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

NO. 15-4082

ALFRED PROCOPIO, JR., 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, Alfred Procopio, Jr., appeals through counsel a July 9, 2015, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for prostate cancer and diabetes mellitus, type II (DM).<sup>1</sup> Record (R.) at 2-23. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs and the appellant submitted a reply brief. The appellant has also filed a motion for oral argument, and the Secretary filed a response opposing the motion. Also pending is the appellant's motion for leave to file a reply to the Secretary's opposition; the appellant's response; and the Secretary's opposition to the later motions. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons set forth below, the Court affirm the Board's decision as to denial of service connection for prostate cancer and diabetes mellitus with edema.

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<sup>1</sup>The Board also remanded the appellant's claim for service connection for coronary artery disease, to include as secondary to herbicides, because the regional office (RO) had not yet issued a Statement of the Case with respect to this claim. The Court does not have jurisdiction to address the remanded claim. *See* 38 U.S.C. § 7266(a); *Breeden v. Principi*, 17 Vet.App. 475 (2004).

The Court concludes that, in this case, there is no reason that oral argument "will materially assist in the disposition of this appeal." *Janssen v. Principi*, 15 Vet.App. 379 (2002). The Court will therefore deny the appellant's motion for oral argument and deny the appellant's motion for leave to file a response to the Secretary's motion opposing oral argument.

## I. FACTS

Mr. Procopio served on active duty in the U.S. Navy from September 1963 to August 1967, R. at 1688, including service aboard the U.S.S. *Intrepid*, an aircraft carrier, from November 1964 through July 1967, R. at 34. In July 1966, the *Intrepid* was deployed off the coast of Vietnam. R. at 226-39; *see* R. at 423-512 (deck log book reflecting the location of the U.S.S. *Intrepid* from July 1, 1966, to July 31, 1966), 1084 (reflecting Mr. Procopio's assertion that his ship was in the Gulf of Tonkin from May 1967 to July 1967), 1681 (reflecting Mr. Procopio's assertion that "we sailed into Vietnam on two occasions and spent time in the Gulf of Tonkin and on the Southern Coast of Vietnam"). Mr. Procopio's service treatment records do not reflect diagnoses or treatment of DM or a prostate condition during active military service. R. at 1512-1602.

In October 2006, Mr. Procopio sought entitlement to service connection for DM and noted that his disability began in January 2004. R. at 1680. On his application, he reported that he was in Vietnam from March 1966 to July 1967. R. at 1674, 1681. He explained that "the benefits I am seeking is service connection for type II diabetes with edema. While in the Navy, I served onboard the USS *Intrepid*. During my service, we sailed into Vietnam on two occasions and spent time in the Gulf of Tonkin and on the Southern Coast of Vietnam." R. at 1681. He further stated that "I believe this to be the cause of my type II diabetes with edema." *Id.* The RO deferred Mr. Procopio's claim in January 2007 and again in an April 2007 rating decision. R. at 1315, 1330.

In October 2007, Mr. Procopio sought entitlement to service connection for prostate cancer and argued that "I believe that this condition is also as a result of my exposure to Agent Orange while stationed aboard the U.S.S. *Intrepid*." R. at 1262. The RO received additional evidence and argument from Mr. Procopio in March 2009 in which he stated that "I believe that my exposure to Agent Orange was while serving onboard the aircraft carrier USS *Intrepid* from March to November 1966 and again from May 1967 to July 1967 in the Gulf of Tonkin." R. at 1084. He argued that

"[w]hile performing my duties onboard the ship, we quite frequently handled these chemicals and the aircraft and equipment that was used to spray these chemicals, as well as the water that was pulled from the Gulf and 'purified' through co-distillation for use as our drinking water." R. at 1084. He further argued that "[t]his water was runoff water from Vietnam and the probability that we were drinking dioxin[-]contaminated [water] is high." *Id.* Along with his argument, Mr. Procopio submitted a scientific study entitled "Co-Distillation of Agent Orange and Other Persistent Organic Pollutants in Evaporative Water Distillation." R. at 1086-93 (Australian scientific article).

