[redacted]
War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: [redacted]

Service Number and Rank: [redacted]

Address: [redacted]

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

Held: at Wellington on 24 May 2018

DECISION

1. This is an appeal by [redacted] (the **Appellant**) against the decision of the Review Officer (**RO**) dated 15 March 2017 to uphold the Decision Officer's decision of 27 April 2016 and decline to accept his conditions of **Cervical Spondylosis** and **Lumbar Spondylosis (redefined from Lumbar Spondylopathy)** as being service-related, and to uphold the Decision Officer's decision of 25 May 2016 and decline to accept his conditions of **Osteoarthritis Right Knee (redefined from Right Knee Pain)** and **Osteoarthritis Right Ankle (redefined from Right Ankle Pain)** as being service-related.

2. The Appellant appeared in person at the appeal hearing, accompanied by his representative Mr Gavin Nicol. The Respondent, Veterans' Affairs New Zealand (**VANZ**), was represented by Mr Graeme Astle, with Ms Anne-Marie Tribe in attendance.

Background to the appeal

3. On 27 April 2016, the Decision Officer (**DO**) declined to accept the Appellant's conditions of Cervical Spondylosis and Lumbar Spondylopathy in each case on the ground that *"…I have considered all the available evidence and I am satisfied that [each condition] is not related to your service because the link to service has not been established."* Similarly, on 25 May 2016, the DO also declined to accept the Appellant's claimed condition of Right Knee Pain and Right Ankle Pain, in each case on the ground that *"…I have considered all the available evidence and I am satisfied that [each condition] is not related to your service because the link to service has not been established."* The DO determined that with regard to the Appellant's condition of Right Knee Pain *"your injury occurred during a rugby game which was not part of your qualifying operational service in East Timor."* The DO also determined that with regard to the Appellant's condition of Right Ankle Pain *"your injury cannot be related to your service in East Timor."*

4. On 15 March 2017 the RO reviewed the DO's decision. Having noted the letter from Mr Nicol accompanying the Appellant's application for review of the DO's decision (received on 22 November 2016) with regard to his claims relating to his Neck, Back, Right Knee and Right Ankle, in which he explained why the Appellant was seeking a review of the decisions, and noting that *"[the Appellant] has qualifying service under the Veterans' Support Act 2014 in respect of qualifying operational service in East Timor (1 May 2001 – 11 November 2001). All other service came under the coverage of ACC and is not covered by the Veterans' Support Act 2014",* the RO had regard to the information provided in the Appellant's Disablement Pension application. In regard to the Appellant's condition relating to his Neck, the RO observed that the Appellant had noted symptoms of *"pain when moving head around, Disc bulge";* that he *"did not know the period of service where the injury/illness occurred and noted in respect of how he believes his service caused, contributed to or aggravated his back condition '-wear and tear by carry(ing) heavy packs – battle drills with equipment on – Running with boots, webbing and packs'"* and that *"Dr McDougall noted a diagnosis of probable spondylopathy based on reduced lumbar flexion and tilt…".* With regard to the Appellant's condition relating to his knee, the RO observed that the Appellant had *"noted symptoms of 'Arthritis in right knee very painful at certain ranges'";* that he *"did not know the period of service where the injury/illness occurred and noted in respect of how he believes his service caused, contributed to or aggravated his knee condition: 'injured knee whilst in the Services which required surgery'",* and that "*Dr McDougall noted bilateral patellofemoral crepitus with some patellofemoral compression; pain; good range of motion."* With regard to the Appellant's condition relating to his right ankle, the RO observed that the Appellant had *"noted symptoms of 'Arthritis in right ankle'";* that he *"did not know the period of service where the injury/illness occurred and noted in respect of how he believes his service caused, contributed to or aggravated his ankle condition: 'had an accident that required surgery whilst in the Services'",* and that "*Dr McDougall noted there was no definite diagnosis – arthralgia (pain in joint) only…fairly lax lateral ligament + clunk on left, but not right. No signs arthritis. No details of operation ? was drainage of haemarthrosis."*

5. The RO also had regard to the information provided in the report dated 14 March 2016 from Mr James Fenton in which he had commented on the Appellant's Cervical Spine, Lumbar Spine, Right Knee and Right Ankle. With regard to the Appellant's cervical spine, the RO noted that Mr Fenton had commented: *"[The Appellant] says he has had some issues with his neck for a long time and probably about age mid-30s. He wonders if it may have been aggravated by rugby. He has noticed stiffness. He has attended a chiropractor every second week for the last two years but prior to that he really had no particular intervention. He used to get some numbness along the ulnar border of the right upper limb but this has settled since he has been undertaking chiropractic treatment. He is not requiring analgesia. He says it was probably aggravated and made more uncomfortable by the metal helmet he used to wear during service. It is uncomfortable but does not significantly impact on activities of daily living. Examination showed reasonable cervical movements but slight restriction of extension. There was no neurological deficit. An x-ray of the cervical spine on 14/03/2016 showed some degenerate changes from C2-3 to C6-7 but reasonable maintenance of disc spaces. There is also a degree of foraminal encroachment bilaterally from C3-4 to C6-7. There is no history of a single specific injury and the causation is likely to be idiopathic* (of unknown cause)…" With regard

to the Appellant's lumbar spine, the RO noted that Mr Fenton had commented: *"[The Appellant] said he initially developed this also during service and noticed on parade and carrying a rifle he would get lower back pain. At times it interferes with his sleep and it has been a little worse over the last six months. He has had some help with chiropractic treatment. No neurological symptoms. It causes general discomfort but does not affect his ability to carry out activities of daily living. On examination he could not touch hands to his knees and had some restriction of extension in lateral flexion. No neurological deficit in lower limbs. An x-ray of the lumbar spine on 14/03/2016 showed minor degenerate type changes from L1 to L3-4 with minor disc space narrowing at L1-2. There is also some evidence of right L4-5 facet joint arthritis. In terms of causation, once again there is no specific injury and it is likely to be idiopathic i.e. age-related…"* With regard to this right knee, the RO noted that Mr Fenton had commented: *"[The Appellant] tells me he had two separate arthroscopic examinations during service probably when he was aged in his mid-30s. He can't specifically remember the nature of the accident. It may have been related to rugby. At this point it aches and he gets sudden pain if he puts it in the wrong position. These episodes of sudden pain make some daily activities a bit more difficult. Clinically he has a transverse scar anteriorly from old trauma with a full range of motion of the knee. There is a degree of varus deformity. In terms of causation, this would appear to have been an accident sustained during Military Service requiring arthroscopic examination. I judge the narrowing of the cartilage interval on this latest knee x-ray dated 14/03/2016 at approximately 2mm…"* With regard to the Appellant's right ankle, the RO noted that Mr Fenton had commented: *"[The Appellant] said he had recurrent sprains during service and it started to swell intermittently. He subsequently underwent surgical procedure but he can't remember the exact nature of this. He said it swells at times and he can't walk on it comfortably and it therefore interferes with more daily activities. On examination there was slight diffuse swelling but a normal range of motion of the ankle and an anterolateral scar which is probably most in keeping with either and (sic) arthrotomy for removal of loose bodies or perhaps a stabilisation procedure. An x-ray of the ankle on 14/03/2016 shows normal alignment of the ankle and normal joint space but there is some osteophytic lipping on both sides. Causation would appear to have been recurrent sprains that started during service…"*

