Vet.App. No. 19-7301

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

LESLIE C. LONG,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Register

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS

FOR VETERANS CLAIMS

LESLIE C. LONG,	)	
	)	
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ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Board of Veterans' Appeals (Board) properly denied Appellant's claim for entitlement to an earlier effective date, prior to March 30, 2014, for the award of service connection for tinnitus.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction under 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review Board decisions.

B. Nature of the Case

Appellant, Leslie C. Long, appeals that portion of the October 3, 2019, Board decision that denied entitlement to an effective date earlier than March 30, 2014, for service connection for tinnitus. [Record Before the Agency (R.) at 4-34]. Appellant additionally expresses an intent to appeal the October 3, 2019, Board decision to the extent that it denied his claim for entitlement to an earlier effective date for service connection for a traumatic brain injury (TBI), headaches, and an eye injury. [Appellant's Brief (App. Br.) at 16]. Appellant does not appeal any other portion of the Board's October 3, 2109, decision. [1]

[1] Specifically, Appellant does not appeal that part of the October 3, 2019, Board decision which dismissed claims for (1) service connection for cardiac diastolic dysfunction with mild left ventricular hypertrophy, (2) an initial rating in excess of 10% for service-connected tinnitus, (3) an initial rating in excess of 20% for shell fragment wound of the right shoulder, (4) an initial compensable rating for shell fragment wound of the right upper thigh, (5) a rating in excess of 20% for status post right (dominant) forearm shell fragment wound with cutaneous neuropraxia from shrapnel wound right dorsum hand and distal radial forearm, (6) a compensable rating for bilateral deafness, (7) an initial compensable rating for scars, pepper spots on the right side of neck, (8) an initial compensable rating for scars, pepper spots of the right arm (dominant), (9) an initial rating in excess of 30% for painful scars, pepper spots of the right arm, right leg, right pelvic region, and left hand, (10) an initial compensable rating for scars pepper spots of the right leg, right pelvic region, and left hand, (11) a rating in excess of 50% from March

On appeal, Appellant argues that the Board erred in determining that an informal claim for service connection for tinnitus has remained pending since September 1970. App. Br. at 4. Alternatively, Appellant asserts that the Board committed reversable error by failing to award an earlier effective date for his claims pursuant to 38 C.F.R. § 3.156(c)(3). App. Br. at 2.

30, 2015, for post-traumatic stress disorder (PTSD), (12) a rating in excess of 70% from September 28, 2017, for PTSD, (13) entitlement to special monthly compensation based on aid and attendance, (14) entitlement to an effective date earlier than March 30, 2015, for scars, pepper spots of the right arm, right leg, and right pelvic region, (15) entitlement to an effective date earlier than March 30, 2015, for scars, pepper spots on the right side of neck, (16) entitlement to an effective date earlier than March 30, 2015, for shell fragment wound of the right upper thigh (flexion), (17) for whether there was clear and unmistakable error (CUE) in the September 30, 1970, rating decision which would support an effective date earlier than March 30, 2015, for a compensable evaluation for scars, pepper spots of the right arm, right leg, and right pelvic region, and (18) whether there was CUE in the September 30, 1970, rating decision which would support an effective date earlier than March 30, 2014, for service connection for tinnitus. Appellant also does not appeal that part of the October 3, 2019, Board decision which denied (1) an initial compensable rating for shell fragment wound of the right upper thigh (abduction, adduction, and rotation), (2) a raring in excess of 10% for right corneal shell fragment wound with foreign body residual and pseudoaphakia with sympathetic left eye, (3) entitlement to an effective date earlier than March 30, 2015, for service connection for PTSD, (4) entitlement to an effective date earlier than March 30, 2015, for service connection for shell fragment wound of the right upper thigh (extension), (5) entitlement to an effective date earlier than March 30, 2015, for service connection for shell fragment wound of the right shoulder (dominant) (6) entitlement to an effective date earlier than March 30, 2015, for service connection for shell fragment wound to the right upper thigh (abduction, adduction, and rotation), (7) entitlement to an effective date earlier than March 30, 2015, for a total disability rating based on individual unemployability (TDIU), and (8) entitlement to an effective date earlier than March 30, 2015, for eligibility to Dependents' Education Assistance (DEA) under 38 U.S.C. Chapter 35. These claims are therefore abandoned. *See Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (finding that claims not addressed in Appellant's brief had been abandoned on appeal).

The Secretary respectfully disagrees and submits that the Court should affirm the Board's decision. First, the claims for entitlement for earlier effective dates for TBI, headaches, and a right eye injury were not properly before the Board. Because these claims were not before the Board, this Court lacks jurisdiction over the claims, and the Court should therefore reject Appellant's arguments concerning these issues. Second, the Board's determination that an effective date earlier than March 30, 2014, is not warranted for the award of service connection for tinnitus is supported by a plausible basis in the record and is therefore not clearly erroneous.

