Bendall-Harris and Repatriation Commission (Veterans’ entitlements) [2015] AATA 521 (17 July 2015)

|  |  |
| --- | --- |
| Division | **VETERANS' APPEALS DIVISION** |
| File Number(s) | 2014/6181 |
| Re | Neville Bendall-Harris |
|  | APPLICANT |
| And | Repatriation Commission |
|  | RESPONDENT |

# Decision

|  |  |
| --- | --- |
| Tribunal | **Ms A F Cunningham, Senior Member** |
| Date | **17 July 2015** |
| Place | **Perth** |

The decision under review is affirmed.

....(Sgd) A F Cunningham....................................................................

**Ms A F Cunningham, Senior Member**

### Catchwords

Veterans Entitlements - operational service - whether PTSD war caused - meaning of being an eyewitness - decision under review affirmed.

### Legislation

Veterans’ Entitlements Act 1986 (Cth)- ss 120 (1), 120 (4)

Statement of Principles- Instrument No 82 of 2014

### Cases

*Re Cranage V Repatriation Commission* (2000) AATA 1119

*Mines V Repatriation Commission* (2004) FCA 1331

*Repatriation Commission V Deledio* (1998) FCA 391

*Watson V Repatriation Commission* (2010) AATA 743

*Woodward V Repatriation Commission* (2003) FCA FC 160

### Secondary Materials

*Macquarie Dictionary*

# REASONS FOR DECISION

**Ms A F Cunningham, Senior Member**

**17 July 2015**

1. The applicant, Neville Bendall-Harris served in the Australian Army from 9 July 1969 until 8 July 1971. Between 11 June 1970 and 9 June 1971 he served in South Vietnam (which constitutes operational service), as a Liaison Officer with USA forces and as a Radio Operator. His claim for war caused post-traumatic stress disorder (PTSD) was rejected by the Repatriation Commission and by the Veteran’s Review Board. Mr Bendall-Harris now seeks a review of the Board’s decision by the Administrative Appeals Tribunal (the Tribunal).
2. The hearing was conducted by way of video link to the Perth Registry. The applicant was represented by Mr Grayden and Mr Ponnuthurai appeared on behalf the respondent. Mr Bendall-Harris gave oral evidence and was cross-examined by Mr Ponnuthurai. The T documents were tendered pursuant to section 37 of the *Administrative Appeals Tribunal Act* 1975.

# issues

1. The issues for the Tribunal to determine are firstly, whether Mr Bendall-Harris suffers from PTSD and if so, secondly, whether the condition is war caused within the meaning of the *Veterans Entitlements Act* 1986 (VE Act).

# diagnosis- ptsd

1. In determining whether a disease or injury is war caused, a finding must be made about the nature of the disease or injury from which the veteran claims that he or she is suffering. As Gray J explained in *Mines V Repatriation Commission* (2004) FCA 1331; (2004) 86 ALD 62 at 71:

“… There may be cases in which the very question whether an injury or disease has been suffered is itself bound up with the question of connection with war service. PTSD provides an example. It is only possible to know whether a person has suffered PTSD if it is known that the person has experienced a traumatic event. There are, therefore, two questions. One is whether the person is suffering from symptoms which, if a traumatic event is identified, would result in a diagnosis of PTSD. The second is whether the traumatic event occurred. Of course, there might be more than one possible traumatic event, and there might be a question as to which of such events is responsible for the condition…’

