorder – standard of proof for diagnosis of disease in a sub-hypothesis – time of clinical onset of panic disorder – error of law not affecting the decision

The veteran died from a cerebrovascular accident. He had served in the Australian Army during World War 2 and the hypothesis put to the Tribunal was that his service contributed to the cause of a panic disorder that, in turn, led to the cerebrovascular accident, resulting in his death.

In finding that the hypothesis was not reasonable, the Tribunal said:

> Findings of fact need only be made at stage 4 of the *Deledio* analysis however in order to 'complete' stage 3 it is necessary to make findings with respect to the 'clinical onset' or 'clinical worsening' of panic disorder. I previously decided on the probabilities that the deceased did suffer from panic disorder. However I am satisfied that the clinical onset of it was not until the mid-1960s (at the earliest) as was the evidence of Mr Smith [the veteran's son] or from 1971 (at the latest) as was the evidence of Dr O'Dwyer. There is no material which points to the deceased experiencing a severe stressor … within two years before the clinical onset of panic disorder …

It was argued for Mrs Smith that the Tribunal had misdirected itself in relation to the standard of proof. It was argued that having found that there was a panic disorder and having found that there were relevant stressors, the reverse onus of proof should apply and the Tribunal could not have been satisfied beyond reasonable doubt that the clinical onset did not occur within two years of stressors on service.

The Commission argued that, consistent with *McKenna's* case, every link in the hypothesised chain had to be upheld by a relevant SoP, and that the Tribunal had found there was no evidence pointing to onset of panic disorder within two years of eligible war service. The Commission referred to *Lees'* case, in which the Court had held that material had to point to all of the diagnostic criteria for clinical onset to be said to have occurred at a particular time.

The Commission conceded that the Tribunal had made an error of law in applying the balance of probabilities standard of proof to whether the veteran had suffered from panic disorder, but given that the Tribunal had found that the veteran *had* suffered from panic disorder, the error made no practical difference to the outcome.

The Court agreed with the following submissions of the Commission:

> [54] The respondent submitted that the only relevant time for the tribunal to determine whether there was clinical onset of panic disorder had to be between the veteran's discharge in July 1946 and July 1948 at the latest. It was submitted there was insufficient material to enable the tribunal or indeed any doctor who gave evidence before the tribunal to make a finding of clinical onset of panic disorder so as to satisfy the

relevant Statement of Principles at that time. It was submitted that there is no error by the tribunal in its application to the standard of proof required, as all it had to do was to look and determine whether there was material pointing to or raising each of those elements, and that is what in fact the tribunal did and found that there was not any such material. As the Statement of Principles could not be satisfied or the template could not be met by the material that was raised the hypothesis could not therefore be found to be a reasonable hypothesis.

Formal decision

The Court dismissed the appeal and ordered Mrs Smith to pay the Commission's costs.

Editor: An important aspect of this case was the concession by the Commission (and agreement by the Court) that the existence and onset of a disease that is not the direct subject of the claim, but is part of a causal chain (a 'sub-hypothesis') connecting service to the claimed condition or the condition that caused death, is *not* to be determined on the balance of probabilities. Instead, what is required is material pointing to its existence and the time of its onset.

Nevertheless, as *Lees*' case ((2002) 18 *VeRBosity* 109) indicates, the material must point to the existence of *all* the essential diagnostic elements at the relevant time. It is a different matter when considering the existence of a claimed disease or the disease that was a direct or independent cause of death. In such a case, the existence of the disease or injury (but not the time of onset – as that will always be part of the hypothesis) must be decided on the balance of probabilities: see *Benjamin's* case ((2001) 17 *VeRBosity* 119) and *Hancock's* case ((2003) 19 *VeRBosity* 82).

Statements of Principles issued by the Repatriation Medical Authority

April – June 2004

Number of Instrument	Description of Instrument
11 of 2004	Revocation of Statement of Principles (Instrument No. 82 of 1999 as amended by No 9 of 2001 and No 91 of 2001) and determination of Statement of Principles concerning **diabetes mellitus** and death from diabetes mellitus.
12 of 2004	Revocation of Statement of Principles (Instrument No. 83 of 1999 as amended by No 10 of 2001 and No 92 of 2001) and determination of Statement of Principles concerning **diabetes mellitus** and death from diabetes mellitus.
13 of 2004	Revocation of Statement of Principles (Instrument No. 27 of 1994 as amended by No 184 of 1995 and No 7 of 2002) and determination of Statement of Principles concerning **tinea** and death from tinea.
14 of 2004	Revocation of Statement of Principles (Instrument No. 28 of 1994 as amended by No 185 of 1995 and No 8 of 2002) and determination of Statement of Principles concerning **tinea** and death from tinea.
15 of 2004	Revocation of Statement of Principles (Instrument No. 3 of 1997) and determination of Statement of Principles concerning **malignant neoplasm of the testis and paratesticular tissues** and death from malignant neoplasm of the testis and paratesticular tissues.
16 of 2004	Revocation of Statement of Principles (Instrument No. 4 of 1997) and determination of Statement of Principles concerning **malignant neoplasm of the testis and paratesticular tissues** and death from malignant neoplasm of the testis and paratesticular tissues.
17 of 2004	Revocation of Statement of Principles (Instrument No. 42 of 1999) and determination of Statement of Principles concerning **hiatus hernia** and death from hiatus hernia.
18 of 2004	Revocation of Statement of Principles (Instrument No. 43 of 1999) and determination of Statement of Principles concerning **hiatus hernia** and death from hiatus hernia.
19 of 2004	Amendment of Statement of Principles (Instrument No. 115 of 1995) and determination of Statement of Principles concerning **acute blepharitis** and death from acute blepharitis.
20 of 2004	Amendment of Statement of Principles (Instrument No. 116 of 1995) and determination of Statement of Principles concerning **acute blepharitis** and death from acute blepharitis.
21 of 2004	Amendment of Statement of Principles (Instrument No. 117 of 1995) and determination of Statement of Principles concerning **chronic blepharitis** and death from chronic blepharitis.

