IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

RAYMOND I. WALKER,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 16-2286
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee,	)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Court of Appeals for Veterans Claims (Court) Rules 27(a) and 45(g), Appellant, Raymond I. Walker, and Appellee, Robert A. McDonald, Secretary of Veterans Affairs, by and through their representatives, respectfully move this Court to vacate those portions of the March 15, 2016, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a rating in excess of 50% for posttraumatic stress disorder (PTSD), from October 5, 2009, and denied entitlement to a total disability rating based on individual unemployability (TDIU), from October 5, 2009. *See* [R. at 1-19]. The Board also remanded the issues of entitlement to a rating greater than 30% for PTSD, prior to October 5, 2009, and entitlement to a TDIU, prior to October 5, 2009. Those issues are not ripe for appellate review and are, therefore, not affected by this motion. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam

order) (a Board remand "does not represent a final decision over which this Court has jurisdiction.").

BASIS FOR PARTIAL REMAND

The parties agree the portion of the decision on appeal that declined to award a disability rating in excess of 50% for PTSD for the period from October 5, 2009, did not contain sufficient comparison of the severity, frequency, and duration of the symptoms shown by Appellant to those contained in higher (70% and 100%) rating criteria in violation of 38 U.S.C. § 7104(d); *Mauerhan v. Principi*, 16Vet.App. 436, 442 (2002); *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013). Further, the parties agree that the TDIU issue on appeal for the period from October 5, 2009, is "inextricably intertwined" with the PTSD issue. *See Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991) (two issues are "inextricably intertwined" when they are so closely tied together that a final Board decision cannot be rendered unless both are adjudicated).

In particular, the Board's analysis [R. at 7-10 (1-19)] appears to consist exclusively of the symptom-hunting prohibited by this Court's holding in *Mauerhan*, 16 Vet.App. at 442. The Board noted an August 2015 VA examiner's finding of "short/long term memory impairment," but did not discuss the frequency and severity as evidenced in VA outpatient treatment records. *See* [R. at 9 (1-19)]. Indeed, the Board did not discuss the findings in the VA outpatient treatment records at all. In contrast, a

September 2011 VA neuropsychology consult indicates Appellant complained of significant memory problems where he "forgets appointment if he does not see the appointment slip daily," "asks the same questions over and over," and even "left the stove on and burned the house down." [R. at 649 (648-53)].

The Board's failure to discuss whether these significant memory problems were of similar gravity to those in the higher rating criteria violated *Vazquez-Claudio*, 713 F.3d at 117, and compels vacatur of the decision on appeal and remand of Appellant's claim of entitlement to an initial disability rating in excess of 50% for the period from October 5, 2009. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998). Although the Secretary does not concede any error with the Board's extraschedular analysis, on remand the parties agree the Board should also reconsider whether referral for an extraschedular rating is appropriate. *Thun v. Peake*, 22 Vet. App 111 (2008), aff'd sub nom. *Thun v Shinseki*, 572 F.3d 1366 (Fed. Cir 2009).

Again, the proper rating of Appellant's PTSD is inextricably intertwined with the adjudication of his TDIU claim from October 5, 2009, and, therefore, the parties agree vacatur and remand of the TDIU claim is also appropriate.

On remand, the Board is directed to consider all relevant evidence in this matter, to include VA outpatient treatment records and, in particular,

the September 19, 2011, VA neuropsychologist's consultation. On remand, Appellant is entitled to submit additional evidence and argument on the questions at issue, *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (*per curiam* order), and VA is obligated to conduct a critical examination of the justification for the decision, *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). 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 v. Derwinski*, 1 Vet.App. 49, 56 (1990). As stated in *Forcier v. Nicholson*, the terms of the joint motion for remand granted by the Court are enforceable. 19 Vet.App. 414, 425 (2006) (Secretary's duty to ensure compliance with the terms of a remand "include[s] the terms of a joint motion that is granted by the Court but not specifically delineated in the Court's remand order").

Additionally, the Board shall incorporate copies of the Court's order and this motion into Appellant's claims folder for appropriate consideration in subsequent decisions on this claim. Finally, the Secretary "shall take such actions as may be necessary to provide for the expeditious treatment" of this claim. 38 U.S.C. § 7112.

CONCLUSION

In light of the foregoing, the parties request that the Court vacate the March 15, 2016, decision of the Board, to the extent it declined to award a

disability rating in excess of 50% for PTSD, from October 5, 2009, and declined to award a TDIU from October 5, 2009, and remand the issues for readjudication.

Respectfully submitted,

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