No. 24-5983

In the

Supreme Court of the United States

Trevor Taylor,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

CORRECTED PETITION FOR A WRIT OF CERTIORARI

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October 29, 2024

Two Questions Presented

#1 - "If the allegations occurred of obstruction of justice, fraud on the court, and evidence tampering, which led to prejudicial losses with harmful error, can the CAVC and CAFC ignore it, or should they have gotten involved, and if they can disregard it, does this lead to an absurd legal position that cheating is okay, and thus should be abandoned forthwith?"

#2 - "Can the CAVC and CAFC replace allegations of cheating with unsuitable statements such as 'We don't have the jurisdiction to readjudicate the claim facts,' especially when the the Justice lawyer agreed that the evidence had been switched?"

All parties appear in the caption of the case on the cover page.

Statement of Jurisdiction

1) In the Agency appeal of Trevor Taylor, No: 230917-377155, Board of Veterans' Appeals, For the Secretary of Veterans Affairs, Judgement entered October 31, 2023.

2) *Taylor v. McDonough*, No: 23-6758, United States Court of Appeals for Veterans Claims, Judgement entered 3/22/2024.

3) *Taylor v. McDonough*, No: 24-1642, United States Court of Appeals for the Federal Circuit, Judgement entered 9/6/2024.

-Note: Non-attorney, *pro-se* appellant used a 7-day free trial to Lexis+ to help with the following research burden. I labored to learn how to make this packet and the results are natural. Any document filed *pro se* is "to be liberally construed," and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Nevertheless, the Supreme Court has held that a *pro se* complaint must at least show that the pleader is entitled to relief.

-2nd note: The Justice lawyer, Ms. Bartelma, for USCA FC No: 24-1642 agreed that the evidence was switched, on page 20 of her brief (document 18 at CAFC), when she wrote, "Mr. Taylor additionally complains that the VA's brief

"pirated and committed swindling by switching the sections in the audiologist's report" – an apparent reference to the VA brief mistakenly attributing a statement to the wrong "section" of the report."

The CAVC then "dismissed based on the merits," rooted on something, I'm not sure of what, as they didn't address the important main legal issue of government council misconduct. My position on this is, "Who cares about the claim facts right now? If cheating is involved, that's the infection that must be treated immediately with medicine." Courts are required by the Judicial Council to fix these events. As a citizen, self-represented, how can I be wrong if the career Justice lawyer, with decades of experience, concurred in her brief?

I have the option to later re-submit the medical issue to the VA as a supplemental claim, but if the courts openly allow *actus reus* - the act or the physical act, then, in military disability claims it would include the submission of a fraudulent opening brief, then the Fruit of the Poisonous Tree Doctrine should apply, which is a rule under which evidence, that is the direct result of illegal conduct, is inadmissible. The doctrine draws its name from the idea that once the tree is poisoned (the primary evidence is illegally obtained), then the fruit of the tree (any secondary evidence), is like-wise tainted and may also not be used.

Note: I don't get it. Isn't cheating always a simple issue that every person on Earth can appreciate? Why do the lower courts make it seem like it's a complex

legal issue that only scholars can understand? That is the epitome of fatuity - that only elite folks with advanced University degrees can understand the idea of bunco. "The People" know when they're being gold-bricked. Specific narrow jurisdiction isn't required for a court to adjudicate it - it's a wildcard that they must mend.

The Veteran wasn't arguing the facts of the adjudication, he was asking for a chance at a fair claim adjudication in the first instance and reporting the misconduct. Both courts dismissed/affirmed stating that I wanted to readjudicate the issues, for which they stated they don't have jurisdiction, but I wasn't - I was reporting wrongdoing and thus, a vacate/remand/reverse would be appropriate to speak to the allegations. If it's true, "that I just don't understand because I didn't go to law school," than the law should be changed so that folks acknowledge it. That small part of the law doesn't work.

Opinions Below

Attached (previously mailed with first version):

Board opinion, CAVC two opinions, CAFC opinion.

Constitutional and Statutory Provisions Involved

-*Yates v. United States*

Supreme Court of the United StatesFeb 25, 2015574 U.S. 528U.S. Federal

OVERVIEW: Court of Appeals for the Eleventh Circuit erred when it found that fishing boat captain was properly convicted of violating 18 U.S.C.S. § 1519 because he told member of his crew to throw undersized fish overboard after he was told by government agent to return those fish to port; term "tangible object" that appeared in § 1519 did not include fish.

-*Republican Party v. Degraffenreid*

Supreme Court of the United StatesFeb 22, 2021141 S. Ct. 732U.S. Federal

... ago, a congressional election in North Carolina was thrown out in the face of evidence of tampering with absentee ballots. Because fraud is more prevalent with mail-in ballots, increased use of those ballots raises the likelihood that courts will be ...

