

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

TOMMY G. VINEYARD,)
)
 Appellant)
)
 v.)
)
 ROBERT A. McDONALD,)
 Secretary of Veterans Affairs,)
)
 Appellee)

Vet. App. No. 15-1473

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet.App. R. 27 and 45(g), the parties move the Court to vacate and remand the part of the March 18, 2015, decision of the Board of Veterans' Appeals (Board) denying service connection for a left shoulder condition. Those portions of the Board's decision remanding for further development prior to adjudication of entitlement to service connection for bilateral hearing loss and a low back disorder are not ripe for appeal to this Court and are not at issue in this current Court appeal.

BASES FOR REMAND

Remand is required because the Board erred in failing to comply with the Court's prior remand. See *Stegall v. West*, 11 Vet.App. 268, 271 (1998). In addition, the Board failed to address certain evidence favorable to Appellant. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 58 (1990). Finally, the Board failed to ensure that Appellant was afforded an adequate medical examination report concerning his left shoulder condition. 38 U.S.C.

§ 5103A(d)(1); 38 C.F.R. § 4.2.

1. STEGALL REMAND

In December 2014, this Court remanded Appellant's claim for service connection for a left shoulder condition for action consistent with the terms of a Joint Motion for Partial Remand (JMPR). See December 30, 2014, Order in Case No. 14-0981 (R. at 163-69). The JMPR required the Board to make competency and credibility determinations with regard to Appellant's lay statement that "he **dislocated** his shoulder in-service." (R. at 166 (163-79)) (emphasis added). It further required that "if the Board finds the Appellant is competent to make this statement, and that the statement is credible, the parties agree that the Board should remand for a new VA examination or addendum opinion based upon this factual premise." *Id.* On remand, the Board found that Appellant was credible to the extent that an injury in service had occurred. (R. at 8). However, although the Board considered the credibility and competency of the Veteran's statement of an in-service injury, it did not clearly state whether Appellant's statement that "he **dislocated** his shoulder in-service" was or was not credible and/or competent. Under the terms of the JMPR, unless the Board made one or more of these findings as to the dislocation of Appellant's shoulder, it was required to request a new addendum opinion, which it did not do. Therefore, the parties agree that the decision failed to comply with the terms of the remand. *Stegall*, 11 Vet.App. at 271 ("where, as here, the remand orders of

the Board or this Court are not complied with, the Board itself errs in failing to ensure compliance.”).

2. INADEQUATE REASONS AND BASES

In addition, the parties agree that the Board erred by failing to consider favorable evidence submitted by Appellant and received by the Board in February 2015. At that time, Appellant submitted a copy of a 1978 separation examination and report of medical history, which states in the section for “physician’s summary and elaboration of all pertinent data”: “Partial dislocation, left shoulder, 1977, result of playing base football.” (R. at 71 (69-73)). This evidence appears to contradict the Board’s findings that Appellant “has not described or identified any lay testimony as to left shoulder symptoms in service or since service.” (R. at 10). On remand, the Board must consider the 1978 separation examination and report of medical history. See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (“the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.”).

3. INADEQUATE EXAMINATION

Moreover, the parties agree that the April 13, 2010 VA medical opinion the Board relied on in denying Appellant’s claim for service connection for a left shoulder condition is inadequate for rating purposes. The opinion provides the following rationale for the conclusion that Appellant’s shoulder condition is less

likely than not caused by or a result of a remote dislocation that occurred in service: “Dislocation of the shoulder was not an entry in the health record that I could find.” (R. at 818). In reaching this conclusion, the examiner failed to consider the 1978 separation examination and report of medical history statement referenced above. The examiner also did not address a 1975 report of an x-ray taken of Appellant’s left shoulder during service, suggesting an injury to the shoulder at that time. (R. at 776). The parties agree that on remand the Board must instruct the regional office (RO) to obtain a new or addendum medical opinion in which this evidence is addressed.

On remand the Board must ensure compliance with all relevant provisions of 38 U.S.C. §§ 5103, 5103A and 38 C.F.R. § 3.159. See *Pelegriani v. Principi*, 18 Vet.App. 112 (2004); *Nolen v. Gober*, 14 Vet.App. 183 (2000) (per curiam order). 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). Appellant shall be free to submit additional evidence and/or argument in support of his claim, and the Board must consider any such argument or evidence submitted. *Kutscherousky v. West*, 12 Vet. App. 369, 372 (1999). Further, the Board shall obtain copies of the Court’s order, this motion, and Appellant’s brief, and incorporate them into Appellant’s claims folder for appropriate consideration in subsequent decisions on this claim.

The Parties respectfully request that the Court expressly incorporate the terms of this motion into the order, and that the Court remand this appeal for further action consistent with the foregoing. See *Forcier v. Nicholson*, 19 Vet. App 414, 425 (2006), *affirmed* 221 Fed. Appx. 996, 2007 U.S. App. LEXIS 8738 (Fed. Cir. 2007)("The duty to ensure compliance 'personally' arises when the Secretary agrees to the specific terms of a motion for remand, and, based upon his position as "the head of the Department," he can be held accountable for this responsibility.") 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). The Secretary "shall take such actions as may be necessary to provide for the expeditious treatment" of this claim. 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully move the Court to vacate and remand that portion of the March 18, 2015, decision of the Board to the extent that it denied entitlement to service connection for a left shoulder disability.

Respectfully submitted,

FOR APPELLANT:

Dated: 11/6/2015

/s/ Christopher F. Attig
CHRISTOPHER F. ATTIG, ESQ.
Attig Law Firm PLLC
P.O. Box 7775
San Francisco, CA 94120-7775

FOR APPELLEE:

LEIGH A. BRADLEY

General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ Carolyn F. Washington

CAROLYN F. WASHINGTON

Deputy Chief Counsel

Dated: 11/6/2015

/s/ Laura R. Braden

LAURA R. BRADEN

Appellate Attorney

Office of the General Counsel (027D)

U.S. Department of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, D.C. 20420

(202) 632-8391