[redacted]
War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: Neal Grant CATLEY

Service Number and Rank: [redacted]

Address: [redacted]

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

Held: at Wellington on 14 September 2018

DECISION

1. This is an appeal by Neal Grant CATLEY (the **Appellant**) against the decision of the Review Officer (**RO**) dated 11 April 2016 to uphold the Decision Officer's decision of 2 February 2016 and decline to accept the condition of **Asthma** as being service-related under the Veterans' Support Act 2014 (**VSA**).

2. At his request, the Appellant attended the appeal hearing via teleconference. Veterans' Affairs New Zealand (**VANZ**) was represented by Mr Graeme Astle. Ms Ann-Marie Tribe of VANZ was in attendance.

Preliminary Matter

3. On 22 November 2017 the Veterans' Entitlements Appeal Board (the **Board**) considered the Appellant's notice of appeal against the RO's decision declining his claim for the condition of Asthma. On 27 November 2017, at the Board's request, the Secretary had written to the Appellant asking for an explanation as to why he had not made his appeal within six months as required by the Act. Having considered the Appellant's response, the Board determined on 4 December 2017 that it would be in the interests of justice to exercise its discretion under section 228(5) of the Act to extend the time for bringing the appeal to enable the appeal to proceed.

Background to the appeal

4. On 2 February 2016 the Decision Officer (**DO**) declined to accept the Appellant's claimed condition of Asthma *"as the evidence available shows it is not related to your qualifying service".* The reason for her decision was: "*The relevant Statement of Principles, Asthma, No 60 of 2012, applied does not uphold a causal relationship to service. You have written on your application form that you 'had asthma prior to joining…' As this condition was an underlying condition, your service smoking could have aggravated your asthma. In considering whether your smoking during service aggravated your asthma the definition of 'clinical worsening of asthma' in the Statement of Principles needs to be*

met. From the Asthma, No 60 of 2012 Statement of Principles, the definition of clinical worsening means permanent worsening of asthma evidenced by (a) an episode of severe asthma resulting in status asthmaticus, cerebral hypoxia or death (b) a persistent change from well controlled to poorly controlled asthma; or (c) a substantial increase in the requirement for hospitalisation for management of the manifestations or complications of asthma. There is no information to show that clinical worsening of your asthma meets this definition."

5. On 11 April 2016 the RO upheld the DO's decision of 2 February 2016 and declined to accept Asthma as being service-related under the VSA. In coming to her decision, the RO noted that the Appellant had "*noted in the Disablement Pension received on 23 February 2015 in respect of his claim for Asthma….how he believes his service caused, contributed to or aggravated this condition: 'Had asthma prior to joining. Condition was aggravated by being compelled to smoke cigarettes. SoP 60/2012.'"* The RO further noted that the Appellant's General Practitioner, Dr Stuart Lydiard, *"confirmed a current diagnosis of asthma and advised of past and current treatment used to manage the condition (inhalers/nebuliser), and that… [the Appellant] becomes short of breath and has a cough if he omits his treatment."* She observed that *"documentation accompanying the application included: a copy of a letter dated 12 October 2010 from Respiratory Specialist Nurses that noted lung function (spirometry) assessment findings; a copy of the spirometry assessment report dated 12 October 2010; a copy of Dr Lydiard's letter dated 17 January 2011 that had previously been provided in support of a review of decision application in 2011 in respect to decline [the Appellant's] claim of Asthma under the War Pensions Act 1954."* The RO also observed that the Appellant *"is eligible for coverage under the [VSA] in respect of qualifying routine non-operational service from 19 September 1957 to 31 March 1974 (non-operational service from 1 April 1974 comes under coverage of ACC); and qualifying operational service during the Indonesian Confrontation while service [sic] on HMNZS Otago."*

6. Having noted the Appellant's qualifying service, the RO had regard to the Appellant's service medical documentation which she observed showed "*[the Appellant] was treated for various respiratory tract conditions during his naval career (common cold, tracheitis, influenza, bronchitis, chest infection)"* and that *"no respiratory problems were stated or documented in the medical examination report prior to release from the Navy in 1985."* She also noted the information provided *"in a VANZ Smoking Questionnaire dated 26 October 2010"* in which the Appellant stated he *"started smoking during service in 1957; smoked cigarettes and occasionally a pipe; and started smoking because 'The Royal New Zealand Navy <u>forced me</u> to start smoking!'"* The RO also noted that the Appellant had stated that he *"became a regular smoker at the age of 15 years 3 months. His smoking habit increased during service due to being addicted to smoking and (because of) easy access to duty-free cigarettes";* that *"[the Appellant] has written that on retirement from the RNZN in 1985 he attended a 'how to stop smoking seminar' and from that day forward he has never smoked"* and that he had provided the additional comment: *"Upon entry to the Royal New Zealand Navy in September 1957, I was marched (together with all my class mates) to the Naval Stores and issued with one (1) pound of Park Drive tobacco. I was then marched to the Armed Forces canteen to purchase two (2) packets of matches and cigarette papers. Immediately thereafter my class were*

