[2012] AATA 347

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| Division | **VETERANS' APPEALS DIVISION** |
| File Number(s) | 2011/2458 |
| Re | LAZO ATHANASIOU |
|  | APPLICANT |
| And | REPATRIATION COMMISSION |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **Deputy President S D Hotop**  **Brigadier A G Warner, Member** |
| Date | **12 June 2012** |
| Place | **Perth** |

The decision under review is affirmed.

...........sgd S D Hotop.............

**S D Hotop, Deputy President**

# Catchwords

**VETERANS’ AFFAIRS** – veterans’ entitlements – disability pension – applicant rendered “defence service” in Australian Army from November 1978 to June 1985 – applicant claimed “sore neck” related to defence service – applicant has suffered cervical spondylosis – Statement of Principles (“SoP”) – SoP does not uphold contention that applicant’s cervical spondylosis connected with defence service – applicant’s cervical spondylosis not defence-caused – decision under review affirmed

# Legislation

Veterans’ Entitlements Act 1986 (Cth), s 5D(1), s 70(5), s 120(4), s 120B(3), s 196B(3) and  
 s 196B(14)

Statement of Principles concerning cervical spondylosis No 34 of 2005

Statement of Principles concerning cervical spondylosis No 77 of 2008

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# REASONS FOR DECISION

**Deputy President S D Hotop**

**Brigadier A G Warner, Member**

**12 June 2012**

# Introduction

1. Lazo Athanasiou (“the applicant”) served in the Australian Regular Army from November 1978 to June 1985. His service constitutes “defence service” for the purposes of Part IV of the *Veterans’ Entitlements Act 1986* (Cth) (“VE Act”).
2. In February 2009 the applicant made a claim for disability pension under Part IV of the VE Act in respect of medical conditions described as “depression” and “sore neck”.
3. On 12 May 2009 a delegate of the Repatriation Commission (“the respondent”) determined that “depressive disorder” is related to service but that “cervical spondylosis” is not related to service.
4. On 24 March 2011 the Veterans’ Review Board (“VRB”) affirmed the delegate’s determination that cervical spondylosis is not related to service.
5. On 21 June 2011 the applicant applied to the Tribunal for review of the VRB’s decision of 24 March 2011.

# The Evidence

1. The evidence before the Tribunal comprised the “T Documents” (T1–T13, pp I–VII, 1–182) lodged by the respondent in accordance with s 37 of the *Administrative Appeals Tribunal Act 1975* (Cth), and the oral evidence of the applicant.

# The Applicant’s Statements in Support of His Claim

1. The following statement of the applicant accompanied his claim for disability pension:

“ **ACCIDENT AT BUSHMEAD 1983**

1983 we were assigned to a job at Bushmead Rifle Range where Plant Troop were upgrading roads at the Range, and we were moving dirt with the Into’s 109 tippers, and a man made sand ramp was being formed up by CAT/D66 bucket, and on that day I was one of the drivers of a tipper.

I was coming up the ramp to dump my load of sand when the left side of the sand ramp gave way and I went over the side rolling the tipper onto the passengers side, as the tray stopped it going fully over, and I found myself falling out of the drivers seat and upside down falling onto my head with my body weight pushing my chin to my chest.

I had managed to climb up and pull myself out and through the drivers window I was still a bit dazed and not realizing the front wheel was still spinning and I stepped out onto it and was thrown out and onto the sand ramp and my head hitting the sand hard. I was driven back to 22 Construction Squadron by the Plant SGT G Smith to be checked by our RAP SGT as I had some cuts, and remember having a bit of a head ache and a sore neck that lasted for thirteen to fourteen days, I found it hard to turn my head as it was very sore. The RAP recommended that I put hot packs on my neck to relieve the pain and help the movement. I wasn’t charged for being the cause of the accident.” (sic) (T4, p 71)

1. The applicant made the following statutory declaration, dated 4 May 2010, in support of his application to the VRB for review of the determination of the delegate of the respondent dated 12 May 2009:

