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Editor's notes

This annual edition of *VeRBosity* contains reports on all of the Federal Court decisions relating to veterans' matters in 2013. These decisions canvass a range of issues, such as the application of s119(1)(h) of the VEA, whether an AAT review is confined to matters considered by the VRB, and questions of diagnosis of PTSD.

This edition also reports on selected AAT cases concerning three MRCA claims and two remittals from the Federal Court. The other reported AAT cases cover a variety of topics, including service eligibility as a member of the Forces or under the British nuclear test service provisions, as well as eligibility for war widow's pensions and special rate.

The recent legislative amendments flowing from the Military Compensation Review are also noted.

Katrina Harry, National Registrar

Resignation of long-serving VRB Members

Services Member Air Commodore Frank Burt OBE (Retd) and Services Member Major Gregory Mawkes MBE (Retd) have both recently resigned from the Board.

Frank has been a Services Member at the Board for over 16 years and Greg has been a Services Member at the Board for 21 years.

Both Frank and Greg have been greatly valued members of the Board and they will be missed by all staff and members. We wish them all the very best with their future endeavours.

Determinations & instruments of allotment in 2013

Determinations

In 2013 only one Determination was made under s5R(1)(a) of the VEA by the Minister for Veterans' Affairs, declaring the service of certain individuals in Vietnam (Southern Zone), as continuous full-time service. This determination dated 22 July 2013 revokes an earlier determination dated 25 May 2009.

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 2013.

Legislative amendments

Privacy Amendments (Enhancing Privacy Protection) Act 2012

This Act made a number of significant changes to the *Privacy Act* 1988, which commenced on 12 March 2014. The reforms include a single set of unified privacy principles that regulate the handling of personal information by both Commonwealth agencies and private sector organisations. These new principles are called the Australian Privacy Principles (APPs) and replace the Information Privacy Principles that previously applied to Commonwealth agencies. New privacy notices have been included in the VRB brochure and forms, and our privacy policy is available at www.vrb.gov.au/privacy

Veterans' Affairs Legislation Amendment (Military Compensation Review and Other Measures) Act 2013

This Act includes legislative amendments to implement the Government's response

on 19 recommendations and one observation made by the Review of Military Compensation Arrangements.

Of particular relevance to the VRB, are the changes in the following Schedules which took effect on 1 July 2013:

- **Schedule 2 - Compensation for permanent impairment.** The date of effect for periodic impairment compensation is now based on each accepted condition rather than all accepted conditions, and a lifestyle factor has been incorporated into the calculation of interim permanent impairment compensation. This Schedule also includes a transitional provision applicable to the recalculation of the amount of permanent impairment compensation a person is to be paid for the period prior to 1 July 2013, where the person already has an injury or disease accepted under the VEA and/or SRCA.
- **Schedule 6 - Special Rate of Disability Pension (SRDP).** The eligibility criteria for SRDP has been expanded to include a person who would otherwise meet the criteria in s199 of the MRCA except for the person having received a lump sum incapacity payment under s138 of the MRCA, or the person is receiving a nil rate of incapacity payment because the amount of the incapacity payment is fully offset by Commonwealth superannuation.
- **Schedule 8 - Remittal power of Veterans' Review Board.** The VRB

has been provided with an explicit power to remit a matter to the MRCC for needs assessment and compensation.

- **Schedule 10 - Aggravation of or material contribution to war-caused or defence-caused injury or disease.** All claims for conditions accepted under the VEA and aggravated by defence service after 1 July 2004 are now determined under the VEA, rather than offering a choice between the VEA and the MRCA, which was previously the case.

GARP M (Transitional Impairment Methodology and Interim Permanent Impairment Lifestyle Methodology) Amendment Determination 2013 (Instrument No. MRCC 22 of 2013)

GARP M has been amended by this Instrument, which commenced on 1 July 2013. Chapters 22 and 25 have been amended.

Chapter 22 includes a new method of assessment of lifestyle effect for calculating interim impairment payments. The effect of this will be to increase interim impairment payments by including a lifestyle rating in the methodology. Chapter 25 deals with the new method of working out the amount of compensation payable under the MRCA for a person with an accepted VEA and/or SRCA injury or disease before a claim for permanent impairment is made under the MRCA.



Questions & Answers

Question:

Can a VRB application for review be lodged by email?

Answer:

No.

Section 5T regulates the lodgement of all claims, applications, requests or other documents under the VEA.

The provision only allows for "electronic lodgement" and "transmission electronically", where it is approved by the Commission.

The relevant legislative instrument, *Veterans' Entitlements (Electronic Lodgement Approval) Instrument 2010*, only allows for lodgement of VRB AFRs by facsimile. It does not allow email lodgement.

Question:

What are the eligibility requirements for the Special Rate of Disability Pension (SRDP) under the MRCA?

Answer:

Section 199 of the MRCA sets out the eligibility criteria for SRDP:

- (a) at least one of the following applies:
 - (i) the person is receiving compensation worked out under Division 2 of Part 4 as a result of one or more service injuries or diseases;
 - (ii) the amount, under section 126, of the person's compensation for a week, as a result of one or more service injuries or diseases, is nil or a negative amount;
 - (iii) the person has been paid a lump sum under section 138 in respect of the person's incapacity for work as a result of one or more service injuries or diseases;
- (b) as a result of the injuries or diseases, the person has suffered an impairment that is likely to continue indefinitely;
- (c) the Commission has determined under Part 2 that the person's impairment constitutes at least 50 impairment points;
- (d) the person is unable to undertake remunerative work for more than 10 hours per week, and rehabilitation is unlikely to increase the person's capacity to undertake remunerative work.

Please note, subparagraph 199(1)(a)(ii) applies in relation to a week ending on or after 1 July 2013, and subparagraph 199(1)(a)(iii) applies in relation to lump sums paid before, on or after 1 July 2013.

Question:

What remittal power does the VRB have in MRCA liability matters?

Answer:

The Board was provided with a limited power of remittal in the recent legislative amendments. That is, where the Board sets aside a MRCA liability matter, it will now be able to remit pursuant to section 353A of the MRCA to require the Commission to reconsider the claim for compensation.

Prior to the introduction of s353A, the Board had a limited but explicit power of remittal in s139(4) of the VEA as applied by s353 of the MRCA. If the Board granted compensation under the MRCA, it could remit the assessment of the amount of compensation to the MRCC. This was the only circumstance in which the Board could previously remit a matter to the Commission.

Question:

What steps does the Board have to take under the new methodology in Chapter 25 of GARP M?

Answer:

Instrument No. MRCC 22 of 2013 sets out a new method of calculating the amount of compensation payable under the MRCA for a person with an accepted VEA and/or SRCA injury or disease before a claim for permanent impairment is made under the MRCA.

At Step 1, use GARP M to assess, as at the date of the MRCA determination, the combined effect of all MRCA accepted conditions and any VEA and/or SRCA conditions that were accepted conditions on the date of the MRCA PI claim, to calculate the resulting compensation that would be payable under the MRCA.

At step 2, assess whether the MRCA accepted condition contributes at least 5 impairment points to the overall impairment rating (if not, the claim is rejected).

At step 3, if compensation is payable, calculate the amount of compensation that would be payable under the MRCA for the VEA and/or SRCA accepted conditions referred to in Step 1 as at the date of the MRCA determination, using GARP M.

Steps 4 to 7 follow.

The Board can determine the required combined impairment ratings, lifestyle ratings, and compensation factors up to Step 3. From this point, it is open to the Board to use the remittal power in s139(4) as applied, to remit to the Commission to determine the amount of compensation payable.

Administrative Appeals Tribunal

Layton and Repatriation Commission

Dr P McDermott, RFD, Senior Member

[2013] AATA 37
25 January 2013

War widow's pension claim - ischaemic heart disease - PTSD factor - DSM-IV-TR Diagnostic Criteria - four step procedure for determining whether death was war caused

Facts

Mrs Layton's late husband, Reginald Layton, rendered operational service with the Australian Army in New Guinea during World War 2. Mrs Layton applied for a war widow's pension. A delegate of the Repatriation Commission refused her claim. The Veterans' Review Board (VRB) affirmed the Commission's decision. Mrs Layton sought further review by the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

The issue in dispute was whether Mr Layton suffered "a clinically significant anxiety spectrum disorder" within the meaning of the relevant SoP for ischaemic heart disease. Specifically, whether Mr Layton had suffered PTSD which was attributable to his operational service.

The Tribunal's consideration

Firstly, the Tribunal was required to determine the kind of death that was applicable to the veteran. It was accepted, and the Tribunal found, that the veteran's kind of death was ischaemic heart disease (IHD).

Following the Federal Court decisions in *Budworth* (2001) and *Bawden* (2012), the Tribunal proceeded to determine Mrs Layton's claim in accordance with the relevant Statement of Principles (SoP) for IHD and the four-step process set out in *Deledio* (1998):

1. The Tribunal must consider all the material which is before it and determine whether that material points to a hypothesis connecting the injury, disease or death with the circumstances of the particular service

rendered by the person. No question of fact finding arises at this stage. If no such hypothesis arises, the application must fail.

2. If the material does raise such a hypothesis, the Tribunal must then ascertain whether there is in force an SoP determined by the Authority under s 196B(2) or (11). If no such SoP is in force, the hypothesis will be taken not to be reasonable and, in consequence, the application must fail.

3. If an SoP is in force, the Tribunal must then form the opinion whether the hypothesis raised is a reasonable one. It will do so if the hypothesis fits, that is to say, is consistent with the "template" to be found in the SoP. The hypothesis raised before it must thus contain one or more of the factors which the Authority has determined to be the minimum which must exist, and be related to the person's service (as required by ss 196B(2)(d) and (e)). If the hypothesis does contain these factors, it could neither be said to be contrary to proved or known scientific facts, nor otherwise fanciful. If the hypothesis fails to fit within the template, it will be deemed not to be "reasonable" and the claim will fail.

4. The Tribunal must then proceed to consider under s 120(1) whether it is satisfied beyond reasonable doubt that the death was not war-caused, or in the case of a claim for incapacity, that the incapacity did not arise from a war-caused injury. If not so satisfied, the claim must succeed. If the Tribunal is so satisfied, the claim must fail. It is only at this stage of the process that the Tribunal will be required to find facts from the material before it. In so doing, no question of onus of proof or the application of any presumption will be involved.

At step 1, the Tribunal determined that the material before it raised a hypothesis connecting the death of the veteran with the circumstances of his operational service. There was evidence the veteran killed a Japanese soldier in two separate incidents during his operational service. As a result of experiencing these incidents he suffered from PTSD, which fell within the SoP definition of "a clinically significant anxiety spectrum disorder" which contributed to the veteran suffering IHD, which was a cause of death of the veteran.

At step 2, the Tribunal ascertained the relevant SoP in force.

At step 3, in assessing whether a raised hypothesis is reasonable, the Tribunal noted it was required to follow the High Court decision in *Byrnes* (1993) citing *Bushell* (1992), which held that a reasonable hypothesis is raised when:

...the material points to some fact or facts ('the raised facts') which support the hypothesis.

In *Byrnes* (1993) the Court went on to say:

The position may be summarised as follows:

(1) First, sub-s.(3) of s.120 is applied: do all or some of the facts raised by the material before the Commission give rise to a reasonable hypothesis connecting the veteran's injury with war service? The hypothesis will not be reasonable if it is contrary to known scientific facts or is obviously fanciful or untenable. If the hypothesis is not reasonable, the claim fails. Proof of facts is not in issue at this point.

Since the introduction of SoPs in 1994, the Tribunal must ascertain if it has material before it which fits the template for the relevant SoP. The material must pose a credible proposition - as in *East* (1987) the Federal Court said it must be:

...more than a possibility, no fanciful or unreal, consistent with the known facts. It is a hypothesis pointed to by the facts even though not proved on the balance of probabilities.

The Tribunal referred to the other relevant Federal Court cases of *Gilbert* (1989) and *Bey* (1997) indicating the evidence must "point to" or "support" the hypothesis, and not merely be "left open" as a possibility. Also, in *Bushell* (1992) the High Court held that the sub 120(3) test will reveal a reasonable hypothesis where:

...there is sufficient factual material to point to a reasonable hypothesis connecting the injury etc with operational service.

The Tribunal examined the material before it which pertained to the hypothesis. In the SoP concerning IHD the relevant factor was "having a clinically significant anxiety spectrum disorder, as specified, at the time of the clinical onset of ischaemic heart disease". The definition of "a clinically significant anxiety spectrum disorder as specified" includes PTSD. The Tribunal noted there was evidence before it that Mr Layton had atherosclerosis for some years prior

to his death and a psychiatrist considered Mr Layton had PTSD since WWII, therefore the evidence was consistent with Mr Layton having PTSD at the time of the clinical onset of IHD.

The Tribunal considered its next task was to consider whether Mr Layton suffered from PTSD which attracted “a diagnosis under DSM-IV-TR” as well as being “sufficient to warrant ongoing management” in accordance with the SoP for IHD. There was conflicting evidence from the two expert psychiatrists as to whether Mr Layton had PTSD. The Tribunal went through each of the Diagnostic Criteria, A to F, for PTSD in DSM-IV-TR. For the purpose of assessing whether there was a reasonable hypothesis, the Tribunal indicated there was evidence before it that the veteran suffered from PTSD which resulted from his operational service during WWII. There was material before the Tribunal which was consistent with Mr Layton attracting a diagnosis of PTSD under DSM-IV-TR. The Tribunal pointed out it did not have to make an actual finding to its reasonable satisfaction that Mr Layton did attract a diagnosis of PTSD. The Tribunal considered the material before it was consistent with Mr Layton’s disorder

being sufficient to warrant ongoing management.

At step 4, the Tribunal considered under s120(1) of the Act whether or not, for the hypothesis, it was satisfied beyond reasonable doubt that Mr Layton’s death was not war-caused. After the Tribunal’s review of the evidence before it, the Tribunal decided it could not be satisfied beyond a reasonable doubt that Mr Layton’s death was not war-caused. The Tribunal considered the incidents with the Japanese soldiers, and could not be satisfied beyond reasonable doubt that the two incidents did not occur. The Tribunal also considered the conflicting psychiatric evidence and could not be satisfied beyond a reasonable doubt that Mr Layton did not attract a diagnosis of PTSD.

Formal decision

The Tribunal set the decision under review aside and in substitution found that Mrs Layton is entitled to a war-widow’s pension.



Editorial note

The bulk of the Tribunal’s analysis in

this case occurred at stage three of *Deledio*. The Tribunal differed from the opinion of the VRB that it had to be reasonably satisfied that a diagnosed condition of PTSD was before it. The Tribunal considered at the third *Deledio* stage it did not have to make an actual finding to its reasonable satisfaction that the veteran did attract a diagnosis of PTSD. In the Tribunal's opinion, it was sufficient that there was material before it that was consistent with the veteran having attracted a diagnosis of PTSD under DSM-IV-TR. The Tribunal stated where it considered it was required to make a finding to its reasonable satisfaction as to the existence of a diagnosed condition was in its finding that IHD was a cause of the death of the veteran, before it considered the application of the SoP for that condition (citing s120(4) of the VEA, *Benjamin* (2001) and *Collins* (2009)). The Tribunal's reasoning is consistent with the decision of the Federal Court in *Onorato v Repatriation Commission* [2011] FCA 1507 that the standard of proof to be applied to the existence of a disease in a sub-hypothesis is the "beyond reasonable

doubt" standard, although this case was not specifically cited in the Tribunal's decision.

