[redacted]
War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: [redacted] Reference number: 2016/4 "Case of W"

Service Number and Rank: [redacted], [redacted]

Address: [redacted]

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

Held: at Wellington on 1 December 2016

DECISION

1. This is an appeal by [redacted] (the **Appellant**) against the decision of the Review Officer (**RO**) dated 15 October 2015 to uphold the Decision Officer's decision of 4 March 2015 to decline to accept his condition of **Ischaemic Heart Disease (redefined from Coronary By-pass)** as being service-related.

2. The Appellant, at his request, appeared at the appeal hearing via audio-visual Skype, representing himself. Veterans' Affairs New Zealand (the **Respondent**) was represented by Mr Graeme Astle who appeared in person.

Background to the appeal

3. On 4 March 2015 the Decision Officer declined to accept the Appellant's claimed condition, Ischaemic Heart Disease, as being service-related, as *"the relevant Statement of Principles (Ischaemic Heart Disease No 90 of 2007) applied does not uphold a causal relationship to your qualifying service pre 1 April 1974 under the Veterans' Support Act 2014."* In giving the reason for her decision, the Decision Officer stated: *"You relate Ischaemic Heart Disease to your access to cheap alcohol and cigarettes therefore your excess alcohol consumption and smoking habit are not attributable to your past qualifying service prior to 1 April 1974, the commencement date of cover by ACC."*

4. On 15 October 2015 the RO upheld the Decision Officer's decision of 4 March 2015 and declined to accept the Appellant's condition of Ischaemic Heart Disease as being service-related. In coming to her decision, the RO had regard to the detailed information provided in and with the Appellant's Review of Decision Application dated 6 August 2015, received by Veterans' Affairs on 11 August 2015, in which he wrote: *"...I joined the Royal New Zealand Navy at the age of 18.5 years. At the time of my enlistment I neither smoked nor drank alcohol. This is confirmed by an email from a*

boyhood friend with whom I was a keen cross-country runner….Richmond states: 'Certainly in our days as young lads we were not interested in alcohol and with sports not interested in smoking. I certainly cannot recall you or any of the people we got around with smoking or drinking, we had better things to do.' A copy of the email has been provided…Upon joining the Navy a different cultural norm existed. Here I discovered almost everyone smoked (very few didn't) and smoking was permitted in our barracks. In fact spittoons…were provided for cigarette butts and the YMCA canteen sold tobacco products. But it was not until I graduated three months later to my specialist training that I commenced smoking. By this time I was completely indoctrinated in the Navy culture with its emphasis on teamwork. Accordingly (unknown to me at the time) I was subjected to two subtle influences – Navy and peer group…When I graduated from my specialist training I was assigned to an office workplace where I discovered smoking was officially sanctioned. As well as being culturally accepted Navy practice, it was a reflection on life in New Zealand at the time. One research found in 1950's – "Many enjoyed a smoke with their drink, consuming on average 2.3 kg of tobacco each year.' This practice continued into the 1960's and beyond…" The RO observed that the Appellant had "*referred to various publications relating to the social attitude to smoking at that time, and how and why that attitude later changed, leading eventually to the banning of smoking in public places"* and that the Appellant had commented: *"given all this overwhelming evidence of the dangers of smoking, the RNZN did not address this major health matter. <u>There was no age limit on smoking.</u> Wynd (2012) offers 'a portion of teenagers who joined before they turned 18 took up smoking in the Navy.' More significantly he claims <u>health issues or the risks did not factor into any decision making at this time."</u>* The RO went on to observe that the Appellant had *"noted an excerpt from Wynd, M (2012) 'Use, Consumption, and Supply of Tobacco to the RNZN to the RNZN post 1947 and the Policy Changes towards its use within the Navy'…that refers to duty-free tobacco"* and in which it was further written: *"Upon being posted to my first warship in 1969 I discovered (except during periods of action stations, replenishments at sea, or helicopter operations) smoking was permitted aboard ship in the internal compartments, on the upper deck, in sleeping quarters and workplaces. My first sleeping quarter consisted of a combination of a bunk and hammock sleeping arrangements. I was allocated a hammock and slept with my body only approximately 45 cm from the deck head; this in a tobacco smoke-filled compartment, which housed 30 plus sailors. My small working compartments below decks were similarly filled with tobacco smoke. Consequently, if one did not smoke, one was subjected to second-hand smoke and its inherent dangers. This was to continue throughout my sea-going and shore career. Even though by the 1970's the risks of tobacco smoking were well known, the RNZN continued to ignore medical research indicated by tobacco advertising being included in the Navy News (an RNZN publication) through to the 1980's. In the wider society tobacco advertising of the day deliberately targeted youth, claiming there were no health risks from smoking. Persuasive advertising was common. Therefore, give the naval culture of the time, it is little wonder there were few non-smokers; especially among susceptible teenagers."*