given lessons by our Instructor on how to roll cigarettes and how to smoke! We were all told it would make men out of us – and become 'real sailors'. This process for the next two years was repeated every four (4) weeks. I recall being as 'sick-as-a-dog' for many weeks and wished I would be discharged! However, it never happened – and all sympathy I ever got was 'toughen-up' and be a real man! Also I believe 'forced-smoking' was the principal driver that caused the rapid and premature decay of most of my natural teeth, added to that, I believe 'forced-smoking' is the only reason for my respiratory problems." The RO further noted that the Appellant's wife had written on the VANZ Witness Smoking Questionnaire that: *"…she met her husband in 1954/55";* that the Appellant *"started smoking during service in 1957, smoked cigarettes and started smoking because "Joined the Navy. The 'in' thing",* and that the Appellant *"did not smoke when we met in 1954. Started smoking when joined the Navy. Continued due to pressure. Stopped smoking when he left the Navy",* and that she "*had verified that her husband ceased smoking in 1985 as he realised it was causing breathing problems and (smoking) was becoming anti-social."*

7. The RO also had regard to the information provided by the Appellant in his application for a War Disablement Pension received by VANZ in October 2010, in which he noted *"that he had symptoms of shortness of breath and that he was 'susceptible to colds and chest infections requiring regular prescription medication. Required to attend Lower Hutt Hospital Chest Clinic for specialist diagnosis and ongoing treatment'",* and that he believed that his condition was service-related because of *"having to work in confined Radio Control rooms both ashore and afloat with smokers (myself included) and, with no ventilation. Painting of ships, especially in unventilated areas with no protective breathing apparatus."* The RO observed that *"Dr Lydiard had noted the medical diagnosis of asthma";* that the Appellant *"had been referred for respiratory function tests",* and that he *"required the use of inhalers (bronchodilator and steroid) for management of his respiratory condition."* She further observed that *"Dr Lydiard noted that [the Appellant] first consulted with him for this condition in 2006, and had consulted with previous Doctors for many years."* In addition, the RO observed that *"additional information noted in Dr Lydiard's Surgery Consultation dated 30 September 2010 notes that [the Appellant] had asthma as a child, and that the conditions returned in 2003",* and that *"a letter dated 12 October 2010 from Respiratory Specialist Nurse Wendy McBride to Dr Lydiard"* stated: *"Thank you for referring [the Appellant] for spirometry assessment of his dyspnoea. The report shows probable restriction with an FEV1 of 71% or predicted and there was significant response to Salbutanol in the Post BD test with a 340ml increase in the FEV1 bringing it to within normal limits at 81% predicted. I note the abrupt halt to the blows, the fluctuating expiratory limb of the flow/volume loop and coughing bouts at the end of each blow with difficulty catching his breath. He also describes symptoms of huskiness, frequent throat clearing, coughing and has nasal congestion and stuffiness causing post nasal drip which is likely contributing to some vocal cord issues and this may account for the restriction. He uses Otrivin nasal spray fairly often but he has purchased a nasal wash/sinus kit today which may be more successful in relieving the congestion. In addition he is a shallow breather with numerous symptoms related to this, especially the breathlessness at rest and frequent yawning, neck and shoulder discomfort, intermittent dizziness and pins and needles in his fingers. I have discussed abdominal breathing techniques to activate the diaphragm with emphasis on exhaling fully. I understand that he has had an asthma*

diagnosis confirmed in the past, but at present all he uses is intermittent Flixotide with a spacer. I have explained that an ICS needs to be used regularly and he would benefit from the addition of Salbutamol as evidenced from the reversibility component on the spirometry. I have also given him a spacer to help with better lung deposition."

8. The RO further had regard to the information in the medical assessment report dated 27 October 2015 from Respiratory Physician Dr Adrian Harrison, in which he noted that the Appellant *"had a 25 pack-year smoking history";* that the Appellant's *"history in respect of symptoms, asbestos and cordite exposure, and asthma triggers",* and that in respect of his history of asthma: *"As a small child [the Appellant] had an episode of suspect bronchiolitis with cough and sputum going on between 1-2 years between the ages of approximately 3-5 years. Subsequently he had no chest symptoms at all, an in particular there is nothing in his early life to suggest asthma prior to joining the RNZN at age 15 years."* The RO observed that the *"assessment included lung function testing (spirometry) and chest x-ray";* that *"Dr Harrison noted the lung function test results supported a diagnosis of asthma"*; that *"chest x-ray showed no abnormalities, and specifically showed no interstitial lung disease or pleural plaques",* and that *"Dr Harrison's assessment summary included classification and percentage estimate for impairment of the whole person in relation to AMA guidelines."*

