[redacted]
War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: [redacted] **on behalf of herself and on behalf of her children** [redacted]

Service Number and Rank of deceased Veteran: [redacted] Royal New Zealand Infantry Regiment

Address: [redacted]

Grounds of appeal: Appeal against the 19 April 2022 decision of the Review Officer declining claims for survivor benefits and weekly compensation under Schedule 2, Part 4 of the Veteran's Support Act 2014.

Hearing held: 14 April 2023

Parties:
The Appellant, [redacted] on behalf of herself and her children, represented by Mr Ross Himona and Mr Rob Todman, RNZRSA.

The Respondent, Veterans' Affairs New Zealand, represented by Ms Tracy Lamb, Assistant Director Legal Services, Veterans' Affairs and Ms Anne-Marie Tribe, Manager Applications and Entitlements. Dr Mike O'Reilly, Principal Medical Advisor Veterans' Affairs, was called as an expert witness.

Outcome:
Pursuant to section 237(1)(c) of the Veterans' Support Act 2014 the Board revokes the Review Officer's decision and requires the Respondent to make the decision again on the basis of specialist advice, taking into account the nature of the veteran's service in the Solomon Islands, as to whether the section 15 reasonable hypothesis test is satisfied.

DECISION

This is an appeal against the 19 April 2022 decision of the Review Officer declining claims for survivor benefits[1] and weekly compensation under Schedule 2, Part 4 of the Veteran's Support Act 2014 (**the VSA**).

Background

The late [redacted] (**the veteran**) commenced service on 6 February 2011. He had qualifying operational service in the Solomon Islands between 16 July and 30 November 2012 while serving in the New Zealand Army. He is a Scheme Two veteran.

The Appeal Board thanks the veteran's surviving family for his service. Kei wareware tātou ki a rātou. Lest we forget.

Sadly, the veteran died suddenly at home at about 11pm on 3 January 2018. He called out to his de facto partner, [redacted] and was found by her on the couch at their home making gurgling sounds, unconscious and unresponsive. Notwithstanding early CPR being applied, and the prompt calling of emergency services, the veteran could not be revived. He was aged 28.

Pathologist Thambirajah Balachandra undertook an autopsy at 10:30am on 4 January 2018. His report dated 8 March 2018 states in part:

> Therefore, the cause of death was not ascertained. The only explanation for sudden death in a previously healthy male, with negative autopsy and ancillary tests, is a fatal cardiac arrhythmia. Therefore, in my opinion the cause of death was:
>
> CAUSE OF DEATH FOR MEDICAL CERTFICATE
>
> (a) No anatomic cause of death.

On 12 March 2018 Coroner David Robinson made a decision not to open an inquiry into the veteran's death and made a finding the cause of death was Cardiac Arrhythmia (No anatomic cause of death[2]).

When Coronial Services returned a sample of the veteran's blood to [redacted], she submitted it for genetic testing. On 9 April 2019 paediatric cardiologist/electrophysiologist Jon Skinner wrote to [redacted] advising:

> ...the laboratory have identified a mutation in the cardiac sodium channel gene SCN5A which we think explains the sudden death of your husband [redacted]
>
> … It is likely that he had an electrical vulnerability in [his] heart due to a prolonged QT interval….
>
> We are going to indicate to the Coroner that the cause of death should be changed from unascertained to cardiac sodium channelopathy, likely Long QT syndrome.
>
> Channelopathy means a disorder of the ion channels. These are the channels which move sodium and potassium in and out of the heart cell every time the heart beats. In long QT type 3, the sodium channel is leaky so the sodium does not move back into the

[1] Schedule 2, clause 53 refers to survivor's grant. That is what [redacted] applied for.
[2] Section 64(1) Coroners Act 2006 Notification of Coroner's decision not to open enquiry.

> cell quick enough and renders the heart electrically vulnerable. Tragically it is quite common in long QT type 3 for the first presentation to be a cardiac arrest.

It is not known if Dr Skinner contacted the Coroner.

