BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
MELVIN A. CREDIFORD

DOCKET NO. 10-37 705) DATE JUNE 03, 2014
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On appeal from the
Department of Veterans Affairs Regional Office in Oakland, California

THE ISSUE

Entitlement to service connection for a cervical spine disability.

REPRESENTATION

Veteran represented by: Military Order of the Purple Heart of the U.S.A.

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

L. Jeng, Counsel

IN THE APPEAL OF [redacted]
MELVIN A. CREDIFORD

INTRODUCTION

The Veteran served on active duty in the United States Coast Guard from August 1983 to August 1985, and from January 1990 to March 1991.

This case comes before the Board of Veterans' Appeals (the Board) on appeal from a September 2005 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Oakland, California.

In August 2012, the Veteran presented testimony in a videoconference hearing before the undersigned. A copy of the transcript has been associated with the claims folder.

The Board has reviewed the documents in both the paper claims file and the electronic claims file in rendering this decision.

FINDING OF FACT

1. A January 1985 motor vehicle accident was caused by the Veteran's alcohol consumption and excessive speed.

2. An April 1985 memorandum from the Commanding Officer of the Coast Guard Station Grays Harbor determined that the Veteran's injuries from the accident were not a result of his own misconduct and were incurred in the line of duty.

3. A December 1985 memorandum from the Commander of the Thirteenth Coast Guard District determined that the Veteran's injuries from his November 1985 accident were not incurred in the line of duty and were due to his own misconduct.

4. The Veteran is presumed to have been intoxicated at the time of the accident which constitutes willful misconduct.

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CONCLUSION OF LAW

Injuries sustained in a January 1985 motor vehicle accident were the result of the Veteran's own willful misconduct and were not incurred in the line of duty. 38 U.S.C.A. §§ 105 , 1101, 1110, 1112, 1113, 1131, 1137 (West 2002); 38 C.F.R. §§ 3.1, 3.301 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

In correspondence dated in December 2004, prior to the September 2005 rating decision, the RO satisfied its duty to notify the Veteran under 38 U.S.C.A. § 5103(a) (West 2002) and 38 C.F.R. § 3.159(b) (2013), known as the Veterans Claims Assistance Act of 2000 (VCAA). Specifically, the RO notified the Veteran of: information and evidence necessary to substantiate the claim; information and evidence that VA would seek to provide; and information and evidence that the Veteran was expected to provide. In light of the Board's denial of the Veteran's claim, no disability rating or effective date will be assigned, so there can be no possibility of any prejudice to him under the holding in *Dingess v. Nicholson*, 19 Vet. App. 473 (2006).

VA has done everything reasonably possible to assist the Veteran with respect to his claim for benefits in accordance with 38 U.S.C.A. § 5103A (West 2002) and 38 C.F.R. § 3.159(c) (2012). All identified and available treatment records have been secured. The Veteran's service treatment records and post-service medical records are in the claims folder. The Board notes that the Veteran was not afforded a VA examination with a medical opinion addressing the nature and etiology of any current cervical spine disability. *See McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006); *see also* 38 U.S.C.A. § 5103A(d)(2) (West 2002); 38 C.F.R. § 3.159(c)(4) (2013). However, in the present case, the pertinent issue is whether any injury was incurred in the line of duty and was not due to willful misconduct. *See* 38 U.S.C.A. §§ 105, 1131 (West 2002); 38 C.F.R. §§ 3.1(m),(n), 3.301 (2013). In the present

decision, the Board has determined that the proximate cause of his injures was the Veteran's own willful misconduct and intoxication in service. Under 38 C.F.R. § 3.159(d)(1), VA does not have to provide assistance to the claimant, including a VA examination, due to the claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of Veteran status, or other lack of legal eligibility. Therefore, a VA examination is not required here, and in fact, would serve no useful purpose in the instant case.

As noted above, the Veteran presented testimony before the undersigned in June 2007. In this regard, in *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), the United States Court of Appeals for Veterans Claims (Court) held that 38 C.F.R. § 3.103(c)(2) requires that the RO official or Veterans Law Judge who conducts a hearing fulfill two duties to comply with this regulation. These duties consist of: (1) fully explaining the issues and (2) suggesting the submission of evidence that may have been overlooked. This was done during the August 2012 hearing before the Board. Neither the Veteran nor his representative has asserted that VA has failed to comply with 38 C.F.R. § 3.103(c)(2), nor have they identified any prejudice in the conducting of the Board hearing. Thus, the duties to notify and assist have been met.

