

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

Vet. App. No. 16-80

FRANKIE MCFADDEN,

Appellant

vs.

ROBERT A. MCDONALD
Secretary of Veterans Affairs
Appellee

On Appeal From the Board of Veterans' Appeals

Brief of the Appellant Frankie McFadden

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUES PRESENTED	1
STATEMENT OF THE CASE.....	2
I. JURISDICTION STATEMENT	2
II. NATURE OF THE CASE	2
FACTUAL BACKGROUND	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Board’s adverse finding of material fact that Mr. McFadden did not set foot in the Republic of Vietnam was clearly erroneous.....	6
1. The presumption of regularity does not apply in this case.....	7
2. The Board has failed to adequately discuss the actual evidence supporting Mr. McFadden’s claim.	10
II. The Board’s adverse finding of material fact should be reversed.....	11
CONCLUSION AND RELIEF REQUESTED.....	14

TABLE OF AUTHORITIES

Cases

<i>DeLoach v. Shinseki</i> , 704 F.3d 1370, 1380 (Fed.Cir.2013)	12
<i>Gabrielson v. Brown</i> , 7 Vet.App. 36 (1994).....	6
<i>Gutierrez v. Principi</i> , 19 Vet.App. 1, 10 (2004).....	12
<i>Kyhn v. Shinseki</i> , 24 Vet.App.228 (2011)	7
<i>Marsh v. Nicholson</i> , 19 Vet.App.381, 386 (2005)	7
<i>Pacheco v. Shinseki</i> , 26 Vet.App.413 (2014).....	12
<i>Pullman-Standard v. Swini</i> , 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66, (1982)	12
<i>Romanowsky v. Shinseki</i> , 26 Vet.App.289, 295 (2013).....	6, 12
<i>United States v. U.S. Gypsum Co.</i> , 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed.746 (1948).....	6, 12

Statutes

38 U.S.C. § 5107(b)	6
38 U.S.C. § 7104(a)	6
38 U.S.C. § 7252	2
38 U.S.C. § 7261(a)(4).....	11

Record Before the Agency

R.6 (R.1-16) (2015 BVA decision)..... 11, 12

R.8 (R.1-16) (2015 BVA decision)..... 7, 9

R.9 (R.1-16) (2015 BVA decision)..... 8, 11, 12

R.22 (DPRIS response)..... 4

R.23 (R.23-25) (veteran's statement)..... 3

R.126 (R.108-165) (DD214)..... 2

R.130 (R.108-165) (record of discharge) 9

R.131 (R.108-165) (transfer record)..... 2, 9, 13

R.133 (R.108-165) (administrative remarks)..... 9

R.184 (R.180-185) (lay statement)..... 3, 11

R.272 (R.269-272) (treatise information) 3, 10

R.324 (R.321-337) (DRO hearing transcript) 4

R.326 -332 (R.321-337) (DRO hearing transcript). 5

R.390 (NPRC response) 3

R.656-666 (R.649-669) (medical records) 2

R.670 (DPRIS response)..... 4, 8

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ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
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Appellee)	

On Appeal From the Board of Veterans' Appeals

Brief of the Appellant Frankie McFadden

ISSUES PRESENTED

The Board based its decision on a “presumption of regularity” despite the lack of evidence of a regular consistent procedure that would give rise to the presumption. Was the Board’s finding clearly erroneous?

The Board found that all pertinent evidence was of record and explicitly weighed that evidence to reach its conclusion. If the Court finds that the Board’s conclusion was clearly erroneous, is the appropriate remedy reversal?

In the alternative, should the case be remanded so that the Board can provide adequate reasons and bases for its conclusion that a presumption of regularity rendered the veteran's lay evidence not credible?

STATEMENT OF THE CASE

I. JURISDICTION STATEMENT

The Court's jurisdiction in this matter is based on 38 U.S.C. § 7252.

II. NATURE OF THE CASE

Appellant Frankie McFadden ("the veteran" or "the appellant") appeals from a December 7, 2015, decision of the Board of Veterans' Appeals (Board or BVA) that denied entitlement to service connection for prostate cancer, status-post prostatectomy, to include as due to herbicide exposure.

FACTUAL BACKGROUND

Frankie McFadden served on active duty in the Navy from February 1971 to February 1973. R.126 (R.108-165). Mr. McFadden was transferred from the USS America on January 25, 1973, for separation, and reported to Jacksonville, FL, on January 30, 1973. R.131 (R.108-165). Mr. McFadden underwent a "radical retropubic prostatectomy" in April 1999 for prostate cancer. R.656-666 (R.649-669).

