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Editor's notes

This annual edition of *VeRBosity* contains reports on all of the Federal Court decisions relating to veterans' matters in 2015. It also reports on two decisions of the Federal Circuit Court and selected AAT cases, including remittals from the Federal Court and all MRCA cases before the Tribunal.

Please also refer to the VRB's website www.vrb.gov.au for up to date Practice Notes on all Federal Court decisions as they become available.

Lynley Gardner, Senior Legal Officer

Abbreviations

The following abbreviations have been used in this publication:

AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975</i>
DVA	Department of Veterans' Affairs
FC	Federal Court
FCC	Federal Circuit Court
FFC	Full Court of the Federal Court
MRCA	<i>Military Rehabilitation and Compensation Act 2004</i>
MRCC	Military Rehabilitation and Compensation Commission
PTSD	Post traumatic stress disorder
RC	Repatriation Commission
SRCA	<i>Safety Rehabilitation and Compensation Act 1988</i>
VEA	<i>Veterans' Entitlements Act 1986</i>

Appointment of VRB Members

Appointment of part-time Members

The following Members have recently been appointed or re-appointed to the Board:

Senior Members

- Robyn Bailey
- Gary Barrow
- Alison Colvin
- Jenny D'Arcy
- Robert Douglass
- Hilary Kramer
- June McPhie
- Jillian Moir
- Les Young
- Tammy Williams
- Chris Wray

Services Members

- Mark Bornholt
- Scott Clark
- Nadine Crimston
- Chris Hamilton
- Simon Hart
- Louise Hunt

- Peter Maher
- Rob Regan
- Francis Roberts
- Iain Whitehouse
- Bruce Wood
- Warwick Young

Members

- Jane Anderson
- Christopher Austin
- Sharon Brennan
- Frank Brown
- Linda Corbould
- Geoff Hourn
- Chris Keher
- Sandra Kerr
- Josephine Lumb
- Nicholas Wilson
- Neville Wyatt

Determinations & instruments of allotment in 2015

Determinations were made by the Assistant Minister for Defence under section 5C(1) of the VEA, and under subsections 6(1)(a) or (b) of the MRCA.

Veterans' Entitlements (Non-warlike Service—Operation Augury) Determination 2015

The Assistant Minister for Defence has signed a new determination relating to Operation AUGURY, an operation that supports Defence's understanding of Islamist terrorist threats to Australia and the region in order to support national counter terrorism efforts to protect Australian national security interests. This support will occur in Jordan.

Veterans' Entitlements (Non-warlike Service—Operation Manitou) Determination 2015

The Minister for Defence has signed a new determination declaring service provided by ADF personnel on Operation MANITOU, the maritime operation, including counter-piracy operations, as non-warlike service for the purpose of the Act.

Military Rehabilitation and Compensation (Non-warlike Service) Determination 2015 (No. 1)

The Assistant Minister for Defence has signed a new determination replacing the

Legislative amendments

existing list of 23 operations, referred to in Military Rehabilitation and Compensation Determination (Non-warlike Service) 2014 (No. 3) and adds one new operation; Operation AUGURY which is considered to be non-warlike under the auspices of the Act.

*Please note this Determination has been revoked by the Military Rehabilitation and Compensation (Non-warlike Service) Determination 2015 (No. 2)

Military Rehabilitation and Compensation (Non-warlike Service) Determination 2015 (No. 2)

This determination replaces the existing list of 24 operations, referred to in Military Rehabilitation and Compensation (Non-warlike Service) Determination 2015 (No.1) and adds one new operation; Operation MANITOU in an amended area which is considered to be non-warlike under the auspices of the Act.

Military Rehabilitation and Compensation (Members - War Artists and Entertainers - Service End Date) Amendment Determination 2015

The Minister for Veterans' Affairs signed this determination which closes off MRCA coverage for entertainers and war artists who provided the relevant services for the Defence Force.

Instruments

Instruments are usually made by the Vice Chief of the Defence Force under subsections 5B(2)(a) or (b) of the VEA or section 56D(1) of the VEA. No Instruments were issued in 2015.

Legislative amendments

Federal Budget 2016-17

The Government announced it will not proceed with the 2014-15 Budget measure to end the three month backdating of veterans' disability claims, reinstating funding of \$37.8 million over the forward estimates.

VRB Practice Directions

The Budget also provides funding to the VRB for:

- a new case management system that will streamline processes and reduce backlogs by allowing veterans to lodge appeals, manage them, and monitor their real-time progress electronically
- the national rollout of an alternative dispute resolution model that has been trialled in NSW/ACT, that saw 57 per cent of applications finalised without the need for a full hearing and, being finalised within two months rather than the usual 12 months from the date of appeal.

VRB Practice Directions

Practice Direction No 1 of 2015

Access to the Board - Use of Telephone and Video Links

Effective: 5 February 2015

1. The purpose of this practice direction is to clearly set out the Board's procedure in relation to

the use of telephone and video links at a hearing.

2. Pursuant to section 142(2) of the VEA, the Principal Member may, give directions as to the procedure and operations of the VRB generally and the conduct of reviews by the VRB.
3. The Board's normal practice at hearings is to require the applicant and their representative to attend to give oral evidence. However, the Board recognises that there may be circumstances where this is either not possible or not necessary.
4. A party wishing to use telephone or video links should make a request in writing to the Board. This should occur as soon as possible and the request must explain the nature of the difficulty which makes it impractical for an applicant, representative or witness to attend. If the request concerns a video-link, it must also set out

VRB Practice Directions

what alternative arrangements are in place, should the video-link fail. e.g. conference telephone and relevant contact number.

5. As noted in the Board's General Practice Direction, once a request is made for a video hearing it will be considered at the discretion of the presiding member hearing the application, once the application has been listed for hearing.

6. The Principal Member directs that a telephone or video link hearing will be provided if it will enable a hearing to be listed at an earlier date than might otherwise occur.

7. The Board may also consider telephone or video links of its own motion, where appropriate.

8. Please note the Board pays for the cost of video hearings.

9. It is important that staff of the Registry are provided with

relevant telephone numbers for video-link or telephone hearings. Representatives must advise any witnesses (including the applicant) of the date, time and estimated duration if they are to give evidence by telephone or video.

VRB Case Note No. 4:

VRB's decision to proceed with hearing following application for adjournment

The issue

The procedural issue for determination was whether or not to continue with the hearing, after the veteran did not comply with Board's Adjournment Practice Direction. The substantive issue was the appropriate diagnosis of the veteran's psychiatric condition.

The Applicant's position

The first hearing of veteran's application for review was adjourned at the veteran's request under section 151 of the VEA, for

VRB Practice Directions

the purpose of obtaining a further report from his treating psychiatrist.

At the second hearing the veteran's advocate agreed that the supplementary report from the veteran's treating psychiatrist was completely inadequate. The matter was further adjourned under s152 of the VEA to make a request for the veteran to be examined by an independent psychiatrist and a report prepared as to the opinion of the psychiatrist about the diagnosis of any condition suffered by the veteran.

Following receipt of the independent psychiatric report, the application was listed for a third hearing. Via email, the veteran contacted the Board and advised he could not attend on that date. The Board relisted the application for another hearing date.

Four days before the hearing the veteran wrote to the Board advising he wanted the hearing vacated as he wished to refute the independent psychiatric report. He advised he would be requesting a further independent investigation by a psychiatrist be arranged through DVA. The veteran also advised he had dispensed with the

services of his advocate, who had represented the veteran in the two previous hearings.

Two days before the hearing the Board advised the veteran by email that he should attend the hearing and make his application for an adjournment. The veteran responded the same day, indicating he was not available on the hearing date, and he did not understand why the application needed to be made in person. He indicated that if the Board needed to hear why he totally objected to their chosen psychiatrist "assessing" his credibility with his demeaning and inaccurate report, he was happy to put it in writing.

He stated he was aware it was his right to elect for another assessment if there are two conflicting reports and he needed to agree who will be conducting the next interview; and would advise his next intended action after consultation with a new representative. On the same day the Board responded to the veteran, indicating the Board will consider the matter at the appointed time, and the veteran should consider carefully the consequences of failing to attend which include the Board dealing with the

matter in his absence. The Board noted the veteran is entitled to arrange for a further psychiatric report from a psychiatrist of his own choosing but at his expense. The Board indicated it would not consider ordering another report at public expense on the basis that the veteran did not like the views expressed in the current report.

No response was received and veteran failed to appear at the appointed time for the hearing.

The Board's consideration

The Board first determined as to whether to proceed to consider the matter in the absence of the veteran or his representative, or whether in the interests of fairness the matter should be further adjourned.

Section 133A of the VEA sets out the objective of the Board as '*providing a mechanism of review that is fair, just, economical, informal and quick*'. Each of the words set out in s133A stands on its own. No individual word has more or less importance than the others. The words must be read together to obtain the desired objective, balancing the

sometimes competing requirements of each against the other.

In considering any course of action the Board was guided by the Board's Adjournment Practice Direction which is published on the Board's website. Relevant extracts of that Direction are set out below:

The Board has a responsibility to manage cases so that they are brought to a conclusion at the earliest reasonable opportunity...the following policy will apply

- 1. Matters are listed for hearing on the basis that the hearing will proceed on the date fixed.*
- 2. An application for an adjournment must be made in writing with reasons.*
- 3. The matter will be referred to the Presiding Member for consideration.*
- 4. An application for an adjournment made less than 10 working days prior to the hearing date will not be granted unless there are particular and compelling reasons... In such cases the hearing will commence as scheduled and the panel will determine after*

VRB Practice Directions

considering all the circumstances and the material before it whether it will proceed with the hearing or adjourn the matter.

In considering whether or not to continue with the hearing the Board noted the following matters:

- The matter as at the hearing date was two years and five months old. The target of the Board is to finalise hearings within 12 months of the date of lodgement of the application for review.
- The matter has been the subject of two previous hearings. The first hearing was adjourned at the veteran's request to obtain further medical evidence. The veteran gave extensive evidence on that day that is set out in the relevant Board decision.
- A second hearing was adjourned at the Board's request, but with the acquiescence of the veteran, to obtain an independent

psychiatric report to provide evidence that was deficient in the reports of the veteran's treating psychiatrist.

- The initial application for a further adjournment was made outside the ten day period set out in the Adjournment Practice Direction. This resulted in the Board shifting the hearing day to one more suitable to the veteran.
- The next application for an adjournment was made within the 10 day period set out in the Direction. In that request the veteran advised he had dispensed with the service of his advocate and asserted a right for a further report to be prepared using a psychiatrist of his choosing at public expense. The Board is not aware of such a right. Further material may be requested by the Board pursuant to s152 of the VEA, however this

is a matter that is entirely within the discretion of the Board. There is a right to obtain further medical evidence by a veteran outside a s152 request, but that material must be obtained at the veteran's expense.

- The Board noted the matter was initially adjourned to enable the veteran to obtain further medical evidence at his expense. It was only after such evidence was not forthcoming that the Board further adjourned the matter for a further report.
- The veteran was clearly advised and on notice that the matter would proceed at the appointed time and could be finalised in his absence if he failed to appear.
- No further correspondence was received from the veteran indicating any alternate reason as to his inability to attend the

hearing, such as a medical emergency.

On the basis of the material set out above, the Board was reasonably satisfied that the veteran had deliberately chosen not to attend the hearing. His reasons clearly include his dissatisfaction with the independent psychiatric report. Given the matter is now over two years old, has been the subject of two previous adjourned hearings, and the Board's objective of providing a mechanism of review that is quick, and that the Board is of the view that it has sufficient material before it to come to a considered decision, the Board determined to finalise the matter in the absence of the veteran.

In coming to this conclusion, the Board was also mindful of certain beneficial provisions of the VEA. These include a right to a full de novo hearing of a decision of the Board by the AAT and the fact that a veteran may make multiple applications in respect of the same condition. The Board was of the view that any prejudice to the veteran occasioned by proceeding in his absence was more than counter balanced by the

Questions & Answers

need to bring these proceedings to a conclusion.

The Board went on the deal with the substantive issue concerning the appropriate diagnosis of the veteran's psychiatric condition, and ultimately affirmed the decision under review.



Questions & Answers

Question:

Can a VRB application for review be lodged electronically?

Answer:

Yes – via facsimile or an online form.

Two new instruments, MRCC34/2014 and R33/2014 cover the approved method and addresses for electronic lodgement under the VEA and MRCA (including via the DVA website). DVA still accepts lodgement by facsimile to approved numbers.

Question: Are there any substantial changes to the new GARP M (issued in 2015) or GARP 6 (issued in 2016)?

Answer:

No.

Instrument 2015 No. MRCC 4 re-issued the *Guide to Determining Impairment and Compensation* (GARP M). Apart from minor drafting changes the instrument is still the same in substance as the GARP M it replaces.

Instrument 2016 No. R1 re-issued the *Guide to the Assessment of Rates of Veterans' Pensions* (GARP). GARP 6 has been amended to make minor policy changes and technical updates. However, it has not changed any of the impairment methodologies in GARP V. No new policy changes have been proposed.

Please note, Instrument 2016 No. R1 does not contain the non-reduction provisions for general rate that were included in Instrument 8 of 1997. This means the

VRB is not restricted in reducing the general rate of pension.

Previously, clause 3 of Instrument 8 of 1997 provided that the general rate of pension could not be reduced below the rate that applied at 18 April 1998, unless:

- the degree of incapacity had decreased (as assessed under GARP IV); or
- the previous assessment or last assessment would not have been made but for a false statement or misrepresentation of a person.

Administrative Appeals Tribunal

Smith and Repatriation Commission

Deputy President S A Forgie

[2015] AATA 27

21 January 2015

Remittal – whether veteran by reason of incapacity alone prevented from continuing to undertake remunerative work and so is suffering loss of salary or wages or earnings

Facts

Mr Smith was called up for National Service in April 1970, and had operational service in Vietnam from 9 November 1970 to 4 November 1971. On 31 March 2009 he applied for an increase in his disability pension to the special rate, for his war-caused conditions of bilateral sensorineural hearing loss, bilateral tinnitus, PTSD, solar keratosis and tinea. Mr Smith's application was refused by the RC. His appeals to the

VRB, AAT and FC were unsuccessful.

The FFC allowed his appeal, and the matter was remitted to the AAT.

Issues before the Tribunal

Due to concessions made by the RC, the only issue was whether Mr Smith meets the criteria specified in section 24(1)(c) for payment of pension at the special rate, or if he does not, whether he meets those specified in section 23(1)(c) for payment at the intermediate rate.

The Tribunal's consideration

In 1982 Mr Smith was involved in an industrial accident, and as a result his left leg was amputated above the knee and he also suffered injury to his right ankle. However, the AAT was satisfied on the balance of probabilities that Mr Smith was not prevented from undertaking remunerative work that he was undertaking by reason of any incapacity arising from his physical injuries. The AAT was satisfied that he was incapacitated as a result of his PTSD. The AAT indicated modern day work as a farmer or using skills as an electrician

require both concentration and interpersonal skills, as well as physical ability. The AAT found Mr Smith did not have the necessary concentration or interpersonal skills in 2003 when he ceased his last remunerative employment or at the time that he lodged his application for increase in disability pension on 31 March 2009. There was no disagreement between the parties that Mr Smith suffered a loss of salary or wages that he would not have suffered had he been free of the PTSD, therefore Mr Smith satisfied section 24(1)(c).

The AAT did not need to go on to consider the ameliorating provisions of section 24(2)(b), but did so for completeness. The AAT indicated it would not have been satisfied that Mr Smith had been genuinely seeking remunerative work at any point in the assessment period. However, the AAT had already found that Mr Smith met the criteria in section 24(1)(c). The AAT also set out its difficulties with the FFC's view that section 24(2)(b) was applicable whether or not a veteran has previously engaged in remunerative work.

Formal decision

The AAT set aside the decision under review and substituted a decision that the applicant is entitled to be paid at the special rate.



