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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 14-2018

MELVIN A. CREDIFORD, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Judge*.

MEMORANDUM DECISION

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

DAVIS, *Judge*: U.S. Coast Guard veteran Melvin A. Crediford appeals through counsel from a June 3, 2014, Board of Veterans' Appeals (Board) decision that denied disability benefits for a cervical spine disability. For the following reasons, the Court will affirm the June 2014 Board decision.

I. BACKGROUND

Mr. Crediford served on active duty from August 1983 to August 1985, and from January 1990 to March 1991. In January 1985, he was involved in an in-service motor vehicle accident. In April 1985, the Coast Guard issued an investigation report of the accident. The report noted that, on the day of the accident, Mr. Crediford had worked from approximately 6:30 a.m. to 6:30 p.m. After his shift, he went to the Westport Veterans of Foreign Wars (VFW) Club and consumed alcohol. After departing the VFW, Mr. Crediford's "vehicle failed to negotiate [a] sharp 90 degree turn . . . proceeded across the corner of the turn, left the roadway, hit a shallow ditch, rolled over, and came to a rest on its top." Record (R.) at 292. Mr. Crediford was extracted from his car, taken to a hospital for treatment, and then taken to a police station where he was given a breathalyzer test. The test, which was administered approximately three and a half hours after Mr. Crediford last consumed

alcohol, registered a .12% blood alcohol level. R. at 293.

The April 1985 report opined that at the time of the accident, Mr. Crediford was "suffering the effect of fatigue as well as alcohol, having worked in the galley for 12 hours" that day. R. at 294. The report explained that Mr. Crediford's blood alcohol content at the time of the accident could not be determined, but that "one can assume [Mr. Crediford's] blood alcohol content was higher at the time of the accident." *Id.* The report concluded that Mr. Crediford's injuries were not a result of his own misconduct and were incurred in the line of duty.

In December 1985, however, the commanding officer for the Thirteenth Coast Guard District issued a memorandum explaining that "the Commandant approved a finding that the injuries sustained by [Mr.] Crediford on 20 January 1985 were 'not incurred in the line of duty and were due to his own misconduct.'" R. at 316. Based in part on this memorandum, the Board denied Mr. Crediford's June 2004 claim for a cervical spine condition associated with the in-service motor vehicle accident. The Board determined that the proximate cause of the disability was Mr. Crediford's own willful misconduct and intoxication. *See* R. at 5. This appeal followed.

II. ANALYSIS

Mr. Crediford argues that the Board's statement of reasons or bases is inadequate because it failed to consider "clear evidence of fatigue as a primary cause of the accident." Appellant's Reply Brief (Br.) at 2-3 (arguing that the Board "never once mentions fatigue, or anything relating to fatigue, in its decision"). He also argues that the Board should have applied the benefit of the doubt rule.

A finding of willful misconduct, defined as "an act involving conscious wrongdoing or known prohibited action," negates the statutory presumption that a disease or injury was incurred in the line of duty. *Daniels v. Brown*, 9 Vet.App. 348, 351 (1996); 38 C.F.R. § 3.1(n) (2015). A veteran cannot receive VA compensation for a disability that is the result of willful misconduct or abuse of alcohol or drugs. 38 U.S.C. §§ 105(a), 1110. The Board's determination that a disability is the result of willful misconduct is a finding of fact that must be supported by a preponderance of the evidence. *Thomas v. Nicholson*, 423 F.3d 1279, 1283 (Fed. Cir. 2005). The Court reviews such a finding under the "clearly erroneous" standard of review. *Daniels*, 9 Vet.App. at 351; *see* 38 U.S.C. § 7261(a)(4).

