IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

RICKEY R. MITCHELL,	)	
	)	
Appellant,	)	
	)	Vet. App. No. 18-0004
v.	)	
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION TO VACATE; REVERSE, IN PART;
REMAND, IN PART; AND DISMISS, IN PART

Pursuant to VET. APP. R. 27(a) and 45(g), the parties respectfully move this Court for an order that (1) vacates the Board's November 9, 2017, decision; (2) reverses the Board's finding that the issue of Appellant's entitlement to an effective date earlier than November 25, 1996, for the grant of service connection for posttraumatic stress disorder (PTSD) was not on direct appeal; (3) remands the issue of Appellant's entitlement to an effective date earlier than November 25, 1996, for PTSD for initial adjudication; (4) remands the issue of Appellant's entitlement to a rating in excess of 30% for PTSD for the period from November 25, 1996, to May 17, 2006, for readjudication; (5) dismisses the appeal of the Board's finding that the issue of entitlement to rating in excess of 70% as of May 18, 2006, was not on appeal; (6); dismisses the appeal of the Board's determination that a March 8, 1997, VA Regional Office (RO) rating decision did not contain clear and unmistakable error (CUE) on the basis of a failure to grant

service connection for a psychiatric disability; and (7) dismisses the appeal of the Board's determination that an August 10, 1994, VA RO rating decision did not contain CUE based on a failure to adjudicate Appellant's entitlement to service connection for a nervous condition on a direct basis.

BASES FOR REVERSAL AND REMAND

The Court should reverse the Board's finding that the issue of Appellant's entitlement to an effective date earlier than November 25, 1996, for the grant of service connection for PTSD was not on direct appeal and should remand that issue for initial adjudication. On, April 23, 2014, the parties entered into a stipulated agreement that expressly allowed Appellant to appeal the effective date assigned for PTSD. R. at 1044-49; *see Mitchell v. Shinseki*, Vet. App. No. 13-3240 ("Joint motion to terminate appeal/settlement agreement"). In that agreement, "[t]he Appellee agree[d] to assign an effective date of November 25, 1996[,] for Appellant's award of service connection for [PTSD]," and further agreed that, "should Appellant appeal the disability evaluation or the effective date assigned by the agency of original jurisdiction as a result of this settlement, his appeal will be under the same BVA docket number (07-39 349) assigned to him for the October 30, 2013, decision, provided he notifies the BVA of this provision at the time of such appeal." R. at 1047 (1044-49) / Stipulated Agreement, Paragraph 1 (emphasis added).

In September 2014, the agency of original jurisdiction (AOJ) issued a decision that assigned Appellant an effective date of November 25, 1996, for

PTSD. R. at 1062-74. In October 2014, Appellant filed a Notice of Disagreement (NOD) with the assigned effective date. R. at 968.

The Board found that the issue of the effective date assigned for the grant of service connection for PTSD was "not on appeal" and was **"**conclusively resolved in an April 2014 Stipulated Agreement and the Court's subsequent April 2014 dismissal, with prejudice of an appeal relating to the assignment of an effective date pursuant to the terms of the Stipulated Agreement." R. at 5 / Board decision at 4. However, the parties agree that the Board clearly erred in making that determination and that its finding should be reversed. Reversal is the appropriate remedy "when the only permissible view of the evidence is contrary to the Board's decision." *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (citing *Johnson v. Brown*, 9 Vet.App. 7, 10 (1996)). Here, the only permissible view of the evidence is contrary to the Board's finding that Appellant was precluded from appealing the November 25, 1996, effective date assigned in the AOJ's September 2014 rating decision. *See* R. at 1047 (April 23, 2014, Stipulated Agreement, Paragraph 1); *see also* R. at 1068 (noting that VA Form 4107, "Notice of Appellate Rights" was attached to the AOJ's September 2014 decision assigning the effective date of November 25, 1996, for PTSD). As a result, the parties move the Court for an order that reverses the Board's clearly erroneous finding that the issue of Appellant's entitlement to an effective date earlier than November 25, 1996, for PTSD was not on appeal and that remands that issue for initial adjudication. On remand, VA must determine, as part of its analysis, whether the record contains

any pending, unadjudicated claims of entitlement to service connection for a psychiatric disability dated prior to November 25, 1996.

In addition, the parties agree that the Board erred by failing to provide an adequate statement of reasons or bases for its determination that Appellant was not entitled to a rating in excess of 30% for PTSD for the period from November 25, 1996, to May 17, 2006. *See* R. at 21-28 / Board decision at 20-27. In part, the Board reasoned that medical records "up to and including May 2006" medical records supported its finding that a rating in excess of 30% was not warranted for the period from November 25, 1996, to May 17, 2006. R. at 22 / Board decision at 21 (emphasis added); *see* R. at 4463-75 (March 11, 2006, VA "Mental Hygiene Clinic Note" and "Clinic Progress Note). However, the cited May 2006 VA medical records were previously found to support Appellant's entitlement to a 70% rating for PTSD effective May 18, 2006. *See* R. at 3018, 3025-29 (3017-35) (March 24, 2009, Decision Review Officer (DRO) decision, granting Appellant an increased rating, from 30% to 70% for PTSD effective May 18, 2006, and noting that it determined PTSD was "worse from the date of initial service connection," which, at that time, was May 18, 2006). The Board's failure to clearly explain how the May 2006 records support a 30% rating for the period from November 25, 1996, to May 17, 2006, and a 70% rating effective May 18, 2006, renders its statement of reasons or bases inadequate and warrants remand. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining that remand is the appropriate remedy 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).

