

**APPELLANT'S REPLY BRIEF**  
**UNITED STATES COURT OF APPEALS**  
**FOR VETERANS CLAIMS**

**No. 16-03**

**LOYD MAYS,**

**Appellant,**

**v.**

**ROBERT A. MCDONALD,**  
**SECRETARY OF VETERANS AFFAIRS,**

**Appellee.**

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

LOYD MAYS,	)	
	)	
Appellant,	)	
	)	Vet. App. No. 16-03
v.	)	
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**REPLY BRIEF OF THE APPELLANT**

Pursuant to U.S. Vet. App. R. 28(c), Loyd Mays (Veteran, Appellant or Claimant), respectfully submits to the United States Court of Appeals for Veterans Claims (Court), his Reply Brief in response to the Appellee’s (Secretary’s) Brief (Sec. Br.), and continues to assert that there are errors of law contained within the Department of Veterans Affairs (VA) decision of November 13, 2015 in which the Board of Veterans’ Appeals (Board or BVA) denied the Appellant’s claim of entitlement to restoration of a 70 percent rating for service-connected bilateral hearing loss, to include the propriety of the disability rating reduction to 30 percent, effective July 1, 2010.

## STATEMENT OF THE ISSUE

### I. WHETHER THE BOARD FAILED TO SUPPORT ITS NOVEMBER 13, 2015 DECISION WITH ADEQUATE REASONS OR BASES.

#### ARGUMENT

The Appellant continues to assert that the Board's decision of November 13, 2015 was in error. *See* R. at 2-25. The Appellant incorporates by reference his arguments presented in his Brief and makes reply to the Brief of the Appellee in the interest of further clarity.

The Secretary avers that, “[t]he Board did not err in its determination that a VA examination was not required.” Sec. Br. at 16. In support, the Secretary points to the Board's explanation that an examination is unnecessary 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.” Sec. Br. at 18 citing R. at 6. However, this is an inadequate reason or basis for not obtaining a medical opinion and the Board ignored the option of obtaining a retrospective medical opinion for the relevant time period to determine whether, based on available evidence, the Veteran's ability to function under the ordinary conditions of life and work improved. When VA determines that a medical examination or opinion is necessary to make a decision on a claim, “... this may include obtaining a retrospective medical opinion.” *Chotta v. Peake*, 22 Vet. App. 80, 85 (2008). The Board found that a current medical examination would be unhelpful surrounding

circumstances relevant in 2009 and 2010, but the Board failed to consider the option of obtaining a retrospective medical opinion. The Secretary claims that “Appellant has not established how a retrospective medical examination would [be] useful in light of the medical evidence already of record.” Sec. Br. at 19. This is simply not true. As Appellant argued in his initial brief, the Board attributed the objective worsening of the Veteran’s hearing loss in 2009 to a different type of hearing loss than that for which he is service-connected; however, there is no medical evidence of record to support this finding. *See* Appellant’s Brief (App. Br.) at 6. In accordance with *Chotta*, if the record raised a question as to whether the Veteran’s worsening hearing loss was caused by the service-connected hearing loss, or some other type of hearing loss, as the Board contends, then an etiology opinion should have been obtained. *See Chotta*, 22 Vet. App. at 85 (“[i]f the record raises a question as to whether the appellant’s symptoms were caused by the service-connected condition or something else, then an etiology opinion may be required”). This was not done. Thus, contrary to the Secretary’s claim, Appellant has demonstrated how a retrospective medical examination would be useful in light of the medical evidence, or lack thereof, of record. Consequently, the Board failed to provide adequate reasons or bases for finding that a VA medical opinion was not warranted. *See* R. at 6; *see also Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990) (the Board is to include in its decision a statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record, with such statement being adequate to enable an appellant to understand the precise basis for the Board’s decision as well as to facilitate review by this Court). Accordingly, remand is warranted. *See*

*Washington v. Nicholson*, 19 Vet. App. 362, 371 (2005) (remand is the appropriate remedy when the Board fails to provide an adequate statement of reasons or bases for its determination).

