

Vet.App. No. 19-1774

**IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS**

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**THOMAS F. MANTING,**  
Appellant,

**v.**

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

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ON APPEAL FROM THE  
BOARD OF VETERANS' APPEALS

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**BRIEF OF APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

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**WILLIAM A. HUDSON, JR.**  
Acting General Counsel

**MARY ANN FLYNN**  
Chief Counsel

**RICHARD A. DALEY**  
Deputy Chief Counsel

**JAMES L. HEIBERG**  
Appellate Attorney  
Office of General Counsel  
U.S. Dept. of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
202-632-8312

Attorneys for the Secretary

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. ISSUES PRESENTED .....	1
II. STATEMENT OF THE CASE .....	1
A. Jurisdictional Statement .....	1
B. Nature of the Case .....	1
C. Statement of Facts .....	2
III. SUMMARY OF THE ARGUMENT .....	7
IV. ARGUMENT .....	8
A. The Board Provided an Adequate Statement of Reasons or Bases for Its Denial of Service Connection Claim for Right-Ear Hearing Loss and Hypertension.....	9
B. The Board Provided an Inadequate Statement of Reasons or Bases for Its Finding that Appellant Did Not Have a Current Psychiatric Disability.....	15
V. CONCLUSION .....	15

## TABLE OF AUTHORITIES

### CASES

<i>Caluza v. Brown</i> , 7 Vet. App. 498 (1995) .....	9
<i>Combee v. Brown</i> , 34 F.3d 1039 (Fed. Cir. 1994) .....	13
<i>Euzebio v. Wilkie</i> , __ Vet. App. ___, ___, No. 17-2879, 2019 U.S. App. Vet. Claims LEXIS 1476 (Aug. 22, 2019) .....	14
<i>Gilbert v. Derwinski</i> , 1 Vet. App. 49 (1990) .....	8-9
<i>Hilkert v. West</i> , 12 Vet. App. 145 (1999) .....	9, 14
<i>Hines v. Principi</i> , 18 Vet. App. 227 (2004) .....	2
<i>Hyder v. Derwinski</i> , 1 Vet. App. 221 (1991) .....	10
<i>Jandreau v. Nicholson</i> , 492 F.3d 1372 (Fed. Cir. 2007) .....	13
<i>Kern v. Brown</i> , 4 Vet. App. 350 (1993) .....	10
<i>Locklear v. Nicholson</i> , 20 Vet. App. 410 (2006) .....	10, 11
<i>McLendon v. Nicholson</i> , 20 Vet. App. 79 (2006) .....	12, 13
<i>McPhail v. Nicholson</i> , 19 Vet. App. 30 (2005) .....	2
<i>Shinseki v. Sanders</i> , 556 U.S. 396 (2009) .....	9
<i>Waters v. Shinseki</i> , 601 F.3d 1274 (Fed. Cir. 2010) .....	12
<i>Woehlaert v. Nicholson</i> , 21 Vet. App. 456 (2007) .....	10, 11

### STATUTES

38 U.S.C. § 1116 .....	14
38 U.S.C. § 5103A .....	11, 12
38 U.S.C. § 5107(a) .....	13
38 U.S.C. § 7104(d)(1) .....	8
38 U.S.C. § 7252 .....	1