Additionally, on remand, the Board should address to what extent, if any, the probative value of the January 1997 VA examination report and medical opinion are affected by VA's November 1996 adoption of the DSM-IV. *See* 61 Fed. Reg. 52,695 (Oct. 8, 1996) (final rule amending VA's Schedule for Rating Disabilities pertaining to mental disorders and adopting the DSM-IV as the basis for the nomenclature of the rating schedule for mental disorders). The January 1997 report appears to use terminology, such as "chronic neurotic depression," which was contained in the DSM III but which was eliminated in the DSM-VI. *See* R. at 4582-87 (January 21, 1997, VA PTSD examination report); *Monzingo v. Shinseki*, 26 Vet.App. 97, 107 (2012) (explaining that, even if a medical opinion is inadequate to decide a claim, it may be given some weight based upon the amount of information and analysis it contains); *see also Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) (explaining that examination reports "must be read as a whole").

BASES FOR DISMISSAL

Appellant does not contest the Board's finding that the issue of entitlement to a rating in excess of 70% beginning May 18, 2006, was not appealed and was not before the Board. *See* R. at 12 / Board decision at 11 ("The Veteran has appealed the assignment of a 30[%] rating for the period prior to May 18, 2006, but has not challenged the later ratings."); *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (emphasizing that, when an appellant abandons an issue, it

is the usual practice of the Court to decline to exercise its discretion to review it and to dismiss the appeal of that issue).

The Court should also dismiss Appellant's appeal of the Board's determination that there was no CUE in the March 8, 1997, RO rating decision that denied Appellant's claim of entitlement to service connection for PTSD based on his November 25, 1996, claim for compensation. *See* R. at 31-35 / Board decision at 30-34. The 2014 stipulated agreement, and the RO's subsequent September 2014 rating decision effectuating that stipulated agreement, ensured that Appellant was granted service connection for PTSD effective November 25, 1996. *See* R. at 1044-49 (April 2014 Stipulated Agreement); R. at 1062-74 (September 22, 2014, RO rating decision). As a result, the benefit denied in the RO's March 1997 rating decision has been granted in full and the March 8, 1997, RO rating decision has been rendered a legal nullity by subsequent proceedings. Appellant expressly waives his appeal of the Board's determination that the RO did not commit CUE by denying service connection for PTSD in the March 8, 1997, RO rating decision, and the parties move the Court to dismiss that portion of Appellant's appeal. *See Pederson*, 27 Vet.App. at 285.

In addition, the Court should dismiss Appellant's appeal of the Board's determination that there was no CUE in the August 10, 1994, RO decision in denying Appellant service connection for a nervous condition on a direct basis. *See* R. at 35-38 / Board decision at 34-37. In pertinent part, the RO's 1994 decision explained that Appellant claimed service connection for a nervous

condition as a result of exposure to herbicides in service, but that his condition could not be "granted as a result of exposure to herbicides" and that "there is no other basis for service connection." R. at 4657-58 (4657-58, 4680-82). The RO expressly denied service connection for a nervous condition "as a result of exposure to herbicides" and "[i]n addition" because service connection was not warranted under the provisions of 38 C.F.R. § 3.303 or 38 C.F.R. § 3.309. R. at 4680, 4682 (4657-58, 4680-82); *see* R. at 36 / Board decision at 35 (Board finding that "the August 1994 rating decision specifically denied service connection for that condition under both 38 C.F.R. § 3.309 (presumptive service connection due to Agent Orange exposure) and 38 C.F.R. § 3.303 (ordinary service connection)"). Appellant expressly waives his appeal of the Board's determination that the RO did not commit CUE by denying service connection for a psychiatric condition on a direct basis in its August 10, 1994, rating decision, and the parties move the Court to dismiss that portion of Appellant's appeal. *See Pederson*, 27 Vet.App. at 285.

CONCLUSION

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 issue being remanded except the parties' right to

appeal the Court's order implementing this joint motion. The parties agree to unequivocally waive any right to appeal the Court's order on this motion and respectfully ask that the Court enter mandate upon the granting of this motion.

Appellant is entitled to submit additional evidence and argument on the remanded issues. *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 v. Derwinski*, 1 Vet. App. 394, 397 (1991) (alteration in original). Therefore, on remand, the Board is expected to "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*, 1 Vet.App. at 397. The Board shall incorporate copies of this joint motion and the Court's order granting it into Appellant's VA file for appropriate consideration in subsequent decisions on the claims, and the Secretary shall ensure this case is afforded expeditious treatment as required by 38 U.S.C. § 7112.

WHEREFORE, the parties move this Court for an order that (1) vacates the Board's November 9, 2017, decision; (2) reverses the Board's finding that the issue of Appellant's entitlement to an effective date earlier than November 25, 1996, for the grant of service connection for PTSD was not on direct appeal; (3) remands the issue of Appellant's entitlement to an effective date earlier than November 25, 1996, for PTSD for initial adjudication; (4) remands the issue of Appellant's entitlement to a rating in excess of 30% for PTSD for the period from November

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Respectfully submitted,

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