In April 2009, the RO issued a rating decision, denying service connection for DM with edema and service connection for prostate cancer. R. at 1063. The RO reasoned that service connection was not warranted for these disabilities because the evidence of record did not show "a medical relationship between a current disability and a disease, event, or injury" during service and because the evidence of record did not reflect "on-ground Vietnam service" to warrant entitlement to service connection on a presumptive basis. R. at 1065.

In response, Mr. Procopio submitted his Notice of Disagreement (NOD) and a May 2009 private treatment record, written by Dr. Gordon L. Grado, MD, FACRO, FACR. R. at 1035-43. The private treatment record reflects that Mr. Procopio provided Dr. Grado with a "detailed description and discussion regarding his military history" and communicated that he was concerned with "his exposure as a 'blue water sailor' where they were in the runoff from Vietnam of these sprays and of Agent Orange." R. at 1035. Dr. Grado opined that Mr. Procopio "has multiple problems associated with Agent Orange exposure including prostate cancer, erectile dysfunction, and diabetes" and recorded that the "patient received not only direct exposure from planes on the flight deck but from the evaporators on board, which condensed the waters used for food, cleaning clothes, and showering." *Id.*

The RO issued a Statement of the Case (SOC) in October 2009 continuing to deny service connection for prostate cancer and DM. R. at 981. The RO concluded that "there is simply no record of your purported exposure to herbicides in service" and that "there is neither a direct nor a presumptive basis for the grant of service connection for prostate cancer and diabetes mellitus type 2." R. at 1000. Mr. Procopio thereafter perfected his appeal to the Board and argued that "it remains my contention that my exposure to dioxin/agent orange occurred while onboard ship handling the

drums that carried these chemicals, as well as maintaining the aircraft that were responsible for flying over Vietnam and spraying these chemicals." R. at 969. A Supplemental SOC (SSOC) was subsequently issued in December 2009, and, after additional VA treatment records were obtained, the RO issued another SSOC in January 2010. R. at 929-32, 933-45, 958-64.

Mr. Procopio's claims were subsequently transferred to the Board and, in September 2010, he presented for a Board hearing. R. at 898-907. During the hearing, he testified that he was exposed to "chemical exposure and herbicide exposure, due to . . . workings upon the flight deck, such as . . . when planes land and take off, there's fluid or chemicals that are on the deck that I worked in to replace landing lights . . . ." R. at 902. He also argued that his treating physician, Dr. Grado, opined that he was exposed to Agent Orange "[e]ither through direct contact or through the distillation of the water aboard ship." R. at 904.

Subsequently, Mr. Procopio submitted additional medical evidence in support of his claim, including an October 2010 letter from private physician Dr. Grado opining that "[i]f Mr. Procopio was exposed to Agent Orange or Agent Orange was used in the regions where he was off shore, then his claim would be 'as likely as not' related to Agent Orange." *Id.*

In March 2011, the Board issued a decision denying service connection for prostate cancer and diabetes, both to include as secondary to herbicide exposure. R. at 866-78. The Board found that Mr. Procopio "did not serve or visit on-shore in Vietnam" and was "not exposed to herbicide while on active duty." R. at 867. Additionally, the Board considered Mr. Procopio's contention that he was exposed to herbicides through the drinking water onboard the U.S.S. *Intrepid*, and it also considered the Australian scientific article of record, but found that "this article is too general in nature to provide, alone, the necessary evidence to show that the Veteran was exposed to Agent Orange while onboard the USS INTREPID." R. at 875.

Mr. Procopio appealed the Board's decision to this Court and, in October 2012, the Court vacated and remanded the Board's decision. R. at 788-802; *Procopio v. Shinseki*, 26 Vet.App. 76 (2012). A panel of this Court held that remand was warranted because Mr. Procopio was not provided with an adequate Board hearing. *Id.* at 81-83.