The Tribunal also noted that the VRB considered it had to be reasonably satisfied as to each of Diagnostic Criteria A to F for PTSD in DSM-IV-TR. The Tribunal respectfully differed from this opinion, noting the Federal Court in *Warren* (2007) and the Full Court of the Federal Court in *Warren* (2008), had recognised that a diagnosis can be given to an individual even though the clinical presentation falls just short of meeting the full criteria for the diagnosis, provided that the symptoms that are present are persistent and severe.

Grant and Repatriation Commission

Deputy President S D Hotop
Brigadier A G Warner, Member

[2013] AATA 200
8 April 2013

***Applicant not a “veteran” -
applicant did not render “British
nuclear test defence service” -
applicant not a “member of the
Forces”***

Facts

Mr Grant served in the Royal Australian Air Force from 22 March 1948 to 11 April 1958. He made a claim for a disability pension in respect of benign parotid tumour, basal cell carcinomas and erectile dysfunction, which he claimed had been caused or contributed to by “exposure to atomic radiation”. The Repatriation Commission decided Mr Grant was not entitled to claim a pension under the *Veterans’ Entitlements Act* 1986 (VEA) as he was not a “veteran” or “member of the Forces” as defined in the Act. The Veterans’ Review Board affirmed that decision, and Mr Grant sought review by the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

The issue to be determined by the Tribunal was whether Mr Grant is a “member of the Forces” for the purposes of Part IV of the VEA. It was common ground he was not a “veteran” as defined in the VEA.

The Tribunal’s consideration

It was agreed that the only basis on which the applicant may be a “member of the Forces” was if he rendered “British nuclear test defence service” as described in s69B(4) of the VEA:

(4) A person rendered British nuclear test defence service while the person was a member of the Defence Force and, at a time between the start of 3 October 1952 and the end of 31 October 1957, flew in an aircraft of the Royal Australian Air Force or the Royal Air Force that was at that time:

(a) used in measuring fallout from nuclear tests conducted in an area described in the table in subsection (2);
and

(b) contaminated by the fallout.

Mr Grant gave evidence that he flew in a RAF Lincoln aircraft on 16 October 1953 from Mallala to Woomera and then to Laverton. The “Totem 1” atomic test had occurred on the previous day at Emu Field near Maralinga (which was one of the relevant areas during the relevant period, described in s69B(2)).

The critical issue was whether subsections (a) and (b) of 69B(4) were met. In Mr Grant’s oral evidence, he “presumed” the aircraft was, at that time, used in measuring fallout from Totem 1, on the basis of the apparently scientific personnel on board the aircraft and the “banter” amongst them referring to “high” and “still high” readings. However, Writeway Research reports tendered by the Commission indicated there was no record of a Lincoln aircraft departing RAAF Mallala or Woomera or arriving at RAAF Laverton on 16 October 1953. The Tribunal concluded that the evidence did not establish to its reasonable satisfaction (that is, on the balance of probabilities) that the requirements of s69B(4) were met.

Formal decision

The Tribunal affirmed the decision under review.



Editorial note

For further reading, please refer to updates on BNT service in the *VeRBosity Special Issue* 2012.

Csont and Military Rehabilitation and Compensation Commission

Deputy President S D Hotop
Dr J Chaney, Member

[2013] AATA 215
11 April 2013

Compensation - applicant suffered permanent impairment resulting from service injuries/service diseases - degree of whole person impairment - combined impairment rating - lifestyle rating

Facts

The applicant served in the Australian Army from 26 March 2007 to 6 June 2008. Liability was accepted under the *Military Rehabilitation and Compensation Act* 2004

(MRCA) for his bilateral medial tibial stress syndrome, thoracic strain, lumbar spondylosis with sciatica and adjustment disorder (the compensable conditions). A delegate of the Military Rehabilitation and Compensation Commission made a determination that the applicant had suffered a whole person permanent impairment as a result of the compensable conditions and calculated the amount of compensation on the basis of a combined impairment rating of 24 and lifestyle rating of 2. On reconsideration that determination was confirmed. The applicant lodged an application for review by the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

The applicant contended he was entitled to a greater amount of permanent impairment compensation than had been determined, however he did not specify the precise basis or provide any new medical evidence. The respondent contended the appropriate combined impairment rating was less than had been determined, and should be 19 points instead of 24 points.

The Tribunal's consideration

The Tribunal accepted the Departmental Medical Officer's assessment of the degree of impairment resulting from the compensable conditions. The Tribunal was satisfied the impairment rating in relation to the applicant's thoraco-lumbar spine was appropriate, and should not be reduced as submitted by the respondent. Therefore the Tribunal maintained the combined impairment rating of 24 points, and found that the appropriate lifestyle rating was 2.

Formal decision

The Tribunal affirmed the decision under review.



Editorial note

The applicant was critical of the reports and medical impairment assessment forms completed in August and September 2011 by an orthopaedic surgeon and a psychiatrist, who examined him at the request of the Department. The combined medical impairment rating was based on these reports and forms. As the applicant did not provide any new medical evidence or specify why the delegate's calculation was incorrect, the

Tribunal accepted the delegate's calculation of the amount of permanent impairment compensation was correct.

**Anderson and Military
Rehabilitation and Compensation
Commission**

Deputy President S D Hotop

[2013] AATA 360
31 May 2013

Compensation - applicant claimed for obstructive sleep apnoea contracted in 2010 - related solely to incident which occurred in course of RAN service in April 1988 - MRCA does not apply

Facts

The applicant served in the Royal Australian Navy (RAN) from 8 January 1988 to 1 August 2011. He lodged a claim for acceptance of liability under the *Military Rehabilitation and Compensation Act 2004* (MRCA) for obstructive sleep apnoea. A delegate of the Military Rehabilitation and Compensation Commission made a determination disallowing his claim, and on reconsideration that determination was

confirmed. The applicant lodged an application for review by the Administrative Appeals Tribunal (the Tribunal).

It was agreed by the parties that on 25 April 1988 the applicant attended a function in the course of his service with the RAN, and at that function he was punched several times about the head and face and directly on the nose at least once by another serving member. The applicant suffered swelling and bleeding of the soft tissues of the nose, a broken nose and deviated septum. In late 2006 the applicant began to experience symptoms of obstructive sleep apnoea when he was rendering war-like service within the meaning of the MRCA. Those symptoms persisted and were first diagnosed as obstructive sleep apnoea in February 2010.

Issues before the Tribunal

The issue for determination was whether the MRCA applies to the applicant's obstructive sleep apnoea. Specifically, whether the applicant's obstructive sleep apnoea:

- relates to defence service rendered by him on or after 1 July 2004, within the meaning of s7(1)(b)(i) of the *Military Rehabilitation and Compensation (Consequential and Transitional Provisions) Act 2004* (CTPA); or
- relates to defence service rendered by him before, and on or after 1 July 2004, within the meaning of s7(1)(b)(ii) of the CTPA.

The Tribunal's consideration

The Tribunal considered the terms of s7(1), and in particular subpara (b)(ii), of the CTPA are plain and unambiguous in their meaning, which is that (relevantly) a disease which is contracted on or after 1 July 2004 will fall within the provisions of the MRCA only if it:

- “relates to” (within the meaning of s5(1) of the CTPA) defence service rendered by a person “on or after” 1 July 2004 (subpara (b)(i)); or
- “relates to” defence service rendered by the person “before, *and* on or after” 1 July 2004 (subpara (b)(ii)) (emphasis added).

The Tribunal was of the opinion that the context in which the word “and” appears in subpara (b)(ii) of s7(1) of the CTPA confirms that that word should be interpreted conjunctively, and not disjunctively. If it were interpreted disjunctively the effect would be that subpara (b)(ii) would refer to defence service rendered before, *or* on, or after 1 July 2004, rendering subpara (b)(i) superfluous. Accordingly, subpara (b)(ii) will only be satisfied if the relevant disease contracted on or after 1 July 2004 “related to” defence service rendered by the person *both* “before” *and* “on or after” 1 July 2004, whether that service is continuous service which “spans” 1 July 2004 or is rendered “during separate periods before and on or after” 1 July 2004 (see s7(3) of the CTPA).

It was common ground that the only incident connecting the applicant’s obstructive sleep apnoea to service was being punched in the nose on 25 April 1988. The Tribunal concluded that s7(1) of the CTPA was not satisfied, and the MRCA does not apply to the applicant’s obstructive sleep apnoea.

Formal decision

The Tribunal affirmed the decision under review.



Editorial note

This case was really an argument about statutory interpretation. The Tribunal accepted the respondent's submissions, and did not accept the applicant's submissions. The Tribunal made it clear that the MRCA does not apply to an injury or disease sustained or contracted on or after 1 July 2004 which "relates to defence service" rendered solely before 1 July 2004.

Kaluza and Repatriation Commission

Ms N Bell, Senior Member
Dr S H Toh

[2013] AATA 424
24 June 2013

PTSD - generalised anxiety disorder - anxiety disorder - alcohol dependence - alcohol abuse - hypertension - whether conditions war caused - remittal from Federal Court

Facts

This is the third time Mr Kaluza's application for review came before the Tribunal. After the first time, the Federal

Court found the Tribunal had erred in relation to Mr Kaluza's period of operational service. After the second time, the Full Court of the Federal Court found the Tribunal was (among other reasons) in error when it held that the only issue that had been remitted was the issue on which Mr Kaluza had succeeded in the Federal Court the first time. This time it is clear the entire case has been remitted and the Tribunal is to consider the entire decision under review.

There was no dispute Mr Kaluza has eligible defence service in the Royal Australian Air Force from 7 December 1972 to 31 October 1973. He was on two flights to Vietnam in February 1969 and November 1970, however Mr Kaluza claims operational service on two additional flights in early 1968 and February 1969.

There was no dispute Mr Kaluza suffers from hypertension, but his disability pension claim for other conditions was in issue.

Issues before the Tribunal

The issues were:

- What was Mr Kaluza's operational service?
- From what conditions does he suffer?
- Are those conditions war-caused?

The Tribunal's consideration

Firstly, the Tribunal considered Mr Kaluza's recollection of a flight in early 1968, which was to take stores, equipment and mail to Vietnam and then repatriated wounded personnel. He said the flight was under the command of Wing Commander McKimm, it was diverted to Kuala Lumpur after an air pressure incident, and then continued to Vietnam as a Medivac flight returning to Butterworth. Mr Kaluza relied on events during that flight in relation to his claimed psychiatric condition. The Tribunal heard evidence from two military historians, who agreed there was one flight on 14 February 1968 that bore some of the features of the flight Mr Kaluza had described, however there was no record of it being diverted and Mr Kaluza was not listed as being on the

flight. There was another medical evacuation flight in January 1968 whose mission was recorded as having been delayed for 24 hours due to unserviceability, that bore a resemblance to the flight described by Mr Kaluza, however there was no record of Mr Kaluza being on that flight.

The Tribunal relied upon the High Court decision in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, in which the Court said, in relation to the application of the civil standard of proof to circumstantial evidence:

Where direct proof is not available and a conclusion falls short of certainty, it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference, provided they do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a matter of conjecture...If circumstances are proved in which it is reasonable to find a balance of probabilities in favour of a particular conclusion, it is not to be regarded as mere conjecture or surmise.

The Tribunal did not consider that the evidence and inferences urged upon it were sufficient to satisfy the Tribunal that on the balance of probabilities Mr Kaluza was on either flight. The Tribunal found they do not “do more than give rise to conflicting inferences of equal degrees of probability”, and “the choice between them is a matter of conjecture”. There was too much of a speculative nature.

However, there was now no dispute Mr Kaluza had operational service on a flight to Vietnam on 21-24 February 1969, that he says transported a coffin and SAS soldiers from Butterworth to Pearce. Mr Kaluza relied on events on that flight in relation to his claimed psychiatric condition and alcohol related condition.

Secondly, the Tribunal considered what conditions are suffered by Mr Kaluza. Mr Kaluza had contended two broad sets of symptoms, stress or anxiety related symptoms; and alcohol related symptoms. The Tribunal was not reasonably satisfied he suffers from PTSD, as it did not find his experience of a card game on a coffin on the 1969 flight to have been a “traumatic event” within the meaning of the DSM-IV definition reproduced in the relevant Statement of

Principles (SoP). The Tribunal did not find he responded to the event with the requisite “intense fear, helplessness or horror”. Turning to generalised anxiety disorder (GAD), the Tribunal went through the diagnostic criteria, as drawn from DSM-IV, in the relevant SoP, and was satisfied Mr Kaluza suffers from GAD. The Tribunal then considered the diagnostic criteria for alcohol dependence, drawn from DSM-IV, in the relevant SoP concerning alcohol dependence and alcohol abuse (which are exclusive of each other), and was satisfied Mr Kaluza suffers from alcohol dependence. There was no dispute Mr Kaluza suffers from hypertension.

Thirdly, the Tribunal considered whether Mr Kaluza’s GAD, alcohol dependence and hypertension were war-caused. The Tribunal followed the *Deledio* steps in relation to each condition. Regarding GAD, the Tribunal looked at the current relevant SoP factors but did not find material pointing to any event of the kinds described in the definitions of a category 1A or 1B stressor during Mr Kaluza’s operational service, or material pointing to Mr Kaluza having had a clinically significant psychiatric condition within the ten years before the clinical

onset of GAD. The Tribunal also considered the earlier SoP concerning anxiety disorder, where both relevant factors required a clinical onset within two years, which posed the same difficulties in respect of material pointing to the necessary date of clinical onset. Further, the Tribunal did not consider that the material pointed to Mr Kaluza having experienced a severe psychosocial stressor on operational service.

Regarding alcohol dependence, the current relevant SoP factors were having a clinically significant psychiatric condition at the time of the clinical onset of alcohol dependence, but the Tribunal could not find material pointing to conformity with this; or experiencing a category 1B stressor within the five years before the clinical onset of alcohol dependence, however the Tribunal had already found (above) the material does not point Mr Kaluza having experienced a category 1B stressor. Looking at the earlier SoP, the Tribunal could not find material pointing to conformity with “suffering from a psychiatric disorder at the time of the clinical onset of alcohol dependence”. The Tribunal also considered the factor “experiencing a severe stressor”, but did not find the

material as a whole pointed to the event having amounted to one that might evoke intense fear, helplessness or horror.

Regarding hypertension, the relevant SoP factors related to alcohol consumption, and suffering from a clinically significant anxiety disorder for the six months immediately before the clinical onset of hypertension. It was agreed that the date of clinical onset of Mr Kaluza’s hypertension was 1975. As the Tribunal had already concluded that none of the anxiety disorder hypotheses raised by Mr Kaluza conform to the relevant SoPs, it followed that the hypothesis as to hypertension did not conform to the “clinically significant anxiety disorder” factor. The alcohol consumption hypothesis did not conform to the relevant factor, as the Tribunal had found Mr Kaluza’s alcohol dependence was not war-caused.

Formal decision

The Tribunal varied the decision under review and decided that Mr Kaluza suffers from GAD, alcohol dependence and hypertension, which were not war-caused.

Editorial note



For further details in relation to the previous decisions of the Federal Court, please refer to the three VRB practice notes on the VRB website concerning *Kaluza v Repatriation Commission* [2008] FCA 1365 decided by Branson J, *Kaluza v Repatriation Commission* [2010] FCA 1244 decided by Jacobson J, and *Kaluza v Repatriation Commission* [2011] FCAFC 97 decided by McKerracher, Perram and Robertson JJ. These case summaries are also available in Volumes 24 (No. 2), 26 and 27 of *VeRBosity*.

In the 2008 decision, Justice Branson considered that the Tribunal did not give consideration to the whole of the period during which Mr Kaluza was to be taken to have been allotted for duty in an operational area. As such, her Honour set aside the decision of the Tribunal and remitted the matter.

