

date earlier than November 26, 2014, for the grant of service connection for hypertensive kidney disease was not warranted. Record Before the Agency (R.) at 1-12. New and material evidence received prior to the expiration of the appeal period will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period. 38 C.F.R. § 3.156(b). If a regional office renders a decision but receives new and material evidence within the appeal period, the regional office decision does not become final until the regional office acts on the new evidence. See *Beraud v. McDonald*, 766 F.3d 1402, 1407 (Fed. Cir. 2014) (holding that when evidence is received during the appeal period, the regional office must provide a determination that is directly responsive to the new submission and determine whether it constitutes new and material evidence and that, until it does so, the claim at issue remains open).

The Board found that Appellant did not appeal the May 2010 and June 2012 rating decisions that previously denied his claim for a kidney condition, and that the “record [did] not contain any other formal claim or statements that amount to an informal claim that have not adjudicated prior to November 26, 2014 [sic].” R. at 9. The Regional Office (RO) originally denied the claim for service connection for a kidney condition in May 2010, R. at 939-47, and Appellant submitted additional evidence in March 2011, R. at 890-93. In a January 23, 2012, rating decision, the RO noted that additional evidence was received in March 2011 and continued to deny the claim for service connection for kidney disease. R. at 868-71. The RO mailed the notification letter for the January 2012 rating decision on

January 30, 2012. R. at 861-62. In both the May 2010 and January 2012 rating decision, the RO denied the claim for service connection because the evidence reflects that Appellant's kidney disease was due to his hypertension (HTN) and not due to the anti-inflammatory medication he took for his service-connected left knee disability. R. at 939-47 (May 2010 rating decision), R. at 868-71 (January 2012 rating decision). On January 22, 2013, Appellant submitted a letter from his VA physician dated December 15, 2011, which noted that Appellant had a long-standing history of HTN, which had caused chronic kidney insufficiency, and that the "progressive decline of this kidney function was accelerated by anti-inflammatory medication and currently he is requiring hemodialysis." R. at 759. The Board did not address whether this additional evidence was new and material evidence pursuant to 38 CFR § 3.156(b).

Therefore, a remand is warranted for the Board to provide adequate statements or reasons or bases addressing whether the December 15, 2011, letter from Appellant's VA physician, which he submitted on January 22, 2013, was new and material evidence received prior to the expiration of the appeal period such that the January 2012 rating decision did not become final and remained pending pursuant to 38 C.F.R. § 3.156(b). See *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining that remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

General Remand Instructions

The Board decision should be vacated and the appeal remanded for readjudication consistent with the foregoing. 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 joint motion.

On remand, Appellant may submit additional evidence and argument regarding his claim. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). 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). Before relying on any additional evidence developed, the Board will ensure that Appellant is given notice thereof and an opportunity to respond thereto. See *Thurber v. Brown*, 5 Vet.App. 119 (1993). The terms of this Joint Motion are enforceable on remand. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). Also,

on remand, the Board shall obtain copies of the Court's order and this motion and incorporate them into Appellant's VA file and provide this claim expeditious treatment, as required by 38 U.S.C. §7112.

WHEREFORE, the parties respectfully move the Court to vacate the January 2, 2020, decision of the Board denying an effective date earlier than November 26, 2014, for the grant of service connection for hypertensive kidney disease, and remand the matters for readjudication consistent with this motion.

Respectfully submitted,

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DATE: November 23, 2020

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