9. The RO determined that the *"documentation/evidence available provides no verifiable information to show the condition of asthma was present before or during qualifying operational service, therefore it cannot be presumed to have been a result of or aggravated by the performance of qualifying operational service under section 19 of the Veterans' Support Act 2014, nor is asthma a 'conclusively presumed condition' under section 21 (previously known as 'Presumptive List conditions)'."* Having observed that *"there is a Statement of Principles for Asthma"*, she noted that *"therefore section 14 of the Veterans' Support Act 2014 is applied. Section 14 applies the Statement of Principles for determining whether or not the condition is connected to qualifying service."* Further observing that *"SOPs provide definitions of the disease or injury and specify what factors must exist for the condition to be causally connected to the veteran's qualifying service"* and that *"only one factor need be met for the claim to be successful, provided the material available is consistent with a hypothesis that the injury, illness or death was service related",* the RO noted that the Statement of Principles *"currently approved for use by Veterans' Affairs is Asthma No. 60 of 2012 (Reasonable Hypothesis)."*

10. In coming to her conclusion, the RO noted that *"the information available refers to asthma/symptoms as a very young child that wasn't evident at the time of joining the Navy"* and determined that from the evidence available she was *"unable to establish a diagnosis of asthma during service."* The RO observed that *"Dr Lydiard noted that the condition returned in 2003, and that the condition was treated with inhalers";* that the *"investigation in 2010 was suggestive of asthma",* and that it was *"noted at the time that diagnosis of asthma had been given in the past."* She further noted that *"recent investigation confirms a diagnosis of asthma."* Having considered *"all the available material in relation to the factors listed in the SoP",* the RO concluded that *"no factors are established to connect the asthma with the circumstances of [the Appellant's] qualifying service."*

The RO accordingly determined *"the decision of 2 February 2016 to decline the claim for Asthma is upheld."*

11. On 6 October 2016 the Appellant gave notice of appeal to the *"Independent Veterans' Entitlements Appeal Board",* stating that *"following my attendance at the VANZ Act 2014 review at the Tauranga RSA, I now wish to be reconsidered for a review of my asthma condition. The following facts are considered relevant.*

    A. Assessment by Adrian C Harrison letter of 27 October 2015. Dr Harrison's assessment is attached.

    ASSESSMENT

    1. *[The Appellant] has asthma which, as far as I am able to ascertain, started at the age of 15 after joining the RNZ Navy. I could not elicit any symptoms to suggest asthma prior to that date. The absence of both allergic trigger factors and family history of asthma tend to argue that he did not have pre-existing risk factors before its onset.*
    2. *It is often not possible to ascribe a cause to asthma but cigarette smoking would certainly have been an important provoking it [sic] and was most likely the causative factor.*
    3. *The asthma seems to be stable. I think that it would be appropriate for him to try Symbicort 200/6 turbuhaler two puffs bd and take this regularly. I am not convinced that Flixotide and Ventolin alone will be providing him with the best possible treatment.*
    4. *According to AMA Guidelines, [the Appellant] has Class 2 respiratory impairment from all causes, which I estimate to be 15% impairment of the whole person….*

    B. Dr Stuart Lydiard's letter of 06 October 2017. Dr Lydiard's letter is attached.

    C. Email to VANZ Review Secretariat dated 26 September 2017 is attached."

Appellant's written submissions

12. In a written submission dated 16 July 2018, the Appellant reiterated his earlier statements to the effect that he did not suffer from the condition of asthma prior to joining the RNZN, noting that *"…at my medical examination dated 16 July 1957 at Rotorua it clearly states that I have never suffered from Asthma. Also, as a result of my rigorous final examination at the Royal New Zealand Naval Hospital, HMNZS Philomel on 18 September 1957, by several military Doctors/Surgeons, there was no medical condition past or present whatsoever to stop my joining the RNZN."* The Appellant further submitted that *"it is well documented the initial stage of my Naval career at HMNZS Tamaki [Motuihe Island] all of the boys in my intake [42nd Boys] were coerced/forced, to smoke cigarettes. As a result, I became a frequent patient at the Sick Bay suffering from chest pains, headaches, wheezing and, in some cases painful boils over my hips and backside. At those times, I told the Sick Bay attendant[s] my having to smoke all the time is making me sick. The normal stock-standard Sick Bay attendant[s] reply was, 'don't worry about it young lad – soon you'll get used to smoking and then you can call yourself a real sailor!' As a young 15 year old boy I no [sic] reason to disbelieve the advice of the Sick Bay attendant[s]."* The Appellant went on to submit that after one year at HMNZS Tamaki, he graduated and was posted to HMNZS Philomel to start his basic communications course. He wrote that his *"chest pains and headaches continued and, as such, I frequently visited the RNZN hospital."* He further wrote that *"on a few occasions, I was admitted to*

hospital in order to investigate my chest pains, headaches and wheezing. Following unspecified medical examinations/tests, I was advised by two senior medical officers [Commanders Frew and Reid] that my medical symptoms pointed to asthma attacks. I learned in later years that my medical condition was not recorded as Asthma but Pluerisy. In hindsight, I firmly believe it was a 'cover up' as formally recording my smoking was the root cause of my asthma attacks would've caused much anxiety with serious consequences to the RNZN generally and, in particular, to its senior naval medical officers and their staff."

