

Contents

New Ministerial Determinations	78
Articles	
Incapacity Payments (MRCA)	78
In Memoriam	85
Practical tips for representatives	86
Quick reference for legal research	88
Administrative Appeals Tribunal	
McKay (entitlement – stressor)	91
Draper (entitlement – stressor)	93
Robinson (entitlement – diagnosis)	95
Milbourn (death –smoking history)	98
MacKay (death –chain of causation)	99
Pleming (death –chain of causation)	101
Federal Court of Australia	
Cadd (special rate)	104
Todd (reasons for decision)	106
Norton (<i>Deledio</i> steps & stressor)	108
Kaluza (operational service)	111
Gilkinson (reasonable hypothesis)	114
Green (Standard of proof)	115
Roper (continuous full time service)	118
Collins (kind of death)	120
Federal Magistrates Court of Australia	
Mayfield (meaning of event)	123
Cunningham (aggravation)	126
Repatriation Medical Authority	
Statements of Principles	129
Investigations	131
Index of AAT & Court cases	134

Editor's notes

The Federal Court has again commented on the difficulties of interpreting legislation in the Veterans' jurisdiction. In *Collins*, reported in this edition, the Court noted that the case was:

concerned with the notoriously difficult provisions of the *Veterans' Entitlements Act 1986* (Cth) (the Act).

This statement echoes similar comments the Court made in *Byrne* [2007] FCAFC 126; *Tunks* [2008] FCA 521 and *Hall* [2007] FCA 2021.

This edition of *VeRBosity* contains eight reports on decisions of the Federal Court, and two from the Federal Magistrates Court. Don't forget to look out for "further reading" and "practical application" tips following some of the case reports.

This edition also includes a helpful quick reference guide to conducting legal research and practical tips for representatives appearing before the Veterans' Review Board. In addition, there is an article concerning Incapacity Payments under the MRCA. Finally, there are also six reports on selected AAT decisions handed down from July to December 2008.

Katrina Harry
Editor

New Ministerial determinations

Military Rehabilitation and Compensation (Non-warlike Service) Determination 2008/1

This Determination was tabled in the Senate and the House of Representatives on 10 November 2008. The determination revokes and replaces the Military Rehabilitation and Compensation (Non-warlike Service) Determination 2007/2 and adds a thirteenth operation which determines that service with the ADF in support of the ADF mission in Sudan, on Operation Hedgerow, is non-warlike service for the purpose of the *Military Rehabilitation and Compensation Act 2004*.

The Determination commenced on 28 July 2008. It does not affect the operation of the previous Military Rehabilitation and Compensation (Non-warlike service) Determination 2007/1.

Military Rehabilitation and Compensation (Pay-related Allowances) Determination 2008

This Determination was tabled in the House of Representatives and the Senate on 26 August 2008. It provides that the Reserve Service Allowance is taken to be a pay-related allowance for the purposes of the *Military Rehabilitation and Compensation Act 2004*.

The determination may be relevant when considering incapacity payments under MRCA. It commenced on 1 September 2006.

Incapacity Payments

By Trina McConnell and Bruce Topperwien

What are incapacity payments?

The *Military Rehabilitation and Compensation Act 2004* (MRCA) provides financial compensation for loss of earnings ('economic loss') in the form of incapacity payments. If a member or former member is 'incapacitated for service' or 'incapacitated for work' due to a service injury or disease, the person may be entitled to compensation for economic loss, that is loss of salary or wages due to a service injury or disease.

Incapacity payments are payable only until the person reaches 65 years of age. Payments are calculated by reference to the person's normal weekly earnings immediately before the person was incapacitated for work.

The Act makes a distinction between 'incapacity for service' and 'incapacity for work'. Different rules apply to the calculation of incapacity payments depending on the nature of service and work.

Incapacity for service

Incapacity for service means an incapacity of a person to engage in the defence service that the person was engaged in before the onset of the incapacity at the same level at which he or she was previously engaged.¹

¹ Section 5, MRCA

Assessing compensation

Incapacity for work

Incapacity for work means²:

- an incapacity of a person to engage in the work that he or she was engaged in before the onset of the incapacity, at the same level at which he or she was previously engaged; or
- if the person was not previously engaged in work (for example, a cadet, or an unemployed Reservist)—the person's incapacity to engage in any work that it is reasonably likely he or she would otherwise be engaged in.

Link between service injury or disease and incapacity

The incapacity for service or work must 'result' from a service injury or disease³. This means that there must be a direct causal connection between the service injury or disease and the incapacity for service or work.

Incapacity from aggravated injury or disease

If a service injury or disease was accepted on the basis that it was aggravated by service, the person may be entitled to compensation only if the incapacity for service or work resulted from the aggravation.⁴

In general terms, compensation for incapacity for service or work is intended to make up for lost earnings caused by that incapacity. To assess the amount of compensation payable, a number of concepts are used, including:

- 'normal earnings';
- 'actual earnings';
- 'able to earn';
- 'suitable work';
- 'normal weekly hours'.

The legislation for incapacity for service or work is quite complex and covers over 100 pages of the Act and so the following is merely a general overview of the topic.

Different rules apply to each of these terms depending on whether the person is a:

- Permanent Forces member;
- Continuous full-time Reservist;
- Part-time Reservist;
- Part-time Reservist who was previously a Permanent Forces member;
- Part-time Reservist who was previously a continuous full-time Reservist; or
- Cadet or declared member.

² Section 5, MRCA

³ Para 85(1)(c), s86(1)(c), s87(10)(c), MRCA.

⁴ Section 88, MRCA.

Normal earnings

A person's 'normal earnings' depends on a number of factors, but in general terms, they are a notional amount per week that the person was earning before he or she was incapacitated by the service injury or disease.⁵

For each type of member or former member, there are different rules for determining a person's normal earnings.

Actual earnings

In general terms, a person's 'actual earnings' are a notional amount per week based on what the person actually earns or earned in a particular week.⁶

In relation to 'incapacity for work' but not 'incapacity for service', the actual earnings may be affected by how much the person is 'able to earn in suitable work'.⁷

For each type of member or former member, there are different rules for determining a person's actual earnings.

Able to earn in suitable work

For members or former members who are incapacitated for work in civilian employment, their actual earnings for a week are the greater of:⁸

- the weekly amount, if any, that the person is able to earn in suitable work; and

- the amount, if any, that the person earns for that week.

'Suitable work' is defined to mean work for which the person is suited having regard to:⁹

- the person's age, experience, training, language and other skills;
- the person's suitability for rehabilitation or vocational retraining;
- if work is available in a place that would require the person to change his or her place of residence—whether it is reasonable to expect the person to change his or her place of residence;
- any other relevant matter.

Whether the person is 'able to earn in suitable work' requires consideration of:¹⁰

- if the person is working in suitable work—the amount the person is earning in that work;¹¹
- if the person fails to accept an offer of suitable work:¹²
 - the amount the person would be earning in that work if the person had accepted the offer, and
 - whether the failure was reasonable;

⁵ Subsection 91(1), s 95(1), s 104(1), s 108(1), s 132(2) MRCA, and MRC Regs 5-8.

⁶ Section 92, s 101, s 115, s 131(2), MRCA and MRC Regs 5-6.

⁷ Section 101, s 105, s 115, s 132, MRCA.

⁸ Para 101(4)(a), s 105(4)(a), s 115(4)(a), s 132(1), MRCA

⁹ Section 5, MRCA.

¹⁰ Section 181, MRCA

¹¹ Subsection 181(2), MRCA

¹² Para 181(3)(a), s 181(4), MRCA.

Incapacity Payments

- if the person accepted an offer of suitable work but fails to begin or continue that work:¹³
 - the amount the person would be earning in that work if the person had begun and continued that work, and
 - whether the failure was reasonable;
- if the person was offered suitable work on condition that a rehabilitation or vocational training program is completed, but the person fails to complete the program:¹⁴
 - the amount the person would be earning in that work if the person had not failed to complete the rehabilitation or vocational training program; and
 - whether the failure was reasonable;
- if the person failed to seek suitable work after becoming incapacitated:¹⁵
 - the amount the person would reasonably be expected to earn in suitable work having regard to the state of the labour market at the relevant time; and
 - whether the failure was reasonable.

Normal weekly hours

A person's 'normal weekly hours' are defined in s 132(2) of the MRCA.

Generally, for a person who, when the service injury was sustained or service disease was contracted, was:

- a Permanent Forces member; or
- a Full-time Reservist; or
- a part-time Reservist who was not engaged in civilian work,

the 'normal weekly hours' are 37.5 hours per week.¹⁶

Generally, for a person who was in civilian work when the injury was sustained or disease contracted, the person's 'normal weekly hours' are worked out by combining:

- the number of hours of civilian work usually performed in a week, with
- the number of hours of defence service usually performed in a week.

¹³ Para 181(3)(b), s 181(4), MRCA

¹⁴ Para 181(3)(c), s 181(4), MRCA

¹⁵ Subsection 181(5), MRCA

¹⁶ Subsection 132(2), MRCA.

Incapacity Payments

CURRENT MEMBERS' INCAPACITY PAYMENTS – Chapter 4, Part 3

Service giving rise to condition	Current service	Normal earnings	Actual earnings	Division
Permanent Forces	Permanent Forces	Normal ADF pay & allowances (S91)	Actual ADF pay & allowances (S92)	2
Permanent Forces	CFTS	Normal ADF pay & allowances (S91)	Actual ADF pay & allowances (S92)	2
Permanent Forces	Part-time Reserve	Full-time ADF pay & allowances + remuneration allowance (S104)	Reserve pay & allowances + civilian pay & allowances (S105)	4
CFTS	CFTS	Normal ADF pay & allowances (S91)	Actual ADF pay & allowances (S92)	2
CFTS	Part-time Reserve	Full-time ADF pay & allowances + remuneration allowance (S104) OR Pre-CFTS civilian earnings* (S111) + Reserve pay & allowances* (S114)	Reserve pay & allowances + civilian pay & allowances (S115)	5
Part-time Reserve	Part-time Reserve	Reserve pay & allowances** + civilian pay & allowances** (S95)	ADF pay & allowances + civilian pay & allowances (S101)	3

* MRCC may determine an example period for both civilian and Reserve pay which is after the CFTS period.

** Based on an example period before the onset of incapacity.

Incapacity Payments

FORMER MEMBERS' INCAPACITY PAYMENTS – Chapter 4, Part 4

Service giving rise to condition	Last full-time service (if relevant)	Last service	Normal earnings	Normal hours	Division
Permanent Forces		Permanent Forces	ADF pay & allowances + remuneration allowance (S141)	37.5	3
Permanent Forces		CFTS	ADF pay & allowances + remuneration allowance (S144)	37.5	4
Permanent Forces		Part-time Reserve	ADF pay & allowances + remuneration allowance (S164)	37.5	7
CFTS		CFTS	ADF pay & allowances + remuneration allowance (S144) OR Pre-CFTS civilian pay & allowances* (S147) + Reserve pay & allowances* (S149)	37.5 Pre-CFTS civilian hours* + Reserve hours*	4
Permanent Forces OR CFTS	CFTS	Part-time Reserve	ADF pay & allowances + remuneration allowance (S168) OR Pre-CFTS civilian pay & allowances** (S171) + Reserve pay & allowances** (S173)	37.5 Pre-CFTS civilian hours** + Reserve hours**	8
Part-time Reserve		P/T Reserve (engaged in civilian work)	Reserve pay & allowances* (S154) + civilian pay & allowances* (S156)	Defence hours* + civilian hours*	5
Part-time Reserve		P/T Reserve (not engaged in civilian work)	Reserve daily rate x 7 & allowances* (S161)	37.5	6

* Based on an example period before last period of CFTS (Division 4) or before ceasing to be a member of the ADF (Division 5 & 6).

** MRCC may determine an example period for both civilian and Reserve pay which is after the CFTS period.

(These charts are sourced from training material prepared by DVA.)

Incapacity Payments

What happens after the first 45 weeks of incapacity payments?

Payments of compensation for incapacity for service or work are reduced after 45 weeks (whether consecutive or not) of incapacity payments after discharge from the ADF.¹⁷

The person's incapacity payments are reduced by the 'adjustment percentage',¹⁸ which depends on whether or not the person is working.

Compensation payable after the first 45 weeks of incapacity is calculated under s 131 of the MRCA as follows:

$$\left(\begin{array}{l} \text{Person's} \\ \text{adjustment percentage} \\ \text{for the week} \end{array} \times \begin{array}{l} \text{Person's} \\ \text{normal earnings} \\ \text{for the week} \end{array} \right) - \begin{array}{l} \text{Person's} \\ \text{actual earnings} \\ \text{for the week} \end{array}$$

The relevant 'adjustment percentage' is determined under s 131(2) as follows:

If the person is not working	75%
If the person is working 25% or less of the person's normal working hours:	80%
If the person is working more than 25% but not more than 50% of the person's normal working hours:	85%
If the person is working more than 50% but not more than 75% of the person's normal working hours:	90%
If the person is working more than 75% but less than 100% of the person's normal working hours:	95%
If the person is working 100% or more of the person's normal working hours:	100%

¹⁷ The reduction after 45 weeks applies only to 'former members': see s 118, s 125, s 128, s 129, s 131, MRCA

Compensation reduced due to Commonwealth Superannuation

If a person receives superannuation from a fund to which the Commonwealth has contributed on behalf of the member, the person's incapacity payments are reduced by the weekly amount of superannuation which relates to the Commonwealth's contribution to the fund (not the person's contributions).¹⁹ If a person received a lump sum from such a superannuation fund, their compensation is reduced by a weekly amount relating to the Commonwealth's contribution to that fund calculated by reference to the person's age and the amount of the lump sum.²⁰

Cessation of payments at age 65

Payments of compensation for incapacity for service or work generally cease when the person turns 65 years of age.²¹ The exception to this rule is if the person was over 63 years of age when the relevant injury or disease was sustained or contracted. In that case, compensation can be paid for up to 104 weeks (whether consecutive or not) during which the person is incapacitated for work.²²

¹⁸ Section 131, MRCA.

¹⁹ Section 134, MRCA

²⁰ Section 135, s 136, MRCA

²¹ Section 120, MRCA

²² Section 121, MRCA

Serving members (pre discharge)

The MRCA provides for incapacity payments to be made to permanent members of the ADF, or members of the Reserve on continuous full-time service who are still serving and are incapacitated for service as a result of an accepted condition. The MRCA also provides for incapacity payments to be made to part-time reservists who are incapacitated for service or incapacitated for other work in which they are normally engaged as a result of an accepted condition.

Incapacity payments for serving members are payable from the date of onset of the incapacity for service and will cease when the person is no longer incapacitated for service, or ceases to be a member of the ADF. Incapacity payments include provision for pay and/or allowances that the member would have received but for the incapacity. The allowances continue for the period that would have been paid but for the incapacity. The relevant service chief is the authority for advice as to the duration of, or entitlement to, pay rate and/or allowance.

Former Members (Post Discharge)

The MRCA provides for post-discharge incapacity payments to be made where a former member is incapacitated for work and their post-discharge actual earnings are less than their pre-discharge normal earnings. In these cases the calculation of normal earnings is based on their military earnings at the time of discharge. Incapacity payments continue until such time as the person's actual earnings are the equivalent of

his/her assessed normal earnings or the person reaches age 65. The entitlement to incapacity payments is based on s 118. Once a s 319 claim for liability is accepted compensation for loss of earnings is payable to a former member for any week that the injury or disease contributed to the incapacity for work.

Jackson, Major

Timothy John Horswill

Members and staff of the Veterans' Review Board were saddened by the death of Major Jackson on 7 December 2008.

Major Jackson served as a Full-time Senior Member on the Board in South Australia from 19 February 1987 to 9 October 1989. He made a great contribution to the veteran community through his work on the Board.

Formerly of the 1st Battalion Durham Light Infantry and later of 3rd Battalion Royal Australian Regiment.

Major Jackson was a veteran of the UN Mission in Cyprus and of Malaya, Borneo and Vietnam.

Much loved and admired father of Major Edward Jolly, current Senior Member of the Board in South Australia.

The members and staff of the Board extend their deepest sympathy to Major Jacksons' wife and family.



Practical tips for representatives appearing before the VRB

Who can appear before the VRB?

Section 147 of the *Veterans' Entitlements Act 1986* precludes a legal practitioner from representing a person before the Veterans' Review Board (VRB), but permits any other person of the applicant's choosing appearing as a representative.

The role of the representative before the VRB

When appearing on behalf of a person before the VRB, the primary role for an advocate in proceedings is to assist applicants to prepare and present their case.

The role of the VRB is to reach a decision which is correct and preferable having regard to the known facts, the available evidence and the applicable law.

A representative's role in this process is to assist the VRB in making the correct or preferable decision.

