

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

HUGHES D. BAILEY-JIMENEZ,)

Appellant,)

v.)

DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)

Appellee.)

Vet. App. No. 22-6476

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet.App. Rules 27(a) and 45(g), the parties respectfully move the Court to vacate the July 7, 2022, decision of the Board of Veterans' Appeals (Board) which denied entitlement service connection for a lumbar spine disorder. [Record Before the Agency (R.) 4-10].

BASES FOR REMAND

First, the parties agree that the Board violated Appellant's right to fair process by issuing its decision under review prematurely. In February 2022, Appellant's counsel notified the Board that he desired the full 90-day period provided by 38 C.F.R. § 20.1305(a) in which to submit additional evidence or argument. [R. 40]. In June 2022, the Board informed Appellant that his appeal was returned to the docket for a decision. [R. 13]. The Board's letter also confirmed Appellant's entitlement to a 90-day evidence submission period under Section 20.1305. *Id.* Nevertheless, the Board issued the decision under review 35 days later. [R. 4-10]. Remand is required for the Board to honor Appellant's

request for a period for submission of new evidence and argument in accordance with the principles of fair process. *Bryant v. Wilkie*, 33 Vet.App. 43, 44 (2020).

Second, the Board failed to adequately address the credibility of Appellant's lay statements as directed in the November 2020 Joint Motion for Remand. *Stegall v. West*, 11 Vet.App. 268 (1998). In that Motion, the parties agreed that

the Board did not address Appellant's complaints of continuous back pain since service. Therefore, remand is necessary for the Board to provide reasons or bases which address Appellant's November 1999, April 2004, and November 2012 complaints of back pain and symptoms since service. See *Miller v. Wilkie*, 32 Vet.App. 249, 260 (2020) ("If credibility of some evidence was a relevant issue for the Board, [the Court] would expect some discussion on the matter.").

[R. 1663 (1662-65)]. In the decision under review, the Board's only discussion of Appellant's credibility was as follows:

While the April 2021 clinician stated that the Veteran reported seeking treatment in 1965, at the 1998 hearing, the Veteran testified that he began receiving treatment for low back pain in 1996. Therefore, his claims regarding continuity of care are inconsistent and do not coincide with the evidence of record, which showed treatment beginning in 1988.

[R. 9 (4-10)]. Appellant had not claimed "continuity of care," but rather continued lumbar spine symptomatology since service. [R. 1662-63 (1662-65)]. The Board's analysis failed to explain whether Appellant's statements were credible and, if so, how they should be weighed in determining his entitlement to service connection. Remand is required for the Board to address the credibility of Appellant's lay statements and to determine whether another medical examination or opinion is

necessary pursuant to *Miller. Miller*, 32 Vet.App. at 259 (discussing the interplay of credibility determinations and medical examinations).

Finally, the Board mischaracterized the evidence. It found that “at the 1998 [Board] hearing, [Appellant] testified that he began receiving treatment for low back pain in 1996.” [R. 9 (4-10)]. To the contrary, Appellant stated that he first sought treatment for his back almost immediately after his discharge with Dr. Negrón and Dr. Varela. [R. 2982 (2976-84)]. Subsequent to their care, he managed his pain on his own by taking medication. [R. 2979-80 (2976-84)]. However, when the pain became overly severe in 1996, he began treatment at the VA clinic in Mayaguez. [R. 2983 (2976-84)]. Accordingly, the Board should correct this mischaracterization in readjudicating Appellant’s entitlement to service connection for a lumbar spine disorder.

The parties agree that this joint motion and its language are the product of the parties’ negotiations. The Secretary 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 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 the joint motion. The parties agree to unequivocally waive 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, Appellant will be free to submit additional evidence and argument on the questions at issue. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). Before relying on any additional evidence developed, the Board should 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). The terms of this joint motion for remand are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Board shall incorporate copies of this motion and the Court's order into Appellant's record. The Secretary will ensure the Board affords this case expeditious treatment as required by 38 U.S.C. § 7112.

CONCLUSION

Considering the foregoing, the parties respectfully move the Court to vacate the July 7, 2022, decision of the Board which denied entitlement service connection for a lumbar spine disorder. The parties request that the Court remand the matter for readjudication in accordance with the Court's order and this joint motion.

Respectfully submitted,

FOR APPELLANT:

Date: February 28, 2023

/s/ Gideon J. Miller

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