

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

SAM BUTLER,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

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Vet. App. 20-1514

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27(a) and 45(g), the parties respectfully move this Court to vacate the November 21, 2019, decision of the Board of Veterans' Appeals (Board) that determined that a reduction in the disability evaluation of residuals of prostate cancer from 100 to 60 percent, effective May 1, 2016, was proper, and denied entitlement to a disability evaluation in excess of 60 percent for residuals of prostate cancer, and to remand these matters for further adjudication consistent with the terms of this motion. For purposes of this motion, the Secretary concedes that the Board committed error in the adjudication of these issues.

BASES FOR REMAND

The parties agree that remand of the above-identified issues is warranted because the Board failed to comply with the terms of the June 2019 Joint Motion for Remand. *Cf. D'Aries v. Peake*, 22 Vet.App. 97, 105 (2008). In that motion, the parties agreed that the Board erred because it failed to address the competency of the December 2015 and February 2017 Department of Veterans Affairs (VA) medical examiners, nurse practitioners specializing in pediatrics and family practice, to opine on matters related to urology. R. at 95-99.

The Board in the instant decision did not directly address the competency of the examiners to opine on urology-related issues. *See Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009). Instead, it found that the examiners were competent to review the record and essentially determine that Appellant's cancer was in remission and that, even if they were less qualified than a urologist, the fact that Appellant's cancer was in remission was confirmed by his private urologist. R. at 10. Ultimately, the Board found that the lack of active cancer warranted a reduction from 100 percent since the 100 percent evaluation was based on active cancer. *Id.*

The parties agree that the Board's discussion is problematic and thus does not substantially comply with the terms of the prior remand order for several reasons. First, the Board does not explain why the examiners were competent to assess whether Appellant's cancer was in remission. If all the examiners were expected to do was review the claims file and report on what other medical

professionals had found, it is unclear why their opinions were solicited in the first place. Moreover, the fact that their opinions that Appellant's cancer was in remission aligned with that of Appellant's private urologist does not mean that they were competent to provide an opinion on the question.

Second, even if the examiners were competent to conclude that Appellant's cancer was in remission (or even if a competent medical opinion was not needed to support this conclusion), the lack of active cancer might indicate that a 100 percent evaluation was no longer warranted but is not determinative of whether Appellant's evaluation was properly reduced from 100 to 60 percent (instead of 80 percent). To that end, the Board did not address the examiners' qualifications with respect to whether an 80 percent evaluation was warranted, for example, on the basis of urinary or renal issues.

Because the parties agreed that the Board's discussion in its prior decision was deficient because it failed to address Appellant's arguments as to the competency of the examiners, and because they agree that the Board's current discussion also fails to adequately address those arguments, they agree that remand of the issues is again required. See *Stegall v. West*, 11 Vet. App. 268 (1998). On remand, the Board should address the examiners' competence per the terms of the prior June 2019 Joint Motion for Remand.

ADDITIONAL TERMS

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 for remand (JMR). 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 joint 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 claims, and the Board must consider any such argument or evidence submitted. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). The terms of this joint motion are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). "The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Board" of this claim. 38 U.S.C. § 7112. Finally, the Board shall incorporate copies of this joint motion and the Court's order into Appellant's record.

WHEREFORE, the parties move the Court to enter an order vacating the November 21, 2019, decision of the Board that determined that a reduction in the evaluation of residuals of prostate cancer from 100 to 60 percent, effective May 1,

2016, was proper, and denied entitlement to a disability evaluation in excess of 60 percent for residuals of prostate cancer, and remanding for readjudication consistent with the above discussion.

Respectfully submitted,

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