



War Pensions Number

## VETERANS' ENTITLEMENTS APPEAL BOARD

Name: Ashley John STURROCK Reference number: 2016/1

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Service Number and Rank: [REDACTED] Cook (Junior Assistant Cook - Leading Cook)

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Address: [REDACTED]

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

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Held: at Wellington on 24 August 2016

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### DECISION

1. This is an appeal by Ashley John STURROCK (the **Appellant**) against the decision of the Review Officer (**RO**) dated 20 July 2015 to uphold the Decision Officer's decision of 10 February 2015 and decline to accept his condition of **Peripheral Vascular Disease (PVD)** as being service-related.
2. The Appellant did not appear in person at the appeal hearing, however, he was represented by Mr Tony Fraser. Veterans' Affairs New Zealand (**the Respondent**) was represented by Mr Graeme Astle.

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

3. On 10 February 2015 the Decision Officer declined to accept the Appellant's claimed condition, PVD, as being service-related. The reason for her decision was: *"Smoking is a recognised causal factor for Peripheral Vascular Disease however, on referencing your signed smoking questionnaire dated 24 October 2012 it shows you had an established smoking habit prior to you serving aboard HMNZS Otago when it deployed as part of the Indonesian Confrontation from 15/10/1964 to 10/5/1965. Consequently the Decision Officer determines your smoking habit was not attributable to service and is therefore unable to relate this condition to your past military service."*
4. On 20 July 2015 the RO upheld the Decision Officer's decision of 10 February 2015 and declined to accept Peripheral Vascular Disease as being service-related. In coming to her decision, the RO had regard to the information provided in and with the Appellant's review application, including: the Appellant's Review of Decision Application received 5 June 2015; the Appellant's Smoking Questionnaire dated 24 October 2012; a letter from Mr Tony Fraser dated 13 May 2015, and a letter dated 12 December 2014 from Dr Wilkinson. From information provided in the Appellant's Smoking Questionnaire, the RO observed that *"an approximate 50+ pack year smoking history is indicated."* She noted that the Appellant served in the Royal New Zealand Navy from 6 February 1963 to 28

October 1972, and that his service *"includes qualifying operational service under the Veterans' Support Act 2014 for the Indonesian Confrontation during service on HMNZS Otago (qualifying period 15 October 1964 to 10 May 1965"*. The RO determined that *"Statement of Principles (SoP) No 23 of 2012 for Atherosclerotic Peripheral Vascular Disease (reasonable [hypothesis]) is the appropriate SoP to apply given [the Appellant] has qualifying operational service"* and that *"Medical documentation confirms the diagnosis of Atherosclerotic Peripheral Vascular Disease for the purpose of the SoP."* Having noted that the factors listed for the condition of Atherosclerotic Peripheral Vascular Disease include smoking and hypertension, the RO further determined that *"information currently available is not sufficient to establish a diagnosis of hypertension for the purposes of the SoP, nor do any of the factors listed indicate a causal relationship to [the Appellant's] military service (Statement of Principles Hypertension No 63 of 2013 Reasonable Hypothesis)."* The RO noted that *"Cigarettes and tobacco supplied in the RNZN, while duty free under customs and excise laws, were not supplied free of charge and were paid for by the rating or officer. [The Appellant] has written that his smoking habit remained constant during service, increasing during hazardous duty and in time of stress/ anxiety, indicating a smoking habit that increased at times during service rather than a smoking habit that remained significantly increased as a result of operational service."* Having considered *"information in relation to guidelines that assist decision making using Statements of Principles, in particular in respect of material contribution from operational service"*, the RO *"determined to uphold the decision to decline the claim as the information available indicates a smoking habit that became established as a result of the smoking culture for that time and the right to purchase duty free tobacco/cigarettes, and does not establish significant material contribution resulting from operational service....."*

#### **Written submissions**

5. On 11 November 2015 the Appellant lodged an appeal against the decision of the RO, contending that *"...my PVD, resulting in amputation of both my legs was attributable to my smoking during my Navy service and therefore I totally disagree with the decision of the Review Officer."* On 1 June 2016, the Veterans' Entitlements Appeal Board (**the Board**) received Mr Fraser's written submission, in which he challenged the decisions of both the Decision Officer and the RO, noting the conditions on board sea going vessels pre 1970, in particular, living and working *"....in cramped mess decks and working spaces with many shipmates for many months at a time, where smoking and exposure to passive smoking was the accepted norm to alleviate boredom and stress during hazardous times....."*. Mr Fraser submitted that Factor 6(a) of the *"RMA SOP quoted by VA for PVD No 23 of 2016.....is relevant in [the Appellant's] case....."*, and noted that *"Since the above in November 2015, [the Appellant's] GP diagnosed him with both Chronic Obstructive Pulmonary Disease (COPD) and Ischaemic Heart Disease, resulting in Veterans' Affairs acceptance of COPD at 55%, but decline of Heart Disease. It was accepted that smoking is the main causal factor and contributor to both these conditions. Just as it is for PVD."* Having elaborated on the Appellant's current situation, and advising that no further medical evidence in support of the appeal would be presented, Mr Fraser commented that *"Although Smoking is an accepted causal factor for PVD he has been declined this condition as he had commenced his habit on joining the Navy, but before*