6. The RO also had regard to the Appellant's service medical file documentation *"before, during and on return from East Timor"* which noted: "*4 December 2000 Medical Review Pre-Overseas Service East Timor: Recent problems with left knee noted as having settled with treatment; gastric condition noted as causing no further problems following treatment. No orthopaedic problems noted in the physical examination findings; 15 June 2001 pain right elbow for two weeks; 14 July 2001 sore left foot – medial strain left foot; 21 August 2001 NZ Forces Clinical Report – pain over right Achilles tendon for one month; had gradually worsened over the last three to four weeks. Diagnosis of Achilles tendonitis; 7 September 2001 painful elbow ?injured at PT the day before – bruised / tennis elbow; 17 October 2001 Medical Review Post Overseas Service (East Timor): Questionnaire regarding conditions experienced since last examination – 'Yes' boxed ticked for 'Knee, ankle, joint or other bone injury' – the examining Medical Officer noted that this referred to 'Tennis elbow – minor problems. Achilles – still having problems tender while exercising.' The Medical Officer commented/advised (following medical examination): 'For review Achilles tendonitis'."*

7. Having had regard to the Appellant's medical documentation relating to all aspects of his service, the RO noted that *"[the Appellant's] service in East Timor is the only period of service covered by the Veterans' Support Act 2014"* and that *"therefore only conditions that can be connected to [the Appellant's] Service in East Timor can be accepted as service-related."* She observed that the medical evidence *"shows current diagnoses of: Cervical Spondylosis; Lumbar Spondylosis; Osteoarthritis Right Knee and Osteoarthritis Right Ankle"* and further that *"the conditions do not qualify for automatic acceptance under legislative service-related presumptions, and are instead considered in accordance with section 14 of the Veterans' Support Act 2014 which includes the application of the Statements of Principles."* Having also observed that Statements of Principle (**SoPs**) *"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";* that *"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",* and that *"if no factors are met in the SoP, the condition cannot be connected to the person's qualifying service and the case must be declined",* the RO noted that *"…approved SoPs applicable to [the Appellant's] diagnosed conditions and qualifying service in East Timor are: Cervical Spondylosis (Reasonable Hypothesis) No. 66 of 2014; Lumbar Spondylosis (Reasonable Hypothesis) No. 62 of 2014 and Osteoarthritis (Reasonable Hypothesis) No. 13 of 2010 as amended by 35 of 2011."*

8. Having considered *"all the above information and the requirements needed to meet the factors listed in each of the SoPs",* the RO concluded that *"the information is not sufficient to relate the conditions to [the Appellant's] qualifying operational service for East Timor, and that the available information raises a probable relationship to injuries / events during periods of service not covered by the Veterans' Support Act 2014 rather than [the Appellant's] qualifying service."* The RO noted that the Appellant *"presented with Achilles tendonitis during his Service in East Timor",* but observed that condition *"is not however a factor in the SoP for osteoarthritis of the lower limbs; nor does the available information suggest the Achilles tendonitis resulted in damage to the right ankle joint to meet any factors for osteoarthritis of the lower limb."* Having considered *"all the available information",* the RO determined to uphold *"the decisions of 27 April 2016 and 25 May 2016 and decline to accept Cervical Spondylosis, Lumbar Spondylosis (redefined from Lumbar Spondylopathy), Osteoarthritis Right Knee (redefined from Right Knee Pain) and Osteoarthritis Right Ankle (redefined from Right Ankle Pain) as service related."*

Written submissions

9. On 25 July 2016 the Appellant lodged an appeal against the decision of the RO with regard to his conditions of Cervical Spondylosis, Lumbar Spondylosis, Osteoarthritis Right Knee and Osteoarthritis Right Ankle. In explaining why he was appealing the RO's decision, the Appellant wrote, in respect of his condition of Cervical Spondylosis - *"a. Please see attached corresponding letters attached. b. We believe you have not considered applying VSA 14 – S10 (iii). I believe there has been no benevolence applied. c. I believe the reverse onus of proof has not been applied to this returned veteran. d. Packs and webbing is bound to cause injuries when running with and going to ground with, as these are weighted and suspended around the shoulders and neck any long term*

jarring is likely to cause an injury which will lead to Cervical Spondylosis. e. As a good employer NZDF should have checked out that the equipment issued was not causing any long term injuries to their employees' skeletal frame. Spondylosis seems to be very common amongst soldiers who have served overseas". In respect of his condition of Lumbar Spondylosis the Appellant wrote: *"a. Please see attached corresponding letters attached. b. We believe you have not considered applying VSA 14 – S10 (iii). I believe there has been no benevolence applied. c. I believe the reverse onus of proof has not been applied to this returned veteran. d. Packs and webbing is bound to cause injuries when running with and going to ground with, as these are weighted and suspended around the shoulders and neck any long term jarring is likely to cause an injury which will [lead] to Lumbar Spondylosis. e. As a good employer NZDF should have checked out that the equipment issued was not causing any long term injuries to their employees' skeletal frame. Spondylosis seems to be very common amongst soldiers who have served overseas".* In respect of his condition of Osteoarthritis Right Knee the Appellant wrote: *"a. Please see attached corresponding letters attached. b. We believe you have not considered applying VSA 14 – S10 (iii). I believe there has been no benevolence applied. c. I believe the reverse onus of proof has not been applied to this returned veteran. d. Packs and webbing is bound to cause injuries when running with and going to ground with, as these are weighted and suspended around the shoulders and likely to cause skeletal damage to the right knee. e. As a good employer NZDF should have checked out that the equipment issued was not causing any long term injuries to their employees' skeletal frame. Knee and Ankle problems seems to be very common amongst soldiers who have served overseas."*

10. On reading the notice of appeal form, the Board observed that the Appellant had not specifically noted that he wished to appeal the RO's decision regarding his right ankle. Notwithstanding this, in light of comments and submissions in the various documentation relating to the appeal, and having regard to the principle of taking a benevolent approach to claims (s10(b)(iii)) of the Veterans' Support Act 2014 (**the Act**)), and the principle of determining claims in accordance with substantial justice and the merits of the claims (s10(b)(iv)(A) of the Act) and not in accordance with any technicalities, legal forms, or rules of evidence (s10(b)(iv)(B) of the Act), the Board determined to hear the Appellant's appeal in relation to his condition of Osteoarthritis Right Ankle.

