

Vet.App. No. 19-3953

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

EDGAR WHITEHEAD,
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**

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

CAROLYN F. WASHINGTON
Deputy Chief Counsel

KATELYN N. LANCTO
Appellate Attorney
Office of General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6112

Attorneys for Appellee

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Secretary of Veterans Affairs,)	
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Appellee.)	

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

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

I. ISSUE PRESENTED

Whether the Court should affirm the Board's February 2019 decision that denied entitlement to service connection for tinnitus.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The U.S. Court of Appeals for Veterans Claims (Court) has jurisdiction under 38 U.S.C. § 7252(a), which grants this Court exclusive jurisdiction to review Board decisions.

B. Nature of the Case

Appellant, Edgar Whitehead, appeals the February 22, 2019 Board's decision that denied entitlement to service connection for tinnitus. [Record Before the Agency (R.) at 7-12].

C. Statement of Facts

Appellant served on active duty from October 1981 to October 2001. [R. at 157]. Appellant submitted a claim for entitlement to service connection for tinnitus in a December 2002 statement. [R. at 2511 (2511-12)]. In April 2004, the Regional Office (RO) issued a rating decision denying, *inter alia*, Appellant's claim for tinnitus. [R. at 2489 (2487-92)]. A May 2004 private treatment record notes a 6-month history of tinnitus. [R. at 2444 (2444-47)]. Appellant submitted a statement in August 2006 asking the RO to reopen the claim for service connection for tinnitus. [R. at 2477].

Appellant was afforded a VA medical examination in November 2006 for his tinnitus claim. [R. at 2429-32]. The examiner reviewed service treatment records (STRs) and VA records as well as private treatment records in reaching the opinion that it was "a medical certainty that the symptom of tinnitus is not a consequence of acoustic trauma and other noise exposure while [Appellant] was on active duty." *Id.* at 2432. The examiner considered Appellant's STRs, which showed "clinically normal pure tone thresholds at retirement in 2001." *Id.* at 2429. He also noted 2004 records showing changes in high frequency thresholds that documented an onset of tinnitus in late 2003. *Id.* In addressing Appellant's noise exposure in the

military, the examiner noted noise exposure from “weapons training, heavy equipment, and artillery fire,” while also noting that Appellant likely did not suffer occupational noise exposure following separation from service. *Id.* at 2429-30. The examiner reasoned instead that Appellant’s tinnitus did not have its onset until two years after service, and Appellant’s age, genetics, and other factors may be involved in the tinnitus. [R. at 2432 (2429-32)].

The RO reopened Appellant’s claim in a January 2007 rating decision, but denied the claim as the evidence did not establish that Appellant’s tinnitus was incurred in or aggravated by military service. [R. at 2428 (2420-28)].

Appellant filed another application for compensation for entitlement to service connection for tinnitus in February 2015. [R. at 1476-77]. The RO treated this as a claim to reopen his previous claim and denied it because there was no new and material evidence received. [R. at 1468 (1466-71)]. In September 2015 Appellant filed a notice of disagreement (NOD). [R. at 1355]. He attached a private treatment note from August 2015, which opined that Appellant’s tinnitus “could be” the result of his history of noise exposure in the military. [R. at 1354 (1352-54)].

Appellant was afforded a VA examination for tinnitus in January 2016. [R. at 1311-12]. The examiner reviewed the claims file (c-file) and opined that it was at least as likely as not that Appellant’s tinnitus was related to his diagnosed hearing loss, but it was less likely than not that his tinnitus was related to military noise exposure. *Id.* at 1311. The examiner noted that Appellant reported an onset of 2008, yet the records indicated an actual onset in 2003. *Id.* at 1312. The

examiner also reasoned that even with the conflicting reports of onset date, Appellant's tinnitus had its onset after service and therefore there was no nexus to service. *Id.*

A February 2016 rating decision reopened the tinnitus claim and denied entitlement to service connection because it was not incurred in or aggravated by military service. [R. at 1302 (1285-1305)]. In March 2016 Appellant filed a NOD reasserting that his tinnitus was caused by his military noise exposure. [R. at 1284 (1283-84)]. Appellant opted into the Rapid Appeals Modernization Program (RAMP) in February 2018. [R. at 1245]. The RO issued a rating decision in September 2018 continuing to deny the claim for tinnitus. [R. at 1229 (1227-33), 538-41]. In October 2018, Appellant filed a statement in support of his claim asking for direct Board review of this denial. [R. at 390-92].