5. The RO also noted what the Appellant had written with regard to his alcohol use: *"In a review of alcohol use/misuse within the military Dunbar-Millar (1984) says western military culture has historically tolerated and may have even encouraged excessive alcohol consumption. Fear et al*

(2007) attempt to explain the type of person who is attracted to the Armed Forces and their proclivity to abuse alcohol – 'Of necessity, the armed forces recruit risk-taking individuals. It would be impossible to conduct a military campaign without service personnel who are willing to risk death or injury. It may be that some of the characteristics that make a successful combat soldier also put them at risk of alcohol misuse.' Before I joined the RNZN I neither smoked nor drank alcohol. It was not until a year after my enlistment I first sampled alcoholic drink. By this time I was completely immersed in Navy culture and my peer group. As (O'Koon 1997) states the prevailing emphasis was on teamwork and cohesion, which was vital for unit functionality. In the wider community, Longden (2007) mentions, 'Social drinking remained the focus of most communities – whether in the village inn, city lounge bar, or working men's clubs.' However, it was not until I was posted to my first warship and entitled to draw my daily issue of rum my alcohol use began to increase. Each day (whether at sea or in harbour) we were issued (free of charge) with one-eighth of a pint of rum at 95.5% proof alcohol. Senior Ratings (Petty Officers and above) received their rum neat, whilst the Junior Ratings (us) it was diluted with two parts of water to make three-eighths of a pint of grog. Whilst it was possible to elect not to draw the rum and receive a very small monetary payment, very few did. For us young people it was part of what the American Psychological Association (2002) explains, 'The process by which an adolescent begins to achieve a realistic sense of identity also involves experimenting with different ways of appearing, sounding and behaving.' Additionally, there were occasions where a double issue of rum was issued on the orders of the Queen or Governor General. In addition to the rum issue, when at sea each evening we were individually issued a can of beer each. These were pierced and required to be drunk on the day. At no time did we pay for this alcohol issue. It was not unusual for immature sailors to feel the need to imitate their messmates drinking habits. A sentiment echoed by a World War 2 soldier Ken Hardy who said, 'I was so ignorant of the right things to do. I had no experience of booze really, none at all, and I didn't really know how to behave towards it.' (Longden 2007) This is supported by Vanyukov and Ridenour (2012), who state, 'Adjustments to social norms is very important in humans, more than in other species because of advanced communication and procurement and defense of resources, which is strongly related to creating and maintaining social structures. Shunning, marginalisation, ostracism and exile are commonly perceived as extremely stressful in all social species.' This was true in my situation and progressively (along with my colleagues) became to see the lifestyle as normal. Each port visited offered abundant opportunities to indulge in alcohol. Increasingly my tolerance for alcohol grew, but I was unaware of the looming dangers..."

6. The RO further noted that the Appellant had *"referred to the culture and acceptance of alcohol within the Royal Navy and Royal New Zealand Navy",* observing that he had stated: *"...As I steadily rose through the ranks to both Senior NCO level and eventually Commissioned Officer, the privileges of rank increased my access to alcohol. So much so I reached a level where I was experiencing increasing Anterograde amnesia (blackouts). I thought I was coping well, but the culture of the NCO messes and officers Wardroom had seduced me and I found myself drinking more and more. Alcohol had by now taken over much of my life and my blackouts increased. Despite the best efforts of a Naval Chaplain and Doctor to help me, there was no effective official treatment programme they could prescribe. In a recent study Jones et al (2011) mention, 'Although alcoholism has always been*

identified as incompatible with military service, the effects of habitual heavy drinking among military personnel are less well understood.' With regard to my changing alcohol-induced mental condition Fergusson and Boden (2011) found 'There is increasing evidence to implicate the misuse of alcohol in the development of mental disorders such as depression and the development of suicidal behaviours in young people.' I experienced these in full measure. Following my discharge from the RNZN alcohol continued to play a major part in my lifestyle. I had little understanding what was happening to me and I continued on a self destructive path. This continued until I was fortunate to be admitted to Hamner Springs Hospital, managed by Dr Robert Crawford. Here I began to understand my alcohol use and more importantly receive coping mechanisms to use for the rest of my life. I submit alcohol damaged my health, resulting in Ischaemic Heart Disease..."

