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War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: Russell Wayne WALSH

Service Number and Rank: V102440, Able Seaman, Royal New Zealand Naval Volunteer Reserve

Address: PO Box 40-397 , UPPER HUTT 5018

Grounds of appeal: Appeal against the 20 July 2020 decision of the Review Officer to uphold the 25 June 2019 decision of the Decision Officer to decline to accept Malignant Neoplasm of the Colo-Rectum as service-related under the Veterans' Support Act 2014

Held: at Wellington on 24 September 2021

Parties:

The Appellant, Russell Walsh, Mark Compain, Royal New Zealand Returned and Services Association

The Respondent, Veterans' Affairs New Zealand (**Veterans' Affairs**), represented by Ms Anne-Marie Tribe, Manager Decisions and Entitlements (written submission only), Dr Mike O'Reilly, Principal Clinical Advisor, Ms Marti Eller, Deputy Head of Veterans' Affairs.

Outcome: Confirms Review Officer's decision

Summary of reasons for decision:

There is a hypothesis that the Appellant's condition could be related to his qualifying service, but he does not meet any factor in the Balance of Probabilities Statement of Principles (SoP) for Malignant Neoplasm of the Colorectum (No. 38 of 2013) to connect his condition to his service.

The SoPs are legislative instruments which must be applied. The appropriateness of the SoPs and the factors within them are beyond the scope of an appeal.

DECISION

This is an appeal by Russell WALSH (the Appellant) against the 20 July 2020 decision of the Review Officer to uphold the 25 June 2019 decision of the Decision Officer to decline to accept Malignant Neoplasm of the Colo-Rectum as service-related under the Veterans' Support Act 2014 (**the Act**).

Background

Qualifying service

The Appellant served in the Royal New Zealand Naval Volunteer Reserve between 24 March 1970 and 3 May 1976.

The Appeal Board thanks the Appellant for his service.

Disablement Pension Application

On 5 November 2018, Veterans' Affairs received an application for a disablement pension for bowel cancer from the Appellant. The Appellant wrote that he was in the Royal New Zealand Naval Volunteer Reserve and the nature of his duty was, "Routine, engine room, and deck". During this period of time he was a motor mechanic with the New Zealand Post Office.

Corinne Glenn, General Practitioner, completed the medical certificate diagnosing T3 N0M0 mucinous adenocarcinoma of the bowel and peripheral neuropathy secondary to chemotherapy.

On 3 December 2018, Veterans' Affairs acknowledged Mr Walsh's application for a disablement pension.

On 12 June 2019, Mr Walsh wrote to the Minister for Veterans raising concerns about the length of time taken to process his application. He referenced section 11 of the Act which at that time required Veterans' Affairs to perform its duties and exercise its powers on reasonable grounds and in a timely manner, making a decision on every claim within 30 days after receiving the claim.

On 24 June 2019, Marti Eller, Acting Head of Veterans' Affairs, wrote to the Appellant noting that "[s]urges in volumes and an increased complexity of applications have contributed to backlogs". She advised that Veterans' Affairs had received an increase in operational funding which would improve the application process. She advised the Appellant that his claim was due to be considered shortly, and she expected he would be contacted soon.

Decision Officer's decision

On 25 June 2019, the Decision Officer decided that the condition of Malignant Neoplasm of the Colorectum could not be accepted as a service related condition under the Act. The Decision Officer noted that the condition applied for was the ongoing effects of bowel cancer, which had been redefined as Malignant Neoplasm of the Colorectum. The Decision Officer reasoned that there were no factors outlined in the Balance of Probabilities Statement of Principles (**SoP**) for Malignant Neoplasm of the Colorectum (**SoP No 38 of 2013**) which could be linked to Mr Walsh's qualifying routine service. She wrote:

For asbestos exposure to be considered a factor in the development of Malignant Neoplasm of the Colorectum, Mr Walsh would have had to be exposed to asbestos for at least 2000 hours, while the asbestos is being applied, removed, dislodged, cut or drilled. Mr Walsh's service file does not provide evidence that he served any significant time on board ships, this criteria has not been met.

The Decision Officer recorded that she had considered the application form, service history, medical information and the SoP.

On 8 July 2019 Veterans' Affairs advised the Appellant of that decision.

