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War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: Robert Hamilton SMITH

Service Number and Rank: **N45713, Sgt Infantry; WO2 Intelligence**

Address: 49 West Street, Hawthorndale, Invercargill 9810

Grounds of appeal: Appeal against decision of the Review Officer to decline to accept claimed condition as being service-related

Held: at Wellington on 22 November 2017

DECISION

1. This is an appeal by Robert Hamilton SMITH (the **Appellant**) against the decision of the Review Officer (**RO**) dated 26 April 2016 to uphold the Decision Officer's decision of 21 January 2016 and decline to accept his condition of **Motor Neurone Disease** (**MND**) as being service-related under the Veterans' Support Act 2014 (the **VSA**).

2. The Appellant was not able to appear in person at the appeal hearing, however, at his request, he was represented by his wife, and also by his advocate, Ms Sarah Dowie, both of whom appeared at the appeal hearing via audio-visual Skype. The Respondent, Veterans' Affairs New Zealand (**VANZ**), was represented by Mr Graeme Astle, who appeared in person at the hearing. Ms Ann-Marie Tribe, also of VANZ, was in attendance.

Background to the appeal

3. On 21 January 2016 the Decision Officer declined to accept the Appellant's claimed condition, MND, as being related to his qualifying service. The reason for her decision was: *"Your qualifying service under the Veterans' Support Act 2014 is from 18 April 1972 until 1 April 1974 in respect of routine service and operational service in Bougainville from May 1999 to September 1999 and Afghanistan from November 2003 to May 2004. The relevant Statement of Principles, Motor Neurone Disease, No 67 of 2013, Reasonable Hypothesis (as you have qualifying operational service) applied does not uphold a causal relationship to your service. There is no information to support that you have*

had a smoking habit, severe traumatic brain injury or received head blows that could be service related. The factor 6(d) 'inability to obtain appropriate clinical medical management for motor neurone disease' has been considered. However, there is no information available to support that your qualifying service prevented you from having medical management for motor neurone disease."

4. On 26 April 2016, the RO upheld the Decision Officer's decision of 21 January 2016 and declined to accept MND as being service-related under the VSA. In coming to her decision, the RO had regard to the reason the Appellant gave for seeking a review in his Review of Decision application form received by VANZ, namely: *"I would like the decision reviewed because: 1. I do not believe that the questions asked in the letter attached have been answered and am unsure whether they were even considered as part of the application as I was advised would happen by Jacqui (sic) Couchman. (Her letter dated 5 November 2015 refers) 2. The letter sent on my behalf by Mr Beker dated 15 November 2015 has not been acknowledged (or answered) so again I do not believe this was considered with my claim even though I had referred to it in my application."* The RO also had regard "*to the letter dated 15 October 2015 addressed to Jacqui (sic) Couchman, Head of Veterans' Affairs New Zealand, from Mr Ian A Beker QSM, JP, AFNZIM and President Awarua RSA",* noting that Mr Beker had referred in his letter to *"environmental exposures – the use of DDT and 245T, and Electro Magnetic Frequencies"*, and that he had *"commented in respect of: the diagnosis and possible causes of motor neurone disease; acceptance of motor neurone disease under the U.S. Department of Veterans' Affairs; the Australian Statement of Principles in respect of motor neurone disease; the review of the decision in 2014 under the War Pensions Act 1954, and why reconsideration was being sought under the 1954 Act."* The RO further noted the letter dated 5 November 2015 from Jacki Couchman to Mr Beker, *"which acknowledged Mr Beker's letter, and advised him that the determination under the War Pensions Act 1954 could not be re-looked at as [the Appellant's] statutory right to appeal the review decision had expired";* that "*Mr Beker was also advised of the replacement of the War Pensions Act 1954 by the Veterans' Support Act 2014 on 7 December 2014 (no application could be made under the War Pensions Act 1954 following introduction of the Veterans' Support Act 2014)"*, and that *"[the Appellant] was entitled to apply for Motor Neurone Disease as a new claim under the Veterans' Support Act 2014."* The RO also noted the letter dated 15 December 2015 from Mr Beker to Jacki Couchman "*requesting clarification, including how to progress [the Appellant's] claim for motor neurone disease."*

5. The RO observed, as had the Decision Officer, that the Appellant had *"qualifying service under the Veterans' Support Act 2014 in respect of qualifying routine non-operational service from 18 April 1972 until 1 April 1974 (routine non-operational service from 1 April 1974 comes under ACC); and qualifying operational service for Bougainville from May 1999 to September 1999, and Afghanistan from November 2003 to May 2004."* Having noted that the Appellant's Disablement Pension application for the new claim for MND was received on 1 December 2015, she further observed that the Appellant had written, in respect of how he believed his service caused, contributed to or aggravated this condition: *"the first symptoms surfaced in 2004 (tingling in fingers) that was not recognised therefore I received no treatment. It was first diagnosed in 2013."* The RO also observed

that the Appellant's General Practitioner Dr Jane Chalmers had confirmed the medical diagnosis; that "*neurology letters were provided from August 2014 and February 2015 that noted investigations undertaken in 2012 and 2013, leading to the diagnosis of motor neurone disease in 2013, and treatment prescribed / required for management of the condition"* and that *"a letter from June 2013 was also provided from Rehabilitation Consultant Dr Kellie Perrie detailing the care required by [the Appellant]."*

6. Having noted the Decision Officer's decision, and the information that she had taken into account in coming to her decision, and having had regard to *"[the Appellant's] personnel and medical files, his War Disablement Pension file and case management documentation, and the application and review documentation including Mr Beker's letters",* the RO concluded that *"the information available does not provide a diagnosis of motor neurone disease before or during qualifying operational service in Bougainville or Afghanistan, therefore the condition cannot be presumed to have been as a result of or aggravated by the performance of qualifying operational service under section 19 of the Veterans' Support Act 2014, nor is Motor Neurone Disease a 'Conclusively presumed condition' under section 21 (previously known as Presumptive List conditions) for qualifying operational service in Bougainville or Afghanistan."* The RO went on to observe, however, that *"there is a Statement of Principles that is applicable for Motor Neurone Disease",* noting that the *"claim is therefore determined in accordance with section 14 of the Veterans' Support Act 2014, which applies the Statements of Principles for determining whether or not the condition is connected to qualifying service."* After noting the basis for the existence of the Statements of Principles (**SoP**), and that *"only one factor in the SoP need be met for the claim to be successful, provided the material available is consistent with a hypothesis that the injury, illness or death was service related",* the RO, noting the Appellant's qualifying operational service, proceeded to apply the SoP for Motor Neurone Disease No. 67 of 2013 (Reasonable Hypothesis).

7. The RO had regard to the definition of MND for the purpose of the SoP, and the factors set out in the SoP, *"one of which must exist before it can be said a reasonable hypothesis has been raised connecting motor neurone disease with the circumstances of the person's qualifying service – factor 6 (a) (b) (c) (d):*
   (a) Smoking at least ten pack-years of cigarettes, or the equivalent thereof in other tobacco products, before the clinical onset of motor neurone disease; or
   (b) Having moderate to severe traumatic brain injury more than one year before the clinical onset of motor neurone disease; or
   (c) Having received at least 250 blows to the head while participating in a high impact contact activity, where these blows occurred more than one year before the clinical onset of motor neurone disease; or
   (d) Inability to obtain appropriate clinical management for motor neurone disease."

   The RO also had regard to the definition of 'a high impact contact activity' provided in the SoP, namely, *"means a sport or pastime in which there is forceful impact of the head with another object or person;"* and that 'blows to the head' *"means episodes in which blunt, non-penetrating rotatory or linear acceleration or deceleration forces, of at least of the intensity that would be received from a*

forceful punch to the head from a gloved fist, are applied (directly or indirectly) to the head, with or without concussion or loss of consciousness". The RO also observed that factor 6(d) *"applies only to material contribution to, or aggravation of, motor neurone disease where the person's motor neurone disease was suffered or contracted before or during (but not arising out of) the person's relevant service."*

8. The RO observed that the Appellant's service medical documentation dated 19 May 2004 *"notes symptoms that included 'tingling fingers L) hand ? pinched nerve. Discussed with Medical Officer in Afghanistan', neck noted as sore and having full range of movement, sharp pain in elbow for last two days that resolved with arnica. Stiff neck with reduced range of movement noted 15 November 2004 (presented with symptoms of atypical migraine headaches), x-ray of the neck was arranged, no comments noted in respect of x-ray result. Medical notes in 1997 document treatment for left ulnar nerve dysfunction following injury to left elbow with decreased movement, swelling, and tingling in fingers."* Having had regard to this information, the RO concluded that *"the information available does not establish clinical signs of motor neurone disease during service for the purpose of the SoP",* further noting that *"there is no reference to moderate to severe traumatic brain injury or blows to the head during qualifying service that would meet the SoP factors",* and that *"[the Appellant] is documented as being a non-smoker."* The RO determined that *"the information available does not establish a factor in the SoP that would connect the Motor Neurone Disease with the circumstances of [the Appellant's] qualifying service"* and upheld "*the decision of 21 January 2016 to decline the claim for Motor Neurone Disease…"*

Written submissions

9. On 25 October 2016, the Appellant lodged an appeal against the decision of the RO, attaching to his notice of appeal a letter from Ms Sarah Dowie, MP, which articulated the grounds for his appeal. Having provided some information by way of background, and having referred to some provisions of the VSA, more specifically sections 3, 10, 7 and 9, Ms Dowie submitted as follows: *"In declining [the Appellant's] application, VANZ stated there was a lack of evidence to show his MND was service related. On 19 May 2004, while serving [the Appellant] suffered from a sore neck tingling in his fingers on his left hand, sharp pain in his elbow, general tiredness, light headedness, spinning and nausea…[the Appellant] presented to a New Zealand Army medical officer on 19 May 2004 with these symptoms. The Medical Officer failed to recognise the severity of the symptoms, adequately investigate the symptoms and, subsequently diagnose the onset of MND."* Ms Dowie further submitted: *"During his qualifying service in Afghanistan, [the Appellant] wore radio transmitting headgear for a minimum of 12 hours per day for seven months. This radio headgear emits Electro Magnetic Frequencies (EMF). EMF is a well-documented causal factor of MND."* Having made reference to research carried out by Dr Neil Cherry relating to environmental health factors for MND, and to other supporting documents, Ms Dowie submitted: *"documented and published research findings therefore have commonality in that there is a higher causality between EMF and MND rates. [The Appellant's] qualifying service included significant exposure to EMF and as a result, contracted MND (sic)."* Ms Dowie challenged the RO's finding that there was no causal relationship between the Appellant's service and his condition of MND, arguing *"[the Appellant] had presented to*

a Medical Officer whilst serving with symptoms of MND contracted during his deployment to Afghanistan, which went undiagnosed", and that section 6(d) of the SoP No 67 of 2013 *"is an inability to obtain appropriate clinical treatment management for MND and is applicable to [the Appellant's] situation."* Ms Dowie further submitted that *"only one of the specified factors must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting MND or death from MND with the circumstances of a person's relevant service",* and that therefore *"sections 6(a), (b) and (c) of the Statement of Principles No 67 of 2013 are irrelevant as only one sub-paragraph must be meet (sic). Clearly this is addressed above and 6 (d) is relevant."* Ms Dowie concluded her submission by re-stating key points of her submission: *"8.1 Veterans Affairs have accepted [the Appellant] has qualifying service 12 years ago, during his deployment to Afghanistan from November 2003 until May 2004. 8.2 [The Appellant] first presented to a military officer on 19 May 2004 with symptoms synonymous with early onset of MND. (Refer Appendix C – copy of medical notes). 8.3 The opportunity to diagnose MND was missed by the medical officer. 8.4 [The Appellant] wore electromagnetic headgear for a minimum of 12 hours per day for seven months during his deployment to Afghanistan from November 2003 to May 2004. 8.5 Studies show a causal link between EMT (sic) exposure and MND. 8.6 I believe that [the Appellant] meets the threshold for Disablement Pension as set out in section 14 of the Veterans Support Act 2014 in that he: (i) presented with symptoms of MND on 19 May 2004 and in failing to carry out diagnostic testing the Medical Officer denied [the Appellant] with appropriate clinical management for MND (as per the relevant Statement of Principles No 67 of 2013 6(d); (ii) Was subjected to prolonged exposure to EMF which is a well-documented causal factor of MND according to the enclosed international research; (iii) Has accepted qualifying service during his deployment to Afghanistan (Nov 2003 – May 2004); 8.7 Would you please reconsider this application for Disablement Pension for [the Appellant] under section 14 of the Veterans Support Act 2014."* Ms Dowie, stated finally: *"I also note that there have been previous applications under the War Pensions Act 1954 by [the Appellant] prior to his application under the Veterans Support Act 2014. And, that consideration of the earlier application was overtaken by time and the commencement of the current Act. It could be argued that further consideration should have been given to the determinations under the War Pensions Act 1954 as [the Appellant] could well have been disadvantaged by this. [The Appellant] therefore reserves the right to discuss this procedural unfairness during any hearing."*

10. On 21 September 2017, Ms Dowie made a further written submission *"in response to the provided dossier",* which she advised *"supplements the original appeal submission dated 25 October 2016."* Ms Dowie advised that *"this submission argues that [the Appellant] received at least 250 blows to the head while participating in high impact activities while on service, therefore meets the conditions for the Disablement Pension."* Ms Dowie noted that *"the original appeal submission dated 25 October 2016 sets out why [the Appellant's] MND is directly related to his service. [The Appellant] has qualifying operational service and therefore the Australian Statement of Principles for Motor Neurone Disease No 67 of 2013 is applied. The SoP sets out factors, one of which must exist before it can be said there is a connection between MND with the circumstances of the person's qualifying service",* and further submitted *"For this supplementary submission, factor c is of note: (c) Having received at least 250 blows to the head while participating in a high impact contact activity, where*

these blows occurred more than one year before the clinical onset of motor neurone disease." Having referred to the definitions in the SoP of 'high impact contact activity' and of 'blows to the head', Ms Dowie went on to state: *"[The Appellant] received at least 250 blows to the head whilst participating in high impact contact activities while on service. Even though [the Appellant] was wearing a helmet, [the Appellant] frequently took hits to the head throughout his years of service while doing high impact contact activities such as jumping down from the backs of trucks and off walls on the Confidence Course. These resulted in jarring blows up through the body and the head and are directly related to his service. These incidents can be seen throughout [the Appellant's] Afghanistan service record. In addition, [the Appellant] also believes that while wearing a helmet on service, every step (both marching & at the double) constituted a blow to the head as the helmets were loose and bounced with every step. Therefore, these blows to the head qualifies as 'forceful impact of the head with another object or person.'* Ms Dowie concluded her supplementary submission by stating (among other things), *"[The Appellant] received at least 250 blows to the head while participating in a (sic) high impact contact activities while on service. Therefore, proper causation is established and [the Appellant] meets the conditions for the Disablement Pension. This is further coupled with the original appeal submission dated 25 October 2016 that states [the Appellant's] radio headgear worn during service emitted electromagnetic frequencies which is a well-documented causal factor of MND…"*

11. In his response to the submissions made on behalf of the Appellant, Mr Astle, in his written submission dated 30 October 2017, noted the reference to factor 6 (c) of the SoP concerning Motor Neurone Disease No 67 of 2013, observing that *"the contention is that [the Appellant] received at least 250 blows to the head while participating in high impact activities"* had *"not been made in previous information supplied to Veterans' Affairs…."*. Noting that *'this is a new assertion",* Mr Astle submitted that *"it is not supported by any existing or new medical evidence or documentation reinforcing the belief that jumping down from trucks and off walls and having a loose helmet would meet factor 6 (c) of the Statement of Principles."* Mr Astle also submitted that *"there is also no reference in [the Appellant's] personnel and medical records that any of his conditions or symptoms may have resulted from these activities or from wearing a loose helmet or that the effect would meet the definition of "blows to the head" of at least the intensity that would be received from a forceful punch to the head from a gloved fist."* He noted the opinion of the Chief Medical Officer – NZDF Health, Dr Paul Nealis, that *"the level of trauma required to meet factor 6 (c) is high…that trauma from training and active duty is not at the same energy level as American football for example. In this sport it would require many thousands of high energy episodes to meet the factor. Jumping from trucks and going to ground does not have the same energy transfer as butting heads at speed. In addition, Motor Neurone Disease is not seen in fast jet pilots who have repeated head trauma from flying – the head hits the airframe a lot on high G activities".* Mr Astle further submitted *"that this new assertion is unlikely to meet the requirements and definitions of factor 6 (c)."*

12. In his written submission, Mr Astle also noted the reference "*to the further point highlighted in the submission dated 25 October 2016 and restated in the latest submission being that [the Appellant's] headgear worn during service emitted electro-magnetic frequencies",* but also noted that *"this is not*

included as a factor in the Statement of Principles relating to Motor Neurone Disease." Mr Astle accordingly submitted that *"as exposure to electro-magnetic frequencies is not included as a factor, this cannot be considered a service related cause of Motor Neurone Disease."*

13. With regard to the RO's decision of 26 April 2016, which he noted *"is the subject of the appeal",* Mr Astle highlighted a number of points, including that the Appellant's service included both qualifying routine service (from 18 April 1972 until 1 April 1974) and qualifying operational service (for Bougainville from May 1999 to September 1999, and Afghanistan (from November 2003 to May 2004); that the Appellant's application had been declined by the Decision Officer on 21 January 2016 on the basis that on the information available it did not show that Motor Neurone Disease was caused by the Appellant's qualifying service; that the Appellant sought a review of this decision – which included reference to an earlier application made under the War Pensions Act 1954 *"which could no longer be appealed as the statutory right to do this had expired, resulting in a claim being filed under the Veterans' Support Act 2014, which is the subject of this appeal";* that the Appellant believed his service caused, contributed to or aggravated his Motor Neurone Disease condition – that he stated that *"the first symptoms surfaced in 2004 (tingling in fingers) that was not recognised therefore he received no treatment. A medical diagnosis of Motor Neurone Disease occurred in 2013";* that the RO considered the Appellant's personnel and medical files, War Disablement Pension file and case management documentation, his application and review documentation, "*including letters from Mr Beker (who had written to Veterans' Affairs in relation to [the Appellant's] application under the War Pensions Act)";* that after reviewing the information, this did not provide a diagnosis of MND before or during qualifying service in Bougainville or Afghanistan, and that on that basis it was concluded that the condition could not be presumed to have been as a result of, or aggravated by the performance of qualifying operational service under section 19 of the Act, and that MND is not a 'conclusively presumed condition under section 21 of the Act for qualifying operational service in Bougainville or Afghanistan.

14. Mr Astle went on to note that there is an applicable SoP i.e. No 67 of 2013 for MND, and that the Appellant's claim was therefore determined in accordance with section 14 of the Act. He further noted that smoking (factor 6 (a)) was not considered as the Appellant is a documented non- smoker; that 'moderate to severe traumatic brain injury' (factor 6 (b)) was also not considered *"as there was no reference to such an injury in [the Appellant's] personnel and medical files",* and that *"similarly, there was no reference to [the Appellant's] receiving at least 250 blows to the head (in accordance with the definition) and this was discounted (see earlier comments in relation to the appeal submission made on behalf of [the Appellant] on 22 (sic) September 2017)."* Mr Astle noted that *"the fourth element (factor 6 (d)) relates to inability to obtain appropriate clinical management for Motor Neurone Disease",* and submitted that *"this applies only to material contribution to, or aggravation of, Motor Neurone Disease where the person's Motor Neurone Disease was suffered or contracted before or during (but not arising out of) the person's relevant service."* Mr Astle observed that *"the National Review Officer (sic) reviewed all the available medical information and notes and concluded that the available information did not establish clinical signs of Motor Neurone Disease during service for the purposes of the Statement of Principles."* In conclusion, Mr Astle submitted

that *"the Decision Officer's decision made on 21 January 2016 to decline the application for Motor Neurone Disease, which was upheld by the National Review Officers' (sic) decision on 26 April 2016 was the correct one. This was on the basis that the information available does not establish a factor in the Statement of Principles that would connect Motor Neurone Disease with the circumstances of [the Appellant's] service."*

The appeal hearing

15. At the hearing of the appeal on 22 November 2017, and at the invitation of the Veterans' Entitlements Appeal Board (the **Board**) to make submissions, the Appellant's wife outlined the history of the Appellant's claim relating to his condition of MND, expressing in some detail various concerns about the manner in which her husband's claim had been dealt with under the War Pensions Act 1954. In particular, she expressed her concern that the then Head of VANZ, Jacki Couchman, had not ensured in October 2015 that the claim be 'reconsidered' under section 14(5) of that Act on the basis of additional evidence and the interests of justice, and that the application had instead been processed under the provisions of the VSA, which, she stated was not communicated, which was *"yet another stressor".* With regard to the Appellant's claim under the VSA, the Appellant's wife submitted that the benevolent principles stated in the VSA had not been applied, adding that the four factors listed (in SoP No 67 of 2013 in relation to MND) made no mention of exposure to insecticides or electromagnetic frequencies, despite a *"clear link being established in all these reports"* showing "*the effect EMF on the brain and the significant public health risks of EMF".* She queried how it could be that MND (ALS) could be recognised in the US as a presumptive list condition and not be a factor in the SoP under consideration.

