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On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO) in Atlanta, Georgia

THE ISSUES

1. Whether new and material evidence has been received sufficient to reopen a previously denied claim of entitlement to service connection for an ear disorder, to include ear infections.
2. Whether new and material evidence has been received sufficient to reopen a previously denied claim of entitlement to service connection for bilateral hearing loss.
3. Whether new and material evidence has been received sufficient to reopen a previously denied claim of entitlement to service connection for tinnitus.
4. Whether a July 1986 rating decision that denied service connection for chronic ear infections contained clear and unmistakable error (CUE).

REPRESENTATION

Veteran represented by: Chuck R. Pardue, Attorney-at-Law
WITNESS AT HEARING ON APPEAL

Veteran

ATTORNEY FOR THE BOARD

L. Durham, Associate Counsel

INTRODUCTION

The Veteran served on active duty from October 1950 to September 1952.

These matters come before the Board of Veterans' Appeals (Board) on appeal from a February 2006 rating decision, which declined to reopen the Veteran's claims of entitlement to service connection for chronic ear infections, bilateral hearing loss, and tinnitus; and a November 2010 rating decision, which denied the Veteran's claim of CUE in the July 1986 rating decision that denied entitlement to service connection for chronic ear infections.

Despite the determination reached by the RO, the Board must find new and material evidence in order to establish its jurisdiction to review the merits of a previously denied claim. See *Barnett v. Brown*, 83 F. 3d 1380 (Fed. Cir. 1996); *Jackson v. Principi*, 265 F. 3d 1366 (Fed. Cir. 2001); see also VAOPGCPREC 05-92. The following decision addresses this question.

These issues were remanded by the Board in July 2011 in order to afford the Veteran a hearing before a member of the Board. In September 2011, the Veteran testified before the undersigned Veterans Law Judge at a hearing held in at the Atlanta, Georgia, RO. A transcript of that proceeding has been associated with the claims file.

The Board notes that evidence has been submitted since the most recent statement of the case (SOC) and supplemental statement of the case (SSOC) has been issued with regard to these issues without a waiver of initial review of this evidence by the Agency of Original Jurisdiction (AOJ). However, as this evidence duplicates

evidence that was already associated with the claims file, the Board finds no prejudice to the Veteran in proceeding to adjudicate the claims as done below.

Please note this appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2011). 38 U.S.C.A. § 7107(a)(2) (West 2002).

FINDINGS OF FACT

1. By a RO decision dated in July 2003, the Veteran's application to reopen his previously denied claim of service connection for chronic ear infections was denied on the basis that there was no new and material evidence showing that the condition began in service or that the current condition can be linked to ear infections the Veteran experienced in service.
2. Evidence received since the July 2003 RO decision is not cumulative or redundant, and raises a reasonable possibility of substantiating the claim of entitlement to service connection for an ear disorder, to include ear infections.
3. Resolving doubt in favor of the Veteran, his ear disorder, to include ear infections is shown to be etiologically related to his active duty service.
4. By a RO decision dated in July 2003, the Veteran's claim of service connection for bilateral hearing loss was denied on the basis that there is no evidence of significant noise exposure during active duty and bilateral hearing loss cannot be granted as secondary to nonservice-connected chronic ear infections.
5. Evidence received since the July 2003 RO decision is not cumulative or redundant, and raises a reasonable possibility of substantiating the claim of entitlement to service connection for bilateral hearing loss.
6. Resolving doubt in favor of the Veteran, his bilateral hearing loss is shown to be etiologically related to his active duty service.
7. By a RO decision dated in July 2003, the Veteran's claim of service connection for tinnitus was denied on the basis that there is no evidence of significant noise exposure during active duty and tinnitus cannot be granted as secondary to nonservice-connected chronic ear infections.
8. Evidence received since the July 2003 RO decision is not cumulative or redundant, and raises a reasonable possibility of substantiating the claim of entitlement to service connection for tinnitus.
9. Resolving doubt in favor of the Veteran, his tinnitus is shown to be etiologically related to his active duty service.
10. In a July 1986 rating decision, the RO denied entitlement to service connection for chronic ear infections.
11. The Veteran has not alleged any errors of fact or law in the July 1986 rating decision that compels the conclusion, to which reasonable minds could not differ, that the results would have been manifestly different but for the errors.