“ …

1. I was posted into 22 Construction Squadron, Plant Troop, in early January 1982. I was posted out of the School of Military Engineering, Holsworthy Barracks, Holsworthy, in New South Wales.
2. In approximately January/February 1983 I was tasked as a member of Plant Troop to upgrade roads at Bushmead Rifle Range. This involved moving dirt into 109 tipper vehicles. I was a Tipper Drive (sic). To do our job a Caterpillar D66 Dozer was making a sand ramp so we could come up the ramp to dump loads of sand.
3. While I was driving up the sand ramp, after about 2 hours on this duty, the left side of the sand ramp gave way as I was tipping my load and my vehicle rolled on the left side, being the passenger’s side. Luckily the tray was up which prevented a full rollover, but the tray caused the vehicle to spring back up, after sheering off the tray, and I fell out of the driver’s side (sic). As I fell out of the driver’s seat I was upside down and I fell onto my head with my body weight pushing my chin to my chest. I then climbed up and pulled myself out through the driver’s window and I was still a bit dazed and not realising the front wheel was still spinning and I stepped out onto it and I was thrown out and onto the sand ramp and my head hit the sand hard. Shortly after I was driven back to 22 Construction Squadron by the Plant Sergeant G Smith to be checked out by the Regimental Aid Post Sergeant, as I had some cuts and remember having a bit of a headache and a sore neck that lasted for 13 to 14 days after this event. Throughout that period of time following the accident I found it hard to turn my head as it was very sore. The Regimental Aid Post Medical Staff recommended that I put hot packs on my neck to relieve the pain and try to improve my range of movement which had been reduced by the accident.
4. A couple of days after the accident the Squadron Sergeant Major (SSM), Warrant Officer Class 2 Mick Ryan informed me that an investigation would occur and if I was found to be at fault as a result of the vehicle accident, I would be charged with a Military Offence in accordance with the requirements of Unit Standing Orders.
5. Within the next few days I was paraded before the 2IC (Captain) and told that I would not be formally charged with a Military Offence of Negligent Driving. In view of the Fact that the $60,000.00 or more tipper truck was formally written off as unrepairable, I was very relieved to hear this.
6. I was very pleased that no Military Charge would result because firstly my Conduct Record was clear, and secondly, I was to undertake a Special Air Service Regiment (SASR) Cadre Selection Course on 4th May 1983, so I did not want this to be jeopardised. I was looking forward to the SASR Selection Course and I wanted nothing to stand in the way of me being able to participate on the Course.
7. To prepare myself for the SASR Selection Course, myself and Spr Mark Gommers and Spr Roger Van Der Cult, signed up for a civilian static parachute jump on Saturday 5th March 1983. The 3 of us jumped at about 1:00 pm that day. I jumped first.
8. My jump was uneventful, and I had no problem. I landed on my feet and I was the first to land. Therefore I presume that the other 2 saw me land and can verify this fact. I looked around and saw Mark Gommers in trouble with his chute. The chute was open and he had been dragged across the ground into a barbed wire fence, and he was holding barbed wire away from his throat, as the wind blew his chute on the other side of the barbed wire and was dragging his body into the wire. I quickly got out of my chute and sprinted about 300 to 400 metres to Mark where I released him from his chute. I checked him and he was fine other than for cuts to his hands. After Mark retrieved his chute which had blown onto the opposite paddock about 100 metres away, we both then walked back to my chute which I collected and then we both walked about 500 metres to the debriefing room. At the debriefing, the Supervising Jump Staff asked all of us if we had any injuries, and I didn’t respond because I did not have any.
9. On 4th May 1983 I flew to Singleton Army Barracks New South wales and marched into the SASR Cadre Selection Course. On 24th May 1983 I was withdrawn from the Course because I had rolled my ankles on a few occasions and as a result my timings on exercises were below the cut-off time limit required. I was told that I could re-apply for the SASR Selection Course in 1984. I was disappointed over being withdrawn from the Course due to my injuries however I was very pleased that I could have another go at the Course in 1984.
10. I adamantly and honestly state that I had no problems with my neck before the Bushmead Rifle Range Army vehicle accident. I further state, adamantly and honestly, that I suffered no injury to my neck whatsoever during the civilian parachute jump on 5th March 1983. I truly cannot recall suffering any pain on 5th March 1983 following the jump, however I definitely did suffer neck pain and headaches after the Army truck rollover. As regards my parachute jump I landed smoothly, and on my feet which were spread as I landed, and I remained standing on my feet.
11. I am aware of a document in my Service Medical Records dated 8th March 1983 which refers to a parachute jump and also refers to me supposedly landing and rolling backwards. I have difficulty explaining this entry because it is simply incorrect. The Army truck accident was potentially life threatening and exposed me to pain and headaches that lasted over 2 weeks or thereabouts. The civilian parachute jump was uneventful for me, and to my belief perhaps I saw it as stirring up the earlier Army truck accident injury to my neck.

…” (T13, pp 129–131)

# Statutory Declarations Accompanying the Applicant’s Claim for Disability Pension

1. A statutory declaration of John Patrick Kranz, dated 5 May 2008, states as follows:

“ …

I John Kranz was stationed at 22 Construction Squadron in 1983 as a plant operator assigned to Plant Troop. During 1983 Plant Troop was undertaking road upgrades at the Bushmead rifle range. I was one of the Plant Operators assigned to the job.

I would to submit (sic) this statutory declaration that on the day of the accident I was elsewhere on the site but do recall seeing the dump truck on its side and being informed that Mr L Athanasiou was the driver.

