IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1331

KEVIN SCOTT,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

KEVIN SCOTT,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 19-1331
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE

BOARD OF VETERANS' APPEALS

APPELLANT'S BRIEF

ISSUES PRESENTED

I. Whether the Board clearly erred by failing to ensure VA satisfied its duty to assist by relying on the inadequate August 2011 VA addendum opinion, or alternatively, whether the Board failed to provide an adequate statement of reasons or bases to support its reliance on this opinion.

II. Whether the Board's statement of reasons or bases is inadequate for other aspects of its decision.

JURISDICTION

Appellate jurisdiction is predicated on 38 U.S.C. §§ 7252(a) and 7266(a).

NATURE OF THE CASE

Appellant, Kevin Scott, appeals from a decision of the Board of Veterans' Appeals ("Board") of December 19, 2018, which denied him entitlement to service connection for a bilateral hearing loss disability and tinnitus. Appellant requests that the decision on appeal be vacated in part and that these issues be remanded for further development and readjudication.

The decision on appeal also remanded Appellant's claim of entitlement to service connection for stuttering, which is therefore not before the Court. *See Breeden v. Principi*, 17 Vet. App. 475, 475 (2004).

STATEMENT OF THE RELEVANT FACTS

Appellant had active service with the U.S. Army from October 1968 until July 1970. *See* Record Before the Agency (**R.**) at **98** (DD-214), **415** (DD-214). His MOS included duties as a firefighter and Hero Missile Crewman. *See* **R. 415** (DD-214).

At his entry to service, his ears were marked as normal and he denied having any ear problems. **R. 310–11** (Sept. 1968 Entrance Report of Medical History ("ROMH")), **308–09** (Sept. 1968 Entrance Report of Medical Examination ("ROME")). His puretone thresholds were recorded in American Standards Association ("ASA") units and measured at:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	5	-5	-5	-	5
LEFT	15	-5	-5	-	-5

R. 309 (**308–09**) (Sept. 1968 Entrance ROME).

Appellant's service treatment records ("STRs") reflect that he complained about ear problems multiple times during service. *See* **R. 270** (June 1969 STR, noting Appellant's chief complaint was "ear problem" and that both ears were packed with cerumen), **271** (June 1969 STR, noting Appellant "c/o pain in right ear" and providing medication "in hope" that it would loosen the cerumen).

At separation, his ears were as marked normal. *See* **R. 306–07** (June 1970 Separation ROMH), **287–88** (June 1970 Separation ROME). His puretone threshold measurements were:

	HERTZ					
	500	**1000**	**2000**	**3000**	**4000**	**6000**
RIGHT	10	5	10	10	10	40
LEFT	25	10	10	10	10	15

R. 287 (**287–88**) (June 1970 Separation ROME).

In July 1985, Appellant complained of hearing loss in both ears and constant ringing in the right ear. **R. 362** (July 1985 private treatment record).

In the beginning of August 1985, Appellant had a right ear stapedectomy.[1] **R. 364**

[1] A stapedectomy is a procedure where "a surgeon inserts a prosthetic device into the middle ear to bypass the abnormal bone and permit sound waves to travel to the inner ear and restore hearing." *Otosclerosis*, NAT'L INST. ON DEAFNESS & OTHER COMM. DISORDS., https://www.nidcd.nih.gov/health/otosclerosis (last visited Sept. 12, 2019).

(Aug. 1985 private treatment record).

In October 1992, Appellant complained that he "can't hear out of [the] left ear." **R. 361** (Oct. 1992 private treatment record). The physician noted that he maintained "good hearing" in his right ear post-stapedectomy and that Appellant wanted the same procedure in his left ear. ***Id.***

In November 1992, Appellant had a left ear stapedectomy. **R. 365** (Nov. 1992 private treatment record).

In November 2010, Appellant filed his claims, in relevant part, for service connection for bilateral hearing loss and tinnitus. **R. 404–09** (Nov. 2010 VA Form 21-526).

In January 2011, Appellant underwent a VA examination for the bilateral hearing loss and tinnitus. *See* **R. 353–55** (Jan. 2011 VA examination). During the examination, Appellant "reported that during basic training he was about 10 feet away from a hand grenade explosion" and that after the explosion "he felt 'deaf' for a few days, but his hearing did return." **R. 353** (**353–55**). He also stated that he did not wear hearing protection in service. ***Id.*** Additionally, he reported that the tinnitus began after the in-service grenade explosion. **R. 354** (**353–55**). His puretone thresholds were measured at:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	35	45	70	85	100
LEFT	15	30	40	70	85

Id. His speech recognition scores were measured to be 48% in the right ear and 80% in the left ear. ***Id.*** While the examiner was not able to opine about nexus as Appellant's STRs were not available for review, the examiner did state that Appellant's tinnitus is a symptom

associated with the hearing loss. **R. 353**, **355** (**353–55**).