SUMMARY OF THE ARGUMENT

Contrary to Appellant's arguments, the Board properly relied on the November 2006 and January 2016 VA medical examinations, which are adequate and probative of the claim. The examinations included clear rationale based on review of the entire claims file, and when read as a whole they were adequate. As a result, the Court should reject Appellant's arguments and affirm the Board's decision.

III. ARGUMENT

A. The November 2006 and January 2016 VA audiological examinations were adequate, and the Board did not err in relying on them.

Appellant argues that the Board erred in relying on the November 2006 and January 2016 VA medical examinations because they failed to provide sufficient rationale, failed to address material evidence and were conclusory. Appellant's Brief (App. Br.) at 2-11. These examinations were adequate, and the Board did not err in relying on them. The Board provided an adequate statement of the reasons or bases for its decision.

A medical examination is "adequate" when it is based upon consideration of the veteran's prior medical history and describes the disability such that the Board's evaluation is fully formed. *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007); see also *Monzingo v. Shinseki*, 26 Vet. App. 97, 105 (2012) (holding examination reports adequate when "they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion"). There is a general presumption of competence afforded to reviewing physicians. See *Monzingo*, 26 Vet.App. at 106-07 ("[T]he general presumption of competence includes a presumption that physicians remain up-to-date on medical knowledge and current medical studies"); see also *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011) (noting that, in the absence of clear evidence to the contrary, VA medical examiners are presumed competent).

Appellant argues that the November 2006 VA examination is inadequate because the examiner improperly opined that there was a “medical certainty” that his tinnitus was not a consequence of acoustic trauma or noise exposure during service. App. Br. at 5; [R. at 2432 (2429-32)]. He argues that this conclusion is unsupported by the given rationale and unsupported by medical literature. App. Br. at 5-6.

The November 2006 examiner found that it was “a medical certainty that the symptom of tinnitus is not a consequence of acoustic trauma and other noise exposures while [the] veteran was on active duty.” *Id.* The examiner also opined that it was more likely than not that Appellant suffered from an emerging medical problem which is unrelated to military noise exposure. *Id.* He supports these opinions by referencing the documented date of onset two years after separation from service, which is confirmed by Appellant’s own self-reporting. *Id.* Additionally, the examiner notes that the onset of tinnitus was linked in time to the onset of high frequency hearing loss with an unknown etiology. *Id.* “Age, genetics, and other factors not yet identified may be involved in the post service onset of hearing loss, dizziness, and tinnitus.” [R. at 2432 (3429-32)]. When read as a whole, the opinion is adequate and supported by adequate rationale. See *Monzingo*, 26 Vet.App. at 105. Appellant merely disagrees with the determination of the competent medical examiner, which is not a legitimate basis to overturn the decision of the Board.

Appellant further argues that medical literature fails to support this “medical certainty,” citing to the Institute of Medicine (IOM) study “Noise and Military Service: Implications for Hearing Loss and Tinnitus (2006 IOM study). However, this literature was never presented as evidence before the Board or provided to the examiner for review. Accordingly, the 2006 IOM study was not a part of the proceedings before the Board and may not properly be relied upon, cited to, or considered by this Court. See 38 U.S.C. § 7252(b); *Rogozinski v. Derwinski*, 2 Vet.App. 352, 354-55 (1992) (supplementary materials which are evidentiary in nature “may not come through the back door” as supplemental authorities, legal authorities, or facts not subject to dispute); see also *Kyhn v. Shinseki*, 716 F.3d 572, 576 (Fed. Cir. 2013) (reliance on extra-record evidence is in contravention of the jurisdictional requirement that the Court review is limited to the records before the Board). Therefore, this Court should not consider this extra-record medical literature.

