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#### Editor's notes

This annual edition of *VeRBosity* contains the first VRB case notes, dealing with practice and procedure issues. It also reports on a number of AAT cases, including five matters which provide an insight into MRCA liability decision making.

This edition also reports on the Federal Court case of *McKerlie* which reinforces, that a preliminary matter for decision-makers to decide, on the balance of probabilities, is the diagnosis of the injury or disease claimed. Case reports on *Hunter* and *Border* also touch on the issue of how decision makers are considering the narrowed definition of a category 1A stressor in PTSD claims.

Katrina Harry & Lynley Gardner  
Editors

## VRB welcomes new Members

### New Principal Member

On 26 February 2010 the Minister for Veterans' Affairs, Alan Griffin, announced the appointment of Mr Doug Humphreys as the Principal Member of the Veterans' Review Board for five years, beginning on 22 March 2010.

Mr Humphreys is an experienced senior public servant with an extensive background in government tribunals. Before his appointment as the Principal Member of the VRB, Mr Humphreys was the Principal Registrar of the Commonwealth Administrative Appeals Tribunal for the past six years. He is also an alternate member of the NSW Legal Aid Commission Board, and has served as an infantry officer in the Army Reserve since 1976.

*"Mr Humphreys' service background combined with his legal expertise gives him a strong understanding of the unique nature of military service and his role in making decisions related to service", Minister Griffin said.*

*"Mr Humphreys has a strong network within the legal fraternity and across the Australian Public Service. The partnerships he formed with the Registrars and Heads of other Commonwealth Tribunals resulted in greater co-operation across each organisation. No doubt the benefits of such partnerships will flow to the Veterans' Review Board."*

### Appointment of new part-time Members

In November 2010 the appointment of 19 new part-time Members to the VRB was announced. Their appointments commenced on 1 January 2011 for various periods. The new Members are:

#### Canberra

- Patrick Callioni (Senior Member)
- Brigadier Mark Bornholt AM (Rtd) (Services Member)
- Allan Anforth (Member)

#### Sydney

- Moira Brophy (Member)
- Commodore Simon Hart CSC (Rtd) (Member)
- Jillian Moir (Member)

#### Queensland

- Alison Colvin (Senior Member)
- Barbara Kent (Senior Member)
- Dr John Griffin (Services Member)
- Tracey Barty (Member)
- Scott Clark (Member)
- Professor Patrick Murray (Member)

#### Victoria

- Anne Pahl (Services Member)
- Carmel Morfuni (Member)
- Dr Rhonda Galbally (Member)

## VRB welcomes new Members

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### *Perth*

- Major Grant Walsh CSM (Rtd) (Services Member)
- Dr David Cockram (Member)
- Geoffrey Hourn (Member)

### *Adelaide*

- Peter Gaughwin (Member)

### **Re-appointments to the Board**

The following part-time Members were re-appointed to the VRB from 1 January 2011 for various periods:

### *Sydney*

- Jenny D'Arcy (Senior Member)
- Christopher Keher (Senior Member)
- Hilary Kramer (Senior Member)
- Colonel Leslie Young (Senior Member)
- Colonel Roger Tiller AM CSC (Rtd) (Services Member)
- Air Commodore Bruce Wood (Rtd) (Services Member)
- Lieutenant Colonel Warwick Young (Services Member)
- Air Commodore Frank Burt OBE (Rtd) (Services Member)
- Major Janet Hartmann (Rtd) (Services Member)
- Zita Antonios (Member)

### *Queensland*

- Sylvia Winters (Senior Member)
- Francis Benfield (Services Member)
- Lieutenant Colonel Alexander
- Richard Main (Rtd) (Services Member)
- Morag McColm (Member)

### *Victoria*

- Jackie Fristacky (Senior Member)
- Christopher Wray (Senior Member)
- Colonel Robin Terrence Regan CSC (Rtd) (Services Member)

### *Perth*

- Garry Barrow (Senior Member)
- Major Gregory Mawkes MBE (Services Member)

### *Adelaide*

- Edward Jolly (Senior Member)
- Dr Robert Black AM RFD (Services Member)

### *Tasmania*

- Wing Commander Stuart Bryce (Services Member)

Members' biographies are available on the VRB website at:

[www.vrb.gov.au/members\\_bios.html](http://www.vrb.gov.au/members_bios.html)

## Determinations & instruments of allotment in 2010

### **Determination of Warlike Service - Operation Catalyst (16 July 2003 - 31 July 2009)**

This Determination revokes the Determination of Warlike service - Operation CATALYST (16/07/2003) and declares service with the Australian Defence Force contribution in support of the United States led coalition operations in Iraq, on Operation CATALYST for the period 16 July 2003 to 31 July 2009 as warlike service for the purpose of the *Veterans' Entitlements Act 1986*.

### **Military Rehabilitation and Compensation (Warlike Service) Determination 2010/1**

This Determination revokes and replaces the Military Rehabilitation and Compensation (Warlike Service) Determination 2009/3 to amend the existing list of seven operations.

### **Instruments**

The following Instruments were issued in 2010 and are still current:

- Instrument of Assignment - North East Thailand not including Ubon (31 May 1962 - 27 July 1962);
- Instrument of Allotment - Ubon in Thailand (31 May 1962 - 27 July 1962);
- Instrument of Assignment - North East Thailand including Ubon (28

- July 1962 - 24 June 1965);
- Instrument of Allotment - North East Thailand including Ubon (25 June 1965 - 31 August 1968);
- Instrument of Allotment - Malaysia, Singapore and Brunei (17 August 1964 - 14 September 1966);
- Instrument of Allotment - Somalia (Operation SOLACE) (10 January 1993 - 21 May 1993).

## Legislative amendments

### **2010 Budget Measures**

The following amendments, which flow from the Clark Review, are relevant to VRB appeals under the *Veterans' Entitlements Act 1986* (VEA).

#### ***From 1 July 2010:***

- A new category of service eligibility has been created under the VEA, known as "British nuclear test defence service". Amongst other benefits, this provides eligibility for disability and war widow(er) pensions under the "reasonable hypothesis/beyond reasonable doubt" standard of proof.
- Certain submarine special operations between 1978 and 1992 have been reclassified as operational service. This also provides eligibility for disability and war widow(er) pensions under the "reasonable hypothesis/beyond

reasonable doubt” standard of proof.

- The age of domicile of choice for veterans who served with British Commonwealth or allied (BCAL) defence forces during World War II has been lowered from 21 to 18 years of age for the purposes of the VEA. Potential benefits include disability and war widow(er) pensions.

### ***From 1 October 2010:***

- Eligibility for war widow(er) pension has ceased for widows or widowers who enter into a de facto relationship with a third party before claiming the war widow(er) pension.

### ***Service relating to British nuclear test defence***

A series of British nuclear weapons tests were conducted in Australia in the 1950s and 1960s. Subsections 64B(2), (3) and (4) of the VEA set out the requisite areas, dates and activities for a member of the Defence Force to have rendered “British nuclear test defence service”. Please note, 1 July 2010 is the earliest date of effect which can be set if a claim was lodged before 1 July 2010 or up to 3 months after 1 July 2010.

### ***Service on submarine special operations***

Service by a member of the Defence Force who rendered continuous full time service during the period between 1978 and 1992 and was awarded, or eligible to be awarded, the Australian Service

Medal with Clasp “SPECIAL OPS” has been reclassified as operational service under the VEA. This will benefit up to 890 former submariners and others who meet this criteria. Again, 1 July 2010 is the earliest date of effect which can be set if a claim was lodged before 1 July 2010 or up to 3 months after 1 July 2010.

### ***Domicile of choice***

The age of domicile of choice for BCAL veterans has been lowered from 21 to 18 years of age for the purposes of the VEA. This change enables veterans who were 18, 19 or 20 at the time of appointment or enlistment in BCAL defence forces to gain eligibility under the VEA as Australian veterans, providing they meet the other domicile and service eligibility requirements. Only a small number of veterans and war widow(er)s will potentially benefit from this Budget measure, however it removes the discrepancy in treatment of BCAL veterans due to their age.

### ***Effect of widows and widowers entering into de facto relationships***

War widows or widowers who enter into a de facto relationship with a third party before claiming the war widow(er) pension now have the same status under the VEA as those who marry or remarry before claiming the pension. They will no longer be eligible for a war widow(er) pension as they have also been excluded from the VEA definition of a “dependent” of the veteran or member. The amendments only apply to new claims lodged on or after 1 October 2010,

and ensures equal treatment of widows or widowers regardless of whether the new relationship is a marriage or de facto relationship.

## Diagnostic and Statistical Manual of Mental Disorders - Version 5

This article provides an overview of developments in the Diagnostic and Statistical Manual of Mental Disorders (DSM). The overview only relates to mental health disorders covered by Statements of Principles (SoPs).

The DSM is a manual used to determine and help a patient's diagnosis of his/ her mental condition. It has evolved from systems for collecting census and psychiatric hospital statistics, and from a manual developed by the US Army. It is used in the United States and in varying degrees around the world by, among others, clinicians, researchers and health insurance companies.

DSM 1 was first published in 1952. The current version is DSM-IV-TR which was published in 2000.

The American Psychiatric Association, in association with the US National Institute of Mental Health, intend publishing a new DSM. This review of the DSM commenced in 1999 and it is expected that the new Manual (DSM 5) will be

published by 2013. The final product will be a result of great international co-operation in the development of DSM 5. However, the revision of the DSM has been controversial with the mental health community around the world, resulting in a lengthy period of time between the commencement of the review in 1999 and its proposed publication in 2013.

Although there is no legislative direction for the Repatriation Medical Authority (RMA) to do so, the RMA applies the DSM when determining SoPs for mental disorders. The introduction of DSM 5 will have a direct effect on the RMA, but its impact will also be felt by all decision-makers under the *Veterans' Entitlements' Act* 1986 and the *Military Rehabilitation and Compensation Act* 2004.

The DSM is commonly used by all medical practitioners who provide psychiatric reports to the Repatriation Commission and the Military Rehabilitation and Compensation Commission when a mental health disorder has been claimed by a veteran or member. It is also used by medical practitioners providing reports on behalf of applicants at the Veterans' Review Board (VRB) and the Administrative Appeals Tribunal.

While in many cases the diagnostic criteria for a SoP are based on the DSM, following *Benjamin v Repatriation Commission* [2001] FCA 1879 any references in a decision (for example, at the VRB level) to diagnosis should not be based on the SoP but rather to the DSM. The key point clarified by the primary judge and Full Court decisions in

*Benjamin* is that it was an error of law to for the Tribunal to have regarded itself as bound to apply the definition in the SOP. If there is uncertainty about the diagnosis of the claimed disease or injury, it may be appropriate to seek further clarification from the medical practitioner who provided the diagnosis.

The DSM contains diagnostic criteria for over 100 diagnosable mental disorders. The RMA has produced SoPs for only 12 mental disorders:

1. Acute stress disorder;
2. Adjustment disorder;
3. Alcohol dependence and alcohol abuse;
4. Anxiety disorder;
5. Bipolar disorder;
6. Depressive disorder;
7. Drug dependence and drug abuse;
8. Eating disorder;
9. Panic disorder;
10. Personality disorder;
11. Post traumatic stress disorder; and
12. Schizophrenia.

### **1. Acute stress disorder**

This disorder has been largely left unchanged except for the following:

- Criterion A - the event is not described as a “traumatic event” and is described more explicitly, in that it is explicit that the person experienced an event him/herself; witnessed in person the event happening to others; or was repeatedly exposed to aversive details of the event. The exposure through electronic media or movies is no longer sufficient and the

person’s reaction to the event is no longer a criterion.

- Criterion B – DSM 5 contains 4 headings for intrusion symptoms, dissociative symptoms, avoidance symptoms and arousal symptoms. There are 14 symptoms listed under the above headings, of which the person must exhibit at least 8 symptoms. DSM IV currently contains a list of 5 symptoms and a person needs to exhibit 3 of the 5 symptoms listed.

### **2. Adjustment disorder**

This disorder is largely unchanged. However, in DSM IV this disorder excluded bereavement disorder, as did the relevant SoP. DSM 5 proposes to include bereavement related disorder as a subtype of adjustment disorder. Bereavement related disorder is said to arise when a person experienced the death of a close relative or friend at least 12 months earlier. It is possible that such a disorder could arise during eligible service. It will be interesting to see how the RMA applies this sub-type if it is included in the final version of DSM 5.

### **3. Alcohol dependence/abuse**

In DSM IV the psychiatric conditions of alcohol abuse and alcohol dependence were considered to be two different conditions. After further studies the American Psychiatric Association are of the view that these conditions should be considered as one disorder, namely a subset of substance related disorders.

In DSM 5 alcohol disorder appears under two diagnoses: substance-use disorder

and alcohol-use disorder. The present SoP relating to alcohol abuse/dependence includes both abuse and dependence. The description of the disorder is exactly the same as in the SoP, except that the paragraph B of the description of alcohol abuse is not replicated in the proposed definition of substance-use disorder or alcohol-use disorder.

#### **4. Anxiety disorder**

The current SoP only provides for generalised anxiety disorder, anxiety disorder due to a general medical condition and anxiety disorder not otherwise specified. DSM IV contains another type of anxiety – substance induced anxiety disorder. This does come within the scope of the current SoP. DSM 5 contains a substantial alteration to generalised anxiety disorder. Criterion 3 B in DSM IV requires excessive anxiety and worry occur on more days than not for three months or more, however the revision requires only one month.

#### **5. Bipolar disorder**

The SoP for bipolar disorder contains 10 sub-disorders which are derived from separate DSM IV diagnostic criteria. These sub-disorders are to be found in DSM 5. The definition of “bipolar disorder not otherwise specified” has been revised radically with a view to encourage clinicians to specify threshold symptoms indicating bipolarity.

#### **6. Depressive disorder**

The definition of this disorder in the relevant SoP includes a range of

depressive disorders described in DSM IV. DSM 5 has not substantially altered any of the diagnostic criteria of the relevant disorders found in the SoP.

#### **7. Drug dependence/abuse**

DSM IV does not contain diagnostic criteria for “drug abuse” and neither will DSM 5. That being so, the definitions of drug abuse and drug dependence are similar for all substance abuse and substance dependence. No substantial alterations are proposed for DSM 5.

#### **8. Eating Disorder**

The SoP under this heading covers anorexia, nervosa, bulimia nervosa and eating disorder not otherwise specified. It is proposed that “binge eating disorder” be added to eating disorders. Definitions have been changed to some degree and are less directive of the weight loss required.

#### **9. Panic disorder**

This disorder has been varied under DSM 5 by including panic disorder with or without agoraphobia. Hence diagnostic criterion B found in DSM IV does not appear in DSM 5.

#### **10. Personality disorder**

This disorder is subject to radical change. The Personality Disorders Work Group reviewing personality disorders has recommended a significant reformulation of the approach to the assessment and diagnosis of personality psychopathology, including the proposal of a revised general category of personality disorder; and the provision for clinicians to rate dimensions of personality traits, a limited set of



personality types and the overall severity of personality dysfunction.

### 11. Post traumatic stress disorder

DSM 5 does not alter DSM IV substantially. In some cases it does use different terminology but in essence the description of the disorder remains constant. In the past veterans have successfully claimed that they were exposed to a traumatic event by way of seeing replays in television. Under the new provisions, exposure through electronic media, television, movies or pictures is excluded unless the exposure is work related. One of the criteria used in previous versions of the DSM was the need for the veteran to give evidence of his or her reaction to the event, i.e. intense fear, helplessness or horror. This has been removed from the DSM 5 description of the disorder.

### 12. Schizophrenia

DSM 5 does not contain any substantial changes to the DSM IV diagnostic criteria.

### Conclusion

Given the level of controversy generated by the development of DSM 5, there could be further alterations before publication.

### Further reading



Further information on DSM 5 can be found at the American Psychiatric Association's DSM 5 website at: [www.dsm5.org/Pages/Default.aspx](http://www.dsm5.org/Pages/Default.aspx)

Further commentary on issues to be considered by decision-makers when addressing the preliminary matter of diagnosis is contained in the summary of *McKerlie v Repatriation Commission* [2010] FCA 1127 in this Volume at pages 65-68.



## Questions & Answers

### Question:

**A WW2 veteran served in the RAAF and all of his service, with one exception, was undertaken in Australia.**

**On the one occasion that he travelled outside territorial waters, the vessel he was on went from the Australian mainland to Labuan.**

**What needs to be considered for this to be recognised as operational service?**

### Answer:

For operational service to be recognised in World War 2, a person must have served during the period 3 September 1939 to 28 April 1952 (both dates included).

For the purposes of operational service, section 6A(3) Item 1 the "cut off date" (service on or after the date is taken not to be operational service) is 1 July 1951.

This item applies to a "a member who was appointed or enlisted for war service in any part of the Defence Force that was raised during World War 2 for war service, or solely for service during that

war or during that war and a definite period immediately following that war".

If the Veteran's service record confirms that he "was appointed or enlisted for war service in any part of the Defence Force that was raised during World War 2 for war service, or solely for service during that war or during that war and a definite period immediately following that war" then his service would fit within this item.

A further consideration though would be whether the Veteran had "continuous full-time service outside Australia".

### Commission's policy

The Commission's view of the phrase in Column three "continuous full-time service outside Australia during a war to which this Act applies" is mentioned on CLIK, in the Compensation and Support library under the policy tab. It states:

Service immediately before or immediately after a period recognised as operational service is also counted as operational service. This does not apply if service is not continuous. If a person is stationed in Australia at all times, but travelled from one place in Australia to another and thereby were for short periods of time outside Australia, they should not be considered to have served outside Australia.

The legislative policy is noted in *Kohn* (see citation below) at [54]:

The legislative policy behind the Veterans' Entitlements Act is that a person who has rendered operational service in the sense defined in s.6(1) should more readily be able to obtain a pension than a person who has not rendered such service. It was the intention of the legislature that it was only members of the Armed Forces who, in truth, were on service outside Australia during World War 2 who should receive this preferential treatment as to pensions. It cannot be conceived that Parliament intended that veterans who were at all times stationed in Australia but who travelled from one place in Australia to another and thereby were for short periods of time outside Australia, should be treated in the same way as veterans who fought in a theatre of war, sailors who served continuously on a ship engaged in or likely to become engaged in combat or members of the Air Force engaged in flying missions outside Australia.

### Federal Court's Guidance

The phrase whether a person has 'rendered continuous full-time service outside Australia' was first considered by the Federal Court in *Repatriation Commission v Kohn* (1989) 87 ALR 511. The Court held that the essential purpose of any trip outside Australia had to be considered, and if the person was merely a passenger on a ship that sailed from one port in Australia to another port in Australia, but which happened to sail outside the territorial waters in the course of the voyage, it did not mean that the person had rendered 'continuous full-time service outside Australia'. The

purpose of the voyage was not connected with rendering service outside Australia.

In *Proctor v Repatriation Commission* [1999] FCA 32, the Full Federal Court endorsed the *Kohn* 'essential character of service' test, but upheld the Tribunal's decision that Mr Proctor had rendered operational service on a voyage between two parts of Australia, on the basis of its 'factual assessment, which involved giving consideration to the length of Mr Proctor's service overall, the length of the voyage, the purpose of the voyage, and hence the purpose of Mr Proctor's service on the vessel'.



### Question:

**When a decision-maker is considering the threshold**

**issue of whether the applicant is entitled to claim a disability pension as a "member of the Forces", is the decision-maker empowered to enquire behind the reason contained in the member's discharge record?**

### Answer:

The short answer is yes.

### *Legislative framework*

Section 68(1) of the *Veterans' Entitlements Act* 1986 (VEA) defines a "member of the Forces" as a person to whom Part IV applies by virtue of section 69, 69A or 69B of the Act.

Section 69 of the VEA provides in part:

69. (1) Subject to this section, where a person:

(a) has served in the Defence Force for a continuous period that commenced on or after 7 December 1972 and before the terminating date; or

(b) is serving in the Defence Force on or after the terminating date and has so served continuously since a date before that date;

this Part applies to the person:

(c) if the person:

(i) has served on continuous full-time service as a member of the Defence Force after 6 December 1972; and

(ii) has, whether before or after that date, completed 3 years' effective full-time service as such a member; or

(d) if:

(i) the person has served as a member of the Defence Force under an engagement to serve for a period of continuous full-time service of not less than 3 years; and

(ii) the person's service as such a member was terminated before the person had completed 3 years' effective full-time service as a member of the Defence Force, but after 6 December 1972, by reason of the person's death **or the person's discharge on the ground of invalidity or physical or mental incapacity to perform duties; ...**

(emphasis added)

### *Examples*

An applicant with less than three years continuous full-time service will be

ineligible for a disability pension under the VEA, unless his or her discharge was on the ground of invalidity or physical or mental incapacity to perform duties.

A member's discharge record may indicate he or she was discharged as being "unsuitable" or "not suited to be a soldier" under the relevant regulations, which does not appear to meet the VEA requirements.

However, an applicant may submit that the actual reason for his or her discharge were medical reasons - which constituted invalidity or physical or mental incapacity to perform duties.

#### **Relevant case law**

The Federal Court decision of *Whiteman v DVA* [1996] FCA 845 (summarised in (1996) 12 *VeRBosity* No 3 at pages 77-79) was concerned with the interpretation of the *Defence Service Homes Act* 1918, but the provisions of that legislation are similar to the provisions of section 69 of the VEA. Madgwick J set out the following test:

The question for the decision-maker, when determining an applicant's eligibility would be this: is the applicant to be regarded, as a matter of ordinary language, as having been discharged on the ground of his or her incapacity to perform duties? It is no more a restatement of that test to put it in the following way, which may perhaps be more helpful to a decision-maker: is it fair to say that physical or mental incapacity for some or all military duties was the factor actuating the military discharge of the person in question.

This is to be decided according to the standard of reasonable satisfaction (*Ferriday v Repatriation Commission* (1996) 150 ALR 67 summarised in (1996) 12 *VeRBosity* No 3 at pages 75-77).

#### **Conclusion**

Applying *Whiteman*, a decision-maker is empowered to enquire behind the stated reason contained in the member's discharge record, so as to establish the actual ground on which the member was discharged. *Whiteman* sets out the relevant question to be considered by the decision-maker. In some cases, further information may be required by the decision-maker regarding the reasons for discharge, in order to determine whether or not it is "fair to say that physical or mental incapacity for some or all military duties was the factor actuating the military discharge".

## **VRB Case Notes**

### **1. Validity: Was the withdrawal effective?**

#### **The issue**

Before the substantive matter could be considered, the issue for the Board to resolve was whether the applicant had lost his opportunity for review because of a letter he signed and sent to the Board which, on the face of it, withdrew his application.

### The applicant's position

The applicant contended that he had been incorrectly advised by his advocate as to the effect of withdrawing his matter. Further, he was not aware of the true nature and effect of the withdrawal letter on his capacity to continue with his application before the Board. Finally, the applicant noted that it was only a matter of a few days between the time he had sent the letter and when he had called the Board requesting rescission of the withdrawal, once the true effect of withdrawal was known.

### The relevant legislation and case law

#### *No power to reinstate*

The Board noted that there was no specific power in the VEA that would allow the Board to reinstate appeals.

#### *Beneficial legislation*

The Board considered section 119 of the VEA, noting that the provision gives the Board a wide power of discretion to act in a manner that is according to substantial justice and a discretion to dispense with technicalities.

#### *Leading case on this issue of a withdrawal*

The Board considered *Repatriation Commission v Stafford* (1995) 21 AAR 543, where the Full Court of the Federal Court (Jenkinson, Ryan and Lee JJ) held at paragraph 10 that:

...only a clear, unambiguous withdrawal by a veteran of a condition

from the scope of review, which the Board was satisfied was a withdrawal of **the effect of which the veteran understood** could relieve the Board of the duty.

The Board also noted that *Stafford* was applied in *Re Allister and Repatriation Commission* [1999] AATA 563. Senior Member John Handley at paragraph 33 considered the conditions precedent during a VRB hearing for a withdrawal to be effective:

An explanation by a VRB member to a veteran of the nature and effect of a withdrawal. ...If the VRB, having given such an explanation, is then satisfied by the response made by the veteran that the withdrawal is intended and understood I would have thought that the duty has been entirely exercised.

### The Board's consideration

Applying the principles outlined in *Stafford*, the Board found that the withdrawal, in this case, was not "clear and unambiguous...the effect of which the veteran understood." Accordingly the Board held that the letter of withdrawal was not effective and that the application for review was still on foot for the Board to determine. The matter was adjourned to allow the applicant to put forward further evidence in relation to the substantive matter of the appeal.

## 2. Service of a decision: Was the appeal lodged within time?

*Specifically, whether service of a copy of a decision on the solicitor was effective service?*

### The issue

Before the substantive matter could be considered, the issue for the Board to resolve was whether the appeal was lodged within the 3 month time limit specified within sub-section 135(5) of the *Veterans' Entitlements Act 1986* (VEA).

### The Background

The Solicitor, in this matter, wrote to the Department of Veterans' Affairs stating he was acting on behalf the applicant, attaching an authority signed by the applicant. The Department forwarded to both the solicitor and the applicant a copy the delegate's decision, which was the subject of review before the Board.

The Solicitor gave evidence to the Board that she received her copy of the decision 4 business days after it was posted, and on that same day wrote to the applicant enclosing a copy of the decision.

The applicant gave evidence that he did not receive his copy of the letter from the Department until 10 days after it was posted (some 6 days after his solicitor). However, he did receive a copy of the solicitor's letter one day before receiving the copy from the Department.

The main issue for the Board to consider, arising out of these circumstances, was whether service of a copy of the decision on the solicitor was effective service. If so, then for the purposes of sub-section 135 (5) of the VEA the application for review would be out of time.

### The relevant legislation and case law

#### *Time frame for applications*

The time frame for review applications to the Board is set out in sub-section 135 (5) of the VEA. That section states relevantly:

An application... to the Board to review a decision...may be made within 3 months after service **on the person** to whom the decision relates a copy of that decision in accordance with subsection 34(2), but not otherwise (emphasis added).

The Board noted that the provisions of sub-section 135 (5) are to be applied strictly - see *Thomas Jervis Bowen and Repatriation Commission* [1994] AATA 53 which applies the Federal Court decision in *David John Roy Compton v Repatriation Commission* [1993] FCA 468.

### The Board's consideration

The Board noted that the form used for an application for a review did not contain a section specifying a notice of address for service of documents.

Further, the front page of the application form stated:

Where the decision is one assessing a rate of pension or concerning a claim for an attendant allowance – 3 months from the date **you** receive notice of the decision (emphasis added)

The Board considered that these observations supported the contention that the date for commencement of the time period commences from the date of service of the decision on the applicant, not his/her advocate/representative.

