

5th June 2018



Compensation and Rehabilitation for Veterans
Productivity Commission
GPO Box 1428
CANBERRA CITY
ACT 2604

Veterans Compensation and Rehabilitation Inquiry

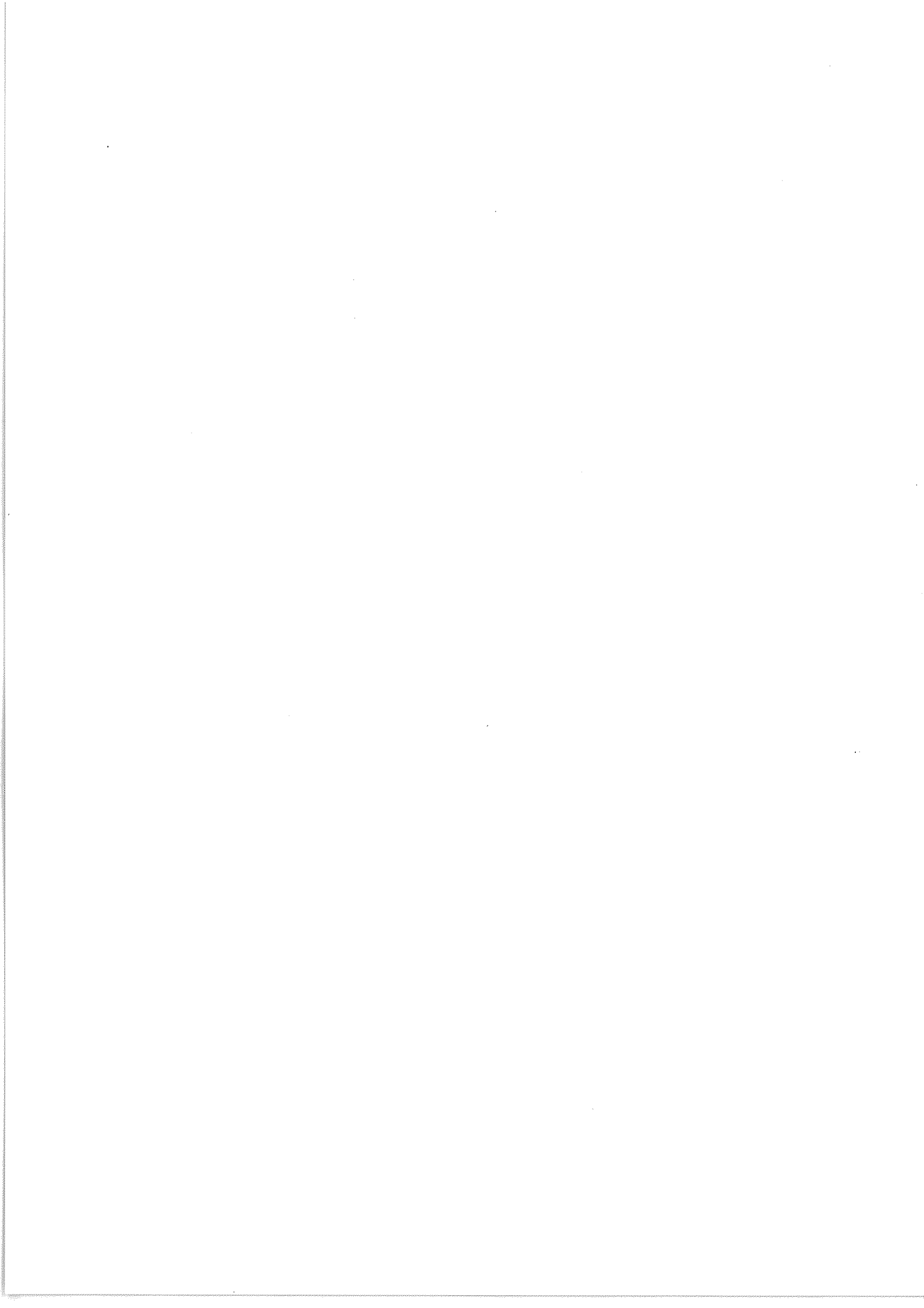
1. I, Terence Meehan am a practicing Compensations Advocate Level 4, trained under both the Training Information Program (TIP) and the Advocacy Training Development Program (ADTP). I currently practice at the Hervey Bay RSL Sub Branch on behalf of ex-servicemen and ex-service women throughout the Wide Bay Region.
2. I am also the Deputy Regional Manager for the ATDP Queensland and the Northern Territory.
3. My submission relates, in the main, to what I believe to be an inequity of the Statements of Principals (SOP's) used when dealing with former members of the Royal Australian Air Force (RAAF) who were involved in the "F-111 Deaseal/Reseal Program".
4. The Statements of Principal to which I refer are:- No. 83 of 2015 and No. 84 of 2015.
5. Should you require any additional information I can be contacted as indicated below:-

