

AUSTRALIA / JUDGMENT

Sloan v Repatriation Commission [2012] FCA 1079

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FEDERAL COURT OF AUSTRALIA

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Sloan v Repatriation Commission [2012] FCA 1079

Citation: Sloan v Repatriation Commission [2012] FCA 1079

Appeal from: Sloan and Repatriation Commission [2011] AATA 424

Parties: RUPERT CHARLES SLOAN v REPATRIATION COMMISSION

File number: VID 784 of 2011

Judge: BROMBERG J

Date of judgment: 3 October 2012

Catchwords: DEFENCE AND WAR – defence service – veterans' entitlements – whether illness suffered by the applicant defence-caused – whether applicant's injury occurred 25 years before the "clinical onset" of illness – test for "clinical onset" – whether AAT failed to apply the accepted meaning of "clinical onset" – whether AAT disregarded evidence – whether AAT's approach to determining when "clinical onset" occurred was erroneous because it failed to determine for itself when symptoms or features of illness were in existence.

Administrative Law – appeal of decision of the AAT – whether AAT's conclusions as to "clinical onset" compromised by error of law – no error of law – appeal denied.

Legislation: Administrative Appeals Tribunal Act 1975 (Cth) s 44

Veterans' Entitlements Act 1986 (Cth) ss 70(5)(a), 120(4), 120B

Cases cited: Lees v Repatriation Commission (2002) 125 FCR 331

Kaluza v Repatriation Commission [2010] FCA 1244

Kaluza v Repatriation Commission (2011) 122 ALD 448

Date of hearing: 2 April 2012

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 24

Counsel for the Applicant: Ms A Magee

Solicitor for the Applicant: Williams Winter

Counsel for the Respondent: Ms E James

Solicitor for the Respondent: Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION VID 784 of 2011
ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL
BETWEEN: RUPERT CHARLES SLOAN
Applicant
AND: REPATRIATION COMMISSION
Respondent
JUDGE: BROMBERG J
DATE OF ORDER: 3 October 2012
WHERE MADE: MELBOURNE

THE COURT ORDERS
THAT:

1. The appeal be dismissed.
 2. The applicant pay the respondent's costs of the appeal.
- Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION VID 784 of 2011
ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL
BETWEEN: RUPERT CHARLES SLOAN
Applicant
AND: REPATRIATION COMMISSION
Respondent
JUDGE: BROMBERG J
DATE: 3 October 2012
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REASONS FOR JUDGMENT

1 The applicant Rupert Sloan ("Mr Sloan") served in the Australian Army between 1942 and 1946. During a training exercise in early 1943, he fell whilst carrying a tripod and a full pack. Mr Sloan claims that as a result of the fall, he suffered an injury to his lumbar spine ("the injury") which caused him to suffer lumbar spondylosis ("the illness").

2 Relying upon the illness and the circumstances in which the injury occurred, Mr Sloan made an application to the respondent ("the Commission") for a pension. That application was denied, as was Mr Sloan's application for its review made to the Veterans' Review Board and then later to the Administrative Appeals Tribunal ("the AAT").

3 Pursuant to s 44 of the Administrative Appeals Tribunal Act 1975 (Cth) ("the AAT Act"), Mr Sloan appealed to this Court from the decision made by the AAT on 21 June 2011 ("the decision") to affirm the decision of the Veterans' Review Board.

4 The somewhat complex legislative structure provided for by the Veterans' Entitlements Act 1986 (Cth) ("the VE Act") in relation to applications for pensions is not at issue and need not be set out. The only issue raised before the AAT was whether the illness suffered by Mr Sloan was "defence-caused". That is, whether the illness arose out of or was attributable to Mr Sloan's defence service: s 70(5)(a) of the VE Act. In answering that question the AAT had to apply the standard of proof provided by s 120(4) of the VE Act in combination with s 120B.

5 Section 120B(3) of the VE Act relevantly required that the AAT be satisfied that Mr Sloan's illness was defence-caused if the material before the Commission raised a connection between the injury and some particular service rendered by Mr Sloan and there was in force a Statement of Principles ("a SoP") which upheld the contention that Mr Sloan's illness is, on the balance of probabilities, connected with his defence service.

