Vet.App. No. 19-1331

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

KEVIN SCOTT,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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I. ISSUE PRESENTED

Whether the Court should affirm the December 19, 2018, Board of Veterans' Appeals (Board) decision, which denied claims of entitlement to service connection for bilateral hearing loss and tinnitus, and remanded the issue of entitlement to service connection for stuttering.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

This Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Kevin Scott, appeals from a December 19, 2018, decision of the Board that denied entitlement to service connection for bilateral hearing loss and tinnitus, and remanded the issue of entitlement to service connection for stuttering.

C. Statement of Relevant Facts

Appellant served honorably on active duty in the U.S. Army for one year, from September July 1969 through July 1970. (Record (R.) at 410).

During Appellant's military induction medical examination in 1968, he underwent an audiogram and reported no hearing issues. (R. at 279 (278-279)). Appellant's puretone threshold readings from this examination were as follows:

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

(R. at 279). In June 1969, while in service, Appellant went to the Lyster Army Hospital complaining of an ear problem. (R. at 270-271). The physician on duty determined that Appellant's ears were packed with cerumen (earwax)[1], which was subsequently removed. *Id*. Following this incident, Appellant reported no other ear issues while in service.

[1] According to Dorland's Medical Dictionary, cerumen is "the waxlike secretion found within the external meatus of the ear; called also earwax." Dorland's Illustrated Medical Dictionary, 303 (28th ed. 1994).

At his separation examination in 1970, Appellant reported no hearing or ear-related issues. (R. at 273-275). During this examination, he underwent an audiogram which yielded the following puretone threshold readings:

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

(R. at 275).

Fifteen years later, in 1985, Appellant was diagnosed with bilateral otosclerosis.[2] (R. at 359-362). He underwent a successful right ear stapedectomy in August 1985, and November 1992, he underwent a successful left ear stapedectomy.[3] *Id*. Following these procedures, Appellant was noted to have "good hearing." (R. at 361).

In November 2010, Appellant submitted a claim for entitlement to service connection for bilateral hearing loss, tinnitus, and a speech condition secondary to his bilateral hearing loss. (R. at 404-409).

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[2] According to Dorland's Medical Dictionary, otosclerosis is "a pathological condition of the bony labyrinth of the ear, in which there is formation of spongy bone (otospongiosis), especially in front of and posterior to the footplate of the stapes; it may cause bony ankylosis of the stapes, resulting in conductive hearing loss." Dorland's Illustrated Medical Dictionary, 1205 (28th ed. 1994).

[3] According to Dorland's Medical Dictionary, a stapedectomy is the removal of stapes. Dorland's Illustrated Medical Dictionary, 1572 (28th ed. 1994). Stapes are "the innermost of the auditory ossicles, shaped somewhat like a stirrup; it articulates by its head with the incus, and its base is inserted into the fenestra vestibuli." *Id*.

In January 2011, Appellant was diagnosed with hearing loss. (R. at 353-355). During this examination Appellant underwent a VA audiogram which yielded the following puretone threshold readings:

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

(R. at 354).

Because Appellant's service medical records were not included in the examiner's c-file during the January 2011 exam, the audiologist offered an addendum opinion in August 2011, following her review of these records. (R. at 340-343).

In August 2011, the Chicago Regional Office (RO) issued a decision that denied Appellant's claim of entitlement to service connection for bilateral hearing loss and tinnitus. (R. at 317-324). Appellant submitted a timely notice of disagreement in January 2012. (R. at 263).

In September 2013, the RO issued a statement of the case (SOC), continuing its decision to deny entitlement to service connection for bilateral hearing loss and tinnitus. (R. at 116-138). Appellant submitted a VA Form 9 in October 2013. (R. at 112-113). In February 2017, the appeal was placed on the Board's docket. (R. at 89).

In March 2017, Appellant submitted a letter to the Board, in support of his claim. (R. at 87-88).