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On 21 May 2008, the Minister for Veterans Affairs, the Hon. Alan Griffin MP, wrote to the Chairman of the Joint Standing Committee for Foreign Affairs, Defence and Trade, Senator Michael Forshaw, noting that:

“One of the election commitments of the Rudd Government was that it would conduct a Parliamentary Inquiry into the adequacy of the health and support needs of RAAF Deseal/Reseal workers and their families”.

After hearing initially from the Government Agencies directly involved in the Deseal/Reseal (DSRS) issue, the Department of Defence, Veterans Affairs and the Commonwealth Ombudsman in Canberra on 21st July 2008, the Committee held two public hearings in Brisbane on 28th and 29th July 2008. Another public hearing was held in Canberra on 19th September which allowed the Committee to revisit a range of issues with relevant Government agencies as well as from organisations representing the interests of servicemen and veterans.

The Inquiries conducted by the Committee focused on specific cases directly impacting on upwards of 2,000 ex-personnel and many more family members.

The key dates which defined these issues were:-

- 1973 The first F-111 aircraft arrived in Australia
- 1973 - 2000 Treatment of fuel leaks using ‘pick and patch’ methods
- 1977 - 1982 First DSRS program
- 1985 - 1992 ‘Wings’ program
- 1991 - 1993 Second DSRS program
- 1996 - 1999 Spray seal program
- 28 Jan 2000 Spray seal program suspended

The Department of Veterans Affairs (DVA) Factsheet F-111.04 - Compensation under subsection 7(2) of the DRCA for F-111 workers lists the conditions which can be claimed as being possibly associated with F-111 Deseal/Reseal review. Included among those listed is Depression.

On 2nd October 2014 ex-serviceman Mr. X lodged a claim in respect of ‘Depression’ under the SRCA Act. His treating specialist provided a report confirming the diagnosis of ‘Major Depression’ - liability was accepted.

On 20th April 2015 Veterans Affairs acknowledged receipt of serviceman Mr. X’s claim for permanent impairment lump sum compensation in respect of his compensable condition of ‘Major Depression’.

The Department wrote to Mr. X on 18th May 2015 in respect to this application for permanent impairment. The letter stated: *“In relation to permanent impairment lump sum claims, section 124 (3) states that”:*

124(3) A person is not entitled to compensation under section 24 or 25 in respect of a permanent condition..., being an impairment or death that occurred before the commenting date of:-

- (a) *The person received compensation in respect of that impairment or death under the 1912 ACT, the 1930 Act or the 1971 Act; or*
- (b) *the person was not entitled to receive compensation of a lump sum in respect of the impairment or death;*
 - (i) *where the impairment or death occurred before the commencement of the 1930 Act - under the 1912 Act;*
 - (ii) *where the impairment or death occurred after the commencement of the 1930 Act but before the commencement of the 1971 Act - under the 1930 Act as in force when the impairment or death occurred; or*
 - (iii) *in any other case - under the 1971 Act as in force when the impairment or death occurred.*

The available medical evidence has established that Mr. X does currently suffer a psychiatric condition and that the diagnosis has been confirmed as Major Depression. Furthermore, the available evidence has established that the condition became permanent and stable prior to December 1988. I am therefore satisfied that the psychiatric impairment resulting from your compensable condition became permanent prior to December 1988.