C. Statement of Relevant Facts

Appellant served on active duty in the United States Army from April 1968 to April 1970. [R. at 3247 (DD 214), 3082 (DD 215)]. During his active duty service, Appellant served inside the Republic of Vietnam and sustained injuries from combat. [R. at 3247, 2367-68 (October 2014 Correspondence awarding Appellant a Purple Heart for "wounds received as a result of hostile actions")]. Specifically, Appellant sustained multiple shell fragment wound injuries to the right side of his body, including an "intraocular foreign body" to his right eye. [R. at 3235-36 (February 1969 Hospital Summary), 3216-18 (May 1970 Report of Medical Examination)]. Appellant was subsequently placed on limited duty following these injuries. [R. at 3231 (March 11, 1969, Physical Profile Record), 3233 (March 13, 1969, Physical Profile Record)].

After his honorable discharge, Appellant sought service connection for residual injuries from his in-service shell fragment wounds, including perforated ear drums. [R. at 3249-52 (June 1970 Application for Compensation)]. After receipt of this claim, the Veterans Administration Regional Office (RO) scheduled Appellant for a disability medical examination. [R. at 3246 (June 1970 Request for Examination)]. Appellant was afforded an examination in August 1970, at which time the examiner recorded the conditions for which service connection was sought as (1) shell fragment wound (SFW) of the right hand; (2) SFW right arm; (3) SFW right side; (4) SFW right head; (5) injury to right eye; and (6) perforated ear drum. [R. at 3175-87 (August 1970 Report of Medical Exam)]. Specific to the ear condition, the examiner described the symptoms Appellant reported as including "an infection in [his] right ear and the left one has been clogged up," "earaches," "drainage in the right ear," and "ringing in [the] right ear." [R. at 3175]. Upon clinical examination of Appellant's ears, the examiner again recorded the subjective reports of "intermittent tinnitus," but ultimately did not include "tinnitus" as a diagnosis. [R. at 3177]; *see* [R. at 3182 (recording Appellant's reports of "some tinnitus")]. Instead, the examiner diagnosed Appellant with "[d]eafness neurosensory bilateral[ly.]" [R. at 3177].

In September 1970, the RO issued a rating decision which awarded Appellant entitlement to service connection for (1) residuals SFW to the right forearm with cutaneous nerve damage; (2) residuals SFW right cornea; (3) scars resulting from SFW; and (5) bilateral deafness. [R. at 3147-48 (September 1970

Rating Decision, awarding service connection as of April 29, 1970, the day after Appellant's honorable discharge)]. Notably, the September 1970 Rating Decision did not deny entitlement to service connection for any condition. *Id*. No notice of disagreement (NOD) was filed in response and the RO did not receive any correspondence from Appellant expressing any dissatisfaction with the benefits awarded.

Nearly 45-years later, Appellant submitted an application seeking service connection for, among other disabilities, tinnitus. [R. at 3073-74 (March 2015 Application for Disability Compensation)]. At this time, Appellant requested that he be awarded service connection for tinnitus from 1970 and included a notation that he believed his claim involved an allegation of clear and unmistakable evidence (CUE). [R. at 3073]. Although the RO scheduled Appellant for Department of Veterans Affairs (VA) examinations for his claimed conditions, including tinnitus, Appellant did not appear for his scheduled examination or provide any cause for this failure. [R. at 3026-29 (Failure to Appeal for Scheduled Examination)]. As such, the RO denied Appellant entitlement to service connection. [R. at 2973-81 (July 2015 Rating Decision)].

Of note, at the time of the July 2015 Rating Decision, the RO acknowledged Appellant's allegations of CUE in the September 1970 Rating Decision. [R. at 2977]. The RO explained that although Appellant's August 1970 medical examination included a report of "intermittent tinnitus," the law in 1970 "only allowed for compensation for persistent tinnitus." *Id*. Thus, absent any subjective

reports of persistent tinnitus in August 1970, or any diagnosis reflecting the same, the RO explained that there was no basis to award service connection at that time. *Id*. Thus, it determined there was no CUE in the 1970 rating decision. *Id*.

Following notification that his claims were denied, Appellant contacted the RO and requested that he be rescheduled for his audiological examination. [R. at 2905 (August 2015 Report of General Information)]. The rescheduled examination took place in October 2015 and, at that time, the examiner diagnosed Appellant with bilateral tinnitus. [R. at 2861-68 (October 2015 Hearing Loss and Tinnitus Examination)]. The VA examiner further reported that, in his medical opinion, the tinnitus disability was at least as likely as not etiologically related to Appellant's active duty service. [R. at 2867]. Thereafter, the RO awarded Appellant entitlement to service connection for tinnitus, effective March 30, 2015. [R. at 2464-84 (December 2015 Rating Decision)]. With this award, the RO again explained that it "reviewed the evidence [Appellant] identified as [] CUE and note that no decision for this condition has been rendered prior to this claim." [R. at 2473].