On December 19, 2018, the Board issued a decision denying Appellant's claims of entitlement to service connection for bilateral hearing loss and tinnitus. (R. at 5-15). In its decision, the Board relied on the August 2011 VA addendum medical opinion, and noted the absence of contemporaneous complaints of hearing loss or tinnitus during or immediately following Appellant's service. *Id*. Appellant now challenges that decision.

III. SUMMARY OF THE ARGUMENT

The August 2011 VA addendum medical opinion was adequate. The examiner provided a reasoned and clear medical determination regarding etiology of hearing loss and tinnitus, based upon consideration of Appellant's prior medical history. Appellant's arguments ostensibly aim to hold the examiner to a "reasons or bases" standard and request that the Court require the examiner to provide information that was outside of her purview during the examination. Furthermore, Appellant's counsel improperly intermingles her own medical opinions and conclusions in making her arguments against the adequacy of the opinion. Simply put, the examination was sufficient to allow the Board to make a fully informed evaluation, and the Board's reliance upon the examination is not clearly erroneous.

Furthermore, the Board provided an adequate statement of reasons or bases regarding its reliance on the August 2011 VA addendum medical opinion, and its determinations on Appellant's credibility and continuity of symptomology.

As an initial matter, the August 2011 VA addendum medical opinion was adequate, and the Board's statement of reasons or bases is not inadequate for merely relying on it.

Additionally, the Board explained its evidentiary findings regarding the probative value of Appellant's lay opinions, determining Appellant to be a competent, but not credible reporter of his medical history. (R. at 9, 11). Appellant argues to the contrary, asserting that the Board did not address favorable evidence of a nexus and did not make a credibility determination regarding his lay statements. Appellant's assertions are incorrect, however, as the Board *did* determine Appellant to be incredible regarding his medical history, and the "favorable" evidence Appellant references is a *self-reported* medical history.

Appellant also argues against the adequacy of the Board's statement of reasons or bases in regard to continuity of symptomology. Again, however, Appellant is unpersuasive. The Board's decision illustrates that it properly considered the absence of symptoms, in addition to the medical evidence, to ultimately determine that there was not a continuity of symptomology.

Lastly, the Board did not violate its duty to assist, because Appellant's claim that his service medical records were not "complete" was too vague and unspecific. Without more information to aid in the development of the claim, VA would be conducting nothing more than a fishing expedition, searching for evidence. The RO requested and received all of Appellant's service medical records. Thus, based on his request, there is no reasonable possibility that the asserted procurement of

records referenced by Appellant would have aided in substantiating his claim, because there is no evidence of any other records.

Accordingly, the Court should find that the Board relied on an adequate August 2011 VA addendum medical opinion, provided an adequate statement of reasons or bases, and adhered to its statutorily mandated duty to assist, and further, that Appellant has not shown that any of the Board's findings or determinations were clearly erroneous.

IV. ARGUMENT

A. The August 2011 VA Addendum Medical Opinion was Adequate.

The August 2011 VA audiologist offered a clear, succinct opinion regarding etiology of Appellant's hearing loss and tinnitus. This opinion was based on an in-person examination and review of Appellant's entire medical and service history, and it provided the Board with sufficient information to be fully informed in rendering its decision.

An adequate medical examination is one that is based on a consideration of the veteran's prior medical history and describes the veteran's condition with a level of detail sufficient to allow the Board to make a fully informed decision. *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). This requires the examiner to not only render a clear conclusion on the relevant medical question, but also to support that conclusion "with an analysis that the Board can consider and weigh against contrary opinions." *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007). However, this obligation is not insurmountable and an examination report need not "explicitly lay

out the examiner's journey from facts to a conclusion." *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012). In fact, the Court has explicitly ruled that there are *no reasons or bases requirements for examiners* and that examination reports must be read as a whole. *Id*.; *see also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) (emphasis added).