As your impairment became permanent before December 1988, your claim must be assessed in accordance with the provision of the "Compensation (Commonwealth Government Employees) Act 1971.

The Compensation (Commonwealth Government Employees) Act 1971 DID NOT (emphasis added) make provision for payment of lump sum compensation in respect of psychiatric conditions.

It was determined that NO (emphasis added) payment can be made under the transitional provisions of Section 124 of the 1988 Act in respect of Major Depression.

Factsheet F-111 - 04, Compensation under subsection 7(2) of the DRCA for F-111 workers clearly states: "*You can claim COMPENSATION (emphasis added) under 7(2) of the DRCA for diagnosed condition identified by the Doctors Advisory Committee as being possible associated with F-111 Deaseal/Reseal service*".

Whilst ex-serviceman Mr. X did receive a 'white card' which entitled him to care and treatment for his accepted condition he and his family were NOT COMPENSATED, (emphasis added) as they were led to believe they would be, for the condition of Major Depression.

As a result of the decision handed down by the Department, ex-serviceman Mr. X enlisted the assistance of a Compensation Advocate Level 4 on the Central Coast of NSW, Mr. William Forsbey.

On 25th February 2015, Mr. Forsbey lodged a claim on behalf of ex-serviceman Mr. X for 'Major Depression and Memory Impairment' under the Veterans Entitlement Act (VEA) 1986.

Ex-serviceman Mr. X had eligible service as a Member of the Defence Forces during the period 1972 to 28th May 1990. Therefore, his claim could only be accepted on the balance of probabilities should the claimed conditions be related to that service.

Mr. Forsbey contended that Mr. X's depressive disorder and memory impairment was caused by his employment on the F-111 Deseal/Reseal Program.

The Delegate of the Repatriation Commission determined the claim using Statement of Principals, Instrument number 84 of 2015 which sets out the factors known to contribute to his condition.

The Decision: *"I have considered all relevant evidence and am reasonable satisfied that depressive disorder is NOT (emphasis added) related to X's eligible service"*.

In November 2016 Mr. X's Advocate lodged an application for review of the Repatriation Commission decision of 23 February 2016 in respect of depressive disorder with the Veterans Review Board (VRB).

The Board considered the application on 8th November 2016. The Veterans Review Board decided to:-

- AFFIRM the decision under review, meaning the Repatriation Commission's decision was unchanged.

Standard of Proof

In respect of the ex-serviceman's defence service, subsection 120(4) of the Act applied. Therefore the Board was required to decide all relevant matters to its reasonable satisfaction. That meant that the Board had to decide whether, on the balance of probabilities, Mr. X's depressive disorder with memory impairment was defence caused.

Statement of Principles

The Board was required to apply section 120B of the Act in reaching its decision, meaning that the Board was required to decide matters to its reasonable satisfaction in accordance with any Statements of Principal issued by the Repatriation Medical Authority or any relevant determinations or declarations under the Act.

Causation Issues

The Act provides that a disease or injury of a Member of the Forces or a member of a Peacekeeping Force is defence - caused if, in effect it;

- *Resulted from an occurrence on peacekeeping service*
- *Arose out of or was attributable to defence service or peacekeeping/hazardous service;*
- *Resulted from an accident while travelling to or from duty etc*

Applicant's Case

Mr. Forsbey prepared a detailed written submission. He relied on:

- Factor 9(3)(d) of the SOP No. 83 of 2015 (concerning depressive disorder) “for substance/medication - induced depressive disorder only:
- Taking a drug or a drug from a class of drugs from the specified list of drugs, within 30 days before the clinical onset of depressive disorder.

Mr. Forsbey argued that ‘*taking a drug*’ is not confined to taking prescribed medication. In support of this argument he noted that factor 9(3)(e) refers to “*being treated with a drug*”, which is more akin to taking prescribed medication. Taking a drug therefore can be viewed more widely. Mr. Forsbey put it to the Board that Mr. X’s daily inhaling of organic solvents while working on the F-111 Deseal/Reseal project meets factor 9(3)(d) as it could be fairly described as taking a drug.

