UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-1774

THOMAS F. MANTING,

Appellant

v.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS

Appellee.

APPELLANT'S BRIEF

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II. Whether the Board failed to provide an adequate statement of reasons and bases explaining why it decided the claim (absent an exam) on the inadequately developed medical record when it denied his claim to service-connection for hypertension.

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II. STATEMENT OF THE CASE

A. Jurisdiction

Appellant Thomas F. Manting (Manting) invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252 (2019).

B. Nature of the Case / Result Below

The appellant timely appeals the Board's November 19, 2018, decision that denied him service-connection for right ear haring loss, PTSD, hypertension, and an acquired psychiatric disorder other than PTSD. [R 4-19 (BVA decision)]

C. Relevant Facts

Appellant is an U.S. Air Force Vietnam war veteran with honorable service

from August 1963 to July 1967. He was awarded *inter alia* the Vietnam Service Medal and the Vietnam Campaign Medal. [R 414 (DD-214)]

Acquired psychiatric disorder

Appellant claims benefits for "an acquired psychiatric disorder, other than PTSD". He has explained, "In approximately 1966, while I was in DaNang, Vietnam, some barracks were blown up and I had friends that were killed. I was put on a detail to help remove the injured and killed airman from the wreckage". [R 432 (February 3, 2014 VAF21-4138)]

His claim is in appellate status from February 3, 2014. [R 432 (February 3, 2014 VAF21-4138) (SC); 122-28 (July 2014 RD); 56-80 (August 2016 SOC); 47 (August 2018 VAF9); 43 (September 2016 VAF8); 4-19 (BVA decision)].

In denying his SC claim in the decision now on appeal, the Board found, absent an exam: (1) appellant's STRs are silent for any evidence of treatment for a mental disorder; (2) appellant has not been diagnosed as suffering from any mental disorder, apart from a singular 2010 VA PTSD diagnosis; and, (3) appellant's lay statement description of symptoms did not trigger the need for an exam. Based thereon, the Board denied the claim. [R 16 (4-19) (BVA decision)]

Hypertension

Appellant claims benefits for his conceded-as-diagnosed hypertension. His

SC claim is in appellate status from February 3, 2014. [R 432 (February 3, 2014 VAF21-4138) (SC); 122-28 (July 2014 RD); 56-80 (August 2016 SOC); 47 (August 2018 VAF9); 43 (September 2016 VAF8); 4-19 (BVA decision)]

Right ear hearing loss

Appellant is service-connected for left ear hearing loss, rated as non-compensable from June 29, 2008, pursuant to 38 C.F.R. § 3.385, DC 6100 (2019). He now claims benefits for a right ear hearing loss. His claim is in appellate status from February 3, 2014. [R 432 (February 3, 2014 VAF21-4138) (SC); 122-28 (July 2014 RD); 56-80 (August 2016 SOC); 47 (August 2018 VAF9); 43 (September 2016 VAF8); (4-19) (BVA decision)]

In deciding appellant's claim in the decision now on appeal, the Board: (1) reopened appellant's right ear hearing loss claim; and, (2) found appellant's diagnosed right ear hearing loss is unrelated to his exposure to in-service noise which caused his service-connected left ear hearing loss. The Board denied the claim. The Board adopted the April 2014 exam. [R 6-7, 11-14 (4-19) (BVA decision); 159-64 (November 2014 audio exam)]

Appellant timely appeals.

III. ARGUMENTS & AUTHORITIES

In issuing a decision, the BVA must provide "a written statement of the

Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1) (2019). "[T]he BVA must articulate with reasonable clarity its reasons or bases for decisions, and in order to facilitate judicial review, the Board must identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive." *Gilbert v. Derwinski,* 1 Vet. App. 49, 57 (1990).

In the absence of such an explanation, the Court is precluded from effectively reviewing the adjudication. *See Meeks v. Brown,* 5 Vet. App. 284, 288 (1993). Remand is the appropriate remedy where the BVA has failed to provide an adequate statement of reasons or bases for its determinations. *Hicks v. Brown,* 8 Vet. App. 417, 422 (1995).

