



Australian Government
Veterans' Review Board

VeRBosity



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Editor's notes

This biennial edition of *VeRBosity* contains reports on all of the Federal Court decisions relating to veterans' matters in 2016 and 2017.

It also reports on all MRCA cases before the AAT and remittals to the AAT from the Federal Court.

Please 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
FFC	Full Court of the Federal Court
HC	High Court
MRCA	<i>Military Rehabilitation and Compensation Act 2004</i>
MRCC	Military Rehabilitation and Compensation Commission
PTSD	Post traumatic stress disorder
RC	Repatriation Commission
SoP	Statement of Principles
SRCA	<i>Safety Rehabilitation and Compensation Act 1988</i>
VEA	<i>Veterans' Entitlements Act 1986</i>

Appointment of new VRB Principal Member

Farewell to Doug Humphreys OAM and welcome to Jane Anderson

On 19 December 2017 the Minister for Veterans' Affairs announced a new appointment to the VRB. Ms Jane Anderson was appointed as Principal Member to the VRB for a period of five years from 31 January 2018. Ms Anderson has served as a part time member of the VRB since 2015, and brings 17 years post admission and administrative law and practice experience to the role of Principal Member.

The Minister also thanked outgoing Principal Member Mr Doug Humphreys OAM for the exceptional leadership he has provided since his appointment in March 2010. Mr Humphreys took up the role of President of the Law Society of NSW for 2018.

Determinations & instruments of allotment in 2016 & 2017

The following Determinations were made under section 5C(1) of the VEA, and under subsections 6(1)(a) or (b) of the MRCA.

Veterans' Entitlements (Warlike Service—Operation Okra) Determination 2016

The Assistant Minister for Defence and Parliamentary Secretary to the Minister for Defence has signed a new determination relating to Operation OKRA (ADF contribution to the Iraq and Syria crisis).

Veterans' Entitlements (Non-warlike Service—Operation Okra) Determination 2016

The Assistant Minister for Defence and Parliamentary Secretary to the Minister for Defence has signed a new determination relating to Operation OKRA (ADF contribution to the Iraq and Syria crisis).

Veterans' Entitlements (Warlike Service—Operation Augury) Determination 2017

The Minister for Defence Personnel has signed a new determination relating to Operation AUGURY, an operation that supports Defence's understand of Islamist terrorist threats to Australia and the region.

Veterans' Entitlements (Non-warlike Service—Operation Augury) Determination 2017

The Minister for Defence Personnel has signed a new determination relating to Operation AUGURY, an operation that supports Defence's understand of Islamist terrorist threats to Australia and the region.

Veterans' Entitlements (Non-warlike Service—Operation Litten) Determination 2017

The Minister for Defence Personnel has signed a new determination relating to Operation LITTEN, maritime operations in the Mediterranean Sea from 31 August 2016 to 21 October 2016, and on and after 4 November 2016.

Veterans' Entitlements (Non-warlike Service—Operation Manitou) Determination 2017

The Minister for Defence Personnel has signed a new determination relating to Operation MANITOU, the maritime operation, including counter-piracy operations.

Military Rehabilitation and Compensation (Warlike Service – 2017 Measures No. 1) Determination 2017

The Minister for Defence Personnel has signed a new determination replacing the existing list of 19 operations, referred to in Military Rehabilitation and Compensation (Warlike Service) Determination 2016 (No. 1) and adds one new operation; Operation AUGURY which is considered to be warlike under the auspices of the Act.

Military Rehabilitation and Compensation (Non-warlike Service – 2017 Measures No. 1) Determination 2017

This determination replaces the existing list of 26 operations, referred to in Military Rehabilitation and Compensation (Non-warlike Service) Determination 2016 (No.1) and adds three new operations; Operation MANITOU, OKRA and LITTEN in amended areas which are considered to be non-warlike under the auspices of the Act.

Military Rehabilitation and Compensation (Pay-related Allowances) Determination 2017

The Minister for Defence Personnel signed this determination specifying which allowances paid under the *Defence Act* 1903 are pay-related allowances for the purposes of the Act.

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 s6D(1) of the VEA. No Instruments were issued in 2016 or 2017.

Legislative amendments

Budget Savings (Omnibus) Act 2016

This Act included a schedule to create a single appeal path for the review of original determinations made under the MRCA from 1 January 2017. All MRCA appeals now go to the VRB, rather than an election between the VRB and a section 349 reconsideration.

Veterans' Entitlements Amendment (Medical Expenses Reimbursement) Regulations 2017

These Regulations amend the *Veterans' Entitlements Regulations* 1986 to increase the amount available for reimbursement for medical evidence provided by an applicant for a review of a decision to the VRB or by an applicant to the Specialist Medical Review Council to \$1000.

Veterans' Affairs Legislation Amendment (Budget Measures) Act 2017

There have been legislative changes to the over 65 test for intermediate and special rate in sections 23(3A)(g) and 24(2A)(g) of the VEA. These apply to claims or applications for increase made on or after 1 July 2017. The amendment Act removes the distinction between

a veteran who was working as an employee, or on his or her own account. It also removes the requirement that the veteran worked for the same employer, or in the same field of work.

Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 (DRCA)

From 12 October 2017, the DRCA replaces the SRCA for current and former Australian Defence Force (ADF) members who have injuries or illnesses arising from their service prior to 1 July 2004. The DRCA replicates the SRCA, but has been modified to cover only current and former ADF members and their dependants. Eligibility and benefits under the DRCA will be the same as those currently available under the SRCA. Those members and dependants with existing claims and entitlements under the SRCA will now be automatically covered by the DRCA.

The commencement of the new Act will not alter the eligibility and benefits currently available under the MRCA or the VEA. The new Act gives the Minister for Veterans' Affairs responsibility for all rehabilitation and compensation schemes that cover current and former ADF members.

Veterans' Affairs Legislation Amendment (Omnibus) Act 2017

The VRB related amendments to the VEA were as follows:

- the VRB's objective was updated in section 133A;
- section 137A created an ongoing requirement for the parties to lodge material documents with the VRB;
- section 142(2) was amended to include the provision of documents under section 137A;
- section 145C was amended to include the variation or revocation of a decision;
- section 148(9) was amended to include the requirement that a party to a review and any representative must use their best endeavours to assist the VRB to fulfil the objective in section 133A.

Section 137A and subsection 148(9) apply in relation to an application for review made on or after 1 December 2017. Subsection 145C(4) applies in relation to a decision of the VRB made on or after 1 December 2017.

The VRB related amendments to the MRCA were to section 353, to include section 137A of the VEA in the applied provisions.

VRB Practice Directions

Section 137 Practice Direction

Effective: 31 May 2017

1. Introduction

This Direction sets out the procedures of the Veterans' Review Board (VRB) in relation to the documents that a decision-maker must lodge under section 137 of the *Veterans' Entitlements Act 1986* (VEA). These documents are referred to in this Direction as the 'Section 137 documents'.

2. When and how does this practice direction apply?

This Direction applies from **31 May 2017** to any application for a review of a decision to which section 137 of the VEA Act applies and as applied by the Military Rehabilitation and Compensation Act 2004 (MRCA).

3. When and to who must section 137 documents be provided?

The decision-maker must provide a copy of the Section 137 documents to the applicant within 6 weeks after receiving his or her application for review. The decision maker must also forward a copy of the section 137 documents to the VRB.

4. How must the section 137 documents be provided?

To the applicant

By delivering, posting or sending by electronic communication the section 137 document to a person's nominated contact address.

To the VRB

Pursuant to section 148(5A) of the VEA, the Principal Member directs that one hard copy of the section 137 report be provided to:

For NSW, ACT, VIC & TAS appeals	Sydney Registry
For QLD, SA, NT & WA appeals	Brisbane Registry

Additionally, for all cases lodged on or after 31 May 2017, an electronic copy of the section 137 report is to be provided in addition to a hard copy. The electronic copy should be forwarded to the relevant registry email box.

5. What should the section 137 documents contain?

The section 137 report must contain the evidence under the decision-maker's control, which is relevant only to the review of the decision.

For example, this may include, but is not limited to:

Entitlement and liability cases

- Documents establishing eligibility to claim (ie: showing service history)
- Service medical records relevant to the disabilities under review (or related SoP factors)
- Documents showing the diagnosis (Claim form, Diagnostic report, Specialist's report, Radiology/Pathology reports, DMO opinion)
- Documents showing status of SoP factors and/or aetiology
- UV Calculation, Spirometry, Audiogram etc where this is relevant to diagnosis
- Previous decisions relating to the disabilities under review
- MRCA Injury and Disease Details Sheet

Death Cases

- Documents establishing dependent status
- Documents establishing veteran's eligibility (ie: showing service history)
- Service medical records relevant to the disabilities under review (or related SoP factors)
- Documents showing cause of death, and potentially contributing causes, of death
- Documents showing status of SoP factors and/or aetiology
- Previous decisions relating to the death or disabilities relevant to the death
- For MRCA death compensation claims – material relating to financial dependency and EYP.

Compensation and assessment cases

- Current Medical Impairment Assessment (MIA) forms
- MIA forms used in the decision under review
- Audiograms, spirometry, visual fields, and associated reports
- Other medical reports relevant to assessment
- GARP Assessment (CIA + worksheets)
- Lifestyle rating forms and lifestyle Questionnaires
- Reports commenting on lifestyle (relevant to the assessment period)
- Previous decisions and MIAs relating to the assessment period
- Documents showing employment history
- All reports relating to incapacity for work
- Documents related to income (TFN's to be redacted)
- Needs Assessment/Incapacity claim form

6. How should the section 137 documents be presented?

Unless otherwise agreed with us, the section 137 documents must be arranged in the following order:

- a. the application for review;
- b. any section 31 or 347 reconsideration decision and reasons;
- c. the relevant Commission's decision and reasons for its decision;
- d. the applicant's formal claim and/or application for increase;
- e. all other documents in chronological order from the earliest to latest date.

Items (a) and (d) must contain clearly visible record of the date the document was received by the decision maker.

Each document must be identified with a number commencing with the application for review as 'T1'. Subsequent documents will bear 'T' numbers in sequence. Each page must be numbered sequentially.

The Section 137 documents must be accompanied by a cover sheet, as set out in Attachment A and an index, which sets out the date of each document and a brief description of each document. The pagination must be set out in the index. All section 137 documents should be provided as double-sided and secured using a plastic binder.

7. Can supplementary section 137 documents be provided?

The applicant may within the 28 days, after he or she has been given the section 137 documents, provide the decision maker with comments on the report. This must be done in writing.

The decision maker may then conduct a further investigation as a consequence of the comments. Any evidence obtained as a consequence of that investigation must also be sent to the applicant and the VRB. These documents are referred to as 'Supplementary Section 137 documents'.

8. Requesting access to documents

Applicants should make any request for access to documents under the decision makers control using the *Freedom of Information Act 1982*. This should be done as soon as possible after the application for review is lodged.

Additionally, applicants may wish to consider making a request to the decision maker to view relevant files during an ADR conference, where appropriate.

9. Requirement to comply with this practice direction

In the case where the parties have not complied with this practice direction or with specific directions made by the VRB, the application may be referred for a direction hearing.

Additionally, either party can request a direction hearing if the need arises. The request should be in writing and set out the reasons for which the direction hearing is sought.

10. How is additional material added to the section 137 documents by the VRB?

The VRB may add additional material that we have received from the parties, to the section 137 documents. For how this is done, please refer to the General Practice Direction.

Record keeping for representatives

Good record-keeping

Good record-keeping is essential for every representative.

It is important to maintain good records of relevant events, conversations, correspondence and other communications with the claimant and anyone else with whom you communicate about their case.

Proper documentation helps representatives keep track of their activities and to demonstrate that they have followed proper procedures and have acted on the claimants' instructions.

What are records?

Records include letters, faxes, memos, e-mail messages, information kept in computers, any notes taken during or after phone calls, and any other related information you have acquired. You should keep a record of all information related to your efforts on behalf of the people whom you represent.

What records should be created?

Numerous documents are created in the process of assisting veterans and their dependants with their claims and appeals. These may include printed, faxed and electronic letters (e-mail messages and attachments), and may serve several purposes. For example, they may be used to:

- contact people who are not available in person or by phone;
- record and confirm important information received orally, in meetings or through phone calls;
- record and confirm important understandings, undertakings, appointments, and deadlines.

If you work for an ex-service organisation, there may be additional record-keeping requirements covered by State or Commonwealth laws concerning legal, financial or management records. You should be aware of any such policies and legal requirements within your organisation. These rules may also concern the retention and disposal of records.

Create a file

A separate file should be created for each claimant. The records in the file should be full and accurate. They should correctly reflect what was done, and be complete, retrievable, and understandable to someone else.

You should also create a sub-file for Alternative Dispute Resolution (ADR) program cases before the VRB, to help you identify what material is available to the VRB at any future hearing. In these cases any material provided during an ADR event will not automatically be added to the section 137 documents. It will only be added if the parties make a request and they agree to the material being made available at any future hearing. There are two exceptions:

- material obtained under a section 148(6A) request will automatically be added to the section 137 documents, unless a party objects; and

- case appraisal reports and neutral evaluation reports will be automatically added to the section 137 report, unless a party objects.

Take notes

It is important to get into the habit of recording all relevant phone calls, meetings or other oral conversations. After any phone call, make a short note.

If it is likely that a phone call will be lengthy, ensure that you have adequate writing paper (or your computer) near the phone.

If possible, you should jot down key details, at least in point form, during the call.

In your more detailed notes written afterwards, be sure to include the time and date of the conversation, the names of participating persons, and a short outline of the discussion.

Follow-up letters

When appropriate, use the written information as the basis for follow-up letters to confirm meetings, calls, decisions, key facts, undertaking given, and so on.

By following up a meeting or conversation with a claimant with a letter confirming what was discussed and agreed, you ensure that any misunderstandings get cleared up early. It also ensures that the claimant has a written reminder of what he or she agreed to do, and what you agreed to do.

Always ask for, and note the name and contact details of, anyone you may need to communicate with later on.

Make and keep copies

Always make and keep copies of letters, other documents and electronic messages that you send, receive or share with others and put them on the file. This includes printing e-mails and SMS messages.

It is important to recognise that it is your (or your organisation's file) not the claimant's file. However, because the file contains personal information about the claimant, the claimant has a right to access it if he or she chooses to do so.

If the claimant chooses to end your relationship, while you should keep copies of all relevant documents, you should provide the claimant with all original documents that the claimant has provided to you as well as copies of other relevant documents related to his or her case.

How should records be kept?

DVA, in consultation with a number of experienced veterans' representatives have developed a computerised case management system for the use of representatives and pension officers. This system is called VPAD. It facilitates best practice record-keeping and enables efficient tracking and maintenance of cases by representatives and their organisations.

If you do not have access to VPAD, you should maintain a system of some sort that records all your cases, both past and present.

For current cases, your system should enable you to quickly find out what is currently happening, such as what the case is about, what the issues are, when the next appointment will be, what evidence is being sought and from whom, and any important dates.

If either the claimant or the VRB contacts you, you should quickly be able to give an update on the progress of any case.

How long should documents be kept?

For your own protection, you should keep documents for at least seven years after the last action that was taken or last advice given in the case.

Under State and Territory statutes of limitation, the limitation periods for commencing civil litigation can vary from periods as short as six months to periods of up to 15 years. But the main causes of action likely to give rise to litigation against representatives is generally six years. Such actions include negligence (for example, negligent advice, or negligently failing to take a certain course of action), and breach of contract.

Keeping the documents for an extra year provides a margin of safety as the time begins to run from when the relevant damage occurred, which might be some time after the action occurred or the advice was given.

It should be noted that limitation periods are usually not absolute bars to commencing litigation. It is up to the defendant to invoke the limitation as a defence to the action.

What documents must be kept?

While working on a current case, a representative needs to keep a copy on file of all documents created in the course of that case. However, once the matter has been concluded it is unnecessary to keep everything.

All that must be kept are those records that indicate any advice given, instructions received, and records of any meetings and conversations in connection with the case. That is, evidence of the claimant's instructions, the representative's actions, the actions of others relating to the case, and any advice given.

