

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

LOYD MAYS,
Appellant,

v.

ROBERT A. McDONALD,
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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B. Nature of the Case

Appellant, Loyd Mays, appeals the November 13, 2015, Board decision that denied entitlement to restoration of a 70 percent disability rating for bilateral hearing loss to include consideration of whether reduction of the disability rating (evaluation) to 30 percent effective from July 1, 2010, was proper. (Record (R.) at 2-25).

C. Statement of Facts

Appellant had active duty service from September 1974 to September 1966. (R. at 711).

In February 2005, Appellant filed a claim, *inter alia*, for entitlement to service connection for bilateral hearing loss. (R. at 783 (777-87)). The Regional Office (RO) issued a rating decision in April 2005 that, *inter alia*, denied his claim. (R. at 697-99 (694-95, 697-701)). Appellant submitted a notice of disagreement (NOD) and request for review by a Decision Review Officer (DRO) in July 2005 (R. at 686, 688 (686-89)). In September 2005, the DRO issued a rating decision that granted entitlement to service connection for hearing loss, right ear with an evaluation of 0 percent, effective February 16, 2005. (R. at 649 (649-50)). The RO also issued a Statement of the Case (SOC) that, *inter alia*, denied entitlement to service connection for hearing loss, left ear, that same month. (R. at 645 (628-46)). In October 2005, Appellant submitted a VA Form 9 regarding the denial of his left ear claim and a notice of disagreement (NOD) regarding the evaluation of his right ear. (R. at 621-24). That same month, Appellant submitted a request

for review by a DRO (R. at 615), the RO issued an SOC regarding Appellant's right ear evaluation (R. at 595-611), and Appellant submitted a VA Form 9 (R. at 591-92). In November 2005, the RO issued a Supplemental SOC regarding Appellant's left ear claim. (R. at 574-78).

In May 2007, Appellant was afforded a VA audio examination. (R. at 548-50). For his right and left ear, Appellant's puretone air conduction examination results were as follows:

		Hertz			
	1000	2000	3000	4000	Puretone average
Left	65	85	80	75	58
Right	55	65	55	55	76

Id. at 549. Appellant's speech discrimination scores were 64% in the right ear and 72% in the left ear. *Id.* The examiner diagnosed Appellant with bilateral moderate to severe sensorineural hearing loss. *Id.* at 550. She opined that the decrease in hearing was related to military noise exposure. *Id.*

Pursuant to a June 2007 DRO decision, the DRO granted entitlement to hearing loss in the left ear, and increased Appellant's rating for bilateral hearing loss to 10 percent, effective February 16, 2005, and 30 percent from May 29, 2007. (R. at 544 (543-46)). The DRO issued a Supplemental SOC in July 2007. (R. at 529-38). In March 2008, the Board issued a decision that, *inter alia*, denied entitlement to higher initial ratings. (R. at 514 (501-14)). This decision was not appealed.

In April 2009, Appellant submitted a request for increase for his bilateral hearing loss. (R. at 495 (495-96)). In May 2009, Appellant was afforded a VA fee-based audio examination. (R. at 454-59). Appellant's puretone conduction threshold examinations results were as follows:

		Hertz			
	1000	2000	3000	4000	Puretone average
Left	85	95	100	110	97.5
Right	85	95	100	100	95

Id. at 456. Appellant's speech recognition scores were 12% in his right ear and 14% in his left ear. *Id.* at 458.

In June 2009, the RO issued a rating decision that, *inter alia*, increased Appellant's bilateral hearing loss to 70 percent, effective April 9, 2009. (R. at 449-51 (444-53)).

