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Contents
October – December 2004

Editor's notes

This edition of *VeRBosity* is my first and I feel privileged to assume a responsibility for a journal now in its 20th year. In that time, *VeRBosity* has provided an invaluable commentary and information service on the state of veterans' law. I hope to preserve its ability to remain relevant and as such welcome any comments, suggestions or criticism.

For those of you involved in preparing cases before the VRB, there is a helpful practice note outlining the responsibilities involved in managing cases before the VRB.

Two cases reported in this edition, *Mines* and *Piggott* provide an opportunity for the Federal Court and AAT respectively to examine the steps required prior to the application of the *Deledio* steps.

James McKay
Editor

This edition of *VeRBosity* contains reports of a High Court special leave application, and 8 Federal Court and 2 Federal Magistrates Court judgments in veterans' matters received in October to December 2004 as well as selected AAT decisions handed down in the same period. One Federal Court SRCA matter is also included. There is an index of all AAT and Court cases received in this period and information on recent Statements of Principles determined by, and current investigations of, the Repatriation Medical Authority.

VRB case management

Bruce Topperwien

The VRB is ready to review applications for review as quickly as possible, and depending on the applicant's and their representative's availability, can usually list a case for hearing within a couple of weeks of receipt of advice that they are ready for a hearing. Thus applications can be heard very shortly after the VRB receives the s 137 report from DVA. However, usually applicants and their representatives are not ready to proceed at that time.

Case management

While the VRB allows applicants and their representatives considerable time to investigate and develop their cases, VRB staff regularly monitor applications for review that have been outstanding for more than 6 months. If nothing has been heard from an applicant or their representative for 3 months or more, the VRB will write to the applicant asking for advice about the progress of the case. A copy of this letter is also sent to the representative. Applicants and their representatives can avoid being sent this letter if they advise the VRB of the particular action they are taking to progress their application and when they expect to be ready. That way, the VRB knows why the matter is not yet ready to proceed and need not contact them.

Applicants and representatives should always keep in mind that if they are having difficulties in obtaining particular material for their case, they can contact the Registrar who might be able to provide advice or assistance. This might include suggestions for other avenues of inquiry, or making requests of DVA under s 148(6A) to investigate or obtain further evidence.

Dismissal processes

Once an application is 2 years old, special legislative provisions apply to the monitoring process. Under s 155AA of the VEA, if a Registrar (as delegate of the Principal Member) forms the opinion that an application should be ready to proceed at a hearing, the Registrar must send a notice under s 155AA(4) to the applicant. That notice requires the applicant to advise the Registrar in writing, within 28 days, either that the applicant is ready to proceed at a hearing or the reasons why the applicant is not ready to proceed at a hearing.

If the applicant has nominated a representative under s 148(1), a copy of the notice will be sent to that representative. However, the obligation to respond to the notice always remains with the applicant. The representative can make a valid response to the notice *only if* he or she has been properly authorised under s 155AC. Such authorisation can be given only after the applicant has received the s 155AA notice. It is critical to note that even if a representative has been nominated under s 148(1) to represent the applicant for the purposes of the review, such authorisation cannot extend to representing the applicant for the purposes of a s 155AA or s 155AB notice. The applicant must make a separate authorisation under s 155AC before the representative can act on behalf of the applicant in relation to the s 155AA notice.

If the applicant or authorised representative does not respond to the notice within the 28 days, the Registrar *must* dismiss the application. The Registrar has no discretion. If the applicant or the authorised representative responds, but does not give a reasonable excuse for not proceeding at a hearing, the Registrar *must* dismiss the application.

If the only response given is that the applicant is seeking further evidence, such a reason might not be regarded as reasonable. To enable the Registrar to decide whether 'seeking further evidence' is reasonable, the Registrar needs information about the nature of the evidence being sought, its relevance to the application, from where it is being sought, and the timeframe in which it is expected to be obtained. If a Registrar does not have such detailed information, he or she may seek it from the representative before deciding whether 'seeking further evidence' is reasonable in the circumstances of the case.

If the Registrar is satisfied that the applicant has given a reasonable excuse for not being ready to proceed at a hearing, s 155AA(6) provides that the Registrar must write to the applicant and the Repatriation Commission notifying of that decision. This is called an 'extension notice'. The Repatriation Commission can appeal to the AAT a decision by a Registrar to grant an extension.

Section 155AB provides that if at 3 months after the extension notice the application is not listed for a hearing, the Registrar must give a notice to the applicant under s 155AB(4). Like the s 155AA(4) notice, the s 155AB(4) notice requires the applicant to advise the Registrar in writing, within 28 days, either that the applicant is ready to proceed at a hearing or the reasons why the applicant is not ready to proceed at a hearing. This process repeats under s 155AB every 3 months each time that an extension notice is sent.

Responsibilities of representatives

While the applicant is primarily responsible for ensuring their application is being properly progressed and that responses are made to s155AA or 155AB notices, the representative also has particular responsibilities, and in some cases can be held personally liable if things go wrong. A number of AAT cases have demonstrated cases where things have gone wrong.

In *Re Johnson* [1999] AATA 745, the applicant had responded to a s 155AA notice personally. But after receiving the s 155AB notice, he saw his representative and gave him the signed authorisation to respond on his behalf. No response was received within the 28 days. In evidence, the representative indicated that he thought the form was merely to authorise him to represent the applicant at the VRB. He said that he was 'unaware that that letter indicated that some further action was needed to prevent the matter being dismissed'. The Tribunal noted:

> What is of concern to the Tribunal is that representation of veterans is left in the hands of representatives who, while clearly skilled in some areas, are not given sufficient training to understand the requirements of such complex legislation. The legislation relating to veterans is difficult enough for highly skilled legal practitioners to comprehend at times and it is therefore essential that any advocates acting on behalf of veterans have an understanding, at the very least, of what time limits apply to the various sections.

In *Re Gregory* [2000] AATA 448, the applicant gave specific instructions to the representative to respond to the notice on his behalf, yet the representative failed to do so. The Tribunal noted:

> While this applicant did all that was required of him by the notice, he did so within the context of being represented. By virtue of the notice and the authorisation (and the applicant's statement in this case) the representative was also in the position of having been made very aware of the need for the provision of a response within 28 days. Whatever caused the applicant's representative to fail to respond to the notice cannot be said to be as a result of a deficiency in the notice itself. In this case, fault must be

> said to lie otherwise than with the notice, which has sufficient clarity so as to be a notice pursuant to sub-section 155AA(4) of the Act.

In both cases, the Tribunal affirmed the Registrar's decision to dismiss the applications (see (2000) 16 *VeRBosity* 34). *Re Johnson* appeared to involve a failure of the representative to understand the process or to properly read the documents he had been given by the applicant. *Re Gregory* appeared to involve a failure to follow the applicant's instructions.

While these two cases demonstrate the duty of representatives to carefully read the material put before them and to follow applicants' instructions, a representative who is effectively looking after his or her client's interests would be pro-active so that either a s 155AA notice is not sent, or if that cannot be prevented, there is a system in place to ensure that there is no risk of dismissal.

How to avoid a s155AA notice being sent

After 2 years have elapsed, the Registrar must examine an application to decide whether a s 155AA notice should be sent. If at that time the Registrar is aware that a case is not ready for a hearing because a particular action is being taken, the essential precondition for sending a s 155AA(4) notice does not exist, and a notice cannot be sent. Therefore, if a representative keeps the VRB informed of the progress of the application, and it is clear that the matter is continuing to be progressed effectively, a Registrar will be less likely to form the opinion that the matter should be ready to proceed at a hearing.

What to do if a notice is received

When the Registrar sends a section 155AA notice to an applicant, a copy is sent to the representative. The representative should contact the applicant as soon as possible to discuss how to respond to the notice. In every case, the applicant *must* take some action or else the application will be dismissed. The representative cannot take any action, including lodging a certificate of readiness, without being formally authorised by the applicant under s 155AC and without instructions from the applicant concerning the action to be taken. As there is a strict 28-day limit on responding it is imperative that the representative contact the applicant as soon as possible to discuss the response.

Once s 155AA action has commenced this compulsory process rolls on relentlessly every 3 months while ever the applicant continues to have a reasonable excuse for not being ready to proceed at a hearing. In a number of cases responses have been received and reasons accepted as 'reasonable' time and again, but the applicant has then inadvertently failed to respond on the 4th or 5th occasion, resulting in the matter being dismissed when it was just about ready to proceed. It is therefore essential that representatives closely manage all cases in which s 155AA action has begun to ensure that there are no such slip-ups.

Section 31 reviews

In some instances, representatives have given as their reason for not being ready for a hearing, that they have sought a s 31 review. If the case has been submitted for a s 31 review, then it should be ready for a hearing. This is not a reasonable excuse for not providing a certificate of readiness. The VRB encourages applicants to seek s 31 review if they consider that all the matters within the application are likely to be successfully concluded by that means. It is less costly for a delegate of the Commission to review the matter than for the VRB to constitute a 3-member panel and arrange a hearing. However, sometimes seeking a s 31 review can

take longer than it takes the VRB to arrange a hearing, and if only some of the matters are successfully concluded by that means, the VRB will still have to arrange a hearing to deal with those aspects that have not been withdrawn from the VRB's review.

If a s 155AA or s 155AB notice has been sent and a s 31 review has already been sought, it is best to respond to that notice by stating that the applicant is ready to proceed to a hearing and also state that a s 31 review has been sought. The Registrar can then check with DVA to determine the status of that request for s 31 review before listing the matter for hearing.

Is waiting for the 2 years a proper option?

In some cases, representatives have deliberately left applications 'pending' for 2 years in the hope that the relevant Statement of Principles might change favourably for the applicant who in the representative's opinion, and without such a change, has no chance of success. Once the s 155AA notice is sent, the representative then advises the applicant that he or she can either go to hearing or just ignore the notice and the application will then be dismissed. (The third possibility of advising that the reason for not proceeding to a hearing because the applicant hopes that the Statement of Principles will change is unlikely to be accepted by a Registrar as 'reasonable'.)

The VRB discourages this course of action. Representatives have a responsibility to properly advise applicants of their prospects of success and to discourage frivolous applications. In a case where the representative thinks the applicant has no chance of success, the representative should give the applicant three choices: withdraw the application; proceed to a hearing; or seek a second opinion or other representation.

It should be noted that the VRB is not prevented from bringing a case on for hearing before the 2 year mark if an applicant does not respond to correspondence or even if the applicant says that he or she is not ready to proceed. If after a reasonable time a Registrar considers that the applicant is not actively seeking further evidence but is merely hoping the law will change, or for some other reason is not actively pursuing the matter, the Registrar can list the case for a hearing. The dismissal provisions merely provide a convenient means of dealing with such cases if they are more than 2 years old without having to proceed to a hearing.

Benefits of effective case management

Effective case management ensures that applicants have their matters dealt with as quickly as practicable. Keeping the VRB informed of a case's progress reduces the need for representatives to keep responding to VRB 'follow-up letters', reduces the risk of dismissal, and enables Registrars to provide timely assistance to representatives in difficult cases.

A venerable veteran

Jim Dickson
VRB Services Member

One of the most appreciative veterans in the community is 105 year old. **William Evan Crawford Allan**, now believed to be the only surviving Australian to have seen active service in both World Wars.

'Darby', as he is affectionately known to the Navy community, was born on 24 July 1899. He grew up in tough circumstances in the Bega district in NSW and joined the fledgling Royal Australian Navy on 13 March 1914 as a

Boy Seaman. Trained in HMAS *Tingira* he saw active service in HMAS *Encounter* in the Pacific and Indian Oceans during WW1 and was in Sierra Leone, en route to UK to commission the first HMAS *Sydney*, when the armistice was declared on 11 November 1918.

Between the wars Darby served in the first RAN ships to bear the names *Australia, Brisbane, Adelaide, Melbourne* and *Stuart* and rose to the rank of Chief Petty Officer in the early 1930's. Washed overboard from HMAS *Australia* in the Atlantic in 1928, he was injured while being rescued from very rough seas and has a 'Hurt Certificate' to prove it! He was a member of the Australian contingent at the coronation of King George VI in 1937.

After service in the British armed merchant cruiser *Moreton Bay* in the early years of WW2 he returned to Australia and was commissioned in 1942. He continued in the RAN until 1947 when he declined a posting to Manus Island in New Guinea, left the service and took up subsistence farming at Somerville in Victoria. Widowed in the early 1980s he lived with his only daughter for some years thereafter. At the age of 100 he moved to his present Retirement Home where he is wonderfully looked after by an affectionate staff who regard him as a 'treasure'. Though physically frail, 'Darby' (or Evan as the caring staff prefer to call him) is remarkably acute mentally. He is proud to have been of service to the country and grateful for the extensive assistance given by the Department of Veterans' Affairs – assistance which he feels has helped him to live such a long and fulfilling life.

Administrative Appeals Tribunal

Re Piggott and Repatriation Commission

Campbell

[2004] AATA 1220
19 November 2004

Entitlement – psychiatric condition – diagnosis – causation – assessment – consideration of diagnostic criteria listed in DSM IV – PTSD – alcohol abuse.

Mr Piggott had left school at 15 having obtained his intermediate certificate, and joined the Navy as a musician in 1966. From May 1968, Mr Piggott sailed in HMAS *Sydney* to Vietnam on five occasions over a period of 18 months.

On his first voyage to Vietnam in May/June 1968 in HMAS *Sydney*, Mr Piggott detailed the following before the Tribunal in support of the application to ground a psychiatric diagnosis as being war-caused:

Incident 1

> [A]t 2-3 am in the morning some, two to three days prior to arrival in Vung Tau Harbour on his first voyage, he was awakened by an aircraft flying over. He heard it coming back, felt terrified and tried to get under the stretcher. He took a while to settle down, did not sleep further that night and felt foolish the next morning when told that it was a spotter plane that came out from Vung Tau on every trip.

Incident 2

The Tribunal heard evidence from the applicant in relation to his first experience of a scare charge:

> … [W]ithout warning a scare charge was detonated – 'it frightened the living daylights out of me. I did jump up. I was making a bolt for the flight deck, as I thought we had been mined. I was grabbed by one of the senior guys and was told it was a scare charge'. It took 15-20 minutes before he settled down somewhat and a lot longer to really settle down fully.

