

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

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|--------------------------------|---|-----------------------|
| LARRY SCOTT, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Vet. App. No. 19-6232 |
| |) | |
| ROBERT L. WILKIE, |) | |
| Secretary of Veterans Affairs, |) | |
| |) | |
| Appellee. |) | |

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g), the parties move the Court to vacate the part of the June 21, 2019, decision of the Board of Veterans' Appeals (Board) that denied a petition to reopen a claim of entitlement to service connection for a left knee disability, and claims of entitlement to service connection for (1) a right knee disability, (2) a right elbow disability, and (3) erectile dysfunction, and to remand the issues for readjudication consistent with the following. [Record Before the Agency (R.) at 4-19].

The Court should not disturb that portion of the Board's decision that granted petitions to reopen claims of entitlement to service connection for a right knee disability and a right elbow disability. See *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority").

BASES FOR REMAND

The parties agree that vacatur, in part, and remand of the Board decision are warranted because the Board erred when it (1) provided an inadequate statement of reasons or bases when it failed to address relevant evidence of record related to the petition to reopen the claim of entitlement to service connection for a left knee disability, and (2) failed to ensure compliance with VA's duty to assist when it relied on an inadequate VA examination to deny entitlement to service connection for erectile dysfunction. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Further, the parties agree that the Board erred when, after reopening the claims of entitlement to service connection for a right knee disability and right elbow disability, it adjudicated these claims on the merits in the first instance.

Petition to Reopen – Left Knee Disability

In denying Appellant's petition to reopen the claim of entitlement to service connection for a left knee disability, the Board found that "the record is devoid of any evidence whatsoever of treatment for the left knee" and as such, new and material evidence to reopen the service connection claim had not been received. [R. at 10-11 (4-19)]. However, the parties agree that the Board erred when it failed to address relevant evidence of record that may contradict the finding that there was no evidence of left knee treatment of record.

Specifically, a February 2016 VA treatment record documents Appellant's reports of "some trouble with *knees*." [R. at 166 (164-68) (February 2016 Nutrition

Consult Report]]. Further, Appellant's VA treatment records consistently document a diagnosis of osteoarthritis of "multiple joints." See, e.g., [R. at 154 (154-55) (March 2016 Gastroenterology Attending Note)]. The parties agree that the Board erred in failing to address this evidence when it determined that the record was "devoid" of medical evidence pertaining to the left knee.

On remand, the Board must address this evidence in the context of whether it constitutes new and material evidence to reopen the claim of entitlement to service connection for a left knee disability.

VA Examination – Erectile Dysfunction

Appellant has claimed entitlement to service connection for erectile dysfunction as secondary to his service-connected coronary artery disease (CAD). In denying the appeal, the Board relied on a December 2015 VA opinion, which noted that Appellant's erectile dysfunction was less likely than not due to or the result of his CAD. The December 2015 examiner explained that Appellant had numerous health conditions, any of which could be the cause of his erectile dysfunction, including his "heart disease" and "clogged blood vessels (atherosclerosis)". [R. at 1065 (December 2015 VA Medical Opinion)]. In relying on the December 2015 medical opinion, the Board noted that the examiner listed "quite a few conceivable causes, but the number of possibilities makes certainty not possible." [R. at 15 (4-19)].

Additionally, when denying entitlement to service connection for erectile dysfunction, the Board discounted the probative value of a July 2016 private

treatment record which documents the provider's opinion that Appellant's erectile dysfunction is a "multifactorial problem that almost certainly [this] has some relation to his cardiac disease, as well as the medications he is on for his cardiac disease." [R. at 355-56 (354-56) (July 2015 Private Treatment Record – Carolina East Physicians)]. The Board found that the July 2016 private opinion was "self-contradictory" in that it first noted there were multiple causes for the erectile dysfunction, but then pointed to Appellant's heart disease and medication as a "near-certain cause." [R. at 16 [4-19]].

