

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

GORDON A. GRAHAM,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 12-1980
)	
ERIC K. SHINSEKI,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Court of Appeals for Veterans Claims (Court) Rules 27(a) and 45(g), the parties respectfully move the Court to vacate and remand that part of the May 17, 2012, Board of Veterans' Appeals (BVA or Board) decision that denied entitlement to an effective date earlier than February 23, 2007, for the grant of VA benefits based on service connection for hepatitis C.¹ Record Before the Agency (R.) at 6.

¹ The Board also denied entitlement to an effective date earlier than March 31, 1994, for the assignment of a 10% disability rating for service-connected tinnitus. Record Before the Agency [R]. at 6. Additionally, in a second decision also dated May 17, 2012, the Board determined that there was not clear and unmistakable error (CUE) in a March 1992 Board decision which denied entitlement to VA benefits based on service connection for a bilateral hip disorder and a low back disorder. [R. at 18-19]. However, Appellant does not appeal those portions of the Board decisions and therefore he should be deemed to have abandoned any potential challenges thereto and the Board decision should be affirmed as a matter of law. See *Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997) (claims not addressed by the appellant in pleadings before the Court found to be abandoned).

BASIS FOR REMAND

The parties agree that vacatur and remand are required because the Board erred by failing to provide an adequate statement of reasons or bases to support its decision. In order to render an adequate decision, the Board must consider all relevant evidence of record and discuss all “potentially applicable” laws and regulations. See 38 U.S.C. § 7104; *e.g. Majeed v. Principi*, 16 Vet.App. 421, 431 (2002); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56 (1990). Here, the Board’s statement of reasons or bases for its finding that the November 1994 Regional Office (RO) decision became final was inadequate insofar as the Board failed to discuss whether the January 1995 Statement of the Case (SOC) was “complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans’ Appeals.” See 38 C.F.R. § 19.29.

In support of its determination that the November 1994 RO decision denying entitlement to VA benefits based on service connection for hepatitis C became final, the Board explained that although Appellant submitted a timely notice of disagreement (NOD) in December 1994, an SOC was issued in January 1995 which included a letter notifying Appellant “that if VA did not hear from him in 60 days, it would be assumed that he did not intend to complete his appeal, and VA would close the record.” [R. at 9; see R. at 3374 (3373-3384)]. The Board additionally explained that following the issuance of the SOC, “there was no communication or correspondence from [Appellant] which, even liberally, could be interpreted as an appeal of the November 1994 rating decision, or a

claim, or application to reopen the previously denied claim of service connection for hepatitis until he submitted a claim to reopen in February 2007.” *Id.* As such, the Board concluded that because Appellant “never submitted any unadjudicated formal petition to reopen the claim for service connection for hepatitis C subsequent to the January 1995 [SOC] and prior to February 23, 2007, [and] nor is there any prior communication in the record that could be considered an informal claim for VA compensation for the same . . . February 23, 2007, is the earliest possible effective date.” [R. at 10].

The parties agree, however, that the Board’s finding that the November 1994 RO decision became final is not supported by an adequate statement of reasons or bases because the Board failed to explain how the aforementioned January 1995 SOC comports with that portion of § 19.29 which provides that the SOC must be “complete enough to allow the appellant to present written and/or oral arguments before the [BVA].” In this regard, a review of the January 1995 SOC reveals that Appellant was informed that VA was “reviewing the additional records that you submitted with your appeal and we will notify you of our decision as soon as it is reached.” [See R. at 3383]. Given that some of the records submitted by Appellant with his December 1994 NOD pertained to the hepatitis C claim, (R. at 3385-3391), it is unclear how the SOC clearly conveyed that the denial of that claim was final. The inherently contradictory information provided by the SOC does not render it complete enough to allow Appellant to present an appropriate response for it is unclear whether further adjudication was to take

place with respect to all or some of his claims.² See 38 C.F.R. § 19.29. As such, the parties agree that the Board's finding that the November 1994 RO decision was final is not supported by adequate reasons or bases. See *Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.").

On remand, Appellant is entitled to submit additional evidence and argument. See 38 C.F.R. § 20.1304; *Kutcherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam). 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, 56-57 (1990). Finally, the Board shall ensure expeditious treatment of Appellant's claims on remand. See 38 U.S.C. § 7112; *Drosky v. Brown*, 10 Vet.App. 251, 257 (1997).

WHEREFORE, the parties respectfully move the Court to issue an Order vacating that part of the May 17, 2012 Board decision that denied entitlement to

² The January 1995 SOC explicitly informed Appellant that further development was to take place with respect to his claim for an increased evaluation for tinnitus. [R. at 3383]. However, as the Board noted, an SSOC was not issued subsequent to that development and as such, the November 1994 RO decision with respect to the claim for tinnitus did not become final. [See R. at 12]. Appellant has since been granted entitlement to an effective date of March 31, 1994, for the grant of entitlement to benefits based on service connection for tinnitus. [See R. at 924-936].

an effective date earlier than February 23, 2007, for the grant of service connection for hepatitis C and remanding this appeal for further action consistent with the foregoing.

Respectfully submitted,

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DATE: April 2, 2013