### REGULATIONS

38 C.F.R. § 3.159(c)(4) .....	11
38 C.F.R. § 3.307 .....	11

## RECORD CITATIONS

R. at 4-17 (November 19, 2018, Board Decision) .....	2, 6, 7, 10, 11, 12, 13, 15
R. at 47 (August 2018 VA Form 9) .....	6
R. at 56-80 (August 2016 Statement of the Case) .....	6
R. at 104-14 (September 2014 Notice of Disagreement) .....	6
R. at 122-28 (July 2014 Rating Decision) .....	6
R. at 159-64 (April 2014 VA Hearing Loss and Tinnitus Examination) .....	5, 6, 9
R. at 230 (July 2008 VA Treatment Record) .....	3
R. at 381-413 (Service Treatment Records) .....	2, 3, 4
R. at 414 (DD-214) .....	2
R. at 432-36 (February 2014 Statement) .....	4, 5
R. at 451-56 (May 2011 Rating Decision) .....	4
R. at 485-93 (November 2010 VA PTSD Examination) .....	4, 15
R. at 567 (September 2010 Disability Claim for PTSD) .....	4
R. at 586-89 (October 2008 Rating Decision) .....	4
R. at 594-95 (September 2008 VA Examination) .....	4
R. at 614-38 (June 2008 Application for Compensation) .....	4

Appellant, Thomas F. Manting, appeals the November 19, 2018, Board decision denying service connection for right-ear hearing loss, hypertension, and

for an acquired psychiatric disorder other than PTSD.<sup>1</sup> (Record (R.) at 4-17).

### **C. Statement of Facts**

Appellant served on active duty service in the United States Air Force from August 1963 through July 1967, including service in the Republic of Vietnam. (R. at 414). Upon induction, Appellant's right-ear pure tone thresholds, in decibels (dB), were<sup>2</sup>:

	HERTZ				
	500	1000	2000	3000	4000
RIGHT	0 (15)	0 (10)	-5 (5)	0 (10)	0 (5)

(R. at 408 (399-408)).

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<sup>1</sup> Appellant does not challenge the portion of the Board's decision denying a claim to reopen the previously denied claim of service connection for PTSD, notwithstanding his seemingly errant statement in his nature of the case that he was appealing the Board's decision denying service connection for PTSD on the merits. See McPhail, 19 Vet. App. at 33 ("This Court has consistently held that any claims not raised on appeal are abandoned."). The Board's decision to reopen the previously denied claim for service connection for right-ear hearing loss is a favorable finding, which is beyond the Court's jurisdiction to disturb. Hines, 18 Vet.App. at 239.

<sup>2</sup> Prior to November 1967, service departments consistently used American Standards Association (ASA) units to record pure tone sensitivity thresholds in audiometric measurement. VA currently uses International Standards Organization – American National Standards Institute (ISO-ANSI) units. To convert, 15 dB is added at 500 Hz, 10 dB at 1000, 2000, and 3000 Hz, and 5 dB at 4000 Hz. For purposes of comparison between the service audiometric data and more recent VA audiometric data, the tables show the ASA measurements recorded in service with the comparable ISO-ANSI measurements in adjacent parentheses.

At separation, Appellant reported no problems with his ears. (R. at 385 (385-89)). Appellant's audiometric test results at separation, pure tone thresholds, in dB, were recorded as follows:

	<b>HERTZ</b>				
	<b>500</b>	<b>1000</b>	<b>2000</b>	<b>3000</b>	<b>4000</b>
<b>RIGHT</b>	5 (20)	5 (15)	5 (15)	10 (20)	5 (10)

(R. at 387).

A March 1967 service treatment record (STR) entitled "Hearing Conservation Data" noted that Appellant reported wearing hearing protection and noted audiometric data as well. (R. at 413). On this document, pure tone thresholds, in dB, were recorded as follows:

	<b>HERTZ</b>				
	<b>500</b>	<b>1000</b>	<b>2000</b>	<b>3000</b>	<b>4000</b>
<b>RIGHT</b>	10 (25)	10 (20)	5 (15)	0 (10)	5 (10)

(*Id.*).

Appellant's blood pressure on induction in 1963 was 118/76. (R. at 401). Appellant's separation examination report measured his blood pressure at 130/68. (R. at 387). The STRs are silent for complaints about, diagnoses of, or treatments for hypertension. (R. at 381-413). VA medical records indicate that Appellant was diagnosed with hypertension in July 2008. (R. at 230).