22 of 2004	Amendment of Statement of Principles (Instrument No. 118 of 1995) and determination of Statement of Principles concerning **chronic blepharitis** and death from chronic blepharitis.
23 of 2004	Amendment of Statement of Principles (Instrument No. 65 of 1997) and determination of Statement of Principles concerning **contact dermatitis** and death from contact dermatitis.
24 of 2004	Amendment of Statement of Principles (Instrument No. 66 of 1997) and determination of Statement of Principles concerning **contact dermatitis** and death from contact dermatitis.

Copies of these instruments can be obtained from:
- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **RMA Website: *http://www.rma.gov.au/***

Conditions under Investigation by the Repatriation Medical Authority

as at 30 June 2004

Description of disease or injury	[*SoPs under consideration*]	Gazetted
Achilles tendonitis or bursitis	[*Instrument Nos. 53/96 & 54/96*]	19-11-03
Acute myeloid leukaemia	[*Instrument Nos 169/96 & 170/96*]	16-07-03
Acute sprains and acute strains	[*Instrument Nos. 50/94 & 51/94*]	19-11-03
Asbestosis	[*Instrument Nos 138/96 & 139/96*]	16-04-03
Bipolar disorder	[*Instrument Nos 128/96 & 129/96*]	24-03-04
Brodie's abscess	—	5-03-03
Caisson disease	[*Instrument Nos 147/95 & 148/95*]	31-03-04
Cervical spondylosis	[*Instrument Nos 50/02 & 51/02 as amended by 64/02, 81/02 & 82/02*]	25-02-04
Chronic bronchitis & emphysema	[*Instrument Nos 73/97 & 74/97*]	16-04-03
Chronic lymphoid leukaemia	[*Instrument Nos 67/01 & 68/01*]	16-07-03 17-12-03
Dermatomyositis	—	16-07-03
Epilepsy	[*Instrument Nos 79/96 & 80/96*]	5-03-03
External burns	[*Instrument Nos 37/94 & 38/94 as amended by 195/95 & 196/95*]	25-02-04
Fracture	[*Instrument Nos. 11/94 & 12/94 as amended by Nos. 219/95 & 220/95*]	19-11-03
Gastro-oesophageal reflux disease	[*Instrument Nos 52/02 & 53/02*]	18-12-02
Haemorrhoids	[*Instrument Nos 13/00 & 14/00*]	13-11-02

Description of disease or injury	[*SoPs under consideration*]	Gazetted
Hodgkin's disease	[*Instrument Nos 25/00 & 26/00*]	20-08-03
Inguinal hernia	[*Instrument Nos 72/98 & 73/98*]	16-04-03
Intervertebral disc prolapse	[*Instrument Nos 130/96 & 131/96 as amended by 92/97 & 93/97*]	23-06-04
Jakob-Creutzfeldt disease	[*Instrument Nos 63/95 & 64/95 as amended by Nos 190/95, 49/97 & 50/97*]	18-12-02
Lateral epicondylitis	—	24-03-04
Leptospirosis	—	5-03-03
Lumbar spondylosis	[*Instrument Nos 46/02 & 47/02 as amended by 77/02 & 78/02*]	25-02-04
Malignant neoplasm of the breast	[*Instrument Nos 53/97 & 54/97*]	16-07-03
Malignant neoplasm of the larynx	[*Instrument Nos 27/95 & 28/95 as amended by Nos 155/95 & 156/95, 151/96 & 152/96, 193/96 & 194/96*]	16-07-03
Malignant neoplasm of the lung	[*Instrument Nos 35/01 & 36/01*]	20-08-03
Malignant neoplasm of the oral cavity or hypopharynx	[*Instrument Nos 113/96 & 114/96*]	6-03-02
Malignant neoplasm of the pancreas	[*Instrument Nos 55/97 & 56/97 as amended by 20/02 & 21/02*]	20-08-03
Malignant neoplasm of the prostate	[*Instrument Nos 84/99 & 85/99 as amended by Nos 69/02 & 70/02*]	16-07-03
Malignant neoplasm of the salivary gland	[*Instrument Nos 25/97 & 26/97*]	6-03-02
Malignant neoplasm of the small intestine	[*Instrument Nos 153/96 & 154/96 as amended by Nos 7/98 & 8/98*]	16-04-03
Malignant neoplasm of the thyroid gland	[*Instrument Nos 33/98 & 34/98*]	16-07-03
Meniere's disease	[*Instrument Nos 77/01 & 78/01*]	5-05-04
Metastatic carcinoma of unknown primary	—	19-11-03
Motor neuron disease	[*Instrument Nos 65/01 & 66/01*]	5-05-04
Myelodysplastic disorder	[*Instrument Nos 15/00 & 16/00*]	20-08-03
Narcolepsy	—	28-01-04
Neoplasm of the pituitary gland	[*Instrument Nos 37/97 & 38/97*]	13-11-02
Non melanotic malignant neoplasm of the skin	[*Instrument Nos 43/01 & 44/01 as amended by Nos 51/01 & 52/01*]	8-05-02
Osteoarthrosis	[*Instrument Nos.81/01 & 82/01*]	15-10-03
Osteomyelitis	—	5-03-03
Paget's disease	[*Instrument Nos.15/96 & 16/96*]	28-01-04
Peptic ulcer disease	[*Instrument Nos 21/99 & 22/99*]	23-06-04

