

AUSTRALIA / JUDGMENT

Walker v Repatriation Commission [2024] FCA 190

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Walker v Repatriation Commission [2024] FCA 190

File number(s): ACD 31 of 2022

Judgment of: ABRAHAM J

Date of judgment: 7 March 2024

Catchwords: ADMINISTRATIVE LAW – veterans' affairs – veterans' entitlements under the Veterans' Entitlements Act 1986 (Cth) (VEA) – application under s 39B of the Judiciary Act 1903 (Cth) – application for extension of time under r 31.02 of the Federal Court Rules 2011 (Cth) to lodge an application for an order for review under s 11 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) – where applicant suffered medical conditions alcohol dependence/abuse, hypertension, gastro-oesophageal reflux disease, chronic pancreatitis, cirrhosis of the liver, diabetes mellitus and osteoarthritis – whether there is a causal connection to defence service – application of statement of principles under the VEA – whether the Veterans' Review Board (the Board) made unreasonable, illogical or irrational findings – whether the Board failed to consider particular medical conditions the subject of claims – whether the Board failed to consider or misunderstood relevant material

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

Administrative Decisions (Judicial Review) Act 1977 (Cth) ss 10, 11

Judiciary Act 1903 (Cth) s 39B

Veterans' Entitlements Act 1986 (Cth) ss 14, 70, 71, 135, 136, 137, 138, 139, 120B, 196B

Federal Court Rules 2011 (Cth) r 31.02

Cases cited: Australian Postal Corporation v D'rozario and Others [2014] FCAFC 89; (2014) 222 FCR 202

CKL21 v Minister for Home Affairs [2022] FCAFC 70; (2022) 293 FCR 634

Comcare v Fiedler [2001] FCA 1810; (2001) 115 FCR 328

Cremona v Administrative Appeals Tribunal and Another [2015] FCAFC 72; (2015) 230 FCR 1

Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 3; (2022) 289 FCR 21

Edelsten v Minister for Health and Others [1994] FCA 82; (1994) 58 FCR 419

Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority [2014] FCA 1019; (2014) 227 FCR 1

Knight v Repatriation Commission [2010] FCA 1134; (2010) 52 AAR 547
Linwood v Repatriation Commission [2016] FCA 90; (2016) 148 ALD 542
Lucic v Nolan [1982] FCA 232; (1982) 45 ALR 411
Minister for Home Affairs v DUA16 [2020] HCA 46; (2020) 271 CLR 550
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 264 CLR 541
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611
Minister for Immigration and Citizenship v SZRKT [2013] FCA 317; (2013) 212 FCR 99
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41; (2021) 274 CLR 398
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL [2021] FCAFC 48; (2021) 284 FCR 1
Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17; (2022) 275 CLR 582
Repatriation Commission v Knight [2012] FCAFC 83; (2012) 202 FCR 451
Repatriation Commission v Stafford [1995] FCA 537; (1995) 56 FCR 132
SZOR v Minister for Immigration and Citizenship [2012] FCAFC 58; (2012) 202 FCR 1
Turaga v Minister for Immigration and Border Protection [2017] FCA 58
Warren v Repatriation Commission [2018] FCA 1193
Division: General Division
Registry: Australian Capital Territory
National Practice Area: Administrative and Constitutional Law and Human Rights
Number of paragraphs: 77
Date of hearing: 9 February 2024
Counsel for the Applicant: Mr Kaplan
Counsel for the First Respondent: Ms Wright
Solicitor for the First Respondent: Australian Government Solicitor
Counsel for the Second Respondent: The Second Respondent filed a submitting notice, save as to costs.
ORDERS
ACD 31 of 2022
BETWEEN: GRENVILLE PAUL WALKER
Applicant
AND: REPATRIATION COMMISSION
First Respondent
VETERANS' REVIEW BOARD
Second Respondent
order made by: ABRAHAM J
DATE OF ORDER: 7 MARCH 2024

**THE COURT ORDERS
THAT:**

1. The applicant's application for an extension of time under r 31.02 of the Federal Court Rules 2011 (Cth) to lodge an application for an order of review under s 11 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) is granted.
2. The decision of the second respondent in respect to VRB No N12/0765, VRB No N14/0185 and VRB No N14/0186 is quashed.
3. The applications VRB No N12/0765, VRB No N14/0185 and VRB No N14/0186 be remitted to the second respondent for redetermination.
4. The parties be heard on costs.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

REASONS FOR JUDGMENT**ABRAHAM J:**

1 The applicant, Grenville Walker, has two applications for judicial review of decisions made by the Veterans' Review Board (VRB, the Board) on 27 August 2014 (together, the applications). First, an amended application under s 39B of the Judiciary Act 1903 (Cth) (First Application). Second, an application for an extension of time under r 31.02 of the Federal Court Rules 2011 (Cth) (FCR) to lodge an application for an order for review under s 11 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) (Second Application).

2 The grounds of review relied on by the applicant in each application are the same. In broad terms, as accurately articulated by the applicant, they raise questions as to whether the Board:

- (a) failed to consider, or misunderstood, the applicant's claims for a pension based on the medical conditions hypertension, gastro-oesophageal reflux disease (GORD), chronic pancreatitis, cirrhosis of the liver, and diabetes mellitus (Other Conditions) (Ground 1);
- (b) denied the applicant procedural fairness by not disclosing to him that it was proposing to find (as it did at [37] of its reasons) that, if he could not establish an entitlement to a pension based on the medical condition alcohol dependence/abuse, it necessarily followed that the Other Conditions would fail (Ground 2);
- (c) failed to consider relevant materials, or made unreasonable, irrational or illogical findings, in rejecting the applicant's claim for a pension based on the medical condition alcohol dependence/abuse (Ground 3); and
- (d) failed to consider or misunderstood relevant materials in rejecting the applicant's claim for a pension based on the medical condition osteoarthritis of the left knee (Ground 4).