The Board noted that while that it is the Department's usual practice to forward copies of decisions to both applicants and representatives, that does not necessarily mean that the decision is taken to be received by the applicant at the point when the representative receives it.

The Board concluded by noting that there was no evidence that the solicitor had clearly indicated that she was to be the address for service of documents and considered that the application for review was lodged within time and was on foot before the Board.

# Administrative Appeals Tribunal

Myers and  
Repatriation Commission

Mr S Webb, Member

[2010] AATA 710

16 September 2010

***War widow's pension claim -  
Veteran died as a result of cancer  
of the prostate - animal fat  
consumption***

## Facts

Mr Myers rendered operational service in the Royal Australian Navy during World War II. He died in 1989 due to prostate cancer.

Mrs Myers sought a review of the Repatriation Commission's refusal of her claim for a war widow's pension, which was affirmed by the Veterans' Review Board.

## Issues before the Tribunal

The issue to be decided was whether or not Mr Myers' death was war-caused.

## The Tribunal's consideration

Applying the principles set out in *Repatriation Commission v Deledio* [1998]

FCA 391; (1998) 83 FCR 82 the Tribunal considered it was necessary to determine:

- (a) whether a hypothesis connecting the death with the particular service is raised on the material; and if so
- (b) whether a Statement of Principles (SoP) is applicable; and if so
- (c) whether the raised hypothesis is consistent with the applicable SoP and is therefore a reasonable hypothesis; and
- (d) whether it is established, beyond reasonable doubt, that there is no sufficient ground for determining the death is war-caused.

The applicant's claim failed at the first step of *Deledio*. The Tribunal considered significant aspects of the hypothesis posed (consumption of animal fat) were not pointed to by 'facts', albeit not proved, that were raised by the materials before it. The first difficulty with the hypothesis posed concerned assumptions about Mr Myers' pre-war diet. The second difficulty concerned the requisite connection between Mr Myers' post-service diet (in particular his consumption of animal fat), and the circumstances of his operational service. The Tribunal was reasonably satisfied no hypothesis of connection between Mr Myers' death and the circumstances of his operational service was raised on the materials.

The Tribunal went on to consider the hypothesis posed in relation to the applicable Statement of Principles, which did not satisfy the quantum and causal elements of the relevant SoP factor (consumption of animal fat). Even if the hypothesis posed was raised on the material, it appeared to the Tribunal it would not be a reasonable hypothesis as it was not consistent with the applicable SoP.

Even if the hypothesis was reasonable, the Tribunal considered it would not assist the applicant's case, as the hypothesis relied on dietary assumptions regarding Mr Myers' pre-service diet that were not consistent with known facts (i.e. his diet during this period was not so deficient in calories that he lost weight). The estimate of animal fat in Mr Myers' pre-service diet could not be sustained, and that essential element of the hypothesis of connection was disproved beyond reasonable doubt by the objective evidence contained in his service records.

### Formal decision

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



### Editorial note

This decision considers each step outlined in *Deledio* and serves as a reminder to decision-makers that there is no fact finding at the first three steps of the *Deledio* process.



In *Tunks v Repatriation Commission* [2009] AATA 229, reported in (2010) 25 *VeRBosity* at pages 15-19, the Tribunal also considered animal fat consumption on remittal of the case from the Federal Court. In *Tunks*, the 'existence' or 'reliability' of information was a significant issue. Although the Tribunal found the first three steps of *Deledio* were satisfied, the claim ultimately failed at step 4 as there was very little real evidence as opposed to speculation and conjecture regarding Mr Tunks' consumption of dietary fat pre-service.

**Farley-Smith and  
Repatriation Commission**

Mr Egon Fice, Senior Member  
Miss E A Shanahan, Member

[2010] AATA 637  
25 August 2010

***War widow's pension claim -  
Veteran's death as a result of  
myelofibrosis - chronic myeloid  
leukaemia - exposure to benzene***

***Procedural issues -  
disqualification for apprehension  
of bias - effect of remittal on  
concession in first hearing***

**Facts**

Mr Farley-Smith rendered operational service in the Australian Army during

World War II. He died in 2001 from myelofibrosis.

Mrs Farley-Smith sought a review of the Repatriation Commission's refusal of her claim for a war widow's pension, which was affirmed by the Veterans' Review Board. The Administrative Appeals Tribunal (the Tribunal) set aside the decision and instead decided that Mr Farley-Smith's death was war-caused. The Commission lodged an appeal to the Federal Court and was successful. The Tribunal's decision was set aside by the Federal Court and remitted to the Tribunal to be reheard.

**Issues before the Tribunal**

The Tribunal considered two preliminary issues which arose in the course of hearing the matter. The first issue was a submission by counsel for Mrs Farley-Smith, that the Tribunal should disqualify itself from continuing to hear the matter on the ground that its conduct during the ten day hearing gave rise to an apprehension of bias. The second issue concerned a concession that the Commission had made at the first Tribunal hearing, that Mr Farley-Smith was exposed to benzene in the course of his operational service.

The substantive issues for determination were:

- The kind of death;
- Having regard to the medical scientific evidence before the Tribunal, whether the material pointed to a reasonable hypothesis of

connection between Mr Farley-Smith's claimed exposure to benzene and his kind of death; and

- If so, whether exposure to benzene in the claimed circumstances was consistent with the reasonable hypothesis.

### The Tribunal's consideration

#### *Disqualification for apprehension of bias*

In the present case, the submission regarding apprehension of bias was based on one of the four main categories of case - the conduct of the hearing. The Tribunal referred to the apprehension of bias principle set out in *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337:

...The question is one of possibility (real and not remote), not probability...

The application of this principle requires two steps:

- "...the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits"; and
- "...an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

The Tribunal applied the Australian test of whether the decision-maker "*is open to persuasion*" or whether the "*conclusion already formed [is] incapable of alteration, whatever evidence or arguments may be presented*", and formed the view that there was nothing in the submission which pointed to the fact that it was not

capable of being persuaded to the applicant's views about her claim. The Tribunal did not accept that its conduct, in offering assistance to counsel for Mrs Farley-Smith and attempting to obtain necessary evidentiary material from witnesses, might convey an apprehension of bias.

The Tribunal also considered its refusal to accept into evidence some documents which may be said to have been relevant, and was of the opinion it had given Mrs Farley-Smith every reasonable opportunity to present her case. There was no basis for the submission that its conduct demonstrated it had prejudged the matter, or that an independent layperson sitting in the hearing room might form that apprehension.

Therefore, the Tribunal rejected the submission that it disqualify itself.

#### *Effect of remittal on concession by Commission at first Tribunal hearing*

The Tribunal considered the effect of the Federal Court order meant there was no operative Tribunal decision and that a fresh determination must be made by the Tribunal, in accordance with *Morales v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 519.

Counsel for Mrs Farley-Smith submitted that the Commission was estopped from contesting Mr Farley-Smith's exposure to benzene, due to its concession on this point at the first hearing. However, the

Tribunal was of the opinion that there was no operative decision on which to base the estoppel. The Tribunal considered its view was supported by relevant case law, and also by notes from the first telephone directions hearing by the Tribunal after the matter was remitted, which indicated the matter was to be heard again “*with any evidence available. Start again.*” As the Commission amended its statement of facts and contentions at the very outset of the rehearing process to put Mr Farley-Smith’s exposure to benzene into contention, the Tribunal found the Commission was not estopped from arguing the issue.

#### ***Kind of death***

Turning to the substantive issues, the Tribunal indicated it must firstly determine the kind of death met by Mr Farley-Smith on the balance of probabilities (*Repatriation Commission v Hancock* (2003) 37 AAR 383), and referred to the interpretation of the expression “kind of death” in *Collins v Repatriation Commission* [2009] 258 ALR 204.

After considering all of the medical evidence the Tribunal found, on the balance of probabilities, that the kind of death met by Mr Farley-Smith was primary myelofibrosis.

#### ***Was Mr Farley-Smith’s death war-caused***

As myelofibrosis is a non-SoP condition, the Tribunal was required to adopt the pre-SoP position found in caselaw prior to 1 June 1994. The Tribunal considered it was important at this stage to bear in mind that a hypothesis is merely a

proposition made as a basis for reasoning, without the assumption of its truth - but it must have a sound basis.

The Tribunal referred to *Bushell v Repatriation Commission* (1992) 175 CLR 408, noting there is no presumption that the injury, disease or death of a veteran was war caused, and there must be some material which raises the relevant causal hypothesis. After determining whether a hypothesis is reasonable, the claim must then be dealt with in accordance with s120(1) of the VEA - and it is only then that the Tribunal should embark upon a fact-finding exercise.

The Tribunal also referred to *Byrnes v Repatriation Commission* (1993) 177 CLR 564, which set out the way in which the second step i.e. s120(1) of the VEA, should be dealt with. Although the High Court said in *Byrnes’* case the assumption of the occurrence or existence of a fact did not make the hypothesis unreasonable, the Tribunal considered this was qualified by the Federal Court’s statement in *Repatriation Commission v Dunn* [2006] FCA 1703 that:

If there is an assumed fact it cannot be the fact to which the hypothesis must be addressed; that it, the fact of connection.

Therefore, if the Tribunal was to find that Mr Farley-Smith was exposed to benzene in the course of his service, it cannot be assumed that the exposure resulted in him developing myelofibrosis.

The Tribunal went on to consider the expert evidence, noting from *Bushell* that it would be a rare case where a

hypothesis put forward by a medical practitioner who is eminent in the relevant field of knowledge would be unreasonable. Following submissions by counsel for the Commission, the Tribunal found one of the medical practitioners called for Mrs Farley-Smith was not an expert in the relevant field, and another was not eminent in the relevant field. The Tribunal also considered a submission by counsel for the Commission that one of the medical practitioners was not an impartial witness and had acted as an advocate for Mrs Farley-Smith. After consideration of relevant caselaw, the Tribunal was of the opinion that the medical practitioner had not brought independent assistance to the Tribunal by way of objective, unbiased opinion, and had crossed the line into advocacy. Although the Tribunal intended to rely on his opinions, they would be treated with caution.

The Tribunal examined a number of epidemiological case and cohort studies concerning the relationship between benzene exposure and myelofibrosis, before it considered whether the hypothesis raised by Mrs Farley-Smith was reasonable.

As stated in *Bushell*, the Tribunal must find the hypothesis is reasonable if the material points to (and not merely leaves open) some fact or facts which support the hypothesis, and the Tribunal (standing in the shoes of the Commission) must consider medical or scientific evidence which is opposed to the material which supports the veteran's claim, in order to examine the validity of the reasoning which supports the claim

that there is a connection between the incapacity or death and the veteran's service. Given the expert evidence, the Tribunal found the hypothesis relied upon by Mrs Farley-Smith, that Mr Farley-Smith's myelofibrosis was connected to benzene exposure, was not reasonable.

*Sufficiency of ground for determining that Mr Farley-Smith's death was war-caused*

The Tribunal considered this issue, in case its finding that no reasonable hypothesis had been raised was wrong. The Tribunal examined the raised facts to determine whether they supported Mrs Farley-Smith's hypothesis. The claim should succeed unless the Tribunal was satisfied beyond reasonable doubt that the factual foundation upon which the hypothesis could operate did not exist.

As in *Byrnes'* case, the factual foundation of the hypothesis would be disproved either by proof beyond reasonable doubt that:

- a fact or facts relied upon to support the hypothesis were not true; or
- the truth of a further fact was inconsistent with the hypothesis.

The Tribunal found that Mr Farley-Smith was exposed to benzene in the course of his service, however it was not more than occasional exposure to fumes in an open environment or occasional dermal contact with petrol. Mr Farley-Smith's level and duration of benzene exposure was insufficient to satisfy the

concentrations required, on current scientific knowledge, to attribute any disease to this exposure. As the facts necessary to support the hypothesis did not exist, there was no sufficient ground for making a determination that Mr Farley-Smith's myelofibrosis and subsequent death was war-caused.

### Formal decision

The Tribunal affirmed the decision under review.



### Editorial note

This case raises interesting issues which may be relevant to tribunal members' tasks. In particular, consideration of disqualification for apprehension of bias, and how to determine whether a hypothesis involving benzene exposure is reasonable - which could also apply to cases concerning disability pension claims. This outcome of this case hinged on the Tribunal's consideration of how appropriate expert evidence may be used to determine whether a hypothesis is reasonable.

### Further reading



For further information on the apprehension of bias, please see our Principal Member's paper on *Bias: Some Practical Issues in Tribunals* presented at the Thirteenth AIJA/COAT Annual Tribunal's

Conference, which is available on the VRB's website at:

[www.vrb.gov.au/publications.html#ps](http://www.vrb.gov.au/publications.html#ps)

Chief Justice Gleeson of the High Court (at the time) also made the following comment on experts in his keynote address to the Judicial Conference of Australia in 2007:

There seems, however, to have been a marked increase in the use of experts in cases where the true technical or specialist expertise involved is limited, and the experts are used mainly for the purposes of advocacy. When experts are used, their relevant expertise should be in something other than giving evidence.

### Hawke and Repatriation Commission

M D Allen, Senior Member

[2010] AATA 657  
31 August 2010

***Whether lumbar spondylosis, ischaemic heart disease and intervertebral disc prolapse were defence-caused - relevant SoP factors - lifting weights and cigarette smoking***

### Facts

Mr Hawke served in the Australian Army and rendered defence service from 1972 until his discharge in 1985.

Mr Hawke sought a review of the Repatriation Commission's decision, as affirmed by the Veterans' Review Board, that refused his claim for lumbar spondylosis, intervertebral disc prolapse (IDP) and ischaemic heart disease (IHD).

### **The applicant's position**

The applicant claimed that his IDP and IHD were related to his defence service as stress on service had led to an increase in his smoking habit, and that lumbar spondylosis had been caused by lifting heavy weights on service.

### **Issues before the Tribunal**

The Tribunal was required to determine to its reasonable satisfaction whether the conditions were defence-caused.

### **The Tribunal's consideration**

The Tribunal identified the relevant Statements of Principle (SoP), and the relevant SoP factors for lifting weights and cigarette smoking.

Based on the available evidence, the Tribunal was satisfied that the relevant SoP factor (lifting weights) for lumbar spondylosis was met.

In relation to IDP and IHD, it was clear to the Tribunal that Mr Hawke had an entrenched smoking habit prior to his eligible defence service. During defence service his smoking habit increased during various periods when Mr Hawke was under stress, so the Tribunal considered to what degree the increased smoking habit caused, or contributed to, the smoking related conditions. The

Tribunal indicated the contribution must be a material contribution. Given Mr Hawke's smoking history, the Tribunal was not reasonably satisfied that the overall increase in his smoking during stressful periods of defence service made a material contribution to the SoP factors connecting his conditions with defence service.

### **Formal decision**

The Tribunal set aside the decision under review regarding lumbar spondylosis and remitted the matter to the Repatriation Commission with the direction that Mr Hawke is entitled to pension for the defence caused disease. The Tribunal affirmed the decision under review regarding IDP and IHD.



### **Editorial note**

Although it was not expressly referred to in the Tribunal's decision, it appears that the principle espoused in *Kattenberg v Repatriation Commission* [2002] FCA 412 was applied. That is, if a factor in a SoP requires a minimum accumulation of consumption or exposure over time, that factor need not be satisfied by an accumulation that is wholly related to service. It is sufficient to meet the factor if:

- the person had the level of consumption or exposure specified by the SoP; and
- the level of consumption or exposure that can be related to the person's service made a material contribution to the overall consumption or exposure.

**Further reading**



For further guidance regarding the application of the principle in *Kattenberg*, please see DVA's Advisory Note AN04/2003 in the CLIK Reference Library.

**Buchanan and  
Repatriation Commission**

Mr John Handley, Senior Member

Dr Roslyn Blakley, Member

[2010] AATA 703  
15 September 2010

***Whether hypertension was war-caused - operational service in Vietnam - salt consumption***

**Facts**

Mr Buchanan served in the Australian Army and rendered operational service in Vietnam between 1971 and 1972, and defence service from 7 December 1972 until his discharge in 1991.

Mr Buchanan sought a review of the Repatriation Commission's decision, as affirmed by the Veterans' Review Board, that refused his claim for hypertension.

**Issues before the Tribunal**

There was no dispute as to the diagnosis of hypertension or the date of the clinical onset of hypertension.

The issues remaining were whether Mr Buchanan consumed 12 grams of salt supplements per day on average for a continuous period of six months before the clinical onset of hypertension and whether the consumption was related to service.

**The Tribunal's consideration**

The Tribunal was satisfied that Mr Buchanan suffers hypertension, and proceeded with an analysis under the four-step process set out in *Deledio*. The hypothesis advanced by Mr Buchanan was that his hypertension was caused by his excessive ingestion of salt during service, and the Tribunal was satisfied the material pointed to a hypothesis connecting hypertension with the circumstances of his service. The Tribunal also identified the relevant Statement of Principles (SoP). Accordingly, the first two stages of *Deledio* were satisfied.

The Tribunal considered the hypothesis was reasonable as it was consistent with the template of factor 5(c) in the SoP, therefore the third step of *Deledio* was satisfied.

The real focus of the review was the fourth step of *Deledio*, at which findings of fact were made. On the basis of Mr Buchanan's evidence, the Tribunal was satisfied that he consumed at least 12 grams of salt per day during his service in Vietnam. The Tribunal accepted Mr Buchanan's high salt intake in Vietnam caused him to consume

excessive amounts of salt well after his operational service - including for a continuous period of six months immediately before the clinical onset of hypertension. The applicant's expert report on physiological and psychological effects that determine salt consumption was not challenged.

In determining whether a causal link existed between Mr Buchanan's salt consumption and his service, the Tribunal referred to the High Court's consideration of the meaning of "arose out of, or attributable to" in *Roncevich v Repatriation Commission* [2005] HCA 40; (2005) 222 CLR 115. The Tribunal was satisfied that Mr Buchanan's ingestion of an average of 12 grams of salt per day for a continuous period of six months before the clinical onset of hypertension arose out of, or was attributable to his service. Further, the Tribunal was satisfied Mr Buchanan's increased salt consumption arose out of, or was attributable to his operational service. The Tribunal accepted Mr Buchanan's evidence that the nature of his service in Vietnam (the climate, physically demanding work and bland food) caused him to increase his salt intake. Therefore, the Tribunal could not be satisfied beyond reasonable doubt that Mr Buchanan's hypertension was not war-caused, and the fourth step of *Deledio* was satisfied.

### Formal decision

The Tribunal set aside the decision under review and substituted its decision that Mr Buchanan's hypertension was war-caused. The Tribunal remitted the

application to the Repatriation Commission for assessment of pension.



### Editorial note

In *Roncevich* the High Court considered the meaning of the words "arose out of, or attributable to" in the context of s 70(5) of the *Veterans' Entitlements Act* 1986.

Relevantly, section 70(5) provides that the death of a member, injury suffered by a member or disease contracted by a member shall be taken to be defence-caused if:

- (a) the death, injury or disease, as the case may be, arose out of, or was attributable to, any defence service, or peacekeeping service, as the case may be, of the member...

The High Court stated:

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

In *Buchanan* the Tribunal noted that a similar conclusion was reached by the



Federal Court in *Law v Repatriation Commission* (1980) ALR 64, where Toohey J decided that the words “arose out of, or was attributable to” should not be interpreted as if meaning “caused by” - the expression required a “less proximate relationship to the injury”. His Honour’s decision was upheld on appeal to the Full Court of the Federal Court and the High Court.

The Tribunal followed these precedents in *Buchanan* and ultimately it was satisfied Mr Buchanan’s increased salt consumption arose out of, or was attributable to his operational service.

#### Further reading



For more information about the application of *Roncevich* in other recent cases, please see the Question & Answer section in (2010) 25 *VeRBosity* at pages 11-13.

#### Allen and Repatriation Commission

Dr K S Levy, RFD, Senior Member

[2010] AATA 840

29 October 2010

***Whether alcohol abuse and anxiety disorder were related to operational service - no clinical onset of psychiatric condition within 5 years after the date of the incident - hypothesis raised is not a reasonable one***

#### Facts

Mr Allen served in the Royal Australian Navy from 1969 until 1975. He rendered operational service on HMAS Sydney in South Vietnamese waters for a period of approximately three weeks in 1971, and defence service from 7 December 1972 until his discharge in 1975.

Mr Allen sought a review of the Repatriation Commission’s decision, as affirmed by the Veterans’ Review Board, that refused his claim for anxiety disorder and alcohol abuse.

#### Issues before the Tribunal

The issues to be determined were:

- Whether the applicant suffers anxiety disorder which is attributable to his war service; and
- Whether his alcohol abuse is attributable to his war service.

### The Tribunal's consideration

After considering various psychiatric reports, the Tribunal found that the appropriate diagnoses were anxiety disorder and alcohol dependence. The Tribunal also considered clinical onset at this stage, and found the applicant did not have a psychiatric condition within five years after the date of the incidents in Vung Tau harbour (discussed below) on 21 February 1971.

The Tribunal proceeded with an analysis under the four-step process set out in *Deledio*. The Tribunal considered step 1 was satisfied, as the applicant's case raised a hypothesis which could connect his present conditions with his service in the RAN. The incidents relied on by the applicant occurred when HMAS Sydney was in Vung Tau harbour for a period of 8 hours on 21 February 1971, and included the applicant hearing a loud explosion/scare charge while he was working as a stoker in the engine room and hearing sentries firing self-loading rifles whilst he was in the upper part of the ship.

Step 2 was also satisfied, as two Statements of Principles exist that are relevant to the diagnosed conditions.

At step 3 of *Deledio*, the Tribunal was required to determine whether the hypothesis raised was a reasonable one. The Tribunal noted the tests under the current SoPs require the experiencing of a category 1A stressor or category 1B stressor, and their definitions require a specific severe traumatic event. The Tribunal was not satisfied that the

incidents were a category 1A or 1B stressor. The Tribunal also considered the applicant's right to have his claim reconsidered under the former SoPs. Looking at the evidence as a whole, it appeared to the Tribunal that the prima facie case of the applicant's hypothesis was outweighed in context and in substance by the scenario painted by the specific and experienced former officers of the RAN who gave evidence to the Tribunal. The Tribunal took into account not only an objective assessment of the circumstances but also a likely subjective assessment of a reasonable person in the position of Mr Allen and the likelihood of the connection being raised between his present conditions and his former naval service. The Tribunal found the supporting evidence of the three officers who were called by the respondent and who had served on HMAS Sydney at the same time as the applicant were more credible, consistent and had more substantive explanations than the witnesses presented for the applicant's case. Therefore, the Tribunal found that step 3 of *Deledio* was not satisfied.

The Tribunal went onto consider step 4 to give some reliability and validity to its finding at step 3. The Tribunal could not find any facts which satisfied the definition of a category 1A stressor or 1B stressor, and found similarly in respect of the requirements of the two former SoPs. The Tribunal was not satisfied that the facts relied upon by the applicant provided a full account or placed the evidence in proper context, and the applicant's evidence was therefore

subject to some questions of credibility when taken wholly in context.

### Formal decision

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



### Editorial note

At step 3 of *Deledio*, the Tribunal considered the relevant case of *Repatriation Commission v Stoddart* [2003] FCAFC 300, which also involved a stoker in the mechanical engineering service of the RAN while on operational service. The Tribunal explained the reasoning in *Stoddart* as follows:

The Full Court in *Stoddart* refers to the breadth of the threat required under the earlier SoPs. It contemplated an actual threat but also extended to a person being confronted with an event which, when looked at *objectively* from the perspective of a reasonable person in the position of the applicant, was capable of concluding that he did in fact, *subjectively*, experience “the event as a real risk of death or serious injury”.

In relation to how real the risk of death or serious injury was, the Full Court said that the threat must be regarded according to the dictionary definition of that term as meaning “an indication of probable evil to come; something that gives indication of causing evil” (at [32]). The assessment of the risk is a contextual one and involves, in particular, the gravity of the risk.

In *Allen* the Tribunal applied this reasoning, by making an objective assessment of the circumstances and also

a likely subjective assessment of a reasonable person in the position of Mr Allen.

### Sticher and Repatriation Commission

Mr S Karas, AO, Senior Member

[2010] AATA 336  
7 May 2010

### ***Whether alcohol dependence and anxiety disorder were war-caused - application of Statement of Principles - conditions for satisfying a category 2 stressor met***

#### Facts

Mr Sticher served in the Australian Army from 1969 until 1972 and rendered operational service in South Vietnam.

Mr Sticher sought a review of the Repatriation Commission decision that refused his claim for anxiety disorder, and alcohol abuse and alcohol dependence. The Veterans’ Review Board varied the decision under review by amending the diagnosis of alcohol abuse and alcohol dependence to alcohol dependence, and affirmed the decision.

#### Issues before the Tribunal

The issues to be determined were:

- Whether anxiety disorder and alcohol dependence were war-caused; and particularly

- Whether the applicant experienced a category 1A, 1B or category 2 stressor as defined in the relevant Statements of Principles during operational service, and whether the clinical onset of anxiety disorder preceded the clinical onset.

### The applicant's position

The applicant submitted that he experienced category 2(a), (c) and (f) stressors for the purpose of the relevant SoP concerning anxiety disorder during his operational service in Vietnam by reason of:

- being isolated from his family and adverse events within his family unit during such separation;
- concerns over the nature of his duties by virtue of his guard duties and duties outside the perimeter of the base at which he served;
- death of a work colleague.

The applicant submitted that he suffered a clinically significant psychiatric disorder of anxiety disorder at the time of the clinical onset of alcohol abuse/dependence for the purpose of the relevant SoP concerning alcohol dependence and alcohol abuse.

### The Tribunal's consideration

The Tribunal proceeded with an analysis under the four-step process set out in *Deledio*.

Firstly, the Tribunal determined that the material before it pointed to a requisite

hypothesis that connected the applicant's condition to his Vietnam service.

Secondly, the Tribunal noted the relevant SoPs.

Thirdly, the Tribunal was of the opinion that the hypothesis raised in this matter was a reasonable one and was consistent with the template found in the SoPs.

Fourthly, the Tribunal was not satisfied beyond a reasonable doubt that the applicant's anxiety disorder and alcohol abuse and dependence were not related to his service in Vietnam. The Tribunal found that the applicant was socially isolated in Vietnam, and the applicant was adamant he did not make any real friends in Vietnam that carried on to his post Vietnam service to any great extent. The Tribunal considered the applicant was credible in his answers and evidence, and had no reason to doubt him. The expert opinion of the applicant's psychiatrist also confirmed his anxiety disorder and resultant alcohol abuse and dependence due to his Vietnam service. Therefore, the applicant satisfied the category 2 stressor referred to in the legislation.

