

PROFESSIONAL SERVICES)

REVIEW TRIBUNAL) No 1 of 1997

TRIBUNAL:

**The Hon A.R. Neaves, President
Dr N.J. Radford, Member
Dr M. Williams, Member**

DATE:

PLACE:

DECISION

**The determination made herein by the respondent
and dated 23 April 1997 is affirmed**

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**(Alan R. Neaves)
President**

PROFESSIONAL SERVICES)

No 1 of 1997

REVIEW TRIBUNAL)

BETWEEN: DR JEAN FERGUS McFARLANE

Applicant

and

GAIL BATMAN

Respondent

**TRIBUNAL: The Hon A.R. Neaves, President
Dr N.J. Radford, Member
Dr M. Williams, Member**

DATE:

REASONS FOR DECISION

Nature of the Proceedings:

1. This is a proceeding under Division 3 of Part VA of the Health Insurance Act 1973 (Cth)("the Act"). It comes before the Tribunal by virtue of the Minister for Health and Family Services having, pursuant to section 115(1) of the Act, forwarded to the President the request made on behalf of Dr Jean Fergus McFarlane ("the applicant") pursuant to section 114(1) of the Act that the determination made by Ms Gail Batman ("the respondent") and dated 23 April 1997 be referred to a Professional Services Review Tribunal. In making that determination, the respondent was acting as the Determining Officer appointed under section 106Q(1) of the Act. It is described as a final determination and was made in accordance with section 106U of the Act in relation to the applicant.

History of the Matter:

2. On two occasions, on 8 November 1991 and 3 December 1992, the applicant was counselled by a medical adviser of the Health Insurance Commission ("the Commission") established under the Health Insurance Commission Act 1973 (Cth) in relation to concerns as to her pattern of servicing and, in particular, the level of pathology services initiated by her. Following a consideration of the pattern of the applicant's servicing during the period 1 January 1993 to 31 December 1993 and of information concerning the pathology services initiated during the period 1 January 1994 to 31 March 1994, concerns were expressed over the substantial amounts of pathology the applicant ordered on her patients, the fact that the amount of pathology she had ordered had increased and the circumstances that, when pathology was ordered, most patients were having very similar tests. As a consequence, the applicant was again counselled by a medical adviser of the Commission on 30 August 1994.
3. On 31 August 1995 a document was signed by Dr R.P. Tomlins, Medical Director acting on behalf of the Commission and pursuant to section 86 of the Act, referring to the Director of Professional Services Review "the conduct of Dr Jean McFarlane in relation to whether she has engaged in inappropriate practice in connection with the rendering and initiation of Medicare services as defined in the Act". The document identified the referred services (see section 87(1) of the Act) as "all pathology services initiated by Dr McFarlane at all her practice locations". The referral period was expressed to be 1 January 1994 to 31 December 1994.
4. On 22 September 1995, after the applicant had been given an opportunity to make written submissions stating why the referral should be dismissed, the Director of Professional Services Review, Dr A.J. Holmes, signed an instrument under

subsection 93 and 95 of the Act setting up Professional Services Review Committee No 4 ("the Committee") to consider whether the applicant had engaged in inappropriate practice. The Committee consisted of five members, the Director of Professional Services Review taking the view that it was desirable to appoint two additional members in order to give the Committee a wider range of clinical expertise, having regard to the matters to which the referral related (see section 95(1)(c) and section 95(6)). The Committee as so constituted comprised a chairperson and two members who were medical practitioners, the additional two members being a specialist physician and a specialist pathologist.

5. The Committee held a hearing on 21 November 1995 at which the applicant gave evidence and addressed the Committee. She also provided documentary material to the Committee during and after the hearing.
6. Pursuant to section 106L((1) of the Act, the Committee made a written report to the Determining Officer appointed under section 106Q of the Act. At that time Dr A. Adams held that appointment. The report was signed by each of the members of the Committee, then signatures bearing different dates in February 1996. The report records the finding of the Committee "that Dr McFarlane's conduct in relation to the referred services was unacceptable to the general body of medical practitioners". Attached to the report is a statement of the Committee's reasons for reaching that finding. The reasons conclude with the following statement:

The Committee, having considered the referral documentation, statistical data supplied, the evidence given at the hearing and the submissions received from Dr McFarlane, finds that her conduct with regard to the initiation of pathology services in the referral period is such that it would be unacceptable to the general body of medical practitioners.