7. The RO also noted that the Appellant had *"written in summary of why he attributes his ischaemic heart disease to his Service"*: *"Smoking As outlined in my 'Smoking' submission, senior officers not only viewed smoking as a welfare issue, but traditionally worked to protect duty free privileges. Wynd (2012) persuasively explains this when discussing a 1951 proposal to increase the naval tobacco allowance. To me this implies the RNZN chose to ignore research into the dangers of smoking at the expense of servicemen's health. After 41 years I ceased smoking only months before being admitted to hospital to undergo a triple cardiopulmonary bypass operation in 2008. Alcohol Alcohol was also viewed as a cultural rather than a health issue. Right through my service no sailor below the rank of Commissioner Officer bought a rum or beer issue. I suggest supplying young men with a daily dose of 95.5% proof alcohol inevitably impaired...both the physical and mental health of some (me among them). For 10 years of my career I was supplied with over proof alcohol. That this has had a detrimental effect on my health is supported by the research done by McCormick (2005). In my case I found myself increasingly unable to resist the power of alcohol, creating an increasing dependence, which unfortunately began to manifest itself when I reached the pinnacle of my career and was commissioned as an officer. Upon reaching officer rank I found little sympathy or understanding of my emerging alcoholic condition. Rather I was judged on whether I was 'socially suitable' for the company of other officers. This eventually led to ostracism, blaming, shaming and condemnation, with the inevitable adverse effect on me mentally. Consequently my career was cut short; with my final service medical examination tellingly noted 'Medically fit in all respects.' I entered the civilian world, virtually unable to cope, until undergoing treatment at Hamner Springs Hospital. Conclusion It is submitted that during my service the RNZN knew about the dangers of smoking and alcohol, but continued to supply free alcohol and duty free tobacco, without alerting its staff to the inherent dangers of both; or providing effective treatment programmes for those who developed adverse reactions. It is further submitted during my service I developed two serious addictions, which resulted in Ischaemic heart disease in later life."* The RO further noted that the Appellant had advised that doctors were not routinely carried on the ships he served on, nor was there health education available regarding smoking and drinking; had documented various stressors he experienced during his service and had commented on Statements of Principles; had referenced the various publications he referred to, and that he had "*provided a copy of the late Mr George Naera's Submission in Support of Petition to Parliament in which Mr Naera referred to his own Navy Service and use of alcohol and tobacco."*

8. The RO observed that the Appellant had written the following on his Disablement Pension application of how he believed his service caused, contributed to or aggravated his Ischaemic Heart Disease: *'Heavy smoking by self and others. Living and working in confined conditions where almost everyone smoked. Ready access to cheap alcohol. Over indulgence in alcohol resulting in adverse service health assessments.'* She also observed that GP, Dr Sarah West, had confirmed the medical diagnosis of Ischaemic Heart Disease based on the Appellant's personal and medical history, and had advised "*how the disability affects [the Appellant].*" The RO also considered the hospital discharge summaries that the Appellant had submitted with his claim: *"[The Appellant] presented on 31 August 2008 with chest pain and associated symptoms whilst doing minimal activities. [The Appellant] had no knowledge of history of hypertension, dyslipidaemia and diabetes. [The Appellant's] mother had coronary by-pass graft surgery at age 51. Medical investigation revealed severe three vessel coronary artery disease. [The Appellant] underwent coronary by-pass surgery on 15 September 2008. There were no complications and [the Appellant] was discharged from hospital on 20 September 2008",* and observed that the hospital discharge summaries noted that *"[the Appellant] was an ex-smoker; smoked for 43 years and had stopped smoking six months previously; background history of dyslipidaemia and family history of coronary artery disease noted on the final discharge summary…"*

9. Having noted that the Appellant *"has coverage under the Veterans' Support Act 2014 in respect of qualifying routine service only. Qualifying routine service means service in the armed forces before 1 April 1974 that is not qualifying operational service (i.e. non war or emergency)",* the RO identified that Statement of Principles (SoP) for Ischaemic Heart Disease No 90 of 2007 (as amended by Nos 44 of 2009; 97 of 2010; 126 of 2011 and 34 of 2014 Balance of Probabilities) *"applies in respect of qualifying routine service under section 14 of the Veterans' Support Act 2014."* The RO also concluded that *"Reference to the relevant SoP shows factor 6(p) does not connect the ischaemic heart disease with circumstances of [the Appellant's] qualifying service in respect of the stressors [the Appellant] has described during service (the information / evidence available does not meet the criteria specified in the factor."* The RO went on to observe, however, that *"a factor in respect of smoking does however show identify [sic] [the Appellant's] habit as a contributing factor of the ischaemic heart disease: 6(g)(ii) 'smoking at least five pack years of cigarettes or the equivalent thereof in tobacco products, and the clinical onset of ischaemic heart disease has occurred within five years of smoking cessation."* The RO further observed that *"Dyslipidaemia is also indicated as a factor in the hospital discharge summary of 20 September 2008",* but concluded that *"the information available is not sufficient to confirm dyslipidaemia for the purpose of SoP – factor 6(f) 'having dyslipidaemia before the clinical onset of ischaemic heart disease with the circumstances of [the Appellant's] qualifying service.'"* The RO went on to state: "*Careful consideration has been given to the information provided by [the Appellant] and to information in [the Appellant's] Service personnel and medical files."* Having noted that *"[The Appellant] commenced his smoking habit during service as a result of the smoking culture at that time. Duty free cigarettes were available to [the Appellant] as a function of the tax and excise laws. [The Appellant] has advised of stressors he experienced during service;"* the RO concluded: *"I am however unable to reasonably connect [the*