"Whether a medical opinion is adequate is a finding of fact, which the Court reviews under the 'clearly erroneous' standard. *See* 38 U.S.C. § 7261(a)(4); *Gilbert*, 1 Vet. App. at 52 (1990). '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)).

I. Whether the Board failed to provide an adequate statement of reasons and bases explaining why it decided the claim (absent an exam) on an inadequate medical record when it denied his claim to service-connection for acquired psychiatric disorder.

Appellant has explained "While I was in DaNang Vietnam some barracks were blown up. I had fellow airman that were wounded and killed. I helped to remove [the] injured and killed from the wreckage". [R 421 (421-435) (February 2014 VAF21-0781)]

Based thereon, appellant has explained he suffers from chronic sleep problems, difficulty in making decisions, flashbacks, memory loss, and nervousness. He has also explained he abuses alcohol and is unable to share his feelings. [R 433 (February 2014 VAF21-4138)]

VAMC treatment records additionally report appellant, who has been married three times, described sleep disturbances accompanied by nightmares, and flashbacks, triggered by the smell of burning and smoke. He also described being "anxious", "shaky", and "sad". He has also questioned why he was spared while thinking about the in-service barracks explosion. [R 342 (VAMC)]

The November 2010 PTSD examiner also reported a number of chronic mental disorder symptoms including flashbacks, avoidance, sleep impairment,

and an exaggerated startle reflex. [R 491 (485-93) (November 2011 PTSD exam)]

The Board discounted the evidence by explaining it only suggested "the Veteran could [not] have any current mental condition other than PTSD". And, as the PTSD examiner had reported appellant's symptoms did not meet the diagnostic threshold for a PTSD diagnosis, appellant did not suffer from any mental disorder. [R 16 (4-19) (BVA decision)]

The Board's reasoning is at best inadequate. The examiner did not opine appellant did not suffer from another mental disorder, only that he did not meet the diagnostic criteria for a PTSD diagnosis. The fact is he had not been asked to consider alternate diagnoses apart from PTSD. [R 492 (485-93) (November 2011 PTSD exam) (The examiner was limited to answering the question, "Does the Veteran meet the DSM-IV criteria for a diagnosis of PTSD?")]

The Board ignored the evidence which shows the PTSD examiner did report chronic mental disorder symptoms, accompanied by a GAF score (60). The GAF score alone (even apart from the well-documented mental disorder symptoms) denotes a level of functional impairment attributable to a mental disorder. Obviously, contrary to the Board's dispositive finding, the for the most

part ignored favorable evidence proves the probable existence of a mental disorder.

When the favorable medical evidence (showing the probable existence of a mental disorder) is coupled with appellant's competent description of his symptoms, as chronically linked to his in-service traumatic experience, appellant cleared the "low threshold" of proof necessary to trigger the necessity of an exam for mental disorders other than PTSD. *See Jandreau v. Nicholson,* 492 F.3d 1372, 1374, 1376-77 (Fed. Cir. 2007); 38 U.S.C. § 5103A; 38 C.F.R. § 3.159 (2019). The Board did not find appellant's description of his chronic symptoms, and his in-service trauma, not competent, nor not credible as evidence. The examiner also did not question their validity. A veteran is competent to provide lay evidence regarding those matters which are within his personal knowledge and experience. *See Washington v. Nicholson*, 19 Vet. App. 362, 368 (2005). VA may not reject a veteran's competent lay evidence, regarding matters which are within his or her personal knowledge and experience, based solely upon the fact that the record fails to contain corroborating medical evidence. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006); *see also Barr v. Nicholson,* 21 Vet. App. 303 (2007) (As appellant was examined in November 2010, and the Board cited that exam in denying his claim, appellant was entitled to an adequate

exam. An exam which was not limited to PTSD.)

Absent an adequate explanation why the Board discounted the favorable evidence, the Court and appellant have been denied an opportunity for meaningful judicial review. *See* 38 U.S.C. § 7104(d) (2019).

II. Whether the Board failed to provide an adequate statement of reasons and bases explaining why it decided the claim (absent an exam) on the inadequately developed medical record when it denied his claim to service-connection for hypertension.

