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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 21-0370

LARRY W. BENSON, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.*

PIETSCH, *Judge*: Larry W. Benson appeals through counsel a December 11, 2020, Board of Veterans' Appeals (Board) decision that denied service connection for an acquired psychiatric disorder, to include post-traumatic stress disorder (PTSD). The appeal is timely and the Court has jurisdiction over this matter pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision.

## I. BACKGROUND

Mr. Benson served on active duty in the U.S. Army from April 1968 to March 1969, with 11 days of time lost from November 2 to 12, 1968. Record (R.) at 743. An August 1968 newspaper article stated that on Friday, August 23, 1968, Mr. Benson was the driver in a motor vehicle accident (MVA) that resulted in the death of Mr. Benson's passenger. R. at 492. The article further stated that the state trooper had "said his investigation indicated that Benson was driving the car east when he lost control in a curve, ran off the pavement on the left side, and struck two trees. . . . Benson was charged by the officer with reckless driving." *Id.* Service treatment records show

that on August 23, 1968, after the MVA, Mr. Benson was admitted to Womack Army Hospital, Fort Bragg, North Carolina. R. at 1029-30.

In March 2015, Mr. Benson filed a claim for service connection for PTSD and depression. R. at 955-56. He attached a statement in support of his claim for PTSD, alleging that on August 23, 1968, he was driving a friend; he "ran off [the] right side of [the] road, skidded across the road[,] and hit two pine trees"; his friend died as a result; he was treated for depression in November 1968; and he was later discharged for character and behavior disorders. R. at 957-58.

In a May 2015 VA examination, Mr. Benson was diagnosed with PTSD and alcohol use disorder. R. at 934-42. Mr. Benson reported that his in-service stressor was the MVA that killed his friend. R. at 938. The examiner reported: "[Mr. Benson] stated that he was convicted with involuntary manslaughter and served probation for 5 years. Mr. Benson detailed how the accident occurred. He stated that he sped through a turn and lost control of the car and hit two trees." *Id.* The examiner opined that Mr. Benson's PTSD was at least as likely as not incurred during service.

In June 2015, Mr. Benson described the MVA as occurring because he had looked in his rear view mirror at two men walking beside the road, then ran off the right side of the road, then over-corrected, and then ran off the left side of the road and hit two trees. R. at 745-46. In August 2015, VA requested that the North Carolina Department of Public Safety, State Highway Patrol, supply an accident report from August 23, 1968; the North Carolina Department of Public Safety, State Highway Patrol responded that its record retention system did not extend back to the date of the accident. R. at 609-10. VA then called a representative of the North Carolina Department of Transportation, who notified VA that records of car accidents in 1968 were not attainable. R. at 611.

In December 2015, the VA regional office (RO) determined that Mr. Benson's injuries resulting from the August 23, 1968, MVA were not incurred in the line of duty, R. at 319-21, and the RO denied service connection for PTSD, R. at 268-80, 282-84. Mr. Benson appealed this decision. R. at 266-67. In December 2016, Mr. Benson, through counsel, submitted a sworn affidavit in which he alleged that he "was NOT drinking on the day of the accident"; that "the accident did not occur because of any reckless conduct on my part"; that he "plead[ed] guilty to involuntary manslaughter and served 5 years probation following the accident"; that he "was advised by [his] public defender to plead guilty even though . . . the accident was not caused by [his] own willful or reckless conduct"; and that he followed the advice of his public defender

"despite [his] innocence," because when he pleaded guilty he was young and naive. R. at 231-33. Mr. Benson also asserted that he "did not act willfully or recklessly at the time of the accident," describing the event as occurring

> because two men were walking on the side of the road. The road went slightly up hill and turned slightly to the left. When my vehicle reached the top of the hill, we passed . . . another man walking toward us on the right side of the road. I asked my friend . . . if he knew the other man . . . . At that time, I glanced back at the two men in my rear view mirror and the right side tires of the vehicle ran off the road. The shaking of the car panicked me and, as a result, I over-corrected in an effort to avoid hitting the ditch on the right.