Diagnosis

At issue was whether the Tribunal could find on the whole of the evidence and on the balance of probabilities an appropriate diagnosis for Mr Piggott's claimed conditions. Before the Tribunal was evidence of varying diagnoses. The treating psychiatrist, Dr Reinhardt, had diagnosed post-traumatic stress disorder (chronic) and alcohol dependence (in partial remission), an opinion with which consultant psychiatrist Dr Dinnen substantially agreed. Dr Haik disagreed, concluding that Mr Piggott suffered from a depressive disorder with clinical onset about 2000 with no alcohol abuse or dependence and no PTSD or, excessive alcohol use, while Professor Mattick found depressive disorder with clinical onset five to six years ago and alcohol abuse with clinical onset 1970.

PTSD

The Tribunal turned to an evaluation of the two stressors claimed against all the evidence and the diagnostic criteria for PTSD listed in DSM IV. The Tribunal held on the balance of probabilities that Mr Piggott '[42] was exposed to two traumatic events and that both threatened death or serious injury or a threat to his physical integrity and that on both occasions his response was one of intense fear.' The Tribunal followed the subjective/objective test laid down by Mansfield J in *Stoddart* and later affirmed by *Woodward*:

> [43]. In the circumstances of this matter, namely a musician, recently recruited and trained, and on his first sea voyage, albeit to Vietnam, experienced two incidents, with the Tribunal having no evidence before it which would allow it to sustain that such incidents did not occur on balance of probabilities. In the light of such a finding that on balance of probabilities the two incidents did occur the Tribunal finds again on balance of probabilities that it was reasonable for the Applicant to perceive the threat that he did on both occasions, the perception of such a threat being judged objectively with the knowledge and in the circumstance of the Applicant.

The Tribunal then turned to an examination of Mr Piggott's symptomology to determine on the balance of probabilities whether the stressors gave rise to a condition properly diagnosed as PTSD. Referring to a comparison of the evidence against the criteria laid out in DSM-IV, the Tribunal 'was satisfied on balance of probabilities that the Applicant meets criteria B of DSM IV, as evidenced by both the recurrent distressing dreams which he has reported; the intrusive recollection of traumatic events, and both the psychological distress and physiological reactivity when exposed to a cue.'

In relation to criteria C of DSM IV, the Tribunal further held the evidence to supportive of a diagnosis of PTSD, noting Mr Piggott's difficulty with crowds, loss of interest in many significant activities, avoidance of potential situations of panic and his relative isolation.

Similarly, the Tribunal was satisfied that the evidence supported satisfaction of critera D (difficulty falling or staying asleep; irritability or out bursts of anger; difficulty concentrating; hypervigilance; and exaggerated startle response), criteria E (that symptoms persisted for

more than a month) and criteria F (causing clinically significant distress or impairment in social, occupational or other important areas of functioning).

Alcohol abuse

Having found Mr Piggott to have PTSD, the Tribunal turned to whether a diagnosis of alcohol abuse or dependence could be found. The Tribunal found on the evidence that it could so determine:

> [57] …from 1970 … he was drinking excessive daily amounts of alcohol and … was driving home in such circumstances. Further, …[he] was failing to fulfil domestic responsibilities in relation to child and other family requirements from the early seventies because of his drinking and this led to conflict with his wife – a conflict which has continued over time and for the same reasons.

Further assessing the symptomology of alcohol abuse against the criteria listed in DSM IV, the Tribunal was satisfied on the balance of probabilities that Mr Piggott was suffering from alcohol abuse, and further accepted the evidence that such abuse formed part of his PTSD.

Having found diagnoses on the balance of probabilities the Tribunal then turned to the issue of causation, following the steps outlined in *Deledio*. Here the Tribunal highlighted the conundrum found in dealing with psychiatric disorders in steps 1 and 3 of *Deledio.*

> [62] ...[T]he Tribunal observes that the initial process requires a decision that the Applicant has a psychiatric condition and what, if able, is the diagnosis of that condition, with both findings to be made on the balance of probability. Further, when a diagnosis of PTSD is made, a preliminary finding, again on the balance of probabilities must have been made that an individual has satisfied DSM IV criteria A – exposure to a traumatic event. In this matter the Tribunal observes that both the primary decision maker and the VRB concluded that the Applicant suffered from PTSD and in so doing must have made a preliminary finding that DSM IV criteria A – exposure to a traumatic event must have occurred on the balance of probabilities. Having so found as they did, it is difficult to then reverse such a finding during the causative considerations that such exposure to a traumatic event, or in Statement of Principles terms – experiencing a severe stressor did not occur – for such an activity is internally inconsistent with their earlier finding that such an exposure to a traumatic event did occur.

However, the Tribunal was careful to point out that there may be cases where the veteran may have experienced stressors that were not attributable to military service, and then the question becomes an open one:

> [63]. The Tribunal accepts that there may be a circumstance where an individual has experienced multiple exposures to traumatic events both during operational service and earlier and/or later in civilian life, with the task of finding beyond reasonable doubt that the exposure to traumatic events in military life has not caused or contributed to the causation of the PTSD. In this matter such an issue does not arise, as there is no suggestion of any traumatic event being experienced by the Applicant in his non-military endeavours.

Formal decision

There being no facts to satisfy the Tribunal beyond reasonable doubt that the claim could not succeed, Mr Piggott's PTSD and alcohol abuse were determined to be war-caused.

Editor: This case demonstrates that when the matter of diagnosis might be in dispute, the proper approach is for it to be found on the basis of an examination of all the available evidence and determined on the

balance of probabilities. It is important to note that this process occurs prior to application of the SoPs through the *Deledio* steps. Note in particular the Tribunal's process of weighing the evidence against the diagnostic criteria outlined in DSM IV.

See also *Mines'* case in this edition of *VeRBosity* (p 137) for further guidance on the steps to be taken before the *Deledio* steps.

Re Fowles and Repatriation Commission

Lindsay, Lynch

[2004] AATA 1412
31 December 2004

Entitlement – operational service – whether irritable bowel syndrome war-caused – inability to obtain appropriate clinical management – severe diarrhoea – decision affirmed.

Mr Fowles served in the Royal Australian Navy from 1952 to 1958, which included operational service in Korea from mid 1954 to March 1955. He sought to have his irritable bowel syndrome accepted as war-caused.

Evidence

After about a month after commencing operational service, Mr Fowles developed constipation and diarrhoea. A medical examination recorded prior to entry into the Navy that Mr Fowles had not previously suffered from stomach or bowel trouble or chronic constipation. Further evidence was led outlining the significant changes to Mr Fowles' diet that occurred after he joined the navy and rendered operational service.

Mr Fowles had sought treatment for his diarrhoea and constipation during his service career, but it was not until consulting his family doctor in 1974 that a diagnosis of irritable bowel syndrome was made.

The treating gastroenterologist said that 'Mr Fowles has a constipation-predominant irritable bowel syndrome and had onset of symptoms while in service.'

The Commission arranged for a second opinion, that of a Dr Gillies, who concluded thus:

> [15] … With respect to the IBS symptoms, his initial symptoms during service were constipation but over the years, this evolved with episodes of alternating constipation and diarrhoea, abdominal pain, some episodes of faecal soiling and some episodes of severe constipation, when, currently for up to four days at a time, he does not open his bowels... .

When asked whether in her opinion Mr Fowles satisfied any factors in the Statement of Principles, Dr Gillies opined:

> While technically, I do not believe he does satisfy the SOP, it is quite likely that the constipation which developed in a 20 year old with marked and sudden change in diet, was the trigger for development of IBS. The IBS has continued to wax and wane and has become a chronic problem. With this I believe, has developed a degree of anxiety and one tends to aggravate the other.

Application of *Deledio* steps

The first step required the Tribunal to determine whether the material points to a hypothesis connecting Mr Fowles condition and his service. The Tribunal held that there was such material. At step two, SoP No 103 of 1996 was correctly identified as the relevant SoP in force.

Step three requires the raised hypothesis to be reasonable. The hypothesis is

reasonable if the evidence supports satisfaction of factors in the SoP.

Mr Fowles relied on two factors, namely an inablity to obtain appropriate clinical management, or, in the alternative, suffering an episode of severe diarrhoea within the six months immediately before the clinical onset of irritable bowel syndrome.

Inability to obtain appropriate clinical management

Mr Fowles had stated that treatment for his bowel problems on board the ship never went past the sick berth attendant, although he was treated with coloxil and paraffin, which his own doctor continues to prescribe in response to his ongoing bowel problems post service. As determination of whether clinical management is appropriate is judged by reference to contemporary medical standards, not current medical standards – see also *Wellington* (1999) 15 *VeRBosity* 98 – the Tribunal agreed with Dr Gillies that the treatment Mr Fowles received was in line with the medical standards of the day. Accordingly, the SoP factor was held not to apply.

Severe diarrhoea

After examining all the material before it, and while recognising that there was evidence of Mr Fowles suffering bouts of diarrhoea, the Tribunal was not satisfied that the complaint was severe enough to satisfy the SoP factor.

> [29] In relation to factor 5(c) of SoP 103 of 1996 as raised in this matter, it is necessary that the evidence points to an episode of severe diarrhoea, which must have occurred within six months of clinical onset of irritable bowel syndrome. The material does not point to the factor being met and the hypothesis is therefore not reasonable.

The Tribunal went on, however, to observe that the SoP may be worthy of the RMA's reappraisal:

> We are of the opinion that the RMA should consider amending this SoP so that it makes provision for veterans whose constipation (as well as diarrhoea) manifests or evidences their irritable bowel syndrome.

Finding neither factor satisfied, the Tribunal reluctantly affirmed the decision under review.

Editor: The AAT in this case might have misunderstood the SoP and the expert evidence as recited in the case. The experts indicated that *clinical onset* is often characterised or triggered by constipation. The SoP agrees with that in its definition of irritable bowel syndrome (IBS). However, onset and cause are different issues and unless there is sound medical-scientific evidence (as defined in s 5AB(2)) that constipation is a *cause* of the disease rather than a *symptom* or a trigger for the symptoms, the RMA cannot include it in a SoP. None of the medical evidence referred to in the reasons appear to suggest that constipation is a cause of IBS. It might even be that a particular diet can exacerbate the symptoms but that does not mean that it either caused or aggravated the disease itself.

Re Moon and Repatriation Commission

DP Muller

[2004] AATA 1264

30 November 2004

Jurisdiction – whether letter of explanation of method of payment of arrears of special rate pension constitutes a decision made by respondent – arrears of special rate paid at the rates in force

during each indexation period to which arrears relate

In August 2001 the Tribunal had determined that Dr Moon was entitled to payment of disability pension at the special rate with effect from 30 December 1991. As a result of this decision, Dr Moon was paid an amount of arrears calculated to be owing to him from the end of 1991 to October 2002.

Dr Moon claimed that the rate of payment of his arrears should have been the rate applicable in August 2001 for the whole period from January 1992. Dr Moon had appealed initially to the VRB, which held that as the matter of calculation was not a decision of the Commission, it was not a matter the Board could review.

Whether reviewable by the VRB

The Tribunal identified the key elements that must be satisfied before the review by the VRB as follows:

> [12] … (a) There must be a decision;
>
> (b) That decision must be a decision of the Commission, or its delegate, or delegates; and
>
> (c) The decision of the Commission must be a decision in respect of a claim or application lodged under section 14 or 15 of the VEA.

The Tribunal stated the VRB's decision turned on whether calculation of an arrears of pension was a decision or not.

> [13] It seems to have been the contention of the Commission, adopted by the VRB, that a computer interpreted the VEA and then automatically calculated Dr Moon's arrears, without any human involvement. Thus, it was contended, there was never any decision made and therefore no reviewable decision capable of being reviewed by the VRB.

The observation that 'a computer interpreted the VEA and then automatically calculated [the] arrears' was given more scrutiny by the Tribunal:

> [14] [C]ommon sense dictates that a human agency made decisions relating to the way in which the Act was to be interpreted and the rates at which arrears payments to Dr Moon were to be made. It must be the fact that a delegate of the Commission decided what information was to be fed into the computer. A human agency must have determined that the rate of arrears was to be the rate that was historically applicable to each individual year and not the rate for 2001 for the whole of the arrears period. In this exercise the computer was nothing more than a sophisticated adding machine.

Further, the Tribunal held that a letter written by a Departmental officer in response to Dr Moon's request to have the calculation of arrears explained constituted a decision in respect of a pension, and further held that the VRB did in fact have jurisdiction to hear the appeal under s 135(1).

> [23] The Respondent's role in relation to the payment of pensions and determining claims and applications is found in sections 18, 122, 122A and 180(2) of the VEA. Section 18 spells out the duties of the Commission in relation to 'all matters relevant to the determination of the claim or application'. Sections 122 and 122A relate to some mechanical details in relation to the payment of pensions. Section 180(2) charges the Respondent with administering the VEA.
>
> [24] Section 135(1) is drafted in exceptionally broad terms. Review by the VRB is allowed in circumstances where a person who has made a claim for a pension in accordance with section 14, or for an increase in pension under section 15 is dissatisfied with *any* decision of the Commission in respect of the claim or application.

Whether reviewable by the AAT

The Tribunal then looked at the provisions concerning its own jurisdiction.

> [27] A combination of section 25 of the AAT Act and s 175(1) of the VEA provides that the Tribunal's jurisdiction to review decisions made under the Act will be enlivened as long as:
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> (a) There has been a decision of the Respondent; and
>
> (b) (b) That decision has been reviewed by the VRB.

The Tribunal took the view that '[28] … it would require a perverse interpretation of the VEA and the AAT Act to come to the conclusion that a veteran who is not satisfied with a decision about the rate at which his pension is paid, cannot have that decision reviewed by either the VRB or the AAT.' Thus the Tribunal found it had jurisdiction.

On the substantive issue concerning the calculation of arrears of pension, the Tribunal found there had been no error. Subsection 198(10) of the VEA has the effect that arrears of pension are paid at the rate applicable at the relevant time rather than at the rate when the decision was made. Therefore, the decision under review (said to be constituted by a letter from a Departmental officer) was affirmed.