Description of disease or injury	[*SoPs under consideration*]	Gazetted
Peripheral neuropathy	[*Instrument Nos 79/01 & 80/01 as amended by 13/03 & 14/03*]	20-08-03
Plantar fasciitis	[*Instrument Nos. 3/00 & 4/00 as amended by Nos. 47/03 & 48/03*]	19-11-03
Pulmonary barotrauma	—	24-03-04
Rheumatoid arthritis	[*Instrument Nos 126/96 & 127/96*]	13-11-02
Rotator cuff syndrome	[*Instrument Nos. 83/97 & 84/97*]	19-11-03
Seborrhoeic dermatitis	[*Instrument Nos 50/99 & 51/99*]	16-07-03
Seizures	[*Instrument Nos 81/96 & 82/96*]	5-03-03
Sleep apnoea	[*Instrument Nos 39/97 & 40/97*]	11-06-03
Soft tissue sarcoma	[*Instrument Nos 23/01 & 24/01*]	20-08-03
Spondylolisthesis & spondylolysis	[*Instrument Nos 15/97 & 16/97*]	5-03-03
Steatohepatitis	—	25-02-04
Sudden unexplained death	[*Instrument Nos 99/96 & 100/96 as amended by 185/96, 186/96, 18/02, 19/02, 49/03 & 50/03*]	25-02-04
Thoracic spondylosis	[*Instrument Nos 48/02 & 49/02 as amended by 79/02 & 80/02*]	25-02-04
Toxic encephalopathy	—	25-02-04

AAT and Court decisions – April to June 2004

AATA = Administrative Appeals Tribunal
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court

Carcinoma

colon
- alcohol
  Ware, J A (Navy)
  [2004] AATA 472 13 May 2004

colorectum
- smoking
  - pre-existing habit
    Porter, N (Army)
    [2004] AATA 575 4 Jun 2004
  - service merely the setting, not causal in increase
    Porter, N (Army)
    [2004] AATA 575 4 Jun 2004

prostate
- animal fat
  Thomas, J W (Army)
  [2004] AATA 534 26 May 2004

Circulatory disorder

atherosclerotic peripheral vascular disease
- smoking
  West, E (Army)
  [2004] AATA 467 13 May 2004

atrial fibrillation
- surgery
  Fursman, G (Army)
  [2004] AATA 509 21 May 2004

central retinal vein occlusion
- smoking
  Nicholls, A H (Army)
  [2004] AATA 649 24 Jun 2004

cerebrovascular accident
- embolus
  Fursman, G (Army)
  [2004] AATA 509 21 May 2004

congestive cardiac failure
- smoking
  - pre-existing established habit
    Bourke, R C (Navy)
    [2004] AATA 480 14 May 2004

embolus
- atrial fibrillation
  Fursman, G (Army)
  [2004] AATA 509 21 May 2004

hypertension
- alcohol
  Dowd, G (Army)
  [2004] AATA 437 4 May 2004
  Ware, J A (Navy)
  [2004] AATA 472 13 May 2004
  Griffin, J J W (RAAF)
  [2004] AATA 513 21 May 2004
  Bentley, I C (Navy)
  [2004] AATA 622 18 Jun 2004

ischaemic heart disease
- cessation of smoking
  Davison, J (Army)
  [2004] AATA 581 5 May 2004
- resumption of smoking
  - years after cessation
    Davison, J (Army)
    [2004] AATA 581 5 May 2004
- smoking
  Davison, J (Army)
  [2004] AATA 581 5 May 2004

peripheral vascular disease
- smoking
  - pre-existing established habit
    Parrotte, B (Navy)
    [2004] AATA 536 27 May 2004

supraventricular tachycardia
- smoking
  - pre-existing established habit
    Bourke, R C (Navy)
    [2004] AATA 480 14 May 2004

Date of effect

disability pension
- further claim successful
  - unable to backdate to earlier date
    Ward (*French J*)
    [2004] FCA 796 22 Jun 2004

war widow's pension
- further claim successful
  - unable to backdate to earlier date
    Harrison, P
    [2004] AATA 512 21 May 2004