-*Fischer v. United States*

Supreme Court of the United StatesJun 28, 2024144 S. Ct. 2176U.S. Federal

OVERVIEW: Per the *noscitur a sociis* and *ejusdem generis* canons of construction and in light of its history, the "otherwise" clause of 18 U.S.C.S. § 1512(c)(2) was designed by Congress to capture other forms of evidence and other means of impairing its integrity or availability beyond those Congress specified in 18 U.S.C.S. § 1512(c)(1).

-*Pugin v. Garland*

Supreme Court of the United States Jun 22, 2023599 U.S. 600U.S. Federal

OVERVIEW: An offense may relate to obstruction of justice under 8 U.S.C.S. § 1101(a)(43)(S) even if the offense did not require that an investigation or proceeding be pending because individuals could obstruct the process of justice even when an investigation or proceeding was not pending.

-United States v. Dunnigan

Supreme Court of the United States Feb 23, 1993507 U.S. 87U.S. Federal

OVERVIEW: Respondent was properly given an enhanced sentence because the U.S. Constitution permitted a court to enhance respondent's sentence under federal sentencing guidelines where the court found that respondent committed perjury at the trial.

-14A M.J. OBSTRUCTING JUSTICE § 2

Interfering with Performance of Official Duties.—|Secondary Materials

Obstruction of justice does not occur when a person fails to cooperate fully with an officer or when the person's conduct merely renders the officer's task more difficult or frustrates his or her investigation. Courts have previously applied a two step analysis to determine whether the evidence was sufficient to prove obstruction of justice under the Virginia statute. First, the evidence must be sufficient for a rational fact finder to conclude that the accused's actions did, in fact, prevent a law enforcement officer from performing his duties. Second, the evidence must be sufficient for a rational fact finder to conclude that the accused acted with an intent to obstruct—i.e., prevent—an officer from performing his or her duty.

-*The Sixth Circuit* has quoted, with approval, a definition of fraud on the court that consists of five elements: (1) conduct on the part of an officer of the court; (2) that is directed to the "judicial machinery" itself; (3) that is intentionally false, willfully blind to the truth, or is in reckless disregard of truth or falsity; (4) that is a positive averment or is a concealment when one is under a duty to disclose; and (5) that deceives the court. Thus, misconduct of an officer of the court is an essential element of fraud on the court; but there is fraud on the court only if this misconduct precludes proper adjudication by the court.

-*12 Moore's Federal Practice - Civil § 60.21*

"Fraud on the court" is defined in terms of its effect on the judicial process, not in terms of the content of a particular misrepresentation or concealment. Fraud on the court must involve more than injury to a single litigant; it is limited to fraud that "seriously" affects the integrity of the normal process of adjudication. Fraud on the court is limited to fraud that does, or at least attempts to, "defile the court itself" or that is perpetrated by officers of the court "so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases."

-*§ 14:130.1. Obstruction of justice*

LA - LexisNexis® Louisiana Annotated Statutes|La. R.S. § 14:130.1s|Statutes

Tampering with evidence with the specific intent of distorting the results of any criminal investigation or proceeding which may reasonably prove relevant to an investigation or proceeding. Tampering with evidence shall include the intentional

alteration, movement, removal, or addition of any object or substance either: At the …place of review of any such evidence.

Statement of Case

This involves the government council at the Dept. of Veterans Affairs, actually a law student at the time (not a lawyer), who switched the evidence twice in her brief, to her benefit and against the disabled Veteran. And it worked as she heartily won.

The CAVC and CAFC does have jurisdiction over all issues involving fraud done during their hearings as spelled out in their authorization.

As a regular citizen/veteran, I would like to say for the issue of cheating in Court, ALL cases in all courts are directly related. It's *ipso facto*, if there is a court case, cheating won't be involved and that the hearings have been certified, in a way, as truthful.

Obstruction of justice, fraud on the court and evidence tampering isn't allowed. It's elementary for daily operations that officers of the court won't do it. Yet they blatantly did and the two lower-courts must be interested in the Supreme Court reviewing the matter as they obviously have jurisdiction to clean up dishonesty in their Courts that isn't harmless error, but rather expensive error. It was not harmless because the event caused a surprise hospital stay for surgery, and those bills are prejudicial losses.

First Cheating Event (switched audiogram sections)

Appellee council wrote in her brief that the Veteran misunderstood the audiologist's notes in section four of the medical exam, and then went on to discuss section four and how it made his informal brief infertile in the Judge's eyes. But this was brazen fraud and lawyer-cheating because section four is mostly blank except the word, "No," as it was section five that had the quoted verbiage about repetition, but she got an advantage by calling it section four as that explained away the audiologist shouting the SRT phrases at me many times to see if I could repeat them back (they must be said only in a normal voice). This was calculated because the disabled Veteran is very sick and the law student thought impeded too, thus an easy quarry.

Appellee Council got away with it despite Veteran raising it multiple times in complaints and motions. No matter, the DIY Veteran was wrong each time.

