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DOCKET NO. 13-13 041 ) DATE

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On appeal from the Department of Veterans Affairs Regional Office in Atlanta, Georgia

THE ISSUES

1. Whether new and material evidence has been received to reopen the claim of service connection for bilateral hearing loss disability.
2. Whether new and material evidence has been received to reopen the claim of service connection for a bilateral knee disorder.
3. Whether new and material evidence has been received to reopen the claim of service connection for a disorder of the feet and toes.
4. Whether new and material evidence has been received to reopen the claim of service connection for a dental disorder, as secondary to radiation exposure.
5. Whether new and material evidence has been received to reopen the claim of service connection for a testicular disorder, as secondary to radiation exposure.
6. Whether new and material evidence has been received to reopen the claim of service connection for a spine disorder, as secondary to radiation exposure.
7. Entitlement to service connection for bilateral hearing loss disability.

REPRESENTATION

Appellant represented by: Chuck Pardue, Attorney at Law

WITNESS AT HEARING ON APPEAL

The Appellant

ATTORNEY FOR THE BOARD

Hallie E. Brokowsky, Counsel

INTRODUCTION

This appeal was processed using the Virtual VA and Veterans Benefits Management System (VBMS) paperless claims processing systems.

The Veteran served on active duty from September 1956 to December 1957.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a September 2010 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Atlanta, Georgia.

The issues of new and material to reopen a claim of service connection for tinnitus and entitlement to service connection for cataracts have been raised by the record, at the Veteran's October 2015 hearing before the

undersigned VLJ, but have not been adjudicated by the Agency of Original Jurisdiction (AOJ). Therefore, the Board does not have jurisdiction over these issues, and they are referred to the AOJ for appropriate action. 38 C.F.R. § 19.9(b) (2015).

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2015). 38 U.S.C.A. § 7107(a)(2) (West 2014).

## FINDINGS OF FACT

1. In an unappealed November 2006 rating decision, the RO denied service connection for bilateral hearing loss disability, a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure.
2. The evidence received since the November 2006 rating decision as to the issues of service connection for a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure is cumulative in nature and repetitive of facts that were previously considered.
3. The evidence received since the November 2006 rating decision as to the issue of service connection for bilateral hearing loss disability is relevant and probative of the issue at hand.
4. Bilateral hearing loss disability was not manifested during service or within one year of separation; bilateral hearing loss disability is not attributable to service.

## CONCLUSIONS OF LAW

1. The November 2006 rating decision the claims of service connection for bilateral hearing loss disability, a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure is final. 38 U.S.C.A. §§ 5108, 7105 (West 2014); 38 C.F.R. § 20.1103 (2015).
2. New and material evidence has not been received to reopen the claim of service connection for a disorder of the feet and toes. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. § 3.156 (2015).
3. New and material evidence has not been received to reopen the claim of service connection for a bilateral knee disorder. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. § 3.156 (2015).
4. New and material evidence has not been received to reopen the claim of service connection for a dental disorder due to radiation exposure. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. § 3.156 (2015).
5. New and material evidence has not been received to reopen the claim of service connection for a testicular disorder due to radiation exposure. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. § 3.156 (2015).
6. New and material evidence has not been received to reopen the claim of service connection for a spine disorder due to radiation exposure. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. § 3.156 (2015).
7. New and material evidence has been received to reopen the claim of service connection for bilateral hearing loss disability. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. § 3.156 (2015).
8. Bilateral hearing loss disability was not incurred in or aggravated by service, nor can an organic disease of the nervous system be presumed to have been incurred therein. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1131, 1137, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.307, 3.309 (2015).

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

### Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA) imposes obligations on VA to provide claimants with notice and assistance. 38 U.S.C.A. §§ 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2015). The United States Court of Appeals for Veterans Claims (Court) issued a decision in the appeal of *Dingess v. Nicholson*, 19 Vet. App. 473 (2006), which held that the notice requirements of 38 U.S.C.A. § 5103(a) and 38 C.F.R. § 3.159(b) apply to all five elements of a service connection claim, including the degree of disability and the effective date of an award. Those five elements include: (1) veteran status; (2) existence of a disability; (3) a connection between a veteran's service and the disability; (4) degree of disability; and (5) effective date of the disability.