Editorial note

A summary of the FFC's decision in *Smith v Repatriation Commission* [2014] is available on the VRB's website, and provides an authority (despite the AAT's reservations) that section 24(2)(b) is **not confined** in its operation to veterans who did not or could not work following military service. The ameliorating provisions allow veterans to retain their eligibility while their service-related incapacity remains the substantial cause of their inability to obtain remunerative work if they were genuinely seeking work.

**Parr and Military Rehabilitation &
Compensation Commission**

Dr M Denovan, Member

[2015] AATA 239
22 April 2015

***Eligible Young Person Payment –
whether dependent was an
“eligible young person” at the time
the veteran became eligible for 80
impairment points***

Facts

Mr Michael Parr served in the Australian Army from 27 July 2002 to 4 October 2011. He has a number of accepted conditions under the MRCA and the SRCA. Mr Parr has three children. The MRCC determined that the youngest two children of Mr Parr each satisfy the criteria for an Eligible Young Person Payment (EYPP), however Mr Parr’s eldest child, Yume Parr, did not satisfy the eligibility criteria for an EYPP.

Issues before the Tribunal

Once a veteran has 80 or more impairment points for one or more service injuries or diseases, section 80(2) of the MRCA specifies that the veteran is

entitled to receive an additional lump sum payment for each dependant who satisfies the legislative definition of “eligible young person” at the later of:

(a) The date determined by the Commission to be the date on which the impairment suffered by the impaired person constitutes at least 80 impairment points; or

(b) either:

(i) if the person has a single service injury or disease—the date on which a claim was made under section 319 for acceptance of liability for the injury or disease; or

(ii) otherwise - the date on which the most recent claim was made under section 319 for acceptance of liability for one of the service injuries or diseases concerned.

“Dependant” is defined by sections 15 and 17 of the MRCA.

“Eligible young person” is defined under section 5 of the MRCA to mean:

(a) A person under 16; or

(b) A person who:

(i) is 16 or more but under 25; and

(ii) is receiving full time education at a school, college, university or other education institution; and

Administrative Appeals Tribunal

(iii) is not in full-time employment or engaged in work full-time on his or her own account.

The issue for determination was whether, at the time Mr Parr lodged his most recent claim that resulted in him being eligible for 80 impairment points, or at the time he was entitled to 80 impairment points (whichever is the later), Yume Parr was an “eligible young person”?

The Tribunal’s consideration

Yume Parr graduated in December 2011. As she ceased to be a full time student at the time she graduated, in order to be eligible to be paid an EYPP, all the other eligibility criteria must have been met by that date. The date Mr Parr was considered entitled to 80 impairment points was relevant to this decision. Pursuant to section 80, Yume Parr must still have been a full time student at the later of the two following dates:

- The date the MRCC determined that Mr Parr was entitled to 80 or more impairment points, or
- The date of lodgement of the latest claim for a disease or injury that was relevant in Mr Parr having been allocated 80 impairment points.

Sections 68-70 of the MRCA set out how the MRCC is to determine the date of effect from which a veteran is entitled to compensation - for example, amongst other things the MRCC must be satisfied that the compensable condition is likely to continue indefinitely, and is stabilised.

Under section 68(1)(c), a veteran must also have lodged a claim for the compensable condition, before they can be entitled to any compensation for that condition. Prior to Yume Parr graduating, as a result of Mr Parr’s successful claim for major depressive disorder he was assessed as having 64 impairment points with effect from 31 July 2011 when the condition became permanent and stable. Although Mr Parr made successful claims for other

conditions and was assessed as having 80 impairment points with effect from 22 March 2012 (when other significant conditions were stable), at this point in time Yume Parr was no longer an “eligible young person”.

Formal decision

The AAT affirmed the decision under review.

Lewis and Military Rehabilitation & Compensation Commission

Ms N Isenberg, Senior Member

[2015] AATA 581
11 August 2015

Whether veteran suffered a service death – veteran died due to cardiac arrest – no causal factor relating condition to service – criteria not met

Facts

Mr Gregory Lewis served in the Royal Australian Navy from 6 June 1994 until his death in April 2008. He died of a cardiac arrest, at the age of 32, having

collapsed at the family home. In August 2008 his wife, the applicant, lodged a MRCA claim for compensation for dependents of the deceased member. The respondent refused the claim, and the VRB affirmed the determination under review. The applicant sought review of the VRB decision.

Other claims were also lodged but this summary only concerns the MRCA death claim, which dealt with the substantive issues.

Issues before the Tribunal

The issue before the AAT was whether Mr Lewis suffered a service death, as defined in section 28 of the MRCA, for which liability must be accepted pursuant to section 24(1) of the MRCA.

The Tribunal’s consideration

The applicant submitted that section 29(3) of the MRCA applies, in that Mr Lewis received treatment under the regulations made under the *Defence Act* 1903 (which was conceded by the respondent), and as a consequence of that treatment, he died. The respondent

Administrative Appeals Tribunal

submitted that Mr Lewis' death at home on 12 April 2008 was not as a consequence of that treatment.

"Treatment" in section 29(3) has the meaning, given the meaning in section 13(1) by section 5 of the MRCA:

Treatment provided, or action taken, with a view to:

- (a) restoring a person to physical or mental health or maintaining a person in physical or mental health; or
- (b) alleviating a person's suffering; or
- (c) ensuring a person's social well-being.

The AAT examined Mr Lewis' treatment on his return to Australia, following hospitalisation for acute alcohol intoxication in Hawaii in 2004 when he had several cardiac arrests and required defibrillation. The applicant referred to the failure to insert a defibrillator. The evidence was that the recommendation, which Mr Lewis accepted, was not to install a pacemaker. The AAT did not consider there was a causal link between the treatment provided, namely the failure to insert a defibrillator, and Mr Lewis' death. There was no evidence

that his death was as a consequence of the failure to have a defibrillator inserted.

Alternatively, the applicant submitted that the medical treatment relating to Mr Lewis' pathology results, and in particular his elevated cholesterol levels (dyslipidaemia), was a direct cause of his death. The AAT noted that there was no evidence of elevated cholesterol levels after 2004. The AAT did not accept the applicant's contention that Mr Lewis' cholesterol level remained untreated between September 2004 and his death nearly four years later, or that his death was a consequence of the treatment of advice as to diet and exercise and the failure to prescribe statins.

In the alternative, the applicant submitted that the claim could be dealt with under section 24(1) and section 28 of the MRCA. The applicant relied on factors 6(f), (v) and (gg) in the Statement of Principles concerning ischaemic heart disease, number 90 of 2007, as amended:

- (f) having dyslipidaemia before the clinical onset of ischaemic heart disease

Administrative Appeals Tribunal

(v) having dyslipidaemia before the clinical worsening of ischaemic heart disease

(gg) inability to obtain appropriate clinical management for ischaemic heart disease

Based on the expert evidence, the AAT was prepared to accept that Mr Lewis suffered from ischaemic heart disease. There was, however, no evidence as to the date of clinical onset of ischaemic heart disease, although the autopsy found there to be “fairly severe atherosclerosis of the left anterior descending coronary artery”, which might suggest the condition had been present for some time, but it was not found in 2004. There was no evidence as to the date of clinical onset of dyslipidaemia, although there was evidence Mr Lewis had dyslipidaemia in 2004. The AAT considered it was reasonable to conclude that the dyslipidaemia preceded the ischaemic heart disease. When looking at whether dyslipidaemia was related to Mr Lewis’ service, the AAT indicated that one of the experts considered it was not related to service but was due to genetic factors

and diet. There was no evidence connecting Mr Lewis’ dyslipidaemia with his service, so it was not related to service.

As to factor 6(v), there was no evidence that Mr Lewis’ ischaemic heart disease had worsened.

In relation to factor 6(gg), the applicant contended that Mr Lewis was not adequately monitored given previous health concerns outlined in his medical documents. Ultimately the AAT found that there was no evidence that Mr Lewis had an inability to obtain appropriate clinical management in the sense that he was unable to, or prevented from, obtaining such clinical management.

For completeness, the AAT addressed the applicant’s alternative submission that Mr Lewis’ death was caused by cardiac arrhythmia. One of the experts described Mr Lewis’ arrhythmia as “primary ventricular arrhythmias” which was different to the definition of atrial fibrillation in the relevant SoP, number 20 of 2003, therefore the SoP did not

apply. In circumstances where one of the experts considered that the arrhythmias were of an “unknown cause” and the applicant was not actually rendering military service at the time of his death, there was no basis to conclude that the condition was a ‘service death’ pursuant to section 28 or was caused by a ‘service injury or disease’ pursuant to section 27 of the MRCA.

Formal decision

The AAT affirmed the decision under review.



Editorial note

The AAT noted the meaning of “inability to obtain appropriate clinical management” was considered in *Brew v Repatriation Commission* [1999] FCA 1246 and *Repatriation Commission v Money* [2009] FCAFC 11. In *Brew* the FC confirmed that appropriate clinical management must be measured by the standards of clinical management available at the relevant time and then regarded by the

medical profession as appropriate. The AAT referred to paragraph 43 of the decision in *Money* in which the FFC commented that:

...However, we do not on the material before us accept that the expression “appropriate clinical management” envisages only positive treatment of the disease. Both the Tribunal and Dr Waring expressed opinions consistent with the propositions that advice properly could and should be given to a patient in the proper course of providing a prognosis that he or she desist from certain activities (e.g. to stop smoking) or take other steps (e.g. to lose weight or to cease work on submarines) as measures designed to preclude exacerbation of the disease’s inexorable progress. We are satisfied that the making of prudential recommendations as to the taking of or refraining from, courses for the purpose of thereby foreclosing the possible impacts of extraneous causes that might be likely to accelerate the process of the disease may, in appropriate circumstances, properly be regarded as falling within appropriate clinical management for cl 5(a) purposes. In expressing this view, we agree with the primary judge’s conclusion that providing advice as part of the appropriate clinical management of a condition in relation to factors not mentioned in the SoP does not undermine the regime of SoPs.

**Military Rehabilitation &
Compensation Commission and
Horner**

Deputy President K Bean

[2015] AATA 618
21 August 2015

Entitlement to incapacity benefits – determination of normal earnings – meaning of reasonable expectation of promotion – where promotion would almost have certainly occurred but for compensable injury – provision intended to exclude from normal earnings any promotion that had not yet actually occurred

Facts

Mr Christopher Horner served in the Royal Australian Air Force. His service was cut short by a depressive illness which he developed as a result of his service and he was medically discharged on 25 January 2013. At the time of his discharge Mr Horner held the actual rank of Flight Lieutenant. However he had been identified for promotion to the rank of Squadron Leader, subject to securing a suitable posting and certain other conditions.

The MRCC had originally calculated Mr Horner's incapacity payments on the

basis that his normal earnings were those of a Flight Lieutenant. On review, the VRB set aside the MRCC's determination and substituted its determination that "assessment of compensation for incapacity to work be based on the normal weekly earnings of a recently promoted Squadron Leader". The MRCC appealed to the AAT.

Issues before the Tribunal

The issue for determination was how Mr Horner's normal earnings should be determined – specifically, whether these should be determined on the basis that his normal earnings were those of a Flight Lieutenant or a Squadron Leader.

The Tribunal's consideration

The parties agreed that section 141 of the MRCA applied to working out Mr Horner's normal earnings, which relevantly provides:

Working out normal earnings

(1) The **normal earnings** for a week for a person who was a Permanent Forces member immediately before last ceasing to be a member of the Defence

Administrative Appeals Tribunal

Force means the amount worked out using the following formula:	promotion; or (iii) the reasonable expectation of a posting. ...
Person's ADF pay for the week	
+	
Person's allowance component for the week	Section 186 is also potentially relevant, as it allows for the compensation paid to serving members to take account of any increase in their pay due to an actual promotion:
+	
\$100	
Note: The amount of \$100 is indexed under section 183.	
(2) The person's ADF pay for a week means the amount of pay that the person would have earned for the week as a Permanent Forces member if:	Increases in pay and allowances due to actual promotions (1) This section applies for the purposes of sections 91, 96, 114 and 149 if a person is promoted. (2) The amount of pay that the person would have earned for a period as a member of the Defence Force, and the amount of a pay-related allowance that the person would have been paid for a period, include:
(a) the person were still a Permanent Forces member; and	(a) the amount of any actual increase in the person's pay or a pay-related allowance; or
(b) the person were not incapacitated for service.	(b) the amount of an additional pay-related allowance the person would be paid;
Note: The person's ADF pay for a week might be adjusted under Part 5.	for the period because the person is promoted. Note: A person must actually be promoted in order to receive an increase under this subsection.
Section 180 relevantly sets out the "amounts that are excluded when working out normal and actual earnings" as follows:	
Amounts that are excluded when working out normal and actual earnings	
(1) In working out normal earnings, do not include:	Although the VRB noted the terms of section 180(1)(b)(ii), its decision was based upon the VRB's conclusion that Mr Horner had more than a "reasonable expectation" of promotion.
(a) any amount of a bonus that is earned by the person (whether paid as a lump sum or periodically); or	
(b) the amount of any expected increase due to:	
(i) the reasonable expectation of a bonus; or	
(ii) the reasonable expectation of a	

Administrative Appeals Tribunal

The question for the AAT was whether, in excluding increases due to “the reasonable expectation of a promotion”, the legislature also intended to exclude an increase due to a promotion which, but for the compensable injury, would almost certainly have occurred i.e. does section 180 also exclude increases which were almost certain rather than just “reasonably expected”?

Regarding the meaning of the phrase “reasonable expectation”, the AAT referred to a decision of the FFC in *Peabody v Commissioner of Taxation* (1993) 40 FCR 531, in which Hill J summarised the effect of a number of other authorities as follows:

These cases indicate, what would presumably be in any event obvious, that the meaning of words such as “reasonable expectation” depends upon the context in which they appear. Nevertheless, in the present context, as in *Cockcroft*, the words were intended to receive, and should receive, their ordinary meaning. So too, as in *Cockcroft*, the word “reasonable” is used in contradistinction to that which is “irrational, absurd or ridiculous”. The word “expectation” requires that the hypothesis be one which proceeds beyond the level of a mere possibility to become that which is the expected outcome. If it were necessary to

substitute one ordinary English phrase for another, it might be said that it requires consideration of the question whether the hypothesised outcome is a reasonable probability: cf *Davies v Taylor* (supra).

The AAT also had regard to the Explanatory Memorandum which accompanied the *Military Rehabilitation and Compensation Bill* 2003, which said in relation to what became section 141:

To determine normal earnings for person (sic) who was a Permanent Forces member immediately prior to his or her discharge, the Commission will include the pay and any allowances that were payable to the person immediately before discharge.

In relation to what became section 180, it said:

The following are not included in any calculation of normal or actual earnings:

...

Possible increases due to the expectation of a bonus, promotion or posting – This reflects section 8 of the SRCA, in that calculations for normal earnings can not include speculation that there is or was a reasonable expectation of a promotion, bonus or posting and that it would actually occur.

The AAT considered there was nothing elsewhere in the text of the statute which suggests that section 180 was not intended to exclude the expectation of a

promotion which had not yet occurred regardless of how probable the promotion was. Further, the part of the Explanatory Memorandum relating to what became section 180 strongly suggests that it was intended to exclude consideration of any promotion which had not occurred, as section 8 of the SRCA clearly does. The part of the Explanatory Memorandum relating to what became section 141 also suggests that normal earnings are to be calculated by reference to what was actually “payable” to a person at the date of their discharge. The AAT concluded that the intention of section 180(1)(b)(ii) was to exclude from normal earnings any expectation of a promotion which had not yet actually occurred, and it should be construed accordingly.

calculated on the basis of the salary of a Flight Lieutenant.



Editorial note

The AAT was influenced in reaching its conclusion

by the fact that the relevant provisions of the MRCA are clearly modelled on s8 of the SRCA, which does not allow for the possibility of including an expected promotion in the normal weekly earnings of an injured employee, no matter how certain the promotion may have been. While the MRCA requires normal earnings to be calculated at the date of discharge (rather than the date of injury), in the AAT’s view that difference did not significantly detract from the proposition that, broadly speaking, similar principles were intended to apply.

