REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-58

EDWARD S. AREL,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. Contrary to the Secretary's argument, the Court should consider the Veteran's argument that the 2013 VA examination was inadequate.

In his opening brief, the Veteran argued that the Board erred in relying on the 2013 VA examination because the examination was inadequate. *See* Appellant's Br. at 7-21. The Secretary responds that "Appellant had every opportunity to raise this issue prior to the Board decision." Secretary's Br. at 18. He relies on *Maggitt v. West,* 202 F.3d 1370, 1377 (Fed. Cir. 2002), to invite the Court to decline to review the Board's reliance on the inadequate exam, *see* Secretary's Br. at 18. However, the Veteran's interests in being heard outweigh any countervailing agency interest, so the Court should reject the Secretary's invocation of issue exhaustion. *See Maggitt*, 202 F.3d at 1377 (finding that the test to determine whether discretionary invocation of exhaustion is proper is "whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve.").

First, the Secretary argues that "the Court should decline to consider Appellant's argument at all," because he "did not raise [the argument] below, despite representation." Secretary's Br. at 18. However, the Veteran was represented by a Veterans Service Organization before the Board, not by current counsel. *See* R-3. This fact distinguishes this case from *Massie v. Shinseki*, 25 Vet.App. 123 (2011). In *Massie*, the appellant was represented by the same counsel "throughout the administrative appeals process," which, the Court found, eliminated concerns "regarding the potentially harsh result of applying the exhaustion of remedies doctrine . . . ." *Id.* at 127. Here, however, the Veteran's

current counsel could not have raised the adequacy of the July 2013 examination before the Board. *See* R-3. The Secretary's citation to *Massie* is, therefore, misplaced. *See Massie*, 25 Vet.App. at 127; *see also* Secretary's Br. at 18.

Second, the Secretary's citation to *Dickens v. McDonald*, 814 F.3d 1359 (2016) is also misplaced. Secretary's Br. at 18. The Veteran's argument that the July 2013 opinion was inadequate presents an evidentiary matter, unlike the procedural issue that the Court refused to entertain in *Dickens*. 814 F.3d at 1360-62 (holding that this Court properly declined to address the appellant's argument that the hearing officer committed an error); Secretary's Br. at 18. The Veteran's challenge to the Board's reliance on the inadequate examination is an evidentiary matter because it relates to the sufficiency of the evidence to decide the claim and not whether a proper procedural protocol was followed. *See* Appellant's Br. at 7-20. Unlike a procedural issue that "may be irrelevant to final resolution and may indeed merely delay [the] resolution," *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015), the acceptance or rejection of evidence is at the heart of the appeal and easily impacts the outcome. Further distinguishing *Dickens* is the fact that the appellant in that case did not include the alleged duty to assist error in a previous joint motion for remand; here there was no such prior motion. *Dickens*, 814 F.3d at 1360.

Third, Mr. Arel has continuously argued that he is entitled to service connection for bilateral hearing loss and tinnitus. The Federal Circuit has found that "consider[ation] [of] . . . evidence that could support a veteran's claim for disability benefits" is not a procedural matter subject to issue preclusion. *Scott*, 789 F.3d at 1381.

The converse is also true: it is always in the veteran's interest to be able to argue that the Board should not have considered evidence on which it relied, as that is the factual underpinning of the decision. *See Maggitt,* 202 F.3d at 1377. And here, the Board adopted the examiner's opinions as determinative—first noting that the 2013 examination was the "only nexus evidence of record," and subsequently using the examination to deny the claim. R-9. This, in and of itself, raises the issue of whether the examination was adequate and places it before this Court. *See* 38 U.S.C. § 7261(a)(3).

Fourth, the Veteran's interest is served by a thorough examination of the record in keeping with all relevant law, and this outweighs any interest of VA because direct service connection is not a "relatively unique theory" of entitlement, but instead is encompassed within his original claim. *Massie*, 25 Vet.App. at 127. To that end, "issue exhaustion cannot be invoked to bar citation of record evidence in support of a legal argument that has been properly preserved for appeal." *Bozeman v. McDonald*, 814 F.3d 1354, 1359 (Fed. Cir. 2016).

Finally, the Secretary faults the Veteran for "not submit[ting] the IOM report," Secretary's Br. at 18; however, "[v]ery few claimants have ready access to any medical treatises and thus are basically prevented, unless they are represented, from challenging the Board's reliance on such treatises," *Hatlestad v. Derwinski*, 3 Vet.App. 213, 217 (1992). And because the Veteran was not represented by counsel, and therefore would have been "basically prevented" from challenging the examination as he does now, his interest weighs in favor of this Court entertaining the argument. *Id*; *Maggitt*, 202 F.3d at 1377.