In the 2010 decision, Justice Jacobson dismissed the appeal. The Court found the Tribunal had correctly limited the scope of its review on remittal i.e. to the second question of law answered favourably to Mr Kaluza in his first appeal to the Federal Court.

In the 2011 decision, the Full Court of the Federal Court allowed the appeal and remitted the case to the Tribunal to be heard and decided again.

Summers and Repatriation Commission

G. D. Friedman, Senior Member

[2013] AATA 439

27 June 2013

PTSD - traumatic events - whether condition diagnosed and war-caused - alcohol dependence - whether war-caused - whether intermediate or special rate of pension applies - remittal from Federal Court

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. This occurred while he was still on emergency leave on compassionate grounds, which constitutes operational service.

The applicant initially made a claim for a disability pension in respect of post traumatic stress disorder and alcohol dependence, and sought a special rate of pension. His applications were refused by the Repatriation Commission and Veterans' Review Board. On review, the Administrative Appeals Tribunal (the Tribunal) affirmed the decisions. The applicant's appeal to the Federal Court was dismissed by North J. Ultimately, the Full Court of the Federal Court set aside the orders of North J and remitted the matter to the Tribunal for determination according to law.

Issues before the Tribunal

There was no dispute that the diagnosis of alcohol dependence was made out. The issues before the Tribunal were:

- Does the applicant suffer from PTSD? If so, is the condition war-caused?

- Is alcohol dependence war-caused?
- Does the applicant qualify for intermediate rate pension or special rate pension?

The Tribunal's consideration

PTSD

Firstly, the Tribunal considered whether the applicant suffers from PTSD. The Tribunal referred to the DSM-IV-TR requirements of a traumatic event and a response of the requisite intensity. The Tribunal described five events which occurred during the applicant's operational service, four in Vietnam and one in Australia concerning the alleged assault near Watson's Bay. Although there were inconsistencies in the accounts of the Watson's Bay event given by the applicant over the years, the Tribunal took into account that he was affected by alcohol during and after the incident, he suffered life-threatening injuries and was hospitalised for several weeks. The Tribunal accepted expert evidence from one psychiatrist that alcohol-related cognitive impairment can result in seemingly inconsistent recall of traumatic events. The applicant described his response to the event at the

time and afterwards, which was supported by his wife's evidence. The Tribunal found that the applicant was exposed to a traumatic event in which he experienced an event that involved actual or threatened death or serious injury, and that his response involved intense fear, helplessness or horror, therefore he met the diagnostic criteria, and suffers from PTSD.

The Tribunal went on to consider whether PTSD was war-caused, applying the four-step process identified in *Deledio*. Regarding the first step, the Tribunal determined that the material pointed to a hypothesis connecting PTSD with the circumstance of the applicant's service. In relation to the second step, the Tribunal identified the relevant SoP in force. At step three, the Tribunal formed the opinion that the hypothesis raised was a reasonable one. At step four, the Tribunal referred to an extract of the Federal Court's decision in *Kaluza v Repatriation Commission* [2010] FCA 1244 concerning the meaning of the expression "clinical onset" in *Lees*. The Tribunal found that the clinical onset of the applicant's PTSD occurred after his service in Vietnam and accepted that the Watson's Bay event was a life-

threatening event that constituted a category 1A stressor that was experienced by the applicant before the clinical onset of PTSD. Therefore, he satisfied the relevant SoP factor and the fourth step of *Deledio*, and the Tribunal found the applicant's PTSD was war-caused.

Alcohol dependence

The Tribunal moved on to the second issue of whether alcohol dependence was war-caused. Regarding the first step in the *Deledio* process, the Tribunal determined that the material pointed to a hypothesis connecting alcohol dependence with the circumstances of the applicant's service. In respect of the second step, the Tribunal identified the relevant SoPs. At step three, the Tribunal followed the Full Court's reasoning and noted that in order to determine the requirements of the definition of alcohol dependence it must apply the relevant SoP, rather than rely solely on the expert psychiatrists' opinions, who applied the guidelines in DSM-IV-TR instead of adhering strictly to the diagnostic criteria. As three (or more) of the SoP diagnostic criteria for alcohol dependence were not met in the same 12 month period following the applicant's

service in Vietnam or the Watson's Bay event, the hypothesis was not reasonable and did not fit the template of the applicable SoPs. The third step from *Deledio* was not satisfied, and there was no sufficient ground for determining that the applicant's alcohol dependence was war-caused.

Intermediate or special rate of pension

Finally, the Tribunal considered whether the applicant qualified for intermediate rate pension or special rate pension, specifically whether s23(1)(c) or s24(1)(c) was met. The Tribunal applied the test in s24(1)(c) as described in *Flentjar*. In respect of question one, the relevant remunerative work was retail salesperson. Regarding question two, there was no dispute that the applicant was prevented from continuing to undertake that work by reason of his war-caused conditions. In relation to question three, the Tribunal found that the non-accepted condition of alcohol dependence had contributed significantly to the applicant's incapacity. Also, the facts that he ceased work due to involuntary redundancy, and considered himself as retired, were important elements in the cessation of employment and in preventing him from continuing

to undertake that work, so there was no need to seek other employment for some time afterwards. Therefore the answer to question three was no.

The Tribunal considered the ameliorating provisions, but found that the applicant did not satisfy s23(3)(b) or s24(2)(b). The Tribunal did not consider the applicant's approach to Retravisson and a telephone call to a Harvey Norman store four years after the redundancy constituted "genuinely seeking to engage in remunerative employment" during the assessment period. Further, the stores did not want him due to his age and the financial state of the retail industry at that time. The Tribunal was reasonably satisfied that the applicant's incapacity from his accepted disabilities was not the substantial cause of his inability to obtain remunerative work in which to engage.

In relation to s23(3)(a) and s24(2)(a), the Tribunal accepted the applicant's evidence that he had intended to work through the busy 2005 Christmas period before ceasing work, so his cessation of work in November 2005 through involuntary redundancy was not due to incapacity at that time, and he could not be taken to have suffered a loss of salary

or wages, or of earning on his own account, by reason of his incapacity.

Therefore, the applicant did not satisfy s23(1)(c) or s24(1)(c), and he was not eligible for disability pension at the intermediate or special rate.

Formal decision

The Tribunal set aside the decisions under review and substituted a decision that Mr Summers' post traumatic stress disorder is war-caused. In all other respects the Tribunal affirmed the decisions under review.



Editorial note

In *Summers*, the Full Court highlighted the importance of distinguishing between definitions in diagnostic criteria, and definitions as part of causation such as category 1A stressors. The first issue centered around the diagnostic criteria in the Statement of Principles concerning post traumatic stress disorder, in particular the need for there to have been a traumatic incident and for the applicant to have a response involving fear, helplessness or horror. The second issue related to the applicant's alcohol

dependence. The first Tribunal erred in law because it found that the fact of drinking heavily in Vietnam equated to the clinical onset of alcohol dependence. The clinical onset of alcohol abuse was during the applicant's operational service in Vietnam, but the clinical onset of alcohol dependence came later. The first Tribunal confused the diagnostic requirement of having a response to the traumatic event with a category 1A stressor, which does not require a response.

Oliver and Repatriation Commission

Deputy President S D Hotop

[2013] AATA 525
25 July 2013

War widow's pension claim - ischaemic heart disease - passive smoking factor

Facts

Mrs Oliver's late husband, Leslie Oliver, rendered operational service in Korean waters with the Royal Australian Navy from March to November 1953. Mr Oliver died in 1980 at the age of 45 years from causes certified as "coronary occlusion, coronary atherosclerosis,

hypertension". In 2010 Mrs Oliver applied for a war widow's pension. A delegate of the Repatriation Commission refused her claim. The Veterans' Review Board affirmed the Commission's decision. Mrs Oliver sought further review by the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

It was common ground that the veteran's kind of death was "death from ischaemic heart disease". The issue in dispute was whether the death of the veteran was "war-caused".

The Tribunal's consideration

The Tribunal followed the four-step process set out in *Deledio*. Firstly, the Tribunal considered whether the material before it raised a hypothesis connecting the veteran's death with the circumstances of his operational service. The Tribunal was of the opinion that it did. The hypothesis was that the veteran was present in enclosed spaces where there was a visible tobacco haze throughout his operational service and

subsequently in civilian life, and that the "passive smoking" to which he was exposed in those circumstances contributed substantially to his contracting ischaemic heart disease from which he subsequently died.

The Tribunal identified the relevant Statement of Principles, and the applicable factor:

- (i) being in an atmosphere with a visible tobacco smoke haze in an enclosed space for at least 1000 hours before the clinical onset of ischaemic heart disease, where the last exposure to that atmosphere did not occur more than five years before the clinical onset of ischaemic heart disease

The Tribunal noted clause 5 of the SoP requires that that factor be "related to" the operational service rendered by the veteran.

The Tribunal referred to the decision of the Federal Court in *Knight v Repatriation Commission* [2010] FCA 1134, in which Katzmann J held that the above SoP factor does not, in terms, require that the last exposure to "an atmosphere with a visible tobacco smoke haze in an enclosed space" within five years of the "clinical onset of ischaemic heart disease" occur during the relevant service. In *Repatriation Commission v*

Knight [2012] FCAFC 83, the Full Court of the Federal Court agreed with Katzmann’s J interpretation. In *Knight*, Katzmann J also said:

Whether a factor is related to service, as required by clause 5, is to be determined by considering whether it meets the statutory definition of ‘related to service’ in s196B(14). The relationship between the factor and service is not established only where the last exposure occurred during service.

Likewise, the Full Court said:

...In this case the factor was exposure to tobacco smoke. The question raised by s 196B(14)(d) (through cl 5) becomes, in that context, whether the service contributed to the exposure to tobacco smoke.

The Tribunal also cited *Gilkinson v Repatriation Commission* [2011] FCAFC 133, in which the Full Federal Court considered the relationship between para (b) and para (d) of s 196B(14) of the *Veterans’ Entitlements Act 1986* (VEA). The Court held that each paragraph involves a broad test of causation and that the test of causation in para (d), “contributed to in a material degree by

...”, is not necessarily broader than the test in para (b), “arose out of, or was attributable to”.

The Tribunal was of the opinion that material before it pointed to the existence or fulfilment of the SoP factor concerning exposure to tobacco smoke, due to evidence relating to the veteran’s exposure throughout his operational service in 1953 and subsequently in civilian life at the Yokine Bowling Club and South Fremantle Football Club from 1963 to 1979, and medical material about the veteran contracting ischaemic heart disease in the period 1976-1979. The Tribunal was also of the opinion that that material pointed to that factor being “related to” (within the meaning of para 196B(14)(b) or (d) of the VEA) the veteran’s operational service, as required by clause 5 of the SoP. Therefore, the hypothesis raised by the material before the Tribunal was a reasonable hypothesis.

Finally, the Tribunal considered whether it was satisfied beyond reasonable doubt that there was no sufficient ground for determining that the death of the veteran was war-caused. The Tribunal noted s8(1)(b) of the VEA provides that the death of the veteran shall be taken to

have been war-caused if it (relevantly) “arose out of, or was attributable to” the operational service rendered by him. Based on three letters from a sailor who lived on board HMAS Culgoa in 1963 on which the veteran had served, Mrs Oliver and a member of the Yokine Bowling Club, the Tribunal made the following findings:

- the veteran was in an atmosphere with a visible smoke haze in enclosed spaces for several hours per day throughout the whole of his operational service from 14 March 1953 to 27 November 1953;
- the veteran was subsequently in an atmosphere with a visible tobacco smoke haze in enclosed spaces at the Yokine Bowling Club and the South Fremantle Football Club on a regular basis for several hours per week throughout the whole of the period from 1963 to 1979;
- the veteran contracted ischaemic heart disease in 1976 and that disease progressively worsened until he died from that disease on 1 January 1980.

The Tribunal noted the respondent did not dispute any of the facts necessary to support the reasonable hypothesis.

Therefore, the Tribunal was satisfied none of the facts necessary to support that hypothesis had been disproved beyond reasonable doubt, and there was no material before it which was inconsistent with that hypothesis. It followed that the Tribunal could not be satisfied beyond reasonable doubt that there was no sufficient ground for determining that the veteran’s death was war-caused.

The Tribunal concluded that the death of the veteran “arose out of, or was attributable to” his operational service and is taken to have been war-caused.

Formal decision

The Tribunal set the decision under review aside and in substitution found that Mrs Oliver is entitled to a war-widow’s pension.



Editorial note

This decision follows the Full Federal Court’s decision in *Repatriation Commission v Knight* [2012] FCAFC 83, which is summarised in Volume 27 of *VeRBosity* at page 88. In that case, the Court identified

two discrete issues at play when the Tribunal came to consider whether there was a reasonable hypothesis:

- the determination of whether the material before the Tribunal pointed to the factor relied upon (i.e. exposure to tobacco smoke: cl 6(i));
- whether the material also pointed to that factor having been contributed to in a material degree, or aggravated by, the veteran's service (i.e. the question posed by cl 5 of the SoP and s196B(14)(d)).

In the present case the Tribunal addressed both these issues, and also paragraph 196B(14)(b) in relation to the second issue. For further reading regarding the Court's interpretation of paras 196B(14)(b) and (d), please also refer to the summary of *Gilkinson v Repatriation Commission* [2011] FCA 1507 in Volume 26 of *VeRBosity* at page 65.

Burgess and Repatriation Commission

Mr M Denovan, Member

[2013] AATA 645

12 September 2013

Whether applicant was "a member of the Forces" - applicant did not complete period of service

Facts

Mr Burgess was conscripted under the repealed *National Service Act* 1951 – 1971 (Cth) to serve for a period of 18 months with the Australian Army as a national serviceman. He enlisted on 29 September 1971 and was discharged on 9 February 1973.

His application for a disability pension was rejected by the Commission on the grounds he was not a member of the forces as defined in the Act. This decision was affirmed by the Veterans' Review Board. Mr Burgess applied to the Tribunal.

Issues before the Tribunal

The Tribunal noted that to claim under the VEA, a national servicemen must

have commenced serving in the Regular Army Supplement immediately before 7 December 1972 and on or after that date, completed the period of service for which the person was deemed to have been engaged to serve.

Section 69(1)(f) of the Act also provides that a person whose service was terminated for reason of death or on the ground of invalidity or physical or mental incapacity may be eligible for benefits even though they did not complete the full period of service.

The Tribunal noted the term 'deemed to be engaged to serve' is derived from s27(1) of the *National Service Act*. That section indicated the period of engagement for national servicemen was 18 months.

The dispute before the Tribunal was not that the applicant was engaged, and deemed to serve for a period of 18 months. Nor was it in dispute that he commenced serving on 29 September 1971 and was discharged on 9 February 1972.

The issue to be decided by the Tribunal was whether Mr Burgess has eligible defence service within the meaning of the VEA.

The applicant's case

It was argued before the Tribunal that after the Whitlam government announced the end of liability under the *National Service Act*, the applicant was given only two choices; either leave immediately or re-enlist for another three years. It was argued that the applicant was not given the option of completing his term of service. It was also contended the applicant's discharge was not legal.

The Tribunal's consideration

The Tribunal noted that on 5 December 1972 the government announced liability for call up under the *National Service Act* ended that day. On 6 December 1972 the government announced that it would release all national servicemen who did not want to complete their term of service. National servicemen who completed their term of service would be provided two additional benefits; the War Service homes entitlement and the right to apply for Repatriation benefits for disabilities caused by military service.

