

**STATEMENT FOR THE RECORD OF  
THE HONORABLE MARGARET BARTLEY, CHIEF JUDGE  
U.S. COURT OF APPEALS FOR VETERANS CLAIMS**

**FOR SUBMISSION TO THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON VETERANS' AFFAIRS  
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS**

**NOVEMBER 29, 2023**

CHAIRMAN LUTTRELL, RANKING MEMBER PAPPAS, AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

Thank you for the invitation to submit a statement on behalf of the U.S. Court of Appeals for Veterans Claims (Court) with respect to the oversight hearing entitled: "Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal." The hearing appears focused primarily on the Board of Veterans' Appeals (Board) training and quality assurance operations, and the Board's remands of veterans benefits cases to the Veterans Benefits Administration. As the only independent federal court tasked with reviewing Board decisions, the Court is happy to share factual information concerning our judicial review of those decisions, and we hope that this statement will be helpful in examining and understanding Board decision quality. The Court is not privy to what occurs once the Court remands a case due to error in the Board's decision-making and, thus, some matters that are the focus of this hearing are not within the Court's sphere of knowledge.

By way of background, the Court was created in 1988 as an independent judicial body with exclusive jurisdiction to review appeals of Board decisions. With the creation of the Court, veterans became entitled, for the first time, to contest in a court of law adverse final VA decisions on their benefits claims. Our caseload over the years shows that approximately eight percent of Board decisions are appealed to the Court. Pursuant to 38 U.S.C. § 7252(a), the Court has the power to "affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." The scope of our review is statutorily limited to the record that was before the Board. Further, except in isolated instances, we may not find facts. Instead, we are tasked with deciding all relevant questions of law and holding unlawful and setting aside Board decisions and findings that are, among other things, arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law. The Court's interpretations of law by panels of Judges are precedential, and binding in all cases subsequently decided by the Secretary and the Board.

It is notable that although an ultimate grant of benefits is paramount for veterans, VA's procedural compliance with adjudication requirements is equally important and statutorily safeguarded. Congress created the Court to ensure full and fair process for claimants, to make certain that they understand not only the outcome of the Board's decision but also the basis for that decision. *See* S. Rep. No. 418, 100th Cong., 2nd Sess. 38 (1988) (legislative history of 38 U.S.C. § 7104(d)) (underscoring the importance of the Court's function in this regard). Thus, by statute, every decision of the Board must include "a written statement of the Board's 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." 38 U.S.C. § 7104(d). This statutory "reasons or bases" requirement not only is meant to ensure that the veteran understands the reason for the Board's benefits decision, but also to permit the Court to understand the precise basis for the decision so that its accuracy may be reviewed. If the Board decision is not clear to permit the Court to determine whether the decision is legally justified, or if the Court can't discern the basis of the Board's rationale, the decision does not comply with section 7104(d) and remand may be required when the outcome could potentially change. As noted, the Court is charged with reviewing decisions of the Board and may not find facts in the first instance.

It may be helpful to provide a short overview of how a case proceeds through the Court. Before briefs are filed and the case goes before a Judge, a Court staff attorney convenes a mediation conference with the veteran's lawyer and an attorney from VA's Office of General Counsel, who represents the VA Secretary in every appeal. The goal of mediation conferencing is to facilitate narrowing or resolution of the issues on appeal. Full or partial resolution of the appeal often occurs at this point, when the parties together agree that the Board made an error of fact or law requiring reversal or remand. In those instances, the parties file with the Court a joint motion for full or partial remand, called a "joint motion," identifying the Board errors that the parties agree were made. The joint motion guides the Board as to how to remedy the identified errors. Joint motions reflect agreement by both parties, the VA and the veteran, that the Board erred and that the matter must be returned to the Board for error correction. Such appeals do not require a written decision by a Judge because there is no controversy. The Court's Executive Officer/Clerk is authorized to grant such uncontested motions, allowing Judges to concentrate on appeals where the

parties do not reach an agreement, such as when the VA Secretary defends the Board decision and does not concede Board error. A joint motion that is granted results in termination of the appeal and return of the matter to the Board. The Board must then ensure any necessary development and readjudicate the case in accordance with the terms of the remand and applicable law. If the veteran's representative and the VA Secretary do not reach agreement during mediation conferencing, the appeal is then decided by a Judge or Judges of the Court, in which case a written decision is issued that affirms, modifies, or reverses the Board decision, or remands the matter for readjudication based on Board error.

The percentage of Court appeals resolved by joint motion of the parties due to Board error has historically been high. For several years after mediation conferencing began in 2008, the percentage of appeals resolved via joint motion between the parties was approximately 50%, but it has since risen to 75% and even higher. Those statistics are remarkable because they reflect a significant number of appeals in which the VA Secretary concedes that the Board decision contained consequential error, requiring remand of the case. As to the Court's remand rate overall, combined joint motion and Judge decision remand rates due to Board error are likewise high. In fiscal year 2020, 81% of the Court's appeals were remanded due to Board error. The number of the Court's appeals that were remanded due to Board error rose to 83% in fiscal year 2021 and 84% in fiscal year 2022.

As to the types of Board errors in cases that come before the Court, most fall into two broad categories: the failure to assist veterans as required by statute and caselaw, and the failure to provide a discernable reason for the VA benefit decision as required by statute and caselaw. The duty to assist directs the VA Secretary to make reasonable efforts to assist a VA claimant in obtaining evidence necessary to substantiate a claim. This requires, among other things, that VA obtain relevant records in deciding a claim, provide an adequate medical examination and/or medical opinion in certain cases, and base medical opinions on accurate facts. Court decisions and joint motions demonstrate considerable errors in Board decision-making in this area. *See* Court's June 9, 2023, Report to Congress (Attached). Additionally, as noted earlier, statutorily the Board must provide a written statement of 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. This is meant to enable both the veteran and the Court to understand why a benefit was denied. The Board violates the statutory "reasons or bases" requirement when, among other things, it fails to consider favorable evidence, fails to address issues or arguments raised by the veteran or the record, or

improperly finds the veteran not credible. *Id.* These legal errors may require correction and a new Board decision.

The Court is honored to afford veterans and their families and survivors full, fair, and prompt judicial review of Board decisions pertaining to VA benefits claims. Thank you for the opportunity to submit this statement.



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

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WASHINGTON, DC 20004  
202-501-5835

CHAMBERS OF  
CHIEF JUDGE MARGARET BARTLEY

June 9, 2023

[Transmitted via email to the Chairmen and Ranking Members of the U.S. Senate and U.S. House of Representatives Committees on Appropriations; the Senate Subcommittee on Military Construction, Veterans' Affairs, and Related Agencies; and the House Subcommittee on Military Construction, Veterans Affairs, and Related Agencies]

Dear [Chairman/Ranking Member]:

In the Joint Explanatory Statement accompanying the 2023 Consolidated Appropriations Act (PL 117-328), the United States Court of Appeals for Veterans Claims (Court) was directed to provide to the Committees a report on "recurring issues that the Court addresses" in its review of appeals from decisions of the Board of Veterans' Appeals (Board), as well as "the impact it has on the quality or timeliness of a veteran's claim." The following examples of recurring issues are based on Court decisions, which are available on Westlaw or Lexis, as well as issues frequently cited by the parties when they jointly move to vacate a Board decision and remand the matter(s).

**I. Recurring Issues**

**A. Duty to Assist**

The duty to assist directs the Secretary to make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate a claim. 38 U.S.C. § 5103A(a)(1). This duty requires, among other things, that VA obtain relevant records in deciding a claim, provide a medical examination and/or medical opinion in certain cases, and base medical opinions on accurate facts. Recurring issues at the Court that relate to the duty to assist include:

Obtaining records:

*Lurati v. McDonough*, No. 22-0658, 2023 WL 2384735 (Vet. App. Mar. 7, 2023) (Board did not obtain veteran's SSA records or find that they were unavailable); *Reaves v. McDonough*, No. 21-8209, 2023 WL 2327198 (Vet. App. Mar. 2, 2023) (VA failed to obtain veteran's private medical records).

Providing examination or medical opinion:

*Everett v. McDonough*, No. 19-9118, 2022 WL 593753 (Vet. App. Feb. 28, 2022) (Board did not provide a medical opinion as required by statute); *Dobbs v. McDonough*, No. 21-0031, 2022 WL 3009595 (Vet. App. Jul. 29, 2022) (Board did not provide a medical opinion as required by statute).

Providing adequate medical examination or opinion:

*Celaya v. McDonough*, No. 21-7189, 2023 WL 2733332 (Vet. App. Mar. 31, 2023) (examiner provided no rationale to inform as to why disability was unrelated to service).

Factual premise for medical opinion:

*Tucker v. McDonough*, No. 22-2639, 2023 WL 3735103 (Vet. App. May 31, 2023) (examiner erroneously opined there was no record of treatment for approximately 30 years after service, despite evidence reflecting such treatment 10 years after service); *Walters v. McDonough*, No. 20-8402, 2021 WL 6133769 (Vet. App. Dec. 29, 2021) (examiner stated both that the condition first manifested prior to service and that it did not manifest until after service).

Opinion must be complete, not speculative, and address all theories of entitlement:

*Wright v. McDonough*, No. 20-2147, 2022 WL 17828848 (Vet. App. Dec. 21, 2022) (examiner used speculative language, opining that claimed disability "does not seem to be associated" with a service-connected disability); *Fagerstrom v. McDonough*, No. 20-1322, 2021 WL 1555305 (Vet. App. Apr. 21, 2021) (examiner did not address whether hearing loss is related to in-service ear drum injury).

Credible lay statements:

*Blair v. McDonough*, No. 22-3244, 2023 WL 3735139 (Vet. App. May 31, 2023) (examiner ignored veteran's lay statements regarding post-service symptoms); *Wooden v. McDonough*, No. 21-7406, 2023 WL 2424983 (Vet. App. Mar. 9, 2023) (examiner did not acknowledge favorable lay testimony).

Substantial compliance with a prior remand:

*Sorrell v. McDonough*, No. 22-0853, 2023 WL 3735765 (Vet. App. May 21, 2023) (prior remand ordered medical opinion to address aggregate impact of veteran's service-related disabilities but resulting opinion focused on only one disability); *Biernatt v. McDonough*, No. 21-7138, 2023 WL 2534110 (Vet. App. Mar. 16, 2023) (examiner failed to comply with prior remand instruction to specifically consider veteran's lay statements when rendering a medical opinion).

## **B. Reasons for Decision**

In its decision, the Board must provide a written statement of 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. 38 U.S.C. § 7104(d)(1). This enables both the claimant and the Court to understand why a benefit was denied. See *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). If the Board decision is not clear to permit the Court to determine whether the decision is legally justified, or when the Court can't understand the basis of the Board's rationale, remand may be required since the Court may not find facts in the first instance. See *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). Recurring issues at the Court that relate to § 7104(d)(1) include:

Consideration of favorable evidence:

*Warren v. McDonough*, No. 22-1593, 2023 WL 3735878 (Vet. App. May 31, 2023) (Board did not consider veteran's statements made while seeking medical treatment); *Horne v. McDonough*, No. 21-4685, 2022 WL 4591821 (Vet. App. Sept. 30, 2022) (when determining effective date for increased disability rating, Board failed to consider evidence of worsening).

Issues or arguments expressly raised by the veteran or reasonably raised by the record:

*Marshall v. McDonough*, No. 21-4937, 2023 WL 2547984 (Vet. App. Mar. 17, 2023) (Board did not address explicitly raised theory of service connection); *Saunders v. McDonough*, No. 22-4145, 2023 WL 3719238 (Vet. App. May 30, 2023) (Board did not address earlier effective date argument specifically raised by veteran).

Evaluating credibility:


*Davis v. McDonough*, No. 21-4349, 2022 WL 17828856 (Vet. App. Dec. 21, 2022) (Board found the veteran not credible without laying a proper foundation for that finding).

## **II. Impact of Recurring Issues on Quality or Timeliness of a Veteran's Claim**

The Joint Explanatory Statement directed the Court to report on the impact of recurring issues on the quality or timeliness of a veteran's claim. However, as an independent federal Court that reviews VA's Board decisions, the Court is not privy to what happens to a veteran's benefits appeal once the Court remands to VA due to Board error. Therefore, the Court is unable to provide the Committees with information as to the impact that recurring issues in Board decisions have on the quality or timeliness of a veteran's claim. The Court can only note that claims remanded by our Court are entitled to expeditious treatment by the Board. *See* 38 U.S.C. § 7112.

Congress created the Court to ensure full and fair process for claimants, to make certain that they understand not only the outcome of the Board's decision in their case, but the precise basis for that decision. *See* S. Rep. No. 418, 100th Cong., 2nd Sess. 38 (1988) (legislative history of 38 U.S.C. § 7104(d)). We undertake this mission with the utmost seriousness and, as always, we appreciate your ongoing support of the Court. Please let me know if I may be of further assistance.

Sincerely,



Margaret Bartley  
Chief Judge