

SITTI H. PRINCE,)
Appellant,)
)
v.) Vet. App. No. 19-5738
)
ROBERT L. WILKIE,)
Secretary of Veterans Affairs,)
Appellee.)

Pursuant to U.S. Vet. App. Rules 27 and 45(g), the parties move the Court to vacate, in part, the February 6, 2019, decision of the Board of Veterans' Appeals (Board), which denied entitlement to a rating in excess of 50% prior to September 16, 2008, for post-traumatic stress disorder (PTSD) and a rating in excess of 70% prior to December 22, 2010, for PTSD, and remand the issues for additional development and readjudication.

The Court does not have jurisdiction over the Board's grant of entitlement to a rating of 70% for PTSD from September 16, 2008, as this is a favorable finding. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) (explaining that the Court is not permitted to reverse the Board's favorable findings of fact). Additionally, the Board remanded the issue of entitlement to special monthly compensation (SMC) based on the need for aid and attendance. The Court does not have jurisdiction over this claim. *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) ("[T]he Board's remand does not represent a final decision over which this Court has jurisdiction.").

BASES FOR REMAND

The parties agree vacatur and remand are warranted because the Board erred when it found the duty to assist had been satisfied. The Secretary's duty to assist includes a duty to "make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim." 38 C.F.R. § 3.159(c). For the purposes of VA treatment records, § 3.159(c)(3) "does not impose a relevancy standard on the VA's duty to provide assistance in obtaining VA medical records," and the duty is limited only if "there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim." *Sullivan v. McDonald*, 815 F.3d 786, 791-92 (Fed. Cir. 2016) (quoting 38 C.F.R. § 3.159(d)).

In the present decision, the Board remanded Appellant's claim for entitlement to SMC for further development, to include "[obtaining] and [associating] with the electronic claims file the Veteran's private and VA clinical records **from October 2007 to present** if not already associated with the claims file (to include the records concerning his treatment in San Francisco, the Philippines, at Westside Chicago, and Branson) for his PTSD and coronary artery disease." (Record Before Agency (R.) 56 (41-57)). Before deciding a claim, the Board is required to consider all relevant evidence of record and to consider and discuss in its decision all "potentially applicable" provisions of law and regulation. *See Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991). It is unclear why the Board decided Appellant's PTSD claim when it also determined there may be relevant outstanding private and VA treatment records relevant to that claim. On remand,

the Board must ensure that reasonable efforts are undertaken to obtain any outstanding records.

The parties agree that this joint motion for partial remand (JMPR) 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 matters being remanded, except the parties' right to appeal the Court's order implementing this JMPR. 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, Appellant is entitled to submit additional evidence and argument in support of her claims. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam); see also *Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992). 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). Before relying on any additional evidence developed, the Board must ensure that Appellant is given notice thereof and an opportunity to respond thereto. See *Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993).

"A remand is meant to entail a critical examination of the justification for the decision" and is not "merely for the purposes of rewriting the opinion so that it will

superficially comply with the ‘reasons or bases’ requirement of 38 U.S.C. § 7104(d)(1)[.]” *Fletcher*, 1 Vet.App. at 397. The law requires that, in any subsequent decision, the Board provide an adequate statement of reasons or bases to support its findings and conclusions on all material issues of fact and law. 38 U.S.C. § 7104(d)(1). The law also requires that the Secretary “take such actions as may be necessary to provide for the expeditious treatment” of the claims remanded pursuant to this motion. 38 U.S.C. §§ 5109B, 7112. The Board shall obtain copies of this JMPR and the Court’s order and incorporate them into Appellant’s claims folder for appropriate consideration in subsequent decisions on these issues. The Court has held that a remand confers on the appellant a right to VA compliance with the terms of the remand order and imposes on the Secretary a concomitant duty to ensure compliance with those terms. *Stegall v. West*, 11 Vet.App. 268, 271 (1998); *see also Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006).

CONCLUSION

In light of the foregoing, the parties request that the Court vacate, in part, the February 6, 2019, decision of the Board, which denied entitlement to a rating in excess of 50% prior to September 16, 2008, for PTSD and a rating in excess of 70% prior to December 22, 2010, for PTSD, and remand the issues for additional development and readjudication consistent with the terms of this joint motion.

Respectfully submitted,

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