Appellant's STRs were also silent for any treatment for, or diagnoses of, any mental condition. (R. at 381-413). In his claim, Appellant asserted that he was diagnosed with PTSD in approximately November 2010 by the Green Valley, Arizona, VAMC. (R. at 432 (432-36)). In November 2010, VA conducted an initial evaluation for PTSD. (R. at 485-93). The examiner noted that Appellant's Global Assessment of Functioning (GAF) score was 60 over the past year, and, although he described having a number of symptoms associated with PTSD, he did not meet the full diagnostic criteria. (R. at 493).

Appellant first sought disability compensation for hearing loss in June 2008. (R. at 614-38). VA provided an examination in September 2008, the results of which indicated normal hearing in Appellant's right ear and mild sensorineural loss in the left. (R. at 594-95). The examiner opined that the left-ear hearing loss was at least likely as not related to military noise exposure. (R. at 594). The Phoenix, Arizona, Regional Office (RO) granted service connection for Appellant's left-ear hearing loss and assigned it a non-compensable rating, effective June 29, 2008. (R. at 586-89). The RO denied service connection for right-ear hearing loss, because Appellant's audiometric tests did not show hearing loss for VA purposes. (R. at 587).

Appellant filed a disability claim for PTSD in September 2010. (R. at 567). The RO denied the claim in May 2011. (R. at 451-56). Subsequently, Appellant sought to reopen the service-connection claims for right-ear hearing loss and PTSD, and also filed new service-connection claims for hypertension and for an



acquired psychiatric condition, other than PTSD, in February 2014. (R. at 432-36). In a supporting statement, Appellant wrote, “In approximately 1966, while I was in DaNang, Vietnam, some barracks were blown up and I had friends that were killed. I was put on a detail to help remove the injured and killed airmen from the wreckage”. (R. at 432).

VA provided an audiometric examination in April 2014. (R. at 159-64). The examination results showed that Appellant had a current disability of right-ear hearing loss. (R. at 160). The pure tone thresholds, in dB, were recorded as follows:

	HERTZ				
	500	1000	2000	3000	4000
RIGHT	25	25	30	30	30

(*Id.*). Appellant’s right-ear speech discrimination score was 92%. (*Id.*). The VA examiner noted sensorineural hearing loss in the frequency range of 500-4000 Hz. (R. at 162). The examiner observed that Appellant was a jet mechanic/crew chief in the Air Force and that he had military noise exposure from jet engines and occasional bombings on base. (R. at 164). Appellant worked in sales following his military service and reported no occupational or recreational noise exposure. (*Id.*). The examiner noted that Appellant’s pertinent medical history included hypertension as well as otitis in early childhood. (*Id.*).

The examiner opined that Appellant did not experience a permanent positive threshold shift (worse than reference threshold) greater than normal measurement variability at any frequency between 500 and 6000 Hz for the right ear. (R. at 163). When asked whether Appellant's right ear hearing loss was at least as likely as not caused by or a result of an event in military service, the examiner opined that it was not. (*Id.*). The examiner also explained that Appellant had normal hearing thresholds upon separation from the military and there were no threshold shifts. (*Id.*). She indicated there was no evidence to support Appellant's claim of military noise-induced hearing loss in the right ear. (*Id.*). The examiner also found that Appellant experienced significant threshold shifts in his left ear. (*Id.*).

The RO denied the claims in a July 2014 rating decision. (R. at 122-28). Appellant filed a notice of disagreement (NOD) with the rating decision in September 2014. (R. at 104-14). The RO continued its denial of the claims in an August 2016 statement of the case (SOC). (R. at 56-80). Appellant then appealed to the Board in August 2018. (R. at 47).

In its decision, the Board relied on the April 2014 VA examination report to deny service connection for right-ear hearing loss. (R. at 11-14). It found that the evidence indicated that Appellant's right-ear hearing loss first manifested between 2008 and 2014 and was not chronic or incurred in service. (R. at 13). The Board noted that the examiner articulated a basis for distinguishing between the severity of the threshold shifts in each ear in finding her rationale to be adequate. (R. at 14).