The question at issue in this case is whether Mr. McFadden set foot in the Republic of Vietnam and thus was presumptively exposed to Agent Orange.

Mr. McFadden stated that he left the USS America on a small mail plane for Da Nang, at night, around the end of January 1973. He slept in transit housing in Da Nang that night, and then was moved to another location in Da Nang the following night because of incoming rocket fire. When he was able to leave Da Nang, he was transferred to Manila and from there to the United States. R.23 (R.23-25). A buddy statement from Mr. Connie Lewis stated that Mr. McFadden did leave the ship on a small mail plane, to return to the States, rather than returning by ship. R.184 (R.180-185).

Mr. McFadden submitted pages from an article regarding air base defense in Vietnam from 1968-1973, showing attacks in Da Nang on January 26 and 27, 1973. R.272 (R.269-272).

In 2007, VA requested information from the National Personnel Records Center (NPRC) regarding Mr. McFadden's presence in the Republic of Vietnam. A 2007 NPRC response stated that it was unable to determine whether he was actually in Vietnam, but that the USS America was in the "official waters" of Vietnam from January 9, 1973, to January 25, 1973. R.390.

A 2009 Defense Personnel Records Information Retrieval System (DPRIS) response indicated a review of command files, showing that the USS America was in the Gulf of Tonkin from January 9, 1973, to February 2, 1973. The response noted that deck logs do not normally give names of personnel coming and going, unless they are VIPs or high ranking officers. The deck logs “may” indicate planes or boats coming or going, but would not include destinations. R.670.

A second DPRIS response indicated a review of deck logs for the USS America in January and February 1973, showing that the ship was involved in “flight operations” in the Gulf of Tonkin from January 9, 1973, through January 31, 1973. There was no record of aircraft landing in Vietnam, or of the ship docking in Vietnam. However, the report of the review of deck logs similarly failed to indicate any other specifics about planes leaving the ship. R.22.

In an October 2011 DRO hearing, Mr. McFadden made it clear that he was not contending that his ship had docked in the Republic of Vietnam during the eight months he served on the USS America off the coast of Vietnam. R.324 (R.321-337). He explained that since his separation date was sooner than his ship would arrive back in the United States, he was put on a small mail plane and flown to Da Nang for further transport. He was unable to leave Da Nang immediately because of the heavy rocket fire

in late January, but was later flown to the Philippines and then to Jacksonville, FL, for separation. R.326 -332 (R.321-337).

SUMMARY OF ARGUMENT

The Board relied on a “presumption of regularity” to deny credibility to the veteran’s statement and to a buddy statement. The evidence did not show that there was a regular and consistent procedure of recording events such as the departure of a mail plane from the ship in the deck logs, and the only evidence from the military on the question indicated that this type of information would likely not be recorded in the deck logs. The only basis for asserting a regular procedure was the Board member’s own assumptions. This basis is inadequate to give rise to a presumption of regularity. The Board denied credibility to the veteran’s statement and to the buddy statement he submitted, despite the objective evidence of record that tended to corroborate Mr. McFadden’s statement. The Board’s conclusion was clearly erroneous.

The Board found that all pertinent evidence was of record and explicitly weighed that evidence to reach its conclusion. The only evidence against Mr. McFadden’s claim is the “presumption of regularity” asserted by the Board, a presumption that is not supported by any evidence of record. Since the evidence of record supports Mr. McFadden’s claim, the Board’s adverse finding of material fact should be reversed.

ARGUMENT

I. The Board's adverse finding of material fact that Mr. McFadden did not set foot in the Republic of Vietnam was clearly erroneous.

In order to render an adequate decision, the Secretary must consider "all information and lay and medical evidence of record." 38 U.S.C. § 5107(b). Similarly, 38 U.S.C. § 7104(a) requires the Board to base its decision on consideration of "all evidence and material of record." Lay evidence must be considered as well as medical records. The Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Gabrielson v. Brown*, 7 Vet.App. 36 (1994).

A finding of fact by the Board is clearly erroneous when a court, after reviewing all of the evidence, "is left with the definite and firm conviction that a mistake has been committed." *Romanowsky v. Shinseki*, 26 Vet.App.289, 295 (2013), citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed.746 (1948).

Despite the evidence indicating that Mr. McFadden did leave his ship on January 25, 1973, his statements that he was flown to Da Nang on a small mail plane for later transport to to the Philippines and then to the United States, and the evidence that Da Nang did in fact come under rocket fire at the time he indicated that he was in Da Nang, the Board

determined that his evidence and that of Mr. Lewis was not credible. R.8 (R.1-16).

