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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2400

GEORGE A. OWENS, APPELLANT,

v.

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

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The appellant, George A. Owens, through counsel appeals a January 22, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to benefits for bilateral hearing loss. Record (R.) at 5-20. The Board also denied entitlement to benefits for bilateral knee and ankle disabilities and sleep apnea, as well as entitlement to a disability rating in excess of 70% for post-traumatic stress disorder. *See id.* The appellant does not challenge the Board's decision as to those claims and the Court will therefore dismiss the appeal as to those matters. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc); Appellant's Brief (Br.) at 2 n.2. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision denying entitlement to benefits for bilateral hearing loss and remand that matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from January 1969 to February 1972, including service in Vietnam. R. at 2039. His military occupational specialty was wheeled vehicle

mechanic. *Id.* His entrance and separation examination reports reflect normal hearing. *See* R. at 2105, 2124. At separation, he denied having or ever having had hearing loss. R. at 2102; *see* R. at 2106.

The record contains an October 2006 VA audiology consultation note indicating that a physician had advised the appellant several years earlier to wear hearing aids. R. at 899. The appellant complained of difficulty understanding certain sounds, as well as occasional bilateral tinnitus. *Id.* The examiner noted that the appellant's history was "significant for noise exposure in and out of service." *Id.* A hearing test revealed that the appellant's hearing was within normal limits, with excellent speech discrimination scores. *Id.*

At a May 2013 VA audiology evaluation, the appellant reported that he could not hear the television and could not understand other people speaking, difficulties that he noticed beginning "a few years ago." R. at 262. He again reported intermittent bilateral tinnitus. *Id.* Testing revealed mild to moderate sensorineural hearing loss in the right ear and moderate sensorineural hearing loss in the left ear, with excellent word discrimination in both ears. *Id.*

The appellant filed a claim for benefits for bilateral hearing loss and tinnitus in May 2015 "due to excessive gun[]fire and environmental noise." R. at 267. He underwent a VA audiological examination several months later. R. at 209-13. The VA audiologist reviewed the appellant's claims file, interviewed him, and conducted audiological testing. *Id.* She diagnosed bilateral sensorineural hearing loss. R. at 210-11. She found that the appellant did not have "a permanent positive threshold shift (worse than reference threshold) greater than normal measurement variability at any frequency between 500 and 6000 [hertz]" in either ear. R. at 211-12. Accordingly, she opined that the appellant's hearing loss was not at least as likely as not caused by or a result of service. *Id.* She explained: "The [appellant] had normal hearing on his entrance hearing exam[ination] dated April 25, 1968. He also had normal hearing on his exit hearing exam[ination] dated November 15, 1971. When comparing these two exam[ination]s there is no [significant threshold shift,] which indicates no decline in hearing." R. at 211, 212. The examiner noted that the appellant's current audiological results "agree[d]" with the May 2013 results and that the appellant "reported he works in construction and has since he was released from active duty" and "stated when he first started working he was not provided hearing protection." R. at 212. With respect to tinnitus, which the appellant reported started in the 1970s, the examiner determined that

the condition was at least as likely as not related to service, given that he worked as a wheeled vehicle mechanic and was exposed to combat noise. R. at 212-13.

In a December 2015 decision, a VA regional office denied the appellant's claim for benefits for bilateral hearing loss but granted his claim for benefits for tinnitus and assigned the maximum 10% disability rating for that condition. R. at 168-74. He filed a Notice of Disagreement with the denial of benefits for bilateral hearing loss, R. at 143-45, and ultimately appealed to the Board, R. at 47-48.

The Board issued the decision on appeal in January 2019, denying the appellant's claim for benefits for bilateral hearing loss. R. at 5-20. This appeal followed.

