[redacted]
War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: [redacted]

Service Number and Rank: [redacted]

Address: [redacted]

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

Held: at Wellington on 22 November 2017

DECISION

1. This is an appeal by [redacted] (the **Appellant**) against the decision of the Review Officer (**RO**) dated 18 March 2016 to uphold the Decision Officer's decision of 29 June 2015 and decline to accept his condition of **Multiple Sclerosis (MS)** as being service-related under the Veterans' Support Act 2014 (the **VSA**).

2. The Appellant was not able to appear in person at the appeal hearing, however, at his request, he was represented at the appeal hearing by his advocate, Mr Richard Terrill. The Respondent, Veterans' Affairs New Zealand (**VANZ**), was represented by Mr Graeme Astle, who appeared in person at the hearing. Ms Ann-Marie Tribe, also of VANZ, was in attendance. The Chief Executive of the RNZRSA, Rear Admiral Jack Steer (Rtd) attended the appeal hearing as an observer.

Background to the appeal

3. On 29 June 2015 the Decision Officer (**DO**) declined to accept the Appellant's claimed condition, MS, as being related to his qualifying service. The reason for her decision was: *"the evidence available shows it is not related to your qualifying service. The information has been considered in relation to the factors listed in the Statements of Principles (SoPs) for Multiple Sclerosis (No's: 100 of 2011 Reasonable Hypothesis and 101 of 2011 Balance of Probabilities have been applied). I have concluded regrettably that the information available does not meet a factor with which to connect multiple sclerosis to your service."*

4. On 18 March 2016, the RO upheld the DO's decision of 29 June 2015 and declined to accept MS as being service-related under the VSA. In coming to her decision, the RO had regard to the reason the Appellant gave for applying for a review of the decision in his Review of Decision application form received by VANZ on 7 January 2016, namely: *"I do not feel that the Decision Officer's response letter addresses my Application and the Factors I believe could have resulted from my RNZAF service. The Decision Officer says that 'the decision to decline your claim for Multiple Sclerosis (MS) as the evidence available shows it is not related to your qualifying service.' What 'evidence available'? How does it show that it is not related to my service"….I believe my qualifying service is responsible for my MS onset. I have provided three Factors the first being my exposure to DDT. You will know that DDT is in the Organchlorine group of chemicals used as pesticides which are known to link with Neurodegenerative diseases of which MS is one. There is ample evidence to show the neurotoxicity and immunotoxin properties of Pesticides. Secondly endured a Class 1A stressor event as defined by the AMA in the SoP guidelines. I have given detail of the near death experience which I am sure is recorded in the RNZAF Archives and indeed the No 14 (Bomber) Squadron History. My third factor was my potential exposure to Agent Orange which we all know has had terrible health implications. I had several missions into Vietnam and Cambodia which necessitated time on the ground in these countries."* The RO observed that the Appellant had gone on to question the choice of Neurologist consultant (Dr Wallis) in particular as "*he does not do AMA assessments and stated he did not think they were useful in neurological work and his failure to comment on the likely causes of the condition",* and noted also that *"[the Appellant] also felt that he was not given the opportunity to discuss the 3 Factors relevant to his belief that his qualifying service was the cause of his MS onset with Dr Wallis."* The RO noted that the Appellant had stated: *"The Decision Officer does not provide any science based proof to reject my claim. Just saying 'the evidence available shows it is not related to your qualifying service' is regrettably unacceptable to me because it says nothing."* The RO further also noted that the Appellant *"refers to Dr Hornabrook who diagnosed his MS in 1986 and notes 'He reported the previous visual impairment in 1982 approx., and physical tingling/weakness in my left arm in 1976 (one month after leaving the RNZAF) and also a reported visual impairment in 1968 (whilst flying on Canberra's (sic)) were all most probably MS events.'"* The RO further noted the two articles of information that the Appellant had printed from the internet.

