IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Vet. App. No. 19-2400

GEORGE A. OWENS,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

JAMES B. COWDEN
Deputy Chief Counsel

SHANNON E. LEAHY
Senior Appellate Attorney
Office of the General Counsel (027K)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6912

Attorneys for Appellee

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	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the U.S. Court of Appeals for Veterans Claims (Court) should affirm that part of the January 22, 2019, decision of the Board of Veterans' Appeals (Board or BVA) that denied entitlement to service connection for a bilateral hearing loss disability.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant, George A. Owens, appeals, through counsel, the January 22, 2019, Board decision that denied entitlement to service connection for a bilateral hearing loss disability. (Record Before the Agency (R.) at 12-14 (5-20)); *see* Appellant's Brief (App. Br.). The Secretary requests that the Court affirm the

Board's denial of entitlement to service connection for a bilateral hearing loss disability.

Appellant does not challenge the Board's denial of entitlement to (1) service connection for a bilateral ankle disability, (2) service connection for a bilateral knee disability, (3) service connection for sleep apnea, and (4) a rating in excess of 70% for post-traumatic stress disorder (PTSD). *See* App. Br. at 1-2 & n.2 (noting that "this appeal is limited to the BVA denial of service connection for bilateral hearing loss"); (R. at 7-12, 14-19 (5-20)). Therefore, any appeal of these issues has been waived, and the Court should dismiss the appeal with respect to those issues *See Pederson v. McDonald*, 27 Vet.App. 276, 281-86 (2015) (en banc) (declining to review the merits of an issue not argued and dismissing that portion of the appeal); *Cacciola v. Gibson*, 27 Vet.App. 45, 48 (2014) (same).

B. Statement of Facts

Appellant served on active duty from January 1969 to February 1972, including service in Vietnam. (R. at 2039). His hearing was normal on examination at both entrance to and separation from service. (R. at 2124 (2123-24); 2105 (2104-05)). At his April 1968 examination for entrance onto active duty, the following thresholds were reported on audiometric testing:

	500 Hertz (Hz)	1000 Hz	2000 Hz	3000 Hz	4000 Hz	6000 Hz
Right	0	0	10	–	0	–
Left	15	-5	15	–	0	–

(R. at 2124 (threshold levels reported in decibels (dB)). At his November 1971 examination for separation from active duty, the following thresholds were reported

on audiometric testing:

	500 Hz	1000 Hz	2000 Hz	3000 Hz	4000 Hz	6000 Hz
Right	5	5	5	–	0	–
Left	0	5	0	–	0	–

(R. at 2105 (threshold levels reported in dB)). The only scores that showed a worsening during service were Appellant's right ear at 500 Hz and 1000 Hz (a 5-dB positive shift) and left ear at 1000 Hz (a 10-dB positive shift).

On his separation Report of Medical History in November 1971, Appellant specifically denied having or ever having had hearing loss. (R. at 2102 (2102-03)); *see also* (R. at 2106 (February 1972 Statement of Medical Condition (When Examined More than 3 Days Prior to Separation) documenting Appellant's report that there has been no change in his medical condition from the time of his November 1971 separation medical examination)).

An October 2006 Department of Veterans Affairs (VA) audiology consultation documents Appellant's report that a physician recommended that he wear hearing aids several years ago. (R. at 899 (898-99)). The examiner noted "History significant for noise exposure in and out of service." *Id.* The examiner found that Appellant's hearing was within normal limits, with excellent speech discrimination scores bilaterally. *Id.*

At a May 2013 VA audiology consult and evaluation, Appellant reported that he could not hear the TV and could not understand other people speaking. (R. at 262 (261-62)). He stated that he noted these difficulties "a few years ago." *Id.* He reported intermittent bilateral tinnitus. *Id.* Testing revealed mild-moderate

sensorineural hearing loss (SNHL) in the right ear and moderate SNHL in the left ear, with excellent word discrimination in both ears. *Id.*

In May 2015, Appellant filed a claim seeking, *inter alia*, service connection for hearing loss and tinnitus. (R. at 267-70).

