

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Docket No.19-3953

EDGAR WHITEHEAD,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee

Appeal from the Board of Veterans Appeals

BRIEF OF APPELLANT, EDGAR WHITEHEAD

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STATEMENT OF THE ISSUES

- A. The Board failed to provide adequate reasons and bases for its denial of Mr. Whitehead's service connection claim.**
- B. The Board's reliance on the November 2006 and January 2016 VA examinations and negative etiological opinions was in error.**

STATEMENT OF THE CASE

A. Procedural History

This matter is before the Court on appeal from a February 22, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for tinnitus. (R. 7-12). In the same decision, the Board noted that the veteran, Edgar Whitehead, has a separate claim for sleep apnea currently awaiting higher-level review at Mr. Whitehead's VA regional office (RO). (R. 8). Thus, the Board did not adjudicate the sleep apnea claim in its decision. *Id.*

The tinnitus claim was previously denied by the RO in April 2004, January 2007, February 2016, and September 2018 rating decisions. (R. 542-45, 1301-05, 2424-28, 2489-92). The veteran underwent relevant VA examinations in August 2001, November 2006, and January 2016. (R. 740-42, 1143-47, 1458-64). As noted, the Board denied the veteran's tinnitus claim in its February 22, 2019, decision. Accordingly, Mr. Whitehead who served on active duty from October 1981 to October 2001, now seeks judicial review of the Board's denial of his claim for service connection for tinnitus.

B. The Board's Decision

In the February 22, 2019, decision, the Board found that the veteran's tinnitus had an onset date in 2003 and was not incurred in nor related to his active service. (R. 7; Finding of Fact). Based on its finding, the Board concluded that the criteria for service connection for tinnitus have not been met. (R. 7; Conclusion of Law). Accordingly, the

Board denied the veteran's service-connection claim. (R. 7; Order; *see also* R. 7-12).

In reaching its finding of fact and conclusion of law, the Board discussed, in general, the law relevant to establishing service-connection claims. (R. 8-9). In addition, the Board discussed the evidence relevant to Mr. Whitehead's tinnitus claim. (*See generally* R. 9-12). The Board also provided its assessment of the probative value of such evidence. *Id.*

The Board noted that there is contradictory evidence concerning both the onset of the veteran's tinnitus and whether the disorder is related to his service. *Id.* However, the Board found the evidence indicating that the onset of Mr. Whitehead's tinnitus did not occur prior to 2003 and that the tinnitus is not related to his active duty service, including his acknowledged exposure to hazardous noise levels to be the most probative. *Id.* In reaching this conclusion, the Board adopted the negative nexus opinions of the November 2006¹ and January 2016 VA examiners. (R. 11-12; *see also* R. 740-42, 1143-47). This adoption was in error.

SUMMARY OF ARGUMENT

The Board erroneously denied the veteran's claim for service connection for his tinnitus by failing to provide an adequate explanation of its reasons and bases and adopting inadequate VA examinations to support its denial of the service connection claim. Specifically, the VA examinations failed to provide sufficient rationale to support the examiner's conclusion, resorted to speculation, and failed to address relevant favorable evidence for service connection. These errors necessitate that the Court vacate the Board's decision and remand the matter for further adjudicative action.

ARGUMENT

¹ The Board mistakenly referred to this as the "January 2006" VA examination. (R. 11-12).

A. The Board failed to provide adequate reasons and bases for its denial of Mr. Whitehead's service connection claim.

The Board's explanation of the reasons and bases for its February 22, 2019, decision concerning the denial of the veteran's service-connection claim for tinnitus is inadequate and, therefore, violates 38 U.S.C. §7104(d)(1). Masors v. Derwinski, 2 Vet. App. 181, 188 (1992); Gilbert v. Derwinski, 1 Vet. App. 49, 56-57 (1990). Pursuant to the statute, the Board was required to provide a written statement of reasons or bases adequately explaining its findings of fact and conclusions of law to enable Mr. Whitehead to understand the bases for the decision and also to facilitate judicial review by this Court. *See* 38 U.S.C. §7104(d)(1).