3 For the reasons below, Grounds 1, 3 and 4 are established and the applications are granted. In those circumstances, it is unnecessary to consider Ground 2.

Chronology

4 The context in which this proceeding was commenced, which is not in dispute, is detailed in the applicant's submissions. The following is taken in large part from those submissions.

5 The applicant served in the Royal Australian Navy from 7 July 1967 to 3 January 2006. His eligible service under the Veterans' Entitlements Act 1986 (Cth) (VEA) is from 7 December 1972 to 30 June 2004.

6 On 26 March 2012, the applicant made claims to the Department of Veterans' Affairs (Department) for a pension in respect of incapacity from a defence-caused injury or a defence-caused disease under s 14 (read with ss 70 and 71) of the VEA, such injury or disease including the Other Conditions and osteoarthritis (left knee). On 19 June 2012, the Repatriation Commission (the Commission, the respondent) determined that the applicant was not entitled to be granted a pension based on those conditions save for osteoarthritis (left knee) (which was the subject of a later decision).

7 On 11 July 2012, the applicant made an application to the Board under ss 135 and 136 of the VEA to review the Commission's decision. That application was assigned the file number VRB No N12/0765. On 1 March 2013, the Commission determined that the applicant was not entitled to be granted a pension in relation to the osteoarthritis in his left knee.

8 On 22 July 2013, the applicant made a claim for a pension in respect of incapacity from a defence-caused injury or a defence-caused disease under s 14 of the VEA, such injury or disease being alcohol abuse/dependence. On 15 August 2013, the Commission determined that the applicant was not entitled to be granted a pension based on that condition.

9 On 5 March 2014, the applicant made applications to the Board under ss 135 and 136 of the VEA for review of the decisions made by the Commission in relation to his claim for a pension for his osteoarthritis (left knee) and alcohol abuse/dependence. These applications were given the file numbers VRB No N14/0815 and VRB No N14/0816, respectively.

10 On 27 August 2014, the Board made the following decisions under s 139 of the VEA (together, the 2014 Decision):

- (a) VRB No N12/0765 (concerning the Other Conditions) – the Board affirmed the decision under review on the basis that those conditions were not defence-caused within the meaning of s 70 of the VEA.
- (b) VRB No N14/0185 (concerning osteoarthritis (left knee)) – the Board affirmed the decision under review on the ground that no incapacity could be found.
- (c) VRB No N14/0186 (concerning alcohol abuse/dependence) – the Board affirmed the decision under review on the ground that the injury or disease was not defence-caused within the meaning of s 70 of the VEA.

11 The 2014 Decision is the subject of these applications.

12 Between September 2015 and May 2022, the applicant made various applications to the Department, the Board and the Tribunal for a pension in respect of incapacity from a defence-caused injury or a defence-caused disease. For present purposes it is unnecessary to detail those applications. Suffice to say that at no time was the 2014 Decision reviewed by the Tribunal.

13 I note that in November 2016, the Board upheld the applicant's claim of osteochondritis dissecans in the left knee; and in May 2019 his claims of alcohol dependence/abuse, hypertension, GORD, chronic pancreatitis, cirrhosis of the liver and diabetes mellitus. The former claim was accepted with effect from 24 June 2015, while the latter from 14 September 2017. That is, the claims the subject of this proceeding were ultimately accepted by the Board, albeit in respect of a different period.

14 The applicant commenced proceedings in this Court on 13 July 2022.

15 On 15 November 2022, the respondent filed an interlocutory application seeking summary dismissal of the proceedings. That application was dismissed on 5 July 2023.

Evidence

16 In support of his application for an extension of time, the applicant read two affidavits he had sworn, one dated 14 July 2022 and the other 11 October 2022. The respondent objected to various passages in each affidavit, primarily relating to what the applicant was, or was not told, by persons from whom he sought advice. The respondent submitted that those passages are hearsay. The applicant submitted that they were not being relied on for any hearsay purpose, but rather the fact that information was provided. I admitted the evidence on that basis. The applicant was not required for cross-examination. It was not suggested the conversations did not occur or that he did not act for the reasons he gives. The contents of the affidavits were otherwise not challenged. I accept his evidence.

17 Mr Walker gave evidence that after the 2014 Decision was made he received legal advice the effect of which was that there was no point in challenging the 2014 Decision in the Administrative Appeals Tribunal (Tribunal) or that, in order to do so, he "would need to provide evidence that [he] was ordered to drink alcohol or at least encouraged to do so" and "would need to put [his] house up as collateral" because any decision of the Tribunal "was bound to end up in the Federal Court". He received further advice in June 2015 the effect of which was that he "should re-submit [his] claims to [the Department] as [he] was out of time to appeal the 2014 Board Decision". Until May 2022, the applicant was not informed by any legal or other representative that he could challenge the 2014 Decision in this Court. Mr Walker gave evidence that the advice given to him after the 2014 Decision was made left him with the impression that he could only take his matter to this Court if and when he had exhausted all other avenues of appeal. The issue is not the correctness of the advice, but the fact of it. It explains the actions that the applicant took in relation to these claims, and why no proceedings were issued at a time proximate to the reasons now the subject of review.

18 The applicant also tendered as business records relevant portions of his report to the Board under s 137 of the VEA, dated 17 March 2014.

19 The Court also had before it the material in the application book that was filed in relation to the interlocutory hearing, and the court book prepared for the purposes of this hearing (as identified by the parties).

The Board's Reasons

20 As noted above, the Board affirmed the decisions under review concerning the Other Conditions, osteoarthritis (left knee) and alcohol abuse/dependence.

21 In the reasons for its decision, the Board considered the Other Conditions to be sequelae of the condition alcohol abuse/dependence, such that acceptance of the former was dependant on the latter. Much of the reasons therefore focused on the condition alcohol abuse/dependence, in respect of which the applicant submitted that his time in service (particularly his visit to the morgue and the stress imposed by external investigations) had made a significant contribution to his drinking habit.