Appellant's] smoking habit to those stressors, from the information provided. The material available does not show a smoking habit that resulted from or was materially contributed to by the performance of military duty, and is therefore determined as not having resulted from [the Appellant's] qualifying service." She further noted: *"Factor 6(i) – being in an atmosphere with a visible smoke haze – has also been applied"* and concluded: *"The information available is not sufficient to meet the criteria specified for this factor 'being in an atmosphere with a visible smoke haze in an enclosed space for at least 10,000 hours before the clinical onset of ischaemic heart disease, where the last exposure to that atmosphere did not occur more than five years before the clinical onset of ischaemic heart disease.'"* Having observed that *"the factors in the relevant Statement of Principles for Ischaemic Heart Disease do not include alcohol use",* the RO determined that "*the material available does not, on the balance of probabilities, relate the disability of Ischaemic Heart Disease to the circumstances of [the Appellant's] qualifying service".* She accordingly upheld the decision of 4 March 2015 and *"[declined] to accept Ischaemic Heart Disease as service-related under the Veterans' Support Act 2014."*

Written submissions

10. By way of notice of appeal dated 16 March 2016, the Appellant contended that both the Decision Officer and the RO had viewed his application *"… through a 2015 lens, rather than full appreciation or understanding of the societal norms of 1960' & 1970's",* in the case of the RO, "*despite my submitting the findings of many recognised researchers."* The Appellant submitted that the RO *"has virtually ignored my conclusions, which again were supported by much credible research"*, noting that although the RO *"agrees smoking is a contributing factor for ischaemic heart disease"* she *"has ignored the evidence of my boyhood friend, Mr Barry Richmond who categorically states I did not smoke or drink alcohol prior to joining the RNZN. The reasons I did so are contained in my original application."* The Appellant went on to observe that the RO *"agrees with <u>one</u> factor contributing to Ischaemic Heart Disease ([P6]) – SOP only requires <u>one</u> factor!! – Viz – Statement of Principles concerning Ischaemic Heart Disease, Instrument No.90 of 2007 (P2. Clause 5) outlines the factors that must be related to service and (subject to clause 7) states 'at least **<u>one</u>** of the factors set out in clause 6 must be related to relevant service rendered by the person'. The same page contains clause 6, which the Reviewing Officer agrees Clause 6(g)(ii)* ***was a contributing factor.***" With regard to the condition of Dyslipidaemia, the Appellant submitted that *"much research has shown that a major contributing factor to Ischaemic Heart Disease",* and, in response to the RO's statement that *"there is no information to connect the dyslipidaemia with the circumstances of [the Appellant's] qualifying service",* he argued that *"the fact that I neither smoked nor drank alcohol until I commenced my 'qualifying service' should be a sufficient causal link. Because unbeknown to me my nicotine and alcohol use caused a gradual build-up of LDL (low density lipoprotein) and triglycerides was occurring; both a major factor in contributing to the formation of blockages in coronary arteries, increasing risk of heart disease."* With regard to the RO's comments in relation to alcohol, the Appellant noted that he had included research into the effect of alcohol on heart *"because the original Decision Officer mentioned [it] in their letter to me dated 21 April 2015",* and *"because alcohol overuse has been found medically to materially contribute to heart disease."* The Appellant further expressed his belief that he had "*submitted sufficient information to outline the various stressors which I was subject to during my military career",* commenting, in response to the RO's

statement *"I am unable to reasonably connect [the Appellant's] smoking habit to those stressors, from information supplied",* that *"it appears that the [RO] has little or no understanding/experience of naval service, as outlined in my original application."* The Appellant also submitted that *"despite my inability to obtain the various ships' Reports of Proceedings….there is sufficient evidence produced to make a causal link between my military career and smoking habit."*