Thereafter, Mr. Procopio's case was returned to the Board and, in November 2012, Mr. Procopio submitted a statement requesting "consideration [be] given to the fact that I was also

exposed to aircraft that flew through the spray of Agent Orange while on their missions." R. at 777. In March 2013, the Board remanded Mr. Procopio's claims for further adjudication and development, to include additional VA notice. R. at 760-65.

Thereafter, VA received a June 2013 private treatment record, written by Dr. Grado, in conjunction with Mr. Procopio's claim for service connection for coronary artery disease. R. at 708-11. Dr. Grado provided an impression of "Agent Orange exposure in Vietnam as blue water sailor off the coast of Vietnam"; with "[s]ide effects related to Agent Orange, including erectile dysfunction, prostate cancer, coronary artery disease"; and "[t]ype 2 diabetes mellitus (also associated with Agent Orange)." R. at 711.

Also in June 2013, the RO issued another SSOC and, in September 2013, Mr. Procopio submitted another statement arguing that he was exposed to Agent Orange when working on the flight deck of the U.S.S. *Intrepid*. R. at 623. This case was returned to the Board and, in November 2013, the Board, again, remanded Mr. Procopio's claims because he "was not scheduled for a videoconference hearing before a Veterans Law Judge." R. at 620.

After his case was again returned to the RO, additional evidence was received, including the deck log book of the U.S.S. *Intrepid*, showing the ship's deployment off the coast of Vietnam commencing on July 1, 1966, at Yokosuka, Japan, and ending on July 31, 1966, at Dixie Station, South China Sea. R. at 423-512. In November 2013, Mr. Procopio's counsel submitted additional evidence and argument in support of Mr. Procopio's claims, including, inter alia, a "Memorandum in Support of Veteran Procopio's Claim"; a pleading from a separate case filed in the United States District Court for the District of Columbia, captioned as *Blue Water Navy Vietnam Veterans Association, Inc., et al. v. Eric Shinseki, Secretary of Veterans Affairs*; multiple declarations; a "Comment by John B. Wells"; and treatises. R. at 187-410.

Thereafter, Mr. Procopio presented for a Board hearing. R. at 168-86. His counsel argued that "the river banks were sprayed [and] [t]hat was mixed with petroleum. The petroleum would then float down into the South China Sea." R. at 176. He also argued that the "evidence will support . . . that ships that were constantly anchoring within the South China Sea, within the territorial seas, would churn up the bottom. Now, coming from Louisiana, we know that Agent Orange floats, but

it also falls to the bottom and emulsifies. Constant anchoring would turn that, would churn up the bottom." R. at 176-77.

In July 2015, the Board issued the decision that is now on appeal. R. at 2-23. The Board denied service connection for prostate cancer and DM with edema, both to include as due to exposure to herbicides. The Board found that "[t]he competent and credible evidence of record is against a finding that the Veteran was present on the landmass or the inland waters of Vietnam during service and, therefore, he is not presumed to have been exposed to herbicides, including Agent Orange." R. at 4. The Board also found that "[t]he competent and credible evidence of record is against finding that the Veteran was directly exposed to herbicides during service." *Id.*

## II. ANALYSIS

### A. Presumptive Service Connection

Under 38 U.S.C. § 1116(a) a veteran who "served in the Republic of Vietnam" between January 6, 1962, and May 7, 1975, is presumed service connected for certain conditions likely caused by exposure to Agent Orange, including DM and prostate cancer, even if the veteran cannot prove actual exposure to a qualifying herbicide. 38 U.S.C. § 1116(a); 38 C.F.R. § 3.309(e) (2016). "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (2016). In *Haas v. Peake*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) adopted VA's interpretation of the statutory phrase "served in the Republic of Vietnam" to mean that, for a veteran to be entitled to the presumption, he or she must have been present at some point on the landmass or inland waters of Vietnam. 525 F.3d 1168, 1182-83 (Fed. Cir. 2008).