…” (T4, p 75)

1. A statutory declaration of Michael Mellor, dated 22 December 2008, states as follows:

“ …

1. My association with Louie Athanson (sic) was when we were both posted with 22 Const Sqn Irwin Barracks. Louie was a sapper. I was the SQN’s SGT Medic IC.
2. The incident in question 1982–83 I was on leave. However on returning to the unit, the story of Louie doing his disco dance on a moving wheel was well known within the unit and as such believed to be true.
3. Having a talk with Louie about the incident/accident and any medical problems at the time, he told me he was seen by a medic but no problems detected. As it was treated as minor it was only recorded in the medic’s day book.
4. Louie was also a first class first aider, and working with him I always found him to be truthful and honest, and I would not hesitate about doubting his word.

…” (T4, pp 76–77)

# Additional Statutory Declarations in Support of the Applicant’s Application to the VRB

1. A statutory declaration of Dr William Edward Maitland, dated 31 March 2009, states as follows:

“ …

While a General Practitioner in Townsville … I attended Louie Anthanasiou between 1984 and 1990.

He was complaining of lower back pain which had been present since being involved in a motor vehicle accident in 1982.

He was also complaining of cervical pain.

I addressed both his lower back and cervical pain.

…” (T13, pp 127–128)

1. A statutory declaration of Mark Gommers, dated 3 August 2009, sates as follows:

“ …

1. Mr Lou Athanasiou rescued me from an entrapment in parachute rigging at an airfield south of Perth on 26 February 1983.
2. Mr Athanasiou responded to my shouts for help and ran toward me to render assistance. He was able to jettison my parachute by activating a ‘capewell’ – which freed me from impending strangulation.
3. Mr Athanasiou had to run at a sprint some 300 m distance to reach me. He then had to untangle me and then manipulate my ‘capewell’.
4. Post rescue, we walked some 400–500 m back to the debriefing room at the airfield. Mr Athanasiou appeared and acted fit and well throughout my ordeal.
5. I am forever grateful to Mr Athanasiou as I was subsequently able to apply for, and join Australia’s Special Air Service (SAS).
6. Mr Athanasiou also trained for, and then undertook SAS selection training with me.
7. The SAS selection course was several weeks after the aforementioned parachuting incident.

…” (T13, pp 132–133)

1. A statutory declaration of Michael John Ryan, dated 14 May 2010, states as follows:

“ …

1. I enlisted into the Australian Regular Army on or about 25th January 1962 and was appointed to the Royal Australian Engineers.
2. I was discharged from the Army in 1985 and re-enlisted shortly afterwards.
3. I attained the Rank of Warrant Officer Class I and in 1982/1983 I was the Squadron Sergeant Major (SSM) of 22 Construction Squadron, Irwin Barracks, Karrakatta, Perth.
4. I am presently the President of the Royal Australian Engineers Association of Western Australia.
5. I recall Sapper Lazo Athanasiou being involved in an ECN 109 Tipper accident in 1983, the precise date of which I do not recall, whilst he was operating the vehicle at Bushmead Rifle Range.
6. I distinctly recall that he was injured as a result of the Tipper rolling over, and I recall him being taken to the Regimental Aid Post (RAP), at Irwin Barracks, Karrakatta, Perth.
7. An Investigating Officer was appointed to investigate the circumstances of the vehicle accident. An investigation was necessary in accordance with Unit Standing Orders, and Defence Instructions, because firstly a Service Member was injured namely Sapper Lazo Athanasiou, and secondly the extent of damages to the vehicle as a result of the accident was considerable, hence the need for a formal investigation.
8. Captain R Huby the Second in Command (2IC), would have been appointed as Investigating Officer to investigate the occurrence of the vehicle rollover with resulting injury. The appointing Officer was the Officer commanding Major Don Muirhead.
9. I recall to the best of my memory and recollection that the ECN 109 Tipper, was so badly damaged that it was written off.
10. Sapper Athanasiou, after investigation by the Investigating Officer was not charged with a Military offence of negligent driving. I know this because of my Military position and appointment at the time as Squadron Sergeant Major (SSM). Had he been charged, it would have fallen to me to raise the Military Charge Sheet (A4) and then organise the Military prosecution.
11. I remain absolutely resolute that Sapper Athanasiou, a Soldier under my Command, was involved in a serious vehicle accident in 1983, at Bushmead Rifle Range, whilst a Serving Defence Member of Plant Troop in 22 Construction Squadron, and whilst in the performance of his Military duties, and I further recall him suffering injuries as a result of the accident in which he was involved.

…” (T13, pp 134–135)