Whether a medical opinion is adequate is a finding of fact subject to review under the "clearly erroneous" standard. *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009); *D'Aries v. Peak*, 22 Vet.App. 97, 104 (2008). Under the "clearly erroneous" standard of review, the Court cannot substitute its judgment for that of the Board, and it *must* affirm the Board's factual findings so long as they are supported by a plausible basis in the record. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (emphasis added); *see also Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Finally, the Board may not deny service connection based solely on normal audiometric test results upon separation from service where the record contains other evidence linking hearing loss to service. *Hensley v. Brown*, 5 Vet.App. 155, 160 (1993). However, VA examinations *are not* inadequate when an examiner relies on normal audiometric test results from service entry and separation when forming a nexus opinion, if there are other factors in the mix. *Id*.

Here, the August 2011 VA addendum medical opinion—considered together with the January 2011 VA audiology examination[4]—is adequate, as it considered Appellant's prior medical history, described his condition with a level of detail sufficient to allow the Board to make a fully informed decision, and provided a clear conclusion supported by an analysis that the Board was able to consider and weigh against contrary opinions. Specifically, after review of Appellant's medical history, service medical records, and an in-person examination, the VA audiologist concluded that

> Given 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 the veteran's hearing loss and tinnitus were caused by or a result of military noise exposure. Given the veteran had normal hearing for ratings purposes on his separation audiogram, it is less likely than not the veteran's hearing loss was caused by or a result of military noise exposure.

(R. at 340). This not only illustrates a clear conclusion supported by medical analysis, but it also represents an opinion that the Board can weigh against contrary opinions in formulating its own decision. Indeed, Appellant's March 2017 lay opinion is a contrary opinion that the Board weighed against the August 2011 addendum opinion. (R. at 8-9). Moreover, the opinion specifically explains whether there is a causal nexus between in-service exposure and Appellant's

[4] The Secretary notes that the August 2011 VA addendum medical opinion was an addendum to the January 2011 in-person examination. The examiner was unable to provide an opinion following the January 2011 examination, because the c-file did not include Appellant's service medical records. *See* (R. at 355).

present hearing loss. (R. at 340) ("it is less likely than not the veteran's hearing loss was caused by or a result of military noise exposure.").

Appellant argues that that examiner failed to support her finding with "any sort of detail" to permit the Board to render a decision. (Appellant's Brief (App.) at 8). However, as shown above, the examiner did provide a rationale for her finding, based upon complete review of Appellant's medical records and service medical records. (R. at 340) (" . . the veteran did not report hearing loss or tinnitus at the time of his medical concerns with his ears . . . the veteran had normal hearing for ratings purposes on his separation audiogram . . ."). VA examiners are *not* held to reasons or bases standards and they need not "explicitly lay out the examiner's journey from facts to a conclusion." *See Monzingo*, 26 Vet.App. at 106; *Acevedo*, 25 Vet.App. at 293 (emphasis added). Requiring the examiner to offer more would necessarily mean that she is being held to the reasons or bases standard. Thus, contrary to Appellant's assertions, the examiner *did* offer meaningful rationales for her findings, with detail sufficient to allow the Board to offer a fully informed decision.

Appellant suggests that the examiner had a duty to "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," and offer a "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." (App. at 9). However, this inquiry was simply not within the examiner's purview. Rather, the examiner was tasked with determining whether "it [was] as likely as not (at least a 50% probability) or less likely than not (less than a 50% probability) that [Appellant's] hearing loss [and tinnitus] . . . [was] related to" Appellant's service. (R. at 357 (356-358)). Thus, the examiner had no duty nor requirement to offer an opinion as wide in scope as suggested by Appellant. Not only would such a wide-ranging opinion be outside of the examiner's duty, it would also be improper, as the examiner is not held to a reasons or bases standard. More importantly, the Board—not the examiner—is the finder of fact.