In addition, in *Kent v. Nicholson*, 20 Vet. App. 1, 11-12 (2006), the CAVC held that, in the context of an application for reopening, VCAA notice (1) must notify a claimant of the evidence and information that is necessary to reopen the claim and (2) must notify the claimant of the evidence and information that is necessary to establish entitlement to the underlying benefit sought by the claimant. The CAVC elaborated that VA is required, in response to an application to reopen, to look at the bases for the denial in the prior decision and send a notice letter that describes what evidence would be necessary to substantiate that element or elements required to establish service connection that were found insufficient in the previous denial.

In this case, the agency of original jurisdiction (AOJ) issued notice letters, dated in June 2010, to the Veteran. These letters explained the appropriate definition of new and material evidence and the evidence needed to substantiate claims for service connection. The letters also informed him of his and VA's respective duties for obtaining evidence. The AOJ decision that is the basis of this appeal was decided after the issuance of an initial, appropriate VCAA notice. As such, there was no defect with respect to timing of the VCAA notice. See *Pelegrini v. Principi*, 18 Vet. App. 112 (2004).

VA also has a duty to assist a veteran with the development of facts pertinent to the appeal. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159(c). This duty includes the obtaining of "relevant" records in the custody of a Federal department or agency under 38 C.F.R. § 3.159(c)(2), as well as records not in Federal custody (e.g., private medical records) under 38 C.F.R. § 3.159(c)(1). VA will also provide a medical examination if such examination is determined to be "necessary" to decide the claim. 38 C.F.R. § 3.159(c)(4).

The claims file contains the Veteran's available service treatment records, reports of post-service treatment, and the Veteran's own statements in support of his claims. The Veteran was also afforded a VA examination responsive to the claim for service connection of bilateral hearing loss disability. *McClendon v. Nicholson*, 20 Vet. App. 79 (2006). The opinion was conducted by a medical professional, following thorough examination of the Veteran, solicitation of history, and review of the claims file.

As will be discussed below, the Veteran has not presented new and material evidence to reopen the claims for service connection of a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure, and thus, no opinions are necessary. See *Bardwell v. Shinseki*, 24 Vet. App. 36 (2010).

The Board also observes that the undersigned VLJ, at the Veteran's October 2015 hearing, explained the concept of new and material evidence to reopen a claim for service connection as well as the concept of service connection; the evaluation process was also explained. Potential evidentiary defects were identified and the file was left open to provide an opportunity to submit additional evidence. The actions of the Judge supplement VCAA and comply with 38 C.F.R. § 3.103.

The Board has reviewed the Veteran's statements and medical evidence of record and concludes that there is no outstanding evidence with respect to the Veteran's claims. For these reasons, the Board finds that the VCAA duties to notify and assist have been met.

### Legal Criteria to Reopen Service Connection

In general, rating decisions and Board decisions that are not timely appealed are final. See 38 U.S.C.A. §§ 7104, 7105 (West 2014); 38 C.F.R. § 20.1103. If new and material evidence is presented or secured with respect to a claim that has been finally disallowed, the claim shall be reopened and reviewed. See 38 U.S.C.A. § 5108; 38 C.F.R. § 3.156.

Under 38 C.F.R. § 3.156, a claimant may reopen a finally adjudicated claim by submitting new and material evidence. "New" evidence is defined as evidence not previously submitted to agency decision makers. "Material" evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an

unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a). The CAVC has interpreted the language of 38 C.F.R. § 3.156(a) as creating a low threshold. *Shade v. Shinseki*, 24 Vet. App 110 (2010).

New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the AOJ by the Board without consideration in that decision in accordance with the provisions of 38 C.F.R. § 20.1304(b) (1)), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period. 38 C.F.R. § 3.156(b).

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 as an original claim for benefits. 38 C.F.R. § 3.156(c).

If it is determined that new and material evidence has been submitted, the claim must be reopened. The evidence is presumed credible for the purposes of reopening a claim, unless it is inherently false or untrue or, if it is in the nature of a statement or other assertion, it is beyond the competence of the person making the assertion. *Justus v. Principi*, 3 Vet. App. 510 (1992).

The RO initially denied service connection of bilateral hearing loss disability, a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure in November 2006. The Veteran did not file a substantive appeal and the decision became final. See 38 U.S.C.A. § 7105(c).

