

Failure to convince the Tribunal sees second bite at the cherry pipped

Moore and Military Rehabilitation and Compensation Commission [2017]
ATA 532

Key Points

- The central issue was whether the Administrative Appeals Tribunal should allow a case to be re-litigated in circumstances where there had previously been a consent decision issued.
- The Tribunal determined that Mr Moore failed to provide sufficiently compelling reasons for the Tribunal to allow the case to be re-litigated.

Background


Mr Moore was the victim of an assault at his home on 29 July 2002 while working with the Royal Australian Air Force (**RAAF**). During the assault, Mr Moore suffered injuries to his face, particularly his jaw, and he claimed to have subsequently developed a psychiatric condition along with several other related conditions.

On 30 October 2003, Mr Moore lodged two claims for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**). The first was in relation to an “adjustment disorder with depressed/anxious mood” and the second was in relation to a “right temporo-mandibular joint dysfunction”.

These claims were both rejected by the Military Rehabilitation and Compensation Commission (**MRCC**) on 25 February 2005. This determination was affirmed by a reviewable decision dated 24 June 2005. Mr Moore sought the review of the 2005 reviewable decision and on 30 July 2008, a decision was issued by the AAT, with the consent of the parties, under section 42C of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) which affirmed the 2005 reviewable decision.

In November 2012, the Defence Abuse Response Taskforce (DART) was established to assess and respond to individual cases of abuse in its varying forms within the Australian Defence Force. Mr Moore lodged a complaint to DART in 2013 and, after a review of this complaint, DART granted a reparation payment to Mr Moore.

Following his successful complaint to DART, Mr Moore lodged two further claims for compensation under the SRC Act in respect of “post-traumatic stress disorder” and his previously claimed jaw condition. In what the MRCC contends was an error, it revoked the determination dated 25 February 2005 and accepted Mr Moore’s claims for compensation in a determination dated 5 March 2014. Mr Moore then lodged a further four claims for



compensation in respect of “bruxism” secondary to PTSD (accepted on 5 May 2014), a “major depressive disorder” secondary to his PTSD and his jaw condition (accepted on 12 September 2014), “alcohol dependence” secondary to his claimed major depressive disorder (accepted on 12 September 2014), and “erectile dysfunction” secondary to his PTSD, jaw condition, major depressive disorder, and alcohol dependence (accepted on 12 March 2015).

The MRCC then issued reviewable decisions dated 13 May 2016 and 14 June 2016 revoking liability for all four of these previously accepted conditions. Mr Moore sought the review of these decisions on the basis that his claimed conditions were secondary to his accepted PTSD and jaw condition.

The MRCC sought to have Mr Moore’s Applications dismissed on the grounds of section 33(1)(a) of the AAT Act.

The AAT was required to determine whether the new Applications were the same as those which had previously been litigated in 2008 and, if they were, whether there was reason for the Tribunal to further consider them anyway. The Tribunal noted that this question is considered one of the most uncertain aspects of its jurisdiction.


The Law


While there have been decisions to the effect that estoppel can serve as a basis for the Tribunal to dismiss an Application where it has been previously decided, the Tribunal was constrained in this case to only consider whether section 33 of the AAT Act, being a more informal power, could serve this purpose.

Section 33(1)(a) of the Act states that in a proceeding before the Tribunal, the procedure of the Tribunal is, subject to the AAT Act and the regulations and any other enactments, within the discretion of the Tribunal.

Section 62(1) of the SRC Act grants a determining authority the ability to, on its own motion, reconsider a determination made by it or by a delegated authority.

Mr Moore drew attention to the Tribunal decision in *Re Matusko and Australian Postal Corporation* [1995] AATA 14, where the Tribunal summarised the authorities regarding the re-litigation of issues, and submitted:

- no formal issue estoppel arises from the Tribunal’s previous findings;
 - the Tribunal should not generally allow re-litigation of issues already decided;
 - but, the Tribunal should use its flexible procedures to allow further consideration of issues where there is reason to do so, for instance where –
 - there is a different decision;
 - there is a clear legislative intent;
 - the reconsideration decision is not final;
- 

- 
- there has been a change in circumstances or fresh evidence; or
 - where justice to the parties requires a departure from the general rule.

Mr Moore also drew attention to the Tribunal decision in *Quinn and Australian Postal Corporation* [1992] AATA 668, specifically the statement from this decision that,

“As it is clear from the statutory intention that the respondent can only reconsider a determination where there has been a change in circumstances, it seems justifiable to expect the respondent to be able to produce material in these proceedings supporting its assertion that the applicant is no longer entitled to compensation. There is no strict burden of proof as such but there must be additional evidence to indicate that there has been such a change in circumstances.”

The Tribunal referenced the Full Court of the Federal Court decision in *Telstra Corporation Limited v Hanaford* [2006] FCAFC 87 as being relevant in the circumstances given that this decision had established that there was a clear legislative intent that decisions regarding compensation entitlements under the SRC Act were not to be final.

Conclusion


The Tribunal determined that Mr Moore failed to provide a sufficiently compelling reason for the Tribunal to allow his case to be re-litigated and dismissed his Applications pursuant to section 33(1)(a) of the AAT Act.

First, it was held that the MRCC, by virtue of section 62 of the SRC Act and the decision in *Hanaford*, had the capacity to correct decisions it felt to be erroneous, with these corrections not constituting a ‘change in circumstances’ or ‘fresh evidence’ requiring the matter to be reheard by the Tribunal.

Second, it was held that the DART decision did not constitute new or fresh evidence as this decision was made on the basis of plausibility, not a finding of fact, making it wholly inappropriate for the MRCC or the Tribunal to rely on the decision as evidence or proof in the making of its decisions.

Third, it was held that the other evidence Mr Moore sought to rely on did not constitute ‘fresh evidence’ such that his matter ought to be re-litigated given that this evidence had already been dealt with in previous proceedings.

Fourth, it was held that the passage of nearly 15 years since Mr Moore’s assault meant that the MRCC would have been prejudiced by the difficulty and expense involved in collating all the relevant evidence necessary to re-litigate the matter, while no injustice was caused to Mr Moore in denying him the opportunity to present evidence he considered ‘new’ given that this evidence did not shed light on the issue of causation.





Lessons Learnt

This decision reinforced the Tribunal's general rule of not allowing the re-litigation of issues.

Where the issues raised in an Application regarding a new condition are substantively the same as those which have been previously litigated, and the claimed condition, although couched in new terminology, is substantively the same as a previously litigated condition and is borne out of the same incident, the Tribunal will follow the general rule regarding the re-litigation of issues.

To succeed in re-litigating a case, the applicant must prove that there is sufficient reason, such as a change in circumstances, fresh evidence, prejudice, etc. which would cause a departure from this rule.

Contact:

Andrew Gulyas

Solicitor

Direct: +61 (0) 2 9376 1122

andrew.gulyas@hbalegal.com

Nathan Hepple

Partner

Direct: +61 (0) 2 9376 1188

nathan.hepple@hbalegal.com

Visit www.hbalegal.com for more case articles and industry news.

Disclaimer: This article is intended for informational purposes only and should not be construed as legal advice. For any legal advice please contact us.