Formal decision

The AAT set aside the decision under review and substituted a decision that Mr Horner’s “normal earnings” for the purposes of the MRCA are to be

**Meadows and Military
Rehabilitation & Compensation
Commission**

Deputy President K Bean
Professor D Ben-Tovim, Member

[2015] AATA 913
27 November 2015

***Liability for PTSD and depression
– whether arose from a serious
breach of discipline –
consideration of SoPs – conditions
not compensable – whether
applicant incapacitated for work as
a result of compensable back
condition – whether applicant's
failure to seek suitable work
reasonable in all the
circumstances – applicant entitled
to incapacity payments –
assessment of degree of
permanent impairment suffered by
applicant as a result of his
compensable back condition***

Facts

Mr Meadows enlisted in the Royal Australian Navy on 26 February 2001. He was charged with offences relating to the misuse of a Defence travel car and misuse of Defence accommodation. After pleading guilty to some of the charges, he was held in custody at the Defence Force Correctional Establishment (DFCE) from 10 February 2010 until his discharge from the RAN on

4 March 2010. He was then transferred to Silverwater Correctional Complex where he served the remainder of a period of imprisonment, which had been imposed upon him by way of punishment for the offences.

Mr Meadows later lodged a claim for compensation in respect of “lower back pain”, and “PTSD and depression” due to the treatment he received at the DFCE. The respondent accepted liability for “lumbar intervertebral disc protrusion L4/5” but rejected liability for PTSD. On reconsideration, the respondent confirmed the determination, clarifying that liability was also denied for depression. Mr Meadows appealed to the AAT.

Mr Meadows also made a claim for incapacity arising out of his back condition. The respondent determined that he was not entitled to receive incapacity payments on the basis that he was not incapacitated for work. On reconsideration, the respondent confirmed the determination. Mr Meadows appealed to the AAT.

The respondent determined that it was not liable to pay compensation for

Administrative Appeals Tribunal

permanent impairment arising from Mr Meadows' compensable back condition, as Mr Meadows did not reach the relevant minimum threshold of 10 impairment points. On reconsideration, the respondent revoked the determination and found that Mr Meadows suffered an impairment which rated 13 impairment points. Mr Meadows appealed to the AAT.

Issues before the Tribunal

The issues for determination were:

- Is the respondent liable to pay compensation to Mr Meadows in respect of PTSD and/or depression?
- Is the respondent liable to pay compensation for incapacity to Mr Meadows in respect of his compensable back condition, and, if so, at what rate and for what period/s?
- Is the respondent liable to pay compensation to Mr Meadows for permanent impairment in respect of his compensable back condition, and if so, what is the extent of the permanent impairment and liability?

The Tribunal's consideration

PTSD and/or depression

The respondent relied on section 32, which excludes liability in certain circumstances, as follows:

...

- (1) The Commission must not accept liability for an injury sustained, or a disease contracted, by a person if:
 - (a) the injury or disease resulted from the person's serious default or wilful act while a member; or
 - (b) the injury or disease arose from:
 - (i) a serious breach of discipline committed by the person while a member; or
 - (ii) an occurrence that happened while the person was committing a serious breach of discipline while a member; or
 - (c) the injury or disease was intentionally self-inflicted while the person was a member;

except if the injury or disease results in serious and permanent impairment.

The respondent submitted that liability could not be accepted, as PTSD and

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depression arose from 'a serious breach of discipline' committed by the applicant within the meaning of section 32(1)(b)(i), and have not resulted in 'serious and permanent impairment'.

The AAT restricted its consideration to whether the events which occurred during the applicant's detention at DFCE, and their medical consequences, 'arose from' his breaches of discipline. The AAT noted that those events were not part of the breach of discipline itself, for example where an injury results directly from intoxication or other behaviour in breach of military discipline. Further, they were not part of the punishment imposed with respect to the breaches of discipline (dismissal from the ADR and a period of civilian imprisonment), as the need for the applicant's detention at the DFCE arose from the amendment of the *Defence Force Discipline Act 1982* (DFD Act). Also, the relevant events were not an inevitable or foreseeable consequence of the applicant being held in custody under the DFD Act. The AAT concluded that the

treatment the applicant was subjected to was too remote from his breaches of discipline for the consequential psychiatric conditions to be properly regarded as 'arising out of' those breaches. The AAT also considered that the apparently unauthorised mistreatment he was subjected to effectively 'broke' any chain of causation between the offences and the medical consequences he ultimately suffered.

The AAT went on to examine the medical evidence before it, relating to the connection between the applicant's service and his psychiatric conditions. There was no dispute that the applicant suffers from PTSD and also a depressive disorder. Both psychiatrists agreed that the applicant's PTSD had its onset in early 2010, either during the applicant's detention in the DFCE or shortly thereafter, and the applicant's depressive condition had its onset at about the same time. Both psychiatrists also agreed that the applicant's PTSD resulted primarily from his detention in the DFCE. The first issue which arose was whether that

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detention, or any event which occurred during that detention, could be regarded as a relevant stressor as defined in the Statement of Principles concerning PTSD, number 83 of 2014. As there did not appear to be any relevant event capable of amounting to “a category 1B stressor”, the more relevant question was whether the detention involved any category 1A stressor, in particular a “life-threatening event”, being “held captive” or being “tortured”. As the circumstances of the applicant’s PTSD did not match the terms of the SoP, it was not open for the AAT to conclude, by reference to the detention, that his PTSD was service-related. The medical evidence did not support the proposition that earlier events in the applicant’s service made a causal contribution to him developing PTSD in 2010.

In relation to the applicant’s depressive condition, the AAT did not consider that the applicant’s experiences in detention satisfied the definition of a “category 1A stressor” for the purposes of the relevant SoP, number 84 of 2015. Whilst some of

the earlier events in the applicant’s service potentially amounted to category 1B stressors, they occurred more than two years before the onset of his depression and did not satisfy the requirements of the applicable factor. However the AAT noted that the definition of “category 2 stressor” for the purposes of depression includes “experiencing serious legal issues”. The AAT was satisfied that the applicant was “experiencing serious legal issues” in the six months prior to the onset of his depressive disorder but the “serious legal issues” faced by the applicant, and their medical consequences, arose from his breach of discipline so liability is precluded by section 32. Further, the AAT was not satisfied that the applicant’s depressive condition has resulted in a “serious and permanent” impairment” within the meaning of section 32.

Therefore, the applicant’s PTSD or depressive disorder was not compensable under the MRCA.

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Incapacity payments

The key question for the AAT was what, if any, amount the applicant should be considered to have been able to earn in suitable employment in the period since his discharge from the ADF. As there was no dispute that the applicant had not sought work since his discharge, an important consideration was whether his failure to seek suitable work was “reasonable in all the circumstances”. The AAT ultimately concluded that in the period since the applicant was discharged from the ADF until he commenced university studies in March 2015 it was reasonable for him not to pursue the employment options which the AAT accepts would have been open to him, but rather to focus on rehabilitation and managing and treating the effects of his back condition, together with exploring and planning his longer-term re-entry into the paid workforce. In the period since March 2015, although his physical condition appears to have improved to some extent, it has been reasonable for him to pursue his full-time

university course, funded by DVA, and he has not had and does not have capacity to undertake paid work. Therefore the applicant’s ability to earn in suitable employment has been nil in the period from his discharge in March 2010 to the present. The AAT accepted the respondent’s contention that the applicant’s normal earnings at the time of his discharge were \$1,252.23 per week, plus the applicable indexed amount, and his actual earnings have been and are zero. The AAT remitted to the respondent the calculation of the applicant’s actual entitlements.

Permanent impairment compensation

The issue for determination was the extent of the applicant’s permanent impairment of his back and the entitlements flowing from it. Having regard to the medical evidence before it, the AAT was satisfied that the appropriate rating under the applicable tables was 11 points. His lifestyle rating was 3, equating to a compensation factor of 0.092.

Formal decision

The AAT:

- **affirmed** the decision under review in relation to PTSD and depression;
- **set aside** the decision under review in relation to incapacity payments and substituted a decision that Mr Meadows is entitled to incapacity payments (on the basis that his normal earnings immediately before he ceased to be a member were \$1,252.23, plus the applicable indexed amount and his actual earnings have been nil), and remitted to the respondent the determination and calculation of the amounts payable;
- **varied** the decision under review in relation to permanent impairment compensation regarding Mr Meadow's compensable back injury (so as to provide that his degree of impairment is 11 points and his lifestyle rating is 3, which equates to a compensation factor of 0.092), and remitted the matter

to the respondent for calculation of the amount payable.

**Coleman and Military
Rehabilitation & Compensation
Commission**

Deputy President Dr C Kendall

[2015] AATA 955
11 December 2015

Injury to shoulders – member of Australian Army Reserves – peacetime service – whether injury attributable to defence service – lack of evidence in relation to occurrence and circumstances of injury

Facts

Mr Coleman rendered peacetime service in the Australian Army Reserves from 13 August 2012 until 21 October 2014. He contended that he hurt both of his shoulders on 11 December 2012 when performing exercises at his place of parade as a Reserve Army soldier.

Mr Coleman's claim for liability for "full thickness tear of the supraspinatus tendon of the left shoulder; subacromial bursitis of the left shoulder; partial

thickness, articular surface tear of the supraspinatus tendon of the right shoulder and subacromial bursitis of the right shoulder” was rejected. The VRB affirmed that determination. Mr Coleman appealed to the AAT.

Issues before the Tribunal

The diagnosis of the conditions was not in issue. The AAT was asked to determine whether the applicant’s claimed conditions are service injuries. The applicant relied on factor 6(a) in the Statement of Principles concerning rotator cuff syndrome, number 101 of 2014 – “having an injury to the affected shoulder within the 30 days before the clinical onset of rotator cuff syndrome”.

The Tribunal’s consideration

The respondent argued that there was insufficient evidence to support a conclusion that the applicant’s claimed conditions were sustained in the circumstances he claims – specifically, while lifting a heavy tyre during a training session on 11 December 2012. The respondent contended that the date

of clinical onset was 7 January 2013, which is when the applicant attended his general practitioner with sore shoulders. The condition was later confirmed by ultrasound on 16 January 2013 to be “full thickness tear of the supraspinatus tendon and subacromial bursitis”. The applicant agreed with that contention, and the AAT also agreed this was the date of clinical onset.

The AAT noted it must be satisfied that the applicant’s injuries were sustained while undertaking military service and that his injuries were sustained between the period 7 December 2012 and 7 January 2013 (the 30 day period stipulated by factor 6(a) in the relevant SoP). The evidence showed that the applicant only undertook training from 7-10pm on 11 December 2012. Therefore, the AAT needed to be satisfied that the applicant was injured on that date as a result of something that occurred during the course of his military service and training. The AAT noted that as at 11 December 2012 the applicant’s shoulders were already symptomatic and painful,

Administrative Appeals Tribunal

and the applicant did not see a doctor until 7 January 2013 – 26 days after he claims to have hurt himself while lifting a heavy tyre. The AAT was not satisfied with the applicant's explanation that he did not tell anyone about his injury for 26 days because he did not want to be seen as "weak" or someone who complained.

The evidence also showed that there was no mention made of the "tyre incident" to any of the applicant's treating medical practitioners at a time contemporaneous to the alleged date of injury – it was not raised with any of the medical personnel or military officers until mid-2015. When the applicant's claimed condition was first reported to the military, it was recorded as being in "civilian employment". In the Defence Work Health and Safety Incident Report dated 10 September 2013 the applicant stated he sustained damage to his shoulder rotator cuff as a result of army training, most likely caused by excessive amounts of push-ups and military presses. In his compensation claim, the applicant said in respect of his left shoulder it was caused

by high amounts of repetitive arm and shoulder motion due to army training, and in respect of his right shoulder it was caused by overcompensating for left shoulder injury.

The AAT concluded that:

- the material before the AAT did not raise a connection between the applicant's claimed conditions and his defence service; and
- although there is a SoP in force, the material and the SoP did not uphold the contention that the claimed conditions were, on the balance of probabilities, connected with that defence service.

Formal decision

The AAT affirmed the decision under review.

**Murphy and Military Rehabilitation
& Compensation Commission**

Senior Member B McCabe

[2015] AATA 967
15 December 2015

***Deep vein thrombosis – not
satisfied applicant meets
requirements of SoP***

Facts

Mr Murphy has asked the MRCC to accept liability under the MRCA for his deep vein thrombosis (DVT). The applicant was a serving member of the defence forces at the time. He explained in his oral evidence that he was required to do a lot of air travel around Australia for work purposes in 2011, and had taken approximately 46 flights over an 18 month period. After a flight on 17 May 2011, which lasted around 3 hours and 40 minutes, the applicant said he felt a twinge in his leg as he got off the plane and initially thought it was a muscle strain. He did some exercises when he got home but the pain became worse. Three days later he saw a doctor and it was DVT.

Issues before the Tribunal

The MRCC accepted the applicant suffers from DVT and the date of onset was on or about 18 May 2011. The AAT considered whether the applicant's condition was connected with his defence service.

The Tribunal's consideration

The AAT looked at the relevant Statement of Principles concerning DVT, number 55 of 2012. The two potentially relevant factors were:

- (e) having restricted mobility for a continuous period of at least four hours within the four weeks before the clinical onset of deep vein thrombosis; or
- (t) being obese at the time of the clinical onset of deep vein thrombosis.

The applicant could not satisfy the first factor, as he spent less than four hours on the plane on 17 May 2011. He did not experience restricted mobility for a continuous (i.e. single) period of four hours during the four weeks that preceded the onset of the condition.

The second factor raised more difficult issues. In the SoP “being obese” means an increase in body weight by way of fat accumulation which results in a Body Mass Index (BMI) of 30 or greater. The MRCC contended there was no evidence to confirm the applicant’s BMI was the product of fat accumulation – rather, the applicant’s BMI went up because he added muscle mass, an hypothesis which was consistent with him continuing to exercise at a relatively high level of intensity (although he was not running) while maintaining a healthy diet. The applicant spoke about his intensive exercise program in the period before the date of onset of DVT. He experienced weight gain of about 12 kilograms after knee surgery in 2005 when he was unable to exercise, and could not lose the weight when he resumed his exercise program. His medical records confirmed the applicant’s BMI was 29 in 2005 and 30 or more from at least 2006. In 2011 the applicant experienced pain in both knees and was advised to reduce his running. Although his work demands did not allow as much time to exercise, he still

exercised at a reasonably high level of intensity. The AAT ultimately accepted the MRCC’s central point that there was no evidence of the applicant experiencing an increase in accumulation of fat that led to an elevated BMI in the period leading up to the date of onset of DVT.

Formal decision

The AAT affirmed the decision under review.

Federal Circuit Court of Australia

Deslandes v Repatriation Commission

Judge Jarrett

[2015] FCCA 1786
14 August 2015

Appeal from AAT – questions of law – whether AAT properly applied subsection 119(g) or 119(h) of the VEA – whether AAT properly acquitted its obligation to give reasons pursuant to section 43 of the AAT Act

Facts

Mr Deslandes served in the Royal Australian Navy from 1 May 1974 until 28 September 1977. His application for a disability pension for lumbar spondylosis was refused by the RC. The decision was affirmed on review by the VRB and AAT. Mr Deslandes' appeal to the FC was transferred to the FCC.

The Court's consideration

Questions of Law 1 & 3

Question 1: whether the Tribunal failed to act according to the 'substantial merits' of the case for the purposes of s 119(1)(g) of the VEA.

Question 3: whether the Tribunal failed to apply s 119(1)(h) of the VEA. In particular, the Appellant states that the Tribunal failed to take into consideration the fact that there were no clinical records from the physiotherapist who was treating the Appellant around the time of the accident in 1977.

Consideration of Questions 1 & 3

Section 119(1)(g) of the VEA provides that the RC (and the AAT on appeal) "shall act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities".

