VeRBosity

Volume 23 No. 2

July – December 2007

Contents

Editor's notes

Recently, the Federal Court commented on the difficulties of interpreting legislation in the Veterans' jurisdiction. In *Byrne*, a case reported in this edition, Justice Gyles said:

> [1] One can only have sympathy for the members of the Administrative Appeals Tribunal … who are called upon to apply ss 120, 120A and 120B of the *Veterans' Entitlements Act 1986* (Cth) … as they have been interpreted by the authorities of the High Court and this Court. The reasoning required would confuse most philosophers …

To assist you in navigating the complexities of our jurisdiction, this edition of *VeRBosity* includes a helpful guide to war widows' pensions.

On a personal note, Bruce Topperwien recently left the VRB after 9 years as its Executive Officer, including 5 months as Acting Principal Member to take up a legal position with DVA. Bruce was with the VRB at its inception in 1985 and has made a significant contribution to both the VRB and the veteran community through his innovation, commitment to continuing education of staff, members and advocates, involvement with the Training and Information Program (TIP), editorship of and contributions to *VeRBosity*, papers and articles, and the VRB website. We wish Bruce well in his new role with DVA.

Trina McConnell and Katrina Harry
Editors

VRB welcomes new members

The Minister for Veterans' Affairs, Bruce Billson, announced the appointment of eight new Members to the Veterans' Review Board (VRB) on Monday 1 October 2007. Mr Billson said :

'These new appointees have the experience and knowledge to make an effective contribution to the VRB,' Mr Billson said. 'They include a mix of strong military backgrounds, extensive legal experience, and an understanding of merits review procedures that is necessary in such a position.

'The addition of new Members will ensure that veterans who choose to review the outcome of a claim will continue to receive the highest standard of procedural fairness,' Mr Billson said.

'I congratulate the new Members of the Board, and welcome the experience and knowledge they will bring to the VRB,' Mr Billson said. The appointments are:

Mr Ivan Cahill

Senior full-time Member (ACT)

Mr Cahill is a graduate of the University of Queensland, Macquarie University and the Royal Military College Duntroon, and was most recently the Director of Litigation with the Department of Veterans' Affairs. He previously served in the ADF for 25 years, including two tours of duty in Vietnam and one in Papua New Guinea.

Mr Edward Bentram Mark Jolly

Senior part-time Member (SA)

Mr Jolly has a Masters in Law from Melbourne University, and is currently a Barrister in private practice. He served as a Legal Officer in the Australian Army from 1993-1998 and has retained his commission as a Major.

Ms Andrea Marilyn Hall-Brown

Senior part-time Member (QLD)

Ms Hall-Brown is a graduate in Laws and Science, and is currently a Barrister in private practice. She is a former senior member of the Veterans' Review Board, having held the position from 1998-2006.

Ms Amanda MacDonald

Senior part-time Member (NSW)

Ms MacDonald has a Masters of Administrative Law and Policy from the University of Sydney. She is currently a Member of the Migration Review and Refugee Review Tribunals, after acting as a Senior Member of those Tribunals from 2005-2006.

Mr Gary Charles Barrow

Part-time Member (WA)

Mr Barrow served as a permanent officer in the Royal Australian Navy from 1960-1986. In 1983 he graduated from the University of Sydney Law School, and also qualified as a Legal Officer in the RAN. He has been in private practice as a solicitor since 1986 and has continued to serve as a Naval Reserve officer.

Mr Graham Michael Barter

Part-time Member (NSW)

Mr Barter is a Barrister in private practice currently on full time military duty with the Command Legal Office, Land Headquarters. He is a graduate of the University of New South Wales, and served in the Australian Army Legal Corps from 1981-1989, and again from 1999.

Mr Andrew Harding Braban

Part-time Member (QLD)

Mr Braban has a Masters in Law from the United States Army Judge Advocate Generals School, and previously served as Chief Legal Officer to the Commander of the International Forces East Timor. He continues to work for Defence Legal Services and is the Principal Legal Officer for the Queensland College of Teachers.

Mr Victor Kent Patrick RFD

Part-time Member (SA)

Mr Patrick was a Stipendiary Magistrate and Deputy Coroner of South Australia from 1986-2007. He also served as a Legal officer in the Australian Army from 1974-1977, and reached the rank of Lieutenant Colonel in the Army Reserve before reaching retirement age.

Operation Vigilance 'non warlike service'

The Minister for Defence recently determined service by the ADF supporting the whole of Government operation to enhance international peace and security to be 'non warlike service'. The Minister made the determination under the *Military Compensation and .Rehabilitation Act* 2004.

Representatives of approved philanthropic organisations

The Minister for Veterans' Affairs recently determined certain accredited representatives of approved philanthropic organisations are to be treated as full time members of the defence force rendering continuous full-time service that was warlike service for the purposes of the VEA.

The Minister also determined certain accredited representatives of approved philanthropic organisations are to be treated as full time members of the defence force in an operational area described in items 9, 10, 11, 12, 13 and 14 of Schedule 2 of the Act, during a period specified in column 2 of that Schedule opposite to the descriptions of the area in column 1, as if the person was a member of the Defence Force who was rendering continuous full-time service in an operational area for the purposes of the VEA.

Guide to war widows' pensions

The VEA enables a tax-free, non means-tested pension to be paid to the widow or widower of a veteran if:

- the veteran's death is accepted as related to eligible war service;
- the veteran died as a result of an injury or disease that is accepted as related to eligible war service;
- the veteran was in receipt of, or entitled to receive, the extreme disablement adjustment (EDA), the special rate disability pension or an increased pension under VEA s.27(1) (double amputees) at the time of death; or
- the veteran was a prisoner of war (POW).

For widows or widowers of veterans within the last two categories, no claim is required and the war widow(er)'s pension is paid automatically upon the veteran's death.

If the veteran dies as a result of an injury or disease that is accepted as related to eligible war service, a claim is required so that this factual issue can be verified. A claim is also required if the question of whether the veteran's death was service-related must be determined.

The VEA also makes provision for payment of orphan's pensions to the children of veterans in one of the above categories if the children are under 16, or over 16 but under 25 and in full-time education.

Similar provisions covering the payment of the defence widow(er)'s pension and orphan's pension resulting from the death of members of the Forces serving on peacetime service between 7 December 1972 and 7 April 1994, members of the Forces with hazardous service on or after 7 December 1972 or members of a Peacekeeping Force.

To be eligible for a pension, the widow or widower must be of the opposite gender to the veteran or member.

Re-marriage provisions — caution regarding eligibility

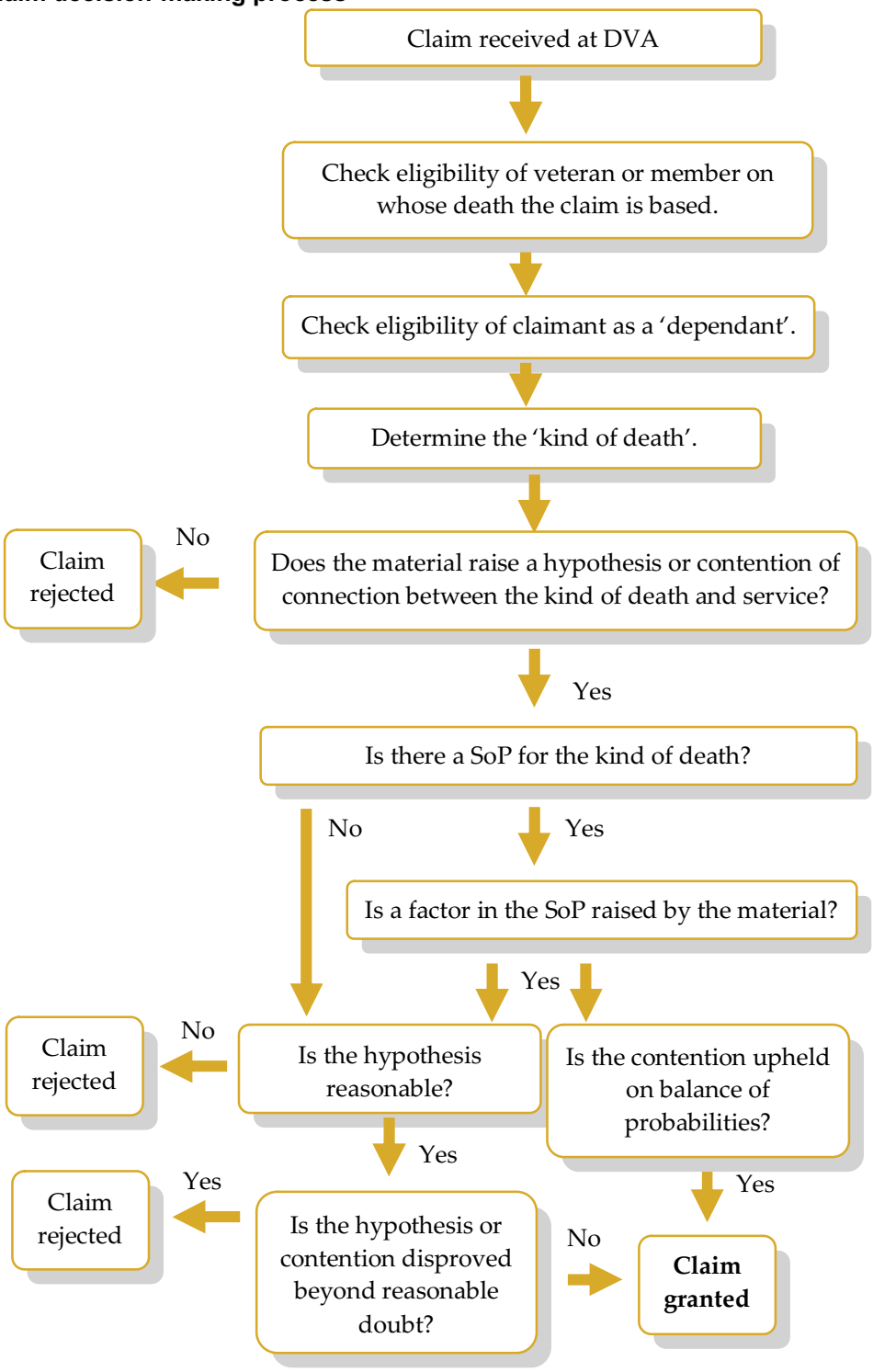
The VEA does not enable a widow or widower to lodge a claim for, or be granted, a war widow(er)'s pension after remarriage (or marriage in the case of a partner who was living with a veteran in a marriage-like relationship at the time of the veteran's death). This is because a 'dependant' under the VEA does not include a widow or widower who remarries or marries.

Only widows who remarried or remarry after 28 May 1984 can retain their pensions.[1] Widowers became eligible to claim in respect of their spouse's death with effect from 22 January 1991. Such widowers are not eligible to claim if they remarried before 22 January 1991.[2]

[1] Subsection.13(8A), VEA.

[2] Subsection 13(8B), VEA.

Death claim decision-making process



Eligible dependants

To be recognised as the widow or widower of a veteran a claimant needs to have been validly married to the veteran ***at the time of the veteran's death*** and not to have remarried between the time of the veteran's death ***and the time of lodging a claim*** in respect of the veteran's death.[3] A simple declaration from the claimant that he or she has not re-married is usually sufficient proof that the person has not re-married but if there is any suspicion that this is not so, the official marriage records would be checked from the date of the veteran's death. Should it be found after a decision has been made to accept the veteran's death as war-caused that the claimant had re-married prior to lodging the claim, the decision to grant pension is void.[4]

The VEA includes the following as dependants of a veteran (or a member of the Forces, or a member of a Peacekeeping Force):[5]

- the partner;
- a non-illness separated spouse;
- a widow or widower (other than one who marries or remarries); or
- a child.

A dependant can claim a pension under Part II or Part IV of the Act only in relation to the death of a veteran or member. This means that only the last two categories can claim a dependant's pension. Previously disability pension was payable to the dependants of veterans who were in receipt of disability pensions. This ceased in 1985 and many took the option of receiving a one-off lump sum in place of on-going pension.

A dependant of a deceased veteran will receive a pension without needing to make a claim if:

- the veteran had been a prisoner of war;[6]
- the veteran was in receipt of disability pension:[7]
  - with the extreme disablement adjustment (EDA);[8]
  - at the special rate;[9] or
  - the rate of which was increased because the veteran was a double amputee;[10] or
- the dependant claiming the pension is a child of a veteran who rendered operational service and is not being

[3] Section 11 and s 13(8), VEA. See *Finn v Repatriation Commission* (1990) 6 *VeRBosity* 101; *Re Hoskins and Repatriation Commission* [2002] AATA 755; *Re Goodenough and Repatriation Commission* (20 April 2000); *Re Macdonald and Repatriation Commission* (15 July 1994).

[4] Subsection 13(8), VEA.

[5] Dependants for the purposes of the VEA are defined in section 11. That section relates dependency to a 'veteran'. The section also applies to dependants of a 'member of the Forces' or a 'member of a Peacekeeping Force': see s 11(3).

[6] Subsection 13(2A), VEA.

[7] Subsection 13(2), VEA.

[8] Subsections 13(2) and 22(4), VEA.

[9] Section 24, VEA.

[10] Items 1 to 8 of s 27(1), VEA.

maintained by a parent, adoptive parent or step-parent.

If a pension is not payable on any of these grounds, the dependant would need to make a claim for pension on the ground that the death of the veteran or member was war-caused or defence-caused.

VRB jurisdiction in claims for war widow's pension

The VRB has jurisdiction to consider a claim for war widow(er)'s pension only on the ground that the person's death was war-caused or defence-caused.

The VRB cannot consider a claim based on any of the other grounds, such as automatic payment because the person was a prisoner of war or in receipt of special rate of disability pension. Such matters are not the subject of claims for pension, and decisions concerning them are not made by delegates of the Repatriation Commission, but are made by officers of DVA on behalf of the Commonwealth.[11]

Orphans

An orphan's pension is a non means-tested pension payable to a person on the same basis as the war widow's pension, except that, instead of being the partner of the veteran or member, the claimant must be the child of the veteran or member.

An **orphan's pension** can be claimed by a child who is under 16 years of age or a full-time student under 25 years of age, where the child:[12]

- is the natural or adopted child of the veteran or member; or
- was wholly or substantially dependant on the veteran or member at the time of death.

The widow or widower, or a natural or adopted child need not have been financially dependent on the veteran or member to be regarded as 'dependants' under the VEA.[13]

If the child is under 18 years of age, the claim must be made by a parent or guardian of the child, or someone approved by the parent or guardian. If there is no parent or guardian, the Commission may approve someone to make the claim on the child's behalf.[14].

Kind of death

In order for the death of a veteran or member to be accepted as being related to service, one of the links to service set out in s 8 or s 70 of the VEA must be met. However, before applying those provisions relating to causation, it is necessary to determine the kind of death applicable to the veteran or member.

The 1994 amendments of the VEA that brought in SoPs, introduced the concept of 'kind of death' into the VEA.

For a death to be war-caused or defence-caused under the VEA, or a 'service death' under the MRCA, the hypothesis or

[11] Subsections 13(2) and 13(2A), and s 13A, VEA.

[12] Section 10, VEA.

[13] Section 11, VEA.

[14] Paragraph 16(d), VEA.

contention said to connect the person's death with their service must be 'upheld' by (or must 'fit the template' of) a factor in the relevant SoP.

To determine which, if any, SoP applies, it is necessary to know whether the RMA has made a SoP about the 'kind of death' suffered by the veteran or member.

This means that the 'kind of death' met by the person must be determined before considering a connection, if any, between the person's death and their service.

The 'kind of death met by the person' is a **preliminary issue** to be decided on the **balance of probabilities**,[15] but not by reference to the SoPs.[16] This was amplified by Selway J in *Hancock*, setting out the correct approach as follows:

> **First**, … determine, on balance of probabilities, whether the pre-conditions other than causation, had been made out ...
>
> **Next**, … determine on balance of probabilities what kind of death Mr Hancock had suffered. This involved the identification, on the balance of probabilities, of any and all Statements of Principles … and any other 'kinds of death' which were applicable to that death.
>
> If one or more Statement of Principles were applicable, then the methodology in *Deledio* is applicable in relation to those 'kinds of death'. …
>
> If no Statement of Principles … is applicable at all to a particular kind of death then the methodology in *Byrnes* is applicable … .

Mr Hancock had inoperable cancer. He died within 3 weeks of major surgery and within 2 weeks of suffering a stroke. As he was unable to exercise properly due to osteoarthrosis of his knees, it was suggested that this lack of exercise reduced his life expectancy.

For the claim to succeed on this basis, it first had to be established on the balance of probabilities that his osteoarthrosis contributed to his death in this way. If that could be found, then Mr Hancock's 'kind of death' could be characterised as 'death from osteoarthrosis of the knees'. Only then could the decision-maker consider whether a hypothesis had been raised connecting his operational service with his death from osteoarthrosis of the knees.

Repatriation Commission v Hancock (2003) 19 *VeRBosity* 82.

The 'kind of death' is the 'the real or operative cause of death as opposed to the final stage of the process of dying'.[17]

The 'kind of death' is death from the particular injury or disease, if any, that is said to have contributed to the death of the person. A person may have had more than one kind of death if more than one condition contributed to their death.[18]

[15] *Repatriation Commission v Hancock* (2003) 19 *VeRBosity* 82; *Repatriation Commission v Codd* (2005) 21 *VeRBosity* 68.

[16] *Benjamin v Repatriation Commission* (2001) 17 *VeRBosity* 119, *Hancock* (2003) 19 *VeRBosity* 82; *Codd* (2005) 21 *VeRBosity* 68.

[17] *Re Brown and Repatriation Commission* [2004] AATA 1010 at paragraph [6].

[18] *Hancock* (2003) 19 *VeRBosity* 82; *Codd* (2005) 21 *VeRBosity* 68.

A person's death may be contributed to by an injury or disease if that condition hastened their death.[19]

If the material suggests that a person's death was contributed to by a particular injury or disease, the *fact* of that manner of death must be established before consideration can be given to a hypothesis, or contention, of connection between that injury or disease and the person's service.

