BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF [redacted]
DUDLEY A. KING

DOCKET NO. 10-05 370) DATE *June 1, 2016*
) *PAT*
)

On appeal from the
Department of Veterans Affairs Regional Office in Cleveland, Ohio

THE ISSUE

Entitlement to an initial compensable disability rating for bilateral hearing loss.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESSES AT HEARING ON APPEAL

Appellant and his spouse

ATTORNEY FOR THE BOARD

Bridgid D. Houbeck, Counsel

INTRODUCTION

The Veteran had active service from October 1969 to March 1971, including service in the Republic of Vietnam from October 1970 to March 1971.

This matter has come before the Board of Veterans' Appeals (Board) on appeal from a January 2009 rating decision of the Department of Veterans Affairs (VA), Regional Office (RO), in Cleveland, Ohio, that granted service connection for bilateral hearing loss and assigned an initial noncompensable disability rating, effective June 10, 2008.

In June 2012, the Veteran testified at a video conference hearing over which the undersigned presided. A transcript of that hearing has been associated with his claims file. The provisions of 38 C.F.R. § 3.103(c)(2) impose two distinct duties on VA employees, including Board personnel, in conducting hearings: the duty to explain fully the issues and the duty to suggest the submission of evidence that may have been overlooked. *Bryant v. Shinseki*, 23 Vet. App. 488 (2010). During the above hearing, the undersigned clarified the issues on appeal and inquired as to the etiology, continuity, and severity of the Veteran's asserted symptoms. The Veteran was offered an opportunity to ask the undersigned questions regarding his claim. Neither the Veteran nor his representative has asserted that VA failed to comply with these duties; they have not identified any prejudice in the conduct of the Board hearing. The Board, therefore, concludes that it has fulfilled its duty under *Bryant*.

In March 2014, the Board remanded this case for further development. As will be discussed further herein, the Board finds that the agency of original jurisdiction (AOJ) substantially complied with the remand orders, and no further action is necessary in this regard. *See D'Aries v. Peake*, 22 Vet. App. 97, 105 (2008); *Dyment v. West*, 13 Vet. App. 141, 146-47 (1999) (remand not required under *Stegall v. West*, 11 Vet. App. 268 (1998), where the Board's remand instructions were substantially complied with), *aff'd*, *Dyment v. Principi*, 287 F.3d 1377 (2002).

In addition to the paper claims file, there is a Virtual VA paperless claims file associated with the Veteran's claim. A review of the documents in such file reveals

that they are either duplicative of the evidence in the paper claims file or are irrelevant to the issue on appeal.

FINDING OF FACT

Audiometric testing shows that the Veteran's hearing loss is manifested by no more than Level IV hearing in the right ear and Level II hearing in the left ear.

CONCLUSION OF LAW

The criteria for a compensable initial disability rating for bilateral hearing loss have not been met. 38 U.S.C.A. §§ 1155, 1160, 5107 (West 2014); 38 C.F.R. §§ 3.383, 3.385, 4.1, 4.7, 4.85, 4.86, Diagnostic Code 6100 (2015).

REASONS AND BASES FOR FINDING AND CONCLUSION

Duties to Notify and Assist

VA has a duty to notify and assist claimants in substantiating claims for VA benefits. *See e.*g. 38 U.S.C.A. §§ 5103, 5103A (West 2014) and 38 C.F.R. § 3.159 (2015). In the instant case, VA provided adequate notice of the requirements of the underlying service connection claim in a letter sent to the Veteran in September 2008. This notice included information on how VA determines disability ratings and effective dates.

VA has a duty to assist a claimant in the development of a claim. This duty includes assisting the claimant in the procurement relevant treatment records and providing an examination when necessary. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159.

The Board finds that all necessary development has been accomplished, and

therefore appellate review may proceed without prejudice to the Veteran. *See Bernard v. Brown*, 4 Vet. App. 384 (1993). Service, VA, and private treatment records are associated with the claims file. VA provided relevant examinations in September 2008, December 2009, May 2011, and September 2014. These examinations contained all information needed to rate the disability. Indeed, the examiners reviewed the objective evidence of record, documented the Veteran's current complaints, and performed a thorough clinical evaluation. Therefore, these examinations are adequate for VA purposes.

