

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

LARRY MAY,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-8187
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Court of Appeals for Veterans Claims (Court) Rules 27(a) and 45(g), Appellant, Larry May, and Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, by and through their representatives, respectfully move this Court to vacate, in part, the Board of Veterans' Appeals (Board) decision of July 30, 2019, which the denied the claim of entitlement to a total disability rating based on individual unemployability (TDIU) and remand the matter for readjudication consistent with this motion.

Additionally, Appellant expressly waives his appeal of the part of the Board's decision that dismissed without prejudice the issue of entitlement to an increased rating for posttraumatic stress disorder (PTSD). See *Bowers v. Shinseki*, 26 Vet.App. 201, 210 & n.12 (2013) (recognizing an appellant's right to expressly abandon parts of his appeal). As such, 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).

BASIS FOR REMAND

The parties agree that remand is warranted because the Board, in making its decision, erred by not providing an adequate statement of reasons or bases for its determination.

In rendering its decision, the Board is required to provide a written statement of its “findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.” 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board may commit remandable error when it fails to provide an adequate statement of its reasons or bases. *Id.*

Here, the Board concluded that “[a]fter a review of the evidence of record, [it] determines that TDIU is not warranted.” Record Before the Agency (R.) at 5 (1-10). The Board noted that it “acknowledges the medical and lay evidence indicating an inability to work due to PTSD and the inability to use his right arm or hand”, but explained that “the fact that even a medical professional finds a Veteran unemployable due to a service-connected disability is not dispositive, as the Board has ultimate

responsibility for determining whether a veteran is unemployable.” R. at 7 (1-10) (citing to the holding in *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013)).

The Board then proceeds to find “that despite his limitations, the Veteran is not unemployable.” R. at 7 (1-10). However, in reaching this finding, the Board, without any further explanation as to why it favored this evidence over the other, relied on the findings of the January 2017 VA examiner as it noted “the evidence, including the Veteran’s January 2017 C&P examination report, indicates that the Veteran’s psychiatric disability does not prevent him from working in a setting where he can avoid potential stressors.” *Id*; see *D’Aries v. Peake*, 22 Vet.App. 97, 107 (2008) (it is within the purview of the Board to evaluate the medical evidence and favor one medical opinion over another as long as it provides an adequate statement of reasons or bases for doing so). The Board further noted that “[t]he report also notes that despite his right shoulder disability, the Veteran can learn to use his left arm and hand for basic activities.” *Id*. Because the Board appears to rely on the January 2017 VA examiner’s finding regarding employability despite its earlier attestation that a medical professional’s finding on the issue is not dispositive and because the Board does not explain why it favored the January 2017 VA examination report over the other evidence of record it referenced, the parties agree that remand is warranted.

On remand, the Board should provide an adequate statement of reasons or bases that discusses the weight and probative value of all relevant medical evidence of record, as noted above and to include its reasoning as to why it favors one medical opinion over the other, when considering entitlement to a TDIU in this case. Additionally, the Board should be mindful of the Court's guidance for "determining whether a veteran can secure and follow a substantially gainful occupation" set forth in *Ray v. Wilkie*, 31 Vet.App. 58, 73 (2019).

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. Pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and 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.

Furthermore, Appellant will be free to submit additional evidence and argument regarding his claim and the Board may develop additional information, as deemed appropriate. See *Kutscherousky v. West*, 12

Vet.App. 369 (1999); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018) (clarifying that pursuant to *Kutscherousky*, "the appellant [has] 90 days to submit evidence without qualification" following a remand from the Court of Appeals for Veterans Claims). Moreover, the Board is 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). The terms of this JMPR are enforceable, and Appellant has enforceable rights with respect to its terms. *See Forcier v. Nicholson*, 19 Vet. App. 414, 425 (2006). Finally, the Board shall incorporate copies of the Court's order and this joint motion into Appellant's VA file and afford Appellant's claim expeditious treatment as required by 38 U.S.C. § 7112.

CONCLUSION

The parties respectfully move this Court to vacate, in part, the Board's decision of July 30, 2019, which denied the claim of entitlement to a TDIU and remand the matter for further proceedings consistent with this motion.

Respectfully submitted,

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