Example: Mr Brown was admitted to hospital, for the final time, he had been diagnosed with dementia from Alzheimer's disease and was sent to palliative care. In other words he was regarded as dying. His final illness was bronchopneumonia. Medical evidence was that bronchopneumonia is the most likely cause of death in people with Alzheimer's disease. The 'kind of the death' in Mr Brown's case was dementia in which bronchopneumonia was but the end of the dying process and not an operative cause.

Re Brown and Repatriation Commission [2004] AATA 1010.

The question whether the injury or disease contributed to the person's death is not part of the hypothesis[20] or contention[21] of a connection to service. It is a preliminary issue to be decided on the balance of probabilities.

When the kind of death suffered by veteran or member is determined, attention then turns to addressing whether there is any causal connection arising out of or attributable to his or her service and the kind of death suffered.

Deciding whether a SoP applies

SoPs usually define 'death from' the relevant injury or disease in a non-exhaustive way to include 'death from a terminal event or condition that was contributed to by' that injury or disease.

SoPs define **'terminal event'** to mean 'the proximate or ultimate cause of death'. If a person's death is found to have been contributed to by a particular injury or disease for which there is a SoP, then there is a SoP in respect of that 'kind of death' and s 120A(3) or s 120B(3) applies.

A death certificate usually contains two parts:

- the first indicates the direct and antecedent causes of death;
- the second indicates other significant conditions contributing to the death, but not related to the disease or condition causing it.

While the death certificate is not definitive and can be contradicted by other more cogent evidence,[22] both parts of the death certificate can be taken to indicate conditions that may have contributed either directly or indirectly to the death, and so may point to one or more 'kinds of death' in a particular case.

[19] *Repatriation Commission v Doolette* (1990) 6 *VeRBosity* 66.

[20] Subsection 120A(3), VEA.

[21] Subsection 120B(3), VEA.

[22] *Nicolia v Commissioner for Railways* [1972] ALR 185 at 186 and 187.

Death certificates

How the Death Certificate is completed

Death Certificates in Australia comprise two separate forms; a medical certificate which indicates the cause or causes of death, and a questionnaire providing personal information about the deceased.

The medical certificate is completed either by a doctor who was in attendance at the time of death or who can certify as to the cause of death, or by the coroner when the death was unexpected or unexplained.

The personal information questionnaire is completed by the next of kin. This normally takes place at the funeral parlour with the help of the funeral director. Both forms are collected by the Registrar of Births and Deaths in each state and territory.

What is on the medical certificate of cause of death

There are two parts to the standard medical certificate of cause of death.

Part I is the area 'above the line'. This is where the disease or condition directly leading to death is stated followed by any conditions which have given rise to this disease or condition (these are called antecedent causes). Any conditions listed above the line should form what is termed the 'morbid train of events' that have led to death. That is, they will form a sequence starting at the disease or condition which directly led to death. This condition may then have been 'due to (or as a consequence of)' an antecedent cause which was in turn, 'due to (or as a consequence of)' another antecedent cause et cetera. The 'Underlying Cause' is the cause which is listed last. That is, it is the cause that is deemed to have started the morbid train of events.

Part II is the area 'below the line'. This area is to be used to list other significant conditions which have contributed to the death but which are not deemed to be part of the morbid train of events leading to the death.

Chain of causation relating to kind of death

Once a 'kind of death' has been determined, it is necessary to consider whether the material raises a hypothesis or contention of a connection between that kind of death and the veteran's or member's service.

In *McKenna*, [23] the Federal Court held that if a hypothesis relies on a sub-hypothesis or sub-hypotheses, each part of the causal chain is required to satisfy the relevant SoPs along that causal chain.

The fact that an injury or disease within a causal chain might have been accepted previously as war-caused or defence-caused does not create a presumption that it is related to service for the purposes of another claim.[24] The Board

[23] *McKenna v Repatriation Commission* [1999] FCA 323.

[24] *Langley v Repatriation Commission* (1993) 43 FCR 194, 9 *VeRBosity* 40.

must consider the entire chain of causation afresh.

SoP for 'kind of death'

If the kind of death is covered by a SoP, the Board must apply that SoP and when considering other injuries or diseases in a chain of causation leading to the 'kind of death', the Board must apply the relevant SoP for each of those disabilities.[25]

For example, if the veteran died from a cardiac arrest caused by ischaemic heart disease that was said to be contributed to by hypertension, that was said to be contributed to by alcohol dependence that was said to be brought about by eligible war service, the Board would have to apply the SoPs in the following manner. The Board would first look to the SoP for ischaemic heart disease and see whether it contains a factor for hypertension. If so, and if that factor were met, the Board would then look to the SoP for hypertension. If that SoP contained a factor concerning alcohol consumption, and if that factor were met, and the alcohol consumption was related to the veteran's alcohol dependence, the Board would then look at the SoP for alcohol dependence to see whether there was a factor in that SoP that could relate the veteran's alcohol dependence to the circumstances of his service.

No SoP for 'kind of death'

If the kind of death is not one covered by a SoP, and the hypothesis relies on a sub-hypothesis that has a relevant SoP, the decision maker need not have particular regard to that SoP.[26]

Nevertheless, *Casey's* case[27] indicates that it is not an error of law to have regard to a SoP when assessing the reasonableness of the hypothesis even though the Board is not bound to apply the SoP provided that it is raised with the applicant in the course of the hearing and the applicant is given an opportunity to make submissions in relation to it. It would certainly be an error to treat the SoP as if the Board were bound by it.

Veterans' Review Board

2008 Veterans' Law Conference

5th and 6th November 2008

Canberra

More information coming to our website soon!

[25] *McKenna v Repatriation Commission* [1999] FCA 323.

[26] *Spencer v Repatriation Commission* [2002] FCA 229, (2002) 18 *VeRBosity* 21.

[27] *Casey v Repatriation Commission* (1995) 60 FCR 510, 11 *VeRBosity* 86.

Administrative Appeals Tribunal

Re Howlett and Repatriation Commission

Jarvis, Deputy President

[2007] AATA 1736
6 September 2007

Operational service – review by respondent of earlier decision to accept PTSD and alcohol dependence as war caused – asserted stressors shooting of sampan by American gunboat and scare charge event

Facts

Mr Howlett joined the Royal Australian Navy on 20 June 1970 aged 17 years. He was engaged in operational service on *HMAS Sydney* in Vung Tau Harbour in November 1970 and February 1971.

In a decision dated 11 May 2001, a delegate of the Repatriation Commission ('the Commission') accepted Mr Howlett's post traumatic stress disorder ('PTSD') and alcohol dependence as war caused.

Subsequently, pursuant to section 31 of the VEA, another delegate of the Commission undertook a review of the earlier decision. The delegate considered further evidence that had emerged after the Commission made the initial decision. This included:

- Writeway Research reports; and
- the outcome of an AAT decision in which another veteran relied upon one of the events Mr Howlett had relied upon.

In a decision dated 31 March 2006, the delegate was not satisfied that Mr Howlett's PTSD and alcohol dependence were war caused. Accordingly, he reassessed Mr Howlett's pension and reduced it from the intermediate rate to 40% of the General Rate.

The Veterans' Review Board affirmed the decision dated 31 March 2006. Mr Howlett appealed to the AAT for review of the Commission's decision.

Applicant's position

Mr Howlett put forward a hypothesis connecting his PTSD and alcohol dependence with the circumstances of his service via his exposure to two traumatic events whilst in Vietnam:

- shooting of a sampan by an American gunboat; and
- explosion of a scare charge when he was in an engine compartment of a landing barge attending to its batteries.

Respondent's position

The Commission said that the new evidence indicated that the sampan incident did not occur. Further, that the scare charge event would not meet the criteria set out in the relevant SoP, and therefore, at stage 3 of *Deledio* the AAT should find that the hypothesis was not reasonable.

Issues before the AAT

The issues for the decision maker were:

- whether he was satisfied that the evidence before the delegate who made the initial decision to accept conditions as war caused was false in a material particular; and
- whether, having regard to any matter that was not before the Commission when the initial decision was made, pension should be decreased on the grounds that PTSD and alcohol dependence were not war caused?

The AAT's reasons

Diagnosis

There was no issue as to diagnosis. The Commission accepted the diagnosis of PTSD and alcohol abuse.

Step 1 – is there a hypothesis?

The AAT was satisfied that on a consideration of all of the material before it, a hypothesis was pointed to connecting Mr Howlett's PTSD and alcohol abuse with the circumstances of his service via one or more of the asserted events whilst he was in Vietnam.

Step 2 - Relevant SoPs?

The AAT identified:

- SoP in respect of PTSD no 3 of 1999 as amended by no 54 of 1999; and
- SoP in respect of alcohol dependence no 76 of 1998.

Step 3 - is the hypothesis consistent with the template set out in the relevant SOPs?

The relevant factor in the PTSD SoP was 5(a):

> 'experiencing a severe stressor prior to the clinical onset of post traumatic stress disorder'

The relevant factor in the alcohol dependence SoP was 5(a):

> 'suffering from a psychiatric disorder at the time of the clinical onset of alcohol dependence.'

The Commission did not dispute that Mr Howlett was suffering from PTSD at the time of clinical onset of his alcohol dependence.

In considering whether the material before the AAT pointed to the requirements in the SoP definition of '*severe stressor*' Deputy President Jarvis said:

> 41. 'In the present matter, there is evidence that Mr Howlett was confronted with an event that caused him to be terrified for his own safety, in that he thought that either the Sydney or the landing barge was under attack and was also concerned about the risk of injury from acid in the battery; that he was in a situation that he had never previously experienced, because he was in a confined space below the water line in a small vessel; and that the noise of the explosion was such as to result in a loss of hearing for 20 to 30 minutes. His service record indicates that this event happened on only his second trip to Vietnam, and that he was only 17 years of age at the time…A number of the above aspects of the scare charge event differentiate it from

the circumstances existing on other occasions when sailors on board the Sydney in Vung Tau Harbour might have experienced the use of scare charges.

43. Taking into account the evidence before me as to the above matters, including the evidence as to Mr Howlett's state of knowledge at the time, I conclude that there is evidence before me that the scare charge event meets the criteria of experiencing a severe stressor, within the meaning of the PTSD SoP…'

Step 4 – satisfaction beyond reasonable doubt

The AAT considered that there was no evidence to disprove the scare charge event, nor were there any facts that were inconsistent with that event, in order to disprove the hypothesis based on that event.

The AAT noted that the Commission had not made any contention regarding the applicant's credibility. Specifically, that if the AAT made any adverse finding in relation to the sampan event, it should reject Mr Howlett's evidence regarding the scare charge event. In any event, the AAT considered that Mr Howlett gave clear evidence as to the scare charge event and his evidence appeared to be credible.

Formal decision

The AAT decided that the hypothesis arising from the scare charge event was reasonable and was not disproved beyond reasonable doubt. The AAT was not satisfied that the new evidence obtained by the Commission displaced the conclusion that Mr Howlett's PTSD and alcohol abuse were war caused. As such, it was not appropriate to reduce Mr Howlett's pension.

Editor's note:

Diagnosis of PTSD

It is relevant to keep in mind that the diagnostic criteria for PTSD includes identification of a causal factor. As diagnosis of a claimed condition must be determined on the balance of probabilities, where PTSD is accepted as the correct diagnosis its connection to service will usually be a mere formality. Nonetheless, in some situations there may be a different cause for PTSD other than that alleged to have occurred during the relevant service. [28]

Re Cunningham and Repatriation Commission

Mr B.H Pascoe, Senior Member

[2007] AATA 1790
21 September 2007

Operational service – peptic ulcer disease, hiatus hernia, irritable bowel syndrome, depressive disorder – asserted psychosocial stressor sea sickness

Facts

Mr Cunningham was born on 3 January 1952 and joined the Royal Australian Navy on 7 July 1968 aged 16 ½ years. He rendered two periods of operational service aboard HMAS Voyager from 17 November 1969 to 5 December 1969 and 16 February 1970 to 5 March 1970.

[28] *Mines v Repatriation Commission* [2004] FCA 1331.

The application for review by the AAT was a decision of the Repatriation Commission ('the Commission') refusing Mr Cunningham's claims for peptic ulcer, hiatus hernia, irritable bowel syndrome, depressive disorder with some features of anxiety and alcohol dependence or abuse.

However, Mr Cunningham advised the AAT that he was no longer pursuing the claim for alcohol dependence or abuse. Further, the Commission had accepted a claim for gastro oesophageal reflux disease.

Applicant's position

Mr Cunningham put forward a hypothesis connecting his depressive disorder with the circumstances of his service via his:

- Chronic sea sickness experienced during operational service; and
- Subsequent social isolation and depression at the possibility of being unable to serve at sea.

In addition, Mr Cunningham put forward a hypothesis connecting his peptic ulcer disease with service via his contracting helicobacter pylori infection during his operational service.

Finally, Mr Cunningham said his hiatus hernia should be accepted as the Commission had accepted his claim for gastro oesophageal reflux disease.

Respondent's position

It was accepted that the claim for irritable bowel syndrome relied on the claim for depressive disorder being accepted pursuant to Instrument No.103 of 1996.

Issues before the AAT

The issues for the decision maker were:

- Whether Mr Cunningham suffered from peptic ulcer, hiatus hernia, irritable bowel syndrome, depressive disorder with some features of anxiety; and
- If so, whether his peptic ulcer, hiatus hernia, irritable bowel syndrome, depressive disorder with some features of anxiety were war caused.

The AAT's reasons

Depressive disorder

Diagnosis

The reasons for the AAT's decision made no reference to the issue of diagnosis.

Step 1 – is there a hypothesis?

The AAT identified the hypothesis relied upon by Mr Cunningham. Specifically, that his depressive disorder was connected with the circumstances of his service via chronic sea sickness and subsequent isolation.

Step 2 - Relevant SoPs?

The AAT identified the SoP in respect of depressive disorder no 58 of 1998 and 17 of 2007.

Step 3 - is the hypothesis consistent with the template set out in the relevant SOPs?

The AAT first considered SoP no 58 of 1998. The relevant factor in that SoP was 5(b): *'experiencing a severe psychosocial stressor or stressors within the two years immediately before the clinical onset of depressive disorder*'.

The AAT noted the definition of a severe psychosocial stressor in clause 8 of the SoP as:

> ' 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, assault (including sexual assault), severe illness or injury, experiencing a loss such as divorce or separation, loss of employment, major financial problems or legal problem.'

In considering step 3 of *Deledio* Senior Member Pascoe said:

> '[10]…Here the hypothesis of depression arising from severe seasickness is reasonable under the terms of the SoP. The question there is whether the Tribunal can be satisfied that the seasickness was not attributable to operational service and whether the clinical outset of a depressive disorder was within the two years of that stressor. In relation to the latter question the records show a diagnosis of an acute anxiety state in March 1971. … However, it is clear that Mr Cunningham experienced the onset of seasickness on the two voyages prior to operational service…That constitutional predisposition was the cause of the seasickness and the subsequent depression on the realisation that his long-held ambition to be a sea going sailor was not to be achieved. Being a pre-existing condition with the symptoms well established prior to operational service, I am satisfied that the seasickness was not war-caused. As such the depressive disorder cannot be accepted as war-caused under Instrument 58 of 1998.'

The AAT then went on to consider the SoP no 17 of 2007. The relevant factor relied upon was '*experiencing a category 2 stressor within the one year before the clinical onset of depressive disorder*'.

The AAT noted the definition of a category 2 stressor in clause 9 of the SoP as:

> 'one or more of the following negative life events, the effects of which are chronic in nature and cause the person to feel on-going distress, concern or worry:
>
> (a) being socially isolated and unable to maintain friendships or family relationships, due to physical location, language barriers, disability, or medical or psychiatric illness'.

In considering step 3 of Deledio in relation to the alternative SoP Senior Member Pascoe said:

> '[11]…Here it could be said that the hypothesis is reasonable under the terms of the SoP. The evidence of Mr Cunningham was that, while seasick on board HMAS Sydney he stuck to himself most of the time and was the subject of constant comments and laughter from his shipmates. This can be readily accepted. However, the effects of the stressor must be chronic, i.e. continuing a long time. It is clear that the word chronic is used to differentiate from acute being brief and severe. While Mr Cunningham's evidence of some social isolation whilst on the voyager can be accepted, there is no evidence of any ongoing difficulties with his ability to maintain friendship or family relationships. I am satisfied that his relatively brief periods of sticking to himself and laughter

directed at him cannot be seen to satisfy the requirements of the SoP.'

Peptic ulcer disease

Diagnosis

The reasons for the AAT's decision made no reference to the issue of diagnosis.

Step 1 – is there a hypothesis?

The AAT identified the hypothesis relied upon by Mr Cunningham. Specifically, his peptic ulcer disease was connected with his service via his contracting helicobacter pylori infection.

Step 2 - Relevant SoPs?

The AAT identified the SoP in respect of peptic ulcer disease as no 21 of 1999. No reference was made to the current SoP no 57 of 2006.

Step 3 - is the hypothesis consistent with the template set out in the relevant SOPs?

The AAT noted the relevant factor was:

> 'having Helicobacter pylori infection at the time of the clinical onset of peptic ulcer disease'.

In considering step 3 of Deledio Senior Member Pascoe said:

> '[13]….having such an infection at the time of the clinical onset of peptic ulcer disease provides a reasonable hypothesis connecting peptic ulcer disease with the veteran's relevant service. The evidence of Dr R. Knight, a gastroenterologist, was that Mr Cunningham had contracted Helicobacter pylori infection which was eradicated by antibiotic therapy in the 1990's. Dr Knight said that it was believed that the infection was spread by human excretions, including vomiting. While Dr Knight acknowledged that a person can be infected as an infant but not be affected until a later age and there was no way of knowing when or how Mr Cunningham was infected, he said that it is conceivable that he contracted the infection during naval service in 1969 and 1970 related to living in confined quarters, sharing of utensils and potential contamination from other infected individuals. The evidence of Mr Cunningham was that, with some 680 naval crew and over 500 army personnel on board during the voyager to and from Vietnam, he slept in a hammock close to many other on the hanger deck of Sydney.'

