

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

LORENA ARMSTEAD,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 20-5053
)	
DAT P. TRAN,)	
Acting Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet.App. Rules 27(a) and 45(g), the parties move the Court for an order vacating the April 10, 2019, decision of the Board of Veterans' Appeals (Board), that denied entitlement to service connection for the cause of the Veteran's death for purposes of entitlement to dependency and indemnity compensation (DIC) benefits, and remanding for readjudication. (Record (R.) at 64-70).

BASES FOR REMAND

The parties agree that vacatur and remand are warranted for the Board to address whether Appellant's April 2019 request to hold the record open for 90 days to submit additional evidence and arguments was received prior to the Board decision, and whether the decision complied with the holding in *Bryant v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 1953 (Oct. 26, 2020).

Appellant's claim for DIC was remanded for further development in a January 7, 2019 Board Decision. (R. at 100-08). On February 12, 2019, a

Supplemental Statement of the Case (SSOC) was sent as well as a letter indicating that Appellant failed to submit evidence requested in the previous Board remand within the prescribed period. (R. at 74; 75-80). Appellant was notified on March 18, 2019 that the appeal was returned to the Board, and was informed that she had 90 days from the date of the letter or until the Board issued a decision (whichever came first), to submit additional evidence and argument. (R. at 73).

Appellant submitted a letter dated April 3, 2019, requesting that the record be held open for 90 days from March 18, 2019, for the submission of a written brief and any additional evidence. (R. at 57 (57-58)). According to USPS tracking, the letter was delivered on April 9, 2019. (R. at 29). The envelope is stamped as being inspected (x-rayed) by the VA mailroom on April 9, 2019, while the letter itself is stamped as being received by the VA mailroom on April 11, 2019. (R. at 57-58). The Board decision was issued on April 10, 2019. (R. at 64-70)).

Under the recent decision in *Bryant v. Wilkie*, the Court held that “when an appellant notifies VA that he or she intends to submit additional argument or evidence to the Board during the period specified in § 20.1304(a) [amended & renumbered §20.1305(a) eff. 2/19/2019], principles of fair process prohibit the Board from issuing an adverse decision until it either receives that argument or evidence or until 90 days have elapsed since mailing the § 20.1304(a) notice.” *Bryant*, 2020 U.S. App. Vet. Claims LEXIS 1953 *2 (Oct. 26, 2020). Here, the Board did not address the April 2019 letter, in which Appellant requested that the record be held open for the full 90 days so that she could submit additional

evidence and argument. Remand is required for the Board to address whether the April 2019 letter from Appellant was received prior to the Board's decision, and if so, provide fair process to Appellant. See *id.* at *13-14.

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 matters being remanded, except the parties' right to appeal the Court's order implementing this 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 JMR 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)). 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*, 1 Vet.App. at 397. Appellant is entitled to submit additional evidence and argument regarding her claims. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam). In any subsequent decision, the Board shall provide an adequate statement of reasons or bases for its findings and conclusions on all

material issues. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). The terms of this JMR are enforceable on remand. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Secretary shall provide these claims expeditious treatment, as required by 38 U.S.C. § 7112. Finally, the Board shall incorporate copies of this JMR and any Court order relating to it into Appellant's file before VA.

WHEREFORE, the parties move the Court to enter an order vacating the April 10, 2019, decision of the Board that denied entitlement to service connection for the cause of the Veteran's death for purposes of entitlement to DIC benefits, and remanding for readjudication consistent with the foregoing.

Respectfully submitted,

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Date: February 3, 2021

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