UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CASE NO. 19-0461

ROCCO J. DELAURI,

Appellant

V.

ROBERT L. WILKIE,

Secretary of Veteran Affairs

Appellee

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

Appellant is seeking compensation under 38 U.S.C.A. § 1151 for service-connected claim of right ear hearing loss.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

The claims on appeal are entitlement to service connection for right ear hearing loss. (R. 5). This 60-year-old Veteran served honorably on active duty with an armor battalion in the United States Army from September 6, 1977, to August 25, 1981. He served a tour of duty in Europe (Germany). (R. 854). The current appeal results from service connection claims for bilateral hearing loss and tinnitus filed at the Roanoke, Virginia Regional Office (RO) in December 2013. (R. 297-300). Following a Veterans Claims Assistance Act letter of March 1, 2014 (R. 293-95), and an audiological QTC examination[1] on June 9, 2014 (R. 151-58), the Roanoke RO denied service connection for bilateral hearing loss and tinnitus by rating decision of August 26, 2014. (R. 141-45). The Veteran's notice of disagreement, received on August 26, 2015, requested Decision Officer Review (DRO) review. (R. 122-23). Two years later, the DRO issued a confirming statement of the case on September 5, 2017. (R. 57-88). The Veteran perfected an appeal to the Board with a VA Form substantive appeal on November 2, 2017. (R. 50). The Board decision of September 25, 2018 was followed by the Veteran's timely Notice of Appeal to the Court.

[1] QTC (Quality, Timeliness, Customer Service) is a contract service used by VA to perform VA examinations. https://www.qtcm.com/qtc-medical-services-awarded-prime-contract-by-u-s-department-ofveterans-affairs/

SUMMARY OF THE ARGUMENT

The BVA failed to properly discredit the lay testimony of the Veteran in its decision. The BVA also failed to decide that another exam was warranted.

I. THE BVA DECISION FAILED TO PROPERLY DISCREDIT THE VETERAN'S LAY TESTIMONY

"Establishing service connection generally requires medical evidence of a current disability, medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury." *Rose v. West*, 11 Vet. App. 169, 171 (1998). A finding of service connection is a question of fact, not a question of law. *Rose*, id.; see *Hayes v. Brown*, 9 Vet. App. 67, 72 (1996); *Irby v. Brown*, 6 Vet. App. 132, 135 (1994); *Swann v. Brown*, 5 Vet. App. 229, 232 (1993). The Court must affirm the findings of fact made by the Board unless they are found to be "clearly erroneous." 38 U.S.C. § 7261(a)(4). Similarly, the outcome of the Board's application of the equipoise requirement found in 38 U.S.C. § 5107(b) is a factual determination that the Court reviews under the "clearly erroneous" standard. *Mariano v. Principi*, 17 Vet. App. 305, 313 (2003) (citing *Roberson v. Principi*, 17 Vet. App. 135, 146 (2003) (per curiam order)); see 38 U.S.C. §§ 5107(b), 7261(b)(1). Under the "clearly erroneous" standard of review, "if there is a 'plausible' basis in the record for the factual determinations of the BVA, even if [the] Court might not have reached the same factual determinations, [the Court] cannot overturn them." *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990); 38 U.S.C. § 7261(a)(4).

In the current appeal, the Board failed to consider all relevant lay testimony. "The BVA cannot rely only upon evidence it considers to be favorable to its position but must review and base its decision upon all the evidence of record." *Smith v. Derwinski*, 2 Vet. App. 137, 141

(1992) (italics in original); also see *EF v. Derwinski*, 1 Vet. App. 324, 326 (1991); *Willis v. Derwinski*, 1 Vet. App. 66, 70 (1991). "[T]he Board commit[s] prejudicial error in failing to adequately consider material evidence favorable to the claim." *Barr v. Nicholson*, 21 Vet. App. 303, 310 (2007). The Court "has long held that merely listing evidence before stating a conclusion does not constitute an adequate statement of reasons or bases." *Dennis v. Nicholson*, 21 Vet. App. 18, 22 (2007) (citing *Abernathy v. Principi*, 3 Vet. App. 461, 465 (1992)). Thus, the Board's failure to analyze the evidence, in accordance with the rating criteria, renders its statement of reasons or bases inadequate and frustrates judicial review. 38 U.S.C. § 7104(d)(1).

In this instance, the Board failed to discuss the relevance of the Veteran's service appellant's arguments at the Board dated September 12, 2018. (R. 11-13). Specifically, the appellant cited to several websites related to the progressive nature of hearing loss. It is established that even with apparent recovery of normal hearing after acoustic trauma there can be widespread and ongoing damage to the cochlear hairs and their nerves becoming manifested only over time. See *http://www.jneuroscli.org/content/29/45/14077.full.pdt+html* regarding delayed and progressive ear damage. (R. 12) (Bold-italics emphasis added).In its statement of "reasons or bases," the Board must also include in its decision "'the precise bases for that decision, and . . . the Board's response to the various arguments advanced by the claimant.'" *Gilbert*, at 56 (citing from S. Rep. No. 418, 100th Cong., 2nd Sess. 38 (1988) in relation to the Veterans' Judicial Review Act) (Bold-italics emphasis added).