For example, a representative has a responsibility to the VRB to present whatever supportive evidence is available to them to enable the VRB to make an informed decision.

Practical case management tips

The following 'practical tips' provide advice regarding effective techniques for representatives managing a case before the VRB.

Manage the information

Applications before the VRB often involve a lot of paperwork. It is always good practice to keep a central file with copies of all information received in a particular application. Don't forget to:

- ✓ use the file to record notes of conversations and discussions relevant to the review; and
- ✓ place copies of additional reports or other evidence on the file.

Understand the issues

A well prepared representative will understand the facts and law relevant to the review at the earliest possible opportunity. A good way to start is to:

- ✓ Examine the s137 report, read the claim form first, then the delegate's decision; and
- ✓ Next, read all the documents from start to finish. It is useful to prepare a chronology to help with this process.

Hot tip

Use a word processing program to draw a table for the chronology. You can then easily cut and paste dates and sort the information into chronological order.

Focussing your case

Once a representative has determined the issues relevant to the application for review, the next step is to focus on the best method of presenting these to the VRB.

The VRB has prepared a series of submission templates to assist representatives to clarify issues of diagnosis, kind of death, medical and other evidentiary matters.

The submission templates are currently in draft form for VEA entitlement, war widows, general rate assessment and special rate matters, along with MRCA liability for peacetime, warlike and non-warlike service.

Hot tip

Download a copy of the submission templates from the VRB website. Please visit: www.vrb.gov.au

Knowing the process

Representatives need to be familiar with the processes of the VRB. It is good practice to keep detailed notes inside of the file cover tracking the progress of an application. By doing this, a representative will know at what stage of the VRB application process the review is at and what action he or she is required to take.

Further reading on the VRB application process:

VeRBosity special issue 2006 at page 8.

Be aware of your responsibilities

While assisting applicants to prepare and present their case is the most evident part of a representative's role, it is important to be aware of the wider responsibilities in relation to the VRB.

Further reading: role and responsibilities of representatives before the VRB:

VeRBosity special issue 2006 at page 28-29.

Privacy

It is important that you maintain the privacy of everyone whose personal information you have obtained in course of assisting the applicant to prepare their case.

Further reading on privacy:

VeRBosity special issue 2006 at page 40.

Keep well informed and be familiar with electronic resources

Representatives need to keep up to date and be aware of the legislation and relevant case precedents. The VRB's website www.vrb.gov.au is a great starting point. Representatives can:

- ✓ Keep up to date with current legal developments via practice notes; and
- ✓ Download current and past editions of *VeRBosity*.

Quick reference guide for conducting legal research

The following article provides a quick reference guide for conducting legal research with key online resources. For more detailed discussion regarding sources of advice and information please see VerBosity special issue 2006 at page 42 to 47.

Finding and researching legislation

The key resource for finding and researching legislation online is:

www.comlaw.gov.au

Comlaw can be used to find primary legislation (including Acts and statutes of Parliament). For example:

How do I find a copy of the MRCA?

- On the comlaw homepage, go to "Acts". Under that heading click on "compilations - current".
- For MRCA, scroll down to "M" and under that heading click on "Mi".
- Scroll down and click on "[Military Rehabilitation and Compensation Act 2004](#)".
- Click on the format (Word, HTML, PDF, ZIP) you wish to download.

In addition, Comlaw can be used to find subordinate legislation (including rules, regulations, determinations and instruments). For example:

How do I find a copy of a service determination?

- Log onto the Comlaw home page. You will see a Quick search box.
- To find a determination under the VEA you can enter a phrase such as "service determination and veteran" in the Quick Search box.
- To find a determination under the MRCA you can enter a phrase such as "service determination and military" in the Quick Search box.

Alternatively, If you know the title of the determination eg Military Rehabilitation and Compensation Pay-related Allowances Determination:

- On the comlaw homepage, go to "legislative instruments". Under that heading click on "compilations - current".
- Scroll down to "M" and under that heading click on "Mi".
- Scroll and skip through the pages and click on [Military Rehabilitation and Compensation \(Pay-related Allowances\) Determination 2008](#)
- Click on the format you wish to download.

Finding and researching case law

The key resource for finding and researching case law online is:

www.austlii.edu.au

Austlii can be used to find copies of AAT, Federal Court and High Court decisions. However, it is important to note that decisions of the Federal Court and High Court are the most useful to consider when you are researching the legal issues in your cases.

Federal court cases look at how the law was applied. Parts of the decision which are essential to the court's order are binding on decision makers. In contrast, AAT cases look at factual issues and evidence. They are not binding on decision makers at the VRB.

How do I find a Federal Court case?

Log onto the Austlii home page, go to the grey panel of the left:

- Under "cases and legislation" click on "Commonwealth"
- Under "Cth case law" click on "Federal Court of Australia Decisions 1977" (if it is a single judge decision); or
- Click on "Full Court Decisions 2002" (if it is a full bench [3 judges] decision)
- You can search by Database Search, Name Search, Recent Decisions or by title or year.

How do I use the database searching option on Austlii?

The most common way to conduct a database search is the "Boolean searching". You combine search terms using "AND", "OR" and "NOT". For example:

AND - "Ischaemic heart disease" AND "Death" AND "veteran" will find cases with all the terms in the same document.

OR - "Ischaemic heart disease" OR "Death" OR "veteran" will find any document that has either term. This search option retrieves larger results.

NOT - "post traumatic stress disorder" NOT "anxiety" will find documents which contain the term "PTSD" but not if it also includes "anxiety".

Other important tools: SoPs

The key resource for finding Statements of Principles (SoPs) online is:

www.rma.gov.au

You can search alphabetically or by number for the SoP you require. However, SoPs are legislative instruments and can also be found on the Comlaw website.

Hot tip

You can subscribe to the Comlaw website and you will be informed when a new SoP is registered on the site.

Other important tools: GARP

The key resource for finding GARP (M) and (5th edition) online is:

www.comlaw.gov.au

Where can I find GARP M?

- On the Comlaw homepage, go to “legislative instruments”. Under that heading click on “compilations - current”.
- Scroll down to “G” and under that heading click on “Gu”.
- Scroll and skip through the pages and click on Guide to Determining Impairment and Compensation (GARP M)
- Click on the format you wish to download.

🔥 **Hot tip**

A copy of GARP (5th edition) can be found on the DVA website.

www.dva.gov.au

From the DVA website you can also access the Consolidated library of Information and Knowledge (CLIK). This contains legislation, policy and reference material.

Where can I find GARP (5th edition)?

On the DVA homepage:

- in the blue column on the left side click on “pensions”
- Scroll down and click on “policy”
- Scroll down and click on “GARP 5”
- Click on the cover of GARP and it will open in PDF format

VRB training package

The VRB is currently developing a standardised training package for ESO advocates, which address various topics including legal research and submissions. It has been delivered in various locations with considerable success to date by a VRB training team. Some feedback the VRB has received includes:

“This type of training is invaluable to level 3 and 4 advocates. The use of senior members, service members of the VRB as instructors, stating where, why etc from their side of the fence was greatly appreciated. Their standard of presentation, knowledge and experience could not be surpassed. A great job – thanks again .”

If you would like more information on the training package please send an email to contact@vrb.gov.au or call the Director, Legal.

Administrative Appeals Tribunal

Re McKay and Repatriation Commission

Ms N Isenberg, Senior Member
Dr S Toh, Member
[2008] AATA 1114
15 December 2008

Operational service – claim for PTSD and alcohol dependence – whether applicant suffered a severe stressor.

Facts

Mr McKay served in the Royal Australian Navy and rendered a number of short periods of “operational service”. In particular, he served aboard HMAS Vendetta while it undertook escort duties to HMAS Sydney en route to Vietnam.

Prior to his operational service, Mr McKay served on HMAS Voyager during the time of its collision with HMAS Melbourne.

Mr McKay sought a review of the Repatriation Commission decision, as affirmed by the Veterans’ Review Board (VRB), that refused his claim for war caused PTSD and alcohol dependence.

Applicant’s position

Mr McKay submitted that his PTSD either arose or was materially contributed to by his suffering a severe

stressor while aboard HMAS Vendetta. Alternatively, that he suffered PTSD as a result of his HMAS Voyager experience, which was aggravated by a severe stressor while aboard HMAS Vendetta. His claimed condition of alcohol dependence followed his PTSD.

Issues before the Tribunal

There was no dispute that Mr McKay suffered PTSD and alcohol dependence. The Tribunal identified the following issues:

- Did Mr McKay experience a severe stressor while aboard HMAS Vendetta?
- Was the clinical onset of Mr McKay’s PTSD and alcohol dependence before or after his service aboard HMAS Vendetta?
- If before, was his condition clinically worsened by his operational service aboard HMAS Vendetta?

The Tribunal’s reasoning

Step 1 and 2 – is there a hypothesis and relevant SoPs?

The Tribunal identified Mr McKay’s hypothesis that the claimed conditions either arose or were materially contributed to by Mr McKay suffering a severe stressor while aboard HMAS Vendetta. Alternatively, he suffered PTSD as a result of his HMAS Voyager experience which was aggravated by a severe stressor while aboard HMAS Vendetta.

The Tribunal noted that Mr McKay had not submitted that his circumstances came within the current SoPs (No 5 of 2008 and 17 of 2008). The Tribunal said:

We must apply the relevant SoP for the claimed conditions on the basis of *Repatriation Commission v Gorton* (2001) 65 ALD 609, namely that the relevant SoP is that currently in force, unless the SoP in force when the claim was first determined, is more beneficial.

The SoPs in effect when the claim was first determined were:

- SoP concerning PTSD No. 3 of 1999 as amended by No. 54 of 1999; and
- SoP concerning Alcohol Dependence or Alcohol Abuse No. 76 of 1998.

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

Mr McKay provided evidence to the Tribunal that his time aboard HMAS Vendetta caused him to feel very anxious, and at times fearful. He was hypervigilant in matters of safety, and oversensitive to course changes. He said that his behaviour became almost "phobic".

During operations – particularly at night, as this was when the Voyager collision had occurred – he had a feeling of foreboding of a recurrence of the Voyager collision, especially as HMAS Sydney was similar to HMAS Melbourne.

In relation to the issue of clinical onset, the Tribunal considered that there was material which pointed to clinical onset of PTSD during Mr McKay's HMAS Vendetta service. There was also material which pointed to clinical worsening of PTSD during his HMAS Vendetta service.

The Tribunal came to the view, without making a finding of fact, that every essential element of each hypothesis was pointed to by the material before it.

Step 4 – satisfaction beyond reasonable doubt

The Tribunal came to the view that a reasonable person in the position and with the knowledge of Mr McKay would objectively perceive the night-time manoeuvres on HMAS Vendetta, when in company with HMAS Sydney, as a threat of death or serious injury.

In relation to the issue of clinical onset of PTSD the Tribunal said:

Having considered the evidence of both specialists we have come to the view that the clinical onset of PTSD was not until during or after Mr McKay's HMAS Vendetta service, precipitated by his experience aboard that ship, as detailed above. In coming to that view we note that a veteran may experience more than one severe stressor. Here, there is no doubt that Mr McKay's HMAS Voyager experience was traumatic, and, in the scheme of things, an experience far exceeding that of his HMAS Vendetta experiences. However, the medical evidence, on balance, has led us to the view that all of the diagnostic criteria were not satisfied until after the second, although lesser, severe stressor.

In relation to the claim for alcohol dependence, the Tribunal found that at the time of clinical onset of his alcohol dependence in about 1997 Mr McKay was suffering PTSD.

Formal decision

The Tribunal set aside the decision under review and substituted its decision that Mr McKay's PTSD and alcohol dependence were war-caused.

**Re Draper and
Repatriation Commission**

Mr Bernard J McCabe, Senior Member

[2008] AATA 1032
17 November 2008

Operational service – claim for ischaemic heart disease, PTSD and alcohol dependence – whether applicant suffered a severe stressor.

Facts

Mr Draper served in the Royal Australian Navy and rendered three short periods of operational service aboard HMAS Melbourne in 1965. Mr Draper was aboard the Melbourne when the ship collided with HMAS Voyager.

Mr Draper sought a review of the decision of the Repatriation Commission, as affirmed by the Veterans' Review Board ("the VRB"), that refused his claim for war caused ischaemic heart disease, PTSD and alcohol dependence.

Applicant's position

Mr Draper gave evidence about a range of incidents that occurred while he was aboard the *Melbourne*. Two incidents which may have occurred during periods of operational service included:

- seeing an aircraft going over the side of the ship as the aircraft landed or took off; and
- an incident in the Straits of Malacca when the *Melbourne* passed close by another large vessel that he thought might result in another *Voyager*-style collision.

The Commission's position

The Commission contended that Mr Draper's psychiatric conditions were not aggravated by anything that occurred during his three periods of operational service.

The Tribunal's reasoning

Diagnosis

A number of psychiatrists made varying diagnoses including PTSD, alcohol dependence, generalised anxiety disorder, major depression, substance abuse disorder and cognitive disorder associated with a recent head injury. The Tribunal was satisfied that Mr Draper suffered from PTSD, alcohol dependence and ischaemic heart disease.

Causation

In relation to the claim for PTSD, the Tribunal noted that there were two relevant SoPs: No 5 of 2008 and No 3 of 1999 amended by No 54 of 1999. Both SoPs referred to aggravation of an existing condition.

Senior Member McCabe of the Tribunal said:

There is no evidence before me that would enable me to conclude the applicant's condition worsened while he was on operational service or in response to events that he experienced

while he was on service. Dr Stephenson comes closest when she opined in her report of 8 February 2007 that the applicant's condition worsened in an unspecified way while on the Melbourne. But she does not attribute that unspecified worsening to any particular event, much less an event that occurred during the course of operational service. Indeed, what evidence there is appears to point the other way. I note in particular there is uncontradicted evidence from the applicant that his condition substantially improved once he left the Melbourne and moved to the United Kingdom to work on submarines. He enjoyed a successful career in that different environment. That evidence is inconsistent with a conclusion that he experienced a permanent aggravation to his underlying condition.

In relation to the claim for ischaemic heart disease, the Tribunal noted that Mr Draper had taken up an intense smoking habit before he undertook operational service and that his period of operational service was only very short. The Tribunal accepted the Commission's argument that Mr Draper's smoking during operational service did not make a material contribution to the minimum requirements of the SoP.

Formal decision

The Tribunal decided that the decision under review must be affirmed.

Editorial Note

In the majority of cases before the Tribunal in 2007 which concerned a claim for PTSD, the main issue in dispute was diagnosis.

In PTSD cases, the diagnostic criteria in DSM IV has a criterion of causality. The decision maker must determine whether the person was exposed to a stressor and responded to it as defined in DSM IV.

As the diagnosis of a claimed condition is on the balance of probabilities, where PTSD is accepted as the correct diagnosis its connection to service will usually be a mere formality.²³

However, both *Re McKay* and *Re Draper* highlight a category of cases where the key issue for consideration is whether there may have been a different cause for PTSD other than that alleged to have occurred during the relevant period of service.

In *Re McKay* and *Re Draper* the contended severe stressor during operational service was apprehension of a recurrence of a Voyager - Melbourne type collision.

In *Re McKay*, the Tribunal considered apprehension of a recurrence of a Voyager - Melbourne type collision, at night, met the definition of experiencing a severe stressor in the SoP. In contrast, in *Re Draper* the Tribunal did not specifically address the issue of the alleged severe stressor but did note that the evidence appeared to "point the other way" in respect of this issue.

The medical evidence in *Re McKay* suggested that some of Mr McKay's PTSD symptoms did not manifest themselves until some "external cue" occurred, such as a "similar situation".

²³ *Mines v Repatriation Commission* [2004] FCA 1331

It is interesting to note that the Tribunal did not consider the alleged stressor, in view of the medical evidence, to be part of the PTSD symptomology of intrusive re-experiencing ie. acting or feeling as if the event were recurring but as a “second, although lesser, severe stressor”.

Re McKay and *Re Draper* highlight the importance of having evidence pointing to:

- the time of clinical onset or clinical worsening within the time required by the factor; and
- if worsening is at issue, medical evidence of the clinical worsening of the condition.

The severe stressor factors in SoPs no 3 & 4 of 1999 as amended by no 54 & 55 of 1999, which were relevant in *Re McKay* and *Re Draper* have been replaced in the most recent version of the PTSD SoPs with new onset and worsening factors including:

- experiencing a category 1A stressor;
- experiencing a category 1B stressor;
- having significant other who experiences a category 1A stressor; and
- experiencing the traumatic death of a significant other,

A category 1A stressor refers to “experiencing a life-threatening event”. The Tribunal has discussed a “category 1A stressor” in *Re Robinson*.

