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War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: Edward William BATES

Service Number and Rank: A17917 Petty Officer Marine Engineer

Address: 55 Quick Avenue, Aramoho, Whanganui

Grounds of appeal: Appeal against the 14 August 2020 decision of the Review Officer to uphold the 8 April 2020 decision of the Decision Officer declining cover for malignant neoplasm of the prostate as service-related under the Veterans' Support Act 2014

Held: at Wellington on 19 March 2021

Parties:

The Appellant, Mr Edward (Ned) Bates

Appellant's representatives, Mr Gavin Smith and Mr Richard Terrill

Support person Mrs Janet Bates

Respondent, Veterans' Affairs New Zealand, representatives Ms Ann-Marie Tribe, Manager Decisions and Entitlements, Ms Paula Carr, Decisions Team Leader and Dr Mike O'Reilly, Clinical Advisor

Outcome: Confirm Review Officer's decision

Summary of reasons for decision:

The Appellant's malignant neoplasm of the prostate is not service-related. The Statement of Principles (SoP) that the Veterans' Support Act 2014 require to be applied is *No. 54 of 2014 Malignant Neoplasm of the Prostate (Balance of Probabilities)*. The available medical evidence does not show that Mr Bates meets a factor referred to in the SoP.

The Veterans' Entitlements Appeal Board is bound by the process for deciding claims in the Veterans' Support Act 2014 including applying a SoP where one is relevant.

Mr Bates may wish to consider other pathways to challenge the SoP.

DECISION

This is an appeal by Edward BATES (the Appellant) against the 14 August 2020 decision of the Review Officer to uphold the 8 April 2020 decision of the Decision Officer declining cover for malignant neoplasm of the prostate as service-related under the Veterans' Support Act 2014 (the Act).

Background

Qualifying service

The Appellant served in the Royal New Zealand Navy between 19 September 1963 and 19 April 1976. He has qualifying routine service during the period 19 September 1963 and 31 March 1974.

The Appeal Board thanks the Appellant for his service.

Prostate cancer diagnosed

Mr Bates' prostate cancer diagnosis was confirmed by biopsy in 2014. A report from Dr Anthony Nixon, Urologist dated 14 April 2014 states that Mr Bates has prostate cancer that is fairly extensive. He notes:

The exact cause of his prostate cancer is unclear. It is thought that people who are exposed to radiation are at increased risk of developing this disease. As such, it seems appropriate that his war pension allowance is increased to compensate for this diagnosis.

Mr Bates had a radical prostatectomy on 22 August 2014.

Application to Veterans' Affairs to cover prostate cancer under the Act

On 13 March 2019 Mr Bates applied to Veterans' Affairs for cover for prostate cancer, to enable funding for a PSMA PET CT scan to detect potential metastases, as well as a recurrence of the prostate tumour. He was concerned because he had an elevated PSA level. He wrote that exposure to alcohol, furnace fuel oil and silver nitrate during his service had caused the cancer. He noted that he first became aware of the cancer in December 2013.

Veterans' Affairs investigated cover by obtaining medical notes from Eastcare Medical, and the Northland, Wanganui and Mid Central District Health Boards.

Decision Officer's decision

On 8 April 2020 Decision Officer [REDACTED] issued a decision declining cover for malignant neoplasm of the prostate as a service related condition because Mr Bates did not develop malignant neoplasm of the prostate until "well after the completion of his qualifying service". His reasoning was:

Mr Bates has coverage under the Veterans' Support Act 2014 in respect of his qualifying routine service in the Royal New Zealand Navy between 1963 and the 31st of March 1974.

This means that in order for the condition of Malignant Neoplasm of the Prostate to be accepted as service related condition it must have been caused by or contributed to by this period of service

In order for this causal or contributory relationship to be established Mr Bates must meet a factor as listed in the appropriate Statement Of Principles. In the case of Mr Bates condition the appropriate Statement of Principles is Malignant Neoplasm of the Prostate 54/2014.

The only factors listed in this Statement of Principles are for the clinical worsening of the condition. In order for Mr Bates' to meet a factor related to clinical worsening his condition of Malignant Neoplasm of the Prostate he would have had to have had the condition prior to his qualifying routine service and the period of service have resulted in the worsening of the condition.

As the available information shows Mr Bates' did not develop Malignant Neoplasm of the Prostate until well after the completion of his period of qualifying service, it cannot be said to have been worsened by his qualifying service.

Veterans' Affairs conveyed that decision to Mr Bates on 3 June 2020.