Editor: This decision suggests that all pension payments, whether made by computer or manually, are subject to review by the VRB and AAT. By extension it implies that every payday pensioners must be notified of a review right (see s 27A of the AAT Act). The Tribunal seems not to have considered whether the payment calculation is actually a decision of a delegate of the Secretary of the Department of Veterans' Affairs discharging obligations under the *Financial Management and Accountability Act 1997* to expend appropriations from the Consolidated Revenue Fund in accordance with sections 81 and 83 of the Australian *Constitution*, rather than a decision of the Commission, which is given no such appropriations to expend.

Dr Moon has appealed the Tribunal's decision to the Federal Court.

Re Aust and Repatriation Commission

Constance

[2004] AATA 1094
20 October 2004

Summons to obtain medical records relating to another person's application – whether Tribunal should revoke summons

Mr Aust was seeking a review of a decision of the Commission that his malignant neoplasm of the prostate was not related to his operational service.

Acting at the request of Mr Aust, the Tribunal's Registrar issued a summons to produce documents addressed to the Commission requiring it:

> [3] … to produce.....all medical reports tendered by the applicant (Ena Mavis Deledio) in her application (sic) against the Repatriation Commission …

The Commission applied to have the summons set aside on the following grounds:

> [4] …(a) the documents being sought are irrelevant to any issue in these proceedings;
>
> (b) the production of the documents would involve an unjustified breach of the privacy of the person to whom the reports related; and that
>
> (c) the production of the documents would set an unfortunate precedent which would raise the concern of other veterans that their medical information held by the Commission may be produced under summons.

The Tribunal summarised the applicant as endeavouring to obtain the medical records of a veteran who had suffered

the same condition as that suffered by Mr Aust in an effort to assist the veteran's case. The Tribunal noted the concession made by Counsel for Mr Aust that the summons was a 'fishing expedition'.

After outlining the legal basis of the Tribunal's power to revoke a summons under s 33 of the AAT Act, the Tribunal issued a caution that use of the power is to be determined on its merits.

> [8] Each case must be decided on its own facts, and this decision should not be taken to indicate that it would never be appropriate to issue a summons for the production of medical reports relating to a person who is not a party to the proceedings.

On this basis, the Tribunal found the documents sought to be irrelevant to the application. Further -

> [9] While there is a suggestion in the Federal Court's decision that there may be some information of general application in Dr Sullivan's report, this is not sufficient to show that the report(s) contain relevant material. However, if lack of relevancy was the only ground for revocation which could be established it would usually be preferable to wait until the documents were produced before making this decision.

Interestingly, the Tribunal held that the Commission's argument for revocation on the grounds of privacy was not made out, suggesting that should the evidence be held to be relevant, there would be ways of legitimately presenting the material without compromising privacy.

Ultimately, however the Tribunal set aside the summons 'on the ground that the Tribunal should not permit its processes to be used in a manner which would be in breach of the common principles under which documentary evidence may be obtained.'

Federal Court of Australia

Anderson v Repatriation Commission

Gray J

[2004] FCA 1009
6 August 2004

Special rate – farmer – whether veteran eased out of farming by war-caused disabilities alone – whether veteran engaged in 'remunerative work'

Continuation of claim veteran's death

Mr Anderson has sought the special rate of pension. Between the Tribunal hearing and the appeal to the Federal Court, he died. His widow was his 'legal personal representative' for the purposes of continuing the claim.

Background

On return from World War 2 Mr Anderson acquired a farming property. In 1961 he suffered an amputation of one leg below the knee as a result of a farming accident. In 1976 he was granted oa service pension. The pension ceased in 1986 when his assets were assessed as being in excess of the asset limit. Throughout the 1990s Mr Anderson made a series of claims for acquired cataracts, bilateral sensorineural hearing loss, PTSD, ischaemic heart disease, ischaemic dementia and aortic stenosis. All bar the aortic stenosis were accepted as war-caused conditions.

Entitlement to special rate

At issue was the late veteran's claim to a pension at the special rate. The Tribunal

had initially rejected the application based on evidence that Mr Anderson had chosen to retire from farming around the late 1980s and early 1990s. The move from a 162-acre property to a 14-acre property in 1987 suggested willingness to significantly scale down his farming activity. Claim records dating back to as early as 1976 indicated that he was having trouble continuing to farm as a result of his age and leg amputation. This was affirmed in correspondence with the Department in 1987, which again indicated Mr Anderson's reluctance to continue farming by reason of his age and leg amputation.

The Tribunal was also not impressed by Mrs Anderson's contention that the activity conducted on the smaller property constituted 'remunerative work'. Evidence before the Tribunal suggested that the Andersons had earned around $2 a week from egg sales, $50 a week from horse agistment, and $100 over 5 years from the sale of border collie pups.

The Court held that the Tribunal had correctly decided on the whole of the evidence before it that Mr Anderson was not entitled to a pension at the special rate because his circumstances failed to indicate that he had ceased remunerative work by reason of his war-caused disabilities alone. Further, the Court held that it was open for the Tribunal to find that Mr Anderson's activity was more of a hobby than of one constituting 'remunerative work'.

Accordingly the appeal was dismissed.

Ryde v Repatriation Commission

Sackville J

[2004] FCA 1281
6 October 2004

Successive claims for war widow's pension – whether pension can be backdated to the date of a previous unsuccessful claim

Section 20 of the VEA provides that where a claim for pension has been granted, the Commission may set a date of payment of the pension up to 3 months prior to the lodgment of the claim. Ms Perez had succeeded in being granted a widow's pension to take effect on 7 February 2001. However, she contended that the entitlement ought to be backdated 3 months prior to an earlier unsuccessful claim.

Tribunal's decision

The Tribunal had held Ms Perez's claim to have no merit.

> [2] The AAT decided that s 20 of the VE Act does not permit a pension to be backdated to a date earlier than three months before the date of lodgement of the successful claim for the pension. In particular, it decided that s 20 of the VE Act does not permit the Commission, or the AAT on review, to backdate a pension to a date three months before the lodgement of an earlier unsuccessful claim.

The error of law claimed on appeal concerned the interpretation of s 20.

Background

Ms Perez was the de facto partner of the veteran Mr Ryde, who died in 1991. Mr Ryde had rendered eligible war service with the RAAF between 1941 and 1949. Ms Perez had initially made a claim for a widow's pension in September 1991, which was rejected by the Commission and upon review by both the VRB and the AAT.

Following the initial claim, Statements of Principles were incorporated into the scheme, including one for cerebrovascular accident (CVA). A subsequent claim was lodged in 1999, however no reference was made to the

relevant SoP, nor to any applicable factors connecting service with CVA.

Ms Perez then lodged a third claim in 2001, which provided evidence of meeting a relevant factor in the SoP. The delegate this time decided that there was a reasonable hypothesis connecting service with the death of the veteran, and granted a pension from a date 3 months prior to lodgment of that particular claim.

Ms Perez sought review by the VRB and the AAT of the setting of the date. Both affirmed the delegate's original decision that a pension was payable from February 2001.

Case on appeal

The applicant's submitted that the expression 'the claim for a pension, in accordance with a form approved for the purposes of s 14(3)(a)' in s 20 of the VEA did not refer to a successful claim. Therefore, the submission continued, Ms Perez's entitlement to a pension ought to be backdated to the date of the veteran's death, since the date of his death was within 3 months prior to Ms Perez's first lodgment of a claim. Counsel for Ms Perez argued that each of the three claims effectively constituted the one claim.

The Commission argued that the Act had to be read as whole. It noted there was specific provision to impose limits on the capacity of a claimant to lodge fresh claims. Further, the Commission pointed out that the scheme permits the determination of successive claims in respect of the death of a veteran, and that each claim is spent once it is fully determined.

Reasoning

Despite acknowledging the persuasiveness of Ms Perez's argument, the Court held that though the cause of death remained the same, the three claims could not be held to be the same in substance. First, there was the intervening factor of the introduction of SoPs in 1994, which immediately marked a distinction between the 1991 claim and the two subsequent claims. Secondly, the 1999 claim made no mention of a relevant SoP factor, and subsequently a reasonable hypothesis was unable to be established. The Court held that the 2001 claim, although seeking the same thing as the two earlier claims, was based on different grounds, and therefore was considered a separate claim.

The Court drew further attention to potential problems should Ms Perez's argument be accepted:

> [43] This analysis suggests that the approach contended for by the applicant would lead to difficulties in practice. When is a particular claim in substance the same as an earlier, rejected claim? If the claimant relies on fresh evidence, or advances a new theory as to the relationship between the veteran's war service and his or her death, does that amount to a new claim? Does it depend on the nature of the fresh evidence, or on the extent to which the new theory is linked to previous arguments put on behalf of the claimant?

The Court held that a claim for a pension is spent once determined, and the process is initiated anew with the lodgment of a successive claim. The appeal was dismissed.

Editor: Ms Perez was originally unrepresented. The Court referred her to the Registrar for a referral to a legal practitioner on the Pro Bono Panel under Order 80 of the Federal Court Rules.

Repatriation Commission v Graham

Selway J

[2004] FCA 1287
8 October 2004

Special rate – remunerative work that the veteran was undertaking – distinction of types of remunerative work – hypothetical comparison

Mr Graham had worked as a manager of holiday units and a restaurant, which he owned. He slowly withdrew from aspects of the business until it was finally sold, since which time he has not worked. Part of the nature of the work was to engage in some physical labour by attending to grounds and maintenance, otherwise the work involved a mixture of clerical activity and client interaction. It was this more managerial type of work that the Tribunal had held the veteran was prevented from continuing because of his war caused disabilities alone.

The Commission in this case alleged the Tribunal to have erred in law by treating all remunerative work ever undertaken by the respondent as being 'remunerative work that the veteran was undertaking' and in dividing the tasks of management into sub tasks constituting of themselves to be 'types of work'. Further, the Commission argued the Tribunal misinterpreted the third question identified in *Flentjar* (1997) 13 *VeRBosity* 111. That question asks whether it was the war caused injury alone that prevented the veteran from undertaking the relevant remunerative work. Finally, Selway J provided further clarification on the fourth question of *Flentjar*, which requires a loss to have been suffered by reason of the incapacity to undertake that type of work.

Type of work that was undertaken

The Tribunal had held that on a characterisation of the veteran's employment history, he was prevented from performing some types of manual remunerative work by reason of non war-caused disabilities, but assessed that he was prevented by his war-caused depressive disorder alone from undertaking other more managerial and clerical remunerative work. The Commission sought to argue that the job of managing holiday units and a restaurant, including the manual labour tasks associated with it constituted one type of employment and not separate types of work.

> [24] The Commission […] argued that the AAT was in error in its division of the types of work performed by the respondent at the restaurant and at the units. The tasks performed by the respondent would seem to have been similar to those performed by many small business operators. He did everything that he was capable of doing. Insofar as the restaurant was concerned this consisted primarily of managing the restaurant and working as a waiter; insofar as the units were concerned it consisted primarily of managing them and doing various unskilled tasks such as gardening and acting as a handyman. In its analysis the AAT has treated these various tasks as separate and distinct 'types' of work. The result, on the facts of this case, is that the AAT was able to treat the types of remunerative work involving physical strength as being separate from the types of work that have a lesser physical requirement. As already noted the respondent was suffering from non war-caused injuries which limited his capacity to engage in physically demanding work. The Commission says that the AAT, by effectively splitting one 'type' of work into different categories, has effectively foreclosed the question whether it was the war caused injury alone which prevented the veteran from undertaking that remunerative work. The Commission says that in doing so the AAT has fallen into an error of law in its understanding of the meaning of 'remunerative work'.

Selway J held that although the question of whether there was an error of law was open, the characterising various kinds of work, as opposed to a single discrete job, as different 'types' of remunerative work did not constitute such an error.

> [27] … I am not satisfied that this is as self evident as the Commission claims. As the AAT put it:
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> > I am mindful that the applicant's previous work in managing the holiday units also embraced carrying out gardening and maintenance activities. However, on the authorities mentioned ... above, the determination required by s 24(1)(c) of the relevant remunerative work is not confined to any particular job, but rather entails an examination of the type of work which the veteran has previously undertaken. I consider that the work of managing the holiday units would not necessarily also entail performing outside maintenance and gardening activities, and that these activities constituted a separate kind of work.
>
> [28] In my view that analysis is correct, both as to law and fact. A person could be both a gardener and a motel manager at the same time. Whether the respondent could be so described was a question of mixed law and fact for the AAT. If it was wrong in its conclusion in this case, I am unable to say that the error was one of law.

Meaning of 'alone'

The Commission also argued that the Tribunal had misconstrued the meaning of the word 'alone' in s 24(1)(c) of the VEA. Selway J noted that there was only one piece of medical evidence (that of Dr Conway) tendered in relation to the effects of his non-war caused disabilities on his ability to work, and it did not break down the capacity for different kinds of work to exist as so found by the Tribunal. It therefore remained open for the Tribunal to construe that the non-war caused injuries '[29] … would have been factors in the respondent being unable to undertake work that would require bending, lifting or walking.'

Selway J noted, however, that the Tribunal had misinterpreted s 24(1)(c), but it did not affect the end result.

> [30] However, as already noted, in reaching these conclusions the AAT also commented that Dr Conway had remarked on the effects of the non war caused injuries in 'restricting' the respondent's capacity for work. The AAT commented that it was only if the non war caused injuries prevented the respondent from working that they could be taken into account. The AAT commented that if Dr Conway had misunderstood the relevant test then her opinion would not be relevant.
>
> [31] These remarks of the AAT involve a misunderstanding of the law. What needed to be established for the purposes of s 24(1)(c) of the Entitlements Act is that it was the war caused injuries alone that prevented the veteran from undertaking the relevant remunerative work. If non war caused injuries restricted the veteran's capacity to work such that the war caused injuries alone did not prevent the veteran from working, then a special pension was not payable: see *Hendy* at [37] and see Spender J in *Repatriation Commission v Alexander* (2003) 75 ALD 329, 334 [24].
>
> [32] However, it does not seem to me that this error of law affected the result reached by the AAT. The error was made in a comment by the AAT. It was not a critical part of the AAT's reasoning. Further, it would not appear to have affected the AAT's conclusions in relation to those types of work in respect of which the AAT found that the respondent was prevented from undertaking solely as a result of war caused injuries. As already noted the AAT concluded that Dr Conway simply did not address that issue in her report. It was open to the AAT to reach that conclusion.