Veteran's right to a transparent appeal was ruined as the non-attorney committed swindling by switching the sections in the audiologist's report and neither VA or CAVC/CAFC leaders would get involved to restore it or even explain it as an innocent error. I asked the student, Sarah E. Long, to resolve her mistake many times so it wouldn't flatten my appeal, but there was no response. This grad student was lecturing a Desert Storm Veteran that it's a dog-eat-dog world. Or she was caught and "like a deer in the headlights." Similarly, the CAVC judges also

acted this way, perhaps dismayed that a 20-something, the VA general council honors student, had tricked them.

The CAVC & CAFC incorrectly applied the law when they allowed blatant brief double-dealing for which they were explicitly notified. Both courts may have determined their actions were correct, but the Supreme Court can ensure that the law has been appropriately applied to the case.

Second Cheating Event (fake recreation of audiogram test results)

Appellee Council (law student) wrote of the Veteran, "In his informal brief, the appellant contends that several of these entries reflect a [1991 handwritten number] 26 rather than a 20. Appellant's informal brief at 8-9, 11-12, 18."

But instead, it shows a year 2023-made graphic at the top of the page for the wrong hearing results. I'm referring to the handwritten Exhibit A in my CAVC informal brief, the Desert Storm exit hearing test, but appellee council is showing a digital, typed-up hoax of that hearing test, which doesn't show the upper-tails of the number "6." This is another idea of the law student. She has therefore told the Judge that the graphic box she did perhaps on her phone in 2023 was the audiogram handwritten by the doctor in 1991 in W. Germany (although she wasn't born yet).

My informal brief explains this many times. She switched the evidence twice and together, it seems like funny business because it later caused stress,

leading to a surprise illness requiring surgery (harmful error losses). Tampering with evidence is an act in which a person alters, conceals, falsifies, or destroys evidence with the intent to interfere with an investigation (usually) by a law-enforcement, governmental, or regulatory authority. "Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire Rubber Co.*

This whole situation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or without observance of procedure required by law. It doesn't take due account of the Secretary's application of section 5107(b) or the rule of prejudicial error.

Reasons for Granting the Writ

This is an important public issue. Are the Courts malodor or will they stamp out perfidiousness against taxpayers? It doesn't seem like it's a conflicted concept, yet the CAVC and CAFC have re-opened this debate about government lawyer misconduct (in this case it was a law student), which is judicial activism. Despite the cheating, which was not harmless error as it involved $35,000 in hospital bills, their absurd legal positions support it and thus, denial of military disability benefits

involving Special Monthly Compensation (SMC) and bilateral hearing loss. Ergo, according to them, artifice is okay as long as it denies SMC (the most-ill Veterans get SMC).

Conclusion

No other court but this one can fix the problem, as the Federal Circuit has exclusive subject matter jurisdiction over Veterans Court appeals. 38 U.S.C. § 7292(c). The Supreme Court's intervention is thus amply warranted and urgently needed, because it continues to ruin patriotic lives everyday. Unfortunately, the recognition of obstruction of justice, fraud on the court and evidence tampering isn't universally recognized in the court system and that's a peculiar development. Is revisitation needed?

Are the lower-courts interested in a ruling involving a law student? Although she wasn't legally installed to replace a licensed lawyer, as CAVC has a court rule about it involving a dozen strict details that need to be followed, and of course, they didn't obey any off them, including getting the Veteran's permission to accept a kid as the government representative (I would have objected as she doesn't understand the complexities of SMC).

In sum, they showed "straight from the shoulder" disrespect to a possibly-terminal ill Veteran with nearly the top medical rating. To then be burdened with cheating from a child serving as appellee council, in the complex field of law, is

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

TREVOR SPENCER TAYLOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Defendant-Appellee

2024-1642

Appeal from the United States Court of Appeals for Veterans Claims in No. 23-6758, Judge Amanda L. Meredith.

Decided: September 6, 2024

TREVOR TAYLOR, Ann Arbor, MI, pro se.

KATY M. BARTELMA, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by BRIAN M. BOYNTON, ERIC P. BRUSKIN, PATRICIA M. MCCARTHY.

Before MOORE, *Chief Judge*, CHEN, *Circuit Judge*, and MURPHY, *District Judge*.[1]

PER CURIAM

Trevor Spencer Taylor, a veteran, appeals from a decision of the Court of Appeals for Veterans Claims ("the Veterans Court"). SAppx7–17.[2] He seeks a service connection for bilateral hearing loss. For the following reasons, we *dismiss* this appeal for lack of jurisdiction.