Liberally read, the appellant's argument suggests that the bilateral hearing loss disability is progressively getting worse, warranting another VA examination to determine whether the right ear hearing loss would now meet the service connection requirements under 38 C.F.R. § 3.385. The five-year-old QTC examination of June 9, 2014, indicated that the right ear hearing

loss nearly met the regulatory requirement for the grant of service connection. Progressive means "advancing; going forward; going from bad to worse; increasing in scope or severity." Dorland's Illustrated Medical Dictionary, 1464 29th Ed. (2000).

II. THE VA FAILED IN ITS DUTY TO ASSIST APPELLANT IN DEVELOPING HIS CLAIM BY FAILING TO OBTAIN A THOROUGH AND CONTEMPORANEOUS MEDICAL EXAMINATION

The Secretary's duty to assist includes, in appropriate cases, the duty to conduct a thorough and contemporaneous medical examination. 38 U.S.C. § 5103A; see *Green v. Derwinski*, 1 Vet. App. 121, 124 (1991). Further, "once the Secretary undertakes the effort to provide an examination when developing a service-connection claim, even if not statutorily obligated to do so, he must provide an adequate one." *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). This Court has held that a medical opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" id. (quoting *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994)), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Monzingo v. Shinseki*, 26 Vet. App. 97, 105 (2012) (per curiam). To fully inform the Board's evaluation, a medical opinion regarding secondary service connection must address both causation and aggravation. *El-Amin v. Shinseki*, 26 Vet. App. 136, 138-40 (2013). Whether a medical opinion is adequate is generally a finding of fact that the Court reviews under the "clearly erroneous" standard of review. See *D'Aries v. Peake*, 22 Vet. App. 97, 104 (2008). Similarly, the Board's determination of whether VA satisfied its duty to assist is also a finding of fact that the Court

reviews under the "clearly erroneous" standard of review. See *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); see also *Gilbert*, 1 Vet. App. at 52.

In the decision here, since the Board failed to discuss the appellant's arguments, it made no determination whether an updated VA examination was required. The mere passage of time is not ordinarily sufficient to require the Board to direct VA to conduct a new medical examination to adequately assess the current state of a claimant's disability. *Palczewski v. Nicholson*, 21 Vet. App. 174, 182 (2007) (the mere passage of time between a prior VA medical examination and the adjudication of a claim is not, in and of itself, sufficient to compel VA to provide the veteran with a new, contemporaneous medical examination). However, where record evidence indicates that a condition worsened since the prior examination, such that the record does not adequately reveal the current state of the disability, VA's fulfillment of its duty to assist requires a new medical examination. Id. at 183 (citing *Caluza v. Brown*, 7 Vet. App. 498, 505 (1995), aff'd per curiam, 78 F.3d 604 (Fed. Cir. 1996) (table)) (Bold-italics emphasis added); *Caffrey v. Brown*, 6 Vet. App. 377, 381 (1994). VA regulations state in relevant part: "Generally, reexaminations will be required if . . . evidence indicates that there has been a material change in a disability or that the current rating may be incorrect." ***38 C.F.R. § 3.327(a)*** (Bold-italics emphasis added).

This standard may be satisfied based on a Veteran's assertion that his or her condition has worsened. See *Snuffer v. Gober*, 10 Vet. App. 400, 403 (1997) (citing VA Gen. Coun. Prec. Op. 11-95 and finding that the Board erred by not requiring a new audiology examination after the veteran had complained of worsening hearing problems); see also *Caffrey*, 6 Vet. App. at 381 (finding the Board erred by not requiring a new medical examination after the veteran had

presented medical evidence suggesting that his disabilities had worsened). Based on the above cited flaws, the Board's statement of reasons or bases for the denial of service connection for right ear hearing loss is inadequate. The Board is required to include in its decision a written statement of the reasons or bases for its findings of fact and conclusions of law that is understandable by the claimant and facilitates review by this Court. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995) (Board's statement "must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court"). The statement of reasons or bases must explain the Board's reasons for discounting favorable evidence, *Thompson v. Gober*, 14 Vet. App. 187, 188 (2000), discuss all issues raised by the claimant or the evidence of record, *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008), and discuss all provisions of law and regulation where they are made "potentially applicable through the assertions and issues raised in the record." *Schafrath v. Derwinski*, 1 Vet. App. 589 (1991). Remand (and not reversal) is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate." *Tucker v. West*, 11 Vet. App. 369, 374 (1998); see also *Allday*, supra. See also *Bankhead v. Shulkin*, 29 Vet. App. 10, 23 (2017) ("remand, not reversal, is the appropriate remedy" where the Board fails to provide an adequate statement of reasons or bases).

CONCLUSION

For the reasons stated above the BVA decision should be remanded with instructions to further develop the Appellant's claim. Thus, a remand warranted.

Respectfully Submitted,

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