

**APPELLANT'S REPLY BRIEF**

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

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**19-1007**

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**DONALD STEVEN GIPSON,**

**Appellant,**

**v.**

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

**Appellee.**

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**DONALD STEVEN GIPSON,**

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**APPELLANT'S REPLY BRIEF**

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**REPLY ARGUMENT**

**A. The Court should find the Secretary's arguments to be unpersuasive.**

In his brief, Mr. Gipson argued that the Board failed to provide an adequate statement of reasons or bases and this error prevented him from understanding the precise basis of the Board's decision and precludes effective judicial review. 38 U.S.C. § 7104(d)(1), Appellant's Brief (App.Br.) at 4-12. In particular, Mr. Gipson argued that the Board failed to analyze whether statements submitted on his notice of disagreement and substantive appeal were new and material evidence sufficient to reopen his previously and finally disallowed claim for entitlement to service connection for bilateral hearing loss. App.Br. at 6-12.

In response, the Secretary argued that the Board is presumed to have considered all evidence, was not required to discuss every piece of evidence, and did not err when it failed to discuss whether the statements made by Mr. Gipson on his notice of disagreement and

substantive appeal were new and material evidence sufficient to reopen the previously disallowed hearing loss claim. Secretary's Brief (Sec.Br.) at 3-8.

The Court should find the Secretary's arguments to be unpersuasive. The argument that the Board provided an adequate statement of reasons or bases is itself contradicted by the Secretary's concession that the Board did not explicitly analyze the statements made by Mr. Gipson on his notice of disagreement and substantive appeal. Sec.Br. at 7. Further, argument in the alternative that any error by the Board was harmless relied upon a rationale not provided by the Board. In other words, the Board did not set forth any such rationale that Mr. Gipson's statements were not new and material evidence, and the Court should decline the invitation to allow the Secretary to rewrite the Board's decision.

The Board's failure to analyze Mr. Gipson's statements on his notice of disagreement and substantive appeal is prejudicial error that warrants vacatur and remand. For these reasons, the Board's decision should be vacated and the matter remanded for additional proceedings.

**1. The Board's failure to analyze statements made by Mr. Gipson on his notice of disagreement and substantive appeal is prejudicial error.**

In his brief, the Secretary conceded that the Board did not analyze the statements Mr. Gipson made on his notice of disagreement and substantive appeal. Sec.Br. at 7. The Secretary argued that under the circumstances, the Board was presumed to have reviewed all of the evidence and didn't have an obligation to discuss all of the evidence, to presumably include the favorable statements of in-service noise exposure and hearing loss made by Mr. Gipson on his notice of disagreement and substantive appeal. Id.

The Board must include in its decision a written statement of the reasons or bases for its findings and conclusions, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. 49, 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir. 1996) (table); *Gilbert*, 1 Vet.App. at 57.

Confusingly, while the Secretary conceded that the Board did not address Mr. Gipson's statements, the Secretary argued that the Board had nonetheless weighed the evidence. Id. Here, the Secretary wrote, in pertinent part:

And, although the Board did not specifically refer to his NOD and substantive appeal, this does not demonstrate error. The Board is presumed to have considered all evidence presented in the record and is not required to discuss every piece of evidence *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed.Cir. 2007). The Board did not have to specifically address his NOD and

substantive appeal where neither statement presented evidence that was not previously of record. 38 C.F.R. § 3.156(a). It is sufficient for Appellant to understand the basis of its determination that new and material evidence was not submitted to warrant reopening his claim. *See Moody*, 30 Vet.App. at 339.

Sec.Br. at 7.

The Secretary's concession that the Board did not address the credibility or probative value of pertinent evidence followed by the immediate assertion that the Board nonetheless weighed the evidence is confusing and inherently contradictory. If the Board did not analyze the credibility or competence of Mr. Gipson's statements that he was exposed to loud noise on the flight deck in service and experienced hearing loss due to that noise exposure, then how could it have fulfilled its legal obligation to account for the evidence that it finds persuasive or unpersuasive and provide an adequate statement of reasons or bases for the rejection of that favorable evidence?

The Secretary simply left unexplained how the Board could have possibly met its legal obligation without addressing the most pertinent, favorable evidence that Mr. Gipson submitted in support of his motion to reopen his previously and finally disallowed claim for hearing loss.