*being deployed to the Indonesian Confrontation on HMNZS OTAGO and therefore not service related."* Mr Fraser further submitted: *"We believe this decision to be somewhat pedantic."*

6. In response, the Respondent submitted in its written submission dated 25 July 2016, that there was *".....no new information or evidence provided from that previously supplied when [the Appellant's] claim was first considered"*, and highlighted a number of points *"in relation to the National Review Officer's decision on 20 July 2015 which is the subject of the appeal"*, including that the Appellant's service included qualifying operational service; that the Review Officer had noted that SoP No 23 of 2012 for Atherosclerotic Peripheral Vascular Disease (PVD) was appropriate to apply given that the Appellant had qualifying operational service; that causal factors listed for PVD include smoking and hypertension; that the Review Officer noted that the information available was not sufficient to establish a diagnosis of hypertension for the purposes of the SoP, and that none of the factors listed in SoP Hypertension No 63 of 2013 Reasonable Hypothesis would indicate a causal relationship to the Appellant's military service; that although the Review Officer acknowledged and commented on the Appellant's smoking history, after having considered that information and having followed the guidelines for using the SoPs as part of the decision making process in respect of the material contribution from operational service, the Review Officer upheld the decision to decline the claim; and that by way of further reasoning the Review Officer noted that available information indicated a smoking habit that became established as a result of the smoking culture for that time and that the right to purchase duty free tobacco/cigarettes did not establish a significant material contribution resulting from operational service. The Respondent further submitted that *"the National Review Officer in reaching the determination to uphold the Decision Officer's decision to decline the claim has correctly interpreted the requirements of the SoPs covering Peripheral Vascular Disease."*
7. Additionally, the Respondent drew to the Board's attention two additional claims filed by the Appellant on 7 December 2015 - one relating to the condition of Ischaemic Heart Disease, the other relating to Chronic Obstructive Pulmonary Disease. The Respondent further advised that the claim in relation to the first condition had been declined by the Decision Officer but that the claim in relation to the second had been accepted. The Respondent submitted that the acceptance of the claim for COPD had been made in error, however noted that although vested with the power to reconsider that decision it believed had been made in error, *"no action has yet been taken by Veteran's Affairs under section 205 in respect of the condition of the Chronic Obstructive Pulmonary Disease decision relating to [the Appellant]."*

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

8. At the hearing of the appeal on 24 August 2016, Mr Fraser advised the Board that on 23 August, the evening before the appeal hearing, the Appellant had suffered a debilitating stroke and that he had been hospitalised. Although advising that he had nothing further to add to the material that had already been provided for the Board's consideration, Mr Fraser exhorted the Board to take a benevolent approach to the determination of the Appellant's claim. Mr Fraser indicated that he would be happy to answer questions that the Board might put to him, observing that as he had joined the Navy in 1961 as a young boy of 16 years, just three years before the Appellant, he was very familiar

with the circumstances of service life in the Navy around the time that the Appellant had served. Mr Astle had no objection to such information being provided by Mr Fraser.