The November 2006 rating decision denied the Veteran's claims for service connection of bilateral hearing loss disability, a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure on the basis that there was no evidence of a bilateral hearing loss disability or dental disorder due to radiation exposure, and that there was no evidence that a disorder of the feet and toes, a bilateral knee disorder, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure were incurred in or the result of active service. The rating decision noted that there was no objective of evidence of treatment for or a diagnosis of bilateral hearing loss disability. The rating decision also noted that there was no evidence of treatment for or a diagnosis of a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure in service; the rating decision also stated that there were no manifestations of bilateral hearing loss disability, a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due to radiation exposure within one year of separation. Likewise, the rating decision noted that the Veteran was treated for an acute tooth infection in service, but that there was no medical evidence showing that the Veteran had a current dental disorder. The rating decision also noted that the Veteran does not have a disease that is recognized as due to radiation exposure.

Since the denial of the Veteran's claims in November 2006, the evidence submitted includes a July 2010 VA audiological examination report, as well as well as statements submitted by the Veteran in support of his claims. The Veteran also submitted internet research and an uninterpreted audiological evaluation from Augusta ENT, dated in October 2015, as well as a March 2006 record from Torrance Memorial Medical Center.

The evidence submitted subsequent to the November 2006 rating decision as to the issues of service connection for a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due radiation exposure is not new and material. The Veteran has submitted internet research discussing the effects of radiation exposure. However, none of these reports reflect that the Veteran had radiation exposure, or that the Veteran's current disorder of the feet and toes, a bilateral knee disorder, a testicular disorder, and a spine disorder are due to his service, including any possible radiation exposure. Likewise, none of these documents demonstrate that the Veteran has a current dental disorder. At the time of the prior decision, the Veteran did not have a disease recognized as related to radiation exposure, and there was no medical evidence demonstrating that the Veteran's current disorder of the feet and toes, a bilateral knee disorder, a testicular disorder, and a spine disorder are due to his service, including any possible radiation exposure; at that time, there was also no medical evidence that the Veteran had a current dental disorder. This has not changed; the Veteran has not provided any new and material evidence demonstrating that he has a dental disorder or that his current disorder of the feet and toes, a bilateral knee disorder, testicular disorder, and spine disorder are due to a disease or injury in service, including any possible radiation exposure. Similarly, the lay

statements are cumulative of the prior claims and prior lay evidence. The March 2006 record from Torrance Memorial Medical Center is duplicative of records considered at the time of the November 2006 denial.

In sum, the evidence submitted as to the Veteran's claims of service connection for a disorder of the feet and toes, a bilateral knee disorder, a dental disorder due to radiation exposure, a testicular disorder due to radiation exposure, and a spine disorder due radiation exposure is cumulative rather than new and material. Although the threshold for reopening a claim is low, the evidence presented in this case does not serve to reopen these claims.

### Bilateral Hearing Loss Disability

Since the denial of the Veteran's claim for service connection of bilateral hearing loss disability in November 2006, the evidence submitted includes a July 2010 VA examination report, as well as an October 2015 private audiological evaluation by Augusta ENT, as well as statements by the Veteran in support of his claim, including testimony before the undersigned. The VA and private audiological evaluation reports show that the Veteran has been diagnosed with hearing loss disability for VA purposes. The Veteran, at his October 2015 hearing before the undersigned, testified that he was diagnosed with bilateral hearing loss disability since service.

The evidence submitted subsequent to the November 2006 rating decision as to the issue of service connection for bilateral hearing loss disability is new and material. The claim was previously denied on the basis that there was no evidence that the Veteran had bilateral hearing loss disability. In essence, at the time of the prior decision, other than the claim, there was no evidence of inservice disease or injury, no evidence of post-service disability and no evidence of a nexus to service.

The added evidence speaks directly to an element which was not of record, mainly current hearing loss disability. This evidence cures an evidentiary defect. See *Kent v. Nicholson*, 20 Vet. App. 1, 10 (2006) (finding that "the question of what constitutes material evidence to reopen a claim for service connection depends on the basis on which the prior claim was denied"). Accordingly, the Board finds that the claim for service connection of bilateral hearing loss disability is reopened.

### Service Connection

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C.A. §§ 1110, 1131 (West 2014); 38 C.F.R. § 3.303(a) (2015). To establish a right to compensation for a present disability, a Veteran must show: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service—the so-called "nexus" requirement. *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)).

Service connection may be granted for any disease initially diagnosed after service when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

For the showing of chronic disease in service, there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time. As organic diseases of the central nervous system are chronic diseases for VA compensation purposes, if chronicity in service is not established, a showing of continuity of symptoms after discharge is required to support the claim. 38 C.F.R. §§ 3.303(b), 3.309; *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

The threshold for normal hearing is from 0 to 20 decibels. *Hensley v. Brown*, 5 Vet. App. 155, 157 (1993). For the purposes of applying the laws administered by VA, impaired hearing will be considered to be a disability when the auditory threshold in any of the frequencies 500, 1000, 2000, 3000, 4000 Hertz is 40 decibels or greater; or when the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent. 38 C.F.R. § 3.385.

