

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

FRANKIE MCFADDEN
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**

LEIGH A. BRADLEY
General Counsel

MARY A. FLYNN
Chief Counsel

CHRISTOPHER W. WALLACE
Deputy Chief Counsel

SHONDRIETTE D. KELLEY
Appellate Attorney
U.S. Department of Veterans Affairs
Office of the General Counsel (027G)
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7091

Attorneys for Appellee

TABLE OF CONTENTS

I. ISSUE PRESENTED 1

II. STATEMENT OF THE CASE 1

 A. JURISDICTIONAL STATEMENT1

 B. NATURE OF THE CASE1

 C. STATEMENT OF RELEVANT FACTS2

III. SUMMARY OF ARGUMENT 5

IV. ARGUMENT 5

 A. APPELLANT FAILS TO DEMONSTRATE THE BOARD’S FINDINGS OF
 FACT WERE CLEARLY ERRONOUS.....5

V. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

<i>Alaska Airlines, Inc. v. Johnson</i> , 8 F.3d 791 (Fed. Cir. 1993)	8
<i>Anderson</i> , 470 U.S.	7
<i>Ashley v. Derwinski</i> , 2 Vet. App. 307 (1992)	8
<i>Ashley v. Derwinski</i> , 2 Vet.App. 62 (1992)	8
<i>Buchanan v. Nicholson</i> , 451 F.3d 1331 (Fed. Cir. 2006)	10
<i>Coburn v. Nicholson</i> , 19 Vet.App. 427 (2006)	12
<i>Davis v. Brown</i> , 7 Vet.App. 298 (1994)	9
<i>Gardin v. Shinseki</i> , 613 F.3d 1374 (Fed. Cir. 2010)	10
<i>Gilbert v. Derwinski</i> , 1 Vet.App. 49 (1990)	6, 7, 10, 11
<i>Gutierrez v. Principi</i> , 19 Vet.App. 1 (2004)	12
<i>Haas v. Peake</i> , 525 F.3d 1168 (Fed. Cir. 2008)	7
<i>Hickson v. West</i> , 12 Vet.App. 247 (1999)	6
<i>Johnson v. Brown</i> , 9 Vet.App. 7 (1996)	12
<i>McLendon v. Nicholson</i> , 20 Vet.App. 79 (2006)	10
<i>Newhouse v. Nicholson</i> , 497 F.3d 1298 (Fed. Cir. 2007)	11
<i>Parsons v. United States</i> , 229 Ct.Cl. 335, 670 F.2d 164 (1982)	8
<i>Rizzo v. Shinseki</i> , 580 F.3d 1288 (Fed. Cir. 2009)	9
<i>Saylock v. Derwinski</i> , 3 Vet.App. 394 (1992)	9
<i>Sizemore v. Principi</i> , 18 Vet.App. 264 (2004)	9
<i>Tucker v. West</i> , 11 Vet.App. 369 (1998)	12
<i>United States v. Chem. Found., Inc.</i> , 272 U.S. 1	8

Statutes

38 U.S.C. § 1110	6
38 U.S.C. § 7252(a)	1

38 U.S.C. § 7261(a)(4).....	7
-----------------------------	---

Regulations

38 C.F.R. § 3.303(a).....	6
38 C.F.R. § 3.307(a)(6)(iii)	7
38 C.F.R. § 3.307(d)(iii).....	6
38 C.F.R. § 3.309(e).....	6
38 C.F.R. §§ 3.307 and 3.309	6

TABLE OF CITATIONS

R. at 2-14 (December 2015 Board decision).....	5, 8, 9
R. at 19 (May 2015 brief in support of claim)	5
R. at 22 (JSRRC response).....	4, 9, 12
R. at 23 (September 2014 letter from Appellant)	4
R. at 29-31 (March 2015 supplemental statement of the case)	4
R. at 38-41 (September 2014 Board decision).....	4
R. at 126 (DD-214)	2
R. at 166 (January 2014 withdrawal of request for travel board hearing)	4
R. at 184 (August 2012 buddy statement)	4, 7, 11
R. at 235 (December 2011 appeal to Board)	4
R. at 238-266 (November 2011 statement of the case).....	3
R. at 269-272 (report from office of Air Force history).....	11
R. at 321-337 (June 2011 travel board transcript)	2, 3, 7
R. at 600 (October 2009 notice of disagreement)	2
R. at 645-648 (February 2009 statement in support of claim).....	2
R. at 666-668 (April 1999 medical records)	2
R. at 670 (JSRRC response).....	4, 9, 11

