

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

ROOSEVELT HENDERSON,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 18-3880
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. Rules 27, and 45(g)(2), Appellant and Appellee, through undersigned counsel, move the Court for an Order vacating and remanding the July 18, 2018, decision of the Board of Veterans' Appeals (BVA or Board), which denied entitlement to service connection for an acquired psychiatric disorder, to include post traumatic stress disorder (PTSD), anxiety, and depression. (Record (R.) at 4-8).

BASIS FOR REMAND

As part of its duty to assist, the Department of Veterans Affairs (VA) is required to obtain records of treatment at VA facilities and any relevant records held by any other Federal department or agency that the claimant adequately identifies and authorizes VA to obtain. 38 U.S.C. § 5103A(c); *Turner v. Shulkin*, 29 Vet.App. 207, 218 (2018). Under 38 U.S.C. § 5103A and 38 C.F.R. § 3.159(c)(2), VA will make as many requests as necessary to obtain relevant records from a Federal agency, and will end its efforts to obtain records from a Federal

department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. 38 C.F.R. §§ 3.159(c)(2) and (3). VA has a duty to assist all claimants in obtaining evidence necessary to substantiate a claim. 38 U.S.C. § 5103A(a)(1).

VA failed in its duty to assist in obtaining outstanding service records. In the decision on appeal, the Board determined that Appellant did not give enough information regarding the timing of his in-service stressor to complete a search of his service records. (R. at 7 (4-8)). However, in a February 2016 Statement in Support of Claim, Appellant informed VA that he had served as a combat engineer with C Company, 35th Engineers in Fort Lewis, Washington when he witnessed a fellow soldier drowning. (R. at 68 (68-69)). A March 2015 private treatment record also notes that Appellant reported that he experienced this stressor in Ft. Lewis, Washington, where he had basic training and six weeks of additional training and Appellant was diagnosed with PTSD. (R. at 385-86). He was also diagnosed with PTSD based on this stressor in February 2016. (R. at 73). Appellant had active duty service from March 1951 to February 1953. (R. at 354). In *Gagne v. McDonald*, 27 Vet.App. 397, 403-04 (2015), Court determined that the adequate identification prong of the duty to assist was satisfied when VA was provided with information sufficient to locate records pertaining to a claimed in-service stressor, including his unit, the circumstances of the claimed stressor, and a 13-month timeframe in which the stressor occurred. In this case, Appellant has identified his period of basic training and six weeks of additional training in Ft. Lewis as the

period when he witnessed the PTSD stressor of seeing a fellow soldier drowning. (R. at 68, 385-86). Appellant has identified a specific period of time that could be searched by VA in order to verify stressor information and remand is warranted for VA to comply with the duty to assist.

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 matter 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 joint motion and respectfully ask that the Court enter mandate upon the granting of this motion.

The terms of this joint motion are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006); *see also Stegall v. West*, 11 Vet.App. 268, 271 (1998). Appellant is entitled to submit additional evidence and argument, and the Board may seek any other evidence it feels is necessary to the timely resolution of Appellant's claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). "The Court has held that '[a] remand is meant to entail a critical examination of the justification for the decision'" and the BVA must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Kahana v. Shinseki*, 24 Vet.App. 428, 437 (2011)

(quoting *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991)). Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument and evidence. See *Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993). Upon the Court's grant of this JMPR, the Board shall obtain copies of this motion and the Court's order, and incorporate them into Appellant's VA file for appropriate consideration in subsequent decisions. Finally, the Secretary "shall take such actions as may be necessary to provide for the expeditious treatment" of this claim. 38 U.S.C. §§ 5109B, 7112.

WHEREFORE, the parties respectfully request that the Court enter an order vacating and remanding the July 18, 2018, Board decision, which denied entitlement to service connection for an acquired psychiatric disorder, to include PTSD, anxiety, and depression, for further adjudication consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

May 1, 2019
DATE

/s/ Timothy R. Franklin
TIMOTHY R. FRANKLIN
Law Office of Sean Kendall
PO Box N
Boulder, CO 80306-1876
(303) 449-4773

FOR APPELLEE:

JAMES M. BYRNE

General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ James B. Cowden

JAMES B. COWDEN

Deputy Chief Counsel

May 1, 2019

DATE

/s/ Lavinia A. Derr

LAVINIA A. DERR

Appellate Attorney

Office of the General Counsel

U.S. Department of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, D.C. 20420

(202) 632-6924

Attorneys for Appellee,
Secretary of Veterans Affairs