[redacted]
War Pensions Number

VETERANS' ENTITLEMENTS APPEAL BOARD

Name: Anthony Edward WADE Reference number: 2015/2

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 1 December 2016

DECISION

1. This is an appeal by Anthony Edward Wade (the **Appellant**) against the decision of the Review Officer (**RO**) dated 15 October 2015 to uphold the Decision Officer's decision of 4 June 2015 to decline to accept his condition of **Chronic Obstructive Pulmonary Disease** ***"****as service-related under the VSA 2014".*

2. The Appellant appeared in person at the appeal hearing with his representative Mr Richard Terrill. Veterans' Affairs New Zealand (the **Respondent**) was represented by Mr Graeme Astle who appeared in person. Rear Admiral Jack Steer, Chief Executive of the Royal New Zealand Returned Services Association, was in attendance.

Background to the appeal

3. On 4 June 2015 the Decision Officer declined to accept the Appellant's claimed condition of Chronic Obstructive Pulmonary Disease as being service-related, stating *"the relevant Statement of Principle of Chronic Obstructive Pulmonary Disease No 37 of 2014 Reasonable Hypothesis has been applied in considering this application."* In giving the reason for her decision, the Decision Officer stated: *"This SoP sets out the factors known to contribute to This [sic] condition. Wilst [sic] smoking is a causal factor for this condition your smoking habit is not considered attributable to your military service. No other Statement of principle factors were identified to relate this condition to service."*

4. On 29 October 2015 the RO upheld the Decision Officer's decision of 4 June 2015 and declined to accept the Appellant's condition of Chronic Obstructive Pulmonary Disease as being service-related. In coming to her decision, the RO had regard to the information provided in and with the Appellant's Review of Decision Application dated 12 August 2015, received by Veterans' Affairs on 14 August 2015, in which he wrote: *"see Note 1 attached. Dr Karalus and Dr Naidoo have both submitted*

evidence to support my original application." The RO noted that in the attached note to which he had referred, the Appellant had written: *"My request for a review of the Panel decision to decline my claim for a disablement Pension for COPD seems odd to me based on the following. You have chosen to ignore the report from Dr Karalus when his professional opinion stated that he felt that the claim was valid. This is your choice of specialist, paid for by VANZ, so it seemed to be a waste of his time to make out the report. You have declined the case for COPD based on something called the statement of Principles, which is an Australian standard. I have no idea what this is and your letter did not explain either. Is the Australian standard compatible with the agreements made in the Memorandum of Understanding and in particular clause 7 which refers to the 'reverse onus of proof'. This clause states that a condition or illness suffered by a Veteran is to be considered to relate to the Veteran's Service unless there is proof to the contrary. I believe that you have not shown any other cause for my contracting COPD. Was there any consideration given to the chemical smoke I was exposed to during the period of gas mask testing. I also get the impression that I am being penalised because my claim is being made so many years after my service. The main reason for this is that I was unaware of the Pension service until just recently."*

5. Having noted that the Appellant *"has qualifying service under the Veterans' Support Act 2014 in respect of: Qualifying routine (non war or emergency) service prior to 1 April 1974, and qualifying operational service in respect of the Indonesian Confrontation while serving on HMNZS Royalist (qualifying period 20 May 1965 to 29 October 1965)"* and that the Appellant had served in the Weapon Electrical Branch in various ranks, the RO had regard to the *"information provided in the Disablement Pension application received 20 February 2015 for the condition of Chronic Obstructive Pulmonary Disease."* She observed that the Appellant had written how he believed his service had caused contributed to or aggravated this condition: *"(1) endless supply of cheap duty free cigarettes. (2) In Hong Kong on Royalist in 1965 while testing gas masks was exposed to C.S gas (chemical smoke)."* She further observed that GP Dr Priyendran Naidoo had noted "*the medical diagnosis of Chronic Obstructive Pulmonary Disease had been confirmed on spirometry"* along with *"the spirometry test findings and current treatment"*, and that "*medical documentation accompanying the claim application also noted the diagnosis of chronic obstructive pulmonary disease based on spirometry findings… dated 15 November 2011",* and noted the *"subsequent letters dated 14 February 2012; 14 August 2012 from Respiratory & Sleep Physician Dr Leong Leow."* The RO also observed that Dr Leow had *"noted in the letter dated 15 November 2011: '… [The Appellant] is a 64 year old man who has been referred due to an abnormal chest x-ray. He tells me that he has had trouble with recurrent chest infections for several years. He seemed to be getting a chest infection once every few months, and most of the time he is coughing up several tablespoons of yellowish green phlegm every morning. About two months ago he had a pneumatic illness associated with worsening cough, fevers, rigors, night sweats and minor haemoptysis where he was coughing up specks of blood. This persisted for a few days but once he had had a course of antibiotics for about a week, the haemoptysis resolved. However, once the antibiotics were stopped his cough seems to have recurred again and he is now back to his usual baseline of chronic obstructive cough…"* The RO observed that Dr Leow had noted: *"Lung function test findings that evidenced chronic obstructive pulmonary disease"* and also "*other test findings (chest x-ray and testing for TB)";* that *"a*

