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

NO. 16-0080

FRANKIE MCFADDEN, APPELLANT,

v.

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

Before PIETSCH, *Judge*.

**MEMORANDUM DECISION**

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

PIETSCH, *Judge*: The appellant, Frankie McFadden, appeals through counsel a December 7, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied him entitlement to disability benefits "for prostate cancer, status-post prostatectomy, to include as due to herbicide exposure."<sup>1</sup> Record (R.) at 3-14. This appeal is timely and the Court has jurisdiction over the matters on appeal pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate when the issues are of "relative simplicity" and "the outcome is not reasonably debatable." *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will vacate the Board's conclusion that the appellant did not visit Vietnam during his active service and is therefore not entitled to § 3.309(e) presumptive service connection for his claimed

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<sup>1</sup> There are multiple facets to this conclusion. The Board found that the appellant is not entitled to presumptive service connection that, pursuant to 38 C.F.R. § 3.309(e), is available to veterans who have prostate cancer and were exposed to herbicides during their active service. That is so, the Board indicated, because the appellant did not demonstrate that he spent time in Vietnam and has not otherwise established that he was exposed to herbicides during his service. See 38 C.F.R. § 3.307(a)(6)(iii) (2016) (VA generally presumes that veterans who served in Vietnam between January 1962 and May 1975 were exposed to herbicides); see also *Haas v. Peake*, 525 F.3d 1168, 1198 (Fed. Cir. 2008) (holding that, even though the veteran did not serve in Vietnam, he remains "free to pursue his claim that he was actually exposed to herbicides while" on active service). Finally, the Board concluded that the appellant has not demonstrated that his prostate cancer is directly linked to his active service. See *Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994) (stating that presumptive service connection "does not foreclose proof of direct service connection").

disorder and it will remand that matter for further proceedings consistent with this decision. The Court also will dismiss the appellant's appeal of all other conclusions reached by the Board.

## I. BACKGROUND

If the appellant can demonstrate that he was exposed to Agent Orange during his active service in the U.S. Navy, then VA must presume that his prostate cancer is related to his service. 38 C.F.R. § 3.309(e)(2016). If, in turn, he can show that he visited Vietnam while on active duty, then VA must presume that he was exposed to Agent Orange. 38 C.F.R. § 3.307(a)(6)(iii). Consequently, this case comes down to a single make-or-break factual question: Did the appellant enter Vietnam during his active service?

The appellant began his service in February 1971. R. at 126. Soon thereafter, he went aboard the U.S.S. *America*, an aircraft carrier that the Navy operated off of Vietnam. On January 25, 1973, he received orders to proceed from U.S.S. *America*, then in or near the Gulf of Tonkin, to the "nearest separation activity CONUS" (continental United States) to end his active service. R. at 131. He arrived at a naval air station in Jacksonville, Florida, on January 30, 1973, and formally separated from the Navy a few days later. R. at 126, 131.

The appellant's whereabouts during the five days between January 25, 1973, and January 30, 1973, are in dispute. The appellant has repeatedly and consistently stated that he left the U.S.S. *America* aboard a small aircraft bound for DaNang.<sup>2</sup> R. at 23, 180, 235, 326, 645. He intended to quickly transfer to a larger aircraft and begin his long journey to the United States. R. at 180, 235. He asserted, however, that enemy activity in DaNang delayed his departure by three days. R. at 23, 235, 327, 329. The record indicates that the air base in DaNang came under attack on January 26-27, 1973. R. at 272.

VA made a number of attempts to confirm the appellant's story, but was unable to do so. R. at 22, 390. In the decision presently on appeal, the Board found that his assertions are not credible and denied his claim on that basis. R. at 2-14. The appellant seeks review of the Board's conclusion.

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<sup>2</sup> The appellant also submitted a letter from a fellow veteran that generally supports his account. R. at 184.

