

STEVIE E. BOOKER,)
Appellant,)
)
v.) Vet. App. No. 20-1697
)
)
ROBERT L. WILKIE,)
Secretary of Veterans Affairs,)
Appellee.)

Pursuant to U.S. Vet. App. Rules 27 and 45(g), the parties move the Court to vacate the portion of the November 13, 2019, decision of the Board of Veterans' Appeals (Board), which denied entitlement to service connection for a lumbar spine disability, and to remand the matter for additional development and readjudication consistent with the following.

BASES FOR REMAND

The parties agree that the Board failed to satisfy the duty to assist Appellant by relying on an inadequate examination. The Secretary's duty to assist includes

“providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.” 38 U.S.C. § 5103A(d)(1). The Court has held that a medical opinion is adequate “where it is based on consideration of the veteran’s prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the Board’s ‘evaluation of the claimed disability will be a fully informed one.’” *Steffl v. Nicholson*, 21 Vet.App. 120, 123 (2007) (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)). The opinion “must support its conclusions with an analysis that the Board can consider and weigh against contrary opinions.” *Steffl*, 21 Vet.App. at 124-25. “[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two.” *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

Here, the 2014 VA medical examination is inadequate because it does not contain adequate rationale. To be adequate, a medical opinion must “describe the veteran’s condition in sufficient detail so that the Board’s evaluation of the claim may be fully informed.” *Roberson v. Shinseki*, 22 Vet. App. 358, 366 (2009); see also *Acevedo v. Shinseki*, 25 Vet. App. 286, 293 (2012). The examiner provided the following rationale for his opinion that Appellant’s back disability is less likely than not related to service:

Found 3 c/o low back pain after a sports injury, and 2 separate falls – 1984, 1985, 1988, all diagnosed as paralumbar strains. X-rays were negative 1985 injury. [I]t is less likely than not that strain injuries could cause any significant disc disorders 25 years after the fact.

[R. at 2099-2100]. However, a negative x-ray in 1985 does not account for Appellant's subsequent in-service injury to his back in 1988. [R. at 2198-99]. Moreover, the examiner provided no basis for how he determined that the in-service injuries could not cause the current disability. [R. at 2099-2100].

Moreover, the examiner relied on the passage of time to discount the possibility that Appellant's in-service injuries caused his current disability, but he did not discuss Appellant's report that his back pain has continued since service and his explanation for why there were no treatment records. [R. at 2099-2100, 362-63, 358-59]; *see also Miller v. Wilkie*, 32 Vet.App. 249, 260 (2020) (holding that "The examiner must address the veteran's lay statements to provide the Board with an adequate medical opinion.").

Thus, on remand, the Board must obtain a new opinion which provides adequate rationale for its conclusions as well as addresses Appellant's lay statements that his back pain continued since service and his explanation for why there were no treatment records.

The parties also agree that the Board erred because it provided an inadequate statement of reasons or bases to support its decision. A Board decision must be supported by an adequate statement of reasons or bases which explains the basis of all material findings and conclusions. 38 U.S.C. § 7104(d)(1). This requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995),

aff'd per curiam, 78 F.3d 604 (Fed. Cir. 1996) (table). The Board's statement of reasons or bases must simply be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review of the same. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

Here, the Board failed to consider Appellant's statements that he has experienced back pain ever since service and his explanations for the absence of documented medical treatment for his back disability for the years following service. Appellant asserted that he hurt his back during service and "it's been hurting ever since" and "ever since [he] got hurt in the military [he has] been suffering ever since." [R. at 358-363]. He explained that he did not have medial insurance and was not aware that VA would provide treatment after his military service; he went to the emergency room "if it was a dire emergency" but otherwise he just toughed it out. [R. at 358-363]. Although the Board noted that Appellant made these statements, it did not analyze these statements or reconcile his explanation with the examiner's focus on the 25-year passage of time from service to treatment. [R. at 7-8].

Thus, on remand, the Board must consider and discuss Appellant's statements that his back pain has persisted since service and his explanation for the lack of documented medical treatment.

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 granting this motion.

Upon remand, Appellant may submit additional evidence and argument. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam); *see also Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992). 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). 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*, 1 Vet.App. at 397). Before relying on any additional evidence developed, the Board must ensure that Appellant is given notice thereof and an opportunity to respond thereto. *See Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993).

The law requires that, in any subsequent decision, the Board provide an adequate statement of reasons or bases to support its findings and conclusions on all material issues of fact and law. 38 U.S.C. § 7104(d)(1). The law also requires that the Secretary "take such actions as may be necessary to provide for the expeditious treatment" of the claim remanded pursuant to this motion. 38 U.S.C.

§§ 5109B, 7112. The Board will obtain copies of this motion and the Court's order and incorporate them into Appellant's claims folder for appropriate consideration in subsequent decisions on this claim. *See Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) (Secretary's duty to ensure compliance with the terms of a remand "include[s] the terms of a joint remand that is granted by the Court but not specifically delineated in the Court's remand order"). The Court has held 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. *Stegall v. West*, 11 Vet.App. 268, 271 (1988).

CONCLUSION

In light of the foregoing, the parties request that the Court vacate the portion of the November 13, 2019, decision of the Board, which denied entitlement to service connection for a lumbar spine disability, and to remand this issue for additional development and readjudication consistent with the terms of this joint motion.

Respectfully submitted,

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