22 Given the parties' submissions focussed on [29]-[37] of the Board's reasons, it is helpful to recite those paragraphs in full. There the Board stated:

29. In his detailed report at Folios 89-92 (2), Dr White has suggested a diagnosis of adjustment disorder with anxious mood as being present at the time of Mr Walker's stressful service during 1996 and has intimated that the presence of such a condition at that time would be sufficient to satisfy factor 6(f) of the Statement of Principles Instrument No 2 of 2009, which provides:

"having a clinically significant psychiatric condition at the time of the clinical worsening of alcohol dependence or alcohol abuse".

30. The Board noted that Dr White had recorded the clinical onset of alcohol abuse/dependence in 1968 and there was no medical evidence to dispute this. Accordingly, the claim for this condition hinges upon whether or not there was a material contribution to Mr Walker's alcohol habit causally related to the morgue visit. Referring to the alcohol statement completed by Mr Walker on 24 April 2012 (Folios 61 to 63(1)), at Folio 63(1), Mr Walker has indicated no change in his drinking habit from December 1974 to early 2000. This period also embraces the stressful period described by Mr Walker when, as Command Police Officer, he had been involved in some serious investigations following the apparent disappearance of weapons, ammunition and night vision gear from the ammunition depot at Newington. The drinking pattern is contradicted in a report by Dr White at Folio 90(2), where he stated that Mr Walker's drinking had increased, which is inconsistent with Mr Walker's own evidence at Folio 63(1).

31. Mr Wain has submitted that, because he was never referred to the Alcohol Rehabilitation facility at RAAF Base Richmond, there had been an inability to obtain appropriate clinical management for his alcohol problem. However, the Board notes that at no time was Mr Walker deemed incapable of doing his assigned duties and that at no time had he sought assistance to mitigate his heavy pattern of drinking. He was asked specifically by the Board whether he had ever sought help and he said that he had chosen not to. That being the case, it could hardly be said that Mr Walker had been unable to obtain appropriate clinical management.
32. In his report at folio 92(2), Dr White has opined that, at the time of his high stress workload around 1996, Mr Walker would have met the concept of an adjustment disorder with anxious mood and therefore met the criteria for having a psychiatric diagnosis. However, the Statement of Principles requires that the psychiatric condition be 'clinically significant' (Factor 6(f)). This is further defined in the Instrument as "sufficient to warrant ongoing management". The Board is reasonably satisfied that there is no evidence to suggest this.
33. Apart from inconsistencies in the quantities of alcohol consumed and when, the evidence is that Mr Walker has had alcohol abuse/dependence since 1968. Despite Dr White's assertions that there was material aggravation around 1996, this is not supported by Mr Walker's own statement of his alcohol consumption. Even Dr white has conceded the continuance of an ongoing alcohol problem, as exemplified by his statement at Folio 91(2):

"He had eligible service from December 1972 to June 2004. During this period I consider that he did have serious and persisting Alcohol Abuse and Dependence".

...

35. Whilst there is evidence of continued excessive alcohol consumption from 1968 – that being before eligible service under the Act, there is no evidence of any issues arising from his duties, driving offences involving alcohol or domestic disharmony that would lead to the fulfilment of the criteria describing alcohol abuse in the Statement of Principles. Indeed, it would also be difficult to establish alcohol dependence from the criteria listed for that condition, other than continued excessive use, which ceased completely when he was aware that his liver was failing in 2006 and has not been recommenced since.
36. For the reasons given above, the Board finds that none of the factors set out in the Statement of Principles is raised by the evidence in this case. The Board is therefore reasonably satisfied that the material before it does not raise a connection between Mr Walker's alcohol abuse/dependence and the relevant service as required by the Act. In these circumstances, the Board is required to affirm the decision under review insofar as this condition is concerned.

37. As discussed, and agreed with Mr Wain, the acceptance of the claimed conditions of hypertension, gastro-oesophageal reflux disease, chronic pancreatitis, cirrhosis of the liver and diabetes mellitus was contingent upon the acceptance of alcohol abuse/dependence. As alcohol abuse/dependence has been determined as not to be defence caused, the Board is reasonably satisfied that the claims for these conditions, determined to be sequelae, also fail. The Board accordingly affirms the decision under review insofar as these conditions are concerned.

23 In respect to the condition osteoarthritis (left knee), the Board referred to Mr Walker's service medical records and noted that the diagnosis contained therein was in fact osteochondritis dissecans and not osteoarthritis. As such, the Board was reasonably satisfied that no incapacity could be found and affirmed the claim for osteoarthritis (left knee).

Grounds of Review

24 As can be seen from the summary of the Board's reasons, the evidence of alcohol consumption was central to the applicant's claims. Given that, it is appropriate to first address Ground 3 which challenges the Board's reasons in respect to aspects of that evidence, particularly in [30] and [32]-[33].

25 As will be apparent from my reasons below, Ground 3 is established. Accordingly, the consideration of the remaining grounds of review can be briefer.

Ground 3: unreasonable, illogical or irrational findings

Submissions

26 The applicant submitted that in determining the claim for a pension based on the condition alcohol abuse/dependence, the Board made a series of findings that flew in the face of evidence that was before it. He contended the evidence was of central importance to the applicant's claims and of a kind that, had it been considered, could only have led to entirely different findings being made, such that an inference is available to be drawn that it was overlooked: *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99 at [111]-[112].

27 The applicant referred to the finding at [30] (see also [33] and [35]) of the Board's reasons that the applicant "indicated no change in his drinking habit from December 1974 to early 2000" and that "[t]he drinking pattern is contradicted in a report by Dr White...where he stated that [the applicant's] drinking had increased, which is inconsistent with [the applicant's] own evidence". The applicant's evidence included his responses to questions in an Alcohol Questionnaire dated 24 April 2012 where he stated at folio 62 that, between 1996 and 1999, he "drank more often and consumed more". The applicant submitted that, contrary to [30] of the Board's reasons, that is consistent with the evidence given by Dr White in his medical report that, "during this period around 1996 [the applicant's] alcohol intake had seriously increased".