Review lodged

On 6 September 2019, the Appellant applied for a review of that decision. He identified issues with his service record, noting that the records of training which took place outside of the Reserve Headquarters were incomplete and, in particular, not all of the voluntary time (weekend training and maintenance) spent on board Seaward Defence Motor Launches (**MLs**) was recorded. He wrote:

My service record only appears to show the dates of my compulsory attendance, either at parades or sea training, these are simply the commitments required to remain proficient. The record does not record the many volunteer hours that were put in that were mostly unpaid. During my time in the Wellington, HMNZS Olphert, and for a lesser period in Christchurch, HMNZS Pegasus, many hours were spent undertaking maintenance in the motor launch (ML) attached to the division at the time. The records does not include the unpaid day and weekend training, often to facilitate training for others such as seamen and officer training. In Wellington weekend training typically started mid afternoon on Friday and finished mid afternoon on Sunday. It would be conducted either within harbour limits or the Cook Strait area, including the Nelson area. Whilst my service record does not record qualifying parades at HMNZS Olphert and Pegasus, on occasions there could also include night time harbour training in the attached ML. Thus my service record does not reflect the reality of the environment I was in during my service at that time.

The Appellant also provided information in relation to the nature of his service in MLs, providing a labelled photograph. He noted in particular that when he was in the engine room he was in close proximity to asbestos lagged exhaust pipes. He wrote:

The asbestos lagging around the exhaust pipes was prone to deterioration due to vibration, movement and breakdown through contamination, so we carried replacement lagging to effect repairs to the lagging when required. When required a damaged lagging was normally repaired/replaced during alongside maintenance periods.

The engine room environment meant the contamination of clothing was inevitable. Because personal washing facilities on board were primitive, with limited provision to wash clothing, contamination lingered often for days after the contamination took place.

It is also possible that asbestos contamination was present in the food we prepared and ate on board, as I have memories of lagged pipes in the galley. The galley was adjacent to the crew mess. We all took turns in repairing food for the entire crew.

He concluded that the service records and associated medical records were "incomplete and deficient and therefore insufficient on which to base a conclusive decision".

He was critical of Veterans' Affairs decision to rely on the SoP factors for the circumstances of how asbestos can be present, noting instead that asbestos is a human carcinogen and it does not matter how the asbestos gets into the atmosphere.

On 13 September 2019, Veterans' Affairs acknowledged the review.

On 17 October 2019, the Appellant wrote to the Minister for Veterans again, expressing concern that Veterans' Affairs had advised him that his review could take 4-6 months to consider.

The Minister for Veterans replied on 24 October 2019, noting the Veterans' Affairs were working hard to progress claims as quickly as possible.

Review Officer's decision

On 20 July 2020, the Review Officer, Dr Mike O'Reilly, decided to uphold the Decision Officer's decision declining to accept Malignant Neoplasm of the Colorectum as service related under the Act.

The Review Officer accepted the material was consistent with a hypothesis that the veteran's illness was service related. However, it was not more probable than not that the Appellant was exposed to greater than 2000 hours of respirable asbestos fibres in an enclosed space, as required by the factor prescribed by clause 6(h) of SoP No. 38 of 2013. The Review Officer noted:

Asbestos fibres are relatively stable while bound in lagging of the sort surrounding engine exhaust, as described in Mr Walsh's application. They are unlikely to become particulate from the routine vibration associated with running of the engines or other activities where there is work not being performed on the lagging itself, hence the condition applied in para 2 above. Even assuming full time service during the period of his service, with estimated 40 hours service below deck, this would require 50 weeks of exposure during maintenance or work involving the removal or manipulation of the asbestos lagging. Unfortunately I cannot reasonably make the case, acknowledging the absence of specific maintenance records for the vessels involved, that Mr Walsh would have been exposed for this period of time, during his service.

Veterans' Affairs advised the Appellant of that decision on 9 September 2020, apologising for the delay in doing so.

Initially the Appellant sought the assistance of Bernadine Mackenzie, the Head of Veterans' Affairs to reconsider his case. He noted that it was unfair for his claim to be considered under SoP No. 38 of 2013 because of the lack of knowledge about the nature of volunteer service,

inadequate record keeping by the Defence Force and the inflexibility of the decision tree process. He noted that the majority of time spent in MLs was unrecorded as it was unpaid or voluntary.

The Appellant noted that the level of activity required to meet the SoP would not have been recorded 40 years ago, and the records would not still exist. He asked that benevolence be applied.

On 12 March 2021 Veterans' Affairs offered for the Appellant to meet with Dr O'Reilly, Clinical Advisor and Review Officer, to discuss the decision-making framework.

On 22 April 2021, the Appellant complained to the Minister for Veterans about the way in which Veterans' Affairs had attended to his claim.

On 11 May 2021, the Appellant spoke with Dr O'Reilly.

On 17 May 2021, Ms Mackenzie responded, apologising to the Appellant for the time taken to issue his decision and review decision.