There is no indication of additional existing evidence that is necessary for a fair adjudication of the claim that is the subject of this appeal. Hence, no further notice or assistance to the Veteran is required to fulfill VA's duty to assist.

Analysis

As noted in the introduction, the Veteran was originally granted service connection for sensorineural hearing loss in the January 2009 rating decision at issue. He has appealed the noncompensable initial disability rating assigned at that time.

Disability ratings are intended to compensate impairment in earning capacity due to a service-connected disorder. 38 U.S.C.A. § 1155. Separate diagnostic codes identify the various disabilities. *Id.* It is necessary to rate the disability from the point of view of the Veteran working or seeking work, 38 C.F.R. § 4.2, and to resolve any reasonable doubt regarding the extent of the disability in the Veteran's favor. 38 C.F.R. § 4.3. If there is a question as to which disability rating to apply to the Veteran's disability, the higher rating will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

In considering the severity of a disability, it is essential to trace the medical history of the Veteran. 38 C.F.R. §§ 4.1, 4.2, 4.41 (2015). Consideration of the whole-recorded history is necessary so that a rating may accurately reflect the elements of disability present. 38 C.F.R. § 4.2 (2015); *Peyton v. Derwinski*, 1 Vet. App. 282 (1991). While the Veteran's entire history is reviewed when assigning a disability

rating, 38 C.F.R. § 4.1, where service connection has already been established and an increase in the disability rating is at issue, it is the present level of disability that is of primary concern. *Francisco v. Brown*, 7 Vet. App. 55 (1994). However, the Veteran is appealing the initial assignment of a disability rating, as such, the severity of the disability is to be considered during the entire period from the initial assignment of the disability rating to the present time. *Fenderson v. West*, 12 Vet. App. 119 (1999). Additionally, in determining the present level of a disability for any increased rating claim, the Board must consider the application of staged ratings. *See Hart v. Mansfield*, 21 Vet. App. 505 (2007). In other words, where the evidence contains factual findings that demonstrate distinct time periods in which the service-connected disability exhibited diverse symptoms meeting the criteria for different ratings during the course of the appeal, the assignment of staged ratings would be necessary.

The assignment of a particular diagnostic code is "completely dependent on the facts of a particular case." *See Butts v. Brown*, 5 Vet. App. 532, 538 (1993). One diagnostic code may be more appropriate than another based on such factors as an individual's relevant medical history, the current diagnosis and demonstrated symptomatology. Any change in a diagnostic code by VA must be specifically explained. *Pernorio v. Derwinski*, 2 Vet. App. 625 (1992).

Words such as "moderate," "moderately severe," and "severe" are not defined in the Rating Schedule. Rather than applying a mechanical formula, the Board must evaluate all of the evidence to the end that its decisions are "equitable and just." 38 C.F.R. 4.6 (2015). Use of terminology such as "severe" by VA examiners and others, although evidence to be considered by the Board, is not dispositive of an issue. All evidence must be evaluated in arriving at a decision regarding an increased rating. 38 C.F.R. §§ 4.2, 4.6 (2015).

It is possible for a Veteran to have separate and distinct manifestations from the same injury that would permit rating under several diagnostic codes; however, the critical element in permitting the assignment of several ratings under various diagnostic codes is that none of the symptomatology for any one of the conditions is duplicative or overlapping with the symptomatology of the other condition. *See*

Esteban v. Brown, 6 Vet. App. 259, 261-62 (1994); 38 C.F.R. § 4.14 (2015) (precluding the assignment of separate ratings for the same manifestations of a disability under different diagnoses).

Rating hearing loss ranges from noncompensable to 100 percent, based upon organic impairment of hearing acuity as measured by the results of controlled speech discrimination tests, together with the average hearing threshold level as measured by pure tone audiometry tests in the frequencies 1000, 2000, 3000, and 4000 cycles per second. 38 C.F.R. § 4.85(a), (d). The rating schedule establishes eleven (11) auditory acuity levels, designated from level I, for essentially normal acuity, through level XI, for profound deafness. 38 C.F.R. § 4.85, Diagnostic Code 6100.