BACKGROUND

Mr. Taylor served in the United States Army from June 1986 to June 1990 and from January to March 1991. His service as an M1 Armor Crewman carried a risk of exposure to hazardous noise and certain toxic substances. SAppx29. In 2019, he sought a service connection for bilateral hearing loss. A Regional Office of the Department of Veterans Affairs ("VA") examined his record and found no hearing test results meeting the VA's criteria for impaired hearing. SAppx28. The VA noted that Mr. Taylor declined a new auditory examination because he believed that there was already sufficient evidence of record. SAppx30. The VA denied service connection. Mr. Taylor appealed to the Board of Veterans' Appeals ("Board"). The Board found that Mr. Taylor did not have bilateral hearing loss for VA purposes and concluded that the criteria for service connection for bilateral hearing loss were not met. SAppx18. The Board noted that Mr. Taylor had submitted his own statements that he believes he suffers from hearing loss, but the

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[1] Honorable John F. Murphy, District Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[2] "SAppx" refers to the supplemental appendix attached to Appellee's Informal Brief, ECF No. 18.

Board gave conclusive weight to the medical evidence in his record.

Mr. Taylor appealed to the Veterans Court, which affirmed in a single-judge decision. SAppx9–17. The Veterans Court reviewed Mr. Taylor's hearing test data and confirmed that none met the VA's criteria for hearing loss. The Veterans Court also disagreed with Mr. Taylor's arguments that the VA failed to correctly consider or adequately address his in-service and post-service medical records. Mr. Taylor sought reconsideration and a full-panel decision, and the Veterans Court maintained the single-judge decision. SAppx8.

Mr. Taylor timely appeals the Veterans Court's decision affirming the Board's denial of service connection for bilateral hearing loss.

DISCUSSION

We have jurisdiction only "with respect to the validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision. 38 U.S.C. § 7292(a). "Except to the extent that an appeal . . . presents a constitutional issue, [we] may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." § 7292(d)(2).

On appeal, Mr. Taylor identifies five alleged errors for review by this Court: (i) the hearing tests were improperly administered and the VA failed to identify helpful test results in his claims file; (ii) the Veterans Court was biased in favor of counsel for the VA; (iii) counsel for the VA led the Veterans Court astray by citing to the wrong section of the audiologist's notes; (iv) the Veterans Court misread several hearing test results as "20" decibels instead of "26"; and (v) the Veterans Court failed to properly oversee the

VA because one or more lawyers who represent the VA are also members of the Veterans Court Bar Association. Mr. Taylor characterizes these alleged errors as both legal and constitutional. In particular, Mr. Taylor argues that the Veterans Court decision demonstrates improper entanglement between the Veterans Court and the VA in violation of separation of powers principles.

Most of Mr. Taylor's arguments fall outside of our jurisdiction because they challenge factual determinations or applications of law to fact. *See* § 7292(d)(2). We are not permitted to reassess Mr. Taylor's records as he requests. Nor do we perceive a genuine constitutional issue in Mr. Taylor's appeal. The Veterans Court did not address or rely on any constitutional issues. Mr. Taylor's arguments on appeal that he did not receive fair treatment at the Veterans Court do not raise colorable constitutional concerns. And we do not agree with Mr. Taylor that his case or his allegations about the lawyers involve perceptible due process concerns. Labeling arguments as constitutional does not automatically confer jurisdiction. *Helfer v. West*, 174 F.3d 1332, 1335 (Fed Cir. 1999). Therefore, we lack jurisdiction to consider Mr. Taylor's appeal.

CONCLUSION

We have considered Mr. Taylor's remaining arguments and find them unpersuasive. Accordingly, we *dismiss* this appeal for lack of jurisdiction.

DISMISSED

COSTS

No costs.

Not published
NON-PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 23-6758

TREVOR SPENCER TAYLOR, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, FALVEY, and LAURER, *Judges*.

ORDER

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

On January 12, 2024, the Court issued a memorandum decision that affirmed the October 31, 2023, Board of Veterans' Appeals decision that denied entitlement to disability compensation for bilateral hearing loss. On February 2, 2024, the self-represented appellant timely filed a motion for reconsideration or, in the alternative, a panel decision. *See Taylor v. McDonough*, U.S. Vet. App. No. 23-6758 (Feb. 2, 2024) (unpublished order). The motion for reconsideration by the single judge will be denied, and the motion for a decision by a panel will be granted.

Based on review of the pleadings and the record of proceedings, it is the decision of the panel that the appellant fails to demonstrate that 1) the single-judge memorandum decision overlooked or misunderstood a fact or point of law prejudicial to the outcome of the appeal, 2) there is any conflict with precedential decisions of the Court, or 3) the appeal otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); *see also Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge decision in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is

ORDERED, by the single judge, that the motion for reconsideration is denied. It is further

ORDERED, by the panel, that the motion for panel decision is granted. It is further

ORDERED, by the panel, that the single-judge decision remains the decision of the Court.

DATED: February 29, 2024 PER CURIAM.

Copies to:

Trevor Spencer Taylor

VA General Counsel (027)

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 23-6758

TREVOR SPENCER TAYLOR, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MEREDITH, *Judge*.

