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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 VSA).**

Re-hearing held: 20 September 2024

Parties:
The Appellant, the Estate of Tā Harawira Gardiner, represented by Mr Ross Himona and Mr Rob Todman, Hon Hekia Parata (Lady Gardiner) and Ms Mihimaraea Parata Gardiner.

The Respondent, Veterans' Affairs New Zealand, represented by Ms Tracy Lamb Assistant Director Legal Services Veterans' Affairs, Mr Alex Brunt, Deputy Head Veteran's Affairs, and Dr Mike O'Reilly, Principal Medical Officer Veterans' Affairs.

Outcome of re-hearing:

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

The Appeal Board's decision is that the Appellant's claim for glioblastoma must be treated as a service-related condition under the VSA.

McQueen J in *The General Manager of Veterans' Affairs v The Estate of Lieutenant Colonel Tā Harawira Gardiner* [2023] NZHC 1897 determined that where there is a relevant statement of principles (**SOP**) but none of the factors in that SOP apply to the Appellant's claim, the process set out in section 15 of the VSA must be followed. The Appeal Board accordingly considered the Appellant's claim under section 15 of the VSA. The Respondent conceded that the hypothesis that the Appellant's exposure to Agent Orange during the Vietnam War might have caused or contributed to the onset of glioblastoma was "more than a possibility" and "consistent with the known facts". The issue on the appeal was whether that hypothesis was "inconsistent with proved or known scientific facts". The Appeal Board found that, given the plausibility of the hypothesis based on a mechanistic analysis, the absence of a proven link in epidemiological studies did not

constitute a fact. The scientific fact accepted by the Appeal Board is that it is not currently known whether dioxin has a causative or contributory connection with glioblastoma, but such a connection cannot be ruled out. The hypothesis is not inconsistent with that fact and is therefore reasonable.

The Respondent did not assert that there were reasonable grounds for believing that the Appellant's glioblastoma was not service-related, if the hypothesis that his exposure to Agent Orange caused or contributed to his glioblastoma is reasonable.

DECISION FOLLOWING RE-HEARING

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 27 September 2021 and decline to accept Malignant Neoplasm of the Brain (Glioblastoma) as service-related under the Veterans' Support Act 2014 (**the VSA**).

Background

[1] The background to this decision is set out in the preliminary decision of the Veterans' Entitlements Appeal Board (**the Appeal Board**) dated 26 April 2022. The essential facts follow.

[2] The Appellant had qualifying operational service as an infantry platoon commander 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.

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

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

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

[6] The Appellant appealed that decision.

[7] 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 on 17 June 2022.

[8] On 14 July 2022, the Appeal Board decided by majority vote that the Appellant's glioblastoma should be treated as service-related and accordingly substituted its decision for that of the Review Officer pursuant to section 237(2)(a) of the VSA.

[9] The General Manager of Veterans' Affairs New Zealand appealed to the High Court against that decision on five points of law pursuant to section 239 of the VSA. The appeal was heard on 27 March 2023. Judgment was delivered by McQueen J on 20 July 2023.[1]

Direction to re-hear appeal

[10] In the *Gardiner* judgment, the High Court allowed the Respondent's appeal and directed the Appeal Board as follows:[2]

> I direct the Appeal Board to consider again Tā Harawira's application for a disablement pension. I direct the Appeal Board to take account of my conclusions as to the questions of law, in so doing. I also direct each member of the Appeal Board to provide reasons for their conclusions, which, as a matter of principle, they must do.

Re-hearing

[11] The Appeal Board received comprehensive written submissions from the parties, which were supported by a large body of judicial precedent and peer-reviewed scientific papers. The Appellant called the evidence of Professor David McBride, Professor of Occupational and Environmental Medicine at the University of Otago, as an expert witness. Professor McBride attended the oral re-hearing of the appeal, which was held in person in Wellington on 20 September 2024.

[12] In its written submissions and in the course of cross-examination, the Respondent raised some concern about whether Professor McBride was qualified as an expert in

[1] *The General Manager of Veterans' Affairs New Zealand v The Estate of Lieutenant Colonel Tā Harawira Gardiner KNZM* [2023] NZHC 1897 (20 July 2023) (**the *Gardiner* judgment**).
[2] At [113].

respect of the causative link between dioxin and glioblastoma. The Appeal Board noted that, under section 229(3)(a), it may:

> ... 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.