Stage 4 – satisfaction beyond reasonable doubt

In considering step 4 of Deledio Senior Member Pascoe said:

> '[14]…While it is clear that there is no evidence of contracting of Helicobacter pylori infection during operational service and it is just as possible that Mr Cunningham contracted the infection as an infant, I cannot be satisfied beyond reasonable doubt that it was not contracted aboard Sydney during operational service. Consequently, the claimed condition of peptic ulcer disease should be accepted as war-caused...'

Hiatus hernia

Diagnosis

The reasons for the AAT's decision made no reference to the issue of diagnosis.

Step 1 – is there a hypothesis?

The AAT noted Mr Cunningham's assertion that his hiatus hernia should be

accepted as the Commission had accepted his claim for gastro oesophageal reflux disease.

Step 2 - Relevant SoPs?

The AAT identified the SoP in respect of hiatus hernia no 17 of 2004.

Step 3 - is the hypothesis consistent with the template set out in the relevant SOPs?

The AAT noted the relevant factors were factor 5(a): '*undergoing a surgical procedure to the region of the oesophageal hiatus of the diaphragm within the two years immediately before the clinical onset of hiatus hernia*' and 5(d) '*having gastro-oesophageal reflux disease at the time of the clinical worsening of hiatus hernia*.'

In considering step 3 of Deledio Senior Member Pascoe said:

> '[15]…. There is no evidence of any clinical findings of the existence of the hiatus hernia until May 1998. There is no evidence of any clinical worsening of hiatus hernia after that date.. Consequently, I am satisfied that Mr Cunningham does not meet that factor with no clinical worsening. In 1998 Mr Cunningham's ulcer was treated with highly selective vagotomy which was unsuccessful. Whilst this procedure appears to satisfy the surgical procedure requirement of factor 5(a), there is no evidence of any clinical findings of hiatus hernia until some ten years later... It cannot be said that the hiatus hernia followed the surgical procedure, but clearly, predated that procedure. As a result, I am satisfied that the hiatus hernia does not satisfy the requirements of the relevant SoP.'

Formal decision

The AAT affirmed the decision in relation to the claim for depressive disorder, and in view of its findings affirmed the decision in relation to irritable bowel syndrome also. Further, the decision in relation to hiatus hernia was affirmed. However, the AAT set aside the decision in relation to the claim for peptic ulcer disease.

Editor's note

Diagnosis

A decision maker must determine, on the balance of probabilities, the diagnosis of a claimed condition before considering whether it is related to service.

In *Mines v Repatriation Commission* [2004] FCA 1331, Justice Gray said:

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

This is an important to step because without determining diagnosis the decision maker cannot then decide whether a statement of principles

applies, and if so, which one or which factors apply.

Application of the Statements of Principles

The decision maker must apply the SoP in force at the date of its decision. If a claim cannot succeed under the current SoP, the claimant has a right to apply the SoP in force at the time of the decision under review.

In this matter, the AAT was required to consider the SoP 17 of 2007 in relation to depressive disorder. Only if the claim could not succeed under that SoP, could Mr Cunningham seek to apply the SoP no 58 of 1998. Similarly, in relation to peptic ulcer disease the AAT was required to consider the SoP in force at the time of its decision no 57 of 2006. Only if the claim could not succeed under that SoP, could Mr Cunningham seek to apply the SoP no 21 of 1999.

Re Scott and
Repatriation Commission

M J Carstairs, Senior Member
Dr J B Morley, RFD, Member

[2007] AATA 1701
28 August 2007

Operational service - whether depressive disorder, diabetes and hypertension were service related – asserted stressor martial breakdown

Facts

Mr Scott was engaged in several periods of operational service between 1960 and 1962 and in Vietnam between 1965 and 1972. In addition, Mr Scott rendered defence service from 1972 until his discharge in July 1978.

Applicant's position

Mr Scott put forward a hypothesis connecting his depressive disorder with his service via his marriage break up which occurred while he was rendering operational service.

In addition, Mr Scott contended that if the AAT accepted that his depressive disorder was related to service, there would be no dispute that his hypertension was war caused on the ground that he satisfied factor 5(o) of the relevant SoP.

Further, Mr Scott contended that his depression led to increased eating and drinking and that his diabetes could be related to service on the basis of factor 5(b) in the relevant SoP concerning obesity.

Issues before the AAT

The issues for the AAT were:

- Whether Mr Scott suffered from depressive disorder, diabetes and hypertension; and
- If so, whether his depressive disorder, diabetes and hypertension were war caused.

The AAT's reasons

Diagnosis

The Commission accepted the diagnosis of Type 2 diabetes and hypertension.

However, in relation to Mr Scott's psychiatric condition, there was evidence that he had a complex condition of several psychiatric entities. In particular,

Mr Scott was diagnosed with PTSD for which liability had been accepted under military compensation legislation. Nonetheless, the AAT was reasonably satisfied that Mr Scott suffered from major depressive disorder.

Step 1 – is there a hypothesis?

The AAT was satisfied that on a consideration of all of the material before it, a hypothesis was pointed to connecting Mr Scott's depressive disorder with the circumstances of his service via a marital break up.

Step 2 - Relevant SoPs?

The AAT identified the SoP for depressive disorder no 17 of 2007 (replacing instrument no 58 of 1998 in effect at the time of Mr Scott's claim).

Step 3 - is the hypothesis consistent with the template set out in the relevant SOPs?

The relevant factor in the PTSD SoP was 6(f): '*experiencing a category 2 stressor within the one year before the clinical onset of depressive disorder*.'

The AAT noted that the definition of a category 2 stressor included '*experiencing a problem with a long-term relationship including: the break-up of a close personal relationship, the need for marital or relationship counselling, marital separation, or divorce*.'

The evidence before the AAT was that Mr Scott had married his first wife at the age of 18. She left him in 1965 when he was aged 24 years and they had three children under the age of 5. Mr Scott's first trip to Vietnam was in May 1965. When he returned to Australia his wife told him that she had met someone else. He and his wife discussed the future of their relationship, and he thought the problems were resolved. He asked for a compassionate posting but was refused. He then returned to Vietnam in September 1965. On arrival in Vung Tau, he received a letter from his wife telling him she had left him. His first reaction was to drink a bottle of aftershave mixed with cordial. His drinking increased after the marriage break up.

The AAT considered that the hypothesis raised was reasonable. The marriage break up was considered to come within the definition of a category 2 stressor. The AAT noted that Mr Scott's evidence about his distress and its ongoing nature was not seriously challenged. Further, the AAT observed that some material pointed to the required onset and some to clinical worsening.

Step 4 – satisfaction beyond reasonable doubt

The AAT decided that the hypothesis was not disproved beyond reasonable doubt. The AAT considered Mr Scott's evidence was truthful, it was not contradicted by any other evidence and was supported by two psychiatrists.

Hypertension

Step 1 – is there a hypothesis?

The AAT was satisfied that on a consideration of all of the material before it, a hypothesis was pointed to connecting Mr Scott's hypertension with the circumstances of his service via his service related depression.

Step 2 - Relevant SoPs?

The AAT identified the SoP for hypertension no 35 of 2003 (as amended).

Step 3 - is the hypothesis consistent with the template set out in the relevant SOPs?

The relevant factor in the hypertension SoP was 5(o) '*suffering from a clinically significant depressive disorder for the six months immediately before the clinical onset of hypertension*'.

The AAT noted that Mr Scott's general practitioner confirmed that Mr Scott had a systolic reading of 150/90 in 1983 and thereafter his blood pressure had been fluctuating.

The AAT decided that factor 5(o) of the SoP for Hypertension was met.

Step 4 – satisfaction beyond reasonable doubt

The AAT noted that there was no evidence refuting the conclusion that hypertension was war-caused.

Diabetes Mellitus

Step 1 – is there a hypothesis?

The AAT was satisfied that on a consideration of all of the material before it, a hypothesis was pointed to connecting Mr Scott's diabetes mellitus with the circumstances of his service via his service related depression.

Step 2 - Relevant SoPs?

The AAT identified the SoP for hypertension no. 11 of 2004.

Step 3 - is the hypothesis consistent with the template set out in the relevant SOPs?

The relevant factor in the hypertension SoP was *5(b) ' in relation to type 2 diabetes mellitus, being obese for a period of at least five years before the clinical onset of diabetes mellitus'.*

The AAT noted entries in Mr Scott's service medical records indicating obesity and that Mr Scott relates his binge eating to his marriage break-up .

The AAT found that obesity was related to Mr Scott's service as being a reaction to a psychiatric condition that was found to be related to service.

Step 4 – satisfaction beyond reasonable doubt

The AAT made no reference to stage 4 of *Deledio.*

Formal decision

The AAT found that Mr Scott suffered from depressive disorder, diabetes and hypertension and that these conditions were war caused.

Editor's note:

It is not sufficient for a decision maker merely to identify an event that occurred during a person's relevant service that might be characterised as severely stressful. In this case, the AAT was required to consider, pursuant to clause 5 of the SoP, whether the material before it pointed to Mr Scott's marital break up being related to his relevant service.

In respect of personal matters, service must be more than merely the setting in which it occurs. Specifically, service must contribute to the cause of the personal matter.[29]

In this case the decision maker to was required to consider whether all of the material before it pointed to Mr Scott's relevant service contributing to his martial break up. If there was no material

[29] *Holthouse v Repatriation Commission* (1982) 1 RPD 287

pointing to Mr Scott's marital break up being related to his relevant service, then it was open to the decision maker to find that the hypothesis was not reasonable. As such, the claim would fail.

Re Davis and Repatriation Commission

G D Friedman, Senior Member

[2007] AATA 1722
24 July 2007

Operational service – whether generalised anxiety disorder war caused – asserted stressors - whether serious default, wilful act or breach of discipline

Facts

Mr Davis served in the Australian Army as a National Serviceman. He rendered operational service in Vietnam from 6 January 1969 to 28 November 1969.

Applicant's position

Mr Davis put forward a hypothesis connecting his generalised anxiety disorder with his service via several events that occurred while he was rendering operational service. These included:

- witnessing a Buddhist monk self-immolating ('immolation incident');
- witnessing a South Vietnamese Policeman shoot two young people ('the shooting incident');
- dislocating his right thumb apprehending a young Vietnamese man who stole his watch ('watch incident');
- striking a Vietnamese woman on the face after she disclosed his cards, after which he was escorted from the bar at gunpoint ('the bar incident');
- confrontation by a man wielding a sword in a threatening manner; after which he drew his rifle and shot the man in self defence ('the sword incident');
- witnessing the arrival of a helicopter and seeing a wounded soldier covered in blood ('the casualty incident').

Respondent's position

The Commission obtained evidence which indicated the events did not occur in the way described by Mr Davis. Further, in submissions it was contended that some of the incidents involved actions by Mr Davis that amounted to a breach of discipline, serious default or wilful act.

The AAT's reasons

Diagnosis

The Commission accepted that Mr Davis suffered from generalised anxiety disorder ('GAD').

Step 1 – is there a hypothesis?

The AAT was satisfied that on a consideration of all of the material before it, a hypothesis was pointed to connecting Mr Davis' GAD with the circumstances of his service via the events outlined above.

Step 2 - Relevant SoPs?

The AAT identified the SoP for GAD no 1 of 2000.

Step 3 - is the hypothesis consistent with the template set out in the relevant SOPs?

The relevant factor in the GAD SoP was 5(a)(ii): '*experiencing a severe psychosocial stressor within the two years immediately before the clinical onset of anxiety disorder*'.

The AAT noted that the definition of a severe psychosocial stressor in clause 8 of the SoP.

In relation to the immolation incident the evidence before the AAT was that in 1969 Mr Davis witnessed a person in an orange robe who was on fire, that he has flashbacks of the incident, he awakes sweating, and the smell of bacon makes him recall the incident. In relation to the bar incident Mr Davis feared for his life.

In addition, two reports were before the AAT. The first was a report of Dr Strauss. He reported that Mr Davis had a number of stressful incidents in Vietnam that could be classified as severe psychosocial stressors, and that the SoP for GAD could be met.

The second, was a report from Writeway Research Services. It stated that immolation incidents were rare, and the only one believed to have occurred was in 1967. Further, the bar incident would probably have been reported and that the absence of a report was a strong indication that it did not occur.

The AAT considered that all of the material was consistent with factor 5(a)(ii) and that Mr Davis satisfied the third step in *Deledio.*

Step 4 – satisfaction beyond reasonable doubt

In assessing the weight and credibility of the material before it, the AAT considered that Mr Davis was a truthful witness who described the incidents in a forthright and candid way. However, only the immolation and bar incidents were considered to have had the requisite impact on him required by the definition in the SoP. The AAT noted that the evidence of Dr Strauss was generally not disputed.

However, in relation to the Writeway Research report the AAT noted that it had difficulties with the conclusions reached in that report. Specifically, the author had little practical experience in Saigon. Accurate records or witnesses statements were not available and research regarding the immolation incident was limited. For these reasons, the AAT placed little weight on the Writeway report and found that the fourth step in *Deledio* was satisfied.

Finally, the AAT rejected the Commission's submission that the incident relied upon by Mr Davis amounted to a breach of discipline, serious default or wilful act. The AAT noted that the issue was not raised before or at any time during the hearing.

As such, there was insufficient evidence to support a finding that section 9(3) of the VEA applied.

Formal decision

The AAT found that Mr Davis' GAD was war caused.

Editor's note:

The AAT's rejection of the Commission's submissions regarding section 9(3) of the VEA raises an important procedural issue. In a court, the so-called 'rule in *Browne v Dunn*'[30] requires that a witness be given the opportunity during their giving of evidence to answer any proposed attack by a party on their evidence or credibility.

While that rule of evidence does not apply to the VRB or AAT,[31] nevertheless, procedural fairness indicates that an applicant have an opportunity to answer the case against them. That is, it should be made clear by a party, or by the VRB or AAT in their investigative functions, before or while the witness is giving evidence that the evidence of a particular witness is to be challenged or not believed. However, a 'tribunal conducting an inquisitorial hearing is not obliged to prompt and stimulate an elaboration which the applicant chooses not to embark on.'[32]

[30] (1894) 6 *The Reports* 67

[31] *Re Minister for Immigration & Multicultural Affairs; Ex parte Plaintiff S154/2002* [2003] HCA 60; *Lawrance v Centrelink* [2005] FCA 1318; and s 33(1)(c) of the *Administrative Appeals Tribunal Act* 1975.

[32] *Re MIMA; Ex parte Plaintiff S154/2002* [2003] HCA 60 at para [58].

Re Moseley and Repatriation Commission

G J Short
Dr E T Eriksen

[2007] AATA 1898
29 October 2007

Facts

Mr Moseley joined the Australian Army at age 18 in 1967. He rendered operational service in Vietnam from 4 September 1971 to 24 February 1972. In addition, he rendered eligible defence service from 7 December 1972 until 25 August 1975.

In a decision dated 4 January 2006, a delegate of the Repatriation Commission ('the Commission') refused Mr Moseley's claim for pension on the grounds that PSTD, alcohol dependence, alcohol hepatitis and gynaecomastis were not war caused.

The Board affirmed the Commission's decision. Mr Moseley appealed to the AAT.

Applicant's position

Mr Moseley put forward hypotheses connecting his PTSD and alcohol dependence with the circumstances of his service via his exposure to two traumatic events whilst in Vietnam:

- On his first night in Nui Dat he was required to attend for picket duty at a site located approximately 100 meters inside the first perimeter. At 8pm he

heard explosions and could see flashes and the movement of dirt. He and his companion were told that a mortar attack has occurred and that they should return to camp. He thought the explosions were 50 meters in front of his position. This was a frightening event and his whole life changed after this incident.

- One week later, he was working at a cleaning bay when he heard distant explosions. He located his camera and took some pictures. He thought the explosions were enemy mortar. He then left the area.

Respondent's position

The Commission submitted that Mr Moseley had not experienced incoming mortars and that consequently his claim for acceptance of PTSD and other conditions should fail.

Issues before the AAT

The issues for the decision maker were:

- Whether Mr Moseley suffered from PSTD, alcohol dependence, alcohol hepatitis and gynaecomastis; and
- If so, were these conditions war caused?

The AAT's reasons

Diagnosis

The AAT first considered whether, on the balance of probabilities, Mr Moseley suffered from PTSD. It recognised that Mr Moseley may have fabricated the events relied upon, or may have been convinced of events which did not occur. As such, the AAT was not satisfied that Mr Moseley experienced explosions either on his first night in Vietnam and/or later which involved actual or threat of death or serious injury or a threat to his or another's personal physical integrity. The AAT was not satisfied that Mr Moseley suffered from PTSD.

The Commission agreed, on the basis of a supplementary report provided for the resumed hearing, that the applicant suffered from generalised anxiety disorder ('GAD'), alcohol dependence, alcohol hepatitis and gynaecomastis.

Causation

Generalised anxiety disorder

Step 1 – is there a hypothesis?

The AAT considered that on all of the material before it, a hypothesis was pointed to connecting Mr Moseley's GAD and alcohol abuse with the circumstances of his service via the asserted events whilst he was in Vietnam.

Step 2 - Relevant SoPs?

The AAT identified:

- SoP in respect of GAD no 101 of 2007 and 1 of 2000; and
- SoP in respect of alcohol dependence no 76 of 1998.

Step 3 - is the hypothesis consistent with the template set out in the relevant SoPs?

The AAT noted that the relevant factor in the GAD SoP no 1 of 2000 was 5(a)(ii):

> 'experiencing a severe psychosocial stressor within the two years

> immediately before the clinical onset of anxiety disorder'.

The AAT did not make any reference to the definition of a severe psychosocial stressor in clause 8 of the SoP.

Further, the AAT noted the history provided to the psychiatrist and Mr Moseley's evidence that he experienced explosions in close proximity and feelings of fear and distress.

