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 REPLY BRIEF

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ARGUMENT

I. The Secretary has not shown that the August 2011 VA addendum opinion is adequate, or that the Board provided an adequate statement of reasons or bases for relying on this opinion.

In his principal brief, Appellant first argued that the Board clearly erred by relying on the August 2011 VA addendum opinion, where the examiner failed to provide adequate rationale for the negative nexus opinions. Appellant's Brief ("App. Br.") at 7-11. More specifically, Appellant argued that the examiner failed to address significant facts in Appellant's prior medical history that may establish a causal connection between service and hearing loss or tinnitus, despite normal audiometric testing at separation. *See id.*

In response, the Secretary first argued that Appellant seeks to hold the examiner to a reasons or bases standard "and request that the Court requires the examiner to provide information that was outside of her purview during the examination." Secretary's Brief ("Sec. Br.") at 5, 7-11. While Appellant recognizes that there is no requirement that a medical examiner "explicitly lay out the examiner's journey from facts to a conclusion," Sec. Br. at 7-8, 10 (citation omitted), the Secretary overlooks that it must be clear from the examiner's report that his or her opinion is based upon consideration of the claimant's *entire* medical history. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (holding "a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."). Indeed, the Secretary ignores that "[w]ithout a medical opinion that clearly addresses the relevant facts and medical science, the Board is left to rely on its own lay opinion, which it is forbidden from doing." *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (citing *Colvin v. Derwinski*,

1 Vet. App. 171, 175 (1991)). Thus, while the Board bears the ultimate responsibility of providing adequate reasons or bases for its findings of fact, the Board cannot carry out that duty without an accurate and adequately detailed medical basis for findings pertaining to medical issues. *See Colvin*, *supra*.

As Appellant argued in his principal brief, *see* App. Br. at 7-11, it is well established that a medical opinion is inadequate if the examiner fails to apply "valid medical analysis to the significant facts of the particular case in order to reach the conclusion." *Nieves-Rodriguez*, *supra*, at 304. This is not because medical examiners are required to discuss all evidence of record, but rather because *the Board* is obligated to obtain sufficiently detailed medical evidence to support a competent decision on medical matters.

In relation to this issue, the Secretary asserted that 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." Sec. Br. at 11 (citing **R. 357** (**356-58**) (July 2011 Exam Request)). Thus, according to the Secretary, "the examiner had no duty nor requirement to offer an opinion…wide[r] in scope" than that specific inquiry. *Id.*

However, as noted above, an adequate medical rationale must apply medical analysis to the significant facts at hand, contain clear conclusions with supporting data, and clearly address the medical science underlying the opinion. *See Nieves-Rodriguez* and *Stefl*, both *supra*. Here, the August 2011 VA examiner's rationale contains only mere data, i.e., no reports of hearing loss or tinnitus when Appellant sought treatment in service, without a medical explanation as to why that data is important. *See* **R. 347-48**.

Thus, contrary to the Secretary's contentions, *see* Sec. Br. at 10-11, it was entirely within the examiner's purview to, for instance, explain the significance of the lack of documented hearing loss or tinnitus complaints at the time he sought treatment for his ears in service, *see* **R. 270** (June 1969 service treatment record ("STR")), **271** (June 1969 STR), and why the absence of complaints at that time necessarily supported the conclusion that the in-service noise exposure did not cause the hearing loss or tinnitus. *See* **R. 348** (**347-48**) (Aug. 2011 VA addendum opinion). This is especially so as the examiner heavily relied on this factor in finding no nexus between Appellant's bilateral hearing loss and tinnitus and in-service noise exposure. ***Id.*** ("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.").

The Secretary also argued that Appellant was lay hypothesizing to challenge the adequacy of the August 2011 VA addendum opinion. *See* Sec. Br. at 5, 11-12. The Secretary, however, misunderstands Appellant's argument. Rather, Appellant was pointing to critical facts and relevant events underlying his entire medical history that the VA examiner failed to account for in making their findings, not lay hypothesizing about the "importance of certain pieces of medical evidence," "weigh[ing] medical evidence," or even making "medical determinations." Sec. Br. at 11-12; *see Nieves-Rodriguez, supra*, at 304. Indeed, as argued in his principal brief, in *Hensley v. Brown*, 5 Vet. App. 155, 158-60 (1993), the Court elucidated factors that were relevant to a direct causation analysis in hearing loss cases (to include in-service threshold shifts (by any amount) and the presence of hearing loss as evidenced by thresholds higher than 20db). And, contrary to the

Secretary's contentions, Appellant was not lay hypothesizing, but rather emphasizing how these relevant factors are also present in this case, yet the examiner did not address them in finding no nexus. The Secretary does not make any argument as to how these did not constitute significant facts that the examiner did not have to consider.

