

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

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| HENRIETTA M. WOOD, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Vet. App. No. 18-3981 |
| |) | |
| ROBERT L. WILKIE, |) | |
| Secretary of Veterans Affairs, |) | |
| |) | |
| Appellee. |) | |

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27 and 45, Appellant and Appellee, by and through their undersigned counsel, respectfully move this Court to issue an order vacating and remanding the April 17, 2018, decision of the Board of Veterans' Appeals (Board or BVA), which denied the claims of entitlement to service connection for a heart disability and diabetes mellitus (DM) made by John W. Wood (Veteran). (Record (R.) at 1-15). The Veteran died in January 2016, and the Appellant is his surviving spouse. (R. at 7).

BASIS FOR REMAND

In rendering its decision, the Board is required to include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented in the record. See 38 U.S.C. § 7104(d)(1). That statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. See *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000); *Allday v. Brown*, 7 Vet.App.

517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to Appellant. See *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Additionally, in rendering its decision, the Board must provide a statement of reasons and bases that addresses all issues raised by the claimant or the evidence of record, *Robinson v. Mansfield*, 21 Vet.App. 545, 552 (2008), and discuss all provisions of law and regulation where they are made “potentially applicable through the assertions and issues raised in the record,” *Schafrath v. Derwinski*, 1 Vet.App. 589 (1991). The Board errs when it does not address arguments or assertions presented by a claimant. See *Smith v. Derwinski*, 2 Vet.App. 137, 141 (1992); see also *EF v. Derwinski*, 1 Vet.App. 324, 326 (1991).

In this case, the Board noted that the Veteran claimed he was exposed to an herbicide agent in service and that it caused his heart disability and DM. (R. at 9). The Board then noted that Appellant served in Thailand and that:

Under the procedures outlined in the M21-1MR, if a Veteran served at the Royal Thai Air Force Bases of U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat or Don Muang during the Vietnam Era as a security policeman, security patrol dog handler, member of the security police squadron, or otherwise served near the air base perimeter, as shown by evidence of daily work duties, performance evaluations, or other credible evidence, then herbicide exposure may be conceded on a direct or facts-found basis. See VBA Manual M21-1, IV.ii.1.H.5.b.

Id. The Board then determined that, *inter alia*, “the Veteran [was] not shown to have been exposed to an herbicide agent during his military service. He is not shown to have duties involving the perimeter of the air base” and then denied his claims. (R. at 11) (underline added). However, the parties agree that the Board did not support its findings with any adequate analysis, and as such, the Board did not provide a statement of the reasons or bases for its decision. See *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 59.

The parties agree that remand is warranted because the Board did not address the explicit argument that the Veteran served on the Takhli air base on the flight line, which meant he worked near the perimeter of the base and was thus exposed to herbicides. Here, Appellant, via her representative, submitted a February 23, 2018, “Response to VCAA Letter” and specifically argued that the M-21 gave special consideration in relation to herbicide exposure to veterans that worked near the perimeter of a Thailand military base and that this applied to the Veteran because:

The Veteran was a weapons mechanic and weapons maintenance Supervisor while serving at Takhil and his performance reports note work on the flight line and accommodations for loading and unloading aircraft. Recent BVA decision notes that service of flight line is service on the perimeter [and] attached your reference [is that decision].

(R. at 57 (51-57)). Additionally, on March 6, 2018, Appellant, via her representative, submitted a “Response to SSOC” and again argued that the M-21 gave special consideration in relation to herbicide exposure to veterans that

worked near the perimeter of a Thailand military base and that this applied to the Veteran since he worked on the flight line near the perimeter of the base. (R. at 19). Because Appellant's argument was not addressed by the Board, the parties agree that remand is warranted for such consideration in the first instance. *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Additionally, upon remand, the Board must consider all applicable laws and regulations, analyze the credibility and probative value of the evidence, to include lay evidence, account for the evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. See 38 U.S.C. § 7104; *Dela Cruz v. Principi*, 15 Vet. App. 143, 149 (2001) (finding that the Board is not required to discuss all evidence of record but must discuss relevant evidence); See *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006) (noting Board must determine whether lay evidence is credible in and of itself); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994). The requirement of providing adequate reasons and bases is a statutory mandate that the BVA must adhere to in adjudicating a claim. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

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 matters being remanded.

Upon remand, Appellant will be free to submit additional evidence and argument on the questions at issue, and the Board shall “reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case.” See *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991); *Kutscherousky v. West*, 12 Vet.App. 369 (1999) and *Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992). 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). Before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof and an opportunity to respond thereto. See *Thurber v. Brown*, 5 Vet.App. 119 (1993); *Austin v. Brown*, 6 Vet.App. 547 (1994). VA must also provide for the expeditious treatment of this claim on remand from the Court. See 38 U.S.C. §§ 5109B, 7112.

WHEREFORE, the parties respectfully move the Court to enter an order vacating and remanding the April 17, 2018, Board decision in accordance with the contents of this motion, applicable statutory and regulatory provisions, and decisions of this Court.

Respectfully submitted,

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