R. at 1161-1163 (April 2009 rating decision)..... 2

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

FRANKIE MCFADDEN,)
)
 Appellant)
)
 v.)
)
ROBERT A. MCDONALD,)
 Secretary of Veterans Affairs)
)
 Appellee)

Vet.App. No. 16-0080

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

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should affirm the December 7, 2015, decision of the Board of Veterans' Appeals (Board), which denied entitlement to service connection for prostate cancer, status-post prostatectomy, to include as due to herbicide exposure.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Frankie L. McFadden (Appellant) appeals the December 7, 2015, decision of the Board, which denied his claim of entitlement to service connection for prostate cancer, status-post prostatectomy, to include as due to herbicide exposure. Appellant asserts that the Board's finding of material fact that he did

not set foot in the Republic of Vietnam was clearly erroneous and should be reversed. (App. Br. at 5-6). However, contrary to Appellant's assertions, the Board properly applied the presumption of regularity and reversal is not warranted.

Appellant's contentions fail to demonstrate clear error and the Board's decision should be affirmed.

C. Statement of Relevant Facts

Appellant served in the United States Navy from February 1971 to February 1973. (R. at 126). He was diagnosed with prostate cancer in 1999 and underwent a radical retropubic prostatectomy in April 1999. (R. at 666-668). In March 2009, the VA Regional Office (RO) in St. Petersburg received a statement in support of claim from Appellant which served as a claim for entitlement to service connection for prostate cancer. (R. at 645 (645-648)).

A rating decision denying service connection for prostate cancer was issued in April 2009, finding "[a]s the evidence of record does not establish that you had the requisite in-country service in Vietnam, or that you were either diagnosed with this condition in service, or within one year from discharge from active military service, service connection cannot be granted." (R. at 1163 (1161-1163)). In October 2009, Appellant submitted his notice of disagreement. (R. at 600).

Appellant testified before a Decision Review Officer (DRO) in October 2011. (R. at 321-337). Per Appellant, he departed his ship, the USS America, on

a mail plane in January 1973, was delayed in Da Nang for three days due to heavy rocket fire then flew to the Philippines and later the U.S. (R. at 326-332 (321-337)). In November 2011, a statement of the case was issued which denied entitlement to service connection for prostate cancer as a result of exposure to herbicides. (R. at 265-266 (238-266)). It referenced a history of the USS America from 1972 to 1973 which stated:

We have reviewed the 1972 command history for the USS AMERICA (CVA-66). The history reveals that the USS AMERICA departed the Naval Station (NS) Norfolk, Virginia for a Western Pacific (WESTPAC) deployment on June 5, 1972. The USS AMERICA conducted Special Operations (SPECOPS) periods on Yankee Station, in the Gulf of Tonkin, during the periods from July 12-25, August 11-27, September 7-October 7, October 21 to December 1, and December 10-26, 1972. During this time, period the USS AMERICA made Ports of Call in Subic Bay, Republic of the Philippines (RP), Singapore, and Hong Kong. The USS AMERICA was at anchor in Hong Kong from December 27, 1972 to January 4, 1973. We have reviewed the 1973 command history for the USS AMERICA. The history reveals that the USS AMERICA departed Hong Kong after a Port of Call, on January 4, 1973 and was continuing on her Western Pacific deployment which had commenced on June-5, 1972. The USS AMERICA conducted SPECOPS periods on Yankee Station in the Gulf of Tonkin from January 9 to February 2, and February 12-16, 1973. During this time period, the USS AMERICA also made Ports of Call in Subic Bay. The USS AMERICA returned to the NS Norfolk on March 24, 1973. According to the National Archives and Records Administration (NARA), College Park, Maryland and the Naval Historical and Heritage Command (NHHC), Washington DC, command histories, deck logs and muster rolls/personnel diaries are the only administrative records produced by commissioned U.S. Navy ships during the Vietnam war that are permanently retained. These records do not normally annotate individuals arriving or going ashore on a routine basis: The deck logs may indicate aircraft or boats arriving/departing but do not list passengers by name, unless that individual is a very important person (VIP) or high-ranking officer. Also, the deck logs do not normally list the destinations of these aircraft and vessels. Logbooks maintained aboard river boats or launches were not considered permanent records. Information regarding the, duties and assignments requiring Mr. McFadden to do ashore in the Republic of Vietnam (RVN)

may be in his Official Military Personnel File (OMPF).