CONCLUSIONS OF LAW

1. The July 2003 RO decision denying the Veteran's application to reopen his previously denied claim of service connection for chronic ear infections is final. See 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. § 20.1103 (2011).
2. New and material evidence sufficient to reopen the Veteran's claim of service connection for an ear disorder, to include ear infections has been submitted. See 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156(a) (2011).
3. Service connection for an ear disorder, to include ear infections is warranted. See 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304 (2011).
4. The July 2003 RO decision denying the Veteran's claim of service connection for bilateral hearing loss is final. See 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. § 20.1103 (2011).

5. New and material evidence sufficient to reopen the Veteran's claim of service connection for bilateral hearing loss has been submitted. See 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156(a) (2011).

6. Resolving doubt in favor of the Veteran, service connection for bilateral hearing loss is warranted. See 38 U.S.C.A. §§ 1110, 1112, 1113, 1131, 5103, 5103A, 5107 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304, 3.307, 3.309, and 3.385 (2011).

7. The July 2003 RO decision denying the Veteran's claim of service connection for tinnitus is final. See 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. § 20.1103 (2011).

8. New and material evidence sufficient to reopen the Veteran's claim of service connection for tinnitus has been submitted. See 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156(a) (2011).

9. Resolving doubt in favor of the Veteran, service connection for tinnitus is warranted. See 38 U.S.C.A. §§ 1110, 1131, 5103, 5103A, 5107 (West 2002 & Supp. 2008); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304, and 4.87 (2011).

10. The July 1986 rating decision which denied entitlement to service connection for chronic ear infections was not clearly and unmistakably erroneous. 38 U.S.C.A. § 5109A (West 2002); 38 C.F.R. § 3.105(a) (2011).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. Veterans Claims Assistance Act of 2000 (VCAA)

With respect to the Veteran's claims for service connection for bilateral hearing loss, tinnitus, and an ear disorder, to include ear infections, the benefits sought on appeal have been granted, as discussed below. As such, the Board finds that any error related to the VCAA on these claims is moot. See 38 U.S.C. §§ 5103, 5103A (West 2002 & Supp. 2009); 38 C.F.R. § 3.159 (2011); *Mayfield v. Nicholson*, 19 *Veteran. App.* 103, (2005), *rev'd on other grounds*, *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

As provided for by the VCAA, VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2011). However, the United States Court of Appeals for Veterans Claims (Court) has held that the VCAA does not apply to claims of CUE in prior final decisions. *Livesay v. Principi*, 15 *Vet. App.* 165, 179 (2001) (*en banc*).

Nevertheless, with respect to the claim for CUE, the Board notes in passing that the Veteran and his accredited representative have been afforded ample opportunity to present his contentions, and there is no indication that either the Veteran or his representative have further argument to present.

II. Analysis

The Board must assess the credibility and weight of all evidence, including the medical evidence, to determine its probative value, accounting for evidence which it finds to be persuasive or unpersuasive, and providing reasons for rejecting any evidence favorable to the claimant. Equal weight is not accorded to each piece of evidence contained in the record; every item of evidence does not have the same probative value. When all the evidence is assembled, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the Veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case, the claim is denied. See *Gilbert v. Derwinski*, 1 *Vet. App.* 49 (1990).

Service connection may be established for disability resulting from personal injury suffered or disease contracted in line of duty in the active military, naval, or air service. 38 U.S.C.A. § 1110 (West 2002). That an injury or disease occurred in service is not enough; there must be chronic disability resulting from that injury or disease. If there is no showing of a resulting chronic condition during service, then a showing of continuity of symptomatology after service is required to support a finding of chronicity. 38 C.F.R. § 3.303(b) (2011). Service connection may also be granted for any injury or disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease or injury was incurred in service. 38 C.F.R. § 3.303(d) (2011).

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. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Certain diseases, to include organic diseases of the nervous system, such as hearing loss, may be presumed to have been incurred in service when manifest to a compensable degree within one year of discharge from active duty. 38 U.S.C.A. § 1112 (West 2002); 38 C.F.R. §§ 3.307, 3.309 (2011).

