

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

KATIE DEMERY,

Appellant

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee

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Vet. App. No. 17-3469

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27 and 45(g)(2), the parties respectfully move the Court to vacate and remand the June 22, 2017, Board of Veterans' Appeals (Board) decision denying Appellant entitlement to a total disability evaluation based on individual unemployability (TDIU).¹ Record Before the Agency (R.) at 1-14.

BASIS FOR REMAND

The parties agree that the Board erred when it provided an inadequate statement of reasons or bases for its denial of TDIU when it did not explain the meaning and relevance of the term sedentary employment and how it determined

¹ The June 22, 2017, Board decision lists Veteran Alvin Demery, Jr. as the claimant. Mr. Demery passed away in August 2017, but a Notice of Appeal (NOA) was filed on his behalf in October 2017. In January 2019, the Court determined that the NOA was invalid as to Mr. Demery. *Demery v. Wilkie*, 30 Vet.App. 430 (2019). But the Court permitted Katie Demery, Mr. Demery's surviving spouse, to amend the NOA to reflect her name, thereby replacing Mr. Demery as Appellant on the Court's docket. *Id.* at 444.

that the Veteran was capable of substantially gainful employment in light of his service-connected disabilities and his occupational and educational experience.

Under 38 U.S.C. § 7104(d)(1), the Board must provide a written statement of “the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.” The Board’s statement should “identify those findings [the Board] deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive.” *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The statement is adequate if it is “clear enough to permit effective judicial review.” *Id.* (internal quotations and citation omitted). To comply with this requirement, the Board must analyze the probative value of the evidence and explain the reasons or bases for its rejection of evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995); *aff’d per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

In its June 2017 decision, the Board discussed the medical evidence and lay statements documenting the limitations caused by the Veteran’s service-connected disabilities and concluded that the Veteran was limited to sedentary work. R. at 6 (1-14). But the Board did not address the meaning and relevance of the concept of sedentary work or explain how it factors into the Veteran’s overall disability picture and his ability to secure substantially gainful employment. Thus, the Board’s statement of reasons or bases precludes Appellant from understanding the basis of the Board’s decision. See *Withers v. Wilkie*, 30 Vet.App. 139, 147 (2016). In addition, the Board did not state what it understood the phrase

“unable to secure and follow substantially gainful employment” to mean as it pertains to TDIU. As this Court made clear in *Ray v. Wilkie*, 31 Vet.App. 58, 67-76 (2019), the failure to do so is error. Remand, therefore, is necessary for the Board to provide an adequate statement of reasons or bases to support its determination of whether the Veteran was entitled to TDIU, including a discussion of the term sedentary employment and consideration of the Court’s precedent in *Ray* in the first instance.

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

The Board decision should be vacated and the appeal remanded for readjudication consistent with the foregoing. A copy of this motion for remand should be associated with the claims file, along with the Court’s order granting this motion.

On remand, Appellant is entitled to submit additional evidence and argument in support of her claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). On

remand, the Board should afford Appellant full assistance with her claim, reexamine the evidence of record, seek any other evidence necessary to support its decision, and issue a timely and well-supported decision. See *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). Before relying on any additional evidence the Board should afford Appellant notice and opportunity to respond, including the opportunity to submit additional argument or evidence in response. See *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993). “A remand is meant to entail a critical examination of the justification for the decision.” *Kahana v. Shinseki*, 24 Vet.App. 428, 437 (2011) (internal citation omitted). The Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law reasonably raised by the evidence in any subsequent decision. See 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. The Board is required to provide this claim expeditious treatment. 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully move the Court to vacate and to remand the June 22, 2017, Board decision denying Appellant entitlement to TDIU.

Respectfully submitted,

FOR APPELLANT

Dated: 7/15/2019

/s/ Amy F. Odom

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