Veterans' Entitlements Appeal Board

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**War Pensions Number**

# VETERANS' ENTITLEMENTS APPEAL BOARD

**Name: Tā Harawira Tiri GARDINER (deceased)**

**Service Number and Rank**: G30780, Lieutenant Colonel, New Zealand Army

**Address:** [redacted]

**Grounds of appeal:** Appeal against the 4 February 2022 decision of the Review Officer to uphold the decision of the Decision Officer dated 20 September 2021 and decline to accept Malignant Neoplasm of the Brain (Glioblastoma) as a service-related condition under the Veterans' Support Act 2014 (**the Act**).

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**Substantive hearing held:** via Zoom on 17 June 2022

**Parties:**
The Appellant, the Estate of Tā Harawira Gardiner, represented by Mr Ross Himona, the Honourable Hekia Parata (Lady Gardiner)

The Respondent, Veterans' Affairs New Zealand, represented by Ms Tracy Lamb Assistant Director Legal Services Veterans' Affairs, Ms Marti Eller, Deputy Head Veteran's Affairs, Dr Mike O'Reilly, Principal Medical Advisor Veterans' Affairs

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**Outcome of substantive hearing:**

Pursuant to section 237(2)(a) of the Veterans' Support Act 2014 (**the VSA**) the Appeal Board substitutes its decision for that of the Review Officer.

In accordance with the votes of the majority, the Appeal Board's decision is that the Appellant's claim for glioblastoma must be treated as a service-related condition under the VSA.

The view of the majority members is that section 10(b)(iv) of the VSA, read together with section 229(5), obliges the Appeal Board to determine the Appellant's claim in accordance with the substantial justice and the merits of the claim. The Governor-General had a duty to include glioblastoma in the relevant presumptive list given the 2013 decision of the War Pensions Appeal Board that that condition was presumed to be attributable to war service in Vietnam, because the Governor-General was obliged to give effect to the principle of promoting equal treatment of equal claims under section 10(b)(ii). It is the duty of the Appeal Board to determine the claim as if that had been done.

The view of the minority member is that the Appellant is not entitled to the benefit of any of the presumptions in sections 19 and 21. Section 14 applies, there is a reasonable hypothesis that the Appellant's glioblastoma is service-related and there is a relevant Statement of Principles (**SOP**). The Appellant does not meet any of the factors in the SOP.

The minority member considers that section 10 of the VSA does not allow the Appeal Board to judicially review the Minister's decision not to include glioblastoma in the presumptive list.

Neither can the Appeal Board rely on section 10 to find that a Minister was bound to adopt and carry forward decisions made under the War Pensions Act 1954 when they drafted the presumptive list, as that would not be consistent with the prescribed process for deciding claims provided for in the VSA. Even applying the principles of natural justice and the broad principles in section 10, it is not open to the Appeal Board to find the Appellant's glioblastoma is a service-related condition, as that would be inconsistent with the Veterans' Support Regulations 2014.

# SUBSTANTIVE DECISION

This is an appeal on behalf of the late Lieutenant Colonel Tā Harawira Tiri GARDINER against the 4 February 2022 decision of the Review Officer to uphold the decision of the Decision Officer dated 20 September 2021 and decline to accept Malignant Neoplasm of the Brain (Glioblastoma) as service-related under the Veterans' Support Act 2014 (**the VSA**).

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## Background

The background to this decision is set out in the preliminary decision of the Veterans' Entitlements Appeal Board (**the Appeal Board**) dated 27 April 2022. The essential facts follow.

The Appellant has qualifying routine service in the New Zealand Army from 11 January 1963 to 3 June 1969 and 9 May 1970 to 31 March 1974. The Appellant has qualifying operational service in the New Zealand Army in the Vietnam War from 4 June 1969 to 8 May 1970.

He was diagnosed with glioblastoma on 28 July 2021.

On 6 September 2021 the Respondent received the Appellant's Disablement Pension application.

On 20 September 2021 a Decision Officer declined to accept the Appellant's claim for glioblastoma as a service-related condition.