To comply with the statutory requirement, the Board was required to consider all applicable provisions of law and regulation, accurately analyze the credibility and probative value of evidence, account for evidence it found persuasive or unpersuasive, and provide adequate reasons for rejecting material evidence favorable to the claim. Tatum v. Shinseki, 23 Vet. App. 152, 155 (2009); *see also* Gabrielson v. Brown, 7 Vet. App. 36, 40 (1994); Abernathy v. Principi, 3 Vet. App. 461, 465 (1992); Simon v. Derwinski, 2 Vet. App. 621, 622 (1992); Hatlestad v. Derwinski, 1 Vet. App. 164, 169 (1991). Here, the Board failed to do so.

Specifically, the Board erred by implicitly finding that the VA in this case had satisfied its duty to assist Mr. Whitehead as required pursuant to 38 U.S.C. § 5103A. The duty to assist requires that the assistance provided by the VA shall include providing a medical examination or obtaining a medical opinion where, as here, it is necessary in order to make a decision on the veteran's claims. 38 U.S.C. § 5103A(d)(1); *see also* McLendon v. Nicholson, 20 Vet. App. 79 (2006). Moreover, once the decision has been made to afford a veteran an examination, the VA must provide an *adequate* examination or obtain an *adequate* opinion. Barr v. Nicholson, 21 Vet. App. 303 (2007). Indeed, this

Court has held, pursuant to 38 C.F.R. §§ 4.1 and 4.2, that an examination report must, among other things, provide an *adequate rationale* to support an understanding of the conclusion contained therein. *See, e.g., Bloom v. West*, 12 Vet. App. 185, 187 (1999); *Goss v. Brown*, 9 Vet. App. 109, 114 (1996); *Hicks v. Brown*, 8 Vet. App. 417, 421 (1996); *Stanton v. Brown*, 5 Vet. App. 564, 569 (1993).

Contrary to the Board's conclusion, the November 2006 and January 2016 VA audiological examination reports and negative etiological opinions, the examinations the Board relied on in denying the veteran's tinnitus service-connection claim, were *not* adequate and, therefore, as explained in more detail below, cannot support the Board's denial of Mr. Whitehead's claim. The November 2006 and January 2006 VA examinations and etiological opinions both fail to provide sufficient rationale to support their conclusions, making conclusory statements without adequate support, and fail to address relevant aspects of the veteran's medical and personal history that could have resulted in the veteran's tinnitus.

Thus, because the denial of Mr. Whitehead's claim resulted from errors in the analysis and evaluation of the evidence of record, the Board's explanation of its reasons and bases is inadequate. Accordingly, the Board's failure to provide an adequate statement of reasons or bases precludes effective judicial review and, therefore, requires remand. *See Quirin v. Shinseki*, 22 Vet. App. 390, 398 (2009) (citing *Tucker v. West*, 11 Vet. App. 369, 374 (1998)).

B. The Board's reliance on the November 2006 and January 2016 VA examinations and negative etiological opinions was in error.

Because the Board relied upon and adopted the inadequate negative nexus

opinions of the November 2006 and January 2016 VA audiological examiners in denying the veteran's service-connection claim for tinnitus, the Court must vacate the denial and remand the veteran's claim for further agency action. (R. 11, 12).