In considering whether the material before it pointed to the requirements of the relevant factor of the SoP the AAT said:

> 'In this case it is suggested that Mr Moseley experienced a severe psychosocial stressor within two years of the clinical onset of generalized anxiety disorder. The history provided to Dr Ewer and Mr Moseley's evidence to this Tribunal included the experience of explosions in close proximity to Mr Moseley and Mr Moseley's feelings of fear and distress. This Tribunal considers that the hypothesis is reasonable in that it meets the template found in the SoP.'

Step 4 – satisfaction beyond reasonable doubt

The AAT considered that the relevant question was whether it was satisfied beyond reasonable doubt that one or more of the facts necessary to support the hypothesis were disproved beyond reasonable doubt.

The AAT noted that it was unlikely that explosions occurring on or around the perimeter would go unrecorded and also that it would seem unlikely that a person suffering from significant alcohol dependence and GAD would not have the symptoms or practical effects of these conditions recorded in their service record.

Nonetheless, the AAT was not satisfied beyond reasonable doubt that any of the bases upon which the hypothesis rest did not exist. Specifically, no other facts which were inconsistent with the hypothesis had been proved beyond reasonable doubt. As such, the AAT found that Mr Moseley's GAD was war caused.

Alcohol Dependence

Step 1 – is there a hypothesis?

The AAT noted that two hypotheses were suggested. One related to the clinical onset of alcohol dependence within two years after experiencing a severe stressor. The second related to suffering from a psychiatric disorder at the time of the clinical onset of alcohol dependence.

Step 2 - Relevant SoPs?

The AAT identified the SoP no 76 of 1998 concerning alcohol dependence or abuse.

Step 3 - is the hypothesis consistent with the template set out in the relevant SoPs?

The AAT noted that the relevant factor in the alcohol dependence SoP no 76 of 1998 was 5(a):

> 'suffering from a psychiatric disorder at the time of the clinical onset of alcohol dependence...'

It found that Mr Moseley suffered from a psychiatric disorder, in this case generalised anxiety disorder, at the time of the clinical onset of alcohol

dependence. In this circumstance the third step in *Deledio* was satisfied.

Step 4 – satisfaction beyond reasonable doubt

The AAT found that the basis upon which the hypothesis rested had not been disproved beyond reasonable doubt and no other fact which was inconsistent with a necessary basis for the hypothesis had been proved beyond reasonable doubt. As such, alcohol dependence was war caused.

Alcohol hepatitis and gynaecomastis

Step 1 – is there a hypothesis?

The AAT noted that it was common ground that if Mr Moseley was found to suffer from war caused alcohol dependence then alcohol hepatitis and gynaecomastis should also be found to be war caused as stemming from his alcohol dependence.

Step 2 - Relevant SoPs?

The AAT was unable to find an SoP for alcohol hepatitis and gynaecomastis. As such, the AAT proceeded to determine the claim in accordance with the approach set out in *Byrnes.*

The AAT considered the evidence before it and noted the opinion of Mr Moseley's local medical officer (which was not contested by the Commission) that alcohol hepatitis and gynaecomastis were caused by alcohol dependence. As alcohol dependence was determined to be war caused the AAT also determined that alcohol hepatitis and gynaecomastis were war caused.

Formal decision

The AAT set aside the decision under review. It varied the diagnosis of PTSD to GAD and substituted a decision that GAD, alcohol dependence, alcohol hepatitis and gynaecomastis were war caused.

Re Dunn and
Repatriation Commission

S D Hotop, Deputy President
Dr P A Staer, Member

[2007] AATA 1996
28 November 2007

Prostate cancer – high fat diet – material needed to raise a connection between the diet and service

Facts

The late veteran, rendered operational service in the Royal Australian Navy ('RAN') from 12 July 1947 to 30 June 1951 and from 2 November 1953 to 16 July 1954. The late veteran's claim for malignant neoplasm of the prostate was rejected by a delegate of the Repatriation Commission and was affirmed by the VRB. Mr Dunn died and his widow continued his claim by appealing to the AAT.

The AAT set aside the VRB's decision and, in substitution therefor, decided that the veteran's malignant neoplasm of the prostate was war-caused. The AAT's decision was, however, set aside by the Federal Court of Australia on 8 December 2006 and the matter was

remitted to the AAT for hearing and determination according to law.

Applicant's position

Mrs Dunn put forward a hypothesis connecting her late husband's malignant neoplasm of the prostate with the circumstances of his service as follows:

- from the commencement of his RAN service (including his operational service), the late veteran was introduced to a daily service diet which contained a substantially higher level of animal fat than his daily pre-service diet, and he maintained that daily diet for the duration of his RAN service (including his operational service);
- after his discharge from the RAN, he maintained a diet with a high animal fat content (similar to his RAN service and operational service diet) until January 1984 because he associated that diet with the 'caring family environment' which he enjoyed in the RAN;
- his maintaining that high animal fat diet until January 1984 contributed in a material degree to his subsequently contracting malignant neoplasm of the prostate.

The AAT's reasons

Diagnosis

There was no issue as to diagnosis.

Is there a hypothesis?

The AAT was satisfied that on consideration of the whole of the material before it a hypothesis was pointed to connecting the late veteran's malignant neoplasm of the prostate with the circumstances of his service via the instances outlined above.

The relevant SoPs?

The AAT identified the SoP concerning malignant neoplasm of the prostate no 28 of 2005.

Is the hypothesis consistent with the template set out in the SoP?

The AAT, having considered the whole of the material before it, was of the opinion that that material raised a hypothesis that was consistent with clause 5(c) and clause 4, of the SoP No 28 of 2005. Specifically, the AAT identified material which pointed to:

- a pre-service diet of 42.1 grams of animal fat per day;
- a post-service diet of 224.8 grams of animal fat per day;
- maintenance, after discharge, of a diet containing an amount of animal fat at least as high as that contained in his RAN service (including his operational service) diet until January 1984;
- having maintained due to the 'caring family environment' which he enjoyed during his RAN service (including his operational service); and
- diagnosis of malignant neoplasm of the prostate in 1995.

Satisfaction beyond reasonable doubt

The AAT, considered the whole of the material before it, and regarded the analysis, opinions and conclusions set

out in Dr English's report, and her oral evidence, as cogent, and accepted them.

The AAT noted that there was no expert evidence before it which contradicted Dr English's analysis, opinions and conclusions.

More specifically, the AAT, on the basis of Dr English's report, was satisfied, beyond reasonable doubt, that:

- the reported pre-service daily diet substantially understated the amount of animal fat actually consumed, and, accordingly, it could not be regarded as reliable;
- the standard diet provided during RAN service (including operational service) was at least 108.8 grams of animal fat per day;
- the amount of animal fat consumed on a daily basis immediately prior to, and as at the commencement of, the late veteran's operational service was at least 108.8 grams per day (and probably greater than that amount).

In short, the AAT was satisfied, beyond reasonable doubt, that the late veteran's consumption of animal fat did not, during the period of his RAN service (including his operational service), increase by at least 40%, or at all, compared with the amount of animal fat consumed by him in the period immediately prior to, and as at the commencement of, his operational service.

In relation to, the post-service period, the AAT on the basis of Dr English's report, was satisfied, beyond reasonable doubt, that the veteran's reported diet of 224.8 grams of animal fat substantially overstated the amount of animal fat actually consumed on a daily basis and, accordingly, it could not be regarded as reliable.

Further, the AAT was satisfied, beyond reasonable doubt, that any increase in the late veteran's animal fat consumption occurred solely by reason of his own voluntary choice and was not related to his operational service.

Accordingly, the AAT was satisfied, beyond reasonable doubt, that the factual foundation of the raised hypothesis connecting the veteran's malignant neoplasm of the prostate with the circumstances of his operational service was disproved, and that, therefore, there was 'no sufficient ground' for determining that the veteran's malignant neoplasm of the prostate was a war-caused disease.

Decision

The AAT affirmed the Repatriation Commission's decision to refuse the late veteran's claim for malignant neoplasm of the prostate.

Editor's note

For further reading on issues concerning prostate cancer matters please see:

- the case summary of the Federal Court's decision in this matter which was reported in *VeRBosity* Volume 22 no 4 [pp. 139-202]; and
- the commentary concerning the prostate cancer group actions reported in *VeRBosity* Volume 21 no 4 from page 140.

Federal Court of Australia

Repatriation Commission v Farley-Smith

Middleton J
[2007] FCA 1058
18 July 2007

Whether hypothesis reasonable – procedural fairness

Facts

Mr Farley-Smith served in the Army during World War 2 in an anti-aircraft regiment in the Northern Territory. He died in 2001 from myelofibrosis. The AAT accepted that the veteran's death was war-caused on the basis of a hypothesis linking his death from myelofibrosis with his exposure to benzene during his service.

Grounds of appeal

The Repatriation Commission appealed that decision to the Federal Court on a number of grounds, which the Court summarised as amounting to the following issues:

- whether the decision was not open to the AAT on the evidence before it as it had failed to consider the relevant connection with the veteran's service;
- whether the AAT had applied the wrong test in asking itself whether there was proof that benzene does not cause myelofibrosis and whether the relevant connection was false; and
- whether the AAT had failed to accord procedural fairness to the Commission in considering material on which the Commission had no opportunity to respond.

The first issue-sufficiency of evidence

The facts raised by the material were essentially that the veteran used petrol and petroleum products during his service; the duration, extent and quantity of usage was unknown; the petroleum contained benzene; the period of possible duration was about 12 months; the veteran contracted myelofibrosis 52 years later; and he died from that condition.

The issue was whether there was sufficient material before the AAT to point to a reasonable hypothesis connecting the veteran's death with the circumstances of his service having regard to these raised facts.

The Court then considered the medical evidence and noted that the Commission had called two experts, Professor Fox (a haematologist) and Professor Peach (an epidemiologist), both of whom denied that there was any connection between benzene and myelofibrosis. Mrs Farley-Smith introduced into evidence in the AAT written reports from Dr Collins. He did not give oral evidence as the Commission did not seek to cross-examine him. The Court said:

> [25] In his first report, Dr Collins made two important statements:
>
> It has been generally accepted that in primary myelofibrosis, there is no

definitively known cause and hence the use of various terminologies for this condition, such as 'idiopathic' or 'agnogenic' although with recent research these descriptive terms would appear somewhat inappropriate. The development of this form of the disease has been linked to exposure to petroleum derivatives, particularly toluene and benzene, or to ionizing radiation (see accompanying example article by Tondel).

It has been suggested that, as a Bofors gunner during the war, the late Mr Farley-Smith may have been exposed to petrol/benzene. If such a suggestion can be appropriately substantiated then, in my opinion, there is a real possibility his death was war associated through the link between benzene exposure causing toxic effects on the bone marrow which then resulted in myelofibrosis.

[26] I observe that the reference to the article by Tondel (Tondel, et al, 'Myelofibrosis and Benzene Exposure' (1995)) is only by way of example to support his conclusion. I also observe that Dr Collins was aware that the veteran's exposure to benzene was as 'a Bofors gunner' and during the war, and thus was aware of the substantial gap in years between exposure and death, and probably between exposure and the time the veteran contracted myelofibrosis, and of the general nature of the veteran's exposure.

[27] Further, in his second report dated 15 June 2004, he referred to the report of Professor Peach dated 26 March 2004, where Professor Peach raised the temporal issues in the following manner:

The widow is hypothesising that a relatively short, intermittent exposure to benzene can cause myelofibrosis more than 50 years after such exposure has ceased.

Nevertheless, Dr Collins still maintained his view as to the causal link between benzene and myelofibrosis. It cannot be said that Dr Collins was not aware of the temporal issues, and that his view should be disregarded on this account.

[28] Before me, an attack was sought to be made of Dr Collins on the basis that he was not qualified at all, and certainly not as qualified as the expert witnesses called by the applicant. This was not raised before the Tribunal and, as I have said, his reports were tendered without objection. I note that Dr Collins is described in his reports as a Consultant Forensic Pathologist.

[29] In my view, it is too late now before this Court for the applicant to be submitting that Dr Collins was not sufficiently qualified to express his view and to rely, as the applicant does, on the comments of Menzies J in *Commissioner for Government Transport v Adamcik* (1961) 106 CLR 292 at 302:

It would be going too far to say that any legally qualified medical practitioner is to be regarded as sufficiently qualified as an expert to express an opinion upon any matter of medical science...

[30] It was further contended by the applicant that the Tondel article was contradicted by subsequent papers, not by Tondel himself, but apparently by his 'supervisors and senior staff', according to Professor Peach. It was also contended that Dr Collins, in any

event, only raised the 'possibility' of the relevant causal connection, which was not sufficient to give rise to a reasonable hypothesis. The respondent pointed out that in response to Professor Peach, Dr Collins stated that:

Whilst I agree with Prof. Peach's view that the proposed relationship between benzene exposure and the subsequent development of myelofibrosis is based on epidemiological studies and individual case reports, such a correlation does not necessarily exclude a definitive causal connection.

[31] As I have indicated, the Tondel article was merely an example of one reference material relied upon by Dr Collins. I do, however, accept that the Tondel article could not assist directly on the temporal issues as it concerned a case study about one man who had been exposed to benzene for 17 years as a petrol station attendant and who contracted myelofibrosis 13 years after that exposure.

[32] However, Dr Collins expressed himself, knowing of the temporal issues in this case, more definitively than the applicant submitted. Dr Collins spoke of a 'real possibility', not just a 'possibility' or 'mere possibility', that the veteran's death was relevantly connected to his exposure to benzene. Dr Collins' above response to Professor Peach does not detract from the opinion of Dr Collins, which he did not recant, in favour of the hypothesis proposed by the respondent, being cognisant of the temporal issues.

[33] In any event, this was not the only material before the Tribunal that supported the hypothesis connecting the veteran's death with his war service, although Dr Collins' evidence was the only material before the Tribunal to address the temporal issues in the way I have indicated above.

[34] The other expert called by the respondent was Dr Parkin. Dr Parkin provided a letter to the respondent dated 24 April 2003, which letter was tendered in evidence before the Tribunal. Dr Parkin was a haematologist at Heidelberg Repatriation Hospital and he identified four reports that linked benzene with myelofibrosis. Dr Parkin concluded that there was support for the hypothesis that benzene exposure contributed to the veteran developing myelofibrosis. The Tribunal does not seem to expressly take Dr Parkin's evidence into account, but that was material before the Tribunal.

[35] In addition there was the survey material from Sweden referred to in the Tondel article, and the United Kingdom survey referred to (although also discounted) by Professor Peach, and the bundle of documents produced by the respondent which were specifically relied upon by the Tribunal. Even accepting the criticisms of the applicant in respect of the content of the material, it does nevertheless show that the hypothesis (putting aside temporal issues) was not contrary to known scientific facts, nor was so obviously fanciful, impossible, incredible or untenable, or too remote or too tenuous: see Bushell v Repatriation Commission (1992) 175 CLR 408 at 414 and East 16 FCR at 533.

[36] In addition to the concession regarding the veteran's exposure to benzene, the Tribunal also referred to other decisions of the Tribunal (on which no objection was taken) where it

seemed clear that access to petroleum was readily available and its usage was probably without protective clothing or breathing apparatus: see *Whitworth v Repatriation Commission* [2002] AATA 861; *Prestegar v Repatriation Commission* (unreported, Northrop J, 14 February 1997). All this material was available to the Tribunal to support the hypothesis.

[37] There was also the study in the United Kingdom of 24,500 male employees in oil distribution centres of three petroleum companies in the UK between 1950 and 1975 (Rushton and Alderson, 'Epidemiological survey of Oil Distributions Centres in Britain' (1983)), which was referred to by Professor Peach. The Tribunal referred to this study by reference to three 'petroleum refineries' but I do not think anything turns upon this incorrect reference to petroleum refineries instead oil distribution centres. It was not a mistake which necessarily gives rise to an error of law and does not in my view impact upon the reliance placed by the Tribunal upon the study. This study concluded that having regard to the instance of myelofibrosis in the UK, it was expected that there would be 3 deaths within the total number surveyed, but in fact there were 5 deaths. Professor Peach, whilst acknowledging that the greater number of deaths than expected would not have been 'a chance finding', said that the study did not conclude an association between myelofibrosis and benzene. In fact, Professor Peach said that there had been studies conducted within the Australian petroleum industry which had concluded that there was no association between myelofibrosis and benzene and where there had been a measure of the extent of benzene exposure. Nevertheless, the Tribunal was entitled to attribute less weight to Professor Peach's view, and rely upon the study itself (which it did).

[38] Finally, there was the bundle of documents produced by the respondent. Putting aside the circumstances of reliance by the Tribunal upon those documents (to which I will return) that material does contain some general references to the connection between benzene and the contraction of myelofibrosis, although again not in respect of the temporal issues.

[39] Against this material before the Tribunal, the Tribunal heard the very strong views of Professors Fox and Peach concerning the connection between benzene and myelofibrosis. Professor Peach, in particular, did not agree with Dr Collins and criticised his conclusions. However, the Tribunal did not find the evidence of Professors Fox and Peach to be of such a 'superior reliability' that there was not sufficient ground to determine the death was war-caused. Both were subject to cross-examination, and one adverse comment was made implicitly of Professor Peach by the Tribunal in the Tribunal stating that Professor Fox was far less rigid than Professor Peach in expressing his opinions.

[40] In any event, it was not for the Tribunal to necessarily determine opposing views, just have regard to them in examining the validity of the reasoning which supports the hypothesis: see *Bushell* 195 CLR at 413-416. This, in my view, was the task the Tribunal undertook.