11. The Appellant went on to comment: *"I am led to believe Veterans' Affairs has acted contrary to the intent of the Veterans' Support Act 2014, which during its formulation was explained by the Honourable Mark Burton – then Minister of Defence to the 2002 Royal New Zealand Returned Services Association Conference – 'As a point of clarification, full pension coverage means that veterans do not have to prove that a disability is the result of their service – only that it may have been."* The Appellant further stated: *"At a seminar on 11 September 2015 at the Taradale RSA (Napier) the VANZ representative Jackie Couchman assured all present the Veterans' Support Act 2014 'Maintained a benevolent approach in recognition of service'. The manner my applications have been handled does not appear to reflect this."* The Appellant submitted: *"The intent of both the War Pensions Act 1954 and The Honourable Mark Burton are supported by serving members of the Armed Forces…"* After citing a reply to a New Zealand Defence Force Review of the War Pensions Act 1954 online survey questionnaire in March 2009, the Appellant concluded his submission, as follows: *"Both the Decision Officer and the Reviewing Officer have assessed my claim under the Veterans' Support Act 2014, whereas my service was prior to 1 April 1974. Thus the War Pensions Act 1954 applies, especially the intent of Section 17, which allows for presumptions to operate in favour of claimants for pensions. That one has to go to extensive lengths to prove eligibility against every facet of the Statements of Principles indicates a disturbingly litigious rather than a benevolent /balance of probabilities approach by Veterans' Affairs when assessing claims. To me this is in direct contradiction of the statements by the Honourable Mark Burton and VANZ representative Jackie Couchman."* The Appellant also provided a character reference from Mr Rupert Webb, dated 23 May 2016, in which he stated: *"This letter is to state that I have known [the Appellant] since 1964 where we attended Otago Boys High School together. I would like to confirm during this time period he neither smoked tobacco or drank alcohol and was very committed to the sports of both cross country running and soccer. I have always know [the Appellant] to be of the highest integrity and character. I value his lifelong friendship greatly."*

12. In its response to the Appellant's submissions, the Respondent, in its written submission dated 12 July 2016, acknowledged the further evidence filed by the Appellant on 10 June 2016, advised its acceptance of the information provided by Mr Rupert Webb, and highlighted a number of points. Having noted the Appellant's service and his coverage under the Veterans' Support Act, aspects of both his and his mother's medical history and that the Appellant had "*smoked for 43 years before stopping 6 months prior to his operation",* Mr Astle observed that: *"the Review Officer drew reference to the relevant SoP, noting that factor 6(p) did not connect the Ischaemic Heart Disease with circumstances on [the Appellant's] qualifying service in respect of the stressors [the Appellant] had described during his service and concluded that the information / evidence available did not meet the criteria specified in factor 6(p)";* that *"factor 6(g)(ii) was noted in respect of [the Appellant's]*

smoking habit as a contributing factor of Ischaemic Heart Disease"; that *"although dyslipidaemia was indicated in the hospital discharge form, the Review Officer noted that the information available was not sufficient to confirm dyslipidaemia for the purpose of the SoP – factor 6(f)"* and that *"in addition, it was noted that there was no information to connect dyslipidaemia with the circumstances of [the Appellant's] qualifying service."* Mr Astle further noted that the RO *"gave careful consideration to [the Appellant's] previous smoking habit and the information he provided, along with information from his Service Personnel and Medical files"* and that she had *"found the following:*

- *Although [the Appellant's] previous smoking habit was a contributing factor to Ischaemic Heart Disease there was insufficient information to determine the smoking habit resulted from the circumstances of his qualifying service in order to connect it to Ischaemic Heart Disease.*
- *The material provided by [the Appellant] did not show a smoking habit that resulted from or was materially contributed to by the performance of military duty, and determined it did not result from qualifying service.*
- *Available information relating to SoP factor 6(i) – smoke haze, was considered insufficient to meet the criteria specified in the factor.*
- *Alcohol use was discounted, as it was not included in factors in the relevant SoP for Ischaemic Heart Disease."*

Having observed that the RO *"in upholding the decision to decline the claim for Ischaemic Heart Disease … found that the material available did not, on the balance of probabilities, relate to the disability of Ischaemic Heart Disease to the circumstances of [the Appellant's] qualifying service",* Mr Astle submitted that the RO *"in reaching the determination to uphold the [Decision] Officer's decision to decline the claim has correctly interpreted the requirements of the SoPs covering Ischaemic Heart Disease."*

13. Further evidence was received from the Appellant on 25 November 2016, in the form of an affidavit sworn by Mr Osborne who deposed to a number of matters, including his views on service conditions at the time that he served in the Royal New Zealand Navy with the Appellant. The Appellant made a further extensive written submission (received by VANZ on 29 November 2016) in which he again challenged the Decision Officer's decision dated 21 April 2015 and the RO's decision dated 15 October 2015 on the ground that these decisions were conducted *"through a 2015 lens, rather than full appreciation/understanding of the societal norms of 1960's & 70's".* He reiterated his earlier observation that the RO had agreed *"smoking is a contributing factor for ischaemic heart disease..."* and again pointed out that the *"SoP only requires <u>one</u> factor!!..."* The Appellant also submitted that much research had shown that Dyslypidaemia *"is a major contributing factor to Ischaemic Heart Disease..."* and that the fact that he *"neither smoked nor drank alcohol until I commenced my 'qualifying service' should be sufficient causal link...",* and in response to the RO's finding that *"The factors in the relevant Statement of Principles for Ischaemic Heart Disease do not include alcohol use",* he submitted that, among other things, he had included reference to the effect of alcohol *"because alcohol overuse has been found medically to materially contribute to heart disease."* The Appellant also identified in some detail what he believed were the *"various stressors which [he] was subject to during [his] military career."* Having expressed his belief that *"Veterans'*

