



Australian Government

Defence Honours and Awards Appeals Tribunal

Merrell and the Department of Defence re: Byrne [2020] DHAAT 11 (18 June 2020)

File Number 2019/010

Re **Mrs Jeanette Merrell obo Mr Jack Byrne (deceased)**
 Applicant

And **Department of Defence**
 Respondent

Tribunal Ms Jane Schwager AO (Presiding Member)
 Air Vice-Marshal John Quaipe AM (Retd)

Hearing Date 20 February 2020

DECISION

On 18 June 2020, the Tribunal decided to set aside the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Jack Byrne is not eligible for the award of the Australia Service Medal 1939-1945, and to refer the application to the Chief of Army for reconsideration of Mr Byrne's discharge classification. Should the Chief of Army amend Mr Byrne's discharge classification to an honourable discharge, the Tribunal decided that Mr Byrne would be eligible for the Australia Service Medal 1939-1945.

CATCHWORDS

DEFENCE AWARD – Australia Service Medal 1939-1945 – failure to receive honorable discharge – discharge pursuant to district court martial – discharge for medical reasons.

LEGISLATION

Defence Act 1903 – Part VIIC – Sections 110T, 110V, 110VB(2).

Defence Regulation 2016, Section 36.

Commonwealth of Australia Gazette No. 91, *Royal Warrant for the Australia Service Medal 1939-1945*, dated 30 November 1949.

Commonwealth of Australia Gazette No. S309, *Amendments to the Royal Warrant for the Australia Service Medal 1939-1945*, dated 21 August 1966.

Australian Military Regulations, Statutory Rules 1927, No 149 dated 14 December 1927 and various amendments.

Military Board Instruction 187/1948, dated 8 October 1948.

REASONS FOR DECISION

Background

1. Following a Defence review initiated by recommendations from the Tribunal's *Inquiry into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards*, the applicant, Mrs Jeanette Merrell, received the Pacific Star and the War Medal 1939-1945 previously withheld from her late father, Mr Jack Byrne.

2. On 24 May 2018, Mrs Merrell applied to the Directorate of Honours and Awards of the Department of Defence (the Directorate) regarding her father's entitlement to the Australia Service Medal (ASM) 1939-1945. On 9 June 2018, Mr Mark Jordan, Assessment Manager of the Directorate, replied to Mrs Merrell with the advice that her late father was not recommended for the ASM 1939-1945 as 'he did not receive, or was entitled to receive, an honourable discharge for his service in World War II'.

3. On 8 April 2019, Mrs Merrell applied to the Tribunal for a review of Mr Jordan's decision.

4. On 24 April 2018, the Chair of the Tribunal wrote to the Secretary of the Department of Defence seeking a report concerning the decision to not recommend Mr Byrne for the ASM 1939-1945. On 5 June 2019, Defence provided its report. The report was forwarded to Mrs Merrell on 11 June 2019 seeking her comments which were provided on 5 July 2019.

5. The Tribunal then undertook a merits review of the applicant's case, applying the eligibility criteria extant at the date of the decision under review. The Tribunal's review included a hearing conducted 27 February 2020. Following the hearing, the Tribunal obtained documentation from Mr Byrne's medical records held at the Department of Veterans Affairs. The relevant material was provided to Mrs Byrne for comment on 19 May 2020. Mrs Byrne's comments were received by the Tribunal on 12 June 2020.

Tribunal Jurisdiction

6. Pursuant to s110VB(2) of the *Defence Act 1903* 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 or the Minister to refuse to recommend a person for an honour or award in response to an application. Section 6 of the *Defence Regulation 2016* defines a defence award as being those awards set out in Section 36 of the Regulation. Included in the defence awards set out in Section 36 is the ASM 1939-1945.

7. The Directorate's letter of 9 June 2018 conveys a decision in effect refusing to recommend Mr Byrne for the ASM 1939-1945. This is the decision for which Mrs Merrell has sought review in the Tribunal. The Tribunal has jurisdiction to review this decision.

8. In conducting this review, the role of the Tribunal is to determine whether the decision of the Directorate on the ASM 1939-1945 is the correct or preferable decision, having regard to the applicable law and the relevant facts.

Eligibility Criteria for the Australian Service Medal 1939-1945

9. The ASM 1939-1945 was instituted by Royal Warrant published in the Commonwealth of Australia Gazette No. 91 of 30 November 1949 to recognise members of the Australian Armed Forces and others who rendered service between 3 September 1939 and 2 September 1945. Pertinent to this review, Clause 6 of the Royal Warrant states:

‘Only those who have received, or would be entitled to receive, an honourable discharge shall be eligible.’

Mr Byrne’s Service Record

10. Mr Jack Byrne enlisted in the Australian Military Forces on 14 September 1942 - his eighteenth birthday - and was taken on strength for training at No 2 Infantry Training Battalion. On 11 August 1943, Mr Byrne was transferred to the 2nd Australian Imperial Force. He embarked for operational service in New Guinea on 22 November 1943. After 106 days overseas service, on 7 March 1944, he returned to Australia. Mr Byrne was discharged from the AIF on 14 November 1945.

11. Mr Byrne’s service record shows that prior to his embarkation for overseas service, he was frequently absent from his unit or ‘place of parade’ without leave. Between October 1942 and August 1943, he was absent on six occasions for various periods of up to 18 days. Mr Byrne received fines and periods of detention in punishment for his absences.¹

12. During his New Guinea service, Mr Byrne was found guilty of *Conduct to the Prejudice of Good Order and Military Discipline* and fined £1.10.00 by his Commanding Officer.

13. Following his return to Australia, Mr Byrne was again punished for being absent without leave on two occasions in April 1944. On 5 October 1944, he was fined £5 by his Commanding Officer for *Disobeying a Lawful Command given by his Superior Officer*.

14. On 7 October 1944, Mr Byrne faced his first District Court Martial (DCM). He was charged with:

- (i) absenting himself without leave from 13 May 1944 to 14 June 1944,
- (ii) absenting himself without leave from 15 June 1944 to 29 July 1944, and
- (iii) losing by neglect his regimental necessities.

¹ Service Record, Byrne, Jack, NAA: B883, NX17367.

Mr Byrne was found guilty and sentenced to undergo six months detention.²

15. On 2 May 1945, Mr Byrne appeared before his second District Court Martial. On this occasion he was charged with:

- (i) absenting himself without leave from 13 January 1945 to 8 February 1945,
- (ii) escaping from confinement on 12 February 1945, and
- (iii) deserting His Majesty's Service, absent without leave from 12 February 1945 until 24 April 1945.

He was found guilty on all three charges and sentenced to detention for a period of one year from 2 May 1945.³

16. On 14 November 1945, two months and a few days after the formal Japanese surrender, Mr Byrne was discharged from the Army and the unserved portion of his sentence was remitted. His Proceedings for Discharge form indicates the reason for discharge as 'DCM'.⁴ A medal slip included on his file suggests that his awards were withheld as a consequence of his discharge with reference to a code '(k)'.

Defence Submission

17. The Defence submission notes the review of Mr Byrne's medallic entitlements following the Government's acceptance of recommendations from the Tribunal's *Inquiry into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards*. From that review Mrs Merrell received her father's Pacific Star and the War Medal 1939-1945. The Defence submission notes that Mr Byrne cannot be recommended for the ASM 1939-1945 as he failed to meet criteria 6 of the Royal Warrant of having received an honourable discharge.

18. The Defence report provides an interpretation of the discharge code (k) which appears on Mr Byrne's medal slip. The report highlights that discharge codes were outlined by Australian Military Regulations and that code (k) refers to Mr Byrne being discharged under Regulation 184 for the reason:

*(k) that, by reason of numerous convictions, he is deemed to be incorrigible.*⁵

19. The review of Mr Byrne's medallic entitlements concluded with reference to Military Board Instruction 187/1948 dated 8 October 1948, that having been discharged by reason of his numerous convictions, Mr Byrne's discharge is regarded as dishonourable.

² Jack Byrne, Date of Court Martial 7 October 1944, NAA: A471, 60852.

³ Jack Byrne, Date of Court Martial 2 May 1945, NAA: A471, 68759.

⁴ District Court Martial.

⁵ *Australian Military Regulations, Statutory Rules 1927 No 149*, dated 14 December 1927, Part III, Division 7 – Discharge and rank on discharge, Regulation 184.

Applicant's Evidence

20. While her application seeks the award of the ASM 1939-1945, Mrs Merrell's main concern is that her father's war service records have labelled her father 'dishonourable'. In her application of 8 April 2019, Mrs Merrell has described her father as being '*anything but dishonourable*'. She describes his behaviour during his Army service as being *abnormal* and out of character with his behaviour both before and after his war service. She describes her father as a sensitive man who was greatly affected by his war memories.

21. In her response to the Defence Submission, Mrs Merrell again noted that her father was *an ordinary man, greatly affected by War and the atrocities associated with it*. At the hearing, Mrs Merrell reiterated her father's general good character and the distress that he experienced following the war and in particular the difficulties that he faced towards the end of his life.

22. In describing the difficulty that her father experienced as a soldier, Mrs Merrell drew the attention of the Tribunal to Mr Byrne's own words as recorded in the proceedings of his District Court Martial (DCM) on 2 May 1945. At his trial, Mr Byrne gave his reason for his absences as:

'... I cannot soldier on account of nervous trouble. That has been the trouble throughout the time I have been in the Army. Since arrested on the last occasion I have been examined by an Army doctor and it has been certified that I am suffering from an anxiety state and that I am to be medically boarded following my trial.'

23. Mr Byrne's defending officer stated to the Court that he '*had the medical question checked by the Officer and they tell me that it is certified by the attending medico that he is suffering from an anxiety state and that he will be medically boarded after trial*'. Despite pleading *Not Guilty* to each of the three charges and admitting to the Prosecuting Officer that following his escape he had no intention of returning to the Army, nothing further was recorded in the proceedings of the DCM.

Tribunal Consideration

24. The question for the Tribunal to consider is whether Mr Byrne had an entitlement to receive the ASM 1939-1945 for his Army service. Of the Second World War campaign awards issued to Australians, the ASM 1939-1945 is unique in that the eligibility criteria specifically restricts this award to those who received or were entitled to receive, an honourable discharge.

25. The Tribunal notes that the terms 'honourable' or 'dishonourable' with respect to discharge from the armed services were not defined by regulation during the period preceding the institution of the ASM 1939-1945. However, the Tribunal is satisfied that notwithstanding the absence of formal definition, having been discharged as a consequence of his DCM and being deemed 'incurable' as a consequence of his numerous convictions, Mr Byrne's discharge cannot be regarded as being an honourable discharge.

26. With his record standing as it does, Mr Byrne's eligibility for the ASM 1939-1945 is specifically excluded. The only avenue available to Mrs Merrell would be for Defence to review and amend the nature of Mr Byrne's discharge. At the hearing Mrs Merrell gave her consent for her father's medical records to be accessed by the Tribunal. These records were subsequently obtained and copies have been forwarded to both Defence and the Applicant.

27. Mr Byrne's medical records include the report of his Final Medical Board dated 18 May 1945 supported by a specialist examination conducted by a Dr W. Stafford, Psychiatrist, on 16 May 1945. The report of the Medical Board corroborates the evidence provided by Mr Byrne and his defending officer at his court martial 2 May 1945.

28. At Item 27 of the report, the Medical Board has opined that Mr Byrne has reached the "*stage of discharge*" as defined in paragraph 2 of "*Instructions to Final Medical Boards on members of the Defence Forces*" dated 30th September, 1943 (Amended 1945.) although the qualifications, '*after detention*' and '*fit for detention*' have also been included with the opinion. It is quite clear that in the opinion of the Medical Board, Mr Byrne was to be discharged for medical reasons following the period of detention imposed by DCM.

29. The Tribunal notes that Mr Byrne's eventual discharge was not actioned in accordance with the conclusions of his Final Medical Board but rather in accordance with 'code (k)' of Regulation 184. The Tribunal makes no judgement with respect to Mr Byrne's medical condition at the time of his discharge but simply notes that had Army followed the findings of Lieutenant Colonel C.O. Donovan, Director of Medical Services, Mr Byrne would have received a discharge for medical reasons. Had Army chosen to follow the guidance of the Final Medical Board, Mr Byrne would be eligible for the award of the ASM 1939-1945.

DECISION

30. As the Tribunal has no jurisdiction to amend the nature of Mr Byrne's discharge, the Tribunal decided to set aside the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Jack Byrne is not eligible for the award of the Australia Service Medal 1939-1945, and to refer the application to the Chief of Army for reconsideration of Mr Byrne's discharge classification. Should the Chief of Army amend Mr Byrne's discharge classification to an honourable discharge, the Tribunal decided that Mr Byrne would be eligible for the Australia Service Medal 1939-1945.