Next, Appellant contends that the Board erred in relying on medical treatise evidence to conclude that "... the overall hearing loss that the Veteran experienced was not at all *sensorineural* hearing loss, so *was* capable of improvement, while actual sensorineural hearing loss was not capable of improvement." R. at 7 (emphasis in original); *see Ennis v. Brown*, 4 Vet. App. 523, 526 (1993) (citing *Murphy v. Derwinski*, 1 Vet. App. 78, 81 (1990)) ("such a conclusion, especially if it is medical or scientific in nature, like all other findings of the BVA, must be supported by 'a written statement of ... the reasons or bases for those findings and conclusions'"). Whether the Veteran experienced sensorineural hearing loss, or some other kind of hearing loss, is a question that is medical in nature, and simply relying on generic medical treatise literature fails to address the relevant facts and provide a competent medical opinion. "Without a medical opinion that clearly addresses the relevant facts and medical science, the Board is left to rely on its own lay opinion, which it is forbidden from doing." *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007); *see Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991) (holding that the Board may only consider independent medical evidence in support of its findings and may not substituted its own medical opinion); *see also Mariano v. Principi*, 17 Vet. App. 305, 313-17 (2003); *Flash v. Brown*, 8 Vet. App. 332, 339 (1995) (the Board may not rely on its own unsubstantiated medical opinion). In response, the Secretary states that Appellant's position "... that the Board made an unsubstantiated medical finding

regarding the temporary decrease in his hearing levels ... 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." Sec. Br. at 12. However, the Veteran has only been diagnosed with sensorineural hearing loss. *See* R. at 132 (132-133) (January 2009 VA audiological assessment concluded that the "Veteran has a bilateral sensorineural hearing loss"); *see also* R. at 100 (100-101) (June 2010 VA audiological assessment concluded that the Veteran's right ear has mild to severe sensorineural hearing loss and his left ear has mild to moderately-severe sensorineural hearing loss). Thus, the Board had absolutely no basis to conclude that the Veteran has at any time suffered from any type of hearing loss other than sensorineural hearing loss and, in light of this evidence, the appropriate action was for the Board to obtain a medical opinion, which it failed to do.

Lastly, the Board failed to meet its obligation to adequately ascertain whether the improvement in the Veteran's hearing also reflects an improvement in his ability to function under the ordinary conditions of his life and work. *See* R. at 77 (77-82) (parties agreed in the Joint Motion for Remand (JMR) that remand was "warranted for the Board to render an adequate statement of reasons or bases addressing whether the improvement in Appellant's service-connected bilateral hearing loss ... reflected an improvement in his ability to function under the ordinary conditions of work and life"); *see also Brown v. Brown*, 5 Vet. App. 413, 421 (1993) (the Court explained that "in any rating reduction case not only must it be determined that an improvement in a disability has actually occurred but also that that improvement actually reflects an improvement in the veteran's

ability to function under the ordinary conditions of life and work”). The Secretary asserts that “[r]egarding 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.’” Sec. Br. at 11 citing R. at 22. Thus, the Secretary has acknowledged that the Board merely relied on the difference in objective testing to conclude that the Veteran improved under the ordinary conditions of life and work without pointing to any evidence whatsoever to show an actual functional improvement in his daily living. In the JMR, “[t]he parties note[d] that ... Appellant had alleged that his bilateral hearing loss ... had rendered him unable to sustain substantially gainful employment, ... while in April 2009 he had claimed his hearing loss had worsened and that he was having trouble understanding words ... sp[oken] to [him].” R. at 79; *see* R. at 495 (in an April 2009 statement in support of claim, the Veteran “request[ed] an increase in my service connected bilateral hearing loss. My hearing has worsened. I’m especially having trouble understanding words when people speak to me”). Simply relying on objective test results does not account for the functional impact of the Veteran’s hearing loss and demonstrate a necessary improvement under the ordinary conditions of life and work. Again, Appellant contends that a determination of the Veteran’s hearing disability requires a medical opinion that specifically addresses his ability to function under the ordinary conditions of his life and work. Despite this being the basis for the prior JMR in this matter, this was not adequately done. *See Stegall v. West*, 11 Vet. App. 268, 271 (1998)

(“a remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders”).

Consequently, Appellant continues to assert that the Board’s decision on appeal contains errors sufficient to warrant remand.

### **CONCLUSION**

For the foregoing reasons, Appellant respectfully requests that the November 13, 2015 Board decision be vacated and the case remanded for further adjudication consistent with this Court’s decision and applicable law.

Respectfully submitted,

September 15, 2016

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