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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3953

EDGAR WHITEHEAD, 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 Edgar Whitehead served the Nation honorably in the U.S. Army from October 1981 to October 2001.¹ In this appeal, which is timely and over which the Court has jurisdiction,² he contests a February 22, 2019, Board of Veterans' Appeals decision that denied service connection for tinnitus.³ Because the Board's decision is based on the correct legal principles, is not clearly erroneous, and is supported by adequate reasons or bases, we will affirm.

I. ANALYSIS

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.⁴ The Court reviews the Board's findings regarding service connection for clear error.⁵ We may overturn the Board's factual findings only

¹ Record (R.) at 157.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ R. at 7-12.

⁴ See *Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2019).

⁵ 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

if there's 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.⁶

The Court also reviews Board determinations about the adequacy of medical opinions for clear error.⁷ A medical opinion is adequate when it's "based upon consideration of the veteran's . . . medical history and examinations and also describes the disability in sufficient detail" so that the Board's "evaluation of the claimed disability will be a fully informed one."⁸ "It is the factually accurate, fully articulated, sound reasoning for the conclusion . . . that contributes probative value to a medical opinion."⁹

Finally, 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.¹⁰ 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.¹¹

In the decision on appeal, the Board acknowledged that appellant met the first two requirements for service connection because he had tinnitus and was exposed to hazardous noise during service, but denied his claim based on the third element because the preponderance of the evidence failed to show a nexus between his tinnitus and his in-service noise exposure. The Board assessed private and VA treatment records, finding the November 2006 and January 2016 VA examiner's opinions to be adequate and most probative as it found they were based on an accurate medical history and contained sufficient reasoning.¹² The November 2006 VA examiner opined that "[i]t is a medical certainty that the symptom of tinnitus is not a consequence of acoustic trauma and other noise exposures while veteran was on active duty" and that tinnitus is linked to onset of

⁶ *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

⁷ *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008); see *Gilbert*, 1 Vet.App. at 52.

⁸ *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007); see *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

⁹ *Nieves-Rodriguez*, 22 Vet.App. at 304.

¹⁰ 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 56–57.

¹¹ 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.

¹² We note that the Board refers to a January 2006 VA examination report in its decision, however this is a typographical error. Appellant agrees that the Board was actually referring to the November 2006 VA examination report. See Appellant's Br. at 2, n. 1.

hearing loss, which is of unknown etiology.¹³ That examiner also stated that "[a]ge, genetics, and other factors not yet identified may be involved in the post service onset of hearing loss, dizziness, and tinnitus."¹⁴ The January 2016 VA examiner similarly opined that because appellant's tinnitus is a symptom of his hearing loss and did not begin until after service, it is "less likely than not that [tinnitus] was caused by or a result of noise exposure."¹⁵ In assessing the evidence of record, the Board concluded that "[t]he greater weight of the evidence is against finding that [appellant's] tinnitus was incurred during service or was caused by in-service noise exposure."¹⁶

Appellant argues that the Board erred when it found the November 2006 and January 2016 VA examination reports adequate and then relied on them to deny his tinnitus claim. Appellant asserts that the examiners failed to provide sufficient rationales for their negative nexus opinions, ignored favorable evidence, failed to consider the impact his predisposition of hazardous noise exposure had on his tinnitus etiology, and offered opinions that are contrary to medical science.¹⁷ The Secretary defends the Board's decision in full, asserts that the examinations are adequate, and urges that we affirm.

We will first address appellant's argument that the November 2006 and January 2016 examiners VA opinions are contrary to medical science. In support of this argument, appellant cites a 2006 IOM report and a NAS report, both addressing noise exposure and tinnitus, and explains that such evidence contradicts the negative VA examination reports of record, rendering those reports inadequate. Appellant also relies on this evidence as support for his other arguments concerning the adequacy of the VA examinations. However, we may not consider those reports in connection with this appeal. Our review is limited by statute to "the record of proceedings before the Secretary and the Board."¹⁸ Because neither report was actually before the Board here and we cannot say that they were constructively present either, we are precluded from considering them here.¹⁹

¹³ R. at 1146, 2432 (duplicate).

¹⁴ *Id.*

¹⁵ R. at 741.

¹⁶ R. at 12.

¹⁷ Appellant's Br. at 4.

¹⁸ 38 U.S.C. § 7252(b); *Kyhn v. Shinseki*, 716 F.3d 572, 576-78 (Fed. Cir. 2013); *Euzebio v. Wilkie*, 31 Vet.App. 394, 399-400 (2019).