28 The applicant also challenged the Board's finding at [32] that "there [wa]s no evidence to suggest" that any psychiatric condition that the applicant may have had was "clinically significant" (i.e. according to the relevant Statement of Principle under the VEA (SOP), "sufficient to warrant ongoing management"). However, Dr White's evidence was that it "would have been appropriate that [the applicant] be referred for specific treatment for his alcohol problems". Given the centrality of Dr White's report to the Board's task, the better inference to draw from the absence of any reference to this evidence in its reasons is that it was overlooked.

29 The applicant submitted the findings made by the Board at [30], [32]-[33] and [35] of its reasons were ones which no reasonable decision-maker in the Board's position could have made having regard to the evidence that was before it: citing *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 (SZMDS) at [130]-[131], [135]. Had those findings not been made, the Board could realistically have found at [36] that the claimed condition alcohol abuse/dependence was service-related, and thus met the criteria in the relevant SOP.

30 The respondent submitted that when properly understood, Ground 3 raises questions about the weight afforded to evidence by the Board and invites an impermissible analysis of the merits of the Board's decision. The respondent submitted that an administrative decision-maker to whom the determination of facts has been assigned is within his or her jurisdiction to decide the facts rightly or wrongly: citing *Australian Postal Corporation v D'rozario and Others* [2014] FCAFC 89; (2014) 222 FCR 202 (D'rozario) at [77]. Emphatic judicial disagreement with a decision-maker's reasoning is not a sufficient basis to make out a ground of illogicality or irrationality in decision-making: *SZOOR v Minister for Immigration and Citizenship* [2012] FCAFC 58; (2012) 202 FCR 1 (SZOOR) at [6]. The respondent noted such an approach helps maintain the distinction between judicial and merits review of administrative decision-making. The respondent emphasised that the reasons of an administrative decision-maker are meant to inform, and not be scrutinized in an over-zealous fashion: *SZOOR* at [5].

31 The respondent submitted that none of the applicant's challenges rise to a claim of jurisdictional error, such as that a finding of the Board was based on no evidence (i.e. not a skerrick of evidence): citing *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; (2021) 274 CLR 398 at [17]. The respondent submitted that although the Board referred to folios 61 to 63 (at [30] of its reasons), the impugned statement confined the inconsistency (between Dr White's evidence and the applicant's evidence) to the content of folio 63(1) (where the applicant had indicated no change in his drinking habit from December 1974 to early 2000). The respondent submitted that, confined to folio 63(1), the stated inconsistency was accurate, as Dr White had reported the applicant's alcohol intake to have seriously increased in 1996. Though it was accepted that there is no inconsistency between Dr White's evidence and the applicant's evidence at folio 62 (which stated that between 1996 and 1999, he "drank more often and consumed more"), the respondent submitted that the Board had considered folios 61 to 63 but had preferred the evidence at folio 63 and limited the inconsistency on that basis. It was contended that this demonstrates that Ground 3 attacks only the merits of the Board's decision, and the weight given to the evidence which it preferred.

32 The respondent also submitted that the condition not requiring management referred to by the Board at [32] was adjustment disorder, not alcohol use disorder.

33 In reply, the applicant contended that the respondent's submissions ignore the centrality of the evidence at folio 62 to his case and the failure by the Board to grapple with this evidence. It was submitted that beyond mentioning "folios 61 to 63", the Board did not refer to the evidence in detail and therefore could not have preferred the applicant's evidence at folio 63 over that at folio 62. Alternatively, the applicant submitted that if the respondent is correct in arguing that the Board did review the evidence and had preferred that in folio 63 over folio 62, then it necessarily followed that the Board was aware of the evidence in folio 62 and deliberately overlooked it, which, it was submitted, was legally unreasonable.

34 Further, it was contended that the distinction which the Commission seeks to draw between Dr White's opinion that Mr Walker required "specific treatment for his alcohol problems" and specific treatment for the adjustment disorder which underpinned those "alcohol problems" is one without a difference. In other words, it was submitted, the need for treatment of the latter was implied in Dr White's more general opinion of the need for treatment for the former. Alternatively, the applicant submitted that if the respondent's interpretation of [32] is correct, then that exposes yet another error, being a failure to consider Mr Walker's claim of adjustment disorder on its merits.

Consideration

35 A decision is illogical or irrational "if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn": SZMDS at [135]. Irrationality, illogicality or unreasonableness will not be established if the decision is one upon which reasonable minds may differ: SZMDS at [131] and see also [135]. The correct approach is to ask whether it was open to the Board to engage in the process of reasoning in which it did and to make the findings of fact it did on the material before it: SZMDS at [133]; and see generally for a summary of the principles: Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 3; (2022) 289 FCR 21 (Djokovic) at [32]-[35]. It is also established that a decision-maker may fall into jurisdictional error if he or she "ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument": Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17; (2022) 275 CLR 582 (Plaintiff M1/2021) at [27].

36 The threshold for legal unreasonableness is usually high: Minister for Home Affairs v DUA16 [2020] HCA 46; (2020) 271 CLR 550 at [26] citing Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 264 CLR 541 at [11], [52], [89] and [135]. Caution is required by the Court in assessing a complaint of unreasonableness to ensure that it does not impermissibly engage in a merits review of the decision: Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332 at [66]. As the Court in Djokovic reiterated at [17]: "[t]he Court does not consider the merits or wisdom of the decision; nor does it remake the decision. The task of

the Court is to rule upon the lawfulness or legality of the decision by reference to the complaints made about it". "It is not sufficient that the court disagrees with the basis of the fact finding or associated reasoning, or even strongly or emphatically disagrees; it must be shown that the findings were not rationally open to be made": CKL21 v Minister for Home Affairs [2022] FCAFC 70; (2022) 293 FCR 634 at [65], citing, inter alia, SZMDS at [119] and [135].