The Appellant's appeal

On 24 June 2021, the Appellant lodged this appeal against the Review Officer's decision. He summarised his grounds of appeal as follows:

1. During my service there is a high probability that I was in an environment where asbestos was present, and therefore, I was exposed to its potential harm.
2. The level of potential exposure cannot be determined within the degree of accuracy needed to satisfy the precise measurements listed in the SoP.
3. The SoP was developed after a review of international research in best practise procedures, but it is unlikely that these took into consideration the environment that existed in the New Zealand Navy at the time.
4. After my discussion with Dr O'Reilly on 7 May 2021, I do accept that he reviewed my case with an open mind, however I submit that the decision made is wrong for the following reasons:
 - i. The information available from the NZDF including my service record is deficient. It is not complete and does not give sufficient detail on which to base a decision and so the decision is not fair.
 - ii. The decision does not take into consideration the environment that was present at the time, an environment in which not only direct inhalation was possible, but also cross contamination from others, and because of this the decision is not fair.
 - iii. The decision-making process did not factor in the different nature of service and service conditions of volunteers at the time, instead it considered all types of service and conditions, regular or volunteer, are similar thereby differentiating on employment status.
 - iv. The NZDF did not supply protective clothing such as overalls or supply information about the presence of harmful substances, and in doing so NZDF breached their duty of care responsibilities.

- v. Laundering of clothing that could have held asbestos fibres was our personal responsibility; any contamination that was on the clothing we wore during service could have been transported outside of the service environment.
5. Not taking into consideration the wider operational service environment that existed at the time is a denial of the principles of natural justice.
6. Not taking into consideration the overarching purpose of the Veterans' Support Act and the intention of Parliament prejudiced the outcomes of the review.

The Appellant specifically noted his service in a multilevel building in Hinemoa Street in Wellington and another multilevel building in Ghuznee Street in Wellington, both of which may have had asbestos, as well as the asbestos in the MLs.

He calculated that, based on records from the Navy Museum in Auckland, between 1947 and 1974 it was not unusual for the ML attached to the Wellington Division to travel 9,000 nautical miles in a year. The overall living conditions in the MLs were best described as primitive; there were no facilities to wash clothing on board and no provision of personal protective equipment such as overalls or dust masks.

Respondent's additional evidence about the stability of asbestos fibres

The Appeal Board asked Veterans' Affairs to provide any additional evidence which the Review Officer relied upon in making the following statement in the decision:

Asbestos fibres are relatively stable while bound in lagging of the sort surrounding the engine exhausts....They are unlikely to become particulate from the routine vibration associated with running engines or other activities where there is work not being performed on the lagging itself...

In its response of 6 August 2021, Veterans' Affairs indicated that the Review Officer referred to a study in the *Annals of Occupational Hygiene*,¹ paraphrasing its text as follows:

Some of these studies have suggested that excess mortality and morbidity may be at least partly attributed to constant exposure to low levels of airborne asbestos generated from vibrations of the insulated shipboard equipment and the natural movements of the ship. Although vibrations and natural ship movements could potentially increase airborne asbestos concentrations, the current data suggest that this is not the case.

Veterans' Affairs also submitted that, although the authors of the study acknowledge the possible limitations in making historic assumptions prior to 1978; they note:

Although it is possible that airborne asbestos concentrations on ships at sea were higher in years prior to 1978 due to a lesser concern about importance of maintaining insulation, we would be surprised if earlier data for these vessels (except during wartime conditions) revealed improper maintenance of insulation because of the resulting housekeeping problems. Based on the available information, then, there is no reason to believe that

¹ Murbach DM, Madl AK, Unice KM, Knutsen JS, Chapman PS, Brown JL, Paustenbach DJ. Airborne concentrations of asbestos onboard maritime shipping vessels (1978-1992) *Ann Occup Hyg*. 2008 Jun, 52(4): 267-79.

background exposures to asbestos on ships would be responsible for causing adverse health effects.

Hearing

Appellant's case

The Appellant made the following main points:

- His cancer diagnosis in February 2013 came as a shock. His operation took over six hours and he had six months of chemotherapy. That has affected the nerve endings in the soles of his feet and in his fingers. He now has an ostomy bag and has to carry anti-nausea medication.
- He is troubled that Veterans' Affairs defends its decision and the process used to arrive at the decision, when the information is not reliable. For instance, Veterans' Affairs refer to a report that is not about a vessel in which he served and his service records are incomplete.
- The Decision Officer applied a tick box process, did not have enough information to assess his claim and should have referred back to him for more information.
- He accepted that he does not meet the SoP. He said it is impossible for anyone to prove the technicalities required. Veterans' Affairs must look outside the SoP and consider the purpose of the Act and the information in his claim.
- His service records are incomplete. They only include when he was paid, plus weekend training and harbour training. He cannot recall his hours. As a volunteer he was a seaman doing engineering duties. He did have a fulltime job as a motor mechanic at NZ Post, but was given time off to be a Volunteer Naval Reserve. There were very few qualified engineers so he was in short supply. He took a lot of weekend trips.
- He challenged Veterans' Affairs calculations that he had only been exposed to asbestos for approximately 108 days of his service, contending that was a gross underestimation. It also did not make any allowance for the lack of protective clothing.
- He proposed an alternative approach. Records from the Navy Museum show that the ML attached to HMNZS *Olphert* undertook 900 steaming hours per year and he would have been on board for at least 50% of that time, or 450 hours, and that for each hour of steaming there would be at least one hour of maintenance, so he would have been exposed to asbestos for about 900 hours plus each year, or more than 4,000 hours during his service.
- He recalls spending 13 weekends prior a Christmas exercise in 1972 doing maintenance and harbour training.
- There are no records for his service in 1971, but he recalls spending 10 days on board HMNZS *Kuparu*. However he indicated that that would be only a fraction of the actual time he put in on MLs during that year, including the maintenance required before each trip.

- Asbestos was widespread throughout the ML; it was in the galley and the exhaust pipes in the engine room were lagged with asbestos. Anywhere on board the ML was a confined space, so he would have been exposed to asbestos. It could have been dislodged.
- He sought information about the old Naval Volunteer Reserve HQ in Buckle Street, but the records have been destroyed. He went to the Wellington City Council to seek information about the Ghuznee Street and Hinemoa Street buildings, and believes it is more than probable that asbestos was in those buildings as they had a high level of dust, but acknowledges he does not know what was in that dust.

Mr Compain, the RNZRSA representative, noted that the RNZRSA would be bringing to the attention of Veterans' Affairs further modern deployments which have also involved exposure to asbestos.

The case for the Respondent Veterans' Affairs

Ms Eller apologised to the Appellant for not being able to provide a timely service in his claim. She referred to the backlog of thousands of claims Veterans' Affairs had to process, due in part to the new legislation and the effects of the Kaikoura earthquake.

Dr O'Reilly made the following main points:

- The Repatriation Medical Authority's Statements of Principles are legislative instruments. The appropriateness of the SoPs and the factors within them are beyond the scope of an appeal.
- The SoP was applied appropriately, and the specific factor regarding asbestos exposure was the only factor applicable.
- Decisions can be made with incomplete facts. Veterans' Affairs recognises the vulnerabilities in the historic record keeping of the NZDF and the impact of subsequent archival practices on the integrity and reliability of historical service records.
- The ability to draw inferences regarding exposures allows for a benevolent interpretation of the SoP factors.
- The most probable environment in which the Appellant would be exposed to asbestos was on board the MLs, although Veterans' Affairs acknowledges the possibility of exposure during work in headquarters.
- When the naval records are combined with the Appellant's recollections of when he served, there is evidence that the Appellant conducted approximately 80 days of training or tasks on board a ML. Veterans' Affairs acknowledges that there is no data for 1971, but has drawn an inference that the Appellant would have accumulated 108 days of exposure during the relevant period of service between March 1970 and April 1972, based on extrapolation from the available data and recollections. Working on that basis it would take 19 hours per day of exposure at the time material containing respirable asbestos fibres was being applied, removed, dislodged, cut or drilled in order to reach the threshold of 2000 hours total exposure. It is implausible that the Appellant would have been exposed to asbestos for 2000 hours in those circumstances..

- Even if Veterans' Affairs accepted Mr Walsh's evidence that he was in the vessel for 1800 hours and spent an equivalent number of hours conducting maintenance alongside, he would need to have spent 55% of his time working directly with asbestos which was being applied, removed, dislodged, cut or drilled. That is also implausible.
- The Appellant can write to the RNZRSA or the Minister for Veterans seeking a review of the SoP, if he is dissatisfied with the regulatory framework.
- The requirement for Veterans' Affairs to make a decision on claims within 30 days was removed from the Act when it was reviewed, as the time frame was not realistic.

Analysis

The Board had specific regard to all the principles specified in section 10(b) of the Act, and the overarching benevolent intent of the Act.

