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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 2011 and 2012. It also reports on selected AAT cases concerning five MRCA claims, three remittals from the Federal Court and a case involving "British nuclear test service". The other reported AAT cases follow on from the important Federal Court decisions in *Onorato* and *Connell*.

Katrina Harry, National Registrar

## VRB welcomes new Members

### **Appointment of new part-time Members**

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

#### *New South Wales*

- Mr Frank Brown (Member)
- Ms Elayne Hayes (Member)
- Major Jonathan Hyde (Member)

#### *Queensland*

- Captain Jay Bruce (Retd) (Services Member)
- Brigadier Christopher Hamilton (Services Member)
- Mr Wayne Lynch (Member)
- Colonel Peter Maher (Member)
- Mrs Jennifer Walker (Member)
- Commander Iain Whitehouse (Retd) (Services Member)

#### *South Australia*

- Ms Deborah Morgan (Member)

#### *Victoria*

- Lieutenant Colonel David Collins (Services Member)

## Determinations & allotment in 2011 & 2012

Determinations were made by the Minister for Veterans' Affairs under s5C(1) of the VEA, and in the Minister's capacity as Minister for Defence Science and Personnel under subsections 6(1)(a) or (b) of the MRCA. Please note, some of the Determinations below have been revoked by later Determinations.

### **Military Rehabilitation and Compensation (Warlike Service) Determination 2011 (No. 1)**

This Determination amends the existing list of seven operations referred to in Determination 2010/1, by adding a new operation, Operation Paladin. The references to the other operations in this Determination are identical to those set out previously in Determination 2010/1.

### **Military Rehabilitation and Compensation (Non-warlike Service) Determination 2011 (No. 1)**

This Determination details the fifteen operations which are considered to be non-warlike under the auspices of the Act.

**Veterans' Entitlements (Warlike Service - Operation Paladin) Determination 2011**

This Determination is to declare service with the Australian Defence Force contribution to the UN Truce Supervision Organisation on Operation Paladin as warlike service for the purpose of the Act.

**Veterans' Entitlements (Non-warlike Service - Operation Paladin) Determination 2011**

This Determination is to declare service with the Australian Defence Force contribution to the UN Truce Supervision Organisation on Operation Paladin as non-warlike service for the purpose of the Act.

**Revocation of Determination of Warlike Service – North East Thailand (including Ubon) (25 June 1965 - 31 August 1968)**

Eligibility for the benefits previously associated with the Determination of warlike service are provided through the inclusion of service in North-East Thailand (including Ubon) from and including 25 June 1965 to and including 31 August 1968 in Schedule 2 of the Act, thus granting the personnel concerned qualifying service, effective from 1 July 2010.

**Military Rehabilitation and Compensation (Warlike Service) Determination 2012 (No. 1)**

This Determination amends the existing list of eight operations referred to in Determination 2011/1, by adding a new operation, the ADF contribution to the North Atlantic Treaty Organization (NATO) no-fly-zone and maritime enforcement operation against Libya in 2011. The references to the other operations in this Determination are identical to those set out previously in Determination 2011/1.

**Military Rehabilitation and Compensation (Non-warlike Service) Determination 2012 (No. 1)**

This Determination replaces the previous Determination 2011/1 regarding operations considered to be non-warlike and adds a new operation, the ADF contribution to the North Atlantic Treaty Organization (NATO) no-fly-zone and maritime enforcement operation against Libya in 2011.

**Veterans' Entitlements (Warlike Service - NATO no-fly-zone and maritime enforcement operation against Libya) Determination 2012**

This Determination is to declare service with the ADF contribution to the North Atlantic Treaty Organization (NATO) no-fly-zone and maritime enforcement operation against Libya in 2011 as warlike service for the purpose of the Act.

**Veterans' Entitlements (Non-warlike Service - NATO no-fly-zone and maritime enforcement operation against Libya) Determination 2012**

This Determination is to declare service with the ADF contribution to the North Atlantic Treaty Organization (NATO) no-fly-zone and maritime enforcement operation against Libya in 2011 as non-warlike service for the purpose of the Act.

**Military Rehabilitation and Compensation (Non-warlike Service) Determination 2012 (No. 2)**

This Determination revokes the earlier Determination 2012/1 and includes coverage of the ADF contribution to the United Nations Mission in the Republic of South Sudan in 2011 as part of Operation Aslan.

**Veterans' Entitlements (Non-warlike Service - Operation Aslan) Determination 2012**

This Determination is to declare service with the ADF contribution to the United Nations Mission in the Republic of South Sudan in 2011 as non-warlike service for the purpose of the Act.

**Military Rehabilitation and Compensation (Warlike Service) Determination 2012 (No. 2)**

This Determination replaces the existing list of nine operations referred to in Determination 2012/1, by adding an end date to Operation Slipper with its current area of operations (item 7) and adding a new Operation Slipper with an amended area of operations (item 10). The

reference to the other operations in Determination 2012/1 remains unchanged.

**Military Rehabilitation and Compensation (Non-warlike Service) Determination 2012 (No. 3)**

This Determination revokes the earlier Determination 2012/2 and includes coverage of the ADF operation to assist the Government of Tonga with the restoration of law and order in Tonga in 2006.

**Veterans' Entitlements (Non-warlike Service - Operation Quickstep Tonga) Determination 2012**

This Determination is to declare service with the ADF operation to assist the Government of Tonga with restoration of law and order in Tonga in 2006 as non-warlike service for the purpose of the Act.

**Veterans' Entitlements (Warlike Service - Operation Slipper) Determination 2012**

This Determination is to declare service with the ADF contribution to Operation Slipper as warlike service for the purpose of the Act in an amended operational area.

**Instruments**

Instruments are usually made by the Vice Chief of the Defence Force under subsections s5B(2)(a) or (b) of the VEA or s6D(1) of the VEA.

No Instruments were issued in 2011 and 2012.

## Legislative amendments

### *Extension of Eligibility for British Nuclear Test Participants*

Recent legislative amendments to the *Veterans' Entitlements Act 1986* (the VEA) affect the definition of British nuclear test defence service at the end of s69B and mean that a person rendered **British nuclear test defence service** while the person was a member of the Defence Force if the person satisfies the requirements specified in an instrument under subsection (6).

The relevant instrument is R7/2012.

### *Instrument R7/2012*

This instrument establishes another class of person who is taken to have rendered British nuclear test defence service for the purposes of the VEA.

A person has rendered British nuclear test defence service as a member of the Defence Force if the person was involved in the transport, recovery, maintenance, or cleaning of an aircraft that was contaminated as a result of its use in a nuclear test, conducted in a nuclear test area, during specific periods of time. A copy of the instrument is available on CLIK.

The recent amendments also establish another class of person who is a nuclear test participant for the purposes of the *Australian Participants in British Nuclear Tests (Treatment) Act 2006*.

*British nuclear test defence service – a type of defence service to which the RH standard of proof applies*

Although this category of service eligibility is provided for under part IV of the VEA and under s68 is a type of defence service, it still attracts the reasonable hypothesis/ beyond reasonable doubt standard of proof.

**Please note** section 120 of the VEA provides that where incapacity from injury or disease of a member of the forces, or death of such a member, relates to British nuclear test defence service, the standard of proof to be applied is the **reasonable hypothesis**. For further reading please refer to page 59 of VeRBosity Special Issue 2012.

## VRB Practice Direction

**When is it appropriate to raise the issue of bias of a Board member?**

### *What is bias?*

There are two types of bias: actual and perceived.

### *Actual bias*

Cases of actual bias are rare. Proof of actual bias is onerous. Actual bias is established only if an applicant can prove that a decision maker was actually prejudiced against them, for example, the member had made their mind up before

the hearing and will not change it no matter what the evidence.

### ***Perceived or apprehended bias***

Perceived or apprehended bias is related to whether there has been conduct or some event involving the Board member that means he or she might not bring an impartial mind to the resolution of the question they are required to decide.

For example the Board member may have:

- a social or personal relationship with an applicant, a witness or representative;
- an association or professional relationship, or
- a communication between a witness, the applicant or their representative – or a representative from the Commission.

Where one of the above examples arises it is likely that it will be declared by the Board member and they will advise the parties that they have made a decision to recuse.

### ***What is a decision to recuse?***

If a Board member makes a decision to recuse, that means they will stand aside and will no longer hear the case – because they feel there is a perceived prejudice or conflict of interest. The matter will be listed for a hearing before another Board member, or heard before a quorum of 2 members in some cases.

### ***How do I make an application for a Board member to recuse?***

If you think there is an issue of perceived or apprehended bias in relation to your

matter, then you will need to make an application for the Board member or members to recuse themselves (stand aside) from the hearing.

You will need to make this request at the hearing to the member concerned, but you should also advise the Registrar in your state, in advance, that you will be making the application at the hearing.

In making an application for a member to stand aside you must clearly articulate how it is said that the existence of the relationship, association, communication, interest or particular view might be thought (by a reasonable observer) possibly to divert the Board member from deciding the case on its merits.

### ***How can I find out more?***

If you think there is an issue of perceived or apprehended bias, please ask the staff in your local VRB registry.

The Administrative Review Council has also published a document, “A Guide to Standards of Conduct for Tribunal Members”, which contains more information about bias and is published on their website: [www.arc.ag.gov.au](http://www.arc.ag.gov.au)

The VRB’s Service Charter also sets out the standards of service you can expect from us and how to make a complaint if you are not satisfied with how we have dealt with your case. It is available on our website or you can ask us to send it to you.



## Questions & Answers

### Question:

**Does a member have to render continuous full-time service (CFTS) in order to be covered under the *Military Rehabilitation and Compensation Act 2004* (MRCA) or the *Veterans' Entitlements Act 1986* (VEA)?**

### Answer:

No. This issue is particularly relevant to part-time reservists who have not been deployed on CFTS.

Prior to the introduction of the concepts of non-warlike and warlike service in the mid-1990s, the VEA only provided coverage for reservists who were deployed on CFTS. ADF members were generally required to have rendered CFTS in an operational area to have operational service under the VEA.

However, warlike and non-warlike service under the VEA and MRCA do not require an ADF member to have rendered CFTS. The definition in s6F of the VEA of *operational service - warlike and non-warlike service* does not stipulate that a member must have rendered CFTS. The definitions of a *veteran* in s5C and *eligible war service* in s7 of the VEA do not require a member to have rendered CFTS if their

eligibility is via warlike or non-warlike service. Under s5 of the MRCA, *Defence Force* means the Permanent Forces and the Reserves (either part-time or continuous full-time reservists). Section 6 of the MRCA characterises service with the Defence Force as either warlike, non-warlike and peacetime service, and no distinction is made between part-time service and CFTS.

### Question:

**Does a member who was conscripted under the *National Service Act 1951* as amended, have any coverage under the VEA?**

### Answer:

Yes, in accordance with s69(1)(f)(ii) of the VEA.

For conscripts who completed their service after 6 December 1972, the period of service after that date is eligible 'defence service' provided they completed the period for which they were engaged to service or for which they were appointed.

If a conscript's service was terminated after 6 December 1972 and before the period for which they were engaged or appointed on the grounds of invalidity or physical or mental incapacity to perform, that part of their service from 7 December 1972 until their discharge is taken to be 'defence service'.

# VRB Case Note

**(No. 3) Connection to service under the provision of the *Military Rehabilitation and Compensation Act 2004* (the MRCA)**

## The issue

The substantive issue for determination was the connection of the injury to defence service.

## The Applicant's position

The Applicant contended the injury occurred during his annual physical fitness test he was required to undertake as part of service requirements. The Applicant contended that but for the requirements of the physical fitness test, he would not do sit ups or push ups, he trained during working hours, but on many occasions out of normal working hours as the pressure of work did not allow sufficient time to maintain the required level of fitness. He stated the RAAF was vigilant in ensuring all personnel undertook the required fitness tests.

## The relevant legislation

### *Standard of proof*

The Board noted the applicable standard of proof for peacetime service as set out in section 335(3) of the MRCA means that the Board must be reasonably satisfied there is a connection between the applicant's peacetime service and the claimed condition.

### *Connection to service*

The Board noted that for liability to be accepted the injury or disease must be a 'service injury' or 'service disease'.

Section 27 of the MRCA provides that a persons claimed condition is a service injury or a service disease if it:

- (a) resulted from an occurrence that happened while the person was a member rendering defence service;
- (b) arose out of or was attributable to any defence service rendered by the person while a member;
- (c) was due to an accident that would not have occurred, or a disease that would not have been contracted, but for the person having rendered defence service while a member, or changes to the person's environment



consequent upon the person having rendered defence service while a member;

(d) was contributed to in a material degree or was aggravated by any defence service rendered by the person while a member after the person sustained the injury or contracted the disease; or

(e) resulted from an accident that occurred while the person was travelling, while a member rendering peacetime service but otherwise than in the course of duty, on a journey to a place for the purpose of performing duty, or away from a place of duty upon having ceased to perform duty.

Section 30 of the MRCA provides that an injury sustained or a disease contacted is a service injury if;

(a) the injury or disease:

(i) was sustained or contacted while the member was rendering defence service, but did not arise out of that service; or

(ii) was sustained or a disease contracted before the commencement of defence

service, but not while the person was rendering defence service; and

(b) in the opinion of the Commission, a sign or symptom of the injury or disease was contributed to in a material degree by, or was aggravated by, any defence service rendered by the person while a member after he or she sustained the injury or contracted the disease.

The Board noted sections 339 and 341 of the MRCA require the Board to determine matters to its reasonable satisfaction in accordance with the current Statements of Principles (SoPs) relevant to the claim.

### **The Board's consideration**

The Board noted the delegate determined that the applicant was serving as a Reservist, was "off duty" at the time of the injury and not rendering defence service or performing a defence related activity. The delegate relied upon Defence Instruction (General) Personnel 14-2 to support the view that the injury was not covered for compensation under the MRCA.

The Board considered the applicability of this Defence Instruction (General) Personnel 14-2. The instruction is headed "Australian Defence Force Policy on Sport" and noted the definition of sport being *"an activity that involves physical exertion and skill that is governed by a set of rules or customs in a structured, competitive environment, where participants are provided with a team and or personal challenge."*

The Board noted it had difficulty finding that individual personal fitness training for the purposes of passing a fitness test could fall under the definition of sport as quoted.

The Board was of the view that the use of the instruction by the delegate to deny liability for an injury sustained in individual fitness training conducted in order to pass a mandatory fitness test is to misconstrue the purpose and effect of the wording of the policy.

Further the Board considered that the use of policy to deny a liability created under the MRCA, an Act of Parliament was not a proper exercise of administrative power. The Board's view was that any decision to deny liability under the MRCA should be based on the

provisions of the legislation, not policy such as Defence instructions.

The Board also considered the test set out in *Roncevich and Repatriation Commission* [2005] 222CLR 115. In *Roncevich* the High Court held that the relevant question is whether the injury arose out of, or was attributable to any defence service. The Court went on to state at 22 that for activity to be related to defence service:

Depends upon such matters as the nature of the person's employment, the circumstances in which it is undertaken, and what, in consequence the person is required or expected to do to carry out the actual duties. The connection must however be a causal and not merely a temporal one.

The Board looked at two factual scenarios. The first being that the injury was sustained during an annual physical fitness test.

In these circumstances the Board was reasonably satisfied that the claimant was "on duty" and was therefore covered for any injury sustained by the MRCA.

The second scenario was that the injury was sustained while undertaking individual fitness training for the PFT at home.

Using the test in *Roncevich* the Board was of the view that the conduct of personal fitness training with a view to passing a required physical fitness test must constitute a sufficient connection with defence service to create a liability under the MRCA.

Having found a connection with defence service, the Board turned to consider the relevant SoP. The Board was reasonably satisfied there was medical evidence to support a diagnosis of the claimed condition and the Board was of the view that based on the evidence that the relevant SoP upheld the claimant's contention that his condition was connected with his defence service.

Because the Board was reasonably satisfied that the material before it raised a connection between the claimant's condition and his peacetime service, liability was accepted as a condition being related to the claimant's peacetime service.

# Administrative Appeals Tribunal

## Doherty and Military Rehabilitation and Compensation Commission

M D Allen, Senior Member

[2011] AATA 234  
8 April 2011

***Applicant's degree of whole person impairment and impairment points not in issue. The dispute concerns the actual amount of compensation payable to the Applicant***

### Facts

Mr Doherty sought review of a decision of the Military Rehabilitation & Compensation Commission (MRCC) dated 12 March 2009. This decision considered the degree of permanent impairment for the compensable conditions of:

- Aggravation of osteoarthritis – left knee;
- Aggravation of internal derangement – left knee;
- Tear of supraspinatus tendon – left shoulder;

- Anterior labral tear – left shoulder; and
- Infraspinatus and subscapularis tendinosis – left shoulder.

It was determined that the Applicant suffered a permanent impairment as a result of these conditions and the degree of impairment was 26 points with a lifestyle rating of 2.

### Issues before the Tribunal

The issue to be determined by the Tribunal was:

- The actual amount of compensation payable to the Applicant

### The Tribunal's consideration

*Interpretation of S68 of the Military Rehabilitation and Compensation Act 2004 (MRCA) and S13 of the Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004 (CTPA)*

The Tribunal noted that as pointed out in *James v Military Rehabilitation and Compensation Commission* (2010) 186 FCR 134, the MRCA and the CTPA should be read as one.

The Tribunal further noted S67 of the MRCA allows the MRCC to determine a guide for assessing impairment. Chapter 25 of the Guide (namely the Guide to Determining Impairment and Compensation; being Statutory Instrument M9 of 2005) provides:

This Chapter deals with situations where an injury or disease (**the condition**) has been accepted under the VEA or the SRCA before a claim is made under the MRCA. The claim under the MRCA may be for a new condition unrelated to the first or for an aggravation of the pre-existing condition. The method to deal with amounts of compensation already paid for the condition and the amount due under the MRCA now or later is described below.

Chapter 25 of the Guide then adds:

A claim made under section 319 of the MRCA may result in liability for an injury or disease being accepted and compensation payable. Where a person entitled to a payment under MRCA in respect of permanent impairment was or is paid a lump sum for permanent impairment under the SRCA or liability for a condition accepted under

the SRCA the combined impairment must be determined under the MRCA using this Guide. An accepted liability under the SRCA is referred to as **the old injury or disease**.

...

The impairment resulting from any **old injury or disease** must be determined using this Guide as at the date of MRCA determination. The points so derived for **the old injury or disease** must then be combined using the combined impairment table to determine the overall impairment assessment for the purpose of the MRCA.

...

The SRCA lump sum converted to a period payment, is subtracted from the MRCA periodic payment to get the net MRCA periodic payment"

The Tribunal noted what the Full Federal Court said in *James*, and that there was no doubt that the introduction of the provisions of Chapter 25 of the Guide was not beyond the real exercise of power conferred by the CTPA. The Tribunal considered the respondent

had applied chapter 25 of the Guide to impairment as it was required to do pursuant to S13 of the CTPA.

### Formal decision

The Tribunal affirmed the decisions under review.



### Editorial note

This matter was heard on the papers, the Tribunal stated at the outset that it would have been materially assisted by oral argument from both parties.

The decision of James and MRCC [2010] FCAFC 95 is discussed in detail in at page 56 in Volume 26 of *VeRBosity*.

For further reading on permanent impairment compensation, incapacity payments and liability claims please see *VeRBosity* Special Issue 2012, Chapters 14-15.

**Hubbard and Military  
Rehabilitation and Compensation  
Commission**

M D Allen, Senior Member  
Dr T K Austin, Member

[2011] AATA 603  
31 August 2011

***Pay-related allowance - Naval  
Capability Allowance - meaning of  
normal earnings and actual  
earnings for members of the ADF***

**Facts**

Mr Hubbard enlisted in the Royal Australian Navy in 1998 and is still serving. In 2007 he claimed compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA). A delegate of the Military Rehabilitation and Compensation Commission (MRCC) accepted liability for the diseases described as “major depression and alcohol abuse/depression”.

In 2009 Mr Hubbard sought compensation for loss of naval capacity allowance. His claim was rejected and he

sought review by the Administrative Appeals Tribunal (the Tribunal).

**Issues before the Tribunal**

The issue to be determined by the Tribunal was whether Mr Hubbard was entitled to payment of naval capacity allowance.

**The Tribunal’s consideration**

Firstly, the Tribunal noted that the payment of naval capacity allowance is made pursuant to a determination by the Defence Force Remuneration Tribunal under section 58H of the *Defence Act* 1903, being Determination No.9 of 2008.

The Tribunal set out the relevant provisions of the MRCA concerning incapacity payments. Section 85 gives full-time members an entitlement to compensation where the Commission has accepted liability for the injury or disease, and the member has made a claim for compensation. The amount of compensation a member receives for a week is worked out under section 89, and

depends on the difference between the member's normal and actual earnings for the week. Section 91 sets out the formula for normal earnings for a week for a full-time member, which is the member's normal ADF pay for the week plus the member's normal pay-related allowances for the week. Section 92 sets out the formula for actual earnings for a week for a full-time member, which is the member's actual ADF pay for the week plus the member's actual pay-related allowances for the week. The term "pay-related allowance" is defined in section 5 to mean an allowance specified in a determination under section 11, which states:

- (1) The Defence Minister must make a written determination specifying which allowances that are paid under a determination made under section 58B or 58H of the *Defence Act 1903* are pay-related allowances for the purpose of this Act.

...

The representative for the Commission informed the Tribunal that no determination had been made by the

Defence Minister specifying that the naval capability allowance is a pay-related allowance for the purposes of the MRCA. Therefore, the Tribunal concluded the naval capability allowance could not form part of Mr Hubbard's pay-related allowances for the purpose of determining his actual earnings for compensation purposes.

### Formal decision

The Tribunal affirmed the decision under review.



### Editorial note

In passing, the Tribunal drew attention to the injustice suffered by Mr Hubbard, as he did all he could to qualify for the allowance but one month before the expiration of the period of 18 months, when he would have received a payment of \$12,000, he was injured during the course of his defence service. The Tribunal noted his injuries have been accepted under the MRCA.

**Roberts and Military Rehabilitation  
and Compensation Commission**

Mr R G Kenny, Senior Member  
Dr G J Maynard, Brigadier (Rtd), Member

[2011] AATA 835  
25 November 2011

***Claim for acceptance of liability of  
osteoarthritis left hip and major  
depressive disorder - application  
of Statement of Principles -  
claimed conditions not caused by  
service - no aggravation of the  
conditions by service***

**Facts**

Mr Roberts served in the Australian Regular Army from 8 January 2007 until 23 September 2008. He claimed compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA). A delegate of the Military Rehabilitation and Compensation Commission (MRCC) rejected his claims for aggravation of left hip osteoarthritis and major depressive disorder. On reconsideration by the MRCC, the decision was affirmed, and Mr Roberts sought further review by the Administrative Appeals Tribunal (the Tribunal).

**Issues before the Tribunal**

Mr Roberts rendered peacetime service under the MRCA, so the decision concerning liability was to be made to the Tribunal's reasonable satisfaction. The Tribunal could only accept liability if a relevant Statement of Principles (SoP) upheld Mr Robert's contention that the claimed condition was, on the balance of probabilities, connected with that service. The Tribunal identified the relevant SoPs for major depressive disorder and hip osteoarthritis.

**The Tribunal's consideration**

*Osteoarthritis Left hip*

The medical evidence was that Mr Roberts' osteoarthritis pre-dated his service and was aggravated by it, so the Tribunal considered the relevant SoP factors were:

- disordered joint mechanics of the hip for a stated period before the clinical worsening of osteoarthritis in that joint;
- lifting of loads of at least 35 kilograms while bearing weight



through the affected joint to a cumulative total of at least 168,000 kilograms within any 10 year period before the clinical worsening of osteoarthritis in that joint;

- being overweight for at least 10 years before the clinical worsening of osteoarthritis in that joint; or having a waist to hip circumference ratio exceeding 1.0 for at least 10 years before the clinical worsening of the hip osteoarthritis, or in the earlier SoP - being obese for at least ten years within the twenty-five years before the clinical worsening of the osteoarthritis.