(R. at 670). Appellant filed an appeal to the Board in December 2011 and requested a hearing in a local VA office. (R. at 235).

In September 2012, the RO received a buddy statement from a veteran that served with Appellant which attested that Appellant left the USS America on a mail plane. (R. at 184).

Appellant withdrew his request for a travel board hearing in January 2014. (R. at 166). The Board issued a decision in September 2014 remanding Appellant's claim for further development to include contacting the U.S. Army and Joint Services Records Research Center (JSRRC), or any other appropriate agency to request ship history and deck logs for the USS America (CVA-66) from January 1973. (R. at 40 (38-41)). Later that month, Appellant submitted a letter to the Board as an addendum to his testimony in 2011. (R. at 23).

In March 2015, the RO received a response from the JSRRC stating "[n]o aircraft are recorded as landing in Vietnam. The deck logs do not document that the ship docked or that ships personnel stepped foot in Vietnam." (R. at 22). A supplemental statement of the case was issued in March 2015. (R. at 29-31). It indicated JSRRC reported that in January 1973 no aircraft were recorded as landing in Vietnam nor did deck logs document that the ship docked or that personnel stepped foot in Vietnam. (R. at 30 (29-31)). Consequently, service connection for prostate cancer, status-post prostatectomy, as due to herbicide exposure remained denied. (R. at 31 (29-31)).

Appellant submitted a brief in support of his claim in May 2015. (R. at 19). In December 2015, the Board issued its decision denying entitlement to service connection for prostate cancer, status-post prostatectomy, to include as due to herbicide exposure. (R. at 2-14). The present appeal followed.

III. SUMMARY OF ARGUMENT

This Court should affirm the December 7, 2015, decision of the Board, which denied entitlement to service connection for prostate cancer, status-post prostatectomy, to include as due to herbicide exposure. The Board's application of the presumption of regularity was sound. Further, its finding that the evidence weighed against Appellant's contentions that he set foot in the Republic of Vietnam were not erroneous but based on the record and allowed Appellant to understand the justification for its denial of his claim and this Court to effectively review the decision. Appellant's arguments to the contrary fail to demonstrate prejudicial error in the decision on appeal.

IV. ARGUMENT

A. APPELLANT FAILS TO DEMONSTRATE THE BOARD'S FINDINGS OF FACT WERE CLEARLY ERRONOUS.

Appellant contends that the presumption of regularity did not arise in this case and therefore he had no burden to rebut it. (App. Br. at 10). He further asserts that the Board failed to discuss favorable evidence. (App. Br. at 10). Lastly, he requests the reversal as his remedy. (App. Br. at 11-13). This Court should affirm the decision on appeal, however, because Appellant fails to demonstrate clearly erroneous error.

Service connection may be granted for a disability resulting from personal injury suffered or disease contracted in the line of duty, or for the aggravation of a pre-existing injury or disease in the line of duty. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). Establishing service connection generally requires competent medical, or in certain circumstances, lay evidence of a current disability, an in-service incurrence or aggravation of an injury or disease, and a nexus between the claimed in-service injury or disease and the current disability. See *Hickson v. West*, 12 Vet.App. 247, 253 (1999). Service connection for certain chronic diseases may also be established on a presumptive basis where the evidence indicates that the condition manifested to a compensable degree within one year from discharge from service. 38 C.F.R. §§ 3.307 and 3.309. The Board's determination of service connection is a question of fact that the Court reviews under the clearly erroneous standard. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (finding of fact is not clearly erroneous if there is a plausible basis for it in the record).

A presumption exists for veterans who, during active service served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. Specifically, those veterans will be presumed to have been exposed during such service to an herbicide agent (Agent Orange) unless there is affirmative evidence that the veteran was not exposed. 38 C.F.R. § 3.307(d)(iii). Prostate cancer, moreover, is a disability presumptively associated with Agent Orange exposure. See 38 C.F.R. § 3.309(e).