37 It is timely to recall, as emphasised by the respondent, that the Board's reasons are not to be read in a manner astute to discern error: Plaintiff M1/2021 at [38], citing Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259.

38 Given the material before the Board, I accept the applicant's submissions. I do not accept the respondent's submission that Ground 3 is doing no more than seeking a merits review.

39 The first impugned statement appears in the Board's reasons at [30] (recited above at [22]), that the applicant "indicated no change in his drinking habit from December 1974 to early 2000". The Board expressly stated in [30] that it was referring to the Alcohol Questionnaire dated 24 April 2012, at folio 63. However, the applicant stated at folio 62 (the preceding page of the Alcohol Questionnaire) that, "between 1996 and 1999", he "drank more often and consumed more". The answer at folio 63 is not to be considered in isolation from the remainder of the responses in the Alcohol Questionnaire, including the answer at folio 62. The answer at folio 62 is not mentioned anywhere in the Board's reasons. The statement based on folio 63 is then used by the Board to establish an inconsistency between the applicant's evidence and the evidence of Dr White as to what the applicant had said to him.

40 The question of whether there was an increased consumption of alcohol was an important one to the resolution of the claims. The respondent submitted that the Board referred (at [30]) to folios 61 to 63, and then confined the finding as to inconsistency to folio 63, which, in its submission, reflects that the Board preferred the evidence at folio 63. That submission recognises there is conflicting evidence and infers that the Board resolved that conflict in reaching its conclusion. I do not accept that that inference can be drawn from the mere reference to folio pages on which the evidence is found. The respondent's reliance on aspects of the transcript of the hearing in support of its interpretation of the Board's reasons also does not assist. Given the importance of the evidence on this topic, if the Board did resolve the conflict in the evidence, as it is suggested by the respondent, one would have expected it to have said so. Indeed, the last sentence of [30] (where the finding of inconsistency is made) does not support the respondent's submission. It finds "[t]he drinking pattern is contradicted in a report by Dr White at Folio 90(2), where he stated that Mr Walker's drinking had increased, which is inconsistent with Mr Walker's own evidence at Folio 63(1)". While it is true that the Board's reasons here again refer to folio 63, the Board does not refer to any finding it had made about the alcohol intake, instead drawing attention to the inconsistency within the applicant's own evidence in the Alcohol Questionnaire. The applicant did indicate a change in his drinking habit in the Alcohol Questionnaire at folio 62. There is no relevant inconsistency between what Dr White records and the applicant's evidence at folio 62. I note that the Board does not suggest there is any inconsistency in the applicant's evidence (between folios 62 and 63), but rather suggests the inconsistency is only with Dr White's

evidence. The finding of inconsistency based on folio 63 was used to discount Dr White's opinions. If the Board had been aware of, or considered the answer in folio 62, it could not reasonably have concluded that Dr White's statement was inconsistent with the applicant's evidence. If that finding had been made by the Board knowing of the answer in folio 62, but ignoring it, the finding would be unreasonable.

41 Accepting that the failure to refer to evidence does not necessarily mean that it was not considered, in the circumstances, I accept the applicant's submission that the better inference in this case is that the Board did not consider the evidence. There is no proper basis to suggest that it was considered but not accepted. That said, whether the Board failed to consider the answer in folio 62 of the Alcohol Questionnaire or ignored it, the practical result for Ground 3 is the same. This aspect of the ground is established.

42 The significance of the impugned statement that the applicant's position is inconsistent with Dr White's report is reinforced at [33] where the Board rejects Dr White's conclusion that there was evidence of a material aggravation of his condition because of his service.

43 The second impugned statement is the Board's finding at [32] that "there [wa]s no evidence to suggest" that any psychiatric condition that the applicant may have had was "clinically significant" to meet the requirements for adjustment disorder with anxious mood. That, as the applicant submitted, was a reference to the relevant SOP, being "sufficient to warrant ongoing management". As the applicant submitted, Dr White's evidence was that it "would have been appropriate that [the applicant] be referred for specific treatment for his alcohol problems". Again, this is a matter of importance to the claims. It was not referred to in the Board's reasons (notwithstanding that, as the respondent pointed to in submission, other aspects of Dr White's report have been referred to). On Dr White's evidence, the adjustment disorder was causative of the alcohol problems, and so the need for treatment of the alcohol problems implied the need for treatment of the condition that underpinned it. There was "evidence to suggest" such a clinically significant condition; whether it was to be accepted is a different issue. The Board appears to have misunderstood Dr White's opinion. I accept the applicant's submission that this omission has resulted in a finding that is unreasonable or illogical. This aspect of the ground is established. Given the significance of the conclusion to the resolution of the claim, it is plainly a material error.

44 The respondent's submission that, if Ground 3 is established, relief should nevertheless not be granted because the Board would have reached the same conclusion due to its finding at [35], cannot be accepted, for the reasons given above. The reasons given below in relation to Ground 1 also illustrate why that is so. The respondent's submission in support tended to be rather circular in nature. It failed to recognise or grapple with the errors established and their significance to the Board's findings.

Ground 1: failure to consider the Other Conditions

Submissions

45 The applicant submitted that his claim was made in part on the basis that he suffered from the Other Conditions but that, in contravention of its duty under s 139(2) of the VEA, those conditions were not the subject of any consideration or determination by the Board. The applicant submitted that s 139(2) requires the Board to satisfy itself with respect to, or determine, "every possible ground of entitlement to the pension which the application under s 14 raised": *Repatriation Commission v Stafford* [1995] FCA 537; (1995) 56 FCR 132 (*Stafford*) at [8]; and that only "a clear, unambiguous withdrawal...of...condition[s] from the scope of the review...could relieve the Board of [that] duty": *Stafford* at [11]; see also *Warren v Repatriation Commission* [2018] FCA 1193 at [23] (*Warren*); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* [2021] FCAFC 48; (2021) 284 FCR 1 at [82]; *Comcare v Fiedler* [2001] FCA 1810; (2001) 115 FCR 328 at [40].