**Re Robinson
Repatriation Commission**

Mr Egon Fice, Member
[2008] AATA 786
3 September 2008

Operational service – Post Traumatic Stress Disorder – diagnosis applying DSM IV - category 1A stressor – life threatening event

Facts

Mr Robinson served in the Royal Australian Navy and rendered operational service in Malaysia, Singapore, Brunei and Vietnam.

Mr Robinson sought a review of the Repatriation Commission’s decision, as affirmed by the VRB, that refused his claim for stress/anxiety and emotional problems.

Issues before the Tribunal

The Tribunal identified the following issues:

- whether Mr Robinson suffers from PTSD or any other psychiatric condition;
- the date of clinical onset of the diagnosed condition; and
- whether any diagnosed condition is causally related to Mr Robinson’s operational service in the Navy.

The Tribunal’s consideration

Diagnosis

In forming a view as to diagnosis, the Tribunal said:

In order to be satisfied with the diagnosis offered by both psychiatrists, I must also be satisfied, on the balance of probability, that the event described by Mr Robinson which led to his being diagnosed with PTSD, in fact occurred.

The event described by Mr Robinson, said to have given rise to his PTSD, occurred while he was serving on the Derwent. While the ship was on patrol off the coast of Borneo, Mr Robinson's role was to man a 10 inch signal lantern which was used as a searchlight to illuminate suspect vessels intercepted after dark.

The Tribunal was satisfied that the account given by Mr Robinson was substantially true and accurate. It was supported independently by contemporaneous documentary evidence.

However, the Tribunal noted that the most contentious issue about the diagnosis was whether the event described by Mr Robinson, could be described as a traumatic event in accordance with the Diagnostic Criterion A set out in DSM-IV. The Tribunal said:

There are two parts to this. The first is whether Mr Robinson was confronted with an event that involved actual or threatened death or serious injury or a threat to the physical integrity of himself or others. Secondly, I must determine whether his response involved intense fear, helplessness, or horror.

The description set out in Criterion A of DSM-IV is precisely the same as the definition of the term experiencing a

severe stressor as that is used in many SoPs...

The Tribunal was satisfied that the event described by Mr Robinson, when viewed objectively by a reasonable person in the position of and with the knowledge of Mr Robinson, was capable and did convey the risk of serious injury to his physical integrity. The Tribunal was also satisfied as to the second limb of Criterion A in DSM-IV, that Mr Robinson's reaction to the event was one of intense fear.

The Tribunal was also satisfied that the evidence disclosed that Mr Robinson satisfied Criterion B, C and D of DSM-IV. There was evidence that he persistently re-experienced the event; that the duration of the disturbance was more than one month and it caused clinically significant distress and impairment in social, occupational or other important areas of functioning.

Causation

The Tribunal noted the decision by Justice Gray in *Mines* case and said:

the four steps in *Deledio* hardly need be considered if the conclusion is reached that the Veteran suffers PTSD, out of an abundance of caution, I have decided to do so.

The Tribunal considered each of the steps set out in *Deledio*. At the third step the Tribunal said:

While it is clear that the definition of a category 1A stressor is narrower than the definition in the superseded SoP of experiencing a severe stressor, there nevertheless remains the common trauma of experiencing a life-

threatening event. The narrowing of the definition of a category 1A stressor also seems to be at odds with Criterion A of DSM-IV which must be met in order to establish a diagnosis of PTSD. The definition of the phrase, experiencing a severe stressor, is clearly based on Criterion A, using the same language. It seems that although one can be diagnosed with PTSD because a person witnessed or was confronted with an event that involved threat of death or serious injury or to the physical integrity of the person or others, that no longer falls under the definition of a category 1A stressor. The definition of a category 1B stressor in SoP No 5 of 2008 includes a traumatic event which involves being an eyewitness to a person being killed or critically injured; but, again, that is much narrower than the traumatic event described by Criterion A or the definition of the expression experiencing a severe stressor set out in Instrument No 3 of 1999.

Be that as it may, the material discloses that Mr Robinson did experience a life threatening event. Standing up, exposed from the waist up, while directing the searchlight onto the intercepted vessel, with the distinct possibility that persons aboard that vessel may attempt to shoot out the light, quite clearly fits the definition in SoP No 5 of 2008.

At step four of *Deledio* the Tribunal again referred to *Mines* case. It said:

The final step according to *Deledio* requires me to proceed under s 120(1) of the VE Act and determine whether I am satisfied beyond reasonable doubt that Mr Robinson's incapacity did not arise from a war-caused injury. It is at

this stage that I am required to make findings of fact from the material put before me. However, for the reasons explained by Gray J in *Mines* case, to do so would simply be repeating what I have already found in relation to the facts when addressing the diagnosis.

Formal decision

The Tribunal decided that Mr Robinson's PTSD was war-caused. As such, The Tribunal set aside the decision under review and in substitution decided that Mr Robinson was incapacitated as a consequence of PTSD and that his incapacity should attract compensation in accordance with s 13 of the VEA.

Further reading:

The Tribunal has considered category 1A and/or 1B stressors in a number of cases including:

- *Re Sanderson and Repatriation Commission* [2008] AATA 891
- *Re McDonell and Repatriation Commission* [2008] AATA 613
- *Re Glasby and Repatriation Commission* [2008] AATA 163
- *Re Mann and Repatriation Commission* [2008] AATA 163
- *Re Coulter and Repatriation Commission* [2008] AATA 1085

**Re Milbourn
Repatriation Commission**

Ms Robin Hunt, Senior Member
Dr John Campbell, Member

[2008] AATA 959
28 October 2008

***War widow's pension claim – death
from small cell metastatic carcinoma
of the lung – smoking history***

Facts

Mrs Milbourn is the widow of a veteran who served in the Australian Army between 13 January 1942 and 1 February 1943.

The late Mr Milbourn suffered no accepted war-caused disabilities and died in 1987 of small cell metastatic carcinoma of the lung.

The VRB affirmed the Repatriation Commission's decision refusing a war widow's pension because of the finding that Mr Milbourn's death was not related to his war service.

Issues before the Tribunal

Mr Milbourn's kind of death was not disputed. The remaining question for the Tribunal to consider was whether Mr Milbourn's smoking, which led to death by lung cancer, was related to his relevant service so as to meet the tests set out in a relevant SoP.

The applicant's position

Counsel for Mrs Milbourn argued that her late husband's death came within factor 6(a)(ii) of the SoP No 18 of 2006.

This factor requires that, on the balance of probabilities, death from malignant neoplasm of the lung, including malignant neoplasm caused by small cell carcinoma, must be connected with the circumstances of a person's relevant service.

The Tribunal's reasoning

The Tribunal held that when forming an opinion about any relationship to service, on balance, it was not satisfied that Mr Milbourn had a war-caused smoking habit.

The Tribunal noted Mrs Milbourn's recollections of what Mr Milbourn told her of his smoking during army service.

The Tribunal also noted a medical report which stated:

..For "age started", the information is "18 yrs, cigarettes". For "average daily consumption" is added "less than 20 cig/day". "Still smoking" is crossed out and "if not when stopped?" is answered "21 yrs". This report does not, in our view, support a finding that Mr Milbourn smoked during his eligible service but rather indicates that he had stopped when he was aged 21. Copies of a mobilization attestation form and death certificate before us indicate Mr Milbourn was born on 16 August 1920, so he was aged 20 in 1941 when he enlisted. This accords with Mrs Milbourn's recollection of what her late husband told her but the report of 1983 does not support any finding that Mr Milbourn resumed smoking in the army let alone a finding that he developed a war-caused habit while he was in the army.

The Tribunal found that the material before it was unclear about a temporal connection between Mr Milbourn's smoking with his army service and even less clear about any greater relationship to army service. On balance, the Tribunal was not satisfied that Mr Milbourn had a war-caused smoking habit.

Formal decision

The Tribunal affirmed the decision under review. It was not reasonably satisfied on the balance of probabilities in accordance with subsection 120(4) that Mr Milbourn's death was war-caused. Mrs Milbourn's claim for a war widow's pension failed.

Editorial note

An appeal has been lodged to the Federal Court from the Tribunal's decision.

The main issue for consideration in this matter was the relationship between the late veteran's smoking habit and his war service. Specifically, whether the Tribunal was satisfied, on the balance of probabilities, that the late veteran's smoking habit was caused by his eligible war service.

The Full Federal Court provided guidance on this issue in *Repatriation Commission v Tuite* (1993) 39 FCR 540. Davies J said:

Eligible war service encompasses not only active service but all incidents of service, such as camp life. Under s9(1)(b), but not under ss9(1)(d) and 9(2), if an injury or disease is claimed to have arisen out of or be attributable to a serviceman's period of camp life, the question will usually be whether life in camp was a contributing cause and not

merely the setting in which the event occurred.

Re MacKay and Repatriation Commission

Brigadier C. Ermert, Member

[2008] AATA 775

29 August 2008

Kind of death - Ischaemic Heart Disease (IHD) – Hypothesis raised that service caused Depressive Disorder caused IHD which caused death

Facts

Mr MacKay rendered operational service between 6 January 1941 and 22 February 1946. He died in 1981 from ischaemic heart disease.

Mrs MacKay sought a review of the Repatriation Commission's refusal of her claim for a war widow's pension, which was affirmed by the VRB.

Applicant's position

The hypothesis proposed connecting Mr Mackay's war service and his death was that he suffered a depressive disorder as a result of his war service which in turn caused his IHD.

Issues before the Tribunal

There was no dispute before the Tribunal that Mr MacKay's kind of death was ischaemic heart disease. The Tribunal identified the following issues:

- Does the SoP for Depressive Disorder uphold the hypothesis connecting Mr Mackay's depressive disorder with the circumstances of his service?

- If so, does the SoP for IHD uphold the hypothesis connecting Mr Mackay's depressive disorder with his death?
- If so, is the Tribunal satisfied beyond reasonable doubt that there is no sufficient ground for determining that Mr Mackay's death was war-caused?

The Tribunal's reasoning

At the outset, the Tribunal noted that *McKenna v Repatriation Commission* was a relevant consideration in this case.

Depressive Disorder

The Tribunal identified the relevant SoP for Depressive Disorder: No. 27 of 2008.

The Tribunal had before it the evidence of two psychiatrists. Dr Morris did not think that the evidence established that Mr Mackay had suffered a depressive condition. Dr Dinnen expressed a view that Mr Mackay had a major psychotic depressive illness and it is more likely than not that he continued to suffer from less severe forms of depressive illness from the time he served in New Guinea until his death. However, during cross examination Dr Dinnen conceded that in forming his opinion he was speculating about information that he had been given.

The Tribunal rejected the Commission's submission that the "speculation" undertaken by Dr Dinnen meant that this aspect of the hypothesis was not pointed to or supported by the material before it.

The Tribunal considered that the material before it, including the evidence of Dr Dinnen, fit the SoP for diagnosis of

"depressive disorder", being "depressive disorder not otherwise specified".

The Tribunal then turned to consider the next question - whether the material fit factor 6 of the SoP for Depressive Disorder that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting depressive disorder with the circumstances of service.

The Tribunal considered the evidence of a historian about the Wewak campaign and Mr Mackay's service during that campaign. The Tribunal found this material fit factor 6(a) of the SoP.

The Tribunal also considered that Dr Dinnen's evidence was material which fit or was consistent with the SoP requirement of clinical onset within five years of suffering a relevant stressor.

Ischaemic heart disease

The Tribunal noted that the second sub-hypothesis must fit the SoP for IHD: No. 89 of 2007). The factor relied to connect Mr Mackay's death with his service was 6(o):

having clinically significant depressive disorder for at least five years, before the clinical onset of ischaemic heart disease.

The Tribunal noted that clause 9 of the SoP for IHD states:

"clinically significant" means sufficient to warrant ongoing management, which may involve regular visits (for example, at least monthly), to a psychiatrist, counsellor or general practitioner.

The Tribunal considered that factor 6(o) was satisfied on the basis of available clinical notes and Dr Dinnen's report.

The Tribunal went onto find that it was not satisfied beyond reasonable doubt that Mr Mackay's death was not war-caused.

Formal decision

The Tribunal set aside the decision under review and in substitution decided that Mr Mackay's death was war-caused. Mrs Mackay was entitled to a war widow's pension.

**Re Fleming and
Repatriation Commission**

Mr S Webb, Member
[2008] AATA 736
22 August 2008

**kind of death - suicide - hypotheses of
war-causation**

Facts

Mr Fleming rendered operational service in the Australian Army from 28 January 1942 to 27 October 1944.

Mr Fleming had the condition of anxiety state accepted as war caused by Repatriation Commission in 1985. He died on 27 December 2005 by suicide.

Mrs Fleming sought a review of the Repatriation Commission's refusal of her claim for a war widow's pension, which was affirmed by the VRB.

The applicant's position

The hypotheses (and sub-hypotheses) of connection put forward by Mrs Fleming was that:

- Mr Fleming was suffering from depression or PTSD at the time of his suicide.
- The depression was caused by an anxiety state or the PTSD.
- The anxiety state or the PTSD was caused by traumatic stressors during the period of his operational service.

The Tribunal's reasoning

At the outset, the Tribunal noted:

that Mr Fleming's anxiety state in 1985 was accepted as war-caused under the *Repatriation Act 1920* has no direct relevance to the identification of an hypothesis for the purposes of subs 120(3) of the VEA in these proceedings

...

the reasonableness of an hypothesis is to be decided by reference to relevant and applicable SoPs determined by the Repatriation Medical Authority. An hypothesis may be upheld by more than one SoP; for an hypothesis to be upheld by a SoP, each of its sub-hypotheses must be so upheld.

Kind of death

The Tribunal was reasonably satisfied that Mr Fleming's kind of death was suicide. However, the Tribunal noted that there may be more than one 'kind of death'.

The Tribunal considered that the evidence of two psychiatrists, Dr Morris and Dr Lehmann, pointed to Mr Fleming suffering from depression when he died. The Tribunal said:

Dr Lehmann was Mr Fleming's treating General Practitioner for many years and reported no clinical history

of depression or anxiety in Mr Fleming from 1966 to March 2005. Dr Lehmann reported that *“The cause of his depression [in 2005] was, in Mr Fleming’s opinion very precise, and that was his increasing blindness”*.

The Tribunal also considered evidence from Dr Hordern. The Tribunal noted that his “retrospective diagnosis” was based on telephone conversations with the widow and her daughter. He had not asked questions regarding the diagnostic criteria for PTSD.

The Tribunal was reasonably satisfied that Mr Fleming suffered from Major Depressive Disorder and that it was an operative factor in his death by suicide. The evidence did not establish, on the balance of probabilities, that Mr Fleming was suffering from PTSD at the time of his death or that PTSD was operative in his death.

Causation

The Tribunal first considered whether there was an hypothesis connecting Mr Fleming’s death with his particular service raised on the material.

The Tribunal considered that the hypothesis that Mr Fleming’s depression was attributable to stressors during the period of his operational service was not raised on the material before it.

However, the Tribunal considered that the hypothesis that Mr Fleming’s suicide was related to depression arising from an anxiety disorder or PTSD, and the anxiety disorder or PTSD were attributable to traumatic stressors during the period of operational service was raised on the material before it.

Were the raised hypotheses reasonable?

The relevant factors in the SoP concerning suicide were:

- (b) suffering from depression at the time of suicide or attempted suicide; or
- (c) suffering from post traumatic stress disorder at the time of suicide or attempted suicide;

The Tribunal noted the evidence of Dr Hordern that Mr Fleming was suffering from PTSD when he died. However, the Tribunal considered that Dr Hordern’s evidence and the evidence provided by Mrs Fleming, her daughter and son did not point to each aspect of the definition of PTSD set out in the SoP or in the definitions and diagnostic criteria for PTSD in DSM IV.

The Tribunal considered that there was material which pointed to Mr Fleming suffering from a Major Depressive Disorder when he committed suicide (Dr Morris, Dr Hordern and Dr Lehmann).

The Tribunal noted that the relevant factor in the SoP concerning depressive disorder required the presence of a clinically significant psychiatric condition within the period of two years immediately before the clinical onset of the depressive disorder.

The Tribunal considered that the material before it pointed to the clinical onset of Mr Fleming’s Major Depressive Disorder in December 2005.

In relation to a clinically significant psychiatric disorder, the Tribunal reiterated its comments that there was no material pointing to Mr Fleming

suffering from PTSD, with reference to the diagnostic criteria set out in the DSM-IV.

In relation to anxiety disorder, the Tribunal found there was no material pointing to the presence of clinically significant symptoms or behaviours in Mr Fleming in the two years preceding 2005 that was consistent with the requisite diagnostic criteria for an anxiety disorder as defined by any applicable SoP (see, for example, the diagnostic criteria for a Generalised Anxiety Disorder as defined at cl 3(b) in the SoP concerning Anxiety Disorder, Instrument Number 101 of 2007 which replaced Instrument Number 1 of 2000, or in the DSM-IV.)