5. The RO also had regard to the specialist letter from William E Wallis, Neurologist dated 2015, which stated: *"[The Appellant] brought along extensive typed records regarding his exposure to pesticides, Agent Orange, and so forth during his military career. He also described various sources of stress that he thinks may be relevant. He gave an accurate account of the evolution of his neurological symptoms. He also said that the diagnosis of multiple sclerosis was made by an Auckland neurologist, Dr Neil Anderson. He remembered that Dr Neil Anderson told him that he had the primary progressive form of the disorder that is not amendable to any current medication or treatment. I was able to obtain copies of Dr Anderson's records. Dr Anderson's records do not contain information about his very first neurological symptoms, which include an episode of optic neuritis involving the left eye. It was painful, and he had a large left central scotoma. He saw an eye specialist, who made the diagnosis and referred him to a neurologist in Wellington, the late Dr Richard Hornabrook. Dr Hornabrook considered that [the Appellant] might very well have multiple*

sclerosis. One reason was that he had had a few transient neurological symptoms previously, including transient loss of sensation in his hands and left foot as well as a transient episode of loss of vision previously. These had not come to medical attention. As far as I can tell, he recovered from all of these symptoms, including his visual deficit. He did not recall any specific investigations for the initial neurological symptoms, and here is where the information from Dr Anderson's records is helpful. [The Appellant] was referred to Dr Anderson by an orthopaedic surgeon, Dr Coldham in June 2011. He had seen Dr Coldham because of chronic spinal pain, and Dr Anderson found evidence of upper motor neurone changes in both lower limbs (spasticity). Reportedly, previous MR imaging of the spinal cord had shown no definite abnormalities, but a subsequent review of the films by Dr Anderson and neuroradiologist indicated that there was atrophy of the spinal cord. Dr Anderson was suspicious of multiple sclerosis, and arranged an MR brain imaging that did show changes compatible with the diagnosis of multiple sclerosis. Dr Anderson also noted a history impaired bladder function and records that disclose enlargement of the bladder. He arranged visually evoked potentials at Auckland City Hospital that were abnormal and considered features of bilateral optic nerve disease. This combination of findings and laboratory results confirmed the diagnosis of multiple sclerosis...Furthermore, he told me that Dr Hornabrook, many years ago had already considered the diagnosis of MS. The bladder and bowel dysfunctions are undoubtedly related to spinal cord atrophy from multiple sclerosis."

6. After commenting generally about the basis of Statements of Principles (**SoPs**), the RO noted that *"SoPs provide definitions of the disease or injury and specify what factors must exist for the condition to be causally connected to the veterans (sic) qualifying service. Provided the material available is consistent with a hypothesis that the injury, illness or death was service related, only one factor need be met for the claim to be successful."* She further noted that *"the relevant SoPs for Multiple Sclerosis are (No's: 100 of 2011 Reasonable Hypothesis and 101 of 2011 Balance of Probabilities)."*

7. The RO observed that the Appellant had referred to three factors which he believed to be responsible for his MS onset, stating: *"1. You will know that DDT is in the Organchlorine group of chemicals used as pesticides which are known to link with Neurodegenerative diseases of which MS is one. There is ample evidence to show that neurotoxicity and immunotoxin properties of Pesticides."* With regard to this, the RO noted that SoP factor 6(a) states: *"Inhaling an organic solvent or having cutaneous contact with an organic solvent on more days than not for a continuous 12 month period before the clinical onset of Multiple Sclerosis",* but concluded that *"this factor is not met as DDT is not an organic solvent."*

8. With regard to the second point raised by the Appellant i.e. *"Secondly endured a Class 1A stressor event as defined by the AMA in the SOP guidelines",* the RO noted that factor 6(k) states: *"experiencing a category 1A stressor within the six months before the clinical worsening of multiple sclerosis",* and concluded that *"this factor is not met as clinical worsening applies to a condition that was contracted before, or during (but not arising out of) the persons relevant service. [The Appellant's] condition was first diagnosed in 1986 and is therefore after his qualifying service under the Veterans' Support Act 2014."*

9. With regard to the third point raised by the Appellant i.e. *"my potential exposure to Agent Orange which we all know has had terrible health implications",* the RO observed that *"in referring to the relevant SoP Agent Orange is not documented as a causal factor for Multiple Sclerosis and is not a conclusively presumed injury, illness or condition for Viet Nam veterans under the Veterans' Support Act 2014."*

10. In carrying out her review, the RO gave consideration to the *"medical assessment findings/ information provided by William E Wallis, Neurologist dated 20 May 2015, and to the information submitted by [the Appellant] on his Disablement application form received 16 February 2015 and Review of Decision application form received 7 January 2016",* as well as *"advice sought from the Veterans' Affairs Chief Medical Advisor and Dr D McBride, Occupational Health in respect of molecular structure of DDT".* Having had regard to *"all the information available for the purpose of this review",* the RO *"determined to uphold the decision of 29 June 2015 and decline to accept Multiple Sclerosis as being service-related under the Veterans' Support Act 2014."*