On 4 February 2022 the Review Officer upheld the decision of the Decision Officer that the Appellant's glioblastoma was not service related.

The Appellant appealed that decision.

Following a hearing on 11 April 2022 the Appeal Board found that the Review Officer lacked jurisdiction to make the review decision because he had had previous involvement with the claim before being appointed as the Review Officer. The Review Officer's decision was therefore a nullity. The Appeal Board revoked the Review Officer's decision of 4 February 2022 pursuant to section 237(1)(c) of the VSA. In circumstances where the Appeal Board found that the Respondent had prejudged the matter, rather than remitting the decision back to the Respondent to make again, the Appeal Board set the substantive matter down for hearing.

The Appeal Board's role on this occasion is to substitute its decision for that of the Review Officer pursuant to section 237(2)(a) of the VSA. The Appeal Board is to decide whether the appellant's glioblastoma is service-related.

## Appellant's case

### Lady Gardiner's evidence

Lady Gardiner was intrigued by the gap between the *Kenyon* decision and the Veterans' Support Bill. She queried whether Parliament understood that enacting the Bill would mean glioblastoma would no longer be accepted as service related for veterans exposed to Agent Orange.

Lady Gardiner understood the need for objectivity but said subjectively she believed Tā Wira's glioblastoma was service related. This is because he had only been sick twice in his life. Once in 2013 with systemic hepatitis and then when he was diagnosed with glioblastoma.

**Submissions**

The Appellant's case is that the claim that glioblastoma was service-related, should be accepted. Mr Himona lodged written three sets of written submissions and spoke to those. In summary he made the following main points:

*Equal treatment of equal claims and the* Kenyon *precedent*

The War Pensions Appeal Board (**WPAB**) decision of *Kenyon*, 19 December 2013 can and should be considered a precedent requiring equal treatment of an equal claim in accordance with section 10(b)(ii) of the VSA.

*Kenyon* continues to have effect as if it had been decided under the VSA.

The glioblastoma claim before the Appeal Board was lodged through section 35 of the Legislation Act 2019 (**the Legislation Act**) and not in accordance with the provisions of section 14 or 15 of the VSA and does not invoke the relevant presumptive list or the relevant Statement of Principles (**SOP**).

The application of section 35 of the Legislation Act through section 10(b)(ii) of the VSA is not precluded by any provision in the VSA.

*The US and Australian context is relevant*

In *Kenyon*, the WPAB accepted that two US precedents had precedential value.

The precedent established in 2011 by the US Board of Veterans' Appeals decision number 1103413 should apply. Glioblastoma is not a presumptive condition in the US legislation, but a connection to service has been accepted in hundreds of cases.

US and Australian context has been directly incorporated into the VSA in the presumptive list for Vietnam, in the Australian SOPs, and in the adoption of the reasonable hypothesis from Australia.

*Reasonable hypothesis*

A reasonable hypothesis may be raised to support an application even though the condition is not a presumptively listed condition and does not meet the requirement of a relevant SOP. There is a reasonable hypothesis linking the Appellant's glioblastoma to his service in Vietnam.

*Benevolence*

The 2006 Memorandum of Understanding (MOU) continues to speak through the VSA specifically in relation to the reverse onus of proof evidential standard, which is given effect in the VSA through presumption, through the Australian SOP's, through section 15, and through the reasonable hypothesis evidential standard that pervades the VSA.

The Appeal Board has wide discretion in applying the principle of benevolence because the case is not being brought through and is not limited or constrained by the substantive provisions of the Act.

The onus is on the Respondent to rebut the grounds for appeal and they have not done so.

## The Respondent's case

### Ms Marti Eller's evidence

Ms Eller said that the first test under the VSA is whether there is a reasonable hypothesis or reasonable story. Then the Respondent (**VANZ**) tests that reasonable hypothesis against the evidential base.

The intention of including the SOPs as a means of decision-making was to ensure consistent decisions.

The Law Commission had been working on the VSA for 12 years prior to its introduction in the House. The policy about consistency of decision making predated the *Kenyon* decision. *Kenyon* should not have precedence over the VSA's SOP led process.