Appellant maintains that he was prejudiced, *see* App. Br. at 11, and that remand is warranted for the Board to obtain a new 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, consistent with the reasons set forth in his briefs. *See Mariano v. Principi*, 17 Vet. App. 305, 312 (2003).

Alternatively, Appellant argued that the Board's statement of reasons or bases was inadequate for relying on the August 2011 VA addendum opinion. App. Br. at 11-14; *see Wise v. Shinseki*, 26 Vet. App. 517, 529 (2014). More specifically, Appellant argued that before the Board relied on this opinion, it needed to discuss the favorable evidence supporting his claims that was not accounted for in this opinion, including a June 2011 VA treatment record, in-service upward threshold shifts and thresholds indicating hearing loss at Appellant's separation from service, and the lay evidence of Appellant's continued hearing loss symptoms since service. App. Br. at 11-14.

As it relates to the June 2011 VA treatment record, the Secretary responded that "the treatment record referenced by Appellant is his self-reported medical history," and that "the Board addressed Appellant's credibility, and thus delegitimized any purported inconsistency between the addendum opinion and Appellant's self-reported medical history." Sec. Br. at 13-14. This treatment record provides no indication that the physician's

finding that Appellant's hearing loss "bil[aterally] *due to* 1968 when in basic training" is instead just a notation of Appellant's own self-reported medical history. **R. 330** (**329-33**) (June 2011 VA treatment record) (emphasis added). And, the Secretary has failed to point to where it says as much. It appears that the Secretary is rewriting the Board's decision in relation to this evidence and providing findings that the Board itself has not made. *See Evans v. Shinseki*, 25 Vet. App. 7, 16 (2011) ("[I]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."); *Smith v. Nicholson*, 19 Vet. App. 63, 73 (2005) ("[I]t is not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court.").

The Secretary also asserted that Appellant's argument "that the August 2011 VA examiner failed to discuss whether his hearing loss was causally related to his service….is a misstatement of fact[.]" Sec. Br. at 14. However, the Secretary misunderstands Appellant's argument as Appellant did not just argue that the examiner merely "failed to discuss whether his hearing loss was causally related to his service." Sec. Br. at 14. Rather, Appellant contended that "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." App. Br. at 12 (emphasis added); *see also Cosman v. Principi*, 3 Vet. App. 503, 505 (1992).

In this regard, Appellant argued that the August 2011 VA addendum opinion does not comport with 38 C.F.R. § 3.303(d) and *Hensley*, *supra*, and that the examiner failed to address favorable evidence supporting direct causation (i.e., the upward threshold shifts and thresholds indicating hearing loss at Appellant's separation from service). App. Br. at

12-13. Thus, because the August 2011 VA examiner did not address this evidence, Appellant argued that the Board was required to discuss it in its statement of reasons or bases before it adopted this opinion as its own and explain how it was sufficiently informed about nexus without the examiner addressing it. *Id.*; *see also Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994).

To the extent the Secretary asserted that this is a repetition of the previous arguments, Sec. Br. at 14-15, this is not responsive, and particularly problematic given his position earlier in his brief that the examiner did not address this evidence in their opinion. *See* Sec. Br. at 10-12. And, the Secretary has failed to point to where the Board discussed this evidence before relying on the August 2011 VA examiner's opinion.