By section 119(1)(h) the AAT is directed to take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance, including any reason attributable to the effects of the passage of time, including the effect of the passage of time on the availability of witnesses, and the absence of, or a deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence

that happened during the service of a veteran, was not reported to the appropriate authorities.

The applicant argued that by reason of section 119(h), the AAT was obliged to take into account the difficulty that lies in the way of the AAT ascertaining the existence of the fact that he complained about back pain to a physiotherapist he consulted 8 days after a motor vehicle accident, because of the absence of those treatment notes. The FCC noted that the AAT needed to be satisfied that the applicant had sustained trauma (as defined in the SoP) to his lumbar spine from the motor vehicle accident. The FCC found that the physiotherapy notes would not have affected the outcome of the AAT's quest for evidence, because the applicant gave no evidence that he told the physiotherapist anything about his back pain, other than that he had a sore back. Ultimately, the applicant gave no evidence to the AAT, and could point to no evidence, that either altered mobility or range of movement of the lumbar spine developed within the 24 hours of the motor vehicle accident. The FCC concluded that insisting upon some evidence that establishes the necessary

elements of the definition of trauma to the lumbar spine is not a failure to act according to section 119(1)(g).

Question of Law 2

Question 2: whether the Tribunal erroneously applied s 120(4) of the VEA because it impermissibly placed an onus on the Appellant to provide contemporaneous records showing how much weight he had lifted during his service (and therefore satisfying factor 6(h) of the SOP).

Consideration of Question 2

This question related to the AAT's rejection of Mr Deslandes' claim for lumbar spondylosis on the basis of the SoP factor for carrying or lifting heavy loads. In paragraph 13 of the AAT's reasons the AAT indicated:

The applicant's estimates of the weight he lifted are not substantiated by any contemporaneous material. I am unable to be reasonably satisfied that the applicant performed the amount of lifting required by factor (h) in the SoP, during his service and prior to the onset of lumbar spondylosis.

The FCC considered the AAT was entitled to remark upon and take into account the lack of any contemporaneous material that demonstrated the weights that had been lifted by the applicant, and by doing so it did not place or suggest that there was an evidentiary onus on the

applicant to provide contemporaneous material to satisfy the SoP factor.

Question of Law 4

Question 4: whether the Tribunal erred by failing to take into account a relevant consideration, namely a medical report of Dr Sharwood.

Consideration of Question 4

The AAT had before it two reports from Dr Sharwood, an orthopaedic surgeon. The applicant argued that the AAT failed to take into account the second report of Dr Sharwood. The FCC accepted the AAT made no mention of Dr Sharwood's evidence in its reasons, but considered the evidence was of little or no value. Dr Sharwood's evidence did not support the hypothesis that the applicant experienced a trauma of the nature anticipated in the SoP – rather, his opinion assumed that as a fact without setting out his own findings about that, or the basis of his assumption.

Question of Law 5

Question 5: whether the Tribunal erred by failing to give reasons, as required under s 43(2) of the AAT Act, about the Appellant's evidence of his treatment for back condition.

Consideration of Question 5

The applicant argued that the AAT failed to give sufficient reasons under section 43(2) of the AAT Act for failing to accept his evidence about:

- The symptoms and signs of pain, and tenderness; mobility and range of movement of the lumbar spine; and the duration of those symptoms and signs;
- The physiotherapy treatment obtained by him in respect of his back following the accident;
- The estimate of weights carried or lifted by him relevant to factor 6(h) of the Statement of Principles.

The respondent submitted that the AAT's reasons for decision clearly considered the applicant's evidence about the length and type of his treatment around the time of the motorbike accident, however the AAT also recorded that his claimed conditions were not supported by any contemporaneous medical records. At this point the AAT was faced with a choice between two conclusions open on a consideration of the facts – either accept

the applicant's evidence, or the medical records that set out the injuries and diagnosis made at the time of, or close to, the accident. The FCC noted the AAT chose the latter as it was entitled to do.

In relation to the weights lifted by the applicant, the FCC was of the view the AAT dealt with that issue. It noted that there were no contemporaneous notes dealing with the weights lifted by the applicant during his work. In light of the applicant's own evidence in cross-examination, it was not surprising that the AAT expressed an inability to be satisfied about the weights lifting by him in his work.

The Court's Decision

The appeal was dismissed.



Editorial note

The FCC considered there are limits upon the operation of subsections 119(1)(g) and 119(1)(h):

Whilst s.119(1)(g) directs the decision-maker to disregard legal forms and technicalities in favour of substantial justice, it does not provide a warrant for a decision-maker to rewrite the Act

to achieve a more just result than that for which Act provided: *Golfins v Repatriation Tribunal* (1980) ADL 557. Section 119(1)(g) overrides neither the provisions of the Act nor the provisions of an instrument made under statutory authority including a Statement of Principles: *Knight v Repatriation Commission* (2002) FCA 103. Section 119(1)(g) does not require the Tribunal to take a more benevolent view of Mr Deslandes's case than it would otherwise have done: *Grundman v Repatriation Commission* [2001] FCA 892.

Both parties referred to *Repatriation Commission v Bey* (1997) 79 FCR 364, in which the FCC said at 373-374:

The second complaint is that his Honour was wrong in ruling that the Tribunal had no obligation to raise any favourable inference pursuant to s 119 to the Act. Section 119(1)(g) requires the Tribunal (standing in the place to the Commission) to act according to substantial justice and the substantial merits to the case, without regard to legal form and technicalities. Section 119(1)(h) requires the Tribunal to take into account any difficulties that lie in the way to ascertaining the existence of any fact, matter, cause or circumstance. The respondent's contention appears to be that in requiring a causative link between the arthritis and war service the Tribunal was acting contrary to s 119. For the reasons we have given, in order for the hypothesis advanced by the respondent to be reasonable there must be material pointing to a connection between his disease and war service. The material either points to a connection or it does not. If it does not, the deficiency cannot be remedied by resort to a procedural provision

such as s 119(1)(g). The requirement to act according to substantial justice does not displace the Tribunal's obligation to act in accordance with law: *Golfins v Repatriation Tribunal* [1980] FCA 105; (1980) 48 FLR 198 at 209; *Re McKay and Repatriation Commission* (1988) 8 AAR 215 at 222; *Kumer v Immigration Review Tribunal* [1992] FCA 319; (1992) 36 FCR 544 at 555-556. Paragraph (h) of s119(1) is a provision of the same character as par (g): see the words which introduce it - "without limiting the generality to the foregoing". Thus, like par (g), it does not authorise the Tribunal to depart from the meaning of provisions of the Act as expounded by judicial decisions. In any event, we do not regard the phrase "difficulties that ... lie in the way of ascertaining the existence of any ... cause" as enabling the Tribunal to ignore current medical evidence that there is no proved connection between arthritis and war-caused stress.

James v Repatriation Commission

Judge Jarrett

[2015] FCCA 2644
25 September 2015

Appeal from AAT – questions of law – no questions of law stated in notice of appeal – questions formulated in written submissions and argument

Facts

Mr James' application for increase in his disability pension to the special rate was refused by the RC. The decision was affirmed on review by the VRB and AAT. Mr James' appeal to the FC was transferred to the FCC.

The Tribunal's decision

The only issue for the AAT was whether the applicant satisfied section 24(1)(c) of the VEA – the alone test. The AAT was not persuaded that the applicant's accepted psychiatric conditions prevented him from continuing to undertake his lawn mowing business.

The Court's consideration

It was the FCC's view that the amended notice of appeal did not state any questions of law, however the FCC went on to address the arguments by each of the parties.

Appeal Ground 1

1. Whether in finding that the Applicant failed to satisfy s 24(1)(c) of the Act, the Tribunal properly considered and applied s 24(1)(c) of the Act in circumstances where the Tribunal failed to give any weight to, or ignored, a relevant matter of great importance, namely the uncontroverted evidence of two medical experts.

Consideration of Appeal Ground 1

The FCC noted that appeal grounds 1(a) to (i) were a recitation of factual matters followed by an assertion that the AAT did not make certain findings, and there was no attempt to link it to the first question of law. In particular, ground 1(h) argued that the AAT did not consider or make any findings about how many hours the applicant could work per week in the lawn-mowing business. The FCC indicated for the purposes of section 24(1)(c), that was not necessary. There was no dispute, and the AAT accepted, that section 24(1)(b) was

satisfied. To the extent that the applicant argued that the AAT could not have found that section 24(1)(b) was satisfied and not also section 24(1)(c), there was no error in the AAT's reasons. Section 24(1)(b) goes to the "nature and level of" the veteran's war-caused incapacity whereas section 24(1)(c) goes to causation: *Repatriation Commission v Alexander* (2003) 75 ALD 329 at [13] per Spender J. In *Wright v Repatriation Commission* (2005) 213 ALR 536 Tamberlin J explained at [15]:

The two findings are separate and complementary. They pose difference hurdles which the veteran must surmount. The finding that the prevention from continuing to undertake remunerative work is not caused solely by war-caused injury or war-caused disease is a different and separate finding from a requirement that the nature of the incapacity is such that a person cannot work from more than 8 hours ...

Regarding section 24(1)(c), the applicant's claim failed at the second *Flentjar* question – the AAT did not consider that the applicant's decision to cease remunerative work in his lawn-mowing business was attributable to his war-caused injuries or conditions. The FCC indicated the AAT's findings were open on the evidence before the AAT.

Appeal Grounds 2 - 4

2. Whether the Tribunal failed to comply with s 43(2B) of the Administrative Appeals Tribunal Act 1975 by failing to give reasons, or adequate reasons for:

- a. finding that the Applicant's accepted psychiatric conditions did not prevent him from continuing to undertake one of the kinds of remunerative work he was undertaking, namely property maintenance;
- b. in making the said finding, not following the uncontroverted evidence of two medical experts.

3. Whether in finding that the Applicant failed to satisfy s 24(1)(c) of the Act, the Tribunal properly considered and applied s 24(1)(c) of the Act in circumstances where the Tribunal made contradictory findings in that on the one hand, the Tribunal accepted that the Applicant satisfied 24(1)(b) of the Act, which included an assessment of the Applicant's capacity to work in his lawn-mowing business, and then on the other hand found that the Applicant did not satisfy 24(1)(c) of the Act without making the necessary consequential finding as to what the aggregate periods of remunerative work the Applicant was therefore capable of performing.

4. Whether in finding that the Applicant failed to satisfy section 24(1)(c) of the Act, the Tribunal properly considered and applied s 24(1)(c) of the Act in circumstances where it made a finding that was so unreasonable that no tribunal acting reasonably could have made it, namely that the Applicant's accepted

psychiatric conditions did not prevent from continuing to undertake remunerative work characterised as property maintenance.

Consideration of Appeal Grounds 2 - 4

The AAT received evidence from two psychiatrists, who both expressed the opinion that the applicant was "prevented by the accepted psychiatric conditions alone from continuing in the remunerative work". The applicant argued that the AAT gave no reasons, or no adequate reasons to explain why it rejected the opinion of the experts insofar as it related to his lawn-mowing business. The FCC noted the AAT did explain its reasons in paragraphs [7] – [10], and that Tribunal reached the view that the applicant was unable to satisfy the requirements of section 24(1)(c) with the benefit of material not available to the doctors who had given evidence – namely the answers given by the applicant in cross-examination in relation to his lawn mowing activities and his reasons for ceasing that activity. The FCC indicated it was open to the AAT to reach the findings that it did on the evidence before it. The AAT's reasons explained how it did that, albeit briefly, but they were adequate.

Appeal Ground 5

5. Whether in finding that the Applicant failed to satisfy section 24(1)(c) of the Act, the Tribunal properly considered and applied s 24(1)(c) of the Act by failing to consider a submission of substance made by the Applicant concerning the effect of the evidence of two medical experts which, if accepted, was capable of affecting the outcome of the Applicant's claim.

Consideration of Appeal Ground 5

The applicant argued that the AAT's conclusion that he failed to satisfy section 24(1)(c) was so unreasonable that no tribunal acting reasonably on the material before it could have reached that conclusion. The FCC noted that where a decision-maker's application of the facts found to the statutory regime under consideration is so perverse as to fit the description of irrational, there may be a question of law involved: *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [26]; *Watsford v Commissioner of Taxation* [2013] FCA 1389. However, the FCC indicated there was no irrationality in the AAT's application of the facts as it found them to meet the requirements of section 24(1)(c). The AAT's findings were open to the AAT on the evidence before it.

The Court's Decision

The appeal was dismissed.



Editorial note

Ultimately the applicant did not establish that the AAT's decision contained any error, and no questions of law arose on the AAT's decision.

Federal Court of Australia

Repatriation Commission v Watkins

Kenny, Barker and Rangiah JJ

[2015] FCAFC 10
11 February 2015

Special rate of pension under section 24(1)(c) – whether applicant prevented from engaging in remunerative working by war-caused injuries alone – leave to extend time to rely on notice of contention refused

Facts

The respondent, Mr Watkins, is a veteran who served in the Royal Australian Navy for nine years, including during the Vietnam War. As at July 2009, Mr Watkins was in receipt of a disability pension at 100% of the general rate for his war-caused conditions of bilateral sensorineural hearing loss with tinnitus, osteoarthritis of the right ankle and foot, solar keratosis, PTSD and alcohol dependence. On 31 July 2009, shortly before his 64th birthday, Mr Watkins

applied to the RC for his pension to be paid at the special rate.

On 29 October 2009 a delegate of the RC decided Mr Watkins was not eligible for a special rate of pension. Mr Watkins went through the appeal process and the primary judge allowed the appeal on the basis that the AAT had misconstrued section 24(1)(c) of the VEA. The RC appealed to the FFC.

Grounds of appeal

The RC appealed on the basis that the primary judge erred:

- (1) in the construction of s 24(1)(c) of the Act, by holding that non warcaused disabilities will only be a disqualifying factor if they, of themselves and independently of the warcaused ailments, would prevent the veteran from undertaking the relevant work.
- (2) in holding that, where a veteran suffers both warcaused and non warcaused disabilities, non warcaused disabilities will only prevent the veteran from meeting the “alone” test in s 24(1)(c) if the non warcaused disabilities, of themselves and independently of the war-caused ailments, would prevent the veteran from undertaking the relevant work.
- (3) in that his Honour should have held that a veteran who is affected by

non warcaused disabilities which contribute, in combination with the veteran's warcaused ailments, to cause the veteran's incapacity to undertake the relevant work, fails to meet the requirement in s 24(1)(c) that the veteran's warcaused ailments alone prevent the continuance of work.

Therefore, the primary issue was whether the primary judge erred in the construction he gave section 24(1)(c).

The Primary judgment

The primary judge accepted the following construction of section 24(1)(c) at paragraph [24]:

The construction contended for by the applicant is that the 'alone' element requires that the preventative effect not be, by reason of or because of, some cause or causes other than the war-caused incapacity. The 'alone' element asks whether there is a nonwar caused disability (or disabilities) which independently of the war-caused ailments have also brought about the preventative effect. The war caused ailments and their consequences are to be put to one side and an assessment be made as to whether there is an additional cause or causes which prevent the veteran from working. *The nonwar caused disabilities will only be a disqualifying factor if they of themselves and independently of the war-caused ailments also have the preventative effect.*

(Emphasis added.)

The Court's consideration

After considering detailed submissions by the parties, the FFC indicated the decision of the FFC in *Repatriation Commission v Richmond* [2014] FCAFC 124 preferred the constructional approach urged on this Court in this appeal by the RC. The FFC in *Richmond* expressly disagrees with the construction of section 24(1)(c) adopted by the primary judge in the decision under appeal. The FFC considered *Richmond* to be correct and applicable in this appeal, and consequently the appeal was allowed.

The FFC also considered a procedural issue of whether Mr Watkins should be given leave to file a notice of contention, which had not been filed within 21 days after the notice of appeal was served. The FFC decided to refuse leave to rely on the draft notice of contention given:

- the lack of merits in the contentions sought to be raised by Mr Watkins' draft notice of contention;
- the failure to file a notice of contention within time;

- the failure to explain the delay in seeking to bring it forward; and
- the failure to seek an extension of time to do so in a timely way.