### Formal decision

The Tribunal set aside the decision under review and substituted its decision that the applicant was entitled to pension under the VEA.



### Editorial note

In *Sticher* the Tribunal was satisfied the applicant's circumstances on service met the definition of "a

category 2 stressor", which means one or more of the following negative life events, the effects of which are chronic in nature and cause the person to feel on-going distress, concern or worry:

- (a) being socially isolated and unable to maintain friendships or family relationships. Due to physical location, language barriers, disability, or medical or psychiatric illness;
- ...

The Tribunal relied on both the applicant's evidence and the expert opinion of his psychiatrist in reaching its conclusion.

The issue of whether an applicant suffered a category 2 stressor was also considered by the Tribunal in a number of other cases during 2010. In particular, in relation to having concerns in the work environment. In *Crook and Repatriation Commission* [2010] AATA 580 the Tribunal found the applicant's fear of another collision by HMAS Melbourne satisfied the criteria, and in *North and Repatriation Commission* [2010] AATA 131 applicant's concerns precipitated by the pain he experienced due to his misdiagnosed ankle condition also satisfied the criteria.

However, in *Reinke and Repatriation Commission* [2010] AATA 1040 the applicant's general sense of dissatisfaction or even disillusionment with one's work environment did not satisfy the criteria.

**Bartholomai and  
Repatriation Commission**

Senior Member K Bean

[2010] AATA 705  
16 September 2010

***Application for increase in pension to special rate - application of "alone test" - non-accepted condition of severe headaches contributed to inability to work during the assessment period***

**Facts**

Mr Bartholomai served in the Australian Army and rendered operational service in Vietnam, and defence service from 1974 until his discharge in 1990.

Mr Bartholomai sought a review of the Repatriation Commission's decision, as affirmed by the Veterans' Review Board, that refused his application for increase in pension to the special rate.

**Issues before the Tribunal**

The issue for determination was whether Mr Bartholomai satisfied the terms of s 24 of the *Veterans' Entitlements Act 1986*, such that he should be paid disability pension at the special rate. It was not in dispute that Mr Bartholomai met the threshold requirements imposed by s 24, in that his degree of service related incapacity was at least 70 percent, and his service related incapacity was sufficient to render him incapable of undertaking remunerative work for more than 8 hours per week. The only

contested issue was whether Mr Bartholomai satisfied the “alone test” in s 24(1)(c).

### The Tribunal’s consideration

The main issue for the Tribunal’s determination was whether the applicant’s headaches contributed to his inability to undertake remunerative work during the assessment period, such that he does not satisfy the test set out in s 24(1)(c). In light of the provisions of s 24(2) of the Act, the Tribunal was also required to consider:

- whether the applicant ceased to engage in remunerative work because of his headaches; and
- whether his headaches have prevented him from engaging in remunerative work.

Firstly, the Tribunal looked at whether the applicant ceased to work or was prevented from working because of his headaches. The Tribunal was satisfied that the main reason he ceased work was his war-caused condition of PTSD and related anxiety. Therefore, the Tribunal did not consider the applicant ceased to engage in remunerative work for reasons other than his accepted disabilities, and was not satisfied that his headaches prevented him from working at any time during the assessment period.

Secondly, the Tribunal looked at whether the applicant’s headaches contributed to his inability to work during the assessment period. Based on the available evidence, the Tribunal considered that the headaches made

some contribution to his inability to re-enter the workforce after he ceased work, and in particular during the assessment period. The Tribunal concluded the applicant did not satisfy the “alone” test.

### Formal decision

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



### Editorial note

In reaching the conclusion that Mr Bartholomai did not satisfy the “alone test”, the Tribunal had regard to the reasoning of the Full Court of the Federal Court in *Repatriation Commission v Hendy* [2002] FCAFC 424; (2002) 76 ALD 47 that:

The decision-maker is required to take into account any factor that plays a part or contributes to a veteran being prevented from continuing to engage in remunerative work.

Even though Mr Bartholomai’s war-caused disability was sufficient to prevent him from working, the Tribunal considered his headaches also played a part in his inability to work during the assessment period.

The Tribunal also had regard to the fact there is no “presumption of continuance”. The Tribunal referred to the unreported decision of the Federal Court in *Jackman v Repatriation Commission*. *Jackman* is reported in (1997) 13(2) *VeRBosity* at page 73, and in relation

to a "presumption of continuance"  
Tamberlain J said:

A presumption of continuance is not appropriate to the determination the AAT has to make under s.24(1)(c). It is well accepted that the relevant date of assessment is the date of application, not retirement: *Banovich v. Repatriation Commission* (1986) 69 ALR 395. The AAT must make its determination as at the time of application, taking into account all considerations relevant to the specific case in question. Where the application date is close to the retirement date the weight to be given to the applicant's circumstances at the time of retirement will be greater than in cases, such as the present, where there is a lengthy period of time between the dates. In such cases other significant factors such as age and time out of the work force can become important and relevant considerations: *Repatriation Commission v. Wilson* (1996) 43 ALD 777; *Repatriation Commission v. Braund* (1991) 23 ALD 591. It is not sufficient for the AAT to be satisfied that at the date of retirement the applicant satisfied s.24(1)(c): *Braund* at 595.

Applying this reasoning in the present case - even though Mr Bartholomai ceased work due to his accepted disabilities, it did not mean that he must be taken at application day to be prevented from undertaking the work he was undertaking by reason of those disabilities alone.

**Beatson and  
Military Rehabilitation and  
Compensation Commission**

Hon R J Groom, Deputy President

[2010] AATA 190  
22 March 2010

***Claim for labral tear in right hip -  
recovery from that injury - Tribunal  
now asked to consider  
osteoarthrosis of right hip joint  
(different injury) - Tribunal does  
not have jurisdiction***

**Facts**

In February 2007 Mr Beatson lodged a claim for compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA) for "tore labrial (sic) in right hip" arising out of a motorcycle accident and aggravated by his service.

A delegate of the Military Rehabilitation and Compensation Commission (MRCC) confined his consideration of Mr Beatson's claim to a "...small partial thickness postero-inferior acetabular labral tear of the right hip" and applied the relevant Statement of Principles concerning acute sprain and acute strain.

In October 2008 the Veterans' Review Board (VRB) reviewed and affirmed the original determination. The only injury considered by the VRB was "small partial

thickness postero-inferior acetabular tear right hip."

The decision of the VRB was the reviewable decision before the Administrative Appeals Tribunal (the Tribunal). In 2009, following fresh medical advice, Mr Beatson claimed that the recurrent pain in his right hip was not caused by a labral tear in the right hip resulting from the motorcycle accident, but from osteoarthritis of the right hip.

### Issues before the Tribunal

The issue for determination was whether the Tribunal had jurisdiction to consider the compensation claim for osteoarthritis of the right hip.

### The Tribunal's consideration

The Tribunal considered it was confined by the MRCA to review only a "reviewable" determination, which is a decision by the VRB or the MRCC on a reconsideration or a decision to vary a determination under section 348(1). The question to be answered by the Tribunal was whether there was a fundamental difference in the injury now being claimed, compared with the injury initially claimed and considered and determined by the MRCC and VRB.

The Tribunal considered the fact that Mr Beatson had recovered from the posterior labral tear was significant. The evidence indicated that the initially

claimed injury of labral tear of the right hip and subsequently claimed injury of osteoarthritis of the right hip were two different injuries. The nature and the causes of the two injuries were quite distinct. The original claim was not broadly expressed (e.g. pain in the right hip), but was a claim for a specifically identified injury (i.e. a labral tear). The newly claimed injury, osteoarthritis, was also clearly identified.

The Tribunal was satisfied that the newly claimed injury was a fundamentally different injury. The MRCC did not have a proper opportunity to investigate it before making the original determination, and it was not the subject of that determination or of the review by the VRB. Mr Beatson remained entitled to make a fresh claim for compensation for osteoarthritis of the right hip.

### Formal decision

The Tribunal did not have jurisdiction to consider a claim by the applicant for osteoarthritis of the right hip.



### Editorial note

This case highlights the importance of the wording of the original claim, in determining whether a new injury is part of the reviewable determination before the Tribunal - or original determination being reviewed by the VRB.

Further commentary on this issue is included in the Editorial Note for



*McKerlie v Repatriation Commission* [2010] FCA 1127, summarised in this Volume at pages 65-68.

**Military Rehabilitation and  
Compensation Commission and  
Archer**

Hon R J Groom, Deputy President  
Dr R J Walters, RFD, Member

[2010] AATA 525  
13 July 2010

***Social gathering of army personnel  
at base - fall from third storey  
balcony - alcohol consumed -  
serious and permanent impairment  
- injuries attributable to defence  
service - injuries would not have  
occurred but for service***

**Facts**

Mr Archer served in the Australian Regular Army and was seriously injured in 2005 when he fell from the third floor balcony of his accommodation on base. He claimed compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA). A delegate of the Military Rehabilitation and Compensation Commission (MRCC) rejected his claim.

On reconsideration, the original determination was affirmed. The Veterans' Review Board (VRB) set aside the determination and substituted a decision that Mr Archer had suffered a

"service injury" under section 27(c) of the MRCA and therefore was entitled to compensation. The MRCC sought a review by the Administrative Appeals Tribunal (the Tribunal) of the VRB decision.

**Issues before the Tribunal**

Mr Archer rendered peacetime service under the MRCA, so the matter had to be decided to the Tribunal's reasonable satisfaction. The VRB finding that the requirements of section 339 (with reference to the relevant Statement of Principles) had been met was not in issue.

The issues to be determined by the Tribunal were whether the injuries sustained by Mr Archer were "service injuries" as defined in section 27 of the MRCA under the "occurrence", "arose out of, or attributable to" or "but for" provisions.

It was agreed that section 32 of the MRCA, which excludes liability to pay compensation if the injury resulted from being under the influence of alcohol, did not apply as Mr Archer's injuries had caused a serious and permanent impairment.

**The Tribunal's consideration**

Firstly, the Tribunal considered and made findings on key facts. Secondly, the Tribunal considered the principal issues to be determined.

### **Occurrence**

In considering whether Mr Archer's injuries resulted from an occurrence while he was rendering defence service, the Tribunal took the view that this test may, in some circumstances, be more difficult to satisfy than the other two relevant alternate tests, as:

- It requires proof of a temporal relationship between the occurrence and the person's service, as well as a causative factor - as the words "resulted from" indicate causation (see *Woodward v Repatriation Commission* [2003] FCAFC 160 and *Repatriation Commission v Law* [1981] HCA 57).
- The temporal element goes beyond the actual performance of work which the person is employed to do and includes "*the doing of whatever is incidental to the performance of the work*" and whatever the worker is "...required, expected or authorised to do in order to carry out his actual duties..." (see *Henderson v Commissioner for Railways WA* [1937] HCA 67).

As the Tribunal found that the other two relevant alternate tests were satisfied, the Tribunal did not consider it was necessary to express a final view on the occurrence provision.

### ***Arose out of, or attributable to***

In considering whether Mr Archer's injuries arose out of or were attributable to any defence service rendered by him, the Tribunal noted the majority in

*Roncevich v Repatriation Commission* [2005] HCA 40 (involving similar facts) held:

- The correct question to be asked was not whether the person's intoxication arose out of the task he was required to do as a soldier but rather whether the injury arose out of or was attributable to his defence service (Tribunal's emphasis).
- "*A causal link alone or a casual connexion is capable of satisfying a test of attributability...*" and the cause did not have to be "...sole, dominant, direct or proximate" - so the Tribunal was required to examine the evidence to determine whether such a causal link or causal connection existed.

The Tribunal considered a number of facts together established a strong connecting link between Mr Archer's injuries and his defence service, and the important issue was the effect of the culture and influences at the base on Mr Archer, and the part they played, directly or indirectly, in contributing to his fall and injuries. The Tribunal was satisfied on the material before it, that there was encouragement of socialising and drinking at the base.

The Tribunal also considered two matters which the majority in *Roncevich* determined to be relevant considerations - that Mr Archer's fall and his injuries occurred at the army base and at that time he was subject to military discipline. The Tribunal found the following causative factors established Mr Archer's defence service contributed to his fall and injuries:

- The consumption of a large quantity of alcohol and its effect on Mr Archer.
- The expectation among army personnel at the base that they should meet, socialise and drink together, which was a reality or life at the army base, influenced Mr Archer to drink as he did.
- The physical environment of the accommodation units and particularly the open air balconies.

Therefore, following the broad approach in *Roncevich*, the Tribunal found there was a sufficient causal nexus to establish that Mr Archer's injuries were attributable to the defence service rendered by him.

### ***But for***

Finally, the Tribunal considered whether Mr Archer's injuries would not have occurred but for his defence service. Although the ordinary meaning of these words appear to be very wide, the Tribunal referred to comments made by Justice Madgwick in *MRCC v Roberts* [2007] FCA 1, "*that the concept of 'but for' implies, indeed is synonymous with, some kind of causal connection*". The Tribunal took the view that the causal factors linking Mr Archer's defence service to his injuries (detailed above) were also sufficient to satisfy the "but for" test.

The Tribunal concluded the injuries suffered by Mr Archer in the fall at the

army base on 6 March 2005 were service injuries within the meaning of section 27.

### **Formal decision**

The Tribunal affirmed the decision under review.



### **Editorial note**

In *Re Archer*, the Tribunal considered the decision in *Roncevich* where the High Court adopted a purposive approach to what was an injury which "*arose out of, or was attributable to defence service*", the test in section 70(5)(a) of the VEA. The Court found that any activity that an employee is "*reasonably required, expected or authorised to do to carry out his duties*" amounts to defence service for the purpose of the provision. That is, service extends to any activity "*incidental*" to the actual work the person is employed or "*expected*" to do as part of service. Applying the broad approach in *Roncevich*, the Tribunal found that the "*arose out of, or attributable to*" and "*but for*" tests in section 27 of the MRCA were satisfied.



### **Further reading**

For further reading on how *Roncevich* has been applied in recent SRCA and MRCA decisions please see VeRBosity Vol 25 pages 11-13.

**Eagle and  
Military Rehabilitation and  
Compensation Commission**

Deputy President S D Hotop  
Ms K Hogan, Member

[2010] AATA 584  
6 August 2010

***Claim for acceptance of liability of  
fractured tooth - no medical or  
dental evidence regarding cause -  
not a service injury or a service  
disease***

**Facts**

Mr Eagle has been a member of the Australian Army Reserve from 11 August 2003. He lodged a claim under the *Military Rehabilitation and Compensation Act 2004* (MRCA) with the Military Rehabilitation and Compensation Commission (MRCC) for acceptance of liability in relation to a "tooth injury".

A delegate of the MRCC made an original determination rejecting liability for his fractured front tooth. Following Mr Eagle's request for review by the Veterans' Review Board (VRB) of the original determination, another delegate of the MRCC made a determination amending the description of the injury in the original determination to fractured tooth but otherwise confirmed that determination.

The VRB affirmed the original determination (as amended) and Mr Eagle sought further review by the Administrative Appeals Tribunal (the Tribunal).

**Issues before the Tribunal**

The issue in dispute was whether the injury sustained by Mr Eagle was a "service injury" as defined in section 27 of the MRCA under the "occurrence", "arose out of, or attributable to" or "but for" provisions. Mr Eagle rendered peacetime service under the MRCA, so the matter had to be decided to the Tribunal's reasonable satisfaction. It was common ground that "fractured tooth" was a non-SoP condition.

**The Tribunal's consideration**

The Tribunal considered that each of the three relevant alternative bases (above) on which the injury sustained by Mr Eagle might be determined to be a "service injury" involves the requirement of a causal relationship between the defence service rendered by Mr Eagle and his sustaining that injury (see *Woodward v Repatriation Commission* [2003] FCAFC 160, *Roncevich v Repatriation Commission* [2005] HCA 40 and *MRCC v Roberts* [2007] FCA 1).

Although there was some evidence of a temporal relationship between Mr Eagle participating in a "Battle PT Course" run in the course of his defence service and his sustaining the injury, there was no evidence before the Tribunal of a causal

relationship. There was no dental or medical evidence before the Tribunal relating to the cause of the injury, and Mr Eagle himself could not explain how, or precisely when, the injury occurred. Therefore, the Tribunal was not reasonably satisfied that the injury was a “service injury”, as the presence of a temporal relationship was not sufficient to satisfy the relevant provisions of section 27.

### Formal decision

The Tribunal affirmed the decision under review.



### Editorial note

Before liability can be accepted for a condition or a death, it must be established that it is a ‘service injury’, ‘service disease’ or ‘service death’. This is done via one of the ‘connections’ set out in the various heads of liability in the MRCA, which include:

- Occurrence;
- Arose out of or was attributable to;
- But for changes of environment or circumstances;
- Travelling to or from duty;
- Death from an accepted disability;
- Aggravation of an underlying injury or disease.

Compared with the VEA, the MRCA liability provisions have the

following additional means by which a service relationship can be accepted:

- Aggravation of a sign or symptom of an injury or disease;
- Condition arising from treatment.

### Further reading



Please see Chapter 9 on Liability in (2006) 22 *VeRBosity* Special Issue: *A practical handbook* for

*representatives at the VRB*, available on the VRB’s website:

[www.vrb.gov.au/publications.html#\\_verbosity](http://www.vrb.gov.au/publications.html#_verbosity)

Please note, since that publication there has been a change in the legislation regarding the head of liability for ‘Unintended consequence of treatment’.

Paragraph 29 of the MRCA now provides that liability can be accepted for a condition if:

- treatment is received for an earlier service injury or service disease and it is paid or provided wholly or partly by the Commonwealth and as a consequence of that treatment, the person sustains or contracts the relevant condition; or
- treatment is received for any condition (it does not have to be a service injury or disease) under regulations made under the Defence Act 1903 and as an unintended consequence of that treatment, the person sustains or contracts the relevant condition

**Gosling and  
Military Rehabilitation and  
Compensation Commission**

Mr R G Kenny, Member

[2010] AATA 642  
26 August 2010

***Claim for acceptance of liability of  
L5/S1 intervertebral disc prolapse  
with right sided sciatica -  
application of Statement of  
Principles - claimed condition not  
caused by service - no aggravation  
of condition by service -  
acceptance of liability for  
temporary aggravation***

**Facts**

Mr Gosling served in the Royal Australian Navy from April 2007 until October 2008. He lodged a claim under the *Military Rehabilitation and Compensation Act 2004* (MRCA) with the Military Rehabilitation and Compensation Commission (MRCC) for acceptance of liability in relation to “slipped disc” and “sciatica”.

A delegate of the MRCC rejected liability for L5/S1 intervertebral disc prolapse with right sided sciatica, but accepted liability for aggravation of the signs and symptoms of pre-existing L5/S1 intervertebral disc prolapse with right sided sciatica.

On reconsideration by the MRCC the decisions were affirmed, and Mr Gosling sought further review by the Administrative Appeals Tribunal (the Tribunal).

**Issues before the Tribunal**

Mr Gosling rendered peacetime service under the MRCA, so the decision concerning liability was to be made to the Tribunal’s reasonable satisfaction. The Tribunal could only accept liability if a relevant Statement of Principles (SoP) upheld Mr Gosling’s contention that the claimed condition was, on the balance of probabilities, connected with that service. Where there was no relevant SoP, the matter was to be determined under the general principles of causation under the MRCA.

**The Tribunal’s consideration**

The Tribunal considered the definition of the term “intervertebral disc prolapse” in the relevant SoP for intervertebral disc prolapse, and was reasonably satisfied on the medical evidence that Mr Gosling suffers from intervertebral disc prolapse at the L5/S1 level of his spine.

The Tribunal referred to the applicable factors in the relevant SoP and the associated definition:

- (a) having a trauma to the relevant disc within the 24 hours before the clinical onset of intervertebral disc prolapse; or
- ...
- (h) having a trauma to the relevant disc within the 24 hours before

the clinical worsening of  
intervertebral disc prolapse

**“a trauma to the relevant disc”** means an injury, including G force-induced injury, to the affected intervertebral disc that causes the development of symptoms and signs of pain, and tenderness, and either altered mobility or range of movement of that part of the spine. These symptoms and signs must last for a period of at least ten days following their onset; save for where medical intervention for the trauma to the relevant disc has occurred and that medical intervention involves either:

- (a) immobilisation of that part of the spine by splinting, or similar external agent;
- (b) injection of corticosteroids or local anaesthetics into that part of the spine; or
- (c) surgery to that part of the spine;

The Tribunal was reasonably satisfied that factor (a) was not met in respect of an incident on 24 June 2008 when Mr Gosling lifted a heavy box.

The Tribunal considered whether another incident on 6 August 2008, when Mr Gosling picked up a large block, aggravated his intervertebral disc prolapse. The Tribunal noted that for a condition to have been aggravated by defence service, it must have been made worse by some aspect of that service and not simply become worse (see *Ogden Industries Pty Ltd v Lucas* (1967) 116 CLR

537 in the context of workers compensation legislation). The Tribunal was reasonably satisfied there was no aggravation in accordance with factor (h) of the relevant SoP.

The medical evidence indicated there was a temporary increase in Mr Gosling’s symptoms after the incident on 6 August 2008. As an increase in symptoms without a worsening of the underlying condition was not the subject of any SoP, the Tribunal considered whether the increase in symptoms was a service injury in that it resulted from an occurrence that happened while Mr Gosling was a member rendering defence service or which arose out of, or attributable to, any defence service rendered by him. The MRCC had accepted liability on that basis, and the Tribunal was reasonably satisfied that was the correct decision.

### Formal decision

The Tribunal affirmed the decision under review.

### Editorial note



This case did not follow the VRB appeal path as Mr Gosling elected for reconsideration by the MRCC. It steps through the issues to be considered for a claim for intervertebral disc prolapse. Following diagnosis, the relevant SoP was applied. Importantly, the case demonstrates that where a sign or symptom of a pre-

existing condition has been aggravated by defence service under section 30 of the MRCA, SoPs are not used to determine liability. The Tribunal's decision about the type of aggravation (i.e. underlying condition v signs or symptoms) was based on the medical evidence in this case.

### Further reading



Please see the Military Rehabilitation and Compensation Scheme Policy Instruction Number 12

concerning *Determination of Liability for Aggravation* in the CLIK MRCA Manuals & Resources Library.

### Porter and Military Rehabilitation and Compensation Commission

Mr F D O'Loughlin, Senior Member  
Miss E A Shanahan, Member

[2010] AATA 968  
2 December 2010

### ***Aggravation of signs or symptoms of a disease or injury - aggravation of underlying disease or injury***

#### Facts

Mr Porter served in the Royal Australian Navy from August 2004 to September 2007 as a flight navigation instructor in King Air 350 aircraft.

Prior to his RAN service, Mr Porter was a member of the Royal New Zealand Navy from 1992 to 2004. Between 2002-2004 he was seconded to the ADF as an instructor, flying in aircraft similar to the KA 350.

Mr Porter has lumbar spondylosis and claimed that his duties in the RAN in the period leading up to November 2006 through to 2007 when he discharged either aggravated the signs or symptoms of his lumbar spondylosis, or materially contributed to those signs or symptoms.

#### Issues before the Tribunal

The issues to be determined were whether the applicant's duties from 2006 to 2007, in particular the jump seat position he was required to occupy in the KA 350 aircraft, materially contributed to or aggravated:

- his underlying spinal condition (in which case the parties accept the Statement of Principles (SoP) concerning lumbar spondylosis would prevent his claim from succeeding); or
- the signs or symptoms of his underlying spinal condition (in which case the SoP is not applicable and the parties accept his claim would succeed).

#### The Tribunal's consideration

The Tribunal noted an aggravation of signs or symptoms of an injury of disease can be taken to have occurred where the



pain or restrictions associated with the condition increase or intensify.

The Tribunal identified the relevant tests to be applied as follows:

- sections 27 and 23(1) of the *Military Rehabilitation and Compensation Act* 2004 (MRCA) with the need to prove a claim by reference to the SoP - if aggravation of signs and symptoms is a manifestation of an aggravation of the underlying condition; or
- sections 30 and 23(3) of the MRCA without the need to prove a claim by reference to the SoP - if those signs or symptoms are aggravated by relevant defence service without aggravation of the underlying condition.

The Tribunal went on to consider the applicant's service history and duties, and the medical evidence. The weight of the evidence before the Tribunal lead it to be reasonably satisfied that the deterioration in the applicant's signs or symptoms of his condition was not a manifestation of the deterioration of the underlying condition. The Tribunal indicated:

It is not extraordinary that signs and symptoms of a disease can worsen without the underlying condition altering. A condition can stabilise in its state of degeneration and signs or symptoms of a stabilised underlying condition may change for the better or worse.

Therefore, the applicant was entitled to compensation under section 23(3) of the MRCA.

### Formal decision

The Tribunal set aside the decision under review and remitted the matter to the respondent to determine the compensation payable to the applicant and to consider payment of the applicant's disbursements.



### Editorial note

The Tribunal made the important distinction as to when SoPs apply or do not apply in cases involving the question of aggravation/material contribution. Ultimately the weight of the medical evidence in this case lead to the Tribunal's conclusion that it was only the signs or symptoms of the applicant's lumbar spondylosis which were aggravated by his service in the RAN.

**Jamieson and  
Military Rehabilitation and  
Compensation Commission**

M J Carstairs, Senior Member

Associate Professor J B Morley RFD, Member

[2010] AATA 778

12 October 2010

***Permanent impairment not as a  
result of compensable condition  
- incapacity - liability for  
psychiatric sequelae***

**Facts**

Mr Jamieson served in the Australian Army Reserve and sustained injuries on field exercises in Singleton in October 2003 and November 2004. He claimed compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA). A delegate of the Military Rehabilitation and Compensation Commission (MRCC) accepted liability for:

- Aggravation of lumbar degenerations at L2/3, L3/4, L4/5 and L5/S1;
- Aggravation of soft tissue musculo-ligamentous injury to the neck; and
- Musculo-ligamentous injury to the left shoulder.

From this favourable determination, other claims followed for permanent impairment, continuing incapacity and psychiatric disorder due to chronic pain from Mr Jamieson's orthopaedic

conditions. The determinations in relation to these other claims came under review by the Administrative Appeals Tribunal (the Tribunal).

**Issues before the Tribunal**

The issues to be determined by the Tribunal were:

- Whether Mr Jamieson was entitled to permanent impairment compensation;
- Whether Mr Jamieson was entitled to incapacity payments after October 2005 (when it was determined that any contribution from his employment as a reservist would have ceased to contribute to his incapacity, and any residual incapacity was due to underlying degenerative conditions); and
- Whether Mr Jamieson's major depressive disorder and alcohol dependency were service injuries.

