Vet. App. No. 19-0058

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

EDWARD S. AREL,
Appellant,

v.

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

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

SELKET N. COTTLE
Deputy Chief Counsel

MARY E. JONES
Appellate Attorney
Office of the General Counsel (027I)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6901

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Appellant,	)	
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	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board or BVA), November 21, 2018, decision denying entitlement to service connection for (1) right-ear hearing loss; (2) left-ear hearing loss; and (3) tinnitus.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has proper jurisdiction under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

On November 21, 2018, the Board issued the decision on appeal, denying Mr. Edward Arel (Appellant) entitlement to service connection for (1) right-ear

hearing loss; (2) left-ear hearing loss; and (3) tinnitus.[1] Appellant filed a timely appeal of the Board's decision on January 4, 2019.

C. STATEMENT OF RELEVANT FACTS

Appellant served in the United States Army from July 1969 to July 1971. [Record (R.) at 233]. He earned the Army Commendation Medal; the National Defense Service Medal; the Vietnam Service Medal; and the Vietnam Campaign Medal. [R. at 233].

On separation from service, Appellant underwent a medical examination which showed normal hearing; that is, his bilateral hearing thresholds were at zero decibels. [R. at 220 (219-220)]. In October 2012, Appellant applied for service connection for bilateral hearing loss and bilateral tinnitus. [R. at 509-14]. In March 2013, a hearing test characterized his hearing loss as moderate. [R. at 460].

Appellant underwent a VA medical examination for hearing loss and tinnitus in October 2013. [R. at 274-78]. His speech discrimination scores were 100 percent bilaterally, but he was diagnosed with bilateral sensorineural hearing loss. [R. at 275]. The examiner conceded that noise exposure was highly probable, but noted that Appellant's service treatment records (STRs) showed no hearing loss or significant changes in hearing thresholds; there was no record of complaint or treatment for hearing loss or tinnitus in the STRs; and a report by the Institute of

[1] In his brief, Appellant stated that he does not challenge the denial of entitlement to service connection for his right ear hearing loss. Appellant's Brief (App. Br.) at 5, fn.2. The Secretary requests that the Court dismiss the appeal with regard to that issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

Medicine (IOM) stated that there was insufficient scientific basis to conclude that permanent hearing loss directly attributable to noise exposure will develop long after noise exposure. [R. at 277]. The examiner explained that the IOM panel concluded that a prolonged delay in the onset of noise-induced hearing loss was unlikely. [R. at 277]. The examiner concluded, "[b]ased on the objective evidence available, there is no evidence on which to conclude that [Appellant's] current hearing loss was caused by or a result of [Appellant's] military service, including noise exposure." [R. at 277]. As to tinnitus, the examiner opined that it was less likely than not caused by or a result of military noise exposure because Appellant had normal hearing on enlistment and separation examinations with no shifts in hearing threshold levels. [R. at 277]. There was no basis to conclude that tinnitus was associated with noise injury because there was no objective evidence of noise injury. [R. at 277-78].

The Regional Office (RO) denied Appellant's claim for service connection for bilateral hearing loss and tinnitus in a December 2013 rating decision. [R. at 247-50]. Appellant submitted his Notice of Disagreement (NOD) in September 2014. [R. at 234-37]. The RO issued a Statement of the Case, and Appellant submitted his substantive appeal. [R. at 53-67, 38-42].

The Board issued the November 21, 2018, decision that is the subject of this appeal. [R. at 4-12]. The Board found that, regarding left ear hearing loss, the evidence established Appellant sustained acoustic trauma in service, but service connection could not be granted on a presumptive basis. [R. at 8-9]. The only

nexus evidence was the October 2013 VA medical examiner's conclusion that the evidence from service was not sufficient to establish that Appellant's hearing loss was caused by or a result of service. [R. at 9]. The Board found the VA examiner's opinion highly probative, and concluded that the preponderance of the evidence established that there was less likely than not a causal link between Appellant's left ear hearing loss and in-service acoustic trauma. [R. at 9].

As to tinnitus, the Board found that Appellant suffered acoustic trauma in service. [R. at 10]. The October 2013 VA medical examiner, relying on lack of in-service evidence of measurable acoustic trauma or any complaint of tinnitus, opined that there was no basis on which to conclude that Appellant's tinnitus was associated with in-service acoustic trauma. [R. at 10]. The Board, therefore, concluded that service connection was not warranted on a presumptive basis. [R. at 10]. Nor was service connection warranted on a direct basis as the only nexus evidence of record was the VA examiner's opinion that the evidence from service was not a sufficient basis on which to conclude that Appellant's tinnitus was associated with noise exposure in service. [R. at 10]. The Board again found the opinion highly probative and concluded that a preponderance of the evidence established that there was less likely than not a causal link between Appellant's tinnitus and in-service acoustic trauma. [R. at 10-11].

