

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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17-2083

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LARRY E. ENGLISH,

Appellant,

v.

DAVID J. SHULKIN, M.D.,  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## **ISSUES PRESENTED FOR REVIEW**

- I. In denying the Veteran an increased rating for his patellofemoral syndrome of the right knee between January 15, 2008, and April 14, 2010, the Board misapplied 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5257 (2017) when it required objective evidence of instability. The Board further failed to adequately consider and discuss functional limitations as required by 38 C.F.R. § 4.40 (2017). The August 2016 Joint Motion for Remand (JMR) required the Board to consider functional loss and the Veteran's lay statements regarding instability in his right knee. Did the Board err when it misapplied DC 5257, failed to comply with the August 2016 JMR, and did not provide adequate reasons and bases for its decision?
- II. In denying the Veteran an increased rating for his patellofemoral syndrome of the right knee between January 15, 2008, and April 14, 2010, the Board failed to meet its duty to assist. The November 2016 VA examiner failed to provide an adequate retrospective VA examination as required by *Sharp v. Shulkin*, 29 Vet.App. 26 (2017). Did the Board err when it found this VA examination adequate for rating purposes?

## **STATEMENT OF THE CASE**

Larry E. English served in the United States Army as a Personnel Clerk from June 1976 to June 1979 and from February 1991 to October 1991. R-1524 (DD-214

Discharge Form); R-1999 (1994-2004).<sup>1</sup> Mr. English received the Army Service Ribbon, National Defense Service Medal, Army Lapel Button, Sharpshooter Badge M-16, Army Reserve Component Achievement Medal, NCO Professional Development Ribbon, Overseas Service Ribbon, Army Achievement Medal, and the Army Good Conduct Medal. R-1524.

During his first period of service, Mr. English was involved in an automobile accident. R-436 (436-37) (Veteran Letter to the President). While in service, he was in a Jeep that “hit a pothole, and then . . . ejected [him] . . . [A]s it rode down the hill, it flipped over above [him], and it almost . . . hit [him].” R-1146 (1142-56) (Transcript of July 2009 Hearing Before the BVA). Mr. English stated after the accident, “I lost consciousness . . . [I]he only thing I remember is once I was thrown, I looked up and saw my sergeant major. And then they said I got up and I tried to walk and I fell back down. I guess I couldn’t walk and I went unconscious.” *Id.* Mr. English was hospitalized for two weeks. R-1147. Mr. English testified “when I hit my head it just shocked me all the way down. In my knee, I couldn’t run PT for a while. And like when I got out of service, I had, I did arthroscopic surgery in [19]81, about a year or so after, about a year after I got out.” *Id.* During Mr. English’s service in Desert Storm, he reinjured his right knee during physical training. R-319-20 (316-25) (Transcript of October 2015 Hearing Before the BVA).

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<sup>1</sup> Appellant’s counsel was unable to locate the Veteran’s DD-214 for the first-time period in service in the record. His dates of service, however, are not in dispute.

After his service, Mr. English worked on the Ford assembly line. R-231 (231-239). Mr. English became a line supervisor, but was unable to keep his position as “he was limited in [walking].” R-239. By 2009, Mr. English relied on coworkers to assist him in supervising and sat more often than not due to his right knee. R-1106 (1103-06) (August 2009 VA Examination). Because of the walking demands of his job, eventually the Veteran “had to change his job description. He could not work overtime to make more money.” R-239.

Mr. English filed a claim for service connection for his right knee condition in January 2008. R-1449. The Veteran was afforded a VA examination in February 2008. R-1320 (1320-25) (February 2008 VA Examination). Mr. English complained of knee problems that “flare[] up ‘all the time’ depending on weather, working at Ford.” R-1321. The examiner noted “flares [occur] every 1-2 weeks, pain is moderate [and] lasts all day.” *Id.* The knee flares “further limit[ed]” Mr. English’s walking. R-1322. The examiner noted Mr. English was “[a]ble to stand up to one hour” and was limited to walking one mile. R-1321. The VA examiner indicated the right knee gave way, had pain, weakness and instability. R-1322. He also tested flexion at 0 to 105 degrees and extension at 90 degrees to zero degrees. R-1323. Mr. English’s knee had “[a]bnormal [t]racking” and “[s]ubpatellar [t]enderness” and caused “[s]ignificant [e]ffects” on his occupation. R-1324.

