IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

PAUL E. PETERSEN,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 20-8475
	)	
DENIS MCDONOUGH, Secretary of Veterans Affairs,	)	
	)	
	)	
Appellee.	)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g), the parties, through their undersigned counsel, respectfully move the Court to issue an order to vacate that portion of the August 14, 2020, decision of the Board of Veterans' Appeals (Board) that denied Appellant's claim for entitlement to an initial rating higher than 20% for residuals of a left eye injury for the period from July 28, 1995, to March 11, 2016, and to remand this matter for readjudication in accordance with the contents of this motion. [Record Before the Agency (R.) at 1-23].

Also, in the decision on appeal, the Board remanded Appellant's claims for entitlement to a rating higher than 10% for right knee osteoarthritis, and for a rating higher than 10% for left knee osteoarthritis. The Court does not have jurisdiction over these claims, because the Board's decision on these matters is not final. *See Breeden v. Principi,* 17 Vet.App. 475, 478 (2004) (per curiam order).

Appellant is not challenging the Board's decision on appeal to the extent that it denied his claims for entitlement to an initial rating higher than 60% for residuals of a left eye injury for the period from March 11, 2016. Accordingly, the parties respectfully request that the Court dismiss the appeal as to this matter. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

BASES FOR PARTIAL REMAND

The parties agree that vacatur, in part, and remand are necessary, because the Board provided an inadequate statement of reasons or bases for its decision. As with any finding on a material issue of fact and law presented on the record, the Board must support its determination of the appropriate rating with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates judicial review. 38 U.S.C. § 7104(d)(1); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990).

Prior to March 11, 2016, Appellant's service-connected residuals of a left eye injury have been assigned an initial 20% disability rating under 38 C.F.R. § 4.84a, Diagnostic Code (DC) 6009 (1995), injury of the eye. Although the rating criteria for this diagnostic code was revised effective December 10, 2008, the amended rating criteria **do not apply** to this case. *See* 73 Fed. Reg. 66,543 (Nov. 10, 2008) (explicitly indicating that "[t]hese amendments shall apply to all applications for benefits received by VA on or after December 10, 2008."). Under the applicable, pre-revised rating criteria, 38 C.F.R. § 4.84a provides the

following:

> Eye, injury of, unhealed: the above disabilities, in chronic form, are to be rated **from 10 percent to 100 percent for impairment of visual acuity or field loss, pain, rest-requirements, or episodic incapacity**, combining an additional rating of 10 percent during continuance of active pathology. Minimum rating during active pathology . . . 10.

38 C.F.R. § 4.84a (1995) (emphasis added). Neither the code itself nor any other portion of the rating schedule provides a definition of "rest-requirements" or "episodic incapacity" as used in this diagnostic code. *See* 38 C.F.R. § 4.84.

In the decision on appeal, the Board attempted to address the rating criteria in conjunction with the residuals of the left eye injury symptoms demonstrated in the record, but the parties agree that the provided statement of reasons or bases was inadequate. Specifically, the Board failed to explain the standard it applied to the evidence of record to determine an appropriate rating based on "pain, rest-requirements, or episodic incapacity" in DC 6009. For example, the Board addressed episodes of pain and swelling, missing work in 2010, and the lack of testimony from Appellant's wife and mother related to rest or incapacitation and concluded that there was "no evidence of episodic incapacity." [R. at 16]. However, the Board did not further explain how it assessed "episodic incapacity" beyond referencing the term. Similarly, although the Board identified and discussed evidence in the record reflecting pain and rest-requirements that rose to a compensable level, it failed to explain why a higher rating was not warranted. [R. at 16]. For example, the Board found that "hour-long painful flare ups

undoubtedly delayed, but did not ultimately impair, his daily activities," but did not explain why that was so. *Id.* Nor did the Board explain why it was significant that these hour-long painful flare-ups "did not ultimately impair" his daily activities with respect to assigning a disability rating for "pain and rest-requirements" under DC 6009. *Id*. If the Board was using analogous ratings, it did not explain which diagnostic code(s) it used and why. *See* 38 C.F.R. § 4.20; *see also Lendenmann v. Principi*, 3 Vet.App. 345, 351 (1992) (explaining that to determine whether a DC is analogous to Appellant's condition, VA should consider (1) the functions affected by the condition, (2) the location of the condition, and (3) the similarity of the symptoms of each condition). As it is unclear what standard the Board employed when addressing the rating criteria, the parties agree that remand is necessary.

Further, the parties remind the Board that, as emphasized above, the pre-2008 rating criteria for DC 6009 provides for ratings from 10% to 100% for impairment of visual acuity or field loss, pain, rest-requirements, or episodic incapacity, combining an additional rating of 10% during continuance of active pathology. 38 C.F.R. § 4.84a, DC 6009. As correctly noted by the Board, *see* [R. at 19], the parties agree that 38 C.F.R. § 4.80 (1995) **only** deals with the visual impairment component (i.e., "impairment of visual acuity or field loss") and not the remaining factors listed in the rating criteria for DC 6009. *Compare* [R. at 16-17] (stating that "the maximum rating available for a single service-connected eye is 30 percent absent anatomic loss.") *with* [R. at 19] (stating that "[a]s noted above, the maximum rating available for a single service-connected eye *based on visual*

impairment is 30 percent absent anatomic loss) (emphasis added).

Accordingly, the parties agree that remand is necessary for the Board to provide an adequate statement of reasons or bases applying the pre-2008 rating criteria for diagnostic code 6009 to the evidence of record for the period prior to March 11, 2016. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (stating that remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

CONCLUSION

The Court should vacate, in part, the Board decision and remand the appeal for readjudication consistent with the foregoing. 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, 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). Further, Appellant may submit additional evidence and argument. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order); *see Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992). 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 and an opportunity to respond thereto. *See Austin v. Brown*, 6 Vet.App. 547 (1994); *Thurber v. Brown*, 5 Vet.App. 119 (1993).

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 (1990). A copy of this joint motion will be associated with Appellant's VA file, along with a copy of the Court's Order granting it. The terms of this joint motion are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Secretary shall ensure that this case is afforded expeditious treatment as required by 38 U.S.C. § 7112.

(Continued on the next page)

Respectfully submitted,

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DATE: March 10, 2022

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