16. Having confirmed her support for the submissions made by the Appellant's wife, Ms Dowie submitted that there had been a breach of the principles of natural justice in the way that the Appellant had been treated, and that he had not been treated fairly under the War Pensions Act 1954. Ms Dowie advised the Board that the Appellant had been *"promised reconsideration under the Act",* but that the *"goal posts have been moved to the disadvantage of [the Appellant]."* Ms Dowie invited the Board to take this into account when considering the appeal. Ms Dowie further submitted that the Appellant had qualifying service, and that "*the diagnosis occurred during qualifying service"* – that the *"tingling experience"* noted in his medical records, showed *"early onset of Motor Neurone Disease"* - but that the Medical Officer denied him treatment which brought him within factor 6(d). Ms Dowie suggested that, in considering the presumption provided in section 19 of the VSA *"a reasonable person would not have put on a radio headset if he knew that he had the onset of MND and if he knew that this would have triggered the risk",* and submitted that *"just because there is a presumptive list, it doesn't mean that the list is exhaustive – that it is accepted that many factors can bring on MND."* Ms Dowie, noting the requirements of paragraph 7 of the SoP, further submitted that factor 6(d) was applicable to the Appellant's situation. Ms Dowie concluded her oral submission by observing that in the Appellant's case, *"it is obvious that this comes back to his wearing a headset for 12 hours a day."*

17. In response, Mr Astle acknowledged the long drawn out process relating to the Appellant's claim in respect of his condition of MND, however, noted that this was an appeal under the VSA and that the appeal could be dealt with only under, and in accordance with the provisions of that Act. Observing that both the Decision Officer and the RO, on reviewing the Decision Officer's decision, were bound to consider the matter within the framework of the applicable SoP, Mr Astle invited the Board to have *"an independent fresh look"* at the decisions that had been made by VANZ. Mr Astle assured the Board that *"VANZ was not trying to be difficult – that VANZ was sympathetic to [the Appellant's] situation"* – and that VANZ was simply *"following the process and the methodology"* required under the VSA. He submitted that the appropriate course of action regarding any procedural matters of concern to the Appellant that had occurred under the War Pensions Act 1954 would be to raise such concerns directly with VANZ. Mr Astle further submitted that *"nothing new had been raised at the appeal hearing",* and advised that the Respondent's position was clearly set out in his written submissions dated 30 October 2017. He concluded his address to the Board by inviting the Board to take into account all the information provided and to make a finding accordingly.

Appeals under the Veterans' Support Act (VSA)

18. Under the VSA, a review decision may be appealed by the person who applied for the review or by VANZ. An appeal made to the Board is a *de novo* appeal, and the Board is not bound by any findings of fact made by the decision maker whose decision is the subject of the appeal. Appeals are required to be heard and determined without regard to legal or procedural technicalities. When hearing an appeal, the Board may, among other things, receive any evidence or information that, in its opinion, may assist it to determine the appeal, whether or not that evidence or information would be admissible in a court of law. The Board may determine an appeal without hearing oral evidence from the Appellant. The Board is required, among other things, to comply with the principles of natural justice, and in accordance with the following principles: the principle of providing veterans, their spouses and partners, their children, and their dependants with fair entitlements; the principle of promoting equal treatment of equal claims; the principle of taking a benevolent approach to the claims; and the principle of determining claims in accordance with substantial justice and the merits of the claim, and not in accordance with any technicalities, legal forms, or legal rules of evidence. The Board, by majority vote, must confirm, modify or revoke the review decision, or make any other decision that is appropriate to the case. If the Board revokes the decision it is required to substitute its decision for that of the RO or require VANZ to make the decision again in accordance with directions it gives to VANZ.

19. The Board noted the submissions and comments made by both the Appellant's wife and Ms Dowie at the appeal hearing regarding the issue of 'reconsideration' of the Appellant's claim under the War Pensions Act 1954. After analysis of the relevant provisions of both the War Pensions Act 1954 and the VSA, and on the documentation before it, it was evident to the Board that the Appellant had lodged a valid appeal under the provisions of the VSA, and that the Board had jurisdiction to hear and determine the appeal. In so deciding, the Board noted in passing that the War Pensions Act 1954 had been repealed on 7 December 2014 by section 276 of the VSA, but also noted the 'savings' provisions provided in Part 1 of Schedule 1 to the VSA. In that regard the Board observed

that paragraph 5 of Part 1 of Schedule 1 provided: *"Any right of review or appeal under the War Pensions Act 1954 that existed but which had not been exercised at the commencement of [the VSA] may be exercised and the review or appeal continued and concluded as if [the VSA] had not been passed."* The Board further observed that the National Review Officer had made her decision on review under the War Pensions Act 1954 on 15 January 2014 and that the Appellant's right of appeal, conferred by section 16(1) of the War Pensions Act 1954, had therefore expired on 14 July 2014. The Board was of the view that although section 16(5) of the War Pensions Act 1954 enabled a claimant to satisfy the Secretary that the claim should be reconsidered on the grounds specified, this provision did not constitute a right of review or appeal that *"existed but which had not been exercised at the commencement of [the VSA]"* on 7 December 2014, and that therefore, the 'saving' provision did not apply to the Appellant's situation.

The review decision

20. The Board noted that the RO had correctly accepted the Decision Officer's recognition of the Appellant's service – that the Appellant had qualifying service for the purposes of the VSA, namely qualifying routine service from 18 April 1972 until 1 April 1974, and qualifying operational service in Bougainville, from May 1999 to September 1999, and in Afghanistan, from November 2003 to May 2004. The Board also accepted the RO's findings that the *"information available does not provide a diagnosis of motor neurone disease before or during qualifying operational service in Bougainville or Afghanistan, therefore the condition cannot be presumed to have been as a result of or aggravated by the performance of qualifying operational service under section 19 of the Veterans' Support Act 2014…",* and that MND was not a *"Conclusively presumed condition' under section 21…for qualifying operational service in Bougainville or Afghanistan."*

21. The Board also noted that the RO (again, correctly in its view) had identified that SoPs applicable to the condition of MND existed (the SoPs being listed in Schedule 1 of the Veterans' Support Regulations 2014, and therefore the Australian Statement of Principles that apply for the purposes of the VSA), and that SoP No 67 of 2013 for Motor Neurone Disease (Reasonable Hypothesis) was the appropriate SoP to apply given the Appellant's qualifying operational service. The Board concurred with the RO's decision that the Appellant's claim should therefore be determined in accordance with section 14 of the VSA.

22. The Board further noted that in paragraph 4 of the SoP, the Repatriation Medical Authority (**RMA**) states that it has formed the view that there is sound medical-scientific evidence that indicates that MND can be related to service. Paragraph 5 of the SoP provides in effect that at least one of the factors in paragraph 6 must be related to the person's service. Paragraph 6 of the SoP sets out the factors that must exist in a particular case for a claim to succeed. The Board noted that exposure to electromagnetic fields was not included as a factor, and concurred with VANZ's view that *"as exposure to electro-magnetic frequencies is not included as a factor, this cannot be considered a service-related cause of Motor Neurone Disease."* Notwithstanding the arguments raised by the Appellant's wife and Ms Dowie in their respective submissions to the Board, the Board determined

that such exposure could not be said to raise a reasonable hypothesis connecting MND with the circumstances of the Appellant's service.

23. The Board observed that the RO had identified that for the purposes of the SoP, the condition of MND had been ascribed the following meaning: " '*motor neurone disease' means a progressive neurodegenerative disease with clinical signs of lower and upper motor neurone damage in the absence of other disease processes that explains the clinical signs",* and that the SoP set out the factors, one of which was required to exist before it could be said "*that a reasonable hypothesis had been raised connecting motor neurone disease with the circumstances of the person's qualifying service – factor (a) (b) (c) (d):*

    6(a) smoking at least ten pack-years of cigarettes, or the equivalent thereof in other tobacco products, before the clinical onset of motor neurone disease; or

    6 (b) having moderate to severe traumatic brain injury more than one year before the clinical onset of motor neurone disease; or

    6(c) having received at least 250 blows to the head while participating in a high impact contact activity, where these blows occurred more than one year before the clinical onset of motor neurone disease;

    6 (d) inability to obtain appropriate clinical management for motor neurone disease."

24. With regard factor 6 (a): the Board agreed with the RO's decision that factor 6 (a) did not apply to the Appellant's case, noting that the Appellant was, as the RO had stated, *"documented as being a non-smoker."* That this factor did not apply was accepted by both parties to the appeal.