Appellant was afforded a VA audiology examination in September 2009. (R. at 373-76). Appellant's puretone air conduction threshold examinations results were as follows:

		Hertz			
	1000	2000	3000	4000	Puretone average
Left	55	60	55	50	55
Right	60	85	80	75	75

Id. at 374. Appellant's word recognition results were 64% in his right ear and 68% in his left ear. *Id.* The examiner diagnosed Appellant with a mild to severe sensorineural hearing loss for the right ear and a mild to moderately-severe

sensorineural hearing loss for the left ear. *Id.* She also found, “[c]ompared with audiometric results obtained on 1/23/09 and C&P on 5/29/07 the hearing loss has remained essentially unchanged.” *Id.*

In January 2010, the RO issued a rating decision that, *inter alia*, proposed to decrease Appellant’s evaluation to 30 percent disabling. (R. at 363 (359-65)). The RO issued a rating decision in April 2010 that decreased Appellant’s evaluation for his bilateral hearing loss to 30 percent, effective July 1, 2010. (R. at 341 (337-38, 341-44)). Appellant submitted an NOD in May 2010 (R. at 335 (335-36)).

Appellant was afforded a VA audiology consultation in June 2010. (R. at 178-79). His pure tone air conduction audiology results were:

	Hertz			
	1000	2000	3000	4000
Left	60	65	60	55
Right	65	85	80	80

Id. at 178. The examiner found no significant progression in his hearing loss since September 2009 examination. *Id.* at 179. She urged Appellant to wear his hearing aids more consistently as “[t]his is the only way that he will hear better.” *Id.*

The RO issued an SOC in August 2010 (R. at 315-34), and Appellant submitted a VA Form 9 in August 2010 (R. at 304-05). In June 2011, the Board remanded Appellant’s claim in order to schedule him with a VA audiometric

examination to address the discrepancy between the May 2009 and September 2009 examinations. (R. at 276-77 (273-77)).

In August 2011, a VA addendum opinion from an audiologist was issued. (R. at 265-67). Appellant's puretone threshold values were as follows:

	Hertz				
	1000	2000	3000	4000	Puretone average
Left	65	65	60	60	62.5
Right	70	90	85	85	82.5

Id. at 266. The examiner, however, found that Appellant's speech recognition score was "[t]oo unreliable to score," reasoning that Appellant "would not respond to most of the words even after repeated re-instruction and pausing." *Id.*

In November 2011, the RO issued a Supplemental SOC (R. at 255-61). The Board issued a decision in March 2013 that determined that the August 2011 VA examiner failed to consider the May 2009 audiological report and remanded Appellant's claim to obtain an opinion. (R. at 239-42 (236-42)). In April 2013, the VA audiologist issued an addendum opinion that found the May 2009 examination was unreliable and inconsistent and should not be used for rating purposes. (R. at 231). In May 2013, the RO issued a SSOC (R. at 225-28).

In November 2013, the Board issued a decision that remanded Appellant's claim in order to obtain additional records. (R. at 203-04 (201-04)). In January 2014, the RO issued a SSOC (R. at 106-12). In May 2014, the Board issued a decision that determined that the reduction of Appellant's rating was

proper. (R. at 96 (86-96)). In January 2015, the Board remanded Appellant's claim pursuant to a joint motion for remand (JMR). (R.at 83). The parties agreed that the Board should consider whether the improvement reflected an improvement in his ability function under the ordinary conditions of life and work. (R. at 80 (77-82)).

III. SUMMARY OF ARGUMENT

Appellant argues that the Board failed to provide an adequate statement of reasons or bases for failing to obtain a retrospective medical opinion and for its determination that Appellant's service-connected hearing loss had improved under the ordinary conditions of life and work. However, the record is replete with several years of objective tests of Appellant's hearing level, which supports the Board's decision. As such, Appellant has not established any prejudicial error on the part of the Board. Accordingly, the Board's November 13, 2015, decision should be affirmed.

IV. ARGUMENT

A. The Board provided an adequate statement of reasons or bases for its decision

Pursuant to 38 U.S.C. § 1155, a veteran's disability will not be reduced unless an improvement in the disability is shown to have occurred. When a rating has continued for five years or more, a reduction maybe accomplished when the evidence clearly warrants the conclusion that sustained improvement has been demonstrated, and when the rating agency determines that it is

reasonably certain that the improvement will be maintained under the ordinary conditions of life. 38 C.F.R. § 3.344(a). “Reexaminations disclosing improvement, physical or mental, in [disabilities that have not become stabilized and are likely to improve] will warrant reduction in rating” for a rating that has been in effect for less than five years. 38 C.F.R. § 3.344(c). Specifically, it is necessary to ascertain, based upon a review of the entire recorded history of the condition, whether the evidence reflects an actual change in disability and whether examinations reports reflecting change are based upon thorough examinations. In addition, it must be determined that an improvement in a disability has actually occurred and that such improvement actually reflects an improvement in the veteran’s ability to function under the ordinary conditions of life and work. *Brown v. Brown*, 5 Vet.App. 413, 420-21 (1993).