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claims has resulted from his or her war-caused incapacity.

The first limb provides that to qualify for the special rate, the preventative effect must arise from the veteran's war-caused incapacity alone, and not from other non war-caused preventative factors as well. If other non war-caused factors contribute to the preventative effect, even if they are only of secondary importance and not of themselves sufficient to prevent the veteran from engaging in remunerative work, their presence will deny the veteran eligibility for the special rate.

Formal decision

The appeal was allowed.



Editorial note

At paragraph 37 of the FFC decision the RC argued that the issue in the appeal was:

whether the non war-caused factor must, of itself, be of such a character that it alone prevents the veteran from continuing to undertake remunerative work, or whether it was enough that the non war-caused factor is a contributing factor but not the only cause of the veteran not engaging in remunerative work.

The RC referred to the FFC decision in *Richmond* at [57] and [58]:

- 57 The first limb of s 24(1)(c) requires the decision maker to decide whether the veteran's war-caused injury of disease (or both) *alone* prevented him or her from continuing to undertake the remunerative work the veteran was engaged in. The alone element of the test is concerned with whether or not there is more than one cause of the preventative effect that the veteran

Another submission made by the RC was that the primary judge erred in considering that the construction he favoured was also supported by another FFC decision, *Smith v Repatriation Commission* [2014] FCAFC 53. The RC contended the observations of Buchanan J in *Smith* at [48] referred to by the primary judge did not assist Mr Watkins because Buchanan J was not discussing the issue that currently arises. The RC noted in *Richmond* at [24] the FFC referred to what Buchanan J said in *Smith* at [47] – [48] and indicated that his Honour's approach was consistent with the constructional approach it adopted.

Beezley v Repatriation Commission

Bromberg J

[2015] FCA 78
17 February 2015

Application for special rate – whether a finding made by the AAT as to whether the veteran performed work of a particular kind raised a question of law in relation to the phrase “remunerative work” – whether factual finding made that veteran was not performing work after turning 65 was made in a manner which raised an error of law

Facts

The applicant, Mr Beezley, is a veteran who had operational service in Vietnam between November 1967 and July 1968. He has a number of war-caused conditions, including PTSD. Mr Beezley was in receipt of a disability pension at 90% of the general rate, and just after his 65th birthday he applied for a pension at the special rate. The respondent declined the increase, and the applicant went through the appeal process.

Relevantly, in 1980 Mr Beezley acquired an electroplating business, All-Brite Plating, which was incorporated in 1991. Although there was some conflict between the AAT’s finding that Mr Beezley was self-employed and its finding that business was conducted by a corporation, at least by May 2011 Mr Beezley was an employee of the business and, with his wife, one of All-Brite’s two directors. The business declined substantially during the 2011 financial year. In the first week of May 2011 Mr Beezley was paid his monthly salary in advance. On 11 May 2011 All-Brite entered into a creditors’ voluntary winding-up and a liquidator was appointed. A crucial matter in dispute was the extent to which Mr Beezley had any involvement with All-Brite after 11 May 2011 and in particular after his 65th birthday on 23 May 2011.

Grounds of appeal

The applicant’s primary ground of appeal was that the AAT misconstrued the phrase “remunerative work” in

section 24(2A) of the VEA by holding that the work undertaken by the applicant assisting the liquidator did not constitute “remunerative work”.

The Court’s consideration

The applicant argued the work performed by him after his 65th birthday of assisting the liquidator was incorrectly excluded from consideration by the AAT. As a result, the AAT found the applicant was not *undertaking his or her last paid work after the veteran had turned 65*, and therefore failed to satisfy section 24(2A)(f) of the VEA. The applicant argued there were two reasons why the AAT came to the conclusion that the assistance provided by him to the liquidator was not “remunerative work”.

Firstly, the applicant argued the AAT took the view that assistance given to a liquidator pursuant to an obligation under section 530A(2)(c) or section 530A(3) of the *Corporations Act* 2001 (Cth) could not be “remunerative work”. The FC accepted that whether or not a particular activity is encompassed with

the phrase “remunerative work” in section 24(2A)(d), and in particular whether an activity required by a liquidator under section 530A of the *Corporations Act* is capable of being “work”, is a question of law. However, as the respondent correctly contended, the AAT did not make a finding that assistance provided to a liquidator could not be an activity encompassed by the phrase “remunerative work”. The AAT was not satisfied that in assisting the liquidator, the applicant was employed or otherwise engaged by All-Brite and that, in that sense, assisting the liquidator was not “work” in which the applicant was engaged. Further, the AAT found, even if assisting the liquidator was part of the applicant’s work with All-Brite, it was not work for which he had an entitlement to be remunerated and was not work from which he was in fact remunerated. The AAT’s conclusion that assisting the liquidator was not “work” was a factual conclusion based on the AAT’s acceptance of evidence before it, that at the time that the applicant was assisting the liquidator, he was not

employed by All-Brite at all. The FC was not satisfied that the AAT either posed or answered the question of law, that the applicant contended was determined in error.

Secondly, the applicant argued the AAT misconstrued “remunerative work” because the AAT wrongly determined that the applicant had no entitlement to be and was not remunerated for undertaking his statutory obligations under section 530A of the *Corporations Act*. The FC considered whether or not the applicant was entitled to be or was in fact remunerated for assisting the liquidator was a question of fact, and the finding he was not entitled to be remunerated nor actually paid was a factual finding. The FC was of the view that a finding of fact was not susceptible to challenge unless the manner in which the finding was made raises a question of law. The applicant’s submissions pointed to two propositions said to be wrong which the AAT took into account in reaching the finding of fact. The FC considered it was not necessary to decide

whether the AAT’s propositions were right or wrong, as there was other evidence before the AAT upon which its finding was based. There was probative evidence from the liquidator which supported the AAT’s finding that the applicant did not work for All-Brite after 19 May 2011, had no entitlement to be paid, and was not paid for any work performed beyond that date. The AAT regarded the monies received in advance by the applicant as not referable to any work performed by him for All-Brite beyond 19 May 2011 because the AAT was satisfied he performed no work for All-Brite beyond that date. The FC indicated there was no place for judicial review as no material error of law had taken place.

Formal decision

The appeal was dismissed.



Editorial note

The applicant's arguments in this case centred on subsections 24(2A)(d) and (f) of the VEA. Section 24(2A) relevantly provides:

24 Special rate of pension

...

(2A) This section applies to a veteran if:

...

(d) the veteran is, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake the remunerative work (**last paid work**) that the veteran was last undertaking before he or she made the claim or application; and

...

(f) the veteran was undertaking his or her last paid work after the veteran had turned 65; ...

week of May 2011. All-Brite went into liquidation on 11 May 2011. The AAT was not satisfied that the applicant worked for All-Brite beyond 19 May 2011. The applicant's 65th birthday was on 23 May 2011. He did not apply for an increase in his disability pension until 31 May 2011. While the AAT accepted the applicant had been paid in advance, it characterised the payment as intended to reward the applicant for the work it was anticipated he would perform for All-Brite. However, the AAT was not satisfied that the applicant worked for All-Brite beyond 19 May 2011 and concluded that beyond that day he had no entitlement to remuneration.

The phrase "remunerative work," which appears in section 24(2A)(d), is defined in section 5Q of the VEA as follows:

remunerative work includes any remunerative activity.

The sequence of events in this case was critical. The applicant was paid his monthly salary in advance in the first

Ralph v Repatriation Commission

Murphy J

[2015] FCA 165
4 March 2015

Application for special rate – whether application lodged prior to applicant turning 65 – section 24(2A) applicable – whether applicant was engaged in “remunerative work” – whether AAT misconstrued “working...for a continuous period of at least 10 years” under section 24(2A)(g) – whether AAT misconstrued “suffering a loss” under section 24(2A)(e)

Facts

The applicant, Mr Desmond Ralph, served in the Australian Army from 1966 to 1971, including operational service in Vietnam. Mr Ralph applied for the special rate of pension in 2009 by posting an application to the office of DVA, but the date that his application was lodged is in dispute.

On 29 July 2009 the respondent decided that Mr Ralph was not eligible for the special rate of pension, and the VRB

affirmed that decision. Mr Ralph applied to the AAT. The AAT decided to treat the issue regarding the date of lodgement of Mr Ralph’s application as a preliminary issue. Mr Ralph stated that his application was posted on 16 April 2009 and he argued that, by operation of section 29 of the *Acts Interpretation Act* 1901 (Cth) and section 160 of the *Evidence Act* 1995 (Cth), the application is deemed to have been lodged four business days after it was posted, being 22 April 2009. This was one day before his 65th birthday on 23 April 2009. The respondent argued that the application was lodged on 1 May 2009, as shown by DVA’s date stamp on the application. The AAT decided the application was lodged on 1 May 2009, based on section 5T(2) of the VEA. The AAT later affirmed the decision under review, and decided that Mr Ralph did not satisfy the criteria in section 24(2A) of the VEA and was not eligible for the special rate. Mr Ralph appealed to the FC.

The Court's consideration

Question of Law 8 regarding Date of Lodgement issue

- Question 8 alleged that the Tribunal misconstrued s5T(2)(b) of the VEA, and that it erred in failing to decide that the application was deemed to have been lodged on 22 April 2009 by operation of s29 of the *Acts Interpretation Act* and s160 of the *Evidence Act*.

Consideration of Date of Lodgement Issue

The FC did not accept the applicant's argument. The FC did not consider section 29 of the *Acts Interpretation Act*, which refers to serving, giving or sending a document by post, applies to section 5T(2) of the VEA, when that section refers to lodgement of a document at an approved place. Firstly, in the FC's view "serve", "give" or "send" refer to delivery of a document whereas "lodged" connotes receipt or physical acceptance. Secondly, in relation to applications lodged at an approved place, section 5T(2)(b) states that an application "is taken to have been so lodged *on the day on which it is received* at that place" i.e. physical receipt is required. Thirdly, section 19(9) of the VEA points in the same direction, and

provides that the "assessment period" for applications commences on the "application day", which is defined to mean "the day on which the claim or application was *received* at an office of the Department in Australia". The FC considered section 5T(2) unambiguously provides that lodgement of a posted application only occurs when it is physically received at a place approved by the RC.

Questions of Law regarding Operation of section 24(2A) Issues

- **The Remunerative Work Issue:** questions 1 to 4 revolve around the meaning of the words "remunerative work" in s24(2A) of the VEA. The questions include whether the Tribunal misconstrued the provision, took into account irrelevant considerations, made an illogical or irrational decision, and whether it provided adequate reasons for its decision;
- **The 10 Years Continuous Work Issue:** questions 5 to 7 revolve around the meaning of the words "working...for a continuous period of at least 10 years" in s24(2A)(g) of the VEA. The questions include whether the Tribunal misconstrued the provision, failed to have regard to a relevant consideration and whether it provided adequate reasons for its decision; and

-
- **The Loss Issue:** question 9 is whether the Tribunal misconstrued the words “suffering a loss” in s24(2A)(e) of the VEA.

Ralph as a gesture of appreciation.

Consideration of Operation of section 24(2A) Issues

The Remunerative Work Issue

The FC considered the AAT’s task under section 24(2A) was to undertake a factual enquiry as to whether the applicant was engaged in “work” in his son’s businesses, Jet Couriers and Metrains, and was remunerated or paid for that work. The evidence included:

- Mr Ralph’s subjective view that he did not regard his activities at Jet Couriers and/or Metrains as work for which he was paid;
- that he did not render any invoices for his purported work to Jet Couriers and/or Metrains;
- that he was given the use of a motor vehicle from Jet Couriers’ large fleet and that he continued to be given the use of a motor vehicle after he ceased his purported work;
- he never declared his receipt of a motor vehicle in his tax returns; and
- his son’s evidence that the motor vehicle was provided to Mr

On the basis of that evidence the FC considered the conclusion that the applicant was just helping out his sons, rather than working as a paid consultant, was open to the AAT. The same evidence also went to the question of whether the applicant was remunerated for the activities he performed for his sons’ businesses. The FC could see no legal error in the AAT taking into account that Jet Couriers continued to provide the applicant with a motor vehicle even after he ceased working for them, and the AAT’s conclusion that the motor vehicle was not provided as remuneration for work was open to it. The FC could see nothing in the AAT’s decision to indicate it misconstrued subsections 24(2A) and 5Q(1) of the VEA.

The FC did not consider the AAT took into account irrelevant considerations or that it made an illogical or irrational decision in its approach to “remunerative work”. Finally, the FC did not accept that the AAT failed to provide adequate and sufficient reasons, as required by section 43(2B) of the AAT Act.

The 10 Years Continuous Work Issue

Section 24(2A)(g) requires that when the veteran stopped undertaking his or her last paid work:

- (i) if he or she was then working as an employee of another person – had been working for that person, or for that person and any predecessor or predecessors of that person; or
- (ii) if he or she was then working on his or her own account in any profession, trade, employment, vocation or calling:

for a continuous period of at least 10 years that began before the veteran turned 65.

In the FC’s view, the AAT did not misconstrue the phrase “working...for a continuous period of at least 10 years” in section 24(2A)(g). The AAT limited its decision regarding section 24(2A)(g) by reference to the applicant’s work as a self-employed transport consultant because it took the view that his activities in his sons’ businesses were not “remunerative work”.

The applicant also argued that the AAT misconstrued the phrase “working...for a continuous period of at least 10 years” by treating it as setting out an absolute

requirement that the veteran had worked for a continuous period of 10 years, regardless of the reasons for any gaps in continuity, such as breaks which arise from a veteran’s war-caused disability. The FC indicated that even if the AAT was required to ignore the three year break in the continuity in the applicant’s work as a self-employed transport consultant (which the AAT found resulted from his accepted war-caused disabilities) he did not work on his own account as a transport consultant for 10 years – he only worked for about 2 years.

The Loss Issue

The FC considered it was unnecessary for the AAT to decide whether the applicant was suffering a loss, as he had failed to satisfy section 24(2A)(g).

Formal decision

The appeal was dismissed.



Editorial note

Once it was determined that the application for special rate was lodged after Mr Ralph turned 65, his eligibility was assessed under section 24(2A). In relation to the 10 years' continuous work issue, the FC referred to the decision of the FFC in *Thomson v Repatriation Commission* [2000] FCA 204, which explained that:

As was pointed out by the Full Court [in *Grant*], subs (g) of s24(2A) is concerned with the capacity in which the last paid work was undertaken. A veteran meets the requirements of the subsection if the last paid work has been undertaken in the relevant capacity for a period of at least 10 years. If the capacity is as an employee, the veteran must have been employed by the same employer (or its predecessor) continuously for the 10 year period. If the veteran is self-employed, then the last paid work must have been undertaken in that capacity continuously for the 10 year period. When subcl (ii) refers to the requirement that the self-employed veteran must have been "so working" continuously for the 10 year period, the reference is to the capacity in which the veteran worked.

Foster v Repatriation Commission

Mansfield J

[2015] FCA 198
11 March 2015

Claim for PTSD, alcohol dependence and hypertension – veteran found to have been the subject of abuse and bullying – where AAT erred in law in finding that veteran did not experience events that involved actual or threatened serious injury having regard to the bullying conduct

Facts

The applicant, Mr Kevin Forster, joined the Australian Regular Army in January 1973 when he was 15 years old, and discharged in November 1978. Mr Forster claimed he suffers PTSD, alcohol dependence and hypertension as a consequence of abuse and bullying during his Army service. His claim was rejected by the RC and that decision was affirmed by the VRB and AAT. He appealed to the FC.