Although Mr Roberts had a congenital hip condition, there was no evidence before the Tribunal that it satisfied the definition of disordered joint mechanics. Mr Roberts provided evidence regarding his lifting and weight bearing activities during his service, however from the date of enlistment to the date of clinical worsening of left hip osteoarthritis his lifting responsibilities were well below the threshold required in the SoP. In

terms of SoP definitions of being overweight or obese, the Tribunal was satisfied that Mr Roberts was already in excess of the relevant weight limits at enlistment and subsequent readings above the 25/30 BMI thresholds were not related to his service. Therefore, the SoP requirements were not met.

#### *Depressive disorder*

The Tribunal accepted that the clinical onset of major depressive disorder was in 2007, and went on to consider the following SoP factors:

- experiencing a category 1B stressor within the two years before the clinical onset of depressive disorder;
- being the victim of severe childhood abuse within the 30 years before the clinical onset of depressive disorder;
- experiencing a category 2 stressor within the six months before the clinical onset of depressive disorder;
- chronic pain of at least six months duration at the time of the clinical onset of depressive disorder.

Reference was made to Mr Roberts having seen his father's body at the time of his funeral, however this matter did not have any relationship to Mr Roberts' service so the Tribunal was satisfied it was not a relevant category 1B stressor. Similarly, the factor relating to severe childhood abuse did not have any relationship to service. Bullying and harassment during Mr Roberts' service was raised as a category 2 stressor, however, the Tribunal was satisfied that the SoP reference to bullying was not made out on the evidence before it. The Tribunal also considered whether Mr Roberts met the chronic pain factor, but it was satisfied the factor was not made out. None of the SoP factors were met in Mr Roberts' case.

### Formal decision

The Tribunal affirmed the decision under review.

### Bayford and Repatriation Commission

G. D. Freeman, Senior Member

[2011] AATA 913  
20 December 2011

### ***Special rate of pension - whether incapacity from war-caused injuries alone prevented the veteran from undertaking remunerative work - whether loss of salary or wages or earnings of own account***

#### Facts

Mr Bayford was receiving disability pension at 80 per cent of the general rate, and sought the special rate of pension.

#### Issues before the Tribunal

The issue for determination was whether Mr Bayford satisfied s24(1)(c) of the Act:

whether he is prevented from continuing to undertake remunerative work that he was undertaking; and whether he has suffered a loss of salary or wages or earning on his own account that he would not be suffering if he were free of his accepted conditions.

**The Tribunal's consideration**

The Tribunal set out the test in s24(1)(c) as described by the Full Federal Court in *Flentjar v Repatriation Commission* [1997] FCA 1200:

- (1) What was the relevant "remunerative work that the veteran was undertaking" within the meaning of s 24(1)(c) of the Act?
- (2) Is the veteran, by reason of war caused injury or war caused disease, or both, prevented from continuing to undertake that work?
- (3) If the answer to question 2 is yes, is the war caused injury or war caused disease, or both, the only factor or factors preventing the veteran from continuing to undertake that work?
- (4) If the answer to questions 2 and 3 are, in each case, yes, is the veteran by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that he would not be suffering if he were free of that incapacity?

In answer to the first question, the relevant "remunerative work that Mr

Bayford was undertaking" was as a book keeper.

The Tribunal went on to find that Mr Bayford was, by reason of his accepted condition chronic adjustment disorder (unspecified), prevented from continuing to undertake that work. He was only able to sleep for about four hours at night, leading to concentration and memory problems, and falling asleep at work. Mr Bayford indicated that he reduced his working hours to about 18 per week in 2006. He resigned in 2009 when he could not cope with even the reduced hours and felt he had no option but to cease work.

Turning to question 3, the Tribunal found that Mr Bayford's accepted conditions were the only factors preventing him from continuing to perform the type of work he was undertaking.

The Tribunal also found that the answer to question 4 was yes. Mr Bayford and

his wife continued to be directors of their book keeping business, although his wife had recently retired and the company was soon to be wound up. Mr Bayford had continued to receive income from the company through dividends but not from his personal exertion. Since ceasing work in 2009 he had performed minor tasks for the company such as preparing Business Activity Statements and helping to prepare financial statements for the accountant, but had not received remuneration for these activities.

Applying the Federal Court's decision in *Counsel v Repatriation Commission* [2002] FCAFC 2001, where the Court held that the appellant had suffered a loss of earnings because he no longer had access to the cash flow or earnings of his business, the Tribunal in the present case found that since Mr Bayford had ceased work in 2009 he had lost access to an income stream that he previously derived from his personal exertion. Looking at the dividends Mr Bayford had received from 2009 to 2011 meaning that his income remained unchanged, the

Tribunal applied the principle in *Re Fahey and Repatriation Commission* [1986] AATA 244 that the question is not one of loss of income. The Tribunal did not believe that the remuneration received from dividends paid by the company represented earnings resulting from Mr Bayford's personal exertion, as was the situation in *Re Jones and Repatriation Commission* [2011] AATA 631.

Therefore, the test in *Flentjar* was satisfied and the Tribunal found that Mr Bayford satisfied s24(1)(c) of the Act and met the criteria for the special rate of pension.

#### **Formal decision**

The Tribunal set aside the decision under review and substituted a decision that Mr Bayford was eligible to receive disability pension at the special rate.



#### **Editorial note**

When considering question 4 in *Flentjar*, the Tribunal referred to

*Repatriation Commission v Connell* [2011] FCAFC 116, where the Full Federal Court stated:

...Being able to perform work without restriction because of illness or injury is a situation far removed from being able to perform the same work, but with restrictions due to illness or injury. Each is remunerative work of the same type, in this case, painting. But it is not the same remunerative work considering the nature and quality of the work. If one is performing full-time work without any health related restrictions that reduce one's hours on account of such restrictions it cannot be sensibly said that the later work is a continuation of the work previously undertaken. It is of an entirely different nature and quality, although identical in terms of describing the relevant occupation.

In the present case, Mr Bayford reduced his hours to 18 per week in 2006 due to his accepted condition of chronic adjustment disorder (unspecified), and then ceased work in 2009. Following the reasoning in *Connell*, although his remunerative work was of the same type, that is book keeping, it was not the same

remunerative work considering the nature and quality of the work. In *Connell* the Commission had argued that the applicant could not satisfy s23(1)(c) because he continued to undertake the same remunerative work that he was undertaking before he suffered a loss of earnings by reason of his incapacity.

**Steegstra and Military  
Rehabilitation and Compensation  
Commission**

Deputy President P E Hack SC

[2012] AATA 12  
13 January 2012

***Claim for acceptance of liability of  
right knee injury - whether injury  
attributable to defence service -  
lack of evidence of circumstances  
of injury***

**Facts**

Mr Steegstra served in the Royal Australian Air Force between October 2002 and October 2008. He claimed compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA). A delegate of the Military Rehabilitation and Compensation Commission (MRCC) rejected his claim

in relation to his right knee injury. On reconsideration by the MRCC, the decision was affirmed, and Mr Steegstra sought further review by the Administrative Appeals Tribunal (the Tribunal).

### **Issues before the Tribunal**

The issue to be determined was whether the injury sustained by Mr Steegstra was a “service injury” as defined in section 27 of the MRCA under the “occurrence” or “arose out of, or attributable to” provisions. It was common ground that Mr Steegstra’s service with the RAAF was defence service. The Tribunal indicated the connection between the claimed injury and the rendering of service was to be tested by reference to the applicable Statement of Principles concerning acute sprain and strain.

### **The Tribunal’s consideration**

The Tribunal set out the relevant history of injury to Mr Steegstra’s right knee. He was a live-in member at the RAAF Base, Richmond. Mr Steegstra’s case was that

on 27 October 2005 a little before 7.30am when he was due at assembly, he was walking down stairs from his quarters when he slipped and hurt his right knee. As Mr Steegstra suffered great pain and his knee was swelling, he attended the base hospital for treatment and was provided with crutches and an elastic knee cover. When he presented at work, he “was awarded a day or two off duty”. Mr Steegstra contended that the next relevant event occurred on 31 October 2005, when he slipped in the shower area and hurt his right knee. He attended the base hospital, and the medical records referred to Mr Steegstra having “a known tear of his [posterior cruciate ligament]” which had been “reinjured last week whilst walking down stairs backwards”. There was no reference to him attending using crutches or being prescribed crutches, or being given any time off, although Mr Steegstra said he was given five days sick leave.

The Tribunal stated there was considerable cause to doubt the reliability of Mr Steegstra’s account of

two separate falls on 27 and 31 October, as there were no leave records for time off duty on either occasion, and his account was contradicted by the contemporaneous medical records. There was also no reference to the earlier fall in two earlier statements by Mr Steegstra, or to the orthopaedic surgeons he saw for the purposes of a medico-legal opinion. The earlier fall was only referred to in a third later statement by Mr Steegstra, and the Tribunal was not satisfied this account was accurate. The Tribunal did not accept evidence from a witness who saw Mr Steegstra at work in late October 2005 on crutches, as Mr Steegstra said he did not return to work after the fall on 27 October 2005. The Tribunal was not satisfied Mr Steegstra's injury was sustained in the circumstances he described. The Tribunal considered the alternate case that a fall occurred some days prior to 31 October 2005, as described in his medical records. However, the Tribunal was not satisfied it was related to Mr Steegstra's defence service. There was no acceptable evidence of the circumstances under which he was "walking downstairs

backwards", and no evidence he did not engage in any non-service activities in the relevant period. Therefore, the Tribunal was not prepared to infer it must have been an "occurrence" that happened whilst Mr Steegstra was rendering defence service or that the injury "arose out of, or was attributable to" his defence service.

### Formal decision

The Tribunal affirmed the decision under review.

### Bull and Repatriation Commission

Mr M Denovan, Member

[2012] AATA 29  
20 January 2012

***Special rate - ameliorating provision not applicable as the veteran not actively and genuinely attempting to gain remunerative work - service caused conditions alone have not prevented veteran from gaining remunerative work***

### Facts

Mr Bull served in the Australian Army from 1987 to 1994. He was medically

discharged due to back pain associated with a prolapsed disc, which had been diagnosed and treated in 1991. Lumbar spondylosis was later accepted as a service related condition.

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

### **Issues before the Tribunal**

The main issue for determination was whether Mr Bull satisfied the "alone test" in s24(1)(c).

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

The Commission submitted that when considering s24(1)(c), the Tribunal should follow the guideline set out in *Flentjar v Repatriation Commission* [1997] FCA 1200.

The applicant submitted that the questions in *Flentjar* did not apply to all matters and did not apply when deciding whether Mr Bull was entitled to special rate, referring to the decision of the Full Federal Court in *Repatriation Commission v Connell* [2011] FCAFC 116.

The Tribunal considered that the principles from *Connell*, which dealt with the intermediate rate of pension, do apply to s24(1)(c). In *Connell*, the Full Federal Court stated that "*Flentjar does not set out a template of questions which are required to be considered in every case involving the interpretation of s23(1)(c) or s24(1)(c).*" The Tribunal considered in the event that the *Flentjar* proforma makes it more difficult for a veteran to meet the criteria for special rate that would otherwise be the case, the Commission must provide a cogent reason for applying that proforma. The Commission did not advance any cogent reason as to why the present case was so similar to the facts in *Flentjar* that the Tribunal should apply the template, so the Tribunal agreed with the applicant that it would not be appropriate to use the template.

The Tribunal went on to consider what 'remunerative work' Mr Bull was undertaking. The Tribunal found that it was Mr Bull's work serving as a trooper in the Australian Army which equated to an unskilled labourer in civilian life, as none of his attempts at work following discharge could be regarded as



remunerative work for the purposes of the Act.

Next, the Tribunal considered whether Mr Bull, by reason of his service caused medical conditions alone, was prevented from continuing to undertake the remunerative work that he was undertaking. The Tribunal noted the Full Federal Court in *Repatriation Commission v Hendy* [2002] FCAFC 424 stated:

The decision-maker is required to take into account any factor that plays a part or contributes to a veteran being prevented from continuing to engage in remunerative work. If a period of time elapses after a veteran ceases remunerative work, and before the commencement of the assessment period, lack of recent work experience, time out of the workforce and increasing age will be relevant for consideration under s 24(1)(c) of the Act. The decision-maker is required to consider the effect, contribution to, and relative weight to be attached to any or all of those factors during the assessment period.

The Tribunal rejected the Commission's submission that family matters (his marital separation and associated Family Court matters) were factors that prevented Mr Bull from continuing to undertake remunerative work that he was previously undertaking.

He had a number of non-service caused back and neck conditions, however there was insufficient evidence before the Tribunal as to whether those conditions caused any functional impairment. However, the Tribunal did not accept that Mr Bull's lack of fitness (as a result of a long convalescence due to back pain) and lumbar spondylosis alone prevented him from continuing to engage in remunerative work. Mr Bull's disability pension rating at 50% of the general rate after he was discharged from the Army was consistent with a finding that he was not prevented from continuing to engage in remunerative work after his discharge. The medical evidence indicated Mr Bull was managing quite well until 2009. Given that Mr Bull has not worked for more than 17 years, the Tribunal considered the very length of time out of the workforce, his very little work experience in adult life, very few skills

and no qualifications other than a high school certificate were the main reasons he was prevented from continuing to undertake remunerative work. Therefore, service caused conditions alone had not prevented Mr Bull from working during the assessment period.

### Formal decision

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



### Editorial note

In this case, the Tribunal followed *Connell* and did not apply the template of questions set out in *Flentjar* to its consideration of s24(1)(c). Instead, the Tribunal firstly examined what ‘remunerative work’ the veteran was undertaking, before it went on to determine whether the veteran was, by reason of his service caused medical conditions alone, prevented from continuing to undertake the remunerative work that he was undertaking. As the Tribunal concluded the ‘alone’ test was not met, it was not necessary to look at whether the veteran had suffered a loss of earnings.

### Sandry and Repatriation Commission

Ms J L Redfern, Senior Member  
Dr I Alexander, Member

[2012] AATA 71  
9 February 2012

***War widow's pension claim - whether cirrhosis caused by hepatitis virus - onus of proof in relation to diagnosis of hepatitis***

### Facts

Mr Sandry served in the Royal Australian Air Force from 18 February 1944 to 23 November 1963. He rendered eligible service during World War II and operational service from September 1954 to April 1955. Mr Sandry died in 1969 at the age of 43 from cirrhosis of the liver.

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

### Issues before the Tribunal

The Tribunal was required to consider whether Mr Sandry's death was war-caused.

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**The applicant's position**

The hypothesis advanced by Mrs Sandry was that her late husband developed cirrhosis of the liver as a result of chronic infection with the hepatitis B or C virus, which he contracted while being treated in hospital in Japan with an infected toe during his operational service. There was no dispute that Mr Sandry had been in hospital in Japan with an infected toe and had been treated with penicillin and dressings.

In the Statement of Principles concerning cirrhosis of the liver, the relevant SoP factors were having chronic infection with the hepatitis B virus before the clinical onset of cirrhosis of the liver, or having chronic infection with the hepatitis C virus before the clinical onset of cirrhosis of the liver. The Commission contended that the Statements of Principles concerning hepatitis B or hepatitis C were also relevant, and the applicant needed to establish one or other of these diagnoses by reference to the SoPs. The applicable SoP factor was having been exposed to the hepatitis B or C virus before the clinical onset of hepatitis B or C as the case may be.

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**The Tribunal's consideration**

The Tribunal considered it was fundamental to the hypothesis and the SoPs that Mr Sandry was exposed to and/or contracted hepatitis B or C while he was in hospital in Japan. The Tribunal followed the four-step process set out in *Deledio*. The first step was to consider all the material and determine whether there was material pointing to a hypothesis connecting Mr Sandry's death with his war service. The hypothesis was that Mr Sandry contracted hepatitis B or C while he was being treated in hospital in Japan, and was based on the applicant's expert's opinion that it was likely that Mr Sandry would have been given antibiotics by intravenous injection, and it was possible he may have been given an injection with a poorly sterilised needle (due to the lack of understanding at the time about these matters). Therefore, it was possible that he was exposed to hepatitis B or C at this time and contracted hepatitis B or C as a result of this exposure. This was said to be a reasonable hypothesis given the expert's opinion that alcoholic liver disease was unlikely and there was no other factor to explain Mr Sandry's death by cirrhosis of the liver at such a young age.

The Tribunal posed the question of whether it must first form a view about the diagnosis of hepatitis to its “reasonable satisfaction” before this analysis could be undertaken. The Tribunal referred to the Federal Court’s approach to this issue in *Onorato v Repatriation Commission* [2011] FCA 1507. The Tribunal in the present case stated:

Once the Tribunal determined the kind of death to its reasonable satisfaction, s 120(4) was exhausted and the reverse onus of proof applied to the question of whether the death was war caused (at [42]).

In *Onorato*, as in this matter, the kind of death is not in dispute. This being the case, and following the reasoning of Katzman J, it is not appropriate to decide the issue of whether Mr Sandry was exposed to or contracted hepatitis B or C to our reasonable satisfaction but rather by reference to the process set out in *Deledio*.

After consideration of the relevant case law, the Tribunal indicated:

In summary, the Tribunal must consider all the material and form an opinion about whether that material points to a reasonable hypothesis. The

hypothesis will be reasonable if it is consistent with the relevant SoP and the material points to one or more of the factors in the SoP. In forming this opinion, it is permissible for the Tribunal to make an assessment about the material and whether it is fanciful, tenuous or too remote but it is not permissible for the Tribunal to reject an hypothesis as unreasonable on the basis that it cannot be proved on the balance of probabilities. If the hypothesis is consistent with the relevant SoP, it could not be said to be “fanciful”.

The Tribunal formed the view that the available material did not raise a reasonable hypothesis connecting the relevant factors in the Statement of Principles concerning cirrhosis of the liver with the circumstances of Mr Sandry’s service. There was no material to point to any basis for the expert’s opinion that Mr Sandry was “likely” to have been injected with antibiotics. On the assumption that he did receive injections in hospital, there was no material to point to any basis for the opinion that he was “possibly” injected with a poorly sterilised needle or that he was exposed to the hepatitis B or C virus.

Finally, there was no material to point to any basis for the opinion that Mr Sandry contracted hepatitis B or C. As these were essential elements of the hypothesis and the relevant factors in the SoP, the Tribunal concluded the opinion, and therefore the hypothesis, was speculative and tenuous. The Tribunal was not satisfied that the material pointed to the hypothesis as fitting the template of the relevant SoPs.

### Formal decision

The Tribunal affirmed the decision under review.



### Editorial note

Following the Federal Court's decision in *Onorato*, the Tribunal did not first need to decide the issue of whether Mr Sandry was exposed to or contracted hepatitis B or C to its reasonable satisfaction but rather by reference to the process set out in *Deledio*. The applicant's claim ultimately failed at the first step of *Deledio*.

### Jordan and Repatriation Commission

R G Kenny, Senior Member

[2012] AATA 292

15 May 2012

### ***Whether applicant rendered British nuclear test defence service under s69B of the Veterans' Entitlements Act***

### Facts

Mr Jordan served with the Royal Australian Navy from 12 September 1951 to 10 September 1957. He lodged a claim with the Commission on 22 October 2010 for malignant neoplasm of the colorectum, malignant melanoma of the skin and pleural plaque. On 1 December 2010 the Commission rejected that claim and on 22 June 2011 the Veterans' Review Board affirmed that decision.

### Issues before the Tribunal

The issue to be determined by the Tribunal was:

- Whether Mr Jordan's RAN service included eligible service in the form of "British nuclear test defence service".

### The Tribunal's Consideration

It was submitted on behalf of Mr Jordan that on 5 September 1956 and 30 August 1956 while serving on HMAS Cootamundra he rendered British nuclear test defence service.

On the first of those dates a 44 gallon drum containing radio active waste material was taken on board the Cootamundra in Sydney, taken to sea and dropped overboard some 100 miles from the coast. It was then submitted that the waste material had been produced in British Government nuclear tests in Australia in the 1950's.

In relation to the second date, he submitted that Mr Jordan was exposed to further radio active material on board the Cootamundra when two scientists joined the vessel and conducted experiments at sea using radio active isotope carbon – 14.

The Tribunal noted there was no dispute concerning the dates of Mr Jordan's service or the events described. However, the Tribunal noted that the claim would be rejected on timing.

Noting the provisions of s69B(3) and the three periods within which eligibility

may be established. The relevant periods are:

- 3 October 1952 to 19 July 1956
- 15 October 1953 to 25 November 1953
- 27 September 1956 to 30 May 1963.

Neither 5 September 1956 or 30 August 1956 fall within these periods prescribed by s69B(3).

### Formal decision

The Tribunal affirmed the decision under review.



### Editorial note

Please refer to updates on BNT service on page 5 of this edition of VerBosity.

**Stransky and Military  
Rehabilitation and Compensation**

Senior Member J F Toohey

Dr W Isles

[2012] AATA 403

29 June 2012

***Claim for acceptance of liability of  
presbyopia - applicant developed  
blurred vision following general  
anaesthetic - inability to obtain  
appropriate clinical management -  
whether unintended consequence  
of treatment***

**Facts**

Ms Stransky served in the Australian Regular Army from January 1984 until August 2009. She claimed compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA). A delegate of the Military Rehabilitation and Compensation Commission (MRCC) rejected Ms Stransky's claim for presbyopia, which she contended was caused by long years of work at computers and aggravated by general anaesthetic when she underwent an operation paid for by the Commonwealth in October 2008.

**Issues before the Tribunal**

There was no dispute that Ms Stransky suffered from presbyopia. The issue to be determined was whether the MRCC was liable to compensate her for her condition.

**The Tribunal's consideration**

The Tribunal set out the provisions of the MRCA to be considered. Under s23(1)(a) the MRCC must accept liability for a service injury or disease under s27. Section 27(d) relevantly provides that an injury or disease is a service injury or disease if it was contributed to in a material degree by, or was aggravated by, any defence service rendered by the person while a member after sustaining the injury or contracting the disease.

Under s23(2)(a), the MRCC must accept liability for a service injury or disease under s29 arising from treatment provided by the Commonwealth. Section 29(2)(b) relevantly provides that an injury or disease is a service injury or disease if a person receives treatment for

an earlier non-service injury or disease, and as an unintended consequence of that treatment the injury or disease, or a sign or symptom of it, is aggravated by the treatment.

ophthalmologist. Expert evidence from an ophthalmologist was that the delay in referral and the fact she saw an optometrist had no bearing on her presbyopia. Therefore, the SoP factor was not met.

Looking at the definitions of injury and disease in section 5, the Tribunal considered Ms Stransky's presbyopia was a disease, and accepted she suffered a temporary aggravation of her presbyopia following the general anaesthetic in October 2008. The standard of proof was reasonable satisfaction, as Ms Stransky had peacetime service.

In terms of whether Ms Stransky's presbyopia was an unintended consequence of treatment provided by the Commonwealth, the expert evidence from an ophthalmologist was that the general anaesthetic did not play any part in causing or aggravating Ms Stransky's presbyopia.

#### **Formal decision**

The Tribunal examined the applicable Statement of Principles concerning presbyopia and considered the sole factor, inability to obtain appropriate clinical management. Ms Stransky found her vision was blurred when she woke from the anaesthetic, and contended there was a delay in her referral for assessment, and she was inappropriately referred to an optometrist rather than an

The Tribunal affirmed the decision under review.



