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

No. 19-0435

GEORGE D. MILLHEISER, APPELLANT,

V.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

ALLEN, *Judge*: Appellant George D. Millheiser served the Nation honorably in the U.S. Army from September 1966 through September 1968, including service in the Republic of Vietnam.<sup>1</sup> In July 2007, VA denied appellant's claim for service connection for hearing loss, and that decision became final.<sup>2</sup> In the September 26, 2018, decision now on appeal, the Board granted appellant's request to reopen that claim, but the Board denied service connection in the same decision.<sup>3</sup>

The Board's decision to reopen the claim is a favorable finding that we will not disturb.<sup>4</sup> The only issue for us to consider, then, is appellant's argument that the Board provided an inadequate statement of reasons or bases in support of its denial of appellant's hearing loss claim. We find that the Board provided an adequate statement of reasons or bases for its decision and, thus, we will affirm the Board's decision denying appellant's claim for hearing loss.

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<sup>1</sup> Record (R.) at 5, 337, 421.

<sup>2</sup> R. at 6.

<sup>3</sup> R. at 4-10.

<sup>4</sup> See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

## I. ANALYSIS

Establishing service connection generally requires (1) a current disability, (2) in-service incurrence of aggravation of a disease or injury, and (3) a nexus between the claimed in-service disease or injury and the present disability.<sup>5</sup> The Board must also include, in each decision, "a written statement of reasons or bases for its findings and conclusions on all material issues of fact and law."<sup>6</sup> The Court reviews the Board's findings regarding service connection for clear error.<sup>7</sup> We may overturn the Board's factual findings only if there is no plausible basis in the record for the Board's decision and the Court is "left with the definite and firm conviction that" the Board's decision was in error.<sup>8</sup>

The Board found that appellant has a current bilateral hearing loss disability sufficient to satisfy the first element of his service-connection claim.<sup>9</sup> The Board also found that during his military service, appellant's occupational specialty carried "a high probability for exposure to loud noise," and that appellant was awarded a combat infantryman badge.<sup>10</sup> These factual findings led the Board to conclude that appellant satisfied the second element of his claim for service connection.<sup>11</sup> The Board found, however, that appellant failed to establish a nexus between his military service and his current hearing loss.<sup>12</sup> Consequently, the Board denied appellant's claim. Appellant now argues that the Board erroneously (1) afforded greater weight to an unfavorable VA medical nexus opinion than to a favorable private medical nexus opinion without providing an adequate statement of reasons or bases for doing so; and (2) failed to consider appellant's service-connected tinnitus in addressing whether appellant's hearing loss is service connected.<sup>13</sup>

### A. Medical Opinions

Appellant makes three arguments as to the VA medical nexus opinion. First, appellant urges that his in-service noise exposure caused his hearing loss, and that any post-service noise

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<sup>5</sup> *Harvey v. Shulkin*, 30 Vet.App. 10, 15 (2018) (citation omitted).

<sup>6</sup> 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 58 (1991).

<sup>7</sup> *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

<sup>8</sup> *See Gilbert*, 1 Vet.App. at 52.

<sup>9</sup> R. at 7.

<sup>10</sup> R. at 8.

<sup>11</sup> *Id.*

<sup>12</sup> R. at 8-10.

<sup>13</sup> Appellant's Brief (Br.) at 3-5.

exposure merely worsened his existing hearing loss. Under this theory, appellant asserts that his hearing loss should be considered service-connected because his in-service noise exposure is the underlying cause of his hearing loss.