That being so, the Tribunal did not proceed to consider the remaining aspect concerning anxiety state and the connection of that condition to stressors during the period of Mr Fleming's operational service.

Formal decision

The Tribunal considered the hypotheses connecting Mr Fleming's death with the circumstances of his operational service were not consistent with the applicable SoPs. The decision under review was affirmed.

Editorial note

The Tribunal's characterisation of kind of death in *Re Fleming* was consistent with the line of reasoning in *Repatriation Commission v Codd* [2007] FCA 877 that the "kind of death" met by a person is the medical cause of death, including the contributing or underlying medical cause of death.

The Tribunal's decision in *Re Fleming* was also consistent with the line of reasoning in *Repatriation Commission v Hancock* [2003] FCA 711 that it may be that multiple medical conditions cause a particular death. In such a case, it may be necessary that all of those conditions be considered for the purpose of determining whether there is a relevant statement of principles applicable. If one of the multiple medical conditions is a cause of death and that condition was itself caused by war service, then that may be sufficient to establish an entitlement to a pension.

In *Re MacKay and Re Fleming*, it was hypothesised that particular psychiatric conditions were a part of the chain of causation leading to the "kind of death". As such, at the time of its decision the Tribunal in both cases had to apply the relevant SoPs (*McKenna's case*), but all it had to do was determine whether or not the material pointed to the late veteran suffering from the relevant psychiatric condition and that it was related to the relevant service.

However, it is important to note that since the Tribunal made its decision in *Re Fleming* and *Re MacKay* the Federal Court handed down its decision in *Green* (see page 115). Following this decision, if the Tribunal were dealing with the same issues now, as were raised in *Re MacKay* and *Re Fleming*, the existence of the relevant psychiatric condition(s) that were part of the hypothesised chain of causation leading to the kind of death would first need to be determined on the balance of probabilities rather than merely pointed to by the material before the decision-maker.

Federal Court of Australia

Cadd v Repatriation Commission

Finn J
[2008] FCA 1024
8 July 2008

Special rate – Meaning of “ceasing to engage in remunerative work” in s 24(2)(a)(i)

Facts

Mr Cadd applied unsuccessfully for a special rate of pension under s 24 of the *Veterans’ Entitlements Act 1986* (VEA). At the time of his application for a special rate of pension, he was in receipt of a pension at the general rate for post-traumatic stress disorder (PTSD) and other war-caused disabilities. He sought review of that decision in the Administrative Appeals Tribunal (AAT). He appealed from the decision of the AAT to the Federal Court.

The Tribunal’s reasoning

The Tribunal characterised that type of work in Mr Cadd’s case as “a club manager” and found that his PTSD alone would prevent employment for more than eight hours per week. In considering whether s 24(1)(c) was satisfied the Tribunal indicated the decisive issue was whether the exclusionary provisions of s 24(2)(a)(i) of

the VEA applied to Mr Cadd’s circumstances. The Tribunal held that these provisions did apply saying:

The Tribunal finds that in 2003, the year Mr Cadd resigned from the Club, his psychiatric symptoms were not such as to allow a diagnosis of PTSD to be made. The diagnoses made by Dr Ewer in 2003 were, in April, pathological gambling and adjustment disorder with depressed mood and in August, again pathological gambling, this time in remission, together with adjustment disorder with depressed mood and alcohol dependence, also in remission.

...

The Tribunal has considered Mr Cadd’s evidence to the effect that he attempted to find employment after his resignation from the Club. However, on balance, the Tribunal finds that with effect from 1 March 2003, that is the day after Mr Cadd resigned his employment with the Club, Mr Cadd had “ceased to engage in remunerative work”. The effect of this finding is that, pursuant to s 24(2)(a) of the VE Act, Mr Cadd is deemed not to satisfy the second limb of s 24(1)(c), that is he shall not be taken to be “suffering a loss of salary or wages, or of earnings on his or her own account” by reason of his incapacity from accepted disabilities...

Grounds of appeal

Mr Cadd appealed to the Federal Court on the ground that the Tribunal applied the wrong test in determining that his circumstances brought him within the exclusionary provisions of s 24(2)(a) of the VEA. Specifically, Mr Cadd submitted that the Tribunal had

misapplied the law by focussing on why he ceased a particular job and not upon why, if it was the case, he ceased to be engaged in remunerative employment.

The Commission's position

The Commission submitted that the Tribunal asked and answered the correct question, ie whether a state of affairs had been reached such that it could properly be said that Mr Cadd was no longer engaged in remunerative work. The Commission said that the Tribunal had considered all of the medical evidence and Mr Cadd's oral evidence at hearing and found, in effect, that he ceased to engage in remunerative work on his resignation for reasons related to conditions from which he then suffered which were not war caused.

The Court's Consideration

Justice Finn was satisfied that the Tribunal had not misapprehended and misapplied the test in s24(2)(a)(i) of the VEA. His Honour considered that the Tribunal understood and asked itself the question required to be asked when considering whether in the circumstances a veteran ceased to engage in remunerative work for reasons other than his war-caused incapacity and disease. His Honour agreed with the Commission's submission that the Tribunal addressed the evidence – both medical and of Mr Cadd – that related to that question. His Honour said:

[15]...In light (i) of the events which occurred since he ceased to have remunerative work in February 2003, ie his persistent inability to get work; (ii) of his medical condition at February 2003 until the onset of PTSD in 2004;

and (iii) of his own appreciation, albeit for the most part in retrospect, of his fitness for work (but compare his 18 March 2003 application noted by the Tribunal (at [13] of its reasons)), the conclusion that Mr Cadd ceased to engage in remunerative work for a reason other than incapacity from war-caused condition was one that clearly was open to it.

In addition, Justice Finn noted:

[16] At best the appeal seeks a review on the merits of the Tribunal's decision. Such is not permissible.

Formal decision

Justice Finn was satisfied that the Tribunal did not apply the wrong test in determining that Mr Cadd's circumstances brought him within the exclusionary provisions of s 24(2)(a) of the VEA. As such, Mr Cadd's appeal was dismissed.

Editorial Note

Section 24(2)(a) provides that a person will not be able to satisfy the "loss of earnings" test if there are other reasons that are also causally related to his or her having ceased to engage in work or related to the person's being prevented from engaging in work.

In Mr Cadd's case the Tribunal considered whether, in his particular circumstances, it could properly be said that he was no longer engaged in remunerative work. The Tribunal took the view that Mr Cadd had ceased in his normal line of work as a club manager for some other reason (ie. resignation related to pathological gambling, adjustment disorder and depressed

mood which were not war caused) and that he had not worked since. The Tribunal considered the evidence that Mr Cadd had attempted to find employment after his resignation but also considered his oral evidence at hearing that he considered himself unfit for any employment since his resignation from the Club. This latter evidence would seem to indicate that Mr Cadd had no definite plans to go to another job, or that his war caused PTSD had intervened to prevent that happening. As such, it was clearly open to the Tribunal to find that the other reasons (ie. resignation due to pathological gambling, adjustment disorder and depressed mood which were not war caused) were the reasons why Mr Cadd had ceased to engage in remunerative work, and therefore the reason why he was not entitled to pension at the Special Rate. The Federal Court agreed that this finding was open to the Tribunal.

Whether or not s 24(2)(a) will apply to exclude a person from obtaining the special rate of pension will always depend on the circumstances of each individual case. In cases where a person leaves a job for any number of reasons, the operation of s 24(2)(a) will not necessarily prevent them from being awarded the special rate of pension. For example, if a person resigned with the intention of going to a new job, but his or her accepted disabilities, alone, intervened to prevent him or her from doing so, then the person's resignation is not the reason why he or she has ceased to engage in work.

Further reading: Please see pages 30 to 33 of VeRBosity Special issue: "Special rate of pension"

Todd v Repatriation Commission

Logan J
[2008] FCA 1276
21 July 2008

Whether the Tribunal erred in failing to give reasons or sufficient reasons for the conclusion reached – whether Tribunal had explained why it preferred a particular body of evidence

Facts

Mr Todd served in the Royal Australian Navy and rendered operational service in 1969 in HMAS Vampire and in 1972 in HMAS Sydney. He made a claim unsuccessfully for anxiety disorder, on the basis that causation was due to his medical condition of pleural plaques. The decision was affirmed on review by the Veterans' Review Board (VRB). Mr Todd sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal affirmed the decision of the Commission and Mr Todd appealed the decision of the Tribunal to the Federal Court.

The Tribunal's reasoning

The key part of the Tribunal's reasoning relevant to the appeal concerned the observations it had made regarding the evidence of two psychiatrists, Dr Likely and Dr Mulholland. In relation to the evidence of Dr Likely, the Tribunal stated:

[11] Dr Likely's evidence was unsatisfactory in several respects. His

oral evidence was presented in a disorganised fashion. He also contradicted his own written report of 22 January 2007. In that report, he said he had changed his longstanding view that the applicant suffered from PTSD—yet at the hearing he repeated the view that PTSD was an appropriate diagnosis. While we do not criticise a clinician for changing his view in a considered way, we were unable to clearly discern the basis for Dr Likely’s change of mind in this case. We formed the impression that Dr Likely’s objectivity may have been affected by his longstanding relationship with his patient.

In relation to the evidence of Dr Mulholland the Tribunal stated:

[12] The respondent tendered two reports by Dr Mulholland. The second report was a short clarification of matters referred to in his original report. Dr Mulholland says the applicant suffers from generalised anxiety disorder which pre-dates the diagnosis of the respiratory conditions. We were impressed with the opinions offered in Dr Mulholland’s reports for two reasons. Firstly, Dr Mulholland is an independent expert who has seen and apparently considered all of the material. His objectivity has not been compromised by a treating relationship with the applicant. Secondly, his reports are clear and demonstrate careful and consistent analysis.

Grounds of appeal

The applicant challenged the Tribunal’s decision on the ground that the Tribunal failed to give reasons or sufficient reason to support the conclusion reached.

The applicant put forward two further issues linked to this ground of appeal:

- had the Tribunal erred in accepting the evidence of another psychiatrist, Dr Mulholland, in preference to that of Dr Likely; and
- should the Tribunal have considered a contention raised in a medical opinion of a third psychiatrist, Dr Stephenson, even though the parties had not expressly raised it before the Tribunal.

The Court’s Consideration

Did the Tribunal fail to give reasons or sufficient reasons?

Justice Logan noted that the Tribunal was not required to exhaustively set out all the evidence before it, but where there is a controversy in medical evidence, it must explain why it prefers a particular body of medical evidence. He held that the Tribunal had done so, and there was no error of law in the way it had explained the reasons for its preference.

Did the Tribunal err in not considering a contention raised in the opinions of Dr Stephenson?

Justice Logan considered that the question before him was whether, though the parties narrowed the issues by concession, the Tribunal was nonetheless obliged in the discharge of its duties to make the correct or preferable decision in respect of the review application, to look beyond the issues that were identified for it. He did not consider the Tribunal had erred in this aspect of the appeal. His Honour held that having regard to the way Dr Stephenson had modified her opinion,

and the fact that reference to her reports were of a historical rather than argumentative nature, it was not surprising that the Tribunal chose to make no reference to either of those reports.

Formal decision

Justice Logan held that there was no error of law in the way the Tribunal had approached its task. As such, Mr Todd's appeal was dismissed.

Repatriation Commission v Norton

Heerey J
[2008] FCA 1132
5 August 2008

Application of the Deledio steps and meaning of a "experiencing a severe stressor"

Facts

The late Mr Goodwin served in the Australian Army in Vietnam from 2 April 1969 until 4 March 1970. He made a claim unsuccessfully for liver cancer caused by cirrhosis of the liver. The decision was affirmed on review by the Veterans' Review Board (VRB). Subsequently to the VRB's decision Mr Goodwin died as a result of the cancer. Ms Norton, as executrix of his estate, appealed under s 126 of the Veterans' Entitlements Act 1986 (VEA) to the Administrative Appeals Tribunal (Tribunal). She appealed from the decision of the AAT to the Federal Court.

The Tribunal's reasoning

The hypothesis put forward before the Tribunal that was said to raised by Mr Goodwin's claim was that: (i) severe stressors related to his service, (ii) caused alcohol dependence or abuse which, (iii) caused the cirrhosis which, (iv) caused the liver cancer. Steps (iii) and (iv) were not in dispute.

After referring to a number of medical reports, the Tribunal was unable to find in the reported histories the necessary DSM-IV-TR criteria for alcohol dependence and thus (found) that Mr Goodwin suffered from alcohol abuse.

The Tribunal then posed for itself the question whether the alcohol abuse "resulted from the objective/subjective effect of a severe stressor that might evoke intense fear (Repatriation Commission v Stoddart (2003) 134 FCR 392)".

The Tribunal noted that the SoP defined experiencing a severe stressor and considered that the inclusion of the word "might" in this definition lowered the standard of proof. The Tribunal said

[74]... The use of the term might in the Tribunal's opinion shifts the weight in the assessment in the objective/subjective analyses (Stoddart) of claimed stressors toward the subjective analysis; and in light of the psychiatric opinion, the Tribunal finds that the stressors described and in particular the bar theft accusation and search, do meet the SoP's criteria...

The Court's Consideration

The Federal Court held that the Tribunal had erred at stage 3 of Deledio by failing to form an opinion whether the alcohol hypothesis fitted or was consistent with SoP no 76 of 1998.

Justice Heerey noted that the diagnostic criteria for alcohol abuse, set out in clause 2(b) of the SoP required very specific manifestations. His Honour found that the Tribunal did not attempt to identify such manifestations in the material before it, nor did the Tribunal attempt to identify the date of clinical onset or clinical worsening of the alcohol abuse. As such, the Tribunal did not identify the necessary elements which the SoP required.

In addition, Justice Heerey found that the Tribunal had misunderstood the term "experiencing a severe stressor". His Honour said:

[20] The construction which Full Court decisions have placed on this expression in the context of the SoP can be summarised as follows:

The event must be one which (i) the person actually perceived as involving actual or threatened death or serious injury and (ii) which could reasonably be so perceived by someone with that person's knowledge and experience. There are both subjective and objective elements: *Repatriation Commission v Stoddart* (2003) 134 FCR 392 at [22], [30].

It is sufficient if a threat is (actually and reasonably) perceived, notwithstanding that there was in fact no threat: *Stoddart* at [31].

To be "confronted" with the event the person does not necessarily have to be physically present: *Woodward v Repatriation Commission* (2003) 131 FCR 473 at [123].

"Risk" is used in the sense of "an indication of probable evil to come: something that gives indication of causing evil or harm": *Stoddart* at [36].

[21] The use of the word "might" has nothing to do with "shift(ing) the weight ... towards the subjective analysis". The word "might" accommodates the possibility that a person of particular fortitude might be confronted with an event involving, for example, threat of death, but does not react with "intense (or any) fear, helplessness or horror". Such a person would be, literally, fearless. Nevertheless, such an event might evoke the actual, and objectively reasonable, intense fear etc in an ordinary person. At the other extreme, the definition excludes an event which (objectively) does not have the possibility of evoking the reaction of intense fear etc. The definition thus sets out the limits within which the *Stoddart* subjective and objective tests are to be satisfied. The concluding part of the definition ("which event or events...") is setting out the objective criteria which the event must satisfy. Of course, the event must also be one which the person (subjectively) perceived as involving a threat of death etc and which a reasonable person could (objectively) so perceive.

Formal decision

Justice Heerey allowed the Commission's appeal and remitted the matter to be heard by a differently constituted Tribunal.

Editorial Note

Chain of SoPs

If there is a SoP in force concerning the injury, disease or death that is the subject of the claim (in this case malignant neoplasm of the liver) as well as an SoP for an injury or disease (in this case alcohol abuse) that is said to have led to that injury, disease or death, then all the relevant SoPs must be met for the hypothesis to succeed: *McKenna v Repatriation Commission* [1999] FCA 323.

Meeting a factor in an SoP – clinical onset

Clause 5(b) of the alcohol abuse SoP no 76 of 1998 not only requires exposure to a "severe stressor", it also requires clinical onset of alcohol abuse within two years of that exposure.

For a hypothesis to fit the template of the alcohol abuse SoP, the material before the decision maker must point to a person having manifested all of the requisite symptomology set out in the diagnostic criteria in the SoP within two years of his or her exposure to a severe stressor: *Repatriation Commission v Lees* (2002) 36 AAR 484.

This particular issue also arose recently in *Repatriation Commission v Brady* [2007] FCA 1087. In *Brady*, the Federal Court emphasised that the time of clinical onset can be determined only if the relevant disease is first properly identified because the time of clinical onset

depends on when the particular disease's diagnostic criteria were first satisfied.

Experiencing a severe stressor

The Court's decision in *Norton* recognises that the subjective element of the definition of "experiencing a severe stressor" incorporates the wide variety of human experience ie. a person of particular fortitude might be confronted with an event involving, for example, threat of death, but does not react with "intense (or any) fear, helplessness or horror".

