

Vet. App. No. 19-3403

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

PASQUAL A. OLVERA,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

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

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TABLE OF CONTENTS

I. ISSUE PRESENTED.....	1
II. STATEMENT OF THE CASE	1
A. Jurisdictional Statement.....	1
B. Nature of the Case	2
C. Statement of Relevant Facts.....	2
III. SUMMARY OF THE ARGUMENT.....	3
IV. ARGUMENT	3
A. The Board’s statement of reasons or bases denying Appellant entitlement to service connection for alcohol abuse disorder is adequate and Appellant’s claim is precluded as a matter of law	3
B. Appellant has abandoned all issues not argued in his brief.....	5
V. CONCLUSION.....	5

TABLE OF AUTHORITIES

Cases

<u>Allen v. Principi</u> , 237 F.3d 1368 (Fed. Cir. 2001)	4
<u>Bucklinger v. Brown</u> , 5 Vet. App. 435 (1993)	5
<u>Davis v. Principi</u> , 17 Vet. App. 54 (2003)	4
<u>Gabrielson v. Brown</u> , 7 Vet. App. 36 (1994)	4
<u>Gilbert v. Derwinski</u> , 1 Vet. App. 49 (1990)	3, 5
<u>Sabonis v. Brown</u> , 6 Vet. App. 426 (1994)	3, 4-5
<u>Williams v. Gober</u> , 10 Vet. App. 447 (1997)	5
<u>Winters v. West</u> , 12 Vet. App. 203 (1999)	5

Statutes

38 U.S.C. § 1110 (2018)	3
38 U.S.C. § 7104(d) (2018)	5
38 U.S.C. § 7105(d)(1) (2018)	3
38 U.S.C. § 7252(a) (2018)	1
38 U.S.C. § 7261(a)(4) (2018)	3

Regulations

38 C.F.R. § 3.156(c)	2-3
----------------------------	-----

RECORD CITATIONS

R. at 3-6 (February 2019 Board Decision)	2, 3, 4
R. at 33-34 (October 2018 Substantive Appeal)	2, 4
R. at 76-106 (September 2018 Statement of the Case).....	2
R. at 137-38 (March 2018 Notice of Disagreement)	2
R. at 140-49 (March 2018 Rating Decision notification letter).....	2
R. at 158-62 (March 2018 Rating Decision)	2
R. at 240 (DD Form 214).....	2
R. at 723-25 (July 2008 Rating Decision notification letter)	2
R. at 727-29 (July 2008 Rating Decision)	2
R. at 824-33 (March 2008 Claim)	2, 4

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**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court should affirm the February 15, 2019, Board of Veterans' Appeals (Board) decision, which denied entitlement service connection for alcohol abuse disorder.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Pasqual A. Olvera, appeals the February 15, 2019, Board decision, which denied his entitlement to service connection for alcohol abuse disorder. See Appellant's Informal Brief (App. Inf. Br.) at 1-3; (R. at 3-6).

C. Statement of Relevant Facts

Appellant served in active service from July 1958, through September 1961. (R. at 240).

In March 2008, he filed a claim for entitlement to service connection for alcoholism. (R. at 830 (824-33)). The Regional Office (RO) denied that claim in a July 2008 rating decision. (R. at 723-25, 727-29).

The RO considered evidence Appellant submitted after the July 2008 rating decision from the Phoenix, Arizona VA Medical Center (VAMC) and denied reopening in a March 2018 rating decision. (R. at 140-49, 158-62). It found that the evidence from the VAMC did "not relate to an unestablished fact necessary to substantiate the claim and d[id] not raise a reasonable possibility of substantiating the claim." (R. at 159). Appellant filed a notice of disagreement in March 2018. (R. at 137-38), and the RO issued a statement of the case in September 2018, continuing the denial of his claim (R. at 76-106). He appealed to the Board in October 2018. (R. at 33-34).

