



Australian Government

Defence Honours and Awards Appeals Tribunal

Applicant and the Department of Defence [2015] DHAAT 04 (15 January 2015)

File Number(s) 2014/020

Re **Applicant**
APPLICANT

And **Department of Defence**
RESPONDENT

Tribunal Ms C. Heazlewood (Presiding Member)
Ms N. Isenberg

Hearing Date 15 January 2015

DECISION

On 15 January 2015 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that the applicant is not eligible for the award of the Anniversary of National Service 1951 - 72 Medal.

CATCHWORDS

DEFENCE AWARD – Anniversary of National Service 1951 - 72 Medal – prior service with the CMF – whether illness or disability due to service.

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1)

National Service Act 1951 – ss 3, 27, 35A, 35B(2)

Defence Force Regulations 1952 - reg 93C and Schd 3

Anniversary of National Service 1951 - 72 Medal Regulations 2006

REASONS FOR DECISION

Introduction

1. The Applicant seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the Anniversary of National Service 1951 - 72 Medal (ANSM). The Applicant had lodged an application for the award of the ANSM on 11 February 2007, which was rejected by the Directorate on 10 September 2007 and again on 4 September 2008. The Applicant sought review of this decision in his application to the Tribunal dated 17 February 2014.

The Tribunal's Jurisdiction

2. Pursuant to s.110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review an application properly made to the Tribunal regarding a reviewable decision. The term *reviewable decision* is defined in s.110V(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 The Applicant for the ANSM 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 ANSM. Therefore the Tribunal has jurisdiction to review this decision.

Steps taken in the conduct of the Review

3. In accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011 (No.1)*, on 20 March 2014 the Tribunal wrote to the Secretary of the Department of Defence informing him of the Applicant's application for review and requesting that he provide a report. On 8 July 2014, the Directorate on behalf of the Secretary provided the Tribunal with a report. A copy of the report of the Directorate was forwarded to the Applicant for comment. The Applicant provided a written response to the Tribunal received on 25 July 2014.

The Anniversary of National Service 1951 - 72 Medal

4. The ANSM was instituted by Her Majesty The Queen by Letters Patent on 10 October 2001, *for the purpose of commemorating the service of persons who gave service under the 'National Service Act 1951'*. The *Anniversary of National Service 1951 - 72 Medal Regulations 2001* are set out in the Schedule attached to the Letters Patent. Regulation 4 of the Regulations states:

- (1) *The Medal may be awarded for service under the National Service Act 1951 between 1951 and 1972.*
- (2) *The service for which the Medal is awarded is:*
 - (a) *service under the National Service Act 1951 for which a person was called up, or for which a person volunteered, that satisfied the requirements applicable to that service under the Act;*
 - (b) *other service that discharged a person's liability to perform the*

service mentioned in paragraph (a) and that has been determined by the Governor General to be service for which the Medal may be awarded.

- (3) *The other conditions for the award of the Medal are as determined by the Governor-General on the recommendation of the Minister.*

5. The Governor General made a Declaration and Determination pursuant to Reg 4(3) on 25 October 2002. Sub paragraphs (i), (ii), (iii), (iv) and (v) set out the varying periods of service which had to be met between 12 April 1951 and 5 December 1972. Between 1 January 1965 and 7 October 1971 a member must have completed two years full time service. The Determination set out an exception to the above periods of service of:

(vi) Service as described in subparagraphs (i), (ii), (iii), (iv) and (v) of this Instrument may be deemed by the Chief of the Defence Force or a delegate of the Chief of the Defence Force to have established if it was terminated due to the death, illness or injury or other disability due to service.

The Applicant's service record

6. According to the Defence records the Applicant enlisted in the Citizen Military Forces (CMF) on 26 August 1963. He was underage on that date having been born on 24 September 1946 and so he was discharged on 24 September 1963. He re-enlisted the next day for two years and initially served as a gunner before becoming a cook. The Applicant re-enlisted on 26 August 1965 for a further two years and was discharged on 23 August 1966 at his own request so that he could travel to New Zealand.

7. The Applicant was called up for National Service on 23 June 1967 having undergone the standard medical examination on 2 May 1967. The Applicant enlisted on 12 July 1967 for two years with the Australian Regular Army Supplement (National Service) (ARAS(NS)). In December 1967 the Applicant was assigned to the Royal Australian Army Medical Corps. On 3 February 1969 the Applicant was discharged from ARAS(NS) as 'medically unfit for further training' pursuant to s.35B(2) of the *National Service Act 1951* (the NS Act).

The Applicant's Submission

8. In his application for review the Applicant explained that he had had narcolepsy all his life. The condition was not diagnosed until 1981. When he underwent his medical examination before enlisting for National Service, he was not diagnosed as suffering from narcolepsy. As a result his condition was incorrectly treated and he was prescribed medications that exacerbated his existing symptoms and caused other symptoms. It was these symptoms which caused him to be discharged from ARAS(NS). The substance of the Applicant's submission was that he was discharged because of a medical condition that was caused by his service.

10. In support of his submission the Applicant provided a medical report from his treating neurologist Dr Cameron dated 29 June 2011. Dr Cameron advised that he had been treating The Applicant since 1981. He wrote that the Applicant suffers from narcolepsy, which had been a life long problem. In Dr Cameron's opinion *this*

condition did cause or contribute to various alleged psychiatric problems the Applicant experienced during his National Service. Dr Cameron confirmed the Applicant's contention that being prescribed Valium would have complicated his condition.

11. In further submissions the Applicant stated that he had been prescribed both penicillin and Valium during his National Service. He was allergic to both drugs and these drugs caused whatever psychiatric symptoms he exhibited when he underwent medical examinations during his national service. The drugs made his narcolepsy worse. The Applicant wrote that he suffered from a fairly mild form of narcolepsy, which was well treated by Dr Cameron. His narcolepsy is so well controlled by taking strong coffee, he is still able to drive.

12. At the hearing the Applicant told the Tribunal that he chose to enlist for National Service because he wanted to serve his country. He had particularly wanted to serve in Vietnam to improve his medical experience as a nurse's aide. He had been told that he did not have to serve because of his earlier service with the CMF. After he was discharged from the ARAS(NS) he returned to work as a nurse's aide (later a State Enrolled Nurse). He continued working in this capacity for the rest of his working life.

13. The Applicant said that he had had symptoms of narcolepsy all his life. During his service with the CMF he was considered to be lazy when he exhibited the symptoms of narcolepsy. This caused him to be 'in trouble' at times. At times he just fell asleep during his National Service training. He was sometimes put on extra duties because he fell asleep at inappropriate times. The Applicant finds that stressful situations make his symptoms worse.

14. The Applicant said that he was given Valium by a doctor at the Military Hospital. He was working at the Hospital at the time and he went to see a doctor because he was feeling unwell and falling asleep. The Applicant recalled that he was given 2mg of Valium in the form of small blue tablets. He took these tablets for about one month but they affected him so badly he stopped taking them. The Applicant could not recall whether he was given a prescription for Valium. The Applicant told the doctors that he had been badly affected by the Valium and they referred him to a psychiatrist

15. According to the Applicant he saw the psychiatrist three times. The Applicant did not think that he had any psychiatric symptoms and could not explain why he had been referred to a psychiatrist. The psychiatrist did not tell him that he had schizophrenia. The psychiatrist prescribed Stelazine and he took this medication for about a month, but it made him nauseous. After he was discharged he stopped taking the medication on the advice of a doctor at the hospital (Concord Repatriation General) where he was employed. He felt better after he stopped taking the Stelazine. The Applicant said that he has not been referred to another psychiatrist.

The Directorate's Submission

16. The Directorate referred to the determination of the Governor-General and noted that the Applicant had to have served two years to meet the requirement to be

awarded the ANSM. It was noted that the Applicant had served in the CMF for just under three years which meant that he was qualified to receive the Australian Defence Medal. On 12 July 1967 The Applicant was conscripted into the ARAS(NS) and then discharged on 3 February 1969 as 'Medically Unfit for further service in the Military Forces'. The Applicant served for one year, six months and 22 days. He was required to serve for two years and this meant that he was not eligible to be awarded the ANSM.

17. The Directorate considered whether the Applicant had an undiagnosed medical condition that was exacerbated by his service. The Directorate sought advice from the Joint Health Command about whether the medications prescribed would have exacerbated or adversely affected the Applicant's narcolepsy. Rear Admiral Walker could find no evidence that the Applicant's medical condition was exacerbated by the medication he was prescribed on service. The Directorate also considered whether the period of service the Applicant had to complete could be reduced because of his earlier service. The Directorate decided that it had insufficient evidence to come to a decision on this matter.

The Applicant's Medical Files

18. The Medical Examination and report conducted on 2 May 1967 recorded that the Applicant did not have a mental illness and nor did he have severe depression. On 26 February 1968 The Applicant sought treatment for anal warts. The medical practitioner described the Applicant as a healthy man with no abnormalities detected. A prescription dated 17 July 1968 was for penicillin and Benadryl expectorant. On 18 and 23 September 1968 the Applicant was reviewed for Pharyngitis and was continued on the penicillin. In October 1968 the Applicant was admitted for Diathermy for his anal warts. A later prescription was illegible.

19. Following the treatment in October 1968 the Applicant was referred to a psychiatrist who he saw on 12 and 14 November 1968. The psychiatrist recorded that the Applicant had said that he was homosexually oriented and that in the past he had attempted suicide. The psychiatrist diagnosed him as suffering from a long-standing personality disorder with some psychotic aspects. He recommended that the Applicant be discharged and he prescribed Stelazine for the psychotic aspects. A subsequent medical report recorded that The Applicant's disability was 5% for anal warts and 30% for 'pre schizophrenia'.

20. The Final Medical Board recorded that the Applicant suffered from a nervous disorder and anal warts. The nervous disorder predated the Applicant's service. The reason why the Applicant was brought before the Board was because he had been diagnosed with schizophrenia and anal warts. The schizophrenic condition caused his disability for service and it was not caused by his military service. The Applicant had an overall disability for employment of 30%.

22. The review conducted by Rear Admiral Walker noted in his report of 27 May 2014 that in 1981 Dr Cameron had diagnosed the Applicant as having narcolepsy. Dr Cameron had supported The Applicant's claim. However, Dr Cameron did not provide any reasons for his conclusion that The Applicant's narcolepsy had contributed to his psychiatric problems during his service. Rear Admiral Walker

could find no evidence that the Applicant had been prescribed Valium. The only legible word on the otherwise illegible prescription was 'Codelsol', a trade name for prednisolol, which the Applicant had been prescribed for an eye condition. Rear Admiral Walker concluded that there was no evidence that the Applicant's symptoms of narcolepsy during his service were misdiagnosed as schizophrenia. She did observe that the Applicant's clinical presentation in 1968 was unusual and that the psychiatrist had diagnosed the Applicant as having a personality disorder, not schizophrenia. The psychiatrist noted that some of the Applicant's thinking indicated possible psychosis, which could result in a schizophrenic breakdown.

Conclusion

23. The ANSM may be awarded to a person who has satisfied the requirements under the NS Act for which the person was called up, or other service that discharged the person's liability to serve. The Governor-General in the Declaration and Determination of 25 October 2002 determined further requirements. Those requirements were that a person who served between 1 January 1965 and 7 October 1971 had to serve for two years. However if the person's service was terminated because of an illness or other disability due to service, a lesser period of service may be accepted if the CDF so decides.

24. The Tribunal finds that the Applicant commenced his National Service on 12 July 1967 and was discharged on 3 February 1969 and thus he served for one year, six months and 22 days. On 12 July 1967 s.27 of the NS Act provided that when a person presented himself for service he was deemed to be enlisted in the Regular Army Supplement for a period of two years. The Applicant was required to serve for two years to discharge his obligation under the NS Act. Because the Applicant did not serve for two years he did not satisfy the requirements of the NS Act and the Determination of the Governor-General.

25. Prior to his National Service the Applicant served in the CMF from 26 August 1963 until 23 August 1966, a period of just under three years. In his submissions the Applicant argued that his service with the CMF should have lead to a reduction of the period he had to serve to comply with the requirements of the NS Act. In the alternative he argued that the medical treatment he received while he served, caused him to be discharged early because of his illness or disability due to his service.

26. Section 35A provided that a person who had served in the Permanent Forces before his National Service, was entitled to have his period of National Service reduced by the period he had served in the Permanent Forces. Section 35(2) defined Permanent Forces as not including the Regular Army Reserve or the Regular Army Emergency Reserve.

27. In 1968 s.35A was repealed and a new section was inserted into the NS Act with effect from 24 June 1968. Its provisions were similar to the previous s.35A. The term Permanent Forces was defined in s.3 as including the Australian Regular Army and the Regular Army Supplement, but not the CMF. The Applicant was discharged on 3 February 1969 having not completed his service period of two years. His period of service could not be reduced by the period he had already served, because that

service was with the CMF and this service was not regarded as service with the Permanent Forces.

28. According to the Final Medical Board the Applicant was considered medically unfit for service because of his diagnosed condition of schizophrenia. The Medical Board concluded that this was a pre-existing condition, which had not been evident when the Applicant enlisted. The Applicant had a 30% disability for civilian employment and this disability, according to the Medical Board was not due to The Applicant's service.

29. After reviewing the medical file Rear Admiral Walker concluded that there was no evidence that the Applicant had been prescribed Valium, nor was there evidence that the Applicant's narcolepsy symptoms had resulted in the Applicant being incorrectly diagnosed with schizophrenia. The information in the medical record showed that the Applicant had been prescribed penicillin but there is no record of an allergic reaction. After carefully considering the evidence the Tribunal agrees with Rear Admiral Walker's conclusion and finds that the Applicant was not given Valium. The Applicant may have been confused because at about the same time he was prescribed Stelazine.

30. The Tribunal accepts that the Applicant may have suffered from narcolepsy since he was a child. The Applicant's evidence to the Tribunal was that his symptoms are relatively mild and he can control those symptoms with strong coffee. He is still able to drive. During his service he was occasionally spoken to about being inattentive but was never placed on a charge. The Applicant said that he managed his condition during his service even though did not know what it was. The Tribunal finds that the Applicant's symptoms that lead to him being referred to a psychiatrist could not have been caused by the medication he was given because he was placed on Stelazine after he saw the psychiatrist. The Tribunal accepts that Stelazine made the Applicant nauseous. It is a strong medication prescribed for psychosis with known adverse side effects. The Applicant was discharged from service because of his schizophrenic like symptoms, not because of the side effects of Stelazine. The Tribunal finds that this condition was not due to the Applicant's service. The exception in the Determination and Declaration does not apply to the Applicant and the Tribunal cannot recommend that a lesser period of service be accepted as satisfying the requirements for the ANSM.

DECISION

21. On 15 January 2015 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that the Applicant is not eligible for the award of the Anniversary of National Service 1951 - 72 Medal.