1. A statutory declaration of Gordon Smith, dated 10 May 2010, states as follows:

“ …

1. I enlisted into the Australian Regular Army on 20th August 1968 and was appointed to the Royal Australian Engineers, Corps. I discharged from the Australian Regular Army on 20th August 1991, having attained the Rank of Warrant Officer, Class 1.
2. In 1983 I was the Plant Troop Sergeant of 22 Construction Squadron, based at Irwin Barracks, Karrakatta in Western Australia.
3. As I recall, in approximately February 1983 my Unit was assigned a duty at Bushmead Rifle Range involving the construction of a new Driver Training Circuit. Sapper Lazo Athanasiou was assigned to that duty and I do recall seeing him at Bushmead on that day. He was a Tipper Driver, assigned to duties delegated by the Project Manager, Warrant Officer Class II, Rod Alexander.
4. On that day I was called to the site of a vehicle accident which involved Sapper Athanasiuo’s Tipper rolling over. Upon arriving at the scene of the accident I saw his Tipper on its side. I was told about the accident, and we then proceeded to right the vehicle, using a wrecker to get it back on its wheels. The task was difficult because the tray was torn off during the rollover.
5. I have been reminded that I drove Sapper Athanasiou to the Regimental Aid Post (RAP) at Irwin Barracks, however, I cannot clearly recall this after 27 years, but as I was the supervising Squadron Plant Sergeant on that day, it certainly is likely that I did drive him to receive medical treatment.
6. I never subsequently learned that Sapper Athanasiou was charged with a Military Offence under the Defence Force Discipline Act for Negligent Driving, so as a result I assumed that upon formal Unit investigation, no blameworthiness was found to be present in his actions in his driving duties of the Tipper, and as a result he was not charged with a Military Offence.

..” (T13, pp 136–137)

# The Applicant’s Relevant Service Medical Records

1. The applicant’s service medical records covering the period from his enlistment to his discharge are in evidence (T3, pp 6-61; T13, pp 165-175). His service medical records for the period 1982–1983 refer to the following:

* 19 February 1982: “lumbar back pain getting out of bed 2 days ago” (T3, p 22);
* 2 March 1982: “Back: resolved with physiotherapy” (T3, p 24);
* 8 March 1983: “Parachuting on 5-3-83 – landed and as he rolled backwards got a sort of whiplash to neck … movements of head → neck pain in all supporting neck muscles … → physio

…” (T3, p 29);

* 11 March 1983: “Neck settling

Finished physio” (T3, p 30);

* 7 April 1983: “Doing back exercises on 6.4.83 (extension) and developed pain in thoraco-lumbar back …” (T3, p 32);
* 11 April 1983: “Pinched a nerve in neck − had physio. Now fully settled.”

(T13, p 169);

* 9 July 1983: “Acute thoraco-lumbar strain …” (T13, p 170)
* 11–12 July 1983: admitted to Repatriation General Hospital on 11 July 1983 with “acute spinal pain”; provisional diagnosis: “lower thoracic disc lesion”; discharged on 12 July 1983 (T3, pp 34–48);
* 23 September 1983: “Doing heavy carrying → pain in lower thoracic spine …”

(T3, p 51).

1. A record of a medical examination conducted on 21 September 1984 for the purpose of assessing the applicant’s fitness for SASR parachute jumping refers to “recurrent back pain” and concludes that the applicant is “unfit for parachute training” (T3, p 57).
2. The applicant’s Medical History Questionnaire on discharge, signed by him and dated 29 May 1985, indicates that he had suffered knee, ankle and back injuries but no “other joint injury or dislocation” (T3, pp 8–9).

# Radiological Reports Regarding the Applicant’s Cervical Spine

1. A CT scan report, dated 29 July 1995, refers to (*inter alia*) the following finding:

“ A very large postero-lateral disc protrusion is demonstrated at C4/5 on the left with marked encroachment on the left neural foramen and some indentation of the antero-lateral aspect of the cord on the left.” (T13, p 138)

1. An MRI scan report, dated 15 February 2008, concludes as follows:

“ **Comment:**

1. Multilevel discogenic degenerative change with mild to moderate central canal stenosis due to broad based disc-osteophyte complex at C4/5 and C5/6. No site of foraminal stenosis and no definite cause for right sided C5 radiculopathy seen.
2. There is heterogeneity of marrow signal within T2 and T3 vertebral bodies. This is most likely due to the previous of (sic) intra-osseous haemangiomata.
3. There is a well circumscribed 5mm diameter cystic structure within the C4 right pedicle with bony remodelling. There is a thin rim of bony margin remaining evident within the pedicle. Aetiology of the cyst is unclear.” (T7, pp 95–96)

# The Applicant’s Evidence

1. In his oral evidence the applicant said that he passed a driver’s course on 20 September 1982 and that he started a job driving a tipper truck at the Bushmead Rifle Range about a week later.
2. He described an accident in which he was involved while driving a tipper truck at the Bushmead Rifle Range in terms similar to those of para 3 of his statutory declaration of 4 May 2010 (set out in paragraph 8 above). He said, however, that that accident had occurred in the last week of September 1982, about a week after he had passed the driver’s course.
3. He said that, after that accident, Sergeant Gordon Smith, the job supervisor, took him to the Regimental Aid Post (“RAP”) at 22 Construction Squadron, not to “5MD” (the medical centre at the Barracks). He said that at the RAP he saw the Sergeant medic who bandaged cuts on his head. He added that he “felt alright but a bit dazed” and he was sent home. He also said that he saw the RAP for over two weeks during which he received treatment by way of “deep heat” and ice and that his neck soreness lasted over two weeks.
4. As regards the civilian parachute jump referred to in paras 7 − 8 of his abovementioned statutory declaration, the applicant said that it was his first jump and that he “came down fast” and landed with his feet apart about the width of his shoulders, and that, contrary to a statement in his service medical records (see paragraph 15 above), he did not fall back and hit his head.
5. He opined that the tipper truck accident in late September 1982 initially caused his neck injury and that the parachute jump incident on 5 March 1983 “stirred it up”.
6. He said that he started to suffer neck pain “on and off” in 1986 and that he has suffered episodes of severe neck pain since then which ultimately resulted in his ceasing work in 2007.
7. He said that the first time he realized that he had “a disc problem” in his neck was in 1996 when he saw the CT scan report (see paragraph 18 above). He added that, prior to that, he had always thought his neck problem was “muscular” and not serious.
8. He said that, comparing the tipper truck accident with the parachute jump incident, the tipper truck accident was more serious in that he suffered a serious injury in that accident.