The second issue – the absence of evidence

The Commission submitted that the AAT asked itself the wrong question when it tested the hypothesis of connection by asking whether there was 'proof that benzene does not cause myelofibrosis' and 'proof that the connection is false'. It was argued that the absence of evidence to disprove a hypothesis cannot elevate it to a 'reasonable' hypothesis. The Court said:

> [45] In my view, the Tribunal did not ask the wrong question or pose the wrong test.
>
> [46] The Tribunal needed to test the hypothesis to determine whether it was reasonable. The Tribunal could rely upon the material before it to so test the hypothesis. The absence of evidence, whilst not elevating in itself a hypothesis as being reasonable not otherwise supported by sufficient material, could be taken into account in determining whether the hypothesis was reasonable. The Tribunal raised the issue of the absence of proof in connection with whether the hypothesis relied upon was contrary to proven scientific facts or to the known phenomena of nature. In my view, this was appropriate. It accepted that the contents of the report of Dr Collins, the survey material from Sweden referred to in the report of Tondel, the United Kingdom survey referred to by Professor Peach, and the bundle of documents produced by the respondent supported or pointed to a reasonable hypothesis connecting the service of the veteran and his exposure to benzene to his subsequent death from myelofibrosis. When the Tribunal said that there was no proof that benzene does not cause myelofibrosis and no proof that the connection is false, the Tribunal was not postulating a test, but merely observing that the hypothesis was not contrary to proven scientific facts or to the known phenomenon of nature, which was a relevant enquiry.

The third issue – breach of procedural fairness

The Court said:

> [49] The [Commission] submitted that the bundle of documents referred to at [95] of the Tribunal's reasons should not have been relied upon by the Tribunal in its reasons as it was not given copies of such material at the hearing, not given the opportunity to make submissions in relation to them, and not given the opportunity of putting the documents to Professors Peach or Fox. Further, the [Commission] submitted that, despite objecting to the tender of the material at the hearing, and the Tribunal stating that it would hear the applicant on the question of the weight to be given to the material, the Tribunal did not hear the applicant further on this matter, and proceeded to rely upon the documents. In this regard, the applicant submitted that it had been denied procedural fairness and there had been a breach of s 39(1) of the AAT Act. In my view, this submission should be upheld.

Mrs Farley-Smith argued that the AAT did not need to rely on these documents to reach its conclusion. The Court rejected that submission and said:

> [58] An analysis of the Tribunal's reasons show, in my view, the bundle

of documents was relied upon in at least two respects. One was to impact particularly upon the acceptance of the evidence given by Professor Peach. The other was to show the connection between benzene and myelofibrosis was 'more than a possibility', which was a critical issue. …

[60] In addition, the Tribunal did seem to single out this bundle of documents as at least assisting in the Tribunal concluding that the hypothesis was 'more than a possibility'. I acknowledge that the Tribunal did later refer to other material, which in itself may have been sufficient to assist in the conclusion reached (particularly the reliance on Dr Collins), but I cannot be satisfied as to the comparative weight given to all the material relied upon by the Tribunal to reach its ultimate conclusion. Having regard to the separate and specific treatment given to the bundle of documents by the Tribunal, it may well be that the Tribunal was finally persuaded by the information in the bundle to reach the conclusion it did.

Decision

The Court remitted the matter to the AAT to be reheard by a differently constituted tribunal.

What this case means

Apart from highlighting the effects of procedural errors (first, by the Commission in failing to challenge the expertise of a witness as a preliminary issue at the hearing, and secondly, by the Tribunal in failing to allow the parties to make submissions in relation to material that it considered), this case emphasises the nature of the evidence required to raise a reasonable hypothesis if there is no relevant Statement of Principles to be applied.

A hypothesis will be 'reasonable' if it is raised by the whole of the material, it is more than a mere possibility, and is 'not contrary to known scientific facts, nor … obviously fanciful, impossible, incredible or untenable, or too remote or too tenuous'. The fact that there are contrary views expressed by eminent experts does not render a hypothesis unreasonable.

Repatriation Commission v Brady

Gordon J
[2007] FCA 1087
31 July 2007

Diagnosis of claimed disease – alcohol abuse – alcohol dependence – anxiety disorder not otherwise specified – generalised anxiety disorder – necessity to identify the correct disorder in order to apply a SoP

Facts

Mr Brady claimed a disability pension in relation to an alcohol problem, post traumatic stress disorder and anxiety/depression. The AAT found that he did not suffer from post traumatic stress disorder, and affirmed that part of the decision under review, but granted the claim in respect of 'generalised anxiety disorder and alcohol dependence or alcohol abuse', finding that those conditions were war-caused.

Grounds of appeal

The Commission appealed this decision on the grounds that the AAT had erred in law:

1. in finding that the veteran suffered from alcohol dependence or alcohol abuse;
2. in determining that 'generalised anxiety disorder' was war-caused when it had found that the veteran suffered from a separate disorder, namely, 'anxiety disorder not otherwise specified';
3. in determining that 'generalised anxiety disorder' was war-caused when there was no or insufficient evidence to support such a finding.

The Court's consideration

Alcohol abuse or alcohol dependence

In relation to the first ground of appeal, the Commission argued that, in terms of the definition in the relevant Statement of Principles, alcohol abuse can be diagnosed only if the symptoms of alcohol dependence have never been met.

It was argued on behalf of Mr Brady that nothing really turned on the description of the disease because the same factors in the Statement of Principles applied for whichever disorder was diagnosed. The Court disagreed. Gordon J said:

> [28] The question raised by this appeal was whether it was necessary for the Tribunal to find which of the two conditions was applicable to the veteran and if so, whether the Tribunal's failure to do so was an error of law?
>
> [29] The answer to each question is yes. … [I]t was an error of law for the Tribunal to fail to make a finding as to which of the two conditions was applicable to the veteran.

The Court then considered whether the matter should be remitted, and said that it should for the following reasons:

> [32] First, the conditions are distinct and are to be diagnosed on the basis of different criteria. …
>
> [33] Secondly, the observations of the Full Court in Repatriation Commission v Butcher [2007] FCAFC 36 at [19] in relation to s 44(7) of the AAT Act are apposite:
>
> The Tribunal had fallen into legal error, and in our view, the appropriate course of action in this case was for the Tribunal to reconsider the evidence having regard to any further submissions or evidence which the parties wished to advance. In cases where a wrong principle has been applied by an administrative tribunal, it will generally follow that the matter should be referred back, except in cases where it would be futile to do so or where there could be no other outcome.
>
> [34] Each of those observations applies to the present case. The Tribunal had fallen into legal error. Not only did the Tribunal fail to make a finding about which of two disorders the veteran suffers but, in some paragraphs, appeared to approach the matter as if the veteran suffered from both. … That is not possible.
>
> [35] Thirdly, the evidence before the Tribunal was not entirely satisfactory.

Paragraph 5 of the Alcohol SoP sets out the factors that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting alcohol dependence or alcohol abuse with the circumstances of a person's service. In the present case, the factor relied upon was (para (b)) that the veteran 'experience[ed] a severe stressor within the two years immediately before the clinical onset of alcohol dependence or alcohol abuse.

[36] I accept the contentions of the Commission that in determining whether that factor existed, it was necessary for the Tribunal:

(1) to distinguish between the two disorders; and

(2) to have before it (and it appears that it did not) evidence from a medical practitioner determining for the purposes of the Alcohol SoP whether the disease is or was present at a particular time: Repatriation Commission v Milenz (2006) 93 ALD 107 at [34] citing Repatriation Commission v Cornelius [2002] FCA 750 at [26].

[37] The latter requirement imposed a medical-scientific standard, not a lay standard, which in the present case required evidence from a medical practitioner identifying the date of the clinical onset of the disease the veteran had contracted within two years from October 1970 (being the date of a helicopter incident in Vietnam). Moreover, such a diagnosis would have to take into account the criteria prescribed by the Alcohol SoP for each relevant disorder – alcohol dependence or alcohol abuse.

The Court said that for those reasons, the matter had to be remitted to the AAT to be reheard. It then went on to discuss the other grounds of appeal.

Anxiety disorder diagnosis

The Court noted that:

> [40] … At para [91], the Tribunal records its finding on the balance of probabilities that the appropriate diagnosis was that of 'anxiety disorder not otherwise specified'. The Tribunal notes at [94] that the Anxiety SoP is with respect to 'generalised anxiety disorder' (which it is). However, it then refers to the disorder as 'anxiety' (at [108], [109], [111], [113]) and then sets aside the decision of the VRB and, in substitution, decides that the injury or disease is not that of 'anxiety disorder not otherwise specified' but of 'generalised anxiety disorder'. As the Anxiety SoP makes clear, the disorders are different.

The Court noted that the third ground of appeal was in essence the same as the second and that it too would succeed.

Decision

The Court allowed the appeal, set aside the AAT's decision and remitted the matter to be reheard by a differently constituted tribunal.

Gardiner v Repatriation Commission

Sackville J
[2007] FCA 1290
21 August 2007

Whether AAT engaged in impermissible fact finding

Facts

Mr Gardiner was born on 11 September 1923. He enlisted in the Australian Army on 12 February 1942 and served until 11 November 1944. service included a period in New Guinea as an artillery gun layer.

On 10 August 1975, Mr Gardiner died when the tractor he was driving overturned, pinning him face down on the ground, causing asphyxiation. A post mortem examination identified the cause of death as 'asphyxiation due to cerebral concussion.'

The AAT affirmed the decision of the Repatriation Commission that Mr Gardiner's death was not war caused and that a pension was not payable to his widow, Mrs Gardiner.

Grounds of appeal

Mrs Gardiner appealed that decision to the Federal Court. The case concerned one issue:

- Did the AAT engage in an impermissible process of fact finding?

The AAT's reasons

Mrs Gardiner's case before the AAT was that her late husband was so restricted in movement by his war caused lumbar spondylosis that when the tractor he was driving 'rolled', he was unable to jump clear, becoming pinned underneath the overturned tractor and suffocated.

The AAT observed that little was known of Mr Gardiner's state of health on the day of his death, and that no mention had been made at the inquest of any lack of mobility on his part. Nor had the issue been raised when Mrs Gardiner made her first claim for pension in the 1980s. Further, the AAT noted that Mr Gardiner had been in sufficiently good health on the day of his death to use a tractor to plough a field.

In addition, the AAT referred to a consulting engineer's report noting that the opportunity for a tractor driver of the deceased's age to exit a tractor in the process of overturning was an extremely short period of time even for an able bodied man.

The AAT said:

> '…[to] say that it was his lumbar spondylosis that prevented him jumping clear of the tractor so as to avoid fatal injury when all he had was one to two seconds in which to take that action is, on what is known in this matter, mere speculation and incapable of raising an hypothesis properly categorised as reasonable'.

The Court's consideration

Justice Sackville considered that the AAT found, as a matter of fact, that all of the material before it did not point to the

applicant's hypothesis as a reasonable one. His Honour found that the AAT had not rejected the analysis in the consulting engineer's report, neither had it made findings on any disputed issue of fact nor had the AAT preferred some evidence over other evidence. In his Honour's opinion the AAT did not engage in fact finding when considering whether a hypothesis was raised by the material. It was only saying what the authorities have said: the material must point to the connecting hypothesis, rather than the connection remaining purely in the realm of conjecture or speculation. As such, his Honour found that Mrs Gardiner had failed to establish that the AAT had erred in law.

Editor's note:

Subsection 120(3) of the VEA requires the decision maker to form an opinion that the material before it does or does not raise a reasonable hypothesis connecting a person's death with the circumstances of their service. There is no doubt that the decision maker is required to look at all of the material, not just some of it. However, it cannot at this point make a finding on any disputed issues of fact. Nonetheless, in performing the task required by s120(3) the decision maker will need to assess the factual material before it. This involves reaching an opinion about a matter, and it is in that sense, a question of fact.

In this case the AAT properly discharged it statutory duty. The AAT did not treat the opinion of those who investigated the accident as unreliable, inaccurate or speculative. The AAT did not describe the evidence of any witness as unreliable, inaccurate or speculative. Its finding that Mrs Gardiner had not raised a reasonable hypothesis connecting her late husband's death with his war service was a finding of fact and so could not be challenged on appeal to the Court.

Gittins v Repatriation Commission

Marshall J
[2007] FCA 1380
30 August 2007

Whether AAT erred finding no reasonable hypothesis - application of the *Deledio* steps

Facts

Mr Gittins was a veteran who served in the Australian Army from July 1949 until December 1971. He had served on operations in Japan from July 1953 until July 1955. Mr Gittins died in 1997 as a consequence of a low grade non-Hodgkin's lymphoma. The AAT affirmed a decision that Mr Gittins' death was not war caused and that pension was not payable to his widow.

Mrs Gittins appealed to the Federal Magistrate's Court. Federal Magistrate Riley dismissed her appeal.

Grounds of appeal:

Mrs Gittins appealed to the Federal Court. The case concerned two issues:

- was there only one cause of death; and
- had the AAT correctly applied the Deledio process?

The AAT's reasons

Mrs Gittins contended before the AAT that her husband's kind of death was non-Hodgkin's lymphoma; and that his death was war caused as he had an inability to obtain appropriate clinical management because of his fear or phobia of doctor's or hospitals, arising out of his experiences when hospitalised in Japan.

In the course of the hearing Counsel for Mrs Gittins changed the emphasis on the hypothesis raised. Submitting that the late veteran's war caused phobia of medical intervention resulted in him failing to obtain adequate and appropriate treatment for his non-Hodgkin's lymphoma.

The AAT found that Mr Gittins died from non-Hodgkin's lymphoma. It then considered the two hypothesis.

In relation to the first hypothesis the AAT found:

- there was material before it pointing to a hypothesis connecting the death with war service;
- the hypothesis was that Mr Gittins was unable to obtain appropriate clinical management for his lymphoma;
- there was an SoP in force relevant to such a hypothesis – SoP 37 of 2003;
- the hypothesis was not consistent with the template found in the SoP because of the lack of evidence that Mr Gittins had contracted the disease before his operational service; and
- as the hypothesis failed to fit the template of the SoP, the claim could not succeed.

In relation to the second hypothesis the AAT found:

- There was an absence of an SoP for fear or phobia of that kind (ie. medical intervention);
- nonetheless, the absence of an SoP did not prevent it considering whether the hypothesis was reasonable; and
- the hypothesis was too tenuous and too remote to be reasonable.

The Federal Magistrate's Court

Federal Magistrate Riley considered that there was only one cause of death, non-Hodgkin's lymphoma and that the relevant SoP applied. Mr Gittins did not die of phobia.

In relation to the first hypothesis, her Honour considered that the AAT had properly applied the first three Deledio steps. As the claim did not fit within the template of the SoP it failed. It was unnecessary for the AAT to consider fourth step of Deledio.

In relation to the second hypothesis, her Honour held that the AAT had erred. It should have given no further consideration to the alternative hypothesis. She concluded that:

- where there is only one cause of death, and
- an SoP applies to that kind of death,
- that SoP governs the determination of whether the hypothesis is reasonable.

In any event, her Honour considered that the AAT's error was of no consequence.

The court's consideration

Counsel for Mrs Gittins argued before the Federal Court that the AAT had 'implicitly' found that phobia was one of the causes of death. Justice Marshall concluded that a finding in relation to a kind of death should be precise not implicit. Further, his Honour held that Federal Magistrate Riley was correct in determining that:

- there was only one cause of death;
- that AAT had properly applied the first three Deledio steps; and
- the SoP that applies to the kind of death found governs the determination of whether the hypothesis that death arose from the relevant service is reasonable.

Editor's note

Kind of death

The first question in cases such as this is to ascertain the kind of death. It is open to find that a late veteran may have had more than one kind of death . However, there was a very clear finding in this case that Mr Gittins' kind of death was non Hodgkin's lymphoma. The 'kind of death' was not fear or phobia.

The second hypothesis

The SoP for non-Hodgkin's lymphoma set out the matters that needed to exist for a claim based on the relevant kind of death to succeed. The relevant SoP did not set out phobia or fear as a factor capable of connecting Mr Gittins' kind of death from non-Hodgkin's lymphoma with the circumstances of his service. The AAT was not permitted to consider the second hypothesis without reference to the relevant SoP. This was an error of law. However, ultimately this was not material to the decision made by the AAT. It would appear that the AAT was led into error by a confusion between Mr Gittins' kind of death and the circumstances of his death.

The Deledio steps

There was no error of law made by the AAT in its consideration of the first hypothesis, or the methodology applied in accordance with the Deledio steps. Only if the hypothesis is found to be reasonable because it fits the template set out in the SoP will the decision maker be required to consider s120(1) - step four of *Deledio*.

Repatriation Commission v Sergeant

Collier J
[2007] FCA 1408
10 September 2007

Identification of hypothesis - whether second step in *Deledio* satisfied

Facts

Mr Sergeant was a veteran who served in the Royal Australian Air Force from 22 October 1943 to 5 June 1946. He served in Morotai from 7 April 1945 until late October 1945 as a radio operator.

Mr Sergeant died in 2004. The death certificate records the causes of death as:

> '1(a) ? Cerebrovascular accident with ? seizure (b) Hypertension (c) Epilepsy 2. Ischaemic heart disease, cerebral haemorrhage, transient ischaemic attack'.

The AAT set aside the decision of the Board and decided that the death of the late Mr Sergeant was war-caused and that pension was payable to his widow.

Grounds of appeal

The Repatriation Commission appealed to the Federal Court. The case concerned two issues:

- did the AAT identify the relevant hypothesis; and
- had the AAT correctly applied the second step in *Deledio?*

The AAT's reasons

The AAT found that a cerebrovascular accident was Mr Sergeant's main cause of death. The AAT did not identify the relevant hypothesis. However, it could be inferred that the relevant hypothesis was:

- the cerebrovascular accident was caused by hypertension;
- the hypertension was caused by either an anxiety disorder or panic disorder;
- anxiety or panic disorder was caused by Mr Sergeant's operational service.

The AAT made a finding that the second step in *Deledio* was satisfied. However, it only identified three SoPs relevant to the claim, namely:

- SoP for Cerebrovascular Accident (No 57 of 2003 and No 51 of 2006)
- SoP for Ischaemic Heart Disease (No 53 of 2003 as amended by No 9 of 2004)
- SoP for Hypertension (No 35 as amended by No 3 of 2004).

The Court's consideration

Justice Collier concluded that the AAT did not identify the relevant hypothesis. Further, to the extent that a hypothesis was identifiable, the AAT had not properly identified the SoPs that upheld the whole of that hypothesis.