In June 2011, Appellant's VA physician noted that he had hearing loss "bil[aterally] due to 1968 when in basic training." **R. 330** (**329–33**) (June 2011 VA treatment record).

In August 2011, the VA examiner rendered an addendum opinion after review of Appellant's STRS. *See* **R. 347–48** (Aug. 2011 addendum opinion). The examiner opined that "[g]iven the veteran did not report hearing loss or tinnitus at the time of his medical concerns with his ears, it is less likely than not that the veteran's hearing loss and tinnitus were caused by or a result of military noise exposure." **R. 348** (**347–48**). The examiner further opined that "given the veteran had normal hearing for ratings purposes on his separation audiogram, it is less likely than not [his] hearing loss was caused by or a result of military noise exposure." ***Id.***

In August 2011, the Regional Office ("RO") denied Appellant's service connection claims for bilateral hearing loss and tinnitus. **R. 320–24** (Aug. 2011 Rating Decision).

In January 2012, VA received Appellant's Notice of Disagreement ("NOD") with the RO's August 2011 rating decision. **R. 263** (Jan. 2012 NOD).

In September 2013, the RO issued a Statement of the Case ("SOC") continuing the denials of service connection for bilateral hearing loss and tinnitus. **R. 135–37** (**116–38**) (Sept. 2013 SOC).

In October 2013, Appellant filed his formal appeal with the August 2011 rating decision. **R. 112–13** (Oct. 2013 VA Form 9). He stated, "I do not believe that all my documentation was [] looked at." **R. 112** (**112–13**). He further stated that his hearing loss has continued since it started during active duty and that he was "never given a discharge

physical or [] audiogram." **R. 112–13**.

In March 2017, Appellant submitted a statement explaining that his "hearing loss began in Basic training due to loud noise exposure at the hand grenade and rifle range," and that it "continued to get worse" throughout his service. **R. 87 (87–88)** (Mar. 2017 statement). He stated that he was "seen several times for hearing loss and ringing in [his] ears by military doctors." ***Id.*** He also reiterated that he was not given a separation physical and that he has suffered with hearing loss and ringing in his ears since service. ***Id.*** He further stated that he believed his STRs were incomplete, and that they "do not show [his] doctor visits regarding [his] hearing loss[.]" **R. 87–88**.

In December 2018, the Board issued the decision on appeal. *See* **R. 5–15** (Dec. 2018 Board Decision). With respect to the bilateral hearing loss and tinnitus claims, the Board found that the evidence did not establish a nexus or continuity of symptomatology or that either condition manifested within the one-year presumptive period after Appellant's separation from service. *See* **R. 5** (**5–15**). Otherwise, the Board relied on the August 2011 VA addendum opinion to support its denial of the claims. *See* **R. 9, 12** (**5–15**).

SUMMARY OF THE ARGUMENT

Appellant first contends that the Board clearly erred by failing to ensure VA satisfied its duty to assist by relying on the inadequate August 2011 VA addendum opinion, where the examiner failed to provide a rationale for the negative nexus opinions to have sufficiently informed the Board. Alternatively, Appellant argues that the Board's statement of reasons or bases is inadequate for relying on this opinion.

Appellant further contends that the Board failed to provide adequate reasons or

bases for other aspects of its decision, where the Board failed to: (1) address favorable evidence showing a nexus between Appellant's service and the bilateral hearing loss (and, in turn, tinnitus as secondary); (2) address his argument that his STRs are incomplete; and (3) adequately address lay evidence relating to continuity of symptoms for both conditions.

Appellant therefore requests that the Board's decision be vacated in part and that his bilateral hearing loss and tinnitus claims be remanded for further development and readjudication.

ARGUMENT

I. The Board clearly erred by failing to ensure VA satisfied its duty to assist by relying on the inadequate August 2011 VA addendum opinion, or alternatively, the Board failed to provide an adequate statement of reasons or bases to support its reliance on this opinion.

