

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

MICHAEL CALKINS,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

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Vet.App. No. 19-5683

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet.App. R. 27(a) and 45(g), the parties respectfully move the Court for an order vacating that part of the May 2, 2019, decision of the Board of Veterans' Appeals (Board), which denied entitlement to a rating in excess of 50% for posttraumatic stress disorder (PTSD) prior to March 8, 2017, and remanding for readjudication.

Appellant expressly waives his appeal to that part of the Board decision that denied (1) an effective date earlier than October 11, 2013, for the grant of service connection for PTSD; (2) an initial compensable rating for bilateral hearing loss; (3) an initial rating higher than 10% for tinnitus; and (4) a rating in excess of 70% for PTSD beginning March 8, 2017. *See Bowers v. Shinseki*, 26 Vet.App. 201, 210 & n.12 (2013) (recognizing an appellant's right to expressly abandon parts of his appeal). The parties request that the Court dismiss the appeal with respect to that issue. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

The Board also remanded Appellant's claims for: (1) entitlement to a total disability rating based on individual unemployability (TDIU) prior to March 18, 2017; and (2) an effective date earlier than March 18, 2017, for the basic grant of eligibility to Dependents' Education Assistance under 38 U.S.C. Chapter 35. Accordingly, these claims are not currently before the Court. See *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam) (the Court lacks jurisdiction to review Board remands).

BASES FOR REMAND

The parties agree that remand is required because the Board erred when it provided an inadequate statement of reasons or bases for its decision denying Appellant's claim. See 38 U.S.C. § 7104(d)(1). In denying Appellant's claim for a rating in excess of 50% for PTSD prior to March 8, 2017, the Board found that Appellant "expressed recurrent thoughts of death" which it found was "similar to suicidal ideation." (R. at 12). But the Board found that thoughts of death, and suicidal ideations, were different concepts. *Id.* The Board explained that "[s]uicidal ideation is a veteran's thoughts of his or her own death or thoughts of engaging in suicide-related behavior." *Id.* The Board found that "[d]uring the October 2013 VA examination, [Appellant] reported current thoughts of death but denied suicidal ideation." (R. at 12). Because Appellant denied suicidal ideations at the October 2013 and 2014 VA examinations, and instead only endorsed thoughts of death, the Board found that his "thoughts of death d[id] not rise to the level contemplated by the 70[%] rating." *Id.*

In *Bankhead*, however, the Court discussed the notion of “suicidal ideation” and held that “both passive and active suicidal ideation are **comprised of thoughts**: passive suicidal ideation entails thoughts such as wishing that you were dead, while active suicidal ideation entails thoughts of self-directed violence and death.” *Bankhead v. Shulkin*, 29 Vet.App. 10, 20 (2017) (emphasis added) (citations omitted). The Court further held “that the presence of suicidal ideation alone, that is, a veteran’s thoughts of his or her own death or thoughts of engaging in suicide-related behavior, may cause occupational and social impairment with deficiencies in most areas.” *Id.* Here, the Board erred because it failed to address whether Appellant’s thoughts of death warranted a rating in excess of 50% pursuant to *Bankhead*. *Id.* Upon remand, the parties agree that the Board shall provide a statement of reasons or bases discussing whether Appellant’s reported thoughts of death warrant a rating in excess of 50% for PTSD prior to March 8, 2017.

The parties agree that this Joint Motion for Partial Remand (JMPR) 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 JMPR. The parties

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

Appellant is entitled to submit additional evidence and argument. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam). 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 v. Derwinski*, 1 Vet.App. 394, 397 (1991)). 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*, 1 Vet.App. at 397. Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof and an opportunity to respond thereto. See *Thurber v. Brown*, 5 Vet.App. 119 (1993).

In any subsequent decision, the Board should provide an adequate statement of reasons or bases for its findings and conclusions on all material issues. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). The Secretary shall provide this claim expeditious treatment, as required by 38 U.S.C. §§ 5109B and 7112. Finally, the Board shall incorporate copies of this JMPR and the Court’s order into Appellant’s claims folder.

The terms of this JMPR are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). 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).

CONCLUSION

WHEREFORE, the parties respectfully move the Court to enter an order vacating that part of the May 2, 2019, Board decision which denied entitlement to a rating in excess of 50% for PTSD prior to March 8, 2017, and remanding for readjudication.

Respectfully submitted,

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Date: May 14, 2020

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