On 7 March 2023 [redacted] sought a copy of the death certificate. It records the cause of death as "No Anatomic Cause of Death. Coroner decided not to hold an inquest."

On 2 August 2021 [redacted] and her sons [redacted] applied for a survivor's grant and weekly compensation.

On 6 December 2021 a Decision Officer declined the requests on the basis that the veteran's death was not service-related. Specifically, that SOP 57/2013 (Sudden Unexplained Death) was the relevant Statement of Principles, and no causal factor was apparent connecting the veteran's cause of death with the circumstances of his qualifying service.

Veterans' Affairs notified that decision to [redacted] on 14 January 2022.

On 25 March 2022 [redacted] applied for a review of that decision on behalf of herself and her sons. RNZRSA Senior Support Advisor Mr Rob Todman set out the grounds of appeal. In summary he said that the VSA and Veterans' Support Regulations 2014 (**VSR**) do not require a veteran to have suffered a service-related death, to obtain the entitlements sought.

On 19 April 2022 a Review Officer decided to uphold the Decision Officer's decision declining the claims for entitlements. In summary he concluded the VSA requires the veteran's cause of death to be related to service and that the veteran's death was not related to his service for the following reasons:

- It did not occur during service.
- SOP 57/2013 is the appropriate SOP against which to examine a hypothesis of service causation.
- The service record does not show a related factor between the veteran's clinical record and the relevant SOP. Therefore, there cannot be a hypothesis consistent with the SOP and in accordance with section 14 of the VSA it is impossible for the cause of death to be considered service-related.

On 4 May 2022 Veterans' Affairs notified that decision to [redacted].

On 27 October 2022 Veterans' Affairs received the Appellant's appeal of that decision.

On 29 November 2022 Mr Todman filed the grounds of appeal. In summary those grounds are as follows:

- The VSA and the VSR do not require a veteran to have suffered a service-related death, for a surviving partner and dependent children to obtain a survivor's grant and weekly compensation.
- Following a review by Professor Patterson, the Government introduced a new eligibility criterion based on Scheme One veterans having only qualifying operational service. No change was recommended for Scheme Two because the survivor's grant eligibility criteria is only qualifying operational service.
- Veterans' Affairs policy incorrectly interprets the VSA. That incorrect interpretation and policy should be revoked.

RNZRSA Senior Advocate Mr Ross Himona subsequently filed alternate grounds of appeal. In summary he submitted that:

- The Review Officer did not interpret the SOP correctly. The intent of the SOP is to identify Sudden Cardiac Death as one explanation for Sudden Unexplained Death. The pathologist's opinion indicated that the veteran suffered Sudden Cardiac Death. Hence the intent of the SOP is satisfied, so the entitlements are payable.
- The SOP for Sudden Unexplained Death may not be relevant. The pathologist's evidence is that the cause of death was unexpected but not unexplained. Section 15 of the Act must be applied and a reasonable hypothesis must therefore be considered.
- There is a reasonable hypothesis that the veteran's death might have been caused by an undiagnosed underlying genetic predisposition aggravated by qualifying service.

Analysis

The issue in this appeal is whether the Review Officer correctly declined claims for survivor benefits[3] and weekly compensation under Schedule 2, Part 4 of the VSA.

In considering this appeal, the Board has had specific regard to all the principles specified in section 10(b) of the VSA, and the overarching benevolent intent of the VSA.

Does the veteran's cause of death have to be service-related in order for his surviving partner and children to receive a survivor's grant and weekly compensation?

The Appellant submits that the veteran's death does not have to be service-related. They simply have to have operational service because Scheme One of the VSA was recently amended so a Scheme One veteran's death does not have to be service-related for entitlements to be available. Applying the principle of equal treatment of equal claims in section 10(b)(ii) of the VSA, all veterans should be treated equally. Otherwise, the amendment has created two classes of widow and that is inequitable.

The Board does not find the Appellant's arguments under this head persuasive. As the Board recently held unanimously in *Gardiner v Veterans' Affairs New Zealand*,[4] "the principles cannot override … clear unambiguous provisions of the VSA".