The Secretary also contended that "the Board discussed and weighed the credibility and probative value of Appellant's lay statements regarding etiology" and that "the underlying factual predicate upon which the examiner based her opinion was unchanged by Appellant's testimony." Sec. Br. at 14. In this regard, the Secretary stated that "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." *Id.*

The October 2013 and March 2017 statements, however, do not only relate to etiology and noise exposure during service, but contain allegations of Appellant's *continued* symptoms of both conditions since their onset in service. *See* **R. 112-13** (Oct. 2013 VA Form 9), **87-88** (Mar. 2017 statement). And, to the extent the Secretary asserted "the underlying factual predicate upon which the examiner based her opinion was

unchanged by Appellant's lay testimony," Sec. Br. at 14, the Secretary is not competent to make medical determinations. *See Kern v. Brown*, 4 Vet. App. 350, 353 (1993). Moreover, because the August 2011 VA examiner did not have this additional information relating to continuity of symptoms before rendering a nexus opinion, it is unclear how the Secretary can assert that the "underlying factual predicate upon which the examiner based her opinion was unchanged by Appellant's lay testimony." Sec. Br. at 14; *cf. 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") (citation omitted).

Thus, in the alternative to the above duty to assist argument, Appellant also maintains that the Board failed to provide an adequate statement of reasons or bases for relying on the August 2011 VA addendum opinion, in failing to discuss any of the deficiencies noted in his briefs, and that remand is at least warranted for the Board to address the adequacy of the opinion and its reliance on it in light of the case law and deficiencies noted in his briefs. *See Daves v. Nicholson*, 21 Vet. App. 46, 51 (2007).

II. The Secretary has not shown that the Board provided an adequate statement of reasons or bases for other aspects of its decision.

Appellant further contended that the Board failed to support other aspects of its decision to deny him entitlement to service connection for bilateral hearing loss and tinnitus with an adequate statement of reasons or bases. App. Br. at 14-24.

First, Appellant contended that the Board failed to address a favorable June 2011 VA treatment record, in which the examining physician wrote: "HEARING LOSS: yes

bil[ateral] ***due to*** 1968 when in basic training." App. Br. at 15-16 (citing **R. 330** (**329-33**) (June 2011 VA treatment record) (emphasis added)). The Secretary responded that "the Board offered an adequate statement of reasons or bases regarding the purportedly favorable evidence of nexus." Sec. Br. at 16. The Secretary stated that "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." *Id.* (citing **R. 8-9** (**5-15**) (Dec. 2018 Board Decision)). The Secretary also asserted that the information contained within this treatment record "merely restates the information Appellant provided to the audiologist in January 2011" and that the "'due to' notation presents a conclusion regarding a topic on which Appellant is not competent—etiology." Sec. Br. at 17.

As noted above, however, this treatment record says nothing about the June 2011 examining physician's finding that Appellant's hearing loss "bil[aterally] *due to* 1968 when in basic training" is instead just a notation of Appellant's own self-reported medical history. **R. 330** (**329-33**) (June 2011 VA treatment record) (emphasis added). Moreover, the Secretary does not point to where in the Board's decision it addressed the June 2011 VA treatment record, to include finding that it was a self-reported medical history, and thus not probative. *See* Sec. Br. at 15-17. While the Board is permitted to discount competent evidence when such discounting is appropriate and find certain evidence more probative, the Board did not provide any reasons or bases for doing so in this case as it relates to the June 2011 VA treatment record. *See Wise*, *supra*, at 524 ("[T]he 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."). The Secretary's arguments serve as nothing more than post-hoc rationalizations, and he attempts to rewrite the Board's decision by taking its findings regarding other evidence and applying it to the June 2011 VA treatment record. Sec. Br. at 16 (citing **R. 8-9** (**5-15**) (Dec. 2018 Board Decision)); *see also Evans* and *Smith*, both *supra*.

Appellant next argued that the Board failed to provide an adequate statement of reasons or bases when it failed to address his argument that his STRS are incomplete. App. Br. at 16-17 (citing **R. 87-88** (Mar. 2017 statement)). The Secretary responded that "the Board did not violate its duty to assist because Appellant offered nothing but a vague assertion" regarding his incomplete STRs. Sec. Br. at 18. The Secretary stated that VA "requested and obtained Appellant's complete service treatment records," and that "[r]equiring 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 [the] statutorily mandated duty" to make reasonable efforts to obtain relevant records. Sec. Br. at 18-19.

