



Australian Government

Defence Honours and Awards Appeals Tribunal

Dale and the Department of Defence [2021] DHAAT 8 (28 June 2021)

File Number(s) 2020/027

Re **Mr Victor Churchill Dale**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Jane Schwager, AO
Rear Admiral James Goldrick, AO, CSC, RAN (Retd)

Hearing Date 15 June 2021

DECISION

On 28 June 2021 the Tribunal affirmed the decisions of 13 November 2019 of the Directorate of Honours and Awards of the Department of Defence that Mr Victor Churchill Dale is not eligible for the award of the Australian Defence Medal for his service in the Australian Army between 1966 and 1968, or for the award of the Republic of Vietnam Campaign Medal for his service in Vietnam in 1967.

CATCHWORDS

AUSTRALIAN DEFENCE MEDAL – neither initial enlistment period nor minimum period of service met – discharge at own request on compassionate grounds.

FOREIGN AWARD – refusal to recommend the award of the Republic of Vietnam Campaign Medal – medical condition.

LEGISLATION

Defence Act 1903 – Part VIIC – Sections 110T, 110VB(1) and 110VB(6).

Defence Regulation 2016 – Section 36.

Australian Defence Medal Regulations 2006, Commonwealth of Australia Gazette No. S48, 30 March 2006

Australian Defence Medal Regulations 2006 – Instrument of Delegation, dated 23 September 2018.

Military Board Instruction 102-4, 23 December 1968, ‘Medals – The Vietnamese Campaign Medal’.

REASONS FOR DECISION

Introduction

1. Mr Victor Churchill Dale is seeking award of the Australian Defence Medal (ADM) for his service in the Australian Army between 1966 and 1968 and award of the Republic of Vietnam Campaign Medal (RVCM) for his service in Vietnam in 1967.

2. On 23 September 2019, Mr Dale applied to the Directorate of Honours and Awards for award of both medals. On 23 November 2019, Mr Wayne Parker, Manager Service and Campaign Award Assessments, responded to Mr Dale and denied that he was eligible for either award.¹

Australian Defence Medal

3. The reason for Defence's refusal of Mr Dale's application for the ADM was because, although he saw active service in Vietnam during his time in the Australian Regular Army, he did not complete his initial three-year engagement. Because his discharge was at his own request on compassionate grounds, Defence decided this does not meet the conditions for exemption from the minimum service requirement.

4. Mr Dale has applied for a review of the decision, stating that he left the Army only because of a compelling requirement to support his ailing and recently widowed mother who was in reduced circumstances. He believes that his service and the reason for departure justify an exception to the normal requirements of the award. The key question for consideration is whether any of the provisions for exception might meet Mr Dale's case.

Republic of Vietnam Campaign Medal

5. Mr Dale was not awarded the RVCM because he was evacuated from theatre as a result of suffering from Acne Vulgaris. At 153 days in theatre, his deployment to Vietnam was short of the qualifying time of 181 days. Although Mr Dale could have received the medal had he been evacuated after being wounded in action, Defence policy is that the definition of being 'wounded in action' does not extend to physical illness of the nature involved.²

6. Mr Dale has applied for a review of the decision, claiming in his comments on the Defence Report that the nature and timing of his illness were such that it was exacerbated by operational service in the field and that he 'very much doubt[s] that my skin infections would have occurred' had he been serving in theatre in a non-combat role.³ Given that a key criterion for being 'wounded in action' is that it be the direct result of the actions of the enemy, the question for consideration is whether Acne Vulgaris was acquired the same way and whether physical illness so acquired meets the criterion.

¹ DHA Letter BN10931284 (DHA – 5411678) dated 13 November 2019.

² DH&A/OUT/2020/0056 dated 22 October 2020.

³ Mr Dale Letter to the Tribunal dated 11 November 2020.