# The Relevant Legislation

## The VE Act

1. Section 70 of the VE Act, which deals with eligibility for a pension under Part IV of that Act, relevantly provides:

“ …

(5) For the purposes of this Act, the death of a member of the Forces (other than a member to whom this Part applies solely because of section 69A) or member of a Peacekeeping Force shall be taken to have been defence-caused, an injury suffered by such a member shall be taken to be a defence-caused injury or a disease contracted by such a member shall be taken to be a defence-caused disease if:

(a) the death, injury or disease, as the case may be, arose out of, or was attributable to, any defence service, or peacekeeping service, as the case may be, of the member;

…”

The terms “disease” and “injury” are defined in s 5D(1) as follows:

“ **disease** means

(a) any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or

(b) the recurrence of such an ailment, disorder, defect or morbid condition;

but does not include:

(c) the aggravation of such an ailment, disorder, defect or morbid condition; or

(d) a temporary departure from:

(i) the normal physiological state; or

(ii) the accepted ranges of physiological or biochemical measures;

that results from normal physiological stress (for example, the effect of exercise on blood pressure) or the temporary effect of extraneous agents (for example, alcohol on blood cholesterol levels).”

“ **injury** means any physical or mental injury (including the recurrence of a physical or mental injury) but does not include:

(a) a disease; or

(b) the aggravation of a physical or mental injury.”

1. Section 120 of the VE Act, which prescribes the standard of proof to be applied in making determinations in respect of pensions under that Act, relevantly provides:

“ …

(4) Except in making a determination to which subsection (1) or (2) applies, the Commission shall, in making any determination or decision in respect of a matter arising under this Act or the regulations, including the assessment or re-assessment of the rate of a pension granted under Part II or Part IV, decide the matter to its reasonable satisfaction.

Note: This subsection is affected by section 120B.

…”

Section 120B relevantly provides:

“ …

(3) In applying subsection 120(4) to determine a claim, the Commission is to be reasonably satisfied that an injury suffered by a person, a disease contracted by a person or the death of a person was war-caused or defence-caused only if:

(a) the material before the Commission raises a connection between the injury, disease or death of the person and some particular service rendered by the person; and

(b) there is in force:

(i) a Statement of Principles determined under subsection 196B(3) or (12); or

(ii) a determination of the Commission under subsection 180A(3);

that upholds the contention that the injury, disease or death of the person is, on the balance of probabilities, connected with that service.

…”

1. Section 196A of the VE Act establishes the Repatriation Medical Authority (“the Authority”) and s 196B(1) provides that the “main function of the Authority is to determine Statements of Principles for the purposes of the Act …”. Section 196B(3) provides:

“ If the Authority is of the view that on the sound medical-scientific evidence available it is more probable than not that a particular kind of injury, disease or death can be related to:

(a) eligible war service (other than operational service) rendered by veterans; or

(b) defence service (other than hazardous service) rendered by members of the Forces; or

(ba) peacetime service rendered by members;

the Authority must determine a Statement of Principles in respect of that kind of injury, disease or death setting out:

(c) the factors that must exist; and

(d) which of those factors must be related to service rendered by a person;

before it can be said that, on the balance of probabilities, an injury, disease or death of that kind is connected with the circumstances of that service.

…

Note 3: For **factor related to service** see subsection (14).”

Section 196B(14) relevantly provides:

“ A factor causing, or contributing to, an injury, disease or death is **related to service** rendered by a person if:

(a) it resulted from an occurrence that happened while the person was rendering that service; or

(b) it arose out of, or was attributable to, that service; or

…

(d) it was contributed to in a material degree by, or was aggravated by, that service; or

…”

## The Statement of Principles

1. Pursuant to s 196B(3) of the VE Act, the Authority has determined the following relevant Statement of Principles (“SoP”) which is presently in force:

* Statement of Principles concerning cervical spondylosis No 34 of 2005, as amended by Statement of Principles concerning cervical spondylosis No 77 of 2008 (“the relevant SoP”).

The relevant provisions of that SoP are set out in paragraph 35 below.