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's November 21, 2018, decision which denied entitlement to service connection for left-ear hearing loss and tinnitus. The

IOM report was neither actually nor constructively before the Board, so the Board was neither required nor able to consider it. The Board does not have a duty to *sua sponte* review the medical literature on which a VA medical examiner bases his or her opinion. The Board cannot reject a VA medical opinion based on its own review of the medical literature, particularly where the medical literature is not before the Board; this is inconsistent with the law. The October 2013 VA medical opinion was not inadequate, and the Board was entitled to assign it probative weight. The 2013 VA medical opinion was adequate and provided sufficient rationale for the Board to rely on the opinion to deny service connection for tinnitus. Appellant has not demonstrated that the Board committed prejudicial error that would warrant any action by the Court other than affirmance.

IV. ARGUMENT

A. The Board Properly Considered the Evidence of Record and Found the 2013 VA Examination Adequate to Deny Service Connection for Left Ear Hearing Loss

1. The IOM Report Was Not Before the Board Actually or Constructively and the Court May Not Review the Report *Sua Sponte*

a. The IOM report was not actually before the Board

There is no argument that the IOM report is not part of the Record Before the Agency (record). The record does not contain any portion of the IOM report. Indeed, rather than citing to the record to discuss the IOM report, Appellant directs the Court to a website. Appellant's Brief (App. Br.) at 16. Yet the Court is precluded by statute from considering as part of the record any material which is not

contained in the "record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b); *see Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990) (review in the Court shall be on the record of proceedings before the Secretary and the BVA); *see also Andrews v. Derwinski*, 3 Vet.App. 61, 62 (1991) ("[E]vidence which existed prior to the BVA's decision, but which was not part of the record of proceedings before the BVA and the Secretary, cannot be considered by the Court.").

Appellant argues instead that the Board had constructive possession of the IOM report. That is, Appellant asserts that the Board had actual knowledge of the IOM report because the Board has referenced such report in other Board decisions, because the Secretary has conceded knowledge of the report, and because the report is available on VA's website, even though it is not contained in the current Record. App. Br. at 16. However, the Board did not have constructive possession of the IOM report.

b. The IOM report was not constructively before the Board

The scope of the doctrine of constructive possession has been narrowed over time. Though this Court has held that documents may be constructively before the Board and thereby in the record as contemplated by 38 U.S.C. § 7252(b) the instances in which the Court may deem documents constructively before the Board are limited. *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992). Not all documents in the Secretary's control or that the Secretary or the Board is aware of are deemed constructively before the Board in any given adjudication. VA-generated

documents are not considered constructively before the Board in a particular claimant's case "unless the document has a direct relationship to the claimant's appeal." *Monzingo v. Shinseki*, 26 Vet.App. 97, 102 (2012). The same is true of documents VA received. *See id.* (holding that a study prepared under a contract between the National Academy of Sciences and VA was not constructively before the Board in the appellant's adjudication, even though VA "sponsored and received a copy" of the report). Because the Secretary has actual knowledge of documents he generates and receives, his actual knowledge of a particular report or study is not sufficient to place that document constructively before the Board in a particular veteran's appeal.

The same is true of the Board, which is an agent of the Secretary. *See Kuppamala v. McDonald*, 27 Vet.App. 447, 452 (2015); *see also* 38 U.S.C. § 7101(a). The Court has held that the Board's familiarity with a particular document, as shown by the fact that the Board relied on that document in other cases or that the Board possesses the document in its reference materials, does not place the document constructively before the Board. *Bowey v. West*, 11 Vet.App. 106, 109 (1998). In those instances, the connection between those documents and a particular claimant's appeal is "too tenuous." *Id.* Thus, the Board's "actual knowledge" of a document or its contents is not the legal standard for determining whether a document was constructively before the Board, and thus reviewable by the Court, under § 7252(b).