Affairs has acted contrary to the intent of the Veterans' Support Act 2014.." and having made extensive reference to aspects of the judgement of McGechan J in Nixon v War Pension Appeal Board and Auld HC Wellington CP No. 360/91, the Appellant submitted, among other things, that he had *"provided sufficient evidence to make a causal link between [his] military career and smoking and drinking habits."*

The appeal hearing

14. At the hearing of the appeal on 1 December 2016, the Appellant reiterated many of the points that he had made in his extensive submissions to the Board prior to the hearing, including: that the Navy had issued alcohol (those *"over 20 drew a tot of rum which was issued each day - there was no incentive not to take it")* and had provided unlimited access to cigarettes with no age limit imposed; that *"smoking was permitted right throughout the ship"* and that living in crammed conditions meant that *"passive smoking will get you anyway",* and that service at sea *"with 230 people on board a 300 foot ship was inherently dangerous",* with this being recognised in the 'hard line allowance' paid initially at 5c a day, but later increased to a $1 a day. The Appellant expressed again his concern that *"VANZ appeared to be ignoring case law, such as the Nixon case"* and stated his view that *"Veterans should not have to go through this",* especially given the assurances of benevolence given by the Head of Veteran's Affairs and the Minister. He further commented that *"routine service was relegated as if 'home servicemen'"* which ignored the "*very real stress"* associated with service on deployment during the Cold War when *"spies were everywhere",* with a ship *"pitching 36 degrees in a major storm"* and with claustrophobic living conditions on a ship which existed "*no matter the type of service"*, the sea being *"neutral - it doesn't know if a war is on."* The Appellant also expressed his shock at needing triple by-pass surgery, noting that he was *"the only one in his family with Ischaemic Heart Disease other than his mother...",* and observed that *"ships carried 'combat medics', but no doctors (except when royalty were on board)"* and that the Navy provided "*no remedial programmes".*

15. In response Mr Astle, while noting that Veterans' Affairs was required to work within the confines of the legislation which he observed was "*new to everyone"*, acknowledged that the information provided by the Appellant had been very helpful in amplifying and explaining the circumstances of his service. Mr Astle further acknowledged that the evidence clearly showed that the Appellant was a heavy smoker (smoking a packet a day); that cigarettes were readily available and that they could be smoked almost anywhere on the ship, including in the Appellant's 5 foot by 6 foot office in which all occupants were regularly smoking, and that the stressors identified by the Appellant (including fears that the ship might be sunk by big waves and the possibility of being an IRA target when ashore in the UK) had had an influence on his smoking habit. Mr Astle advised the Veterans' Entitlement Appeal Board (**the Board**) that, having regard to the Board's decision in the Sturrock appeal and the evidence presented by the Appellant at the appeal, he accepted on behalf of the Respondent that the Appellant's smoking habit was service-related, and that the requirements of factor 6(h)(ii) of SoP No. 90 0f 2007 had been met.

16. At the invitation of the Board, the Appellant described in some detail his service and personal history from the date of his enlistment. The Appellant advised that he had spent three months at HMNZS

Tamaki, before commencing his trade training as a writer/clerk at HMNZS Philomel, thereafter getting some practical experience in the Commodore's Office, before being posted to HMNZS Blackpool and then to the survey ship, HMNZS Lachlan, as a qualified Leading Writer. The Appellant advised that at the time he was married with one child, and that he had been back just one week before he was deployed to the UK to bring HMNZS Canterbury (which was being built in Glasgow) back to New Zealand. The Appellant further advised that when in the UK they *"worked the ship up"*, and then he sailed the ship back to New Zealand, during which time several *"Force 10 gales worked up monstrous seas".* The Appellant advised that on his return to New Zealand he was posted to Wellington, then to HMNZS Taranaki; that he was promoted to Chief Petty Officer and then commissioned prior to being posted to HMNZS Tasman, and that he was then posted to HMNZS Otago to qualify as an assistant supply officer, during which period his *"addictions got out of control",* and which, *"with no programmes to help",* led him to resign from the Navy – a decision he said he regretted *"to this very day".*