46 The applicant submitted that the Board appeared to reason that, because it was not satisfied that his alcohol dependence/abuse condition was a defence-caused injury or disease, it necessarily followed that the claim for a pension based on the Other Conditions failed. However, the applicant stated that the submissions made before the Board were an acknowledgment that the common thread running through the various conditions was alcohol consumption, not satisfaction of the requirements in the SOP for alcohol dependence/abuse. That is, the case was based on alcohol consumption, not alcohol dependence/abuse, and as such, each of the SOPs for the Other Conditions needed to be met. Thus, while a finding of alcohol dependence/abuse would have led to a conclusion that the Other Conditions were satisfied, the converse was not true. The applicant submitted that the Board was under a statutory obligation by s 139(2) to engage with the Other Conditions and to satisfy itself whether they met the requisite criteria in the relevant SOPs. Despite this, the Board at [35]-[37] did not suggest there was no service connection to alcohol consumption, but rather that the criteria for establishing a connection between the applicant's alcohol dependence/abuse condition and his service had not been met.

47 The respondent submitted that properly read, the Board did not confine its consideration to alcohol dependence/abuse but considered alcohol consumption in relation to all the possible service connections relied on. It was submitted that the Board acknowledged at [19] of its reasons that the applicant's claim in respect of the Other Conditions was based upon a claimed connection to alcohol consumption; that the Board cites directly at [23] the submission that "but for" the applicant's service he may not have drunk as much as he did; and that the Board assessed evidence on the question of the applicant's drinking history from [30]-[31] and [33]-[35] of its reasons. The respondent submitted that any attempt to undercut those findings invites a merits review.

48 The respondent drew attention to [30], where the Board regarded the applicant's alcohol abuse/dependence as having existed prior to his eligible service for the purpose of the VEA, which it said provided important context explaining any interchangeable references to alcohol consumption and abuse. The respondent also contended that the Board found at [35]-[36] that the applicant had heavy alcohol consumption from 1968-2006 which amounted to excessive use, but

that the consumption/use of alcohol was not service-related, and that [37] of the Board's reasons does no more than state that it agrees with the contention that the Other Conditions were sequelae of the condition alcohol abuse/dependence.

49 The respondent also contended that the causal connection to defence service is no different as between any of the SOPs involved in this matter: citing ss 120B(3) and 196B(14) of the VEA. The respondent submitted that the service connections to alcohol consumption were all claimed connections that the Board had previously considered. It was submitted that the applicant has not contended that there was any other service connection, not already considered by the Board that the Board was asked to, but omitted to, consider in respect of the other SOPs relating to the Other Conditions. It followed from the adverse finding on the lack of service connection that none of the Other Conditions met the SOP requirements via a factor concerning service-related alcohol consumption.

50 In reply, the applicant submitted that the respondent's interpretation of the Board's reasons conflates the medical condition of alcohol use disorder with the fact or existence of alcohol consumption. He noted the SOPs concerning alcohol dependence/abuse are silent as to the requisite level of alcohol consumption, unlike the SOPs for the Other Conditions. The SOPs for alcohol dependence/abuse require the clinical worsening of alcohol use disorder, and it was that factor that the Board applied at [29]-[30] of its reasons; there was no implicit finding that the applicant's alcohol consumption was not defence-caused, and the Board should not be understood to be referring to the fact of alcohol consumption and alcohol use disorder interchangeably. Thus, the applicant submitted that the Board fundamentally misunderstood his claims and how it was to apply to law to his case, which does not appeal to the merits of the Board's decision.

Consideration

51 As a starting point, s 139 of the VEA imposes a duty on the Board "to satisfy itself with respect to, or to determine, as the case requires, all matters relevant to the review." "Those 'matters' will comprehend every possible ground of entitlement to the pension which the application under s 14 raised or which, in the words of s 139(1), 'the evidence that was before the Commission when the decision was made' suggests": Stafford at [8].

52 Accepting the caution with which one approaches the Board's reasons, nonetheless I accept the applicant's submission that the Board failed to address and consider the Other Conditions.

53 Properly read, the reasons focus on the criteria for alcohol dependence/abuse, which are each defined in the relevant SOP. So much is evident from [35]-[37] of its reasons. It is also apparent from the Board's reasons commencing at [29], which refers to factor 6(f) of the alcohol dependence/abuse SOP. The Board reasoned at [37] that it necessarily followed from the conclusion as to alcohol dependence/abuse that the Other Conditions fail. That is the only paragraph with dispositive reasoning in relation to the Other Conditions.

54 However, the statutory inquiry which the Board is bound to follow, dictated by s 196B(14) of the VEA, is whether there is a connection between the service and the posited factor in the SOP in relation to the condition claimed (not a connection between the service and the condition): Repatriation Commission v Knight [2012] FCAFC 83; (2012) 202 FCR 451 at [13]; Knight v Repatriation Commission [2010] FCA 1134; (2010) 52 AAR 547 at [47]; Linwood v Repatriation Commission [2016] FCA 90; (2016) 148 ALD 542 at [26]. The Board was required to address the SOP factors for each of the Other Conditions, which relevantly, in relation to alcohol, are in different form. It did not do so. In each relevant SOP factor, the reference is to a consumption of a specified amount of alcohol within a designated period, which is very different from factor 6(f) referred to at [29] of the Board's reasons. The Board at [30] posited that the claim for the condition "hinges upon whether or not there was a material contribution to Mr Walker's alcohol habit causally related to the morgue visit". That is not the question required to be asked.