CT scan of the chest was to be obtained", and that *"[the Appellant] had a 40 pack year history – stopped in 1995."*

6. Having had regard to "*a copy of the CT scan report dated 21 November 2011",* the RO noted that *"the CT scan was reported as showing some evidence of infection but no evidence of bronchiectasis or malignancy, and raised the possibility that [the Appellant's] chronic cough was contributed to by gastro-oesophageal reflux (confirmed in Dr Leow's letter dated 14 August 2012)."* The RO noted that *"an up to date medical assessment was requested from General and Respiratory Physician Dr Noel Karalus…"* and that the Appellant had been asked to complete a Veterans' Affairs Smoking Questionnaire. She observed that Dr Karalus had noted in his report dated 2 April 2015 that the Appellant had joined the New Zealand Navy at the age of 16 years and served until he was 30 years of age, and that: *"[the Appellant] started smoking cigarettes in the Navy. He smoked 20 cigarettes/day stopping at the age of 40, about 25 years ago. This equates to about 25 pack years. He said he stopped because he developed a cough and sputum. He did not have asthma as a child but was admitted to Waikato Hospital with asthma about 15 years ago. He was also seen by the respiratory physician, Dr Leong Leow, in recent years and had a CT scan of the chest, and was diagnosed with COPD then. He has been getting winter bronchitis for about ten years, and in fact saw his doctor ten days ago and is currently on Amoxycillin 500mg t.d.s. for a chest infection. When he gets a cold, he gets a blocked nose for which he uses Butacort. His usual treatment for his COPD is Symbicort 200/6. Two doses twice daily regularly, plus Duolin PRN which he mostly needs two or three times a day…while in the Navy, he was on a cruiser living in hammocks, and then he was in three different frigates. The holds were lagged with asbestos lagging, and they were dusty, especially when there were exercises with guns firing. He was not directly involved in applying or removing lagging, and he wasn't directly involved in maintenance of the frigates because he was in the radar section. He was not exposed to ionising radiation either. However, he said on one occasion when they were in dock in Hong Kong, they were exposed to some chemical smoke to test gas masks…"* The RO observed that Dr Karalus had *"included spirometry test findings in his report, and also advised of the percentage of whole person impairment under the AMA Guides (that are based on spirometry findings) as had been requested."*

7. The RO observed that the Appellant had noted in his Veterans' Affairs Smoking Questionnaire (received on 21 May 2015) that *"he started smoking in 1964; started smoking on a regular basis at age 17"* and that he had written *"of the reasons he had started smoking / commenced on a regular basis: '(1) everybody else smoked (2) the low cost of cigarettes (duty free)."* She further noted that the Appellant had "*smoked one packet of 20 cigarettes per day; his smoking habit did not change during service"* – that his *"smoking habit changed after service when he stopped smoking in the 1990's due to illness",* observing that Dr Naidoo had *"noted on a Witness Smoking Questionnaire that [the Appellant] ceased his smoking habit when in hospital with asthma in 1994."* Having noted (among other things) that the Appellant's Service medical documentation *"shows [the Appellant] was treated for a dry cough chest congestion in May 1968 (expectorant, aspirin and inhalations); and notes (19 June 1969) [the Appellant] was treated for pneumonia as a child and that there was no history of asthma., Chest x-rays reports do not indicate an abnormality",* the RO concluded that

“Chronic obstructive pulmonary disease was not evident during [the Appellant’s] qualifying operational service during the Indonesian Confrontation, therefore it cannot be presumed to have been as a result of performing qualifying operational service under section 19 of the Veterans’ Support Act 2014; nor does the Indonesian Confrontation or the condition of Chronic Obstructive Pulmonary Disease qualify for consideration under section 21 of the ‘Conclusively presumed condition’ (previously known as Presumptive List conditions). The disability of Chronic Obstructive Pulmonary Disease qualifies instead for determination under section 14 of the Veterans’ Support Act 2014, which applies the Statements of Principles.”