In August 2016, Appellant, who was at that time represented by his current non-attorney representative, filed an NOD. [R. at 2315-88 (August 2016 Notice of Disagreement with attached exhibits), 2390-91 (July 2016 Appointment of Representative)]. Specific to the tinnitus claim, Appellant expressed disagreement with the effective date assigned and again asserted his belief that his award should date back to 1970. [R. at 2315 (expressing belief that he "complained of constant

ring[ing]" of his ears at the August 1970 examination)]. As part of this NOD, Appellant attached service personnel records which he asserted had "never been associated with the claims file," and therefore triggered reconsideration of his claims under 38 C.F.R. § 3.156(c). [R. at 2326-65]. Appellant also included correspondence from the Department of the Army which awarded him the combat infantryman badge, the Vietnam Service Medal with one bronze star, and a Purple Heart. [R. at 2366-70]. Appellant asserted that the receipt of these service medals also triggered reconsideration of his claims under § 3.156(c). [R. at 2366].

Appellant's representative submitted additional argument in October 2016 advocating for the application of § 3.156(c). [R. at 2240-45 (October 2016 Argument)]. At that time, Appellant asserted that his submission of his in-service Court Martial Proceedings triggered reconsideration under § 3.156(c), thereby reopening the prior September 1970 Rating Decision. [R. at 2240]. Reopening of that decision, according to Appellant, required the RO to also "infer claims such as [t]raumatic [b]rain [i]njury (TBI) due solely to concussive explosive effects" and for "chronic Ottis Media." *Id*. Because reopening required reconsideration of these inferred claims, Appellant, through his representative, asserted that there was no need to submit a formal application for benefits on VA's prescribed forms. *Id*.; *see also* [R. at 2244 (where Appellant, through his representative, asserted that "Mr.

Long sees the VA's request [for Appellant] to file for [TBI] and ottis media as superfluous")].[2]

In December 2016, the RO issued a rating decision denying Appellant's CUE claim. [R. at 2178-81 (December 2016 Rating Decision)]. The RO, again, explained that the laws in existence in 1970 required a showing of "constant" tinnitus, as opposed to Appellant's description of "intermittent" tinnitus. [R. at 2180]. The RO also explained that in 1970 Appellant had not submitted a claim for benefits for tinnitus. *Id*.

Appellant timely submitted a NOD with the RO's CUE determination. [R. at 2077-96 (January 2017 Notice of Disagreement)]. As part of his appeal of both the effective date for tinnitus and his CUE motions, Appellant was afforded a hearing before a decision review officer (DRO) in February 2017. [R. at 1876-1942 (February 2017 DRO Transcript)]. Thereafter, the RO issued a May 2018 Rating Decision, which, in part, awarded Appellant an earlier effective date for his tinnitus claim. [R. at 431-449 (May 2018 Rating Decision)]. At that time, the RO explained that the award was based upon prior liberalizing criteria[3] for the award of benefits

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[2] Appellant did subsequently submit a formal claim for service connection for an "[i]njury to the eye – unhealed – retained metal fragments." [R. at 2014 (February 2017 Supplemental Claim for Compensation)]. The RO subsequently awarded Appellant service connection for both TBI and for migraine headaches associated with this TBI. [R. at 1580-89 (May 2017 Rating Decision)].

[3] Effective March 10, 1976, VA amended the Diagnostic Code (DC) for tinnitus to provide a 10% rating for tinnitus that is "[p]ersistent as a symptom of head injury, concussion, or acoustic trauma." 38 C.F.R. § 4.84b, DC 6260; *see* 41 Fed. Reg. 11298 (Mar. 18, 1976).

for service connection for tinnitus. [R. at 435-36]. The RO assigned Appellant an effective date of March 30, 2014, one year prior to the date upon which VA received Appellant's claim for service connection. *Id*. In the May 2018 Rating Decision, the RO additionally addressed Appellant's request for reconsideration, under 38 C.F.R. § 3.156(c), of the September 1970 Rating Decision based on the receipt of service department records. Ultimately the RO determined that no reconsideration was warranted. [R. at 448-49].

Following this May 2018 Rating Decision, the RO issued two statement of the cases (SOC), one with respect to the effective date for tinnitus and another for the CUE claims, which continued to deny Appellant's claims. [R. at 280-380 (May 2018 Statement of the Case – tinnitus), 381-430 (May 2018 Statement of the Case – CUE)]. Appellant timely appealed both SOCs and additionally submitted a statement of rebuttal from his current representative. [R. at 154-63 (June 2018 VA Form 9, with attached argument), 172-81 (June 2018 Statement of Rebuttal)]. The appeal was then certified to the Board. [R. at 120-21 (August 2018 VA Form 8)].