I. The presumption of regularity does not apply in this case.

The only apparent basis for the Board's determination that Mr. McFadden's account was not credible was its reliance on a "presumption of regularity," that Mr. McFadden's leaving the ship on a small mail plane would have been noted in the ship's deck logs. R.8 (R.1-16). According to the Board's reasoning, the absence of any evidence in the deck logs outweighs the other evidence of record, because it is presumed that the records were accurately kept pursuant to normal procedures.

Whether a presumption of regularity attaches to the public actions of a public official is a question of law to be determined by the Court *de novo*. *Marsh v. Nicholson*, 19 Vet.App.381, 386 (2005). The Court must determine whether there is a "regular and established VA practice to which the presumption of regularity may be applied." *Kyhn v. Shinseki*, 24 Vet.App.228, 233-234 (2011). In this specific case, the Board member sought to apply a presumption of regularity to the actions of military officials, stating that the deck logs would have included information about Mr. McFadden leaving the ship on a small mail plane. R.8 (R.1-16).

However, the actual evidence belies the Board member's own assertion that this would have been a "regular and established practice." A

2009 Defense Personnel Records Information Retrieval System (DPRIS) response noted that deck logs do not normally give names of personnel coming and going, unless they are VIPs or high ranking officers. The deck logs “may” indicate planes or boats coming or going, but would not include destinations. R.670. Clearly, it is not a regular and established practice to include records of a small mail plane flying to Da Nang or to record the name of any personnel on such flights, according to the information from military officials.

The Board member also asserted that the fact of a plane being delayed leaving Da Nang would have been so significant as to surely have been included in the deck logs. R.9 (R.1-16). However, there is no basis for this assertion, not even logic and common sense. There is nothing in the record to indicate that a ship’s deck logs would record information regarding flights from Da Nang to the Philippines, and no apparent reason that this sort of activity in Da Nang would be recorded in a ship’s deck logs. The delay of a flight from the ship itself would likely be a significant event that would be recorded, but the flight in question was not such a flight. It was a flight from Da Nang to the Philippines, and it is unlikely that every ship in the coastal waters would note in its deck log all flight activities from Da Nang. Again, this conclusion is based solely on the Board member’s own opinion, and is not supported by any evidence at all.

It is clear from Mr. McFadden's official records that he left the USS America on January 25, 1973. R.131 (R.108-165). However, there is nothing at all in the deck logs that indicates his departure, by any means. If the deck logs could be presumed to necessarily discuss his departure on a small mail plane, surely they would have discussed his departure in some other fashion. The fact that there is no such information in the record shows that there was no "regular and established practice" of noting the departure of servicemen from the ship.

Finally, the Board member stated that the presumption of regularity arose because the records (presumably, the ship's deck logs) are presumed to have been accurate "pursuant to duties to record accurately the events and assessments pertaining to military disciplinary proceedings." R.8 (R.1-16). Since there is nothing in the record to indicate that there was any disciplinary proceeding against Mr. McFadden, this statement is mystifying at best. Mr. McFadden's service personnel records (SPRs) contain nothing at all that would even suggest a military disciplinary proceeding. His record of discharge indicates that he received an honorable discharge, due to a "Reduction in Authorized Strength," R.130 (R.108-165), and that he was recommended for reenlistment. R.133 (R.108-165). The Board member cannot invoke a presumption of regularity based on an inaccurate statement about the facts in this case.

In this case, there is no applicable presumption of regularity, because there is no evidence in the record of any regular process with which military officials could be presumed to have complied. In fact, the only official evidence indicates that there was no such regular practice. The only evidence of a “regular practice” giving rise to a presumption of regularity is the Board member’s own theory, with no evidence to support it, and which is based on a misunderstanding of the actual facts of the case. Since the presumption of regularity did not arise in this case, there is no burden on the veteran to “rebut” it.

2. The Board has failed to adequately discuss the actual evidence supporting Mr. McFadden’s claim.

In contrast, the Board ignored relevant facts that supported Mr. McFadden’s account. Mr. McFadden left the USS America in some manner on January 25, 1973. His explanation that he went to Da Nang on a small mail plane is consistent with the official records, and is not contradicted by any actual evidence in this case.

