

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

JAMES STEPHEN CURTIN,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 20-4228
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR PARTIAL REMAND

Under U.S. Vet. App. R. 27 and 45(g)(2), Appellant, James Stephen Curtin, and Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, by and through their attorneys, respectfully move the Court to vacate the portions of the February 20, 2020, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for service connection for an acquired psychiatric disorder, to include posttraumatic stress disorder (PTSD), an anxiety disorder, bipolar disorder, and depression, and a total disability rating based on individual unemployability (TDIU), and to remand those matters for further proceedings consistent with this motion.

The portion of the Board's decision that remanded the issue of entitlement to service connection for bilateral hearing loss is not final. The Court is without jurisdiction over that issue. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

Appellant does not challenge the Board's denial of entitlement to service connection for chest pain and has thus abandoned that claim. *Cacciola v. Gibson*,

27 Vet.App. 45, 56-57 (2014) (holding that, when an appellant expressly abandons an appealed issue or declines to present arguments as to that issue, the appellant relinquishes the right to judicial review of that issue, and the Court will not decide it).

The parties note that the Board's decision was promulgated under the Appeals Modernization Act (AMA).

BASES FOR REMAND

The parties agree that remand is warranted because the Board failed to provide adequate reasons or bases and address whether the November 27, 2017, VA examination is adequate pursuant to its duty to assist. *See Barr v. Nicholson*, 21 Vet.App. 303, 308 (2007). The examiner determined that while Appellant did not have a diagnosis of PTSD, his diagnosed bipolar disorder was less likely than not related to service, because "[i]t would be mere speculation to make a connection between his service activities and his current mental health status." [R. at 517 (516-41)]. The Board found that the November 2017 opinion is "highly probative of no nexus between the Veteran's current disabilities and service because it contains a clear conclusion that is supported by the Veteran's service treatment records, as well as the private treatment records throughout the appeal." [R. at 10].

But the Board failed to address the speculative nature of the examiner's determination and whether that language rendered the opinion inadequate. *See Hood v. Shinseki*, 23 Vet.App. 295, 298-99 (2009) (holding that the equivocal

nature of an examiner's opinion "should have signaled to the Board that the medical opinion was speculative and of little probative value"). When an examiner indicates that it would be speculation to provide a nexus opinion, the examiner must "clearly identify precisely what facts cannot be determined." See *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). On remand, the Board must provide adequate reasons or bases in determining whether the November 2017 examination is adequate given its speculative nature. If Board finds the opinion to be inadequate, it should request a new examination. *Barr*, 21 Vet.App. at 308.

Regarding TDIU, the Board found that Appellant did not have any service-connected disabilities and is therefore not eligible for TDIU. [R. at 14]. However, the Board concurrently remanded a claim for service connection for bilateral hearing loss. [R. at 14-15]. Similarly, the issue of service connection for an acquired psychiatric disorder is being remanded to the Board. Accordingly, the issue of TDIU is inextricably intertwined with his pending service connection claims. *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (issues are "inextricably intertwined" when a decision on one issue would have a "significant impact" on a veteran's claim for the second issue). The Board should therefore readjudicate his entitlement to TDIU as well.

CONCLUSION

The parties agree that this joint motion and its language are the product of the parties' negotiations. On remand, the Board will send Appellant a letter permitting no fewer than 90 days for the submission of additional argument to the

Board prior to readjudication, barring an explicit waiver by Appellant. 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.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, Appellant may submit additional argument to the Board consistent with a notice letter that will be sent by the Board. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Board shall provide this claim expeditious treatment as required by 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully request that the Court vacate that part of the February 20, 2020, Board decision that denied service connection for

an acquired psychiatric disorder and entitlement to TDIU, and remand those matters for further proceedings consistent with the foregoing.

Respectfully submitted,

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December 16, 2020

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