Appellant, a decorated veteran of the Vietnam War, is presumed to have been exposed to tactical herbicides while stationed in Vietnam. *See* 38 C.F.R. § 3.307 (2019). However, in denying the claim in the decision now on appeal, the Board dispositively found, “Hypertension is not a condition presumptively linked to herbicide agent exposure”. [R 15 (4-19) (BVA decision)] The Board remandably erred.

It has been publicly reported the National Academy of Sciences, Engineering and Medicine has found there is “sufficient evidence” to presume a link between hypertension and exposure to tactical herbicides. Specifically, in November 2018, the National Academy recommended hypertension be added to the list of 14 presumptive diseases associated with tactical herbicide exposure. *See* https://www.nap.edu/resource/25137/111318_VAO_2018_highlights.pdf

(last visited August 16, 2019).

It also has been publicly reported the Secretary has acknowledged that recommendation and has advised the public he will make a determination on the agency's acceptance or rejection of the National Academy's recommendation by mid-Summer 2019. https://www.c-span.org/video/?c4789193/ao-addition-decision (last visited August 16, 2019). The agency's announcement was made in testimony to the U.S. Senate Committee on Veterans' Affairs on March 26, 2019. During the hearing, while seated next to Secretary Wilkie, Richard Stone, M.D., Executive in Charge, Veteran Health Administration, announced the Secretary's intent to decide within 90 days of the hearing.

Appellant's hypertension claim should be stayed.

The Board also erred in deciding the claim on a direct basis absent a medical examination. Specifically, the Board found, as no evidence showed appellant's conceded exposure to tactical herbicides "may be associated" with his conceded-as-diagnosed hypertension, an exam was not necessary to decide appellant's claim. [R 15 (4-19) (BVA decision)]

The Board again remandably erred.

As mentioned above, the National Academy has provided favorable medical evidence which shows appellant's in-service exposure to tactical

herbicides is more than likely related to his conceded-as-diagnosed hypertension. Appellant has cleared the "low threshold" of proof necessary to trigger an exam. See *Jandreau v. Nicholson,* 492 F.3d 1372, 1374, 1376 - 77 (Fed. Cir. 2007); 38 U.S.C. § 5103A; 38 C.F.R. § 3.159 (2019).

The Board failed to provide an adequate statement of reasons and bases explaining its clearly erroneous decision. Absent an adequate explanation, the Court and appellant have been denied an opportunity for meaningful judicial review. *See* 38 U.S.C. § 7104(d) (2019).

III. Whether the Board failed to provide an adequate statement of reasons and bases explaining its reliance on the inadequate November 2014 audio exam when it denied the veteran service-connection for right ear hearing loss.

The relied-on November 2014 examiner diagnosed bilateral hearing loss. The examiner reported, while appellant's STRs showed an in-service left ear hearing threshold shift, his STRs did not show a comparable in-service right ear hearing threshold shift. Based thereon, the audio examiner opined, "There is no evidence to support Veteran's claim of military noise-induced hearing loss in the right ear". [R 163 (159-64) (November 2014 audio exam)]

The Board denied appellant's SC claim. [R 11-14 (4-19) (BVA decision)] The Board remandably erred.

A comparison of appellant's audio exams (*e.g.* his1963 entrance audio exam, his March 1967 hearing conservation data, his June 1967 separation exam, his September 2008 audio exam, and his relied-on 2014 audio exam), undercuts the central premise of the relied-on November 2014 audio examiner's dispositive opinion (*i.e.* appellant's right ear did not suffer an in-service threshold shift). The Board's dispositive finding based thereon also fails. [R 399-401 (August 1963 Report of Medical Exam); 413 (March 1963 hearing conservation data); 385-87 (June 1967 Report of Medical Exam); 594 (September 2008 audio exam); 159-64 (November 2014 audio exam)]

Prior to November 1967 U.S. military branches employed ASA units to measure audio acuity. Following thereon they switched to ISO/ANSI (as used by the VA). The numbers in parens are the results converted from ASA units to ISO/ANSI units - as applied to results dated prior to November 1967. The converted (pre-November 1967) results are achieved by adding 15 db at 500hz; by adding 10 db at 1000hz, 2000hz and 3000hz; and by adding 5 db at 4000hz.

