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Editor's notes

In this issue, a quick guide to the meaning of 'arose out of or attributable to service'. The issue is topical, flowing on from the High Court's decision in the case of *Roncevich* which is also reported here.

A recent *Safety, Rehabilitation and Compensation Act 1988* case, *Telstra v Keen*, suggests that redundancy payments are not to be considered as salary, wages or earnings. A short case note and a general guide to the law in this area follows.

The Tribunal case of *Spek* is also reported, which examines the meaning of the misconduct provisions that operate to disentitle applicants.

A round up of recent case law on the *Deledio* steps is also included.

This edition of *VeRBosity* contains reports of 1 High Court and 4 Federal Court judgments in veterans' matters received in July to September 2005 as well as selected AAT decisions handed down in the same period. There is an index of all AAT and Court cases received in this period and information on recent Statements of Principles determined by, and current investigations of, the Repatriation Medical Authority.

Vale

Denyse Phillips

Members and staff of the Veterans' Review Board were saddened by the death of Denyse Phillips on 3 November 2005.

Ms Phillips served as a Senior Member on the Board with great distinction for over 11 years. She is fondly remembered as a capable, caring and generous person who made an enormous contribution to the veteran community through her work on the Board.

She is sadly missed by her many friends among the members and staff of the Board.

MRCA Review Choices

The Veterans' Review Board is aware of information circulated recently by a law firm concerning review rights under the *Military Rehabilitation and Compensation Act 2004* (MRCA). The Board does not give advice or have any particular view about which review path a person should take. However, in light of some misinformation that has been circulated and concerns it has raised in the veteran community, the VRB considers it important to clearly set out the review paths and the effect of choosing either path, so that claimants can make an informed choice.

From an 'original determination' under the MRCA, a person may apply either for:

- reconsideration by a Military Rehabilitation and Compensation Commission (MRCC) delegate under s 349 of the MRCA; or
- review by the VRB under s 352 of the MRCA.

If a person applies for reconsideration under s 349 the person cannot apply to the VRB. If a person applies to the VRB, the person cannot apply for reconsideration under s 349.

Section 349 reconsideration

An application for reconsideration by a delegate must be made within **30 days** of the 'original determination' being given to the person. However, the delegate may grant an extension of time to apply for review.

Once the original determination has been reconsidered, the reconsideration determination, reasons, and notice of appeal rights are sent to the claimant.

Application to AAT following s 349 reconsideration

If the person is dissatisfied with the reconsideration determination, an application for review must be made to the AAT within **60 days** of receiving notice of the reconsideration determination and reasons. The AAT has the power to grant an extension of time to apply for review.

VRB review

Instead of seeking reconsideration under s 349, review by the VRB can be sought within **12 months** of being given the 'original determination'. The VRB has no power to extend the time to apply.

Once an application is made to the VRB, an MRCC delegate examines the case to decide whether to reconsider under s 347 of the MRCA. If no reconsideration is done or the reconsideration does not change the original determination, the matter will proceed to the VRB.

If the original determination is revoked or varied under s 347 to the extent that there is a completely different determination from the original determination, the VRB application lapses.

If the applicant is dissatisfied with a s 347 reconsideration determination that varied the original determination, a fresh application must be made to the VRB (or, instead, to a reconsideration delegate under section 349). This is because a s 347 reconsideration is regarded as a new 'original determination' for which there is a new review right, and another choice of review path.

If the original determination is varied under s 347 but there is still an aspect of that determination that was unaltered, the VRB application may continue and the VRB will review that part of the determination that was not changed.

Once the VRB has reviewed the original determination, the VRB's determination and reasons are sent to the applicant.

Application to the AAT following VRB review

An application for review of the VRB determination may be made to the AAT within **3 months** of receiving notice of the VRB's determination and reasons. The AAT has the power to grant an extension of time to apply for review, but only up to 12 months.

Effect of choosing reconsideration – costs may be awarded by AAT

If a claimant chooses the s 349 reconsideration path, and the matter then goes to the AAT and the applicant is successful, the AAT may award legal costs to the applicant (but cannot award costs against an applicant).

If the claimant chooses the VRB review path, the AAT will not be able to award costs.

Effect of choosing VRB review – legal aid may be available at AAT

If the claimant chooses the VRB review path and the member or former member has rendered warlike service or non-warlike service since 1 July 2004, the claimant will be eligible for non-means tested legal aid at the AAT under the war veterans' legal aid scheme (as long as the relevant State or Territory Legal Aid Commission thinks the case has some merit).

Legal aid under the war veterans' legal aid scheme is not available if the claimant chooses the reconsideration path or the member or former member has rendered only peacetime service since 1 July 2004.

Deledio – commentary on recent cases

Application of the *Deledio* steps – the cases of Mines; Hill; Youngnickel; Griffin; Fenner; Hardman; Codd

These cases concern the application of the steps set out in the *Deledio*[1] case that specified how Statements of Principles are to be applied in the context of the High Court's two-step approach in the pre-SoP case of *Byrnes'* case[2].

Byrnes (1993) 177 CLR 564

In Byrnes, the High Court said that the process was:

Byrnes Step 1

Do all or some of the facts raised by the material before the Commission give rise to a reasonable hypothesis connecting the veteran's injury with war service? The hypothesis will not be reasonable if it is contrary to known scientific facts or is obviously fanciful or untenable. If the hypothesis is not reasonable, the claim fails. Proof of facts is not in issue at this point.

Byrnes Step 2

If a reasonable hypothesis is established, the claim will succeed unless:

- one or more of the facts necessary to support the hypothesis are disproved beyond reasonable doubt; or
- the truth of another fact in the material, which is inconsistent with the hypothesis, is proved beyond reasonable doubt, thus disproving, beyond reasonable doubt, the hypothesis.

Deledio [1998] FCA 391 and **Bull** [2001] FCA 1832

In *Deledio*, the Court set out a 4-step process, which was subsequently modified by *Bull's* case.[3] Those steps are:

Deledio Step 1

The material must raise facts, which, if they were true, would connect the particular circumstances of the veteran's service with the particular injury, disease or death claimed. There is no fact-finding at this step, but an examination of all the material to determine what connections are raised by it.

Deledio Step 2 (as modified by Bull)

All the relevant SoPs must be identified by determining whether the kind of injury, disease or death, the subject of the claim, is one about which the Repatriation Medical Authority has determined a SoP.

Deledio Step 3 (as explained by Bull)

It must be determined whether the hypothesis is reasonable. The hypothesis must be pointed to by the material and not merely be left open by an absence of evidence.

If there is no relevant SoP in force, the hypothesis must be more than a possibility, and must be consistent with

[1] *Repatriation Commission v Deledio* (1998) 49 ALD 193, 27 AAR 144, 14 *VeRBosity* 45

[2] *Byrnes v Repatriation Commission* (1993) 177 CLR 564, 116 ALR 210, 30 ALD 1, 18 AAR 1, 9 *VeRBosity* 83

[3] *Bull v Repatriation Commission* [2001] FCA 1832, (2001) 188 ALR 758, 34 AAR 326, 66 ALD 271, 17 *VeRBosity* 118

the 'known' facts, not be too tenuous, remote, fanciful or impossible: *East v Repatriation Commission*[4]. The 'raised facts' need not be 'found' (ie, proved), but must be supported by the material. If the hypothesis meets these tests, it is 'reasonable'. If the hypothesis does not meet these tests, it will not be reasonable and the claim must be refused.

If there is a relevant SoP in force, in addition to the hypothesis meeting the tests in *East's* case, the hypothesis must be 'upheld' by a SoP. The Court said that this means that the hypothesis must be 'consistent with the template' of a factor in the SoP. In other words, if a factor in a SoP prescribes a number of elements, the hypothesis must also contain the same elements: *Howard's* case.[5]

Deledio Step 4

Step 4 is identical to step 2 in *Byrnes'* case. It requires, in effect, that the reasonable hypothesis to be disproved beyond reasonable doubt.

Benjamin [2001] FCA 1879 and **Hancock** [2003] FCA 711

Preliminary matters

In *Benjamin's*[6] and *Hancock's*[7] cases the Court said that there were 2 preliminary matters that had to be determined before the 4 *Deledio* steps could be considered. Those two matters, which must be decided on the balance of probabilities, are:

- the particular service rendered by the veteran or member; and
- the kind of injury, disease or death that is the subject of the claim.

In *Benjamin's* case, the Full Court said:

> The diagnosis of that disease, and the determination of whether or not there is an SoP in force in respect of that kind of disease, falls for determination according to the standard of proof laid down in s120(4) [reasonable satisfaction]. The characterisation of a disease (or injury or death in an appropriate case), for the purposes of determining whether or not an SoP is in force in respect of that kind of disease (or injury or death), is separate from the question of whether a claim relates to the operational service rendered by a veteran within s120(1). The standard of proof laid down by s120(1) [beyond reasonable doubt] has no application to the former question.

Mines [2004] FCA 1331

Mr Mines' claim for PTSD was based on the following alleged stressors: witnessing a firefight in Saigon; being present when American soldiers returned fire; being ordered to point an unloaded gun at a Vietnamese policeman; witnessing the carnage of a bus destroyed by a bomb blast. The Tribunal found that Mr Mines' circumstances did not meet the requirements of the PTSD SoP.

The Court said that the Tribunal had made an error of law by missing out the preliminary step of identifying the kind of injury or disease from which Mr Mines suffered. Instead, the Tribunal had merely noted that Mr Mines had been diagnosed by different psychiatrists with either PTSD or generalised anxiety disorder and then considered both SoPs without deciding for itself what the relevant disease actually was before considering the relevant SoP.

[4] *East v Repatriation Commission* (1987) 16 FCR 517, 74 ALR 518, 6 AAR 492, 3 *VeRBosity* 127
[5] *Howard v Repatriation Commission* [1999] FCA 1030, (1999) 15 *VeRBosity* 66
[6] *Benjamin v Repatriation Commission* [2001] FCA 1879, (2001) 34 AAR 270, 70 ALD 622, 17 *VeRBosity* 119
[7] *Hancock v Repatriation Commission* [2003] FCA 711, (2003) 37 AAR 383, 19 *VeRBosity* 82

The Court noted that the experiencing and re-experiencing of a traumatic event is part of the diagnostic criteria for PTSD and said:

> [48] It is therefore clear that the question whether a veteran is suffering, or has suffered, a claimed injury or disease must be determined to the reasonable satisfaction of the decision-maker, ie on the balance of probabilities. That question is not to be determined by asking whether there is a reasonable hypothesis that the veteran is suffering, or has suffered, the injury or disease and asking whether the material establishes that the facts supporting that hypothesis do not exist beyond reasonable doubt. 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 last sentence in that passage is not saying that the *Deledio* steps need not be considered, but that in the peculiar case of PTSD, in which the cause is part of the diagnosis, once the diagnosis has been confirmed on the balance of probabilities with the traumatic event being the one identified with eligible service, then the standard of proof required to meet the diagnostic tests will certainly meet the reasonable hypothesis / reverse beyond reasonable doubt standard in the *Deledio* process. Nevertheless, the Court recognised that in some situations, such as occurred in *Hill's* case, there might be a different cause for the disorder than that alleged to have occurred during eligible service.

Hill [2005] FCAFC 23

Mr Hill had been a member of the crew of the aircraft carrier HMAS *Melbourne* on each of two occasions when aircraft had crash landings. One of these was during eligible service, and the other was not. It was clear to the Tribunal that the incident that Mr Hill alleged was the cause of his PTSD was the one that had occurred during non-eligible service, whereas Mr Hill persisted in claiming it was the one that happened during eligible service.

After considering the evidence concerning the incidents, the Tribunal found, beyond reasonable doubt, that Mr Hill could not have seen the incident that occurred during eligible service. In light of that finding the Tribunal said that the hypothesis linking the PTSD with Mr Hill's operational service was 'not reasonable'.

At first instance[8], Mansfield J said that the Tribunal had truncated the *Deledio* process by moving immediately to the fourth step, but that in light of the finding that he had not seen the relevant incident on the beyond reasonable doubt standard, the claim had to fail in any event.

On appeal the Full Court said[9]:

> [80] In general, it is a salutary practice for the AAT to follow the *Deledio* steps because by doing so it is less likely to overlook an hypothesis that is fairly raised by the material and must therefore be considered. On occasion, a failure to follow those steps may give rise to an error of law. Indeed, the primary judge held that the AAT's

[8] *Hill v Repatriation Commission* [2004] FCA 85; 20 *VeRBosity* 101

[9] *Hill v Repatriation Commission* [2005[FCAFC 23; 21 *VeRBosity* 27

> failure to follow those steps had been an error of law in the present case. However, in our view, a failure to follow the *Deledio* steps will not of itself give rise to an error of law, and certainly will not do so in all cases. Of course, and in any event, even if an error of law is demonstrated it does not necessarily follow that the decision must be set aside.

It had been argued that the Tribunal ought to have contemplated alternative hypotheses other than the one proposed by Mr Hill. The Full Court said:

> [96] The Full Court in Deledio no doubt chose its language carefully when it formulated the four-stage process that the AAT should normally follow. An obligation, expressed in the terms of the first stage, implies a duty to consider not merely the particular hypothesis put forward, but also any other hypothesis fairly raised by the evidence.
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> [97] However, the AAT is not required to trawl through voluminous documentation, with a view to seeing whether somewhere within that body of material there might be the semblance of an hypothesis connecting the applicant's condition with the circumstances of his or her service. There is a substantial difference between an hypothesis fairly raised by the material, and one which can only be postulated on the basis of speculation and conjecture.
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> [98] … [I]f it is necessary to couple a fertile imagination with a selective rendition of the evidence in order to create the hypothesis, it is not an hypothesis of the kind which the Full Court in *Deledio* had in mind.
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> …
>
> [103] It is one thing to say that a tribunal must consider any inferences that are reasonably open on the material before it. It is altogether another to say that a tribunal must consider every conceivable permutation of the facts, and engage in speculation and conjecture as to possible hypotheses. The former is a course that *Deledio* not only permits but requires. The latter has no place under the VE Act.

Youngnickel [2004] FCA 1691

Youngnickel's case[10] concerned the application of the *Deledio* steps and the nature of the evidence that had to exist before it could be said that the hypothesis fitted the template of a SoP at step 3 of the process. The relevant SoP required experiencing a severe stressor within the 2 years immediately before the clinical onset of the disease. The Tribunal had found that the material pointed to Mr Youngnickel experiencing a severe stressor but said that there was 'no material which pointed to features and symptoms of alcohol abuse/dependence by August 1968' (that is, 2 years after the alleged stressor).