Tribunal Jurisdiction

7. 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 to refuse to recommend a person for a defence award or foreign award in response to an application. The *Defence Regulation 2016* defines defence awards as being those set out in Section 36 of the Regulation. The ADM is included in the defence awards listed in Section 36.

8. The term *foreign award* is defined in s110T of the Defence Act as an honour or award given by a government of a foreign country, or by an international organisation. The RVC M was instituted on 12 May 1964 by the Government of the Republic of Vietnam. On 24 June 1966 Her Majesty the Queen granted unrestricted approval for members of the Australian armed forces to accept and wear the RVC M.⁴

9. The Tribunal was satisfied that Mr Dale's application to Defence of 23 September 2019 constitutes an application as required by s110V(1)(c) of the Act. The Tribunal was satisfied that Mr Parker's advice of 23 November 2019 constitutes a refusal to recommend the awards, thus satisfying the requirements of s110V(1)(a) and (b) of the Act and creating the *reviewable decision*.

10. As required by s110VB(6), the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision. In accordance with s110VB(1) of the Act, as the Applicant seeks a defence award, and a foreign award, the Tribunal has the power to affirm or set aside the decision.

Conduct of the Review

11. Mr Dale applied to the Tribunal on 10 August 2020 for a review of the decision. On 20 August 2020, in accordance with the Tribunal's Procedural Rules, the Tribunal wrote to the Secretary of the Department of Defence advising of the review of Mr Dale's eligibility for the ADM and RVC M and inviting submissions and an explanation of how Defence had reached its decisions to refuse the awards.⁵ A written submission was issued by the Directorate on 22 October 2020. This submission concluded that Mr Dale did not complete his initial three-year engagement before his discharge on compassionate grounds at his own request and was therefore ineligible for the award of the ADM. Furthermore, it stated that Mr Dale did not serve in Vietnam for a continuous or aggregated period of 181 days and that, having been evacuated from theatre due to illness rather than as a battle casualty, he was not eligible for the award of the RVC M.⁶

12. The Defence submission was provided to Mr Dale on 30 October 2020.⁷ Mr Dale provided a response on 11 November 2020.⁸ On 10 March 2021, the Tribunal sought advice from Defence as whether the medical judgements made in

⁴ Cable, London to Canberra, 24 June 1966. NAA: 3111, 1966/3374

⁵ DHAAT/OUT/2020/256 dated 20 August 2020.

⁶ DH&A/OUT/2020/0056 dated 22 October 2020.

⁷ DHAAT/OUT/2020/317 dated 30 October 2020.

⁸ Mr Dale letter to the Tribunal dated 11 November 2020.

relation to Mr Dale's condition in Vietnam in 1968 are still considered appropriate given a contemporary understanding of his condition.⁹ Defence responded on 22 April 2021 and this information was provided to Mr Dale.¹⁰ On 15 June 2021 the Tribunal heard evidence by telephone from Mr Dale at a hearing also attended by Ms Allison Augustine and Mr Wayne Parker as representatives of the Department of Defence.

The Australian Defence Medal

13. The ADM was instituted on 8 September 2005, *for the purpose of according recognition to Australian Defence Force personnel who have served for a minimum of six years since the end of World War II.*

14. The *Australian Defence Medal Regulations 2006* (the Regulations) are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006, notably to reduce the period of qualifying service to four years. Regulation 4 of the amended regulations, extant at the time of the reviewable decision, states:

- (1) The Medal may be awarded to a member, or a former member, of the Defence Force who after 3 September 1945 has given qualifying service that is efficient:*
 - (a) By completing an initial enlistment period; or*
 - (b) For a period of not less than 4 years service; or*
 - (c) For periods that total not less than four years; or*
 - (d) For a period or periods that total less than four years, being service that the member was unable to continue for one or more of the following reasons:*
 - (i) The death of the member during service;*
 - (ii) The discharge of the member as medically unfit due to a compensable impairment;*
 - (iii) the discharge of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force or his or her delegate;*
- (2) For sub regulation (1), the Chief of Defence Force or his or her delegate may determine that a period of the member's qualifying service is efficient service.¹¹*

15. On 13 July 2020, the Regulations were further amended to allow the award of the medal to a member whose service was less than four years, where the discharge or termination of the member was on the grounds of being medically unfit not limited to a compensable impairment, or where a member ceased service because of mistreatment by a member of the Defence Force or an employee of the Department of Defence was considered a significant contributing factor.¹²

⁹ DHAAT/OUT/2021/130 dated 10 March 2021.