Review application

On 16 July 2020 Mr Bates applied for a review of that decision. In summary his reasons were:

- If prostate cancer had been diagnosed prior to his enlistment, he would not have passed his pre-enlistment medical examination.
- No testing or screening was done to determine either the presence or absence of a cancerous tumour within the prostate gland at the time he enlisted, so the possibility of its presence at that time cannot be excluded with 100% confidence.
- Veterans' Affairs have accepted cover for his throat cancer and asbestos plaques in his lungs, both of which had a slow insidious growth, like his prostate cancer.
- All of the following factors contributed to his prostate cancer:
 - dirty ships that had been in radioactive zones
 - heavy furnace fuel oil exposure
 - alcohol
 - a smoking culture
- He has no family history of prostate cancer although he has a large family. He had five brothers of which he is the youngest and none have had prostate cancer.

He provided a newspaper article about the fallout from Mururoa and technical information about heavy fuel oil and Gamlen.

Review Officer's decision

On 14 August 2020 Review Officer [REDACTED] issued a decision upholding the Decision Officer's decision.

██████████ concluded that Mr Bates' prostate cancer was not service related. He applied the Statement of Principles (SoP) *54/2014 Malignant Neoplasm of the Prostate (Balance of Probabilities)* because Mr Bates only has qualifying routine (non-operational) service. He observed that the SoP had only two associated factors, 6(a) and 6(b), and that the effect of paragraph 7 of the SoP was to exclude the factors applying in Mr Bates' case. He reasoned:

A case for service contribution to the development of prostate cancer can only be made if the diagnosis occurred during or before service. Unfortunately, this is not the case for Mr Bates.

I would like to acknowledge the concerns raised by Mr Bates. There are relatively few occupational exposures [that] have been shown to be directly related to Prostate cancer, and these are reflected in the SOP's. Specifically, there is no clear association between exposure to radiation or fuel oil and Prostate malignancy, despite significant research.

Mr Bates raises a legitimate hypothesis suggesting a connection to service. However, the hypothesis is not consistent with the SOP associated with the condition.

Veterans' Affairs communicated that decision to Mr Bates on 27 August 2020.

The Appellant's appeal

On 30 September 2020 Mr Bates appealed the Review Officer's decision. He incorrectly referred to SoP 53/2014 (the Reasonable Hypothesis SoP for his condition), which does not apply to him as a veteran who has qualifying routine service only.

He referred to his alcohol intake and smoking. He noted in particular:

Smoking: my smoking habit during my service was exacerbated by the very cheap duty-free cigarettes that were provided to us; the huge smoking culture; also the fact that smoking was permitted in the mess decks on all of the ships I served on. The latter ensured even if I was not a smoker, I was breathing in smoke passively at any time of day or night. My actual smoking would have conservatively been more in the vicinity of 30 pack/ years. Double the level specified that creates health problems. It appears this smoking was [not] considered in the decision process as it was not mentioned in the decision document.

Hearing

Summary of the Appellant's case

Mr Bates' evidence

Mr Bates said that he is one of many turned down for cover for prostate cancer, along with a lot of his shipmates.

Mr Bates described his exposure to carcinogens including cleaning fuel tanks, using the detergent Gamlen, painting freshwater tanks with silver nitrate paint, maintaining boilers coated in asbestos, repairing asbestos pipes and three days wearing an asbestos suit for firefighting training.

Of his 12 years 7 months service he spent seven years at sea in an unhealthy working environment.

As far as he is concerned, there is no difference between routine and operational service on board a warship.

Submissions

Mr Smith read a written statement and made the following main points:

- Mr Bates passed a full medical examination on 19 September 1963. On 18 November 1963 he was admitted to the Royal New Zealand Navy Hospital with pain when passing urine and epigastric pain. It was diagnosed as possible dysuria; a urinary tract infection which was never properly diagnosed.
- On 13 February 1969 Mr Bates was made subject to 14 days' stoppage of grog on medical grounds and paid grog money in lieu. He received a Captain's warning for alcohol abuse on 18 December 1972. The warning lasted 21 months.
- Mr Bates smoked heavily until 1976 and drank heavily until 1997.
- SoP 54/2014 is not fit for purpose and its use by Veterans' Affairs is challenged on the following grounds:
 - It was written by Australian authorities who did not take into account the conditions of service in the Royal New Zealand Navy. In New Zealand, a daily tot of rum was issued to naval ratings. The SoP ignores alcohol misuse.
 - The SoP does not consider concerns about heat, H₂S fumes, passive cigarette smoke, paint fumes, carcinogenic chemicals, cordite, noise or daily alcohol intake, and is not specifically written to cover daily life on a warship, a unique situation.
- While the SoP refers to smoking at least 15 pack years of cigarettes in factor 6(a), it does not refer to damage caused by passive smoking in a warship with little ventilation.
- Alcohol is considered in SoP 53/2014 but not in 54/2014 and it should be in both.
- Veterans' Affairs has not proved that Mr Bates' prostate cancer was not present during his service.
- Mr Bates left the Navy without his prostate cancer being detected. He first sought treatment in 2000, some 24 years after service. His prostate cancer was diagnosed incidentally after bowel resection surgery in 2013.

Summary of the Respondent's case

Dr O'Reilly's evidence

Dr O'Reilly gave the following evidence:

- The body of evidence in relation to alcohol was not strong enough to warrant its inclusion in the Balance of Probabilities SoP for malignant neoplasm of the prostate.

- The SoPs are scientific documents that are service neutral, and include all potential causes of a condition. When the SoPs are formulated, other exposures have been considered and excluded as being causative.
- SoPs are reviewed on a 10 year cycle and can be reevaluated if new scientific evidence becomes available. They can also be reviewed at the request of the Returned and Services League of Australia (RSL) or the Australian Department of Veterans' Affairs.
- The Repatriation Medical Authority (RMA) meets monthly to discuss evidence around conditions being reviewed. Veterans' Affairs New Zealand has been represented at those meetings since 2015. The RMA is comprised of medical academics and epidemiologists.
- The Royal New Zealand Returned and Services Association (RSA) can recommend to the Veterans' Health Advisory Panel that a particular SoP is not appropriate for New Zealand veterans.
- Ron Patterson's March 2018 review of the Act recommended the possibility of amending SoPs for the New Zealand context.
- He is able to provide a New Zealand perspective to the Veterans' Health Advisory Panel and is prepared to work with Mr Bates and his advocate to raise the issue of alcohol consumption with the RSL.

Submissions

Ms Tribe spoke to the written submissions for Veterans' Affairs. She made the following main points:

- While Veterans' Affairs fully acknowledges the difficult working and living conditions on board warships, in a case of qualifying routine service only the exposures (factors) noted in the applicable SoP No. 54 of 2014 can be considered as to be causative or contributory to the condition of prostate cancer. In support of this submission she attached a list of the studies that have been researched in respect of malignant neoplasm of the prostate.
- The RMA is independent of the Australian Department of Veterans' Affairs and Veterans' Affairs New Zealand, ensuring that an impartial and objective approach is taken in the development of these decision making tools.
- The Review Officer has looked at the factors of smoking and the inability to obtain clinical management, which are both worsening factors. For those worsening factors to apply, Mr Bates would have had to have had prostate cancer before or during his service. The medical evidence does not show that, therefore Veterans' Affairs cannot accept his claim.
- The effects of military service on the drinking behaviours of New Zealand males in the period of Mr Bates' service were not exceptional when compared with society as a whole. There is no evidence of differential lifespan drinking behaviours between service people and the community.
- There is no clinical evidence of any connection between Mr Bates' urinary tract infection in November 1963 and his diagnosis of prostate cancer almost 50 years later.

- Prostate cancer is most prevalent in men over 65 years old. In 1963, when he joined the Navy, Mr Bates was 17 years old. The development of prostate cancer in someone of that age is exceedingly rare.
- Almost 50 years had passed between Mr Bates being discharged from the Navy and being diagnosed with prostate cancer. While it is not entirely impossible that he experienced prostate related symptoms during his period of service, it is infinitely more likely that his prostate issues developed many years after his service ceased.

Process to decide whether to accept a claim

Section 14 of the Act sets out the steps to be taken in deciding whether to accept a claim. The first step is to consider all the available material that is relevant and decide whether the material is consistent with a hypothesis that the veteran's injury, illness, or death was service-related. If the material is consistent with such a hypothesis, then the second step is to decide whether there is a SoP that applies. If there is no SoP that applies, then section 15 applies. If there is a SoP that applies, the third step is to decide whether the hypothesis is consistent with the SoP. If it is consistent with the SoP, the claim must be accepted unless there are reasonable grounds for believing that the veteran's injury, illness, or death was not service-related.

Analysis

The SoPs are a decision-making tool adopted by Veterans' Affairs to establish the link between a veteran's illness and their eligible service under the Act.

Section 14(5) of the Act provides that if a SoP applies, then it must be decided whether the hypothesis is consistent with the statement of principles. That is, it must be used in the decision-making process.

Mr Bates has qualifying routine service under the Act. Under regulation 15(3) and Schedule 1 of the Veterans' Support Regulations 2014, there is a relevant SoP and it is *54/2014, Malignant Neoplasm of Prostate (Balance of Probabilities)*, which took effect from 14 May 2014. A much higher evidential threshold is required for a factor to be included in a Balance of Probabilities SoP than in a Reasonable Hypothesis SoP. There must be strong evidence that suggests that it is "more likely than not" that a factor could contribute to a medical condition for the Balance of Probabilities SoPs.

SoP 54/2014 provides that subject to clause 7, at least one of the factors set out in clause 6 must be related to the relevant service:

Factors:

6. The factor that must exist before it can be said that, on the balance of probabilities, malignant neoplasm of the prostate or death from malignant neoplasm of the prostate is connected with the circumstances of a person's relevant service is:
 - (a) smoking at least 15 pack-years of cigarettes, or the equivalent thereof in other tobacco products, before the clinical worsening of malignant neoplasm of the prostate, and where smoking has ceased, the clinical worsening of malignant neoplasm of the prostate has occurred within 10 years of cessation; or

- (b) inability to obtain appropriate clinical management for malignant neoplasm of the prostate.

Factors that only apply to material contribution or aggravation:

- 7. Paragraphs 6(a) and 6(b) apply only to material contribution to, or aggravation of, malignant neoplasm of the prostate where the person's malignant neoplasm of the prostate was suffered or contracted before or during (but not arising out of) the person's relevant service.

Is Mr Bates' malignant neoplasm of the prostate service-related under the Act?

The first step is for the Appeal Board to decide whether the facts are consistent with a hypothesis that the veteran's injury was service-related. Section 7 of the Act defines "service-related" as "caused by, contributed to, or aggravated by qualifying service."

The Appeal Board must make its decision based on the medical evidence. That evidence shows, on the balance of probabilities, that the facts are consistent with a hypothesis that Mr Bates' prostate cancer was service-related because Mr Bates has been exposed to a number of carcinogens such as smoking on board all of the ships in which he served during his service.

To establish a link between the condition and Mr Bates' service, the factor that must be met and connected with the circumstances of Mr Bates' service is described in clause 6 of the SoP 54/2014. For that factor to be applicable, clause 7 confirms that the malignant neoplasm of the prostate must have been present prior to or during Mr Bates' service.

The medical evidence does not show on the balance of probabilities, that the malignant neoplasm of the prostate was present prior to or during Mr Bates' service.

Mr Bates was 17 years old when he began military service in 1963. He had not been diagnosed with prostate cancer before his service. He is extremely unlikely to have had prostate cancer at that age.

His service medical records do not refer to him having symptoms of prostate cancer during service and he was not diagnosed with prostate cancer during service. There is no credible medical evidence that his bladder infection in 1963 was a symptom of prostate cancer.

Mr Bates' routine qualifying service concluded on 1 April 1974. He first consulted his general practitioner in 2000 with prostate related symptoms including poor urine flow, although his PSA readings were consistently low and additional examinations did not indicate any presence of prostate cancer at that time. The diagnosis of prostate cancer was confirmed by biopsy in 2014.

Almost 50 years passed from the date Mr Bates was discharged from the Navy and when he was diagnosed with prostate cancer.

While the Board acknowledges that Mr Bates was not tested prior to or during service, the available evidence shows it is highly unlikely a young man would have had prostate cancer, so such testing would not have been justified.

In making its decision, the Appeal Board has had specific regard to all the principles specified in section 10(b) of the Act, and the overarching benevolent intent of the Act.

Conclusion

In view of the law, which the Appeal Board is bound to apply, the Appeal Board confirms the decision of the Review Officer, that the Appellant's malignant neoplasm of the prostate is not service related.

Observation

As discussed in detail at the hearing, the Appeal Board accepts that Mr Bates was exposed to a number of carcinogens throughout his service in the Navy, and have empathy for his view that the application of SoP 54/2014 is unjust in his circumstances because those carcinogens are not factors in the SoP that applies to him.

As discussed, Mr Bates may wish to consider other possible pathways to seek a change in the law that applies to veterans such as himself with prostate cancer. Those options may include liaising with Dr O'Reilly and making submissions to the Veterans' Health Advisory Panel, writing to the Minister for Veterans, complaining to the Ombudsman or raising the matter with the RSL.

Outcome

The Appeal Board dismisses the appeal.



Ms Raewyn Anderson, Chairperson



Mr Christopher Griggs, Member



Dr Deborah Read, Member



Dr Chris Holdaway, Member

Date: 31 March 2021