

AUSTRALIA / JUDGMENT

Renton v Repatriation Commission [2009] FCA 268

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FEDERAL COURT OF AUSTRALIA

Renton v Repatriation Commission [2009] FCA 268

VETERANS' ENTITLEMENTS – Statement of Principles – alcohol dependence or alcohol abuse – whether applicant experienced a severe stressor – whether inability to obtain appropriate clinical management

ADMINISTRATIVE APPEALS TRIBUNAL – appeal from decision of the Tribunal – question of law – whether s 119(1)(h) and s 120 of the Veterans' Entitlements Act 1986 (Cth) correctly applied – whether Statement of Principles correctly applied

Veterans' Entitlements Act 1986 (Cth) ss 13(1), 119(1)(f), (g), (h), 120, 120A

Administrative Appeals Tribunal Act 1975 (Cth) s 44

Repatriation Commission v Deledio (1998) 83 FCR 82 applied

Fenner v Repatriation Commission (2005) 218 ALR 122 cited

Stoddart v Repatriation Commission (2003) 74 ALD 366 considered

Repatriation Commission v Constable (2006) 151 FCR 391 applied

DONALD KEITH RENTON v REPATRIATION COMMISSION

QUD 280 of 2007

DOWSETT J

27 MARCH 2009

BRISBANE

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY QUD 280 of 2007

BETWEEN: DONALD KEITH RENTON

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: DOWSETT J

DATE: 27 MARCH 2009

PLACE: BRISBANE

REASONS FOR JUDGMENT

background

1 The applicant served in the Australian Army from 5 March 1968 until 2 December 1970. His service included a period of operational service in Vietnam from 4 June until 24 September 1970. The applicant claims a disability pension pursuant to s 13(1) of the Veterans' Entitlements Act 1986 (Cth) ("the Act"). It has been accepted that he suffers from an anxiety condition which was war-caused. He claims also to suffer from war-caused alcohol dependence. The respondent (the "Commission") rejected the claim. That decision was upheld by Veterans' Review Board (the "Board"). The Administrative Appeals Tribunal (the "Tribunal") upheld the Board's decision. The applicant appeals against that decision.

LEGISLATION

2 Section 9(1) of the Act relevantly provides:

- (1) Subject to this section, for the purposes of this Act ... a disease contracted by a veteran shall be taken to be a war-caused disease, if:
 - (a) the ... disease contracted, by the veteran resulted from an occurrence that happened while the veteran was rendering operational service; [or]
 - (b) the ... disease contracted, by the veteran arose out of, or was attributable to, any eligible war service rendered by the veteran; [or]

...

3 The claim is pursuant to Part II of the Act. Section 120 prescribes the standard of proof to be applied in such claims. Relevantly, it provides that:

- (1) Where a claim under Part II for a pension in respect of the incapacity from ... disease of a veteran, ... relates to the operational service rendered by the veteran, the Commission shall determine that the ... disease was a war-caused disease ... unless it is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination.
- (2) ...

- (3) In applying subsection (1) ... in respect of the incapacity of a person from ... disease ... related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining:

...

- (b) that the disease was a war caused disease ...; or

...

... 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 ... disease ... with the circumstances of the particular service rendered by the person.

- (4) ...

- (5) Nothing in the provisions of this section, or in any other provision of this Act, shall entitle the Commission to presume that:

...

- (b) a disease contracted by a person is a war-caused disease ...;

...

- (6) Nothing in the provisions of this section, or in any other provision of this Act, shall be taken to impose on:

- (a) a claimant or applicant for a pension or increased pension, or for an allowance or other benefit, under this Act; or
- (b) the Commonwealth, the Department or any other person in relation to such a claim or application;

any onus of proving any matter that is, or might be, relevant to the determination of the claim or application.

4 Section 120A provides that:

- (1) This section applies to any of the following claims made on or after 1 June 1994:

- (a) a claim under Part II that relates to the operational service rendered by a veteran;

...

- (2) ...

- (3) For the purposes of subsection 120(3), a hypothesis connecting ... a disease contracted by 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) ...

that uphold the hypothesis.

5 The relevant statement of principles is Instrument No 76 of 1998 (the "SoP"). The condition of alcohol dependence is defined as follows:

"alcohol dependence" means the presence of a constellation of cognitive, behavioural and physiological symptoms indicating the use of alcohol despite significant alcohol-related problems. The pattern of repeated self administration may result in tolerance, withdrawal and compulsive alcohol use behaviour.