The Committee summarised its findings as follows:

"DECISION:

The committee is of the opinion that Dr Jean Fergus McFarlane has engaged in inappropriate practice as defined in section 82(1)(a) of the Health Insurance Act.

PRECIS OF REASONS:

In conformity with accepted standards of clinical practice, Dr McFarlane:

- . failed to take a relevant clinical history involving all systems including family history;

- . failed to perform a system by system medical examination including blood pressure reading and urine testing;
 - . failed to document adequate clinical records (by accepted standards);
 - . failed to perform such investigations that a good history and examination would indicate as necessary;
 - . failed to prescribe therapeutics in the manner and for indications consistent with normal pharmacological practice;
 - . failed to undertake continuing medical education;
 - . requested a constant basic block of pathology investigations irrespective of the condition being treated or the medical necessity;
 - . repeated many of the pathology tests despite previous normal results;
 - . holds views regarding the aetiology of disease (particularly viral diseases) which are unacceptable to the vast majority of her peers;
 - . demonstrated a lack of insight into the fact that she does not conform to general medical standards".
7. The Determining Officer, Dr Adams, pursuant to section 106(1) of the Act, made a draft determination. The applicant was then afforded an opportunity to make written submissions suggesting changes to the draft determination, an opportunity of which she took advantage.
8. On 23 April 1997, pursuant to section 106T(1) of the Act, the respondent, who had by this time been appointed as the Determining Officer in place of Dr Adams, made a final determination in accordance with section 106U of the Act relating to the applicant. The final determination, having recited that the Committee had found that the applicant had engaged in inappropriate practice as defined in section 82 of the Act, directed that:

(i) in accordance with paragraph 106U(1)(b) of the Act, Dr McFarlane be counselled by the Director, Professional Services Review or the Director's nominee in relation to each of the concerns expressed by the Committee;

(ii) in accordance with subparagraph 106U(1)(g)(i) of the Act, Dr McFarlane be disqualified for a period of 12 months from the time when this determination takes effect in respect of the initiation of all services to which an item relates in Groups P3 and P4 of the Pathology Table;

(iii) in accordance with paragraph 106U(1)(h) of the Act, Dr McFarlane be fully disqualified for a period of 6 months from the time when this determination takes effect.

The Tribunal was informed that, although the determination is dated 23 April 1997, it was not served on the applicant until 2 May 1997.

9. By letter dated 30 May 1997 sent by facsimile transmission to the Minister for Health and Family Services at an address within the Minister's Department, an address provided to the applicant by the Determining Officer, Mr T.J. McBride of the legal firm Clarke and Kann, acting on behalf of the applicant, requested, pursuant to section 114 of the Act, that the (final) determination be referred to a Professional Services Review Tribunal for review.
10. By letter dated 22 August 1997, the request was forwarded to the President of this tribunal.

Representation:

11. Prior to the commencement of the hearing, the Tribunal believed that the applicant would be represented by Mr McBride and no indication was given that the position was otherwise. However, when the hearing was called on, the applicant appeared without legal assistance and informed the Tribunal that, as in her opinion the matters to be debated were medical rather than legal issues, she wished to address the Tribunal herself. This she was permitted to do.
12. The respondent was represented at the hearing by Ms R. Henderson of counsel, instructed by Ms W. Hannon of the Australian Government Solicitor's Office.
13. In the course of Ms Henderson's address, a number of legal issues emerged for discussion and the Tribunal took the view that it should require Mr McBride's presence on the second day of the hearing so that the Tribunal might have the benefit of any submissions which he might wish to make. Mr McBride appeared on the second day of the hearing and addressed the Tribunal.

Role of the Tribunal:

14. Section 119 of the Act relevantly provides:

(1) A Tribunal that reviews a determination in accordance with a request, (a) shall consider the matter to which the determination relates having regard to the grounds set out in the request, the documents forwarded by the Minister with the request and any addresses made to the Tribunal during the proceedings on the review; and (b) shall, subject to subsection (2), (i) (ii) if

the determination consists of a final determination under section 106T, affirm or set aside the determination, or set aside the determination and make any other determination that the Determining Officer is empowered to make under that section.