1. The relevant standard of proof to decide the question of diagnosis as required by subsection 120(4) of the VE Act, is the reasonable satisfaction test. That is, the Tribunal must decide the question on the balance of probabilities.
2. In determining the question of connection with operational service, subsection 120(1) of the VE Act requires that the Tribunal must make such a finding unless it is satisfied beyond reasonable doubt that there is no sufficient ground for so determining.
3. The evidence contained in the T documents indicates that on enlistment in 1969, Mr Bendall-Harris was considered to have normal emotional stability and mental capacity. On discharge it was reported that his emotional stability and mental capacity were normal.
4. There are three medical reports contained in the T documents. In his report of 21 December 2004, Professor Emeritus Robert Kosky, a psychiatrist, recounted Mr Bendall-Harris’ history of symptoms and his service experiences in Vietnam. In particular that during his time working with the American forces, Mr Bendall-Harris had become friendly with a US helicopter pilot. When he returned to 104 Squadron Base he accidentally tuned to a frequency to hear what he thought was his friend calling “Mayday” and that the helicopter was taking hits. Mr Bendall-Harris has been unsure what has happened to his friend and thinks that all were killed but has continued to search the internet.
5. Professor Kosky reported that Mr Bendall-Harris has felt very guilty and distressed by the incident and has been unable to tell anyone about it because he should not have been tuned to the frequency. Although a somewhat unusual event, Professor Kosky was prepared to accept it as a traumatic event in terms of criteria A of the Statement of Principles (SoP) for PTSD. In his words he said that “Mr Bendall-Harris experienced an event which involved the actual or threatened death of another and that his response was one of fear, helplessness and horror.” He further considered that in terms of criteria B, Mr Bendall-Harris has re-experienced the event persistently through distressing recollections and distressing dreams. In terms of criteria C, he has persistently avoided activities, places or people that might arouse collection of the trauma, hence his lack of connection with the military after his discharge. On criteria D, he stated that Mr Bendall-Harris has difficulty falling or staying asleep, irritability and outbursts of anger, difficulty concentrating and hypervigilance. As Mr Bendall-Harris’s symptoms appeared directly after his discharge, Professor Kosky therefore regarded them as being caused by the war service and its stressor.
6. Dr Anthony J Manda, Consultant Psychiatrist provided a report on 26 August 2005 in which he recounted the history given by Mr Bendall-Harris. It included the incident when early one morning, he was listening to chatter on the helicopter frequencies and heard a Mayday call followed by a call sign that was something like “Tomahawk taking hits” . Dr Manda reported that Mr Bendall-Harris was extremely stressed to think that someone he knew could have at that moment died and that all he could do was sit there, doing nothing and unable to tell anyone.
7. Whilst Dr Manda considered that the symptoms reported by Mr Bendall-Harris satisfy the criteria for PTSD, in his opinion hearing the helicopter Mayday call could not satisfy the SoP regarding a severe psychosocial stressor. He went on to state however, that if the VRB decided that the Mayday call was sufficient to satisfy the definition of a severe psychosocial stressor, then he would accept Professor Kosky’s diagnosis of PTSD.
8. Dr McCarthy reported on 16 December 2013, that he agreed with Professor Kosky’s finding that Mr Bendall-Harris’s experience with the Americans and in particular his hearing the Mayday call, does constitute a stressor, albeit an unusual one, that fulfils the criteria in the SoP for PTSD. He reported that Mr Bendall-Harris has suffered from anxious arousal, re-experiencing phenomena and avoidance phenomena following a traumatic event while serving with the military.
9. The following evidence regarding Mr Bendall-Harris’ service and the circumstances that he claims gave rise to his PTSD condition are set out in a written statement which was tendered in evidence. For the first three months Mr Bendall-Harris was deployed at 104 Signal Squadron HQ in Nui Dat working as a switchboard operator and looking after the relay bank of radios in the bunker on Nui Dat Hill. During the following three months he was a Radio Operator with the Liaison Officer detachment with the US Army stationed at Xuan Loc. Mr Bendall-Harris stated that he enjoyed his time with the Americans and made lots of friends, in particular, one named Bill Smith who was a helicopter machine gunner. He said that he was keen on flying and had been training for his pilot’s licence prior to enlistment. Bill Smith introduced him to the American pilots and they would often let him fly with them when not on official business. On some occasions Mr Bendall-Harris assumed the role of machine gunner which he found a “great adrenaline rush”.
10. Mr Bendall-Harris’s final three months in Vietnam were spent at 104 Signal Squadron HQ as a radio operator monitoring communications for the task force. He was required to monitor transmissions and telephone conversations to ensure that operators were adhering to proper procedures. He only worked the night shift which he found boring and on the whole uneventful. Although unauthorised, to ease the boredom, he would tune in to the FM frequency used by his American pilot mates to hear what they were up to. He recalls that one morning just after daybreak, he was listening to the chatter on the chopper frequencies. Although the communication was not clear he heard a “Mayday, Mayday, Mayday,” and a call sign something like “Tomahawk” followed by “taking hits”. He thought that he recognised the pilot’s voice as that of a pilot whom he had befriended. He said that he was immediately horrified that it could be someone he knew. He was unsure whether their call sign was “tomahawk”. He turned up the volume to try and get as much information as he could. From the chatter that followed he knew that the chopper had crashed and the crew were all lost. He was 21 years of age at the time.
11. Mr Bendall-Harris said in his statement that he,

 “was extremely stressed and thought that someone I knew had just in that very moment died and all I could do is sit there. I felt hopeless. The fact that I could not tell anyone about what I had heard made it all the more stressful and upsetting. For weeks afterwards I would listen in to try and gain some details about the identity of those lost and whether they were anybody that I knew. I did not get any more information. Since then I have continued to search for the identity of the pilot and crew of the helicopter that was shot down. I have been able to ascertain through my own research that what I heard was probably an accident that occurred on 17 March 1971. On that date there was a stoush involving the 128th and 187th Assault Helicopter Company. The 128th were call-signed Tomahawks. Not long afterwards, in early June 1971, I returned to Australia. Such was the stigma attached to those who served in Vietnam I did not talk to anyone about my service. I was made to feel like a criminal for having gone to Vietnam.”

1. Mr Bendall-Harris’ account of the above incident was not seriously tested by Mr Ponnuthurai during cross-examination. His oral evidence suggested that Mr Bendall-Harris had no knowledge of the actual occupants of the helicopter and nor could he identify any of the voices of the helicopter crew. The only voice that he actually heard was that of the pilot making the Mayday call which Mr Bendall-Harris said was not that of Bill Smith, his friend who was a door gunner.
2. The Tribunal accepts Mr Bendall-Harris’ account of the incident that he overheard a Mayday call from a US helicopter that had been struck by ground fire and that it is likely that it crashed with no survivors. It was Mr Bendall-Harris’ evidence that he feared that some of the occupants of the helicopter may have been soldiers whom he had earlier befriended but he could not be sure. There was no evidence that Mr Bendall-Harris was involved in any other traumatic event during his period of operational service.
3. Mr Ponnuthurai informed the Tribunal that based on the contents of the three medical reports referred to above, the respondent accepts the clinical diagnosis of PTSD. What remains in contention is the connection between Mr Bendall-Harris’ PTSD and his operational service. The standard of proof provisions outlined in subsection 120(1) of the VE Act require the Tribunal to find that the disease was war caused unless it is satisfied beyond reasonable doubt that there is no sufficient ground for making such a finding.

# connection with operational service

1. In considering this issue, the Court in *Repatriation Commission V Deledio* (1998) FCA 391 outlined a four step process as follows:
2. consider all the material and determine whether it points to a hypothesis connecting the disease with the circumstances of the particular service rendered;
3. if the material raises a hypothesis, ascertain whether there is in force a SoP concerning the disease;
4. if there is a SoP in force, form an opinion whether the hypothesis raised is a reasonable one by reference to the template found in the SoP; and
5. proceed to consider under S 120 (1) of the VE Act whether the decision maker is satisfied beyond reasonable doubt that the incapacity did not arise from a war caused injury.
6. The relevant SoPs concerning PTSD are Instruments No 5 of 2008 and No 82 of 2014. The latter instrument was in force at the time of the decision under review. The hypothesis raised on behalf of Mr Bendall-Harris is that his medically diagnosed PTSD is connected to his service in that it resulted from the traumatic event described as “the helicopter incident.”
7. Paragraph 6 of both Instruments state that to be regarded as reasonable, the hypothesis must contain one or more of the factors which the Repatriation Medical Authority has determined to be the minimum which must exist and be related to the person’s service. The factors relied upon by Mr Bendall-Harris are Factors 6 (a) and (b) which refer to experiencing a category 1A stressor and a category 1B stressor before the clinical onset of PTSD.
8. A category 1A stressor is defined in clause 9 as follows:

(a) experiencing a life-threatening event;

(b) being subject to a serious physical attack or assault including rape and sexual molestation; or

(c) being threatened with a weapon, being held captive, being kidnapped’ or being tortured.

1. A category 1B stressor is defined in clause 9 as follows:

(a) being an eyewitness to a person being killed or critically injured;

(b) viewing corpses or critically injured casualties as an eyewitness;

(c) being an eyewitness to atrocities inflicted on another person or persons;

(d) killing or maiming a person; or

(e) being an eyewitness to or participating in, the clearance of critically injured casualties.

1. It was submitted by Mr Ponnuthurai that the events referred to in the description of a category 1A stressor necessarily involve the person himself and that the events contemplated by a category 1B stressor refer to a person witnessing the injury or killing of other persons. Mr Ponnuthurai argued that if this was not the case, there would be no need for the distinction between category 1A stressors and category 1B stressors.
2. He referred to the Tribunal’s decision in *Re Cranage V Repatriation Commission* (2000) AATA 1119 where Senior Member Handley referred to the definition of “experiencing a stressor as set out in the diagnostic criteria for PTSD in DSM IV which reads as follows:

“(a) the person has been exposed to a traumatic event in which both of the following were present:

(i) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others; and

(ii) the person’s response involved intense fear, helplessness, or horror…”

1. At paragraph 98 of that decision the Tribunal stated: “In so far as para (b) of “experiencing a stressor” is concerned I am satisfied that it should be entirely interpreted subjectively. Little however turns on this issue for the purposes of the present application unless it can be established that objectively Mr Cranage satisfies paragraph (a).
2. Senior Member Handley’s analysis relates to factors 6 (a) and (b) which both include the terms “*experiencing* a category… stressor before the clinical onset of post-traumatic stress disorder. Subparagraph (a) refers to a category 1A stressor and subparagraph (b) refers to a category 1B stressor. The distinction between these two types of stressors lies in the definition of those terms as reproduced above.
3. Post-traumatic stress disorder is defined in clause 3(b) as a psychiatric condition meeting certain criteria which are derived from DSM-IV-TR. They include a person being exposed to a traumatic event which the person experienced, witnessed, or was confronted with involving actual or threatened death or serious injury or a threat to the physical integrity of self or others and the persons response involved intense fear, helplessness or horror….
4. This description necessarily contemplates experiencing, witnessing or being confronted with death or injury to other persons. The Tribunal in *Re Cranage* was not satisfied that the applicant had experienced, witnessed or been confronted with actual or threatened death or serious injury or a threat to his or another person’s integrity. The decision was not concerned with an analysis of the events contemplated by a category 1A stressor as opposed to a category 1B stressor.
5. Senior Member Fice in *Watson V Repatriation Commission* (2010) AATA 743 noted that the SoP definitions are no longer consistent with Criterion A1 in DSM-1V-TR. In order to satisfy the definition of a category 1A stressor, a person must experience the events described under Criterion A, however there is no reference to being confronted with any of these events.
6. The Full Court of the Federal Court in *Woodward V Repatriation Commission* (2003) FCA FC 160; (2003) 131 FCR 473 noted that the definition of “experiencing a severe stressor” has three elements that relate to a person’s encounter with an event involving death. Although these elements may overlap in any particular situation, the Full Court said that the definition will be satisfied if any one of them is present. Further, that a person may be “confronted with” an event that he or she has neither experienced or witnessed.
7. The terms “experienced”, “witnessed”, and “confronted with” an event are included in the description of the diagnostic criteria for PTSD in paragraph 3 of the SoP No 5 of 2008 and are separated by the word “or” which suggests that they are each separate elements of the diagnostic criteria. The term “confronted with” however is not reproduced in the definition section of paragraph 9 in describing either a category 1A stressor or a category 1B stressor. This suggests that if a veteran was confronted with but did not witness or experience an event which involved a threat to the physical integrity of self or another person, it would not fall within the category 1A or category 1B stressor definitions.
8. The term “an eyewitness” is defined in paragraph 9 as *“a person who observes an incident first hand and can give direct evidence of it. This excludes a person exposed only to media coverage of the incident.”* This definition is consistent with the elements of a category 1B stressor which contemplates death or injury to persons other than the applicant.
