

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

RICHARD ANTHONY REITTINGER,)

Appellant,)

v.)

Vet.App. No. 20-3418

DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)

Appellee.)

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27 and 45(g)(2), the parties, through their attorneys, respectfully move the Court to vacate and remand the March 19, 2020, decision of the Board of Veterans' Appeals (Board) that denied re-adjudication of the previously decided claims for entitlement to service connection for bilateral upper and lower extremity peripheral neuropathy. [Record Before the Agency (R.) at 1-11].

BASES FOR REMAND

The parties agree that remand is warranted because the Board erred when it failed to set forth an adequate statement of reasons or bases regarding whether service department records submitted after the June 2019 VA Form 10182 were part of the evidentiary record before the Board.

The Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable a claimant to understand

the precise basis for the Board's decision, as well as to facilitate review in this Court. See 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).

By way of background, in a June 14, 2019, Regional Office (RO) decision, the RO denied a claim for entitlement to service connection for bilateral upper and lower extremity peripheral neuropathy on the basis that Appellant had not submitted new and relevant evidence. [R. at 1565-76]. On June 20, 2019, Appellant filed a Decision Review Request: Board Appeal, appealing the denial of readjudication of bilateral upper and lower extremity peripheral neuropathy and electing Direct Review by the Board. [R. at 1551-52]. On July 23, 2019, August 20, 2019, and January 27, 2020, Appellant submitted service department records consisting of deck logs pertinent to the issue of his service within 12 nautical miles of Vietnam. [R. at 1533-35 (July 2019 submission)]; [R. at 1513-26 (August 2019 submission)]; [R. at 1366-68 (January 2020 submission)]. In the March 2020 decision on appeal, the Board denied re-adjudication of the claims for service connection for bilateral upper and lower extremity peripheral neuropathy without considering these service department records, and instructed Appellant that if he wishes the Department of Veterans Affairs (VA) to consider the evidence submitted outside of the evidentiary window, he must submit a Supplemental Claim and re-submit such evidence. [R. at 9].

The parties agree that the Board erred insofar as it failed to set forth an adequate statement of reasons or bases that addressed whether the deck logs

submitted after the AMA Direct docket election were part of the evidentiary record before the Board. The parties note that 38 C.F.R. § 3.103(c)(2), in pertinent part, states, “The agency of original jurisdiction will not consider, or take any other action on evidence that is submitted by a claimant, associated with the claims file, or constructively received by VA as described in paragraph (c)(2)(iii) of this section, after notice of decision on a claim, and such evidence will not be considered part of the record at the time of any decision by the agency of original jurisdiction, *except as described in § 3.156(c)* and under the following circumstances.” (emphasis added). And under 38 C.F.R. § 3.156(c), VA must reconsider a claim when “at any time after VA issues a decision on a claim, if VA 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.” *Id.*

The parties thus agree that remand is required, and that on remand, the Board must consider the service department records as part of the evidentiary record. Further, in light of the newly received service department records, the Board must reconsider the claim pursuant to § 3.156(c), and that further remand to the RO for consideration in the first instance is not required insofar as Appellant agrees to waive Agency of Original Jurisdiction (AOJ) review of these service department records.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, the Board will send

Appellant a letter permitting no fewer than 90 days for the submission of additional argument to the Board prior to readjudication, barring an explicit waiver by Appellant. In any subsequent decision, the Board must set forth adequate reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. See 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). The Board is still expected reexamine the evidence of record and conduct a critical examination of the justification for the previous decision. See *Andrews v. McDonough*, 34 Vet.App. 151 (2021). The Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Board shall provide this matter expeditious treatment as required by 38 U.S.C. § 7112.

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 that, 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. The parties respectfully ask that the Court enter mandate upon the granting of this motion.

WHEREFORE, the parties respectfully request that the Court vacate and remand the Board's March 19, 2020, decision that denied re-adjudication of the

previously decided claims for service connection for bilateral upper and lower extremity peripheral neuropathy.

Respectfully submitted,

FOR APPELLANT:

DATE: November 23, 2021

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