11. The Appellant further wrote in his letter accompanying his Notice of Appeal: *"With regards to the above decision I still believe that my injuries were caused through the poor quality of the military equipment issued as follows: 1. Bata Bullets flat soled shoes were issued as running shoes 2. King Leo boots with hard plastic soles also used for battle efficiency tests, field exercises and running (battle PT) 3. Field service marching order (FSMO) issued onwards packs /Alice pack that required own modifications. Without modifications these packs put stress on the spine and were very user unfriendly. In the early part of my career we were expected to train with the above equipment including running with our packs (battle PT) which I believe has been banned in accordance with routine orders because of the injuries that this caused. Medical records/files are not a true or accurate reflection of events. A lot of injuries go either unreported or fabricated, to not affect your chances of you not being selected for a deployment, and to ensure you were not medically downgraded. Soldiers would not report injuries unless it got so bad that they were unable to hide,*

and was easier to say that they hurt themselves playing rugby which has a lot more 'mana' than just saying they injured themselves while walking / running with their pack, or during a field exercise, or PT." The Appellant went on to write that: *"being medically fit to deploy was, and still is an important factor in selection for overseas deployment, if you were medically not fit or medically downgraded, then you were not fit enough to perform your basic duties, which had a serious impact on promotion and employability within the NZDF."* The Appellant further stated: *"I believe the poor quality of the equipment, and the use of this equipment, hand in hand with my other deployments to Sinai and East Timor, where I was subjected to a lot of jarring impact while driving on the rough, undulating roads, caused a lot of strain to my joints, and back which continues to affect me today, I believe these actions have aggravated and compounded my injuries, and is the underlining cause of my current pain."* The Appellant also wrote: *"Regarding the decision letter dated 15 March 2017, if the belief is that my injuries were caused by playing sport, consideration must be given in that sport, as part of Army Physical Training Programme was considered compulsory activity and failure to attend was a chargeable offence (failure to comply with a written order)…Sport is considered part of your army training and is an important part of preparation for the soldiers physical and mental wellbeing prior to deployment overseas, and is an essential tool that a deployed soldier needs as it forms the basis of team work and [esprit de corps], which I believe the most valuable component you can have with a deployed unit."* The Appellant noted *"there is also the belief amongst medical experts that carrying a 40 kg plus pack and jumping off trucks while moving does not damage a soldier's skeletal framework, this is a theory that has not been proven by scientific analysis. Until New Zealand Defence Force and Veterans' Affairs investigate this situation the onus of proof must always under the law be up to specialists and Veterans' Affairs. Even the battle efficiency test is now considered to cause more injuries than acceptable due to the jarring impact during the walk and weight bearing loads, and the poor quality of the army equipment…"* The Appellant concluded his written statement by stating: *"For natural justice, I believe the appeal of my conditions should be reviewed favourably."*

12. Included with the Appellant's Notice of Appeal was a statement from the Appellant's advocate, Mr Gavin Nicol, who wrote: *"Firstly, Veterans' Affairs has not applied VSA 14 S10 (b) (iii) and has not shown any benevolence to this client, thus failing to interpret the Act correctly. Because there is no benevolence shown or reverse onus of proof, I believe [the Appellant] has been severely disadvantaged…"* Having noted that *"it is interesting to note that [the Appellant] received the General Service Medal, and the Multi National Forces and Observers medal for service in the Sinai Peninsula and yet service in this area is not accepted under the Act. Anywhere we send our soldiers, sailors and airmen there is always a risk that they will return to us as a casualty. There is no safe place in the world now",* Mr Nicol further wrote: *"You seem to be tied up with routine service. You cannot go overseas and serve this nation without that routine service. Anybody who deploys as a peace keeper or war service will always remember the injuries caused by training, by sport, and the battle efficiency test. All these points are part of the jigsaw that makes a service person able to serve our nation overseas."* Mr Nicol continued: *"Next and most important is our military and medical files are not up to the professional standard that is required in this modern world. Anyone who has worked in welfare for a period of time will always find medical files that have the wrong arm or leg recorded. The other things that makes these things unprofessional is that our service personnel*

want to deploy overseas and if they get hurt in the bush, in sport, they will keep quiet about that injury so that they will be deployed overseas. This is part of the Warrior Syndrome (to show fear and pain is to show weakness) and it is especially prevalent among Maori and Pacific Island personnel. This affects their Mana and tribal relationship." Having reiterated some aspects of the Appellant's submission (relating to the effects of jumping of trucks with 40 kg packs and the battle efficiency test) Mr Nicol submitted: "*For natural justice, this appeal should go ahead as the reverse onus of proof is up to Veterans Affairs to prove that he has no problems with his neck, back, knee and ankle. Reminding you that we cannot differentiate between what injuries he received and where they were aggravated by service for New Zealand…hoping that you will listen to our considerations so [the Appellant] can have an active rest of his life is these problems are dealt with now."*

13. On 27 March 2018, Mr Nicol submitted a further written submission comprised of previous submissions made by or on behalf of the Appellant i.e. in a letter from Mr Nicol to the RO dated 18 October 2016, in a letter from the Appellant dated 25 July 2017 which he had included with his notice of appeal form, and the grounds for his appeal as stated in his notice of appeal form.

14. The Respondent submitted its written submission in response on 4 May 2018. Having acknowledged the points made on behalf of the Appellant in his submission received by Veterans' Affairs (**VANZ**) on 27 March 2018, Mr Astle submitted that the points raised *"do not add any additional information to what has previously been provided and considered when reaching the determinations to decline the claims that are the subject of this appeal."* Noting however the reference to benevolence and reverse onus of proof in the appeal documentation, Mr Astle sought to clarify each of these points. While noting that section 10 of the Veterans' Support Act (**VSA**) required *"functions to be performed and powers to be exercised in accordance with certain principles…"* Mr Astle submitted that *"these principles, when applied, must also take into account the process of deciding claims which is set out in sections 14 and 15 of the [VSA]."* He further submitted that *"following this process ensures Principle (ii) is adhered to enabling equal treatment of equal claims",* and that *"the benevolent approach would not be applied where a claim is declined when there is an applicable SoP, but the factors are not met."* Mr Astle observed that *"The Australian SoPs that are applicable in New Zealand and [that] apply for the purposes of the [VSA] are listed in Schedule 1 of the Veterans' Support Regulations 2014",* and noted in some detail both the usual structure of SoPs and how they are applied. In this latter regard, Mr Astle noted that *"when deciding claims Veterans' Affairs is bound by section 14 of [the VSA]",* and that *"as part of the decision process a determination is made whether there is a SoP that applies"* – that *"if a SoP does apply a further determination is then made as to whether the hypothesis is consistent with the SoP"* and that *"if it is found that the hypothesis is not consistent with the SoP the claim will not be accepted."* Mr Astle further noted that *"in relation to [the Appellant's] claims the [RO] found that there was a SoP that was applicable to each condition",* but that she concluded *"that the condition did not present during qualifying operational service in East Timor and could not be presumed as having been as a result of, or aggravated by, the performance of qualifying service."* He further observed that *"when applying the SoPs, the [RO] found that the relevant information available did not establish a factor of the SoPs to connect the condition with the circumstances of [the Appellant's]*

qualifying operational service. In these circumstances when applying the SoPs, a reverse onus of proof does not apply."