Appellant cited to the oral argument in *Euzebio v. Wilkie*, __ Vet.App. __, 2019 U.S. App. Vet. Claims LEXIS 1476 (August 22, 2019), where the Secretary conceded that the Board had actual knowledge of similar medical reports. App. Br. at 17. Yet since Appellant submitted his brief to the Court, the Court decided *Euzebio*. The Court explained that, "as the constructive possession doctrine developed, the requirement that the document not relate too tenuously to the appellant's claim grew in significance" and now "an appellant must show that there is a *direct relationship* between the document and his or her claim to demonstrate that the document was constructively before the Board, even if the document was generated for and received by VA under a statutory mandate." *Euzebio*, __ Vet.App. at __, 2019 U.S. App. Vet. Claims LEXIS at *14 (citing *Monzingo*, 26 Vet.App. at 101-03; *Goodwin v. West*, 11 Vet.App. 494, 496 (1998) (per curiam order); *Bowey*, 11 Vet.App at 108-09) (emphasis original). The Court went on to hold that the medical report at issue in that case "was not constructively part of the record before the Board" because VA's awareness of a report that contains general information about the type of disability on appeal is insufficient to trigger the constructive possession doctrine where there is no direct relationship to the claim on appeal, even where the report at issue was obtained by VA pursuant to a statutory mandate. *Euzebio*, __ Vet.App. at __, 2019 U.S. App. Vet. Claims LEXIS at *15-*16.

Similarly, here, the IOM report was not constructively part of the record before the Board because it has no direct relationship to the claim on appeal. Thus,

Appellant's argument that the Board had actual knowledge of the IOM report, and had a duty to review it or consider it directly, is unavailing. VA does not claim ignorance of the contents of the IOM report; however, as in *Euzebio*, the IOM report is not directly related to Appellant's claim, and the report is not contained in the record. There is no basis for the Board to apply its general knowledge of the existence of a medical report to Appellant's case.

Appellant also urges the Court to find that the Board should take official notice of the IOM report in this case, as it did of a different IOM report referenced in *Gray v. McDonald*, 27 Vet.App. 313 (2015). App. Br. at 18-19; *see Gray*, 27 Vet.App. at 322 n.7. Yet while the Board may be permitted to obtain and consider recognized medical treatises in its decisions, the regulations do not require the Board to obtain any particular medical treatises. 38 C.F.R. § 20.908(b) (2019).[2] Moreover, the particular section of the regulation Appellant cites, section 20.908(b)(2), states only that the Board is not required to notify the appellant and his representative that the Board will consider a recognized medical treatise in the adjudication of the appeal if the Board uses the treatise or medical dictionary for the limited purpose of defining a medical term and that definition is not material to the disposition of the appeal. 38 C.F.R. § 20.908(b)(2). Had the Board obtained

[2] Appellant cites 38 C.F.R. § 23.908(b)(2) (2019) in his brief. However, in the 2019 regulations, 38 C.F.R. Part 23 contains the regulations related to nondiscrimination on the basis of sex in education programs or activities receiving financial assistance, and contains no subpart 23.908. Presumably, Appellant intended to refer to 38 C.F.R. § 20.908, which Appellee has discussed above.

the IOM report, it would have been required to notify Appellant and his representative and allow Appellant an opportunity to respond to the use of that medical treatise under 38 C.F.R. § 20.908(b)(1). However, the Board was not required to obtain the report, and did not obtain the report, so it is not in the record. Moreover, because the report was not part of the record, the Board had no duty to review its contents.

c. The Court may not review the IOM report *sua sponte*

The Court may not review the IOM report *sua sponte*. As noted above, the Court is constrained by statute from considering any material which is not contained in the "record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b); *see Rogozinski*, 1 Vet.App. at 20; *Andrews*, 3 Vet.App. at 62. The IOM report is not before the Court because it is not contained in the record. The Court exceeds its jurisdiction when it considers evidence not in the record before the Board. *Kyhn v. Shinseki*, 716 F.3d 572, 576-78 (Fed. Cir. 2013). Appellant cites to non-precedential decisions where the Court took judicial notice of the contents of the IOM report, yet these cases are not binding on the Court. App. Br. at 20. Precedential case law indicates that the Court should take judicial notice only of facts not reasonably in dispute. *Brannon v. Derwinski*, 1 Vet.App. 314, 317 (1991) (stating "Courts are better suited to acknowledge undebatable historic facts, which include statutes and regulations, than to comment on and interpret the status of medical principles").