R. at 232. That same day Mr. Benson submitted his sworn statement, VA issued a Statement of the Case (SOC) denying service connection for PTSD. R. at 211-30.

In February 2017, Mr. Benson perfected his appeal by filing a VA Form 9. R. at 203. And his counsel submitted a letter arguing that Mr. Benson's PTSD was incurred in the line of duty and was not the result of willful misconduct. R. at 204-05. His counsel invited VA's attention to the December 2016 sworn affidavit and to lay statements dated 2016 testifying as to Mr. Benson's character, and his counsel stated: "Mr. Benson did plead guilty to involuntary manslaughter and served 5 years probation following the accident, but only due to the ill advice of his public defender at the time." *Id.*

In January 2019, the Board denied service connection for an acquired psychiatric disorder, including PTSD, based on the determination that Mr. Benson was under the influence of alcohol at the time of the August 1968 MVA that resulted in his PTSD. R. at 110-14. Mr. Benson appealed this decision, and in a May 2020 decision, this Court vacated the Board's January 2019 decision and remanded the matter for readjudication. *See Benson v. Wilkie*, No. 19-2083, 2020 U.S. App. Vet. Claims LEXIS 918 (May 18, 2020) (mem. dec.).

In May 2020, Mr. Benson's counsel invited VA's attention to Mr. Benson's "[b]lank criminal record [history,] . . . void of any conviction related to the MVA or otherwise," and to a copy of her search of North Carolina's Department of Public Safety records; a copy of a "[m]edical journal article regarding PTSD and impairment of memory"; and a copy of the PTSD criteria from the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), noting that the PTSD criteria "show[ed] memory impairment and cognitive distortions of self-blame." R. at 24-42.

In the December 2020 decision on appeal, the Board denied service connection for an acquired psychiatric disorder, including PTSD. R. at 5-11. The Board conceded that the May 2015 VA examiner had opined that Mr. Benson's PTSD was related to his in-service August 1968 MVA. R. at 7. The Board also conceded that the Secretary had failed to rebut the "line-of-duty presumption" under 38 U.S.C. § 105(a) on the basis of alcohol or drug abuse. R. at 7, 9. But the Board found that Mr. Benson's psychiatric disability was the result of willful misconduct on the night of August 23, 1968, and that therefore the disability was not incurred in the line of duty. R. at 7, 9-11.

## II. ANALYSIS

Generally, there are three elements that must be satisfied to warrant a grant of service connection: "[T]he veteran must show (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *See Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004). Congress has provided that basic entitlement to service connection is warranted "[f]or disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in . . . service, during a period of war." 38 U.S.C. § 1110. "[B]ut no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs." *Id.*

There is a "line-of-duty presumption" under 38 U.S.C. § 105(a), which states: "An injury or disease incurred during active . . . service will be deemed to have been incurred in line of duty . . . unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs." The Federal Circuit has explained:

> The effect of the line-of-duty presumption on claims for disability compensation can be summarized as follows: If a veteran shows that he suffered an injury or contracted a disease during active military service, that injury or disease will be presumed under section 105(a) to have occurred in the line of duty. That presumption can be rebutted only if the government shows that the injury or disease was caused by the veteran's own willful misconduct or abuse of alcohol or drugs. Thus, if the veteran establishes that he was injured or contracted a disease during active service and the government does not show that the injury or disease resulted from willful misconduct, the veteran has satisfied the second of the three elements of a compensation claim–that a disease or injury was incurred in service.

*Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009) (citations omitted). The Secretary can rebut the line-of-duty presumption, if he shows, by a preponderance of the evidence, that the disease or injury was caused by the veteran's own willful misconduct. *See Thomas v. Nicholson*, 423 F.3d 1279, 1284-85 (Fed. Cir. 2005); *see also* 38 C.F.R. § 3.301(a) (2020).