In relation to the requirement that the taking of the drug being within 30 days before the clinical onset of depressive disorder, Mr. Forsbey relied on a psychiatric report which stated:

“Mr. X was associated with F-111 Deseal/Reseal Programme at RAAF Base Amberley in the early 1980’s. He served on two occasions, both were approximately 6 months. He was exposed to toxic chemicals which were used to remove sealant from inside fuel tanks. He has been feeling depressed since halfway through the first tour of the above mention exposures at Amberley”.

It was submitted that the clinical onset of depressive disorder was, therefore halfway through his first tour in 1980 which would satisfy the onset being within 30 days of exposure to organic solvents.

Mr. Forsbey told the Board that Mr. X sought help in the 1980’s for mental health issues. He did not know what was wrong with him and was at first reluctant to seek help because of the perceived stigma of doing so.

The Boards Determination

The Board was satisfied of a diagnosis of depressive disorder with memory impairment based on the opinion of X’s treating psychiatrist.

The SOP, 84 of 2015, was relevant to these conditions covering Mr. X’s defence service.

The Board had to determine two (2) critical issues:

- Taking a drug, and
- Clinical onset within 30 days.

Meaning of ‘Taking a Drug’

The Commission sought an opinion from Dr. A Bordujenko, a Contracted Medical Advisor. The doctor said:

“The use of this factor is predicated on the use of the agent as a drug not as an incidental occupational exposure. It is specified that the person is “taking a drug”. There is a factor for occupational exposure to organic solvents in the Reasonable Hypothesis SOP for depressive disorder SOP 83 of 2015. This factor is as follows;

- (f) inhaling, ingesting or having cutaneous contact with organic solvents, in an unventilated and confined space, on more days than not for a continuous period of at least five years before the clinical onset of depressive disorder and where the clinical onset of depressive disorder occurs within two years of the period;*

There is no such factor in the Balance of Probabilities SOP that indicated that the level of evidence for this factor was not met at the balance of probabilities standard”.

The relevant factor is not met by occupational exposure to organic solvents.

Opinion

In considering beneficial legislation which the VEA is and noting SOP's are part of the legislation, the Board considered the purpose or legislative intention.

The Board came to the view that factor 9(3)(d) is open to interpretation and that the words “*taking a drug*” is broad enough to include being exposed to organic solvents. The inhaling or ingesting of the agent amounts to taking.

The Board went on to say; *“If the words “being treated with a drug” which is used in factor 9(3)(a) and used in other SOP's such as the SOP for hypertension, which refers to being treated with a drug from a specified list, were used, instead of “taking a drug”, the legislative intent would be abundantly clear”.*

The Board found that Mr. X was taking a drug from the specified list of drugs as used in factor 9(3)(a) of the SOP for depressive disorder and this satisfies the first leg of the factor.

Clinical Onset

The Advocate relied on the report of the Psychiatrist report which referred to Mr. X's involvement in the Deseal/Reseal program in the early 1980's and indicated that Mr. X become depressed halfway through the first tour. He further expressed the opinion that Mr. X's condition of depressive disorder became permanent prior to 1st December 1988. The doctor based his opinion on the fact that Mr. X was feeling depressed halfway through his first tour and the fact that Mr. X saw a Psychiatrist in Melbourne in 1987.

The Board considered the material and found a clear diagnosis of depressive disorder in December 1987. Mr. X's treating psychiatrist was of the opinion that depression became permanent prior to 1st December 1988. Whilst he inferred that depression was present prior to 1988 it did not identify the clinical onset of depressive disorder which needs to be within 30 days as referred to in the factor.

The Board stated; “even if the Board was of the view there was some connection, it could not (emphasis added) be reasonably satisfied on the material that clinical onset was within 30 days”.

Conclusion

*The Board was reasonably satisfied that the material before it did not raise a connection between Mr. X’s depressive disorder and memory impairment and the relevant service as required by the Act. The Board **affirmed** the decision under review.*

Administrative Appeals Tribunal

History: On 22nd December 2016 Mr. Forsbey, on behalf of Mr. X appealed to the Administrative Appeals Tribunal (the Tribunal) against the Board’s decision of 8th November 2016.

Contentions:

- The diagnosis is substance induced Major Depression and Memory Impairment
- The clinical onset has been identified as during Mr. X’s first tour on the Deseal/Reseal Program.
- The connection to service has been identified
- The relevant SOP is No. 84 of 2015
- The factor relied upon is 9(3)(d) in that Mr. X’s inhalation of organic solvents constitutes “taking a drug or a drug from a class of drugs from the specified list of drugs”.
- The Veterans Review Board supported the above contention.

In April 2017 Mr. X moved from Blue Haven, NSW to Hervey Bay, Queensland.

Following discussions with Mr. Forsbey the relevant documents of the case were forwarded to me for review and I agreed to represent Mr. X in his application to the Administrative Appeals Tribunal.

Mr. Forsbey advised the ‘Brisbane Registry’ of the change to representation on 18th April 2017 and all further correspondence was addressed to me.

On the 19th April 2017 the Registry of the AAT listed the matter for a Telephone Conference at my office on the 27th April 2017 - Mr. X and his wife attended the Telephone Conference. Following a lengthy discussion it was decided that a 2nd Telephone Conference would be held on the 22nd June 2017, as the Commission had decided to seek a second psychiatric opinion in regards to Mr. X’s condition.

An appointment was made by the Commission for Mr. X to see a psychiatrist in Bundaberg, QLD on 31st July 2017. The appointment was postponed due to the specialist becoming ill and was rescheduled for August 2017. Mr. X duly attended the appointment, however despite numerous phone calls by both the respondent and by me, as well as by the Registrar, no returned calls were forthcoming.

The parties agreed that a 3rd Telephone Conference would be held on 21st September 2017. At this conference it was decided by the Conference Registrar to direct the respondent to *"give to the Tribunal and the other party, a copy of the medical report prepared by Dr Jenkins on or before 21st December 2017"*.

On the 22nd December 2017 the Conference Registrar granted a request by the respondent for an *"extension of time to comply with the 4th December direction"*. A new direction was issued i.e., *"on or before 25th January 2018, the Respondent must give to the Tribunal and the other party a copy of the medical report prepared by Dr. Jenkins"*.

These delays further added to the frustration and angst suffered by both Mr. X and by his wife.

On 29th January 2018 the Advocate acting on behalf of the Department of Veterans Affairs advised the Registrar that the report from Dr. Jenkins would not be forthcoming. Despite this the Respondent was happy to proceed to conciliation.

Friday 09th February 2018 was the date of conciliation held at the hearing rooms of the Administrative Appeals Tribunal in Brisbane.

A very open and fruitful discussion took place between the parties which the Conference Registrar presiding.

Following lengthy discussions in relation to the issue of 'taking a drug' as defined in the relevant SOP and the 'clinical onset' being within thirty (30) days the applicant took the decision to consider withdrawing the AAT claim.

The respondent explained to Mr. X and his wife that it was incumbent on the AAT to reach a decision based on evidence. The Registrar reiterated the requirement for the Tribunal to reach a decision as to whether or not the SOP in force was or was not adhered to.

It was pointed out *"that even though the VRB had determined that Mr. X was taking a drug from the specified list of drugs as used in factor 9(3)(a) of the SOP and thus satisfied the first leg of the factor it does not necessarily follow that the AAT would hold that view"*. The Registrar further added *"the matter of clinical onset being within 30 days was also an issue"*. The fact remains that the evidence which would be before the AAT clearly indicates that the date of clinical onset was in December 1987 and became permanent prior to 1st December 1988. Whilst this inferred that depression was present prior to 1988 it did not identify the clinical onset which needs to be within 30 days as referred to in the factor.

Both the applicant and his wife expressed their displeasure that the Commonwealth had quite clearly led the airmen involved in the Deseal/Reseal program to believe that they would be compensated for conditions arising out of that service but No compensation was forthcoming. They also expressed concerns as to the 'date of clinical onset'.

