

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

**JERRY MITCHELL,** )  
Appellant, )  
)  
v. )  
)  
**DENIS MCDONOUGH,** )  
Secretary of Veterans Affairs, )  
Appellee. )

Vet. App. No. 22-3781

**JOINT MOTION FOR REMAND**

Under U.S. Vet. App. R. 27(a) and 45(g), the parties move the Court to vacate the March 2, 2022, decision of the Board of Veterans' Appeals (Board) that denied entitlement to earlier effective dates for the awards of service connection for (1) right hip degenerative arthritis with limitation of extension, (2) right hip degenerative arthritis with limitation of flexion, and (3) right hip degenerative arthritis with limitation of abduction/adduction, and remand those issues for readjudication.

**BASES 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 addressing whether earlier effective dates are warranted by application of 38 C.F.R. § 3.156(c).

Rating decisions denying service connection for a right leg condition were issued in November 1977 and August 2003. R. at 1590-92, 1830. In a January

2022 written brief presentation, Appellant's representative explicitly argued that 38 C.F.R. § 3.156(c) applies to this case because additional service department records were associated with the claims file after the November 1977 rating decision. R. at 13. The Board erred by failing to address this argument.

The Board also erred by failing to address two specific aspects of the record which require consideration under 38 C.F.R. § 3.156(c). First, the August 2003 rating decision lists the evidence of record at that time as including "Service Medical Records from June 22, 1975 through June 15, 1977." R. at 1591. An August 2013 rating decision lists the evidence of record at that time as including "Service treatment records to include National Guard, from April 4, 1975 through March 17, 1978." R. at 1361. The Board should address whether this change to the description of the date range of the service records is evidence that additional service records may have been associated with the claims file between the August 2003 and August 2013 rating decisions, including records dated before June 22, 1975, and after June 15, 1977.

Second, Appellant's service department records currently in his VA file contain service records dated after November 1977, which therefore could not have been received by VA at the time of the November 1977 rating decision. These documents include:

- A March 17, 1978, report of medical examination. R. at 1071-72.

- A March 17, 1978, report of medical history. R. at 1075-77.<sup>1</sup>
- An Army National Guard Retirement Credits Record listing service dated up to July 4, 1979. R. at 1085.
- A DA Form 2-1 dated as reviewed on September 9, 1978, and listing Appellant's service as ending on July 4, 1979. R. at 1087-89.
- A service personnel record dated January 25, 1978. R. at 1094.
- A service personnel record dated March 25, 1981. R. at 1095.

Application of section 3.156(c) could potentially result in earlier effective dates because the July 2018 Board decision which granted service connection for a right leg disability, including leg length inequality and pain and weakness of the right hip and right knee, based its grant on multiple service department records, including some records that the Board may find were received or associated with the claims file after the November 1977 and/or August 2003 rating decisions. R. at 824-31; see 38 C.F.R. § 3.156(c)(3).

Remand is therefore warranted for the Board to provide adequate reasons or bases addressing whether earlier effective dates are warranted by application of 38 C.F.R. § 3.156(c).

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<sup>1</sup> The parties note that Appellant's March 17, 1978, Report of Medical History is followed by a date stamp page indicating that it was received by the VA Regional Office (RO) on March 22, 2012. R. at 1077. March 22, 2012, is the same date that Appellant filed a claim to reopen his claims for service connection for his right leg and low back. R. at 1576.

## OTHER MATTERS

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). Consistent with the closed record characteristic of the AMA and the structure of its review lanes, the Board shall reexamine the evidence of record and conduct a critical examination of the justification for the previous decision. The Board shall incorporate copies of this Joint Motion and the Court's order into Appellant's record. The Board shall provide these matters 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 matters 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.

**CONCLUSION**

The parties ask the Court to vacate the March 2, 2022, decision of the Board that denied entitlement to earlier effective dates for the awards of service connection for (1) right hip degenerative arthritis with limitation of extension, (2) right hip degenerative arthritis with limitation of flexion, and (3) right hip degenerative arthritis with limitation of abduction/adduction, and remand those issues for readjudication consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

/s/ Glenn R. Bergmann  
**GLENN R. BERGMANN**

Date: January 23, 2022

/s/ David S. Ames  
**DAVID S. AMES**  
Bergmann & Moore, LLC  
25 W. Middle Lane  
Rockville, MD 20850  
301-290-3160

FOR APPELLEE:

**RICHARD J. HIPOLIT**  
Deputy General Counsel for Veterans  
Programs

**MARY ANN FLYNN**  
Chief Counsel

/s/ Dustin P. Elias  
**DUSTIN P. ELIAS**  
Deputy Chief Counsel

/s/ Abigail J. Schopick

**ABIGAIL J. SCHOPICK**

Senior Appellate Attorney

Office of General Counsel (027E)

U.S. Dept. of Veterans Affairs

810 Vermont Avenue, NW

Washington, DC 20420

(202) 632-4388