Under 38 C.F.R. § 3.1(n), "[w]illful misconduct means an act involving conscious wrongdoing or known prohibited action." Willful misconduct "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences," and "mere technical violation of police regulations or ordinances will not per se constitute willful misconduct." 38 C.F.R. § 3.1(n)(1)-(2) (2020). And "[a] service department finding that injury, disease or death was not due to misconduct will be binding on [VA] unless it is patently inconsistent with the facts and the requirements of laws administered by [VA]." 38 C.F.R. § 3.1(n).

The Court reviews the Board's findings of fact, including the Board's determinations concerning the probative value of the evidence, for clear error. 38 U.S.C. § 7261(a)(4); *Hickson v. Shinseki*, 23 Vet.App. 394, 404 (2010). And the Board's decision must include a written statement of the reasons or bases for its findings and conclusions, adequate to enable a claimant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

On appeal, Mr. Benson argues for reversal of the Board's denial of service connection for PTSD, asserting that the Board erred when it weighed the evidence. In response, the Secretary urges the Court to affirm the Board's decision.

A. The May 2015 Report of Speeding

Mr. Benson argues that the Board should not have relied on the May 2015 VA examination report to the extent the examiner stated that Mr. Benson used the word "sped" to describe his conduct in the MVA, when he purportedly never used that word. *See* Appellant's Brief (Br.) at 2, 6. He asserts that the "examiner was summarizing what he had been told." *Id.* at 6. And he asserts that the Board should not have found this summary probative, when considering it in conjunction with the remaining evidence of record; he argues that evidence in the record contradicts the report of speeding around the turn. *Id.* at 5-7. The Secretary responds that the Board did not clearly err by relying on the May 2015 VA examination report to the extent it showed that Mr. Benson was speeding. *See* Secretary's (Sec.) Br. at 8-10.

The Court is not convinced that the Board erred by relying on the May 2015 VA examination report's record of Mr. Benson's description of the MVA. The Board found that "at the May 2015 VA examination, the Veteran admitted that he 'sped through a turn and lost control of the car and hit two trees.'" R. at 10 (quoting the May 2015 VA examination report). This finding is supported by the record. R. at 938. And Mr. Benson does not identify any affirmative evidence showing that he did not actually state to the examiner that he had been speeding through a turn, nor any evidence showing that he had ever denied speeding. The Court notes that it has held that

> although the Board may reject a medical opinion that is based on facts provided by the veteran that have previously been found to be inaccurate [under *Reonal v. Brown*, 5 Vet.App. 458 (1993)] and may reject such a medical opinion because other facts present in the record contradict the facts provided by the veteran that formed the basis for the opinion [under *Swann v. Brown*, 5 Vet.App. 229 (1993)], the Board may not disregard a medical opinion solely on the rationale that the medical opinion was based on a history given by the veteran.

*Kowalski v. Nicholson*, 19 Vet.App. 171, 179 (2005). And to the extent Mr. Benson insists that the absence of other evidence of speeding disputes the Board's finding of speeding, "the Board may not consider the absence of evidence as substantive negative evidence" disputing a fact. *See Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011).

Accordingly, the Court is not definitely and firmly convinced that Mr. Benson did not report to the May 2015 VA examiner that he had sped through the turn and that the Board clearly erred by relying on the May 2015 VA examiner's recording of Mr. Benson's description of the MVA. *See Padgett v. Nicholson*, 19 Vet.App. 133, 147 (2005) (en banc) (holding that the Court should reverse the Board's denial of benefits when the Court has a definite and firm conviction that a mistake has been made); *Vazquez-Flores v. Shinseki*, 24 Vet.App. 94, 104 (2010) (holding a Board finding of fact clearly erroneous under *Padgett*, 19 Vet.App. 133); *Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 121 (2009) (reversing a Board determination because the Court had a "definite and firm conviction that the Board's finding that the evidence weighed against a finding" was "clearly erroneous").

