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October 16, 2023

Keith Loyd Cottrell
16 N Star Vale Dr
SPC 38 Payson, AZ 85541

RE: Claim for Veterans' Benefits

Dear Mr. Cottrell:

Enclosed, please find a copy of the Joint Motion for Partial Remand and a copy of the Court Order granting the Motion.

If you should have any questions, please do not hesitate to contact our office. Thank you.

Very truly yours,

Zachary M. Stolz

EAS/

Enclosure

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

KEITH LOYD COTTRELL,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 23-2843
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

JOINT MOTION FOR PARTIAL REMAND

Under U.S. Vet. App. Rules 27 and 45(g)(2), Appellant, Keith Loyd Cottrell, and Appellee, Denis McDonough, Secretary of Veterans Affairs, by and through their attorneys, respectfully move the Court to vacate that part of the February 23, 2023, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a rating in excess of 10 percent, prior to March 5, 2019, for coronary artery disease (CAD), status post coronary triple artery bypass graft, and to remand this matter for readjudication consistent with this motion. [Record Before the Agency (R.) at 5 (1-13) (February 23, 2023, Board Decision)].

The part of the Board decision that granted entitlement to an increased rating of 100 percent for CAD, status post coronary triple artery bypass graft, effective March 5, 2019, is favorable to Appellant and should not be disturbed on appeal. See [R. at 5-6, 10-11]; *Medrano v. Nicholson*, 21 Vet.App. 165, 170-71 (2007).

BASES FOR REMAND

The parties agree that vacatur and remand are warranted because the Board erred by providing an inadequate statement of reasons or bases. 38 U.S.C. § 7104(d)(1). Generally, the Board's decision must be based on all the evidence of record, and the Board must provide a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." *Id.* "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, provide the reasons for its rejection of any material evidence favorable to the claimant, and consider and discuss all "potentially applicable" provisions of law and regulation. *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 failed to properly comply with these requirements.

Appellant's CAD is rated under 38 C.F.R. § 4.104, Diagnostic Code (DC) 7005. See [R. at 112, 126, 160-62 (112-30, 160-62) (May 2019 Decision Review Officer (DRO) Decision)]; [R. at 438, 466-68, 473 (438-53, 466-75) (February 2018 Rating Decision)]. Under the version of 38 C.F.R. § 4.104, Diagnostic Code (DC) 7005 that was applicable in 2019, a disability rating of 100 percent is warranted for chronic congestive heart failure; or when there is a workload of 3 METs or less

which results in dyspnea, fatigue, angina, dizziness, or syncope; or when there is left ventricular dysfunction with an ejection fraction of less than 30 percent. 38 C.F.R. § 4.104, DC 7005 (2019).

In a March 5, 2019, private examination, the examiner indicated that exercise stress testing on March 28, 2017, showed METs of 3 resulting in dyspnea and fatigue. [R. at 410 (405-12) (March 5, 2019, Private Disability Questionnaire for Heart Conditions)]. In May 2019, the RO issued a DRO decision granting an increased disability rating of 100 percent for Appellant's CAD disability effective April 4, 2019. See [R. at 112, 126, 160-62]. In July 2019, Appellant filed a VA Form 10182 appealing to the Board and electing the hearing lane. [R. at 106-07 (July 2019 VA Form 10182)].

In its decision, the Board favorably determined that an earlier effective date of March 5, 2019, is warranted for Appellant's 100 percent disability rating under 38 C.F.R. § 4.104, DC 7005. [R. at 10-11]; see also [R. at 5-6, 9]. In doing so, the Board primarily relied on the March 5, 2019, private opinion as the evidentiary basis for that determination because it shows Appellant's heart disability resulting in METs of 3 with dyspnea and fatigue as of March 5, 2019. See [R. at 10]; [R. at 410]; see also [R. at 5-6]; [R. at 9 (reviewing and summarizing the findings of the March 5, 2019, private opinion, including that "[e]xercise stress testing showed METs of 3 resulting in dyspnea and fatigue")]; [R. at 11]. The Board denied a rating in excess of 10 percent for CAD prior to March 5, 2019. [R. at 5-6, 9-11]. However, it is unclear whether the Board considered that the March 5, 2019, private

examiner noted and relied on exercise stress testing performed on March 28, 2017, which pre-dates the date of the opinion, for the relevant finding that served as the basis for the 100 percent disability rating evaluation and grant of a March 5, 2019, effective date. See *generally* [R. at 5-11]; [R. at 410]. Thus, remand is warranted for the Board to provide adequate reasons or bases addressing the evidence of record, including the March 5, 2019, private opinion and its notation of reliance on exercise stress testing dated March 28, 2017, and whether that could warrant an increased rating in excess of 10 percent prior to March 5, 2019, for Appellant's CAD disability claim.

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 that, pursuant to Rule 41(c)(2), the parties agree to unequivocally waive further Court review of and any right to appeal to the U.S. Court of Appeals for the Federal Circuit the Court's order implementing this Joint Motion. The parties respectfully ask that the Court enter mandate upon the granting of this motion.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, Appellant may submit

additional argument to the Board consistent with a notice letter that will be sent by the Board. In any subsequent decision, the Board, consistent with the closed record characteristic of the AMA and the structure of its review lanes, must reexamine the evidence of record and 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 Board shall incorporate copies of this joint motion and the Court's order into Appellant's record. The Board shall provide this claim expeditious treatment as required by 38 U.S.C. § 7112.

WHEREFORE, the parties respectfully request that the Court vacate that part of the February 23, 2023, Board decision that denied entitlement to a rating in excess of 10 percent, prior to March 5, 2019, for CAD, status post coronary triple artery bypass graft, and to remand this matter for readjudication consistent with the foregoing.

Respectfully submitted,

FOR APPELLANT:

Date: September 27, 2023

/s/ Kevin A. Medeiros
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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 23-2843

KEITH LOYD COTTRELL, APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

ORDER

The parties have filed a joint motion for partial remand (JMPR) to this appeal of the Board of Veterans' Appeals decision. As part of their motion, the parties have affirmatively waived any and all rights to appeal in this matter. It is

ORDERED that the motion for partial remand is granted. The matter identified in the JMPR is remanded, pursuant to 38 U.S.C. § 7252(a), for action consistent with the terms of the joint motion. *See Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006); *Stegall v. West*, 11 Vet.App. 268, 271 (1998). The appeal as to the remaining issue is dismissed. This order is the mandate of the Court. An application pursuant to 28 U.S.C. § 2412(d), the Equal Access to Justice Act (EAJA), for award of attorney fees and other expenses shall be submitted for filing with the Clerk not later than 30 days from the date of this order.

DATED: October 12, 2023

FOR THE COURT:

TIFFANY M. WAGNER
Clerk of the Court

By: /s/ Cynthia M. Brandon-Arnold
Cynthia M. Brandon-Arnold
Chief Staff Attorney/Deputy Clerk

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

jjw