[13] We found Professor McBride's evidence to be of great assistance in the determination of this appeal. During the course of the hearing, it became apparent to the Appeal Board that several key facts arising from that evidence were not in dispute between the parties.

[14] The Appeal Board is grateful to both parties for the approach they took to this appeal, particularly at the oral hearing. It became apparent to the Appeal Board at the oral hearing that the parties' positions were not in fact as far apart as might have been thought at an earlier time. We are particularly grateful to the advocates for the parties. For the sake of economy and efficiency, we refer to the key submissions made in the course of our analysis of the relevant issues. That should not be taken as an indication that we have not considered carefully all of the extensive submissions made by both parties, as well as the supporting material they provided.

Analysis under VSA s 14

[15] As a starting point, the Respondent submitted that the direction given by the High Court means that the Appeal Board must reconsider the appeal afresh, including the application of section 14 of the VSA.

[16] While we agree with that submission, that part of the process can be traversed relatively quickly. The first step is to consider all the available material that is relevant and decide whether that is consistent with an hypothesis that the glioblastoma suffered by Tā Harawira was service-related.[3] At paragraphs 14 to 16 of its submissions, the Respondent conceded that the available material is consistent with such an hypothesis. That is common ground between the parties and we think rightly so.

[3] VSA s 14(2).

[17] The next step is to consider whether there is a statement of principles that applies.[4] McQueen J held in the *Gardiner* judgment at [30] that the relevant SOP in this case is SOP 85/2016. We are bound by that ruling.

[18] The next step is to consider whether the hypothesis is consistent with the SOP.[5] McQueen J held in the *Gardiner* judgment at [31] that none of the factors specified in cl 9 of the SOP applied to Tā Harawira. That is common ground between the parties and there is no basis on which we could take a different view.

[19] While it may not be immediately apparent on a plain reading of the statute, McQueen J held that, where there is a relevant SOP, but no factors apply:[6]

> [77] ... a claimant should be treated as if there is no applicable SOP, and the process in s 15 should apply. This approach accords with the requirements in s 10(b) that a benevolent approach is taken, and that claims are not determined in accordance with any technicalities, legal forms, or legal rules of evidence, but rather in accordance with substantial justice and the merits of the claim.
>
> [78] Thus, even when a SOP is apparently applicable, but no factors relate to the claimant, the overarching question should still be whether there is a reasonable hypothesis that the condition or injury is service-related. If it is, the claim should be accepted unless there are reasonable grounds for believing that the veteran's injury, illness or death was not service-related.

[20] McQueen J went on to hold that this approach:[7]

> ... also allows the decision maker to consider the application of the principles in s 10(b). This is important in the present case, as it allows the decision maker to consider whether an "equal claim" exists, as required under s 10(b)(ii).

Analysis under section 15 of the VSA

[21] For the Appellant, Mr Himona expended considerable effort in making submissions on the true meaning of section 15 of the VSA, for which the Appeal Board is grateful. However, it will be apparent that we do not consider the provision to be quite as complex as Mr Himona suggested. Our primary duty is to ascertain the meaning of section 15 from its text and in the light of its purpose and context.[8] We have found Mr Himona's references to the repealed War Pensions Act 1954 and equivalent legislation overseas of limited assistance.

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[4] VSA s 14(3).
[5] VSA s 14(5).
[6] At [77] and [78].
[7] At [80].
[8] Legislation Act 2019 s 10(1).

[22] The first step in applying section 15 of the VSA is to determine whether the hypothesis, on which reliance is placed by the Appellant, is reasonable.[9] In this context, "reasonableness" is defined by section 15(4):

> An hypothesis is reasonable if it is—
> (a) more than a possibility; and
> (b) consistent with the known facts; and
> (c) not inconsistent with proved or known scientific facts.

[23] It appears that the concept of "reasonable hypothesis" was borrowed from Australia's Veterans' Entitlements Act 1986 (**the VEA**).[10] Section 120(2) of the VEA provides that a veteran's incapacity claim must be accepted as "defence-caused" unless the decision maker "is satisfied, beyond reasonable doubt, that there is no sufficient ground for making that determination". Prior to 1 June 1994, the VEA provided that the decision maker must be so satisfied "beyond reasonable doubt" if:[11]

> ... the material before it does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person.

