DETERMINATION AND REASONS FOR DETERMINATION

PROFESSIONAL SERVICES REVIEW TRIBUNAL) **No 1 of 1996**

Re **DR JAMES ADRIAN TANKEY**
Applicant

And **DR ANTHONY ADAMS**
Respondent

DETERMINATION

Tribunal: The Hon Mrs Margaret Lusink, AM, President
Dr Peter Joseph, Member
Professor David Tiller, Member

Sitting at Brisbane: 17 - 18 March 1997

Date of Determination: 18 April 1997

Determination: That the Final Determination made by the Respondent on 16 August 1996 be set aside and in lieu thereof it is DIRECTED:

1. In accordance with s.106U(1)(b) of the Act, Dr Tankey be counselled by the Director or his nominee.

2. In accordance with s.106U(1)(c) of the Act Dr Tankey repay to the Commonwealth the sum of $580,576.00, being an amount equivalent to any medicare benefit paid for inappropriate services during the referral period.

3. In accordance with s.106U(1)(g)(i) and s.106U(3) of the Act Dr Tankey be disqualified for a period of

twelve months from the time when this determination takes effect in respect of the provision of all services to which an item relates in Group A1 of Part 2 of the General Medical Services Table.

4. In accordance with s.106U(1)(h) and s.106U(4) of the Act Dr Tankey be fully disqualified for a period of six months from the time when this determination takes effect.

President

Health Insurance Act 1973 as amended

Health Legislation (Prefessional Services Review) Amendment Act 1994

Dr Garo Artinian v The Commonwealth of Australia Federal Court of Australia N.S.W. Registry, No. NG 861 of 1996 27 November 1996

McIntosh v Minister of Health (1986) 17 F.C.R. 463

Re Minister for Health v Thomson (1985) 8 F.C.R. 213

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 70 A.L.J.R. 568

REASONS FOR DETERMINATION

Pursuant to the provisions of the Health Insurance Act 1973 as amended (the Act) the Health Insurance Commission (the Commission) referred to the Director of the Professional Services Review (D.P.S.R.) the conduct of Dr James Adrian Tankey as to whether for the period 1 January 1994-31 December 1994 he had engaged in inappropriate practice in connection with the rendering and initiating of services.

Dr Tankey is a vocationally registered general medical practitioner with surgeries at Ipswich and Amberley in the State of Queensland.

The D.P.S.R. convened a Committee which conducted a hearing over three days during September, October and November 1995. On 12 January 1996 their report was sent to the Determining Officer (D.O.) Dr Anthony Adams. The Committee found that Dr Tankey had engaged in inappropriate practice in relation to the services specified in the referral from the Commission.

The final determination of the D.O. dated 16 August 1996 directed that Dr Tankey be counselled, that he repay to the Commonwealth $258,277.45 and that he be partially disqualified for 12 months and totally disqualified for 6 months. Dr Tankey has requested a review of that determination.

The Referral and the Committee Hearing

The Committee convened by the D.P.S.R. consisted of a Chairman and two members, all of whom, as required by the Act, are vocationally registered general medical practitioners. Written submissions were provided by Dr Tankey.
He supported these with argument before the Committee that the hearing should not proceed because of possible bias. It was his contention that the Commission's referral to the D.P.S.R. had reached the conclusion that his conduct was inappropriate and he therefore could not receive a fair hearing.

The referral document from the Commission, after setting out the basis for its decision to refer, in paragraph 11 reads:

> "For these reasons the Health Insurance Commission believes that Dr Tankey's conduct in connection with rendering or initiating of Medicare services is unacceptable to the general body of General Practitioners."

In May 1994 the then Minister for Human Services and Health provided "Guidelines as to the Form and Content of Referrals" to the Director of the Professional Services Review. Information and material which may be included in referrals are in the schedules.

It is important that referrals by the Commission follow the provisions of the Act and the guidelines strictly. Expressions of opinion we believe, should be avoided, or if made

should not be transmitted to the Committee. The referral is to the D.P.S.R. and not to a Committee which has not yet been convened. A different procedure may avoid a repetition of any future allegation of perceived bias.

The application by Dr Tankey was dismissed. The matter was heard on 22 September 1995 and 6 October 1995 and evidence was given by the doctor and his wife Mrs Christine Tankey. The hearing then concluded. On 8 November 1995 the doctor was advised in writing that the Committee had decided to re-open the case on 22 November 1995. The reason given was that the Committee believed that Dr Tankey's perception was that their views were not representative of the whole body of general practitioners.

