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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 2014. It also reports on one decision of the Federal Circuit Court and selected AAT cases, including remittals from the Federal Court and all MRCA cases before the Tribunal. The recent legislative amendments enhancing the operation of the VRB are noted, and our ADR trial is currently operating in NSW and the ACT.

Katrina Harry, National Registrar

VRB welcomes new Members

Appointment of new part-time Members

The following Members have recently been appointed to the Board:

Queensland

- Colonel Craig McConaghy SC (Senior Member)
- Colonel Evan Carlin (Senior Member)

South Australia

- Dr Peter Salu (Senior Member)
- Ms Anne Trengove (Senior Member)

Victoria

- Mr Robert Douglass (Member)

The following Determinations reflect the announcement in the 2013-14 Budget that exchange duty in Afghanistan will be Warlike Service. Five new operations have been added involving Australian Defence personnel serving with other nations, either on exchange or secondment, to deploy with their host unit on operations:

- Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 1)
- please note this Determination has been revoked by the Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 2) below.
- Veterans' Entitlements (Warlike Service - International Security Assistance Force) Determination 2014
- Veterans' Entitlements (Warlike Service - Operation ARIKI) Determination 2014
- Veterans' Entitlements (Warlike Service - Operation ATHENA) Determination 2014
- Veterans' Entitlements (Warlike Service - Operation ENDURING FREEDOM: Afghanistan) Determination 2014
- Veterans' Entitlements (Warlike Service - Operation HERRICK) Determination 2014

Determinations & instruments of allotment in 2014

Determinations were made by the Assistant Minister for Defence under s5C(1) of the VEA, and under subsections 6(1)(a) or (b) of the MRCA.

Veterans' Entitlements (Non-warlike Service—Operation Accordion) Determination 2014

The Assistant Minister for Defence has signed a new determination relating to the ADF contribution, Operation ACCORDION in the Persian Gulf. The determination specifies a period of non-warlike service beginning 1 July 2014.

Veterans' Entitlements (Non-warlike Service—Operation Manitou) Determination 2014

The Assistant Minister for Defence has signed a new determination relating to the ADF contribution, Operation MANITOU in the Persian Gulf. The determination specifies a period of non-warlike service beginning 1 July 2014.

Veterans' Entitlements (Warlike Service—Operation Slipper) Determination 2014

The Assistant Minister for Defence has signed a new determination relating to the ADF contribution, Operation SLIPPER in Afghanistan. The determination specifies a period of warlike service beginning 1 July 2014.

Military Rehabilitation and Compensation (Non-warlike Service) Determination 2014 (No. 1)

The Assistant Minister for Defence has signed a new determination specifying

periods of non-warlike service. This determination revokes the earlier non-warlike service determination and includes coverage of the ADF in Persian Gulf operations:

- ACCORDION
- MANITOU

*Please note this Determination has been revoked by the Military Rehabilitation and Compensation (Non-warlike Service) Determination 2014 (No. 3) below.

Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 2)

The Assistant Minister for Defence has signed a new determination specifying periods of warlike service. This determination revokes the earlier warlike service determination, adding an end date to Operation Slipper with its current area of operations (item 10) and adding a new Operation Slipper with an amended area of operations in Afghanistan (item 16).

*Please note this Determination has been revoked by the Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 4) below.

Veterans' Entitlements (Non-warlike Service—Operation Hawick) Determination 2014

The Assistant Minister for Defence has signed a new determination relating to the ADF contribution, Operation HAWICK, the ADF support to Operation Bring Them Home, the Whole-of-Government response to the MH17 air disaster in Ukraine, in the land territory and superjacent airspace of Ukraine, as non-warlike service beginning 21 July 2014.

Veterans' Entitlements (Non-warlike Service—Operation OKRA) Determination 2014

The Assistant Minister for Defence has signed a new determination relating to the ADF contribution, Operation OKRA, to support Australian national interests in Iraq in response to the rapidly deteriorating security situation, as non-warlike service.

Veterans' Entitlements (Warlike Service—Operation Okra) Determination 2014

The Assistant Minister for Defence has signed a new determination relating to the ADF contribution, Operation OKRA, to support Australian national interests in Iraq in response to the rapidly

deteriorating security situation, as warlike service.

Military Rehabilitation and Compensation (Non-warlike Service) Determination 2014 (No. 3)

This determination replaces the existing list of 21 operations, referred to in the Military Rehabilitation and Compensation Determination (Non-warlike Service) 2014 (No. 1) and adds one new operation, Operation OKRA over two different periods in two specified areas.

Veterans' Entitlements (Warlike Service—Operation Highroad) Determination 2014

The Assistant Minister for Defence has signed a new determination relating to the ADF contribution, Operation HIGHROAD, to support to the new North Atlantic Treaty Organisation-led Resolute Support Mission in Afghanistan, as warlike service.

Military Rehabilitation and Compensation (Warlike Service) Determination 2014 (No. 4)

This determination replaces the existing list of 17 operations, referred to in the Military Rehabilitation and Compensation Determination (Warlike Service) 2014 (No. 2) and adds one new

operation: Operation HIGHROAD (items 18).

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 2014.

processes as recommended by the 2011 Review of Military Compensation Arrangements;

- making the VRB legislative framework more consistent with the AAT legislative framework; and
- allowing the VRB to implement more effective administrative and business procedures.

Legislative amendments

Veterans' Affairs Legislation Amendment (Mental Health and Other Measures) Act 2014

This Act received Royal Assent on 30 June 2014. The amendments in Schedule 4 of the Act enhance the operation of the VRB, and came into effect on 28 July 2014.

The amendments include:

- providing for modern and effective alternative dispute resolution (ADR) processes, including case conferencing, similar to other Commonwealth merits review tribunals, particularly the AAT;
- improving case management powers that will also facilitate ADR

Federal Budget 2014-15

One of the measures in the 2014-15 Federal Budget which may impact on future VRB appeals is the proposed amendment to the backdating of VEA disability pension claims. For claims received from 1 January 2015, it was proposed that any payment would be made from date of lodgement of the claim, rather than from three months prior to lodgement. This aligns with the commencement provisions for MRCA permanent impairment payment. However no legislation has been passed as yet to put this proposal into effect. Backdating provisions for war widow and war widowers pension claims will remain unaffected.

The Budget also provides funding to newly eligible veterans, including those with border protection service, service in

a disaster zone either in Australia or overseas, peacekeepers and some AFP.

We will keep you posted on the passage of legislative amendments and new service determinations.

VRB Practice Directions

Amendments to the *Veterans' Entitlements Act* 1986 and the *Military Rehabilitation and Compensation Act* 2004, which impact on the VRB, came into effect on 28 July 2014. The amendments were contained in the *Veterans' Affairs Legislation Amendment (Mental Health and Other Measures)* Bill 2014. The changes will allow the VRB to make significant improvements to service and will enhance the operation of the VRB. The changes include the use of modern and effective alternative dispute resolution processes and improved case management powers, administrative and business procedures.

The General Practice Direction and ADR Guidelines have been amended to reflect some of these changes. Three new

practice directions regarding oral reasons, the composition of VRB panels, and the Commissions' address for service have also been issued.

Please note that in respect of ADR, a trial using the new legislative framework for ADR commenced in NSW and the ACT only, from 1 January 2015. The VRB continues to offer ADR as outlined in the ADR guidelines for all states other than NSW.

Practice Direction No 1 of 2014 **Oral reasons** **Effective: 29 September 2014**

1. The purpose of this practice direction is to enable VRB Senior Members to provide oral reasons for decision, following a hearing, where the decision is favourable to the applicant.
2. The VRB, under its legislation, must give reasons for its decision. It may decide to give oral or written reasons for its final decision.
3. Pursuant to section 142(2) of the VEA, the Principal Member may,

- give directions as to the procedure and operations of the VRB generally and the conduct of reviews by the VRB.
4. As such, the Principal Member directs that the VRB may only give oral reasons for its decision, where the decision is favourable to the applicant. The oral reasons will be delivered by the Senior Member of the panel, following a short adjournment of the hearing.
 5. If the VRB gives oral reasons, the panel will be required to prepare and sign its decision during the adjournment to enable registry to provide a copy of the decision to the parties, immediately following the delivery of oral reasons. Oral reasons may not be able to be provided in some regional hearing locations.
 6. Further, if the VRB gives oral reasons a party may request a copy of a digital recording of the oral reasons OR may request the VRB to give written reasons.
 7. A request for a copy of a digital recording can be made by contacting the VRB by phone, email or mail.
 8. A request for written reasons must be made in writing and set out the grounds as to why written reasons are required. The request must be made within 28 days from the date upon which the decision was given and the request must be lodged at a VRB registry.
 9. The VRB must ensure that decisions are handed down, and reasons given, as expeditiously as possible.

Practice Direction No 2 of 2014 Composition of panels Effective: 28 July 2014

1. This Practice Direction deals with the composition of the VRB generally, for directions hearings and when a decision can be made by a single member of the VRB on the papers.
2. The VRB shall, under its legislation, for the purposes of a hearing of a review be constituted by three

members, being the Principal Member or a Senior Member, a Services Member and one other member.

hearing should be conducted by a three member panel constituted in accordance with section 141(1) of the VEA.

3. Pursuant to section 142(2) of the VEA, the Principal Member may, give directions as to the procedure and operations of the VRB generally and the conduct of reviews by the VRB.
4. As such, the Principal Member directs that any directions hearings in relation to a review, pursuant to section 148(4A), will be conducted by a single member of the VRB, unless that member determines that it is more appropriate that it be dealt with in a hearing constituted by a three member panel constituted in accordance with section 141(1) of the VEA.
5. Further, the Principal Member directs where particular reviews are referred for an alternative dispute resolution processes, a decision may be made by a single member of the VRB on the papers, where it is favourable to the applicant, unless the VRB determines that an oral
6. Further, the Principal Member directs that where particular reviews are referred for preliminary hearings they will be conducted by a single member of the VRB, unless that member determines that it is more appropriate that it be dealt with in a hearing constituted by a three member panel constituted in accordance with section 141(1) of the VEA.
7. Directions hearings and preliminary hearings will be conducted by the Principal Member or a Senior Member.

Practice Direction No 3 of 2014
Address for Service
Effective: 28 July 2014

1. This Practice Direction deals with the giving of a copy of the decision and reasons to each party of the review.
2. The VRB shall, under its legislation, give a copy of the decision and reasons to each party of the review.
3. Pursuant to section 142(2) of the VEA, the Principal Member may, give directions as to the procedure and operations of the VRB generally and the conduct of reviews by the VRB.
4. As such, the Principal Member directs that each party to the application must provide the VRB with an address for service of its decisions and reasons.
5. The Commissions are hereby relieved of the obligation to provide an address for service consequent to the repeal of section 140(2A) of the VEA. For the purposes of this practice direction:
 - (a) service of a document addressed to "Repatriation Commission" will be taken to be service at electronic mailbox "VRBVEA"; and
 - (b) service of a document addressed to "Military Rehabilitation and Compensation Commission" will be taken to be service at electronic mailbox "VRBMRCA".
6. For the purposes of section 140(1) and (2) of the VEA, the Commissions address for service will be taken to be the address specified in para 5(a) and (b).
7. It will not be necessary for the Registrar to place on the file for any application for review a copy of this practice. The publication of the practice direction is itself deemed to be sufficient notification of the Commission address for service.



Questions & Answers

Question:

A member's post traumatic stress disorder (PTSD) was accepted under the VEA. Can the member make a claim under the MRCA if their PTSD is aggravated by defence service after 1 July 2004?

Answer:

No.

Following legislative amendments, from 1 July 2013 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.

The member may be able to apply under s15 of the VEA for an increase in the rate of pension, on the ground that their incapacity has increased because of the aggravation of PTSD.

Question:

Can a member claim for an injury or disease that is the unintended consequences of medical treatment?

Answer:

Yes - under the MRCA.

Section 29 of the MRCA provides that liability can be accepted for an injury or disease that is the unintended consequence of medical treatment. Treatment covered is:

- treatment for a service injury or disease under the MRCA; or
- any treatment under the Defence Regulations.

Former members who have a Gold Card for treatment under the MRCA are entitled to be treated for any injury or disease, whether it is a service injury or disease or not. Section 29 does not apply to treatment for a non service injury or disease under the MRCA.

Members of the ADF (including Reserves) are entitled to treatment for any injury or disease, whether a service injury or disease or not, under regulation 58F of the Defence Force Regulations 1952. Section 29 applies to treatment for any condition under these Regulations.

Administrative Appeals Tribunal

Simos and Repatriation Commission

Miss E A Shanahan, Member

[2014] AATA 110

28 February 2014

***Severity of stressors experienced -
exposure to multiple stressors
post service – reasonable
hypotheses – reliability of
evidence***

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, and affirmed on review by the VRB and the AAT. Mr Simos appealed to the Federal Court.

The Federal Court allowed the appeal on one 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. The Court noted the Tribunal's failure to explain why it came to a conclusion the patrol incident was not a life threatening event. The Court considered the Tribunal misdirected itself as to what constitutes an objectively reasonable perception that an incident was life threatening. Justice Tracey considered the Tribunal did not properly assess the objective part of the test.

The Court remitted the matter to the Tribunal so that the Tribunal could reconsider its decision in light of the evidence which was before the Tribunal at the original hearing.

Issues before the Tribunal

The Tribunal noted it was required to reconsider its decision that there was no objective foundation for Mr Simos' claim to have experienced a life threatening event.

His Honour determined the Tribunal had reached this conclusion on the mistaken belief that Mr Simos had made a concession to that effect. The directed reconsideration did not require the Tribunal taking further evidence.

The Tribunal's consideration

The Tribunal noted that in reaching its decision of 3 August 2011 it had relied on Mr Simos' spontaneous evidence before the VRB and AAT, in particular the AAT where he twice stated that he did not think he would be killed.

Mr Simos also stated that his subjective response, that is fear and numbness, was momentary. However, the Tribunal also noted that when the question "Were you in fear of your life?" was put to Mr Simos he answered yes.

The Tribunal noted that Mr Simos' description of the patrol incident had some common features to the descriptions over the years the claim had been on foot. The Tribunal understood there were two other more experienced soldiers with him on sentry duty. They were also housed in a well constructed sentry post. The patrol was said to have

occurred in the dark of night when it was windy and raining. One of Mr Simos' fellow soldiers reportedly saw movement in the long grass and fired one or two rounds of ammunition into the area.

The Tribunal also noted that:

In the original hearing Mr Barsley of Writeway research services provided a report which stated that the Nui Dat camp was never attacked by enemy infantry throughout the course of the war in Vietnam.

The Tribunal considered the case of *Re White and Repatriation Commission* [2003] AATA 943. In that case the Tribunal rejected the claim for anxiety disorder and alcohol abuse having determined the hypotheses did not meet the template of the relevant SoP. The factor relied upon was that Mr White was experiencing a severe psychosocial stressor which was defined as "*an identifiable occurrence that evokes feelings of substantial distress in an individual*". Examples provided in the SoP were being shot at and death or serious injury of a relative.

The Tribunal considered the facts in *White* to be similar to those in Mr Simos' case. The Tribunal noted that both applicants had a brief period of

operational service and were inexperienced. In both cases the clinical diagnosis of the anxiety disorder and alcohol misuse was not made for 30 years.

The Tribunal also noted that Mr White's appeal to the Federal Court was dismissed, Spender J said at 28:

In my opinion, the ordinary language of the definition makes it clear that the examples given are those of "identifiable occurrences" contemplated, not of "substantial distress". The examples are of "occurrences", not emotions.

...an event that evokes feelings of substantial distress in a person satisfies the definition of "severe psychosocial stressor" has to be rejected. Such a submission, that any occurrence no matter how trivial or innocuous it objectively is, can be a "serious psychosocial stressor" means examples in the definition would be not only irrelevant and devoid of utility, but positively misleading.

The Tribunal noted that in Mr Simos' case the relevant SoP 101 of 2007 did not include the concept of a severe psychosocial stressor but category 1A, 1B

and 2 stressors instead. Mr Simos was relying on experiencing a life threatening event, one of the examples of a category 1A stressor.

The Tribunal noted that the descriptions of category 1 A and 1B stressors are couched in **objective terminology** and while not detracting from the established objective and subjective elements as interpreted by the Federal Courts in the *Stoddard* and *Woodward* cases, do reinforce the requirement of the objective element of the traumatic event as emphasised by Spender J in *White*.

In the present case the Tribunal noted there had been no evidence to support Mr Simos' assertion. There was no record of the event in official army records, although in accordance with rules of engagement the event should have been reported and investigated. Mr Simos does not know the names of his companions in the patrol and no attempt was made to contact them for statements.

The Tribunal considered the incident did not meet the reasonable man test. As it was not life threatening, as objectively there was no enemy attack.

Formal decision

The decision was affirmed.



Editorial note

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

This case was remitted back to the Tribunal on one ground of appeal - 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:

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.**

(Emphasis added)

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”.

Fotek and Repatriation Commission

Mr R G Kenny, Senior Member

[2014] AATA 117
5 March 2014

***Appropriate diagnosis of
psychiatric conditions - no factual
basis for diagnosis of PTSD***

Facts

Mr Fotek served in the Royal Australian Navy from 3 January 1967 until 8 July 1988. His service included a period of operational service in Vietnam between 14 September 1970 and 8 April 1971 on board the HMAS Perth. In August 2010 Mr Fotek lodged a disability pension claim for a condition diagnosed as posttraumatic stress disorder (PTSD), which he contended was related to the circumstances of his Vietnam service. A delegate of the Repatriation Commission determined Mr Fotek's PTSD was not related to his service. The Veterans' Review Board affirmed the Commission's decision. Mr Fotek sought further review by the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

The applicant's representative submitted that Mr Fotek experienced three stressful events in Vietnam, each of which satisfied the diagnostic criteria for PTSD and any one of which was responsible for causing that condition. The respondent's representative submitted that Mr Fotek's case did not provide evidence for a diagnosis of PTSD, and even if it did, the condition was not attributable to his operational service as none of the events occurred in the manner or with the effects claimed by Mr Fotek.

The Tribunal's consideration

The Tribunal considered evidence from Mr Fotek about the three events; a medical report from a psychiatrist Dr John Chalk; reports and evidence from a psychiatrist Dr Jonathon Hargreaves; and copies of Reports of Proceedings of the HMAS Perth for 1970 and 1971.

The Tribunal referred to the six diagnostic criteria (taken from DSM-IV-TR) in the Statement of Principles No. 5 of 2008 for PTSD, as amended by No. 19 of 2014. The first criterion is:

3(b) (A) the person has been exposed to a traumatic event in which:

(i) the 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; and

(ii) the person's response involved intense fear, helplessness, or horror;

The Tribunal also identified the relevant SoP factors 6(ba) and (da), relating to perception of threat and/or harm from being in a threatening, hostile, hazardous or menacing situation or environment.

The Tribunal cited the case of *Repatriation Commission v Warren* [2007] FCA 866. While noting the comment by Keifel J that PTSD may be diagnosed without all of the SoP criteria being met, the Tribunal was satisfied that one material criterion which must be met for PTSD to be diagnosed is clause 3(b)(A)(i)-(ii) of the SoP - exposure to a traumatic event and the appropriate response. In that regard, the Tribunal noted the Full

Federal Court in *Repatriation Commission v Bawden* (2012) 206 FCR 296 said:

[47] ...the decision-maker must be satisfied that a collection of symptoms manifests a diagnosable disease, and if it is so satisfied, it must then consider whether the illness or disease is war-caused. The point for present purposes is that PTSD can only be diagnosed as an illness or disease in terms of a traumatic event. ...

The decision-maker needs to consider whether the veteran's symptoms manifest any illness or disease resulting in incapacity. But, to the extent that the claim is for incapacity from PTSD and a decision-maker is not satisfied that a traumatic event produced those symptoms, the decision-maker cannot proceed to a diagnosis of PTSD.

[48] The point on which the present case turns is not one of insufficient correspondence between the symptoms described in the DSM-IV and those described by Mr Bawden; rather it is concerned with the inability of the decision-maker to be satisfied that Mr Bawden suffered a traumatic stress. A diagnosis of the disorder

depends on satisfaction as to the historical fact of a traumatic stress.

The Tribunal was reasonably satisfied that criterion A of the diagnostic factors was not met by the evidence in this case. The first event involved the report by three sailors of seeing of a swimmer in the water near the HMAS Perth when it was on the gunline off the coast of Vietnam on 11 October 1970. There were discrepancies between the applicant's version that the search of the hull for mines by the ship's divers for about an hour was only half completed, and the Report of Proceedings that a bottom search was conducted from 1945 hours to 2300 hours. Even if this event was sufficient to satisfy criterion A(i), the Tribunal was reasonably satisfied criterion A(ii) was not met as the applicant's descriptions of his reaction at the time fell short of one which involved intense fear, helplessness or horror.

The second event involved the Perth's encounter with a fishing boat while operating on the gunline on 1 February 1971. The men on the fishing boat were brought on to the Perth, some of which were Viet Cong who had wanted to

surrender themselves. A South Vietnamese patrol boat came and took the prisoners away. Mr Fotek was disturbed because of what he thought would happen to the men. He believed they would be killed by the South Vietnamese and thrown into the sea, and felt like an executioner. Mr Fotek felt the impact of the incident years later when he watched media coverage of the Gulf War as he empathised with the Iraqi soldiers who, like the Viet Cong prisoners, were only serving their country in the same way he had done. The Tribunal was reasonably satisfied that criterion A(i) was not met as there was no evidence which supported Mr Fotek's belief the men were taken to their death on departing the Perth. The Report of Proceedings described them as being escorted to a Centre for further exploitation. In any event, the Tribunal was also reasonably satisfied criterion A(ii) was not met. The Tribunal considered there must be a degree of contemporaneity between criterion A(i) and (ii), and any response that arose 20 years later when Mr Fotek observed coverage of the Gulf War was a response to that phenomenon.

The third event involved a request by an aircraft spotter to fire upon a group of some 400 Viet Cong, while the Perth was patrolling off the coast of Vietnam on the gunline. The Perth fired at the target, as did a U.S. Coast Guard cutter. The spotter advised the firing resulted in some 100 casualties. Mr Fotek was not concerned with that firing event, but was horrified by the attitude of the Perth's captain to human life when he received a signal about two weeks later attributing half the casualties to the U.S. cutter as it had also fired upon the target. The captain was resentful at having to share the "kill" with the other vessel. The Tribunal was reasonably satisfied that Mr Fotek's observation of the captain's attitude two weeks after the firing of the ship's guns did not amount to exposure to a traumatic event that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others.

Therefore, the Tribunal was reasonably satisfied that a diagnosis of PTSD could not be made on the material before it.

Formal decision

The Tribunal affirmed the decision under review.



Editorial note

In this case the SoP concerning PTSD replicates the diagnostic criteria contained in DSM-4, while the relevant SoP factors are aligned with DSM-5. The Tribunal did not consider the diagnostic criteria for PTSD contained in DSM-5, nor did it need to proceed to consider the causation changes.

**Applicant 5611 and
Military Rehabilitation and
Compensation Commission**

Deputy President S D Hotop

[2014] AATA 121

6 March 2014

Jurisdiction - during VRB hearing applicant made request to withdraw application for review - VRB consented to withdrawal - VRB did not make reviewable determination

Facts

The applicant served in the Australian Army from 15 September 1998 to 28 June 2008. On 31 August 2011 the applicant lodged a claim for acceptance of liability under the *Military Rehabilitation and Compensation Act* 2004 (MRCA) for post traumatic stress disorder (PTSD) and chronic fatigue syndrome. On 14 December 2011 a delegate of the respondent made a determination, declining the claim. On 15 January 2012 the applicant lodged an application for review by the Veterans' Review Board (VRB). On 6 September 2013 the VRB decided to consent to withdraw the application for review pursuant to

s155(1) of the *Veterans' Entitlements Act* 1986 as applied by s353 of the MRCA. On 4 November 2013 the applicant sought review by the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

An officer of the respondent raised the issue of the Tribunal's jurisdiction to review the VRB's decision. The parties agreed to the jurisdictional issue being determined on the papers.

The VRB's reasons for decision

The VRB's reasons for decision noted that the applicant did not attend the hearing but discussed the matter by conference telephone. He was represented at the hearing by an advocate. The advocate submitted that the stressors for the applicant's PTSD were in 2003 during his warlike service in Iraq, and that the applicant's chronic fatigue syndrome was most likely to be causally related to PTSD. The advocate later acknowledged that the onset of PTSD was during a period of the applicant's VEA service, and the matter before the VRB was an application for

review under the MRCA. He agreed one course of action would be to have the applicant withdraw the matter from review and make a new VEA claim. The VRB briefly adjourned the hearing to enable the advocate to telephone the applicant in private, and on resumption of the hearing the applicant asked that his application for review be withdrawn. The VRB indicated in its reasons for decision that in response to questions from the VRB, the applicant made it clear he understood that a matter cannot be reinstated once it has been withdrawn from review. In the circumstances the VRB considered the interests of both parties to the review and accepted it was proper for the matter to be withdrawn.