The entitlements sought by the Appellant are provided for in Part 4 of Schedule 2 to the VSA. Under clause 1(2) of Schedule 2, Part 4 applies "only in relation to Scheme Two". By necessary implication, the Appellants must be covered by Scheme Two to be eligible for any of the entitlements provided for in Part 4 of Schedule 2.

Scheme Two is in large part codified by Part 4 of the VSA. Section 83 of the VSA provides that Part 4:

[3] See footnote1.
[4] Appeal 2022/1, from the reasons of the Chair with which the other Members agreed.

(a) applies to the following persons:
(i) every veteran with qualifying operational service performed on or after 1 April 1974; and
(ii) every spouse, partner, child, and dependant of every veteran referred to in subparagraph (i); but
(b) does not apply to the following persons:
(i) the veterans referred to in section 38(1)(a)(ii) and (iii); and
(ii) every spouse, partner, child, and dependant of every veteran referred to in subparagraph (i).

Section 38(1)(ii) and (iii) applies only in respect of certain operational service in Vietnam; hence it is not relevant for present purposes.

Section 14(2) of the VSA provides that, in considering a claim under the VSA (including under Scheme Two):

> The first step is to—
>
> (a) consider all the available material that is relevant; and
>
> (b) decide whether the material is consistent with an hypothesis that the veteran's injury, illness, or death was service-related.

That is a statutory requirement for every claim, subject to the exceptions provided for or referred to in sections 15 and 16.

While, in contrast with some other provisions of the VSA conferring entitlements, the relevant provisions in Part 4 of Schedule 2 do not explicitly link the entitlements to injury or death which is connected with qualifying operational service, the meaning of an enactment must be ascertained from its text and in light of its purpose and its context.[5] That includes the other provisions of the VSA already mentioned above.

The purpose of the Act is set out in section 3. One of the purposes of the VSA is to provide for entitlements for eligible veterans who suffer service-related injuries or illnesses (section 3(1)(b)). Section 3(1)(c) describes another purpose as being to provide entitlements for eligible spouses, partners, and dependents of severely impaired or deceased veterans.

The Board's view is that the purpose of the Act and its context all support an interpretation that a Scheme Two veteran's death must be service-related in order for their partner and children to receive the additional benefits. We conclude that the entitlements provided for in Part 4 of Schedule 2 to the VSA, which are intended for the surviving spouses and dependents of veterans who suffer a fatal injury, are intended to apply only in cases of service-related death as defined in section 7. Section 7 of the VSA defines service-related death as follows:

> (a) in relation to Part 3 (Scheme One), means death attributable to qualifying service; and
>
> (b) in relation to Part 4 (Scheme Two), means—
>
> (i) the death of a person who, at the time of the person's death, was taking part in qualifying operational service:
>
> (ii) the death of a person within 10 years after the person took part in qualifying operational service from a service-related illness or injury:

[5] Legislation Act 2019 s 10(1).

(iii) the death of a person more than 10 years after the person took part in qualifying operational service from an accepted late-onset condition.

The Board now turns to the question of whether the veteran's death should be considered as service-related.

Applying section 14, is the available material consistent with a hypothesis that the veteran's death was service-related?

The veteran died six years after his qualifying operational service. Under section 7 of the VSA, the veteran's death is service-related if it occurred within 10 years after the person took part in qualifying operational service from a service-related illness or injury. An illness or injury is service-related if it is "caused by, contributed to by, or aggravated by qualifying service".

The evidence before the Board about the veteran's cause of death comes from the coronial process, Dr O'Reilly and Dr Skinner.

Pathologist Dr Balachandra investigated the veteran's death by undertaking an examination and various tests including blood tests but he did not undertake gene tests. His conclusion was that the only explanation for sudden death in a previously healthy male, with negative autopsy and ancillary tests, was a fatal cardiac arrhythmia. The coroner issued a death certificate stating the cause of death as "No anatomic cause of death".

Dr O'Reilly accepted the veteran probably died from a cardiac arrest. He said that standard language for the death certificate when there is sudden cardiac death is "No anatomical cause of death."

