

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

RALPH SANTOS,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 21-0394
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g)(2), Appellant, Ralph Santos, and Appellee, Denis McDonough, Secretary of Veterans Affairs (Secretary), by and through their attorneys, respectfully move the Court to vacate that portion of the October 1, 2020, Board of Veterans' Appeals (Board) decision that denied entitlement to an effective date earlier than May 24, 2019, for the award of a 70% rating for posttraumatic stress disorder (PTSD), and to remand the matter for further development and readjudication. [Record Before the Agency (R.) at 5-11].

Appellant does not pursue the part of the Board's decision that dismissed as moot the issue of entitlement to an earlier effective date for the award of basic eligibility for dependents educational assistance, and thus, it should not be disturbed. *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015).

BASIS FOR REMAND

The parties agree that vacatur and remand are warranted because the Board erred when it provided an inadequate statement of reasons or bases, thus necessitating remand for further consideration. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57-58 (1990).

Here, the Board erred in failing to provide reasons or bases for its finding that the evidence of record does not show Appellant's PTSD met the criteria for 70% in the year prior to the date of the May 24, 2019 claim. [R. at 7-9]. The Board's findings and conclusions on material issues of fact and law require a written statement of its reasons or bases. 38 U.S.C. § 7104(d)(1); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (per curiam order). Generally, in a claim for increased compensation, the effective date may date back as much as one year before the date of the application for increase if it is factually "ascertainable that an increase in disability had occurred" within that timeframe. 38 U.S.C. § 5110(b)(2); 38 C.F.R. § 3.400(o)(2); see also *Gaston v. Shinseki*, 605 F.3d 979 (Fed. Cir. 2010); *Hazan v. Gober*, 10 Vet. App. 511 (1997).

In this case, the Board outlined the facts of case, particularly the February 2018 and June 2019 VA examinations. [R. at 8-9]. Then, the Board noted that VA treatment records from 2018 to 2019 showed therapy sessions, medication, and that Appellant experienced symptoms of irritability and anxiety, but presented no homicidal/suicidal intent or ideation. [R. at 9]. After which, the Board concluded that, "[r]eview of the evidence of record does not show that it was factually

ascertainable that [Appellant's] service-connected PTSD met the criteria for the assignment of a 70[%] rating in the year prior to the date of claim, as his symptoms did not more nearly approximate symptoms such as those demonstrating a higher level of impairment. Therefore, entitlement to an effective date earlier than May 24, 2019 for the assignment of a 70[%] disability rating for PTSD is denied. 38 U.S.C. § 5110; 38 C.F.R. § 3.400." *Id.*

It is well settled that the Board is not permitted to merely list the relevant evidence and then state a conclusion. *See Abernathy v. Principi*, 3 Vet.App 461, 465 (1992) (holding that merely listing the relevant evidence is not adequate to fulfill the Board's obligation to provide a statement of reasons or bases for its decision); *see also Dennis v. Nicholson*, 21 Vet.App. 18, 22 (2007) (holding that, "the Court has long held that merely listing the evidence before stating a conclusion does not constitute an adequate statement of reasons or bases"). Here, the Board recited the evidence then stated its conclusion. [R. at 8-9]. As a result, the Board did not explain why the evidence, in the year prior to May 24, 2019, did not show Appellant's symptoms more "nearly approximate[d] symptoms such as those demonstrating a higher level of impairment." [R. at 9]; *see Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 117 (Fed. Cir. 2013).. On remand, the Board must provide an analysis of whether an earlier effective date for a 70% rating for PTSD is factually ascertainable in the year prior to May 24, 2019.

The parties 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 that, pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and any right to appeal to the U.S. Court of Appeals for the Federal Circuit of the Court's order on this JMPR. The parties respectfully ask that the Court enter mandate upon the granting of this 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*, 1 Vet.App. at 57. The Board is still expected reexamine the evidence of record and conduct a critical examination of the justification for the previous decision. See *Andrews v. McDonough*, --- Vet.App. ---, 2021 U.S. App. Vet. Claims LEXIS 972, 19-20 (May 28, 2021). 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 the portion of the October 1, 2020, Board decision that denied entitlement to an

effective date earlier than May 24, 2019, for the award of a 70% rating for PTSD, and remand the matter for action consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

Date: November 4, 2021

/s/ Haley E. Smith

HALEY E. SMITH

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

FOR APPELLEE:

RICHARD A. SAUBER

General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ Carolyn F. Washington

CAROLYN F. WASHINGTON

Deputy Chief Counsel

Date: November 4, 2021

/s/ Timothy A. Campbell

TIMOTHY A. CAMPBELL

Appellate Attorney
Office of General Counsel (027D)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-6793

Attorneys for Appellee
Secretary of Veterans Affairs