DECISION AND REASONS FOR DECISION [2012] AATA 228

**ADMINISTRATIVE APPEALS TRIBUNAL )**

 **)** No: 2012/0447

**General Administrative Division )**

 Re: Paul Rosenzweig

Applicant

And: Military Rehabilitation & Compensation Commission

Respondent

**CORRIGENDUM TO DECISION NO. [2012] AATA 228**

**TRIBUNAL:** Deputy President D G Jarvis

**DATE:**  7 November 2012

**PLACE:**  Adelaide

The Tribunal directs the Registrar, pursuant to subsection 43AA(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), to alter the text of the decision in the within proceedings by inserting the words *“change or disturbance of the normal physiological”* in the quotation of Gleeson CJ and Kirby J at paragraph 27 so that the second sentence of the quotation reads:

 *“... If this evidence amounts, relevantly, to something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an “injury” in the primary sense of that word. ...”*

................ [Signed] ...................

 D G Jarvis

 (Deputy President)

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| Division | **VETERANS' APPEALS DIVISION** |
| File Number(s) | 2012/0447 |
| Re | Paul Rosenzweig |
|  | APPLICANT |
| And | Military Rehabilitation and Compensation Commission |
|  | RESPONDENT |

# Decision

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| --- | --- |
| Tribunal | **Deputy President D G Jarvis** |
| Date | **19 April 2012**  |
| Place | **Adelaide** |

The tribunal, pursuant to s 29(7) of the *Administrative Appeals Tribunal Act 1*975 (Cth), extends until 30 April 2012 the time for the filing of an application for review of the reviewable decision of the respondent made on 7 February 2005, and directs that the time within which the Commission is to lodge and serve the documents required by s 37 of the Act be extended until 29 June 2012.

................ [Signed] .................

**Deputy President D G Jarvis**

# Catchwords

**PRACTICE AND PROCEDURE** – Application for an extension of time – claim for compensation for retinal vein occlusion – delay of 7 years – failure by respondent’s predecessor to consider whether occlusion was an injury simpliciter, and not a disease – held that respondent could not rely on prejudice due to its own failure to investigate the claim on that alternative basis – extension of time granted.

# Legislation

Administrative Appeals Tribunal Act 1975 (Cth), s 29(7)

Safety, Rehabilitation and Compensation Act 1988 (Cth), s 65(4)

# Cases

Australian Postal Corporation v Burch (1998) 26 AAR 312

Australian Postal Corporation v Burch (1998) 85 FCR 264

Budd v Secretary, Department of Education, Employment and Workplace Relations [2008] FCA 1540

