

IN THE
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2400

GEORGE A. OWENS,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

APPELLANT’S REPLY BRIEF

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I. OVERVIEW

George A. Owens (Mr. Owens *or* Appellant), a Vietnam combat veteran,¹ is appealing a January 22, 2019, Board of Veterans' Appeals (Board *or* BVA) decision, R. 5-20, to the extent that the Board denied service connection for bilateral sensorineural hearing loss. *Id.* at 5. The Board conceded the first and second *Hickson*² elements for establishing service connection, namely, medical evidence of current disability, and satisfactory evidence of service incurrence (i.e., exposure to loud noise during service). *Id.* at 12. Favorable findings by the Board may not be disturbed by the Court. *E.g., Tatum v. Shinseki*, 26 Vet.App. 443, 450 (2014). The BVA denial was predicated on the third *Hickson* element, nexus. R. 13 (5-20). *See also* the Secretary's brief (SB) at 5 (Board denied service connection due to lack of nexus). A Department of Veterans Affairs (VA) regional office had previously granted service connection for tinnitus based on in-service acoustic trauma and assigned a 10% rating therefor, R. 168-74, a fact not mentioned in the Board decision on appeal.

Appellant requested that the BVA denial of service connection for bilateral sensorineural hearing loss be vacated or set aside and the case remanded for readjudication. Appellant's opening brief (AOB) at 8. Mr. Owens argued, in the

¹ R. 2039.

² *Hickson v. West*, 12 Vet.App. 247, 252 (1999).

alternative, that the appeal should be granted on the basis of direct service connection, or on the basis of the relationship between hearing loss and tinnitus. *Id.* at 5-6, 6-8. Appellee, the Secretary, has requested affirmance. SB at 5, 17.

II. SECRETARY’S ARGUMENTS AND APPELLANT’S RESPONSE

A. General

The Veteran will discuss, *seriatim*, the Secretary’s principal arguments for affirmance.

B. Whether the 2015 VA Examiner Directly Addressed the Nexus Element.

The Secretary did not state that the August 2015 examiner *addressed* or *discussed* nexus. Instead, the Secretary speculates that “the VA examiner *considered* the nexus element.” SB at 11 (emphasis added). For the sake of accuracy and completeness, the entire “rationale” for the negative August 2015 hearing loss opinion follows:

The veteran had normal hearing on his entrance hearing exam dated April 25, 1968. He also had normal hearing on his exit hearing exam dated November 15, 1971. When comparing these two exams there is no STS which indicates no decline in hearing.³

R. 211-12 (209-13).

³ Admittedly, the examiner’s use of a double negative gives one pause. The examiner did not define “STS.”

Furthermore, the same examiner, in the same examination report, concluded that it was at least as likely as not that tinnitus was caused by or a result of military noise exposure. *Id.* at 212. Here, the examiner specifically mentioned Appellant's exposure to combat noise in Vietnam. *Id.* at 212-13. In view of the foregoing, Mr. Owens is at a loss to explain how the examiner could have even "considered" nexus in the context of hearing loss.

C. Whether Appellant "Relied" on a Rescinded Training Letter.

The Secretary states that Mr. Owens "relies solely on VA's recognition, in a rescinded training letter, that hearing loss is the most common cause of tinnitus." SB at 14. As he emphasized in this opening brief, Appellant acknowledged that the training letter at issue has been rescinded but proceeded, with citations, to show that accepted that medical principles regarding the relationship between hearing loss and tinnitus remained operative. AOB at 6-7.

D. Whether Appellant "Relied" on the VA Clinician's Guide (*Guide*).

The Secretary asserts that Appellant's argument that the August 2015 medical opinion was inadequate "relies solely on his citation to the VA Clinician's Guide." SB at 15. Mr. Owens agrees that the *Guide* is not regulatory. Nonetheless, in a single judge memorandum decision involving the reverse of the situation in the case at bar (i.e., a grant of service connection for hearing loss and a

denial of service connection for tinnitus), the Court found a VA examination report inadequate based on failure to follow the *Guide*. *Charlton v. Shinseki*, No. 12-1687, 2013 WL 5410070, at *4 (Vet.App. Sept. 27, 2013).⁴

E. Other matters.

Although an examiner is not required to draw a roadmap showing the route from the facts to his or her conclusion, the essential rationale for the opinion must be discernable from a review of the report as a whole. *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012). The examiner in this case failed to explain how this combat veteran's in-service acoustic trauma caused his tinnitus but not his sensorineural hearing loss. The Board dodged this question by failing to disclose the inconvenient fact that, at the time of its decision, service connection was in effect for tinnitus due to service-incurred acoustic trauma. Whether or not done intentionally, this clearly frustrates judicial review.

III. CONCLUSION

Appellant respectfully requests that the Court grant the relief specified in his opening brief.

⁴ This nonprecedential decision is cited pursuant to the provisions of U.S. Vet. App. R. 30(a).

Respectfully submitted,

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