

War Pensions Number

## VETERANS' ENTITLEMENTS APPEAL BOARD

Name: [REDACTED]

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Service Number and Rank: [REDACTED]

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Address: [REDACTED]

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Grounds of appeal: Appeal against decision of the Review Officer to decline to accept claimed condition as being service-related

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Held: at Wellington on 22 February 2018

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### DECISION

1. This is an appeal by [REDACTED] (the **Appellant**) against the decision of the Review Officer (**RO**) dated 26 October 2016, firstly to uphold the Decision Officer's decision of 8 July 2016 and decline to accept his condition of **Prostate Cancer** as being service-related under the Veterans' Support Act (the **Act**), and secondly, to award him a permanent pension of 5% for his condition of Non-Melanotic Neoplasm of the Skin (redefined from Skin Cancer).
2. The Appellant attended the appeal hearing via teleconference. Veterans' Affairs New Zealand (**VANZ**) was represented by Mr Graeme Astle. Ms Ann-Marie Tribe of VANZ was in attendance.

#### ***Background to the appeal***

3. On 8 July 2016 the Decision Officer declined to accept the Appellant's claimed conditions of Prostate Cancer and Skin Cancer as being service-related. The reason for her decision was: "*A review of all available evidence has found no evidence that your condition is related to your service in J Force...I have considered all the available evidence and I am satisfied that your prostate cancer is not related to your service because the link to service has not been established. When considering all the available material that is relevant, the material is not consistent with your condition as being service-related. I have considered all the available evidence and I am satisfied that your skin cancer is not related to your service because the link to service has not been established. When considering all the available material that is relevant, the material is not consistent with your condition being service-related. These decisions are made in accordance with section 14(2)(a) and (b) of the Veterans' Support Act 2014.*"
4. On 26 October 2016 the RO upheld the Decision Officer's decision of 8 July 2016 and declined to accept Prostate Cancer as service-related under the Veterans' Support Act 2014. With regard to the Appellant's condition of Non-Melanotic Neoplasm of the Skin (redefined from Skin Cancer),

however, the RO overturned the Decision Officer's decision of 8 July 2016 and accepted Non-Melanotic Neoplasm of the Skin (redefined from Skin Cancer) as service-related under the Veterans' Support Act 2014 and awarded a permanent pension of 5%. In coming to her decision, the RO had regard to the information provided in the Appellant's review application received on 11 August 2016 and the reasons he gave for seeking a review of the decision i.e. *"My father died of war wounds (1<sup>st</sup> World War) age 58. No cancer. My mother died age 85. No cancer or skin cancer. How can you say prostate cancer and skin cancer does not apply in my case. I am 92 years of age and I do get pain. Are you people too mean to give a little. I do know of J force members who have died of bowel cancer, prostate cancer. One is still alive and getting \$150.00 a fortnight."* The RO noted that the Appellant had qualifying service under the Veterans' Support Act 2014 (VSA) in respect of his service with J Force; that the Appellant's service medical documentation noted that his complexion was fair; that he had had no skin disease prior to service with J Force, and that *"the Medical Board dated 10 July 1947 post service in Japan / prior to discharge from the Army shows [the Appellant] stated that he was suffering from 'nil' and had suffered from skin trouble during service; no skin abnormality was found on examination."* The RO further noted that the Appellant's conditions of Prostate Cancer and Skin Cancer had been previously considered and declined under the War Pensions Act 1954, but observed that conditions so declined *"can be applied for as new claims under the Veterans' Support Act 2014."*

5. The RO also had regard to the information in the Appellant's Disablement Pension application received by VANZ on 18 May 2016, including that the Appellant related his conditions to his service in Japan; that the Appellant's GP, Dr G W Robertson had noted a diagnosis of skin cancer due to sun exposure, and that the Appellant had previously had surgery to excise a Basal Cell Carcinoma, but that *"there was no current treatment or impact on daily living from the skin cancer"*, and that Dr Robertson had commented that the Appellant's prostate cancer was *"Not proven but could be linked to radiation exposure..."*. The RO also noted the letter dated 5 March 2007 from James H F Shaw, Clinical Professor of Surgery, regarding the Appellant's lesion on his face (*"...a BCC with a positive margin but the majority of these do not recur...He also pointed out several other skin lesions and we have placed his name on the waiting list at Auckland Hospital to do this"*); the letter dated 10 August 2001 from Urologist Mr Russell McIlroy regarding the Appellant's prostate cancer (*"...He had a PSA of 15 and had a prostate biopsy which showed a Gleason Score 3+3 in both lobes...He feels he would like to have this observed over the next three months and we will review him with a PSA at that time. If it is rising then we would look at hormonal treatment for him."*), and other information in the Appellant's War Disablement Pension file. Having considered urology letters from 2001 to 2006 and skin specialist letters from 2006 to 2007, the RO concluded that *"documentation therefore shows that [the Appellant] was diagnosed with prostate cancer in 2001 and skin cancer in 2006, and that both conditions have reached a permanent stable state."*
6. The RO observed that the Appellant's prostate cancer and skin cancer *"do not qualify for automatic acceptance under legislative service-related presumptions in the Veterans' Support Act 2014"* and that *"the conditions are therefore determined in accordance with section 14, which applies to Statements of Principles for determining whether or not the condition is connected with a persons'*