Analysis

The Veteran seeks service connection for a cervical spine disability, which he contends was incurred during an in-service motor vehicle accident.

Service connection may be granted if it is shown the Veteran develops a disability resulting from an injury sustained or disease contracted in the line of duty, or for aggravation during service of a pre-existing condition beyond its natural progression. 38 U.S.C.A. §§ 1110, 1131, 1153; 38 C.F.R. §§ 3.303, 3.306.

Generally, service connection requires evidence of a current disability with a relationship or connection to an injury or disease or some other manifestation of the disability during service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303; *Boyer v. West*, 210 F.3d 1351, 1353 (Fed. Cir. 2000).

However, service connection can only be established when a disability or cause of death was incurred or aggravated in the line of duty, and not the result of the service member's own willful misconduct or, for claims filed after October 31, 1990, the result of his or her abuse of alcohol or drugs. 38 U.S.C.A. §§ 105 , 1131; 38 C.F.R. §§ 3.1(m), (n) , 3.301(a). *See also* VAOPGCPREC 7-99 (June 9, 1999); VAOPGCPREC 2-98 (Feb. 10, 1998).

Willful misconduct means an act involving conscious wrongdoing or known prohibited action. It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences. 38 C.F.R. § 3.1(n)(1). Mere technical violations of police regulations or ordinances will not per se constitute willful misconduct, and willful misconduct will not be determinative unless it is the proximate cause of injury, disease, or death. 38 C.F.R. § 3.1(n)(3). 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 simple drinking of alcoholic beverage is not of itself willful misconduct; however, the deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. 38 C.F.R. § 3.301(c)(2). Alcohol abuse means the use of alcoholic beverages over time, or such excessive use at any one time, sufficient to cause disability to or death of the user. 38 C.F.R. § 3.301(d).

The VA Adjudication Procedure Manual, M21-1MR, provides further guidance with regard to willful misconduct determinations and alcohol consumption. A person is held responsible for disabling injuries or death that resulted directly and immediately from indulgence in alcohol on an individual occasion. Willful misconduct in cases involving alcohol consumption is the willingness to achieve a drunken state and, while in this condition, to undertake tasks for which the person is

unqualified, physically and mentally, because of the resulting intoxication. Determinations of willful misconduct in such instances depend on the facts found. Exercise care to guard against findings of willful misconduct on the basis of inconclusive evidence. An adverse determination requires that there must be excessive indulgence as the proximate cause of the disability or death in question. *See* VA Adjudication Procedure Manual, M21-1MR, Part III, Subpart v, Chapter 1, Section D, Topic 16, Blocks a and b.

In determining willful misconduct, the M21-1MR also indicates that laboratory tests bearing on the issue of alcoholic intoxication together with all other facts and circumstances should be considered. A table was developed by the National Safety Council (NSC) in 1938. In 1960, Blood Alcohol Concentration (BAC) for "under the influence" was reduced from .15 to .10, and then reduced again to .08 in 2004. Under 23 U.S.C.A. § 163, BAC of .08 is a per se violation of driving while intoxicated. By July of 2005, all states, Washington D.C., and Puerto Rico had adapted BAC of .08 as the legal level intoxication. If an individual's BAC is .08 or more, a presumption is established that the person was under the influence of intoxicating liquor. *See* VA Adjudication Procedure Manual, M21-1MR, Part III, Subpart v, Chapter 1, Section D, Topic 16, Block c.

38 U.S.C.A. § 105(a) establishes a presumption in favor of a finding of line of duty. If it is determined that an exception to line of duty does apply (such as willful misconduct), and the claim is denied solely on the basis of such exception, it must be established that the denial of the claim was justified by a preponderance of the evidence. *Thomas v. Nicholson*, 423 F.3d 1279, 1284-85 (Fed. Cir. 2005); *Daniel v. Brown*, 9 Vet. App. 348, 351 (1996); *Smith v. Derwinski*, 2 Vet. App. 241, 244 (1992). Additionally, the element of knowledge of or wanton or reckless disregard of the probable consequences must be specifically addressed. *Myore v. Brown*, 9 Vet. App. 498, 503 -04 (1996).

Review of the record reflects that in January 1985 after consuming several alcoholic beverages, the Veteran was involved in a motor vehicle accident requiring him to be extracted from his car by the local fire department and ambulance service. He was taken to the emergency room and treated for minor cuts and bruises, and x-rays

revealed no sustained injuries. He was taken from the hospital to the police department and given a Breathalyzer test approximately three and half hours after his last drink. His blood alcohol level was measured at 0.12 percent of blood alcohol by weight. He was charged with driving a motor vehicle while under the influence of alcohol as the legal limit for DWI in the state was 0.10 percent of blood alcohol by weight. In April 1985, the Veteran pled not guilty to the DWI charge and the charge was reduced to negligent driving to which he plead guilty and paid a $250.00 fine.

In an April 1985 Memorandum from the Commanding Officer of the Coast Guard Station Grays Harbor, it was noted that the bartender who served the Veteran his drinks did not observe the Veteran in an intoxicated condition, he was not wearing his seat belt while driving on government property or on the public roadway, he failed to reduce his speed as posted, he was suffering from fatigue from working a 12 hour shift as well as the effects of alcohol, his injuries were temporary, his blood alcohol content at the time of the accident could not be determined or reasonably reconstructed, it could be assumed that his blood alcohol content was higher at the time of the accident, and the Veteran's injuries were not a result of his own misconduct and were incurred in the line of duty. It was recommended that no disciplinary actions be taken against the Veteran.

In December 1985, the Commander of the Thirteenth Coast Guard District issued a memorandum whereby it was determined that the injuries the Veteran sustained in January 1985 were not incurred in the line of duty and were due to his own misconduct.

After reviewing the record, the Board finds that the preponderance of the evidence is against the Veteran's claim. As set forth above, there is a legal presumption that an injury incurred during active service was incurred in the line of duty, unless the injury was a result of the person's own willful misconduct. In other words, a finding of "willful misconduct" negates the "line of duty" presumption. The threshold question before the Board, therefore, is whether the Veteran's willful misconduct caused the accident which resulted in his injuries.

The evidence of record reflects that a blood alcohol test performed several hours after the accident revealed that the Veteran's blood alcohol level was 0.12. The Board notes that a blood alcohol percentage of 0.08 or more raises a presumption that the person was under the influence of intoxicating liquor under VA's Adjudication Procedure Manual, M21-1MR, Part III, Subpart v, Chapter 1, Section D, Topic 16, Block c. (Even when considering that in 1985, the standard for under the influence would have been 0.10, the Veteran would still have been over the intoxication level. *See* VA's Adjudication Procedure Manual M21-1, (M21-1), Part IV, Chapter 11, 11.04(c)(2) (using the standards of the National Safety Council , U.S. Department of Transportation and the Departments of the Army, the Navy and the Air Force)). It is significant that the Veteran's blood alcohol level was 0.12 several hours after his accident as pointed out in the April 1985 Memorandum from the Commanding Officer of the Coast Guard Station Grays Harbor that the Veteran's blood alcohol level would have been higher at the time of the accident. Hence, the Board finds that the evidence clearly establishes that the Veteran was intoxicated at the time of the accident.

The law is clear that, if intoxication results proximately and immediately in disability or death, the disability or death will be considered to be the result of the person's own willful misconduct. *See* 38 C.F.R. § 3.301(c)(2); *Gabrielson v. Brow*n, 7 Vet. App. 36, 41 (1994). The evidence in this case clearly shows that the Veteran's intoxication was the proximate cause of the accident. Although the Veteran argues that his charges were dropped to the lesser charge of negligent driving due to his fatigue, he acknowledges he consumed alcohol. He further contends that the officer administering the Breathalyzer stated to him that he knew that the Veteran was not drunk and was surprised at the test results. However, the Board is more persuaded by the actual results of the test than the Veteran' s contentions in that regard.

The VA has recognized that a blood alcohol content of the degree which the Veteran demonstrated on the night of his accident raises a presumption of intoxication which has not been rebutted in this case. The investigation report likewise concluded that the Veteran's alcohol consumption, in part, resulted in the accident.

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In conclusion, the Board finds that the preponderance of the evidence shows that the Veteran was driving his car at an excessive rate of speed after consuming alcohol at the time of the accident. These actions proximately and immediately caused his car accident. Thus, the Board finds that the January 1985 motor vehicle accident was caused by the Veteran's alcohol consumption and constitutes willful misconduct. As such, injuries sustained in that accident were not incurred in the line of duty, and the appeal is denied.

ORDER

The appeal is denied.

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A. C. MACKENZIE
Acting Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (888) 838-7727.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).