

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

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|--------------------------------|---|------------------------------|
| WALTER P. JONES, JR., |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Vet. App. No. 19-2499 |
| |) | |
| ROBERT L. WILKIE, |) | |
| Secretary of Veterans Affairs, |) | |
| |) | |
| Appellee. |) | |

JOINT MOTION FOR REMAND

Pursuant to Vet.App. Rules 27(a) and 45(g), the parties respectfully move this Honorable Court for an order vacating and remanding the February 14, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for ischemic heart disease. Record Before the Agency (R.) at 4-13.

BASES FOR REMAND

The parties agree that vacatur and remand are necessary because the Board erred when it failed to provide an adequate statement of reasons or bases and when it did not fulfill its duty to assist in this case when it denied entitlement to service connection for ischemic heart disease. 38 U.S.C. See 38 C.F.R. §§ 5103A, 7104(d); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Remand is necessary because the Board failed to provide an adequate statement of reasons or bases when it found that Appellant's military occupational

specialty (MOS) as a light infantryman with the United States Army at Korat Royal Thai Air Force Base (RTAFB) in Thailand in mid-1962 did not support his claim of exposure to an herbicide agent. R. at 9 (4-13). The Board appeared to find that exposure to herbicides in Thailand may not be presumed because even if Appellant crossed the perimeter of Korat RTAFB, he did not have frequent or regular contact with the perimeter of the base like a security patrolman or policeman. R. at 9, 10. Although the M-21 is not binding on the Board, it appeared to model its decision under the section of the Adjudication Procedure Manual, the M-21, that instructs “special consideration of herbicide exposure on a factual basis should be extended to Veterans whose duties place them on or near the perimeters of Thailand military bases.” M21-1, Part IV, Subpart ii, Chapter 1, Section H, paragraph 4(a); see *Overton v. Wilkie*, 30 Vet.App. 257, 263 (2018), citing *Gray v. Sec’y of Veterans Affairs*, 875 F.3d 1102, 1108 (Fed. Cir. 2017) (explaining that, “[t]he Federal Circuit made it clear that the Board is not bound by the M21-1.”). This includes duties of security police officers, security patrol dog handlers, member of the security police squadrons, or service members “otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence.” M21-1, Part IV, Subpart ii, Chapter 1, Section H, paragraph 4(b).

However, a note to Step 1 of Adjudication Procedure Manual, M21-1, Part IV, Subpart ii, Chapter 1, Section H, paragraph 4(b) provides that “Concede herbicide exposure on a direct or facts-found basis for **Army** veterans who served

on RTAFBs in Thailand if the Veteran: (1) provides a statement that he was involved in perimeter security duty; and (2) there is additional credible evidence supporting this statement.” (emphasis added). The M-21 notes that Army personnel may have provided RTAFB security early in the Vietnam War before the bases were fully operational. See M21-1, Part IV, Subpart ii, Chapter 1, Section H, paragraph 4(b). At the October 2018 Board hearing, Appellant testified that he was at Korat RTAFB before it was fully operational and that he walked the perimeter for security. R. at 17 (“My unit was the first unit in Korat, Thailand . . . we walked the perimeter . . . for security”), R. at 1350 (“patrolled outside the wire”), R. at 1408 (“ . . the base did not have any hard stand buildings/barracks for us as we spent much of our time conducting ‘Civic Action’ patrols outside of the Korat perimeter”). On remand, the Board should discuss whether Appellant, as a U.S. Army soldier, was involved in perimeter security and had herbicide exposure on a direct or fact-found basis.

As an act of compromise between the parties, and acknowledging that the Board is not bound by the M-21, the parties agree the Board should request that the Joint Services Records Research Center (JSRRC) verify exposure to herbicides. The M21 directs the RO to request a JSRRC search under two circumstances: if the veteran does not provide the dates and location and nature of the exposure or if he does, if exposure cannot be acknowledged on a direct or facts-found basis, then send a JSRRC request. M21-1, Part IV, Subpart ii, Chapter 1, Section H, paragraph 4(b), Step 7. Appellant provided sufficient information for

VA to send a request to the JSRCC for verification of exposure to herbicides pursuant to M-21. The parties agree that remand is necessary for the Board to ensure that VA complies with the procedures outlined in the M21 and to resubmit the request to the JSRCC in order to verify exposure to herbicides.

As an additional act of compromise between the parties, the Board must attempt to obtain Appellant's classified service records, such that they exist. Appellant asserted that he held a "Secret Final Security Clearance." R. at 1350 (June 2015 VA Form 9), R. at 1420 (April 2013 Statement In Support of Claim). There is no indication from the record that VA developed the claim based on participation in special operations incidents. See M-21, Part IV, Subpart ii, Chapter 1, Section I, topic 4(a)-(d). On remand, the Board should ensure that VA attempts to develop the claim according to these provisions.

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.

On remand, Appellant is entitled to submit additional argument or evidence. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999); *Quarles v. Derwinski*, 3 Vet.App. 129 (1992); see *Clark v. O'Rourke*, 30 Vet. App. 92 (2018). The Board is also expected to "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). Before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. See *Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993). 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*).

Copies of this joint motion and the Court’s order shall be associated with Appellant’s claims file for appropriate consideration in subsequent decisions on the claim. See *Breeden v. Principi*, 17 Vet.App. 475 (2004). The Court has noted that a remand confers on the Appellant a right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. See *Stegall v. West*, 11 Vet.App. 268, 271 (1998). 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. 38 U.S.C. § 7104(d)(1). Further, the Secretary “shall take such actions as may be necessary to provide for the expeditious treatment” of this claim. 38 U.S.C. § 7112.

CONCLUSION

WHEREFORE, the parties respectfully move the Court to vacate and remand the February 14, 2019, Board decision that denied service connection for

ischemic heart disease for action consistent with the foregoing discussion.

Respectfully submitted,

FOR THE APPELLANT:

Dated: 4/3/2020

/s/ Alexandra Curran

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Dated: 4/3/2020

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