**The Tribunal's consideration**

***Permanent impairment***

Firstly, the Tribunal considered whether Mr Jamieson was entitled to permanent impairment compensation. To succeed in this claim, he needed to establish that as a result of the compensable conditions he had suffered an impairment that had stabilised and was likely to continue indefinitely (s 68 of the Act).

The Tribunal turned to the medical evidence to determine the central issue of whether Mr Jamieson had suffered an impairment. There was medical evidence that Mr Jamieson's back condition as related to his defence

service would resolve in the short term, and the Tribunal accepted that Mr Jamieson aggravated his underlying back condition. Therefore, the Tribunal was not satisfied that Mr Jamieson suffered an impairment as a result of the compensable conditions.

### *Incapacity payments*

The issue for the Tribunal was whether Mr Jamieson had recovered from the compensable injuries. The Tribunal found that Mr Jamieson had lumbar spinal degenerative changes which were symptomatic before his first service-related injury in October 2003. The Tribunal also concluded that the service-related aggravations of Mr Jamieson's back and neck were temporary and no longer contributed to his incapacity, and he now had no service-related injury of his left shoulder.

### *Liability for psychiatric conditions*

The Tribunal noted the Act provides for a definition of service injury at s 27, and ultimately a finding that a condition is a service injury requires that the evidence must satisfy connections set out in relevant Statements of Principles. The Tribunal considered the chronic pain factor in the relevant Statement of Principles for depressive disorder. The parties agreed that any chronic pain which Mr Jamieson suffers needed to be related to service injury and not to pain experienced due to degenerative conditions in his back, neck and

shoulders. As the Tribunal had decided that Mr Jamieson had recovered from the aggravation of his degenerative injury, his claim could not succeed. Mr Jamieson's claim for alcohol dependence on the basis of his depressive disorder also failed.

### **Formal decision**

The Tribunal affirmed the decisions under review.



### **Editorial note**

In *Jamieson* the Tribunal dealt with a number of matters which flowed from the initial acceptance of liability for his orthopaedic conditions. The outcome of the claim for permanent impairment impacted on the success of the other claims for continuing incapacity and psychiatric disorder.

### **Further reading**



For more information about MRCA generally, please see Chapters 13-16 in (2006) 22 *VerBosity* Special Issue: *A practical handbook for representatives at the VRB*, available on the VRB's website:

[www.vrb.gov.au/publications.html#\\_verbosity](http://www.vrb.gov.au/publications.html#_verbosity)

# Federal Court of Australia

## Hunter v Repatriation Commission

Perram J

[2010] FCA 145  
25 February 2010

### ***SoP for Post Traumatic Stress Disorder – whether material before Tribunal supported hypothesis – whether physical confrontation required***

#### **Facts**

##### ***The claim***

Mr Hunter, served in the Royal Australian Navy between 26 May 1958 and 25 May 1979. The matter before the Federal Court concerned his claim for disability pension for Post Traumatic Stress Disorder (PTSD). The Tribunal accepted that Mr Hunter suffered from PTSD but concluded that it was not related to the episodes of his naval service upon which he relied.

##### ***The contended stressors***

The stressors upon which Mr Hunter relied both occurred during 1965 and 1966 when Mr Hunter was serving on board the minesweeper *HMAS Teal* in

waters adjacent to Malaysia, Brunei and Singapore during the confrontation which took place between Indonesia and Malaysia at that time. The first episode related to these circumstances surrounded patrolling at night; the second to damage inflicted upon another vessel, the *HMS Woolaston*, by a sampan which contained a bomb. Mr Hunter hypothesised that his PTSD was caused by one or both of these events.

#### ***Grounds of appeal***

The thrust of Mr Hunter's appeal related to an accrued right to rely on an earlier SoP for PTSD and he nominated the following question of law:

- Did the Tribunal err in its interpretation of the SoP concerning PTSD, No 3 of 1998 as amended by No 54 of 1999, by failing to pose and answer the correct question in dealing with the Applicant's hypothesis that he experienced a severe stressor during his operational service on *HMAS Teal*?

#### **The Court's consideration**

##### ***Significant differences in the SoPs***

Before considering whether the Tribunal had erred in its interpretation of the SoP No 3 of 1998 as amended by No 54 of 1999, Justice Perram made the observation that the SoP was defined in a materially different way to the current SoP which required a category 1A or 1B stressor.

Justice Perram noted that the later SoP required the claimant to have come, in effect, face to face with some species of peril and it could be satisfied if a claimant were “confronted” with a peril. His Honour noted that the Federal Court has held that being “confronted” includes being confronted “in the mind”: *Woodward v Repatriation Commission* (2003) 131 FCR 473 at 495. Consequently, the two SoP’s significantly differed in that physical confrontation was required under one but not the other.

***Tribunal did not consider any of the material dealing with “confrontation”***

In his opinion, Justice Perram considered the Tribunal had overlooked the differences in the SoPs and thus had not turned its mind to the requirements of the earlier SoP. His Honour noted the evidence provided by Mr Hunter in relation to the stressors he relied upon, and considered that this was clearly capable of sustaining a view that Mr Hunter was confronted with a threat to his person in the *Woodward* sense. Further, his Honour considered that the Tribunal erred in law by failing to appreciate the inferences which could be drawn from the material which was before it. Justice Perram said:

[34]...It is quite obvious, I think, that the Tribunal did not consider any of the material dealing with “confrontation” with an actual death because it assumed, erroneously, that the requirements of the earlier SoP were the same as those of the later SoP.

***Determining issues of credit***

Justice Perram concluded by noting that the Tribunal had erred in failing to observe the material before it was capable of supporting a finding that Mr Hunter suffered an extreme stressor. As such, Mr Hunter was entitled to succeed on the appeal. However, his Honour went onto note that he was in no position to assess whether Mr Hunter did, in fact, suffer such a stressor:

[40]...For example, the Tribunal may decline to accept his evidence about the occurrence of the incident at all. This is not a hypothetical possibility, for the Tribunal, in fact, rejected Mr Hunter’s account of another incident involving an Indonesian vessel. To determine matters of that kind it would be necessary to determine issues of credit which I am in no position to do.

**Formal decision**

Mr Hunter’s appeal was allowed and the parties were to bring orders giving effect to Justice Perram’s reasons outlined in the judgment.



**Editorial note**

***Accrued rights to SoPs***

The decision in *Hunter* emphasises that decision-makers at the Tribunal (and the Board) must apply the SoPs currently in force, but if the applicant cannot succeed under those SoPs, the applicant may have an accrued right to have the SoPs applied that were in force at the time of the decision under

review: *Repatriation Commission v Gorton* [2001] FCA 1194.

However, please note that Section 341 of the MRCA expressly takes away any accrued right and requires the current SoP to apply in all instances.

***Significant differences in the SoPs for PTSD***

Justice Perram's reasoning also highlights that the definition of a category 1A stressor is narrower than the definition of "experiencing a severe stressor" in the superseded SoP. While the decision in *Hunter* did not consider issues of diagnosis, it is interesting to note the implication that the narrowing of the definition of a category 1A stressor is at odds with criterion A of DSM-IV, which must be met in order to establish a diagnosis of PTSD. That is, while a person could be diagnosed with PTSD because he or she was "confronted" with an event that involved threat of death or serious injury, that no longer meets the definition of a category 1A stressor in the current SoPs, when considering the issue of causation.

An emerging issue in future cases dealing with the newer SoP may be whether the position that was taken in *Mines* case (i.e. if a decision-maker must be reasonably satisfied that a traumatic event occurred and as such the veteran suffers PTSD - the reasonable hypothesis process of reasoning, and the four steps in *Deledio* hardly need to be considered) will now start to shift.

**Kowalski v Repatriation Commission**

Spender, Emmett & Jacobsen JJ

[2009] FCAFC 19  
5 March 2010

***Refusal to grant disability pension – whether decision affected by bias – whether primary judge perverted course of justice – function of the AAT***

**Facts**

Mr Kowalski served in the Australian Army between April 1972 and October 1973 and rendered "defence service". The matter before the Full Federal Court concerned his claim for disability pension for depressive disorder, anxiety disorder, hypertension and ischaemic heart disease.

Mr Kowalski appealed to the Full Federal Court from the decision of Justice Besanko who had dismissed an appeal from an order made by a Deputy President of the Administrative Appeals Tribunal (the Tribunal) affirming a decision of the Veterans' Review Board rejecting the claim brought by Mr Kowalski.

**Grounds of appeal**

Mr Kowalski's notice of appeal stated 71 grounds against the orders made by the Primary Judge. Their Honours did not

refer to all grounds individually, but took all grounds into account noting they fell into two discrete categories, including:

- in relation to the primary judge's reasons, he had "perverted the course of justice" in reaching a result that was adverse to Mr Kowalski; and
- the primary judge was biased in that he had proceeded to hear the appeal before awaiting the outcome of an application for leave to appeal brought by Mr Kowalski against the refusal of the primary judge to accede to Mr Kowalski's application that he disqualify himself.

### The Court's consideration

#### *First ground of appeal: "perverting the course of justice"*

Their Honours noted that the substance of this ground of appeal was that both the Deputy President and the primary judge were bound to accept Mr Kowalski's claim. Their Honours considered that it is quite clear that the Deputy President was not bound to accept Mr Kowalski's claim. The function of the Tribunal is to conduct a review of the decision of the decision-maker and to determine whether the decision was the correct or preferable one on the material before the Tribunal: *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 24 ALR 577 at 589 per Bowen CJ and Deane J. Nor was the

primary judge bound to accept Mr Kowalski's claims.

#### *Second ground of appeal: "bias"*

In their Honours' opinion, this ground of appeal had no foundation. The primary judge was not bound to await the outcome of the application for leave to appeal. The failure of a judge to disqualify himself or herself may be brought as a ground of appeal from the final orders of that judge. It is not ordinarily to be the subject of a separate application for leave to appeal and the primary judge need not await the fate of any such application.

Further, their Honours noted that Mr Kowalski sought to argue the claim of bias in another way, namely, that the Deputy President was biased because he did not permit Mr Kowalski to ask certain questions of witnesses who gave evidence before the Tribunal. That complaint was also the basis for an assertion of denial of procedural fairness. Their Honours noted the finding of the primary judge at [80]:

...an applicant is not entitled to ask whatever question he or she thinks appropriate; the Deputy President had the power to disallow irrelevant, or otherwise objectionable, questions.

Their Honours concluded that Mr Kowalski's ground of bias (or perversion of the course of justice, which seems to be to the same effect) was misconceived.

### Formal decision

Mr Kowalski's appeal was dismissed with costs.

### Rana v Repatriation Commission

Lander J

[2010] FCA 281  
26 March 2010

### **Whether veteran appellant was a veteran/member of the Defence Force**

#### **Facts**

Mr Rana enlisted in the Australian Army in October 1980. In 1981 he experienced some personal difficulties and for a period he was admitted to hospital and diagnosed with "reactive depression". In January 1982 he was charged for failing to appear at a place of parade and later in March 1982 he was charged and convicted of absenting himself without leave. Following these convictions a senior officer made a request for Mr Rana to be discharged from the Army under regulation 176(1)(n) of the *Australian Military Regulations 1927* (Cth) that "*his retention (in the Army) was not in the interests of Australia or the Army*". In March 1982 approval was given for Mr Rana to be discharged under this regulation.

In 2003, Mr Rana sought the benefits under the *Veterans' Entitlements Act 1986* (VEA), which are payable to members of

the Forces identified in s 69 of VEA. A delegate of the Repatriation Commission (the Commission) had determined, as did the Veterans' Review Board, that the applicant was not a member of the Defence Force as defined in s 69 of the VEA. On appeal to the Administrative Appeals Tribunal (the Tribunal), Deputy President Hack affirmed the decision of the Commission. Mr Rana appealed from the Tribunal's decision to the Federal Court.

#### **The Tribunal's reasoning**

As Mr Rana had not completed 3 years of effective full-time service, he would only be eligible for the benefits he sought under the VEA if he could bring himself within the provision that he had been discharged from the Army "*on the ground of invalidity or physical or mental incapacity to perform duties*": see section 69 of the VEA.

Mr Rana contended that he qualified under s 69 and that his discharge had been on that ground. Specifically, that he was subjected to racial abuse, discrimination and sexual assaults of varying severity during the period of his service. He contended that this resulted in him suffering from a psychiatric condition, which prevented him from adequately performing his duties and led to his discharge from the Army. He contended therefore he came within section 69 of the VEA.

The Commission, on the other hand, contended that whatever condition Mr Rana suffered from at the time of his



discharge was mild and was not such that it rendered him incapable of carrying out his duties, and did not lead to his discharge from the Army. The Commission contended that Mr Rana was discharged for the reasons given; that is, because his retention in the Army was not in the interests of Australia or the Army.

Deputy President Hack approached this issue, firstly by considering whether Mr Rana had a condition at the relevant time which interfered with his capacity to perform his duties. He concluded that Mr Rana was suffering a mental condition, namely personality disorder.

The Deputy President then considered whether Mr Rana had the capacity to perform his duties during his Army service. He concluded that the contemporary medical evidence did not draw any connection between the applicant's difficulties with his service life which ultimately led to his discharge and any psychiatric condition. He also found that there was no evidence of any connection in the reports of soldiers and officers who served with Mr Rana at the time.

Mr Rana's application before the Tribunal ultimately failed as Deputy President Hack did not accept that his mental state gave rise to the behaviour which led to his poor work performance and resultant discharge.

### Grounds of appeal

Justice Lander noted the grounds of appeal set out in Mr Rana's amended notice of appeal and considered that they were not questions of law at all. His Honour commented:

[90] The applicant is not entitled to argue under the guise of questions of law that the Deputy President arrived at the wrong factual conclusion.

Insofar as the appeal did raise a question of law, Justice Lander summarized this as whether the Tribunal should have proceeded the way it did. Specifically, was it correct to decide the preliminary issue of whether the applicant was a veteran or member, before considering whether he was entitled to any benefits under the VEA.

### The Court's consideration

#### *Approach to section 69*

Justice Lander considered that Deputy President Hack's approach to the issues arising from Mr Rana's application was logical, sensible and practical:

[72] If the applicant was not a member of the Defence Force at the relevant time, there was no point conducting the s 70 inquiry whether he was incapacitated from a defence caused injury or defence caused disease. The applicant suffered no prejudice by the Deputy President proceeding in the way that he did.

### *The correct and preferable decision*

Justice Lander noted that the other grounds of appeal raised by Mr Rana went to “the merits” and the failure by the Deputy President to make findings consistent with the evidence adduced by Mr Rana. His Honour commented that these were not matters which could be examined by the Federal Court:

[89] The applicant has wrongly assumed that because he adduced evidence in support of the proceeding the AAT was bound to accept it. The AAT was not bound to accept the applicant's evidence or contentions. It was bound to conduct a review of the decision and to determine whether on the evidence before him the decision under review was the correct or preferable decision: *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 24 ALR 577.

### **Formal decision**

Mr Rana's appeal was dismissed and he was ordered to pay the Commission's costs.



### **Editorial Note**

#### *Member of the forces*

A member of the forces is a person who served in the defence force for a continuous period that commenced after 7 December 1972 and has the type of service required for the purposes of section 69 of the VEA.

Where a person has not completed 3 years of effective full-time service, they may still be considered as a member of

the forces if his or her service ceases for reasons of medical discharge, or death.

### *Medical discharge exemptions*

As mentioned in the Q&A section above, the leading case on the issue of medical discharge exemptions is *Whiteman v Secretary Department of Veterans Affairs* [1996] FCA 845. In *Whiteman*, the Federal Court held that a decision-maker has power to go beyond the military's stated reason or administratively noted ground for discharge to determine the actual ground of discharge. Therefore, if it can be shown that the real reason why a person was discharged was a medical condition, it does not matter that the formal reason was something else.

In *Rana*, the Court made passing reference to *Whiteman* in relation to Mr Rana's particular circumstances. Prior to his appeal to the Court in this matter, Mr Rana had sought to have the Chief of Army inform the Defence Force Retirement and Death Benefits Authority, that at the time he was retired, grounds existed on which he could have been retired because of invalidity or physical or mental incapacity to perform his duties. If the Chief of Army did so, Mr Rana may have been eligible for DFRDB benefits. A delegate of the Chief of Army determined that at the time of Mr Rana's discharge, grounds did not exist whereby he could have been discharged because of a physical or mental incapacity to perform his duties. Mr Rana appealed this decision to the Federal Court and Justice Mansfield held that there was no reviewable error and dismissed the application.

Returning to the current matter, Justice Lander made some comment that *Whiteman* should be distinguishable in Mr Rana's circumstances. The point of distinction was that as Mr Rana had already unsuccessfully challenged the decision of the Chief of Army regarding his grounds for discharge, it would be a curious result if he could get a conflicting decision in a separate review application.

**Border v Repatriation  
Commission**

Reeves J

[2010] FCA 264  
16 September 2009

***Whether there is a real question of law, and one that is sufficiently strong to warrant a full hearing***

***SoP for Post Traumatic Stress Disorder (PTSD) – application of the Deledio steps***

**Facts**

Mr Border served in the Australian Army from 20 March 1967 to 20 March 1987 with “operational service” in Vietnam from 13 April to 28 October 1971, and “defence service” from 7 December 1972 until 20 March 1987. Mr Border’s claim was that his PTSD was due to certain events during his operational service in Vietnam.

Mr Border relied on four events which he contended individually or together caused his PTSD. The events were: being bitten by a scorpion; being told that he risked being shot when he turned on a torch; humiliation by a Sergeant shouting that he was mishandling rockets; and being absent overnight when his unit moved from Nui Dat to Vung Tau.

**The Tribunal’s reasoning**

The issue at the Tribunal was whether a reasonable hypothesis was raised satisfying factor 6(a) in SoP No 5 of 2008 for PTSD. The SoP provides:

6. The factor that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting **posttraumatic stress disorder** or **death from posttraumatic stress disorder** with the circumstances of a person’s relevant service is:

(a) experiencing a category 1A stressor before the clinical onset of posttraumatic stress disorder; or ...

9. For the purposes of this Statement of Principles:

**“a category 1A stressor”** means one or more of the following severe traumatic events:

- (a) experiencing a life-threatening event;
- (b) being subject to a serious physical attack or assault including rape and sexual molestation; or
- (c) being threatened with a weapon, being held captive, being kidnapped, or being tortured;

Tribunal Senior Member K S Levy RFD noted that the meaning of “life threatening event” is not defined in SoP No 5 of 2008, and he referred to the examples of a category 1A stressor to assess whether the hypothesis in relation to each event was of the magnitude necessary for it to satisfy SoP factor.

The Senior Member noted the 4 step process enunciated by the Full Federal Court in *Repatriation Commission v Deledio* [1998] FCA 391. Step 1: He identified the four hypotheses said to relate the applicant’s service with his PTSD. Step 2: He identified the relevant SoP. Step 3: In order to decide if the material “points to” a reasonable hypothesis he discussed each of the alleged stressful events, concluding that none of them could be assessed as “life threatening”. He concluded that the incidents were a “mere possibility” and “not tenable”. Step 3 was, therefore, not satisfied.

### Grounds of appeal

Mr Border filed an appeal against the Tribunal’s decision in the Federal Court. In response the Commission filed a notice of motion to strike out the appeal, on the basis that it did not identify a question of law.

The issue to be determined on both notices of motion was whether Mr Border had identified a proper question of law arising out of the Tribunal’s decision.

### The Court’s consideration

#### *The strike out application*

Regarding the strike out application, Justice Reeves considered relevant precedents and concluded that his task was to identify if there was a real question of law taking a broad view of the grounds relied on, the orders sought, and the circumstances of the particular case. In relation to the prospect of success, his task was to determine whether the question of law was strong enough to warrant a hearing. Both questions were answered in the affirmative.

#### *The Deledio steps*

In relation to Deledio step 3 Justice Reeves noted the Tribunal’s terminology where it said: “*the evidence must point to the criteria in the SoP*” and the level of detail in which it considered each event. Also noted was the acknowledgement that:

There is a hypothesis raised between the facts presented by the applicant and his military service.

Reeves J concluded:

I consider there is a real question about whether the Tribunal did, in fact, engage in a fact finding exercise when it was assessing whether Mr Border’s hypothesis was reasonably consistent with the template in the SoP, contrary to the Full Court’s decision in Deledio.

### Formal decision

The respondent's notice of motion to strike out the appeal was dismissed, and the appellant was given leave to amend his notice of appeal.



### Editorial note

When the case is heard the Court will be considering what is meant by "*consistent with the template in the SoP*"

The Court's decision in *Border v Repatriation Commission (No 2)* is the last summary contained in this section.

### Repatriation Commission v Glanville

Cowdroy J

[2010] FCA 405  
30 April 2010

***Use of assumptions. Status of expert evidence as 'material'. Application of the 'not fanciful' test. Need to consider evidence and submissions on fundamental questions.***

### Facts

Mr Glanville served in the Australian Army with "operational service" during WW2. He died on 30 January 2004 from prostate cancer. Mrs Glanville's claim for war widow's pension was refused by the Repatriation Commission (Commission)

and this decision was affirmed by the Veterans' Review Board. The Administrative Appeals Tribunal (Tribunal) set aside the decision and granted the claim. The Commission appealed that decision to the Federal Court.

### The Tribunal's reasoning

Mrs Glanville's contention at the Tribunal was that her husband's death was due to ingestion of animal fat. The relevant SoP factor is:

(c) increasing animal fat consumption by at least 40% and to at least 50gm/day, and maintaining these levels for at least five years within the twenty-five years before the clinical onset of malignant neoplasm of the prostate;

The Tribunal heard evidence from two dieticians, Dr English for the Commission, and Dr Volker for the applicant. Both based their reports on a survey regarding Mr Glanville's post service diet, provided by Mrs Glanville.

Dr Volker gave evidence that Mr Glanville's army rations would have been bland and boring, and that because of the frightening conditions during his service he would have become determined to eat only flavoursome food containing fat after service.

Dr English gave evidence that if the survey completed by Mrs Glanville was accurate, Mr Glanville would have had an impossible weight gain.

The Tribunal accepted the material put forward by Dr Volker as ‘not fanciful’ and that this pointed to a reasonable hypothesis which met the requirements of the SoP factor. The Tribunal discounted Dr English’s report on the basis that a disagreement between two experts is not sufficient to disprove a hypothesis.

### Grounds of appeal

The Commission submitted that there were 4 errors of law:

1. Use of assumptions made by an expert witness to establish a reasonable hypothesis;
2. Concluding that a hypothesis was reasonable because there was material that was not fanciful;
3. Failing to consider a serious submission; and
4. Failing to consider evidence given by an expert witness.

### The Court’s consideration

#### *Ground 1. Use of Assumptions*

Justice Cowdroy considered firstly whether Dr Volker’s testimony which included a number of assumptions, constituted ‘material’ for the purpose of supporting a reasonable hypothesis; and whether the hypothesis raised by such testimony can be a reasonable hypothesis.

Following the reasoning in *Deledio*, the Court found that there was no material before the Tribunal regarding the nature of the food the veteran actually consumed during service; there was no evidence regarding his liking for such food; and no evidence that he disliked that food because of his war time experiences and diet. The only evidence of his food preference was that he liked his mother’s cooking and the fact that he struggled to keep to a diet in his advancing years because he liked the food that he was used to eating.

The Court considered a range of authorities, and formed the opinion that Dr Volker’s testimony provided ‘material’ before the Tribunal that pointed to the assumption relied on in the respondent’s hypothesis. Whether the hypothesis was reasonable is considered in the second ground of appeal.

#### *Ground 2. Whether the Hypothesis is Reasonable*

The Commission submitted that the Tribunal had found a reasonable hypothesis based solely on the assumptions made by Dr Volker. The Tribunal assessed the material before it as ‘not fanciful’ whereas that phrase should have been used in evaluating the reasonable hypothesis.

The Court found that the term ‘not fanciful’ has been applied in consideration of whether a reasonable hypothesis exists, and not (as the Tribunal had done in this case) as a

standard for evaluating the material before the decision-maker.

The Court found that the Tribunal had failed to address the question whether the hypothesis was reasonable – an issue fundamental to its task. The Tribunal had misdirected itself in failing to apply the required test.

#### ***Grounds 3 & 4. Failure to Consider Submissions and Evidence***

The final two grounds of appeal were that the Tribunal failed to deal with the submission that there was no material before it to satisfy the SoP; and failed to consider evidence of an expert witness (Dr English).

The Commission submitted that it drew the Tribunal's attention to Dr English's opinion that the information supplied by Mrs Glanville concerning the applicant's post service diet was invalid. Based on Dr Volker's figures the veteran would have experienced an impossible weight gain. However, the Tribunal made no findings concerning Dr English's evidence.

The Commission submitted that Dr English's opinion about the validity of the dietary survey went to the fundamental issue (i.e. the quantity of fat consumed), and it was necessary for the Tribunal to make a finding on the issue of whether it accepted or rejected such evidence. The Commission also submitted that the Tribunal failed to consider its submission relating to the significance of Dr English's evidence.

Counsel for Mr Glanville submitted that the Tribunal was correct in its reasoning that a disagreement between two experts is not sufficient to disprove a hypothesis beyond reasonable doubt.

The Court held that the Tribunal must give proper regard to all material on the fundamental question for determination. In this instance the Tribunal was required to address the information raised by Dr English's opinion.

The Court also upheld the submission that the Tribunal was required to consider the Commission's submissions concerning the evidence of Dr English. The survey was the only evidence that Mr Glanville increased his fat consumption to the level required by the SoP, and evidence which questions the validity of that evidence requires proper consideration. The Tribunal fell into jurisdictional error by failing to address and consider the Commission's submission before it.

#### **Formal decision**

Justice Cowdroy allowed the appeal, set aside the Tribunal's decision, and remitted the matter to be heard by the Tribunal, differently constituted.



#### **Editorial note**

This case is one where the Tribunal referred to the case of *Byrnes v Repatriation Commission* [1993] HCA 51 regarding acceptance of assumptions, and

*Repatriation Commission v O'Brien* [1985] HCA 10 regarding the requirements of a reasonable hypothesis ('not fanciful'). Although the Tribunal stated that it was following *Deledio* it ignored the steps which the Full Federal Court spelt out in that case (having inappropriately discounted Dr English's evidence).

Justice Cowdroy's decision emphasises that any case involving the reasonable hypothesis standard must properly satisfy the *Deledio* formulation.