13. In his written submission, the Appellant also advised to the effect that in February 1959 he was "*so concerned about his chest pains, headaches and wheezing"* that he decided to visit his Auntie's doctor (whose name he could not recall) in Ellerslie/Greenlane. He wrote: *"To cut to the nut, the Doctor following his examination said I had Asthma and gave me a 'repeat' prescription of 50 Ephedrine pills…"* and that the Doctor had *"suggested that I should try to cut down my smoking habit"* which the Appellant wrote he *"tried hard to do that but, failed",* commenting that *"notwithstanding that, throughout my long and distinguished Naval career my Asthma attacks did not stop my being an active sportsman."* The Appellant further wrote *"it is pleasing to note that two separate medical officer reports [dated 8/6/1978 and 8/6/1984] made special note of my honesty."* Adding to that, the Appellant noted that from the start of his second career as a senior executive officer, which involved *"'top level' security vetting procedures"*, his employer *"had total confidence in the quality of my veracity."* The Appellant concluded his written submission by advising that *"as there is nothing further I can add to my Appeal it is not my intention to be present at the Veterans' Entitlements Appeal Board in Wellington on Friday 18 [sic] September 2018…"*

14. In his written submission dated 15 August 2018, Mr Astle acknowledged the submission made by the Appellant which he observed highlighted the following points:
    - *"That prior to joining the Royal New Zealand Navy his medical examination at Rotorua clearly states that he did not suffer from asthma.*
    - *That prior to joining the Navy [the Appellant] was a non-smoker and that he was coerced/forced to smoke cigarettes once he had joined the Navy.*
    - *That from [the Appellant's] perspective he suffered from chest pain, headaches and wheezing during his service in the Navy.*
    - *That he was admitted to hospital on a few occasions during his service in the Navy and in his view, he was advised by two senior medical officers that his medical symptoms pointed to asthma attacks although he later learned this was recorded as pleurisy.*
    - *That in February 1959 he visited a doctor in Auckland who indicated he had asthma and was prescribed ephedrine pills."*

Respondent's written submissions

15. Noting that the above mentioned matters would be *"addressed later in this submission",* Mr Astle, by way of background, observed that the Appellant had applied for a War Disablement Pension under the War Pensions Act 1954; that "*his application included several conditions and illnesses including shortness of breath";* that *"on 9 December 2010 [the Appellant's] application for shortness of breath (redefined as asthma) was declined on the basis that there was insufficient information available to*

confirm his condition was caused by an event or incident in his service as for the presumption of attributability to or aggravation by service to apply under that legislation", and that *"this decision was reviewed by [the Appellant] and after further consideration the decision to decline Asthma was upheld by the National Review Officer on 3 June 2011."* Having further noted that the Appellant had several accepted conditions, and that his *"total combined whole person impairment percentage is 63%",* Mr Astle had regard to the Appellant's application for a disablement pension for the condition of Asthma, filed on 23 February 2015. Mr Astle also observed that "*in his application it was noted that [the Appellant] had asthma prior to joining the Navy and that this condition was aggravated by being compelled to smoke cigarettes during his service in the Navy";* that *"this is like what was stated in [the Appellant's] application under the War Pensions Act",* but that *"as part of his review under that Act [the Appellant] had noted that he did not have asthma or any other chest infection when he joined the Navy";* that "*despite this earlier assertion, the Decision Officer found that on the basis outlined in [the Appellant's] application under the Veterans' Support Act 2014 that as he had asthma when joining the Navy that there was no information to show that clinical worsening of his asthma had occurred during service"* and that the DO "*had therefore declined the application noting that no factor could be met in the relevant Statement of Principles."*

