

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

**Vet. App. No. 19-2658**

**GARY M. LAMBERT,**

**Appellant**

**v.**

**ROBERT L. WILKIE,**

**SECRETARY OF VETERANS AFFAIRS,**

**Appellee.**

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**APPELLANT'S BRIEF**

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## **I. STATEMENT OF THE ISSUES**

- A. Whether the Board of Veterans' Appeals commits remandable error when it relies on an inadequate examination record in denying Appellant's claim for service connection for tinnitus.**
- B. Whether the Board of Veterans' Appeals commits remandable error when it offers inadequate reasons and bases for denying Appellant's claim for service connection for tinnitus.**

## **II. STATEMENT OF THE CASE**

### **A. Jurisdiction**

Appellant Gary B. Lambert (Lambert)<sup>1</sup> invokes this Court's appellate jurisdiction granted through 38 U.S.C. § 7252 (2018).

### **B. Nature of the Case / Result Below**

Lambert appeals the Board's December 20, 2018, decision, which denied his claim for entitlement to service connection for tinnitus. [R 5, 5-10 (2018 Board Decision)]<sup>2</sup>

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<sup>1</sup> The Board Decision that appears in the Record Before the Agency misspells Lambert's name as Lambart.

<sup>2</sup> On April 6, 2019, the Board issued an order correcting the portion of the December 20, 2018, decision that denied Lambert's claim for service connection for acquired psychiatric disorder, to include diagnoses of posttraumatic stress disorder (PTSD), depressive disorder, and anxiety disorder. The order of correction granted entitlement to service connection for acquired psychiatric

### **C. Relevant Facts**

Lambert is a Vietnam veteran with active duty honorable service in the U.S. Army from June 16, 1964 to June 15, 1967. [R 1239 (1967 DD-214)] Appellant was awarded the Vietnam Service Medal, the Republic of Vietnam Campaign Medal, the National Defense Service Medal, the Good Conduct Medal, the Aircraft Crewman Badge, and the Marksman Badge (M-14 Rifle). [Id.]

In the decision now before this Court, Lambert sought service connection for tinnitus. [R 5, 5-10 (2018 Board Decision)] In denying Lambert's claim, the Board acknowledged that Lambert (1) suffers from tinnitus and (2) has established in-service acoustic trauma from exposure to combat noise and aircraft. [R 8, 5-10 (2018 Board Decision)] Despite this evidence, however, the

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disorder, to include diagnoses of posttraumatic stress disorder (PTSD), depressive disorder, and anxiety disorder, and corrected the conclusions of law to indicate that the criteria for service connection for acquired psychiatric disorder, to include diagnoses of posttraumatic stress disorder (PTSD), depressive disorder, and anxiety disorder have been met. Accordingly, Appellant elects not to appeal the portion of Board's December 20, 2018, decision which purportedly denied his claim for service connection for acquired psychiatric disorder, to include diagnoses of PTSD, depressive disorder, and anxiety disorder.

Board denied Lambert's claim.

### III. ARGUMENTS & AUTHORITIES

#### A. The Board erred when it relied on an inadequate examination record in denying Lambert's claim for service connection for tinnitus.

Evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability is necessary to establish service connection. *Romanowsky v. Shinseki*, 26 Vet. App. 289, 293 (2013). When the VA obtains and relies on a medical examination or opinion as part of developing a claim for service connection, the examination must be adequate. *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). For an examination or opinion to be adequate, it must describe the disability in sufficient detail so that the Board's "evaluation of the claimed disability will be a fully informed one," *Steffl v. Nicholson*, 21 Vet. App. 120, 123 (2007), and "sufficiently inform the Board of the medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet. App. 97, 105 (2012). "If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes." 38 C.F.R. § 4.2 (2014); see *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

In denying Appellant's claim, the Board relies upon an inadequate 2011

examination in which the examiner refuses to provide a medical opinion regarding the etiology of Appellant's tinnitus. [R 8, 5-10 (2018 Board Decision)]

In the 2011 examination, the examiner comingled her analysis regarding Appellant's bilateral hearing loss and tinnitus. Specifically, the examiner reported being unable determine without resort to speculation whether Appellant's **tinnitus** began because of his military noise exposure because no separation audio exists to confirm the presence or absence **of hearing loss**. [R 1204-1205, 1195-1205 (2011 examination)] Notably, the examiner copied verbatim her responses about the etiology of hearing loss and the etiology of tinnitus. Compare hearing loss answer 4 [R 1201-1202, 1195-1205 (2011 examination)] with tinnitus answer 3 [R 1204-1205, 1195-1205 (2011 examination)].

