

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

RANDY L. WILLIAMS,
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**

RANDY L. WILLIAMS,)	
)	
Appellant,)	
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v.)	Vet. App. No. 19-4993
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ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

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

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

I. ISSUES PRESENTED

Whether the Court should affirm the Board of Veteran's Appeals (Board) July 21, 2019 decision, that denied entitlement to service connection for bilateral hearing loss (BHL), pharyngitis/viral syndrome, acne, and abnormal lab results.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

Appellate jurisdiction is predicated on 38 U.S.C. § 7252, which gives this Court exclusive jurisdiction to review final decisions by the Board.

B. Nature of the Case

Pro se Appellant, Randy L. Williams, seeks the Court's review of the July 21, 2019, Board of Veterans' Appeals (BVA or the Board) decision that denied his claim of entitlement to service connection for (1) BHL; (2) pharyngitis/viral syndrome; (3) acne; and (4) abnormal lab results. [Record Before the Agency (R.) (R. at 3-12)].

C. Relevant Factual and Procedural History

Appellant served on active duty from October 1991 to October 1995. [R. at 614]. Appellant's service does not include any foreign service. *Id.* In August 1993, service treatment records (STRs) indicate Appellant was treated for a sore throat and diagnosed with exudative pharyngitis and viral syndrome. [R. at 642-44]. March 1995 STRs reveal Appellant suffered from a "stuffy nose, sore throat, congestion and a cough x 4 days." [R. at 566 (566-67)]. He was diagnosed with clinically acute sinusitis. *Id.* at 567. Then in July 1995, Appellant was again diagnosed with exudative pharyngitis after suffering symptoms for 3 days. [R. at 569].

In September 1993, a hearing conservation record indicates Appellant's hearing was within normal limits with a mild hearing loss at 6000 Hz. [R. at 573, 645 (645-47)]. A hearing conservation examination in September 1994 documented that Appellant suffered ringing in the ears. [R. at 561 (561-62)]. Appellant's hearing again measured within normal limits. *Id.* at 562. In a

separation audiological test in September 1995, his hearing thresholds were found to be “stable.” [R. at 570].

Appellant received treatment for acne while in service, documented in a February 1994 STR. [R. at 649]. In June 1994, a dermatology record noted that his acne had improved. [R. at 653].

In January 2012, Appellant filed an application for compensation for, *inter alia*, abnormal lab results, pharyngitis/viral syndrome, hearing impairment, and acne. [R. at 606 (606-13); 602 (598-605)].

In November 2013, Appellant was afforded a VA medical examination for his nose, throat, larynx and pharynx. [R. at 256-61]. The examiner found that Appellant did not have a pharyngeal injury or any other pharyngeal conditions. *Id.* at 258. The examiner found that there was no diagnosis because the claimed condition of pharyngitis had resolved. *Id.* at 261. He opined that Appellant’s pharyngitis was less likely than not incurred in or caused by service. [R. at 303 (302-04)]. The examiner reasoned that “although claimant was treating for this condition while on active service, it is not a chronic condition and symptoms have resolved.” *Id.*

Appellant was also provided a VA hearing examination in November 2013. [R. at 224-31]. Appellant’s puretone thresholds at various frequencies were as follows:

Right Ear

A	B	C	D	E
500 Hz	1000 Hz	2000 Hz	3000 Hz	4000 Hz
10	10	5	25	25

Left Ear

A	B	C	D	E
500 Hz	1000 Hz	2000 Hz	3000 Hz	4000 Hz
15	15	10	20	25

Id. at 225. His speech discrimination score using the Maryland Consonant-Vowel Nucleus-Consonant (CNC) word list was 100% for both ears. *Id.* at 226. The examiner found that Appellant did not qualify for hearing loss according to VA standards. *Id.* at 228.

Appellant received a VA medical examination for his skin condition at that time as well. [R. at 262-67]. The examiner noted that Appellant did not have, nor had he ever had, a skin condition. *Id.* at 262. The examiner noted a specific history for acne in February 1994, but was unsure whether the condition got better. *Id.* at 263. The examiner found that there was no current diagnosis for acne because the condition had resolved. *Id.* In an accompanying medical opinion, the examiner opined that it was less likely than not that Appellant's skin condition was incurred in or caused by service. [R. at 306 (305-07)]. The

examiner reasoned that Appellant's in-service instance of acne was not a chronic condition and symptoms had resolved. *Id.*

In December 2013, the Regional Office (RO) issued a rating decision denying the claims. [R. at 192-201, 204-11]. Appellant filed a timely Notice of Disagreement (NOD) in April 2014 with respect to the December 2013 rating decision. (R. at 164-77). He also asserted that the RO committed clear and unmistakable error (CUE) in its decision. [R. at 166-69 (164-77)]. The RO issued a statement of the case (SOC) in January 2018 denying Appellant's CUE allegations. [R. at 63 (34-71)]. In February 2018, Appellant filed an appeal to the Board in which he reasserted his CUE allegations. [R. at 23-33].

III. SUMMARY OF THE ARGUMENT

Contrary to Appellant's arguments, the Board provided an adequate statement of the reasons or bases for its decision to deny his claim's for service connection for BHL, acne, pharyngitis and abnormal lab results. Appellant's Informal Brief (App. Inf. Br.) at 18-22. Appellant fails to establish that he has any current disabilities, and the conditions he is seeking service connection for are not considered chronic under 38 C.F.R. § 3.309(a). and therefore, the Board would not have been required to consider continuity of symptomatology. Appellant fails to assert any evidence the Board improperly weighed, and the decision addresses the probative weight to assign to the November 2013 VA examinations.

Additionally, the Board properly declined to address Appellant's argument that the December 2013 RO rating decision committed CUE, as there is no final decision for which a CUE motion can be based.

Finally, while Appellant argues that the Board should have considered a theory of entitlement that his abnormal lab results were manifestations of an undiagnosed illness, he is not entitled to service connection on this basis, and the Board was not required to consider it. Therefore, the Court should affirm the Board's decision.

IV. ARGUMENT

A. The Board did not err in declining to discuss continuity of symptomatology for the claims of BHL, acne and pharyngitis.

Liberally construing Appellant's arguments, he asserts that the Board erred when it failed to address whether he was entitled to service connection for BHL, acne and pharyngitis on a presumptive theory of entitlement based on continuity of symptomatology. App. Inf. Br. at 18-22. The Board correctly found that Appellant did not have BHL under VA standards, and did not have current acne or pharyngitis, and he could not establish service connection without a current disability. [R. at 6-8].

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the

claimed in-service injury or disease and the current disability. See 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); see also *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2019). For chronic diseases included in the provisions of 38 U.S.C. § 1101(3) and 38 C.F.R. § 3.309(a), there are two alternative methods of establishing service connection – chronicity and continuity of symptomatology. See *Walker v. Shinseki*, 708 F.3d 1331, 1335-36 (Fed. Cir. 2013).

The statutory presumptions of service connection are set forth in 38 U.S.C. § 1112, which provides for a presumption for “chronic disease[s] becoming manifest to a degree of 10% or more within one year from the date of separation from service. 38 U.S.C. § 1112, 1113. The Secretary implements this presumption through regulations 38 C.F.R. §§ 3.303(b), 3.307(a)(3) and 3.309(a). 38 C.F.R. § 3.303(b) provides for entitlement to service connection on a presumptive basis for post-service manifestations of “chronic disease” if the chronicity of the disease was “shown as such in service (or within the presumptive period under § 3.307),” or, if there is “continuity of symptomatology” after service. The presumptive period for a chronic disease under § 3.307 is one year from separation from service. The definition of a chronic disease is found in § 3.309(a), which enumerates several specific diseases that are eligible “chronic diseases” under the scheme. Only the chronic diseases listed under 38 C.F.R. § 3.309(a) may qualify for service connection under § 3.303(b). See *Walker*, 708 F.3d. at 1338-39.