The Tribunal noted the Applicant's evidence:

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That he recalled being told by his Commanding Officer that he had two options; he could either leave immediately or he could re – enlist for a further three years. He did not want to re-enlist so he elected to discharge. He said he had a lot of mental blanks, and little recollection of events around the period of time of his discharge.

The Tribunal noted that there is no discretion in the Act which allows the Tribunal to make a finding that but for the applicant's lack of information, he would have completed his 18 month period of service, and is entitled to benefits. The Tribunal also noted there is no discretion which allows the Tribunal to find a person is entitled to benefits because his discharge prior to the end of the deemed period of service was illegal.

In particular the Tribunal commented:

On 11 December 1972, the applicant signed an application for two years leave without pay on the grounds of exceptional hardship. The applicant told me at the hearing he does not recall applying for two years leave

without pay, but accepts it is his signature on the application. He remembers being told he was going to be discharge on compassionate grounds.

He was given leave without pay and was then discharged on the grounds of extreme hardship. This suggests his application was approved... I conclude that the applicant was lawfully discharged.

The Tribunal also noted the applicant signed a form of indemnity which stated that his period of National Service had not expired, and in which he acknowledged that he was still subject to military law. The Tribunal concluded that the signing of this form is consistent with the applicant having been on leave without pay, but still subject to military law until he was discharged on 9 February 1973.

Formal decision

As the applicant did not complete the 18 month period he was deemed to serve,

he did not satisfy the requirements of s69(1)(f) of the Act. The decision under review was affirmed.



Editorial note

Section 69 (1)(f)(ii) of the VEA provides coverage for a member who was conscripted under the *National Service Act 1951* as amended.

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 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’.

In this case the Tribunal found that the applicant was discharged lawfully on the grounds of extreme hardship but this did not equate with early discharge on the grounds of “invalidity or physical or

mental incapacity” and therefore the fact he did not complete the deemed period service meant that he was not eligible to claim for benefits under the Act.

Dunn and Repatriation Commission

Deputy President S D Hotop

[2013] AATA 673
20 September 2013

Applicant working as employee of another person when stopped undertaking last paid work - applicant had not been working for that person for continuous period of at least 10 years that began before applicant turned 65

Facts

Mr Dunn is an ordained Minister within the Uniting Church in Australia. He served as a chaplain in the Royal Australian Air Force from 1976 to 1988. On 19 May 2012 a delegate of the Repatriation Commission made a decision that increased disability pension to 60% of the general rate. This was increased to 90% of the general rate of pension on 13 September 2012 pursuant to section 31 of the VEA. This decision

was affirmed by the VRB on 27 November 2012. Mr Dunn appealed to the AAT in relation to assessment.

Issues before the Tribunal

The ultimate issue for determination for the Tribunal was whether the applicant is eligible for the special rate of pension under s24 of the VEA. Noting that section 73 of the VEA provides that Divisions 4 and 5 of Part II of the VEA (provisions governing above general rate of pension) also apply to members of the defence force.

Applicant's evidence

The applicant was ordained as a Minister in October 1969. His ordination as a Minister has continued without interruption from October 1969 and he continues to be an ordained Minister because "ordination is for life". The applicant noted that although he is not currently employed by the Uniting Church he is occasionally called upon to conduct services as an ordained Minister

rather than a lay person. From October 2006 he has served and continues to serve, as Executive Chair of the UnitingCare Forum WA, within the Synod of WA, on a fractional basis, for which he received part payment up until September 2011 and thereafter he has served in that capacity on a voluntary basis.

From 2009 to October 2011 he held the position of Strategic Property Officer with UnitingCare West and he was employed in that position for 4 days per week for which he was remunerated by that agency. In regards to this position he had entered into a 3 year contract from February 2009 to January 2012 but he had to resign for health reasons in October 2011.

The Tribunal's consideration

The ultimate issue for determination is whether the applicant fulfils the relevant requirements for eligibility for the special rate of pension. As the applicant turned 65 before making the claim, that issue is

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to be determined in accordance with subsections(2A) of s24 of the VEA.

The only matter in dispute is whether para (g) of (2A) is fulfilled.

The circumstances required by para(g) are:

when the veteran stopped undertaking his or her last paid work, the veteran:

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

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

The Tribunal referred to the case of *Thomson v Repatriation Commission* [2000]

FCA 204 where the Federal Court said at 62 (emphasis added):

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

In the present case the Tribunal noted the particular remunerative activity which the applicant was undertaking before making the claim and which he was prevented from continuing to undertake solely by reason of incapacity from defence caused injury was his

employment as Strategic Property Officer with UnitingCare West.

As regards remunerative activities which the applicant was undertaking as an ordained Minister or as Executive Chair of the UnitingCare Forum WA, the applicant continues to undertake those activities and therefore has not been “prevented from continuing to undertake” them, within the meaning of para (g).

Formal decision

The Tribunal found that the “last paid work” which the applicant “stopped undertaking”, within the meaning of para (g) was his paid work as Strategic Property Officer. It was pointed out by the Federal Court in *Grant and Thomson*, para (g) of s24(2A) is concerned with capacity in which the relevant “last paid work” was undertaken. The Tribunal noted the capacity was as an employee and he falls within subpara (i). He was working for that organisation for approximately 2 years and 8 months –

not for a continuous period of at least 10 years that began before he turned 65.

The Tribunal also considered the applicant’s ongoing work as a Minister did not meet the requirements of para (g) of s24(2A).



Editorial note

In this case the applicant could not satisfy the requirements of para(g) of s24/(2A) on two counts. Firstly the only work he had stopped, that of a Strategic Project Officer was less than the 10 year requirement with the same employer. As for his work as a Minister he had not stopped this work so could not satisfy s24(2A). The Tribunal referred to the case of *Thomson* and noted the Court considered subs(g) of s24(2A) is concerned with the capacity in which the last paid work was undertaken.

In *Thomson* the Full Court also considered whether s24(2A)(g)(ii) required that there be continuity of “work” by the veteran throughout the relevant 10 year period. The Court noted

that 24(2A)(g) is concerned with capacity and appears to prevent claims by veterans over 65 that are based on new or recent employment or self employment. The Court said at 16:

The Tribunal and primary judge treated s24(2A)(g) as requiring that the capacity in which work was undertaken and the continuity of work undertaken be considered as separate matters. In the result, the issue of continuity of work was approached on the basis of some form of mathematical exercise; for example, the primary judge concluded that a failure to work 180 out of the last 360 week days was sufficient to warrant the Tribunal's finding of a lack of continuity.

In *Thomson* the Court noted that there was continuity in the appellant working as a medical practitioner on his own account during the relevant period as he maintained indemnity insurance, medical registration, AMA membership fees and was actively engaged as a locum. The Court considered that although the Tribunal properly considered the gaps in the work undertaken, the approach taken was

mainly to the last 18 months of the 10 year period rather than by reference to the whole period. The Court considered that recent intermittent gaps in work are likely to take on less significance when continuity is viewed over a 10 year period.

For further reading on the issue of continuity of employment please see the cases of *White v Repatriation Commission* [2001] FCA 1585 and *James v Repatriation Commission* [2004] FMCA 548.

Repatriation Commission and Prior

Mr RP Handley, Deputy President
Dr M Couch, Member

[2013] AATA 684
24 September 2013

Death from suicide - nuclear testing in Monte Bello islands - whether veteran rendered British nuclear test service

Facts

Mr Prior died of carbon monoxide poisoning on 19 October 2001 aged 67. He served in the RAAF from 30 November 1953 to 1 December 1986,

retiring at the rank of Air Commodore. The applicant contends that Mr Prior's service included British nuclear test defence service (BNTDS) on 16 May 1965. The applicant contends that on 16 May 1956, Mr Prior, then a flight Sergeant, was the pilot of a Neptune aircraft that penetrated a nuclear cloud resulting from the detonation of a nuclear device at the Monte Bello Islands off the north western coast of Western Australia during British nuclear weapons testing. Mr Prior subsequently developed a chronic skin condition. The applicant contends that Mr Prior was suffering from a skin condition and depression related to his BNTDS at the time he committed suicide.

On 11 October 2011, the VRB decided to set aside the Commission's decision and substituted a decision that Mr Prior's death was defence caused and that Mrs Prior was therefore entitled to a payment of pension. The Commission applied to the Tribunal for a review of the VRB decision.

Issues before the Tribunal

The first and main issue before the Tribunal was whether Mr Prior rendered BNTDS. In particular, whether he flew in a RAAF aircraft in an area contaminated by the fallout of the nuclear test conducted on 16 May 1956, that was within an area of 10 km of Main Beach on Trimouille Island on the Monte Bello Archipelago.

Evidence before the Tribunal

The Tribunal noted the evidence that between April and June 1956, a detachment of three RAAF Neptune aircraft from Number 11 Maritime Reconnaissance Squadron, based at Richmond NSW were deployed to RAAF Base Pearce and an airfield at Onslow in Western Australia in support of Operation Mosaic. Operation Mosaic was the code name used in connection with the testing of British nuclear weapons on the Monte Bello Islands.

At the hearing the Tribunal noted the research conducted by Dr McCarthy, indicating that the Neptune aircraft were used to conduct safety patrols in the

vicinity of the testing. Mr Prior was deployed to Western Australia with other Neptune crew on 15 April 1956 and returned to Richmond on 21 May 1956. On 16 May, Mr Prior's log book indicates that as first pilot, he flew a Neptune aircraft for a period of 6 hours and 15 minutes.

The Tribunal noted that Dr McCarthy assumed the patrols undertaken by the Neptune aircraft were to prevent intruders going into the test area and he accepted that the aircraft might have patrolled an area within a radius of up to 100 nautical miles from the test area. Dr McCarthy also acknowledged that it was possible that Mr Prior's Neptune could have come into contact with the mushroom cloud. He said there is no record of any contamination found in relation to the Neptune in the aircraft's log book but agreed that this does not necessarily mean that it did not happen. Dr McCarthy had sought advice from an experienced Neptune pilot, Tony Lowe, about the conditions in a Neptune aircraft:

The Neptune (which is not a pressurised aircraft and therefore operates at lower altitudes, being used principally for Maritime surveillance) has been described as a "hot" aircraft, has air vents allowing outside air to enter the aircraft, and was sometimes flown with a rear window open to cool the interior with outside air. Thus Dr McCarthy acknowledged that there is a very high probability of outside air getting into the aircraft.

A letter was provided to the Tribunal from Group Captain RJ Connor RAAF (Rtd) dated 15 October 2012:

Navigation in the mid 1950's was not as precise as we know it today. Distant measuring equipment was rudimentary as were inertial navigation systems and GPS etc., did not exist. Position fixing over the water out of sight of land was primarily determined by dead reckoning with the occasional position line obtained from a ground radio station if available or by visual or radar fix from a land fall. An exact position could not always be guaranteed, especially in cloud, and therefore avoidance of the atomic cloud could be difficult.

The Tribunal also noted the evidence of captain Mr McKenzie RAN (Rtd) about Mr Prior's deployment for Operation Mosaic. Mr McKenzie doubted that radiation contamination would have been noted because the crew probably was unaware of this. Mr Prior never mentioned his Neptune being contaminated. Mr McKenzie also said that while intermittent cloud would be noted in a pilot's log book, just breaking through a layer of cloud would not. He said it would be difficult for an aircraft to distinguish between ordinary cloud and the cloud from a nuclear explosion.

The Tribunal's consideration

The Tribunal found:

We are satisfied from Mr McKenzie's account of his conversation with Mr Prior that Mr Prior told him that he had flown through the nuclear cloud in the aftermath of the detonation of the nuclear device on 16 May 1956.

It is likely that the Neptune's crew would have been allocated a search zone in the vicinity of the Monte Bello Islands, probably working with a radius of between 80 and 100 nautical

miles of Trimouille Island. It is not clear exactly how close the aircraft would have flown to Trimouille Island in order to perform its search but we also note Mr Connor's evidence about the accuracy of navigation at the relevant time and the sometimes inexact measurement of distance which, we extrapolate, could mean an aircraft flying closer to a fixed point than might otherwise be expected.

In the Tribunal's view it was possible that Mr Prior's Neptune flew within 10kms of Main Beach of Trimouille Island. Pursuant with s119(1)(h) of the Act, and taking into account the difficulty of ascertaining the facts given the passage of time since the nuclear test on 16 May 1956, the lack of witnesses and the paucity of official records, the Tribunal was reasonably satisfied s69B(2) was satisfied.

The Tribunal also noted that Mr Prior was involved in the transport of an aircraft and were reasonably satisfied that it was used in an area within 10kms of Main Beach on Trimouille Island. Noting that as the Tribunal was satisfied

Mr Prior flew through the nuclear cloud; the aircraft being unpressurised, unsealed and taking in outside air for ventilation would have suffered contamination and so s69B(3) would also be satisfied.

The Tribunal were therefore satisfied that Mr Prior rendered BNTDS pursuant to both s69B(2) and s69B(3). The Tribunal went on to find that Mr Prior's death was defence caused

Formal decision

As the Tribunal decided Mr Prior's death was war caused, the decision was affirmed.



Editorial note

In this case the focus was on whether the member was rendering service within 10km of the Main Beach on Trimouille Island on 16 May 1956 in accordance with s69B(2). The Tribunal was satisfied that the member was, albeit relying on s119(1)(h) of the Act. They also went on to find that s69B(3) was also satisfied as the aircraft in which the member was flying would

have been contaminated as a result of its use in the relevant nuclear test area, being within 10 km of the Main beach on Trimouille Island.

Section 68 of the VEA defines British nuclear defence service as given the meaning by any of the subsections 69(2),(3),(4) and (5).

Please note for the purpose of subsection (5), the Commission established another class of person taken to have rendered BNTDS. This was established by Instrument R7/2012 in accordance with Section 69B(6). The instrument like s69B(3) covers working with contaminated things. Unlike s69B(3) which requires that contamination occur as a result of use in an area in the table during a specified period. The R7/2012 does not require that the contaminated aircraft was in the relevant nuclear test area, merely that it was contaminated by that test.

**Mason and Military Rehabilitation
and Compensation Commission**

Deputy President RP Handley

[2013] AATA 717

8 October 2013

Claim for compensation for dependants of deceased member - member suffered from hypertension - member died from sudden cardiac death during a service approved football match - whether member received appropriate clinical treatment of hypertension from RAAF medical staff

Facts

The applicant served in the Royal Australian Air Force (RAAF) from 3 July 1990 until his sudden death during a service-approved football game on 22 April 2006. His wife, Ms Mason, lodged a 'Claim for Compensation for Dependants of Deceased Members and Former Members' in respect of her husband's death under the *Military Rehabilitation and Compensation Act 2004* (MRCA). A delegate of the Military Rehabilitation and Compensation Commission (MRCC) accepted that the applicant was a dependant partner of the member, but denied liability for the claim on the basis that Mr Mason's death was

not causally related to his service. The Veterans' Review Board confirmed the MRCC's decision, and the applicant lodged an application for review by the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

The issue for determination was whether Mr Mason's death was a 'service death' pursuant to s28(1) of the MRCA. There was no dispute that Mr Mason died from ischaemic heart disease (IHD). The relevant 'kind of death' was death from IHD. The applicant relied on factor 6(a) of the relevant Statement of Principles (SoP) concerning IHD - "having hypertension before the clinical onset of ischaemic heart disease". In the relevant SoP concerning hypertension, the applicant relied on factor 5(z) - "inability to obtain appropriate clinical management for hypertension", which only applies "to material contribution to, or aggravation of, hypertension where the person's hypertension was suffered or contracted before or during (but not arising out of) the person's relevant service". There was no dispute that Mr Mason suffered from hypertension

before the clinical onset of IHD, which gave rise to the following issues:

1. Was the clinical management of Mr Mason's hypertension appropriate?
2. If not, was he unable to obtain appropriate clinical management for his hypertension?
3. If so, was that inability related to his service?
4. If so, did that service-related inability to obtain appropriate clinical management make a material contribution to, or aggravate Mr Mason's hypertension?