Lastly, Appellant asserts that the examiner should have considered puretone threshold shifts in rendering her decision. (App. at 10-11). Unfortunately, Appellant's counsel is not competent to provide explanations regarding the significance of medical evidence. *Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (holding that the Court may not consider medical explanations or opinions offered by Appellant's counsel). Nonetheless, Appellant's counsel purports to do exactly what *Kern* prohibits, by inserting her own lay opinion regarding the importance of certain pieces of medical evidence over others to delegitimize the VA examiner's opinion. (App. at 10) ("Many of his other entrance and separation audiometric scores revealed upward threshold shifts of 5 dB, also indicating a decrease in his

hearing ability. . . . This supports that Appellant had hearing loss in service . . . .").[5] The examiner, *not* Appellant's counsel, is the proper person to weigh medical evidence and make medical determinations, and Appellant's arguments regarding how the examiner should have viewed puretone threshold shifts are improper and should not be considered by the Court. *See Kern*, 4 Vet.App. at 353.

Accordingly, the Court should find that the August 2011 VA addendum medical opinion was adequate, and that the Board's reliance on it was not clearly erroneous. *See Gilbert*, 1 Vet.App. at 52 (emphasis added); *Anderson*, 105 S.Ct. at 1504 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed.Cir. 2000) (table); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

B. The Board Provided an Adequate Statement of Reasons or Bases in Relying on the August 2011 VA Addendum Medical Opinion.

The Board's reliance on the 2011 VA addendum medical opinion does not render its reasons or bases inadequate, because the examination is demonstrably adequate, and the Board's discussion of and reliance on it meets the requirements prescribed in both statute and case law.

[5] The Secretary notes the Appellant's counsel provided a conversion of contemporary puretone threshold readings. (R. at 10-11). Again, this is not opposing counsel's area of expertise, as she is not an audiologist.

A Board decision must be supported by a statement of reasons or bases which adequately explains the basis of the its material findings and conclusions. 38 U.S.C. § 7104(d)(1) (2018); *Gilbert*, 1 Vet.App. at 57. This generally requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially 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).

When analyzing lay evidence, if the Board determines that lay evidence is competent and credible, it must weigh the evidence against other evidence of record, providing an appropriate statement of reasons or bases for its conclusions. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1334-37 (Fed.Cir. 2006); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56-57; *see also* 38 U.S.C. § 7104(d)(1) (2018).

Here, the Board offered an adequate statement of reasons or bases in relation to the August 2011 VA addendum medical opinion, because, as discussed above, the examination is adequate.

Appellant argues that Appellant's treatment record contradicts the addendum opinion. (App. at 12). However, the treatment record referenced by Appellant is his self-reported medical history, notated during a primary care physician intake appointment. (R. at 330 (329-333)). Converse to Appellant's assertions, the Board addressed Appellant's credibility, noting inconsistency in reporting his condition, and thus delegitimized any purported inconsistency

between the addendum opinion and Appellant's self-reported medical history. (R. at 9).

Appellant asserts that the August 2011 VA examiner failed to discuss whether his hearing loss was causally related to his service. (App. at 12). This is a misstatement of fact, however, as the examiner unambiguously opined regarding causation. (R. at 340) ("it is less likely than not the veteran's hearing loss was caused by or a result of military noise exposure.").

Appellant also argues that it is unclear how the Board afforded the August 2011 addendum opinion great weight when it failed to take into account his October 2013 VA Form 9 and his March 2017 letter. (App. at 13). As explained above, however, the Board discussed and weighed the credibility and probative value of Appellant's lay statements regarding etiology. (R. at 9-10). Moreover, the underlying factual predicate upon which the examiner based her opinion was unchanged by Appellant's lay testimony—the examiner's notes indicate that Appellant asserted noise exposure during service at the time of the January 2011 examination, and the post January 2011 examination statements merely repeat the underlying assertions. (R. at 341).

In his remaining argument on this issue, Appellant generally repeats his contentions regarding the purported inadequacy of the examination, in terms of a deficiency in the Board's statement of reasons or bases. *Compare* (R. at 8-10) *with* (App. at 12-14). The Court need not dwell on Appellant's alternative phrasing of

his previous arguments, because it has been established that the examination was adequate. *See* (R. at 9-10).

Accordingly, the Court should find that the Board offered an adequate statement of reasons or bases regarding its reliance on the August 2011 VA addendum medical opinion, and further, that Appellant has not met his burden of persuasion. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

C. The Board Provided an Adequate Statement of Reasons or Bases for Its Decision to Deny Entitlement to Service Connection for Bilateral Hearing Loss and Tinnitus.

In its decision, the Board provided clear determinations regarding the credibility of Appellant's self-reported medical history, and the presence (or in this instance, absence) of credible evidence to show a continuity of symptomology. These findings and the subsequent explanations thereof meet the reasons or bases standard.

1. The Board Addressed Evidence of Nexus.

A Board decision must be supported by a statement of reasons or bases which adequately explains the basis of the its material findings and conclusions. 38 U.S.C. § 7104(d)(1) (2018); *Gilbert*, 1 Vet.App. at 57. The reasons or bases requirement necessitates the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially favorable to the claimant. *Caluza,* 7 Vet.App.

at 506. The Board, however, need not comment upon every individual piece of evidence contained in the record. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed.Cir. 2007).

A layperson is competent to provide "evidence not requiring that the proponent have specialized education, training, or experience." 38 C.F.R. § 3.159(a)(2) (2018). "Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person." *See* 38 C.F.R. § 3.159(a)(1); *see also Waters v. Shinseki*, 601 F.3d 1274, 1278 (2010) (emphasizing that the Board "must consider lay evidence, but may give it whatever weight it concludes the evidence is entitled to").

Here, the Board offered an adequate statement of reasons or bases regarding the purportedly favorable evidence of nexus. Specifically, the Board explained that "[b]ecause the Veteran's statements regarding the condition of his ears over time have been somewhat inconsistent, his recent lay statements will be given minimal probative weight." (R. at 9). Despite Appellant's assertions, the Board did not need to specifically reference the June 2011 self-reported medical history, because the Board's notation of Appellant's history of inconsistent reports, followed by its credibility finding is sufficient for the reasons or bases standard to which the Board is held. (R. at 8-9); *see Newhouse*, 497 F.3d at 1302 (holding that the Board does not need to comment on every piece of evidence in the record).

Appellant argues that this June 2011 hearing loss notation is evidence potentially favorable to his claim. (App. at 15). As indicated above, however, the record Appellant is referencing is a *self-reported* medical history. *See* (R. at 330); (Secretary's Brief (Sec.) at 13). The information from June 2011 merely restates the information Appellant provided to the audiologist in January 2011. *Compare* (R. at 353-354) *with* (R. at 330). Moreover, Appellant's focus on the words "due to" must be considered in the context in which they were written (i.e. during a primary care physician intake appointment, notated as part of Appellant's self-reported medical history). (R. at 330). Taken on its face, the "due to" notation presents a conclusion regarding a topic on which Appellant is not competent—etiology. *Id*.; *see also* 38 C.F.R. § 3.159(a)(1) (2018); *Waters*, 601 F.3d at 1278.

Accordingly, the Court should find that the Board offered an adequate statement of reasons or bases in making a credibility determination regarding Appellant's self-reported medical history.

2. *The Board Did Not Violate its Duty to Assist Regarding Appellant's STR Claim*.

The duty to assist requires that the Secretary make reasonable efforts to obtain records so long as they are both relevant and *adequately identified* by the claimant. 38 U.S.C. § 5103A(b)(1) (2018); 38 C.F.R. § 3.159 (2018) (emphasis added). Because this duty is limited to relevant records, it does not require the Secretary to assist in the procurement of records when "no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. §

5103A(a)(2) (2018); *see also Golz v. Shinseki*, 590 F.3d 1317, 1320-1321 (Fed.Cir. 2010) (explaining that the "duty to assist is not boundless in scope"); *Gober v. Derwinski*, 2 Vet.App. 470, 472 (1992) (holding that the statutory duty to assist "is not a license for a 'fishing expedition' to determine if there might be some unspecified information which could possibly support a claim"); *Walch v. Shinseki*, 563 F.3d 1374, 1378 (Fed.Cir. 2009) (recognizing that the "duty to assist is not an unbounded obligation").

In order to demonstrate a violation of the duty to assist, a claimant must show more than the mere possibility that certain unobtained records could be relevant. *Raugust v. Shinseki*, 23 Vet.App. 475, 478 (2010) (holding that the claimant's assertion that it was "conceivable" that certain records would have aided claim insufficient to establish error in failure to obtain those records). There "must be specific reason to believe these records may give rise to pertinent information." *Golz*, 590 F.3d at 1323. The Board's determination that the duty to assist is satisfied is a factual determination subject to judicial review under the deferential clearly erroneous standard. *Nolen v. Gober*, 14 Vet.App. 183, 184 (2000).

Here, the Board did not violate its duty to assist because Appellant offered nothing but a vague assertion that his "medical records from the Army [were] not complete. . . ." (R. at 87). In January 2011, VA requested and obtained Appellant's complete service treatment records. (R. at 379). These records included his entrance and separation examinations, and other medical treatment he obtained during service, such as a September 1969 screening, June 1969 complaint of ear

pain, and a December 1968 hospital visit. (R. at 271). Requiring further investigation into this vague assertion of missing medical records, without adequate identification such as a date or location, would turn VA claim development into a "fishing expedition," which is not the purpose of this statutorily mandated duty. *See Gober*, 2 Vet.App. at 472; 38 U.S.C. § 5103A(b) (2018).

Accordingly, the Court should find that the Board did not violate its duty to assist, and further, that Appellant has not demonstrated that the Board's implicit finding that it fulfilled the duty to assist was clearly erroneous. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

3. <u>There is No Probative Evidence of a Continuity of Symptomology</u>.

A Board decision must be supported by a statement of reasons or bases which adequately explains the basis of the its material findings and conclusions. 38 U.S.C. § 7104(d)(1) (2018); *Gilbert*, 1 Vet.App. at 57. The Board has significant discretion when assessing the evidence, and how it interprets that evidence, the weight it assigns to it, and what, if any, inferences it draws from that evidence. 38 U.S.C. § 7261(a)(4) (2018). This discretion is subject to review under the limited "clear error" standard. 38 U.S.C. § 7261(a)(4) (2018). Under this deferential standard, the Board's findings of fact must only have a plausible basis in the record; if they do, they must be affirmed. *See Gilbert*, 1 Vet.App. at 52; *see also Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013) ("A Board statement should generally be read as a whole, and if that statement permits an understanding and

facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate.") (citation omitted).

When evaluating the credibility of lay statements, the Board may consider whether the statements conflict with other statements or evidence, the potential bias of the witness, and the level of detail of the information reported. *Buchanan*, 451 F.3d at 1336-37; *Gardin v. Shinseki*, 613 F.3d 1374, 1379-80 (Fed.Cir. 2010) (affirming rejection of lay evidence based on finding that it was vague and inconsistent with the record). The Board may reject such statements if it finds them to be mistaken, incorrect, untrustworthy, or otherwise unreliable. *See McLendon v. Nicholson*, 20 Vet.App. 79, 84 (2006).

Here, the Board offered an adequate statement of reasons or bases regarding Appellant's statements on his continuous symptoms of both hearing loss and tinnitus. Specifically, the Board explained that although Appellant is competent to report observable symptoms, he has been an inconsistent reporter and thus his statements were minimally probative. (R. at 9) ("Because the Veteran's statements regarding the condition of his ears over time have been somewhat inconsistent, his recent lay statements will be given minimal probative weight."); (R. at 11) (" . . . the Board finds the Veteran's reports of continuity of symptomatology not consistent with his reports in contemporaneous treatment records, which show that he did not report experiencing tinnitus in service."). Such a determination is squarely within the Board's power. *See Buchanan*, 451 F.3d at

1336-37. Moreover, these statements illustrate a clear analysis and evidentiary determination, and more importantly, an adequate statement of reasons or bases.