Regardless, the examiner, as noted above, is presumed competent, which includes a presumption that they are up-to-date on medical knowledge and literature. See *Monzingo*, 26 Vet.App. at 105. Therefore, the Court can presume that the examiner was up to date on this medical literature and still found that it was less likely than not that Appellant’s tinnitus was related to military noise exposure. This was not erroneous, and the Board did not err in relying on the November 2006 VA medical examination.

Appellant also claims that the 2006 IOM study undermines the medical support of the January 2016 opinion. App. Br. at 9. For the same reasons as stated above, the 2006 IOM study is an extra-record reference which should not be considered by the Court, but if the Court does consider it, it does not undermine the January 2016 opinion. While the January 2016 examiner did find that it was more likely than not that tinnitus was a symptom associated with post-service hearing loss, she based this opinion on the conflicting onset reports by Appellant, including the most recent report of an onset as recently as 2008, there was no nexus between noise exposure and tinnitus. [R. at 1312 (1311-12)]. This does not directly conflict with the 2006 IOM study which indicates that noise exposure can impact tinnitus. Appellant's claim that the January 2016 VA examination is unsupported by medical literature is without merit and should not be considered by the Court.

Appellant also argues that the November 2006 VA medical examination was inadequate because the examiner relied on conjecture, namely, that factors like age, genetics, and other factors may have influenced his post-service onset of tinnitus. App. Br. at 6-7. Appellant cites to the dissent in *Coburn v. Nicholson*, 19 Vet.App. 427 , 435 (2006) for the proposition that a medical opinion that resorts to speculation and conjecture is inadequate. This dissent is not precedent, and also deals with the probative value of a medical opinion that relied on an inaccurate factual premises, not speculation, and is inapplicable here. Appellant also incorrectly asserts that *Reonal v. Brown* stands for the proposition that a

speculative medical opinion is of no probative value. 5 Vet.App. 458, 461 (1993) (holding that “[a]n opinion based upon an inaccurate factual premise has no probative value.”). These cases are inapplicable here, where the examiner did not rely on an inaccurate factual premise.

Rather, the examiner offers examples of factors, such as age and genetics, which may have contributed to Appellant’s post-service onset of tinnitus. [R. at 2432 (2429-32)]. While the examiner does not attribute these directly to Appellant, but is not prohibited from mentioning possible causes other than military noise exposure. The examiner does not need to determine the exact cause of the tinnitus, but was only required to opine on whether it was more likely than not that the condition was related to service. Again, Appellant merely disagrees with the determinations of the medical examiner, which is not a basis for remand. The examination was adequate, and the Board did not err in relying on it.

Appellant additionally argues that neither the November 2006 nor the January 2016 examiner were permitted to rely on the evidence of an onset of tinnitus two years after separation because the lack of evidence of tinnitus in service does not affirmatively constitute negative evidence against his claim. App. Br. at 7-8. While the Board is not permitted to rely on the absence of evidence as substantive negative evidence without providing the proper foundation for drawing such an inference, the examiner is also under no such reasons or bases requirement. See *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015); see also *Forshey v. Principi*, 284 F.3d 1335, 1363 (Fed. Cir. 2002) (explaining that the

“absence of actual evidence is not substantive negative evidence.”). The examiner is permitted to consider the absence of evidence, it is the Board’s job to assign the evidence probative weight and make an ultimate determination in the case. See *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (holding it to be the responsibility of the Board to assess the probative weight of the evidence).