9. At the invitation of the Board, Mr Fraser described in some detail what the culture, especially in relation to smoking, was like in the Navy in the 1960s for a young rating, such as the Appellant. He advised that new recruits lived in barracks for the first 12 weeks of training at TAMAKI and that literally on the very first day of service, young recruits were presented with a tobacco request form for a monthly supply of tobacco, authorising a deduction from their pay, which they were told to sign; that they that *"well over 3/4 took up smoking"* and that *"if you didn't smoke your ration the Drill instructors would reclaim it"*. Mr Fraser informed the Board that *"smoking was rife - that everyone was smoking"*; that *"you were the odd man out if you didn't smoke"* - that *"there was a bit of bullying if you didn't smoke"*, and that *"there was a smoking culture, with only a few that didn't smoke"*. Mr Fraser further advised that after basic training finished, the recruits then went to PHILOMEL where *"everyone had to live on board - there was no choice to live off ship"*, and that *"when you went to sea you could get duty free cigarettes from the ship's canteen"*; that *"everyone was smoking in close proximity - it was like living in a blue haze"*; that there were *"no smoke free areas on the ship, other than in flammable areas"*, but that *"you could go on the upper deck"*.
10. When asked about his knowledge of the Appellant's life on board ship during operational service, Mr Fraser noted that as a cook, the Appellant would have faced many *"stressors about logistics"*, and that from time to time he would be allocated an action station and be *"locked down"* for many hours, noting in particular one 'no duff' action-station experienced by the Appellant, when an unknown boat approached, which Mr Fraser opined *"would have been stressful."* He advised the Board that the Appellant had told him that he *"smoked more during stressful periods."* Mr Fraser also expressed his view that although the Appellant *"does not have PTSD, he is an anxious person"*. Mr Fraser also alluded to one incident that he discussed with the Appellant when *"an American destroyer went through the side of the ship tearing a gash in its side"* where the Appellant's bunk was located, on No. 4 deck. Although the Appellant was not present at the time, Mr Fraser suggested that the Appellant had had thoughts about what might have happened had he been in his bunk at the time. Mr Fraser advised that to his knowledge there were *"no bullets flying"* during the Appellant's service, but that there was some stress, and a lot of *"down time and boredom"* - that there was a lot of *"free time at sea after you had worked your 8 - 10 hour shift"*, and that *"smoking helped relieve that boredom"*.
11. In response, Mr Astle observed that the papers indicated that Appellant had started smoking on joining the service, and that the amount that he smoked increased sometimes (rather than 'spiking'), but returned to a certain level of smoking which was continued until July 2012 when he ceased the habit. He further observed that the evidence given by Mr Fraser, which he stated he accepted, provided much additional information than had been available to the RO, whom he noted had had to make her decision only on the material with which she had been provided. Mr Astle acknowledged that it would have been helpful if the information provided at the hearing had been available to the RO, however, he declined to speculate *"what the RO would have done"* had this been the case, noting that the decision was a *"tricky one to make - not black and white"*. Mr Astle conceded that it

was not possible "*to argue against the smoking culture*" that existed at the time, observing that just as when cigarette rations were introduced, the majority would take up smoking.

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

12. Under the VSA, a review decision may be appealed by the person who applied for the review or by VANZ. An appeal made to the Board is a *de novo* appeal, and the Board is not bound by any findings of fact made by the decision maker whose decision is the subject of the appeal. Appeals are required to be heard and determined without regard to legal or procedural technicalities. When hearing an appeal, the Board may, among other things, receive any evidence or information that, in its opinion, may assist it to determine the appeal, whether or not that evidence or information would be admissible in a court of law. The Board may determine an appeal without hearing oral evidence from the Appellant. The Board is required, among other things, to comply with the principles of natural justice, and in accordance with the following principles: the principle of providing veterans, their spouses and partners, their children, and their dependants with fair entitlements; the principle of promoting equal treatment of equal claims; the principle of taking a benevolent approach to the claims; and the principle of determining claims in accordance with substantial justice and the merits of the claim, and not in accordance with any technicalities, legal forms, or legal rules of evidence. The Board, by majority vote, must confirm, modify or revoke the review decision, or make any other decision that is appropriate to the case. If the Board revokes the decision it is required to substitute its decision for that of the RO or require VANZ to make the decision again in accordance with directions it gives to VANZ.

***The review decision***

13. The Board noted that the RO (correctly in its view) had identified that the Appellant had qualifying service for the purposes of the VSA - qualifying operational service (with regard to his service in the Royal New Zealand Navy on HMNZS OTAGO during the Indonesian Confrontation during the period 15 October 1964 to 10 May 1965) and qualifying routine service (with regard to his service in the Royal New Zealand Navy prior to 1 April 1974 that was not qualifying operational service.) The Board also noted that the RO (again, correctly in its view) had decided that the Statement of Principles (SoP) No 23 of 2012 for Atherosclerotic Peripheral Vascular Disease (Reasonable Evidence) 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 "*an approximate 50+ pack year smoking history is indicated*", and concurred with the RO's view that "*medical documentation confirms the diagnosis of Atherosclerotic Peripheral Vascular Disease for the purpose of the SoP.*"
14. The Board observed that the RO had identified that "*the (causal) factors listed for Atherosclerotic Peripheral Vascular Disease include smoking and hypertension:*  
*6(a) smoking at least five pack-years, or the equivalent thereof in other tobacco products, before the clinical onset of atherosclerotic peripheral vascular disease, and where smoking has ceased, the clinical onset of atherosclerotic peripheral vascular disease has occurred within 20 years of cessation; or*  
.....