# The Issue

1. It is common ground, and the Tribunal finds on the basis of the medical evidence, that the applicant has suffered cervical spondylosis. The sole issue for the Tribunal’s determination is whether the applicant’s cervical spondylosis is a defence-caused injury or a defence-caused disease, for the purposes of Part IV of the VE Act.

# Analysis

## Is the applicant’s cervical spondylosis a defence-caused injury or a defence-caused disease?

1. Pursuant to s 120B(3) of the VE Act, the Tribunal is to be reasonably satisfied that the applicant’s cervical spondylosis is a defence-caused injury or a defence-caused disease only if:

* the material before it raises a connection between that injury or disease and the applicant’s defence service; and
* the relevant SoP upholds the contention that that injury or disease is, on the balance of probabilities, connected with that service.

1. The Tribunal accepts that the material before it “raises a connection” between the applicant’s cervical spondylosis and his defence service, for the purposes of s 120B (3)(a) of the VE Act. That material includes the applicant’s evidence, and his earlier written statement and statutory declaration in which he claimed to have injured his neck in an accident involving the rolling over of a tipper truck which he was driving at the Bushmead Rifle Range (see paragraphs 7−8, 21 above).
2. The crucial question is, therefore, whether the relevant SoP “upholds the contention” that the applicant’s cervical spondylosis is, on the balance of probabilities, connected with his defence service, for the purposes of s 120B(3)(b) of the VE Act. That SoP relevantly states:

“ …

**Basis for determining the factors**

**4.** On the sound medical-scientific evidence available, the Repatriation Medical Authority is of the view that it is more probable than not that **cervical spondylosis** and **death from cervical spondylosis** can be related to relevant service rendered by veterans or members of the Forces under the VEA, …

**Factors that must be related to service**

**5.** Subject to clause 7, at least one of the factors set out in clause 6 must be related to the relevant service rendered by the person.

**Factors**

**6.** The factor that must exist before it can be said that, on the balance of probabilities, **cervical spondylosis** or **death from cervical spondylosis** is connected with the circumstances of a person’s relevant service is:

…

(f) having a trauma to the cervical spine within the twenty-five years before the clinical onset of cervical spondylosis; or

…

**Other definitions**

**9.** For the purposes of this Statement of Principles:

…

**‘trauma to the cervical spine’** means a discrete injury, including G force-induced injury, to the cervical spine that causes the development, within twenty-four hours of the injury being sustained, of symptoms and signs of pain, and tenderness, and either altered mobility or range of movement of the cervical spine.  These symptoms and signs must last for a period of at least ten days following their onset; save for where medical intervention for the trauma to the cervical spine has occurred and that medical intervention involves either:

(a) immobilisation of the cervical spine by splinting, or similar external agent; or

(b) injection of corticosteroids or local anaesthetics into the cervical spine; or

(c) surgery to the cervical spine.

…”

1. The applicant submits that he suffered a “trauma to the cervical spine” (as defined in clause 9 of the relevant SoP) in the tipper truck accident at the Bushmead Rifle Range which, according to his oral evidence, occurred in the last week of September 1982.
2. It is common ground, and the Tribunal finds on the basis of the abovementioned CT scan report of 29 July 1995 (see paragraph 18 above), that the applicant was suffering from cervical spondylosis as at 29 July 1995. The Tribunal also finds, on the basis of the abovementioned MRI scan report of 15 February 2008, that the applicant has since continued to suffer from cervical spondylosis.
3. Accordingly, if:

* the tipper truck accident occurred, as described by the applicant in his statement and oral evidence (see paragraphs, 7, 8 and 21 above); and
* the applicant suffered a “trauma to the cervical spine” (as defined in clause 9 of the relevant SoP) in that accident;

the factor set out in para (f) of clause 6 of the relevant SoP, together with clause 5 of that SoP, will have been satisfied and that SoP will, in those circumstances, have upheld the contention that the applicant’s cervical spondylosis is, on the balance of probabilities, connected with his defence service, for the purposes of s 120B(3)(b) of the VE Act.

1. Having regard to the evidence before it, the Tribunal is satisfied that the applicant was involved in an accident while driving a tipper truck in the course of his defence service at the Bushmead Rifle Range. The evidence regarding the date of that accident is, however, far from clear. It may be summarised as follows:

* the applicant’s statement (which accompanied his claim for disability pension) refers to the accident occurring in “1983” (paragraph 7 above);
* the applicant’s statutory declaration, dated 4 May 2010, refers to the accident occurring in “approximately January/February 1983” (paragraph 8 above);
* the statutory declaration of John Patrick Kranz, dated 5 May 2008, refers to the accident occurring “during 1983” (paragraph 9 above);
* the statutory declaration of Michael Mellor, dated 22 December 2008, refers to the accident occurring when he was on leave “1982–83” (paragraph 10 above);
* the statutory declaration of Michael John Ryan, dated 14 May 2010, refers to his recalling that the accident occurred “in 1983” (paragraph 13 above);
* the statutory declaration of Gordon Smith, dated 10 May 2010, refers to his recalling that the accident occurred “in approximately February 1983” (paragraph 14 above);
* the applicant, in his oral evidence, stated that the accident occurred in the last week of September 1982, about a week after he passed the driver’s course on 20 September 1982 (paragraphs 20 and 21 above).

