IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JAMES R. GLENN,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 20-8755
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g), Appellant, James R. Glenn, and Appellee, Denis McDonough, Secretary of Veterans Affairs, through counsel, move the Court to vacate the September 1, 2020, Board of Veterans' Appeals (Board) decision that denied Appellant's claims of entitlement to service connection for allergies and hypertension, and remand the matter for further proceedings consistent with this motion.

BASES FOR REMAND

The parties agree that vacatur and remand are warranted because the Board clearly erred when it relied on the 1973 Report of Medical History to find the presumption of soundness did not attach because a preexisting condition was noted upon entrance, and it failed to provide adequate reasons or bases for its decision. The Board is required to provide an adequate statement of reasons or bases for its findings and conclusions on all material issues of fact and law that enables the claimant to understand the precise basis for the Board's decision and

facilitates review to the Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990).

Here, the Board found that Appellant's allergies were noted at entry, and thus, the presumption of soundness did not attach because "service treatment records note hay fever treated with medication in the August 1973 entry examination." [Record Before the Agency (R.) at 7 (4-13)]. But the August 1973 Report of Medical Examination notes a normal clinical evaluation without any comments. [R. at 1933-34]. On the August 1973 Report of Medical History, Appellant checked "yes" to whether he has ever had or now has hay fever, and the physician commented that the hay fever was seasonal and Appellant had been prescribed medication. [R. at 1931-32]. However, a history of preservice conditions recorded at the time of the entrance examination does not constitute a notation of conditions unless those conditions are recorded in the examination report. *See Crowe v. Brown*, 7 Vet.App. 238, 246 (1994); 38 C.F.R. § 3.304(b) ("Only such conditions as are recorded in examination reports are to be considered as noted.").

The parties agree that the Board clearly erred when it relied on the 1973 Report of Medical History to find that Appellant's allergies were noted at entry. *See Crowe*, 7 Vet.App. at 246. On remand, if the Board finds there is still a question of whether Appellant was sound upon entrance, it shall readjudicate the issue in accordance with 38 C.F.R. § 3.304(b) and provide adequate reasons or bases for its findings. If the Board finds there remains a question of Appellant's soundness upon entrance, the Board must address whether the presumption is rebutted under

the clear and unmistakable standard. *See* 38 C.F.R. § 3.304(b); *Wagner v. Principi*, 370 F.3d 1089, 1096 (2004); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining that remand is the appropriate remedy where the Board provided an inadequate statement of reasons or bases). Additionally, the Board must obtain an adequate examination or opinion that addresses the first prong of the presumption of soundness because the September 2019 medical opinion does not include an opinion regarding whether Appellant's allergies clearly and unmistakably preexisted service. *See* [R. at 404-08 (September 30, 2019, VA Medical Opinion)]; [R. at 428 (427-28) (Examination Scheduling Request for a medical opinion on "Aggravation of a pre-existing condition")]; *see also* 38 U.S.C. § 5103A(d)(1) (VA's duty to assist includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.").

Finally, Appellant has argued that his hypertension is secondary to his asthma medication. [R. at 1467 (April 2017 Board hearing, p. 9)]. Thus, the parties agree that the claim for service connection for hypertension should also be remanded as it is inextricably intertwined with the allergies claim. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that where a decision on one claim would have a "significant impact" on another claim, the claims are inextricably intertwined).

The parties agree that this joint motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made

herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matters being remanded except the parties' right to appeal the Court's order implementing this joint motion. Pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review and any right to appeal to the U.S. Court of Appeals for the Federal Circuit of the Court's order on this joint motion, and respectfully ask that the Court enter mandate upon the granting of this joint motion.

Upon remand, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). "The Court has held that '[a] remand is meant to entail a critical examination of the justification for the decision.'" *Kahana v. Shinseki*, 24 Vet.App. 428, 437 (2011) (quoting *Fletcher*, 1 Vet.App. at 397). Appellant shall be free to submit additional evidence and arguments in support of his claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. The Court has noted that a remand confers on the appellant a right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. *See*

Stegall v. West, 11 Vet.App. 268, 271 (1998). Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof and an opportunity to respond thereto. *See Thurber v. Brown*, 5 Vet.App. 119, 126 (1993). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's claims file. The Secretary will afford this case expeditious treatment as required by 38 U.S.C. § 7112.

CONCLUSION

WHEREFORE, the parties request that the Court enter an order vacating and remanding the September 1, 2020, Board decision for further proceedings in accordance with the Court's order and this joint motion.

Respectfully submitted,

FOR APPELLANT:

Date: 7/21/2021

/s/ Katherine Ebbesson
KATHERINE EBBESSON
BARTON F. STICHMAN
National Veterans Legal Services Program
1600 K Street, NW, Suite 500
Washington, DC 20006-2833
(202) 621-5705

FOR APPELLEE:

RICHARD A. SAUBER
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Christopher W. Wallace

CHRISTOPHER W. WALLACE
Deputy Chief Counsel

Date: 7/21/21

/s/ Sarah E. Wolf
SARAH E. WOLF
Senior Appellate Attorney
Office of the General Counsel (027G)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6727