In commingling the analyses, the examiner fails to explain why separation audio regarding hearing loss is necessary to determine whether – or the extent to which – Appellant's diagnosed tinnitus is reasonably related to Appellant's known noise exposure during service. The examiner also fails to explain how separation audio regarding hearing loss is necessary to differentiate between the two possible causes (in-service vs. post-service exposure) of delayed-onset tinnitus (and hearing loss) identified in the examination. Finally, the examiner fails to assess – in the absence of this separation audio – the probability as between the two known possible causes of delayed-onset tinnitus.

These failures render this examination inadequate. The absence of

separation audio testing does not relieve the examiner from her duty to assess the probability of the evidence actually before her or obtainable by her.

*McLendon v. Nicholson*, 20 Vet. App. 79 (2006). Rather than evaluate the competing available evidence, the examiner instead simply concludes – without demonstrating that she carefully considered all procurable and assembled data – that she cannot reach a conclusion without resorting to speculation. This violates the statutory equipoise rule as noted in *Jones v. Shinseki*, 23 Vet. App. 382, 389 (2010) (discussing 38 U.S.C. § 5107(b) and 38 C.F.R. § 3.102).

Accordingly, the Board relies on an inadequate examination and fails to provide adequate reasons and bases for its findings and conclusions. This claim should therefore be remanded for additional development consistent with the Board's duties and obligations.

**B. The Board erred when it offered inadequate reasons and bases for denying Lambert's claim for service connection for tinnitus.**

In denying Appellant's claim, the Board acknowledged that Appellant (1) suffers from tinnitus and (2) has established in-service acoustic trauma from exposure to combat noise and aircraft. [R 8, 5-10 (2018 Board Decision)] Despite this evidence, however, the Board denies Appellant's claim, using flawed rationale and relying on an inadequate examination. As such, the Board decision and underlying examination violate the *Jones* requirement that some combination of the examiner's opinion and the Board's analysis of the record must make clear that the examiner did not invoke "the phrase 'without resort to mere speculation'



as a substitute for the full consideration of all pertinent and available medical facts to which a claimant is entitled.” 23 Vet. App. 382, 387 (2010)

As noted by the Board, in addition to his in-service acoustic trauma which has been established, Appellant also reports post-service noise exposure from his employment with an airline working near aircraft. [Id.] The Board then inexplicably and illogically concludes – *based on this very evidence* – that there is “essentially an absence of evidence” regarding nexus, and that as such, there “cannot be even equipoise, and there can be no resolution of doubt.” [Id.] Rather than perform its duty to evaluate and weigh the evidence, it concludes that the evidence presented by Appellant – that he suffers from tinnitus and that he experienced in-service acoustic trauma – is essentially canceled out by evidence that the tinnitus could have been caused by post-service noise exposure and the lack of separation audiometric testing. In doing so, the Board flatly ignores the evidence submitted by Appellant regarding delayed-onset tinnitus and then concludes that Appellant has failed to meet his burden of production. [Id.] This not only contravenes the principle in *McLendon v. Nicholson*, 20 Vet. App. 79, 84-85 (2006) that the absence of actual evidence is not substantive negative evidence, the Board takes it a step further and concludes that competing negative evidence negates favorable evidence, which results in an absence of actual evidence, which it then deems to be substantive negative evidence.

Accordingly, the Board relies on an inadequate examination and fails to

provide adequate reasons and bases for its findings and conclusions. This claim should therefore be remanded for additional development consistent with the Board's duties and obligations.

#### **IV. CONCLUSION**

For the foregoing reasons, Appellant's claims should be remanded to obtain a medical examination consistent with the requirements of *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006), an adequate statement of its reasons and bases consistent with *Moore v. Derwinski*, 1 Vet. App. 401, 404 (1991) and proper development and review of the record consistent with the VA's duties and obligations.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

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on December 9, 2019.

By: /s/ Neely L. Fedde  
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