

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

<b>JOHNNIE E. JORDAN, JR.,</b>	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-6857
	)	
<b>ROBERT L. WILKIE,</b>	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

**JOINT MOTION FOR REMAND**

Pursuant to U.S. Vet. App. R. 27(a) and 45(g), the parties respectfully move this Court to issue an order vacating the August 27, 2018, decision of the Board of Veterans' Appeals (Board) that denied (1) service connection for sleep apnea, to include as secondary to a service-connected sinus condition, and (2) an evaluation in excess of 10 percent, prior to April 21, 2017, and an evaluation in excess of 30 percent thereafter, for post-concussive headaches, and remanding those matters for readjudication. Record (R.) at 1-16.

**BASES FOR REMAND**

Remand is required because the Board failed to provide a second hearing for Appellant. See *Quinn v. Wilkie*, 31 Vet.App. 284 (2019). After the Board provided Appellant a hearing in April 2017, R. at 1709-28 (August 8, 2017, Board Decision), the Board remanded Appellant's claim in August 2017. R. at 1700-06 (August 8, 2017, Board Decision). In the decision below, the Board failed to address Appellant's April 2018 request for a second Board hearing. R. at 1-16. However, the Court has since held that the statutory requirement for the Board to "afford[ ] the appellant an opportunity for a hearing" applies to cases that return to

the Board following a Board remand. *Quinn*, 31 Vet.App. at 290. On remand, the Board must “afford[ ] the appellant an opportunity for a hearing.” 38 U.S.C. § 7107(b).

### **CONCLUSION**

Considering the foregoing, the parties respectfully move the Court to enter an order vacating the August 27, 2018, Board decision and remanding the appeal for further proceedings consistent with this motion. 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, 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). Appellant shall be free to submit additional evidence and/or arguments 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).

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). 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.”)

The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Secretary will afford this case expeditious treatment, as required by 38 U.S.C. §§5109B, 7112.

Respectfully submitted,

**FOR APPELLANT:**

/s/ Chris Attig

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