

# Office of Administrative Review

## Reading and Analyzing Board Remands- Training Handout 1

### Instructor Guide

REMAND DATE: August 25, 2021

#### REMANDED

**Service connection for a respiratory disorder.**

**Service connection for a skin disorder.**

**Service connection for hearing loss.**

***Instructor Notes:*** Discuss with learners that this is the section of the remand where the Board lists all the remanded issues. Students should understand that the issues listed here will involve development and therefore, they should cross-reference any development they undertake with this list to make sure development is complete. Here, the issues on remand are all for service connection.

#### REASONS FOR REMAND

The Veteran had active duty service from March 1984 to September 1996.

This appeal comes before the Board on appeal from a March 2011 rating decision. In March 2017, the Veteran testified at a Board hearing.

In April 2017, the Board remanded these issues for further development.

While the case was in remand status, in a March 2021 rating decision, the RO granted service connection for the Veteran's tinnitus, thereby resolving his appeal as to that matter.

***Instructor Notes:*** Discuss with learners that this initial section gives adjudicatory background on the appeal. It should mention the Veteran's service dates as well as the date of the appealed decision. It will mention if this appeal was previously remanded and any adjudicatory decisions made in the interim. Here, the Board states these issues were previously remanded.

#### All claims.

Pertinent to all claims on appeal, in the April 2017 remand, the Board specifically noted that the Veteran had specifically asserted that a complete copy of his service treatment

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records (STRs) had not been associated with the claims file. Thus, the Board directed the RO to request the Veteran's complete STRs from appropriate sources.

Pursuant to the Board's remand, in May 2019, the RO requested the Veteran's complete medical/dental records and his entire service personnel records (SPRs). While the Veteran's SPRs were provided in May 2019, and an STR abstract was provided in early June 2019, a response pertaining to the request for his medical/dental records, dated later in June 2019, indicated that all available requested records had been shipped to a contracted scan vendor for upload into the Veteran's electronic claims file. Notably, however, it does not appear that any additional STRs were uploaded to the Veteran's claims file, as there are no additional STRs dated after this letter that were associated with the file, and there appear to be no STRs in addition to those previously associated with the claims file in July 2014.

A remand by the Board confers on a claimant a legal right to compliance with the remand order. *Stegall v. West*, 11 Vet. App. 268, 271 (1998). As it appears that additional STRs remain outstanding, remand is required in order for the RO to ensure that the Veteran's complete STRs are associated with the claims file.

**Instructor Notes:** Discuss with learners that the Board states these reasons cover all the issues. The reasons section is broken down by issue; however, if the reason covers all the issues, the Board can label it as such. Here, the Board states that the issues are all affected by the incomplete STR development.

### **Service connection for a respiratory disorder.**

With respect to the Veteran's claim for a respiratory disorder of the lungs, in an April 2020 VA opinion, the examiner noted his chronic obstructive pulmonary disorder (COPD), and provided the opinion that the claimed disorder was less likely than not incurred in or caused by a claimed in-service injury, event, or illness. In providing this opinion, the examiner determined that the Veteran did not meet the criteria for illness caused by asbestosis, but only had COPD. Thus, the examiner specifically opined that it was less likely than not that the Veteran had a current respiratory condition, COPD, related to asbestosis exposure in service. The examiner did not specifically provide an opinion with respect to whether the Veteran's COPD was otherwise at least as likely as not related to his active service. See *Stegall*, 11 Vet. App. at 271.

Moreover, the Board observes that a February 2019 VA examination report noted that the Veteran also had a 6mm nodule in the right middle lobe. Questionable nodules of the left lung were also identified in a February 2011 imaging study. The examination reports of record do not address whether the Veteran's lung nodules are, or have been, disabling

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or whether the nodules are likely etiologically related to his active service, to include as a result of asbestos exposure. Thus, clarification is required.

**Instructor Notes:** Discuss that the Board provides the reasons for the remand on the respiratory disorder and explains why the previous medical opinion was found to be insufficient. It is important to understand the Board's rationale here because if clarification is sought but the new medical opinion answers the question the same way it was previously answered, then it should be found insufficient and returned for clarification.

### **Service connection for a skin disorder.**

Pursuant to the Board's February 2018 remand, the Veteran was afforded a VA skin diseases examination in February 2019. The examiner noted that the Veteran did not have any rash of his feet currently, but that the Veteran had described what sounded like seborrheic dermatitis. The examiner further concluded that no medical opinion could be provided because there were no active dermatoses.

Notably, prior evidence of record, including an April 2010 VA examination report, noted the Veteran's skin condition of his feet. That examiner appeared to indicate that the Veteran had jungle rot of the bilateral feet. Additionally, multiple VA clinical treatment reports noted various skin conditions over the last several years, including a lesion on his back, noted in August 2009; skin breakdown of the groin, noted in March 2012; and stasis dermatitis and chronic ulceration of the legs, noted in August 2019 and June 2020. A medical opinion must be provided addressing the etiology of all skin conditions manifested during the appeal period, including for any condition that has subsequently resolved. See 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c); *McLendon v. Nicholson*, 20 Vet. App. 79 (2006).