Characterisation of 'suffering a loss of wages etc'

Selway J found further error in the manner in which the Tribunal dealt with the analysis of losses 'that the [veteran] would have suffered because he was unable to undertake the hypothetical remunerative employment which he was prevented from undertaking by his war caused injuries.' The Tribunal had analysed and determined a loss of income on the financial evidence tendered concerning the veteran's two businesses. Selway J held that though this approach was in fact wrong, the same conclusion (that the veteran had in fact suffered a loss) could nevertheless be supported on another basis.

> [35] In this case the AAT did not engage in the required analysis. The AAT found that, if the respondent had not been suffering from the war caused injury he 'would have continued to manage and operate the units'. With respect this was not the correct comparison given the factual conclusions already reached by the AAT. The units had been sold. It was not an option for him to continue to operate and manage them. Even more fundamentally, some of the tasks that he had formerly done when operating the units (such as gardening) he could no longer do for reasons in which non war caused injuries were a factor. The issue that the AAT was required to consider was whether there was a loss of earnings between what the respondent actually earned at any time during the assessment period and what the respondent would have earned during that same period as a hypothetical manager who could not bend, lift or walk (being those aspects of his previous tasks that he could no longer undertake for reasons including non war caused reasons). It may be, for example, that such work was not available or, if it was, that the respondent did not have the training or experience for it. The AAT did not engage in that analysis. In my view it was required to do so. Instead it asked itself whether the former business would have succeeded if the respondent had not been affected by his war caused injury. This was not the relevant question. The AAT's failure to make the required comparison was due to a misunderstanding of the meaning of s 24(1)(c) of the Entitlements Act. It involved an error of law.
>
> [36] However, that error of law does not require that the AAT's decision be set aside if the decision can be supported on some other basis. In this case there was an alternative basis for the conclusion reached by the AAT. As already noted the AAT also found that the respondent discontinued his employment with the Council in 1995 as a result of his war caused injuries. It found that the respondent could have continued to perform the duties of that position up to and including the assessment period but for being prevented from doing so by his war caused injuries. It also compared the earnings that he actually received during the assessment period and what he would have earned if he had continued to be employed by the Council and concluded that he had suffered a loss of salary during the assessment period. In my view this conclusion was fairly open to the AAT. It involved no error of law.

Formal decision

Selway J dismissed the appeal, holding there was no error of law affecting the ultimate result in the decision of the Tribunal. The Court ordered the Commission to pay Mr Graham's costs.

Editor: This case highlights the need to characterise a *type* of work (rather than a particular job) the veteran had been undertaking and which, but for war-caused disabilities, he or she would still be doing at the application day. If war-caused disability is the only thing stopping the veteran doing that *type* of work, the first part of s 24(1)(c) will be met.

Mines v Repatriation Commission

Gray J

[2004] FCA 1331
19 October 2004

Entitlement – whether war-caused – standard of proof – standard for determining whether veteran suffers from a disease – post traumatic stress disorder – whether veteran experienced a traumatic event in course of war service – whether this question determined on balance of probabilities or on reverse beyond reasonable doubt standard – characterisation of symptoms suffered by veteran

Mr Mines had served as a keyboard operator on two tours of duty in Vietnam. He had claimed that he experienced a number of severe stressors while on operational service in Vietnam, which led to a diagnosis of post-traumatic stress disorder. The Tribunal had rejected Mr Mines' appeal against the decision not to accept his PTSD as war-caused.

The incidents relied upon by Mr Mines were witnessing a firefight in Saigon, being present when American soldiers returned enemy fire, being ordered to point an unloaded machine gun at a Vietnamese policeman, and witnessing the carnage of a destroyed bus resulting from a bomb blast.

Tribunal's findings

Gray J set out the reasoning the Tribunal gave for raising, and then rejecting the hypothesis connecting PTSD with the veteran's war service:

> [31] The Tribunal […] found that:
>
> > 'The applicant raised a hypothesis that his Vietnam service and the stressors he suffered therein have led to a psychiatric disorder and alcohol abuse. Having examined all the material, the Tribunal concluded this was a reasonable hypothesis. Based on the applicant's evidence, there is material pointing to this hypothesis and the hypothesis itself is not fanciful, absurd, untenable, too remote or too tenuous.'
>
> [32] The Tribunal then turned to what it called 'the agreed applicable SoPs', to examine whether or not the hypothesis was consistent with the factors in those SoPs. It said:
>
> > 'The prime stressor relied upon by the applicant was the so-called Saigon firefight. The evidence of Mr Lambey, who was the sergeant in charge of the group at the time of the alleged incident, has unequivocally rejected that they were fired on at any time or that they (the party of some 12 soldiers) returned fire. In his evidence, the applicant stated that in none of the other four incidents was he or his party fired upon. In relation to the applicant's observance of the results of a bus bombing, his evidence before the Tribunal was that the victims of the bombing were all within the bus and not as previously stated in the street and covered with blood.'

The Tribunal held that the applicant did not meet the requirements of the relevant SoP for PTSD, nor for alcohol abuse. Establishment of such by the veteran was critical in accepting other sequelae conditions

Case on appeal: correct application of the *Deledio* steps

The first step in *Deledio* asks whether the material points to a hypothesis connecting the disease with the circumstances of the particular service rendered by the veteran. Prior to the asking of this question, however, Gray J noted that two facts have to be relevantly identified – namely the existence of the

claimed for injury or disease and whether the veteran rendered operational service. The question concerning the existence of the injury or disease is to be decided on the balance of probabilities.

> [38] Only if those facts exist can there be a question whether there is a reasonable hypothesis connecting them. It must follow that the question whether those elements exist is not part of the reasonable hypothesis, but must be determined antecedently to the formation of the hypothesis. This reasoning suggests that what applies to the determination of the question whether a finding should be made of injury, disease or death, and of operational service, should be approached by reference to s 120(4). In other words, the decision-maker should only make a finding that an injury, disease or death exists or has occurred, or that a veteran rendered operational service, if reasonably satisfied that those things occurred. By authority, it has been determined that this means satisfied on the balance of probabilities. See *Repatriation Commission v Smith* (1987) 15 FCR 327 at 335.

After considering the relevant authorities, namely *Byrnes*, *Cooke, Budworth and Benjamin*, Gray J held the proper standard for determining whether a condition existed, before asking the first question in *Deledio*, was to the reasonable satisfaction of the decision-maker. Further:

> [48] … If the question is posed as whether a veteran has suffered PTSD as a result of a traumatic event said to have occurred during the veteran's operational service, it must be answered by saying that the decision-maker must be reasonably satisfied that the traumatic event occurred before reaching the conclusion that the veteran suffered PTSD. Only if such a conclusion is reached does the reasonable hypothesis process of reasoning, outlined in the four steps referred to in *Deledio*, come into operation. As I have already suggested, in those circumstances, the connection between the disease and the operational service has already been determined, and the four steps in *Deledio* hardly need to be considered.

The error in the Tribunal's decision identified by Gray J was essentially that the Tribunal had failed at any stage of its reasoning to find whether the applicant had in fact suffered from a disease or injury. It was noted that the Tribunal only went as far as raising a hypothesis without first making a finding of fact.

> [54] This assumption was incorrect. As I have said, the first task of the Tribunal, before it embarked on the steps referred to in *Deledio*, was to decide whether it was reasonably satisfied that the applicant was suffering from a disease, even if, as the Full Court in *Budworth* said at [19], the Tribunal only identified the collection of relevant symptoms which it was satisfied constituted the disease which the appellant had contracted. It was not necessary for the Tribunal to name the disease, or attach a traditional medical label to the collection of symptoms. It was necessary, however, for the Tribunal to make a finding as to whether some disease was suffered. At that stage, the question of a hypothesis, or its reasonableness, did not arise.

Gray J allowed the appeal and ordered that it be remitted and reheard by a Tribunal differently constituted, although it was suggested that the applicant's case may still fall at the first hurdle:

> [59] When it comes to consider whether it is reasonably satisfied that the applicant suffers from symptoms that, given the right traumatic event, might amount to PTSD, the Tribunal might well find on the material before it that it is not so satisfied. That is not a matter for determination by this Court, which deals only with questions of law in appeals of this kind. In any event, the applicant is entitled to have a proper

consideration by the Tribunal, following the four steps referred to in *Deledio*, in respect of any condition from which the Tribunal is reasonably satisfied that he suffers.

Editor: This case serves to accentuate the requirement of finding a diagnosis prior to contemplating whether a hypothesis connecting the condition with service may exist or not.

Brennan v Repatriation Commission

Selway J

[2004] FCA 1431
4 November 2004

Statement of Principles – Application of Deledio – Identification of relevant hypothesis – Whether hypothesis consistent with Statement of Principles – Whether error of law

Mr Brennan served in the Army on postings in New Guinea and Australia between 1941 and 1946. He had sought to have his psychiatric condition considered a war-caused disease by advancing two hypotheses. The first connected his condition with a back injury suffered during war service, and the second arose from being informed, during war service, that his brother had been killed while on active service. The applicant sought to link both incidents to his anxiety disorder.

The SoP for anxiety disorder relevantly required the veteran to have suffered a major illness or injury within the two years immediately before the clinical onset of anxiety disorder or experiencing a severe psychosocial stressor within the two years immediately before the clinical onset of anxiety disorder.

Back injury – major injury?

In relation to the hypothesis proposed by back injury (the so called major illness or injury relied upon), Selway J held that the only error the Tribunal made '[16] would seem to be an error in understanding the claim as put by the applicant', and that of itself is not an error of law. Selway J found the Tribunal had decided correctly that the back injury, while a nuisance and being chronic in nature, was not a 'major illness or injury' and therefore could not be held to fit the template as required by step 3 of *Deledio*, even if 'the analysis must take the best view possible from the applicant's perspective'. Further:

> [16] …However, where, as here, all evidence relating to his condition is ultimately derived from the applicant himself and none of that evidence is relevantly in dispute, it is plainly appropriate to look at all of it to determine what the relevant hypothesis is. This is what the AAT did. Looked at as a whole, it is plain that the applicant's case was that he had a chronic back condition as a result of his army service. That chronic back condition had caused him significant difficulties during his life but he had lived with what pain it caused. In his statement to one of the treating doctors he described the back pain as a 'nuisance'. He had learned to live with it. It was clear that he continued in his employment until retirement age, notwithstanding his back pain. It was clear that he continued to play golf even after that. In the circumstances it seems to me to have been open to the Tribunal to find, as it did, that the 'hypothesis' put forward by the applicant was not one involving a back pain which was 'life threatening or seriously disabling'.

News of brother's death – stressor?

In relation to the argument put forward to the Tribunal that the receipt of news concerning Mr Brennan's brother's death was causally linked to a diagnosis of

generalised anxiety disorder, Selway J reserved criticism as to the absence of relevant evidence. Selway J also found that the Tribunal's conclusion in determining the incident failed to fit the definition of experiencing a severe psychosocial stressor was open to find on the evidence (scant though that evidence appeared to be).

> [22] The evidence in this case was totally inadequate to enable the AAT to identify what the relevant 'factor' was and whether that 'factor' was the result of the applicant's war service. If, for example, there was evidence that the news of his brother's death was received during the applicant's war service, that this caused him stress and anxiety, that that stress or anxiety, resulted in a generalised anxiety disorder and that he suffered from that generalised anxiety disorder within two years of that stress or anxiety then this might well be the basis for identifying a relevant hypothesis which was consistent with the SoP. None of that evidence was before the AAT. It was correct in its conclusion that the hypothesis which was before it, such as it was, was not consistent with the 'template' within the SoP.

The appeal was dismissed and Mr Brennan was ordered to pay the Commission's costs.

Peacock v Repatriation Commission

Dowsett J

[2004] FCA 1449
11 November 2004

Special rate – whether medical evidence at time of retirement necessary to satisfy the test in* Flentjar *– whether applicant was prevented from working by war-caused disability alone – contract designed to end when applicant could access superannuation benefits – whether access to superannuation benefits could prevent the applicant from working

Mr Peacock worked as a clerical officer contracted by a Council. The termination conditions of his contract of employment were tailored to fit with the timing of receipt of superannuation benefits. The Tribunal held at para 31 of its decision that 'the availability of his superannuation payments at age 55 had a significant role to play in the applicant's decision to cease employment and that, therefore, it was not his war-caused injuries or diseases, alone, which prevented him from continuing to undertake his previous remunerative work when his contract expired or at any time thereafter'.

Dowsett J characterised Mr Peacock's case as focussing on the inconsistent findings that on the one hand declared the veteran to have been incapable of undertaking remunerative work for a period greater than 8 hours a week yet on the other held that he was not so incapacitated at the time he ceased remunerative work.

> [25] … [C]ounsel for the applicant focused upon an alleged inconsistency between the respondent's concession (accepted by the Tribunal) that the applicant had been, since the date of his claim (31 January 2003), unable to work for more than eight hours a week and its failure to accept that he was so incapacitated at the time at which his employment ceased. He also submits that the Tribunal failed to identify '...any factor independent of the disability suffered by the applicant...' which prevented his undertaking work.