Mr. Arel, therefore, should not be prevented from pursuing an argument challenging the Board's reliance on the 2013 VA examination, and the Court should reject the Secretary's argument to the contrary. *See* Secretary's Br. at 18.

II. The Secretary's argument that the Board was not required to consider portions of the IOM Report addressing hearing loss is based on unduly narrow views of official notice, the constructive possession doctrine, and *McCray*.

The Veteran argued in his opening brief that the 2013 VA examiner's opinion is inconsistent with the IOM Report. Appellant's Br. at 7-20. The Secretary does not argue that the opinion was consistent with the report. *See* Secretary's Br. at 19 (noting but not disputing the "alleged inconsistency"). Instead, he seeks to avoid the Court's reviewing the report to determine whether the Board erred in failing to address the report before relying on the opinion. *See id.* at 5-24. For the following reasons, the Court should reject his arguments.

A. The Court should find error in the Board's failure to take official notice of the IOM Report, and it can take judicial notice of the report's correct contents for that purpose.

As the Veteran argued in his opening brief, the IOM Report contains "technical or scientific facts that are within the agency's area of expertise" and is therefore subject to VA's official notice. *Sykes v. Apfel*, 228 F.3d 259, 272 (3d Cir. 2000); *see* Appellant's Br. at 18-19. Indeed, the report's purpose is to "help VA and veterans understand whether service in certain military specialties might be associated with an increased risk of hearing loss later in life." 148 Cong. Rec. S9555 (daily ed. Sept. 26, 2002) (statement of Sen. Rockefeller); *see also* Public Law No. 107-330, § 104(c) (Dec. 6, 2002). The doctrine of

official notice is codified in the Administrative Procedure Act (APA), 5 U.S.C. § 556(e), to put such facts before the agency. *See Yeoman v. West*, 140 F.3d 1443, 1447 (Fed. Cir. 1998).

Accordingly, the Board should have taken notice of the correct contents of the IOM Report for purposes of assessing the VA medical opinion. *See* Appellant's Br. at 18-19. The Secretary responds that "the Board had no duty to review [the report's] contents" because it "is not in the record." Secretary's Br. at 9. However, Congress stated that the Board did not need to decide matters "exclusively" on material in the record, "thereby affording opportunity for the Board to take notice . . . of matters not on the record." *The Proposed Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearing on S. 11 and S. 2292 Before the Committee on Veterans' Affairs*, 100th Cong. 741 (1988). Thus, Congress suggested that it intended official notice to put facts outside the record, yet within the agency's expertise, before the Board. *See id.*

Because the IOM Report's correct contents are a matter of which the Board should have taken notice, the Court should find that it erred in failing to do so. For this limited purpose, the Court can take judicial notice of the report to ascertain what it says. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 103-04 (2012); *see also* Appellant's Br. at 20. Regardless of whether the validity of the findings and conclusions in the IOM Report are "subject to reasonable dispute," *Monzingo*, 26 Vet.App. at 104, merely what is printed in the report's pages is not. *See* Appellant's Br. at 20-21.

B. Alternatively, the IOM Report is constructively part of the record of proceedings, so the Court can review the report to determine whether the Board erred in relying on the opinion.

The IOM Report was directly related to the claim. In his opening brief, the Veteran argued that the Board knew or should have known about the correct contents of the IOM Report and that the report bore a direct relationship to his appeal to the Board. *See* Appellant's Br. at 11-19. This placed it constructively in the record of proceedings under 38 U.S.C. § 7252(b). *See Euzebio v. Wilkie*, 31 Vet.App. 394, 401 (2019). The Secretary does not dispute that "the Board had actual knowledge of the IOM report." Secretary's Br. at 9; *MacWhorter v. Derwinski*, 2 Vet.App. 655, 656 (1992). However, he asserts that the IOM report "has no direct relationship to the claim on appeal." *Id.* at 8. He is incorrect.

Because the IOM Report served as the basis of the VA opinion that, in turn, determined the outcome of the claim, it bore a "direct relationship" to the Veteran's claim. *Euzebio*, 31 Vet.App. at 401. The Secretary concedes that the VA examiner relied on the IOM Report. Secretary's Br. at 14. Like the Secretary in his brief, the Board recognized that the examiner relied on the IOM Report for her ultimate conclusion. *See* R-8. The Board then adopted the examiner's opinion as determinative, finding that the opinion was the "only nexus evidence of record" and relied on it to deny the claim. R-9. The IOM Report's findings about delayed-onset hearing loss directly related to the Veteran's claim because the VA examiner opined that "there is no evidence on which to conclude that the Veteran's current hearing loss was caused by or a result of the veteran's military service, including noise exposure." R-277.