After the coronial process Dr Skinner conducted tests and gave an opinion that a mutation in the cardiac sodium channel gene SCN5A explains the veteran's death.

Dr O'Reilly said that Dr Skinner's finding of a gene mutation does not determine that the gene mutation was the cause of death, it is an opinion rather than a determination. The determination has been made by the coroner. He also said that if the veteran had presented to a doctor at any time during service, with signs of dizziness or collapse that would have been investigated. There is no mention of that in his medical service records.

In performing its functions under the VSA, the Board is obliged to act in accordance with the principle of taking a benevolent approach to claims.[6] Where there is plausible evidence supporting the veteran's claim in respect of a particular issue, it has been the invariable approach of this Board to give the veteran the benefit of the doubt on that issue. That is an important way in which the Board adheres to the principle of benevolence. Accordingly, we find for the purposes of this appeal that the veteran died for the reasons given by Dr Skinner.

However, that is not the end of the enquiry. The cause of death identified by Dr Skinner does not produce an entitlement under the VSA unless the underlying illness identified was service-related, as that term is defined above. Dr Skinner did not suggest there was any link to service. Dr O'Reilly's evidence was that there is no link to service, in particular no evidence of a stressful event during service that could have caused the veteran's death some six years after service.

The Board has to consider all of the available material that is relevant, and to decide whether the material is consistent with a hypothesis that the veteran's death was service-related. The

[6] VSA s 10(b)(iii).

role of a specialist tribunal is to use our members' expertise to assess the evidence before us.

First, the Board accepts the Respondent's submission that the veteran's service cannot have caused the veteran's genetic mutation. Dr Skinner's evidence is that it is an inherited disease.

However, the real issue here is whether the veteran's undiagnosed genetic condition may have been aggravated by his qualifying operational service.

The Appellant relies on Dr Skinner's evidence. Dr Skinner does not however make a connection to the veteran's service as the cause of his cardiac arrest, other than to say the genetic mutation makes the heart electrically vulnerable. He also said it is quite common in long QT type 3 for the first presentation to be a cardiac arrest. The Appellant invites the Board to rely on a general presumption that illness must be service-related. The Board declines to accept that invitation; the presumptions within the VSA apply on their own terms and none are applicable in this case.

Paragraph 85 of the Respondent's written submissions concedes that "it was not in issue that [redacted] death was potentially consistent with an hypothesis advanced that his death was service-related". As we observed in *Warner v Veterans' Affairs New Zealand*, representations of that nature made to the Board are binding on the party making them.[7]

Taking a benevolent approach, the Board therefore finds that the material before it is consistent with an hypothesis that the veteran's death was service-related.

Is there is an applicable SOP?

The Review Officer decided on 19 April 2022 that the relevant SOP was No 57/2013 Sudden Unexpected Death, which was a SOP in force at the time of his decision. This raises two issues for the consideration of the Board.

The first issue is whether SOP 57/2013 still applies in this appeal. Regulation 4 of the Veterans' Support Amendment Regulations (No 3) 2022 amended Schedule 1 of the VSR with effect from 29 September 2022, by replacing the reference to SOP 57/2013 with a reference to SOP 45/2022. The effect of that amendment was to revoke SOP 57/2013 as a New Zealand legal instrument. This appeal was lodged following that revocation on 27 October 2022.

Section 32(1)(d) of the Legislation Act 2019 provides that the repeal or amendment of legislation does not affect the previous operation of the legislation or anything done or suffered under it. In the present context, that means the decision of the Review Officer to consider SOP 57/2013 was correct – the Board will not apply a retrospective lens to that.

However, under section 229(1) of the VSA, appeals made to this Board are *de novo* appeals. The Board is not bound by any findings of fact made by the Review Officer. Effectively, the Board is called upon to make the decision anew. Taking into account the full context of the VSA, the Board interprets this as an obligation to determine the appeal on the basis of the law as it stands now, not as it stood at a previous time.