It appears unquestionable that Mr. Gipson's statements are pertinent, favorable evidence of exposure to loud noise in service as well as to complaints of hearing loss from working on the flight line in the Navy. Neither the Board in its decision nor the Secretary in his brief asserted otherwise. The statement was written and signed by Mr. Gipson and it relates to the specific circumstances surrounding when, where, and how he was exposed to noise consistent with his service duties. Critically, the statement by Mr. Gipson also appears

to have provided a nexus to his diagnosed hearing loss, yet again, the Board did not analyze these statements.

In short, Mr. Gipson accepts the Secretary's concession that the Board did not discuss or consider his favorable statements, and asks that the Court vacate the Board's decision and remand the matter based on this error. The Board was obligated to consider the credibility of this pertinent and favorable evidence, account for whether it was persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. The failure to do so was prejudicial error; a point to which appellant turns to below.

**2. The Board's failure to provide an adequate statement of reasons or bases was prejudicial error which prevented Mr. Gipson from understanding the precise basis of the Board's decision and which precludes judicial review.**

After determining that the Board committed error, the Court is required to "take due account of the rule of prejudicial error". 38 U.S.C. §7261(b)(2); *Conway v. Principi*, 353 F.3d 1369 (Fed.Cir.2004). An error which has a substantial influence on the result reached is prejudicial error. *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct.1239, 90 L.Ed 1557 (1946). Whether the error affected the substantial rights of the parties should be evaluated in terms of the essential fairness of the adjudication. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54, 104 S.Ct. 845, 78 L.Ed 2d 663 (1984).

It is well established that the Secretary is precluded from correcting an inadequate statement of reasons or bases. *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2005)(rejecting the Secretary's rationale for decision because "the Board did not set forth any such rationale; it is



not the task of the Secretary to rewrite the Board's decision through his pleadings filed in this Court."); *Wanless v. Principi*, 18 Vet.App. 337, 343 (2004)(Steinberg, J. concurring)(noting that "Court's role is to review whether the Board in its decision, rather than the Secretary in his brief, provided an adequate statement of reasons or bases").*See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("[L]itigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

Before conceding that the Board had failed to directly address pertinent and favorable statements made by Mr. Gipson in his notice of disagreement and substantive appeal, the Secretary argued initially that the Board's failure to analyze Mr. Gipson's statements was harmless because those statements were neither new nor material evidence. Sec.Br. at 5-7. Here, the Secretary wrote, in pertinent part:

Appellant argues the Board provided inadequate reasons or bases for its determinations. [] Specifically, he contends the Board did not analyze whether his lay statements that he experienced hearing loss in service were new and material, particularly statements made in his NOD and substantive appeal. [] However, such statements were existent in the record in November 2006, when the Regional Office (RO) denied Appellant's claim for entitlement to service connection for bilateral hearing loss, and as such, these statements are not new evidence.

Sec.Br. at 5-6.

The Secretary's analysis pertaining to whether the statements submitted by Mr. Gipson were new and material evidence was not part of the Board's rationale for its decision, and the Court should reject the Secretary's attempts to rewrite the Board's reasons or bases. Whether or not Mr. Gipson's statements were new and material evidence

sufficient to reopen his previously denied hearing loss claim was never touched upon in the Board's decision. R. 1-12 (1-12). As argued above, the Secretary conceded that the Board never discussed whether Mr. Gipson's statements were new and material evidence. Although the Secretary argued that the Board is presumed to have reviewed all of the evidence, this presumption does not vitiate the Board's obligation to provide written reasons or bases for the rejection of favorable evidence in its decision.

The Board's failure to provide an adequate decisional statement was not harmless error since it deprived Mr. Gipson of his statutory right to clear reasons or bases for the denial of benefits available by statute as well as the clear statutory right to judicial review of the Board's decision. *See* 38 U.S.C. §7104(d); 38 U.S.C. §7252(a). A BVA decision which contains inadequate reasons or bases precludes effective judicial review. The Court cannot assess the credibility of Mr. Gipson's statements in the first instance, nor can it account for that evidence or provide an adequate statement of reasons or bases for the rejection of that favorable evidence? Similarly, absent a credibility determination, it is impossible for the Court to determine whether that evidence would be persuasive or unpersuasive on the question of whether Mr. Gipson was exposed to loud noise and experienced hearing loss in service.

Thus, for these reasons, the Board's decision should be set aside and the matter remanded for additional proceedings.

## **CONCLUSION AND PRAYER FOR RELIEF**

Appellant prays that the Court set aside the Board's decision.

**Respectfully submitted.**

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