The Board, finding that the RO received service personnel records after the March 2008 rating decision, reconsidered the claim in accordance with 38 C.F.R.

§ 3.156(c), and issued its decision denying Appellant's claim. (R. at 4, 3-6). This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision that denied entitlement to service connection for alcohol abuse disorder. The Board properly found that Appellant's alcohol abuse disorder was precluded as a matter of law. *See Sabonis v. Brown*, 6 Vet. App. 426 (1994).

IV. ARGUMENT

A. The Board's statement of reasons or bases denying Appellant entitlement to service connection for alcohol abuse disorder is adequate and Appellant's claim is precluded as a matter of law.

A Board decision must include "a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7105(d)(1). The Board's decision that service connection is not warranted is a finding of fact reviewed under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). Under this deferential standard of review, the Court cannot substitute its judgment for that of the Board and must affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

A veteran cannot receive VA compensation benefits for a disability that is the result of willful misconduct or the abuse of alcohol or drugs. 38 U.S.C. § 1110. In *Allen*, the Court held that "the best interpretation of [38 U.S.C. §1110] is that it

precludes compensation only in two situations: 1) for primary alcohol abuse disabilities; and 2) for secondary disabilities (such as cirrhosis of the liver) that result from primary alcohol abuse.” *Allen v. Principi*, 237 F.3d 1368, 1376 (Fed. Cir. 2001). Additionally, regardless of whether alcohol abuse and polysubstance dependence are developed during service, the law prohibits an award of service connection for those conditions. *Davis v. Principi*, 17 Vet.App. 54, 57 (2003); *Gabrielson v. Brown*, 7 Vet.App. 36, 41 (1994).

Here, the Board acknowledged Appellant’s contention that he incurred alcohol abuse during service. (R. at 4 (3-6)); see (R. at 33-34); see also (R. at 830 (824-33) (where Appellant noted that he was an alcoholic due to his time in service as he “never saw so much alcohol” as he did in service and he “had problems during [his] entire time in service” from alcohol)). The Board ultimately denied Appellant’s claim in concluding that “[d]irect service connection for alcohol abuse disorder [wa]s precluded as a matter of law and the requirements for secondary service connection ha[d] not been met as [Appellant] ha[d] no established service-connected disabilities.” (R. at 3 (3-6)). The Board is correct in finding that “[c]laimed alcohol abuse is not a disability for which compensation is payable.” See *Davis*, 17 Vet.App. at 57 (affirming that “service connection cannot, as a matter of law, be granted for primary substance abuse”)). Notwithstanding Appellant’s reports that his alcoholism began in service, see (R. at 33-34, 830 (824-33)), the law bars compensation for substance abuse developed in service. *Davis*, 17 Vet.App. at 57 (2003); see also *Sabonis*, 6 Vet.App. at 430 (“where the law and

not the evidence is dispositive, the claim should be denied or the appeal . . . terminated because of the absence of legal merit or the lack of entitlement under the law”).

In explaining that Appellant’s alcoholism is not a disability for which compensation is payable, the Board’s statement of reasons or bases is adequate. 38 U.S.C. § 7104(d). As there was a plausible basis in the record for denying Appellant’s claim, the Board’s findings must be affirmed. *Gilbert*, 1 Vet.App. at 52.

B. Appellant has abandoned all issues not argued in his brief.

It is axiomatic that issues not raised on appeal are abandoned. See *Disabled Am. Veterans* at 688 n.3 (stating that the Court would “only address those challenges that were briefed”); *Winters v. West*, 12 Vet.App. 203, 205 (1999); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned BVA determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Thus, any and all other issues that have not been addressed in Appellant’s Informal Brief, have therefore been abandoned.

V. CONCLUSION

In view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court affirm the Board’s February 15, 2019, decision denying entitlement to service connection for alcohol abuse disorder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America that, on February 21, 2020, a copy of the foregoing was mailed postage prepaid to:

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