Whether incentive to retire prevents remunerative work

While the Tribunal was satisfied that MR Peacock's war-caused disabilities alone were such to 'render the veteran

incapable of undertaking remunerative work' under s 24(1)(b), it was not satisfied that the same disabilities alone, prevented him from 'continuing to undertake remunerative work' under s 24(1)(c). Dowsett J overturned the Tribunal's decision, holding that the superannuation benefits are more properly characterised as an inducement rather than a barrier to prevent the undertaking of such work. Dowsett J expanded further on the relationship of 24(1)(b) and (c) relevant to the facts available:

> [33] The Tribunal concluded, in answer to the first *Flentjar* question, that the applicant had previously undertaken work of a clerical or administrative nature. The second *Flentjar* question was whether the applicant was, during the claim period, prevented by his war-caused conditions from continuing to perform clerical or administrative work. The respondent had conceded, and the Tribunal had found, that he satisfied the requirements of par 24(1)(b) of the Act. Although the questions are not identical, I cannot see how, on the present evidence, that finding can be reconciled with the Tribunal's conclusion that the applicant was not prevented by his conditions from performing clerical or administrative work during the claim period. As I have said, it seems that the Tribunal, in considering the second *Flentjar* question, looked to the situation in 2000 rather than the situation during the claim period. It is likely that the same error attended the Tribunal's consideration of the third *Flentjar* question. Further, to the extent that the Tribunal concluded that the applicant's access to superannuation benefits was a 'factor' preventing him from continuing to work for the purposes of the third question, I doubt the correctness of the decision. Such access may be an incentive to retire, but it cannot *prevent* work.

Further issue not considered

Despite allowing the appeal on the basis that the Tribunal had erred in its misapplication of 24(1)(c), it ought to be noted that Dowsett J did flag a further hurdle in the applicant's path – that of the operation of s 24(2)(a):

> [37] Favourable answers to the four *Flentjar* questions would not necessarily result in a favourable outcome for the applicant. It was also necessary to address subpar 24(2)(a)(i). Clearly, the applicant ceased to engage in remunerative work in 2000. If he ceased work for some reason other than his incapacity, he would be ineligible for the special rate. In the present case, the operation of par 24(1)(c) and subpar 24(2)(a)(i) may overlap, both focusing upon the role of the applicant's access to superannuation benefits in his decision to retire. However there will be cases in which they do not do so. The latter sub-section seems to be directed at the situation in which a veteran has ceased to work in a particular area for reasons unconnected with his war-caused conditions and thereafter asserts that, but for such conditions, he would have again sought and obtained employment in the same area. Such a person might satisfy par 24(1)(c) but not satisfy subpar 24(2)(a). The Tribunal did not deal with this aspect. As I have observed, it considered the operation of par 24(2)(b), finding that it did not apply so as to benefit the applicant. There is no appeal from that decision.

Formal decision

Dowsett J allowed the appeal, setting aside the Tribunal's decision and remitting it to the Tribunal for further consideration in accordance with law.

Editor: This case highlights the phrase 'prevented from continuing to undertake remunerative work' in s 24(1)(c). The authority appears clear that inducements to retire, such as the maturing of superannuation benefits,

are irrelevant to the question of whether the veteran is 'prevented' from working as a result of the veteran's war caused conditions alone. However, as Dowsett J indicates at the end of the judgment at paragraph 37, despite finding error in favour of the applicant at s 24(1)(c), the further test in 24(2) may present an insurmountable hurdle on remittal to the Tribunal.

Youngnickel v Repatriation Commission

Bennett J

[2004] FCA 1691
20 December 2004

Alcohol abuse and dependence – whether material pointing to clinical onset – application of* Deledio *steps – whether material sufficient to raise a hypothesis – consideration of whole of the material – whether material consistent with the SoP – assessment of 'reasonableness'

Mr Youngnickel had claimed that his alcohol abuse and dependence was related to his operational service in 1966 aboard HMAS *Derwent*. The Tribunal had affirmed the rejection of his claim, and he appealed to the Federal Court on the grounds that the Tribunal had misapplied subsections 120(1) and (3) and had erred in law in finding that there was no material pointing to the clinical onset of the applicant's alcohol abuse and dependence within 2 years of suffering a severe stressor.

The alleged severe stressor

The relevant Statement of Principles (SoP) required experiencing a severe stressor within the 2 years immediately before the clinical onset of the disease. The particular incident Mr Youngnickel sought to rely on was when he saw a fish being thrown up onto the deck of the ship when he was on watch. He was then 19 years of age and he said that he was scared because he thought it was a grenade. He said that he either blacked out, or blanked out, or ducked for cover, He had no actual memory of the event other than seeing an object being thrown and landing on the deck. He said that he was traumatised by the event and felt unable to seek assistance, although he accepted that it was available. He said that from that time on he drank a lot.

The Tribunal found the material pointed to Mr Youngnickel having experienced a severe stressor in terms of the SoP, but that there was 'no material which pointed to features and symptoms of alcohol abuse/dependence by August 1968'.

Clinical onset

The Court examined the case law concerning clinical onset, referring to *Cornelius* (2002) 18 *VeRBosity* 52 and said:

> [27] … this means that the disorder itself must be present at the specified time. …
>
> [28] In *Cornelius*, as here, there was no material before the Tribunal which suggested that any medical practitioner had in fact said that a feature or symptom reported by the veteran within the specified time period enabled him to say that he had the disease at that time. The question then was whether material before the Tribunal did so by inference.
>
> [29] Her Honour observed … that without the material which pointed to the veteran becoming aware within the relevant time of some feature or symptom which enables a medical practitioner to say that he had the disease at that time, it cannot be said that the hypothesis fits the template of the SoP.

The Court then referred to *Lees'* case (2002) 18 *VeRBosity* 109, and said:

> [31] Accordingly, in that case, the Tribunal did not err in basing its decision upon the premise that all of the symptoms of the disease had to be shown within the two year period.

The evidence concerning clinical onset

In a medical report given prior to the hearing, Dr Brown had said that the SoP factor was satisfied. In evidence given at the Tribunal hearing, Dr Brown said, in relation to the 2 years after the incident:

> … you wouldn't see the symptoms and signs of alcohol dependence that developed many years later, but what we would see is a pattern of behaviour of drinking consumption which was excessive, perhaps compared to peers...
>
> ...This man's history, if he is accurate in his recall, indicated that he had some minor disciplinary problems, he became disinhibited, he said that he would say things that were out of turn and inappropriate, and that certainly could be consistent with someone who is starting to drink excessively and it was affecting their behaviour.
>
> It doesn't necessarily indicate that somebody is developing a disorder, it means they're drinking excessively and it's affecting their behaviour, but it is a warning sign. … So if his history is accurate, there was an escalation of drinking behaviour in the years afterwards and some early warning signs that his behaviour was maladaptive. …

It was argued that this evidence supported clinical onset within the two years. The Court held that:

> [36] ... The totality of that material did not necessitate a finding that the material was consistent with the relevant SoP. The weight which the Tribunal gave to the bare assertion in one part of Dr Brown's report in the context of the rest of her report and cross-examination was a matter for the Tribunal. There was no impermissible fact-finding at this stage of the Tribunal's decision. …
>
> [38] Section 120(3) of the Act requires consideration of the whole of the material to determine whether the material does not raise a reasonable hypothesis. …
>
> [39] Having found that a hypothesis was raised, the task of the Tribunal was to determine whether the material raised a reasonable hypothesis.
>
> [40] In *Hardman* [(2004) 20 *VeRBosity* 105] the question was whether, for the purposes of the third step referred to in *Deledio*, the Tribunal is confined in its consideration only to the matters favourable to the claimant to determine whether there is a reasonable hypothesis or whether the Tribunal must consider at step three the whole of the material, whether adverse to or favourable to the claimant.
>
> [41] Hill J noted that s 120 requires that all relevant facts before the decision maker be looked at and that the reasonable hypothesis has to emerge from all of those facts. …
>
> [43] Each element of the hypothesis is to be raised by the material. However, the elements of the hypothesis may be raised 'so slightly that the entire hypothesis was not to be viewed as reasonable' [*Bull* (2001) 17 *VeRBosity* 118].
>
> [44] As Moore J observed …, it is not sufficient that the material raises a hypothesis, the hypothesis must also be one to which the material, as a whole, points. Emmett and Allsop JJ pointed out in *Bull* … that a hypothesis that was not obviously fanciful or not impossible or not incredible or tenable or not too remote or not too tenuous, was not therefore necessarily reasonable. …
>
> [47] … *Byrnes* [(1993) 9 *VeRBosity* 83]], *Bushell* [(1992) 8 *VeRBosity* 2] and *Bey* [(1997) 13 *VeRBosity* 117] may support the proposition that, in

some cases, a hypothesis may assume the occurrence of certain facts and the making of assumptions without rendering the hypothesis unreasonable. However, as pointed out in *Connors* [(2000) 16 *VeRBosity* 47], this does not apply after the introduction of s 120A in 1994. Section 196B(2) provides that, where there is a SoP, the factors there set out must exist 'as a minimum'.

[48] The opinion to be formed is whether the hypothesis is consistent with the template. It is at this stage that the element of 'reasonableness' still has work to do. This is consistent with the distinction drawn in *Byrnes* … between the necessity for the material to raise some fact or facts which give rise to the hypothesis and the determination of whether the hypothesis is reasonable. As made clear by the Full Court in *Bey* …, a reasonable hypothesis involves more than a mere possibility. It must point to and not merely leave open a hypothesis (*East* [(1987) 3 *VeRBosity* 127). …

[50] … In coming to its conclusion, the Tribunal, in considering the whole of the material, is bound to have regard to both supporting and opposing material for the purpose of examining the validity of the reasoning which supports the claimed connection. The hypothesis may however be unproved and opposed to the weight of informed opinion and still be reasonable (*Bushell*).

[51] It is of interest that, in *Cornelius*, Branson J noted that an acknowledgment that it was not possible to exclude the presence of the relevant syndrome did not assist the veteran. …

[54] … Whether material raises a reasonable hypothesis is a question of fact which entitles the Tribunal to reject material for good reason and to accept other material which does or does not point to the hypothesis advanced. The Tribunal is not, however, entitled at this point to find facts or reject matters (*Bull*).

Formal decision

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

Editor: Important points to draw from this case are: (1) in relation to 'clinical onset', there must be material that points to the veteran having had all the required signs and symptoms at the relevant time such that a medical practitioner could say that the veteran had the disease at that time. (2) Each element of the hypothesis must be raised by the material. (3) Whether a hypothesis is consistent with a SoP factor requires an examination of the totality of the material, and every essential element of the factor must be pointed to by that material. (4) Matters required to exist by a SoP factor cannot be assumed, but must be pointed to and not left open as a mere possibility because of an absence of evidence. (5) In concluding whether a hypothesis is reasonable, the decision-maker is bound to have regard to both supporting and opposing material for the purpose of examining the reasoning that supports the claimed connection between the disease and service.

Repatriation Commission v Tsourounakis

Spender, Kiefel and Emmett JJ

[2004] FCAFC 332
20 December 2004

Service pension – assets test – house occupied and improved by son – whether change of ownership where no transfer of legal title – proprietary estoppel

The central question of the appeal concerned the question of whether Mr and Mrs Tsourounakis were the beneficial owners of a property for the purposes of determining their entitlement to a service pension. Mr and Mrs Tsourounakis claimed that they had effectively alienated the whole or a substantial part of the beneficial ownership of the property in favour of their son, Michael. Mr Tsourounakis met the conditions for a service pension under s 36, but under s 36A(2), such a pension is not payable if the age service pension rate, calculated under s 36N in accordance with the Rate Calculator, is nil.

The property in question was occupied by Michael and his wife from 1992 onwards. It was purchased by Mr and Mrs Tsourounakis some 25 years prior, and had subsequently been let. They had suggested to Michael that he and his wife move into the property when Michael was in financial trouble and was forced to sell his own house.

From that time in 1992 up to the institution of proceedings, evidence was tendered of a substantial amount of money invested by Michael in the improvement of the property.

The Tribunal had held that from the point of Michael's possession of the property, Mr and Mrs Tsourounakis were taken to have divested themselves of the property. The Court dealt with the Tribunal's findings in short order, holding the decision to have absolutely no evidentiary basis.

> [40] Every piece of objective evidence is inconsistent with a conclusion that, in 1992, Mr and Mrs Tsourounakis intended to divest themselves, at that time, of a proprietary interest in the Property.

The Court held that under the relevant property legislation, (the *Property Law Act 1911* (Qld)) no interest in land can be disposed of except by writing signed by the person conveying the same. Further:

> [43] a voluntary assignment of property is effective in equity only when the assignor has done everything within his or her power to transfer title to the assignee such that the transfer of title can be carried out without the further intervention of the assignor.

The Court then turned to the question whether the interest of Mr and Mrs Tsourounakis had been diminished by reason of Michael's contribution to the improvement of the property. This would require fulfilment of that required by the doctrine of proprietary estoppel.

The Court provided some guidance on these principles:

> [56] • the value of the Property at the time at which expenditure was incurred and the relationship between the amount of the expenditure and any increase in the value of the Property as a consequence of the expenditure;
>
> • the extent to which Michael and Mary have lost the use of funds that were expended in carrying out renovations of or improvements to the Property;
>
> • the value to Mary and Michael of their occupation of the Property on the basis that they bear rates and other outgoings;
>
> • whether any compensation for occupation of the Property free of rent should be made, having regard to the extent of the expenditure on improvements, on maintenance of the Property, and on outgoings; and if so, what compensation;
>
> • the extent to which dispossession of Michael and his family would be unconscionable having regard to any emotional investment that they have put into the Property in reliance upon

the assurances of Mr and Mrs Tsourounakis.

[57] In circumstances where Michael and his family have treated the Property as their home for more than 13 years and have incurred expenditure that has increased its value to a very significant degree, it may be that the only appropriate order is to treat Michael as having an entitlement to remain in possession of the Property for the lifetime of the survivor of his parents and to be given the property by testamentary devise by the survivor. Such a conclusion may mean that the value of the interest of Mr and Mrs Tsourounakis in the Property would be very close to nil. On the other hand, it may be significant that, in his letter to the Commission of 15 November 2002, Michael asserted that his parents still had a net equity in the Property of $200,000. The appropriate diminution in the value of the interest of Mr and Mrs Tsourounakis would be a matter for the Tribunal.

Formal decision

The appeal was upheld and remitted to be heard by the Tribunal.

Military Rehabilitation and Compensation Commission v Wall

Hely J

[2004] FCA 1711
22 December 2004

SRCA claim – cerebrovascular accident and ischaemic heart disease – whether relationship between smoking and duties as a member of the Defence Force

In this appeal the Military Rehabilitation and Compensation Commission (MRCC) stood in place of Comcare, which had initially lodged the appeal in April 2004. From 1 July 2004, the *Safety Rehabilitation and Compensation Act 1988* (SRCA) by the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* required the newly formed MRCC to stand in place of Comcare in matters involving members and former members of the ADF.