Additionally, the Board provided an adequate statement of reasons or bases regarding its evidentiary determination on continuity of symptomology. Specifically, the Board reasoned that because the record was devoid of any notation of symptoms between separation and Appellant's 1985 stapedectomy—and even then, he maintained good hearing until 2011—there was not a continuity of symptomology. (R. at 9, 11). Reliance on the complete absence of any notation of hearing issues or ringing (tinnitus) between separation and a 1985 stapedectomy does not render the Board's reasons or bases inadequate. *See Buczynski v. Shinseki,* 24 Vet.App. 221, 224 (2011) (holding that where there is a lack of notation of medical condition or symptoms where such notation would normally be expected, the Board may consider this as evidence that the conditions or symptoms did not exist).

Appellant raises several arguments regarding the Board's statement of reasons or bases for its evidentiary determinations in relation to continuity of symptomology. These arguments will be addressed below.

i. Hearing Loss

Appellant first argues that the Board failed to explain why he would have been expected to report his complaints or seek treatment for hearing loss, citing to *Kahana v. Shinseki* for legal support. (App. at 19); 24 Vet.App. 428, 434 (2011). Unlike in *Kahana*, however, here the Board did not "provide [its] own medical

judgment in the guise of a Board opinion." *Id*. Rather, the Board merely reasoned that without documentation or notation of symptoms, there was not a continuity of symptomology. (R. at 9). This reasoning is legally sufficient, as the Court explained in *Buczynski v. Shinseki*. 24 Vet.App. at 224. In *Kahana*, the Board speculated on the severity, common symptomatology, and usual treatment of an ACL injury, but here, the Board did not employ such speculation—instead, it used the absence of evidence to support its finding. *Kahana*, 24 Vet.App. at 434; *see* (R. at 9); *Buczynski*, 24 Vet.App. at 224.

Appellant next argues that he did not "affirmatively deny" he was suffering from hearing loss during his June 1969 medical treatment for earwax removal and thus, that his notedly inconsistent reports of symptomology should have been "read as in accordance" with his service treatment records. (App. at 19-20). There is no "affirmative denial" requirement, and Appellant does not attempt to support this assertion with legal precedent. Rather, he puts forth a fact-based argument, and it is unpersuasive. In short, Appellant argues that the Board should have interpreted the facts differently—in his favor. As the finder of fact, the Board's factual determinations are subject to review under the deferential "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4) (2018). Appellant has not met this burden. *See Gilbert,* 1 Vet.App. at 52 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *see also Anderson*, 105 S.Ct. at 1504.

Appellant also argues that the Board's reasons or bases are inadequate because it "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." (App. at 20). This argument is misguided, because it calls for the speculation specifically prohibited by *Kahana*. As Appellant aptly noted, the Court in *Kahana* explained that the Board may not speculate on the severity, common symptomatology, and usual treatment of an injury. *Kahana*, 24 Vet.App. at 434; (App. at 19). In fact, had the Board explained why Appellant's symptoms would have or should have risen to a certain severity to require documentation, it would have overtly violated *Kahana*. Thus, were the Board to engage in the discussion that Appellant asserts is necessary, it would be doing so in error.