The November 2006 examiner wrote that “[i]t is *a medical certainty* that the symptom of tinnitus is not a consequence of acoustic trauma and other noise exposures while veteran was on active duty” (R. 1146) (emphasis added). The examiner continued by stating that the onset of tinnitus was not until two years after the veteran left service and other factors “*may be* involved in the post service onset.” *Id.* (emphasis added). The examiner found that it is more likely than not that the veteran's tinnitus is a newer medical problem unrelated to the veteran's noise exposure during service. *Id.*

Here, the examiner's explanation for his conclusion cannot fairly be read to support a purported *medical certainty* that no relationship exists between the veteran's current tinnitus and the acoustic trauma he suffered during active duty service, or that his current disability is an emerging medical problem. Indeed, his only rationale appears to be that the symptoms of tinnitus may have begun two years after separation from service and that other post-service factors “may be” related to Mr. Whitehead's tinnitus. The purported rationale, however is insufficient to support the flawed negative nexus conclusion.

The examiner claims with “medical certainty” that the veteran's tinnitus is not related the veteran's exposure to acoustic trauma during service. (R. 1146). However, the medical literature does not support the examiner's conclusion. Multiple medical studies have shown that veterans exposed to acoustic trauma during service are likely to develop tinnitus at some time in their life. *See, e.g.,* <https://www.nap.edu/catalog/11443/noise-and-military-service-implications-for-hearing-loss-and-tinnitus> (explaining that based on different studies regarding veterans, the onset time line of tinnitus can differ between

persons exposed to acoustic trauma). However, in the negative nexus opinion, the examiner states that with a *medical certainty* the veteran's tinnitus is "not a consequence of acoustic trauma and other noise exposures while veteran was on active duty," but does not provide adequate rationale to support this conclusory finding. (R. 1146).

The only rationale provided by the examiner is that the veteran's tinnitus did not develop until after the veteran left service and that "other factors not yet identified *may be* involved." (R. 1146) (emphasis added). The examiner's conjecture concerning other possible causes of the veteran's tinnitus is speculation and, therefore, of no probative value. It is settled law that a medical opinion that resorts to speculation and conjecture cannot support the Board's denial of the veteran's claim. *See, e.g., Coburn v. Nicholson*, 19 Vet. App. 427, 434 (2006); *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) (explaining that a speculative medical opinion is of *no probative value*). Thus, the Board's erroneous reliance on the November 2006 VA examiner's opinion should be rejected by the Court. *See, e.g., Fagan v. Shinseki*, 573 F.3d 1282, 1298 (Fed. Cir. 2009) (explaining that speculation, even by an expert, cannot support the Board's denial of a claim); *Miller v. West*, 11 Vet. App. 345, 348 (1998) (explaining that conclusory or speculative opinion, *i.e.*, one that is merely a bare conclusion without an adequate supporting rationale, even though offered by a medical expert, is not probative without a valid factual predicate in the record).

Here, the examiner's statement that various post-service factors "may be" involved in Mr. Whitehead's tinnitus is merely speculation, as is his suggestion that the veteran's tinnitus is an "emerging medical problem." (R. 1146-47). In assessing evidence such as medical opinions, the failure of the provider to give an adequate basis for his opinion undercuts the credibility of the evidence in the adjudication of the merits of the claim. *Hernandez-Toyens v. West*, 11, Vet. App. 379, 382 (1998). Indeed, it is axiomatic that an

important factor to be considered in determining the probative value of a medical opinion is the thoroughness and detail of the opinion. *See, e.g., Prejean v. West*, 13 Vet. App. 444, 448-49 (2000). Indeed, the Board is precluded from relying on medical opinions that fail to provide adequate support for their conclusions. *See, e.g., Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (“A medical examination report must contain not only clear conclusions with supporting data, but also *a reasoned medical explanation* connecting the two.”) (emphasis added); *Parrish v. Shinseki*, 24 Vet. App. 391, 401 (2011) (explaining that the *foundation and rationale of a medical opinion are crucial* when the Board assesses the weight to be provided to the opinion); *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (stressing that a medical opinion must be supported by an analysis that the Board can consider and weigh). As the nexus opinion here fails to provide an adequate rationale to support the examiner's conclusion, the Board is precluded from relying on the exam's findings.