¹⁰ DH&A/OUT/2021/0011 dated 22 April 2021.

¹¹ *Australian Defence Medal Regulations 2006*, Commonwealth of Australia Gazette No. S48, 30 March 2006.

¹² *Australian Defence Medal Regulations 2006*, Amendment Regulations, Commonwealth of Australia Gazette, No G000629, 5 August 2020.

Republic of Vietnam Campaign Medal

16. The Government of the Republic of Vietnam established a campaign medal known in Australia as the Republic of Vietnam Campaign Medal (RVCM). This was offered to the Australian Government in May 1966 for award to Australian service personnel who had served in Vietnam. The offer was accepted. The RVCM remains a foreign medal and is additional to the Australian and Imperial campaign medals which have been issued to recognise service in Vietnam.

17. The original directive by the Chief of the Joint General Staff of the Republic of Vietnam Armed Forces which related to the RVCM for foreign military forces was dated 1 September 1965. Article 2 laid down the conditions for the award to Vietnamese personnel and Article 3 set out the conditions for award to 'Allied soldiers assigned to the Republic of Vietnam after 6 months.'¹³ The criteria were amended in March 1966, but not in such a way as to affect Mr Dale's case. Although the amendment did direct that 'Eligibility of individuals for the award will be determined by Royal Australian authorities (sic),'¹⁴ this does not grant Australia the authority to amend the criteria.

18. The Secretary of the Department of Defence set out the conditions for award of the RVCM to Australian service personnel in a memorandum to the three Service Departments dated 16 September 1966. These were:

- (a) *Special Service – as defined by the Repatriation (Special Overseas Service) Act 1962 for a minimum of 6 months duration, either continuous or aggregated, in Vietnam with retrospective effect to 31st July 1962.*
- (b) *'Special Service' in Vietnam of less than six months' duration since 31st July 1962 if*
 - (1) *Killed on active service or wounded-in-action and evacuated,*
 - (2) *Captured and later released or escaped.*

19. The instrument by which the criteria were interpreted by Army and promulgated for Army use was *Military Board Instruction 102-4* dated 23 December 1968.¹⁵ This set out qualifying conditions as:

To qualify for the award a member must be allotted for 'Special Service' in Vietnam as defined by MBI 216-1 and one of the following:

- a. Must serve in Vietnam for a minimum period, either continuous or aggregated, of 181 days from 31 Jul 62 inclusive to a future date,*
- b. Have served in Vietnam for a period of less than 181 days from 31 Jul 62 inclusive to a future date if:*

¹³ 'Directive Pertaining to awarding of Campaign Medal' dated 1 September 1965 Joint General Staff Republic of Vietnam Armed Forces.

¹⁴ Government of the Republic of Vietnam Memorandum Nr 183/TTM/QD dated 31 August 1966. Appendix 5, Defence Honours and Awards Appeals Tribunal *Report of the Inquiry into the feasibility of amending the qualifying criteria for the Republic of Vietnam Campaign Medal*, p. 29

¹⁵ Military Board Instruction 102-4 dated 23 December 1968, 'Medals – the Vietnamese Campaign Medal'.