### Dr Mike O'Reilly's evidence

The VSA has increased the Government's liability by increasing claims through the SOPs. The aim of the SOPs is to provide fair and accurate decisions. Evidence is required to include a factor in an SOP. Although the SOP for Malignant Neoplasm of the Brain excludes the situation in *Kenyon,* it does so on the basis of sound scientific evidence. *Kenyon* is a subjective decision made without a complete understanding of glioblastoma and its relationship to exposure to Agent Orange. It is a decision based on flawed assumptions.

The US cases have been decided under US law that is different to the VSA.

A significant body of evidence was examined in 2018 concerning glioblastoma and its relationship to Agent Orange. That examination found that:

(a) There was inadequate evidence to make any determination as to whether there was an association; and

(b) There was an absence of evidence about an epidemiological association between dioxins and glioblastoma.

### Submissions

The Respondent's case is that the claim that glioblastoma was service-related does not meet the criteria in the VSA, so cannot be accepted. Ms Lamb spoke to written submissions. She made the following main points:

*The VSA applies and prescribes a process*

The VSA requires a connection to qualifying service before veterans are eligible for entitlements, services and support. The VSA relies largely on SOPs to make the determination of whether a claim is accepted.

In the Appellant's case the statutory eligibility framework provisions were followed. The claim did not meet the considerations in the SOP, so no statutory presumption applied.

As section 15 did not apply, the Appellant cannot raise reasonable hypothesis evidence. This prevents the Appeal Board from applying the US precedent.

The VSA represents a new scheme for determining eligibility of claims. On the basis of the decision of the High Court in *Keelan v General Manager of Veterans' Affairs New Zealand*[1] and because section 35 of the Legislation Act does not apply to such a framework, the precedent set by the *Kenyon* decision cannot be applied.

*The US and Australian context is not relevant*

The scheme of VSA prevents the terms of the MOU, overseas jurisdictions' legislation or their case law applying under the statutory eligibility framework.

*Reverse onus/reasonable hypothesis*

The only reverse onus of proof/reasonable hypothesis evidence that can be put forward by a claimant is that permitted by section 15 of the VSA.

There is no residual obligation created in the MoU for the Crown to consider a claimant's reverse onus of proof evidence for the purposes of determining eligibility, outside of section 15 of the VSA. The VSA is a code determining entitlements, services and support under the VSA.

*Benevolence*

The principles in section 10 of the VSA do not affect the interpretation of any other sections of the VSA.

## Analysis of Chair

**How did the Appellant make the claim for glioblastoma?**

Mr Himona's primary submission was that Tā Wira's glioblastoma claim had been lodged through section 35 of the Legislation Act and not in accordance with the provisions of section 14 or 15 of the VSA and does not invoke the presumptive list for Vietnam veterans or the relevant SOP, Malignant Neoplasm of the Brain (Reasonable Hypothesis) No 85 of 2016.

I do not accept that submission. The Appeal Board finds that the Appellant's claim has been made under the VSA and that is the statute under which the claim is to be determined.

The VSA is the prescriptive statutory scheme for determining eligibility of veterans' claims. The transitional provisions provide for and limit the extent to which the Respondent and the Appeal Board can exercise jurisdiction in relation to the (now repealed) War Pensions Act 1954 (the WPA): Schedule 1 application, savings and transitional provisions. The transitional provisions are not relevant for present purposes.

One of the purposes of the VSA is to provide for entitlements for eligible veterans who suffer service-related injuries or illnesses (section 3(1)(b)). Section 199(a) of the VSA provides that it is a function of VANZ to provide entitlements to veterans and other claimants in accordance with the VSA. No reference is made to the WPA or the MoU in that section.

Part 1 of the VSA, sections 10, 14, 15, 16, 19, 21 and 28, prescribes the process for how veteran's claims are to be decided.

While section 35 of the Legislation Act provides that powers exercised under repealed or amended legislation have continuing effect, that provision does not allow for new claims to

[1] [2016] NZHC 1869.

bypass the VSA statutory scheme for determining claims. The effect of section 35 of the Legislation Act is to preserve any decision made under the WPA as if that decision had been made under the VSA, provided that it could have been made under the VSA. For example, the transitional provisions in clause 6(1) of Schedule 1 to the VSA explicitly preserves war disablement pensions granted under the WPA.

The VSA is a new and distinct scheme for determining the eligibility of new claims made under that Act. The Appellant's claim for glioblastoma was received by the Respondent on 6 September 2021. It is to be determined under the VSA.

The High Court in *Keelan* rejected the argument advanced in that case that the principles and assumptions contained in the WPA could be overlaid on the VSA. At [6], Simon France J held that "… any fresh decisions must be taken under the Veterans' Support Act 2014". At [72], the Court made it clear that the VSA is "a new Act with its own purposes and principles. It establishes a different methodology for assessing claims".

At [33] the High Court specifically noted that:

> Sections 14 and 15 prescribe a process for deciding claims that is both prescriptive and different from that which existed under the War Pensions Act 1954. A central feature of the new scheme is the adoption of what are called statements of principles which govern the consideration of claims for different conditions. These statements of principles are extensive documents that identify a list of criteria applicable to almost every condition.

The reasoning in *Keelan* is authoritative for present purposes because the Court discussed the applicability of the VSA for new claims and the difference between it and the WPA. One significant difference is the inclusion of the SOPs. The SOPs are legislative instruments approved by the Minister for Veterans, which have the force of law pursuant to the VSA. They have been produced by the Australian Repatriation Medical Authority for use in the assessment of service-related claims in both Australia and New Zealand.

**Why the equal treatment of equal claims argument is not successful**

The Appellant has argued that *Kenyon* should be considered a precedent requiring equal treatment of claims in accordance with section 10(b)(ii) of the VSA. While I have empathy for the Appellant's claim, I cannot find in his favour on this basis.

*Kenyon* was decided under the WPA rather than the VSA. In that case the Vietnam War veteran's claim for glioblastoma was successful on the basis that he was entitled to the benefit of the presumption in section 17(3) of the WPA. The War Pensions Appeal Board reasoned:

> The Board accepted for the purposes of this appeal the Appellant's service was in connection with a war or emergency. Section 17(3) of the War Pensions Act (the Act) entitles the appellant, with such service, to produce any evidence (whether strictly legal or not) to show that the condition that resulted in his disablement was possibly or probably attributable to or aggravated by his service with the forces in connection with any war or emergency. This sub-section further provides that if any reasonable evidence to that effect is produced by him, a presumption that that condition was in fact attributable to or aggravated by his service is established. Thereafter, that presumption may be rebutted only by evidence that satisfies the Board (in this instance) that the condition was not so attributable or aggravated but was due entirely to other causes.

By contrast with the test in section 17(3) of the WPA, the test in the VSA is more objective and prescriptive.

Section 229 of the VSA sets out how the Appeal Board is to determine appeals.

Section 229 (2) states that appeals must, in accordance with section 10(b)(iv), be heard and determined without regard to legal or procedural technicalities.

Section 229(5) provides that the appeal Board must comply with

(a) The principles of natural justice; and

(b) The principles specified in section 10(b) of the VSA; and

(c) Any other relevant provision of the VSA and any regulations made under section 265 of the VSA.

I accept that section 10(b)(ii) of the VSA provides for equal treatment of equal claims, but my view is that it must be read in a manner which is consistent with section 14 (discussed further below) to mean equal treatment of equal claims made under the VSA, not equal treatment with claims made and determined under the WPA.

The Respondent submitted that the principles in section 10 of the VSA do not affect the interpretation of any other sections of the VSA. I do not accept that submission. If there is any ambiguity in the meaning of one of the operative provisions of the VSA, the section 10 principles are relevant as a contextual aid to interpretation. However, the Respondent is correct when it submits that the principles cannot override the clear unambiguous provisions of the VSA such as section 14.

Section 10 of the VSA does not allow the Appeal Board to judicially review the Minister's decision not to include glioblastoma in the list of conclusively presumed conditions for service in Vietnam between 1964 and 1972 as set out in regulation 13(3) of the Veterans' Support Regulations 2014 (VSR). Neither can the Appeal Board rely on section 10 to find that a Minister was bound to adopt and carry forward decisions such as *Kenyon* made under the WPA (prior legislation) when they drafted the presumptive list, as that would not be consistent with the prescribed process for deciding claims provided for in the VSA.

When determining appeals, the Appeal Board always has regard to all of the principles of natural justice, the principles in section 10(b) and the overarching benevolent intent of the VSA. Other appeals have been allowed where the Respondent has misinterpreted the law or taken a less than benevolent approach to how the law and evidence should be interpreted, for example in considering whether the factors in a SOP have been met. In this appeal there is no doubt about the interpretation of section 14 and the proper application of the law to the facts. While the Appeal Board acknowledges the Appellant's service, it is not open to us to step around section 14 and simply decide the appeal in accordance with a broader assessment of the substantial justice and merits of the claim than is provided for in the Regulations.

Section 14 of the VSA sets out the sequential steps to be taken in deciding whether to accept a claim under the VSA. This section stipulates that the first step is to consider all the available material that is relevant and decide whether the material is consistent with an hypothesis that the veteran's injury, illness, or death was service-related. If the material is consistent with such an hypothesis then the second step in the process 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.

Section 16 provides that the process in sections 14 and 15 applies to the extent that it is not modified or overtaken by the presumptions in sections 17 to 21 or the provisions of section 28.

Section 21 refers to conditions that are conclusively presumed to be associated with the veteran's service. Regulation 13(3) of the VSR provides a presumptive list for Vietnam veterans.

This Appeal Board must apply the law as it stands. In Veterans' Entitlements Appeal Board Appeal 2021-1, a case where a Vietnam veteran claimed a condition not on the presumptive list, was service-related, we found that Veterans' Affairs was correct not to accept the condition as service-related under section 21. We said:

> The Appellant has not been diagnosed with a condition on the presumptive list. The Appeal Board has sympathy for the argument that the law is out of date but must apply the law as it stands.

It is not a function of this Board to determine what ought to have been specified in the regulations prescribing the presumptive list for Vietnam veterans. This Board does not have jurisdiction to review regulations and must apply them on their terms. I have carefully considered the authorities relied upon by Mr Griggs and do not accept that they are authority to either review the Minister's decision not to include glioblastoma in the presumptive list in the VSR or to entertain a 'collateral attack' on the validity of the VSR on the basis of an 'omission' from the presumptive list.

An option open to the Appellant is to invite the Minister to amend regulation 13(3) of the Veterans' Support Regulations 2014 by adding glioblastoma to the presumptive list of service-related conditions.

**Determination of the Appellant's claim under the VSA**

In August 2021 the Appellant was diagnosed with glioblastoma, a type of brain tumour or neoplasm of the brain. Sadly, the Appellant's tumour was malignant or cancerous and he has passed.

The Appellant has qualifying service under Scheme One of the VSA, with qualifying operational service in the Vietnam War. The Appeal Board acknowledges the Appellant's service and the mana in which he is held.

I find that the Appellant is not entitled to the benefit of any of the presumptions in section 19 or 21 of the VSA. For the glioblastoma to be directly related to qualifying service through the presumption in section 19, the condition must have occurred during the period of the veteran's qualifying service. The Appellant's glioblastoma was diagnosed in mid-August 2021; therefore it is unlikely to have occurred during the period of his service in Vietnam. The list of conclusively presumed conditions for Vietnam veterans in section 21 does not include any malignancy of the brain including the condition of glioblastoma. I find the Appeal Board must apply the law as it stands.

Section 14 states:

> This section sets out the sequential steps to be taken in deciding whether a claim under this Act is accepted.

The plain language of the words “this Act”, is a reference to the VSA only. It is not a reference to any previous Acts. As noted above, the transitional provisions of the VSA address the WPA to the extent Parliament considered appropriate.

The first step in section 14(2) is to consider whether the available relevant material is consistent with an hypothesis that the appellant’s glioblastoma was service related.

I accept that there is a reasonable hypothesis that the appellant’s glioblastoma is service related. I note that the US National Academies of Sciences, Engineering and Medicine‘s *Veterans and Agent Orange: Update 11 (2018)* is the most up to date and extensive meta-analysis systemic review of the scientific literature concerning glioblastoma in Vietnam. It showed there is an absence of evidence connecting glioblastoma and exposure to herbicides in Vietnam. On the other hand, I accept that the condition of glioblastoma is such a rare cancer tumour that no one can say definitively that it is not related to Agent Orange exposure. I also understand there is literature suggesting that there may be an association between exposure to Agent Orange and other agents used in the Vietnam War and the carcinogenic changes this has long term on DNA and cellular metabolism. I also accept that Courts in the United Sates have accepted veterans’ claims for glioblastoma where the evidence is equivocal. One such precedent is decision number 1103413 of the US Board of Veterans’ Appeals.

Section 14(3) of the VSA provides that the second step is to decide whether there is a statement of principles that applies. I find that the relevant statement of principles is SOP Malignant Neoplasm of the Brain (Reasonable Hypothesis) No 85 of 2016.

In accordance with section 14(5) if there is an SOP that applies, the third step is to decide whether the hypothesis is consistent with the SOP. The Appeal Board cannot refuse to apply the factors in SOP 85 of 2016 as it is the applicable SOP.

I find that the hypothesis is not consistent with the SOP because there is no evidence before the Appeal Board that the Appellant meets any of the three factors in clause 9 of SOP 85/2016.

Clause 9 of the SOP provides that at least one of the following factors must as a minimum exist before it can be said that a reasonable hypothesis has been raised connecting malignant neoplasm of the brain or death from malignant neoplasm of the brain with the circumstances of a person’s relevant service:

Factor 1: The first factor is “having received a cumulative dose of at least 0.1 sievert of ionising radiation to the brain at least two years before the clinical onset of malignant neoplasm of brain”. There is no evidence that the Appellant was exposed to ionising radiation during his service in the New Zealand Army. The Appellant’s general practitioner confirmed that there was no record of him being exposed to ionising radiation for medical purposes prior to the clinical onset of his brain tumour in July 2021. This factor is not met.

Factor 2: The second factor is “being infected with human immunodeficiency virus before the clinical onset of malignant neoplasm of brain”. There is no evidence that the Appellant has ever been infected with human immunodeficiency virus. This factor is not met.

Factor 3: The third factor is the “inability to obtain appropriate clinical management for malignant neoplasm of brain”. The Appellant was not diagnosed with glioblastoma during service therefore this factor cannot be met.

Finally I find that section 15 does not apply, because there is a relevant SOP that applies. It is not therefore a correct application of the legislation to consider whether the claim is consistent with an hypothesis that is reasonable.

For the reasons I have explained above, even applying the broad principles in section 10 of the VSA, I do not consider it is open to the Appeal Board to find the Appellant's glioblastoma is service-related on a basis that would be inconsistent with the VSR. Adopting such an approach would mean the VSR are rendered irrelevant.

## Analysis of Mr Griggs

I have had the advantage of reading in draft the analysis of the Chair, my colleague Ms Anderson. For the reasons which follow, I have come to a different conclusion to her as to the manner in which this appeal should be decided.

I agree with much of what the Chair has said in her analysis. Section 35 of the Legislation Act 2019 does not have the effect contended for it by Mr Himona on behalf of the Appellant, for the reasons given by the Chair. The provisions of the VSA must be applied as intended by Parliament.

Section 229(5) of the VSA provides that, in determining appeals, the Appeal Board must comply with:

(d) The principles of natural justice; and

(e) The principles specified in section 10(b) of the VSA; and

(f) Any other relevant provision of the VSA and any regulations made under section 265 of the VSA.

While it was not directly addressed by the parties, in my view the issue at the core of this appeal is what the Appeal Board should do if there is a conflict between one or more of the principles specified in section 10(b) and a regulation made under section 265. I agree with the Chair that the operative provisions of the VSA must be interpreted consistently with the principles specified in section 10(b), to the extent possible. If a provision of the VSA cannot reasonably be given a meaning consistent with those principles, then it must be given effect on its terms. Parliament is sovereign. However, the same considerations do not apply when the Appeal Board is called upon to consider the consistency of a regulation with the principles specified in section 10(b).

Section 10 of the VSA is *sui generis*. I am not aware of any other provision in the statute book to which it is remotely equivalent. For that reason, it bears careful reading in this context:

> Every person who performs any function or exercises any power under this Act must do so—
>
> (a) in acknowledgement, on behalf of the community, of the responsibility for the injury, illness, or death of veterans as a result of them being placed in harm's way in the service of New Zealand; and
>
> (b) in accordance with the following principles:
>
> (i) the principle of providing fair entitlements to veterans and other claimants:
>
> (ii) the principle of promoting equal treatment of equal claims:
>
> (iii) the principle of taking a benevolent approach to claims:
>
> (iv) the principle of determining claims—
>
> (A) in accordance with substantial justice and the merits of the claim; and

(B) not in accordance with any technicalities, legal forms, or legal rules of evidence.

The first striking element of section 10 is that its application is not limited to this Appeal Board or to the Respondent. It applies to every person who performs any function or exercises any power under the VSA. As the Chair has noted, regulation 13(3) of the Veterans' Support Regulations 2014 (**VSR**) specifies a list of illnesses and conditions which much be treated as service-related, if the veteran who suffers from them served *inter alia* in Vietnam at any time between 29 May 1964 and 31 December 1972. Regulation 13 is an Order in Council which was made by the Governor-General pursuant to section 265 of the VSA, acting on the recommendation of the Minister responsible for Veterans' Affairs pursuant to section 21 of the VSA. There is in my view no doubt that, when the Minister made that recommendation and the Governor-General made the regulation, they were both persons performing functions and exercising powers under the VSA. If Parliament had intended the scope of section 10 to be limited to the Respondent, for example, it would have said so.

The second striking element of section 10 is that it imposes duties which are mandatory in nature. By way of contrast, section 4 of the Social Security Act 2018 provides that every person performing or exercising a duty, function, or power under that Act must *have regard to* certain general principles. That well-understood statutory language would permit the decision-maker to consider the principle, but not give effect to it. Such is not the case under section 10 of the VSA. The decision-maker must perform the function or exercise the power in accordance with the principles. I cannot think that it is an accident that Parliament adopted this mandatory approach.

It follows in my view that, when the then Governor-General made the VSR on 1 December 2014, His Excellency had a duty under section 10(b)(ii) of the VSA to give effect to the principle of promoting equal treatment of equal claims. Equally, when the then Minister provided his recommendation for the purposes of section 21, he had a duty to give effect to that principle.

For the Appellant, Mr Himona drew the Appeal Board's attention to the decision of the WPAB in *Kenyon*.[2] That decision was handed down on 16 December 2013, before the VSA was enacted and a little under 12 months before the VSR were made. Mr Kenyon was a Vietnam veteran who appears to have been diagnosed with glioblastoma in 2013, some 43 years after he completed his operational tour in Vietnam. He had never smoked and there was no family history of this condition, or any other evidence to suggest causation outside the service context. The WPAB took into account a number of decisions by the US Board of Veterans' Appeals, which culminated in the view that it was possible that glioblastoma diagnosed in Vietnam veterans was due to their exposure to Agent Orange while serving in the war. Based on this finding, the WPAB:

> …determined that the Appellant was entitled to the benefit of the presumption in section 17(3) of the War Pensions Act 1954 – that his condition was in fact attributable to his service.

I find that, when the then Minister provided his recommendation in 2014 as to which conditions ought to be specified in the presumptive list for Vietnam veterans in regulation 13(3) of the VSR, the *Kenyon* case was an "equal claim". It established a precedent that glioblastoma in Vietnam veterans might be related to their service, due to their exposure to Agent Orange. In my view it was the Minister's duty to make his recommendation in accordance with the principle of promoting equal treatment of equal claims, namely by including glioblastoma in the presumptive list. When the Governor-General made the Order in Council, His Excellency

[2] War Appeal 7, 19 December 2013.

similarly had a duty to ensure that the presumptive list promoted equal treatment of equal claims, by including glioblastoma.

I do not think that, when Parliament provided for the principle of promoting equal treatment of equal claims, it intended that "equal claims" should be confined to claims made under the VSA. If Parliament had intended that limitation, it would have said so. As a matter of ordinary usage, it seems to me that a previous claim by a New Zealand veteran of the same operational theatre in respect of the same condition is, absent any other distinguishing characteristics, an "equal claim", whether or not it has been considered under the VSA. I am strengthened in this view by the context of section 10(b), which requires the Appeal Board to take a benevolent approach in interpreting the VSA, to do what is fair, and to determine claims in accordance with the substantial justice and merits of the claim, not in accordance with technicalities and legal forms.

The Chair has stated that the Appeal Board does not have jurisdiction to review the VSR and must apply them on their terms. I do not entirely agree. The Appeal Board is a judicial tribunal, as such was described by the Supreme Court in *Arbuthnot v Chief Executive of the Department of Work and Income*.[3] As such, it must determine disputes between the Executive Government, represented by the Respondent, and veterans, as private citizens, independently, impartially and in accordance with the law. This may include considering collateral challenges to the VSR,[4] if it is alleged that those regulations are invalid on any of the grounds explained by the Court of Appeal in *Conley v Hamilton City Council*.[5]

However, in my view it is not necessary to consider in the context of this appeal whether the omission of glioblastoma from regulation 13(3) of the VSR in breach of the duty in section 10(b)(ii) could be viewed through the lens of invalidity, because section 10(b)(iv), read together with section 229(5), obliges the Appeal Board to determine the Appellant's claim in accordance with substantial justice and the merits of the claim. If, as I do, the majority of the Appeal Board considers that the Governor-General had a duty to include glioblastoma in the relevant presumptive list, then in my view it is the duty of the Appeal Board to determine the claim as if that had in fact been done. While section 229(5)(c) of the VSA does require the Appeal Board to comply with the VSR, it does not oblige the Appeal Board to give effect to an omission from the VSR which contravenes section 10(b) or any other provision of the Act. That would contravene the VSA, with which the Appeal Board is also required to comply.

As a consequence, in my view the decision of the Appeal Board should be that the Appellant's claim for glioblastoma must be treated as a service-related condition under the VSA.

The Appeal Board has been invited to give an opinion on the application of American and Australian precedents but has quite properly declined to do so. It is not necessary to consider those precedents to decide this appeal and it is not the function of the Appeal Board to give opinions on a hypothetical basis.

## Analysis of Dr Holdaway

I agree that the VSA applies. The Appeal Board must apply the VSA as intended and does not have authority to change or add conditions to the presumptive list.

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[3] [2008] 1 NZLR 13 (SC) at 26.
[4] *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 (CA) at [48].
[5] [2008] 1 NZLR 789 (CA) at [45].

I agree with Mr Griggs that exercising benevolence requires that the Appellant's claim for glioblastoma be accepted as a service-related condition under the VSA.

## Decision

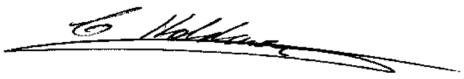
In accordance with the votes of the majority, the Appellant's condition of glioblastoma must be treated as service-related under the VSA.

**Order relating to the publication of decision**

Pursuant to the powers vested in it by section 238 of the VSA, the Board, on its own initiative and after consultation with the Appellant makes an order prohibiting the publication of the Appellant's address. The name, service number and rank of the Appellant may be published.

Ms Raewyn Anderson, Chairperson

Mr Christopher Griggs, Member



Dr Chris Holdaway, Member

Date: 14 July 2022