The Tribunal's consideration

The critical question was whether the VRB's decision was a "reviewable determination" as defined in s354(1) of the MRCA. The applicant had made an application to the VRB for review of an "original determination" of the respondent. Under s352 of the MRCA, the VRB had jurisdiction to make a "reviewable determination" under Part 4 of the MRCA "on review of [that] original determination". However, in the

Tribunal's opinion the VRB's decision did not purport to be, and did not constitute, an exercise of that jurisdiction. Instead of making a determination under Part 4 of the MRCA the VRB consented to the applicant's withdrawal of his application of review of the respondent's "original determination" after the VRB had commenced, but not completed, that review.

The Tribunal noted the applicant's submissions about his, and his advocate's, communications with the VRB immediately prior to his withdrawal of his application for review. However, the Tribunal did not doubt the accuracy of the VRB's reasons for decision. Further, the Tribunal was satisfied the applicant, who was represented before the VRB by an experienced advocate, made an informed request to the VRB to withdraw his application for review.

Formal decision

The Tribunal did not have jurisdiction in respect of the application for review.



Editorial note

After the hearing the applicant was out of time to lodge a further application for review by the VRB, as by then it had been almost two years since the original determination was made. He is now left with the option of making a new DVA claim.

Historically, in relation to VEA cases, the Full Court made clear in *Stafford* (1995) 38 ALD 193 that a s155(1) withdrawal can be a barrier to review by the AAT:

...if those decisions had been withdrawn by Mr Stafford from the Board's review, then those decisions would not in our opinion have been susceptible of review by the Tribunal. Neither in *Fitzmaurice v Repatriation Commission* .. Nor in any other decision of this court to which we were referred was anything said which would stand in the way of understanding the word 'decision' in s175 as comprehending every decision of the Commission which was not the subject of review, either because it was not a decision in respect of which application for review was made or because application to review had been

withdrawn. The right conferred by s175(1) to apply to the Tribunal for review arises only where a decision made by the Commission has been reviewed by the Board upon request made under s135 and affirmed.

The Court in *Stafford* also found that only clear unambiguous withdrawal by the veteran of conditions in dispute from the scope of the review could relieve the VRB of its duty.

Riley and Military Rehabilitation and Compensation Commission

Senior Member Bernard J McCabe

[2014] AATA 262
2 May 2014

Application for compensation for "service death" - soldier suffered fatal heart attack - ischaemic heart disease not linked to service

Facts

Mr Gregory Riley was a full-time member of the Army Reserve when he suffered a fatal heart attack at work on 27

February 2007. His widow, Mrs Kerri Riley, applied for compensation under the *Military Rehabilitation and Compensation Act 2004* (MRCA), arguing the Commonwealth was liable for her husband's death because it was a "service death" within the meaning of s28 of the MRCA.

Issues before the Tribunal

There was no dispute that Mr Riley's heart attack was the product of coronary artery disease, and the kind of death he suffered was ischaemic heart disease (IHD). The date of onset of IHD was 27 February 2007. The Tribunal was required to consider the Statement of Principles (SoP) concerning IHD to resolve the question over any link between that condition and Mr Riley's service. The relevant SoP factors were:

- the late veteran experienced hypertension (high blood pressure) before the clinical onset of IHD (factor 6(a));
- the late veteran had dyslipidaemia (a disorder of the blood fats) before the clinical onset of IHD (factor 6(f)); or

- the late veteran was unable to undertake any physical activity greater than three METs for at least the seven years before the clinical onset of IHD (factor 6(j)).

The Tribunal's consideration

Hypertension

The Commission raised a preliminary issue about the application of the MRCA, which only applies to injuries sustained or diseases contracted on or after the commencement of the MRCA on 1 July 2004. The Commission submitted that as Mr Riley's hypertension appears to pre-date 1 July 2004, any claim in respect of that condition (or a death that resulted from it), would have to be brought under the *Safety Rehabilitation and Compensation Act 1988* (SRCA). The Tribunal indicated the medical records clearly establish Mr Riley was diagnosed with hypertension (within the meaning of the relevant SoP) on 23 March 2004, therefore his claim in respect of that condition would have to be made under the SRCA and his IHD cannot be related to his service under the MRCA by reason of hypertension.

Dyslipidaemia

The Tribunal was provided with evidence of Mr Riley's drinking habits, as excessive alcohol intake is known to increase the risk of dyslipidaemia. Mr Riley's supervisor gave valuable evidence about the consumption of alcohol on the Army base where Mr Riley was posted. However, the Tribunal was not satisfied Mr Riley became a heavy drinker for cultural reasons associated with work. The Tribunal also considered evidence to the effect that Mr Riley drank heavily to cope with work-associated stress. But the evidence also appeared to establish that his drinking persisted over a long period, and it was difficult to be sure of the genesis of that habit. The Tribunal was not satisfied that aspect of the claim was made out.

Inability to undertake physical exercise at the requisite level

The Tribunal noted a failure to undertake regular physical activity is a factor in developing dyslipidaemia, and an inability to exercise is a factor in the development of IHD. The Commission relied in particular on evidence showing Mr Riley passed the Defence

Department's Basic Fitness Assessment (BFA) on a number of occasions in the relevant period before his death. The Tribunal referred to the evidence of Mr Riley's supervisor about physical training activities and informal BFAs for the unit, and another witness who confirmed Mr Riley participated in a run or walk as part of an informal BFA. The Tribunal was satisfied this evidence confirmed Mr Riley was able to complete a BFA incorporating a walk, if not a run, at a level suggesting he was capable of undertaking activity that met the three METs standard on at least one occasion in the period before his death. The Tribunal accepted Mr Riley had some impairment due to work-related injuries necessitating medical restrictions on his ability to exercise. They made exercise more difficult and less attractive and he may have exercised much less as a result - which may have contributed to the onset of dyslipidaemia. However, the Tribunal was satisfied the evidence establishes Mr Riley was able to undertake physical activity at the required level, even if it is doubtful he did it very often. It followed that his IHD could not be attributed to an inability to undertake physical activity.

Formal decision

The Tribunal affirmed the decision under review.



Editorial note

Regarding the consumption of alcohol on base, Mr Riley's supervisor gave evidence that Mr Riley was expected to attend the mess each day for morning tea or lunch or in the afternoon, but it did not serve alcohol until the afternoon when he finished work. He was expected to attend after work at least once a fortnight on payday for "happy hour", and he also attended a formal mess once each quarter when alcohol was served. However, the Tribunal considered the formal messes were not of sufficient frequency to promote habituation; even the fortnightly visits to the mess were unlikely to have had that effect. Importantly, Mr Riley's supervisor explained in his evidence to the Tribunal that the culture of heavy drinking that pervaded the military in earlier years had faded, at least among the soldiers who lived off-base, with the introduction of random breath testing and tougher drink-driving laws.

Sinclair and Military Rehabilitation and Compensation Commission

Deputy President S D Hotop

[2014] AATA 304

16 May 2014

Liability accepted under MRCA for atrial fibrillation - determination of amount of PI - offsetting due to SRCA left knee condition

Facts

Mr Gary Sinclair served in the Royal Australian Navy (RAN) from 23 August 2002 to 1 May 2006. He was retired from the RAN on the ground of invalidity due to physical impairment from chronic left knee pain. Liability for Mr Sinclair's left knee condition was accepted under the *Safety Rehabilitation and Compensation Act* 1988 (SRCA), and his atrial fibrillation was accepted under the *Military Rehabilitation and Compensation Act* 2004 (MRCA). Mr Sinclair received permanent impairment (PI) compensation under the SRCA for his left knee condition, and claimed PI compensation under the MRCA for his atrial fibrillation. The MRCC made a determination on 5 September 2012, and subsequently a "reviewable decision" on 19 February 2013, under the MRCA that

Mr Sinclair was entitled to an amount of PI compensation in respect of his accepted conditions. Mr Sinclair was dissatisfied with the amount and appealed to the Tribunal.

Issues before the Tribunal

The primary issues for determination were the appropriate impairment ratings which apply to the applicant's compensable conditions, pursuant to GARP M, for the purpose of assessing the amount of PI compensation under s68 of the MRCA.

The Tribunal's consideration

The Tribunal set out the applicant's evidence and relevant medical evidence. In relation to atrial fibrillation, the Tribunal applied Chapter 15 (intermittent impairment) of GARP M and the total impairment rating was 12. Regarding the left knee condition, the Tribunal applied Chapter 3 (impairment of spine and limbs) and the total impairment rating was 12.

Looking at disfigurement and social impairment under Chapter 17, the appropriate impairment rating under Table 17.1 was 2. The combined

impairment rating in accordance with Chapter 18 was 25.

The Tribunal determined the lifestyle ratings in accordance with Chapter 22, which resulted in a final lifestyle rating of 2. Applying Table 23.2 which relates to "peacetime service" in Chapter 23, the appropriate compensation factor was 0.149.

The amount of weekly compensation payable under the MRCA was \$47.09, which was then subject to offsetting due to SRCA lump sum PI compensation of \$46,725.05 having been paid to the applicant. The Tribunal applied Chapter 25, which required the weekly amount of \$49.50 (representing the current lump sum value of the SRCA lump sum payment) to be subtracted from the weekly amount of \$47.09 payable under the MRCA, which resulted in a "negative figure".

However, the Tribunal noted the Full Federal Court indicated in *James v Military Rehabilitation and Compensation Commission* [2010] FCAFC 95 the production of a "negative figure" by the application of Chapter 25 of GARP M "does not of itself oblige the [applicant] to make any payment to the

Commonwealth". Rather, "it simply means that no compensation is payable for the impairment the subject of a claim under the MRC Act".

**Willis and
Repatriation Commission**

Deputy President J W Constance

[2014] AATA 326

27 May 2014

Formal decision

The Tribunal set aside the decision under review and substituted a decision that no amount of permanent impairment compensation is payable for the accepted conditions.



Editorial note

The Tribunal noted that a lump sum compensation payment of \$65,666.94 was made to Mr Sinclair by the Commission following the original determination of 5 September 2012. The "reviewable decision" of 19 February 2013 was substantially less favourable to Mr Sinclair, but nevertheless confirmed the original determination in order to avoid raising an overpayment. The Tribunal's decision is even less favourable, and although the Tribunal understands the Commission will not seek to recover the overpayment, it is ultimately a matter for the Commission.

Special rate of pension – whether applicant prevented from continuing to undertake that work by reason of incapacity from war caused diseases alone

Facts

Mr Willis lodged a claim with the Repatriation Commission seeking that his pension be paid at the special rate. The Commission decided that Mr Willis was not eligible for special rate. The Veterans' Review Board affirmed the Commission's decision. Mr Willis sought a review by the Administrative Appeals Tribunal (the Tribunal). The Tribunal determined that he was not entitled to the special rate of pension.

Mr Willis then appealed to the Federal Court. The main ground and the only ground of merit for the appeal was that reasons given by the Tribunal for its decision were not adequate, and by reason of that inadequacy the AAT made an error of law.

Specifically, the Court noted the Tribunal in its reasons found:

His time out of the workforce, his age, his lack of education and inability to use computers or computerised farm equipment as well as his physical limitations in walking long distances are all factors preventing him from undertaking remunerative work of the types he has previously done. His location in a remote area is also a factor.

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

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

The Court considered how the AAT dealt with that evidence was not explained in its reasons. The AAT failed to provide a sufficient explanation of the conclusions it reached.

The Federal Court held that legal error was established and allowed the appeal.

The case was remitted to the Administrative Appeals Tribunal to be heard and decided again.

Issues before the Tribunal

At the outset, the Tribunal noted the recent Full Federal Court decision in *Smith v Repatriation Commission* [2014] FCAFC 53, and how the Full Court set out the legislative scheme of the Act as it applies to an application for special or intermediate rate.

The Tribunal noted the following issues for determination:

1. What was the remunerative work that Mr Willis was undertaking?
2. Is Mr Willis prevented from continuing to undertake that work by reason of incapacity from his war caused disease alone?
3. If so, is he suffering by reason of that prevention, a loss of salary, wages or earnings on his own account?
4. If so, would Mr Willis be suffering that loss if he were free of the incapacity?

The Tribunal noted that in identifying the work which was being undertaken, it is the type of work which is relevant not Mr Willis' last job.

The Tribunal's consideration

What was the remunerative work that Mr Willis was undertaking?

The Tribunal considered Mr Willis was undertaking the following work:

- As a labourer and/or foreman in vineyards and orchards engaged in tasks such as pruning, planting and harvesting.
- As a process worker in a factory.
- As a handyman doing light maintenance work and gardening.
- As a farm labourer engaged in tasks such as caring for livestock, working on crops and driving farm vehicles.

Is Mr Willis prevented from continuing to undertake that work by reason of incapacity from his war caused disease alone?

The Tribunal was satisfied that, at least since 2011, when Mr Willis was

diagnosed as suffering peripheral neuropathy, this condition along with PTSD and alcohol dependence alone have prevented Mr Willis to undertake any of the remunerative work that he has undertaken previously. The Tribunal noted although at times he last ceased work in vineyards and in a factory for reasons other than his war caused injuries, the Tribunal was satisfied that since 2011 he had been prevented from seeking such work by reasons of those injuries alone.

Is Mr Willis suffering, by reason of his being prevented from undertaking remunerative work, a loss of salary, wages or earnings on his own account?

The Tribunal was satisfied that Mr Willis had lost all sources of income and earnings.

The Tribunal then considered the application of s24(2), noting Justice Buchanan in *Smith v Repatriation Commission* at [48-49]:

Section 24(2)(a) supplements the requirements of s24(1)(c) by identifying specific circumstances which will cause it not to be satisfied.

Those circumstances, in effect, state the opposite to the conditions in s 24(1)(c) itself. Thus, there is no established loss of earnings by reason of the incapacity if remunerative work was ceased for other reasons (s 24(2)(a)(i)), or if the veteran is also incapacitated or prevented from doing remunerative work for some other reason (s 24(2)(a)(ii)). In this assessment, of course, it continues to be accepted that the veteran is actually incapacitated in any event ("a veteran who is incapacitated ..."). The purpose of the enquiry is to see whether, nevertheless, there are other explanations for economic loss so that the incapacity is not the only reason for it.

Section 24(2)(b) provides some relief from the potentially harsh consequences of this arrangement. It applies where remunerative work is not being done. In my view, it accommodates a cessation of earlier remunerative work, as well as a circumstance where a veteran has not worked since injury, or since the development of the incapacity. In all those circumstances, in my view, a veteran may demonstrate genuine

efforts to obtain work which are made fruitless by the incapacity.

The Tribunal was satisfied that Mr Willis did not cease to engage in the remunerative work of a farmhand for any reason or reasons other than his war caused diseases alone. However the Tribunal found that he did cease some forms of work i.e. factory work and work in vineyards for reasons other than incapacity from his war caused diseases.

On this basis the Tribunal decided that in accordance with s24(2)(a)(i), Mr Willis is not to be taken to be suffering a loss. It follows that he would not satisfy 24(1)(c).

The Tribunal therefore considered it necessary to turn to s24(2)(b) which Buchanan J described as providing relief from the potentially harsh consequences of s24(2)(a). **The Tribunal noted although Mr Willis has been engaged in remunerative work in the past the paragraph is applicable and is not to be interpreted as applying only to a veteran who has never engaged in work.**

In *Smith* Buchanan J noted:

There may be circumstances.. where a veteran will be entitled, **notwithstanding earlier cessation of**

remunerative work (whatever the reason), to point to genuine efforts to re-engage in remunerative work. Such an approach does not subvert the operation of s24(1)(c). It merely provides an alternative and intended method of satisfying s24(1)(c).

...

Ceasing to work at a particular time for reasons other than war caused injury or disease, including for reasons which might be entirely beyond the control of the veteran (such as redundancy), is not permanently disentiing circumstance.

(Emphasis added)

The Tribunal was satisfied that Mr Willis had genuinely sought to engage in remunerative work on Mr Cunningham's farm. The Tribunal was also satisfied that the incapacity arising from his war caused diseases is the substantial cause of his inability to obtain such work or on other farms in the district. Mr Cunningham said that he would have employed Mr Willis on the farm but for his unreliability.

The Tribunal was satisfied that Mr Willis was not incapacitated, or prevented,

from engaging in any of the types of remunerative work in which he has been engaged, for any reason or reasons other than his war caused diseases. On this basis, subparagraph 24(2)(a)(i) does not disentitle him to receive a special rate of pension and he does not need to rely upon s24(2)(b) in this regard. In reaching this conclusion the Tribunal noted 24(2)(b) refers to a situation when the veteran is incapacitated from engaging in remunerative work.

Would Mr Willis be suffering the financial loss if he was free of the war caused incapacity?

The Tribunal was satisfied that without the incapacity caused by PTSD, alcohol dependence and peripheral neuropathy Mr Willis could be employed as a farmhand. The Tribunal was satisfied he was suffering a financial loss.

Formal decision

The Tribunal found that Mr Willis was entitled to a special rate of pension in accordance with s24 of the Act.



Editorial note

Please refer to the case summary in this edition of the recent Full Federal Court decision in *Smith v Repatriation Commission* [2014] FCAFC 53.

In *Smith*, the Full Court clarified the position in relation to what is required when demonstrating a genuine effort to obtain employment in order to gain the benefit of s24(2)(b). The Full Court clearly stated that efforts to obtain employment before the commencement of the assessment period could also be taken into account.

The Full Court also noted that s24(2)(b) was **not confined** in its operation to veterans who did not or could not work following military service.

Please also refer to the earlier case summary of *Willis v Repatriation Commission* [2012] FCA 399 in Volume 27 of *VeRBosity* at pages 85-87. This practice note is also available on the VRB website: www.vrb.gov.au.

Sharley and Repatriation Commission

Miss E A Shanahan, Member

[2014] AATA 344

2 June 2014

Reconsideration of claim of osteoarthritis of the knees - on remittal from Federal Court

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, before the Commission had time to obtain any further evidence and effect a reconsideration. The Commission later advised that it had affirmed the original decision to reject the part of Mr Sharley's claim that related to osteoarthritis of both knees. The Federal Court found no error of law in the Tribunal's decision regarding Mr Sharley's psychiatric disorder. However, the Court determined that the Tribunal had unfinished business as it had not given final consideration to, and made a decision upon, Mr Sharley's claim for a pension for osteoarthritis. The Court remitted Mr Sharley's claim for osteoarthritis of the knees to the Tribunal.

Issues before the Tribunal

Originally the Tribunal found Mr Sharley's osteoarthritis of both knees was not war-caused, on the basis that the trauma factor in the relevant Statement of Principles (SoP) concerning osteoarthritis was not met. It also identified another SoP factor relating to being overweight - having a Body Mass Index (BMI) of 25 or greater - for at least 10 years before the clinical onset of

osteoarthritis. The Tribunal remitted the claim for osteoarthritis of both knees to the Commission for reconsideration on this factor. After attempting to obtain further medical evidence regarding Mr Sharley's weight for the relevant 10 year period, as there was no independent evidence available that Mr Sharley remained overweight (i.e. had a BMI greater than 25) for the relevant 10 year period the Commission affirmed its decision that osteoarthritis of both knees was not war-caused.

When the case returned to the Tribunal for the second time, the Tribunal considered it was required to address and reconsider its previous decision regarding the claim submitted by Mr Sharley that his osteoarthritis of both knees was war-caused in accordance with the trauma factor.

The Tribunal's consideration

In its earlier decision the Tribunal determined that Mr Sharley's osteoarthritis of both knees was not war-caused, because at stage 3 of *Deledio* it found that the hypothesis was not reasonable as it was not consistent with the template to be found in the SoP. The

present Tribunal considered its initial finding to be correct. However, in case the Tribunal is in error, it proceeded to consideration under stage 4 of *Deledio*. The Tribunal was satisfied beyond reasonable doubt that there is no sufficient ground for making the determination that the disease was war-caused, on the basis that Mr Sharley's evidence and various statements are conflicting and inconsistent:

[34] The inconsistencies in Mr Sharley's description by of the actual injury and his symptomatology, coupled with the fact that he did not report any knee symptoms to his general practitioner until 2007, some 37 years after the alleged injury, and the finding in 2007 that the changes of osteoarthritis in Mr Sharley's knees were mild, results in the Tribunal being satisfied beyond reasonable doubt that Mr Sharley's osteoarthritis of both knees is not war-caused, thereby failing stage 4 of the *Deledio* process.

Formal decision

The Tribunal affirmed the decision under review.



Editorial note

Both the applicant and respondent made submissions about the SoP factor relating to being overweight for at least 10 years before the clinical onset of osteoarthritis. However, the Tribunal confined its review to its previous decision based on the trauma factor.

In the Federal Court proceedings, one aspect of the fourth question of law raised by the applicant was that - after remitting the question of whether the applicant's osteoarthritis of his knees might be found to be war-caused on the basis of his being overweight for at least ten years before the clinical onset of the condition, and the Commission ultimately re-affirmed its decision to reject such claim - the Tribunal failed to give any consideration to the applicant's claim on this basis. It will be interesting to see if there is any further appeal, however on the last occasion the Federal Court made a costs order against Mr Sharley concerning his appeal about his psychiatric condition.

**Bawden and
Repatriation Commission**

Deputy President J W Constance

[2014] AATA 462

9 July 2014

***Whether veteran suffers from
PTSD – whether war caused***

Facts

Mr Bawden made claims for entitlement under the VEA for posttraumatic stress disorder, alcohol dependence or abuse and depressive disorder. All were rejected by the Repatriation Commission. Mr Bawden sought review by the Veteran's Review Board which also refused the claims. He appealed to the Administrative Appeals Tribunal which affirmed the decision.

Mr Bawden then appealed to the Federal Court and on 5 April 2012 Gray J set aside the decision. The Commission appealed to the Full Court. The Full Court allowed the appeal and set aside the orders of Gray J.

In its decision the Full Court affirmed the part of the Tribunal's decision that Mr Bawden does not suffer from PTSD as defined in DSM-IV. The Full Court set

aside the part of the decision of the Tribunal which found that Mr Bawden does not suffer from war caused alcohol dependence and war caused depressive disorder, and remitted the matter to the Tribunal for the determination of the question whether Mr Bawden suffers from a war caused disease other than PTSD as defined in DSM-IV.

Issues before the Tribunal

The Tribunal noted the orders of the Full Federal Court precluded it from determining whether Mr Bawden suffers from PTSD as defined in DSM-IV. The Tribunal also noted that after the Full Court decision DSM-5 was released.

The Tribunal acknowledged there was nothing in the Act that requires the decision maker to use DSM-5 instead of DMS-IV. However the Tribunal decided that where possible the later version is to be preferred.

As a consequence, the Tribunal decided it was required to determine whether Mr Bawden suffers from PTSD as defined in DSM-5.

The issues before the Tribunal were narrowed to:

1. Does Mr Bawden suffer from PTSD as defined in DSM-5? If so, is the condition war-caused?
2. Does Mr Bawden suffer from any other psychological condition or conditions as defined in DSM-5 other than a condition concerning alcohol? If so, is each condition war-caused?
3. Does Mr Bawden suffer from an alcohol condition as defined in DSM-5? If so, is the condition war caused?

The Tribunal's consideration

Does Mr Bawden suffer from PTSD as defined in DSM-5?

The Tribunal considered Mr Bawden to be a reliable witness and accepted his evidence which was supported by his accounts given to two psychiatrists, that he witnessed the destruction of a sampan by a patrol boat during one of his trips to Vietnam, and that he observed what he considered to be the deaths of the occupants of the sampan.

The Tribunal therefore found that Mr Bawden had exposure to *actual or threatened death, serious injury, or sexual violence* (criterion A of the diagnosis of

PTSD in DSM-5) by *witnessing, in person, the events as it occurred to others.*

The Tribunal, in view of its finding on the sampan event, was reasonably satisfied Mr Bawden was suffering from PTSD.

Is PTSD war-caused?

The Tribunal found that Mr Bawden's witnessing of the destruction of the sampan event constitutes a category 1B stressor that was experienced before the clinical onset of PTSD. It concluded his PTSD was war-caused.

Does Mr Bawden suffer from any other psychological condition or conditions as defined in DSM-5 other than a condition concerning alcohol?

The Tribunal preferred the more recent psychiatric assessments and accepted the evidence that Mr Bawden's symptoms are indicative of an alcohol condition in addition to PTSD.

The Tribunal found that Mr Bawden did not suffer from any other psychological

condition or conditions in DSM-5 (other than conditions concerning alcohol).

Does Mr Bawden suffer from an alcohol condition as defined in DSM-5?

The Tribunal noted that in DSM-5 the conditions of alcohol dependence and alcohol abuse have been deleted and replaced by the following alcohol related disorders: alcohol use disorder; alcohol intoxication; alcohol withdrawal; other alcohol-induced disorders; and unspecified alcohol-related disorder.