The Court noted that by specifying the time of clinical onset, the SoP required '[27] … that the disorder itself must be present at the specified time', and referred to *Cornelius'* case[11] and *Lees'* case[12].

In relation to *Lees'* case the Court noted that, '[31] … 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.'

It was argued that there in fact was some evidence upon which the Tribunal could have found clinical onset within the two years, but the Court noted that merely having some evidence supporting the case did not mean that a reasonable

[10] *Youngnickel v Repatriation Commission* [2004] FCA 1691, (2004) 20 *VeRBosity* 144
[11] *Repatriation Commission v Cornelius* [2002] FCA 750, (2002) 18 *VeRBosity* 52
[12] *Lees v Repatriation Commission* [2002] FCAFC 398, (2002) 36 AAR 484, 74 ALD 68, 18 *VeRBosity* 109

hypothesis was raised. The Court then discussed the case law concerning the raising of a reasonable hypothesis in the context of SoPs and made a number of very important points:

- each element of the hypothesis must be raised by the material;
- whether a hypothesis is consistent with a SoP factor requires an examination of the totality of the material, not merely some of the material;
- every essential element of the factor must be pointed to by that material;
- 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; and
- 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.

Griffin [2004] FMCA 486

Similarly, in *Griffin's* case,[13] the Federal Magistrates Court noted that while there was some material pointing to satisfaction of the SoP factor, it was open to the Tribunal to find, on the whole of the material, that the material did not point to satisfying the factor in its entirety.

The Court also noted that when an element of a factor is a medical condition, there needs to be medical evidence to point to that condition existing.

[13] *Griffin v Repatriation Commission* [2004] FMCA 486, (2004) 20 *VeRBosity* 149

Fenner [2005] FCA 27

Mr Fenner's claim was based on three allegedly stressful events. The Tribunal affirmed the rejection of his claim, finding that it was satisfied beyond reasonable doubt that the events were not as severe or did not occur as claimed by Mr Fenner.

The Court[14] criticised the Tribunal's approach to the evidence indicating that if the Tribunal were to be satisfied to the 'beyond reasonable doubt' level of satisfaction, it is a requirement of procedural fairness that concerns about the credibility of the applicant's evidence be put to the applicant when he or she is giving that evidence. For the beyond reasonable doubt standard of proof to be achieved, it is not sufficient to prefer other evidence to that of the applicant's or the applicant's witnesses without seriously challenging their evidence by questioning them directly about those aspects of their evidence that might be rejected because of inconsistencies or other contrary evidence.

Hardman [2005] FCAFC 83

Like *Youngnickel's* case, *Hardman's* case[15] turned on the question of the time of clinical onset. But, unlike *Youngnickel*, in *Hardman*, the Court found that the Tribunal had engaged in fact-finding at step 3 when it found that the hypothesis was not reasonable because the material before it 'overwhelmingly' suggested a clinical onset of depression no earlier than 1969 and so more than two years after any relevant stressor.

The Court said that this finding by the Tribunal indicated that the material pointed not in one direction (away from the hypothesis), but in two directions, one

[14] *Fenner v Repatriation Commission* [2005] FCA 27, (2005) 21 *VeRBosity* 24

[15] *Hardman v Repatriation Commission* [2005] FCAFC 83, (2005) 21 *VeRBosity* 61

supporting the hypothesis and the other pointing, albeit 'overwhelmingly', in the other direction. Thus it could not be said that on the whole of the material the reasonable hypothesis was not raised. The Court said:

> [27] … The point at issue was whether there was a reasonable hypothesis that there was clinical onset of that depression within two years of the hospital incident. The primary judge appeared to regard that hypothesis as depending upon the proposition that the appellant was happy and relaxed at the time he joined the ship but withdrawn after he returned from the operation. If that were all that was involved, there would have been no error of law by the Tribunal for reasons adequately explained in *Bull*.
>
> [28] However, as pointed out by counsel for the appellant, that was not all. In the first place, the evidence of Messrs Gallagher and Thirkell went well beyond that bald statement. Next, the existence of a stressor was assumed. Then there was the opinion of Professor Quadrio that Gallagher's description of the appellant's conduct after he returned to the ship was consistent with depression. The Tribunal had accepted the principle that the onset of depressive disorder should be assessed by identifying the point at which the appellant displayed symptoms that would have enabled a clinician to diagnose a depressive disorder. There was thus an hypothesis available on certain of the facts that the relevant symptoms were displayed after the return of the appellant to the vessel and well within the two year period required by the SoP. To reject that hypothesis on the basis that it was swamped by countervailing material is a finding which preferred some facts to others and so rejected those facts upon which the relevant hypothesis could be based. That is directly contrary to the three steps as described in *Deledio*.

The Court also commented on whether the *Deledio* steps had to be applied in every case. It said that in some circumstances, a finding on the beyond reasonable doubt standard of an essential fact will dispose of the matter without having to go through steps 1 to 3, except in a cursory way.

> [32] It is accepted that the steps set out in *Deledio* are those logically demanded by s 120 of the Act: *Hill v Repatriation Commission* [2005] FCAFC 23 (Hill) at [115]. However, it is apparent that following those steps can mislead a lay tribunal as this case (and the case of Meehan cited by counsel for the appellant) illustrates. It is clear enough that s 120A was enacted to deal with the difficulty inherent in applying s 120(3) following the decisions in *Bushell* and *Byrnes*. That amendment settled the major problem in applying s 120(3). It correspondingly defined and restricted the area for judgment arising under that provision and so limited the practical operation of it. In most cases the hypothesis will be obvious as will the relation of it to the applicable SoP. There is a risk that the Tribunal's primary role of fact finding can be diverted into convoluted hypothetical reasoning by too mechanical an application of the *Deledio* steps in any given case. Those steps, as such, are not found in the Act. There are many cases in which the Tribunal can proceed to fact finding with little more than a glance at s 120(3). Indeed, in many cases there would be no error of law involved in disposing of a case under s 120(1) without adverting to s 120(3) (*Hill* at [80] and [85]).

Codd [2005] FCA 888

The veteran was killed at a level crossing when a train hit the truck he was driving. A coroner had found that the rising sun might have impaired the veteran's view of the train. There was also evidence that he had a blood alcohol level equivalent to drinking one glass of beer. The hypothesis put by his widow was that the veteran's concentration was impaired by

reason of anxiety or alcohol dependence, and that those conditions were caused by his operational service. The Tribunal found that the veteran's death was war-caused.

The Court[16] noted that:

> [29] Before anything else, the Tribunal must find to its 'reasonable satisfaction' that a disease exists; *Repatriation Commission v Budworth* (2001) 116 FCR 200 at [14]-[15]. It is not confined to considering only those diseases or conditions contended for by one or other party before it, and should not test the existence of a postulated disease by reference to any SoP while conducting this first inquiry; see *Benjamin* at [41] and [48]-[50]. At this first stage it is necessary to determine whether the veteran has a 'collection of relevant symptoms', and not the 'nomenclature or … traditional medical label' that may be used to describe them; *Budworth* at [19]. (After the symptoms from which a veteran suffers or suffered have been identified, it might be necessary to have regard, in a general and preliminary way, to various SoPs to determine into which of them the identified symptoms fit. That may occur in taking the second step described in *Deledio* … .)

The Court accepted the Commission's argument that the Tribunal had erred in finding that the material before it was capable of supporting a finding that the veteran suffered from generalised anxiety disorder (GAD) at the time of his death. Ryan J said:

> [47] Without attempting to exhaust the collection of symptoms of GAD of which there was no evidence, it is sufficient to indicate that the material did not afford a basis for concluding that, at the time of his death, the veteran was experiencing excessive anxiety and worry in the sense of apprehensive expectation as required by par A of cl 8 of the SoP. Mrs Codd's evidence tended rather to suggest anxiety about past events which led the veteran to drink to excess because 'he wanted to forget things' or because he was 'ashamed'. The evidence was sufficient to indicate at least symptoms (1), (4) and (6) of those enumerated in par C of cl 8 of the SoP but it did not suggest, as required by that paragraph that those symptoms were associated with the anxiety and worry (about a future event) mandated by par A of that clause. Nor did the evidence indicate that at least some of the three symptoms which I have just identified were present for more days than not during the six months preceding the veteran's death. As well as failure to indicate that the veteran suffered from anxiety or worry of the requisite kind, the evidence was not capable of excluding his symptoms from having occurred solely during PTSD as required by par D of cl 8 of the SoP.
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> [48] It may be that the Tribunal was led into the error of law which I have imputed to it by its expression at [59] of its reasons that;
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> > 'The issue of diagnosis is not to be determined pursuant to the SoP (refer *Benjamin v Repatriation Commission*).'
>
> However, … *Benjamin* … makes clear, the Tribunal was required to decide to its reasonable satisfaction that a veteran was suffering from a collection of symptoms constituting a particular injury or disease. In this case, GAD was one of several injuries or diseases postulated on behalf of the veteran's widow. Once a postulation of that kind occurs, it is necessary for the decision-maker to have regard to the definition of the injury or disease in the applicable SoP. That is not to say that the evidence, whether of medical experts or lay observers, has to use the nomenclature which is to be found in the SoP, or, even, that it has to advert

[16] *Repatriation Commission v Codd* [2005] FCA 888, 21 *VeRBosity* 68

> to a particular SoP among several conceivably available. …

The Court also held that the Tribunal had failed to consider whether the hypothesis fitted the template of the SoP. In particular, the Tribunal had not considered whether there was evidence that the veteran had suffered from generalised anxiety disorder within two years of experiencing the stressor that was alleged to have occurred during his service in 1945. The Court noted that there was no evidence at all about symptoms before 1950. That being the case, the hypothesis could not, as a matter of law, be reasonable.

Discussion

It is apparent that some decision-makers are still having difficulty with the requirement not to find facts at steps 1 to 3 of the *Deledio* process. This is not assisted by the Court's statements in both *Hill* and *Hardman* that the Tribunal need not follow the *Deledio* process, but can find facts on the beyond reasonable doubt standard in some cases and circumvent the first three steps. However, following the *Deledio* process is less likely to lead a decision-maker to make a legal error even if the matter could legitimately be resolved by going directly from the preliminary steps to step 4.

While this is mainly an issue for decision-makers, advocates need to be sure that they present their cases in a way that leads the Board and the Tribunal through the *Deledio* process so that the decision-maker is more likely to follow the correct process and the result that is being sought. Thus the submissions in a case for an applicant should follow a clear sequence of:

1. Identification of the dates and nature of any eligible service.

2. Identification and discussion of the evidence concerning the diagnosis of the injury or disease or the kind of death that is the subject of the claim.

3. Identification and discussion of the evidence that is said to raise a hypothesis of a connection between the particular service rendered by the person and the claimed injury, disease or death (including the identification of the evidence concerning the time of clinical onset or clinical worsening of the relevant injury or disease).

4. Identification of the relevant Statement of Principles, if any.

5. Discussion of the reasonableness of the hypothesis, and how it fits the template of the Statement of Principles, including the evidence concerning the time of clinical onset and any other essential elements.

6. Discussion of any evidence that might tend to contradict the claim.

While the *Deledio* process is strictly applicable only to those cases to which the 'reasonable hypothesis / beyond reasonable doubt' standard of proof applies, it is also a useful process to adopt for 'balance of probabilities / reasonable satisfaction' cases. But instead of referring to a 'hypothesis' of a connection with service, the submission should refer to a 'contention' of a connection with service, as that is the language used in section 120B, which relates to Statements of Principles and the reasonable satisfaction standard of proof.

Are redundancy payments a loss of salary, wages, or earnings?

Telstra v Keen [2005] FCAFC 195

Key principle: Redundancy payments are not salary, wages or earnings: they are compensation for loss of a job and so do not relate to a period after the termination of employment. If a veteran who ceased work due to war-caused disabilities received a redundancy payment equal to 6 months salary, the redundancy payment does not count as salary, wages or earnings and does not stop the veteran having a loss of salary from the day after ceasing work.

Telstra v Keen, which concerned section 33 of the *Safety, Rehabilitation and Compensation Act 1988* (SRCA), is relevant to the meaning of 'loss of salary, wages, or of earnings on his or her own account', in section 23(1)(c) and 24(1)(c) of the *Veterans' Entitlements Act 1986*.

Under section 33 of the SRCA, compensation in respect of a particular day, is reduced by any amount of 'salary, wages, or pay' paid by the employer to the employee in respect of that day.

Telstra argued that compensation was not payable to Ms Keen for a period of 80 weeks after her employment ceased because she had been paid a redundancy payment equivalent to 80 weeks of her normal salary.

The Court held that the redundancy payment was not 'salary, wages, or pay' because it was not a payment for labour and services, but was a payment for loss of a job. The fact that it was calculated by reference to the length of Ms Keen's employment did not affect this. The calculation method merely provided a means of calculating the amount of compensation for the loss of the job. It did not make the payment referable to any period past the end of the person's employment.

Practical application: If a veteran is entitled to the special or intermediate rate of pension and received a redundancy payment, that payment cannot be counted as salary, wages, or earnings for the purpose of sections 23 or 24. The veteran suffered the loss from the day after ceasing work, not at a later time calculated by reference to how much the redundancy payment was worth in terms of salary or wages. This can be contrasted with sick leave pay, which is a payment by way of salary or wages: see *Re Andrew*[1], *Re Davis*[2], and *Re Uren*[3].

A general reference guide on the law relating to loss of salary, wages, or earnings follows.

[1] *Re Andrew and Repatriation Commission*, AAT 14 June 1988
[2] *Re Davis and Repatriation Commission*, AAT 12 March 1987
[3] *Re Repatriation Commission and Uren*, AAT 30 April 1986

General guide on the law of loss of salary, wages, or earnings

VEA: s 23(1)(c), 23(3A)(e), 24(1)(c), 24(2A)(e)

Special and intermediate rate – loss of salary, wages or earnings on his or her own account

The final test for the special rate or intermediate rate of pension is that the person has suffered a loss of salary or wages, or of earnings on his or her own account because of:

- being prevented from continuing to undertake remunerative work due to incapacity from accepted disabilities alone (s 23(1)(c) 23(3A)(e), s 24(1)(c), s 24(2A)(e)); or
- if under age 65, being unable to obtain remunerative work (after genuinely seeking it), the substantial reason being incapacity from accepted disabilities (s 23(3)(b), s 24(2)(b)).