The diagnostic criteria for alcohol dependence are those specified in DSM-IV, and are as follows:

A maladaptive pattern of alcohol use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12-month period:

- (1) tolerance, as defined by either of the following:
 - (a) a need for markedly increased amounts of alcohol to achieve intoxication or desired effect
 - (b) markedly diminished effect with continued use of the same amount of alcohol
- (2) withdrawal, as manifested by either of the following:
 - (a) the characteristic withdrawal syndrome for alcohol
 - (b) the same (or closely related) substance is taken to relieve or avoid withdrawal symptoms
- (3) alcohol is often taken in larger amounts or over a longer period than was intended
- (4) there is a persistent desire or unsuccessful efforts to cut down or control alcohol use
- (5) a great deal of time is spent in activities necessary to obtain alcohol, use alcohol or recover from its effects
- (6) important social, occupational or recreational activities are given up or reduced because of alcohol use
- (7) 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;

(Original emphasis.)

6 Paragraphs 3, 4, 5 and 6 of the SoP are as follows:

Basis for determining the factors

3. The Repatriation Medical Authority is of the view that there is sound medical-scientific evidence that indicates that alcohol dependence or alcohol abuse and death from alcohol dependence or alcohol abuse 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, at least one of the factors set out in clause 5 must be related to any relevant service rendered by the person.

Factors

5. The factors that must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting alcohol dependence or alcohol abuse or death from alcohol dependence or alcohol abuse with the circumstances of a person's relevant service are:
 - (a) suffering from a psychiatric disorder at the time of the clinical onset of alcohol dependence or alcohol abuse; or
 - (b) experiencing a severe stressor within the two years immediately before the clinical onset of alcohol dependence or alcohol abuse; or
 - (c) suffering from a psychiatric disorder at the time of the clinical worsening of alcohol dependence or alcohol abuse; or
 - (d) experiencing a severe stressor within the two years immediately before the clinical worsening of alcohol dependence or alcohol abuse; or
 - (e) inability to obtain appropriate clinical management for alcohol dependence or alcohol abuse.

Factors that apply only to material contribution or aggravation

6. Paragraphs 5(c) to 5(e) apply only to material contribution to, or aggravation of, alcohol dependence or alcohol abuse where the person's alcohol dependence or alcohol abuse 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.

(Original emphasis.)

7 The expression "experiencing a severe stressor" is defined in para 8 to mean that:

... the person experienced, witnessed or was confronted with, an event or events that involved actual or threat of death or serious injury, or a threat to the person's or other people's physical integrity, which event or events might evoke intense fear, helplessness or horror.

In the setting of service in the Defence Forces, or other service where the Veterans' Entitlements Act applies, events that qualify as severe stressors include:

- (i) threat of serious injury or death; or
- (ii) engagement with the enemy; or
- (iii) witnessing casualties or participation in or observation of casualty clearance, atrocities or abusive violence;

...

8 The expression "relevant service" is defined to mean:

- (a) operational service; or
- (b) peace-keeping service; or
- (c) hazardous service ...

DELEDIO

9 In *Repatriation Commission v Deledio* (1998) 83 FCR 82 at 97, the Full Court identified a four step process for applying these provisions as follows:

1. The Tribunal must consider all the material which is before it and determine whether that material points to a hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person. No question of fact finding arises at this stage. If no such hypothesis arises, the application must fail.
2. If the material does raise such a hypothesis, the Tribunal must then ascertain whether there is in force an SoP determined by the Authority under s 196B(2) or (11). If no such SoP is in force, the hypothesis will be taken not to be reasonable and, in consequence, the application must fail.
3. If an SoP is in force, the Tribunal must then form the opinion whether the hypothesis raised is a reasonable one. It will do so if the hypothesis fits, that is to say, is consistent with the "template" to be found in the SoP. The hypothesis raised before it must thus contain one or more of the factors which the Authority has determined to be the minimum which must exist, and be related to the person's service (as required by ss 196B(2)(d) and (e)). If the hypothesis does contain these factors, it could neither be said to be contrary to proved or known scientific facts, nor otherwise fanciful. If the hypothesis fails to fit within the template, it will be deemed not to be "reasonable" and the claim will fail.