If such information is kept on computers you need to ensure that must be capable of being retrieved in an appropriate format.

There must also be an adequate back-up system so that information is not lost. If you upgrade your computer the data must be transferred to a compatible system on the new computer.

Do not leave copies on claimants' data on the old computer if you are disposing of it.

Data on floppy discs will probably not last seven years in that form of storage and should be transferred to a hard disc of a computer or to CDs, Zip drive, flash drive, or memory stick. But even CD storage might not last seven years. CDs should be checked and copied every year to ensure that the data is still accessible. Old CDs and floppy discs should be physically broken up.

What documents can be destroyed?

There is no simple answer to this. If you work for an ex-service organisation you will need to follow their policies and legal requirements concerning retention and destruction of documents.

Like good housekeeping, destroying documents is part of good administrative practice and a common sense approach to organising your work. It should be an everyday practice to dispose of records, while being careful not to jeopardise important information.

Such everyday ‘cleaning-up’ occurs if the document is:

- a duplicate (such as a draft or ‘information copy’);
- unimportant (such as a message slip); or
- of short term value (such as a reminder note that has been actioned).

Generally, you do not need to keep duplicates of documents, such as a section 137 report, provided that the original is known to exist and the duplicate contains no meaningful annotations that would make it an original record in its own right.

If the original document exists in DVA or the VRB and litigation is commenced, you should be able to obtain it by summons or other litigation discovery processes.

How should documents be destroyed?

Documents relating to a claimant should never be placed in the ordinary garbage without first being shredded or otherwise made unreadable. Documents must be destroyed so that they cannot be recreated in any form.

The confidentiality of the records must be maintained throughout the destruction process. You should not let anyone destroy the documents who is not authorised to read the documents.

There is a real risk that unless documents are properly destroyed they may be discovered at the local rubbish tip, and might turn out to be very embarrassing not only for the claimant, but your own reputation if their source is traced back to you. The claimant might also be able to obtain damages against you for breach of privacy.

What records do the VRB keep?

The VRB keeps its file, which contains all correspondence between the VRB and the applicant, the representative, and other parties. It also has a computer database containing information about each application for review.

The VRB file and one copy of the section 137 report is kept by the VRB for seven years from the date the matter was finalised and can be retrieved from archives in the event it is needed in litigation.

While the VRB keeps the digital recording of its hearings for only two years, it is unlikely that it would be required in litigation involving a representative. This is because anything said or done in the course of a hearing by a representative is protected by section 167(2) of the VEA (provided it does not amount to contempt of the VRB). (See below.)

Privacy

It is essential that you maintain the privacy of everyone whose personal information you have obtained in the course of your activities. This involves ensuring that:

- at the time personal information is obtained, or when permission is being given to obtain personal information, the person to whom it relates is made aware of who else is likely to see or hear about their personal information;
- personal information is always appropriately secured;
- personal information is not released or made available to anyone without the permission of the person to whom it relates (unless a law requires its release).

Professional indemnity insurance

Subsection 167(2) of the VEA provides that a person representing a party at a hearing before the VRB has the same protection and immunity as a barrister has in appearing for a party in proceedings in the HC.

This does not mean that a representative will be immune from all legal actions that might be taken against them.

If you do not have professional indemnity insurance you run a substantial risk in the event of litigation being commenced against you by an unhappy former claimant.

The Veterans' Indemnity and Training Association Inc (VITA) was established in 1995 as a result of concerns of ex-service organisations that they might be subject to litigation if the advice they gave in good faith was incorrect. VITA provides professional indemnity insurance for the suitably qualified, trained and authorised practitioners (pension and welfare officers and representatives) of those organisations who are members of VITA. There are specific requirements, including for recording keeping, that must be met for VITA coverage.

VITA promotes the DVA sponsored Training and Information Program (TIP) as the training program needed for practitioners to be covered for professional indemnity insurance. The Advocacy Training and Development Program (ATDP) is the next evolution of TIP, and replaces TIP. The ATDP is working with VITA to ensure this coverage will apply to all practitioners during the transition period while the formal ATDP courses are implemented and practitioners have had the opportunity to have previous training and experience recognised through the Recognition of Prior Learning process.



Questions & Answers

Question:

Can a VRB application for review be lodged by email?

Answer:

Yes.

From 28 November 2016 new legislative instruments allow VRB appeals to also be lodged by email (as well as in writing, by facsimile, or online via DVA's MyAccount):

- Veterans' Entitlements (Electronic Lodgement Approval) Instrument (No. 2) 2016 (Instrument 2016 No. R59)
- Military Rehabilitation and Compensation (Electronic Lodgement Approval) Instrument 2016 (Instrument 2016 No. MRCC60)

MRCA appeals lodged by email can only be sent to appeals@dva.gov.au or GeneralEnquiries@dva.gov.au.

VEA appeals lodged by email must now be made on the approved form D7524 (this is a new requirement) and can only be sent to appeals@dva.gov.au or GeneralEnquiries@dva.gov.au.

Question:

Is there a new GARP M?

Answer:

Yes.

Instrument 2016 No. MRCC 37 repealed and re-made the *Guide to Determining Impairment and Compensation* (Instrument 2015 No. MRCC 4).

The Explanatory Statement for Instrument 2016 No. MRCC 37 indicates:

The *Guide to Determining Impairment and Compensation* (GARP M) was recently remade for the purposes of the sunset exercise. In the course of that exercise, some earlier amendments were inadvertently omitted and the instrument as remade was in the incorrect form.

The purpose of this instrument is to remake the instrument with the omitted amendments. This instrument contains the amendments made by *GARP M (Transitional Impairment Methodology and Interim Permanent Impairment Lifestyle Methodology) Amendment Determination 2013* (Instrument 2013 No. MRCC 22).

The measures implemented by that instrument were overall beneficial in nature. They amended GARP M to:

- insert a new method of assessment of lifestyle effect for calculating interim impairment payments in Chapter 22; and

- replace the current Chapter 25 with a new Chapter 25.

The amendments to Chapter 22 made it possible for certain members of the veteran community (members and former members of the Australian Defence Force) to obtain a higher amount of interim compensation for an injury or disease under the MRCA by amending GARP M in accordance with recommendation 8.7 of the MRCA Review.

The amendments to Chapter 25 substituted a new Chapter 25 that was more favourable in relation to compensation payments to some members and former members of the Australia Defence Force than the repealed Chapter 25. Chapter 25 deals with situations where an injury or disease has been accepted under the *Veterans' Entitlements Act 1986* (VEA) and/or the *Safety Rehabilitation and Compensation Act 1988* (SRCA).

Administrative Appeals Tribunal

GTSQ and Military Rehabilitation and Compensation Commission

Deputy President J W Constance

[2016] AATA 35

29 January 2016

Psychological injury – whether the Commission must accept liability for disease contracted – whether disease is a service disease – whether applicant made wilful and false representation that he did not previously suffer from the disease

Facts

The applicant served in the Australian Army from 2003 until 2008. In early 2007 he was deployed in East Timor on Operation Astute for six weeks. In 2012 the applicant lodged a claim for compensation for a psychological injury. The respondent rejected the claim, and on reconsideration the determination was affirmed. The applicant appealed to the AAT.

Issues before the Tribunal

The issues for determination were:

- whether the applicant suffers from PTSD and/or a chronic major depressive illness; and
- whether section 34(1) of the MRCA applied to prevent the respondent from accepting liability for major depressive disorder, or an aggravation of that condition.

The Tribunal's consideration

Diagnosis

After considering the evidence and opinions of various medical practitioners, the AAT was satisfied on the balance of probabilities that the applicant suffers from a major depressive disorder. The AAT was not satisfied that he suffers from, or has suffered from PTSD, preferring the diagnoses made by two of the psychiatrists to that of another psychiatrist.

Wilful and false representation

The AAT noted subsection 34(1) provides:

The Commission must not accept liability for an injury sustained, or a disease contracted, by a person, if the person made a wilful and false representation, in connection with his or her defence service or proposed defence service, that he or she did not suffer, or had not previously suffered, from that injury or disease.

The AAT considered the medical history questionnaire completed by the applicant prior to his enlistment in the Army and as part of the recruitment process, in which he did not disclose any suspected or diagnosed psychological or psychiatric illness. One of the psychiatric reports also indicated the applicant denied having had any psychiatric symptoms or problems before deployment in East Timor.

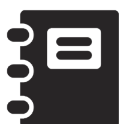
The AAT also considered contrary clinical notes from the applicant's general practitioner (GP) prior to his enlistment, and the Hunter Valley Mental Health Service.

The applicant gave evidence and denied that, at the time he completed the medical history questionnaire, he was aware he had been diagnosed with, and treated for, anxiety and depression previously. He did not recall any treatment by his GP or giving a history to the Hunter Valley Mental Health Service.

The AAT was satisfied the applicant made a representation that was both "wilful" and "false". In his response to the medical history questionnaire, the applicant made the representation that he had never had depression. Based on the GP's clinical notes, the AAT was satisfied the applicant suffered from clinically diagnosed depression from 31 August 1998 for about 12 months, and was prescribed medication to treat the condition. Therefore, the AAT was satisfied the applicant's representation was false. The AAT considered the more difficult question was whether the applicant's representation was "wilful". The AAT reached the conclusion that it was, as the AAT was satisfied the applicant made it knowing it was false and with the intent of assisting him achieving the aim of being enlisted as a member of the Australian Army.

Formal decision

The AAT affirmed the decision under review.



Editorial note

The AAT referred to the FC's consideration of the words "wilful and false representation", which appear in a similar provision in the SRCA, in *Comcare Australian v Porter* (1996) 70 FCR 139.

Bailey and Military Rehabilitation and Compensation Commission

Senior Member CR Walsh

[2016] AATA 415

22 June 2016

Whether the respondent must accept liability for the applicant's claim for "Morton's metatarsalgia" – whether injury a service injury – peacetime service – reasonable satisfaction to be assessed by reference to the relevant SoP

Facts

Ms Jeanetta Bailey enlisted in the Australian Regular Army in 1988 and was discharged in 2007. On discharge, she transferred to the Army Reserves and became an inactive member in 2008. The applicant rendered two periods of warlike service under the MRCA on Operation Catalyst in 2006, and peacetime service.

The applicant made a claim for compensation for "Morton's metatarsalgia", allegedly caused by wearing tight fitting military boots through her service in the Australian Army. The respondent refused her claim. On reconsideration the determination was affirmed, and the applicant appealed to the AAT.

Issues before the Tribunal

The relevant issues for consideration were:

- what condition does the applicant suffer from?
- when was the date of clinical onset of the condition?
- is there a SoP which should be applied?
- was the condition resultant from "warlike/non warlike" service or "peacetime" service?
- if "peacetime",
 - › whether a factor in the applicable SoP existed?
 - › if so, whether there is the necessary link between the SoP factor and the applicant's relevant defence service rendered on or after 1 July 2004?
- whether the applicant satisfies one of the alternative tests in section 27 of the MRCA (for the purpose of section 23(1) and/or section 23(4) of the MRCA) to establish the sufficient connection between the injury and her defence service.

The Tribunal's consideration

Left foot

The diagnosis of Morton's metatarsalgia of the left foot was not in dispute. However, the AAT considered there was insufficient evidence to support a conclusion that the condition was sustained in the circumstances that the applicant claims. The available medical evidence did not "raise a connection" between the condition and some particular defence service rendered

by the applicant while she was a member of the Army sufficient to satisfy section 339(3)(a) of the MRCA. Even if it did, the AAT found the material before the AAT, and the SoP, did not “uphold the contention” that the condition was, on the balance of probabilities, connected with that service for the purpose of section 339(3)(b) and (c) of the MRCA. The only potential factor in the relevant SoP was 6(a) - wearing footwear which tightly restricts the forefoot of the affected foot, for at least four hours per day on more days than not, for the two years before the clinical onset of Morton’s metatarsalgia. The AAT was of the view that the date of clinical onset of the condition was 8 October 2009. As the applicant transferred from the Australian Regular Army to the Army Reserves on 15 February 2007, and became an inactive Army Reserve member on 19 May 2008, the total amount of days in which she paraded from 8 October 2007 to 8 October 2009 was only 80 days. Therefore, the SoP factor was not satisfied.

Right foot

The AAT considered there was insufficient evidence to support a conclusion that there was a diagnosis of Morton’s metatarsalgia in relation to the applicant’s right foot. Even if the AAT was satisfied there was a diagnosis, the AAT found there was insufficient evidence to support a conclusion that the condition was sustained in the circumstances that the applicant claims, for similar reasons to those above relating to factor 6(a).

The AAT also considered whether factor 6(d) applied - having a biomechanical abnormality of the foot which damages or compresses the interdigital nerve within the affected intermetatarsal space, at the time of the clinical onset of Morton’s metatarsalgia. While the medical evidence suggested the possibility the applicant had some biomechanical abnormality (within the SoP definition) in her right foot as far back as March 1998, the contemporaneous medical evidence did not establish that it damaged or compressed the interdigital nerve within the affected intermetatarsal space at the time of clinical onset of Morton’s metatarsalgia on 8 October 2009. Therefore, SoP factor 6(d) was not satisfied.

Formal decision

The AAT affirmed the decision under review.

Linwood and Repatriation Commission

Deputy President Bernard McCabe

[2016] AATA 407 & 708

20 June 2016 & 15 September 2016

Remittal – ankle condition withdrawn before review – no reference to asthma in notice of appeal – respondent conceded psychiatric condition – date of effect- rate of pension

Facts

Mr Mark Linwood served in the military. He claimed a disability pension for a psychiatric condition, asthma and an ankle condition. The applicant withdrew his claim for the ankle condition before the respondent made its decision. The respondent rejected his other claims. The VRB affirmed the decision under review, and the AAT also affirmed the VRB's decision. The applicant's appeal to the FC was successful, however the judgment dealt only with the psychiatric condition.

On remittal, on 20 June 2016 the AAT considered there was no reviewable decision about the ankle condition.

The AAT's earlier decision regarding asthma was not contested or considered by the FC, and was therefore undisturbed by the FC's orders. Therefore, the AAT was satisfied the decision in relation to asthma had not been remitted for reconsideration.

In relation to the psychiatric condition, the respondent was prepared to make a concession based on evidence provided by the applicant in his affidavit that was tendered but not accepted as evidence in the FC. However, the applicant refused to tender his affidavit and asked the AAT to rely on the material already provided. The applicant wanted to proceed with the hearing, although he did not indicate he would introduce any new evidence. The AAT decided to remit the matter to the respondent for reconsideration under section 42D of the AAT Act.

The respondent reconsidered its decision and accepted the applicant's psychiatric condition was related to his service, with a date of effect of 14 September 2012. The respondent also assessed the applicant's disability pension at 80% of the general rate.

The applicant was unhappy with the decision made under the remittal and returned to the AAT on 15 September 2016.

Issues before the Tribunal

The issues for consideration were the date of effect and pension assessment.

The Tribunal's consideration

The AAT noted the claim was received by the respondent on 14 December 2012, and the earliest date of effect is three months prior to that date i.e. 14 September 2012.

The AAT considered the decision about the rate of pension should be reviewed by the VRB.

Formal decision

The AAT affirmed the decision under review.

Stark and Military Rehabilitation and Compensation Commission

Senior Member A C Cotter

[2016] AATA 916

17 November 2016

Whether chronic inflammatory demyelinating polyneuropathy aggravated by treatment provided by the Commonwealth – whether liability exists under s 23(2) of the MRCA - inflammatory bowel disease – whether liability exists under s 23(1) of the MRCA

Facts

Mr Stark served with the Australian Army Reserve for almost 45 years. He enlisted in February 1969 and was medically discharged in August 2013. His relevant eligible defence service under the MRCA was peacetime service from 1 July 2004 to 19 August 2013.

In 1991 liability was accepted under the SRCA for Mr Stark’s “amoebic dysentery”. In 2015 liability was extended under the SRCA to include “ulcerative colitis (inactive) and mild, intermittent post-infective/inflammatory IBS (irritable bowel syndrome)”.