The Board clearly erred by failing to ensure VA satisfied its duty to assist by relying on the inadequate August 2011 VA addendum opinion in denying Appellant's claims for service connection for bilateral hearing loss and tinnitus.

Once VA determines that a medical examination is necessary to decide a compensation claim, it is compelled to ensure its adequacy. *See Barr v. Nicholson,* 21 Vet. App. 303, 311–12 (2007). An examination report is adequate when it is based upon consideration of the veteran's prior medical history and examinations and describes the veteran's disability in sufficient detail so that the Board's evaluation of the claim will be fully informed. *See Roberson v. Shinseki*, 22 Vet. App. 358, 366 (2009). Further, "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two." *Nieves-Rodriguez v. Peake,*

22 Vet. App. 295, 301, 304 (2008); *see also Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) ("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.") (citing *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991)). Moreover, if the report does not contain the detail necessary for the Board to competently render a decision, it must remand for clarification. *See* 38 C.F.R. §§ 4.2, 19.9(a); *Bowling v. Principi*, 15 Vet. App. 1, 12 (2001).

Further, the Board's determination that VA fulfilled its duty to assist is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990). A 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." *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Here, the August 2011 VA examiner's nexus opinions lack any meaningful rationale. First, the examiner merely stated that because "the veteran did not report hearing loss or tinnitus at the time of his medical concerns with his ears, it is less likely than not" that his current hearing loss and tinnitus were caused by or a result of military noise exposure. **R. 348** (**347–48**) (Aug. 2011 addendum opinion). The examiner failed to support this nexus finding with any sort of detail that would have enabled the Board to competently render a decision, especially given the fact that when Appellant sought treatment for his ears during service, the physician wrote his chief complaint was an "ear problem," **R. 270** (June 1969 STR), and Appellant did not affirmatively deny tinnitus or hearing loss at that

time. The August 2011 VA examiner did not explain the significance of the lack of documented hearing or tinnitus complaints at that time and why the absence of complaints necessarily supported the conclusion that the in-service noise exposure did not cause the hearing loss or tinnitus. Further, this opinion is void of any reasoned discussion or medical explanation regarding the relationship between Appellant's in-service ear treatment and in-service noise exposure, and bilateral hearing loss and tinnitus. *See* **R. 348** (**347–48**) (Aug. 2011 addendum opinion); *see also Nieves-Rodriguez* and *Stefl*, both *supra*.

Additionally, the August 2011 VA examiner opined that because Appellant had normal hearing for rating purposes on his separation audiogram, it was less likely than not that his current hearing loss was caused by or a result of military noise exposure. **R. 348** (**347–48**) (Aug. 2011 addendum opinion). However, the Court has held that 38 C.F.R. § 3.385 "does not preclude service connection for a current hearing disability where hearing was within normal limits on audiometric testing at separation from service." *Hensley v. Brown*, 5 Vet. App. 155, 159 (1993). Therefore, the examiner's bare statement that Appellant's hearing was normal at separation, **R. 348** (**347–48**), lacks sufficient reasoning or detail regarding nexus for Appellant's bilateral hearing loss that would have enabled the Board to make a fully informed decision. More specifically, this opinion fails to explain whether Appellant's current bilateral hearing loss is *causally* related to his service, including in-service noise exposure, even if it did not reach the threshold for rating purposes until later in time. *See* 38 C.F.R. § 3.303(d) ("Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service.").

For example, the August 2011 VA examiner did not address the upward threshold shifts during service. In *Hensley*, the Court noted that one factor to consider in the direct causation analysis for hearing loss cases is whether there had been an upward shift in tested thresholds in service, even if the § 3.385 requirements are not met until later in time. *See Hensley*, *supra*, at 159–60, 164. Here, Appellant's STRs do show upward threshold shifts at some frequencies from Appellant's induction to and separation from service. For instance, at Appellant's entrance, his puretone threshold measurement in his left ear was 0 dB at 4000 Hertz,[2] and at separation, it was 10 dB. **R. 309** (**308–09**) (Sept. 1968 Entrance ROME), **287** (**287–88**) (June 1970 Separation ROME). Many of his other entrance and separation audiometric scores revealed upward threshold shifts of 5 dB, also indicating a decrease in his hearing ability. *See* **R. 309** (**308–09**) (Sept. 1968 Entrance ROME), **287** (**287–88**) (June 1970 Separation ROME). This supports that Appellant had hearing loss in service, even if he did not meet the § 3.385 requirements until later, yet the August 2011 VA examiner failed to address this. *See* **R. 347–48** (Aug. 2011 addendum opinion).

