IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

EDJUEL R. BURKHALTER,	)	
	)	
Appellant,	)	
	)	Vet. App. No. 19-2462
v.	)	
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet.App. Rules 27(a) and 45(g), the parties respectfully move the Court to vacate in part the December 19, 2018 decision of the Board of Veterans' Appeals (Board) to the extent it denied Appellant's claim of entitlement to an effective date prior to August 7, 2012 for the award of service connection for compression fractures of the thoracolumbar spine with degenerative disc disease and strain (back disability). [Record Before the Agency (R.) at 4–21].

Also in this decision, the Board remanded Appellant's claims of entitlement to service connection for a jaw disability, to include jaw dislocation, and a neck disability, to include as secondary to his back disability, as well as Appellant's claim of entitlement to an initial rating in excess of 20 percent prior to October 2016 and in excess of 40 percent since October 2016 for his back disability, to include on an extraschedular basis, and entitlement to a total disability rating based on individual unemployability (TDIU). Further, the Board referred to the agency of original jurisdiction Appellant's claims of entitlement to service

connection for bilateral hearing loss and tinnitus. These are not final decisions of the agency and are not before the Court. *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

BASIS FOR REMAND

The parties agree that, in denying Appellant an effective date prior to August 2012 for the award of service connection for his back disability, the Board erred in failing to address two of Appellant's express contentions and the record evidence on which he relied for those contentions. *Douglas v. Derwinski*, 2 Vet.App. 103, 108 (1992) (finding that "the Board [is] required, under section 7104(d)(1), to state 'the precise basis for [its] decision [and its] response to the various arguments advanced by the claimant'") (quoting *Hatlestad v. Derwinski*, 1 Vet.App. 164, 169 (1991)); *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (holding that while the Board need not address all record evidence, it must address relevant evidence favorable to the claimant's position).

First, in his August 2018 brief to the Board, Appellant argued that he was entitled to an effective date of April 1957, the month he left active service. [R. at 80–81 (73–88)]. He contended that his claim for service connection was granted in December 2016 in part based on service medical records associated with the claims file after the January 1958 rating decision denying his original claim and that, as a result, he was entitled to an April 1957 earlier effective date pursuant to 38 C.F.R. § 3.156(c). *Id.*; [R. at 374–80] (December 2016 rating decision); [R. at 708, 713 (701–26) (July 2016 Board decision acknowledging evidence is new

and material if unavailable at the time of the prior denial and relates to unestablished facts necessary to further the veteran's claim); [R. at 1057 (1048–59)] (February 2014 Notice of Disagreement, arguing that a November 2, 1956 U.S. Air Force report of radiograph was not previously associated with the claims file); [R. at 1044 (1044–45)] (U.S. Air Force report of radiograph dated November 2, 1956); [R. at 1507–08] (January 1958 rating decision); [R. at 1528–31] (November 1957 claim for service connection); 38 C.F.R. § 3.156(c)(3) (providing that an award "based all or in part" on newly associated official service department records "is effective on the date entitlement arose or the date VA received the previously denied claim, whichever is later").

Second, in this same brief Appellant alternatively requested an effective date of June 1980. [R. at 85 (73–88)]. He contended that shortly after VA denied his June 1980 request to reopen his claim for service connection, [R. at 1423], in a July 1980 rating decision, [R. at 1366], he submitted new and material evidence that required the claim to be re-adjudicated pursuant to 38 C.F.R. § 3.156(a), [R. at 1364] (letter from Appellant's private anesthesiologist dated July 2, 1980, received by VA on July 10, 1980). It appears that this evidence was received on the same date VA mailed Appellant the notification letter concerning the July 1980 rating decision. *See* [R. at 1362–63] (VA notification letter sent July 10, 1980). Appellant argued that because VA did not re-adjudicate the claim after submission of this evidence, the July 1980 rating decision never became final and that his June 1980 claim remained pending and un-adjudicated until service

connection was ultimately granted in the December 2016 rating decision. [R. at 85 (73–88)]; *see also Turner v. Shulkin*, 29 Vet.App. 207, 211 (2018).

The Board denied Appellant's requests for these two earlier effective dates without addressing these express contentions. [R. at 10 (4–21)]. This was error. Remand is required so that the Board can offer an adequate statement of reasons or bases addressing these arguments and the pertinent record evidence. *Douglas*, 2 Vet.App. at 108; *Dela Cruz*, 15 Vet.App. at 149.

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 motion.

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

On remand, 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); *Clark v. O'Rourke*, 30 Vet.App. 92, 98 (2018) (clarifying that pursuant to *Kutscherousky*, a claimant has a full 90 days to submit additional evidence or argument "without qualification," on remand from the Court of Appeals for

Veterans Claims). Before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof, an opportunity to respond thereto, and a reasonable opportunity to submit additional argument or evidence. *See Austin v. Brown*, 6 Vet.App. 547, 551 (1994). The Board "must provide [Appellant] with reasonable notice of such evidence and of the reliance proposed to be placed on it, and a reasonable opportunity for the claimant to respond to it." *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993). The Board must also "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). And 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 in the record. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56–57 (1990). The Board is further directed to obtain copies of the Court's order and of this motion and to incorporate them into Appellant's claims file for appropriate consideration in subsequent decisions on the claim.

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." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Substantial compliance with those terms is required. *Dyment v. West*, 13 Vet.App. 141, 147 (1999). The terms of this JMR are enforceable, and Appellant has enforceable

rights with respect to its terms. *See Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) ("We further hold that the Board has a duty under *Stegall* to ensure compliance with the terms of the agreement struck by the parties, which form the basis for the 'remand order' even if they are not incorporated explicitly.")

Finally, the Secretary "shall take such actions as may be necessary to provide for the expeditious treatment" of the claim. 38 U.S.C. §§ 5109B, 7112.

CONCLUSION

Considering the foregoing, the parties respectfully move the Court to issue an order vacating in part the December 19, 2018 Board decision to the extent it denied Appellant's claim of entitlement to an effective date prior to August 7, 2012 for the award of service connection for his back disability and remanding this matter for further proceedings in accordance with the Court's order and this joint motion.

Also in this decision, the Board remanded Appellant's claims of entitlement to service connection for a jaw disability, to include jaw dislocation, and a neck disability, to include as secondary to a back disability, as well as Appellant's claims of entitlement to an initial rating in excess of 20 percent prior to October 2016 and in excess of 40 percent since October 2016 for his back disability, to include on an extraschedular basis, and entitlement to TDIU. Further, the Board referred to the agency of original jurisdiction Appellant's claims of entitlement to service connection for bilateral hearing loss and tinnitus. These are not final decisions of the agency and are not before the Court.

Respectfully submitted,

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Date: November 20, 2019

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