In cases where a Veteran's disability rating is reduced, the Board must determine whether the reduction was proper. *Dofflemyer v. Derwinski*, 2 Vet.App. 277, 279–80 (1992). A reduction is void *ab initio* when the Board affirms a reduction of a Veteran's disability rating without observing the applicable laws and regulations. *Tatum v. Shinseki*, 23 Vet.App. 152, 159 (2009) (“Because this matter involves a rating reduction, and the Board failed to consider the applicable laws and regulations before finding that [the appellant] was no longer entitled to a compensable disability rating, the Board's finding is rendered ‘void ab initio’ and ‘not in accordance with the law.’”); *Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995); see *Schafrath v. Derwinski*, 1 Vet.App. 589,

595–96 (1991) (“When the issue raised is a rating reduction and the Court determines that the reduction was made without observance of law . . . this Court, acting under 38 U.S.C. § 4061(a)(3)(D) [(now 38 U.S.C. § 7261(a)(3)(D))], has ordered reinstatement of the prior rating.”).

The Board's decision must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Appellant argues that the Board erred: 1) when it offered its own medical conclusion regarding the characterization of his hearing loss as something other than sensorineural hearing loss; 2) it relied on general medical treatise evidence to show that sensorineural hearing loss was incapable of improvement; and 3) was obligated to ascertain whether the improvement in his hearing reflected an improvement in his ability to function under the ordinary conditions of work. (Appellant's Brief (App. Br) at 9-10).

In its decision, the Board found actual improvement of the bilateral hearing loss and improvement under the ordinary conditions of life and work, when compared to the severity of hearing loss of the May 2009 VA fee-based examination, and determined that the rating reduction was proper and restoration of the 70 percent rating was not warranted. (R. at 14 (2-25)). Recognizing that medical treatise evidence indicates that bilateral sensorineural hearing loss is incapable of improvement, it found that Appellant's May 2009 examination results indicating worsening hearing levels was necessarily attributable to some temporary condition or fact that resolved by the time of the September 2009 VA audiology examination. *Id.* at 16. It also determined that the 70 percent rating from May 2009 to July 2010 was not to be disturbed and the relevant question is what caused the temporary hearing loss in May 2009. *Id.* at 7. The Board found that:

The temporary nature of the worsened hearing in May 2009, with an associated post-service causative factor (loud noise), has probative value to suggest improvement following removal of the post-service causative factor, as well as to show the overall hearing loss that [Appellant] experienced was not all *sensorineural* hearing loss, so *was* capable of improvement, while actual sensorineural hearing loss was not capable of improvement.

Id. (Emphasis in original). The Board determined that, in light of the audiometric results in September 2009 which findings it determined were consistent by subsequent testing in June 2010 and August 2011, "the June 2009 rating decision grant of 70 percent rating was necessarily based on an inaccurate if implicit factual assumption that the May 2009 audiometric results represented a

permanent worsening of the *service-connected* chronic sensorineural hearing loss disability.” *Id.* at 8.