The period in which the applicant completed his trade training as a

mechanic at the Army Apprentices School at Balcombe, Victoria, is relevant to this proceeding. Initially at Balcombe the applicant shared quarters with a more senior apprentice, however that apprentice's Army service was terminated a short time later. The AAT accepted the applicant was subjected to abuse and bullying at Balcombe, and concluded there was a culture of bullying at Balcombe during the time the applicant was there. The AAT took the view that the senior apprentices who were in their second or third year of service would routinely bully or harass first-year apprentices, and during the first few months of the applicant's service four senior apprentices were summarily discharged after one junior apprentice was hospitalised with what a contemporary newspaper described as "a broken nose and other facial injuries". Other practices called "bastardising" or "hazing" which were accepted by the AAT included senior apprentices coming into the applicant's room in the evening, upending his bed and assaulting him. The AAT said, more accurately, the

conduct was bullying involving physical assaults, both the actual and threatened application of force, and verbal abuse. The applicant gave evidence he was "absolutely terrified" during these incidents, which occurred more than twice a week before the four senior apprentices were discharged. Other evidence confirmed objectively the nature and frequency of the bullying conduct. The issue before the AAT was whether the three conditions were defence-caused.

The Court's consideration

Questions of Law regarding PTSD

- (1) Did the Tribunal pose and answer wrong question/s in determining whether a "factor" exists within the meaning of cl 6 of SoP No 6?
- (2) Did the Tribunal fail "to make relevant consideration/s" (sic) in determining whether a "factor" exists within the meaning of cl 6 of SoP No 6?
- (2A) Did the Tribunal engage in an illogical or irrational process or processes of reasoning in applying SoP No 6?

Consideration of PTSD

The applicant contended that:

- the Tribunal misconstrued the words “torture” and “assault” within the meaning of cls 6(a) and 9(c) of SoP No 6, and therefore posed and answered the wrong legal questions; and
- the Tribunal failed to make relevant considerations in determining whether a “factor” exists within the meaning of cl 6 of SoP No 6, including that the Tribunal failed to take into account mental suffering in answering the legal questions as to whether the applicant experienced “torture” within the meaning of a category 1A stressor in cl 9(c) of SoP No 6.

The FC did not accept that the AAT erred on a question of law by limiting the concept of “being tortured” to the infliction of severe bodily pain. In the FC’s view, the AAT considered whether the bullying conduct had caused the applicant the mental anguish he described, and the AAT did not accept that it had because the AAT did not accept him as a reliable reporter of his reaction to the bullying behaviour. The AAT then turned to the physical

consequences to see if they amounted to torture.

The applicant went on to successfully argue that the AAT incorrectly interpreted “serious assault” in the context of clause 9(b) of SoP No 6. The FC was satisfied that, in the assessment of whether the applicant was exposed to a severe traumatic event i.e. a category 1A stressor, the AAT misdirected itself about what constitutes a “serious physical attack or assault”. The AAT’s reasons merge the assessment of the quality of the conduct with the consequences of the conduct to the particular person. In the FC’s view, that was the error, and the AAT misdirected itself by focusing on the physical consequences of the bullying conduct upon the applicant. Further, to fail to take into account the claim that the consequences of the bullying behaviour produced adverse psychological consequences was itself an error on a question of law. Even if it was the case that the AAT did not believe the applicant himself was scared or upset at

all by the bullying conduct and its anticipation (noting there was no express rejection of that claim), there was other uncontested evidence from the junior apprentices which supported the claim that the bullying conduct was traumatising. The AAT was not entitled to de-classify the character of the bullying conduct because it did not accept that the applicant was as traumatised as he claimed to be. As the AAT said itself, following *Border*, the characterisation of the conduct is an objective one.

Questions of Law regarding Alcohol Dependence

- (3) Did the Tribunal err in law by failing to make the necessary determination or determinations pursuant to SoP No 2, as required by the Act?
- (4) Did the Tribunal pose and answer the wrong question or questions in determining whether a “factor” exists within the meaning of cl 6 of SoP No 2?
- (5) Did the Tribunal provide adequate and sufficient reasons for its application of SoP No 2, as required by s 43(2B) of the AAT Act?
- (6) Did the Tribunal engage in illogical or irrational process/es of reasoning in applying SoP No 2?

Consideration of Alcohol Dependence

The FC noted the same definition of a category 1A stressor is used in clause 9 of SoP No 2 regarding alcohol dependence, so it concluded for the same reasons as for PTSD above that the AAT fell into error.

The relevant factor in 6(a) of the SoP requires that the stressor was experienced within two years of the clinical onset of alcohol dependence. The AAT did not make a finding regarding the exact time of clinical onset but it determined that it did not occur within two years of the asserted category 1A stressor, namely the bullying behaviour. The AAT indicated the relevant psychiatrist had not addressed the time of clinical onset, but one of his reports indicated it began in 1973 and had been in remission for many years but returned recently. The respondent accepted the AAT was in error on that matter.

Questions of Law regarding Hypertension 1430 where his Honour observed at para [50]:

(7) Did the Tribunal err in law by failing to make the necessary determination or determinations pursuant to SoP No 64, as directed by the Act?
(8) Did the Tribunal engage in an illogical or irrational process or processes of reasoning in applying SoP No 64?

[T]he definition of “a category 1A stressor” makes no express mention of the type of feelings experienced by the veteran. To the contrary, it simply states that such a stressor “means one or more of the following severe traumatic events”. Furthermore, whilst subpara (a) of the definition incorporates the experience of the veteran in the event by defining it as “experiencing a life-threatening event”, the other two subparas – (b) and (c) – focus on the inherent nature of the event concerned rather than the feelings or emotions engendered by it. Thus, they variously refer to: “a serious, physical attack”, “assault”, “rape”, “sexual molestation”, “being threatened with a weapon”, and “being held captive, being kidnapped or being tortured”. Whilst all these events would obviously evoke feelings of severe stress, the definition seems to deliberately eschew any such subjective factor as a relevant consideration in determining whether the event falls within the definition.

Consideration of Hypertension

The grounds of appeal regarding hypertension were unsuccessful.

Formal decision

The appeal was allowed in part. The decision under review in respect of PTSD and alcohol dependence was set aside and remitted to the AAT for rehearing. The decision under review regarding hypertension was affirmed.

The AAT, following *Border*, said that each of the elements in clauses 9(b) and 9(c) of the definition of a category 1A stressor in SoP No 6 focus on the objective seriousness of the event or conduct. The AAT also recognised that the subjective response to an event might provide some guide as to its objective seriousness.



Editorial note

The AAT relied on the decision of Reeves J in *Border v Repatriation Commission* (No2) [2010] FCA

**Summers v Repatriation
Commission**

Kenny, Murphy & Beach JJ

[2015] FCAFC 36
17 March 2015

Whether the AAT failed to consider the applicability of factor 6(a) of the Statement of Principles (SoP) for Alcohol Dependence and Alcohol Abuse – whether the AAT misconstrued section 120 and /or the applicable SoP – whether the AAT adhered to the Deledio process for determining whether injury or disease war-caused under the VEA

Facts

Mr Summers served in the Australian Army from 12 July 1967 to 11 July 1969. He experienced operational service in South Vietnam from 23 June 1968 until 14 October 1968. In Vietnam, the applicant was stationed at Vung Tau and operated the Other Ranks canteen. After three and a half months, the applicant's father died and the applicant returned to Melbourne. After attending his father's funeral in Melbourne, the applicant was sent to Sydney in preparation for his return to Vietnam. While in Sydney, on

26 October 1968 the applicant was involved in an altercation with a group of sailors near Watson's Bay which resulted in him falling over a cliff. This occurred while he was still on emergency leave on compassionate grounds, which constitutes operational service.

Mr Summers made a disability pension claim for PTSD and alcohol dependence, and sought an increased rate of pension. This claim has been dealt with by the AAT, the FC, the FFC, and again by the AAT. It returned for a second time to the FC, where the appeal and cross appeal (regarding the AAT's acceptance of PTSD) were dismissed. Mr Summers now appeals for a second time to the FFC.

Grounds of appeal

The appeal primarily concerned the proper application of section 120(3) (reasonable hypothesis) and the operation of the applicable Statement of Principles (SoP) for alcohol dependence.

The Court's consideration

The FFC allowed the appeal on two grounds:

- (1) On the material raised before it the Tribunal failed to consider the applicability of clause 6(a) of the applicable SoP (on the basis that Mr Summers suffered from war-caused PTSD at the time of the clinical onset of his alcohol dependence). The Court was not satisfied that the Tribunal addressed this argument. This ground was not raised before the primary judge, and the Court granted leave for Mr Summers to add this new ground of appeal.
- (2) The Tribunal erred in its approach to the material regarding Mr Summers' alcohol dependence and the applicable SoP, and the primary judge erred in failing to correct this error. At the stage of the enquiry under s120(3) around which the appeal turns, the Tribunal was required to decide whether the material before it pointed to or raised a hypothesis consistent with the applicable SoP. In the Court's view it misconceived its task and asked itself the wrong question.

The other grounds of appeal regarding special rate pension were unsuccessful.

1. Whether the AAT failed to consider the applicability of factor 6(a) of the SoP

Mr Summers argued before the AAT that he satisfied clause 6(a) of the SoP because he suffered PTSD at the time of the clinical onset of his alcohol dependence. The FFC considered the AAT did not properly consider the argument.

First, whether the AAT was addressing a hypothesis advanced in reliance on clause 6(a) or 6(b) was a matter of real importance. The AAT treated the Watson's Bay event as the relevant category 1A stressor under clause 6(b), and for Mr Summers to satisfy that clause the material before the AAT was required to point to him having experienced that event within a five year period before the clinical onset of his alcohol dependence (meaning the material was limited to the five year period from about 26 October 1968 to 26 October 1973). The AAT did not decide the precise date that Mr Summers commenced to suffer PTSD but said it arose out of the Watson's Bay event in

the period following that. For Mr Summers to satisfy clause 6(a) the material before the AAT was required to point to him having PTSD at the time of the clinical onset of his alcohol dependence (meaning material from any date from about 26 October 1968 through to the date of the application on 10 December 2007 could demonstrate this). The FFC indicated at no point did the AAT expressly state which hypothesis it was referring to, and at no point did it expressly address the clause 6(a) hypothesis.

Second, the AAT referred to Mr Summers' hypothesis singularly. It was unclear to the FFC whether the AAT was addressing only one hypothesis, and if so which one, or whether it was addressing the four asserted hypotheses in a rolled up way. Again the FFC noted that at no point did the AAT expressly deal with the clause 6(a) hypothesis.

2. *Whether the AAT misconstrued section 120 and/or the applicable SoP*

The FFC indicated that as part of the AAT's task under section 120(3) it was required to consider whether the hypothesis Mr Summers advanced to connect his alcohol dependence with the circumstances of his service was consistent with the template in clause 3(b) of the SoP, and therefore a reasonable hypothesis. For Mr Summers to meet these requirements, the material before the AAT needed to point to or raise him having "*clinically significant impairment or distress, as manifested by three (or more) of the following* [from a list of seven diagnostic criteria then set out] *occurring at any time in the same 12-month period...*". The FFC noted it is established that it is impermissible to engage in fact finding at stage three of the *Deledio* process. The FFC considered the appeal in light of a hypothesis based on clause 6(a), meaning the three clause 3(b) factors could be found in any 12 month period from about 26 October 1968 through to 10 December 2007.

The FFC turned to consider the material in relation to each clause 3(b) factor to determine whether the AAT misunderstood its task under section 120(3) of the VEA and clause 3(b) of the SoP. The FFC inferred from the AAT's approach to the material before it that it did misunderstand this task. In regards to some of the factors, the AAT used the language of fact finding. The FFC made it clear it did not purport to make the enquiry under stage three of the *Deledio* process itself, as this will be a task for the AAT.

The Court's decision

The appeal was allowed. The AAT's decision was set aside in so far as it affirmed the decisions under review (regarding alcohol dependence and pension assessment), and the matter was remitted to the AAT for rehearing according to law.



Editorial note

The FFC observed that Mr Summers' application

for special rate is likely to turn on whether his alcohol dependence is found to be war-caused, when it returns for a third time to the AAT.

McKinley v Repatriation Commission

Pagone J

[2015] FCA 145
2 March 2015

Claim for PTSD and alcohol abuse – whether AAT failed to afford procedural fairness – whether AAT took into account an irrelevant consideration – whether decision affected by actual or apprehended bias – whether findings irrational, illogical or manifestly unreasonable – whether AAT failed to make independent inquiries – whether AAT failed to provide adequate reasons for its factual findings – whether AAT failed to apply the correct standard of proof in relation to factual findings

Facts

The applicant, Ms McKinley, served in the Australian Army from 12 February 1986 to 12 October 2005. Relevantly, she had operational service in East Timor from 10 October 1999 to 1 February 2000.

The applicant suffered injuries to her knee and ankle which were accepted as war-caused, and receives a disability pension at 60% of the general rate for those injuries.

On 30 November 2012 the applicant applied to have PTSD and alcohol abuse accepted as war-caused, and to have her pension increased to the special rate. Her previous claim for PTSD in 2005, which a delegate of the RC diagnosed as generalised anxiety disorder, was refused, and that decision was affirmed by the VRB. The VRB's decision was affirmed by the AAT. The evidence in that application to the AAT included a statement by the applicant dated 17 October 2005 and a report by Writeway Research Service Pty Ltd dated 11 August 2006, which was also part of the material before the AAT in the present case.

On 3 December 2012 a delegate of the RC decided the appropriate diagnoses were generalised anxiety disorder and alcohol dependence, and found that neither

condition was war-caused. The decision was affirmed by the VRB, and that decision in turn was affirmed by the AAT. The applicant appealed to the FC.

The Court's consideration

Question of Law 1

1. Did the Tribunal fail to afford the applicant procedural fairness because it did not give the applicant sufficient notice that it would place considerable reliance on the Writeway report in preference to the applicant's evidence?

Consideration of Question 1

The FC indicated it was clear from the AAT's decision that the applicant was afforded procedural fairness in relation to the Writeway report. The report had been included in the documents before the AAT and had been provided to the applicant, and her legal advisers, for the proceedings. It was clearly known to the applicant's legal representative that the respondent was relying on the report in answer to her claim, and was encouraging the AAT to accept material in the report in preference to her evidence.

Question of Law 2

2. Did the Tribunal taken into account an irrelevant consideration in assessing the reliability of the Writeway report, namely its impression of previously prepared Writeway reports?

Consideration of Question 2

It was submitted for the applicant that the AAT had taken into account its personal view about other reports written by Writeway. In paragraph [76] the AAT indicated:

...I have had many occasions in reviews of veterans' applications to read the reports of consultants engaged by the Writeway organisation. I was impressed by the quantity of documents and historical sources that were accessed in conducting the research...

Looking at the whole of paragraph 76, the FC considered the impression referred to was the impression created by the Writeway report about the applicant, and not the impression created by other reports.

Question of Law 3

3. Was the decision of the Tribunal actuated by real or apparent bias in considering the Writeway report favourably (and preferentially) in light of previous experiences with the Writeway company?

Consideration of Question 3

The ground relied on was that the decision of the AAT was "actuated by real or apparent bias", because the AAT preferred the Writeway report over the applicant's evidence, "owing to his positive impression of past Writeway reports". For the reasons considered in the context of question 2, the FC indicated the AAT did not reveal a predisposition in favour of reports written by the Writeway organisation. Therefore, there was no foundation for the claim that the AAT decided the questions before it while motivated by "real" or "apparent" (apprehended) bias.

Question of Law 4

4. Did the Tribunal make a finding that was irrational or illogical and/or manifestly unreasonable in determining that the applicant did not suffer from a category 1A or 1B stressor linking her [general anxiety disorder] to her service for the purposes of the applicable Statement of Principle as a

result of preferring a Writeway report to the applicant's evidence?

Consideration of Question 4

The FC referred to the relevant paragraphs, [78]-[93], of the AAT's decision which defeated the ground advanced by the applicant that the AAT's finding was because of a preference for the Writeway report to the applicant's evidence.

Question of Law 5

5. Did the Tribunal fail to make its own independent inquiries, as it was bound to do by law, by neglecting to suggest that the author of the Writeway report be called to give evidence given the weight it intended to attach to the content of the report, to the prejudice of the applicant?