16. Having observed that the Appellant *"filed for a review on 23 December 2016, having been granted an extension of time to do so",* and that *"his review application included further information relating to when his asthma may have first occurred",* Mr Astle noted that the Appellant *"was adamant that he did not have asthma when he joined the Navy and that this was reflected by [sic] the extensive medical examinations he underwent prior to being accepted into the Navy."* Having submitted that in relation to the RO's decision of 11 April 2016, *"which is the subject of the appeal",* Mr Astle highlighted a number of points, including:
    - *"That [the Appellant] has qualifying service under the Veterans' Support Act 2014 in respect of qualifying routine non-operational service from 19 September 1957 to 31 March 1974 and qualifying operational service during the Indonesian Confrontation whilst serving on HMNZS Otago (noting that non-operational service from 1 April 1974 comes under coverage of ACC).*
    - *That the [RO] considered [the Appellant's] personnel [sic] and medical files, War Disablement Pension information, case management documentation and the review documentation filed by [the Appellant]"* and that reference was made to the following documentation and information:
        (i) General Practitioner Dr Stuart Lydiard's confirmed current diagnosis of asthma;
        (ii) Service medical documentation showing that [the Appellant] had been treated for various respiratory tract conditions during his naval career;
        (iii) No respiratory problems were stated or documented in the medical examination report prior to [the Appellant's] release from the Navy in 1985;
        (iv) A VANZ Smoking Questionnaire dated 26 October 2010 completed by [the Appellant] where it was noted that he started smoking during service in 1957 and that his smoking habit increased during service due to being addicted to smoking. He stopped smoking in 1985 after leaving the Navy;

(v) *Various medical reports and information from Dr Lydiard's Surgery Consultation (30 September 2010);*

(vi) *A medical assessment from Dr Adrian Harrison dated 27 October 2015 which noted that [the Appellant] had a 25-pack year smoking history. He also noted a history in respect of symptoms, asbestos and cordite exposure and asthma triggers. Dr Harrison concluded that there was nothing in [the Appellant's] early life to suggest asthma prior to joining the Navy at the age of 15. He also noted that lung function test results supported a diagnosis of asthma."*

Mr Astle noted that the RO had *"concluded after reviewing all available material that the documentation provided no verifiable information to show the condition of Asthma was present before or during qualifying operational-service";* that *"in addition, it could not therefore be presumed to have been because of or aggravated by the performance of qualifying operational service under Section 19 of the Veterans' Support Act 2014",* and that *"as Asthma is not a conclusively presumed condition (s21) the Statements of Principles (SoP) applies (s14). The SoP used Asthma No.60 of 2012 (Reasonable Hypothesis)."* He further noted that the RO *"was unable to establish from the evidence available a diagnosis of asthma during service";* that *"Dr Lydiard had noted that the condition had returned on [sic] 2003 and that it was treated with inhalers";* that *"investigation in 2010 was suggestive of asthma and it was also noted at that time that a diagnosis of asthma had been given in the past";* that *"recent investigation confirmed a diagnosis of asthma…however, the conclusion was that no factors had been established in SoP No.60 of 2012 to connect asthma with the circumstances of [the Appellant's] qualifying service",* and that *"on this basis the [RO] upheld the [DO's] decision to decline the claim."*

17. In further considering the Appellant's submission, Mr Astle noted that "*the relevant Statement of Principle is No. 60 of 2012"* and that the definition of 'asthma' was prescribed in clause 3(b) of that SoP. Having noted the statements of the Repatriation Medical Authority (**RMA**) with respect to clauses 4, 6, 7 and 9 of the SoP, Mr Astle observed that *"in [the Appellant's] situation the most relevant SoP factor is factor 6(h)",* but further noted that the Appellant had *"stated in his submission that prior to joining the Royal New Zealand Navy his medical examination at Rotorua clearly states that he did not suffer from asthma"* and that *"service medical documentation show that [the Appellant] was treated for various respiratory tract conditions during his naval career, several [of] which could be considered as being symptomatic of having asthma."* Mr Astle also observed that *"Dr Harrison noted that [the Appellant] had a 25 pack-year smoking history, asbestos and cordite exposure and asthma triggers",* however he noted that *"[the Appellant's] service medical records do not indicate a diagnosis of asthma";* that *"No respiratory problems were stated or documented in the medical examination report prior to [the Appellant's] release from the Navy in 1985"* and that *"Dr Lydiard's Surgery Consultation dated 30 September 2010 notes that [the Appellant] had asthma as a child (which [the Appellant] disputes and that the condition returned in 2003."*

18. Mr Astle concluded his written submission stating: *"When considering the relevant clauses of the SoP outlined above in conjunction with the medical information and material provided by [the Appellant] and on the basis that he did not have asthma as a pre-existing condition when he joined*

the Navy, Veterans' Affairs respectfully submits that no factor is able to be met in the relevant SoP." He further submitted that *"the Decision Officer's decision made on 2 February 2016 to decline the application for asthma, which was upheld by the National Review Officer's decision on 11 April 2016, is the correct one",* this being *"on the basis that the information available does not establish a qualifying factor in the Statement of Principles that would establish that the clinical worsening of asthma had occurred (noting that no pre-existing condition existed) due to the circumstances of [the Appellant's] qualifying service."*