Regarding whether the improvement of hearing loss reflected an improvement in the ability to function under the ordinary conditions of life and work, the Board determined that the improvement between the May 2009 examination and the September 2009 was “suggestive of improvement under the ordinary conditions of life and work.” *Id.* at 22. Additionally, the Board found that the change in Appellant’s speech recognition scores between May 2009 and September 2009 demonstrated “significant improvement,” finding good speech recognition ability bilaterally. *Id.* at 23. Moreover, the Board noted that Appellant was urged to wear his hearing aids more consistently and the fact that his hearing aids worked properly lent support in “finding improvement under the ordinary conditions of life and work because his primary complaint was difficulty hearing others during conversation.” *Id.*

The Board’s decision is supported in the record. Indeed, as the Board finds, the evidence clearly demonstrates that Appellant had only worsened hearing levels for a short period of four months wherein his hearing levels appear to temporarily decrease. See (R. at 21 (2-25)); see also (R. at 456 (454-59)) (May 2009 VA fee based examination results); compare with (R. at 374 (373-76)) (September 2009 test results). Appellant’s hearing level, in fact, maintained at the level of a 30 percent rating and did not appear to substantially decrease for years after the September 2009 VA examination. See (R. at 178 (178-79)) (June

2010 VA audiology consultation); (R. at 266 (265-67)); (August 2011 test results); *compare with* 38 C.F.R. §§ 4.85, 4.86. Moreover, as the Board notes ((R. at 22-23 (2-25)), Appellant’s speech recognition scores of 12% and 14% in his right and left ear respectively increased dramatically from May 2009 (R. at 458 (454-59)) to 64% and 68% in September 2009, which the examiner noted that the good speech recognition ability had been demonstrated bilaterally (R. at 374 (373-76))¹.

To the extent that Appellant argues that the Board made an unsubstantiated medical finding regarding the temporary decrease in his hearing levels, this argument is without merit as it is apparent that the Board was merely weighing the evidence of record and reached the inescapable conclusion that Appellant’s worsened hearing levels were due to a temporary condition. Indeed, the Board, as factfinder, is responsible for evaluating the medical evidence of record and assigning each report or opinion its due probative weight. *Washington v. Nicholson*, 19 Vet.App. 362, 367–68 (2005) (noting that it is the Board’s duty, as factfinder, to assess the credibility and probative weight of all relevant evidence); *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991) (“The [Board] has the duty to assess the credibility and weight to be given to the evidence”). In this case, Appellant’s hearing levels decreased for what appeared to be a four-month period (May to September 2009) and then increased to a level consistent with a 30 percent rating for many years. While Appellant argues that the Board’s

¹ Measured at a 95 decibel hearing level. (R. at 374).

finding is unsubstantiated, there is no other conclusion that the Board could make based on the findings of the objective medical evidence of record, as the rating criteria for hearing loss requires the “mechanical application” of Appellant’s hearing tests results to determine the severity of his disability. See *Lendenmann v. Principi*, 3 Vet.App. 345, 349 (1992) (disability ratings for hearing impairment are derived by the mechanical application of the rating schedule to the claimant’s hearing loss and speech recognition value). Thus, Appellant has not demonstrated that the prejudice or error in the Board’s determination. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal); *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009) (appellant bears burden of demonstrating prejudice on appeal).

To the extent that Appellant argues that the Board improperly relied on medical treatise evidence to establish that sensorineural hearing loss is not capable of improvement, this argument is unpersuasive. Indeed, “[i]t is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, *reconciling the various reports into a consistent picture.*” 38 C.F.R. § 4.2 (emphasis added); see also *Quiamco v. Brown*, 6 Vet.App. 304 (1994) (holding that “the Board is required to consider and discuss all evidence on both sides of the issue, and to reconcile any conflicts among such evidence or, alternatively, provide an explanation of the reasons for rejecting evidence favorable to the claimant or determining that such evidence is of little relative weight or probative value. “If the medical evidence of record is

insufficient, or . . . of doubtful weight or credibility, the [Board] is always free to supplement the record by seeking an advisory opinion, ordering a medical examination[,] or citing recognized medical treatises in its decisions that clearly support its ultimate conclusions.” *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991). Here, consistent with its duty, the Board reconciled the results of the May 2009 examination with known principles of hearing loss contained in medical treatise evidence and established case law. *See id*; *see also Fountain v. McDonald*, 27 Vet.App. 258, 264 (2015) (“By internal agency materials, the Secretary has made clear that sensorineural hearing loss is considered subject to § 3.309(a) as an ‘[o]rganic disease[] of the nervous system’”). Moreover, Appellant cites to no prejudicial error, as the objective medical evidence clearly demonstrate that his hearing loss had markedly sustained improvement for years subsequent to the rating reduction. *Hilkert*, 12 Vet.App. at 151; *Sanders*, 556 U.S. at 410; *Brown*, 5 Vet.App. at 421 (“Thus, in any rating reduction case not only must it be determined that an improvement in a disability has actually occurred but also that improvement actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work”)