Secondly, the Board ignored the evidence that there was in fact rocket fire on Da Nang on the relevant dates, R.272 (R.269-272), evidence that corroborates Mr. McFadden’s account of being unable to immediately transfer to a larger plane for transportation to the Philippines and then to the United States. While this evidence does not, of course, directly prove

Mr. McFadden's presence in Da Nang, it corroborates his account and provides a logical explanation for his stay on land in Vietnam for two days.

Finally, the Board ignored the implications of its own interpretation of Mr. Lewis's buddy statement. Mr. Lewis stated that Mr. McFadden left on a small plane to return to the United States, R.184 (R.180-185), and the Board stated that this no small plane would be able to go to the United States from the ship. R.6 (R.1-16). In fact, this very fact supports Mr. McFadden's account – a small mail plane would presumably be able to reach Da Nang, although not to reach the United States.

There is no evidence to support the Board's conclusion that Mr. McFadden's statement is "simply not factually accurate." R.9 (R.1-16). In contrast, there is actual evidence that tends to corroborate Mr. McFadden's statement, lay evidence that must be considered by the Board. The Board's determination that Mr. McFadden did not set foot in the Republic of Vietnam is clearly erroneous.

II. The Board's adverse finding of material fact should be reversed.

This Court has the authority to reverse a finding of material fact adverse to the appellant that is clearly erroneous. 38 U.S.C. § 7261(a)(4). The Court of Appeals for the Federal Circuit has noted that "where the Board has performed the necessary fact-finding and explicitly weighed the evidence, the Court of Appeals for Veterans Claims should reverse when,

on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.” *DeLoach v. Shinseki*, 704 F.3d 1370, 1380 (Fed.Cir.2013), citing *United States v. U.S. Gypsum Co.*, *supra*. See also *Romanowsky*, *supra*.

Reversal is appropriate when the record permits only one view of the evidence. *Pullman-Standard v. Swini*, 456 U.S. 273, 292, 102 S.Ct. 1781, 72 L.Ed.2d 66, (1982); *Pacheco v. Shinseki*, 26 Vet.App.413, 418 (2014); *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004).

In this case, the Board has stated that no further factual development would be appropriate, since the case “must be evaluated based on the current evidence of record.” R.6 (R.1-16). The Board has explicitly weighed the evidence, making a finding that the statements of Mr. McFadden and Mr. Lewis are “simply not factually accurate.” R.9 (R.1-16). This finding is based on nothing more than the Board member’s own theories, and is contrary to the actual evidence from DPRIS, indicating that this information would not necessarily be included in deck logs.

Since the Board’s finding is contrary to the actual evidence of record, it is clearly erroneous. This is not a case of “weighing the evidence,” because there is no evidence in the record to support the Board’s finding.

There is, on the other hand, considerable evidence supporting Mr. McFadden’s presence in Vietnam. He left his ship in the coastal waters of Vietnam on January 25, 1973, while the ship was still in those waters. He

did not arrive in Jacksonville, FL, for separation until January 30, 1973. R.131 (R.108-165). There is no evidence in the record of his leaving the ship in any manner, but since official records indicate that he left the ship on January 25, 1973, he clearly left in some way. His own statement indicates that he flew to Da Nang on a small mail plane. A buddy statement corroborates his statement of leaving the ship on a small plane. His account of being delayed in Vietnam is supported by the evidence showing rocket fire in Da Nang on January 26 and 27, 1973.

In short, all of the actual evidence of record tends to corroborate Mr. McFadden's account of flying to Da Nang and being delayed there for two days.

In contrast, the only "evidence" relied on by the Board to deny his presence in the Republic of Vietnam is an unsupported assertion that these events would have been recorded in deck logs pursuant to a presumption of regularity, and thus that Mr. McFadden's and Mr. Lewis's statement are not credible. However, there is no basis in the record that would support such a presumption of regularity, and, in fact, the evidence from DPRIS shows that this information would not likely have been recorded in the records.

Since all of the evidence supports a finding that Mr. McFadden was in fact in the Republic of Vietnam for several days, the Board's finding to the contrary is clearly erroneous and should be reversed by this Court.

CONCLUSION AND RELIEF REQUESTED

For the reasons and upon the authorities cited above, Mr. McFadden respectfully requests this Court to reverse the Board's finding of material fact that he did not set foot in Vietnam, and thus is not entitled to the presumption of Agent Orange exposure. In the alternative, Mr. McFadden requests the Court to vacate the Board's decision and remand this case so that the Board can provide adequate reasons and bases for its conclusion that a presumption of regularity applies and can discuss the evidence tending to corroborate Mr. McFadden's lay evidence.

Respectfully submitted,

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