

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

JOHN J. MULL,
Appellant,

v.

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

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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

JOHN J. MULL,)	
)	
Appellant,)	
)	
v.)	Vet.App. No. 19-3992
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

ISSUES PRESENTED

1. Whether the Board of Veterans' Appeals' (Board or BVA) statement of reasons or bases is insufficient where the Board failed to address evidence that is potentially favorable to the claimant.
2. Whether the arguments for reversal lack merit where the arguments are undeveloped or unsupported.

STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a), which grants the United States Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

John J. Mull (Appellant) appeals the May 13, 2019, decision of the Board that denied entitlement to service connection for a bilateral hearing loss disability and denied entitlement to service connection for tinnitus. [Record (R.) at 2-12]. In his brief, he argues that service connection is warranted. [Appellant's Informal Brief (Br.) at 3].

The Secretary asks the Court to vacate and remand the May 13, 2019, Board decision that denied service connection because the Board failed to address evidence that is potentially favorable to the Appellant.

C. Statement of Relevant Facts and Procedural History

The Veteran served on active duty from December 1962 to December 1964 as a military policeman. [R. at 155]. His service medical records were obtained by VA and do not contain any notations regarding complaints of or treatment for hearing loss or tinnitus. [R. at 167-201]]. In November 1964, Appellant reported he did not have, nor had he had, ear "trouble." [R. at 188 (188-89)]. At his separation examination in November 1964, an audiology examination was

conducted, and Appellant was assigned a “1” rating assessing hearing under the PULHES profile system. [R. at 191 (190-91)]. In January 2013, Appellant filed a claim for service connection for bilateral hearing loss and tinnitus. [R. at 237 (237-42)]. VA also received a January 2013 private hearing examination. [R. at 235-36]. The examiner diagnosed Appellant with hearing loss and tinnitus and opined that “[i]t is more than likely that Mr. Mull’s hearing loss and complaint of tinnitus was (sic) due to his military experience (since serving as a Military Police).” [R. at 235 (235-36)].

Appellant was provided a VA examination in November 2013. [R. at 80 (80-84)]. The examiner opined that Appellant’s hearing loss was not due to military noise exposure. [R. at 83 (80-84)]. The examiner also noted that Appellant had tinnitus and that his “tinnitus is at least as not (50% probability or greater) a symptom associated with hearing loss.” [R. at 84 (80-84)].

In a November 30, 2013 rating decision, VA denied service connection for hearing loss and tinnitus. [R. at 132-35]. After a review of the evidence to include Appellant’s service medical records, Appellant’s private opinion, and the VA examination and opinion, the RO denied service connection for hearing loss as it accorded greater weight to the VA opinion as that examiner had reviewed Appellant’s records, including his service medical records and had provided an explanation for the opinion. [R. at 133 (132-35)]; see [R. at 127-29] (December 2013 letter to Appellant). The RO also denied service connection for tinnitus, again

according greater weight to the VA examiner's opinion. [R. at 134 (132-35)]. Appellant timely filed a Notice of Disagreement. [R. at 119-20]. He submitted a Statement in Support of Claim in September 2014, contending that his doctor had found his hearing loss and tinnitus to be related to service. [R. at 107]. The RO issued a Statement of the Case in December 2015. [R. at 85-106]. Appellant perfected his appeal in January 2016. [R. at 76].

Appellant testified at a videoconference hearing in March 2019. [R. at 21 (21-42)]. During his March 2019 videoconference hearing, Appellant testified that he was exposed to numerous types of gunfire and other weapons fire without ear protection during service. [R. at 23-25 (21-42)]. His representative indicated that Appellant had testing in January 2013 by his private physician as to his hearing loss and that "this will be faxed in on the waiver on Friday." [R. at 39 (21-42)]

On May 10, 2019, VA received correspondence from the Appellant that included a February 2019 medical opinion from Hackensack Meridian Health. [R. at 15 (15-19)]. Dr. Rudolph noted Appellant had been a military police officer in service and opined that Appellant's "hearing loss and tinnitus are a direct result from his military service." [R. at 15 (15-19)]. Appellant waived RO consideration of that evidence. [R. at 19 (15-19)].

On May 13, 2019, the Board rendered the decision currently on appeal in which the Board found that Appellant's hearing disabilities did not have their onset in service, did not manifest within one year following service discharge, continuity

of symptomatology. [R. at 5 (2-12)]. The Board did not reference or discuss the February 2019 opinion. [R. at 2-12].

SUMMARY OF THE ARGUMENT

The Court should remand the May 10, 2019, Board decision that denied entitlement to service connection for Appellant's hearing disabilities because the Board failed to address evidence that is potentially favorable to the Appellant.

ARGUMENT

A. THE BOARD'S STATEMENT OF REASONS OR BASES WAS INADEQUATE BECAUSE THE BOARD FAILED TO ADDRESS APPELLANT'S MAY 2019 SUBMISSIONS CONTAINING A FEBRUARY 2019 PRIVATE MEDICAL OPINION

It is well established that the Board is required to include in its decision "a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented in the record;" that statement must be adequate to enable an appellant "to understand the precise basis for the Board's decision, as well as to facilitate informed judicial review in this Court." *See Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see also* 38 U.S.C. § 7104(d)(1).

Moreover, "decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." 38 U.S.C. § 7104(a); *see Majeed v. Principi*, 16 Vet.App. 421, 431 (2002). Deficiencies in the Board's analysis preclude effective judicial review, warranting remand. *See Simington v. West*, 11

Vet.App. 41, 45 (1998); *see also Meeks v. Brown*, 5 Vet.App. 284, 288 (1993); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). “[T]he Board is required to consider all issues raised either by the claimant . . . or by the evidence of record.” *Robinson v. Mansfield*, 21 Vet. App. 545, 552 (2008), *aff’d sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). The Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive and provide the reasons for its rejection of any material evidence favorable to the claimant. *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

Appellant argues that the evidence submitted in May 2019, the private medical examination and opinion from February 2019, and an examination from January 2013, support his claim. [Br. at 2].

Here, the Secretary asserts the Board erred because it failed to address Appellant’s correspondence received on May 10, 2019. [R. at 15 (15-19)]. This correspondence included a February 27, 2019, medical opinion from Hackensack Meridian Health. *Id.* The opinion linked Appellant’s hearing loss and tinnitus to his period of service and thus is potentially favorable evidence. Because the Board did not address this evidence, the Secretary asserts that remand is warranted for the Board to address this in the first instance. *Washington v. Nicholson*, 19 Vet.App. 362, 387-68 (2005). Accordingly, the Secretary agrees with Appellant that a remand is warranted so that the Board can consider Appellant’s May 2019

submissions, and “provide the reasons for its rejection of any material evidence favorable to the claimant.” *Thompson*, 14 Vet.App. at 188.

However, to the extent Appellant asserts the Board erred in failing to address January 2013 private examination, the Secretary asserts his argument lacks merit. The Board did address Appellant’s January 2013 examination, however it found that it was of less probative value than the VA examination. See [R. at 7, 8,9, 11 (4-12)]. Appellant does not assert any error in the Board’s assessment of the probative value of the VA examination or his 2013 examination. Accordingly, the Secretary does not assert that remand is warranted on that basis. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal), *aff’d per curiam*, 232 F.3d 908 (Fed.Cir. 2000) (table).

B. APPELLANT’S ARGUMENTS FOR REVERSAL ARE UNSUPPORTED AND, TO THE EXTENT HE ARGUES THE BOARD SHOULD HAVE APPLIED THE BENEFIT OF THE DOUBT, HIS ARGUMENT LACKS MERIT.

Appellant argues that service connection for bilateral hearing loss is appropriate and service connection for tinnitus is warranted. [Br. at 3]. To the extent that Appellant argues for reversal, Appellant’s arguments for reversal are misplaced and do not establish that reversal is warranted. *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (“reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board’s decision”); *Johnson v.*

Brown, 9 Vet.App. 7, 10 (1996) (“when the only permissible view of the evidence is contrary to that found by the BVA, reversal is the appropriate remedy”). Here, Appellant fails to establish that the only permissible view of the evidence is contrary to the Board’s decision. See *Hilkert v. West*, 12 Vet.App. at 151. Accordingly, the Court should reject any arguments for reversal.

Appellant appears to argue that the Board failed to apply 38 C.F.R. §§ 3.102, 4.2, and 4.3. [Br. at 2]. However, Appellant makes no discernable argument as he fails to explain how the Board should have applied these regulations. [Br. at 2]. Accordingly, Appellant has not met his pleading standard. See *Abbott v. O’Rourke*, 30 Vet.App. 42, 50 n.3 (2018) (rejecting Appellant’s arguments for “failing to satisfy even the liberal standard for *pro se* pleadings at the Court”); *Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (providing that the Court need not address arguments that are “far too terse to warrant detailed analysis by the Court”).

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellee, Robert L. Wilkie, respectfully urges the Court to remand the Board’s May 13, 2019, decision that denied entitlement to service connection for Appellant’s bilateral hearing loss and tinnitus because the Board failed to address evidence that is potentially favorable to the Appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 6th day of February 2020 a copy of the foregoing was mailed, postage prepaid, to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Lamar D. Winslow
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