

MARK R. LABELLE,
 Appellant,
 v.
ROBERT L. WILKIE,
 Secretary of Veterans Affairs,
 Appellee.

Vet. App. No. 19-0948

Pursuant to U.S. Vet. App. R. 27 and 45(g), the parties respectfully move the Court to vacate the December 28, 2018, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for tinnitus and remand the claim for readjudication consistent with the following. [Record Before the Agency (R.) at 4-10].

The Board erred when it failed to ensure VA complied with its duty to assist by providing Appellant with an adequate medical examination. See 38 U.S.C. § 5103A(d). VA provided Appellant an examination in February 2016. [R. at 148-52]. Although the examiner reviewed the claims file and addressed Appellant's relevant medical history, her opinion misstated the medical report on which she relied and failed to apply the principles within that report related to Appellant's specific circumstances, rendering the opinion inadequate. *Id.*; see *Bailey v.*

O'Rourke, 30 Vet.App. 54, 60 (2018); *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008); *see also Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007).

In her opinion, the examiner referenced The Institute of Medicine (IOM) 2006 report, *Noise and Military Service: Implications for Hearing Loss and Tinnitus* (IOM report) as part of her rationale that Appellant's tinnitus was not related to service. [R. at 152 (148-52)]. The examiner explained that the study "never stated that tinnitus could result from undiagnosed noise injuries." *Id.* However, the parties note that, in discussing the possibility of delayed-onset, noise-induced tinnitus, the report actually states that, although "degenerative changes in afferent pathways will most likely not affect auditory thresholds, it is possible that they could contribute to other central processes such as tinnitus." IOM report at 118-19.

The examiner also based her rationale on the relation of the scientific literature to "most cases," as opposed to how the principles within the report applied to Appellant's particular case. [R. at 152 (148-52)]. Moreover, the examiner opined that an association between tinnitus and noise exposure cannot be assumed to exist in the "absence of an objectively verifiable noise injury." *Id.* The examination report does not contain any notations or discussion of Appellant's type of in-service noise exposure, which both VA and the Board have conceded Appellant experienced. *See id.*; *see also* [R. at 7 ("Thus, in-service exposure to hazardous noise is established."); [R. at 169 (168-70) (February 2016 VA examination request noting "Record showing MOS [(military occupation specialty)] of Security Forces (3P0X1) which had a moderate probability for hazardous noise

exposure”)]. The examiner also did not explain why the conceded noise exposure would not amount to the type of exposure that she considers a “noise injury.” See [R. at 152 (148-52)].

Because the examiner did not provide any rationale for her opinion that was specific to Appellant’s particular medical condition and circumstances, the parties agree that the Board erred by relying on an examination that was inadequate to adjudicate the claim. See *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007) (“[O]nce the Secretary undertakes the effort to provide an examination when developing a service-connection claim, even if not statutorily obligated to do so, he must provide an adequate one, or at a minimum, notify the claimant why one will not or cannot be provided.”). On remand, VA must obtain a medical opinion that addresses Appellant’s particularized circumstances and the relevant medical literature. See *Bailey*, 30 Vet.App. at 60.

CONCLUSION

The parties agree that this joint motion for remand (JMR) 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 JMR. The parties agree to unequivocally waive any right to appeal the Court’s order on this joint

motion and respectfully ask that the Court enter mandate upon the granting of the 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 argument. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). “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 and evidence. See *Austin v. Brown*, 6 Vet.App. 547, 551 (1994); *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 joint motion are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Board shall incorporate copies of this joint motion and any Court order relating to it into Appellant’s VA file for appropriate consideration in subsequent decisions. The Secretary will afford this case expeditious treatment as required by 38 U.S.C. §§ 5109B, 7112.

WHEREFORE, the parties respectfully move the Court to issue an order vacating the December 28, 2018, Board decision and remanding the claim for readjudication consistent with the terms of this joint motion.

Respectfully submitted,

FOR APPELLANT:

Date: July 10, 2020

/s/ Brittani L Howell

BRITTANI L HOWELL

Chisholm Chisholm & Kilpatrick LTD
321 S Main St #200
Providence, RI 02903
(401) 331-6300

FOR APPELLEE:

WILLIAM A. HUDSON, JR.

Principal Deputy General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ Selket N. Cottle

SELKET N. COTTLE

Deputy Chief Counsel

/s/ Safiya L. Dixon

SAFIYA L. DIXON

Appellate Attorney
Office of the General Counsel (0271)
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420
(202) 632-6126