Comcare v A'Hearn (1993) 45 FCR 441

Hunter Valley Developments Pty Ltd v Cohen (1984) 3 FCR 344

Jackamarra v Krakouer (1998) 195 CLR 516

Kennedy Cleaning Services Pty Ltd v Petkoska (2000) 200 CLR 286

Lukac v Linfox Armaguard Pty Ltd & Anor [2010] FCA 740

Phillips v The Australian Girls' Choir Pty Ltd & Anor [2001] FMCA 109

Re Filsell and Comcare (2009) 109 ALD 198

# REASONS FOR DECISION

**Deputy President D G Jarvis**

**19 April 2012**

1. On 1 June 2004, the applicant, Paul Rosenzweig, claimed compensation for a *“blindness left eye”* condition. This resulted from a retinal vein occlusion that occurred on 26 March 2004, while Mr Rosenzweig was on duty with the Australian Regular Army. He claims that the condition was caused by chloroquine and mefloquine medication which he had taken as a prophylaxis against contracting malaria when he was serving as a major in the Australian Army in East Timor.
2. The claim was considered by the Military Compensation and Rehabilitation Service within the Department of Veterans’ Affairs. At that time claims management functions for members of the Defence Force had been delegated to the Service. The Service denied liability for the claim in October 2004, on the basis that there were a number of risk factors that caused retinal vein occlusion, that the medical evidence available did not reveal any particular cause in Mr Rosenzweig’s case, and that there was no evidence suggesting that his service made a material contribution to the development of the condition. Following a request for reconsideration dated 25 October 2004, the rejection of the claim was affirmed on 7 February 2005.
3. By letter dated 5 April 2011, Mr Rosenzweig resubmitted the *“claim for review based on current circumstances and information which (had) become available since that time”*. His letter said in effect that none of the risk factors referred to by the Service when rejecting his claim applied in his case, and he referred to certain information published since 2004 which indicated that his retinal vein occlusion might have resulted from the medication he had taken in connection with his East Timor service. In a letter dated 27 May 2011, the Military Rehabilitation and Compensation Commission (which by then had the function of determining claims for compensation in place of the Service) referred to the earlier rejections of Mr Rosenzweig’s claim, and to the Service’s earlier advice that if he was dissatisfied with its decision he could apply for review to this tribunal. The Commission said that the advice concerning review by this tribunal still applied.
4. On 6 February 2012, Mr Rosenzweig lodged an application for an extension of time to apply to this tribunal for review of the decisions contained in each of the letters that had advised him of the rejection of his claim. The Commission opposes his application.
5. Mr Rosenzweig gave evidence in support of his application, and I will refer to his evidence when considering various issues that are relevant to the exercise of my discretion as to whether to extend time. He gave evidence in a careful and forthright manner, and I accept his evidence.

# Legislative provisions

1. Under s 29(1)(d) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) an application to this tribunal for review of a decision must be lodged with this tribunal within the prescribed time which relevantly, by virtue of s 29(2)(a) of the AAT Act and s 65(4) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act), is the 60th day after a document setting out the terms of the reviewable decision is given to the applicant.
2. The tribunal is given a discretion to extend the time for making an application for review by s 29(7) of the AAT Act. This section provides as follows:

 “(7) The Tribunal may, upon application in writing by a person, extend the time for the making by that person of an application to the Tribunal for a review of a decision ... if the Tribunal is satisfied that it is reasonable in all the circumstances to do so.”