Lastly, regarding improvement in the ability to function under the ordinary conditions of life and work, the Board properly relied on the substantial increase in Appellant’s speech discrimination hearing level from May 2009 to September 2009, noting his improvement in speech discrimination test scores was indicative of improvement of his hearing under the ordinary conditions of life and work. (R.

at 22 (2-25)); *see also* *Martinak v. Nicholson*, 21 Vet.App. 447, 455 (2007) (“The Secretary has chosen to construct the hearing loss rating schedule based exclusively on the results provided from two objective tests, a pure tone audiometry test and a speech discrimination test”); 38 C.F.R. § 4.10 (“The basis of disability evaluations is the ability of the body as a whole, or of the psyche, or of a system or organ of the body, to function under the ordinary conditions of daily life, including employment”); 38 C.F.R. § 4.1 (explaining that disability evaluation percentages “represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupation). In addition, based on the evidence of record, the Board also emphasized that Appellant’s inconsistent use of his hearing aids supported a finding of improvement under the ordinary conditions of life and work, as it was apparent that his voluntary choice not to use his VA provided hearing aids would have some bearing on his ability to function in life and work. *See* (R. at 23 (2-25)); *see also* (R. at 374 (373-74)) (September 2009 VA examination that observed, “However with the use of his VA-issued hearing aids and with reasonable accommodations as specified in the Americans with Disabilities Act the veteran’s hearing loss should not adversely impact on his ability to both find and maintain gainful employment); (R. at 178-79) (June 2010 VA audiology consult that read: “[Appellant] reported inconsistent use of the hearing aids and did not bring them or wear them to today’s appointment . . . He did report that they were working. Veteran was once again urged to wear

the hearing aids more consistently. This is the only way that he will hear better”). Because the Board directly addressed Appellant’s improvement in ability to function under the ordinary conditions of life and work based on the medical evidence of record, Appellant has not established error in the Board’s decision. *Hilkert*, 12 Vet.App. at 151. As such, the Board’s decision should be affirmed.

B. The Board did not err in its determination that a VA examination was not required.

VA must provide a medical opinion or examination when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which he claimant qualifies, (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the Veteran’s service or with another service-connected disability, but (4) insufficient competent evidence on file for VA to make a decision on the claim. 38 U.S.C. § 5103(A)(d); 38 C.F.R. § 3.159(c)(4)(i); *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006). The Board’s overall conclusion as to whether a medical examination is necessary is reviewed under the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” standard. 38 U.S.C. § 7261(a)(3)(A); *McLendon*, 20 Vet.App. at 81.

Thus, in any rating reduction case not only must it be determined that an improvement in a disability has actually occurred but also that improvement

actually reflects an improvement in the veteran's ability to function under the ordinary conditions of life and work.” *Brown*, 5 Vet.App. at 421; see 38 C.F.R. § 4.13 (“When any change in evaluation is to be made, the rating agency should assure itself that there has been an actual change in the conditions, for better or worse, and not merely a difference in thoroughness of the examination or in use of descriptive terms.”). In addition, the Board must “establish, by a preponderance of the evidence . . . , that a rating reduction was warranted.” *Id.*

The evaluation process for hearing impairment applies a claimant’s puretone audiometry test scores and, in appropriate cases, speech discrimination test scores to a set of tables that are used to determine the appropriate rating. 38 C.F.R. §§ 4.85, 4.86; see also *Lendenmann*, 3 Vet.App. at 349. Application of a claimant’s audiometry testing scores to the relevant table in 38 C.F.R. § 4.85 results in Roman numeral designations from I through XI for each ear, which in turn are applied to another table to determine the percentage of compensation to which the claimant is entitled. 38 C.F.R. § 4.85(h).

Appellant argues that the Board failed to support its decision with an adequate statement of reasons or bases for not obtaining a medical opinion. (App. Br. at 4-11).² In particular, Appellant contends that the Board provided inadequate reasons for its finding that a current examination was not needed

² Appellant also argues that a VA examination is required to address his ability to function under the ordinary conditions of life and work. See (App. Br. at 11). However, this issue is addressed in Appellant’s other argument. See Issue A, *supra*.

because it would be of minimal probative value when it failed to consider the option of obtaining a retrospective medical examination. *Id.* at 5-6.

In its decision, the Board noted that Appellant's attorney had argued that a VA audiology examination is needed, but found that a current examination was not needed because "any newly created post-reduction evidence measuring hearing loss six years after the reduction would be of minimal probative value on the question of whether hearing loss had actually improved at the time of the April 2010 reduction." (R. at 6 (2-25)). The Board noted that there was more contemporaneous and more probative evidence of record including examinations in September 2009, June 2010, and August 2011, all of which confirm a level of hearing impairment consistent with a 30 percent rating. *Id.* at 6-7.

The Board's decision is supported in the record. Indeed, the September 2009, June 2010, and August 2011 VA test results show hearing results both for puretone and speech recognition consistent with a 30 percent rating. See (R. at 374 (373-76)) (September 2009 test results); (R. at 178 (178-79)) (June 2010 VA audiology examination); (R. at 266 (265-67)) (August 2011 test results); *compare with* 38 C.F.R. §§ 4.85, 4.86. To the extent that Appellant argues that record requires a retrospective medical opinion pursuant to *Chotta v. Peake*, 22 Vet.App. 80 (2008) (App. Br. at 6-7), this case is distinguishable. In *Chotta*, the Court found that a retrospective medical opinion may have been necessary and helpful because of the absence of medical records for a 50-year period. 22 Vet.App. at 85. As noted previously in this case, there is no lack of hearing

evaluation, many of which are contemporaneous with his disability rating reduction. See, e.g. (R. at 374 (373-76)). Accordingly, Appellant has not established how a retrospective medical examination would be useful in light of the medical evidence already of record.

Given the above evidence, Appellant provides no reason for how the Board abused its discretion in determining that the evidence of record was sufficient when it relied on objective, contemporaneous audiology tests of record. 38 U.S.C. § 7261(a)(3)(A); *McLendon*, 20 Vet.App. at 81. Indeed, as noted above, Appellant's disability rating involves the "mechanical application" of his hearing level test results to the rating criteria. *Lendenmann*, 3 Vet.App. at 349. Notably, the Board in this case relied on medical examinations contemporaneous with his rating reduction which all showed fairly consistent hearing levels which were commensurate with a 30 percent rating level. Moreover, Appellant provides no discernible reason for how these objective tests of his auditory levels were insufficient or invalid; thus, he fails to establish error or prejudice in the Board's decision. *Hilkert* 12 Vet.App. at 151; *Sanders*, 556 U.S. at 410.

In light of this evidence, Appellant does not adequately explain why a retrospective medical examination – conducted several years after the rating reduction - is required in this case. While he argues that there is insufficient evidence to determine if his temporary worsening hearing was caused by some other type of hearing loss, he ignores the actual issue in this case – whether there is actual improvement that reflects an improvement in the veteran's ability

to function under the ordinary conditions of life and work. See *Brown*, 5 Vet.App. at 421; 38 C.F.R. § 4.13. Accordingly, the Board properly found that the objective VA examinations of record were sufficient and found that there was actual improvement in Appellant's hearing levels under the ordinary conditions of life and work. See (R. at 6, 22-23 (2-25)). Because Appellant has not established that the Board's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," the Board's decision should be affirmed. 38 U.S.C. § 7261(a)(3)(A); *McLendon*, 20 Vet.App. at 81.

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. See *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008). The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it to be necessary.

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, requests that the Court affirm the November 13, 2015, Board decision.

Respectfully submitted,

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