The Veteran does not assert that he was in combat, nor are available service records reflective of such. Therefore, the provisions of 38 U.S.C.A. § 1154(b) are not applicable. **Nonetheless, the Board concedes that he had in-service noise exposure.** See 38 U.S.C.A. § 1154(a); 38 C.F.R. § 3.303(a).

At the outset, the Board notes that the record contains an uninterpreted audiological evaluation from Augusta ENT, dated in October 2015. Thus, it is unclear whether this report demonstrates that the Veteran has right ear hearing

loss disability for VA purposes. However, the Board will concede that this report demonstrates that the Veteran has right ear hearing loss disability for VA disability purposes. The Board observes that the July 2010 VA examination showed left ear hearing loss disability for VA purposes, but normal right ear hearing.

Nonetheless, the Board finds that the weight of the evidence reflects that the Veteran does not have bilateral hearing loss disability that was caused or aggravated by his service. In this case, there is no evidence of bilateral hearing loss during active duty or within one year of separation. No bilateral hearing loss disability (organic disease of the nervous system) was "noted" or identified during service or within one year of separation. Additionally, there is nothing to suggest that there were characteristic manifestations sufficient to identify bilateral hearing loss pathology during service or within one year of separation. 38 C.F.R. § 3.303(b). In short, the evidence fails to establish the presence of pathology during service or within one year of separation.

In rendering a decision on appeal, the Board must analyze the credibility and probative value of the evidence, account for the evidence which it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. See *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994). As noted by the Federal Circuit, the Department must consider lay evidence, but may give it whatever weight it concludes the evidence is entitled to. *Waters v. Shinseki*, 601 F.3d 1274 (2010). The Board has considered the Veteran's statements and hearing testimony. However, the Veteran's statements are insufficient to establish a nexus to his service.

The Veteran's medical history does not establish a manifestation of bilateral hearing loss disability within one year of separation. To the extent that the Veteran links his bilateral hearing loss disability to an event or illness, including noise exposure, during his service, the Board finds that the probative value of the general lay assertions are outweighed by the clinical evidence of record. In this case, the Veteran has made no assertions of bilateral hearing loss symptomatology related to his service except as it relates to his claim for service connection. See *Pond v. West*, 12 Vet. App. 341 (1999).

The Board acknowledges that the Veteran had noise exposure during service and that he asserts this noise exposure caused his bilateral hearing loss disability. Nonetheless, the Board notes that, despite the Veteran's complaints, there is simply nothing to show that the Veteran had decreased hearing during his period of active duty or within one year of separation, or that his bilateral hearing loss disability is related to that period of active duty. The Board points out that the Veteran's hearing was normal at his October 1957 separation examination, he denied ear trouble and that hearing loss disability was not identified until his August 2010 VA examination.

In this regard, the Board observes that the July 2010 VA examination report, which determined that the Veteran's bilateral hearing loss disability is not related to his service, is entitled to greater probative weight than the more general lay assertions of the Veteran, even assuming those lay assertions were competent. The Board notes that the opinion of the VA examiner is consistent with the medical evidence of record, which does not demonstrate that the Veteran's bilateral hearing loss disability is related to his service. See *Prejean v. West*, 13 Vet. App. 444, 448-49 (2000).

For the foregoing reasons, the preponderance of the evidence is against the claim of service connection for bilateral hearing loss disability. The benefit-of-the-doubt doctrine is therefore not for application, and the claim must be denied.

## ORDER

The application to reopen the claim for service connection of a disorder of the feet and toes is denied.

The application to reopen the claim for service connection of a bilateral knee disorder is denied.

The application to reopen the claim for service connection of a disorder of the feet and toes is denied.

The application to reopen the claim for service connection of a dental disorder secondary to radiation exposure is denied.

The application to reopen the claim for service connection of a testicular disorder secondary to radiation exposure is denied.

The application to reopen the claim for service connection of a spine disorder secondary to radiation exposure is denied.

The application to reopen the claim for service connection of bilateral hearing loss disability is granted.

Entitlement to service connection for bilateral hearing loss disability is denied.

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H. N. SCHWARTZ  
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs