

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

CHRISTOPHER J. OSBORN
Appellant,
v.

ROBERT A. MCDONALD
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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CHRISTOPHER J. OSBORN,)
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Appellant,)
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v.)
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ROBERT A. MCDONALD,)
Secretary of Veterans Affairs,)
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Appellee.)

Vet. App. No. 15-3845

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the August 18, 2015, decision of the Board of Veterans' Appeals (Board) should be affirmed to the extent that it denied entitlement to service connection for traumatic brain injury and a left eye disability on grounds that the disabilities were incurred as a result of willful misconduct.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252.

B. Nature of the Case

Appellant, Christopher J. Osborn, appeals the August 18, 2015, Board decision to the extent that it determined that his traumatic brain injury and left eye disability were the result of willful misconduct.

C. Statement of Facts

While Appellant presents the facts in a way that favors his view of the case and disputes the Board's conclusion that his injuries were the result of intoxication, he does not otherwise challenge any of the factual determinations made by the Board with respect to the evidence as clearly erroneous. It is therefore the facts, as found by the Board, that must serve as the basis to review of the merits of his legal arguments. Those facts are as follows:¹

- Appellant served on active duty in the United States Army from March 2004 to February 2006.
- In July 2005, Appellant and some friends were out on the town and became intoxicated.
- At some point, Appellant and his friends entered a private home where a party was occurring in order, it was claimed, to make a phone call, and became involved in a fight.
- Appellant was struck in the left side of the head with a piece of steel rebar or similar object and lost consciousness. He sustained a traumatic brain injury and damage to the left eye.
- Appellant was not an invited guest of the private home and was a trespasser.

¹ These facts are also confirmed by the record. See, e.g., RBA at 1257-60 (service department personnel and administrative records). See also RBA at 1228-52 (service department records).

RBA at 6-7 (2-15). On review of the evidence, the Board found that Appellant was intoxicated when he sustained his injuries and that it was his intoxication that led directly to his presence at the party and the physical altercation in which he was involved. RBA at 6. The Board found that alcohol use and intoxication were the proximate cause of the injuries and that, if not for excessive drinking, Appellant would not have been where he was, doing what he was doing, and that he would not have sustained the injuries he sustained. RBA at 6.

III. SUMMARY OF THE ARGUMENT

Appellant fails to demonstrate that the Board impermissibly determined that the injuries he sustained in active service that resulted in traumatic brain injury and a left eye disability were the result of willful misconduct. As such, the Board decision that denied entitlement to disability compensation benefits for traumatic brain injury and a left eye disability should be affirmed.

IV. ARGUMENT

Appellant contends that the Board provided an inadequate statement of reasons or bases to support its decision because it “failed to point to any evidence” to support its assessment that his intoxication was what led to the physical altercation that resulted in his injuries. (App. Br. at 7-8). He contends that this purported lack of any evidence rendered its statement of reasons or bases inadequate “to rebut the presumption” that his injuries were incurred in the

line of duty and not as a result of willful misconduct.² *Id.* His argument is nothing more than a mere disagreement with the way the Board interpreted and evaluated the evidence.

Factual determinations made by the Board are entitled to deference and reviewed only for clear error. 38 U.S.C. § 7261(a)(4). Under this standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual determinations so long as they are supported by a plausible basis in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). See also *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). The Board has wide latitude when it comes to deciding matters of fact and its factual determinations may be derived from any number of sources, to include credibility determinations, physical or documentary evidence, or inferences drawn from other facts. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504 (1985). The mere fact that the evidence could be viewed differently does not render the Board's interpretation of the evidence clearly erroneous. *Id.*

² Although Appellant captions his argument as the Board "misinterpreted and misapplied the law," his actual argument is simply that the Board failed to provide an adequate statement of reasons or bases to support its decision because it failed to point to "any evidence" that his intoxication was ultimately the cause of his injuries. (App. Br. at 4, 7-8). That the Board is required to find that an injury was proximately caused by willful misconduct by a "preponderance of the evidence" is no different a standard than that required for the Board to reach any adverse factual determination. *Compare* (App. Br. at 9).

(“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”).

The burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (recognizing an appellant bears the burden of demonstrating error). And to warrant judicial interference with that decision, the appellant must demonstrate that such error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). If the appellant cannot demonstrate that the outcome of his claim could have been different had the alleged error not been committed, the error is necessarily non-prejudicial. See *Valiao v. Principi*, 17 Vet.App. 229, 232 (2003) (observing that an error is nonprejudicial “where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision”). See also *Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose). Finally, it is the responsibility of the appellant, and the appellant alone, to articulate the basis of his or her arguments and develop those arguments sufficient to permit an informed consideration of the same. See *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments).

Appellant takes issue with the Board's finding that it was his intoxication that set in motion the events that directly resulted in his injuries, arguing, instead, that it "was not the alcohol that caused the Veteran to try and break up a fight and it was certainly not the alcohol that prompted other individuals to "jump" the Veteran after he was merely trying to break up the fight." (App. Br. at 7). His argument is predicated entirely on his own personal view of the evidence and version of events, and he makes no attempt to demonstrate clear error in the Board's assessment of the evidence or the inferences it drew from the same. Indeed, as stated above, Appellant does not raise any issue as to the plausibility of the Board's subsidiary findings of fact and, instead, rests his argument solely on his own attempt to persuade the Court to view the evidence differently. This is not enough to demonstrate clear error.

Here, the Board found – and Appellant does not dispute – that, in July 2005, Appellant and some friends were off base and intoxicated; that, at some point, and regardless of the reason why, he and his friends entered a private home without invitation and as trespassers and became involved in a fight; and that, as a result of the fight, Appellant sustained several injuries for which he now seeks disability compensation. RBA at 6-7 (2-15). It was entirely reasonable for the Board to infer, based on these facts, that Appellant sustained his injuries while he was intoxicated, that his intoxication led him to enter the private home and party without an invitation, and that the intoxication led to the physical altercation in the private home that resulted in his injuries. *Cf. City of Bessemer*

City, N.C., 470 U.S. at 574 (recognizing that the mere fact that another view of the evidence may be permitted does not render the factfinder's view of the evidence clearly erroneous).

While Appellant might prefer that the Board have found him to be the innocent victim in the situation, that it was irrelevant that he entered the private home without an invitation because he had a good reason for doing so, that he used good and sound mental judgment when he entered the home, that he tried to break up a fight and, in doing so, acted commendably and unimpaired, and that he was "jumped" for no reason whatsoever even though he was drunk and trespassing in someone else's private home, that is simply not what the Board found. And because Appellant fails to show that the Board clearly erred in how it interpreted the underlying facts, it is the Board's interpretation of the evidence and its version of the facts, not his, that must be considered when assessing the propriety of the Board's ultimate conclusion. *Gilbert*, 1 Vet.App. at 52. See also *Deloach v. Shinseki*, 704 F.3d at 1380 ("The Court of Appeals for Veterans Claims, as part of its clear error review, must review the Board's weighing of the evidence; it may not weigh any evidence itself."). In short, while Appellant submits that the Board essentially had zero basis to infer that his intoxication played a decisive role in his actions that resulted in his injuries, his argument is predicated entirely on his own personal view of the evidence and he fails to show how, in light of the totality of the evidence, the such inference by the Board is and was unreasonable. As such, his argument must fail. See *Sanders*, 556 U.S. at

409 (holding that the appellant bears the burden of demonstrating prejudicial error).

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Court should affirm the August 18, 2015, Board decision that denied entitlement to service connection for traumatic brain injury and a left eye disability.

Respectfully submitted,

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