And, as another example of direct causation, the VA examiner did not address the presence of some hearing loss during service. For instance, at Appellant's separation, he had a 25-dB threshold at 500 Hertz in his left ear and a 40-dB threshold at 6,000 Hertz in his right ear. **R. 287** (**287–88**) (June 1970 Separation ROME). In *Hensley*, the Court took note of the fact that "the threshold for normal hearing is from 0 to 20 dB, and higher

[2] As Appellant's 1968 entrance audiogram took place prior to 1969 and does not specifically state it was conducted according to ISO/ANSI standards, Appellant has converted the results to ISO/ANSI standards. *See* VA Adjudication Procedures Manual, M21-1, pt. III, subpt. iv, ch. 4, § D.2.c (Apr. 9, 2019).

threshold levels indicate some degree of hearing loss." *Hensley*, *supra*, at 158. However, despite the fact that there was some degree of hearing loss at multiple frequencies, the August 2011 VA examiner also failed to address these measurements. *See* **R. 347–48** (Aug. 2011 addendum opinion).

The Board's failure to obtain an adequate medical opinion consistent with the above was prejudicial because it was insufficiently informed about nexus before it rendered its decision. More specifically, § 3.303(d) and *Hensley* set a bar for rationale in hearing loss medical opinions (i.e., that hearing loss at separation is not a requirement to demonstrate service connection), and had the Board remanded to afford Appellant an adequate medical opinion that comported with the requirements of § 3.303(d) and *Hensley*, to include consideration of the documented threshold shifts and evidence showing greater than 20dB loss, a new examiner could have found that the bilateral hearing loss (and, in turn, tinnitus as secondary) were related to his service and in turn supported his claims for service connection. *See Burton v. Shinseki*, 25 Vet. App. 1, 6 (2011) (citing finding of prejudice in *Arneson v. Shinseki*, 24 Vet. App. 379, 389 (2011), where, despite uncertainty about how an error affected the course of an adjudication, prejudice was established when error "could have altered" the Board's determinations); *see also* § 3.303(d); *Hensley*, *supra*.

Remand is thus required for the Board to obtain a reasoned medical opinion that adequately addresses the causal relationship, if any, between Appellant's bilateral hearing loss and tinnitus and service, including in-service noise exposure.

Alternatively, the Board's statement of reasons or bases is inadequate for relying on the August 2011 VA addendum opinion. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, *supra*, at 56–

57; *see also Wise v. Shinseki*, 26 Vet. App. 517, 529 (2014) (finding that the "apparent shortcomings and discrepancies" in a medical opinion raised questions as to its adequacy, which "the Board was required to discuss [] before relying on that opinion"). Here, the Board afforded "[t]he August 2011 VA addendum opinion…great probative weight as it has a clear conclusion and supporting data, as well as a reasoned medical explanation connecting the two," and noted that "there is no opposing medical opinion…of record." **R. 9**, **12** (**5–15**) (Dec. 2018 Board Decision).

First, and contrary to the Board's statement, there is a June 2011 VA treatment record, in which the examining physician noted that Appellant had hearing loss "bil[aterlly] *due to* 1968 when in basic training." **R. 330** (**329–33**) (June 2011 VA treatment record) (emphasis added). This treatment record contradicts the Board's finding that there is no opposing medical opinion of record with respect to Appellant's bilateral hearing loss (and, in turn, his tinnitus as secondary), yet the Board failed to discuss it before relying on the August 2011 VA addendum opinion.

Further, as noted above, the August 2011 VA examiner failed to discuss whether Appellant's hearing loss was *causally* related to his service, even if he did not have hearing loss for VA rating purposes at his separation. *See* § 3.303(d); *Hensley*, *supra*; *see also Cosman v. Principi*, 3 Vet. App. 503, 505 (1992) ("[E]ven though a veteran may not have had a particular condition diagnosed in service, or for many years afterwards, service connection can still be established."); *Douglas v. Derwinski*, 2 Vet. App. 103, 108–09 (1992) ("claim for direct service connection…is not invalid, as a matter of law, if evidence of it did not manifest during service or within one year thereafter"). Even though the August

2011 VA addendum opinion does not comport with § 3.303(d) and *Hensley*, the Board relied on this opinion and failed to discuss how it was sufficiently informed about nexus before it denied Appellant's bilateral hearing loss claim. If the August 2011 VA examiner was not going to address the favorable evidence supporting direct causation (including the upward threshold shifts and thresholds indicating hearing loss), then the Board was required to discuss it before it could seemingly adopt this opinion as its own. *See Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994) (holding the Board cannot adopt a medical opinion as its own without initially carrying out its obligation to discuss evidence which appears to support appellant's position not addressed by that opinion).