Mr Stark also had liability was accepted under the MRCA for osteoarthritis of the left knee with degenerative tear of the lateral meniscus. On 19 January 2012 Mr Stark underwent an arthroscopy for his knee condition at the Commonwealth’s expense. On 26 June 2012 he lodged a MRCA liability claim for chronic inflammatory demyelinating polyneuropathy (CIDP), claiming that it rapidly developed following his knee surgery and that he suffered the first signs within a week of the surgery.

In April 2013 the MRCC refused liability for CIDP. The VRB affirmed that determination. Mr Stark appealed to the AAT.

Issues before the Tribunal

The main issues were:

- whether liability exists under section 23(2) of the MRCA for the claimed CIDP; and
- in the alternative, whether liability exists under section 23(1) of the MRCA for the claimed CIDP.

There was also a preliminary issue about whether the original decision made by the MRCC delegate was invalid.

The Tribunal’s consideration

Preliminary issue: was the original decision “invalid”?

The AAT did not accept Mr Stark’s submission as to the purported invalidity of the original decision infecting or tainting the review process.

Firstly, the AAT noted the reviewable decision with which it is concerned is that of the VRB, not the delegate’s decision. The VRB affirmed the determination under review by it, namely the MRCC’s determination of 23 April 2013 refusing liability for CIDP.

Secondly, and importantly, the AAT's review is *de novo*. It is not bound by the findings or reasoning of the original decision maker, nor those of the VRB. Under section 43(1) of the AAT Act, the AAT may exercise all the powers and discretions conferred by any enactment on the decision maker and may affirm that decision, vary it, or set it aside and either substitute a new decision or remit the matter for reconsideration. The AAT indicated even if the delegate was in error and the decision was invalid, it does not affect the AAT's ability to review that decision. The AAT considered it has long been established that an applicant to the AAT has standing, and the AAT has jurisdiction, citing Bowen J in *Collector of Customs (New South Wales) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338 at 346:

...provided there is a decision in fact and provided further that the decision purports to have been made in the exercise of powers conferred by an enactment whether or not as a matter of law it was validly made and whether or not action on the basis there was power to make the decision was right or wrong.

Does liability exist under s 23(2) of the MRCA for the claimed CIDP?

Mr Stark received treatment (the arthroscopy) paid for by the Commonwealth for his previously accepted left knee condition. The medical experts agreed that Mr Stark suffers from CIDP; it was more than likely that Mr Stark's CIDP was in evidence prior to his surgery; and his CIDP was not caused or sustained as a result of the arthroscopy.

Mr Stark contended that his CIDP was aggravated by the surgery, therefore the aggravated disease was a "service disease" under section 29(2) of the MRCA for which the MRCC was liable under section 23(2) of the Act. Mr Stark's hypothesis was effectively built on four "planks": the neurological evidence by Dr Limberg; the evidence of his treating orthopaedic surgeon, Dr Hayes; the observations of his treating physiotherapist, Mr Clarke, highlighting the temporal association between the surgery and aggravation of CIDP; and the distinctive pattern of onset of the condition, as observed by Mr Clarke. However, the AAT had significant doubts and reservations about the key planks on which Mr Stark's hypothesis was based. As such, the AAT was not reasonably satisfied by Mr Stark's hypothesis and was unpersuaded by it.

In contrast, the AAT was reasonably satisfied by the alternative hypothesis put forward by the RC, that there was no link between the surgery and the aggravation of the condition, and that the timing of the events was coincidental. The AAT considered the evidence of Dr Cameron, neurologist, for the MRCC was both forthright and consistent. He also offered an alternative and logical explanation to the "planks" on which Mr Stark's hypothesis was based. Therefore, the AAT did not consider that liability for the claimed CIDP existed under section 23(2) of the MRCA.

Does liability exist under s 23(1) of the MRCA?

In the alternative, Mr Stark contended that the surgery, in association with an underlying neuropathy directly related to IBD (accepted under the SRCA) resulted in the CIDP condition. Mr Stark said that the CIDP was "related to defence service linked to a condition that would not have happened except for 'rendered defence service while a member'". He relied on the SoP relating to peripheral neuropathy.

Firstly, the RC contended that the IBD condition was longstanding, and there was no evidence to suggest that it was aggravated post 1 July 2004 (being the date of the commencement of the MRCA). Therefore, it was not a MRCA condition. Secondly, the RC contended that the

relevant SoP factors were not satisfied.

In accordance with section 339(3)(a) of the MRCA, the AAT accepted that the material before it raised a connection between the disease and service. The question was therefore whether, on the balance of probabilities, the material and the SoP upheld that contention.

The AAT noted the current SoP concerning peripheral neuropathy contains factor 6(a) - “having a systemic disease from the specified list at the time of the clinical onset of peripheral neuropathy”. The expression “a systemic disease from the specified list” is defined in clause 9 as including IBD.

The AAT then considered the relevant SoP for IBD. It was not disputed that liability was accepted under SRCA for amoebic dysentery and “ulcerative colitis (inactive) and mild, intermittent post-infective/inflammatory IBS (irritable bowel syndrome)”. What remained uncertain was the date of clinical onset of the ulcerative colitis, or its clinical worsening, for the purposes of the IBD SoP. Specifically, it was not known whether either occurred before, on or after 1 July 2004 (being the date on which the MRCA commenced). There was also no evidence before the AAT that would satisfy the potential SoP factors for IBD. Therefore, the AAT was not satisfied that the IBD SoP was met and upheld Mr Stark’s contention.

In regards to the SoP concerning peripheral neuropathy, there was a similar issue relating to the date of clinical onset of peripheral neuropathy. Factor 6(a) requires a person to have a systemic disease from the specified list (being IBD) “at the time of the clinical onset of peripheral neuropathy” before it can be said that the peripheral neuropathy “is connected with the circumstances of (their) relevant service”. Again, there was no evidence before the AAT that establishes the date of clinical onset. Therefore, the AAT was not satisfied that the SoP concerning peripheral neuropathy was met and upheld Mr Stark’s contention.

The AAT was also not satisfied that the contention was otherwise upheld by the material before the AAT. Consequently, the AAT did not consider there was a liability under section 23(1) of the MRCA.

IBD accepted under SRCA

Mr Stark contended that because IBD was accepted under the SRCA, it was open to the AAT to find under the SRCA that CIDP resulted due defence service through the previously accepted SRCA condition. The AAT disagreed. In addition to the matters outlined in detail already, the AAT considered such an order would be outside the scope of the review and beyond its jurisdiction.

Formal decision

The AAT affirmed the decision under review.



Editorial note

In the course of its decision, the AAT considered what is meant by deciding something to the decision maker's "reasonable satisfaction". The AAT referred to *Repatriation Commission v Smith* [1987] FCA 260 in which Beaumont J (with whom Northrop and Spender JJ agreed) said at paragraph [20]:

By contrast, s 120(4) speaks in terms of a reasonable satisfaction. This expression has a settled meaning, at least in a curial context. In *Briginshaw v Briginshaw* ... [1938] HCA 34; (1938) 60 CLR 336, Dixon J, dealing with the civil standard of persuasion, said (at p 362):

"...it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences".

The AAT also referred to *Murray and Repatriation Commission* [1997] AATA 117, in which the AAT expanded on Beaumont J's words at paragraph [53], noting that section 120(4) was "intended to introduce the standard of proof required in civil litigation":

The Tribunal, therefore, is bound to apply the civil standard of proof and will only be satisfied by a probability not a mere possibility.

WFLT and Military Rehabilitation and Compensation Commission

Miss E A Shanahan, Member

[2016] AATA 1072

22 December 2016

Compensation – normal weekly earnings – Special Forces Disability Allowance (SFDA) – physical and mental injury sustained in the war in Afghanistan – desire to remain in special forces regiment until retirement age – unfit for active service – transfer to a division with no entitlement to SFDA – discharged on medical grounds – remains incapacitated

Facts

WFLT joined the Army Reserves in 1989, and in 1990 he enlisted as a full time soldier. The applicant was deployed to Bougainville and the Solomon Islands in 1998 and to East Timor in 1999 and 2001. In 2002, the applicant discharged from the regular Army and transferred to the reserves, in order to serve with the NSW Police Force. In late 2006 the applicant re-entered the Army on a short term contract and then joined the Commandos on 8 January 2007. He was deployed to Timor-Leste in 2007 and Afghanistan in late 2007.

On 6 February 2008 the applicant injured his neck while he was being repatriated from Tarin Kowt to Kandahar on a United States of America Blackhawk helicopter. He was wearing his full rig and combat load of equipment, which prevented him from sitting squarely in his seat and from fully accessing the four point harness. When the helicopter started performing sudden manoeuvres veering to the left and right and up and down, his head snapped back violently and hit the fuselage of the helicopter.

As a result, the applicant now has a cervical disc protrusion causing neck and shoulder pain with paraesthesia in the hands. He also has PTSD from his service in Bougainville in 1998 and major depressive disorder, a right ankle injury and ongoing low back pain due to multiple disc degenerative disease and left S2 nerve root compression. The applicant was receiving the SFDA when he injured his neck while posted to Afghanistan.

In the Medical Employment Classification Review Board report dated 12 October 2011, it was recorded that the applicant would be posted to a non-deployable position at the Department of Material Organisation (DMO) in January 2012 for 3 years. On 30 November 2011 the Soldier Career Management Agency provided a posting notification assigning the applicant from the 2nd Commando Regiment to 138 Signal Squadron in Victoria, effective from 16 January 2012 to 21 January 2013. A further minute from the Commando Regiment dated 14 December 2011 indicated SFDA would be ceased with effect from 16 January 2011 (the AAT assumed this date was a typographical error due to the date of the minute).

On 19 December 2011 the applicant completed an incapacity claim form challenging the decision to cease his SFDA. The applicant commenced working in Melbourne in January 2012 in DMO where his official title was that of Special Operations Liaison Officer/Special Forces Projects, Soldier Modernisation Systems Program Office, despite advice he was

assigned to 138 Signal Corps in Watsonia. The applicant indicated he discharged from the Army in September 2014 on medical grounds and has not worked since.

On 29 May 2012 the applicant asked the VRB to review the respondent's undated advice that there was no confirmation the applicant had been posted out of his development cell position within the Special Forces to 138 Signal Squadron, and the only information available was that his posting out was part of the post out cycle of 120 personnel. It also stated that "when posted from 2 CDO REGT you forgo all components of Special Forces Disability Allowance". On 27 April 2012 the respondent made a determination denying liability to pay the SFDA from 16 January 2012 to 21 January 2013.

On 11 March 2014 the VRB extended the payment of the applicant's SFDA for the period 16 January 2012 to 21 January 2013, and denied payment from 22 January 2013. WLFT appealed to the AAT.

The Tribunal's consideration

The AAT noted that section 91 is the relevant section of the MRCA, which provides the formula for working out normal earnings and for a member of the permanent forces on a weekly basis this is the member's normal ADF pay for the week plus the member's normal pay related allowances for the week. Section 91(4) requires the Chief of the Defence Force to advise the respondent in writing of the date on which each compensable pay related allowance would normally have ceased to be paid to the member if the member were not incapacitated for service. The parties agreed no such advice had been provided by the Chief of the Defence Force or their delegate to the respondent. Therefore, the AAT concluded that as there had been not such advice, the eligibility for the SFDA continues.

The AAT also noted that section 91(5)(a) defines a compensable pay related allowance for a member as being the pay related allowance that was being paid to the member immediately before the onset of the member's incapacity for service. It was clear from the facts before the AAT that the applicant satisfies this subsection, as he was being paid the SFDA at the time of his accident in Afghanistan on 6 February 2008. The AAT considered the applicant continued to be physically incapacitated from his spinal injuries and by PTSD at least aggravated by the 2008 event, although caused by earlier stressors.

Formal decision

The AAT set aside the decision under review and substituted its decision that WFLT is entitled to continuing payment of SFDA as part of his normal weekly earning on which his compensation payments are based.



Editorial note

The AAT indicated the continuation of the entitlement is indefinite but subject to reappraisal in the event the applicant is sufficiently rehabilitated and his conditions improved to enable him to return to work in a full-time capacity. The matter was remitted to the respondent to re-determinate the applicant's compensable payments.

Mr D.J. Morris, Member

[2017] AATA 67

25 January 2017

Myofascial strain of the cervical spine and cervical spondylosis – whether symptoms or signs aggravated by military service – whether liability exists under section 30 of the MRCA – lack of medical evidence – no liability found

Facts

Mr Larter enlisted in the Australian Army in December 1996 and was medically discharged on 29 July 2005. He rendered peacetime service under the MRCA from 1 July 2004 until 29 July 2005.

On 14 April 1999 Mr Larter suffered an injury during training where he strained his neck. Myofascial strain of cervical spine and cervical spondylosis were accepted under the SRCA. He claimed to have suffered an “aggravation to my neck” on 16 August 2004 in a fall when on duty. His MRCA liability claim was rejected. The VRB affirmed that determination. Mr Larter appealed to the AAT.

Issues before the Tribunal

The issue was whether the incident that Mr Larter says occurred on 16 August 2004 materially contributed to, or aggravated the signs and symptoms of, his underlying cervical spine condition. This requires an application of sections 23(3)(a) and 30 of the MRCA.

The Tribunal’s consideration

The AAT noted the relevant standard of proof was reasonable satisfaction. It was accepted that Mr Larter suffers from cervical spondylosis, and myofascial strain of the cervical spine with a date of injury on 14 April 1999.

Mr Larter and three other former members of the Australian Army who were serving in 2004 gave evidence to the AAT, and there were two medical witnesses. The focus of the hearing was on an incident that Mr Larter said took place at Campbell Barracks on 16 August 2004, where he fell while carrying an RTC (a chest containing communications equipment).

While the AAT found that Mr Larter did have a fall on duty in August 2004, the date of the fall was in dispute and the AAT was unable to make a finding about whether the incident occurred on 16 or 17 August 2004. The AAT found that Mr Larter’s evidence about seeing Dr Hammond at the RAP was not plausible. Mr Larter said he was given an ice-pack by a medic at the RAP, and one of the former Army members recalled he saw Mr Larter leaving the RAP with what he thought might have been an ice-pack, held to his neck. However, there was no note of any attendance at the RAP before the AAT and Mr Larter gave evidence that he did not report the incident to his military superiors. The AAT considered the fact that Mr Larter saw Dr Hammond on six occasions in the six weeks from mid-August 2004 and on not one of these occasions raised with him the fall with the RTC was significant. Especially significant

was that Mr Larter did not mention it when he saw Dr Hammond on 25 August 2004, a little over a week after his fall, when one would expect such an event to be fresh in his mind, and particularly if he thought, or suspected, that it had injured or aggravated the injury, in his neck. The AAT accepted Dr Hammond's evidence that if Mr Larter had raised the incident with him he would have recorded it in his notes.

The AAT could not be reasonably satisfied on the evidence before it that the August 2004 incident materially contributed to, or aggravated, the signs and symptoms of Mr Larter's underlying and pre-existing cervical spine condition based on:

- no contemporary medical reports or the applicant raising it at the time with medical practitioners he consulted and not mentioning it until many years later;
- professional and consistent medical evidence, including the radiological analysis by Dr Yin that his neck condition is deteriorating because of underlying pathology and not owing to an aggravation.

The AAT was not reasonably satisfied that the August 2004 incident raised a connection between Mr Larter's pre-existing cervical spine condition and his military service. He had chronic neck pain as recorded by Dr Cardwell in July 2004, and did not report an increase in his symptomatology or restriction in August 2004.

For completeness, the AAT found that sections 27(d) and 23(1) of the MRCA did not apply, and any increased symptomatology of Mr Larter's conditions was caused by the natural progression of his pre-existing conditions and not an aggravation.

Formal decision

The AAT affirmed the decision under review.



Editorial note

Both parties referred to the AAT's discussion of the types of aggravation in *Porter and Military Rehabilitation and Compensation Commission* [2010] AATA 968 at [8]-[9]:

An aggravation of signs or symptoms of an injury or disease can be taken to have occurred if the pain or restrictions associated with the condition increase or intensify. If those signs or symptoms are aggravated by relevant defence service without aggravation of the underlying condition, then ss 30 and 23(3) are the tests to be applied, without the need to prove a claim by reference to the SoP.