Written submissions

11. On 29 September 2016, VANZ received the Appellant's notice of appeal form, in which he lodged an appeal against the decision of the RO. His grounds for appeal were: *"1. We believe that the NRO research with regard to the use of DDT was incomplete based on the following: a. DDT is a solid or crystaline (sic) substance. B. to spray or apply DDT it has to be mixed with another fluid substance usually kerosene. 2. As kerosene was the organic solvent used to mix DDT and each aircraft was regularly sprayed I was exposed to kerosene (organic) solvent whilst aboard this aircraft. 3. Kerosene was used as the propulsion fuel for all jet and jet aircraft used at this time. Thus: a. I was exposed to kerosene within the aircraft and b. At all times on the flight line. 4. I believe that my condition is related to factor 6 a. of SoP 100 of 2011."*

12. On 10 August Mr Richard Terrill, advocate for the Appellant, made written submissions on behalf of the Appellant. Observing that the Appellant's application was made under scheme one of the VSA, and that the Appellant had qualifying operational and routine service (Mr Terrill noted that the Appellant's service *"was routine in NZ and Singapore and operational in Vietnam and Cambodia"),* Mr Terrill submitted that *"section 10 of that Act has not been applied in that there has not been an acknowledgement by the community for [the Appellant's] service nor has there been a benevolent approach taken to his application."* Mr Terrill observed that *"Mr R W Hornabrook diagnosed MS in April 1986 …There can be no doubt that [the Appellant] suffers from MS."* Mr Terrill submitted that the Appellant, during his service *"was exposed on more days than not to Kerosene liquid and fumes. Kerosene is used for propulsion of jet and jet prop aircraft. It is also used as a wetting agent for the dispersal of DDT which was used in the tropics extensively to control Mosquitos. [The Appellant] reports kerosene being in contact with his skin, hair and clothing. This is relevant as it is covered by the SOP for MS."* He further submitted that *"during his service and after he was diagnosed with MS, [the Appellant] suffered a near miss accident. As defined in Health and Safety Law. This is detailed in a statement at H1 of the Dossier. We therefore contend that [the Appellant's] MS was aggravated by this incident."* Noting that the RO had declined the Appellant's application *"as the evidence*

available shows it is not related to your service", Mr Terrill submitted that *"if this is based on medical files it is definitely flawed. There obviously will not be notations of each time [the Appellant] was saturated in Kerosene. Nor will there be a notation of a near miss accident",* and concluded his submission by stating: *"The evidence submitted by [the Appellant], Dossier S1 should be sufficient to make a determination in accordance with VSA 14 s 10 b (iii) and (iv), and we respectfully submit that the Appeals Board uphold this appeal in accordance with Natural Justice."*

13. In his written submission dated 20 September 2017, and in response to the submissions made by Mr Terrill to the effect that VANZ had not taken a benevolent approach in deciding the Appellant's application, Mr Astle submitted that in applying the principles specified in section 10 of the VSA, the process for deciding claims which is set out in sections 14 and 15 of the VSA *"must also be taken into account",* noting that *"following this process ensures Principle (ii) is adhered to enabling equal treatment of equal claims."* Mr Astle further submitted that *"the benevolent approach would not be applied where a claim is declined when there is an applicable SoP but the factors are not met."* In relation to the RO's decision, Mr Astle highlighted a number of matters, including: the Appellant had coverage under the VSA "*having served in Singapore during a period that qualifies as routine service and has qualifying operational service for Vietnam";* the grounds upon which the Decision Officer had declined the Appellant's application – that she *"was unable to make a connection between any of the factors listed in the …(SoPs) in relation to the claimed condition",* the relevant SoPs for MS being *"Numbers 100 of 2011 – Reasonable Hypothesis and 101 of 2011 – Balance of Probabilities";* that the Appellant disagreed with the DO's decision, raising three points that he believed had been overlooked at the time of the original decision, *"the first of these was his exposure to DDT during his time in the RNZAF….The second point…was that he suffered a Class 1A stressor as defined by SoP 100 of 2011 resulting from an inflight emergency whilst serving on board Canberra planes with 14 Squadron. The third point raised was the possibility of exposure to Agent Orange whilst in Vietnam which may have caused his Multiple Sclerosis given exposure to this substance has terrible implications";* that the RO had *"…sought assistance from Veterans' Affairs Chief Medical Advisor and Occupational Health Specialist regarding the molecular structure of DDT"* and "*that it was determined that in relation to DDT exposure the Appellant did not meet the requirements for factor 6(a)…as the chemical structure of DDT is not that of the prerequisite chemical compounds that this factor requires exposure to",* and that the RO had also determined that "*the Appellant's 1A stressor did not meet the requirement of the relevant factor 6 (k)…"* as *"this factor relates to the aggravation of a pre-existing condition and [the Appellant] had not been diagnosed at that time. Agent Orange was also ruled out as it is not a chemical provided in the SoP."*