Under this standard, "if there is a 'plausible' basis in the record for the factual determinations of the [Board], even if this Court might not have reached the same factual determinations, we cannot overturn them." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Further, the Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions of fact and law that adequately enables an appellant to understand the basis for the Board's decision and facilitates review by this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 57. To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for its rejection of favorable material evidence. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

In its decision here on appeal, the Board provided a detailed account of the record. Contrary to Mr. Crediford's argument, the Board noted that the April 1985 report found he was "*suffering from fatigue* from working a 12 hour shift as well as the effects of alcohol" at the time of the accident. R. at 9 (emphasis added); *see* R. at 294. Accordingly, and because the Board is presumed to have considered all evidence of record, the Court rejects Mr. Crediford's argument that the Board overlooked evidence of fatigue. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007).

Despite evidence of fatigue, however, the Board concluded that a preponderance of evidence weighed against Mr. Crediford's claim. It noted that the December 1985 memorandum concluded that Mr. Crediford's injuries were due to his own misconduct (*see* R. at 316), and discussed the April 1985 report in depth. The Board noted that the 1985 report revealed a blood alcohol level of .12% several hours after the accident, which raised a presumption that Mr. Crediford was under the influence of alcohol. *See* VA ADJUDICATION PROCEDURE MANUAL, M21-1MR, pt. III, subpt. v, ch. 1, sec. D, topic 16, block c (noting that a blood alcohol concentration of .08% or higher establishes the presumption that a person was under the influence of intoxicating liquor). The Board also noted that Mr. Crediford challenged the results of the breathalyzer test, but explained that it is "more persuaded by the actual results of the test" than by Mr. Crediford's contentions. R. at 10.

Mr. Crediford argues that the Board erred in finding the presumption of intoxication triggered because he challenged the breathalyzer test results, and because the "actual results" of the breathalyzer are not in the record. He also notes that the April 1985 report concluded that his blood

alcohol content at the time of the accident could not be determined. *See* R. at 294 (stating that Mr. Crediford's blood alcohol content "at the time of the accident cannot be determined nor can it be reasonably . . . reconstructed").

Although Mr. Crediford is correct that the results from the breathalyzer test taken after the accident are not a part of the record, it is clear from the Board decision that the Board relied on the April 1985 report documenting the breathalyzer test results. *See* R. at 9-10, 293. Mr. Crediford has not demonstrated that the Board clearly erred by relying on the breathalyzer test results documented in the April 1985 report; rather, he merely points out that he disputed the results of the breathalyzer test in criminal proceedings related to the accident. *See* Appellant's Br. at 6 (citing R. at 25 (testimony from Mr. Crediford that he "hired an attorney to defend me in court as to my contention that the breathalyzer test was inaccurate")); *see also* R. at 45 (Mr. Crediford's testimony that "a breathalyzer test cannot be counted on to be accurate"). Further, although the 1985 report noted that Mr. Crediford's blood alcohol level at the time of the accident could not be determined, it also concluded that "one can assume [Mr. Crediford's] blood alcohol content was higher at the time of the accident" based on the later breathalyzer test. R. at 294. Mr. Crediford points to no evidence undermining this report or the Board's reliance on it. Rather, as the Board noted, Mr. Crediford admitted to drinking alcohol prior to the accident. R. at 10.

Accordingly, the Board provided an adequate statement of reasons or bases, and its finding that Mr. Crediford's injury is a result of his willful misconduct is plausible in light of the record as a whole. *See Daniels*, 9 Vet.App. at 351; *Gilbert*, 1 Vet.App. at 53. Further, because the Board determined that a preponderance of the evidence weighed against Mr. Crediford's claim, the benefit of the doubt rule is not applicable. *See Gilbert*, 1 Vet.App. at 56 (explaining that the benefit of the doubt rule has no application when a preponderance of evidence weights against a veteran's claim); *see* 38 U.S.C. § 5107(b) (stating that the Secretary shall give the benefit of the doubt to a claimant when there is "an approximate balance of positive and negative evidence").

III. CONCLUSION

Based on the foregoing, the Court AFFIRMS the Board's May 5, 2014, decision.

DATED: August 31, 2015

Copies to:

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