In *Monzingo*, the Court determined that it could take judicial notice of the facts that VA was ordered by Congress to contract for certain medical reports; that such reports had been published; and that VA received a copy of those reports. 26 Vet.App. at 103-04. The Court explained however, that "the findings and conclusions within these reports [were] neither facts of universal notoriety nor facts not subject to reasonable dispute" and the Court could not take judicial notice of those findings and conclusions and would not evaluate the Board's decision through the lens of those findings and conclusions. *Id.* at 104; *see Brannon*, 1 Vet.App. at 316 (refusing to take judicial notice of the fact that a duodenal ulcer is a chronic disease in all instances despite Appellant's arguments, submitted medical texts, and evidence that the Secretary had previously invited the Court to judicially notice the chronic nature of a duodenal ulcer in another case); *see also Vilfranc v. McDonald*, 28 Vet.App. 357, 360 f.3 (2017) (taking judicial notice of the anatomy of the jaw); *Allday v. Brown*, 7 Vet.App. 517, 531 (1995) (taking judicial notice of the date of a decision); *Hennessey v. Brown*, 7 Vet.App. 143, 148 (1994) (refusing to take judicial notice where the Court would have to "make the medical determinations necessary" in assessing whether appellant's condition was an emergency). The ease by which the Court, or the Board, could obtain the IOM report has no bearing on the appropriateness of the Court considering a document that was not actually or constructively before the Board, and is not a fact not in dispute.

The Court has not looked outside the record to determine prejudicial error in a manner such as Appellant suggests. App. Br. at 20-21. Indeed, in the cases Appellant cites, this Court and the United States Court of Appeals for the Federal Circuit (Federal Circuit) stated that the courts may review the record of proceedings before the Secretary and the Board and take account of the rule of prejudicial error. App. Br. at 20-21; *Newhouse v. Nicholson*, 497 F.3d 1298 (Fed. Cir. 2007); *see also Mayfield v. Nicholson*, 19 Vet.App. 103, 112-14 (2005) (comparing 38 U.S.C. § 7261(b)(2) to the federal harmless-error statute, 28 U.S.C. § 2111, which requires the Court to "give judgment after an examination of the record" without regard to harmless error, and to 31 U.S.C. § 3805(c) providing that the "court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error"), *rev'd in part by Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006). The Court may only find facts "related solely to the issue of harmless error." *Byron v. Shinseki*, 670 F.3d 1202, 1206 (Fed. Cir. 2012). It may not find facts related to the probative weight of a medical opinion. There is no case law to suggest that the Court may review medical literature that was not before the Board in order to assess prejudicial legal error. App. Br. at 20. Neither does the Board have a *sua sponte* duty to review the IOM report.

2. The Board Has No *Sua Sponte* Duty to Review the Medical Literature Relied on by a VA Medical Examiner Where Such Literature is Not Part of the Record

The Board has no duty to review, *sua sponte*, the medical literature relied on by a medical examiner. Citing *McCray v. Wilkie*, 31 Vet.App. 243 (2019),

Appellant argues that the Court identified three scenarios in which the Board may review the contents of medical reports that are underlying medical opinions: *sua sponte*; when the issue is raised by the veteran; or when the record reasonably raises the issue of apparent qualifiers or contradictions in the report. App. Br. at 11; *see also McCray*, 31 Vet.App. at 257. Yet *McCray* does not hold that the Board is required to review medical report *sua sponte*, especially in a case where the medical report is not part of the record. 31 Vet.App. at 257. Appellant argues that the language of the decision imposes on the Board a duty to *sua sponte* review the medical report. App. Br. at 11. However, nothing in *McCray* imposes such a duty. The Court stated,

> *If* the Board finds that a medical text that serves as the basis for a medical opinion contains apparent qualifiers or contradictions, or *if* the veteran raises the issue or it is reasonably raised from review of the evidence of record, [*then*] the Board must address the issue and explain whether those aspects of the medical text diminish the probative value of the medical opinion evidence or render the opinion inadequate, and if not, why not.

McCray, 31 Vet.App. at 257 (emphasis added). Where, as here, the veteran did not raise the issue of an inadequate examination due to inconsistencies between the medical literature and the examiner's opinion, and where the medical text is not present in the record so the evidence of record does not raise the issue, and where the medical text is not actually or constructively before the Board, then there is no duty for the Board to obtain the medical text, review it, and determine whether it contains apparent qualifiers or contradictions. To impose such a duty on the Board would be unworkable and inconsistent with case law.