**Instructor Notes:** Discuss that the Board provides the reasons for the remand on the skin disorder and explains why the previous medical examination was found to be insufficient. It is important to understand the Board's rationale here because if clarification is sought but the new medical opinion answers the question the same way it was previously answered, then it should be found insufficient and returned for clarification.

### **Service connection for hearing loss.**

With respect to the Veteran's claimed bilateral hearing loss, he was afforded a new VA audiological examination in February 2021, where the examiner opined that the Veteran's hearing loss was less likely than not etiologically related to his active service. The

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examiner, however, relied, at least in part, on the finding that the Veteran's STRs did not show reports of complaints of, or treatment for, decreased hearing in service or at separation. See *Dalton*, 21 Vet. App. at 39-40. Further, the examiner did not address the possibility that the Veteran may have developed a delayed-onset hearing loss. See *Hensley v. Brown*, 5 Vet. App. 155, 159 (1993). Thus, remand is warranted to afford the Veteran a new VA audiological examination to determine the nature and etiology of his bilateral hearing loss. 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159; *McLendon*, 20 Vet. App. at 79.

Further, to the extent that the examiner that conducted an April 2010 VA examination opined that the Veteran's tinnitus was a symptom associated with his hearing loss, opinions should be provided with respect to whether the Veteran's hearing loss is at least as likely as not etiologically related to his service-connected tinnitus.

**Instructor Notes:** Discuss that the Board provides the reasons for the remand for hearing loss and explains why the previous medical opinion was found to be insufficient. The Board's rationale is that the examiner did not provide a complete medical opinion and explains what was missing. It is important to understand the Board's rationale here because if a new medical exam/opinion is requested but the new medical opinion answers the question the same way it was previously answered, then it should be found insufficient and returned for clarification.

The matters are REMANDED for the following action:

**Instructor Notes:** Discuss that this section will include all the development required by the Board. The issues and development discussed here should match the reasons for remand above.

1. Ensure that a complete copy of the Veteran's service treatment records, to include all records obtained pursuant to the May 2019 request, are associated with the claims file. Document all requests for missing records, as well as all responses, in the claims file.

**Instructor Notes:** Discuss how this matches the "all issues" part of the reasons and the Board is requiring development for specific records and action to take if the development cannot be completed.

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2. Arrange for the Veteran to undergo appropriate VA examination for his claimed respiratory disorder.

Any and all indicated studies and tests deemed necessary by the examiner should be accomplished. The claims file and a copy of this REMAND should be made available to the examiner for review. After review of the record and completion of the examination (including any necessary tests and studies), the examiner should:

(a.) clearly identify all disabling respiratory disorders involving the Veteran's lungs (to include COPD **and disorder manifested by lung nodules**) **currently present or present at any point pertinent to the current claim** (even if now asymptomatic or resolved).

(b.) For **each** such identified disorder, the examiner should provide an opinion as to whether it is **at least as likely as not** (i.e., a 50 percent probability or greater), that such had its onset during service, or is otherwise medically-related to the Veteran's service, **to include as a result of the Veteran's reported exposure to asbestos during service.**

In addressing the above, the examiner must consider and discuss all pertinent medical and lay evidence of record, to include the multiple reports noting lung nodules, and the Veteran's assertions pertaining to the onset of his respiratory symptoms, and as to the nature and continuity of relevant symptoms. The examiner is advised that the Veteran is competent to report his respiratory symptoms, and the onset of such symptoms and resulting treatment. If lay assertions in any regard are discounted, the examiner should clearly so state, and explain why.

The examiner must provide reasons for all opinions. In this regard, a discussion of the facts and medical principles involved would be of considerable assistance to the Board.

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**Instructor Notes:** Discuss how the Board's directions here match the reasons for remand for the respiratory condition. The Board includes specific language that must be in the exam/medical opinion request. First, the examiner should be instructed to review the claims file as well as the remand. After the review, the examiner has to identify all past and present respiratory conditions. Then for each diagnosis, the examiner has to provide an opinion about onset in service and/or relationship to herbicide exposure. The Board instructs that the examiner has to discuss medical and lay evidence, and if the examiner discounts the lay statements, the examiner must explain why. The exam/medical opinion request, as well as the exam/medical opinion, that is returned from the examiner, must completely address the Board's directions. If not, they will be deemed insufficient. Ensure that you read and discuss each element of these instructions for learner understanding.

