

ANTHONY W. SEDA,)
Appellant,)
)
v.) Vet. App. No. 20-2227
)
DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)
Appellee.)

Pursuant to U.S. Vet. App. Rules 27 and 45(g), the parties move the Court to vacate the portion of the December 2, 2019, decision of the Board of Veterans' Appeals (Board) that found proper the rating reduction for bilateral hearing loss from 100 to zero percent, effective December 1, 2013; denied entitlement to restoration of a 100 percent rating; and found proper the discontinuance, effective December 1, 2013, of (1) special monthly compensation (SMC) based on statutory housebound status; (2) Dependents Educational Assistance (DEA) benefits; and (3) SMC(k)(1) for deafness, and to remand these matters for readjudication consistent with the following.

BASES FOR REMAND

The parties agree that remand is warranted because the Board erred when it provided an inadequate statement of reasons or bases to support its decision.

See 38 U.S.C. § 7104(d)(1). A Board decision must be supported by an adequate statement of reasons or bases which explains the basis of all material findings and conclusions. 38 U.S.C. § 7104(d)(1). This requires the Board to analyze the probative value of the evidence, account for that which 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). The Board's statement of reasons or bases must be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review of the same. *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

The parties agree that the Board erred when it made contradictory findings and relied on facts and reasons that were not described within the October 2012 proposal to reduce that the Regional Office (RO) issued. Prior to any rating reduction that would reduce a Veteran's disability compensation, VA must issue a proposed decision "setting forth all material facts and reasons" for the reduction. 38 C.F.R. § 3.105(e) (2012). Additionally, VA will not reduce total disability ratings, in the absence of clear error, without examination showing material improvement in physical condition, and such examinations must be evaluated in conjunction with all the facts of record, particularly whether the veteran attained improvement under the ordinary conditions of life. 38 C.F.R. § 3.343(a).

Here, however, the Board did not determine whether the RO properly proposed to reduce Appellant's rating in October 2012 based on the examinations existing at the time of the reduction proposal and whether those examinations, and

the RO's proposed reduction, complied with § 3.343(a). [Record (R.) at 10-11]. Instead, it determined that the September 2013 rating reduction was proper, in part, because November 2017 and May 2018 audiometric examinations supported the reduction. [R. at 10-11]; *see also* [R. at 12 ("The 2017 and 2018 VA audiological examinations reflect significantly higher speech recognition than in the 2009 examination. Further, the 2017 and 2018 examiners found that these results were valid for rating purposes. The accurate depiction of his speech recognition shows that his hearing loss did not impact him as severely as he so contends.")].

The Board's statement of reasons or bases is inadequate because it both found that there was "actual improvement" shown in these two later examinations and also found that the grant of a total rating for Appellant's hearing loss was "based on a clear error." [R. at 11, 12]. The Board failed to provide an adequate statement of reasons or bases as to whether the RO properly reduced Appellant's rating based solely on the facts and reasons provided in the October 2012 rating decision. Additionally, to the extent the Board found that the grant of a 100 percent rating for bilateral hearing loss was based on "clear error," this term was not used in the October 2012 reduction proposal, nor within the September 2013 rating decision. [R. at 12, 1689, 1216]. On remand, the Board must provide an adequate statement of reasons or bases determining whether the RO's rating reduction was proper based on the "facts and reasons" contained in the RO's October 2012 reduction proposal and the September 2013 rating decision.

Finally, the parties agree that Appellant's claims for (1) SMC based on

statutory housebound status; (2) DEA benefits; and (3) SMC(k)(1) for deafness are inextricably intertwined with Appellant's bilateral hearing loss claim. Thus, the Court should remand these claims as well.

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 matter 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 may submit additional evidence and argument in support of his claim. *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 it 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 should obtain copies of this motion and the Court’s order and incorporate them into Appellant’s claims folder for appropriate consideration in subsequent decisions on these claims. See *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006) (Secretary’s duty to ensure compliance with the terms of a remand “include[s] the terms of a joint remand that is granted by the Court but not specifically delineated in the Court’s remand order”). The Court has noted 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 (2008).

CONCLUSION

In light of the foregoing, the parties request the Court vacate the portion of the December 2, 2019, Board decision that found proper the rating reduction for bilateral hearing loss from 100 to zero percent, effective December 1, 2013; denied

entitlement to restoration of a 100 percent rating; and found proper the discontinuance, effective December 1, 2013, of (1) SMC based on statutory housebound status; (2) DEA benefits; and (3) SMC(k)(1) for deafness, and to remand these issues for readjudication consistent with the terms of this joint motion.

Respectfully submitted,

FOR APPELLANT:

/s/

ETHAN F. MARON

Lieberman & Mark

818 Connecticut Avenue, NW, Suite 502

Washington, DC 20006

(202) 393 3020

FOR APPELLEE:

RICHARD A. SAUBER

General Counsel

MARY ANN FLYNN

Chief Counsel

/s/ Selket N. Cottle

SELKET N. COTTLE

Deputy Chief Counsel

/s/ Mary E. Jones

MARY E. JONES

Appellate Attorney

Office of the General Counsel (0271)

U.S. Department of Veterans Affairs

810 Vermont Avenue, N.W.

Washington, DC 20420

(202) 632-6901