

UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS

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Docket No.19-3953

**EDGAR WHITEHEAD,**  
**Appellant,**

v.

**ROBERT L. WILKIE,**  
**Secretary of Veterans Affairs,**  
**Appellee**

Appeal from the Board of Veterans Appeals

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**REPLY BRIEF OF APPELLANT, EDGAR WHITEHEAD**

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## REPLY ARGUMENT

### **A. The Board erred by relying on inadequate VA examinations in denying Mr. Whitehead's claims.**

When the VA affords a veteran an examination to determine the connection of a disability to service, it is established law that the VA must provide an adequate examination. To be adequate, pursuant to 38 C.F.R. §§4.1 and 4.2, the examination must provide essential rationale that "sufficiently inform[s] the Board of a medical expert's judgment." Monzingo v. Shinseki, 26 Vet. App. 97, 105 (2012). Contrary to the Secretary's arguments, the November 2006 and January 2016 VA examinations do not meet that standard.

As explained in the Main brief (at 4), both the examiners in the November 2006 exam and January 2016 exam failed to provide sufficient rationale to support their conclusions regarding the etiology of Mr. Whitehead's tinnitus by making unsupported conclusory statements, and failed to address relevant aspects of Mr. Whitehead's medical history. The Secretary asserts that the Board did not err in relying on the examinations as the exams provided adequate rationale to support the conclusions and the examiners are not required to review every piece of evidence. However, even when read as a whole, the 2006 and 2016 VA examinations do not provide an adequate rationale for the Board to rely on.

The November 2006 examiner held with "medical certainty" that Mr. Whitehead's tinnitus is not a result of exposure to acoustic trauma while in service. (R. 1146). The Secretary argues that the examiner's "medical certainty" is supported by the examiner's reference to the onset date of tinnitus being after service and that other factors, including hearing loss, age, and genetics, all may be involved in the development of this condition. (Secretary's brief at 6; R. 2432). When read as a whole, the Secretary claims that this

rationale is enough to support the 2006 examiner's conclusory statement regarding the certainty that tinnitus is unrelated to service as the examiner is presumed to be competent in regards to medical knowledge. (Sec'y's brief at 6-7). However, while it is medically true that many factors can lead to the development of tinnitus, exposure to acoustic trauma is a known cause of the condition. As noted in the 2006 exam, Mr Whitehead was exposed to acoustic trauma during service from weapons training, heavy equipment, and artillery fire. Post service exposure is unlikely as Ms. Whitehead worked as a mail carrier. (R. 1144). The examiner failed to explain why the in service exposure was less likely the cause than genetic factors.

While an examiner is not required to explain every small detail of their analysis of service connection, enough essential rationale needs to be provided to inform the Board of the examiner's medical judgement. Monzingo v. Shinseki, 26 Vet. App. 97, 105 (2012). Essential rationale means that the examiner provides a sufficient analysis in the opinion that the Board could validly compare the VA opinion with contrary medical opinions. Stefl v. Nicholson, 21 Vet. App. 120, 124 (2007). This essential rationale can include why a medical study is important, what risk factors the veteran does or does not have, or how the condition manifested, among other issues. *Id.* The only rationale by November 2006 examiner was that Mr. Whitehead developed tinnitus two years after service along with his hearing loss with an unknown etiology. (R. 1146-47). Based on this, the examiner concluded that Mr. Whitehead was suffering from an "unknown" emerging medical problem. *Id.* The examiner did not explain what that could be or why exposure to acoustic trauma was a likely cause for Mr. Whitehead's development of acoustic trauma compared to genetic factors. This conclusory statement, without more, is not enough for the Board to rely on. Miller v. West, 11 Vet. App. 345, 348 (1998). (holding that a bare conclusion without an adequate factual predicate is not probative).

In addition the January 2016 examination was also inadequate. Like the 2006 exam, the 2016 exam failed to provide an adequate rationale for the conclusions. The 2016 examiner held that tinnitus was not related to service as the date of onset cannot be determined and the condition is more likely related to Mr. Whitehead's hearing loss with an unknown etiology. (R. 741). The Secretary asserts that the examiner is not prohibited from relying on the absence of evidence, such as no symptoms for a period of time after service, or required to address the veteran's predisposition to the condition. (Sec'y's brief at 9, 11).

However, the only rationale the 2016 examiner provides for his negative etiological opinion is the onset date of Mr. Whitehead's tinnitus. As stated in the Main brief (at 7-8), a post-service onset of a condition, alone, does not support a negative etiological opinion without more evidence. It is settled law that even when the veteran's STRs do not reflect complaints of or treatment of the current disability, the absence of evidence does not affirmatively constitute negative evidence against the veteran's claim. *See, e.g., Forshey v. Principi*, 284 F.3d 1335, 1363 (Fed. Cir. 2002) (en banc) (Mayer, C.J., and Newman, J. dissenting (on grounds not relevant to this issue)) (distinguishing between the existence of negative evidence and the absence of evidence and explaining that "[t]he absence of actual evidence is not substantive negative evidence"); *see also Horn v. Shinseki*, 25 Vet. App. 231, 239 (2012); *Smith v. Derwinski*, 2. Vet. App. 137, 140 (1992)). While the examiner is not held to the same standards as the Board, as stated by the Secretary, the examiner failed to explain why he concluded tinnitus is not related to service besides the fact that the onset date was after service. (Sec'y's brief at 9; R. 741). Here there is a known cause, acoustic trauma which is being rejected based on some hypothetical "unknown" cause. Without an adequate explanation, the 2016 exam also fails to provide adequate rationale for its conclusion.

In regards to the issues of predisposition, the Secretary is correct that the examiner was not specifically asked to address the issue. However, as Mr. Whitehead's STRs show exposure to acoustic trauma and as acoustic trauma is a known cause of tinnitus, an explanation as to why Mr. Whitehead's in-service exposure was not the cause of his tinnitus that developed soon after service was necessary to provide an adequate rationale regarding the etiology of the condition.

Finally, the 2016 examiner failed to address the 2007 VA treatment note that related Mr. Whitehead's tinnitus to exposure to artillery fire during service. (R. 1409). The Secretary asserts that the examiner is not required to address this favorable evidence, as examiners do not have a reasons and bases requirement like the Board. (Sec'y's brief at 13). Further, the Secretary argues that this treatment note was found to lack probative value by the Board as the note does not provide any rationale to weigh against the VA examinations. (Sec'y's brief at 14; R. 11). Yet if a VA treatment note connecting Mr. Whitehead's tinnitus to service related artillery fire does not provide rationale to counter the VA examinations, it must be equally true that the 2006 and 2016 VA examinations that merely concluded that tinnitus was related to other factors, likewise do not provide a sufficient rationale to support the Board's reliance.

Based on the evidence, the Board erred in relying on the November 2006 and January 2016 VA examinations. The examiners both failed to provide a rationale adequate to support their conclusory statements, thus precluding the Board from relying on the exams in its denial of service connection for Mr. Whitehead's claim. Accordingly, Mr. Whitehead should be granted service connection or the matter remanded for further administrative action.



## CONCLUSION

For all the forgoing reason, Mr. Whitehead respectfully requests that the Court vacate the Board's February 22, 2019, decision and grant Mr. Whitehead's service connection claim for tinnitus or, alternatively, remand his claim for additional administrative action.

DATED: March 20, 2020

Respectfully submitted,

/s/Francis M. Jackson  
Francis M. Jackson, for the Appellant

## CERTIFICATE OF SERVICE

I, Francis M. Jackson, hereby certify that I have served a copy of this Reply Brief of the Appellant electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing(s) to the following attorney(s) on the date listed below:

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