Proposition:

The person must have suffered a loss of salary or wages, or of earnings on his or her own account.

Explanation:

'Earnings' are the rewards the person gains for his or her personal efforts in performing work. (*Brydon*[1])

'Earnings' are not the same as income. A person might not have had a loss of income but still could have had a loss of earnings. (*Greenwood*[2])

Proposition:

A loss occurs if in the assessment period the remuneration, if any, a person receives for work performed is substantially less than that which the person would have received had he or she not been prevented from continuing to undertake the relevant kind of work.

Explanation:

The relevant kind of work to which the loss must relate is not necessarily the last paid work (except for a person aged over 65 on the application day). It is the kind of work the person would have been undertaking in the assessment period but for the effect of accepted disabilities. (*Starcevich*[3])

A loss of earnings is the usual result of being prevented from continuing to undertake relevant remunerative work. (*Banovich*[4]) A loss must be substantial. (*Starcevich*)

'Earnings' in a business context means the gross earnings to which the person had access from time to time for their own benefit. (*Counsel*[5])

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[1] *Repatriation Commission v Brydon* [2003] FMCA 299, 19 *VeRBosity* 91

[2] *Repatriation Commission v Greenwood* (1990) 22 ALD 289, 12 AAR 408, 6 *VeRBosity* 140

[3] *Starcevich v Repatriation Commission* (1987) 18 FCR 221, 76 ALR 449, 7 AAR 296, 3 *VeRBosity* 163

[4] *Banovich v Repatriation Commission* (1986) 69 ALR 395, 6 AAR 122, 2 *VeRBosity* 112

[5] *Counsel v Repatriation Commission* [2002] FCAFC 201, (2002) 122 FCR 476, 72 ALD 204, 18 *VeRBosity* 55

Proposition:

A person suffers a relevant loss from the day after the last day of relevant employment to which a payment of remuneration relates.

Explanation:

Redundancy payments are not salary, wages or earnings: they are compensation for loss of a job and so do not relate to a period after the termination of employment. (*Telstra v Keen*[6])

Sick leave payments are in the nature of salary or wages. (*Re Andrew*[7], *Re Davis*[8], *Re Uren*[9])

A person is deemed not to have had a loss if the person ceased to engage in, or is prevented from continuing to undertake, remunerative work for a reason other than accepted disabilities.

A person is taken not to have had a loss if, in the assessment period, a reason other than incapacity from accepted disabilities contributed to the person ceasing to be in the workforce. (*Magill*[10])

Examples

1. A veteran ceased work because of war-caused injuries and received a redundancy payment equating to 6 months salary. The veteran suffered a loss of salary the day after leaving work. The redundancy payment does not count as salary, wages or earnings and so does not stop the person having a loss of salary.

2. A veteran who ceased work because of war-caused injuries was on sick leave for the last 6 months of his employment. The veteran suffered a loss of salary the day after the sick leave ended. Sick leave payments count as salary.

[6] *Telstra v Keen* [2005] FCAFC 195
[7] *Re Andrew and Repatriation Commission*, AAT 14 June 1988
[8] *Re Davis and Repatriation Commission*, AAT 12 March 1987
[9] *Re Repatriation Commission and Uren*, AAT 30 April 1986
[10] *Magill v Repatriation Commission* [2002] FCA 744, 18 *VeRBosity* 50

Arose out of, or was attributable to … service

The High Court judgment in *Roncevich*[1] (see case note at page 113):

1. confirmed the meaning of the phrase 'arose out of, or was attributable to … service'; and
2. clarified the scope of service that can give rise to liability for compensation.

In light of *Roncevich* and other relevant cases, the law now appears to be as follows:

Proposition:

The 'arose out of, or was attributable to … service' relationship to a claimed injury, disease or death involves a causal contribution from, not merely a temporal or coincidental connection with, the person's eligible service.

Explanation:

The relevant circumstance of service must have contributed to the cause but need not be the sole, dominant, direct or proximate cause of the injury, disease or death. (*Law*[2])

Service must have caused the relevant circumstance and not merely be the

[1] *Roncevich v Repatriation Commission* [2005] HCA 40; 21 *VeRBosity* 113
[2] *Repatriation Commission v Law* (1981) 147 CLR 635, 36 ALR 411, 1 RPD 188

setting in which the circumstance occurred. (*Tuite*[3])

If the causal factor is something that occurs in everyday life, as well as in a service context, such as solar exposure, the circumstances of service must have made a special contribution over and above that of the person's everyday life. (*Bendy*[4])

Proposition:

The *scope of service* rendered depends on the nature of the person's service and the circumstances under which the person served. It involves not only what the person was required to do but includes those activities that the person was reasonably expected or authorised to undertake in order to carry out the person's duties. It also includes activities that were reasonably incidental to the performance of the person's duties.

Explanation:

An activity that was *reasonably expected* to be have been undertaken is one that the person understood was expected of the person by a relevant authority or by the person's colleagues in connection with the performance of the person's duties.

An activity is *authorised* if it was approved for the purpose of, or in connection with, the performance of the person's duties.

An activity is *reasonably incidental* to the performance of duties if the person understood it to be necessary or appropriate to be done in order to carry out the person's duties. (*Kavanagh*[5])

Examples

Whether an activity that occurred (whether off duty or on duty) falls within the scope of service may depend on its nature and the degree of connection with the Defence Force, military discipline, and the performance of duties.

Social events: A social event that a person was expected to attend because of its connection to the military and an expectation of attendance by superiors, or because of regularity of practice, may give rise to a relevant association with the person's duties. (*Roncevich*, *Maunder*[6])

Sporting activities: Merely because a person is expected to keep fit does not mean that every fitness promoting activity is authorised or expected to be performed or is incidental to the performance of the person's duties. (*Re Buckfield*[7])

Personal matters: service must be more than merely the setting in which things occur: service must contribute to the cause. Merely personal or domestic matters while occurring in the context of a service environment are not necessarily related to that service. (*Holthouse*[8])

[3] *Repatriation Commission v Tuite* (1993) 39 FCR 540, 17 AAR 158, 29 ALD 609, 9 *VeRBosity* 30
[4] *Repatriation Commission v Bendy* (1989) 18 ALD 144, 10 AAR 323, 5 *VeRBosity* 91
[5] *Kavanagh v Commonwealth* (1960) 103 CLR 547
[6] *Maunder v Commonwealth* (1983) 76 FLR 341
[7] *Re Buckfield and Repatriation Commission* (1993) 29 ALD 884
[8] *Holthouse v Repatriation Commission* (1982) 1 RPD 287

Administrative Appeals Tribunal

Re Lees and Repatriation Commission

Jarvis DP; Eriksen

[2005] AATA 905
16 September 2005

Generalised anxiety disorder – alcohol abuse or alcohol dependence – gastro-oesophageal reflux disease – diagnosis accepted at first hearing before Tribunal – Tribunal decided that conditions not war-caused – appeal to Federal Court allowed – matter remitted to Tribunal differently constituted – fresh evidence contesting diagnosis – conflict of medical evidence

This matter was heard on remittal from the Full Court of the Federal Court (Heerey, Moore and Kiefel JJ)[1]. The Court had allowed an appeal on the ground that the Tribunal had erred in finding that there was no material before it to the effect that the clinical onset of Mr Lees' generalised anxiety disorder had occurred within two years of the asserted stressors.

Following remittal, the Commission requested an updated medical report from Dr Blakemore who reported that in his opinion, Mr Lees was not suffering from a generalised anxiety disorder, or alcohol abuse. On this basis the Commission disputed diagnosis.

Counsel for Mr Lees contended that the scope of the remitter from the Court was confined to the issue on which the appeal succeeded. It was argued that the issue of diagnosis had already been settled, and the Court's decision that there was material before the Tribunal pointing to the clinical onset of generalised anxiety disorder within the two-year period was the issue to be determined on remittal.

The Tribunal held that the remitter should not be interpreted in such a restrictive manner. It was further decided that the Commission was not estopped from disputing diagnosis, which was a similar conclusion to that reached in relation to questions of estoppel in *Re Jebb and Repatriation Commission*[2].

Issues before the Tribunal

On re-hearing, the Tribunal described the following issues before it:

(a) Is Mr Lees suffering from a generalised anxiety disorder?

(b) Is he suffering from alcohol abuse?

(c) If he is suffering from either or both of those conditions, are they war-caused?

(d) Is his condition of gastro-oesophageal reflux war-caused?

Diagnosis – Generalised Anxiety Disorder

At the outset the Tribunal noted that '[11] the issue of the diagnosis is a separate issue from whether the conditions were war-caused, and should be addressed before determining the issue of causation.'

Before the Tribunal was conflicting medical evidence on the issue of

[1] *Lees v Repatriation Commission* [2002] FCAFC 398, (2002) 36 AAR 484, 74 ALD 68, 18 *VeRBosity* 109

[2] *Jebb and Repatriation Commission* [2005] AATA 470; 21 *VeRBosity* 53

diagnosis of the two primary asserted conditions of generalised anxiety disorder and alcohol abuse.

Both doctors based their opinions on diagnosis on the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV) applicable SoP.

The doctor whose reports supported a diagnosis of GAD and alcohol abuse was Mr Lees treating psychiatrist (Dr Ewer), and had provided five reports over 6 years. The doctor in disagreement with the diagnosis (Dr Blakemore) had seen Mr Lees twice before tendering his first report and then again to obtain an updated history for a second report.

After weighing up the conflicting views, the Tribunal preferred the opinion of Dr Blakemore to that of Dr Ewer'.

> [17] Both psychiatrists refer to the importance of the patient's history in arriving at their diagnoses. We find that Dr Blakemore was careful to obtain a detailed history from Mr Lees, and to record that history accurately. As against this, in his reports and evidence, Dr Ewer asserted in a number of instances that various relevant diagnostic criteria from DSM-IV were satisfied, but included little detail as to the symptoms of which Mr Lees was complaining. It was also apparent from his evidence that in some cases where symptoms were referred to, Dr Ewer did not, in our view, adequately investigate or particularise them.

The Tribunal further noted that Dr Ewer conceded in his evidence '[18] that on the history obtained by Dr Blakemore, he would not have diagnosed either generalised personality disorder or alcohol abuse'.

It was argued that the Tribunal should have regard for the fact that Dr Ewer had seen Mr Lees on many more occasions than Dr Blakemore, and 'that the severity of Mr Lees' condition of generalised anxiety disorder might have fluctuated and might have been less severe on the occasions when he saw Dr Blakemore'.

The Tribunal responded:

> We accept the force of these submissions, and we have taken them into account. However, Mr Lees expressly acknowledged the correctness of the history recorded by Dr Blakemore, with the exception of certain matters which are, in our view, of minor import in relation to the issue of diagnosis. Although Mr Lees did provide some further information in evidence as to his symptoms and their effect on him, we do not think that that information or the other matters referred to by counsel affect the essential basis for Dr Blakemore's conclusions.

The Tribunal noted that '[19] DSM-IV should not be construed as if it were a statutory or quasi-statutory instrument; it is a diagnostic tool used by psychiatrists in conjunction with their clinical judgment'. The Tribunal further noted that 'DSM-IV distinguishes generalised anxiety disorder from non-pathological anxiety, and says that worries associated with the condition "are difficult to control and typically interfere significantly with functioning, whereas the worries of every-day life are perceived as more controllable and can be put off until later".'

> [19] Further, under diagnostic criterion E, the anxiety, worry or physical symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. Whilst we agree with [the] contention that some of the examples given by Dr Blakemore in his evidence were extreme, we nevertheless accept Dr Blakemore's opinion in preference to that of Dr Ewer that Mr Lees' symptoms and their effect on him were not of sufficient significance to constitute generalised anxiety disorder. Under DSM-IV all of

> diagnostic criteria A to F must be satisfied before a diagnosis of generalised anxiety disorder can be made. We note Mr Lees' evidence that he worries about matters related to his work, but he has been employed successfully for many years, and has changed employment infrequently, and then in order to move to better paid employment.

Diagnosis – Alcohol Abuse

Again, the Tribunal was presented with different histories presented by both doctors in relation to Mr Lees' claim of suffering from alcohol abuse. Dr Ewer was of the opinion that Mr Lees satisfied two criteria of the alcohol abuse SoP, namely recurrent abuse in situations that are physically hazardous, and persistent social or recurrent inter-personal problems caused or exacerbated by alcohol.

On the criterion referring to recurrent substance abuse in situations in which it is physically hazardous, Mr Lees' argument appeared to contend that the use of alcohol led to the physically hazardous situation of causing self-harm to his own liver.

In 1972, Mr Lees contracted hepatitis. Dr Ewer noted that despite a recommendation to reduce his alcohol consumption Mr Lees did not. In contrast Dr Blakemore reported that Mr Lees had been told to stop drinking for a month, which he did, and was then told that it was safe to drink again.

Further, the Tribunal noted that a report from a specialist in 1999 had indicated that Mr Lees had '[22] recovered completely from the effects of the hepatitis' and that his abnormal liver function tests were 'more due to fatty infiltration of the liver related to his body habitus and high cholesterol'. The Tribunal also referred to Mr Lees' general practitioner's notes in which there was no indication that Mr Lees' liver would be damaged by his consumption of alcohol.

The Tribunal said:

> [23] On the above state of the evidence before us, we find that Mr Lees' use of alcohol has not been harmful to his liver. In any event, we are inclined to agree with the doubt expressed by Dr Blakemore as to whether the diagnostic criterion A(2) would apply to a person who was engaging in conduct that would result in self-harm (that is, by using alcohol in circumstances which could be harmful to that person) or that this would be relevant to the diagnostic criteria for alcohol abuse. However, it is unnecessary for us to determine that question in view of our above finding.

In relation to the criteria requiring continued alcohol abuse despite having persistent or recurrent social or interpersonal problems, the Tribunal found the following:

> [24] We have referred above to Mr Lees' history of employment. Whilst he gave evidence of having had some difficulties at work, we find that they are not sufficient to constitute problems of the kind described in criterion A(4) of DSM-IV. Mr Lees also gave evidence of having had some difficulties in his relationship with his wife and daughters in the past. However, the specific incidents to which he and Dr Ewer referred happened some time ago, and Mr Lees gave evidence that his relationship with his wife and daughters is now satisfactory. We prefer Dr Blakemore's opinion that Mr Lees does not satisfy criterion A(4).