Mr Wall enlisted in the Army in 1954 and served 3 months full-time and 3 years part-time. He commenced smoking during his 3 months National Service. In 1987 and 1989 respectively his ischaemic heart disease (IHD) and a cerebrovascular accident (CVA) had their onset. Under the SRCA, IHD is properly characterised as a 'disease', while CVA is considered an 'injury'. Hely J then succinctly outlined what was required for Mr Wall to succeed in his compensation claim under the SRCA:

> [12] It follows that Mr Wall would be entitled to compensation under the SRC Act in respect of his IHD and CVA if:
>
> (a) the 'disease' constituted by his IHD was contributed to in a material way by his employment by the Commonwealth; and
>
> (b) the 'injury' constituted by his CVA was an injury arising out of or in the course of his employment by the Commonwealth.

Tribunal's reasoning

Comcare had initially rejected Mr Wall's contention that '[15] … service life contains many potential links to smoking, such as stress, peer pressure, availability and boredom.' Comcare had held that '[16] … while the Army may have tolerated smoking, that was reflective of the general population's attitude towards cigarette consumption at the time,' and that 'smoking was not required in the performance of duties by the Australian Defence Force, but was rather a matter of personal choice'. The Tribunal found that despite Mr Wall's evidence being 'exaggerated', the taking up of smoking by service personnel '[21] is now a well-

accepted hazard of service in the military'. Further:

> [21] To take a young man of 19 years away from his normal life and place him in an environment where smoking is common among his peers, is encouraged by the provision of cheap cigarettes, together with the strains and tensions of army life, particularly in recruit training, makes it 'clear that to adopt a smoking habit is a risk of that employment'.

Commission's Appeal

The Commission argued before the Court that the Tribunal had erred by failing to consider whether the CVA arose out of his performance of duties as a member of the Defence Force and whether the IHD was contributed to by his performance of duties as a member of the Defence Force. Further, the Commission argued that the Tribunal had erred in its consideration of the VEA on the basis of that Act's irrelevancy to Mr Wall's claim.

Hely J accepted that the Tribunal had asked the question whether there was a causal connection between Mr Wall's 'military service' and his smoking habit, rather than the strictly correct question of whether there was a causal connection between the performance of his duties as a member of the Defence Force and his smoking habit. However, Hely J held the distinction too fine to warrant remittal for reconsideration, characterising the phrase 'military service' as being an '[35] apt expression to describe the performance of a person's duties as a member of the defence force.' This conclusion was reached after outlining a line of authority urging beneficial construction of Tribunal reasoning.

On the question of whether the Tribunal had irrelevantly relied on authority from the VEA, Hely J held the Tribunal had made clear that '[45] it did not base its decision on the VEA'. Instead, the Tribunal had used it to 'partially inform its decision' which it would have reached without such reference anyway.

Formal decision

The appeal was dismissed.

Federal Magistrates Court

Griffin v Repatriation Commission

Connolly FM

[2004] FMCA 486
27 October 2004

Cervical spondylosis – disordered joint mechanics – application of* Deledio *steps – diagnosis – whether material other than medical evidence considered

Mr Griffin suffered an injury when he fell from an observation tower in Dutch New Guinea during operational service in World War 2. He contended the fall led to cervical spondylosis.

SoP factors

The applicant first relied upon factor 5(h) of SoP Nº 50 of 2002 requiring the suffering of 'a trauma to the cervical spine before the clinical onset of cervical spondylosis'. The extent of the evidence supporting the reliance upon this factor was contained in a report of a Dr Fraser suggesting that 'that pain and stiffness *would have lasted seven days*' and that he had 'no reason to doubt his history of neck pain'. However, the Tribunal held that such evidence as a whole did not point to the applicant having the requisite

symptoms of pain, tenderness and altered mobility of the cervical spine. Connolly FM agreed with the Tribunal's reasoning and that such a conclusion was open to so finding.

The applicant then relied upon factor 5(e) requiring 'disordered joint mechanics affecting the cervical spine before the clinical onset of cervical spondylosis'. The phrase 'disordered joint mechanics' is further defined in the SoP as requiring the presence of one of seven conditions. The applicant argued that the Tribunal erred in law by requiring medical evidence be produced pointing to the applicant having disordered joint mechanics.

Connolly FM agreed with the position tendered by the Commission.

> [20] [G]iven each of the elements referred to is a medical condition, it is impossible to conceive of evidence that would point to one of the conditions required by the definition of 'disordered joint mechanics' that was not medical evidence. Accordingly, ground one of the applicant's claim is not made out.

Putting aside the observation of the impossibility of conceiving that such evidence may not be medical evidence, Connolly FM held that the Tribunal had properly based its decision on the whole of the evidence before it:

> [25] … [T]he applicant submitted that the Tribunal was wrong in law in requiring medical evidence being led in order to conclude that there was disordered joint mechanics in the applicant. However, what the Tribunal said was to find that there was no material pointing to disordered joint mechanics, which was defined in technical medical terms in clause 8 of the 2002 SoP. It did not require that medical evidence be led but made a finding of fact that there was no material pointing to an essential element of the hypothesis prescribed by the SoP.

In the alternative the applicant sought to rely on factor 5(g) which required 'suffering from permanent ligamentous instability of the cervical spine before the clinical onset of cervical spondylosis'. Again the Tribunal found there was no medical evidence pointing towards the satisfaction of any of these factors. The Tribunal also reviewed the possibility of an alternative finding on the basis of previous SoPs. Connolly FM held that such a finding was not unreasonable.

> [22] In finding that there was nothing in …[the] … evidence or elsewhere pointing to disc prolapse at the time of or connected with service, it cannot be said that the Tribunal 'unreasonably raised the requirements' to be met by the applicant. There must, as the Full Court said in *Hill* [18 *VeRBosity* 53], be material pointing to each element that the SoP makes essential.

Connolly FM dismissed the appeal.

Roberts v Repatriation Commission

McInnis FM

[2004] FMCA 926
2 December 2004

Whether emphysema war caused – extension of time sought

Mr Roberts sought to establish a hypothesis that his emphysema was war caused. The relevant SoP in force was No.73 of 1997 and the factor relied upon was factor 5(b) - smoking at least ten pack-years of cigarettes, or the equivalent thereof in other tobacco products, before the clinical onset of chronic bronchitis and/or emphysema.

Extension of time

The Court heard the matter of entitlement together with the application for an extension of time for the appeal which

was lodged more than 6 months later than the 28 day limit imposed by s 44(2A)(a) of the AAT Act. McInnis FM first outlined the principles relating to the grant of an extension of time. They are summarised below and were outlined by McInnis FM initially in *Phillips v Australian Girls' Choir & Anor* [2004] FMCA 109:

> 1. There is no onus of proof upon an applicant for extension of time though an application has to be made. Special circumstances need not be shown, but the court will not grant the application unless positively satisfied it is proper to do so. The 'prescribed period' of 28 days is not to be ignored. …
>
> 2. It is a prima facie rule that the proceedings commenced outside the prescribed period will not be entertained. … It is not a pre-condition for success in an application for extension of time that an acceptable explanation for delay must be given. …
>
> 3. Action taken by the applicant other than by making an application to the court is relevant in assessing the adequacy of the explanation for the delay. It is relevant to consider whether the applicant has rested on his rights and whether the respondent was entitled to regard the claim as being finalised. …
>
> 4. Any prejudice to the respondent, including any prejudice in defending the proceeding occasioned by the delay, is a material factor militating against the grant of an extension. …
>
> 5. The mere absence of prejudice is not enough to justify the grant of an extension. …
>
> 6. The merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted. …
>
> 7. Considerations of fairness as between the applicant and other persons otherwise in a like position are relevant to the manner of exercise of the court's discretion. …

Counsel for Mr Roberts had submitted an explanation for the delay, relying on a claim that he was in the process of moving from Victoria to New South Wales and his decision to appeal was delayed 'by both his uncertainty about the cost issue and as to whether the appeal would be instituted in Victoria or New South Wales'.

Further, the application argued that it had merit as the legislation was beneficial and therefore 'some leniency' ought to be granted 'in the circumstances where there is no detriment to be caused to the respondent or any other person [at 13]'

Merits of the application

The Court then turned to a consideration of the merits of the appeal before ultimately deciding the matter relating to the extension of time.

The parties had both agreed that Mr Roberts did suffer from emphysema, which was related to smoking tobacco and that the relevant SoP in force was No 73 of 1997. Further, the parties both agreed that Mr Roberts had smoked 'at least 10 pack years of cigarettes or the equivalent in other tobacco products before the clinical onset of chronic bronchitis and/or emphysema'

'Related to service'

The question for the AAT then turned on whether, as per clause 4 of the SoP, Mr Roberts smoking was 'related to service', which as the Commission's submission noted required a causal relationship. The evidence outlined by the Tribunal revealed significant conflict. It was not in dispute that Mr Roberts had commenced smoking while at HMAS *Albatross*, and that he had served periods of operational service in the FESR and Vietnam. However, the Tribunal held there was no connection between the Mr Roberts smoking and service or any increase in his smoking and his service. McInnes FM found no error of law in the Tribunal's reasoning, particularly as '[29] it is clear

the AAT in its reasons carefully considered all of the material before it.' Further, the Court accepted the Commission's submission that acceptance of the grounds of Mr Roberts' application would render the fourth stage of *Deledio* a nullity. As McInnes FM concludes:

> [30] His emphysema could not be war-caused if his smoking was not war-caused and his smoking would be war-caused if the smoking of '10 packs a year of cigarettes' was contributed to in a material degree by his service or that it would not have occurred but for the rendering of the service (see *Kattenberg* (2002) [18 *VeRBosity* 41].

Conclusions

The Court refused to entertain the application for an extension of time, noting that 'an absence of prejudice to the respondent does not of itself mean that the application for extension of time should be granted'. Further, while careful to note that an explanation is not a pre-condition, McInnes FM held 'that the material placed before the court … does not provide any or any adequate explanation for the delay.'

In relation to the merits of the appeal the Court concluded the following:

> [38]. … The AAT on a proper reading of its reasons has not imposed an incorrect test. It has not made findings of a kind that could be regarded as failing to have regard to relevant or taking into account irrelevant considerations. … [The AAT] followed … the four-step process in *Deledio* correctly. …[H]aving considered the evidence and having found evidence of the applicant unacceptable, it then concluded that it was inappropriate to make findings of fact connecting smoking of tobacco with service or an increase in the smoking of tobacco with service.

High Court of Australia

Roncevich v Repatriation Commission

McHugh, Gummow, Callinan JJ

[2004] HCTrans 378
8 October 2004

Special leave to appeal – meaning of 'arose out of … defence service'

At the end of this hearing, the High Court granted special leave for Mr Roncevich to appeal in order to argue the meaning and application of 'arose out of … defence service'. In the course of argument, the judges mentioned a number of workers' compensation cases that have considered the meaning of the phrase 'arose … in the course of employment'.

Editor: It will be of interest to see whether this temporal test, which applies to workers' compensation law will be read into the 'arose out of … defence service' test, which on current authority, is not a temporal test, but a causal test related to the incidents of rendering service. If a temporal test is imported it might be due to the slight difference in wording between s 9(1)(b) and s 70(5(a). The former provision, which applies to eligible war service, expressly refers to service that is 'rendered'. That word does not appear in s 70(5)(a). Nevertheless, it is included in the definition of 'defence service' in s 68.

Statements of Principles issued by the Repatriation Medical Authority

October – December 2004

Number of Instrument	Description of Instrument
26 of 2004	Revocation of Statement of Principles (Instrument No 13 of 2000) and determination of Statement of Principles concerning **haemorrhoids** and death from haemorrhoids.
27 of 2004	Revocation of Statement of Principles (Instrument No 14 of 2000) and determination of Statement of Principles concerning **haemorrhoids** and death from haemorrhoids.
28 of 2004	Revocation of Statement of Principles (Instrument No 25 of 2000) and determination of Statement of Principles concerning **Hodgkin's lymphoma** and death from Hodgkin's lymphoma.
29 of 2004	Revocation of Statement of Principles (Instrument No 26 of 2000) and determination of Statement of Principles concerning **Hodgkin's lymphoma** and death from Hodgkin's lymphoma.
30 of 2004	Revocation of Statement of Principles (Instrument No 73 of 1997) and determination of Statement of Principles concerning **chronic bronchitis and emphysema** and death from chronic bronchitis and/or emphysema.
31 of 2004	Revocation of Statement of Principles (Instrument No 74 of 1997) and determination of Statement of Principles concerning **chronic bronchitis and emphysema** and death from chronic bronchitis and/or emphysema.
32 of 2004	Revocation of Statement of Principles (Instrument No 126 of 1996) and determination of Statement of Principles concerning **rheumatoid arthritis** and death from rheumatoid arthritis.
33 of 2004	Revocation of Statement of Principles (Instrument No 127 of 1996) and determination of Statement of Principles concerning **rheumatoid arthritis** and death from rheumatoid arthritis.
34 of 2004	Revocation of Statement of Principles (Instrument No 63 of 1995 and 49 of 1997) and determination of Statement of Principles concerning **Creutzfeldt-Jakob disease** and death from Creutzfeldt-Jakob disease.
35 of 2004	Revocation of Statement of Principles (Instrument Nos 64 and 195 of 1995 and 50 of 1997) and determination of Statement of Principles concerning **Creutzfeldt-Jakob disease** and death from Creutzfeldt-Jakob disease.
36 of 2004	Amendment of Statement of Principles (Instrument No 85 of 2001) and determination of Statement of Principles concerning **asthma**.
37 of 2004	Amendment of Statement of Principles (Instrument No 86 of 2001) and determination of Statement of Principles concerning **asthma**.