In September 2019, prior to his hearing with a Board Veterans Law Judge (VLJ), Appellant, through his current representative, submitted a written statement expressing his intent to withdrawal the claims for, as relevant here, the "Motion to Revise the 1970 rating[] decision." [R. at 83-93 (September 2018 Correspondence)]. Appellant, through his current representative, subsequently reaffirmed his intent with withdrawal his CUE motions during his September 2018 Board hearing. [R. at 42-69 (September 2019 Board Transcript)].

On October 3, 2019, the Board issued the decision on appeal. [R. at 4-34]. Initially, the Board explained that Appellant applied for, and received, service connection for TBI in a May 2017 Rating Decision. [R. at 13-14]; *see* [R. at 1580-89 (May 2017 Rating Decision, which also awarded service connection for migraine headaches due to TBI)]. However, the Board explained that the record did not show that Appellant submitted a NOD with respect to the effective dates assigned in that May 2017 Rating Decision. [R. at 14]. Therefore, the Board explained that Appellant's arguments, with respect to these claims, amounted to an impermissible free standing earlier effective date claim and would not be addressed. [R. at 14]; *citing Rudd v. Nicholson*, 20 Vet.App. 296, 300 (2006).

The Board did not adjudicate any claim for an earlier effective date for a right eye injury. Instead, the claim addressed by the Board in the October 3, 2019, decision was Appellant's request for a rating above 10% for right corneal shell fragment wound with foreign body residuals and pseudoaphakia with sympathetic left eye. [R. at 6].

Finally, with respect to Appellant's claim for an earlier effective date for tinnitus, the Board explained that Appellant is presently in receipt of the earliest effect date allowable under the law. [R. at 26-28]. Addressing Appellant's arguments that the September 1970 Rating Decision failed to address his informal claim for tinnitus, the Board explained that Appellant's reports of intermittent ringing in his right ear during the August 1970 medical examination was insufficient to raise an informal claim for tinnitus. [R. at 27]. The Board next explained that

Appellant arguments for reconsideration under 38 C.F.R. § 3.156(c) were inapplicable in this matter because there was no prior final denial of benefits for tinnitus at the time of the September 1970 Rating Decision. [R. at 27-28].

Thereafter, on October 16, 2019, Appellant filed his Notice of Appeal with this Court. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Secretary submits that the Court should affirm the Board's October 3, 2019 decision. First, with respect to the claims for earlier effective dates for service connection for TBI, headaches, and a right eye injury, because these matters were not properly on appeal to the Board, the Court lacks jurisdiction. Appellant does not assert any argument which would dispute this finding. Therefore, the Court should dismiss Appellant's appeal with respect to these claims.

Second, the Court should affirm the Board's determination that an award of an effective date for service connection for tinnitus prior to March 30, 2014, is not warranted. The Board's determination that there was no pending informal claim for service connection for tinnitus prior to Appellant's March 30, 2015, application for benefits is not clearly erroneous and is supported by both the law and evidence of record. Although Appellant disagrees, he has not asserted any meaningful argument that the Board's factual determinations are clearly erroneous. Finally, because there was no claim for service connection for tinnitus prior to Appellant's March 30, 2015, application, the record does not support application of 38 C.F.R. § 3.156(c) to this claim.

IV. ARGUMENT

A. Standard of Review

The Court reviews the Board's findings of fact, such as the effective date for disability compensation for a service-connected disability, under the clearly erroneous standard of review. *See Brokowski v. Shinseki*, 23 Vet.App. 79, 85 (2009); *see also* 38 U.S.C. § 7261(a)(4). Under the "clearly erroneous" standard of review, "the Court is not permitted to substitute its judgment for that of the [Board] . . . if there is a 'plausible basis' in the record for the factual determinations of the [Board], even if this Court might not have reached the same factual determination," the Court cannot overturn the Board's findings. *Gilbert v. Derwinsk*i, 1 Vet.App. 49, 52-53 (1990).

It is also relevant to the Court's standard of review that an appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), *aff'd* 232 F.3d 908 (Fed. Cir. 2000); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009). An appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010).

B. The Issues of Entitlement to Earlier Effective Dates for TBI, Headaches, and a Right Eye Injury Were Not Before the Board, and thus the Court Lacks Jurisdiction Over these Claims

Appellant fails to demonstrate that this Court has jurisdiction over his claims for earlier effective dates for TBI, headaches, and a right eye injury. The Court's jurisdictional statute grants the Court the "power to affirm, modify, or reverse a

decision of the Board or to remand the matter, as appropriate." 38 U.S.C § 7252(a); *see Henderson v. Shinseki*, 562 U.S. 428, 439 (2011) (describing section 7252, which was enacted as section 4052, as prescribing this Court's jurisdiction).