For veterans who served in the U.S. Navy during the Vietnam era, VA distinguishes between the "brown water" Navy, which consisted of usually smaller vessels that "operated on the muddy, brown-colored inland waterways of Vietnam," and the "blue water" Navy, which consisted of larger "gun line ships and aircraft carriers . . . operat[ing] on the blue-colored waters of the open ocean." VA Training Letter 10-06, at 4 (Sept. 9, 2010). VA has defined inland waterways to include "rivers, estuaries, canals, and delta areas 'inside the country.'" *Gray v. McDonald*, 27 Vet.App. 313, 321

(2015) (quoting VA Training Letter 10-06). VA also extends the presumption of herbicide exposure to veterans who served on ships where deck logs reference "anchoring [in] or entering the 'mouth' of" the Cua Viet River, Saigon River, Mekong River Delta, Ganh Rai Bay, and the Rung Sat Special Zone. *Id.* However, VA does not include in the definition of inland waterways "open deep-water coastal ports and harbors where there is no evidence of herbicide use." *Id.* at 321-22.

In *Gray*, the veteran served aboard a ship whose logs reflected that it anchored in Da Nang Harbor on numerous occasions in 1972. *Id.* at 316. The Board, relying on VA policy, concluded that Mr. Gray's presence in Da Nang Harbor did not entitle him to the presumption of herbicide exposure. *Id.* at 317. On appeal, this Court held that, although the Federal Circuit in *Haas* upheld VA's distinction between blue open water and the brown inland waterways, VA's exclusion of Da Nang Harbor from the definition of inland waterways was not entitled to deference, was inconsistent with the regulation, and was arbitrary and irrational. *Id.* at 319, 326. Accordingly, the Court vacated the Board decision as arbitrary and capricious and remanded the matter "for VA to reevaluate its definition of inland waterways--particularly as it applies to Da Nang Harbor--and exercise its fair and considered judgment to define inland waterways in a manner consistent with [§ 3 .307(a)(6)(iii)'s] emphasis on the probability of exposure." *Id.* at 326-27.

The appellant asserts that VA's exclusion of the territorial seas of the Republic of Vietnam from the regulatory definition of "inland waterway" was arbitrary and capricious in light of the Court's decision in *Gray*. Appellant's (App.) Brief (Br.) at 27-30. However, the Board considered the Court's recent holding in *Gray*, but correctly found that it was not applicable to the appellant's case because "the record reflects . . . the [appellant's] presence aboard ship in the Gulf of Tonkin and South China Sea, with some activity in the territorial waters of South Vietnam," and because the appellant "has not specifically alleged that his ship anchored in a deep water harbor such as Cam Ranh Bay," Da Nang Harbor, Quy Nhon Bay, Ganh Rai Bay, or any other bay or harbor in Vietnam. R. at 14; *see* R. at 423-512, 1084; *Gray*, 27 Vet.App. at 319, 326. Further, the appellant does not assert that his ship anchored or entered the mouth of one of the enumerated rivers that VA considers, in VA Training Letter 10-06, to constitute "inland waterways." *See Gray*, 27 Vet.App. at 326.

Therefore, because the appellant has not provided the Court with any evidence of record demonstrating that his ship anchored in a deep water harbor, as was the case in *Gray*, the holding

in *Gray* does not help the appellant and his argument must fail. *See Gray*, 27 Vet.App. at 320 n. 6 (noting that the holding of *Haas* applies where a veteran "never entered a harbor or port" and "served exclusively on the open ocean"); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (holding that the appellant bears the "burden of demonstrating error in the Board's decision"), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

The appellant also argues that the Federal Circuit's decision in *Haas* must be limited to its facts and should not be applied to his claims "because it was not decided in accordance with the accepted canons of construction for [v]eteran's cases." App. Br. at 8. However, the Court agrees with the Secretary's assessment and conclusions regarding the applicability of *Haas* to the appellant's claims:

Essentially, [the] appellant is requesting this Court to review and reverse a decision by the superior tribunal. Yet, such an argument is inappropriate and legally erroneous. Indeed, the Federal Circuit's decision in *Haas* is binding precedent on this Court, and this Court does not have the statutory authority to review decisions of a higher court and provide the relief that [the] [a]ppellant seeks in this case. *See Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) (holding that such binding precedent on this Court includes "a decision of the United States Court of Appeals for the Federal Circuit (which may review some of this Court's decisions)"; *see also* 38 U.S.C. § 7292.