14. In his submission, Mr Astle noted that the Appellant had lodged an appeal application on 29 September 2016 *"in which he raised two further reasons as to why he believed that factor 6(a) of the SoP 100 of 2011 had been incorrectly applied. The first was that the solvent exposure that he was claiming in relation to DDT was not the substance itself but the chemical used to dissolve it for dispersion which he claimed was kerosene. The second reason was that he was exposed to kerosene whilst on board aircraft and at all times on the flight line."* Mr Astle advised the Veterans' Entitlements Appeal Board (the **Board**) that while preparing the appeal documentation relating to

the Appellant's appeal, to enable the appeal to be scheduled for a hearing, VANZ "*took note of the additional new points raised on appeal by [the Appellant]"* and *"as a consequence Veterans' Affairs determined that it would be reasonable to consider this new material and do so by way of a reconsideration of his claim under Section 205 of the Veterans' Affairs Act 2014. This was done by reviewing all the material provided by [the Appellant] in relation to his application along with the medical information available."* Mr Astle further advised that *"following reconsideration, the conclusion reached was that until such time that Veterans' Affairs is able to analyse additional data from a full version of [the Appellant's] logbook, that whilst Veterans' Affairs agrees that [the Appellant] was exposed to a factor 6 (a) solvent during his time in service, the extent of the exposure identified does not meet the criteria as outlined in SoP 100 of 2011. The information does not demonstrate that [the Appellant] inhaled or experienced cutaneous exposure to the factor 6 (a) solvent on more days than not in a continuous 12-month period and Veterans' Affairs respectively submits that as a consequence the decision to decline [the Appellant's] application for Multiple Sclerosis remains unchanged."*

15. Mr Astle then provided a *"summary of the reconsideration undertaken in relation to [the Appellant's] application."* With regard to the application of the SoPs, Mr Astle observed that only SoP 100 of 2011 – Reasonable Hypothesis, and not SoP 101 of 2011- Balance of Probabilities included factor 6(a), and that therefore, in accordance with VANZ *"current operational policy",* only "*Qualifying Operational Service can be taken into account when determining whether this factor is met."* Based on this approach, Mr Astle submitted *"that it would decline to accept Multiple Sclerosis as being a service related condition as the available evidence indicates that [the Appellant's] Qualifying Operational Service solely consisted of one (1) flight into South Vietnam, hence he would not meet the time factor outlined in 6 (a)."* Despite this, however, Mr Astle noted that VANZ had "*reconsidered [the Appellant's] claim "setting aside the restriction of only Qualifying Service as being relevant."*

16. On the basis of this approach, Mr Astle submitted that the first question to be answered was whether kerosene is an organic solvent as specified in factor 6(a). Having taken into account the definition of 'organic solvent' in the SoP 100 of 2011, Mr Astle submitted that on analysis, kerosene's *"chemical make-up is such that it meets the definition of an aromatic hydrocarbon organic solvent and therefore qualifies as a substance of exposure as outlined in SoP 100 of 2011."* He further submitted that *"the most common forms [of jet fuel] that [the Appellant] would have come into contact with are JP5 and JP8, both of which are kerosene based but contain fuel oil derivatives such as benzene and toluene in various chemical structures. These components are also substances that would meet the definition of organic solvent as per factor 6(a).* Mr Astle went on to explain that *"in order to minimise the number of variables and allow for more generalised exposure to the type of substance as a whole, Kerosene was highlighted as the specific substance to consider, being factor 6(a) of the SoP – organic solvent",* further noting that the Appellant had *"raised the hypothesis that whilst the original review declined his claim on the basis that DDT not meeting the definition of factor 6(a), what he was actually exposed to was the factor 6(a) solvent used as a delivery agent for DDT".* Mr Astle observed that "…*in order for DDT to be applied as a vector control measure it must be dissolved in an organic solvent",* noting that *"factor 6(a) solvents are commonly used for this purpose.*" He observed that during his time in the RNZAF, the Appellant