II. ANALYSIS

On appeal, the appellant argues that "[t]he Board's decision is tainted" because the Board overlooked "the relevant and material fact that VA has granted service connection for tinnitus on the basis of in-service acoustic trauma." Appellant's Br. at 5, 6-8. He further contends that the August 2015 VA audiological examination is inadequate because the examiner did not discuss the relationship, if any, between his tinnitus and his hearing loss. *Id.* at 5-6. In that regard, he also contends that the examiner did not "appreciate that negative service medical records, including audiometry reports, do not preclude a grant of direct service connection for hearing loss." *Id.* at 5. The Secretary disputes these arguments and urges the Court to affirm the Board decision. Secretary's Br. at 6-16.

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2019). Additionally, a medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Steffl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)) (internal quotation marks omitted), and "sufficiently inform[s] the Board of a medical expert's judgment on

a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Id.* at 105-06.

Whether a claimant is entitled to benefits and whether a medical examination or opinion is adequate are findings of fact that the Court reviews under the "clearly erroneous" standard of review. See *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (per curiam); *Russo v. Brown*, 9 Vet.App. 46, 50 (1996). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); see *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any material issue of fact or law, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); see 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57.

Regarding direct service connection, the Board reviewed and summarized the appellant's service medical records, the October 2006 VA audiology consultation report, and the August 2015 VA audiological examination. R. at 12-13. The Board acknowledged the appellant's assertions that his hearing loss is related to in-service noise exposure, but found him not competent to render an etiology opinion. R. at 13. Instead, the Board relied heavily on the August 2015 VA examiner's opinion, affording it "great probative weight" and noting that "[t]here is no competent evidence [against] which to weigh [] this medical opinion." *Id.* The Board explained that the VA examination "was performed by a medical professional who possesses the necessary training and expertise to render an opinion on the matter, involved a thorough review of the [appellant's] file, and includes an opinion that is supported by a well-reasoned rationale." *Id.*

The Court cannot address whether the Board erred when it relied on the August 2015 VA examination to deny the appellant's claim because the Board's summary of that examination report reflects only that the rationale for the negative nexus opinion was that the service records did not show a decline in hearing. R. at 13. The Board did not discuss whether the examiner addressed or should have addressed the possibility that the appellant's later-developed hearing loss could have been caused by the conceded in-service acoustic trauma. See *Hensley v. Brown*, 5 Vet.App.

155, 159-60 (1993) (holding that 38 C.F.R. § 3.385 "does not preclude service connection for a current hearing disability where hearing was within normal limits on audiometric testing at separation from service," and that, "when audiometric test results at a veteran's separation from service do not meet the regulatory requirements for establishing a 'disability' at that time, he or she may nevertheless establish service connection for a current hearing disability by submitting evidence that the current disability is causally related to service"). Although the parties make competing arguments as to whether the August 2015 VA examination was adequate in that regard, *see* Appellant's Br. at 5-6; Secretary's Br. at 16, the Court's review is frustrated by the Board's failure to make the necessary factual findings in the first instance, *see Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) ("[A]ppellate tribunals are not appropriate fora for initial fact finding."); *see also* 38 U.S.C. § 7261(c). Remand is thus necessary. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("[W]here the Board . . . failed to provide an adequate statement of reasons or bases for its determinations, . . . a remand is the appropriate remedy.").

Given this disposition, the Court will not now address the remaining arguments and issues raised by the appellant. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (noting that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order). On remand, the appellant is free to submit additional evidence and argument on the remanded matter, including the specific arguments raised here on appeal, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to the benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for the decision," *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991), and the Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112.

III. CONCLUSION

The appeal of the Board's January 22, 2019, decision denying entitlement to benefits for bilateral knee and ankle disabilities and sleep apnea, as well as entitlement to a disability rating in excess of 70% for post-traumatic stress disorder, is DISMISSED. After consideration of the

parties' pleadings and a review of the record, the Board's decision denying entitlement to benefits for bilateral hearing loss is VACATED and the matter is REMANDED for further proceedings consistent with this decision.

DATED: May 12, 2020

Copies to:

David T. Landers, Esq.

VA General Counsel (027)