8. The RO then proceeded to note that *"The Veterans' Support Act 2014 introduced the Statements of Principles (SoPs) as the principle decision making instruments for determining conditions claimed for Disablement Pension",* observing that *"the adoption of SoPs reduces the amount of discretion used by decision makers and ensures greater transparency and consistency in decision making. SoPs were developed in Australia by an independent statutory authority, the Repatriation Medical Authority. The SoPs are based on extensive, world-wide medical-scientific evidence and are legal instruments."* She went on to state: *"SoPs provide definitions of the disease or injury and specify what factors must exist for the condition to be causally connected to the veteran's 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."* The RO noted that *"the Statements of Principles No 37 of 2014 (Reasonable Hypothesis) and No 38 of 2014 (Balance of Probabilities) currently apply under the Veterans' Support Act 2014 in respect of the diagnosis of Chronic Obstructive Pulmonary Disease"* and that *"while the factors listed include smoking (factor 6a) as a factor for chronic obstructive pulmonary disease, it is necessary to show a causal relationship between the smoking habit and the veteran's qualifying service, in order for the factor in respect of smoking to succeed."* She further stated: *"the information available needs to show the veteran's smoking habit resulted from or was materially contributed to by the veterans' qualifying service, for example a smoking habit that became established as a result of the stress of war in conjunction with the encouragement to smoke through the free provision of cigarettes in rations packs."* The RO found that *"the information available shows [the Appellant's] smoking habit became established because everybody else smoked and the low cost of cigarettes (duty-free as a result of tax and excise laws). The information provided by [the Appellant] does not suggest a smoking habit that resulted from or was contributed to by the performance / stressors of military duty / activity ([the Appellant] noted there was no change to his smoking habit during service.)"* The RO concluded that *"the information is therefore not sufficient to determine [the Appellant's] smoking habit resulted from or was materially contributed to by qualifying military service, which means the chronic obstructive pulmonary disease cannot be connected with the circumstances of [the Appellant's] qualifying service."* Having considered the material/information available *"in relation to all the other factors provided",* the RO determined that *"regrettably I am unable to establish a factor that would relate the chronic obstructive pulmonary disease to the circumstances of [the Appellant's] qualifying service"* and accordingly upheld "*the decision of 4 June 2015"* and declined *"to accept Chronic Obstructive Pulmonary Disease as being service-related under the Veterans' Support Act 2014."*

Written submissions

9. By way of notice of appeal received by Veterans' Affairs New Zealand on 18 December 2015, the Appellant contended that *"Not all service factors have been taken into consideration by the NRO [sic]. Much emphasis was placed on smoking but other factors of ship board environments were not considered. See attached letter."* The Appellant enclosed with his notice of appeal a submission written by his advocate Mr Terrill, a copy of *"SoP 37/2014 RMA"* and a document from the Ministry of Defence entitled *"Synopsis of Causation Chronic Obstructive Pulmonary Disease"* dated September 2008. In his written submission, Mr Terrill wrote: *"[The appellant] served aboard HMNZS Royalist. A rather ancient ship at that time. Indeed it was in such disrepair that it broke down out of Singapore and had to be towed home. Our case is based around the fact that conditions aboard this ship were at best substandard. When considering the review of decision the NRO seemed to emphasise the fact that [the Appellant] did smoke as his choice. This is so but [the Appellant] has an addictive personality as proven by his addiction to alcohol."* Mr Terrill went on to *"look at the relevant SoP factors": 1. Smoking we know [the Appellant] smoked as did 90% of his ship mates. 2. 6(d) mentions an atmosphere with visible tobacco haze. There would be in enclosed mess decks on this ship up to 60 people smoking and that enclosed area had a constant tobacco haze as a norm. 3. 6(f) (g) (ga) mentions environmental dusts and other pollutants. The sleeping quarters on this ship had lagged pipes running through them. All sailor [sic slept, dressed and generally lived in this environment. Each time a gun fired or the ship lurched dust and other debris would fall down upon and be inhaled by those living there. 4. 6(j) once again mentions the smoking factor. 5. 6(m) mentions the tobacco smoke haze. 6. 6(pa) mentions the dust which would have been inhaled constantly whilst living and sleeping. Some of this dust contained toxins such as asbestos. 7. 6(ra) mentions viral infections. The medical evidence proves [the Appellant] did indeed suffer from these infections. Apart from smoking none of the above were taken into consideration it would appear. It is our contention that all these aforementioned factors contributed to [the Appellant] having COPD. We say that all of them had a cumulative effect on [the Appellant]."* Mr Terrill enclosed with his submission *"a copy of the British MOD Synopsis of Causation"* and advised that he had *"highlighted the relevant sections. These include respiratory infections, smoking, passive smoking and inhaling dust."* He also enclosed a copy of SOP 37/2014 *" and highlighted areas of our concern."*

