IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

STEVEN GREENE,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-6851
	)	
ROBERT L. WILKIE, Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27 and 45(g), Appellant and Appellee, through their undersigned counsel, respectfully move the Court to issue an order to vacate the September 19, 2018, decision of the Board of Veterans' Appeals (Board) that denied claims of entitlement to an effective date earlier than (1) May 27, 2013, for the grant of entitlement to service connection for coronary artery disease; and, (2) August 8, 2011, for the grant of entitlement to service connection for diabetes mellitus, Type II, and to remand these matters for readjudication consistent with this motion. [Record (R.) at 3-9].

BASES FOR REMAND

The parties agree that vacatur and remand are required because the Board erred when it failed to provide an adequate statement of reasons or bases in finding that entitlement to earlier effective dates for the award of service connection benefits were not warranted. *See* 38 U.S.C. § 7104(d)(1); *see also Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991) (the Board has a duty to acknowledge and

consider all regulations that are potentially applicable).

With respect to earlier effective date claims for service connection for diseases presumed to be caused by herbicide agents or Agent Orange exposure, VA has promulgated special rules to implement orders of a United States District Court in the class action of *Nehmer v. United States Department of Veterans Affairs*. 38 C.F.R. § 3.816. *See Nehmer v. U.S. Veterans Admin.*, 32 F. Supp. 1404 (N.D. Cal. 1989) (Nehmer I); *Nehmer v. U.S. Veterans Admin.*, 32 F. Supp. 2d 1175 (N.D. Cal 1999) (Nehmer II); *Nehmer v. Veterans Admin. of the Gov't of the U. S.*, 284 F.3d 1158 (9th Cir. 2002) (Nehmer III); *Nehmer v. U.S. Veterans Admin.*, 494 F.3d. 846 (2007) (Nehmer IV).

Relevantly, 38 C.F.R. § 3.816, defines *Nehmer* class members and sets forth effective date rules for Vietnam veterans that currently have a "covered herbicide disease," or have died from a "covered herbicide disease." In short, the Nehmer litigation has created an exception to the generally applicable effective date rules contained in 38 U.S.C. § 5110 (g) and 38 C.F.R. § 3.114.

In pertinent part, a "*Nehmer* class member" is defined as a Vietnam veteran who has a covered herbicide disease. 38 C.F.R. § 3.816 (b)(1)(i). According to 38 C.F.R. § 3.816 (b)(2), a "covered herbicide disease" includes a disease for which the Secretary of Veterans Affairs has established a presumption of service connection before October 1, 2002, pursuant to the Agent Orange Act of 1991.

Ischemic heart disease, to include coronary artery disease, was not added to the list of presumptive disabilities until August 31, 2010. See 75 Fed. Reg.

53,202 (August 31, 2010). Notwithstanding the language of 38 C.F.R. § 3.816, however, notice accompanying the issuance of the final August 31, 2010, rule specifically notes the Nehmer provisions apply to the newly covered diseases. *Id*.; *see also Garza v. Shinseki,* 480 Fed. Appx. 984, 987 (Fed. Cir. 2012) (specifically associating ischemic heart disease with *Nehmer* despite 38 C.F.R. § 3.816).

The *Nehmer* regulation provides for situations where the effective date can be earlier than the date of the liberalizing law, assuming a "*Nehmer* class member" has been granted compensation from a covered herbicide disease. Either (1) VA denied compensation for the same covered herbicide disease in a decision issued between September 25, 1985 and May 3, 1989; or (2) the class member's claim for disability compensation for the covered herbicide disease was either pending before VA on May 3, 1989, or was received by VA between May 3, 1989 and the effective date of the statute or regulations establishing a presumption of service connection for the covered disease (here August 31, 2010). In these situations, the effective date of the award will be the later of the date such claim was received by VA or the date the disability arose. 38 C.F.R. § 3.816(c)(1); (c)(2).

A prior decision will be construed as having denied compensation for the same disease if the prior decision denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation has been awarded. Minor differences in the terminology used in the prior decision will not preclude a finding, based on the record at the time of the prior decision, that the prior decision denied compensation for the same covered

herbicide disease. 38 C.F.R. § 3.816(c)(1).

A claim will be considered a claim for compensation for a particular covered herbicide disease if: (i) the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing compensation claims, as indicating an intent to apply for compensation for the covered herbicide disability; or (ii) VA issued a decision on the claim, between May 3, 1989, and the effective date of the statute or regulation establishing a presumption of service connection for the covered herbicide disease (August 31, 2010), in which VA denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation has been awarded. 38 C.F.R. § 3.816(c)(2)(i), (ii).

As to 38 C.F.R. § 3.816(c)(3), if the class member's claim was received within one year of his or her separation from service, the effective date of the award shall be the day following the date of the class member's separation from active service. If the requirements of paragraph (c)(1) or (c)(2) listed above are not met, the effective date of the award shall be determined in accordance with liberalizing law and general effective date provisions of 38 C.F.R. §§ 3.114 and 3.3400. 38 C.F.R. § 3.816(c)(4).

In the decision on appeal, the Board indicated that Appellant was granted entitlement to service connection for coronary artery disease and diabetes mellitus, Type II, based on herbicide presumption. *See* [R. at 6]. However, despite this finding, the Board failed to address the potential applicability of *Nehmer*, to include

acknowledging *Nehmer* claims and identifying whether Appellant was a *Nehmer* class member. The parties note that, during the pendency of an April 28, 2006, claim of entitlement to service connection for the loss of both kidneys, *see* [R. at 832-41], medical records were added to Appellant's claims file; these medical records contained diagnoses of coronary artery disease and diabetes mellitus, Type II. *See* [R. at 750] (September 3, 2003, private record noting that Appellant "has coronary heart disease and is post coronary artery stenting three years ago"); and, [R. at 722] (October 14, 2005, private record noting that he "has diabetes").

Considering the above, the parties agree that remand is required so that the Board can provide an adequate statement of reasons or bases addressing the applicability of *Nehmer* and 38 C.F.R. § 3.816 in the first instance.

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 matters 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 will be free to submit additional evidence and argument, and the Board may "seek other evidence it considers necessary to

the timely resolution of the remanded matter(s)[.]". *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order); *see Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992). 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 v. Derwinski*, 1 Vet.App. 394, 397 (1991). "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*, 1 Vet.App. at 397*).* 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).

Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof and an opportunity to respond thereto. *See Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993). A copy of this joint motion for remand shall be associated with Appellant's VA file, along with a copy of the Court's Order granting it, for appropriate consideration in subsequent decisions. *See Stegall v. West*, 11 Vet.App 268, 271 (1998). The terms of this joint motion for remand are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Secretary shall ensure that this case is afforded expeditious treatment as required by 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully move the Court to enter an order vacating the September 19, 2018, decision of the Board that denied claims

of entitlement to an effective date earlier than (1) May 27, 2013, for the grant of service connection for coronary artery disease; and, (2) August 8, 2011, for the grant of service connection for diabetes mellitus, Type II, and remanding this matter for readjudication in accordance with the contents of this motion.

Respectfully submitted,

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DATE: September 6, 2019

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