"deployed to South East Asia on five (5) occasions during which he would have likely been exposed on a daily basis, to fogging, and the resultant cutaneous or inhaled exposure of a factor 6(a) solvent as a delivery agent." Mr Astle observed that *"based on the currently available information the maximum amount of time that [the Appellant] was likely to have been present in a fogged environment is 85 days or 23.2877% during a continuous 12-month period",* and submitted: *"this amount of exposure falls short of meeting the time requirement as outlined in SoP 100 of 2011."* Mr Astle further submitted however that, in coming to this view, VANZ had been "*unable to take into account the exposure to a factor 6(a) solvent as a result of a fogging programme with the potential of a cumulative cutaneous exposure as a result of contaminated clothing"* observing that in order for any "*potential ongoing cutaneous exposure following removal from a fogged area"* to be quantified, VANZ would need *"additional information in relation to the amount of factor 6(a) solvent used and the overall dilution rate."*

17. Mr Astle noted that in his appeal application, the Appellant had referred to the time that he had spent in and around aircraft - that *"after qualifying as aircrew [the Appellant] spent time serving on board English Electric Canberra and Lockheed C-130 aircraft".* Mr Astle further noted advice from the Chief Medical Advisor regarding air contamination in aircraft, along with a review of current literature on the subject by the Expert Panel on Aircraft Air Quality established by the Australian Civil Aviation Safety Authority, which had concluded that *"based on an analysis of the available literature that due to the practice of ventilating the cabin space on aircraft with 'bleed' air from engines, there is a potential for contaminants from the fuel in the engines to be drawn into the cabin space and that some of these contaminants could be factor 6(a) organic solvents."* Mr Astle also observed that the Appellant's "*flight log data is incomplete – based on the log book data currently available the maximum amount of days' exposure was 21 days or 5.7534% of the days in a continuous 12-month period",* noting that *"the number of days of exposure to meet the factor in the SoP is more days than not in a continuous 365 – day period."* Mr Astle submitted that *"…at this stage [the Appellant] also falls short of the time bound exposure criteria as outlined in SoP 100 of 2011 in regard to his time in and around aircraft."* Mr Astle concluded his submission by stating that *"…this conclusion was reached by examining the totality of his Qualifying Service notwithstanding current operational policy regarding SoP factors that are only indicated for Qualifying Operational Service."*

18. On 16 October 2017, Mr Terrill made a further written submission, in which he challenged Mr Astle's submission of 20 September 2017 as being *"flawed in a number of areas".* Mr Terrill submitted that: *"…the Airforce and the Navy, when Flying or afloat are at all times operational regardless of the operation being warlike or not. It is an anomaly of the SoP system used in New Zealand that two SoPs can be used to make a determination. This procedure is contrary to the guide used by the RMA";* that *"the statement around benevolence is incorrect. It is not the intention that clauses 14 or 15 be brought into any equation relating to benevolence. Clause 10 is clear that Veterans' Affairs take a benevolent approach at all time to all claims. See the High court Decision of Whata J NZHC 1305 enclosed. Paras 113 – 115…";* that the Australian Repatriation Commission Guidelines CM 5017 *"are clear as to how a claim should be determined. You will note that they use the term Hazardous service. We believe that flying is categorised as hazardous service and therefore only SoP 100 of 2011 should apply in this case",* and that VANZ *"on this occasion have not proved*

beyond reasonable doubt that [the Appellant's] condition was not caused by his service in the RNZAF." Noting the statement in Mr Astle's submission advising to the effect that until such time as VANZ is able to analyse additional data from a full version of the Appellant's logbook, Mr Terrill commented that the Appellant's logbook *"has always been available to Veterans Affairs who, have consistently failed to ask [the Appellant] for it",* advising that *"[the Appellant's] Logbook will be available from the writer from 19 October. Should they wish to 'Analyse' it."* Noting the inclusion of some information about another serviceman in the Appellant's logbook, Mr Terrill opined *"Another example of the inadequacies of the system being used by Veterans Affairs decision makers."* Mr Terrill concluded his submission noting that *"…a thorough examination of A2 would have shown not 1 flight to the Vietnam War Theatre as stated by Veterans Affairs, but 5",* and advising of his intention *"to produce further photographs and legal evidence at the Appeal hearing."*