38 of 2004	Amendment of Statement of Principles (Instrument No 5 of 2001) and determination of Statement of Principles concerning **deep vein thrombosis**.
39 of 2004	Amendment of Statement of Principles (Instrument No 6 of 2001) and determination of Statement of Principles concerning **deep vein thrombosis**.
40 of 2004	Revocation of Statement of Principles (Instrument Nos 153 of 1996 and 7 of 1998) and determination of Statement of Principles concerning **malignant neoplasm of the small intestine** and death from malignant neoplasm of the small intestine.
41 of 2004	Revocation of Statement of Principles (Instrument Nos 154 of 1996 and 8 of 1998) and determination of Statement of Principles concerning **malignant neoplasm of the small intestine** and death from malignant neoplasm of the small intestine.
42 of 2004	Revocation of Statement of Principles (Instrument No 37 of 1997) and determination of Statement of Principles concerning **neoplasm of the pituitary gland** and death from neoplasm of the pituitary gland.
43 of 2004	Revocation of Statement of Principles (Instrument No 38 of 1997) and determination of Statement of Principles concerning **neoplasm of the pituitary gland** and death from neoplasm of the pituitary gland.
44 of 2004	Determination of Statement of Principles concerning **malignant neoplasm of unknown primary site** and death from malignant neoplasm of unknown primary site.
45 of 2004	Determination of Statement of Principles concerning **malignant neoplasm of unknown primary site** and death from malignant neoplasm of unknown primary site.
46 of 2004	Revocation of Statement of Principles (Instrument No 26 of 1997) and determination of Statement of Principles concerning **malignant neoplasm of the salivary gland** and death from malignant neoplasm of the salivary gland.
47of 2004	Revocation of Statement of Principles (Instrument No 27 of 1997) and determination of Statement of Principles concerning **malignant neoplasm of the salivary gland** and death from malignant neoplasm of the salivary gland.
48 of 2004	Revocation of Statement of Principles (Instrument No 340 of 1995; No 27 of 1996; and No 51 of 2001) and determination of Statement of Principles concerning **non-melanotic malignant neoplasm of the skin** and death from non-melanotic malignant neoplasm of the skin.
49 of 2004	Revocation of Statement of Principles (Instrument No 341 of 1995; No 28 of 1996; and Nos 44 and 52 of 2001) and determination of Statement of Principles concerning **non-melanotic malignant neoplasm of the skin** and death from non-melanotic malignant neoplasm of the skin.
50 of 2004	Determination of Statement of Principles concerning **leptospirosis** and death from leptospirosis.

51 of 2004	Determination of Statement of Principles concerning **leptospirosis** and death from leptospirosis.
52 of 2004	Determination of Statement of Principles concerning **epicondylitis** and death from epicondylitis.
53 of 2004	Determination of Statement of Principles concerning **epicondylitis** and death from epicondylitis.

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 31 December 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
Anxiety disorder	[*Instrument Nos. 1/00 & 2/00*]	1-09-04
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 lymphoid leukaemia	[*Instrument Nos 67/01 & 68/01*]	16-07-03 17-12-03
Depressive disorder	[*Instrument Nos. 58/98 & 59/98*]	1-09-04
Dental caries	[*Instrument Nos. 366/95 & 367/95*]	1-09-04
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
Hodgkin's disease	[*Instrument Nos 25/00 & 26/00*]	20-08-03

Description of disease or injury	**[*SoPs under consideration*]**	**Gazetted**
Impotence	[*Instrument Nos 97/96 & 98/96 as amended by: 16/02 & 17/02*]	22-12-04
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
Lumbar spondylosis	[*Instrument Nos 46/02 & 47/02 as amended by 77/02 & 78/02*]	25-02-04
Malignant neoplasm of the bile duct	[*Instrument Nos 17/00 & 18/00*]	22-12-04
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 oesophagus	[*Instrument Nos. 115/96 & 116/96 as amended by 11/98 & 12/98*]	1-09-04
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 thyroid gland	[*Instrument Nos 33/98 & 34/98*]	16-07-03
Meniere's disease	[*Instrument Nos 77/01 & 78/01*]	5-05-04
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
Osteoarthrosis	[*Instrument Nos.81/01 & 82/01*]	15-10-03
Osteoporosis	[*Instrument Nos. 67/02 & 68/02 as amended by 25/04*]	1-09-04
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
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
Post traumatic stress disorder	[*Instrument Nos. 3/99 & 4/99 as amended by 54/99 & 55/99*]	1-09-04
Pulmonary barotrauma	—	24-03-04
Rheumatoid arthritis	[*Instrument Nos 126/96 & 127/96*]	13-11-02

Description of disease or injury	**[*SoPs under consideration*]**	**Gazetted**
Rotator cuff syndrome	[*Instrument Nos. 83/97 & 84/97*]	19-11-03
Solar keratosis Instrument Nos.	[*Instrument Nos 47/01 & 48/01, as amended by 55/01& 56/01*].	3-12-04
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
Tuberculosis	[*Instrument Nos. 81/97 & 82/97*]	1-09-04

AAT and Court decisions – October to December 2004

Editor's Note: It has been suggested on more than a few occasions that *VeRBosity's* index might include an additional reference noting the outcome of the cases. After some consideration, it has been decided to resist this addition for a couple of reasons.

The first is that an index entry for a PTSD case, for example, may list the varying incidents relied upon to support the diagnosis of PTSD, yet the ultimate decision may accept only one or a couple of incidents and reject others. Stating the decision as 'set aside' next to an index entry of an incident that was in fact rejected by the Tribunal or Court may be misleading.

Secondly, it is a sound practice for practitioners to appraise themselves of *all* relevant case law when preparing for a hearing. Indicating whether a case has been affirmed or set aside may encourage a practice of picking and choosing precedents whose principles may have been altered or indeed overturned by subsequent case law.

AATA = Administrative Appeals Tribunal
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court
HCATrans = High Court special leave hearing
SRCA = decided under the *Safety, Rehabilitation and Compensation Act 1988* and in which the MRCC was a party

Carcinoma

non-Hodgkin's lymphoma
- helicobacter pylori
Graham, M (Army)
[2004] AATA 1167 9 Nov 2004

pancreas
- chronic pancreatitis
Thompson, D
[2004] AATA 1356 17 Dec 2004

prostate
- high fat diet
Aust, C (Navy)
[2004] AATA 1188 10 Nov 2004

Circulatory disorder

ischaemic heart disease
- alcohol
Collier, R G (Navy)
[2004] AATA 1100 22 Oct 2004
Hodges, R C (Navy)
[2004] AATA 1348 16 Dec 2004
- hypertension
Collier, R G (Navy)
[2004] AATA 1100 22 Oct 2004

Date of effect

out of time
Adams, G
[2004] AATA 1233 11 Nov 2004

war widow's pension
- further claim successful
- unable to backdate to earlier date
Ryde (*Sackville* J)
[2004] FCA 1281 6 Oct 2004

Death

carcinoma of pancreas
- chronic pancreatitis
Thompson, D
[2004] AATA 1356 17 Dec 2004

carcinoma of prostate
- high fat diet
Schuman, P M
[2004] AATA 1228 22 Nov 2004

chronic bronchitis and emphysema
- smoking
Crawford, E M
[2004] AATA 1064 13 Oct 2004
Mattner, J
[2004] AATA 1326 14 Dec 2004

ischaemic heart disease
- hypertension
- salt intake
Fields, M
[2004] AATA 1301 8 Dec 2004
- inability to undertake physical exercise
Williams, J W
[2004] AATA 1079 15 Oct 2004
- smoking
Crawford, E M
[2004] AATA 1064 13 Oct 2004
Murton, A
[2004] AATA 1272 1 Dec 2004
Stien, A
[2004] AATA 1411 24 Dec 2004

non-Hodgkin's lymphoma
- helicobacter pylori
Graham, M (Army)
[2004] AATA 1167 9 Nov 2004

Parkinson's disease
- hypotension
Lundgren, M J
[2004] AATA 1232 23 Nov 2004

peripheral vascular disease
- smoking
Crawford, E M
[2004] AATA 1064 13 Oct 2004

myocardial infarction
- inability to undertake physical exercise
Williams, J W
[2004] AATA 1079 15 Oct 2004

terminal event
- broncopneumonia
Mattner, J
[2004] AATA 1326 14 Dec 2004

Eligible service

allied veteran
- service with Italian partisans
- not a member of army of allied country
Marinucci, A O
[2004] AATA 1280 2 Dec 2004

qualifying service
- whether incurred danger from hostile forces of the enemy
- Bass Strait
Millar, C J (RAAF)
[2004] AATA 1263 30 Nov 2004
- enemy minefields
Millar, C J (RAAF)
[2004] AATA 1263 30 Nov 2004
Williams, R (Army)
[2004] AATA 1302 8 Dec 2004
- Horn Island
Williams, R (Army)
[2004] AATA 1302 8 Dec 2004
- SS *Nairana* in Bass Strait
Millar, C J (RAAF)
[2004] AATA 1263 30 Nov 2004
- Thursday Island
Williams, R (Army)
[2004] AATA 1302 8 Dec 2004

Evidence and proof

application of Deledio steps
- diagnosis to be found prior to steps
Mines (*Gray J*)
[2004] FCA 1331 19 Oct 2004

credibility
- smoking
Crawford, E M
[2004] AATA 1064 13 Oct 2004

insufficient
- s 119 considered
Schuman, P M
[2004] AATA 1228 22 Nov 2004

Gastrointestinal disorder

hiatus hernia
- obesity
Olsen, G (RAAF)
[2004] AATA 1283 2 Dec 2004

irritable bowel syndrome
- alcohol
Allan, G (Army)
[2004] AATA 1056 12 Oct 2004
- change of diet
Fowles, M G
[2004] AATA 1412 31 Dec 2004
- inability to obtain appropriate clinical management
Fowles, M G
[2004] AATA 1412 31 Dec 2004
- psychiatric disorder
Holzhauser, L J (Navy)
[2004] AATA 1408 24 Dec 2004

General rate, EDA, degree of incapacity & impairment

effects of non war caused disabilities
Glasscock, A
[2004] AATA 1227 23 Nov 2004

Genitourinary disorder

impotence
- alcohol
Holzhauser, L J (Navy)
[2004] AATA 1408 24 Dec 2004
- anxiety disorder
Holzhauser, L J (Navy)
[2004] AATA 1408 24 Dec 2004

Hearing disorder

Meniere's disease
- acoustic trauma
Somerset, E (Army)
[2004] AATA 1077 15 Oct 2004

Historical material

Army
- 28 Commonwealth Brigade, FESR
Peckham, D (Army)
[2004] AATA 1329 14 Dec 2004

Navy
- HMAS *Duchess*
  - January 1966
    McDowall, W L (Navy)
    [2004] AATA 1054 12 Oct 2004
- HMAS *Parramatta*
  - September 1962
    Siegrist, U (Navy)
    [2004] AATA 1332 15 Dec 2004
- HMAS *Sydney*
  - September 1956
    Siegrist, U (Navy)
    [2004] AATA 1332 15 Dec 2004
- HMAS *Warramunga*
  - 1958 (Formosa Straits)
    Siegrist, U (Navy)
    [2004] AATA 1332 15 Dec 2004
- HMAS *Yarra*
  - February 1970
    Robertson, J M (Navy)
    [2004] AATA 1143 3 Nov 2004
- Operation Awkward
  - February 1970
    Robertson, J M (Navy)
    [2004] AATA 1143 3 Nov 2004

Infection

Lyme disease
- tick bite
  Blair, J A W (Navy)
  [2004] AATA 1311 9 Dec 2004

Jurisdiction & powers

Administrative Appeals Tribunal
- power to review
  Moon, B F
  [2004] AATA 1264 30 Nov 2004
- scope of review
  - jurisdiction to review calculation of arrears
    Moon, B F
    [2004] AATA 1264 30 Nov 2004

Musculo-skeletal disorder

gout
- anxiety disorder
  Holzhauser, L J (Navy)
  [2004] AATA 1408 24 Dec 2004

Practice and procedure

Administrative Appeals Tribunal
- summons
  - fishing expedition
    Aust, C
    [2004] AATA 1094 12 Oct 2004
  - set aside
    Aust, C
    [2004] AATA 1094 12 Oct 2004
  - to obtain 3rd party medical reports
    Aust, C
    [2004] AATA 1094 12 Oct 2004

extension of time to appeal
- outline of principles
  Roberts (*McInnis FM*)
  [2004] FMCA 926 2 Dec 2004

Psychiatric disorder

adjustment disorder
- death of a friend
  Batzloff, G (Army)
  [2004] AATA 1115 27 Oct 2004

alcohol abuse or dependence
- aggravation
  Mitchell, D
  [2004] AATA 1150 14 Sep 2004
- whether suffering psychiatric disorder
  Cottrell, G
  [2004] AATA 1171 9 Nov 2004
  Law, B N
  [2004] AATA 1341 16 Dec 2004
- clinical onset
  Cottrell, G
  [2004] AATA 1171 9 Nov 2004
  Riddel, J (Navy)
  [2004] AATA 1279 2 Dec 2004
  Holzhauser, L J (Navy)
  [2004] AATA 1408 24 Dec 2004
  Youngnickel (Navy) (*Bennet* J)
  [2004] FCA 1691 20 Dec 2004
- experiencing a severe stressor
  - BBQ on quarterdeck, Saigon Harbour
    Trigge, M (Navy)
    [2004] AATA 1114 27 Oct 2004
  - boiler room incident
    Mitchell, D
    [2004] AATA 1150 14 Sep 2004
  - breakdown of ammunition truck in dangerous area
    Allan, G (Army)
    [2004] AATA 1056 12 Oct 2004