He was advised that the Committee intended calling three independent general medical practitioners and he was invited to attend with three witnesses of his own choosing. The applicant's solicitor declined the invitation on behalf of his client on a number of grounds including the belief that the doctors called by the Committee would not "under any circumstances be representative of the general body of practitioners." Subsequently the applicant sent a list of questions to the Chairman which he asked to be put to the doctors who had been subpoenaed to attend. These questions were duly answered.

The Commission in its reference to the D.P.S.R. had detailed matters of concern. These included 27,048 services rendered by Dr Tankey in the referral period. This compared to practitioners in the 95 percentile who provided 12,000 services. The Commission investigated and alluded to, referrals to pathologists and other specialists, the number of diagnostic imaging services requested, the draft criteria of Entry Standards for accreditation to the Royal Australian College of General Practitioners and opinions of consultants.

Dr Tankey explained to the Committee how he organised his practice for maximum efficiency with the help of three office staff and a full time trained sister. The latter carries out many minor medical procedures. He said that he had learned to work long hours when he was a resident doctor in a hospital, that he makes himself available to all patients at all times, that he does not write comprehensive referral letters because "they are not read", and that he does paperwork and checks pathology and other specialist reports at home at night. His evidence was supported by his wife. Mrs Tankey is a trained nurse. She works in the surgery when the permanent sister is away and she keeps the books of the practice. The doctor told the Committee that he works so hard because he loves his work, and he emphasised that he had no complaints from patients nor from specialists to whom he sends patients.

The Committee did not accept that Dr Tankey could provide an adequate professional service in the time devoted to each patient, given the high patient numbers he sees on a continuing basis, nor were they satisfied that he kept proper medical records. The doctor also failed to satisfy the Committee that he can see patients effectively at two or three times the rate of other general practitioners.

The Committee found that medical records were incomplete, medications were not recorded, allergies were not recorded, there was poor or absent recording of diagnoses and physical findings and referrals were not noted. They further found that as a general practitioner he failed to take into account family, social or other considerations relating to patients, and that referral to specialists appeared to occur only after a brief discussion of the patient's problems. Dr Tankey submitted letters of support from a number of specialist colleagues and survey forms completed by patients to demonstrate their satisfaction with the way in which he practised. We agree with the Committee's decision to give little weight to these documents.

Even if one were to accept all Dr Tankey's assertions as to his availability, his ability to work long hours, his organizational talents and superior diagnostic skills, the numbers of services carried out and evidence of work practises would preclude delivery of an acceptable standard of patient care.

Upon the material before us, and having carefully considered the addresses by both Counsel for Dr Tankey, and Counsel for the D.O. respectively, the Tribunal is satisfied that the evidence supports the Committee's finding that:

> (Dr Tankey) “... has engaged in inappropriate practice as defined in s.82 of the Act in relation to services specified in the referral from the Health Commission dated 26 July 1995."

"Inappropriate practice" in s.82(1) reads:

> "A practitioner engages in inappropriate practice if the practitioner's conduct in connection with rendering or initiating services is such that a Committee could reasonably conclude that:
>
> > (a) if the practitioner is a specialist - (s.81(2) general medical practice is taken to be a specialty) the conduct would be unacceptable to the general body of the members of the specialty in which the practitioner was practising when he or she rendered or initiates the services ..."

"Inappropriate service" in s.106U(5) means "A service in connection with which the person under review is stated in a committee's report to have engaged in inappropriate practice."

S.81(1) of the Act defines "referral" as a matter referred to the Director under s.86, "referred services" as the services to which the referral relates, and "services" as (a) "a service for which, at the time it was rendered or initiated, medicare benefit was payable."

The connection between inappropriate practice and medicare payments is that inappropriate practice is concerned with "conduct in rendering or initiating services" as set out above. "Service" relates to services for which medicare benefits are payable. This being so, inappropriate practice is constituted by any conduct in connection with

rendering or initiating services which would be unacceptable to the general body of members of the specialty in which the practitioner practises.

The referral from the Commission to the D.P.S.R. reads as to paragraph 2:

"REFERRED SERVICES

2. For the purposes of s.87(1) of the Act, this referral relates to all services rendered and initiated by Dr Tankey from all his practice locations and all institutions visited by him."

The Committee's finding uses the referred services as the basis for its conclusion of inappropriate practice by Dr Tankey. It therefore follows that when the Commission referral concerns and categorically states "all services ... from all his practice locations and all institutions visited by him.", the Committee's finding means "all services ..." also. This excludes the proposition that some of the referred services were appropriate and some were not. "Inappropriate services" in 106U(1)(c) in this case means all the services enumerated in the Commission's referral. The medicare benefits paid for those services during the referral period is $580,576.00.