MEMORANDUM DECISION

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

MEREDITH, *Judge*: The pro se appellant, Trevor Spencer Taylor, appeals an October 31, 2023, Board of Veterans' Appeals (Board) decision that denied entitlement to disability compensation for bilateral hearing loss. Record (R.) at 3-10. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the Board's decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from June 1986 to June 1990 and from January to March 1991. R. at 17970, 17971. At entrance to his first period of service, he denied ear trouble, and his hearing test results were as follows:

Hertz (Hz)	500	1000	2000	3000	4000	6000
Right	5	0	0	0	0	0
Left	5	0	0	0	5	30

R. at 18950 (all results in decibels); *see* R. at 18948. In March 1990, he sought treatment for a sore throat, headache, runny nose, and dizziness; the treating clinician noted that he had wax buildup

in his ear canals; and the clinician diagnosed pharyngitis. R. at 18939. Upon separation from his second period of service, an examiner recorded the following hearing test results:

Hz	500	1000	2000	3000	4000	6000
Right	25	20	20	20	20	20
Left	25	20	20	20	20	30

R. at 18890.[1]

The record contains a January 2010 VA memorandum reflecting that the appellant's service treatment records were unavailable for review. R. at 19635-36. Years later, the appellant submitted a claim for disability compensation for tinnitus,[2] R. at 16696-700, and he underwent a VA hearing loss and tinnitus examination in November 2018, R. at 16562-71. The examiner reviewed the appellant's claims file, noted that he underwent several audiograms in service, and recorded the following hearing test results in the disability benefits questionnaire (DBQ):

Hz	500	1000	2000	3000	4000	6000
Right	15	10	10	10	10	5
Left	10	10	10	15	15	10

R. at 16564; *see* R. at 16562-63. His speech discrimination score was 100% in each ear. R. at 16564. The examiner determined that the appellant did not have a permanent positive threshold shift in either ear during service, and she diagnosed normal hearing. R. at 16565-66. She did not complete questions pertaining to the etiology of the claimed condition. R. at 16565-66.

The appellant subsequently sought disability compensation for hearing loss. R. at 16044-48; *see* R. at 618. In support of his claim, he submitted statements from fellow servicemembers who recounted an incident when the appellant was involved in a physical altercation during service. R. at 703-04, 1009, 1178. The appellant also submitted medical records dated between 2009 and 2022 reflecting complaints of ear pain, ear wax, dizziness, and difficulty

[1] In his informal brief, the appellant contends that several of these entries reflect a 26 rather than a 20. Appellant's Informal Brief (Br.) at 8-9, 11-12, 18.

[2] The record of proceedings does not contain a decision as to this claim, but the record reflects that the appellant is not service connected for tinnitus. *See* R. at 618. He is service connected for several other conditions, including migraines, a psychiatric disorder, and sleep disordered breathing, and he is in receipt of special monthly compensation (SMC). R. at 613-16.

attend any subsequent examinations. Secretary's Br. at 9. The Secretary further asserts that the 2018 examination report is adequate; the examiner specifically referenced the appellant's service treatment records; and to the extent that the appellant may be seeking to challenge the competence of the examiner, the appellant cannot raise that issue for the first time on appeal to the Court. Secretary's Br. at 9-10. The appellant did not file a reply brief.

B. Law

Establishing that a disability is service connected for purposes of entitlement to VA disability compensation generally requires medical or, in certain circumstances, lay evidence of (1) a current disability, (2) incurrence or aggravation of a disease or injury in service, and (3) a nexus between the claimed in-service injury or disease and the current disability. *See* 38 U.S.C. § 1110; *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); 38 C.F.R. § 3.303 (2023). Regarding disability compensation for hearing loss, a VA regulation provides as follows:

> 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[%].

38 C.F.R. § 3.385 (2023).

Additionally, under certain circumstances, and as part of its duty to assist claimants, VA must provide a medical examination. *See* 38 U.S.C. § 5103A(d). "[O]nce the Secretary undertakes the effort to provide an examination [or opinion,] . . . he must provide an adequate one." *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one,'" *Stefl*, 21 Vet.App. at 123 (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)), and "sufficiently inform[s] the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion," *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (per curiam), *overruled on other grounds by Euzebio v. McDonough*, 989 F.3d 1305 (Fed. Cir. 2021). The law does not impose any reasons-or-bases requirements on medical examiners, and the adequacy of

medical reports must be based upon a reading of the report as a whole. *Monzingo*, 26 Vet.App. at 105-06.

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

C. Board Decision

As an initial matter, the Board noted that this appeal stems from a September 2023 RO decision, and because the appellant selected direct review by the Board, the Board may consider only evidence of record at the time of the September 2023 decision. R. at 3-4. The Board then explained that, for VA disability compensation purposes, impaired hearing constitutes a disability if the criteria in § 3.385 are satisfied. R. at 4-5. In assessing whether the appellant satisfies those criteria, the Board found that the November 2018 VA examination report reflects that the appellant has auditory thresholds between 10 and 15 decibels at each frequency bilaterally and speech recognition scores of 100% in both ears. R. at 6. Additionally, the Board noted that the 2018 examiner opined that the appellant has normal hearing, and the Board found that the appellant's VA treatment records do not contain a diagnosis of hearing loss. R. at 6, 7.