If the aggravation of symptoms or signs is a manifestation of an aggravation of the underlying pathological condition, then ss 27 and 23(1) are the tests to be applied; with the need to prove a claim by reference to the SoP.

Gibson and Military Rehabilitation and Compensation Commission

Ms N Isenberg, Senior Member

Dr I Alexander, Member

[2017] AATA 776

23 May 2017

Whether applicant's mental illness caused by his service – depressive disorder – anxiety disorder – panic disorder – clinical onset – whether the applicant was diagnosed with a mental illness

Facts

Mr Gibson enlisted in the Royal Australian Air Force on 31 January 2006 and was medically discharged on 7 March 2016. He rendered peacetime service under the MRCA during this time.

In 2014 the MRCC rejected Mr Gibson's MRCA liability claim for pain disorder and major depression. The VRB affirmed that determination. Mr Gibson appealed to the AAT.

Issues before the Tribunal

The issue was whether liability must be accepted under section 23(1) of the MRCA regarding Mr Gibson's claim for panic disorder and major depression. Mr Gibson attributed the development of depression and anxiety to the deaths of three friends, chronic pain and treatment of his fistula condition, and an incident in which he was 'abused and ridiculed' in front of other members for not being able to do as many push-ups as a female colleague (which was the claimed category 2 stressor).

The Tribunal's consideration

The AAT accepted that Mr Gibson suffers either major depressive disorder or generalised anxiety disorder, or possibly both – but ultimately nothing turned on this difference in diagnosis. It was unnecessary for the AAT to find if he suffers from panic disorder, due to the reasons below.

The SoP factor relied upon by Mr Gibson regarding depressive disorder was:

experiencing a category 2 stressor within the six months before the clinical onset of depressive disorder.

Anxiety disorder contains the identical provision. The factor relied upon by Mr Gibson regarding panic disorder was:

having a clinically significant disorder of mental health from Specified List 1 at the time of the clinical onset of panic disorder.

Depressive disorder and anxiety disorder are both on the Specified List, so the consideration of panic disorder turned on whether Mr Gibson's depressive disorder or anxiety disorder were found to be related to his service.

The AAT referred to *Lees v Repatriation Commission* [2002] FCAFC 398, in which the FFC held that there was a clinical onset of a disease either:

- when a person becomes aware of some feature or symptom which enables a doctor to say that the disease was present at that time; or
- when a finding is made on investigation which is indicative to a doctor that the disease is present.

The AAT noted the definition in *Lees* emphasised the need for medical evidence to a determination of the clinical onset. The AAT indicated that although it is for a doctor to say when the clinical onset occurred by the presence of features or symptoms, clinical onset is not necessarily when the patient first saw a doctor for medical treatment, referencing *Kaluza v Repatriation Commission* [2011] FCAFC 97.

In Mr Gibson's case, from his service medical records, it appears he first complained of anxiety issues in February 2011, however there were no details of the symptoms of which he complained. The record specifically records no precipitating factor, and it appears Mr Gibson's report to the Medical Officer was of anxiety in relation to various assessments which would be made in the course of his training.

The AAT noted Mr Gibson later told his treating psychiatrist, Dr Parker, of having first felt 'down' in 2007 after the death of his friends, and gave a history of symptoms since then. There was no diagnosis until 2013 when Mr Gibson first saw Dr Parker. Dr Parker considered the clinical onset of depressive disorder was shortly after the deaths of Mr Gibson's friends in 2007, but another expert psychiatrist thought it was somewhat later. Even if the AAT preferred Dr Parker's view, the claimed bullying incident/category 2 stressor in August 2006 was experienced nearly 12 months before the deaths. Consequently, the date of clinical onset was not within six months of the claimed stressor, as required by the SoP factor relied on.

Having come to this view about clinical onset, the AAT indicated it was unnecessary for it to consider if the incident relied on amounted to a category 2 stressor. Accordingly, the AAT was not reasonably satisfied that liability must be accepted pursuant to section 23(1) of the MRCA in respect of either the depressive disorder or anxiety disorder.

As to panic disorder, although Dr Parker considered there to have been symptoms of panic present from 2007, the clinical onset of panic disorder did not meet the diagnostic criteria until after Mr Gibson's fistula condition was diagnosed in 2011. Without making a finding as to diagnosis, as the condition relied on the acceptance of Mr Gibson's depressive disorder or anxiety disorder as service-related, Mr Gibson's claim regarding panic disorder also failed.

Formal decision

The AAT affirmed the decision under review.



Editorial note

The AAT noted in its decision there is some inherent unreliability in an applicant giving a history of his symptoms, which can enable a doctor to reliably diagnose the clinical onset of a condition back some years.

McKinley and Repatriation Commission

Miss E A Shanahan, Member

Ms Anna Burke, Member

[2017] AATA 872

15 June 2017

Remittal – claim for PTSD, generalised anxiety disorder and alcohol abuse - new SoPs - conflicting evidence of the applicant – unreliability of evidence of applicant - AAT does not have jurisdiction for s70 claim

Facts

Ms Jennifer Anne McKinley (now Warren) served in the Australian Army from 1986 until 2005. She had operational service in East Timor from October 1999 until February 2000. The applicant left the Army but remained in the Army Reserve for approximately two years. She re-joined the regular Army in 2002 until her discharge in 2005.

In November 2012 the applicant lodged another claim for psychological conditions. The respondent rejected the claim, and the VRB affirmed the decision under review, confirming the diagnoses were generalised anxiety disorder (GAD) and alcohol dependence. In 2014 the AAT handed down its decision affirming the VRB's decision, and the applicant appealed to the FC. The FC affirmed the AAT's decision. On appeal, the FFC remitted the matter to the AAT, and directed the AAT to reconsider its 2014 decision by a differently constituted Tribunal. The FFC found the AAT had applied the wrong standard of proof in relation to one particular incident.

Issues before the Tribunal

The applicant asked the AAT to also consider her claim under section 70 of the VEA, which relates to defence-caused injury or defence-caused disease, based on events during her defence service in 2004. The AAT noted the respondent considered both operational and defence service in its decision. However, the VRB limited its consideration to the applicant's operational service, as the applicant's advocate had advised that only the operational service claim was being pursued. Therefore, the AAT found it did not have jurisdiction to hear the expanded claims under section 70 relating to defence service.

The Tribunal's consideration

The parties agreed the correct diagnoses were GAD and alcohol abuse disorder. The AAT also noted the diagnosis of PTSD in remission, due to a motorcycle accident, which was not service related.

The AAT went on to consider whether GAD and alcohol abuse disorder were caused by the applicant's operational service in East Timor, following the four-step process in *Deledio*. The AAT accepted that some of the material points to a hypothesis connecting the conditions with the applicant's service. The AAT then identified the relevant SoPs. The AAT found the hypotheses are reasonable to the extent that they fit the templates found in the SoPs.

The issue was at step four of the *Deledio* process - whether in accordance with section 120(1) the AAT was satisfied beyond reasonable doubt that the claimed conditions did not arise from a war-caused injury. The AAT considered three relevant incidents in terms of the severity of the stressor and their supporting evidence. However, the AAT found in light of the conflicting and unreliable evidence there were insufficient grounds to decide beyond reasonable doubt that the applicant's GAD and alcohol abuse disorder were war-caused.

Formal decision

The AAT affirmed the decision under review. The AAT did not have jurisdiction to hear the claim under section 70 of the VEA.



Editorial note

The AAT referred to the decision of the majority of the HC in *Bushell v Repatriation Commission* [1992] HCA 47 in interpreting section 120(1) and section 120(3):

The Commission will be satisfied beyond reasonable doubt “that there is no sufficient ground for making [the] determination” if it is satisfied beyond reasonable doubt that it cannot accept the raised facts or so many of them as are necessary to support the hypothesis. Thus, if the Commission is satisfied beyond reasonable doubt that it cannot accept the raised facts because of the unreliability of the material which is claimed to support them or because of the superior reliability of other parts of the material before the Commission or because the raised facts depend on inferences which the Commission is satisfied cannot be drawn, the Commission will be satisfied that there is no sufficient ground for making the determination.

Deputy President Dr Christopher Kendall

[2017] AATA 1320

18 August 2017

Whether applicant suffers or suffered from claimed conditions of lumbar spondylosis and thoracic spondylosis – date of clinical onset – whether one of the factors in the applicable SoP exists – whether the applicant has established a sufficient connection between the injury and his defence service

Facts

Mr John Reeday served in the Australian Regular Army Reserve from 2010 until 2014, and rendered peacetime service.

In 2011 he lodged a claim for compensation for pain caused by ‘lumbar spine’, ‘thoracic spine’, ‘right shoulder’, ‘cervical spine’ and ‘headaches’. The respondent refused liability, on the basis that the delegate was not satisfied that the applicant continued to suffer from any of the following conditions:

- acute sprain or strain of back, thoracic region;
- acute sprain or strain of neck;
- headache secondary to acute sprain or strain of neck;
- acute sprain or strain of back, lumbar region;
- acute sprain or strain of right shoulder.

The VRB affirmed the determination under review and amended the diagnoses to cervical spondylosis, thoracic spondylosis, lumbar spondylosis and right sided L5 pars defect. The applicant appealed to the AAT.

Issues before the Tribunal

The only issues for consideration were whether the MRCC was liable under section 23 of the MRCA for the applicant’s claimed conditions of lumbar spondylosis and thoracic spondylosis, specifically:

- whether the applicant suffers or suffered from the claimed conditions and the date of clinical onset;
- whether there is an applicable SoP;
- whether one of the factors contained in the applicable SoP exists;
- whether the applicant satisfies the tests for liability in section 27 of the MRCA establishing a sufficient connection between his claimed conditions and his defence service.

The Tribunal's consideration

On the evidence, the AAT found that the applicant had been diagnosed with thoracic spondylosis and lumbar spondylosis, and the date of clinical onset for both conditions was 7 May 2011.

The applicant relied on the heavy lifting factor in the applicable SoPs. The AAT noted both SoPs require evidence that the applicant engaged in lifting loads of at least 35 kilograms while bearing weight through the lumbar/thoracic spine to a cumulative total of at least 168,000 kilograms within any ten year period before the clinical onset of lumbar/thoracic spondylosis, and where the clinical onset of lumbar/thoracic spondylosis occurs within the 25 years following that period. The AAT considered there was insufficient evidence for the AAT to find that this actually occurred, as there was no reliable or credible evidence before the AAT regarding the actual weights lifted by the applicant so as to satisfy the requirements of the SoPs. There was no evidence that corroborated the applicant's evidence, and no mention in any of the medical notes about the applicant's weight bearing exercise regime. Therefore, the AAT was not satisfied that one of the factors contained in the applicable SoPs exists.

Formal decision

The AAT affirmed the determination under review.

Dr L Bygrave, Member

[2017] AATA 1518

20 September 2017

Back injury – left wrist injury – injury caused by service – whether the MRCC must accept liability for service-related injury – claimed conditions were materially contributed to or aggravated by service

Facts

Mr Rafael Perez-Bedoya served in the Royal Australian Navy from 2010 to 2014, and rendered peacetime service.

In 2014 he lodged a claim for a 'L40L5 bulging disc' and 'torn ligament left wrist'. The respondent rejected liability for back strain and left wrist ganglion distal ulnar. The VRB affirmed the determination under review. The applicant appealed to the AAT.

Issues before the Tribunal

The relevant issues for consideration were whether:

- the applicant sustained a back injury and left wrist injury as claimed;
- the claimed conditions resulted from, or were attributable to, the applicant's defence service;
- the claimed conditions were materially contributed to, or aggravated by, the applicant's defence service;
- the applicant satisfies the relevant SoP for the claimed conditions.

The Tribunal's consideration

The applicant's legal representative submitted that the applicant's claimed injuries were attributable to his defence service because:

- his injuries were sustained at the premises of his RAN accommodation when he was going to his car to collect his Navy uniform; and
- his back injury was caused and/or aggravated by a requirement for him to lift weights at the gym in order to pass his annual RAN fitness test.

While the AAT accepted that the applicant fell on the stairs at his Navy accommodation on 25 October 2013, it found there was no evidence to support his claim that any injuries he sustained resulted from, or were attributable to, his defence service. Specifically, the AAT was satisfied:

- there was no evidence the applicant was required to live at the Navy accommodation as part of his defence service.

- there was no evidence the stairs at the Navy accommodation were wet due to rain on the date of the fall, as a Bureau of Meteorology report showed there was no rain in the Sydney metropolitan area on that day.
- there was no contemporaneous evidence the applicant was going to his car to collect his Navy uniform. He was on pre-approved annual leave on the date of the fall. The applicant did not indicate he was going to his car to collect his uniform in his 2014 claim form or incident report dated 1 December 2014. He first mentioned it in his written statement dated 28 April 2016.

The AAT found the evidence that the applicant injured his left wrist when he fell on 25 October 2013 was consistent. However, the AAT was not persuaded that the applicant injured his back on that date, as the medical evidence showed he had experienced periodic back pain in 2011, 2012 and November 2013. The medical experts concurred that the applicant's lower back pain experienced in November 2013 was an aggravation of a pre-existing degenerative change in the lumbar spine, and the aggravation has resolved in 2016. Further, the AAT was not persuaded the applicant's back injury resulted from or was aggravated by lifting weights at the gym, as there was no evidence his role as a Steward required him to complete heavy weight-lifting sessions.

Therefore, the AAT was satisfied, on the balance of probabilities, the applicant's injuries did not result from, and were not attributable to, his defence service - nor were they materially contributed to, or aggravated by, his defence service. As a result of this finding, there was no requirement to consider whether the applicant satisfied the relevant SoPs for the claimed conditions.

Formal decision

The AAT affirmed the decision under review.

Senior Member J Sosso

[2017] AATA 1635

6 October 2017

Where applicant suffers from ulcerative colitis – irritable bowel syndrome – whether condition connected to military service – SoP concerning inflammatory bowel disease – whether applicant was using non-steroidal anti-inflammatory drugs before clinical onset of inflammatory bowel disease

Facts

Mr Luke Morris served in the Royal Australian Air Force from 2006 until he was medically discharged in 2016, and rendered peacetime service.

In 2014 he lodged a claim regarding his bowel condition, ulcerative colitis. The respondent rejected his claim. On reconsideration, the decision under review was affirmed. The applicant appealed to the AAT.

Issues before the Tribunal

The relevant issues for consideration were:

- Does the applicant suffer from ulcerative colitis?
- If yes, what is the relevant SoP applicable to the applicant's claimed condition?
- What is the date of the onset of the applicant's condition?
- Does the applicant satisfy the relevant SoP criteria, such that his condition can be said to be connect to his military service in order for liability to be accepted?

The Tribunal's consideration

The respondent accepted the medical evidence supports a finding that the applicant suffers from ulcerative colitis. The parties agreed the relevant SoP was 20 of 2012 concerning inflammatory bowel disease (IBD). IBD is defined in the SoP to include ulcerative colitis.

The relevant SoP factor was 6(d):

being treated with a drug or a drug from a class of drugs in the specified list, for at least the seven days before the clinical onset of IBD.

The term 'a drug or a drug from a class of drugs in the specified list' is defined in the SoP to include non-steroidal anti-inflammatory drugs.

Regarding clinical onset, the AAT referred to the decision of *Kaluza v Repatriation Commission* [2011] FCAFC 97 where the FFC observed the primary judge noted that there was a clinical onset of a disease either:

- when a person becomes aware of some feature or symptom which enables a doctor to say the disease was present at that time; or

- when a finding is made on investigation which is indicative to a doctor that the disease is present.

Counsel for the applicant submitted the applicant first became aware of the relevant symptoms of IBD in late August 2012. Counsel for the respondent submitted the contemporaneous medical evidence failed to document the applicant suffering from the symptoms of IBD before 15 March 2013. The AAT applied a beneficial approach and proceeded on the basis that the date of clinical onset was late August 2012.

The AAT went on to consider whether the applicant was being treated with non-steroidal anti-inflammatory drugs. The AAT considered the contemporaneous medical evidence disclosed no basis for concluding that the applicant was either suffering from IBD or taking non-steroidal anti-inflammatory medication, other than Naprosyn, during 2012, including seven continuous days prior to the date of clinical onset of IBD in late August 2012 let alone any of the later possible dates for clinical onset. The AAT also considered the applicant's evidence.