Moreover, after the August 2011 VA examination, Appellant submitted multiple statements discussing his continued hearing loss symptoms since service. *See* **R. 112–13** (Oct. 2013 VA Form 9, asserting that his hearing loss started during active duty and has continued to the present), **87–88** (Mar. 2017 statement, stating, "[M]y hearing loss [] began while serving in the United States Army. My hearing loss began in Basic training due to loud noise exposure at the hand grenade and rifle range. It continued to get worse during my service career due to loud noise exposure during my M.O.S…."; "I have continued to live with my hearing loss and ringing in both ears until this day."). There are thus no VA examinations of record that took into account the lay evidence of Appellant's continued hearing loss symptoms since service, and it is unclear how the Board afforded the August 2011 VA addendum opinion "great probative weight," when the examiner did not have this additional information before rendering a nexus opinion. *Cf. Buchanan v. Nicholson*, 451 F.3d 1331, 1336 n.1 (Fed. Cir. 2006) (VA examiner's opinion "failed to consider whether

the lay statements presented sufficient evidence of the etiology of [the veteran's] disability such that his claim of service connection could be proven without contemporaneous medical evidence"); *Dalton v. Nicholson*, 21 Vet. App. 23, 39 (2007); *McKinney v. McDonald*, 28 Vet. App. 15, 30 (2016) (finding VA examination inadequate based on "examiner's failure to consider [the veteran's] testimony when formulating her opinion") (citing *Barr*, *supra*, at 310–11 (finding that a medical examination that ignores lay assertions regarding continued symptomatology is inadequate because it fails to take into account the veteran's prior medical history)).

Remand is therefore at least warranted for the Board to provide adequate reasons or bases addressing its reliance on the August 2011 VA addendum opinion in light of the case law and deficiencies in this opinion and its discussion noted above. *See Daves v. Nicholson*, 21 Vet. App. 46, 51 (2007) (holding that the Board's reasons or bases concerning the duty to assist did not permit the Court to conduct proper review).

II. The Board failed to provide an adequate statement of reasons or bases for other aspects of its decision.

The Board must always provide a written statement of reasons or bases "for its findings and conclusions on all material issues of fact and law presented on the record," and "the statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as facilitate review in this Court." *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995). Further, "the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection

of any material evidence favorable to the claimant." *Wise, supra*, at 524.

A. Failure to Address Favorable Evidence of Nexus

The Board's statement of reasons or bases is inadequate for denying Appellant service connection for bilateral hearing loss (and, in turn, tinnitus as secondary) because it failed to discuss favorable evidence that shows a nexus between Appellant's bilateral hearing loss and service. As part of its statement of reasons or bases, "the Board is required to specifically address material record evidence that is potentially favorable to the claim." *Todd v. McDonald*, 27 Vet. App. 79, 86–87 (2014).

Here, in June 2011, when Appellant was establishing primary medical care with VA, the examining physician wrote: "HEARING LOSS: yes bil[ateral] *due to* 1968 when in basic training[.]" **R. 330** (**329–33**) (June 2011 VA treatment record) (emphasis added). This evidence is favorable as it supports establishing a nexus between Appellant's hearing loss (and, in turn, for tinnitus as secondary) and service, yet the Board failed to address it in its decision, which constituted error. *See Todd, supra*.

Appellant was prejudiced because had the Board addressed this evidence, it could have established a nexus between his hearing loss and service and in turn supported his claims for service connection, or at least required the Board to engage in further development as this evidence contradicts the only medical opinion of record. *See Arneson, supra*. Remand is thus warranted for the Board to provide an adequate statement of reasons or bases that addresses this favorable evidence and whether it supports service connection for the bilateral hearing loss (and, in turn, for tinnitus as secondary). *See Tucker v. West*, 11 Vet. App. 369, 374 (1998) (remand appropriate "where the Board has…failed to provide

an adequate statement of reasons or bases for its determinations").