¹⁹ See e.g., *Euzebio*, 31 Vet. App. at 400-02; *Monzingo v. Shinseki*, 26 Vet.App. 97, 101-03 (2012) (per curiam).

We now turn to appellant's arguments that the examiners provided insufficient rationales for their opinions, erroneously relied on the fact that his tinnitus began in 2003, and failed to consider favorable evidence of record. In short, appellant asserts that the November 2006 VA examiner's opinion is too speculative and the January 2016 VA examiner's opinion is too conclusory. The Court concludes that appellant's arguments are nothing more than a disagreement with the examiners' interpretation of the medical evidence. Such a disagreement does not establish legal error.

Insofar as appellant asserts that the November 2006 examiner's opinion is too speculative because the examiner suggested that there "may be" other causes of appellant's tinnitus, this argument fails. As long as the November 2006 VA examiner adequately supports his opinion that there was no link between appellant's tinnitus and service, a conclusion to the exact etiology is not required.²⁰ And regarding appellant's contention that the January 2016 VA examiner's opinion that appellant's tinnitus is most likely related to hearing loss is too conclusory, the only evidence appellant offers to counter the examiner's conclusion in this regard are references to the medical treatise evidence, which, as noted above, will not be considered in connection with this appeal.

Moreover, a review of the record confirms the Board's findings that both examiners based their opinions on an accurate account of appellant's medical history and provided sufficient rationales for their opinions. Both examiners considered appellant's medical records, private and VA, and the fact that appellant had acoustic trauma in service before they discussed the nature of appellant's tinnitus. The Court therefore concludes that the November 2006 and January 2016 VA examination reports were based on reasoned medical judgment and sufficiently informed the Board to facilitate its consideration of whether service connection for tinnitus was warranted.²¹ In short, the Board's conclusions that the opinions were adequate for adjudication purposes are not clearly wrong.

To the extent that appellant argues that the January 2016 VA examiner failed to consider relevant evidence, i.e., a 2015 private examiner's statement suggesting a 1996 onset of tinnitus, this argument fails for two reasons. First, a review of the record belies this assertion. The January 2016 VA examiner noted that there was evidence indicating a possible onset in 1996, but explained

²⁰ See *Jones v. Shinseki*, 23 Vet.App. 382, 388 (2010); see also *Stefl*, 21 Vet.App at 124.

²¹ See *Monzingo*, 26 Vet.App. at 107; *Nieves-Rodriguez*, 22 Vet.App. at 301.

that during the examination appellant reported that his tinnitus began after service.²² Second, appellant incorrectly conflates the duties of a VA examiner with those of a VA adjudicator. A medical examiner reviews the medical history, but is not required to discuss favorable medical evidence.²³ And, a medical examiner is not held to reasons-or-bases requirements that apply to the Board. Here, the Board acknowledged the discrepancy of onset dates in the record and found, after weighing appellant's reports and the medical evidence, that the most probative evidence revealed that appellant's onset of tinnitus occurred after service. Thus, contrary to appellant's assertions, the evidence to which he points was considered by not only the January 2016 VA examiner, but also the Board.

Finally, appellant argues that the examinations are inadequate because the examiners failed to consider "the degree to which [his] long-term in-service acoustic trauma predisposed him to develop tinnitus."²⁴ However, as noted above, the examiners considered the fact that he was exposed to acoustic trauma in service when formulating their opinions. The only evidence appellant offers to support his assertion that his predisposition contributed to his development of tinnitus, besides the medical treatise evidence that the Court cannot consider, are his lay assertions. But neither appellant nor his counsel has demonstrated that they possess the medical knowledge to render such an assertion. Thus, appellant's lay hypothesizing about the effect his predisposition has on the etiology of his tinnitus cannot be evidence of a medical connection.²⁵

In sum, the Court concludes that appellant has failed to demonstrate that the Board clearly erred when it found the November 2006 and January 2016 VA examinations adequate and relied on them to deny his tinnitus claim.²⁶ Thus, we will affirm.

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court AFFIRMS the February 22, 2019, Board decision.

DATED: May 7, 2020

²² R. at 1312.

²³ See *Monzingo*, 26 Vet.App. at 105;; *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).

²⁴ Appellant's Br. at 7-8.

²⁵ See *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991).

²⁶ See *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table); *D'Aries*, 22 Vet.App. at 104.

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