The Tribunal's consideration

The Coroner certified the cause of death as "coronary artery vessel disease which is a natural cause of death" and noted that it could have occurred at any time. The medical evidence also included reports and oral evidence from two cardiologists, Professor Nestel and Professor O'Rourke.

The first issue for the Tribunal to decide was whether the clinical management of Mr Mason's hypertension was appropriate. The Tribunal noted:

Both Professor Nestel and Professor O'Rourke have expressed their opinions on the issue of whether the clinical management of Mr Mason's hypertension was appropriate. Professor Nestel's general comment was that the RAAF doctors had managed Mr Mason reasonably well. Nevertheless, Professor Nestel said the treatment was not optimal and consistent with best practice. Professor O'Rourke commented that few people in civilian life would have had access to the medical care available to Mr Mason. He said the medical care Mr Mason received was that recommended by the National Heart Foundation and by the guidelines issued by professional bodies.

The Tribunal considered there were a number of aspects to Mr Mason's treatment:

- Regarding the review of his blood pressure readings, the Tribunal was satisfied that the review of Mr Mason's blood pressure readings over the relevant period was appropriate. His blood pressure was reviewed at regular intervals and the experts appear, for the most part, to agree that this aspect of Mr Mason's

clinical management was appropriate.

- With regard to whether the medication prescribed for the control of Mr Mason's hypertension was appropriate, the Tribunal was satisfied from the expert evidence that Enalapril was appropriate treatment for hypertension at the time of Mr Mason's diagnosis with hypertension in late 1997 and continued to be appropriate treatment until probably the mid-2000s. During the period to early 2005, Mr Mason's hypertension appears to have been relatively well controlled by Enalapril. By 2006, the experts agreed that it was no longer the best medication available, but Mr Mason had discontinued taking medication by early 2005.
- With regard to the need for specialist assessment and treatment, the Tribunal was not satisfied that had Mr Mason been treated in civilian life, the treatment he received would have been any different from that which he received while serving in the RAAF.

The Tribunal found there was no evidence of clinical worsening after Mr Mason's diagnosis with hypertension.

Therefore, the Tribunal was not satisfied that treatment during the course of his service made a material contribution to the development of his disease or aggravated that disease. In light of this conclusion, the Tribunal did not consider it was necessary to address the other three issues listed above.

Formal decision

The Tribunal affirmed the decision under review.



Editorial note

In reaching its conclusion, the Tribunal referred to the cases of *Johnston v Commonwealth* [1082] HCA 54; (1982) 150 CLR 331 and *Repatriation Commission v Money* [2009] FCAFC 11. In *Money*, both majority judgments of the Full Federal Court make it clear that in respect of an "inability to obtain appropriate clinical management" the inability must occasion a material contribution to, or aggravation of the claimed condition. In addition, both judgments emphasise that it is necessary for a decision maker to identify any contribution to a material degree, or

aggravation of the claimed condition; or in other words - how the inability affected the disease itself. For further reading please see the case summary of *Money* in Volume 25 of *VeRBosity* at pages 60-64.

Federal Court of Australia

Cross v Repatriation Commission

Jacobson J

[2013] FCA 229
15 March 2013

Whether the Tribunal misdirected itself as to the application of s119(1)(h) of the VEA

Facts

Mr Cross died as a result of a gastrointestinal haemorrhage. He had a long term smoking habit which contributed to his death, however, the Tribunal determined that his smoking habit was not war caused. The Tribunal received evidence from three sources on the question of whether the smoking habit was related to service. The first was a claim form by Mr Cross, the second a written report by Mrs Cross and the third a statement by Mr Cross' son.

The Tribunal noted the reasons given by Mrs Cross and her son were different than that of Mr Cross. The Tribunal stated they were inconsistent with the reasons given by Mr Cross. The Tribunal concluded that it could not be satisfied that the connection between Mr Cross' smoking and army service was not more than temporal and affirmed the decision under review.

Counsel for the Commission emphasised the Tribunal had to be satisfied to the relevant civil standard. The Commission noted there was no material difference between the evidence of Mr Cross, his widow and son, what was critical to the Tribunal's reasons was that it could not be satisfied that the evidence enabled it to reach the state of satisfaction required by s120(4).

The Court's consideration

Mrs Cross appealed to the Federal Court.

The Court noted the Tribunal's reasons:

Grounds of appeal

1. The Tribunal misapplied itself as to the application of s119(1)(h)(i) of the Act.

The Applicant contended that the difficulties referred to in s119(1)(h), namely the difficulties in ascertaining the cause of Mr Cross' smoking habit arising from the effects of the passage of time were not adopted by the Tribunal. Instead the Tribunal determined the question by pointing to inconsistencies between 3 different accounts of the cause of Mr Cross' smoking habit.

The issue in dispute is whether Mr Cross' smoking habit arose out of, or was attributable to service. To be "attributable to" service, it is not necessary that Mr Cross' service be the sole or dominant cause of the development of his smoking habit (*Gilkinson v Repatriation Commission* [2011] FCAFC 133)...

We are reasonably satisfied that Mr Cross commenced smoking during service.... However, as has been authoritatively determined, a temporal connection alone is insufficient to establish a causal connection between smoking and service (*Re Repatriation Commission v Tuite* [1993] FCA 39,

Repatriation Commission v Law [1981]
HCA 57).

The Court noted the Tribunal concluded that it could not be reasonably satisfied that the connection between Mr Cross' smoking and his army service was not more than temporal in nature. The Tribunal received evidence from three separate sources on the question of whether the necessary causal connection existed. The Tribunal considered that each explanation was plausible but could not be satisfied that the reasons given by Mr Cross or his widow and son were in fact the reason he developed a smoking habit during service.

The Court noted it is not the function of s119(1)(h) to fill in gaps where the evidence is not sufficient to support an applicant's case.

The Court referred to the case of *Mason v Repatriation Commission* [2000] FCA 1409:

Cases of the present type will usually involve problems of remembering

details of events and s119(1)(h) is designed to ensure that those matters are taken into account but these matters are not to prevail over the structure and text of the remaining provisions of the Act.

The Court also noted Mansfield J in *Fenner v Repatriation Commission* [2005] FCA 27:

S119(1)(h) is relevant to the way the Tribunal proceeds but it cannot remove the responsibility of applying s120.

The Court considered the Tribunal dealt with the matter in accordance with the above principles. It recognised the beneficial nature of the Act and the need to take into account matters such as the unavailability of Mr Cross and the difficulty in having Mrs Cross attend to give evidence. After allowing for these difficulties in accordance with s119(1)(h), the Tribunal went on to say it could not be satisfied of the requisite standard in s120(4).

The Court considered the effect of the Tribunal's remark "in the absence of better evidence" was that the evidence of

the three family members was insufficient to satisfy the Tribunal to the prescribed standard that the smoking habit was war caused, not that the Tribunal thought it had to resolve the inconsistencies between the evidence.

The Court concluded that the Tribunal considered all the evidence that was available, took into account the unavailability of witnesses and was not satisfied to the standard required by s120(4).

Formal decision

Appeal dismissed.



Editorial note

The Federal Court noted the function of s119 in *Repatriation Commission v Bey* [1997] FCA 1374:

The material either points to a connection or it does not, if it does not, the deficiency cannot be remedied by resort to a procedural provision such as s119(1)(g).

As Wienberg J noted in *Mason v Repatriation Commission* [2000] FCA 1409:

The role of s119 is not to invent evidence which may serve to establish that connection.

More recently the Federal Court noted in *Fenner v Repatriation Commission* [2005] FCA 27 that:

Whilst the directions of s119 are of relevance to the way in which the Tribunal proceeded, they cannot remove from it the responsibility of applying ss120 and 120A.

This recent case of Cross reinforces the principles as established by the Court in cases of *Fenner* and *Bey* that a decision maker must be satisfied to the requisite standard of proof there is a connection between the claimed condition and service. Section 119 cannot be used to fill in gaps in order to establish that connection.

**Oldmeadow v Repatriation
Commission**

Mansfield J

[2013] FCA 423
10 May 2013

***Whether AAT review confined to
matters considered by the VRB***

Facts

The issue in this case was the rate of Mr Oldmeadow's disability pension. On 30 May 2008 the Repatriation Commission decided Mr Oldmeadow met the criteria for payment of the Extreme Disablement Adjustment (EDA). It did not accept he was entitled to the Special Rate of pension.

This decision was affirmed by the Veterans' Review Board (VRB). Mr Oldmeadow sought further review by the Administrative Appeals Tribunal (the Tribunal), who affirmed the decision under review. Mr Oldmeadow appealed the decision of the Tribunal to the Federal Court.

Grounds of appeal and the Court's consideration

Section 24(2A) was the relevant provision of the *Veterans' Entitlements' Act* 1986 (VEA), which prescribes six criteria for eligibility for the Special Rate of pension:

1. turned 65 before the claim is made: s24(2A)(b);
2. had a degree of incapacity from war-caused injury or war-caused disease of at least 70%: s24(2A)(c);
3. because of incapacity from war-caused injury or war-caused disease, is unable to undertake the remunerative work that he was last undertaking: s24(2A)(d);
4. is suffering a loss of earnings as a consequence: s24(2A)(e);
5. was undertaking his last paid work after he turned 65: s24(2A)(f); and
6. when the veteran stopped his last paid work, he had been working for a continuous period of at least 10 years: s24(2A)(g).

It was common ground that Mr Oldmeadow met the first three criteria. The Commission found he had not

worked past the age of 65, therefore s24(2A)(f) was not satisfied. It is now accepted by the Commission that Mr Oldmeadow did work past the age of 65.

The VRB addressed criteria 4, 5 and 6 and was not satisfied he met s24(2A)(e). The Tribunal addressed the preliminary issue of whether Mr Oldmeadow met the 10 year requirement in s24(2A)(g), and found it was not met by a few months. The Tribunal accepted evidence that he started work with the Australian Bureau of Statistics in September 1993, rather than May 1993 as accepted by the VRB.

In his application under s44 of the *Administrative Appeals Tribunal Act 1975*, Mr Oldmeadow raised the question of whether the AAT had the jurisdiction or power to consider and determine the “preliminary question”, as the Commission did not consider that question, and his application to the VRB and the Tribunal did not seek review “in relation to” that question.

The Federal Court took the view that the Tribunal was entitled to consider, on its review of the Commission’s decision, whether Mr Oldmeadow satisfied the 10-year criterion. His Honour referred to *Bramwell v Repatriation Commission* (1998) 158 ALR 623 in which Weinburg J indicated “it is the decision of the Commission and not its reasons for decision which the AAT is to review.” In the present case, His Honour stated:

The scope of the relief available to the AAT on a review of a decision supports the conclusion that it must consider the decision afresh, and may substitute the correct and preferable decision and not simply be confined to the particular issue addressed by the Commission. If it were satisfied that the reason for the decision of the Commission was wrong (as was acknowledged), if it could not go beyond that issue, it could not substitute the correct or preferable decision. It would need additionally to address the other criteria for qualifying for the special rate of pension. As Weinburg J pithily said in *Bramwell* at 632, “There is either a hearing de novo, or there is not”.

Mr Oldmeadow's application under s5 of the *Administrative Decisions (Judicial Review) Act* 1976 was also considered by the Court. The first ground was rejected, as it was the same error of law argued above under s44 of the AAT Act.

Regarding grounds 2(a), 3 and 4, the Court considered that the material relied upon by the Tribunal was capable of supporting its findings of fact, namely that Mr Oldmeadow commenced employment on 27 September 1993, so that the criterion in s24(2A)(g) was not satisfied.

Regarding the ground 2(b) - a failure to take into account relevant considerations - the Court did not consider this ground of review had been made out. His Honour referred to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 in which Mason J said that ground is only made out if the decision maker fails to take into account a consideration which he or she is bound to take into account. In the present case, the relevant consideration was whether the criterion in s24(2A)(g) was established, and clearly the Tribunal took

that into account. Secondly, there was no basis for concluding, due to its brief reasons, the Tribunal did not take relevant considerations into account. In conclusion, the Court did not consider the Tribunal's decision was so unreasonable that no reasonable person could have reached the decision it reached, citing *McVeigh v Willarra Pty Ltd* [1984] FCA 379; (1984) 6 FCR 587, and its critical finding of fact was not unsupported by evidence: *Luu v Renevier* [1989] FCA 518; (1989) 91 ALR 39.

Formal decision

The appeal was dismissed.



Editorial note

In this case, the Tribunal review was not confined to matters considered by the VRB. The Tribunal correctly reviewed the whole decision, even if that involves considering matters not considered by the original decision-maker.

Simos v Repatriation Commission

Tracey J

[2013] FCA 607

20 June 2013

Whether the Tribunal erred in finding the material did not point to life threatening event during military service of appellant - whether Tribunal misdirected itself as to what constitutes an 'objectively reasonable perception' - whether Tribunal failed to determine the meaning of 'viewing corpses or critically injured casualties as an eye witness' - whether Tribunal failed to give adequate reasons for rejecting certain contentions advanced by expert witnesses

Facts

Mr Simos applied for a disability pension on the grounds he was suffering from a psychiatric disorder, alcohol abuse or dependence, hypertension, atrial fibrillation and asthma and that these conditions were related to his operational service in Vietnam. The claim was rejected by the Repatriation Commission, affirmed on review by the VRB and the AAT.

Mr Simos appealed to the Federal Court.

Grounds of appeal

1. The Tribunal had erred by finding the material before it did not point to there having been any life threatening event during military service.
2. Misdirecting itself as to what constitutes an objectively reasonable perception that an incident was life threatening.
3. Failing to determine what was meant by the expression "viewing corpses or critically injured casualties as an eyewitness".
4. Failing to disclose any adequate reasons for rejecting the construction of the expression "viewing corpses or critically injured casualties as an eyewitness".
5. Misapplying the definition of "a clinically significant psychiatric condition".

The Court's consideration

A life threatening event

The first two grounds of appeal related to the patrol incident and whether this constituted a category 1A stressor.

The Court considered the Tribunal confined itself to a consideration of Mr Simos' subjective response to the patrol incident, and failed to make a reasoned determination as to whether or not the patrol incident was a life threatening event.

The Court said:

When dealing with the issue of whether Mr Simos had experienced a life threatening event, at the Deledio step 3 stage, the Tribunal was not engaged in a fact finding exercise. It was concerned to determine whether the hypothesis that Mr Simos suffered was war caused anxiety disorder fitted within the "template" constructed by the SoP. The Tribunal concluded that the material did not point to Mr Simos having experienced any life threatening event during service. It did not say why it had come to this conclusion and in particular why the patrol incident did not constitute a "life threatening event".

The Court concluded that the Tribunal dealt with Mr Simos' claim to have experienced a category 1A stressor on the

mistaken basis that Mr Simos did not assert that the patrol incident could, objectively, be regarded as a life threatening event. This mistake was critical in the determination of the appeal.

The Tribunal recorded that Mr Simos had agreed that *"there was no objective event meeting the definition of a 1A stressor"*. The Court concluded the Tribunal's failure to give any detailed consideration to this aspect of Mr Simos' claim, strongly suggested that it accepted and acted on what it considered to be a concession that no objective basis for the claim existed.

This ground was allowed.