Service in Vietnam, for the purposes of applying this presumption, generally means actual in-country service in Vietnam from January 9, 1962, through May 7, 1975, or “inland waterways” service (i.e., “brown water” service). 38 C.F.R. § 3.307(a)(6)(iii); see *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

As the finder of fact, the Board has wide latitude and discretion in its evaluation of the evidence, and its assignment of probative weight, credibility determinations, interpretations and ultimate conclusions are subject to review under the deferential clearly erroneous standard. See 38 U.S.C. § 7261(a)(4). Under this standard of review, the findings of the Board must be affirmed so long as there is plausible support for them in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson, N.C.*, 470 U.S. at 574.

In the present case, Appellant asserts that he set foot in the Republic of Vietnam in January 1973. However, there is nothing in the record that corroborates this assertion. Appellant testified before a DRO, in 2011, that he departed the USS America on a mail plane in January 1973 and was delayed in Da Nang for three days due to heavy rocket fire. (R. at 326-332 (321-337)). He later produced a buddy statement in 2012 that attested Appellant “did leave the USS America on a small mail plane at night back to the States.” (R. at 184). The Board considered these statements and weighed them against records from the JSRRC and found, “during the entire period, no aircraft were recorded as landing

in Vietnam and deck logs did not document that the ship docked or that ship personnel stepped foot in Vietnam. Such a finding provides some evidence against the Veteran's claim.” (R. at 7 (2-14)). The Board further found:

[A]ircraft carrier logs are normally highly detailed and there is no objective evidence that any aircraft landed in Vietnam, despite the contentions of the Veteran and his friend. The records are presumed to have been accurately recorded in the regular course and pursuant to duties to record accurately the events and assessments pertaining to military disciplinary proceedings. "There is a presumption of regularity under which it is presumed that government officials 'have properly discharged their official duties." *Ashley v. Derwinski*, 2 Vet. App. 307, 308 (1992) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926)). To rebut the presumption, the Veteran bears the burden of producing clear evidence that VA did not follow its regular practices or that its practices were not regular. See *Ashley*, 2 Vet. App. at 309. The Veteran does not present such evidence in this case.

(R. at 8 (2-14)). Lastly, the Board determined, “[w]hile the Veteran's honorable service is not in question, the Veteran's factual statements, and those of his friend, so many years after service, that he was somehow delayed in Da Nang as the result of rocket fire on a plane that was not cited in a deck log is simply not factually accurate.” (R. at 9 (2-14)).

There is a presumption of regularity that public officers perform their duties “correctly, fairly, in good faith, and in accordance with law and governing regulations.” *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993) (quoting *Parsons v. United States*, 229 Ct.Cl. 335, 670 F.2d 164, 166 (1982)). In applying the presumption of regularity, courts presume that, in the absence of clear evidence to the contrary, public officials have properly discharged their official duties. See *Ashley v. Derwinski*, 2 Vet.App. 62, 64-65 (1992); see also

Davis v. Brown, 7 Vet.App. 298, 300 (1994); *Saylock v. Derwinski*, 3 Vet.App. 394, 395 (1992). Appellant argues the presumption of regularity doesn't exist in this case because the Board's conclusion that the delay of a mail plane would have been documented is based "solely on the Board member's own opinion" and "an inaccurate statement about the facts in this case". (App. Br. at 8, 9). Appellant argues "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". (App. Br. at 7). This is a misstatement. The Board's focus was not on whether there was evidence of Appellant's departure from the USS America but if there was any objective evidence that any aircraft from the USS America *landed* in Vietnam in January 1973. (R. at 7 (2-14)). The information provided by JSRRC indicated that neither the command history nor deck logs for the USS America indicated that there were. (R. at 22). The presumption of regularity doctrine allows courts to presume that what appears "regular is regular, the burden shifting to the attacker to show the contrary". *Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009). It is clear from the evidence of the record that the Navy documents flight operations and documents whether ships docked or personnel went ashore. (R. at 22, 670). This Court has also previously found that as a matter of course, the military keeps track of its personnel. See *Sizemore v. Principi*, 18 Vet.App. 264, 273 (2004) (explaining that morning reports document daily personnel actions such as persons wounded, killed, or missing in action; and that such reports

generally can be obtained from the NPRC).

Appellant has not presented evidence to the contrary and fails to rebut the presumption of regularity.