15. By way of background, after noting that the Appellant's conditions of Osteoarthritis Right Elbow and Social Anxiety Disorder had been accepted as being related to his service, Mr Astle made reference to the DO's first decision made on 27 April 2016 (relating to his conditions of Cervical Spondylosis and Lumbar Spondylopathy) and to the DO's second decision made on 25 May 2016 (relating to his conditions of 'Right Knee Pain' and 'Ankle Pain'.) In relation to the RO's decision of 15 March 2017, which he noted was the subject of the appeal, Mr Astle highlighted a number of points, including: that the Appellant "*has qualifying services under the VSA in respect of his qualifying operational service for East Timor (1 May 2001 – 11 November 2001) as a* [redacted]*"*; that *"all other service comes under the coverage of ACC and is not covered by the [VSA];* that the Appellant's *"service in Sinai (NZCMO 12 May 1996 – 9 November 1996) is not included in the list of qualifying service covered by the [VSA]",* and that the Appellant's *"applications (which are the subject of this review [sic] were received on 9 October 2015 (before the introduction of Scheme Two) and were therefore considered under Scheme One of the [VSA]."* Having observed that the RO had considered the Appellant's extensive service medical documentation, Mr Astle noted that the RO had concluded that *"[the Appellant's] qualifying service in East Timor (for a period of just over 6 months) is the only period of service covered by the [VSA], hence only conditions that can be connected to his service in East Timor can be accepted as service-related."* Mr Astle further noted that the medical evidence *"shows current diagnoses of Cervical Spondylosis; Lumbar Spondylosis; Osteoarthritis Right Knee and Osteoarthritis Right Ankle",* but that these conditions *"do not qualify for automatic acceptance under the legislative service related presumptions and were therefore considered in accordance with section 14 of the [VSA] which includes the [SoPs]."* Mr Astle also noted that, having considered all the information available and the requirements to meet the factors detailed in the SoP applicable to each condition i.e. Cervical Spondylosis No. 66 of 2014 (Reasonable Hypothesis), Lumbar Spondylosis No. 62 of 2014 (Reasonable Hypothesis), and Osteoarthritis No. 13 of 2010 as amended by No. 35 of 2011 (applicable to both his Right Knee and Right Ankle), that the RO had concluded that *"the information was not sufficient to relate [the conditions] to [the Appellant's] qualifying operational service in East Timor and that the available information raised a probable relationship to injuries/events during periods of service outside of [the Appellant's] qualifying operational service."* He observed further that that the RO had noted that although the Appellant had presented with Achilles Tendonitis during his service in East Timor, such condition was "*not a factor in the SoP for Osteoarthritis of the lower limbs"*, and further that *"the available information did not indicate Achilles Tendonitis resulted in damage to the right ankle joint in order to meet any factors in the relevant SoP."* By way of conclusion, Mr Astle submitted: *"given that [the Appellant's] qualifying operational service only covered a period of little more than 6 months in East Timor (1 May 2001 – 11 November 2001), the service and medical information available has not provided a link to his qualifying service in relation to the conditions applied for"* and that *"consequently…the decisions made by the [DO] on 27 April 2016 and 25 May 2016 to decline the applications for Cervical*

Spondylosis, Lumbar Spondylosis Osteoarthritis Right Knee and Osteoarthritis Right Ankle which were upheld by the National Review Officer's [sic] decision on 15 March 2017, were correct."

16. In a further written submission received on 18 May 2018, Mr Nicol expressed his disagreement with *"some of the conclusions you have reached about benevolence…We see no signs of that in the decision, in fact the conclusion on page 7 shows little understanding of the military person's commitment."* Having noted the comment that the Appellant *"spent little more than 6 months in East Timor",* and that *"Service and medical information does not provide a link to his qualifying service",* Mr Nicol expressed his and the Appellant's disagreement with this statement, adding he believed *"that the whole paragraph is degrading [the Appellant's] service. Any comment that suggests that just over 6 months in a war or peace keeping zone is unacceptable, because these young ones put their lives on the line for the nation."* After making some additional comments Mr Nicol submitted *"reverse onus of proof should always be in the Veterans' favour",* and invited the Board to consider a number of points, including: *"Are the medical files correct. The past has shown that the medical files in combat zones have been inadequate…"; "while training injuries do take place because of the extreme rigor that is placed on the body and the weights carried. You cannot have a soldier, sailor or flight crew in a war zone or peace keeping situation unless you have taken the full rigour of training that is required to do the job effectively and efficiently in that zone. This requires a lot of extremely hard work which puts pressure on the skeletal body and the mind. In the past and I am speaking from experience Veterans cover any niggly injuries that they received while training, so they will not be taken off the list for deployment. This is another reason for the medical files not to be correct. Also with the onus of proof you have not given us any real quotes for your decision using his medical files. If you cannot prove under the laws of onus of proof his claim should stand."* Having referred to what he considered an "*extremely negative and uncalled for"* comment, Mr Nicol submitted: *"the appeals on the four injuries that are now affecting [the Appellant] we attribute to his service. In the services one went to the R.A.P. and you were seen by junior medical staff who did not always write up your case or make a correct diagnosis. Any injuries due to training or deployment were often misdiagnosed or not recorded thus there is not a professional standard of evidence provided by Defence."* He concluded this submission by adding *"… [the Appellant]…served in Sinai and Timor Leste and we hopefully expect natural justice to prevail."*

17. Appended to the above-mentioned submission received on 18 May 2018 was a further submission from Mr Nicol entitled "Appeal – [the Appellant] 24 May 2018". In this document Mr Nicol submitted that *"the VA submission repeatedly refers to a lack of evidence as the reason to decline i.e. that a link to service has not been established";* that *"VA has failed to consider 'all relevant and available material' under s14 (2) (a) and (b) i.e. VA appears to have dismissed considerable research that points to the cumulative holistic, negative physical impacts that arise from the very nature of military service i.e. from the continual, physically demanding preparation for duty on operational service",* and that "*evidence also points to a common military unwillingness to report minor injuries, which stems from a culture that demands its personnel to accept difficulties and minor setbacks as normal and carrying on regardless. All of which is an element of the essential mind-set constantly required of military personnel who are instructed (not asked) to achieve government objectives whenever the*

NZDF is deployed operationally." Mr Nicol reiterated his concerns about the prevalent culture and military mind-set which prevented military personnel from recording *"every single minor injury",* and submitted that *"it can therefore be reasonably inferred that had the individual religiously recorded every injury or complaint prior to operational service, there is likely to be more evidence in the medical file to meet the SoP factors. Yet VA consistently fail to demonstrate consideration of this extensive body of evidence, which shows that the proactive reporting is more than a reasonable hypothesis, and is thus relevant, available material for the purposes of s14."*

