

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

JAMES MELENCHICK,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 18-3681
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45, Appellant, James Melenchick, and Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, through their respective counsel, move the Court to vacate the May 23, 2018, decision of the Board of Veterans' Appeals (BVA or Board), that dismissed Appellant's claim for entitlement to an effective date prior to April 9, 2009, for the award of service connection for posttraumatic stress disorder (PTSD), and remand for readjudication consistent with the foregoing.

BASES FOR REMAND

The parties agree that vacatur and remand are warranted because the Board erred by not providing an adequate statement of reasons or bases for its decision.

Each decision of the Board shall include a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and

conclusions, on all material issues of fact and law presented on the record. 38 U.S.C. § 7104(d)(1).

In making its statement of findings, the Board must identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive. In providing its reasons or bases, the Board must include in its decisions the precise basis for that decision, and the Board's response to the various arguments advanced by the claimant. This must include an analysis of the credibility or probative value of the evidence submitted by and on behalf of the veteran in support of his or her claim and a statement of the reasons or bases for the implicit rejection of this evidence by the Board. *Moore v. Derwinski*, 1 Vet. App. 401, 404 (1991) (internal citations omitted).

The purpose behind the requirement that the Board provide an adequate statement of reasons or bases for its decision is to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (internal citations omitted), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

The parties agree that the Board's reasons and bases for its decision are not adequate and therefore remand is warranted.

In this case, Appellant initially sought service connection for a nervous condition in November 1971. (R. at 1220-23). His claim was denied in a March 1972 rating decision. (R. at 1083).

Appellant was subsequently granted service connection for PTSD via a July 2009 rating decision. An effective date of April 9, 2009 was assigned. Although Appellant was notified of the decision, he did not appeal, and it became final. (R. at 383-92, 418-25).

In the decision currently on appeal, the Board noted that in February 2015, Appellant submitted a VA Form 9 and several written statements in which he indicated that certain medical evidence "should show the clear and unmistakable errors that the VA has made in not rating me from 1971 until 2012." (R. at 7).

The Board found that "[g]iven their general nature and in the absence of the identification of a specific rating decision in question, the Veteran's written statements may not be reasonably considered to be a request for revision of a decision based on clear and unmistakable error." (R. at 7).

A *pro se* appellant's CUE request must be read sympathetically. See *Andrews v. Nicholson*, 421 F.3d 1278, 1283 (Fed. Cir. 2005); *Canady v. Nicholson*, 20 Vet.App. 393, 402 (2006) (a sympathetic reading of a *pro se* request for CUE requires the Board to "view the claim in light of the fact that it is the assertion of CUE itself that requires specificity," but "a manifestly changed outcome might be inferred from *pro se* pleadings, even though not explicitly stated."). "[A] sympathetic reading of a CUE motion requires the Secretary to fill in omissions and gaps that an unsophisticated claimant may leave in describing his or her specific dispute of error with the underlying decision." *Acciola v. Peake*, 22 Vet.App. 320, 326-27 (2008). The Board is obligated to read liberally a *pro se* filing

alleging CUE in a final Board decision, and this duty is "antecedent to a determination of whether a CUE claim has been pled with specificity." *Andrews*, 421 F.3d at 1283; *see also Acciola*, 22 Vet.App. at 326-27.

The Board did not provide adequate reasons or bases concerning the duty to sympathetically construe a *pro se* claimant's assertion of CUE, as discussed in the aforementioned caselaw, or how it might apply to the Appellant's claim. Specifically, the Board did not adequately discuss why the Appellant's February 2015 VA Form 9, in which he stated that VA made errors starting with his first claim in 1971, could not be sympathetically construed to be a CUE claim with regard to the 1972 rating decision that denied Appellant's claim for service connected for a nervous disorder. If such a CUE claim was properly pled, Appellant's claim for entitlement to an earlier effective date for his service-connected PTSD may have merit. Remand is warranted for the Board to provide an adequate statement of reasons or bases on these matters.

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 matter being remanded except the parties' right to appeal the Court's order implementing this joint motion. The parties agree to

unequivocally waive any right to appeal the Court's order on this joint motion and respectfully ask that the Court enter mandate upon the granting of this motion.

Upon remand, Appellant may submit additional evidence and argument. *Kutscherousky v. West*, 12 Vet.App. 369 (1999). 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 (1993); *Austin v. Brown*, 6 Vet. App. 547 (1994).

In any subsequent decision, the Board shall provide an adequate statement of reasons or bases for its decision on all material issues of fact and law. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). The Board, therefore, 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).

This Court has explained that "[a] remand is meant to entail a critical examination of the justification for the decision" and is not "merely for the purposes of rewriting the opinion so that it will superficially comply with the 'reasons or bases' requirement of 38 U.S.C. § 7104(d)(1)." *Id.*; see also *Kahana v. Shinseki*, 24 Vet. App. 428, 437 (2011). 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). The Board shall incorporate copies of this joint motion and the Court's order granting it into Appellant's file before VA for consideration in

subsequent decisions on this issue. The Secretary “shall take such actions as may be necessary” to ensure the expeditious treatment of this issue. 38 U.S.C. §§ 5109B, 7112.

WHEREFORE, the parties move the Court to vacate the May 23, 2018, Board decision that dismissed the issue of entitlement to service connection for PTSD prior to April 9, 2009, and remand for readjudication.

Respectfully submitted,

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