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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 12-2321

DENNIS D. MCKELVY, APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

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

GREENBERG, *Judge*: The appellant, Dennis D. McKelvy, appeals through counsel the July 18, 2012, decision of the Board of Veterans' Appeals (Board) that determined that his discharge from service is a bar to VA benefits based on that period of service and denied his claims for benefits based on service connection for alcoholism and hepatitis C. Record (R.) at 3-16. The appellant argues that the Board (1) erred in finding that the duty to assist had been satisfied because records held by the Board for Correction of Naval Records (BCNR) were not obtained; (2) did not provide an adequate statement of reasons or bases for its determination that the appellant's discharge was characterized by "willful and persistent" misconduct; and (3) relied on a VA medical opinion that was based on an inaccurate factual premise. Appellant's Brief (Br.) at 11-18. Review by a single judge is authorized by 38 U.S.C. § 7254(b). *See also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's July 2012 decision and remand the matter of the character of the appellant's discharge for proceedings consistent with this decision.

The appellant served on active duty in the U.S. Navy from January 1964 to March 1968 as a boatswain's mate, including service on the U.S.S. *Ozbourn* and combat in Vietnam. R. at 879, 908. The appellant reported aboard the *Ozbourn* in April 1964. R. at 916. From September 1965 to December 1965, the *Ozbourn* was stationed on the coast of South Vietnam and provided naval

gunfire support for forces on shore, including on the Saigon River. R. at 553, 999. The appellant served as a projectileman and stated that, in October 1965, they provided "emergency gun support for the evacuation of friendly forces," but missed the target and fired 8 to 10 rounds on friendly forces before adjusting and killing over 150 enemies. R. at 273. The appellant also stated that, in November 1965, he assisted in unloading dead and wounded soldiers from a helicopter and was covered in their blood in the process. R. at 275. Following these incidents, the appellant had trouble sleeping, but his requests to be removed as projectileman or to receive a hardship discharge were denied. R. at 275. The *Ozbourn* returned to California in February 1966, and the appellant was commended for "exemplary conduct and performance of duty" in the Western Pacific by his commanding officer. R. at 905.

In March 1966, the appellant went absent without leave (AWOL) for 1 day and received 30 days extra duty as punishment. R. at 851. In June 1966, the appellant went AWOL for 30 days, missing the sailing of the *Ozbourn*, and was sentenced by court martial to a reduction in rank, forfeiture of $43 per month for 2 months, and 30 days confinement as part of his sentence. R. at 862. In November 1966, the appellant was reassigned to the U.S.S. *Gridley* and went AWOL for 7 days and was restricted to the limits of the ship as punishment. R. at 849. In March 1967, the appellant's performance on the *Gridley* was evaluated and the reviewing officer stated that the appellant was "a very hard and capable worker" whose "record has improved greatly." R. at 571.

In April 1967, the appellant again went AWOL and failed to obey an order and was restricted to the limits of the *Gridley* for 30 days and made to perform extra duties for 20 days as punishment. R. at 848. In September 1967, the appellant was warned that his conduct was below acceptable standards and that he would be discharged under other than honorable conditions for further disciplinary infractions. R. at 846. Later that month he went AWOL for 4 days, for which he was restricted to the ship for 25 days and given extra duties for 25 days. R. at 846. In October 1967, a performance evaluation reflected that the appellant "has shown an outstanding improvement over his past efforts in professional performance" and "has worked with an enthusiasm and initiative that has prompted both his leading petty officer and chief to assign him the duties of leading seaman," but that "his liberty . . . periods have been marred by a continued exhibition of disregard for his shipmates and for Navy Regulations," and that the "problem has recently become so acute that his

more favorable traits . . . are outweighed by the heavy administrative burden incurred in dealings with his numerous misdemeanors." R. at 572.

In October 1967, the appellant was recommended for an undesirable discharge by his commanding officer, who stated that the appellant was "[c]apable of reasonably good work" but was "totally unreliable because of a chronic pattern of unauthorized absences." R. at 459. On November 1, 1967, the Chief of Naval Personnel determined that the appellant should be given an undesirable discharge for unfitness, but this discharge was held in abeyance "pending further observation of [the appellant's] conduct." R. at 454. The appellant was warned that "a discharge of this nature will deprive [him] of virtually all benefits as a veteran" and he was given a period of service probation in which to "forestall [the discharge] by future good performance." R. at 456.

Later in November 1967, the appellant was found sleeping on watch and punished with confinement for 3 days on bread and water. R. at 845. In December 1967, the appellant went AWOL for 4 days and was given 30 days restriction to the ship and 15 days of extra duties. R. at 844. The appellant's undesirable discharge for unfitness was made effective March 1968. R. at 877.