18. Having reiterated the concerns expressed above, Mr Nicol surmised that *"when we add together the demanding nature of service, the military mind-set and the s17 presumption that the individual enlisted in full health, there are reasonable grounds to accept that the injuries being claimed almost certainly have a history in previous, unrecorded injuries and / or a build-up of weaknesses in the body."* He went on to submit that *"the rigid factors within the SOPs make no allowance for the well-understood military practice of not recording injuries";* that *"they also fail to acknowledge the reality that preparation for qualifying operational service is at times more demanding than the service itself, as personnel push to develop extra physical and mental fitness required",* and that *"in addition, those deploying are hardly likely to disclose an injury for fear of not deploying."* Mr Nicol contended that *"this is exactly where the s10 Benevolence provision should have been applied. s10 exists to manage the inflexible 'perfect world' nature of SoP factors with the inconsistencies and less than perfect world of military service i.e. considering evidence related to the interplay between military culture and the cumulative build-up of unrecognised / unrecorded weaknesses throughout the body, outside of the individual's medical file."* He went on to contend that VANZ's statement "*that* '*benevolence would not be applied where a claim is declined when there is an applicable SoP but the factors are not met', is a misapplication of the spirit and intention of s10 provisions, which apply to all sections of the Act, and are not otherwise qualified except in the context of acknowledging service to NZ. As we have already outlined we believe s10 should have been applied to other relevant material that VA has not considered under s14. Accordingly, it is contended that the current VA interpretation of what constitutes 'evidence to demonstrate a link to qualifying service', and 'what are therefore reasonable grounds for believing that the Veteran's injury was not service related', fails to consider all available and relevant information, and also fails to exercise a reasonable interpretation of s10 benevolence in considering 'gaps' in the official record. By not doing so, it results [in] an almost impossible standard for military personnel to meet."* Mr Nicol requested that *"the decision to decline be repealed and the panel direct VA to reconsider the conditions on the basis that the nature of the service, military mind-set and accepted fitness on enlistment demonstrates a more than reasonable hypothesis that conditions arose or [were] aggravated during operational service, by a number of unrecorded injuries and /or cumulative weaknesses, exercising s10 benevolence as was intended, and in line [with] the known facts about military service and culture."* Mr Nicol concluded his written statement by requesting that the Respondent withdraw its phrase *"given [the Appellant's] operational service only covered a period of a little more than 6 months",* in order to *"remove any doubt about VA's motivation for making such a statement as it applies to this case, and to also assure the Veteran Community that length of service is not a criteria being applied to decision-making."*

The appeal hearing

19. At the hearing of the appeal on 24 May 2018, the Chair acknowledged the extensive submissions made by both the Appellant and Mr Nicol, and invited both the Appellant and Mr Nicol to make such further representations as they considered appropriate. The Appellant reiterated that in many situations servicemen did not divulge their injuries *"for fear of being medically down-graded"* – that *"if you can hide it you might recuperate",* and that *"it is the nature of the job to conceal your injuries",* to be *"macho male, and hide injuries to ensure that they would get deployed."* The Appellant also opined that *"the medical files were not very good – a corporal writes down these things, some files are destroyed"* but the *"files provide the evidence."* In response to the concerns expressed about "*VANZ's put-down"* of the Appellant's service, Mr Astle emphasised that it was not the Respondent's intention in any way not to acknowledge the Appellant's service, but simply to note the period of his service in East Timor (6 months) in relation to the entire period of his many years of service i.e. 24 years. The Appellant submitted that VANZ was *"looking at the wrong things"* – that during his service he had *"been jumping off trucks onto un-level ground",* undertaking *"high impact tasks"* including *contact drills and hitting the ground".* At the invitation of the Board, the Appellant explained that his tasks in East Timor involved *"driving, organising, patrolling – in vehicles and on foot"* to keep the areas secure. He also explained the circumstances leading to his injuries/conditions. With regard to his Right Knee condition, the Appellant advised that he had had a motorcycle accident in 1982 – that he had been a pillion passenger and that the driver had lost control. He advised that he had not been admitted to hospital – that his knee had an open wound which was required to be dressed, that he had had to use crutches for 3 months, that his knee was very swollen and "*hurt lots of times when climbing up hills etc with heavy packs."* With regard to his Neck and Back conditions, the Appellant advised that *"a car hit me",* but that he had *"no injury after the accident"* - that he could *"not recall any specific injury"* – and that the earliest memory of having a sore neck and back was *"during the last 10 years or so"* and that *"my neck has just gone bad."* The Appellant recalled having *"had a bad neck before* [he] *deployed"* and participating in a two week exercise after which he had "*had a week's stand-down to let the niggles settle down",* but stated that *"you don't go to the RAP for that – you just recover".* The Appellant also stated that *"sport was compulsory and part of the military ethos"* and commented that *"equipment was heavy – webbing and ammo weighing 7-10 kgs, packs weighing 25 – 35 kgs and helmet/body armour weighing about 10kgs"*, also noting the taxing nature of RFL/Battle Efficiency tests. With regard to his Right Ankle, the Appellant advised he *"was always rolling his ankles",* recalling a *"bad one"* when on one occasion in April 1993 he sprained his ankle and that it *"swelled up."* The Appellant further stated however that *"there was nothing big – just lots of little injuries."*

20. In response, Mr Astle reiterated that VANZ had intended no offence when referring to duration of the period of the Appellant's service in East Timor, emphasising that VANZ was simply trying to differentiate between the Appellant's different types of service and the duration of one relative to the other. While acknowledging the tendency for servicemen not to report their injuries to avoid missing out on being deployed, Mr Astle observed that the Appellant's medical file was *"one of the more detailed that VANZ has seen",* and noted that it contained some very useful material. Mr Astle

observed that based on what had been recorded in the Appellant's medical file during his service in East Timor, VANZ had been able to link the Appellant's troublesome elbow to his qualifying service and as a result the Appellant had been awarded a disablement pension for his elbow condition. Mr Astle submitted that *"the problem here however is that it is hard to find any specific events to connect [the Appellant's] conditions* [relating to the appeal] *to his qualifying service."* Mr Astle expressed his wish to convey that *"VANZ tries to approve claims",* but VANZ *"has to operate under the legislation",* and *"if VANZ can't link the injury/condition back to qualifying service, they can't get it 'over the line' and therefore can't approve it."* While acknowledging that all the Appellant's conditions likely occurred while he was serving in the Army, *"the conditions could not be connected to his qualifying service in East Timor."* Mr Astle concluded his submission by advising the Appellant that if he had *"any further information to enable VANZ to do this"* he *"should bring this to VANZ."*

Appeals under the Veterans' Support Act (VSA)

