

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

THOMAS R. BACKLUND,)	
Appellant,)	
)	
v.)	Vet. App. No. 20-2297
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g), the parties move the Court to vacate the December 5, 2019, decision of the Board of Veterans' Appeals (Board), which denied entitlement to service connection for an acquired psychiatric disorder to include schizophrenia, depression, and posttraumatic stress disorder (PTSD), and to remand the matter for additional development and readjudication consistent with the following.

BASIS FOR REMAND

Remand is warranted because the Board erred when it failed to ensure substantial compliance with its prior remand directives. *See Stegall v. West*, 11 Vet.App. 268, 271 (1998) (holding that a remand by the Board “confers on the veteran . . . as a matter of law, the right to compliance with the remand orders” and the Board errs when it fails to ensure compliance with the terms of such a remand). The Board also failed to satisfy its duty to assist, which compels the Board to ensure that the medical opinions it obtains are adequate. *See Barr v. Nicholson*, 21 Vet. App. 303, 311-12 (2007).

Here, the Board failed to follow its June 2019 remand instructions, which directed the Regional Office (RO) to obtain a new VA examination and direct the examiner to: identify all diagnosed psychiatric disorders, reconciled with conflicting evidence in the record; determine for any diagnosed psychiatric disorder whether it is at least as likely as not that the disability had its onset during, was caused by, or is otherwise related to active service; obtain a detailed history of relevant symptoms; if the examiner diagnoses PTSD, indicate the in-service stressor and opine as to whether the stressor is adequate to support a dx of PTSD, and opine whether Appellant's symptoms are related to the claimed stressor; and consider and address the July 2016, August 2016, and January 2017 medical treatment statements, and December 2017 hearing testimony to identify stressors and opine why or why not they were considered, with complete rationale for all opinions. [Record (R.) at 384-85].

The July 2019 VA medical examiner did not comply with all of these directives; specifically, she did not address the directives to identify Appellant's stressors or opine why or why not they were considered. [R. at 76-79]. While she cited to the July 2016 evidence, nothing in the opinion indicates she considered the August 2016 or January 2017 evidence, and she did not discuss any specific statements made at the hearing. [R. at 76-79]. The examiner's failure to consider the treatment records and hearing testimony that she was explicitly instructed to consider is an error, and the Board's failure to ensure substantial compliance with its prior remand directives warrants remand. *Stegall*, 11 Vet.App. at 271.

The July 2019 examination was also inadequate because the examiner failed to provide a reasoned medical explanation for her opinion. [R. at 77]. Specifically, it is unclear what the examiner meant when she stated that there was not “strong support” for the occurrence of military sexual trauma (MST), a diagnosis of PTSD, or Appellant’s schizoaffective disorder being related to service. [R. at 76]. In requiring “strong support” in the records, the examiner applied a higher standard than that required for service connection, which is “at least as likely as not.” See 38 U.S.C. § 5107(b); *Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014) (“This ‘unique’ standard of proof is lower than any other in contemporary American jurisprudence and reflects ‘the high esteem in which our nation holds those who have served in the Armed Services.’”); *Jones v. Shinseki*, 23 Vet. App. 382, 388 n.1 (2010) (“...in the veterans benefits system the benefit of the doubt as to any issue material to resolution of the claim goes to the veteran if the evidence is in equipoise...”).

Further, the examiner failed to explain why she could not provide an opinion as to his trauma- and stressor-related disorders without resort to mere speculation. [R. at 77]. While an examiner’s use of the word “speculate” in a medical opinion does not necessarily render the opinion inadequate, the examiner must “clearly identify precisely what facts cannot be determined.” See *Jones*, 23 Vet. App. at 390. “Relevant points that can be discussed in an examination report include, but are not limited to, why the examiner finds cited studies persuasive or unpersuasive, whether the veteran has other risk factors for developing the claimed condition,

and whether the claimed condition has manifested itself in an unusual manner.” *Stefl*, 21 Vet. App. at 124. The examiner did not discuss any potential reasons for why it would be mere speculation to opine as to the etiology of his trauma- and stressor-related disorders. See [R. at 76]. It is unclear whether the examiner could not determine nexus due to the examiner’s limitations or the medical community’s limitations. Moreover, it is inconsistent for the examiner to state that she cannot determine whether Appellant’s symptoms are due to service without resorting to mere speculation but then also find that Appellant’s condition is less likely than not incurred in or caused by service and his reported stressors.

Thus, on remand, the Board must ensure compliance with the 2019 remand directives. The Board must obtain a new medical opinion which explicitly responds to the questions posed in the 2019 remand instructions and provides a thorough opinion with adequate rationale using the correct standard.

The parties agree that this joint motion for remand (JMR) 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 JMR. The parties agree to unequivocally waive any right to appeal the Court’s order on this JMR and respectfully ask that the Court enter mandate upon the granting of this motion.

Upon remand, Appellant may submit additional evidence and argument in support of his claim. *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 it 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 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).

“A remand is meant to entail a critical examination of the justification for the decision” and is not “merely for the purposes of rewriting the opinion so that it will superficially comply with the ‘reasons or bases’ requirement of 38 U.S.C. § 7104(d)(1).” *Fletcher*, 1 Vet.App. at 397. 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 claims remanded pursuant to this motion. 38 U.S.C. §§ 5109B, 7112. The Board should 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) (explaining that the Secretary’s duty to ensure compliance with the terms of a remand “include[s]

the terms of a joint motion that is granted by the Court but not specifically delineated in the Court's remand order"). 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. *Stegall*, 11 Vet.App. at 271.

CONCLUSION

In light of the foregoing, the parties request the Court to vacate the portion of the December 5, 2019, decision of the Board, which denied entitlement to service connection for an acquired psychiatric disorder to include schizophrenia, depression, and PTSD, and to remand the issue for additional development and readjudication consistent with the terms of this joint motion.

Respectfully submitted,

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