

AUSTRALIA / JUDGMENT

Repatriation Commission v Milenz [2006] FCA 1436

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FEDERAL COURT OF AUSTRALIA

Repatriation Commission v Milenz [2006] FCA 1436

ADMINISTRATIVE LAW – appeal from decision of Administrative Appeals Tribunal – Tribunal found that veteran suffered from three war-caused diseases – whether Tribunal erred in construction of ss 120(1), (3), (4), 120A(3) of Veterans' Entitlements Act 1986 (Cth) – inquiry to be made under Deledio steps – whether Tribunal failed to address the requirements of the Statements of Principles with respect to two of the diseases – construction of phrase "clinical worsening" – whether material capable of supporting finding of clinical worsening of two of the diseases – conclusion in relation to third disease dependent on conclusion in relation to second disease.

Administrative Appeals Tribunal Act 1975 (Cth) s 44

Veterans' Entitlements Act 1986 (Cth)s 120(1), s 120(3), s 120(4) and s 120A(3)

Repatriation Commission v Gosewinckel (1999) 59 ALD 690 applied

Repatriation Commission v Deledio (1998) 83 FCR 82 applied

Lees v Repatriation Commission (2002) 125 FCR 331 cited

Repatriation Commission v Cornelius [2002] FCA 750 cited

Santa Sabina College v Minister for Education (1985) 58 ALR 527 cited

REPATRIATION COMMISSION v YURGEN MILENZ

No VID 1488 of 2005

FINN J

8 NOVEMBER 2006

DARWIN (HEARD IN MELBOURNE)

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY VID 1488 OF 2005

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY MR J HANDLEY,
SENIOR MEMBER

BETWEEN: REPATRIATION COMMISSION

Applicant

AND: YURGEN MILENZ

Respondent

JUDGE: FINN J

DATE OF ORDER: 8 NOVEMBER 2006

WHERE MADE: darwin (heard in melbourne)

THE COURT ORDERS

THAT:

1. The appeal be allowed.
2. The decision of the Tribunal be set aside.
3. The matter be remitted to the Tribunal for hearing and determination according to law.
4. The respondent pay the applicant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY VID 1488 OF 2005

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL CONSTITUTED BY
MR J HANDLEY, SENIOR MEMBER

BETWEEN: REPATRIATION COMMISSION

Applicant

AND: YURGEN MILENZ

Respondent

JUDGE: FINN J

DATE: 8 NOVEMBER 2006

PLACE: darwin (heard in melbourne)

REASONS FOR JUDGMENT

1 This is an appeal under s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) against a decision of the Administrative Appeals Tribunal reversing that of the Repatriation Commission and granting the respondent, Yurgen Milenz, a further pension entitlement in respect of the three war-caused diseases. These were alcohol abuse, depressive disorder and irritable bowel syndrome. These diseases or their aggravation were ascribed to the occurrence of a single event in 1971 when Mr Milenz was on war service in Vietnam as a crew member of HMAS Yarra. That event involved the ship being called to "action stations" and "locked down" for a short period, though hostile action did not ensue. Mr Milenz was locked below decks during this event. He believed he was at risk of death or serious injury. The event is said to have evoked feelings of substantial distress.

2 The various questions of law said to arise in the appeal relate in essence to the proper construction and operation of s 120(1), s 120(3), s120(4) and s 120A(3) of the Veterans' Entitlements Act 1986 ("Cth") ("the VE Act"). The Act imposes a liability on the Commonwealth to pay a pension to, amongst others, a veteran incapacitated by a war-caused disease: s 13(1). It prescribes the circumstances in which an injury or disease is to be taken to be war-caused or to be aggravated by war service: s 9. And in ss 120 and 120A it stipulates the standard and manner of proof where a claim is made for a pension in respect of incapacity from a war-caused or aggravated disease or injury. I outline those provisions below.

3 Part XIA of the VE Act established the Repatriation Medical Authority and gave it the primary function of determining "Statements of Principles". In this regard it is necessary only to note the provisions of s 196B(2) of the Act which, insofar as presently relevant, state:

"Determination of Statement of Principles

(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;

...

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."