First, with respect to the claim involving an earlier effective date for service connection for TBI, the Board explicitly states in its decision that it does not have jurisdiction. [R. at 13-14]. The Board explained that service connection for TBI was awarded in a May 2017 Rating Decision, which Appellant had not yet appealed. *Id*.; *see* [R. at 1580-85 (awarding service connection for TBI and assigning an effective date of December 27, 2016)]. Therefore, absent an appeal of this May 2017 Rating Decision, the Board explained that Appellant's arguments with respect to the assignment of an earlier effective date for TBI amounted to an impermissible freestanding earlier effective date claim. [R. at 14], citing *Rudd v. Nicholson*, 20 Vet.App. 296, 300 (2006). The Secretary submits that the Board's analysis in this regard is correct, and therefore, this Court should determine that it does not have jurisdiction over Appellant's claim for the assignment of an earlier effective date for the award of service connection for TBI.

Second, as to Appellant's arguments concerning the assignment of an earlier effective date for headaches, the Secretary submits that this claim is again outside of this Court's jurisdiction. Appellant was awarded service connection for this disability in the May 2017 Rating Decision, which he did not appeal. [R. at 1580-85 (awarding service connection for migraine headaches and assigning an

effective date of December 27, 2016)]. Absent a timely NOD, any issue stemming from this May 2017 Rating Decision was not properly on appeal to the Board. Because the Board did not have jurisdiction over that matter, the Court also lacks jurisdiction over it. *Evans v. Shinseki*, 25 Vet.App. 7, 10 (2011).

Third, a claim for an earlier effective date for a right eye injury was not on appeal and was not addressed by the Board's October 3, 2019, decision. Instead, the claim addressed by the Board was Appellant's request for a rating above 10% for right corneal shell fragment wound with foreign body residuals and pseudoaphakia with sympathetic left eye. [R. at 6]; *see* [R. at 2973-81 (July 2015 Rating Decision, denying an increased rating), 2315-25 (August 2016 Notice of Disagreement), 431-54 (May 2018 Rating Decision, awarding increased rating of 10% for right eye disability), 280-380 (May 2018 Statement of the Case), 253 (June 2018 VA Form 9)]. Appellant does not challenge the Board's denial of an increased rating. *See* App. Br. at 16; *see also Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (finding that claims not addressed in Appellant's brief had been abandoned on appeal).

The Secretary submits that the Court should affirm the Board's finding that the claims for earlier effective dates for the award of service connection for TBI, headaches, and a right eye injury were not properly before the Board at the time of the October 3, 2019 decision. Appellant makes no argument to the contrary. Therefore, he has not met his burden of showing that this Court has jurisdiction over a claim. *See Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992).

C. The Court Should Affirm the Board's Finding that An Effective Date Earlier than March 30, 2014, for Service Connection for Tinnitus Is Not Warranted Because the Determination Is Based on the Entire Evidence of Record and Supported with Adequate Reasons or Bases

In its decision, the Board denied Appellant's claim for the assignment of an effective date prior to March 30, 2014, for the award of service connection for tinnitus. [R. at 26-29]. The Board explained that Appellant did not submit any application seeking the award of benefits for tinnitus until March 30, 2015. [R. at 26-27]; *see* [R. at 3073]; *see also* 38 C.F.R. § 3.400 (explaining that the effective date of an award for compensation is the date of the receipt of the claim or the date entitlement arose, **whichever is later**). Despite this, the Board also noted that Appellant was previously awarded entitlement to an effective date of March 30, 2014, one year prior to the date of his application based on a liberalizing law. [R. at 28; 431-49]. But the Board determined that the award of an effective date prior to March 30, 2014, was not warranted because the record did not include any communication or action from Appellant indicating an intent to seek service connection for tinnitus prior to his March 2015 application for benefits. [4] The

[4] When VA compensation is increased due to a liberalizing law or "liberalizing VA issue," "the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue." 38 C.F.R. § 3.114(a); *see* 38 C.F.R. § 3.400(p) (referring effective dates for liberalizing laws to section 3.114); *see also* 38 U.S.C. § 110(g) (statutory authority). As relevant here, if VA reviews the claim at the claimant's request more than one year after the liberalizing law's effective date, benefits are authorized for one year prior to the receipt of the request. *Id.* § 3.114(a)(3).

Secretary submits that the Board's factual finding in this regard is not clearly erroneous and must therefore be affirmed.

Appellant fails to meet his burden of demonstrating prejudicial error in the Board's October 3, 2109, decision. While Appellant generally argues that his June 1970 application for benefits for "perforated ear drums" should have been construed to encompass an additional claim for tinnitus, he fails to present any meaningful argument in support of these assertions. Furthermore, Appellant fails to assert any argument that the Board's determinations are clearly erroneous.

