IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

PETRA L. GARDENHIRE, Appellant, v. **DOUGLAS A. COLLINS**, Secretary of Veterans Affairs, Appellee.	Vet. App. No. 25-0473

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet. App. R. 27 and 45(g)(2), Appellant, Petra L. Gardenhire, and Appellee, Douglas A. Collins, Secretary of Veterans Affairs, by and through their undersigned counsel of record, respectfully move the Court to vacate the December 4, 2024, decision of the Board of Veterans' Appeals ("Board") that denied entitlement to (1) a rating in excess of 10 percent for the service-connected status-post encephalitis from November 16, 1953, to January 14, 1955, and (2) a rating in excess of 10 percent for the service-connected status-post encephalitis from March 17, 1956, to September 29, 2009. [Record Before the Agency [R.] at 5 (1-36)]

BASIS FOR REMAND

The parties agree that the Board erred because it failed to provide an adequate statement of reasons or bases. Generally, the Board must base its decision on all the evidence of record and 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." *See* 38 U.S.C. § 7104(d)(1). "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." *See 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. *See Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991); *see also Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

Specifically, the parties agree that the Board erred when it failed to adequately explain its reliance on the October 2020 VA medical Opinion, [R. at 1178-82 (October 2020 Medical Opinion DBQ); R. at 1184-95 (October 2020 Central Nervous System and Neuromuscular Diseases DBQ)]; the November 2020 VA medical opinion, [R. at 1094-1111 (November 2020 Medical Opinion DBQ)]; and the January 2021 VA medical opinion [R. at 1051-55 (January 2021 Medical Opinion DBQ); R. at 1056-60 (Medical Opinion DBQ)] for its finding that the Veteran did not have active febrile disease as required for a 100% disability rating under DC 8000 from March 17, 1956 to September 29, 2009. [R. at 30 (1-36)]. As to these VA medical opinions, the Board previously found that they were

inadequate, in its prior December 8, 2021, decision. [R. at 633-646 (December 2021 Board Remand)]. In that decision, the Board found:

> [T]he October 2020 VA examination and VA opinions obtained in November 2020 and January 2021 are inadequate for the purpose of readjudicating the Veteran's appeal. Specifically, while the VA physicians knew about the Veteran's reports of experiencing numbness in his lower lip, headaches, fatigue, dyspnea, memory impairment, sleep impairment, anxiety, agitation, dizziness, psychiatric symptoms, and slurred speech during the appeal period, his lay statements were discounted due to a lack of medical evidence confirming such. Not only are these rationales contrary to the United States Court of Appeals for Veterans Claims' (the Court's) holding in *Buchanan v. Nicholson*, 451 F.3d 1331, 1337 (Fed. Cir. 2006), especially in the current case where VA has lost the VA treatment records which may bolster his assertions, but they do not abide the unique framework of 38 C.F.R. § 4.124a, which contemplates special considerations for rating encephalitis residuals not capable of objective verification – such as those asserted by the Veteran.

Id. at 636-637 (633-646). Here, the Board noted these examinations were inadequate but did not explain how this factored into its findings when it relied on those opinions to find that the Veteran did not have active encephalitis prior to September 29, 2009. [R. at 21, 30 (1-36)]; Thus, reliance on these medical opinions without addressing the prior findings as to the inadequacies of these opinions, renders the Board's reasons and bases for its decision inadequate. This is particularly so where the Board found these examinations erred in wrongly

discounting the Veteran's lay statements, due to a lack of medical evidence confirming them. *Id*.

Further, the parties note that there is evidence showing that VA treatment records requested were unavailable. [R. at 2248 (March 14, 2013, Formal Finding of Unavailability)]; [R. at 635 (December 2021 Board remand in which it was noted that VA treatment records dated prior to October 2008 were unavailable to review)]; [R. at 1648 (1648-52) (September 5, 2018, VA letter to Charles Gardenhirewhich provided: "We have determined that these records cannot be located and therefore are unavailable for review. All efforts to obtain the needed information have been exhausted, and based on these facts, we have determined that further attempts to obtain the records would be futile.")].

Thus, on remand, the parties agree that the Board must address the evidence indicating VA treatment records were unavailable , [R. at 1648 (1648-52)], and the benefit of the doubt in light of such evidence. *Cf. O'Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991) (holding that when service medical records are lost, the Board's obligation to "consider carefully the benefit-of-the-doubt rule is heightened").

The parties agree that this joint motion (JMR) 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 JMR. 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.

The Court should vacate the Board decision and remand the appeal for readjudication consistent with the foregoing. On remand, Appellant may submit additional arguments to the Board, consistent with a notice letter that will be sent by the Board. 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); *see also 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.

CONCLUSION

WHEREFORE, the parties respectfully request that the Court vacate theDecember 4, 2024, Board Decision that denied a rating in excess of 10% for the service-connected status-post encephalitis from November 16, 1953, to January 14, 1955, and from March 17, 1956, to September 29, 2009, and remand the matters for readjudication consistent with this joint motion.

Date: October 9, 2025

Respectfully submitted,

FOR APPELLANT:

/s/ Wesley A. McCauley
WESLEY A. MCCAULEY
United Veteran's Disability, LLC
Non-Attorney Practitioner
100 N. Patterson St., Steve. 52
Valdosta, GA 31601
Telephone: (229) 270-1571

/s/ Benjamin R. Binder
BENJAMIN R. BINDER, ESQ.
Binder and Watson Law Group
Counsel for Appellant
P.O. Box 47386
Tampa, FL 33646-0102
Telephone: (813) 647-5371

FOR APPELLEE:

DANIELLE A. RUNYAN
Acting General Counsel

DAVID L. QUINN
Assistant Chief Counsel

/s/ Drew A. Silow
DREW A. SILOW
Deputy Chief Counsel

/s/ Mark R. Leventhal
MARK R. LEVENTHAL
Appellate Attorney
Office of General Counsel (027M)
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, DC 20420
(202)632-4382

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

PETRA L. GARDENHIRE, Appellant,	)	
v.	)	Vet.App. No. 26-2988
DOUGLAS A. COLLINS, Secretary of Veterans Affairs, Appellee.	)	

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet.App. R. 27 and 45(g)(2), the parties, through their respective attorneys, respectfully move the Court to vacate and remand the March 18, 2026, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a rating in excess of 10% from November 16, 1953, to January 14, 1955, and in excess of 10% from March 17, 1956, to September 29, 2009, for status post-encephalitis. [Record Before the Agency (R.) at 1-37].

BASES FOR REMAND

The parties agree that remand is warranted for the Board to provide an adequate statement of reasons or bases that addresses Appellant's explicitly raised argument challenging the adequacy of the January 2022 Department of Veterans Affairs (VA) medical opinion. *See* 38 U.S.C. § 7104(d)(1). In December 2021, the Board remanded the issues on appeal and directed: "Pursuant to 38 U.S.C. § 5019(a), the [Regional Office (RO)] must obtain advisory medical opinions from a medical expert who specializes in Neurology." [R. at 736 (722-39) (December 8, 2021, Board decision)]. In January 2022, a VA medical opinion was

obtained. [R. at 246-87 (January 19, 2022, Medical Opinion Disability Benefits Questionnaire (DBQ))]. Following the October 2025 Court order that vacated and remanded the December 2024 Board decision and that granted an October 2025 Joint Motion for Remand (JMR), Appellant submitted argument in support of her appeal in November 2025. [R. at 65-82 (November 6, 2025, Appellant submission)]; [R. at 87-92 (October 9, 2025, JMR)]; [R. at 93 (October 17, 2025, Court Order)]; [R. at 94-129 (December 4, 2024, Board decision)].

Here, the Board found that the January 2022 VA medical opinion was "adequate and complete" and substantially complied with the December 2021 remand directives. [R. at 23]. The Board relied on the January 2022 VA medical opinion to deny higher ratings. [R. at 27-35].

The Board erred by not addressing Appellant's explicitly raised arguments challenging the adequacy of the January 2022 VA medical opinion; the Board's findings are conclusory. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). Specifically, in the November 2025 arguments, Appellant argued that the January 2022 VA medical opinion, obtained in response to the December 2021 remand directive, was inadequate because the VA examiner provided equivocal findings, did not provide the medical literature on which they relied, and did not accept the Veteran's reports of subjective symptoms. [R. at 77-78]. In finding the January 2022 VA medical opinion was "adequate and complete," the Board did not provide an adequate statement of reasons or bases addressing the November 2025 challenge to the medical opinion's adequacy. *Allday*, 7 Vet.App. at 527.

Further, the Board's finding that that the January 2022 VA medical opinion substantially complied with the December 2021 remand directive is conclusory. *D'Aries v. Peake*, 22 Vet.App. 97, 105 (2008). The December 2021 remand directive ordered the RO to obtain advisory medical opinions under 38 U.S.C. § 5109(a), which concerns "an advisory medical opinion from one or more independent medical experts who are not employees of the Department." [R. at 736]. The January 2022 VA medical opinion was authored by the same VA examiner who authored the November 2020 VA medical opinion. *Compare* [R. at 246-87], *with* [R. at 1187-1204 (November 19, 2020, Medical Opinion DBQ)]. In finding the January 2022 VA medical opinion substantially complied with the December 2021 remand directive, the Board did not address whether the January 2022 VA medical opinion substantially complied with its prior order to obtain an advisory medical opinion under 38 U.S.C. § 5109(a). *D'Aries*, 22 Vet.App. at 105 Therefore, remand is warranted for the Board to provide an adequate statement of reasons or bases that addresses the adequacy of the January 2022 VA medical opinion and whether it substantially complies with the December 2021 remand directives. *Id.*; *Allday*, 7 Vet.App. at 527.

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 of the Court's order on 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 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 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.

Respectfully submitted,

FOR APPELLANT:

September 21, 2026
Date

/s/ Edward J. Miller
EDWARD J. MILLER
Binder and Watson, LLP
P.O. Box 47386
Tampa, FL 33646
(443) 944-7687

FOR APPELLEE:

JAMES S. C. BAEHR
General Counsel

DAVID L. QUINN
Assistant Chief Counsel

/s/ Drew A. Silow
DREW A. SILOW
Deputy Chief Counsel

September 21, 2026
Date

/s/ Alexander W. You
ALEXANDER W. YOU
Senior Appellate Counsel
Office of the General Counsel (027M)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-4337