HYPOTHETICAL--ANSWER

SERVICE CONNECTION FOR HEARING LOSS AND TINNITUS
ANSWER

ENTITLEMENT TO SERVICE CONNECTION FOR BILATERAL HEARING LOSS AND TINNITUS.

I. Background

A. The facts presented are from a real case handled by NVLSP attorneys. The case was decided by the Board of Veterans Appeals (BVA) on January 14, 2009.

II. The BVA Decision

The Board granted entitlement to service connection for bilateral hearing loss and tinnitus. As such, the Board found that the veteran met all criteria for establishing service connection for the disabilities. See 38 U.S.C. § 1110.

A. Current disability. The veteran showed current evidence of hearing loss by meeting the criteria of 38 C.F.R. § 3.385. The veteran’s impaired hearing qualifies as a disability under either standard stated in 38 C.F.R. § 3.385, because the auditory thresholds in any of the frequencies 500, 1000, 2000, or 4000 Hertz is 40 decibels or greater – in fact, three of four are 40 or more decibels – and the auditory thresholds for at least three of the frequencies are above 26 decibels. See 38 C.F.R. § 3.385.
B. Injury in service. The veteran showed acoustic trauma during combat service. It was conceded by the BVA that the veteran was exposed to acoustic trauma as he proved his combat service through his military occupational specialty of light weapon infantryman and his receipt of the Combat Infantry Badge (CIB). 38 U.S.C. § 1154(b) provides that the VA must accept a veteran’s lay statement about the occurrences in service if the events: (1) occurred while the veteran was “engaged in combat with the enemy;” (2) is “consistent with the circumstances” of such service; and (3) there is not “clear and convincing evidence to the contrary.” Id.

C. Medical nexus linking current disability and service injury. The BVA relied upon the competent lay evidence of the veteran and his spouse and the 2005 and 2008 private medical opinions which found that the veteran’s bilateral hearing loss and tinnitus were more likely than not attributable to acoustic trauma (noise exposure) in service.

III. Important Points in BVA decision
A. The BVA rejected the 2006 VA medical nexus opinion that denied a link between the veteran’s current hearing loss and service due to a lack of hearing loss shown during service or at service separation. The BVA cited the case of *Hensley v. Brown*, 5 Vet. App. 155, 160 (1993): “[W]hen audiometric test results at a veteran’s separation from service do not meet the regulatory requirements for establishing a ‘disability’ at that time, he or she may nevertheless establish service connection for a current hearing disability by submitting evidence that the current disability is causally related to service.” *Hensley* at 160.

B. The BVA rejected the 2006 VA medical nexus opinion that denied a link between tinnitus due to the veteran’s statement to the doctor that his tinnitus had its onset 3 or 4 years earlier. The BVA held that the competent lay statements of the veteran and his spouse of the veteran’s tinnitus since his return from service are competent evidence of tinnitus since the veteran’s service discharge.

C. In sum, the BVA held that due to the private opinions linking the veteran’s hearing loss and tinnitus to service and the competent lay statements of the veteran and his spouse of the veteran’s difficulty
hearing and tinnitus since his return from service, service connection for the disabilities was warranted.
The veteran served on active duty from February 1968 to February 1970. This matter comes to the Board of Veterans' Appeals (Board) from a March 2006 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Detroit, Michigan.

In December 2008, the veteran submitted evidence that has not yet been considered by the RO. In this regard, the Board may consider this evidence in the first instance because the veteran has waived RO consideration thereof. See 38 C.F.R. § 20.1304(c) (2008).

FINDINGS OF FACT

1. The veteran served in combat and was exposed to acoustic trauma in service.

2. The veteran incurred bilateral hearing loss in service.

3. The veteran incurred tinnitus in service.
CONCLUSIONS OF LAW


REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Notice and Assistance

Considering the favorable outcome detailed below, VA's fulfillment of its duties under the Veterans Claims Assistance Act (VCAA), 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126, need not be addressed at this time.

Laws and Regulations

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303(a). Service connection may also be granted for any disease diagnosed after discharge when all of the evidence establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

In order to establish service connection for the claimed disorder, the following must be present: medical evidence of a current disability; medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and medical evidence of a nexus between the claimed in-service disease or injury and the current disability. See Hickson v. West, 12 Vet. App. 247 (1999).

In the case of any veteran who has engaged in combat with the enemy in active service during a period of war, satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, condition or hardships of such service, even though there is no official record of such incurrence or aggravation. Every reasonable doubt shall be resolved in favor of the veteran. See 38 U.S.C.A. § 1154(b); 38 C.F.R. § 3.304(d); see also Collette v. Brown, 82 F.3d 389, 392 (1996).

Section 1154(b), however, can be used only to provide a factual basis upon which a determination could be made that a particular disease or injury was incurred or aggravated in service, not to link the claimed disorder etiologically to the current disorder. See Libertine v. Brown, 9 Vet. App. 521, 522-23 (1996). Section 1154(b) does not establish

Impaired hearing will be considered to be a disability for VA compensation purposes only if at least one of the thresholds for the frequencies of 500, 1000, 2000, 3000, or 4000 Hertz is 40 decibels or greater; the thresholds for at least three of the frequencies are greater than 25 decibels; or speech recognition scores using the Maryland CNC Test are less than 94 percent. 38 C.F.R. § 3.385.

The requirements for service connection for hearing loss as defined in 38 C.F.R. § 3.385 need not be shown by the results of audiometric testing during a claimant's period of active military service in order for service connection to be granted. The regulation does not necessarily preclude service connection for hearing loss that first met the regulation's requirements after service. Hensley v. Brown, 5 Vet. App. 155 (1993). Thus, a claimant who seeks to establish service connection for a current hearing disability must show, as is required in a claim for service connection for any disability, that a current disability is the result of an injury or disease incurred in service, the determination of which depends on a review of all the evidence of record, including that pertinent to service. 38 U.S.C.A. §1110; 38 C.F.R. §§ 3.303 and 3.304; Hensley, 5 Vet. App. at 159-60.

Under applicable criteria, VA shall consider all lay and medical evidence of record in a case with respect to benefits under laws administered by VA. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, VA shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107(b); see also Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990).

Factual Background

The veteran's service treatment records do not show diagnosis of bilateral hearing loss. His separation examination, dated in January 1970 contains audiometric testing results that do not show hearing loss as defined by VA regulations. See 38 C.F.R. § 3.38. His service treatment records and separation examination likewise do not contain a diagnosis of tinnitus or complaints of ringing in the ears.

Initially, the Board notes that the veteran is asserting that he has bilateral hearing loss resulting from in-service acoustic trauma stemming from exposure to gunfire. The veteran's personnel records show that his military
occupational specialty (MOS) was light weapon infantryman and that he served in Vietnam and received the Combat Infantry Badge (CIB). It is therefore conceded that the veteran was exposed to acoustic trauma in service. See 38 U.S.C.A. § 1154(b); 38 C.F.R. § 3.304(d).

Of record is a July 2005 opinion from an audiologist employed at Proctor ENT. This opinion references a charted audiogram and contains a diagnosis of normal to mild/moderate high frequency sensorineural hearing loss binaurally. The Board is precluded from interpreting this report in order to obtain pure tone thresholds. See Kelly v. Brown, 7 Vet. App. 471 (1995). The opinion states that it is highly likely that the veteran's hearing loss and tinnitus can be attributed to noise exposure when he served in the military.

On VA audiological testing in March 2006, pure tone thresholds, in decibels, were as follows:

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Pure tone averages were 19 for the right ear and 19 for the left ear. Speech audiometry revealed speech recognition ability of 100 percent in the right ear and 92 percent in the left ear. The examiner diagnosed hearing essentially within normal limits bilaterally and tinnitus, with an onset of 4 years prior, as apparently related by the veteran.

The VA examiner that conducted the examination noted that the veteran's pre-induction and separation audiological evaluations yielded normal hearing acuity bilaterally. He concluded that because the veteran's discharge audiological evaluation showed normal bilateral hearing that it was not at least as likely as not that the veteran's hearing loss was
due to military noise exposure. He also found that it was not at least as likely as not that tinnitus was related to military noise exposure based upon the fact that its onset did not occur until approximately 32 years following the veteran's discharge.

In his May 2006 Substantive Appeal the veteran related that he informed the VA examiner that the ringing in his ears began in service and that the VA examiner's provided history was inaccurate. He also related that he had only been exposed to abnormal noise levels during service as he worked as a parts salesman following his discharge, where he was not exposed to high noise levels.

Of record is another opinion from an audiologist at Proctor ENT dated in December 2008. This opinion references a September 2008 audiogram for which, pure tone thresholds, in decibels, were reported as follows:

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In this opinion, the audiologist states that it is more likely than not that the veteran's bilateral hearing loss and tinnitus can be attributed to in-service noise exposure. Parenthetically, the Board notes that these audiometrics meet the threshold for considering hearing loss as a disability for VA purposes. See 38 C.F.R. § 3.385.

Also dated in December 2008 is a personal statement from the veteran's spouse. In this statement she relates remembering the veteran complaining of ringing in his ears shortly after his return from Vietnam and that she recalled him having to play the radio and television more loudly upon his return than she previously remembered.
Analysis

Initially, the Board notes that the March 2006 VA examiner's opinion is problematic. Service connection for hearing loss is not necessarily precluded for hearing loss that first met the regulation's requirements after service; however, this appears to be the sole basis for the examiner's opinion. See Hensley, 5 Vet. App. at 155. Moreover, the March 2006 audiometrics do not meet the criteria necessary for right ear hearing loss to be considered a disability under VA regulations; the criteria would be met regarding the left ear. See 38 C.F.R. § 3.385. Nonetheless, the private and lay evidence of record is sufficient to grant the claims.

As outlined above, it has been conceded that the veteran was exposed to acoustic trauma in service and the competent medical evidence of record attributes the diagnoses of bilateral hearing loss and tinnitus to this noise exposure. The private medical opinions competently relate the veteran's hearing loss and tinnitus to noise exposure in service. Similarly, the veteran's and his wife's statements are competent affirmative evidence on the issue of service connection for tinnitus. See Jandreau v. Nicholson, 492 F.3d 1372, 1377 (Fed. Cir. 2007); see also Charles v. Principi, 16 Vet. App. 370 (2002). Accordingly, the Board finds that the evidence is at least in equipoise that the veteran's bilateral hearing loss and tinnitus are attributable to service. Accordingly, the claims are granted.

ORDER

Entitlement to service connection for bilateral hearing loss is granted.

Entitlement to service connection for tinnitus is granted.

M. E. LARKIN
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs
Statement of Spouse O. Veteran

My name is Spouse O. Veteran. I was born in July 1949 and I have been married to Donald E. Veteran since August 1969.

Donald entered active service in the United States Army on February 19, 1968. He served in Vietnam for one year from July 1968 through July 1969. During that time, his occupational specialty was as a light weapons infantryman, and he was honored with several awards including the Combat Infantryman Badge, National Defense Service Medal, Vietnam Service Medal, Vietnam Campaign Medal and a Marksman Rifle badge. Upon his return from Vietnam, we were married in XXXXXXXX, Michigan on XXXXXXXX X, XXXX. Shortly after we were married, Donald was posted to Fort Riley, Kansas, where he served until his discharge on February 18, 1970. I accompanied him to Fort Riley, Kansas, and as such, had the opportunity to immediately observe the physical effects of Donald’s combat service in Vietnam.

Within the first year of Donald’s return from Vietnam, he often complained of ringing in his ears. Also, I noticed that upon Donald’s return from Vietnam and continuing through today, Donald would play the radio and television more loudly than I previously had known him to. For example, when we lived at Fort Riley, Kansas, Donald would listen to the television at such a loud volume that I worried our landlady, who lived in the apartment above ours, would complain.

Within the first several years of our marriage, I noticed that Donald often would not respond to me when I spoke to him or asked him questions. Eventually, I asked him about this, and he complained that I “mumbled” when I spoke. Knowing that I did not mumble when I spoke, I realized then that Donald was likely having difficulty with his hearing.

After Donald’s discharge from the army, he worked for 35 years as a parts salesman at Sears. He was not exposed to any excessive noise at his job, nor did he have any hobbies that exposed him to excessive noise, such as hunting, shooting at gun ranges or attending concerts.

Donald’s hearing difficulties persist today and he complains about constant ringing in his ears. For example, when one of our daughters, Theresa, visits us with her husband Edwin and their ten-year-old daughter Emily, Edwin often complains about the television volume being too loud. Emily comes to our house every day after school, and when her parents pick her up, they sometimes ask why the television volume is so loud. She answers, “Papa [Donald] has it like this.” When we go out to dinner with friends, I often need to prompt Donald to respond to questions people ask, but that he does not hear. Donald often asks people to repeat things because he cannot hear them the first time. Donald speaks loudly on the telephone and in public places, such as stores, because he cannot hear himself. Donald’s hearing difficulties and ringing in his ears were apparent to me when he returned from Vietnam and have impacted his life every day since his return.
I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED: October , 2008

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Spouse O. Veteran