

requires the Board to provide with its decision a statement of the reasons or bases for that decision which allows for an understanding and judicial review of the Board's decision. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To fulfil this requirement, the Board is required to consider and discuss all relevant evidence and all issues material to the adjudication of the claims at hand, including all potentially applicable provisions of law, all issues reasonably raised by the record, and all arguments explicitly presented by the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996); *Robinson v. Peake*, 21 Vet.App. 545, 552-56 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

In this case, Appellant has alleged that his diabetes and Parkinson's disease are related to an exposure to herbicides during service in the Philippines and/or Guam. [R. at 12.] To that end, the parties note that the Department of Veterans Affairs (VA) Adjudication Procedures Manual (M21-1) provides procedures for developing claims based on herbicide exposure in locations other than the Korean Demilitarized Zone, Thailand, or Johnston Island. M21-1, Part IV, Subpart ii, Chapter 1, Section H, Subsection 6. Under this guidance, when the claimant provides certain identifying information regarding the alleged exposure, VA is to request a review of the Department of Defense's inventory of herbicide operations to determine whether herbicides were used as claimed. If exposure cannot be

confirmed through such review, VA is to request that the Joint Services Records Research Center (JSRRC) verify exposure to herbicides.

In this case, VA did review the Department of Defense inventory, and the Board recorded that the Philippines were not identified on that list. [R. at 13.] However, the Board did not discuss whether Appellant's service in Guam was listed in the inventory as a location where herbicide operations were conducted. [R. at 13.] Moreover, the record does not reflect that any request to the JSRRC was ever completed, and the Board did not discuss this in the decision now before the Court. [R. at 5-15.]

The Court of Appeals for the Federal Circuit has held that the M21-1 is not binding on the Board. *DAV v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017), *rev'd on other grounds, Nat'l Org. of Veterans' Advocates v. Sec'y of Veteran's Affairs*, No. 2020-1321, (Fed. Cir. 2020). However, this Court has held that the Board is "can't ignore such a relevant provision" of the M21-1. *Overton v. Wilkie*, 30 Vet.App. 257, 264 (2018). Rather, the Board must independently review the matter and "discuss any relevant provisions contained in the M21-1 as part of its duty to provide adequate reasons or bases, but because it is not bound by those provisions, it must make its own determination before it chooses to rely on an M21-1 provision as a factor to support its decision." *Id.*

In this case, the parties agree that M21-1, IV, ii, 1, 6, H is relevant to Appellant's claims. However, the Board failed to provide a statement of reasons or bases which considered this provision of the M21. [R. at 5-15.] As such, the

parties agree that the Board failed to provide an adequate statement of reasons or bases. *Overton*, 30 Vet.App. at 264. Additionally, the parties agree that the Board failed to provide an adequate statement of reasons or bases when it failed to address whether Guam was reflected in the Department of Defense Inventory reviewed by VA. [R. at 13.]

What is more, the parties agree that the Board failed to provide an adequate statement of reasons or bases for its decision when it failed to consider relevant evidence of record relating to Appellant's exposure to herbicides. In particular, the parties note that the record in this case contains a Report from the Government Accountability Office titled Agent Orange: Actions Needed to Improve Accuracy and Communication of Information on Testing and Storage Locations. [R. at 92-212.] In this report, it notes that Department of Defense documents identified the use of commercial herbicides in Guam. [R. at 129.]

The parties agree that this report is evidence relevant to Appellant's claims for service connection. However, the Board failed to consider this evidence in its statement of reasons or bases. [R. at 5-15.] As such, the parties agree that the Board failed to provide an adequate statement of reasons or bases for its decision. *Caluza*, 7 Vet.App. at 506.

In light of the foregoing, the parties agree that vacatur of the Board's decisions to deny entitlement to service connection is appropriate and that remand of Appellant's claims is appropriate. *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining that remand is the appropriate remedy when the Board failed to provide

an adequate statement of reasons or bases). The parties also 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. 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 JMPR, and respectfully ask that the Court enter mandate upon the granting of this motion.

"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 v. Derwinski*, 1 Vet.App. 394, 397 (1991)). 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*, 1 Vet.App. at 397. Before relying on any additional evidence developed, the Board will ensure that Appellant is given notice thereof and an opportunity to respond thereto. See *Austin v. Brown*, 6 Vet.App. 547, 551 (1994); *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993). Appellant is entitled to submit additional evidence and argument regarding his claim on remand. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). Additionally, the Board will associate with the

VA claims file copies of this joint motion and the Court's Order granting it. A "remand by this Court or the Board confers on the veteran or other claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). The terms of this Joint Motion are enforceable on remand. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). Finally, the Secretary "shall take such actions as may be necessary to provide for the expeditious treatment" of the claim. 38 U.S.C. § 7112.

WHEREFORE, the parties move the Court to vacate those portions of the February 25, 2020, decision of the Board, which denied Appellant entitlement to service connection of diabetes mellitus, type 2, and Parkinson's disease. The parties then ask that these claims be remanded to the Board for consideration in accordance with the contents of this motion.

Respectfully submitted,

FOR APPELLANT:

Date: December 15, 2020

/s/ Alexandra Curran
ALEXANDRA CURRAN
Attig Curran Steel, PLLC
P.O. Box 250724
Little Rock, AR 72225
(866)627-7764

FOR APPELLEE:

WILLIAM A. HUDSON, JR.
Principal Deputy General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Edward v. Cassidy, Jr.
EDWARD V. CASSIDY, JR.
Deputy Chief Counsel

Date: December 15, 2020

/s/ Brandon T. Callahan
BRANDON T. CALLAHAN
Senior Appellate Attorney
Office of General Counsel (027B)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-7141