55 Further, it does not necessarily follow from a failure to establish the criteria for the alcohol dependence/abuse SOP that there is no service connection between alcohol consumption and the Other Conditions. The respondent accepted that was so but argued that was not this case. However, the claims for the Other Conditions were made and were not at any stage withdrawn. That being so, the Board was required to determine them in accordance with s 196B of the VEA.

56 I do not accept the respondent's submission that the Board did not confine its consideration to alcohol dependence/abuse. The high point of the respondent's argument appeared to be [35] of the Board's reasons. The respondent submitted that there was no need to consider the causal factors if it was confining its consideration to alcohol dependence/abuse, and that [35] would have been enough.

57 Two further submissions made by the respondent in relation to the Board's reasons should also be addressed. Each bear upon the approach taken by the Board and undermine the respondent's submission that no other decision would have been made.

58 First, as noted above, the respondent submitted that the Board did not confine itself to consideration of the alcohol dependence/abuse SOP but also considered every service connection relied on. It submitted that the visit to the morgue, and the problems that the applicant experienced at work as the Command Police Officer, were all the service connections "that had ever been raised for all of the conditions, and the Board said not a single one it considered raised a connection to service between the excessive alcohol use and service". The respondent further submitted "that every causal connection that was posited is dealt with in [the Board's] reasons". It is the passage at [30] that is said by the respondent to reflect that. A proper reading of the reasons does not reflect that every causal connection posited was dealt with in the Board's reasons. However, even if that is so, it only serves to highlight the materiality of the errors in Ground 3, as any consideration of the causal connections posited by the application occurred in the context of the Board's conclusions as to the change in drinking habit and inconsistency with Dr White's evidence; those conclusions being tainted by error. Further, that submission does not address the inquiry which the Board was required to undertake, and the different factors in the SOPs for the Other Conditions.

59 Second, in attempting to illustrate the submission referred to immediately above, the respondent addressed the paragraphs in the reasons which preceded the Board's consideration. Those paragraphs were a summary of the submissions there advanced. At [19] of the Board's reasons, the Board recorded that the applicant wrote that he "considered that [the Other Conditions] were causally connected to his eligible service and that they were due to his alcohol consumption". That accurately describes the case. At [22], the Board recited that the applicant "sought to address the claim for alcohol abuse/dependence (resolved), as a number of the other claimed conditions were dependent upon its acceptance as defence-caused". When addressing that statement the respondent accepted that the claim in respect to the Other Conditions is "not dependent on the acceptance of the psychiatric condition [the aspect of the alcohol dependence/abuse SOP said to be relied on], but if you did accept the psychiatric condition, those other conditions would follow...but if you [did not] accept the psychiatric condition you might still find a service connection to the others". This is a proper acceptance by the respondent that the Other Conditions must be separately considered by the Board. Given that, it is difficult to reconcile [37] of the Board's reasons with a proper consideration of those other conditions. Rather [37], read in context, appears to reach a conclusion in relation to the Other Conditions based only on the Board's conclusion in respect to the alcohol dependence/abuse SOP.

60 I am satisfied that the Board failed to consider the Other Conditions claimed, as it was required to do. This ground is established.

Ground 2: denial of procedural fairness

61 Having concluded in respect to Ground 1 that the Board erred in the approach it took to resolve the claims concerning the Other Conditions, an argument as advanced by Ground 2 that the Board should have put the applicant on notice of that approach does not add to the resolution of these applications. Accordingly, it is unnecessary to address this ground.

Ground 4: failure to consider or misunderstand relevant material

Submissions

62 The applicant submitted that none of the evidence suggesting that the applicant suffered from osteoarthritis, osteoarthrosis and/or osteochondritis dissecans in his left knee was considered, even though it undermined the Board's findings at [40]-[41]. The report of Dr McNicol dated 20 June 2022, for example, stated that an x-ray showed what appeared to be "a chronic defect" in the applicant's left knee which "may represent an old osteochondritis dissecans or an old injury". A National Capital Diagnostic Imaging Report dated 23 May 2005 recorded that the applicant had osteoarthrosis in his left knee. The applicant submitted that this evidence contradicted, or at least cast doubt on, the Board's conclusion (at [41]) that "no incapacity can be found". The applicant contended that had the evidence been considered, it may have prompted the Board to obtain further information in relation to his left knee, noting that the Board had the power to inform itself on matters relevant to the case: citing ss 138(1) and 139(1)-(2) of the VEA.

63 The respondent submitted, as with Ground 3, that Ground 4 raises questions about the weight afforded to evidence and invites an impermissible analysis of the merits of the decision: citing D'rozario at [77]; SZOOR at [5]-[6]. It also submitted that the applicant only expressly claimed left knee osteoarthritis which meant that the Board did not have to consider the other conditions, "osteoarthrosis" and "osteocondritis dissecans". The applicant contended that that submission should be rejected as the Board was duty-bound under s 139 of VEA "to satisfy itself with respect to, or to determine, as the case requires, all matters relevant to the review" (i.e. examine all of the claims arising on the applicant's material).

Consideration

64 The principles applicable to illogical or irrational decisions are recited above.

65 Ground 4 refers to the Board's conclusion at [39]-[41]:

39. Osteoarthritis of the left knee. Mr Wain referred the Board to Folio 66(2) where Mr Walker's LMO, Dr Chan-Fen Lin diagnosed osteoarthritis left knee. The Board pointed out an x-ray conducted on 5 July 2012, after Dr Chan-Fen Lin's diagnosis on 20 April 2012, demonstrated (Folio 95(2)):

"The bone alignment is normal. No bone abnormality seen. No joint effusion or radio-opaque loose body is seen".

40. Following Mr Walker directing the Board to his service medical records, the Board noted that the diagnosis contained in those records was in fact osteochondritis dissecans and not osteoarthritis. This is a completely separate diagnosis that mainly affects cartilage but can also cause erosion of the bone that generally recovers. The Board notes that there is no such erosion demonstrated in the x-ray referred to above.
41. The Board is reasonably satisfied that no incapacity can be found. Accordingly, the Board affirms the claim for osteoarthritis left knee.