qualifying service.” She further observed that “*Statements of Principles provide definitions of the disease or injury and specify what factors must exist for the condition to be causally connected to the person’s qualifying service. Only one factor need be met for the claim to be successful, provided the information available connects the factor with the circumstances of the person’s qualifying service. The condition cannot be accepted as service-related if no factors are met.*” The RO determined that “*the Statement of Principles (SoPs) adopted for use by New Zealand relevant to [the Appellant’s] conditions and qualifying service are: Malignant Neoplasm of the Prostate (Reasonable Hypothesis) No 43 of 2014 (prostate cancer) and Non-Melanotic Neoplasm of the Skin (Reasonable Hypothesis) No 81 of 2007 as amended by 71 of 2011 (non-melanoma type skin cancers); replaced on 15 September 2016 by Non-Melanotic Neoplasm of the Skin (Reasonable Hypothesis) No 7 of 2016.*” The RO concluded that “*the available information, when considered in relation to the factors listed for Malignant Neoplasm of the Prostate, does not connect the prostate cancer to [the Appellant’s] qualifying service.*” With regard to the Appellant’s skin cancer condition, however, the RO determined that “*the available information is sufficient to conclude the skin cancer is connected to [the Appellant’s] J Force (material contribution) in relation to factor 6(c) / 9(d) ‘having sunlight exposure to unprotected skin at the affected site for a cumulative period of at least 2250 hours while in a tropical area, or having equivalent sunlight exposure in other latitude zones, before the clinical onset of non-melanotic malignant neo-plasm of the skin.*” Having had regard to the AMA Guides Table 2 page 280 ‘Impairment Classes and Percents for Skin Disorders’ and associated examples, the RO determined that the Appellant “*meets criteria for 5% impairment of the whole person under Class 1 “Signs and symptoms of skin disorder are present or only intermittently present; **and** There is no limitation or limitation in the performance of few activities of daily living, although exposure to certain chemical or physical agents might increase limitation temporarily; **and** No treatment or intermittent treatment is required.*” Following a review of the available information the RO “*determined to uphold the decision of 8 July 2016 and decline to accept Prostate Cancer as service-related under the Veterans’ Support Act 2014” and “Overturn the decision of 8 July 2016 and accept Non-Melanotic Neoplasm of the Skin (redefined from Skin Cancer) as service-related and award a permanent pension of 5%.*”

#### **Appellant’s written submissions**

7. On 20 January 2017 the Appellant lodged an appeal against the decision of the RO, stating that “*...The pension you have given me of just over \$10 a week, I think is an insult. I do know of Army personnel who have never left the country but have retired at 45 and a pension for life. Is that where all our money is going. I am 92 years. Are you too mean to give return men a little. As for the prostate cancer...I should get something and the skin cancer. When I was in Japan I was in bandages up to my arm pits for over two months. Thanks for the little you gave me. I am not happy with the results...*” The Appellant further elaborated in Part 3 of his notice of appeal: “*I am saying the amount is an insult. If I am being paid for one why not the prostate cancer. As I stated before no cancer in my family. You can pay long serving personnel to the age of 45 then they are on a pension for life. Is that where our money is going and nothing for the return men. I think this should be looked into.*” The Appellant made no further written submissions.