9. The term “experience” is not defined in the SoP and reference can therefore be made to the ordinary meaning of the term. The Macquarie Dictionary defines the term “experience” as “a particular instance of personally encountering or undergoing something; the process or fact of personally observing, encountering, or undergoing something; the observing, encountering or undergoing of things generally as they occur in the course of time.”
10. Where a term is not precisely defined in the legislation, it is also appropriate to consider the term in the context of the statutory provision. The other listed events include being subject to a serious physical attack or assault including rape and sexual molestation or being threatened with a weapon, being held captive, being kidnapped or being tortured. The Tribunal does not consider that the incident as described by Mr Bendall-Harris, although obviously distressing to him, is akin to any of these events which suggest a subjective experience.
11. Nor does the Tribunal accept that Mr Bendall-Harris actually “experienced” a life threatening event as this word is commonly understood and is therefore not satisfied that the “helicopter incident” as described by Mr Bendall-Harris, fits the definition of “experiencing a life-threatening event” for a category 1A stressor.
12. The remaining question is whether the incident constitutes a category 1B stressor as that term is defined in paragraph 9 of the SoP. The only applicable subclause is (a) “being an eyewitness to a person being killed or critically injured.”
13. It was submitted by Mr Ponnuthurai that being an “eyewitness” necessary contemplates a person who can give first-hand evidence of an event and not someone who has learned of an incident via a radio channel. Mr Bendall-Harris was not confronted with any evidence of death or injury and it was only his conclusion that this had occurred and possibly to someone he knew.
14. The term “eyewitness” is defined in the SoP as outlined above and refers to a person who observes an incident first hand and can give direct evidence of it. The word “observe” is defined in the Macquarie Dictionary as “to see, perceive, or notice; to watch, view, or note for some scientific, official or other special purpose”.
15. Mr Grayden argued that being an eyewitness does not necessarily require the physical presence of the person but that a person can give direct evidence of an event. He pointed out that Mr Bendall-Harris had observed the event first-hand. In the context of this being beneficial legislation, the Tribunal should not apply a narrow definition to the term “eyewitness” and could not, Mr Grayden submitted, be satisfied beyond reasonable doubt that the “helicopter incident” as experienced and heard by Mr Bendall-Harris, was not the cause of his PTSD.
16. The Tribunal was also referred to SoP number 82 of 2014 which was the SoP in force at the time of the Board’s decision. The criteria for PTSD referred to in paragraph 3 (b) include:

“A. Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways:

(i) directly experiencing the traumatic event (s);

(ii) witnessing, in person, the event (s) as it occurred to others;

(iii) learning that the traumatic event (s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event (s) must have been violent or accidental; or

(iv) experiencing repeated or extreme exposure to aversive details of the traumatic event (s) (for example, first responders collecting human remains; police officers repeatedly exposed to details of child abuse). This criterion does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related; and…”

1. The major changes between Instrument No 5 of 2008 and No 82 of 2014 is the inclusion of Factors 6 (f) and (m) which have no application in the current case. The category 1A and 1B stressor definitions are unchanged. It was submitted by Mr Ponnuthurai that the inclusion of factors 6 (f) and (m) are an indication of a more restrictive interpretation of the factors that must as a minimum exist to connect a reasonable hypothesis with the circumstances of the person’s service. This is because these additional factors refer to exposure to repeat or extreme aversive details of severe traumatic events. Mr Ponnuthurai submitted that the nature of the incident as described by Mr Bendall-Harris is not consistent with such factors. Whilst Mr Ponnuthurai conceded that it is acceptable to apply the earlier SoP if its application resulted in a more favourable outcome for Mr Bendall-Harris, he contended that the SoP that was in force at the time of the Board’s decision could assist in the interpretation and correct application of the meaning of the terms used in the SoP.