However, the decision emphasises that the objective element of the definition must also be met. As Justice Heerey stated, "the definition excludes an event which (objectively) does not have the possibility of evoking the reaction of intense fear etc".

In order to satisfy the definition of experiencing a "severe stressor", a person must demonstrate not only that that he or she perceived the event as involving a threat of death etc but that, when judged objectively, from the standpoint of a person with the knowledge and in the circumstances of the person, the event:

- is of a kind which conveys an actual or a threatened risk of death or serious injury; and
- is such that it might evoke feelings of intense fear, helplessness or horror.

New SoPs for alcohol abuse or alcohol dependence

It should be noted that the comments Justice Heerey made at paragraph 20 of the Court's decision (ie. to be

"confronted" with the event the person does not necessarily have to be physically present: *Woodward v Repatriation Commission* (2003) 131 FCR 473 at [123]) does not apply to "a category 1B stressor" in the current SoPs concerning alcohol abuse or alcohol dependence no 17 and 18 of 2008. The category 1B stressor factor requires the person to be an eyewitness, rather than merely being confronted with the event.

The SoPs define being an "eyewitness" as a person who observes an incident first hand and can give direct evidence of it. The definition specifically excludes a person exposed only to media coverage of the incident.

Kaluza v Repatriation Commission

Branson J
[2008] FCA 1356
9 September 2008

Extent of operational service – whether veteran taken to be allotted for duty in an operational area during whole of return flight from Vietnam – whether performing duties not associated with a continuing journey

Facts

Mr Kaluza served in the Royal Australian Air Force as an aircraft technician, and participated in flights to Vietnam. Mr Kaluza made an unsuccessful claim to the Repatriation Commission ("the Commission") for PTSD, alcohol dependence and hypertensive

cardiovascular disease. The decision was affirmed on review by the Veterans' Review Board (VRB). Mr Kaluza sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal varied the decision under review to a finding that Mr Kaluza suffered from anxiety disorder, alcohol abuse, and hypertension but affirmed the decision none of the conditions claimed were war-caused. Mr Kaluza appealed that decision of the Tribunal to the Federal Court.

The Tribunal's reasoning

A key issue before the Tribunal concerned Mr Kaluza's operational service. Before the Tribunal, the Commission held that Mr Kaluza rendered operational service on two trips to Vietnam, one in 1969 and another in 1970. Mr Kaluza claimed he had rendered operational service on four to six trips between 1968 and 1971.

The relevant instrument of allotment made under s5B(2) of the VEA was that made by the Minister for Defence, Industry, Science and Personnel on 23 December 1997, which provided that members of Nos 36 and 37 Squadron Richmond were taken to have been allotted for duty during the period determined according to paragraphs 1 and 2 in Schedule B of the instrument. Those paragraphs provided the start and end dates of "allotment", and provided that the allotment commenced on the day the person left the last port of call in Australia if the person was in Australia when they commenced the journey (as was the case with Mr Kaluza), and the allotment ended when the person arrived

at the first port of call in Australia on return from Vietnam unless immediately after the person left Vietnam, the person journeyed to a place outside Australia to perform duty not associated with a continuing journey to Australia. In which case, the allotment ceased on the day the person arrived at that place.

The Tribunal considered the evidence of Mr Kaluza and two reports of Air Commodore Brennan of Writeway Research Services. The Tribunal concluded that Mr Kaluza's recollections were not reliable and preferred the evidence of Air Commodore Brennan, who had found that there was no independent evidence of any trips other than the two trips recorded in RAAF records, and which the Commission had conceded were operational service.

In relation to the first of those trips, the Tribunal found that Mr Kaluza's allotment ceased (and thus his operational service ceased) when he arrived at Butterworth. It said:

... after Mr Kaluza left Vietnam on 22 February 1969, he arrived in Butterworth. We did not have any evidence to satisfy us that he performed duty there associated with a continuing journey to Australia. He then travelled from Butterworth to Pearce on 24 February 1969, but he had arrived at Butterworth on 22 February 1969, and hence his journey had ended on that day as far as operational service went. ...

Grounds of appeal

Mr Kaluza appealed to the Federal Court from the decision of the Tribunal on two grounds:

- Did the Tribunal incorrectly construe the relevant provisions of the VEA and the instrument as precluding a finding that he had operational service if the specific date or dates of that service were not established or if that service was not confirmed by service records or both; and
- Did the Tribunal incorrectly construe the relevant provisions of the VEA and the instrument as requiring a finding that operational service ceased if he went from Vietnam to a place outside Australia and there was no evidence as to whether he performed duties in that place outside Australia associated with a continuing journey to Australia?

The Court's Consideration

First ground – had the Tribunal erred by finding operational service was precluded if the dates of that service were not established or not confirmed by service records?

Justice Branson did not consider that the Tribunal had proceeded on the basis that it was precluded from finding that Mr Kaluza had operational service if the specific dates of that service were not established. Her Honour noted that the Tribunal had ultimately preferred to rely on the records, as researched by Air Commodore Brennan, rather than Mr Kaluza's recollection. As this was a finding of fact it could not raise an error of law. It was open for the AAT to find that he had rendered operational service only on the two trips for which RAAF records existed

Second ground – had the Tribunal erred by finding operational service ceased if there was no evidence as to whether Mr Kaluza performed duties associated with a continuing journey?

Justice Branson considered that the Tribunal had erred in this aspect of the appeal by misconstruing schedule B of the instrument of allotment. Her Honour held that:

The plain intention of Schedule B of the Instrument is ... that a person sent from Australia on a mission to Vietnam is to be regarded as being allotted for duty in Vietnam during the whole of the period of the journey to and from Australia – unless the person was diverted to another mission immediately after leaving Vietnam. For this reason the period for which the person is taken to have been allotted for duty in Vietnam commences from the date of the last port of call in Australia (paragraph 1(a)) and ends on the day when the person arrives at the first port of call in Australia (paragraph 2(b)) unless, immediately after leaving Vietnam, the person travelled to a place other than Australia for the purpose of performing duties not associated with a continuing journey to Australia (paragraph 2(a)).

Her Honour rejected the Commission's argument that duty in the operation area comes to an end if the person leaves Vietnam to a place outside Australia, unless there is evidence that, at that place, the person performed duties associated with a continuing journey to Australia.

Formal decision

Justice Branson considered that the Tribunal did not give consideration to the whole of the period during which Mr Kaluza is to be taken to have been allotted for duty in an operational area. As such, her Honour set aside the decision of the Tribunal and remitted the matter.

Editorial Note

The Court was not primarily interpreting section 6C(3), which extends 'operational service' to trips to and from the operational area, but was interpreting an instrument that determined the beginning and ending of 'allotment for duty'. While both the instrument and s6C(3) have 'port-to-port' provisions, they are for different purposes and are not identical. If Mr Kaluza's allotment had ended at Butterworth, s6C(3)(c) would have applied, not 6C(3)(d) or (e).

Port to Port Eligibility

Port-to-port provisions are found only in s 6C(3) and 6D(3) of the VEA. They extend the operational service of a person who has served in an operational area and who was allotted for duty or was a member of a unit that was allotted for duty in that area.

Generally, those provisions operate to extend a person's operational service from the last port of call when leaving Australia to the first port of call on return to Australia after having served in the operational area.

However, if the person was outside Australia when the journey to the operational area commenced, or the person ceased to be allotted for duty in

the operational area, or was assigned for duty in another area outside Australia after serving in the operational area, operational service will begin or end in that other area rather than the last or first port of call in Australia.

Port-to-port eligibility does not apply to warlike and non-warlike service. The relevant instruments must be examined to identify the extent of a person's operational service.

**Gilkinson v Repatriation
Commission**

Burchardt J
[2008] FCA 1441
22 September 2008

Whether the Tribunal committed an error of law by posing and answering the wrong question; and failing to address expressly the hypothesis.

Facts

Mr Gilkinson served in the Royal Australian Navy and saw operational service on ten voyages to and from South Vietnam as a member of the crew of HMAS Sydney between 1970 and 1972. He made a claim unsuccessfully for sleep apnoea. The decision was affirmed on review by the Veterans' Review Board (VRB). Mr Gilkinson sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal affirmed the decision under review and Mr Gilkinson appealed the decision of the Tribunal to the Federal Court.

The Tribunal's reasoning

Mr Gilkinson's primary submission before the Tribunal was that his sleep apnoea was caused or was contributed to by his obesity. He argued that *Kattenberg v Repatriation Commission* (2003) 73 ALD 365 was authority for the proposition that, if operational service contributed to a material degree to his obesity, then that was a sufficient connection. The relevant SoP for sleep apnoea, Instrument No. 13 of 2005, contained the factor of being obese at the time of the clinical onset of sleep apnoea.

The Tribunal noted a report from Dr Volker PhD, a dietician, which stated:

'shift work, plentiful supply of food and alcohol and low levels of physical activity all contributed to the veteran's weight gain. The veteran was 57.2kg in May 1965 and 87.5 kg in March 1969. This represents a gain of 30.3kg in 55 months. This translates to a gain of over half kilo/month. The veteran was already over-weight and well on his way to being obese (BMI >30 in 1969). Obesity does not occur instantly, it takes time to accumulate excess energy storage. The adverse health effects of over-weight and obesity develop as gradually as the weight is gained.'

The Tribunal found that it was satisfied beyond reasonable doubt that Mr Gilkinson's obesity was not connected with his operational service. The Tribunal considered that it was clear from Mr Gilkinson's medical records, that he was well on the way to being obese before operational service. There was nothing that occurred during his operational service, prior to the assumed clinical onset of sleep apnoea in 1970-71,

that in any way caused or contributed to his obesity over and above the existing fact that he was eating to excess and not exercising sufficiently.

Grounds of appeal

Mr Gilkinson appealed to the Federal Court arguing that the Tribunal had erred in law because it:

- failed to pose and answer the correct question in dealing with his hypothesis that shift work on operational service contributed to his obesity; or
- failed to ask whether there was a reasonable hypothesis that eating to excess and not exercising sufficiently on operational service was causally related to that service and, if so, whether those factors contributed to his obesity.

The Court's Consideration

The Court found that the Tribunal had failed to pose and answer the correct question in dealing with the hypothesis raised by the material before the Tribunal that shift work on operational service contributed to his obesity. Justice Rares noted that no mention was made of shift work in any part of the Tribunal's reasoning process. More specifically, the Tribunal's reasons did not deal with that part of the hypothesis in Dr Volker's evidence that the development of Mr Gilkinson's obesity was contributed to by either the effects of shift work alone, or that in combination with the two factors of eating to excess and not exercising sufficiently. The relevant question for the Tribunal to ask was whether there was a reasonable

hypothesis that Mr Gilkinson's shift work during the period of his operational service prior to the diagnosis of obesity in June 1971 contributed causally to his being obese at that time.

While the Commission argued that consideration of the 'shift work hypothesis' was implicit in the Tribunal's reasoning, the Court found that was not enough. His Honour noted that the Tribunal dealt expressly with three of the four factors raised in Dr Volker's hypothesis namely, the plentiful supply of food and alcohol and low levels of physical activity. It did not deal with shift work, and so it could not be assumed to have considered it.

Formal decision

Justice Rares allowed Mr Gilkinson's appeal and remitted the matter to be heard in accordance with the law and reasons in his decision.

Repatriation Commission v Green

Ryan J
[2008] FCA 1132
30 October 2008

Standard of proof for existence of disease in sub-hypothesis

Facts

Mr Green served in the Australian Army in World War 2 and in the RAAF in Korea in 1953-54. He committed suicide by cutting the carotid artery and jugular vein in his neck. His widow claimed a war widow's pension on the ground that

the veteran killed himself because he had a war-caused throat cancer. The veteran had lived in the Philippines for many years and there was no medical evidence available about his illness. The claim was rejected by the Commission and the decision was affirmed on review by the Veterans' Review Board (VRB). She appealed to the Administrative Appeals Tribunal (AAT), which set aside the Commission's decision and granted war widow's pension. The Repatriation Commission appealed from the decision of the AAT to the Federal Court.

The Tribunal's reasoning

The Tribunal found that the material before it raised a hypothesis that Mr Green suffered from either a malignant neoplasm of the larynx or some other severe illness that was related to his service-related smoking habit, and that this disease became so painful that it precipitated his suicide. This was despite there being no medical opinion to support that hypothesis. The Commission had conceded that if the AAT found that the veteran suffered from malignant neoplasm of the larynx, it would concede a link to service via the veteran's smoking habit.

The AAT consulted a medical textbook and a website and provided those authorities to the Commission for its comments. The Commission responded by saying that its Medical Adviser, Dr Morgan, had advised that Mrs Green's evidence of the veteran's symptoms were consistent with throat cancer, but also with other chronic conditions such as non-malignant tumours (eg, laryngeal nodules,

squamous papillomas) and chronic infections such as TB or candida, and the symptoms do not point to any specific laryngeal condition.

The AAT then consulted other internet sites concerning a number of the other chronic conditions postulated by Dr Morgan, and said that these conditions have smoking as one of the possible causes, and that no SoP exists for them. In relation to the infections, the AAT said that the medical texts and internet sites concerning these conditions did not match the symptoms as described by Mrs Green.

The AAT then found that it was open for it to find that the veteran suffered from a severe illness that was related to smoking and that this severe illness satisfied the requirement in the Statement of Principles concerning suicide that the veteran had suffered from a 'severe illness' within the meaning of a 'severe psychosocial stressor' as defined in that Statement of Principles.

The Court's Consideration

Justice Ryan held that the AAT had to find on the balance of probabilities what disease the veteran suffered from before it could link that disease to the veteran's service and to his suicide. Ryan J said:

'[64] ... the decision-maker is required to review the collection of symptoms disclosed by the evidence and determine whether or not it fits within the template afforded by any SoP considered applicable. That is to be done whether or not the claimant or any witness has ascribed to the collection of symptoms a label ... The task for the decision-maker is to find

whether, on the balance of probabilities, the veteran suffered from a condition specified in the SoP ... and whether at least one of the factors ... was related to the veteran's service ...

[68] In my view, the non-existence of an SoP for those diseases did not absolve the Tribunal from the need to make a finding as to whether it was more probable than not that the veteran suffered from one or other of them rather than from malignant neoplasm of the larynx. ...

[72] [The Tribunal] overlooked the fact that the Commission's concession was expressly conditioned on a finding of malignant neoplasm of the larynx. If the Tribunal was unable to make a finding as specific as that, it remained under the necessity, in the absence of an appropriately widened concession, of determining whether the more generalised condition which it was able to ascribe to the veteran was a "severe illness" evoking feelings of substantial distress in the veteran within the definition of "severe psychosocial stressor" in the SoP concerning "Suicide or Attempted Suicide". The Tribunal was also obliged to find on the balance of probabilities that whatever "severe illness" it did find was related to the veteran's war service either by the "war-caused smoking habit" which the Commission had been prepared to concede in the event of a finding of malignant neoplasm of the larynx or by some other link such as exposure to toxic fumes for which the respondent had contended in the alternative.

[73] The Tribunal's failure to ask the questions necessary to make at least the findings of fact which I have just

indicated was, in my opinion, an error of law in the construction and application of the relevant sections of the VE Act and the two SoPs in issue. ...'

Formal decision

Justice Ryan allowed the Repatriation Commission's appeal, set aside the decision of the Tribunal and remitted the matter to be reheard. The Repatriation Commission did not seek an order for costs.

Editorial Note

Standard of proof for the existence of a disease in a sub-hypothesis

In this case, the Court has held that the existence of an injury or disease that is part of the hypothesised chain of causation between service and the veteran's death (or presumably another claimed injury or disease) is to be determined on the balance of probabilities rather than merely pointed to by the material before the decision-maker. This is required whether or not there is a SoP for the particular injury or disease.

Practical application

If it is hypothesised that a person suffered from alcohol dependence due to service, which led to hypertension, which in turn led to the claimed ischaemic heart disease, the decision-maker must first determine, on the balance of probabilities that the person suffered from alcohol dependence and hypertension as well as the ischemic heart disease before the hypothesis can be considered to be reasonable. The material needs to do more than merely point to the existence of those diseases.

Roper v Repatriation Commission

Tracey J
[2008] FCA 1610
30 October 2008

Whether rendered 'continuous full-time service outside Australia'

Facts

Mr Roper served in the RAAF during World War 2 entirely within Australia except for training flights on 11 and 23 April 1945 in which he flew to Middleton Reef and back. Middleton Reef is located approximately 600 kilometres east of Coffs Harbour. Mrs Roper claimed a war widow's pension. The claim was rejected by the Commission and the decision was affirmed on review by the Veterans' Review Board (VRB). In making their decisions, both the Commission and the VRB found that Mr Roper had not rendered operational service. Mrs Roper appealed to the Administrative Appeals Tribunal (AAT). As a preliminary matter, the AAT held a hearing to determine whether or not the veteran had rendered continuous full-time service outside Australia during World War 2 (and thus rendered operational service). The AAT held that he had not rendered operational service. Mrs Roper appealed that interlocutory decision to the Federal Court.