The second issue is whether SOP 45/2022 applies to the present case. That SOP relates to "sudden unexplained death", which according to clause 7(2) of the SOP:

[7] Appeal No. 2020/9. See reference to *Carrell v Carrell* [1975] 2 NZLR 441 at 445.

(a) means death without evidence of disease or injury which could account for the death, and within 24 hours of first onset of symptoms or signs; and

(b) includes death delayed beyond 24 hours because of life support by mechanical devices.

The Appellant submitted that the SOP does not apply because there is now an explanation for the veteran's death.

Dr O'Reilly's evidence was that the SOP applies because:

- The list of references for the SOP includes consideration of conditions that result in cardiac death such as long QT syndrome. The SOP was first formulated in 2013 after a global evaluation of the evidence of the causes and relationships of sudden unexpected death and it was inclusive of those conditions and causes.
- Factors within the SOP are generic enough to include all death including sudden cardiac death.
- There is no SOP for arrythmia related death. The Sudden Unexplained Death SOP is the one that would apply.

SOP 45/2022 is a legal instrument which the Board must apply (or not) on the basis of its provisions, rather than any literature to which reference might have been made when formulating the SOP. It is clear that there is now evidence of a disease[8] which could account for the veteran's sudden death, namely the channelopathy caused by the genetic mutation. Moreover, the Board has found that that disease was the cause of death for the purposes of this appeal. As a matter of common sense, the veteran's death, while sudden, is no longer unexplained.

The Board concludes that SOP 45/2022 does not apply to the circumstances of the veteran's death. As Dr O'Reilly accepted there is no other applicable SOP. The Review Officer's decision cannot stand in the light of that finding.

Is the claim consistent with a reasonable hypothesis?

In the absence of an applicable SOP, under section 15(2) of the VSA:

> The person deciding whether to accept the claim must decide whether the claim is consistent with an hypothesis that is reasonable.

The Appellant's reasonable hypothesis argument is that the veteran's death might have been caused by an undiagnosed underlying genetic predisposition aggravated by qualifying service. The Appellant says that the fact there is a gap in the evidence is no barrier. Again, there is reliance on presumption. The Board does not accept this submission.

The Appellant invited the Board to consider a range of authorities in respect of the meaning of "reasonable hypothesis". We did not find those of assistance. Section 15(4) of the VSA is clear in its terms:

> An hypothesis is reasonable if it is—
>
> (a) more than a possibility; and
>
> (b) consistent with the known facts; and

[8] Any abnormality of bodily structure or function, other than those arising directly from physical injury. Black's Medical Dictionary 41st edition.

(c) not inconsistent with proved or known scientific facts.

There must be some plausible scientific evidence before the decision-maker which enables that decision-maker to conclude, that there is "more than a possibility" that, in this case, the veteran's genetic condition was aggravated by his qualifying operational service. If there is plausible evidence to that effect, then the veteran's death within 10 years of his qualifying operational service would be service-related as such is defined by section 7 of the VSA.

There is no evidence before the Board which could allow it to make that assessment. While the Board has accepted that there is a possibility that the veteran's cardiac sodium channelopathy was aggravated by his qualifying operational service, the Appellant's claim cannot be accepted unless it is proved that that is "more than a possibility", consistent with known facts and not inconsistent with proved or known scientific facts.

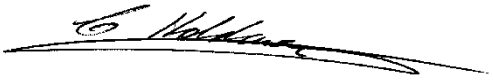
It follows that it is necessary for the Board to revoke the Review Officer's decision and require the Respondent to make the decision again on the basis of specialist advice, taking into account the nature of the veteran's service in the Solomon Islands, as to whether the reasonable hypothesis test is satisfied.

Order relating to the publication of decision

Pursuant to the powers vested in it by section 238 of the VSA, the Board, on its own initiative and after consultation with the Appellants makes an order prohibiting the publication of any identifying details in relation to the Appellants or the veteran.

Ms Raewyn Anderson, Chairperson

Mr Christopher Griggs, Member



Dr Chris Holdaway, Member

Dr Tristram Ingham, Member

Date: 23 May 2023