Appellant next asserts that the Board did not provide "any clear reasons to reject Appellant's competent reports regarding continued hearing loss symptoms since service." (App. at 20). This is a clear misstatement of fact. The Board specifically analyzed and discussed Appellant's lay reports. (R. at 9) ("Because the Veteran's statements regarding the condition of his ears over time have been somewhat inconsistent, his recent lay statements will be given minimal probative weight."). Moreover, this analysis and evidentiary determination was squarely within the Board's powers. *See McLendon*, 20 Vet.App. at 84 (holding that the Board may reject lay statements if it finds them to be mistaken, incorrect, untrustworthy, or otherwise unreliable).

ii. Tinnitus

Appellant next argues that because the Board made no "explicit negative credibility finding" regarding his lay reports on his medical history of tinnitus, its reasons or bases are inadequate. (App. at 21). As discussed above and noted by Appellant, the Board made a clear evidentiary evaluation regarding Appellant's lay statements. *See* (R. at 11) (" . . . the Board finds the Veteran's reports of continuity of symptomatology not consistent with his reports in contemporaneous treatment records, which show that he did not report experiencing tinnitus in service."); (Sec. at 16-17). Nonetheless, Appellant still asserts that a "non-finding" of credibility frustrates judicial review. This is simply incorrect, as the Board found Appellant competent but not credible. (R. at 11).

Appellant asserts that the Board failed to establish a proper foundation for using the absence of symptoms to weigh against his credibility regarding his medical history. (App. at 22). This argument is mistaken, however, as the Board offered a discussion and subsequent analysis regarding the absence of symptoms. (R. at 11). Moreover, as discussed above, the Board's use of the absence of evidence to reach its conclusion is not an issue, nor does it render its statement of reasons or bases inadequate. *Buczynski*, 24 Vet.App. at 224.

Next, Appellant argues that 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." (App. at 22-23). This argument is unpersuasive. Much like his argument regarding

hearing loss documentation, this argument calls for the type of speculation that is specifically prohibited by *Kahana*. 24 Vet.App. at 434. Appellant is arguing that the Board should have speculated into the severity of the injury, by explaining why Appellant would have been expected to seek treatment or have treatment documented. (App at 22). Had the Board ventured into such a discussion regarding why Appellant would have been expected to have documented complaints or certain treatment, its decision would have certainly violated *Kahana*, because it would have been forced to speculate into the severity, common symptomatology, and usual treatment of tinnitus. 24 Vet.App. at 434.

Appellant next offers several assertions regarding medical conclusions, each in violation of *Kern*. 4 Vet.App. at 353. In his Brief, Appellant's counsel states that "it is reasonable to conclude that Appellant did in fact complain of tinnitus . . . (in addition to hearing loss) and the examiner just wrote down 'ear problem' to quickly notate what Appellant's reason for seeking treatment" during his June 1969 medical examination for excessive earwax. (App. at 22-23). Appellant's counsel also attempts to presume the nature and substance of the questions asked during Appellant's separation examination. (App. at 23) (" . . . Appellant was not expressly asked about whether he had ringing in his ears."). These are clear attempts to substitute the opinion of Appellant's counsel with that of the examiner, and to offer an explanation of what the examiner was thinking. The Court should discard these assertions, because they violate the mandate in *Kern* and Appellant's counsel is

not competent to provide explanations regarding the significance of medical evidence. *Kern*, 4 Vet.App. at 353.

Appellant's remaining arguments simply reassert the contentions addressed above. The Court need not dwell on Appellant's alternative phrasing of his previous arguments, because, as established previously, the Board's statement of reasons or bases is adequate.

Accordingly, the Court should find that the Board offered an adequate statement of reasons or bases regarding continuity of symptomology, and further, that Appellant has not met his burden of persuasion. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169 (holding that, on appeal to this Court, the appellant "always bears the burden of persuasion.").

D. Appellant Has Abandoned All Issues Not Argued in His Brief.

It is axiomatic that issues or arguments not raised on appeal are abandoned. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed.Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (deeming abandoned Board determinations unchallenged on appeal); *Bucklinger v. Brown*, 5 Vet.App. 435, 436 (1993). Therefore, any and all issues that have not been addressed in Appellant's brief have therefore been abandoned.

V. CONCLUSION

For the foregoing reasons, the Secretary respectfully submits that the December 19, 2018, Board decision should be affirmed in all respects.

Respectfully submitted,

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