The Tribunal's reasoning

The AAT found that the flights were part of training in preparation for being posted overseas (that posting did not

eventuate). The AAT found that there were no enemy submarines in the area, and the risk to being exposed to enemy contact was low. During the flight bombs were dropped and the aircraft's machine gun was fired. The AAT concluded that the essential character of the trips was one of training and familiarisation with the Liberator aircraft. It was not one of being on operational service.

The Court's Consideration

Justice Tracey referred to the judgment of Hill J in *Repatriation Commission v Kohn*, which he said provided guidance on the characterisation of service as to whether it constitutes 'continuous full-time service outside Australia.' Tracey J said:

[23] ... It was open to the Tribunal to determine that the relevant service of Mr Roper fell into the second category of case identified by Hill J, namely, that in which when "looked at overall, notwithstanding that at a discrete moment of time the service of the member was outside Australia, the service is properly as a matter of ordinary English language to be seen as having an essential character of continuous full-time service within Australia ...". The training base was in Australia. The training flights left from and returned to the Australian base. The duration of those parts of the flights which took place outside Australian territorial limits were relatively short. In these circumstances it cannot, in my opinion, be said that there was no evidence to support the two impugned findings. ...

[27] The Tribunal directed itself consistently with Hill J's judgment in *Kohn*. It was required to characterise

Mr Roper's flights to (or towards) Middleton Reef. The amount of time Mr Roper spent outside Australia during these flights was a matter to be considered in forming this judgment. This was a fact finding exercise. It is clear from the principles identified by the Tribunal ... that it correctly understood the task it was required to perform. It did not treat the time spent outside Australia as a relevant principle. Rather it identified this as a matter which, in an appropriate case, would assist in determining the essential character of a veteran's service. The Tribunal's reasoning at paragraphs [44] to [47] demonstrates that it considered the evidence before it in light of the principles which it had distilled from decisions of this Court.'

Tracey J indicated that the appeal had been taken prematurely because the AAT had not delivered its final decision in the case. He said:

[35] In the present matter the Tribunal has done no more than decide that Mr Roper did not render operational service within the meaning of s 6A(1) of the VE Act and that the issues in the case must be decided according to the standard of proof provided for in s 120(4) of the VE Act. The Tribunal has yet to determine the ultimate question raised on Mrs Roper's application, namely, whether or not she is entitled to a pension, under the VE Act, by reason of her husband's service in the Defence Force during World War II. That question may be resolved favourably to her. The Tribunal's decision on the standard of proof is not in any sense dispositive of the application. If Mrs Roper succeeds in her application to the Tribunal the

preliminary decisions which she presently seeks to challenge will have had no adverse bearing on the outcome of her case.'

Formal decision

Justice Tracey dismissed the appeal and ordered Mrs Roper to pay the Commission's costs.

Editorial Note

Continuous full-time service outside Australia

Other Court cases that have considered this provision include Kohn [1989] FCA 244, Proctor [1999] FCA 32 and Roscoe [2003] FCA 1568. These cases agree that there is a process of characterisation required of the nature of the service that was being rendered while the person was outside Australia, such that it can be said that the person was rendering 'operational service'. In Re Collier [2004] AATA 663, the AAT applied these principles, and found that the veteran had rendered operational service:

[43] We find that the "essential character" of the voyage ... on SS Katoomba was that it was a voyage outside Australia, in an area of enemy submarine activity, at a time when vessels were being torpedoed in the same waters in which the vessel was sailing. We find that the purpose of the voyage was to move a signals unit to an area where it was required to support combat operations in New Guinea. We find that the voyage took nine days and SS Katoomba was outside Australian waters for the whole of the journey except when leaving and arriving port. We find this matter is distinguishable on the facts from Kohn.

Mr Kohn seems to have been travelling alone, but Mr Collier was travelling in company with his Division and with all the stores and equipment of his Division. He was not travelling on a training exercise, but for the purpose of establishing a signals unit, where it was required to support combat operations in New Guinea. His voyage was of a longer duration than that of either Mr Proctor or Mr Kohn. He was outside Australian waters and the voyage was a significant episode of service in its own right, not a mere transitory passage outside Australia. As in Proctor there was significant exposure to danger of enemy combat during the voyage. We find the facts in this matter are much closer to those in Proctor than to those in Kohn.

Practical application

Relevant considerations, some of which may involve questions of degree, are:

- the purpose for being outside Australia;
- time outside Australia;
- proximity of enemy and likelihood of contact;
- whether the trip was merely to facilitate continued performance of duty within Australia;
- whether duties were to be performed outside Australia that had an operational character.

Collins v Repatriation Commission

Emmett J
[2008] FCA 1982
9 December 2008

Determination of 'kind of death' – degree of causation of or contribution to death necessary for characterisation as a particular kind of death

Facts

Mr Collins rendered operational service in the Royal Australia Air Force from January 1943 until January 1946. He died in 2005 and the death certificate recorded the following as "cause of death and duration of last illness":

(1)(a) Pulmonary Embolism, days
(1)(b) Myocardial Infarction (Acute), days

(2) Motor Axonal Neuropathy, years

Hypertension, years

Ms Collins claimed a war widow's pension. The Repatriation Commission, refused the claim and the Veterans Review Board affirmed that refusal. Ms Collins then applied to the Administrative Appeals Tribunal who affirmed the decision under review. She then appealed from the Tribunal's decision to the Federal Court.

Grounds of appeal

Mrs Collins appealed to the Federal Court on the ground that the Tribunal had incorrectly held that a medical condition found to be contributory to the

death of the Veteran, namely ischemic heart disease, was not a kind of death of the Veteran for the purposes of s 120A of the VEA.

The Tribunal's reasoning

The Tribunal found that the kind of death met by Mr Collins was death by pulmonary embolism.

The Tribunal considered that the evidence showed that ischaemic heart disease hastened, but was not the cause of, Mr Collins death. The Tribunal found that the Veteran's death was caused by the pulmonary embolism, which, it found, occurred as a consequence of motor axonal neuropathy which the Veteran had suffered for many years.

The Tribunal found that, while the Veteran may have died when he did, rather than some hours or days later, because he had ischaemic heart disease, the ischaemic heart disease was not the cause or even one of the causes of the Veteran's death. Rather, the Tribunal found the cause of death was the pulmonary embolism.

The Tribunal observed that Mrs Collins' case proceeded on the basis that the kind of death met by the Veteran was death by ischaemic heart disease. The material presented to the Tribunal on behalf of Mrs Collins sought to draw a connection between the Veteran's operational service and that ischaemic heart disease. However, there was no material that sought to draw a connection between the Veteran's service and his death by pulmonary embolism. The Tribunal concluded that, in the light of its finding that the kind of death met by the Veteran

was death by pulmonary embolism, the application must fail.

The Court's Consideration

Justice Emmett considered that there was no error of law on the part of the Tribunal. Nonetheless, in light of the arguments raised his Honour made the following comments:

It may be that, if death is hastened because of the accelerated progress of a disease, being acceleration caused by a war-caused condition, the death was attributable to war service (*see Doolette v Repatriation Commission* (1990) 21 ALD 489 at 492). Further, where a veteran contracts a disease that he was likely to have contracted in any event but, because of war service, the contraction of the disease has been accelerated, it may be possible to conclude that the disease is attributable to war service (*see Langley v Repatriation Commission* (1993) 43 FCR 194 at 204). However, the situation in the present case is different from the circumstances to which I have just referred. In the present case, the ischaemic heart disease did not contribute in any way to the pulmonary embolism that was the cause of the Veteran's death.

If the ischaemic heart disease had been shown to have had some cause or connection with the pulmonary embolism, the position might have been different. However, there was no material before the Tribunal that would support such a contention. It may be that multiple medical conditions cause a particular death. In such a case, it may be necessary that all of those conditions be considered for the purpose of determining whether there

is a relevant statement of principles applicable. If one of the multiple medical conditions is a cause of death and that condition was itself caused by war service, then that may be sufficient to establish an entitlement to a pension (see *Repatriation Commission v Hancock* [2003] FCA 711 at [8]).

Certainly, in order to ascertain whether a statement of principles applies, it is necessary to identify the kind of death met by the Veteran. The identification of the kind of death is the critical step in the analysis, but in determining the kind of death, the proof is on the balance of probabilities (see *Hancock* [2003] FCA 711 at [9]). Clearly enough, the phrase "kind of death met by a person" is concerned with causation. It is not a question about whether the death was slow, fast or otherwise, it asks questions of medical causation about the cause of death in the context of the Act.

The question of the kind of death met by a veteran is a question of medical causation of the death, although that might include contributing or underlying causes in the sense to which I have already referred (see, for example, *Repatriation Commission v Codd* (2007) 95 ALD 619 at [31] and [39]). That is to say, if there is a cause that contributes to the ultimate cause of death, then that cause may have some relevance. The factual finding made by the Tribunal in the present case, however, is that, while the ischaemic heart disease may have caused the Veteran's death to occur hours or days earlier, it did not in any way contribute to the pulmonary embolism, which was the actual cause of death.

Formal decision

Justice Emmett dismissed the appeal.

Editorial note

An appeal has been lodged from this decision to Full Federal Court.

This case followed the reasoning of the Court in *Repatriation Commission v Codd* (2007) 95 ALD 619 that "kind of death" is concerned with causation, it is not concerned with how slow, fast or otherwise the death occurred.

Further reading: A case report concerning *Codd* is contained in *VeRBosity* Vol 23 No 1 at page 39.

More specifically, in *Collins* the Court distinguished *Doolette* and *Langley* by explaining that the issue of whether a disease "hastened" a person's death will only be a relevant consideration where there is evidence that particular disease is a cause that contributes to the ultimate cause of death.

Practical application

It is contended that a veteran's "kind of death" is chronic bronchitis. A specialist report suggests that chronic bronchitis hastened the veteran's demise from prostate cancer. To find that the late veteran's 'kind of death' could be characterised as 'death from chronic bronchitis', the decision maker would need to be reasonably satisfied that chronic bronchitis played a part in the cause, or the hastening of, the late veteran's prostate cancer.

Federal Magistrates Court of Australia

Repatriation Commission v Mayfield

Jarrett FM
[2008] FMCA 1103
11 August 2008

Meaning of “event” in Statement of Principles concerning alcohol abuse — evidence of clinical worsening

Facts

Mr Mayfield served in the RAAF and rendered operational service at Ubon, Thailand. He made a claim unsuccessfully for alcohol dependence. The decision was affirmed on review by the Veterans’ Review Board (VRB). He sought further review by the Administrative Appeals Tribunal (Tribunal). The Tribunal substituted its own decision that Mr Mayfield’s alcohol dependence was war caused and that he was entitled to pension at the intermediate rate. The Repatriation Commission (Commission) appealed to the Federal Court, and the matter was transferred to the Federal Magistrates Court.

The Tribunal’s reasoning

The Tribunal was satisfied that Mr Mayfield suffered from alcohol

dependence and it identified two hypotheses connecting his alcohol dependence with the circumstances of his service. They were:

- Mr Mayfield’s quarters were located beside a fuel dump and he lived in fear of an explosion. That fear, coupled with constant aircraft noise from the nearby airstrip, made sleeping difficult and he resorted to sleeping some distance from the fuel dump and consuming alcohol to ensure sleep.
- Being a casual observer at the scene of an aircraft crash, he came across what he believed to be body parts. He found the experience horrifying and the experience led him to change his alcohol consumption patterns and/or increase his alcohol consumption.

The Tribunal found the first hypothesis fitted the template of the relevant SoP and was reasonable.

Grounds of appeal

The Commission argued that the Tribunal erred in its interpretation of the SoP by treating the existence of the fuel dump and its proximity to Mr Mayfield’s quarters at Ubon, and therefore the entire period of Mr Mayfield’s operational service at Ubon, as “an event” for the purposes of the definition of the term “experiencing a severe stressor”.

Further, the Commission argued that the Tribunal did not consider whether the whole of the material before it pointed to Mr Mayfield manifesting features and symptoms of alcohol dependence as

prescribed in clause 2(b) of the SoP during his service in Ubon.

The Commission also challenged the Tribunal's finding that the second hypothesis was raised by the material. Specifically, that there was no evidence that could point to the clinical worsening of the features or symptoms of alcohol dependence.

In relation to the assessment of pension, the Commission argued that the Tribunal failed to ask itself whether there was some other reason why Mr Mayfield was prevented from engaging in remunerative work, and also argued that the Tribunal had failed to ask itself why Mr Mayfield had not been engaged in remunerative work on a part-time basis or intermittently.

The Court's Consideration

An "event" and definition of "experiencing a severe stressor"

Federal Magistrate Jarrett considered that the Tribunal did not treat Mr Mayfield's service at Ubon, of itself, as the "event" for the purposes of being satisfied that there was a severe stressor. Instead, it was his service in the context of the existence of the fuel dump, and the fear that it generated in Mr Mayfield, which was the "event" for the purposes of the SoP.

Did the whole of the material point to features and symptoms of alcohol dependence?

Federal Magistrate Jarrett noted that the Tribunal, in its reasons, did not step through the process of considering each of the matters set out in clause 2(b) of the relevant SoP. Nor did it consider whether

any three of the matters referred to in that clause manifested themselves in the two year period after Mr Mayfield experienced his severe stressor. However, his Honour considered that the Tribunal did not need to do so. Specifically, the Tribunal had evidence before it from a psychiatrist in which it was implicit that the diagnostic criteria for the condition were met and the Tribunal was entitled to accept that evidence.

Was material before the Tribunal capable of pointing to Mr Mayfield's alcohol dependence having clinically worsened?

Federal Magistrate Jarrett accepted the Commission's submission and held that the Tribunal did not ask itself the right question. His Honour noted that the Tribunal's enquiry focussed on the quantity of alcohol consumed by Mr Mayfield, not the features or symptoms of alcohol dependence.

In his Honour's view, there was no evidence that pointed to a clinical worsening of Mr Mayfield's alcohol dependence at any time. The Tribunal's reliance on those factors in the relevant SoP was misplaced. However, his Honour considered that the Tribunal was not in error in determining that the hypothesis raised by the material before it concerning clinical onset did fit the template of the SoP. As such, Federal Magistrate Jarrett considered that this aspect of appeal must fail.

Did the Tribunal ask itself the correct questions in respect of the “assessment” aspect of the appeal?

Overall, Federal Magistrate Jarrett considered that the Commission’s challenge to the assessment aspect of the appeal, while couched in terms suggestive of questions of law, was actually a challenge to the findings of fact made by the Tribunal, and so did not raise a question of law.

Formal decision

Federal Magistrate Jarrett dismissed the Commission’s appeal.

Editorial Note

Clinical worsening

In this case the Court agreed with the Commission’s submission regarding “clinical worsening” that, at stage 3 of Deledio, there must be material pointing to the worsening of specific elements in the diagnostic standards in the SoP (ie. the features or symptoms of alcohol dependence). While the Court refers to the “diagnostic” standards in the SoP, it is important to remember that this should not be confused with questions of diagnosis of the claimed condition, which must be determined on the balance of probabilities before step 1. The Court’s reasoning in this case follows the Federal Court decision in *Repatriation Commission v Milenz* [2006] FCA 1436.

Further reading: A case report concerning *Milenz* is contained in *VeRBosity* Vol 22 No 4 at pages 171 to 176. This report also contains a detailed explanation of the implications of *Milenz* case for decision making.

An “event” and the definition of “experiencing a severe stressor”

The SoP concerning alcohol dependence or alcohol abuse defined ‘experiencing a severe stressor’ as:

... the person experienced, witnessed or was confronted with, an event or events that involved actual or threat of death or serious injury, or a threat to the person’s or other people’s physical integrity, which event or events might evoke intense fear, helplessness or horror...

The Commission argued that the stressor relied upon by the applicant was a “continuous state of affairs” and that this was contrary to the definition in the SoP which required an “event.”

The Court did not completely reject the Commission’s submission in this respect but considered it was misplaced. Jarrett FM was of the view that the Tribunal did not treat Mr Mayfield’s service at Ubon, of itself, as the event. Rather, it was the existence of the fuel dump and the fear it generated that was the “event” for the SoP. This case indicates that an “event” would need to point to a discrete and tangible danger that evoked a particular response in the claimant.

While the current SoPs concerning alcohol dependence (no 17 and 18 of 2008) no longer contain the “experiencing a severe stressor” definition they refer to “a category 1A stressor” and “a category 1B stressor”, both of which refer to “severe traumatic events”.