B. Failure to Address Argument that STRs Are Incomplete

The Board's statement of reasons or bases is inadequate for denying Appellant service connection for bilateral hearing loss and tinnitus because it failed to address his argument that his STRs are incomplete. In *Hatlestad v. Derwinski*, the Court noted that "the Board must include in its decisions 'the precise basis for that decision [and] the Board's response to the various arguments advanced by the claimant.'" 1 Vet. App. 164, 169 (1991) (citations omitted). Further, the Board is required to "adjudicate all issues reasonably raised" by the record and those that are expressly raised. *Brannon v. West*, 12 Vet. App. 32, 35 (1998); *see also Urban v. Principi*, 18 Vet. App. 143, 145 (2004). The Court has held that "[i]nherent in the duty-to-assist obligation and the *Gilbert* explanation mandate is a requirement for the Secretary to respond to a claimant's request for VA assistance one way or the other." *Godwin v. Derwinski*, 1 Vet. App. 419, 425 (1991), *abrogated on other grounds by McGinnis v. Brown*, 4 Vet. App. 239 (1993); *see Nohr v. McDonald*, 27 Vet. App. 124, 134 (2014) (remanding where Board failed to address the "substance" of a claimant's request for assistance) (citing *Tatum v. Shinseki*, 26 Vet. App. 443, 451 (2014), and *Godwin*, *supra*).

In his March 2017 statement, Appellant asserted, "I believe my medical records from the Army are not complete and do not show my doctor visits regarding my hearing loss that affected my life to this day." **R. 87–88** (Mar. 2017 statement). The Board's discussion, however, fails to respond to, or even mention, Appellant's argument regarding his missing STRs, resulting in error. *See Robinson v. Peake*, 21 Vet. App. 545, 552 (2008)

(the Board is required to consider all issues raised either by the claimant or by the evidence of record).

Had the Board properly addressed this argument, there is a reasonable possibility that it would have determined that VA did not meet its duty to assist in failing to obtain all of Appellant's STRs, and remanded the case for further development, which in turn, could have supported his claims for service connection. *See Arneson, supra*. Therefore, remand is warranted for the Board to provide an adequate statement of reasons or bases that addresses Appellant's argument about outstanding service medical records and whether further development is necessary. *See Hatlestad*, *Godwin*, and *Tucker*, all *supra*.

C. Lay Evidence of Continuity of Symptoms

The Board's statement of reasons or bases is inadequate because it failed to adequately address Appellant's lay reports of continued symptoms of hearing loss and tinnitus since service.

In addition to the abovementioned case law outlining the requirements for an adequate statement of reasons or bases, including addressing favorable evidence and assessing the credibility of evidence, "the Board may not consider the absence of evidence as substantive negative evidence." *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011) (citing *McLendon v. Nicholson*, 20 Vet. App. 79, 85 (2006)). The Board must first establish a proper foundation for drawing inferences against a claimant from an absence of documentation. *See Horn v. Shinseki*, 25 Vet. App. 231, 239 (2012); *Fountain v. McDonald*, 27 Vet. App. 258, 272 (2015). A proper foundation must demonstrate that silence tends to prove or disprove a relevant fact. *See Horn*, *supra*, at 239.

i. Bilateral Hearing Loss

With respect to Appellant's bilateral hearing loss claim, the Board found that "continuity of symptomatology is not established." **R. 5**, **10** (**5–15**) (Dec. 2018 Board Decision). In making this finding, however, the Board failed to address Appellant's competent lay reports that he has suffered from hearing loss symptoms since service. *See* **R. 112–13** (Oct. 2013 VA Form 9, asserting that his hearing loss started during active duty and has continued to the present), **87–88** (Mar. 2017 statement, stating, "[M]y hearing loss [] began while serving in the United States Army. My hearing loss began in Basic training due to loud noise exposure at the hand grenade and rifle range. It continued to get worse during my service career due to loud noise exposure during my M.O.S…."; "I have continued to live with my hearing loss and ringing in both ears until this day."); *see also Layno v. Brown*, 6 Vet. App. 465, 469 (1994) ("Lay evidence . . . may provide sufficient support for a claim of service connection, and it is error for the Board to require medical evidence to support that lay evidence."). The Board appears to have rejected this favorable evidence demonstrating continuity of symptomatology without providing adequate reasons or bases for doing so, rendering its statement of reasons or bases inadequate with respect to this issue. *See* **R. 7–10** (**5–15**) (Dec. 2018 Board Decision); *see also Caluza*, *Thompson*, *Todd*, and *Wise*, all *supra*.

Further, to the extent the Board's decision can be read as it using the absence of documentation relating to hearing loss or documentation of treatment thereof, to weigh against and reject the lay evidence of continued hearing loss symptoms since service, it failed to establish a proper foundation for doing so. *See Buchanan*, *supra*, at 1337 ("[T]he

Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence."); *Fountain*, *Buczynski*, and *Horn*, all *supra*. Here, the Board relied on an apparent "gap" in "clinical evidence" from Appellant's service until 1985, when his hearing loss complaints were first *clinically* documented, and from his left ear stapedectomy in 1992, when his private doctor reported that he maintained good hearing in his right ear post-stapedectomy, until January 2011, when his hearing impairment was clinically diagnosed. **R. 7**, **9** (**5–15**) (Dec. 2018 Board Decision).

Initially, for the period during service, the Board failed to provide any reason why Appellant would have been expected to continuously report his hearing loss complaints, or that those complaints necessarily would have been documented when he made them. *See Kahana v. Shinseki*, 24 Vet. App. 428, 434 (2011) (finding the Board erred when it made an unsupported medical determination as to the relative severity, duration, and treatment of an expected documented ACL injury). With respect to this issue, as mentioned above, Appellant did seek out treatment for his ears during service, but the examining physician at that time only wrote that his chief complaint was "ear problem" and documented the physical findings from an examination of Appellant's ears (i.e., that "both ears packed with cerumen"). **R. 270** (June 1969 STR). Appellant did not affirmatively deny that he was suffering from bilateral hearing loss at that time. In fact, he stated that he was seen in June 1969 for hearing problems. *See* **R. 112–13** (Oct. 2013 VA Form 9). And, the fact that Appellant allegedly sought treatment for hearing problems at that time, at least in theory, should have helped with his hearing loss issues during service and accounted for the

absence of further complaints or treatment during service and at separation. Thus, Appellant's reports of continued hearing loss symptoms since service can be read as in accordance with his STRs and separation examination.

The Board similarly failed to explain why Appellant's hearing loss symptoms would have been of such severity that it would have been reasonable to expect documentation of them after his separation from service until 1985, and from October 1992 until January 2011. *See Fountain, supra,* at 273. The fact that Appellant purportedly sought treatment during service for hearing loss helps to explain the lack of formal complaints relating to hearing loss after his discharge from service up until he sought treatment in 1985. Further, although Appellant's October 1992 private physician noted that he "maintained good hearing in his right ear," *see* **R. 361** (Oct. 1992 private treatment record), this does not equate to him not having hearing loss at all at that time in his right ear, and Appellant did undergo a stapedectomy a few years prior which alleviated some of his symptoms in that ear. And, the Board has not provided any clear reasons to reject Appellant's competent reports regarding continued hearing loss symptoms since service. *See Barr, supra,* at 310 (when the subject is one to which a lay person is competent to testify, such "testimony can be rejected only if found to be mistaken or otherwise deemed not credible."). Thus, the Board has failed to provide any foundation to demonstrate that such silence proves the absence of continuity. *See Horn, supra,* at 239.

The Board's failure to adequately address the abovementioned evidence was prejudicial because had the Board appropriately addressed this evidence (to include laying a proper foundation) and found Appellant credible, his statements relating to continuity

would have weighed against the August 2011 VA examiner's negative nexus opinion, which in turn, could have established a nexus between his service and the bilateral hearing loss, or at least required further development in support of his claim, e.g., in the form of an addendum medical opinion that accepted his lay statements relating to continuity of hearing loss symptoms as fact. *See Arneson*, *supra*.

Remand is thus warranted for the Board to provide an adequate statement of reasons or bases that adequately addresses the favorable lay evidence relating to continuity of hearing loss symptoms since service and that includes a clear foundation for its assessment of the lay evidence relating to the same. *See Thompson*, *Wise*, *Fountain*, *Horn*, and *Tucker*, all *supra*.

ii. Tinnitus

With respect to Appellant's reports about continued ringing in his ears since service, the Board failed to adequately explain its finding that continuity of symptomatology was not established. *See* **R. 5**, **10–12** (**5–15**) (Dec. 2018 Board Decision). In relation to this issue, the Board recognized that Appellant was "competent to report experiencing symptoms of ringing in his ears in service and consistently since separation," **R. 11** (**5–15**) (Dec. 2018 Board Decision), but made no *explicit* negative credibility finding regarding his reports of his medical history or continued tinnitus symptoms since service. *See* **R. 10–12** (**5–15**) (Dec. 2018 Board Decision). Instead, the Board only found that his "reports of continued symptomatology [are] not consistent with his reports in contemporaneous treatment records[.]" **R. 11** (**5–15**) (Dec. 2018 Board Decision); *see also Ussery v. Brown*, 8 Vet. App. 64, 67–68 (1995) ("The BVA thus neither found the appellant's testimony

