

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

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**STEPHEN E. WILLIAMS,**  
Appellant,

v.

**ROBERT L. WILKIE,**  
Secretary of Veterans Affairs,  
Appellee.

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**ON APPEAL FROM THE  
BOARD OF VETERANS' APPEALS**

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**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

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Vet App. No. 19-1491

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**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

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**I. ISSUE PRESENTED**

Whether the Court should vacate and remand the Board of Veterans' Appeals (BVA) November 28, 2018, decision that denied Appellant's claim for entitlement to a compensable rating for loss of teeth numbers 7, 8, 9, 10, 11, 22, 23, 24, and 25, due to trauma?

**II. STATEMENT OF THE CASE**

**A. Jurisdictional Statement**

The Court's jurisdiction in this matter is predicated on 38 U.S.C. § 7252.

## **B. Factual and Procedural History**

Appellant served on active duty in the U.S. Air Force from April 1966 until December 1969. (R. at 2296).

In February 2016, Appellant filed an application for disability compensation seeking an increase in his non-compensable disability evaluation for “dental trauma/ broken jaw.” (R. at 2122-25).

An April 2016 Compensation and Pension Inquiry requested that Appellant be provided with an oral and dental examination and indicated that “Capri complains about Jaw pain found in VBMS/VVA.” (R. at 2117-19).

Appellant underwent a VA examination for dental and oral conditions in May 2016. (R. at 2104-2111). Appellant was diagnosed with loss of teeth, as well as a fracture of the mandible, (R. at 2108), which was noted as being well-healed. (R. at 2109). The examiner noted that Appellant’s condition limits his diet, as well as affects his speech. The examiner indicated that the masticatory surfaces could be restored by suitable prosthesis. (R. at 2110).

A May 2016 rating decision continued the evaluation for loss of teeth due to trauma as non-compensable. (R. at 2094-2098).

Appellant filed a Notice of Disagreement in June 2016. (R. at 2074-76). A Statement of the Case was issued in December 2017. (R. at 2009-42).

Appellant filed a VA Form 9, appealing to the Board in December 2017. (R. at 114). He indicated therein that he desired a BVA hearing. *Id.* Appellant, via his representative, withdrew his request for a hearing in March 2018. (R. at 92-93).

Appellant's representative submitted a written brief presentation in November 2018. (R. at 12-13).

The Board's decision currently on appeal was issued on November 28, 2018. (R. at 3-10).

### **III. SUMMARY OF ARGUMENT**

The Board's November 28, 2018, decision that denied Appellant's claim for entitlement to a compensable rating for loss of teeth numbers 7, 8, 9, 10, 11, 22, 23, 24, and 25 due to trauma should be vacated and remanded for so that the Board may provide an adequate statement of reasons or bases for its determinations as required by 38 U.S.C. § 7104(d)(1).

### **IV. ARGUMENT**

Each decision of the Board shall include a written statement of the Board's 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).

In making its statement of findings, the Board must identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive or unpersuasive. In providing its reasons or bases, the Board must include in its decisions the precise basis for that decision, and the Board's response to the various arguments advanced by the claimant. This must include an analysis of the credibility or probative value of the evidence submitted by and

on behalf of the veteran in support of his or her claim and a statement of the reasons or bases for the implicit rejection of this evidence by the Board. *Moore v. Derwinski*, 1 Vet. App. 401, 404 (1991) (internal citations omitted).

The purpose behind the requirement that the Board provide an adequate statement of reasons or bases for its decision is to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court. *Mayfield v. Nicholson*, 19 Vet.App. 103, 129 (2005) (internal citations omitted), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

Pursuant to 38 C.F.R. § 4.59, “[i]t is the intention [of the rating schedule] to recognize actually painful . . . joints as entitled to at least the minimal compensable rating for the joint.”

Moreover, Appellant’s representative submitted a written brief presentation in November 2018. The brief cited case law and regulations suggesting that a VA examiner “must be asked to express an opinion as to whether pain could significantly limit functional ability. . . VA also has a duty to consider pain alone as an impairment because it diminishes the body’s ability to function.” (R. at 13, citing 38 C.F.R. § 4.40, *DeLuca v. Brown*, 8 Vet.App. 202 (1995), and *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018)).

Evidence of record indicates that Appellant experiences pain in his jaw as the result of the loss of teeth that he sustained while in service. (R. at 2112 [December 2, 2014 urgent care note indicating pain the jaw when yawning], 2117-



2119 April 2016 [Compensation and Pension Exam Inquiry indicating “Capri complaints about Jaw pain found in VBMS/VVA.”]). Appellant indicates in his brief that he experiences pain as the result of his tooth loss, and that this was not taken into account in the Board’s decision. (Appellant’s Informal Brief)).

The Board did not discuss evidence of record that indicates that Appellant experiences pain as the result of his tooth loss. The Board also did not discuss the aforementioned case law and regulations which concern pain, to include 38 C.F.R. § 4.59, and those raised in the Appellant’s November 18, 2018, written brief presentation. (R. at 13).

Remand is warranted so that the Board may provide an adequate statement of reasons or bases concerning the evidence of record that reflects that Appellant experiences jaw and/ or tooth pain as the result of the tooth loss sustained in service, as well as applicable regulations pertaining to whether pain may be considered a disability or as the basis for an increased disability rating.

## **V. CONCLUSION**

WHEREFORE, for the foregoing reasons, the Secretary respectfully requests that the Board’s November 28, 2018, decision should be vacated, remanded, and returned to the Board for action as delineated herein.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury of the laws of the United States of America, that on November 6, 2019, a copy of the foregoing was mailed, postage pre-paid, via first class U.S. mail, to:

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/s/ Angela-Marie C. Green  
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