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

No. 19-0461

ROCCO J. DELAURI, APPELLANT,

V.

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

Before TOTH, *Judge*.

**MEMORANDUM DECISION**

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

TOTH, *Judge*: VA regulation 38 C.F.R. § 3.327 states that a reexamination is appropriate whenever the agency "determines there is a need to verify either the continued existence or the current severity of a disability." That determination is made "if it is likely that a disability has improved, or if evidence indicates there has been a material change in a disability or that the current rating may be incorrect." *Id.* Veteran Rocco J. Delauri contends that the Board ignored lay evidence showing that hearing loss in his right ear had worsened since his previous examination and, thus, the Board erred in failing to have him reexamined. Because the veteran presented no such evidence, reexamination wasn't warranted and the Court affirms.

During a VA examination in 2014, audiometric testing revealed that Mr. Delauri had hearing loss in both ears, but only the loss in the left ear rose to a level considered disabling. The examiner found no connection, however, between the veteran's hearing loss and service. Citing the "American College of Occupational Medicine Noise and Hearing Conservation Committee," he explained that "noise induced hearing loss will not progress once [the person] is no longer exposed to damaging levels of noise." R. at 155. And, since the veteran's service records did not document hearing loss, his "hearing loss did not occur during his time of service." *Id.* VA denied the veteran's claim, and he appealed to the Board.

In September 2018, he submitted a written statement to the Board attacking the medical basis of the examiner's opinion. He argued that the committee referenced by the examiner did not, in fact, "conclude that noise induced hearing loss is not progressive." R. at 12. He added that guidance issued by that committee "established that, even with apparent recovery of normal hearing after acoustic trauma, there can be widespread and ongoing damage to the cochlear hairs and their nerves being manifested only over time." *Id.* The veteran went on to cite various documents and websites in support of this argument and others that need not be recited here.

In a decision issued that same month, the Board granted service connection for hearing loss in the veteran's left ear. Notably, it rejected the medical examiner's negative opinion because it was apparent that he did not account for the veteran's lay statements of having served in an armor battalion and having spent time in noisy tanks. The Board considered the veteran credible and competent to convey that he experienced hearing loss due to noise exposure from tanks and, because the evidence on the whole was in equipoise, the Board gave the veteran the benefit of the doubt and awarded service connection for the left ear.

The right ear, however, exhibited hearing loss but not to a level considered disabling under VA regulations. *See generally* 38 C.F.R. § 3.385 (2019). The Board denied service connection because the award requires a current disability. *See Harvey v. Shulkin*, 30 Vet.App. 10, 15 (2018).

On appeal, the veteran argues that the Board failed to discuss the comments he made in the statement he submitted to the Board on the "progressive nature of hearing loss." Appellant's Brief at 3. He contends that his discussion on the subject should have been liberally construed as an argument that his condition had worsened since the 2014 examination. So construed, he argues, those lay statements should have led the Board to reexamine his hearing ability.

Mr. Delauri emphasizes the rule that, if the evidence of record "indicates there has been a material change in a disability," a new examination is generally required. 38 C.F.R. § 3.327 (2019). This Court's holding that, in the hearing loss context, a veteran may satisfy this standard with his own assertion that his disability has increased in severity since the last examination, would seem to bolster his case. *See Snuffer v. Gober*, 10 Vet.App. 400, 403 (1997) (holding that, because "the appellant complained of increased hearing loss two years after his last audiology examination, VA should have scheduled the appellant for another examination").

But his argument ultimately depends on how the evidence was actually construed—and that doesn't work in the veteran's favor here. Nothing about his statement suggested that his

condition had deteriorated since the 2014 examination. If the lack of any reference in his statement to worsening doesn't make that clear, the context does. The very obvious reason he presented scientific evidence that hearing loss can progress after noise exposure has ceased was to refute the premise of the examiner's opinion that "noise induced hearing loss will not progress once [the person] is no longer exposed to damaging levels of noise." R. at 155. In other words, the evidence was not offered to suggest that his condition had worsened since the examination; it was offered to show that his condition could have worsened since service—a finding that he would have benefitted from, as his records didn't document hearing loss in service.

The Court finds no evidence overlooked by the Board of worsening hearing loss, and the "mere passage of time" is not enough to "require . . . a new medical examination." *Palczewski v. Nicholson*, 21 Vet.App. 174, 182 (2007).

Accordingly, the Board's September 25, 2018, decision is AFFIRMED.

DATED: April 30, 2020

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