**Gilkinson and  
Repatriation Commission**

Mr RP Handley, Deputy President  
Dr H Haikal-Mukhtar, Member

[2012] AATA 467  
24 July 2012

***Whether sleep apnoea war-caused  
- remittal from Federal Court***

**Facts**

Mr Wilkinson rendered ten periods of operational service in the Royal Australian Navy on HMAS Sydney on voyages between Australia and Vietnam, and also had a period of defence service from 7 December 1972 to 9 July 1977. He made a claim for a disability pension in respect of sleep apnoea, which was refused by the Repatriation Commission. The appeal history is set out in the case summary of *Gilkinson v Repatriation Commission* [2011] FCAFC 133 contained later in this edition of VerBosity. Ultimately, the Full Court of the Federal Court set aside the previous decision of the Administrative Appeals Tribunal (the Tribunal) and remitted it to the Tribunal to be decided again according to law

either with or without the hearing of further evidence.

**Issues before the Tribunal**

The only live issue before the Tribunal was whether Mr Wilkinson's sleep apnoea was war-caused.

**The Tribunal's consideration**

The Tribunal noted that it must proceed with an analysis under the four-step process identified by the Court in *Repatriation Commission v Deledio* [1998] FCA 391 and *Kaluza v Repatriation Commission* [2010] FCA 1244:

(1) The Tribunal must consider all the material before it and determine:

(a) whether the material points to some fact(s) (the raised facts) which support a hypothesis connecting the disease with the circumstances of the operational service; and

(b) whether that hypothesis can be regarded as reasonable if the raised facts are true.

(2) If the raised facts point to a hypothesis of a connection, is there a Statement of Principles (SoP) in force in respect of the kind of disease from which the veteran suffers?

(3) If a SoP is in force, the Tribunal must determine whether, in its opinion, the hypothesis is reasonable, meaning is it consistent with the “template” found in the SoP? In particular, does the hypothesis raised contain one or more of the factors that the Repatriation Medical Authority has determined to be the minimum that must exist and be related to the veteran’s service?

(4) If the hypothesis is reasonable, the Tribunal must be satisfied beyond reasonable doubt that the incapacity did not arise from the war-caused disease. (Any fact finding must only be made at this final stage in the process.)

The Tribunal also referred to the recent decision of *Repatriation Commission v Knight* [2012] FCAFC 83, in which the Full Federal Court said there are two discrete issues at play in considering whether there is a reasonable hypothesis:

(i) does the material before the Tribunal point to the factor relied upon; and

(ii) does the material also point to that factor being related to the veteran’s operational service (s 196B(14))?

Section 196B(14) relevantly provides that a factor causing, or contributing to, an injury, disease or death is related to service rendered by a person if (b) it arose out of, or was attributable to that

service; or (d) it was contributed to in a material degree by, or was aggravated by, that service. When remitting this matter to the Tribunal, the Full Federal Court held that paragraph (d) is not a broader test that necessarily subsumes paragraph (b), and paragraph (b) requires a contributory cause that need not be the sole or dominant cause.

Regarding step 1, the Tribunal was satisfied that the raised facts - particularly Mr Gilkinson’s alcohol consumption, stuffy nose, obesity and snoring - supported a hypotheses connecting his sleep apnoea with operational service, even though his operational service was fragmented between February 1970 and November 1972. The Tribunal found that the raised facts pointed to Mr Gilkinson’s sleep apnoea arising out of or being attributable to his service, and took the view that the hypothesis can be regarded as reasonable if the raised facts are true.

The Tribunal identified the relevant Statement of Principles to be applied, satisfying step 2.

At step 3, the Tribunal noted Mr Gilkinson relied on five SoP factors, and proceeded to firstly address the issue of

the date of clinical onset of sleep apnoea. The Tribunal found the material before it pointed to the clinical onset of sleep apnoea in 1971, which excluded the SoP factors relating to clinical worsening. Regarding the SoP factor for chronic obstruction of the upper airways, the Tribunal was satisfied the material pointed to Mr Gilkinson having chronic obstruction of the upper airways at the time of clinical onset of sleep apnoea in 1971. Concerning the SoP factor relating to obesity, the Tribunal was satisfied the material pointed to Mr Gilkinson being obese during operational service. The Tribunal then specifically examined whether there was material before it pointing to Mr Gilkinson's operational service contributing to his weight gain (s 196B(14)). The Tribunal was satisfied the material before it pointed to Mr Gilkinson's weight gain being contributed to by shift work, diet, lack of physical activity and alcohol consumption during his operational service. Thus, the hypothesis was reasonable in so far as it was consistent with the SoP factors.

At step 4, the Tribunal was not satisfied beyond reasonable doubt that Mr Gilkinson had not suffered incapacity as

a result of his sleep apnoea. Thus, in relation to the SoP factors considered above, the Tribunal was not satisfied beyond reasonable doubt that the hypothesis was negated.

### Formal decision

The Tribunal set aside the Repatriation Commission's decision refusing sleep apnoea, and substituted a decision that Mr Gilkinson's sleep apnoea is war-caused. Pension assessment was remitted to the Repatriation Commission.



### Editorial note

This edition of VeRBosity also includes summaries of the decisions of the Full Court of the Federal Court in *Gilkinson* and *Knight*.

**King and  
Repatriation Commission**

Senior Member J F Toohey  
Dr I Alexander, Member

[2012] AATA 725  
23 October 2012

***Prostate cancer and erectile  
dysfunction - animal fat  
consumption - remittal from  
Federal Court***

**Facts**

Mr King rendered operational service in the Royal Australian Air Force from October 1955 to May 1958. In August 2007 he was diagnosed with prostate cancer, and as a result of radiotherapy he also developed erectile dysfunction. The Veterans' Review Board affirmed the Commission's decision refusing Mr King's claim for those conditions. The Administrative Appeals Tribunal (the Tribunal) affirmed that decision. The Federal Court allowed Mr King's appeal and remitted the matter to the Tribunal.

**Issues before the Tribunal**

The Tribunal was required to determine whether Mr King's prostate cancer was war-caused.

**The Tribunal's consideration**

The Tribunal noted the steps to be followed in determining whether a hypothesis is reasonable are set out in *Deledio*. The Tribunal identified the relevant SoPs, and SoP factors. It was not in dispute that Mr King's erectile dysfunction was directly attributable to the radiotherapy treatment for prostate cancer, so if his prostate cancer is found to be war-caused, it will follow that his erectile dysfunction is war-caused. Therefore, the only SoP factor to be considered for prostate cancer was "increasing animal fat consumption by at least 40% and to at least 50gm/day, and maintaining these levels for at least five years within the twenty-five years before the clinical onset of malignant neoplasm of the prostate".

The Tribunal looked at whether the material pointed to the factor relied on. It was not in dispute that Mr King maintained the requisite level of increased consumption of animal fat for

at least five years in the twenty-five years before the clinical onset of his prostate cancer. The Tribunal found there was material pointing to each of the elements of the SoP factor.

The Tribunal then examined whether the material pointed to Mr King's increased consumption of animal fat being related to his operational service. The Tribunal considered the meaning of "related to service" in s196B(14), specifically (b) it arose out of, or was attributable to, that service; or (d) it was contributed to in a material degree by, or was aggravated by, that service. The Tribunal referred to the Full Federal Court's consideration of these subsections in *Gilkinson v Repatriation Commission* [2011] FCAFC 133, in which the Court held that subsection (d) is not a broader test that necessarily subsumes subsection (b). The Tribunal was satisfied that the material before it pointed to more than a mere temporal connection between Mr King's operational service and the change in his dietary habits, to a preference for foods of a kind that meant his consumption of animal fat increased. The Tribunal was satisfied the material pointed to a conclusion it arose out of his operational service, in accordance with s196B(14)(b).

Alternatively, it also pointed to Mr King's operational service having contributed in a material degree to his increased consumption, in accordance with s196B(14)(d).

Finally, based on the expert evidence the Tribunal was not satisfied beyond reasonable doubt that there was no sufficient ground for determining that Mr King's prostate cancer - and it follows, his erectile dysfunction - are not war-caused.

### Formal decision

The Tribunal set the decision under review aside and in substitution found that Mr King's prostate cancer and erectile dysfunction are war-caused.



### Editorial note

This edition of VeRBosity also includes a summary of the Court's decisions in *King* and *Gilkinson*.

**Onorato and  
Repatriation Commission**

Ms G Ettinger, Senior Member  
Dr I Alexander, Member

[2012] AATA 759  
1 November 2012

***War widow's pension claim -  
remittal from Federal Court***

**Facts**

Mrs Onorato's late husband, Joseph, rendered operational service as an anti-aircraft gunner during World War 2. Mrs Onorato applied for a widow's pension. The delegate of the Repatriation Commission refused Mrs Onorato's claim. The Veterans' Review Board affirmed the Commission's decision. Mrs Onorato sought further review by the Administrative Appeals Tribunal (the Tribunal). That application was also unsuccessful and she appealed to the Federal Court. The Federal Court allowed Mrs Onorato's appeal and remitted the matter to the Tribunal.

**Issues before the Tribunal**

The Tribunal was required to consider whether Mr Onorato's death was war-caused. There was no dispute between the parties that Mr Onorato suffered hypertension with a date of onset in 1970, and ischaemic heart disease from 2006, which was a significant cause of death.

**The Tribunal's consideration**

The Tribunal proceeded with an analysis under the four-step process set out in *Deledio*. The hypothesis raised in this matter was that Mr Onorato developed an anxiety disorder as a result of the stressors encountered in his operational service, which caused or contributed to his hypertension, which in turn contributed to his ischaemic heart disease and death from ischaemic heart disease. The stressors were identified as the occasion when Mr Onorato came across a Japanese officer who had committed suicide by slitting his wrists and throat, and also through being bullied by the use of racist language used against him during his war service.

The Tribunal identified the relevant Statements of Principles to be applied, satisfying step two of *Deledio*. The

relevant factors in the Statement of Principles for anxiety disorder stipulate that a person must have experienced a category 1B stressor within the five years before the clinical onset of anxiety disorder, or experienced a category 2 stressor within the one year before the clinical onset of anxiety disorder. The Tribunal considered the stressors described by the expert psychiatrists and Mr Onorato's family, and the evidence as to Mr Onorato's anxiety and clinical onset. The Tribunal was satisfied that the material pointed to the clinical onset of an anxiety disorder meeting the relevant SoP factors, therefore the hypothesis was found to be reasonable.

The Tribunal went on to consider whether it could be satisfied beyond reasonable doubt that Mr Onorato's anxiety disorder was not war-caused, in accordance with step four of *Deledio*. Based on the expert psychiatrists' opinions that the anxiety disorder arose as a result of, and at the time of Mr Onorato's war service, the Tribunal could not be satisfied his anxiety disorder was not war-caused.

The Tribunal identified the relevant factor in the Statement of Principles for hypertension, requiring Mr Onorato to

have been suffering from a clinically significant anxiety disorder for the six months immediately before the onset of hypertension. The parties agreed the clinical onset of hypertension was in 1970, and the clinical onset of Mr Onorato's anxiety was held by the expert psychiatrists to be during operational service at the time he experienced the stressors. Therefore, the Tribunal found a reasonable hypothesis had been raised connecting hypertension with the circumstances of Mr Onorato's operational service. The Tribunal could not be satisfied beyond reasonable doubt that Mr Onorato was not suffering from a clinically significant anxiety disorder for the six months immediately before the clinical onset of hypertension in 1970.

Turning to ischaemic heart disease, the relevant factor in the Statement of Principles for ischaemic heart disease was having hypertension before the clinical onset of ischaemic heart disease. As the parties agreed the onset of Mr Onorato's hypertension was in 1970, and the onset of ischaemic heart disease was in 2006, his situation fit the template and a reasonable hypothesis was raised connecting ischaemic heart disease or death from ischaemic heart disease with

the circumstances of Mr Onorato's operational service. The Tribunal was satisfied that ischaemic heart disease was a significant cause of Mr Onorato's death, and found that his kind of death was ischaemic heart disease. Finally, the Tribunal could not be satisfied beyond reasonable doubt that Mr Onorato's death was not war-caused.

### Formal decision

The Tribunal set the decision under review aside and in substitution found that Mr Onorato's death was war-caused.



### Editorial note

This edition also includes a summary of the Federal Court's decision to allow Mrs Onorato's appeal and remit the matter to the Tribunal. The Federal Court's decision was not appealed any further, and remains a precedent.

## Norris and Repatriation Commission

Mr R G Kenny, Senior Member

[2012] AATA 785  
13 November 2012

***Eligibility for intermediate or special rate of pension - incapacity from war-caused conditions not sufficient to prevent applicant undertaking remunerative work for more than 20 hours or 8 hours per week in parts of the assessment period***

### Facts

Mr Norris sought a review of the Repatriation Commission's decision, as affirmed by the Veterans' Review Board, to assess his disability pension at 90% of the general rate.

### Issues before the Tribunal

The issue for determination was whether Mr Norris met the criteria for the intermediate or special rate of pension.

### The Tribunal's consideration

It was not in dispute that Mr Norris met the requirements of ss 23(1)(a) and 24(1)(a)(i), as he was in receipt of a



pension at more than 70% of the general rate.

In terms of ss 23(1)(b) and 24(1)(b), the Tribunal considered all of the medical evidence and preferred the opinion of one psychiatrist that Mr Norris was capable of undertaking 20 hours per week of remunerative work. The Tribunal was satisfied that, throughout the assessment period, Mr Norris' incapacity from his accepted disabilities was not such as to render him incapable of undertaking remunerative work for 20 hours or 8 hours per week.

Although it was not necessary, the Tribunal made a number of observations concerning ss 23(1)(c) and 24(1)(c), following the template of questions set out in *Flentjar*. In answer to question 1, "what was the relevant "remunerative work that the veteran was undertaking" within the meaning of s24(1)(c) of the Act', the Tribunal was satisfied Mr Norris' remunerative work was as a marine mechanic, training marine mechanics, employment advisor for disabled people, teacher aide, wardsman, employment supporter and in sales

maintenance. The advocate for Mr Norris directed the Tribunal to *Repatriation Commission v Connell* [2011] FCAFC 116 for the analysis of Mr Norris' remunerative work. However, the Tribunal did not consider it applied as Mr Norris' circumstances differed to Mr Connell's, who had been engaged in full-time remunerative work and then continued that work on a part time basis. In 2005 Mr Norris ceased full-time work as an employment advisor for disabled people to move from NSW to Queensland for economic reasons. From 2005 to 2010 he held various part time positions and did volunteer work. From September 2008 Mr Norris entered into a Centrelink scheme, where he received Centrelink benefits if he undertook paid or volunteer work for a total of 30 hours a fortnight. Mr Norris' advocate submitted that the voluntary work also constituted remunerative work as Mr Norris was in receipt of a Centrelink benefit, however the Tribunal did not accept that contention. The Tribunal considered there needs to be a remunerative component related to the work undertaken as determined by an employer/employee relationship.

The Tribunal answered the second *Flentjar* question, 'is the veteran, "by reason of war-caused injury or war-caused disease, or both, prevented from continuing to undertake that work"', in the negative based on the psychiatric evidence.

The Tribunal considered the third *Flentjar* question relating to the 'alone test'. The Tribunal was satisfied Mr Norris ceased his last full-time work for reasons unassociated with his disabilities. His main part time employment as a teachers aide ended when each teaching year or contract finished. The evidence from Mr Norris' employers was that his disabilities played no part in the cessation of any of his paid employment from 2005 to 2009. In the assessment period, his only remunerative work as a teachers aide was not continued as there were no further contractual arrangements. The Tribunal was satisfied Mr Norris did not cease his full or part-time employment because of his disabilities, so the third *Flentjar* question was answered in the negative.

The Tribunal was satisfied the fourth *Flentjar* question would be answered in the negative, relating to whether, by reason of being prevented from continuing to undertake the work, Mr Norris was suffering a loss of salary, wages or earnings on his own account that he would not be suffering if he were free of that incapacity. The Tribunal was satisfied Mr Norris ceased work for reasons other than his accepted disabilities. Looking at the ameliorating provisions in ss 23(3)(b) and 24(2)(b), there was no evidence that Mr Norris sought other remunerative work in the assessment period or that, if he did, his accepted disabilities were the substantial cause of his being unsuccessful.

The requirements of ss 23(1)(c) and 24(1)(c) were not met.

#### **Formal decision**

The Tribunal affirmed the decision under review.

# Federal Court of Australia

## Kowalski v Repatriation Commission

Dowsett, Cowdroy & Logan JJ

[2011] FCAFC 43  
28 March 2011

***Whether the applicant should be granted leave to amend his notice of appeal - whether the Court should allow the introduction of new evidence on appeal - whether the primary Judge had erred in making his decision***

### Facts

Mr Kowalski served in the Australian Army between April 1972 and October 1973 and rendered “defence service”.

The matter before the Full Federal Court concerned his claim for disability pension for gastro-oesophageal reflux disease (GORD). His claim was initially rejected by the Repatriation Commission (the Commission), but that decision was set aside by the Veterans’ Review Board (the Board) and GORD was accepted as defence-caused. The Commission appealed to the Administrative Appeals

Tribunal (the Tribunal), which set aside the Board’s decision and affirmed the Commission’s initial decision. Mr Kowalski appealed to the Federal Court on a question of law. His appeal was dismissed by the primary Judge, and Mr Kowalski then appealed to the Full Federal Court.

### Grounds of appeal

At the hearing Mr Kowalski sought to amend his notice of appeal, to include a ground that the primary Judge should have disqualified himself. The Court refused his application for leave to amend the notice of appeal, as the issue had not been raised before the primary Judge.

Mr Kowalski also sought to introduce further evidence in the form of documentary exhibits to an affidavit which he had sworn. The Court refused leave to read the affidavit, as none of the material sought to be introduced was relevant to an issue before the primary Judge. The evidence was directed to the establishment on the factual merits of whether his GORD was defence-caused. The Court indicated that if Mr Kowalski’s grounds of appeal have any

substance, a re-hearing on those factual merits would be a matter for the Tribunal on remission.

From Mr Kowalski's notice of appeal, the Court identified the following alleged errors of law in respect of the primary Judge's decision:

- (a) A failure to conclude that the "reasonable hypothesis" test was applicable.
- (b) Alternatively, a failure to conclude that the tribunal had incorrectly applied ss 120(4) and 120B of the VEA and the statement of principles (SoP) applicable to GORD.
- (c) A failure to conclude that the tribunal had either ignored or failed to act on undisputed evidence in respect of Mr Kowalski's meeting the criteria in the applicable SoP.
- (d) A failure to hold that, having not appeared in the proceeding before the VRB to defend its decision, the Commission was estopped from raising any ground of challenge to that board's decision in favour of Mr Kowalski before the tribunal, what Mr Kowalski termed "Anshun Estoppel".

## The Court's consideration

### *Reasonable hypothesis test*

As Mr Kowalski did not have operational service, the "reasonable hypothesis" test was not applicable.

### *Sections 120(4) and 120B of the VEA*

The Court found that the Tribunal and primary Judge had each correctly concluded that s 120(4) of the VEA was applicable to the circumstances of Mr Kowalski's claim. The Tribunal was required to decide his claim to its reasonable satisfaction. Section 120B(3) of the VEA required the Tribunal to be reasonably satisfied that Mr Kowalski's GORD was defence-caused only if:

- (a) the material before the tribunal raised a connection between that disease and some particular service rendered by him; and
- (b) there is in force an SoP;

that upholds the contention that his disease is, on the balance of probabilities, connected with that service.

The Tribunal found that no such connection was raised, based on

specialist evidence from two gastroenterologists. The Court indicated that the primary Judge correctly concluded that the Tribunal was entitled to make such a finding of fact, and no error of law had been shown on the part of the Tribunal in reaching that finding of fact.

#### *SoP criteria*

The Tribunal proceeded to make a finding that the relevant factors in the GORD SoP were not, in any event, satisfied on the evidence. The Court noted the Tribunal did not ignore undisputed evidence (as alleged by Mr Kowalski), and found the primary Judge did not err in concluding the Tribunal had correctly rejected the “reasonable hypothesis” test and had correctly construed and applied ss 120(4) and 120B(3) of the VEA and the GORD SoP.

#### *Estoppel issue*

Mr Kowalski argued at the Tribunal that as the Commission had not appeared before the Board, it was not entitled at the Tribunal to put in issue findings of fact which the Board had made in his

favour, referring to *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589. He also argued (to the same effect) that the nature of the proceeding before the Tribunal was an appeal in the strict sense. The Tribunal rejected both of these arguments and the primary Judge dealt expressly only with the latter of these two arguments. The Court noted both the Tribunal and primary Judge relied on *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA 179; (1979) 46 FLR 409, which set out the nature of the Tribunal’s review:

The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.

The Court concluded that Mr Kowalski’s argument was completely at odds with the Tribunal’s review function as described in *Drake*, and the right to seek tribunal review under section 176 of the VEA is unaffected by anything the

Commission has said or not said before the Board.

**Malady v Repatriation  
Commission**

**Formal decision**

Emmett, Dowsett and Rares JJ

Mr Kowalski's appeal was dismissed with costs.

[2011] FCAFC 45  
31 March 2011



**Editorial note**

In this case the Court dealt with two preliminary issues concerning amendment of the notice of appeal and introduction of new evidence, before examining the specific grounds of appeal. The Court's discussion of the Tribunal's review function is applicable to all reviews before the Tribunal.

***Whether a judge of the Court, having found error on the part of the Administrative Appeals Tribunal, erred in declining to remit the matter to the Tribunal for further determination***

**Facts**

The matter before the Full Federal Court concerned Mr Malady's claim for disability pension for major depression, alcohol abuse and drug abuse. His claim was rejected by the Repatriation Commission (the Commission) on 2 February 2001. On 7 October 2002, the Veterans' Review Board (the Board) affirmed the decision of the Commission. The veteran then appealed to the Administrative Appeals Tribunal (the Tribunal). On 28 July 2005, the Tribunal set aside the decision of the Board and substituted its own decision, that the veteran's major depressive disorder, alcohol dependence or abuse and drug dependence or abuse were war caused. The Commission then appealed to the Federal Magistrates Court. On 21 July

2006, the Federal Magistrates Court set aside the Tribunal's decision and ordered proceedings be remitted to the Tribunal for further hearing and consideration. The Tribunal differently constituted decided that the veteran suffered from major depressive disorder, alcohol abuse and drug abuse and that those conditions were war caused. The Commission then appealed to the Federal Court.

The Federal Court found that it was not open to the Tribunal to rely on the condition of borderline personality disorder to connect the claimed conditions to service in light of the Tribunal's finding of fact that the borderline personality disorder was not connected to the veteran's operational service. The Federal Court allowed the appeal and set aside the Tribunal's decision and affirmed the decisions of the Board and the Commission. The Court noted that an order to remit the matter back to the Tribunal will only be appropriate in cases where the Tribunal's error of law has distracted it from making findings which might resolve favourably to an applicant.

The veteran then appealed the decision to the Full Federal Court.

### Grounds of appeal

It was argued on behalf of Mr Malady that the primary judge erred in failing to order that the proceedings be remitted to the Tribunal to be reheard and determined according to law. The Full Court granted leave to Mr Malady to file written submissions stating the findings the Tribunal could and should have made, had it not made the conceded error of law, indicating the evidence in the appeal papers on which those findings would be based and whether he invited the Full Court to make findings of fact.

Mr Malady in his written submissions contended that the Tribunal should have found that he experienced various stressors that aggravated his alcohol abuse condition and his drug abuse condition. He contended that the Tribunal should have considered whether each of his pre existing alcohol abuse and drug abuse had clinically worsened by his service in East Timor. He relied on each of the patrol vehicle and shallow grave incidents as satisfying the factor of "experiencing a severe stressor". Mr Malady also argued that the Tribunal should have found that his depressive disorder was causally linked

to his service because one or both of his alcohol and drug abuse had been aggravated by that service.

