

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

TINA L. LUCKETT,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

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Vet. App. No. 21-4881

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet.App. R. 27 and 45(g), the parties, by and through their attorneys, respectfully move the Court to issue an order vacating, in part, the June 10, 2021, Board of Veterans' Appeals (Board) decision, which denied entitlement to a compensable rating for recurrent vulvovaginitis, and to remand for readjudication consistent with this motion. [Record Before the Agency (R.) at 1-23] (June 10, 2021, Board Decision).

Appellant does not challenge the portion of the Board's decision before the Court that denied her claim for entitlement to service connection for a left shoulder disability, and her appeal of that part of the Board's decision should be dismissed. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). The Board also remanded Appellant's claims for entitlement to 1) a compensable rating for migraines prior to October 11, 2019; 2) service connection for gastroesophageal reflux disease (GERD); 3) service connection for Barrett's esophagus; 4) service connection for gastritis; 5) service connection for residuals of uterine fibroids, to

include as secondary to recurrent vulvovaginitis; 6) service connection for a hysterectomy, claimed as secondary to uterine fibroids; 7) service connection for a lumbosacral strain; 8) service connection for a neck condition; and 9) service connection for fatigue; therefore, the Court does not have jurisdiction over those claims. See *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

BASIS FOR REMAND

The parties agree that vacatur and remand are required because the Board erred when it failed to set forth an adequate statement of reasons or bases for its decision. See 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).

The parties agree that the Board erred insofar as it did not consider whether Appellant was entitled to a separate compensable rating for urinary frequency, which was raised by the record. See *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); see also *Morgan v. Wilkie*, 31 Vet.App. 162, 164 (2019) (The Board is required to exhaust schedular alternatives for determining a rating disability including rating a single disability under multiple diagnostic codes (DC) so long as doing so does not run afoul of, for example, the rule against pyramiding). Here, during an October 2019 private gynecological examination, the examiner noted that Appellant's vulvovaginitis symptoms included frequent urination. [R. at 321 (321-26)]. Appellant also sought treatment for urinary tract infections (UTI) and was prescribed antibiotics in August 2015 and August 2020. [R. at 945, 947 (945-92)]

(August 19, 2015, Oakwood private treatment record); [R. at 327] (August 14, 2020, private treatment record). Yet the Board did not address whether Appellant was entitled to a separate disability rating for her urinary frequency associated with her service-connected vulvovaginitis. On remand, the Board must address whether Appellant is entitled to a separate disability rating for her urinary frequency under 38 C.F.R. § 4.115a. See *Morgan*, 31 Vet.App. at 164; but see 38 C.F.R. § 4.14.

Further, although the Secretary does not concede error on this issue, the parties also agree that on remand the Board should address Appellant's argument as raised in her February 22, 2022, Appellant's Brief (App. Br.) that she was entitled to a compensable disability rating under 38 C.F.R. § 4.116, DC 7610, because she treated her recurrent vulvovaginitis symptoms for seven to fourteen days, two to three times per year, and this is "continuous treatment" under DC 7610. App. Br. at 19-20; see also App. Reply Br. at 8-15. In addressing this argument, the Board should specifically address Appellant's October 9, 2020, statement that "I have symptoms that require continuous treatments about 2-3 times a year, which last for 7-14 days." [R. at 346 (346-54)] (October 9, 2020, Statement in Support of Claim).

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 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, 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 is entitled to submit additional evidence and/or arguments. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam order). Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof and an opportunity to respond thereto. See *Thurber v. Brown*, 5 Vet.App. 119, 126 (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, 57 (1990). "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). The Board shall incorporate copies of this JMPR, Appellant's brief, Appellant's reply

brief, and the Court's order into Appellant's record. The Secretary shall afford this case expeditious treatment as required by 38 U.S.C. § 7112.

FOR APPELLANT:

Date: December 22, 2022

/s/ April Donahower

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