The Tribunal noted the diagnostic criteria for alcohol use disorder are:

A problematic pattern of alcohol use leading to clinically significant impairment or distress, as manifested by at least two of the following, occurring within a 12-month period:

1. *Alcohol is often taken in larger amounts or over a longer period than was intended.*
2. *There is a persistent desire or unsuccessful efforts to cut down or control alcohol use.*
3. *A great deal of time is spent in activities necessary to obtain alcohol, use alcohol, or recover from its effects.*

4. *Craving, or a strong desire or urge to use alcohol.*
5. *Recurrent alcohol use resulting in a failure to fulfil major role obligations at work, school, or home.*
6. *Continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol.*
7. *Important social, occupational or recreational activities are given up or reduced because of alcohol use.*
8. *Recurrent alcohol use in situations in which it is physically hazardous.*
9. *Alcohol use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol.*
10. *Tolerance, as defined by either of the following:*
 - a. *A need for markedly increased amounts of alcohol to achieve intoxication or desired effect.*
 - b. *A markedly diminished effect with continued use of the same amount of alcohol.*
11. *Withdrawal, as manifested by either of the following:*

- a. The characteristic withdrawal syndrome for alcohol (refer to Criteria A and B of the criteria set for alcohol withdrawal, pp. 499-500).*
- b. Alcohol (or a closely related substance, such as a benzodiazepine) is taken to relieve or avoid withdrawal symptoms*

The Tribunal accepted the evidence that Mr Bawden was drinking more than intended (which would satisfy criterion 1 in DSM-5), unsuccessful efforts to cut down (which would satisfy criterion 2) and significant social repercussions from drinking (which would satisfy criterion 6).

The Tribunal therefore found that Mr Bawden suffered from alcohol use disorder.

Is alcohol use disorder war-caused?

The Tribunal was satisfied the condition was war-caused, given the findings in relation to PTSD and that Mr Bawden experienced a category 1B stressor when he experienced the sampan event. The Tribunal was also satisfied this occurred within the five years of the clinical onset of alcohol use disorder.

Formal decision

The Tribunal set aside the decision of the Veterans' Review Board made on 20 May 2009 and in substitution for the decision set aside it was decided that PTSD and alcohol use disorder are war caused.



Editorial note

It is interesting to note that the Tribunal stated it was precluded by the Full Court in determining the issue of PTSD, but then decided it could due to DSM-5 being released after the Full Court decision as the Full Court decision related to PTSD in terms of DSM-IV.

In any event, this case looks at the definitions of both PTSD and alcohol use disorder in DSM-5.

The practice notes and commentary in relation to the *Bawden* Federal Court decisions can be found in VerBosity volume 27 pages 80 and 104. The Full Court in *Bawden* confirmed the test for diagnosis of PTSD is on the balance of probabilities.

Horn and Repatriation Commission

Dr P McDermott RFD, Senior Member
Dr G J Maynard, Brigadier (Rtd), Member

[2014] AATA 520
29 July 2014

**War widow's pension claim -
Alzheimer-type dementia -
hypertension factor**

Facts

Mrs Horn's late husband, Noel, rendered operational service with the Australian Army during WWII. In 2012 Mrs Horn applied for a widow's pension. A delegate of the Repatriation Commission (the Commission) refused her claim. The Veterans' Review Board affirmed the Commission's decision. Mrs Horn sought further review by the Administrative Appeals Tribunal (the Tribunal). As the applicant is now deceased, her application is being continued by her estate.

Issues before the Tribunal

It was common ground that the veteran's kind of death was "Alzheimer-type dementia". The issue in dispute was

whether the veteran's alcohol habit was war caused.

The Tribunal's consideration

The Tribunal followed the four-step process set out in *Deledio*. At step 1, the Tribunal considered whether the material points to a hypothesis connecting the death of the veteran with the circumstances of the particular service rendered by him. There was evidence that the veteran began to drink alcohol for the first time during the war, and that after his service he would drink heavily. At this stage the Tribunal assumed that the veteran engaged in heavy drinking during the war, because within a few years after the conclusion of hostilities he was engaged in heavy drinking. The Tribunal considered that the material before it pointed to a hypothesis that the veteran commenced drinking alcohol during wartime, causing him to become a heavy drinker during and after the war, and this heavy consumption of alcohol contributed to his longstanding-hypertension, which was a cause of Alzheimer-type dementia certified to be a cause of the veteran's death.

At step 2, the Tribunal ascertained there are Statements of Principles (SoP) in force for hypertension (No 63 of 2013) and Alzheimer-type dementia (No 22 of 2010).

At step 3, the Tribunal considered whether a reasonable hypothesis has been raised connecting death from Alzheimer-type dementia with the circumstances of the veteran's relevant service. The relevant factor in the SoP for Alzheimer-type dementia is:

- (g) having hypertension at least 10 years before the clinical onset of Alzheimer-type dementia;

The Tribunal determined the clinical onset of Alzheimer-type dementia was in 2002, and hypertension was diagnosed in about 1976 or 1977, so the SoP factor was met. Next, the Tribunal identified the relevant factor in the SoP for hypertension - "consuming an average of at least 300 grams of alcohol per week for at least the six months before the clinical onset of hypertension." The veteran's level of alcohol consumption was not in issue, so the SoP factor was satisfied.

What was in issue was whether this consumption was related to service. The Tribunal relied on evidence from the

veteran's grandson, who stated that he was informed by the veteran that he did not drink as a teenager (the legal drinking age was then 21 years of age). The veteran's grandson also stated that the veteran drank alcohol whilst in the Army, and they would drink whatever they could get their hands on and as the veteran did not smoke, he would swap his cigarette ration for alcohol. The veteran's grandson also indicated that the veteran would drink heavily after the war. The Commission conceded that the veteran had stressful service. The Tribunal considered there was a reasonable hypothesis connecting the veteran's death with the circumstances of his service. There was material pointing to the veteran having first drunk alcohol whilst he was on operational service and exposed to severe stress, causing the veteran to become a heavy drinker after WWII. The hypothesis fits the template found in the relevant SoP.

At step 4, the Commission conceded it cannot satisfy the Tribunal beyond a reasonable doubt that the death of the veteran was not war-caused.

Formal decision

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



Editorial note

As the widow in this case died before the application was considered by the Tribunal, the evidence of the veteran's grandson was crucial. Due to the Commission's concessions, the issues were narrowed down to the connection between alcohol consumption and service. In a similar AAT case, *Thompson and Repatriation Commission*, heard by the same members on the same day as the present case, the Tribunal relied on evidence from the widow and the veteran's sons. Although there was no evidence that the veteran began to drink alcohol for the first time during his service in the war, the Tribunal considered it was reasonable to assume that the veteran would not have consumed alcohol to excess after the war if he was not then a seasoned drinker, and it was also reasonable to assume that the veteran's exposure to stress on

operational service caused the veteran to become a heavy drinker after WWII.

Domjahn and Military Rehabilitation and Compensation Commission

Senior Member Bernard J McCabe

[2014] AATA 663
11 September 2013

Claim that applicant's sleep apnoea linked to his defence service - not established that applicant was obese at the time - insufficient evidence to establish clinical worsening

Facts

Mr Mark Domjahn served in the Australian Army between 1995 and 2011. In August 2008 he was diagnosed with severe obstructive sleep apnoea. His claim for acceptance of liability under the *Military Rehabilitation and Compensation Act 2004* (MRCA) was refused.

Issues before the Tribunal

There was no doubt Mr Domjahn is suffering from "sleep apnoea" within the

meaning of the relevant Statement of Principles (SoP). The relevant SoP factor for consideration was 6(a)(ii) - which is to say the applicant was “obese at the time of the clinical onset of sleep apnoea”. Being obese is defined in the SoP as “an increase in body weight by way of fat accumulation which results in a Body Mass Index (BMI) of 30 or greater”.

The Tribunal’s consideration

The Tribunal was satisfied the date of clinical onset of sleep apnoea was 27 August 2008 when a sleep study was conducted, following an increase in symptoms sometime in the course of early to mid-2008. The Tribunal then examined Mr Domjahn’s BMI in the period before clinical onset - that is, in the earlier part of 2008. The Tribunal noted Mr Domjahn’s height and weight were recorded reasonably regularly throughout his service career, however he did not have a BMI of at least 30 and could not meet the SoP factor.

Mr Domjahn raised a further possibility at the hearing that he experienced a clinical worsening of his condition - presumably as a consequence of a rapid weight gain in mid to late 2008 after the

diagnosis of sleep apnoea, when his physical activities were curtailed by a series of restrictions. The Tribunal was not satisfied on the limited (and incomplete) evidence before it that there had been a clinical worsening.

Formal decision

The Tribunal affirmed the decision under review.



Editorial note

The Tribunal noted in its decision that there was a surprising inconsistency in the records of the applicant’s height. The Tribunal preferred the height recorded by two medical specialists, whom the applicant recalled actually measuring his height in bare feet using a fixed standard against a wall. It seemed the other records were made on the basis of self-reporting. The Tribunal noted that even if the lowest height figure (the measure most favourable to the applicant) was used in the BMI calculations, he still fell just short of a BMI of 30.

**Downes and Military Rehabilitation
and Compensation Commission**

Mr M Denovan, Member

[2014] AATA 688
19 September 2014

***Compensation - GARP M - lifestyle
rating - rating for resting joint pain***

Facts

Mr Garry Downes served in the Royal Australian Air Force from 7 August 1989 to 10 January 2011. His service period is covered under all three Acts - the *Safety Rehabilitation and Compensation Act 1988* (SRCA), the *Veterans' Entitlements Act 1986* (VEA) and the *Military Compensation and Rehabilitation Act 2004* (MRCA). Mr Downes has a number of accepted medical conditions under the SRCA, VEA and MRCA. He sought permanent impairment under the MRCA. The respondent made a determination which accepted liability to pay compensation for permanent impairment in respect of Mr Downes' accepted conditions, deciding that Mr Downes had a combined impairment rating of 16 points and a lifestyle rating of two. In the calculations for the combined impairment rating, a rating of zero was given for resting joint pain. Mr Downes

believes he should have been allocated five impairment points for resting joint pain, and a lifestyle rating of three.

Issues before the Tribunal

The Tribunal must decide what the appropriate impairment ratings are for resting joint pain and lifestyle.

The Tribunal's consideration

Resting joint pain

The Tribunal noted resting joint pain is assessed using Table 3.4.1 of GARP M. Mr Downes gave evidence about his pain, and relied upon a previous decision made pursuant to the VEA which allocated five impairment points for resting joint pain. The Tribunal noted that in deciding the appropriate assessment to be used in the decision under review, it must rely on relevant medical information and reports relevant to the time period considered, and the earlier decision is not binding on the Tribunal. The Tribunal relied on reports and evidence from a consultant orthopaedic surgeon. Although Mr Downes experiences pain at rest, the medical evidence before the Tribunal

was that much of that pain was neuropathic in origin and does not originate from his joints, and it may be that some pain is related to his non-accepted condition of gastritis. The Tribunal accepted that the appropriate rating for resting joint pain is two.

Lifestyle rating

Mr Downes provided a self-assessment of three for his lifestyle rating. Both parties agreed that a rating of two for personal relationships and mobility was appropriate. The respondent contended that appropriate rating for recreational and community activity is two, and three for employment activities while Mr Downes contended he should be rated three and four respectively. The Tribunal considered Table 22.3 of GARP M concerning recreational and community activities and found the appropriate rating was two, taking into account Mr Downes' evidence and also evidence from the consultant orthopaedic surgeon.

In regard to employment, the Tribunal considered the appropriate rating from Table 22.5 was two, however the Tribunal accepted the respondent's submission that three should be

allocated. The overall lifestyle rating was two, which is consistent with the expected lifestyle rating for a person with a total combined impairment of 18 points, provided by Table 23.1. None of the medical reports before the Tribunal suggested Mr Downes' lifestyle had been impacted exceptionally severely compared with others with a similar level of impairment.

Formal decision

The Tribunal varied that part of the reviewable decision which found that Mr Downes' resting joint pain was allocated a rating of zero, and substituted a decision that he is allocated a rating of two for resting joint pain. The remainder of the decision was affirmed. The matter was remitted to the respondent, to calculate the change in the amount of compensation, if any, payable to the applicant.



Editorial note

The Tribunal noted in its decision that, unlike the assessment of lifestyle, there is no provision in GARP M for any form of

self-assessment when allocating impairment points. Reliance is placed on current medical reports and opinions.

**QMQK and Military Rehabilitation
and Compensation Commission**

Senior Member A K Britton

[2014] AATA 773

24 October 2014

***Claim for adjustment disorder and
achilles tendinopathy – whether
the injury/disease is connected
with service – Category 2 stressor***

Facts

The applicant served in the Australian Army for sixteen days in November 2010. That service constitutes “peacetime service” and “defence service” for the purpose of the *Military Rehabilitation and Compensation Act 2004* (the MRCA). It was agreed the applicant suffers (or suffered) from an adjustment disorder and left achilles tendonitis. He sought review of a decision of the Veterans’ Review Board that refused his claim for compensation for both conditions.

Issues before the Tribunal

The issue was whether one or both of the claimed conditions is a “service injury” or “service disease”. The applicant relied on factor 6(d) in the relevant Statement of Principles (SoP) concerning adjustment disorder – experiencing a category 2 stressor within the three months before the clinical onset of adjustment disorder. He relied on the “inability to obtain appropriate clinical management” factor in the relevant SoP concerning achilles tendinopathy and bursitis.

The Tribunal’s consideration

Adjustment disorder

The Tribunal noted a “category 2 stressor” is defined by clause 9 of the relevant SoP to mean:

one or more of the following negative life events, the effects of which are chronic in nature and cause the person to feel ongoing distress, concern or worry: [emphasis added]

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

...

(c) having concerns in the work or school environment including:

ongoing disharmony with fellow work or school colleagues, perceived lack of social support within the work or school environment, perceived lack of control over tasks performed and stressful work loads, or experiencing bullying in the workplace or school environment;

...

The Tribunal considered whether the applicant satisfied the first element of paragraph (a) – being socially isolated and unable to maintain friendships. The applicant submitted he was unable to make or develop friendships with fellow recruits, due to the pain he experienced after injuring his foot at Kapooka. However, the Tribunal noted “maintain” means an inability to continue or retain friendships, not an inability to develop or make new friendships. The Tribunal was not reasonably satisfied that the applicant suffered this kind of “negative life event”.

The Tribunal also considered whether the applicant experienced any of the “negative life events” within the

meaning of paragraph (c). The applicant contended he had ongoing disharmony with fellow work colleagues, perceived lack of social support within the work or school environment, and experienced bullying in the workplace. The Tribunal considered it was highly relevant that there was no record of these alleged stressors in any of the available medical records from Kapooka. The first record of these alleged stressors appears in his compensation claim which was made 10 months after he left Kapooka. The applicant gave conflicting accounts and now has only a vague recollection of the events that occurred at Kapooka. Coupled with the absence of any contemporaneous or compliant evidence, the Tribunal was left with doubts about the reliability of the applicant’s accounts of his experiences at Kapooka, and was not reasonably satisfied the alleged negative life events occurred.

Therefore, the Tribunal was not reasonably satisfied the applicant suffered a category 2 stressor, and the relevant SoP did not uphold the contention that the applicant’s adjustment disorder was connected with his service.

Left achilles tendonitis

It was agreed that the applicant suffers from left achilles tendonitis, and was suffering from that condition while at Kapooka. The Tribunal noted the “inability to obtain appropriate clinical management” factor in the relevant SoP only applies to material contribution or aggravation of achilles tendinopathy, where the person’s achilles tendinopathy was suffered or contracted before or during (but not arising out of) the person’s service.

The Tribunal considered whether there was an inability to obtain appropriate clinical management for the condition. The two orthopaedic surgeons who prepared reports and gave evidence agreed the treatment given to the applicant when he first attended the RAP on 3 and 4 November 2010 was appropriate. One of the doctors was of the opinion the condition was relatively mild and a further review was unnecessary. The other doctor agreed the condition was mild but considered a further review would have been prudent before the applicant returned to full duties, or if his symptoms worsened. The Tribunal noted in oral evidence the applicant gave conflicting accounts about

the period he remained in training after receiving treatment, and there was no independent or complaint evidence to support his claim that he reported he was experiencing significant pain and prevented from seeking treatment. The Tribunal was not reasonably satisfied the applicant returned to full duties or his symptoms worsened (warranting further review), or he was effectively prevented from seeking further treatment for his foot after 4 November 2010. Therefore, the Tribunal was not reasonably satisfied the applicant was unable to obtain appropriate clinical management, and the relevant SoP did not uphold the contention that the applicant’s achilles tendonitis was connected with his service.

Formal decision

The Tribunal affirmed the decision under review.

**Jensen and Military Rehabilitation
and Compensation Commission**

Senior Member Bernard J McCabe

[2014] AATA 807
30 October 2014

***Liability accepted under MRCA for
shoulder condition – entitlement to
incapacity benefits – calculation of
applicant’s actual and normal
earnings – no substitution of
minimum wage for calculated
civilian components***

Facts

Mr Matthew Jensen injured his left shoulder in 2011 during an exercise with the Australian Army Reserve. He lodged a claim for compensation under the *Military Rehabilitation and Compensation Act 2004* (the MRCA). Liability was accepted for Mr Jensen’s left shoulder condition, however it was subsequently determined he had no entitlement to incapacity benefits from 2 August 2011 to 13 March 2012.

Issues before the Tribunal

The Commission conceded for the purposes of the hearing Mr Jensen was incapacitated for work in the period

under review, but contended this did not assist Mr Jensen.

The Tribunal noted s95 was to be used to calculate the part-time Reservist’s normal earnings for a week (“ADF component” plus “civilian component”). Section 101 was to be used to calculate actual earnings for a week (actual ADF pay plus actual civilian earnings, plus any actual pay-related allowances). Where there is a difference between normal and actual earnings, an entitlement to compensation may arise.

The Tribunal was satisfied Mr Jensen did not lose any ADF earnings as a consequence of his condition. The hearing focussed on the civilian component of Mr Jensen’s earnings.

The Tribunal’s consideration

Section s98(4) of the MRCA provides:

The civilian daily earnings for an incapacitated Reservist who was not engaged in civilian work before the onset date for the incapacity is nil.

Mr Jensen argued various provision of the MRCA required the Commission to adopt the national minimum wage (which can be taken into consideration when determining actual earnings) as a default figure for normal civilian earnings.

However, using s99, the Tribunal ascertained Mr Jensen's normal civilian earnings were nil in the two week period before he was incapacitated. The Tribunal indicated there was no statutory basis for looking at extraneous information about the minimum wage when calculating Mr Jensen's normal civilian earnings, and to do so would misrepresent his position and put him in a better position after being injured than he was beforehand.

The Tribunal concluded that the Commission correctly calculated Mr Jensen's normal civilian earnings, and his actual civilian earnings.

Formal decision

The Tribunal affirmed the decision under review.

Holden and Repatriation Commission

G. D. Friedman, Senior Member

[2014] AATA 810

30 October 2014

Widow's claim – death from ischaemic heart disease (IHD) – whether psychiatric condition contributed to IHD - remittal from Federal Court

Facts

Mrs Holden is the widow of Geoffrey Holden, the veteran, who died on 2 August 2011 from ischaemic heart disease (IHD). Mrs Holden's application for a war widow's pension was refused by the respondent, and the decision was affirmed by the Veterans' Review Board. Mrs Holden appealed to the Administrative Appeals Tribunal (the Tribunal). On 1 November 2013 the Tribunal set aside the decision and substituted a decision that Mrs Holden be granted a war widow's pension.

The respondent appealed to the Federal Court and on 12 June 2014 the Court allowed the appeal. The Tribunal's decision of 1 November 2013 was set aside, and the matter was remitted to the Tribunal as originally constituted. The Court directed the Tribunal to give further reasons, setting out the evidence or other material on which it based its findings in paragraphs [47] and [48] of its reasons for decision. The Tribunal was required to re-exercise its powers under s43(1) of the *Administrative Appeals Tribunal Act 1975*.

The Tribunal's consideration

The Tribunal provided its further reasons, setting out the evidence and other material on which it based its findings in [47] and [48].

Formal decision

The Tribunal set aside the decision under review, and substituted a decision that Mrs Holden be granted a war widow's pension.



Editorial note

As required by the Federal Court, the Tribunal recorded in more detail its explanation of the findings it made, and maintained its decision to grant Mrs Holden a war widow's pension.

Barber and Military Rehabilitation and Compensation Commission

Deputy President S D Hotop

[2014] AATA 839
7 November 2014

Claim for acceptance of liability for Crohn's disease, diverticular disease of the colon, nephrolithiasis, lung scarring, and malignant neoplasm of the thyroid gland – liability accepted for malignant neoplasm of the thyroid gland

Facts

Mr Darren Barber served in the Royal Australian Air Force from 12 March 1987 to 21 February 1991, and in the Royal Australian Navy from 5 March 2007 to 16 September 2011. On 30 June 2010 he lodged a claim under the *Military Rehabilitation and Compensation Act 2004* (the MRCA) for acceptance of liability for

various conditions. On 28 March 2011 a delegate of the Military Rehabilitation and Compensation Commission accepted liability for septicaemia, but liability was refused for Crohn's disease, diverticular disease of the colon, nephrolithiasis, lung scarring, and malignant neoplasm of the thyroid gland. On 29 May 2013 the Veteran's Review Board affirmed that determination. On 27 August 2013 Mr Barber appealed to the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

The Tribunal was required to determine whether each of the refused conditions is a "service injury" or a "service disease" within the meaning of the MRCA.

The Tribunal's consideration

Crohn's disease

It was common ground that the applicant suffers from Crohn's disease, and the Tribunal found the clinical onset was in or about March 2009. The Tribunal identified the relevant "smoking" and "inability to obtain appropriate clinical management" factors in the Statement of Principles (SoP) concerning

inflammatory bowel disease. The Tribunal was not satisfied that the applicant's smoking was contributed to in a material degree by, or otherwise related to, his RAN service. The Tribunal was not satisfied that the applicant was unable to obtain appropriate clinical management for his Crohn's disease. On the contrary, he consulted a number of doctors. Further, the Tribunal was not satisfied that the medical treatment was inappropriate.

Diverticular disease of the colon

It was common ground that the applicant suffers from this condition, and the Tribunal found the clinical onset was in 2010. The Tribunal considered the "scleroderma" and "inability to obtain appropriate clinical management" factors in the applicable SoP, but was not satisfied that either was met.

Nephrolithiasis

It was common ground that the applicant suffers from nephrolithiasis, and the Tribunal found the clinical onset was on or about 2 May 2010. The Tribunal listed the relevant factors in the SoP concerning renal stone disease:

- (c) having a malignant neoplasm, other than non-metastatic non-melanotic malignant neoplasm of the skin, at the time of the clinical onset of renal stone disease;
- (l) having inflammatory bowel disease involving the small intestine, at the time of the clinical onset of renal stone disease; or
- (o) having a partial or complete ileal resection or ileal bypass surgery, within the two years before the clinical onset of renal stone disease.

Regarding factor (c), it was common ground that the applicant suffers from malignant neoplasm of the thyroid gland, and the Tribunal was satisfied this pre-dated the onset of nephrolithiasis. However, the Tribunal was not satisfied that the factor was “related to” the applicant’s RAN service.

Regarding factor (l), the Tribunal was satisfied that the applicant had Crohn’s disease at the time of clinical onset of his nephrolithiasis, but the Tribunal was not satisfied the factor was “related to” the applicant’s RAN service.

Likewise, regarding factor (o), assuming the surgery which the applicant had for his Crohn’s disease in March 2010 constituted a “partial or complete ileal resection”, the Tribunal was not satisfied that the factor was “related to” the applicant’s RAN service.

Malignant neoplasm of the thyroid gland

It was common ground that the applicant suffers from malignant neoplasm of the thyroid gland, and the Tribunal was satisfied the clinical onset was in the period 2008-2009. However, the Tribunal was not satisfied any of the factors in the relevant SoP were met. The Tribunal indicated the medical evidence raised the issue of a relationship between the applicant’s treatment with “Humira” medication (for his Crohn’s disease) and his malignant neoplasm of the thyroid gland, and brings s29 of the MRCA into play. The Tribunal noted a specialist’s evidence that the Humira treatment caused the pre-existing malignant neoplasm of the thyroid gland to progress more rapidly. The question arose for the purposes of s29(2) of the MRCA, whether, “as an unintended consequence of” the Humira treatment, the applicant’s cancer was “aggravated by [that] treatment”.

The Tribunal considered the meaning of the phrase “unintended consequence” in s6A(2) of the *Safety, Rehabilitation and Compensation Act 1988* (the SRCA), which is relevantly comparable to s29(1)(b) of the MRCA. In *Comcare v Houghton* [2003] FCA 332 Lindgren J said:

...in my opinion s 6A(2) does not encompass an injury which was, and was always known to be, an unavoidable direct consequence of the medical treatment, albeit one which those administering the treatment did not positively desire, seek or aim to produce...

The Tribunal was not satisfied the aggravation was an “unavoidable direct consequence” (citing *Houghton*) or with reference to AAT cases an “inevitable consequence” (*Re Eaton and Comcare* [2002] AATA 222) or a “highly likely consequence” (*Re Glendenning and Comcare* [2004] AATA 6) of the Humira treatment. However, under s29(2)(b) of the MRCA the Tribunal indicated there was a further matter to be considered – the relevant knowledge of the medical practitioner(s) who provided that treatment to the applicant at the relevant time. There was no evidence any of the treating doctors were aware, or even had

reason to suspect, that the applicant had cancer in the period when he was receiving the Humira treatment. It cannot reasonably be said that aggravation of the applicant’s cancer was an intended consequence of the Humira treatment. The Tribunal found the aggravation was an “unintended consequence” of the treatment. The Tribunal was also satisfied the Humira treatment constituted “treatment under regulations made under the *Defence Act 1903* for an earlier injury or disease that is not a service injury or a service disease” within the meaning of s29(2)(b) of the MRCA. Therefore, pursuant to s29(2)(b) the applicant’s malignant neoplasm of the thyroid gland is a service disease.