Finally, Appellant's arguments for the assignment of an earlier effective date under 38 C.F.R. § 3.156(c) are without merit. The record in this matter does not demonstrate that Appellant was ever finally denied entitlement to service connection for tinnitus. In fact, Appellant was awarded entitlement to service connection for tinnitus based on his initial submission of a claim, in March 2015. Absent any prior final denial, the reconsideration provisions of § 3.156(c) are not triggered.

i. The Board's determination that there was no informal claim for service connection for tinnitus prior to March 30, 2015, is not clearly erroneous

Under the law in effect in 1970, "[a]ny communication or action, indicating an intent to apply for one or more benefits under the laws administered by [VA], . . . may be considered an informal claim" but that "[s]uch informal claim must identify

the benefit sought." 38 C.F.R. § 3.155(a) (1970).[5] The regulations in 38 C.F.R. pt. 3 (§ 3.1 et. seq.) have evolved over time, but the "identity of the benefit sought" language remained until 2015.[6] In interpreting the pre-2015 language of § 3.155(a), the United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that "any communication can qualify as an informal claim if it: (1) is in writing; (2) indicates an intent to apply for veterans' benefits; and (3) identifies the particular benefits sought." *Reeves v. Shinseki*, 682 F.3d 988, 993 (Fed. Cir. 2012); *see also Rodriguez v. West*, 189 F.3d 1351, 1353-54 (Fed. Cir. 19999).

Additionally, this Court has treated the "benefit sought" language in pre-2015 versions of § 3.155(a) as not merely requiring identification of the type of benefit sought—*e.g.*, pension, 38 C.F.R. § 3.3 (1970); disability or death compensation, *id*. § 3.4; or dependency and indemnity compensation, *id*. § 3.5—but as referring, in the case of disability compensation, to the condition, symptom, or the like underlying the asserted disability. *See, e.g., Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007) (explaining that "[t]he requirement to identify the benefit sought means that a claimant must describe the nature of the disability for which he is seeking

[5] The 1970 regulations also contained a provision stating that "[a] specific claim in the form prescribed by the Administrator of [VA] must be filed in order for benefits to be paid to any individual under the laws administered by [VA]." 38 C.F.R. § 3.151 (1970).

[6] Effective March 24, 2015, a claim must be filed on a standard form. 38 C.F.R. § 3.155 (2017); 79 Fed. Reg. 57660 (Sept. 14, 2014). Instead of informal claims, the new regulation provides that a claimant may request an application for benefits, upon receipt of which, "the Secretary shall notify the claimant . . . of the information necessary to complete the application form or form prescribed by the Secretary." 38 C.F.R. § 3.155(a).

benefits"); *Brannon v. West*, 12 Vet. App. 32, 34-35 (1998) (explaining that before VA can adjudicate an original claim for benefits, the claimant must submit a written document identifying the benefit and expressing some intent to seek it).

In determining the scope of a claim, VA must give a sympathetic reading to a pro se veteran's filings. *Roberson v. Principi,* 251 F.3d 1378, 1384 (Fed. Cir. 2001). But the "sympathetic reading" requirement only requires VA to consider claims "reasonably" raised by the evidence. *Brokowski v. Shinseki*, 23 Vet. App. 79, 86 (2009). "VA is not required to anticipate a claim for benefits for disabilities that have not been identified in the record by medical professionals or by competent lay evidence at the time that a claimant files a claim or during the claim's development." *Id.*; *see also Clemons v. Shinseki*, 23 Vet.App. 1, 4-5 (2009) (recognizing that the Secretary "has no duty to read the mind of the claimant" but should "construe a claim based on the reasonable expectations of the non-expert, self-represented claimant and the evidence developed in processing that claim).

Consistent with these interpretations, the Board determined that there is no evidence of any unadjudicated formal or informal claim for service connection for tinnitus prior to Appellant's March 15, 2015, application. [R. at 26-27]. In so finding, the Board explained that Appellant's June 1970 application for benefits did not include any indication or intent to seek compensation for tinnitus. Instead, and as the Board explained, Appellant expressed his intent to seek compensation for "perforated ear drums," and made no notation of any symptoms such as ringing in his ears. [R. at 27]; *see* [R. at 3250 (describing the condition as "perforated ear

drums")]. Furthermore, the Board explained that although Appellant's August 1970 medical examination noted his descriptions of "intermittent" ringing in the ears, this notation was insufficient to raise a claim for benefits for tinnitus because there was no expression of intent on Appellant's behalf to seek service connection for such a condition. [R. at 27]. *See Brannon*, 12 Vet.App. at 35 ("The mere presence of the medical evidence does not establish an intent on the part of the veteran to seek . . . service connection.").

The Board's factual findings are not clearly erroneous and are supported by an adequate statement of reasons or bases. As the Board explained, Appellant's June 1970 application for benefits described the claimed condition as "perforated ear drums," and made no mention or allegation of symptoms such as ringing in his ears. [R. at 26-27], *see* [R. at 3250]. Later, in describing the symptoms of his disability to the August 1970 medical examiner, Appellant reported symptoms including "an infection in his right ear," that the "left [ear] has been clogged up," "earaches," "drainage in the right ear," and "ringing in [the] right ear." [R. at 3175]. But this later report of "ringing in [the] right ear," is not sufficient to infer a claim for tinnitus because, as the Board explained, there is no intent. *See MacPhee v. Nicholson*, 459 F.3d 1323, 1326-27 (Fed. Cir. 2006) (holding that the plain language of the regulations requires a claimant to have intent to file a claim for VA benefits); *see also Ellington v. Nicholson*, 22 Vet.App. 141, 146 (2007) (holding that informal claim was not filed where veteran lacked intent and there was no

reason to believe that application for benefits was being filed by completing medical questionnaire).