With respect to hearing loss, VA has specifically defined what is meant by a "disability" for the purposes of service connection. See 38 C.F.R. § 3.385 (2009). "[I]mpaired 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."

The Board notes that the Court has held that the threshold for normal hearing is from 0 to 20 decibels, and that higher threshold levels indicate some degree of hearing loss. See *Hensley v. Brown*, 5 Vet. App. 155, 157 (1993).

1. Whether new and material evidence has been received sufficient to reopen previously denied claims of entitlement to service connection for bilateral hearing loss, tinnitus, and an ear disorder, to include ear infections.

The issue for resolution before the Board is whether new and material evidence has been submitted sufficient to reopen the Veteran's previously denied claims of entitlement to service connection for bilateral hearing loss, tinnitus, and an ear disorder, to include ear infections. **After review of the evidence of record, the Board finds that new and material evidence has been submitted.**

The Board notes that the Veteran's claims of service connection for bilateral hearing loss and tinnitus, and his application to reopen his previously denied claim for service connection for an ear disorder, to include ear infections were denied in a July 2003 RO decision. Rating actions are final and binding based on evidence on file at the time the claimant is notified of the decision and may not be revised on the same factual basis except by a duly constituted appellate authority. 38 C.F.R. § 3.104(a) (2011). The claimant has one year from notification of an RO decision to initiate an appeal by filing a notice of disagreement (NOD) with the decision, and the decision becomes final if an appeal is not perfected within the allowed time period. 38 U.S.C.A. § 7105(b) and (c) (West 2002); 38 C.F.R. §§ 3.160(d), 20.201, and 20.302(a) (2011). The Veteran was notified of the July 2003 RO decision via a September 16, 2003, letter. He did not file a timely appeal. Therefore, the July 2003 rating decision became final. See 38 U.S.C.A. § 7105 (West 2002). In order to reopen a claim which has been denied by a final decision, the claimant must present new and material evidence. 38 U.S.C.A. § 5108 (West 2002).

New evidence means 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) (2011).

According to the Court, the pertinent VA law requires that in order to reopen a previously and finally disallowed claim, there must be new and material evidence presented or secured since the time that the claim was finally disallowed on any basis. See *Evans v. Browns*, 9 Vet. App. 273 (1996). When determining whether the claim should be reopened, the credibility of the newly submitted evidence is presumed. See *Justus v. Principi*, 3 Vet. App. 510 (1992).

The basis for the July 2003 denial of the application for the claim of entitlement to service connection for an ear disorder, to include ear infections was that there was no new and material evidence showing that the chronic ear infections or an ear disorder began in service or that the current condition can be linked to ear infections the Veteran experienced in service. The basis for the July 2003 denial of the claims of service connection for bilateral hearing loss and tinnitus was that there is no evidence of significant noise exposure during active duty and bilateral hearing loss and tinnitus cannot be granted as secondary to nonservice-connected chronic ear infections. At the time of these denials, a separation examination report, VA and private medical records, and statements submitted by the Veteran were considered.

The new evidence submitted since this denial consists primarily of statements and testimony from the Veteran, VA and private medical records, and statements submitted by the Veteran's family and fellow service members.

With regard specifically to the newly submitted statements from the Veteran's family and fellow service members,

the Board notes that the claims file contains a March 2005 letter from a former service member who served with the Veteran. The former service member indicated that he recalled the Veteran being relieved of his duties in late 1951 because his ears were infected and he could not hear.

Therefore, as the newly submitted evidence speaks specifically to the onset of ear infections and hearing impairment in service, and, thus, speaks to the possibility that the Veteran's current ear disorder, to include ear infections, hearing loss, and tinnitus began during his period of military service, the Board concludes that it satisfies the low threshold requirement for new and material evidence. As such, the claims are reopened. The Board will now turn to evaluating the merits of his claims.