**Respondent's written submissions**

8. In his written submission dated 26 January 2018, Mr Astle highlighted a number of points in relation to the Appellant's application: that the Appellant has qualifying service under the VSA in respect of qualifying operational service with J Force (noting that the Appellant was attested into the Army on 14 February 1946, that he entered camp on 8 March 1946 and that he was discharged on 9 August 1947); that his application for Prostate Cancer was declined by the Decision Officer on 8 July 2016 on the ground that the information and evidence available did not connect Prostate Cancer to the Appellant's qualifying service; that the Appellant's condition of Prostate Cancer had been previously considered and declined under the War Pensions Act 1954; that the Appellant had noted that he related his condition to service in Japan, and that his GP, Dr G W Robertson had commented in respect of this condition 'not proven but could be linked to radiation exposure...'; that urology letters from 2001 to 2006 confirmed both a diagnosis of Prostate Cancer and that the condition had reached a permanent and stable state, and that the Appellant's condition of Prostate Cancer does not qualify for automatic acceptance under service-related presumptions in the VSA. Mr Astle also highlighted that the RO, on the information available, when considered in relation to the Appellant's application for Non-Melanotic Neoplasm of the Prostate, did not connect the Appellant's Prostate Cancer to his qualifying service; that the RO overturned the Decision Officer's decision relating to the Appellant's application for Non-Melanotic Neoplasm of the Skin (redefined from Skin Cancer) and accepted this condition as being service-related on 26 October 2016, and that the Appellant was advised of the acceptance of this condition in writing on 12 December 2016, with the letter explaining that the whole-person impairment rating for this condition was 5% which equates to a fortnightly payment of \$21.82, with payments being backdated to 12 May 2016.
  
9. Mr Astle submitted that despite his condition of Non-Melanotic Neoplasm of the Skin having been accepted, the Appellant had included this condition in his appeal documentation, stating that the amount being paid is 'an insult'. Mr Astle also submitted that "*the amount payable is based on the whole-person impairment rating applicable for Non-Melanotic Neoplasm of the Skin (5%), observing that the VSA requires percentages awarded for accepted disabilities to be determined in terms of whole-person impairment, in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment 4<sup>th</sup> Edition (the AMA Guides), and noting "that the AMA Guides are internationally recognised, and provide an equitable and uniform means of determining impairment."* Mr Astle further submitted that "*the Decision Officers' decision made on 8 July 2016 declining the application for Prostate Cancer, which was upheld by the National Review Officer's decision on 26 October 2016, was the correct one. This was on the basis that the information and evidence available does not establish a factor in the Statement of Principle that would connect Prostate Cancer to the circumstances of [the Appellant's] qualifying service.*" With regard to the condition of Non-Melanotic Neoplasm of the Skin, Mr Astle submitted that "*there is no ground for appeal on the basis that this condition has been accepted and [the Appellant] is being paid a fortnightly amount calculated in accordance with the AMA Guides in relation to whole-person impairment ratings.*"

### ***The appeal hearing***

10. At the hearing of the appeal on 22 February 2018, members of the Veterans' Entitlements Appeal Board (the **Board**) spoke with the Appellant via teleconference. The Appellant was invited to make any submissions that he wished to make, and in particular to describe to the Board the circumstances of his service with J Force. The Appellant reiterated that there was no cancer in his family and that he was the 'only one'; that while he swam and got sunburnt, his "*cancer was definitely caused by radiation*". The Appellant was emphatic that both his conditions were related to his service, and that "*as you can't provide evidence to prove that it did or didn't, I should get the benefit of the doubt.*" The Appellant advised the Board that when he served in J Force, "*in places all over Japan*" which necessitated having "*lots of injections, typhus etc*", his "*outfit spent 2 months here and there*", "*out in the open, quite a bit in the sun*" involved in "*security and rebuilding*", and that as Corporal of the Guard, he was the person in charge of the control point, but that he was "*mobile and he moved around*", carrying out "*general duties in the midday sun.*" He advised that there was no sun protection, and that no instructions were given by officers or medical officers with respect to any protection that may be needed. The Appellant further advised that it was difficult to recall much more ("*this is going back 72 years*"), but that whatever the outcome, he would "*still keep appealing*" as he deserved more than amount awarded, saying "*you can't buy much with \$11*". The Appellant also queried, "*when there is no other cancer in my family, and when others are getting money for prostate cancer, why can't I?*"
  
11. In response, Mr Astle invited the Board to consider the written submissions that the Respondent had already provided to the Board, and advised that he did not have any further submissions to make in addition to those that had already been made. Mr Astle, however, asked the Appellant whether Veterans' Affairs New Zealand (**VANZ**) was paying for any hospital or doctor's bills relating to his skin cancer condition, including the costs of getting his lesions removed. Mr Astle also advised the Appellant that if he had incurred any costs relating to his condition he should "*send the bill to VANZ*", and that in future, he should use his treatment card so that the charge could be sent directly to VANZ for payment. Mr Astle further advised the Appellant to get his skin condition reassessed at the earliest permitted opportunity, and keep engaged with his doctor to ensure that he received appropriate treatment for that condition. With regard to his condition of prostate cancer, Mr Astle suggested that he enlist the support of the RSA and/or his Case Manager to help him find out more about what evidence his colleagues (who had served in similar situations to him) had presented to be successful in their claim for prostate cancer, noting that this might enable VANZ to reconsider his claim for prostate cancer on the basis of new evidence.

### ***Appeals under the Veterans' Support Act (VSA)***

12. Under the VSA, a review decision may be appealed by the person who applied for the review or by VANZ. An appeal made to the Board is a *de novo* appeal, and the Board is not bound by any findings of fact made by the decision maker whose decision is the subject of the appeal. Appeals are required to be heard and determined without regard to legal or procedural technicalities. When hearing an appeal, the Board may, among other things, receive any evidence or information that, in its opinion, may assist it to determine the appeal, whether or not that evidence or information would

be admissible in a court of law. The Board may determine an appeal without hearing oral evidence from the Appellant. The Board is required, among other things, to comply with the principles of natural justice, and in accordance with the following principles: the principle of providing veterans, their spouses and partners, their children, and their dependants with fair entitlements; the principle of promoting equal treatment of equal claims; the principle of taking a benevolent approach to the claims; and the principle of determining claims in accordance with substantial justice and the merits of the claim, and not in accordance with any technicalities, legal forms, or legal rules of evidence. The Board, by majority vote, must confirm, modify or revoke the review decision, or make any other decision that is appropriate to the case. If the Board revokes the decision it is required to substitute its decision for that of the RO or require VANZ to make the decision again in accordance with directions it gives to VANZ.

***The review decision***

13. The Board noted that the Appellant served in the New Zealand Army from 8 March 1946 until he was discharged on 9 August 1947 (having served in Japan as part of J Force from 30 July 1946 to 6 July 1947) and that the RO (correctly in its view) had identified that the Appellant had qualifying operational service for the purposes of the VSA.
  
14. The Board also noted that the RO (again, correctly in its view) had decided that the Statement of Principles (SoP) No 53 of 2014 concerning Malignant Neoplasm of the Prostate (Reasonable Hypothesis) and that SoP No 81 of 2007 for Non-Melanotic Malignant Neoplasm of the Skin (as amended by No 71 of 2011 Non-Melanotic Malignant Neoplasm of the Skin) and replaced on 15 September 2016 by SoP No 7 of 2016 Non-Melanotic Malignant Neoplasm of the Skin (Reasonable Hypothesis) were the appropriate SoPs to apply given the Appellant's qualifying service. The Board observed that the SoPs the RO referred to in her decision are listed in Schedule 1 of the Veterans' Support Regulations 2014, and that such SoPs are therefore Australian Statement of Principles that apply for the purposes of the VSA.

***Condition of Prostate Cancer***

15. The Board noted that in clause 4 of the SoP No 53 of 2014 concerning Malignant Neoplasm of the Prostate (Reasonable Hypothesis), the Repatriation Medical Authority states that it has formed the view that there is sound medical-scientific evidence that indicates that malignant neoplasm of the prostate can be related to service, and that clause 5 of the SoP provides in effect that at least one of the factors in clause 6 must be related to the person's service. Clause 6 of the SoP sets out the factors that must exist in a particular case for a claim to succeed.
  
16. Having considered the evidence available to it, the Board concurred with the RO's view that "*the available information, when considered in relation to the factors listed for Malignant Neoplasm of the Prostate, does not connect the prostate cancer to [the Appellant's] qualifying service.*" The Board noted that VANZ is able to reconsider cover for Prostate Cancer if the Appellant provides new evidence linking it to his service.