A June 2008 private audiogram showed pure tone thresholds, in decibels, as listed below:

	HERTZ				
	1000	**2000**	**3000**	**4000**	**Average**
RIGHT	20	30	55	70	44
LEFT	25	30	60	70	46

Speech discrimination was 90 percent bilaterally. He reported difficulty understanding speech when there is background noise.

Under Table VI, the both ears are assigned Roman numeral "II." Under Table VII, if the poorer ear is rated II and the better ear is rated II, then a noncompensable disability rating is warranted. *See* 38 C.F.R. § 4.85.

Specific provisions are in effect for "exceptional patterns of hearing impairment," specifically cases where the pure tone thresholds at each of the four specified frequencies are 55 decibels or more, or where the pure tone thresholds are 30 decibels or less at 1000 Hertz and 70 decibels or more at 2000 Hertz. 38 C.F.R. § 4.86. Neither of these patterns is shown here.

The Veteran underwent a VA examination in conjunction with this claim in September 2008. This examiner diagnosed the Veteran with normal hearing from 250 to 1000 hertz, sloping to severe sensorineural hearing loss in the right ear and sloping to profound sensorineural hearing loss in the left ear. His pure tone thresholds, in decibels, were as follows:

	HERTZ				
	1000	**2000**	**3000**	**4000**	**Average**
RIGHT	20	30	55	75	45
LEFT	25	30	60	70	46

Speech audiometry revealed speech recognition ability of 96 percent bilaterally. He reported having the greatest degree of difficulty hearing the television and conversation, especially in background noise.

Under Table VI, the both ears are assigned Roman numeral "I." Under Table VII, if the poorer ear is rated I and the better ear is rated I, then a noncompensable disability rating is warranted. *See* 38 C.F.R. § 4.85. Similarly, these results do not show an exceptional pattern of hearing impairment that would warrant application of Table VIA. 38 C.F.R. § 4.86.

The Veteran underwent another VA audiological examination in December 2009. At that time, he reported an increase in his hearing loss. His pure tone thresholds, in decibels, were as follows:

	HERTZ				
	1000	**2000**	**3000**	**4000**	**Average**
RIGHT	20	30	55	70	44
LEFT	25	30	60	70	46

Speech audiometry revealed speech recognition ability of 100 percent in the right ear and 96 percent in the left ear. This had significant occupational effects. The impact of his hearing loss on occupational activities was poor social interactions and hearing difficulty.

Under Table VI, the both ears are assigned Roman numeral "I." Again, this warrants a noncompensable disability rating and no exceptional pattern of hearing loss is shown. *See* 38 C.F.R. §§ 4.85, Table VII; 4.86.

In May 2011, the Veteran underwent a VA ears examination. His pure tone thresholds, in decibels, were as follows:

	HERTZ				
	1000	**2000**	**3000**	**4000**	**Average**
RIGHT	25	35	50	70	45
LEFT	30	30	60	75	49

Speech audiometry revealed speech recognition ability of 94 to 100 percent bilaterally. He was found to have moderate sensorineural hearing loss bilaterally.

Again, under Table VI, the both ears are assigned Roman numeral "I," which warrants a noncompensable disability rating and no exceptional pattern of hearing loss is shown. *See* 38 C.F.R. §§ 4.85, Table VII; 4.86.

At his June 2012 hearing, the Veteran reported not being able to hear the telephone ring if there was any ambient noise. He had to unplug the surround sound on his television because he was unable to hear what people were saying when it was on. He wore hearing aids and noted that if he did not wear his hearing aids he would have to turn the television up so loud that his wife could not be in the room. His wife testified that the Veteran could not hear anyone unless he was facing them directly. She reported that he was unable to hear the telephone ring or birds chirping outside. The Veteran testified that he was retired.

A June 2012 private audiogram showed pure tone thresholds, in decibels, as listed below:

	HERTZ				
	1000	**2000**	**3000**	**4000**	**Average**
RIGHT	35	40	65	75	54
LEFT	30	35	70	75	53

Speech discrimination was 80 percent in the right ear and 90 percent in the left ear. He reported an increase in hearing impairment.