The Regional Office (RO) granted “[s]ervice connection for patellofemoral syndrome, right knee . . . with an evaluation of 10 percent effective January 15, 2008.”



R-1311 (1304-07, 1310-14) (March 2008 Rating Decision). The Veteran filed a Notice of Disagreement and VA Form 9 in July 2008. R-1271 (June 2008 Notice of Disagreement); R-1279. The RO issued a new Rating Decision on September 28, 2009, denying an increased rating under DC 5099-5019 in excess of 10 percent. R-1068 (1063-69). The Board remanded Mr. English's claim for an increased rating in December 2009. R-1055 (1052-57). In the remand order, the Board asked for a Statement of the Case, a VA examination for other disorders, and an additional Supplemental Statement of the Case. R-1055-56. Those actions were completed by January 2010. R-519 (494-521) (January 2010 Statement of the Case); R-1026 (January 2010 Notice of Disagreement); R-524 (522-25) (January 2010 Supplemental Statement of the Case).

Mr. English was afforded another VA examination in August 2009. R-1103. The VA examiner noted Mr. English's knee had instability and was giving way. R-1104. The VA examiner expounded:

Vet[eran] works at Ford, as a Supervisor, [and had] increased pain when walking the plant. The [V]eteran now has to rely on [a lot] more people to help him out in his area to make sure his job is being performed. He sits at his station more often and is more stationary as a result of the right knee.

R-1106. The VA examiner further noted weakness, decreased speed of joint motion, limited flexibility, and popping. R-1104.

Mr. English had an additional VA examination in April 2010. R-860 (860-73) (April 2010 VA Examination). The examiner found right knee flexion from 0 degrees to 90 degrees and extension limited by 20 degrees. R-865.

In March 2011, Mr. English underwent a right knee arthroscopy. R-642 (642-44) (March 2011 surgery report). Later, in June, Mr. English received a temporary 100 percent rating from April 20, 2011, to June 1, 2012, after knee replacement surgery. R-664 (660-68).

The RO granted an increased rating for the right knee from 30 percent to 60 percent, effective July 2014. R-348 (341-55) (October 2014 Rating Decision).

During his October 2015 hearing, Mr. English testified that he used a cane and a knee brace before having his knee replaced. R-319. He stated the April 2010 examiner asked “me how . . . I was walking with the . . . amount of instability that I had on my knee because I was grinding bone to bone and it was hitting . . . my knee cap. It was grinding a hole.” R-318.

In December 2015, the BVA denied “[e]ntitlement to an initial rating in excess of 10 percent disabling for patellofemoral syndrome of the right knee for the period from January 15, 2008 until April 14, 2010.” R-310 (299-312) (December 2015 BVA Decision).

Mr. English appealed the Board’s decision to the Court. *See* R-168 (168-73) (August 2016 joint motion for remand (JMR)). The parties agreed remand was warranted for two reasons. R-168-173. First, the Board failed to discuss evidence of

functional loss and whether an increased rating was warranted based on the evidence. R-169-70. Second, the Board did not state why Appellant's lay statements were not sufficient to support a rating under DC 5257. R-170. The parties noted DC 5257 does not state that objective evidence is required and there was no assessment of the Appellant's credibility. *Id.* VA examiners in February 2008 and August 2009 noted a history of complaints of right knee instability, even though they did not make objective medical findings of instability upon examination. *Id.*