4 There is a Statement of Principles ("SoP") for each of the three diseases which Mr Milenz claims were war-caused or aggravated.

5 Where a claim for a pension for incapacity from disease relates to operational service rendered, the Commission is obliged to 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: s 120(1). Section 120(3) stipulates that the Commission will be so satisfied beyond reasonable doubt –

"... 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."

6 Insofar as presently relevant, s 120A(3) provides that, for the purposes of s 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) ...

that upholds the hypothesis."

7 Section 120(4) provides for present purposes that:

"(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 ... decide the matter to its reasonable satisfaction."

8 I would note in passing that the subsection's reasonable satisfaction standard is to be applied where the matter in issue is whether or not a veteran actually suffers the injury or disease said to be war-caused: see *Repatriation Commission v Gosewinckel* (1999) 59 ALD 690 at [35]-[49].

9 The interaction of s 120 and s 120A has been considered in many cases, but most notably in *Repatriation Commission v Deledio* (1998) 83 FCR 82 which provided an exposition of the proper application of the provisions which, as in the present matter, is now regularly applied by the Commission and the Tribunal. The four steps the Court identified (at 97-98) are often referred to as "the Deledio steps". They are:

"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) ...
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 never 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."

10 The appeal is concerned primarily with the third of these steps.

11 Before turning to each of the diseases in issue there is one further matter of a general character to which I need refer. It relates to SoPs. The function of an SoP for s 120(3) purposes is to prescribe a medical-scientific standard with which a hypothesis must be consistent: *Deledio*, at 96. Accentuating the "medical-scientific" character of the standards set in the three presently relevant SoPs, the factor or factors which must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting the relevant disease with a person's service, are all related in some way (usually by time) to the "clinical onset" or the "clinical worsening" of the disease. Diagnostic criteria, or else prescribed symptoms, are in turn specified for each of the diseases.

12 I emphasise the above for this reason. The essence of the Commission's challenge to the Tribunal's reasons in relation both to alcohol abuse and the depressive condition is that the clinical judgment and diagnostic standards prescribed in the two relevant SoPs were simply not made or applied respectively in raising the s 120(3) reasonable hypothesis. Because the Tribunal found that the clinical onset of each disease pre-dated war service, the relevant factor the SoP in each instance required to exist was tied to "the clinical worsening" of the respective diseases. As will be seen, the proper construction of this formula is central to this appeal.

13 For ease in exposition I will deal separately with the appeal as it relates to each of the three diseases.

A. Alcohol Abuse

14 The relevant SoP (No 76 of 1998) relates both to Alcohol Dependence and Alcohol Abuse. Though the Tribunal considered there to be no dispute between the doctors that Mr Milenz suffered from "alcohol abuse and alcohol dependence" – "that diagnosis is beyond doubt": Reasons [46] – it is, in my view, clear from the structure of the Reasons that alcohol abuse only was considered for the purpose of raising a reasonable hypothesis: see e.g. Reasons [58], [77], [78] and [81]. Each of the two diagnoses is, in any event, made exclusive of the other in the SoP: see diagnostic criteria B for "alcohol abuse" below.

15 The SoP as it relates to alcohol abuse provides, insofar as presently relevant, as follows:

"2. ...

(b) For the purposes of this Statement of Principles,

...

'alcohol abuse' means the presence of cognitive, behavioural or physiological symptoms indicating the use of alcohol despite significant alcohol-related problems, however these symptoms have never met the criteria for alcohol dependence. Additionally, signs of tolerance or withdrawal are absent.

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

A. A maladaptive pattern of alcohol use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12-month period:

- (1) recurrent alcohol use resulting in a failure to fulfil major role obligations at work, school, or home
- (2) recurrent alcohol use in situations in which it is physically hazardous
- (3) recurrent alcohol-related legal problems
- (4) continued alcohol use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of alcohol.

B. The symptoms have never met the criteria for alcohol dependence.

The definitions for alcohol dependence and alcohol abuse exclude acute alcohol intoxication in the absence of alcohol dependence or alcohol abuse.

...

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:

...

