



Australian Government

Defence Honours and Awards Appeals Tribunal

Wakerley and the Department of Defence [2014] DHAAT 41 (27 December 2014)

File Number(s) 2014/067

Re **Mr Alan Wakerley**
Applicant

And **Department of Defence**
Respondent

Tribunal Air Commodore M. Lax OAM, CSM (Retd) (Presiding Member)
Brigadier M. Bornholt AM (Retd)

Hearing Date 10 December 2014

DECISION

On 27 December 2014 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Alan Wakerley is not eligible for the award of the Australian Service Medal 1945-1975 with Clasp 'PNG'.

CATCHWORDS

DEFENCE AWARD – Australian Service Medal 1945-1975 with Clasp 'PNG'

LEGISLATION

Defence Act 1903 – ss 110T, 110V, 110VA, 110VB(2)

Defence Force Regulations 1952 - reg 93C and Schd 3

Australian Service Medal 1945-1975 Letters Patent and Regulations 1995

Australian Service Medal 1945-1975 Regulations 1998

REASONS FOR DECISION

Introduction

1. The applicant, Mr Alan Wakerley (Mr Wakerley), a former member of the Australian Army, seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate), that he is not eligible for the Australian Service Medal 1945-1975 with Clasp 'PNG' (ASM 1945-75 with Clasp 'PNG') award. Mr Wakerley first lodged an application for the award on 23 April 2001 with the Directorate, which was rejected on 27 June 2001. On 22 June 2007, Mr Wakerley again wrote to the Directorate regarding his entitlement to the ASM 1945-75 with Clasp 'PNG' and on 27 June 2007, the Directorate advised him that he was not eligible.

2. In 2008, Mr Wakerley then wrote to Ms Yvette D'Ath MP, his local Federal Member seeking support for his claim. Ms D'Ath wrote to the Hon. Dr Mike Kelly MP, who was the Parliamentary Secretary for Defence at the time, and who responded on 28 May 2008 that Mr Wakerley was not eligible. Ms D'Ath advised Mr Wakerley that he was not eligible in a letter dated 4 June 2008. Mr Wakerley then sought a review of this decision in his application to the Tribunal on 8 May 2014.

Tribunal Jurisdiction

3. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence award in response to an application. The Directorate made a decision to refuse to recommend Mr Wakerley for the ASM 1945-75 with Clasp 'PNG' following his application. Reg 93C of the *Defence Force Regulations 1952* defines a *defence award* as being those awards set out in Part 2 of Schedule 3. Included in the defence awards set out in Part 2 is the ASM 1945-75. Therefore the Tribunal has jurisdiction to review this decision.

Steps taken in the conduct of the review

4. In accordance with its *Procedural Rules 2011*, on 19 June 2014, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Wakerley's application for review and requesting that he provide a report. On 11 August 2014, the Directorate, on behalf of the Secretary, provided the Tribunal with a report. In that report, the Directorate confirmed its position that Mr Wakerley's service did not meet the eligibility criteria for the award he sought. On 20 August 2014 the Tribunal forwarded a copy of the report of the Directorate to Mr Wakerley for comment. On 27 August 2014 Mr Wakerley provided a written rebuttal.

5. The Tribunal met on 14 November 2014 to scope the review. The Tribunal then met on 10 December 2014 to hear the case. During its meeting the Tribunal considered the material provided by Mr Wakerley and the Directorate. It also heard oral evidence from Mr Wakerley who agreed to be available by telephone that day.

The Australian Service Medal 1945-1975

6. The ASM 1945-75 is an Australian award instituted by Letters Patent on 22 February 1995 ‘for the purpose of according recognition to members of the Defence Force, and certain other persons, who rendered service in non-warlike military operations’. The Schedule sets out the *Regulations Governing the Award of the Australian Service Medal 1945-1975* (the Regulations).¹ Regulation 3 states that the Governor-General, on the recommendation of a Minister may declare a non-warlike operation in which members of the Defence Force were engaged, between 3 September 1945 and 16 September 1975, to be a declared operation. Regulation 4 of the ASM 1945-75 Regulations sets out the conditions for the award of the medal as follows:

Conditions for award of the Medal

4.(1) The Medal may be awarded to:

- (a) a member, or former member, of the Defence Force; or
- (b) a person in a class of persons determined by the Minister for the purposes of these Regulations;

who served in connection with a declared operation.

4.(2) The conditions for the award of the Medal are determined by the Governor-General on the recommendation of a Minister.

4.(3) The Medal may only be awarded to a person who fulfils the conditions for the award of the Medal.

4.(4) An initial award of the Medal to a person is made in the form of the Medal with a clasp denoting the declared operation for which the Medal is being awarded.

4.(5) A subsequent award of the Medal to the person may only be made in the form of an additional clasp to the Medal.

The Australian Service Medal 1945-1975 with Clasp ‘PNG’

7. The Clasp ‘PNG’ to the ASM 1945-75 was introduced by the Australian Government in response to a recommendation of the 1994 Committee of Inquiry into Defence and Defence Related Awards (CIDA). Its purpose was to recognise members of the Australian Defence Force (ADF) who had contributed to the gaining of independence by Papua New Guinea in the period from 16 February 1951 to 16 September 1975 when independence was achieved. The original eligibility requirements called for a minimum of 180 days service.² The 180 day requirement was

¹ *Commonwealth of Australia Gazette* No. S122 dated 3 April 1995.

² *Commonwealth of Australia Gazette* No. S337 dated 5 September 1995.

later reduced to 30 days and the commencement date for eligibility was amended to 3 September 1945, but the 16 September 1975 end date remained extant.³

8. A further declaration was made by the Governor-General on 25 May 1998 which revoked regulation 3 and 4(2) respectively and made new regulations which apply in Mr Wakerley's case.⁴ The Tribunal noted that the Directorate relied on the latest declaration by the Governor-General, but as this was made after Mr Wakerley's original application was rejected, it does not apply.⁵

9. Relevant to this case, the Governor-General has declared under regulation 3 of the ASM 1945-75 Regulations that:⁶

...the Australian Defence Force activities in Papua New Guinea, that is to say, the Territory of Papua and the Territory of New Guinea as administered in an administrative union under the name of the Territory of Papua and New Guinea or the name Papua New Guinea and inclusive of all islands forming part of either Territory to a distance of 161 kilometres to seaward from the coast during the period commencing 3 September 1945 and extending to the independence of Papua New Guinea on 16 September 1975, to be a declared operation for the purposes of the Regulations.

10. Further, under Subregulation 4(2) of the Regulations that the conditions for the award of the ASM 1945-75 with Clasp 'PNG' for the declared operation are:

(i) the Medal be awarded to a member of the Australian Defence Force who rendered service as such a member while posted to or serving as a member of the Australian element of the declared operation for a period of 30 days or more, or for periods amounting in the aggregate to 30 days or more;

...

(v) the qualifying periods of service as described in subparagraphs (c)(i), c(ii), (c)(iii) or (c)(iv) may be deemed by the Chief of the Defence Force or a delegate of the Chief of the Defence Force to have been established notwithstanding that the member has not met the qualifying periods described; and

(vi) the Chief of the Defence Force or a delegate of the Chief of the Defence Force in exercising the discretion to deem under subparagraph (c)(v) shall take into account whether service in relation to the declared operation:

(A) was terminated owing to the death, evacuation due to illness or injury or other disability due to service, of a member as described above;

...

³ *Commonwealth of Australia Gazette* No. S274 dated 18 July 1996.

⁴ *Commonwealth of Australia Gazette* No. S350 dated 9 July 1998.

⁵ *Commonwealth of Australia Gazette* No. S74 dated 30 April 2009.

⁶ *Commonwealth of Australia Gazette* No. S350 dated 9 July 1998.

11. For a member to be eligible for the award of the ASM 1945-75 with Clasp 'PNG', the criteria for both the ASM 1945-75 and ASM 1945-75 with Clasp 'PNG' must be met.

Mr Wakerley's Service Record

12. Defence records of Mr Wakerley's service show that he enlisted in the Citizen Military Forces (CMF) on 25 August 1943. On 23 November 1944, Mr Wakerley was attached to the 15th Battalion serving in Torokina, PNG where he was involved in the fighting. On 9 July 1945, Mr Wakerley was seriously wounded in action, and due to the extent of his injuries, he was evacuated to Townsville on 22 August 1945. Mr Wakerley was discharged 'medically unfit' on 20 February 1946.

13. For his Army service, Mr Wakerley has the following awards:

1939-1945 Star,
Pacific Star,
War Medal 1939-1945,
Australia Service Medal 1939-45, and
Australian Defence Medal.

Mr Wakerley's Submission

14. In his written submission, Mr Wakerley bases his application on the medical discharge clause in the regulations which gives CDF the discretion to award the medal for those unable complete the time required due to injury. He provided copies of previous correspondence with Defence and refers to clauses in the regulations among the correspondence where he states that if: 'I had not been wounded in action and evacuated to Australia on 20 August 1945, I would have still been there also [with my Battalion] giving me entitlement to the award which I now justly seek'.

15. In his response to the Defence submission, Mr Wakerley further claims that in his opinion, too much emphasis is placed upon the qualifying period because if 'I had not been evacuated to Australia on 20 August 1945 (*sic*) after over 1 month of being wounded in action, and instead remained in bed at 2/7th Australian General Hospital, Lae for another 30 days I would have qualified without question'. He goes on to state that 'other awards are awarded under regulation whereby if through illness, injury etc in my case wounded in action, it would be deemed that I would have completed the requirements for the award I was applying for'. He maintains 'I am justly entitled to be awarded the Australian Service Medal (ASM) 1945-75 with Clasp 'PNG''.

16. At interview Mr Wakerley described how he was seriously wounded in the stomach and his life saved by the medical officer who was then with his unit. He reiterated his claim that the medical discharge clause should apply to him as, had he not been wounded, he believed he would have remained in PNG with his comrades in the Battalion and thus received the ASM 1945-75 with Clasp 'PNG'. He stated there should be some flexibility when the circumstances 'were not your fault'.

The Directorate's Submission

17. In its written submission to the Tribunal, the Directorate stated that Army records show that Mr Wakerley served in the CMF between his enlistment on 25 August 1943 until his discharge 'medically unfit' on 20 February 1946. The Directorate argues the eligibility criteria for the ASM 1945-75 with Clasp 'PNG' commenced on 3 September 1945 and extends to the independence of PNG on 16 September 1975. Mr Wakerley was in action at Torokina, PNG where he was wounded and evacuated back to Australia on 22 August 1945. Mr Wakerley did not return to PNG but was medically discharged on 20 February 1946. As Mr Wakerley left PNG before the commencement date of the ASM 1945-75 with Clasp 'PNG' and he did not complete 30 days service after the commencement date, he is not eligible for the award.

Review by the Directorate

18. After considering the Directorate's review of Mr Wakerley's case dated 11 August 2014, the Tribunal found the Directorate had used the 30 April 2009 regulations and not those dated 9 July 1998. In Mr Wakerley's case, this did not affect the finding made by the original case officer in 2001, but it may have. The Tribunal draws this matter to the Directorate's attention for future cases.

Conclusion

19. The Tribunal carefully considered all the material before it and considered the eligibility criteria for the ASM 1945-75 with Clasp 'PNG'.

20. There is no dispute about Mr Wakerley's service record or that he served in CMF between 25 August 1943 and 20 February 1946. The Tribunal also accepts that Mr Wakerley served in PNG, was seriously wounded in action as he described at the hearing, and was evacuated to Townsville on 22 August 1945. The Tribunal noted that Mr Wakerley did not return to PNG after 22 August 1945 because of his injuries.

21. The requirements to be met to be awarded the ASM 1945-75 with Clasp 'PNG' are set out in the Regulations which specify a qualifying period of 30 days for service in PNG between 3 September 1945 and 16 February 1975. For Mr Wakerley to be eligible for the ASM 1945-75 with Clasp 'PNG', he is required to have 'rendered service as such a member while posted to or serving as a member of the Australian element of the declared operation for a period of 30 days or more, or for periods amounting in aggregate to 30 days or more'. The Tribunal finds that Mr Wakerley did not serve in PNG for 30 days or more after 3 September 1945.

22. Mr Wakerley makes a number of claims as to his eligibility. First, that 'too much emphasis is placed upon the qualifying period'. The Tribunal advised Mr Wakerley that it has no discretion to vary the qualifying period or commencement and end dates as the Letters Patent and Regulations are the law. As such the period of 30 days service in the prescribed area and the qualifying dates cannot be altered.

23. Next, Mr Wakerley states that he should be eligible under a provision in the declaration and determination under the regulations published in the *Commonwealth of Australia Gazette* No. S350 dated 9 July 1998 which gives the CDF or a delegate of the

CDF the discretion to deem that when a member's service is terminated owing to evacuation due to illness or injury, they become eligible for the award. However, Mr Wakerley misinterprets this provision. The provision is enacted once a member commences service after the start date of 3 September 1945, not if a member is prevented from rendering service prior to the start due to illness or injury or evacuation. For Mr Wakerley to be eligible under this provision, he had to have commenced service in PNG on or after 3 September 1945 and then have been evacuated due to illness or injury. The Tribunal finds that this was not the case.

24. The Tribunal finds that Mr Wakerley is required to have served for 30 days in PNG on or after 3 September 1945 but that Mr Wakerley returned to Australia on 22 August 1945, 12 days before the commencement date of the ASM 1945-75 Clasp 'PNG'. As such, Mr Wakerley is not eligible for the award of the ASM 1945-75 Clasp 'PNG'.

25. For the reasons stated above, the Tribunal finds that Mr Wakerley is not eligible for the ASM 1945-75 with Clasp 'PNG'.

DECISION

26. The Tribunal has decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Alan Wakerley is not eligible for the award of the ASM 1945-75 with Clasp 'PNG'.