Moreover, the Board's finding that of no informal claim at the time of the June 1970 application for benefits is supported by the August 1970 medical examiner's determination that Appellant did not then have a current diagnosis for tinnitus. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (award of service connection requires medical diagnosis of a current disability) *aff'd* 78 F.3d 604 (Fed. Cir. 1996). During this August 1970 examination, Appellant was noted as describing "intermittent tinnitus." [R. at 3177]. The VA examiner, upon consideration of Appellant's reported symptoms, diagnosed Appellant with "[d]eafness neurosensory bilateral, results of concussion blast injury." *Id*. Thus, even after consideration of Appellant's description of his symptoms, the VA examiner did not provide a diagnosis for tinnitus. As was previously explained, this determination was consistent with VA regulations at that time.[7] *See* [R. at 435-36]. Thus, absent a written intent to seek benefits for tinnitus, and absent a diagnosis for tinnitus, the Board's determination that there was no informal claim is not clearly erroneous.

Furthermore, and as the Board noted, Appellant did not file any statement, notice of disagreement, or any other correspondence indicating that he also

[7] At the time of Appellant's June 1970 application for benefits, tinnitus was rated under DC 6260, which assigned a non-compensable rating for tinnitus that was "severe and continuous." *See* 38 C.F.R. § 4.84b, DC 6260 (1970).

intended on filing for tinnitus at that time. [R. at 27]. Indeed, Appellant did not file anything with VA until March 30, 2015, more than 40 years after the September 1970 Rating Decision. As such, the Board's conclusion finding that the June 1970 claim did not reasonably raise a claim for tinnitus has a plausible basis in the record, is well supported by the law, and is not clearly erroneous.

While Appellant may disagree, he fails to assert a cogent argument that the Board's factual finding was clearly erroneous. Instead, Appellant appears to cite, correctly, to law explaining what constitutes an informal claim. *See, e.g.,* App. Br. at 16, 19. But in merely citing to applicable case law, Appellant fails to explain how the facts of his appeal demonstrate that there was an informal claim for tinnitus prior to March 30, 2015, or that the Board's factual findings are clearly erroneous. As such, the Secretary submits that Appellant has not met his burden of demonstrating error on appeal. *See Hilkert*, 12 Vet.App. at 151; *Shinseki v. Sanders*, 556 U.S. at 409.

Appellant appears to rely on his more recent statements, assertions that he had tinnitus since his active duty service. *See, e.g.,* App. Br. at 18. But these assertions do not support his contention for the assignment of an earlier effective date because they do not tend to show that his June 1970 claim included an informal claim for tinnitus. Appellant also appears to challenge the veracity of the August 1970 examiner's summary of his reported symptoms. For example, Appellant cites to his February 2017 DRO hearing, during which he testified that he told the medical examiner in 1970 that his ears "ring almost all the time." App.

Br. at 18, citing [R. at 1914]. But this argument is without merit, and as Appellant himself concedes, contemporaneous statements made to medical professions tend to carry more probative weight than subsequent statements made for the purpose of obtaining monetary benefits. *See* App. Br. at 19; *see also Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006) (bias of witness may be considered as indication of a lack of credibility).

Therefore, the Secretary submits that the Board's determination that no informal claim for tinnitus existed prior to March 30, 2015, should be affirmed as it is not clearly erroneous and because Appellant has not met his burden on demonstrating prejudicial error. *See Hilkert*, 12 Vet.App. at 151; *Shinseki v. Sanders*, 556 U.S. at 409.

ii. The record does not support the application of 38 C.F.R. § 3.156(c) to this claim

As an alternative theory to entitlement, Appellant appears to argue that he should be awarded an earlier effective date for his tinnitus based on the submission of service department records. *See, e.g.,* App. Br. at 27. In so arguing, Appellant appears to assert that his claim for tinnitus was implicitly denied by the September 1970 Rating Decision. *See, e.g.,* App. Br. at 23 (asserting claims for "perforated ear drums," "perforation of right cornea," and "SFW to right side of head with trauma" were "implicitly denied"). But this argument is not persuasive for two reasons.