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

THE CLAIM

10 For the purposes of para 5(b) of the SoP the applicant identified two potential stressors which allegedly occurred during his operational service. The first was his handling of casualty figures. The Tribunal summarized the relevant evidence as follows:

10. Mr Renton was a radio keyboard operator in Saigon. He handled transmissions between Australia and the task-force, and between units in the field and headquarters. He says he scrutinised casualty lists each time they came across his desk. During the course of his evidence at the hearing, he explained he was looking for the names of his brother and other relatives who were also serving in Vietnam. He was worried they might have been injured or killed. I note one of his brothers had been shot and wounded some years earlier.
11. The applicant said he was only worried about the names of relatives appearing on the casualty lists. He said he became distressed each time he scrutinised the lists but was relieved when he did not come across names he knew. None of his relatives were ever referred to on the lists. He said he was otherwise unaffected by the experience.

11 The second event (the "Saigon incident") occurred outside a bar in Saigon in 1970. The Tribunal summarized the evidence of the incident as follows:

13. This incident was the focus of the evidence led at the hearing. Mr Renton claimed the incident unfolded one night between 24 June and 14 July 1970. (The applicant was charged with disciplinary offences on each of those dates. He said he remembered he had been charged with an offence on 24 June before the incident occurred, but the second charge was not preferred until 24 July after the events in question.) He said he was making his way through the streets of Saigon to his billet after curfew when he came upon a hotel. There were two American servicemen outside making a fuss. He approached them to find out what was happening. They told him they were members of a Navy SEAL team. They said one of their comrades was inside being beaten by local toughs. Mr Renton says he looked through the locked gates into the building and saw an American serviceman being struck with lengths of timber. Mr Renton says he resolved to help. He says he climbed the fence which surrounded the establishment. It was made of wrought iron and was crowned with sharp decorative stakes. He then somehow scaled the wall of the building to the second level. He smashed a window to gain access. The men downstairs who were administering the beating to the American serviceman heard the sound of breaking glass and threw the man out. The applicant climbed down to the ground level and scaled the fence. Mr Renton says the

American serviceman slipped while he was scaling the fence and one of the stakes plunged into his thigh.

14. While the applicant and the two American servicemen on the street (who had remained behind to bang on the front gates of the establishment) struggled to release their injured colleague from the fence, the applicant says he heard someone fire a single shot. He says he saw a muzzle-flash come from the corner of a building across the street. He says it was unclear whether the shot came from inside the building, or from the street at one end. He says there was no one else on the street at the time. He also says he recognised the distinctive sound of an AK-47 rifle which was known to be the weapon of choice for the enemy. All four men (including the injured man) ran off.
15. A short while later, the applicant said the fleeing men came across an American military police patrol. There were two MPs in a vehicle. The applicant and the other three servicemen told the MPs what had occurred. After the injured serviceman was despatched to hospital in another military police vehicle, the applicant says he and the other two men climbed into the rear of the police vehicle and drove back to the site of the incident. The MPs did not call for any assistance. They looked around the site. The police found nothing untoward and drove the men back to the American billet without further delay. They did not arrest the men for being out after curfew.
16. The applicant says he stayed at the American quarters that night. The injured serviceman returned from the hospital during the course of the night with some stitches to his leg. They all discussed what had occurred, although Mr Renton says they did not drink. He claims the Americans speculated about what they might have done if circumstances were different and they were armed. Mr Renton says he has no doubt there would have been a gunfight, and he would have been caught in the middle. The Americans returned to the United States the following day, and Mr Renton went back to his accommodation. He never heard from them again.

12 In submissions before the Tribunal, the applicant also sought to rely on para 5(a), alleging that he was, at the relevant time, suffering from an anxiety condition which had been recognized as being war-caused. It was caused by the Saigon incident. The Tribunal summarized the relevant evidence as follows:

21. The third basis on which the applicant says he can satisfy the SoP arises out of his anxiety condition. Factor 5(a) refers to experiencing a psychiatric condition at the time of the clinical onset of the alcohol dependence condition. (Factor 5(c) refers to suffering a psychiatric disorder at the time of the clinical worsening of the condition.)

22. It has already been accepted that the applicant suffered from an anxiety condition commencing in 1970. The Veterans' Review Board decided the alcohol dependence condition pre-dated the onset of the anxiety condition, but I accept there is evidence in the form of Dr Majumdar's reports and the applicant's testimony that suggest the alcohol dependence condition arose out of the same events as the anxiety condition. I therefore accept the applicant's story is capable of fitting the template of the SoP.