The appellant applied for VA benefits in August 1968, but in October 1968, the Waco, Texas, VA regional office determined that his entire period of service was characterized by "willful and persistent misconduct" and held his discharge to be under dishonorable conditions. R. at 448, 1152. The appellant was not sent a copy of this decision, but was sent a letter stating that he was denied benefits because he was "separated from service under conditions which preclude entitlement to this benefit." R. at 1152. The appellant's application for benefits in September 2000 was also denied on the grounds that the character of his discharge was "under dishonorable conditions." R. at 414-17. The appellant argued in an October 2000 Notice of Disagreement that he had some meritorious service, that his discharge was not dishonorable, and that his alcoholism and post-traumatic stress disorder (PTSD) caused his misbehavior in service. R. at 410-13.

In August 2002, the appellant informed VA that BCNR had decided not to upgrade his discharge, but requested that VA review its character of discharge determination in his case. R. at 366. VA continued to deny the appellant's applications for benefits, but remanded in November 2008 for further development and determined in January 2011 that a medical opinion was warranted regarding whether the appellant was insane during service. R. at 86, 92-97. The medical examiner

concluded that the appellant was not insane at the time of his misconduct in service, finding that PTSD does not cause "uncontrollable impulses" or "bad acts and fighting," that none of the criteria for PTSD indicates a higher potential for unauthorized absences, and that "[i]t is difficult to imagine what form of insanity would allow a sufferer good control over their impulses in one setting (on board ship, for example) and render those impulses irresistible in another setting." R. at 37-40. The Board returned the appellant's case to its docket to adjudicate the character of the appellant's discharge on the merits, and in July 2012 issued the decision now under appeal. R. at 3-4, 22.

If a service member receives an undesirable discharge or a discharge under other than honorable conditions, VA must make a formal character of discharge determination before addressing a claim for benefits on the merits. VA Adjudication Manual Rewrite (M21-1 MR) pt. III, subpt. v, ch. 1, § y, § B–5(c). If VA determines that the service member was discharged or released under the circumstances outlined in 38 U.S.C. § 5303 or 38 C.F.R. § 3.12, which include "willful and persistent misconduct," such benefits are not payable unless VA finds that the service member was insane[1] at the time of committing the offense that precipitated that discharge or release. 38 U.S.C. § 5303(b); 38 C.F.R. § 3.12(b) (2013).

The Court agrees with the appellant that the Board's determination that the duty to assist was satisfied in this case is clearly erroneous. *See Nolen v. Gober*, 14 Vet.App. 183, 184 (2000) (Board determination as to whether the Secretary fulfilled his duty to assist is a finding of fact subject to review under the "clearly erroneous" standard prescribed by 38 U.S.C. § 7261(a)(4)); *see also United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (holding that a finding of material fact is "clearly erroneous" when a court, after reviewing all the evidence, "is left with the definite and firm conviction that a mistake has been committed").

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[1]An insane person is defined by VA regulation as

> one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

38 C.F.R. § 3.354(a) (2013).

Specifically, the Board's determination that the records considered by the BCNR were not relevant because the BCNR did not upgrade the appellant's discharge draws a false equivalency between the determinations made by the BCNR and by VA. The determination of the BCNR not to upgrade the appellant's "other than honorable" discharge to "honorable" does not answer the question of whether the appellant's "other than honorable" discharge was a bar to eligibility for VA benefits, because veterans discharged under "other than honorable" conditions may still be eligible for benefits. *See* 38 U.S.C. § 5303(b); 38 C.F.R. § 3.12(b). The Board improperly failed to obtain the BCNR records on the basis of its finding that, "given that the BCNR did not upgrade the appellant's discharge, these records are not relevant to this case" (R. at 7-8), and the Board must obtain them on remand. *See* 38 U.S.C. § 5103A(c)(1) ("[T]he assistance provided by the Secretary . . . shall include obtaining . . . other relevant records pertaining to the claimant's active military, naval, or air service that are held or maintained by a governmental entity.").

The Court also notes that, when the Board determined that the appellant's service was characterized by willful and persistent misconduct, it failed to explicitly link the conduct with a specific Board determination of ineligibility for veterans benefits in accordance with § 3.12(d). *But see Stringham v. Brown*, 8 Vet.App. 445, 449 (1995) (periods of AWOL are not minor offenses). Although the Board found that the appellant was not insane during service, willfulness is separate and distinct from insanity as an element of "willful and persistent misconduct" under § 3.12(d)(4), and the Board made no explicit finding of willfulness in the appellant's case.

Although the Court is remanding the appellant's claim on different grounds, the Board is required to provide an adequate statement of reasons or bases for its determinations on remand, and when adjudicating the appellant's claim should determine whether the appellant's conduct at issue was willful, potentially accounting for the appellant's PTSD in its analysis. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (establishing that the Board must provide a statement of reasons or bases for its determinations adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court).

Because the Court holds that remand is necessary, the Court will not address the appellant's alternative arguments. *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 may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[M]any unfortunate and meritorious [veterans], whom [C]ongress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one . . . ." (internal quotation marks omitted)).

For the foregoing reasons, and on review of the record, the Board's July 18, 2012, decision is VACATED and the matter REMANDED for proceedings consistent with this opinion.

DATED: October 10, 2013

Copies to:

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VA General Counsel (027)