

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

LADELL G. PRESTON,

Appellant,

V.

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee.

Vet. App. 21-0140

JOINT MOTION FOR REMAND

Pursuant to U.S. Court of Appeals for Veterans Claims (Court) Rules 27(a) and 45(g), Appellant, Ladell G. Preston, and Appellee, Denis McDonough, Secretary of Veterans Affairs (Secretary), by and through their representatives, respectfully move this Court to vacate and remand, the September 15, 2020, decision of the Board of Veterans' Appeals (Board), which denied entitlement to an earlier effective date prior to March 19, 2009, for a total disability rating (TDIU). (Record (R.) at 5 (2-10) (September 2020 Board decision)).

BASES FOR REMAND

The parties agree the Board erred when it failed to provide an inadequate statement of reasons or bases for its determinations. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

Specifically, the parties agree that the Board erred when it listed evidence prior to March 2009 in a parenthetical but failed to explain *why* that evidence does

not warrant referral for extraschedular consideration of TDIU. (R. at 7-8). The parties agree that the Board's decision failed to comply with the remand instructions contained in the Court's January 2020 Memorandum Decision, which ordered an analysis of the relevant facts, such as Appellant's inability to squat or knee, and difficulty bending, standing for long periods of time and walking long distances impair his ability to perform activities required for substantially gainful employment. (R. at 76-77 (73-78)); *Stegall v. West*, 11 Vet. App. 268, 271 (1998). Upon remand, the Board is directed to conduct an analysis of the relevant facts, and provide new, adequate reasons and bases, explaining its decision whether to refer the claim for extraschedular consideration, in compliance with the Court's instructions. *Id.*

The parties agree that this joint motion 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 joint motion. Pursuant to Rule 41(c), 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.

On 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 v. Derwinski*, 1 Vet.App. 394, 397 (1991). Appellant shall be free to submit additional evidence and/or arguments in support of his claim. *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*, 1 Vet.App. at 397). Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. See *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

In any subsequent decision, the Board shall provide an adequate statement of reasons or bases for its decision on all material issues of fact and law. See 38 U.S.C. § 7104(d)(1). The terms of this joint motion for remand are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Board shall incorporate copies of this joint motion and the Court’s order into Appellant’s record. The Secretary will afford this case expeditious treatment as required by 38 U.S.C. § 7112.

CONCLUSION

Considering the foregoing, the parties request that the Court vacate the September 15, 2020, Board decision which denied entitlement to an earlier

effective date prior to March 19, 2009, for TDIU, and remand the issue for readjudication consistent with this motion.

Respectfully submitted,

FOR APPELLANT:

DATED: July 14, 2021

/s/ Alexandra Curran
ALEXANDRA CURRAN
Appellate Attorney
Attig | Curran | Steel, PLLC
P.O. BOX 250724
Little Rock, AR 72225
1 (866) 627-7764 (ext. 5)

FOR APPELLEE:

RICHARD A. SAUBER
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Christopher W. Wallace
CHRISTOPHER W. WALLACE
Deputy Chief Counsel

/s/ Katerina M. Georgiev
KATERINA M. GEORGIEV
Appellate Attorney
Office of General Counsel (027G)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6981