25. With regard to factor 6(b): the Board observed that there was no evidence before it to indicate that the Appellant had at any time suffered 'moderate to severe traumatic brain injury', and, accordingly, the Board concluded that this factor also was not applicable to the Appellant's situation.

26. With regard to factor 6(c): the Board noted that the RO had similarly determined that there was no evidence regarding 'blows to the head', and concurred with her view based on the evidence available to her at the time that she made her decision. That Board noted however the submissions of Ms Dowie presented both before and at the appeal hearing and, in line with the *de novo* nature of its appellate jurisdiction, considered all the evidence before it, applying the definitions in the SoP of the terms 'high impact contact activity' (i.e. *"a sport or pastime in which there is forceful impact with another object or person"*) and 'blows to the head' (i.e. *"episodes in which blunt, non-penetrating rotary or linear acceleration or deceleration forces, of at least the intensity that would be received from a forceful punch to the head from a gloved fist, are applied (directly or indirectly) to the head, with or without concussion or loss of consciousness.")* Having analysed the evidence before it, the Board did not agree with Ms Dowie's submissions that the Appellant *"received at least 250 blows to the head while participating in high impact contact activities while on service";* that *"even though…wearing a helmet, [the Appellant] frequently took hits to the head throughout his years of service while doing high impact contact activities such as jumping down from the backs of trucks and off walls on the Confidence Course";* that *"these resulted in jarring blows up through the body*

and the head and are directly related to his service"; that *"these incidents can be seen throughout [the Appellant's] Afghanistan service record",* and that *"…while wearing a helmet on service, every step (both marching & at the double) constituted a blow to the head as the helmets were loose and bounced with every step."* The Board accordingly did not accept Ms Dowie's view that *"therefore, these blows to the head qualifies (sic) as 'forceful impact of the head with another object or person".* To the contrary, the Board accepted Mr Astle's submission presented in response to Ms Dowie's submissions regarding the applicability of factor 6(c).

27. With regard to factor 6 (d): the Board noted (as had the RO) that *"paragraph 6 (d) applies only to material contribution to, or aggravation of, motor neurone disease where the motor neurone disease was suffered or contracted before or during (but not arising out of) the person's relevant service."* The Board further noted that the RO had observed that *"[the Appellant's] service medical documentation dated 19 May 2004 noted symptoms that included 'tingling fingers L) hand ? pinched nerve. Discussed with Medical Officer in Afghanistan', neck noted as sore and having full range of movement, sharp pain in elbow for last two days that resolved with arnica. Stiff neck with reduced range of movement noted 15 November 2004 (presented with symptoms of atypical migraine headaches), x-ray of the neck was arranged, no comment noted in respect of x-ray result. Medical notes in 1997 document treatment for left ulnar nerve dysfunction following injury to left elbow with decreased movement, swelling, and tingling in fingers."* Having had regard to the Appellant's medical file, the Board agreed with the RO's view that *"the information available does not establish clinical signs of motor neurone disease during service for the purposes of the SoP."* This being so, the Board determined that factor 6(d), which concerned the inability to obtain appropriate clinical management for the condition MND, did not apply in the Appellant's case.

Appeal Board Decision

28. Having had regard to all relevant available material, the Board agreed with the conclusion of the RO: *"that the information available does not establish a factor in the SoP that would connect the Motor Neurone Disease with the circumstances of [the Appellant's] qualifying service."* Accordingly, the Board decided that the hypothesis that the Appellant's condition of MND was service-related was not consistent with the SoP.

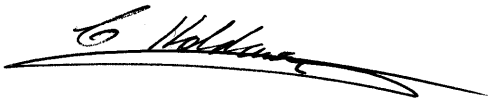
29. The Board had specific regard to all the principles specified in section 10(b) of the VSA, and the overarching benevolent intent of the VSA. After having carefully considered all the material before it, the Board determined to **confirm** the decision of the RO dated 26 April 2016 to uphold the Decision Officer's decision of 21 January 2016 and decline to accept Motor Neurone Disease as service-related under the VSA.

Order relating to the publication of decision

30. Pursuant to the powers vested in it by section 138 of the VSA, the Board, on its own initiative and after consultation with the Appellant's wife and Ms Dowie, makes an order prohibiting the publication of the name, service number, rank, and address of the Appellant.

The appeal is dismissed.

Ms Rebecca Ewert, Chairperson



Dr Chris Holdaway, Member

Ms Raewyn Anderson, Member

29 January 2018