Section 14 of the Act sets out the sequential steps to be taken in deciding whether to accept a claim. The first step is to consider all the available material that is relevant and decide whether the material is consistent with a hypothesis that the veteran's injury, illness, or death was service-related. If the material is consistent with such a hypothesis then the second step is to decide whether there is a SoP that applies. If there is no SoP that applies, then section 15 applies. If there is a SoP that applies, the third step is to decide whether the hypothesis is consistent with the SoP. If it is consistent with the SoP, the claim must be accepted unless there are reasonable grounds for believing that the veteran's injury, illness, or death was not service-related.

The Appellant has qualifying routine service only. As a consequence, under regulation 15 of the Veterans' Support Regulations 2014, the SoP which applies in this case is the Balance of Probabilities Statement of Principle No. 38 of 2013 Malignant Neoplasm of the Colorectum.

Clause 6 of the SoP contains the factors which must exist before it can be said that, on the balance of probabilities, malignant neoplasm of the colorectum or death from malignant neoplasm of the colorectum, is associated with the circumstances of a person's relevant service.

The factor prescribed in clause 6(h) states:

Inhaling respirable asbestos fibres in an enclosed space:

- (i) For a cumulative period of at least 2000 hours before the clinical onset of malignant neoplasm of the colorectum; and
- (ii) at the time material containing respirable fibres was being applied, removed, dislodged, cut or drilled; and
- (iii) the first inhalation of asbestos fibres commenced at least 10 years before the clinical onset of malignant neoplasm of the colorectum.

The Appeal Board notes the length of time it has taken for the resolution of the Appellant's claim by Veterans' Affairs. This has understandably had a negative impact on the veteran which is regrettable.

The Appeal Board acknowledges that the Appellant's life has been significantly altered by his cancer diagnosis, his ongoing need for an ostomy bag and his peripheral neuropathy.

Pursuant to section 14 of the Act, the first step for the Appeal Board is to decide whether the facts are consistent with a hypothesis that the veteran's condition was service-related. Section 7 defines "service-related" as "caused by, contributed to, or aggravated by qualifying service."

The Appellant has qualifying routine service under the Act, as a volunteer naval reserve between 24 March 1970 and 31 March 1974.² The condition with which he has been diagnosed is malignant neoplasm of the colorectum.

For a condition to be service-related, the Act requires a valid hypothesis of a relationship to service, and for that hypothesis to be consistent with one or more of the factors within the SoPs associated with the condition.

The Appeal Board agrees with the Review Officer's determination that there is a hypothesis that the Appellant's condition could be related to his qualifying service, but he does not meet any factor in the SoP to connect his condition to his service. The Appeal Board accepts that the SoPs are legislative instruments and the appropriateness of the SoPs and the factors within them are beyond the scope of an appeal.

The factor in clause 6(h) of the SoP requires the Appellant, before the clinical onset of his bowel cancer, to have inhaled respirable asbestos fibres:

- in an enclosed space;
- for at least 2000 hours; and
- at a time when the material containing the respirable asbestos fibres was being applied, removed, dislodged, cut or drilled.

The Appeal Board accepts the research-based evidence produced by Veterans' Affairs indicating that asbestos fibres are relatively stable while bound in lagging surrounding engine exhausts and are unlikely to become particulate from routine vibration associated with running engines or other activities where there is work not being performed on the lagging itself. While the Appellant took issue with the reference to research on vessels different to the MLs in which he served, the Appeal Board is satisfied that the research is relevant and applicable to the specific issue of the stability of asbestos fibres in pipe lagging.

The Appeal Board acknowledges the limitations an incomplete service record and the passage of time have imposed on the Appellant's ability to show that he meets the relevant factor in the SoP. The Appeal Board has applied a benevolent approach to the evidence provided by the Appellant. Even drawing the most generous inference as to the hours the Appellant might have been exposed to respirable asbestos fibres which was being applied, removed, dislodged, cut or drilled, it is not plausible that he could have been so exposed for 2000 hours during his qualifying routine service. To his credit, the Appellant acknowledges this. His real complaint is against the criteria in the SoP itself, which is not something that the Appeal Board can rule on.

² The cut-off date reflects the date on which the Accident Compensation Act 1972 came into force: Veterans' Support Act 2014 s 8(2).

Outcome

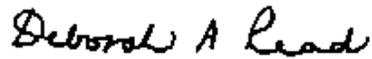
The Appeal Board confirms the Review Officer's decision of 20 July 2020 upholding the 25 June 2019 decision of the Decision Officer to decline to accept the Appellant's Malignant Neoplasm of the Colo-Rectum as service-related under the Veterans' Support Act 2014.



Ms Raewyn Anderson, Chairperson



Mr Christopher Griggs, Member



Dr Deborah Read, Member



Dr Chris Holdaway, Member

Date: 20 October 2021