21. 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

22. The Board noted that the RO had correctly identified that the Appellant had qualifying service for the purposes of the VSA in respect of qualifying operational service for East Timor (1 May 2001 – 11 November 2001) and that *"all other service came under the coverage of ACC and is not covered by the [VSA];* that "*the Appellant's service in Sinai (NZCMO 12 May – 9 November 1996) is not included in the current list of qualifying service covered by the [VSA]"* and that *"the Appellant's] completed application for* [his claimed conditions] *was received on 9 October 2015 (before the introduction of Scheme Two) and was therefore considered under Scheme One of the [VSA].*" The Board also noted that the RO had also correctly decided that the Statement of Principles (**SoP**) concerning Cervical Spondylosis No. 66 of 2014 (Reasonable Hypothesis), SoP concerning Lumbar Spondylosis No. 62 of 2014 (Reasonable Hypothesis) and SoP concerning Osteoarthritis No. 13 of 2010 (Reasonable Hypothesis), as amended by Amendment SoP concerning Osteoarthritis No. 35

of 2011 were the appropriate SoPs to apply to the conditions relating to this appeal given the Appellant's qualifying service. The Board observed that each of these SoPs is listed in Schedule 1 of the Veterans' Support Regulations 2014, and that such SoPs are therefore Australian Statements of Principles that apply for the purposes of the VSA. The Board concurred with the RO's decision that none of the Appellant's conditions qualified "*for automatic acceptance under legislative service-related presumptions"* and that therefore the Appellant's conditions should be determined in accordance with section 14 of the VSA, which she had noted *"includes the application of the Statements of Principles."*

23. The Board noted that in paragraph 4 of each of the SoPs under consideration in this appeal, the Repatriation Medical Authority states that it has formed the view that there is sound medical evidence the [condition in question] can be related to service; that paragraph 5 of each SoP provides in effect that at least one of the factors specified in paragraph 6 must be related to the person's service, and that paragraph 6 of each SoP sets out the factors, one of which must exist for a claim to succeed.

24. With regard to the Appellant's condition of Cervical Spondylosis, the Board noted that entries in his service medical records revealed that the Appellant had had a sore neck for many years (from 1997), and that Orthopaedic Surgeon Mr James Fenton had noted in his letter dated 14 March 2016 that *"there is no history of a single specific injury and the causation is likely to be idiopathic…"* Similarly, with regard to the Appellant's condition of Lumbar Spondylosis, the Board noted that the Appellant's service medical records contained entries relating to lower back pain since 1988, and that Mr Fenton had also noted in his report of 14 March 2016 that *"In terms of causation, once again there is no specific injury and it is likely to be idiopathic i.e. age-related…"* Notwithstanding the extensive submissions of the Appellant and Mr Nicol regarding their views regarding how his service had caused the conditions relating to his neck and back, having had regard to all the evidence before it, and having considered the SoPs applicable to Cervical Spondylosis and Lumbar Spondylosis respectively, the Board agreed with the RO's decision that the available information does not connect the condition of either Cervical Spondylosis or Lumbar Spondylosis to the circumstances of the Appellant's qualifying service i.e. his service in East Timor during the period 1 May 2001 to 11 November 2001.

25. With regard to the Appellant's conditions of Osteoarthritis Right Knee and Osteoarthritis Right Ankle, the Board observed that the Appellant's service medical records revealed that he had had problems with his right knee and right ankle several years prior to his deployment for operational service in East Timor. In this regard, the Board further observed that his condition of Osteoarthritis Right Knee appeared to be linked to a rugby injury he sustained on 19 January 2001 (in respect of which he was referred for arthroscopic surgery in September 2002), and that an arthroscopy carried out on 7 May 2007 suggested that his condition of Osteoarthritis Right Ankle was the result of a rugby injury he had sustained in 1993. The Board also noted that although the Appellant's medical file showed that he had reported other medical conditions (including an injury to his right elbow during a PT session which later was accepted as an injury related to his service in East Timor) during his service in East Timor, the Appellant had not experienced any problems with either his right knee or right

ankle during this period of service. The Board concurred with the RO's decision that the available information does not connect the Appellant's conditions of Osteoarthritis Right Knee and Osteoarthritis Right Ankle to his qualifying operational service.

Appeal Board Decision

26. The Board noted the submissions made by Mr Nicol regarding the *"Warrior Syndrome"* and the prevalent culture and "*military mind-set"* which led to the reticence of some servicemen to report their "*niggly injuries"*, often for fear of not being deployed, but observed that it appeared from his service medical record that the Appellant had in fact presented for medical treatment in a responsible manner. Further, notwithstanding the submissions made by the Appellant and Mr Nicol regarding the quality of service medical files, the Board formed the view that while some of the points they had raised might apply to many service medical files in existence, the Appellant's service medical documentation seemed to be of a high standard. In this regard the Board noted Mr Astle's observation that the Appellant's service medical file was one of the best he had seen, and that the record keeping had in fact enabled VANZ to accept the Appellant's claim in relation to his condition of Osteoarthritis Right Elbow.

27. Having had regard to all the evidence before it, and having had specific regard to all the principles specified in s10(b), and the overarching benevolent intent of the VSA, the Board determined that the hypothesis that the Appellant's conditions of Cervical Spondylosis, Lumbar Spondylosis, Osteoarthritis Right Knee and Osteoarthritis Right Ankle respectively were <u>not</u> consistent with the SoP applicable to each condition i.e. SoP concerning Cervical Spondylosis No. 66 of 2014 (Reasonable Hypothesis), SoP concerning Lumbar Spondylosis No.62 of 2014 (Reasonable Hypothesis) or the SoP concerning Osteoarthritis No. 13 of 2010 (Reasonable Hypothesis) as amended by SoP No. 35 of 2011 (Reasonable Hypothesis). In so finding, the Board agreed with the RO's decision to decline to accept the Appellant's conditions of Cervical Spondylosis, Lumbar Spondylosis, Osteoarthritis Right Knee and Osteoarthritis Right Ankle as being service-related under the VSA.

28. The Board accordingly determined to **confirm** the decisions of the RO dated 15 March 2017 to uphold the decision of the DO of 27 April 2016 and decline to accept Cervical Spondylosis and Lumbar Spondylosis, and the decision of the DO of 25 May 2016 and decline to accept Osteoarthritis Right Knee and Osteoarthritis Right Ankle on the basis that such conditions are not service-related under the VSA.

Order relating to the publication of decision

29. Pursuant to the powers vested in it by section 238(3) of the VSA, the Board, on its own initiative makes an order prohibiting the publication of the name, service number, rank, address, War Pension Number and other specific identifiers of the Appellant.

The appeal is dismissed.

Ms Rebecca Ewert, Chairperson

Dr Chris Holdaway, Member

Ms Raewyn Anderson, Member

Dr Hillary Gray, Member

22 June 2018

Appendix

Entries in the Appellant's service medical documentation pertaining to the Appellant's service, other than East Timor, relating to each of the Appellant's claimed conditions concerning his neck, back, right knee and right ankle.

