IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

GEORGE D. MILLLHEISER,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 19-435
	)	
ROBERT L. WILKIE,	)	
Secretary of Veteran Affairs,	)	
	)	
Appellee.	)	

APPELLANT'S MOTION FOR RECONSIDERATION BY A SINGLE JUDGE OR FOR PANEL DECISION IF THE SINGLE JUDGE DENIES RECONSIDERATION

Pursuant to U.S. Vet. App. R. 35(a)(1), Mr. George D. Millheiser (Appellant) moves for reconsideration of the Court's March 10, 2020, single-judge memorandum decision (Mem. Dec.) which affirmed a September 26, 2018, Board of Veterans' Appeals decision (Board Decision) which denied service connection for hearing loss. This motion also encompasses a motion for panel decision in the event the single judge denies reconsideration.

This motion is timely if filed not later than twenty-one days after the date of a single judge's dispositive action. U.S. Vet. App. R. 35(d). Therefore, the initial due date for this motion was March 31, 2020. Pursuant to motions for extension of

time which were granted on March 31, 2020, and April 14, 2020, respectively, this motion is timely if filed on or before April 28, 2020.

BACKGROUND

Mr. Millheiser is a Vietnam combat veteran[1] who served on active duty from September 1966 to September 1968. *See* Appellant's Opening Brief (AOB) at 1-2 for additional information regarding his military duties. Appellant has been attempting to establish service connection for hearing loss since filing an initial claim in September 1972, at which time he dated hearing loss to his time in service. R. 488-91. The Board decision reopened the claim and denied on the merits. R. 4. There is no dispute regarding the first and second elements to establish service connection. Mem. Dec. at 2; R. 7, 8.

ARGUMENT

I. THE COURT OVERLOOKED APPLICABLE LAW IN DETERMINING THAT THE BOARD PROVIDED AN ADEQUATE STATEMENT OF REASONS OR BASES FOR ADOPTING A POSITIVE MEDICAL OPINION AND REJECTING A FAVORABLE MEDICAL OPINION ON NEXUS

The Board afforded more probative value to an unfavorable Department of Veterans Affairs (VA) medical opinion on nexus than a favorable private medical opinion on nexus. Mem. Dec. at 4; R. 9. The Board's statement of reasons or

[1] The DD Form 214 shows decorations including the CIB (Combat Infantryman Badge), VCM (Vietnam Campaign Medal), and VSM (Vietnam Service Medal). R. 421.

bases, R. 9, relied at least in significant part on the VA examiner ruling out delayed-onset hearing loss. That opinion, in turn, was predicated on the Institute of Medicine (IOM) report entitled "Noise and Military Service: Implications for Hearing Loss and Tinnitus." *See* R. 42, 44, 55, for references to the IOM report. In his reply brief at 4-5, Appellant cited *McCray v. Wilkie*, 31 Vet.App. 243, 256-57, 260 (2019), which invoked qualifying or contradictory statements in the IOM text regarding delayed-onset hearing loss as the basis for *McCray* being set aside and the case remanded.

The Mem. Dec. neglects to mention *McCray*, or its holding, in its analysis. But, the Mem. Dec. at 3 specifically alludes to the VA examiner's opinion that "hearing loss due to noise exposure occurs at time of exposure or very soon afterwards." Given the prevalence of appeals involving service connection for hearing loss, and the number of situations where hearing loss meeting VA disability criteria[2] was first documented years after service,[3] the concept of delayed-onset hearing loss is an issue of continuing public interest.

II. THE COURT'S *ROBINSON* ANALYSIS IS INCOMPLETE

[2] 38 C.F.R. § 3.385.

[3] *See, e.g.*, *Owens v. Wilkie*, No. 19-2400; *Packham v. Wilkie*, No. 19-1686; *Walker v. Wilkie*, No. 18-6995. At the time of briefing on the issue of entitlement to service connection for hearing loss, service connection was in effect for tinnitus. A decision is pending in each. A fourth decision in the same category, *Ewing v. Wilkie*, No. 18-6926, 2020 WL 1238374 (Vet.App. March 16, 2020), was a single-judge vacate/remand. The *Ewing* judgment was entered April 7, 2020.