Appellant's further written submission

19. By way of letter dated 4 September 2018, the Appellant made a further written submission, in which he responded to the various points made in VANZ's written submission dated 15 August 2018. The Appellant wrote:

> *"In response to page 3, paragraph 2, I have stated several times during the past few years that I did not have asthma prior to my joining the Royal New Zealand Navy [RNZN] in September 1957. I did, however, admit that I made a silly mistake on my initial VANZ application in saying I had asthma as a young child. You will see at paragraph 2 of [the Appellant's letter of 4 December 2017], I again took ownership of my mistake and stated that, 'I am prepared to formally recant my mistake and, as such, sign an affidavit in any NZ court, or law office.' My offer to do this will never change. Also please note my GP [Stuart Lydiard] through no fault of his own, [who has copies of all my VANZ medical correspondence], in his letter to VANZ copied what I had written in my initial VANZ application. That is, my silly asthma mistake of saying I had asthma as a young child. My GP was not born when I was a young child.*
>
> *In response to page 3, Review of Decision the first paragraph is correct.*
>
> *In response to [the Appellant's] Decision, paragraph 1 is correct.*
>
> *In response to Background, paragraph 2 at 63% is incorrect. [The Appellant's] combined whole person impairment percentage is 66%. [Reference D (i.e. VANZ letter dated 20 August 2018) refers]*
>
> *You will see Dr Lydiard's Letter at Reference C, supports Dr Harrison's conclusion.*
>
> *Quote.*
>
> *Dr Harrison clearly states that [the Appellant] had a history of bronchiolitis as a child. <u>This condition is not asthma</u>, and many children with this will wheeze for a long time after this.*
>
> *Unquote.*
>
> *My Mother and Father in April 1952 immigrated [sic] from England to New Zealand. Prior to receiving New Zealand Government Immigration approval the family, including their three sons, had to undergo a comprehensive and rigorous UK Hospital medical assessment/examination. Nobody in my family was diagnosed with asthma. Note that, had asthma been detected in any of the family members then, immigration to New Zealand would've been declined. I was nine years old when the family departed England.*
>
> *Dr Harrison's Medical Report at Reference E clearly states, under Assessment.*
>
> *Quote.*
>
> *'[The Appellant] has asthma which, as far as I am able to ascertain, started at the age of 15 after joining the RNZ Navy. I could not elicit any symptoms to suggest asthma prior to that date. The absence of both allergic trigger factors and family history of asthma tend to argue that he did not have pre-existing risk factors before the onset.*

Unquote.

Also, at paragraph 4 of Dr Harrison's Assessment it states:

Quote.

'According to AMA guidelines [the Appellant] has Class 2 respiratory impairment for all causes, which I estimate to be 15% impairment of the whole person.'

Unquote.

In response to page 6, paragraph 7, Conclusion. Unfortunately, my professional skill-set does not extend to my understanding of what is meant by:

'the information available does not establish a qualifying factor in the Statement of Principles that would establish that the clinical worsening of asthma had occurred [noting that no pre-existing condition existed] due to the circumstances of [the Appellant's] qualifying service.'

However, Dr Harrison's Specialist Report at Reference E is clear in that I did not have asthma prior to joining the RNZN and in accordance with AMA guidelines my whole person impairment is assessed at 15%.

Forwarded for your consideration. Thank you."

The appeal hearing

20. At the hearing of the appeal held on 14 September 2018, which the Appellant attended via teleconference, the Appellant wholeheartedly reiterated that he "*did not have asthma prior to joining the Navy*." Noting the apparent importance to the Appellant of being believed in this regard and to relieve the Appellant of feeling compelled to argue the point further, the Board took the unusual step of advising the Appellant at this stage of the hearing that it accepted that he did not have asthma prior to joining the Navy in September 1957. The Appellant expressed his thanks at being believed, saying *"there is no point in saying what is not true."*

21. The Appellant recalled that on his second day in the Navy he had been issued with one pound of tobacco, and that he had been taken to the Armed Forces Canteen to purchase two packets of cigarette paper, and then to his dormitory where he had been taught how to roll cigarettes. He explained that this was just *"part of the joining routine"*, adding that when he smoked *he "felt as sick as a dog",* but was told *"not to be a silly lad"* and that smoking *"was part of being a sailor".* The Appellant advised that *"this went on for ages",* and that he became *"addicted."* When asked by the Board to explain his symptoms, the Appellant deposed that he *"couldn't breathe properly",* he was *"hyperventilating",* he *"couldn't run";* that he *"went to the sick bay a lot"*, and that *"that's the guts of it."* When asked what happened when at the Sick Bay, the Appellant advised *"nothing really, it was poorly run"*, and that because he attended often, *"an aspirin was stuck to [his] forehead and [he] was told to 'go away'."* The Appellant further recalled one occasion that he went to the hospital (but was not admitted), and saw *"two Navy doctors, Commanders Frew and Reid, who indicated that I may have asthma, but this was not recorded."* He concluded by stating, to the effect that there was not much more to add, other than what was written: that he applied to VANZ, but that the upshot was that on the evidence his applications were declined.