The Board also found that Appellant had a current diagnosis of hypertension, and that he was presumed to have been exposed to herbicide agents during his service in Vietnam. (R. at 15). The Board noted that hypertension is not a disease presumptively linked to herbicide exposure, but that Appellant's lay contentions alone were not sufficient to trigger a VA examination as they did not meet the minimum competency required for a finding that his hypertension "may be associated" with his herbicide exposure. (*Id.*). The Board also found that the 40-year gap between active duty service and Appellant's diagnosis for hypertension weighed heavily against the claim. (*Id.*).

In denying service connection for an acquired psychiatric disorder, the Board noted that Appellant's STRs did not show any treatment for, or diagnoses of, any mental condition. (R. at 16). The Board determined that, aside from a remote diagnosis of PTSD in 2010, there was no other medical evidence to suggest that Appellant had a current mental health condition that would warrant a medical examination. (*Id.*).

This appeal ensued.

### **III. SUMMARY OF THE ARGUMENT**

The Board did not err in finding that the evidence of Appellant's right-ear hearing loss and hypertension did not warrant service connection. The Board considered the evidence that Appellant asserts warranted service connection, but it had a plausible basis in the record, based on VA hearing loss examination results and other evidence, to determine that neither condition was incurred in or related

to active duty service. The April 2014 VA hearing loss examiner provided an adequate rationale explaining that Appellant did not experience a significant threshold shift in his right ear, as he had in his left, that would support a claim of military noise-induced hearing loss. Appellant also points to no evidence beyond his lay contentions linking his war-time herbicide exposure to his current hypertension that would warrant a medical examination. Accordingly, Appellant has not demonstrated that the Board's decision denying service connection for right-ear hearing loss and hypertension was clearly erroneous, and the Court should affirm that part of the decision now on appeal.

However, the Board did not provide an adequate statement of reasons or bases for its finding that Appellant did not have a current mental health disorder. Specifically, the Board failed to address the significance, if any, of Appellant's GAF score of 60, as noted during the November 2010 VA PTSD evaluation. Moreover, the Board did not address the examiner's finding that Appellant had described a number of symptoms that are associated with PTSD. Vacatur and remand are therefore warranted for the Board to provide an adequate statement of reasons or bases that addresses whether this evidence indicates that Appellant has a current mental health disorder that would warrant a medical examination or opinion.

#### **IV. ARGUMENT**

A Board decision must be supported by a statement of reasons or bases, which adequately explains the basis of the Board's material findings of fact and conclusions of law. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49,

57 (1990). This standard 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).

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) (clarifying that the appellant bears the burden of demonstrating error). Moreover, to warrant judicial interference with the Board decision, the appellant must show that such demonstrated 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).

**A. The Board Provided an Adequate Statement of Reasons or Bases for Its Denial of Service Connection for Right-Ear Hearing Loss and Hypertension**

Appellant's argument is premised on the assumption that the April 2014 VA examiner failed to consider that the hearing in Appellant's right ear deteriorated, in addition to his left ear. (Appellant's Brief (App. Br.) at 13). However, the examiner reviewed Appellant's claims file, and certainly would have been aware of all the audiometric measurements associated with it. (R. at 159). The examiner specifically found Appellant's in-service left-ear threshold shifts to be significant but did not for the right. (R. at 162). This distinction was the basis for her negative nexus opinion regarding Appellant's right-ear hearing loss. (R. at 163). Ultimately, Appellant merely disagrees with the examiner's finding that his right-ear threshold

shifts were not significant, and he points to no contrary medical evidence of record supporting his position. The contention is nothing more than Appellant's unsubstantiated lay opinion. See *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."); *Kern v. Brown*, 4 Vet.App. 350 (1993) (noting that "appellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence"). Thus, the Court should reject such argument as underdeveloped. See *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) (rejecting the appellant's argument because it was underdeveloped); *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments).

