

AUSTRALIA / JUDGMENT

Collins v Repatriation Commission [2005] FCA 1566

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FEDERAL COURT OF AUSTRALIA

Collins v Repatriation Commission [2005] FCA 1566

VETERANS' ENTITLEMENTS – appeal from decision of the Administrative Appeals Tribunal to affirm a decision that the applicant's polycythaemia vera was not war-caused – whether reasonable hypothesis linking applicant's operational service and his PV exists – whether AAT applied correct Statement of Principle

Veterans' Entitlements Act 1986 (Cth) ss 5, 6, 9, 13, 15, 17, 19, 68(1), 120, 120A, 196B

Bushell v Repatriation Commission (1992) 175 CLR 408 cited

Byrnes v Repatriation Commission (1993) 177 CLR 564 cited

Stoddart v Repatriation Commission (2003) 197 ALR 283 referred to

Repatriation Commission v Keeley (2000) 60 ALD 401 referred to

JOHN GEORGE COLLINS v REPATRIATION COMMISSION

No QUD 107 OF 2004

SPENDER J

4 NOVEMBER 2005

BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY QUD 107 OF 2004

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: JOHN GEORGE COLLINS

APPLICANT

AND: REPATRIATION COMMISSION

RESPONDENT

JUDGE: SPENDER J

DATE OF ORDER: 4 NOVEMBER 2005

WHERE MADE: BRISBANE

**THE COURT ORDERS
THAT:**

1. The appeal be dismissed with costs, to be taxed if not agreed.
Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY QUD 107 OF 2004
ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL
BETWEEN: JOHN GEORGE COLLINS
APPLICANT
AND: REPATRIATION COMMISSION
RESPONDENT
JUDGE: SPENDER J
DATE: 4 NOVEMBER 2005
PLACE: BRISBANE

REASONS FOR JUDGMENT

1 This is an appeal by John George Collins ('the applicant') from a decision of the Administrative Appeals Tribunal ('the AAT') given on 31 May 2004, whereby the AAT decided to affirm the decision of the Repatriation Commission ('the Commission') dated 3 December 2001, to reject the applicant's claim for medical expenses and pension pursuant to s 13 of the Veterans' Entitlements Act 1986 (Cth) ('the Act') for the applicant's condition of polycythaemia vera as a war-caused disability within the meaning of s 9 of the Act.

2 Polycythaemia vera ('PV') is a disease of the bone marrow closely related to leukaemia but involving a proliferation of haemoglobin rather than lymphocytes. It inevitably leads to leukaemia and has no known cure.

3 The applicant has several disabilities that have been accepted by the respondent as war-caused, including post-traumatic stress disorder. He receives free medical treatment for PV. He currently receives a disability pension at 100 per cent of the General Rate, plus the Extreme Disablement Adjustment. The result of this case has no bearing on the payment of his medical expenses, nor on the rate of his pension.

4 The applicant has consistently maintained that his PV was caused by exposure to ionising radiation during his operational war service in Japan in the 1940s. He has contended that other countries, including Canada, Britain and the United States accept that radiation may be the cause of myelo-proliferative disorders such as PV, and compensate their veterans accordingly.

5 The applicant was born on 30 June 1928 and served in the Australian Army from 12 March 1946 until 8 April 1948. From 25 July 1947 until 9 March 1948, he served with the British Commonwealth Occupational Force in Japan. The whole of his service constituted operational service.

6 The applicant arrived in Kure, Japan on 25 July 1947 and was assigned to 14 Works and Parks Company based in Hiroshima. He operated a bulldozer. His job was to demolish bomb damaged buildings and prepare sites for redevelopment. During the whole of his time in Japan, he worked in the Hiroshima Prefecture. He left Kure on 9 March 1948 and reached Sydney on 22 March. He was discharged "Termination of Engagement" on 8 April 1948.

7 The applicant seeks an order directing the Commission to grant his claim or, in the alternative, an order remitting the application to the Commission for proper reconsideration. In effect, the applicant is seeking a declaration that the condition of PV is related to his war service, in that there is a reasonable hypothesis or hypotheses which is not remote or fanciful, linking the onset of that condition to his war service.

8 Initially, there were two circumstances which gave me a jaundiced view about prospects of a successful appeal in this matter.

9 The first is a statement that appears in submissions made on behalf of the applicant to the AAT in respect of a hearing before the AAT in the year 2000:

'Collins is almost 72 years old and has terminal cancer. He receives a war disability pension at the Extreme Disablement rate and is not eligible for any increase above that rate. However, as a J.P. and a welfare officer for the Atomic Ex-Servicemens' Association, he feels he is entitled and obliged to pursue his claim on a point of principle. He hopes to prevent further misapplication of the SOPs by the DVA, which is intended to disadvantage and deprive claimant veterans.' (Emphasis added)

10 The second is the history of the claims by the applicant in respect of his contention that his condition of PV was war-caused.

11 He first lodged a claim for that condition as being war-caused on 9 June 1988. The Commission, in a decision dated 22 September 1988, did not accept that that condition as war-caused. The Veterans' Review Board ('the VRB'), in reviewing the Commission's decision on 18 July 1989, first adjourned its consideration to enable further investigations to be carried out. Various medical reports were obtained which appear to have been obtained on 4 October 1989, 21 December 1990 and 12 March 1991. A claim lodged by the applicant on 28 August 1995 was rejected by the Commission on 25 September 1995. The applicant sought review by the VRB of that decision, and further medical material was submitted in support of his claim. On 5 March 1996 the VRB affirmed the Commission's decision. Mr Collins lodged an application to the AAT to review the Commission's decision as affirmed by the VRB. The AAT dismissed that application by consent of the parties on 21 April 1997.

12 The applicant lodged a further claim for PV on 11 September 1995 which, according to the AAT in its decision on 27 August 2001: 'does not seem to have been determined by the Commission.' The AAT then noted that:

'9. Although there is no copy of it in the T documents, it appears that Mr Collins had lodged a further claim for a number of conditions, including polycythaemia vera, on 23 October, 1996. ...'

13 As indicated above, the Commission on 21 April 1997 refused the applicant's claim for PV, but accepted his claims in relation to the remaining three conditions. On 14 July 1997 the applicant wrote to the Department of Veterans' Affairs indicating that he wished to apply to the VRB for a review of the Commission's decision insofar as it rejected his claim for PV. On 23 April 1999 the VRB decided to adjourn its consideration of the application so that it could undertake further research and consideration. On resuming its consideration on 5 March 1999, the VRB then substituted for the decision of the Commission dated 21 April 1997 a decision accepting Mr Collins' claim that his condition of PV was war-caused within the meaning of s 9 of the Act, and found that the Commission was liable to pay pension for any incapacity arising from that condition from and including 23 July 1996, and remitted the matter to the Commission to assess the rate of that pension.

14 The Commission sought review by the AAT of the decision of the VRB of 5 March 1999 which had accepted the applicant's condition of PV as war-caused.

15 On 21 March 2000 the AAT set aside that part of the decision relating to PV on the basis that the claim made by the applicant on 18 December 1996 was not a valid claim, as s 14(5) of the Act prohibited its being made while his earlier claim made on 28 August 1995 had not been finally determined. The earlier claim had not been finally determined until 21 April 1997, when his application to the AAT had been dismissed by consent.

16 On 27 March 2000 the applicant lodged a further claim in respect of PV. In a decision dated 16 May 2000 the Commission refused that claim and its decision was affirmed by the VRB on 31 July 2000. The AAT (constituted by DP Forgie) in its judgment of 27 August 2001 noted that in the circumstances of the applicant, the AAT need consider only the Statement of Principle No. 78 of 1999 ("SoP 78"). The AAT held that:

'47. The effect of s.120A(3) is that Mr Collin's hypothesis must be upheld by SoP 78. ...'

17 Having analysed, in particular, clauses 4, 5 and 6 of SoP 78, the AAT said:

'49. It follows that, before he can be found to have a war-caused injury or war-caused disease in the circumstances of this case, the material must point to Mr Collins having an inability to obtain appropriate clinical management for a condition of polycythaemia vera, which he suffered or contracted before or during (but not arising out of) his operational service where his inability materially contributed to, or aggravated, his polycythaemia. Having regard to the limited template appearing in SoP 78 and to the RMA's role, it can only be presumed that the RMA is not of the view that there is sound medical-scientific evidence that indicates that polycythaemia vera can be related to a veteran's operational service. In the particular circumstances of Mr Collins' case, it can only be presumed that the RMA is not of the view that there is sound-medical evidence that indicates that polycythaemia vera can be said to arise out of a veteran's operational service. If there is new medical evidence indicating such a connection, it is open to the RMA to

review SoP 78.

...

51. For the reasons I have given, I remit the matter to the Commission to determine the applicant's claim in accordance with these reasons.'

18 On 3 December 2001 the Commission determined:

'I have determined polycythemia [sic] vera using Statement of Principles, Instrument number 11 of 2001, which sets out the factors known to contribute to this condition.

The factor that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting polycythaemia vera or death from polycythaemia vera with the circumstances of a person's relevant service is:

- a. inability to obtain appropriate clinical management for polycythaemia vera.

I have considered all relevant evidence and am satisfied beyond reasonable doubt that polycythemia [sic] vera is not related to Mr Collins' operational service.

19 The applicant sought review of the decision of the Commission of 3 December 2001 rejecting his claim that his condition of PV was war-caused. [It is to be noted that that rejection followed the rejection on 22 September 1998 of the applicant's claim that the condition of PV was war-caused, and the rejection by the Commission on 25 September 1995 that his PV was war-caused.]

20 On the review by the VRB of the third rejection by the Commission of his claim in respect of PV, that being the decision of the Commission of 3 December 2001, the VRB on 7 August 2002 affirmed the decision. The majority of the VRB decided:

'23. The material before the Board raises the hypothesis that polycythaemia vera is related to exposure to ionising radiation during the veteran's service in Japan. For that hypothesis to be reasonable in terms of section 120(3) it must meet the template of a factor in the relevant SOP. In the present case the RMA has included in the SOP concerning polycythaemia vera, only a factor in relation to material contribution to or aggravation of the condition. The evidence indicates that the veteran's condition was diagnosed in December 1986, some 42 years after his operational service. Although in the normal course of things, it is likely that the condition had its onset some time prior to that date, this was the date on which it was clinically manifested.

24. The veteran's circumstances do not therefore fulfil the requirements of the factor of the SOP in that polycythaemia vera was not present during his operational service. The Board is therefore of the opinion that no reasonable hypothesis within the meaning of section 120(3) of the Act, has been raised to connect the condition with the circumstances of the veteran's service. It follows that the Board is not satisfied beyond reasonable doubt that the veteran's polycythaemia vera was war caused.' (Emphasis added)

21 It should be observed that the applicant's service was "operational service", and the requirement of the Act about onus is that the claim in those circumstances should be granted unless the Board is satisfied beyond reasonable doubt that the disease was not war-caused.

22 Member H.D. Logue of the VRB dissented. Member Logue noted that:

'5. ... the claim for polycythaemia vera was lodged with the Department on 27 March 2000 on the basis of the condition having been caused by operational service with the British Commonwealth Occupational Force in Japan. At that date, Statement of Principles No 78 of 1999 was in force in relation to operational service. It was subsequently amended by Instrument No 11 of 2001 from 10 January 2001.'

Member Logue stated:

'2. ... the veteran is entitled to have the claim determined in accordance with the law that applies at the date of lodgement of the claim and also pursuant to any subsequent variation or variations of that law prior to the date of determination. [Emphasis in the original]

He expressed the view that:

'8. ... the combination of paragraphs 5 and 6 [of SoP 78] limits the application of the Statement of Principles to cases where operational service worsens or aggravates a condition that was present during that service. It follows, in my opinion, that as the current claim is based on the veteran's operational service having caused the onset of polycythaemia vera, Statement of Principles No 78 of 1999 is not relevant to the claim. It is therefore appropriate to apply the principles in the Bushell & Byrnes cases in order to determine whether a reasonable hypothesis arises in this case.

9. Having reviewed the material before the Board, I concur with the majority decision that that material raises the hypothesis the polycythaemia vera is related to exposure to ionising radiation during the veteran's service in Japan. However, unlike the majority decision, I am of the opinion that the material gives rise to a reasonable hypothesis in accordance with the principles in the Bushell & Byrnes cases to connect the claimed condition with the veteran's operational service and I am further satisfied that there is no sufficient ground for negating that hypothesis.'

23 The reference to "the Bushell and Byrnes cases" in par 8 above is a reference to Bushell v Repatriation Commission (1992) 175 CLR 408 and Byrnes v Repatriation Commission (1993) 177 CLR 564.

24 On 5 November 2002 the applicant sought review of the decision of the VRB of 7 August 2002. The AAT on 5 September 2003 rejected the applicant's application to make the Repatriation Medical Authority a party to those proceedings. On 31 May 2004 the AAT affirmed the decision to refuse the claim of the applicant that his PV was war-caused.

25 As that detailed history of the litigation indicates, the question of whether the condition of the applicant of PV was war-caused is a very well-ploughed field. However, it is not a case of repeated applications in the face of unqualified previous failures, and the bases for the rejection of the applicant's claims have not been consistent.

26 The position therefore is, notwithstanding the circumstance that the present appeal, if successful, would not result in further entitlements in the applicant and is being pursued as a matter of principle, and the further circumstance that the issues he wishes to pursue have been the subject of multiple considerations previously, it is necessary, as always, to consider carefully the merits of this appeal.

Consideration of this Appeal

27 The case for the applicant before the AAT, (from which this appeal is brought), relied on a report of Dr Bernshaw, Radiation Oncologist, dated 27 October 1995, and oral evidence given by Dr Bernshaw to the AAT. The report of 27 October 1995 is not in the appeal papers before me. Dr Bernshaw said in his oral evidence:

'It is my strong opinion that he has been exposed to a higher than reasonable amount of radio-active material by virtue of consuming foods produced locally in Japan and caught from Hiroshima Bay some 22 to 30 months after the bomb blast. It is my opinion that he both obtained radioactive material and was contaminated by radioactive dust at ground zero site in a manner which would not have occurred had he not been in Japan. ...'

Dr Bernshaw expressed his belief:

'... there is a reasonable hypothesis to be made that the conditions of his service in the armed forces has contributed to his development of polycythaemia rubra vera and that there is a high likelihood that this will terminate in some form of malignant myelo-proliferative disorder and take his life.'

28 In his oral evidence Dr Bernshaw said that he believed that there was a reasonable hypothesis of causation between the conditions of the applicant's operational service and his 'pre-malignant condition of PV', at the time of his seeing him in 1995, 'and probably his current condition'.

29 The evidence of Dr Bernshaw was unchallenged by Ms E. Ford, counsel for the Commission, at the AAT.

30 The AAT in its decision of 31 May 2004 said that:

'18. Pursuant to s.196B the Repatriation Medical Authority has determined a Statement of Principles (SoP) in respect of the condition polycythaemia vera. The SoP relevant to Mr Collins' case is No. 78 of 1999 as amended by No. 11 of 2001.'

31 The AAT referred to clauses 3 and 4 of Statement of Principle No. 11 of 2001 ('SoP 11'), and indicated:

'21. The Repatriation Medical Authority does not take the view that radiation from radioactive residue is a cause of PV.'

The AAT, having regard to the provisions of s 120A(3) of the Act as to what is a reasonable hypothesis, concluded:

'The hypothesis that Mr. Collins' PV was caused by radiation from the atomic bomb residue in Hiroshima is not reasonable.'

The AAT said:

'22. ... There is no material before the Tribunal about what would amount to appropriate treatment [of polycythaemia vera]. There is no material which suggests that if Mr Collins had had whatever was appropriate, he would not be as bad now as he is.'

32 The AAT, as indicated above, applied SoP 11 of 2001 which relevantly required that a minimum factor that must exist:

'... in relation to the circumstances of a person's relevant service causing or materially contributing to or aggravating polycythaemia vera ... is inability to obtain appropriate clinical management for polycythaemia vera.'

33 The AAT concluded that the hypothesis contended for by the applicant, namely that his PV was caused by exposure to radiation during his war service, was not reasonable, as he did not meet the factor that the cause or material contribution to, or aggravation of, his condition of PV was 'an inability to obtain appropriate clinical management for PV', as required, according to the AAT, by SoP 11.

34 This appeal has to be considered in the applicable legislative framework:

35 The Act establishes a beneficial legislative scheme providing pensions and other entitlements for persons who have served Australia, both in times of conflict and, in certain circumstances, through their service in the Australian Defence Forces.

36 A person who becomes incapacitated from a war-caused injury or war-caused disease is eligible for a pension in accordance with the Act. Part II of the Act deals with eligibility for such pensions. For war-caused injuries or diseases, a reference to the incapacity of a veteran from a war-caused injury or disease is a reference to the effects of that injury or disease, not the injury or disease itself (s 5D(2) of the Act).

37 "Operational service" is defined in s 6 to 6F inclusive of the Act. "Defence service" is defined in 5Q(1A) and s 68(1) of the Act. A "veteran" is defined in s 5C(1) of the Act, and "war-caused disease" and "war-caused injury" are defined in s 5D(2) and s 9 of the Act. A veteran who becomes incapacitated as a result of a war-caused injury or war-caused disease is eligible for a pension in accordance with the Act.

38 Section 9(1)(b) of the Act defines for the purposes of the Act when an injury or disease may be taken to be a war-caused injury or war-caused disease. For the purposes of this appeal, that obliges that an injury or disease shall be taken to be war-caused if:

'... (b) the injury suffered, or disease contracted, by the veteran arose out of, or was attributable to, any eligible war service rendered by the veteran;'

39 In the circumstances of this case, there is no dispute that the applicant is a veteran who rendered operational service in Japan. In the unchallenged opinion of Dr Bernshaw, there is 'a reasonable hypothesis of causation between conditions of [the applicant's] service and ... his current condition [of PV]'. The hypothesis advanced by the applicant is that his PV is a disease contracted by the veteran which arose out of, or was attributable to, his war service in Japan.

40 Section 13 of the Act imposes upon the Commonwealth, liability to pay pensions to eligible persons. Section 14 deals with the making of claims for pensions and s 15 deals with making applications for increases in such pensions. Section 17 requires the Secretary of the Department of Veterans' Affairs to investigate claims and applications. Section 19 gives to the Repatriation Commission the duty of determining claims and applications for pensions and to determine the rate at which the pension is payable.

41 The Act establishes in Part II a scheme that provides for four different rates of pension, depending upon the degree of impairment.

42 In determining a causal link between the service of a veteran and particular diseases and injuries, the Act provides for the development and determination of Statements of Principles by a body entitled the Repatriation Medical Authority (s 196B). A Statement of Principle determined under s 196B is a disallowable instrument (s 196D).

43 The Repatriation Medical Authority has determined Statements of Principle in respect of the condition of PV.

44 Although the applicant's condition of PV was diagnosed in 1986, his current claim was filed in March 2000, so it is subject to the post 1994 regime which established the Repatriation Medical Authority for the promulgation of Statements of Principle.

45 The SoP in force at the time of his application, 27 March 2000, was SoP 78 of 1999.

46 SoP 78 revoked SoP No. 67 of 1995, and is dated the twenty-eighth of October 1999. SoP 78 relevantly provided:

'... Basis for determining the factors

3. The Repatriation Medical Authority is of the view that there is sound medical-scientific evidence that indicates that polycythaemia vera and death from polycythaemia vera can be related to relevant service rendered by veterans, members of Peacekeeping Forces, or members of the Forces.

Factors that must be related to service

4. Subject to clause 6, the factor set out in clause 5 must be related to any relevant service rendered by the person.

Factors

5. The factor that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting polycythaemia vera or death from polycythaemia vera with the circumstances of a person's relevant service is:
 - (a) inability to obtain appropriate clinical management for polycythaemia vera.

Factors that apply only to material contribution or aggravation

6. Paragraph 5(a) applies only to material contribution to, or aggravation of polycythaemia vera where the person's polycythaemia vera was suffered or contracted before or during (but not arising out of) the person's relevant service; paragraph 8(1)(e), 9(1)(e), 70(5)(d) or 70(5A) (d) of the Act refers.'

47 SoP 11 of 2001 amended SoP 78, by deleting clause 3 and inserting in its place the following clause:

'3. After examining the available sound medical-scientific evidence the Repatriation Medical Authority is of the view that there is sound medical-scientific evidence that indicates that the only factor that may be related to the cause of or material contribution to or aggravation of polycythaemia vera or death from polycythaemia vera and which can be related to relevant service is that set out in clause 4.'

and deleting clause 4 and inserting in its place the following clause:

'4. The factor that must as a minimum exist in relation to the circumstances of a person's relevant service causing or materially contributing to or aggravating polycythaemia vera or death from polycythaemia vera is inability to obtain appropriate clinical management for polycythaemia vera.'

and deleted clauses 5 and 6.

48 SoP 11 also provided:

'The amendments made by this instrument apply to all matters to which Instrument No. 78 of 1999 and section 120A of the Act apply.'

49 SoP 11 is dated the third of January 2001.

50 The explanatory notes in respect of the tabling of SoP 11 have a relevance to this matter. It is necessary for the proper interpretation of SoP 78 and SoP 11 to have regard to the explanatory notes on the tabling of SoP 11. Those notes state:

'The Repatriation Medical Authority (the Authority) has determined, under subsection 196B(2) of the Veterans' Entitlements Act 1986 (the Act), and the Acts Interpretation Act 1901 s.33(3) the attached Instrument Number 11 of 2001.

2. This instrument amends Instrument No. 78 of 1999 Statement of Principles concerning polycythaemia vera.
3. The reason for this amendment is that the Authority wishes to clarify the original intent of an instrument made under subsection 196B(2) of the Veterans' Entitlements Act 1986 in light of a decision of the Veterans' Review Board in re Collins and Repatriation Commission, 5 March 1999.
4. In its decision, the Veterans' Review Board had before it Statements of Principles No.67 of 1995 and No.68 of 1995, concerning polycythaemia vera. This disease is also known as polycythaemia rubra vera. In its consideration of the Statements of Principles Nos.67 of 1996 and 68 of 1995, the Veterans' Review Board analysed those Statements of Principles as intended to be used where polycythaemia vera was already contracted prior to service, and a claim under the Act was for aggravation of that condition. On that analysis, an hypothesis based upon the proposition that service caused the onset of the disease fell outside the Statements of Principles.
5. On 28 October 1999 the Authority determined to revoke Statement of Principles No.67 of 1995, and determined Statement of Principles No.78 of 1999.
6. In both Statement of Principles No.78 of 1999 and its predecessor Statement of Principles No.67 of 1995, the Authority had determined that inability to receive appropriate clinical management for polycythaemia vera as the factor which must as a minimum exist before it can be said, a reasonable hypothesis that polycythaemia vera or death from polycythaemia vera can be related to a person's relevant service for the purposes of subsection 196B(14) of the Act.
7. Prior to determining Statements of Principles No.67 of 1995 and No.78 of 1999, the Authority had conducted an investigation pursuant to subsections 196B(4) and (7) of the Act respectively and was satisfied that the sound medical-scientific evidence did not currently identify any factor for the clinical onset of polycythaemia vera. The information available to the Authority during these investigations does not support a decision that any factor can be related to onset of this disease.
8. After considering Statement of Principles No.78 of 1999, in light of the reasons of the Veterans' Review Board's decision referred to, the Authority is of the view that its intent in the Statement of Principles No.78 of 1999, is not clear.

9. To clarify the original intent of instruments made under subsection 196B(2) that there is no factor which can be related to the onset of this disease, and that the only factor which can be related to relevant service for the purposes of the Act, is the inability to receive appropriate clinical management during service, the Authority intends to amend Statements of Principles as required.

...'

51 The Act sets out the standard of proof in respect of determinations in respect of s 120, and where a Statement of Principle is in effect for the claimed condition, the operation of s 120 is controlled by s 120A in circumstances where the service has been operational service.

52 Section 120 relevantly provides:

'(1) Where a claim under Part II for a pension in respect of the incapacity from injury or disease of a veteran, or of the death of a veteran, relates to the operational service rendered by the veteran, the Commission shall determine that the injury was a war-caused injury, that the disease was a war-caused disease or that the death of the veteran was war-caused, as the case may be, unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination.

...

- (3) In applying subsection (1) or (2) in respect of the incapacity of a person from injury or disease, or in respect of the death of a person, related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining:
- (a) that the injury was a war-caused injury or a defence-caused injury;
 - (b) that the disease was a war-caused disease or a defence-caused disease; or
 - (c) that the death was war-caused or defence-caused;

as the case may be, if the Commission, after consideration of the whole of the material before it, is of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person.

- (4) Except in making a determination to which subsection (1) or (2) applies, the Commission shall, in making any determination or decision in respect of a matter arising under this Act or the regulations, including the assessment or re-assessment of the rate of a pension granted under Part II or Part IV, decide the matter to its reasonable satisfaction.'

53 Section 120A relevantly provides:

'...

(3) For the purposes of subsection 120(3), a hypothesis connecting an injury suffered by a person, a disease contracted by a person or the death of a person with the circumstances of any particular service rendered by the person is reasonable only if there is in force:

- (a) a Statement of Principles determined under subsection 196B(2) or (11); or
- (b) a determination of the Commission under subsection 180A(2);

that upholds the hypothesis.

(4) Subsection (3) does not apply in relation to a claim in respect of the incapacity from injury or disease, or the death, of a person if the Authority has neither determined a Statement of Principles under subsection 196B(2), nor declared that it does not propose to make such a Statement of Principles, in respect of:

- (a) the kind of injury suffered by the person; or
- (b) the kind of disease contracted by the person; or
- (c) the kind of death met by the person;

as the case may be.' (Emphasis added)

54 Section 196B(2) relevantly provides:

'...

(2) If the Authority is of the view that there is sound medical-scientific evidence that indicates that a particular kind of injury, disease or death can be related to:

- (a) operational service rendered by veterans; or
- (b) peacekeeping service rendered by members of Peacekeeping Forces; or
- (c) hazardous service rendered by members of the Forces;

the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out:

- (d) the factors that must as a minimum exist; and
- (e) which of those factors must be related to service rendered by a person;

before it can be said that a reasonable hypothesis has been raised connecting an injury, disease or death of that kind with the circumstances of that service.'

55 The submissions on behalf of the applicant and the submissions on behalf of the respondent make it clear that this is a very difficult case.

56 The applicant contends that the AAT applied the wrong SoP. At the time the application was lodged, the relevant SoP was SoP 78 of 1999. For the applicant it was asserted that the amending instrument, SoP 11 of 2001 does not apply, and the AAT fell into error by applying it. The submission then follows that, by its own operation, clause 6 of SoP 78 takes clause 5 out of play in this case, because 'this case is a case of cause'. It is then submitted that clause 4, by its operation, keeps clause 5 out of the way because of the content of clause 6.

57 The result, in the applicant's submission, is that the only part of the Statement of Principle that has any operation on a claim of this sort is clause 3, which says that polycythaemia vera can be related to relevant service and that, in the applicant's submission, 'upholds the hypothesis of Dr Bernshaw'. Accordingly, so it is said, s 120A(3) is satisfied, and it follows that the requirements of s 120(3) are satisfied, and the Commission therefore cannot properly reach the conclusion that there is no reasonable hypothesis connecting the disease with the circumstances of the service.

58 It was submitted on behalf of the respondent that the AAT applied the correct SoP, being SoP 78 as amended by SoP 11, and the SoP 78 as amended by SoP 11 did exclude a hypothesis that the applicant's PV was caused by operational service.

59 It was submitted that the explanatory note to SoP 11 clarified SoP 78 by making it clear that an hypothesis based on the proposition that service caused the onset of the disease was covered by the amended SoP. However, the statement in the explanatory note that 'the information available to the Authority during these investigations does not support a decision that any factor can be related to onset of this disease' is logically inconsistent with the contention in clause 4 of the amended SoP that 'the factor that must as a minimum exist in relation to the circumstances of a person's relevant service causing ... polycythaemia vera ... is inability to obtain appropriate clinical management for polycythaemia vera.'

60 The real difficulty in this case is that SoP 78 as amended by SoP 11 has the effect of requiring that the factor that must exist before there is a connection between a veteran's operational service and the condition of PV is that his PV must be caused by his inability to obtain appropriate clinical management for his PV.

61 This required factor in SoP 11 in relation to the cause of the veteran's PV is nonsensical. I find it extraordinarily difficult to accept that such a requirement could be expounded by any rational person, let alone an expert body of medical scientists. Yet that is what the amended Statement of Principle postulates as a necessary requirement before the hypothesis of connection between operational service and the veteran's PV is a reasonable hypothesis.

62 In my judgment, the applicable SoP is as the respondent contends, that is to say, SoP 78 as amended by SoP 11. The terms of s 120A(3), that an hypothesis is reasonable only if there is in force a Statement of Principles determined under s 196B(2) that upholds the hypothesis, requires the conclusion that the relevant SoP is that which is in force at the time of decision. See also s 120A(2). That amended SoP excludes an hypothesis that the veteran's PV was caused by exposure to radiation during operational service, because it requires that the veteran's PV was caused by the veteran's inability to obtain appropriate clinical management for the veteran's PV, and that

factor alone.

63 The AAT decided that the SoP in force at the time of its decision, (which was also the SoP in force at the time of the Commission's decision), was SoP 78 as amended by SoP 11. That amended SoP was the one against which it should measure or determine the applicant's entitlement.

64 In *Stoddart v Repatriation Commission* (2003) 197 ALR 283 at par 16, Mansfield J said:

'In *Gorton*, [*Repatriation Commission v Gorton* (2001) 110 FCR 321] the Full Court (Heerey, Emmett and Allsop JJ) determined that, in performing its function of review, the tribunal should first approach the question of entitlement to a pension under the VE Act by reference to the SoP in force at the time of its decision. If it determined by reference to that SoP that there was no entitlement to a pension, only then should it consider whether, by virtue of an SoP in force at the time of the commission's decision (or perhaps at the time of the application) there was an "accrued right" which was preserved under that earlier SoP to have the claim determined also by reference to that earlier SoP. In the earlier decision of the Full Court in *Repatriation Commission v Keeley* (2000) 98 FCR 108; 60 ALD 401 (Keeley) the Full Court decided that a claimant is entitled to an accrued right to have his or her claim considered and reviewed by the tribunal on the basis of the SoP current at the time of the commission's decision, despite the later revocation of that earlier SoP. As explained in *Gorton*, it is only necessary to have regard to any such accrued right if the Tribunal, applying the SoP current at the date of its review, is of the view that the claim should be refused.'

65 Mansfield J noted at par 19:

'... in my view the analysis in each case of the source of the "accrued right" which was found to exist indicates that the tribunal in this matter correctly addressed the claim by reference to the SoP in force at the time of the commission's decision (and at the time of its decision), and correctly rejected the contention that the applicant had an accrued right to have his claim determined by the SoP in force at the time his application was made.'

66 Mansfield J referred to the observations of Lee and Cooper JJ in *Repatriation Commission v Keeley* (2000) 60 ALD 401 at 415:

'The terms of s 120A(2) show a clear intention by Parliament that such a Statement is to "affect" the accrued right obtained by the lodgment of a claim under the Act to have the claim decided by the Commission. It is plain that by postponing a right to have a claim decided until a Statement has been determined, Parliament intended that the decision, and therefore the right to have a decision made, may be affected by a Statement determined under s 196B and that a pending claim is to be decided by application of the Statement when determined.'

67 Mansfield J concluded, at pars 23 and 24:

'Those cases indicate that the accrued right, which arises by reason to the making of a claim for benefits under the VE Act, is to have the claim determined by reference to the SoP in force at the time of the commission's decision. That is because of the direction in s 120A(2).

I consider that reasoning applies whether there was no SoP in force at the time the claim was made, or there was an SoP in force at the time the claim was made and was replaced by a reviewed SoP at the time of the commission's decision. ...'

68 It may be thought quite unsatisfactory that the terms of the SoP in force at the time of the Commission's decision (and which was the same amended SoP in force at the time of the decision of the AAT) are devoid of rational or scientific conviction.

69 The requirement that the hypothesis connecting operational service with the condition of PV in the veteran be a reasonable hypothesis is, by the amended SoP, the nonsensical requirement that the veteran's PV be caused by an inability to obtain appropriate clinical management of his PV.

70 That nonsensical requirement, however, is what the Parliament by s 120A(3) of the Act, and the Repatriation Medical Authority, by SoP 78 as amended by SoP 11, has stipulated as necessary.

71 There is nothing the AAT or this Court can do about it.

72 In my judgment the AAT, in the quite unusual circumstances of this case, made no error of law. Accordingly, the appeal should be dismissed.

73 The appropriate order is that the appeal be dismissed with costs, to be taxed if not agreed.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender

Associate:

Dated: 4 November 2005

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