These facts distinguish this case from *Monzingo*, in which, "beyond noting that VA sponsored and received a copy of" the IOM Report, "Mr. Monzingo offer[ed] no other support for his argument that the report was constructively before the Board." 26 Vet.App. at 103. This case is also distinguishable from *Euzebio*, in which "the Board was not requested to and did not address" the evidence in question. 31 Vet.App. at 402; *but see* Secretary's Br. at 9 ("[A]s in *Euzebio*, the IOM report is not directly related to Appellant's claim."). Finally, unlike in *Bowey v. West*, 11 Vet.App. 106 (1998), the examiner here did not "merely reference[ ]" the IOM Report, *id.* at 109; instead, it was the foundation of her opinion, *see* R-277, and, in turn, the Board's decision, *see* Appellant's Br. at 11-19; Secretary's Br. at 14 ("The examiner relied on the medical literature.").

The Court should, therefore, conclude that the portion of the IOM Report on which the examiner relied was constructively in the record before the Board. *See* Appellant's Br. at 8. As a result, the Court can look to the report to assess whether the Board adequately explained its reliance on the examiner's opinion. *See Bell v. Derwinski*, 2 Vet.App. 611, 612-13 (1992).

The Board erred by relying on the VA medical opinion without discussing the IOM Report. The VA examiner characterized the IOM Report as stating that "there was insufficient scientific basis to *conclude* that permanent hearing loss directly attributable to noise exposure will develop long after noise exposure." R-277 (emphasis added). On the contrary, the report states that there "is not sufficient evidence from

longitudinal studies in laboratory animals or humans *to determine whether* permanent noise-induced hearing loss can develop much later in one's lifetime, long after the cessation of that noise exposure." Appellant's Br. at 8 (citing IOM Report at 47 (emphasis added)). Contrary to the examiner's characterization of it, the IOM Report makes clear that there is no definitive answer, one way or the other, as to whether noise-induced hearing loss is possible. *See* IOM Report at 47. Accordingly, the opinion was based on an inaccurate factual premise. *See* Appellant's Br. at 10.

As the Veteran argued in his opening brief, the Board was required to discuss the IOM Report because the examiner relied on it to formulate her opinion. *See* Appellant's Br. at 11-19. The Secretary responds that "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." Secretary's Br. at 13. For the following reasons, the Court should reject the Secretary's argument that the Board had no duty to review the IOM Report. *See id.* at 12-17.

First, in the sentence just quoted, the Secretary appears to agree that when a medical test *is* constructively before the Board, the Board must review it. *See id.* As argued above, the IOM Report was constructively before the Board in this case. Alternatively, the Board should have taken official notice of the report's contents.

Second, the Secretary fails to show why *McCray* does not impose a *sua sponte* duty on the Board to ensure that cited medical texts do not contain qualifiers or contradictions. *See id.* at 12-17; *see also McCray v. Wilkie*, 31 Vet.App. 243, 257 (2019).

McCray's holding is not limited to situations "where the medical evidence text ha[s] been . . . entered into the record." *But see* Secretary's Br. at 16. To the contrary, *McCray* stands for the proposition that the Board must find out whether a medical text cited in the opinion upon which it relies contains qualifiers or contradictions. *See* 31 Vet.App. at 257; Appellant's Br. at 11.

Third, the Secretary's position is at odds with VA's pro-veteran, non-adversarial system, which does not impose on a pro se veteran the burden of reviewing medical texts cited in a medical opinion, comparing the texts to the opinion, and ensuring the texts are placed in the record for the Board's review. *See* Appellant's Br. at 12. The Secretary argues that VA's (1) duty to retrieve a factually accurate opinion and (2) knowledge of the IOM Report notwithstanding, the Board is free to "consider the opinion only on its face" unless the claimant comes forward with the IOM Report. Secretary's Br. at 19. However, "[v]ery few claimants have ready access to any medical treatises and thus are basically prevented, unless they are represented, from challenging the Board's reliance on such treatises"—either directly or via an examiner's reliance on them. *Hatlestad*, 3 Vet.App. at 217. Yet this is exactly the burden the Secretary seeks to place on Mr. Arel, who was not represented by counsel. *See* Secretary's Br. at 19, 22; R-4. The Court should reject this invitation. *See* Appellant's Br. at 12-15.