These facts are not in dispute: (a) Prior to the Board Decision, VA granted service connection for tinnitus due to in-service acoustic trauma. R. 313-16 (October 2009 rating decision). (b) This grant of service connection was not disclosed in the Board Decision. R. 4-10. (c) Appellant has bilateral sensorineural hearing loss. R. 53. (d) On the issue of service connection for hearing loss, the Board made a favorable finding regarding the in-service incurrence element (exposure to loud noise and a CIB award). R. 8. (e) VA recognizes a potential relationship between hearing loss and tinnitus. *VA C&P Service Clinician's Guide* (Mar. 2002) (Guide), § 5.8(d).[4] Since the Board did not acknowledge the inconvenient fact that service connection has been in effect for tinnitus, it avoided answering the perplexing question of how in-service acoustic trauma caused tinnitus but not hearing loss.

Citing *"Robinson v. Mansfield*," [sic][5] the gravamen of the Secretary's brief on the matter of a relationship between hearing loss and tinnitus was that "the Board was not *required* to address a theory of service connection not raised by the record." Secretary's brief (SB) at 16 (emphasis added). Then, as if to add insult to

[4] If both tinnitus and hearing loss are present, "the audiologist must state if the tinnitus is due to the same etiology or causative factor(s) as the hearing loss."

[5] *Robinson v. Peake*, 21 Vet.App. 545, 555-56 (2008), *aff'd sub nom.*, *Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009) (hereinafter *Robinson*).

injury, the Secretary cast aspersions on the *protected*[6] grant of service connection for tinnitus. SB at 17.

Also citing *Robinson*, the Court held that the theory of a causative relationship between tinnitus and hearing loss was not reasonably raised by the record and that Appellant did not raise it below. Mem. Dec. at 4-5. In the Court's words, "we, like the Board, are under no *obligation* to consider an argument that was not raised below. . . ." *Id*. at 5 (emphasis added).

A. A RELATIONSHIP BETWEEN TINNITUS AND HEARING LOSS WAS REASONABLY RAISED BY THE RECORD

In its analysis, the Court noted that "the VA examiner found that appellant's tinnitus was less likely than not associated with appellant's hearing loss." *Id*. at 4; R. 56. The examiner also opined, without any citation of authority, and contrary both to accepted medical principles and VA policy[7] that "[h]earing loss does not cause tinnitus or vice versa." R. 56. In a statement that confuses Appellant, the Court mentioned that "there was no mention of hearing loss whatsoever in the 2009 Board decision that granted direct service connection for tinnitus," citing R. 310-12. Mem. Dec. at 4. R. 310-12 represents a regional office rating decision, not a Board decision. Furthermore, the record is replete with references to tinnitus

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[6] Protection attaches when service connection has been in effect 10 or more years. 38 U.S.C. § 1159; 38 C.F.R. § 3.957. The effective date of the grant of service connection for Appellant's tinnitus is July 6, 2006. R. 314, 316.

[7] *See* citations, AOB at 8.

in conjunction with hearing loss. *See, e.g.*, R. 76-77, September 2009 private audiology report (current complaint bilateral hearing loss and bilateral tinnitus; medical treatises indicate cause of tinnitus can usually be determined by finding cause of any coexisting hearing loss; tinnitus as likely as not attributed to same cause as hearing loss, i.e., in-service exposure to noise); R. 369-73, July 2007 rating decision (claims for service connection for tinnitus and hearing loss simultaneously adjudicated); R. 100, Appellant's statement in support of claim for service connection for hearing loss (mentioning "10% service connected for tinnitus"); R. 393-97, February 2007 rating decision (claims for service connection for tinnitus and hearing loss simultaneously adjudicated); R. 410, August 2006 (statement in support of claim).

It is seminal case law that the Board must liberally review all documents submitted prior to the Board decision to determine what issues are reasonably raised by the record. *EF v. Derwinski*, 1 Vet.App. 324, 326 (1991). While the Secretary "is not required to raise and investigate 'all possible' theories of service connection for a claim . . . the Secretary generally must investigate the reasonably apparent and potential causes of the veteran's condition and theories of service connection that are reasonably raised by the record or raised by a sympathetic reading of the claimant's filing." *DeLisio v. Shinseki*, 25 Vet.App. 45, 53 (2011) (internal citations omitted). If only one document in the file passes this test, surely

it must be the September 2009 report from a Doctor of Audiology, R. 76-77, opining that appellant's "tinnitus can as likely as not be attributed to the same etiology as his hearing loss, i.e., in-service exposure to noise." Citing R. 24-31, the Court stated that Appellant did not raise this argument below. Mem. Dec. at 4. But, Appellant's representative from the Disabled American Veterans (DAV), did reference the September 2009 medical opinion in his November 2016 "Statement of Accredited Representative in Appealed Case." R. 26.