Death

atrial fibrillation
- ischaemic heart disease
  - smoking
    Shields, M N (Army)
    [2004] AATA 616 18 Jun 2004

carcinoma of brain
- inability to obtain appropriate clinical management
  - disease of short duration
    Forbes, P (RAAF)
    [2004] AATA 423 29 Apr 2004

carcinoma of lung
- smoking
  - pre-existing habit
    French, S (RAAF)
    [2004] AATA 409 23 Apr 2004

cerebral ischaemia
- smoking
  Ferrar, K J (RAAF)
  [2004] AATA 433 30 Apr 2004

death certificate
- accuracy doubted
  Riordan, K (Army)
  [2004] AATA 554 1 Jun 2004
  Johnson, M
  [2004] AATA 602 15 Jun 2004
  Shields, M N (Army)
  [2004] AATA 616 18 Jun 2004

hypertension
- alcohol
  Parrotte, B (Navy)
  [2004] AATA 536 27 May 2004

ischaemic heart disease
- alcohol
  - anxiety disorder
    Fogarty, O (Navy)
    [2004] AATA 535 27 May 2004
- hypertension
  - anxiety disorder
    Cocks, A M (Army)
    [2004] AATA 413 6 May 2004
  - clinical onset
    Cocks, A M (Army)
    [2004] AATA 413 6 May 2004
  - salt
    Cocks, A M (Army)
    [2004] AATA 413 6 May 2004
- obesity
  - fattening diet in treatment for tuberculosis
    Cameron, J (Army)
    [2004] AATA 570 4 Jun 2004
- smoking
  Riordan, K (Army)
  [2004] AATA 554 1 Jun 2004
  Shields, M N (Army)
  [2004] AATA 616 18 Jun 2004

kind of death
- correct diagnosis
  Suckling (No 1) (*McInnis FM*)
  [2004] FMCA 193 8 Apr 2004
- standard of proof
  Suckling (No 1) (*McInnis FM*)
  [2004] FMCA 193 8 Apr 2004

rheumatic heart disease
- streptococcal A infection
  Phelps, R D (RAAF)
  [2004] AATA 355 2 Apr 2004

Eligible service

operational service
- whether continuous full-time service outside Australia
  - essential character test
    Collier, L (Army)
    [2004] AATA 663 28 Jun 2004
  - nine day voyage
    Collier, L (Army)
    [2004] AATA 663 28 Jun 2004

qualifying service
- Malacca Straits
  - 1964-1965
    Trott, J (British Navy)
    [2004] AATA 348 5 Apr 2004
- period of hostilities
  - associated with an operational area
    Trott, J (British Navy)
    [2004] AATA 348 5 Apr 2004
- whether incurred danger from hostile forces of the enemy
  - Indonesian forces
    Trott, J (British Navy)
    [2004] AATA 348 5 Apr 2004
  - Malacca Straits 1964-1965
    Trott, J (British Navy)
    [2004] AATA 348 5 Apr 2004

Endocrine and metabolic disorders

diabetes mellitus
- smoking
  Griffin, J J W (RAAF)
  [2004] AATA 513 21 May 2004
  Murphy, D J (Navy)
  [2004] AATA 587 23 April 2004

Entitlement & liability

arose out of, or was attributable to
- part contribution from short periods of service
  Crane (*Spender, RD Nicholson, North JJ*)
  [2004] FCFCA 86 5 April 2004
- temporal connection insufficient
  Stewart (*McInnis FM*)
  [2004] FMCA 321 21 May 2004

serious breach of discipline
- precludes entitlement even if there is another service-related cause
  Norris, G T T (Army)
  [2004] AATA 670 29 Jun 2004
- shot and killed prisoner
  Norris, G T T (Army)
  [2004] AATA 670 29 Jun 2004

serious default or wilful act
- precludes entitlement even if there is another service-related cause
  Norris, G T T (Army)
  [2004] AATA 670 29 Jun 2004
- shot and killed prisoner
  Norris, G T T (Army)
  [2004] AATA 670 29 Jun 2004

Evidence and proof

application of the *Deledio* steps
- assessing the material
  Brand (*Phipps FM*)
  [2004] FMCA 270 21 May 2004
- standard of proof
  - kind of injury or disease in sub-hypothesis
    Smith (*McInnis FM*)
    [2004] FMCA 368 10 Jun 2004

credibility
- altered smoking history
  West, E (Army)
  [2004] AATA 467 13 May 2004
  Murphy, D J (Navy)
  [2004] AATA 587 23 April 2004
  Parrotte, B (Navy)
  [2004] AATA 536 27 May 2004
  Nicholls, A H (Army)
  [2004] AATA 649 24 Jun 2004
- prepared to tailor evidence to suit SoP
  Ware, J A (Navy)
  [2004] AATA 472 13 May 2004
  Henderson, A B (Army)
  [2004] AATA 675 29 Jun 2004

kind of injury, disease or death
- standard of proof
  - kind of death
    Suckling (No 1) (*McInnis FM*)
    [2004] FMCA 193 8 Apr 2004
  - kind of injury or disease in sub-hypothesis
    Smith (*McInnis FM*)
    [2004] FMCA 368 10 Jun 2004

Gastrointestinal disorder

diverticular disease of the colon
- low fibre diet
  Fogarty, O (Navy)
  [2004] AATA 535 27 May 2004

gastro-oseophageal reflux disease
- alcohol dependence
  - not diagnosed
    Beynon, G N (Army)
    [2004] AATA 397 20 Apr 2004

General rate, EDA, degree of incapacity & impairment

Guide to Assessment (1998 GARP)
- Chapter 4
  Nguyen, N T
  [2004] AATA 632 21 Jun 2004