13 Although the matter is not clear, it seems that the applicant also referred to paras 5(c) and 5(e) of the SoP.

THE TRIBUNAL'S DECISION

14 At para 2 of its reasons the Tribunal observed that:

The parties agree the applicant suffers from an alcohol dependence condition. I accept the medical evidence to that effect. The question is whether the condition is related to his war service. That determination must be made having regard to s 120 of the Act. The Full Federal Court in *Repatriation Commission v Deledio* ... said it was necessary to follow a four-step reasoning process in the application of s120 where a claim is made in respect of the periods of operational service.

15 In considering the first step prescribed by *Deledio*, the Tribunal identified the applicant's first hypothesis as being that the alleged stressors had caused his alcoholic dependence. The Tribunal concluded that the "material taken as a whole points to the hypothesis for which the applicant contends". The second hypothesis was that his alcohol dependence resulted from his attempts to cope with his anxiety condition. The Tribunal accepted that the material also pointed to that hypothesis.

16 In connection with the second step contemplated in *Deledio*, the Tribunal identified the SoP and then proceeded to the third step. With respect to the applicant's handling of the casualty lists, the Tribunal was not satisfied that the events as he described them satisfied the definition of a severe stressor in the SoP on the basis that "none of the names he feared seeing were ever included on the list". Additionally, the Tribunal concluded that:

A person with the background and experience of the applicant – even one with a relative who had been hurt in the past – would not have regarded the experience of reading the lists as a severe stressor of a kind or magnitude of the other examples given in the definition.

(Original emphasis.)

17 The Tribunal then considered the events in Saigon. It was common ground that an incident such this would have been a severe stressor for the purposes of the SoP. The Tribunal noted that the SoP required that the severe stressor have occurred within two years before the clinical onset of alcohol dependence. The Tribunal considered that there was evidence suggesting that his alcohol dependence arose in 1970 following the alleged incidents. However there was also evidence which, in the Tribunal's view, pointed to an earlier onset. Nonetheless, for the purposes

of the third step, the Tribunal accepted that on the applicant's evidence, the severe stressor arguably occurred within the prescribed time frame. The Tribunal then considered the applicant's hypothesis based upon his anxiety condition, accepting that there was evidence suggesting that the condition arose out of the same circumstances as caused the applicant's alcohol dependence. On that basis, the Tribunal accepted that the hypothesis was "capable of fitting the template of the SoP".

18 The Tribunal proceeded to the fourth step prescribed in *Deledio*, considering whether it was satisfied beyond reasonable doubt that there was no sufficient ground for deciding that the applicant's alcohol dependency was war-caused. It concluded that the applicant's account of the Saigon incident was implausible. It did not accept that the incident had occurred. This left the hypothesis that his anxiety condition had been caused by his alcohol dependence. The Tribunal concluded that the onset of such dependence was prior to the Saigon incident. The anxiety condition had been allegedly caused by that incident. Thus the applicant could not have been suffering from it at the time of onset of his alcohol dependence.

19 Counsel had submitted that the Tribunal should also consider whether the applicant's alcohol dependence had been aggravated by his experiences in Vietnam and his anxiety condition. The Tribunal found no evidence of such aggravation.

THE APPEAL

20 Pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) (the "AAT Act"), a party may appeal from a decision of the Tribunal "on a question of law".

21 At the commencement of the appeal, counsel for the applicant was granted leave to amend the notice of appeal to identify the following "questions of law":

- (a) Whether the Tribunal erred in law failing to take into account or apply the presumption in section 119(1)(h) of the Veterans[] Entitlements Act 1987 (Cth) that deficiencies in obtaining evidence from official records to ascertain the existence of a fact.
- (b) Whether the Tribunal erred in law failing to correctly apply the test in section 120 of the Veterans[] Entitlements Act 1987 (Cth) that it must be satisfied beyond reasonable doubt that the applicant's incapacity did not arise from a war-caused injury. The Tribunal then failed to take into account relevant material facts and ignore irrelevant material facts.
- (c) Whether the Tribunal erred in law failing to correctly apply a statutory test when evaluating the Statement of Principle for [a]lcohol dependence or alcohol abuse. The Tribunal then failed to take into account relevant material facts and ignore irrelevant material facts.