The parties agree that the Board provided an inadequate statement of reasons or bases for discounting the July 2016 private opinion, particularly given that the ultimate conclusion of the July 2016 private provider is nearly identical to the explanation provided by the December 2015 VA examiner – that Appellant's erectile dysfunction had numerous causes, but was at least in part due to his service-connected CAD. Further, regarding the December 2015 VA opinion, the parties agree that the examiner's rationale is inadequate as it indicates "the exact cause" of Appellant's erectile dysfunction could not be determined. As the legal standard here for establishing entitlement to service connection for erectile dysfunction is whether it is "at least as likely as not" that the disability is related to service or a service-connected disability, the examiner's indication that an "exact" relationship was required renders the examination and opinion inadequate. The parties also note that in its reasons or bases, the Board committed the same error as the December 2015 VA examiner when it noted that "certainty" was not

possible, suggesting that a higher legal standard than required by law was necessary here.

On remand, Appellant shall be afforded a new VA examination to determine whether his erectile dysfunction is at least as likely as not caused or aggravated by his service-connected CAD. The Board must support any subsequent decision with an adequate reasons or bases, with discussion of all relevant lay and medical evidence of record. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990) (indicating the Board must provide an explanation of its material findings and conclusions sufficient to enable the claimant and the Court to understand the basis of its decision and permit judicial review).

Service Connection – Right Knee & Right Elbow

When “the Board addresses in its decision a question that had not been addressed by the RO, it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing, and, if not, whether the claimant has been prejudiced thereby.” *Bernard v. Brown*, 4 Vet.App. 384, 394 (1993). Further, pursuant to VA Gen. Coun. Prec. 16-92, “adverse BVA findings on matters not considered by the AOJ. . .raise an issue concerning whether the appellant’s procedural rights to notice, 38 C.F.R. § 3.103(b), a hearing, 38 C.F.R. § 3.103(c), and to submit evidence in support of a claim, 38 C.F.R. § 3.103(d), have been abridged.”

In the June 21, 2019 decision, the Board granted petitions to reopen claims of entitlement to service connection for a right knee disability and a right elbow disability and noted that a “Statement of the Case [SOC] provided information and analysis concerning primary and presumptive service connection with analysis of service records and post-service records.” [R. at 9 (4-19)]. Further, the Board noted that Appellant had entered argument as to the merits of the service connection claims and as such, it could proceed with adjudication without any prejudice to Appellant. *Id.* Upon review of the December 2016 SOC referenced by the Board, the parties agree that the AOJ only found that new and material evidence to reopen the claims had not been received and simply reiterated the basis for the prior final denials; a discussion of the merits of the service connection claims was not provided. [R. at 359-83 (December 2016 Statement of the Case)].

The parties agree that the Board mischaracterized the contents of the Statement of the Case and as the merits of the service connection claims were not addressed by the Agency of Original Jurisdiction (AOJ), the Board erred in denying the claims without affording Appellant necessary notice and providing him with an opportunity to submit evidence. *See Bernard* 4 Vet.App. at 394; *see also* VA Gen. Coun. Prec. 16-92. Therefore, the Board shall remand the claims of entitlement to service connection for a right knee disability and a right elbow disability to the AOJ for initial adjudication.

Other Considerations

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 matters being remanded except the parties' right to appeal the Court's order implementing this joint motion for partial remand (JMPR). Pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and 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.

On 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). Appellant shall be free to submit additional evidence and arguments in support of his claims. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999); see *Clark v. O'Rourke*, 30 Vet. App. 92 (2018). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Kahana v. Shinseki*, 24 Vet.App. 428, 437 (2011) (quoting *Fletcher*, 1 Vet.App. at 397). 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 or evidence. See *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

In any subsequent decision, the Board shall provide an adequate statement of reasons or bases for its decision on all material issues of fact and law. See 38 U.S.C. § 7104(d)(1). The terms of this JMPR are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Board shall incorporate copies of this JMPR and the Court's order into Appellant's record. The Secretary will afford this case expeditious treatment as required by 38 U.S.C. §§ 5109B, 7112.

CONCLUSION

WHEREFORE, the parties request that the Court vacate the parts of the June 21, 2019, decision of the Board, that denied a petition to reopen a claim of entitlement to service connection for a left knee disability, entitlement to service connection for right knee and right elbow disabilities, and entitlement to service connection for erectile dysfunction, and to remand the issues for readjudication consistent with the foregoing.

Date: June 18, 2020

Respectfully submitted,

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