

IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS

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**DONALD STEVEN GIPSON,**  
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 APPELLEE  
SECRETARY OF VETERANS AFFAIRS

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**DONALD STEVEN GIPSON,** )  
 )  
 Appellant, )  
 )  
 v. ) Vet.App. No. 19-1007  
 )  
 **ROBERT L. WILKIE,** )  
 Secretary of Veterans Affairs, )  
 )  
 Appellee )

## APPELLEE'S BRIEF

Whether the Court should affirm the November 9, 2018, decision of the Board of Veterans' Appeals (Board) that denied reopening Appellant's claim for entitlement to service connection for bilateral hearing loss.

## Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

Donald S. Gipson, (Appellant), appeals the November 9, 2018, decision of the Board that denied reopening his claim for entitlement to service connection for bilateral hearing loss.

The Board reopened and granted Appellant's claim of entitlement to service connection for tinnitus. This is a favorable determination that the Court may not disturb. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

### **Statement of Relevant Facts**

Appellant served on active military duty from November 1987 to October 1992. [Record (R.) at 3846]. In February 2006, he filed a claim for entitlement to service connection for bilateral hearing loss. [R. at 3110]. In October 2006, Appellant was provided a VA medical examination. [R. at 3027-3032]. The examiner acknowledged Appellant's complaints of in-service noise trauma and hearing loss, [R. at 3027], but noted his hearing was normal at testing at that time and that he did not complain of hearing loss. [R. at 3028]. The examiner noted mild hearing loss at 6000hz on one examination during service, but reported subsequent examinations were normal. *Id.* The examiner also noted that an examination four years after discharge showed normal results. [R. at 3030]. The examiner opined against a link between Appellant's hearing loss and his military service. *Id.* A November 2006 rating decision denied the claim. [R. at 3011-3026]. Appellant did not appeal this decision and it became final.

In October 2014, Appellant sought to reopen his bilateral hearing loss claim. [R. at 1942-1943]. An April 2015 rating decision found that new evidence was not submitted and did not reopen the claim. [R. at 110-131]. That same month, Appellant requested reconsideration. [R. at 104, (102-104)].

A May 2015 rating decision continued to deny reopening the claim. [R at 69-91]. The decision explained that without a qualified medical opinion based upon review of the all the medical evidence, service connection cannot be granted. [R. at 86]. Later that same month, Appellant filed a Notice of Disagreement (NOD). [R. at 64-65]. A Statement of the Case (SOC) was issued in August 2016 [R. at 45-59], and that same month, Appellant perfected his appeal. [R. at 43].

The Board denied Appellant's application to reopen. Specifically, it found Appellant's claim for hearing loss was previously denied in November 2006 because there was no nexus evidence that linked it to his military service. [R. at 6, (1-10)]. This appeal ensued.

### **III. SUMMARY OF ARGUMENTS**

The Court should affirm the November 9, 2018, decision of the Board that denied reopening Appellant's claim of entitlement to service connection for bilateral hearing loss. The Board provided an adequate statement of reasons or bases for its determinations, plausibly based its determination on the facts and application of the law, and Appellant has not demonstrated that the Board's decision was clearly erroneous or the result of prejudicial error.

### **IV. ARGUMENTS**

**The Board Provided an Adequate Statement of Reasons or Bases Where it Denied Reopening Appellant's Claim for Entitlement to Service Connection for Bilateral Hearing Loss, Plausibly Based its Determination on the Facts and the Law, and Appellant has not Demonstrated the Board's Decision is Clearly Erroneous or the Result of Prejudicial Error.**

The Court should affirm the Board's decision that denied Appellant's application to reopen a claim for entitlement to service connection for bilateral hearing loss, because there is a plausible basis for the Board's determinations, and Appellant has not demonstrated the Board's decision contained prejudicial error. See *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); 129 S. Ct. 1696, 173 L.ED. 2d 532 (2009) (Appellant bears the burden of demonstrating prejudicial error); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (noting that the appellant bears the burden of persuasion on appeals to the Court) *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

VA defines "new and material" as:

New evidence means existing evidence not previously submitted to agency decision makers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

38 C.F.R. § 3.156(a). As part of the passage of the Veterans Appeals Improvement and Modernization Act of 2017, VA no longer reopens claims based on "new and material evidence." Pub. L. 115-55, 131 Stat. 1105 (Aug. 23, 2017). That language is derived from the pre-Act version of the applicable regulation. See 38 C.F.R. §§ 3.156(a), 3.2400 (2019) (explaining that claims before the effective date of the Act are "legacy appeals" to be analyzed under VA's traditional process and claims after that date are to be adjudicated under a



modernized appeal system); 84 Fed. Reg. 2449 (Fed. 7, 2019) (stating the effective date of the Act is February 19, 2019). Appellant's claim was adjudicated under the legacy appeals system such that the "new and material evidence" standard applies here. Whether evidence is new and material for the purposes of reopening a finally disallowed claim is a finding of fact we review for clear error 38 U.S.C. § 7261(a)(4); *Elkins v. West*, 12 Vet.App. 209, 217-218 (1999) (en banc). A factual finding is clearly erroneous when the Court is "left with the definite and firm conviction that a mistake has been committed". *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