Ground (a) – s 119(1)(h)

22 Section 119(1) relevantly provides that the Commission:

- (f) is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it thinks just;
- (g) shall act according to substantial justice and the substantial merits of the case, without regard to legal form and technicalities; and
- (h) without limiting the generality of the foregoing, shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance, including any reason attributable to:
 - (i) the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; and
 - (ii) the absence of, or a deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence that happened during the service of a veteran, or of a member of the Defence Force or of a Peacekeeping Force, as defined by subsection 68(1), was not reported to the appropriate authorities.

23 The applicant submits that the Tribunal failed to take into account the operation of s119(1)(h) "when faced with a lack of documentary evidence to support the deficiency of the records of the American [M]ilitary [P]olice and the shooting incident as described by the applicant". It is also submitted that the Tribunal rejected the applicant's evidence, at least partly upon the basis that there was no other evidence to corroborate his account, and on the basis that his recollection was almost certainly affected by his alcohol dependence and anxiety condition.

24 Section 119(1)(h) directs the Commission (and, it may be assumed, the Tribunal) as to the way in which each should deal with evidence concerning relevant events. It should be read in conjunction with s 119(1)(f) and s 119(1)(g) which provide that the Commission is not bound to act in a formal manner or by the rules of evidence, and that it should act according to the substantial justice and merits of the case, without regard to legal form and technicalities. Section 119(1)(h) requires the Commission take into account "difficulties" which lie in the way of ascertaining the existence of any fact, matter, cause or circumstance. Such difficulties include the passage of time and the effects thereof, and any shortcomings in relevant official records, including those resulting from failure to report an occurrence. For present purposes no relevant "difficulties" have been identified. The applicant may point to the absence of any official records supporting his claim, together with the passage of time and the development of his anxiety condition and alcohol dependence. However there is no reason to believe that absent such circumstances, the applicant would have been faced by fewer, or less significant difficulties.

25 In effect, the applicant submits that s 119(1)(h) should be construed as requiring the Tribunal to accept the applicant's claims simply because he has made them. That is not the correct approach to the section. See *Fenner v Repatriation Commission* (2005) 218 ALR 122 at [26]-[29]. There is nothing in this ground of appeal.

Ground (b) - Section 120

26 The applicant submits that the Tribunal wrongly concluded that his handling of casualty lists did not constitute a severe stressor within the meaning of the SoP. The Tribunal considered that a person with the applicant's background and experience, "even one with a relative who had been hurt in the past would not have regarded the experience of reading casualty lists as a severe stressor of a kind or magnitude of the other examples given in the definition." (Original emphasis.) There is no requirement in the SoP that a veteran regard the relevant experience as being a severe stressor.

27 The applicant submits that in assessing the alleged stressors, the circumstances of the veteran should be taken into account including, in this case, that his brother had previously been wounded in Vietnam, and that both men and a cousin were then serving there. It is submitted that the Tribunal was also obliged to take into account the "applicant[s] unique circumstance of suffering from a diagnosed psychiatric condition of hysterical personality". In making these submissions the applicant relies upon the decision of Mansfield J in *Stoddart v Repatriation Commission* (2003) 74 ALD 366, especially at [50] as follows:

In my judgment, the meaning of the word "threat" as used in the definition of "experiencing a severe stressor" does not require the construction or meaning contended for by the respondent and accepted by the tribunal. The adjectival clause "that involved actual or threat of death or serious injury ..." explains the nature of the event or events which must be experienced. It contemplates an objective and assessable state of affairs. I do not think it provides for idiosyncratic and personal perceptions of events which, judged objectively, do not in fact fall within the adjectival clause. But it does not follow that the "threat" there referred to must involve events which judged objectively and with full information involve an actual threat of death or serious injury. That construction would appear to go beyond the purpose of SoPs. It would involve the Repatriation Medical Authority in the two SoPs being interpreted as saying (for example) that on medical-scientific evidence PTSD cannot be related to operational service where events actually experienced and which a person with the knowledge and in the circumstances of a particular claimant could reasonably lead to that person perceiving a threat of death or serious injury or to physical integrity, did not, judged objectively and with full knowledge of all the circumstances, in fact amount to such a threat. Such an interpretation would lead to excluding from the scope of the word "threat" a range of circumstances, some of which are referred to above, which commonsense indicates are matters not directly within medical-scientific evidence. That is, if a threat of serious injury or death is perceived by a claimant from actual events experienced in circumstances where, judged objectively and with the knowledge and in the circumstances of the claimant, it was reasonable to perceive the threat, I do not understand it to be a medical-scientific opinion that no reasonable hypothesis can be raised connecting the condition resulting from those events with them. The definition of "sound medical-scientific evidence" in s 5AB(2) also indicates that the Repatriation Medical Authority would not intend to impose a prescriptive exclusion of the kind which would result from the interpretation of the SoPs which the tribunal adopted.