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

Justice Rares noted that each of Mr Malady's pre existing conditions (alcohol abuse, drug abuse and borderline personality disorder) could only be found by the Tribunal to be a clinically significant psychiatric condition if it related to service within the meaning of s196B(14). He noted that for the purposes of 196B(14), none of those conditions resulted from an occurrence that happened while Mr Malady was rendering service because each existed beforehand. In relation to S196(14)(b), none of them could be said to have arisen out of or be attributable to the service for the same reason. S196(14)(f) prescribed that a disease could be related to service if a factor that caused or contributed to it would not have occurred: " (i) but for the rendering of that service by the person; (ii) but for changes in the person's environment consequent upon his her having rendered that service."

He further noted the Tribunal's findings that Mr Malady's service was not the sole

cause of the worsening of the alcohol and drug dependence or the development of his depressive disorder would make remission to the Tribunal on this issue futile.

Justice Rares noted the primary judge referred to the Tribunal's finding that Mr Malady had not experienced any severe traumatic stressor while in East Timor however, the Tribunal found that the alcohol abuse and drug abuse were aggravated by his operational service.

Justice Rares also noted that there was no basis for a finding that Mr Malady experienced an event that fell within the definition of "experiencing a severe stressor" in any substance abuse SoP, and that there was no factual issue in relation to the alcohol and drug abuse SoPs that the Tribunal left open as capable of being found in favour of Mr Malady.

Justice Rares therefore considered his claim under those SoPs were not affected by the error of law and doomed to fail.

Emmett and Dowsett JJ agreed with the reasons and orders proposed by Rares J.



### Formal decision

Mr Malady's appeal was dismissed with costs.



#### Editorial note

For further reading on the primary judge's decision please see page 59 in Volume 26 of *VeRBosity*.

### Kaluza v Repatriation Commission

McKerracher, Perram and Robertson JJ

[2011] FCAFC 97  
4 August 2011

***What was actually remitted to the Tribunal and how the Tribunal perceived its role, whether the test for clinical onset was misstated and whether the Tribunal addressed itself to the wrong SoP***

#### Facts

On appeal to the Federal Court (the first appeal) the question for determination was whether Mr Kaluza was rendering operational service at the time when the claimed stressors occurred. In the first appeal, Branson J concluded that there was no proper basis for review in

relation to the 1968 incident which had been determined on the merits. However, her Honour decided the question relating to the 1969 claim favourably to Mr Kaluza. The first Tribunal decision was set aside and remitted to the Tribunal to be determined according to law.

On remittal, the Tribunal concluded that none of the conditions which Mr Kaluza suffers were war caused. Mr Kaluza sought review appealing that decision to the Federal Court (the second appeal).

Mr Kaluza appealed from the judgment of the Court in the second appeal dismissing his appeal from the second Tribunal decision.

#### Grounds of appeal

1. His Honour erred in construing the remittal, made by Branson J as being limited to the Applicant's operational service in 1969.
2. His Honour erred in holding that the Tribunal had not erred in finding that the clinical onset of the Appellant's anxiety disorder was in 1972.

3. His Honour erred in holding that the Tribunal had not erred in determining whether there were raised facts pointing to the hypothesis that the Appellant had experienced a severe psychosocial stressor.
4. His Honour erred in holding that the Tribunal had not erred in determining whether there were raised facts pointing to the hypothesis that the Appellant had experienced a severe stressor.

The Tribunal stands in the shoes of the primary decision maker and by s43(1) of the AAT Act, for the purpose of reviewing a decision, may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision. In our view construing the scope of a remittal as limited would tend to run counter to the Tribunal's function.

The Tribunal acts on the material before it without being limited in the same way in which the Court is generally limited on judicial review to the material before the primary decision maker.

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

#### *The remittal*

The Court noted that it cannot be said that a decision maker exercising executive power is confined to considering only those issues in respect of which a point of law was made out.

The Court went on to say :

In light of the statements in Wang, in our view, unless there is some qualification in the remittal order, there is nothing ambiguous about the order. The entire case is remitted.

The Court noted this does not mean that there is an obligation on the Tribunal to rehear all the same evidence. It is for the Tribunal rehearing the matter to determine all questions of fact and law relevant to the claim. By considering that it was bound to only consider the 1969 claim (rather than it being open to it to entertain an application to adduce new evidence on the 1968 claim), the Tribunal did not consider the entire remittal and deprived itself of the obligation to consider the 1968 flight claim.

The Court also noted, given that the first Tribunal decision was affected by legal error, it is the entire determination comprising the various claims within it that was set aside, not the legal error giving rise to an erroneous conclusion as to one of the claims.

The Court accepted Mr Kaluza's arguments, that what was remitted was the entire case. It was not a question of whether Mr Kaluza should have been permitted to reopen his entire claim as advanced by the Commission. It was rather a question of identifying precisely what was remitted.

The error on the part of the Tribunal was to consider that it was precluded from considering the grounds which were not upheld on the first appeal.

#### *Date of clinical onset*

The primary judge also rejected Mr Kaluza's contention that the Tribunal had misstated the test for determining "the clinical onset" of Mr Kaluza's disease.

The primary judge had noted that the definition in *Lees* emphasised the need for a determination of the clinical onset by medical evidence. Noting, although it

was for a doctor to say when the clinical onset occurred by the presence of features or symptoms, clinical onset was not necessarily when the patient first saw a doctor for medical treatment.

Mr Kaluza contended the second Tribunal misapplied the test referred to in *Lees* so as to treat the date of clinical onset as the date on which treatment was sought.

The primary judge did not agree that the paraphrasing by the Tribunal, of the test in *Lees* was inaccurate and that it captured the essence of the test which was that all the symptoms must be displayed and treatment sought so that a practitioner can determine the date of clinical onset.

The Tribunal found that there was a psychiatric condition established in 1968 but it was first treated in 1972. Because that was the date of first treatment the Tribunal held that 1972 was the date of onset.

The Court agreed this analysis suggested that the Tribunal's approach was that the test in *Lees* was that all the required symptoms had to be displayed and treatment sought in order to determine

clinical onset. However, that was not the approach taken in *Lees*.

In other words, the Tribunal construed the test as one in which the date for clinical onset was to be the date of the formal finding on investigation even though that may be well after the date at which all the required symptoms were displayed.

The Court considered this ground should succeed and the fact that it was not advanced before Branson J on the earlier appeal does not preclude it from being raised now in relation to what was, as the Court held in relation to Ground 1, a full rehearing.

*Severe psychosocial stressor*

This question here was whether the Tribunal addressed itself to the wrong SoP in considering whether there were raised facts pointing to the hypothesis that Mr Kaluza had experienced a severe psychosocial stressor.

The Tribunal said:

A severe psychosocial stressor is defined in Instrument No 1 of 2000 as an **identifiable occurrence that evokes**

**feelings of substantial distress in an individual.**

The Tribunal then went on to say referring to a different definition:

Mr Kaluza's experiences on the flight of 24 February 1969, as he raised them, demonstrated some distress, and in order to fit the template, needed to point to a threat of death or serious injury or to his physical integrity, and which with his knowledge and in his experience, could reasonably be so perceived.

Stoddart is authority for the situation where Mr Kaluza's distress regarding the identity of the person in the coffin did not need to be accurate, that is the events experienced can be a combination of subjective feelings and objective situations as in the case of the cocked gun ( which may or may not be loaded, referred to in Stoddart. In order to fit the template, Mr Kaluza's fourth hand in the game of cards on the casket had to point to a threat of death or serious injury or to his physical integrity by a combination, at least of an objective threat and/ or the expression of his feelings. Mr Kaluza's situation does not in our view meet the

factors for experiencing a severe psychosocial stressor in order to raise a reasonable hypothesis.

The Court noted that *Stoddart* was dealing with a different SoP, and that the words underlined came from **SoP No 3 of 1999 not from SoP 1 of 2000** and are quite different to “**evokes feelings of substantial distress**” which was the language of the correct SoP.

The difficulty with the Tribunal’s reasons on this topic were that, although it correctly stated the test by reference to the correct SoP and it referred again to part of the correct SoP in passing (albeit that it tended to treat the examples given as being exhaustive rather than examples only) in the central part of its reasoning it considered terms from the incorrect SoP and that error was repeated and applied.

The Court found the Tribunal applied the incorrect test and upheld this ground.

#### *Severe stressor*

The final issue was whether there was legal error in the Tribunal’s determination of whether there were raised facts pointing to the hypothesis that Mr Kaluza had experienced a severe

stressor as defined in the relevant SoP. The Court noted:

Woodward shows that one may be confronted with such events which one has neither seen nor experienced. Although the Tribunal noted that it was agreed by both parties that Mr Kaluza held an incorrect belief at the time about the identity of the deceased soldier in the casket, nevertheless the Tribunal did not in its reasons specifically address the question of whether, objectively, Mr Kaluza was confronted with an event of this nature.

The primary judge said he did not consider that in the present case the Tribunal fell into the error identified in *Woodward*. His Honour said the Tribunal identified the correct test and its conclusion was based upon the matters to which he had referred in dealing with the question of the severe psychosocial stressor as defined does not necessarily mean that it does not point to a severe stressor.

The Court found that the Tribunal did not address part of the correct question, that part being whether Mr Kaluza was

“confronted with an event that involved actual death”.

The Court concluded on the basis that if the Tribunal had addressed that question it would have articulated reasons for its conclusion. Without addressing that issue the Tribunal could not have gone straight to consider the effect of the (unidentified) event.

The Court upheld this ground.

made on investigation which is indicative to a doctor that the disease is present. The test does not require both.

This case also emphasises the importance of applying the correct definitions from the correct SoPs. Given the definitions have changed overtime.

Although the cases of *Hunter* and *Border* deal with cases concerning PTSD, they also address the definitions in the SoP.

### Formal decision

Appeal allowed

### Robertson v Repatriation Commission

Edmonds J

[2011] FCA 937

22 August 2011



### Editorial note

For further reading please see previous practice notes, *Kaluza v Repatriation Commission* [2008] FCA 1365 decided by Branson J and *Kaluza v Repatriation Commission* [2010] FCA 1244 decided by Jacobson J at [www.vrb.gov.au](http://www.vrb.gov.au).

In particular this case reinforces the test in *Lees* for clinical onset. That test is 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

### ***Whether the Tribunal identified the correct test under the Act in determining veteran's 'kind of death'***

### Facts

On 27 October 2006, Mrs Robertson claimed a pension on the ground that her husband's death was attributable to war caused arthritis. A delegate of the Commission decided on 27 January 2007 that Mr Robertson's death was not related to service. The Veterans' Review

Board affirmed this decision on 9 July 2008. On 21 August 2008 the applicant appealed to the Administrative Appeals Tribunal (the Tribunal). The Tribunal found that the weight of the evidence supported the conclusion that Mr Robertson's atrial fibrillation did not play an integral part in his death. As there was no evidence before the Tribunal to indicate any condition other than those in the death certificate led to his death, and as it was not contended that any other condition in his death certificate was service related, the Tribunal affirmed the decision under review. Mrs Robertson then appealed to the Federal Court.

### Grounds of appeal

The applicant's complaint related to the Tribunal's use of the expression 'integral part' when approaching the task of determining the kind of death suffered by Mr Robertson.

The applicant contended the Tribunal did not explain what it meant and that none of the dictionary definitions of the word 'integral' readily appear applicable to consideration of the medical cause of death.

The applicant submitted that by the Tribunal's reliance on *Re Martyn and Repatriation Commission* and *Hayes v Repatriation Commission* and the omission of any reference to *Collins* the Tribunal demonstrated it intended the term 'integral part' to exclude a medical condition that makes a contribution to death.

The applicant further submitted that the Tribunal's use of a wrong, restrictive test, is further demonstrated as the Tribunal placed Associate Professor Haber's evidence - supportive of atrial fibrillation as the cause of death on one side of the equation, and Professor O'Rourke's opinion and the death certificate on the other side of the equation, even though the death certificate listed atrial fibrillation as a contributing cause.

### The Court's consideration

The Court agreed with the respondent's submission that the applicant's contentions did not reconcile with the plain words of the Tribunal's reasons.

The Tribunal expressly acknowledged that multiple medical conditions may contribute to a veteran's death. The

Tribunal did not instruct itself that medical conditions that contribute to a death can be excluded from consideration.

The Tribunal drew a distinction between a condition that is ‘merely present’ and a condition that is an ‘integral part’ of the kind of death. The meaning is clear the Tribunal used ‘integral part’ to describe a condition which is ‘more than merely present’; the Tribunal did not use ‘integral part’ to describe a condition that contributes to death but can nonetheless be disregarded.

The Court noted the ultimate decision the Tribunal made reflected the distinction that it drew, that atrial fibrillation was merely present and that other conditions that the veteran suffered were the causes of his death.

The Court also referred to the Full Court which heard *Collins* and *Hill v Repatriation Commission* which observed that identifying a veteran’s kind of death is a question of fact, to be determined by the decision maker on the evidence.

In the present case the Tribunal was required to decide on the balance of probabilities whether atrial fibrillation was kind of death. It preferred the

evidence of Professor O’Rourke. It was reasonably open to the Tribunal to accept the Professor’s evidence and the Tribunal explained its reasons for doing so.

The Court decided the appeal in this matter did not raise a question of law.

### Formal decision

The appeal was dismissed.

### Repatriation Commission v Connell

Marshall, Downes and Bromberg JJ

[2011] FCAFC 116

31 August 2011

***Whether in reviewing the decision of the Board, the Tribunal failed to properly construe the provisions of s23(1)(c) of the Act.***

### Facts

The Tribunal set aside a decision of the Veterans’ Review Board and considered that Mr Connell should be paid at the Intermediate Rate of pension. The Repatriation Commission appealed this decision to the Federal Court. Although, the application arose in the original jurisdiction of the Court the matter was



referred to a Full Court for hearing and determination pursuant to s44(3)(b) of the AAT Act.

The matter before the Full Federal Court concerned the proper construction of the provisions of s23(1)(c) of the Act and in particular the proper meaning of the words prevented from continuing to undertake remunerative work that the veteran was undertaking.

Mr Connell gave evidence before the Tribunal that his post traumatic stress disorder had become worse since his holiday to Vietnam and he had greater difficulty concentrating. He worked as a self employed painter and in a good week he would work about 19 hours, some weeks not at all.

The Tribunal was reasonably satisfied that Mr Connell's war caused incapacity led to a loss of earnings. The Commission argued that Mr Connell could not satisfy s23(1)(c) because he continued to undertake the same remunerative work that he was undertaking before he suffered a loss of earnings by reason of his incapacity.

The Tribunal said that s23(1)(c) does not require that the veteran must be prevented by his war caused injury or

disease from continuing to undertake any remunerative work of the kind previously undertaken. Rather the requirement in paragraph (c) focuses on the loss of salary, wages or earnings suffered as a result of the incapacity. It is the financial loss suffered by the veteran by reason of his or her reduced capacity to work as a result of the war caused injury or disease for which the veteran is compensated.

### Grounds of appeal

The Repatriation Commission referred the Court to the judgement of the Full Court in *Peacock v Repatriation Commission* (2007) 161 FCR 256 where the Full Court said:

The difference between the total and permanent incapacity required for the special rate and the incapacity required for the intermediate rate is that , in the former, the incapacity must render the veteran incapable of working for more than eight hours per week and, in the latter, of working otherwise than on a part-time basis or intermittently.

The Commission submitted that s23(1)(c) contained 3 distinct elements;

- The veteran must be prevented from continuing to engage in remunerative work that the veteran was undertaking;
- That prevention must be due to incapacity from the war caused injury or disease alone; and
- The veteran must be suffering a loss of earnings that he or she would not be suffering but for the incapacity.

Counsel for the Repatriation Commission referred to *Flentjar v Repatriation Commission* where the Court referred to the following four questions:

1. What was the “remunerative work” that the veteran was undertaking?
2. Is the veteran, by war caused injury or disease , or both, prevented from continuing to undertake that work?
3. If yes to (2) is that injury, disease or both, the only factor or factors preventing the veteran from continuing to undertake that work?

4. If yes to (2) and (3) is the veteran by reason of being prevented from continuing to undertake that work, suffering a loss of earnings that he would not otherwise be suffering?

Counsel for the Repatriation Commission contended that the four questions in *Flentjar* reflected the proper construction of s23(1)(c) as well as s24(1)(c) and should have been posed and answered by the Tribunal and that the Tribunal failed to apply s23(1)(c) in accordance with these terms.

### **The Court’s consideration**

The Court considered the sole ground of appeal advanced by the Commission was: Having determined that the respondent was continuing to work as a painter, the Tribunal purported to find that he was nonetheless “prevented from continuing to undertake remunerative work that [he] was undertaking” within the meaning of the expression in s23(1)(c) of the Act.

The Court found that ground of appeal to be misplaced.

The live issue before the Court was whether the words “prevented from continuing to undertake remunerative work that the veteran was undertaking” has the effect that if the veteran was undertaking a particular type of work such as painting and still continued to perform that type of work, albeit on a restricted basis part of s23(1)(c) is not satisfied.

The Commission contended the expression “remunerative work” is to be read as though it said “all remunerative work”. The contention also equates the word “work” with occupation. A plain reading of the provision does not support that contention. It would be erroneous to equate “work” with occupation because “remunerative work” is defined in s5Q(1) of the Act. On the facts of the case it is clear that Mr Connell was prevented from continuing some of the remunerative activities that he would be undertaking.

In the context of the beneficial nature of the Act, “remunerative work” should not receive a restrictive interpretation. There is no valid reason to confine the expression to work of a particular type. “Remunerative work that the veteran was undertaking” should not be confined

to the actual type of work involved but should also be referable to its nature and quality. The Court did not consider that a worker must be working full time prior to the worker becoming entitled to payment at the intermediate rate.

The Court noted:

The veteran is prevented from undertaking remunerative work that he was undertaking namely, the work he was undertaking in the 15 hours each week which he can no longer work.

The construction favoured by the Commission of the contentious part of s23(1)(c) in issue on this appeal would have the effect of imposing such a restriction on a veteran who is under 65 when the legislation have and did not impose such a restriction on those veterans as it has with older veterans.

There was no error of law committed by the Tribunal.

### **Formal decision**

The appeal was dismissed with costs.



### Editorial note

In *Connell* the Full Court looked at the proper construction of s23(1)(c) of the VEA. The live issue before the Court was whether the words “*prevented from continuing to undertake remunerative work that the veteran was undertaking*” has the effect that if the veteran was undertaking a particular type of work such as painting and still continued to perform that type of work albeit on a restricted basis part of s23(1)(c) is not satisfied.

This significant decision of the Full Court provides comprehensive guidance on the issue of whether the considerations in *Haskard* and *Wright* apply to intermediate rate pensions.

Previously the Commission had interpreted the legislation to require that a veteran must have been forced to cease to undertake the type of work they had been undertaking to be eligible for the intermediate rate of pension.

Following the Federal Court’s decision in *Connell*, applicants are now entitled to the intermediate rate if the effect of their accepted disabilities is such that they

must reduce their hours of work to 20 or less hours per week. Applicants are not required to have ceased to undertake the type of work they had been undertaking to be eligible for the intermediate rate of pension.

Note: Section 23(3A)(g) provides “when the veteran stopped undertaking his or her last paid work”. The over 65 provision for intermediate rate has the essential element that the veteran “must have stopped” working. A restriction the Court noted was not imposed on veterans under the age of 65.

### Rana v Repatriation Commission

Kenny, Stone and Logan JJ

[2011] FCAFC 123  
21 September 2011

***Whether there was an error by the primary judge in his reasons as to why there was no merit in the judicial review application***

### Facts

Both the direction given by the Tribunal at the procedural stage and its later final decision became the subject of proceedings instituted by Mr Rana in the

Court's original jurisdiction. Those proceedings were also heard together however separate judgements were given.

The Tribunal's procedural direction was that the matter will proceed by way of preliminary hearing where the issue will be confined to whether Mr Rana is a veteran/member of the armed forces for the purposes of the Veterans' Entitlements Act 1986 (VEA).

On 4 September 2009 the Tribunal determined that preliminary issue adversely to Mr Rana. The result of that adverse determination was a decision by the Tribunal that the decision under review should be affirmed.

In relation to the Tribunal's earlier procedural direction, Mr Rana's appeal took the form of an application under s39b of the *Judiciary Act* 1903 (Cth) for the judicial review of the decision to give that direction.

That application was dismissed by the learned primary judge. The appeal was against that order of dismissal.

### Grounds of appeal

The grounds of appeal were stated by Mr Rana to be:

- i. The learned judge erred in denying the appellant natural justice; by not properly considering that Member Short when cited legal precedents and principle that ss69 and 70 related proceedings should be heard together. The reason given by him is illogical , unreasonable or unsatisfactory or inadequate in law. This was unfair to the applicant and not supported by evidence.
- ii. The learned judge had substantial evidence before him to infer that the appellant was surprised in directions hearing that only preliminary hearings would go forward, and to that no reasonable explanation was provided for, where by Member Short would allow oral submissions to the respondent to cite precedents to separate the joint hearing and without prior notice, and the unrepresented litigant was not prepared to rebut the

legal citations of the precedents. This disadvantaged the unrepresented appellant, when the respondent without giving reasonable notice orally cited various precedents to separate the matter for preliminary inquiry. This was unfair and unreasonable to the appellant.

### The Court's consideration

Mr Rana pressed each ground of appeal. The Court noted there was a disjunct between Mr Rana's submissions and his grounds of appeal. His submissions ventured into matters which if relevant at all, were relevant only to his separate appeal under s44 of the AAT Act.

The Court considered it was within the discretion of both Member Short and Deputy President Hack to undertake the task of reviewing the Commission's decision by first deciding whether the VEA had any relevant application to Mr Rana. No procedural unfairness attended the direction by either of these members of the Tribunal that the review application be heard in this way. Mr Rana was, on each occasion, offered an opportunity to be heard on the subject of

how the Tribunal ought to proceed and took advantage of that opportunity.

The learned primary judge was right to conclude that the Tribunal, as constituted on each interlocutory occasion, was entitled to act as it did.

There was no error in any of the other reasons given by his Honour as to why there was no merit in the judicial review application.

The Court also noted that:

An absence of utility is one reason why a court may, as a matter of discretion, refuse to grant judicial review remedy.

There were thus multiple reasons why the judicial application was rightly dismissed.

In respect of the exercise of judicial power, it has long been the position that leave should not readily be granted to appeal against interlocutory judgements which concern matters of practice and procedure alone.

Such an appeal is only open in respect of a decision which had about it a quality of finality: Chaney's case. Such appeals must also be on questions of law.

The Court noted in judicial proceedings, the scope for oppression by a party with a deep pocket or a querulous disposition of another party can be present in administrative review proceedings. Recalling this and the scheme of the AAT Act is to permit challenges on a limited basis to the Tribunal's final decisions and also confer a broad discretion on the Tribunal as to how it goes about making those final decisions, counsels a principled restraint in the granting of judicial review remedies in respect on interlocutory decisions of the Tribunal in relation to matters of practice and procedure.

#### **Formal decision**

Mr Rana's appeal was dismissed with costs.

### **Rana v Repatriation Commission**

Kenny, Stone and Logan JJ

[2011] FCAFC 124

21 September 2011

#### ***Whether there was an appeal under s44 of the AAT Act before the Court***

#### **Facts**

The appeal arose out of an appeal brought by Mr Rana under s44 of the AAT Act against the Tribunal's final decision, which was to affirm the decision to refuse him a pension.

That application was dismissed by the learned primary judge.

This appeal is against that order of dismissal.

