Vet. App. No. 19-2658

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

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**GARY LAMBERT,**
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 THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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## I. ISSUES PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (Board) decision of December 20, 2018, denying entitlement to service connection for tinnitus where the Board's findings are plausibly based on the evidence of record, to include an adequate VA medical examination, and supported by VA statutes and regulations and current case law, as well as an adequate statement of reasons and bases.

## II. STATEMENT OF THE CASE

### A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the Board under 38 U.S.C. § 7252(a).

## B. NATURE OF THE CASE

On December 20, 2018, the Board issued the decision on appeal, denying Mr. Gary Lambert (Appellant) entitlement to service connection for: (1) tinnitus; and (2) an acquired psychiatric disorder, to include diagnoses of posttraumatic stress disorder (PTSD), depressive disorder, and anxiety disorder.[1] Appellant filed a timely appeal of the Board's decision on April 19, 2019.

The Board remanded Appellant's claims for: (1) gastroesophageal reflux disease, to include as secondary to an acquired psychiatric disorder; and (2) service connection for erectile dysfunction, to include as secondary to an acquired psychiatric disorder. Because the Board's remand of these claims "does not make a final determination with respect to the benefits sought by the [V]eteran, . . . the Board's remand does not represent a final decision over which this Court has jurisdiction." *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

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[1] On April 16, 2019, the Board issued an order setting forth corrections to the portions of the December 20, 2018, decision related to the acquired psychiatric disorder claim. The order made clear that the criteria for entitlement to service connection for an acquired psychiatric disorder, to include PTSD, depressive disorder, and anxiety disorder, have been met and entitlement to service connection is granted. As such, Appellant is not appealing those portions of the December 20, 2018, decision. The Court should deem abandoned and dismiss any appeal of that claim. *See Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (holding that matters not argued on appeal are deemed abandoned).

## C. STATEMENT OF RELEVANT FACTS

Appellant served on active duty in the U.S. Army from June 1964 to June 1967. [Record Before the Agency (R.) at 1239]. In May 2011, Appellant filed a claim for service connection for tinnitus. [R. at 1268 (1268-77)].

VA provided Appellant an examination in August 2011. [R. at 1195-1205]. The examiner diagnosed Appellant with tinnitus. [R. at 1203]. The examiner acknowledged Appellant's noise exposure during service as well as post-service occupational exposure but could not render an etiology opinion without speculation. [R. at 1204-05]. The examiner supported this opinion by explaining that without a valid separation audiogram, she cannot determine without speculation whether the tinnitus began as a result of the in-service noise exposure. [R. at 1205]. In a February 2013 Rating Decision, VA denied service connection for tinnitus finding no nexus to Appellant's service. [R. at 531 (530-35)]; [R. at 515 (514-17)].

Appellant filed his Notice of Disagreement in March 2013. [R. at 496-505]. In December 2016, VA issued a Statement of the Case continuing the denial of service connection for tinnitus. [R. at 102-03 (72-103)]. Appellant filed his appeal shortly thereafter. [R. at 67 (67-69)]. On December 20, 2018, the Board denied service connection for tinnitus. [R. at 5 (5-10)]. This appeal followed.

## III. SUMMARY OF ARGUMENT

The Court should affirm the Board's December 20, 2018, decision, which denied entitlement to service connection for tinnitus. In making its determination,

the Board properly considered all relevant evidence of record and provided an adequate statement of reasons or bases as required by law. The August 2011 VA medical examination was also fully adequate as the examiner reviewed Appellant's claims file, including lay statements and pertinent service treatment records, and based her conclusion on an accurate and complete medical history. Therefore, Appellant has not demonstrated that the Board committed prejudicial error that would warrant any action by the Court other than affirmance.

## IV. ARGUMENT

### A. THE AUGUST 2011 VA MEDICAL EXAMINATION WAS ADEQUATE

Contrary to Appellant's contentions, the August 2011 VA medical examination was adequate. [Appellant Brief (App. Br.) at 3-5]; [R. at 1195-1205]. The examiner reviewed the claims file and addressed Appellant's relevant medical history from his service records. [R. at 1204-05 (1195-1205)]. The examiner noted Appellant's noise exposure during service as well as post-service occupational noise exposure, including working on the ramp for an airline for 34 years. *Id*. The examiner also acknowledged Appellant's subjective complaints of experiencing tinnitus. [R. at 1203 (1195-1205)]. Despite considering the totality of the record, the examiner could not render an etiology opinion without speculation. [R. at 1204-05 (1195-1205)]. The examiner explained that her inability to render an opinion was based on the absence of a valid separation audiogram, evidence of many years of occupational noise exposure following Appellant's discharge from service, and Appellant's lay reports of an onset of tinnitus only two years prior to the

examination. *Id*. Such rationale is sufficient to support the examiner's determination. *See Sharp v. Shulkin*, 29 Vet.App. 26, 33 (2017) (the Board is permitted to accept a VA examiner's statement that she cannot offer an opinion without resorting to speculation when the it is shown that it is not based on the absence of procurable information).

Further, Appellant's assertion that the examiner failed to explain why a separation audiogram is necessary to determine etiology is without merit. [App. Br. at 4]. In making this contention, Appellant overlooks the other evidence of record that the examiner considered in making her conclusion which included an enlistment audiogram that showed normal hearing and Appellant's own reports of a recent onset of tinnitus. [R. at 1204-05 (1195-1205)]. It follows that the examiner provided adequate explanation for why she could not provide an etiology opinion without relying solely on the absence of a separation audiogram. *Id*. Appellant also does not cite to, or suggest the existence thereof, related objective evidence of record to show etiology that the examiner failed to consider. Thus, Appellant has shown no error. *See Berger v. Brown*, 10 Vet.App. 166, 169 (1997) ("[T]he appellant . . . always bears the burden of persuasion on appeals to this Court.").

Appellant's argument that the examiner failed to assess the probability as between two known causes of delated onset tinnitus – i.e., in-service noise exposure vs. post-service noise exposure – asks more than the law requires, and thus, fails to establish error. [App. Br. at 4]. The examiner here clearly considered both possibilities, discussing both the length and type of Appellant's exposure

during and after service, as well as the type of hearing protection Appellant used both during and after service. [R. at 1204-05]. Thus, it is clear that she considered all procurable data before stating that she could not opine, without resorting to speculation, whether Appellant's tinnitus was a result of service. *See Sharp*, 29 Vet.App. at 33; *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). She further explained the basis for her conclusion that she could not offer a non-speculative opinion. [R. at 1204]. As such, the Board was permitted to accept her statement that she could not offer an opinion without resorting to speculation. *See Sharp*, 29 Vet.App. at 33; *Jones*, 23 Vet.App. at 390 ("An examiner's conclusion that a diagnosis or etiology opinion is not possible without resort to speculation is a medical conclusion just as much as a firm diagnosis or a conclusive opinion."). Accordingly, Appellant has failed to establish that the August 2011 examination and opinion is inadequate or that the Board did not properly rely on it. *See Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (discussing that a medical examination or opinion is adequate where the examiner's opinion is based upon consideration of the Veteran's prior medical history and describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one).

### B. THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS OR BASES FOR ITS DETERMINATION

Appellant contends that that Board flatly ignored the evidence he submitted regarding delayed onset to conclude that he failed to meet his burden of production. [App. Br. at 6]. However, the Board did in fact acknowledge the

articles regarding delayed onset of tinnitus Appellant submitted. [R. at 8]. The Board also conceded acoustic trauma in service and discussed the August 2011 examination. *Id*. Based on its review of the record, the Board found that there is a lack of probative evidence of nexus, insufficient to balance. *Id*. The Board explained that while Appellant may have delayed-onset tinnitus, "[t]he evidence shows two sources of remote acoustic trauma," and "[n]othing makes one trauma more like a cause than the other." [R. at 8]. Appellant argues that the Board went "a step further" and concluded that competing negative evidence negates favorable evidence, but the Board decision contains no such statement. [App. Br. at 6]; [R. at 8]. The Board merely found that, in the absence of evidence to support any finding of a nexus, entitlement to the service connection is not warranted. [R. at 8].

A reading of the Board's entire decision shows that it adequately supported its denial of service connection. The Board thoroughly explained its finding that there was no evidence of a nexus between tinnitus and Appellant's period of service in the record, thereby eliminating the need for resolution of doubt. [R. at 8 ("In what is essentially the absence of evidence, there cannot be equipoise, and there can be no resolution of doubt.")]. This is correct. *See Fagan v. Shinseki*, 573 F.3d 1282, 1289 (Fed. Cir. 2009) (holding that an "examiner's statement, which recites the inability to come to an opinion, provides neither positive nor negative support for service connection," and thus, "is not pertinent evidence, one way or the other, regarding service connection"); *see also*, 38 U.S.C. § 5107(b)

(requiring the Secretary to apply the benefit of the doubt to the "positive and negative evidence"). The Board's statement of reasons or bases was sufficient to enable Appellant to understand the basis of its decision and to permit judicial review of the same. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Further, Appellant has not pointed to any evidence in the record to counter the Board's findings and support his contentions. [App. Br. at 5-7]. Because Appellant has failed to establish error warranting remand, the Court should affirm the Board's decision. 38 U.S.C. § 7261(a)(4) (the Board's findings of fact are reviewed by this Court under the clearly erroneous standard of review).

## V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments advanced, the Court should affirm the Board's December 20, 2018, decision which denied entitlement to service connection for tinnitus.

Respectfully submitted,

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