

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

CHARLES A. SMITH,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 20-4843
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. Rules 27(a) and 45(g), Appellant and Appellee, by and through their undersigned counsel, respectfully move this Court to issue an order to vacate and remand the March 16, 2020, Board of Veterans' Appeals (Board) decision that denied Appellant's claims of entitlement to: (1) service connection for hypertension, to include as due to herbicide agent exposure; (2) service connection for congestive heart failure, to include as due to herbicide agent exposure; (3) service connection for diabetes mellitus type II, to include as due to herbicide agent exposure; (4) service connection for stroke, to include as due to herbicide agent exposure; and (5) service connection for atrial fibrillation, to include as due to herbicide agent exposure. (Record (R.) at 5-15) (March 2020 Board Decision).

BASIS FOR REMAND

The parties agree that vacatur and remand are warranted because the Board erred when it failed to provide an adequate statement of reasons or bases for its decision. 38 U.S.C. § 7104(d)(1) (2019); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Specifically, the Board failed to consider certain evidence when deciding Appellant's claim. See (R. at 8-15); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) (holding that the Board must analyze the probative value of the evidence, account for that which it finds persuasive or unpersuasive, and explain the basis of its rejection of evidence materially favorable to the claimant).

In its decision, the Board based its analysis of Appellant's entitlement to service connection solely on his service at Uda Poa Air Base in Thailand. (R. at 10-12). However, Appellant has asserted that he also served at U-Tapao Royal Thai Air Force Bases (RTAFBs) in Thailand. (R. at 2009) (February 2015 Statement in Support of Claim); see (R. at 10). Though the Board noted this assertion, it failed to provide any analysis on whether Appellant's purported service at U-Tapao RTAFB could establish entitlement to service connection for the claimed disabilities. *Compare* (R. at 10) *with* (R. at 11-12). In fact, the Board *only* analyzed Appellant's claim based upon service at Uda Poa Air Base, despite his assertions of service at U-Tapao. (R. at 11-12). The Board's failure to address Appellant's assertion of service at U-Tapao RTAFB renders its statement of reasons or bases inadequate and warrants remand. *Caluza*, 7 Vet.App. at 506.

The parties agree that this joint motion for remand 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 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 motion.

Upon remand, Appellant may submit additional evidence and argument. See *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). "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 shall 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). The terms of this joint motion are enforceable on remand. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). 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. 38 U.S.C. § 7104(d)(1) (2020); *Gilbert*, 1 Vet.App. at 49.

The Board shall incorporate copies of the Court's Order and this joint motion into the record. The Secretary shall afford this case expeditious treatment. 38 U.S.C. § 7112 (2020).

WHEREFORE, the parties request that the Court enter an order vacating and remanding the March 16, 2020, Board decision that denied service connection for hypertension, congestive heart failure, diabetes, stroke, and atrial fibrillation in accordance with the foregoing.

Respectfully submitted,

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