- (d) experiencing a severe stressor within the two years immediately before the clinical worsening of alcohol dependence or alcohol abuse;

...

Factors that apply only to material contribution or aggravation

6. Paragraphs 5(c) to 5(3) 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:" emphasis added.

- (i) The Tribunal's decision

16 Though Mr Milenz gave somewhat inconsistent histories of his drinking habits to those who provided expert reports, the evidence clearly established this problem predated both his operational service and the event on HMAS Yarra. In consequence, the Tribunal's focus in par 5 of the SoP above was upon factor (d). For Deledio step three purposes, the Tribunal was satisfied that a reasonable hypothesis had been raised that (a) Mr Milenz had experienced a "severe psychosocial stressor" in the "action stations" event; (b) he suffered from alcohol abuse; (c) there was material pointing to alcohol abuse existing prior to operational service being worsened by service; and (d) the hypothesis was consistent with the template in the SoP.

17 For the purposes of Deledio step four, the Tribunal was satisfied that (i) the psychosocial stressor was an identifiable event that evoked feelings of distress in Mr Milenz: Reasons [75]; and (ii) there had been a clinical worsening of the alcohol abuse: Reasons [77]. As to the latter, it commented at [78]:

"The history of alcohol consumption is confusing and inconsistent, however, it was consumed prior to operational service. On occasions the quantity was immodest. But after operational service, the quantity, type and frequency of alcohol consumed was far greater. It follows that there has been a clinical worsening of alcohol abuse. The worsening, in my view is referable to him having experienced a severe stressor, as defined and within two years of the worsening. There was an event which objectively did occur and from which Mr Milenz suffered a subjective reaction. His increased alcohol consumption was an element of that reaction:" emphasis added.

18 In consequence the Tribunal was not satisfied beyond reasonable doubt that the Commission had established that the condition of alcohol abuse was not war-caused.

(ii) The medical evidence

19 Three psychiatrists, Drs Percival, Ratnayake and Strauss provided reports for the Commission and two of them (Drs Percival and Strauss) gave brief oral evidence. Mr Milenz did not call any medical witnesses.

Dr Percival

20 I would note at the outset that the very detailed history of alcohol consumption which Dr Percival attributed to Mr Milenz was disputed in part by Mr Milenz. Dr Percival reaffirmed in cross-examination that the history was recounted as given. The history had Mr Milenz, by the end of his first year's service in the navy and prior to his departure for Vietnam, drinking every day when on shore, getting so drunk that he had no idea of his total consumption of alcohol, and experiencing frank alcoholic blackouts as a consequence.

21 Dr Percival's report of 28 January 2003 noted (inter alia) that Mr Milenz:

"... concedes that he was never at any time in any specific situation of danger, or even in a situation where he might have had a reasonable apprehension as to a specific danger, as opposed to the generalized uncertainty inevitably associated with service under the conditions of the Vietnam War. On one occasion, when HMAS Yarra was leaving harbour, the vessel was closed up at action stations, and actually fired its guns at a target whose nature was unknown at the time to Mr Milenz, and in fact has remained so, but there is no question of there having been any return fire."

22 His diagnosis in summary was that:

"... there is a primary Axis I diagnosis of Alcohol Dependence, but no evidence to link this to the veteran's war service, either in terms of the temporal relationship of the developing severity of his dependence and his period of eligible service, or in his having experienced any sufficiently stressful event during his eligible service for which could be reasonably argued at least a causal relationship to an alleged subsequent exacerbation of his problems with alcohol."

Dr Ratnayake

23 Two reports were prepared by Dr Ratnayake, one on 23 June 2003, the other on 16 July 2003. The former diagnosed Mr Milenz as having Axis 1 alcohol abuse. Dr Ratnayake did not consider that that condition was the result of a factor listed in the SoP. Further, it was considered that Mr Milenz's diagnosis could not be related to his eight day period of operational service. The report indicated that the earliest date for alcohol abuse would be shortly after he joined the Navy, around 1966 or 1967.

24 In her second report, Dr Ratnayake noted the history in Dr Percival's report and stated that it was difficult to establish when Mr Milenz first met the criteria for alcohol abuse. She could only state with certainty that, "at present, he fulfils the criteria for alcohol abuse".