Lung scarring

The Tribunal found the applicant suffered from lung scarring between February-May 2010. The applicant believed this non-SoP condition was due to his hospital treatment following his surgery for Crohn’s disease, and effectively ended his career as a Submariner. The Tribunal was of the opinion that the medical evidence did not support the proposition that the lung

scarring was a service injury or a service disease.

**Ford and Military Rehabilitation
and Compensation Commission**

Deputy President S D Hotop

[2014] AATA 858
20 November 2014

Formal decision

The Tribunal varied the decision under review by determining that malignant neoplasm of the thyroid gland is a service disease. It affirmed the decision under review in all other respects.



Editorial note

The Tribunal also noted s36 of the MRCA, pursuant to which liability must not be accepted for the applicant's Crohn's disease if that disease is related to his RAN service "only because of [his] use of tobacco products". In any event, the Tribunal was not satisfied that the applicant's Crohn's disease was related to his RAN service by reason of his cigarette smoking.

***Claim for cavernous angioma – not
a service injury***

Facts

Mr Benjamin Ford enlisted in the Royal Australian Air Force on 29 October 2004 and rendered a number of periods of "peacetime" and "warlike/non-warlike service" until his discharge in 2011. He lodged a claim under the *Military Rehabilitation and Compensation Act 2004* (the MRCA) for acceptance of liability for "cavernous angioma". On 18 September 2012 a delegate of the Military Rehabilitation and Compensation Commission refused liability for "intracerebral haemorrhage (date of onset 20 September 2011)". On 18 October 2013 the Veteran's Review Board affirmed that determination. On 19 November 2013 Mr Ford appealed to the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

It was common ground that the applicant suffered a cavernous angioma on 18 September 2011. The issue was whether the condition was a “service injury” under the MRCA.

2006, as amended by No 123 of 2011, and the relevant factor was:

- (a) having hypertension at the time of the clinical onset of cerebrovascular accident

The Tribunal’s consideration

The Tribunal noted the question of whether the condition was a “service injury” was to be determined on the reasonable hypothesis standard of proof, and followed the approach prescribed by the Full Federal Court in *Deledio* as subsequently qualified by the Full Court. At step 1, the Tribunal accepted that the material before it raised a hypothesis connecting the injury with the circumstances of the applicant’s relevant RAAF service - in that he had elevated blood pressure from time to time during his service as a result of stress and anxiety experienced by him especially when engaged in flying operations in the Middle East, and he sustained the injury on 18 September 2011 while engaged in such a flying operation. At step 2, it was common ground that the applicable Statement of Principles (SoP) concerning cerebrovascular accident was No 51 of

At step 3, the Tribunal noted there was material which indicated the applicant had elevated blood pressure at various times during his relevant RAAF service prior to the injury on 18 September 2011. However, there was no material which indicated the applicant had a medical diagnosis of hypertension prior to the injury. The day before he sustained the injury, his latest blood pressure reading was not elevated. Although the material indicated the applicant had elevated blood pressure at various times before 18 September 2011, it did not point to the applicant having the condition of hypertension, or an elevated blood pressure, at the time when he sustained the injury on 18 September 2011. Therefore, the material did not point to factor (a) having been met. The raised hypothesis connecting the injury with the circumstances of the applicant’s relevant RAAF service did not accord with, and was not upheld by the SoP, and accordingly was not a reasonable hypothesis.

For completeness, the Tribunal went on to consider the SoP concerning hypertension, and the “inability to obtain appropriate clinical management” factor. Even if the applicant did suffer hypertension, the material before the Tribunal did not point to any existing hypertension suffered by the applicant having been materially contributed to, or aggravated by, an inability to obtain appropriate clinical management. In any event, the material before the Tribunal did not point to an “inability” on the part of the applicant “to obtain appropriate clinical management for hypertension”. The Tribunal concluded the hypertension SoP did not uphold the hypothesis that hypertension was connected with the circumstances of the applicant’s relevant RAAF service, and accordingly was not a reasonable hypothesis.

Therefore, the injury was not a “service injury” under the MRCA.

Formal decision

The Tribunal varied the decision under review, by amending the description of the injury to “right pontine cavernous angioma (sustained on 18 September

2011), but otherwise affirmed the decision.

Brough and Military Rehabilitation and Compensation Commission

Deputy President J W Constance

[2014] AATA 879
26 November 2014

Claim for disc bulge – meaning of injury - whether applicant suffered a service injury - whether the injury resulted from an occurrence that happened whilst rendering defence service – Permanent impairment – whether can consider previously non-accepted condition – impairment rating

Facts

Mr Brough has been a member of the Australian Regular Army since 2004. In 2009 he was injured in a fall whilst engaged in an Army Basic Parachute Course. He lodged a claim for compensation for his injuries under the *Military Rehabilitation and Compensation Act 2004* (the MRCA). The Commission accepted liability for the fractures of his spine, but in a determination dated 7 February 2011 denied liability for a disc bulge at L5/S1 level. This determination

was affirmed on 2 June 2011 and Mr Brough appealed to the Administrative Appeals Tribunal (the Tribunal). The Commission also determined that Mr Brough was not entitled to compensation for permanent impairment as his impairment was under the relevant threshold of 10 points. This determination was affirmed on 10 April 2013, and Mr Brough also sought a review of that determination.

Issues before the Tribunal

Disc bulge

The issue was whether Mr Brough had suffered an injury as defined in the MRCA, and if so, was it a service injury?

Permanent impairment

The only matter in issue was the correct impairment rating for Mr Brough's loss of musculoskeletal function in accordance with Table 3.3.2 of GARP M.

The Tribunal's consideration

Disc bulge

The Tribunal was satisfied that Mr Brough suffers from a disc bulge at

L5/S1. The Commission argued that the finding of a mild disc bulge was not a 'diagnosable condition', which the Tribunal understood to be a contention that there was no injury. It was clear to the Tribunal that a disc bulge is an injury within the meaning of the MRCA.

Turning to the issue of whether the injury suffered by Mr Brough was a service injury within the meaning of the MRCA, it was not in dispute that at the time of the parachute accident Mr Brough was engaged in defence service, in particular peacetime service. Therefore, the reasonable satisfaction standard of proof applied. There was no SoP for bulging of the intervertebral disc. On the basis of evidence from one of the orthopaedic surgeons involved, the Tribunal was reasonably satisfied that the injury suffered by Mr Brough was a result of his hitting the ground in the manner he did when his parachute failed on 4 August 2009. The Tribunal was reasonably satisfied that Mr Brough's condition of a bulging disc at L5/S1 constitutes a service injury for the purposes of the MRCA.

Permanent impairment

Firstly, the Tribunal was satisfied that it had jurisdiction to determine the question of the level of impairment arising from Mr Brough's back condition with reference to his bulging disc at L5/S1 as he sought compensation for permanent impairment when he made his initial claim, even though his representative's later request for a permanent impairment assessment was only in relation to accepted conditions. The Tribunal noted the Commission did not consider the level of impairment including the disc bulge as it determined that there was no liability to pay compensation for that condition. The Tribunal referred to *Re Fuad and Telstra Corporation Limited* ([2004] AATA 1182 (cited with approval in *Irwin v Military Rehabilitation and Compensation Commission* [2009] FCAFC 33):

It follows that all matters put before the decision-maker as part of a claim under the Act are before this Tribunal for review when an application for review is made, even though the decision may not address them in any particular way. That leaves the

problem of identifying exactly what was before the decision-maker but that is a practical problem and not a jurisdictional problem.

Regarding the correct impairment rating for Mr Brough's loss of musculoskeletal function under table 3.3.2, the Commission argued the rating was five, whereas it was argued on behalf of the applicant that the rating was ten or fifteen. The Tribunal accepted the applicant's evidence and was satisfied that the accepted injuries to his spine, including the disc bulge, generally cause pain within half an hour of prolonged sitting or standing and so require frequent changes of posture. Therefore, Mr Brough was entitled to an impairment rating of ten points under table 3.3.2, age adjusted to eleven under table 3.6.1.

Formal decision

Regarding the disc bulge at L5/S1, the Tribunal set aside the decision under review and in substitution determined that liability is accepted under the MRCA.

Regarding permanent impairment compensation, the Tribunal set aside the decision under review and remitted the matter to the Commission for reconsideration, directing that Mr Brough has an impairment rating of 11 under the applicable tables of GARP M.

**JRKH and Military Rehabilitation
and Compensation Commission**

Deputy President I R Molloy

Dr M Denovan, Member

[2014] AATA 883
27 November 2014

Compensation – service injury or disease – low testosterone levels – suppression of hypothalamic pituitary gonadal axis – establishing diagnosis

Facts

The applicant served in the Australian Army from 6 January 2004 to 26 April 2010. On 9 July 2012 he lodged a claim under the *Military Rehabilitation and Compensation Act 2004* (the MRCA) for acceptance of liability for an injury or disease related to warlike service described as low testosterone levels. On 22 October 2012 a delegate of the Military

Rehabilitation and Compensation Commission refused liability, on the basis that a confirming diagnosis had not been established. On 28 March 2014 the Veteran's Review Board (VRB) varied the Commission's determination to include a diagnosis of suppression of the hypothalamic pituitary gonadal axis, but otherwise affirmed the earlier determination. The applicant appealed to the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

The question was whether the applicant is suffering from the injury or disease as claimed (or some other injury of disease).

The Tribunal's consideration

The Tribunal noted under s335(3) of the MRCA, the diagnosis is to be established to the Tribunal's reasonable satisfaction: *Repatriation Commission v Cooke* [1998] FCA 1717. Only after the diagnosis is established should the Tribunal proceed through the four *Deledio* steps.

The Commission conceded that low levels of testosterone could be classified as a disease, but submitted the

applicant's testosterone levels are not below the normal range, so as to establish a disease within the meaning of s5(1) of the MRCA. The Commission relied on the applicant's pathology reports, and the reports of the Departmental Medical Officer (DMO) and a urologist.

The applicant relied on the evidence of himself, his wife and his treating endocrinologist. The submission seemed to be that the applicant's testosterone levels were not what should be expected of a man of his apparent fitness.

The Tribunal preferred the evidence of the DMO and urologist over that of the endocrinologist, and was not satisfied as to the applicant's diagnosis of low testosterone levels or suppression of the hypothalamic pituitary gonadal axis such as to constitute an injury or disease within the meaning of s5(1) of the MRCA.

Formal decision

The Tribunal varied the decision under review so as to affirm the Commission's original determination regarding suppression of hypothalamic pituitary gonadal axis and low testosterone levels.



Editorial note

In making the formal decision, the Tribunal noted the VRB varied the Commission's determination to include a diagnosis of suppression of the hypothalamic pituitary gonadal axis. It appeared to the Tribunal the VRB changed the *claimed* diagnosis to include suppression of hypothalamic pituitary gonadal axis in addition to or in substitution for low testosterone levels. However, the Tribunal was not convinced the VRB expressly addressed the existence of either condition.

Federal Circuit Court of Australia

Besson v Repatriation Commission

Judge Burnett

[2014] FCCA 123

6 February 2014

Application for disability pension - PTSD - operational service - whether there was a reasonable hypothesis connecting the disease with the circumstances of the applicant - experience of a life threatening event - subjective/objective test

Facts

On 15 June 1964 Mr Besson was on operational service as a member of the crew of HMAS Sydney, when he claimed to suffer a “life threatening event”. He later developed post traumatic stress disorder and other conditions. His application for a disability pension was refused by the Repatriation Commission, on the ground that his PTSD could not be linked to his operational service. On

review, the Administrative Appeals Tribunal (the Tribunal) affirmed that decision. Mr Besson appealed to the Federal Circuit Court of Australia.

Issues before the Tribunal

The Tribunal accepted that on 15 June 1964, while HMAS Sydney was on escort duty near Indonesia, the ship’s company was called to action stations and ordered to secure the ship. The Tribunal also accepted Mr Besson’s evidence that immediately before this event, he was about to ascend to the ship’s weather deck to rest for the evening. Before Mr Besson could reach the deck, the exit hatch was secured and he was confined within the compartment until an ‘all clear’ was sounded about seven to fifteen minutes later. Mr Besson’s evidence to the Tribunal was that he “*assumed the crew were all about to die because the ship must have been under attack*” and that he was “*terrified throughout the incident*”. The Commission conceded that Mr Besson suffers from PTSD and a range of other conditions, but did not accept there was a causal link between the Mr

Besson's PTSD and his operational service. At paragraph [18] the Tribunal noted a 'subjective/objective' test must be applied to determining the question of whether Mr Besson's story fits the definition of category 1A stressor (which includes a "life-threatening event"):

"...that is, a test which refers to a person (the objective component) in the applicant's circumstances, which include his age, experience and some other matters."

The Tribunal concluded at [19]:

"The applicant was a young recruit with limited experience - although this was not his first voyage. He had already been exposed to the dangers of naval service (through his own experience, and through the experiences of people he knew, like those who had perished on the [HMAS] Voyager). I accept a person in the applicant's position would probably experience a degree of apprehension about the dangers that might lurk when a ship goes to action stations. I can even accept a sailor might feel more apprehensive when aboard an ageing vessel like the Sydney. They were cruising through

potentially hostile waters, and potentially hostile vessels had been sighted in relatively close proximity earlier the same day. Even so, I am not persuaded a person in the applicant's position could be expected to react to an alarm as the applicant did. He seems to have leaped to the conclusion that the alarm meant the ship was likely to be sunk. There was no reason for him to form that view, and other sailors of his age or experience would merely have been anxious at what might eventuate rather than terrorised by their imaginings of a particular and dire outcome."

The Court's consideration

The first ground of appeal was principally that the Tribunal member did not directly refer to the four step process as set out in *Deledio*, so it could not be said with any certainty that the Tribunal turned its mind to or applied the requisite test of assessing the reasonableness of the hypothesis raised by the appellant, in particular step 3. The Court noted that although the Tribunal did not mechanically list and signpost each step, it was apparent from its reasons that they were considered and addressed. The appellant's substantive

complaint was directed to the Tribunal's remarks about its application of the 'subjective/objective' test and its finding. The appellant contended the Tribunal's finding was erroneously based or reached following a mistaken conclusion by the Tribunal, because it failed to consider relevant material in the "T" documents, in particular, insufficient allowance was made for his naval history, including events that sought to heighten his basis for personal concern. The Court considered the finding made by the Tribunal was open to it on the material before it, and to contend that the Court ought to allow the appeal because of an "erroneous finding" or mistaken conclusion" invites the Court to effect impermissible merits review.

The second ground of appeal was that the Tribunal erred by restricting the SoP definition of "experiencing a life-threatening event". The Court agreed with the respondent's submission that the Tribunal applied the judicial interpretation of the phrase "experiencing a life threatening event" in *Border v Repatriation Commission (No 2)* (2010) 191 FCR 163, in which Reeves J noted at [67]:

"...It is the effect of the event and not the threat itself that has to be assessed.

Moreover, it is the veteran's perception of the event that is critical, relevantly his or her perception that it posed a threat of death. If that perception was a reasonable one, it constitutes a life-threatening event within the terms of subpara (a). That perception will be a reasonable one if, judged objectively, from the point of view of a reasonable person in the position of, and with the knowledge of, the veteran, it is capable of, and did convey the threat of death...this is a mixed objective and subjective test. Since there will be a very wide range of reactions to any event involving a threat of death, this test is not to be applied in an unduly restrictive manner...the question is whether the event might or was capable of giving rise to the perception of the threat of death, not whether it did. For this reason, the veteran's conduct after the event is irrelevant to the assessment. So, too, is any information not known to the veteran which showed, objectively, that the event did not pose a threat of death, eg being threatened with a fun that was in fact unloaded."

The Court accepted that:

“...the Tribunal did do what was required. That is, it applied the objective/subjective test in concluding that, judged objectively from the point of view of a reasonable person in the position of and with the knowledge of the applicant, the incident relied upon was not capable of conveying the threat of death.”

The third ground of appeal was principally that the Tribunal made no reference to the cases in which the subject and objective test has been examined. The Court noted the absence of reference to authority does not of itself demonstrate error, and was satisfied the Tribunal appropriately applied the test in accordance with the caselaw.

present case, the Court also referred to the earlier authority of *Stoddart* when discussing the subjective/objective test. In *Border (No. 2)*, the Court pointed out two key differences between *Stoddart* and *Border (No. 2)* - firstly, that *Stoddart* was dealing with step four in the *Deledio* process (not step three), and secondly, the expression being considered in *Stoddart* was “experiencing a severe stressor” (not “experiencing a category 1A stressor”).

The Court’s Decision

The appeal was dismissed.



Editorial note

Please refer to the case summary of *Border v Repatriation Commission (No. 2)* in Volume 26 of *VeRBosity* at pages 75-78. In the

Federal Court of Australia

Richmond v Repatriation Commission

Dodds-Streeton J

[2014] FCA 272
25 March 2014

Whether applicant was prevented from working by war caused injuries alone and whether Tribunal misconstrued s24(1)(c) and the questions identified in Flentjar

Facts

The applicant, Mr Richmond, suffers from a number of medical conditions which the respondent accepts as war caused: hyperkeratosis, basal cell carcinoma, bilateral sensorineural hearing loss, bilateral tinnitus, non melanotic malignant neoplasm of the skin, and alcohol dependence and anxiety disorder.

On 14 February a delegate of the Commission decided the applicant was not entitled to a special rate of pension. This decision was affirmed by the Veterans' Review Board on 10 November

2011 and affirmed by the AAT on 20 June 2013.

The applicant appealed to the Federal Court. The main issue in the appeal was whether the AAT erred in holding the applicant was not eligible for a pension at the higher rate because it misconstrued s24(1)(c) of the VEA and the questions identified in *Flentjar v Repatriation Commission* [1997] FCA 1200.

Grounds of appeal

The applicant's amended notice of appeal set out the following grounds:

1. The Tribunal misapplied s24(1)(c) of the Act and the decision in *Flentjar v Repatriation Commission* by asking itself the wrong question and/ or identifying a wrong issue when it found that:
 - a. the applicant's age and frustration at the teaching environment added to his decision to stop working; and
 - b. the applicant ceased work also because of his age and these matters were factors that prevented the applicant from working more than

eight hours a week during the assessment period.

2. The Tribunal erred in the application of s24(1)(c) of the Act in that it:
 - a. failed to enquire into the hypothetical position that would have been obtained if the applicant was not incapacitated due to his war caused disability; and
 - b. erred in using consequences of the applicant's war caused disability as a reason to deny entitlement to the special rate of pension,
3. The Tribunal properly failed to accord procedural fairness to the applicant by failing to respond to a substantial, clearly articulated argument that the applicant's frustration at the teaching environment was a consequence of his war caused psychiatric injury.
4. The Tribunal failed to provide adequate reasons for its decision.

The Court's consideration

The Court's consideration in the appeal centred on the four questions which a decision maker should consider and address in applying s24(1)(c) of the Act. These questions were set out by Branson J in the *Flentjar* decision:

Flentjar questions

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

The grounds of appeal in this case involved a consideration of the third and fourth questions in *Flentjar*.

The Tribunal decision in relation to the Flentjar questions

In response to the first *Flentjar* question the Tribunal found that the remunerative work undertaken by the applicant was as “a trade teacher, boilermaker and boat operator”.

It also found that the answer to the second *Flentjar* question was “yes”, based on the evidence from medical practitioners that the applicant was prevented from working more than eight hours per week in any of his previous roles.

The Tribunal then referred to the third *Flentjar* question and stated:

[62] In respect of question 3, [the applicant] has emphasised the impact of his accepted war caused conditions on his inability to work. He lodged the application which is the subject of this review in August 2007, more than two and a half years after he has resigned from Goulburn Ovens and more than

two years after his short resumption of teaching at the Gordon Institute in mid 2005. He was 62 years old at the start of the assessment period and is now 68 years of age. It is now eight years since he stopped working and he has not undertaken remunerative work since lodging the claim

The Tribunal then concluded:

[63] The Tribunal is not satisfied that [the applicant’s] accepted war caused disabilities are the sole factors that have prevented him from working for more than eight hours per week during the assessment period. The Tribunal finds that [the applicant’s] age and frustration at the teaching environment were two of the additional factors adding to his decision to stop working. His leave records show that he was a conscientious employee. He did not take time off because of his accepted war conditions except during 2002 when his chest pains were under investigation. The Tribunal finds that he ceased work as a trade teacher due to his accepted disabilities but also because of his age.

[64] The answer to the third *Flentjar* question is *no*.

[65] There is no evidence that the applicant has sought work since... January 2010. The Tribunal is not satisfied that he meets 24(2)(b) of the Act.

The Court's consideration of each ground of appeal

Ground 1

The Tribunal misapplied s24(1)(c) of the Act and the decision in Flentjar v Repatriation Commission by asking itself the wrong question and/or identifying a wrong issue when it found that:

- a. the applicant's age and frustration at the teaching environment added to his decision to stop working; and*
- b. the applicant ceased work also because of his age,*

and these matters were factors that prevented the applicant from working more than eight hours a week during the assessment period.

The Court noted s24(1)(c) may be divided into limbs, each of which may be

amplified or qualified by another provision of s24.

The first limb of s24(1)(c) is:

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

That limb is read subject to the application of s24(2)(b) which states:

(b) where a veteran, not being a veteran who has attained the age of 65 years, who has not been engaged in remunerative work satisfies the Commission that he or she has been genuinely seeking to engage in remunerative work, that he or she would, but for the incapacity, be continuing so to seek to engage in remunerative work and that that incapacity is the substantial cause of his or her inability to obtain remunerative work in which to engage, the veteran shall be treated as having been prevented by reason of that incapacity from continuing to undertake remunerative work that the veteran was undertaking.

This section is ameliorative as a veteran who has not been engaged in remunerative work may still satisfy the alone criterion in 24(1)(c) if satisfies 24(2)(b).

Gordon J described s24(2)(b) in *Smith v Repatriation Commission* [2012] FCA 1043:

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

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

(1) it extends the class of veterans entitled to make an application for a pension at the special rate to include veterans who have not been engaged in remunerative work; and

(2) it provides that the veteran’s war caused injury or war caused disease need not be the sole cause but must be

a substantial cause of his or her inability to obtain remunerative work.

The second limb of s24(1)(c) is:

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

That limb is to be read with s24(2)(a), which provides:

For the purpose of paragraph (1)(c):

(a) a veteran who is incapacitated from war caused injury or war caused disease, or both, shall not be taken to be suffering a loss of salary or wages, or of earnings on his her own account, by reason of that incapacity if;

(i) the veteran has ceased to engage in remunerative work for reasons other than his or her incapacity from that war caused injury or war caused disease; or

(ii) the veteran is incapacitated, or prevented from engaging in remunerative work for some other reason ...

The Court noted the different subparagraphs (b) and (c) of subsection 24(1) were explained by Spender J in *Alexander*:

Section 24(1)(b) addresses the severity of incapacity from war caused injury or war caused disease. It imposes a requirement, for the special rate of pension with which s24 is concerned, that the veteran be totally and permanently incapacitated, which is defined by s24(1)(b) to be an incapacity from war caused injury or war caused disease or both to be of such a nature as, of itself alone to render the veteran incapable of undertaking remunerative work for periods aggregating more than 8 hours per week.

Section 24(1)(b) thus addresses the extent of the veteran's war caused incapacity. Section 24(1)(c) is directed at a quite different question, causation. Section 24(1)c requires that the veteran's war caused incapacity, and only that war caused incapacity, prevented the veteran from continuing to undertake remunerative work that the veteran was undertaking.

Section 24(1)(c) is a "sole cause" requirement. The subsection contains

the requirement that incapacity from war caused injury or war caused disease or both "alone" prevents a veteran from continuing to undertake remunerative work that the veteran was undertaking.

The Court also noted that s19(5C) "introduces the notion that the respondent's inquiry is restricted to the assessment period". The "assessment period" is defined in s19(9) to mean the period starting on the application day and ending when the claim or application is determined.

The Court also stated that the four questions articulated by Branson J in *Flentjar* have been endorsed in subsequent authority as embodying the correct approach to the application of s24(1)(c).

The Court went on to say at [106]

It is well established that, in the context of the first *Flentjar* questions, the Tribunal must consider the remunerative work that the veteran was undertaking. Such work "does not mean a particular job with a particular employer but the substantive work that the veteran had undertaken in the past: *Hendy* at [36].

The Court also noted at [108]

The authorities in my view establish that if there is a non war caused factor which prevents, or contributes to preventing, the veteran from continuing to undertake the relevant remunerative work, even if it is only of secondary weight and insufficient in itself to prevent the veteran from continuing, the “alone” test will not be satisfied.

However a factor which prevents or contributes to preventing the veteran from continuing to undertake the remunerative, but is itself the consequence of the veteran’s war caused condition, will not constitute an independent preventative factor for the purpose of defeating the “alone” requirement in s24(1)(c).