**Cunningham v
Repatriation Commission**

Burchardt FM
[2008] FMCA 1251
19 September 2008

***Disease – recurrence –
aggravation***

Facts

Mr Cunningham rendered two periods of operational service aboard HMAS Sydney from 17 November 1969 to 5 December 1969 and 16 February 1970 to 5 March 1970. He made an unsuccessful claim to the Repatriation Commission (Commission) for peptic ulcer, hiatus hernia, irritable bowel syndrome, depressive disorder with some features of anxiety and alcohol dependence or abuse. The decision was affirmed on review by the Veterans' Review Board (VRB). On review the Administrative Appeals Tribunal (Tribunal) affirmed the Commission's decision in relation to depressive disorder, irritable bowel syndrome and hiatus hernia, and set aside the decision in relation to the claim for peptic ulcer disease, accepting it as war-caused. Mr Cunningham appealed to the Federal Court, and the Commission cross appealed in respect of the acceptance of peptic ulcer. The matter was then transferred to the Federal Magistrates Court.

The Tribunal's reasoning

Mr Cunningham suffered from seasickness before he went to Vietnam. However, he suffered much more severely on his two operational service

trips than he had previously. Mr Cunningham said that he kept to himself, where possible, as he was subject to critical comments and laughter. He said he became depressed with the constant seasickness as he was unsure of his future; that he felt he had let down his father, a former navy man, and might not be able to continue his long-held ambition. The determinative passage in relation to the Tribunal's reasoning was as follows:

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 onset of the depressive disorder was within two years of that stressor. In relation to the latter question the records show a diagnosis of an acute anxiety state in March 1971. I am prepared to accept that as the date of clinical onset of his depressive state. ... However, it is clear that Mr Cunningham experienced the onset of seasickness on the two voyages prior to operational service. From his first exposure to the open sea on board a ship he experienced seasickness and it would seem clear that he had a constitutional predisposition to that element. It was only when he was in open seas that he suffered the illness with no ongoing symptoms once on dry land. 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.

Grounds of appeal

Mr Cunningham grounds of appeal were that the Tribunal erred in law by:

- failing to take into consideration the fact that Mr Cunningham was perfectly well until his service began and that his seasickness and depression therefore arose from his service;
- failing to consider that the definition of disease in the Veterans' Entitlements Act 1986 (VEA) meant that recurrence of seasickness was a disease;
- failing to consider the hypothesis that Mr Cunningham's seasickness caused his depression.

The Commission argued that none of these matters were made out and that were not questions of law. In relation to the cross appeal, the Commission submitted that Mr Cunningham was not suffering from peptic ulcer on the application day, or subsequently, and so the Tribunal erred in finding the disease to be war-caused.

The Court's Consideration

First ground – Mr Cunningham's health before operational service

Federal Magistrate Burchardt did not consider that the Tribunal had erred in relation to the first ground of appeal because the Tribunal had found that the

seasickness had been evident on two voyages before operational service began and therefore was a pre-existing condition with the symptoms well established before operational service.

Second ground – definition of 'disease' and reference to 'recurrence'

Burchardt FM held that this ground failed because the recurrence of symptoms in this case was not a recurrence of the pre-existing disease. Further, the Court held that the temporary presence of symptoms was not sufficient to show an aggravation.

Third ground – depression caused by sea sickness

Federal Magistrate Burchardt also considered that the third ground of appeal failed. His Honour considered that the Tribunal did expressly consider the hypothesis that the seasickness caused the depression. His Honour noted that while the Tribunal, to an extent, rolled the three hypotheses into one it could not be overly criticised for approaching the matter in the way that it did as it largely followed Mr Cunningham's evidence and the submissions made by counsel on his behalf.

Overall, Federal Magistrate Burchardt held that the finding by the Tribunal 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' was open to it on the materials and did not constitute an error of law.

Formal decision

The appeal was dismissed and the cross-appeal was allowed.

Editorial Note

An appeal has been lodged from this decision to the Federal Court.

His Honour's reasoning in relation to the second ground of appeal was brief, but touched on two importance concepts – the definition of 'disease' in the VEA and the meaning of aggravation.

Definition of 'disease' and reference to 'recurrence'

'Disease' in s5D of the VEA is defined as any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or the recurrence of such an ailment, disorder, defect or morbid condition. In this case, the Court noted that the 'recurrence of symptoms' is not necessarily a 'recurrence of a disease or injury'.

Aggravation

Under the VEA, if an injury or disease has been aggravated by service, that injury or disease is treated as 'war-caused' or 'defence-caused'. This case follows *Repatriation Commission v Yates* (1995) 57 FCR 241 which held that an aggravation of a symptom is not necessarily an aggravation of the underlying disease. An aggravation must be more than temporary in nature and it must worsen the injury or disease itself rather than merely worsen its symptoms.

It is also important to remember, in respect of cases where aggravation is claimed, that there is a limitation.

A veteran or member needs to have had at least 6 months eligible war service or defence service for an injury or disease to be accepted on the grounds of aggravation by service. However, this limitation does not apply to a veteran, such as Mr Cunningham, who rendered operational service.

Statements of Principles issued by the Repatriation Medical Authority

July to December 2008

Number of Instrument	Description of Instrument
51 of 2008	Amendment of Statements of Principles (Instruments Nos 13 of 2008) concerning diverticular disease of the colon
52 & 53 of 2008	Revocation of Statements of Principles (Instruments Nos 11 & 12 of 1999) and determination of Statements of Principles concerning hepatitis B and death from hepatitis B.
54 & 55 of 2008	Revocation of Statements of Principles (Instruments Nos No. 43 & 44 of 1995, as amended by Instrument No. 9 & 10 of 1997) and determination of Statements of Principles concerning hepatitis C and death from hepatitis C.
56 & 57 of 2008	Revocation of Statements of Principles (Instruments Nos 45 & 46 of 1995) and determination of Statements of Principles concerning hepatitis D and death from hepatitis D.
58 & 59 of 2008	Revocation of Statements of Principles (Instruments Nos 51 & 52 of 1997) and determination of Statements of Principles concerning malignant neoplasm of the brain and death from malignant neoplasm of the brain.
60 & 61 of 2008	Revocation of Statements of Principles (Instruments Nos 17 & 18 of 2003) and determination of Statements of Principles concerning fibromuscular dysplasia and death from fibromuscular dysplasia.
62 & 63 of 2008	Revocation of Statements of Principles (Instruments Nos 135 & 136 of 1995) and determination of Statements of Principles concerning ascariasis and death from ascariasis.
64 & 65 of 2008	Revocation of Statements of Principles (Instruments Nos 162 & 163 of 1995) and determination of Statements of Principles concerning hookworm disease and death from hookworm disease.
66 & 67 of 2008	Revocation of Statements of Principles (Instruments Nos 137 & 138 of 1995) and determination of Statements of Principles concerning animal envenomation and death from animal envenomation.
68 & 69 of 2008	Revocation of Statements of Principles (Instruments Nos 32 & 34 of 2004) and determination of Statements of Principles concerning rheumatoid arthritis and death from rheumatoid arthritis.
70 & 71 of 2008	Revocation of Statements of Principles (Instruments Nos 143 & 144 of 1995, as amended by Instrument No. 13 & 14 of 1997) and determination of Statements of Principles concerning personality disorder and death from personality disorder.

Repatriation Medical Authority

- 72 & 73 of 2008 Revocation of Statements of Principles (Instruments Nos 19 & 20 of 1997) and determination of Statements of Principles concerning **immune thrombocytopaenic purpura** and death from immune thrombocytopaenic purpura.
- 74 & 75 of 2008 Revocation of Statements of Principles (Instruments Nos 5 & 6 of 2001, as amended by Instrument No. 38 & 39 of 2004,) and determination of Statements of Principles concerning **deep vein thrombosis** and death from deep vein thrombosis.
- 76 & 77 of 2008 Amendment of Statements of Principles (Instruments Nos 33 & 34 of 2005) concerning **cervical spondylosis**.
- 78 & 79 of 2008 Amendment of Statements of Principles (Instruments Nos 37 & 38 of 2005) concerning **lumbar spondylosis**.
- 80 & 81 of 2008 Amendment of Statements of Principles (Instruments Nos 39 & 34 of 2007) concerning **intervertebral disc prolapse**.

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 30 December 2008

Description of disease or injury	SoPs under consideration	Gazetted
Accidental hypothermia	<i>Instrument Nos. 376/95 & 377/95</i>	27-06-07
Acoustic neuroma	<i>Instrument Nos. 67 & 68/1996</i>	25-06-08
Acute blepharitis	<i>Instrument Nos 115 & 116/1995 amended 9 & 20/2004</i>	25-06-08
Acute pancreatitis	<i>Instrument Nos 45 & 46/97 amended by 74 & 75/1998 & amended by 41 & 42/2003</i>	25-06-08
Acute sinusitis	<i>Instrument Nos. 209/95 & 210/95 as amended by 328/95 & 329/95</i>	27-06-07
Alzheimer's disease	<i>Instrument Nos 17 & 18/2001</i>	19-09-07
Anal fissure	<i>Instrument Nos 247 & 248/1995 amended by 11 & 12/1997</i>	25-06-08
Bipolar disorder	<i>Instrument Nos 25 & 26/2008 amended by 50/2008)</i>	-
Bronchiectasis	<i>Instrument Nos. 59/01 & 60/01</i>	20-12-06
Bronchiolitis obliterans organising pneumonia		30-04-08
Cerebral meningioma	<i>Instrument Nos. 207/95 & 208/95</i>	2-05-07
Chronic blepharitis	<i>Instrument Nos. 117 & 118/1995 amended by 21 & 22/2004</i>	25-06-08
Chronic rhinosinusitis	-	14-11-08
Chronic sinusitis	<i>Instrument Nos. 21 & 22/03</i>	14-11-07
Coeliac disease	<i>Instrument Nos. 17 & 18/1997</i>	25-06-08
Conductive hearing loss	<i>Instrument Nos. 19 & 20/1996</i>	25-06-08
Conjunctivitis	<i>Instrument Nos. 111 & 112/1996</i>	25-06-08
Contact dermatitis	<i>Instrument Nos 65 & 66/1997 as amended by 23 & 24/2004</i>	25-06-08
Cushing's syndrome	<i>Instrument Nos. 249/95 & 250/95</i>	2-05-07
Dental malocclusion	<i>Instrument Nos. 372/95 & 373/95</i>	27-06-07
Dislocation	<i>Instrument Nos. 290/95 & 291/95</i>	2-05-07
Eating disorder	<i>Instrument Nos. 47 & 48/2008</i>	02-07-08
Effects of lightning	<i>Instrument Nos 151/95 & 152/95 as amended by 197/95 & 198/95</i>	2-05-07
Epileptic seizures	<i>Instrument Nos 47 & 48/2005</i>	28-12-05
Extrinsic allergic alveolitis	<i>Instrument Nos 57 & 58/97</i>	25-06-08
Fibrosing alveolitis		14-11-08

Repatriation Medical Authority

Description of disease or injury	SoPs under consideration	Gazetted
Frostbite	<i>Instrument Nos. 166/95 & 167/95</i>	2-05-07
Gout	<i>Instrument Nos. 11 & 12/2000 amended by 43 & 44/2003</i>	09-01-08
Haemochromatosis	<i>Instrument Nos. 5&6/97</i>	25-06-08
Herpes simplex	<i>Instrument Nos 342/95 & 343/95</i>	27-06-07
Human immunodeficiency virus	<i>Instrument Nos 1&2/96</i>	25-06-08
Human T-cell lymphotropic virus type 1	<i>Instrument Nos 51&52/96</i>	25-06-08
Idiopathic fibrosing alveolitis	<i>Instrument Nos 15/98 & 16/98</i>	15-06-05
Immersion foot	<i>Instrument Nos. 168/95 & 169/95</i>	2-05-07
Influenza	<i>Instrument Nos. 267/95 & 268/95</i>	2-05-07
Internal derangement of the knee	<i>Instrument Nos 59 & 60/1997 amended by 96/1997</i>	25-06-08
Irritable bowel syndrome	<i>Instrument Nos 103& 104/96</i>	25-06-08
Ischaemic heart disease	<i>Instrument Nos 89&90/1997</i>	27-08-08
Kaposi's sarcoma	<i>Instrument Nos 159 & 160/1996</i>	25-06-08
Macular degeneration	<i>Instrument Nos. 25 & 26 of 2003</i>	1-03-06
Malaria	<i>Instrument Nos. 172/95 & 173/95</i>	2-05-07
Malignant neoplasm of the cerebral meninges	<i>Instrument Nos 205/95 & 206/95</i>	2-05-07
Malignant neoplasm of the cervix	<i>Instrument Nos 41&42/1997</i>	25-06-08
Malignant neoplasm of the eye	<i>Instrument Nos 64&65/1999</i>	30-04-08
Malignant neoplasm of the liver	<i>Instrument Nos 171/96 & 172/96</i>	8-11-06
Malignant neoplasm of the nasopharynx	<i>Instrument Nos 167 & 168/1996</i>	25-06-08
Malignant neoplasm of the ovary	<i>Instrument Nos 43/97 & 44/97</i>	27-06-07
Malignant neoplasm of the renal pelvis & ureter	<i>Instrument Nos 155/95 & 156/95</i>	27-06-07
Metatarsalgia	<i>Instrument Nos 39 & 40/96</i>	25-06-08
Methaemoglobinaemia	<i>Instrument Nos. 284/95 & 285/95</i>	2-05-07
Migraine	<i>Instrument Nos. 74/99 & 75/99</i>	30-08-06
Multiple sclerosis	<i>Instrument Nos. 44 & 45/02 amended by 76/2002</i>	27-08-08 27-11-02
Nephrolithiasis	<i>Instrument Nos. 178/95 & 179/95</i>	2-05-07 25-05-07
Non fatal effects of electric shock and death from electrocution	<i>Instrument Nos. 149 & 150/95</i>	
Non-Hodgkin's lymphoma	<i>Instrument Nos. 37/03 & 38/03</i>	20-12-06
Obstructive nephropathy	<i>Instrument Nos. 87 & 88/96</i>	25-06-08
Osteoarthritis	<i>Instrument Nos. 31/05 & 32/05</i>	20-12-06
Panic disorder	<i>Instrument Nos. 9/99 & 10/99 as amended by 58/99 & 59/99</i>	8-11-06
Personality disorder	<i>Instrument Nos. 143/95 & 144/95 as amended by 13/97 & 14/97</i>	8-11-06
Photocontact dermatitis	<i>Instrument Nos 63&64/1997</i>	25-06-08
Pilonidal sinus	<i>Instrument Nos. 176/95 & 177/95 as amended by 312/95 & 313/95</i>	2-05-07
Poisoning and toxic reaction from plants	<i>Instrument Nos. 164/95 & 165/95</i>	2-05-07

Repatriation Medical Authority

Description of disease or injury	SoPs under consideration	Gazetted
Polyarteritis nodosa	<i>Instrument Nos. 157 & 158/96</i>	25-06-08
Posterior advential heel bursitis	<i>Instrument Nos 55/96 & 56/96</i>	25-06-08
Pruritis ani	<i>Instrument Nos 41/96 & 42/96</i>	25-06-08
Retinal vascular occlusive disease	<i>Instrument Nos.33 &34/2006</i>	-
Rheumatic heart disease	<i>Instrument Nos. 93/95 & 94/95</i>	2-05-07
Rheumatoid arthritis	<i>Instrument Nos. 32/04 & 33/04</i>	30-08-06
Ross River Fever	<i>Instrument Nos 79/97 & 80/97</i>	25-06-08
Schistosomiasis	<i>Instrument Nos. 255/95 & 256/95</i>	2-05-07
Schizophrenia	<i>Instrument Nos. 132/96 & 133/96</i>	8-11-06
Scleroderma	-	27-08-08
Scrub typhus	<i>Instrument Nos. 25/95 & 26/95</i>	27-06-07
Sensorineural hearing loss	<i>Instrument Nos.29 & 30/2001</i>	25-06-08
Sinus barotrauma	<i>Instrument Nos. 316/95 & 317/95</i>	2-05-07
Strongyloidiasis	<i>Instrument Nos. 282/95 & 283/95</i>	2-05-07
Subarachnoid haemorrhage	<i>Instrument Nos. 39/03 & 40/03</i>	28-02-07
Suicide or attempted suicide	<i>Instrument Nos. 71/96 & 72/96 as amended by 177/96 & 178/96</i>	8-11-06
Systemic lupus erythrmatosus	<i>Instrument Nos 85 &86/2007</i>	-
Tension type headache	<i>Instrument Nos. 76/99 & 77/99</i>	30-04-08
Trigeminal neuralgia	<i>Instrument Nos. 23/95 & 24/95</i>	28-06-06
Trigeminal neuropathy	<i>Instrument Nos. 23/95 & 24/95</i>	30-04-08
Ureteric calculus	<i>Instrument Nos. 180/95 & 181/95</i>	2-05-07
Varicocele	<i>Instrument Nos 124/96 & 125/96</i>	25-06-08