Viewing corpses or critically injured casualties as an eyewitness

The Tribunal had said that Mr Simos had not experienced a category 1B stressor as defined because he did not view a corpse or a critically injured casualty at any time, although he claims to have seen body bags at Saigon Airport from a distance of 50 metres. Its conclusion was

that body bags could not be equated with viewing corpses.

Mr Simos submitted that the word “corpse” should be given its widest meaning and should not be read down to require direct or immediate observation.

The Court noted the viewing of corpses was one of a number of “severe traumatic events” referred to in the definition of “a category 1B stressor” in clause 9 of the SoP. Each of the events described in the definition involves the observation, by the veteran, of the infliction of serious physical harm or death or the subsequent observation of dead or maimed victims. The veteran is confronted with a dead or badly injured person. The Court considered there was no basis for extending the reach of the definition to cover observations made after a victim has been treated in hospital or has been embalmed and placed in a body bag. At 44 (emphasis added):

Observations of this latter kind are removed from the close temporal proximity of the observation of the infliction of harm on the victim or of its immediate consequences which are the severe traumatic events comprehended by the definition.

The Court concluded Mr Simos did not view a corpse when he saw body bags in Saigon Airport and the Tribunal was correct in holding this observation did not fall within the definition of a category 1B stressor.

Adequacy of reasons

This ground also related to the body bag incident. As already noted, the Tribunal had said Mr Simos had not experienced a category 1B stressor because he had not viewed a corpse, but did not give reasons for reaching this conclusion.

The Court noted two of the doctors who gave evidence to the Tribunal were permitted to express their opinions that the viewing of body bags fell within the meaning of a category 1B stressor. The Court said at 53 (emphasis added):

The medical witnesses were qualified to express an opinion as to the psychiatric effect on Mr Simos of his viewing body bags. Their expertise did not extend to a determination of whether or not Mr Simos' observation and the impact of that observation on him constituted a category 1B stressor within the meaning of the SoP. **That was a matter ultimately for the Tribunal to determine.** It did so, while there may be an issue as to whether it gave adequate reasons for its negative determination on this point,, it was under no obligation to explain why it disagreed with the opinion of the two medical witnesses. This ground must be rejected.

Misapplication of the definition of "a clinically significant psychiatric condition"

The Tribunal found that Mr Simos suffered from a generalised anxiety disorder and had done so since the time of his service in Vietnam. Despite this, the Tribunal found that his condition did not warrant ongoing management until 1998 when he commenced treatment by a clinical psychologist and that he did not

have a clinically significant psychiatric condition. As a result it found he had failed to establish diagnostic criterion E in the SoP.

The Court concluded that it was open to the Tribunal to conclude that Mr Simos had suffered from GAD since his service but to also conclude that the condition did not warrant ongoing management until 1998. Mr Simos had to satisfy a series of symptoms from which he suffered must have caused him "clinically significant distress or impairment". A clinically significant psychiatric condition is defined in the SoP to mean a mental health disorder which is sufficient to warrant ongoing management. Mr Simos' medical records did not disclose treatment prior to 1998. There simply was no ongoing management of his GAD. The Court found this ground was not made out.

Formal decision

Appeal allowed on the first ground that the Tribunal proceeded on the mistaken basis that Mr Simos had conceded that there was no objective foundation for his

claim to have experienced a life threatening event.



Editorial note

Objective/subjective assessment of whether a veteran experienced a “life threatening event”

The only ground of appeal allowed in this case concerned the failure of the Tribunal to explain why it came to the conclusion the patrol incident was not a life threatening event. The Court considered the Tribunal acted on a mistaken belief that a concession had been made that there was no life threatening event on an objective basis, as such, the Tribunal did not consider this part of the claim. Justice Tracey considered the Tribunal did not properly assess the objective part of the test. Reeves J considered the objective/subjective assessment of whether a veteran experienced a “life threatening event” in the case of *Border v Repatriation Commission* (No.2) [2010] FCA 1430 (emphasis added):

It is the effect of the event and not the threat itself that has to be assessed. Moreover, it is the veteran’s perception of the event that is critical, his or her perception that it posed a threat of death. If that perception was a reasonable one, it constitutes a life threatening event within the terms of subpara (a). That perception will be reasonable if judged objectively from the point of view of a reasonable person in the position of, and with the knowledge of the veteran, it was capable of and did convey the threat of death.. unlike subparas b and c, **this is a mixed objective and subjective test.**

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

Viewing body bags does not equate with viewing corpses within the definition of a category 1B stressor

Also in this case, the Court concluded that **viewing body bags could not be**

equated with viewing corpses within the definition of a category 1B stressor.

Viewing corpses is one of the examples given as a “severe traumatic event”. The Court specifically notes that observations of body bags are removed from the close proximity of the infliction of harm on the victim or its immediate consequences. As such the Court considered Mr Simos did not view a corpse when viewing body bags.

A clinically significant psychiatric condition

Please also note the Statements of Principles define “a clinically significant psychiatric condition” to mean any axis 1 disorder of mental health that attracts a diagnosis under DSM-IV-TR which is sufficient to warrant ongoing management, which may involve regular visits (for example, at least monthly), to a psychiatrist, clinical psychologist or general practitioner.

In this case the Court found the medical records did not disclose ongoing management of Mr Simos’ GAD, a

requirement in the definition of a clinically significant psychiatric condition.

Forrester v Repatriation Commission

Mortimer J

[2013] FCA 898
6 September 2013

Whether the Tribunal erred in finding material before it did not point to or support hypothesis advanced - whether link between events and operational service too remote or tenuous - whether Tribunal’s reasoning inconsistent with its conclusion

Facts

Mrs Forrester applied for a pension under the VEA following the death of her husband Mr Forrester. On 30 November 2012, the Administrative Appeals Tribunal (AAT) affirmed the Commission’s decision refusing to grant the pension.

The cause of death in this case (ruptured abdominal aortic aneurism) was not in

dispute. There was also no dispute that hypertension was a risk factor in the relevant Statement of Principles (SOP). The remaining issue before the AAT was whether Mr Forrester's hypertension could be related to his operational service by way of an increase in Mr Forrester's pre-service alcohol consumption.

While there was evidence in Mr Forrester's service personnel records and other historical evidence which corroborated the occurrence of the events alleged to have caused him to increase his alcohol consumption, there was no evidence of an increase in alcohol consumption during or immediately after operational service and no evidence that any of the events relied on had any particular effect on alcohol consumption. The AAT therefore concluded that there was no material pointing to the proposed hypothesis of connection and refused the claim for WWP.

An appeal was made to the Federal Court.

Court's consideration of relevant law

The appeal centred on the Tribunal's understanding and applications of ss120(1) and (3) of the Act.

The Court noted s120(1) requires the Commission to determine the death was war caused *"unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination"*.

Section 120(3) then provides for **one circumstance** in which the Commission is obliged to find there is "no sufficient ground" for the purposes of s120(1) (emphasis added):

After consideration of the whole of the material before it, [the Commission] is of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person.

Section 120(3) effectively prescribes a circumstance in which satisfaction

beyond reasonable doubt for the purpose of s120(1) is deemed to have been established (and the causal connection deemed not to exist). In *Bushell v Repatriation Commission* [1992] HCA 47, Mason CJ, Deane and McHugh JJ (at 413-414) described the limited but important effect of s120(3) (emphasis added):

Subsection (3) is concerned with whether “the material” raises a reasonable hypothesis that the relevant injury, disease or death was connected with the service of the veteran. It is not concerned with conflicts in the material...

The material will raise a reasonable hypothesis within the meaning of s120 (3) if the material points to some fact or facts (the raised facts) which support the hypothesis and if the hypothesis can be regarded as reasonable if the raised facts are true.

The Court referred to the cases of *East v Repatriation Commission* [1987] FCA 242, and the commentary of the Veterans’ Review Board in *Re Stacey*, which

identified what subsequently became the accepted construction of the threshold required by the phrase “*does not raise a reasonable hypothesis connecting*” in s120(3). The Board observed that the relevant hypothesis must “find some support” in the material and that the material must “point to, and not merely leave open” the hypothesis relied upon.

In *Bushell*, the High Court recognised the difficulties for the Commission in determining whether, on the basis of medical and scientific information and opinion, facts raised by a veteran supported a hypothesis connecting service with injury, disease or death. It was after *Bushell*; in 1994 that s120A was introduced to provide the necessary basis for a finding that a hypothesis was ‘reasonable’ in a medical sense.

The Court concluded that in its current form the Act requires the decision maker to undertake a process which parliament intends to be beneficial to applicants. The Court noted the scheme imposes particular processes and standards of

proof to establish the requisite connection.

Identifying the hypothesis

The Court noted a hypothesis is no more than an explanation of an ultimate fact: *Repatriation Commission v Stares*. In the present case the ultimate fact is Mr Forrester's death from an aortic aneurysm. The explanation for that death is that Mr Forrester commenced drinking heavily during his operational service in Vietnam as a result of stressors during service.

The Deledio steps

The first step in *Deledio*, requires the Tribunal to form a view or opinion about the material before it, and a characterisation of that material as "pointing to" or "supporting" the hypothesis advanced, involves some level of factual assessment.

In *Stares* (pre *Deledio* case) the Full Court held that assuming a fact in that case, the

veteran started his heavy drinking during war service - was permissible at what is now identified as the first stage of the *Deledio* approach. As noted in *Byrnes*:

By saying that "the material must point to some fact of facts" their Honours were not erecting a requirement that each element in the hypothesis must be supported by evidence tending to establish it. Such a requirement would convert the hypothesis to a prima facie conclusion.

The approach of asking whether the material points to or supports a hypothesis, has been held to require more than that the material before the decision maker leaves the hypothesis open as a possibility. A possibility of connection with service and death is not enough: *Repatriation Commission v Bey* [1997] FCA 1347.

The Court concluded the reasonableness of a hypothesis therefore has two aspects: a medical or scientific aspect and a factual aspect. It said:

One looks to the factual circumstances relating to the particular veteran and the other looks to the medical basis for what is factually asserted. Since the introduction of s120A consideration of these aspects has become somewhat separated. A hypothesis will be reasonable if there are facts that point to or support it, but it also needs to be reasonable because a SoP upholds it.

Tribunal's decision

The Tribunal rejected Mrs Forrester's claim at the first step of the *Deledio* process. The Court noted the following conclusions of the Tribunal:

[34] Having considered all of the material before us we determine that it does not point to a hypothesis connecting Mr Forrester's death from aortic aneurysm to his operational service.

[35] The material before us does not point to or support the hypothesis that Mr Forrester increased his consumption of alcohol on an ongoing basis as a result of all or any events said to have caused him particular stress. The evidence of Mrs Forrester, Ms Swan and Mr Swan indicates that there was friction between Mr

Forrester and his superior officer and that he found some of the tasks he was required to undertake as part of his duties to be distressing. This material also indicates that he was angry as a result of events which occurred during his operational service. The material does not point to any connection between the soldier firing his weapon in the vicinity of Mr Forrester and Mr Forrester's consumption of alcohol. There is no material which points to any change in Mr Forrester's drinking habits as a result of all or any of these events.

[36] The hypothesis put forward links particular events in Vietnam with a substantial increase in Mr Forrester's alcohol consumption and subsequent hypertension. This hypothesis must be considered in the light of all of the material before us. On this basis the linking of the hypertension with the particular events of the operational service is too remote and too tenuous.

Applicant's case

There were three questions of law raised by the applicant:

1. In the circumstances, there was only one conclusion available to the Tribunal at the first *Deledio* step:

namely that the whole of the material did point to, or support, the hypothesis relied upon.

2. It was also not open to the Tribunal to find that the linking of the hypertension with the particular events in Vietnam was “too remote and too tenuous”
3. The Tribunal’s finding at [72] of its reasons was inconsistent with its conclusion that the material did not point to or support the hypothesis relied on by Mrs Forrester.

Court’s consideration of the applicant’s arguments

The first argument

Centred on the inference the Tribunal should have drawn from the whole of the material. The applicant submitted an inference was available that Mr Forrester’s increased consumption of alcohol had been caused by the circumstances of service because the material before the Tribunal revealed: he was a social drinker before operational service; upon his return from operational service he was drinking every day and was a heavy drinker of alcohol; the veteran’s drinking habits upon his return

from Vietnam became a cause of friction between him and the applicant.

The Court noted the Tribunal correctly used and applied the language of the first step in *Deledio* to the material before it, and briefly discussed the particular events relied on for the hypothesis. The Tribunal concluded there was no link between these events and the increase in Mr Forrester’s alcohol consumption. These conclusions are based on what the Tribunal identified as the most pertinent material before it. Although its conclusion could have been explained in more detail, the conclusion was open to the Tribunal on the material before it to which it referred.

The Court noted at [48]

Where a Tribunal is applying a statutory expression (here, s120(3), as construed in *Deledio*) to the evidence or material before it, there will be no error of law in the conclusion or determination reached if it is reasonably possible to arrive at different conclusions or

determinations; see *Vetter* 202CLR 439 at 451 per Gleeson CJ, Gummow and Callinan JJ and the authorities there referred to. An error of law (and therefore a question of law about the orders and decision made by the Tribunal) will arise if on the facts only one conclusion was open. This in turn requires characterisations at the level of perversity, irrationality or illogicality to be applied to the Tribunal's reasoning and factual conclusion.

The Court considered the conclusion reached by the Tribunal was of several reasonably open to it on the material. The Court also noted that what emerges from the reasons of the Tribunal is that the particular events relied upon in the hypothesis as "*stressors*" was what led the Tribunal to the conclusion that the material before it did not point to or support a hypothesis that connected those events with any increase in drinking.

The second argument

This relied on the Full Court's decision in *Bull v Repatriation Commission*. The applicant submitted that by using the phrase "*too remote and too tenuous*", the Tribunal misdirected itself because that characterisation according to *Bull*, was reserved for hypotheses that were fanciful or irrational.

The terms "*too tenuous*" or "*remote*" are orthodox terms to use in this context. The Court considered these terms were not the same as irrationality, but rather suggests a different problem with a causal link between war service and the veteran's death.

The Court noted:[65]

It is important to recall that the hypothesis in Mr Forrester's case sought to link, in whole or in part, five particular events in Vietnam with the change in Mr Forrester's drinking habits. That is why [40] of *Bull* , even if it could be taken as some kind of general endorsement for the purposes of s120(3) of hypotheses of the kind with which it deals (and I do not consider it could be so taken), does not

assist the resolution of the question of law in the present case. In the present case, what the Tribunal was saying at [69] was too remote or tenuous was, in its own words, the link between “particular events of operational service” relied on by the applicant, and Mr Forrester’s alcohol consumption and hypertension. That conclusion was open to it and no misunderstanding of s120(3) is disclosed by that conclusion.

The third argument

Whether the Tribunal’s reasons at [72] is inconsistent with its conclusions on s120(3).

We would have determined that the hypothesis put forward is consistent with the templates in these statements.

Firstly it was put that in relation to this sentence the Tribunal’s reasoning at step 3 of the *Deledio* test; namely, that a decision maker will find a hypothesis to be reasonable *if it fits, that is to say, is consistent with the template’ to be found in the SoP*.

We would not have been satisfied beyond a reasonable doubt that Mr Forrester’s death was not war caused.

Secondly it was contended that the above sentence was the Tribunal’s reasoning at step 4 of *Deledio*; namely the fact finding stage, where the decision maker determines if it is satisfied beyond reasonable doubt that the death was not war caused.

It was submitted by the applicant that a hypothesis cannot be found to be inconsistent with the template of a SoP if a Tribunal has already found the material before it does not point to or support the hypothesis.