"Neck

19 May 1997 – 21 May 1997 *– Physiotherapy treatment noted in relation [to] right shoulder pain secondary to rugby (injury) – right cervical rotation painful; right C4 (cervical spine) and T345 (thoracic spine) painful – treatment involved T4 manipulation, mobilisation and ultrasound x 2 treatments.*

1 September 1997 *– x-ray report cervical spine 'There is loss of normal cervical lordosis. No bone injury. Neuro foramina are normal.' The x-ray was obtained after [the Appellant] presented with reduced range movement in his neck and right shoulder.*

16 March 1998 *– limited range of movement neck – to continue with physiotherapy.*

8 June 1999 *Musculo-skeletal sore neck and shoulders – history of rugby four days previously – [the Appellant] felt his neck and right shoulder were sore after the game; headaches had become more painful and some neck rotation movement had been lost. Noted to have had the same before but no headaches. Noted on 15 June 1999 to have been seeing a chiropractor and had been improving with each visit.*

7 February 2002 *– 'Woke this morning with stiff neck…' examination noted as showing nil bony tenderness; decreased range of motion without discomfort; nil upper limb symptoms.*

10 February 2009 *– letter from Orthopaedic Surgeon Mr John van Dalen '… [the Appellant] has been troubled with left-sided neck pain and radiating symptoms down into the left arm and also paraesthesia into the hands for the past three months. There is no history of specific trigger that brought the symptoms on. In the past he has had symptoms which had settled. At no time has he experienced any weakness in his left hand grip. He has had a course of physiotherapy which really has only entailed some massage at the base of the cervical spine…' Examination findings were noted; x-rays of the cervical spine noted as showing evidence of some degenerative changes consistent with mild cervical spondylosis. For MRI of cervical spine.*

1 July 2009 *MRI Cervical Spine – conclusion: 'There is a significant central canal compromise particularly at C5/6 and 6/7 levels where there appears to be a degree of cord compromise.'*

11 August 2009 *– letter from Orthopaedic Surgeon Mr John van Dalen noting radiculopathy symptoms affecting the neck (cervical spine) had abated following a course of anti-inflammatory medication. Mr van Dalen commented 'I have explained to [the Appellant] that he really needs to stop with the self-manipulation that he has been undertaking to relieve symptoms in his neck because in fact this is the main aggravating factor…'*

23 February 2010 *– letter from Orthopaedic Surgeon Mr John van Dalen noting problems the previous year with left sided cervical radiculopathy as a result of having disc lesions at C5/6 and C6/7 – the radiculopathy had settled, however, [the Appellant] still had neck stiffness and an ache related to cervical spondylosis.*

1 December 2011 *– Medical Examination for Release from the Army: notes on history since last examination – neck pain – strain under physio. Examination noted as showing 'tender to*

compression of lateral L) neck with some radicular pain experienced with compression at base of neck secondary to neck sprain injury. Previous C6 radiculopathy & central canal compromise seen on MRI 07/09.' Opinion of Board – Left Cervical Radiculopathy C5/6 C6/7 2008 Waiouru"

Back

20 June 1988 *Motor vehicle accident – hit while stationery [sic] – tender over mid back…*

1 October 1992 *Low back pain worse in morning – 8 hours – no definite cause, no sciatica.*

3 August 1998 *lower back pain*

Right Knee

8 July 1987 *– N.Z Armed Forces Candidate Medical Questionnaire – past history of motorbike accident, crutches approximately 12 weeks, approximate date: sometime in 1982*

31 July 1987 *– Entry History Questionnaire (for entry to Army) – past history of motor vehicle accident – motorcycle – right knee lacerations only. Hip, knee and ankle joints normal to examination (Fit, healthy recruit).*

6 August 1992 *Sore right knee (ACC application notes twisted knee while running after slipping on gravel), recurring injury '…had problem for 1 yr, has had knee strapped in the past, finds this helps.' Repetitive strain injury queried. Note of motor vehicle accident 1981 injury right patella and history of pain of and on since then.*

7 August 1992 *– X-ray report Right Knee: No lesion seen.*

21 August 1992 *Recurrent patellar injury right knee – Injured right knee two weeks previously when running – knee pain prolonged running.*

20 September 1993 *Muscle strain right knee following injury playing rugby; had previously injured right knee two months before.*

25 May 1994 *– Strain medial ligament, and history of reoccurring [sic] injury (to right knee) since 1992.*

14 August 1995 *– complained of painful right knee since rugby game previous Saturday diagnosed as soft tissue injury to lateral quad right knee.*

1995 *– Hereford Physiotherapy Centre Palmerston North – three treatments (14 August – 17 August 1995) for bruising (large haematoma) lateral right knee.*

18 May 1998 *NZ Armed Forces Medical Re-Examination Record – some abnormal findings noted for the right knee – no effect on medical grading.*

9 November 1998*: five week history of discomfort right knee.*

8 October 1999 *– Sore right knee '…doesn't remember doing anything to hurt knee but knee is tight and sore…runs on the road every 2nd day on average…'*

5 November 1999 *Right Knee X-ray Report: 'The joint surfaces appear normal. No evidence of any loose bodies or joint fusion. There does not appear to be tilting of the patella which is indicative of excessive lateral pressure syndrome…'*

21 May 2002 *Sports Physician Dr Ra Durie: 'Thank you for asking me to review [the Appellant] regarding his right knee…He injured this doing Kapa Haka over a year ago. He first noticed a pain when he went to squat down and twist. Since then he has had pain in the lateral aspects of the knee*

when squatting. Originally the knee was swollen. Whilst he hasn't had repeat episodes of the knee swelling, it has continued to cause pain every time he squats down…'

22 May 2002 *right Knee X-Ray Report: '…There is a minor narrowing of the medial joint compartment of the right knee with minor marginal osteophyte formation. The lateral joint compartment is unremarkable. Small osteophytes are seen arising from the margins of the patellofemoral joint. There is a small joint effusion. Impression: early changes of osteoarthritis are seen. No other abnormalities are seen.'*

28 May 2002 *Review by Dr Durie: 'I have reviewed [the Appellant] today with his x-rays. These have been reported as showing very early signs of OA (osteoarthritis) medially. However, I have reviewed the films today and I can't say that I am convinced of this. In any case [the Appellant] complains of pain laterally. As previous I remain suspicious of a meniscal tear but we do not have overwhelming signs of this. In this situation I recommend that we get and MRI scan to more accurately determine what is going on…'*

31 July 2002 *MRI Right Knee reported as showing a tear in the medial meniscus; no displaced fragments seen.*

13 August 2002 *– letter from Sports Physician Dr Ra Durie (to David Brougham, Amesbury Orthopaedic Centre): 'Can I ask you to review [the Appellant] regarding his right knee. He has had problems with the right knee for over a year now. History was suggestive of a meniscal tear but there were not great clinical signs to support this. I organised an MRI which shows a tear in the posterior horn and body of the medical meniscus. No other abnormality was seen. In particular the condylar surfaces of the bone were well preserved to suggest that we are not dealing with a degenerative problem here…'*

28 August 2002 *– referral letter to Orthopaedic Surgeon – Senior Medical Officer Dr Don Stewart noted: '[The Appellant] sustained an injury to his right knee nineteen months ago (date of injury noted as 1January 2001) and was eventually referred to Dr Ra Durie by our physiotherapist in May of this year. After x-rays and MR Ra recommended orthopaedic referral and I enclose copies of his reports, including a referral letter to David Brougham. [The Appellant] is keen to undergo surgery soonest…'*