In the present case the Court noted the Tribunal was required to consider and determine whether there were any factors other than the applicant’s war caused condition that played a part in, or contributed to, the veteran’s being prevented, during the assessment period commencing on March 2007, from continuing to engage in remunerative work as a trade teacher, boiler maker and

boat operator. It was also required, having considered any or all of the factors which contributed to a veteran’s incapacity, to determine “whether incapacity from the relevant condition alone prevents a veteran from continuing to undertake remunerative work”.

The Court considered the Tribunal made no finding that there was any factor which prevented or contributed to preventing the applicant from undertaking remunerative work. Rather the Tribunal considered factors which caused or contributed to the applicant’s attaining 60 years of age and his dissatisfaction with the conduct of students and management practices in the TAFE.

The Court considered the Tribunal did not recognise any material distinction between factors which cause an inability or incapacity to continue to undertake work and on the other hand, incentives or reasons for the applicant deciding not to continue it.

The Court considered at [117]

The Tribunal erred in treating in the context of the third *Flentjar* question, a factor acting as an incentive or influencing a decision voluntarily to

cease to work as equivalent to a factor which prevents, or contributes to preventing, a veteran from continuing to undertake the relevant remunerative work.

The Court went on to say at [118]

The alone test in the first limb is defeasible only by factors additional to the veteran's war caused condition which prevent or contribute to preventing, the veteran's continued undertaking of the relevant work.

The Court also considered the relevance of inducements and incentives voluntarily to decide not to continue to undertake work is confined to the fourth *Flentjar* question.

It noted the Tribunal addressed only the reasons for the applicant's ceasing work as a trade teacher and to some extent as a boat operator. The Court noted the Tribunal did not make the distinction between a factor preventing continued work and a factor inducing the veteran to cease work, it also failed to address the relevant occupations as required by *Flentjar*.

It failed to address the situation during the assessment period and consideration

of relevant factors was limited to those up to mid 2005. It cannot be assumed that the factors remained unchanged during the assessment period. Although particular factors may have induced the applicant to cease work in 2005 it could not be assumed that he was not prevented by war caused conditions alone from working during the assessment period.

The Court concluded that the Tribunal failed to ask the hypothetical question which applied to the fourth *Flentjar* question and failed to consider the assessment period or the range of relevant occupations. In the Court's view legal error was established in ground 1.

Ground 2a

Failed to enquire into the hypothetical position that would have been obtained if the applicant was not incapacitated due to his war caused disability.

The Court noted that the Tribunal had failed to consider the third *Flentjar* question and did not address the fourth *Flentjar* question.

In the Court's opinion the hypothetical question is also applicable to the third *Flentjar* question and the first limb of 24(1)(c).

The Court noted the **hypothetical** question was described by Beaumont J in *Smith* at [337]:

...The Tribunal must attempt an assessment of what the respondent probably would have done if he had none of his service disabilities. The starting point is an examination of the prospects of employment...

(Emphasis added)

The Court also noted the case of *Hendy* recognised that at the commencement of the assessment period where the veteran has already been out of the workforce for some time, whether factors such as lack of recent experience or advanced age during the assessment period should be treated as defeating the alone test may depend on an assessment of what the veteran would have done prior to the assessment period but for his war caused illness, which is necessarily hypothetical. If, for example, the veteran would not have left the workforce or moved to a different area but for the war caused condition, such factors would be a

consequence of the condition rather than an independent preventative factor.

Analysis of the relevant authorities indicates that the hypothetical question is not limited to the fourth question or the second limb of 24(1)(c).

The Court considered although the applicant had been out of the workplace for years prior to the assessment period, the Tribunal, while purporting to discuss the third *Flentjar* question, considered factors which contributed to the applicant's decision to stop work in 2005 and it did not address the assessment period. The possibility that advancing age and lack of recent experience were additional preventative factors did not arise. The Tribunal's failure to ask the hypothetical question in relation to the third *Flentjar* question to which it was potentially relevant or in relation to the fourth question in the Court's opinion was an error and ground 2A was established.

Grounds 2B and 3

Erred in using consequences of the applicant's war caused disability as a reason to deny entitlement to the special rate of pension,

The Tribunal properly failed to accord procedural fairness to the applicant by failing to respond to a substantial, clearly articulated argument that the applicant's frustration at the teaching environment was a consequence of his war caused psychiatric injury

The Court noted the authorities establish that a consequence of a war caused condition may not be relied on to exclude a veteran from satisfying the alone test in s24(1)(c).

The Court considered there is no basis on which the Court can conclude that the applicant's frustration was the consequence of the war caused condition.

The Court observed that there is a distinction between the Tribunal's failure to accept the applicant's frustration as part of his war caused condition and its failure to consider the applicant's submissions and evidence on that question.

The Court considered the Tribunal's observations were too oblique to establish that it recognised and considered the applicant's submissions. The Court found ground 2B was not established but ground 3 was established.

Ground 4

The Tribunal failed to provide adequate reasons for its decision.

The Court considered the Tribunal's answer to the third *Flentjar* question did not follow from its findings. It did not sufficiently explain its reasoning on that question. The Tribunal did not make clear whether it deemed it unnecessary to address the fourth *Flentjar* question and if not, why not. To the extent that it purported to address the second limb of s24(1)(c) by reference to s24(2)(a).

The Tribunal merely stated a conclusion and did not expose its reasoning on which of the alternative criteria in s24(2)(a) it relied.

The Court therefore considered the Tribunal's reasons inadequate and the

error alleged in ground 4 was established.

**Schulz v Repatriation
Commission**

Formal decision

Dowsett J

The appeal was allowed.

[2014] FCA 387

22 April 2014



Editorial note

The Full Court's decision in *Smith v Repatriation Commission* summarised later in this edition contradicts this decision. This decision was appealed to the Full Court of the Federal Court, and the case summary of the Full Court's decision is included at the end of this section.

Where statement of principles did not support a reasonable hypothesis - whether Repatriation Commission required to exercise power under s180A of the VEA

Facts

Dr Schulz had operational service with the Royal New Zealand Army Medical Corps in Vietnam from 9 February 1971 until 26 August 1971. For the purposes of the VEA, Dr Schulz's New Zealand service was treated in the same way as would similar service by an Australian veteran.

On 23 February 2011 Dr Schulz lodged a disability pension claim for ischaemic heart disease, hypertension and peritoneal adhesions. Dr Schultz's claim was rejected by a delegate of the Repatriation Commission (the Commission) on the basis that none of his conditions could be related to his operational service, having regard to the relevant Statement of Principles (SoP).

The Veterans' Review Board (VRB) determined that Dr Schulz's peritoneal adhesions were war-caused and remitted this aspect of the matter, but otherwise affirmed the Commission's decision.

Dr Schultz sought further review by the Administrative Appeals Tribunal (the Tribunal).

Issues before the Tribunal

The Tribunal summarised Dr Schulz's arguments as follows:

Specifically, Dr Schultz argues that taking account of the material which lead (sic) to an amendment to the Act in 1994, the Repatriation Commission (and the Veterans' Review Board) was obliged to apply s 180A of the Act and to draft a legislative instrument making him eligible for a pension for the conditions of hypertension and IHD, which, on his submissions, resulted from exposure to Agent Orange in South Vietnam.

The Commission submitted that Dr Schultz's case raised three questions:

- is the Commission required to invoke s 180A in assessing an applicant's claim;
- if it does not make a determination pursuant to s 180A, is there a "reviewable decision" under s 175 of the Act; and
- if the claim is refused, and the respondent does not make a determination under s 180A, can the Tribunal make a determination under that section?

The Tribunal concluded these three questions should be answered as follows:

- the Commission was not "required" to invoke s180A to "further answer" Dr Schultz's claim;
- the failure to make a decision under s180A was not a "reviewable decision" under s 175 of the Act; and
- The AAT could not make a determination under s 180A as it had no legislative or delegated power to do so.

The Court's consideration

The Court considered the error in the Tribunal's approach of answering the three questions was that it shifted the focus away from ss 19, 120 and 120A (pursuant to which the original decision was made) and focussed on s 180A (which was only relevant to the decision making process to the extent that Dr Schulz could establish such relevance).

The Court noted the Tribunal has jurisdiction to review decisions of the Commission and the VRB pursuant to s 175 of the Act, and the only relevant type of decision in this case seems to be those made in connection with claims for pensions and/or allowances pursuant to s135. Thus it seems a decision pursuant to s180A will only be reviewable by the Tribunal if it is the case, as submitted by Dr Schultz, that the Commission must, in considering an application for a pension (which otherwise lacks the support of any SoP), consider whether to exercise its power under s180A.

The Court turned to the procedure to be adopted in considering any application pursuant to s19 (determination of claims and applications):

...that section itself identifies the material to which the Commission must have regard. However ss 120 and 120A are primarily relevant for present purposes. Section 120(1) must be read in light of s 120(3), at least for present purposes. As was pointed out in *Deledio* the first step is to identify any hypothesis connecting the injury, disease or death with the circumstances of the veteran's service. The second step is to consider the reasonableness or otherwise of the hypothesis, "reasonableness" having the meaning attributed to it by s 120A(3). An hypothesis will only be reasonable if there is in force, either a statement of principles or a determination of the Commission under s 180A(2) upholding the hypothesis. Clearly, s 120A(3) refers to an existing statement of principles and/or determination upholding the hypothesis. There is no suggestion that in the absence of any reasonable hypothesis, the Commission is to exercise its power pursuant to s 180A in order to remedy such absence.

The Court concluded it did not follow that where a veteran's particular claim is not supported by an existing SoP or a

determination pursuant to s180A, the Commission must therefore consider whether or not to exercise its powers under that section.

Smith v Repatriation Commission

Rares, Buchanan and Foster JJ

[2014] FCAFC 53

1 May 2014

Formal decision

The appeal was dismissed.



Editorial note

In its decision the Court outlined the options under the VEA to a veteran who lacks the support of a SoP or a determination under s 180A. A person can apply to the Repatriation Medical Authority under s196E for a determination of a SoP or the variation of an existing SoP. If unsuccessful, the person may apply to the Specialist Medical Review Council under s196Y for review. After that process has been completed, the Commission may consider whether or not to exercise its powers pursuant to s180A. As stated by the Court, “s 180A vests power in the Commission but does not create personal rights vested in any veteran.”

Application for increase to rate of pension – whether efforts to obtain work before the assessment period were relevant – whether entitlement to intermediate rate of pension should also have been considered.

Facts

Mr Smith appealed to the Federal Court from a decision of the Administrative Appeals Tribunal (AAT) that determined he was not entitled to the special rate of pension. In its decision the AAT determined that in relation to s24(2)(b) of the VEA, Mr Smith’s attempt to obtain remunerative work had not occurred during the assessment period. The AAT therefore held that Mr Smith did not satisfy s24(1)(c) of the VEA and was not eligible for special rate. Gordon J of the Federal Court dismissed the appeal. Mr Smith then appealed to the Full Federal Court.

Appeal to the Federal Court and decision of Primary Judge

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

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

The Federal Court agreed with the reasoning of the AAT and dismissed the appeal. However, the Court went on to say that s24(2)(b) **deals with veterans who, following military service, cannot work**. The Court noted it applies to a veteran “who has not been engaged in remunerative work”. Mr Smith had a work history and was therefore a person who needed to satisfy s24(1)(c). Section 24(1)(c) refers to “remunerative work

that the veteran *was* undertaking”. Section 24(2)(b) simply refers to “remunerative work”. That phrase in s24(2)(b) would extend to remunerative work that he would, but for the incapacity, be continuing so to seek. It cannot refer to work the veteran has actually undertaken because the section is directed to veterans **who have not been engaged in remunerative work**.

Issues of law before the Full Federal Court

- Whether the prerequisite in s24(2)(b) that an applicant be genuinely seeking remunerative work had to be met during the assessment period.
- Whether the Court went beyond the scope of the question before it and concluded that s24(2)(b) could only apply to veterans who, following military service, could not work and therefore meet the description of a veteran “who has not been engaged in remunerative work”, in the words of s24(2)(b).

Grounds of appeal to the Full Federal Court

1. Does s24(2)(b) of the VEA Act apply only to veterans who have no work history following military service.
2. Does 24(2)(b) of the VEA Act require a veteran to satisfy the relevant decision-maker that he or she had been genuinely seeking remunerative work during the assessment period.
3. Does 24(1)(c) of the VEA Act require identification of the remunerative work that the veteran was undertaking before he or she became incapacitated and does that subsection require consideration of whether the veteran's incapacity was attributable to the veteran's war caused injury or war caused disease alone, and if not, does that subsection require a determination whether the veteran's incapacity was the substantial cause of the veteran's inability to obtain remunerative work in which to engage?

The Court's consideration

The Full Court came to the conclusion that efforts to obtain employment before

the commencement of the assessment period could also be taken into account when deciding whether genuine efforts had been made for the purposes of s24(2)(b).

The Full Court also noted that that s24(2)(b) was not confined in its operation to veterans who did not or could not work following military service.

Failure to address whether s23 applied to the veteran was also considered to be an additional ground to set aside the decision.

Justices Rares, Buchanan and Foster each gave separate reasons for their judgment.

Reasons for Judgment - RARES J

Justice Rares noted that the primary Judge held that because Mr Smith had a work history, he needed to satisfy s24(1)(c) and that the benefits of s24(2)(b) could never apply to him. The primary judge reasoned that the expression "who has **not been** engaged in remunerative work" in s24(2)(b) supported that construction.

Justice Rares considered this reasoning to be incorrect.

Section 24(2)(b) can apply to a veteran who has never been engaged in remunerative work and to one who had, but for any reason, subsequently ceased work, and later sought to obtain remunerative work.

Justice Rares also considered the veteran must sincerely or honestly be doing something in an attempt to try to engage in remunerative work. In *Leane's* case it was held that it was not essential that there be objective signs of active pursuit or work. They gave an example of a veteran who honestly wished to engage in remunerative work, had made a reasonable assessment of his or her disabilities, had reasonably concluded that he or she could only be employed in a particular type of work, was checking employment advertisements on the lookout for such work, but had not yet identified any such employment prospect.

Justice Rares also determined that s23(3)(b) could be relied on by a veteran who genuinely has been seeking to engage in more, or greater amount of, remunerative work. The genuine seeking

referred to in s23(3)(b) will usually be in relation to obtaining increased hours of work over and above what the veteran has been able to achieve.

Justice Rares noted the reason that a veteran would wish to apply for pension under s23 is because, despite his or her attempts to get more work, it is not available when the application under s15 is received. Subsequent attempts to obtain more work may be relevant, but they cannot be essential for the decision-maker's assessment. That is because the existing facts, at the commencing date of the assessment period, often will reflect that the veteran at that date has been genuinely seeking to engage in remunerative work i.e. ss23(3)(b) and 24(2)(b) refer to historical seeking, and do not require subsequent genuine seeking of remunerative work.

Reasons for Judgment - BUCHANAN J

In Justice Buchanan's view s24(2)(b) accommodates a cessation of earlier remunerative work as well as a circumstance where a veteran has not worked since injury or since incapacity.

Justice Buchanan also disagreed with the primary judge, who took the view that s24(2)(b) only operated where a veteran had not been engaged in remunerative work at all since becoming incapacitated. This approach of the primary judge appears to have been accepted in the recent Federal Court case of *Richmond*. This view was not the approach the Full Court stated should be applied.

Justice Buchanan's view was that the test in s24(2)(b) is one to be applied at the time when the assessment is required to be made under s19(5C). A veteran who has not been engaged in remunerative work at a particular point in time (i.e. before or during the assessment period) may nevertheless satisfy s24(1)(c) by demonstrating that there has been a genuine effort to engage in remunerative work, which effort would continue but for the incapacity.

Justice Buchanan noted at [52]:

On the view taken by the AAT, the appellant was disentitled to the benefit of s24 by reason of the fact that s24(2)(a)(i) applied to the remunerative work that he had earlier been undertaking, namely that he ceased that work for reasons other than his

accepted incapacity. The AAT then took the view that efforts to find work earlier than the assessment period should not be taken into account so that s24(2)(b) was not engaged. The latter finding, in my respectful view, **was an error of law which was not corrected by the primary judge.**

Justice Buchanan considered the AAT made two errors of law.

1. the AAT disregarded the efforts made by the applicant to obtain work before the commencement of the assessment period.
2. there was a requirement to address whether any entitlement arose under s23. Such an assessment is prima facie required by s19(5C) and (6) of the Act.

Justice Buchanan noted in particular at [70]:

I see no reason why a veteran would be disentitled to make an application for an increase in pension if he or she had ceased to work for particular reasons at one point in time, then commenced genuine efforts to find work and was prevented only by a war caused injury or disease from obtaining such work. Ceasing to work

at a particular time for reasons other than war caused injury or disease, including for reasons which might be entirely beyond the control of the veteran (such as redundancy), is not a permanently disentitling circumstance. Nor is it necessary to make efforts during an assessment period which might be futile and humiliating if there is adequate evidence before an application is made that genuine efforts have been made to obtain employment.

(Emphasis added)

Reasons for Judgment - Foster J

Justice Foster noted the primary judge held that s24(2)(b) applies only to veterans who have not been engaged in any remunerative work since ceasing military service. Justice Foster respectfully disagreed and noted the starting point for considering whether s24 is engaged at all in any given case is a finding that the veteran is totally and permanently incapacitated (within the meaning of s24(1)(b)) from a war caused condition. Also noting that such incapacity may be complete at the point in time when the veteran ceased military

service or it may only become complete at some later time. It is the veteran's incapacity which triggers the potential engagement of s24, not the cessation of his or her military service.

Justice Foster considered that a veteran who has not worked at all since becoming incapacitated or who has ceased engaging in remunerative work for reasons which include incapacity brought about by war caused injury will be and should be entitled to a pension at a higher rate if he or she has been genuinely seeking to engage in remunerative work.

He determined that **there is no requirement in the VEA for the purpose of s24(2)(b), that the veteran be genuinely seeking work during the assessment period.**

Justice Foster stated at [185]:

The correct position is that the criteria for securing an increase to a higher rate of pension laid down in s23 and s24 must be satisfied at some time during the assessment period. This is the effect of the language of the statute (ss19(5C), 19(6), 23 and 24) and the Full Court decision in *Leane v Repatriation Commission* [2004] FCAFC 83. In

considering whether those criteria have been met at any time in the assessment period, the Court is entitled to have regard to circumstances which obtained prior to the commencement of that period.

Justice Foster also considered s24(1)(c) **does** require the identification of the remunerative work that the veteran was undertaking before he or she became incapacitated.

Formal decision

Appeal was allowed with costs and the decision of the Tribunal set aside. The matter be remitted to the Tribunal for further consideration by it according to law and in light of the Full Court's judgment. The Full Court in particular noted that further consideration should relate to the whole of the appellant's application for a pension increase.



Editorial note

Specifically, the Full Court clarified the position in relation to what is required when demonstrating a genuine effort to obtain employment in

order to gain the benefit of s24(2)(b). The issue arises where there are other factors preventing satisfaction of 24(1)(c) but the **substantial cause** of prevention is the war caused conditions. The benefit only arises where the applicant can demonstrate a genuine effort to obtain work.

The Full Court considered the earlier Federal Court judgments in *Smith v Repatriation Commission* [2012] FCA 1043 and *Richmond v Repatriation Commission* [2014] FCA 272 erred on this point of law. Those cases indicated that the genuine effort to obtain employment can only be during the assessment period.

In this case the Full Court clearly stated that efforts to obtain employment before the commencement of the assessment period could also be taken into account.

The Full Court also noted that s24(2)(b) was **not confined** in its operation to veterans who did not or could not work following military service.

Repatriation Commission v Holden

Mortimer J

[2014] FCA 605

12 June 2014

Widow's pension claim - whether Tribunal erred in construction of phrase "sufficient to warrant ongoing management" - whether there was no evidence on which the Tribunal's conclusions could be based - whether the Tribunal complied with the requirement to give reasons under s43 of the AAT Act

Facts

Mr Holden had operational service during WWII with the Australian Army from 17 April 1944 to 12 November 1946, primarily on small army ships in the south-west Pacific region.

After Mr Holden's death in August 2011, Mrs Holden lodged a war widows' claim. Her claim was refused by a delegate of the Repatriation Commission (the Commission). The Veterans' Review Board affirmed the Commission's decision. Mrs Holden sought further review by the Administrative Appeals Tribunal (the Tribunal), and she was successful. The Tribunal set aside the

Commission's decision and substituted a decision that Mrs Holden be granted a war widow's pension. The Commission appealed to the Federal Court.

The Tribunal's decision

The hypothesis put forward on behalf of Mrs Holden was that Mr Holden's death from ischaemic heart disease (IHD) was war-caused, because there were events during his service which caused him to develop post traumatic stress disorder (PTSD), and PTSD was a factor in his development of IHD.

On review the Tribunal identified three issues. Firstly, the "kind of death" suffered by the veteran, which the Tribunal found to be ischaemic heart disease. This was not contested on appeal.

Secondly, whether the veteran suffered from PTSD and, if so, whether it was war-caused. The parties accepted this question involved a posthumous diagnosis, mainly by reference to accounts by Mrs Holden and documentary information, including clinical records. The Tribunal focussed on one "traumatic event" for the purposes of a diagnosis of PTSD, which

was Mr Holden's experience of a severe storm off the coast of Papua New Guinea which flooded the supply ship to which he was assigned and made everyone on board sick. The ship had to be towed to safety and repaired. Accounts given by Mr Holden to his wife in 2010, and a psychiatrist in 2009, involved descriptions that he thought the ship was going to sink and he was terrified he would die. The Tribunal preferred the opinions of two psychiatrists (one of whom had undertaken a consultation with Mr and Mrs Holden before Mr Holden died) over the opinion of a neuropsychologist, in concluding Mr Holden met the diagnostic criteria set out in the relevant Statement of Principles (SoP) concerning PTSD. The Tribunal then went through the *Deledio* steps and concluded that Mr Holden's PTSD was war-caused, finding the clinical onset of PTSD occurred after Mr Holden's operational service.

Thirdly, whether the veteran's PTSD contributed to his death from IHD. The questions of law raised by the Commission on appeal relate to paragraphs [47] - [49] of the Tribunal's reasons:

In relation to the third step from *Deledio* the Tribunal has considered all the material and forms the opinion that the hypothesis raised is a reasonable one. Therefore the veteran satisfies the third step.

In relation to the fourth step from *Deledio*, the Tribunal finds that the veteran's PTSD **was sufficient to warrant ongoing management, even though there is no evidence that he visited a psychiatrist, clinical psychologist or general practitioner.** Consequently the veteran's PTSD was a *clinically significant anxiety spectrum disorder* and the veteran satisfies factor 6(rr)(iv) of SoP N^o 89 of 2007 (as amended by SoP N^o 43 of 2009) and satisfies the fourth step. The Tribunal is not satisfied, beyond reasonable doubt, that there is no sufficient ground for making a determination that the veteran's IHD contributed to his death. Therefore his death was war-caused within the meaning of [s 8](#) of the Act. Consequently there is no need for the Tribunal to make a finding as to the causal connection between the veteran's IHD and hypertension.

(Emphasis added.)

The Court's consideration

The first question of law was whether the Tribunal correctly construed the phrase “sufficient to warrant ongoing management” for the purposes of the relevant SoP. The Court was of the opinion that the Tribunal’s reasons did not disclose any misconstruction of that phrase. The parties agreed that the phrase is not directed solely at whether in fact a veteran obtained management for a clinically significant anxiety spectrum disorder, rather “sufficient to warrant” refers to an objective judgment to be made by the Tribunal on the basis of the evidence at the time of the review. Counsel for the Commission conceded the phrase does not require that there be any expert or medical opinion that management of the condition is warranted, and accepted that “warrant” means in this context “justify”. The Court indicated that, construed as a whole, the phrase is clearly intended to require a decision-maker to form an opinion about the level or severity of the PTSD condition suffered by the veteran. The Court considered a fair reading of earlier parts of the Tribunal’s reasons shows an awareness of the need to look for a level of PTSD which was clinically

significant, and which required ongoing management as an indicator of severity.

Through its second question of law, the Commission contended that the Court should find there was no evidence on which the Tribunal’s conclusions at [47] - [48] of its reasons were based. The Commission conceded that this contention presented a high threshold, as well as involving an analysis which, if not carefully delineated, could slide into a review of the merits of the decision. The Court considered the real problem was the failure of the Tribunal to identify the evidence or material on which it based its findings, and it was not a case where there was no foundation in the evidence or material on which the Tribunal could base its finding that Mr Holden’s PTSD was a disorder of sufficient severity to warrant ongoing management. The Court gave examples of medical evidence from Mr Holden’s treating doctor and the two psychiatrists, which, together with Mrs Holden’s evidence, were all capable of providing an evidentiary foundation for the Tribunal’s findings.

The third question of law concerned the Tribunal’s obligations to give reasons pursuant to ss 43(2) and 43(2B) of the

AAT Act. Regarding s 43(2B), the Court considered the obligation was twofold:

[77] ...The Tribunal must set out its findings on material questions of fact, and it must include “a reference” to the evidence or other material on which those findings are based...

After reviewing the relevant case law regarding the s 43(2B) obligation, the Court considered there was only partial, and insufficient, compliance by the Tribunal with s 43(2B). At [48] of its reasons, the Tribunal made a finding on material facts, but it did not explain why it had done so, or include any reference to the evidence or other material on which its finding was based. The Tribunal was required to record in more detail its explanation of the findings it made.

Formal decision

The appeal was allowed. The Tribunal’s decision was set aside, and the Court directed the Tribunal to provide further reasons for its findings at [48] and make a fresh decision under s 43(1), together with those further reasons.



Editorial note

The Court noted its decision preserves the ability of the Tribunal to make a different decision on the review if, after further exposition of its reasoning process, it considers a different decision to be the correct or preferable one. It strikes a balance between addressing the complaint made by the Commission, which the Court upheld, preserving the Commission’s appeal rights if error is revealed, but gave effect to the clear merits of the decision as seen by the Tribunal.

**Summers v Repatriation
Commission**

Mortimer J

[2014] FCA 608
12 June 2013

Appeal from decision of AAT to refuse an increase in rate of pension - cross-appeal from decision of AAT that applicant suffered from PTSD - whether the Tribunal erred in its conclusion that alcohol dependence was not war-caused

Facts

Mr Summers served in the Australian Army from 12 July 1967 to 11 July 1969. He experienced operational service in South Vietnam from 23 June 1968 until 14 October 1968. In Vietnam, the applicant was stationed at Vung Tau and operated the Other Ranks canteen. After three and a half months, the applicant's father died and the applicant returned to Melbourne. After attending his father's funeral in Melbourne, the applicant was sent to Sydney in preparation for his return to Vietnam. While in Sydney, the applicant was involved in an altercation with a group of sailors near Watson's Bay which resulted in him falling over a cliff. This occurred while he was still on emergency

leave on compassionate grounds, which constitutes operational service.

Mr Summers made a disability pension claim for post traumatic stress disorder (PTSD) and alcohol dependence, and sought an increased rate of pension. This claim has been dealt with by the Administrative Appeals Tribunal (the Tribunal), the Federal Court, the Full Court of the Federal Court, and again by the Tribunal. It returns for a second time to the Federal Court.

The Tribunal's decision

When the case returned to the Tribunal, it decided that Mr Summers' PTSD was war-caused, but alcohol dependence was not. As alcohol dependence was one of the reasons Mr Summers was not able to work, he was not entitled to either an intermediate or a special rate of pension. Mr Summers appealed to the Federal Court against the Tribunal's finding that his alcohol dependence was not war-caused, and the Tribunal's conclusion he was not entitled to an increased rate of pension. The Commission lodged a cross-appeal against the decision of the

Tribunal that Mr Summers' PTSD was war-caused.

The Court's consideration

Alcohol dependence

The first four questions of law identified in Mr Summers' appeal related to the Tribunal's finding about his alcohol dependence. Question 1 focussed on the Tribunal's construction of specific factors in cl 3(b) of the relevant Statement of Principles (SoP), which act as indicators of the definition of "alcohol dependence":

- The Court noted that cl 3(b) requires that the decision-maker be satisfied that three or more factors manifested themselves within the "same" 12-month period. The Tribunal correctly examined whether there was any 12-month period, not just one year from October 1968 as submitted by the applicant.
- Next, it was submitted that the factor in **cl 3(b)(5)** (a great deal of time is spend in activities necessary to obtain the alcohol, use the alcohol or recover from its effects) requires a "weighing and balancing" exercise.

The Court considered the decision-maker must make a factual finding about how much time the veteran spent on these activities and whether, proportionally to the rest of the veteran's life, the decision-maker's opinion is that it was a "great deal" of time. There was nothing in the Tribunal's approach to suggest it misunderstood the task required.

- There was no substance to the applicant's argument that the Tribunal misinterpreted **cl 3(b)(6)** because it required the veteran to have given up important social *and* occupational *and* recreational activities, or two of these activities - not just one. The Tribunal correctly looked for some specific identification of activities a veteran has forgone or avoided, and did not construe this factor too strictly as suggested by the applicant.
- The Court also indicated the Tribunal did not impermissibly impose any onus on the applicant to prove or persuade the decision-maker of the matters within **cl 6(b)(7)**.

Questions 2 and 3 centred on the way the Tribunal went about its fact finding on the factors in cl 3(b). The Court stated the two findings in issue represent the Tribunal's conclusion having examined the evidence, and the Tribunal was entitled to point to gaps in the evidence which meant the applicant could not satisfy particular factors within cl 3(b).

Question 4 related to the Tribunal's compliance with its obligations under s 43(2B) of the AAT Act concerning the reasons why it was not satisfied the applicant met the criteria in cl 3(b). The level of generality of the applicant's evidence was reflected in the way the Tribunal explained its reasoning, so the Court was of the opinion the Tribunal did not fail to comply with its statutory obligations.

Rate of pension

The other six questions of law related to the Tribunal's findings about ss 23 and 24 of the Act. Question 5 concerned the Tribunal's interpretation of the word "loss" in s 24(1)(c) and s 24(2)(a) of the Act. As the Tribunal answered the third step of *Flentjar* adversely to the applicant, and did not proceed to the fourth step of

whether the applicant was "suffering a loss" within s 24(1)(c) itself, the Court considered there was no misconstruction. The Court rejected the applicant's submission that the Tribunal took an erroneous approach to s 24(2)(a). Given that the Tribunal had already found the applicant did not meet the "substantial cause" test in s 24(2)(b), its approach to s 24(2)(a) was not material to its conclusion that the applicant could not obtain the benefit of the ameliorating provision in s 24(2)(b).

Question 7 challenged the Tribunal's interpretation of the phrase "genuinely seeking to engage in remunerative work" in s 24(2)(b) of the Act. The applicant's submission invited the Court to disagree with the Tribunal's view of the evidence, which was not part of the Court's function.

Question 9 contended the Tribunal took into account irrelevant considerations of age and the state of the retail industry for the purposes of identifying the "substantial cause" of Mr Summers' inability to engage in remunerative work. The Court considered the Tribunal was undertaking a factual inquiry into why the applicant had not been able to find remunerative work, and it was open to

the Tribunal to accept the applicant's own evidence on these issues, and rely on them in forming its conclusions.

Finally, questions 6, 8 and 10 related to the Tribunal's compliance with its obligations under s 43(2B) of the AAT Act in relation to the above findings under s 24(1)(c) and 24(2). The Court was satisfied the Tribunal's reasons exposed its reasoning process in a way that complied with its statutory obligations.

PTSD

In relation to the cross-appeal, the question of law raised was whether the Tribunal failed to make material findings of fact for it to determine that Mr Summers suffered PTSD. The Court considered the Tribunal discharged its obligations under ss 43(2) and (2B) of the AAT Act, and the Commission's contentions sought to try and have the Court interrogate the Tribunal's findings on the merits or provide a further explanation to the satisfaction of the Commission.

Formal decision

The appeal and cross-appeal were dismissed.



Editorial note

This case dealt with quite narrow issues about the diagnostic factors for alcohol dependence, statutory interpretation of s 24(1)(c) and s 24(2) of the VEA, and compliance with ss 43(2) and (2B) of the AAT Act. The Court also made the general point that it is well established that, in applying a SoP to the evidence and material before it, the decision-maker is to form an opinion whether a veteran is or is not suffering from a particular condition: see *O'Dowd v Repatriation Commission* [2013] FCA 991 and the cases there referred to. The decision-maker does not delegate or defer to any medical evidence on this matter, although clearly such evidence may be given weight. For example, whether Mr Summers did or did not suffer from PTSD was a conclusion the Tribunal needed to reach for itself, applying the diagnostic criteria in DSM-IV and taking into account all the evidence and other material before it.

**McKenzie v Repatriation
Commission**

Murphy J

[2014] FCA 777

25 July 2014

***Whether Tribunal erred in finding
there is no material to show a
reasonable hypothesis***

Facts

The applicant, Mrs McKenzie, applied for a war widow's pension. The essence of her claim was that due to peer group pressure, stress and boredom of his operational service in the Philippines, Mr McKenzie commenced to smoke 10-15 cigarettes per day and continued to do so until 1952. The applicant claims that Mr McKenzie's smoking habit caused him to suffer oesophageal cancer. Mr McKenzie died as a result of cardiomyopathy contributed to by treatment for oesophageal cancer.

The Repatriation Commission refused her application on 20 November 2009 and Mrs McKenzie appealed to the Administrative Appeals Tribunal which also rejected her claim.

The applicant then appealed to the Federal Court.

The Federal Court considered that in dealing with Mrs McKenzie's claim the Tribunal failed to correctly apply s120(3) of the Act, as affected by 120A, and did not properly follow the decision-making process described by the Full Court in *Deledio*.

Grounds of appeal

The notice of appeal alleged two questions of law:

1. Whether there was any material before the Tribunal which pointed to a hypothesis connected with the veteran's war service that the malignant neoplasm of the oesophagus which contributed to his death had been caused by his having smoked at least five pack years of cigarettes during a period which commenced at least five years before the clinical onset of the disease.
2. Whether it was open on the material before the Tribunal for it to have concluded that there was no material pointing to the hypothesis.

The Court's consideration

The Court noted the Tribunal was required to form an opinion as to whether the evidence before it pointed to the existence of the required criteria in SoP No. 41. If it did then the SoP would uphold the asserted hypothesis and it would be a reasonable one. The real question was whether in making a factual assessment in order to form an opinion the Tribunal crossed the dividing line and descended into impermissible fact finding.

The Court considered at [54]:

The Tribunal's task at this stage of the s120(3) inquiry was to form an opinion as to whether SoP No.41 upheld the asserted hypothesis. The authorities show that it would do so if the evidence before it pointed to Mr McKenzie having smoked the required minimum quantity of cigarettes or other tobacco products. But instead of looking at what facts were pointed to or raised by the evidence the Tribunal engaged in a process of weighing the evidence, preferring some parts of it to others parts, and ultimately rejecting some of it. It also used the discourse of fact finding. I consider the Tribunal

misunderstood its task under s120(3) and asked itself the wrong question. It did not follow step 3 of the *Deledio* process.

The Court considered the Tribunal descended into impermissible fact finding when it concluded there was **no material** pointing to Mr McKenzie's consumption of cigarettes in light of all the evidence.

The Tribunal was obliged to consider all of the evidence before it, not just some of it. The Court noted the Tribunal was not permitted at step 3 of the *Deledio* process to reject some of the evidence or to engage in fact finding.

However, the Court noted the Tribunal's conclusion that there was no material pointing to Mr McKenzie having consumed the required minimum quantity of cigarettes and other tobacco products must be seen as a rejection of Mrs McKenzie's evidence, that he expressly told her that he smoked 10-15 cigarettes per day. The Tribunal's conclusion that Mrs McKenzie did not know how many cigarettes Mr McKenzie smoked and that her evidence as to his cigarette consumption was speculation

was also be seen as a rejection of that evidence.

The Court considered these conclusions indicated that the Tribunal evaluated and selectively dealt with the material before it, and that it was finding facts rather than simply identifying the raised facts.

The Court also noted that in finding there was “no material” the Tribunal used the language of fact finding.

In the Court’s view:

1. Mrs McKenzie’s evidence that Mr McKenzie told her that he smoked 10-15 cigarettes per day which commenced while he was on operational service and continued until 1952;
2. Janene McKenzie’s evidence that Mr McKenzie told her that he was a “keen smoker”, and that he smoked anything that he could get his hands on, that on return from service he smoked at work to the point that it was inconvenient, and that he smoked “a lot”; and
3. the evidence in Mr McKenzie’s letters home of his consumption of cigarettes and other tobacco products while on service;

clearly pointed to or raised that Mr McKenzie consumed five pack years of cigarettes which is the minimum provided by SoP No. 41.

In the Court’s view the Tribunal’s decision that the material before it did not point to that conclusion was made on the facts as found by it and not on the facts **as raised by the evidence**.

Formal decision

The appeal was allowed. The Court was satisfied the Tribunal erred in its application of s120(3) as affected by s120A, and engaged in impermissible fact finding at step 3 of the *Deledio* process.



Editorial note

This appeal concerned the application of s120(3) of the Act in reference to the decision making exercise set out by the Full Court in *Deledio*.

Murphy J noted that apart from the one qualification, the four step process in *Deledio* has been consistently endorsed and applied in numerous single judge and appellate decisions. The qualification

being – that the second sentence in the second paragraph of Deledio being “ *If no SoP is in force, the hypothesis will be taken not to be reasonable and, in consequence, the application must fail*” is not correct and was noted by the Full Court in *Woodward v Repatriation Commission* [2003] FCAFC 160.

Murphy J also noted that the case of *East v Repatriation Commission* [1987] FCA 242 stands for the well accepted proposition that the relevant element of an asserted hypothesis must be “pointed to” or “raised” by the evidence, and not merely left open. *East* also does not require, at that stage of the inquiry, that each factual element of the hypothesis be proved by making findings on conflicting evidence or that precise evidence be adduced to finally make out each element.

Please refer to the recent Federal Court case of *Forrester v Repatriation Commission* [2013] FCA 898, for further guidance on the decision making process as set out in *Deledio*. The practice note is in *VerBosity* Volume 28 at page 55.

Further decision - 16 September 2014

In the Court’s reasons for judgment on 25 July 2014, the Court set out its preliminary view that if the matter is remitted to the Tribunal for rehearing only one result is reasonably open, and that the Court should make a factual finding under s44(7) of the *Administrative Appeals Tribunal Act 1975* (AAT Act). The Court directed the parties to provide further submissions as to relief.

Following the parties’ submissions, the Court considered it should make a factual finding under s44(7). The Court noted at [16]:

The power to make factual findings is only to be exercised in the limited circumstances described in s 44(7), but these circumstances do not include any requirement to have the same evidence before the Court as was before the Tribunal. It does though include a requirement that the evidence be sufficient to make the finding.

The Court considered it was likely that all available evidence of significance regarding the extent of Mr McKenzie’s cigarette and tobacco consumption was

before it, due to the Tribunal's detailed summary of evidence, and because - given the opportunity to identify the evidence that was not before the Court - the Commission did not identify any evidence of significance.

The Court went on to justify why it was appropriate to make a factual finding:

1. the evidence has been fully traversed by the Tribunal and there is little dispute between the parties as to the primary facts. The dispute really goes to the conclusions to be drawn from those primary facts.
2. having regard to subs 44(7)(b)(i), a factual finding is necessary as the Court's earlier conclusions were expressed in identifying the Tribunal's error of law.
3. having regard to subs 44(7)(b)(ii), the facts underpinning the finding are clear.
4. having regard to subs 44(7)(b)(iii), (iv) and (v) there can be no question that the expeditious and efficient resolution of the whole of the matter will be best achieved if the Court makes the necessary findings of fact.

5. having regard to subs 44(7)(b)(vi), the applicant seeks that the Court should make the necessary finding.

Therefore, the Court concluded at [38]:

Although it really involves mixed questions of fact and law, to the extent that step 3 of the *Deledio* process involves a factual assessment it is appropriate to find, pursuant to s 44(7), that the hypothesis asserted by Mrs McKenzie fits within the template of SoP No 41. It is common ground that the asserted hypothesis fits within the template of SoP No 23 and it therefore fits within both applicable SoPs. Step 3 of the *Deledio* process is to be decided in favour of Mrs McKenzie.

Both parties accepted that step 4 of the *Deledio* process must be decided in favour of Mrs McKenzie, given the Tribunal held at [63] of its decision that, had the asserted hypothesis fitted within the applicable SoPs, it would not have been satisfied beyond reasonable doubt that Mr McKenzie's death was not war-caused.

Therefore Mrs McKenzie was eligible for a war-widow's pension.

Watkins v Repatriation Commission

Bromberg J

[2014] FCA 787

29 July 2014

Whether a disqualifying feature of the criteria in s24(1)(c) is the existence of non war caused disabilities which contribute to but which do not of themselves prevent the veteran from undertaking remunerative work

Facts

Mr Watkins appealed a decision of the Administrative Appeals Tribunal that refused to grant a special rate pension.

The appeal to the Federal Court consisted of a number of questions of law. However, the Federal Court found the Tribunal erred on only one question. The Tribunal misconstrued s24(1)(c).

The main issue in the appeal was whether the AAT erred in holding the applicant was not eligible for a pension at the higher rate because it misconstrued s24(1)(c) of the VEA.

Section 24(1)(c) issues

The Court noted the main issue in contention was whether a disqualifying feature of the criteria is the existence of non-war caused disabilities which contribute to but do not themselves bring about the preventative effect from working.

Bromberg J expressed his view that the “alone” element is concerned with whether beyond the war caused ailments as a cause of the preventative effect, there is another or other causes that have also brought about the preventative effect.

Willis and Forbes cases

As Bromberg J said at [28]

...in *Willis* at [28], the assessment to be made does not look to combinations of the kind which was referred to in *Forbes* at [39], because it proceeds on the basis that the war caused ailments must of themselves, unaided by other factors, be causative of the preventative effect. Once that is appreciated, it must logically follow that the alone element is addressing whether another factor with the same preventative effect exists.

Gordon J decision in Smith

The Court noted what Gordon J indentified in *Smith v Repatriation Commission* [2012] FCA 1043 as the question posed by 24(1)(c), in that it requires the AAT undertake a hypothetical exercise. What would the veteran have done but for the war caused incapacity? If the answer is the same, then that war caused incapacity cannot be said to have been the reason, rather than merely *a* reason, for the veteran's inability to engage in the remunerative work which the veteran had previously done.

The Court noted that the first instance judgment in *Smith* was the subject of further appeal. However the approach to the alone test followed by Gordon J was not the subject of that appeal.

Buchanan and Foster J decision in Smith (No 2)

The Court also noted that there were a number of aspects of the Full Court's decision in *Smith* (No 2) which were of assistance and that Buchanan and Foster JJ made observations consistent

with the approach taken by Gordon J in relation to the 'alone' element.

The operation of s24(1)(c) was noted at [48] of that decision:

...s24(1)(c) is capable of being informed by the provisions of s24(2). The overall effect of s24(1)(c) may be summarised as one which requires a demonstrated loss of earnings as the direct result of the war related incapacity, and only for that reason. Section 24(2)a supplements the requirements of s24(1)(c) by indentifying specific circumstances which will cause it not to be satisfied. Those circumstances, in effect, state the opposite conditions in s24(1)(c) itself.. . Thus, there is no established loss of earnings by reason of the incapacity if remunerative work was ceased for other reasons (s24(2)(a)(i)) , or if the veteran is also incapacitated or prevented from doing remunerative work for some other reason (s24(2)(a)(ii). In this assessment of course it continues to be accepted that the veteran is actually incapacitated in any event. The purpose of the enquiry is to see whether, nevertheless, there are other explanations for economic

loss so that incapacity is not the only reason for it.

As noted by Buchanan J, the assessment required to be made is based upon an acceptance that the veteran is incapacitated from working by reason of his or her war caused ailments. The purpose of the enquiry is to see whether, nevertheless, there are other explanations for the economic loss caused by the veteran's inability to work. The Court also noted that such an enquiry must necessarily put to one side the preventative effect of the war caused ailments. The necessity for those other causes to, of themselves, prevent the veteran from working is reflected in the concern Buchanan J expressed as to the AAT's failure to quantify the extent to which Mr Smith's physical injuries affected his capacity to work.

The Court's consideration

The Court concluded that where a veteran suffers from both war caused ailments and non war caused disabilities, the correct approach to the alone element posed by the first causative limb of the

s24(1)(c) criteria is to ask whether, putting aside the veteran's war caused ailments and their consequences, the veteran's non war disabilities prevent the veteran from continuing to undertake the remunerative work that the veteran was undertaking? If the answer to that question is yes, it will follow that the veteran's war caused ailments are not the only cause and are not "alone" in preventing the veteran from working. In that case, the s24(1)(c) criteria will not be satisfied. Alternatively, if the answer is no, it will follow that the veteran's war caused ailments are the only cause preventing the veteran working and the first causative limb of s24(1)(c) will be satisfied.

The AAT's decision

The Court considered it was necessary for the Tribunal to determine, putting to one side Mr Watkins' war caused ailments and their consequences, whether Mr Watkins' non war caused disabilities prevented him from undertaking remunerative work as a fire fighter. On the facts as found by the Tribunal, if the answer to that question was yes, the Tribunal was entitled to

reject Mr Watkins' application for the special rate. If the answer was no, the Tribunal then needed to consider whether Mr Watkins was suffering a loss of salary or wages by reason of his war caused ailments that he would not have suffered if he were free of that incapacity.

The Court was of the opinion the Tribunal turned to consider whether the existence of non war factors had impacted upon the veteran's ability to work rather than the proper question whether the non war factors had caused that inability.

The Tribunal stated at [40]:

The Tribunal finds it unlikely that a person with Mr Watkins' health history would be employed as a fire fighter. He was almost 64 years of age at the beginning of the assessment period. It was then four years since he had actually worked as a fire fighter. There are onerous physical requirements for those working as fire fighters as well as medical standards to be met. An examination of Mr Watkins' medical history, which included chronic headaches and ataxia at the time he stopped working with those conditions continuing for some

time thereafter would be likely to rule him out of such a role as would his accepted disabilities. His age and time out of the workforce would also be likely to rule him out of reappointment to a similar role. The answer to the third *Flentjar* question is therefore no.

The Court noted the opening sentence of the Tribunal contained its ultimate finding. That finding was that it is unlikely that a person with Mr Watkins' health history would be employed as a fire fighter. The reference to health history is an obvious reference to the combination of Mr Watkins' war caused and non war caused ailments.

Specifically the Court noted that at no point in its decision did the Tribunal identify as a possibility, let alone adopt the proposition, that the correct question for it to consider was whether Mr Watkins' non war caused disabilities, looked in isolation from his war caused ailments and their consequences prevented Mr Watkins from resuming work as a fire fighter.

In Bromberg J's view the Tribunal misconstrued the meaning of s24(1)(c)

and did not address the proper question raised by the first causal limb.

Ellis v Repatriation Commission

Gordon J

[2014] FCA 847

11 August 2014

Formal decision

The appeal was allowed.



Editorial note

For further guidance on the operation of s24(1)(c)

please refer to the case summary in this edition of recent Full Court decision in *Smith v Repatriation Commission* [2014] FCAFC 53.

An example of how the AAT is applying that case to the facts is seen in the remittal decision of *Willis v Repatriation Commission* [2014] AATA 326, which is also summarised in this edition.

Widow's pension claim - whether Tribunal misconceived/misunderstood its function when applying s120(3) of the VEA - whether Tribunal considered the hypothesis put forward by the applicant

Facts

Mr Ellis served in the Australian Army during the Second World War, rendering operational service from 8 April 1942 to 11 June 1947. He died on 3 January 2012. His widow, Mrs Ellis, applied to the Repatriation Commission (Commission) for a war widow's pension. Her claim was rejected by a delegate of the Commission, and the decision was affirmed on review by the Veterans' Review Board and the Administrative Appeals Tribunal (Tribunal). Mrs Ellis appealed to the Federal Court.

Grounds of appeal

Three questions of law were identified in the appeal:

1. Whether there was any material before the [AAT] which raised or pointed to a hypothesis that was consistent with [the Diabetes Mellitus SoP].
2. Whether the [AAT] misconceived and/or misunderstood its function when applying s 120(3) of the [VE Act].
3. Whether it was open for the [AAT] to find on the material before it that the material did not point to the veteran being overweight for at least five years before the clinical onset of his diabetes.

The central issue related to question 2, as submitted by the applicant:

First, the [AAT] misstated the first hypothesis put forward by Mrs Ellis linking Mr Ellis' death with his operational service and failed to distinguish between and correctly apply the first and third *Deledio* steps.

Second, the [AAT] misapplied s 120(3) by requiring that each element of the Diabetes Mellitus SoP be supported by evidence tending to establish it when it was only necessary that the hypothesis be supported by the material before the [AAT].

Third, the [AAT] misapplied s 120(3) by embarking on fact finding at step 3 of the *Deledio* process.

The Court's consideration

1.1 "Misstatement" of the hypothesis

The Court noted the AAT stated at [37] the first hypothesis for its consideration as being:

- (a) Mr Ellis' knee injury limited his physical activity to such an extent that he became overweight;
- (b) Mr Ellis' excessive weight contributed to his developing diabetes mellitus;
- (c) the diabetes mellitus contributed to the development of carcinoma of the liver;
- (d) carcinoma of the liver caused Mr Ellis' death.

The Court indicated that the hypothesis put forward by Mrs Ellis referred to Mr Ellis being overweight with a BMI of over 25 for a period of five years before

the clinical onset of his diabetes mellitus. The Court stated at [45]:

...This detail about Mr Ellis' BMI was an essential element of the relevant SoP...The AAT had a duty to consider the particular hypothesis put forward when undertaking the first *Deledio* step...and it did not do so.

While the Court accepted that the reasons for decision of the AAT "are not to be construed minutely and finely with an eye keenly attuned to the perception of error" and must be read as a whole, citing the cases of *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6 and *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) FCR 280, the difficulty in the present case was that the AAT's reasons stated the first hypothesis incorrectly and this infected other parts of its analysis. The appeal was allowed, as the AAT asked itself the wrong question.

1.2 "Intertwining" of the first and third *Deledio* steps

Mrs Ellis submitted that in deciding whether the hypothesis was raised, the Tribunal impermissibly intertwined the first and third *Deledio* steps. In *Forrester v Repatriation Commission* [2013] FCA 898 the Court stated at [74]:

...the first step in *Deledio* has a factual element particular to the material before the decision-maker about the veteran. It is...a separate but 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 different exercises involved mean, in my opinion, that a 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 third *Deledio* step, in *Repatriation Commission v Warren* [2008] FCAFC 64 Lindgren and Bennett JJ held at [26]:

If there is an SoP in force, it must be asked whether the hypothesis of connection that is raised is a reasonable one. *It will be reasonable if the hypothesis fits, that is to say, is consistent with, the “template” to be found in the SoP. To be consistent with that template, the hypothesis raised must contain the factors that the Authority has determined to be those that must as a minimum exist..., and of those factors the hypothesis must contain the factors that the Authority has determined to be the minimum related to the person’s service that must exist If the hypothesis fits the template in these respects, it cannot be said to be contrary to proved known scientific facts or otherwise fanciful. If, on the other hand, the hypothesis fails to fit the template in these respects, it will be deemed not “reasonable” and the application fails.*

(Emphasis added).

The Court went on to indicate at [54]:

What these authorities demonstrate is two essential aspects - a hypothesis must be raised and it must be reasonable. It can be done together but it must be done. Here, the process was flawed because the AAT did not state the correct hypothesis (step 1), appeared to consider part of the correct hypothesis at some point but then returned to the incorrect hypothesis at step 3. That is an error.

2 Need for more precise evidence

Mrs Ellis submitted that the AAT’s reasoning that the first hypothesis was not consistent with the Diabetes Mellitus SoP involved a misapplication of s 120(3), as the Tribunal implied there was a need for more precise evidence. However, the Court considered there was no identified error. It was common ground that it was not necessary for every element of the hypothesis to be supported, or pointed to, by the material before the Tribunal, and it is the essential elements of the hypothesis that must be addressed.

3 Impermissible fact finding

The Court considered Mrs Ellis submission on this point did not need to be addressed, given its earlier views concerning 1.1 above, because the Tribunal's error was that it asked itself the wrong question and got the wrong answer. The Tribunal was, however, in error in finding the date of clinical onset of diabetes was in 1975. The Court noted the question of fact finding in this context has been addressed in *Deledio* and *Collins*, and the task for the Tribunal is to "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*".

4 Failing to consider all the material before it - Questions 1 and 3

Lastly, the Court addressed Mrs Ellis' submission that, contrary to the requirements of s 120(3), the Tribunal failed to consider all of the material before it in determining whether the material raised a reasonable hypothesis. The Court concluded it was enough to

say that for at least the most part the alleged omissions might be seen as supporting the conclusion otherwise reached that the Tribunal did not properly identify the question to be asked and then answered, as set out at 1.1.

Formal decision

The decision of the Tribunal was set aside and the matter was remitted to the Tribunal differently constituted to be determined according to law.



Editorial note

The Court's detailed analysis in this case centred on the Tribunal's error in misstating the hypothesis at the first *Deledio* step. At the first stage in the *Deledio* process, the Court identified the obligation or "duty to consider not merely the *particular hypothesis put forward* but also *any other hypothesis fairly raised by the evidence*": *Hill v Repatriation Commission* [2005] FCAFC 23. The Tribunal had a duty to consider the particular hypothesis put forward when

undertaking the first *Deledio* step, and it did not do so.

Besson v Repatriation Commission

Rangiah J

[2014] FCA 881
22 August 2014

Application for extension of time - veteran made claim for pension on the basis that his PTSD was war-caused - whether AAT correctly applied the third step of Deledio

Facts

On 15 June 1964 Mr Besson was on operational service as a member of the crew of HMAS Sydney, when he claimed to suffer a “life threatening event”. He later developed post traumatic stress disorder. The Repatriation Commission rejected Mr Besson’s claim for disability pension, on the ground that his PTSD could not be linked to his operational service. The decision was affirmed on review by the Veterans’ Review Board and Administrative Appeals Tribunal (the Tribunal). The Tribunal decided that while Mr Besson genuinely believed his life was in danger, the facts did not answer the description of a “life

threatening event” in the relevant Statement of Principles. Mr Besson appealed to the Federal Circuit Court of Australia (the FCC) and his appeal was dismissed. Mr Besson did not file a notice of appeal against the judgment of the FCC within the required time, and now seeks an extension of time.

The Court’s consideration

The matters relevant to the exercise of the Court’s discretion to grant an extension of time include:

1. Whether the applicant has shown that there is an acceptable explanation for the delay - No
2. Whether the applicant took any other steps to assert his or her rights - No
3. The length of the delay - the delay was 97 days after the expiration of the date for filing the notice of appeal, which was substantial.
4. Any prejudice to the respondent as a result of the delay - No
5. The merits of the proposed appeal. The Court noted an appeal to the Federal Court from a judgment of the FCC is by way of rehearing. The

applicant's principal argument was that when the Tribunal found at the third step of *Deledio* that the facts did not answer the description of a life-threatening event, it made an impermissible finding of fact. The applicant argued that the Tribunal's task at that stage was to determine whether there was material that "fits" the Statement of Principles rather than evaluating the evidence and accepting or rejecting that evidence. The Court noted:

The formation of the Tribunal's opinion at the third stage of the *Deledio* process involves the reaching of a factual conclusion and involves the assessment of all the material before the Tribunal, but not the finding of facts or the rejection of material: *Collins v Administrative Appeals Tribunal* [2007] FCAFC 111.

The Court also cited *Border v Repatriation Commission (No 2)* [2010] FCA 1430, in which Reeves J considered what is required at the third stage in assessing a claim that PTSD has arisen out of a "life-threatening event":

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

assessment. So, too, is any information not known to the veteran which showed, objectively, that the event did not pose a threat of death, eg being threatened with a gun that was in fact unloaded.

(Underlining added.)

The Court indicated:

It is clear from *Border* that at the third stage in the *Deledio* process the decision-maker must consider whether the applicant's perception of the event as posing a threat of death is a reasonable one. If that perception is not reasonable, then the event will not meet the description "life-threatening". This involves what was described in *Collins* as "the reaching of a factual conclusion". That is not only permissible, but is required.

The Court found the Tribunal reached a factual conclusion that the event was not a life-threatening event but did not find facts or reject any material. The Tribunal did no more than decide whether, from the point of view of the hypothetical reasonable person, the event was capable of giving rise to the perception of the threat of death. It did not decide that the event was not in fact life-threatening.

Taking into account all of the relevant matters (including the applicant's poor prospects of success) the Court considered its discretion should be exercised against an extension of time.

Formal decision

The application was dismissed.



Editorial note

The case summary of the FCC decision in *Besson v Repatriation Commission* is contained earlier in this edition. In this appeal, amongst other factors the Court examined the merits of the proposed appeal, in deciding whether to grant an extension of time to appeal against the decision of the FCC. The Court primarily examined whether the Tribunal erred in its approach to the third step of *Deledio*, and concluded it did not.

**Repatriation Commission v
Richmond**

Middleton, Murphy & Rangiah JJ

[2014] FCAFC 124
26 September 2014

***Special rate of pension under s
24(1)(c) – whether applicant alone
prevented from engaging in
remunerative working by war-
caused injuries***

Facts

The respondent, Mr Richmond, served in the Australian Army from 1966 to 1968 and had operational service in Vietnam between April and December 1967. He suffers from a number of medical conditions which the Commission accepts as war caused: hyperkeratosis, basal cell carcinoma, bilateral sensorineural hearing loss, bilateral tinnitus, non melanotic malignant neoplasm of the skin, alcohol dependence and anxiety disorder.

On 14 February 2011 a delegate of the Commission decided Mr Richmond was not entitled to a special rate of pension. The decision was affirmed on review by

the Veterans' Review Board and the Administrative Appeals Tribunal (the Tribunal). Mr Richmond appealed to the Federal Court, and his appeal was allowed. The primary judge set aside the Tribunal decision, and remitted the matter to a differently constituted Tribunal to be determined according to law. The Commission now appeals to the Full Court.

Grounds of appeal

In its Notice of Appeal, the Commission alleged that the primary judge erred in the construction and application of s 24(1)(c) of the Act, but it did not challenge the orders setting aside the Tribunal decision and remitting the matter for rehearing (as it accepted the primary judge's finding that the Tribunal fell into error in respect of other issues).

The Primary judgment

The Full Court substantially agreed with the primary judge's construction of s 24(1)(c), but considered her Honour placed a gloss on the provision which does not assist in its proper

understanding. The Full Court disagreed with her Honour's approach in that small regard.

The Full Court noted the primary judge set out her approach to the construction and application of the first limb of s 24(1)(c) at paras [116]-[120] of her decision:

[116] The Tribunal did not expressly or implicitly recognise any material distinction between, on the one hand, factors which cause, or contribute to causing, an inability or incapacity to continue to undertake work and, on the other hand, incentives or reasons for the applicant deciding not to continue it. The Tribunal appeared to treat the two concepts interchangeably, or at least, proceeded on the basis that a factor of the latter kind was fatal to the satisfaction of the "alone" test in the third *Flentjar* question.

[117] In my opinion, the Tribunal erred in treating, in the context of the third *Flentjar* question, a factor acting as an incentive or influencing a decision voluntarily to cease to work as equivalent to a factor which prevents, or contributes to preventing, a veteran

from continuing to undertake the relevant remunerative work. As Dowsett J recognised in *Peacock*, the third *Flentjar* question concerns the latter, not the former.

[118] The language, structure and context of s 24(1)(c), in my view, indicates that contrary to the respondent's submission, the "alone" test in the first limb is defeasible only by factors additional to the veteran's warcaused condition which prevent or contribute to preventing, the veteran's continued undertaking of the relevant work. **To prevent an activity, according to its ordinary meaning, is to prohibit, disable or restrain, rather than to induce or provide a reason or incentive for action which a person remains capable of taking.** The third *Flentjar* question, although similar to the question in s 24(1)(b) is not identical. It does not follow that because the requirements of s 24(1)(b) are satisfied, those of the third *Flentjar* question are also satisfied. **The first limb of s 24(1)(c) refers to, an incapacity (from war-caused conditions) which "prevents". That language indicates a factor which imposes an involuntary barrier to the relevant activity. Whether such an incapacity alone prevents an activity,**

in my view, necessarily requires consideration of whether there are any other factors which impose an involuntary barrier.

[119] The first limb of s 24(1)(c) and the third *Flentjar* question thus require consideration of whether there are any other factors preventing, in the sense of hindering or disabling, the veteran's continued undertaking of the relevant work, and **not whether there are any other reasons generally for stopping work.**

[120] The relevance of inducements and incentives voluntarily to decide not to continue to undertake work is, in my view, as Dowsett J held in *Peacock* confined to the fourth *Flentjar* question.

(Emphasis added.)

The primary judge considered that, although the question as to whether an incentive or inducement voluntarily to cease work, despite being capable of continuing to work, did not arise in *Flentjar* and *Hendy*, the tenor and reasoning in these cases and *Forbes v Repatriation Commission* [2000] FCA 328

was consistent with the view that inducements and incentives and other elective factors cannot operate to *prevent* a veteran from continuing to undertake the relevant remunerative work under the first limb of s 24(1)(c).

The Court's consideration

At the outset the Full Court clearly set out the two limbs of s 24(1)(c):

- The first limb, which is capable of being informed by s 24(2)(b), requires a causal connection between the veteran's war-caused incapacity, alone, and the veteran's inability to undertake the remunerative work he or she previously engaged in;
- The second limb, which is amplified by s 24(2)(a), requires a causal connection between that inability to work and the veteran's suffering of financial loss. The enquiry under this limb related to whether the veteran's financial loss is a result of his or her war-caused incapacity.

The causal link required by the first limb has three elements:

1. “by reason of” the veteran’s war-caused incapacity;
2. the veteran is “alone (i.e. not for other reasons);
3. “prevented from”;

continuing to undertake the remunerative work that the veteran was undertaking.

The “prevented” element of the test

It was the view of the primary judge that the prevented element of the test could only be satisfied by factors which “prohibit, disable or restrain” the veteran from continuing to engage in the remunerative work, and not by factors which induce or provide the veteran an incentive to cease that work. The Commission argued this distinction creates an unjustifiable and artificial distinction, and all factors that may contribute to a veteran being prevented from continuing to work should be considered.

The Full Court did not accept the Commission’s contentions, but rejected her Honour’s gloss on the word “prevented” which included statements that satisfaction of the test requires an “involuntary barrier” or requires factors which “prohibit, disable or restrain” (see para 118 of the primary judgment above). The Full Court was of the view that the ordinary meaning of “prevented” in s 24(1)(c) was unambiguous and there was no requirement to use other words or expressions. Under the first limb of s24(1)(c) the ordinary meaning of “prevented from” does not include voluntary or elective choices to cease work for a reason other than incapacity, and acceptance of the Commission’s argument would mean that “prevented from” includes “chooses not to”.

In reviewing the case law, the Full Court agreed with conclusion of Dowsett J in *Peacock v Repatriation Commission* [2004] FCA 1449, that factors such as the availability of the veteran’s superannuation benefits may have been

an incentive for him to retire, but it could not have *prevented* him from engaging in remunerative work.

Formal decision

Order 2 of the orders made by the primary judge were set aside, and in lieu thereof the matter was remitted to the Tribunal, differently constituted, for determination according to law. The appeal was otherwise dismissed.



Editorial note

The Full Court noted under the second limb of s 24(1)(c), s 24(2)(a)(i) makes specific provision for the situation where a veteran, for reasons unrelated to war-caused incapacity, has voluntarily decided to leave his or her remunerative employment. The Full Court accepted that this means a veteran who voluntarily chooses to cease remunerative work for reasons other than war-caused incapacity (e.g. to access superannuation benefits or because of dissatisfaction with work unrelated to

war-caused injuries) will usually not be eligible for the special rate, as he or she will usually be unable to establish financial loss by reason of his or her war-caused incapacity.

For further details about the primary judgment please refer to the case summary of *Richmond v Repatriation Commission* which is contained earlier in this edition.

Kaluza v Repatriation Commission

Foster J

[2014] FCA 1137
23 October 2014

Whether the two questions posed by the applicant are questions of law – if so, whether the Tribunal failed to apply to the correct principles as explained in *Kaluza v Repatriation Commission* [2011] FCAFC 97 and *Repatriation Commission v Deledio* [1998] FCA 391

Facts

Mr Kaluza served in the Royal Australian Air Force between 29 August 1963 and 31 October 1983, and had some operational

service on flights to Vietnam as well as eligible defence service. On 24 June 2013 the Administrative Appeals Tribunal (the Tribunal) dealt with Mr Kaluza's case for the third time. The history is outlined in the case summary of *Kaluza and Repatriation Commission* [2013] AATA 424 in Issue 28 of *VeRBosity* at pages 16-20.

Mr Kaluza appealed against the Tribunal's latest decision on two questions of law:

1. In determining whether there were some fact or facts which supported a hypothesis that Mr Kaluza suffered from *war-caused* alcohol abuse, did the Tribunal err by confining itself to a consideration of the medical evidence?
2. In determining whether there were some fact or facts which supported a hypothesis that Mr Kaluza reacted to the coffin incident with intense fear, helplessness or horror, did the Tribunal err by having regard to the *material as a whole*?

Grounds relied on

1. One issue was whether Mr Kaluza suffered from war-caused alcohol abuse at the time of the clinical onset of generalised anxiety disorder or alcohol dependence or both. In respect of hypertension, the issue was whether Mr Kaluza had a war-caused consumption of alcohol that met the requirements of the applicable Statement of Principles, at the time of the clinical onset of hypertension. In determining whether there was some fact or facts pointing to the clinical onset of alcohol abuse, the Tribunal

ignored relevant material and confined itself to the medical evidence. The Tribunal should have formed its own view, on all the evidence, about whether and when the clinical onset of alcohol abuse, as defined in the Statement of Principles, occurred.

2. For alcohol abuse to be war-caused there had to be some fact or facts which supported an hypotheses [sic] that Mr Kaluza responded to the coffin incident with intense fear, helplessness or horror. The Tribunal dealt with this issue in respect of alcohol dependence but its finding was equally applicable to alcohol abuse. In making its finding, the Tribunal considered all the relevant evidence going to his response. The Tribunal should have confined itself to any fact or facts that supported the hypothesis.

The Commission argued that neither of the so-called questions of law was in truth a question of law.

The Court's consideration

The Court did not consider that question 1 raised any question of law. Question 1 assumes that the Tribunal was required to consider hypotheses which related to alcohol abuse. The Court explained at paragraphs [79] – [80]:

...But the Tribunal found that, at all times relevant to his claim for a pension at the higher rate, Mr Kaluza was suffering from alcohol dependence. It made no specific finding as to whether he had ever suffered from alcohol abuse. The Tribunal was required to assess

whether the condition of alcohol dependence (and only that condition) was war-caused. In the circumstances, Mr Kaluza was required to bring forward hypotheses which addressed that condition and that condition only. The fact that the Tribunal regarded alcohol dependence and alcohol abuse as alternative cases propounded by Mr Kaluza was the direct result of the way in which Mr Kaluza ran his case before the Tribunal.

The Tribunal considered the case which Mr Kaluza had advanced before it was that he was suffering either from alcohol dependence or alcohol abuse (but not both) and that, whichever was the correct diagnosis, the condition was war-caused. Mr Kaluza ran a case before the Tribunal which gave primacy to the proposition that he was suffering from alcohol dependence. His case that he was suffering from alcohol abuse was put as an alternative to the primary case relied upon by him viz that he was suffering from alcohol dependence.

The Court also considered both parties' written submissions to the Tribunal. However, Mr Kaluza's submissions were made in circumstances where his primary case before the Tribunal was that, at the time he made his pension claim in 2003 and at all times subsequently, he was suffering from alcohol dependence. Even if the submissions amounted to the raising of a sub-hypothesis, the questions raised are all questions of fact.

For completeness the Court also addressed question 1 on the basis that it was a question of law, and decided there was no error on the part of the Tribunal.

The Court had serious reservations as to whether the second question was in fact a question of law, but assumed it was and went on to address the second question. The Court did not consider that the Tribunal failed to apply the reasoning of the Full Court in *Kaluza v Repatriation Commission* or the reasoning of the Full Court in *Deledio*, so did not err in the manner alleged by Mr Kaluza.

Formal decision

The appeal was dismissed.



Editorial note

The Tribunal's decision still stands that Mr Kaluza's generalised anxiety disorder, alcohol dependence and hypertension were not war-caused.

Kawicki v Repatriation Commission

Buchanan J

[2014] FCA 1147
30 October 2014

Whether applicant entitled to special rate or intermediate rate of pension – whether applicant satisfies s24(1)(c) of the Act in that his incapacity for work was caused by defence-caused injuries alone – whether increase to the general rate of pension should take effect from an earlier date

Facts

Mr Kawicki served in the Royal Australian Air Force from 5 August 1969 to 27 June 1975, and had “defence service” from 7 December 1972 to 27 June 1975.

On 27 September 2007 Mr Kawicki applied for a disability pension. On 12 November 2007 a delegate of the Repatriation Commission decided Mr Kawicki had no entitlement to a disability pension arising from osteoarthritis in his left wrist, right wrist and left ankle. The Veterans’ Review Board (the Board) affirmed the decision on 10 July 2008. Mr Kawicki sought

further review by the Administrative Appeals Tribunal (the Tribunal). On 19 March 2010 the parties reached an agreement that Mr Kawicki’s osteoarthritis of the left wrist and left ankle were defence-caused from 24 June 2007, his osteoarthritis of the right wrist was not defence-caused, and the matter was remitted to the Repatriation Commission for pension assessment.

On 22 June 2010 a delegate of the Repatriation Commission assessed Mr Kawicki’s disability pension at 60% of the General Rate from 24 June 2007, and 90% of the General Rate from 19 March 2010. The delegate decided Mr Kawicki was not eligible for pension at either the special or intermediate rate. The Board affirmed the decision on 9 May 2012. The Tribunal varied the decision under review to increase Mr Kawicki’s disability pension to 100% of the General Rate from 19 March 2010. Mr Kawicki now appeals to the Federal Court, challenging the refusal of the special rate and the failure to back date 100% of the General Rate to 24 June 2007.

The Court's consideration

Refusal of the special rate by the AAT

The Court was of the view that the Tribunal had made a legal error. The Tribunal was required to assess, by reference to the whole assessment period, whether s 24(1)(c) was satisfied i.e. an assessment of whether defence-related conditions alone, or some other circumstance, prevented Mr Kawicki from continuing to work as an electrician during the assessment period. Mr Kawicki's evidence was that his BLIP syndrome had earlier caused him to stop doing some, but only some, of that work. Mr Kawicki said he could not do the other work after 2001 due solely to his defence-related conditions. The Court indicated that those contentions required assessment, with the aid of the historical and contemporary medical evidence, and the Court did not see that assessment in the Tribunal's decision.

Refusal by the AAT to backdate the general rate of pension

On 22 June 2010 a delegate of the Repatriation Commission made two assessments – one of 24 June 2007 (three

months before the date of lodgement of Mr Kawicki's claim), and one of 19 March 2010 (the date the Tribunal remitted the matter to the Commission for assessment). It appeared to the Court that the delegate only treated the Tribunal's finding about the defence-related conditions as effective from 19 March 2010. The Board also treated the Tribunal's decision on 19 March 2010 as having effect and relevance only from that date. The Tribunal raised no issue about it. The Court indicated the Tribunal should consider whether the delegate and the Board gave proper attention and effect to the Tribunal's decision of 19 March 2010.

A further issue

The Court noted no attention appeared to have been given by the Board or Tribunal as to whether Mr Kawicki might be entitled to the intermediate rate of pension, although the delegate decided he was not. The Court indicated consideration should also have been given by the Tribunal to whether Mr Kawicki was entitled to the intermediate rate.

Formal decision

The appeal was allowed. The Tribunal's decision of 10 April 2014 was set aside, with the intent that the Tribunal should deal again with the question of entitlement to special rate and intermediate rate. The Tribunal should give attention, if necessary, to whether assessment of the general rate of pension at 60% from 24 June 2007 pays proper regard to the Tribunal's findings on 19 March 2010.



Editorial note

Given the long history of this matter, any backdating of Mr Kawicki's disability pension at the General Rate or Above General Rate may be for a period of up to two years and nine months.

Sheldon v Repatriation Commission

Collier J

[2014] FCA 1388
18 December 2014

Whether Tribunal failed to consider whether applicant satisfied criteria for "intermediate rate" of pension under s23 – whether Tribunal misconstrued phrase "remunerative work that the veteran was undertaking" in s24(1)(c) or the phrase "remunerative work" in s24(1)(b)

Facts

The applicant, Mr John Sheldon, had operational service in the Australian Army between 1966 and 1967. He has a number of war-caused conditions, in particular lumbar spondylosis. In September 2010 the applicant sought an increase in his disability pension, to either the "special rate" or alternatively the "intermediate rate". The respondent declined the increase, and the applicant appealed to the Veterans' Review Board (VRB). On 11 September 2012 the VRB decided it was not satisfied the applicant qualified for a pension at the special rate.

The applicant sought review by the Administrative Appeals Tribunal (the Tribunal), who affirmed the VRB's decision on 17 April 2014. The applicant then appealed to the Federal Court.

Grounds of appeal

The questions of law for the Court to determined were:

1. Did the Tribunal fail to consider whether the Applicant satisfied the requirements of s 23 of the *Veterans' Entitlements Act 1986* (Cth) so as to qualify for the "intermediate" rate of pension?
2. Did the tribunal misconstrue the phrase "remunerative work that the veteran was undertaking" in s 24(1)(c) or the phrase "remunerative work" in s 24(1)(b) of the *Veterans' Entitlements Act 1986* (Cth) or otherwise adopt an unduly narrow approach to that phrase by considering the particular duties in which the Applicant had been engaged rather than the type of employment undertaken by the Applicant?

The Court's consideration

Regarding question 1, both parties referred to *Smith v Repatriation Commission* [2014] FCAFC 53, which post-dated the decision of the Tribunal in the present case, and in which the Full Court had examined in detail s23 and s24

of the Act. In *Smith* no consideration appears to be given, and no ruling was made, by the Tribunal as to whether Mr Smith was entitled to a pension at the intermediate rate.

The Court was satisfied that the first question of law should be answered in the applicant's favour. First, and notwithstanding its findings concerning s24, the Tribunal was required by s19(5C) and s19(6) to assess whether the applicant had an entitlement to an intermediate rate of pension under s23 at any time during the assessment period.

Second, the respondent sought to rely on *Smith* in submitting there was no need for the Tribunal to consider s23, having dismissed Mr Sheldon's claim under s24. However, the Court considered *Smith* was distinguishable as the Tribunal was satisfied Mr Smith was rendered incapable of working more than eight hours per week due to his war-caused condition alone and that he satisfied s24(1)(b), whereas in the present case the Tribunal was satisfied Mr Sheldon was able to work more than eight hours per week, and therefore did not satisfy s24(1)(b). It was by no means clear that the Tribunal was satisfied that Mr Sheldon was able to work for 20 or more

hours per week as contemplated by s23(1)(b) and s23(2).