# conclusion and findings

1. Although the Tribunal accepts that in overhearing the helicopter Mayday call and subsequent call sign that the helicopter was “taking hits”, Mr Bendall-Harris experienced a very distressing event, for the reasons outlined above, the Tribunal does not consider that it meets the definition of a category 1A stressor.
2. Nor does the Tribunal consider that the “helicopter incident” as described by Mr Bendall-Harris constitutes a category 1B stressor within the meaning of subparagraph (a). Whilst Mr Bendall-Harris heard the incident first hand, when viewed objectively, his description of the incident does not in the Tribunal’s view constitute a severe traumatic event in the context of all of the events listed for a category 1B stressor. It was Mr Bendall-Harris’ evidence that whilst he feared that he may have known some of the occupants of the helicopter, the only voice that was audible was that of the pilot who he could not identify at the time. The only US soldier whose name he recalled was Bill Smith who was a door gunner, and Mr Bendall-Harris had no basis to conclude that he was one of the occupants of the helicopter at the time.
3. Although Mr Grayden submitted that the Tribunal should not apply a restrictive interpretation to the SOP criteria, the diagnostic criteria listed in Instrument No 82 of 2014 suggest that the veteran’s exposure to the traumatic event must be significant. The criteria listed in subparagraph 3(b) A, refer to exposure to actual or threatened death, serious injury or serious violence either directly or by witnessing the event in person and that the learning of a traumatic event occurring to others, include a close family member or close friend. In this case Mr Bendall-Harris was not able to identify the persons who were involved in the incident.
4. It was submitted that there was no other traumatic event that could have been responsible for Mr Bendall-Harris’ PTSD. Mr Ponnuthurai informed the Tribunal that the medical diagnosis of Mr Bendall-Harris’ PTSD was not in dispute. This concession was based on the three medical reports referred to above. Each of the doctors recounted the history of symptoms as relayed to them by Mr Bendall-Harris and was not in a position of being able to verify the accuracy of the account. Professor Kosky stated that Mr Bendall-Harris thought that it was his friend who was making the Mayday call however Mr Bendall-Harris’ evidence to the Tribunal was that the Mayday call was made by the pilot who was unknown to him. Whilst Professor Kosky considered that Mr Bendall-Harris’ reported symptoms met the diagnostic criteria for PTSD, as is commonly known, all of these symptoms are outlined on the Internet and are readily accessible.
5. Dr Manda considered that Mr Bendall-Harris’ account of the helicopter incident would not satisfy the SoP criteria for a severe psychosocial stressor. Although Dr McCartney concluded that Mr Bendall-Harris’ experience in hearing the Mayday call did constitute a stressor, he considered that it was an unusual one and agreed with Professor Kosky’s findings. Presumably this was in the context of Mr Bendall-Harris stating that he believed that he knew the pilot who made the Mayday call. These matters must accordingly raise some doubt as to the accuracy of the medical diagnosis of PTSD and certainly in the context of the relevant SoPs.
6. For the reasons outlined above, the Tribunal does not consider that the hypothesis raised that Mr Bendall-Harris’ PTSD is connected with his service, is a reasonable one on the basis that it does not fit the SoP template for either Instrument No 5 of 2008 or No 82 of 2014. The Tribunal is satisfied beyond reasonable doubt that Mr Bendall-Harris’ condition is not war caused within the meaning of the VE Act.
7. The decision under review is accordingly affirmed.

|  |
| --- |
| I certify that the preceding 49 (forty nine) paragraphs are a true copy of the reasons for the decision herein of Ms A F Cunningham, Senior Member |

......(Sgd) A Tran.................................................................

Associate

Dated 17 July 2015

|  |  |
| --- | --- |
| Date of hearing | **3 June 2015** |
| Representativefor the Applicant | **Mr R Grayden** |
| Representativefor the Respondent | **Mr C Ponnuthurai** |