2 September 2002 *– letter from Orthopaedic Surgeon Mr Alistair W. Grant: 'Thank you for referring [the Appellant]. As you remarked he injured his right knee performing kappa haka in May 2000. He has had recurrent problems with medial pain since this injury. The knee swelled initially but hasn't swelled since…' Symptoms and examination findings noted. Mr Grant commented in respect of investigation findings that x-rays did not show (as far as he could see) degenerative change; and that MRI confirmed a cartilage tear (medial meniscus).*

18 September 2002 *EUA (examination under anaesthetic), arthroscopy and partial medial meniscectomy right knee.*

23 September 2002 *orthopaedic review of right knee five days post arthroscopic surgery 'All portals are healing nicely but he still has a significant effusions, not surprisingly…'*

14 / 21 October 2002 *– NZ Armed Forces clinical notes – right knee painful and slightly swollen.*

30 October 2003 *(Physical Therapy in Sport) – [the Appellant] is noted as having ongoing problems with his patellofemoral joint and medial compartment right knee; queried as relating back to an injury in 1998 / 1999 and subsequent menisectomy – had made no significant progress with rehabilitation over the past three months. Further investigation and possible specialist consultation suggested.*

18 May 2004 *– complaining of recurring problems right knee – history of recurring knee problems – [the Appellant] had returned from field and noticed knee had flared up, pain when squatting / knee stiff; previous cartilage surgery – knee had never completely felt right afterwards / often flared up.*

20 May 2004 *NZ Armed Forces Clinical Report – Medical Officer review of right knee – original injury playing rugby approximately four years previously – surgery in 2002 noted – ongoing problems since then.*

1 June 2004 *– referral for orthopaedic opinion: 'This 37-year-old soldier has a 4-year history of Right Knee problems. He initially injured this knee in 2000 while playing rugby. In September 2002 he had a EUA (examination under anaesthetic), arthroscopy and partial medial menisectomy with little resulting benefit. He describes 2 years of medial joint pain while running, with onset of symptoms after about 200 metres. If he continues to run the joint swells. There is a daily episode of instability. No locking…' The Medical Officer noted examination findings and advised 'It appears he has an ongoing Right Knee meniscal injury…'*

29 June 2004 *– X-ray right knee – findings consistent with early degenerative osteoarthritis changes.*

29 June 2004 *– letter from Orthopaedic Surgeon Mr John van Dalen 'History: This man sustained an injury to his right knee as a result of a rugby injury. It was after the game that he had pain and considerable swelling of the knee. He was seen at the MTC and given Voltaren. The swelling settled and he played another game of a week later. He continued to have problems with the knee and an MRI scan confirmed evidence of a cartilage tear. He underwent arthroscopic surgery to the right knee in Wellington Hospital in 2002. Despite the surgery the knee has continued to be a problem. The current problems are pain with running over the medial aspect of the knee. He can run only 100 metres. Walking is OK. Standing for too long will aggravate the knee. He does not experience any locking of the knee joint but he thinks the knee can give way on him…' Mr van Dalen noted [the Appellant] may have a tear within the remaining portion of the medial meniscus ad was arranging an MRI scan to confirm the presumed diagnosis.*

13 September 2004 *– Hospital Discharge Summary following arthroscopic surgery (partial menisectomy / Operation Record – indication for surgery 'This man has been troubled by his right knee for over two years following an injury to the knee playing rugby. He underwent and arthroscopic resection of a meniscal tear but despite surgery there really has been no improvement. An MR scan was arranged which showed evidence of a residual tear within the posterior horn of the medial meniscus…'*

12 October 2004 and 9 November 2004 *letters from Orthopaedic Surgeon Mr John van Dalen – reviews following arthroscopic surgery (partial medial menisectomy) right knee.*

26 July 2011 *– letter from Orthopaedic Surgeon Mr John van Dalen noting [the Appellant] reported problems with the right knee, thought to be due to early degenerative changes within the medial compartment – x-ray confirmed evidence of early degenerative changes within the medial compartment – x-ray confirmed evidence of some marginal narrowing of the medial compartment of the right knee.*

25 October 2011 *– letter from Orthopaedic Surgeon Mr John van Dalen noting the MR study of [the Appellant's] right knee confirmed evidence of early degenerative changes within the medial compartment, with no sign of any residual tear within the remaining portion of the medial meniscus*

1 December 2011 *– Medical Examination for Release from the Army: notes on history since last examination – ankle /knee injury; ankle and knee joints normal to examination. Opinion of Board OA (osteoarthritis) right knee 2011 Waiouru.*

Right Ankle

24 April 1993 *(date of injury) – Sprain right ankle (whilst playing rugby).*

26 April 1993 *Grade 11 sprain to right ankle – rugby injury.*

26 April 1993 *– x-ray report right ankle – no fracture seen*

15 July 1993 *sore right ankle.*

22 July 1993 *– Hereford Physiotherapy Centre Palmerston North – treatments (x8) for sprain right ankle.*

27 April 1995 *Pain on inversion of right ankle – past history noted of reoccurring injury to the right ankle caused by inversion, training the external ligaments.*

1 September 1997 *– complained of sore right ankle – twisted ankle at rugby games previous Saturday – diagnosed as a soft tissue injury.*

28 January 2005 *– X-ray report – clinical diagnosis of Ankle Sprain - no fracture seen on x-ray.*

30 March 2005 *– letter from physiotherapist noting treatment for strained right ankle – injury in January 2005 – symptoms noted as being exacerbated by military duties.*

4 April 2005 *NZ Armed Forces Clinical Report note: 'ongoing pain & swelling right ankle…'*

8 April 2005 *– referral to Orthopaedic Surgeon Mr John van Dalen in respect of injury right ankle.*

10 May 2005 *– letter from Orthopaedic Surgeon Mr John van Dalen: 'this man sustained an injury to his right ankle joint on 28 January 2005 when he strained the ankle after the knee gave out on him…this man has been troubled by his right ankle in the past although not usually this extent…'*

5 August 2005 *– MRI report Right Ankle – findings noted as consistent with early degenerative changes.*

13 September 2005 *– letter from Orthopaedic Surgeon Mr John van Dalen noting clinical impression of an instability problem with the right ankle – bone scan had revealed findings indicative on some stress on the ankle joint through various giving way episodes. Other investigation had indicated an osteochrondal lesion. Mr van Dalen was still awaiting the MRI scan report.*

23 November 2005 *– letter from Orthopaedic Surgeon Mr John van Dalen: 'An MR scan confirmed evidence or post traumatic changes within the right ankle joint which would account for his current symptoms…'*

24 October 2006 *- letter from Orthopaedic Surgeon Mr John van Dalen noted diagnosis of anterior impingement type symptoms affecting right ankle joint – x-ray findings showed evidence of an anterior tibial osteophyte.*

7 May 2007; 22 May 2007 / 26 June 2007 *– operation record and letters from Orthopaedic Surgeon Mr John van Dalen noting arthroscopic surgery with resection of the osteophyte that had caused the impingement related symptoms.*

1 December 2011 *– Medical Examination for Release from the Army: notes on history since last examination – ankle/knee injury; ankle and knee joints normal to examination.*