Right ear

	500HZ	1000HZ	2000HZ	3000HZ	4000HZ
August 1963	0 (15)	0 (10)	-5 (5)	0 (10)	0 (5)
March 1967	10 (25)	10 (20)	5 (15)	0 (10)	5 (10)
June 1967	5 (20)	5 (15)	5 (15)	10 (20)	5 (10)

September 2008	25	20	25	20	25
November 2014	25	25	30	30	45

Left ear

	500HZ	1000HZ	2000HZ	3000HZ	4000HZ
August 1963	-5 (10)	0 (10)	0 (10)	0 (10)	0 (15)
March 1967	15 (30)	5 (15)	15 (25)	20 (30)	20 (25)
June 1967	10 (25)	10 (20)	25 (35)	25 (35)	20 (25)
September 2008	20	20	25	30	35
November 2014	20	20	25	35	40

Appellant has been diagnosed as suffering from bilateral hearing loss. His report of medical exam at separation shows both ears were within normal limits for VA compensation purposes at the time appellant was honorably discharged from his decorated military service in Vietnam. However, appellant's left ear hearing loss has been service-connected, while his right ear hearing loss has been denied an award. The Secretary has in effect found appellant's STRs showed a deterioration of appellants left ear hearing in-service, which warrants the finding, despite the left ear hearing was within normal limits at the time of separation, his present-day hearing loss is attributable to his military service. That is, the left ear's hearing measured deterioration in-service warrants the

assumption the currently diagnosed left ear hearing loss is the natural progressive result of that in-service deterioration.

A comparison, however, of appellant's in-service right ear and left ear hearing acuity shows the right ear, like the left ear, deteriorated in-service. However, neither the examiner, nor the Board considered that favorable fact appellant's right ear hearing (like his left hear hearing) deteriorated in-service; and, both his right and left ear hearing were within normal limits at separation. The relied-on November 2014 examiner was obligated to (but failed to) consider the favorable deterioration of appellant's right ear hearing in-service in the formation of his opinion. The ignored favorable evidence contradicts the examiner's opinion's rationale appellant's right ear did not deteriorate in-service and was within normal limits at the time of separation. The examiner's rationale the hearing was within normal limits at separation, and not a disability for VA purposes, thereby precluding a current favorable opinion, additionally is opposite of the favorable November 2008 left ear opinion. *See Nieves- Rodriquez v. Peake,* 22 Vet. App. 295, 304 (2008); *Stefl v. Nicholson,* 21 Vet. App. 120, 124 (2007) (The examiner must consider contradictory evidence.)

The Board also failed to explain the Secretary's disparate treatment of the claim. In service-connecting appellant's left ear hearing loss, the Secretary

adopted the theory in-service deterioration of appellant's left ear hearing, if even within normal limits at separation, can be the basis for an award of service-connection for the subsequently diagnosed left ear hearing loss. The Board ignored that same theory in deciding appellant's right ear hearing loss SC claim. Absent an adequate explanation, the Court and appellant have been denied an opportunity for meaningful judicial review. *See* 38 U.S.C. § 7104(d)(1) (2019).

Appellant's right ear hearing loss SC claim is additionally inextricably intertwined with appellant's wrongly decided hypertension SC claim. It too should be remanded as hearing loss can be secondary to the potentially service-connected hypertension, or medications he takes in treatment thereof.

The Board failed to provide an adequate statement of reasons and bases explaining why it discounted the favorable evidence of appellant's recurrent symptoms, but instead adopted the inadequate December 2017 non-diagnosis opinion. Absent an adequate explanation, the Court and appellant have been denied an opportunity for meaningful judicial review. *See* 38 U.S.C. § 7104(d)(1) (2019).

As the Board gave inadequate reasons and bases for its determinations, the veteran is unable to understand the precise reasons for the Board's decisions, judicial review is frustrated, and remand is required.

CONCLUSION

The veteran respectfully requests that the Board's decision be vacated and remanded so that the Board may comply with its duty pursuant to 38 U.S.C. § 7104(d)(1) (2019) in accordance with the argument made above. Appellant asks this Court to remand the issues for further development.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

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on August 16, 2019.

By: /s/ Joseph J. Donnelly
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