(2)

(3) If the determination consists of a final determination under section 106T, the decision of a Tribunal on a review is, for all purposes (except for the purposes of this Part), taken to be a determination of the Determining Officer.

The reference to "this Part" is a reference to Part VA which has the heading Professional Services Review Tribunals and comprises section 107 to section 124A.

15. We are unable to accept the submission made on behalf of the respondent that the Tribunal's role is confined to reviewing the appropriateness of the directions given by the Determining Officer under section 106U of the Act and does not extend to a review of the report of the Committee or its findings or the reasons advanced by it in support. Counsel supported the submission by reference to the following provisions of the statute. First, a contrast was drawn between the provisions of section 95 and those of section 115(2), observing that the members of a Committee are required to have a greater affinity, in a professional sense, with the practitioner whose conduct is under review than is the case with the members of a Tribunal. Secondly, reliance was placed on the form of request which section 114(1) permits and which enlivens the proceeding before a Tribunal, namely a request that "the determination" be referred to a Tribunal for review.

Thirdly, by virtue of the provisions of Subdivision 4B of Part VAA, a Committee may receive oral evidence on oath or affirmation and require the production of documents whereas a Tribunal must proceed (see section 119(1)(a)) upon the documents forwarded to it by the Minister, the grounds set out in the request and any addresses made during the proceedings on the review (see *Minister for Health v Thomson* (1985) 8 FCR 213, in particular pages 218 and 226). Fourthly, it was observed that the only operative direction that a Tribunal may make is a direction in relation to the determination itself.

16. In our opinion, the considerations upon which counsel for the respondent relied are not compelling. Indeed, we take the view that the Parliament has, in the statute, sufficiently clearly indicated the wider role of a Tribunal. Relevant provisions of section 119 of the Act have already been set out and we refer particularly to the requirement expressed in that provision that a Tribunal consider, not the determination, but "the matter to which the determination relates". Further, the power in the Determining Officer to make a draft determination and, later, a final determination if, and only if, the report of a

Committee "contains a finding that the person under review has engaged in inappropriate practice in connection with rendering or initiating some or all of the referred services".

Unless the finding to that effect in a particular case is sustainable, any final determination made would have to be set aside and it seems to us to be a function of a Tribunal to essay that question if that be one of the grounds on which the request for review is made. It is, perhaps, also not insignificant that, before a Tribunal, the person under review is entitled to have legal representation (see section 117(1)), a right denied at a hearing before a Committee (see section 103(1)).

Concerning the Applicant's Practice:

17. The applicant graduated in medicine within the University of Queensland in 1953. In 1984 she retired from her long standing position of Director of Child Health in the Queensland State Health Department. During the referral period she had rooms at West Chermside, Auchenflower, Mt Warren Park, Beenleigh and Wickham Terrace, Brisbane, all in the state of Queensland, and saw patients at each of those locations. She was at that time, and is, a general practitioner, although she has, for a number of years, had a special interest in viral diseases. She is not recognised, for the purpose of the Act, as a specialist in that speciality (see the definition of "specialist" in section 3(1)). However, for the purposes of Part VAA of the Act (that is to say section 80 to section 106ZR inclusive) general medical practice is taken to be a specialist and medical practitioners practising in general medical practice are taken to be specialists in that specialty (see section 81(2)).

It follows that the relevant criterion by which to determine whether the applicant's conduct in connection with the initiating of pathology services in the referral period is properly to be described as engaging in inappropriate practice is that prescribed in paragraph (a) of sections 82(1) and 106L(1) of the Act. That is to say, was the conduct unacceptable to the general body of those practising in general medical practice.

18. The information set out in the following table and later paragraphs has been extracted from the data that the Committee had before it and on which it relied. The accuracy of the data was not challenged or disputed before the Committee, the Determining Officer or the Tribunal. The primary figures and amounts set out in the table relate to the referral period, 1 January 1994 to 31 December 1994, the corresponding figures and amounts shown in brackets relating to the previous year, 1 January 1993 to 31 December 1993:

Number of patients in practice	2154	(2265)
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Number of services to those patients	14,138	(13,863)
Number of patients referred for pathology	1451	(1434)
Rate of referral of patients for pathology	67%	(63%)
Number of pathology services initiated	18,776	(9,400)
Pathology benefit paid	\$552,758.25	(\$242,059.40)
Pathology services per pathology patient	12.94	(6.56)
Pathology benefit per pathology patient	\$380.95	(\$168.80)

