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

No. 19-0435

GEORGE D. MILLHEISER, 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 George D. Millheiser served the Nation honorably in the U.S. Army from September 1966 through September 1968, including service in the Republic of Vietnam.<sup>1</sup> In July 2007, VA denied appellant's claim for service connection for hearing loss, and that decision became final.<sup>2</sup> In a September 26, 2018, decision, the Board granted appellant's request to reopen the claim,<sup>3</sup> but proceeded to deny service connection on the merits.<sup>4</sup> We affirmed the Board's decision in a March 10, 2020, memorandum decision, and appellant timely filed a motion for reconsideration of our memorandum decision. We will now grant that motion, withdraw the March 10, 2020, decision, substitute this memorandum decision in its stead, and remand this matter for further proceedings.

**I. ANALYSIS**

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<sup>1</sup> Record (R.) at 5, 337, 421.

<sup>2</sup> R. at 6.

<sup>3</sup> The Board's decision to reopen the claim is a favorable finding that we will not disturb. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007).

<sup>4</sup> R. at 4-10.

Appellant argues that the Board erroneously failed to consider an argument that appellant raised before the Board and, therefore, the Board's decision must be remanded for consideration of that argument.<sup>5</sup> Specifically, appellant contends that the Board did not consider the relationship between appellant's service-connected tinnitus<sup>6</sup> and his hearing loss.<sup>7</sup> We agree.

Establishing service connection generally requires (1) a current disability, (2) in-service incurrence of aggravation of a disease or injury, and (3) a nexus between the claimed in-service disease or injury and the present disability.<sup>8</sup> The Board found that appellant has a current bilateral hearing loss disability sufficient to satisfy the first element of his service-connection claim.<sup>9</sup> The Board also found that during his military service, appellant's occupational specialty carried "a high probability for exposure to loud noise," and that appellant was awarded a combat infantryman badge.<sup>10</sup> These factual findings led the Board to conclude that appellant satisfied the second element of his claim for service connection.<sup>11</sup> The Board found, however, that appellant failed to establish a nexus between his military service and his current hearing loss.<sup>12</sup> Consequently, the Board denied appellant's claim. As explained below, we find that remand is required for the Board to consider a properly raised argument that the Board previously failed to consider.

"[I]f the Board fails to consider and adjudicate an argument or theory 'reasonably raised by the record,' . . . the Board commits error requiring remand."<sup>13</sup> Though couched in a recitation of facts, appellant's Disabled American Veterans (DAV) representative raised the issue of a relationship between appellant's hearing loss and his service-connected tinnitus before the Board.<sup>14</sup> The DAV representative cited to a positive private medical nexus opinion opining that appellant's hearing loss had the same etiology as his service-connected tinnitus.<sup>15</sup> Should the two conditions

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<sup>5</sup> Motion for Reconsideration at 5-7.

<sup>6</sup> See R. at 310-12 (regional office decision granting service connection for tinnitus).

<sup>7</sup> *Id.*

<sup>8</sup> *Harvey v. Shulkin*, 30 Vet.App. 10, 15 (2018) (citation omitted).

<sup>9</sup> R. at 7.

<sup>10</sup> R. at 8.

<sup>11</sup> *Id.*

<sup>12</sup> R. at 8-10.

<sup>13</sup> *Massie v. Shinseki*, 25 Vet.App. 123, 129 (2011).

<sup>14</sup> R. at 26.

<sup>15</sup> *Id.*

have the same etiology, it would be odd for appellant's hearing loss not to be service connected, given that the only element of appellant's service-connection claim the Board found to be lacking was the nexus element.<sup>16</sup> The Board, however, did not address this issue in its decision. On remand, the Board is to directly address this argument and consider the weight to be afforded to the private medical provider's opinion that the two conditions have the same etiology, ordering a supplemental medical examination, if necessary.

Because the Court is remanding these matters to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.<sup>17</sup> On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.<sup>18</sup> The Board must consider any such additional evidence or argument submitted.<sup>19</sup> The Board must also proceed expeditiously.<sup>20</sup>

## II. CONCLUSION

Appellant's motion for reconsideration is GRANTED. The Court's March 10, 2020, decision is WITHDRAWN. After consideration of the briefs, the governing law, and the record, the Court SETS ASIDE the portion of the September 26, 2018, Board decision that denied service connection for appellant's hearing loss and REMANDS this matter for further proceedings.

DATED: May 11, 2020

Copies to:

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VA General Counsel (027)

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<sup>16</sup> R. at 8-10.

<sup>17</sup> See *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

<sup>18</sup> See *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam); see also *Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

<sup>19</sup> *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

<sup>20</sup> 38 U.S.C. §§ 5109B, 7112.