However, Appellant did not make a duty to assist argument. The Secretary ignores 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.'" *Hatlestad v. Derwinski*, 1 Vet. App. 164, 169 (1991) (citations omitted). The Board had a duty to respond to the "various arguments" advanced by Appellant in support of his appeal, and the Secretary has failed to point to where the Board did as much in its decision. Instead,

the Secretary's responses are mere post-hoc rationalizations for a discussion that the Board itself failed to provide. *See Evans* and *Smith,* both *supra*; *see also* **R. 5-15** (Dec. 2018 Board Decision). For instance, in its decision, the Board made no finding that Appellant's STRs were complete, **R. 5-15**, despite the Secretary's suggestion that they were. *See* Sec. Br. at 18-19 ("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."). It is the Board's responsibility to address all issues either raised by the claimant or by the evidence of record, and the Secretary has not shown that the Board did so in this case. *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).

Additionally, the Secretary's statement that "further investigation" of Appellant's "vague" assertion regarding his incomplete STRs "would turn VA claim development into a 'fishing expedition,'" Sec. Br. at 18-19, is not accurate. Initially, it can hardly be said that Appellant's statement was "vague," as he identified that his STRs were incomplete (indicating a timeframe for the missing records) and specified the treatment that he sought in the alleged outstanding STRs. **R. 87-88** (Mar. 2017 statement, stating, "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."). And, in *Godwin v. Derwinski*, 1 Vet. App. 419 (1991), the Court held that "[i]nherent in the duty-to-assist obligation and the *Gilbert* [*v. Derwinski,* 1 Vet. App. 49 (1990)] explanation mandate is a requirement for the Secretary to respond to a claimant's request for VA assistance *one way or the other*."

Id. at 425 (emphasis added). Appellant maintains that without a response to his argument, he cannot understand the precise basis for the Board's decision and judicial review was frustrated.

Finally, Appellant argued that the Board failed to provide an adequate statement of reasons or bases because it failed to adequately address the lay reports of continued symptoms of hearing loss and tinnitus since service. App. Br. at 17-24. As it relates to bilateral hearing loss, Appellant argued that the Board: (1) failed to address his competent lay reports that he has suffered from hearing loss symptoms since service; and (2) used the absence of documentation to weigh against and reject the lay evidence of continued hearing loss symptoms since service, without establishing a proper foundation for doing so. App. Br. at 18-21.

The Secretary first responded that this case is distinguishable from *Kahana v. Shinseki*, 24 Vet. App. 428, 434 (2011), because "the Board did not 'provide [its] own medical judgment in the guise of a Board opinion,'" but instead "merely reasoned that without documentation or notation of symptoms, there was not a continuity of symptomology." Sec. Br. at 21-22 (citing **R. 9 (5-15)** (Dec. 2018 Board Decision)). According to the Secretary, this reasoning is "legally sufficient" under *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011), and thus did not render the Board's statement of reasons or bases inadequate. Sec. Br. at 21-22.

The Secretary's defense of the Board's decision, however, highlights how the Board's inference from the lack of documentation resulted in a medical determination (i.e., no documentation equating to no symptoms), and is contra to the Court's holding in

Kahana, *supra*. Moreover, in *Buczynski*, the Court held that "the Board **may not** consider the absence of evidence as substantive negative evidence." *Buczynski*, *supra*, at 224 (citation omitted) (emphasis added). And, in subsequent case law relating to this issue, the Court held the Board must first establish a proper foundation before drawing inferences against a claimant from an absence of documentation, and that a proper foundation must demonstrate that silence tends to prove or disprove a relevant fact. *See Horn v. Shinseki*, 25 Vet. App. 231, 239 (2012); *Fountain v. McDonald*, 27 Vet. App. 258, 272 (2015). The Secretary has failed to point to where the Board established a proper foundation before it used the absence of evidence against Appellant.

To the extent the Secretary summarized Appellant's argument as merely that "the Board should have interpreted the facts differently," Sec. Br. at 22, the Secretary misunderstands Appellant's argument. Appellant pointed out facts that suggest the Board failed to establish a proper foundation before it used the absence of evidence against him, and argued that based on these factors, his lay reports of continued symptoms could be read in accordance with the STRs. App. Br. at 19-20. Appellant did not just argue that "the Board should have interpreted the facts differently," Sec. Br. at 22, but rather that the Board needed to account for these factors and establish a proper foundation before it used the absence of evidence against him.

To the extent the Secretary asserted that Appellant's arguments relating to this issue are "misguided" and "call[] for the speculation specifically prohibited by *Kahana*," Sec. Br. 23, this is not accurate. In *Fountain*, the Court held that in establishing a proper foundation, the Board could discuss "whether [the] symptoms the appellant was

experiencing during service were of such severity that it would have been reasonable to expect that he would have sought treatment or complained of [the condition] during service." *Fountain, supra,* at 273. Thus, the Board's lack of discussion as it relates to this issue further supports that it failed to establish a proper foundation before it used the absence of evidence against Appellant.

Finally, while the Secretary asserted that the Board "specifically analyzed and discussed Appellant's lay reports," and stated that Appellant's argument to the contrary was a "misstatement of fact," Sec. Br. at 23, he fails to point to where in the Board's discussion it specifically mentioned Appellant's lay reports of continued hearing loss symptoms since service. The Secretary again attempts to rewrite the Board's decision by taking its findings regarding other evidence and applying it to the lay reports of Appellant's continued hearing loss symptoms since service. Sec. Br. at 23 (citing **R. 9** (**5-15**) (Dec. 2018 Board Decision)); *see also Evans* and *Smith*, both *supra*. Indeed, nowhere in the Board's decision does it discuss Appellant's lay reports of continued hearing loss symptoms as presented in his October 2013 VA Form 9 or March 2017 statement. *See* **R. 5-15** (Dec. 2018 Board Decision).

With respect to tinnitus, Appellant argued that the Board failed: (1) to make an *explicit* credibility finding about his lay reports of continued symptoms; and (2) to establish a proper foundation before it used the absence of documentation relating to tinnitus (or documentation of treatment thereof) to weigh against Appellant's reports of continued tinnitus symptoms since service. App. Br. at 21-24.

The Secretary first responded that the Board "made a clear evidentiary evaluation

regarding Appellant's lay statements," and that it found "Appellant competent but not credible." Sec. Br. at 24 (citing **R. 11** (**5-15**) (Dec. 2018 Board Decision)). The Board, however, made no such *explicit* finding regarding Appellant's credibility in its decision. It merely 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 Ashmore v. Derwinski,* 1 Vet. App. 580, 583 (1991).

The Secretary's next two contentions are restatements of his previous arguments (i.e., that "the Board's use of the absence of evidence to reach its conclusion is not an issue" and that Appellant "calls for the type of speculation that is specifically prohibited by *Kahana*"). Sec. Br. at 24-25. As argued in his briefs, however, these contentions are not persuasive as: (1) the Board must establish a proper foundation before it uses the absence of evidence against an appellant, which here it did not do; and (2) the Board can discuss "whether [the] symptoms the appellant was experiencing during service were of such severity that it would have been reasonable to expect that he would have sought treatment or complained of [the condition] during service" without running afoul of *Kahana*. *Fountain*, *supra*, at 273.

The Secretary's remaining contention postulates that Appellant was lay hypothesizing about the evidence. Sec. Br. at 25-26. However, Appellant was pointing out factors suggesting that the Board failed to establish a proper foundation before it used the absence of evidence against his reports of continued tinnitus symptoms. App. Br. 21-24. Moreover, a clear reading of both the Report of Medical History ("ROMH") and Report of Medical Examination ("ROME") show that Appellant was not asked on the forms about

whether he had ringing in his ears, thus the Secretary is incorrect that this is an "attempt[] to substitute the opinion of Appellant's counsel with that of the examiner." Sec. Br. at 25; *see* **R. 306-07** (June 1970 Separation ROMH), **287-88** (June 1970 Separation ROME).

Thus, the Secretary has not shown that the Board provided an adequate statement of reasons or bases for its decision. Appellant maintains that he was prejudiced and that judicial review was frustrated by the Board's failure to provide an adequate statement of reasons or bases. Remand is thus warranted for the Board to provide an adequate statement of reasons or bases consistent with the reasons set forth in Appellant's briefs. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998).

CONCLUSION

In light of the Board's errors, Appellant respectfully requests that the December 19, 2018, decision on appeal be vacated in part (to the extent it was unfavorable), and that this matter be remanded for further readjudication for the reasons and under the authorities discussed in his briefs.

Respectfully submitted,

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November 18, 2019

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