## II. ANALYSIS

### A. Credibility

The Board's explanation for its conclusion that the appellant is not credible (and, therefore, fabricated his story about flying from the U.S.S. *America* to DaNang) is insufficient. The Board's most important finding was that "aircraft carrier logs are normally highly detailed and there is no objective evidence that any aircraft landed in Vietnam." R. at 8. The Board then essentially concluded that, pursuant to the presumption of regularity, Navy personnel would have made note of an aircraft departing for shore. *Id.*; see *Ashley v. Derwinski*, 2 Vet.App. 307, 308 (1992) ("There is a presumption of regularity under which it is presumed that government officials 'have properly discharged their duties'") (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

The record contains evidence that plainly undermines the Board's conclusion. According to a report sent to VA by the Defense Personnel Records Information Retrieval System (DPRIS), "command histories, deck logs and muster rolls/personnel diaries . . . do not normally annotate individuals arriving or going ashore on a routine basis. . . . Also, the deck logs do not normally list the destinations of these aircraft and vessels."<sup>3</sup> R. at 670 (emphasis added). The Board ignored this evidence. It demonstrates that the Board's conclusion that the U.S.S. *America*'s logs would have included a notation that a plane departed on January 25, 1973, for DaNang is inaccurate.<sup>4</sup> The presumption of regularity does not apply here. The Board's finding to the contrary is incorrect.

The Board based two important factual conclusions on its incorrect application of the presumption of regularity. It concluded that the fact that "no aircraft were recorded as landing in Vietnam and the deck logs did not document that . . . ship personnel stepped foot in Vietnam . . . provides some evidence against the [appellant's] claim." R. at 7. The Board later found that "the

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<sup>3</sup> According to a history maintained by the Navy on its official Web site, the crew of the U.S.S. *America* landed more than 12,000 planes on its deck annually between the date that it was commissioned and August 1973. See [www.navy.mil/navydata/nav\\_legacy.asp?id=71](http://www.navy.mil/navydata/nav_legacy.asp?id=71) (last visited November 14, 2016); *Brannon v. Derwinski*, 1 Vet.App. 314, 316 (1991) (holding that the Court "may take judicial notice of facts of universal notoriety, which need not be proved, and of whatever is generally known within [its] jurisdiction." (quoting *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988))).

<sup>4</sup> The Board also failed to recognize that Navy personnel apparently made no notation of the appellant's departure from the U.S.S. *America*, whether he was headed to Vietnam or someplace else. That is evidence that there was no regular procedure of the kind the Board identified and that, even if there was, it was not properly executed in the appellant's case.

absence of evidence corroborating the account of being on land in Vietnam provides some evidence against the claim." R. at 8.

The DPRIS statement quoted above indicates that in the "normal" course of carrier operations, the appellant could have departed on a plane to Vietnam without personnel noting either the plane's destination or his departure. Indeed, it would have been unusual for his departure to have been noted. The Board's conclusion that the absence of a notation of departure or destination in the U.S.S. *America's* logs is evidence against the appellant's claim is clearly erroneous. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed.").

Next, the Board did not consider evidence indicating that DaNang came under attack on the dates that the appellant stated that he was present there. That evidence weighs in favor of finding the appellant to be credible, and the Board should have specifically considered it. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (stating that the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). Moreover, the Board should have noted that the appellant has retold his story on several occasions and that his recollections have been uniformly consistent. His consistency also weighs in favor of finding him to be credible, and the Board should have considered it. *Id.*

Finally, the Board stated that the appellant's superiors "would not send a sailor to Vietnam, and then have that plane delayed by rocket fire, and no record the plane going to Vietnam or the event itself (a delayed plane is a highly significant event for an aircraft carrier crew)." R. at 9. The Board's statement is wholly unsupported by record evidence and appears to be based entirely on its own supposition about the mindset, actions, and training of the crew of an aircraft carrier operating more than 40 years ago in a combat theater. If, on remand, the Board intends to repeat this supposition, it should accompany it with supporting evidence.