The AAT concluded that there was no evidence, apart from the applicant's statements and testimony, that he using non-steroidal anti-inflammatory drugs (except for the initial prescription of Naprosyn in April 2012) in the period April 2012 until June 2013. Consequently, the applicant did not satisfy the SoP requirements and it was not possible to say that, on the balance of probabilities, his IBD was connected with the circumstances of his ADF service.

Formal decision

The AAT affirmed the decision under review.



Editorial note

The AAT referred to the following guidance of the FFC on clinical onset in *Kaluza v Repatriation Commission* [2011] FCAFC 97:

The test for clinical onset in *Kaluza* is disjunctive. The analogy given for Mr *Kaluza* was that a person might say 'I noticed [symptoms] in March last year but I didn't see a doctor until July'. If a doctor can say from the onset of those symptoms in March that that indicates the presence of a disease at that time, that is the date of clinical onset. The other possibility is the finding which is made on investigation when a person actually attends upon a doctor who examines the person. That is why the Full Court, in adopting the approach of Branson J at first instance in *Lees*, explained that the purpose of the definition was to identify those symptoms or features which 'if observed by a clinician, would warrant a conclusion...' (emphasis in the original)

Linwood v Repatriation Commission

Logan J

[2016] FCA 90

16 February 2016

Application for disability pension – whether depressive disorder is related to defence service – application of SoP – whether the AAT erred in law in finding insufficient evidence that the applicant suffered a category two stressor – where it was manifestly unreasonable for AAT to conclude there was no sufficient evidence

Facts

The applicant, Mr Mark Linwood, served between 1987 and 1997 in the Australian Regular Army. Mr Linwood applied for a disability pension for a number of conditions, including depressive disorder. Depressive disorder was rejected by a delegate of the respondent, and that decision was affirmed on review by the VRB. The VRB's decision was in turn affirmed by the AAT. Mr Linwood appealed to the FC.

Grounds of appeal

The applicant's original notice of appeal contained 22 questions, which were not questions of law. His notice of appeal was amended to add Question 23, which specified a question of law:

Whether, on the evidence before the Tribunal, the Tribunal's finding at paragraph [21] of the decision that there was insufficient evidence to be satisfied that the Applicant experienced a category two stressor connected with his workplace in the six months before 1996 or 1992 was manifestly unreasonable.

The Court's consideration

It was not in issue before the AAT that the applicant suffered from a depressive disorder. The issue was whether it was defence-caused. The AAT, and the FC, referred to the terms of the 2015 SoP concerning depressive disorder. The AAT found as a fact that the applicant had experienced "social isolation, disharmony and bullying while he was in the infantry". Given the language in which it was expressed, the FC indicated this finding was made by reference to paragraphs (a) and (c) of the SoP definition of "category 2 stressor". The finding was based on the acceptance of the applicant's oral evidence, which the AAT summarised in its reasons. In assessing the applicant's oral evidence, the AAT took into account and inferentially accepted, at least in this particular regard, a report from the treating psychiatrist, Dr Jenkins, who stated that the applicant's "capacity to present sequential coherent historical information is impaired". The AAT went on to examine how the SoP applied in two alternative scenarios, where the clinical onset was in 1992 or 1996:

20. Factor 9(1)(e) says the category two stressor must have occurred within six months before the clinical onset of the applicant's depressive condition. A careful review of the medical evidence shows the applicant experienced social difficulties and personal inhibitions before he joined the Army: see exhibit one at p 37. But he was ultimately allowed to enlist. While the applicant recalls having a difficult time when he served in the infantry unit, the first diagnosis of a psychiatric problem was in 1992 when he experienced the "acute transient situational disturbance". (He was also referred for psychological evaluation after a brawl in 1992 but Mr Linwood indicated in his oral evidence that the incident was not the product of any subjective distress on his part, but was an entirely reasonable response to niggling behaviour from another soldier in a bar.) Mr Linwood went on to develop more serious psychiatric issues by 1996.
21. Almost all of the examples of category two stressors that Mr Linwood described in his oral evidence occurred in the infantry unit. He left that unit in 1990, well over a year before severe psychiatric problems manifested themselves in 1992. While he spoke about failing promotion courses between 1992 and 1996, and described a sense that his superiors were treating him more harshly than his contemporaries, his recollection of this period was much less specific and prone to generalisation. I do not have sufficient evidence to be satisfied the applicant experienced a category two stressor connected with his workplace in the six months before 1996 (or even in the six-month period before he was involved in a brawl or experienced the acute transient situational disturbance in 1992).

...

Question 23 of the appeal is directed at the wording of paragraph 21 of the AAT's reasons. In relation to the issue of "sufficient evidence", the FC indicated the material question was whether one or more of the minimum, SoP specified factors were present? Materially, all that was necessary was that there be before the AAT material to engender reasonable satisfaction that at least one factor had effects which were chronic in nature and caused the applicant to feel on-going distress, concerns or worry. The FC indicated at paragraph 34 that:

... a question which emerges is what evidence is necessary in an administrative review of this nature to make a finding of fact without error of law? It is such evidence which will be "sufficient".

After reviewing the relevant case law, the FC indicated at paragraph 38 that:

... to make a finding of fact for which there is no evidence is an error of law but, subject to legal unreasonableness, no error of law is entailed if there is some evidence for that finding by the administrative official or tribunal concerned. Thus Mr Linwood's question 23 can only be answered in his favour if the Tribunal's conclusion that there was no sufficient evidence to support a finding of fact that one or more of the requisite SoP "factors" was present if, having regard to the evidence which was present, an error of law is necessarily entailed in that conclusion.

The FC examined the 1992 scenario considered by the AAT. In the six month period which preceded the applicant's hospital admission in 1992, the AAT identified that he had been involved in a brawl in a bar which was "not the product of any subjective distress" (para 20 above). The AAT also referred to the applicant having described in evidence, in respect of the period between 1992 and 1996 and in a non-specific way, "a sense that his superiors

were treating him more harshly than his contemporaries” (para 21 above). The FC noted this was not the full extent of the evidence before the AAT as to events in 1992 – there was also (emphasis added):

- a Royal Adelaide Hospital admission and discharge records dated 22 August 1992 regarding a suicide attempt the previous night, which noted:

“Reluctant historian ...some recent stressors in his life. However would not elaborate (? Assault 2/52 ago).”

- a report by a specialist psychiatrist dated 29 August 1992, which indicated:

“This man’s O/D was precipitated by his interview with his 2IC, but also as a culmination of events of the last 2/12.

He has been socially isolated in Adelaide, withdrawn and alcohol dependent on relieving stress, particularly since his charge and debts.

He is depressed and demoralised, feels unable to face being in the Army because of the O/D & social isolation.”

- an entry in the 2 Field Hospital clinical notes dated 1 November 1996, including:

“Took a Panadol O/D some years ago when he was found guilty of a military charge of assault.”

- a medical assessment of 9 September 1997, including a summary by the examining medical officer “Depressive illness **which began in 92** associated [with several suicide attempts ...” and “Depression related to Army service, personal life and a personality disorder”.

- two reports by Dr Jenkins dated 19 March 2013 and 17 September 2014, in which he indicated in the earlier report:

“I note that a final medical board report from the Army dated 9 September 1997 indicates that Mr Linwood’s depressive illness commenced in 1992 and was associated with several suicide attempts as well as psychotic features. On that particular report, I note that it indicates ‘depression related to Army service, personal life, and a personality disorder’.”

The FC indicated that taken collectively, and bearing in mind that the AAT was not obliged to apply the rules of evidence and only required to be reasonably satisfied as to matters of facts, the passages it quoted (especially those emphasised) were “sufficient”, if accepted, to establish that the clinical onset of the applicant’s depressive disorder was on or about 22 August 1992, and category 2 stressors (a), (c) and (d). The FC indicated at paragraph 54 that AAT failed to appreciate:

... there was before it some evidence which, if accepted, reasonably admitted of a conclusion that his depressive disorder was defence-caused. That was so because that material supported a factual conclusion that one or more of the requisite category 2 stressors were present before August 1992. In this sense, there was evidence which was capable of being regarded as “sufficient”. To conclude that the evidence before it was not “sufficient” was, in these circumstances, manifestly unreasonable.

Formal decision

The appeal was allowed.



Editorial note

The FC pointed out that it is now for the AAT to decide whether it ought to accept and act upon the evidence (quoted above). It is also for the AAT to decide whether to accept Dr Jenkins' opinions in all respects. Please refer to the case summary of AAT decisions in the preceding section for the outcome of the remittal.

Ralph v Repatriation Commission

Collier, Logan and McKerracher JJ

[2016] FCAFC 89

22 June 2016

Application for special rate – whether application lodged before applicant turned 65 – section 24(2A) applicable - whether applicant was engaged in “remunerative work”– whether primary judge misconstrued “working...for a continuous period of at least 10 years”

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 the Departmental 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’s appeal to the FC was dismissed. He appealed to the FFC.

The Court’s consideration

Ground 1 – The “lodgement” issue

In the appeal Mr Ralph pressed his contention that section 29 of the *Acts Interpretation Act* was applicable, so it ought to have been presumed that the application form was received when it would have been delivered in the ordinary course of the post. He further submitted that the AAT was not entitled to rely on the Departmental date stamp, as there was no evidence before the AAT about the Department’s practice regarding the placing of such stamps on forms.

The FFC noted that as with all provisions in the *Acts Interpretation Act*, section 29 of that Act only applies in the absence of a contrary intention in a particular Act: section 2(2). In this case, a contrary intention is evident in the VEA – the lodgement to which section 5T(2)(a)(i) refers is, by section 5T(2)(b), taken to have occurred on receipt, not delivery. Also, the alternative in section 5T(2)(a)(ii) of delivery to a person looks to be physical delivery (not constructive or deemed delivery). Further, the definition of “application day” in section 19(9) of the VEA refers

to “received” and “so received”. In relation to the AAT’s finding based on the Departmental date stamp, the FFC noted that the AAT was not bound by the rules of evidence: section 33(1) of the AAT Act. The date stamp was, on its face, reasonably capable of supporting a finding of fact that the application was received on the receipt date shown on the stamp, and there was no additional need for the AAT to have material before it as to the Departmental practice regarding the affixing of such stamps. Ground 1 was dismissed.

Grounds 2, 3 and 4 – The “remunerative work” issue

Mr Ralph’s submitted that the primary judge ought to have concluded that the AAT misunderstood what constituted “remunerative work” for the purposes of the VEA. In submissions, counsel for Mr Ralph seized upon the primary Judge’s references to contractual relationships as allegedly indicative that the primary Judge unduly restricted the focus of his scrutiny of whether the AAT had erred in law in reaching its conclusion that section 24(2A)(g) was not satisfied.

The FFC indicated at [36]:

Reading the Tribunal’s reasons in this matter as a whole, it is tolerably clear why Mr Ralph’s claim failed to meet all of the s 24(2A) criteria. It was just that the Tribunal regarded his activities with Jet Couriers and Metrans, as part of familial discourse and that his activities as a transport and logistics consultant, exemplified by his JMR consultancy, were not undertaken for a sufficient time period prior to his making of his application to meet what the Tribunal regarded as the meaning and effect of s 24(2A)(g) of the VEA...

The FFC noted that the AAT did not, in terms, find that the activities undertaken by Mr Ralph for Jet Couriers and Metrans constituted “remunerative work” for the purposes of section 24(2A)(d) of the VEA. The AAT made a finding with an eye to section 24(2A)(g), not section 24(2A)(d), that the activities undertaken by Mr Ralph for Jet Couriers and Metrans did not constitute “working on his own account in his profession, trade, employment, vocation or calling but rather advising and guiding his sons as a father with a pertinent background”. The AAT went further and found that even if Mr Ralph were “working on his own account” for the family companies, and even if the provision of a company car were a form of remuneration for this, he was not suffering any loss. The FFC indicated that while, desirably, the AAT ought expressly to have addressed whether the activities undertaken by Mr Ralph for Jet Couriers and Metrans constituted or evidenced “remunerative work” for the purposes of section 24(2A)(d), the findings made were consistent only with a rejection of these activities as part of the remunerative work which was the “last paid work” undertaken by Mr Ralph.

The FFC concluded that the AAT did not, as Mr Ralph contended, reject the activities undertaken by Mr Ralph for Jet Couriers and Metrans as a form of remunerative work or as indicative of a capacity to undertake remunerative work because of the absence of a contract between him and Jet Couriers or Metrans. The FFC noted that the AAT rejected those activities because they were not remunerative activities, only family advising for which there was but a gesture of appreciation in the provision of a car, not remuneration. The AAT found that the advising was not given in return for the provision of a car. There was no merit in these Grounds.

Grounds 5 – 10 years’ continuous employment

Mr Ralph argued that his earlier work as an employee for Westgate Logistics (for 17 years from 1990) should be aggregated with his JMR consultancy (from 2007-2009 and a later

2012 period being after his 65th birthday) to meet the section 24(2A)(g)(ii) criterion. The FFC considered the difficulty with Mr Ralph's submission is one arising from the text of section 24(2A)(g)– the reference in section 24(2A)(g)(i) is to “working as an employee of another person” whereas the opening reference in section 24(2A)(g)(ii) is to “working on his or her own account”. The criteria are alternatives. The reference to “employment” in section 24(2A)(g)(ii) does not refer to work as an employee - it is descriptive of an occupation. Ground 5 failed.

Formal decision

The appeal was dismissed.



Editorial note

The FFC referred to an extract of the decision by the FFC in *Grant v Repatriation Commission* [1999] FCA 1629 which explained the concept of “remunerative work” and distinguished the subject of inquiry under section 24(2A)(d) from that in section 24(2A)(g):

Determination of the “remunerative work” referred to in s 24(2A)(d) requires the characterisation of the specific remunerative activity or activities that the veteran was last undertaking before making the claim or application rather than of the capacity in which that work was undertaken. The particular capacity in which the work was undertaken is dealt with a separate criterion in s 24(2A)(g). Thus, whether or not the work was undertaken as an employee or as a self employed person is irrelevant to the characterisation to be given to that work under s 24(2A)(d). That conclusion follows from the definition of “remunerative work” in s 5Q, the recognition in s24(2A)(g) that the capacity in which work is undertaken is to be treated as a matter separate from the work that was undertaken for the purposes of s 24 and is consistent with the purpose of s 24(2A) of providing for payment at the special rate where a person is prevented solely by war-caused incapacity from continuing to undertake the work that the veteran was last undertaking before making the claim or application. In our view it would be inconsistent with that purpose for the characterisation of that work to include, or to be made to depend upon, the capacity in which that work was undertaken.

Iliopoulos v Repatriation Commission

Pagone J

[2016] FCA 756

28 June 2016

Reasonable hypothesis test – no relevant SoP – chronic irritable cough syndrome – exposure to insecticides

Facts

The applicant, Mr George Iliopoulos, served in the Australian Army from 1970 to 1972 and had operational service in Vietnam between 12 May 1971 and 21 October 1971. In 2012 Mr Iliopoulos lodged an application for increase in his disability pension and claimed he suffered from bronchial asthma and skin rashes. The respondent decided that bronchial asthma was not related to Mr Iliopoulos' service and there was no medical condition related to the skin rashes. The VRB affirmed the decision under review but increased disability pension to 20% of the general rate. The AAT affirmed the VRB's decision. Mr Iliopoulos appealed to the FC.

Grounds of appeal

The appeal centred on the AAT's conclusion about an hypothesis concerning the connection between a chronic irritable cough syndrome suffered by Mr Iliopoulos and his Vietnam service. As there was no applicable SoP relating to chronic irritable cough syndrome, the claim was determined under section 120 of the VEA by reference to the decided cases prior to the introduction of section 120A.