66 The impugned statement appears at [41], where the Board concludes that it "is reasonably satisfied that no incapacity can be found".

67 The respondent referred to folio 66(2), where Dr Chan-Fen Lin diagnosed the applicant with osteoarthritis (left knee), as well as the applicant's service medical records which recorded the diagnosis as osteochondritis dissecans, not osteoarthritis. Not expressly referred to by the Board are the reports of Dr McNicol and National Capital Diagnostic Imaging which respectively record the applicant has having "osteocondritis dissecans" and "osteoarthrosis" in his left knee. It follows there is an inconsistency between the materials before the Board, with some records reporting the diagnosis as osteochondritis dissecans, and others osteoarthrosis.

68 The very brief consideration by the Board appears to suggest that there is no medical evidence in support of the claim. In that respect, I accept the applicant's submission that the Board misunderstood the relevant materials in rejecting the applicant's claim.

69 The Board's reasons also fail to grapple with the inconsistency in diagnoses recorded in the various reports. As explained above, a failure to refer to evidence does not necessarily mean that it was not considered. However, it is unlikely that the Board, after considering the various reports, resolved the inconsistency and preferred the evidence of the osteochondritis dissecans diagnosis. There is nothing in the reasons to suggest that was so. In any event, the Board was required pursuant to s 139(2) of the VEA to satisfy itself with respect to all of the claims arising on the applicant's material, which included osteoarthritis, osteoarthrosis and osteochondritis dissecans: see *Stafford* at [8] and [11]; see also *Warren* at [23]. The Board had before it evidence of both osteoarthrosis and osteochondritis dissecans. Thus, the better inference to draw is that the Board either failed to consider, or misunderstood, that evidence in reaching its decision.

70 Ground 4 is established.

71 Against that background it is appropriate to turn to the extension of time application and the question of relief.

Extension of time application

Submissions

72 By the Second Application, the applicant seeks an extension of time to review the 2014 Decision. The applicant accepted that the delay is lengthy and that pursuing alternative pathways is not an acceptable explanation for delay in making an application for judicial review. However, the applicant provided an explanation for that delay, noting that he received and relied upon erroneous legal advice in 2014 and 2015 which either led to his not seeking judicial review of the 2014 Decision sooner or not applying to the Tribunal for merits review of that decision within 12 months of the date on which it was made. The applicant submitted that he acted promptly once he discovered that he could challenge the 2014 Decision in this Court.

73 The applicant also submitted that delay is only one factor to which a court will have regard, even where an applicant seeks an extension by some years: citing *Turaga v Minister for Immigration and Border Protection* [2017] FCA 58 at [22]. The applicant contended that an extension of time would be warranted in this case as there are reviewable errors in the 2014 Decision, an adequate explanation for the delay has been given, and the Commission would not be prejudiced by the grant of an extension (particularly as his claims were upheld in subsequent proceedings, albeit in relation to a different period of time).

74 The respondent submitted that, *prima facie*, proceedings not commenced in time should not be entertained: citing *Lucic v Nolan* [1982] FCA 232; (1982) 45 ALR 411 at 416. The respondent noted that pursuant to s 10(2)(b)(ii) of the ADJR Act, the Court may, in its discretion, refuse to grant an application if "adequate provision" is made for alternative review: citing *Cremona v Administrative Appeals Tribunal and Another* [2015] FCAFC 72; (2015) 230 FCR 1. The respondent relied on *Edelsten v Minister for Health and Others* [1994] FCA 82; (1994) 58 FCR 419, where Northrop J said (at 424) that "adequate provision" is to be read as adequate in the sense of suitable or sufficient provision for review. To that end, the respondent submitted that both the VEA and

Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act) make suitable provision for review as follows: the primary determination is completed internally by the Commission; the Board conducts merits review of a primary decision of the Commission; the Tribunal conducts merits review of a reviewable decision of the Board; and decisions of the Tribunal can be appealed to the Court on questions of law within 28 days after receiving notice of the decision: s 44(2A) of the AAT Act. The respondent submitted that the Court's discretion to grant an extension of time should be refused because the applicant made informed decisions not to seek merits review in both 2014/5 and in 2020 based on different legal advice.

Consideration

75 There is no doubt that the length of the delay is significant. However, it is not conclusive of this application. It is but one factor. As explained above at [72], the applicant provided an explanation which was not challenged (although it was contended to be insufficient). I accept that explanation. In circumstances where there is merit in some of the grounds of review and there is no prejudice to the respondent in granting the extension, it is appropriate that it be granted. No persuasive reason has been advanced to the contrary.

Section 39B application

76 The parties addressed the First Application under s 39B of the Judiciary Act in written submissions. Those submissions need not be recited in detail. Suffice to say that the applicant submitted that granting relief ought to be refused because the applicant, in reliance on legal advice, made informed decisions not to seek merits review; and granting relief in these circumstances may undermine reliance by parties on the finality of litigation and be perceived as unfair to other litigants who made provision for alternative review within reasonable time. However, the case for denying relief must be strong. Given the conclusion that error has been established, there is no proper basis in this case to deny relief. I agree with the respondent's submission that "there is a basic presumption that appropriate relief should follow upon a finding of unlawfulness" against a public body: *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* [2014] FCA 1019; (2014) 227 FCR 1 at [476]. Despite the respondent submitting otherwise, no basis was provided why relief should not be granted in circumstances where error is established.

Conclusion

77 For the reasons above, Grounds 1, 3 and 4 are established and the applications are granted. I note that the applicant sought to be heard on the issue of costs.

I certify that the preceding sixty-two (77) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham.

Associate:

Dated: 7 March 2024

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Prepared on 27 October 2026 · Esheria