17. When asked about his experiences when he first arrived at HMNZS Tamaki for his initial training, the Appellant stated that after he had been sent up from Dunedin, he did the *"normal group thing"* – that he was placed in a class of thirty, made class leader and slept on two tier bunks. He advised that they all had to start to work as a team – *"if one messed up the whole team was punished"* and that they *"couldn't go out"* for three months. The Appellant averred that he was *"very fit – a cross country runner"* running five to ten kilometres each morning, and that he was a *"strict Presbyterian".* The Appellant advised that *"Blackpool was very different and thrilling":* that everyone was assigned a mess deck, with thirty to forty on each; that they slept in hammocks; that life generally was *"pretty rough"* in the event of "*infractions against mess rules and the articles of war";* that the mess was *"ruled"* by the leading hand, who was *"like God",* and that everyone ate at the mess before going to their normal station, his being a *"tiny office"*. At around noon, it was *"up spirits"* whereupon those over 20 would *"get their tot"* prior to lunch, with the effect of the rum making people *"very happy"*, before heading back to their workstation for the afternoon, during which time exercises were often conducted. The Appellant informed the Board that life on board was *"fun"* – that they all had *"the same sort of outlook"*, and that *"basically they were a bunch of young boys, boisterous, some you liked, some you didn't, but stupidity and theft were not tolerated."* He further stated that *"interactions were really good, life-long friendships were developed, everyone looked after each other, like a close family, with everyone knowing each other better than their wives did."* The Appellant advised that there was definitely peer pressure – *"a teenage thing where people didn't want to be different"* – but that there was also "*tolerance of the two or three people who were Pentecostal, who didn't smoke or drink – they weren't hassled or ridiculed."* When asked to explain whether there was a precipitating event that drove him, a fit cross country runner, to make the decision to start smoking, the Appellant replied: *"there was a storm, and I was fearful. Someone said to me 'have a cigarette – it will make you feel better', and it did – it made me feel good, a calming feeling. That night I went and bought a packet of cigarettes".*

Appeals under the Veterans' Support Act (VSA)

18. 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

19. The Board noted that the RO (correctly in its view) had identified that the Appellant had qualifying service for the purposes of the VSA i.e. qualifying routine service with regard to his service in the Royal New Zealand Navy from 17 May 1967 until 1 April 1974. The Board also noted that the RO (again, correctly in its view) had decided that the Statement of Principles (SoP) No 90 of 2007 (amended by Nos. 44 of 2009; 97 of 2010; 126 of 2011 and 34 of 2014) for Ischaemic Heart Disease (Balance of Probabilities) (**the SoP**) was the appropriate SoP to apply given the Appellant's qualifying service. Further, the Board accepted the RO's finding that in the Appellant's case his smoking habit was a contributing factor of ischaemic heart disease, and that on the evidence presented, factor 6(g)(ii) *"smoking at least five pack years of cigarettes or the equivalent thereof in tobacco products, and the clinical onset of ischaemic heart disease has occurred within five years of smoking cessation",* rather than factor 6(h), as suggested by Mr Astle, was relevant to the Appellant's situation as the Appellant, *"after 41 years"* had "*ceased smoking only months before being admitted to hospital to undergo a triple cardiopulmonary bypass operation in [31 August] 2008."* In this regard the Board also noted that the Appellant's GP had written on his Disablement Pension application form dated 23 January 2015, that 'the date first consulted for this condition' was 1 September 2008.

20. The Board observed that the RO had found that *"Dyslipidaemia is also indicated as a factor in the hospital discharge summary of 20 September 2008 however the information available is not sufficient to confirm dyslipidaemia for the purpose of SoP – factor 6(f)* '*having dyslipidaemia before the clinical onset of ischaemic heart disease;' and there is no information to connect the dyslipidaemia with the circumstances of [the Appellant's] qualifying service."* While the Board agreed that the RO's decision was correct, the Board concluded this for a different reason, namely, that the reference to Dyslipidaemia in the background section of the hospital discharge summary dated 20 September 2008 was, in its view, not sufficient to constitute a diagnosis that the Appellant in fact

suffered from this condition. The Board further considered that there was insufficient evidence before it to conclude that he in fact he suffered from this condition.

21. The Board noted that the RO had considered whether factor 6(i) of the SoP - being in an atmosphere with a visible smoke haze – applied to the Appellant's situation, and concurred with her finding that *"the information available is not sufficient to meet the criteria specified for this factor 'being in an atmosphere with a visible smoke haze in an enclosed space for at least 10,000 hours before the clinical onset of ischaemic heart disease, where the last exposure to that atmosphere did not occur more than five years before the clinical onset of ischaemic heart disease.'"* The Board also agreed with the RO's finding that *"the factors in the relevant statement of Principles for Ischaemic Heart Disease do not include alcohol use".*

22. The Board disagreed however, with other aspects of the RO's application of the SoP.

23. The Board noted that the SoP is listed in Schedule 1 of the Veterans' Support Regulations 2014. As such it is an Australian Statement of Principles that applies for the purposes of the VSA. In clause 4 of the SoP, the Repatriation Medical Authority (**RMA**) states that it has formed the view that it is more probable than not that ischaemic heart disease can be related to service. 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. The SoP contains factors relating to both the 'clinical onset' and 'clinical worsening' of Ischaemic Heart Disease. If a factor concerns the 'clinical onset' of ischaemic heart disease it relates to cause. If a factor relates to 'clinical worsening' of ischaemic heart disease it relates to material contribution or aggravation of a pre-existing injury/disease/condition. It is usual for clause 7 of an SoP to prescribe that that those factors that concern clinical worsening apply only to material contribution to, or aggravation of, the injury/disease/condition if the injury/disease/condition pre-existed the relevant service. Clause 7 of the SoP relating to Ischaemic Heart Disease states: *"Paragraphs 6(q) to 6 (gg) apply only to material contribution to, or aggravation of, ischaemic heart disease where the person's ischaemic heart disease was suffered or contracted before or during (but not arising out of) the person's relevant service."*

24. On the material before it, the Board determined that the requirements of factor 6(g)(ii) of the SoP were amply satisfied in the Appellant's case. The Appellant had clearly ceased smoking prior to the clinical onset of ischaemic heart disease and had smoked at least five pack-years of cigarettes. Further, it was clear on the evidence that the clinical onset of the Appellant's ischaemic heart disease had occurred within five years of smoking cessation. A key issue was whether the Appellant's smoking, which had caused his condition of Ischaemic Heart Disease, was related to his service. The RO determined that it was not, stating:

> *"While [the Appellant's] previous smoking habit is a contributing factor for the ischaemic heart disease, the information sufficient to determine the smoking habit resulted from [the Appellant's] qualifying service is required in order to connect the ischaemic heart disease with the circumstances of [the Appellant's] qualifying service.*

Careful consideration has been given to the information provided by [the Appellant] and to information in [the Appellant's] Service personnel and medical files. [The Appellant] commenced his smoking habit during service as a result of the smoking culture at the time. Duty free cigarettes were available to [the Appellant] as a function of the tax and excise laws. [The Appellant] has advised of stressors he experienced during service; I am however, unable to reasonably connect [the Appellant's] smoking habit to those stressors, from the information provided.

The material available does not show a smoking habit that resulted from or was materially contributed to by the performance of military duty, and is therefore determined as not having resulted from [the Appellant's] qualifying service."

Appeal Board Decision

25. Section 7 of the VSA provides: *"**service-related**, in relation to an injury, an illness, a condition, or a whole-person impairment, means an injury, an illness, or a whole-person impairment caused by, contributed to by, or aggravated by qualifying service."* The Board observed that the words *"caused by", "contributed to by", "aggravated by"* were disjunctive, and that as a matter of statutory interpretation they should be considered separately, and only as appropriate, in any given case. Noting that the words were not defined in the VSA, the Board determined that the words should be given their ordinary, every-day meaning.

26. According to the Oxford English Dictionary, to *"contribute to"* is to *"do a part in bringing (it) about; to have a part or share in producing".* The question for the Board to determine therefore, was whether the Appellant's qualifying service had a part in his starting to smoke and developing his smoking habit, which caused his condition of Ischaemic Heart Disease.

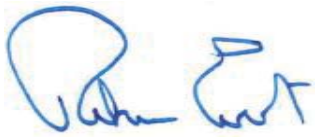
27. The Board disagreed with the view expressed by the RO in her decision, that in order for the smoking related condition of Ischaemic Heart Disease to be regarded as being service-related for the purposes of the VSA, it needed to be shown that the Appellant's smoking habit *"resulted from or was materially contributed to by the performance of military duty…"* It appeared to the Board that, in so deciding, the RO had applied, incorrectly in its view, a definition that was substantively different from that provided in section 7 of the VSA.

28. The Board had specific regard to all the principles specified in s10(b), and the overarching benevolent intent of the VSA. On the evidence before it, and in particular having regard to the evidence given at the appeal hearing by the Appellant regarding the circumstances giving rise to his starting to smoke, the Board was satisfied that the Appellant's smoking habit was contributed to by his qualifying routine service i.e. his service prior to 1 April 1974. The Board accordingly found that factor 6(g)(ii) of the SoP was met.

29. The Board therefore determined that the hypothesis that the Appellant's condition of Ischaemic Heart Disease was service-related was consistent with the SoP. In the absence of reasonable grounds for believing that the Appellant's Ischaemic Heart Disease was not service-related, the Board determined that the Appellant's claim for the condition of Ischaemic Heart Disease should be accepted.

30. Pursuant to the powers vested in it by section 238 of the VSA, the Board, on its own initiative and after consultation with the Appellant makes an order prohibiting the publication of the name, the service number and rank, and the address of the Appellant. The decision may be published and referred to as the case of "W".

The appeal is allowed.



Ms Rebecca Ewert, Chairperson

Dr Chris Holdaway, Member

Ms Raewyn Anderson, Member

Dr Hillary Gray, Member

28 January 2017