#### **Grounds of appeal**

The grounds of appeal were stated by Mr Rana to be:

- i. The learned primary judge was in error in concluding that the appeal from the Tribunal raised no question of law;

- ii. The learned primary judge should have concluded that it was a requirement of the review being undertaken by the tribunal that issues arising under s69 and s70 of the VEA be heard together or, put another way, that it was not permissible for the Tribunal to determine a s69 issue as a preliminary in the review;
- iii. The learned primary judge erred in applying Whiteman's Case;
- iv. The learned primary judge should have permitted the tender of further evidence to show that the Tribunal's conclusion as to the reason for his discharge not being due to a psychiatric condition was based on false assumptions or a misapprehension of fact.

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

As the learned primary judge recognised, the notice of appeal by which Mr Rana sought to initiate an appeal under s44 of the AAT Act against the Tribunal's

decision did not state a question at all, much less a question of law.

The Court noted the right of appeal conferred by s44 of the AAT Act is a right to appeal to this court "on a question of law". The need for a notice of appeal to specify a question of law is not just a matter of pleading. In absence of a question of law there is no subject matter for the appeal and the Court has no jurisdiction to entertain the proceeding.

The learned primary judge scrutinised the grounds which Mr Rana had specified in his notice of appeal. The end result of his Honour's scrutiny of these grounds were conclusions that Mr Rana's appeal from the Tribunal raised no question of law.

The conclusions of the learned primary judge that the appeal was an endeavour to reargue questions of fact and that no question of law was raised were correct. The Tribunal chose to act on a body of medical and lay evidence touching on whether invalidity or physical or mental incapacity lay behind the nominated reason for Mr Rana's discharge. As his Honour recognised the findings of fact made by the Tribunal were reasonably open.



As the Court explained in its reasons for judgment in respect of the judicial review appeal, there was no authority which obliged the Tribunal to only conduct its review by considering at the one time issues arising under s69 of the VEA with issues arising under s70 of that Act.

The Tribunal was master of its own procedure.

### Formal decision

Mr Rana's appeal was dismissed with costs.

## Gilkinson v Repatriation Commission

Perram, Nicholas and Robertson JJ

[2011] FCA 1507  
28 October 2011

### ***Meaning of "arose out of, or was attributable to"***

#### Facts

Mr Gilkinson served in the Royal Australian Navy and saw operational service on ten voyages to and from South Vietnam as a member of the crew of HMAS Sydney between 1970 and 1972. He made a claim unsuccessfully for sleep apnoea. The decision was affirmed on review by the Veterans' Review Board. Mr Gilkinson sought further review by the Administrative Appeals Tribunal (the Tribunal). The Tribunal affirmed the decision under review and Mr Gilkinson appealed the decision of the Tribunal to the Federal Court. Justice Rares allowed Mr Gilkinson's appeal and remitted the matter to the Tribunal. Mr Gilkinson's claim was reviewed by the Tribunal and it was again rejected. Mr Gilkinson then sought a review by the Federal Court. Justice Stone did not accept that the

Tribunal had made an error of law and consequently dismissed Mr Gilkinson's application with costs. Mr Gilkinson then appealed to the Full Federal Court.

### Grounds of appeal

The main issue arising out of the appeal concerned the meaning to be accorded to section 196B(14)(b) of the *Veterans' Entitlements Act 1986* (VEA), "*arose out of, or was attributable to*". Mr Gilkinson argued that the Tribunal did not address s196B(14)(b). The Commission argued that there was no need for the Tribunal to consider this provision, as s196B(14)(b) was covered by s196B(14)(d).

As such, the issue for the Full Court to consider was whether subsection (b) "*arose out of, or was attributable to*" was narrower than subsection (d), "*it was contributed to in a material degree by, or was aggravated by, that service*". If s196B(14)(d) was wider than and more favourable to Mr Gilkinson than s196B(14)(b) then there would be no error of law.

### The Court's consideration

In his separate decision, Justice Perram did not agree with the primary judge that subsection (b) was narrower than subsection (d). His Honour considered that the two provisions dealt with discrete topics. Further, Justice Perram considered that s196B(14)(b) of the VEA did not require service to be the dominant or effective cause of the claimed disease or injury and, that the provision is satisfied where the service is merely their *sine qua non*.

In their joint decision Justice Nicholas and Justice Robertson did not consider subsection (d) to be a broader test that subsumes subsection (b). In particular, their Honours noted that the primary judge's view of the two subsections was inconsistent with the decision in *Roncevich*, where the High Court said that the use in s70(5) of the expressions "*arose out of*" and "*was attributable to*" manifested a legislative intention to give "*defence-caused*" a broad meaning.

Their Honours also noted the Court's decision in *Repatriation Commission v Law* (1980) 31 ALR 140 and that in relation to the expression "*is attributable to*" their Honours said the cause need not

be the sole or dominant cause and that it was sufficient to show “attributability” if the cause is one of a number of causes provided it is a contributory cause. In concluding, Justice Nicholas and Justice Robertson rejected the Commission’s submission that s196B(14)(d) expands on paragraph (b) and that the Tribunal had no need to consider s196B(14)(b).

**Summers v Repatriation  
Commission**

North J

[2011] FCA 1451  
8 November 2011

***Whether the applicant suffers from  
PTSD and whether alcohol  
dependence is war caused***

**Formal decision**

The Court decided that Mr Gilkinson’s appeal should be allowed and the matter be remitted to the Tribunal.



**Editorial note**

This decision follows the judicial guidance of the court in *Repatriation Commission v Law* (1980) 31 ALR 140. For the ‘arose out of, or attributable to’ connections to apply, the relevant circumstance of service must have contributed to the cause but need not be the sole, dominant, direct or proximate cause of the injury, disease or death. For further reading on the earlier court decisions see the VRB archived practice notes at [www.vrb.gov.au](http://www.vrb.gov.au).

**Facts**

Before the Court was an appeal from a decision of the Administrative Appeals Tribunal (the Tribunal) dated 20 October 2010. The Tribunal affirmed a decision of the Veterans’ Review Board, which in turn affirmed a decision of the Repatriation Commission.

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

was involved in an altercation with a group of sailors near Watson's Bay which resulted in him falling over a cliff.

as a result of having been notified of the death of his father.

### Grounds of appeal

1. The Tribunal erred in failing to properly consider the possibility that the veteran suffered from post traumatic stress syndrome.
2. The Tribunal wrongly failed to consider whether there was a reasonable hypothesis connecting PTSD with the applicant's service.
3. The Tribunal's reasons were inadequate in that they did not explain why the Tribunal reached the conclusion that the applicant did not experience, witness or was not confronted with an event involving actual or threatened death or serious injury, ..., as is required in the definition of PTSD.
4. The Tribunal failed to consider whether the Applicant suffered PTSD

5. The Tribunal failed to identify the death of the applicant's father as a reasonable hypothesis to link the applicant's service to his alcohol dependence.

### The Court's consideration

The first complaint, namely, that the Tribunal came to a decision which was so unreasonable that a reasonable Tribunal could not have arrived at it, was not made out. As noted by the Court, the hurdle for establishing such a ground is high. The Tribunal set out the evidence relevant to the question whether the applicant suffered PTSD as a result of the Watson's Bay incident. It analysed the evidence from the applicant and from four psychiatrists and summarised the evidence of those psychiatrists. The Tribunal made an assessment of the medical evidence. The Tribunal took a rational approach by looking to the only objective report of the incident which was by the investigating officer.

The Court noted, in view of the fact the applicant only had a vague memory of events on the night, the Tribunal concluded that the Watson's Bay event did not constitute a traumatic event and the applicant did not have the required response involving intense fear.

The finding that there was no recollection of the assault or the accidental fall, meant that the first part of the definition of PTSD could not have been satisfied because the applicant did not experience, witness, or was confronted with an event that involved the actual or threatened death as required.

The Court noted once it is accepted that the Tribunal made no error in concluding that he did not suffer from PTSD it did not need to consider whether there was a reasonable hypotheses connecting the PTSD with service and the second and fourth grounds of appeal fall away.

The Court considered the third complaint could not be accepted, and noted the Tribunal set out evidence given by each psychiatrist. It had to choose between contending views. The Tribunal explained that it relied upon the applicant's lack of recollection as

supportive of the view that there was insufficient information to substantiate the claim the applicant had experienced a traumatic event.

The final ground was that the Tribunal failed to address whether the notification of the death of the applicant's father was a factor. The Court considered it could hardly be an error to deal with a claim not made.

### Formal decision

Appeal dismissed.



### Editorial note

This decision serves as a good reminder that a preliminary matter for decision makers to decide, on the balance of probabilities, is the diagnosis of the injury or disease that the veteran or member has claimed to be related to his or her eligible service.

A claim for Post Traumatic Stress Disorder is unusual, in that the diagnostic criteria in DSM IV has a criterion of causality contained in criteria A.

The decision maker must determine whether the person was exposed to a stressor and responded to it as defined in DSM IV.

If diagnostic criteria A is satisfied, a decision maker must then also consider it the evidence discloses that the veteran or member also satisfies Criterion B, C, D, E and F of DSM-IV.

Please also note the Full Court case summary later in this edition of VerBosity.

### King v Repatriation Commission

Cowdroy J

[2011] FCA 1436  
8 November 2011

### ***Whether the Tribunal failed to apply s196B(14) of the VEA***

#### **Facts**

The applicant was diagnosed in August 2007 with prostate cancer and claimed that as a result of his career in the Air Force he developed a *"liking for foods with a high fat content that lasted all his life and which led in turn to his prostate cancer"*.

On 14 September 2009 the Veterans' Review Board upheld the decision of the Commission, which found that the applicant's prostate cancer and erectile dysfunction were not war caused. The applicant appealed that decision to the Administrative Appeals Tribunal (the Tribunal) which upheld the decision on 15 April 2011.

The applicant served in the Air Force from January 1950 to February 1961 and performed service in Malaya and in the Far East Strategic Reserve. The Tribunal appeared to have accepted that the applicant's service constituted 'operational service' as defined in the VEA.

The applicant then appealed to the Federal Court. The applicant's notice of appeal was filed on 12 May 2011. At the hearing leave was granted to the applicant to rely upon an amended notice of appeal. The amended notice of appeal raised three issues to be determined.

#### **Grounds of appeal**

1. Whether the Tribunal erred in its application of the words *"increasing*

*animal fat consumption by at least 40%"*  
contained in clause 5 (c) of the SoP.

2. Whether the Tribunal was required to apply, and if so, correctly applied s196B (14) of the VEA, when considering whether the applicant's prostate cancer was related to his operational service.
3. Whether the Tribunal made impermissible findings of fact in the first three stages of the *Deledio* process.

### The Court's consideration

The Court noted the Tribunal observed that the SoP provides that a reasonable hypothesis will be raised if a connection is established between the 40% increase in animal fat consumption and the relevant service.

The applicant's operational service was from October 1955 to August 1957 in Malaysia and from September 1957 to May 1958 in Singapore. The increase in the applicant's animal fat consumption which occurred during the applicant's operational service was only

18%. Due to this finding the Tribunal's conclusion that the applicant's pre operational service was irrelevant for the purposes of the SoP, the Tribunal found that clause 5(c) was not satisfied. In reaching such finding, the Court found that the Tribunal combined the requirements of clauses 4 and 5.

The Court considered the correct application of the SoP:

Clause 5 sets out the factors that must "as a minimum exist before it can be said that a reasonable hypothesis has been raised" connecting that applicant's prostate cancer with his relevant service. The investigation must be directed to the question whether any or one or more of the several factors itemised in clause 5 of the SoP are satisfied or raised. Only when that inquiry has been determined in favour of a veteran, does the inquiry then shift to the threshold issue, namely whether any factor is related to service.

The Court noted the factor for consideration does not specify that the 40% increase must be assessed only before and after the applicant's

operational service. The Tribunal did not address the two stages independently resulting in the possibility that it combined the process.

The Tribunal was presented with evidence the applicant had increased his animal fat consumption by over 40% taking into account both operational and non operational service. The Tribunal erred in failing to find that clause 5(c) was raised.

After addressing whether the factor was raised the Tribunal was then required to consider whether such factor was related to the applicant's operational service, as required by clause 4 of the SoP. The consideration of the clause 4 of the Sop is to be assessed by reference to the provisions of s196B(14) of the VEA.

The Tribunal was also required to consider whether s196B(14)(b) applied in the circumstances as well as s196B(14)(d).

The Court held the Tribunal erred both in its application of clause 5c of the SoP and by failing to consider adequately the provisions of s196B(14) of the VEA.

## Formal decision

Proceedings to be remitted to the Tribunal to be determined according to law.



## Editorial note

For further reading please see the case summary in this edition concerning *Gilkinson v Repatriation Commission* [2011] FCAFC 133. This Full Federal Court decision provides guidance on "contributed in a material degree".

### Onorato v Repatriation Commission

Katzmann J

[2011] FCA 1507  
23 December 2011

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

## Facts

Mrs Onorato's late husband, Joseph, rendered operational service as an anti-aircraft gunner during World War 2. Mrs Onorato applied for a widow's pension. The delegate of the Repatriation Commission (Commission) refused Mrs



Onorato's claim. The Veterans' Review Board affirmed the Commission's decision. Mrs Onorato sought further review by the Administrative Appeals Tribunal (the Tribunal).

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

Before the Tribunal Mrs Onorato contended that her late husband suffered not only from ischaemic heart disease but also from hypertension and an anxiety disorder. Her case was based on the hypothesis that her late husband suffered an anxiety disorder resulting from his war service, and the anxiety disorder caused the hypertension which, in turn, caused the ischaemic heart disease that caused his death. There was no dispute that Mr Onorato died from ischaemic heart disease or that he suffered from hypertension.

Turning to the claimed anxiety disorder, the Tribunal considered that it had to decide whether Mr Onorato suffered a diagnosable anxiety disorder by applying the standard of reasonable satisfaction pursuant to s120(4) of the Act. Only then would it be required to consider any relevant SoP and apply the standard of proof in ss120(1) and (3).

The Tribunal rejected Mrs Onorato's claim that her husband had also had an anxiety disorder and affirmed the decision under review. Mrs Onorato then appealed from the Tribunal's decision to the Federal Court.

### **Grounds of appeal**

Mrs Onorato appealed to the Federal Court on the question of whether the Tribunal applied the wrong standard of proof (or asked itself the wrong question) when it decided that Mr Onorato had not suffered from an anxiety disorder.

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

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

The first issue the Court turned to consider was whether the existence of the anxiety disorder should be determined according to the standard of "reasonable satisfaction" or the "beyond reasonable doubt" standard.

Mrs Onorato contended that once the Tribunal determined to its reasonable satisfaction the kind of death the veteran suffered, the standard of "reasonable satisfaction" was exhausted.

Conversely, the Commission drew the Court's attention to the decision *Repatriation Commission v Green* [2008] FCA 1614 ("*Green*"). In *Green*, the Court held that the existence of an injury or disease that is part of the hypothesised chain of causation between service and the veteran's death (or presumably another claimed injury or disease) is to be determined on the balance of probabilities rather than merely pointed to by the material before the decision-maker. This is required whether or not there is a SoP for the particular injury or disease.

Her Honour noted that "the issue in the present case was not raised in *Green*" and that in *Green*, the Court's attention did not appear to have been drawn to another Full Court decision, *Collins v Administrative Appeals Tribunal* [2007] FCAFC 111 ("*Collins*").

In *Collins*, a similar hypothesis had been put forward that the late veterans' post-traumatic stress disorder ("PTSD") was war caused and that it had been the cause of hypertension. Hypertension led to the development of ischaemic heart disease, of which the veteran died. In *Collins*, the Tribunal determined that it was not reasonably satisfied that the

veteran suffered from PTSD. On appeal, the Full Court unanimously held that the Tribunal had fallen into an error of law. All that the Tribunal was required to do was to determine whether or not the material 'pointed to' or 'raised' the facts, rather than proved on the balance of probabilities, that the veteran suffered from PTSD, that it was related to his service, and that it contributed to the cause of the veteran's ischaemic heart disease.

Following the decision in *Collins*, Justice Katzmann concluded that Tribunal did not ask itself the correct questions and so fell into error. Her Honour considered that:

[40] In *Collins*, as here, there was material before the tribunal that was capable of raising a reasonable hypothesis connecting the veteran's death with his war service. That was evidence from a psychiatrist. There, as here, instead of forming an opinion as to whether the material did raise a reasonable hypothesis, the tribunal embarked on the task of weighing the evidence and deciding whether or not the veteran suffered from the particular anxiety disorder. As Emmett J put it in *Collins* (at [21]) that was not

the task called for by the statutory provisions...

### Formal decision

The Court decided that Mrs Onorato's appeal should be allowed and the matter be remitted to the Tribunal.



### Editorial note

The decision of the Court in *Onorato* provides guidance on the standard of proof to be applied for the existence of a disease in a sub-hypothesis.

Previously, in *Repatriation Commission v Green* [2008] FCA 1614, the Court held that the existence of an injury or disease that is part of the hypothesised chain of causation between service and the veteran's death (or presumably another claimed injury or disease) is to be determined on the balance of probabilities. This was required whether or not there was a SoP for the particular injury or disease. Following the Court's decision in *Onorato*, the standard of proof to be applied for the existence of a disease in a sub-hypothesis is the

"beyond reasonable doubt" standard. Please note, there was material (evidence from a psychiatrist) before the Tribunal that was capable of raising a reasonable hypothesis connecting the veteran's death with his war service.

A summary of the AAT remittal appears earlier in this edition of *VeRBosity*.

### Farley-Smith v Repatriation Commission

Dodds-Streeton J

[2012] FCA 80  
13 February 2012

***Whether Tribunal misapplied relevant principles, whether apprehended bias and whether denial of procedural fairness***

### Facts

The veteran served in the Australian Army and had operational service as a gunner in Darwin between 1943 and 1945. He died on 14 November 2001. On his death certificate the death was certified to be *Myelofibrosis – 4 years and Oesophageal varices 2 years*.

Mrs Farley-Smith lodged a claim with the Repatriation Commission (the

Commission) for a war widow's pension on 11 February 2002. On 7 March 2002 the Commission rejected Mrs Farley-Smith's claim on the grounds that the cause of myelofibrosis was not known. Mrs Farley Smith then appealed to the VRB. On 5 May 2003 the VRB affirmed the Commission's decision. Mrs Farley – Smith then lodged an application with the Tribunal on 23 June 2003 seeking a review of the VRB decision. On 4 October 2005 the Tribunal set aside the Commission's decision and instead decided that Mr Farley- Smith's death was war caused. The Commission then lodged an appeal to the Federal Court. The Commission's appeal was successful. The matter was remitted to the Tribunal. This is an appeal from the second decision of the Tribunal to the Federal court.

### Grounds of appeal

1. The Tribunal erred in law in that it rejected evidence before it in determining whether or not the material pointed to a hypothesis being raised between the claimed condition and the circumstances of the service by

the veteran, namely in substance the relationship between benzene exposure and the medical condition myelofibrosis.

2. The Tribunal erred in law in that it determined that it could not assume a connection to service in the circumstances, because it had made an assumption in relation to the existence or occurrence of a fact upholding the hypothesis.
3. The Tribunal member who is a qualified medical practitioner should have decided it was proper to disqualify herself from hearing the case on the basis that she was a qualified medical practitioner and had previously determined that the connection between the hypothesis posed in this case was too remote and tenuous.
4. the Tribunal erred in law in that without any evidentiary basis for so concluding it determined that it could not assume a connection to service

because it had made an assumption in relation to the existence of a fact upholding the hypothesis.

5. The Tribunal erred in law in that the Tribunal refused the Applicant a right of reply contrary to the Applicant's right on a proper construction of s33 of the Administrative Appeals Tribunal Act 1975 to have the tribunal afford procedural fairness to the Applicant.
6. the Tribunal erred in law on any application in failing to disqualify itself on the ground that the Applicant had failed to articulate every particular event that occurred in the course of the hearing which might cause an independent lay observer to perceive that the Tribunal may be ostensibly biased.

### The Court's consideration

The Court noted the applicant's fundamental complaint under ground 1, was the Tribunal's alleged misapplication of the analytical process required by s120, as construed in *Bushell*

where the High Court required the Tribunal first determine whether all the material raised a reasonable hypothesis connecting the veteran's death with a particular incident, and only then to determine whether the factual foundation of the hypothesis was disproved beyond reasonable doubt.

The Court also noted the Tribunal, at the stage of determining whether the material before it pointed to a reasonable hypothesis, made findings on the expertise or partiality of witnesses offering opinion evidence on the causal connection aspect of the hypothesis and treated the evidence accordingly.

The Court noted:

In *Bushell*, the Court made clear that a hypothesis may be reasonable even if unproved, in the absence of any or any common association between the injury and the incidents of the veteran's service. The Court made clear that s120(3) did not require the tribunal to choose between competing hypotheses or to determine whether one medical opinion is to be preferred. The High Court indicated that in some cases at the stage of determining whether the material raised facts which

pointed to a reasonable hypothesis, the raised facts themselves may be assumed.

The Court considered, pursuant to those authorities, the determination under s120(3) whether the material raises a reasonable hypothesis precedes the determination under s120(1) of whether the injury or disease was war caused because the factual foundation of the hypothesis was or was not disproved beyond reasonable doubt. The Court explained the authorities do not impose an absolute prohibition on critical assessment and fact finding on any matter in the context of that inquiry, and that the Tribunal must critically scrutinise the material before it. The Tribunal recognised that the question whether a reasonable hypothesis was raised must be determined on a consideration of the whole of the material before it.

In relation to grounds 2 and 4 the grounds were not made out.

In relation to ground 3 the applicant alleged the member's dissenting judgment in an earlier case would appear to a fair minded lay observer to give rise to a reasonable apprehension that the

member might not bring an impartial mind to the resolution of the question whether there was a reasonable hypothesis.

In my view nothing in those observations might cause a reasonable observer to apprehend that the member might have absolutely rejected the possibility that benzene might be a causative factor or otherwise held views on that question which might preclude her from bringing an impartial mind to the present case.

The Court also noted that in any event the applicant's legal representative waived any entitlement to object as he failed to either before or during the hearing to apply to the member to disqualify herself.

In relation to ground 5 the Court was of the opinion the applicant was not denied procedural fairness by the refusal of a right to reply.

S33 of the Act provides the proceedings are to be conducted with as little formality as proper consideration of the matters permits. The above provisions neither expressly nor implicitly entitle an applicant to

reply to a respondent's closing submissions.

In relation to ground 6 the Court found there was no evidence the Tribunal refused to disqualify itself on the basis alleged.

### Formal decision

Appeal dismissed.



### Editorial note

When deciding there was no apprehended bias on the part of the member, the Court referred to the recent High Court case of *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2 and reaffirmed the principle set by the High Court earlier in the case of *Ebner*:

In 2000, the test in Australia was stated by this Court in *Ebner v Official Trustee in Bankruptcy*. It requires two steps. The first is "the identification of what it is said might lead a judge ... to decide a case other than on its legal and factual merits." The second is an "articulation of the logical connection between the matter and the feared deviation from the course of deciding

the case on its merits." In *Ebner* the constructed observer was the "fair-minded lay observer" concerned only with a reasonable apprehension of bias. The test is generally applicable to cases of asserted apprehended bias, including cases in which the judge is said to have a pecuniary interest in the outcome of the case which he or she is hearing. This Court rejected the proposition that automatic disqualification applies to such classes of case.

The principle as set out in *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group*:

Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is **disqualified if a fair minded observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.** That

principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement that reflects the fundamental importance of the principle that the tribunal must be independent and impartial. It is convenient to refer to it as the **apprehension of bias principle**.