As regards the applicant’s oral evidence, the Tribunal notes that, according to the applicant’s service records, the applicant *commenced* that driver’s course on 20 September 1982 and passed that course on 4 November 1982 (T3, p 2).

1. Given the inconsistencies and uncertainty of the abovementioned evidence, the Tribunal can be no more precise than to find that the tipper truck accident occurred in the period November 1982– February 1983.
2. Other than the applicant’s evidence, the only evidence before the Tribunal regarding the physical impact of the tipper truck accident on the applicant is as follows:

* the statutory declaration of Michael Mellor, dated 22 December 2008, in which it is stated:

“ …

(3) Having a talk with Louie about the incident/accident and any medical problems at the time, he told me he was seen by a medic but no problems detected. As it was treated as minor it was only recorded in the medic’s day book.

…”;

* the statutory declaration of Michael John Ryan, dated 14 May 2010, in which it is stated:

“ …

6. I distinctly recall that he was injured as a result of the Tipper rolling over, and I recall him being taken to the Regimental Aid Post (RAP), at Irwin Barracks, Karrakatta, Perth.

…”;

* the statutory declaration of Gordon Smith, dated 10 May 2010, in which it is stated:

“ …

5. I have been reminded that I drove Sapper Athanasiou to the Regimental Aid Post (RAP) at Irwin Barracks, however, I cannot clearly recall this after 27 years, but as I was the supervising Squadron Plant Sergeant on that day, it certainly is likely that I did drive him to receive medical treatment.

…”.

1. There is, however, no reference in the applicant’s service medical records, which are in evidence, to either the applicant’s being involved in a tipper truck accident in 1982-1983 or to his suffering any injuries in such an accident; nor is there any other medical evidence before the Tribunal which refers to the applicant’s being involved in a tipper truck accident in 1982-1983 or to his suffering any injuries in such accident. The Tribunal notes the statutory declaration of Dr Maitland, dated 31 March 2009, which refers to the applicant’s “complaining of lower back pain which has been present since being involved in a motor vehicle accident in 1982” and “also complaining of cervical pain”. The Tribunal notes, however, that Dr Maitland referred generally to “a motor vehicle accident”, and not specifically to a tipper truck accident, and that, furthermore, he did not expressly refer to the cause of the applicant’s “cervical pain” or the circumstances in which it arose.
2. There are, on the other hand, some references in the applicant’s service medical records to his experiencing neck pain in the period March-April 1983 (see paragraph 15 above), namely:

* on 8 March 1983 following parachuting on 5 March 1983; and
* on 11 April 1983.

It is further recorded that:

* on 11 March 1983 the neck pain suffered on 8 March 1983 was “settling” following physiotherapy; and
* on 11 April 1983 the “pinched nerve” in the neck was now “fully settled” following physiotherapy.

The Tribunal notes that, according to the applicant’s service medical records, the parachuting incident on 5 March 1983, following which he suffered neck pain, occurred in the course of “civilian sport” when he was not on duty, whereas the pinched nerve in the neck in April 1983 was suffered by him in the course of training activities when he was on duty (T3, pp 29-30; T13, p169).

1. The Tribunal notes the applicant’s evidence regarding his parachute jump on 5 March 1983 (as set out in paras 8, 10 and 11 of his statutory declaration of 4 May 2010 – see paragraph 8 above) to the effect that he “landed smoothly” on his feet and remained on his feet and did not suffer any injury to his neck in that incident. The Tribunal also notes the statement in para 4 of Mark Gommers’ statutory declaration of 3 August 2009 (set out in paragraph 12 above) to the effect that the applicant “appeared and acted fit and well” when rendering assistance to him after that parachute jump. The Tribunal also notes, however, that Mr Gommers (in para 1 of his statutory declaration) states that the date of the parachute jump incident to which he was referring was 26 February 1983.
2. The Tribunal attaches greater weight to the abovementioned contemporaneous service medical records, dated 8 and 11 March 1983, than it attaches to the applicant’s evidence, and, on the basis of those records, it is satisfied, and finds, that:

* on 5 March 1983 the applicant performed a parachute jump in the course of civilian sport;
* upon landing he “rolled backwards” and hit his head on the ground and suffered pain in his neck;
* he attended the Medical Centre at Irwin Barracks, Karrakatta on 8 March 1983 and was referred for physiotherapy to his neck;
* on 11 March 1983 his neck pain was found to be “settling” after physiotherapy.