The Board must provide a statement of the reasons or bases for its determinations that are adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Moody v. Wilkie*, 30 Vet.App. 329, 339 (2018). To accomplish this, the Board is required to assess the credibility, probative value, and persuasiveness of the evidence and to provide reasons for rejecting material evidence that is 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).

Appellant argues the Board provided inadequate reasons or bases for its determinations. [Appellant's Brief (App. Br.) at 5]. Specifically, he contends the Board did not analyze whether his lay statements that he experienced hearing loss in service were new and material, particularly statements made in his NOD

and substantive appeal. [App. Br. at 6-8]. However, such statements were existent in the record in November 2006, when the Regional Office (RO) denied Appellant's claim for entitlement to service connection for bilateral hearing loss, and as such, these statements are not new evidence.

In his May 2015 NOD, Appellant asserted that he developed hearing loss while in the Navy and that was the only time he was exposed to high noise. [R. at 65]. In his August 2016 substantive appeal, Appellant stated that he developed and was diagnosed with hearing loss while on active military duty. [R. at 43]. These statements merely demonstrate Appellant's belief he suffered noise exposure and hearing loss in service. This was not new evidence, insofar as the evidence at the time of the prior final denial in November 2006 contained Appellant's assertion that he had hearing loss in service. In Appellant's February 2006 claim, he reported he suffered hearing loss due to working around F14s and ear infections. [R. at 3110]. More to the point, at the October 2006 VA examination, Appellant reported his hearing loss was caused by working on the flight line in the military. [R. at 3027]. He specifically stated that his hearing loss existed for approximately 15 years and progressed gradually. *Id.* Importantly, Appellant served from November 1987 to October 1992, such that he was in service approximately 15 years prior to his VA examination in 2006. See [R. at 3846]; [R. at 3027]. Thus, his statements that he experienced hearing loss in service, which he made in his May 2015 NOD and August 2016 substantive appeal, are not new; rather, that assertion is repetitive of assertions he made

prior to the November 2006 rating decision. And, even insofar as the November 2006 rating decision indicated that service connection for bilateral hearing loss was denied based upon the lack of both an in-service occurrence and a nexus, see [R. at 3023], this finding does not negate that the statements provided by Appellant during the current claim stream are duplicative of the assertion made to the VA examiner in October 2006. See [R. at 3027].

And, although the Board did not specifically refer to his NOD and substantive appeal, this does not demonstrate error. The Board is presumed to have considered all evidence presented in the record and is not required to discuss every piece of evidence. *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007). The Board did not have to specifically address his NOD and substantive appeal where neither statement presented evidence that was not previously of record. 38 C.F.R. § 3.156(a). It is sufficient for Appellant to understand the basis of its determination that new and material evidence was not submitted to warrant reopening his claim. See *Moody*, 30 Vet.App. at 339.

To the extent the November 2006 rating decision for tinnitus and hearing loss both listed the lack of an in-service occurrence and lack of a nexus as the reason for denial of those claims, and the Board here found that a Appellant's lay assertion of in-service occurrence of tinnitus was sufficient to reopen, [R. at 7], despite the fact that Appellant asserted to the October 2006 examiner that tinnitus began in service, see [R. at 3030] (recording that Appellant asserted he had tinnitus for 15 years), this is not demonstrative of error in the Board's

decision. Rather, the determination to reopen tinnitus was favorable determination that the Court does not have jurisdiction over, *see Medrano*, 21 Vet.App. at 170, and had no impact on the fact that there was a plausible basis for the Board's finding that there was not new and material evidence sufficient to reopen his hearing loss claim (as explained above) Moreover, the Secretary notes that the Board's analysis made clear that there were additional distinctions insofar as tinnitus can be established by self-report and is generally incapable of objective confirmation, whereas the October 2006 examiner explained that the audiology tests in the record previously made clear that Appellant did not have hearing loss in service. [R. at 5]; *see* [R. at 3027-32].

## **V. CONCLUSION**

For the foregoing reasons, Board provided an adequate statement of reasons or bases for its decision, and that decision is based on a plausible basis in the evidence, such that the Court should affirm the Board's decision that denied reopening Appellant's claim of entitlement to service connection for bilateral hearing loss.

Respectfully submitted,

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