28 At [51], after reference to the relevant legislation, his Honour concluded:

It is consistent with those provisions that the SoPs should be read as meaning that a claimant experiences "a severe stressor" if that person experiences, witnesses or is confronted with an event or events which that person perceived as a threat of death or serious injury or to physical integrity, and which that person's knowledge and in that person's experience, could reasonably be so perceived.

29 I understand the enquiry to be as to an objective state of affairs, having regard to the veteran's knowledge and experience. The applicant's brother's previous injury may have caused the former to have a heightened awareness of the possible consequences of involvement in armed combat. The Tribunal took that matter into account when it used the words "even one with a relative who had been hurt in the past". Whether such heightened awareness constituted "knowledge" or "experience" for present purposes may be doubted. However increased susceptibility to psychological trauma as a result of hysterical personality or a brother's injury is not knowledge or experience.

30 The respondent submits that the applicant's challenge to this aspect of the Tribunal's decision is really an attack upon a finding of fact, and therefore not properly a ground of appeal. There is substance in that submission. However I conclude that the Tribunal did not fully understand the definition of the words "experiencing a severe stressor" as applied to the applicant's handling of the casualty lists. Reading the casualty lists may have amounted to his experiencing, witnessing or being confronted by an event or events "that involved actual or threat of death or serious injury or a threat to the person's or other people's physical integrity which event or events might evoke intense fear, helplessness or horror". Having his attention regularly drawn to casualty lists in a theatre of war might well have involved the applicant in experiencing, witnessing or being confronted by events which caused death or serious injury, even if the actual events were not identified. Alternatively his reading of the lists may, itself, have been an event or events which involved actual death or serious injury. Exposure to the casualty lists might also constitute a threat of death or serious injury, particularly if one is present in the theatre and/or one's brother and cousin are there. I see no reason why repeated exposure to casualty lists might not evoke intense fear, helplessness or horror. The Tribunal disposed of this aspect of the case without regard to these matters.

31 The evidence concerning the applicant's handling of casualty lists was not substantial. He did not claim to have been adversely affected by reading the casualty lists at the time. He seems rather to have been concerned to ensure that his brother and cousin were not on the lists. He felt no particular reaction (other than relief) upon discovering that neither was on each list. This evidence, perhaps in conjunction with medical evidence, might, at the fourth step, lead to the rejection of the applicant's claim. However that process should not be allowed to impinge upon step three. I consider that the Tribunal did not consider the relevant question in dealing with the applicant's handling of the casualty lists as a potential stressor.

32 The approach taken by the Tribunal has a second weakness. No attention was paid to the three specific categories of experience identified as severe stressors in the second part of the definition, namely:

...

(i) threat of serious injury or death; or

(ii) engagement with the enemy; or

(iii) witnessing casualties or participation in or observation of casualty clearance, atrocities or abusive violence

33 In *Repatriation Commission v Constable* (2006) 151 FCR 391 at [42]-[50] the Full Court held that an experience falling within any of these categories will be a severe stressor. In the present case, the Tribunal should have considered whether his handling of the casualty lists fell within either the first or third category. This is not quite the point raised by the applicant. However the thrust of his submission is that exposure to the casualty lists was capable of being a stressor, taking into account his peculiar circumstances. In my view, on the evidence, it was capable of being a stressor even without those circumstances.

34 With respect to the Saigon incident, the applicant submits that in applying s 120 the Tribunal failed to take into account the provisions of s 119(1)(h). I have already dealt with this submission in connection with the first ground of appeal. It is not necessary that I say any more about it.

35 I turn to the applicant's anxiety condition. Paragraph 5(a) of the SoP required that the applicant was suffering from a psychiatric disorder at the time of the clinical onset of alcohol dependence. Paragraph 5(c) required that he was suffering from such a disorder at the time of any clinical worsening of his alcohol dependence. The Tribunal concluded that the applicant "was already locked in a pattern of maladaptive alcohol use by the time he arrived in Vietnam", that is prior to his operational service and prior to the onset of his anxiety condition. It has been accepted that the applicant's anxiety condition was war-caused. Curiously, such acceptance seems to have been based on the Saigon incident, evidence of the occurrence of which was rejected by the Tribunal in considering his alcohol dependence.