# consideration

1. In the course of their submissions, both parties referred to the principles laid down by Wilcox J in the well-known case of *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344. These principles were reformulated by McInnis FM in *Phillips v Australian Girls’ Choir Pty Ltd & Anor* [2001] FMCA 109 at [10]. The principles so reformulated take into account the decision in *Comcare v A’Hearn* (1993) 45 FCR 441 to the effect that although in an application for an extension of time, an explanation for the delay in bringing the substantive application will normally be given, such an explanation is not an essential pre-condition for the granting of the extension. I note that the principles set out in *Phillips* (supra) were approved by Cowdroy J in *Budd v Secretary, Department of Education, Employment and Workplace Relations* [2008] FCA 1540 at [19].
2. The propositions in *Phillips* (supra) are, with respect, most helpful, and I will consider the present application by reference to each of those propositions in turn. I would, however, comment that in my view it is also relevant to take into account a further consideration, namely the extent of the delay. In addition, I think that the sixth proposition referred to in *Phillips*, namely that the *“merits of the substantial application are properly to be taken into account in considering whether an extension of time should be granted”* is a matter which, according to later authorities, should be given less weight: see *Lukac v Linfox Armaguard Pty Ltd & Anor* [2010] FCA 740 at [12] and the authorities there cited.
3. I bear in mind that whilst an applicant does not have to show special circumstances in order for an application for an extension of time to be granted, the limitation period should not be ignored, and the application should not be granted unless the tribunal is satisfied that it is proper to do so: *Phillips* (supra) at [10]; *Hunter Valley Developments Pty Ltd* (supra) at 348.
4. *Extent of delay* The period within which the application for review should have been lodged with the tribunal expired on the 60th day after the Service’s letter of 7 February 2005 affirming the rejection of Mr Rosenzweig’s claim was given to him. Mr Rosenzweig said that he was serving in the Philippines when he received the letter, and there is no evidence as to the date of its receipt. However, it is likely that the letter was received during February 2005, and so the application to this tribunal is out of time by about 7 years. The extent of the delay is therefore significant.
5. *Explanation for the delay* Mr Rosenzweig said that at about the time of the rejection of his claim in October 2004, he became aware that a law firm was considering a possible class action regarding the effects of the mefloquine medication, which he understood had resulted in various side effects recorded by a number of Army personnel who had taken the medication. However, he was advised in February 2006 that the firm was not pursuing any legal action.
6. In November 2004 he requested from Defence Health Services a referral for further review by an ophthalmologist to determine the likely cause of his retinal vein occlusion, but this did not proceed due (as he understood it) to funding constraints into research, and he then had to urgently prepare for a posting overseas to the Philippines. He remained overseas from December 2004 until January 2008 in *“an extremely high-tempo military posting”*, and did not pursue his claim for compensation.
7. During this period, as a result of communications with the Department of Veterans’ Affairs regarding an unrelated injury, Mr Rosenzweig learned that a Statement of Principles had been made, which he thought the Department might refer to in order to determine whether his retinal vein occlusion had been caused by the quinine-type medication he had been taking. He found, however, that the Statement of Principles did not support his claim that there was a causal connection between the medication and the occlusion. In any event, liability for compensation under the SRC Act does not depend on Statements of Principles.
8. After a medical examination following his return to Australia in 2008 he found that there had been a significant change in the visual acuity in his left eye. However, he was still considered fit to continue service. He was then selected to return to East Timor in 2009, and served there in 2010.
9. In January 2011 he was again examined in Australia. He was then certified not fit to continue serving because he was blind in his left eye, and it was decided that he should be medically discharged from the Australian Defence Force. He said that this was a wake-up call, and made him realise that his eye condition was really serious. After that, he found references on the internet to certain scientific studies which referred to possible connections between quinine-type medication and retinal vein occlusions. He resubmitted his 2004 claim by sending the letter of 5 April 2011 to the Commission, and he included reference to the scientific evidence of which he had become aware. His letter was met with the response dated 27 May 2011 to which I referred above.
10. Mr Rosenzweig gave evidence that if he had been able to continue serving the Armed Forces, he would have been supported with medical assistance provided by the Army, and he probably would not have pursued his claim for compensation. He requested that the decision to discharge him be reviewed by a medical review board, but the earlier determination was not changed, and he was medically discharged on 31 October 2011. In the period after receiving the response of 27 May 2011 to his resubmitted claim, Mr Rosenzweig continued to seek medical advice. He also made inquiries with the Royal Society for the Blind as to the effects of the blindness in his left eye on various aspects of his life and as to the support which the Society could provide. These matters were clarified in about January this year, and the person from the Society with whom he dealt suggested that he should pursue his claim for compensation in this tribunal. After that he lodged the application for review with this tribunal, and the application for an extension of time.
11. It was apparent from the Service’s letter of 7 February 2005 affirming the rejection of Mr Rosenzweig’s claim for compensation that the Service was treating the claim as a claim for a disease, thus necessitating evidence of a causal connection between the retinal vein occlusion and Mr Rosenzweig’s service. This was also apparent from the Service’s initial rejection of the claim. Mr Rosenzweig explained why he had been unable to pursue further inquiries as to the issue of causation, and he also said that it was not until his *“wake-up call”* in January 2011 that he obtained some further evidence on this issue as a result of his own internet research. He then attempted to pursue his claim after becoming aware of further relevant information. Indeed, it appears that the information in question was not available at the time of the initial rejection of his claim. In the circumstances, I think that he has a reasonable explanation for his delay in applying to this tribunal.
12. *Whether the applicant rested on his rights* The question of whether Mr Rosenzweig rested on his rights is also relevant in assessing the adequacy of his explanation for the delay, as well as in determining whether the Service was entitled to regard his claim as having been finalised.
13. I have referred above to the steps taken by Mr Rosenzweig after he received the three letters advising that his claim had been rejected. It appears that he rested on his rights in the period after November 2004, for the reasons referred to paragraph 13 above, until his *“wake-up call”* in January 2011. It also appears that the Service and the Commission were entitled to regard the claim as having been finalised until Mr Rosenzweig resubmitted the claim in April 2011.
14. *Prejudice to the respondent* The Service rejected the claim because of the absence of evidence as to the cause of the retinal vein occlusion. Mr Rosenzweig referred in his resubmitted claim and in his evidence to some references to scientific studies relevant to that issue. He said that he is prepared to seek further advice from ophthalmologists if his application for an extension of time is granted, but due to financial constraints, he has not at this stage obtained any such further evidence. The issue of causation is likely to depend on evaluating the scientific evidence already proffered by Mr Rosenzweig, as well as an evaluation of further medical evidence that might be obtained by him and by the Commission. There is no evidence that the Commission will be disadvantaged in obtaining and evaluating relevant scientific or medical evidence because of the delay in issuing proceedings in this tribunal, and I think that any such disadvantage would be most unlikely. Further, as far as facts specific to the claim are concerned, it appears likely, having regard to the service records that are kept by the Defence Forces, that the initial onset of Mr Rosenzweig’s retinal vein occlusion, the subsequent treatment he underwent, and the results of his later examinations will have been recorded, and that those records will remain available. In these circumstances, I think it unlikely that the Commission will be prejudiced by the lateness of the application to this tribunal, and indeed it was not submitted on behalf of the Commission that there would be prejudice in this case.
15. As I will explain below, it appears that the Service should have investigated whether Mr Rosenzweig suffered an injury *simpliciter* rather than a disease. This investigation would have involved obtaining factual information relating to the circumstances in which the injury occurred, in addition to relevant scientific and medical advice, and there is the potential for prejudice in that the further factual information necessary might not be as readily ascertainable now as might have been the case previously. However, once again it is likely that records will be available of the history provided by Mr Rosenzweig, at the time when he first sought treatment, of the circumstances surrounding the occurrence of the occlusion, in which case there would be no prejudice to the Commission. In any event, in the circumstances of this case, if the Commission’s predecessor did not investigate at the time when the claim was made whether it related to an injury as opposed to a disease, the Commission should not in my view be entitled to rely on any prejudice that the Commission might now suffer, in investigating the claim so characterised, as a result of Mr Rosenzweig’s delay in making the application to this tribunal.
16. Notwithstanding my above conclusions, I bear in mind that the mere absence of prejudice is not enough to justify granting an extension of time.
17. *Merits of the substantial application* As mentioned above, this is a consideration which on later authorities should be given less weight, but on the issue of causation, Mr Rosenzweig has provided some evidence which indicates that there is at least a possible connection between the medication he was taking and the occlusion. Further, none of the other causative factors referred to in the initial rejection of his claim were applicable to him, with the possible exception of his cholesterol level. That matter would be capable of further investigation, and the issue (if the claim is treated as a claim for a disease) would remain whether the medication he was given made a material contribution to the occlusion. If another factor such as his cholesterol level also contributed to the occlusion, that of itself would not provide a defence to the claim; indeed, it might have made him more susceptible to the occlusion than he otherwise would have been, thus making it more likely that the medication made a material contribution to the occlusion. These issues would, of course, need to be further investigated if time is extended.
18. However, I think that the Service should have investigated whether the condition which Mr Rosenzweig suffered constituted an injury *simpliciter* rather than a disease. Whilst I have not been provided with a copy of the claim form he lodged, Mr Rosenzweig said in his letter of 1 November 2004, in which he requested the Service to review rejection of his claim:

“During a Defence activity in March 2004, I experienced sudden and transient ‘blurring’ of the vision in my left eye, as a result of which my vision deteriorated rapidly.”

1. When he resubmitted his claim in his letter of 5 April 2011, he wrote:

“On 26 March 2004, I experienced sudden and transient ‘blurring’ of the vision in my left eye, at which time I was directly supporting the Vice Chief of the Defence Force by developing options for a revised ADF command and control arrangement. For this work I was awarded an Australian Defence Force Commendation (Gold). The occlusion

actually occurred during a conference chaired by VCDF with the ADF Component Commanders (2-star rank), at which my options were being presented which made it impossible for me to seek treatment immediately.”

1. In *Australian Postal Corporation v Burch* (1998) 26 AAR 312, Northrop J discussed the concepts of *“disease”* and *“injury”* and the use of those expressions in the *Compensation (Commonwealth Government Employees) Act 1971* (Cth) and the SRC Act. (An appeal against Northrop J’s decision was dismissed: *Australian Postal Corporation v Burch* (1998) 85 FCR 264). His Honour referred to cases dealing with the rupture of an arterial wall, where it was decided that the rupture amounted to a physical injury, which was distinct from the defect, disorder or morbid condition (or disease) which enabled it to occur. Similarly, in *Kennedy Cleaning Services Pty Ltd v Petkoska* (2000) 200 CLR 286, Gleeson CJ and Kirby J, after referring to earlier authorities including *Burch* (supra) said, at [39]:

“All of those cases require that consideration be given to the precise evidence, on a fact by fact basis, concerning the nature and incidents of the physiological change accepted at trial. If this evidence amounts, relevantly, to something that can be described as a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state, it may qualify for characterisation as an “injury” in the primary sense of that word. If such an injury happens within the protected period of employment, it is ordinarily compensable without proof of a specific causal connection with the worker’s employment ... If the propounded “injury” is distinct from the underlying pathology that constitutes a “disease” that directly or indirectly caused the sudden event to occur, it is unnecessary to proceed to the alternative and additional basis whereby, in such cases, compensation may also be recovered for the disease process if the statutory preconditions are met.”

Mr Rosenzweig’s description of his sudden loss of vision in the left eye, which gave rise to the diagnosis of his retinal vein occlusion, suggests that he had suffered a sudden and ascertainable or dramatic physiological change or disturbance to his normal physiological state, so that the occlusion should be characterised as an “injury” and not a “disease”. In that event, he would be entitled to compensation if the injury happened in the course of his employment, even if it did not arise out of his employment (see the definition of *“injury”* in s 4(1) of the SRC Act as in force at the relevant date). If it is found that the occlusion happened in the circumstances referred to in Mr Rosenzweig’s letter of 5 April 2011, to which I referred in paragraph 25 above, then it would appear that Mr Rosenzweig’s claim should succeed. These considerations favour the granting of an extension of time.

1. *Fairness as between the applicant and other persons* Any exercise of discretion to grant an extension of time would be based on the circumstances in this case, and there is no suggestion that this would cause unfairness as between Mr Rosenzweig and any other persons.

# conclusion

1. After taking into account the various considerations referred to above, I think that on balance this is a matter where, to adopt the approach referred to by Kirby J in *Jackamarra and Krakouer* (1998) 195 CLR 516 at [66] in cases where the discretion is conferred in unlimited terms, it is *“just in all of the circumstances”* to exercise my discretion in favour of granting an extension of time.
2. It was submitted on behalf of the Commission that the application for an extension of time should be refused because based on my earlier decision in *Re Filsell and Comcare* (2009) 109 ALD 198 at [60], and the authorities there referred to, Mr Rosenzweig would not be precluded from bringing a new claim for compensation based on the evidence now available. On reflection, I think that this is not a reason not to grant an extension of time. Mr Rosenzweig resubmitted his claim in April 2011. The information that he provided, to which I referred in paragraph 25 above, should have alerted the Commission to investigate whether the claim should be treated as a claim for an “injury” *simpliciter* and not a “disease”. The Commission could, and I think should, have reconsidered its predecessor’s earlier determination on its own motion, pursuant to s 62(1) of the SRC Act, or could have treated the letter as a request for reconsideration pursuant to s 62(2) of the SRC Act on the above alternative basis. It did not do so. In these circumstances, I do not think that Mr Rosenzweig should be required to make a new claim for compensation.
3. Because I have drawn attention to the need for Mr Rosenzweig’s claim to be further investigated on the basis that it relates to an “injury” *simpliciter”* and not a “disease”, I think the Commission should be given an opportunity to do this before incurring the expense of compiling the documents required by s 37 of the AAT Act. I will accordingly direct that the time for preparing and lodging the documents required by s 37 of the AAT Act be extended to 29 June 2012.

# decision

1. The tribunal, pursuant to s 29(7) of the *Administrative Appeals Tribunal Act 1975* (Cth), extends until 30 April 2012 the time for the filing of an application for review of the reviewable decision of the respondent made on 7 February 2005, and directs that the time within which the Commission is to lodge and serve the documents required by s 37 of the Act be extended until 29 June 2012.

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| I certify that the preceding 33 (thirty three) paragraphs are a true copy of the reasons for the decision herein of Deputy President D G Jarvis. |

.......... [Signed] ..........

Associate

Dated 19 April 2012

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| Date(s) of hearing | **11 April 2012** |
| Applicant | **In person** |
| Advocate for the Respondent | **Mr S MacGregor** |
| Solicitors for the Respondent | **Sparke Helmore** |