Secretary's (Sec'y) Br. at 19. Accordingly, the appellant's argument that the controlling precedent found in *Haas* should not be applied to his claims must fail.

#### B. Direct Service Connection

A veteran who does not meet the criteria governing herbicide exposure and service connection on presumptive bases may nevertheless establish entitlement to benefits on a direct basis. *Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994) (noting that a veteran may also obtain disability compensation based on in-service herbicide exposure by demonstrating "direct actual causation"); *Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013) (listing in-service incurrence or aggravation of a disease or injury as an element of a direct service-connection claim); 38 C.F.R. § 3.303(d) (2016) ("The presumptive provisions of the statute and [VA] regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid.").

A finding of service connection, or no service connection, is a finding of fact reviewed under the "clearly erroneous" standard in 38 U.S.C. § 7261(a)(4). *See Swann v. Brown*, 5 Vet.App. 229, 232 (1993). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *See id.*

The appellant argues that, in finding that he was not exposed to herbicides during service, the Board clearly erred by relying on VA's conclusion in a 2008 Federal Register notice that "we do not intend to revise our long-held interpretation of 'service in Vietnam'" based on the agency's review of an Australian scientific study similar to the Australian study of record in the current appeal. R. at 19 (Board quoting 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)); *see* App. Br. at 13-16. He asserts that, in the Federal Register notice, VA "misstates the facts of naval operations off of Vietnam and has been repeatedly debunked"; that it contains false conclusions and is contrary to the Australian scientific study of record; and that the "so called VA scientists and experts were never identified or made available for interview." App. Br. at 13-16. He asserts that "despite the fact that there was voluminous evidence contesting this Federal Register notice, the Board gave it undue weight." *Id.* at 15.

However, the Court disagrees and concludes that the appellant's argument must fail for several reasons. First, the Board explained that it "has considered the Australian study [of record], as well as the detailed arguments, testimony, and articles submitted by the [appellant]," but permissibly and reasonably found "this article and the submissions made by the [appellant] . . . too general in nature to provide, alone, the necessary evidence to show that the [v]eteran was exposed to Agent Orange while onboard the U.S.S. *Intrepid*." R. at 18 (citing *Sacks v. West*, 11 Vet.App. 314, 316-17 (1998)). The Board explained that "the articles do not show to any degree of specificity that the [v]eteran was exposed to Agent Orange while drinking water [on] the *Intrepid*, or that he was otherwise shown to have been exposed to herbicides during service." R. at 20.

Second, the Court notes that the Board's reference to the Federal Register notice was in the context of its discussion of the applicability of the holding in *Haas* to the appellant's claims. The Board explained that "the arguments provided by the [appellant] regarding '[b]lue [w]ater' veterans was considered, but the law as to '[b]lue [w]ater' veterans is clear as delineated by the Federal Circuit in *Haas*." R. at 19. The Board further made clear that when the Federal Circuit in *Haas* considered the "blue water" veteran question, the Federal Circuit explained that "VA scientists and experts have noted many problems with the study that caution against reliance on the study to change our long-held position regarding veterans who served off shore." *Id.* Although the appellant disputes these findings of VA regarding the Australian study and argues that they are scientifically incorrect, the issue in this case is whether the appellant has provided evidence to prove that he was directly exposed to Agent Orange, not whether the Federal Circuit in *Haas* correctly decided that "blue water" veterans were excluded from eligibility for presumptive service connection. Again, the Court notes that *Haas* is a precedential decision that is binding upon this Court, and, therefore, the appellant's argument regarding the Federal Register notice fails to allege an error, prejudicial or otherwise, that the Board committed.