Decision

Having found that Mr Lees is not suffering from generalised anxiety disorder or alcohol abuse or dependence, the Tribunal concluded that his claim in respect of gastro-oesophageal reflux disease must also fail. In so finding, the Tribunal did not

need to consider whether these conditions were war-caused.

Editor: Prior to this Tribunal decision, this case had been appealed to Full Federal Court, which ordered it to be 'remitted to the Tribunal to be heard according to law'. In the first Tribunal decision, the Commission had conceded that the applicant suffered from generalised anxiety disorder and alcohol abuse. However, following the remittal, the Commission obtained evidence that countered such a concession, and the Tribunal found after weighing up the evidence that the applicant did not in fact suffer from either of the two conditions. This case shows that an applicant's success on a point of law in the Federal Court or High Court does not necessarily guarantee success on re-hearing at the Tribunal.

Re Spek and Repatriation Commission

Levy

[2005] AATA 576
9 August 2005

Borderline personality disorder – dysthymia – defence caused injury – serious default – depressive disorder – personality disorder – anxiety disorder

Mr Spek had applied to have his claimed disability of depressive disorder related to his defence service. That claim was made despite Mr Spek pleading guilty to a number of service offences. The offences concerned Mr Spek being in unlawful possession of service property. As a result he was handed a suspended sentence of 49 days detention. It was submitted that the offences did not disqualify him under the wilful default or serious breach of discipline provision in section 70(9) of the Act.

The issues before the Tribunal

The Tribunal asked three questions in seeking to determine Mr Spek's claim:

> [8] (i) What is the diagnosis suffered by Mr Spek – a Depressive Disorder, namely Dysthymia and/or a personality disorder?
>
> (ii) Are the accepted diagnoses caused by his eligible defence service in the Australian Army i.e. does his condition fit the Statements of Principles (SoPs) (for any diagnosis accepted)?
>
> (iii) Is there a serious default under section 70(9) of the Act which would disqualify him from entitlement to pension or compensation, or are there exculpatory grounds to negate the affect of that provision?

Diagnosis

The Tribunal described the psychiatric evidence before it as displaying a '[46] wide variance' of opinion and that such opinion was 'strongly held'.

Personality disorder

The Tribunal concluded that the '[48] the evidence which characterises the applicant's behaviour, demonstrates unstable personal relationships, impulsiveness, frequent mood shifts, inappropriate anger, recurrent suicidal threats and apparent chronic feelings of emptiness.' The Tribunal went on to find that these are all characteristics of Borderline Personality Disorder, however, it found that onset occurred in adolescence, thus predating the applicant's defence service.

> [48] From the evidence available about Borderline Personality Disorder and the behaviours exhibited by the applicant, it is accepted that he has Borderline Personality Disorder and that its onset was most likely … to have been in late adolescence. On that basis, it has not been caused by his Army service

although the stress of the investigation undoubtedly heightened the chronicity of it.

Generalised anxiety disorder

The Tribunal accepted evidence from some of the psychiatric reports that the Mr Spek was often anxious and worried excessively, thereby satisfying the minimum criteria for a diagnosis of generalised anxiety disorder.

> [50] On the basis of the evidence provided by the psychiatrists of Mr Spek's behaviours, and having regard to DSM-IV criteria, it is accepted that he also has Generalised Anxiety Disorder and that it is co-morbid with border personality disorder. It may have been evident in some respects before Mr Spek's military service, but the investigation also undoubtedly worsened that condition.

Dysthymia

The Tribunal's findings in relation to dysthymia (a type of depressive disorder) were as follows:

> [51] In relation to Dysthymia, the diagnostic criteria for this disorder in DSM-IV shows that a person would have depressed mood for most of the day, for more days than not as indicated either by subjective account or observation by others for at least two years. There would also be evidence that, while the person was depressed, two or more of the following would also be present:
>
> (a) Poor appetite or overeating;
>
> (b) Insomnia or hypersomnia;
>
> (c) Low energy or fatigue;
>
> (d) Low self esteem;
>
> (e) Poor concentration or difficulty making decisions;
>
> (f) Feelings of hopelessness.
>
> [52] While there is evidence that the applicant has back pain also, which may aggravate the stress and the level of depressed feeling, there is evidence that the applicant suffers at least from factors (a), (b), (d) and (f) above. Therefore, it is accepted that the applicant has Dysthymia and that the Army investigation has had a cumulative effect on his personality disorder and his anxiety condition such that he now has this depressive illness.

Application of the relevant SoPs

SoP No 144 of 1995 – Personality Disorder

For the personality disorder to be shown, on the balance of probabilities, to be connected with the circumstances of military service, the Tribunal characterised the following as relevant to satisfying the SoP:

a) Suffering a catastrophic experience that immediately preceded an enduring personality change to the level of disorder (Paragraph 1 (a)).

b) The 'personality disorder' is defined in paragraph 4 and includes in paragraph (f)(v) of that definition, Borderline Personality Disorder.

c) There must be an 'enduring personality change' as a result of a 'catastrophic experience'. An 'enduring personality change' is defined in paragraph 4 of the SoP as:

> ***'enduring personality change'*** *means a psychiatric condition that is present for at least two years immediately following exposure to catastrophic stress; where*
>
> *a) the catastrophic stress must be so extreme that it is not necessary to consider personal vulnerability in order to explain its profound effect on the personality; and*
>
> *b) the personality change is characterised by a hostile or distrustful attitude towards the world, social withdrawal, feelings of emptiness or hopelessness, a chronic feeling of "being on edge" as if*

> *constantly threatened, and estrangement;"*

The Tribunal concluded that '[56] on any view, the military investigation could not be regarded as a "catastrophic stress" such that a profound change to personality would be understandable without consideration of personal vulnerability to explain that change.' In finding on the balance of probabilities that the disorder was likely to have been present during adolescence, the requirements of the SoP for personality disorder were found not to be satisfied.

SoP No 2 of 2000 – Generalised Anxiety Disorder

The key terms identified by the Tribunal in the application of the SoP were 'clinical onset' and 'severe psychosocial stressor'

Although the Tribunal had found that there was evidence that the onset of Mr Spek's anxiety disorder was prior to military service in late adolescence, the Tribunal was bound to consider whether the military investigation caused an aggravation of a pre-existing illness. The Tribunal concluded as follows:

> [65] [T]he military investigation, must evoke feelings of "substantial distress" as exemplified in the definition e.g. "… being shot at, death or serious injury… experiencing a loss such as divorce or separation … or legal problems". Using the test of the standard or benchmarks as shown in the examples, on the face of it, one might say that "substantial distress" would not be ordinarily envisaged in the circumstances described. However, taking account of the fact that there is a pre-existing disposition to Generalised Anxiety Disorder , and taking account also of the victimisation of the applicant, including extra duties, assault and the period of time during which the psychological distress would have multiplied in the applicant's mind, the Tribunal is satisfied that the applicant would have experienced feelings of "substantial distress". On that basis, the Tribunal finds that the applicant has experienced a severe psychosocial stressor to the extent that it would have been a clinical worsening of his anxiety disorder.

SoP No 59 of 1998 – Depressive Disorder

Having found that the onset of Mr Spek's dysthymia arose as a cumulative result of the military investigation and his personality disorder, the Tribunal concluded that the military investigation was a 'severe; psychosocial stressor' leading to the clinical onset of Mr Spek's dysthymia within one year, thus satisfying the SoP.

Application of disentitlement provisions

The Tribunal then had to decide whether section 70(9) of the Act required it to decide that Mr Spek's guilt in relation to several property offences disentitled him to a pension. The relevant provisions are as follows:

> Section 70(9)
>
> a) If the injury or disease resulted from the member's serious default or wilful act; or
>
> b) Whether the injury or disease arose from a serious breach of discipline committed by the member…

On its face, the Tribunal noted the following in applying the provisions:

> [76] It would seem that clause 1 above is relevant as the applicant did commit wilful acts. Clause 2 above is clearly relevant as the wilful acts committed were central to what were in fact breaches of the *Defence Force Discipline Act*, or in other words, a serious breach of discipline committed by the member.

Counsel for Mr Spek argued that Mr Spek's depressive disorder (dysthymia) arose '[77] out of Mr Spek's relationships

and interactions with the members of the Unit and did not arise as a result of his unlawful possession of official property'.

The Tribunal accepted that Mr Spek's dysthymia may have been caused by '[78] his being ostracised in the Unit due to "rumours" and that he was a "thief".' Attention was drawn to *Re Nelson v Repatriation Commission* (1988) 15 ALD which concerned a soldier attempting desertion and being struck by a truck on the highway. The Tribunal noted that '[e]ven though the truck driver was negligent, the injuries were still regarded as being the result of his serious default in attempting desertion in the first place.'

The Tribunal adopted the principle in *Nelson's* case that 'intervening negligence will rarely break the chain of causation between the threshold conduct and the injury'.

The Tribunal then turned to an examination of whether Mr Spek's offences were 'serious' enough to satisfy the provisions of section 70(9). The Tribunal was unimpressed:

> [81] when one looks at the value of the items mentioned in the transcript of proceedings before the Defence Force Magistrate, the equipment is worth approximately $1,400. In the ordinary criminal courts, people may be charged on indictment for property offences of this value. However, Counsel for the applicant also argued that the offences are 'not serious' and are 'at the lower end of the scale'.

The Tribunal found such arguments to be unsustainable, particularly when balanced with the '[83] appropriately high standards of personal conduct necessary for an effective Defence Force.' The Tribunal noted that Mr Spek's indiscretions were tried before a Defence Force Magistrate (rather than being dealt with summarily) who chose to order detention for all five offences. It was also noted that detention ranked high on a scale of seriousness proportionate to the offence, and explicitly noted that the offences committed by Mr Spek were 'serious'. In conclusion:

> [89] Clearly, the nature of the offences and the penalties imposed imply that they were 'serious'. In the circumstances, given the deceit involved, the duration over which the offences occurred, including the fact that they continued after the investigation was commenced and taking account of the treatment of Mr Spek by his Unit, I find that the principles set out in *Re Nelson* are applicable in the present case and the condition of Dysthymia must be regarded as being part of the chain of causation between the initiating behaviours (or breaches of discipline) and the injury or conditions from which the applicant currently suffers.

Conclusion

The Tribunal found that Mr Spek suffers from the non defence-caused conditions of Borderline Personality Disorder and Generalised Anxiety Disorder. It found that he also suffered from Dysthymia, which was related to defence service, however section 70(9) of the Act operated to prohibit Mr Spek from receiving any compensation from the condition.

High Court of Australia

Roncevich v Repatriation Commission

McHugh, Gummow, Kirby, Callinan, Heydon JJ

[2005] HCA 40

10 August 2005

Whether injury arose out of or was attributable to defence service – Whether attendance at Mess function compulsory – Whether attendance at Mess function constituted defence service – Applicant injured as a result of falling from window due to intoxication – Whether Administrative Appeals Tribunal gave reasons which conformed to law – Sufficiency of reasons – Whether perverse findings of fact constitute an error of law – Jurisdiction of Federal Court to disturb perverse findings of fact – Whether returning matter to the Administrative Appeals Tribunal would be futile – Whether High Court should substitute a finding on the facts.

Facts

The facts of the case are outlined in the joint judgment of McHugh, Gummow, Callinan and Heydon JJ.

> [3] [Mr Roncevich], who was then a Sergeant, attended a dinner at the Sergeants' Mess … where he was stationed and resided. The reason for his attendance at the Mess was that … the most senior soldier in the whole Army and a person of considerable military importance was visiting the Base. Short notice only had been given of this officer's visit.
>
> [4] The evidence was that … it was the expectation and custom of the Army for NCOs on Base to attend at the Mess when a distinguished visitor was a guest. …
>
> [5] [Mr Roncevich] was present at the Mess from about 4:30pm until 9:00pm. In this period he drank a considerable quantity of beer, indeed to the extent that he became inebriated. …
>
> [6] Later in the evening [Mr Roncevich] left the Mess with the permission of … his immediate superior. He intended to change from his military fatigues into civilian clothes, iron his uniform for the next day, and then return to the Mess. Others present there were already in civilian clothes. [Mr Roncevich]'s military commitments had prevented him from changing earlier.
>
> [7] [Mr Roncevich] returned to his room on the second floor of the barracks at the Base, opened his windows to air the room, and began to iron his uniform. [He] was a smoker. He felt the need to clear his throat. He walked to a window, stood on a trunk beneath it and lent forward with the intention of expectorating. He overbalanced and fell to the ground below. The fall caused an 'internal derangement' of his left knee.

Decision of the Tribunal

On retirement from the Army, Mr Roncevich lodged a claim his knee injury. The Commission rejected the claim and on appeal the Administrative Appeals Tribunal affirmed the decision. The joint judgment reproduced the relevant paragraphs of the Tribunal's decision:

> [4] …The Tribunal finds that on the evening of 27 February 1986, between 4.30pm and 9.00pm, the applicant attended the sergeants mess at the

> Holdsworthy Army Base to socialise with fellow NCOs. They drank alcoholic beverages, ate a meal and had a friendly conversation. The situation was in fact no different to what they might have done, had they decided to go to a hotel away from the Base.
>
> The only links between the Army and the intoxication of [the appellant] were that the intoxication occurred on an Army Base and that [the appellant] and his fellow drinkers were soldiers. The intoxication was not caused by, nor did it arise out of any task that [the appellant] had to do as a soldier, nor did it arise out of his defence service, nor did it occur in the course of his defence service.
>
> Consequently, the subsequent injury to [the appellant's] knee was not caused by his defence service, nor did it arise out of or in the course of his defence-service. It was not service-related nor was it defence-caused, within the meaning of those terms in the *Veterans' Entitlement Act 1986*.

The matter was appealed to the Federal Court, where Mansfield J held the Tribunal had not erred. It was further appealed to the Full Court of the Federal Court where a majority agreed with Mansfield J's finding (Whitlam and Marshall JJ, Heerey J dissenting). Mr Roncevich then sought and was granted special leave to appeal to the High Court.

