

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

AVELARDO A. GARCIA,)
)
 Appellant,)
)
 v.) Vet. App. No. 18-6540
)
ROBERT L. WILKIE,)
 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), the parties respectfully move the Court to vacate that part of the October 16, 2018, Board of Veterans' Appeals (Board) decision that found that new and material evidence had not been received sufficient to reopen previously denied claims for (1) entitlement to service connection for diabetes mellitus, type 2; (2) entitlement to service connection for coronary artery disease, secondary to diabetes mellitus, type 2, claimed as atrial fibrillation; (3) entitlement to service connection for hypertension, secondary to diabetes mellitus, type 2; and (4) entitlement to service connection for peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2. (Record Before the Agency (R.) at 14-19 (4-20)).

The parties note that the Board also denied entitlement to service connection for residuals of a tumor on right lung and entitlement to service connection for diverticulosis. [R. at 5-11]. Appellant does not take issue with the

Board's decision in this regard and should be deemed to have abandoned any potential challenge thereto. See *Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015) (en banc).

BASES FOR REMAND

The parties agree that vacatur and remand are warranted because the Board erred when it failed to properly analyze whether evidence presented by Appellant constituted new and material evidence. See 38 U.S.C. § 5108 (“If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.”).

Here, the Board determined that a June 2013 letter from a private physician would be “accorded no probative weight” because the opinion was not supported by reasons or rationale. (R. at 18). This finding is contrary to the law because the credibility of the evidence must be presumed when determining if evidence is new and material. See *Justus v. Principi*, 3 Vet.App. 510, 513 (1992) (stating that “the credibility of the evidence is to be presumed” when determining whether evidence is new and material). Therefore, vacatur and remand are required so that the Board can conduct a proper analysis of the evidence.

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 JMPR. 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.

On remand, Appellant is entitled to submit additional evidence and argument. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order) accord *Clark v. O'Rourke*, 30 Vet.App. 92 (2018). 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, 56-57 (1990). "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)). 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, supra*. Before relying on any additional evidence the Board should afford Appellant notice and opportunity to respond, including the opportunity to submit additional argument or evidence in response. See *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

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, either personally or as ‘the head of the Department.’” *Stegall v. West*, 11 Vet.App. 268, 271 (1998). The terms of this joint motion are enforceable on remand. *Russell v. Shinseki*, 25 Vet.App. 26, 28 (2011) (citing *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006)). The Board shall obtain copies of this joint motion and any Court order relating to it and incorporate them into Appellant’s VA file for appropriate consideration in subsequent decisions. Finally, the Secretary shall ensure expeditious treatment of Appellant’s claim on remand from the Court. See 38 U.S.C. §§ 5109B, 7112; *Drosky v. Brown*, 10 Vet.App. 251, 257 (1997).

WHEREFORE, the parties respectfully move the Court to issue an Order vacating those parts of the October 16, 2018, Board decision that found that new and material evidence sufficient to reopen Appellant’s previously denied claims for diabetes mellitus, type 2, hypertension, coronary artery disease and peripheral neuropathy of the lower extremities had not been received and remanding this appeal for further action consistent with the foregoing.

Respectfully submitted,

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