The Court noted that at first reading an inconsistency does seem apparent.

The Tribunal appears to be saying at [72] that it would have found first that the Sop upheld the hypothesis and second, that, insofar as the s120(1) exercise was concerned, it would have been obliged to find Mr Forrester’s death was a war caused. Yet on the

least demanding test – whether the whole of the material pointed to or supported the hypothesis that Mr Forrester’s death was connected to his increased consumption of alcohol and hypertension because of what he experienced during his service in Vietnam – it found adversely to Mr Forrester.

The Court considered although it may not amount to fact finding, the first step in *Deledio* has a factual element particular to the material before the decision maker about the veteran. This is an integral aspect of determining the reasonableness of the asserted hypothesis. It involves a different comparison to the third step, and centres much more on the specific factual material relied on by the veteran. The Court considered that the different exercises involved mean that the decision maker could reach a conclusion adverse to a veteran on the first step, and assuming against itself and moving to the following steps – a conclusion favourable to the veteran at the third step. That is because they are distinct aspects of reasonableness.

In relation to the Tribunal having determined that Mrs Forrester’s application failed because the material before the Tribunal did not point to or support the hypothesis advanced, the Court said at [79]:

The Tribunal was acting out of an abundance of caution and indicating there would have been no obstacles to the claim to be accepted. The brevity with which this part of its reasons is expressed has given rise to the question over what is meant.

The Court concluded that read fairly and in context this last sentence is no more than a recognition by the Tribunal of the effect of the reverse standard of proof in s120(1). The Court went on to say it is important to recall that the Tribunal was considering what it might have found, had its conclusion on the first *Deledio* step been different. Contrary to the applicant’s characterisation it is not engaging in fact finding in these paragraphs.

Decision

None of the questions of law in the appeal were answered in favour of the applicant and the appeal was dismissed.



Editorial note

This decision emphasises the need to evaluate the reasonableness of an asserted hypothesis of connection between operational service and the claimed injury, disease or death. It also highlights the potential risk resulting from a decision-maker working through the whole *Deledio* process out of an abundance of caution, even where the decision-maker has reached an adverse conclusion on the first or second stage of that process.

O'Dowd v Repatriation Commission

Marshall J

[2013] FCA 991
1 October 2013

Whether AAT erred in deciding the applicant did not suffer from PTSD

Facts

Mr O'Dowd served in the Royal Australian Navy and had operational service in Vietnam between 20 March 1969 and 13 October 1969 on board the HMAS Brisbane. He lodged a disability pension claim for a number of conditions. A delegate of the Repatriation Commission accepted Mr O'Dowd's claims for hearing loss, tinnitus and solar keratosis but decided that his claimed PTSD, rosacea and asthma were not related to his war service. He was granted a disability pension at 40 percent of the General Rate.

Mr O'Dowd appealed to the VRB. The Board consented to the withdrawal of Mr O'Dowd's application for review regarding his asthma, affirmed the

Repatriation Commission's decision regarding his PTSD and rosacea and increased his disability pension to 50 per cent of the General Rate. Mr O'Dowd sought further review by the Administrative Appeals Tribunal (the Tribunal), and it was agreed between the parties that Mr O'Dowd's rosacea was war-caused. The Tribunal affirmed the VRB's decision regarding PTSD. Mr O'Dowd then appealed to the Federal Court.

Grounds of appeal

The Tribunal decided that :

1. Mr O'Dowd did not suffer from PTSD;
2. If it was wrong in so deciding, such PTSD was not war-caused.

Mr O'Dowd only appealed against the first part of the Tribunal's decision.

The Court's consideration

Mr O'Dowd relied on two "extreme traumatic stressors" in 1969 which led to him suffering PTSD. The first stressor was in May 1969 when he claimed to

have visited a hospital at Subic Bay in the Philippines whilst on recreation leave. He visited the children's ward of the hospital with other servicemen, and saw a young girl in a wheelchair with both legs amputated below the knees and her legs wrapped in bandages. The second stressor was in June 1969, when Mr O'Dowd was the weapons fire control leading hand on board HMAS Brisbane and his role was to oversee the firing of two guns. He received target coordinates from an American spotter pilot which, as it transpired, reflected that pilot's then position. The firing occurred and Mr O'Dowd realised that the pilot had sought to be fired upon deliberately and was killed.

The Tribunal found that Mr O'Dowd did not have PTSD, and did not consider either event was an extreme traumatic stressor. The Tribunal examined the criteria in DSM-IV in considering whether Mr O'Dowd had PTSD. In particular, regarding criterion A(1) where a person "experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others", the Tribunal found Mr O'Dowd did not witness the

second event nor did he experience it. He heard about it sometime after the event was said to have occurred. The Tribunal approached the first event in a similar way. The Court noted the Tribunal:

...acknowledged that criterion A(1) in DSM-IV referred to being “confronted with” an event and noted that the introductory paragraph dealing with PTSD in DSM-IV does not refer to being confronted with an event. The Tribunal also acknowledged the Court in *Woodward v Repatriation Commission* [2003] FCAFC 160; (2003) 131 FCR 473 took a broad view of the words “being confronted with” but observed that that case was concerned with the interpretation of legislation and a Statement of Principles (“SoP”) and not with the correctness of a medical diagnosis.

The first two questions of law in the appeal raised the issue of whether the Tribunal failed to take into account a relevant consideration by relying on the introduction to the diagnostic criteria for PTSD in DSM-IV, without considering whether Mr O’Dowd had been confronted with a relevant event in accordance with criterion A(1). The

Court concluded the Tribunal did not err in its application of DSM-IV to Mr O’Dowd in the context of the two stressors alleged to have affected him by reason of being confronted with them, and the Tribunal was entitled to read the words “confronted with” in criterion A(1) in the context of the introductory paragraph to DSM-IV.

The Court accepted the submission by counsel for the respondent that the Tribunal’s discussion of Mr O’Dowd’s alleged stressors was consistent with the approach taken by Spigelman CJ in *New South Wales v Seedsman* [2000] NSWCA 119; (2000) 217 ALR 583, where the Chief Justice referred to the need for a person to experience an event causing injury or death, unless the event involves a family member or close associate. The Court considered *Seedsman* involved an analysis of DSM-IV, whereas *Woodward* involved statutory construction.

The third and fourth questions of law in the appeal raised the issue of whether the Tribunal erred in finding that Mr O’Dowd’s response to the Subic Bay event did not invoke “intense fear, helplessness or horror” within the meaning of criterion A(2) of the definition of PTSD in DSM-IV. The

Court found that the Tribunal did not err in this way. The Court indicated whether Mr O'Dowd felt helpless was a question of fact for the Tribunal to determine, and its finding was open to the Tribunal on the evidence before it. The Tribunal rejected the suggestion that Mr O'Dowd experienced horror, preferring other evidence, and that finding of fact was available to the Tribunal.

The fifth question of law in the appeal raised the issues of whether the Tribunal erred in finding that Mr O'Dowd did not suffer from PTSD and that it failed to decide whether his symptoms amounted to an alternative diagnosable disease. The Court agreed with the respondent's contention that the Tribunal's only obligation is to determine whether the veteran suffers from a diagnosable disease in accordance with *Repatriation Commission v Bawden* (2012) 206 FCR 296, and a fair reading of the Tribunal's reasons show that it discharged its obligation to consider alternative diagnoses raised on the evidence before it.

The last question of law asked whether the Tribunal denied Mr O'Dowd procedural fairness by finding that his

symptoms could be explained by his rosacea, without putting that allegation to him in the course of the hearing. This issue was based on a false premise, as the Tribunal did not find that Mr O'Dowd's symptoms could be explained by his rosacea - rather it said his avoidance of crowds can be explained by his rosacea in the context of a possible alternate diagnosis of agoraphobia. The Court found no denial of procedural unfairness occurred.

The Court's decision

The appeal was dismissed.



Editorial note

The decision of the Tribunal goes into further detail about the introductory paragraph dealing with PTSD in DSM-IV, which:

...describes the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical

integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threatened death or injury experienced by a family member or other close associate.

The Court's decision that the Tribunal was entitled to read the words "confronted with" in criterion A(1) in the context of the introductory paragraph to DSM-IV, is a departure from a strict reading of criterion A(1). The Court preferred the approach of the Court of Appeal of the Supreme Court of NSW in *Seedsman*, over the more expansive view of the Full Federal Court when interpreting the meaning of "being confronted with" in *Woodward*, on the basis that *Seedsman* involved an analysis of DSM-IV, whereas *Woodward* involved statutory construction.

It will be interesting to see how the Court's decision in *O'Dowd* is applied in future cases involving the question of diagnosis of PTSD.

Sharley v Repatriation Commission

Jessup J

[2013] FCA 1031

14 October 2013

Whether AAT erred by not providing adequate reasons for its conclusion that applicant did not suffer war-caused PTSD - whether Tribunal erred by not providing written reasons for part of applicant's claim regarding osteoarthritis after respondent's affirmation of decision remitted by Tribunal

Facts

Mr Sharley served in the Royal Australian Air Force and had operational service in South Vietnam for about 11 months, commencing on 25 February 1970. He lodged a disability pension claim for a number of conditions.

By the time Mr Sharley's appeal reached the Administrative Appeals Tribunal (the Tribunal), only his claims regarding PTSD and osteoarthritis of the knees were in issue. The Tribunal affirmed the decision under review relating to PTSD, finding that he did not suffer from PTSD. It determined that Mr Sharley suffers

from war-caused alcohol dependence in partial remission. The Tribunal remitted the claim for osteoarthritis of both knees to the Repatriation Commission for reconsideration on different grounds as outlined in the Tribunal's decision. Mr Sharley appealed to the Federal Court.

Grounds of appeal

Mr Sharley's appeal raised the following issues:

- Whether the Tribunal gave adequate reasons for its conclusion that the applicant did not suffer from PTSD;
- Whether the Tribunal failed to apply the correct legal test in considering the claim that the applicant had suffered war-caused osteoarthritis of his knees.

The Court's consideration

Regarding the first issue, the Court noted that s43(2) of the AAT Act requires the Tribunal to "give reasons either orally or in writing for its decision", and where the reasons are in writing s43(2B) stipulates that "those reasons shall include [the Tribunal's] findings on

material questions of fact and a reference to the evidence or other material on which those findings were based". The Court referred to relevant commentary on these legislative requirements in *Repatriation Commission v Hendy* [2002] FCA 424, in which the Full Court said:

...this is not a requirement that the reasons provide an unarguable logical progression to a conclusion. It will, in almost every case, be that alternative conclusions are possible based on the evidence and other material to which reasons refer. The fact that the tribunal may come to a conclusion contrary to that which the court or a tribunal differently constituted might come is not a reviewable error, so long as the reasons include the factors set out in s43(2B) of the AAT Act.

The Court also noted in *Hill v Repatriation Commission* [2004] FCA 832, Mansfield J said:

The requirement of s43(2B) of the AAT Act is that the tribunal's process of reasoning be adequately exposed to indicate how the tribunal has gone about its task, and why it has reached its conclusion. It is a corollary of the requirement that the tribunal will

adopt sound and proper legal reasoning. But s43(2B) does not oblige the tribunal to correctly identify and apply the law. It aims to expose whether the law has been correctly identified and applied.

In light of the above cases, and also *Smith v Repatriation Commission* (2012) 131 ALD 63, the Court was satisfied that the Tribunal in the present case provided adequate reasons for its conclusion that the applicant did not suffer from PTSD.

Regarding the second issue, the Court noted that ultimately the Commission accepted that this aspect of the case needed to be remitted to the Tribunal. The Court went on to say something about the procedural course of the applicant's claim in the Tribunal, to illuminate the error into which the Tribunal had fallen. In relation to the applicant's osteoarthritis claim, when the Tribunal was applying step three of the *Deledio* principles it remitted the claim in accordance with s42D of the AAT Act to the Commission for reconsideration and the obtaining of further evidence. In the circumstance where the Commission affirms the decision, s42D(8) requires the proceeding to resume before the Tribunal.

A delegate of the Commission went on to affirm the Commission's original decision that Mr Sharley's osteoarthritis was not related to his operational service. The Tribunal asked the Commission to provide further and better particulars of its decision, which the Commission did. The Tribunal then directed the Commission, through its solicitors, to seek further information from general practitioners who had treated the applicant over the years. However, the material provided was not sufficient for the Tribunal's then purposes, which related to the question of whether the applicant had been overweight for at least 10 years before the clinical onset of osteoarthritis in the joint in question. The Tribunal requested the Commission's solicitors to contact a treating physician, but the physician's response did not take the matter any further. The Commission's solicitors then wrote to the Tribunal requesting it to confirm that the matter had been finalised and closed, which it did. In the Federal Court proceedings, the Commission accepted that the Tribunal had unfinished business, as it had not given final consideration to, and made a decision upon, the applicant's claim for a pension for osteoarthritis. Although the

proceeding did resume in accordance with s42D(8), the Tribunal had not made a decision in writing as required by s43(1) of the AAT Act. The Court therefore made a remitter order.

The Court's decision

The applicant's claim regarding osteoarthritis of the knees was remitted to the Tribunal. The application regarding PTSD was dismissed.



Editorial note

This case dealt with procedural issues which arose in the Tribunal, relating to the adequacy of the Tribunal's reasons for its conclusion the applicant did not suffer from PTSD, and the Tribunal's omission to make a decision regarding the applicant's claim for osteoarthritis. In the circumstance where the Tribunal remits a matter to the original decision-maker under s42D of the AAT Act, and that decision-maker affirms the decision, the proceeding resumes in the Tribunal and the Tribunal is required to make a decision in writing in accordance with s43(1) of the Act.

Vulich v Repatriation Commission

Marshall J

[2013] FCA 1370
17 December 2013

Whether applicant satisfied criteria for pension at the special rate - necessary to satisfy both limbs of s24(1)(c)

Facts

Mr Vulich had operational service in Vietnam from September 1970 to March 1972. In April 2010 a delegate of the Repatriation Commission granted Mr Vulich a disability pension at 100% of the General Rate, with effect from 29 January 2010. In May 2010 he lodged an application for review, seeking a pension at the special rate. The Veterans' Review Board (VRB) affirmed the decision of the Repatriation Commission. Mr Vulich sought further review by the Administrative Appeals Tribunal (the Tribunal), who affirmed the VRB's decision. He then appealed the decision of the Tribunal to the Federal Court.

Issues before the Tribunal

There were two issues before the Tribunal:

1. Whether Mr Vulich could satisfy the “alone test” in s24(1)(c) - the first limb of s24(1)(c); and
2. Whether he satisfied the “substantial cause test” in s24(2)(b) - which is also relevant to the second limb of s24(1)(c).

The Court’s consideration

Initially the Court decided to await a decision of the Full Court in an appeal from the judgment of Gordon J in *Smith v Repatriation Commission* [2012] FCA 1043. The Tribunal in the present case made its decision before Gordon J gave judgment in *Smith*. Counsel for the Repatriation Commission submitted that, had the Tribunal followed *Smith*, it would not have applied the first limb of s24(1)(c) in the way it did. However, there was still the second limb - the loss limb - which the Tribunal did address, so Mr Vulich did not satisfy both limbs and his case would fail at the Tribunal anyway. The Court changed its view and decided it could determine the matter, irrespective of the outcome of the appeal in *Smith*.

The Court turned to consider the question whether, even if the Tribunal did not apply the proper approach to the first limb of s24(1)(c), did it apply the proper approach to the second limb of that provision? Reading the second limb of s24(1)(c) together with the aspect of s24(2)(b) which relates to it, raised the following issues:

- By reason of the veteran’s war caused incapacity alone, has he suffered a loss of earnings on his own account that he would not be suffering from if free from that incapacity?; and
- Is that incapacity the substantial cause of his inability to obtain remunerative work?