Fourth, the facts of this case do not provide a basis for the Secretary's concern that the Board would have to "to seek out unidentified medical literature." Secretary's Br. at 13. Here, the examiner *did* identify the IOM report. R-277. The Board noted this

in its decision. *See* R-8. Therefore, the Board needed only to visit the cited page of the report—which is already within VA's control—to find that report actually qualified the statement on which the examiner relied. *See* Appellant's Br. at 8 (quoting IOM Report at 47). Finding error in its failure to do so would not create the expansive rule that the Secretary fears. *But see* Secretary's Br. at 13-14.

Fifth, the Secretary's argument that the Board "would usurp the role of the medical examiner" by determining that his or her opinion is based on an equivocal or contradictory text is equally unfounded. *Id.* at 17 (citing *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991)). The Secretary's imagined *Colvin* violation is based on the apparent premise that, if the IOM Report is not actually in the record, then the Board must speculate as to what it actually says. *See id*; *see also Colvin*, 1 Vet.App. at 175. But the Secretary "does not claim ignorance of the contents of the IOM report," and its contents were both subject to official notice and directly related to the claim, so any need for speculation is imagined only. *See* Secretary's Br. at 9.

That "examiners are presumed to have depth and breadth of medical knowledge that the Board cannot feasibly obtain" notwithstanding, Secretary's Br. at 15, the Board's exercise of medical expertise is not at issue here. The issue, instead, is the Board's duty to assess the factual accuracy of the examiner's premise. *See* Appellant's Br. at 10. The Board need not provide a medical opinion in order to do so, but rather need only ensure that the opinion is based on a correct characterization of the relied-upon text. *See* Appellant's Br. at 13-14; *but see* Secretary's Br. at 17.

In sum, the Secretary does not claim either that the examiner correctly characterized the IOM Report, or that the report did not contain qualifying language. And the Court should reject all his reasons for claiming that the Board was not required to review the Report. Therefore, the Court should reject the Secretary's arguments that the Board had no duty to review the examiner's opinion against the IOM Report and that the Board properly relied on the opinion. *See, e.g.,* Appellant's Br. at 10, 19, 24.

C. The Board's error was prejudicial to Mr. Arel.

The Board conceded that Mr. Arel (1) has left ear hearing loss and (2) sustained acoustic trauma in service. R-8. Had the Board found the 2013 VA examination inadequate, it would have been required to obtain a new medical opinion based on an accurate characterization of the IOM Report. *See* Appellant's Br. at 21. The Court should reject the Secretary's argument that the examination was otherwise adequate. The Secretary does not disagree that hearing loss that manifests later can be related to service. *See* Appellant's Br. at 22-23. Although he claims that the examiner considered whether this was the case based on Mr. Arel's circumstances, he nevertheless acknowledges that the opinion was "[b]ased on the examiner's understanding of the IOM report . . . [that] a prolonged delay between noise exposure and the onset of noise-induced hearing loss is unlikely." Secretary's Br. at 23-24. And although the Secretary claims that the examiner "indicated that there was some evidence of [post-service] noise exposure," *id.* at 23, there is nothing accounting for that fact in the examiner's rationale, and she even noted that the Veteran used hearing protection whenever it was available, R-276-77. Therefore, the

opinion lacked "a reasoned medical explanation" connecting the conclusion to the Veteran's medical history. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

For the foregoing reasons, the Board's failure to adequately assess the sufficiency and probative value of the opinion warrants remand. *See* Appellant's Br. at 7-21; *McCray*, 31 Vet.App. at 258; *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007).

III. The Secretary is wrong that the 2013 VA examination which the Board relied on to deny service connection for tinnitus was adequate.

As the Veteran argued in his opening brief, the 2013 VA medical opinion lacked an adequate rationale because the examiner's only reason for opining that the Veteran's *tinnitus* was unrelated to his in-service noise exposure was a lack of *hearing loss* in service. R-10; R-277-78; Appellant's Br. at 24. In response, the Secretary claims that the Veteran's lack of hearing loss in service was "reasonably related" to whether his tinnitus disability was incurred in service. Secretary's Br. at 25. The Secretary's opinion notwithstanding, the examiner did not even give an "essential rationale" relating the lack of one condition in service to her opinion that an entirely different condition was unrelated to service. *Monzingo*, 26 Vet.App. at 105; *see* R-277-78. Tinnitus is "a legitimate, independent illness, disease, or disability itself." *See Fountain v. McDonald*, 27 Vet.App. 258, 268 (2015). If it were merely a manifestation of hearing loss, "tinnitus would not be subject to compensation in its own right as a service-connectable disability." *Id.* Because tinnitus and hearing loss are separate disabilities, the fact that Mr. Arel did not have hearing loss on separation does not, in and of itself, explain why his tinnitus was unrelated to service. *See* R-277-78. And the examiner gave no explanation

of why that was so. The Secretary acknowledges that the examiner's rationale was at best "implied." Secretary's Br. at 24. However, the Board is prohibited from making a medical determination to fill gaps in an examiner's rationale. *Colvin*, 1 Vet.App. at 175.

The Secretary alleges that a lack of "complaints of tinnitus until approximately 2003" was another reason "there was no basis to conclude that Appellant's tinnitus was associated with noise injury." Secretary's Br. at 24-25. However, the examiner did not account for the Veteran's lack of complaints prior to 2003 in her rationale; instead, she only noted under "Medical history" that the Veteran's symptoms "began about 10 years ago." *See* R-277-78; *but see* Secretary's Br. at 24-25. Therefore, the opinion lacked "a reasoned medical explanation" connecting the conclusion to the supporting data. *Nieves-Rodriguez*, 22 Vet.App. at 301. In any case, the *Board* did not make any finding regarding the significance of when Mr. Arel's symptoms began when analyzing the probative value of the opinion. *See* R-3-12. Therefore, the Secretary's argument that Mr. Arel's lack of hearing loss in service was "reasonably related" to whether a tinnitus disability was incurred in service, "particularly where Appellant admitted his tinnitus began well after service," amounts to post hoc reasons or bases for the opinion's adequacy. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156 (1991) ("'[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

The Secretary next claims that "noise exposure, and indeed acoustic trauma, do not always result in hearing loss or tinnitus." Secretary's Br. at 26. However, the

question here was whether acoustic trauma resulted in *Mr. Arel's* tinnitus, not whether it "always" causes that condition; that was a question for the medical examiner. Furthermore, the Secretary's reliance on the Federal Circuit's decision in *Reeves v. Shinseki*, 682 F.3d 988, 998-99 (Fed. Cir. 2012), is misplaced. As the Secretary acknowledges, *Reeves* focused on hearing loss, not tinnitus, and it had nothing to do with whether acoustic trauma in service can cause later-manifesting tinnitus. *See* Secretary's Br. at 26 (noting that *Reeves* dealt with whether the appellant "suffered permanent hearing loss while on active duty").

Regardless of his normal hearing in service, the question remains whether the Veteran's in-service noise exposure resulted in his later-manifesting tinnitus. As explained, however, the opinion lacked the "reasoned medical judgment" needed to adequately "inform the Board on [the] medical question" at hand. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). The Court should reject the Secretary's argument that the Board obtained an adequate opinion in this case. The issue is not whether there is nexus evidence "that the Board did not consider," *contra* Secretary's Br. at 25, but instead whether the medical evidence that it *did* consider was adequate, *see Barr*, 21 Vet.App. at 311. Accordingly, the Court should vacate the Board's decision and remand the matter for the Board to comply with the duty to assist. *See id.* At the very least, remand is required for the Board to provide an adequate statement of reasons or bases for its finding that the opinion was adequate. *See* 38 U.S.C. § 7104(d)(1).

CONCLUSION

Mr. Arel was exposed to automatic weapons fire, rocket fire, mortars, and mines during service and has current left ear hearing loss. Nevertheless, the Board denied him entitlement to service connection for hearing loss. In doing so, the Board erred when it failed to review the IOM Report to ensure compliance with VA's duty to assist. The Secretary's arguments that the Board was not required to consider the report rest on a misunderstanding of the applicable law. Had the Board reviewed the report, it would have found that the 2013 medical opinion was inadequate for rating purposes because it relied on an inaccurate factual representation of the report.

The Veteran also suffers from tinnitus. Yet, in denying service connection for hearing loss, the Board relied on a VA medical opinion that that lacked an adequate explanation because the examiner relied on findings regarding hearing loss to deny service connection for tinnitus. Contrary to the Secretary's argument otherwise, the opinion contained insufficient evidence for the Board to decide service connection, and the Board erred in relying on it.

For the foregoing reasons, and those argued in his opening brief, the Veteran requests that this Court vacate the Board's November 2018 decision and remand the appeal for it to properly apply the law, ensure that the duty to assist is satisfied, and provide adequate reasons or bases for its determination.

Respectfully submitted,

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