10. In its response to the Appellant's submissions, the Respondent, in its written submission dated 13 July 2016, invited the Veterans' Entitlements Appeal Board (**the Board)** to have regard to the highlighted points. Having noted the Appellant's qualifying service and his coverage under the Veterans' Support Act and the information in the Appellant's Veterans' Affairs Smoking Questionnaire *"received on 21 May 2015",* Mr Astle wrote: *"Service medical documentation noted that [the Appellant] had been treated for a dry cough and chest congestion in May 1968. It also noted that in June 1969 he had been treated for pneumonia as a child and that there was no history of asthma. Chest x-ray reports did not indicate any abnormality. [The Appellant] was seen by Dr Noel Karalus, a General and Respiratory Physician in 2015. In his report dated 21 April 2015 he provided some information covering [the Appellant's time serving in the Navy. He noted that [the Appellant] was not directly involved in applying or removing asbestos lagging and that he was not directly involved in the maintenance of the frigates. In addition he was not exposed to ionising and*

that on one occasion he was exposed to some chemical smoke to test gas masks. Dr Karalus found that [the Appellant's] spirometry and history placed him in class 3 of respiratory impairment and that judging by his spirometry he would be on the more severe end." Mr Astle wrote: *"The Review Officer noted that chronic obstructive pulmonary disease was not evident during [the Appellant's] qualifying operational service during the Indonesian Confrontation, therefore it could not be presumed to have been evident as a result of performing qualifying...operational service under section 19 of the Veterans' Support Act 2014. The Review Officer applied the Statement of Principle (SoP) No 37 (Reasonable Hypothesis) and No 38 of 2014 (Balance of Probabilities) in accordance with the Veterans' Support Act 2014. In doing so the Review noted that although factors listed in the SoPs include smoking, factor 6(a) as a factor for chronic obstructive pulmonary disease requires a causal relationship to be shown between the smoking habit and the veteran's qualifying service in order for the factor in respect of smoking to succeed. The information available needed to show that the veteran's smoking habit had resulted from or was materially contributed to by the veteran's qualifying service. The example noted was that the smoking habit that became established would need to be as a result of the stress of war service in conjunction with the encouragement to smoke through the free provision of cigarettes in ration packs. The Review Officer also noted that the information provided by [the Appellant] did not suggest a smoking habit resulting from or materially contributed to by the performance / stressor of military duty / activity. [The Appellant] advised that there was no change to his smoking habit during service."* Mr Astle submitted that *"the Review Officer gave careful consideration to [the Appellant's] previous smoking habit and the material provided along with information from his Service Medical files and noted that: the information available was not sufficient to determine that [the Appellant's] smoking habit resulted from or was materially contributed to by his qualifying military service. No causal connection existed between the chronic obstructive pulmonary disease and the circumstances of [the Appellant's] qualifying service. In upholding the decision to decline the claim for chronic obstructive pulmonary disease the Review Officer found that from all the material and information available in relation to all the factors provided, a factor could not be established that would relate chronic obstructive pulmonary disease to the circumstances of [the Appellant's] qualifying service. Veterans' Affairs respectfully submits that the National Review Officer [sic] in reaching the determination to uphold the Decision Officer's decision to decline the claim has correctly interpreted the requirements of the SoPs covering Chronic Obstructive Pulmonary Disease."*