19. Other material before the Committee demonstrated that, in respect of the referral period, the rate at which the applicant referred her patients for pathology was above the 99th percentile for all active general practitioners in Australia; that the number of pathology services initiated by her per pathology patient was above the 99th percentile of 7.49 for those practitioners; and that the cost of the pathology services initiated by her was substantially above the 99th percentile of \$122.98 for all active practitioners in Australia and per consultant physicians, the subspecialties of, in General Medicine (\$287.91), Immunology (\$261.30), Neurology (\$161.83) and Rheumatology (\$274.93).

It was also shown that during the referral period, the applicant had 1919 patient episode initiations resulting in 9.8 tests per episode, this comparing with the average for all Australian general practitioners of 1.7 tests per episode. In the result, the applicant in 1994 initiated more pathology services than almost all other medical practitioners in Australia.

20. The Committee also had before it details of the 10 pathology services most frequently initiated by the applicant during the referral period, each of those services, when rendered, attracting a benefit under Medicare. The following table identifies each service and lists, in respect of each service by reference to its item number in the pathology services table and a brief description, and the number of occasions on which the service was initiated:

ITEM	DESCRIPTION	OCCURRENCES
65007	Full blood examination	1774
66211	Chemical (6 or more tests)	1755
69239	Antibodies to certain antigens (6 or more tests)	1651
71113	Antibodies (2) to tissue antigens	1606
71097	Antinuclear antibodies	1601

71099	Double-stranded DNA antibodies	1596
69247	Acute hepatitis	1589
69265	Hepatitis C	1582
71139	Leucocyte surface antigens (3 or more)	1559
66291	Thyroid function tests	1400

21. The applicant is also shown by the material before the Committee to have requested substantially the same combination of nine or more pathological services on 1557 out of 1919 episodes.
22. It is apparent that the applicant had built up a very busy practice, many, if not most, of her patients - and certainly those for whom multiple pathology services were initiated - presenting with symptoms of tiredness, lethargy and, in general, an inability to cope with the stresses of life, a condition commonly referred to as chronic fatigue syndrome. The applicant, however, claims that the clinical picture of chronic fatigue syndrome is, in truth, the result of chronic infection with one or more of many viruses. She claims that most of the patients had already consulted a number of medical practitioners seeking a cure but with little result. She further claims that, with the treatment she prescribes, her success rate in restoring her patients to health has been very high.

It appears that she requires her patients to rest rather than work, prescribes drugs to alleviate any manifest symptoms, supplements the medication with courses of vitamins and endeavours to give her patients full support and encouragement. The multiple pathology services initiated and often repeated, in some cases a number of times, is designed, she says, to identify what viruses are present and to monitor variations in the previously obtained results.

Findings of the Committee and the Determining Officer:

23. The essential findings of the Committee may be summarised as follows. In the unanimous opinion of the members of the Committee, based on their consideration of the material before them and, in particular, upon an examination of medical records and pathology reports in evidence:
 - . the applicant's patient records show no relevant past history, past treatments, family histories, allergies, social habits, vaccination history or status;
 - . the presenting symptoms recorded are largely limited to those related to chronic fatigue syndrome with virtually no notes on physical findings;

- . patients whose records were examined had no more than a cursory physical examination, blood pressures not being recorded;
- . the applicant does not do specific viral studies, the same multiple pathology services being initiated for large numbers of patients;
- . the applicant does not exercise clinical judgment in selecting which pathology services are appropriate in a particular set of circumstances;
- . the applicant was unable to give any scientific reference in support of a number of strongly held beliefs;
- . there was no scientific rationale for the multiple pathology services initiated
- . pathology services were repeated when there was no basis for expecting any change over previous results;
- . it was impossible to detect a consistent and logical reason for the pathology testing from the evidence or from the pattern of the testing;
- . there was no evidence of a logical or organised approach to pathology testing which could lead to a research outcome;
- . there was no evidence that the pathology testing led to a documented diagnosis upon which patient management was based on or even, in the event of a diagnosis not being possible, the development of an appropriate management plan;
- . the literature references quoted by the applicant did not support her use of pathology testing.