Regarding question 2, the Court noted the phrase “remunerative work” is not defined in the Act, but in *Repatriation Commission v Butcher* [2007] FCAFC 36 the Full Court said:

It is settled law that the subsection requires consideration of ‘remunerative work’ by having regard not to particular tasks and duties involved in specific jobs, but rather to the type of substantive work undertaken by the veteran considered at a higher level of generality: see *Banovich v Repatriation Commission* (1986) 69 ALR 395 at 402; *Starceovich v Repatriation Commission* (1987) 18 FCR 221 at 225; and *Repatriation Commission v Hendy* [2002] FCAFC 424; (2002) 76 ALD 47 at 54.

The Court was satisfied that the Tribunal’s assessment of Mr Sheldon being able to perform remunerative work only as a backhoe operator was a finding open to the Tribunal on the facts of the case and within the scope of s23 and s24 of the Act. However, in the Court’s view the Tribunal erred in taking an unduly restrictive approach to “remunerative work” for the purposes of considering whether Mr Sheldon’s circumstances satisfied s23 or s24. The Tribunal fell into

the type of error described by the Full Court in *Butcher*:

... the tribunal paid regard not to the substantive remunerative work that the veteran had undertaken in the past, but to *particular tasks* performed by the veteran during the course of his employment. The tribunal did not consider, in the general sense required by the subsection, the type of employment undertaken by the veteran but rather the particular duties in which he had been engaged. (Emphasis added.)

The Court also noted the comments of the Full Court in *Hendy*:

The tribunal’s task was to assess what the veteran probably would have done, if he had none of his service disabilities during the assessment period. The requirement to consider “remunerative work that the veteran was undertaking” does not mean a particular job with a particular employer but the substantive remunerative work that the veteran had undertaken in the past.

In the present case, the Court considered the Tribunal appeared to equate (and confuse) the particular tasks which Mr Sheldon had performed while giving himself restricted duties in his own business, with the more onerous tasks Mr Sheldon was required to perform while employed as a backhoe operator by a third party. The Tribunal did not have

regard to Mr Sheldon's undisputed evidence that, because of changes over the years in the manner in which backhoe operating was performed, the role of backhoe operator usually involved more than merely driving a backhoe (which is the task he was able to perform), and in the present day the duties of a person employed in backhoe operating also usually included an element of manual labour (which with Mr Sheldon had difficulties). While the Tribunal identified Mr Sheldon as a "backhoe operator" the Tribunal failed to identify the nature of the substantive work which realistically and practically was required of persons with the skills, qualifications or experience of someone like Mr Sheldon. The Court noted Rares J in *Smith* observed:

[17] It is important that a beneficial provision like s 24(1)(c) be construed in a practical way. *This is particularly so in today's world, where forms of work and occupations are subject to constant change as technology eliminates or reduces some occupations and creates new ones.* The expression "continuing to undertake remunerative work that the veteran was undertaking" in s 24(1)(c) must be construed in a realistic and practical way so as to avoid underlying technical constraints on its application to a veteran whose income earning capacity has been completely or significantly impaired. (Emphasis added.)

The Tribunal approached the phrase "remunerative work" from the limited perspective of the particular (and restricted) duties performed by Mr Sheldon while he was self-employed, rather than the substantive remunerative work in which he had been engaged, and which (on the evidence) had been subject to change in the industry.

Formal decision

The decision under review was set aside, and the case was remitted to the Tribunal to be heard and decided again.



Editorial note

The Court in the present case identified the key points in the judgment of the Full Court:

- Section 23(1)(c) and s 24(1)(c) refer to differing degrees of incapacity or effects of a war-caused injury on a veteran. Section 23 addresses a lower level of incapacity in a veteran.
- It is a question of fact whether the war-caused injury alone brought about the veteran's situation of being unable to engage in work.
- It is necessary to consider whether s 24(1) applies to the circumstances of a veteran prior to considering the applicability of s 23(1) because of the operation of s 23(1)(d).

- The expression “continuing to undertake remunerative work that the veteran was undertaking” in s 23(1)(c) and s 24(1)(c) must operate in respect of the pre-incapacity work of the veteran, including the hours and nature of the work, that the veteran was engaged in and the consequent loss of income attributable to his or her reduced ability to perform at that level after, and by reason of, the effects of the injury.
- The expression “continuing to undertake remunerative work that the veteran was undertaking” must be construed in a realistic and practical way.
- The times may vary at which incapacity from war-caused injury operates to prevent a veteran from continuing to undertake remunerative work.
- Section 24(1)(b) and (c), when read together, states a composite test containing a series of conditions.
- Section 24(2)(b) is applicable notwithstanding that the veteran has engaged in remunerative work since becoming incapacitated. The test in s 24(2)(b) is one to be applied at the time when the assessment is required to be made under s 19(5C).
- A veteran who has not been engaged in remunerative work at a particular point in time (ie before or during the assessment period) may nevertheless satisfy s 24(1)(c) by demonstrating that there has been a genuine effort to engage in remunerative work (which effort would continue but for the incapacity), and that the incapacity is the substantial cause of an inability to obtain remunerative work. In that circumstance, the veteran is treated as having been prevented from continuing to undertake remunerative work earlier undertaken (I note in particular *Buchanan J* at [51]).
- In circumstances where s 24(1)(b) (total incapacity) is satisfied, it follows that s 23(1)(b) will also be satisfied as it is a lesser test directed at a lower entitlement.
- Section 24(1)(c) and s 23(1)(c) apply conditions to be satisfied which are expressed in the same terms.
- There may be circumstances where a particular fact situation which defeated recognition in accordance with s 24(1)(c) might nevertheless justify recognition under s 23(1)(c) (I note in particular *Buchanan J* at [57]).

Statements of Principles issued by the Repatriation Medical Authority

1 January 2014 to 30 March 2015

Description of Instrument	Number of Instrument	Date of effect
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
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
Post traumatic stress disorder	19 of 2014	19 December 2013
Restless leg syndrome	20 & 21 of 2014	26 March 2014
Allergic rhinitis	22 & 23 of 2014	26 March 2014
Somatic symptom disorder	24 & 25 of 2014	26 March 2014
Periodic limb movement disorder	26 & 27 of 2014	26 March 2014
Chronic lymphoid leukaemia	28 of 2014	26 November 2013
Alcohol use disorder	29 & 30 of 2014	26 March 2014
Substance use disorder	31 & 31 of 2014	26 March 2014
Ischaemic heart disease	33 & 34 of 2014	26 March 2014
Hodgkin's lymphoma	35 & 36 of 2014	7 May 2014
Chronic obstructive pulmonary disease	37 & 38 of 2014	7 May 2014
Malignant neoplasm of the thyroid gland	39 & 40 of 2014	7 May 2014

Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
Acute stress disorder	41 & 42 of 2014	7 May 2014
Mitral valve prolapse	43 & 44 of 2014	7 May 2014
Pleural plaque	45 & 46 of 2014	7 May 2014
Chronic myeloid leukaemia	47 & 48 of 2014	7 May 2014
Atrial fibrillation and atrial flutter	49 & 50 of 2014	7 May 2014
Otitis media	51 & 52 of 2014	7 May 2014
Malignant neoplasm of the prostate	53 & 54 of 2014	14 May 2014
Chronic multisymptom illness	55 & 56 of 2014	14 May 2014
Non-Hodgkin's lymphoma	57 of 2014	7 May 2014
Malignant neoplasm of the stomach	58 & 59 of 2014	2 July 2014
Melioidosis	60 & 61 of 2014	2 July 2014
Lumbar spondylosis	62 & 63 of 2014	2 July 2014
Thoracic spondylosis	64 & 65 of 2014	2 July 2014
Cervical spondylosis	66 & 67 of 2014	2 July 2014
Hiatus hernia	68 & 69 of 2014	2 July 2014
Warts	70 & 71 of 2014	2 July 2014
Myeloma	72 & 73 of 2014	13 May 2014
Peripheral neuropathy	74 & 75 of 2014	22 September 2014
Creutzfeldt-Jakob disease	76 & 77 of 2014	22 September 2014
Vascular dementia	78 & 79 of 2014	22 September 2014
Malignant neoplasm of unknown primary site	80 & 81 of 2014	22 September 2014
Posttraumatic stress disorder	82 & 83 of 2014	22 September 2014
Chronic lymphocytic leukaemia/small lymphocytic lymphoma	84 & 85 of 2014	22 September 2014

Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
Non-Hodgkin's lymphoma	86 & 87 of 2014	22 September 2014
Diabetes mellitus	88 & 89 of 2014	22 September 2014
Osteomyelitis	90 & 91 of 2014	17 November 2014
Malignant neoplasm of the lung	92 & 93 of 2014	17 November 2014
Leptospirosis	94 & 95 of 2014	17 November 2014
Malignant neoplasm of the breast	96 & 97 of 2014	17 November 2014
Osteoporosis	98 & 99 of 2014	17 November 2014
Rotator cuff syndrome	100 & 101 of 2014	17 November 2014
Anxiety disorder	102 & 103 of 2014	17 November 2014
Malignant neoplasm of the small intestine	1 & 2 of 2015	27 January 2015
Malignant neoplasm of the testis and paratesticular tissues	3 & 4 of 2015	27 January 2015
Soft tissue sarcoma	5 & 6 of 2015	27 January 2015
Epicondylitis	7 & 8 of 2015	27 January 2015
Shin splints	9 & 10 of 2015	27 January 2015
Tinea	11 & 12 of 2015	27 January 2015
Decompression sickness	13 & 14 of 2015	27 January 2015
Pulmonary barotrauma	15 & 16 of 2015	27 January 2015
Dysbaric osteonecrosis	17 & 18 of 2015	27 January 2015
Albinism	19 & 20 of 2015	27 January 2015
Charcot-Marie-Tooth disease	21 & 22 of 2015	27 January 2015
Haemophilia	23 & 24 of 2015	27 January 2015
Marfan syndrome	25 & 26 of 2015	27 January 2015
Gaucher's disease	27 & 28 of 2015	27 January 2015
Alpha-1 antitrypsin deficiency	29 & 30 of 2015	27 January 2015
Horseshoe kidney	31 & 32 of 2015	27 January 2015

Repatriation Medical Authority

Description of Instrument	Number of Instrument	Date of effect
Wilson's disease	33 & 34 of 2015	27 January 2015
Osteogenesis imperfecta	35 & 36 of 2015	27 January 2015
Huntington's chorea	37 & 38 of 2015	27 January 2015
Autosomal dominant polycystic kidney disease	39 & 40 of 2015	27 January 2015
von Willebrand's disease	41 & 42 of 2015	27 January 2015
Multiple osteochondromatosis	43 & 44 of 2015	27 January 2015
Trochanteric bursitis and gluteal tendinopathy	45 & 46 of 2015	27 January 2015
Herpes zoster	47 & 48 of 2015	30 March 2015
Paget's disease of bone	49 & 50 of 2015	30 March 2015
Plantar fasciitis	51 & 52 of 2015	30 March 2015
Neoplasm of the pituitary gland	53 & 54 of 2015	30 March 2015
Seborrhoeic keratosis	55 & 56 of 2015	30 March 2015
Malignant neoplasm of the salivary gland	57 & 58 of 2015	30 March 2015
Spondylolisthesis and spondylolysis	59 & 60 of 2015	30 March 2015

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

Conditions under Investigation by the Repatriation Medical Authority

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

Condition	ICD code
Arachnoid cyst of the brain	348.0
Trochanteric bursitis of the hip	726.5
Optochiasmic arachnoiditis	322.2
X-linked myopathy with excessive autophagy	359.8

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

AAT and Court decisions – January to December 2014

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

-S24(1)(c)

-remunerative work

Sheldon [2014] FCA 1388 (18 December 2014)

-suffering a loss of earnings on own account

McCracken [2014] AATA 946 (19 December 2014)

Summers [2014] FCA 608 (12 June 2014)

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

Clark [2014] AATA 533 (4 August 2014)

Clark [2014] AATA 955 (22 December 2014)

Dawes [2014] AATA 730 (9 October 2014)

Ferdinands [2014] AATA 215 (11 April 2014)

Fielden [2014] AATA 702 (25 September 2014)

Fraser [2014] AATA 191 (7 April 2014)

Hall [2014] AATA 569 (15 August 2014)

Kawicki [2014] AATA 207 (10 April 2014)

Kawicki [2014] FCA 1147 (30 October 2014)

Lamp [2014] AATA 506 (25 July 2014)

Lees [2014] AATA 308 (16 May 2014)

Loughrey [2014] AATA 88 (24 February 2014)

McCallum [2014] AATA 50 (31 January 2014)

Mewett [2014] AATA 914 (10 December 2014)

Murray [2014] AATA 307 (16 May 2014)

Murray [2014] AATA 433 (2 July 2014)

Nation [2014] AATA 905 (8 December 2014)

Richmond [2014] FCA 272 (25 March 2014)

Richmond [2014] FCAFC 124 (26 September 2014)

Ryan [2014] AATA 370 (12 June 2014)

Schwind [2014] AATA 503 (23 July 2014)

Sheean [2014] AATA 594 (22 August 2014)

Assessment of Disability Pension

General Rate

Kawicki [2014] AATA 207 (10 April 2014)

Kawicki [2014] FCA 1147 (30 October 2014)

Section 23 - Intermediate Rate of Pension

Adamson [2014] AATA 756 (17 October 2014)

Hales [2014] AATA 850 (13 November 2014)

McCracken [2014] AATA 946 (19 December 2014)

Mewett [2014] AATA 914 (10 December 2014)

Sheldon [2014] FCA 1388 (18 December 2014)

Section 24 - Special Rate of Pension

-S24(1)(b)

-applying S28

Sheldon [2014] AATA 228 (17 April 2014)

-remunerative work

Sheldon [2014] FCA 1388 (18 December 2014)

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

Adamson [2014] AATA 756 (17 October 2014)

Clark [2014] AATA 955 (22 December 2014)

Hall [2014] AATA 569 (15 August 2014)

Lees [2014] AATA 308 (16 May 2014)

McCracken [2014] AATA 946 (19 December 2014)

Nation [2014] AATA 905 (8 December 2014)

AAT and Court decisions – January to December 2014

Sweet [2014] AATA 497 (18 July 2014)

Watkins [2014] FCA 787 (29 July 2014)

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

Dawes [2014] AATA 730 (9 October 2014)

Mewett [2014] AATA 914 (10 December 2014)

Sheean [2014] AATA 594 (22 August 2014)

Smith [2014] FCAFC 53 (1 May 2014)

Summers [2014] FCA 608 (12 June 2014)

Willis [2014] AATA 326 (27 May 2014)

Compensation (MRCA)

Incapacity payments

Jensen and MRCC [2014] AATA 807 (30 October 2014)

Permanent impairment

Brough and MRCC [2014] AATA 879 (26 November 2014)

Downes and MRCC [2014] AATA 688 (19 September 2014)

Sinclair and MRCC [2014] AATA 304 (16 May 2014)

Death

Cardiomyopathy

Aspinall [2014] AATA 305 (16 May 2014)

McKenzie [2014] FCA 777 (25 July 2014)

McKenzie [2014] FCA 1007 (16 September 2014)

Cerebrovascular accident

Collins [2014] AATA 787 (24 October 2014)

Sandeman (as attorney for Kluge) [2014] AATA 353 (5 June 2014)

Chronic obstructive pulmonary disease

Erickson [2014] AATA 347 (3 June 2014)

Cirrhosis of the liver

Gover [2014] AATA 909 (8 December 2014)

Dementia

Horn [2014] AATA 520 (29 July 2014)

Needs [2014] AATA 143 (14 March 2014)

Emphysema

Nobes [2014] AATA 742 (14 October 2014)

Hypertension

Thompson [2014] AATA 518 (29 July 2014)

Ischaemic heart disease

Ashton [2014] AATA 897 (4 December 2014)

Budge [2014] AATA 276 (2 May 2014)

Erickson [2014] AATA 347 (3 June 2014)

Holden [2014] AATA 810 (30 October 2014)

Holden [2014] FCA 605 (12 June 2014)

Nobes [2014] AATA 742 (14 October 2014)

Riley and MRCC [2014] AATA 262 (2 May 2014)

Smith [2014] AATA 500 (22 July 2014)

Malignant neoplasm of the liver

Ellis [2014] FCA 847 (11 August 2014)

AAT and Court decisions – January to December 2014

Metastatic carcinoma of the prostate

Palmer [2014] AATA 571 (15 August 2014)

Chronic obstructive pulmonary disease

Hart [2014] AATA 564 (14 August 2014)

Renal failure

Budge [2014] AATA 276 (2 May 2014)

Dementia

Hopkins [2014] AATA 606 (27 August 2014)

Vascular dementia

Collins [2014] AATA 787 (24 October 2014)

Diabetes mellitus

Sheppard [2014] AATA 449 (4 July 2014)

Entitlement to Disability Pension

Atrial fibrillation

QSWZ [2014] AATA 482 (16 July 2014)

Erectile dysfunction

Coleman [2014] AATA 782 (24 October 2014)

McKenna [2014] AATA 56 (6 February 2014)

Bruxism

Smith [2014] AATA 662 (11 September 2014)

Gastro-oesophageal reflux disease

Jones [2014] AATA 887 (28 November 2014)

Carotid artery disease

Hart [2014] AATA 564 (14 August 2014)

Haemorrhoids

Coleman [2014] AATA 782 (24 October 2014)

Cerebrovascular accident

Hart [2014] AATA 564 (14 August 2014)

Hypertension

Forster [2014] AATA 91 (25 February 2-14)

Kaluza [2014] FCA 1137 (23 October 2014)

Reid [2014] AATA 548 (8 August 2014)

Tovey [2014] AATA 837 (6 November 2014)

Cervical spondylosis

Dawson [2014] AATA 564 (14 August 2014)

Mason [2014] AATA 293 (14 May 2014)

Shaw [2014] AATA 908 (8 December 2014)

Smith [2014] AATA 662 (11 September 2014)

Inflammatory bowel disease

Dunn [2014] AATA 330

Chronic bronchitis and/or emphysema

Tovey [2014] AATA 837 (6 November 2014)

Tucker [2014] AATA 610 (28 August 2014)

Intervertebral disc prolapse

Bowen [2014] AATA 36 (29 January 2014)

Dawson [2014] AATA 564 (14 August 2014)

AAT and Court decisions – January to December 2014

Ischaemic heart disease	Psychiatric conditions
Lilley [2014] AATA 798 (28 October 2014)	-Adjustment disorder
Scott [2014] AATA 98 (27 February 2014)	-diagnosis
	Howes [2014] AATA 568 (15 August 2014)
Journey provision – s70(5)(b)	
Gordon [2014] AATA 849 (12 November 2014)	-Alcohol abuse/dependence/use disorder
	-category 1A stressor
Lumbar spondylosis	Coleman [2014] AATA 782 (24 October 2014)
Bowen [2014] AATA 36 (29 January 2014)	Elton [2014] AATA 475 (15 July 2014)
	Forster [2014] AATA 91 (25 February 2-14)
Malignant neoplasm	Hughes [2014] AATA 431 (1 July 2014)
-bladder	Lightowlers [2014] AATA 80 (21 February 2014)
Hind [2014] AATA 565 (15 August 2014)	McKinley [2014] AATA 670 (12 September)
-colorectum	Paprotny [2014] AATA 573 (18 August 2014)
Allison [2014] AATA 48 (31 January 2014)	-category 1B stressor
	Bawden [2014] AATA 462 (9 July 2014)
Morbid obesity	Lightowlers [2014] AATA 80 (21 February 2014)
Rokonayalewa [2014] AATA 881 (27 November 2014)	McKinley [2014] AATA 670 (12 September)
Sheppard [2014] AATA 449 (4 July 2014)	Paprotny [2014] AATA 573 (18 August 2014)
	-death of a significant other
Oesophageal cancer	Wallam [2014] AATA 679 (17 September 2014)
McCallum [2014] AATA 323 (26 May 2014)	-diagnosis
	Summers [2014] FCA 608 (12 June 2014)
Osteoarthritis	-onset within requisite time
Sharley [2014] AATA 344 (2 June 2014)	McKenna [2014] AATA 56 (6 February 2014)
Tearle [2014] AATA 491 (17 July 2014)	-other psychiatric condition
Turner [2014] AATA 264 (2 May 2014)	Kaluza [2014] FCA 1137 (23 October 2014)
	Lees [2014] AATA 308 (16 May 2014)
	Stirling [2014] AATA 804 (30 October 2014)
	-severe childhood abuse
	Forster [2014] AATA 91 (25 February 2-14)

AAT and Court decisions – January to December 2014

-Anxiety disorder	-diagnosis
-category 1A stressor	Paprotny [2014] AATA 573 (18 August 2014)
McKinley [2014] AATA 670 (12 September)	-medical illness
Simos [2014] AATA 110 (28 February 2014)	Paton [2014] AATA 863 (21 November 2014)
-category 1B stressor	-onset within requisite time
McKinley [2014] AATA 670 (12 September)	Douglas [2014] AATA 407 (24 June 2014)
-chronic pain	McKenna [2014] AATA 56 (6 February 2014)
Zerner [2014] AATA 310 (16 May 2014)	Strong [2014] AATA 826 (4 November 2014)
-death of a significant other	-other psychiatric condition
Wallam [2014] AATA 679 (17 September 2014)	Martin [2014] AATA 600 (27 August 2014)
-onset within requisite time	McKenna [2014] AATA 56 (6 February 2014)
Strong [2014] AATA 826 (4 November 2014)	
-other psychiatric condition	-Post traumatic stress disorder
Kaluza [2014] FCA 1137 (23 October 2014)	-category 1A stressor
	Besson [2014] FCA 881 (22 August 2014)
-Bipolar disorder	Besson [2014] FCCA 123 (6 February 2014)
-category 2 stressor	Forster [2014] AATA 91 (25 February 2014)
Phillips [2014] AATA 962 (24 December 2014)	Jones [2014] AATA 887 (28 November 2014)
	McKenna [2014] AATA 56 (6 February 2014)
-Cannabis use disorder	-category 1B stressor
-category 1A stressor	Bawden [2014] AATA 462 (9 July 2014)
Elton [2014] AATA 475 (15 July 2014)	McKenna [2014] AATA 56 (6 February 2014)
	-diagnosis
-Depressive disorder	Coleman [2014] AATA 782 (24 October 2014)
-category 1A stressor	Fotek [2014] AATA 117 (5 March 2014)
Lees [2014] AATA 308 (16 May 2014)	Lees [2014] AATA 308 (16 May 2014)
-category 1B stressor	McKinley [2014] AATA 670 (12 September)
Stirling [2014] AATA 804 (30 October 2014)	Paprotny [2014] AATA 573 (18 August 2014)
-category 2 stressor	Schmidt [2014] AATA 760 (21 October 2014)
Paton [2014] AATA 863 (21 November 2014)	Strong [2014] AATA 826 (4 November 2014)
-chronic pain	TXBZ [2014] AATA 19 (16 January 2014)
Reid [2014] AATA 137 (13 March 2014)	

AAT and Court decisions – January to December 2014

<i>-threatening/hostile/hazardous and/or menacing situation/environment</i>	Disc bulge
Martin [2014] AATA 600 (27 August 2014)	Brough and MRCC [2014] AATA 879 (26 November 2014)
Rhabdomyosarcoma	Diverticular disease of the colon
Lipke [2014] AATA 729 (8 October 2014)	Barber and MRCC [2014] AATA 839 (7 November 2014)
Sleep apnoea	Intracerebral haemorrhage
Sheppard [2014] AATA 449 (4 July 2014)	Ford and MRCC [2014] AATA 858 (20 November 2014)
Trigger finger	Low testosterone levels
Fraser [2014] AATA 191 (7 April 2014)	JRKH and MRCC [2014] AATA 883 (27 November 2014)
Varicose veins	Lung scarring
Tovey [2014] AATA 837 (6 November 2014)	Barber and MRCC [2014] AATA 839 (7 November 2014)
Wernicke's encephalopathy	Malignant neoplasm of the thyroid gland
Coleman [2014] AATA 782 (24 October 2014)	Barber and MRCC [2014] AATA 839 (7 November 2014)
Liability (MRCA)	Nephrolithiasis
Achilles tendinopathy	Sleep apnoea
QMQK and MRCC [2014] AATA 773 (24 October 2014)	Domjahn and MRCC [2014] AATA 663 (11 September 2014)
Adjustment disorder	
QMQK and MRCC [2014] AATA 773 (24 October 2014)	
Crohn's disease	
Barber and MRCC [2014] AATA 839 (7 November 2014)	

Practice and Procedure

Application to Federal Court for extension of time

Besson [2014] FCA 881 (22 August 2014)

Claim

-whether finally determined

Booth [2014] AATA 322 (26 May 2014)

Commission's power to make determination under s180A of the VEA

Schulz [2014] FCA 387 (22 April 2014)

Frivolous or vexatious application

Kowalski [2014] AATA 141 (14 March 2014)

Factual finding by the Federal Court under s44(7) of the AAT Act

McKenzie [2014] FCA 1007 (16 September 2014)

Jurisdiction

Applicant 5611 of 2013 [2014] AATA 121 (6 March 2014)

Atkins [2014] AATA 42 (30 January 2014)

Tribunal's obligations under ss43(2) and (2B) of the AAT Act

Summers [2014] FCA 608 (12 June 2014)

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- get professional advice, if necessary, that is relevant to your circumstances.

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