Chapter 2 of the Administrative Review Council's *Guide to Standards of Conduct for Tribunal Members* refers to the principles in relation to bias and the standard of conduct expected by Tribunal members. In particular the guide notes:

Bias

- (i) A tribunal member should act in an impartial manner in the performance of their tribunal decision-making responsibilities so that their actions do not give rise to an apprehension of bias, or actual bias.
- (ii) A tribunal member should be proactive and comprehensive in disclosing to all interested parties interests that could conflict (or appear to conflict) with the review of a decision.
- (iii) A tribunal member should have regard to the potential impact of

activities, interests and associations in private life on the impartial and efficient performance of their tribunal responsibilities.

- (iv) A tribunal member should not accept gifts of any kind where this could reasonably be perceived to compromise the impartiality of the member or the tribunal.

Please also refer to the VRB practice direction on bias earlier in this edition of VeRBosity.

**Bawden v Repatriation Commission**

Gray J

[2012] FCA 345  
5 April 2012

***Whether a finding as to the occurrence of a traumatic event belongs to that preliminary step or to the later process of determining the causal connection between PTSD and war service***

**Facts**

Mr Bawden served in the Royal Australian Navy between 8 January 1964 and 7 January 1976. His service included nine voyages to Vietnam on HMAS



Sydney between 1967 to 1969. The Commission rejected Mr Bawden's claims for PTSD, alcohol abuse and depressive disorder.

On appeal the Tribunal determined that Mr Bawden did not suffer from PTSD. It therefore had no occasion to consider whether PTSD was war caused. The Tribunal then determined that Mr Bawden suffered from alcohol dependence and from depressive disorder. It proceeded to determine that neither of these conditions were war caused. Mr Bawden appealed to the Federal Court.

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

#### *Claim for PTSD*

The Court noted that problems have arisen in cases in which the diagnostic criteria applied by decision makers in determining whether the veteran has a disease involve reference to particular causes of such a disease.

Should the decision maker, as part of the diagnosis process, determine on the balance of probabilities whether the causal event occurred, or should that determination be left to the four step

process set out in *Deledio*? This was discussed by the Court at length in *Mines v Repatriation Commission*. The Court concluded that a veteran is entitled to have the causal aspect of a claim for PTSD dealt with in accordance with the four step process. Such a claim is not to be precluded by a finding that the decision maker is not satisfied on the balance of probabilities that the traumatic event occurred, made at the initial stage of diagnosis.

The Court noted the clear policy underlying s120 of the VEA is that practical difficulties of establishing causation in respect of a condition from which the veteran might be suffering are such that a veteran who has rendered operational service is entitled to succeed unless the decision maker is satisfied beyond reasonable doubt that the alleged causal connection does not exist. If the determination as to whether a particular traumatic event occurred is transferred from the process of determining causation to the process of diagnosing the veterans' condition, then a veteran who has rendered operational service will be treated no differently as to causation from a veteran who has not rendered operational service.

The Court noted the proper approach of the decision maker is to examine a claim for PTSD without determining conclusively whether the alleged causal event occurred. The correct approach is the one taken in *Budworth*, examining the collection of symptoms and determining whether they constitute a disease. The question of aetiology of the disease should be left to the four step process in accordance with ss120(3) and 120A(3) of the VEA.

In Mr Bawden's case the Tribunal concluded:

In view of its findings on the sampan event, the tribunal is reasonably satisfied Mr Bawden was not exposed to an event that could be described as traumatic as is required for a diagnosis of PTSD, and the tribunal concludes Mr Bawden does not suffer from PTSD, so there is no need to determine whether this condition is war caused.

The Court found the Tribunal in reasoning in this fashion had erred in law. It had transferred the question of whether there was a causal connection between the sampan incident and the claimed condition of PTSD from the four step causation process to the diagnosis

process. Having done so, it dealt with the question of causation according to the reasonable satisfaction standard. It diverted itself from the consideration of whether those symptoms were capable of amounting to PTSD.

*Claim for alcohol abuse, alcohol dependence and depressive disorder*

The Tribunal directed itself to the question of whether Mr Bawden suffered from any psychological condition other than PTSD. In this respect it acted correctly in not attempting as part of the process of diagnosis to deal with the question whether those conditions were related to Mr Bawden's operational service by having resulted from his experience of the sampan incident.

The Tribunal recognised that it had to determine causation questions by applying the beyond reasonable doubt standard.

The Court considered that despite the Tribunal's protestations that "in relation to the third step from *Deledio* the Tribunal is not making any finding of fact", the Tribunal did make findings of fact, it made a specific finding that by the time of his operational service, Mr

Bawden already had an established pattern of heavy drinking with a clinical onset in 1965. This was far removed from the *Deledio* process. A finding that the material points to a hypothesis required by the first step in that process cannot involve findings as to when events occur. A hypothesis that located the clinical onset at a time prior to the sampan incident. The Tribunal had no business in determining that a hypothesis involving those facts was demonstrated by the material. The Tribunal ought to have addressed itself to the hypothesis that it was a sampan incident that led to onset of heavy drinking and therefore his alcohol dependence. The Tribunal needed to determine whether the material raised that hypothesis.

### Formal decision

Appeal allowed



#### Editorial note

In *Bawden*, Justice Gray appears to have qualified his view in *Mines'* case.

To recap, in *Mines'* case, Justice Gray held that if a decision maker was

reasonably satisfied that the claimed traumatic event did not occur - then a diagnosis of PTSD could not be made. His Honour said at para 48:

"...the question whether a veteran is suffering, or has suffered, a claimed injury or disease must be determined to the reasonable satisfaction of the decision-maker, i.e. on the balance of probabilities. That question is not to be determined by asking whether there is a reasonable hypothesis that the veteran is suffering, or has suffered, the injury or disease and asking whether the material establishes that the facts supporting that hypothesis do not exist beyond reasonable doubt. If the question is posed as whether a veteran has suffered PTSD as a result of a traumatic event said to have occurred during the veteran's operational service, it must be answered by saying that **the decision-maker must be reasonably satisfied that the traumatic event occurred before reaching the conclusion that the veteran suffered PTSD**. Only if such a conclusion is reached does the reasonable hypothesis process of reasoning, outlined in the four steps referred to in *Deledio*, come into

operation. As I have already suggested, in those circumstances, the connection between the disease and the operational service has already been determined, and the four steps in *Deledio* hardly need to be considered..."

probabilities whether the causal event occurred, or should that determination be left to the four-step process set out in *Deledio*?..."

The key issues in *Bawden* related to:

- Whether diagnosis of PTSD involved determining causation?
- Whether the decision maker erred in finding on the balance of probabilities that the alleged event was not traumatic?
- Whether the decision maker erred by making findings of fact at too early a stage?
- Whether the decision maker erred in applying the wrong standard of proof to those findings?

At para 20 of his decision, Justice Gray summarised the combination of these issues as:

"...Problems have arisen in cases in which the diagnostic criteria applied by decision-makers in determining whether the veteran has a disease involve reference to particular causes of such a disease. Should the decision-maker, as part of the diagnosis process, determine on the balance of

In *Bawden* Justice Gray concluded that the proper approach for the decision maker, is to examine a claim for PTSD (or any other condition for which causation is said to be part of the diagnosis) without determining conclusively whether the alleged causal event occurred. The question of the aetiology of the disease should be left to the four-step process in accordance with ss 120(3) and 120A(3) of the *Veterans' Entitlements Act*.

Justice Gray appears to have qualified his view in *Mines'* case (despite this being a well established Federal Court authority) that in terms of a diagnosis of PTSD, a decision maker must consider whether the required symptoms resulted from the alleged traumatic event, but must not determine conclusively whether the alleged causal event occurred.

There is a clear tension between Justice Gray's decision in *Bawden* and his earlier decision in *Mines'* case. The decision in *Bawden* does not go so far as to provide an authority for removing the 'reasonable satisfaction' standard of

proof when determining diagnosis in PTSD cases.

Please note, the decision in *Bawden* was appealed by the Commission to the Full Federal Court, which handed down its decision on 3 December 2012. A case summary is contained later in this edition of *VeRBosity*.

### Willis v Repatriation Commission

Bromberg J

[2012] FCA 399  
19 April 2012

### ***Whether there was a failure by the Tribunal to provide adequate reasons***

#### **Facts**

Mr Willis appealed to the Court from a decision of the Administrative Appeals Tribunal that determined that he was not entitled to the special rate of pension.

#### **Grounds of appeal**

1. The main ground and the only ground of merit is that reasons given by the Tribunal for its decision are not

adequate, and by reason of that inadequacy the AAT made an error of law.

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

The Court noted the Commission accepted that a failure to provide adequate reasons for its decision can constitute an error of law.

The Court noted the decision in *Dornan v Riordan* (1990) 24 FCR 564, where a Full Court held that failure to provide adequate reasons is an error of law. The Court noted the question of law posed is whether the AAT has complied with its statutory duty under s43(2) of the AAT Act.

In relation to a decision made under the Veterans' Entitlement Act, and in considering the adequacy of the reasons given for the decision, the High Court in *Roncevich v Repatriation Commission* asked whether sufficient explanation appears from the judgment of the Tribunal, to enable the parties and the Court, to understand and deal with the reasoning and decision of the Tribunal.

The Court noted the requirements of s43(2B) were more recently dealt with in *Appellant V324 of 2004 v Minister for immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 259, where it was accepted that it was necessary to make findings and give reasons in respect of substantial issues on which the case turned. The Court noted that many of these authorities had been considered in *Alexander v Australian Community pharmacy Authority* [2010] FCA 189 and determined that conclusions as to primary facts which were not the subject of controversy before the decision maker are unlikely to require explanation. However, conclusions as to significant facts in dispute are likely to require explanation if persons affected by the decision are to be given an understanding of the basis for the decision. That obligation requires that significant areas of primary fact should ordinarily be addressed.

#### *Task of the AAT*

In order to assess the adequacy of the reasons provided by the AAT, it was necessary to understand the task that the AAT was duty bound to undertake.

This involved the proper interpretation of s24(1)(c) which has been the subject of great judicial consideration. The preferred interpretation and preponderance of authority interpret the words of s24(1)(c) which comprise the “alone test” so that they are designed to exclude a claim where, notwithstanding such a condition, other factors (including other medical conditions prevent employment.

The question raised by the alone test is not whether on its own the war caused incapacity prevents the veteran’s continued employment. The question is whether apart from the war caused incapacity, there is another factor or factors which prevent employment. The existence of other factors which prevent the veteran from working has a disqualifying result for an application for special rate. The war related incapacity must be the lone factor which prevents continued employment. That is what is meant by alone.

The Court noted the Tribunal in its reasons found:

His time out of the workforce, his age,  
his lack of education and inability to  
use computers or computerised farm

equipment as well as his physical limitations in walking long distances are all factors preventing him from undertaking remunerative work of the types he has previously done. His location in a remote area is also a factor.

The Court noted that it is not clear from the AAT's reasons whether in assessing those factors as causative, the AAT separated out any contribution made by Mr Willis' war caused conditions.

That was a live issue in the proceedings because there was evidence before the AAT that Mr Willis' war caused conditions had contributed to his time out of the workforce and that his war caused conditions had been a cause of his move to a remote area.

How the AAT dealt with that evidence is not explained in its reasons. The AAT failed to provide a sufficient explanation of the conclusions it reached.

The AAT's reasons also failed to adequately expose its reasoning in relation to the second element of s24(1)(c) which deals with the requisite nexus between the war caused incapacity and the veteran suffering a loss.

The only part of the AAT's decision which appears to deal with this second element is the factual findings stated which address why Mr Willis ceased work, why his attempts to work were hampered and that he received a disability pension for more than a decade.

The relevance of those factual findings to the test raised by the second element of s24(1)(c) and the reasoning which led to the AAT's conclusion, is neither expressed nor apparent.

The Court held that legal error was established.

### **Formal decision**

Appeal allowed.

**Repatriation Commission v Knight**

Finn, Gilmour and Perram JJ

[2012] FCAFC 83  
6 June 2012

***Whether the Tribunal erroneously imposed a burden of proof-whether the last exposure to tobacco smoke during operational service must be within five years of the clinical onset of ischaemic heart disease in order for cl 6(i) of the Statement of Principles to be satisfied.***

**Facts**

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

to the Tribunal to be determined according to law. The Administrative Appeals Tribunal decided that Mrs Knight should be granted a war widow's pension. The Commission appealed to the Full Court from that determination.

**Grounds of appeal and Court's consideration**

*Erroneous consideration of connexion between service and death*

The Full Court noted the Tribunal's reasoning;

With regard to s196(14)(d), in the tribunal's view the facts raised do point to Mr Knight's operational service contributing in a material degree to his death as a result of ischaemic heart disease.

The Full Court agreed this sentence suggests the Tribunal asked itself whether Mr Knight's service materially contributed to ischaemic heart disease. This is not the inquiry required by s196B(14)(d) which seeks to discern a connexion not between service and the veteran's disease or death but instead between the service and the factor. The



Full Court also noted the Court had already held in this case that it is an error to inquire into whether there is a connexion between service and death and that the statutory inquiry is whether there is a connexion between service and the factor. The Court noted the error was not material to the outcome of the case.

*Irrelevant considerations*

The second argument by the Commission was that the Tribunal had taken into account the statement that Mr Knight had been exposed to tobacco smoke for ‘close to 24 hours a day’. The Court agreed this is not a relevant matter and the only issue was whether the material pointed to the veteran having been exposed to 1000 hours or more. The quantum of the daily exposure was not relevant.

*Findings on clause 6(i)*

The third error relied upon by the Commission was that the Tribunal failed to make findings in relation to the second part of clause 6(i) that is ‘the last exposure did not occur more than five years before the clinical onset of IHD. The Full Court considered the Tribunal’s reasons showed they were well aware of

the need for the last exposure to occur within five years of 1996.

*Failure to give reasons*

The Commission submitted the Tribunal failed to give reasons for its conclusion that “in Mr Knight’s case, the SoP factor was “contributed to in a material degree by, or was aggravated by service”. This, of course, was not the Tribunal’s conclusion. The Court noted the Commission’s correct submission in relation to its first argument that the Tribunal erroneously found a connexion between his service and his death. The Court held there was no utility in considering whether the Tribunal exacerbated that error by failing to give adequate reasons for its erroneous conclusion.

*Erroneous imposition of onus of proof*

The Commission submitted that the Tribunal conceived the Commission bore an onus of proof. It pointed to s120(6).

The Court noted the Tribunal indicated that the relevant issue was whether it was so satisfied, thereby correctly avoiding any notion involving a burden of proof.

*The second limb of cl 6(i)*

The Court noted the issue of whether cl 6(i) requires that exposure which occurs within five years of clinical onset be connected to service was resolved adversely to the Commission by Katzmann J. The Court noted there was no appeal and went on to say there is an issue of estoppel between the parties on that question.

**Formal decision**

The appeal was dismissed with costs.



**Editorial note**

The Full Court noted the SoP factor requires 1000hrs of exposure to passive smoke and the last exposure to is not to occur more than 5 years before the clinical onset of IHD.

In this case the Tribunal was aware of the need for the last exposure to occur within 5 years of 1996 (the clinical onset of IHD). That is the last exposure was to occur between 1991 and 1996.

The Tribunal had found on the facts that Mr Knight had been exposed to 1112 hrs

of smoke during his operational service and a further 6358 hrs during other service. Although there was 28 years between Mr Knight's operational service and the clinical onset of IHD in 1996, the Tribunal found that Mr Knight had a long history of exposure to tobacco smoke while working for defence and the way in which the factor is to operate means the 28 years between operational service and clinical onset is not a barrier.

For further reading on the requirement of the second limb of cl 6(i) please see the judgment of Katzmann J in *Knight v Repatriation Commission* at page 65 in Volume 26 of *VeRBosity*.

**Rayson v Repatriation  
Commission**

Bromberg J

[2012] FCA 345

21 June 2012

***Whether the Tribunal applied the  
wrong standard of proof for  
diagnosis of PTSD***

**Facts**

The veteran served in the Royal Australian Navy. His operational service included two tours of duty in North Korea during the Korean War. Whilst on operational service and serving on HMAS Tobruk, the veteran experienced three events of significance to his claim that he was incapacitated from Post Traumatic Stress Disorder and from Depressive Disorder. The first incident relied upon the veteran being locked in a refrigerator. The second, occurred at night when the Tobruk was illuminated by shells intended to illuminate its land based target but fell short and illuminated the Tobruk. The third incident related to the veteran witnessing the destruction of a sampan involving the death of or serious injury to, those on board.

The late veteran lodged a claim for pension with the Repatriation Commission which was refused. That decision was then affirmed by the Veterans' Review Board. The veteran then applied to the Administrative Appeals Tribunal. The Tribunal affirmed the decision and the applicant brought proceedings to the Federal Court.

**Grounds of appeal**

1. Was the Tribunal wrong to find that the veteran did not suffer from PTSD?
2. Did the Tribunal apply the wrong standard of proof for PTSD?
3. Did the Tribunal fail to identify and consider all available hypotheses for connecting the veteran's major depressive disorder to his war service?

**The Court's consideration**

The Tribunal noted two basic inquiries to be made when determining whether a person has PTSD. The first concerns whether the person was exposed to a sufficiently traumatic event. The second looks to whether the exposure to trauma

has been manifested in the recognised symptoms for PTSD.

The Court noted on a fair reading of the Tribunal's decision as a whole, it is apparent that the focus of the Tribunal's refusal to make a finding of PTSD was an absence of the requisite symptoms for a diagnosis of PTSD. The Court considered the challenge made by the applicant is insufficient in scope to establish that the ultimate finding was erroneous, let alone that it involved an error of law.

*Which standard of proof applies to PTSD*

The applicant contended that PTSD was to be determined by the application of the s120(1) standard of proof and not on the basis of the standard laid down by s120(4).

The Court said this contention was misconceived and contrary to Full Court authority.

The Court noted that the applicant's approach misconceives the subject matter dealt with by s120(1) and the basis upon which the first of the *Deledio* steps is founded. The Court went on to quote Gray J in *Mines v Repatriation Commission*:

At the outset, one point needs to be understood. The steps outlined in *Deledio* constitute a process of reasoning to be undertaken when the question arises whether a connection exists between a particular injury, disease or death and the particular operational service rendered by the veteran concerned. **The first step identified in *Deledio* assumes that there has already been a finding that the requisite injury, disease or death exists** or has occurred, and finding that the veteran concerned rendered operational service. The first step is to identify whether the material points to a reasonable hypothesis connecting one with the other. There cannot be such a reasonable hypothesis unless the two facts to be connected have already been identified. Their identification is not one of the steps referred to in *Deledio*.

The Court went further and noted what the Full Court said in *Benjamin v Repatriation Commission* (following the authority of *Repatriation Commission v Budworth*):

Section 120(1) of the Act assumes the existence of a relevant injury or disease and provides a standard of proof for

the determination of whether that injury or disease was war caused. When the Commission, or the Tribunal on review, is required to determine whether a veteran is suffering from a particular injury or disease, that issue must be decided to the reasonable satisfaction of the decision maker, in accordance with s120(4).

The Court again noted Gray J in *Mines*:

It should be noted that Benjamin was a case involving a suggestion that the veteran suffered from PTSD. The Full Court noted the tribunal had applied the correct standard by concluding that it was not reasonably satisfied that the veteran was suffering from PTSD

It is therefore clear that the question whether the veteran is suffering or has suffered a claimed injury must be determined to the reasonable satisfaction of the decision maker, that is on the balance of probabilities.

The Court noted the Full Court authorities to which it referred and to which Gray J relied and emphasised they are on point and binding. The ground of appeal was rejected.

The Court also found that as the Tribunal made a finding that the veteran did not suffer from PTSD there was no error in law involved in not considering a factor in the applicable SoP.

### Formal decision

Appeal dismissed.

### Summers v Repatriation Commission

Gilmour, Perram and Jagot JJ

[2012] FCAFC 104  
31 July 2012

### ***Whether Tribunal's treatment of alcohol dependence erroneous***

### Facts

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

Melbourne, the applicant was sent to Sydney in preparation for his return to Vietnam. While in Sydney, the applicant was involved in an altercation with a group of sailors near Watson's Bay which resulted in him falling over a cliff.

Mr Summers appealed to the Federal Court from a decision of the Tribunal that reached the following conclusions:

1. He was not suffering from PTSD
2. He was suffering from alcohol dependence but this was not war caused.
3. He was not entitled to special rate.

The Court dismissed the appeal. Mr Summers then appealed to the Full Federal Court.

#### **Grounds of appeal and Court's consideration**

##### ***PTSD***

The Court noted the debate in this case centred around the diagnostic criteria in the Statement of Principle concerning PTSD and the need for there to have been a traumatic incident and for Mr Summers to have a response involving fear, helplessness or horror. The Tribunal needed to be reasonably satisfied as to

the occurrence of a traumatic event and of Mr Summers having a response involving feelings of fear, helplessness and horror.

The Court noted there were two ways in which these matters may have been found by the Tribunal:

1. the fall down the cliff was a traumatic event and that it had immediately provoked in Mr Summers a response involving feelings of fear, helplessness and horror.
2. the fall down the cliff was a traumatic event and that, when he regained consciousness in the hospital the following day( and perhaps in the days which followed), reflection on the devastating events which had befallen him provoked the requisite feelings of fear, helplessness or horror.

The Full Court concluded that even if the Tribunal had looked at the issue in its reasons it would have found the material before it did not include any evidence from Mr Summers that he had a response consisting of feelings of fear, helplessness or horror in the aftermath.

The Full Court found there was no material error by the Tribunal in reaching the conclusions it did on the issue of PTSD.

*Alcohol dependence*

The Tribunal reasoned that as Mr Summers had started drinking heavily in Vietnam the hypothesis of connection between two events which occurred while he was on operational service, the death of his father and the assault at Watson's Bay, was not upheld by the applicable Statements of Principles which required the relevant event to occur before the clinical onset of alcohol dependence.

In the notice of appeal to the Full Court it was contended that the primary judge misdirected himself by not holding that the Tribunal erred in failing to identify all of the hypotheses that were raised. In particular, the hypothesis which connected the veteran's service with aggravation of the veteran's alcohol dependence following his father's death.

The Full Court noted the Tribunal's function remains an inquisitorial one and it is bound to determine an applicant's case on the material before it and in doing so is obliged not to limit its

determination to the case articulated by an applicant if the evidence and material raises a case not articulated by an applicant.

The Court noted there was no dispute that Mr Summers suffered from alcohol dependence. One critical question for the Tribunal was whether the material pointed to Mr Summers having experienced the relevant class of stressor or experienced the death of a significant other within the five years before the clinical onset of alcohol dependence. As to the issue of clinical onset the primary judge concluded that the Tribunal found as a fact that the applicant's alcohol dependence commenced in Vietnam. The Tribunal did so on the basis of one fact that it found that Mr Summers began drinking heavily soon after arriving in Vietnam.

The difficulty is that drinking heavily is indicative of not only alcohol dependence but also alcohol abuse. There is no indication in the Tribunal's reasons that it considered the different diagnostic criteria for alcohol abuse and alcohol dependence. The fact that Mr Summers drank excessively in Vietnam is not indicative of the clinical onset of alcohol dependence.

The material before the Tribunal pointed to the clinical onset of alcohol abuse in Vietnam and alcohol dependence thereafter. The Tribunal seems to have taken the evidence about Mr Summers' heavy drinking in Vietnam as evidence of clinical onset of alcohol dependence.

The Full Court determined that, on the material, a case was raised that clinical onset of alcohol dependence occurred after Mr Summers returned to Australia and that Mr Summers experienced the death of a significant other and a category 1A stressor within the five years before the clinical onset of alcohol dependence.