Dr Strauss

25 The doctor's report of 11 October 2004 indicated the strong belief that Mr Milenz had a long standing depressive condition which, to a certain extent, would account for his alcohol abuse. That abuse began soon after he joined the Navy and this was confirmed by the histories given both to Dr Percival and to himself. Dr Strauss did not believe that the circumstances of Mr Milenz's navy service satisfied any causal factor in relation to alcohol dependence or alcohol abuse.

26 The cross-examination of Dr Strauss on this condition did not add to, or alter the above.

(iii) The Appeal

27 Against the backdrop of the general claim that the appeal raises the question of the proper construction and operation of s 120(1), (3) and (4) and s 120A(3), the questions of law specific to alcohol abuse were:

"1.5 whether the Tribunal failed to meet the requirements of s 120(3) and s 120A(3) of the VE Act by failing to make any finding, on its consideration of the whole of the material before the Tribunal, that the material pointed to the clinical worsening of the features and symptoms of Mr Milenz's alcohol abuse, as prescribed by the diagnostic criteria for that disease, within the time prescribed by paragraph 5(d) of SoP No 76 of 1998;

...

1.8 whether, in consequence of the failure ... referred to in question ... 1.5 ... the Tribunal failed to determine, as required by s 120A(3) of the VE Act, whether the whole of the material before the Tribunal raised a hypothesis connecting ... alcohol abuse ... with Mr Milenz' operational service, being a hypothesis that was upheld by the applicable SoP;

1.9 whether the material before the Tribunal was capable of supporting a finding that the material before the Tribunal pointed to Mr Milenz' alcohol abuse having clinically worsened in the two year period immediately following 24 February 1971."

28 Put shortly, the two central questions are (i) whether the Tribunal failed to address properly or at all the requirement of par 5(d) of the SoP with the consequence that, despite its own view to the contrary, the hypothesis it considered was raised did not fit the template; and (ii) there was not material before the Tribunal capable of supporting a finding of clinical worsening of the disease that could satisfy par 5(d).

29 The answer to each of these turns on the proper construction of the words "clinical worsening" in par 5(d) of the SoP and of the diagnostic judgment those words require to be made. The words are not defined in the SoP. It is the Commission's contention that the requirement that the worsening of alcohol abuse be "clinical" takes one back to the SoP and to the diagnostic criteria stipulated in the definition of alcohol abuse. Thus, it is said, for there to be a clinical worsening of alcohol abuse, i.e. of a "maladaptive pattern of alcohol use leading to clinically significant impairment or distress", there has to be a worsening within the 12 month period of one or more of the four manifestations of the disease stipulated in the diagnostic criteria of the SoP.

30 Mr Milenz contends to the contrary. Once the diagnosis of alcohol abuse has been made, the diagnostic criteria have no further application when considering the worsening of an accepted disease. Those criteria are only relevant if the existence of the disease is in issue. Once its existence has been established, as here, the inquiry is simply as to whether there had been a worsening of it by virtue of war-service, i.e. was it more grave, more grievous or more serious in its effect on Mr Milenz. I would note in passing that the Tribunal appears to have proceeded on this view of par 5(d).

31 I preface what I have to say on this question with the observation that the Tribunal did not advert at all to the SoP's definition of the disease and its stipulated manifestations in forming the view that the material before it pointed to an hypothesis that fitted the par 5(d) template of the SoP.

32 It is well accepted that the Tribunal cannot use other evidence (expert or otherwise) to contradict or provide an alternative to the requirements of an SoP. As Weinberg J noted in *Repatriation Commission v Gosewinckel* at [67]:

"Section 120A and the associated provisions in Part XIA of the VE Act [which include s 196B] were introduced in order to take the determination of 'purely medical ... issues' out of the hands of bodies such as the [Tribunal]."

33 The question whether a disease as defined in a SoP has clinically worsened is a medical one, raising as it does a diagnostic question. I have emphasised "as defined" for the reason that the clinical worsening must be of the disease having the features, symptoms and manifestations prescribed in the relevant SoP's definition: cf *Lees v Repatriation Commission* (2002) 125 FCR 331 at [16].