The Board cannot be required to obtain and analyze every medical text cited by every medical examiner who provides an opinion in a case. There is no legal requirement that a medical examiner specifically identify the medical literature he or she relies upon to support his or her opinion. *Monzingo*, 26 Vet.App. at 106. A medical examiner need only explain the basis of his or her conclusion. *See id.* (explaining that medical examination reports are adequate "when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion"); *see also Nieves-Rodriguez v. Peake,* 22 Vet.App. 295, 301 (2008) (providing that an adequate examination report must contain a "reasoned medical explanation" connecting its conclusions with supporting data). Appellant's assertion that the Board has a duty to *sua sponte* review the medical reports on which an examiner bases his or her opinion would lead to an unworkable standard in which the Board is required to seek out unidentified medical literature in order to analyze whether the examiner misinterpreted it.

Appellant's argument that the Board must provide Appellant with notice of any medical treatise upon which it relies is codified in 38 C.F.R. § 20.908(b), mentioned above. App. Br. at 12. The Secretary agrees that the Board must notify Appellant of any medical treatise upon which it relies, but the Board did not rely on the medical treatise in this case. The examiner relied on the medical literature, and the examiner is under no duty to provide citation to the medical literature on which she relied. *Monzingo*, 26 Vet.App. at 106. As described above, had the Board

obtained the IOM report and considered it directly, the Board would have been required to appropriately notify Appellant. The system does not require Appellant to attempt to review medical texts cited in a VA examiner's report, neither is the Board required by statute, regulation, or case law to obtain and provide the medical evidence that every medical examiner cites in providing an opinion. App. Br. at 12. The Board is required merely to determine the probative value of the examiner's opinion based on the evidence of record and account for that determination with an adequate statement of reasons or bases. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Additionally, there is "a presumption that physicians remain up-to-date on medical knowledge and current medical studies." *Monzingo*, 26 Vet.App. at 106-07 (citing *AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS, PRINCIPLE OF MEDICAL ETHICS V*). This means that VA medical examiners are presumed to have depth and breadth of medical knowledge that the Board cannot feasibly obtain. The Board is able, and in fact required, to appropriately consider medical literature that a claimant submits. *McCray*, 31 Vet.App. at 255 (citing *Harvey v. Shulkin*, 30 Vet.App. 10, 20 (2018), for the proposition that "[i]nterpretation of a medical treatise's meaning and assessment of its probative value as evidence in support of the claim being adjudicated are within the purview of the Board as factfinder"). However, the Court also explained that "when medical text evidence is submitted as an attachment or accompaniment to a medical opinion, or is quoted in a medical opinion, the Board might not individually assess its probative value." *McCray*,

31 Vet.App. at 255. The Court's discussion in *McCray* was in response to a case where the medical evidence text had been, at least in part, entered into the record. *Id.* at 256 ("The Court has not addressed factors relevant to the Board's evaluation of probative value and adequacy in the case of a medical opinion that relies on a medical text that is, at least in part, entered into the record."). Here, the medical text evidence was not submitted as an attachment or accompaniment to the medical opinion. It was also not directly quoted; the examiner largely paraphrased the findings in the IOM report. [Record (R.) at 277]. Because the underlying medical text was not part of the record, actually or constructively, the Board had no basis of comparison. The Board can evaluate medical text evidence that is submitted to the record, but the Board does not have the resources to become a medical expert.

The Board, moreover, is not required to review the medical text evidence that a medical opinion relies on for qualifying or contradictory aspects in every single case. The Court explicitly stated that this is one of "a non-exhaustive list of factors that, depending on the case, *may be relevant* considerations in determining the adequacy and probative value of a medical opinion." *McCray*, 31 Vet.App. at 257 (emphasis added). In this case, the medical text evidence was not part of the record, so the Board was unable to review it for qualifying or contradictory aspects and, as a factor in determining the adequacy and probative value of a medical opinion, was not relevant.

For the Board to determine, without basis in the record, that the medical examiner's opinion is based on medical text evidence containing qualifying or contradictory aspects would usurp the role of the medical examiner. *See Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991) (the Board may not "refut[e] the expert medical conclusions in the record with its own unsubstantiated medical conclusions."). Where, as here, the medical literature is not in the record, any determination by the Board that the medical text does not support the examiner's opinion would be a *Colvin* violation. Only where the medical literature exists in the record, in whole or in part, could the Board reasonably review both the opinion and the medical literature and determine whether the opinion was adequate and had probative value based on the underlying medical literature.

Appellant's argument, that the Board had a *sua sponte* duty to review the medical literature where no part of that medical literature was part of the record, is untenable. This case is distinguishable from the facts of *McCray*. Because the record did not contain any portion of the medical literature that the 2013 examiner relied on, and Appellant did not raise this argument prior to the Board decision such that the Board could independently obtain the IOM report, the Board was not required to obtain the medical literature nor review it *sua sponte*. Requiring the Board to do so would be unworkable. Finally, because the medical literature is not part of the record, for the Board to determine that the examiner's opinion was not supported would create a *Colvin* violation where the Board substitutes its judgment for that of the examiner.

3. The VA Medical Opinion was Adequate and the Board Was Entitled to Assign it Probative Weight

In this case, Appellant did not submit the IOM report, even though, as he notes, it is easy to obtain from the VA website. App. Br. at 16. Nor did Appellant object to the adequacy of the examiner's report before the Board, despite being represented by a Veterans' Service Organization. *See* [R. at 15-17, 19-23, 38-42, 234-39]. For the first time on appeal, Appellant argues that the 2013 VA examination was inadequate because the examiner's opinion was inconsistent with the IOM report. Appellant had every opportunity to raise this issue prior to the Board decision, as the VA examination occurred in 2013 and the Board issued its decision in 2018. [R. at 4, 274]. Appellant, through his representative, submitted a brief before the Board in October 2016 and again in May 2018. [R. at 15-17, 19-24]. Indeed, Appellant did not raise the issue of whether the examiner's opinion was consistent with the IOM report and did not submit the report to VA such that it was a part of the record. [R. at 23]. Under *Maggitt v. West*, 202 F.3d 1370 (Fed. Cir. 2000), the Court has discretion to hear arguments raised before it in the first instance, and so may decline to entertain this argument. *Id.* at 1377-78; *see also Dickens v. McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016); *Massie v. Shinseki*, 25 Vet.App. 123, 127-28 (2011), *aff'd*, 724 F.3d 1325 (Fed. Cir. 2013). Because Appellant did not raise it below, despite representation, and has provided no explanation for the failure to do so, the Court should decline to consider Appellant's argument at all.

If the Court nonetheless chooses to address Appellant's newly-raised argument regarding the adequacy of the 2013 VA examination, the Court should hold that the Board adequately considered the 2013 VA examiner's opinion and assigned it appropriate weight. [R. at 7-9]. As discussed above, the IOM report was not before the Board and the Board was not required to obtain the IOM report in order to compare the examiner's findings to the report. Based on the evidence of record, the Board was not required to ascertain whether the examiner's opinion was consistent with the underlying IOM report. The Board, therefore, could consider the opinion only on its face. On its face, the opinion provided a reasonable basis for the Board's findings. [R. at 7-9]. The Board explained that the VA examiner's conclusions were highly probative as based on a review of Appellant's history and service records and provided adequate reasons and bases for its opinion. [R. at 9].

Appellant's argument consists almost entirely of an objection to the VA examiner's opinion based on the alleged inconsistency with the IOM report. App. Br. at 8-24. However, as explained in detail above, the IOM report was neither actually nor constructively in the record and the Board had no duty to obtain or review the underlying medical literature. Indeed, because the Court may not review the report since it is not part of the record and the Court may not review it *sua sponte*, there is no evidence to support Appellant's assertions in his brief as to the contents of the report. 38 U.S.C. § 7252(b); *see Kyhn*, 716 F.3d at 576-78; *Andrews*, 3 Vet.App. at 62; *Rogozinski*, 1 Vet.App. at 20.

Appellant cites *Monzingo* and *Reonal v. Brown*, 5 Vet.App. 458 (1993), for the premise that the examiner's opinion lacks probative value because it was based on an inaccurate factual premise. *Monzingo*, 26 Vet.App. at 107; *Reonal*, 5 Vet.App. at 460-61. Yet nothing exists in the record that indicates that the opinion was based on an inaccurate factual premise. As noted above, had the Board, with no basis in the record, determined that the examiner's opinion was inadequate, it would have violated *Colvin*. 1 Vet.App. at 175. There is no evidence in the record that there are qualifications or contradictions in the medical evidence. *McCray*, 31 Vet.App. at 257. Based on the record before the Board and before this Court, this is no basis to assert that the medical examiner incorrectly described the contents of the study on which she relied because the record does not contain any part of the underlying medical literature.