- burial at sea of acquaintance
  Siegrist, U (Navy)
  [2004] AATA 1332 15 Dec 2004
- conducting body searches
  McDowall, W L (Navy)
  [2004] AATA 1054 12 Oct 2004
- collision with kumpit (HMAS *Duchess)*
  McDowall, W L (Navy)
  [2004] AATA 1054 12 Oct 2004
- death of a friend
  Christie, R F (Navy)
  [2004] AATA 1048 8 Oct 2004
  Batzloff, G (Army)
  [2004] AATA 1115 27 Oct 2004
- destruction of ammunition dump
  Allan, G (Army)
  [2004] AATA 1056 12 Oct 2004
- diving phobia
  Riddel, J (Navy)
  [2004] AATA 1279 2 Dec 2004
- fear of faulty ammunition
  Peterson, W G (Navy)
  [2004] AATA 1370 21 Dec 2004
- fear of limpet mines
  Lide, K H (Navy)
  [2004] AATA 1120 28 Oct 2004
  Hackett, T J (Navy)
  [2004] AATA 1347 17 Dec 2004
  Williamson, D J (Navy)
  [2004] AATA 1185 10 Nov 2004
- fear of terrorist attacks
  Siegrist, U (Navy)
  [2004] AATA 1332 15 Dec 2004
- fish thrown on board
  Youngnickel (Navy) (*Bennett* J)
  [2004] FCA 1691 20 Dec 2004
- fishing vessels tossed dangerously
  Siegrist, U (Navy)
  [2004] AATA 1332 15 Dec 2004
- guard duty
  Peckham, D (Army)
  [2004] AATA 1329 14 Dec 2004
  Siegrist, U (Navy)
  [2004] AATA 1332 15 Dec 2004
- guns fired without warning
  Hackett, T J (Navy)
  [2004] AATA 1347 17 Dec 2004
- gun misfire incident
  Starr, A J (Navy)
  [2004] AATA 1291 3 Dec 2004
- lack of strategic information
  Hackett, T J (Navy)
  [2004] AATA 1347 17 Dec 2004
- low flying aircraft
  Piggott, G (Navy)
  [2004] AATA 1220 19 Nov 2004
- incoming mortar fire
  Allan, G (Army)
  [2004] AATA 1056 12 Oct 2004
- man overboard incident
  Peterson, W G (Navy)
  [2004] AATA 1370 21 Dec 2004
- mistreatment of prisoners (HMAS *Duchess*)
  Holzhauser, L J (Navy)
  [2004] AATA 1408 24 Dec 2004
- near asphyxiation
  Starr, A J (Navy)
  [2004] AATA 1291 3 Dec 2004
- perimeter patrols
  Allan, G (Army)
  [2004] AATA 1056 12 Oct 2004
- removal of dead bodies
  Siegrist, U (Navy)
  [2004] AATA 1332 15 Dec 2004
- rocket attacks at Nui Dat
  Hendrie, R T (Army)
  [2004] AATA 1174 9 Nov 2004
- scare charges
  Trigge, M (Navy)
  [2004] AATA 1114 27 Oct 2004
  Lide, K H (Navy)
  [2004] AATA 1120 28 Oct 2004
  Williamson, D J (Navy)
  [2004] AATA 1185 10 Nov 2004
  Piggott, G (Navy)
  [2004] AATA 1220 19 Nov 2004
- seeing a killsheet
  Trigge, M (Navy)
  [2004] AATA 1114 27 Oct 2004
- shot at
  Peckham, D (Army)
  [2004] AATA 1329 14 Dec 2004
  Hendrie, R T (Army)
  [2004] AATA 1174 9 Nov 2004
- sinking of the USS *Frank E Evans*
  Williamson, D J (Navy)
  [2004] AATA 1185 10 Nov 2004
- threat of air attack
  Hodges, R C (Navy)
  [2004] AATA 1348 16 Dec 2004

- seeing a kill sheet
  Trigge, M (Navy)
  [2004] AATA 1114 27 Oct 2004
- social element to stressor required
  Trigge, M (Navy)
  [2004] AATA 1114 27 Oct 2004
- shot at
  Kelly, D (Army)
  [2004] AATA 1058 12 Oct 2004
  Hendrie, R T (Army)
  [2004] AATA 1174 9 Nov 2004
- sinking of USS *Frank E Evans*
  Williamson, D J (Navy)
  [2004] AATA 1185 10 Nov 2004
- threat of air attack
  Hodges, R C (Navy)
  [2004] AATA 1348 16 Dec 2004
- typhoon in Vung Tau harbour
  Peterson, W G (Navy)
  [2004] AATA 1370 21 Dec 2004
- witnessed bodies taken from helicopter
  Kelly, D (Army)
  [2004] AATA 1058 12 Oct 2004
- witnessed dead Viet Cong
  Hendrie, R T (Army)
  [2004] AATA 1174 9 Nov 2004
- witnessed helicopter being shot down
  Lide, K H (Navy)
  [2004] AATA 1120 28 Oct 2004
- witnessed limbs taken to incinerator
  Kelly, D (Army)
  [2004] AATA 1058 12 Oct 2004
- witnessed police firing automatic rifles
  Kelly, D (Army)
  [2004] AATA 1058 12 Oct 2004
- witnessed medivac casualties
  Constable, R P
  [2004] AATA 1151 4 Nov 2004
- witnessed napalm bombing
  Lide, K H (Navy)
  [2004] AATA 1120 28 Oct 2004
- witnessed prisoners on deck of ship
  Hackett, T J (Navy)
  [2004] AATA 1347 17 Dec 2004
  Holzhauser, L J (Navy)
  [2004] AATA 1408 24 Dec 2004
- witnessed tracer fire
  Williamson, D J (Navy)
  [2004] AATA 1185 10 Nov 2004
- working in a confined space
  Starr, A J (Navy)
  [2004] AATA 1291 3 Dec 2004
- inability to obtain clinical management
  Robertson J M (Navy)
  [2004] AATA 1143 3 Nov 2004
- major illness of injury
  -back injury
  Brennan (Selway J)
  [2004] FCA 1431 4 Nov 2004

depressive disorder
- alcohol abuse
  Hodges, R C
  [2004] AATA 1348 16 Dec 2004
- clinical onset
  Batzloff, G (Army)
  [2004] AATA 1115 27 Oct 2004
  Law, B N
  [2004] AATA 1341 16 Dec 2004
- experiencing a severe stressor
  - BBQ on quarterdeck, Saigon Harbour
    Trigge, M (Navy)
    [2004] AATA 1114 27 Oct 2004
  - coastal patrols in Vietnam
    Palmer, G (Navy)
    [2004] AATA 1076 15 Oct 2004
  - death of a friend
    Batzloff, G (Army)
    [2004] AATA 1115 27 Oct 2004
  - fear of enemy divers
    Brown, B (Navy)
    [2004] AATA 1262 30 Nov 2004
  - operating searchlights
    Palmer, G (Navy)
    [2004] AATA 1076 15 Oct 2004
  - sentry duty
    Palmer, G (Navy)
    [2004] AATA 1076 15 Oct 2004
  - scare charges
    Trigge, M (Navy)
    [2004] AATA 1114 27 Oct 2004
    Brown, B (Navy)
    [2004] AATA 1262 30 Nov 2004
  - seeing a kill sheet
    Trigge, M (Navy)
    [2004] AATA 1114 27 Oct 2004
  - spat upon by Chinese
    Palmer, G (Navy)
    [2004] AATA 1076 15 Oct 2004

diagnosis
- failure to diagnose psychiatric disease
  Starr, A J (Navy)
  [2004] AATA 1291 3 Dec 2004

- witnessed helicopter being shot down
  Lide, K H (Navy)
  [2004] AATA 1120 28 Oct 2004
- witnessed prisoners on deck of HMAS *Perth*
  Hackett, T J (Navy)
  [2004] AATA 1347 17 Dec 2004
- witnessed napalm bombing
  Lide, K H (Navy)
  [2004] AATA 1120 28 Oct 2004
- witnessed suicide attempts
  Peckham, D (Army)
  [2004] AATA 1329 14 Dec 2004

Remunerative work & special rate

capacity to undertake remunerative work
- effect of non-accepted conditions
  Whalan, T
  [2004] AATA 1387 22 Dec 2004
- probability of decompensating
  Murphy, T J
  [2004] AATA 1349 17 Dec 2004
- capacity to work more than 8 but less than 20 hours a week
  Lide, K H (Navy)
  [2004] AATA 1120 28 Oct 2004
- remunerative work
  McMillan, J
  [2004] AATA 1172 9 Nov 2004
  Smith, P S
  [2004] AATA 1223 19 Nov 2004
  Anderson (*Gray J*)
  [2004] FCA 1009 6 Aug 2004
  Graham (*Selway J*)
  [2004] FCA 1287 8 Oct 2004

ceased to engage in remunerative work
- reason for ceasing
  - access to superannuation benefits
    Peacock (*Dowsett J*)
    [2004] FCA 1449 11 Nov 2004
  - alcohol abuse
    Murphy, T J
    [2004] AATA 1349 17 Dec 2004
    Lee, I
    [2004] AATA 1409 24 Dec 2004
  - reliance on incapacitated partner
    Wright, K J
    [2004] AATA 1047 7 Oct 2004
  - partner's ill health
    Osmon, C
    [2004] AATA 1218 19 Nov 2004
  - failure of business
    Jensen, I P
    [2004] AATA 1189 11 Nov 2004
  - contract not renewed
    Atkinson, J E
    [2004] AATA 1148 29 April 2004
    Peacock (*Dowsett J*)
    [2004] FCA 1449 11 Nov 2004
  - motor vehicle accident
    Williamson, G
    [2004] AATA 1070 14 Oct 2004
- redundancy
  - voluntary redundancy
    Fleming, K
    [2004] AATA 1055 12 Oct 2004
    McMillan, J
    [2004] AATA 1172 9 Nov 2004
    Jensen, I P
    [2004] AATA 1189 11 Nov 2004
    Osmon, C
    [2004] AATA 1218 19 Nov 2004
    Lee, I
    [2004] AATA 1409 24 Dec 2004

employment
- bank manager
  Jensen, I P
  [2004] AATA 1189 11 Nov 2004
- bar manager
  Fletcher, B A
  [2004] AATA 1157 5 Nov 2004
  Johnson, D W
  [2004] AATA 1163 8 Nov 2004
- bobcat contractor
  McKerlie, D
  [2004] AATA 1111 25 Oct 2004
- builder
  Murphy, T J
  [2004] AATA 1349 17 Dec 2004
- bus driver
  Rosolen, W
  [2004] AATA 1159 5 Nov 2004
- canteen manager
  Smith, P S
  [2004] AATA 1223 19 Nov 2004
- contracter
  Atkinson, J E
  [2004] AATA 1148 29 April 2004
- cook
  Osmon, C
  [2004] AATA 1218 19 Nov 2004
- council worker
  McMillan, J
  [2004] AATA 1172 9 Nov 2004
  Peacock (*Dowsett J*)
  [2004] FCA 1449 11 Nov 2004
- delivery driver
  Wright, K J
  [2004] AATA 1047 7 Oct 2004

- psychiatric disorder
  - PTSD
    Wright, K J (Navy)
    [2004] AATA 1047 7 Oct 2004
    Fletcher, B A
    [2004] AATA 1157 5 Nov 2004
    Graham (*Selway J*)
    [2004] FCA 1287 8 Oct 2004
- lack of recent experience
    Jensen, I P
    [2004] AATA 1189 11 Nov 2004
    Whalan, T
    [2004] AATA 1387 22 Dec 2004
- meaning of 'alone'
    Flemming, K
    [2004] AATA 1055 12 Oct 2004
    McKerlie, D
    [2004] AATA 1111 25 Oct 2004
- redundancy
    Flemming, K
    [2004] AATA 1055 12 Oct 2004
    McMillan, J
    [2004] AATA 1172 9 Nov 2004
    Jensen, I P
    [2004] AATA 1189 11 Nov 2004
    Osmon, C
    [2004] AATA 1218 19 Nov 2004
    Lee, I
    [2004] AATA 1409 24 Dec 2004
- sale of business
    Jensen, I P
    [2004] AATA 1189 11 Nov 2004
- state of the employment market
    McKerlie, D
    [2004] AATA 1111 25 Oct 2004
    Chapman, W A
    [2004] AATA 1325 13 Dec 2004

Respiratory disorder

emphysema
- smoking
    Roberts (*McInnis FM*)
    [2004] FMCA 926 2 Dec 2004

Service pension

assets test
- whether gifted house an asset
    Tsourounakis (*Spender, Kiefel and Emmett JJ*)
    [2004] FCAFC 332 20 Dec 2004

income test
- receipt of UK pension
    Vicars, D F
    [2004] AATA 1022 30 Sep 2004

invalidity service pension
- capacity to undertake remunerative work
  - whether incapacity solely due to impairment
    Tran, Q P
    [2004] AATA 1083 14 Oct 2004

Skin disorder

dermatitis
- neurodermatitis
  - head scratching due to PTSD
    Mitchell, D (Navy)
    [2004] AATA 1150 4 Nov 2004

Spinal disorder

cervical spondylosis
- diagnosis
    Griffin (*Connolly FM*)
    [2004] FMCA 486 27 Oct 2004
- lifting
    Orr, T V (Navy)
    [2004] AATA 1344 15 Dec 2004
- trauma
  - fall
    Orr, T V (Navy)
    [2004] AATA 1344 15 Dec 2004
    Griffin (*Connolly FM*)
    [2004] FMCA 486 27 Oct 2004

lumbar spondylosis
- clinical onset
    Riethmuller, M
    [2004] AATA 1289 2 Dec 2004
- lifting
    Orr, T V (Navy)
    [2004] AATA 1344 15 Dec 2004
- trauma
  - fall
    Maddaford, D D
    [2004] AATA 1247 25 Nov 2004
    Orr, T V (Navy)
    [2004] AATA 1344 15 Dec 2004
  - lifting incident
    Wilson, V
    [2004] AATA 1299 7 Dec 2004
  - hernia-related
    Wilson, V
    [2004] AATA 1299 7 Dec 2004

thoracic spondylosis
- lifting
    Orr, T V (Navy)
    [2004] AATA 1344 15 Dec 2004

- trauma
  - fall

Orr, T V (Navy)
[2004] AATA 1344 15 Dec 2004

Words and phrases

experiencing a stressor
- grief reaction not a relevant stressor

Christie, R F (Navy)
[2004] AATA 1054 12 Oct 2004

continuous period of at least 10 years

Annett, D
[2004] AATA 1130 29 Oct 2004

inability to obtain appropriate clinical management

Williams, J W
[2004] AATA 1079 15 Oct 2004

Fowles, M G
[2004] AATA 1412 31 Dec 2004
- peer pressure

Robertson J M (Navy)
[2004] AATA 1143 3 Nov 2004
- single day of defence service

Robertson J M (Navy)
[2004] AATA 1143 3 Nov 2004