In addition to the November 2006 examiner's lack of rationale to support its conclusion, the examiner also erred when it found that the veteran's onset date for tinnitus supports a negative nexus conclusion. It is settled law that even where, as here, the veteran's STRs do not reflect complaints of or treatment of the current disability, the absence of evidence does not affirmatively constitute negative evidence against the veteran's claim. *See, e.g., Forshey v. Principi*, 284 F.3d 1335, 1363 (Fed. Cir. 2002) (en banc) (Mayer, C.J., and Newman, J. dissenting (on grounds not relevant to this issue)) (distinguishing between the existence of negative evidence and the absence of evidence and explaining that “[t]he absence of actual evidence is not substantive negative evidence”); *see also Horn v. Shinseki*, 25 Vet. App. 231, 239 (2012); *Smith v. Derwinski*, 2 Vet. App. 137, 140 (1992)).

Further, the examiner in this instance failed to consider the critical issue of

predisposition, *i.e.*, the degree to which the veteran's long-term in-service acoustic trauma predisposed him to develop tinnitus. While the veteran did not have any complaints of tinnitus in his STRs, the examiner and the Board have both conceded that the veteran was exposed to acoustic trauma, in the form of artillery fire, during service. (R. 1146; 9). It is unclear from the examiner's negative etiological opinion, how the examiner came to this conclusion and what medical science supports his finding. Without such support, the opinion fails to provide a thorough and reliable analysis and explanation capable of adequately supporting the Board's denial of Mr. Whitehead's tinnitus service-connection claim. Thus, the Court should reject the Board's reliance on the VA examiner's flawed November 2006 negative nexus opinion. *See, e.g.*, 38 C.F.R. § 4.2 (pursuant to which the Board was required to reject the flawed etiology opinion rather than adopt it due to the inadequacies).

Similarly, the Board could not properly rely on or adopt the January 2016 VA examiner's negative nexus opinion. (R. 12; *see also* R. 741). As was the case with the 2006 examiner's opinion, the 2016 examiner's opinion is flawed for many of the same reasons as the prior exam. For example, the 2016 examiner relies on a likely onset of tinnitus around 2003, two years after separation from service. (R. 741). However, as discussed, *supra*, even if true, a post-service onset of tinnitus, alone, does not adequately support the examiner's negative nexus conclusion and, therefore does not provide substantial support for the Board's denial of Mr. Whitehead's claim. *See Forshey*, 284 F.3d at 1363; *Horn*, 25 Vet. App. at 239; *Smith*, 2 Vet. App. at 140. Indeed, the 2016 examiner also failed to address the predisposition issue, *i.e.*, the extent to which the veteran's in-service acoustic trauma caused him to subsequently develop tinnitus, just as the 2006 examiner failed to do.

In addition, the January 2016 examiner opined that the veteran's tinnitus is most

likely a result of hearing loss rather than noise exposure during service. (R. 741). However, his rationale for that conclusion is inadequate, which constitutes further error. *See, e.g., Prejean*, 13 Vet. App. at 448-49; *Nieves-Rodriguez*, 22 Vet. App. at 301; *Parrish*, 24 Vet. App. at 401; *Stefl*, 21 Vet. App. at 124. The examiner merely states that tinnitus is more likely connected to the veteran's hearing loss than service because tinnitus is a known symptom of hearing loss. However, medical literature supports a finding of tinnitus as a separate condition from hearing loss. Indeed, while tinnitus may develop from hearing loss, it is equally likely that exposure to loud noise also causes tinnitus. *See, e.g.,* www.health.harvard.edu/diseases-and-conditions/tinnitus (explaining that sound wave resulting from, *inter alia*, loud noise can damage the hair cells located in the middle and inner ear, which then stimulates abnormal neuronal activity, resulting in tinnitus); *see also* (R. 55) (citing a National Academy of Science study that found, *inter alia*, that noise exposure associated with hearing loss is also *likely to be associated with tinnitus*). The examiner's negative nexus opinion is, therefore, conclusory and is unsupported by the medical literature.

