BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF [redacted]

DOCKET NO. 09-24 914) DATE APR 2 0 2011
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On appeal from the
Department of Veterans Affairs Regional Office in Louisville, Kentucky

THE ISSUE

1. Entitlement to service connection for laryngeal cancer, status post hemilaryngectomy, to include as secondary to herbicide exposure.

2. Entitlement to service connection for hearing loss.

3. Whether new and material evidence has been received to reopen a claim of entitlement to service connection for herniated nucleus pulposus at L4-L5.

REPRESENTATION

Appellant represented by: Terrence J. O'Toole, Attorney at Law

WITNESS AT HEARING ON APPEAL

The Veteran

IN THE APPEAL OF [redacted]

ATTORNEY FOR THE BOARD

K. Neilson, Counsel

INTRODUCTION

The Veteran served on active duty from August 1963 to July 1967.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an August 2008 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Louisville, Kentucky.

On July 16, 2010, the Veteran testified at a video conference hearing before the undersigned Veterans Law Judge. A transcript of that hearing is of record.

At the July 2010 hearing, the Veteran indicated that he desired to withdraw his appeal regarding a claim for a higher evaluation for tinnitus. Therefore, the Board finds that the appeal of that claim has been withdrawn. *See* 38 C.F.R. § 20.204 (2010).

Also during the July 2010 hearing, the Veteran, through his attorney, raised various assertions of error with regard to a September 1974 Board decision that had denied a claim for service connection for a herniated nucleus pulposus at L4-L5. To the extent that the Veteran claims clear and unmistakable error (CUE) in that September 1974 decision, the Board notes that "[a] motion for revision of a [Board] decision based on clear and unmistakable error must be in writing, and must be signed by the moving party or that party's representative." 38 C.F.R. § 20.1404(a) (2010). Accordingly, the Board finds that any assertion of CUE raised by the Veteran during his July 2010 cannot be inferred as a motion for revision of the September 1974 Board, as such motion must be in writing and conform with the specific filing and pleading requirements set forth in 38 C.F.R. § 20.1404. If the Veteran believes that the September 1974 Board decision contains CUE, the

Veteran is free to file a motion for revision of that decision at any time in accordance with 38 C.F.R. § 20.1404(c).

Further, after the Veteran's appeal was certified to the Board, he submitted two supplemental briefs with attachments of additional evidence to the Board in the form of articles and VA bulletins. The Veteran waived review of the newly submitted evidence by the agency of original jurisdiction (AOJ). *See* 38 C.F.R. § 20.1304(c) (2010). Thus, the Board will consider such evidence in the adjudication of this appeal.

(The decision below addresses the Veteran's claim for service connection for laryngeal cancer and whether new and material evidence has been received to reopen a claim of entitlement to service connection for a herniated nucleus pulposus at L4-L5. The Veteran's claim for service connection for hearing loss is addressed in the remand that follows the Board's decision.)

FINDINGS OF FACT

1. The Veteran was diagnosed with laryngeal cancer.

2. The Veteran had service aboard the USS Newman K. Perry, which included the period from November 23-28, 1966.

3. By a September 1974 decision, the Board denied service connection for a herniated nucleus pulposus at L4-L5; that decision is final.

4. Evidence received since the Board's September 1974 decision relates to an unestablished fact necessary to substantiate the claim of service connection for a herniated nucleus pulposus at L4-L5 and it raises a reasonable possibility of substantiating the underlying claim.

4. The Veteran as likely as not has a herniated nucleus pulposus at L4-L5 that is attributable to his active military service.

CONCLUSIONS OF LAW

1. The Veteran's laryngeal cancer, status post hemilaryngectomy, is presumed to have been incurred in service. 38 U.S.C.A. §§ 1110, 1116, 5107 (West 2002 & Supp. 2010); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309 (2010); VA Compensation and Pension (C&P) Service Bulletin (January 2010).

2. A September 1974 Board decision that denied service connection for a herniated nucleus pulposus at L4-L5 is final. 38 U.S.C.A. § 7104 (West 2002); 38 C.F.R. § 20.1100 (1974).