Genitourinary disorder

impotence
- diagnosis
  Davison, J (Army)
  [2004] AATA 581 5 May 2004

Haematological and immunological disorders

polycythaemia rubra vera
- radiation
  Collins, J G (Army)
  [2004] AATA 550 31 May 2004

Historical material

Navy
- HMAS *Duchess*
  - January 1966
    Egan, B (Navy)
    [2004] AATA 444 3 Mar 2004
- HMAS *Jeparit*
  - February 1972
    Barrett, E G (Navy)
    [2004] AATA 679 28 Jun 2004

- HMAS *Sydney*
  - February 1968
    Fenner, J K (Navy)
    [2004] AATA 368 8 Apr 2004
- HMAS *Vendetta*
  - October 1969
    Krause, W (Navy)
    [2004] AATA 359 7 Apr 2004
  - March 1970
    Krause, W (Navy)
    [2004] AATA 359 7 Apr 2004
- Operation Awkward
  - 1968
    Preece, D J (Navy)
    [2004] AATA 442 6 May 2004

RAAF
- Operation Blackbird
  - extreme cold in New Zealand
    McGuire, R (RAAF)
    [2004] AATA 403 22 Apr 2004
- Ubon
  - red alert in 1965
    Schmidt, J (RAAF)
    [2004] AATA 402 22 Apr 2004

Confrontation
- Malacca Straits
  - 1964-1965
    Trott, J (British Navy)
    [2004] AATA 348 5 Apr 2004

Ubon, Thailand
- red alert in 1965
  Schmidt, J (RAAF)
  [2004] AATA 402 22 Apr 2004

Vietnam
- 1968
  - HMAS *Sydney*
    Fenner, J K (Navy)
    [2004] AATA 368 8 Apr 2004
- 1969
  - HMAS *Vendetta*
    Krause, W (Navy)
    [2004] AATA 359 7 Apr 2004
- 1970
  - HMAS *Vendetta*
    Krause, W (Navy)
    [2004] AATA 359 7 Apr 2004

Infection

Streptococcal A
- greater risk of infection due to conditions of eligible service
  Phelps, R D (RAAF)
  [2004] AATA 355 2 Apr 2004

Jurisdiction & powers

recovery of overpayment of service pension
- not reviewable
  Jakab, S
  [2004] AATA 428 30 Apr 2004

Musculo-skeletal disorder

Paget's disease
- inability to obtain appropriate clinical management
  Wickham, R (Army)
  [2004] AATA 422 29 Apr 2004

Neurological disorder

disequilibrium
- sensori-neural hearing loss
  Dean, I N (Army)
  [2004] AATA 639 22 Jun 2004
- trauma
  Dean, I N (Army)
  [2004] AATA 639 22 Jun 2004

peripheral neuropathy
- alcohol
  Butterworth, N J (Army)
  [2004] AATA 676 29 Jun 2004

Osteoarthrosis

knee
- disordered joint mechanics
  Townsend, W P (Army)
  [2004] AATA 588 9 Jun 2004

Practice and procedure

Administrative Appeals Tribunal
- adjournment
  - whether to grant pending review of SoPs
    Seale, S & Healey, G
    [2004] AATA 700 30 Jun 2004
- defer consideration until after applicant undergoes medical examination
  Van Heteren, P W
  [2004] AATA 661 25 Jun 2004
- remitter from Federal Court
  - matters to be considered
    Lees, A J
    [2004] AATA 583 7 Jun 2004
  - nature of rehearing
    Lees, A J
    [2004] AATA 583 7 Jun 2004

procedural fairness
- reasonable apprehension of bias
  - previous adverse decisions
    Suckling (No 2) (*McInnis FM*)
    [2004] FMCA 247 25 Feb 2004
  - previous professional acquaintance
    Suckling (No 2) (*McInnis FM*)
    [2004] FMCA 247 25 Feb 2004

Psychiatric disorder

alcohol abuse or dependence
- experiencing a severe stressor
  - backflash from gun firing
    Ware, J A (Navy)
    [2004] AATA 472 13 May 2004
  - closed up in ship
    Preece, D J (Navy)
    [2004] AATA 442 6 May 2004
  - detained at bayonet point by Thai guard
    Schmidt, J (RAAF)
    [2004] AATA 402 22 Apr 2004
  - faulty sidewinder missile
    Hayden, H (RAAF)
    [2004] AATA 429 30 Apr 2004
  - fear of Indonesian invasion
    Hayden, H (RAAF)
    [2004] AATA 429 30 Apr 2004
  - firing range incident
    Cowell, P R (Army)
    [2004] AATA 709 28 Jun 2004
  - insertion into fire support base thought to be under attack
    Campbell, N W (Army)
    [2004] AATA 127 4 Jun 2004
  - interpersonal altercations
    Hayden, H (RAAF)
    [2004] AATA 429 30 Apr 2004
  - land mine incident
    Henderson, A B (Army)
    [2004] AATA 675 29 Jun 2004
  - live fire incident
    Dowd, G (Army)
    [2004] AATA 437 4 May 2004
  - long working hours
    Hayden, H (RAAF)
    [2004] AATA 429 30 Apr 2004
    Griffin, J J W (RAAF)
    [2004] AATA 513 21 May 2004
  - man overboard
    Worden, G R (Navy)
    [2004] AATA 520 24 May 2004
  - Operation Awkward
    Preece, D J (Navy)
    [2004] AATA 442 6 May 2004
    Parr, P (Navy)
    [2004] AATA 568 3 Jun 2004
  - photographing mutilated bodies
    Dowd, G (Army)
    [2004] AATA 437 4 May 2004
  - red alert at Ubon
    Schmidt, J (RAAF)
    [2004] AATA 402 22 Apr 2004
  - road convoy in Vietnam
    Campbell, N W (Army)
    [2004] AATA 127 4 Jun 2004
  - rocket attack
    Barrett, E G (Navy)
    [2004] AATA 679 28 Jun 2004
  - scare charges
    Fenner, J K (Navy)
    [2004] AATA 368 8 Apr 2004
    Worden, G R (Navy)
    [2004] AATA 520 24 May 2004
    Parrotte, B (Navy)
    [2004] AATA 536 27 May 2004
  - shooting at debris
    Worden, G R (Navy)
    [2004] AATA 520 24 May 2004
  - threat of submarine attack
    Fenner, J K (Navy)
    [2004] AATA 368 8 Apr 2004
  - witnessed battle activity
    Fenner, J K (Navy)
    [2004] AATA 368 8 Apr 2004
    Preece, D J (Navy)
    [2004] AATA 442 6 May 2004