The Board further found that VA had scheduled a new hearing loss examination for September 2023, but the appellant did not attend the examination and refused any further examinations. R. at 7. As for the appellant's statements that he has impaired hearing, the Board determined that he is not competent to provide a diagnosis as to that medically complex issue. R. at 7. The Board thus concluded that the appellant "does not have a current diagnosis of bilateral hearing loss and has not had one at any time during the pendency of the claim or recent to the filing of the claim." R. at 6. The Board explained that, "[w]here the medical evidence establishes that a [v]eteran does not currently have a disability for which service connection is sought, service

connection . . . is not authorized." R. at 7. Accordingly, the Board determined that the evidence was persuasively against the claim and denied disability compensation for bilateral hearing loss. R. at 7-8.

D. Discussion

On appeal to this Court, the appellant "always bears the burden of persuasion." *Berger v. Brown*, 10 Vet.App. 166, 169 (1997); *see Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table). Here, taking "due account of the rule of prejudicial error," 38 U.S.C. § 7261(b)(2), the Court concludes that the appellant has not met his burden of demonstrating prejudicial error, *see Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the harmless-error analysis applies to the Court's review of Board decisions and that the burden is on the appellant to show that he or she suffered prejudice as a result of VA error), and the Court cannot discern, under the circumstances of this case, how any error was prejudicial, *see Slaughter v. McDonough*, 29 F.4th 1351, 1355 (Fed. Cir. 2022).

To begin, the appellant contends that the November 2018 VA examination report is inadequate because the examiner did not consider his in-service hearing test results, incorrectly performed the hearing test, and improperly filled out the DBQ. Appellant's Informal Br. at 8, 13-14. As for the in-service hearing tests, the appellant did not respond to the Secretary's contention that the examiner specifically referenced his service treatment records, Secretary's Br. at 9, nor does he address the import of the examiner's notation that she had considered his in-service audiograms, *see* R. at 16563. Further, given that the Board relied only on the examiner's finding that the appellant currently has "normal hearing in both ears," R. at 6; *see* R. at 16565, the Court cannot conclude that the appellant was harmed by any failure of the examiner to discuss his in-service hearing test results or to complete the section of the DBQ pertaining to the etiology of a current condition. *See* R. at 6-7; *see also Monzingo*, 26 Vet.App. at 107 ("[E]ven if a medical opinion is inadequate to decide a claim, it does not necessarily follow that the opinion is entitled to absolutely no probative weight.").

Moreover, to the extent that the appellant questions whether the examiner correctly performed the hearing test, Appellant's Informal Br. at 13-14, his contentions rest on lay speculation in his brief, *see Kern v. Brown*, 4 Vet.App. 350, 353 (1993); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing . . . serves no constructive purpose and cannot be considered by this Court."). Also, if the appellant is averring that the examiner was not competent

to conduct the examination, "VA benefits from a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013) (citing *Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011)). The appellant does not assert, and the record does not reflect, that he challenged the examiner's competence before the Agency. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1291-92 (Fed. Cir. 2009) (holding that the Board is not required to affirmatively establish the competence of a medical examiner unless the veteran raises the issue).

Turning to the appellant's assertion that the Board did not adequately address postservice medical records reflecting ear pain and other symptoms, Appellant's Informal Br. at 14-17, the Board explained that establishing service connection for hearing loss requires evidence satisfying the criteria in § 3.385—specifically, an "'auditory threshold in any of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz [of] 40 decibels or greater; or . . . auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz [of] 26 decibels or greater; or . . . speech recognition scores . . . less than 94[%].'" R. at 4-5 (quoting 38 C.F.R. § 3.385). As to that question, the Board found that the appellant's VA treatment records from the period on appeal do not contain a diagnosis of hearing loss, the November 2018 examination report reflects normal hearing, and the appellant has indicated that he would not attend another examination. R. at 6, 7. The appellant does not contend that his postservice treatment records potentially reflect a diagnosis of hearing loss or that they could have triggered the need for an additional examination, and he does not otherwise explain how he was harmed by any failure to discuss the specific records that he cites. *See Sanders*, 556 U.S. at 409.

Next, the appellant argues that the Board did not adequately address his in-service hearing test results, which he asserts may show that he has a hearing loss disability. Appellant's Informal Br. at 8-9. However, the Board denied the claim on the basis that the appellant did not satisfy the first element of service connection—a current disability. R. at 6. That requirement is satisfied when the claimant has a disability at the time the claim for disability compensation is filed or during the pendency of a claim. *See McClain v. Nicholson*, 21 Vet.App. 319, 321 (2007); *cf. Romanowsky v. Shinseki*, 26 Vet.App. 289, 294 (2013) (holding that the Board must consider evidence of a "recent" diagnosis made prior to the filing of a claim). The appellant does not explain, and the Court cannot discern, how he was harmed by any failure of the Board, in reaching that conclusion,

to address records reflecting the appellant's hearing acuity in 1991. *See McClain*, 21 Vet.App. at 321; *see also Slaughter*, 29 F.4th at 1355.

To the extent that the appellant maintains that his in-service treatment records and statements from fellow servicemembers may show an in-service injury, those arguments pertain to the second element of service connection—incurrence or aggravation of a disease or injury in service. *See* Appellant's Informal Br. at 5; *see also Shedden*, 381 F.3d at 1166-67. As the Board noted, however, service connection cannot be awarded "[i]n the absence of proof of a present disability." *Brammer v. Derwinski*, 3 Vet.App. 223, 225 (1992); *see* R. at 7. Because the appellant has not demonstrated that the Board prejudicially erred in finding that he does not have a current hearing loss disability for VA purposes, any Board error as to the other elements of service connection is necessarily harmless. *See Slaughter*, 29 F.4th at 1355. Additionally, although the appellant suggests that the Board should have applied the "treating physician rule," the Board should have resolved interpretive doubt in his favor, and he was harmed because some of his service medical records are unavailable, Appellant's Informal Br. at 3, 6, those arguments are undeveloped, *see Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped).

Finally, the appellant notes that he is seeking a higher rate of SMC. Appellant's Informal Br. at 1. The Board, however, did not address that matter in the decision on appeal. Therefore, the Court lacks jurisdiction over that matter. *See* 38 U.S.C. § 7252(a) (providing that the Court's jurisdiction is generally limited to review of final Board decisions); *Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) ("[T]he court's jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed."); *see also Tyrues v. Shinseki*, 23 Vet.App. 166, 178 (2009) (en banc) ("[T]his Court's jurisdiction is controlled by whether the Board issued a 'final decision'—i.e., denied relief by either denying a claim or a specific theory in support of a claim and provided the claimant with notice of appellate rights."), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated*, 565 U.S. 802 (2011), *reinstated as modified en banc*, 26 Vet.App. 31 (2012) (per curiam order), *aff'd*, 732 F.3d 1351 (Fed. Cir. 2013). Because the appellant raises no other discernable arguments as to the decision on appeal, the Court will affirm that decision.

III. CONCLUSION

After consideration of the parties' pleadings and a review of the record, the Board's October 31, 2023, decision is AFFIRMED.

DATED: January 12, 2024

Copies to:

Trevor Spencer Taylor

VA General Counsel (027)

BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
TREVOR SPENCER TAYLOR

[redacted]
Docket No. 230917-377155
Advanced on the Docket

DATE: October 31, 2023

ORDER

Entitlement to service connection for bilateral hearing loss is denied.

FINDING OF FACT

The Veteran does not have bilateral hearing loss for VA purposes.

CONCLUSION OF LAW

The criteria for service connection for bilateral hearing loss are not met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. §§ 3.102, 3.303.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served in the United States Army from June 1986 to June 1990 and January 1991 to March 1991.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a September 2023 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO), the Agency of Original Jurisdiction (AOJ).

In the September 2023 VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), the Veteran elected the Direct Review docket.

Therefore, the Board may only consider the evidence of record at the time of the September 2023 agency of original jurisdiction (AOJ) decision on appeal. 38 C.F.R. § 20.301. Any evidence submitted after the AOJ decision on appeal cannot be considered by the Board. 38 C.F.R. §§ 20.300, 20.301, 20.801.

If the Veteran would like VA to consider any evidence that was submitted that the Board could not consider, the Veteran may file a Supplemental Claim (VA Form 20-0995) and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim[s], considering the new evidence in addition to the evidence previously considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.

Service Connection

Service connection for impaired hearing shall only be established when hearing status as determined by audiometric testing meets specified puretone and speech recognition criteria. Audiometric testing measures threshold hearing levels (in decibels) over a range of frequencies (in Hertz). *Hensley v. Brown*, 5 Vet. App. 155, 158 (1993).

Alternatively, under 38 C.F.R. § 3.303 (b), service connection may be established for certain chronic diseases listed under 38 C.F.R. § 3.309 (a) by either (1) the existence of such a chronic disease noted during service, or during an applicable presumption period under 38 C.F.R. § 3.307, and present manifestations of that same chronic disease; or, (2) where the condition noted during service is not, in fact, shown to be chronic or where the diagnosis of chronicity can be legitimately questioned, then a showing of continuity of symptomatology after discharge is required to support the claim of service connection. 38 C.F.R. § 3.303 (b); see also *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

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, or 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 threshold for normal hearing is from 0 to 20 decibels, and higher threshold levels indicate some degree of hearing loss. *Hensley v. Brown*, 5 Vet. App. 155, 160 (1993).