Essentially, the Veteran contended at the September 2011 hearing that he suffered ear infections between October and Christmas in 1950 while on active duty. He claims that he never had hearing problems prior to service but that he had to go on sick call several times throughout service for ear infections. The Veteran contends that, at the time, he was told that he should be separated from service but that he had too much training to be let go. The Veteran further indicated that he began having trouble with his hearing in service when these infections began. He also indicated that he was exposed to loud noises during service when he was taking basic training and shooting rockets without earplugs. The Veteran claims that he was removed from duty as a radio operator because he could not hear. Additionally, ringing in his ear began during service after he began getting ear infections. The Veteran claims that his ear infections have bothered him continuously for the rest of his life since service and have never improved. He has had 2 operations on his right ear. The Veteran has asserted that he was not examined upon separation and that his missing service treatment records would reflect that he received treatment for ear infections.

A November 2005 response to a request for the Veteran's service treatment records reflects that his service treatment records are fire-related and all available service treatment records were mailed. The claims file contains a September 1952 separation examination report which was negative for complaints, treatment, or diagnoses of chronic ear infections, an ear disorder, hearing loss, and tinnitus. This record reflects that the Veteran scored a 15 out of 15 bilaterally on a whispered voice test. The claims file also contains a record dated December 11, 1950, in which it was noted that the Veteran had taken sick. The nature of the illness was not recorded.

In May 1986, the Veteran underwent a VA examination, at which he was noted as having hearing loss and tinnitus. The examiner opined that the tinnitus is secondary to acoustic trauma and middle ear pathologies. In a December 1999 private record, the Veteran was followed for his otitis externa. It was noted that he still has discomfort in his ears, with the right being greater than the left. In a January 2000 private medical record from Dr. M.K.L., it was noted that the Veteran was being followed for chronic fungal external otitis and hearing loss. It was noted that the Veteran's tinnitus is most likely from his sensorineural hearing loss. In an October 2002 private medical record from Sumner Regional Medical Center, it was noted that the Veteran underwent right tympanomastoidectomy with ventilation tube placement and canal plasty.

More recently, the Veteran underwent a VA audiological examination in July 2003. Upon examination, the auditory threshold for multiple frequencies at 500, 1000, 2000, 3000, and 4000 Hertz was noted to be over 40 decibels. Therefore, the criteria for hearing loss, as set forth under 38 C.F.R. § 3.385, have been met bilaterally. The examiner noted that the Veteran's primary assertion was ear infections during military service. He denied military noise exposure during his 2 years of service. The Veteran did have some occupational noise exposure in his business as a ceramic tile installer. The examiner noted that the sensorineural hearing loss and asymmetry exhibited is not related to his past ear infections and the Veteran should be examined by an ENT physician for a medical opinion regarding the possibility that his ear condition be service connected. It was noted that the Veteran has suffered 4 strokes and is a poor historian. He did not have the onset date of his tinnitus and it is the examiner's opinion that his tinnitus is not secondary to noise exposure during military service. The Board notes that the examiner did not indicate that he reviewed the claims file, not was it requested in the examination request that the examiner do so.

In a July 2004 VA treatment record, the Veteran was noted as being followed for right draining ear status post mastoidectomy 2 years ago. In an April 2005 VA treatment record, the Veteran was noted as having tinnitus.

As noted above, the claims file also contains statements from the Veteran's family and fellow service members. In a March 2005 letter, a former service member who served with the Veteran indicated that he recalled the Veteran being relieved of his duties in late 1951 because his ears were infected and he could not hear. In an October 2006 letter, another former service member who served with the Veteran indicated that he did not recall that they were given a separation examination upon being discharged from service. In a letter from the Veteran's sister-in-law, she recalled that the Veteran developed a bad ear infection with much pain while staying with her in the early months of 1953. She recalled that he sought medical treatment many times in the 1950's. In a letter from the Veteran's

son, he recalled that the Veteran has had ear problems for as far back as he can remember.

With regard to establishing service connection on a direct basis, regulations provide that service connection may be granted for any disease diagnosed after discharge, when all evidence, including that pertinent to service, establishes that the disability was incurred in service. 38 C.F.R. 3.303(d) (2011).

In this case, the Board notes that the July 2003 VA examiner indicated that the Veteran's tinnitus is not secondary to noise exposure during military service and that the sensorineural hearing loss and asymmetry exhibited is not related to his past ear infections. However, the examiner also indicated that the Veteran should be examined by an ENT physician for a medical opinion regarding the possibility that his ear condition be service connected. Additionally, the examiner did not indicate that he reviewed the claims file, not was it requested in the examination request that he do so. Therefore, as it appears that the examiner may not have reviewed the claims file, and he specifically indicated that a medical opinion regarding the possibility that his ear condition be service connected should be provided by an ENT physician, the Board finds this opinion not probative with regard to the matters on appeal.