A Board decision must include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions. 38 U.S.C. § 7104(d)(1). Such a statement must be adequate to inform Appellant of the basis for the Board's decision and to facilitate informed review by the Court. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). This statement of reasons or bases must, among other things, analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant and provide the reasons for its rejection of any such evidence. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). An adequate statement of reasons or bases also includes due consideration of all issues reasonably raised by Appellant or by the record. *Sondel v. Brown*, 6 Vet.App. 218, 220 (1194) ("[T]here must be some indication in an appellant's Substantive Appeal, other documents, or oral testimony that he wishes to raise a particular issue before the Board"); see *Robinson v. Peake*, 21 Vet.App. 545, 553 (2008) ("The Board commits error only if failing to discuss a theory of entitlement that was raised either by the appellant or by the evidence of record").

Appellant generally bears the burden of demonstrating prejudicial error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000); *Shinseki v. Sanders*, 556 U.S. 396, 409-11 (2009). An appellant's burden also includes demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010).

Appellant argues that the Board's discussion of his BHL, acne and pharyngitis claims was inadequate because the Board did not address *Walker*, and whether he established entitlement on a presumptive basis through continuity of symptomatology. 708 R.3d at 1336; App. Inf. Br. at 18-22. However, there is no evidence in the record that Appellant suffers from a chronic condition listed under 38 C.F.R. § 3.309(a). First, the November 2013 VA medical examiners found that Appellant did not have present diagnoses for any of the claimed conditions. [R. at 228 (224-31)] (November 2013 VA medical examination establishing that Appellant "does not qualify for a hearing loss according to VA Standards"); [R. at 261 (256-61)] (November 2013 VA medical examination establishing that "there is no diagnosis [of pharyngitis] because the condition has resolved"; [R. at 267 (262-67)] (November 2013 VA medical examination establishing that "[f]or the claimant's claimed condition of ACNE, there is no diagnosis because the condition has resolved"). Where no present disability exists, there "can be no valid claim." *Brammer v. Derwinski*, 2 Vet.App. 223, 225 (1992). Second, even if Appellant did currently have present disabilities of BHL, acne and pharyngitis, none of these conditions are considered chronic under 38 C.F.R. §3.309(a).

Additionally, Appellant provides no evidence of lay testimony that he has experienced BHL, acne or pharyngitis since service. While the Board does not specifically address Appellant's BHL, acne and pharyngitis claims on a theory of continuity of symptomatology, it was not required to, as the Court should reject

this argument. See *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error). Therefore, Appellant could not have possibly established service connection for BHL, acne, or pharyngitis under this theory, because the claimed conditions are not chronic under 38 C.F.R. § 3.309(a), Appellant's does not meet the requirements of hearing loss for VA purposes and does not have present diagnoses for acne or pharyngitis. As such, the Court should disregard this argument and affirm the Board's decision.

B. The Board provided adequate reasons or bases for its decision to deny Appellant's BHL, acne and pharyngitis claims.

Appellant argues that the Board erred in failing to adequately consider his lay statements that he experienced BHL acne and pharyngitis, and instead relied on the lack of contemporaneous medical evidence and silence of the STRs alone. App. Inf. Br. at 19-20, 21.

As to his BHL claim, Appellant cites to VA Fast Letter 10-35, Modifying the Development Process in Claims for Hearing Loss and/or Tinnitus, which states:

A Veteran is competent to report symptoms of hearing loss and/or tinnitus as a disability because symptoms of hearing loss and tinnitus are capable of lay observation. See *Charles v. Principi*, 16 Vet.App. 370 (2002); *Espiritu v. Derwinski*, 2 Vet.App. 492 (1992). Consequently, a Veteran's testimony regarding hearing loss and/or tinnitus is sufficient to serve as evidence that the disability(ies) currently exist.