Further, the January 2016 examiner failed to address material evidence directly supporting Mr. Whitehead's service-connection claim for tinnitus. It is significant that the 2016 examiner acknowledged that the veteran reported to Dr. Highfall, a private physician, in 2015, that the onset of his tinnitus was around 1996, while he was in service, (R. 741, 1358), because it highlights the other favorable material evidence the examiner failed to address. (R. 740-42). In the veteran's record it shows that he was in the 1st Field Artillery Battalion for months, where it is conceded by the Board the veteran was exposed to acoustic trauma in the form of artillery fire. (R. 55, 9). Additionally, Dr. Chambers, a VA treating physician, reported in 2007 that Mr. Whitehead has bilateral tinnitus *from years of artillery-related noise exposure during his military service*. (R. 740-42, 1409).

Yet the January 2016 examiner failed to address these pieces of favorable evidence in his negative etiological opinion, which constituted further error.

This Court has consistently held that when the Board adopts a medical examiner's opinion as its own statement of reasons or bases, the examiner must have *fairly considered the material evidence which appears to support the appellant's position*. Wray v. Brown, 7 Vet. App. 488, 493 (1995) (citing Gabrielson, 7 Vet. App. at 40). In this case, the January 2016 VA examiner did not do so. Therefore, the Board could not rely on the examiner's flawed opinion because, *inter alia*, he did not fairly consider the material evidence favoring the veteran's claim; *i.e.*, the competent medical opinion reflecting a positive nexus between Mr. Whitehead's current tinnitus and his active duty service. Wray, 7 Vet. App. at 493.

As the Court explained in Gabrielson, the Board cannot evade its statutory responsibility under 38 U.S.C. § 7104(d)(1) merely by adopting a medical opinion where the opinion fails to discuss *all the evidence which supports the veteran's claim*. Gabrielson, 7 Vet. App. at 40. On that basis, the Gabrielson Court remanded the veteran's claim. Such a remand is also appropriate here. *See id.* As noted, pursuant to 38 C.F.R. §§ 4.1 and 4.2, an examination report or, in this case, a medical etiology opinion, must, among other things, provide an adequate rationale to support an understanding of the conclusion. *See* Bloom, 12 Vet. App. at 187; Goss, 9 Vet. App. at 114; Hicks, 8 Vet. App. at; Stanton, 5 Vet. App. at 569.

Here, however, the neither the November 2006 nor the January 2016 VA negative nexus opinion constitutes substantial support for the Board's denial of Mr. Whitehead's tinnitus claim. Neither exam provided sufficient rationale to support thier negative etiological opinions. Further, without a supporting medical opinion, the Board itself lacks the medical competency to render a probative opinion on complex medical issues such as

the etiology of Mr. Whitehead's tinnitus disability. *See, e.g., Chotta v. Peake*, 22 Vet. App. 80, 86 (2008) (explaining that the Board lacks the medical knowledge and experience necessary to competently determine complex medical issues such as etiology on its own); *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991) (same).

In this case, without expert guidance, the Board was not competent to conclude that the veteran's current tinnitus disability is not related to the acoustic trauma to which he was exposed during his active duty service. *Id.* Therefore, the Board's denial of Mr. Whitehead's service-connection claim must be vacated.

CONCLUSION

For all of the foregoing reasons, the veteran respectfully requests that the Court vacate the Board's February 22, 2019, decision and remand the veteran's service-connection claim for tinnitus for further administrative action, including the provision of an adequate VA examination with medical etiology opinion.

DATED: November 22, 2019

Respectfully submitted,

/s/Francis M. Jackson
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CERTIFICATE OF SERVICE

I, Francis M. Jackson, hereby certify that I have served a copy of this Brief of the Appellant electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to the following attorney(s) on the date listed below:

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