B. *ROBINSON* IS DISTINGUISHABLE FROM THE CASE AT BAR ON THE MATTER OF REPRESENTATION BELOW

Assuming, arguendo, that the Court should continue to find that even with a liberal reading of the record and arguments made on behalf of Appellant, the matter of a relationship between tinnitus and hearing loss was not reasonably raised by the record, the facts in this case are distinguishable from *Robinson*, the only case cited in the Mem. Dec. as authority for not considering the tinnitus/hearing loss relationship argument. Veteran Robinson was represented below by an attorney, JFC, who was also on the brief. *See Robinson*, 21 Vet.App. at 547, 548, 551. In his appellate brief, Attorney JFC for the first time attempted to convert what had been limited to a claim for secondary service connection into a claim for direct service connection, and even conceded that his initial secondary service connection claim had no merit. *Id*. at 551. In the instant case, the DAV represented Appellant up to and including at the Board. *See*, *e.g.*, R. 4, 13-15, 24-

31.[8] No attorney represented Appellant until a notice of appeal was filed with this Court in January 2019. In a decision entered subsequent to *Robinson*, the Federal Circuit clarified that representation at the agency level by a veteran's service organization "aide" (i.e., the DAV) is not equivalent to representation by an attorney. *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009). The *Comer* court also noted that the function of DAV "aides" is fundamentally different from attorneys who represent clients in adversarial proceedings. *Id*. at 1369-70. The clear message from *Comer* is that a claimant is, in essence, proceeding pro se below when not represented by an attorney.[9]

C. THE COURT FAILED TO PROVIDE AN EXHAUSTION ANALYSIS

Citing *Robinson*, the Secretary argued that the Board is not "required" to address a theory of service connection not raised by the record. SB at 16. The Court stated that it is "under no obligation" to consider an argument that was not raised below. Mem. Dec. at 5. Again assuming, arguendo, that the theory of a relationship between tinnitus and hearing loss was not raised below, neither the Secretary nor the Court cited any jurisdictional or other legal impediment to considering this argument. *Maggit*, 202 F.3d at 1377, held that the "Veterans

[8] Another service organization, the Veterans of Foreign Wars of the US (VFW), previously represented Appellant. R. 369.

[9] The limited assistance provided Veteran Comer was insufficient to disqualify him as a pro se claimant. *Id*. at 1369. *See also Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000).

Court" has jurisdiction to hear arguments presented to it in the first instance, provided it otherwise has jurisdiction over the claim. Whether to hear an argument for the first time is a matter for the exercise of "sound judicial discretion." *Id*. (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)). "The test is whether the interests of the individual weigh heavily against the institutional interests the [exhaustion] doctrine exists to serve." *Id*. A lengthy discussion of the considerations involved followed. *Id*. at 1377-78. No such discussion was offered in the Mem. Dec.

A remand to the Board to adjudicate, in the first instance, the matter of a relationship between service-connected tinnitus and non-service-connected bilateral sensorineural hearing loss would serve the interests of justice and avoid piecemeal adjudication. Appellant points out several factors in his favor. He is a combat veteran who sustained acoustic trauma in Vietnam. He has been attempting, for decades, to obtain VA benefits for his documented hearing loss, albeit unsuccessfully. Should he have to start over, once again, even if benefits should be awarded the effective date would be no earlier than the date of the new claim. 38 U.S.C. § 5110(a). Appellant's situation, i.e., noise-induced hearing tinnitus service connected while service connection denied for noise-induced hearing loss, is not an uncommon scenario. *See supra*, note 3.

CONCLUSION

Based on the points of law and fact that were overlooked, misinterpreted or misunderstood in the March 10, 2020, single-judge disposition affirming the September 26, 2018, Board decision, it is respectfully requested that the Court order reconsideration of that decision and, if reconsideration is denied, panel review.

Respectfully submitted,

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