34 As I have already indicated, the definition of "alcohol abuse" provides its own diagnostic criteria. I need not repeat them here. These contrive the inquiry to be undertaken by a doctor in determining for the purposes of the SoP whether the disease is, or was, present at a particular

time: cf Repatriation Commission v Cornelius [2002] FCA 750 at [26]; or whether that disease, being present, had worsened. In other words, to use the language of the definition, the worsening is in the "clinically significant impairment or distress" which resulted from the maladaptive pattern of alcohol abuse and which, importantly for present purposes, was "manifested" in one or more of the prescribed ways within a 12-month period.

35 What is clear, in my view, is that the Tribunal misconstrued what was comprehended by the clinical worsening requirement of par 5(d) of the SoP. That requirement imposed a medical-scientific standard, not a lay standard. Though the Tribunal found a clinical worsening of Mr Milenz's alcohol abuse, it did not address whether there was a worsening in the disease as defined and manifest. It simply inferred a worsening because, "after operational service, the quantity, type and frequency of alcohol consumed was far greater". These are not features or manifest symptoms of the disease defined in par 2(b) of the SoP.

36 The consequence of the Tribunal so treating par 5(d) is that the actual hypothesis it considered was pointed to on the material before it was not one upheld by the SoP. For this reason the decision as it relates to alcohol abuse must be set aside.

37 There is a sequential question raised by the Commission in light of my conclusion. It is contended that it would be futile to remit the matter to the Tribunal for reconsideration as there was no material before the Tribunal capable of supporting the hypothesis upheld by the SoP. There is no material before me, it is said, suggesting that the clinical worsening of Milenz's alcohol abuse was addressed by the psychiatric experts, or that Mr Milenz's par 2(b) symptoms (if any) in the period 1971 to 1973 – the two years prescribed by par 5(d) – were addressed in any way.

38 The course pressed on me is not one I am prepared to take. I do not speculate on the likely fate of Mr Milenz's claim on a rehearing particularly given the standard of proof provisions of the VE Act. He is entitled to have his case put again to the Tribunal. It is possible that it might come to a result favourable to him: cf Santa Sabina College v Minister for Education (1985) 58 ALR 527 at 540.

B. Depressive Disorder

39 The appeal in relation to this condition can be dealt with relatively briefly as it raises the same general issue as that considered in relation to alcohol abuse.

40 Only one of the three psychiatrists, Dr Strauss, diagnosed Mr Milenz as having a depressive disorder. Such views as the other two had on whether Mr Milenz suffered from a depressive/anxiety condition of some variety had no relevance either to the condition found by the Tribunal or to the SoP applying to it. That SoP (No 58 of 1998) concerned "Depressive Disorder".

41 Paragraph 2(b) defined that condition as:

"(A) the presence of major depressive disorder, dysthymic disorder or depression not otherwise specified where:

- (i) major depressive disorder is either a single episode or recurrent episode as defined in DSM-IV; and
- (ii) dysthymic disorder, as defined in DSM-IV, is a chronic mood disturbance, of at least two years duration, involving depressed mood, or loss of interest or pleasure, with manifestation of the symptoms used to diagnose major depression such as neurovegetative signs, social withdrawal, cognitive impairment and suicidal ideation; and
- (iii) depression not otherwise specified, such as minor depressive disorder and recurrent brief depressive disorder, as defined in DSM-IV, includes disorders with depressive features that do not meet the DSM-IV diagnostic criteria for other specific mood disorders,

Attracting ICD-9-CM code 296.2, 296.3, 300.4 or 311."

42 The particular depressive disorder diagnosed by Dr Strauss was "dysthymia" (i.e. A(ii) above). For its part the Tribunal was satisfied that the appropriate diagnosis was "depressive disorder" but did not indicate which of the three possibilities in the SoP was the particular depressive disorder found.

43 The relevant prescribed factor that had to exist before it could be said that a reasonable hypothesis had been raised connecting depressive disorder to the circumstances of Mr Milenz operational service was that (par 5(f)):

"(f) experiencing a severe psychosocial stressor or stressors within the two years immediately before the clinical worsening of depressive disorder."