First, and as the Board explained, there was no informal claim for tinnitus prior to March 30, 2015. [R. at 26-27]. While Appellant clearly disagrees with this factual determination, he has failed to show that the Board's finding is clearly erroneous. Further, to the extent that Appellant asserts a claim for "perforated ear drums" was implicitly denied in the September 1970 Rating Decision, he is wrong. As explained above, Appellant's June 1970 application for benefits included a claim for "perforated ear drums." [R. at 3250]. In developing that claim, the RO and VA medical examiners reclassified this condition as "bilateral deafness" based on the clinical evaluation of Appellant's condition. *See* [R. at 3181 (where examining clinician reported that the claim "of service connection for deafness is under consideration (i.e., an 'Original' claim for hearing loss.)" and where Appellant's speech recognition scores are reported as 28% in the right ear, and 12% in the left ear)]; *see also* [R. at 3177 (where Appellant is diagnosed with deafness)]. That the RO recharacterized Appellant's claim based on the clinical diagnosis provided was proper and does not mean that a claim for perforated ear drums was implicitly denied. Moreover, the RO **awarded** Appellant service connection for this disability in the September 1970 Rating Decision. [R. at 3147-48].

Second, absent any claim, formal or informal, there was no denial of benefits for tinnitus prior to March 30, 2015, and thus, no prior claim to reconsider. Once a claim has been finally denied, it may not be reopened unless "new and material evidence" is presented with respect to the claim. *See* 38 U.S.C. § 5110; *see also*

38 C.F.R. § 3.156(a) (explaining that "[n]ew evidence means existing evidence not previously submitted," and "[m]aterial evidence means existing evidence that [ ] relates to an unestablished fact necessary to substantiate the claim"). Effective dates for awards of benefits, including those benefits awarded because of new and material evidence, are generally governed by 38 U.S.C. § 5110. *See* 38 U.S.C. § 5110(a); *see also* 38 C.F.R. § 3.400.

Appellant relies on § 3.156(c)(3) for an earlier effective date. Section 3.156(c) requires VA to reconsider a veteran's claim when relevant service department records are newly associated with the veteran's claims file, whether or not they are "new and material" under § 3.156(a). 38 C.F.R. § 3.156(c)(1) (2011) (noting that § 3.156(c) applies "notwithstanding paragraph (a)"). Section 3.156(c) also provides for different effective dates in certain conditions.

Section 3.156(c) includes two parts relevant to this appeal. First, subsection (c)(1) defines the circumstances under which VA must reconsider a veteran's claims for benefits based on newly associated service department records:

> "[A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim."

38 C.F.R. § 3.156(c)(1) (2011); *see also Id*. § 3.156(c)(1)(i)-(iii) (elaborating on the definition of "service department records" to include unit records and declassified service records). Second, subsection (c)(3) establishes the effective date for any benefits that may be granted as a result of reconsideration under subsection (c)(1):

> An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later . . . .

Id. § 3.156(c)(3). Thus, subsection (c)(1) is a separate and distinct provision from subsection (c)(3). As Federal Circuit Federal Circuit explained, § 3.156(c)(1) requires that VA "reconsider only the *merits* of a veteran's claim whenever it associates a relevant service department record with his claims file." *See Blubaugh v. McDonald*, 773 F.3d 1310, 1314 (Fed. Cir. 2014) (emphasis original). Then, only if VA grants benefits resulting from reconsideration of the merits under § 3.156(c)(1) must it consider an earlier effective date under subsection (c)(3).[8]

In this matter, reconsideration under § 3.156(c)(1) did not occur because there was no prior finally denied claim to reconsider. Absent any prior finally denied claim, the reconsideration provisions of 38 C.F.R. § 3.156(c) are not triggered by the facts of this appeal.

Therefore, the Secretary respectfully submits that Appellant's arguments concerning the application of § 3.156(c)(1) are premised on a misunderstanding of the law and should therefore be rejected.

[8] The Federal Circuit is currently considering the scope of "relevant" as it is used in 38 C.F.R. § 3.156(c). *See Kisor v. Wilkie*, Fed. Cir. Docket No. 2016-1929, on remand from 139 S. Ct. 2400 (2019). The outcome of this determination has no bearing on the facts of the present appeal because no official service department record, that existed and had not been associated with the claims file when VA first decided the claim, was ever received or associated with Appellant's claims file.

D. Appellant Has Abandoned All Issues Not Argued in his Brief

The Secretary has limited his response to only those arguments raised by Appellant. This Court has recognized the rights of an appellant to expressly abandon parts of an appeal in the interest of legal strategy. *See Mason v. Shinseki*, 25 Vet.App. 83, 95 (2011) ("Considering arguments not raised by the parties essentially wrests control of the litigation away from the parties, who for any number of reasons, may have chosen not to advance such arguments to the Court."); *cf. Brown v. Shinseki*, 26 Vet.App. 201, 210 n.12 (2013) (recognizing an appellant's right to expressly abandon parts of his appeal). Because Appellant was unable, or chose not to advance any other arguments of error with the Board's decision, it is appropriate to assume that he did not raise the issue "for whatever reason—be it strategy, oversight, or something in between." *Mason*, 25 Vet.App. at 95. Further, "[i]t is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief." *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001).

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, respectfully submits that the Court should affirm the October 3, 2019, decision of the Board of Veterans' Appeals.

Respectfully submitted,

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