Consideration of Question 5

The FC indicated there was no reason for the AAT to call or suggest that the author of the Writeway report be called to give evidence beyond the fact, obvious to all in the proceedings, that the Writeway report was being relied upon by the respondent. There was nothing suggested to the AAT, or to the FC on appeal, that would have caused the AAT to consider it necessary to call the author

of the Writeway report where the applicant's legal representative was not seeking to do so.

Questions of Law 6 & 7

6. In considering the applicant's evidence of observing injured persons at the hospital in Dili (at [93]), did the Tribunal err in any of the following respects:
 - (a) By failing to find that the material, particularly Ms McKinley's evidence, disclosed and pointed to a reasonable hypothesis that the applicant had indeed witnessed critically injured casualties?
 - (b) By failing to provide adequate or sufficient reasons for its finding that the applicant did not witness critically injured patients or patients who had lost limbs, and in doing so breaching s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth)?
7. Did the Tribunal give adequate and sufficient reasons as it was obliged to under s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) for its determination that the applicant:
 - (a) Did not suffer from an injury or disease being [post-traumatic stress disorder]?
 - (b) Did not suffer from war-caused General Anxiety Disorder or alcohol abuse or dependence?

Consideration of Questions 6 & 7

The FC considered the material before the AAT permitted the findings it made,

and the AAT adequately explained why it reached the contrary conclusion to the applicant's evidence. The FC considered the AAT's reasons regarding its conclusions that the applicant did not suffer an injury or disease being PTSD, and that she did not suffer from war-caused general anxiety disorder or alcohol abuse or dependence, were also adequately explained in its reasons.

Question of Law 8

8. Did the Tribunal satisfy itself beyond reasonable doubt, as it was required to do under s 120 of the *Veterans' Entitlements Act 1986* (Cth), that the applicant's [general anxiety disorder] and alcohol dependence were not war-caused?

Consideration of Question 8

The FC was satisfied the clear language used by the AAT demonstrated that it did apply, and was conscious of, the correct standard of proof required in reaching its ultimate conclusion.

The Court's Decision

The appeal was dismissed.



Editorial note

This appeal dealt with a number of procedural issues relating to the AAT's decision. Five out of eight of the grounds of appeal related to the Writeway report. Ultimately none of the grounds of appeal was successful. The reference in Question 4 to the AAT's finding being "irrational or illogical and/or manifestly unreasonable" was discussed in the High Court case of *Minister for Immigration and Multicultural Affairs; Re Ex Parte Applicant S20/2002* [2003] HCA 30. However, in the present case the FC was satisfied the AAT's conclusions could not be said to be "irrational, illogical and not based upon findings or inferences of fact supported by logical grounds" such that the decision-maker misconceived his or her purpose or function.

The decision of the FFC in this case follows on immediately below.

Warren v Repatriation Commission

Collier, Jessup & Mortimer JJ

[2015] FCAFC 159
12 November 2015

Whether the AAT erred in law because it made a finding that the applicant did not experience a stressor in the SoP otherwise than being satisfied beyond reasonable doubt in accordance with stage four of Deledio

Facts

The applicant, Ms Warren (previously McKinley), served in the Australian Army from 12 February 1986 to 12 October 2005. Relevantly, she had operational service in East Timor from 10 October 1999 to 1 February 2000.

On 30 November 2012 the applicant applied to have PTSD and alcohol abuse accepted as war-caused, and to have her pension increased to the special rate.

On 3 December 2012 a delegate of the RC decided the appropriate diagnoses were generalised anxiety disorder and alcohol dependence, and found that neither

condition was war-caused. The decision was affirmed by the VRB, and that decision in turn was affirmed by the AAT. The applicant's appeal to the FC was dismissed. She appealed to the FFC.

The Court's consideration

Ground 1

1. The applicant's contention that the Tribunal had taken an irrelevant consideration into account.

Consideration of Ground 1

A question before the AAT had been whether the applicant had been "confronted" (to use the applicant's terminology) by two Indonesian soldiers upon her arrival at Dili airport. Included in the factual material before the AAT was a Writeway report, which contained the following passage:

In the period 20 to 29 September 1999, the numbers of Indonesian Armed Forces (TNI) had reduced from 15,000 troops to a garrison of 1300 in Dili. Indonesian air force and marines had withdrawn from Comoro airfield and the port of Dili. INTERFET (International Forces East Timor) troops were in control of the airport from 28 September 1999. It is unlikely that any East Timorese civilians would have had weapons at the airport on 11 October 1999 when the applicant arrived.

The AAT was required to decide whether to accept the applicant's evidence in preference to the conclusion in the Writeway report. The AAT indicated:

I accept that there were many occasions when the applicant was anxious and subjectively felt concerned for her safety. However, her recollection and description of events is inconsistent with a significant body of documents historical material, much of which was contemporaneously produced. Neither the applicant nor her representative challenged any of that material in this review, nor was the Writeway author called to give evidence. His report was based on his research of the historical material. I have had many occasions in reviews of veterans' applications to read the reports of consultants engaged by the Writeway organisations. I was impressed by the quantity of documents and historical sources that were accessed in conducting the research. I also regard the report as balanced.

The applicant submitted before the primary Judge that it was apparent from this paragraph the AAT's decision was, at least in a material respect, based on its reading of other "reports of consultants engaged by the Writeway organisation". The question of law raised was:

Did the Tribunal take into account an irrelevant consideration in assessing the reliability of the Writeway report, namely its impression of previously prepared Writeway reports?

The primary Judge decided the impression referred to was the impression created by the Writeway report about the applicant, and not the impression created by other reports.

On appeal, it was submitted that the paragraph disclosed that the AAT had decided the applicant's case by reference to material disclosed in Writeway reports that related to other people and other circumstances. The FFC agreed with the view of the primary Judge. The FFC also dismissed the submission that it was denial of natural justice for the AAT to have brought its acquaintance with previous work by Writeway to bear on its assessment of the work which actually related to the applicant.

Another submission by the applicant was that the AAT made an error of law by not calling the author of the Writeway report to give evidence. The FFC agreed with the view of the primary Judge that there was no error, given counsel for the applicant did not seek to cross-examine or call the author.

It was also a ground of appeal that the AAT's findings in relation to the Writeway report were made on the basis

of “an assumed factual premise for which there was no evidence, namely that the contents of the report went uncontested” by the applicant. However, this did not raise a question of law.

Finally, the FFC agreed with the primary Judge’s decision to dispose of the applicant’s other arguments that the AAT’s reasons in that paragraph were “irrational and illogical”, and, because the other Writeway reports were not in evidence, that the “finding” (as it was called) about the reliability of them was made without evidence.

Ground 2

2. An amendment which the applicant sought to make to her appeal under s44 of the AAT Act but which was rejected by the primary Judge.

Consideration of Ground 2

In its reasons the AAT had said that the applicant had given evidence to the effect that “she was highly medicated on her arrival at Dili”. However, her evidence that she was medicated related to the period 2005-2007, not to 1999 (the time of her arrival in Dili). The primary Judge refused an interlocutory application to raise additional questions of law. The FFC could not find error on the primary

Judge’s part in disposing of the interlocutory application.

In the amended notice of appeal, the asserted error of law was a finding by the AAT that there were no Indonesian soldiers present on the applicant’s arrival at the Dili airport “on the basis of an assumed factual premise for which there was in fact no evidence, namely that (the appellant) was medicated in Dili...”. The FFC did not accept that the AAT’s comment about the applicant being medicated on her arrival at Dili was a finding on a relevant question of fact. Rather, it may, at most, have reflected the AAT’s thinking about the reliability of the applicant’s evidence. The FFC considered the comment did not give rise to an error of law sufficient to sustain an appeal under section 44 of the AAT Act.

Ground 3

3. What Counsel for the applicant described as “the observation of critically injured people at the Dili hospital”.

Consideration of Ground 3

This ground of appeal was expressed as follows:

The learned trial judge erred in upholding the Tribunal’s findings that:

...

The Applicant (sic) did not suffer from war-caused PTSD, or war-caused GAD or war-caused Alcohol Dependence or Abuse because she did not witness critically injured casualties at the hospital in Dili, because the Tribunal:

3.1 Failed to recognise that, on the facts found by the Tribunal, the veteran met the diagnostic criteria for an injury or disease being PTSD or a stressor giving rise to PTSD or a stressor connected to the Applicant's [sic] GAD or Alcohol Dependence or Abuse; and/or

3.2 Failed to give adequate or proper reasons for this material finding of fact.

It was submitted that 3.1 related to the meaning of the expression "critically injured casualty" in the definition of a category 1B in the relevant Statement of Principles concerning anxiety disorder, while 3.2 related to the adequacy of the AAT's reasons in relevant respects.

It was the applicant's factual case that she had viewed critically injured casualties as an eyewitness during the period of her operational service, including at a hospital in Dili.

The FFC rejected ground 3.1 on the simple basis that it did not represent any respect in which the applicant had

established that the primary Judge was in error.

Regarding 3.2, the FFC considered the AAT's reasons complied with section 43(2B) of the AAT Act, and the primary Judge was correct to hold that it did so comply.

In another ground of appeal, the applicant argued that the AAT proceeded not by reference to the reverse beyond reasonable doubt standard, but by reference to a balance of probabilities standard, regarding the factual issue of whether the applicant had, as an eye witness, viewed critically injured casualties – it being contended by her that she had done so when she observed patients with missing limbs in the Dili hospital.

The AAT's reasoning on this point included the following:

Irrespective of whether an application is pursued on the basis of clinical onset or clinical worsening, there must be a finding on the probabilities that events or circumstances occurred in service which – for the purposes of this review – constitute 1A or 1B stressors.

For reasons given above, I am not satisfied that the applicant did experience a category 1A or 1B stressor. That finding is fatal to the application, no less also to the

submission of clinical worsening. Accordingly, I am satisfied beyond reasonable doubt that the conditions of Alcohol Use Disorder or GAD were not war-caused.

It seemed clear to the FFC that, on the matter of the existence of the relevant stressor referred to in the SoP, the AAT did not apply the reverse reasonable doubt standard. The FFC asked whether the AAT erred to have proceeded in this way. The primary Judge held not. The FFC indicated:

...there was material before the Tribunal from which a finding that the applicant was an eyewitness to critically injured casualties might have been made. The first three stages of *Deledio* had been covered. The Tribunal then arrived at the point of moving beyond the mere existence of the material to a finding of fact whether the appellant had witnessed such casualties. In concluding that she had not, it proceeded on the balance of probabilities. This was, in my view, contrary to the requirements of s 120(1) of the VEA Act...What must be established beyond reasonable doubt is that "there is no sufficient ground" for determining that the veteran's injury or disease was war-caused. If the material before the Tribunal, if accepted, would constitute a sufficient ground, the veteran is entitled to succeed unless the Tribunal is satisfied beyond reasonable doubt that the material does not represent the facts as they occurred. This is the situation no less in the case of stressors under the SoP as in the case of other facts that may bear upon the veteran's entitlement.

The FFC held that when the AAT found that the applicant had not viewed critically injured casualties as an eye witness, it erred in law because it made that finding otherwise than being satisfied beyond reasonable doubt of the fact referred to. The primary Judge likewise erred when his Honour held that it had not been an error of law for the AAT to have proceeded as it did.

The Court's Decision

The appeal was allowed.



Editorial note

Mortimer J agreed with the majority judgement above, except for Ground 2. His Honour agreed there was no error in the exercise of the primary Judge's discretion on the interlocutory application. Ground 2 of the amended notice of appeal states:

The learned trial judge erred in upholding the Tribunal's findings that:

...

2. The Applicant did not suffer from war-caused PTSD, or

war-caused Alcohol
Dependence or war caused
GAD because she did not
witness Indonesian soldiers
on her arrival at the Dili
airport, because the Tribunal
made the finding on the basis
of an assumed factual
premise for which there was
in fact no evidence, namely
that Ms McKinley was
medicated in Dili whereas in
fact there was no evidence to
support that factual premise.

Mortimer J noted the AAT found that the event recounted by the applicant did not occur. That was its finding of fact. The AAT's reasons supported that finding by reference to two matters – historical records (in the Writeway report) and its non-acceptance of the applicant's account because she was medicated. In His Honour's opinion, the AAT relied on two evidentiary bases for its finding of fact, and that finding was a material one as to its task on review. One of those evidentiary bases avowedly did not exist. Therefore, Ground 2 should be upheld.

Repatriation Commission v Woodall

Tracey J

[2015] FCA 1267
20 November 2015

Application for special rate – whether AAT erred in its construction of s24(2)(b) by requiring a “liberal and beneficial” approach to the extent and nature of the veteran’s war-caused injuries – whether AAT erred in determining that the veteran’s war-caused injuries were the “substantial cause” of his inability to obtain remunerative work

Facts

Mr Woodall is an Army veteran who suffers from a variety of war-caused injuries, including generalised anxiety disorder (GAD) and the displacement of an intervertebral disc. The AAT determined that the applicant was entitled to the special rate of pension. The RC appealed to the FC.

The AAT referred to the decision of the FFC in *Smith v Repatriation Commission* (2014) 220 FCR 452 at 456 (Rares J) and 490 (Foster J) where their Honours identified three requirements which had

to be satisfied in order for a veteran to have the benefit of the ameliorative provisions of section 24(2)(b) of the VEA:

- the veteran must have been *genuinely seeking to engage in remunerative work*;
- but for incapacity by war-caused injuries, the veteran would be *continuing to seek to engage in remunerative work*; and
- the war-caused incapacity is *the substantial cause of his inability to obtain remunerative work*.

The RC contends the AAT fell into error when it found that the third requirement had been satisfied.

The Court's consideration

Ground 1

1. The Tribunal misconstrued s24(2)(b), and the cases which describe that provision as having an 'ameliorative' effect, as requiring a 'liberal and beneficial' approach to the assessment of the extent and nature of a veteran's war-caused injuries, and therefore misapplied the test provided by the third element of s24(2)(b) of the Act.

Consideration of Ground 1

The RC contended the AAT had fallen into error in undertaking the weighing exercise required by the third element of section 24(2)(b) by ignoring and failing to

balance other causal factors such as Mr Woodall's age, skills and workplace restrictions, at the time he made his applications, against the war-caused injuries as causal factors. The RC argued the AAT had inferred that Mr Woodall had failed to obtain the three jobs for which he had been to interviews because of his war-caused back condition and generalised anxiety disorder. It had further inferred that, had Mr Woodall been interviewed by other prospective employers, they would have responded in the same way upon becoming aware of his war-caused conditions.

The FC indicated the phrase "the substantial cause" clearly recognises that factors, additional to war-caused injury, may impede a veteran who is seeking to obtain employment. In *Fox v Repatriation Commission* (1997) 45 ALD 317, Keifel J said at 319-320:

The words 'the substantial cause' require that, if the incapacity is not of itself productive of the inability to obtain work, it is nevertheless the operative factor which, more than any other, explains it. That something might be 'a substantial cause' has regard to the situation where there may be a number of factors operating which are of sufficient causal significance to qualify as 'substantial' ... The definite article in s24(2) ... requires a stronger and more direct

casual connection between the incapacity and the inability to obtain remunerative work.

The RC noted the AAT identified a number of factors which might adversely affect Mr Woodall's ability to obtain employment. The AAT determined it was satisfied "that the greater or more dominant cause – the substantial cause – was [Mr Woodall's] incapacity [caused] by war-caused injuries." The FC considered this conclusion was open on the limited material before the AAT, which included Mr Woodall's age, employment history, skills, physical limitations and attempts to obtain alternative employment.

The FC considered the AAT's references to the need to undertake the balancing exercise "in a practical, liberal and beneficial manner" was an acknowledgement of the beneficial purpose of the VEA generally and section 24(2)(b) in particular – they related to the application of section 24(2)(b) rather than its meaning. The AAT did not depart in any impermissible way from the ordinary and natural meaning of section 24(2)(b).