Argument on appeal

In dealing with the first argument on appeal, that the Tribunal's reasons lacked sufficient reasoning to constitute an error of law, the Court held its reasons were sufficient '[19] to enable the courts below, and this Court to understand, and to deal with the reasoning and decision of the Tribunal'.

It was then put that the Tribunal had erred in not considering Mr Roncevich's entitlement under subsection 70(7). The Tribunal had originally held that Mr Roncevich's injury did not arise nor was it attributable his defence service, which employs the language of subsection 70(5). Subsection 70(7) provides that an injury or disease may be war-caused if it was due to an accident that would not have occurred but for the defence service rendered by claimant. The argument was put that '[20] the inebriation of the appellant, having regard to the circumstances of his attendance in the Sergeants' Mess … falls within s 70(7), even if the injury were to be held to have been suffered other than in the course of the appellant's defence service'

The Court agreed with the Commission that such an argument was impermissible as it had not been previously raised on appeal, however it did note that Mr Roncevich may be able to advance it on re-hearing before the Tribunal.

The argument that did ground the appeal in Mr Roncevich's favour concerned the Tribunal asking itself the wrong question in determining whether the injury 'arose out of or was attributable to' his defence service.

> [22] Another argument of the appellant should however be accepted. It was, that in asking itself whether the appellant's intoxication was caused by, or arose out of a task that the appellant had to do as a soldier, it asked itself the wrong question, and not the question that the Act requires it to answer. The question that it should have asked is the one posed by s 70(5), whether the injury arose out of, or was attributable to, any defence service of the appellant?

The joint judgment went on to state that '[23] [t]he evidence in this case is capable of providing an affirmative answer to the correct question,' and cited authority from Dixon J in *Henderson*[1] that 'whether an event arises in the course of an activity, or as here, out of "an activity", depends

[1] *Henderson v The Commissioner of Railways* 58 CLR 281

upon such matters as the nature of the person's employment, the circumstances in which it is undertaken, and what, in consequence, the person is required or expected to do to carry out the actual duties.' The joint judgment then discussed the nature of what a person in the appellant's position may be 'required' or 'expected to do as a member of the Defence Force in the context of the facts of the case:

> [24] There is little doubt in this case that there was a requirement, albeit not one to be found in formal military orders, and an expectation, of attendance at the Sergeants' Mess and the consumption in some quantity, even perhaps to the point of intoxication short of physical incapacity, of alcoholic drinks. So too, the need for the appellant's return to his quarters and the preparation of his uniform for the next day, are capable of being seen to have arisen out of, or of having been attributable to, his defence service. The remaining question is whether, climbing on to the box to expectorate through the open window, and then falling because he was inebriated, similarly either arose out of, or was attributable to his defence service.

McHugh, Gummow, Callinan and Heydon JJ then agreed with Heerey J's dissenting view in the Federal Court that s 70(5) ought to be broadly constructed.

> [25] The point made by Heerey J argues in favour of a broad construction of s 70(5). Section 70(9) states that the Commonwealth is not liable under that section to a member in respect of death, injury or disease if any of these resulted from or arose out of a member's serious default, wilful act, or a serious breach of discipline. It is not suggested that the appellant's conduct even remotely approached the magnitude of a serious default, wilful act or serious breach of discipline, yet the respondent has concluded that the appellant's drinking and his subsequent fall constituted such a departure from defence service as to disqualify him from obtaining compensation. The presence and language of s 70(9) argues strongly in favour of a construction of s 70(5) capable of embracing within its terms the appellant's conduct on the evening of his fall.

Further:

> [27]The use disjunctively in s 70(5) of the expressions 'arose out of' and 'attributable' manifest a legislative intention to give 'defence-caused' a broad meaning, and certainly one not necessarily to be circumscribed by considerations such as whether the relevant act of the appellant was one that he was obliged to do as a soldier. A causal link alone or a causal connexion is capable of satisfying a test of attributability without any qualifications conveyed by such terms as sole, dominant, direct or proximate.

Having found the Tribunal erred by asking the wrong question, the joint judgment made orders to set the decision of the Tribunal aside and remit it to be heard according to law.

In a separate judgment, Kirby J agreed with the decision and orders proposed in the joint judgment, and in some length set out the history of the appeal, however, his reasons demonstrate a marked departure from views of McHugh, Gummow, Callinan and Heydon JJ on the application of the principles of causation to the particular facts of the case.

Reference was made to the Full Court of the Federal Court's decision in *Maunder*[2] which Kirby J noted was factually similar to Mr Roncevich's case. That case concerned a member of the Australian Army who had attended a party at the Sergeant's mess from 5.30 pm until 3 am the next morning. The member then drove home whereupon he had an

[2] *Maunder v The Commonwealth* 76 FLR 341

accident that resulted in his death. A claim made by his widow was rejected by the Tribunal and the Court '[73] unanimously concluded that it was open to the Tribunal, on the evidence, to reject the claim on the assessment of the reasonableness of the member's attempt … to drive himself home [and that this] … was a question of fact immune from correction in an appeal limited to one on a 'question of law'.' The Tribunal had also determined that 'it was an incident of the member's duty to be present at the Mess party until 10.30 pm but not thereafter'.

Kirby J noted that the Commission urged the High Court in its argument to take a similar approach in the case of Mr Roncevich.

> [74] It argued that it was open to the Tribunal to conclude, as a matter of fact, that the injury did not arise out of, nor was it attributable to, any defence service. As with Captain Maunder's case, the Tribunal was competent to conclude that a point was reached where convivial participation in a Mess party, even if initially connected to defence service and causes, turned into a purely personal pursuit of activities having no causal relationship with defence service.

Kirby J went on to note, and in light of an exhaustive analysis of the principles of causation that followed, that '[75] it will be obvious that I consider the [Commission's] submission to be a powerful one, consistent with legal authority and principle.' His Honour further noted that '[s]ave for the legal misdescription [the Tribunal asking the wrong question] … [the Commission's submission] would, in my view, have been fatal to an appeal limited to a 'question of law'.'

However, Kirby J, in further discussion on the issue of the Tribunal's misdirection agreed with the joint judgment that the limits imposed by the Tribunal on the scope of defence service (confining it to '[91] notions of compulsion, requirement and obligation') were too narrow.

> [95] By confining attention to considerations of what it was 'compulsory' for the appellant to do as part of his 'defence service' and limiting notions of 'defence service' and 'defence-caused', the Tribunal unduly narrowed the appellant's activities as a member of the Forces out of which entitlements under the Act might arise.
>
> [96] This was not an immaterial restriction. Indeed, it went to the heart of the issues to which the evidence before the Tribunal was addressed. Those issues concerned whether, whatever the legal or disciplinary obligations, attendance by the appellant in the Mess function was expected of him, with the consequence that he would become involved in drinking with colleagues and might become intoxicated because of the social, cultural and environmental norms to which he was subjected at such an event.

In holding that the Tribunal '[97] misdirected itself on a question of law material to its decision,' Kirby J went on to discuss whether the matter ought be remitted to the Tribunal for determination according to law or to bring to an end the '[99] over-long saga' of litigation by inviting the High Court 'to substitute a finding on the facts in favour of [Mr Roncevich]'. Kirby J dismissed such a proposition, holding that the High Court is not the arena for findings of fact.

> [101] [T]he appellant's proposition invited this Court to make a finding of fact which, due to an error on a question of law, has never been decided by the body entrusted by the Parliament with fact-finding, namely the Tribunal. The proper and limited function of 'appeals' from the Tribunal should be observed. The advantages of the Tribunal in fact-finding should be respected. Behind observance of the statutory provisions in this respect lies an important constitutional principle,

> limiting the disturbance of administrative decisions by courts created under Ch III of the Constitution, such as this Court.

Kirby J notes further that resolution on the facts by the High Court would prevent the possible factual finding that some of the events described on the evening of the injury might be characterised as 'personal', 'domestic' or 'voluntary', to the extent that the chain of causation is broken.

> [102][Further] as the discussion of the issues of fact-finding and causation demonstrate, it is far from certain, even within a larger concept of 'defence-caused' and 'defence service' that the appellant would succeed on the facts. He still has to confront the respondent's arguments designed to limit the ambit of what is 'defence-caused' and what arises out of, or is attributable to, any 'defence service' by reference to excluding conduct that can be classified as 'personal', 'domestic' or 'voluntary' in the circumstances. Obviously, the appellant's case does not fall within the somewhat extreme evidentiary circumstances described in *Maunder*. Nevertheless, in the current judicial environment of expressed faith in the voluntarism of alcoholic intoxication, the [Commission] undoubtedly has a strong factual argument to exclude liability, at least under s 70(5)(a) of the Act.

However, Kirby J did note equally that it remained open for the Tribunal to find that the events leading to the injury may indeed be found to fall within the broad scope of what is meant by 'defence service'. This conclusion echoes the strong obiter in the judgment of McHugh, Gummow, Callinan and Heydon JJ:

> [103] It is not impossible that, absent restrictions derived from notions of obligation, requirement and compulsion, a factual conclusion could be reached that the appellant's consumption of alcohol on this occasion was defence related or defence-caused and thus that his consequent fall "arose out of or was attributable to" defence service in its more ample factual understanding.

Decision and orders

The High Court unanimously set aside the decision of the Tribunal, the Federal Court and the Full Court of the Federal Court and remitted the matter to the Tribunal to be heard according to law. Costs were awarded to the successful appellant.

Federal Court of Australia

Constable v Repatriation Commission

Dowsett J

[2005] FCA 928

8 July 2005

Statement of principles – alcohol abuse/dependence – applicant claims to have experienced a severe stressor of casualty clearance whilst in operational service – review of decision – question of law – whether the material points to a hypothesis that fits the relevant template in the SoP – 'might evoke intense fear, helplessness or horror', 'severe stressor', 'reasonable hypothesis connecting', 'war-related', 'war caused disease', – 'witnessing casualty clearance'

Mr Constable enlisted in the Army in 1958. Prior to volunteering for service in Vietnam he had served in Papua and

New Guinea as a driver/storeman in an engineering unit. From 23 July 1969 until 23 July 1970 he served with 17 Construction Squadron at Vung Tau and Nui Dat. He left the Army on 4 November 1979.

He has a number of disabilities that have been accepted as being related to his war service, including a depressive disorder. The Veterans' Review Board rejected a claim for alcohol abuse or dependence, and that decision was affirmed by the Administrative Appeals Tribunal. Mr Constable appealed that decision to the Federal Court alleging the Tribunal had erred in law in failing to apply the appropriate test or misinterpreted the requirements of that test.

Mr Constable's claim relied on the satisfaction of factor 5(g) in Statement of Principles No. 76 of 1998 that required him to have experienced 'a severe stressor within the two years immediately before the clinical onset of alcohol dependence or alcohol abuse' during his period of operational service in Vietnam.

The stressor relied upon by Mr Constable was the observation of a landrover driving in the opposite direction which contained three casualties with bloodied bandages on their heads. He estimated the landrover travelled by at 60km an hour, and he gave evidence that witnessing the incident made him feel sick in the stomach. The incident occurred around Christmas 1969.

Clinical onset

Doswett J first turned to an examination of Mr Constable's alcohol consumption, and noted that the Tribunal had not dealt with the question of the clinical onset of his alcohol abuse.

> [13] He commenced drinking in Papua and New Guinea in 1963, at which time he was drinking six glasses of beer per day. This increased to ten glasses in 1963-64. By 1969-1970, he was drinking fifteen glasses of beer per day, together with four to five glasses of scotch. By 1971 he was consuming twenty glasses of beer per day. He said that when he went to Vietnam in July 1969 he found that alcohol was cheap and readily obtainable. He relied upon it to control his fears and to assist him in sleeping. One of the applicant's relations and a close friend had both been killed in Vietnam and so he was particularly apprehensive and aware of the dangers involved in the posting. He said that his consumption increased from the time at which he arrived in that country.

Given Mr Constable's history of alcohol consumption prior to the incident in 1969, Dowsett J reserved some criticism of the Tribunal's failure to deal with the question of clinical onset, which is a critical component of the factor relied upon.

> [15] It is accepted that he is presently suffering from alcohol abuse. However the medical evidence is somewhat unsatisfactory concerning the date of onset of that condition. The AAT did not deal with the question. In the course of cross-examination, one of the psychiatrists, Dr Mulholland said that he had a 'suspicion... that if somebody really looked at him during that time in Vietnam and, going by his history, a diagnosis of alcohol abuse could have been entertained and was – well, could have been, perhaps would have been.' Another psychiatrist, Dr Likely, saw the applicant on numerous occasions but appears not to have offered an opinion as to the date of onset of the condition. He was not cross-examined. The question is of some importance because the incident upon which the applicant relies as a severe stressor occurred at about Christmas 1969. That was slightly less than half-way through his tour of duty in Vietnam. Given the increase in consumption of liquor which apparently occurred from the beginning of his tour, there must be a good chance that such onset occurred prior to Christmas, 1969.

Error at step three

The Tribunal concluded that Mr Constable's claim failed at the third step prescribed in Deledio in that his hypothesis did not fit within the 'template' prescribed by the statement of principles. Dowsett J held the Tribunal made a '[20] a number of errors concerning the requirements of the statement of principles and the nature of the task which it was undertaking.'

> [21] My first concern [is that the Tribunal] … appears to have considered that only an event which actually caused death or serious injury or subsequent casualty clearance sufficiently close in time and space to such causation could be a relevant event. Such an approach is not prescribed by the statement of principles. The statement of principles provides that participation in, or observation of, casualty clearance, per se, may be a severe stressor. That was the applicant's case. The question was whether that event 'involved' death or serious injury or the threat thereof. The applicant claimed that, on his observations, it did so, largely because of the amount of blood which he saw. The AAT did not reject the landrover incident as a potential severe stressor because it considered that the condition of the men in question had not suggested the possibility of death or serious injury. It rather concluded that the applicant's observation of the men was at a time and place too far removed from the infliction of the relevant injuries. That approach ignored the fact that the statement of principles clearly included observation of casualty clearance as a possible severe stressor, and that such an event must often involve threat of death or serious injury.

Dowsett J also implied that the Tribunal had strayed into the realm of fact-finding at stage three.

> [22] It is also possible that the AAT simply concluded that the landrover incident was not sufficiently "traumatic" to constitute a severe stressor. If so, then that was an inference of fact involving an evaluation of the evidence, in other words "fact-finding". Deledio establishes that fact-finding occurs in step 4, but not step 3. The importance of this distinction appears from the decision in Dixon.

Further, his Honour distinguished the definition of experiencing a severe stressor in relation to satisfaction of the alcohol abuse factor, which contains the compound verb 'might evoke', from the definition of severe psychosocial stressor that is a precondition to satisfaction of an anxiety disorder factor. Dowsett J pointed out that the 'might evoke' phrase 'invites an examination of the event itself rather than its effect upon the applicant'. The Tribunal had referred to the decision of Spender J in *White*[1] '[23] suggesting that the decision establishes that an hypothesis will only satisfy the presently relevant statement of principles if the evidence points to the applicant having had such feelings' ('intense fear, helplessness or horror'). Dowsett J held that approach to be wrong.

> [23] As I have said, prima facie the statement of principles does not say that. In my view, *White* establishes no such proposition. In that case, Spender J considered claims that an anxiety disorder and alcohol abuse were war-caused. The statement of principles for anxiety disorder required that the applicant have experienced 'a severe psychosocial stressor within the two years immediately before the clinical onset of' that condition. The expression 'severe psychosocial stressor' was defined to mean 'an identifiable occurrence that evokes feelings of substantial distress in an individual, for example, being shot at, death or serious injury of a close friend or relative ...'.

[1] *White v Repatriation Commission* [2004] FCA 633; 20 *VeRBosity* 49

> [24] In connection with the claim for alcohol abuse, the applicant in *White* relied upon par 5(a) of the statement of principles for that disorder, namely 'suffering from a psychiatric disorder', rather than par 5(b) which is presently relevant. Thus, to the extent that the decision addressed stressors, it was in connection with those prescribed for anxiety disorder, not alcohol abuse. The two definitions are not identical. The requirement that a stressor evoke 'feelings of substantial distress in an individual' strongly suggests that the relevant event must have had that effect upon somebody. However use of the word 'might' in the presently relevant definition conveys the sense of a possibility rather than actuality.

The Tribunal had also referred to the decisions in *Stoddart* and *Woodward*[2], which again Dowsett J distinguished the subjective element of the test from the more objective requirement of the alcohol abuse stressor factor.

> [25][N]one of those cases supports the proposition that an applicant must claim to have felt fear, helplessness or horror at the time of the relevant event in order that it qualify as a severe stressor. Any such claim would often be little more than an ex post facto reconstruction of complex emotions, probably experienced in unfamiliar circumstances. Further, one person may describe as a feeling of fear or horror, a sensation which another might describe as 'shock' or 'feeling sick in the stomach', expressions used by the present applicant. The applicant also told Dr Likely that he felt concern for the welfare of the injured soldiers. Such a feeling might be described as a feeling of helplessness. Dr Likely considered that the applicant had identified a feeling of horror. He said in evidence that he had been shocked and felt sick in the stomach 'due to nerves'. Even if, for the purposes of step 3, it was necessary that the evidence point to the applicant's having experienced feelings of intense fear, helplessness or horror, his claim had that effect.

Dowsett J further cautioned the Tribunal for straying beyond the meaning of the words of the Statements of Principles factor:

> [26] The [Tribunal] referred to the applicant's rank and experience and of a 'reasonable person' having such 'experience and seniority'. At step 3, the AAT was obliged only to assess whether or not the applicant's claim pointed to his having experienced a severe stressor. The statement of principles says nothing about the rank or experience of the relevant applicant, nor does it speak of any notional 'reasonable' person. The question was not whether a reasonable person of the same rank and experience as the applicant would have experienced intense fear, helplessness or horror. The question was simply whether or not the applicant had identified an event which might have evoked such a reaction. Those other matters may have been relevant at step 4 but not at step 3.

Dowsett J also reserved some criticism for the Tribunal's somewhat speculative findings in relation to the effects of the stressor, which are a critical component of fulfilling the criteria required by the meaning of the stressor.

> [27] I feel compelled to add that it would be a bold step for a tribunal of fact to speculate about the effect upon a soldier of an incident involving casualties in a theatre of war, whatever his or her experience or rank. As far as I can see, there was not much material concerning the applicant's background, training and experience, including his active service, nor of how a reasonable person might react to battle casualties.

[2] *Repatriation Commission v Stoddart*. [2003] FCAFC 300, (2003) 77 ALD 67, 19 *VeRBosity* 125; *Woodward v. v. Repatriation Commission* [2003] FCAFC 160, (2003) 200 ALR 332, 37 AAR 424, 75 ALD 420, 19 *VeRBosity* 83

> In recent times, only a very small proportion of the Australian population has been exposed to the horrors of warfare, or even to the rigors and incidents of military service. It may be unwise to assume that civilian life experiences give a reliable guide to conduct in war.

Decision

The Court held the Tribunal's proceedings to have miscarried and remitted the matter to be Tribunal to be considered in accordance with the law. Mr Constable was awarded costs.

Vock v Repatriation Commission

Tamberlin J

[2005] FCA 967

14 July 2005

Social anxiety disorder – no applicable Statement of Principles – conflicting medical evidence – whether Administrative Appeals Tribunal had sufficiently set out its reasons for preferring the evidence of one doctor over another

Mr Vock appealed a decision of the Tribunal affirming that he did not suffer from social anxiety disorder.

Mr Vock submitted that the Tribunal made two substantial errors of law in reaching the decision. The first is outlined as follows:

> [4] …The first ground of appeal is that there is no discernible reference in the Reasons for Decision to the AAT having considered the evidence pursuant to s 120 upon which a conclusion favourable to the Commission can be reached. In particular, it is said that it is not possible to discern from the Reasons for Decision what considerations were taken into account by the AAT and why Dr Wainwright's diagnosis was preferred over that of Dr Danesi.

It was argued that '[5] a decision-maker is required to set out its findings of fact and to refer to the evidence which it considers material to the decision, and that this has not been done in the present case'.

The second ground of appeal was that Mr Vock was 'not sufficiently informed of the AAT's reasons for its decision.'

Ryan J's analysis of the Tribunal's decision was as follows:

> [9] At the beginning of its Reasons for Decision, the AAT posed the correct question for itself when it said that it must decide whether it is reasonably satisfied as to the matters alleged by the appellant. The AAT then referred to the written evidence and reports and oral evidence as given by Mr Vock, Dr Wainwright and Dr Danesi. The AAT then briefly set out the history of the matter. The AAT made no adverse comment in the decision as to the credibility of Mr Vock, Dr Wainwright or Dr Danesi.
>
> [10] It is apparent from the penultimate paragraph of the Reasons for Decision that the AAT preferred Dr Wainwright's evidence over that of Dr Danesi. The two diagnoses were in direct conflict. However, the decision discloses no reasons for reaching the conclusion that Dr Wainwright's diagnosis should be preferred. There is a statement that the decision-maker observed the appellant in the witness box and considered all the circumstances but these observations are not connected by any reasoning with the AAT's preference for Dr Wainwright's evidence.

Ryan J then observed that '[11] … under s 43(2B) of the AAT Act, where the AAT gives written reasons for its decision, those reasons must include its findings

on material questions of fact and a reference to the evidence or other material on which those findings were based.' In this case, Ryan J held there to be '[12] … no reasoning nexus between the AAT's observation of the appellant and the remarks which the AAT appears to have made in passing and the ultimate conclusion that the diagnosis of Dr Wainwright is to be preferred over that of Dr Danesi.'

The Court outlined the rationale for the satisfaction of the principle of providing satisfactory reasoning on substantial issues:

> [17] The rationale for the requirement that a decision-maker spell out the reasons for its conclusions on substantial issues is the need to inform the public and the parties with an immediate interest in the outcome of the proceedings of the manner in which the decision was arrived at. This, in turn, enables a determination to be made as to whether an error of law has been committed by the decision-maker. In *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65 at 88, Sheppard J points out:
>
> > 'The provision of reasons engenders confidence in the community that the tribunal has gone about its tasks appropriately and fairly. The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given the matter close enough attention or that it has allowed extraneous matters to cloud its consideration. There is yet a further purpose to be served in the giving of reasons. An obligation to give reasons imposes upon the decision-maker an intellectual discipline. The tribunal is required to state publicly what its reasoning process is.'

Ryan J further noted that '[19] the question is not whether the reasons that were given by the AAT were unsound but rather whether it is possible to ascertain from the Reasons for Decision the reasons or the evidence that led to the AAT's finding that the evidence of Dr Wainwright was to be preferred.'

In so finding, Ryan J allowed the appeal and remitted the matter to the Tribunal to be determined according to law.

Blair v Repatriation Commission

Heerey J

[2005] FCA 1076

8 August 2005

Whether Lyme disease caused by operational service – hypothesis put forward that applicant bitten by tick, tick carried pathogens – whether Tribunal introduced burden of proof by requiring evidence of facts for hypothesis to be 'reasonable'

Mr Blair served in the Navy from January 1965 and April 1969 with a number of periods of operational service while serving on HMAS *Vendetta*.

While on a shore excursion in Borneo in 1965, Mr Blair got minute insects all over his hands which prickled him severely. Nine days after this incident he fell ill with flu like symptoms and was diagnosed with viremia.

The hypothesis raised by Mr Blair is summarised as follows:

> [14] The Tribunal found that on the whole of the material a hypothesis had been advanced connecting the Lyme disease to the applicant's eligible service. As characterised by the Tribunal that hypothesis was that Lyme disease is spread by ticks carrying various types of borrelia including borrelia afzelii. The applicant was at

> some stage exposed to an afzelii-like organism, ticks carrying afzelii may have been in Borneo when the applicant was there during his operational service, the applicant may have been bitten by a tick carrying borrelia afzelii and as a result the applicant may have contracted Lyme disease.

The conclusion of the Tribunal in relation to the hypothesis was as follows (at [20]):

> 52. Accepting the evidence before me and without considering issues of proof, I find on all of the evidence, that there is no sound basis for the hypothesis advanced on behalf of the applicant. There is no evidence that Borellia Afzelii were actually present in Borneo at the relevant time and no evidence that the applicant was bitten by a tick during the excursion, let alone evidence that a tick was present on his body for the length of time necessary for the disease to be transmitted.
>
> 53. The hypothesis advanced in this case is based merely on the possibility that the applicant may have been bitten by a tick carrying Lyme disease during the one day recreational excursion in Borneo in 1965. The facts as advanced to [sic] not provide the essential foundation for the hypothesis.
>
> 54. As was said *in Repatriation Commission v Bey*[1]:
>
> > 'A reasonable hypothesis involves more than a mere possibility. It is an hypothesis pointed to by the facts ...'.
>
> 55. I therefore find that the hypothesis advanced in this case is not a reasonable hypothesis within the meaning of s 120(3) of the Act."

Grounds of Appeal

Mr Blair argued three grounds of appeal.

First, it was argued the Tribunal erred by '[21] requiring the applicant to establish as a fact one or more of the matters giving rise to the hypothesis, thereby introducing a burden or onus of proof.

Secondly, the Tribunal '[22] ought to have found that a reasonable hypothesis existed upon the evidence and thereafter allowed the claim to succeed unless the respondent established that one or more facts necessary to support the claim were disproved beyond reasonable doubt or that the respondent established that the truth of a fact inconsistent with the hypothesis was proved beyond reasonable doubt.'

Finally, the third ground '[23] was that by finding that the existence of a reasonable hypothesis required evidence of the presence of borrelia afzelii in Borneo at the relevant time and that there was no evidence the applicant was bitten by a tick during his operational service the Tribunal treated the hypothesis as a mere possibility rather than an hypothesis pointed to by the facts.'

Conclusion on the appeal

The Court dismissed the grounds of appeal as follows:

> [24] Whether the material raises a 'reasonable hypothesis' for the purposes of s 120(3) is a question of fact for it involves no more than a determination whether a hypothesis in connection is reasonable: Bey at 373.
>
> [25] The Tribunal did not disregard that mandate. It was required to examine the evidence and did so. As the Full Court said in *Repatriation Commission v Deledio* (1998) 83 FCR 82 at 93, it is impermissible merely to assume or assert the facts which are said to found the hypothesis. For the reasons it gave, it was quite open for the Tribunal to conclude that critical elements of the hypothesis, namely that borrelia afzelii were present in Borneo and that the applicant was bitten by a tick, did not pass beyond the level of mere

[1] *Repatriation Commission v Bey* [1997] FCA 1347, (1997) 149 ALR 721, 47 ALD 481, 26 AAR 298, 13 *VeRBosity* 117

> speculation. Indeed as to the latter element, there was positive adverse evidence and inferences pointing to the contrary.

[26] Put another way, the hypothesis was shown to be contrary to known scientific facts: *Byrnes v Repatriation Commission* (1993) 177 CLR 564 at 571. The Tribunal was entitled to find that the evidence showed that the removal of the insects and the lack of the [relevant] symptom pointed against the Borneo excursion being the occasion on which the Lyme disease was contracted.

Formal decision

The appeal was dismissed with Mr Blair ordered to pay costs.

Johnson v Veterans' Review Board

Lander J

[2005] FCA 1136

19 August 2005

Application for review of a decision of a Deputy President of the Administrative Appeals Tribunal (AAT) dismissing an application for review of a decision of the Registrar of the VRB – where decision of the Registrar had previously been reviewed – AAT's power to review a decision more than once

Background

Mr Johnson had initially made a claim under the VEA on 20 March 1996. The claim was rejected, and he lodged an application for review before the VRB on 28 April 1996. On 19 October 1998, a registrar of the VRB sent a notice to the applicant under s 155AA(4). Such a notice requires the applicant to lodge a reasonable explanation within 28 days why the application should not be dismissed.

The VRB received a reply on 22 October 1998, and the Registrar granted an Extension Notice under s 155AA(6). On 4 February 1999, the Registrar sent the applicant a notice under s 155AB(4), which requires a written statement indicating that the applicant is either ready to proceed to a hearing, or if not ready, an explanation of why not.

On 11 March 1999, the Registrar dismissed the application for review under s 155AB(5), which requires the Principal Member to dismiss the application if a written statement is not received.

Mr Johnson appealed the dismissal to the Tribunal, and following the granting of an extension of time, the Tribunal affirmed the Registrar's decision to dismiss the application on 12 April 2000.

During the period of appeal to the Tribunal, Mr Johnson lodged a fresh claim with the Commission. On 30 September 1999, the Commission accepted post-traumatic stress disorder as war-caused. Later, in September 2000 and April 2001, two other conditions were accepted and Mr Johnson's pension was increased to the special rate from the date of acceptance of the PTSD.

