

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

MARION S. MILLER-BATES,)	
Appellant,)	
)	
v.)	Vet.App. No. 15-2213
)	
ROBERT A. McDONALD,)	
Secretary of Veterans Affairs,)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27(a) and 45(g), the parties respectfully move the Court for an order 1) vacating the February 12, 2015, decision of the Board of Veterans' Appeals ("BVA" or "Board"), which denied entitlement to service connection for a low back disorder, a cardiovascular disorder, lung cancer, and a gastrointestinal disorder, to include stomach asbestosis and abdominal aortic aneurysm, as due to asbestos exposure, all for the purposes of accrued benefits, and 2) remanding the matter for re-adjudication.

BASIS FOR REMAND

The parties agree that a remand is warranted because the Board failed to ensure that VA complied with the terms of a July 2013 Joint Motion for Remand (JMR) and the remand order contained in a May 2014 Board decision. See Record Before the Agency (R.) 131-35 (July 2013 JMR); 74-77 (May 2014 Board decision). It is well established that "a remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders," and imposes upon the Secretary "a concomitant duty to

ensure compliance with the terms of the remand.” *Stegall v. West*, 11 Vet.App. 268, 271 (1998). The Board errs when it denies a claim in the face of incomplete compliance with earlier remand instructions. See *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). It is also well-settled that substantial compliance, and not strict or absolute compliance, with remand orders is all that is required. See *Dyment v. West*, 13 Vet.App. 141, 146-47 (1999).

In the instant case, the July 2013 JMR stated that in order for VA to comply with its duty to assist it must “attempt[] to obtain the [deceased] Veteran’s records from the now closed P[hiladelphia]N[aval]H[ospital (PNH)] during the relevant time periods. R. at 134 (131-35). Subsequently, the May 2014 Board decision remanded Appellant’s claims, and ordered that VA obtain all outstanding treatment records and reports from PNH for the period from January 1945 to December 1954. R. at 76 (74-77). “Efforts to obtain these records must be associated with the claims file and requests for these records must continue until the AOJ determines that the records sought do not exist or that further efforts to obtain those records would be futile.” *Id*; see also R. at 72 (June 2014 Deferred Rating Decision acknowledging same). In June 2014, VA sent a letter to PNH requesting records relating to the treatment of the deceased Veteran at that facility, R. at 70, but that letter was returned to sender in July 2014 (R. at 62), presumably because PNH was closed. *Cf.* R. at 134 (131-35) (July 2013 JMR acknowledging that PNH was closed). It does not appear from the record that VA undertook any other efforts to obtain records relating to the deceased

Veteran's treatment at the closed PNH. Nor does it appear that the AOJ determined that the records sought do not exist or that further efforts to obtain the records would be futile. Because the May 2014 Board decision explicitly directed that VA obtain the records, that the efforts undertaken to obtain the records be associated with the claims file, and that requests for the records "must continue until the AOJ determines that the records sought do not exist or that further efforts to obtain those records would be futile[,]" (R. at 76 (74-77)) remand is necessary for VA to comply with that order. *Stegall*, 11 Vet.App. at 271. On remand, VA should not limit its attempts to obtain these treatment records to mailing a letter to the admittedly-closed PNH; instead, VA should attempt to obtain records from other possible locations. For example, the January 27, 2016, update to the VA Adjudication Procedure Manual M21-1MR at Part III, Subpart iii, Chapter 2, Sec. B(3)(d) indicates that service treatment records from Naval Hospitals may have been transferred to the National Personnel Records Center "two years after the end of the calendar year during which the Veteran received treatment."). After attempting to obtain the records in question, if no records are found and a negative response is documented regarding the existence of STRs and post-service treatment records from the service department, the AOJ must make a determination that either the records do not exist or further attempts to obtain them would be futile, and determine whether any other evidence might supplement or substitute for the STRs or treatment records. See e.g., VA

Adjudication Procedure Manual M21-1MR at Part III, Subpart iii , Chapter 2, Sec. E (Topics 2, 6, 10) (January 27, 2016).

“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 v. Derwinski*, 1 Vet.App. 394, 397 (1991)). 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*, 1 Vet.App. at 397. 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 *Pelegrini v. Principi*, 18 Vet.App. 112 (2004); *Nolen v. Gober*, 14 Vet.App. 183 (2000) (per curiam order). Appellant is entitled to submit additional evidence and argument regarding his claim. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam).

In any subsequent decision, the Board should provide an adequate statement of reasons or bases for its findings and conclusions on all material issues. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). The Secretary shall provide this claim expeditious treatment, as required by 38 U.S.C. §§ 5109B and 7112. Finally, the Board shall incorporate copies of this joint motion for remand and the Court’s order into Appellant’s claims folder for appropriate consideration. 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.")

CONCLUSION

WHEREFORE, the parties respectfully move the Court to enter an order vacating the February 12, 2015, entitlement to service connection for a low back disorder, a cardiovascular disorder, lung cancer, and a gastrointestinal disorder (as stated above), all for the purposes of accrued benefits, and remanding for readjudication.

Respectfully submitted,

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03/24/2016
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