In providing guidance for the AAT in rehearing the matter her Honour indicated that if, for example, one of the links in the relevant hypothesis was that Mr Sergeant's hypertension was caused by an anxiety or panic disorder that link in the hypothesis would need to be supported by the relevant SoPs.

What this case means

Once a kind of death has been determined, it is necessary to consider whether the material raises a hypothesis that consists of a link or links which connect, at one end, the type of death suffered by the late veteran with the circumstances of their service.

If a hypothesis relies on a sub-hypothesis or sub hypotheses, each of the links in the chain must be supported by an SoP.[33]

[33] *McKenna v Repatriation Commission* [1999] FCA 323.

In this case it was necessary for the AAT to have regard to the SoPs concerning anxiety disorder (No 1 of 2000)[34] and panic disorder (No 9 of 1999). However, the AAT made no reference to these SoPs. Accordingly, contrary to the finding of the AAT, the second *Deledio* step was not satisfied.

Hall v Repatriation Commission

Gyles J
[2007] FCAFC 2021
18 December 2007

Whether death was attributable to eligible service – did AAT err in law by failing to satisfy itself beyond reasonable doubt, that there was no sufficient ground for determining that the veterans' alcohol dependence arose out of his war service?

Facts

Mr Butler served in the Royal Australian Navy between 4 March 1948 and 14 June 1973. He had many periods of operational service, commencing on 27 June 1950 in Korea and ending on 25 May 1969 in Vietnam. He died on 17 December 2002 from cerebrovascular disease.

His widow's claim for pension was rejected by the Repatriation Commission and the AAT affirmed the rejection. The issue in contention before the AAT had concerned whether the late veteran's alcohol consumption was a causal result of his operational service.

Grounds of appeal

Mrs Hall appealed to the Federal Court from the decision of the AAT. The appeal concerned one issue:

> In relation to it's statement that '…*we were not satisfied beyond reasonable doubt that such alcohol consumption was war caused* ' did the AAT misdirect itself as to the meaning of 'beyond reasonable doubt' and apply the wrong standard of proof ?

The Commission's position

The Commission stated that this sentence was a mistake or drafting error and did not reflect the actual reasons for decision. Specifically, the key to the AAT's decision was it's finding that the late veteran had commenced drinking in 1949 because he had 'acquired a taste for it' and that operational service, which commenced in June 1950, did not lead to an increase in drinking.

The court's consideration

Justice Gyles found that the AAT's statement could not be ignored and treated as a slip of the pen. His Honour said:

> 'There were various bases for a link between operational service and alcohol dependence in the material before the Tribunal . The Tribunal considered and dealt with some of those bases and not others . There are occasions where primary facts alleged to support a hypothesis might be positively rejected and the hypothesis, or an essential integer of it, negated beyond reasonable doubt (Byrnes v

[34] Please note the new SoP concerning Anxiety Disorder no 101 of 2007 was given effect on 19 Sept 07.

> Repatriation Commission (1993) 177 CLR 564 at 570) . That is not the manner in which the Tribunal proceeded and, having in mind the objective circumstances of the case, it could hardly have proceeded to find the relevant circumstances disproved in that sense.
>
> In my opinion, the parties were correct in focusing argument before the Tribunal on the existence of the necessary hypothesis, as occurred in Bull 188 ALR 756, but the Tribunal ended up misdirecting itself as to the interplay between s 120(1) and s 120(3) and so applied the wrong standard of proof. The remaining grounds of appeal are best seen as aspects of that fundamental problem. I have remarked elsewhere upon the difficult task that the Tribunal has in applying these sections as they have been interpreted by the relevant authorities of the High Court and this Court (*Byrne v Repatriation Commission* [2007] FCAFC 126, 97 ALD 359 at [1]).
>
> In my opinion, the Tribunal did apply the wrong standard of proof when arriving at the decision and, having found that a reasonable hypothesis existed, and having dealt with the facts in the way it did, the Tribunal, properly directed as to the meaning of 'beyond reasonable doubt', could not have rejected the claim pursuant to s 120(1) .'

Formal decision

The appeal was allowed and the decision of the AAT set aside. The appeal was stood over to enable the parties to make submissions as to the appropriate orders to be made.

Commentary

Step 3 of Deledio

As noted by his Honour, the parties submissions before the AAT had focussed on step 3 of *Deledio.* At this point the AAT was required to determine whether the material before it, taken as a whole, pointed to every essential element of the relevant SoP factor existing in the late veteran's case, and whether there was any evidence pointing to a link between that factor and his eligible service.

If the AAT found that all of the material did not point to every essential element of the relevant SoP factor (including the relationship to service) then it would open to find that the hypothesis was not fairly raised by the material and could not be deemed reasonable. As such, the claim would fail.

Step 4 of Deledio

Step 4 of *Deledio* required the AAT to assess the material before and, in effect, decide whether the hypothesis had been disproved beyond reasonable doubt. If it had, the claim would fail.

Conversely, if the hypothesis had not been disproved beyond reasonable doubt, the claim would succeed.

It is important to note that there is no onus of proof on the Repatriation Commission at this step in *Deledio* to satisfy the AAT beyond reasonable doubt that an essential aspect of the hypothesis (including the relationship to service) does not exist.

Repatriation Commission v Robertson

Cowdroy J
[2007] FCA 1674
4 December 2007

Whether conditions related to eligible service – wrong test identified and applied by AAT – findings made in the absence of evidence – whether futile to remit to AAT upon possibility of different outcome being reached

Facts

Mr Robertson served in the Royal Australian Navy from January 1965 to March 1988. He trained as a diver. On 3 June 1969 Mr Robertson was serving in HMAS Melbourne when it collided with USS Frank E Evans. As a diver his duties immediately following the collision included recovery of survivors, bodies and body parts. Subsequently he experienced psychological stressors caused by his involvement in a diving incident in Hong Kong; being in proximity to HMAS Melbourne and experiencing a fire in HMAS Supply.

Mr Robertson claimed to suffer from post traumatic stress disorder ('PTSD'), alcohol dependence and major depression and that they were related to his service in the RAN.

The AAT set aside the decision of the VRB and determined that Mr Robertson 's PTSD, alcohol dependence and major depression were related to his 'eligible service'.

Grounds of appeal

The Commission appealed to the Federal Court from the decision of the AAT. The appeal concerned three issues:

- Did the AAT err in finding Mr Robertson's service was 'eligible service' as referred to in section 9(1)(e) of the VEA rather than finding he had 'defence service' as defined in section 68(1) of the VEA?
- Did the AAT fail to apply the correct test pursuant to section 70(5)(d) in determining whether Mr Robertson's condition was contributed to in a material degree or was aggravated by his defence service rendered after he developed PTSD?
- If the clinical onset of PTSD was found to have occurred in 1994, was the AAT's inquiry into the intervening stressors irrelevant?

Mr Robertson's position

Mr Robertson agreed with the Commission that the AAT had erroneously referred to section 9(1)(e) of the VEA. However, he submitted that the error made no difference because the statutory provisions contained in section 9(1)(e) and 70(5) were virtually the same for 'eligible war service' and 'defence service'. In any event, Mr Robertson submitted that the subsequent stressors he experienced satisfied section 70(5)(a) of the VEA.

The court's consideration

Justice Cowdroy found that the test which should have been applied by the

AAT was that prescribed by section 70(5) of the VEA. Further, he noted that the reference to section 9(1)(e) of the VEA demonstrated an obvious error by the AAT as entitlement to pension was based on 'defence service' and not 'eligible war service' as considered by the AAT. His Honour said:

> '[29] Even though the text of s9(1)(e) and of s70(5)(d) are similar, this circumstance does not detract from the conclusion that the wrong test was applied by the Tribunal. The failure of the Tribunal to refer to the correct statutory provision demonstrates that the Tribunal asked itself the wrong question. Jurisdictional error therefore exists in its decision…'

His Honour went onto note that the AAT's observations appeared to be inconsistent. Specifically, references to the later stressors suggested that the AAT was only considering whether Mr Robertson's defence service aggravated his PTSD. However, the AAT's finding that the clinical onset of PTSD did not occur until 1994 indicated that the AAT had actually considered that any one of later stressors could have caused Mr Robertson's PTSD.

In relation to alcohol dependence, his Honour found that there was no material before the AAT capable of supporting its finding that the clinical onset of Mr Robertson's alcohol dependence occurred at a time when he had PTSD. In this respect, the AAT had erred.

In respect of major depressive disorder, his Honour found that the AAT had again misdirected itself. The AAT's findings in relation to depressive illness were dependent upon the existence of PTSD being defence caused. In that respect, as noted above, the AAT had erred.

The final issue considered was whether the whole matter should be referred back to the AAT. His Honour was not satisfied that if the AAT had addressed the correct questions, its decision would be the same irrespective of the error: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

> '[48]…The errors of the Tribunal include the reference to eligible service under s 9(1) when the correct test was contained in s70(5) of the Act; the reference to 'war service' when the only service relevant was Mr Robertson's 'defence service'; the failure to refer to the correct provisions of s 70(5) of the Act; and the finding made in the absence of any evidence of Mr Robertson's alcohol dependence. The Tribunal did not identify the correct issues which it was required to determine and accordingly fell into jurisdictional error: see *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 347-8.
>
> [49] In view of the above findings of error in the decision of the Tribunal, the court is not of the opinion that it would be 'futile to remit the matter': see Arnott v Repatriation Commission (2001) 106 FCR 83 at [36]. Rather the Court considers that there is a possibility that a different result would be reached on such remitter: see *Santa Sabina College v Minister for Education* (1985) 58 ALR 527 at 540; and *Nguyen v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 206 at 213-214.'

Formal decision

The Court ordered that the AAT's decision be set aside and the proceedings be remitted for determination by a differently constituted Tribunal pursuant to section 44(5) of the *Administrative Appeals Tribunal Act* 1975 (Cth).

Commentary

Section 70 of the VEA sets out the connections for a person's injury, disease or death with the circumstances of their defence service.

For the 'arose out of, or attributable to' connections to apply pursuant to section 70(5)(a), 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.[35]

For 'aggravation or material contribution' provisions to apply pursuant to section 70(5)(d), the aggravation must:

- relate to a pre-existing injury or disease;
- be of a permanent nature; and
- worsen the injury or disease itself rather than merely worsen its symptoms or have only a temporary worsening effect on the injury or disease.[36]

In addition, when considering Statements of Principles, the only factors that relate to aggravation or material contribution are:

- clinical worsening of the injury or disease; or
- inability to obtain appropriate clinical management.

Further, pursuant to subsection 70(9)(b)(ii) VEA a person must have at least 6 months defence service for an injury or disease to be accepted as defence-caused on the grounds of material contribution or aggravation by defence service or peacekeeping service.

Peacock v Repatriation Commission

Downes, Lander and Buchanan JJ
[2007] FCAFC 156
26 September 2007

practice and procedure – extent of review on remittal

Facts

Mr Peacock was a Vietnam veteran who served from 1966 to 1967. He became entitled to a disability pension and applied for an increase in pension at the special rate.

The Board and AAT affirmed the decision that pension was not payable at the special rate. Mr Peacock appealed to the Federal Court and was successful. The matter was remitted to the AAT. However, on rehearing the AAT again affirmed the decision that pension was not payable at the special rate.

[35] *Repatriation Commission v Law* (1980) 31 ALR 140

[36] *Repatriation Commission v Yates* (1995) 38 ALD 80, 21 AAR 331

Grounds of appeal

Mr Peacock appealed the second decision of the AAT to the Full Federal Court. The case concerned one issue:

- Did the AAT exceed its jurisdiction by addressing a matter on rehearing that had been conceded at the original hearing?

The Full Court's consideration

Their Honours considered that the whole matter was remitted to the AAT. It was not confined to issues relating to that question of law before the Federal Court. In addition, their Honours noted that it would be a rare case where a limitation could be inferred from the reasons of a judgment. In the absence of some express limitation, the AAT was required to determine all questions of fact and law.

Further, their Honours noted that a concession does not permit the AAT to avoid its duty to make the correct or preferable decision on all relevant aspects of the matter before it. Specifically, where the parties invite the AAT to make a decision in accordance with an agreed terms under section 42C of the AAT Act, the AAT is nevertheless required to satisfy itself that the decision is within its power.

Editor's note

Parties to a matter before the Federal Court should routinely put submissions in relation to the following matters:

- Whether the whole case should be remitted, or only part;
- if so, which part; and
- if there is to be further evidence.

Collins v Repatriation Commission

Lindgren, Emmett, Allsop JJ
[2007] FCAFC 111
27 July 2007

Whether hypothesis reasonable – Application of the *Deledio* steps – fact-finding

Facts

Mrs Collins claimed a war widow's pension on the ground that her late husband's death from myocardial infarction was contributed to by hypertension that was contributed to by post traumatic stress disorder, that resulted from a severe stressor, namely, serving in a ship when it was sunk by enemy action in World War 2.

The AAT's reasons

The Tribunal had said:

> [52] In the view of the Tribunal, the position in relation to the Statement of Principles Concerning PTSD on all the material is as follows: Mr Collins was exposed to a traumatic event, namely the sinking of the vessel, and this satisfies the requirements of Factor A of the requirements for PTSD. We are also satisfied that Factor B is satisfied in that the traumatic event was persistently re-experienced by way of recurrent and intrusive and distressing recollections.
>
> [53] In relation to Factor C, the Tribunal is not satisfied that there was persistent avoidance of stimuli associated with the trauma and a numbing of general

responsiveness. There is some evidence from Mr Liprini's statement that the veteran made efforts to avoid conversations associated with the trauma. However, the evidence as to the veteran maintaining an interest in US navy vessels is inconsistent with avoiding activities, places or people that arouse recollections of the trauma. In addition, Mr Collins remained in maritime engagement after the sinking of the vessel in 1941. There is no evidence that he had an inability to recall an important aspect of the trauma. It is doubtful whether he had a markedly diminished interest or participation in significant activities. He was able to engage in taxi driving for many years and on the evidence of Mrs Collins, he got along well with almost anybody over that period. The veteran was a good reader, took an interest in horses and gambling, and enjoyed television. Nor is the Tribunal satisfied that he had a feeling of detachment or estrangement from others. The evidence does not indicate that Mr Collins had a restricted range of affect, for example, being unable to have loving feelings. The veteran did maintain a warm and loving relationship with the applicant for a very substantial period of time. There is no evidence that he had a sense of a foreshortened future, in the sense of not expecting to have a normal life span. Accordingly, Factor C is not made out, and therefore the application must fail.

[54] In relation to Factor D, there is evidence that the veteran experienced difficulty sleeping. This satisfies one of the criteria under Factor D. However, it is doubtful that the veteran exhibited signs of irritability or anger in the context of this provision, as opposed to being merely agitated. The fact that he was a good reader and was able to drive a taxi for a substantial period of time indicates that the veteran did not have undue difficulty concentrating. There was evidence that Mr Collins was highly strung, but there is no evidence that he had an exaggerated startle response. In relation to this last factor, the evidence is to the contrary, as the veteran was described as 'placid.' Therefore, Factor D has not been made out on the evidence as only one symptom under this section has been established where two are required.

[55] For these reasons, having regard to all the material before us, including that of the psychiatrists, the Tribunal is not satisfied that there is a reasonable hypothesis raised. …

Grounds of appeal

This case concerned the question whether the Tribunal had correctly applied the Deledio process when it found that Mr Collins' death was not war-caused, or whether the Tribunal had engaged in fact-finding at one of the earlier stages of the process on the balance of probabilities standard.

The Court's consideration

Allsop J (with whom Lindgren and Emmett JJ agreed) said:

[48] … I take the following as settled and uncontroversial principles concerning the undertaking of the task in s 120(3) as affected by the existence of a SoP under s 196B and by s 120A(3):

(a) The Tribunal must consider the whole of the material before it: s 120(3).

(b) The Tribunal is to form an opinion whether the material raises a reasonable hypothesis connecting the injury, disease or death wit the circumstances of service: s 120(3).

(c) The formation of that opinion involves consideration as to whether a relevant SoP upholds the hypothesis: s 120A(3).

(d) At the stage of formation of the opinion in (b), involving the consideration in (c), no question of fact finding arises: Deledio …

(e) The formation of the opinion involves the reaching of a factual conclusion: Bull … and involves the assessment of all the material before the Tribunal, but not the finding of facts or rejecting material: Bull.

[49] As has been shown in a number of cases concerning ss 120(3) and 120A, the dividing line between impermissible fact finding and required assessment of all the material in the formation of an opinion as to whether a hypothesis is reasonable in connecting the injury, disease or death with the circumstances of service and as to whether a relevant SoP upholds the hypothesis is not necessarily easy to discern. …

[78] … the task in s 120(3) … may involve looking at conflicting material, but not for the purpose of preferring one opinion over another. …

Lindgren J, in agreeing with Allsop J, said of the Deledio process:

[8] At the first three stages, the Tribunal is required to deliberate at a level of abstraction and it is only at the fourth stage that it is required to descend to the resolution of evidentiary conflict, and it is then required to do so according to the 'beyond reasonable doubt' standard.

Allsop J examined the Tribunal's reasons and said:

[79] Here, not only did the Tribunal prefer one medical opinion over another …, but the opinion that was preferred … had within itself preferred some facts … to others which he viewed as 'inadequate, inaccurate and inconsistent' …

[80] In my respectful view, the Tribunal went further at this stage than it was permitted to. It resolved competing medical opinions by preferring one which had itself expressed a preference for the rejection of inconsistent facts which were also before the Tribunal. The rejection of the hypothesis in [53] and [54] can be seen as taken from Dr Delaforce's (and the Tribunal's) resolution of the underlying facts. …

[82] In my view, this approach was one of factual resolution, not the assessment of the hypothesis contemplated by ss 120(3) and 120A(3) of the Veterans Act.

Emmett J, who also agreed with Allsop J, said:

[20] The Tribunal examined the evidence of two psychiatrists who gave conflicting opinions concerning the presence of post traumatic stress disorder so far as the veteran was concerned. The Tribunal appears to have weighed that evidence on the balance of probabilities. The Tribunal did not engage in the task of first forming an opinion as to whether the whole of the material before it raised a reasonable hypothesis connecting the

veteran's death with his war service. That is not a fact finding exercise.

Decision

The Court allowed the appeal and remitted the matter to be reheard by the Tribunal. The Commission was ordered to pay the applicant's costs.

Editor's note

In this case the veteran's 'kind of death' was 'death from myocardial infarction' or 'death from ischaemic heart disease'. While it was hypothesised that post traumatic stress disorder was a contributory cause of the veteran's ischaemic heart disease, the Tribunal did not have to find that the 'kind of death' was 'death from post traumatic stress disorder' for the claim to succeed. It still had to apply the post traumatic stress disorder Statement of Principles (McKenna's case), but all that the Tribunal was required to do was to determine whether or not the material 'pointed to' or 'raised' the facts, rather than proved on the balance of probabilities, that the veteran suffered from post traumatic stress disorder, that it was related to his service, and that it contributed to the cause of the veteran's ischaemic heart disease. This process does not involve preferring one expert opinion over another, although the opinions of other experts can be considered in relation to examining the validity of the reasoning of a supportive medical opinion (*Bushell's* case).

Byrne v Repatriation Commission

Gyles, Edmonds, Buchanan JJ
[2007] FCAFC 126
13 August 2007

Application of the test in *Byrnes*[37]

Facts

Mr Byrne served in the Australian Army from 1 April 1942 until 26 February 1946. A coronial inquiry found that Mr Byrne had died in an accident when his boat overturned during a fishing trip in 1962. His cause of his death was drowning.

The AAT affirmed the decision to refuse Mrs Byrne's claim for a pension, upon being satisfied that her late husband's death was not service related.

Mrs Byrne appealed to the Federal Court. Justice Bennett dismissed her appeal.

Grounds of appeal

Mrs Byrne appealed to the Full Federal Court. No issue was raised in relation to the AAT's treatment of the first two hypotheses. The case concerned only one issue in relation to the third hypothesis:

- Was it open to the AAT to find that it was satisfied beyond reasonable doubt that Coronary Artery Disease ('CAD') was not a contributing factor to Mr Byrne's death by drowning?

[37] *Byrnes and Repatriation Commission* (1993) 177 CLR 564

The AAT's reasons

It was only in the course of final submissions before the AAT that counsel for Mrs Byrne raised the third hypothesis that 'Coronary Artery Disease ('CAD') impaired Mr Byrne's ability to survive once he was in the water.'

The AAT found Mr Byrne's kind of death was drowning. It accepted that Mr Byrne had CAD but did not consider it to be a kind of death. The AAT found that the third hypothesis was reasonable and acknowledged that Mrs Byrne's claim would succeed unless the hypothesis was disproved beyond reasonable doubt in accordance with the principles enunciated in Byrnes. It went on to reject the premises on which the third hypothesis was based. Specifically, finding that CAD did not contribute to Mr Byrne's death by drowning. Once it made this finding the third hypothesis could not stand.

Federal Court's reasons

Justice Bennett found that the AAT correctly determined that the kind of death was drowning and that it understood that the question for determination was whether it was satisfied that the third hypothesis had been disproved beyond reasonable doubt. Her Honour found that the AAT correctly set out the test as enunciated in Byrnes.

The Full Federal Court's consideration

Justice Buchanan

The first issue considered by Justice Buchanan was whether the AAT had addressed the third hypothesis at all. His Honour found that the AAT had effectively rejected the third hypothesis. The second issue considered by his Honour was whether, on the evidence, it was open to the AAT to reject the third hypothesis beyond reasonable doubt. His Honour considered some of the evidence given by two general practitioners before the AAT, and noted that it was supportive of the hypothesis that had not been rejected by the AAT. The only qualified cardiologist to give evidence to the AAT had not been asked to address the third hypothesis. His Honour found that it was not open to the AAT to conclude, on the evidence, that the third hypothesis had been disproved beyond reasonable doubt.

Justice Edmonds

The first issue considered by Justice Edmonds was whether the AAT had addressed the third hypothesis at all. His Honour found that it had not been addressed, and agreed with Justice Buchanan that, on the evidence, it was not open to the AAT to conclude that the third hypothesis had been disproved beyond reasonable doubt.

Justice Gyles

The first issue considered by Justice Gyles was whether the AAT had addressed the third hypothesis at all. His Honour stated that the AAT had not addressed the third hypothesis, and on that basis he found that Mrs Byrne's appeal had to be allowed.

Justice Gyles noted that the Court should not make findings in this appeal based on 'snippets of evidence that were not directed to the issue in question' (at [3]).

Further, his Honour expressed that he had a fundamental difficulty with the third hypothesis as framed, and that 'this death by drowning as such had nothing whatever to do with operational service or service rendered by Mr Byrne' (at [5]).

Editor's note

In this case it is worth noting that the third hypothesis arose as the evidence on autopsy demonstrated that Mr Byrne had some atheroma present. However, no cardiac disability or incapacity resulted from the atheroma. If there had been, Mr Byrne would have met the diagnostic criteria set out in the SoP for Ischaemic Heart Disease.

As there was no SoP in force for 'CAD' and the SoP for IHD did not apply, the AAT was required to apply the process identified by the High Court in Byrnes and Repatriation Commission (1993) 177 CLR 564.

- First, the decision maker must decide whether all of the material before it raises a reasonable hypothesis connecting the person's disease with their service – the section 120(3) question.
- Secondly, if a reasonable hypothesis is raised by the material, the decision maker must decide whether the factual foundation for the hypothesis has been disproved beyond reasonable doubt – the section 120(1) question.

The first question of whether a reasonable hypothesis is raised is to be determined on the whole of the material before the decision maker. Further, a reasonable hypothesis is more than an hypothesis – it is a hypothesis pointed to, and not merely left open, by the material before the decision maker. A reasonable hypothesis is also one that is not too remote, too fanciful or too tenuous.

As the Full Court said in Hill :

> '…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 a semblance of an hypothesis connecting the applicant's condition with the circumstances of his or her service. There is a substantial difference between a hypothesis raised by the material, and one that can only be postulated on the basis of speculation or conjecture.
>
> …An hypothesis is neither pointed to, or raised, unless it emerges both obviously and directly from the evidence in question…'

What the AAT was required to do was to determine whether the whole of the material before it (including all the expert evidence) pointed too:

- the late Mr Byrne suffering CAD;
- that it was related to his service; and
- that it contributed to his accidental drowning.

If the AAT found that all of the material did not point to these factors then it would be open to find that the hypothesis was not fairly raised by the material and could not be deemed reasonable. As such, the claim would fail.

Statements of Principles issued by the Repatriation Medical Authority

July to December 2007

Number of Instrument	Description of Instrument
89 & 90 of 2007	Revocation of Statements of Principles (Instruments Nos 53 & 54 of 2003 as amended by 9 & 10 of 2004) and determination of Statements of Principles concerning ischaemic heart disease and death from ischaemic heart disease.
91 & 92 of 2007	Revocation of Statements of Principles (Instruments Nos 47 & 48 of 1998) and determination of Statements of Principles concerning hallux valgus and death from hallux valgus.
93 & 94 of 2007	Revocation of Statements of Principles (Instruments Nos 13 & 14 of 1994 as amended by 221 & 222 of 1995) and determination of Statements of Principles concerning ingrowing nail and death from ingrowing nail.
95 & 96 of 2007	Revocation of Statements of Principles (Instruments Nos 23 & 24 of 2000) and determination of Statements of Principles concerning malignant neoplasm of the bladder and death from malignant neoplasm of the bladder.
97 & 98 of 2007	Revocation of Statements of Principles (Instruments Nos 69 & 70 of 1995 as amended by 191 & 192 of 1995) and determination of Statements of Principles concerning lipoma and death from lipoma.
99 & 100 of 2007	Revocation of Statements of Principles (Instruments Nos 129 & 130 of 1995 as amended by 183 & 184 of 1996 and 45 & 46 of 2003) determination of Statements of Principles concerning malignant neoplasm of the endometrium and death from malignant neoplasm of the endometrium.
101 & 102 of 2007	Revocation of Statements of Principles (Instruments Nos 1 & 2 of 2000) and determination of Statements of Principles concerning anxiety disorder and death from anxiety disorder.
103 & 104 of 2007	Determination of Statements of Principles concerning peritoneal adhesions and death from peritoneal adhesions.
105 & 106 of 2007	Determination of amended Statements of Principles concerning shin splints.
107 & 108 of 2007	Revocation of Statements of Principles (Instruments Nos 35 & 36 of 1998) and determination of Statements of Principles concerning cirrhosis of the liver.
109 & 110 of 2007	Revocation of Statements of Principles (Instruments Nos 43 & 44 of 1994) and determination of Statement of Principles concerning external bruise.
111 & 112 of 2007	Revocation of Statements of Principles (Instruments Nos 5 & 6 of 1995 and No. 125 of 1995) and determination of Statements of Principles concerning opisthorchiasis.

113 & 114 of 2007 Revocation of Statements of Principles (Instruments Nos 7 & 8 of 1995) and determination of Statements of Principles concerning clonorchiasis.

115 & 116 of 2007 Revocation of Statements of Principles (Instruments 288 & 289 of 1995) and determination of Statements of Principles concerning sarcoidosis.

117 & 118 of 2007 Revocation of Statements of Principles (Instruments 314 & 315 of 1995) and determination of Statements of Principles concerning presbyopia.

119 & 120 of 2007 Revocation of Statements of Principles (Instruments 13 & 14 of 1996) and determination of Statements of Principles concerning otosclerosis.

121 & 122 of 2007 Revocation of Statements of Principles (Instruments 73 & 74 of 2007) and determination of amended Statements of Principles concerning loss of teeth.

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

Conditions under Investigation by the Repatriation Medical Authority

as at 31 December 2007

Description of disease or injury	*SoPs under consideration*	Gazetted
Accidental hypothermia	*Instrument Nos. 376/95 & 377/95*	27-06-07
Accommodation disorder	*Instrument Nos. 296/95 & 297/95*	2-05-07
Acquired cataract	*Instrument Nos. 37 & 38 of 2001 as amended by 32/02 & 33/02*	1-03-06
Acute sinusitis	*Instrument Nos. 209/95 & 210/95 as amended by 328/95 & 329/95*	27-06-07
Addison's disease	—	20-12-06
Adjustment disorder	*Instrument Nos. 57/96 & 58/96*	8-12-06
Alcohol dependence or alcohol abuse	*Instrument Nos. 76/98 & 77/98*	8-11-06
Alzheimer's disease	*Instrument Nos 17/01 & 18/01*	28-03-01
Analgesic nephropathy	*Instrument Nos. 56/94 & 57/94 as amended by 277/95 & 278/95*	28-06-06
Ancylostomiasis	*Instrument Nos. 137/95 & 138/95*	2-05-07
Animal envenomation	*Instrument Nos. 162/95 & 163/95*	2-05-07
Ascariasis	*Instrument Nos. 135/95 & 136/95*	2-05-07
Benign neoplasm of the eye	*Instrument Nos. 1825/95 & 183/95*	28-06-06
Benign prostatic hypertrophy	*Instrument Nos. 133/95 & 134/95*	28-06-06
Binge eating disorder	—	15-06-05
Bipolar disorder	*Instrument Nos 128/96 & 129/96*	24-03-04
Bronchiectasis	*Instrument Nos. 59/01 & 60/01*	20-12-06
Buerger's disease	*Instrument Nos. 73/95 & 74/95*	2-05-06
Cardiac myxoma	*Instrument Nos. 13/98 & 14/98*	28-06-06
Cerebral meningioma	*Instrument Nos. 207/95 & 208/95*	2-05-07
Cervical spondylosis	*Instrument Nos 50/02 & 51/02, as amended by Nos 64/02, 81/02 &82/02*	16-11-05
Chilblains	*Instrument Nos. 265/95 & 266/95*	2-05-07
Chronic lymphoid leukaemia	*Instrument Nos 9/05 & 10/05*	09-03-05
Chronic rhinosinusitis	-	
Chronic sinusitis	*Instrument Nos 21/03 & 22/03*	11-06-03
Cushing's syndrome	*Instrument Nos. 249/95 & 250/95*	2-05-07
Deep vein thrombosis	*Instrument Nos. 5/01 & 6/01 as amended by 38/04 & 39/04*	8-11-06
Dental malocclusion	*Instrument Nos. 372/95 & 373/95*	27-06-07
Depressive Disorder	*Instrument Nos. 17/07 & 18/07*	10-01-07
Dislocation	*Instrument Nos. 290/95 & 291/95*	2-05-07
Diverticular disease of the colon	*Instrument Nos. 67/94 & 68/94 as amended by 87/97 & 281/95*	28-06-06
Drug dependence or drug abuse	*Instrument Nos. 78/98 & 79/98*	8-11-06
Eating disorders	-	
Effects of lightning	*Instrument Nos 151/95 & 152/95 as amended by 197/95 & 198/95*	2-05-07

Description of disease or injury	*SoPs under consideration*	Gazetted
Fibromuscular dysplasia	*Instrument Nos. 51/97 & 52/97*	28-06-06
Fibrosing alveolitis	-	
Frostbite	*Instrument Nos. 166/95 & 167/95*	2-05-07
Gout	*Instrument Nos. 11/00 & 12/00 as amended by 43/03 & 44/03*	15-10-03
Haemorrhoids	*Instrument Nos. 26/04 & 27/04*	20-12-06
Hepatitis B	*Instrument Nos 11/99 & 12/99*	8-11-06
Hepatitis C	*Instrument Nos 43/95 & 44/95 as amended by 9/97 & 10/97*	8-11-06
Hepatitis D	*Instrument Nos 45/95 & 46/95*	8-11-06
Herpes simplex	*Instrument Nos 342/95 & 343/95*	27-06-07
Idiopathic fibrosing alveolitis	*Instrument Nos 15/98 & 16/98*	15-06-05
Idiopathic thrombocytopaenic purpura	*Instrument Nos. 19/97 & 20/97*	28-06-06
Immersion foot	*Instrument Nos. 168/95 & 169/95*	2-05-07
Influenza	*Instrument Nos. 267/95 & 268/95*	2-05-07
Macular degeneration	*Instrument Nos. 25 and 26 of 2003*	1-03-06
Malaria	*Instrument Nos. 172/95 & 173/95*	2-05-07
Malignant neoplasm of the brain	*Instrument Nos 17/03 & 18/03*	8-11-06
Malignant neoplasm of the cerebral meninges	*Instrument Nos 205/95 & 206/95*	2-05-07
Malignant neoplasm of the liver	*Instrument Nos 171/96 & 172/96*	8-11-06
Malignant neoplasm of the ovary	*Instrument Nos 43/97 & 44/97*	27-06-07
Malignant neoplasm of the renal pelvis	*Instrument Nos 155/95 & 156/95*	27-06-07
Methaemoglobinaemia	*Instrument Nos. 284/95 & 285/95*	2-05-07
Migraine	*Instrument Nos. 74/99 & 75/99*	30-08-06
Nephrolithiasis	*178/95 & 179/95*	2-05-07
Non fatal effects of electric shock and death from electrocution	*Instrument Nos.149/95 & 150/95*	2-05-07
Non-Hodgkin's lymphoma	*Instrument Nos. 37/03 & 38/03*	20-12-06
Osteoarthrosis	*Instrument Nos. 31/05 & 32/05*	20-12-06
Panic disorder	*Instrument Nos. 9/99 & 10/99 as amended by 58/99 & 59/99*	8-11-06
Personality disorder	*Instrument Nos. 143/95 & 144/95 as amended by 13/97 & 14/97*	8-11-06
Pilonidal sinus	*Instrument Nos. 176/95 & 177/95 as amended by 312/95 & 313/95*	2-05-07
Poisoning and toxic reaction from plants	*Instrument Nos. 164/95 & 165/95*	2-05-07
Polymyalgia rheumatica	*Instrument Nos. 89/96 & 90/96*	28-06-06
Relapsing polychondritis	*Instrument Nos. 1/97 & 2/97*	28-06-06
Rheumatic heart disease	*Instrument Nos. 93/95 & 94/95*	2-05-07
Rheumatoid arthritis	*Instrument Nos. 32/04 & 33/04*	30-08-06
Sarcoidosis	*Instrument Nos. 288/95 & 289/95*	28-06-06
Schistosomiasis	*Instrument Nos. 255/95 & 256/95*	2-05-07
Schizophrenia	*Instrument Nos. 132/96 & 133/96*	8-11-06
Scrub typhus	*Instrument Nos. 25/95 & 26/95*	27-06-07
Sickle-cell disease	*Instrument Nos. 109/95 & 110/95 as amended by 193/95 & 194/95*	28-06-06

Description of disease or injury	*SoPs under consideration*	Gazetted
Sinus barotrauma	*Instrument Nos. 316/95 & 317/95*	2-05-07
Smallpox	*Instrument Nos. 141/95 & 142/95*	8-11-06
Soft tissue sarcoma	*Instrument Nos 13/06 & 14/06*	10-05-06
Spasmodic torticollis	*Instrument Nos. 33/97 & 34/97*	28-06-06
Strongyloidiasis	*Instrument Nos. 282/95 & 283/95*	2-05-07
Subarachnoid haemorrhage	*Instrument Nos. 39/03 & 40/03*	20-08-03
Substance induced mood disorder	—	28-02-07
Suicide or attempted suicide	*Instrument Nos. 71/96 & 72/96 as amended by 177/96 & 178/96*	8-11-06
Trigeminal neuralgia	*Instrument Nos. 23/95 & 24/95*	28-06-06
Ureteric calculus	*Instrument Nos. 180/95 & 181/95*	2-05-07

AAT and Court decisions – July to September 2007

AATA = Administrative Appeals Tribunal
HCA = High Court of Australia
FCA = Federal Court
FCAFC = Full Court of the Federal Court
FMCA = Federal Magistrates Court
SRCA = *Safety, Rehabilitation and Compensation Act 1988*
Seafarers RCA = *Seafarers Rehabilitation and Compensation Act 1992*

Allowances and benefits

treatment
- review rights
refusal to provide circulation socks
Miller D
[2007] AATA 1753 11 Sept 2007

Recreation Transport Allowance
Cobley, T
[2007] AATA 1968 19 Nov 2007

Carcinoma

Non hodgkin's lymphoma
Gittins, A (Army) (death)
[2007] FCA 1380 30 August 2007

brain tumour
- solvent
Turner, R
[2007] AATA 1446 20 June 2007

colon
- obesity
Hunt, V (RAAF) (death)
[2007] AATA 1404 6 June 2007

pancreas
- smoking
Griffiths, Marie
[2007] AATA 1871 18 Oct 2007

prostate
- contribution by chronic bronchitis
LPR of McNeill, F (RAAF) (death)
[2007] AATA 1984 23 Nov 2007
- high fat diet
Tunks, V (Navy) (death)
[2007] AATA 1416 8 June 2007
Ryan, J (Navy) (death)
[2007] AATA 1648 8 August 2007
Dunn, D. E (Navy) (death)
[2007] AATA 1996 28 Nov 2007

Circulatory disorder

atrial fibrillation
- alcohol
Noud, K D (Army)
[2007] AATA 1408 6 June 2007
Beaumont, A E R (RAAF)
[2007] AATA 1475 27 June 2007

cardiomyopathy
- alcohol
Noud, K D (Army)
[2007] AATA 1408 6 June 2007

cerebrovascular accident
- alcohol
Markham, B (Navy) (death)
[2007] AATA 1422 8 June 2007
Hall, R (Navy) (death)
[2007] AATA 1514 6 July 2007
Hall, R (Navy) (death)
[2007] FCA 2021 18 Dec 2007
Lonergan, M (Army) (death)
[2007] AATA 1924 5 Nov 2007
- hypertension
Sergeant, J (RAAF) (death)
[2007] FCA 1408 10 Sept 2007
Cairns, A (Army) (death)
[2007] AATA 1682 21 August 2007
- inability to undertake physical activity
Condon, M P (death)
[2007] AATA 1647 8 August 2007
- intracerebral space occupying lesion
Hadfield, M (Army) (death)
[2007] AATA 1559 18 July 2007
Fremantle, C (Navy)
[2007] AATA 2109 21 Dec 2007
- intracranial surgery
Fremantle, C (Navy)
[2007] AATA 2109 21 Dec 2007
- smoking
Markham, B (Navy) (death)
[2007] AATA 1422 8 June 2007

Coronary artery disease
- whether contributed to death by drowning
Byrne, M (Army) (death)
[2007] FCAFC 126 13 August 2007
hypertension
- anxiety disorder
Stewart C J (Navy)
[2007] AATA 1598 27 July 2007
Sergeant, J (RAAF) (death)
[2007] FCA 1408 10 Sept 2007
Collins, E
[2007] FCAFC 111 27 July 2007
- depressive disorder
Scott A (Navy)
[2007] AATA 1809 13 September 2007
Caldwell, J (RAAF)
[2007] AATA 1640 6 August 2007
ischaemic heart disease
- inability to undertake physical activity
Bell, M
[2007] AATA 1720 31 August 2007
- hypertension
Collins, E
[2007] FCAFC 111 27 July 2007
- smoking
Beaumont, A E R (RAAF)
[2007] AATA 1475 27 June 2007
Rupenovic, W L (Navy)
[2007] AATA 1711 29 August 2007
Rowe, M A (RAAF)
[2007] AATA 1992 29 Nov 2007

Death

accidental death
- boating accident
Whether coronary artery disease contributed to drowning
Byrne, M (Army) (death)
[2007] FCAFC 126 13 August 2007
- tractor accident
Whether lumbar spondylosis affected ability to jump clear
Gardiner, P (Army) (death)
[2007] FCA 1290 21 August 2007
- train collision
- lack of concentration due to anxiety disorder
Codd (Gordon J)
[2007] FCA 877 15 June 2007
- standard of proof
- balance of probabilities
Willman, M
[2007] AATA 1480 28 June 2007
kind of death
- correct diagnosis
Willman, M
[2007] AATA 1480 28 June 2007
- death by road accident
Codd (Gordon J)
[2007] FCA 877 15 June 2007
- meaning
Codd (Gordon J)
[2007] FCA 877 15 June 2007

Eligible service

qualifying service
- whether allotted for duty in an operational area
Lobegeiger, R
[2007] AATA 1593 26 July 2007
Upton, J
[2007] AATA 1573 23 July 2007
- whether incurred danger from hostile forces of the enemy
- flights over Balikpapan
Strawhorn, L A (RAAF)
[2007] AATA 1793 21 Sept 2007

Endocrine disorder

Diabetes mellitus
- smoking
Daniel, G W (Army)
[2007] AATA 1548 16 July 2007
- inability to undertake psychical activity
Nicks, F R (Army)
[2007] AATA 1970 19 Nov 2007
- obesity
Scott A (Navy)
[2007] AATA 1809 13 September 2007

Evidence and proof

standard of proof for determining death from accepted disability
- reasonable satisfaction (balance of probabilities)
Willman, M
[2007] AATA 1480 28 June 2007

standard of proof for determining kind of injury or disease
- reasonable satisfaction (balance of probabilities)
Warren (Kiefel J)
[2007] FCA 866 8 June 2007

Gastrointestinal disorder

irritable bowel syndrome
- psychiatric disorder
- alcohol dependence
Watson, J (Army)
[2007] AATA 1688 23 August 2007
White, C (Army)
[2007] AATA 2003 30 Nov 2007

Haematological disorder

Myelofibrosis
- benzene exposure
Farley-Smith, G
[2007] FCA 1058 18 July 2007

Haemochromatosis
- alcohol
Shanahan, F (navy) (death)
[2007] AATA 2028 10 Dec 2007

Injury or disease

clinical onset
- meaning
Warren (Kiefel J)
[2007] FCA 866 8 June 2007

Jurisdiction and powers

Administrative Appeals Tribunal
- refusal to provide circulation socks
- no jurisdiction
Miller D
[2007] AATA 1753 11 Sept 2007

Musculoskeletal disorder

chondromalacia patellae
- appropriate clinical management
Riley, D (Army)
[2007] AATA 1689 24 August 2007

Cervical spondylosis
- trauma
Bailey, T R (Navy)
[2007] AATA 2089 21 Dec 2007

Lumbar spondylosis
- trauma
Watt, I (Navy)
[2007] AATA 1536 11 July 2007
Bailey, T R (Navy)
[2007] AATA 2089 21 Dec 2007

osteoarthrosis
- hip
- lifting
Newson, C (RAAF)
[2007] AATA 1539 11 July 2007
- knee
- lifting
Newson, C (RAAF)
[2007] AATA 1539 11 July 2007

Practice and procedure

Failure to accord procedural fairness
- Not allowing parties to make submissions in relation to material considered
Farley-Smith, G
[2007] FCA 1058 18 July 2007

Extent of review on remittal
- not confined to the question of law considered
Peacock, G
[2007] FCAFC 156 26 Sept 2007

Psychiatric disorder

adjustment disorder
- experiencing psychosocial stressor
- heart condition
Hardman, G (Navy)
[2007] AATA 2069 19 Dec 2007
- no clinical worsening
Hassett, S J (RAAF)
[2007] AATA 1608 31 July 2007

- no stressor identified
Dencher, P
[2007] AATA 1530 10 July 2007
- experiencing a severe psychosocial stressor
- apprehending thief
Davis, W
[2007] AATA 1722 24 July 2007
- bar incident
Davis, W
[2007] AATA 1722 24 July 2007
- causalities observed
Davis, W
[2007] AATA 1722 24 July 2007
- civilians affected by militia violence
Keep, K M (Army)
[2007] AATA 1409 6 June 2007
- drunken superior
Stewart C J (Navy)
[2007] AATA 1598 27 July 2007
Fanna, F D (Army)
[2007] AATA 1665 13 August 2007
- handling casualty figures
Renton, D K (Army)
[2007] AATA 1621 2 August 2007
- immolation incident
Davis, W
[2007] AATA 1722 24 July 2007
- Loading coffins/body bags
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- machine gun incident
Stewart C J (Navy)
[2007] AATA 1598 27 July 2007
Higgs, R L (Army)
[2007] AATA 1538 11 July 2007
- murder scene visit
Keep, K M (Army)
[2007] AATA 1409 6 June 2007
- Night flying training exercises
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- Operation Iron Fox
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- patrolling in East Timor
Keep, K M (Army)
[2007] AATA 1409 6 June 2007
Salkeld, P (Navy)
[2007] AATA 1482 28 June 2007
- Periods of high alert
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- perimeter guard duties
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- Re-supply of convoy vehicles
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- Re-supply sorties to fire support base
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- rocket attacks
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- SAS or army battalion insert sorties
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- sea sickness
Cunningham (Navy)
[2007] AATA 1790 21 Sept 2007
- shooting incident
Renton, D K (Army)
[2007] AATA 1621 2 August 2007
Stewart C J (Navy)
[2007] AATA 1598 27 July 2007
Davis, W
[2007] AATA 1722 24 July 2007
- shooting at restaurant
Fanna, F D (Army)
[2007] AATA 1665 13 August 2007
- Sniffer missions over Long Son Island
Maclean, R J (RAAF)
[2007] AATA 1855 16 Oct 2007
- sword incident
Davis, W
[2007] AATA 1722 24 July 2007
- psychiatric condition
- depressive disorder
Wallace, I J (Army)
[2007] AATA 1697 27 August 2007
Depressive disorder
- experiencing a severe stressor
- bombardment missions in Korea
Giger, V (Navy) (death)
[2007] AATA 2000 30 Nov 2007
- casualties observed
Spencer, J (Army) 17 Sept 2007
[2007] AATA 1769

Wallace, I J (Army)
[2007] AATA 1697 27 August 2007
- caribou crash
Caldwell, J (RAAF)
[2007] AATA 1640 6 August 2007
-chronic pain
Harp, N (Navy)
[2007] AATA 1612 31 July 2007
- clearance patrol
Spencer, J (Army) 17 Sept 2007
[2007] AATA 1769
- civilians affected by militia violence
Keep, K M (Army)
[2007] AATA 1409 6 June 2007
- danger from mines
Press, J W (RAAF)
[2007] AATA 1457 22 June 2007
- drills and exercises
Press, J W (RAAF)
[2007] AATA 1457 22 June 2007
- downed helicopter
Spencer, J (Army) 17 Sept 2007
[2007] AATA 1769
- fire support base
Spencer, J (Army) 17 Sept 2007
[2007] AATA 1769
- flare incident
Spencer, J (Army) 17 Sept 2007
[2007] AATA 1769
- flying missions in India/Pakistan
Caldwell, J (RAAF)
[2007] AATA 1640 6 August 2007
- jungle event
Spencer, J (Army) 17 Sept 2007
[2007] AATA 1769
- martial breakdown
Scott A (Navy)
[2007] AATA 1809 13 September 2007
- murder scene visit
Keep, K M (Army)
[2007] AATA 1409 6 June 2007
- patrolling in East Timor
Keep, K M (Army)
[2007] AATA 1409 6 June 2007
- sampan blown up
Rushworth, K M (Navy)
[2007] AATA 1466 25 June 2007
- South Vietnamese Re-education facility
Spencer, J (Army) 17 Sept 2007
[2007] AATA 1769
- threat of air attack
Press, J W (RAAF)
[2007] AATA 1457 22 June 2007
- wet canteen incident
Spencer, J (Army) 17 Sept 2007
[2007] AATA 1769
- video of casualties
Press, J W (RAAF)
[2007] AATA 1457 22 June 2007
pathological gambling
- psychiatric disorder
- anxiety disorder
Keep, K M (Army)
[2007] AATA 1409 6 June 2007
- depressive disorder
Keep, K M (Army)
[2007] AATA 1409 6 June 2007
Phobia of medical intervention
Gittins, A (Army) (death)
[2007] FCA 1380 30 August 2007
post traumatic stress disorder
- diagnosis
Caldwell, J (RAAF)
[2007] AATA 1640 6 August 2007
Ellis, M (RAAF)
[2007] AATA 1714 30 August 2007
Drew, B
[2007] AATA 2040 11 Dec 2007
White, A J (Navy)
[2007] AATA 1949 14 Nov 2007
- experiencing a severe stressor
- American serviceman blown up by a mine in the harbour at Vung Tau
Midgley (Navy)
[2007] AATA 2029 10 Dec 2007
- Bombay incident
Falzun, P (Navy)
[2007] AATA 1743 7 Sept 2007
- diving incident in Hong Kong
Robertson, P (Navy)
[2007] FCA 1674 4 Dec 2007
- fire in HMAS supply
Robertson, P (Navy)
[2007] FCA 1674 4 Dec 2007
- garbage run incident
Falzun, P (Navy)
[2007] AATA 1743 7 Sept 2007
- general fear of mines
Midgley (Navy)
[2007] AATA 2029 10 Dec 2007

- grenade attack
Grant, R H (Army)
[2007] AATA 1847 10 Oct 2007
- hit by a whisky bottle
Richardson, R
[2007] AATA 2057 14 Dec 2007
- Hong Kong incident
Falzun, P (Navy)
[2007] AATA 1743 7 Sept 2007
- lack of recognition by the Australian public of Vietnam Veterans
Midgley (Navy)
[2007] AATA 2029 10 Dec 2007
- picket duty
Richardson, R
[2007] AATA 2057 14 Dec 2007
- propeller incident
Falzun, P (Navy)
[2007] AATA 1743 7 Sept 2007
- proximity to HMAS Melbourne
Robertson, P
[2007] FCA 1674 4 Dec 2007
- rifle trained on East Timorese civilians
White, C (Army)
[2007] AATA 2003 30 Nov 2007
- rocket attack
Richardson, R
[2007] AATA 2057 14 Dec 2007
- sampan incident
Howlett J A (Navy)
[2007] AATA 1736 6 Sept 2007
- scare charge
Howlett J A (Navy)
[2007] AATA 1736 6 Sept 2007
- self-immolation of monk
Grant, R H (Army)
[2007] AATA 1847 10 Oct 2007
- sentry duty
Lea, R (Navy)
[2007] AATA 1358 24 May 2007
Falzun, P (Navy)
[2007] AATA 1743 7 Sept 2007
- shooting by White Mice in Vietnam
Noud, K D (Army)
[2007] AATA 1408 6 June 2007
- Subiac Bay incident
Falzun, P (Navy)
[2007] AATA 1743 7 Sept 2007
- tugboat incident
Falzun, P (Navy)
[2007] AATA 1743 7 Sept 2007
- warning of incoming missile

Schizophrenia
- clinical management
Howard, N
[2007] AATA 1500 2 July 2007

Remunerative work & special rate of pension

ameliorating provision
Trewartha, K
[2007] AATA 2080 20 Dec 2007

earnings on his or her own account
- income protection policy payments
Nelson, K A
[2007] AATA 1597 27 July 2007
- partnership income
McDonald, J. A
[2007] AATA 1980 23 Nov 2007
- projected and actual earnings
Stanhope, H
[2007] AATA 1916 2 Nov 2007

ceased to engage in remunerative work
- war-caused conditions
Goodwin, M
[2007] AATA 1619 2 August 2007
Godwin, J R
[2007] AATA 1701 28 August 2007

kind of work the person was undertaking
- transport industry
- truck driver
Dobson, K L
[2007] AATA 1414 7 June 2007

remunerative work
- able to work at least 8 hours a week
Pill, G
[2007] AATA 1989 28 Nov 2007
- able to work more than 20 hours a week
Strugnell, E
[2007] AATA 2094 21 Dec 2007
- part-time remunerative work same type as the full-time remunerative work
Mitchell, C L
[2007] AATA 2087 21 Dec 2007

- remunerative or therapeutic work
Whitehead, S
[2007] AATA 2077 20 Dec 2007
- whether real or substantive
Morris, J R
[2007] AATA 1445 20 June 2007
- whether genuinely seeking to engage in remunerative work
- domestic arrangement rather than genuine attempt
Neilsen, N
[2007] AATA 1451 21 June 2007

whether prevented by war-caused disabilities alone
- effects of non-accepted disabilities
Barry, R
[2006] AATA 834 28 September 2006
Buhagiar, M C
[2007] AATA 1406 6 June 2007
Horsley, D G
[2007] AATA 1461 22 June 2007
Hamence, R D
[2007] AATA 1735 6 Sept 2007
Cameron, I
[2007] AATA 2067 19 Dec 2007
Miller, S
[2007] AATA 2058 11 Dec 2007
- financial benefits
Thirkell, N J
[2007] AATA 1552 17 July 2007
- redundancy
Milke, P
[2007] AATA 1534 11 July 2007
Tronc, K
[2007] AATA 1940 12 Nov 2007
- retirement
Cameron, P
[2007] AATA 1836 5 Oct 2007
- subsequent injury
Schafferius, N
[2007] AATA 2001 30 Nov 2007
- time out of the workforce
Gibbs, B
[2007] AATA 1899 30 Oct 2007

Respiratory disorder

chronic bronchitis
- smoking
Beaumont, A E R (RAAF)
[2007] AATA 1475 27 June 2007

Pneumonia
- smoking
Cowan, M (Army)
[2007] AATA 1928 6 Nov 2007

Service pension

assets test
- compensation by Court order
Jefferis, J
[2007] AATA 1932 9 Nov 2007
- stakeholding and loan in company
Mein, J
[2007] AATA 1560 18 July 2007
- unrecoverable loans
Woolley, A J
[2007] AATA 2059 14 Dec 2007
- value of metropolitan taxi licence
Murray, E M
[2007] AATA 1618 1 August 2007

Overpayment
- failure to notify change in circumstances
Hutton, R
[2007] AATA 2108 24 Dec 2007

pension bonus scheme
- ineligible if received age pension
De Lisle, R B
[2007] AATA 1453 21 June 2007
- accrual of bonus period
Kelly, L
[2007] AATA 1998 30 Nov 2007