*6(c) having hypertension before the clinical onset of atherosclerotic peripheral vascular disease;  
....."*

15. The Board agreed with the decision of the RO that *"Information currently available is not sufficient to establish a diagnosis of hypertension for the purposes of the SoP"*, observing that information in the letter dated 12 December 2014 from Dr Tom Wilkinson i.e. that the Appellant *"has been found to have somewhat high blood pressure in the past..."* indicated that the Appellant no longer suffered from hypertension. In such circumstances, the Board was of the view that it was not necessary for the RO, or indeed itself, to proceed to consider whether any of the factors listed in the SoP Hypertension No 63 of 2013 Reasonable Hypothesis *"indicate a causal relationship to [the Appellant's] military service."* The Board accordingly did not do so.
16. The Board disagreed however, with the RO's application of the factor 6(a) of the Statement of Principles concerning Atherosclerotic Peripheral Vascular Disease No 23 of 2012 (Reasonable Hypothesis) **(the SoP)**.
17. 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 there is sound medical-scientific evidence that indicates that PVD 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 PVD. If a factor concerns the 'clinical onset' of PVD it relates to cause. If a factor relates to 'clinical worsening' of PVD it relates to material contribution or aggravation of a pre-existing injury/disease/condition. Clause 7 makes it clear that those factors that concern clinical worsening (i.e.6(k) to 6(v)) apply only to material contribution to, or aggravation of, the injury/disease/condition if the injury/disease/condition pre-existed the relevant service.
18. It was evident to the Board, on the material before it, that the both limbs of Factor 6(a) of the SoP were amply satisfied in the Appellant's case. The Appellant had clearly smoked at least five pack-years, or the equivalent in other tobacco products, before the clinical onset of the condition of PVD, and it was apparent that the clinical onset of the condition had occurred within 20 years of his ceasing to smoke (in 2012). A key issue was whether the Appellant's smoking, which had caused his condition of PVD, was related to his service. The RO determined that it was not, stating:

*"Cigarettes and tobacco supplied in the RNZN, while duty free under customs and excise laws, were not supplied free of charge and were paid for by the rating or officer.*

*[The Appellant] has written that his smoking habit remained constant during service, increasing during hazardous duty and in time of stress and anxiety, indicating a smoking habit that increased at times during service rather than a smoking habit that remained significantly increased as a result of operational service.*

*Having considered that information in relation to guidelines that assist decision making using the Statement of Principles, in particular information in respect of material contribution from operational service, I have determined to uphold the decision to decline the claim as the information available indicates a smoking habit that became established as a result of the smoking culture for that time and the right to purchase duty free tobacco/cigarettes, and does not establish significant material contribution resulting from operational service."*

**Appeal Board Decision**

19. 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.
20. 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 PVD.
21. The Board disagreed with the views implicit in the RO's decision, that in order for the smoking related condition of PVD to be regarded as being service-related for the purposes of the VSA, cigarettes and tobacco had to be supplied to the rating or officer free of charge, and not paid for by the rating or officer. The Board also disagreed with the RO's implied requirement that in order to be service-related there was a requirement that the Appellant's smoking habit "*remained significantly increased as a result of operational service.*" Further, the Board did not agree with the RO's ostensible requirement that in order for a smoking habit to be regarded as service-related, it must "*establish significant material contribution resulting from operational service.*" It appeared to the Board that, in so deciding, the RO had applied, incorrectly in its view, clause 7 of the SoP and factors of the SoP relating to clinical worsening of a pre-existing condition, which were not relevant to the Appellant's case.
22. Regulation 52 of the Veterans' Support Regulations 2014 applies in circumstances where an appellant does not provide oral evidence at the hearing. The Board decided, as it is empowered to do under regulation 52(3), that "*it can determine the appeal without hearing oral evidence from the appellant.*" Further, the Board decided that there was sufficient written evidence before it from the Appellant and supporting information from Mr Fraser (in respect of which Mr Astle raised no objection) to determine the appeal.
23. 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 hearing by Mr Fraser, the Board was satisfied that the Appellant's smoking

habit was contributed to by his qualifying service. The Board accordingly found that Factor 6(a) of the SoP was related to the Appellant's qualifying service during the period 6 February 1963 to 28 October 1972.

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

**The appeal is allowed.**



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Ms Rebecca Ewert, Chairperson



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Dr Chris Holdaway, Member



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Ms Raewyn Anderson, Member



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Dr Hillary Gray, Member

**15 September 2016**