

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

DAVID E. SCHNABEL,)
)
 Appellant,)
)
 v.) Vet. App. No. 18-6211
)
ROBERT L. WILKIE,)
 Secretary of Veterans Affairs,)
)
 Appellee.)

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45, the parties, through their respective counsel, respectfully move the Court to vacate that part of the October 15, 2018, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for obstructive sleep apnea, and to remand that matter for appropriate development and readjudication.¹

BASIS FOR REMAND

The parties agree that vacatur, in part, and remand is warranted because the Board erred by failing to provide an adequate statement of reasons or bases

¹ The parties note that the Board's decision to award service connection for bilateral hearing loss is a favorable decision, and is beyond the Court's jurisdiction to disturb. *Hines v. Principi*, 18 Vet.App. 227, 239 (2004) ("This Court cannot controvert findings made by the Board that are not adverse to the appellant.").

for its decision to deny service connection for sleep apnea. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (U.S. 1990). Specifically, the Board erred by failing to address favorable medical evidence. *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The Board determined that Appellant's diagnosed obstructive sleep apnea was not related to his active duty service, to include a boxing accident that occurred during service that resulted in a broken nose and deviated septum. (R. at 8-9; Board decision, pg. 5-6). In reaching this determination, the Board relied on a May 2015 VA examination that concluded that Appellant's deviated nasal septum did not cause or aggravate his obstructive sleep apnea. (R. at 567-68; May 21, 2015 VAX). The May 2015 examiner also concluded that service treatment records (STRs) reported no medical issues as a result of his deviated nasal septum. (R. at 567-68.)

However, in rendering its decision, the Board failed to account for favorable medical evidence that contradicts the May 2015 opinion. Specifically, the Board failed to address the July 22, 2016, opinion of Dr. Steven J. Barrick, (R. at 447-448), and the July 22, 2016, opinion of Dr. David Anaise, (R. at 449-55). These two favorable medical opinions contradict the May 2015 opinion and state that Appellant's deviated nasal septum more likely than not caused his sleep apnea. The opinion provided by Dr. Barrick states that it was more likely than not that

Appellant's sleep apnea "was secondary to, caused by, or aggravated by his deviated septum," which was the result of the in-service boxing injury. (R. at 448). The opinion also states that "obesity is the less likely cause" of Appellant's sleep apnea and lists evidence in Appellant's STRs that show in-service complaints of breathing issues. (R. at 447-48). Additionally, Dr. Anaise opined "that is more likely than not that the veteran's sleep apnea is secondary to his deviated nasal septum which resulted from a trauma incurred during his military service." (R. at 450). The Board's failure to address these opinions renders its statement of reasons or basis inadequate.

On remand, the Board must consider the opinions of Dr. Barrick and Dr. Anaise in determining whether Appellant's diagnosed obstructive sleep apnea was etiologically related to his service.

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 JMPR and

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

Upon remand, the Board 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.” *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). 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*, 1 Vet.App. 49. Appellant shall be free to submit additional evidence and/or arguments in support of his claim, and the Board must consider any such arguments or evidence submitted. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). The Board shall incorporate copies of this joint motion and the Court’s order into Appellant’s record. The Secretary will afford this case expeditious treatment. 38 U.S.C. § 5109B; 38 U.S.C. § 7112.

CONCLUSION

THEREFORE, the parties request that the Court vacate and remand that part of the October 15, 2018, decision that denied entitlement to service connection for obstructive sleep apnea, and to remand that matter for appropriate development and readjudication, consistent with the above discussion.

Respectfully submitted,

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Date: May 3, 2019

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