6 The relevant SoP considered by the AAT was No 38 of 2005 concerning lumbar spondylosis. The relevant factor specified by that SoP and relied upon by Mr Sloan to demonstrate that there was a requisite connection between his illness and his injury was that set out in paragraph 6(f) of the SoP as follows:

6(f) having a trauma to the lumbar spine within the twenty-five years before the clinical onset of lumbar spondylosis.

[emphasis added]

7 Accordingly, the AAT had to determine whether Mr Sloan's injury (experienced in early 1943) occurred no longer than twenty-five years prior to the "clinical onset" of his illness. If clinical onset occurred after early 1968, Mr Sloan's application was bound to fail.

8 The AAT determined that the date of the clinical onset of Mr Sloan's illness was the late 1970s or early 1980s.

9 As s 44 of the AAT Act confines an appeal to this Court to an appeal on a question of law, it is incumbent upon Mr Sloan to demonstrate more than that the AAT's conclusion as to the date of clinical onset was erroneous. Mr Sloan must establish that the conclusion of the AAT is compromised by an error of law.

10 Nine grounds of appeal were raised by Mr Sloan's Notice of Appeal. Grounds six and seven were not pressed on the appeal. For the reasons that follow, none of the grounds of appeal relied upon by Mr Sloan demonstrate an error of law in the AAT's conclusion as to when clinical onset of Mr Sloan's illness occurred.

consideration

Did the AAT adopt the wrong interpretation of "clinical onset"?

11 In its reasons for decision, the AAT noted that the expression "clinical onset" had been the subject of two decisions of this Court including of a Full Federal Court in *Lees v Repatriation Commission* (2002) 125 FCR 331. The AAT set out an extract from [13] of the reasons for judgment in that case. The AAT also set out the following extract from the judgment of Jacobson J in *Kaluza v Repatriation Commission* [2010] FCA 1244:

92. The meaning of the expression "clinical onset" was considered by the Full Court in *Lees*. The effect of what their Honours (Heerey, Moore and Kiefel JJ) said at [13] was that there is a clinical onset of a disease, either:
- when a person becomes aware of some features or symptoms which enable a doctor to say that the disease was present at that time; or
 - when a finding is made on investigation which is indicative to a doctor that the disease is present.
93. The definition therefore emphasises the need for a determination of the clinical onset by medical evidence. It is for the doctor to say when the clinical onset occurred by the presence of features or symptoms. But the clinical onset is not necessarily when the patient first sees a doctor for medical treatment.

12 It was contended for Mr Sloan that Dr Markov, who provided a medical report upon which the AAT relied, had adopted an interpretation of the expression "clinical onset" which was inconsistent with that applied by this Court in the judgments to which I have just referred. By ground 1 of its Notice of Appeal, Mr Sloan contended that the AAT had erred by adopting Dr Markov's interpretation of the expression "clinical onset". It may be accepted that Dr Markov's evidence suggests that he had a different understanding of the expression "clinical onset" than that applied by this Court. However, Mr Sloan has not established that the AAT adopted Dr Markov's interpretation. The reasons given by the AAT for its decision and in particular at paragraphs [6], [7] and [21] show that the AAT determined the date of clinical onset by reference to the interpretation of that expression set out in *Lees* and in *Kaluza*.

Alleged failure to have regard to evidence

13 By the second ground of his Notice of Appeal, Mr Sloan contended that the AAT erred in failing to have regard, or any proper regard, to the evidence of Mr Grossbard. By his third ground, Mr Sloan contended that the AAT erred in failing to have regard to all of Dr Markov's evidence and in particular the evidence given by him in cross-examination. A summary of the evidence given by Mr Grossbard and Dr Markov is set out in the decision. The fact that the summary does not identify every point made in evidence and every proposition acceded to in cross-examination does not necessarily suggest that the AAT did not have regard to all of the evidence given. The AAT's reasons suggest that it did consider the medical evidence before it. Mr Sloan's complaint seems to have more to do with a contention that the AAT did not give sufficient weight to particular evidence which might have assisted his claim. The AAT is entitled to weigh the evidence and arrive at its own conclusions, without making an error of law.

14 By his fourth ground of appeal, Mr Sloan contended that the AAT failed to have regard to his unchallenged evidence that he suffered ongoing symptoms from the date of the injury in 1943. The fifth ground raises the same issue.