**James v Military Rehabilitation and Compensation Commission**

Keane CJ, Middleton And Gordon JJ

[2010] FCAFC 95  
28 July 2010

***MRCA – GARP M – whether offsetting method is prescribed by chapter 25 – within scope of delegated legislation***

**Facts**

The Military Rehabilitation and Compensation Commission (Commission) decided that Lieutenant James was entitled to compensation for permanent impairment in respect of a right knee injury. Lieutenant James had two previous injuries accepted under the SRCA, and the Commission offset the compensation already paid under the SRCA. The offsetting method applied by the Commission is prescribed by Ch 25 of

GARP M. Lt James appealed the decision of the Commission to the Administrative Appeals Tribunal who affirmed the decision that Lt James was entitled to compensation for permanent impairment as a result of his right knee injury amounting to \$0.95 per week or a lump sum of \$1,209.45. Lt James appealed the Tribunal's decision to the Federal Court.

**Lt James' position**

Lt James argued that the Tribunal had made an error of law in misconstruing the provisions of the MRCA. Specifically, the offsetting method provided by Ch 25 of GARP M was in excess of the power conferred on the Commission by the MRCA and the Transitional Act.

In addition, there was a question raised on the appeal as to whether the Tribunal had erred in mistaking the facts agreed between the parties concerning the extent of the impairment suffered by Lt James as a result of the injury to his right knee.

The parties agreed that the Tribunal had erred in that regard, and that, because of the error, the matter must, in any event, be remitted to the Commission for further consideration. It was also common ground that a reconsideration by the Commission would only be of practical benefit to Lt James if Ch 25 of GARP M was held to be invalid.



### The Court's consideration

#### *Is chapter 25 of GARP M authorised by the MRCA and the Transitional Act?*

The Full Court considered that while the MRCA does not reference an injury or injuries suffered prior to the operation of that Act (as such injuries are compensable under the SRCA or VEA), section 13(4) of the Transitional Act expressly addresses the relationship between the service injury which constitutes the 'compensable condition' for the purposes of section 68 of the MRCA and earlier injuries which were compensable under the VEA or SRCA.

The Full Court said:

It is difficult to see that there is anything in Ch 25 of the GARP M regime which is not expressly authorised by s 13: the terms of Ch 25 mirror the provisions of s 13(4), and s 13(4) expressly authorises the inclusion in the guide produced under s 67 of the MRCA of a method for offsetting compensation paid under the VEA or SRCA for previous injuries...a claimant's entitlement to compensation is not determined solely by ss 67 to 69 [of the MRCA] in that the operation of these provisions in circumstances such as the present is affected by s 13 of the Transitional Act.

...

Ch 25 of GARP M is expressly authorised by the text of s 13(4) of the Transitional Act. There is no way of reading that text down so as to rob Ch 25 of GARP M of the support afforded by that text...

#### *Is chapter 25 reasonably proportionate to the power given to the Commission?*

The Court considered the "notion of reasonable proportionality" test of the validity of delegated legislation in the Australian context, noting the High Court's decision in *South Australia v Tanner* [1989] HCA 3; (1989) 166 CLR 161:

... the test of validity is whether the regulation is capable of being considered to be reasonably proportionate to the end to be achieved ... It is not enough that the court itself thinks the regulation inexpedient or misguided. It must be so lacking in reasonable proportionality as not to be a real exercise of the power.

In respect of chapter 25, the Full Court considered that there was certainly no "limit" set by the legislation, against which the operation of chapter 25 of GARP M could be measured. Further, the Full Court considered that there was no doubt that the introduction of the provisions of Ch 25 of GARP M was not beyond the real exercise of power conferred by the Transitional Act, specifically section 13(4) which contemplates that entitlements under the SRCA may be offset against MRCA entitlements.

#### *Is section 13 of the Transitional Act concerned only with SRDP's?*

On Lt James' behalf it was argued that the Explanatory Memorandum reveals section 13 of the Transitional Act is only concerned with special rate disability pensions (SRDPs). Justice Tracey considered that there was nothing in the text of section 13 of the Transitional Act

that suggests its operation is confined to the determination of SRDP entitlements.

will also not be entitled to bring an action within the scope of s 389(1).

#### *Denial of common law damages*

Lt James noted that section 388 of the MRCA bars claims against the Commonwealth for injuries and diseases suffered by service members, and that section 389(1) allows a person to seek common law damages provided that "compensation is payable under section 68, 71 or 75 in respect of a service injury or disease of the person but the compensation has not yet been paid". It was argued that in some circumstances, such as Lt James, where the net compensation in respect of an injury will be zero, no compensation will be payable under s 68 and the exception to extinguishment under s 389(1) will not apply. Lt James submitted that this was a "significant reduction in the rights of injured persons".

The Court considered that the purpose of section 388 of the MRCA is to extinguish common law rights and to replace them with rights under the MRCA. Specifically, section 13(4) of the Transitional Act contemplates offsetting SRCA entitlements against MRCA entitlements. Where this process results in no compensation being payable, the applicant is in no worse position than some other injured persons to whom no compensation is payable, such as an applicant who does not meet the minimum number of "impairment points" required by s 69. Such a person

#### *The right to compensation: creation or quantification?*

Finally, it was argued on behalf of Lt James that the principle from the decisions of the House of Lords in *Lysons v Andrew Knowles & Sons Ltd* [1901] AC 79 esp. at 85-86, 92 and of the High Court in *Nash v Sunshine Porcelain Potteries Ltd* [1959] HCA 7; (1959) 101 CLR 353 esp. at 361, that as a matter of statutory construction, a provision of a statute which creates a right to compensation is not to be read down because of difficulty in accommodating provisions concerned with the quantification of compensation to the circumstances of the case.

The Court concluded that this principle of construction did not assist Lt James. The effect of section 13(4) of the Transitional Act was not in doubt.

#### **Formal decision**

The Court set aside the Tribunal's decision and remitted the matter to the Commission. The Court considered the issue of costs and held that because it is clear that Lt James cannot hope to enjoy any substantial success on the recalculation, which must be carried out by the Commission, there should be no orders as to the costs of the proceedings before the Tribunal.

Editorial note



In *James*, the Court held that the rules for assessing compensation for permanent impairment if a person has conditions accepted under the VEA or SRCA as well as under the MRCA in section 13 of the CTPA and Chapter 25 of GARP M were valid.

The decision emphasises that the method in Chapter 25 seeks to ensure that compensation is paid for impairment for which the Commonwealth is liable but has not previously compensated the person for. If the method in chapter 25 was not used to assess compensation for permanent impairment, it could result in dual entitlements.

Repatriation Commission v Malady

Tracey J  
[2010] FCA 798  
30 July 2010

***Causal connection between depressive disorder, alcohol abuse and drug abuse and operational service – no reasonable hypothesis connecting borderline personality disorder to operational service***

Facts

Mr Malady enlisted in the Australian Army in 1998 and was posted to East

Timor in 1999. Five days after arriving in East Timor, Mr Malady was evacuated to Darwin suffering from dysentery. He did not return to East Timor and in 2000 he was discharged from the Army on medical grounds. In the period between his return to Australia and his discharge, Mr Malady was treated successfully for dysentery and also emotional disorders which were diagnosed as post-traumatic stress disorder (PTSD) and major depression.

Mr Malady applied for disability pension for “major depression”. He claimed that, during his period of service in East Timor, he experienced the following events:

- colleagues accidentally discharging rounds from their firearms;
- his observation of a person who appeared to be carrying a rifle;
- coming across a substance appearing to be blood and smelling like blood; and
- guns, held by Indonesian soldiers who were travelling in a truck, being pointed in his general direction.

His claim was treated by a delegate of the Commission as a claim for “major depression, alcohol abuse and drug abuse” and it was refused. The Board affirmed the Commission’s decision and Mr Malady applied to the Tribunal for review. The Tribunal set aside the Commission’s decision and substituted its own decision that Mr Malady’s major depressive disorder, alcohol dependence or abuse and drug dependence or abuse

were war-caused. The Commission appealed and the Federal Magistrates Court allowed the appeal and set aside the Tribunal's decision remitting it back. The Tribunal, differently constituted, decided that Mr Malady suffered from major depressive disorder, alcohol abuse, and drug abuse, and that those conditions were war-caused. The Commission then lodged its appeal to the Federal Court.

### **The Commission's position**

The Commission contended that the principal error of law made by the Tribunal was that it had relied upon borderline personality disorder (BPD), which was not war-caused, to link Mr Malady's alcohol and drug abuse with operational service.

### **Mr Malady's position**

Mr Malady accepted that the Tribunal erred in this way, and that if a question of law had properly been raised, the Court should set aside the Tribunal's decision and remit the matter.

### **Questions of law raised on appeal**

Justice Tracey noted that the central question raised by the appeal was whether the Tribunal could rely on a condition, which it had found not to be war-caused, to connect Mr Malady's depressive disorder, alcohol and drug abuse to his war service. More

specifically, the issue was whether the Tribunal could rely on a diagnosis of BPD to connect his major depressive disorder, alcohol abuse and drug abuse to his service.

### **The Court's consideration**

Justice Tracey noted that it was not in dispute that, in determining that there was a connection between Mr Malady's alcohol and drug abuse and his operational service, the Tribunal relied on his BPD as a relevant factor. His Honour noted the chain of causation as being: alcohol and drug abuse - psychiatric disorder (BPD) - operational service.

In order to uphold the above hypothesis, Justice Tracey considered that it was necessary that a causal link be established between Mr Malady's BPD and his operational service. There was, as the Tribunal itself held, no causal nexus between Mr Malady's operational service and the BPD from which he suffered. His Honour considered that there was no SoP in force that upheld the hypothesis connecting each of Mr Malady's claimed conditions and his operational service.

His Honour also went on to note that in dealing with Mr Malady's claim, the Tribunal fell into error when it got to the final stage of *Deledio*. Having found that Mr Malady suffered from a "recurrent major depressive disorder", the Tribunal considered the "events in East Timor" (noted above) and said that they were a cause of his developing depression. Justice Tracey noted that these "events"

could not be factors linking Mr Malady's depressive disorder to his operational service because the Tribunal had earlier found that he had not experienced any severe traumatic stressor in East Timor. In Justice Tracey's opinion, the Tribunal was bound to find that Mr Malady's psychiatric condition was not related to his operational service in East Timor in any one of the ways identified in s 196B(14) of the *Veterans' Entitlements Act* 1986.

are those set out in the relevant SoPs. The factors must be related to the service in one or more of the ways listed in s 196B (14) of the Act.

### Hogno v Repatriation Commission

Flick J

[2010] FCA 1044

24 September 2010

#### Formal decision

Justice Tracey allowed the Commission's appeal and set aside the Tribunal's decision. Interestingly, his Honour went onto order that it was not appropriate for the matter to be remitted back to the Tribunal and that the decisions of the Board and the Commission should be affirmed.

***Alcohol dependence and entitlement to special rate of pension - substantial cause of incapacity***

#### Facts

Mr Hogno served in the Australian Army from May 1958 until May 1966. He served at Butterworth in Malaya from 14 January to 20 October 1965. The matter before the Federal Court concerned his claim for disability pension lodged on 25 June 2004 contending that, amongst other things, emotional disorder and substance abuse/alcohol were related to his eligible service.

The Tribunal accepted that Mr Hogno suffered from anxiety disorder which was related to episodes of his military service in Malaya, rejected his contention that his alcohol dependence (in remission) was related to his eligible



#### Editorial Note

##### *Chain of SoPs*

The decision in *Malady* emphasises that if there is an SoP in force for a claimed condition, as well as an SoP for a condition that is said to have lead to the claimed condition, then all of the relevant SoPs must be met for a claim to succeed: *McKenna v Repatriation Commission* [1999] FCA 323.

In his decision, Justice Tracey also made reference to the Full Court's decision in *Repatriation Commission v Money* [2009] FCAFC 11, that the factors which must be present to connect a condition to service

service; and continued his pension at 100% of the General Rate.

applying the steps in *Deledio*. The Court drew attention to the fact that:

### Grounds of appeal

The thrust of the veteran's appeal was:

1. Whether the Tribunal had applied the provisions of s 120(1) correctly; and
2. Whether the Tribunal must consider section 24(2)(b) in all cases when determining whether a claimant is entitled to payment of disability pension under the Act at the Special Rate provided by section 24 of the Act.

- The Tribunal had at the outset set out the required standard of proof, "reasonable hypothesis". It had referred to sections 120(1) and (3).
- It had applied the relevant Statements of Principles.
- It found that the material before it did raise a reasonable hypothesis that the alcohol dependence was related to his eligible service.
- It then went on to identify the material which it could come to a determination that although there was reasonable hypothesis that his alcohol dependence was related to his eligible service but on the facts, it could not be satisfied that Mr Hogno's alcohol dependence is war-caused.

### The Court's consideration

The Applicant submitted that the Tribunal using phrases such as "we are satisfied"; "the weight of the evidence is"; failed to properly apply the "reasonable doubt test". By this it meant that the Tribunal had not applied sections 120(1) and (3) properly. The Applicant also submitted that an alcohol questionnaire completed by him in 2001 should not have been relied on in determining whether or not his alcohol dependence was related to his eligible service.

The Court rejected the submission relating to the alcohol questionnaire completed by the Applicant in 2001. It said that the questionnaire "*was evidence as to the reasons advanced by Mr Hogno for a change in his alcohol consumption...This together with...other evidence (provided by Mr Hogno) led it to conclude that the alcohol dependence was not war-caused.*"

The Court rejected the submission relating to the correct application of section 120(1) of the Act. It said that the Tribunal had properly applied the provisions of section 120 of the Act by

In relation to Special Rate, the Tribunal found that the veteran did not cease to engage in remunerative employment because of his anxiety disorder alone. That a number of business possibilities

did not eventuate was attributable to a range of factors other than his anxiety disorder.

The veteran submitted that the Tribunal had not properly considered and applied section 24 of the Act. In that the Tribunal did not address the issues raised by section 24(2) (b) – whether or not the substantial cause of his inability to obtain remunerative employment was due to his accepted disabilities alone. The Tribunal findings on the issue raised by 24(2)(a) were made out in para 45 of the reasons for judgment:

45. The principal conclusions of the Tribunal are relevantly as follows:

[64] Section 24 (2) relevantly provides that, for the purposes of s 24(1)(c), a veteran who is incapacitated from war-caused injury or war-caused disease, or both, 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 that incapacity if the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war-caused injury or war-caused disease, or both.

[65] Mr Hogno had been engaged for many years in what might broadly be described as administrative work. He also had accountancy skills which he hoped to use. We accept that he found accounts payable work stressful and that there were other stressors at home and driving to work but they are the kind of stresses that lead many people to seek a change of lifestyle. The evidence is that he

intended to keep working and to use those skills, but in a less stressful occupation.

[66] We find that Mr Hogno did not cease to engage in remunerative employment because of his anxiety disorder alone. That a number of business possibilities did not eventuate was attributable to a range of factors other than his anxiety disorder.

[67] We note, for completeness, that even if we are wrong about Mr Hogno's alcohol dependence and it is a war-caused condition, the evidence is that he had all but stopped drinking by the time he ceased employment. There is no evidence to suggest that alcohol played any part in the reason he ceased employment or has not worked since.

The Court observed at para 46:

It may be accepted that the reasons and findings provided by the Tribunal are less than fulsome. But such reasons and findings as are provided by the Tribunal must necessarily be considered by reference to the conclusions previously reached and in the factual context presented to the Tribunal and the submissions in fact advanced for resolution.

The Commission submitted that for the purposes of s 24(2)(b) the evidence fell far short of establishing that Mr Hogno was “genuinely seeking to engage in remunerative work” and there was no evidence to show that “incapacity was the substantial cause of his inability to obtain remunerative work in which to engage.”

The Court found that it was unnecessary to make findings on this submission, even though it harboured some doubt as to it was totally correct.

which was not advanced and where any such submission would seem to be not open to be advanced on the evidence available.

The Court said at para 51:

Care must be taken by this Court when entertaining an appeal from the Tribunal to not itself review the evidence available to the Tribunal and to not itself consider whether findings of fact were open to the Tribunal to be made....Where a factual issue has not been fully explored before the Tribunal, care must be exercised before this Court invokes the power conferred by s 44(7) to make additional findings of fact...."

The Court said at para 53:

...reservation is nevertheless expressed as to whether the Respondent was correct in submitting that the evidence fell far short of Mr Hogno genuinely seeking employment...

The Court went on to say that it held less reservation about the *"submission that there was no evidence to show that it was Mr Hogno's incapacity that was the 'substantial cause' of his inability to obtain remunerative work for the purposes of s 24(2)(b)."*

The Court then went on to make the point at para 54 that:

...no submission (or no substantial submission), it would appear, was directed to whether any incapacity was 'the substantial cause' of his inability to engage in remunerative work. It is difficult to conclude that any question of law for the purposes of s 44(1) of the Administrative Appeals Tribunal Act 1975 (Cth) arises where the Tribunal does not resolve a submission

### Formal decision

1. The Amended notice of appeal as filed on 13 July 2010 is dismissed.
2. The Applicant is to pay the costs of the Respondent.



### Editorial note

This judgment of the Federal Court re-emphasises the primacy of determining entitlement issues by applying the process instituted in the well known *Deledio* judgment. It also emphasises that decision-makers are not limited to referring to material raised only after the claim or application has been lodged with the Commission. Decision-makers can refer to relevant material raised prior to the claim being lodged. In this case the relevant material was an alcohol questionnaire and was used in order to ascertain the weight of the applicant's contentions on alcohol for the purposes of the present claim.



**Knight v Repatriation  
Commission**

Katzmann J

[2010] FCA 1134  
22 October 2010

***Claim for war widow's pension - ischaemic heart disease - veteran exposed to an atmosphere with a visible tobacco smoke haze in an enclosed space for at least 1000 hours - whether clinical onset of IHD must occur within 5 years of the end of service***

**Facts**

Mr Knight served in the Royal Australian Navy from 1964 to 1974. He died at the age of 51 after a myocardial infarction. Mrs Knight applied for a war widow's pension, on the ground that passive exposure to smoke in enclosed spaces onboard ships during her husband's naval service materially contributed to him contracting ischaemic heart disease (IHD), which in turn caused his death. The claim was refused and after the Administrative Appeals Tribunal (Tribunal) affirmed the decision under review Mrs Knight appealed to the Federal Court.

**The Tribunal's decision**

At the Tribunal a medical opinion submitted on the applicant's behalf pointed to the clinical onset of IHD in

1996, two years before Mr Knight's death but more than two decades after he had left the Navy. However, it was argued that Mr Knight continued to be exposed to a visible tobacco smoke haze in an enclosed space after his operational service ceased, first during his further period of defence service with the Navy, then as an employee in the Department of Defence and his later work as a bricklayer. Mrs Knight contended the relevant factor in the applicable Statement of Principles (SoP) was satisfied if there was material to point to the conclusion that her husband developed IHD within five years of his last exposure to the required atmosphere.

The Tribunal took the view that the SoP factor required Mr Knight's IHD to develop within five years of the last exposure during operational service. Alternatively, even if exposure to visible tobacco smoke haze on service contributed to Mr Knight's IHD, the Tribunal expressed the view that the contribution had to be "material" and the Tribunal indicated there was no evidence before it that Mr Knight's exposure during his operational and defence service made a material contribution to his IHD, which was first diagnosed in 1996.

**Questions of law**

Three questions of law were raised by the applicant:

1. Whether the Tribunal is permitted to make factual findings on the material put before it when it is considering

- whether a reasonable hypothesis is raised and, if so, what standard of proof applies;
2. Whether the Tribunal was wrong to interpret the relevant SoP factor to require that the clinical onset of IHD occur within five years of service-related exposure;
  3. Whether the Tribunal was wrong to find that there was no evidence that Mr Knight's service made a material contribution to his IHD.

### The Court's consideration

The short answer to the first question was "no". Both parties believed the Tribunal did not move beyond the third step of *Deledio*, and it is only at the fourth step that fact-finding is to occur. Her Honour accepted one of the applicant's submissions that the Tribunal had applied the wrong test, asking itself whether Mr Knight's service materially contributed to his IHD, instead of whether the relevant SoP factor was contributed to in a material degree by his service. The Tribunal's misstatement of the statutory test meant the Tribunal had erred in law.

In relation to the second question of law, the applicant contended that it was unnecessary that IHD be contracted within five years of operational service in the required atmosphere. The respondent maintained that the Tribunal's interpretation was correct that the last exposure to the required atmosphere had to have occurred during

service. In Justice Katzmann's view the Tribunal misconstrued the SoP. The SoP sets out factors that *can* be connected to service, and whether or not a factor *is* connected with the relevant service is answered by applying s 196B(14) of the Act. Her Honour also considered the Tribunal's reliance on *Repatriation Commission v Newson* [2008] FCA 401 to support its conclusion that the word "exposure" in the relevant SoP factor was not a reference to "generic exposure" but to "exposure during a period of relevant service" was misconceived as that case was distinguishable. Further, Justice Katzmann did not agree with the Tribunal's decision to distinguish *Kattenberg* from the present case. The Tribunal's failure to ask itself the right question in relation to the SoP factor amounted to an error of law.

Her Honour considered it was not necessary to answer the third question of law, but pointed out it wrongly assumed that the relevant causal connection was between the disease and the service - when it is between the factor and the service.

### Formal decision

Justice Katzmann allowed the appeal and the matter was remitted to the Tribunal to be determined according to law.



### Editorial note

In *Knight* two errors of law were made by the Tribunal. Firstly, the Tribunal misstated the statutory test,

asking itself whether Mr Knight's service materially contributed to his IHD, instead of whether the relevant SoP factor was contributed to in a material degree by his service. Secondly, the Tribunal wrongly interpreted the relevant SoP factor to require that the clinical onset of IHD occur within five years of service-related exposure, rather than within five years of Mr Knight's last exposure to the required atmosphere.

It was not in dispute that Mr Knight's death was caused by IHD, or that during his naval service he was exposed to a visible tobacco smoke haze in an enclosed space for at least 1000 hours. On remittal, it will be interesting to see what the Tribunal decides about whether his service made a material contribution to the SoP requirements.

**McKerlie v Repatriation  
Commission**

Besanko J

[2010] FCA 1127  
19 October 2010

***Claim for PTSD – standard of proof to be applied in deciding whether the applicant has PTSD – whether the Tribunal was obliged to consider whether the symptoms claimed by the applicant existed and could amount to some disease other than PTSD***

**Facts**

The applicant served in the Royal Australian Navy and rendered operational service, during two periods in 1971 in South Vietnamese waters. He lodged a claim for post-traumatic stress disorder-alcohol dependency, ischaemic heart disease and hypertension. A delegate of the Repatriation Commission (the Commission) had determined, as did the Veterans' Review Board (VRB) that these conditions were not war-caused. Mr McKerlie appealed the decision to the Administrative Appeals Tribunal (the Tribunal). The Tribunal affirmed the Commission's decision and Mr McKerlie appealed to the Federal Court.

**The Tribunal's reasoning**

The discrete issue before the VRB and the Tribunal concerned whether HMAS Swan ("Swan") anchored in Vung Tau Harbour on 8 December 1971. The Tribunal accepted that the issue was critical as the anchoring was "intricately involved" in the asserted stressor, which founded the claim for acceptance of a PTSD.

In relation to the incident Mr McKerlie contended that, on the relevant day, the Swan had dropped anchor and he was alerted to bubbles emanating from around the anchor line. He had been the first diver to enter the water alongside the anchor chain to investigate the source of the bubbles. It was asserted that when he was approximately three feet under water, he felt a force which he momentarily considered may have been an attack from an enemy diver. He then

concluded that the force had come from above and was the force of another of the Swan's divers falling on top of him.

The Tribunal heard evidence from a number of witnesses. It accepted the evidence that the Swan did not anchor in Vung Tau Harbour on 8 December 1971. Consequently, the Tribunal found that it was not satisfied that the applicant suffered from PTSD. The diagnostic criteria recorded in DSM IV clearly required the experience of a severe stressor and there was no other stressor asserted, apart from the Swan incident, before the Tribunal.

### Grounds of appeal

Mr McKerlie put forward the following grounds of appeal:

- The Tribunal applied the wrong standard of proof in determining whether HMAS Swan dropped its anchor in Vung Tau Harbour. The applicant contended that the issue went to whether the PTSD was war caused, and therefore the Tribunal should have applied the "reasonable hypothesis" test and not the "reasonable satisfaction" test as was applied by the Tribunal;
- The Tribunal also erred in failing to give an adequate explanation of why it would have been satisfied, beyond reasonable doubt, that the applicant did not experience a severe stressor; and

- The Tribunal having found that the applicant was not suffering from PTSD, erred in failing to consider and decide:

-whether he was suffering from a collection of symptoms amounting to a disease; and

-if so, whether the material pointed to a hypothesis connecting that collection of symptoms with the circumstances of his particular service.

### The Court's consideration

#### *Standard of proof to be applied to issues of diagnosis*

The applicant was not successful on the first ground of appeal. Mr McKerlie accepted that it must be established that both the symptoms of the disease and a severe stressor were present. Further, that the standard of proof to be applied to the determination of those issues was the reasonable satisfaction of the decision-maker.

Justice Besanko did not consider the issues raised by the second ground of appeal. His Honour noted that it was put forward defensively by the applicant in the sense that it only arose if the respondent relied on an alternative basis to uphold the decision.

In relation to the third ground of appeal, Justice Besanko considered it was incumbent on the Tribunal to consider whether the symptoms from which the applicant suffered constituted a disease

and, if so, whether the disease was war-caused. His Honour referred to *Benjamin*, which was raised by the applicant's counsel, in support of the argument that the Tribunal must consider and determine "the substantive issues raised by the material and evidence advanced before it" (at 633 [47]). In discharging its obligation, Justice Besanko considered that the Tribunal could have made a decision as to the appropriate diagnosis (other than PTSD) or it could have invited the parties to call medical evidence on the issue. His Honour held that the Tribunal's failure to perform its obligation, in this respect, was an error of law.

Further, Justice Besanko went onto note that the Tribunal was under an obligation to reach the correct or preferable decision on the material before it (see: *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 24 ALR 577). As such, His Honour noted that a review by the Tribunal is inquisitorial and that the Tribunal must not confine itself to a case expressly articulated by the applicant. It must consider all substantive issues arising on the material and advanced before it.

Justice Besanko concluded by noting that, in addition to determining the case expressly articulated by the applicant, the Tribunal was bound to consider and determine if the applicant suffered from the symptoms of which he complained and whether those symptoms constituted a disease within the VEA. If they did, the Tribunal was bound to undertake the process identified in *Deledio*. The Tribunal's failure to do these things,

although it may be explained by the approach adopted by the parties, was an error of law.

### Formal decision

Mr McKerlie's appeal was allowed.