anxiety disorder
- experiencing a severe stressor
  - barotrauma
    Debono, F O (Navy)
    [2004] AATA 580 7 Jun 2004
  - closed up in ship
    Preece, D J (Navy)
    [2004] AATA 442 6 May 2004
  - confined conditions in ship
    Fogarty, O (Navy)
    [2004] AATA 535 27 May 2004
  - faulty sidewinder missile
    Hayden, H (RAAF)
    [2004] AATA 429 30 Apr 2004
  - fear of Indonesian invasion
    Hayden, H (RAAF)
    [2004] AATA 429 30 Apr 2004

- guarding POWs
  Rowe, T J (Navy)
  [2004] AATA 662 25 Jun 2004
- incident with loaded pistol
  Organ, A (Army)
  [2004] AATA 671 29 Jun 2004
- interpersonal altercations
  Hayden, H (RAAF)
  [2004] AATA 429 30 Apr 2004
- land mine incident
  Henderson, A B (Army)
  [2004] AATA 675 29 Jun 2004
- long working hours
  Hayden, H (RAAF)
  [2004] AATA 429 30 Apr 2004
  Griffin, J J W (RAAF)
  [2004] AATA 513 21 May 2004
- man overboard
  Worden, G R (Navy)
  [2004] AATA 520 24 May 2004
- motor vehicle accident
  Noonan, R (Army)
  [2004] AATA 344 2 Apr 2004
- mutiny incident
  Organ, A (Army)
  [2004] AATA 671 29 Jun 2004
- Operation Awkward
  Preece, D J (Navy)
  [2004] AATA 442 6 May 2004
  Parr, P (Navy)
  [2004] AATA 568 3 Jun 2004
- patrolling perimeter of airbase
  Turnbull, D J (RAAF)
  [2004] AATA 614 18 Jun 2004
- scare charges
  Worden, G R (Navy)
  [2004] AATA 520 24 May 2004
- shooting at debris
  Worden, G R (Navy)
  [2004] AATA 520 24 May 2004
- unauthorised weapon discharge
  Graham, K (Army)
  [2004] AATA 490 1 Mar 2004
- verbal abuse
  Graham, K (Army)
  [2004] AATA 490 1 Mar 2004
- whether subjective or objective
  White (*Spender J*)
  [2004] FCA 633 24 May 2004
- witnessed aircraft crash
  Turnbull, D J (RAAF)
  [2004] AATA 614 18 Jun 2004
- witnessed battle activity
  Preece, D J (Navy)
  [2004] AATA 442 6 May 2004
- witnessed beating
  Rowe, T J (Navy)
  [2004] AATA 662 25 Jun 2004

depressive disorder
- experiencing a severe stressor
  - closed up in ship
    Preece, D J (Navy)
    [2004] AATA 442 6 May 2004
  - extreme cold
    McGuire, R (RAAF)
    [2004] AATA 403 22 Apr 2004
  - Operation Awkward
    Preece, D J (Navy)
    [2004] AATA 442 6 May 2004
  - unauthorised weapon discharge
    Graham, K (Army)
    [2004] AATA 490 1 Mar 2004
  - verbal abuse
    Graham, K (Army)
    [2004] AATA 490 1 Mar 2004
  - witnessed battle activity
    Preece, D J (Navy)
    [2004] AATA 442 6 May 2004
- psychiatric disorder
  - post traumatic stress disorder
    McGuire, R (RAAF)
    [2004] AATA 403 22 Apr 2004

obsessive compulsive disorder
- traffic incident
  Hart, N
  [2004] AATA 380 16 Apr 2004

personality disorder
- catastrophic experience
  - threat of Indonesian attack while on sentry duty
    Oliver, A
    [2004] AATA 686 30 Jun 2004
  - patrol boat firing at potential mines
    Oliver, A
    [2004] AATA 686 30 Jun 2004
  - threat from sharks
    Oliver, A
    [2004] AATA 686 30 Jun 2004

post traumatic stress disorder
- aggravation
  Parrotte, B (Navy)
  [2004] AATA 536 27 May 2004