The applicant then commenced action in The Federal Court on 23 August 2002 seeking to challenge the Commission's decision of 28 March 1996. Essentially, Mr Johnson's aim was to compensate for the period between his initial claim and his ultimate success in being awarded the special rate. Landers J:

> [20] The applicant waited five years for the pension which he first sought on 20 March 1996; although the pension, when granted, was backdated until March 1999. Thus, he did not receive the benefit of any pension between December 1995 (the date of the

> application for a pension) and March 1999. The applicant contended that if the Registrar had not decided to dismiss the applicant's application for review on 11 March 1999 he would have received his benefits in December 1995. The respondent does not accept that contention, even if the decision to dismiss the applicant's application for review were set aside.

The claim came before Mansfield J, and Landers J characterised the grounds of appeal as follows:

> [33] As part of that claim, the applicant contended that the Registrar's dismissal of his application for review on 11 March 1999 was invalid because the Principal Member who had delegated his power to the Registrar was no longer the Principal Member as at the date of the dismissal. He contended that the new Principal Member, Mr Rolfe, who had been appointed on 8 April 1997, had not made a delegation pursuant to s 166.
>
> [34] In the alternative, he contended that the delegation made by Mr Gallagher was precise in its terms and required the Registrar to only exercise the delegated powers in accordance with directions issued by Mr Gallagher. He contended that Mr Rolfe had given subsequent directions which were inconsistent with those given by Mr Gallagher. The Registrar had acted on the subsequent directions and therefore not acted in accordance with the delegation made to him.

Mansfield J dismissed the appeal, holding that delegations continue to operate when the delegator ceases to hold office. Mansfield J distinguished the relationship of delegator and delegate to that of principal and agent, and found nothing in the language of the relevant sections to support the construction that the Principal Member's powers and functions should lapse when the delegator is replaced.

Mr Johnson appealed Mansfield J's decision to the Full Court but the appeal was dismissed on 9 May 2003.

Mr Johnson then wrote to the Principal Member of the VRB in November 2003 seeking reinstatement of his application. The VRB replied to the effect that it was not possible to reinstate the application and drew attention to Mansfield J's judgment. Mr Johnson further lodged a request for information from the VRB, in particular, 'the document of authority for Mr D Smith, Registrar SA, to use in his signature block, "Delegate of the Principal Member of the Board" on 11 March 1999.' The VRB replied by enclosing Principal Member Gallagher's delegation of 17 December 1992, along with the dismissal procedures direction issued by him on 21 July 1992 and a copy of the Operations Manual issued by Principal Member Rolfe on 1 March 1999.

On 30 December 2003, the VRB received a document entitled 'Appeal against illegal correspondence', alleging that the 'Registrar in his capacity as delegate of the Principal Member, for which no delegation or authority existed on 11 March 1999, misled the AAT'.

The VRB affirmed by correspondence that is would not be reinstating the application, and Mr Johnson sought review by the Tribunal.

The arguments raised by Mr Johnson were the same as those put before Mansfield J.

The Tribunal dismissed the application as frivolous and vexatious for three reasons, summarised here by Lander J:

> [51] First, because it was not competent for him to reopen the determination made by the Tribunal on 12 April 2000. Secondly, even if it were, it would be futile to set aside the decision by the Registrar to dismiss the application under s 155AB(5). Thirdly, the guidelines issued by Principal

Member Gallagher were not relevant to the exercise of the power by the Registrar under s 155AB(5).

Court's decision

Lander J went on to endorse the Tribunal's decision:

> [54] In my opinion, the Deputy President's decision was right for the reasons he gave. First, the application was misconceived. The applicant had previously challenged the Registrar's decision and action to dismiss the applicant's application for review on 11 March 1999. That application had failed and, although an appeal was lodged, the appeal was discontinued. The Deputy President held that the power which is given to the AAT to review a decision-maker's decision can be exercised once, and once only. In those circumstances, there was no power in the AAT to further review that same decision.

Lander J noted that the consequences of setting aside the decision of the Registrar to dismiss the application would require the Registrar to be '[65] under an immediate obligation, by virtue of the provisions of s 155AB(5), to dismiss the applicant's application for review'.

As a result, Lander J held the application to be futile, even if the appeal to the Court was successful.

Setting aside the futility of the application, Lander J held there to be nor error of law and dismissed the appeal.

Somerset v Repatriation Commission

Greenwood J

[2005] FCA 1399

30 September 2005

Entitlement – Meniere's disease – application of Statement of Principles with reasonable satisfaction standard of proof – inability to obtain appropriate clinical management.

Background

Mr Somerset claimed his Meniere's disease was caused by being 'blown up' by an exploding half-stick of gelignite during training in World War 2. The Tribunal had rejected the claim on the basis that clinical onset of the disease did not occur until after the veteran's service and so the only SoP factor, 'inability to obtain appropriate clinical management', could not possibly apply.

Grounds of appeal

The Court formulated the basis of the appeal as follows:

- whether the Tribunal applied the correct legal tests to the alleged connection between the onset of the effects of Meniere's disease and his service, and
- whether there was material before the Tribunal capable of supporting its decision.

As the applicant had no legal representative, the Court explained that the question before it was whether the Tribunal had made an error of law rather than whether legitimately different views might be taken based on the factual matters before the Tribunal. The Court explained that there may be an error of law if the Tribunal has applied the wrong

test, failed to apply the Statement of Principles, or came to a decision based on evidence that was incapable of supporting the conclusion reached.

Consideration

The Court noted that the claim could succeed only if the material raised a connection between the disease and some particular service rendered by the veteran, and if a Statement of Principles upheld a contention that the disease is, on the balance of probabilities, connected with that service.

The Court said:

> [23] The Statement of Principles is designed to set out known or proved medical-scientific facts against which the veteran's claim must be measured. …

The Court then set out the steps to be applied in deciding cases to which a Statement of Principles applies under s120B:

> [28] [T]he AAT must first determine whether to its reasonable satisfaction the material put before it raises a connection between Mr Somerset's disability and his period of service and that it must then go on to decide whether the applicable Statement of Principles upholds the contention that the veteran's disability is, on the balance of probabilities, connected with his service.

In relation to the first step, the Court said there must be evidence '[30] … raising or demonstrating a connection' between the claimed disability and service. The Court noted that after the Tribunal had evaluated all the medical reports, it had concluded that the weight of evidence supported the view that a noise trauma such as had occurred in the veteran's case is not a recognised cause of the onset or development of Meniere's disease. The Tribunal was therefore not satisfied that the material raised a causal connection.

The Court noted that, having found the material did not raise a causal connection, the Tribunal then considered whether he suffered from Meniere's disease during his service, and so whether a connection might be raised in relation to the worsening of Meniere's disease by service.

The Tribunal had found that as the clinical onset of Mr Somerset's Meniere's disease was after the end of his service, the 'inability to obtain appropriate clinical management' factor, which can only apply to worsening, could not apply.

The Court discussed this factor, saying that '[36] in some circumstances, an inability to obtain appropriate clinical management for a disease is a function of a failure to diagnose the existence of the condition.' However, in such circumstances, 'the factor that must exist might not be demonstrated simply because the symptoms or effects of the disease were not properly identified as referable to the disease.' In other words, while a failure to properly diagnose might cause an inability to obtain appropriate clinical management, a failure to diagnose does not mean that there in fact was an inability to obtain appropriate clinical management. There must be evidence of such an inability occurring in the particular case.

Decision and orders

The Court held that the Tribunal had not made an error of law in the approach it had adopted, nor was its conclusion unsupported by any evidence.

The Court dismissed the appeal, but did not award costs.

On a separate issue, the Court refused a motion to adjourn the hearing of the appeal. The applicant had argued that the Tribunal was to hear a separate claim concerning different disabilities shortly after the date set for the Court's hearing, and that if that application were

successful, there would be no need to proceed with the Federal Court litigation. That motion to adjourn was rejected on the basis that no purpose would be served by adjourning the Court hearing which dealt with a quite a specific question and the issues could not be influenced by any decision the Tribunal might make.

Editor: This case clearly sets out the steps to be applied in a case to which s 120B applies. The Court expressly confirmed the decision-making process undertaken by the Tribunal, which involved looking for any connection, whether supported by a SoP or not in step 1 (equivalent to step 1 in the *Deledio* process). In this case, the Court noted and appeared to endorse the fact that the Tribunal had considered the contention that a blast might have caused the disease, even though there is no such causal factor in the SoP. This is because all connections raised by the evidence must be considered at step 1. Step 2 is the identification of a relevant SoP, and it is not until step 3 – consideration of the contention of a connection with service on the balance of probabilities – that the decision-maker considers the factors in the SoP. At step 3 the decision-maker must see whether the SoP upholds the connection that has been 'raised or demonstrated' by the material to the decision-maker's reasonable satisfaction.

Statements of Principles issued by the Repatriation Medical Authority

July – September 2005

Number of Instrument	Description of Instrument
21 of 2005	Revocation of Statement of Principles (Instrument No 50 of 1999) and determination of Statement of Principles concerning **seborrhoeic dermatitis** and death from seborrhoeic dermatitis.
22 of 2005	Revocation of Statement of Principles (Instrument No 51 of 1999) and determination of Statement of Principles concerning **seborrhoeic dermatitis** and death from seborrhoeic dermatitis.
23 of 2005	Revocation of Statement of Principles (Instrument No 138 of 1996) and determination of Statement of Principles concerning **asbestosis and death from asbestosis.**
24 of 2005	Revocation of Statement of Principles (Instrument No 139 of 1996) and determination of Statement of Principles concerning **asbestosis and death from asbestosis.**
25 of 2005	Amendment of Statement of Principles (Instrument No 261 of 1995) and determination of Statement of Principles **ankylosing spondylitis and death from ankylosing spondylitis.**
26 of 2005	Revocation of Statement of Principles (Instrument No. 262 of 1995) and determination of Statement of Principles concerning **ankylosing spondylitis and death from ankylosing spondylitis.**
27 of 2005	Amendment of Statement of Principles (Instrument No. 34 of 2001) and determination of Statement of Principles concerning chrondromalacia patellae.
28 of 2005	Revocation of Statement of Principles (Instrument No. 84 of 1999; No. 69 of 2002) and determination of Statement of Principles concerning **malignant neoplasm of the prostate and death from malignant neoplasm of the prostate.**
29 of 2005	Revocation of Statement of Principles (Instrument No. 85 of 1999; No. 70 of 2002) and determination of Statement of Principles concerning **malignant neoplasm of the prostate and death from malignant neoplasm of the prostate.**
30 of 2005	Amendment of Statement of Principles (Instrument No. 78 of 1999; No. 11 of 2001) concerning **polycythaemia vera.**

Copies of these instruments can be obtained from:

- **Repatriation Medical Authority, GPO Box 1014, Brisbane Qld 4001**
- **RMA Website: *http://www.rma.gov.au/***

Conditions under Investigation by the Repatriation Medical Authority

as at 30 September 2005

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 stress disorder	[*Instrument Nos 5/99 & 6/99 as amended by 56/99 & 57/99*]	7-09-05
Acute sprains and acute strains	[*Instrument Nos. 50/94 & 51/94*]	19-11-03
Albinism	[*Instrument Nos. 49/95 & 50/95*]	15-06-05
Alkaptonuria	[*Instrument Nos. 13/95 & 14/95 as amended by 188/95 & 189/95*]	15-06-05
Alpha-1 antitrypsin deficiency	[*Instrument Nos. 19/95 and 20/95*]	15-06-05
Anxiety disorder	[*Instrument Nos. 1/00 & 2/00*]	1-09-04
Binge eating disorder	—	15-06-05
Bipolar disorder	[*Instrument Nos 128/96 & 129/96*]	24-03-04
Caisson disease	[*Instrument Nos 147/95 & 148/95*]	31-03-04
Carcinoma in situ of the skin	—	7-09-05
Cardiomyopathy	[*Instrument Nos 19/98 & 20/98 as amended by 22/02 & 23/02*]	2-03-05
Cataract, congenital	[*Instrument Nos 237/95 & 238/95 as amended by 12/03 & 13/03*]	15-06-05
Cerebrovascular accident	[*Instrument Nos 30/02 & 31/02 as amended by 57/03 & 58/03*]	15-06-05
Cervical spondylosis	[*Instrument Nos 50/02 & 51/02 as amended by 64/02, 81/02 & 82/02*]	25-02-04
Charcot-Marie-Tooth disease	[*Instrument Nos 51/95 & 52/95*]	15-06-05
Chicken pox	[*Instrument Nos 58/94 and 59/94 of 1994, as amended by Instrument Nos. 186/95 and 187/95)*.	15-06-05
Depressive disorder	[*Instrument Nos. 58/98 & 59/98*]	1-09-04
Dental caries	[*Instrument Nos. 366/95 & 367/95*]	1-09-04
Dyspepsia	—	7-09-05
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
Gaucher's disease	[*Instrument Nos. 21/95 & 22/95*]	15-06-05
Haemophilia	[*Instrument Nos. 53/95 & 54/95 as amended by 215/95 & 216/95*]	15-06-05