Under Table VI, the right ear is assigned Roman numeral "IV" and the left ear assigned Roman numeral "II." Under Table VII, if the poorer ear is rated IV and the better ear is rated II, then a noncompensable disability rating is warranted. *See* 38 C.F.R. § 4.85. Again, no exceptional pattern of hearing loss is shown. *See* 38 C.F.R. § 4.86.

In September 2014, the Veteran underwent another VA audiological examination. At that time, his pure tone thresholds, in decibels, were as follows:

	HERTZ				
	1000	**2000**	**3000**	**4000**	**Average**
RIGHT	35	40	60	75	53
LEFT	30	35	65	75	51

Speech audiometry revealed speech recognition ability of 96 percent in the right ear and 94 percent in the left ear. This disability was not found to impact his ordinary conditions of daily life or his ability to work.

Under Table VI, the both ears are assigned Roman numeral "I," which warrants a noncompensable disability rating. *See* 38 C.F.R. § 4.85. Again, no exceptional pattern of hearing loss is shown. *See* 38 C.F.R. § 4.86.

Based on the objective data of record, there is no support for assignment of a compensable rating for the Veteran's bilateral hearing loss. The private and VA audiograms did not reveal audiometric results sufficient to warrant a 10 percent evaluation under 38 C.F.R. § 4.85. During the pendency of this appeal, the

Veteran's hearing loss has been manifested by no more than Level IV hearing in the right ear and Level II hearing in the left ear. A single level increase in either ear would be necessary to warrant a 10 percent evaluation, but hearing loss at that level is not reflected in the record. Therefore, entitlement to a higher initial evaluation for sensorineural hearing loss is not warranted.

Although the Board is precluded by regulation from assigning extra-schedular disability ratings under 38 C.F.R. § 3.321(b)(1) in the first instance, the Board is not precluded from considering whether the case should be referred to the Director of VA's Compensation and Pension Service.

The threshold factor for extra-schedular consideration is a finding that the evidence presents such an exceptional disability picture that the available schedular rating for a service-connected disability is inadequate. There must be a comparison between the level of severity and symptomatology of the service-connected disability with the established criteria.

If the criteria reasonably describe the Veteran's disability level and symptomatology, then the disability picture is contemplated by the Rating Schedule, and the assigned schedular evaluation is, therefore, adequate, and no referral is required. *Thun v. Peake*, 22 Vet. App. 111 (2008).

Here, the rating criteria reasonably describe the Veteran's disability levels and symptomatology, and provided for higher ratings for more severe symptoms. As the disability pictures are contemplated by the Rating Schedule, the assigned schedular ratings are, therefore, adequate. Consequently, referral for extra-schedular consideration is not required under 38 C.F.R. § 3.321(b)(1).

Additionally, under *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), a Veteran may be awarded an extraschedular rating based upon the combined effect of multiple conditions in an exceptional circumstance where the evaluation of the individual conditions fails to capture all the service-connected disabilities experienced. However, in this case, after applying the benefit of the doubt under of *Mittleider v. West*, 11 Vet. App. 181 (1998), there are no additional service-

connected symptoms that have not been attributed to a specific service-connected disability. Accordingly, this is not an exceptional circumstance in which extraschedular consideration may be required to compensate the Veteran for a disability that can be attributed only to the combined effect of multiple conditions.

Finally, the record does not show that this bilateral hearing loss disability has rendered the Veteran unemployable. Although the Veteran is not currently working, he reports that he is retired. Neither the Veteran nor the record indicate that his bilateral hearing loss renders the Veteran unable to secure or follow a substantially gainful occupation as a result of his service-connected bilateral hearing loss. Therefore, the question of entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU) is not raised. *See Jackson v. Shinseki*, 587 F.3d 1106 (Fed. Cir. 2009); *but see Rice v. Shinseki*, 22 Vet. App. 447 (2009) (holding that a TDIU claim is part of a claim for a higher rating when such claim is raised by the record or asserted by the Veteran).

ORDER

An initial compensable disability rating for service-connected bilateral hearing loss is denied.

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DEMETRIOS G. ORFANOUDIS
Acting Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help Veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).