The Board remanded Mr. English's claim to the RO for a VA examination in October 2016. R-154 (153-58) (October 2016 BVA Decision). The Board's remand required the RO to procure a retrospective VA examination to consider "prior range of motion of the right knee, painful motion (and at what point it started), additional loss of motion after repetitions, and functional loss due to pain." R-157. It also asked the examiner to consider "active and passive motion as well as weight-bearing and nonweight-bearing considerations from January 15, 2008 until April 14, 2010." *Id.*

In November 2016, Mr. English was afforded another VA examination. R-95 (95-102) (November 2016 VA Examination); *see also* R-156-57. The examiner noted "[t]he 2507 exam request did not pose an actual question on which the examiner could opine, but we have tried to anticipate what is needed to get the Veteran's disability appeal rated." R-100. He added "[i]t would be mere speculation for any medical provider to 'fill in the blanks' so far as missing information from the 2008, 2009 and 2010 exams for rating is concerned." *Id.* The examiner noted that there

were no tests for passive range of motion or weight bearing and nonweight bearing pain in previous VA examinations. R-101. The examiner observed right knee functional loss such as “[d]ecreased walking” and “[d]ecreased walking and standing.” R-102. The examiner gave no opinion as “rendering an opinion based on what missing information ‘might’ have been there if it had been addressed in today’s . . . rating criteria would not be medically valid for any provider.” R-100.

In May 2017, the Board issued the decision presently on appeal. R-13 (1-15). The Board made a factual finding:

The evidence demonstrates that prior to April 15, 2010 the Veteran’s patellofemoral syndrome of the right knee was manifested by subjective complaints of pain, stiffness, weakness, decreased speed, and limited flexibility. Objectively the Veteran’s right knee was manifested by range of motion from 0 to 90 degrees or greater in right leg flexion and 10 to 0 degrees in right leg extension.

R-4. When considering a rating under DC 5257, the Board noted “even if the Veteran sincerely believes that his knee experiences stability [sic], instability itself, can be clinically tested for and diagnosed.” R-10. The Board “considered the Veteran’s statements . . . to include subjective complaints of instability” but found “the Veteran’s listed disability symptoms do not warrant any additional increased rating at this time as his impairments are contemplated in the currently assigned ratings.” R-12. It concluded, “[t]hus, the Board finds the objective testing reflecting no instability or subluxation, more probative than the Veteran’s lay statements in this regard. As such, a rating under this diagnostic code is not applicable.” R-10.

The Board considered “functional limitations” in its decision. R-11. It acknowledged “the February 2008 and August 2009 VA medical examinations note the Veteran’s right knee disability functional effect as decrease[d] mobility.” *Id.* The Board first addressed pain, stating “[p]ain may cause a functional loss but itself does not constitute functional loss; rather, pain must affect some aspect of ‘the normal working movements of the body’ such as ‘excursion, strength, speed, coordination, and endurance,’ in order to constitute functional loss.” *Id.* The Board then stated “limited mobility/decrease[d] range of motion is appropriately contemplated within the criteria.” *Id.* It concluded “the Board does not find that an increased rating is warranted for the Veteran’s noted functional loss in excess of the provided 10 percent already granted for painful and limited motion.” *Id.* Mr. English filed a timely appeal.

### **SUMMARY OF THE ARGUMENT**

The Board erred when it failed to meet its duty to assist Mr. English. First, the Board failed to comply with the terms of the August 2016 JMR. Despite the JMR’s terms, the VA examiner failed to adequately consider Mr. English’s functional loss and failed to consider Mr. English’s complaints of instability.

Further, the Board additionally erred when it failed to provide adequate reasons and bases in its application of 38 C.F.R. §§ 4.40 and 4.45. The Board’s decision prejudiced Mr. English by failing to address material evidence in his favor. Instead, the Board’s decision was a conclusory statement that Mr. English’s pain did not entitle him to a higher rating.