The appeal hearing

11. At the hearing of the appeal on 1 December 2016, Mr Astle to speak first. As neither the Appellant nor Mr Terrill had any objections, the Board agreed that Mr Astle should be permitted to speak to his submission. Mr Astle noted that the *"submission document filed by Veterans' Affairs on 13 July 2016 sets out Veterans' Affairs position in relation to the process surrounding the findings of the Review Officer and the reasons for the decision reached on 29 October 2015 in declining [the Appellant's] claim for Chronic Obstructive Pulmonary Disease",* and that included in that document was *"an acknowledgement of [the Appellant's] service and his qualifying service."* He further noted that that document also *"details [the Appellant's] smoking habit and history of smoking",* that "*it acknowledges and refers to the medical information provided",* as well as *"the Statement of*

Principles referred to as part of the decision process", and that there had been a finding that *"from all the material and information available in relation to all the factors provided, a factor could not be established that would relate chronic obstructive pulmonary disease to the circumstances of [the Appellant's] qualifying service."* Observing that *'the hearing of appeals under the Veterans' Support Act 2014 is quite new with the first appeals being heard on 24 August 2016",* Mr Astle noted that *"this had presented a learning experience for Veterans' Affairs."* He advised that since completing the submission on this appeal he was *"mindful that on a previous appeal (Ashley John Sturrock and Veterans' Affairs – 15 September 2016) the Appeal Board commented on the Review Officer's decision on a claim that is similar to [the Appellant's] claim."* He noted that in that case, the Board had *"disagreed with the Review Officer's application of the Factor 6(a) of the Statement of Principles concerning the condition applied for (Reasonable Hypothesis)."* Mr Astle observed that the Board had noted that *"there was sound medical evidence in relation to the condition applied for that could be related to service";* that *"Clause 5 of the SoP provided that at least one of the factors in clause 6 must be related to the person's service";* that *"clause 6 sets out the factors that must exist in a particular case for a claim to succeed";* that *"the SoP contained factors relating both to the clinical onset and the clinical worsening of the condition",* and that the Board had found in that claim that *"both limbs of Factor 6 a) and 6 (j) of the SoP were amply satisfied in the* ***Sturrock*** *appeal";* that *"the Appellant had smoked at least 5 pack years, or the equivalent in other tobacco products before the clinical onset of the condition",* and that *"it was apparent that the clinical onset of the condition occurred with[in] 20 years of his ceasing smoking in 2012."* Mr Astle proceeded to submit that *"when applying these principles to [the Appellant's] claim, the relevant SoP is Chronic Obstructive Pulmonary Disease – No. 38 of 2014";* that *"clause 5 sets out the same requirements and notes that at least one of the factors set out in clause 6 must be related to the person's service",* and that *"as in the* ***Sturrock*** *appeal, Factor 6 (a) applies in [the Appellant's] claim",* noting that *"he smoked at least 5 pack-year cigarettes, or the equivalent thereof in other tobacco products, before the clinical onset of Chronic Obstructive Pulmonary Disease"* and that *"medical information available [in] a report dated 15 November 2011 indicated that [the Appellant] had COPD which is within 20 years of his ceasing smoking (1994) – material contribution or aggravation – Factor 6 (j)."* Acknowledging that *"similarity of the circumstances of [the Appellant's] service and Mr Sturrock's service",* Mr Astle concluded his submission by advising the Board that *"Based on these circumstances and [the] Board's previous interpretations and findings in* ***Sturrock****, if the Board agrees and subject to any further information the Board requires, then Veterans' Affairs conceded that this claim should be accepted."*

12. In response Mr Terrill both acknowledged and thanked Mr Astle for his concession, and agreed with his analysis of the similarities between the Mr Sturrock's and the Appellant's situation, which he agreed justified the Board in allowing the appeal. He accordingly exhorted the Board to do so.

Appeals under the Veterans' Support Act 2014 (VSA)

13. 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 Veterans' Affairs to make the decision again in accordance with directions it gives to Veterans' Affairs.