The appeal hearing

19. At the hearing of the appeal on 22 November 2017, and having been invited by the Veterans' Entitlements Appeal Board (the **Board**) to make submissions, Mr Terrill referred the Board to his previous written submissions and submitted orally that: there was no doubt that the Appellant had MS; that the Appellant has both qualifying routine service and qualifying operational service, but that the VANZ submission was "*flawed"* as *"service should be regarded as operational if you go to sea or in the air"* and, referring to the Repatriation Commission Guidelines (a copy of which he provided to the Board) that flying was a *"hazardous service".* Mr Terrill further submitted that the provisions of section 10 of the VSA had not been applied, noting that in the Appellant's file *"there were 5 references to operational service in theatre which qualify for the periods relevant"*, and that VANZ had not proved beyond reasonable doubt that his service had not caused his condition of MS. Mr Terrill also noted (and provided copies of) the instrument entitled *"Veterans' Entitlements (Statements of Principles – Cumulative Equivalent Dose) Amendment Determination 2017 (No. 58 of 2017)* which commenced in Australia on 18 September 2017, and its associated guidelines entitled *"Guide to calculation of 'cumulative equivalent dose' for the purpose of applying ionising radiation factors contained in Statements of Principles determined under Part XIA of the Veterans' Entitlements Act 1986 (Cth)* – which amended the definition of *'cumulative equivalent dose'* in the specified SoPs - and invited the Board to consider this documentation in the context of an applicable factor in SoP 100 of 2011.

20. Mr Astle began his oral submission by drawing the attention of the Board to the evidence on which the Appellant was relying for each of the key points. He referred to the letter of Dr Hornabrook to Dr Robin Griffiths dated 28 April 1986, in which Dr Hornabrook indicated that some symptoms had occurred in 1976; that the Appellant had been admitted to hospital in 1982 with blurring of vision in his left eye; that he also developed blurring of vision in his right eye in February 1986 and that the Appellant's condition was diagnosed by Dr Hornabrook in April 1986. He noted that to apply, factor 6(a) required evidence of inhalation of or cutaneous contact with an organic solvent (noting kerosene, being an aromatic hydrocarbon solvent, is an organic solvent for the purpose of factor 6(a)) and that there was a requirement for such inhalation or contact to have occurred on more days than not for a continuous period before the clinical onset of MS. Mr Astle further submitted that such exposure to the organic solvent could include flying time and also exposure on the flight

line. With regard to the relevance of factor 6(k) of the SoP, Mr Astle noted that paragraph 7 of the SoP made it clear that this factor relates to the clinical worsening of MS, and factor 6(k) required that the experience of a category 1A stressor, as defined in paragraph 9 of the SoP, to have occurred within 6 months before the clinical worsening of the condition. He further noted in passing that Mr Wallis' letter dated 20 May 2015 did not address clinical worsening of the Appellant's condition.

21. With regard to Mr Terrill's reference in his oral submission to the Veterans' Entitlements (Statements of Principles – Cumulative Equivalent Dose) Amendment Determination 2017 (No. 58 of 2017) and the associated guide, Mr Astle noted that while the SoP was due to be approved for application under the VSA, it was currently not in force and therefore not applicable in the Appellant's case. He accordingly advised that his submissions would not address this SoP.

22. Mr Astle advised the Board that VANZ had *"picked up the points being made after the RO's decision",* but that "*after reconsideration and taking a very liberal approach",* VANZ was of the view that no factor had been met. He noted Mr Terrill's reference to the decision of Mr Justice Whata in the *Te Ua* case, but submitted, that as this decision involved a claim under the War Pensions Act 1954, it was relevant only to a claim made under that Act, and not one made under the VSA. Mr Astle observed, in effect, however, that the factors stipulated in SoPs, as well as the requirement that only one factor needed to be satisfied, were very benevolent. Mr Astle also noted Mr Terrill's reference to 'hazardous service' in use in Australia, but submitted that this term, as defined in the Australian legislation, was not relevant to the VSA.

23. Mr Astle explained that VANZ had carried out a further, in depth analysis of the Appellant's *"exposure to an organic solvent"* based on the information in the Appellant's logbook with a view to *"getting the Appellant over the line"*, and produced a document identifying the parameters used in assessing the data in the Appellant's logbook to determine his potential exposure to organic solvents during his service in the RNZAF. Mr Astle explained to the Board that based on the most benevolent of assumptions and parametres (including those articulated in the notes to the document presented), the "*maximum exposure inflight"* (between the dates 1 December 1967 to 30 November 1968) was 147 days (i.e. 40.27%) and the "*maximum exposure flight & ground"* (between dates 1 March 1968 to 28 February 1969) was 179 days (i.e. 48.9071%*,* which he submitted did not meet the requirement in factor 6(a) of exposure *"on more days than not for a continuous 12 month period…"*

24. With regard to Mr Terrills' submissions concerning the application of factor 6(k), Mr Astle submitted that it was clear from paragraph 7 that that factor applied *"only to material contribution to, or aggravation of, multiple sclerosis where the person's multiple sclerosis was suffered or contracted before or during (but not arising out of) the person's relevant service"*, and that this was not relevant to the Appellant's case which concerned the clinical onset of the condition. He concluded his address to the Board by inviting the Board to take into account all the information provided and to make a finding accordingly.