Description of disease or injury	**[*SoPs under consideration*]**	**Gazetted**
Hallux valgus, acquired	[*Instrument Nos. 47/98 & 48/98*]	15-06-05
Hallux valgus, congenital	[*Instrument Nos. 300/95 & 301/95*]	15-06-05
Heart block (complete)	—	15-06-05
Hepatitis A	[*Instrument Nos 41/94 & 42/94*]	15-06-05
Hepatitis E	[*Instrument Nos 46/94 & 47/94*]	15-06-05
Hereditary spherocytosis	[*Instrument Nos 57/95 & 58/95*]	15-06-05
Herpes zoster	[*Instrument Nos 60/94 & 61/94*]	15-06-05
Horseshoe kidney	[*Instrument Nos 17/95 & 18/95*]	15-06-05
Huntington's chorea	[*Instrument Nos 107/95 & 108/95*]	15-06-05
Idiopathic fibrosing alveolitis	[*Instrument Nos 15/98 & 16/98*]	15-06-05
Intervertebral disc prolapse	[*Instrument Nos 130/96 & 131/96 as amended by 92/97 & 93/97*]	23-06-04
Ischaemic heart disease	[*Instrument Nos 53/03 & 54/03 as amended by 9/04 & 10/04*]]	15-06-05
Loss of teeth	[*Instrument Nos 5/03 & 6/03*]	2-03-05
Lumbar spondylosis	[*Instrument Nos 46/02 & 47/02 as amended by 77/02 & 78/02*]	25-02-04
Macular branch vein occlusion	—	2-03-05
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 pancreas	[*Instrument Nos 55/97 & 56/97 as amended by 20/02 & 21/02*]	20-08-03
Malignant neoplasm of the thyroid gland	[*Instrument Nos 33/98 & 34/98*]	16-07-03
Marfan syndrome	[*Instrument Nos 9/95 & 10/95*]	15-06-05
Meniere’s disease	[*Instrument Nos 77/01 & 78/01*]	5-05-04
Motor neuron disease	[*Instrument Nos 65/01 & 66/01*]	5-05-04
Multiple osteochondromatosis	[*Instrument Nos 1/99 & 2/99*]	15-06-05
Myasthenia gravis	[*Instrument Nos 263/95 & 264/95*]	15-06-05
Myelodysplastic disorder	[*Instrument Nos 15/00 & 16/00*]	20-08-03
Myopia, hypermetropia and astigmatism	[*Instrument Nos 23/99 & 24/99*]	15-06-05
Narcolepsy	—	28-01-04
Osteoarthrosis	[*Instrument Nos.81/01 & 82/01*]	15-10-03
Osteogenesis imperfecta	[*Instrument Nos. 11/95 & 12/95*]	15-06-05

Description of disease or injury	**[*SoPs under consideration*]**	**Gazetted**
Osteopaenia	[*Instrument Nos. 67/02 & 68/02 as amended by 25/04*]	20-07-05
Osteoporosis	[*Instrument Nos. 67/02 & 68/02 as amended by 25/04*]	1-09-04
Paget's disease of bone	[*Instrument Nos.15/96 & 16/96*]	28-01-04
Parkinson's disease	[*Instrument Nos. 36/02 & 37/02*]	2-03-05
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
Polycystic kidney disease	[*Instrument Nos. 3/99 & 4/99 as amended by 54/99 & 55/99*]	1-09-04
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
Rotator cuff syndrome	[*Instrument Nos. 83/97 & 84/97*]	19-11-03
Seborrhoeic keratosis	—	7-09-05
Secondary parkinsonism	[*Instrument Nos 38/02 & 39/02*]	2-03-05
Soft tissue sarcoma	[*Instrument Nos 23/01 & 24/01*]	20-08-03
Spina bifida	[*Instrument Nos 59/95 & 60/95*]	15-06-05
Spondylolisthesis & spondylolysis	[*Instrument Nos 15/97 & 16/97*]	5-03-03
Steatohepatitis	—	20-07-05
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
Systemic Lupus Erythematosus	—	28-09-05
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
Vascular dementia	—	13-04-05
Von Willebrand's disease	[*Instrument Nos. 61/95 & 62/95*]	15-06-05
Wilson's disease	[*Instrument Nos. 15/95 & 16/95*]	15-06-05

AAT and Court decisions – July to September 2005

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

Allowances and benefits

Recreational transport allowance
- powers of locomotion
  Tiplady, L
  [2005] AATA 755 8 Aug 2005
- whether incapacity similar in effect or severity to amputation
  Tiplady, L
  [2005] AATA 755 8 Aug 2005

Application for Review

dismissal of VRB application
whether s155AA notice was valid
  Rodda, N
  [2005] AATA 655 8 July 2005
  Andrews, E
  [2005] AATA 656 8 July 2005
whether exercise of dismissal power valid
  Johnson (Lander J)
  [2005] FCA 1136 19 Aug 2005

Circulatory disorder

atrial fibrillation
- clinical onset
  Wiseman, H (Army)
  [2005] AATA 793 19 Aug 2005
- smoking
  Wiseman, H (Army)
  [2005] AATA 793 19 Aug 2005
- chronic bronchitis
  Wiseman, H (Army)
  [2005] AATA 793 19 Aug 2005

hypertension
- alcohol
  Patterson, D M
  [2005] AATA 758 9 Aug 2005
- obesity
  Patterson, D M
  [2005] AATA 758 9 Aug 2005
- salt intake
  Patterson, D M
  [2005] AATA 758 9 Aug 2005

ischaemic heart disease
- smoking
  Chasemore, N G
  [2005] AATA 754 8 Aug 2005

Death

Alzheimer's disease
  Orr, N
  [2005] AATA 751 8 Aug 2005

asbestosis
- material contribution from service
  Sliver, K (RAAF)
  [2005] AATA 779 16 Aug 2005

car accident
- hypothesis of death from myocardial infarction
  Baker, I F
  [2005] AATA 733 29 July 2005

cardiomyopathy
- alcohol
  Beith, B (RAAF)
  [2005] AATA 948 29 Sep 2005
- whether alcohol consumption attributable to service
  Beith, B (RAAF)
  [2005] AATA 948 29 Sep 2005

cerebrovascular accident
- metastasised lung cancer
  - smoking
    Hadfield, M
    [2005] AATA 730 1 Aug 2005
- hypertension
  - smoking
    Hadfield, M
    [2005] AATA 730 1 Aug 2005

cerebrovascular dementia
- no evidence
  Orr, N
  [2005] AATA 751 8 Aug 2005

chronic bronchitis
- smoking
  Patterson, M
  [2005] AATA 770 12 Aug 2005

Eligible service

qualifying service
- Horn Island
  Gilgen, H (RAAF)
  [2005] AATA 856 2 Sep 2005

- Mulgrave Island
  Mullen, D W
  [2005] AATA 781 16 Aug 2005
- period of hostilities
  - Northern Ireland
    Gorham, M P (British Army)
    [2005] AATA 878 9 Sep 2005
- whether incurred danger from hostile forces of the enemy
  - Borneo
    Gorham, M P (British Army)
    [2005] AATA 878 9 Sep 2005

Endocrine and metabolic disorders

diabetes mellitus
- smoking
  Wiseman, H (Army)
  [2005] AATA 793 19 Aug 2005

Entitlement and liability

arose out of or attributable to
- defence service
  Roncevich (McHugh, Gummow, Kirby, Callinan, Heydon JJ)
  [2005] HCA 40 10 Aug 2005
- meaning
  Roncevich (McHugh, Gummow, Kirby, Callinan, Heydon JJ)
  [2005] HCA 40 10 Aug 2005

serious default or wilful act
- serious breach of discipline
  - stealing goods
    Spek, T (Army)
    [2005] AATA 756 9 Aug 2005
- wilful act
  Spek, T (Army)
  [2005] AATA 756 9 Aug 2005

Evidence and Proof

insufficient
- no reasons for preference of competing evidence
  Vock (Ryan J)
  [2005] FCA 967 14 July 2005

application of the *Deledio* steps
- assessing reasonableness of hypothesis
  Blair (Heerey J)
  [2005] FCA 1076 8 Aug 2005

credibility
- inconsistent account of events
  Furlett, D J (Army)
  [2005] AATA 728 29 July 2005
  Pattermore, L (RAAF)
  [2005] AATA 737 3 Aug 2005
  Balloch, D (Navy)
  [2005] AATA 782 16 Aug 2005
  Thomas, R (RAAF)
  [2005] AATA 947 29 Sep 2005

General Rate and EDA

Guide to Assessment (1998) (GARP)
- Chapter 4 - emotional & behavioural
  Eden, W J (Army)
  [2005] AATA 901 15 Sep 2005
- Chapter 22 - lifestyle
  Eden, W J (Army)
  [2005] AATA 901 15 Sep 2005

Genitourinary disorder

impotence
- smoking
  Dawson, K (Navy)
  [2005] AATA 718 29 July 2005
- suffered from a blunt or penetrating trauma
  Dawson, K (Navy)
  [2005] AATA 718 29 July 2005

Hearing

Meniere's disease
- inability to obtain appropriate clinical management
  Jakab, S G (Navy)
  [2005] AATA 689 21 July 2005
  Somerset (Greenwood J)
  [2005] FCA 1399 30 Sep 2005
- trauma
  Somerset (Greenwood J)
  [2005] FCA 1399 30 Sep 2005

Musculoskeletal disorder

bone marrow
- alcohol affected
  - no incapacity found
    Higham, AC (Army)
    [2005] AATA 719 29 July 2005

osteoarthritis
- clinical onset
  Haskings, H (Army)
  [2005] AATA 815 25 Aug 2005
  Paul, C H (Army)
  [2005] AATA 933 27 Sep 2005
- congenital bilateral talipes equino varus
  - disordered joint mechanics
    MacGregor, J (Army)
    [2005] AATA 769 11 Aug 2005

- suffering a trauma to the affected joint
  - motor vehicle accident
    Pickering, J (Army)
    [2005] AATA 736 3 Aug 2005
- chondromalacia Patellae
  Tolhurst, A J (Navy)
  [2005] AATA 739 4 Aug 2005

Neurological disorder

multiple sclerosis
- inability to obtain appropriate clinical management
  Shakespeare, M (RAAF)
  [2005] AATA 777 15 Aug 2005

Practice and Procedure

Administrative Appeals Tribunal
- remitter from Federal Magistrates Court
  - ambiguity in consent order for remittal
    Davies, B A
    [2005] AATA 935 27 Sep 2005
  - whether matter or case remitted
    Davies, B A
    [2005] AATA 935 27 Sep 2005

Psychiatric disorder

alcohol abuse
- diagnosis
  Malady, M P (Army)
  [2005] AATA 713 28 July 2005
  Lambert, G (Army)
  [2005] AATA 883 12 Sep 2005
  Lees, A (Navy)
  [2005] AATA 905 16 Sep 2005
- psychiatric disorder
  Malady, M P (Army)
  [2005] AATA 713 28 July 2005
- stressor
  - experiences on arrival in East Timor
    Malady, M P (Army)
    [2005] AATA 713 28 July 2005
  - living close to a fuel depot
    Thomas, R (RAAF)
    [2005] AATA 947 29 Sep 2005
  - maintenance of spotlight
    Watkins, B M (Navy)
    [2005] AATA 792 19 Aug 2005
  - seeing ashes of deceased
    Watkins, B M (Navy)
    [2005] AATA 792 19 Aug 2005

anxiety disorder
- clinical onset
  Spek, T (Army)
  [2005] AATA 756 9 Aug 2005
  Thomas, R (RAAF)
  [2005] AATA 947 29 Sep 2005
  Outhred, N R (Army)
  [2005] AATA 961 29 Sep 2005
- diagnosis
  Lees, A (Navy)
  [2005] AATA 905 16 Sep 2005
  - clinically insignificant
    Anderson, L (RAAF)
    [2005] AATA 869 7 Sep 2005
- major illness or injury
  Dawson, K (Navy)
  [2005] AATA 718 29 July 2005
  - acute penile dysfunction
    Thomas, R (RAAF)
    [2005] AATA 947 29 Sep 2005
- stressor
  - experience of near drowning
    Outhred, N R (Army)
    [2005] AATA 961 30 Sep 2005
  - fear of ambush
    Outhred, N R (Army)
    [2005] AATA 961 30 Sep 2005
  - guarding prisoners
    Dawson, K (Navy)
    [2005] AATA 718 29 July 2005
  - inadequate treatment of kidney condition
    Outhred, N R (Army)
    [2005] AATA 961 30 Sep 2005
  - military investigation
    Spek, T (Army)
    [2005] AATA 756 9 Aug 2005
  - priming hand grenades
    Dawson, K (Navy)
    [2005] AATA 718 29 July 2005
  - scare charges
    Dawson, K (Navy)
    [2005] AATA 718 29 July 2005

depressive disorder
- clinical onset
  Pattermore, L (RAAF)
  [2005] AATA 737 3 Aug 2005
  Spek, T (Army)
  [2005] AATA 756 9 Aug 2005
- diagnosis
  Spek, T (Army)
  [2005] AATA 756 9 Aug 2005

Remunerative work and Special Rate

capacity to undertake remunerative work
Tolhurst, A J (Navy)
[2005] AATA 739 4 Aug 2005

ceased to engage in remunerative work
- reason for ceasing
  - voluntary redundancy
Thompson, K
[2005] AATA 675 15 July 2005

employment
- barman
Siemsen, R A E
[2005] AATA 682 19 July 2005
- caretaker
Bell, T C (Army)
[2005] AATA 717 29 July 2005
- manual labourer
Thompson, K
[2005] AATA 675 15 July 2005
- truck driver
Siemsen, R A E
[2005] AATA 682 19 July 2005

remunerative work
- kind of remunerative work previously undertaken not just last job - s24(1)(c)
Siemsen, R A E
[2005] AATA 682 19 July 2005

whether prevented by war-caused disabilities alone
- effect of non accepted conditions
Siemsen, R A E
[2005] AATA 682 19 July 2005
  - labour market conditions
Bell, T C (Army)
[2005] AATA 717 29 July 2005
  - non accepted back trouble
Thompson, K
[2005] AATA 675 15 July 2005
  - osteoarthritis
Bell, T C (Army)
[2005] AATA 717 29 July 2005

Respiratory disorder

chronic bronchitis
- smoking
Bowden, B (Navy)
[2005] AATA 687 21 July 2005
Patterson, M
[2005] AATA 770 12 Aug 2005

Service Pension

assets test
- property valuation
Tsourounakis, E & V
[2005] AATA 892 15 Sep 2005
- attribution of assets of private companies
Kimpton, P & B
[2005] AATA 916 20 Sep 2005

Spinal disorder

diffuse Idiopathic Skeletal Hyperstosis
- no known cause
Baker, K W (Navy)
[2005] AATA 922 22 Sep 2005

lumbar spondylosis
- clinical onset
Wiseman, H (Army)
[2005] AATA 793 19 Aug 2005
- diagnosis
Baker, K W (Navy)
[2005] AATA 922 22 Sep 2005
- lifting
Wiseman, H (Army)
[2005] AATA 793 19 Aug 2005
- trauma
Paul , C H (Army)
[2005] AATA 933 27 Sep 2005
  - falling off a ladder
Klahn, E (Navy)
[2005] AATA 857 2 Sep 2005

Words and phrases

arose out of or attributable to
Roncevich (McHugh, Gummow, Kirby, Callinan, Heydon JJ)
[2005] HCA 40 10 Aug 2005