During the proceedings on review, it was argued again that the Tribunal is bound by a Committee's findings of inappropriate practice. The authority cited in support was the judgment of Davies J. in McIntosh v Minister of Health (1986) 17 F.C.R. 463. The proposition was also put that in 1994, the amendments to the Act changed the role of the Minister, and, having created the position of a D.O., the Tribunal is in no better position than the D.O. and therefore is bound by the Committee's finding.

We consider the argument to be too restrictive and not in accord with the authority referred to. The combined operation of s.119(1)(a) and (b)(ii) gives the Tribunal much wider powers than the D.O. In the event that the argument was correct it is difficult to see either the purpose of having two medical members on the Tribunal or of the review process itself.

Having said this, it was the intention of Parliament that the P.S.R. Committee should be an investigatory body of peers, the Chairperson and panel members being "practitioners who belong to the profession in which the practitioner was practising when he or she rendered or initiated the referred services" (s.95(2)). It would therefore only be in exceptional circumstances that a finding of inappropriate practice made by such a Committee would be found to be unsustainable.

The Determination

The final determination of the D.O. dated 16 August 1996 directed that Dr Tankey:

(1) be counselled by the D.P.S.R. or his nominee (s.106U(1)(b))

(2) repay to the Commonwealth the amount of $258,277.45, being an amount equivalent to the medicare benefits paid for 50% of the inappropriate services rendered during the period of the referral under items 3, 23, 24 and 36 in Group A1 of Part 2 of the General Medical Services Table (s.106U(1)(c))

(3) be disqualified for a period of 12 months from the time the determination takes effect in respect of the provision of all services to which an item relates in Group A1 of Part 2 of the General Medical Services Table (s.106U(1)(g)(i))

(4) be fully disqualified for a period of 6 months from the time when this determination takes effect (s.106U(1)(h)).

Prior to the final document, two draft determinations had been prepared. In his address to the Tribunal Senior Counsel for Dr Tankey mentioned that his client had been invited to make submissions on the drafts. He also stated that an amount of $74,231.70 was mentioned as repayment in one of the drafts under 106U(1)(c)). It is noted that the D.O.'s statement of Reasons for Final Determination in paragraph 3 refers to two submissions made by Dr Tankey.

Neither the draft determinations nor the submissions made by Dr Tankey on those determinations appear to be among the papers forwarded to the Tribunal by the Minister under s.115.

Grounds for Review

As far as the grounds on which the request for review were made concern findings of fact by the Committee, it was alleged that they had been made against the evidence and the weight of the evidence. We have decided that on any reasonable view of the evidence contained in the proceedings of the Committee and forwarded to us by the Minister, the Committee's decision on questions of fact can be supported. Accordingly those grounds are dismissed.

Where the grounds raise questions of law the Tribunal does not exercise the function of review on points of law; other proceedings must decide those issues. (See Davies J. in McIntosh v Minister for Health 1986 17 F.C.R. 463 at 467 where His Honour discusses the ambit of a Review Tribunal's authority and its limitations.)

Some of the grounds on which the request for review is based contain both fact and law. We nevertheless make the following comments:

1. There was a submission that the Committee had misdirected itself as to the onus of proof and standard of proof. From a careful reading of what was said, the manner in which the comments were made, and having regard to the authorities, it would seem this submission cannot succeed.

In Re Minister for Health v Thomson 1985 8 F.C.R. 213 Beaumont J said

> "...generally speaking concepts of onus of proof used in adversary proceedings are inapplicable in administrative proceedings."

see also : Minister for Immigration and Ethnic Affairs v Wu Shan Liang 1996 70 A.L.J.R. 568

2. Paragraph 5 (a) of the Request states that the fact that Dr. Tankey had been visited by medical advisers from the Commission in 1989, 1991 and 1992, was irrelevant. We agree with the Committee that these surgery visits initiated by the Commission were relevant. They show that Dr. Tankey was made aware, on at least three occasions, that the way he was conducting his practice was causing concern. The pattern did not change.

3. Sub paragraph (b) of the same paragraph refers to too much reliance being placed on a mathematical formula by the Committee and the D.O. in relation to the time the doctor spent with patients. In his address, Senior Counsel for Dr. Tankey expanded this ground by objecting to the use of statistics.

In the recent unreported case of Dr. Garo Artinian v The Commonwealth of Australia Federal Court of Australia N.S.W. Registry, No. NG 861 of 1996. 27 November 1996, where an injunction was sought by Dr. Artinian. Hill J. after discussing earlier authorities, rejected the argument that statistical data was irrelevant.