### **Condition of Skin Cancer**

17. The Board noted that the RO had determined that the available information *“is sufficient to conclude the skin cancer is connected to [the Appellant’s] J Force (material contribution) in relation to factor 6(c) / 9(2) ‘having sunlight exposure to unprotected skin at the affected site for a cumulative period of at least 2250 hours while in a tropical area, or having equivalent sunlight exposure in other latitude zones, before the clinical onset of non-melanotic malignant neoplasm of the skin’.*” Having so determined, the RO overturned the Decision Officer’s decision of 8 July 2016 and accepted the Appellant’s condition of Non-Melanotic Neoplasm of the Skin (which she redefined from Skin Cancer) as service-related under the VSA. Having had regard to the AMA Guides Table 2 page 280 ‘Impairment Classes and Percents for Skin Disorders’, the RO determined that the Appellant *“meets criteria for 5% impairment of the whole person under class 1 “signs and symptoms of skin disorder are present or only intermittently present; **and** There is no limitation or limitation in the performance of few activities of daily living, although exposure to certain chemical or physical agents might increase limitation temporarily; **and** No treatment or intermittent treatment is required.”*
18. After noting that the RO had determined to accept the Appellant’s condition of skin cancer, and after considering the evidence given by the Appellant (a 93 year old veteran) both in written form prior to the appeal hearing and orally via teleconference during the appeal hearing, it was evident to the Board that the Appellant’s appeal, in so far as it related to his condition of skin cancer, related to the RO’s assessment of the whole-person impairment. In coming to this view, the Board was mindful of its obligations under section 10 of the VSA, in particular *the principle of taking a benevolent approach to claims - (s10(b)(iii)) - and the principle of determining claims (A) in accordance with substantial justice and the merits of the claim; and (B) not in accordance with any technicalities, legal forms, or legal rules of evidence - (s10(b)(iv)).*
19. The Board observed that in his written submission to the Board dated 26 January 2018, Mr Astle had submitted that *“there is no ground for appeal on the basis that this condition has been accepted and [the Appellant] is being paid a fortnightly amount calculated in accordance with AMA Guides in relation to whole-person impairment ratings.”* To the extent that this submission suggested that an appeal against the RO’s decision regarding assessment of whole-person impairment for an accepted condition was not permitted under the VSA, the Board did not agree with the submission. In this regard the Board noted that subpart 2 of Part 7 of the VSA relating to *Reviews and Appeals* conferred on a veteran or other claimant a right to apply for a review of a decision by VANZ (s215) and a right to appeal to the appeal board against a review decision (s228). The Board construed these provisions, when read in the context of Part 7 of the VSA, as permitting (among other things) the person who applied for the review of a VANZ decision to appeal against that review decision, including a review decision relating to the assessment of whole-person impairment by the review officer.
20. Notwithstanding the above, the Board considered that there was no evidence before it to indicate either that the RO’s assessment of the Appellant’s whole-person impairment under the AMA Guides, or (despite the Appellant being unhappy with what he was receiving), the amount that he was being paid fortnightly was not correct. The Board observed, however, that the medical information relating

to his skin cancer condition suggested that the Appellant's skin cancer required ongoing, careful monitoring. As Mr Astle had done, the Board encouraged the Appellant to engage with his doctor on a regular basis to ensure that he received effective treatment. In passing, the Board noted that the Appellant was entitled to have his skin cancer condition formally reassessed in June 2018.

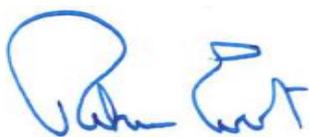
**Appeal Board Decision**

21. Having had regard to all evidence before it, and having had specific regard to all the principles specified in s10(b) of the VSA and the overarching benevolent intent of the VSA, the Board determined that the hypothesis that the Appellant's condition of Prostate Cancer was service-related was not consistent with the SoP No. 53 of 2014 concerning Malignant Neoplasm of the Prostate (Reasonable Hypothesis). In so finding, the Board agreed with the RO's decision to decline to accept the Appellant's condition of Prostate Cancer as being service-related under the VSA, and accordingly determined to **confirm** the decision of the RO dated 26 October 2016 *"to uphold the [Decision Officer's] decision of 8 July 2016 and decline to accept Prostate Cancer as service-related under the Veterans' Support Act 2014."*
22. On the evidence before it, the Board also determined to **confirm** the RO's decision to award the Appellant a permanent pension of 5% for his condition of Non-Melanotic Neoplasm of the Skin which, the Board noted, was based on the RO's assessment of a 5% impairment of the whole person under the applicable AMA Guides.

**Order relating to the publication of decision**

23. Pursuant to the powers vested in it by section 138 of the VSA, the Board, on its own initiative makes an order prohibiting the publication of the name, service number, rank, address and War Pension Number of the Appellant.

**The appeal is dismissed.**



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Ms Rebecca Ewert, Chairperson



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Dr Chris Holdaway, Member



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Ms Raewyn Anderson, Member



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Dr Hillary Gray, Member

**5 March 2018**