44 The Tribunal was satisfied that a reasonable hypothesis had been raised with respect to "depressive disorder" and it noted that there was material pointing to the disorder existing prior to operational service being worsened by service.

45 Later in its reasons it indicated it was satisfied as a fact that there had been a clinical worsening of depressive disorder. It explained this (in Reasons [79]) as follows:

"79. It would also appear from the evidence heard in these proceedings that Mr Milenz did suffer from a depressed state prior to enlistment and certainly before commencement of operational service but was obviously not detected on pre-enlistment or other medical examinations. On the evidence of Dr Strauss, Mr Milenz suffered a 'constitutionally based psychiatric disorder' which appears to have manifested by a sense of failure, behaviour problems, difficulty concentrating and immaturity (refer paragraphs 33 and 34 earlier). Mr Milenz's mood, behaviour, increased alcohol consumption and symptoms subsequent to the episode onboard Yarra clearly point to a worsening of his depressed state."

46 The Commission's appeal challenges, first and foremost, the Tribunal's construction of par 5(f) of the SoP for reasons that parallel those given in the alcohol abuse appeal. The Tribunal, it is said, has not considered whether there has been a clinical worsening of the symptoms and features of any one of the three possible definitions.

47 In my view, for reasons similar to those I earlier gave in relation to the Tribunal's application of the alcohol abuse SoP, the appeal as it relates to depressive disorder must be allowed. Whether there has been a clinical worsening of a particular depressive disorder – and the Tribunal had to, but did not, identify which of the three possibilities it was considering – was a diagnostic question that addressed the features and symptoms of that disorder as defined in the SoP and required a clinical judgment be made. That question was not asked or answered.

48 Again the Commission has raised the issue of futility in remitting the matter to the Tribunal and again I am not prepared to take the course pressed on me. As with the alcohol abuse claim, the issues raised for determination by the Tribunal were not properly addressed. Whether ultimately successful or not, Mr Milenz should be permitted to have his claims determined according to law.

C. Irritable Bowel Syndrome

49 Having regard to my conclusions in relation to depressive disorder, the appeal relating to this matter can be dealt with shortly. The relevant factor in the "Irritable Bowel Syndrome" SoP (No 103 of 1996) that had to exist to raise the reasonable hypothesis (which the Tribunal was satisfied was raised) was (at par 5(b)):

"(b) suffering a specified psychiatric condition within the six months immediately before the clinical onset of irritable bowel syndrome;"

50 Having been satisfied that there was a clinical worsening of Mr Milenz's depressive disorder – a specified psychiatric condition for the purposes of the above SoP – within two years of operational service, and having apparently accepted Mr Milenz's evidence that the irritable bowel syndrome commenced soon after his operational service, the Tribunal concluded that "it follows that the irritable bowel syndrome occurred within six months of suffering from a 'specified psychiatric condition'". I need not consider whether this conclusion could withstand critical examination.

51 There is disagreement between the parties about (a) whether the Commission conceded that Mr Milenz had the syndrome, and (b) whether there was material capable of supporting the finding that he did. I need not express any views on either of these matters other than to say that (i) the "concession" actually made was ambiguous and could be interpreted as either conceding or not conceding that Mr Milenz had the syndrome; and (ii) the evidence dealing with the irritable bowel syndrome was sparse indeed.

52 Because the above conclusion on this matter hangs off the Tribunal's earlier conclusion on depressive disorder, it too must fall with my decision that that conclusion cannot stand. In consequence of this it is unnecessary to consider whether material relating to the concession noted above, which the Commission sought to tender after the hearing, should be admitted.

Conclusions

53 I will order that (i) the appeal be allowed; (ii) the decision of the Tribunal be set aside; (iii) the matter be remitted to the Tribunal for hearing and determination according to law; and (iv) the respondent pay the applicant's costs of the appeal.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 8 November 2006

Counsel for the Applicant: Ms J MacDonnell

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent: Mr A M J Larkin

Solicitor for the Respondent: Williams Winter Solicitors

Date of Hearing: 13 July 2006

Date of Judgment: 8 November 2006

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