IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

MICHAEL SCHUETRUM,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 18-3233
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. Rules 27(a) and 45(g), the parties respectfully move the Court for an order vacating the March 6, 2018, decision of the Board of Veterans' Appeals (Board) that denied entitlement to an effective date prior to December 4, 2011, for the grant of service connection for coronary artery disease (CAD) with cardiomyopathy, for purposes of accrued benefits, and remanding the matter for readjudication.

BASIS FOR REMAND

The parties agree that vacatur and remand are warranted because the Board erred when it failed to provide an adequate statement of reasons or bases for its decision. Record Before the Agency (R.) at 2-12; *see* 38 U.S.C. § 7104(d)(1). Specifically, the Board failed to adequately explain whether reconsideration of the Veteran's 1977 claim for service connection for a heart murmur and disability manifested by chest pain was warranted under 38 C.F.R. § 3.156(c)(1).

The effective date for an award of service connection generally is the date VA received the claim or claim to reopen, or the date entitlement arose, whichever is later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(b)(2). Under 38 C.F.R. § 3.156(c), however, if VA issues a decision on a claim and later "receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim." 38 C.F.R. § 3.156(c) (noting that official service records include "[a]dditional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records"). "This ensures that a veteran is not denied benefits due to an administrative error." *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014).

If VA reconsiders the merits of a claim under subsection (c)(1) and grants benefits, VA must then consider whether an earlier effective date is warranted under subsections (c)(3) and (c)(4). *Id.* at 1314 ("Subsection (c)(1) is a separate and distinct provision from subsections (c)(3) and (c)(4)."). As relevant here, subsection (c)(3) specifies that the effective date for "[a]n award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim whichever is later" absent other applicable provisions. 38 C.F.R. § 3.156(c)(3).

As with all its findings and conclusions on all material issues of fact and law, in determining the proper effective date of an award of disability benefits, the Board is required to provide an adequate statement of reasons or bases that enables the

claimant to understand the precise basis for the Board's decision and facilitates review to the Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the probative value of evidence, account for evidence it finds persuasive or unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

In this matter, the Veteran, Donald L. Schuetrum, filed an initial claim for compensation for a heart murmur and a disability manifested by chest pain in June 1977. (R. at 1139-40). A VA regional office (RO) denied service connection for a heart murmur and disability manifested by chest pain in a September 1977 rating decision. (R. at 1094-96). In October 3, 1977, VA made a request for service data, noting under "additional information requested," "separation point: Patrick AFB [Air Force Base] FL. Pl[ease] indicate all periods veteran was eligible for complete separation or discharge verify all active duty." (R. at 1093 (VA Form 07-3101)). On October 13, 1977, the National Personnel Records Center (NPRC) responded that the Veteran was eligible for complete separation when discharged on October 1, 1954, and January 1, 1971. (R. at 1093). On October 21, 1977, VA received the Veteran's DD Form 13, Statement of Service, (R. at 1083-84), and General Services Administration (GSA) Form 7004, which indicated that "records not located at NPRC," "forwarded for necessary action," and "records transferred/lent

to . . . DPMD001 . . . 10/3/77," selecting "VA Form 07-3101" "dated: 10/11/77," and "writer notified of this referral," (R. at 1085-86).

The Veteran appealed the September 1977 RO decision, *see* (R. at 1088-90 (November 1977 notice of disagreement (NOD)); 1066, 1070-74 (December 1977 Statement of the Case (SOC)); 1055-60 (February 1978 VA Form 9)), and the Board denied his appeal in a September 1978 decision, (R. at 1025-32). The RO and the Board discussed various service treatment records (STRs). *See* (R. at 1026-27, 1029-30; 1070-71; 1094-95); *see also* (R. at 1094 (RO noting "SMR's [service medical records] are incomplete")).