The first question of law raised in the appeal concerned the correct application of the “alone test” in the first limb of s24(1)(c), but the Court did not consider it was necessary to answer that question to resolve the current matter. The second question of law was not pressed. The third question of law was:

Does the decision maker need to give reasons or adequate reasons as to why the Applicant was not entitled to the Special Rate of pension due to his inability to perform work as a self-

employed woodworker, such an ability being caused by his war-caused incapacities alone.

The Court accepted the submission of counsel for the Repatriation Commission that s43(2B) of the AAT Act requires the Tribunal to give written reasons for its decision that “shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based”. The Court also followed *Hill v Repatriation Commission* [2004] FCA 832, in which the Court said the obligation is to adequately disclose a reasoning process to show how the Tribunal went about its task and why it reached its conclusion. The Court considered the Tribunal did so in the present case. The Court indicated the Tribunal’s analysis was consistent with it taking a broad view of the remunerative work undertaken by Mr Vulich, given his history of engaging in a broad range of activities, and it would be unfair to criticise the Tribunal’s failure to give particular attention to his woodworking activity when it was dealing with a work history based largely on employment rather than self-employment. The Court concluded the findings made by the

Tribunal on the question of the application of the second limb of s24(1)(c) were open to it on the material before it.

The Court’s Decision

The appeal was dismissed.



Editorial note

This appeal to the Federal Court involved a narrow question of law concerning the adequacy of the Tribunal’s reasons regarding one aspect of Mr Vulich’s work history. This case clearly demonstrates that both limbs of s24(1)(c) must be satisfied. It will be interesting to see how the Full Court interprets the first limb of s24(1)(c) in the pending *Smith* decision.

Statements of Principles issued by the Repatriation Medical Authority

1 January 2013 to 15 January 2014

Description of Instrument	Number of Instrument	Date of effect
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 syndrome	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
Primary myelofibrosis	17 & 18 of 2013	13 March 2013
Hypopituitarism	19 & 20 of 2013	13 March 2013
Aortic stenosis	21 & 22 of 2013	8 May 2013
Goitre	23 & 24 of 2013	8 May 2013
Chronic gastritis and chronic gastropathy	25 & 26 of 2013	8 May 2013
Hyperthyroidism and thyrotoxicosis	27 & 28 of 2013	8 May 2013
Hypothyroidism	29 & 30 of 2013	8 May 2013
Hashimoto's thyroiditis	31 & 31 of 2013	8 May 2013
Graves' disease	33 & 34 of 2013	8 May 2013
Colorectal adenoma	35 & 36 of 2013	3 July 2013
Malignant neoplasm of the colorectum	37 & 38 of 2013	3 July 2013

Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
Familial adenomatous polyposis	39 & 40 of 2013	3 July 2013
Sleep apnoea	41 & 42 of 2013	3 July 2013
Erectile dysfunction	43 & 44 of 2013	3 July 2013
Gingivitis	45 & 46 of 2013	3 July 2013
Periodontitis	47 & 48 of 2013	3 July 2013
Periodontal abscess	49 & 50 of 2013	3 July 2013
Malignant neoplasm of the anus and anal canal	51 & 52 of 2013	4 September 2013
Fibrosing interstitial lung disease	53 & 54 of 2013	4 September 2013
Asbestosis	55 & 56 of 2013	4 September 2013
Sudden unexplained death	57 & 58 of 2013	4 September 2013
Guillan – Barre syndrome	59 & 60 of 2013	4 September 2013
Malignant neoplasm of the larynx	61 & 62 of 2013	4 September 2013
Hypertension	63 & 64 of 2013	4 September 2013
Gastro oesophageal reflux disease	65 & 66 of 2013	4 September 2013
Motor neurone disease	67 & 68 of 2013	4 September 2013
Lumbar spondylosis	69 & 70 of 2013	26 June 2013
Chronic solvent encephalopathy	71 & 72 of 2013	13 November 2013
Malignant neoplasm of the pancreas	73 & 74 of 2013	13 November 2013
Epilepsy	75 & 76 of 2013	13 November 2013
Epileptic seizure	77 & 78 of 2013	13 November 2013
Steatohepatitis	79 & 80 of 2013	13 November 2013
Heart block	1 & 2 of 2014	15 January 2014
Dental pulp and apical disease	3 & 4 of 2014	15 January 2014
Morbid obesity	5 & 6 of 2014	15 January 2014

Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
Narcolepsy	7 & 8 of 2014	15 January 2014
Dermatomyositis	9 & 10 of 2014	15 January 2014
Chronic fatigue syndrome	11 & 12 of 2014	15 January 2014
Fibromyalgia	13 & 14 of 2014	15 January 2014
Sick sinus syndrome	15 & 16 of 2014	15 January 2014
Alzheimer-type dementia	17 & 18 of 2014	15 January 2014
Posttraumatic stress disorder	19 of 2014	19 December 2013

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

Conditions under Investigation by the Repatriation Medical Authority

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

Condition	ICD code
Arachnoid cyst of the brain	348.0
Plantar wart	078.19

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

AAT and Court decisions – January to December 2013

AATA = Administrative Appeals Tribunal
FCA = Federal Court

Assessment of Disability Pension

Section 23 -Intermediate Rate of Pension

Brown [2013] AATA 5 (9 January 2013)
Kwiatkowski [2013] AATA 849 (29 November 2013)
Szelag [2013] AATA 318 (20 May 2013)

Section 24 -Special Rate of Pension

-Correct date of application

Weldon [2013] AATA 417 (21 June 2013)

-S24(1)(b)

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

Brown [2013] AATA 5 (9 January 2013)
Casey [2013] AATA 907 (18 December 2013)
Fowler [2013] AATA 499 (15 July 2013)
Greenwood [2013] AATA 316 (17 May 2013)
Irving [2013] AATA 904 (18 December 2013)
Szelag [2013] AATA 318 (20 May 2013)

-S24(1)(c)

-cessation of work

Hohn [2013] AATA 487 (11 July 2013)

-redundancy

Lawler [2013] AATA 758 (24 October 2013)
Pfitzner [2013] AATA 492 (12 July 2013)

Summers [2013] AATA 439 (27 June 2013)

-suffering a loss of earnings on own account

Hagar [2013] AATA 557 (8 August 2013)
Holborow [2013] AATA 666 (18 September 2013)

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

Casey [2013] AATA 907 (18 December 2013)
Chopping [2013] AATA 362 (31 May 2013)
Duncan [2013] AATA 877 (9 December 2013)
Hagar [2013] AATA 557 (8 August 2013)
Hohn [2013] AATA 487 (11 July 2013)
Holborow [2013] AATA 666 (18 September 2013)
Hopkins [2013] AATA 554 (8 August 2013)
Hopwood [2013] AATA 668 (19 September 2013)
Hughes [2013] AATA 473 (4 June 2013)
James [2013] AATA 700 (30 September 2013)
Lansom [2013] AATA 813 (15 November 2013)
Longhorn [2013] AATA 854 (29 November 2013)
Muras [2013] AATA 727 (9 October 2013)
O'Brien [2013] AATA 330 (22 May 2013)
Reason [2013] AATA 882 (11 December 2013)
Richmond [2013] AATA 421 (20 June 2013)

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

Chopping [2013] AATA 362 (31 May 2013)
Hopkins [2013] AATA 554 (8 August 2013)
Vulich [2013] FCA 1370 (17 December 2013)

AAT and Court decisions – January to December 2013

-S24(2A)(g) over 65 - continuous period of at least 10 years

Dunn [2013] AATA 673 (20 September 2013)

Kendrick [2013] AATA 491 (24 June 2013)

Oldmeadow [2013] FCA 423 (10 May 2013)

Ralph [2013] AATA 948 (24 December 2013)

Compensation (MRCA)

Permanent impairment

Csont [2013] AATA 215 (11 April 2013)

Death

Aortic aneurysm

Forrester [2013] FCA 898 (6 September 2013)

Cardiomyopathy

McKenzie [2013] AATA 216 (11 April 2013)

Cerebrovascular accident

Dyke [2013] AATA 472 (8 July 2013)

Higgins [2013] AATA 630 (3 September 2013)

Hoath [2013] AATA 799 (12 November 2013)

Howes [2013] AATA 278 (8 May 2013)

Hutton [2013] AATA 940 (23 December 2013)

Cirrhosis of the liver

Parkes [2013] AATA 226 (16 April 2013)

Diabetes mellitus

Ellis [2013] AATA 433 (26 June 2013)

Gastrointestinal haemorrhage

Cross [2013] FCA 229 (15 March 2013)

Ischaemic heart disease

Bottriell [2013] AATA 878 (9 December 2013)

Cavanagh [2013] AATA 876 (9 December 2013)

Holden [2013] AATA 778 (1 November 2013)

Hughes [2013] AATA 238 (19 April 2013)

Layton [2013] AATA 37 (25 January 2013)

Mason [2013] AATA 717 (8 October 2013)

Mitchell [2013] AATA 654 (13 September 2013)

Oliver [2013] AATA 525 (25 July 2013)

Malignant neoplasm

-jujunum

Creffield [2013] AATA 248 (24 April 2013)

-liver

Ellis [2013] AATA 433 (26 June 2013)

-oesophagus

McKenzie [2013] AATA 216 (11 April 2013)

-prostate

Campbell [2013] AATA 798 (12 November 2013)

French [2013] AATA 7 (10 January 2013)

Mountford [2013] AATA 13 (14 January 2013)

-stomach

Palmer [2013] AATA 670 (20 September 2013)

Suicide

Green [2013] AATA 174 (27 March 2013)

Prior [2013] AATA 684 (24 September 2013)

Vascular dementia

Cairns [2013] AATA 742 (15 October 2013)

AAT and Court decisions – January to December 2013

Entitlement to Disability Pension

Atherosclerotic peripheral vascular disease

Umstad [2013] AATA 642 (11 September 2013)

British nuclear test defence service

Grant [2013] AATA 200 (8 April 2013)

Prior [2013] AATA 684 (24 September 2013)

Cerebral ischaemia

Coughlan [2013] AATA 485 (9 July 2013)

Cervical spondylosis

Fox [2013] AATA 555 (8 August 2013)

McDougall [2013] AATA 583 (20 August 2013)

Chronic bronchitis and emphysema

Finn [2013] AATA 266 (1 May 2013)

Williams [2013] AATA 760 (24 October 2013)

Diabetes mellitus

Coughlan [2013] AATA 485 (9 July 2013)

Eye conditions

McCreedy [2013] AATA 456 (4 July 2013)

Quinlivan [2013] AATA 191 (3 April 2013)

Frontal lobe dysfunction

Binns [2013] AATA 655 (13 September 2013)

Hypertension

Coughlan [2013] AATA 485 (9 July 2013)

Intervertebral disc prolapse

Berry [2013] AATA 78 (19 February 2013)

Ischaemic heart disease

Finn [2013] AATA 266 (1 May 2013)

Mewett [2013] AATA 277 (8 May 2013)

Wildman [2013] AATA 476 (9 July 2013)

Lumbar spondylosis

Berry [2013] AATA 78 (19 February 2013)

Deslandes [2013] AATA 800 (13 November 2013)

Fox [2013] AATA 555 (8 August 2013)

Member of the Forces

Burgess [2013] AATA 645 (12 September 2013)

Morbid obesity

Betts [2013] AATA 346 (28 May 2013)

Reinhard [2013] AATA 522 (25 July 2013)

Osteoarthritis

Fox [2013] AATA 555 (8 August 2013)

Johns [2013] AATA 415 (20 June 2013)

Ockwell [2013] AATA 44 (31 January 2013)

Sharley [2013] FCA 103 (14 October 2013)

Pleural plaque

Geletic [2013] AATA 406 (18 June 2013)

Postsurgical deformity of the right chest wall

Derry [2013] AATA 431 (26 June 2013)

AAT and Court decisions – January to December 2013

Psychiatric conditions	-Depressive disorder
-Alcohol abuse/dependence	-category 1A stressor
-category 1A stressor	Mewett [2013] AATA 277 (8 May 2013)
James [2013] AATA 376 (5 June 2013)	-category 1B stressor
Kaluza [2013] AATA 424 (24 June 2013)	Townsend [2013] AATA 335 (24 May 2013)
Knight [2013] AATA 672 (20 September 2013)	-category 2 stressor
Summers [2013] AATA 439 (27 June 2013)	Knight [2013] AATA 672 (20 September 2013)
-category 1B stressor	-clinical onset
Kaluza [2013] AATA 424 (24 June 2013)	Mewett [2013] AATA 277 (8 May 2013)
-clinically significant psychiatric condition	-death of significant other
Kaluza [2013] AATA 424 (24 June 2013)	Ambler [2013] AATA 303 (15 May 2013)
Summers [2013] AATA 439 (27 June 2013)	-inability to obtain appropriate clinical management
-diagnosis	Ambler [2013] AATA 303 (15 May 2013)
Stuth [2013] AATA 646 (12 September 2013)	
-severe stressor	
Kaluza [2013] AATA 424 (24 June 2013)	-Dysthymic disorder
	-category 1A stressor
-Anxiety disorder	James [2013] AATA 376 (5 June 2013)
-category 1A stressor	
Kaluza [2013] AATA 424 (24 June 2013)	-Post traumatic stress disorder
Simos [2013] FCA 607 (20 June 2013)	-aggravation
Sist [2013] AATA 201 (8 April 2013)	Robertson [2013] AATA 149 (19 March 2013)
-category 1B stressor	-category 1A stressor
Kaluza [2013] AATA 424 (24 June 2013)	McLeod [2013] AATA 606 (28 August 2013)
-clinically significant psychiatric condition	Radnidge [2013] AATA 274 (6 May 2013)
Kaluza [2013] AATA 424 (24 June 2013)	Summers [2013] AATA 439 (27 June 2013)
-diagnosis	-category 1B stressor
Stuth [2013] AATA 646 (12 September 2013)	McLeod [2013] AATA 606 (28 August 2013)
-severe psychosocial stressor	-diagnosis
Kaluza [2013] AATA 424 (24 June 2013)	Ambler [2013] AATA 303 (15 May 2013)
	Chattington [2013] AATA 524 (25 July 2013)
	Hair [2013] AATA 190 (3 April 2013)
	Kaluza [2013] AATA 424 (24 June 2013)

AAT and Court decisions – January to December 2013

McDonald [2013] AATA 80 (19 February 2013)

McLeod [2013] AATA 606 (28 August 2013)

O'Dowd [2013] FCA 991 (1 October 2013)

Sharley [2013] FCA 103 (14 October 2013)

Skinner [2013] AATA 751 (22 October 2013)

Summers [2013] AATA 439 (27 June 2013)

-severe stressor

Kirk [2013] AATA 773 (25 October 2013)

Sleep apnoea

De La Rue [2013] AATA 464 (5 July 2013)

Ulcerative colitis

De Chauffepie [2013] AATA 865 (3 December 2013)

Murdoch [2013] AATA 764 (25 October 2013)

Liability (MRCA)

Obstructive sleep apnoea

Anderson [2013] AATA 360 (31 May 2013)

Practice and Procedure

Application for review out of time

Bell [2013] AATA 548 (5 August 2013)

Application to dismiss proceedings summarily

Hopkins [2013] AATA 270 (5 March 2013)

Scope of review

McDonnell [2013] AATA 74 (15 February 2013)

Oldmeadow [2013] FCA 423 (10 May 2013)

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