VA Fast Letter No. 10-35 (Sept. 2, 2010). Training letters are not binding on the Board and need not be considered. See *DAV v. Sec'y of Veterans Affairs*, 859

F.3d 1072, 1077 (Fed. Cir. 2017). Additionally, while it is true that lay evidence may suffice to establish a present disability when the determinative issue does not require medical expertise (see *Caluza*, 7 Vet.App. at 504)), the holding in *Charles* merely establishes that symptoms of ringing in the ears was capable of lay observation. 16 Vet.App. at 374. This does not go so far as to say that lay evidence of hearing loss is sufficient to establish that a hearing loss disability exists.

The requirements for establishing that hearing loss qualifies as a disability for VA purposes is established pursuant to 38 C.F.R. § 3.385, which states:

impaired hearing will be considered to be a disability when the auditory threshold in any of the frequencies 500, 1000, 2000, 3000, 4000 Hertz is 40 decibels or greater; or when the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent.

These are objective medical determinations that require medical expertise. See *Jandreau v. Nicholson*, 492 F.3d 1372 (2007). The Board properly relied on the November 2013 VA medical examination, which recorded thresholds for Appellant's hearing which clearly fall short of establishing a disability. [R. at 225 (224-31) (establishing puretone thresholds with an average decibel of 16.25 for the right ear and 17.5 for the left)]. The Board therefore properly found that Appellant did not have a present disability of BHL for VA purposes, and denied his claim.

The Board considered lay evidence at length, noting that the lay evidence in this case did not establish hearing loss for VA purposes. [R. at 6 (3-12)]. It considered whether the complexity of this specific case and whether the issue could be answered by relying on lay observation alone. *Id. citing Jandreau*, 492 F.3d 1372; *Layno v. Brown*, 6 Vet.App. 465 (1994). The Board ultimately determined that Appellant did not possess the requisite medical training to diagnose diseases of the ear, “which require[] audiometric testing to specific levels and is not capable of lay observation.” *Id.* at 7. The Board provided adequate reasons or bases for rejecting the lay evidence. The Court should affirm the Board’s denial of entitlement to service connection for BHL.

Additionally, construing Appellant’s arguments liberally, he seems to make the argument that because the November 2013 VA medical examiner found it was at least as likely as not that his tinnitus was caused by or a result of military noise exposure, that he logically should be service connected for BHL as well. App Inf. Br. at 20. This argument is not persuasive. The existence of military noise exposure which caused tinnitus is separate from the question of whether Appellant has a present BHL disability. The fact that Appellant is service connected for tinnitus should have no bearing on the analysis of whether he presently meets the criteria for BHL. Therefore, the Court should disregard this argument and affirm the Board’s denial of entitlement to compensation for BHL.

As to his acne and pharyngitis claims, Appellant’s argument fails in several ways. First, even liberally construing the arguments, Appellant fails to identify

the lay evidence he believes the Board improperly discounted. App. Br. at 21; See *Calma v. Brown*, 9 Vet.App. 11, 15 (1996). The Secretary is cognizant of the duty to give a liberal and sympathetic reading to the informal briefs of *pro se* Appellants. See *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (stating that with respect to all *pro se* pleadings, VA must give a sympathetic reading by “determining all potential claims raised by the evidence, applying all relevant laws and regulations”) (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001)); *De Perez v. Derwinski*, 2 Vet.App. 85, 86 (1992); see also U.S. VET.APP. R. 28(e) (providing that a *pro se* appellant need not conform to the strictures regarding the content of his brief). However, it is not the duty of this Court, or the Secretary, to search the record to uncover any errors not identified by Appellant. See *Breeden v. West*, 13 Vet.App. 250, 250 (2000) (per curiam order). While Appellant refers vaguely to “lay statements,” he fails to establish with any specificity any lay evidence that the Board failed to address or assign probative value to, so even under a liberal reading of Appellant’s pleadings, he fails to identify an error for which remand is warranted.