The Court's consideration

Grounds of appeal relating to the AAT's conclusion of an absence of a reasonable hypothesis within the meaning of section 120(3) was not open on the evidence or was otherwise incorrectly reached in light of the evidence of Dr Burdon

Section 120(1) required the RC to determine that the injury or disease claimed by Mr Iliopoulos relating to his operational service was a war-caused disease unless it was satisfied beyond reasonable doubt that there were no sufficient grounds for that determination. Section 120(3) provides that the RC would be satisfied beyond reasonable doubt if it was "of the opinion that the material before it [did] not raise a reasonable hypothesis connecting the injury" or disease with the circumstances of the particular service rendered by Mr Iliopoulos. In *Bushell v Repatriation Commission* (1992) 175 CLR 408 Mason CJ, Dean and McHugh JJ said at page 414 it would be a rare case that an hypothesis would be considered unreasonable when put forward by a medical practitioner who was eminent in the relevant field of knowledge. In that context, Mr Iliopoulos relied on the expert evidence of Dr Burdon and the absence of contradicting expert evidence.

The FC indicated the AAT was not bound to accept the evidence of Dr Burdon, but it was bound to consider the evidence, including the evidence of Dr Burdon, for itself, relying on *Bushell*, *Levier v Repatriation Commission* [1997] FCR 1365 and *Repatriation Commission v Bey* (1997) 79 FCR 364. The FC considered the AAT correctly took into account Dr Burdon's

opinion that a causative connection between Mr Iliopoulos' condition and operational service was a possibility, and correctly took into account Dr Burdon's reasons for that opinion, but formed its own contrary conclusion for the reasons it gave. The FC stated that the AAT undertook the task that it was required by statute to undertake; namely to decide for itself whether the material before the AAT raised a reasonable hypothesis of connection between the injury in question and the particular service rendered by Mr Iliopoulos. The opinion of the AAT was that the material before it, including the expert opinion of Dr Burdon, did not raise a reasonable hypothesis of connection.

Grounds of appeal relating to the relevance of the AAT's reference to the "eminence" of Dr Burdon

The FC noted the AAT's view about the eminence of Dr Burdon did not result in the AAT failing to take it into account. The FC stated that the evidence of an expert in the relevant field of medical science was considered by the AAT.

Grounds of appeal that the AAT had erred by relying on the lack of epidemiological evidence, or had relied upon the lack of evidence of other service personnel having developed chronic irritable cough syndrome after exposure to pesticides or herbicides in Vietnam

The FC noted the AAT was not saying that there needed to be an epidemiological study, or evidence of other veterans suffering the same condition, to find that an hypothesis of connection was reasonable – rather, it was explaining why it was not satisfied to adopt for itself the opinion and reasons given by Dr Burdon. The FC considered the AAT's reference to the absence of other evidence was not imposing an evidentiary burden upon Mr Iliopoulos or saying that such evidence was required, but was an explanation why other evidence might have required a different conclusion. The AAT did however have other expert evidence before it from Professor Holmes which, although not contradicting the evidence of Dr Burdon, related to the AAT reaching a different conclusion.

Ground of appeal relating to the failure to be informed of AAT's use of the SoP for Neurodermatitis

The FC stated the AAT did not err by considering the SoP for irritant contact dermatitis. The SoP had been referred to by the VRB in its reasons for decision and formed part of the material before the AAT. The AAT considered the SoP had not been satisfied, and also considered the alternative scenario, as agreed between the parties, that the SoP was not applicable to his condition.

Ground of appeal as to whether the AAT erred in holding that it could not assume the fact of connection between service and a condition

The FC considered that section 120 requires the decision-maker to make a finding about connection and not to assume as a fact the finding which it must make.

Ground of appeal as to whether the AAT applied the wrong standard of proof in determining the date of clinical onset of chronic irritable cough syndrome

The FC noted the reason the claim failed was not because there was no hypothesis (as contemplated by this ground) but because of the AAT's conclusion that the hypothesis was not reasonable.

Ground of appeal as to whether the AAT misconstrued the expression “reasonable hypothesis” in section 120(3) of the VEA, when read with section 9(1)(e), by failing to determine whether the material pointed to an hypothesis that chronic irritable cough syndrome was aggravated by exposure to irritants during operational service.

The FC indicated that the issue before the AAT had been whether the war service of Mr Iliopoulos in Vietnam had caused his condition. There was no material before the AAT in this case capable of supporting the alternative hypothesis of aggravation.

Formal decision

The appeal was dismissed.



Editorial note

In relation to the ground of appeal about assuming the fact of connection, the FC noted that in *Byrnes v Repatriation Commission* (1993) 177 CLR 564 the HC held that an hypothesis may still be reasonable even if it assumes the occurrence or existence of a “fact”. The AAT considered what had been said in *Byrnes* did not contemplate the assumption of “the fact of connection”, following Nicholson J in *Repatriation Commission v Dunn* (2006) 94 ALD 97 at [46]:

...As was the case in *Byrnes* at CLR 569; ALR 213-14; ALD 5-6, the hypothesis is one of connection of the veteran’s condition with the circumstances of his service. If there is an assumed fact, it cannot be the fact to which the hypothesis must be addressed; that is, the fact of connection.

The FC confirmed nothing in *Byrnes* suggests that the hypothesis may be determined by assuming the very fact which needs to be determined.

Murray v Repatriation Commission

Bromberg J

[2016] FCA 1150

22 September 2016

Intermediate and special rate – whether the AAT erred in misconstruing s 23(1)(c) by reference to s 23(3)(a)(i) and s 24(1)(c) by reference to s 24(2)(a)(i) – AAT failed to consider whether veteran not seeking remunerative work for reasons other than his war-caused disabilities – whether the AAT failed to give adequate reasons

Facts

The applicant, Mr Terrence Murray, had operational service in Vietnam with 17 Construction Squadron between April 1968 and November 1968. In 2009 Mr Murray applied for a disability pension. The respondent accepted ischaemic heart disease but rejected other claims, and set the rate of disability pension at 80% of the general rate. On review, the VRB determined that Mr Murray's generalised anxiety disorder, alcohol dependence, tremor associated with anxiety, hypertension and emphysema were war-caused and remitted pension assessment. In 2012 the respondent increased Mr Murray's disability pension to 100% of the general rate. In 2014 the VRB affirmed that decision. In 2015 the AAT affirmed the VRB's decision. Mr Murray appealed to the FC.

The Court's consideration

The issue before the AAT and on the appeal was whether Mr Murray's circumstances satisfied section 24(1)(c), or failing that section 23(1)(c).

The FC referred to *Repatriation Commission v Richmond* (2014) 226 FCR 21, in which the FFC identified the essence of what each of the two limbs of section 24(1)(c) required and reflected on the overall effect of the provision:

- [52] As we have said, s 24(1)(c) has two limbs. The first limb, which is capable of being informed by s 24(2)(b), requires a causal connection between the veteran's war-caused incapacity, alone, and the veteran's inability to undertake the remunerative work he or she previously engaged in.
- [53] The second limb, which is amplified by s 24(2)(a), requires a causal connection between that inability to work and the veteran's suffering of financial loss. The enquiry under this limb relates to whether the veteran's financial loss is a result of his or her war-caused incapacity.
- [54] As Buchanan J said in *Smith* (at [48]), the overall effect of s 24(1)(c) is that an applicant for the special rate of pension "requires a demonstrated loss of earnings as the direct result of the war-related incapacity, and only for that reason".

Echoing these observations, in *Summers v Repatriation Commission* (2015) 230 FCR 179 the FFC said this:

[165] Section 24(1)(c) has two main limbs. The first limb provides:

“the veteran is, by reason of incapacity from that war-caused injury or war-caused disease, or both, *alone*, prevented from continuing to undertake remunerative work that the veteran was undertaking ... ”

(Emphasis added.)

It requires that the veteran be prevented, by war-caused incapacity *alone* (that is, not for other reasons) from continuing his or her earlier remunerative work: *Smith v Repatriation Commission* [2014] FCAFC 53; (2014) 220 FCR 452 (Smith) at [8]-[11] per Rares J, [47]-[48] per Buchanan J, [167]-168] per Foster J; *Richmond* at [57]-[69] per Middleton, Murphy and Rangiah JJ and the authorities there cited. The possible harshness in the “alone” test in this limb is ameliorated to an extent by s 24(2)(b).

[166] The second limb of s 24(1)(c) is:

... and [the veteran] is, by reason thereof, suffering a loss of salary or wages, or of earnings on his or her own account, that the veteran would not be suffering if the veteran were free of that incapacity;

The operation of this limb is amplified by s 24(2)(a).

[167] We respectfully agree with Buchanan J's explanation in *Smith* at [48] where his Honour said that “[t]he overall effect of s 24(1)(c) may be summarised as one which requires a demonstrated loss of earnings as the direct result of the war-related incapacity, and *only* for that reason” (emphasis added).

The FC considered the connection between the second limb and section 24(2)(a) is apparent from the above extract, and *Richmond* similarly said at [83]:

The plain words of s 24(2)(a)(i), informing the second limb of s 24(1)(c) as they do, make specific provision for the situation where a veteran, for reasons unrelated to war-caused incapacity, has voluntarily decided to leave his or her remunerative employment. This indicates that the legislature intended that matters other than strictly preventative factors would be picked up under that limb. The second limb (and s 24(2)(a)(i)) provide for a broad enquiry as to fact and degree that is well capable of catering for factors such as a veteran's voluntary or elective decision to cease work.

The FC noted an example of the ameliorative effect of section 24(2)(b) referred to in *Summers*, was given in *Richmond* at [91]:

... Further, s 24(2)(b) allows a veteran to qualify for the special rate where the veteran ceases remunerative work for reasons unrelated to war-caused incapacity, and then later (perhaps when the veteran's war-caused incapacity has worsened) demonstrates genuine efforts to obtain work which are made fruitless substantially by reason of that incapacity: *Smith* at [49] per Buchanan J.

The FC indicated that the focus of the enquiry under the first limb of section 24(1)(c) is on what has *prevented* the veteran from continuing to undertake remunerative work, by reference to *Richmond* in [77]:

The enquiry under the first limb is therefore whether the veteran's war-caused incapacity alone, *prevented*, the veteran from continuing to undertake the remunerative work he or she previously engaged in. It is factors that prevent the veteran from engaging in remunerative work that are relevant to the enquiry under the first limb of s 24(1)(c).

The FC noted a counterfactual analysis has often been employed in the application of section 24(1)(c) – the assessment to be made asks whether, absent the war-caused reason, another reason (or other reasons) is a reason for the veteran's inability to engage in remunerative work. In *Repatriation Commission v Smith* (1987) 15 FCR 327 Beaumont J, which whom Northrop and Spender JJ agreed, said at 337:

As has been said, the question posed by s 24(1)(c) is one of hypothetical fact. The Tribunal must attempt an assessment of what the respondent probably would have done if he had none of his service disabilities. The starting point is an examination of the prospects of employment, including self-employment, in southern Tasmania in early 1985 for a healthy sixty-nine year old plumber ...

The FFC in *Richmond* regarded the counterfactual approach at [69] as “expressing a practical rolled up approach to the operation of both limbs”.

The FC emphasised that whether the section 24(1)(c) criteria is satisfied has to be answered by reference to the circumstances prevailing during the assessment period.

The FC went on to examine the reasons of the AAT.

Third ground of appeal

The FC considered the AAT's reasoning did not evince a sufficient engagement by the AAT with the counterfactual assessment of “what [Mr Murray] probably would have done if he had none of his service disabilities” (following *Smith*). Accepting that Tribunal made a finding that, as at the assessment period, Mr Murray was not seeking to engage in remunerative work (addressing the criterion in section 24(2)(a)(i)), the AAT needed to consider and determine whether Mr Murray was not then seeking remunerative work “for reasons other than his... incapacity” from his war-caused disabilities. The AAT's reasons did not support the conclusion the AAT grappled with the question of whether, after June 2007, Mr Murray no longer sought work “for reasons other than” his incapacity from his war-caused disabilities. In failing to address that issue, the FC considered the AAT erred by misconstruing the task required of it by section 24(2)(a)(i), and in turn, section 24(1)(c). For the same reason, the AAT erred by misconstruing the task required of it by section 23(3)(a)(i), and in turn, section 23(1)(c).

Fifth ground of appeal

The FC considered the AAT's reasons failed to expressly identify the basis for the AAT's conclusion at [51] that it was “not reasonably satisfied that [Mr Murray's] circumstances met the provisions of ss 23(1)(c) or 24(1)(c)”.

The FC referred to the HC's observations about the content and purpose of the duty to provide adequate reasons in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [69]:

... It ensures that a person who is dissatisfied with the result at which the Tribunal has arrived can identify with certainty what reasons the Tribunal had for reaching its conclusion and what facts it considered material to that conclusion. Similarly, a court which is asked to review the decision is able to identify the Tribunal's reasons and the findings it made in reaching that conclusion.

The FC considered the AAT's reasons did not ensure that a dissatisfied person like Mr Murray "can identify with certainty" the reasoning of the AAT. The FC also referred to what the FFC said in *Summers* at [110]:

... One of the central objects behind the statutory obligation to give reasons is to expose the Tribunal's reasoning process which may facilitate appeals on a question of law or judicial review. The Tribunal was required to explain what it decided on the issue of cl. 6(a) and why, and in our view it did not: *Preston v Secretary, Department of Family and Community Services* [2004] FCA 300; (2004) 39 AAR 177 at [21] per Stone J; *Hill v Repatriation Commission* [2004] FCA 832; (2004) 207 ALR 470 at [20] per Mansfield J; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCAFC 137; (2009) 179 FCR 554 at [49] per Bennett, Flick and McKerracher JJ; *Dornan and Others v Riordan and Others* [1990] FCA 383; (1990) 24 FCR 564 at 573-574 per Sweeney, Davies and Burchett JJ.

The FC considered the failure to provide adequate reasons constituted an error of law.

The other grounds of appeal were unsuccessful.

The Court's Decision

The appeal was allowed.



Editorial note

On 14 October 2016 the FC amended one of its orders made on 22 September 2016 that the remittal to the AAT was made without limitation. That order was set aside and in lieu thereof the case was remitted to the AAT limited to reconsideration of the issues raised by:

- i. Section 23(1)(c) and (3); and
- ii. Section 24(1)(c) and (2),
of the VEA.

The FC left it for the reconstituted AAT to determine whether a limitation on the calling of further evidence should be imposed.

Repatriation Commission v Sharp

Perry J

[2017] FCA 350

4 April 2017

Application for above general rate of pension – whether respondent prevented from engaging in remunerative work by defence-injuries alone – whether AAT misconstrued the “alone” test by limiting its consideration to diagnosed medical conditions – whether AAT failed to consider respondent’s substance abuse disorder as a causative factor for incapacity to undertake remunerative work – whether AAT’s findings were illogical or irrational – whether AAT failed to provide reasons

Facts

The respondent, Mr Brian Sharp, served in the Royal Australian Air Force from 1968 to 1988. Mr Sharp applied for the special rate of pension in 2014. The RC decided that Mr Sharp was not eligible for the special rate of pension, and the VRB affirmed that decision. Mr Sharp applied to the AAT. The AAT decided that Mr Sharp was entitled to an intermediate rate of pension from 1 May 2014 and the special rate of pension from 20 June 2014. The RC appealed to the FC.

Grounds of appeal

Each of the raised questions of law concern the manner in which the AAT determined the issue of whether the incapacity due to the defence-caused injuries “alone” prevented Mr Sharp from undertaking the remunerative work that he was undertaking and “alone” are responsible for him suffering a loss of earnings that he would not have suffered otherwise as required by section 24(1)(c) (the “alone test”). Specifically, the AAT is said to have erred in its consideration of whether Mr Sharp’s alcohol consumption constituted a factor preventing him from continuing to undertake his remunerative work for the purposes of determining whether the alone test was satisfied.

The Court’s consideration

The FC referred to *Smith v Repatriation Commission* [2014] FCAFC 53, in which Buchanan J explained the different elements to be established under subsections 24(1)(b) and (c):

Section 24(1)(b) and (c), when read together, state a composite test containing a series of conditions. First, s 24(1)(b) requires that a veteran be *rendered*, by the war-related incapacity alone, incapable of working more than eight hours per week. Secondly, s 24(1)(c) requires that the veteran be *prevented*, by that incapacity alone (i.e. not for other reasons) from *continuing* earlier remunerative work. Thirdly, s 24(1)(c) requires that prevention for that reason from continuing that work be the cause of a loss of earnings. Fourthly, s 24(1)(c) requires that the loss of earnings would not be suffered but for the incapacity.