Appellant received a VA Compensation and Pension (C&P) audiological examination in August 2015. (R. at 209-13). The VA examiner interviewed and examined Appellant and reviewed Appellant's claims file (c-file). *Id.* The examiner diagnosed SNHL bilaterally. *Id.* at 210-11. The examiner found that Appellant did not have significant changes in hearing thresholds in service, finding that there was no permanent positive threshold shift (worse than reference threshold) greater than normal measurement variability at any frequency. *Id.* at 211-12. The examiner opined that Appellant's bilateral hearing loss was not at least as likely as not caused by or a result of service because Appellant had normal hearing on his April 1968 entrance exam and on his November 1971 separation exam and a comparison of these two exams indicated that there was no significant threshold shift, which indicated no decline in hearing. *Id.*

The August 2015 VA examiner also noted that Appellant reported bilateral recurrent tinnitus, which Appellant reported started in the 1970s, corresponding to his time in the Army. (R. at 212). The VA examiner opined that it was at least as likely as not that Appellant's tinnitus was due to his military noise exposure. *Id.* The examiner's rationale was that Appellant worked as a wheeled vehicle mechanic while in service, was exposed to combat noise while serving in Vietnam,

specifically at his base camp he "could hear rockets and gun fire every night" and reported noise exposure from explosives and loud vehicles, and reported the tinnitus started in the 1970s, which corresponded with his service in the Army. *Id.* at 212-13.

A VA regional office (RO), *inter alia*, denied entitlement to service connection for bilateral hearing loss in a December 2015 rating decision. (R. at 170 (146-54, 166-74)). The RO granted entitlement to service connection for bilateral tinnitus. *Id.* Appellant filed a timely notice of disagreement (NOD) in December 2015 regarding, *inter alia*, the RO's denial of service connection for hearing loss. (R. at 143-45). The RO issued a Statement of the Case (SOC) in January 2017, continuing the denial. (R. at 107 (79-111)). Appellant filed a timely substantive appeal in February 2017. (R. at 47-48).

In January 2019, the Board issued the decision here on appeal, denying entitlement to service connection for bilateral hearing loss due to a lack of nexus. (R. at 12-14 (5-20)). This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's January 2019 denial of entitlement to service connection for bilateral hearing loss as the Board's determination is supported by a plausible basis in the record and an adequate statement of reasons or bases. The August 2015 VA examination and medical opinion is adequate, and the Board did not err in relying upon it.

Appellant asserts that, because VA has recognized, as a general matter, a potential relationship between hearing loss and tinnitus, he is therefore entitled to service connection for bilateral hearing loss because he is service connected for tinnitus, notwithstanding that he points to no evidence that his hearing loss and his service-connected tinnitus are, in fact, related in this case. His arguments are unpersuasive, and he fails to demonstrate error in the Board's decision.

IV. ARGUMENT

In all cases, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (clarifying that the appellant bears the burden of demonstrating error). Moreover, to warrant judicial interference with the Board decision, the appellant must show that such demonstrated error was prejudicial to the adjudication of his claim. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). It is the responsibility of the appellant, and the appellant alone, to articulate the basis of his arguments and develop those arguments sufficient to permit an informed consideration of the same. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments). Appellant fails to meet his burden in this case. Accordingly, the Court should affirm the Board's denial of entitlement to service connection for bilateral hearing loss.

A. The Board properly denied entitlement to service connection for bilateral hearing loss because there is a plausible basis for its determination that the nexus element has not been met.

In the decision on appeal, the Board properly denied service connection for bilateral hearing loss. (R. at 12-14 (5-20)). To establish service connection, a claimant must generally prove "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship [a 'nexus'] between the present disability and the disease or injury incurred or aggravated during service." *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2007).

The determination as to whether a veteran is entitled to service connection is a finding of fact for the Board to make in the first instance, which this Court reviews for clear error. *See* 38 U.S.C. § 7261(a)(4); *Washington v. Nicholson*, 19 Vet.App. 362, 366 (2005). If there is a plausible basis in the record for the Board's findings, then those findings are not clearly erroneous, and the Court must affirm. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) ("[T]his Court is not permitted to substitute its judgment for that of the [Board] on issues of material fact; if there is a 'plausible' basis in the record for the factual determinations of the [Board], even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them.").

A Board decision must be supported by a statement of the reasons or bases that adequately explains the basis of the Board's material findings of fact and conclusions of law sufficient to enable the claimant to understand the basis of the

Board's decision and facilitate judicial review by the Court. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

In the decision on appeal, the Board denied entitlement to service connection for bilateral hearing loss due to a lack of nexus. (R. at 12-13 (5-20)); *see Shedden*, 381 F.3d at 1167. The Court should affirm the Board's decision as the Board's determination has a plausible basis in the record and, therefore, is not clearly erroneous. *See Gilbert*, 1 Vet.App. at 53. In determining that the nexus element had not been demonstrated, the Board relied on Appellant denying having or ever having had hearing problems on his November 1971 separation Report of Medical History, (R. at 2102 (2102-03)); that Appellant's November 1971 separation Report of Medical Examination audiogram showed normal hearing, per the August 2015 VA examiner, (R. at 2105 (2104-05); 211-12 (209-13)); that Appellant's hearing was within normal limits on examination in October 2006, (R. at 899 (898-99)); that Appellant reported, in an October 2006 VA audiology consult, significant noise exposure both in and out of service, (R. at 899); and the August 2015 VA examiner's determination that Appellant's bilateral hearing loss disability was less likely than not related to service, (R. at 211-12). *See* (R. at 12-

13). The Board permissibly afforded "great probative weight to the August 2015 VA examiner's opinion, as it was performed by a medical professional who possesses the necessary training and expertise to render an opinion on the matter, involved a thorough review of [Appellant's] file, and includes an opinion that is supported by a well-reasoned rationale." (R. at 13); *see Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (recognizing that it is the Board's duty, as fact finder, to assess the credibility and probative weight of the evidence); *Caluza*, 7 Vet.App. at 506; *see also Monzingo v. Shinseki*, 26 Vet.App. 97, 105-06 (2012) (per curiam) (explaining that a medical opinion is adequate if it is based on a correct factual premise, pertinent history and examinations, and provides sufficient detail to fully inform the Board on its medical question). The Board accurately noted that there was no competent evidence to weigh against the 2015 medical opinion. (R. at 13). The Board thus found that the preponderance of the evidence was against Appellant's claim of entitlement to service connection for bilateral hearing loss and properly denied the claim. *Id.* at 13-14.

Appellant contends that the Board decision should be remanded. *See* App. Br. His arguments are not persuasive. First, he asserts that the 2015 VA examiner "did not directly address the nexus element" as her "negative opinion was predicated on the negative service records, including the audiometric results," alluding that "the examiner apparently was of the erroneous apparent belief that negative service medical records alone will suffice to preclude direct service

connection for hearing loss." App. Br. at 6. In making this argument, Appellant relies unpersuasively on the decision in *Hensley v. Brown*, 5 Vet.App. 155 (1993).

Appellant notes the Court's holding in *Hensley* and implies without support that the holding therein precludes a medical examiner from providing a negative nexus opinion based upon that examiner's finding that there was no permanent positive threshold shift greater than normal measurement variability from entrance to separation, which indicates no decline in hearing. The holding in *Hensley*, however, placed no restriction upon the evidence a medical examiner may find medically significant. Rather, in *Hensley*, the Court held that "when audiometric test results at a veteran's separation from service do not meet the regulatory requirements for establishing a 'disability' at that time[, *see* 38 C.F.R. § 3.385], he or she may nevertheless establish service connection for a current hearing disability by submitting evidence that the current disability is casually related to service." 5 Vet.App. at 159-60. Thus, it was recognized that service connection for hearing loss *could* be established even when the separation examination showed normal hearing. *See id.* In so holding, the *Hensley* Court specifically noted that service connection for hearing loss was subject to the same requirements of establishing a current disability and a determination of a relationship between the disability and an in-service disease or injury. *Id.* Thus, the Court made clear that a medical nexus based on the evidence is required to establish service connection. *Id.*

In the decision on appeal, the Board did not rule out the possibility of service connection based upon the lack of an in-service hearing loss disability as defined by 38 C.F.R. § 3.385. *See* (R. at 12-14 (5-20)). Rather, as discussed above, it properly relied upon the adequate August 2015 medical opinion in which the VA examiner determined, based on her medical expertise, that the shift in hearing levels during service was within the normal measurement variability, such that there was no permanent hearing shift due to noise exposure in service. *Id.*; (R. at 210-12 (209-13)). The evidence plausibly supports this reading of the evidence. Contrary to Appellant's bald assertion, App. Br. at 6, the VA examiner considered the nexus element. *See* (R. at 210-12). Further, the VA examination report is adequate as the examiner reviewed Appellant's medical history, performed an audiometric evaluation, rendered a conclusion regarding nexus, and provided sufficient rationale. (R. at 209-12); *see Monzingo*, 26 Vet.App. at 105-06; *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007).

Appellant's second argument is also unavailing. He contends that the Board erred in failing to mention the "relevant and material fact" that he has been granted service connection for tinnitus. App. Br. at 6-8. In support of his argument, he relies on the rescinded VA Training Letter 10-02 (Mar. 18, 2010), which notes that SNHL is the most common cause of tinnitus. App. Br. at 6-7 (citing VA Training Letter 10-02 at E.3 (Mar. 18, 2010)).[1] His argument is not persuasive, and the

[1] Recognizing that this training letter is rescinded, he also cites extra-record evidence that notes that "tinnitus can be the result of a number of health conditions,

Board provided an adequate statement of reasons or bases for its determination. *See Hilkert*, 12 Vet.App. at 151; *Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506.

That Appellant has been granted service connection for tinnitus, and based on the 2015 VA examiner's opinion, is not in dispute. The RO granted service connection for tinnitus in a December 2015 rating decision, (R. at 170 (146-54, 166-74)), after the August 2015 VA examiner opined that it was at least as likely as not that Appellant's tinnitus was caused by military noise exposure because Appellant worked as a mechanic in service, served in Vietnam and was exposed to combat noise, including rockets and gun fire every night, explosives, and loud vehicles, and Appellant's report that his tinnitus started in the 1970s, which corresponded with his service in the Army, (R. at 212-13 (209-13)).

Appellant's argument is that, based on VA's recognition in a rescinded training letter of the potential relationship between hearing loss and tinnitus, generally (as hearing loss being the most common cause of tinnitus), he is therefore entitled to service connection for bilateral hearing loss because he is service-connected for tinnitus, notwithstanding that there is no evidentiary support for a relationship between *his* hearing loss—which he denied having or ever having had at separation from service, did not have during or at separation from service,

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such as noise-induced hearing loss." App. Br. at 7; *see Obert v. Brown*, 5 Vet.App. 30, 32 (1993) ("[The] Court is precluded by statute from considering any material which was not contained in the record before the Board.").

as shown from the normal audiograms at entrance and separation showing no significant permanent threshold shift, that he had hearing within normal limits in 2006 (over thirty years after separation), and a medical professional's opinion, considering the facts of his case, that his current hearing loss was not related to service—and *his* tinnitus—which he reported having since the 1970s, consistent with his time in service, and a medical professional has opined is at least as likely as not related to his in-service noise exposure. His argument is untenable.

Appellant's theory of the case is that his current bilateral hearing loss "cannot be dissociated from already service-connected tinnitus." App. Br. at 1. That is, he contends that because he is service connected for tinnitus based on in-service noise exposure, he is automatically entitled to be service connected for bilateral hearing loss. As he explains in his brief:

> Although one might quibble whether tinnitus is a "symptom" of hearing loss, or whether hearing loss and tinnitus are two separate disabilities, unless the two conditions can be dissociated, a grant of service connection for the Veteran's bilateral sensorineural hearing loss is warranted. If hearing loss and tinnitus are two separate disabilities, it would be an absurd result to grant service connection for the secondary disability (tinnitus) while denying service connection for the primary disability (sensorineural hearing loss). If tinnitus is merely a symptom of the Veteran's hearing loss, it would be an equally absurd result to grant service connection for a disability manifestation (tinnitus) while denying service connection for the underlying disability (sensorineural hearing loss).

App. Br. at 7-8 (internal footnote omitted, citing *Fountain v. McDonald*, 27 Vet.App. 258, 267 (2015)).

His theory fails, however, because he provides no competent record evidence that his service-connected tinnitus was caused by (or is a purported symptom of[2]) his current hearing loss. Rather, he relies solely on VA's recognition, in a rescinded training letter, that hearing loss is the most common cause of tinnitus. This Training Letter, however, is general in nature and does not address the facts existent in this case. *See* VA Training Letter 10-02 (Mar. 18, 2010); *see also Sacks v. West*, 11 Vet.App. 314, 316-17 (1998) (holding that treatise materials discussing generic relationships are not specific enough to show nexus). Appellant's reliance on this Training Letter and his own assertions about the general nature of tinnitus and hearing loss are unavailing. *See Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."); *see also Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (noting that "appellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence").

[2] As the Court recognized in *Fountain v. McDonald*, wherein the Court addressed the rescinded Training Letter 10-02 upon which Appellant relies, the VA rating schedule, specifically 38 C.F.R. § 4.87, identifies tinnitus as a disability subject to compensation payments without requiring that the tinnitus occur in conjunction with any other condition or disease. 27 Vet.App. 258, 267 (2015); *see id.* ("VA treats tinnitus as an independent, stand-alone illness or disease rather than simply a symptom for VA compensation purposes"). The Court explained that "[i]f VA viewed tinnitus as merely a symptom of another condition and not a legitimate, independent illness, disease, or disability itself, tinnitus would not be subject to compensation in its own right as a service-connectable disability." *Id.*

Contrary to his argument, Appellant is not entitled to service connection for bilateral hearing loss simply because he is service connected for tinnitus. To the extent that Appellant's argument regarding the relationship between tinnitus and hearing loss encompasses a contention that this issue reasonably was raised by the record, this argument fails. *See Monzingo*, 26 Vet.App. at 104-05. As the Court recognized in *Monzingo*, "tinnitus and hearing loss are recognized by the Secretary as separate and distinct disabilities" and Appellant fails to identify any competent record evidence relating his current hearing loss and the service-connected tinnitus he has reported having had since the 1970s. *Id.* at 104-05. Appellant fails to demonstrate that the Board's statement of reasons or bases frustrates judicial review. *See Hilkert*, 12 Vet.App. at 151; *Allday*, 7 Vet.App. at 527; *see also Monzingo*, 26 Vet.App. at 105.

Further, to the extent that Appellant argues that the August 2015 VA medical opinion was inadequate because the examiner did not discuss the relationship, if any, between tinnitus and hearing loss, App. Br. at 5, 7, this argument also is unavailing. Appellant does not establish that the 2015 VA examiner was required to make an express statement as to the relationship, if any, between tinnitus and hearing loss in order to render an adequate examination. His argument relies solely on his citation to the VA Clinician's Guide. App. Br. at 7. However, the VA Clinician's Guide is not a binding document, but rather instructive, and allows each examiner discretion as to how to conduct an examination in an individual case. *See Allin v. Brown*, 6 Vet.App. 207, 214 (1994). The first chapter of the Guide itself

states, "[t]he Clinician's Guide and any of its parts (worksheets) are intended solely as a guide for clinicians, and it is not legally binding on a clinician to perform all portions of the examination protocol." VA CLINICIAN'S GUIDE § 1.1 (2002).

Moreover, as discussed above, the August 2015 VA examination was adequate. The VA examiner specifically opined based on her medical expertise that the shift in Appellant's hearing threshold in service was not medically significant and that permanent worsening was ruled out based on that evidence. (R. at 210-11 (209-13)). In contrast to Appellant's hearing loss—which he did not report began in service, he denied upon separation from service, and the examiner found, based on her medical expertise and judgment to the facts of the specific case, was not at least as likely as not a result of service—the VA examiner opined that Appellant's tinnitus, which he reported began in the 1970s which corresponded with his time in service, was at least as likely as not due to military noise exposure. (R. at 212-13). The VA examiner's opinions were adequate to inform the RO and the Board as to the medical significance of the evidence of record. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (noting that a medical opinion must contain clear conclusions with supporting data and a reasoned medical explanation connecting the two). Thus, the Court should reject Appellant's argument that the August 2015 VA medical examination and opinion was inadequate. The Board did not clearly err by finding the August 2015 VA examination report adequate and probative and relying on it in support of its decision.

B. Appellant has abandoned all issues not argued in his brief.

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief and submits that any other arguments or issues should be deemed abandoned. *See Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

V. CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should affirm that part of the January 22, 2019, Board decision that denied entitlement to service connection for bilateral hearing loss.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ James B. Cowden
JAMES B. COWDEN
Deputy Chief Counsel

/s/ Shannon E. Leahy
SHANNON E. LEAHY
Senior Appellate Attorney
Office of General Counsel (027K)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6912

Attorneys for Appellee,
Secretary of Veterans Affairs