The Board also erred by failing to provide adequate reasons or bases for its decision. In rejecting Mr. English's lay statements without explanation as to why he lacked competence to report this observable symptom, the Board prejudiced Mr. English. The Board further found the VA examiners' findings more probative simply because they were medical, despite the Court's holdings that lay evidence can be sufficient. The Board provided no explanation for its findings. The failure to provide adequate reasons or bases for its decision prejudiced Mr. English.

### **STANDARD OF REVIEW**

The Court reviews the Board's decisions regarding claims for increased ratings under the clearly erroneous standard. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). A determination regarding the degree of impairment for purposes of rating a disability is an issue of fact. *Francisco v. Brown*, 7 Vet.App. 55, 57-58 (1994). The Board's answer to that question is subject to review for clear error. *Davis v. West*, 13 Vet.App. 178, 184 (1999).

But the Court reviews claimed legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a); see *Martin v. Brown*, 6 Vet.App. 272, 274 (1994). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Young v. Brown*, 4 Vet.App. 106, 108 (1993). The Court should determine whether the Board's decision, in which it failed to properly interpret and apply

relevant law and failed to provide adequate reasons or bases, is not in accordance with the law.

## ARGUMENT

**I. The Board failed to provide adequate reasons or bases in denying Mr. English in his claim for an increased rating. The Board misinterpreted and misapplied the law, and failed to comply with the Court’s remand order when it denied a higher rating under DC 5257 or based on functional loss.**

*a. The Board erroneously required objective evidence to grant a rating under DC 5257. The Board also failed to provide adequate reasons and bases for its denial.*

In August 2016, the parties agreed that remand was necessary because the Board did not state why Appellant’s statements were not sufficient to support a rating under DC 5257, which does not require objective medical evidence. R-171. In part, the JMR contemplated the February 2008 and August 2009 C&P examinations, in which both VA examiners noted right knee instability in the Veteran’s list of symptoms, but instability was not objectively shown upon physical examination. R-170-71; R-1324; R-1104. The JMR noted “there was no assessment of the Appellant’s credibility with regard to his statements about instability.” R-171. In its most recent decision, the Board again failed to properly discuss the favorable evidence and the applicability of DC 5257.

“[A] remand by this Court or the Board imposes upon the Secretary of Veterans Affairs a concomitant duty to ensure compliance with the terms of the remand, either personally or as the ‘the head of the Department.’” *Stegall v. West*, 11

Vet.App. 268, 271 (1998) (*citing* 38 U.S.C. § 303). If “the remand orders of the Board or this Court are not complied with, the Board itself errs in failing to insure compliance.” *Id.* Further, “the ‘terms of the remand’ may include the terms of a joint motion that is granted by the Court but not specifically delineated in the Court's remand order.” *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006).

Mr. English is competent to provide testimony to observable symptoms he experienced, specifically instability in his right knee, and the Board did not find him lacking credibility. *See Barr v. Nicholson*, 21 Vet.App. 303, 307 (2007) (“Lay testimony *is* competent . . . to establish the presence of observable symptomatology.”); *see* R-1-15. The Board denied entitlement to a separate rating based on instability because “even if the Veteran sincerely believes that his knee experiences stability [sic], instability itself can be tested for and diagnosed.” R-10. The Board stated “[t]he Veteran would be entitled to a rating under DC 5257 if the evidence reflected that he had severe, moderate, or slight recurrent subluxation or lateral instability.” R-10. The Board acknowledged that “the Veteran has complained of right knee instability,” but reasoned that “joint instability can be objectively diagnosed upon clinical examination.” *Id.*; *see Layno v. Brown*, 6 Vet. App. 465, 469 (1994) (“[L]ay witnesses are competent to provide testimony that may be sufficient to substantiate a claim of service connection for an injury.”).

The Board erred because these statements do not comply with the August 2016 JMR. *See Forcier*, 19 Vet.App. at 425; R-171. The parties agreed that “DC 5257 *does*



*not state that objective evidence is required to satisfy that DC's criteria."* R-171 (emphasis added). Remand was necessary because "the Board provided an inadequate statement of reasons or bases for its determination that Appellant's statements were not sufficient to support a rating under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5257." R-170. Nonetheless, the Board again relied on the lack of objective evidence of instability shown during medical testing as the sole reason it denied a rating under DC 5257. R-10. The Board found the Veteran's competent and credible lay statements less probative simply because they were not objective medical evidence without further explanation. *Id.*

As the parties, noted in the JMR, the criteria for rating instability of the knee under DC 5257 do not require objective evidence of instability. A maximum 30 percent rating is warranted when "[r]ecurrent subluxation or lateral instability" of the knee is "[s]evere," a 20 percent rating when the condition is "[m]oderate," and a 10 percent rating when the condition is "[s]light." 38 C.F.R. § 4.71a. The criteria do not define severe, moderate, or slight, let alone impose a requirement of objective evidence to demonstrate even slight instability. 38 C.F.R. § 4.71a. The Board erred by reading a requirement of objective evidence into the diagnostic code and denying a separate rating because that requirement was not met. Where "[t]he regulation does not speak to the type of evidence required . . . [it] certainly does not, by its own terms, restrict evidence to 'objective' evidence." *Petitti v. McDonald*, 27 Vet.App. 415, 427 (2015).

Although there is no clear precedent regarding the sufficiency of lay evidence to establish knee instability under DC 5257, the Court has issued single-judge decisions that speak to this issue. In *Fair v. Shulkin*, the Court held that the Board erred when it found, without explanation, that the medical evidence of a lack of instability outweighed the veteran's lay complaints of instability. No. 16-1150, 2017 WL 1833500, at \*1, \*4 (Vet.App. May 8, 2017); *see also Hall v. Shulkin*, No. 16-3609, 2017 WL 3741201, at \*1, \*3 (Vet.App. Aug. 31, 2017); *Armstrong v. McDonald*, No. 15-0297, 2016 WL 3878476, at \*1, \*2 (Vet.App. July 18, 2016) (disagreeing with appellant's assertion that the Board required objective evidence to demonstrate instability under DC 5257 when it assigned a higher probative value to the medical evidence of record, but remanding the matter based on the Board's failure to provide adequate reasons or bases in support of its probative finding).<sup>2</sup>

As in *Fair*, *Hall*, and *Armstrong*, the Board here failed to explain why it found that the medical evidence of no instability outweighed the Veteran's statements regarding his knee instability. *see Fair*, 2017 WL 1833500, at \*4; *Hall*, 2017 WL 3741201, at \*3; *Armstrong*, 2016 WL 3878476, at \*2. The Board failed to explain why the Veteran's lay reports that his knee gave way were not sufficient to establish recurrent lateral stability, as required by DC 5257. R-10. Instead, the Board relied on

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<sup>2</sup> These cases are single judge decisions and, therefore, are not precedential authority. However, the Veteran cites to them for the persuasive value of their logic and reasoning. U.S. Vet. App. R.30(a) (revised July 18, 2016).

its probative finding to determine that the Veteran did not experience lateral instability in his knee to deny him entitlement to a rating under DC 5257. *Id.*

Because it improperly required objective evidence, the Board did not adequately explain why competent lay evidence of instability did not warrant assignment of a separate rating under DC 5257. That evidence showed that the Veteran suffered from at least slight recurrent instability. R-1104; R-1322. Therefore, as the Board failed to comply with the JMR, and more broadly failed to provide adequate reasons or bases for its decision, which in turn prejudiced Mr. English, remand is the appropriate remedy. R-171-72; *Tucker v. West*, 11 Vet. App. 369, 374 (1998) (“[W]here the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.”).