Regardless, the examiners did not rely on the absence of in-service evidence of tinnitus in finding that tinnitus had its onset approximately two years after service, but rather considered both in-service and post-service medical records to establish the date of onset. A private treatment record from May 2004 establishes a 6-month history of tinnitus at that time. [R. at 2444 (2444-47)]. Appellant’s August 2001 separation report notes that he has never had and did not have at the time problems with his ear, nose or throat. [R. at 1530-31]. Appellant reported to the January 2016 examiner that his tinnitus began in 2008, but he reported an onset of around 2003 in his previous 2006 examination. [R. at 1312 (1311-12)]. The January 2016 examiner specifically noted the conflicting reports of onset, including onset as early as 1996, but found that there was still no nexus established between service and Appellant’s tinnitus. *Id.*

The examiners relied on STRs, post-service treatment records and Appellant’s own reporting to establish that his tinnitus had an onset of approximately two years after service. This was proper, and although the examiners were not required to establish a foundation for relying on negative

evidence, they did not rely on the absence of evidence as substantial negative evidence, and the Board properly relied on these examinations.

Appellant further argues that both the November 2006 and January 2016 examiners failed to address the “critical issue of predisposition.” App. Br. at 7-8. He argues, without support, that the examiners were required to consider “the degree to which the veteran’s long-term in-service acoustic trauma predisposed him to develop tinnitus.” *Id.* at 8. Again, there is no requirement in the law for examiners to address “predisposition” in this way, especially when they were not asked to offer such an opinion. [R. at 1321-22 (December 2015 Compensation and Pension Exam Inquiry)]. The examiners are not required to meet a reasons or bases requirement, and the examinations would not be deemed inadequate for their failure to address an obscure theory of entitlement through predisposition in its rationale. *Monzingo*, 26 Vet.App. at 107; *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). Further, there is no requirement that the examiner comment on every piece of favorable evidence in order for their examination to be considered adequate. *Id.* Therefore, the Board properly relied on these adequate examinations.

Regarding the January 2016 examination, Appellant argues that the examiner incorrectly found that his tinnitus was most likely the result of non-service-connected hearing loss rather than in-service noise exposure and did not provide proper rationale for that opinion. App. Br. at 8-9. First, contrary to Appellant’s contention, the January 2016 examiner did provide rationale for the

opinion that the tinnitus was more likely caused by hearing loss. [R. at 1311-12]. The examiner reasoned that given the wide range of reported onset dates, and the fact that his report during that interview was a 2008 onset, nexus could not be established between military noise exposure and tinnitus. *Id.*

Next, Appellant cites to a website to assert that there is medical support for a finding contrary to the January 2016 examiner's in relation to tinnitus and exposure to noise. App. Br. at 9; *citing Tinnitus*, HARVARD HEALTH PUBLISHING (Dec. 2014), <https://www.health.harvard.edu/diseases-and-conditions/tinnitus>. This literature was not before the Board or the examiner, and should not be relied upon, cited to, or considered by this Court. See 38 U.S.C. § 7252(b); *Rogozinski*, 2 Vet.App. at 354-55; *see also Kyhn*, 716 F.3d at 576. Upon review of the information cited, it does not appear to support Appellant's citation that sound waves from loud noise damage hair cells located in the middle and inner ear, eventually resulting in tinnitus. App. Br. at 9. The website does state that tinnitus can be a symptom of an ear problem such as inner ear damage from loud noise. *Tinnitus*, <https://www.health.harvard.edu/diseases-and-conditions/tinnitus>.

However, even if the Court were to consider this extra-record source, it does not contradict the opinion of the 2016 examiner, who did not dispute that tinnitus could be caused by loud noise, only that in this case, it was more likely than not that the tinnitus was caused by hearing loss unrelated to service. Finally, the examiner, as noted above, is presumed competent, and presumed to have knowledge of medical literature. See *Monzingo*, 26 Vet.App. at 106-07. The

examiner would be presumed to have knowledge of this medical knowledge and still found that Appellant's hearing loss was the likely cause of the tinnitus. [R. at 1312 (1311-12)].