B. The Board's Weighing of the Evidence

Mr. Benson asserts that VA "did not present enough credible evidence" of willful misconduct to rebut the line-of-duty presumption, and that the Board erred by finding "the preponderance of the evidence establishes that the Veteran's August 1968 [MVA] was caused by his own willful misconduct." *See* Br. at 2. He argues why he thinks the Board did not properly

weigh the evidence, including by identifying records purportedly contradicting the Board's finding of willful misconduct. *Id.* at 5-11. In response, the Secretary argues that Board did not clearly err when it weighed the evidence in the record before it, and that Mr. Benson identifies no evidence contradicting the Board's finding of willful misconduct.

The Court is not convinced that the Board erred when it found that the preponderance of the evidence established that the MVA was caused by willful misconduct. The Board first acknowledged the definition of "willful misconduct" under § 3.1(n), and the Board explained that North Carolina law in 1968 established that reckless driving was not a mere technical violation. R. 7, 10. The Board explained that in 1968, North Carolina defined "reckless driving" as driving "(1) carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, or (2) . . . operat[ing] a motor vehicle without caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property." R. at 10. And the Board found that the August 1968 newspaper article reflecting that Mr. Benson was charged with reckless driving, Mr. Benson's May 2015 report of speeding around a turn, and his reports of looking in his rear view mirror instead of paying the necessary attention to the road, and of overcorrecting to avoid a ditch, were probative evidence establishing that the MVA was caused by willful misconduct as defined by VA. R. at 10. Then, the Board found that Mr. Benson's reports of a conviction for involuntary manslaughter and the newspaper evidence of a reckless driving charge were probative evidence of willful misconduct. R. at 10-11. The Board noted: "Involuntary manslaughter is a killing in which there 'is no intention to kill or do grievous bodily harm, but that the killing is committed with criminal negligence.'" *Id.* (quoting BLACK'S LAW DICTIONARY 976 (7th ed. 1999)). And the Board found: "Here, while there is no deliberate intent to kill, there is certainly evidence of criminal negligence." R. at 11.

First, Mr. Benson argues that the Board erred by finding the evidence showed a conviction of involuntary manslaughter and a charge of reckless driving. *Id.* at 2-3, 7-8. But Mr. Benson fails to identify any "evidence on record that directly contradicts that [he] was convicted of [i]nvoluntary [m]anslaughter" and that he had been charged for reckless driving. *Cf.* Br. at 3, 9. To the extent Mr. Benson emphasizes that VA found no formal court records showing a conviction of involuntary manslaughter or a charge of reckless driving, "the Board may not consider the absence of evidence as substantive negative evidence" disputing a fact. *See Buczynski*, 24 Vet.App. at 224. The Board is presumed to have considered the evidence showing that North Carolina's Department

of Public Safety did not retain records dated as far back as August 1968. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). And, as required by law, the Board analyzed the probative value of the evidence in the record before the Board, to include Mr. Benson's own reports of an involuntary manslaughter conviction and the newspaper article showing a charge of reckless driving. *See* 38 U.S.C. § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."); *Wise v. Shinseki*, 26 Vet.App. 517, 524 (2014) (explaining that "the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant").

Second, Mr. Benson argues that the Board should have presumed him innocent of reckless driving because no evidence confirmed he was convicted of that charge. Br. at 7-8. He also argues that North Carolina's definition of "reckless driving" does not necessarily support a finding of willful misconduct (under VA's definition of "willful misconduct"). *Id.* at 10. But even if the Board had acknowledged that there was no evidence of a conviction of reckless driving under North Carolina law, Mr. Benson has not demonstrated how that would have affected the outcome of the Board's determination that the preponderance of the evidence established that the MVA was due to his willful misconduct as defined by VA, in light of how the Board relied on Mr. Benson's own accounts of his actions resulting in the MVA and on his own report of an involuntary manslaughter conviction. *See generally* 38 U.S.C. § 7261(b)(2) (requiring the Court to take due account of the rule of prejudicial error); *Simmons v. Wilkie*, 30 Vet.App. 267, 279-80 (2018), *aff'd*, 964 F.3d 1381 (Fed. Cir. 2020) (explaining that the appellant generally bears the burden of demonstrating prejudice by showing that the Board's error "prevented [him] from effectively participating in the adjudicative process" or "affected or could have affected the outcome of the determination"). And Mr. Benson fails to identify any evidence in the record that affirmatively contradicts his own accounts of his actions resulting in the MVA or that refutes his report of an involuntary manslaughter conviction. He therefore identifies no positive evidence in the record that could have changed the outcome of the Board's preponderance-of-the-evidence determination. *Cf.* 38 U.S.C. § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.").

Mr. Benson does identify November 1968 service records. Br. at 9. But those records show that after the MVA, Mr. Benson was diagnosed with "[e]motional instability reaction" with manifestations that had been present most of his life, including before the MVA; that there was no precipitating stress for this diagnosis other than routine military duty; and that the diagnosis of emotional instability reaction had not been incurred in the line of duty and was not due to Mr. Benson's own misconduct. R. at 325-26. The November 1968 service records cannot possibly constitute favorable evidence that the Board should have discussed when analyzing whether the MVA was due to willful misconduct, because these records show psychiatric symptoms that began before the MVA, as well as a psychiatric diagnosis that was not caused by the MVA and that was not incurred in the line of duty. *See generally Newhouse*, 497 F.3d at 1302; *Wise*, 26 Vet.App. at 524. Mr. Benson does not argue that the Board otherwise erred in its treatment of these November 1968 records.

Third, Mr. Benson apparently argues that the Board should have rejected as not credible his own reports of being convicted of involuntary manslaughter, because he had submitted evidence showing how PTSD can affect memory and cognition. *See* Br. at 8 (referencing the May 2020 submission of copies of a medical journal article and DSM-5 diagnostic criteria for PTSD). Mr. Benson's counsel argues that "it is not unreasonable to conclude that [Mr. Benson] was never actually convicted of [i]nvoluntary [m]anslaughter, despite his belief that he was." *Id.* Mr. Benson's counsel cites no medical evidence to support her lay assertion concerning the significance of the medical journal article and the copy of the DSM-5 PTSD criteria, nor does she assert that she has the medical expertise to render an opinion regarding the significance of that evidence. *See Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) (explaining that a counsel's "[l]ay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court"). Further, neither Mr. Benson nor Mr. Benson's counsel argued to the Agency that Mr. Benson's reports of a conviction should be rejected as not credible because of the potential impact of PTSD on his memory and cognition. Nor has Mr. Benson argued that this issue had been reasonably raised by the evidence of record. Therefore, this question as to the credibility of Mr. Benson's reports of a conviction was not raised to VA, and the Board was not required to discuss it. *See Robinson v. Peake*, 21 Vet.App. 545, 553-54 (2008) (generally requiring VA to address theories and issues that are reasonably raised by the record or raised by a sympathetic reading of the claimant's filings); *see also Comer v. Peake*, 552 F.3d 1362, 1369 (Fed.

Cir. 2009) (explaining that the Federal Circuit has "held that the duty to construe a veteran's filings sympathetically does not necessarily apply when a veteran is represented by an attorney" before the Agency).

Though Mr. Benson disagrees with the Board's weighing of the evidence, for the above reasons, and in light of the Board's explanation, the Court is not definitely and firmly convinced that the Board erred when it found that the preponderance of the evidence establishes that the August 1968 MVA was the result of willful misconduct. The Court therefore will not reverse that Board determination. *See Padgett*, 19 Vet.App. at 147; *Vazquez-Flores*, 24 Vet.App. at 104; *Van Valkenburg*, 23 Vet.App. at 121. Accordingly, Mr. Benson has not demonstrated that the Board erred when it determined that the second element of service connection had not been satisfied, and when it denied entitlement to service connection for an acquired psychiatric disorder, including PTSD; the Court therefore will affirm the Board's decision. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of demonstrating error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000).

## III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings before the Court, and the parties' briefs, the December 11, 2020, Board decision denying service connection for an acquired psychiatric disorder, including PTSD, is AFFIRMED.

DATED: February 18, 2022

Copies to:

Malory O. Windham, Esq.

VA General Counsel (027)