The review decision

14. The Board noted that the RO (correctly in its view) had identified that the Appellant had qualifying service for the purposes of the VSA i.e. qualifying operational service (with regard to his service in the Royal New Zealand Navy on HMNZS Royalist during the Indonesian Confrontation during the period 20 May 1965 until 29 October 1965) and qualifying routine service (with regard to his service in the Royal New Zealand Navy prior to 1 April 1974 that was not qualifying operational service.) The Board also noted that the RO (again, correctly in its view) had decided that the presumptions provided in sections 19 and 21 of the VSA did not apply in the Appellant's case; that the matter should be determined under section 14 of the VSA and that that the Statement of Principles No 37 of 2014 (Reasonable Hypothesis) and No 38 of 2014 (Balance of Probabilities) were the Statements of Principles applicable under the VSA to the condition of Chronic Obstructive Pulmonary Disease. The Board further noted that the RO had identified (correctly in its view) that provided the material available is consistent with a hypothesis that the injury, illness or death was service related, only one factor was required to be met for the claim to be successful, and that the factors listed in the SoPs relating to the condition of Chronic Obstructive Pulmonary Disease included smoking - factor 6(a). Noting that the RO had not specifically stated whether she was applying SoP No 37 of 2014 (Reasonable Hypothesis) or SoP No 38 of 2014 (Balance of Probabilities), and observing that factor 6(a) in each SoP specified different criteria, the Board determined that in light of the Appellant's qualifying operational service SoP No 37 of 2014 (Reasonable Hypothesis) (**the SoP**) was the appropriate SoP to apply in the Appellant's case. The Board concurred with the decision of the Decision Officer in this regard.

15. The Board disagreed, however, with other aspects of the RO's application of the SoP.

16. The Board noted that the SoP is listed in Schedule 1 of the Veterans' Support Regulations 2014. As such it is an Australian Statement of Principles that applies for the purposes of the VSA. In clause 4 of the SoP, the Repatriation Medical Authority (**RMA**) states that it has formed the view that it is

more probable than not that Chronic Obstructive Pulmonary Disease can be related to service. Clause 5 of the SoP provides in effect that at least one of the factors in clause 6 must be related to the person's service. Clause 6 of the SoP sets out the factors that must exist in a particular case for a claim to succeed. The SoP contains factors relating to both the 'clinical onset' and 'clinical worsening' of Chronic Obstructive Pulmonary Disease. If a factor concerns the 'clinical onset' of Chronic Obstructive Pulmonary Disease it relates to cause. If a factor relates to 'clinical worsening' of Chronic Obstructive Pulmonary Disease it relates to material contribution or aggravation of a pre-existing injury/disease/condition. Clause 7 makes it clear that those factors that concern clinical worsening (i.e. 6(j) to 6(s)) apply only to material contribution to, or aggravation of, the injury/disease/condition if the injury/disease/condition pre-existed or was contracted during (but did not arise out of) the relevant service.

17. On the material before it, the Board determined that the requirement of factor 6(a) of the SoP was amply satisfied in the Appellant's case. The Appellant had clearly smoked at least five pack-years of cigarettes before the clinical onset of Chronic Obstructive Pulmonary Disease. In passing, the Board noted that had it been determining the appeal under SoP 38 of 2014 (Balance of Probabilities), it would also have concluded, on a similar basis as outlined in Mr Astle's submission to the Board at the appeal hearing, that the Appellant met the requirements of factor 6(a) under that SoP also. A key issue, however, was whether the Appellant's smoking, which had caused his condition of Chronic Obstructive Pulmonary Disease, was related to his service. The RO determined that it was not, stating:

> *"While the factors listed include smoking (factor 6a) as a factor for chronic obstructive pulmonary disease, it is necessary to show a causal relationship between the smoking habit and the veteran's qualifying service, in order for the factor in respect of smoking to succeed. The information available needs to show that the veteran's smoking habit resulted from or was materially contributed to by the veteran's qualifying service, for example a smoking habit that became established as a result of the stress of war service in conjunction with the encouragement to smoke through the free provision of cigarettes in rations packs. The information available shows [the Appellant's] smoking habit because established because everyone else smoked and the low cost of cigarettes (duty-free as a result of tax and excise laws.) The information provided by [the Appellant] does not suggest a smoking habit that resulted from or was contributed to by the performance / stressors of military duty / activity ([the Appellant] noted that there was no change to his smoking habit during service). The information available is therefore not sufficient to determine [the Appellant's] smoking habit resulted from or was materially contributed to by qualifying military service, which means the chronic obstructive pulmonary disease cannot be connected with the circumstances of [the Appellant's] qualifying service. The material/information available has been considered in relation to all the other factors provided. Regrettably I am unable to establish a factor that would relate the chronic obstructive pulmonary disease to the circumstances of [the Appellant's] qualifying service. The decision to decline the disability of Chronic Obstructive Pulmonary Disease is upheld on the basis the disability is not service-related under the Veterans' Support Act 2014."*

Appeal Board Decision

18. Section 7 of the VSA provides: *"**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."* The Board observed that the words *"caused by", "contributed to by", "aggravated by"* were disjunctive, and that as a matter of statutory interpretation they should be considered separately, and only as appropriate, in any given case. Noting that the words were not defined in the VSA, the Board determined that the words should be given their ordinary, every-day meaning.