15 The reasons of the AAT and in particular at [9] indicate that the AAT did have regard to evidence given by Mr Sloan that he had periodically experienced back pain since the injury. However, as I set out in more detail later, there was documentary evidence before the AAT which was inconsistent with the evidence given by Mr Sloan. As I later explain, the AAT preferred the evidence of contemporaneous medical records to that given by Mr Sloan and thus impliedly rejected Mr Sloan's evidence.

16 The AAT did not fail to take into account Mr Sloan's evidence. No error of law is demonstrated in the AAT's implied rejection of Mr Sloan's evidence.

Did the Tribunal misconstrue its task in determining when "clinical onset" occurred?

17 Both grounds eight and nine of the Notice of Appeal raise the same ground, namely that the concept of clinical onset applied by the AAT was inconsistent with the relevant SoP. However, during the appeal Mr Sloan essentially contended that the AAT misconstrued its task in determining when clinical onset occurred.

18 To understand that contention, it is best that I commence by identifying the task that the AAT was required to perform.

19 Of the two alternatives identified in [92] of the reasons of Jacobson J in *Kaluza*, only the first was relevant on the material before the AAT. The question for the AAT was whether a doctor could have concluded that features or symptoms of lumbar spondylosis were experienced by Mr Sloan in early 1968 or earlier: *Kaluza v Repatriation Commission* (2011) 122 ALD 448 (McKerracher, Perram and Robertson JJ), at [63] – [66]. That question has two parts. First, it required the AAT to make findings based on the evidence before it, as to what features or symptoms of lumbar spondylosis were experienced by Mr Sloan and when they were experienced. Secondly, the AAT needed to determine the time at which an opinion that lumbar spondylosis was present could first have been given by a doctor.

20 It is in relation to that second question that the evidence of medical experts is normally required. What constitutes a feature or symptom of lumbar spondylosis is also a proper subject for medical opinion and such an opinion may assist the AAT to make factual findings as to whether or not features or symptoms of lumbar spondylosis existed. But beyond that involvement, it is not for doctors providing medical opinions to determine a factual controversy as to whether or not features or symptoms of lumbar spondylosis were or were not in existence. That is the function of the AAT.

21 In this case, the conflicting opinions given by the doctors were to a large extent based on different factual assumptions made by the doctors about Mr Sloan's history of symptoms and features experienced in relation to his lumbar spine since 1943. In particular Dr Markov's opinion given in his report, was heavily influenced by the contemporaneous medical records and the

history there given which recorded little or no reference to back pain. On the other hand, Mr Grossbard's opinion was based upon the oral account given to him by Mr Sloan about his history of symptoms, including when they first manifested and their continuing presence.

22 The AAT found at [20] that the weight of medical evidence suggests strongly that the views of those doctors who concluded that clinical onset occurred in the late 1970s was preferable to that of Mr Grossbard (who concluded that the initial onset was in 1943). That finding permits the suggestion to be made that the AAT misunderstood its function. That is so because the AAT's reasoning gives rise to the suggestion that it adopted the factual assumptions made by the doctors whose conclusion as to the date of clinical onset the AAT preferred, without the AAT deciding for itself what features or symptoms were experienced by Mr Sloan and when they were so experienced. The suggestion is aided by the lack of express factual findings recorded in the AAT's reasons on that subject.

23 However, whilst criticism may be made of the manner in which the AAT expressed its reasoning and in particular the lack of express factual findings, it is difficult to avoid the conclusion that the factual case relied upon by Mr Sloan was impliedly rejected because the AAT regarded the contemporaneous medical records as more reliable than the evidence given by Mr Sloan as to his history of symptoms. A fair reading of the whole of the decision, and in particular [19] and [20], points to that being so. I am therefore unable to accept the contention that the AAT misunderstood its task. Therefore, grounds eight and nine must also be dismissed.

disposition

24 In light of my conclusions that each of the grounds pressed by Mr Sloan must be rejected, the appeal should be dismissed. It follows that Mr Sloan should pay the costs of the Commission. I will make orders to that effect.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 3 October 2012

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Prepared on 28 October 2026 · Esheria