36 The Tribunal said that the Board had concluded that the applicant's alcohol dependence pre-existed his anxiety condition, although Dr Majumdar suggested that the alcohol dependence had arisen out of the Saigon incident and the applicant's handling of casualties. The Tribunal also observed that the Board had accepted that the applicant was already locked in a pattern of maladaptive alcohol use by the time he arrived in Vietnam. That statement did not accurately reflect the Board's position. It concluded that his indicative drinking pattern had emerged in the first few weeks after his arrival in Vietnam. The Tribunal indicated that it agreed with its misunderstanding of the Board's view. However it seems to have considered the matter for itself. It had regard to the 1969 charge which involved liquor and concluded that the onset of his alcohol dependence must have occurred prior to his arrival in Vietnam. The applicant submits that the Tribunal erred in this regard. The applicant had claimed that he was a social drinker prior to his

service in Vietnam. Under cross-examination he asserted that his alcohol intake had increased, "probably 3 to 4 weeks after his arrival in Vietnam". It is submitted that the Tribunal did not make any adverse finding of credibility against the applicant in relation to his evidence. Secondly it is submitted that the only incident concerning consumption of liquor in Australia prior to the applicant's Vietnam service was that referred to above. Finally it is submitted that the Tribunal's conclusion was inconsistent with the evidence of Dr Majumdar who was said to have asserted that the date of clinical onset of the dependence was in 1970, following his involvement with the casualty lists and the Saigon incident.

37 It is not correct to say that the Tribunal made no adverse finding of credibility. The Tribunal clearly considered that the applicant's evidence was not reliable because of the passage of time and the effects of his alcohol dependence and anxiety condition. Although his regimental and company conduct sheets may not have disclosed other offences involving liquor, it does not follow that he did not have a drinking problem. The conduct sheets demonstrate quite irregular conduct. Alcohol dependence might have been one explanation, particularly given the history of alcohol use which allegedly commenced shortly after his arrival in Vietnam. It seems unlikely that in the absence of a prior history, alcohol dependence would have emerged so soon after such arrival. Dr Majumdar's opinion was, of course, dependent upon the applicant's account of his own history. The Tribunal was therefore faced with a relatively unsatisfactory service record whilst in Australia, including at least one offence which was alcohol-related, and a rapid emergence of alcohol dependence upon his arrival in Vietnam. Given the Tribunal's adverse view of the applicant as a witness, there was evidence from which it could infer that the applicant's alcohol dependence pre-dated his arrival in Vietnam. Given that factual finding, his alcohol dependence pre-dated his anxiety condition. That condition therefore cannot satisfy para 5(a) of the SoP.

Ground (c) – inability to obtain appropriate clinical management

38 Finally, it is submitted that the Tribunal ought to have considered the applicant's inability to obtain appropriate clinical management for his alcohol dependence upon the basis that such condition was contributed to, or aggravated by, his inability to obtain such management. The Tribunal concluded that there was no evidence of any aggravation or contribution. That is a finding of fact. The applicant submits that there was evidence to the contrary, particularly the "onset" of his hysterical personality on 12 September 1970. That he had such a personality was suggested, perhaps diagnosed, on that day, but it cannot be inferred that he was previously free of it. It is also asserted that the hysterical personality was the "predecessor" of the applicant's alcohol dependence. There is no medical basis for that assertion. Neither is there any factual basis for the assertion that the applicant was unable to obtain appropriate clinical management for any problem which he may have been experiencing.

ORDERS

39 In my view the appeal should be allowed upon the ground that the Tribunal misunderstood the SoP as applied to the applicant's handling of the casualty lists. There is also the curious complication concerning the rejection of the evidence concerning the Saigon incident upon which is based the acceptance of his anxiety condition as being war-caused. The parties should submit proposed orders within seven days. Submissions as to costs should be included.

I certify that the preceding thirty-nine (39) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate:

Dated: 27 March 2009

Counsel for the Applicant: Ms A Frizelle

Solicitor for the Applicant: G Couper Solicitors

Counsel for the Respondent: Ms H Bowskill

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 28 July 2008

Date of Judgment: 27 March 2009

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