The Veteran filed a claim for service connection for a heart disability on December 5, 2012. (R. at 979). Private treatment records show CAD was diagnosed as early as 2002. *See* (R. at 870 (870-71, 974) (April 11, 2013, VA Form 21-0961A-1, Ischemic Heart Disease (IHD) Disability Benefits Questionnaire, completed by the Veteran's private physician, William E. Story, M.D.); 862 (862-65) (September 30, 2013, private medical record from William E. Story, M.D., Central Florida Cardiology Group, received by VA in December 2013); 860 (October 4, 2013, private physician's statement from Robert Clement, M.D., Physician Associates Orlando Health, received by VA in December 2013)). Ischemic heart disease (to include CAD) was added to the list of presumptive herbicide agent-related diseases under 38 C.F.R. § 3.309(e), effective August 31, 2010. *See* 75 Fed. Reg. 53,702 (Aug. 31, 2010).

In August 2013, VA requested (i) service personnel records that document awards, medals, decorations, military occupational specialty, campaigns, and assignments and (ii) herbicide exposure documents. (R. at 920); *see also* (R. at 927 (925-33) (August 5, 2013, Veterans Claims Assistance Act (VCAA) letter)). The NPRC responded in September 2013, indicating (i) that all available requested records have been mailed, best copies, and (ii) that there were no records of exposure to herbicides. (R. at 920).

The Veteran died in August 2013. (R. at 868). His surviving spouse filed an application for dependency and indemnity compensation (DIC), death pension, and/or accrued benefits in December 2013. (R. at 850-59). Also in December 2013, VA received the Veteran's six DD Forms 214 (R. at 874; 875-76; 877-78; 879-80; 881-82; 883-84), five of which are certified copies signed "12/4/2013," (R. at 876; 878; 880; 882; 884), an October 1972 service performance record, (R. at 914-16), and a two-page Air Force Form 1712, (R. at 911-13).

In December 2013, VA requested (i) STRs, (ii) "furnish dates of service in Vietnam," and (iii) service personnel records. *See* (R. at 890, 891 (December 26, 2013, VA Requests for Information)); *see also* (R. at 891 (December 26, 2013, deferred rating decision instructing to "[r]equest the Veteran's folder, which is in files at the St. Petersburg [RO]. The STRs and personnel records have been requested. Return to rating when all records arrive")). In February 2014, VA received an undated statement prepared by the Veteran, wherein he discusses his service in Thailand and Vietnam. (R. at 814-15).

In a March 20, 2014, deferred rating decision, the RO noted "[n]o evidence of service in RVN [(Republic of Vietnam)]. STR's show service in Thailand at Ubon RTAFB [(Royal Thai Air Force Base)], but no evidence showing Veteran served near the perimeter" and that "PIES [(Personnel Information Exchange System)] request still pending for RVN service." (R. at 807). VA received the requested service personnel file from the NPRC in March 2014; the response indicated that all available requested records were mailed. (R. at 812).

In a March 2014 rating decision, the RO granted entitlement to accrued benefits based on the Veteran's claim for service connection for CAD with cardiomyopathy on a presumptive basis, rated at 100%, effective December 4, 2012, the date the Veteran's claim was received.[1] (R. at 797-98 (757-61, 797-98)); *see* 38 C.F.R. §§ 3.307(a)(6), 3.309(e). The RO found that the evidence of record—which, at that time, included the Veteran's DD Forms 214 and "Service Treatment and Personnel Records, from October 2, 1950[,] through May 31, 1977"—"shows that the Veteran served in the Republic of Vietnam (RVN) while on active duty" and, therefore, granted service connection for CAD with cardiomyopathy on a presumptive basis. (R. at 796-98).

The Veteran's surviving spouse appealed the assigned effective date. (R. at 746-47 (April 2014 NOD)). She argued that the effective date should at least

[1] The Board noted in the decision on appeal that "[t]he Veteran filed a claim for service connection for a heart disability on December 5, 2012," and that the RO "appears to have mistakenly identified the receipt date as December 4, 2012." (R. at 5 (2-12)).

go back to February 2002, when the Veteran had heart surgery, or as far back as October 1977, when the Veteran first filed a claim for service connection for a heart condition. *Id.* In a June 2015 statement, the Veteran's surviving spouse asserted that VA continually found the Veteran was not exposed to herbicide agents in Vietnam prior to the grant of service connection for CAD with cardiomyopathy, "[u]ntil finally with this grant you did acknowledge that he was in country [in Vietnam]." (R. at 703 (702-03) (NOD)).

In a December 2015 rating decision, the RO found that the effective date of December 4, 2012, assigned in the March 2014 rating decision was based on clear and unmistakable error (CUE) and assigned December 4, 2011, as the effective date of service connection for CAD with cardiomyopathy under 38 C.F.R. § 3.114. (R. at 693-95 (647-48, 690-95)). In her August 2016 substantive appeal, the Veteran's surviving spouse again argued that "VA had continued over the years to say that my late husband was not exposed to herbicide in Vietnam[, u]ntil finally the VA acknowledge in 2014 that he was in country." (R. at 57-58).

In the decision on appeal, the Board affirmed the effective date assigned. The Board noted that the September 1978 Board decision is final and, as such, "is a legal bar to an effective date prior to the date of that decision for the grant of service connection for a heart disability." (R. at 9-10 (2-12)). In discussing the Veteran's surviving spouse's contentions that "VA continually found he was not exposed to herbicide agents in service," the Board noted that "nothing in the record

reflects . . . that VA made any findings regarding his exposure to herbicide agents in service prior to developing the December 2012 claim." (R. at 10).

The parties agree that the Board erred by not providing an adequate statement of reasons or bases because the Board did not consider 38 C.F.R. § 3.156(c). Specifically, the Board did not address what service records were before it when it issued the 1978 decision and whether additional relevant official service department records were received and associated with the claims file after its September 1978 decision. 38 C.F.R. § 3.156(c)(1). It therefore did not address whether reconsideration of the Veteran's 1977 claim for service connection for a heart murmur and disability manifested by chest pain was warranted under 38 C.F.R. § 3.156(c)(1). *See Blubaugh*, 773 F.3d at 1314 (explaining that VA must consider entitlement to an earlier effective date under subsection (c)(3) "[o]nly if the VA grants benefits resulting from reconsideration of the merits" under subsection (c)(1)).

Accordingly, remand is warranted for the Board to adequately address 38 C.F.R. § 3.156(c)(1) and, if necessary, subsections (c)(3) and (c)(4). *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (explaining that remand is the appropriate remedy where the Board provided an inadequate statement of reasons or bases); *see also Allday*, 7 Vet.App. at 527; *Caluza*, 7 Vet.App. at 506.

ADDITIONAL 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 matter being remanded except the parties' right to appeal the Court's order implementing this joint motion. Pursuant to U.S. Vet. App. 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 will be free to submit additional evidence and argument. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam). 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). "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 must ensure that Appellant is given notice thereof and an opportunity to respond thereto. *See Austin v. Brown*, 6 Vet.App. 547, 551 (1994); *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

The Secretary shall afford Appellant's claim expeditious treatment, as required by 38 U.S.C. § 7112. 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. *See Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) (citing *Stegall v. West*, 11 Vet.App. 268, 271 (1998)). In any subsequent decision, the Board must provide an adequate statement of reasons or bases for its findings and conclusions on all material issues of law and fact presented on the record. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Finally, the Board shall incorporate copies of this joint motion and the Court's order into Appellant's VA file.

CONCLUSION

WHEREFORE, the parties respectfully move the Court to enter an order vacating the Board's March 6, 2018, decision that denied entitlement to an effective date prior to December 4, 2011, for the grant of service connection for CAD with cardiomyopathy, for purposes of accrued benefits, and remanding the matter for readjudication.

Respectfully submitted,

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07/30/2020
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