### Editorial note

This case reinforces, that a preliminary matter for decision-makers to decide, on the balance of probabilities, is the diagnosis of the injury or disease claimed. As His Honour emphasised in *McKerlie*, decision-makers, in this case the Tribunal, have an independent responsibility to decide that matter before considering whether the claimed condition was related to service. See further: *Repatriation Commission v Budworth* [2001] FCA 1421, (2001) 33 AAR 476, 66 ALD 285; *Benjamin v Repatriation Commission* [2001] FCA 1879, (2001) 34 AAR 270, 70 ALD 622.

It is important to note that the range of injuries or diseases a decision-maker must consider is determined by what the veteran or member included in the claim form: see further *Owen v Repatriation Commission* (1995) 38 ALD 241.

*McKerlie* also serves as a good reminder, that in matters involving a claim for PTSD, the diagnostic criteria requires identification of a causal factor. As Justice Besanko emphasised, the standard of proof to be applied in deciding whether both the symptoms of

the disease and a 'severe stressor' are present is the reasonable satisfaction standard. If a decision-maker is not reasonably satisfied that the diagnostic criteria for PTSD has been met, he or she must consider evidence for some other diagnosis to account for the person's symptoms.

**Paddon v Repatriation  
Commission**

Logan J  
[2010] FCA 1147  
22 October 2010

***Answers favourable on questions of law is a necessary but not sufficient basis for remittal to the AAT – concession as to “clinical onset” finding fatal with respect to remittal***

**Facts**

Mr Paddon served in the Australian Army from 1967 to 1970 and rendered two periods of “operational service” in South Vietnam as a member of the crew of the *AV Clive Steele*.

Mr Paddon applied for disability pension for post traumatic stress disorder and alcohol dependence. After adverse decisions by the Repatriation Commission and the Veteran's Review Board, the Administrative Appeals Tribunal (Tribunal) found he was suffering from generalised anxiety

disorder and depression, but affirmed the decision to refuse Mr Paddon's pension claim. Mr Paddon made an appeal to the Federal Court on a question of law.

**Questions of law raised on appeal**

The relevant Statements of Principles define “category 2 stressor” as follows:

“a category 2 stressor” means one or more of the following negative life events, the effects of which are chronic in nature and cause the person to feel on-going distress, concern or worry:

- a. being socially isolated and unable to maintain friendships or family relationships, due to physical location, language barriers, disability, or medical or psychiatric illness;
- b. experiencing a problem with a long-term relationship including: the break-up of a close personal relationship, the need for marital or relationship counselling, marital separation, or divorce;
- c. having concerns in the work or school environment including: on-going disharmony with fellow work or school colleagues, perceived lack of social support within the work or school environment, perceived lack of control over tasks performed and stressful work loads, or experiencing bullying in the workplace or school environment;  
...

The questions of law were whether, in relation to the definition of “category 2 stressor”, the Tribunal had misconstrued:

1. Paragraph (c) and in particular the phrase, “having concerns in the workplace...”; and
2. The word “chronic” in the opening part of that definition?

A further question of law was not pressed. Instead, the applicant conceded that the Tribunal’s conclusion on clinical onset was reasonably open to it and otherwise free from any error of law. However, the Court was required to consider the concession, and whether, as submitted by the respondent, that carried with it the necessary consequence that remission of the matter to the Tribunal was pointless, even if either or each of the questions of law was answered in the applicant’s favour.

#### **The Court’s consideration**

##### ***Paragraph (c) and “having concerns in the workplace”***

The applicant submitted that a misunderstanding of the meaning of paragraph (c) of the definition was evident in the Tribunal’s reasons, and the events which the Tribunal found were not “category 1A stressors” were also capable of falling within paragraph (c) of that definition, properly construed, so the Tribunal had erred in failing to address whether the events were “category 2(c) stressors”.

The respondent submitted that the examples of “concerns in the work or school environment” listed in paragraph

(c) of the definition in the SoP limited the meaning of “concerns”.

Justice Logan considered it was an unlikely construction to regard the inclusory examples as intended to be exhaustive of the meaning of “concerns in the work...environment”. It seemed to Justice Logan that the Tribunal had misunderstood the meaning of the word “concerns” in the context in which it is employed in paragraph (c) of the definition of “category 2 stressor”, and the applicant’s account of a helicopter attack was well capable of falling within the meaning of “concerns in the work...environment” as that term was to be construed. Therefore, the Tribunal’s approach to finding whether the applicant satisfied this aspect of each SoP had been tainted by an error of law. There was also a separate error of law in the Tribunal’s failure to appreciate that the events it dismissed as “category 1A stressors” were capable of being regarded as “category 2 stressors”, as that definition was properly construed.

##### ***Meaning of the word “chronic”***

His Honour then turned to the question of whether the Tribunal had misconstrued the word “chronic” in the opening part of the definition of “category 2 stressor”. Both parties put forward definitions from the Oxford Dictionary, and the respondent also offered a definition from a medical dictionary. Justice Logan considered there was no material difference between the meanings. His Honour considered the language used by the Tribunal and

decided the answer must be either that the Tribunal had misconstrued the word “chronic” or, at least, had failed to give adequate reasons for why the conditions were not “chronic”.

### ***Effect of applicant’s concession on remittal***

The respondent submitted that, even if such errors of law as Justice Logan had found were present, the concession as to the adverse finding regarding “clinical onset” meant that, as a matter of discretion, there should be no remission because that was futile i.e. there was no SoP in force which upheld the hypothesis. Each party relied upon the observations of the Full Court in *Repatriation Commission v Stoddart* [2003] FCAFC 300; (2003) 134 FCR 392 at [43] that “*the Court should be slow to exercise its discretion to shut an applicant out of relief on the basis of futility*”. The errors of law Justice Logan had found did not intrude on the factual conclusion as to clinical onset reached by the Tribunal. His Honour concluded that answers favourable to the applicant on questions of law was a necessary but not sufficient basis for remittal to the Tribunal, and remittal was futile as a conceded basis for the Tribunal’s affirming of the decision under review remained.

### **Formal decision**

Justice Logan dismissed the appeal.

### **Editorial note**



The decision in *Paddon* emphasises that the meaning of “concerns in the work....environment”

is not limited to the included examples, and where events are dismissed as “category 1A stressors” a decision-maker should also consider whether they fit into the definition of “category 2 stressors”. Importantly, where errors of law are found, a concession may be fatal with respect to remittal.

### **Kaluza v Repatriation Commission**

Jacobson J

[2010] FCA 1244

15 November 2010

***Scope of remittal to Tribunal; time for determination of clinical onset of medical conditions; application of relevant SoP definitions***

### **Facts**

Mr Kaluza served in the Royal Australian Air Force from 1963 to 1983. During the Vietnam War he participated in several flights to and from Vietnam.

Mr Kaluza applied for disability pension for a number of medical conditions. After adverse decisions by the Repatriation Commission and the Veteran’s Review Board, the



Administrative Appeals Tribunal (Tribunal) varied the diagnoses of Mr Kaluza's conditions but affirmed the decision to refuse his pension claim. Mr Kaluza made an appeal to the Federal Court on two questions of law. His appeal was successful on the second question and the matter was remitted to the Tribunal (see Practice Note 18 of 2008). On remittal, the Tribunal found that none of the conditions from which Mr Kaluza suffers were war-caused. Mr Kaluza appealed this second decision of the Tribunal to the Federal Court.

### Questions of law raised on appeal

The questions of law were whether:

1. The Tribunal committed an error of law by limiting its review on remittal to an alleged stressor in 1969, without considering another alleged stressor in 1968;
2. If the Tribunal conducted a full review (contrary to the first error claimed by Mr Kaluza), it misapplied the provisions of s 6C of the Act and "failed to ask the correct question" as to whether Mr Kaluza was in operational service;
3. The Tribunal misapplied the decision in *Lees v Repatriation Commission* [2002] FCAFC 398; (2002) 125 FCR 331 by determining the clinical onset of Mr Kaluza's medical conditions at the time when he sought treatment;
4. The Tribunal misapplied the relevant Statement of Principles (SoP), in

particular the necessary factors for a severe psychological stressor; and

5. The Tribunal misapplied the SoP test of a psychological stressor for alcohol abuse.

### The Court's Consideration

*Question 1 - scope of remittal*  
Counsel for the applicant submitted that the order made by Justice Branson in the earlier Federal Court decision was clear and unqualified, and the Tribunal rehearing the matter was required to determine all questions of fact and law relevant to Mr Kaluza's claim, in accordance with *Peacock v Repatriation Commission* [2007] FCAFC 156; (2007) 161 FCR 256.

However, Justice Jacobson considered there was sufficient ambiguity in the terms of the order to warrant consideration of the reasons for judgment and context, which begins with the statutory conferral of power on the Court, giving jurisdiction only on a question of law. Where the Court has jurisdiction, it may make such order as it thinks fit under s 44 of the AAT Act. The exercise of power by Justice Branson in making the order was expressly predicated on Her Honour's reasons for answering the second question of law favourably to Mr Kaluza i.e. the matter which was remitted was the question of whether the leg of the journey from Vietnam, via Butterworth to Peace, in 1969 (during which an alleged stressor occurred) was part of his operational service. Therefore, the Tribunal adopted

the correct construction of the scope of the remittal, and was correct in refusing to permit Mr Kaluza from adducing further evidence as to whether he rendered operational service on a flight in 1968 (when another alleged stressor occurred).

***Question 2 - embarking on a full review but failure to complete the exercise of jurisdiction***

Counsel for the applicant argued the Tribunal had made a new finding about the flight in 1968, which required the Tribunal to determine whether it constituted operational service and whether Mr Kaluza's medical conditions were caused by this flight. However, Justice Jacobson indicated that when the reasons of the Tribunal were read as a whole the Tribunal made no new finding, and the entire scope of the review was limited to the flight in 1969 from Butterworth to Pearce.

***Question 3 - date of clinical onset***

Counsel for the applicant submitted the Tribunal misstated the test referred to in *Lees*, so as to treat the date of clinical onset as the date on which treatment was sought. His Honour did not consider this to be a fair reading of the Tribunal's reasons, and the Tribunal had determined the dates of clinical onset of the conditions on the basis of the medical evidence.

***Question 4 - severe psychological stressor***

Counsel for the applicant argued the Tribunal failed to properly consider and apply this definition in the relevant SoP, as the Tribunal indicated in its reasons the Mr Kaluza needed to point to a threat of death or serious injury, or a threat to his physical integrity. Although this language followed more closely the wording of the SoP for PTSD rather than the relevant SoP for anxiety disorder (which referred to an identifiable occurrence that evokes feelings of substantial distress), in Justice Jacobson's view the Tribunal did not depart in its reasoning from the definition in the SoP for anxiety disorder.

***Question 5 - severe stressor for alcohol abuse***

Counsel for the applicant submitted the Tribunal applied the wrong test for the definition of "severe stressor" in the SoP for alcohol abuse, and as in *Woodward v Repatriation Commission* [2003] FCAFC 160; (2003) 131 FCR 473 the definition did not require the person to see or personally experience the events referred to in the SoP. However, His Honour did not consider the Tribunal fell into the error identified in *Woodward*, and the Tribunal had identified the correct test.

**Formal decision**

Justice Jacobson dismissed the appeal.

**Editorial note**



All of the questions of law raised in this appeal were answered in the negative. The Court found the Tribunal had correctly limited the scope of its review on remittal i.e. to the second question of law answered favourably to Mr Kaluza in his first appeal to the Federal Court. The Court considered the definition of clinical onset in *Lees* emphasised the need for a determination of the clinical onset by medical evidence.

**Border v Repatriation  
Commission (No 2)**

Reeves J

[2010] FCA 1430  
17 December 2010

***PTSD - whether the Tribunal correctly undertook the third step outlined in Deledio - whether the veteran experienced a "life threatening event" - Tribunal did not make objective subjective assessment***

**Facts**

Mr Border served in the Australian Army from 1967 until 1987 and rendered one period of "operational service" in Vietnam during 1971. Some time after he retired from the army, Mr Border

developed post traumatic stress disorder (PTSD).

Mr Border applied for disability pension for PTSD. After adverse decisions by the Repatriation Commission, the Veterans' Review Board, and the Administrative Appeals Tribunal (Tribunal), Mr Border appealed to the Federal Court on a question of law.

**Questions of law raised on appeal**

A preliminary application to strike out the appeal was dismissed by the Court, and leave was given to amend the notice of appeal. The questions of law were:

- Whether the Tribunal's findings that Mr Border's accepted condition of PTSD was not war-caused was open on the basis of the accepted evidence and s 120 of the *Veterans' Entitlements Act 1986*;
- Whether there was any evidence from which the Tribunal was able to draw the inference that the PTSD was other than war-caused.

Before the Tribunal, Mr Border claimed there were four events which occurred during his Vietnam service that either individually, or collectively, contributed to the development of his PTSD:

- "The scorpion event" – This event involved a scorpion biting Mr Border's finger while he was unloading stores at a Q store. He suffered swelling in his arm and face. He was conveyed to a military hospital at Nui Dat for treatment. He

was released from hospital on the same day and he was allowed to return to his unit on instructions he should only undertake sedentary duties.

- “The torch event” – On the night of the “scorpion event” and while not having fully recovered from it, Mr Border was required to perform the duties of a duty sergeant. During this night duty, radio contact was lost with a small party of soldiers at the perimeter wire of the compound. When this occurred, Mr Border became confused and turned on his torch. One of his fellow soldiers shouted at him to turn off the torch or they would “shoot” him.
- “The rockets event” – While working at an ammunition depot, a RAAF sergeant told him to load live rocket ammunition. As he was doing this, he put his hand over two bare wires and the sergeant shouted at him because this could detonate the rockets.
- “The moved base event” – While Mr Border was absent from his base overnight, his unit moved from Nui Dat to Vung Tau and he was forced to obtain a ride with a US aircraft.

On appeal, Mr Border’s case was that the Tribunal erred at step three of the *Deledio* process by making factual findings that none of the four events above, either individually or collectively, amounted to a “life threatening event” - which is included in the definition of a “category

1A stressor” in the relevant Statement of Principles (SoP).

### The Court’s consideration

Initially the Court considered what is required at the third step in the *Deledio* process. Following an analysis of the relevant case law the Court stated:

...first, the Tribunal has to test the veteran’s hypothesis to determine whether the material before it points to facts which support it. Then, since 1994 when the SOP regime was introduced into the Act, the reasonableness of a veteran’s hypothesis has to be determined by whether it fits into, or is consistent with, or is upheld by, the template to be found in the relevant SOP. The hypothesis will do this if it contains, as a minimum, one or more of the factors specified in the relevant SOP template. If it does, that carries with it the necessary causal connection between the injury, disease or death with the veteran’s service.

The Court noted that the Tribunal followed the test in *Stoddart*, however the Court pointed out two key differences between *Stoddart* and the present case which the Tribunal failed to identify. Firstly, *Stoddart* was dealing with step four in the *Deledio* process (not step three), and secondly, the expression being considered in *Stoddart* was “experiencing a severe stressor” (not “experiencing a category 1A stressor”).

The Court went on to examine the significant differences in these two sets of definitions with reference to the relevant

authorities, and considered the correct approach in relation to the event described in subpara (a) of the definition of a category 1A stressor (“experiencing a life-threatening event”) was as follows:

[It is] The effect of the event and not the threat itself that has to be assessed. Moreover, it is the veteran’s perception of the event that is critical, relevantly his or her perception that it posed a threat of death. If that perception was a reasonable one, it constitutes a life-threatening event within the terms of subpara (a). That perception will be a reasonable one if, judged objectively from the point of view of a reasonable person in the position of, and with the knowledge of, the veteran, it was capable of, and did convey the threat of death. Unlike with subparas (b) and (c), this is a mixed objective and subjective test. Since there will be a very wide range of reactions to any event involving a threat of death, this test is not be applied in an unduly restrictive manner. Thus, while at one extreme a totally irrational or baseless reaction will be excluded, it is necessary to be more open to acceptance as one moves across the spectrum of possible reactions. Furthermore, the question is whether the event might or was capable of giving rise to the perception of the threat of death, not whether it did. For this reason, the veteran’s conduct after the event is irrelevant to the assessment. So, too, is any information not known to the veteran which showed, objectively, that the event did not pose a threat of death, e.g. being threatened with a gun that was in fact unloaded.

The Court indicated that while the Tribunal correctly identified the

appropriate objective subjective test in *Stoddart*, it misquoted the test so that the subject matter of the assessment became the threat itself, rather than the event giving rise to it. The Court considered the Tribunal fell into error when it came to apply the test to each of the four events in Mr Border’s hypothesis as:

...it assessed three of the events partly by reference to objective circumstances that either post-dated the event, or were unknown to Mr Border at the time. At the same time, I consider it did not properly assess the objective reasonableness of Mr Border’s perception of the event as life-threatening based upon his circumstances and state of knowledge at the time.

### Formal decision

Justice Reeves allowed the appeal and remitted the matter to the Tribunal to be reconsidered and determined according to law.



### Editorial note

Decision-makers should be mindful that the objective subjective test only applies to subpara (a) of the definition of a category 1A stressor - “experiencing a life-threatening event”.

It was the Court’s view that there is no subjective element involved in determining whether a veteran’s hypothesis fits within, or is consistent with, one or more of the events described in subparas (b) or (c) of the definition,

which focus on the inherent nature of the event concerned:

(b) being subject to a serious physical attack or assault including rape and sexual molestation; or

(c) being threatened with a weapon, being held captive, being kidnapped, or being tortured.

### 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*.

## Statements of Principles issued by the Repatriation Medical Authority

January to December 2010

Number of Instrument	Description of Instrument
1 & 2 of 2010	Revocation of Statements of Principles (Instruments Nos 76 & 77 of 1999) and determination of Statements of Principles concerning <b>tension type headache</b> and death from tension type headache.
3 & 4 of 2010	Revocation of Statements of Principles (Instruments Nos 342 & 343 of 1995) and determination of Statements of Principles concerning <b>herpes simplex</b> and death from herpes simplex.
5 & 6 of 2010	Revocation of Statements of Principles (Instruments Nos 1 & 2 of 1996) and determination of Statements of Principles concerning <b>human immunodeficiency virus</b> and death from human immunodeficiency virus.
7 & 8 of 2010	Revocation of Statements of Principles (Instruments Nos 51 & 52 of 1996) and determination of Statements of Principles concerning <b>human T-cell lymphotropic virus type-1</b> and death from human T-cell lymphotropic virus type-1.
9 & 10 of 2010	Revocation of Statements of Principles (Instruments Nos 209 & 210 of 1995, as amended by 328 & 329 of 1995 concerning acute sinusitis, and 21 & 22 of 2003 concerning chronic sinusitis) and determination of Statements of Principles concerning <b>sinusitis</b> and death from sinusitis.
11 & 12 of 2010	Revocation of Statements of Principles (Instruments Nos 71 & 72 of 1996, as amended by 177 & 178 of 1996) and determination of Statements of Principles concerning <b>suicide and attempted suicide</b> and death from attempted suicide.
13 & 14 of 2010	Revocation of Statements of Principles (Instruments Nos 31 & 32 of 2005) and determination of Statements of Principles concerning <b>osteoarthritis</b> and death from osteoarthritis.
15 & 16 of 2010	Revocation of Statements of Principles (Instruments Nos 64 & 65 of 1999) and determination of Statements of Principles concerning <b>malignant neoplasm of the eye</b> and death from malignant neoplasm of the eye.
17 & 18 of 2010	Revocation of Statements of Principles (Instruments Nos 376 & 377 of 1995) and determination of Statements of Principles concerning <b>accidental hypothermia</b> and death from accidental hypothermia.
19 of 2010	Amendment of Statements of Principles (Instrument No 40 of 2004) concerning <b>malignant neoplasm of the small intestine</b> and death from malignant neoplasm of the small intestine.
20 & 21 of 2010	Revocation of Statements of Principles (Instruments Nos 66 & 67 of 1999) and determination of Statements of Principles concerning <b>cluster headache</b> and death from cluster headache.

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22 & 23 of 2010	Revocation of Statements of Principles (Instruments Nos 17 & 18 of 2001) and determination of Statements of Principles concerning <b>Alzheimer-type dementia</b> and death from Alzheimer-type dementia.
24 & 25 of 2010	Revocation of Statements of Principles (Instruments Nos 290 & 291 of 1995) and determination of Statements of Principles concerning <b>dislocation</b> and death from dislocation.
26 & 27 of 2010	Revocation of Statements of Principles (Instruments Nos 17 & 18 of 1998 concerning Reiter's syndrome) and determination of Statements of Principles concerning <b>reactive arthritis</b> and death from reactive arthritis.
28 & 29 of 2010	Revocation of Statements of Principles (Instruments Nos 37 & 38 of 2003) and determination of Statements of Principles concerning <b>non-Hodgkin's lymphoma</b> and death from non-Hodgkin's lymphoma.
30 & 31 of 2010	Revocation of Statements of Principles (Instruments Nos 11 & 12 of 2000, as amended by 43 & 44 of 2003) and determination of Statements of Principles concerning <b>gout</b> and death from gout.
32 & 33 of 2010	Determination of Statements of Principles concerning <b>joint instability</b> and death from joint instability.
34 & 35 of 2010	Determination of Statements of Principles concerning <b>iliotibial band syndrome</b> and death from iliotibial band syndrome.
36 & 37 of 2010	Amendment of Statements of Principles (Instruments Nos 37 & 38 of 2005, as amended by 78 & 79 of 2008) concerning <b>lumbar spondylosis</b> and death from lumbar spondylosis.
38 & 39 of 2010	Amendment of Statements of Principles (Instruments Nos 39 & 40 of 2007, as amended by 80 & 81 of 2008) concerning <b>intervertebral disc prolapse</b> and death from intervertebral disc prolapse.
40 & 41 of 2010	Amendment of Statements of Principles (Instruments Nos 27 & 28 of 2008) concerning <b>depressive disorder</b> and death from depressive disorder.
42 & 43 of 2010	Amendment of Statements of Principles (Instruments Nos 101 & 102 of 2007) concerning <b>anxiety disorder</b> and death from anxiety disorder.
44 & 45 of 2010	Amendment of Statements of Principles (Instruments Nos 5 & 6 of 2006) concerning <b>spondylolisthesis and spondylolysis</b> and death from spondylolisthesis and spondylolysis.
46 of 2010	Amendment of Statements of Principles (Instrument No 42 of 2004) concerning <b>neoplasm of the pituitary gland</b> and death from neoplasm of the pituitary gland.
47 & 48 of 2010	Revocation of Statements of Principles (Instruments Nos 284 & 285 of 1995) and determination of Statements of Principles concerning <b>methaemoglobinaemia</b> and death from methaemoglobinaemia.



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49 & 50 of 2010	Revocation of Statements of Principles (Instruments Nos 316 & 317 of 1995) and determination of Statements of Principles concerning <b>sinus barotrauma</b> and death from sinus barotrauma.
51 & 52 of 2010	Revocation of Statements of Principles (Instruments Nos 59 & 60 of 1997, as amended by 96 of 1997) and determination of Statements of Principles concerning <b>internal derangement of the knee</b> and death from internal derangement of the knee.
53 & 54 of 2010	Determination of Statements of Principles concerning <b>acute articular cartilage tear</b> and death from acute articular cartilage tear.
55 & 56 of 2010	Determination of Statements of Principles concerning <b>acute meniscal tear of the knee</b> and death from acute meniscal tear of the knee.
57 & 58 of 2010	Determination of Statements of Principles concerning <b>Dupuytren's disease</b> and death from Dupuytren's disease.
59 & 60 of 2010	Amendment of Statements of Principles (Instruments Nos 35 & 36 of 2009) concerning <b>fibrosing interstitial lung disease</b> and death from fibrosing interstitial lung disease.
61 & 62 of 2010	Amendment of Statements of Principles (Instruments Nos 21 & 22 of 2006, as amended by 63 & 64 of 2006) concerning <b>vascular dementia</b> and death from vascular dementia.
63 & 64 of 2010	Revocation of Statements of Principles (Instruments Nos 115 & 116 of 1995, as amended by 19 & 20 of 2004 concerning acute blepharitis; and 117 & 118 of 1995, as amended by 21 & 22 of 2004 concerning chronic blepharitis) and determination of Statements of Principles concerning <b>blepharitis</b> and death from blepharitis.
65 & 66 of 2010	Revocation of Statements of Principles (Instruments Nos 178 & 179 of 1995 concerning nephrolithiasis and 180 & 181 of 1995 concerning ureteric calculus) and determination of Statements of Principles concerning <b>renal stone disease</b> and death from renal stone disease.
67 & 68 of 2010	Revocation of Statement of Principles (Instruments Nos 39 & 40 of 2003) and determination of Statements of Principles concerning <b>subarachnoid haemorrhage</b> and death from subarachnoid haemorrhage.
69 & 70 of 2010	Revocation of Statements of Principles (Instruments Nos 55 & 56 of 2006) and determination of Statements of Principles concerning <b>acute sprain and acute strain</b> and death from acute sprain and acute strain.
71 & 72 of 2010	Revocation of Statements of Principles (Instruments Nos 176 & 177 of 1995, as amended by 312 & 313 of 1995) and determination of Statements of Principles concerning <b>pilonidal sinus</b> and death from pilonidal sinus.
73 & 74 of 2010	Revocation of Statements of Principles (Instruments Nos 247 & 248 of 1995, as amended by 11 & 12 of 1997) and determination of Statements of Principles concerning <b>anal fissure</b> and death from anal fissure.
75 & 76 of 2010	Revocation of Statements of Principles (Instruments Nos 41 & 42 of 1996) and determination of Statements of Principles concerning <b>chronic pruritus ani</b>

and death from chronic pruritus.