But the Board provided an adequate statement of reasons or bases for finding that appellant's hearing loss did not manifest during service. The Board explained that the VA examiner noted that appellant had normal hearing bilaterally as late as September 1988, which was 20 years after discharge from service, and normal hearing in his left ear as late as October 1996.<sup>14</sup> The Board found that this was inconsistent with hearing loss manifesting during service based on the VA examiner's opinion that "hearing loss due to noise exposure occurs at time of exposure or very soon afterwards."<sup>15</sup> The Board concluded that the 20-year lapse between appellant's discharge and his first recorded hearing abnormality was not consistent with hearing loss caused by in-service noise exposure.<sup>16</sup> This finding is in line with the Board's notation that post-service records "fail to document consistent complaints of hearing loss disability until many years after discharge."<sup>17</sup>

Appellant also seems to assert that the Board erroneously imposed as a condition precedent to receiving service-connection the requirement that appellant "mention," at his release from active duty, a hearing abnormality.<sup>18</sup> Assuming we understand appellant's argument correctly, appellant is mistaken. The Board did not impose such a condition precedent. To the contrary, the Board noted that "the absence of in-service evidence of hearing loss . . . is not fatal to a claim for service connection."<sup>19</sup> True, the Board did find that the record did not demonstrate the onset of bilateral hearing loss within 1 year of appellant's discharge from service, but the Board used this finding only to determine that appellant was not entitled to *presumptive* service connection.<sup>20</sup> After finding that appellant was not presumptively entitled to service connection, the Board proceeded to review

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<sup>14</sup> R. at 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> R. at 10. Appellant indicates that he does not fully understand the quoted language. In the interest of clarity, we will reiterate that the Board used this statement to more fully explain the inconsistency between the medical and employment records of evidence and appellant's own statements. We do not view the quoted statement as inconsistent with the evidence of record.

<sup>18</sup> See Appellant's Br. at 7.

<sup>19</sup> R. at 8.

<sup>20</sup> *Id.*

the evidence that was amassed over the next several decades to find that, even absent evidence of hearing loss at discharge, appellant's hearing loss was not service connected.<sup>21</sup>

We acknowledge that the Board rejected the private medical examiner's opinion that did recognize a nexus between appellant's service and hearing loss. But that is the Board's prerogative. When faced with competing evidence, the Board is tasked with weighing that evidence and accepting or rejecting it. The Board may reject evidence that is favorable to a claimant, as long as the Board provides an adequate statement of its reasons or bases for doing so.<sup>22</sup> Here, the Board provided an adequate statement of reasons or bases for rejecting the private examiner's opinion, and its decision in this regard is not clearly wrong. Thus, we will not disturb the Board's decision as to this issue.

### *B. Tinnitus*

Appellant also argues that "[t]he Board's failure to mention VA's grant of service connection for tinnitus fatally flaws its decision."<sup>23</sup> In support, appellant avers that hearing loss is the most common cause of tinnitus, and the VA medical examiner failed in his attempt to explain why appellant's hearing loss was not the cause of his service connected tinnitus.<sup>24</sup> Appellant asserts that if his service connected tinnitus was caused by his hearing loss, it only stands to reason that his hearing loss must also be service connected.

Appellant did not, however, raise this argument below.<sup>25</sup> Indeed, appellant drew no causative connection between his hearing loss and his tinnitus before reaching this Court. Moreover, the VA examiner found that appellant's tinnitus was less likely than not associated with appellant's hearing loss,<sup>26</sup> and there was no mention of hearing loss whatsoever in the 2009 Board decision that granted direct service connection for tinnitus.<sup>27</sup> Thus, appellant's theory that there was a causative relationship between his tinnitus and hearing loss was not reasonably raised by the

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<sup>21</sup> See R. at 8-10.

<sup>22</sup> *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

<sup>23</sup> Appellant's Br. at 7.

<sup>24</sup> *Id.* at 7-8.

<sup>25</sup> See R. at 24-31.

<sup>26</sup> R. at 56.

<sup>27</sup> See R. at 310-12.

record or by appellant, and the Board had no reason or obligation to consider that theory.<sup>28</sup> We therefore conclude that the Board did not err by failing to consider the theory appellant now advances. Finally, we, like the Board, are under no obligation to consider an argument that was not raised below and we will decline to consider appellant's newly raised theory.<sup>29</sup>

## **II. CONCLUSION**

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the September 26, 2018, Board decision that denied service connection for hearing loss.

DATED: March 10, 2020

Copies to:

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<sup>28</sup> *Robinson v. Peake*, 21 Vet.App. 545, 554-56 (2008).

<sup>29</sup> *Id.* at 555.