22. In response, Mr Astle noted that VANZ had considered the Appellant's application and observed that the matter involved *"a technical issue"* involving "*his not having asthma before he joined [the Navy]."* Mr Astle opined that if the Appellant had in fact had asthma prior to joining the service, it may have been possible, taking into account the amount the Appellant had smoked, to have granted his claim by reference to the SoP factor that referenced smoking, namely factor 6(h). Mr Astle further observed however, that "*while medical people had indicated that [the Appellant] may have had asthma, this was not recorded anywhere",* and advised that *"it was around this key point that VANZ had decided not to accept the claim."*

23. The Appellant once more reiterated emphatically that he *"had never had asthma before joining the Navy";* that *"if he had had asthma he wouldn't have been joining the Navy",* and that the fact that he had not smoked before joining the Navy was made clear in the Smoking Questionnaire that he had completed. He submitted that the *"medical people were not efficient and effective in what they [did]",* and that *"ratings wrote things down and signed it."* When asked by the Board whether he could remember wheezing or being short of breath before he joined the Navy, the Appellant advised that he could not, but that he did recall that on the rare occasions that his family could afford to take him to the doctor, the doctor said that he *"had bronchitis*, *he never said asthma."* The Appellant specifically recalled going for a medical examination prior to emigrating to New Zealand, and that he had *"no symptoms of asthma",* noting that if he had had such symptoms his family "*wouldn't have been able to come to New Zealand."* The Appellant concluded his evidence by stating that he could "*only rely on telling the truth"* and *"only rely on specialists' reports";* that Dr Harrison *"had carried out a comprehensive examination";* that his recommendation was that *"[the Appellant's] asthma was caused by his smoking"* and that he *"should have 15% impairment for his respiratory impairment."*

Appeals under the VSA

24. 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.

Statements of Principle (SoPs)

25. The Australian SoPs that are applicable in New Zealand and apply for the purposes of the VSA are listed in Schedule 1 of the Veterans' Support Regulations 2014, as amended from time to time. The production in proceedings of a SoP or amendment of a SoP, certified by the Chief of Defence Force as applying in New Zealand, is, in the absence of proof to the contrary, sufficient evidence that the SoP applies in New Zealand.

26. SoPs are usually structured in the following manner. In the clause of the SoP named 'Kind of injury, disease or death', the RMA defines the kind of injury, disease or death to which the SoP relates. The clause of the SoP named 'Basis for determining the factors' sets out the basis on which the RMA determines the SoP. In this clause the RMA states that it has formed the view that there is sound medical-scientific evidence that indicates that the particular kind of injury/disease/condition can be related to service. The clause of the SoP named 'Factors that must be related to service' provides that in effect that at least one of the factors in clause 6 must be related to the person's service. The clause named 'Factors' sets out the factors that must exist in a particular case for a claim to succeed. The clause contains factors relating to both the 'clinical onset' and 'clinical worsening' of the injury or disease. If a factor concerns the 'clinical onset' it relates to *cause*. If a factor relates to 'clinical worsening', it relates to *material contribution or aggravation of a pre-existing injury/disease/condition.* The clause named 'Factors that only apply to material contribution or aggravation' makes it clear that those factors that concern clinical worsening apply only to material contribution to, or aggravation of, the injury/disease/condition if the injury/disease/condition pre-existed the relevant service.

27. For every kind of injury or disease, the RMA makes two SoPs: a 'reasonable hypothesis' SoP (which in effect says there is sound medical scientific evidence that a particular injury/disease/condition can be connected to service), and a 'balance of probabilities' SoP (which says it is more probable than not that a particular injury/disease/condition can be connected to service.)

The appeal decision

28. Section 14 of the VSA sets out the sequential steps to be taken in deciding whether to accept a claim under the VSA. This section stipulates that 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 in the process 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.

29. The Board noted that the RO had correctly identified that the Appellant had qualifying service for the purposes of the VSA i.e. qualifying routine service with regard to his service in the RNZN during the period 19 September 1957 to 31 March 1974 (noting that non-operational service with effect 1 April 1974 comes under coverage of ACC), and qualifying operational service during the Indonesian

Confrontation in 1966. The Board also observed that the RO had correctly noted that the SoP concerning Asthma No. 60 of 2012 (Reasonable Hypothesis) was currently approved for use by VANZ. In passing, the Board further observed that SoP concerning Asthma No.61 of 2012 (Balance of Probabilities) also applied for the purposes of the VSA.