In *Repatriation Commission v Richmond* [2014] FCAFC 124 the FFC explained at paragraphs [57]-[58] that the alone test in section 24(1)(c):

...is concerned with whether or not there is more than one cause of the preventative effect that the veteran claims has resulted from his or her war-caused incapacity.

... 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.

The FC noted that, in short, section 24(1)(c) requires an applicant to demonstrate that the loss of earnings is the direct result of the war related incapacity and that that incapacity is the sole reason for the loss of earnings.

Question of Law 1 – alleged misconstruction of the alone test in limiting the consideration to diagnosed medical conditions

The FC considered that the AAT made findings which comprehensively considered and rejected the case put by the RC. In summary, the AAT rejected the diagnosis by one expert psychiatrist, Dr Smith, that Mr Sharp suffered from a separate substance use disorder from his anxiety disorder, on the bases that:

- the diagnosis was not consistent with the evidence of Mr Sharp's long-standing GP;
- Dr Smith only had one appointment to assess Mr Sharp;
- some of Dr Smith's views were based on assumptions which were not correct;
- his views were not supported by Mr Sharp's long history of job difficulties and job loss.

The AAT accepted Mr Sharp's case that he self medicated with alcohol effectively as a complication, or as a result, of his anxiety disorder, which was consistent with the evidence of his GP and other evidence. The FC considered that this explained the AAT's finding that Mr Sharp's incapacity from the anxiety disorder was the only factor preventing him from continuing to undertake work in June 2014. The FC indicated "*...a symptom, complication or consequence of a disorder cannot constitute a separate factor from the disorder itself for the purposes of determining what factor or factors are operating to prevent an application from working*". By accepting Mr Sharp's characterisation of his alcohol dependence, the AAT inferentially rejected any issue raised by the material that alcohol consumption, even if not a diagnosed condition, was a separate contributing factor. Therefore, no error in the AAT's application of the "alone test" was established.

Question of Law 2 – alleged failure to consider whether Mr Sharp did not satisfy the alone test because his substance abuse disorder was a causative factor

It was not in dispute that the RC seriously advanced submissions that Mr Sharp suffered from a separate, non-accepted condition of substance abuse disorder which prevented him from continuing to undertake his remunerative work. However, it follows from the reasons given above relating to the first question of law that the AAT did consider the RC's submissions on this point and rejected them.

Question of Law 2A – whether the finding at [67] of the AAT’s reasons is illogical or irrational

The RC’s challenge to paragraph [67] related to the last sentence – “*In my view this is unsupported by the applicant’s history of job difficulties and ultimately, job loss, in circumstances where there was **no** evidence that, at the time, he was abusing alcohol*” (emphasis added). It was argued that statement was not open on the evidence before the AAT and was therefore irrational or illogical. This ground expressly proceeded on the basis that the reference “*at the time*” appears to be the time at which Mr Sharp stopped working.

Counsel for Mr Sharp submitted that read in the context of the decision as a whole, the AAT was referring to its earlier discussion of the applicant’s history of job difficulties and earlier job losses, and not to the time at which Mr Sharp stopped working on 20 June 2014. The FC agreed with this submission, and did not consider the finding at [67] of the AAT’s reasons to be illogical or irrational.

Question of Law 3 – alleged failure to provide reasons

The FC did not consider that the AAT had failed to comply with its obligation to provide reasons in accordance with section 43(2B) of the AAT Act.

The Court’s Decision

The appeal was dismissed.



Editorial note

This case follows the accepted construction of the alone test in *Richmond*, endorsed by *Repatriation Commission v Watkins* [2015] FCAFC 10 and *Summers v Repatriation Commission* [2015] FCAFC 36.

Perry J

[2017] FCA 904

7 August 2017

Application for above general rate of pension – where AAT found applicant’s “last paid work” comprised two remunerative activities for the purposes of ss 24(2A)(d) and (g) – whether only one remunerative activity can comprise “last paid work” for the purposes of s 24(2A)(d) – whether applicant undertaking “remunerative activity” when gap in paid work – whether breach of procedural fairness – whether sufficient for one of two remunerative activities comprising last paid work to satisfy 24(2A)(g)

Facts

The applicant, Commander Peter Saxton, served in the Royal Australian Air Navy as a Reservist between 1994 and 2013. He had periods of continuous full-time service which included deployments to East Timor.

In 2013 the applicant sought an increase in his disability pension beyond 90% of the general rate. At that time, he was 67 years of age. His application was refused, and the VRB affirmed that decision. The AAT affirmed the VRB’s decision that the applicant did not qualify for the special or intermediate rate of pension, on the ground that he had not met the criteria in section 24(2A)(g) or section 23(3A)(g) respectively. Those sections relevantly required the applicant to demonstrate that, when he stopped undertaking his “last paid work”, he had been working for his employer or on his own account for a continuous period of at least 10 years, before he turned 65. The applicant appealed to the FC.

Grounds of appeal

The applicant challenged the AAT’s finding that his last paid work for the purposes of section 24(2A)(d) was his civilian work, as well as his Navy work, on two grounds:

- (1) the Tribunal misconstrued s 24(2A)(d) of the VEA by failing to find that the applicant’s Navy work was the “last paid work” for the purposes of that section, despite the undisputed evidence;
- (2) the finding was made in breach of procedural fairness in circumstances where the finding was not reasonably obvious on the evidence and the Tribunal gave no notice to the parties that it would depart from what were, in essence, agreed facts to the contrary.

The other ground of appeal considered by the AAT was:

- (3) Did the Tribunal misconstrue s 24(2A)(g) of the VEA?

The Court's consideration

Did the AAT misconstrue "last paid work" in s 24(2)(d) of the VEA?

The AAT was of the view that nothing in the terms or context of section 24(2A)(d) or section 23(3A) (d) requires that the "last paid work" be restricted to a single "remunerative activity", to use the language of the definition of remunerative work in section 5Q(1). Section 24(2A)(d) is concerned with the reason which prevented the veteran from continuing to undertake his or her last paid work. In *Grant v Repatriation Commission* [1999] FCA 1629 the FFC indicated at [9]:

Determination of the "remunerative work" referred to in s 24(2A)(d) requires the characterisation of the specific remunerative activity *or activities* that the veteran was last undertaking before making the claim or application rather than of the capacity in which that work was undertaken. The particular capacity in which the work was undertaken is dealt with as a separate criterion in s 24(2A)(g).

(emphasis added)

The AAT also considered that it is plain from the width of the definition of "remunerative work" as meaning "remunerative activity", that remunerative activity and, therefore, last paid work, are not limited to full-time employment but rather can embrace activities undertaken pursuant to part-time or casual arrangements. This construction leaves open the possibility that a person may be regarded as undertaking a remunerative activity for the purposes of the provision, even during periods where there is a gap in her or his paid work. For example, the fact that work may be unavailable from time to time for a veteran in a part-time consultancy role will not necessarily mean that the veteran cannot satisfy the requirement in section 24(2A) (g) of undertaking his or her last paid work for a continuous period of 10 years before turning 65: *Thompson v Repatriation Commission* [2000] FCA 204 at [12]. The AAT considered that the construction adopted by the AAT on this issue must be preferred.

The AAT did not accept the applicant's contention that the "undisputed evidence" was that he ceased civilian work on 30 April 2013 before he made his claim. Also, the AAT did not accept that the undisputed evidence before the AAT established that the applicant's last paid work was his Navy service. The FC considered the AAT did not misconstrue the task required by section 24(2A)(d) in determining what was the applicant's "last paid work" or its equivalent in section 23. Further, it was open to the AAT on the evidence to characterise the applicant's work with Property Development Systems Australia (PDSA) as continuing at least to June 2013, notwithstanding that the allocation of blocks of work to him by PDSA was intermittent and that it was not in dispute that the applicant was not undertaking a block of work for PDSA when he made his claim in May 2013.

Did the AAT breach procedural fairness in finding that the applicant's last paid work comprised two remunerative activities?

The issue was whether, as contended by the applicant, the AAT's conclusion that the applicant's last paid work for the purposes of section 24(2A)(d) was both his work with the Navy and his part-time civilian work was not obviously open. However, the AAT considered no breach of procedural fairness had been made out.

Did the AAT misconstrue section 24(2A)(g) of the VEA?

The question was whether the AAT's assumption that the applicant had to satisfy the requirement under section 24(2A)(g) for both his Navy and civilian work was correct as a matter of statutory construction.

Firstly, it may be accepted on a strictly literal reading the reference to "last paid work" in section 24(2A)(g) should bear the same meaning as the phrase in section 24(2A)(d) and therefore that, if a veteran had two separate remunerative activities then both must meet the criteria in section 24(2A)(g). However, the FC indicated that while the task of statutory construction must begin with the text, that is not necessarily the end of the task.

Secondly, the FC noted that section 24(2A)(g) has a distinct and different purpose from section 24(2A)(d), citing Branson J in *Carter v Repatriation Commission* [2001] FCA 992 at [26]:

...The paragraphs [i.e. ss 24(1)(b), (2A)(d) and (2A)(g)] are, in my view, intended to deal with distinct issues. Paragraph 24(1)(b) is concerned with degree of incapacity, s 24(2A)(d) with the reason which prevented the veteran from continuing to undertake his or her last paid work and s 24(2A)(g) with the demonstration of a long-term intention to undertake a particular type of work beyond the age of 65 years.

This purpose is consistent with the view of the FFC in *Thomson* at [15]:

...If s 24(2A)(g) were concerned only with the continuity of last paid work, then sub-clauses (i) and (ii) would be otiose. All that would have been necessary was a requirement that the undertaking of the last paid work be continuous during the 10 years prior to the relevant date. As explained above, sub-clauses (i) and (ii) make it quite clear that s 24(2A)(g) is concerned with the capacity in which the last paid work was undertaken. *The purpose of those subclauses in s24(2A)(g) appears to be to prevent claims by veterans over 65 years of age that are based on new or recent employment or self-employment* (that is, in the present context, less than 10 years in duration).

(emphasis added)

Thirdly, as both parties accepted, nothing in the VEA or any legislative instrument suggests that the number of the remunerative activities comprising "last paid work" under section 24(2A)(d) or amount earned through those remunerative activities affects the calculation of the special (or intermediate) rate of pension.

The FC considered the AAT's construction would lead to arbitrary and unfair consequences. For example, a veteran who had two "last paid work[s]" for the purposes of section 24(2A)(d) would be precluded from receiving the special rate if only one of the two remunerative activities satisfied section 24(2A)(g), even though the veteran would have been entitled to the higher rate if they had been undertaking only the latter at the relevant time.

The FC indicated that on the one hand, the purpose of section 24(2A)(d) is promoted by construing "last paid work" as encompassing more than one remunerative activity where the veteran was engaging at the relevant time in more than one such activity. On the other hand, the FC considered the purpose of section 24(2A)(g) is best promoted by construing "last paid work" as referring to any one of the remunerative activities found to constitute "last paid work" for the purposes of s 24(2A)(d). The FC found that the AAT wrongly construed section 24(2A)(g) as requiring that both the applicant's Navy work and civilian work must separately meet the criterion in section 24(2A)(g).

The Court's Decision

The appeal was allowed.



Editorial note

Please note, there have been legislative changes to sections 23(3A)(g) and 24(2A)(g) of the VEA, which apply to claims or AFIs made on or after 1 July 2017.

The *Veterans' Affairs Legislation Amendment (Budget Measures) Act 2017* removes the distinction between a veteran who was working as an employee, or on his or her own account. It also removes the requirement that the veteran worked for the same employer, or in the same field of work.

Whitehouse v Repatriation Commission

Tracey J

[2017] FCA 1085
15 September 2017

Application for intermediate rate of pension – where the applicant had been working as a full-time partner of a law firm – where, because of his war-caused incapacity, he subsequently worked as a part-time consultant solicitor – where he was engaged in that part-time work at the time of his application – whether his full-time work should be considered to be his “remunerative work (last paid work)” for the purpose of section 23(3A)(d) of the VEA

Facts

The applicant, Mr David Whitehouse, sought an increase in his disability pension to the intermediate rate in 2014. At that time he was 67 years old and continued to be employed as a part-time solicitor consultant, after being a full-time partner in a law firm between 1977 and 2012. The RC refused his application, and the VRB affirmed that decision. The AAT affirmed the VRB’s decision. The applicant appealed to the FC.

Grounds of appeal

The question of law was:

Whether, on the evidence before the Tribunal, the Tribunal erred in the construction and application of section 23(3A)(d) by failing to find that the veteran’s “last paid work” was the full-time work that he was prevented from continuing to undertake by his war-caused incapacity.

The Court’s consideration

The FC considered the starting point was the text of section 23(3A)(d). In *Grant v Repatriation Commission* [1999] FCA 1629 the FFC considered the construction of section 24(2A)(d), which is in the same terms as section 23(3A)(d), at [8]-[12]:

In order for a decision-maker to be satisfied that the criterion in s 24(2A)(d) has been met the decision-maker must determine:

- the “remunerative work” that the veteran was last undertaking before he or she made the claim or application;
- whether the veteran is, at any time during the assessment period, because of incapacity from war-caused injury or war-caused disease or both, alone, prevented from continuing to undertake *that* remunerative work.

Determination of the “remunerative work” referred to in s 24(2A)(d) requires the characterisation of the specific remunerative activity or activities that the veteran was *last undertaking before making the claim or application* rather than the capacity in which that work was undertaken. The particular capacity in which the work was undertaken is dealt

with as a separate criterion in s 24(2A)(g). Thus, whether or not the work was undertaken as an employee or as a self-employed person is irrelevant to the characterisation to be given to that work under s 24(2A)(d).

...

Section 24(2A)(d) can be contrasted with s 24(1)(c) which provides for a pension at the special rate for veterans under the age of 65 who are prevented by war-caused injury or disease from undertaking “remunerative work that the veteran was undertaking”; a term which has been construed as referring to the type of work that the veteran previously undertook: see *Banovich v Repatriation Commission* [1986] FCA 397; (1986) 69 ALR 395 at 401; [1986] FCA 397; 11 ALN N142. Although by focusing upon the last paid work s 24(2A)(d) may be more restrictive than s 24(1)(c), which focuses upon the remunerative work of the type the veteran previously undertook, neither subsection is concerned with the capacity in which the work is undertaken.

Having identified the last paid work for the purposes of s 24(2A)(d) the decision-maker is then required to determine whether at any time during the assessment period because of incapacity from war caused injury or disease or both, alone, the veteran was prevented from continuing to undertake *that* remunerative work. Thus, the reason why the veteran may have ceased to undertake the past paid work *prior* to the date of the claim is relevant to, but not determinative of, the inquiry required by s 24(2A)(d).

A veteran who has satisfied the requirements of s 24(2A)(d) must also satisfy the criterion in s 24(2A)(e) that, because the veteran was so prevented from undertaking his or her last paid work, the veteran is suffering a loss of salary or wages, or of earnings on his or her account, that he or she would not be suffering if he or she were free from the incapacity. (Emphasis added.)

The FC noted that the references to “capacity in which the work was undertaken” are references to the legal employment status of the veteran at relevant times, namely, whether he or she was an employee or working on his or her own account – to be assessed under section 24(2A)(g).

The FC considered that the distinction drawn between veterans under and over the age of 65 at the date of application is significant. This was the normal retiring age for workers at the time at which the scheme was enacted, which is clear from the passages from the Second Reading Speech. In *Repatriation Commission v Connell* [2002] FCA 1493, Hill J said at [28]-[29]:

In s 23 capacity is dealt with in s 23[(1)](b), as supplemented by s 23(2). In the case of the Intermediate Rate, the veteran’s capacity to work must be such as not to permit the veteran to work other than intermittently or on a part-time basis.

When one comes to look at the Intermediate Rate pension as applicable to someone who had turned 65, having still been in the last paid work when this happened, it can be seen that the veteran may still be capable of undertaking remunerative work on a part-time basis or intermittently, and in fact be undertaking work, for example, of less than twenty hours per week and still be entitled to the pension. However, that fact itself has nothing to do with the question whether the veteran has been prevented, by virtue of the war-caused injury or disease incapacity from continuing to undertake the particular remunerative work that he was last undertaking.