Moreover, contrary to Appellant's argument (App. Br. at 14), the Board did consider the disparity between the threshold shifts in each ear in its discussion of the April 2014 VA examination report. (R. at 14). The Board found no deficiencies in the opinion, noting that the VA examiner explained that Appellant had a threshold shift in one ear and not the other, and that it did not offend reason for the examiner to conclude that one ear could suffer trauma while the other did not. (R. at 14). The Board had a plausible basis for finding that the April 2014 VA examiner's opinion was the only competent medical opinion of record, and the Board directly addressed and refuted Appellant's argument that the examiner's opinion required a consistency of findings between the hearing loss in Appellant's ears in order for the Board to rely on it. (R. at 14).

Appellant's argument that his hearing loss claim is inextricably intertwined with his service connection claim for hypertension fails to identify any evidence of record supporting it and is nothing more than a conclusory assertion. (App. Br. at 14). He makes an oblique reference to medications used to treat his hypertension but neither describes what those medications are or explains how they could also have a detrimental effect on his hearing that would indicate that the conditions are indeed inextricably intertwined. (*Id.*). As such, Appellant's argument is underdeveloped and unpersuasive. See *Woehlaert*, 21 Vet.App. at 463; *Locklear*, 20 Vet.App. at 416.

Regarding Appellant's service-connection claim for hypertension, the Board noted that it is not a disease linked to his presumptive herbicide agent exposure while serving in Vietnam under 38 C.F.R. § 3.307. (R. at 15). The Board, however, did consider whether the evidence supported service connection for hypertension on a direct basis. (*Id.*). In doing so, it noted Appellant's contention that his hypertension is related to service. (R. at 15). In that regard, the duty to assist includes providing a medical examination or obtaining a medical opinion when it is necessary to decide the claim. 38 U.S.C. § 5103A; 38 C.F.R. § 3.159(c)(4). There are four factors to be considered in determining whether a VA medical examination or opinion is necessary: (1) whether there is competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) whether there is evidence establishing that an event, injury, or disease occurred in service, or evidence establishing certain diseases manifesting during an applicable

presumption period; (3) whether there is an indication that the disability or symptoms may be associated with the veteran's service or with another service-connected disability; and (4) whether there is otherwise sufficient competent medical evidence of record to make a decision on the claim. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006).

The Board found that no VA medical examination or opinion was warranted, because the only link between Appellant's hypertension and his presumed herbicide agent exposure was his contention that they were. (R. at 15). And while the Board stated that Appellant's "lay assertion alone does not trigger the duty to provide a VA examination under 38 U.S.C. § 5103A, as it does not meet the *minimum competency* required for a finding that the condition 'may be associated' with [his] herbicide exposure" (*id.* (emphasis added)), which was inartful, *McLendon*, 20 Vet.App. at 83, a conclusory, generalized lay statement suggesting a nexus between a current disability and service does not suffice to meet the "may be associated with service" standard, and a rule to the contrary would result in medical examinations being "routinely and virtually automatically" provided to all veterans claiming service connection. *Waters v. Shinseki*, 601 F.3d 1274, 1278-79 (Fed. Cir. 2010). The Board thus properly found that Appellant's contentions of a link between his hypertension and his presumed herbicide exposure did not warrant a VA examination or opinion. (R. at 15).

Because hypertension is not a disease linked with presumptive exposure to herbicide agents, it is Appellant's burden to show that it was directly related to



service, and under these circumstances, that it was caused by his exposure to herbicide agents while in service. 38 U.S.C. § 5107(a) (“Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.”); *see also Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994) (holding that Radiation Compensation Act does not preclude a veteran from establishing service connection with proof of actual direct causation).

On that front, the Board plausibly found that Appellant lacked the necessary competence to offer an opinion related to the etiology of his condition. (R. at 15). In short, the Board found that there was no evidence beyond Appellant’s incompetent lay contentions to grant service connection for hypertension due to in-service herbicide agent, and that the 40-year gap between his presumed exposure to herbicide agents and the onset of symptoms associated with hypertension weighed heavily against the claim. (*Id.*). The Board did not err in its reasoning or determination and appropriately considered whether his hypertension “may be associated” with in-service herbicide exposure. *McLendon*, 20 Vet.App. at 81. (R. at 15). The contention from a layman that a condition is related to herbicide exposure is not competent and does not establish such as fact. *See Jandreau v. Nicholson*, 492 F.3d at 1374. As it stands, the claim that hypertension is related to herbicide exposure must be denied for lack of any medical nexus.