Ground 2

2. The Tribunal misconstrued s24(2)(b) of the Act by:
 - a. proceeding on the basis that, in order to find that the Applicant's war-caused incapacities were not the substantial cause of his inability to obtain remunerative work, other causal factors must be 'the substantial cause' of the inability to obtain employment.
 - b. impermissibly speculating as to what would have happened if the Applicant had obtained an interview for the positions in respect of which he did not, in fact, obtain an interview; and/or
 - c. failing to undertake the weighing exercise that was necessary in order to determine whether the Respondent's accepted war-caused incapacities were 'the substantial cause' of his inability to obtain remunerative work.

Consideration of Ground 2

Regarding Ground 2(a), the FC indicated a fair reading of the AAT's reasons did not support this contention. The AAT went no further than saying that, even if other negative factors may have been at work, it did not follow that those other

factors “individually or in combination were the substantial cause of [Mr Woodall’s] inability to obtain remunerative work”.

Regarding Ground 2(b), the FC did not accept this submission. What the AAT did was to draw inferences from the limited available evidence about what had occurred when three prospective employers interviewed Mr Woodall, which supported findings about Mr Woodall’s capacity to obtain alternative employment.

Regarding Ground 2(c), the FC considered this complaint lacked substance, as it ignored the plain words of the AAT’s reasons at paragraph [76].

AAT’s task in relation to section 24(1)(c) was:

... to make a practical decision whether the veteran’s loss of remunerative work is attributable to his service-related incapacities, and not to something else as well. It is a decision that should not be made upon nice philosophical distinctions, but with an eye to reality, and as a matter in respect of which common sense is the proper guide.

Richmond recently expressly endorsed these observations. It was the FC’s view that a similar “practical”, realistic and “common sense” approach is also called for when the AAT is making decisions under section 24(2)(b).

The Court’s Decision

The appeal was dismissed.



Editorial note

The FC referred to *Cavell v Repatriation Commission* (1988) 9 AAR 534, where Burchett J said at 539 that the

Statements of Principles issued by the Repatriation Medical Authority

1 January 2015 to 31 December 2015

Description of Instrument	Number of Instrument	Date of effect
Malignant neoplasm of the small intestine	1 & 2/2015	27 January 2015
Malignant neoplasm of the testis and paratesticular tissues	3 & 4/2015	27 January 2015
Soft tissue sarcoma	5 & 6/2015	27 January 2015
Epicondylitis	7 & 8/2015	27 January 2015
Shin splints	9 & 10/2015	27 January 2015
Tinea	11 & 12/2015	27 January 2015
Decompression sickness	13 & 14/2015	27 January 2015
Pulmonary barotrauma	15 & 16/2015	27 January 2015
Dysbaric osteonecrosis	17 & 18/2015	27 January 2015
Albinism	19 & 20/2015	27 January 2015
Charcot-Marie-Tooth disease	21 & 22/2015	27 January 2015
Haemophilia	23 & 24/2015	27 January 2015
Marfan syndrome	25 & 26/2015	27 January 2015
Gaucher's disease	27 & 28/2015	27 January 2015
Alpha-1 antitrypsin deficiency	29 & 30/2015	27 January 2015
Horseshoe kidney	31 & 32/2015	27 January 2015
Wilson's disease	33 & 34/2015	27 January 2015
Osteogenesis imperfecta	35 & 36/2105	27 January 2015
Huntington's chorea	37 & 38/2015	27 January 2015
Autosomal dominant polycystic kidney disease	39 & 40/2015	27 January 2015

Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
von Willebrand's disease	41 & 42/2015	27 January 2015
Multiple osteochondromatosis	43 & 44/2015	27 January 2015
Trochanteric bursitis and gluteal tendinopathy	45 & 46/2015	27 January 2015
Herpes zoster	47 & 48/2015	30 March 2015
Paget's disease of bone	49 & 50/2015	30 March 2015
Plantar fasciitis	51 & 52/2015	30 March 2015
Neoplasm of the pituitary gland	53 & 54/2015	30 March 2015
Seborrhoeic keratosis	55 & 56/2015	30 March 2015
Malignant neoplasm of the salivary gland	57 & 58/2015	30 March 2015
Spondylolisthesis and spondylolysis	59 & 60/2015	30 March 2015
Gastric ulcer and duodenal ulcer	61 & 62/2015	1 June 2015
Hepatitis A	63 & 64/2015	1 June 2015
Cerebrovascular accident	65 & 66/2015	1 June 2015
Hereditary spherocytosis	67 & 68/2015	1 June 2015
Malignant neoplasm of the bile duct	69 & 70/2015	1 June 2015
Acute myeloid leukaemia	71 & 72/2015	20 July 2015
Myelodysplastic syndrome	73 & 74/2015	20 July 2015
Myasthenia gravis	75 & 76/2015	20 July 2015
Trigeminal neuralgia	77 & 78/2015	20 July 2015
Trigeminal neuropathy	79 & 80/2015	20 July 2015
Tuberculosis	81 & 82/2015	20 July 2015
Depressive disorder	83 & 84/2015	20 July 2015
Cardiomyopathy	85 & 86/2015	20 July 2015
Chickenpox	87 & 88/2015	20 July 2015

Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
Malignant neoplasm of the gallbladder	89 & 90/2015	20 July 2015
Arachnoid cyst	91 & 92/2015	20 July 2015
non-Hodgkin's lymphoma	93/2015	20 July 2015
Fracture	94 & 95/2015	21 September 2015
Achilles tendinopathy and bursitis	96 & 97/2015	21 September 2015
Hallux valgus	98 & 99/2015	21 September 2015
Lipoma	100 & 101/2015	21 September 2015
Malignant melanoma of the skin	102 & 103/2015	21 September 2015
Mesothelioma	104 & 105/2015	21 September 2015
Ingrowing nail	106 & 107/2015	21 September 2015
Meniere's disease	108 & 109/2015	21 September 2015
External burn	110 & 111/2015	21 September 2015
Hepatitis E	112 & 113/2015	21 September 2015
Lipoma	114 & 115/2015	16 November 2015
Pterygium	116 & 117/2015	16 November 2015
Pinguecula	118 & 119/2015	16 November 2015
Malignant neoplasm of the oesophagus	120 & 121/2015	16 November 2015
Dental caries	122 & 123/2015	16 November 2015
Loss of teeth	124 & 125/2015	16 November 2015
Discoid lupus erythematosus	126 & 127/2015	16 November 2015
Chronic obstructive pulmonary disease	128 & 129/2015	16 November 2015

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

Conditions under Investigation by the Repatriation Medical Authority

Current RMA section 196 Gazetted investigations for conditions where
there is no Statement of Principle

Condition	Date of notification
Antiphospholipid syndrome	1/9/2015
Barrett's oesophagus	1/9/2015
Bruxism	9/12/2015
Complex regional pain syndrome	15/3/2016
Female sexual dysfunctions	9/12/2015
Ganglion	9/12/2015
Incisional hernia	9/12/2015
Retrolisthesis	3/5/2015
Scheuermann's disease	9/12/2015
Umbilical hernia	9/12/2015

Please refer to the RMA website <http://www.rma.gov.au/> for all current investigations.

AAT and Court decisions – January to December 2015

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

Lee [2015] AATA 371

Stevens [2015] AATA 663

Assessment of Disability Pension

Extreme Disablement Adjustment

Howard [2015] AATA 922

McKinnon (as LPR of the estate of Charles Thomas McKinnon) [2015] AATA 395

Rowe [2015] AATA 541

Smith [2015] AATA 774

-S24(1)(c)

-suffering a loss of earnings on own account

Beale [2015] AATA 725

Coleman [2015] AATA 552

Redden [2015] AATA 273

-whether prevented by accepted disabilities alone from continuing to undertake the remunerative work

Andrews [2015] AATA 1008

Beale [2015] AATA 725

Burridge [2015] AATA 887

Burton [2015] AATA 105

Coleman [2015] AATA 552

Connell [2015] AATA 653

Conway [2015] AATA 113

Cunningham [2015] AATA 391

Ford [2015] AATA 865

Howard [2015] AATA 922

James [2015] FCCA 2644

Loneragan [2015] AATA 747

Maloney [2015] AATA 404

Milenz [2015] AATA 48

Murray [2015] AATA 364

Redden [2015] AATA 273

Richmond [2015] AATA 647

Sizmur [2015] AATA 580

Smith [2015] AATA 27

Section 23 - Intermediate Rate of Pension

Harris [2015] AATA 349

Lee [2015] AATA 371

Maloney [2015] AATA 404

Nelson [2015] AATA 539

Smith [2015] AATA 448

Stevens [2015] AATA 663

Walker [2015] AATA 667

Section 24 - Special Rate of Pension

-S24(1)(b)

-remunerative work

Sheldon [2015] AATA 415

-whether accepted conditions alone cause inability to work more than 8 hours

Cameron [2015] AATA 705

Connell [2015] AATA 653

Cunningham [2015] AATA 391

**AAT and Court decisions –
January to December 2015**

<i>Van As</i> [2015] AATA 789	Death
<i>Watkins</i> [2015] FCAFC 10	
-S24(2)(b) – genuinely seeking to engage in remunerative work	Alzheimer’s disease
<i>Burton</i> [2015] AATA 105	<i>Gallagher</i> [2015] AATA 709
<i>Van As</i> [2015] AATA 789	<i>Harding</i> [2015] AATA 920
<i>Woodall</i> [2015] AATA 163	Aortic stenosis
<i>Woodall</i> [2015] FCA 1267	<i>Dall</i> [2015] AATA 498
	<i>Winter</i> [2015] AATA 350
-S24(2A) – over 65	
-(d) – alone test	Blunt force injuries of head & neck
<i>Beezley</i> [2015] FCA 78	<i>Chaney</i> [2015] AATA 286
<i>Hoare</i> [2015] AATA 899	
<i>Jones</i> [2015] AATA 96	Cardiomyopathy
<i>Saxton</i> [2015] AATA 836	<i>Phillips</i> [2015] AATA 744
-(g) – continuous period of at least 10 years	Defacto
<i>Cameron</i> [2015] AATA 705	<i>Bergin</i> [2015] AATA 224
<i>Dodd</i> [2015] AATA 1004	
<i>Elliot</i> [2015] AATA 894	Hepatocellular carcinoma
<i>Hoare</i> [2015] AATA 899	<i>Ellis</i> [2015] AATA 431
<i>Ralph</i> [2015] FCA 165	
<i>Saxton</i> [2015] AATA 836	Ischaemic heart disease
	<i>Armstrong</i> [2015] AATA 566
	<i>Blakeney</i> [2015] AATA 862
	<i>Coleman</i> [2015] AATA 757
	<i>Dall</i> [2015] AATA 498
	<i>Duffell</i> [2015] AATA 102
	<i>Hodgson</i> [2015] AATA 315
	<i>Lewis and MRCC</i> [2015] AATA 581
	<i>Mossman</i> [2015] AATA 346
	<i>Stewart</i> [2015] AATA 148
	<i>Winter</i> [2015] AATA 350
Compensation (MRCA)	
Eligible young person payment	
<i>Parr and MRCC</i> [2015] AATA 239	
Incapacity payments	
<i>Meadows and MRCC</i> [2015] AATA 913	
<i>MRCC and Horner</i> [2015] AATA 618	
Permanent impairment	
<i>Meadows and MRCC</i> [2015] AATA 913	

AAT and Court decisions – January to December 2015

Malignant melanoma

Hammond [2015] AATA 723

Malignant neoplasm of the bladder

Cleary [2015] AATA 352

Malignant neoplasm of the colorectum

Mahoney [2015] AATA 379

Pye [2015] AATA 201

Metastatic prostate cancer

Trinder [2015] AATA 230

Pancreatic cancer

McGibbon [2015] AATA 745

Entitlement to Disability Pension

Asbestosis

Craig [2015] AATA 400

Asthma

Linwood [2015] AATA 704

Autoimmune haemolytic anaemia

Lightowlers [2015] AATA 17

Cervical spondylosis

Flanders [2015] AATA 1023

Fraser [2015] AATA 345

Sullivan [2015] AATA 1015

Chronic irritable cough syndrome

Iliopoulos [2015] AATA 670

Chronic obstructive pulmonary disease

Van As [2015] AATA 789

Cryptococcoma of the lung

Lightowlers [2015] AATA 17

Diabetes mellitus

Thomas [2015] AATA 514

Gastro-oesophageal reflux disease

Fraser [2015] AATA 345

Hiatus hernia

Fraser [2015] AATA 345

Hypertension

Herrod [2015] AATA 464

Interstitial pulmonary fibrosis

Craig [2015] AATA 400

Ischaemic heart disease

Loneragan [2015] AATA 747

Lumbar spondylosis

Baird [2015] AATA 393

Fraser [2015] AATA 345

Meniere's disease

Fraser [2015] AATA 345

Osteoarthritis

Baird [2015] AATA 393

Fraser [2015] AATA 345

**AAT and Court decisions –
January to December 2015**

Pleural plaque	-Depressive disorder
<i>Craig</i> [2015] AATA 400	<i>-category 1A stressor</i>
	<i>Jones</i> [2015] AATA 812
Psychiatric conditions	<i>-category 1B stressor</i>
-Alcohol abuse/dependence/use disorder	<i>Jones</i> [2015] AATA 812
<i>-category 1A stressor</i>	<i>-category 2 stressor</i>
<i>Herrod</i> [2015] AATA 464	<i>Jones</i> [2015] AATA 812
	<i>Linwood</i> [2015] AATA 704
<i>-category 1B stressor</i>	
<i>Herrod</i> [2015] AATA 464	<i>-chronic pain</i>
<i>Olsen</i> [2015] AATA 119	<i>Camilleri</i> [2015] AATA 822
<i>-onset within requisite time</i>	<i>-onset within requisite time</i>
<i>Forster</i> [2015] FCA 198	<i>Kelly</i> [2015] AATA 56
<i>Kelly</i> [2015] AATA 56	
<i>-other psychiatric condition</i>	-Post traumatic stress disorder
<i>Camilleri</i> [2015] AATA 822	<i>-category 1A stressor</i>
<i>Summers</i> [2015] FCAFC 36	<i>Forster</i> [2015] FCA 198
	<i>Smith</i> [2015] AATA 786
	<i>Bendall-Harris</i> [2015] AATA 521
-Antisocial personality disorder	
<i>-onset within requisite time</i>	<i>-category 1B stressor</i>
<i>Olsen</i> [2015] AATA 119	<i>Smith</i> [2015] AATA 786
	<i>Bendall-Harris</i> [2015] AATA 521
-Anxiety disorder	
<i>-category 2 stressor</i>	<i>-diagnosis</i>
<i>Campbell</i> [2015] AATA 605	<i>Hansell</i> [2015] AATA 377
<i>Schmidt</i> [2015] AATA 229	<i>Olsen</i> [2015] AATA 119
	<i>Kelly</i> [2015] AATA 56
<i>-onset within requisite time</i>	
<i>Olsen</i> [2015] AATA 119	

AAT and Court decisions – January to December 2015

-inability to obtain appropriate clinical management

Wilmott [2015] AATA 1016

Date of effect

Kermode [2015] AATA 234

Tiplady [2015] AATA 81

Rotator cuff syndrome

Fraser [2015] AATA 345

Deledio process

Warren [2015] FCAFC 159

Sleep apnoea

Herrod [2015] AATA 464

Jones [2015] AATA 812

Jurisdiction

Ducat [2015] AATA 909

Hopkins [2015] AATA 571

Hyland [2015] AATA 927

Tiplady [2015] AATA 81

Spondylolisthesis

King [2015] AATA 36

No reasonable prospects of success

Taylor [2015] AATA 821

Thymoma

Lightowlers [2015] AATA 17

Procedural fairness

McKinley [2015] FCA 145

Liability (MRCA)

Deep vein thrombosis

Murphy and MRCC [2015] AATA 967

s119

Deslandes [2015] FCCA 1786

Depression

Meadows and MRCC [2015] AATA 913

Injury to shoulders

Coleman and MRCC [2015] AATA 955

PTSD

Meadows and MRCC [2015] AATA 913

Practice and Procedure

Application for extension of time

Hopkins [2015] AATA 571

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