[24] In 1987, the Full Court of the Federal Court of Australia considered the meaning of a "reasonable hypothesis" in the VEA context. The Court noted the view of a Veterans Review Board that:[12]

> ... a connection asserted by a hypothesis to exist between death or incapacity and service may still be reasonable, even though theoretical, and it may be theoretical in either or both of at least two senses: by postulating a known medical fact but in circumstances not known to have definitely existed in the instant case; or by postulating a medical principle which science is not yet able to definitely prove but is unable to describe as unreasonable.

[25] Having agreed with that statement, the Court concluded that:

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[9] VSA s 15(2).
[10] Law Commission *A New Support Scheme for Veterans: A Report on the Review of the War Pensions Act 1954* (NZLC R115, 2010) at 5.37.
[11] On 1 June 1994, the VEA was amended by the insertion of s 120A. That provides that an hypothesis is only reasonable if "there is in force a [SOP] or a determination of the [Repatriation Commission] that upholds the hypothesis". The VEA has no equivalent to VSA s 15.
[12] *East v Repatriation Commission* (1987) 74 ALR 518 at 534.

> A reasonable hypothesis requires more than a possibility, not fanciful or unreal, consistent with the known facts. It is an hypothesis pointed to by the facts, even though not proved upon the balance of probabilities.

[26] We consider the definition adopted by the Court in *East* helpful, indicating as it does the appropriate threshold for "more than a possibility". In applying that threshold, decision makers must give effect to the principles enshrined in section 10(b) of the VSA, which include the principle of benevolence and the principle of promoting equal treatment of equal claims. We return to the question of equal claims later in this decision.

Evidence and submissions

[27] The parties have brought a considerable body of scientific evidence before the Appeal Board in support of their competing contentions in this appeal. We thank the parties for the thoroughness with which they have approached the matter.

[28] The Respondent submitted that the hypothesis which the Appeal Board must test against section 15 of the VSA is whether exposure to the TCDD[13] contaminant in a tactical herbicide (**Agent Orange**) during the period of Tā Harawira's qualifying service *caused* the development of his glioblastoma [*emphasis added*]. We think it overstates the position to say that the exposure must have caused the glioblastoma. The question for the Appeal Board is whether the glioblastoma was service-related. Under section 7 of the VSA, an illness is also service-related if it is "contributed to by, or aggravated by qualifying service".

[29] This distinction assumes importance in light of the evidence of Professor McBride, called for the Appellant, that:

> ... brain cancer is most likely multifactorial, ionising radiation and HIV being accepted causes, however TCDD toxicity mediated by the AhR receptor is likely to be one of these multiple factors.
>
> ...
>
> Glioblastomas, like the blood dysacrias, are very likely to have a multifactorial aetiology, both constitutional (genetic) and environmental facts contributing. The AhR[14] is active in both these mechanisms.

[13] 2,3,7,8-tetrachlorodibenzo para dioxin.
[14] Aryl hydrocarbon receptor.

[30] Professor McBride gave further evidence that:

> The AhR receptor is a transcriptional factor, a protein that regulates the transcription of genes, that is to say their copying into RNA in the pathway of protein synthesis. It can be activated by a variety of ligands which bind to it. It is therefore an 'exposome' receptor, sensitive to the human environment in the broadest sense, including such elements as physiological and psychological stress.

[31] At the oral hearing, Professor McBride gave evidence that TCDD's interference with the AhR receptor has a dual effect; not only suppressing the body's immune response to cancerous cells but also stimulating the growth of such cells. Furthermore, TCDD is probably a carcinogen in its own right. It has a half-life of seven and half years in the blood of a person exposed to it, after which that person remains at risk. The long time lag between Tā Harawira's exposure at the end of the 1960s and his diagnosis in 2021 was not extraordinary.

[32] The mechanistic evidence of Professor McBride referred to above was not contested by the Respondent.

[33] Professor McBride referred to a 2018 report in the United States by the Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, which observed:

> The Update 2014 committee concluded that the greater than two-fold excess risks of mortality from head and neck cancers as well as from cancers of the oral cavity, pharynx, and larynx cannot be completely attributed to confounding (a cause of the disease, but not measured and adjusted for in the analysis) by smoking because excess risks were not found in this cohort for deaths from other smoking-related diseases such as lung cancer, chronic obstructive pulmonary disease, or coronary artery disease.

[34] In Professor McBride's opinion, that "leaves the excess unexplained, with a reasonable hypothesis that TCDD is responsible".