1. As regards the abovementioned tipper truck accident, the Tribunal is prepared to accept that the applicant suffered some adverse physical effects as a result of that accident. The question for the Tribunal’s determination, however, is whether he suffered a “trauma to the cervical spine” (as defined in clause 9 of the relevant SoP) in that accident.
2. The phrase “trauma to the cervical spine”, as defined in clause 9 of the relevant SoP, necessarily involves a “discrete injury … to the cervical spine”, followed by the “symptoms and signs” as specified in that definition (see paragraph 35 above). In the present case, there is no medical evidence before the Tribunal which supports the proposition that the applicant suffered a “discrete injury” to his cervical spine in the period November 1982 – February 1983 (being the period in which the Tribunal has found that the tipper truck accident occurred) or prior to that period. The Tribunal notes the applicant’s evidence that he only became aware that he had a serious “disc problem” in his neck in 1996 when he saw a CT scan report which confirmed that that was the case and that he believes that he sustained that “disc problem” in the tipper truck accident. There is, however, no medical evidence before the Tribunal which supports the proposition that the applicant sustained a disc injury to his cervical spine in the tipper truck accident, and, in the absence of such evidence, the Tribunal is not reasonably satisfied that he did so. Having regard to the abovementioned considerations, the Tribunal is not reasonably satisfied that the applicant suffered a “trauma to the cervical spine”, within the meaning of para (f) of clause 6 of the relevant SoP, in the tipper truck accident in the period November 1982 – February 1983 or at any time during his defence service prior to that period.
3. There is, on the other hand, medical evidence (in the form of the applicant’s service medical records), which the Tribunal accepts as accurate and reliable, that the applicant suffered neck pain as a result of a parachuting incident on 5 March 1983. It is common ground, however, that that incident occurred in the course of “civilian sport” and did not occur in the course of the applicant’s defence service. Thus, any neck injury which the applicant might have sustained in that incident would not be related to his defence service and would, accordingly, not be a defence-caused injury. In any event, having regard to the applicant’s service medical records which refer to that incident (see paragraph 15 above), the Tribunal is not reasonably satisfied that the applicant suffered a “trauma to the cervical spine”, within the meaning of para (f) of clause 6 of the relevant SoP, in that incident.
4. According to the applicant’s service medical records which are in evidence, the only reference to the applicant’s suffering neck discomfort in the period 1982 – 1983 is the report of 11 April 1983 to the effect that the applicant “pinched a nerve in neck” during training and that it was “now fully settled” following physiotherapy. Having regard to that report, the Tribunal is not reasonably satisfied that the applicant suffered a “trauma to the cervical spine”, within the meaning of para (f) of clause 6 of the relevant SoP, on that occasion.
5. For the sake of completeness, the Tribunal also notes a report, dated 10 February 1985, in the applicant’s service medical records to the effect that the applicant had attended at the RAP for a condition described as “muscular ? strain L shoulder/neck” sustained in the course of training, had received treatment, and was fit for duty (T3, p 60). Having regard to that report, the Tribunal is not reasonably satisfied that the applicant suffered a “trauma to the cervical spine”, within the meaning of para (f) of clause 6 of the relevant SoP, on that occasion.

*Conclusion*

1. Having regard, in particular, to the applicant’s service medical records which are in evidence, the Tribunal is not reasonably satisfied that the applicant suffered a “trauma to the cervical spine”, within the meaning of para (f) of clause 6 of the relevant SoP, in the course of his defence service or, indeed, at any time during the period of his defence service. The Tribunal is, therefore, reasonably satisfied that the factor in para (f) of clause 6 of the relevant SoP does not exist in this case.
2. The applicant did not contend that any other factor in clause 6 of the relevant SoP exists in this case, and the Tribunal is satisfied that none of those other factors exists in this case.
3. The Tribunal concludes that clause 6 of the relevant SoP is not satisfied in the applicant’s case and that, accordingly, clause 5 of that SoP (which requires that “at least one of the factors set out in clause 6” be “related to the relevant service”) is not satisfied in this case.
4. It follows that the relevant SoP does not uphold the contention that the applicant’s cervical spondylosis is, on the balance of probabilities, connected with his defence service. Pursuant to s 120B(3) of the VE Act, therefore, the Tribunal cannot be reasonably satisfied, for the purposes of s 120(4) of that Act, that the applicant’s cervical spondylosis is a defence-caused injury or a defence-caused disease.
5. Accordingly, the Tribunal determines that the applicant’s cervical spondylosis is not a defence-caused injury or a defence-caused disease, for the purposes of Part IV of the VE Act.

# Decision

1. For the above reasons the decision under review is affirmed.

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| --- |
| I certify that the preceding 56 (fifty six) paragraphs are a true copy of the reasons for the decision herein of Deputy President S D Hotop and Brigadier A G Warner, Member |

............sgd E Jordan.....................

Dated 12 June 2012

Date of hearing **3 April 2012**

Representative of the Applicant **Mr B Cooper**

Representative of the Respondent **Mr C Ponnuthurai**

**Compensation and Review Branch**

**Department of Veterans’ Affairs**