### ***Stressor***

The Tribunal's reasons disclose that it equated the meaning of a category 1A stressor to the meaning of a traumatic event as set out in the Statement of Principles relevant to PTSD. The problem is that the definitions are different. The definition of a traumatic event involves both an event and a response to the event. The definition of a category 1A stressor says nothing about a required response. Mr Summers' response to his assault in Watson's Bay was irrelevant to

the question of whether he experienced a category 1A stressor.

The Full Court found the Tribunal erred in law on two bases:

1. failing to consider diagnostic criteria for alcohol dependence as required by the applicable statement of principle SoP 1 of 2009, and thereby failing to determine as required by law whether the material pointed to the date of clinical onset of alcohol dependence as opposed to alcohol abuse.
2. taking into account an irrelevant consideration, being Mr Summers' response to the Watson's Bay assault and fall from the cliff, in determining whether he had experienced a category 1A stressor by reason of either or both his fall from the cliff.

### **Formal decision**

The appeal was allowed insofar as it dealt with the primary judge's rejection of the grounds relating to Mr Summers' alcohol dependence.





### Editorial note

The Tribunal erred in law because it found that the fact of drinking heavily in Vietnam equated to the clinical onset of alcohol dependence. As a result the clinical onset came before the stressor and the relevant SoP was not upheld. The Court noted the Tribunal was wrong to find clinical onset at this time. As in the recent case of *Kaluza*, the test for clinical onset is the one set out in *Lees*, it is either when a person becomes aware of some features or symptoms which enable a doctor to say that the disease was present or when a finding is made on investigation. In this case, it could be said the clinical onset of alcohol abuse was during operational service in Vietnam but not the clinical onset of alcohol dependence which came later.

This case also highlights the importance of distinguishing between definitions in diagnostic criteria and definitions as part of causation such as category 1A stressors. Most notably, in this case the Tribunal confused the diagnostic requirement of having a response to the traumatic event with the 1A stressor which does not require a response.

For further discussion on the definitions of stressors please refer to the case summaries of *Border* and *Hunter* in Volume 26 of *VeRBosity*.

### Smith v Repatriation Commission

Gordon J

[2012] FCA 1043  
19 September 2012

### ***Whether war caused injuries the sole cause of inability to obtain remunerative work***

#### Facts

Mr Smith appealed to the Court from a decision of the Administrative Appeals Tribunal that determined that he was not entitled to the special rate of pension.

#### Grounds of appeal

The appeal concerned the construction of S24 of the VEA, in particular ss24(1)(c) and 24(2)(b).

1. Under s24(1)(c) the appeal concerned whether the AAT fell into error in its consideration of what was the relevant

remunerative work Mr Smith  
previously undertook;

2. For the purposes of s24(2)(b), whether the AAT fell into error by restricting its consideration of Mr Smith's genuine attempts to obtain work to only those attempts he made after applying for an increased pension rate

### The Court's consideration

Section 24(1)(c) focuses on whether there are reasons other than war caused injuries or disease that prevented a veteran from continuing to undertake remunerative work that the veteran was undertaking. If a veteran satisfies that criteria that war related incapacity alone has prevented the veteran from continuing to undertake the remunerative work he was undertaking, that is the end of the inquiry.

If a veteran has not been engaged in remunerative work, the veteran may still satisfy the alone criteria in s24(1)(c) if the veteran satisfies the requirements of s24(2)(b) the **ameliorative provision**.

The Court noted the ameliorative provision operates when the veteran has not been engaged in remunerative work.

If the conditions are satisfied it operates as a deeming provision. It creates a fiction – it treats a veteran not engaged in remunerative work as “having been prevented by reason of that incapacity from continuing to undertake remunerative work that the veteran was undertaking”.

Section 24(2)(b) operates to ameliorate s24(1)(c) in two important ways:

1. it extends the class of veterans entitled to make an application for a pension at the special rate to include veterans who have not been engaged in remunerative work.
2. it provides that the veteran's war caused injury or war caused disease need not be the sole cause but must be a “substantial cause” of inability to obtain remunerative work.

The question of law raised by the appeal was whether a failure by a veteran to take active steps during the assessment period to obtain remunerative work precludes a finding that he has been genuinely seeking to engage in remunerative work.

The AAT interpreted the phrase “genuinely seeking to engage in

remunerative work” as requiring that Mr Smith demonstrate he had been genuinely seeking work during the assessment period. The AAT noted there was no material before them to demonstrate that Mr Smith made a real effort to obtain work at any time **during the assessment period**.

Mr Smith submitted that by restricting itself to a consideration of steps taken by him during the “assessment period”, the AAT erred in its construction of s24(2)(b).

The Court noted the Full Court decision in *Leane*:

that it is unnecessary for the veteran to satisfy the tribunal that he had been genuinely seeking remunerative employment **at all times** during the assessment period. Under s19(5C) of the VEA the Tribunal was required to assess “the rate of rates” at which the pension would have been payable” from time to time” during the assessment period, Section 19(6) provides: where the commission has pursuant to subsection(5C), assessed that the pension was payable at some time during the assessment period at the rate provided by section 23 or 24 then, subject to 24A, the rate at which

the pension is payable shall not be lower than the rate provided by whichever of those sections applied most recently during the assessment period.

The effect of these provisions is that the tribunal was required to determine whether a special pension was payable at any time during the assessment period. If a special pension was payable at any time during this period then the tribunal was required to determine that the special pension was payable from that time, notwithstanding that at some subsequent time the veteran might not have been able to establish that he would be entitled to a special pension.

The Court noted that s24(2)(b) deals with veterans who, following military service cannot work. It applies to a veteran “who has not been engaged in remunerative work”. Mr Smith had a work history and was therefore a person who needed to satisfy s24(1)(c). Section 24(1)(c) refers to “remunerative work that the veteran *was* undertaking”. Section 24(2)(b) simply refers to “remunerative work”. That phrase in s24(2)(b) would extend to remunerative work that he would, but for the incapacity, be continuing so to

seek. It cannot refer to work the veteran has actually undertaken because the section is directed to veterans who have not been engaged in remunerative work.

The Court noted Spender J in the case of *Hall* accepted that evidence which shows that a veteran who may not be able to seek employment but indicated a willingness to accept work if any could be found, satisfied the “genuinely seeking” requirement of s24(2)(b).

The Court went on to say that although it is unnecessary for a veteran to satisfy the AAT that he or she had genuinely seeking to engage in remunerative work at all times during the assessment period, the scheme of the VEA requires a veteran to satisfy the AAT that he or she had, at some time during the assessment period, complied with the requirements of s24(2)(b).

In regard to whether the Tribunal failed to undertake any analysis of the remunerative work which the applicant was actually prevented from undertaking the Court noted the following principles:

In Flentjar Branson J propounded four questions designed to address the s24(1)(c) issue:

1. What was the relevant “remunerative work that the veteran was undertaking” within the meaning of s24(1)(c)?
2. Is the veteran, by reason of war caused injury or war caused disease or both prevented from continuing to undertake that work?
3. if the answer to question 2 is yes, is the war caused injury or war caused disease or both the only factor or factors preventing the veteran from continuing to undertake that work?
4. if the answers to questions 2 and 3 are, in each case, yes, is the veteran by reason of being prevented from continuing to undertake that work, suffering a loss of salary, wages or earnings on his own account that he would not be suffering if he were free of that incapacity?

In Mr Smith’s case, the AAT identified the types of remunerative work undertaken by Mr Smith. The AAT addressed the correct question - what are the types of remunerative work undertaken by Mr Smith. The AAT

correctly considered the types of employment undertaken rather than the particular duties in which Mr Smith had been engaged.

Again the Court noted that Mr Smith had not identified any error of law.

interpretation does not represent the Commission's interpretation.

**Sloan v Repatriation Commission**

Bromberg J

[2012] FCA 1079

3 October 2012

**Formal decision**

Appeal dismissed.

***Whether AAT failed to apply the accepted meaning of “clinical onset”***



**Editorial note**

The issue before the Court was whether the prerequisite in s.24(2)(b) that an applicant be genuinely seeking remunerative work had to be met during the assessment period, as suggested in *Leane's* case.

**Facts**

Mr Sloan rendered eligible service in the Australian Army from 1942 to 1946. In early 1943, he had a fall during a training exercise and suffered an injury to his lumbar spine.

The Court went beyond the scope of the question before it and concluded that s.24(2)(b) could only apply to veterans who, following military service, could not work and therefore meet the description of a veteran “who has not been engaged in remunerative work”, in the words of s.24(2)(b). This

Mr Sloan made a claim for disability pension for lumbar spondylosis, which was denied by the Repatriation Commission. This decision was affirmed by the Veterans' Review Board. Mr Sloan sought further review by the Administrative Appeals Tribunal (Tribunal), affirmed the decision under

review. Mr Sloan appealed the decision of the Tribunal to the Federal Court.

judgment of Jacobson J in *Kaluza* was included in the Tribunal's decision:

### **Grounds of appeal and Court's consideration**

The relevant factor in the Statement of Principles concerning lumbar spondylosis required a trauma to the lumbar spine within the twenty-five years before the clinical onset of lumbar spondylosis. The Tribunal's task was to determine whether Mr Sloan's back injury in 1943 occurred no longer than twenty-five years prior to the clinical onset of his lumbar spondylosis. The Tribunal determined that the clinical onset was the late 1970s or early 1980s.

Seven grounds of appeal were considered by the Federal Court.

#### ***Did the Tribunal adopt the wrong interpretation of "clinical onset"***

In its reasons for decision, the Tribunal identified two relevant decisions of the Federal Court concerning the expression "clinical onset": *Lees v Repatriation Commission* [2002] FCAFC 398 and *Kaluza v Repatriation Commission* [2010] FCA 1244. The following extract from the

The meaning of the expression "clinical onset" was considered by the Full Court in *Lees*. The effect of what their Honours (Heerey, Moore and Keifel JJ) said at [13] was that there is a clinical onset of a disease, either:

- When a person becomes aware of some features or symptoms which enable 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 first ground of appeal was that the Tribunal had erred by adopting an interpretation of the expression "clinical onset" by a rheumatologist (who provided a medical report relied on by the Tribunal), which was inconsistent the interpretation applied by the Court with *Lees* and *Kaluza*. The Court considered the Tribunal's decision demonstrated it had determined the date of clinical onset by reference to *Lees* and *Kaluza*.

*Alleged failure to have regard to evidence*

The second and third grounds of appeal were that the Tribunal erred in failing to have regard to evidence by an orthopaedic surgeon and a rheumatologist. However, the Tribunal's reasons suggest that it did consider the medical evidence before it, and the Court considered the Tribunal is entitled to weigh the evidence and arrive at its own conclusions without making an error of law.

The fourth and fifth grounds of appeal raised the issue of whether the Tribunal had failed to have regard to Mr Sloan's unchallenged evidence that he suffered ongoing symptoms from the date of injury in 1943. The Court considered the reasons of the Tribunal indicated it did have regard to Mr Sloan's evidence, but preferred the evidence of contemporaneous medical records.

*Did the Tribunal misconstrue its task in determining when "clinical onset" occurred?*

The final two grounds of appeal raised the issue of whether the concept of clinical onset applied by the Tribunal was inconsistent with the relevant Statement of Principles. During the

appeal, Mr Sloan contended that the Tribunal misconstrued its task in determining when clinical onset occurred. The Court set out the task that the Tribunal was required to perform:

The question for the AAT was whether a doctor could have concluded that features or symptoms of lumbar spondylosis were experienced by Mr Sloan in early 1968 or earlier: *Kaluza v Repatriation Commission* (2011) 122 ALD 449 (McKerracher, Perram and Robertson JJ), at [63] - [66]. That question has two parts. First, it required the AAT to make findings based on the evidence before it, as to what features or symptoms of lumbar spondylosis were experienced by Mr Sloan and when they were experienced. Secondly, the AAT needed to determine the time at which an opinion that lumbar spondylosis was present could first have been given by a doctor.

The Tribunal found that the weight of medical evidence suggests strongly that the views of doctors who concluded the clinical onset occurred in the late 1970s were preferable to that of the orthopaedic surgeon who concluded the initial onset was in 1943. This gave rise to the

suggestion that the Tribunal adopted factual assumptions made by the doctors whose views it preferred, without deciding for itself what features or symptoms were experienced by Mr Sloan and when they were experienced (the first part of the question set out by the Court above). The suggestion was aided by the lack of express factual findings on this subject in the Tribunal's decision. However, the Court concluded the factual case relied upon by Mr Sloan was impliedly rejected, as the Tribunal regarded the contemporaneous medical records as more reliable than Mr Sloan's evidence about his history of symptoms. Therefore, the Court did not accept that the Tribunal had misunderstood its task.

### Formal decision

The appeal was dismissed.



### Editorial note

This case reinforces the approach to be taken when determining the date of “clinical onset”, as set out in *Lees* and *Kaluza*.

## Repatriation Commission v Bawden

Keane CJ, Jacobson and Bennett JJ

[2012] FCAFC 176  
3 December 2012

***Whether the primary judge erred in holding that diagnosis of PTSD does not require the decision maker to be satisfied on the balance of probabilities that the veteran suffered the traumatic event***

### Facts

Mr Bawden made a claim in respect of incapacity from post traumatic stress disorder, the diagnosis of which includes the occurrence of a traumatic event. The traumatic event contended by Mr Bawden in support of his claim was an incident which the Commission, Veterans' Review Board and the Administrative Appeals Tribunal were not satisfied constituted a traumatic event. On that basis Mr Bawden's claim for incapacity was refused by each of those decision makers.

On appeal to the Federal Court the primary judge considered that the Tribunal should not have proceeded to a conclusion that it was not satisfied that



the traumatic event identified by Mr Bawden occurred because the question whether the traumatic event occurred was concerned, not with diagnosis of an illness or disease, but with the causal nexus between the injury or disease and war service.

The primary judge also concluded that the decision of the Tribunal involved an error of law in its approach to the determination of whether there was a causal connection between Mr Bawden's operational service and his psychological conditions other than PTSD. The Commission accepted that part of the primary judge's decision to be correct and appealed only that part of the decision that included the setting aside of the Tribunal's decision that it was not satisfied Mr Bawden suffered from PTSD.

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

#### *Primary Judge's reasoning*

The Full Court noted the primary judge gave two reasons for concluding that the Tribunal had erred in law in determining on the balance of probabilities whether the traumatic event that Mr Bawden relied had occurred.

Firstly the primary judge considered the underlying policy of s120 of the Act, and that the standard of satisfaction for determining whether there is a causal connection between a disease and war service differs between service that is operational and service that is not. The primary judge explained that if the determination as to whether a particular traumatic event occurred were to be transferred to the step of determining causation from the step of diagnosing then the issue of causation for a veteran who has rendered operational service would be addressed no differently from a veteran who has rendered operational service.

Secondly the primary judge considered that determining causation as part of the diagnosis would lead to anomalies. His Honour said at [22]:

For instance, a veteran with symptoms amounting to PTSD, possibly caused by one of two traumatic events, one associated with the veterans' operational service and the other not, would be in a better position than a veteran with symptoms amounting to PTSD who points only to one alleged traumatic event as the cause. The decision-maker might find on the

balance of probabilities that the former veteran was suffering PTSD, without making a finding as to which of the two traumatic events was the actual cause, but might find on the balance of probabilities that the latter veteran did not suffer from PTSD. The former veteran would then be entitled to have the question of causation (i.e. which of the two traumatic events was to be regarded as the actual cause) determined by the four-step process in accordance with ss 120(3) and 120A(3) of the Veterans' Entitlements Act. The latter veteran would have been denied access to that process.

#### *Full Court consideration*

The Full Court considered s120(1) of the Act has been authoritatively interpreted as assuming the existence of "incapacity from injury or disease" as a matter of established fact rather than as a matter of claim by the veteran. The Court noted the contextual support for that interpretation in s120(3) of the Act, which is expressly concerned only with the issue of causal nexus between incapacity from injury or disease and operational service leaving the issue as to the fact of incapacity from injury or disease to be

resolved in accordance with the provisions of s120(4).

The Full Court stated it was their respectful opinion that the effect of the settled course of judicial authority is that a veteran is entitled to have that aspect of a claim for PTSD concerned with whether it was war caused dealt with in accordance with the four step process explained by the Full Court in *Repatriation Commission v Deledio* (1998) 83 FCR only if it is established on the balance of probabilities that the veteran does in fact suffer from incapacity from that injury or disease: *Budworth*(2001) 116 FCR 200 at [19].

The Full Court stated at [42 & 43]

The obligation of the decision maker was to determine Mr Bawden's claim by reference to an allegation of PTSD. Diagnosis is a process which necessarily involves examining a collection of symptoms in order to identify a disease in accordance with diagnostic criteria.

A decision maker is first obliged to examine the collection of symptoms of which the claimant complains to determine whether, according to the standard of "reasonable satisfaction"

set by s120(4), they constitute a disease for the purposes of entitling a veteran to a pension.

The decision maker's second task is to determine the cause of the disease by applying the Deledio process.

The Full Court also stated that while a veteran must establish on the balance of probabilities that he or she suffers from incapacity from injury or disease the veteran is not obliged to attach a label to the injury or the disease from which the claimed capacity is alleged to result. However, where the disease is asserted to be PTSD, the issue arising from that is to be determined under s120(4) of the Act because it is not a determination to which s120(1) applies. **That is because a traumatic event is necessary for a diagnosis of PTSD at a medical level.**

**PTSD can only be diagnosed as an illness or a disease in terms of a traumatic event.**

The Full Court considered the reasons given by the primary judge for adopting his approach were not sufficiently compelling to overcome the settled course of interpretation. Both the reasons given by the primary judge involve the idea that whether a traumatic event has

occurred is concerned with the issue of causal nexus with war service rather than diagnosis. The Full Court noted in their opinion this is not so. A finding that a traumatic event has occurred is indispensable to a diagnosis of PTSD. The Full Court went further to say at [49]:

One should be slow to attribute to the legislature an intention that incapacity from an alleged illness which the decision maker does not accept occurred at all is nevertheless compensable because it cannot be proven beyond reasonable doubt that it did not occur.

For the above reasons the Full Court concluded the Tribunal made no error of law in concluding that PTSD could not be diagnosed where it was not satisfied that Mr Bawden's symptoms were associated with the sampam incident.

### **Formal decision**

That the primary judge erred in holding that the diagnosis of PTSD was to be determined otherwise than in accordance with s120(4).



### Editorial note

This decision provides clarity and restates the test for diagnosis is on the balance of probabilities.

### Disclaimer

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## Statements of Principles issued by the Repatriation Medical Authority

1 January 2011 to 31 March 2013

Description of Instrument	Number of Instrument	Date of effect
coeliac disease	1 & 2 of 2011	5 January 2011
varicocele	3 & 4 of 2011	5 January 2011
sensorineural hearing loss	5 & 6 of 2011	5 January 2011
conductive hearing loss	7 & 8 of 2011	5 January 2011
Kaposi's sarcoma	9 & 10 of 2011	5 January 2011
polyarteritis nodosa	11 & 12 of 2011	5 January 2011
microscopic polyangiitis	13 & 14 of 2011	5 January 2011
anxiety disorder	15 & 16 of 2011	5 January 2011
dental malocclusion	17 & 18 of 2011	31 March 2011
rheumatic heart disease	19 & 20 of 2011	31 March 2011
malignant neoplasm of the liver	21 & 22 of 2011	31 March 2011
acute rheumatic fever	23 & 24 of 2011	31 March 2011
malignant neoplasm of the nasopharynx	25 & 26 of 2011	25 May 2011
irritable bowel syndrome	27 & 28 of 2011	25 May 2011
acoustic neuroma	29 & 30 of 2011	25 May 2011
obstructive and reflux nephropathy	31 & 32 of 2011	25 May 2011
subdural haematoma	33 & 34 of 2011	25 May 2011
osteoarthritis	35 & 36 of 2011	25 May 2011
malignant neoplasm of the brain	37 & 38 of 2011	25 May 2011
malignant neoplasm of the colorectum	39 & 40 of 2011	25 May 2011

## Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
malignant neoplasm of the lung	41 & 42 of 2011	25 May 2011
acute myeloid leukaemia	43 & 44 of 2011	25 May 2011
myelodysplastic disorder	45 & 46 of 2011	25 May 2011
chronic myeloid leukaemia	47 & 48 of 2011	25 May 2011
malignant neoplasm of the bile duct	49 & 50 of 2011	25 May 2011
malignant neoplasm of the gallbladder	51 & 52 of 2011	25 May 2011
malignant neoplasm of the breast	53 & 54 of 2011	25 May 2011
malignant neoplasm of the oesophagus	55 & 56 of 2011	25 May 2011
malignant neoplasm of the cerebral meninges	57 & 58 of 2011	25 May 2011
cerebral meningioma	59 & 60 of 2011	25 May 2011
malignant neoplasm of the ovary	61 & 62 of 2011	25 May 2011
malignant neoplasm of the salivary gland	63 & 64 of 2011	25 May 2011
malignant neoplasm of the stomach	65 & 66 of 2011	25 May 2011
malignant neoplasm of the thyroid gland	67 & 68 of 2011	25 May 2011
malignant neoplasm of unknown primary site	69 & 70 of 2011	25 May 2011
non-melanotic malignant neoplasm of the skin	71 & 72 of 2011	25 May 2011
soft tissue sarcoma	73 & 74 of 2011	25 May 2011
benign neoplasm of the eye and adnexa	75 & 76 of 2011	25 May 2011
acquired cataract	77 & 78 of 2011	25 May 2011
fibrosing interstitial lung disease	79 & 80 of 2011	25 May 2011
cirrhosis of the liver	81 & 82 of 2011	25 May 2011

## Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
retinal vascular occlusive disease	83 & 84 of 2011	13 July 2011
acute pancreatitis	85 & 86 of 2011	13 July 2011
extrinsic allergic alveolitis	87 & 88 of 2011	13 July 2011
diabetes mellitus	89 & 90 of 2011	13 July 2011
malignant neoplasm of the endometrium	91 of 2011	13 July 2011
malignant neoplasm of the urethra	92 of 2011	13 July 2011
schizophrenia	93 of 2011	13 July 2011
sprain and strain	94 & 95 of 2011	31 August 2011
malignant neoplasm of the bladder	96 & 97 of 2011	31 August 2011
malignant neoplasm of the renal pelvis and ureter	98 & 99 of 2011	31 August 2011
multiple sclerosis	100 & 101 of 2011	31 August 2011
renal artery atherosclerotic disease	102 & 103 of 2011	31 August 2011
chronic pancreatitis	104 & 105 of 2011	31 August 2011
malignant neoplasm of bone and articular cartilage	106 & 107 of 2011	31 August 2011
photocontact dermatitis	108 & 109 of 2011	31 August 2011
irritant contact dermatitis	110 & 111 of 2011	31 August 2011
allergic contact dermatitis	112 & 113 of 2011	31 August 2011
patellar tendinopathy	114 & 115 of 2011	31 August 2011
spinal adhesive arachnoiditis	116 & 117 of 2011	31 August 2011
anosmia	118 & 119 of 2011	31 August 2011
varicose veins of the lower limb	120 & 121 of 2011	2 November 2011
neoplasm of the pituitary gland	122 of 2011	2 November 2011
cerebrovascular accident	123 & 124 of 2011	2 November 2011

## Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
ischaemic heart disease	125 & 126 of 2011	2 November 2011
conjunctivitis	1 & 2 of 2012	11 January 2012
acute infectious mononucleosis	3 & 4 of 2012	11 January 2012
psoriatic arthropathy	5 & 6 of 2012	11 January 2012
adhesive capsulitis of the shoulder	7 & 8 of 2012	11 January 2012
aortic aneurysm	9 & 10 of 2012	11 January 2012
dementia pugilistica	11 & 12 of 2012	11 January 2012
dengue fever	13 & 14 of 2012	7 March 2012
non-aneurysmal aortic atherosclerotic disease	15 & 16 of 2012	7 March 2012
chloracne	17 & 18 of 2012	7 March 2012
inflammatory bowel disease	19 & 20 of 2012	7 March 2012
haemochromatosis	21 & 22 of 2012	7 March 2012
atherosclerotic peripheral vascular disease	23 & 24 of 2012	7 March 2012
angle-closure glaucoma	25 & 26 of 2012	7 March 2012
open-angle glaucoma	27 & 28 of 2012	7 March 2012
chronic venous insufficiency of the lower limb	29 & 30 of 2012	7 March 2012
macular degeneration	47 of 2012	4 April 2012
macular degeneration	68 of 2012	4 April 2012
psoriasis	31 & 32 of 2012	2 May 2012
tinnitus	33 & 34 of 2012	2 May 2012
otitic barotraumas	35 & 36 of 2012	2 May 2012
carotid arterial disease	37 & 38 of 2012	2 May 2012
malignant neoplasm of the cervix	39 & 40 of 2012	11 July 2012
endometriosis	41 & 42 of 2012	11 July 2012



## Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
porphyria cutanea tarda	43 & 44 of 2012	11 July 2012
pes planus	45 & 46 of 2012	11 July 2012
physical injury due to munitions discharge	48 & 49 of 2012	6 September 2012
aplastic anaemia	50 & 51 of 2012	6 September 2012
mesangial IgA glomerulonephritis	52 & 53 of 2012	6 September 2012
deep vein thrombosis	54 & 55 of 2012	6 September 2012
pulmonary thromboembolism	56 & 57 of 2012	6 September 2012
otitis externa	58 & 59 of 2012	6 September 2012
asthma	60 & 61 of 2012	6 September 2012
moderate to severe traumatic brain injury	62 & 63 of 2012	6 September 2012
concussion	64 & 65 of 2012	6 September 2012
fibrosing interstitial lung disease	66 & 67 of 2012	6 September 2012
myeloma	69 & 70 of 2012	31 October 2012
giant cell arteritis	71 & 72 of 2012	31 October 2012
solar keratosis	73 & 74 of 2012	31 October 2012
acute lymphoblastic leukaemia	75 & 76 of 2012	31 October 2012
malignant neoplasm of the prostate	77 & 78 of 2012	31 October 2012
malignant neoplasm of the oral cavity, oropharynx and hypopharynx	1 & 2 of 2013	9 January 2013
ankylosing spondylitis	3 & 4 of 2013	9 January 2013
inguinal hernia	5 & 6 of 2013	9 January 2013
carpal tunnel	7 & 8 of 2013	9 January 2013
adenocarcinoma of the kidney	9 & 10 of 2013	9 January 2013
polycythaemia vera	11 & 12 of 2013	13 March 2013
seborrhoeic dermatitis	13 & 14 of 2013	13 March 2013
essential thrombocythaemia	15 & 16 of 2013	13 March 2013

## Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
primary myelofibrosis	17 & 18 of 2013	13 March 2013
hypopituitarism	19 & 20 of 2013	13 March 2013

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

## Conditions under Investigation by the Repatriation Medical Authority

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

Condition	ICD code
arachnoid cyst of the brain	348.0
fibromyalgia	729.1
hyperthyroidism	242.0, 242.4-9
hypothyroidism	244.0-9
periodic limb movement disorder	327.51
sick sinus syndrome	427.81

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

# AAT and Court decisions – January 2011 to December 2012

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

Costello [2011] AATA 727 (20 October 2011)  
Dunstall [2012] AATA 313 (25 May 2012)  
Norris [2012] AATA 785 (13 November 2012)  
Shadbolt [2011] AATA 723 (19 October 2011)

## Assessment of Disability Pension

### Extreme Disablement Adjustment

Chidley [2011] AATA 905 (16 December 2011)

### General Rate

Connolly [2012] AATA 122 (28 February 2012)

### Section 23 -Intermediate Rate of Pension

Connell [2011] FCAFC116 (31 August 2011)  
Norris [2012] AATA 785 (13 November 2012)  
Thorpe [2011] AATA 491 (15 July 2011)  
Tokarczyk [2011] AATA 355 ( 26 May 2011)

### Section 24 -Special Rate of Pension

#### -S24(1)(a)(i) - degree of incapacity 70%

Langlands [2011] AATA 926 (22 December 2011)

#### -S24(1)(b)

#### -applying S28

Forsyth [2011] AATA 528 (29 July 2011)  
Jones [2011] AATA 631 (7 September 2011)

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

Barrie [2012] AATA 821 (21 November 2012)  
Bonvino [2011] AATA 354 (26 May 2011)

#### S24(1)(c)

#### -cessation of work

Burgess [2011 ] AATA 175 (18 March 2011)  
Ely[ 2011] AATA 572 (19 August 2011)  
Thomson [2011] AATA 833 (25 November 2011)  
Watkins [2011] AATA 918 (21 December 2011)

#### -involuntary redundancy

Small [2011] AATA 268 (21 April 2011)  
-remunerative work  
Bilsby [2011] AATA 133 (28 February 2011)  
Falzun [2011] AATA 891 (14 December 2011)  
Lane [2012] AATA 325 (31 May 2012)  
Van Tongeren [2011] AATA 263 (20 April 2011)

#### -suffering a loss of earnings on own account

Bayford [2011] AATA 913 (20 December 2011)

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

Abbott [2012] AATA 895 (19 December 2012)  
Bull [2012] AATA 29 (20 January 2012)  
Carr [2011] AATA 42 (31 January 2011)  
Charles [2011] AATA 614 (2 September 2011)  
Charlton [2012] AATA 395 (28 June 2012)  
Connolly [2012] AATA 122 (28 February 2012)  
Curtis [2011] AATA 46 (1 February 2011)

<p>Feltham [2012] AATA 357 (14 June 2012)</p> <p>Gilmour [2012] AATA 278 (10 May 2012)</p> <p>Hannebery [2011] AATA 120 (23 February 2011)</p> <p>Holt [2012] AATA 158 (14 March 2012)</p> <p>Kannengiesser [2012] AATA 443 (13 July 2012)</p> <p>Kemp [2012] AATA 207 (12 April 2012)</p> <p>Lorson [2012] AATA 341 (6 June 2012)</p> <p>Matheson [2012] AATA 668 (3 October 2012)</p> <p>McDonald [2012] AATA 164 (15 March 2012)</p> <p>Miller [2011 ] AATA 176 (18 March 2011)</p> <p>Nunn [2012] AATA 46 (31 January 2012)</p> <p>Oakes [2012] AATA 279 (10 May 2012)</p> <p>Pemberton [2012] AATA 414 (4 July 2012)</p> <p>Prendergast [2012] AATA 698 (10 October 2012)</p> <p>Russell [2011] AATA 788 (8 November 2011)</p> <p>Skipworth [2012] AATA 306 (21 May 2012)</p> <p>Smith [2012] AATA 94 (16 February 2012)</p> <p>Smith [2012] FCA 1043 (19 September 2012)</p> <p>Solway [2011] AATA 806 (15 November 2011)</p> <p>Tanzer [2012] AATA 420 (6 July 2012)</p> <p>Willis [2011] AATA 67 (8 February 2011)</p> <p>Willis [2012] FCA 399 (19 April 2012)</p> <p>Woodall [2012] AATA 803 (16 November 2012)</p> <p>Wright [2012] AATA 683 (5 October 2012)</p> <p><b>S24(2)(b) – genuinely seeking to engage in remunerative work</b></p> <p>Kessell [2011] AATA 254 (15 April 2011)</p> <p>Quick [2011 ] AATA 167 (14 March 2011)</p> <p>Scott [2011 ] AATA 369 (31 May 2011)</p> <p>Vulich [2012] AATA 547 (23 August 2012)</p>	<p><b>S24(2A)(e) over 65 – whether suffering a loss of earnings on own account</b></p> <p>Cornish [2011] AATA 65 (8 February 2011)</p> <p>Doyle [2011 ] AATA 876 (12 December 2011)</p> <p><b>S24(2A)(g) over 65 - continuous period of at least 10 years</b></p> <p>Oldmeadow [2012] AATA 691 (12 June 2012)</p> <p><b>Compensation (MRCA)</b></p> <p><b>Incapacity payments</b></p> <p>Hubbard [2011] AATA 603 (31 August 2011)</p> <p>Westwood [2012] AATA 816 (20 November 2012)</p> <p><b>Permanent impairment</b></p> <p>Doherty [2011] AATA 234 (8 April 2011)</p> <p><b>Death</b></p> <p><b>Acute pancreatitis</b></p> <p>Donovan [2011] AATA 510 (25 July 2011)</p> <p><b>Anxiety disorder</b></p> <p>Onorato [2011] AATA 535 (2 August 2011)</p> <p><b>Aortic aneurysm</b></p> <p>Forrester [2012] AATA 846 (30 November 2012)</p> <p><b>Atherosclerotic peripheral vascular disease</b></p> <p>McKenzie [2012] AATA 108 (23 February 2012)</p>
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**AAT and Court decisions –  
January 2011 to December 2012**

<b>Atrial fibrillation</b>	<b>Diabetes mellitus</b>
Robertson [2011] AATA 80 (11 February 2011)	Lloyd [2012] AATA 657 (28 September 2012)
Robertson [2011] FCA 937 (22 August 2011)	
	<b>Gastrointestinal haemorrhage</b>
<b>Bronchopneumonia – chronic bronchitis</b>	Cross [2012] AATA 632 (20 September 2012)
Winter [2011] AARA 278 (27 April 2011)	
	<b>Herpes zoster</b>
<b>Cardiomyopathy</b>	Carnell [2012] AATA 257 (3 May 2012)
Downey [2011] AATA 326 (17 May 2011)	
McKenzie [2012] AATA 108 (23 February 2012)	<b>Hypertension</b>
	Andrew [2011] AATA 624 (5 September 2011)
<b>Cerebral haemorrhage</b>	Julian [2012] AATA 426 (6 July 2012)
Rayson [2012] AATA 776 (7 November 2012)	Leitch [2011] AATA 863 (7 December 2011)
	Linning [2011] AATA 115 (22 February 2011)
<b>Chronic bronchitis and/or emphysema</b>	Lloyd [2012] AATA 657 (28 September 2012)
Moore [2012] AATA 259 (4 May 2012)	Weston [2011] AATA 121 (24 February 2011)
<b>Cirrhosis of the liver</b>	<b>Ischaemic heart disease</b>
Sandry [2012] AATA 71 (9 February 2012)	Booth [2012] AATA 871 (11 December 2012)
	Hurley [2012] AATA 74 (10 February 2012)
<b>De facto relationship</b>	Knight[2011]AATA 496 (19 July 2011)
Desic [2011] AATA 407 (15 June 2011)	Knight [2012] FCAFC 83 (6 June 2012)
	Lloyd [2012] AATA 657 (28 September 2012)
<b>Dementia</b>	McKenzie [2012] AATA 108 (23 February 2012)
Chesher [2011] AATA 284 (2 May 2011)	Onorato [2011] FCA 1507 (23 December 2011)
Hart [2011] AATA 931 (22 December 2011)	Onorato [2012] AATA 759 (1 November 2012)
Quinn [2011] AATA 557 (16 August 2011)	
	<b>Kidney disease</b>
<b>Demyelinating disease of the central nervous system</b>	Collins [2011] AATA 888 (14 December 2011)
Byatt [2011] AATA 170 (16 March 2011)	Furlong [2011] AATA 873 (9 December 2011)

<b>Malignant neoplasm</b>	<b>Remarriage</b>
<i>-bladder</i>	Curran [2011] AATA 402 (10 June 2011)
Morley [2012] AATA 584 (31 August 2012)	
<i>-colorectum</i>	<b>Respiratory failure</b>
Moore [2012] AATA 259 (4 May 2012)	Hawe [2011] AATA 504 (22 July 2011)
<i>-lung</i>	
Willoughby [2012] AATA 97 (17 February 2012)	<b>Suicide</b>
<i>-oesophagus</i>	Howorth [2011] AATA 923 (21 December 2011)
McKenzie [2012] AATA 108 (23 February 2012)	
<i>-prostate</i>	
Coleman [2011] AATA 610 (1 September 2011)	<b>Entitlement to Disability Pension</b>
Gavin [2011] AATA 762 (28 October 2011)	
Glanville [2011] AATA 227 (5 April 2011)	<b>Allied Mariner</b>
Kendall [2011] AATA 141 (2 March 2011)	Pettrick [2011] AATA 54 (4 February 2011)
Martin [2012] AATA 744 (29 October 2012)	
<b>Metastatic carcinoma of the prostate</b>	<b>Arteriovenous malformation of the brain</b>
Gunter [2012] AATA 189 (2 April 2012)	Will [2012] AATA 710 (15 October 2012)
<b>Myelodysplastic disorder</b>	<b>Atherosclerotic peripheral vascular disease</b>
Johns[2011] AATA 511 (25 July 2011)	McDermott [2011] AATA 714 (14 October 2011)
<b>Non-Hodgkin's lymphoma</b>	<b>Bilateral rotator cuff syndrome</b>
Mitchell [2012] AATA 215 (16 April 2012)	Prendergast [2012] AATA 698 (10 October 2012)
<b>Primary sclerosing cholangitis</b>	<b>British nuclear test defence service</b>
Chambers [2012] AATA 595 (5 September 2012)	Jordan [2012] AATA 292 (15 May 2012)
<b>Primary hepatocellular (liver) adenocarcinoma with bony metastases</b>	<b>Cervical spondylosis</b>
Norton [2011] AATA 195 (24 March 2011)	Athanasίου [2012] AATA 347 (12 June 2012)
	Briggs [2011] AATA 516 (26 July 2011)
	Carmichael [2011] AATA 523 (28 July 2011)
	Challes [2011] AATA 151 (8 March 2011)
	Connolly [2012] AATA 122 (28 February 2012)
	Dyce [2011] AATA 550 (11 August 2011)

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Marr [2011] AATA 4 (11 January 2011)	<b>Frontal lobe dysfunction</b>
Roche [2012] AATA 542 (20 August 2012)	Boys [ 2011] AATA 389 (6 June 2011)
<b>Chronic bronchitis and emphysema</b>	<b>Haemorrhoids</b>
Clegg [2011] AATA 410 (17 June 2011)	St Clair [2012] AATA 991 (21 December 2012)
Flanagan [2011] AATA 425 (17 June 2011)	
	<b>Hypertension</b>
<b>Chronic obstructive pulmonary disease</b>	Scott [2012] AATA 225 (18 April 2012)
Menzies [2011] AATA 862 (7 December 2011)	Treloar [2011] AATA 868 (7 December 2011)
<b>Coeliac disease</b>	<b>Inflammatory rheumatic disease</b>
Lynch [2011] AATA 716 (14 October 2011)	Rowe [2011] AATA 119 (23 February 2011)
<b>Colorectal cancer</b>	<b>Intervertebral disc prolapse</b>
Tonkin [2011] AATA 232 (7 April 2011)	Stott [2011] AATA 677 (30 September 2011)
<b>Dental conditions</b>	<b>Ischaemic heart disease</b>
Scown [2011] AATA 53 (3 February 2011)	Azel [2011] AATA 470 (6 July 2011)
	Moran [2011] AATA 546 ( 8 August 2011)
<b>Diabetes mellitus</b>	Smith [2011] AATA 605 (31 August 2011)
Dyce [ 2011] AATA 550 (11 August 2011)	
Kowalski [ 2011] AATA 634 (9 September 2011)	<b>Lumbar spondylosis</b>
Locker [2011] AATA 952 (23 December 2011)	Kelly [2011] AATA 316 (13 May 2011)
Oldacres-Dear [2012] AATA 818 (15 November 2012)	Maslen [2011] AATA 568 (18 August 2011)
Payne [2011] AATA 86 (11 February 2011)	Sloan [ 2011 AATA 424 (21 June 2011)
Southern [2012] AATA 479 (26 July 2012)	Sloan [2012] FCA 1079 (3 October 2012)
	Walker [2012] AATA 630 (20 September 2012)
<b>Dyslipidaemia</b>	<b>Malignant neoplasm of the prostate</b>
Hogben [2012] AATA 878 (13 December 2012)	King [2011] FCA 1436 (15 December 2011)
	King [2012] AATA 725 (23 October 2012)
<b>Eye condition</b>	
Green [2012] AATA 619 (14 September 2012)	

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<b>Multiple sclerosis</b>	Walley [2012] AATA 196 (4 April 2012)
Neal [2012] AATA 843 (30 November 2012)	<i>-clinical worsening</i>
	Lynn [2011] AATA 903 (16 December 2011)
<b>Morbid obesity</b>	<i>-having a clinically significant psychiatric condition at the time of clinical onset</i>
Florence [2011] AATA 483 (11 July 2011)	Phillips [2011] AATA 602 (30 August 2011)
	<i>-stressors and application of S119 VEA</i>
<b>Nephrosclerosis</b>	Chohan [2011] AATA 872 (8 December 2011)
Provost [2011] AATA 153 (24 February 2011)	
<b>Osteoarthritis</b>	<b>-Anxiety disorder</b>
Clarke [2011] AATA 901 (16 December 2011)	French [2012] AATA 415 (4 July 2012)
Richards [2012] AATA 308 (22 May 2012)	Phillips [2011] AATA 602 (30 August 2011)
	Speirs [2011] AATA 240 (11 April 2011)
<b>Prostate cancer</b>	<i>-category 1A stressor</i>
King [2011] AATA 251 (15 April 2011)	Smith [2011] AATA 605 (31 August 2011)
Dunn [2011] AATA 893 (15 December 2011)	<i>-category 2 Stressor</i>
	Bagnall [2012] AATA 720 (17 October 2012)
<b>Psoriasis</b>	DZLG [2011] AATA 573 (19 August 2011)
Halvorson [2012] AATA 930 (21 December 2012)	<i>-clinical worsening</i>
	Lynn [2011] AATA 903 (16 December 2011)
<b>Psychiatric conditions</b>	Moran [2011] AATA 546 (8 August 2011)
<b>-Adjustment disorder</b>	<i>-diagnosis</i>
Watt [2012] AATA 272 (8 May 2012)	Saunders [2011] AATA 676 (29 September 2011)
	<i>-experiencing a category 1A stressor within two years of clinical onset</i>
<b>-Alcohol abuse/dependence</b>	Breakspear [2011] AATA 524 (28 July 2011)
Bawden [2012] FCA 345 (5 April 2012)	
Bentley [2011] AATA 749 (25 October 2011)	<b>-Depressive disorder</b>
Breakspear [2011] AATA 524 (28 July 2011)	Bawden [2012] FCA 345 (5 April 2012)
Craine [2012] AATA 221 (17 April 2012)	Bentley [2011] AATA 749 (25 October 2011)
Moran [2011] AATA 546 (8 August 2011)	Breakspear [2011] AATA 524 (28 July 2011)
Summers [2011] FCA 1451 (8 November 2011)	Byrne [2011] AATA 875 (9 December 2011)
Summers [2012] FCAFC 104 (31 July 2012)	Chohan [2011] AATA 872 (8 December 2011)



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Morgan [2012] AATA 326 (31 May 2012)	Rayson[2011] AATA 233 (7 April 2011)
Pickering [2011] AATA 385 (6 June 2011)	Rayson [2012] FCA 648 (21 June 2012)
<i>-clinical onset</i>	Rehn [2012] AATA 48 (25 January 2012)
Fallon [2011] AATA 15 (18 January 2011)	<i>-disproved beyond reasonable doubt</i>
<i>-material pointing to onset</i>	Avey [2011] AATA 152 (8 March 2011)
Dowling [2011] AATA 200 (28 March 2011)	<i>-not satisfied beyond reasonable doubt that PTSD not war caused</i>
 <b>-Dysthymic disorder</b>	Farrow [2011] AATA 245 (13 April 2011)
St Clair [2012] AATA 991 (21 December 2012)	Joyce [2011] AATA 836 (25 November 2011)
	Pickering [2011] AATA 58 (4 February 2011)
 <b>-Post traumatic stress disorder</b>	<i>-response involved intense fear, helplessness and horror</i>
<i>-aggravation</i>	Kent [2011] AATA 413 (17 June 2011)
Livermore [2011] AATA 217 (30 March 2011)	Oldacres - Dear [2011] AATA 481 (8 July 2011)
<i>-category 1A stressor</i>	Summers [2011] FCA 1451 (8 November 2011)
Breeding [2012] AATA 329 (1 June 2012)	Summers [2012] FCAFC 104 (31 July 2012)
Drysdale [2011] AATA 764 (31 October 2011)	<i>-severe stressor</i>
Hausler [2011] AATA 684 (30 September 2011)	WZNX [2012] AATA 13 (13 January 2012)
Hunter [2011] AATA 514 (26 July 2011)	<i>-suicide</i>
Ibbetson [2012] AATA 167 (16 March 2012)	Ulrich [2011] AATA 679 (30 September 2011)
McDonald [2012] AATA 344 (7 June 2012)	<i>-traumatic events</i>
Sandaver [2012] AATA 881 (14 December 2012)	Bell [2011] AATA 770 (1 November 2011)
Simpson [2012] AATA 845 (30 November 2012)	Bentley [2011] AATA 749 (25 October 2011)
Trigge [2012] AATA 176 (23 March 2012)	Border [2011] AATA 356 (27 May 2011)
<i>-category 1B stressor</i>	Davis [2011] AATA 455 (29 June 2011)
Breeding [2012] AATA 329 (1 June 2012)	Knape [2012] AATA 152 (9 March 2012)
McDonald [2012] AATA 344 (7 June 2012)	O'Dowd [2012] AATA 789 (13 November 2012)
<i>-diagnosis</i>	
Bawden [2011] AATA 283 (2 May 2011)	 <b>-Social phobia</b>
Bawden [2012] FCA 345 (5 April 2012)	Halvorson [2012] AATA 930 (21 December 2012)
Bawden [2012] FCAFC 176 (3 December 2012)	
Bowd [2011] AATA 59 (4 February 2011)	 <b>Sleep apnoea</b>
Eddington [2012] AATA 807 (14 November 2012)	Gilkinson [2011] FCAFC 133 (28 October 2011)
Mills [2011] AATA 336 (20 May 2011)	

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Gilkinson [2012] AATA 467 (24 July 2012)

**Claim**

Stewart [2012] AATA 56 (2 February 2012)

Barclay [2011] AATA 206 (29 March 2011)

**Liability (MRCA)**

**Clinical onset**

Kaluza [2011] FCAFC 97 (4 August 2011)

**Depressive disorder**

Roberts [2011] AATA 835 (25 November 2011)

**Date of lodgment of claim**

Ralph [2011] AATA 881 (14 November 2011)

**Osteoarthritis**

Roberts [2011] AATA 835 (25 November 2011)

**Preliminary issues**

Kowalski [2011] FCAFC 43 (28 March 2011)

**Presbyopia**

Stransky [2012] AATA 403 (29 June 2012)

**Procedural fairness**

Rana [2011] FCAFC 123 (21 September 2011)

Rana [2011] FCAFC 124 (21 September 2011)

**Right knee injury**

Steegstra [2012] AATA 12 (13 January 2012)

Schulz [2012] AATA 561 (27 August 2012)

**Remittal power**

Malady [2011] FCAFC 45 (31 March 2011)

**Practice and Procedure**

**Actual bias**

Kowalski [2011] AATA 212 (8 March 2011)

**Adjournment of hearing**

Duck [2012] AATA 96 (15 February 2012)

**Application for review out of time**

Dachs [2012] AATA 336 (5 June 2012)

**Apprehended bias**

Farley-Smith [2012] FCA 80 (13 February 2012)