3. New and material evidence has been submitted to reopen the claim of service connection for a herniated nucleus pulposus at L4-L5. 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156 (2010).

4. The Veteran has a herniated nucleus pulposus at L4-L5 that is the result of disease or injury incurred during active military service. 38 U.S.C.A. §§ 1110, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.304 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

A. Service Connection for Laryngeal Cancer

The law provides that service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active military service. 38 U.S.C.A. § 1110 (West 2002); 38 C.F.R. §§ 3.303, 3.304 (2010). Service connection may be granted for any disease diagnosed after discharge when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

In addition, the law provides that there are certain diseases, such as respiratory cancers, to include cancer of the larynx, that are associated with exposure to "herbicide agents" during active military, naval, or air service, and are thus presumed to have been incurred in or aggravated during active military service if the requirements of 38 C.F.R. § 3.307(a)(6) are met, even though there is no record of the disease during service, provided that the rebuttable presumption provisions of 38 C.F.R. § 3.307(d) are also satisfied. 38 U.S.C.A. § 1116(a) (West 2002 & Supp. 2010); 38 C.F.R. § 3.309(e) (2010). (In this context, the term "herbicide agent" is defined as a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram. 38 C.F.R. § 3.307(a)(6)(i) (2010).)

A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975, is presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to the contrary. 38 C.F.R. § 3.307(a)(6)(iii). For purposes of this presumption, "[s]ervice in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. *Id*; *see* 38 C.F.R. § 3.313 (2010).

Further, according to a VA Compensation and Pension (C&P) Service Bulletin from January 2010, VA has extended the presumption of herbicide exposure based on service "in the Republic of Vietnam" to include certain veterans not previously considered to have the requisite service. Specifically, VA now considers those Navy veterans who served on specific "blue water" vessels known to have conducted "brown water" operations during the Vietnam war as having served "in the Republic of Vietnam" for purposes of 38 C.F.R. § 3.307(a)(6)(iii). The bulletin provides that "[i]f a veteran's service aboard one of these ships can be confirmed through military records during the time frames specified, then exposure to herbicide agents can be presumed without further development."

Here, the record shows that in 1988, the Veteran was diagnosed as having carcinoma of the larynx. In October 1988, he underwent a right hemilaryngectomy. The Veteran has asserted that his carcinoma of the larynx was due to his exposure to herbicides in service.

The Veteran's DD Form 214 shows that he had 2 years, 7 months, and 12 days of foreign and/or sea service. His last duty assignment was on the USS Newman K. Perry (DD-883). The Veteran's service treatment records (STRs) also show treatment aboard the USS Newman K. Perry during the month of November 1966.

According to the VA C&P service's list of Navy and Coast Guard Ships associated with service in Vietnam and exposure to herbicide agents, last updated on January 6, 2011, the "USS Newman K. Kelly (DD-833) operated on [the] Mekong River Delta and Saigon River [from] November 23-28, 1966." The Board notes that although this list refers to the "USS Newman K. Kelly", the ship identifier – DD-833 – is associated with the USS Newman K. Perry, as evidenced by the Veteran's DD Form 214 and deck logs that have been associated with the record. Further, deck logs from the USS Newman K. Perry show that it was operating on the Mekong River Delta during the timeframe indicated above. As such, the Board finds that the VA C&P service's inclusion of the "USS Newman K. Kelly" (DD-883) on the list of ships operating temporarily on Vietnam's inland waterways or docking to shore was intended to refer to the *USS Newman K. Perry* (DD-883).

Accordingly, in light of the VA C&P Service Bulletin discussed above and the Veteran's DD Form 214 and STRs that place him aboard USS Newman K. Perry during the timeframe in question, and resolving reasonable doubt in favor of the Veteran, the Board finds that the Veteran is entitled to the presumption of exposure. *See* 38 U.S.C.A. § 5107(b) (West 2002); 38 C.F.R. § 3.102 (2010); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (1990); VBA C&P Service Bulletin (January 2010). Therefore, the Board concludes that the Veteran's carcinoma of the larynx is presumed to have been incurred in service. *See* 38 U.S.C.A. § 1116; 38 C.F.R. § 3.309(e); VBA C&P Service Bulletin (January 2010). As such, the Veteran's claim of entitlement to service connection for laryngeal cancer, status post hemilaryngectomy, to include as due to herbicide exposure, is granted.

B. Petition to Reopen Previously Denied Claim

The Veteran originally filed a claim for service connection for a back disability in August 1967, which was denied by the RO in January 1968. He did not appeal that decision. In April 1972, he again sought service connection for a back disability, which was denied by the RO in August 1972 and June 1974. The Veteran appealed the denial of his claim to the Board and in September 1974 the Board denied service connection for a back disability upon finding that the Veteran's then-current herniated nucleus pulposus was not related to the back symptomatology treated in service. The September 1974 Board decision, rendered prior to the advent of the United States Court of Appeals for Veterans Claims, constituted a final appellate determination as to any issue addressed therein. *See* 38 U.S.C.A. § 7104; 38 C.F.R. § 20.1100 (2010).

As a result of the finality of the September 1974 Board decision, the Veteran's claim for service connection for a herniated nucleus pulposus at L4-L5 may now be considered on the merits only if new and material evidence has been received. 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156 (2010); *Manio v. Derwinski*, 1 Vet. App. 140, 145 (1991); *Evans v. Brown*, 9 Vet. App. 273 (1996). Section 3.156(a) of title 38, Code of Federal Regulations provides the following definitions of new and material evidence:

> New evidence means existing evidence not previously submitted to agency decisionmakers. 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); *see Hodge v. West*, 155 F.3d 1356, 1359 (Fed. Cir. 1998). In making the determination of materiality, the "credibility of the evidence is to be presumed." *Justus v. Principi*, 3 Vet. App. 510, 513 (1992).

The Board notes that although the RO "reopened" the Veteran's claim and addressed the issue of service connection on the merits, the Board must independently consider the question of whether new and material evidence has been received because it goes to the Board's jurisdiction to reach the underlying claim and adjudicate the claim *de novo*. *See Jackson v. Principi*, 265 F.3d 1366, 1369 (Fed. Cir. 2001); *Barnett v. Brown*, 83 F.3d 1380 (Fed. Cir. 1996). If the Board finds that no such evidence has been offered, that is where the analysis must end, and what the RO may have determined in that regard is irrelevant. *Id.* Further analysis, beyond consideration of whether the evidence received is new and material is neither required nor permitted. *Id.* at 1384; *see Butler v. Brown*, 9 Vet. App. 167, 171 (1996).

To determine whether new and material evidence has in fact been submitted, the Board must compare the evidence submitted since the previous final denial with evidence previously of record. If the newly submitted evidence is that which was not of record at the time of the last final disallowance (on any basis) of the claim, and is not merely cumulative of other evidence that was then of record, it will be considered "new evidence" under 38 C.F.R. § 3.156(a). If the evidence is in fact new, the Board will then consider whether it is also material.

In this regard, the Board notes that the threshold for determining whether new and material evidence raises a reasonable possibility of substantiating a claim is "low." *Shade v. Shinseki*, 24 Vet. App. 110, 117 (2010). When evaluating the materiality of newly submitted evidence, the focus must not be solely on whether the evidence remedies the principal reason for denial in the last prior decision; rather the determination of materiality should focus on whether the evidence, taken together, could at least trigger the duty to assist or consideration of a new theory of entitlement. *See id.*

In this case, the evidence of record at the time of September 1974 Board decision included: the Veteran's STRs showing that the Veteran injured his back in December 1965, was again treated for back pain in January 1966, and complained of a sore back after exercising in April 1966; the Veteran's separation examination report noting that his spine and musculoskeletal system were clinically evaluated as normal; a May 1972 letter from a private chiropractor stating that the Veteran had been seen in May 1971 for complaints of severe low back pain and received further treatment in July and August 1971; treatment records from DePaul Hospital; the report of a November 1971 hemilaminectomy performed at the VA medical center (VAMC) in St. Louis, Missouri; a July 1972 x-ray report showing intact vertebral bodies and well maintained intervertebral spaces; a July 1972 VA orthopedic examination report containing a diagnosis of "[p]ostoperative condition, surgery for herniated nucleus pulposus with residual low back pain and mild spasm of muscles attaching to lumbar spine with radiation of pain and discomfort into right leg with evidence of minimal weakness on standing right toe"; lay statements from the Veteran, to include his July 1974 hearing testimony, during which hearing he stated that he injured his back in service and had been treated for back problems since that time; and a July 1974 letter from a private physician who indicated that the Veteran had received treatment in February 1970 for low back pain.

In September 1974, the Board denied service connection for a herniated disc at L4-L5. The Board acknowledged that Veteran's complaints of back pain in service, noting that some involved regions of the back other than the lumbar spine. The Board found, however, that there was no clinical evidence of a chronic disability, nor any neurological pathology. The Board also noted that the Veteran's separation examination was normal and the first evidence of any back-related symptomatology was not until February 1970, which the Board found to be too remote to warrant association with the complaints of back pain in service. The Board further found that the back complaints treated in service were acute and transitory, without residuals.

Relevant evidence received since the September 1974 Board decision consists of VA treatment records from 1971 to 2010, containing, among other things, a 2005 diagnosis of lumbar stenosis with ruptured L4-L5 intervertebral disc; a March 1983

letter from the Veteran to his Congressman; private treatment records dated in April 1987 noting that x-rays of the back demonstrated degenerative joint disease of the L4-L5 disc; statements from the Veteran, to include his July 2010 hearing testimony; and an April 2008 VA examination report and July 2008 addendum.

Notably, in his March 1983 letter to his Congressman, the Veteran stated that the doctor who had performed his 1971 surgery indicated to him that the injury to his disc had been sustained five or six years prior to that time. The Veteran also stated that he was unaware of the severity of his alleged in-service injury before his 1971 surgery. Further, the Veteran's medical records contain a November 1971 treatment record wherein it was noted that the Veteran had injured his back in service and had suffered from back pain since that time, which had recently begun to radiate down his leg. Also of note is the July 2008 VA examination report addendum wherein the examiner stated that major trauma is an important cause of spinal stenosis.

The Board finds that the Veteran's statements, as recorded in his 1983 letter to his Congressman and in his hearing testimony, along with evidence of continuous treatment for a back disability since 1971, suggests a possible relationship between the Veteran's current back disability and service. This evidence is new as it was not previously of record when the prior decision was made. This evidence is also material because it is supporting evidence of a chronic back disability in service. *See Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir 2007) (lay testimony describing symptoms at the time supports a later diagnosis by a medical professional). Further, the totality of the evidence submitted since the Board's September 1974 decision is supportive of the Veteran's assertion that he injured his back in service and has suffered continuous symptomatology since that time. *Cf. Bostain v. West*, 11 Vet. App. 124, 128 (1998) (holding that a corroborative medical opinion was sufficient to constitute new and material evidence when it "added some weight to and tended to confirm the validity of the former medical opinions considered by the Board as part of a final disallowance" and there is a "reasonable possibility that the opinion could change the outcome of the appellant's claim on the merits."). The new evidence also sheds greater light on the Veteran's condition during service and thereafter.

As a result, the Board finds that the statements recorded in the Veteran's March 1983 letter, which are presumed credible, *see Justus, supra*, constitute new and material evidence. The evidence relates to an unestablished fact necessary to substantiate the underlying claim and it raises a reasonable possibility of substantiating the claim. Accordingly, the claim of service connection for a herniated nucleus pulposus at L4-L5 is reopened with the submission of new and material evidence. *See* 38 U.S.C.A. § 5108; 38 C.F.R. § 3.156(a).

C. Service Connection for Herniated Nucleus Pulposus at L4-L5

Generally, establishing service connection requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki,* 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

Alternatively, the second and third elements of service connection can be demonstrated through chronicity or continuity of symptomatology. *See Savage v. Gober*, 10 Vet. App. 488, 495-97 (1997); 38 C.F.R. § 3.303(b). First, chronicity is established if the veteran can demonstrate (1) the existence of a chronic disease in service and (2) current or present manifestations of the same disease. *See id.* at 495-97. When the fact of chronicity during service is not established, however, continuity of symptomatology after discharge from service may establish service connection. 38 C.F.R. § 3.303(b). Continuity of symptomatology may be established if it is demonstrated that (1) a condition was "noted" during service; (2) there is postservice evidence of the same symptomatology; and (3) there is medical or, in certain circumstances, lay evidence of a nexus between the present disability and the postservice symptomatology. *Savage, supra.*

The Veteran asserts that he has a herniated disc that is the result of active military service. Specifically, he testified that in December 1965, he was carrying several cases of soda up from the stockroom when the ship suddenly "took off," causing him to fall and injure his back. The Veteran's STRs document that he was treated

for back pain in December 1965. They further indicate that the Veteran was seen by an Army doctor while on leave in January 1966 and show that he was examined by a medical officer on the USS Yosemite in January 1966 for back pain that had begun in December 1965.

The Veteran first applied for VA disability compensation, seeking service connection for a back disability on August 15, 1967, less than one month after separation from service. At that time, service connection was denied as a back disability was not shown on examination at separation. The Veteran has maintained that at the time of his discharge from service, he was not given a medical examination but rather, was mustered out. The Veteran stated that he informed a Lieutenant at that time about his back disability and was told to seek treatment at a VA hospital. During his July 1974 Board hearing, the Veteran testified that he had attempted treatment for his back at a VA hospital after discharge from service, but was told that he would need to see a private physician because his disability was not service connected. The record shows private medical and chiropractic treatment in 1970 and 1971. The Veteran has also testified that he received treatment for his back prior to that time at a clinic in Wellston, Missouri.

In November 1971, the Veteran was seen at a VAMC for complaints of low back pain that radiated to the right hip and leg. At that time, he stated that his pain had started in service. In November 1971, the Veteran underwent a hemilaminectomy at L4-L5. The surgery report recorded the Veteran's account of an injury to his back from falling due to the ship's movement. The Veteran indicated that he had experienced back pain on and off consistently since that time. No intervening injury was noted.

In July 1972, the Veteran underwent a VA examination. Neither the claims folder nor any medical information was available for review by the examiner. The Veteran reported that while in service, he sustained an injury to his back when he fell backwards carrying a case of soda bottles. The Veteran reported having pain and discomfort in his back since that time. Palpation and pressure over the lower lumbar spine revealed mild discomfort not present on the upper lumbar or thoracic

regions. The examiner expressed no opinion regarding the origin or etiology of the Veteran's low back pain and muscle spasms.

In 1983, the Veteran was again seen for back pain, at which time it was noted that the Veteran had had chronic low back pain since the 1971 procedure. Tenderness and a moderate paravertebral muscle spasm were noted to the right of L3-L4. In January 2005, the Veteran underwent a laminectomy of L4 with partial laminectomy of L3 and a left L4-L5 discetomy. It was noted that he had severe stenosis of the L3-4 and a ruptured disc at L4-L5. The Board notes that VA treatment records show consistent complaints of, and treatment for, low back pain from the time of the Veteran's 1971 surgery to the present.

In April 2008, the Veteran was afforded a VA spinal examination. He relayed to the examiner the circumstances surrounding his in-service back injury, stating that he fell backwards while carrying soda cans due to the ship's sudden movement. The Veteran stated that he had experienced back pain on and off since that time. The examiner diagnosed the Veteran as having lumbar stenosis, status post lumbar laminectomy in 2005, and chronic low back pain. The examiner indicated that because the claims folder was not available for review, he could not comment on the etiology or origin of the Veteran's back disability. In a July 2008 addendum, the examiner stated that he had reviewed the claims folder and noted that the Veteran's separation examination report failed to reveal any evidence of a back disability. The examiner also noted that the Veteran's treatment records contained an indication of diffuse idiopathic skeletal hyperstosis, which the examiner stated was "an important cause of spinal stenosis." The examiner further commented that "major trauma is also [an] important etiology of spinal stenosis." The examiner opined that the Veteran's lumbar spinal condition was not likely related to his back injury while in service.

At the outset, the Board notes that although the July 1972 and April 2008 VA examiners failed to link the Veteran's back disability to his military service, neither examiner linked the disability to any specific cause. Further, neither examiner discussed any intervening injury between the Veteran's in-service back injury and his November 1971 surgery; nor does the evidence so reveal that any intervening

injury occurred. Moreover, although in the July 2008 addendum, the VA examiner opined that the Veteran's back disability was not related to his in-service back injury, the examiner provided no supporting analysis for that conclusion. The examiner did, however, suggest trauma as a cause. The Board is aware that there is no requirement imposed on a medical examiner to provide detailed reasons for an opinion, *Ardison v. Brown*, 6 Vet. App. 405, 407 (1994); however, it is incumbent on the VA examiner to consider all of the relevant evidence before forming an opinion, *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007). Indeed, a medical opinion is considered adequate only "where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *See Stefl*, 21 Vet. App. at 123 (quoting *Ardison, supra*). Here, the examiner acknowledged the Veteran's account of his in-service back injury and indicated that trauma was a possible etiology of spinal stenosis, but did not discuss why, in his opinion, the Veteran's in-service trauma could not have led to his present back disability.

The Veteran has regularly reported the events leading up to his in-service back injury, which account the Board finds to be consistent with the circumstances of the Veteran's service. *See* 38 U.S.C.A. § 1154(a) (West 2002). Further, the Veteran's was seen on more than one occasion in service for complaints of back pain following the alleged December 1965 injury. Although there are no treatment records documenting a finding of chronicity, the Veteran has provided, through statements and hearing testimony information that he did in fact experience back symptoms in the years between 1966 and the first post-service notation of treatment for back pain in 1970. Further, the Veteran sought service connection for a back disability within a month of his discharge from service. Additionally, he has indicated that he did receive treatment for his back between 1967 and 1970, although such records are not available. The lack of treatment records prior to 1970 is not necessarily "negative evidence," but rather an absence of evidence. There is also no evidence to suggest that the Veteran sustained any injury to his back other than the one sustained in service in December 1965. The Board thus finds that the continuity void is sufficiently filled by the Veteran's seemingly credible testimony on the matter. There is nothing in the record that disputes his recollection that he

injured his back in service and experienced back pain and received occasional treatment for the pain since the in-service injury.

In the Veteran's case, the evidence establishes the existence of an in-service back injury and a current back disability. Given this evidence, the seemingly credible evidence of continuity related by the Veteran, the VA treatment records documenting treatment for back pain since 1971 and recording the Veteran's assertion in 1971 that his pain had existed since service, and the January 2005 surgery report noting that a ruptured disc at L4-L5 was causing spinal stenosis at that level, and when reasonable doubt is resolved in the Veteran's favor, the Board finds that the Veteran as likely as not had a herniated nucleus pulposus at L4-L5 that is attributable to his active military service. *See* 38 U.S.C.A. § 5107(b) (West 2002); 38 C.F.R. § 3.102 (2010). In view of this finding, the Board concludes that service connection is warranted for a herniated nucleus pulposus at L4-L5. *See* 38 U.S.C.A. § 1110; 38 C.F.R. §§ 3.303, 3.304.

ORDER

Service connection for laryngeal cancer, status post hemilaryngectomy, is granted.

Service connection for status post herniated nucleus pulposus at L4-L5 is granted.

REMAND

In August 2007, the Veteran filed a claim for VA disability compensation, seeking service connection for hearing loss. He alleged in-service noise exposure as the cause of his hearing loss.

The Veteran's STRs contain the results of audiogram performed in July 1963 as part of the Veteran's entrance examination. At that time, his hearing was recorded as:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	-5	-5	0	-5	0
LEFT	-	-5	-5	-5	-5

The Veteran's STRs also contain the results of an August 1963 audiogram, which are as follows:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	20	25	0	20	15
LEFT	10	10	15	15	10

The Veteran's separation examination hearing test consisted only of the whispered voice test with results of 15/15, respectively. No audiological testing was performed at the time of separation from service.

In December 2007, the Veteran underwent a VA audiology examination. The examination report included the results of an audiogram that recorded the Veteran's pure tone auditory thresholds as follows:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	15	15	45	60	65
LEFT	15	20	45	60	65

The VA audiologist reviewed the claims folder and noted that the Veteran's hearing at separation from service was normal (15/15) based on whispered voice tests. The VA audiologist acknowledged the Veteran's assertion regarding in-service noise exposure from gunfire, to include his statement that his bunk was immediately under a gun mount. The VA audiologist diagnosed the Veteran as having normal to moderately severe sensorineural hearing loss bilaterally. He noted that the Veteran had normal hearing sensitivity across the rating range throughout his military career

and was rated at 15 out of 15 with the informal whispered voice test upon discharge from the military. The audiologist opined, therefore, that it was less likely than not that the Veteran's hearing loss was related to his military noise exposure.

As the evidence cited above indicates, the Veteran has a current hearing loss disability for VA purposes. *See* 38 C.F.R. § 3.385 (2010). The Board also finds credible the Veteran's account of noise exposure in service, and indeed, in-service noise exposure has been conceded by the RO. (In a March 9, 2009, decision, a decision review officer determined that the Veteran was shown to have had acoustic trauma in service and no history of occupational noise exposure.) Thus, the question is one of nexus between current disability and the in-service exposure. *See Davidson, supra.*

As to the question of nexus, the Board finds that a remand of the matter is warranted because the December 2007 VA audiology opinion is inadequate. *See Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007) (when VA undertakes to provide a VA examination or obtain a VA opinion, it must ensure that the examination or opinion is adequate); 38 C.F.R. § 3.159(c)(4) (2010).

First, it appears that the VA audiologist relied solely on the Veteran's separation examination report, which the audiologist stated indicated normal hearing at that time. In this regard, the Board notes that the only hearing test done at separation was a whispered voice test. However, as noted in Training Letter 10-02, which was issued in March 2010 regarding the adjudication of claims for hearing loss, "whispered voice tests are notoriously subjective, inaccurate, and insensitive to the types of hearing loss most commonly associated with noise exposure." VBA Training Letter 211D (10-02) (March 18, 2010). In that letter, the Director of the VA C&P Service stated that "whispered voice tests . . . cannot be considered as reliable evidence that hearing loss did or did not occur." *Id.*

Further, it appears that the VA audiologist's negative nexus opinion was based only on the fact that the Veteran did not demonstrate hearing loss upon discharge from service. The Board notes that the onset of hearing loss after service does not preclude a finding of service connection if it can be shown by all of the evidence,

including that pertinent to service, that the disease was incurred in service. 38 C.F.R. § 3.303(d) (2010); *see Peters v. Brown*, 6 Vet. App. 540, 543 (1994); *Hensley v. Brown*, 5 Vet. App. 155, 159-160 (1993). Given the fact that the whispered voice test is not considered to be reliable evidence that hearing loss did not occur, and the fact the VA audiologist failed to attribute the Veteran's hearing loss to any other occurrence or discuss why delayed onset hearing loss might weigh against a finding that such hearing loss was related to service, the VA audiologist's opinion is incomplete and not supported by an adequate rationale. *See Stefl, supra.*

Accordingly, based on the incomplete findings during the December 2007 VA audiology consultation, the conceded in-service noise exposure, and the guidance provided by Training Letter 10-02, the Board finds that a remand of the claim of service connection for hearing loss is necessary because there is not sufficient competent medical evidence on file to make a decision on the claim. *See Barr, supra*; *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006); *see also Stefl*, 21 Vet.App.at 124 (2007) (holding that Board must consider whether medical opinion contains "such sufficient information that it does not require the Board to exercise independent medical judgment"); 38 C.F.R. § 4.2 (2010) (if an examination report does not contain sufficient detail, "it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.").

In this regard, the Board has considered the Veteran's lay assertions that his hearing loss is related to his in-service noise exposure. Although the Veteran is competent to provide testimony concerning factual matters of which he has firsthand knowledge, such as symptoms or events experienced during service, or symptoms of a current disability, generally etiology of dysfunctions and disorders is a medical determination. *See Jandreau*, 492 F.3d at 1374-75; *see also Colantonio v. Shinseki*, 606 F.3d 1378, 1382 (Fed.Cir.2010) (recognizing that in some cases lay testimony "falls short" in proving an issue that requires expert medical knowledge). Here, the Veteran, as a lay person without the appropriate medical training and expertise, is not competent to make such an etiological conclusion with regard to his hearing loss. *See Jandreau, supra*; *Espiritu v. Derwinski*, 2 Vet. App. 492 (1992).

Accordingly, the case is REMANDED to the agency of original jurisdiction (AOJ) for the following action:

1. The AOJ should contact the Veteran and request that he identify the names, addresses, and approximate dates of treatment for all VA and non-VA health care providers who have treated him for hearing loss since service. The AOJ should attempt to obtain copies of pertinent treatment records identified by the Veteran that have not been previously secured and associate them with the claims folder.

2. Schedule the Veteran for a VA audiology examination. (This should be done after action requested in paragraph 1, above is completed to the extent feasible.) The claims folder, and a copy of this remand, must be provided to and reviewed by the examiner as part of the examination. (Advise the Veteran that failure to appear for an examination as requested, and without good cause, could adversely affect his appeal. *See* 38 C.F.R. § 3.655 (2010).)

The audiologist is requested to identify auditory thresholds, in decibels, at frequencies of 500, 1000, 2000, 3000, and 4000 Hertz. A Maryland CNC Test should also be administered to determine speech recognition scores. The audiologist must review the Veteran's lay statements regarding his in-service noise exposure and onset of his hearing loss. The audiologist must also specifically consider the impact of the in-service noise exposure. The audiologist should provide an opinion as to whether the Veteran's current hearing loss is at least as likely as not related to his in-service noise exposure/acoustic trauma. In doing so, the

audiologist must consider all of the evidence of record and follow the guidelines sets set forth in VBA Training Letter 10-02. An explanation should be provided for the differences between the July 1963 and August 1963 audiograms, which appear to be markedly different. A rationale for all opinions expressed must be provided.

If the audiologist determines that he/she cannot provide an opinion on the issue at hand without resorting to speculation, the audiologist should explain the inability to provide an opinion, identifying precisely what facts could not be determined. In particular, he/she should comment on whether an opinion could not be rendered because the limits of medical knowledge have been exhausted regarding the etiology of any diagnosed disorder or whether additional testing or information could be obtained that would lead to a conclusive opinion. *See Jones v. Shinseki*, 23 Vet. App. 382, 389 (2010). (The AOJ should ensure that any additional evidentiary development suggested by the audiologist should be undertaken so that a definitive opinion can be obtained.)

3. The AOJ must ensure that all medical examination reports and opinion reports comply with this remand and the questions presented in the request. If any report is insufficient, it must be returned to the examiner for necessary corrective action, as appropriate.

4. After undertaking any other development deemed appropriate, the AOJ should re-adjudicate the issue remaining on appeal. If any benefit sought is not granted, the Veteran should be furnished with a supplemental statement of the case (SSOC) and afforded

an opportunity to respond before the record is returned to the Board for further review.

Thereafter, the case should be returned to the Board for further appellate review. By this remand, the Board intimates no opinion as to any final outcome warranted. No action is required of the Veteran until he is notified. The Veteran has the right to submit additional evidence and argument on the matter the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This case must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2010).

MARK F. HALSEY
Veterans Law Judge, Board of Veterans' Appeals