- (1) *Killed on active service.*
- (2) *Wounded in action (i.e. classified as a Battle Casualty in a NOTICAS signal vide MBI 38-1).*
- (3) *Captured and later released or escaped.*

Agreed Facts

20. At the start of the hearing, the Tribunal sought and obtained the consent of Mr Dale and the representatives of the Department of Defence to a number of agreed facts. These were:

- a. The length of Mr Dale's service in the Australian Regular Army was two years, four months and five days of an initial three year engagement.
- b. This falls short of the required qualifying service for the ADM, which in Mr Dale's case would have been the three years of his initial engagement.
- c. Mr Dale was discharged at his own request on compassionate grounds on 6 December 1968.
- d. Although Mr Dale was automatically entered onto the Australian Army Regular Reserve for a period of 5 years with effect from his discharge, he was not called back for duty and did not render any further military service which would count towards the award of the ADM.
- e. Mr Dale suffered from Acne Vulgaris while in Vietnam.
- f. Mr Dale's condition was assessed as requiring his medical evacuation to Australia.
- g. The length of Mr Dale's service in Vietnam in 1967 was 153 days, which falls short of the total required for the RVCM.

Mr Dale's Service Record

21. Mr Dale's service record indicates that he enlisted in the Australian Regular Army on 2 August 1966. He was allotted for Special Service in Vietnam and emplaned in Sydney for Vietnam on 6 June 1967, arriving in Vietnam on 7 June 1967. Initially posted to 1 Australian Reinforcement Unit, he was posted to the 7th Battalion, Royal Australian Regiment on 18 July 1967. After being assessed as medically unsuitable for tropical service on 23 September 1967, Mr Dale was approved for return to Australia on the grounds of his medical condition. He emplaned at Vung Tau for Butterworth on 6 November 1967 and arrived in Australia at Darwin Air Base on 7 November 1967. Mr Dale was discharged from the Australian Regular Army on compassionate grounds at his own request on 6 December 1968.

22. Mr Dale has been issued the Returned from Active Service Badge and the Infantry Combat Badge and has received the following awards:

- a. Australian Active Service Medal 1945-75 with Clasp 'VIETNAM'; and
- b. Vietnam Medal

The Tribunal's Consideration of Eligibility for the ADM

23. There is no dispute regarding Mr Dale's period of service in the Australian Regular Army or that it fell short of the three years of his initial engagement. At issue is whether the circumstances of Mr Dale's departure from service could fall within the exception criteria for the ADM.

24. We are satisfied that the Directorate decision was made by an appropriately authorised Delegate and the correct legislation was applied in the making of the decision, being the *Australian Defence Medal Regulations*.

25. The Tribunal is bound by the eligibility criteria that govern the award of the ADM. Accordingly, for Mr Dale to qualify having completed less than the three years of his initial engagement, he must have satisfied one of the exceptions laid down in 4(1)d (i) to (iii) of the *Regulations*.

26. Given that Mr Dale's discharge was at his own request on compassionate grounds, it is clear that his departure was not as a result of any of the circumstances defined in the relevant provisions. Indeed, it is clear from the record that not only was Mr Dale's departure only because of his pressing need to support his widowed mother both domestically and financially but also that the Australian Army was keen to retain his services. Mr Dale's record, most notably his posting to a Recruit Training Battalion after return from Vietnam, confirms that he was a good soldier and one whom the Army continued to value, despite his unfitness for tropical service after 1967.

27. It is clear that Mr Dale acted with great integrity in making his mother's welfare his priority in 1968 and that this was the only reason for his military service to conclude when it did. Nevertheless, discharge at own request on such grounds does not come within the eligibility criteria for an exception to the length of service requirements of the ADM.

The Tribunal's Consideration of Eligibility for the RVC

28. There is no dispute regarding Mr Dale's period of service in Vietnam being from 25 March to 16 September 1969 – a period of 153 days. There is also no dispute that he was medically evacuated from Vietnam because he was suffering from Acne Vulgaris. At issue is whether the condition which required Mr Dale's removal from theatre can be classified as 'wounded in action'.