AAT and Court decisions – January to June 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*

Carcinoma

lung
- smoking
Milbourn, M (Army) (death)
[2008] AATA 959 8 Oct 2008

non-Hodgkin's lymphoma
- smoking
New, M (Army) (death)
[2008] AATA 953 27 Oct 2008

Pancreas
Downey, L (Navy)
[2008] AATA 626 18 July 2008

prostate
- increased animal fat in diet
Burns, J (RAAF)
[2008] AATA 1078 2 Dec 2008
Jackson, D M (RAAF) (death)
[2008] AATA 650 28 July 2008

Circulatory disorder

aortic stenosis
- hypertension
Carden, B R (Navy)
[2008] AATA 780 2 Sept 2008

cerebrovascular accident
- alcohol
Harris, A-L (Army) (death)
[2008] AATA 1025 14 Nov 2008
- hypertension
Carden, B R (Navy)
[2008] AATA 780 2 Sept 2008

hypertension
- alcohol
Carden, B R (Navy)
[2008] AATA 780 2 Sept 2008
- diagnostic criteria not met
McCabe, J T (Navy)
[2008] AATA 753 26 August 2008

ischaemic heart disease
- depressive disorder
MacKay, H (death)
[2008] AATA 949 23 Oct 2008
- sleep apnoea
Jones, B (RAAF) (death)
[2008] AATA 764 29 August 2008
- smoking
Carden, B R (Navy)
[2008] AATA 780 2 Sept 2008
Draper, G (Navy)
[2008] AATA 1032 17 Nov 2008

Death

kind of death
- hastening of death
Downey, L (Navy)
[2008] AATA 626 18 July 2008
Collins (Emmett J)
[2008] FCA 1982 9 Dec 2008
- metastatic prostate cancer
Wheeler, P
[2008] AATA 616 16 July 2008
- suicide
Pleming, E
[2008] AATA 736 22 August 2008
- terminal event
- pneumonia
New, M (Army) (death)
[2008] AATA 953 27 Oct 2008
Downey, L (Navy)
[2008] AATA 626 18 July 2008

Eligible service

operational service
- 'continuous full-time service outside
Australia'
Roper (Tracey J)
[2008] FCA 1610 30 Oct 2008
- allotted for duty
Kaluza (Branson J)
[2008] FCA 1356 9 Sept 2008

**AAT and Court decisions –
January to June 2007**

Evidence and proof

Application of *Deledio* steps
Norton (Heerey J)
 [2008] FCA 1132 5 August 2008

Standard of proof for the existence of a disease in
 a sub-hypothesis (balance of probabilities)
Green (Ryan J)
 [2008] FCA 1132 30 Oct 2008

Preferring body of evidence
Todd (Logan J)
 [2008] FCA 1276 21 July 2008

Reasonable hypotheis
Gilkinson (Burchardt J)
 [2008] FCA 1441 22 Sept 2008

Gastrointestinal disorder

Diverticulitis
Creamer, O(Army) (death)
 [2008] AATA 1015 12 Nov 2008

haemorrhoids
 - clinical worsening
Burns, J (RAAF)
 [2008] AATA 1078 2 Dec 2008

irritable bowel syndrome
 - psychiatric disorder
 - anxiety disorder
Burns, J (RAAF)
 [2008] AATA 1078 2 Dec 2008

- PTSD
SJCL (Navy)
 [2008] AATA 688 6 August 2008

Metabolic disorder

diabetes mellitus
 - smoking
De Marchi, R W W (Army)
 [2008] AATA 954 27 Oct 2008

- obesity
Nicholson, W (Army)
 [2008] AATA 614 15 July 2008

De Marchi, R W W (Army)
 [2008] AATA 954 27 October 2008

Musculoskeletal disorder

cervical spondylosis
 - trauma
 - result of judo practice

Andrews, C (Navy)
 [2008] AATA 983 5 Nov 2008

osteoarthritis
 - shoulder
 - trauma

Winchester, R J (Army)
 [2008] AATA 935 21 Oct 2008

rotator cuff syndrome
 - injury

Winchester, R J (Army)
 [2008] AATA 935 21 Oct 2008

Neurological disorder

Alzheimer's disease
 - head injury
Weston, H (Army) (death)
 [2008] AATA 798 9 Sept 2008

Practice and procedure

Administrative Appeals Tribunal
 - dismissal
Macaulay, G 22 August 2008
 [2008] AATA 734

- failing to give reasons or sufficient reasons
Todd (Logan J)
 (2008) FCA 1276 21 July 2008

- jurisdiction
 - application out of time
Moretti, L 28 Nov 2008
 [2008] AATA 1067

- Summons
 - Obtaining Medicare and PBS histories
Rayson, S
 [2008] AATA 1063 28 Nov 2008

Psychiatric disorder

adjustment disorder
 - diagnosis
 - diagnostic criteria not met
Heydon, M (Army)
 [2008] AATA 791 5 Sept 2008

alcohol abuse or dependence
 - clinical onset
Gough, G G (Navy)
 [2008] AATA 1046 21 Nov 2008

- category 1A / 1B stressor
 - catapult incident
McDonnell, T
 [2008] AATA 613 16 July 2008

**AAT and Court decisions –
January to June 2007**

man overboard			- rescuing a fellow seaman from drowning
Sanderson, N (Navy)			Gough, G G (Navy)
[2008] AATA 891	6 October 2008		[2008] AATA 1046
- scare charges			21 Nov 2008
McDonell, T			- risk of driving over enemy mines
[2008] AATA 613	16 July 2008		McKay, I (Navy)
-culture of drinking			[2008] AATA 1114
De Marchi, R W W (Army)			15 Dec 2008
[2008] AATA 954	27 Oct 2008		- smell/sight of dead bodies
- diagnosis			Skurrie, T (Army)
- diagnostic criteria not met			[2008] AATA 1093
Creber, R (Navy)			8 Dec 2008
[2008] AATA 807	11 Sept 2008		- viewing critically injured casualties
Heydon, M (Army)			Constable, R P (Army)
[2008] AATA 791	5 Sept 2008		[2008] AATA 1099
Nielsen, G (Navy)			9 Dec 2008
[2008] AATA 777	1 Sept 2008		- Voyager/Melbourne collision
event			Draper, G (Navy)
- meaning			[2008] AATA 1032
Mayfield (Jarrett FM)			17 Nov 2008
[2008] FMCA 1103	11 August 2008		- inability to obtain appropriate clinical management
experiencing a severe stressor			Cannon, R J (Navy)
- awoken by a scare charge			[2008] AATA 662
Raspe, J L (Navy)			31 July 2008
[2008] AATA 660	31 July 2008		anxiety disorder
- body under tarpaulin			- diagnosis
Raspe, J L (Navy)			- diagnostic criteria not met
[2008] AATA 660	31 July 2008		McCabe, J T (Navy)
- heard explosion			[2008] AATA 753
Skurrie, T (Army)			26 August 2008
[2008] AATA 1093	8 Dec 2008		- category 1A / 1B stressor
- fuel dump			- catapult incident
Mayfield (Jarrett FM)			McDonell, T
[2008] FMCA 1103	11 August 2008		[2008] AATA 613
- machinegun fire attack			16 July 2008
Skurrie, T (Army)			- scare charges
[2008] AATA 1093	8 Dec 2008		McDonell, T
- meaning of			[2008] AATA 613
Norton (Heerey, J)			16 July 2008
[2008] FCA 1132	5 August 2008		- experiencing a severe stressor
- night manoeuvres aboard a ship			- observing a dead infant
McKay, I (Navy)			Kane, J W (Navy)
[2008] AATA 1114	15 Dec 2008		[2008] AATA 880
- observing body hanging from bridge			3 Oct 2008
Raspe, J L (Navy)			depressive disorder
[2008] AATA 660	31 July 2008		- diagnosis
- observing prisoner abuse			Andrews, C (Navy)
Raspe, J L (Navy)			[2008] AATA 983
[2008] AATA 660	31 July 2008		5 Nov 2008
			- diagnostic criteria not met
			Nielsen, G (Navy)
			[2008] AATA 777
			1 Sept 2008
			McCabe, J T (Navy)
			[2008] AATA 753
			26 August 2008
			- category 1A / 1B stressor
			- catapult incident
			McDonell, T
			[2008] AATA 613
			16 July 2008
			- scare charges

**AAT and Court decisions –
January to June 2007**

McDonnell, T [2008] AATA 613 16 July 2008	Skurrie, T (Army) [2008] AATA 1093 8 Dec 2008
- experiencing a severe stressor	- night manoeuvres aboard a ship
- general war zone	McKay, I (Navy) [2008] AATA 1114 15 Dec 2008
MacKay, H (death) [2008] AATA 949 23 October 2008	- potential detonation of a land mine
Sanderson, N (Navy) [2008] AATA 891 6 October 2008	Coulter, B J (Army) [2008] AATA 1085 4 Dec 2008
- chronic pain	- risk of driving over enemy mines
Andrews, C (Navy) [2008] AATA 983 Nov 2008	McKay, I (Navy) [2008] AATA 1114 15 Dec 2008
- psychiatric disorder	- smell/sight of dead bodies
- post traumatic stress disorder	Skurrie, T (Army) [2008] AATA 1093 8 Dec 2008
Sullivan, W (RAAF) [2008] AATA 1140 19 Dec 2008	- struck by car
post traumatic stress disorder	SJCL (Navy) [2008] AATA 688 6 August 2008
- diagnosis	- threatened with gun by fellow officer
Sanderson, N (Navy) [2008] AATA 891 6 October 2008	Schlegel, R (Army) [2008] AATA 1039 20 Nov 2008
Schlegel, R (Army) [2008] AATA 1039 20 Nov 2008	
Sullivan, W (RAAF) [2008] AATA 1140 19 Dec 2008	
- category 1A / 1B stressor	
- evaporator incident	
Glasby, D (Navy) [2008] AATA 664 31 July 2008	
- fear of being shot while manning a searchlight	
Robinson, N (Navy) [2008] AATA 786 3 Sept 2008	
- experiencing a severe stressor	
- being shot at and exposed to shooting	
Coulter, B J (Army) [2008] AATA 1085 Dec 2008	
- Fear of recurrence of Voyager/Melbourne type collision	
Draper, G (Navy) [2008] AATA 1032 17 17 Nov 2008	
McKay, I (Navy) [2008] AATA 1114 15 15 Dec 2008	
- heard explosion	
Skurrie, T (Army) [2008] AATA 1093 8 Dec 2008	
Sanderson, N (Navy) [2008] AATA 891 6 Oct 2008	
- involvement in an aircraft accident	
Coulter, B J (Army) [2008] AATA 1085 4 Dec 2008	
- machinegun fire attack	

Remunerative work & special rate of pension

ceased to engage in remunerative work	
- meaning	
Cadd (Finn J) [2008] FCA 1024 8 July 2008	
- resignation due to pathological gambling	
Cadd (Finn J) [2008] FCA 1024 8 July 2008	
- settlement of litigation	
Pye, J [2008] AATA 1165 23 Dec 2008	
- unprofitable business	
Pye, J [2008] AATA 1165 23 Dec 2008	
kind of work the person was undertaking	
- bar work /club manager	
Cadd (Finn J) [2008] FCA 1024 8 July 2008	
McAndrew, K [2008] AATA 1061 27 Nov 2008	
- casual work	
Pye, J [2008] AATA 1165 23 Dec 2008	
- handyman/builder business	
Bridges, T [2008] AATA 721 14 Aug 2008	

**AAT and Court decisions –
January to June 2007**

- maintenance engineer	Pye, J [2008] AATA 1165	23 Dec 2008	Pye, J [2008] AATA 1165	23 Dec 2008
- racecourse attendant	Egan, T J [2008] AATA 628	18 July 2008	Bridges, T [2008] AATA 721	14 Aug 2008
- senior executive	McCormack, G [2008] AATA 670	1 August 2008	Brown, J [2008] AATA 669	31 July 2008
- transport industry			- injury from motor vehicle accident	
- delivery driver	Skurrie, T (Army) [2008] AATA 1093	8 Dec 2008	Conole, K [2008] AATA 1113	15 Dec 2008
last paid work (aged over 65)			- moving overseas	
- did not work after age 65	Hooklyn, T [2008] AATA 1003	7 Nov 2008	McAndrew, K [2008] AATA 1061	27 Nov 2008
whether genuinely seeking to engage in remunerative work			- payment of service pension	
- not genuine	Skurrie, T (Army) [2008] AATA 1093	8 Dec 2008	Bridges, T [2008] AATA 721	14 Aug 2008
	Pickering, C [2008] AATA 1070	1 Dec 2008	Brown, J [2008] AATA 669	31 July 2008
whether prevented by war-caused disabilities alone			- time out of workforce	
- age	Dyson, D [2008] AATA 1121	16 Dec 2008	Dyson, D [2008] AATA 1121	16 Dec 2008
	Gorrie, A [2008] AATA 793	5 Sept 2008	Gorrie, A [2008] AATA 793	5 Sept 2008
	Griffin, G J [2008] AATA 821	15 Sept 2008	Griffin, G J [2008] AATA 821	15 Sept 2008
	McMahon, P [2008] AATA 622	16 July 2008	Pickering, C [2008] AATA 1070	1 Dec 2008
	Straatman, P [2008] AATA 1148	22 Dec 2008	SJCL (Navy) [2008] AATA 688	6 August 2008
- effect of drought on business			Straatman, P [2008] AATA 1148	22 Dec 2008
	Sullivan, G [2008] AATA 868	30 Sept 2008	- workplace hiring more staff	
- effects of non-accepted disabilities			Hancox, M S [2008] AATA 623	16 July 2008
	Dyson, D [2008] AATA 1121	16 Dec 2008	working for continuous period of at least 10 years	
	Pickering, C [2008] AATA 1070	1 Dec 2008	Tyas, R [2008] AATA 1158	23 Dec 2008
	Gorrie, A [2008] AATA 793	5 Sept 2008		
	Griffin, G J [2008] AATA 821	15 Sept 2008		

Respiratory disorder

chronic bronchitis		
- smoking	Downey, L (Navy) (death) [2008] AATA 626	18 July 2008
chronic obstructive airways disease		
- diagnosis		
- diagnostic criteria not met	Creber, R (Navy) [2008] AATA 807	11 Sept 2008

**AAT and Court decisions –
January to June 2007**

- smoking
McFarlane, K J (Navy)
[2008] AATA 832 17 Sept 2008
idiopathic pulmonary fibrosis
- alcohol
Adams, A E (Army) (death)
[2008] AATA 775 29 August 2008
- malaria
Adams, A E (Army) (death)
[2008] AATA 775 29 August 2008
sleep apnoea
- hypertension
Jones, B (RAAF) (death)
[2008] AATA 764 29 August 2008

Service pension

age
- backdating earlier than the date of claim
Donohue, B
[2008] AATA 823 16 Sept 2008
assets test
- expiration of exemption for principal home
Greenway, N
[2008] AATA 815 12 Sept 2008
- superannuation products
Sleep, K J
[2008] AATA 1100 10 Dec 2008
Nelson, B
[2007] AATA 1069 20 February 2007
member of a couple
Steward, C
[2008] AATA 714 25 July 2008

Skin and Subcutaneous Tissue

varicose veins
- result of prolonged standing & lifting
Harvey, K (AAMWS)
[2008] AATA 829 17 September 2008

Words and phrases

aggravation
Cunningham (Burchardt FM)
[2008] FMCA 1251 19 Sept 2008
ceasing to engage in remunerative work
Cadd (Finn J)
[2008] FCA 1024 8 July 2008

disease
- recurrence
Cunningham (Burchardt FM)
[2008] FMCA 1251 19 Sept 2008
event
Mayfield (Jarrett FM)
[2008] FMCA 1103 11 August 2008
experiencing a severe stressor
Norton (Heerey, J)
[2008] FCA 1132 5 August 2008
kind of death
Collins (Emmett J)
[2008] FCA 1982 9 Dec 2008

Disclaimer

1. The material available in *VeRBosity* is provided for general information only. Neither the Veterans Review Board (VRB) nor the Commonwealth is providing professional advice.
2. The VRB and the Commonwealth take no responsibility for the accuracy, currency or completeness of any material available in *VeRBosity*.
3. Before relying on any of the material available in *VeRBosity*, we strongly recommend that you:
 - exercise care and skill to consider the accuracy, currency and completeness of the material; and
 - get professional advice, if necessary, that is relevant to your circumstances.
4. The VRB encourages you to contact us regarding any concern about the information in *VeRBosity*.