24. The Determining Officer referred in some detail in her reasons to the history of the matter, the material contained in the document of referral under section 86 of the Act and the Committee's report. She also made some reference to the applicant's submissions. In the light of the material before her, the Determining Officer expressed the view that "the volume of pathology ordering during 1994 was astounding in the total number, the number of services per patient and the lack of selectivity". She also thought it unlikely that the applicant would significantly change her conduct, the applicant having demonstrated "a lack of insight into the fact that she does not conform to general medical standards and the number of pathology services initiated has increased significantly since 1993".

Having regard to what she regarded as the serious nature of the case, the Determining Officer gave the directions to which reference has been made earlier in these reasons.

Grounds of Review:

25. The grounds forming part of the request for review are lengthy and discursive. In large measure, the grounds of review do no more than refer to passages in the reasons given by the Committee and the Determining Officer and assert, without further elaboration, that in respect of the findings embodied in those passages the Committee or the Determining Officer, as the case may be, was in error. Many of the grounds reflect an approach more akin to judicial review than to the review on the merits which the Tribunal is required to undertake. There is little in any of the grounds by way of elaboration and, surprisingly, no attempt was made at the hearing before the Tribunal, to deal seriatim and in depth with any of the matters to which the grounds refer.

The applicant, in her address, reiterated her conviction that her medical practice was carried on in an appropriate and relevant way and, in particular, that the pattern of pathology services initiated was entirely consistent with the implementation of the theories in relation to chronic viral infection which she so vehemently propounded. Her main contention seemed to be that the members of the Committee had not understood her theories and that they were not sufficiently interested to listen to what she was saying. When Mr McBride addressed the Tribunal, he dealt only with the legal issues that had been raised during the course of the address by counsel for the respondent.

26. Not having received the level of assistance which, as a Tribunal, we might reasonably expect, we have, since the hearing, read and re-read much of the material.

Conclusion:

27. The only conclusion that, in our opinion, is open on the material that was before the Committee is that the applicant's conduct in connection with the initiating of pathology services during the referral period from 1 January 1994 to 31 December 1994 was unacceptable to the general body of general medical practitioners at that time. Indeed, we understood the applicant to concede as much during the course of her address. We find ourselves in substantial agreement with the essential findings of the Committee as set out earlier in these reasons. In particular, we can find nothing in the material to support a conclusion that the general body of general practitioners support what clearly appears to be the applicant's approach of routinely testing patients for a variety of viruses, the tests not being selectively chosen by the application of clinical judgment.

28. There can be no doubt that the situation disclosed is a serious one and nothing that has been put to us leads us to conclude that we should interfere with the determination made by the Determining Officer and dated 23 April 1997. The directions there given are, in our opinion, entirely appropriate.
29. Before parting with the matter, however, we wish to make three observations. Firstly, the Committee, in the course of its reasons, drew attention to the large number of services per week (more than 285) that the applicant was rendering on average during the year 1994 and commented that this might be having an adverse effect on the quality of treatment patients were receiving. It seems to us that this aspect of the matter should be given consideration by the Medicare authorities.
30. The second matter concerns the recommendation of the Committee that the applicant's professional conduct should be referred under section 106P(1)(a) of the Act to the Medical Board of Queensland as the regulatory body responsible for registering or licensing practitioners for practice in the State of Queensland. We support this recommendation and, if the necessary steps have not yet been taken, we urge that action be taken as soon as possible.
31. The third matter concerns the role of a pathologist in situations such as that disclosed in this matter. We agree with the comment made by the Committee that there must come a point at which the pathologist assumes a responsibility in relationship to the level of servicing. The matter should be the subject of consideration and guidance by the appropriate professional body.
32. The decision of the Tribunal is that the determination made herein by the respondent and dated 23 April 197 be affirmed.

Solicitors for the applicant: Clarke and Kann
Counsel for the respondent: Ms R.M> Henderson
Solicitor for the respondent: Australian Government Solicitor
Dates of hearing: 24, 25 September 1997
Place of hearing: Brisbane, Queensland
Dated of decision:

This and the preceding pages comprise the decision and the reasons for decision of the Professional Services Review Tribunal constituted by the Hon. A.R. Neaves, Dr N.J. Radford and Dr M. Williams given onday of 1997.

Dated this day of 1997.