The Board notes that the Veteran is competent to offer a description of the symptoms that he experienced in service and to describe a continuity of symptoms since service. A layperson, such as the Veteran, is generally not capable of opining on matters requiring medical knowledge. *Routen v. Brown*, 10 Vet. App. 183, 186 (1997), *aff'd sub nom. Routen v. West*, 142 F.3d 1434 (Fed. Cir. 1998), cert. denied, 119 S. Ct. 404 (1998). However, lay testimony is competent when it regards the readily observable features or symptoms of injury or illness and "may provide sufficient support for a claim of service connection." *Layno v. Brown*, 6 Vet. App. 465, 469 (1994); see also *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007).

In this case, as noted above, the majority of the Veteran's service treatment records are regrettably unavailable for review. Moreover, the Veteran has argued that he was never actually examined upon separation from service and has supported a statement from a fellow service member indicating that he also was not examined upon separation from service.

Therefore, as the Veteran has reported that he suffered chronic ear infections, ringing in his ears, and hearing impairment during active duty service, observations that he is competent to make; he has reported that he has had ongoing ear infections, hearing impairment, and ringing in his ears since his active duty service, observations that he is also competent to make; his service treatment records are regrettably unavailable for review; the post-service medical evidence documents that he has tinnitus, hearing loss, and otitis media; and the claims file contains statements from fellow service members and family members attesting to the fact that he suffered ear infections and hearing impairment in service and afterward, the Board concludes that there is at least an approximate balance of positive and negative evidence as to whether the Veteran's hearing loss, tinnitus, and ear disorder, to include ear infections began during his active duty service. Thus, resolving doubt in favor of the Veteran, the Board concludes that service connection must be granted for the Veteran's bilateral hearing loss, tinnitus, and ear disorder, to include ear infections.

2. Whether a July 1986 rating decision that denied service connection for chronic ear infections contained CUE.

The Veteran essentially contends that the July 1986 rating decision that denied entitlement to service connection for chronic ear infections should be reversed on the grounds that the RO committed CUE in this decision. Specifically, the Veteran, through his representative, is arguing that he was not examined upon separation from service, and, thus, the RO should not have relied upon the September 1952 separation examination report in rendering the July 1986 rating decision. He contends that the document was constructed based on his entrance physical and that certain information on the report is inconsistent with that recorded on his DD-214 form, for example his weight and height. At the September 2011 hearing, the representative argued that a decision based on this document was erroneous, particularly in light of the fact that the Veteran's service treatment records and sick call reports have been determined to be unavailable. The Veteran has also argued throughout the course of this appeal that there is some sort of discrepancy in the fact that his service treatment records were found to be fire-related, but that a separation examination report is still available.

On July 14, 1986, the Veteran was denied service connection for chronic ear infections on the basis that the claimed condition was not shown by the evidence of record.

The Court has consistently stressed the rigorous nature of the concept of CUE. "Clear and unmistakable error is an administrative failure to apply the correct statutory and regulatory provisions to the correct and relevant facts. It is not mere misinterpretation of facts." *Oppenheimer v. Derwinski*, 1 Vet. App. 370, 372 (1991). "Clear and

unmistakable error' requires that error, otherwise prejudicial,...must appear undebatably." *Akins v. Derwinski*, 1 Vet. App. 228, 231 (1991). Clear and unmistakable errors "are errors that are undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Russell v. Principi*, 3 Vet. App. 310, 313-4. "It must always be remembered that CUE is a very specific and rare kind of 'error'." *Fugo v. Brown*, 6 Vet. App. 40, 43 (1993).

The Court has propounded the following three-pronged test for determining when there was CUE present in a prior decision: (1) Either the correct facts, as they were known at the time, were not before the adjudicator (i.e., more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions extant at the time were incorrectly applied; (2) the error must be undebatable and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made; and (3) a determination that there was CUE must be based on the record and law that existed at the time of the prior adjudication in question. *Russell*, 3 Vet. App. at 313-14.

CUE that requires revision of a prior final rating action exists only where it appears "undebatably" that "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied." *Russell*, 3 Vet. App. at 313.

In *Fugo*, 6 Vet. App. at 40, the Court refined and elaborated on the test set forth in *Russell*. The Court stated that CUE was a very specific and rare kind of "error." It was the kind of error, of fact or law, that when called to the attention of later reviewers compelled a conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error.

Upon review of the claims file, the Board finds that the evidence of record does not reveal that an error occurred in the July 1986 rating decision which is undebatable and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made.

Specifically, it was noted in the July 1986 rating decision that the Veteran's service clinical records were not available, and his discharge examination was negative for hearing loss or an ear disorder. A VA examination noted a history of a 1950 ear infection with current complaints of hearing loss and tinnitus. The Veteran reported no chronic ear drainage and does not give a history of perforated eardrums. The examination showed no organic problems involving the ears, and audiological examination showed high frequency hearing loss with complaints of tinnitus. It was noted in the July 1986 rating decision that the Veteran submitted a copy of a March 15, 1952, private physician report, which although partially unreadable, does not appear to involve complaints regarding the ears. The remarks portion indicates no evidence of irritation in the nose.

It appears from this decision that the RO denied service connection for chronic infected ears at least in part due to the fact that there was no indication of chronic infected ears in the evidence of record or examination report. The Board finds there is simply no evidence of record indicating that the relevant facts or appropriate regulations were not considered in rendering this decision.

With regard to the Veteran's argument that there is some sort of discrepancy in the fact that his service treatment records were found to be fire-related but his separation examination report is still available, the Board assures the Veteran that a September 12, 1952, Report of Medical Examination upon separation from service is of record along with a Daily Sick Report for December 1950. Regrettably, no other service treatment records have been able to be located.

With regard to the Veteran's argument that he was not actually examined upon separation from service, and, thus, the RO should not have relied upon the September 1952 separation examination report in rendering the July 1986 rating decision, as noted above, CUE that requires revision of a prior final rating action exists only where it appears "undebatably" that "[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied." *Russell*, 3 Vet. App. at 313.

While the Veteran has recently argued that he was not actually examined in connection with the September 1952 medical record, there was no evidence at the time of the July 1986 rating decision that this separation examination was inadequate or incorrect. Therefore, the RO evaluated the claim under the correct facts, as they were known at the time. Moreover, even if the adjudicator of the July 1986 rating decision had not considered the September 1952 separation examination report, the RO may have very well still determined that the service connection for chronic infected ears was not warranted, as the most recent VA examination did not show such a diagnosis.

Accordingly, the Board finds that the Veteran has not pointed to any error of fact or law which is such that it would

compel the conclusion that the result would have been manifestly different but for the error.

Additionally, the Court has explained that VA's breach of the duty to assist cannot form a basis for a claim of CUE because such a breach creates only an incomplete rather than an incorrect record. *Caffrey v. Brown*, 6 Vet. App. 377, 384 (1994); see *Hazan v. Gober*, 10 Vet. App. 511, 522-23 (1997) (following *Caffrey*). Accordingly, the Board finds that the Veteran has not pointed, nor has the record suggested, any error of fact or law which is such that it would compel the conclusion that the result would have been manifestly different but for the error.

Thus, there is no indication that the RO's July 1986 denial of the Veteran's claim for service connection for chronic infected ears was "undebatably incorrect" so as to warrant a finding of CUE. See *Russell*, 3 Vet. App. at 313.

Although the Veteran may disagree with the RO's findings in the July 1986 rating decision, the Court has determined that an assertion that the RO improperly weighed or evaluated evidence can never raise to the level of CUE. *Fugo*, 6 Vet. App. at 43.

Therefore, the Board concludes that the record does not establish that, but for an error in the July 1986 rating decision, service connection would have granted for chronic infected ears. As such, the criteria for a finding of CUE in the July 1986 rating decision has not been met.

ORDER

Entitlement to service connection for an ear disorder, to include ear infections, is granted.

Entitlement to service connection for bilateral hearing loss is granted.

Entitlement to service connection for tinnitus is granted.

The July 1986 rating decision was not clearly and unmistakably erroneous.

ROBERT E. SULLIVAN
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs