

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

ROBERT F. WILKES,

Appellant,

v.

ROBERT D. SNYDER,

Acting Secretary of Veterans Affairs,

Appellee.

)
)
)
)
)
)
)
)
)
)
)

Vet. App. No. 16-1593

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 that part of the May 5, 2016 decision of the Board of Veterans' Appeals (Board), which denied Appellant's claims for entitlement to service connection for a left ankle disorder and bilateral pes planus because new and material evidence had not been received to reopen the claims. [R. at 2-9]. The Board also reopened Appellant's claim for entitlement to service connection for sleep apnea and remanded this issue for further development. *Id.* at 7-9. That issue is therefore not before the Court. See *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) ("the Board's remand does not represent a final decision over which this Court has jurisdiction").

BASIS FOR REMAND

"Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy." *Tucker v.*

West, 11 Vet.App. 369, 374 (1998). The parties agree that the Board failed to provide an adequate statement of reasons or bases for its characterization of the issues on appeal as claims to reopen and its determination that the July 2013 rating decision was final. See *Allday v. Brown*, 7 Vet.App. 517, 528 (1995).

In its decision, the Board determined that a December 3, 2013 statement from Appellant [R. at 1436], specifically withdrew his Notice of Disagreement (NOD) with the July 2013 VA rating decision that denied his bilateral pes planus and left ankle condition claims. [R. at 5 (2-9)]. However, the Board does not note that also on December 3, 2013, VA also received a statement from Appellant explaining that he would like to have his foot and ankle claims reconsidered and that he wanted a decision made immediately due to financial hardship. [R. at 1435]. Moreover, a July 2014 rating decision confirmed and continued the denial of Appellant's claims, while characterizing the claims as requests to reconsider. [R. at 236-37, 239 (229-46)]. Appellant submitted a NOD in September 2014 [R. at 222-24], which VA acknowledged and responded to later that month. [R. at 203-05]. Thereafter, the Board issued a decision, characterizing the issues as service connection claims, remanding the claims for a Statement of the Case (SOC) to be issued. [R. at 152-53 (150-55)]. A SOC, which did not characterize the claims as claims to reopen, was issued in September 2015. [R. at 119-42]. Therefore, in light of the evidence above, the parties agree that the Board's determination that Appellant specifically withdrew his claims were not supported by an adequate statement of reasons or bases.

See *Tucker*, 11 Vet.App. at 374 (holding that remand is appropriate where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases, or where the record is otherwise inadequate). On remand, the Board should analyze the aforementioned evidence and determine whether the issues on appeal are properly characterized.

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 (1990). As stated in *Forcier*, the terms of a joint motion for remand granted by the Court are enforceable. *Forcier v. Nicholson*, 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"). Finally, Appellant shall be free to submit additional evidence and/or argument in support of his claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). Further, the Board should reexamine the evidence of record, and issue a timely, well-supported decision in this case. See *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991).

CONCLUSION

WHEREFORE, the parties respectfully move the Court to vacate and remand that part of the May 5, 2016 decision of the Board, for action consistent with the foregoing discussion.

FOR APPELLANT:

Date: February 17, 2017

/s/ Christopher F. Attig
CHRISTOPHER F. ATTIG, ATTORNEY
Attig | Steel, PLLC
PO Box 7775, #40478
San Francisco, CA 94120-7775
(866) 627-7764

FOR APPELLEE:

MEGHAN FLANZ
Interim General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Carolyn F. Washington
CAROLYN F. WASHINGTON
Deputy Chief Counsel

Date: February 17, 2017

/s/ Jelani A. Freeman
JELANI A. FREEMAN
Appellate Attorney
Office of General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6931