[35] At the oral hearing, the Respondent conceded that the hypothesis linking Tā Harawira's glioblastoma with his assumed exposure to Agent Orange is more than a possibility and is consistent with the known facts. In our view, the known facts must include the following:

(a) The fact that Tā Harawira was a non-smoker.

(b) The fact that there is nothing in Tā Harawira's medical history which would suggest a predisposition to glioblastoma.

(c) The fact that Tā Harawira was an infantry platoon commander during a period in the Vietnam War when it can be reasonably assumed that he will have been exposed to Agent Orange while on patrol.

(d) The fact that, of Tā Harawira's 17 siblings, he was the only one who served in Vietnam and the only one who contracted this disease.

[36] By the end of the re-hearing, the sole issue which remained on this appeal was whether the hypothesis was "inconsistent with proved or known scientific facts". The Respondent submitted that:

> For the Appellant's hypothesis to be consistent with scientific fact, the causal relationship between glioblastoma and dioxins must be established as a known or proven scientific fact.

[37] The Respondent produced an e-mail from Dr Quinn Ostrom at Duke University dated 21 June 2024. Dr Ostrom is widely published in the relevant field and there is no question as to her expertise. Dr Ostrom wrote that:

> There are still no validated associations between glioblastoma and any risk factor other than therapeutic levels of ionizing radiation to the head. No chemical exposures have been confirmed to increase risk of glioblastoma.

[38] The Appeal Board accepts the evidence of Dr Ostrom. Based on this and a significant body of epidemiological research, the Respondent submitted that the hypothesis was not consistent with the proved or known scientific facts, because the research which had been conducted had failed to substantiate that link.

[39] Giving evidence for the Appellant, Professor McBride drew the Appeal Board's attention to the facts that glioblastoma is a rare cancer and that the cohort of Vietnam veterans is too small to conduct reliable epidemiological studies. Professor McBride said that the scientific basis for the hypothesis is grounded in mechanistic analysis. It is common ground between the parties that dioxin can interfere with the AhR receptor and that that represents a risk for all cancers. It is also accepted that the degree of risk is not evenly

spread among cancers. For the Respondent, Dr O'Reilly conceded those points and also the fact that a scientific link between dioxin and glioblastoma cannot be ruled out. The truth is that, at the current point in scientific knowledge, it is an unknown.

[40] What we take from the evidence and submissions is that, while such a link is as yet unproven on a scientific basis, it remains a plausible explanation for at least some of the excess deaths which have been observed among the Vietnam veterans' cohort. It is consistent with the mechanistic analysis of how dioxin interferes with the AhR receptor and not inconsistent with the epidemiological studies because those studies have simply not found a link. They have not proved that there is no link.

[41] On the basis of the evidence and the Respondent's sensible concessions, the Appeal Board finds that the hypothesis, that Tā Harawira's exposure to Agent Orange during his qualifying service either caused or contributed to the development of his glioblastoma, is reasonable.

[42] Given our finding on the evidence, we do not think that it is necessary to consider the impact of the section 10(b) principles on the "reasonable hypothesis" threshold. However, those principles are of general importance in the context of the exercise of discretion under the VSA, and particularly section 15. We consider their potential impact separately later on in this decision.

Reasonable grounds for belief

[43] Under section 15(3) of the VSA:

> If the claim is consistent with an hypothesis that is reasonable, then the claim must be accepted, unless there are reasonable grounds for believing that the veteran's injury, illness, or death was not service-related.

[44] The Appellant submitted that this and other provisions of the VSA impose a reverse onus which requires the Respondent to prove that the illness was not service-related to the standard of beyond reasonable doubt. We do not accept that submission. As is mentioned above at [23], the standard of beyond reasonable doubt is enshrined in Australia's VEA, albeit with a special meaning in that context. It is not mentioned in the VSA and, short of an explicit provision providing for that, the civil standard of proof on the balance of

probabilities will ordinarily apply,[15] subject to the Appeal Board's duty to give effect to the principles established by section 10(b).

[45] In *A v Minister of Internal Affairs*, the Supreme Court recently considered the meaning of having reasonable grounds for a belief in an immigration context.[16] Applying that guidance to the context of section 15(3), we are of the view that, if a reasonable hypothesis is raised, the claim must be accepted unless the decision maker has an objective and credible basis for thinking that the veteran's illness was not service-related. For example, it is conceivable that, while there is a reasonable hypothesis that Vietnam veterans are susceptible to glioblastoma due to their exposure to Agent Orange, the decision maker might decide that the circumstances of a particular veteran, such as his family, medical or service history, provide an objective and credible basis for believing that his glioblastoma was not service-related. As is the case in respect of the "reasonable hypothesis" threshold, decision makers must give effect to the principles prescribed in section 10(b) of the VSA in making such an assessment.