Appellant argues that the January 2016 VA opinion is inadequate because it fails to consider material, favorable evidence. App. Br. at 9-10. Specifically, he points to an August 2015 private medical report containing Appellant's self-report that he began experiencing tinnitus 19 years previously, in approximately 1996, while in service. (R. at 1358 (1358-60)). The Board found that this private medical report documented Appellant's own report of symptoms, and it was not "an independent medical conclusion." [R. at 10 (7-12)]. First, the examiner is not required to specifically address this evidence, as she was under no reasons or bases requirement. *Acevedo*, 25 Vet.App. at 293. Regardless, the examiner specifically addresses this report of onset in her rationale. [R. at 1312 (1311-12)]. Therefore, even if the examiner were under an obligation to address this favorable evidence, she did address it and ultimately found that there was no nexus between noise exposure in service and tinnitus. *Id.*

Appellant also claimed that the examiner ignored evidence from a February 2007 VA treatment record that notes bilateral tinnitus from years of artillery fire. [R. at 1409]. The examiner did not specifically discuss this record, but as noted earlier, she was not required to do so. See *Acevedo*, 25 Vet.App. at 293. Further, the Board specifically addresses this record but found that it reflected Appellant's own report and contradicted the November 2006 VA examination, a January 2006

VA audiological note and later records. [R. at 11 (7-12)]. The Board found that this record had no probative weight because it “contains no reasoning or discussion that is possible to weigh against the negative evidence of record.” *Id.* While the examiner did not specifically address this evidence, it never would have been required to do so, and the record lacked probative value regardless. Both the November 2006 and January 2016 examiners provided adequate opinions and rationales to support their conclusions, and the Board properly relied on these opinions in denying Appellant’s claim for entitlement to service connection for tinnitus. The Court should affirm the Board’s decision.

B. The Board provided an adequate statement of the reasons or bases for its decision to rely on the adequate VA examinations.

Appellant argues that the Board erred in failing to provide an adequate statement of the reasons or bases for its decision to deny entitlement to service connection for tinnitus because it found that the November 2006 and January 2016 VA medical opinions were adequate, and the Board merely adopted the medical opinions while failing to discuss all of the evidence to support Appellant’s claim. App. Br. at 10-11. Here, the Board relied on adequate VA medical examinations, and properly considered all of the evidence, and the Court should affirm its decision.

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). The Board may not evade its statutory requirement to provide reasons or bases by adopting a medical opinion as its own where the opinion fails to discuss evidence favorable to Appellant's position. *Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994).

The Board did not adopt the November 2006 and January 2016 VA medical opinions as its own, and it gave adequate reasons or bases for its decision. [R. at 7-12]. The Board took note of previous findings that Appellant was exposed to hazardous noise in service (R. at 544 (538-53) (September 2018 rating decision noting military occupational specialties that were probable for hazardous noise exposure) and considered Appellant's various statements that his tinnitus began at least two years after service. [R. at 2430, 2432 (2429-32)] (November 2006 VA examination documenting report of onset two years after service; [R. at 1124 (1123-24)] (January 2007 VA audiological note documenting recent onset of tinnitus); [R. at 1311-12] (January 2016 VA examination noting conflicting reports of onset); [R. at 9 (7-12)]. The Board further discussed Appellant's conflicting reports of onset, including the self-reported onset in the 2015 private treatment record. [R. at 9 (7-12)]; [R. at 1352 (1352-54)]. The Board weighed the favorable evidence over the consistent earlier reporting of normal ears in service as well as later Appellant statements placing onset well after discharge. *Id.* at 10. In addition, the Board weighed the 2006 and 2016 medical opinions and assigned them greater probative weight based on their inclusion of an accurate medical history, as

well as sufficient explanation and reasoning. *Id.* at 12. The Board here clearly provided an adequate statement of reasons or bases for relying on the VA medical opinions, and for denying the claim for entitlement to service connection for tinnitus. Accordingly, the Court should affirm the Board's February 2019 decision that denied entitlement to service connection for tinnitus.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Carolyn F. Washington
CAROLYN F. WASHINGTON
Deputy Chief Counsel

/s/ Katelyn N. Lancto
KATELYN N. LANCTO
Appellate Attorney
Office of General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6112

Attorneys for Appellee Secretary
of Veterans Affairs