The FC noted in the extract above the word “capacity” or its variants was used in a different sense from that adopted by the FFC in *Grant*. The FC considered it is used to refer to the veteran’s “ability” to work as a result of war-caused injury or disease. The qualifying criteria for a veteran who is over 65 at the time at which a claim is made are more restrictive as the veteran has passed the normal retirement age, and people over 65 were not normally to be compensated for incapacity to work because of war-caused injury or disease.

The FC indicated that what section 23(3A)(d) requires is the identification of the particular remunerative work which constituted the applicant’s “last paid work” *at the time* that he made his application for an increased pension rate and then consideration of whether he was prevented from continuing to undertake that work. On the facts found by the AAT, the applicant ceased to be engaged in full-time remunerative work in about June 2012 and at that time he had already turned 65. He then commenced working between four and five hours per day as a consultant solicitor in the same firm. In 2014 when he made his application for an intermediate rate of pension, he was continuing to perform this work as a part-time consultant solicitor. The FC indicated this was the “remunerative work” which he was *last* undertaking and for which he was *last paid* before he made the application. The applicant continued to perform this particular remunerative work during the whole of the assessment period. Therefore, at no time during that period was Mr Whitehouse prevented, by his war-caused disabilities, from continuing to undertake his last paid remunerative work as a part-time consultant solicitor. The question of law should be answered: “No”.

The Court’s Decision

The appeal was dismissed.



Editorial note

As the applicant, who was over 65, had not stopped undertaking his last paid work he did not meet the criteria in section 23(3A)(d).

Statements of Principles issued by the Repatriation Medical Authority

1 January 2016 to 31 December 2017

Description of Instrument	Number of Instrument	Date of effect
Ischaemic heart disease	1 & 2/2016	25 January 2016
Peritoneal adhesions	3 & 4/2016	25 January 2016
External bruise	5 & 6/2016	25 January 2016
Non-melanotic malignant neoplasm of the skin	7 & 8/2016	4 April 2016
Myopia, hypermetropia and astigmatism	9 & 10/2016	4 April 2016
Malignant neoplasm of the endometrium	11 & 12/2016	4 April 2016
Eating disorder	13 & 14/2016	4 April 2016
Diverticular disease of the colon	15 & 16/2016	4 April 2016
Benign prostatic hyperplasia	17 & 18/2016	4 April 2016
Polymyalgia rheumatic	19 & 20/2016	4 April 2016
Systemic lupus erythematosus	21 & 22/2016	4 April 2016
Adjustment disorder	23 & 24/2016	4 April 2016
Lyme disease	25 & 26/2016	4 April 2016
Diabetes mellitus	27 & 28/2016	4 April 2016
Depressive disorder	29 & 30/2016	4 April 2016
Aplastic anaemia	31 & 32/2016	4 April 2016
Acute myeloid leukaemia	33 & 34/2016	4 April 2016
Myelodysplastic syndrome	35 & 36/2016	4 April 2016
Acute lymphoblastic leukaemia	37/2016	4 April 2016
Chronic lymphocytic leukaemia/ small lymphocytic lymphoma	38/2016	4 April 2016
Myeloma	39/2016	4 April 2016
Non-Hodgkin's lymphoma	40/2016	4 April 2016

Description of Instrument	Number of Instrument	Date of effect
Benign neoplasm of the eye and adnexa	41 & 42/2016	23 May 2016
Intervertebral disc prolapse	43 & 44/2016	23 May 2016
Opisthorchiasis	45 & 46/2016	23 May 2016
Clonorchiasis	47 & 48/2016	23 May 2016
Malignant neoplasm of the urethra	49 & 50/2016	23 May 2016
Cholelithiasis	51 & 52/2016	23 May 2016
Cut, stab, abrasion and laceration	53 & 54/2016	23 May 2016
Parkinson's disease and secondary parkinsonism	55 & 56/2016	23 May 2016
Optochiasmatic arachnoiditis	57 & 58/2016	23 May 2016
Sarcoidosis	59 & 60/2016	25 July 2016
Otosclerosis	61 & 62/2016	25 July 2016
Spasmodic torticollis	63 & 64/2016	25 July 2016
Suicide and attempted suicide	65 & 66/2016	25 July 2016
Barrett's oesophagus	67 & 68/2016	25 July 2016
Antiphospholipid	69 & 70/2016	26 September 2016
Ganglion	71 & 72/2016	26 September 2016
Incisional hernia	73 & 74/2016	26 September 2016
Scheuermann's disease	75 & 76/2016	26 September 2016
Analgesic nephropathy	77 & 78/2016	29 November 2016
Fibromuscular dysplasia	79 & 80/2016	29 November 2016
Animal envenomation	81 & 82/2016	29 November 2016
Schizophrenia	83 & 84/2016	29 November 2016
Malignant neoplasm of the brain	85 & 86/2016	29 November 2016
Acquired cataract	87 & 88/2016	29 November 2016
Smallpox	89 & 90/2016	29 November 2016
Bruxism	91 & 92/2016	29 November 2016
Umbilical hernia	93 & 94/2016	29 November 2016

Description of Instrument	Number of Instrument	Date of effect
Female sexual dysfunction	95 & 96/2016	29 November 2016
Complex regional pain syndrome	97 & 98/2016	29 November 2016
Anxiety disorder	99 & 100/2016	29 November 2016
Panic disorder	101 & 102/2016	29 November 2016
Cirrhosis of the liver	1 & 2/2017	23 January 2017
Haemorrhoids	3 & 4/2017	23 January 2017
Relapsing polycrondritis	5 & 6/2017	23 January 2017
Hookworm disease	7 & 8/2017	23 January 2017
Ascariasis	9 & 10/2017	23 January 2017
Hepatitis D	11 & 12/2017	23 January 2017
Hepatitis B	13 & 14/2017	23 January 2017
Otitis barotrauma	15 & 16/2017	23 January 2017
Sinus barotrauma	17 & 18/2017	23 January 2017
Malignant neoplasm of the prostate	19 & 20/2017	23 January 2017
Malignant neoplasm of the oesophagus	21/2017	23 January 2017
Presbyopia	22 & 23/2017	27 March 2017
Spondylolisthesis and spondylolysis	24 & 25/2017	27 March 2017
Suicide and attempted suicide	26 & 27/2017	27 March 2017
Thromboangitis obliterans	28 & 29/2017	22 May 2017
Bronchiectasis	30 & 31/2017	22 May 2017
Cardiac myxoma	32 & 33/2017	22 May 2017
Immersion pulmonary oedema	34 & 35/2017	22 May 2017
Labral Tear	36 & 37/2017	31 July 2017
Accommodation disorder	38 & 39/2017	31 July 2017
Sickle-cell disorder	40 & 41/2017	31 July 2017
Femoroacetabular impingement syndrome	42 & 43/2017	31 July 2017
Influenza	44 & 45/2017	18 September 2017

Description of Instrument	Number of Instrument	Date of effect
Malaria	46 & 47/2017	18 September 2017
Alcohol use disorder	48 & 49/2017	18 September 2017
Rheumatoid arthritis	50 & 51/2017	18 September 2017
Tooth wear	52 & 53/2017	18 September 2017
Popliteal entrapment syndrome	54 & 55/2017	18 September 2017
Benign paroxysmal positional vertigo	56 & 57/2017	18 September 2017
Amendment determination concerning Cumulative equivalent dose	58/2017	18 September 2017

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
Xerostomia	13/3/2018

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

AAT and Court decisions – January 2016 to December 2017

AATA = Administrative Appeals Tribunal

FCA = Federal Court

FCAFC = Full Court of the Federal Court

Assessment of Disability Pension

Extreme Disablement Adjustment

Anderson [2017] AATA 2742

Clark [2016] AATA 333

Richards [2017] AATA 560

Stevens [2016] AATA 297

Section 23 - Intermediate Rate of Pension

Baker [2016] AATA 857

Ducat [2017] AATA 1061

Horsington [2016] AATA 223

Oldmeadow [2017] AATA 1813

Pepper [2016] AATA 652

Sypher [2016] AATA 14

Whitehouse [2016] AATA 996

Whitehouse [2017] FCA 1085

Section 24 -Special Rate of Pension

-S24(1)(b)

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

Baker [2016] AATA 857

Bell [2017] AATA 1065

Gamble [2016] AATA 952

Hardy [2017] AATA 425

Harmer [2016] AATA 26

Kies [2016] AATA 96

McNair [2016] AATA 676

Pepper [2016] AATA 652

Stafford [2016] AATA 935

-S24(1)(c)

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

Agius [2017] AATA 41

Amourous [2016] AATA 40

Barnes [2017] AATA 1385

Brownlie [2017] AATA 2292

CFJX [2016] AATA 207

Crawford [2017] AATA 2191

Glossop [2017] AATA 1166

Kidd [2016] AATA 485

Kidner [2016] AATA 915

Lahiff [2016] AATA 1037

Large [2016] AATA 381

May [2017] AATA 2588

McCool [2017] AATA 1071

Morris [2017] AATA 2165

Murray [2016] FCA 1150

Parkin [2017] AATA 272

Reidlinger [2016] AATA 646

Richwood [2016] AATA 900

Sharp [2016] AATA 719

Sharp [2017] FCA 350

SKVR [2017] AATA 1158

Soul [2017] AATA 2780

Stark [2017] AATA 2583

Tems [2017] AATA 781

Whitney [2016] AATA 586

-S24(2)(b) – genuinely seeking to engage in remunerative work

Crawford [2017] AATA 2191

Pamela Norton as LPR of the late Kenneth Norton [2016] AATA 481

Soul [2017] AATA 2780

-S24(2A) – over 65

-(d) – alone test

Braid [2016] AATA 352

Carnes [2016] AATA 460

Graham [2016] AATA 376

JNGS [2017] AATA 1237

Saxton [2017] FCA 904

-(f) - undertaking last paid work after 65

Ward [2017] AATA 406

-(g) – continuous period of at least 10 years

Clayton [2017] AATA 1546

Golubenko [2017] AATA 885

Hardy [2017] AATA 425

Ralph [2016] FCAFC 89

Saxton [2017] FCA 904

Compensation (MRCA)

Incapacity payments

WFLT and MRCC [2016] AATA 1072

Death

Acute lymphoblastic leukaemia

Browning [2017] AATA 396

Scott [2017] AATA 1

Alzheimer's disease

Kelly [2016] AATA 642

Aortic aneurysm

Wilson [2016] AATA 659

Cardiomyopathy

Humble [2016] AATA 123

Cerebrovascular accident

Blain [2016] AATA 702

Harmer [2017] AATA 655

Ischaemic heart disease

Armstrong [2016] AATA 792

Austen [2016] AATA 923

Duff [2017] AATA 1405

Horwood [2017] AATA 87

Poulton [2017] AATA 566

Malignant neoplasm of the colorectum

Cockram [2017] AATA 2378

Malignant neoplasm of the prostate

Burton [2017] AATA 606

McDonald [2017] AATA 1636

Wynn [2017] AATA 608

Metastatic prostate cancer

Robinson [2016] AATA 7

Osteoarthritis

Davis [2017] AATA 816

Post traumatic stress disorder

Handley [2017] AATA 270

Sepsis

Green [2017] AATA 1355

Entitlement to Disability Pension

Carpal tunnel syndrome

Hunt [2016] AATA 554

Hunt [2017] AATA 697

Cervical spondylosis

Drake [2017] AATA 836

Gall [2017] AATA 397

Chronic irritable cough syndrome

Iliopoulos [2016] FCA 756

Chronic obstructive pulmonary disease

Wallace [2017] AATA 926

Cirrhosis of the liver

Bailey [2017] AATA 1909

Dental caries

Quinn [2017] AATA 2714

Diabetes mellitus

Sheridan [2017] AATA 17

Gastro-oesophageal reflux disease

JNGS [2017] AATA 1237

Hereditary neuropathy with predisposition to pressure palsy

Hunt [2016] AATA 554

Hunt [2017] AATA 697

Hypertension

Kidd [2016] AATA 485

Ischaemic heart disease

Baker [2016] AATA 857

Drake [2017] AATA 836

Lumbar spondylosis

Elton [2016] AATA 479

Perrin [2016] AATA 253

Saltmarsh [2016] AATA 178

Thomas [2016] AATA 902

Zeilinski [2016] AATA 655

Macular degeneration

Whittet [2016] AATA 38

Malignant neoplasm of the prostate

Devenish-Meares [2016] AATA 75

Morbid obesity

Kidd [2016] AATA 485

Multiple sclerosis

Smith [2016] AATA 258

Open-angle glaucoma

Firth [2017] AATA 1591

Osteoarthritis

Derry [2016] AATA 724

Prolapsed intervertebral disc

Westley [2017] AATA 1988

Psychiatric conditions

-Alcohol abuse/dependence/use disorder

-other psychiatric conditions

Voelker [2016] AATA 427

-Anxiety disorder

-category 1A stressor

Visinko [2017] AATA 607

-category 1B stressor

Visinko [2017] AATA 697

-diagnosis

French [2017] AATA 297

-onset within requisite time

Voelker [2016] AATA 427

-Bipolar disorder

-category 2 stressor

Sparks [2016] 793

-Depressive disorder

-category 1A stressor

Elton [2016] AATA 479

Hartland [2016] AATA 452

-category 1B stressor

Hartland [2016] AATA 452

-category 2 stressor

Linwood [2016] FCA 90

Tirris [2016] AATA 272

YZJT [2016] AATA 288

-chronic pain

Tirris [2016] AATA 272

-diagnosis

Roberts [2016] AATA 587

Watson [2016] AATA 408

-Post traumatic stress disorder

-category 1A stressor

Hartland [2016] AATA 452

Sandford [2017] AATA 2038

Stevens [2017] 2419

YZJT [2016] AATA 288

-category 1B stressor

Hartland [2016] AATA 452

Sandford [2016] AATA 2038

YZJT [2016] AATA 288

-diagnosis

Elton [2016] AATA 479

Hansell [2016] AATA 893

McAnally [2016] AATA 1071

Voelker [2016] AATA 427

Watson [2016] AATA 408

-hostile environment

Sandford [2017] AATA 2038

Stevens [2017] AATA 2419

-perception of threat and/or hard to the integrity of the self

Lenz [2017] AATA 783

Psychological condition

-diagnosis

Zielinski [2016] AATA 655

Rotator cuff syndrome

Derry [2016] AATA 724

Drake [2017] AATA 836

Thompson [2016] AATA 462

Sleep apnoea

JNGS [2017] AATA 1237

Smoking

Moffett [2016] AATA 249

Soft tissue sarcoma

Lipke [2017] AATA 2168

Spondylolisthesis

Elton [2016] AATA 479

Saltmarsh [2016] AATA 178

Spondylolysis

Saltmarsh [2016] AATA 178

Thoracic spondylosis

Perren [2016] AATA 253

Wernicke-Korsakoff's syndrome

Phillips [2016] AATA 65

Liability (MRCA)

Irritable bowel condition

Morris and MRCC [2017] AATA 1635

Stark and MRCC [2016] AATA 916

Left wrist injury

Perez-Bedoya and MRCC [2017] AATA 1518

Morton's metatarsalgia

Bailey and MRCC [2016] AATA 415

Psychiatric conditions

Gibson and MRCC [2017] AATA 776

GTSQ and MRCC [2016] AATA 35

Spine conditions

Larter and MRCC [2017] AATA 67

Perez-Bedoya and MRCC [2017] AATA 1518

Reeday and MRCC [2017] AATA 1320

Practice and Procedure

Apprehension of bias

Elton [2016] AATA 260

Date of effect

Linwood [2016] AATA 708

Deledio process

McKinley [2017] AATA 872

Dismissal under s33(1)(a) of the AAT Act

Giger [2017] AATA 1219

Dismissal under s42A(1) of the AAT Act

Gamble [2016] AATA 952

Dismissal under s42B(1) of the AAT Act

Polglaze [2016] AATA 324

Remittances under s42D of the AAT Act

Linwood [2016] AATA 407

S70

McKinley [2017] AATA 872

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