

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

TAMMY SCANLAN,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 21-2827
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to United States Court of Appeals for Veterans Claims Rules 27(a) and 45(g), the parties respectfully move the Court to vacate and remand the part of the March 3, 2021, Board of Veterans' Appeals (Board) decision on appeal that denied entitlement to additional accrued benefits in excess of, cumulative of the amount that VA previously had awarded, \$11,225.16.

In the March 3, 2021, decision, the Board granted entitlement to additional accrued benefits in the amount of \$1,380.00, which was awarded on top of the previously reimbursed amount of \$9,845.16. The Court may not disturb this favorable finding. See *Sheets v. Nicholson*, 20 Vet.App. 463, 466-67 (2006) (Court "cannot disturb a factual finding that is favorable to the appellant").

BACKGROUND

Appellant's claim for additional accrued benefits was previously denied in a July 2019 Board decision, which was appealed to the Court. [R. at 51-59]. In

September 2020, the Court remanded Appellant's claim pursuant to a Joint Motion for Partial Remand (JMPR) entered into by the parties. [R. at 44-49; R. at 50].

In the JMPR, the parties agreed that remand was warranted because the July 2019 Board decision "failed to review the entirety of the expenses itemized in Appellant's September 2016 VA Form 21-534EZ¹ [Application for DIC, Death Pension, and/or Accrued Benefits], and failed to address the Appellant's claims that she provided daily, round the clock care for the Veteran for a little over 2 years." [R. at 44-49 – September 2020 JMPR]. The JMPR directed the Board, on remand, to specifically review all of the alleged expenses contained in Appellant's VA Form 21-534EZ and to readjudicate Appellant's claim. *Id.*

BASES FOR REMAND

The parties agree that remand of Appellant's claim for additional accrued benefits in excess of, cumulatively, \$11,225.16 is warranted because the Board erred by failing to substantially comply with the terms of the Court's prior remand order as required by *Stegall v. West*, 11 Vet.App. 268 (1998).

In the decision on appeal, the Board acknowledged the contention on Appellant's VA Form 21-534EZ that reimbursement of additional accrued benefits was warranted because she provided 24-hour care to the Veteran, including helping him with activities of daily living such as bathing and showering, shaving, feeding, and providing transportation to doctor's appointments for a little over

¹ The VA Form 21-534EZ was signed on September 7, 2016, but was not received by the VA Claims Intake Center until October 5, 2016.

2 years. [R. at 5-6]. However, it denied entitlement to reimbursement for expenses related to this care, concluding that Appellant "failed to identify, itemize, or provide evidence of any specific expenditures born by her in the course of her care for the Veteran." [R. at 7].

The parties agree that this finding is conclusory and does not sufficiently address the primary assertion made in Appellant's VA Form 21-534EZ, which is that she should be reimbursed for caregiving services that she personally bore (in lieu of paying someone else) during the Veteran's last sickness, *i.e.*, aid and attendance, cooking, cleaning, bathing, shaving, 24-hour care, and providing transportation to doctor's appointments for a little over 2 years. See [R. at 1096 (1093-97 – September 2016 VA Form 21-534EZ)]. The Board did not adequately address whether those caregiving services are reimbursable expenses incident to the Veteran's last sickness, as required by the September 2020 JMPR.² In this regard, the parties note that, pursuant to *Helmick v. McDonough*, 34 Vet.App. 141, 143 (2021), the phrase "bore the expense" of last sickness in 38 U.S.C. § 5121(a)(6) and 38 C.F.R. § 3.1000(a)(5) means something broader than "paid."

² See also VA Adjudication Procedures Manual (M21-1), Part Xi.ii.3.E.12.c (Nursing Expenses as Reimbursable Expenses: "Approve charges for nonregistered nursing services performed by a member of the same household in an amount not to exceed those consistent with charges made in the community for such nonprofessional services."); *Healey v. McDonough*, 33 Vet.App. 312, 321 (2021) (holding that the Board must incorporate a discussion of relevant agency guidance into its analysis).

On remand, the Board shall readjudicate Appellant's claim for accrued benefits in excess of \$11,225.16, as required by the terms of the September 2020 JMPR, and specifically review all of the alleged expenses contained in Appellant's VA Form 21-534EZ, including the expenses she bore by providing caregiving services to the Veteran during his last sickness, *i.e.*, aid and attendance, cooking, cleaning, bathing, shaving, 24-hour care, and providing transportation to doctor's appointments for a little over 2 years. [R. at 46-47 (46-49)]. In addressing this issue, the Board must account for the Court's holding in *Helmick*, 34 Vet.App. at 143.

Also, without conceding additional error by the Secretary, the parties agree that the Board must account for the arguments presented in Appellant's Initial Brief and Reply Brief that were filed in this appeal and that, pursuant to the provisions below, are to be associated with Appellant's claims file.

In addition, prior to readjudication, Appellant shall have the opportunity to submit additional information and evidence relevant to this case, to include itemizing the specific expenses, to include caregiving services, she is claiming to have provided to the Veteran during his last sickness and quantifying the amount of time and/or value she expended providing those services.

CONCLUSION

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 joint 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). Appellant shall be free to submit additional evidence and arguments in support of his claim. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999). 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 *Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

In any subsequent decision, the Board shall provide an adequate statement of reasons or bases for its decision on all material issues of fact and law. 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 joint motion, Appellant's Initial Brief and Reply Brief filed in this appeal, and the Court's order into Appellant's record. The Secretary will afford this case expeditious treatment as required by 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully request the Court to issue an order vacating and remanding the May 3, 2021, Board decision to the extent it denied entitlement to additional accrued benefits in excess of, cumulatively, \$11,225.16.

Respectfully submitted,

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Dated: March 29, 2023

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