- 77 & 78 of 2010    Revocation of Statements of Principles (Instruments Nos 55 & 56 of 1996 concerning posterior adventitial heel bursitis) and determination of Statements of Principles concerning **heel bursitis** and death from heel bursitis.
- 79 & 80 of 2010    Revocation of Statements of Principles (Instruments Nos 33 & 34 of 2001 as amended by 27 of 2005) and determination of Statements of Principles concerning **chondromalacia patellae** and death from chondromalacia patellae.
- 81 & 82 of 2010    Determination of Statements of Principles concerning **rapidly progressive crescentic glomerulonephritis** and death from rapidly progressive crescentic glomerulonephritis.
- 83 of 2010            Amendment of Statements of Principles (Instrument No 65 of 2007) concerning **Parkinson's disease and parkinsonism** and death from Parkinson's disease and parkinsonism.
- 84 & 85 of 2010    Revocation of Statements of Principles (Instruments Nos 164 & 165 of 1995) and determination of Statements of Principles concerning **poisoning and toxic reaction from plants and fungi** and death from poisoning and toxic reaction from plants and fungi.
- 86 & 87 of 2010    Revocation of Statements of Principles (Instruments Nos 255 & 256 of 1995) and determination of Statements of Principles concerning **schistosomiasis** and death from schistosomiasis.
- 88 & 89 of 2010    Revocation of Statements of Principles (Instruments Nos 282 & 283 of 1995) and determination of Statements of Principles concerning **strongyloidiasis** and death from strongyloidiasis.
- 90 & 91 of 2010    Revocation of Statements of Principles (Instruments Nos 79 & 80 of 1997) and determination of Statements of Principles concerning **Ross River virus infection** and death from Ross River virus infection.
- 92 & 93 of 2010    Determination of Statements of Principles concerning **Morton's metatarsalgia** and death from Morton's metatarsalgia.
- 94 & 95 of 2010    Determination of Statements of Principles concerning **labral tear** and death from labral tear.
- 96 & 97 of 2010    Amendment of Statements of Principles (Instruments Nos 89 & 90 of 2007, as amended by 43 & 44 of 2009) concerning **ischaemic heart disease** and death from ischaemic heart disease.

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

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## Conditions under Investigation by the Repatriation Medical Authority

as at 31 December 2010

Description of disease or injury	SoPs under consideration	Gazetted
Acquired cataract	<i>Instrument Nos 39/08 &amp; 40/08 as amended by 51/09 &amp; 52/09</i>	03-11-10
Acute lymphoid leukaemia	<i>Instrument Nos 83/01 &amp; 84/01</i>	30-06-10
Acute myeloid leukaemia	<i>Instrument Nos 35/06 &amp; 36/06</i>	03-11-10
Acute rheumatic fever	—	03-11-10
Acute sprain and acute strain	<i>Instrument Nos 69/10 &amp; 70/10</i>	03-11-10
Adenocarcinoma of the kidney	<i>Instrument Nos 87/01 &amp; 88/01</i>	30-06-10
Ankylosing spondylitis	<i>Instrument Nos 25/05 &amp; 26/05</i>	03-11-10
Anosmia	—	01-09-10
Aortic stenosis	<i>Instrument Nos 54/02 &amp; 55/02</i>	30-06-10
Aplastic anaemia	<i>Instrument Nos 1/01 &amp; 2/01</i>	30-06-10
Arachnoiditis	—	30-06-10
Asbestosis	<i>Instrument Nos 23/05 &amp; 24/05</i>	03-11-10
Asthma	<i>Instrument Nos 85/01 &amp; 86/01 as amended by 36/04 &amp; 37/04</i>	30-06-10
Atrial flutter	<i>Instrument Nos 71/02 &amp; 72/02</i>	30-06-10
Benign neoplasm of the eye and adnexa	<i>Instrument Nos 33/08 &amp; 34/08</i>	03-11-10
Carpal tunnel syndrome	<i>Instrument Nos 89/01 &amp; 90/01</i>	30-06-10
Cerebral meningioma	<i>Instrument Nos 19/09 &amp; 20/09</i>	03-11-10
Chloracne	<i>Instrument Nos 19/00 &amp; 20/00</i>	30-06-10
Chronic gastritis	<i>Instrument Nos 75/01 &amp; 76/01</i>	30-06-10
Chronic lymphoid leukaemia	<i>Instrument Nos 9/05 &amp; 10/05</i>	03-11-10
Chronic myeloid leukaemia	<i>Instrument Nos 15/03 &amp; 16/03</i>	03-11-10
Chronic pancreatitis	<i>Instrument Nos 57/01 &amp; 58/01</i>	30-06-10
Chronic sprain and chronic strain	—	03-11-10
Cirrhosis of the liver	<i>Instrument Nos 107/07 &amp; 108/07</i>	03-11-10
Colorectal adenoma	<i>Instrument Nos 62/02 &amp; 63/02</i>	30-06-10
Dementia pugilistica	<i>Instrument Nos 7/00 &amp; 8/00</i>	30-06-10
Dengue fever	<i>Instrument Nos 15/01 &amp; 16/01</i>	30-06-10
Dental pulp disease	<i>Instrument Nos 73/02 &amp; 74/02</i>	30-06-10
Erectile dysfunction	<i>Instrument Nos 17/05 &amp; 18/05</i>	03-11-10
Familial adenomatous polyposis	<i>Instrument Nos 60/02 &amp; 61/02</i>	30-06-10
Fibrosing lung disease	<i>Instrument Nos 35/09 &amp; 36/09 as amended by 59/10 &amp; 60/10</i>	03-11-10
Gastro-oesophageal reflux disease	<i>Instrument Nos 11/05 &amp; 12/05</i>	03-11-10
Giant cell arteritis	<i>Instrument Nos 71/01 &amp; 72/01</i>	30-06-10
Gingivitis	<i>Instrument Nos 3/02 &amp; 4/02</i>	30-06-10
Goitre	<i>Instrument Nos 21/00 &amp; 22/00</i>	30-06-10
Inflammatory bowel disease	<i>Instrument Nos 21/01 &amp; 22/01</i>	30-06-10
Inguinal hernia	<i>Instrument Nos 5/05 &amp; 6/05</i>	03-11-10

## Repatriation Medical Authority

<b>Description of disease or injury</b>	<b>SoPs under consideration</b>	<b>Gazetted</b>
Malignant neoplasm of the anal canal	<i>Instrument Nos 34/02 &amp; 35/02</i>	30-06-10
Malignant neoplasm of the bile duct	<i>Instrument Nos 21/07 &amp; 22/07</i>	03-11-10
Malignant neoplasm of the bladder	<i>Instrument Nos 95/07 &amp; 96/07</i>	22-12-10
Malignant neoplasm of the bone or articular cartilage	<i>Instrument Nos 40/02 &amp; 41/02</i>	30-06-10
Malignant neoplasm of the brain	<i>Instrument Nos 58/08 &amp; 59/08</i>	03-11-10
Malignant neoplasm of the breast	<i>Instrument Nos 27/06 &amp; 28/06</i>	03-11-10
Malignant neoplasm of the cerebral meninges	<i>Instrument Nos 19/09 &amp; 20/09</i>	03-11-10
Malignant neoplasm of the colorectum	<i>Instrument Nos 1/04 &amp; 2/04</i>	03-11-10
Malignant neoplasm of the endometrium	<i>Instrument Nos 99/07 &amp; 100/07</i>	03-11-10
Malignant neoplasm of the gall bladder	<i>Instrument Nos 67/08 &amp; 68/08</i>	03-11-10
Malignant neoplasm of the lung	<i>Instrument Nos 17/06 &amp; 18/06 as amended by 87/07 &amp; 88/07</i>	03-11-10
Malignant neoplasm of the oral cavity, oropharynx & hypopharynx	<i>Instrument Nos 19/05 &amp; 20/05</i>	03-11-10
Malignant neoplasm of the oesophagus	<i>Instrument Nos 41/07 &amp; 42/07</i>	03-11-10
Malignant neoplasm of the ovary	<i>Instrument Nos 70/09 &amp; 71/09</i>	03-11-10
Malignant neoplasm of the prostate	<i>Instrument Nos 28/05 &amp; 29/05</i>	03-11-10
Malignant neoplasm of the salivary gland	<i>Instrument Nos 46/04 &amp; 47/04</i>	03-11-10
Malignant neoplasm of the small intestine	<i>Instrument Nos 40/04 &amp; 41/04 as amended by 19/10</i>	01-09-10
Malignant neoplasm of the stomach	<i>Instrument Nos 7/03 &amp; 8/03</i>	03-11-10
Malignant neoplasm of the thyroid gland	<i>Instrument Nos 9/06 &amp; 10/06</i>	03-11-10
Malignant neoplasm of unknown primary site	<i>Instrument Nos 44/04 &amp; 45/04</i>	03-11-10
Malignant neoplasm of the urethra	<i>Instrument Nos 1/08 &amp; 2/08</i>	03-11-10
Mesangial IgA glomerulonephritis	<i>Instrument Nos 63/01 &amp; 64/01 as amended by 75/02</i>	30-06-10
Motor neurone disease	<i>Instrument Nos 7/06 &amp; 8/06 as amended by 53/09</i>	22-12-10
Myelodysplastic disorder	<i>Instrument Nos 37/06 &amp; 38/06</i>	03-11-10
Myeloma	<i>Instrument Nos 55/03 &amp; 56/03</i>	13-01-10
Neoplasm of the pituitary gland	<i>Instrument Nos 42/04 &amp; 43/04 as amended by 46/10</i>	12-05-10
Non-melanotic malignant neoplasm of the skin	<i>Instrument Nos 81/07 &amp; 82/07</i>	03-11-10
Osteoarthritis	<i>Instrument Nos 13/10 &amp; 14/10</i>	22-12-10
Otitic barotrauma	<i>Instrument Nos 27/01 &amp; 28/01</i>	30-06-10
Otitis externa	<i>Instrument Nos 73/01 &amp; 74/01 as amended by 42/02 &amp; 43/02</i>	30-06-10
Patellar tendinopathy	—	03-11-10
Periodontitis	<i>Instrument Nos 1/02 &amp; 2/02</i>	30-06-10
Pes planus	<i>Instrument Nos 61/01 &amp; 62/01 as amended by 5/02 &amp; 6/02</i>	30-06-10

## Repatriation Medical Authority

<b>Description of disease or injury</b>	<b><i>SoPs under consideration</i></b>	<b>Gazetted</b>
Physical injury due to munitions damage	<i>Instrument Nos 9/00 &amp; 10/00</i>	30-06-10
Porphyria cutanea tarda	<i>Instrument Nos 19/01 &amp; 20/01</i>	30-06-10
Psoriasis	<i>Instrument Nos 56/02 &amp; 57/02</i>	30-06-10
Schizophrenia	<i>Instrument Nos 15/09 &amp; 16/09</i>	03-11-10
Seborrhoeic dermatitis	<i>Instrument Nos 21/05 &amp; 22/05</i>	03-11-10
Sleep apnoea	<i>Instrument Nos 13/05 &amp; 14/05</i>	03-11-10
Soft tissue sarcoma	<i>Instrument Nos 13/06 &amp; 14/06 as amended by 35/08 &amp; 36/08</i>	03-11-10
Solar keratosis	<i>Instrument Nos 7/05 &amp; 8/05</i>	03-11-10
Subdural haematoma	—	12-05-10
Tinnitus	<i>Instrument Nos 25/01 &amp; 26/01</i>	30-06-10

# AAT and Court decisions – January to December 2010

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

## Carcinoma

### Assessment of Disability Pension

#### Degree of Incapacity

**Fisher G** (Army)  
[2010] AATA 895 15 Nov 2010

#### Intermediate Rate

-kind of Work  
**Everett L** (Army)  
[2010] AATA 947 25 Nov 2010  
-less than 20 hours per week  
**Connell B** (Army)  
[2010] AATA 911 17 Nov 2010  
-meaning and effect of  
s 23(1) (c)  
**Connell B** (Army)  
[2010] AATA 911 17 Nov 2010  
-prevented from continuing  
to undertake  
**Everett L** (Army)  
[2010] AATA 947 25 Nov 2010

#### Permanent Impairment (MRCA)

-whether result of  
compensable injuries  
**Jamieson W** (Army)  
(MRCC)  
[2010] AATA 778 12 Oct 2010

#### Temporary Special Rate

-incapacity not permanent  
**Harvey G** (Army)  
[2010] AATA 870 5 Nov 2010

#### Validity of Ch 25 GARP M

**James J** (RAN)(MRCC)  
[2010] FCAFC 28 Jul 2010

#### Malignant Neoplasm of the Colorectum

**Watson JE** (RAN)  
[2010] AATA 220 29 Mar 2010

#### Malignant Neoplasm of the Liver

-clinical onset  
**Norton L** as person  
**approved for Goodwin PJ**  
(Army)  
[2010] AATA 298 27 Apr 2010  
-diagnosis  
**Norton L** as person  
**approved for Goodwin PJ**  
(Army)  
[2010] AATA 298 27 Apr 2010

#### Malignant Neoplasm of the Lung

-passive smoking  
**Fernance M** (RAAF)  
[2010] AATA 735 28 Sep 2010

#### Malignant Neoplasm of the Pancreas

-no hypothesis  
**Piscioneri M** (Army)  
[2010] AATA 995 13 Dec 2010

#### Malignant Neoplasm of the Prostate

-diet  
**Peters D** Army)  
[2010] AATA 887 12 Nov 2010

#### Metastatic Carcinoma of the Prostate

- diet  
**Bawden C** (Army)  
[2010] AATA 774 11 Oct 2010  
**Myers H** (RAN)  
[2010] AATA 710 16 Sept 10

**AAT and Court decisions –  
January to December 2010**

-lack of causation material		<b>Potter KJ</b> (RAAF)	
<b>Shaw M</b> (RAAF)		[2010] AATA 607	17 Aug 2010
[2010] AATA 381	21 May 2010	-clinical onset	
-raised facts		<b>Dwyer R</b> (RAAF)	
<b>Myers H</b> (RAN)		[2010] AATA 646	27 Aug 2010
[2010] AATA 710	16 Sept 10	<b>Kaluza S</b> (RAAF)	
		[2010] AATA 498	2 Jul 2010
		<b>Potter KJ</b> (RAAF)	
		[2010] AATA 607	17 Aug 2010
		-salt supplement	
		<b>Buchanan R</b> (Army)	
		[2010] AATA 703	15 Sep 2010
		-smoking	
		<b>Carr W</b> (Army)	
		[2010] AATA 517	28 Jun 2010
		<b>Hawke D</b> (Army)	
		[2010] AATA 657	31 Aug 2010
		<b>Haynes M</b> (Army)	
		[2010] AATA 555	26 Jul 2010
		<b>Heinz R</b> (RAN)	
		[2010] AATA 97	10 Feb 2010
		<b>Potter KJ</b> (Army)	
		[2010] AATA 607	17 Aug 2010
<b>Circulatory Disorder</b>			
<b>Aortic Stenosis</b>			
-hypertension			
<b>Higginbotham R</b> (RAN)			
[2010] AATA 670	3 Sept 10		
<b>Atrial Fibrillation</b>			
- ischaemic heart disease			
<b>Heinz R</b> (RAN)			
[2010] AATA 97	10 Feb 2010		
<b>Robinson J</b> (RAAF)			
[2010] AATA 617	19 Aug 2010		
<b>Cerebrovascular Accident</b>			
-alcohol			
<b>Robinson J</b> (RAAF)			
[2010] AATA 617	19 Aug 2010		
-hypertension			
<b>Robinson J</b> (RAAF)			
[2010] AATA 617	19 Aug 2010		
<b>False Aneurysm of the Aorta</b>			
-smoking			
<b>Carr W</b> (RAN)			
(2010) AATA 517	28 June 2010		
<b>Hypertension</b>			
-alcohol consumption			
<b>Dwyer RK</b> (RAAF)			
[2010] AATA 646	27 Aug 2010		
<b>Kratzke M</b> (Army)			
[2010] AATA 333	7 May 2010		
<b>Kaluza S</b> (RAAF)			
[2010] AATA 498	2 Jul 2010		
<b>Neath K</b> (RAN)			
[2010] AATA 910	16 Nov 2010		
		<b>Ischaemic Heart Disease</b>	
		-clinical onset	
		<b>Hawke D</b> (Army)	
		[2010] AATA 657	31 Aug 2010
		<b>Potter KJ</b> (Army)	
		[2010] AATA 607	17 Aug 2010
		-hypertension	
		<b>Kratzke M</b> (Army)	
		[2010] AATA 333	7 May 2010
		<b>Robinson J</b> (RAAF)	
		[2010] AATA 617	19 Aug 2010
		-passive smoking - last exposure	
		<b>Knight J</b> (RAN)	
		[2010] FCA 1134	22 Oct 2010
		-smoking	
		<b>Carr W</b> (Army)	
		[2010] AATA 517	28 Jun 2010
		<b>Hawke D</b> (Army)	
		[2010] AATA 657	31 Aug 2010
		<b>Haynes M</b> (Army)	
		[2010] AATA 555	26 Jul 2010
		<b>Heinz R</b> (RAN)	
		[2010] AATA 97	10 Feb 2010
		<b>Potter KJ</b> (Army)	
		[2010] AATA 607	17 Aug 2010

**AAT and Court decisions –  
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<b>Non-SoP</b>			<b>Glomerulonephritis</b>		
-fat embolism brain insult			<b>Hill M (RAN)</b>		
<b>Murray J (Army)</b>			[2010] AATA 540		21 Jul 2010
[2010] AATA 948		26 Nov 2010			
			<b>Hastening Death</b>		
<b>Death</b>			<b>Cribb E (RAAF)</b>		
			[2010] AATA 84		5 Feb 2010
<b>Adenocarcinoma of the Kidney</b>			<b>Fuge G (Army)</b>		
<b>Robert-Hay P (Army)</b>			[2010] AATA 130		19 Feb 2010
[2010] AATA 224		30 Mar 2010	<b>Swindells M (Army)</b>		
			[2010] AATA 482		30 June 2010
			<b>Hypercalcaemia</b>		
<b>Aortic Stenosis</b>			<b>Swindells M (Army)</b>		
<b>Higginbotham R (RAN)</b>			[2010] AATA 482		30 June 2010
[2010] AATA 670		3 Sep 2010			
			<b>Hypertension</b>		
<b>Asthma</b>			<b>Fuge G (Army)</b>		
<b>McWilliam J (Army)</b>			[2010] AATA 130		19 Feb 2010
[2010] AATA 76		3 Feb 2010			
			<b>Ischaemic Heart Disease</b>		
<b>Cerebrovascular Accident</b>			<b>Bird M (RAAF)</b>		
<b>Wishart D (Army)</b>			[2010] AATA 171		12 Mar 2010
[2010] AATA 178		17 Mar 2010	<b>Haynes M (Army)</b>		
			[2010] AATA 555		26 Jul 2010
<b>Chronic Lymphocytic Leukaemia</b>			<b>Hill M (RAN)</b>		
<b>Swindells M (Army)</b>			[2010] AATA 540		21 Jul 2010
[2010] AATA 482		30 June 2010	<b>Kratzke M (Army)</b>		
			[2010] AATA 333		7 May 2010
<b>Cirrhosis of the Liver</b>			<b>L'Estrange J (Army)</b>		
<b>Clarke A (Army)</b>			[2010] AATA 150		1 Mar 2010
[2010] AATA 77		3 Feb 2010	<b>Smyly P (RAN)</b>		
			[2010] AATA 127		18 Feb 2010
			<b>Wilcock N (Army)</b>		
			[2010] AATA 560		27 Jul 2010
<b>Coronary Occlusion as a Result of IHD</b>			<b>Kind of Death</b>		
<b>Hicks S (Army)</b>			<b>Farley- Smith G (Army)</b>		
[2010] AATA 327		5 May 2010	[2010] AATA 637		25 Aug 2010
<b>Gastro Oesophageal Reflux Disease</b>			<b>Frew Y (Army)</b>		
<b>Frew Y (Army)</b>			[2010] AATA 1043		22 Dec 2010
[2010] AATA 1043		22 Dec 2010	<b>Haynes M (Army)</b>		
			[2010] AATA 555		26 Jul 2010



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<b>Hill M (RAN)</b>			<b>Non-Hodgkin's Lymphoma</b>		
[2010] AATA 540	21 Jul 2010		<b>Cribb E (RAAF)</b>		
<b>McWilliam J (Army)</b>			[2010] AATA 84	5 Feb 2010	
[2010] AATA 76	3 Feb 2010				
<b>Piscioneri M (Army)</b>			<b>Primary Myelofibrosis</b>		
[2010] AATA 995	13 Dec 2010		<b>Farley-Smith G (Army)</b>		
<b>Wilcock N (Army)</b>			[2010] AATA 637	25 Aug 2010	
[2010] AATA 560	27 Jul 2010		-smoking		
<b>Low Grade Lymphoma</b>			<b>Farley-Smith G (Army)</b>		
<b>Swindells M (Army)</b>			[2010] AATA 637	25 Aug 2010	
[2010] AATA 482	30 June 2010		<b>Sub-Hypotheses</b>		
<b>Malignant Neoplasm of the Jejunum</b>			-anxiety		
<b>Creffield C (RAAF)</b>			<b>L'Estrange J (Army)</b>		
[2010] AATA 418	7 May 2010		[2010] AATA 150	1 Mar 2010	
<b>Malignant Neoplasm of the Lung</b>			-depressive disorder		
<b>Fernance M (RAAF)</b>			<b>Hicks S (Army)</b>		
[2010] AATA 735	28 Sep 2010		[2010] AATA 327	5 May 2010	
<b>Malignant Neoplasm of the Prostate</b>			-diabetes mellitus		
<b>Fuge G (Army)</b>			<b>Franks P (Army)</b>		
[2010] AATA 130	19 Feb 2010		[2010] AATA 329	6 May 2010	
<b>Wills S (Army)</b>			-ischemic Heart disease		
[2010] AATA 112	15 Feb 2010		<b>Franks P (Army)</b>		
<b>Massive Blood Loss Following Trauma of Accident</b>			[2010] AATA 329	6 May 2010	
<b>Ryan K (Army)</b>			<b>Digestive System</b>		
[2010] AATA 230	31 Mar 2010				
<b>Metastatic Prostate Carcinoma</b>			<b>Cirrhosis of the Liver-</b>		
<b>Bawden C (Army)</b>			-diagnosis		
[2010] AATA 774	11 Oct 2010		<b>Norton L as person</b>		
<b>Shaw M (RAAF)</b>			<b>approved for Goodwin PJ</b>		
[2010] AATA 381	21 May 2010		<b>(Army)</b>		
<b>Multiple Causes</b>			[2010] AATA 298	27 Apr 2010	
<b>Franks P (Army)</b>			<b>Fractured Tooth</b>		
[2010] AATA 329	6 May 2010		-alcohol		
			<b>Frew Y (Army)</b>		
			[2010] AATA 1043	22 Dec 2010	
			-causal relationship		
			<b>Eagle K (Army) (MRCC)</b>		
			[2010] AATA 584	6 Aug 2010	

## AAT and Court decisions – January to December 2010

### Disability Pension – Assessment of Incapacity

#### Reduction of Pension

-Section 31(6) - exercise of power under

**Benson H** (Army)  
[2010] AATA 240                      1 Apr 2010

### Gastrointestinal Disorder

#### Gastro Oesophageal Reflux Disease

- alcohol consumption

**Baird** (Army)  
[2010] AATA 66                      1 Feb 2010

- smoking

**Baird** (Army)  
[2010] AATA 66                      1 Feb 2010

### Jurisdiction and Powers

#### Fundamental Difference in Claimed Injury and Injury Under Review

**Beatson S** (Army) (MRCC)  
[2010] AATA 190                      22 Mar 2010

### Musculoskeletal Disorder

#### Cervical Spondylosis

-carrying loads on the head

**Farmer W** (Army)  
[2010] AATA 477                      28 Jun 2010

-diagnosis

**Farmer W** (Army)  
[2010] AATA 477                      28 Jun 2010

-inability to obtain appropriate clinical management

**Dyer A** (RAN)  
[2010] AATA 729                      23 Sep 2010

-trauma

**Farmer W** (Army)  
[2010] AATA 477                      28 Jun 2010

#### Chondromalacia patellae

-diagnosis

**Corney G** (Army)  
[2010] AATA 598                      12 Aug 2010

-trauma to the patella

**Maxwell N** (Army)  
[2010] AATA 225                      30 Mar 2010

#### Closed Intracranial Injury

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

-arise out of or attributable to

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

-exclusionary provisions s 32

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

-living on base

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

-temporal element

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

#### Distal Fracture

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

-arise out of or attributable to

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

-exclusionary provisions s 32

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

-living on base

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

-temporal element

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

#### Hemiparesis of the Right Arm and Leg

**Archer T** (Army) (MRCC)  
[2010] AATA 525                      13 Jul 2010

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			<b>Lumbar Spondylolisthesis</b>		
-arise out of or attributable to			-high impact trauma		
<b>Archer T</b> (Army) (MRCC)			<b>Beauchamp G</b> (RAN)		
[2010] AATA 525	13 Jul 2010		[2010] AATA 96	10 Feb 2010	
- exclusionary provisions s 32					
<b>Archer T</b> (Army) (MRCC)					
[2010] AATA 525	13 Jul 2010				
-living on base					
<b>Archer T</b> (Army) (MRCC)					
[2010] AATA 525	13 Jul 2010				
-temporal element					
<b>Archer T</b> (Army) (MRCC)					
[2010] AATA 525	13 Jul 2010				
<b>Intervertebral Disc Prolapse</b>			<b>Osteoarthritis</b>		
-carrying/lifting loads of 10 kgs			-hands		
<b>Farmer W</b> (Army)			<b>Dewis, R</b> (RAN)		
[2010] AATA 477	28 Jun 2010		[2010] AATA 19	13 Jan 2009	
-diagnosis			-hips		
<b>Farmer W</b> (Army)			<b>Clemenson B</b> (Army)		
[2010] AATA 477	28 Jun 2010		[2010] AATA 323	4 May 2010	
-trauma to the relevant disc			-knees		
<b>Gosling A</b> (RAN) MRCA			<b>Clemenson B</b> (Army)		
[2010] AATA 642	26 Aug 2010		[2010] AATA 323	4 May 2010	
<b>Lumbar Degeneration</b>			<b>Sharley J</b> (Army)		
-diagnosis			[2010] AATA 474	28 June 2010	
<b>Jamieson J</b> (Army) (MRCC)			-shoulder		
[2010] AATA 778	12 Oct 2010		<b>Dewis R</b> (RAN)		
-due to ageing			[2010] AATA 19	13 Jan 2010	
<b>Jamieson J</b> (Army) (MRCC)			-wrist		
[2010] AATA 778	12 Oct 2010		<b>Clemenson B</b> (Army)		
<b>Lumbar Spondylosis</b>			[2010] AATA 323	4 May 2010	
-aggravation of signs & symptoms			<b>Osteoarthritis Both Hands</b>		
<b>Porter M</b> (RAN) (MRCC)			-clinical onset		
[2010] AATA 968	2 Dec 2010		<b>Roberts W</b> (RAAF)		
-weight bearing			[2010] AATA 734	27 Sep 2010	
<b>Hawke D</b> (Army)			-diagnosis		
[2010] AATA 657	31 Aug 2010		<b>Roberts W</b> (RAAF)		
<b>Maxwell N</b> (Army)			[2010] AATA 734	27 Sep 2010	
[2010] AATA 225	30 Mar 2010		-handheld percussive industrial tool		
<b>Nixon J</b> (Army)			<b>Roberts W</b> (RAAF)		
[2010] AATA 1001	13 Dec 2010		[2010] AATA 734	27 Sep 2010	
			-“Kattenberg” - application of		
			<b>Roberts W</b> (RAAF)		
			[2010] AATA 734	27 Sep 2010	
			<b>Osteoarthritis Both Knees</b>		
			-trauma to knees		
			<b>Corney G</b> (Army)		
			[2010] AATA 598	12 Aug 2010	
			<b>Osteomyelitis</b>		
			-smoking		
			<b>Carr W</b> (Army)		
			[2010] AATA 517	28 Jun 2010	