- experiencing a severe stressor
  - apprehension of an event happening is not a 'threat'
    Dore, R C (RAAF)
    [2004] AATA 646 15 Jun 2004
  - backflash from gun firing
    Ware, J A (Navy)
    [2004] AATA 472 13 May 2004
  - closed up in ship
    Harrison-Kyte, P (Navy)
    [2004] AATA 360 7 Apr 2004
    Krause, W (Navy)
    [2004] AATA 359 7 Apr 2004
  - collision with kumpit
    Egan, B (Navy)
    [2004] AATA 444 3 Mar 2004
  - crashlanding in aircraft carrier
    Adams, R K (Navy)
    [2004] AATA 684 30 Jun 2004
  - detained at bayonet point by Thai guard
    Schmidt, J (RAAF)
    [2004] AATA 402 22 Apr 2004
  - extreme cold
    McGuire, R (RAAF)
    [2004] AATA 403 22 Apr 2004
  - gunfire on Indonesian coast
    Egan, B (Navy)
    [2004] AATA 444 3 Mar 2004
  - meaning of 'intense fear, helplessness or horror'
    Gerzina (*Black CJ, Heerey, Emmett JJ*)
    [2004] FCFCA 96 3 May 2004
  - preparations for combat
    Dore, R C (RAAF)
    [2004] AATA 646 15 Jun 2004
  - red alert at Ubon
    Schmidt, J (RAAF)
    [2004] AATA 402 22 Apr 2004
  - rocket attack
    Krause, W (Navy)
    [2004] AATA 359 7 Apr 2004
    Barrett, E G (Navy)
    [2004] AATA 679 28 Jun 2004
  - scare charges
    Krause, W (Navy)
    [2004] AATA 359 7 Apr 2004
    Fenner, J K (Navy)
    [2004] AATA 368 8 Apr 2004
    Parrotte, B (Navy)
    [2004] AATA 536 27 May 2004
  - sentry duty in HMAS *Sydney*
    Harrison-Kyte, P (Navy)
    [2004] AATA 360 7 Apr 2004
  - shot and killed prisoner
    Norris, G T T (Army)
    [2004] AATA 670 29 Jun 2004
  - threat of mortar attack
    Krause, W (Navy)
    [2004] AATA 359 7 Apr 2004
  - threat of submarine attack
    Fenner, J K (Navy)
    [2004] AATA 368 8 Apr 2004
  - unauthorised weapon discharge
    Graham, K (Army)
    [2004] AATA 490 1 Mar 2004
  - verbal abuse
    Graham, K (Army)
    [2004] AATA 490 1 Mar 2004
  - witnessed battle activity
    Fenner, J K (Navy)
    [2004] AATA 368 8 Apr 2004
  - witnessed beating
    Norris, G T T (Army)
    [2004] AATA 670 29 Jun 2004
  - witnessed severed heads
    Egan, B (Navy)
    [2004] AATA 444 3 Mar 2004

Remunerative work & special rate

ceased to engage in remunerative work
- reason for ceasing
  - redundancy
    Priest, M J
    [2004] AATA 529 25 May 2004
  - retirement
    Smith, G J (*Dowsett J*)
    [2004] FCA 743 11 Jun 2004

employment
- career serviceman
  Johnston, T
  [2004] AATA 361 7 Apr 2004
- carpenter
  Tanner, N
  [2004] AATA 363 7 Apr 2004
- cleaner
  Thatcher, A
  [2004] AATA 519 21 May 2004
- coach driver
  Forbes, R M
  [2004] AATA 600 11 Jun 2004
- farm hand
  Watkins, D F
  [2004] AATA 542 28 May 2004

- groundsman
  Merriman, D
  [2004] AATA 475 14 May 2004
- local government administrator
  Peacock G
  [2004] AATA 523 25 May 2004
- maintenance worker
  Thatcher, A
  [2004] AATA 519 21 May 2004
- office manager
  Forbes, R M
  [2004] AATA 600 11 Jun 2004
- plumber
  McNeill, A M B
  [2004] AATA 594 11 Jun 2004
- security officer
  Young, G J
  [2004] AATA 586 14 May 2004
- strapper
  Hamer, E J
  [2004] AATA 637 22 Jun 2004
- video production business
  Alexander, H J
  [2004] AATA 476 14 May 2004

last paid work (aged over 65)
- characterisation of the profession, trade, employment, vocation or calling
  Easterbrook, N
  [2004] AATA 506 20 May 2004
- golf coaching or instruction
  Easterbrook, N
  [2004] AATA 506 20 May 2004
- nature of the business activity
  Easterbrook, N
  [2004] AATA 506 20 May 2004
- whether worked for a continuous period of at least 10 years
  Easterbrook, N
  [2004] AATA 506 20 May 2004

loss of salary, wages, or earnings
- loss of gross earnings
  Tanner, N
  [2004] AATA 363 7 Apr 2004

remunerative work
- meaning
  Thatcher, A
  [2004] AATA 519 21 May 2004
  - whether a hobby
    Tanner, N
    [2004] AATA 363 7 Apr 2004
    Smith, G J (*Dowsett J*)
    [2004] FCA 743 11 Jun 2004

unable to obtain remunerative work
- the substantial cause test applied
  Merriman, D
  [2004] AATA 475 14 May 2004