The Appellant is essentially questioning how the Board weighed the evidence. When evaluating the credibility of lay statements, in particular, the Board may consider whether the statements conflict with and are consistent with other statements or evidence, the potential bias of the witness, *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006), and the level of detail of the information reported, *Gardin v. Shinseki*, 613 F.3d 1374, 1379-80 (Fed. Cir. 2010) (affirming rejection of lay evidence based on finding that it was vague and inconsistent with the record). And the Board may reject such statements if it finds them to be mistaken, incorrect, untrustworthy, or otherwise unreliable. See *McLendon v. Nicholson*, 20 Vet.App. 79, 84 (2006). Here the Board did exactly that and ultimately the Board's assignment of probative weight to the evidence, to include its specific credibility determinations, may not be disturbed unless clearly erroneous. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990)

Appellant contends that the Board "failed to adequately discuss the actual evidence supporting Mr. McFadden's claim". (App. Br. at 10). Appellant alleges that the Board "ignored evidence that there was in fact rocket fire on Da Nang on the relevant dates". (App. Br. at 10). However, the Board was not under an obligation to discuss it. The Board is not required to comment upon every piece of evidence contained in the record; rather, it must discuss that evidence which is

relevant to the issue at hand. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). Appellant submitted evidence that reports attacks at Da Nang at the time he alleges he was there. (R. at 269-272). However, this document doesn't have any probative value as it is not specific to the issues of this case and doesn't address plane arrivals/departures or Appellant's whereabouts. The buddy statement submitted on Appellant's behalf is also irrelevant in that it merely states that Appellant left the USS America "on a small mail plane at night back to the States". (R. at 184). There is nothing in the statement that indicates its destination or the location of its actual landing. The demand placed upon the Board is quite simple: the Board must provide an explanation of its material findings and conclusions sufficient to enable the claimant and the Court to understand the basis of its decision and permit judicial review. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Appellant's assertions don't prove the Board failed to provide adequate reasons and bases for its findings.

Lastly, Appellant argues that reversal is necessary because the Board's findings were 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". (App. Br. at 12). Appellant's reading of the JSRRC response is inaccurate. The initial JSRRC response says, "[t]hese records do not **normally** annotate individuals arriving or going ashore on a **routine** basis". (R. at 670). (emphasis added) However, the scenario at issue would not qualify as routine. Appellant's assertion is that he took a mail plane,

during heavy rocket fire, for the purpose of returning to his home base for discharge. It is reasonable for the Board to have determined that event would have rated documentation in the deck log. Reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision. See *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004); *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996). Generally, where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, remand is the appropriate remedy. See *Coburn v. Nicholson*, 19 Vet.App. 427, 431 (2006); *Tucker v. West*, 11 Vet.App. 369, 374 (1998). Appellant argues clear error but has not presented any evidence that he set foot in Vietnam other than his own testimony. While Appellant contends differently, the buddy statement and documentation regarding the attacks in Da Nang do not prove that he set foot on the landmass of Vietnam. If Appellant had provided muster rolls, personnel diaries or relevant other evidence, the Board may have reached his desired outcome but that is not the case. What the Board had was the JSRRC's 2015 response which stated "[n]o aircraft are recorded as landing in Vietnam" and the decks logs not documenting that "the ship docked or that ships personnel stepped foot in Vietnam". (R. at 22). To the extent that the Board made an error in the weighing of the evidence, which the Secretary does not concede, remand would be the remedy not reversal.

None of Appellant's arguments demonstrate that the Board's findings were

clearly erroneous.

V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments advanced, Appellant has not demonstrated the Board committed clear error in its findings of fact or its conclusions of law. Because Appellant failed to satisfy his burden of demonstrating the existence of a prejudicial error, the Court should affirm the decision on appeal.

Respectfully submitted,

LEIGH A. BRADLEY

General Counsel

MARY A. FLYNN

Chief Counsel

/s/ Christopher W. Wallace

CHRISTOPHER W. WALLACE

Deputy Chief Counsel

/s/ Shondriette D. Kelley

SHONDRIETTE D. KELLEY

Appellate Attorney

Office of the General Counsel (027G)

U.S. Department of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, D.C. 20420

(202) 632-7091

Shondriette.Kelley@va.gov

Attorneys for Appellee

Secretary of Veterans Affairs