Appeals under the Veterans' Support Act (VSA)

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

The review decision

26. The Board noted that the RO had implicitly accepted the DO's recognition of the Appellant's service – that the Appellant had both qualifying routine service and qualifying operational service for the purposes of the VSA, the latter qualifying service arising from his service in Vietnam. The Board also noted that the RO (correctly in its view) had identified that SoPs applicable to the condition of MS existed (the Board noted that SoPs listed in Schedule 1 of the Veterans' Support Regulations 2014 apply for the purposes of the VSA), and that the relevant SoPs for the condition of MS were No 100 of 2011 concerning Multiple Sclerosis (Reasonable Hypothesis) and No 101 of 2011 concerning Multiple Sclerosis (Balance of Probabilities). The Board further noted that the RO (again correctly in its view) had observed that "*SoPs provide definitions of the disease or injury and specify what factors must exist for the condition to be causally connected to the veterans qualifying service"* and that *"provided the material available is consistent with a hypothesis that the injury, illness or death was service related, only one factor need be met for the claim to be successful."*

27. The Board also noted that the RO, having referred to *"the relevant SoPs for Multiple Sclerosis…No's: 100 of 2011 Reasonable Hypothesis and 101 of 2011 Balance of Probabilities"* and the *"three factors which [the Appellant] believes as being responsible for his MS onset"*, had concluded that factor 6(a) of SoP No 100 of 2011 *"is not met as DDT is not an organic solvent";* that factor 6(k) *"which states experiencing a category 1A stressor within the six months before clinical worsening of multiple sclerosis…is not met as clinical worsening applies to a condition that was contracted before, or during (but not arising out of) the persons relevant service…[the Appellant's] condition was first diagnosed in 1986 and is therefore after his qualifying service under the Veterans' Support Act 2014",* and that *"in referring to the relevant SoP Agent Orange is not documented as a causal factor for Multiple Sclerosis and is not a conclusively presumed injury,*

illness or condition for Viet Nam veterans under the Veterans' Support Act 2014." The Board further noted that the RO, on the basis of such conclusions, had determined *"to uphold the decision of 29 June 2015 and decline to accept Multiple Sclerosis as being service-related under the Veterans' Support Act 2014."*

Preliminary matters

28. Mr Astle advised the Board that VANZ had considered new material provided by the Appellant. The Board noted that VANZ did not issue any new decision under s 205 of the VSA.

29. In his written submission dated 22 September 2017, after noting that there was no factor in SoP 101 of 2011 (Balance of Probabilities) that corresponded with factor 6(a) in SoP 100 of 2011 (reasonable Hypothesis), Mr Astle advised that *"Veterans' Affairs current operational policy is that where factor 6(a) is only cited in the Reasonable Hypothesis SoP, then only Qualifying Operational Service can be taken into account when determining whether or not this factor is met."* Mr Astle went on to state that "*Based on this approach, Veterans' Affairs respectfully submits that it would decline to accept Multiple Sclerosis as being a service related condition as the available evidence indicates that [the Appellant's] Qualifying Operational Service solely consisted of one (1) flight into South Viet Nam, hence he would not meet the time factor outlined in 6(a)."* Mr Astle further advised however that the Appellant's claim had been reconsidered *"despite this limitation".* Mr Astle did not present any written documentation relating to this particular policy. Nor did he elaborate on the basis or rationale for this policy.

30. Noting that the term "***service-related,*** *in relation to an injury, an illness, a condition, or a whole-person impairment, means an injury, an illness, or a whole person impairment caused by, contributed to by, or aggravated by qualifying service"* (s7 of the VSA), and that s8(1) of the VSA provided that: *"In this Act, unless the context otherwise requires,* ***qualifying service*** *means – (a) qualifying operational service; and* [emphasis added] *(b) qualifying routine service",* the validity of the proposition being put forward by Mr Astle on behalf of the Respondent was not immediately apparent to the Board. Further, observing that the proposition involved considerable legal complexity, and that a decision on the point could have significant consequences in relation to VANZ's application of SoPs in the future, the Board considered it inappropriate to decide the matter in the absence of legal argument on the point. With this in mind, and noting that a decision on this point would not affect the outcome of the appeal before it, the Board determined to consider and decide the appeal on the submissions as presented to it by both parties.