Clinical onset refers to the time when relevant symptoms, signs or other evidence of a condition were first present, thus enabling and appropriate medical practitioner to say that the condition first manifested at the time. Mr. X's wife was adamant that there was an issue in the early 1980's despite the fact that Mr. X did not seek professional help until 1987. The respondent made it clear to the parties that should the AAT set aside the VRB decision then having the matter heard by the courts was an option open to the Commission.

As a result of these discussions Mr. X later decided that he had considered the matters discussed at conciliation and subsequently withdrew the AAT claim on 01st March 2018. The application was dismissed.

Post the Vietnam era Australian Forces have been involved in numerous peacekeeping missions through the United Nations and other agencies, including in the Sinai, Persian Gulf, Rwanda, Somalia and the Soloman Islands, as well as many overseas humanitarian relief operations while more recently they have fought as part of multi-lateral forces in Iraq and Afghanistan.

The vast majority of airmen involved in the Deseal/Reseal program did not have Qualifying Service or Warlike Service.

Inequity in the Statement of Principals

SOP No. 83 of 2015 concerning Depressive Disorder at factor 9(3)(f) for major depressive disorder states:

“inhaling, ingesting or having cutaneous contact with organic solvents, in an unventilated space, on more days than not for a continuous period of at least five years before the clinical onset of depressive disorder, and where the clinical onset of depressive disorder occurs within two years of the period.

SOP No. 84 of 2015 concerning Depressive Disorder does not contain factor 9(3)(f) however it does contain factor 9(3)(d) which states:

“taking a drug or a drug from the specified list of drugs, within 30 days before the clinical onset of depressive disorder”.

Therefore: The airmen involved in the Deaseal/Reseal program whose claims are determined in accordance with the ‘Balance of Probabilities’ SOP No. 84 of 2015, (the vast majority of airmen) must provide evidence that they ‘took a drug’ as opposed to “inhaling, ingesting or having cutaneous contact” and in addition they are required to provide evidence that the clinical onset was within 30 days as opposed to within 2 years.

Additionally: the SOP No. 83 of 2015 - reasonable hypothesis - requires “a continuous period of at least five years” of contact.

An investigation undertaken by the Royal Australian Air Force (RAAF) reported that a number of their personnel involved in F-111 fuel tank maintenance were concerned that occupational exposure to a range of chemicals (particularly the chemical SR51) during the period 1977 - mid - 1990's was the cause of past and current health problems.

The maintenance workers complained of headaches, skin rashes, memory loss and various neurological symptoms. Those who complained of these conditions worked in the program for months not years.

These complaints were almost entirely ignored by the Commanding Officers and medical staff. It was not until September 1999, More than 22 years after the program commenced, when a new Sergeant took charge of the fuel maintenance section that action was taken.

The new officer encouraged all affected personnel to see a doctor at the medical centre. At the same time the medical officer noticed that protective gear used in the program was inadequate.

By the end of January 2000, the Commanding Officer of the Aircraft Maintenance Squadron was contacted about the problems and the program was suspended.

Conclusion

As far back as 2008 Parliamentarians have been aware that the user of the chemical SR51 in the Deseal/Reseal program may have had wide reaching long term effects on those involved in the program. The RAAF were aware that many of it's members suffered both physical and psychiatric conditions widely believed to be caused by the use of SR51 as far back as the early 1970's. Neither Government or the Service chiefs took any action to remedy the situation until thousands of airmen were affected.

The beneficial provisions of subsection 7(2) of the Safety Rehabilitation Compensation (Defence related claims) ACT 1988 allows the Government to accept liability for certain medical conditions without the need to establish a link between the medical condition and the persons service. Granted, those whose claims are accepted receive a 'white card' for treatment but the members and their families are not compensated for years of pain and suffering which often results in a member, or former member, being unfit to undertake remunerative work.

The Veterans Entitlement Act 1988, on the other hand places the onus on the member to provide evidence that his condition is a result of his service, was caused by "taking a drug" and a date of clinical onset can be established as being within 30 days of using the chemical SR51.

Kind Regards,

Terence Meehan AM JP