credible nor incredible, and such a non-finding is incapable of judicial review"); *Ashmore v. Derwinski*, 1 Vet. App. 580, 583 (1991) (holding that an adequate statement of reasons or bases "requires the BVA to explicitly determine the credibility of a Veteran's sworn testimony"). The Board's non-finding regarding the credibility of Appellant's competent lay reports relating to continued tinnitus symptoms since service frustrated judicial review and warrants remand.

Further, to the extent the Board used the absence of documentation relating to tinnitus or documentation of treatment thereof, to weigh against Appellant's credibility regarding his reports of continued ringing in his ears since service, it failed to establish a proper foundation for doing so. *See Buchanan*, *Fountain*, *Buczynski*, and *Horn*, all *supra*. Here, the Board found of importance that in his contemporaneous STRs, he did not report experiencing tinnitus in service, including at his separation when his ears were marked as normal, and that "the first indication of tinnitus is more than a year after his separation from service…in July 1985." **R. 10–12** (**5–15**) (Dec. 2018 Board Decision).

For the period during service, the Board failed to provide any reason why Appellant would have been expected to report his tinnitus complaints, or that those complaints necessarily would have been documented when he made them. *See Kahana*, *supra*. And, as noted above, Appellant did seek out treatment for "ear problem[s]" during service, without the treating physician elaborating further on what those ear problems were. **R. 270** (June 1969 STR). The examiner only noted what the physical findings were from an examination of Appellant's ears (i.e., that "both ears packed with cerumen"), ***id.***, and it is reasonable to conclude that Appellant did in fact complain of tinnitus at that time (in

addition to hearing loss) and the examiner just wrote down "ear problem" to quickly notate what Appellant's reason for seeking treatment was. Appellant did not affirmatively deny that he was suffering from tinnitus at that time. And, the fact that Appellant sought treatment for an ear problem, at least in theory, should have alleviated the bilateral ear issues he was having during service and accounted for the absence of further complaints or treatment during service and at separation. Thus, Appellant's reports of continued tinnitus symptoms since service are consistent with his STRs and separation examination.

Moreover, with respect to Appellant's ears being marked as "normal" at separation, Appellant was not expressly asked about whether he had ringing in his ears. *See* **R. 306–07** (June 1970 Separation ROMH), **287–88** (June 1970 Separation ROME). The Board has provided no reason why Appellant would report tinnitus symptoms without being asked about it and he did not affirmatively deny ringing in his ears at separation. Therefore, Appellant's reports of continuity can be read as in accordance with his separation examination.

The Board similarly failed to explain why Appellant's tinnitus symptoms would have been of such severity that it would have been reasonable to expect documentation of them after his separation from service until 1985. *See Kahana* and *Fountain*, both *supra*. Additionally, the Board only found Appellant "not consistent" regarding his reports of continued tinnitus symptoms since service, and has not expressly rejected his credibility, but as argued above, this finding lacks adequate reasons or bases. Thus, the Board has failed to provide any foundation to demonstrate that such silence proves the absence of continuity. *See Horn*, *supra*, at 239.

Appellant was prejudiced because had the Board laid a proper foundation before it assessed the lay evidence relating to his continued tinnitus symptoms since service and found him credible, his statements could have established a nexus between his service and tinnitus, or at least required further development, e.g., in the form of a new addendum opinion that accepted Appellant's lay statements regarding continuity of tinnitus symptoms as fact, which in turn, could have resulted in a favorable nexus opinion and supported his claim. *See Arneson*, *supra*.

Remand is thus warranted for the Board to provide an adequate statement of reasons or bases that adequately addresses the lay evidence relating to continuity of Appellant's tinnitus symptoms since service, including making the proper explicit credibility determination, and for the Board to provide a clear foundation for its assessment of the lay evidence relating to the same. *See Thompson*, *Ussery*, *Ashmore*, *Fountain*, *Horn*, and *Tucker*, all *supra*.

CONCLUSION

In light of the Board's errors, Appellant respectfully requests that the December 19, 2018, decision on appeal be vacated in part, and that this matter be remanded for further development and readjudication for the reasons and under the authorities discussed above.

Respectfully submitted,

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