Consideration

31. The Board noted that in paragraph 4 of the SoP, the Repatriation Medical Authority (**RMA**) states that it has formed the view that there is sound medical-scientific evidence that indicates that MS can be related to service. Paragraph 5 of the SoP provides in effect that at least one of the factors in paragraph 6 must be related to the person's service. Paragraph 6 of the SoP sets out the factors that must exist in a particular case for a claim to succeed.

32. The Board agreed with the RO's decision that MS was not a conclusively presumed condition for Viet Nam veteran's under the VSA, and that exposure to Agent Orange was not included as a factor

in either SoP concerning MS. This being so, the Board determined that such exposure could not be said to raise a reasonable hypothesis connecting MS with the circumstances of the Appellant's service.

33. The Board also agreed with the RO's decision with regard to factor 6(k) which states: *"experiencing a category 1A stressor within the six months before the clinical worsening of multiple sclerosis."* The Board noted that paragraph 7 of the SoP made it clear that factor 6(k) applied only to material contribution to, or aggravation of, MS where the person's MS was suffered or contracted before or during (but not arising out of) the person's relevant service. Noting that the Appellant's condition of MS had been diagnosed in April 1986 by Dr Hornabrook, it was evident on the facts of the case that this factor did not apply to the Appellant's situation.

34. While the Board agreed with the RO's decision that "*DDT is not an organic solvent"*, it was noted that it had subsequently been accepted by VANZ that kerosene, to which the Appellant had been exposed during his service, was an organic solvent for the purposes of factor 6(a). The Board noted that "*before it can be said that a reasonable hypothesis has been raised connecting multiple sclerosis…with the circumstances of a person's relevant service:*

    (a) Inhaling an organic solvent or having cutaneous contact with an organic solvent on more days than not for a continuous 12 month period before the clinical onset of multiple sclerosis…"

    The issue to be determined therefore was whether the Appellant had inhaled or had cutaneous contact with this solvent on more days then not for a continuous 12 month period before the clinical onset of multiple sclerosis i.e. in April 1986 when he was diagnosed as having the condition.

35. The Board considered carefully the in depth analysis carried out by VANZ to quantify the Appellant's exposure to an organic substance during his service in the RNZAF. Having had regard to that analysis, and in particular noting the benevolence of the assumptions and parametres used with the express intent of trying *'to get the Appellant over the line',* that Board agreed that on the evidence before it factor 6(a) of SoP 100 of 2011 had not been met.

36. With regard to other matters raised by way of submission during the course of the appeal: the Board agreed with the Respondent's view that as the *"Veterans' Entitlements (Statements of Principles – Cumulative Equivalent Dose) Amendment Determination 2017 (No 58 of 2017)* was not in force in New Zealand, it could not be relied on by Mr Terrill in support of the Appellant's case. Further, the Board noted that as no review decision relating to this legislative instrument had been made, there was no decision to appeal under s228 (1) of the VSA, and that accordingly the Board had no jurisdiction to deal with the matter. The Board also was of the view that the decision in the *Te Ua* case concerned the application of provisions of the War Pensions Act 1954 and that Mr Justice Whata's comments were therefore applicable to cases decided under that legislation, not those decided under the VSA. The Board also agreed that the term *'hazardous service',* used in the applicable legislation in Australia, did not apply to the VSA.

Appeal Board Decision

37. Having had regard to all relevant available material, the Board agreed with the RO's decision to decline to accept the Appellant's condition of MS as being service-related under the VSA.

38. In coming to its decision, the Board had specific regard to all the principles specified in section 10(b) of the VSA, and the overarching benevolent intent of the VSA. After having carefully considered all the material before it, the Board determined to **confirm** the decision of the RO dated 18 March 2016 "*to uphold the Decision Officer's decision of 29 June 2015 and decline to accept Multiple Sclerosis as service-related under the Veterans' Support Act 2014."*

Order relating to the publication of decision

39. Pursuant to the powers vested in it by section 138 of the VSA, the Board, on its own initiative and after consultation with the Appellant's representative, Mr Terrill, makes an order prohibiting the publication of the name, service number, rank, address and War Pension Number of the Appellant.

The appeal is dismissed.

Ms Rebecca Ewert, Chairperson

Dr Chris Holdaway, Member

Ms Raewyn Anderson, Member

14 February 2018