whether genuinely seeking to engage in remunerative work
  Johnston, T
  [2004] AATA 361 7 Apr 2004
  Merriman, D
  [2004] AATA 475 14 May 2004
  Hamer, E J
  [2004] AATA 637 22 Jun 2004

whether prevented by war-caused disabilities alone
- age
  Forbes, R M
  [2004] AATA 600 11 Jun 2004
- effect of non-accepted disabilities
  Johnston, T
  [2004] AATA 361 7 Apr 2004
  Watkins, D F
  [2004] AATA 542 28 May 2004
  Forbes, R M
  [2004] AATA 600 11 Jun 2004
- redundancy
  Priest, M J
  [2004] AATA 529 25 May 2004
  Pither, S
  [2004] AATA 574 4 Jun 2004
- retirement plans
  Peacock, G
  [2004] AATA 523 25 May 2004
- superannuation benefits
  Peacock, G
  [2004] AATA 523 25 May 2004
- workers' compensation
  - compensated injury not affecting capacity to work
    Conroy, N
    [2004] AATA 488 17 May 2004

Respiratory disorder

bronchiectasis
- pneumonia
  Cook, B (Navy)
  [2004] AATA 343 2 Apr 2004

chronic bronchitis
- smoking
  Murphy, D J (Navy)
  [2004] AATA 587 23 April 2004

chronic obstructive airways disease
- smoking
  - pre-existing established habit
    Bourke, R C (Navy)
    [2004] AATA 480 14 May 2004
    Parrotte, B (Navy)
    [2004] AATA 536 27 May 2004

emphysema
- smoking
  - pre-existing established habit
    Bourke, R C (Navy)
    [2004] AATA 480 14 May 2004
    Murphy, D J (Navy)
    [2004] AATA 587 23 April 2004

mesothelioma
- asbestos
  Crane (*Spender, RD Nicholson, North JJ*)
  [2004] FCFCA 86 5 April 2004

Service pension

assets test
- family trust
  - owned principal home
    Schulz (*Kiefel J*)
    [2004] FCA 718 10 Jun 2004
- loan
  - family trust
    Schulz (*Kiefel J*)
    [2004] FCA 718 10 Jun 2004
- principal home
  - reasonable security of tenure
    Schulz (*Kiefel J*)
    [2004] FCA 718 10 Jun 2004
- money from sale of principal home
  - used to trade in listed securities
    Jakab, S
    [2004] AATA 428 30 Apr 2004

failure to comply with s 54 notice
- trading in listed securities
  Jakab, S
  [2004] AATA 428 30 Apr 2004

failure to comply with s 54A notice
- false statement or misrepresentation
  Botfield, I T
  [2004] AATA 576 3 Jun 2004
- income from DFRDB pension
  Botfield, I T
  [2004] AATA 576 3 Jun 2004

invalidity service pension
- capacity to undertake remunerative work
  - whether solely because of impairment
    Nguyen, N T
    [2004] AATA 632 21 Jun 2004
- impairment
  - psychiatric disorders
    Nguyen, N T
    [2004] AATA 632 21 Jun 2004
- permanent impairment
  - meaning of 'permanent'
    Nguyen, N T
    [2004] AATA 632 21 Jun 2004

Skin disorder

psoriasis
- anxiety disorder
  Rowe, T J (Navy)
  [2004] AATA 662 25 Jun 2004

Spinal disorder

cervical spondylosis
- lifting
  Winterson, G (Navy)
  [2004] AATA 491 2 Mar 2004
- trauma
  - motor vehicle accident
    Webber, P B (RAAF)
    [2004] AATA 502 1 Mar 2004
    Nielson, G P (RAAF)
    [2004] AATA 599 11 Jun 2004

lumbar spondylosis
- lifting
  Winterson, G (Navy)
  [2004] AATA 491 2 Mar 2004
  Rowe, T J (Navy)
  [2004] AATA 662 25 Jun 2004
- trauma
  - jumping
    Brand (*Phipps FM*)
    [2004] FMCA 270 21 May 2004
  - motor vehicle accident
    Nielson, G P (RAAF)
    [2004] AATA 599 11 Jun 2004

Visual disorder

central retinal vein occlusion
- see under **Circulatory disorder**

Words and phrases

experiencing a severe stressor
- apprehension of an event happening is not a 'threat'
  Dore, R C (RAAF)
  [2004] AATA 646 15 Jun 2004
- meaning of 'intense fear, helplessness or horror'
  Gerzina (*Black CJ, Heerey, Emmett JJ*)
  [2004] FCFCA 96 3 May 2004
- whether subjective or objective
  White (*Spender J*)
  [2004] FCA 633 24 May 2004

identifiable occurrence
Hayden, H (RAAF)
[2004] AATA 429 30 Apr 2004

false statement or misrepresentation
Botfield, I T
[2004] AATA 576 3 Jun 2004

inability to obtain appropriate clinical management
Wickham, R (Army)
[2004] AATA 422 29 Apr 2004
Forbes, P (RAAF)
[2004] AATA 423 29 Apr 2004

intense fear, helplessness or horror
Gerzina (*Black CJ, Heerey, Emmett JJ*)
[2004] FCFCA 96 3 May 2004

occurrence
identifiable occurrence
Hayden, H (RAAF)
[2004] AATA 429 30 Apr 2004

permanent impairment
Nguyen, N T
[2004] AATA 632 21 Jun 2004