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

No. 18-1804

VIRGIL P. RIDINGS, JR., APPELLANT,

v.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Senior Judge*.<sup>1</sup>

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

KRAMER, *Senior Judge*: Appellant Virgil P. Ridings, Jr., served on active duty in the U.S. Air Force from November 1963 to January 1986, including service in Thailand at the Korat Royal Thai Air Force Base (RTAFB) during the Vietnam War Era. Record (R.) at 264, 295, 342. He appeals, through counsel, a March 5, 2018, Board of Veterans' Appeals (Board) decision that determined new and material evidence had been submitted to reopen a claim of service connection for Parkinson's disease but denied the claim on the merits. R. at 2-12. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the March 5, 2018, Board decision and remand the matter for further proceedings consistent with this decision.

**I. ANALYSIS**

Mr. Ridings asserts that his Parkinson's disease was caused by exposure to herbicides. Parkinson's disease is recognized as a disease associated with exposure to "herbicide agents."

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<sup>1</sup> Judge Kramer is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 06-19 (Apr. 10, 2019).

38 C.F.R. § 3.309(e) (2019). Although VA has not established a presumption of exposure to herbicide agents for veterans who served in Thailand during the Vietnam War Era, special VA rules were issued governing adjudication of claims based on veterans' assertions that they were exposed to herbicides while serving at certain military bases in Thailand. *See* VA ADJUDICATION PROCEDURES MANUAL (M21-1), pt. IV, sbpt. ii, ch. 1, sec. H.5. This M21-1 provision outlines a series of steps raters should follow "to verify exposure to herbicides." *Id.* sec. H.5.b.

Under step 1, VA should determine whether a veteran served at one of seven RTAFBs and whether the veteran served in the U.S. Air Force as a security police officer, security patrol dog handler, member of the security police squadron, or was "otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence"; if both conditions are met, herbicide exposure is to be conceded. *Id.* However, step 3 states that if herbicide exposure cannot be conceded under steps 1 and 2, VA must ask the veteran for the approximate dates, location, and nature of the alleged exposure. *Id.* If the veteran supplies the requested information, steps 6 and 7 direct the rater to review this information, determine based on this review whether "exposure to herbicides [can] be acknowledged on a direct or facts-found basis," and, if not, refer the matter to the Joint Services Records Research Center (JSRRC) "for verification of exposure to herbicides."<sup>2</sup> *Id.*

Here, Mr. Ridings stated that his exposure is consistent with the M21-1 provision because his living quarters at Korat RTAFB, one of the seven bases named in step 1, were "close to the perimeter not far from the officer's club" and he often worked on the trim pad, which "was also close to the perimeter." R. at 15 (Aug. 2017 statement); *see also* R. at 548 (June 2015 statement that "he was around the perimeter often because of [his] job duties"). He also stated that on one occasion he accompanied the commander of the military police "on patrol . . . of the extreme perimeter." R. at 15.

In the decision on appeal, the Board acknowledged Mr. Ridings's statements regarding his claimed exposure but concluded that "the credible evidence of record, to include his [military occupation], and performance evaluations, does not show that it is least as likely as not that he served . . . near the air base perimeter on a consistent basis." R. at 9. In reaching that conclusion, the Board relied on a 2009 response from the National Personnel Records Center (NPRC) that

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<sup>2</sup> There are additional steps that are not relevant to this analysis. *Id.*

there were no records of herbicide exposure, *id.*, and a performance evaluation that outlined Mr. Ridings's areas of responsibility, but did not identify where he performed those duties or where his living quarters were located, R. at 8.

Mr. Ridings argues that the Board's statement of reasons or bases is inadequate because it apparently found his exposure statements not credible, but did not explain its reasons for doing so. Appellant's Brief (Br.) at 8. He further asserts that it is not entirely clear from the Board's analysis whether the Board found him not credible or found that his degree of his claimed exposure was insufficient to warrant consideration under 38 C.F.R. § 3.309(e). Reply Br. at 3. The Court agrees.