The appellant next asserts that the Board failed to adequately consider the issue of direct service connection due to his exposure to Agent Orange "in the waters, including the territorial sea, off the Mekong River, through which the veteran's ship transited." App. Br. at 16. The appellant's argument is based upon the scientific theory that Agent Orange washed into the Mekong River where it combined with petroleum and other sediment and flowed out into the South China Sea, forming discharge plumes, and that this sea water was distilled on board ship and used for, inter alia, potable water. App. Br. at 17-19. He avers that the Secretary's failure to recognize the presence of Agent Orange in the harbors off the coast of Vietnam, including the harbor in which the appellant's ship transited, was arbitrary and capricious because two reports by the National Academy of Sciences, Institute of Medicine (IOM), Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides, show that "there is no rational basis for the Secretary's position that Agent Orange did not enter the South China Sea or the bays and harbors." App. Br. at 19; *see* R. at 337-40 (excerpt of IOM report entitled *Veterans and Agent Orange: Update 2008*); R. at 415-16 (excerpt of IOM report entitled *Veterans and Agent Orange: Update 2010*).

However, again, the Court notes that the issue on appeal is whether the evidence of record shows that the appellant was directly exposed to Agent Orange, not whether certain reports scientifically prove that herbicides did or did not enter the coastal waters of Vietnam. The record shows that the Board considered entitlement to service connection on a direct basis but reasonably found that the appellant's statements regarding exposure to Agent Orange were "outweighed by the more probative evidence to the contrary--namely, the responses from [the National Public Records Center] and review of the deck logs of the U.S.S. *Intrepid* showing [the appellant had] no exposure to tactical herbicides, included Agent Orange." R. at 17-18; *see Washington v. Nicholson*, 19 Vet.App. 362, 366-67 (2005) (holding that "credibility determinations must be supported by adequate reasons or bases"); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (holding that it is the Board's responsibility to determine the credibility and probative value of evidence).

Finally, in his brief, the appellant acknowledged that actual evidence of his exposure to herbicides while aboard the *U.S.S. Intrepid* does not exist, but argued that the circumstantial evidence he presented should be satisfactory to establish service connection. *See* App. Br. at 26-27. Unfortunately, because presumptive service connection is not available, actual evidence of exposure to herbicides is needed to substantiate his claims. *See Combee*, 24 F.3d at 1043-44; *Wallin v. West*, 11 Vet.App. 509, 514 (1998) (holding that medical treatise, textbook, or article evidence must "discuss[] generic relationships with a degree of certainty" so that there is plausible causality based on the facts of a specific case); *see also Haas*, 525 F.3d at 1193-94 (noting that judgments regarding similar circumstantial evidence of blue water veterans' exposure to herbicides "are properly left to Congress and [] VA in the first instance; this court is not the proper forum for an initial analysis of such evidence and its implications for [] VA's policies."). The Court therefore agrees with the Secretary's conclusion that the appellant "fails to support his scientific theory with any empirical evidence of record . . . reflecting that the U.S.S. *Intrepid* actually entered into a discharge plume that contained Agent Orange . . . [or] that such Agent Orange . . . was pulled into the ship[]s distillation system and converted into, *inter alia*, potable water." Sec. Br. at 25 (citing *Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169).

In sum, because the Board reasonably found that the appellant was not directly exposed to Agent Orange and reasonably found that his DM and prostate cancer were not otherwise linked to

his active military service, the Board had plausible bases for its determinations in this case. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52-53 (1990) (in determining whether a finding is clearly erroneous, "this Court is not permitted to substitute its judgment for that of the [Board] on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the [Board] . . . we cannot overturn them").

### **III. CONCLUSION**

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, the appellant's opposed motion for oral argument and opposed motion for leave to file a response to the Secretary's motion opposing oral argument are DENIED. The Board's July 9, 2015, decision as to denial of service connection for prostate cancer and diabetes mellitus with edema is AFFIRMED.

DATED: November 18, 2016

Copies to:

John B. Wells, Esq.

VA General Counsel (027)