[46] At the oral hearing, Dr O'Reilly for the Respondent conceded that, if there were a reasonable hypothesis that glioblastoma may be connected with exposure to TCDD, the Respondent would not have reasonable grounds for believing that Tā Harawira's glioblastoma was not service-related. That was an important concession. Nevertheless, for completeness and to assist the Respondent with future decision making, in the next section of this decision we examine Tā Harawira's specific circumstances in comparison with those of another New Zealand veteran whose glioblastoma was accepted as service-related, in the context of the principle of promoting equal treatment of equal claims.

Equal claims

[47] Section 10(b)(ii) of the VSA provides that every person who performs any function or exercises any power under that Act must do so in accordance with the principle of promoting equal treatment of equal claims.

[48] A key issue in this appeal was the question as to what constitutes an "equal claim". The Appellant relied on a 2013 decision of the War Pensions Appeal Board (**WPAB**) in respect

[15] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [26], [97], [102] and [146].
[16] [2024] NZSC 63 at [41].

of William Kenyon (*Kenyon*), another New Zealand veteran of the Vietnam War who had been exposed to Agent Orange, as an equal claim. The Appellant also drew the Appeal Board's attention to a large number of United States decisions concerning Vietnam veterans who had been exposed to Agent Orange. Conceivably any of those decisions, after consideration of all the circumstances presented to the decision maker, could be considered equal claims.[17]

[49] The Respondent submitted that, to qualify as an equal claim, a previous successful claim must:

(a) Meet the test for a reasonable hypothesis, which we address earlier in this decision;

(b) Be supported by medical or scientific evidence which is consistent with current "proved or known scientific facts";

(c) Be relevant, ie factually similar to the present claim;

(d) Be recent; and

(e) Be "relevant in relation to current scientific literature or current overseas case law".

[50] The Respondent submitted that *Kenyon* does not meet the criteria for an equal claim in this appeal. The Appellant disputed that and relied on the dicta of McQueen J in that respect in the *Gardiner* judgment.

[51] We agree with the Respondent's submission that a precedent which is put forward as an equal claim must be factually similar to the claim to which it is compared. However, we do not agree that any fixed rule ought to be laid down concerning how recent the precedent should be. We are of the view that the other criteria proposed by the Respondent are essentially subsumed in the test for a reasonable hypothesis.

[52] The principles provided for in section 10(b) are in effect a gloss on the decision making criteria which apply under the VSA. They add additional factors to which effect must be given. Accordingly, we would be reluctant to conclude that a section 10(b) principle added

[17] [2023] NZHC 1897 at [104] to [106].

nothing to the existing criteria. If a decision maker finds that there is an equal claim which has been accepted previously, the decision maker should accept a similar claim if it is possible to do so consistently with the other provisions of the VSA. An analogy can be usefully drawn with the approach which the courts must take when deciding whether a statutory provision can be given a meaning consistent with a right guaranteed by the New Zealand Bill of Rights Act 1990:[18]

> The rights-consistent meaning must only be possible – it need not be the most likely meaning or even a likely meaning.

[53] If a provision of the VSA cannot reasonably be given a meaning consistent with a section 10(b) principle, then it must be given effect on its terms.

[54] A number of guidelines concerning the application of the equal claims principle emerge from the judgment of McQueen J. The first concerns the applicability of previous claims under the War Pensions Act 1954:[19]

> Section 17(3) of the War Pensions Act entitled an applicant to produce any evidence (whether strictly legal or not) to show that the condition that resulted in their disablement was possibly or probably attributable to or aggravated by their service with the forces in connection with any war or emergency. Section 17(3) further provided that if any reasonable evidence to that effect is produced by that applicant, a presumption that that condition was in fact attributable to or aggravated by their service was established. Thereafter, that presumption could be rebutted only by evidence that satisfied the WPAB that the condition was not so attributable or aggravated but was due entirely to other causes. *This is a similar analysis to the procedure established by s 15 of the Act*. [*Emphasis added.*]

[55] McQueen J agreed with the principle 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" and went on to hold that:[20]

> When broadly the same principles apply to the determination of a claim under each statute, and the claim is sufficiently similar, that must be relevant to the determination of whether there is a reasonable hypothesis that an illness, injury, or death was service-related, both as a matter of fact and a matter of law.

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[18] *Fitzgerald v R* [2021] 1 NZLR 551 (SC) at [58] per Winkelmann CJ.
[19] [2023] NZHC 1897 at [34].
[20] At [104] and [105].

Comparison with *Kenyon*

[56] Having established that a successful claim under the War Pensions Act can in principle be an "equal claim" for the purposes of the VSA, the Appeal Board must consider whether *Kenyon* is an equal claim for the purposes of this appeal. This requires us to determine answers to the following questions:

(a) During the course of his qualifying service in Vietnam, was Tā Harawira exposed to the same environmental factors as those to which the Mr Kenyon's glioblastoma was attributed?

(b) Are there factors in the family or medical history of Tā Harawira which differentiate his claim from that of Mr Kenyon?

[57] Tā Harawira served as a infantry platoon commander in the Vietnam War from 4 June 1969 to 8 May 1970. Mr Kenyon served as an infantry soldier in the same operational theatre from 14 November 1969 to 10 November 1970. Mr Kenyon gave evidence to the WPAB that he had been exposed to Agent Orange during his service in Vietnam. It is common ground in this appeal that Tā Harawira was also exposed to Agent Orange. We find that Tā Harawira was exposed to the same environmental factor, namely Agent Orange, as that to which Mr Kenyon's glioblastoma was attributed by the WPAB.

[58] In both cases, the time lag between exposure to Agent Orange and the diagnosis of glioblastoma was over 40 years.

[59] In *Kenyon*, the WPAB accepted evidence that Mr Kenyon had:

(a) Never smoked;

(b) No family history which might suggest a genetic predisposition to glioblastoma; and

(c) Not engaged in any activities following his qualifying service which might have led to him developing glioblastoma.

[60] In light of this evidence and United States decisions which indicated, among other things, that the responsible officer of the U.S. Veterans' Administration could "not specifically rule out the possibility that the Veteran's glioblastoma was due to Agent Orange exposure", the WPAB found that "reasonable evidence" had been produced to show that Mr Kenyon's glioblastoma was attributable to his service in Vietnam. In the absence of any contradictory evidence, the WPAB allowed Mr Kenyon's appeal.

[61] We have set out the equivalent family and medical factors relating to Tā Harawira at [35]. In our view, *Kenyon* is unquestionably an "equal claim" for the purposes of section 10(b)(ii) of the VSA. However, in view of our finding that the Appellant's hypothesis is reasonable in the sense that it is "not inconsistent with proved or known scientific facts",[21] and the concessions which have been made by the Respondent as to the other limbs of the relevant tests, it is not necessary for us to decide what impact that might have in a less clear cut case. We have given some guidance in that respect from [51] to [55].

[62] For the same reasons, it is unnecessary for the Appeal Board to consider whether the considerable number of successful United States veterans' claims referred to us could also be accepted as "equal claims". It was agreed by the parties that veterans' claims in the United States are decided on the "rule of equipoise", which means that the hypothesis must be "at least as likely as not" to be accepted. We observe that that appears to be a more stringent test than that which applies under the VSA. That raises the possibility that a United States case could be accepted as an equal claim in the right circumstances, but we make no finding in that respect and leave the issue for consideration if it arises in the context of another appeal.

Decision

[63] It follows from the foregoing reasons that the decision of the Appeal Board is that the Appellant's glioblastoma must be treated as service-related under the VSA.

[64] We heard from Lady Gardiner and Mr Himona at the re-hearing that this appeal was pursued over the past three years by Tā Harawira's whānau in accordance with his dying wish, not to gain any particular financial benefit for his own whānau, but to vindicate the rights of his

[21] VSA s 15(4)(c).

comrades in the Vietnam veteran community. That is entirely consistent with Tā Harawira's record of selfless service to the nation throughout his life, both in war and peace.

[65] Kua hinga te tōtara o Te Waonui a Tāne. Moe mai rā, moe mai rā e te rangatira.

Order relating to the publication of decision

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

Ms Rebecca Ewert, Chairperson

Mr Christopher Griggs, Member

Dr Chris Holdaway, Member

Dr Tristram Ingham ONZM, Member

Date: 20 October 2024