In every decision, the Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

In the March 2018 decision on appeal, the Board determined that "the credible evidence of record" did not support Mr. Ridings's claim, but the Board did not explain why his statements were not considered credible evidence. R. at 9. The Secretary asserts that, despite the Board's statement, the Board found Mr. Ridings credible, but also found that his "assertions of sporadic exposure to the perimeter were . . . outweighed by the other evidence in the record, including [his military occupation] and performance evaluation." Secretary's Br. at 7 (citing R. at 8-9). However, the Secretary's interpretation does not resolve the problem because the Board did not lay a proper foundation for its implied finding that Mr. Ridings's performance evaluations and areas of responsibility would have specified his proximity to the perimeter, such that their silence on the matter could be considered negative evidence. *See Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015) ("[T]he Board must first establish a proper foundation for drawing inferences against a claimant from an absence of documentation."). Therefore, regardless of whether the Board found Mr. Ridings's statements not credible or, in the Secretary's alternative, credible but less probative than other evidence, the Board's statement of reasons or bases is inadequately supported.

Furthermore, even if the Board properly determines that exposure to herbicide cannot be conceded based on "credible evidence" that Mr. Ridings was "near the air base perimeter," or that "exposure to herbicides [cannot] be acknowledged on a direct or facts-found basis" in accordance with step 1 of the applicable provision of the M21-1, step 7 requires the rater to request information regarding the alleged exposure and, if the information is provided, refer the matter to the JSRRC "for verification of exposure to herbicides." M21-1, pt. IV, sbpt. ii, ch.1, sec. H.5.b. In this case, the Board relied on a 2009 NPRC response as supporting a finding that Mr. Ridings was not exposed to herbicides. *See* R. at 9. However, even assuming that referral to the NPRC instead of the JSRRC satisfies the M21-1 provision, that reliance is misplaced because the NPRC response was obtained in conjunction with Mr. Ridings's previous claim, which was the subject of a final rating decision and has since been reopened. *See* R. at 556-58, 571-72. The Board acknowledged that Mr. Ridings had, since the prior final decision, submitted statements in August 2017 that were new and material evidence sufficient to warrant reopening his previously denied claim. R. at 6. Yet, the Board did not explain why referral to the JSRRC, in accordance with step 7 of the M21-1 provision, was not necessary in this case.<sup>3</sup>

The Board is not bound by the M21-1 provision, but it "is required to discuss any relevant provisions contained in the M21-1 as part of its duty to provide adequate reasons or bases." *Overton v. Wilkie*, 30 Vet.App. 257, 264 (2018); *see also Patton v. West*, 12 Vet.App. 272, 282 (1999) ("The [Board] cannot ignore provisions of the [M21-1] . . . that are favorable to a veteran when adjudicating that veteran's claim."); *Schafraath v. Derwinski*, 1 Vet.App. 589, 593 (1991) ("Where a VA regulation is made potentially applicable through the assertions and issues raised in the record, the Board's refusal to acknowledge and consider that regulation [is error]"). Its failure to do so here is error.

Because the Board did not explain why Mr. Riding's statements were not credible, did not lay a proper foundation for finding the absence of documented service at the perimeter to be negative evidence, and failed to address all relevant provisions of the M21-1, its statement of reasons or bases is inadequate and remand is warranted. *See Tucker v. West*, 11 Vet.App. 369, 374

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<sup>3</sup> An August 2017 Statement of the Case (SOC) states that VA received a negative response from JSRRC in March 2017. R. at 64-65. The Court is not able to review and consider this document because it is not part of the record. However, the portion of the JSRRC response cited in the SOC refers only to *tactical* herbicides and does not address the difference between tactical and commercial herbicides. R. at 65; *see also* R. at 7 (Board's discussion of conceded exposure to *commercial* herbicide use on military bases in Thailand as allowing for presumptive service connection under 38 C.F.R. § 3.309(e)).

(1998) (stating that "where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations . . . a remand is the appropriate remedy"); *Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506. On remand, the Board should re-evaluate Mr. Ridings's 2017 statements and, if more specificity is needed regarding dates and locations, request that Mr. Ridings provide that information before referring the matter in accordance with the M21-1 provision to the JSRRC for exposure verification.

The Court will not, at this time, consider Mr. Ridings's remaining arguments. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). In pursuing the matters on remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). "A remand is meant to entail a critical examination of the justification for the decision. The Court expects that the [Board] will 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). The Board must proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112.

## II. CONCLUSION

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's March 5, 2018, decision is VACATED and the matter is REMANDED for readjudication consistent with this decision.

DATED: July 8, 2019

Copies to:

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