19. According to the Oxford English Dictionary, to *"contribute to"* is to *"do a part in bringing (it) about; to have a part or share in producing".* The question for the Board to determine therefore, was whether the Appellant's qualifying service had a part in his starting to smoke and developing his smoking habit, which caused his condition of Chronic Obstructive Pulmonary Disease.

20. The Board disagreed with the view expressed by the RO in her decision, that in order for the smoking related condition of Chronic Obstructive Pulmonary Disease to be regarded as being service-related for the purposes of the VSA, it needed to be shown that the Appellant's smoking habit *"resulted from or was materially contributed to by the veteran's qualifying service…"* It appeared to the Board that, in so deciding, the RO had applied, incorrectly in its view, a definition that was substantively different from that provided in section 7 of the VSA.

21. The Board had specific regard to all the principles specified in s10(b), and the overarching benevolent intent of the VSA. On the evidence before it, the Board accepted Mr Astle's view to the effect that the evidence regarding the circumstances giving rise to the Appellant's starting to smoke were substantially similar to those that led Mr Sturrock to do the same, and was satisfied that the Appellant's smoking habit was contributed to by his qualifying service. The Board accordingly found that factor 6(a) of the SoP was related to the Appellant's qualifying service.

22. The Board therefore determined that the hypothesis that the Appellant's condition of Chronic Obstructive Pulmonary Disease was service-related was consistent with the SoP. In the absence of reasonable grounds for believing that the Appellant's condition of Chronic Obstructive Pulmonary Disease was not service-related, the Board determined that the Appellant's claim for the condition of Chronic Obstructive Pulmonary Disease should be accepted.

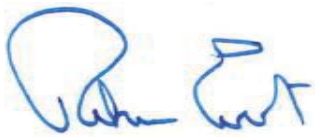
23. The Board noted that the RO had not specifically addressed in her decision the argument submitted by the Appellant that his condition of Chronic Obstructive Pulmonary Disease had been *"caused, contributed to by or aggravated by his service ...(2) In Hong Kong on Royalist in 1965 whilst testing gas marks was exposed to C.S. gas (chemical smoke)."* Noting that *"a respiratory tract irritant from the specified list"* meant those listed in clause 9 of the SoP, including *"9(j) another respirable agent which causes comparable tissue damage"* which the Board considered would include C.S. gas (more commonly known as 'tear gas'), the Board considered it appropriate to consider whether factor 6(b) of the SoP might also have applied in the Appellant's case. After questioning the

Appellant at some length about the circumstances relating to his exposure to C.S. gas, the Board was left in no doubt that he had "*inhaled a respiratory tract irritant from the specified list"* as defined in clause 9 of the SoP (specifically in clause 9(j)), but determined that the evidence fell far short of establishing the minimum requirements specified in factor 6(b)(i) and (ii) of the SoP to enable the Board to conclude that the Appellant's condition of Chronic Obstructive Pulmonary Disease was contributed to by his exposure to C.S gas during his qualifying service. Further, the Board noted that the RO had considered *"the material/ information available...in relation to all other factors provided":* with the exception of factor 6(a) of the SoP, the Board concurred with the RO's decision that no other factors had been established *"that would relate the chronic obstructive pulmonary disease to the circumstances of [the Appellant's] service."* The Board also noted the factors of the SoP to which Mr Terrill had referred to in his written submission appended to the Appellant's notice of appeal (received by Veterans' Affairs on 18 December 2015), and determined that on the material / information available, it was unable to conclude that the requirements of any of those factors had been met.

Order relating to the publication of decision

24. 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 service number and rank, and the address of the Appellant. The name of the Appellant may be published.

The appeal is allowed.



Ms Rebecca Ewert, Chairperson

Dr Chris Holdaway, Member

Ms Raewyn Anderson, Member

Dr Hillary Gray, Member

5 February 2017