Appellant urges that this Court stay the proceedings pending an anticipated determination that hypertension will be added to the list of

presumptive diseases associated with herbicide exposure. (App. Br. at 8-9). He noted that, during a Senate committee hearing in March 2019, VA officials announced their intention to decide within 90 days whether it would add hypertension to the list of presumptive diseases associated with herbicide exposure. (App. Br. at 9). To date, however, VA has made no such announcement. However, the relevant issue is not whether the Secretary has complied with the provisions of 38 U.S.C. § 1116 regarding the recommendation of the National Academy of Sciences (NAS) to add hypertension to the list of presumptive associated diseases with herbicide exposure. Rather, it is whether the Board erred in not considering the NAS recommendation and whether it satisfied the third prong of *McLendon* as an indication that his hypertension may be associated with his exposure to herbicide agents while serving in Vietnam. *Euzebio v. Wilkie*, \_\_ Vet.App. \_\_, \_\_, No. 17-2879, 2019 U.S. App. Vet. Claims LEXIS 1476, \*6 (August 22, 2019). However, there is no indication that Appellant submitted the NAS recommendation directly to the Board for its consideration, and the Court has recently held that such reports are not constructively before the Board. *Euzebio*, 2019 U.S. App. Vet. Claims LEXIS 1476, \*16. Therefore, Appellant's prayer for a stay of the proceedings is not germane to the question of Board error on this issue.

Appellant fails to demonstrate prejudicial error in the Board's decision, and the Board's denial of service connection for right-ear hearing loss and hypertension should be affirmed. *Hilkert*, 12 Vet.App. at 151.

**B. The Board Provided an Inadequate Statement of Reasons or Bases for Its Finding that Appellant Did Not Have a Current Psychiatric Disability**

The Board determined that a medical examination was not warranted because the preponderance of the evidence established that there was no current psychiatric disability. (R. at 16). The Board relied on the absence of complaints or diagnoses of a mental condition in service and noted that, aside from a remote diagnosis of PTSD in 2010, there were no post-service notations of a mental health disability. (*Id.*). However, the November 2010 VA examiner noted that Appellant's Global Assessment of Functioning (GAF) score was 60 and that he had a number of symptoms associated with PTSD. (R. at 493). The examiner addressed only whether Appellant met the formal diagnostic criteria for a PTSD diagnosis under the DSM-IV, finding that he did not. (*Id.*). The examiner did not opine as to whether Appellant had a psychiatric disorder other than PTSD. The Board, however, failed to discuss this evidence and whether the GAF score or symptoms associated with PTSD indicated the presence of a current mental health disability other than PTSD. Therefore, the Board failed to provide an adequate statement of reasons or bases. Thus, vacatur of the Board's denial and remand of the issue is warranted for the Board to consider whether Appellant had a current mental health disability that would warrant a medical examination.

**V. CONCLUSION**

In light of the foregoing, and for the reasons stated, the Court should affirm the Board's November 19, 2018, decision denying service connection for right-ear

hearing loss and hypertension. However, the Court should vacate the issue of service connection for an acquired psychiatric disorder other than PTSD and remand it for the Board to provide an adequate statement of reasons or bases.

Respectfully submitted,

**WILLIAM A. HUDSON, JR.**  
Acting General Counsel

**MARY ANN FLYNN**  
Chief Counsel

/s/ Richard A. Daley  
**RICHARD A. DALEY**  
Deputy Chief Counsel

/s/ James L. Heiberg  
**JAMES L. HEIBERG**  
Appellate Attorney  
Office of General Counsel (027E)  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
202-632-8312