

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

<b>WILLIE J. THREATT, JR.,</b>	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 15-0835
	)	
<b>DAVID J. SHULKIN, M.D.,</b>	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**JOINT MOTION FOR REMAND**

Pursuant to U.S. Court of Appeals for Veterans Claims (Court) Rules 27(a) and 45(g), Appellant, Willie J. Threatt, Jr., and Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, by and through their representatives, respectfully move this Court to issue an order vacating and remanding the Board of Veterans' Appeals (Board or BVA) decision of February 20, 2003, which denied Appellant's claims of entitlement to service connection for right hip, left hip, and back disabilities.

The parties further note that the July 2014 Board decision (See R. at 2-17) should be vacated and dismissed as it is void in light of the fact that it depended (under the proposition of new and material claims) on the finality of the issues that were adjudicated in the February 2003 Board decision

that, as a result of equitable tolling, were not in fact final, and, as noted above, are being remanded based on the agreement in this Motion<sup>1</sup>.

### **BASIS FOR REMAND**

The parties agree that remand is warranted because the Board, in making its decision, erred by not providing an adequate statement of reasons or bases for its decision.

In rendering its decision, the Board is required to provide a written statement of its “findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.” 38 U.S.C. § 7104(d)(1). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board may commit remandable error when it fails to provide an adequate statement of its reasons or bases. *Id.*

#### ***Right Hip Claim***

Here, the Board concluded that “a right hip disability unequivocally pre-existed service, and thus service connection for the pre-existing right hip disability would be appropriate only if the condition was aggravated by service.” R. at 1594 (1586-99). In reaching its determination, the Board

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<sup>1</sup> In a May 2016 order, the Court found that equitable tolling was warranted and that Appellant has timely appealed the February 2003 Board decision.

noted that “the veteran’s service medical records show that a right hip disability was being treated by Dr. Ashby in the months immediately preceding active duty, and the condition was noted on the entrance examination in 1968.” *Id.*

The parties note, however, that Appellant’s entrance examination and report in 1968 only document a painful right hip. See R. at 1906 (1905-06); R. at 1936 (1935-36). In this regard, the parties further note that pain alone is not and has never been a condition for which a veteran can or could receive VA disability compensation for as a matter of law. More specifically, the Court has explained that decisions in *Winn* and *Terry*, which were decided either before or at the time of the February 2003 Board decision in this case, “stand for the proposition that when VA, by regulation, provides that disability compensation is not permitted under section 1110 for a particular condition, the excluded condition can never amount to a ‘defect’ within the meaning of section 1111.” *McKinney v. McDonald*, 28 Vet.App. 15, 28-29 (2016).

Because the Board did not consider Appellant’s notation of right hip pain at the time of his induction examination in light of the caselaw as noted above, the parties agree that remand is warranted.

### ***Left Hip and Back Claims***

To this end, the Board found that “. . . duty to assist provisions of the law have been satisfied.” R. at 1594 (1586-99). In reaching its conclusion, the Board explained that “a VA examination has been provided” and that “given the state of the evidence, there are no proven predicate facts which would enable an examiner to give a competent medical opinion on whether current problems are related to service, and thus another VA examination with medical nexus opinion is not warranted.” *Id.*

The parties note, however, that Appellant’s left hip and back claims were denied because there was no nexus to an inservice event/injury. See R. at 1596-97 (1586-99). In this regard, Appellant had testified that he fell from an obstacle in basic training and injured his right hip, leading to his left hip and back disorders. See R. at 1854-57, 1874, 1886-89 (1886-89). The December 1996 VA examiner also recorded Appellant’s history of a fall in basic training. See R. at 1886 (1886-89).

While the Board acknowledged the December 1996 examination report in its decision, it did not make any findings regarding the competency or credibility of Appellant’s lay testimony regarding his injury in basic training. Moreover, the December 1996 VA examiner, despite noting the fall, did not provide an opinion as to whether Appellant’s current conditions were related to that fall. Given the aforementioned, the parties agree that remand is warranted for the Board to discuss whether a new

exam is warranted in light of Appellant's lay testimony regarding a fall in basic training. See *McLendon v. Nicholson*, 20 Vet.App. 79, 85-86 (2006).

On remand, Appellant will be free to submit additional evidence and argument regarding his claim and the Board may develop additional information, as deemed appropriate. See *Kutscherousky v. West*, 12 Vet.App. 369 (1999); *Colon v. Brown*, 9 Vet.App. 104, 108 (1996); *Holland v. Brown*, 6 Vet.App. 443 (1994); *Quarles v. Derwinski*, 3 Vet.App. 129 (1992).

Additionally, if the Court grants this motion, the Board shall obtain a copy of the Court's order and this joint motion, and incorporate them into the Veteran's claims file for appropriate consideration in subsequent decisions on this claim.

Finally, before relying on any additional evidence developed, the Board should ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. See *Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1983). The Board shall also afford Appellant's claim expeditious treatment, as required by 38 U.S.C. § 7112.

### **CONCLUSION**

The parties respectfully move this Court to issue an order vacating and remanding the Board's decision of February 20, 2003, which denied

Appellant's claims of entitlement to service connection for right hip, left hip, and back disabilities.

Respectfully submitted,

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