4. It was put that the three general practitioners who gave evidence before the Committee examined an inappropriate sample of medical records. The samples appear to be in line with comments made about Dr. Tankey's records by the Commission in its referral.

The Review

The Tribunal on review can affirm or set aside the determination, or set aside the determination and make any other determination that the D.O. is empowered to make. The decision is then taken to be the determination of the D.O. s.119(1)(b)(ii) and s.119(3).

The provisions of s.106U under which the D.O. must make a determination appear to embody elements of correction, restitution, rehabilitation and deterrence.

In the discharge of its duty under s.119(1)(a) and the exercise of its powers set out above, the Tribunal is not only conscious of these elements, but also of the need to strike a proper balance between the public interest, the standard of practice and integrity of the medical profession and the right of an individual citizen to obtain services under the medicare scheme from a medical practitioner of his or her choice.

Counselling

The D.O. directed counselling. Dr. Tankey's recognition of the importance of counselling in the past has not been encouraging, and his intransigence against change gives cause for concern. If, however one is serious about re-education and rehabilitation, positive efforts are needed. It is suggested that for adequate vocational guidance and re-training it may be necessary to seek the assistance of Medical Boards and Colleges. For the present we make a strong recommendation that the nominee of the D.P.S.R. be the appropriate officer of the Royal Australian College of General Practitioners. We would hope that, perhaps by way of s.133 of the Act the counselling provisions may be able to be expanded in the future.

Restitution

The D.O. directed repayment by Dr. Tankey to the Commonwealth of $258,277.45. S.106U(1)(c) under which he was acting reads in part

> "...repay to the Commonwealth an amount equivalent to any medicare benefit paid for inappropriate services..."

Counsel for the D.O. argued that the use of the word "any" created a discretion in the D.O. to direct that all, or a percentage only of benefits received, should be re-paid. The argument by Senior Counsel for Dr. Tankey that all inappropriate services should be identified is rejected, this being one of the evils which the amendments have attempted to eliminate.

Having regard to the intention of the provision, namely the restitution to the Commonwealth of moneys i.e. medicare benefits paid and received for inappropriate services, and having given the words in s.106U(1)(c) their ordinary meaning, we do not believe the section imports such a discretion in the D.O. We believe that the use of the word "any" recognizes the various and varying medicare benefits for each and every medical service.

Support for our view that there is no discretion which gives arbitrary power to the D.O. to direct payment of 5%, 33%, 50% or any other amount of benefits, is found by a perusal of the law prior to the amendments. Then the Committee made a report to the Minister. The report had to express the opinion of the Committee as to whether a practitioner had initiated ... or rendered excessive services and a medicare benefit having been paid the Committee could recommend in the then s.105 2A(g) that where the medicare benefit had been paid-

> "...that the amount of the medicare benefit, or a specified part of that amount be payable to the Commonwealth."

S.106U(1)(c) contains no such express provision, nor can it be read into the section.

If there is a discretion as submitted, then we believe that the D.O. has erred in the exercise of such discretion. In any event we are satisfied that in the particular

circumstances of this case Dr. Tankey should repay the total amount of medicare benefits received during the referral period.

Disqualification

The effect of imposing disqualification, either total or partial or both are far-reaching. Their practical effect is a substantial detriment to a medical practitioner, and dislocation to his patients. These are sanctions which must be applied with great care even though disqualification from medicare benefits does not totally deprive a practitioner of a livelihood - other avenues of generating income in the profession remain. Dr. Tankey's conduct is not borderline but extreme, and we endorse the directions concerning disqualification. From the corrective point of view, namely to severely restrict the practice of medicine at the beginning of the period, with a gradual restoration of practice and reputation during the last six months, is a proper one, particularly combined as it is, with counselling assistance.

I certify that this and the 10 preceding pages are true copy of the determination and the reasons for the determination herein of:

The Hon Mrs Margaret Lusink, AM, President;
Dr Peter Joseph, Member;
Professor David Tiller, Member.

Registrar
18 April 1997

Dates of Hearing: 17 - 18 March 1997
Date of Decision: 18 April 1997
Counsel for the Applicant: Mr L Taeffe, of Senior Counsel
Mr R Corrie, Counsel
Solicitor for the Applicant: Mr K Steed of McNamara & Associates
Counsel for the Respondent: Ms R Henderson, Counsel
Solicitor for the Respondent: Ms W Hannon, Australian Government Solicitor