IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

SAMUEL E. WALDEN, JR.,	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-6654
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27(a), the parties move the Court to vacate the August 30, 2018, Board of Veterans' Appeals (Board) decision that denied service connection for adenocarcinoma of the colon as secondary to exposure to ionizing radiation, (Record (R.) at 1-13 (Board decision)), and to remand the matter for readjudication consistent with the following.

BASIS FOR REMAND

The parties agree that vacatur and remand are warranted because the Board erred when it provided an inadequate statement of reasons or bases. *See* 38 U.S.C. § 7104(d)(1). The Board did not specifically address the opinion provided by the Undersecretary for Benefits (USB) on December 7, 2016. (R. at 1200 (December 7, 2016, "Radiation Review under 38 C.F.R. 3.311")). The Board also failed to discuss the adequacy of the USB opinion in light of the evidence of record, to include Appellant's report of radiation exposure from x-ray machines,

and the "[f]actors to be considered in determining whether a veteran's disease resulted from exposure to ionizing radiation in service[.]" *See* 38 C.F.R. § 3.311(e).

Although the USB substantially relied on a December 6, 2016 dose estimate provided by the Director, Post-9/11 Environmental Health Service (DEHP), there is no reference in the USB opinion to Appellant's report of radiation exposure from x-ray machines, or any indication that the USB considered his report of exposure. *See* (R. at 1902 [1901-02] (July 15, 2012, Appellant statement's describing, *inter alia*, transporting patients "to the lab and to X-ray," having "several x rays," and that "I was around the x ray machines before and after patients were x rayed")); 38 C.F.R. § 3.311(e)(1) (listing "probable dose, in terms of dose type, rate and duration as a factor in inducing the disease" as a factor for consideration, to include "taking into account any known limitations in the dosimetry devices employed in its measurement or the methodologies employed in its estimation"); *Stone v. Gober*, 14 Vet.App. 116, 120 (2000) (holding that "while the Under Secretary for Benefits was not required to explicitly consider each of the factors in section 3.311(e), the cursory explanation provided by the Under Secretary for Benefits did not provide adequate rationale for the conclusion that there was no reasonable possibility that the veteran's cancer was caused by his in-service exposure as required by 38 C.F.R. § 3.311(c)(ii).").

Although the USB is not required to address each factor in section 3.311(e), given that the adequacy of the dose estimate is directly in question in this case, and 38 C.F.R. § 3.311(c) requires that the USB "shall consider" these factors,

remand is warranted for the Board to address the adequacy of the USB opinion in light of *Stone* and section 3.311(e)(1).

Additionally, given the DEHP's reliance on the absence of evidence that Appellant wore a dosimetry badge, the Board will also address whether the dose estimate was prepared based, "to the extent feasible, on available methodologies," and whether any further development is warranted under 38 C.F.R. § 3.311(a)(2)(iii) to ensure the dose estimate reflects consideration of all available methodologies, including whether the dose estimate is consistent with Appellant's assertion of radiation exposure from x-ray machines. *See* 38 C.F.R. § 3.311(a)(2)(iii).

On remand, the Board shall provide an adequate statement of reasons or bases for its determination, consistent with this motion. 38 U.S.C. § 7104(d)(1).

CONCLUSION

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

On remand, Appellant may submit additional evidence and argument. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (*per curiam*). 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 v. Derwinski*, 1 Vet.App. 394, 397 (1991)). Thus, on remand, the Board "will 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*, 1 Vet.App. at 397. The terms of this joint motion are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Board shall incorporate copies of this joint motion, Appellant's briefs, and the Court's order into Appellant's VA file and afford Appellant's claim expeditious treatment, as required by 38 U.S.C. § 7112.

WHEREFORE, the parties move the Court to vacate the August 30, 2018, Board decision and remand the matter for readjudication, consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

Date: July 7, 2020

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