The laws and regulations do not require in service complaints of or treatment for hearing loss in order to establish service connection. *See Ledford v. Derwinski*, 3 Vet. App. 87, 89 (1992). Instead, as noted by the United States Court of Appeals for Veterans Claims (Court):

In *Hensley v. Brown*, 5 Vet. App. 155, 159-60 (1993) the Court held that even if audiometric testing at separation did not establish hearing loss by VA standards at 38 C.F.R. § 3.385, such audiometric test results did not preclude granting service connection for a current hearing loss when there is evidence that current hearing loss is causally related to service. In *Hensley*, there was an upward shift in threshold levels at some frequencies on an examination for separation and in-service audiometric testing yielded elevated thresholds at some frequencies. Thus, the Court found that the claim could not be denied solely because the hearing loss did not meet the criteria for 38 C.F.R. § 3.385 at separation. Rather, if there were any current hearing loss (by VA standards) it had to be determined whether shifts in auditory thresholds during service represented the onset of any current hearing loss (even if first diagnosed a number of years after service). 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 hearing 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. *See* 38 U.S.C. §§ 1110; C.F.R. §§ 3.303 and 3.304; *Hensley*, 5 Vet. App. at 159-60.

1. Entitlement to service connection for bilateral hearing loss

The Veteran contends that he has bilateral hearing loss which is related to his military service.

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303. The three-element test for service connection requires evidence of: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the current disability and the in-service disease or injury. *Shedden v. Principi*, 381 F.3d 1163, 1166 -67 (Fed. Cir. 2004).

The question for the Board is whether the Veteran has a current disability that began during service or is at least as likely as not related to an in-service injury, event, or disease.

The Board concludes that the Veteran does not have a current diagnosis of bilateral hearing loss and has not had one at any time during the pendency of the claim or recent to the filing of the claim. *Romanowsky v. Shinseki*, 26 Vet. App. 289, 294 (2013); *McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007).

On the authorized audiological evaluation in November 2018, pure tone thresholds, in decibels, were as follows:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	15	10	10	10	10
LEFT	10	10	10	15	15

Speech audiometry revealed speech recognition ability of 100 percent in the right ear and of 100 percent in the left ear.

The November 2018 VA examiner evaluated the Veteran and determined that he did not have a diagnosis of hearing loss in either ear. The examiner noted that the Veteran had normal hearing in both ears.

In September 2023, the Veteran was scheduled for a VA hearing loss examination. The Veteran did not appear at the scheduled examination. In a September 2023 telephonic communication, the Veteran stated that "the previous examination caused pain. He does not wish to have another examination at this time."

Further, VA treatment records for the period on appeal do not contain a diagnosis or treatment for bilateral hearing loss.

Where the medical evidence establishes that a Veteran does not currently have a disability for which service connection is sought, service connection for that disability is not authorized under the statues governing Veterans' benefits. *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992); *Rabideau v. Derwinski*, 2 Vet. App. 141, 144 (1992).

There is no diagnosis of a bilateral hearing loss disability, as defined by 38 C.F.R. § 3.385, at any time post service. In the absence of medical evidence of a current bilateral hearing loss disability as defined for VA purposes, the claim for service connection for bilateral hearing loss must be denied.

The Board notes that the Veteran has submitted his own statements that he believes he suffers from bilateral hearing loss.

While the Veteran believes he has a current diagnosis of bilateral hearing loss, he is not competent to provide a diagnosis in this case. The issue is medically complex, as it requires advanced medical knowledge and the ability to interpret complicated diagnostic audiological testing. *Jandreau v. Nicholson*, 492 F.3d 1372, 1377, 1377 n.4 (Fed. Cir. 2007). Consequently, the Board gives more probative weight to the competent medical evidence.

Although he is certainly competent to state that he was exposed to loud noises during service and that he has noticed a difficulty in hearing since discharge from service, the medical evidence does not document hearing loss to the level required to establish service connection.

IN THE APPEAL OF
TREVOR SPENCER TAYLOR

[redacted]
Docket No. 230917-377155
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For the above reasons, the evidence is neither evenly balanced nor approximately so with regard to whether entitlement to service connection for bilateral hearing loss is warranted. Rather, the evidence persuasively weighs against the claim. The benefit of the doubt doctrine, see 38 U.S.C. § 5107(b), is therefore not for application as to this claim. *Lynch v. McDonough*, 999 F.3d 1391 (Fed. Cir. 2021), affirmed en banc 2021 U.S. App. LEXIS 37307 (Dec. 17, 2021) (only when the evidence persuasively favors one side or another is the benefit of the doubt doctrine not for application), 38 U.S.C. § 5107; 38 C.F.R. §§ 4.3, 4.7.

J. NICHOLS
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board M. O'Connor, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.