The 2013 VA examiner's opinion noted that Appellant's service records showed no hearing loss or significant changes in his hearing thresholds greater than normal measurement variability during military service. [R. at 277]. She explained that there was no record of complaint or treatment of hearing loss or tinnitus in the service records. [R. at 277]. She cited the IOM report that there was insufficient scientific basis to conclude that permanent hearing loss directly attributable to noise exposure will develop long after that noise exposure and that "a prolonged delay in the onset of noise-induced hearing loss was 'unlikely.'" [R. at 277]. She opined, then, that there was no evidence on which to conclude that Appellant's current hearing loss was caused by or a result of his military service,

including noise exposure. [R. at 277]. This opinion considers both Appellant's service records and the medical literature and ties the two together. [R. at 277]. The Board's determination that the opinion was highly probative because the opinion was based on Appellant's history and service records and provides adequate reasons and bases for its conclusion is supported. [R. at 9].

4. Appellant Has Not Demonstrated Prejudicial Error that Warrants Remand

In all cases, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (appellant bears the burden of demonstrating error). To warrant judicial interference with that decision, the appellant must demonstrate that such error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). If the appellant cannot demonstrate that the outcome of his claim could have been different had the alleged error not been committed, the error is necessarily non-prejudicial. *See Valiao v. Principi,* 17 Vet.App. 229, 232 (2003) (error is nonprejudicial "where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision"); *see also Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose).

In his brief, Appellant argues that the outcome of his claim would have been different had the alleged error not occurred and this shows that he was prejudiced by the Board's failure to review the IOM report. However, this is specious because the record does not contain a copy of the IOM report. Every appellant can argue that if the evidence of record were different, then he or she would have had a different outcome. However, the Board, and this Court, must determine whether there was an error based on the evidence of record. Both are constrained by the evidence in the record. The IOM report is not part of the record and the Board was not required to obtain or review it.

Appellant argues that the Board's purported error of not obtaining and reviewing the IOM report is not harmless. App. Br. at 21. However, there is no error at all. The Board reviewed the evidence in the record, analyzed the probative value of the evidence, accounted for that which it found persuasive, and provided an adequate statement of reasons or bases that supports judicial review. 38 U.S.C. § 7104(d)(1); *Caluza*, 7 Vet.App. at 506; *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). Appellant relies on a document which is not part of the record to assert that the Board erred, but the Board's failure to consider and address evidence that is not part of the record is not error.

Appellant's alternative argument, that the examiner's opinion was inadequate because it cited the IOM report without considering whether Appellant's specific disability is related to his in-service acoustic trauma is unavailing. The examiner's conclusion cannot be read in isolation from the rest of

her report. *Monzingo*, 26 Vet.App. at 106 (holding that a medical examination report must be read as a whole and does not require that it "explicitly lay out the examiner's journey from the facts to a conclusion"). The examiner discussed Appellant's in-service experience and opined that "[n]oise exposure is conceded as highly probable," including exposure to helicopter noise, tanks, rockets, mortars, gunfire, and grenades without the use of hearing protective devices. [R. at 276]. She noted his post-service activities including home construction, city street repairs, warehouse work, work in a nuclear fuels fabrication plant, and managing maintenance workers for the Department of Energy, with hearing protection devices used when they were available. [R. at 276]. Similarly, she described his recreational activities using power tools and chain saws, using hearing protection devices when available. [R. at 277]. She went on to opine, however, that the IOM report concluded that a prolonged delay in the onset of noise-induced hearing loss was unlikely, and that based on the objective evidence available, there was no evidence on which to conclude that Appellant's current hearing loss was caused by or a result of his military service, including noise exposure. [R. at 277].

Based on the examiner's understanding of the IOM report, which is the only evidence in the record regarding the IOM report, a prolonged delay between noise exposure and the onset of noise-induced hearing loss is unlikely. [R. at 277]. The examiner also indicated that there was some evidence of intervening noise exposure, including Appellant's work and recreational activities. [R. at 276-77]. This opinion is the only evidence of nexus in the record, and nothing in the record

contradicts the examiner's opinion. Thus, despite Appellant's assertions that Appellant's hearing loss still may be due to service, the only evidence of record indicates that it was not. [R. at 7-9, 277]. The Board explained that the 2013 VA examiner's opinion was the only nexus evidence of record, which concluded that the evidence from service was not sufficient to establish nexus. [R. at 9]. Given the evidence in the record, the Board's finding is supported.

The IOM report was not actually or constructively before the Board, so the Board was not required to consider it. The Board had no duty to *sua sponte* review medical evidence which was not part of the record before it and because the Court is bound by the record before the Board, the Court is precluded from reviewing it *sua sponte*. The 2013 VA medical opinion was adequate and the Board's explanation for assigning it probative weight was an adequate statement of reasons or bases. Thus, Appellant has not demonstrated prejudicial error and the Court should affirm the Board's decision.

B. The 2013 VA Examination Was Adequate and the Board was Entitled to Rely on it to Deny Service Connection for Tinnitus

The 2013 VA examiner's opinion contains adequate rationale. Here, as the Board discussed, the examiner relied on the lack of in-service evidence of measurable acoustic trauma or any complaint of tinnitus to opine that there was no basis on which to conclude Appellant's tinnitus was associated with in-service acoustic trauma. [R. at 10, 277-78]. The examiner implied that because there was no evidence of noise injury due to the conceded acoustic trauma, and there were

no complaints of tinnitus until approximately 2003, there was no basis to conclude that Appellant's tinnitus was associated with noise injury. Acoustic trauma alone does not prove noise injury, whether hearing loss or tinnitus. *See Reeves v. Shinseki*, 682 F.3d 988, 998-99 (Fed. Cir. 2012) (indicating that the question of whether an appellant was exposed to acoustic trauma is separate from the issue of whether the appellant suffered permanent hearing loss on active duty). The examiner's consideration of whether Appellant's noise exposure caused measurable acoustic trauma was reasonably related to whether there was a nexus between his tinnitus and service, particularly where Appellant admitted his tinnitus began well after service. [R. at 277-78]. The examiner was not required to explicitly lay out her journey from the facts to a conclusion, and she did not; however, she did provide sufficient rationale to render her opinion adequate. *Monzingo*, 26 Vet.App. at 106; [R. at 277-78].

Appellant argues that his tinnitus may still be related to service, despite the lack of evidence of tinnitus at any time in the approximately 30 years before he complained thereof. App. Br. at 25. Appellant's citation to 38 C.F.R. § 3.303(d) and *Cosman v. Principi*, 3 Vet.App. 503 (1992), are not relevant here. There is no evidence, and Appellant points to none, that the Board did not consider that shows there is a nexus between Appellant's service and his tinnitus. The examiner opined as to whether Appellant's tinnitus was caused by or a result of military noise exposure. [R. at 277]. Whether his tinnitus was a result of service is essentially the same issue as whether "his later tinnitus manifestation was related to service."

App. Br. at 25; [R. at 277-78]. In both cases, there is no evidence that it was; the only nexus opinion of record explicitly stated that Appellant's tinnitus was less likely than not caused by or a result of military noise exposure. [R. at 277-78].

As to Appellant's third argument, noise exposure, and indeed acoustic trauma, do not always result in hearing loss or tinnitus. In *Reeves*, the Federal Circuit explained that the question of whether the veteran was exposed to acoustic trauma was separate from the issue of whether he suffered permanent hearing loss while on active duty. 682 F.3d at 998-99. While that case was related to hearing loss, as noted above, noise injury would have reasonably caused objective evidence of noise injury, potentially lending credibility to Appellant's assertions that his tinnitus was caused by service. The examiner could consider whether there was measurable acoustic trauma to determine the likelihood of incurrence of tinnitus where Appellant did not complain of tinnitus. Thus, considering Appellant's assertion that his tinnitus began approximately 10 years prior to the VA examination and the lack of evidence of complaints of or treatment for tinnitus in the service treatment records, there was no basis for the examiner to conclude that Appellant's tinnitus was incurred in service, despite Appellant's in-service acoustic trauma.

Appellant bears the burden to demonstrate error in the Board decision. *Hilkert*, 12 Vet.App. at 151; *see also Sanders*, 556 U.S. at 409. It is also the responsibility of the appellant, and the appellant alone, to articulate the basis of his arguments and develop those arguments sufficient to permit an informed

consideration of the same. *See Locklear v. Nicholson,* 20 Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments). Appellant has done neither. Read as a whole, the examiner's opinion provides adequate rationale to support a denial of service connection for tinnitus. The Board was, therefore, entitled to find the opinion highly probative in determining nexus and denying Appellant's claim for service connection for tinnitus.

V. CONCLUSION

In light of the foregoing, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, asks the Court to affirm the Board's November 21, 2018, decision which denied entitlement to service connection for (1) left-ear hearing loss; and (2) tinnitus.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel

/s/ Mary E. Jones
MARY E. JONES
Appellate Attorney
Office of the General Counsel (027I)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6901

Attorneys for the Appellee
Secretary of Veterans Affairs