The appellant argues that reversal is warranted. The Court disagrees. The Board concluded that the four decades between the appellant's departure from the U.S.S. *America* and the present are sufficient reason to question the accuracy of his memories. That is a finding that the Board is permitted to make, and the appellant did not challenge it here. *See Buchanan v. Nicholson*, 451 F.3d

1331, 1336 (2006). The Court is therefore not adequately convinced that the Board's credibility determination was clearly erroneous. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) ("[R]eversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision."). Remand is warranted for the Board to reconsider that determination in light of the Court's conclusions. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998). (Remand is appropriate "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.").

On remand, however, the Board should adjust its view of this case. There is no doubt that the appellant left the U.S.S. *America* on January 25, 1973, and arrived in Jacksonville, Florida, five days later. No terrestrial conveyance could have made the journey that quickly. He must have traveled by aircraft. There is no evidence that indicates that the appellant flew directly from the deck of U.S.S. *America* to the United States or even that the ship was capable of servicing transcontinental aircraft.<sup>5</sup> There is, indeed, no evidence whatsoever describing how he left the ship, other than lay statements. Assuming that he was forced to transfer to another aircraft somewhere (or that he traveled to an airport by boat), there is no evidence indicating where that transfer took place. There is evidence, however, that the onshore American military installation closest to the position of the U.S.S. *America* on the day that the appellant left the ship was in Vietnam.

The Board did not discuss whether records from DaNang may shed light on the types of planes that arrived and departed in late January 1973 and list the days that aircraft were grounded by enemy activity. No flight logs or similar documents from DaNang are in the record. The Board also did not obtain any statement or evidence indicating how a sailor in the appellant's situation normally would have traveled to the United States from a ship on combat duty in the Gulf of Tonkin.

The only evidence in the record describing the appellant's journey is his lay statements and his shipmate's letter. Once again, no other evidence even hints at the manner in which he could have gone from the Gulf of Tonkin to Jacksonville, Florida, in five days. The only conclusion that can

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<sup>5</sup> The Board may have suggested that it did not believe that planes flew to shore from the USS *America*. The Court notes, without further comment, that the U.S.S. *America*'s aircraft contingent included a "Carrier Onboard Delivery" airplane named the *Miss America* and that, during its combat missions, the carrier's crew "handled 6,890 packages and transferred 469,027 pounds of mail," presumably onto shore. [www.navy.mil/navydata/nav\\_legacy.asp?id=71](http://www.navy.mil/navydata/nav_legacy.asp?id=71).

be reached at present is that the appellant left the ship by some conveyance and his departure was not recorded. The Board should keep that fact in mind on remand. It also should carefully apply the benefit of the doubt doctrine to this case. *See* 38 U.S.C. § 5107(b).

#### B. Other Matters

The Board also concluded that the appellant has not demonstrated that he was exposed to herbicides in any manner other than by visiting Vietnam and that he has not demonstrated that his prostate cancer is directly related to his active service. The appellant does not challenge those conclusions on appeal. The Court, therefore, will deem those issues to have been abandoned by the appellant and it will not review the portion of the Board's decision addressing them. *See Cacciola v. Gibson*, 27 Vet.App. 45, 56-57 (2014) (when an appellant abandons an issue, the Court will not decide it); *Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (arguments not raised before the Court are considered abandoned on appeal).

The Court need not at this time address any other arguments that the appellant has raised concerning the Board's conclusion that § 3.309(e) presumptive service connection is not warranted in this case. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

### III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs and a review of the record, the portion of the Board's December 7, 2015, decision explaining its conclusion that the appellant is not entitled to § 3.309(e) presumptive service connection for his claimed disorder because he has

not shown that he visited Vietnam during his active service is VACATED and that matter is REMANDED for further proceedings consistent with this decision. The appellant's appeal of the Board's conclusions that he is not entitled to direct service connection for his claimed disorder and has not shown that he was exposed to herbicides in any manner other than by visiting Vietnam is DISMISSED.

DATED: November 29, 2016

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