Regardless, the Board provided an adequate statement of reasons or bases, and properly weighed all of the evidence. The Board considered STRs which indicated treatment for acne and pharyngitis in service, as well as a February 2010 record diagnosing Appellant with acute pharyngitis. [R. at 7 (3-12)]. The Board also considered the February 2010 VA medical examinations and opinions, which note that both acne and pharyngitis are not chronic diseases

and Appellant does not have a current diagnosis for either. *Id.* Only then does the Board rely on the lack of notation of pharyngitis and acne after service, establishing the proper foundation for relying on the absence of evidence as substantive evidence on this case. See *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (explaining that where there is a lack of notation of a medical condition or symptoms where such notation would normally be expected, the Board may consider this as evidence that the conditions or symptoms did not exist). Appellant does not have current diagnoses for acne or pharyngitis, and the Board properly relied on the available evidence.

C. The Board adequately addressed Appellant's argument that the RO committed CUE.

Appellant argues that the Board erred in failing to consider the merits of his argument that the RO committed CUE in its December 2013 decision denying his claims for BHL, acne, pharyngitis and abnormal lab results. App. Br. at ii, 8-9, 10, 14. The Board properly found that Appellant submitted a timely NOD to the December 2013 rating decision, and as such, the rating decision was not final, and the CUE motion was not before it. [R. at 4-5 (3-12)].

A request for CUE is an exception to the rule of finality, in which the claimant collaterally attacks a *final* decision by a RO or the Board. See 38 U.S.C. § 5109A; see also *Disabled Am. Veterans v. Gober (DAV)*, 234 F.3d 682 (Fed. Cir. 2000). A rating decision becomes final when the claimant fails to file a NOD

within one year from the date of mailing of the notice of the rating decision. 38 U.S.C. § 7105(c).

Here, The RO issued its initial rating decision in December 2013 and Appellant filed a timely NOD in April 2014. [R. at 192-201; 204-11; 164-77]. The initial rating decision in this case was never made final, and therefore a motion for CUE could not be pursued. 38 U.S.C. § 5109A. The Board properly declined to consider a CUE application, and the Court should affirm the decision.

D. The Board did not err in failing to consider whether Appellant's abnormal laboratory results were a manifestation of an undiagnosed illness under 38 C.F.R. § 3.317(a).

Appellant argues that the Board erred in failing to consider whether his abnormal September 2012 abnormal lab results were a sign or symptom which may be a manifestation of an undiagnosed illness, where they could not be attributed to any known clinical diagnosis. App. Inf. Br. at 5, 22.

A claimant may be able to establish entitlement on a presumptive basis if they have a disability due to undiagnosed illness or a medically unexplained chronic multisymptom illnesses. 38 U.S.C. § 1117; 38 C.F.R. § 3.317(a). In order to establish entitlement through this avenue, the claimant must be a Persian Gulf Veteran, whose chronic condition manifested while they were on active duty "in the Southwest Asia theater of operations during the Persian Gulf War" or to a degree of 10% during a set presumptive period. *Id.*

The Board denied Appellant's claim relating to abnormal lab results because Appellant did not identify any chronic disability related to service that is

manifested by an abnormal lab result. [R. at 8 (3-12)]. Appellant argues that the Board should have considered whether the lab results were a manifestation of an undiagnosed illness. The only veterans able to establish entitlement to benefits under this avenue are Gulf War veterans, who actually had service in the Southwest Asia theater, which Appellant is not. Appellant's DD Form 214 indicates that he no foreign service, and Appellant offers no evidence that he ever served on active duty in the Southwest Asia theater during the Gulf War. [R. at 614]. As such, the Board did err in failing to address this theory of entitlement, and the Court should affirm the decision.

V. CONCLUSION

WHEREFORE, in view of the foregoing arguments, Appellee, the Secretary of Veterans Affairs, respectfully requests that the Court affirm the Board's July 21, 2019 denial of entitlement to service connection for (1) BHL; (2) acne; (3) pharyngitis/viral syndrome and (4) abnormal lab results.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 10th 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/ Katelyn N. Lancto

KATELYN N. LANCTO

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