29. We are satisfied that the Directorate decision was made by an appropriately authorised Delegate and the correct legislation was applied in the making of the decision - being *Military Board Instruction 102-4*.¹⁶

30. The Tribunal is bound by the eligibility criteria that governed the award of the RVCМ at the time of the reviewable decision. Accordingly, in order for Mr Dale to be eligible for the award of the RVCМ, we must be satisfied that he either completed the qualifying period of 181 days of service in Vietnam or that the reason for his early removal from theatre fell within one of the prescribed exceptions.

31. We carefully considered the key argument made by the applicant.

32. The Tribunal noted that judgements as to whether a soldier was 'wounded in action' as a result of enemy action are inherently subjective. This was acknowledged in the Tribunal's *Report of the Inquiry into Eligibility for the Republic of Vietnam Campaign Medal* when the Tribunal explicitly accepted that, 'In an extreme case, a casualty caused by crawling through a tunnel constructed by the enemy in a defensive position, would be caused by the enemy even though the enemy was not present at the time the casualty was incurred.'¹⁷ The Tribunal's report, however, immediately followed this with the judgement that, 'A casualty caused by illness (such as malaria or encephalitis) would not be eligible'. The Tribunal notes that Mr Dale's medical records not only indicate that he suffered from Acne Vulgaris in youth, but that he experienced a flare-up of the condition while undertaking pre-deployment field training at the Infantry Centre at Singleton in the summer of 1966 – a location whose humidity and temperature at that time of year can approach conditions in Vietnam.¹⁸ He had already been treated during his Army service for an infected sebaceous cyst and acne in July 1966.¹⁹

33. The Tribunal accepts that Mr Dale's condition was exacerbated by the operational environment he experienced in the field as an infantry soldier in Vietnam and that the illness forced his evacuation from theatre. We do not accept, however, an individual's suffering an illness can be considered in the same way as being wounded in action unless a direct link can be established with the actions of the enemy, however obvious the relationship between deployment into theatre and the enemy's general actions which have required a military response by Australia. It remains necessary in each case to establish credible causal links between the individual's illness and the enemy's actions within the operational environment. The Tribunal is not, after careful consideration, of the view that such causal links have been established in Mr Dale's case.

¹⁶ Military Board Instruction 102-4 dated 23 December 1968, 'Medals – the Vietnamese Campaign Medal'.

¹⁷ Defence Honours and Awards Appeals Tribunal *Report of the Inquiry into the feasibility of amending the qualifying criteria for the Republic of Vietnam Campaign Medal*, p. 30

¹⁸ V.C. Dale 5411678 Medical Documents - Attendance and Treatment Card – entry dated 13/12/66.

¹⁹ V.C. Dale (as V.C. Beynon) Medical Documents - Sick Report – entry dated 17/07/66.

Finding

34. For the above reasons we find that Mr Dale is not eligible for the ADM nor is he eligible for the RVC. We therefore find that the decisions of the Directorate should be affirmed.

35. The Tribunal acknowledges that its decisions will be a severe disappointment to Mr Dale, particularly as he had reasonable grounds after his return from Vietnam in thinking that he had been awarded the RVC. The Tribunal recognises that the discovery of his ineligibility would have been a source of considerable personal anguish for Mr Dale.

36. The Tribunal here wishes to acknowledge Mr Dale's service and express the hope that he will wear his Australian Active Service Medal and his Australian Vietnam Medal with pride in his record of commitment to his country demonstrated by volunteering for combat service in the Army in a time of armed conflict and his active service overseas.

DECISION

37. The Tribunal affirmed the decisions of 13 November 2019 of the Directorate of Honours and Awards of the Department of Defence that Mr Victor Churchill Dale is not eligible for the award of the Australian Defence Medal for his service in the Australian Army between 1966 and 1968, or for the award of the Republic of Vietnam Campaign Medal for his service in Vietnam in 1967.