30. The Board considered that on analysis of the evidence before it there was clear medical evidence to support the Appellant's contention that he did not have asthma prior to joining the Navy in 1957. In this regard, the Board noted the medical assessment report dated 27 October 2015 written by Respiratory Physician Dr Harrison (and to which the RO referred in her decision) that *"As a small child [the Appellant] had an episode of suspected bronchiolitis and sputum going on for between 1-2 years between the ages of approximately 3-5 years. Subsequently he had no chest symptoms at all, and in particular there is nothing in his early life to suggest asthma prior to joining the RNZ Navy at age 15 years… "* This being so, the relevant factors of SoP No. 60 of 2012 for the consideration of the Board were those relating to the clinical onset of asthma i.e. factors 6 (a), (b), (c) and (d) (factors 6 (e) to (l) being those relating to clinical worsening of asthma, and thus not applicable to the Appellant's situation.)

31. Having perused the Appellant's medical file, the Board noted that it was evident that the Appellant had experienced a significant number of colds, episodes of nasal congestion, coughs producing phlegm, chest infections, sore throat, tracheitis, sinusitis, and influenza, from early on in his Naval career. The Board was of the view, however, that these conditions did not typify the condition of asthma. Further the Board observed, as had the RO, that no respiratory problems were recorded in the Appellant's medical examination report prior to his release from the Navy in 1985. The Board noted that the first possible symptom of asthma i.e. *"wheezing – can't quite catch his breath"* was recorded in his file in August 1977, but that at no time during his service was the Appellant diagnosed as having asthma. Dr Lydiard's evidence suggested that the Appellant's diagnosis of asthma may have been made around 2003, years after he was released from service in the Navy.

32. In addition to the above - with regard to factor 6(a), the Board considered whether smoking could be regarded as an 'immunologic or non-immunologic stimulus' for the purposes of this factor, but determined that, had this been intended the RMA would have made direct reference to smoking as it had done in factor 6(h). The Board also determined that there was no evidence to support the requirement in that factor for the exposure to such a stimulus to have been within 24 hours before the clinical onset of asthma. Having further decided that on the evidence available it was not able to find that the requirements of factor 6 (b), (c) or (d) had been met, the Board determined the Appellant's condition of asthma was not service-related.

33. Noting in passing Mr Astle's observation that had the Appellant in fact had asthma prior to joining the service it may have been possible, taking into account the amount the Appellant had smoked, to have granted his claim by reference to the SoP factor that referenced smoking, namely factor 6(h), the Board considered whether such action might have been warranted. On considering the evidence available to it, the Board formed the view that, having regard to the definition of the term 'clinical worsening of asthma' in clause 9 of the SoP, this factor would not have applied to the Appellant's

situation. In this regard the Board noted the DO's decision dated 2 February 2016, in which she stated: *"…In considering whether your smoking during service aggravated your asthma the definition of 'clinical worsening of asthma' in the Statement of Principles needs to be met. From the Asthma, No. 60 of 2012 Statement of Principles, the definition of clinical worsening means permanent worsening of asthma evidenced by: (a) an episode of severe asthma resulting in status asthmaticus, cerebral hypoxia or death; (b) a persistent change from well controlled to poorly controlled asthma; or (c) a substantial increase in the requirement for hospitalisation for management of the manifestations or complications of asthma".* The Board concurred with the DO's view that *"There is no information to show that clinical worsening of [the Appellant's] asthma meets this definition."*

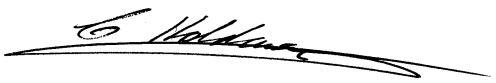
34. The Board had specific regard to all the principles specified in section 10(b) of the VSA, and the overarching benevolent intent of the VSA. Having considered carefully all the evidence before it, the Board concurred with the RO's conclusion that *"no factors are established to connect the asthma with the circumstances of [the Appellant's] qualifying service"* and her decision to uphold the DO's decision of 2 February 2016 *"to decline the claim for Asthma."* Accordingly, the Board determined that the hypothesis that the Appellant's condition of asthma was service-related was not consistent with the SoP, and confirmed the decision of the RO dated 11 April 2016 to "*uphold the decision of 2 February 2016 and decline to accept Asthma as service-related under the Veterans' Support Act 2014."*

Order relating to the publication of decision

35. Pursuant to the powers vested in it by section 238(3) of the VSA, and having regard to the Appellant's views on the matter, in particular his willingness for his name to be published, the Board makes an order prohibiting only the publication of the Appellant's address, service number and War Pension Number.

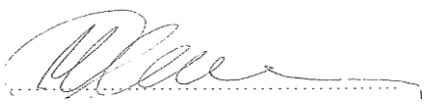
The appeal is dismissed

Ms Rebecca Ewert, Chairperson



Dr Chris Holdaway, Member

Ms Raewyn Anderson, Member



Dr Hillary Gray, Member

1 October 2018