## AAT and Court decisions – January to December 2010

<b>Post Concussional Syndrome</b>	<b>Disqualification</b>
<ul style="list-style-type: none"> <li><b>Archer T</b> (Army) (MRCC)</li> <li>[2010] AATA 525      13 Jul 2010</li> <li>-arise out of or attributable to</li> <li><b>Archer T</b> (Army) (MRCC)</li> <li>[2010] AATA 525      13 Jul 2010</li> <li>-exclusionary provisions s 32</li> <li><b>Archer T</b> (Army) (MRCC)</li> <li>[2010] AATA 525      13 Jul 2010</li> <li>-living on base</li> <li><b>Archer T</b> (Army) (MRCC)</li> <li>[2010] AATA 525      13 Jul 2010</li> <li>-temporal element</li> <li><b>Archer T</b> (Army) (MRCC)</li> <li>[2010] AATA 525      13 Jul 2010</li> </ul>	<ul style="list-style-type: none"> <li>-apprehended bias</li> <li><b>Farley-Smith G</b> (Army)</li> <li>[2010] AATA 637      25 Aug 2010</li> </ul>
	<b>Estoppel</b>
	<ul style="list-style-type: none"> <li>-concessions at previous hearing</li> <li><b>Farley-Smith G</b> (Army)</li> <li>[2010] AATA 637      25 Aug 2010</li> <li>-no creation of estoppel</li> <li><b>Benson H</b> (Army)</li> <li>[2010] AATA 240      1 April 2010</li> </ul>
<b>Thoracic Spondylosis</b>	<b>Expert Evidence</b>
<ul style="list-style-type: none"> <li>-weight bearing</li> <li><b>Maxwell N</b> (Army)</li> <li>[2010] AATA 225      30 Mar 2010</li> </ul>	<ul style="list-style-type: none"> <li>-role of expert witness</li> <li><b>Munro M</b> (Army)</li> <li>[2010] AATA 942      24 Nov 2010</li> <li>-whether appropriate expertise</li> <li><b>Farley-Smith G</b> (Army)</li> <li>[2010] AATA 637      25 Aug 2010</li> </ul>
<b>Trauma to the Affected Joint</b>	<b>Failure to consider submissions and evidence</b>
<ul style="list-style-type: none"> <li>-trench collapse</li> <li><b>Clemenson B</b> (Army)</li> <li>[2010] AATA 323      4 May 2010</li> </ul>	<ul style="list-style-type: none"> <li><b>Glanville C</b> (Army)</li> <li>[2010] FCA 405      30 April 2010</li> </ul>
<b>Practice and Procedure - Administrative Appeals Tribunal</b>	
<b>Accrued Rights</b>	<b>Jurisdiction</b>
<ul style="list-style-type: none"> <li>-Statements of Principles</li> <li><b>Hunter B</b> (RAN)</li> <li>[2010] FCA 145      25 Feb 2010</li> </ul>	<ul style="list-style-type: none"> <li>-particular psych condition not claimed</li> <li><b>Dyce G</b> (Army)</li> <li>[2010] AATA 956      30 Nov 2010</li> </ul>
<b>Amendment of Previous Diagnosis</b>	<b>Links of Causation</b>
<ul style="list-style-type: none"> <li><b>Button K</b> (RAN)</li> <li>[2010] AATA 860      3 Nov 2010</li> </ul>	<ul style="list-style-type: none"> <li><b>Malady M</b> (Army)</li> <li>[2010] FCA 798      30 July 2010</li> </ul>
<b>Application of s 119</b>	<b>Loss of Medical Records</b>
<ul style="list-style-type: none"> <li><b>Clemenson B</b> (Army)</li> <li>[2010] AATA 323      4 May 2010</li> </ul>	<ul style="list-style-type: none"> <li><b>Clemenson B</b> (Army)</li> <li>[2010] AATA 323      4 May 2010</li> </ul>
<b>Applicable Statement of Principles</b>	<b>Preliminary Issues</b>
<ul style="list-style-type: none"> <li><b>Hunter B</b> (RAN)</li> <li>[2010] FCA 145      25 Feb 2010</li> </ul>	<ul style="list-style-type: none"> <li>-whether a veteran</li> <li><b>Rana R</b> (Army)</li> <li>[2010] FCA 280      26 Mar 2010</li> </ul>

<p><b>Scope of Remittal from Federal Court</b></p> <ul style="list-style-type: none"> <li>-qualified remittal</li> </ul> <div> <b>Kaluza S</b> (RAAF)  [2010] AATA 498                  2 Jul 2010  [2010] FCA 1244                15 Nov 2010 </div>	<p><b>Perversion of the Course of Justice</b></p> <ul style="list-style-type: none"> <li>-whether bound to accept claimant's claim</li> </ul> <div> <b>Hogno D</b> (Army)  [2010] AATA 1044              24 Sep 2010  <b>Kowalski K</b> (Army)  [2010] FCAFC 19                5 Mar 2010 </div> <ul style="list-style-type: none"> <li>-whether reasons of AAT adequately explained</li> </ul> <div> <b>Hogno D</b> (Army)  [2010] FCA 1044                24 Sep 2010 </div>
<hr/>	
<p><b>Stage 3 of Deledio Process</b></p> <div> <b>Border R</b> (Army)  [2010] FCA 264                  23 Mar 2010  <b>Border R</b> (Army)  [2010] FCA 1430                17 Dec 2010  <b>Hunter B</b> (RAN)  [2010] FCA 145                  25 Feb 2010  <b>Knight J</b> (RAN)  [2010] FCA 1134                22 Oct 2010 </div>	<div style="border: 1px solid black; padding: 5px;"><b>Psychiatric Disorder</b></div>
<p><b>Standard of Proof</b></p> <ul style="list-style-type: none"> <li>-whether applied correctly</li> </ul> <div> <b>Hogno D</b> (Army)  [2010] FCA 1044                24 Sep 2010 </div>	<p><b>Alcohol Abuse or Dependence</b></p> <ul style="list-style-type: none"> <li>-clinical onset</li> </ul> <div> <b>Crook D</b> (RAAF)  [2010] AATA 580                5 Aug 2010  <b>Norton L as person approved for Goodwin PJ</b> (Army)  [2010] AATA 298                27 Apr 2010 </div> <ul style="list-style-type: none"> <li>-clinical worsening</li> </ul> <div> <b>Ah Gee H</b> (RAN)  [2010] AATA 1008              15 Dec 2010  <b>Norton L as person approved for Goodwin PJ</b> (Army)  [2010] AATA 298                27 Apr 2010 </div>
<p><b>Tribunal Not Bound by Case Articulated by Applicant</b></p> <div> <b>McKerlie T</b> (RAN)  [2010] FCA 1127                19 Oct 2010 </div>	<ul style="list-style-type: none"> <li>-diagnosis</li> </ul> <div> <b>Ah Gee H</b> (RAN)  [2010] AATA 1008              15 Dec 2010  <b>Allen W</b> (RAN)  [2010] AATA 840                29 Oct 2010  <b>Crook D</b> (RAAF)  [2010] AATA 580                5 Aug 2010  <b>Denman J</b> (Army)  [2010] AATA 943                25 Nov 2010  <b>Gawley R</b> (Army)  [2010] AATA 1017              17 Dec 2010  <b>Hogno D</b> (Army)  [2010] AATA 306                29 Apr 2010  <b>Watson P</b> (Army)  [2010] AATA 743                29 Sep 2010 </div>
<p><b>Withdrawal of a Concession by Repatriation Commission</b></p> <div> <b>Robinson J</b> (Army)  [2010] AATA 617                19 Aug 2010 </div>	
<hr/>	
<div style="border: 1px solid black; padding: 5px;"><b>Practice &amp; Procedure - Federal Court</b></div>	
<p><b>Bias</b></p> <ul style="list-style-type: none"> <li>-error in making particular finding</li> </ul> <div> <b>Kowalski K</b> (Army)  [2010] FCA 217                  16 Feb 2010 </div>	
<p><b>Expert Witnesses</b></p> <ul style="list-style-type: none"> <li>-role of in merits review</li> </ul> <div> <b>Munro M</b> (Army)  [2010] AATA 942                24 Nov 2010 </div>	

**AAT and Court decisions –  
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-hypothesis not reasonable <b>Gawley R</b> (Army) [2010] AATA 1017	17 Dec 2010	-diagnosis <b>Gawley R</b> (Army) [2010] AATA 1017	17 Dec 2010
<b>Alcohol Dependence in Partial Remission</b>		<b>Scott S</b> (RAN) [2010] AATA 1056	23 Dec 2010
-diagnosis <b>Sharley J</b> (Army) [2010] AATA 474	28 Jun 2010	-hypothesis not reasonable <b>Gawley R</b> (Army) [2010] AATA 1017	17 Dec 2010
<b>Anxiety Disorder</b>		<b>Generalised Anxiety Disorder</b>	
<b>Denman</b> (Army) [2010] AATA 943	25 Nov 2010	-clinical onset <b>Nixon J</b> (Army) [2010] AATA 1001	13 Dec 2010
<b>Pink D</b> (RAN) [2010] AATA 46	22 Jan 2010	-diagnosis <b>Ah Gee H</b> (RAN) [2010] AATA 1008	15 Dec 2010
-clinical onset <b>Paddon R</b> (ARMY) [2010] AATA 470	25 Jun 2010	-life threatening illness <b>Ah Gee H</b> (RAN) [2010] AATA 1008]	15 Dec 2010
-diagnosis <b>Brady W</b> (Army) [2010] AATA 346	10 May 2010	<b>Major Depressive Disorder</b>	
<b>Crook D</b> (RAAF) [2010] AATA 580	5 Aug 2010	-chronic bronchitis <b>Watson J</b> (RAN) [2010] AATA 220	29 Mar 2010
<b>Lyons W</b> (RAN) [2010] AATA 562	20 July 2010	-diagnosis <b>Garland K</b> (Army) [2010] AATA 126	18 Feb 2010
<b>Pink D</b> (RAN) [2010] AATA 46	22 Jan 2010	<b>Marsh A</b> (Army) [2010] AATA 114	15 Feb 2010
-step 3 Deledio - no reasonable hypothesis <b>Paddon R</b> (Army) [2010] AATA 470	25 Jun 2010	<b>Post Traumatic Stress Disorder</b>	
<b>Depressive Disorder</b>		-category 1A/ 1B stressor	
-diagnosis <b>North G</b> (Army) [2010] AATA 131	19 Feb 2010	-boiler room incident <b>Church S</b> (RAN) [2010] AATA 1042	22 Dec 2010
<b>Paddon R</b> (Army) [2010] AATA 470	25 Jun 2010	-crewing surveillance flight SVN <b>Nixon J</b> (Army) [2010] AATA 1001	13 Dec 2010
-step 3 Deledio - no reasonable hypothesis <b>Paddon R</b> (Army) [2010] AATA 470	25 Jun 2010	-hearing rifle shots on board HMAS Sydney <b>Allen W</b> (RAN) [2010] AATA 840	29 Oct 2010
<b>Dysthymic disorder</b>		-loading rockets SVN <b>Nixon J</b> (Army) [2010] AATA 1001	13 Dec 2010
-clinical onset <b>Scott S</b> (RAN) [2010] AATA 1056	23 Dec 2010		

**AAT and Court decisions –  
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-motor vehicle accident <b>Hogno D</b> (Army) [2010] AATA 306	29 Apr 2010	<b>Downes M</b> (Army) [2010] AATA 344	10 May 2010
-observe damage from rocket fire <b>Paddon R</b> (Army) [2010] AATA 470	25 Jun 2010	<b>Dwyer R</b> (RAAF) [2010] AATA 646	27 Aug 2010
-scare charge <b>Allen W</b> (RAN) [2010] AATA 840	29 Oct 2010	<b>Lyons W</b> (RAN) [2010] AATA 562	20 July 2010
<b>Church S</b> (RAN) [2010] AATA 1042	22 Dec 2010	-diagnostic criteria not met <b>Gawley R</b> (Army) [2010] AATA 1017	17 Dec 2010
<b>Jackson P</b> (RAN) [2010] AATA 1039	22 Dec 2010	-inability to obtain appropriate clinical management <b>Button K</b> (RAN) [2010] AATA	3 Nov 2010
<b>Pink D</b> (RAN) [2010] AATA 46	22 Jan 2010	-severe psychological stressor -chronic pain <b>North G</b> (Army) [2010] AATA 131	19 Feb 2010
-serious assault <b>Scott S</b> (RAN) [2010] AATA 1056	23 Dec 2010	-civilian death from beer can <b>Nixon J</b> (Army) [2010] AATA 1001	13 Dec 2010
-sighting of explosions over the hills at Vung Tau <b>Pink D</b> (RAN) [2010] AATA 46	22 Jan 2010	-experiencing a severe psychosocial stressor <b>Kaluza S</b> (RAAF)	
-unidentified ship <b>Lyons W</b> (RAN) [2010] AATA 562	20 July 2010	-motor vehicle accident <b>Hogno D</b> (Army) [2010] AATA 306	29 Apr 2010
<b>Pink D</b> (RAN) [2010] AATA 46	22 Jan 2010	-observe damage from rocket fire <b>Paddon R</b> (Army) [2010] AATA 470	25 Jun 2010
-witnessing helicopter attack <b>Paddon R</b> (Army) [2010] AATA 470	25 Jun 2010	-West Sahara - sandstorm event <b>Burke M</b> (Army) [2010] AATA 793	15 Oct 2010
-category 2 stressor -service as a gunner in Malaya <b>Denman J</b> (Army) [2010] AATA 943	25 Nov 2010	-witnessing helicopter attack <b>Paddon R</b> (Army) [2010] AATA 470	25 Jun 2010
-social isolation <b>Sticher M</b> (Army) [2010] AATA 336	7 May 2010	-step 4 Deledio <b>Brady W</b> (Army) [2010] AATA 346	10 May 2010
-clinical worsening <b>Church S</b> (RAN) [2010] AATA 1042	22 Dec 2010		
-diagnosis <b>Brady W</b> (Army) [2010] AATA 346	10 May 2010		
<b>Burke M</b> (Army) [2010] AATA 793	15 Oct 2010		

**AAT and Court decisions –  
January to December 2010**

<b>Remunerative Work &amp; Special Rate of Pension</b>
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**Application of s 28 VEA**

**Creek D** (Army)  
[2010] AATA 563 28 Jul 2010

**Munro M** (Army)  
[2010] AATA 942 24 Nov 2010

- able to work at least 8 hours a week

**Bell R** (Army)  
[2010] AATA 616 19 Aug 2010

**Creek D** (Army)  
[2010] AATA 563 28 Jul 2010

**Mitchell A** (Army)  
[2010] AATA 222 30 Mar 2010

**Munro M** (Army)  
2010 AATA 942 24 Nov 2010

**Palm D** (Army)  
[2010] AATA 932 22 Nov 2010

**Valliant J** (Army)  
[2010] AATA 941 24 Nov 2010

**Ceased to Engage in Remunerative Work**

-non accepted medical conditions

**Bell R** (Army)  
[2010] AATA 616 19 Aug 2010

**McKay A** (Army)  
[2010] AATA 1067 24 Dec 2010

-resignation

**Hogno D** (Army)  
[2010] AATA 306 29 Apr 2010

**Munro M** (Army)  
2010 AATA 942 24 Nov 2010

-retirement

**Retrot R** (Army)  
[2010] AATA 87 5 Feb 2010

**Wallace G** (Army)  
[2010] AATA 602 13 Aug 2010

**Type of Remunerative Work**

**Ash P** (Army)  
[2010] AATA 987 9 Dec 2010

**Bell R** (Army)  
[2010] AATA 616 19 Aug 2010

**Dunstall P** (Army)  
[2010] AATA 806 20 Oct 2010

**Mephram D** (Army)  
[2010] AATA 478 28 Jun 2010

**Munro M** (Army)  
2010 AATA 942 24 Nov 2010

**Parkes K** (Army)  
[2010] AATA 967 2 Dec 2010

**Valliant J** (Army)  
[2010] AATA 941 24 Nov 2010

**White G** (Army)  
[2010] AATA 469 25 Jun 2010

**WNFN** (AFP)  
[2010] AATA 813 22 Oct 2010

**Whether Prevented from Continuing to Undertake**

**Creek D** (Army)  
[2010] AATA 563 28 Jul 2010

**Garratt (as LPR for B Gibson)** (RAN)  
[2010] AATA 827 26 Oct 2010

**Jensen I** (Army)  
2010 FCA 422 5 May 2010

**McMahon M** (Army)  
[2010] AATA 146 26 Feb 2010

**Mephram D** (Army)  
[2010] AATA 478 28 Jun 2010

**Munro M** (Army)  
2010 AATA 942 24 Nov 2010

**Olde P** (Army)  
[2010] AATA 184 18 Mar 2010

**Retrot P** (Army)  
[2010] AATA 87 5 Feb 2010

**Valliant J** (Army)  
[2010] AATA 941 24 Nov 2010

**WNFN** (AFP)  
[2010] AATA 813 22 Oct 2010

-whether alcohol contributes to incapacity to engage in

**Couch S** (Army)  
[2010] AATA 201

**O'Donoghue J** (Army)  
[2010] AATA 309 29 Apr 2010

**White G** (Army)  
[2010] AATA 469 25 Jun 2010

-whether genuinely seeking to engage in remunerative work

**Ash P** (Army)  
[2010] AATA 987 9 Dec 2010



**AAT and Court decisions –  
January to December 2010**

<b>Dunstall P</b> (Army) [2010] AATA 806	20 Oct 2010	<b>Creek D</b> (Army) [2010] AATA 563	28 Jul 2010
<b>Johnson I</b> (Army) [2010] AATA 706	16 Sept 2010	<b>Fisher G</b> (Army) [2010] AATA 895	15 Nov 2010
<b>Valliant J</b> (Army) [2010] AATA 941	24 Nov 2010	<b>Johnson I</b> (Army) [2010] AATA 706	16 Sept 2010
<b>White G</b> (Army) [2010] AATA 469	25 Jun 2010	<b>Mansfield B</b> (RAN) [2010] AATA 192	23 Mar 2010
<b>Whether Prevented by War-Caused Disabilities Alone</b>		<b>Wallace G</b> (Army) [2010] AATA 602	13 Aug 2010
		<b>White G</b> (Army) [2010] AATA 469	25 Jun 2010
		<b>Whether Suffering a Loss of Salary, Wages or Earnings on His Own Behalf</b>	
		<b>Couch S</b> (Army) [2010] AATA 201	24 Mar 2010
		<b>Retrot R</b> (Army) [2010] AATA 87	5 Feb 2010
		<b>Valliant J</b> (Army) [2010] AATA 941	24 Nov 2010
		<b>Wright D</b> (Army) [2010] AATA 407	3 Jun 2010
		<b>WNFN</b> (AFP) [2010] AATA 813	22 Oct 2010
		<b>Respiratory Disorder</b>	
		<b>Asthma</b>	
		<b>Tyers D</b> (RAAF) [2010] AATA 108	12 Feb 2010
		<b>Chronic Sinusitis</b>	
		<b>Scott B</b> (RAAF) [2010] AATA 82	4 Feb 2010
-age <b>Fisher G</b> (Army) [2010] AATA 895	15 Nov 2010		
<b>Johnson I</b> (Army) [2010] AATA 706	16 Sept 2010		
<b>Mansfield</b> (Army) [2010] AATA192	23 Mar2010		
<b>Wallace G</b> (Army) [2010] AATA 602	13 Aug 2010		
<b>White G</b> (ARMY) [2010] AATA 469	25 Jun 2010		
-alcoholism and residing overseas on tourist visa <b>Kellett, L</b> (Army) [2010] AATA 14	12 Jan 2010		
<b>Summers RJ</b> (Army) [2010] AATA 803	20 Oct 2010		
-credibility <b>Ash P</b> (Army) [2010] AATA 987	9 Dec 2010		
<b>Creek D</b> (Army) [2010] AATA 563	28 Jul 2010		
-dementia <b>Hall O</b> (Army) [2010] AATA 249	9 Apr 2010		
-effects of non-accepted disabilities <b>Bartholomai JC</b> (Army) [2010] AATA 705	16 Sep 2010		
<b>Cooper A</b> (Army) [2010] ATA 1075	15 Dec 2010		
<b>Parkes K</b> (Army) [2010] ATA 967	2 Dec 2010		
<b>Stadoliukas A</b> (Army) [2010] AATA 986	9 Dec 2010		
-lack of recent work experience <b>Bell R</b> (Army) [2010] AATA 616	19 Aug 2010		

## AAT and Court decisions – January to December 2010

<b>Nasal Polyps</b>		-date of effect
-chronic bronchitis and emphysema		<b>Alsford A</b> (RAN)
<b>Baird J</b> (Army)		[2010] AATA 160 25 Feb 2010
[2010] AATA 66	1 Feb 2010	<b>Tomblin R</b> (RAN)
-smoking		[2010] AATA 363 18 May 2010
<b>Whyte D</b> (RAN)		-evaluation of real estate
[2010] AATA 869	5 Nov 2010	property
<b>Watson JE</b> (RAN)		<b>Sluce M &amp; M</b>
[2010] AATA 220	29 Mar 2010	[2010] AATA 10 11 Jan 2010
-volatile agents		-permanently incapacitated for work
<b>Scott B</b> (Army)		<b>Tran T</b> (Allied)
[2010] AATA 82	4 Feb 2010	[2010] AATA 91 8 Feb 2010
<b>Sleep Apnoea</b>		<b>Qualifying Service</b>
-alcohol consumption		-Commonwealth veteran
<b>Gilkinson D</b> (RAN)		<b>Brennan M</b> (RNZN)
[2010] AATA 23	15 Jan 2010	[2010] AATA 821 25 Oct 2010
- chronic obstruction of the		<b>Meller V</b> (RAF)
upper airways		[2010] AATA 538 21 Jul 2010
<b>Gilkinson D</b> (RAN)		-incurred danger
[2010] AATA 23	15 Jan 2010	<b>Brennan M</b> (RNZN)
- obesity		[2010] AATA 821 25 Oct 2010
<b>Gilkinson D</b> (RAN)		<b>Meller V</b> (RAF)
[2010] AATA 23	15 Jan 2010	[2010] AATA 538 21 Jul 2010
<b>Vidler P</b> (RAN)		-operations against the enemy
[2010] AATA 1021	17 Dec 2010	<b>Palmer J</b> (RAAF)
<b>Watson J</b> (RAN)		[2010] AATA 384 24 May 2010
[2010] AATA 220	29 Mar 2010	
<b>Skin and Subcutaneous Tissue</b>		<b>Service Pension</b>
<b>Contact Dermatitis</b>		-pension entitlement reduced
-diagnosis		after erroneous evaluation
<b>Clemenson B</b> (Army)		of real estate property
[2010] AATA 323	4 May 2010	<b>Sluce M &amp; M</b>
		[2010] AATA 10 11 Jan 2009
<b>Service Pension</b>		<b>Words and Phrases</b>
<b>Invalidity Service Pension</b>		<b>Arisen Out Of</b>
-age service pension		<b>Fernance M</b> (RAAF)
<b>Tran T</b> (Allied)		[2010] AATA 735 28 Sep 2010
[2010] AATA 520	30 June 2010	<b>Assessment Period</b>
		<b>White G</b> (Army)
		[2010] AATA 469 25 Jun 2010

**AAT and Court decisions –  
January to December 2010**

<b>Chronic</b>			<b>Material</b>		
<b>Paddon R (Army)</b> [2010] FCA 1147	22 Oct 2010		<b>Hawke D (Army)</b> 2010 AATA 657	31 Aug 2010	
			-are “assumptions” material		
<b>Clinical Management</b>			<b>Glanville C (Army)</b> [2010] FCA 405	30 Apr 2010	
<b>Dyer A (RAN)</b> [2010] AATA 729	23 Sep 2010				
			<b>Material contribution</b>		
<b>Concerns in the work environment</b>			<b>Fernance M (RAAF)</b> [2010] AATA 735	28 Sep 2010	
<b>Paddon R (Army)</b> [2010] FCA 1147	22 Oct 2010				
			<b>Material Degree</b>		
<b>Contributing</b>			<b>Norton L as person approved for Goodwin PJ (Army)</b> [2010] AATA 298	27 Apr 2010	
<b>Norton L as person approved for Goodwin PJ (Army)</b> [2010] AATA 298	27 Apr 2010				
			<b>Matter that Affects the Payment of Pension</b>		
<b>Experiencing a Severe Stressor (Might)</b>			<b>Benson H (Army)</b> [2010] AATA 240	1 Apr 2010	
<b>Sharley J (Army)</b> [2010] AATA 474	28 Jun 2010				
			<b>Occurrence that Happened</b>		
<b>False in a Material Particular</b>			<b>Norton L as person approved for Goodwin PJ (Army)</b> [2010] AATA 298	27 Apr 2010	
<b>Benson H (Army)</b> [2010] AATA 240	1 Apr 2010				
			<b>Reasonable Proportionality</b>		
<b>Handheld Vibrating Percussive Industrial Tool</b>			<b>James J (RAN) (MRCC)</b> [2010] FCAFC 95	28 Jul 2010	
<b>Roberts W (Army)</b> [2010] AATA 734	27 Sep 2010				
			<b>Related to Service</b>		
<b>Impairment</b>			<b>Gilkinson D (RAN)</b> [2010] FCA 1292	25 Nov 2010	
<b>Munro M (Army)</b> [2010] AATA 942	24 Nov 2010				
			<b>Who has not been engaged in remunerative work</b>		
<b>Inability to Obtain Appropriate Clinical Management</b>			<b>Jensen I (Army)</b> [2010] FCA 422	5 May 2010	
<b>Dyer A (RAN)</b> [2010] AATA 729	23 Sep 2010				
<b>Julian M (RAN)</b> [2010] AATA 1026	17 Dec 2010		<b>Wilful Misconduct</b>		
			<b>Ryan K (Army)</b> [2010] AATA 230	31 Mar 2010	