3. Also, arrange for the Veteran to undergo appropriate VA examination for his claimed skin disorder. Any and all indicated studies and tests deemed necessary by the examiner should be accomplished. The claims file and a copy of this REMAND should be made available to the examiner for review. After review of the record and completion of the examination (including any necessary tests and studies), the examiner should:

(a.) clearly identify all skin disorders (**to include jungle rot of the feet, skin breakdown of the groin, and stasis dermatitis and ulceration of the legs) currently present or present at any point pertinent to the current claim** (even if now asymptomatic or resolved).

(b.) For **each** such identified disorder, the examiner should provide an opinion as to whether it is **at least as likely as not** (i.e., a 50 percent probability or greater), that such had its onset during service, or is otherwise medically-related to the Veteran's service, **to include the Veteran's reported onset of skin symptoms after wearing the shoes of another service member who had served in Vietnam and suffered from jungle rot, during his active service.**

In addressing the above, the examiner must consider and discuss all pertinent medical evidence of record, to include

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evidence of various skin disorders diagnosed in his clinical treatment records (noted above) and the apparent jungle rot diagnosed during VA examination in April 2010, and the relevant lay evidence of record, to include the Veteran's assertions as to the nature, onset, and continuity of relevant symptoms. The examiner is advised that the Veteran is competent to report his skin-related symptoms, and the onset of such symptoms and resulting treatment. If lay assertions in any regard are discounted, the examiner should clearly so state, and explain why.

The examiner must provide reasons for all opinions. In this regard, a discussion of the facts and medical principles involved would be of considerable assistance to the Board.

**Instructor Notes:** Discuss how the Board's directions here match the reasons for remand for the skin condition. The Board includes specific language that must be in the exam/medical opinion request. First, the examiner should be instructed to review the claims file as well as the remand. After the review, the examiner has to identify all past and present skin conditions. Then for each diagnosis, the examiner has to provide an opinion about onset in service. The Board instructs that the examiner has to discuss medical and lay evidence, and if the examiner discounts the lay statements, the examiner must explain why. The exam/medical opinion request, as well as the exam/medical opinion returned from the examiner, must completely address the Board's directions. If not, they will be deemed insufficient. Ensure that you read and discuss each element of these instructions for learner understanding.

4. Also, arrange for the Veteran to undergo a new VA audiological examination. Any and all indicated studies and tests deemed necessary by the examiner, to include audiometry and speech discrimination testing, should be accomplished. The claims file and a copy of this REMAND should be made available to the examiner for review. After review of the record and completion of the examination (including any necessary tests and studies), the VA examiner should:

(a.) provide an opinion as to whether it is **at least as likely as not** (i.e., a 50 percent probability or greater), that the Veteran's hearing loss onset during service, or is otherwise medically-related to his service, **to include his exposure to acoustic**

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***traumas/hazardous military noise during service.***

(b.) If the Veteran's hearing loss is deemed to not be at least as likely as not etiologically related to his service on a direct basis, the examiner should also provide an opinion as to whether it is ***at least as likely as not*** (i.e., a 50 percent probability or greater) that the hearing loss is/was ***caused, or aggravated*** (made worse) beyond its natural progression by the Veteran's service-connected tinnitus.

The examiner is advised that the absence of evidence of a hearing disability during service is not always fatal to a service connection claim. Evidence of a current hearing loss disability and a medically sound basis for attributing that disability to service may serve as a basis for a grant of service connection for hearing loss where there is credible evidence of acoustic trauma due to significant noise exposure in service, post-service audiometric findings meeting the regulatory requirements for hearing loss disability for VA purposes, and a medically sound basis upon which to attribute the post-service findings to the injury in service. Thus, the examiner should ***consider a delayed onset theory of causation for the Veteran's hearing loss.***

The examiner must also consider and discuss all pertinent medical evidence and lay assertions, to include the Veteran's assertions as to the nature, onset, and continuity of his hearing loss symptoms. The examiner is further advised that the Veteran is competent to report his hearing loss symptomatology and the onset of hearing impairment. If lay assertions in any regard are discounted, the examiner should clearly so state, and explain why.

The examiner must provide reasons for all opinions. In this regard, a discussion of the facts and medical principles involved would be of considerable assistance to the Board.



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**Instructor Notes:** Discuss how the Board's directions here match the reasons for remand for the hearing loss. The Board includes specific language that must be in the exam/medical opinion request. First, the examiner should be instructed to review the claims file as well as the remand. The medical opinion instructions require both a direct and alternatively an aggravation medical opinion, so the claims processor should word the request very carefully to ensure all parts are covered. The exam/medical opinion request, as well as the exam/medical opinion is returned from the examiner, must completely address the Board's directions. The Board instructs that the examiner has to discuss medical and lay evidence, and if the examiner discounts the lay statements, the examiner must explain why. If not, they will be deemed insufficient. Ensure that you read and discuss each element of these instructions for learner understanding.