*b. The Board failed to analyze whether the Veteran’s functional loss more nearly approximated a higher rating for the time period from January 15, 2008 and April 14, 2010.*

Further, the Board’s decision did not provide adequate reasons and bases for denying the Veteran an increased rating for his right knee disability based on functional loss. The August 2016 JMR order required the Board to consider functional loss when determining Mr. English’s claim. R-169-70.

The Board’s reasons and bases for its conclusions are inadequate as it failed to analyze Mr. English’s disability under 38 C.F.R. §§ 4.40 and 4.45. The Board, citing 38 C.F.R. §§ 4.40 and 4.45, concluded “[t]he criteria for an initial rating in excess of 10

percent for patellofemoral syndrome of the right knee, for the period from January 15, 2008 until April 14, 2010 have not been met.” R-4. The Board acknowledged that “both the February 2008 and August 2009 VA medical examinations note the right knee disability functional effect as decrease[d] mobility.” R-11. The Board continued by stating, “[h]owever, limited mobility/decrease[d] range of motion is appropriately contemplated within the criteria . . . the Board does not find that an increased rating is warranted for the Veteran’s noted functional loss in excess of the provided 10 percent already granted for painful and limited motion.” R-11.

When determining the appropriate rating for a disability involving the musculoskeletal system, the Board must consider the diagnostic criteria and range of motion measurements contained in 38 C.F.R. § 4.71a. The Board must also consider whether a higher disability evaluation is warranted on the basis of functional loss due to pain or weakness, fatigability, incoordination, or pain on movement. *See* 38 C.F.R. §§ 4.40, 4.45; *Thompson v. McDonald*, 815 F.3d 781, 785 (Fed. Cir. 2016). Section 4.40 addresses disability ratings for the musculoskeletal system and defines functional loss as “primarily the inability . . . to perform the normal working movements of the body with normal excursion, strength, speed, coordination, and endurance.” 38 C.F.R. § 4.40. Section 4.45 contemplates functional loss as it relates to joint disabilities, listing “pain on movement (as well as swelling, deformity, and atrophy) that affects stability, standing, and weight-bearing.” *Mitchell v. Shinseki*, 25 Vet.App. 32, 37 (2011); 38 C.F.R. § 4.45.

The evidence demonstrates that the Veteran's right knee condition caused functional loss as contemplated by sections 4.40 and 4.45. The February 2008 examiner noted:

- “[F]lares [occur] every 1-2 weeks, pain is moderate [and] lasts all day.” R-1321. The knee flares “further limit[ed]” Mr. English’s ability to walk. R-1322.
- Mr. English was “[a]ble to stand up to one hour” and was limited to walking one mile. R-1321.
- Mr. English’s right knee gave way, had pain, weakness and instability. R-1322.

The August 2009 examiner noted:

- Mr. English’s knee had instability and gave way. R-1104.
- Knee weakness, decreased speed of joint motion, limited flexibility, and popping. *Id.*

During his October 2015 hearing, Mr. English testified:

- He used both a cane and a knee brace before having his knee replaced. R-319.

The November 2016 examiner noted:

- The Veteran had stated during his August 2009 examination “he has a 12 year-old daughter. Uses a cane if he takes her to the mall. He state[d] that he uses a cane ‘quite often[.]’ [He s]its and watches his daughter.” R-107.

These symptoms correspond with factors enumerated in 38 C.F.R. § 4.45, which requires “[i]nquiry” into symptoms noted by VA examiners, such as “[w]eakened movement,” “[e]xcess fatigability,” “[i]ncoordination,” “disturbance of locomotion,” and “interference with sitting, standing and weight-bearing.” *See Petitti*, 27 Vet.App. at 429 n.8 (noting that consideration of 38 C.F.R. §§ 4.40 and 4.45 might

result in a disability rating higher than the minimum disability rating for a particular joint). The Board did not adequately analyze and consider these symptoms under 38 C.F.R. §§ 4.40 and 4.45. R-11. Instead, it simply stated that “limited mobility/decrease[d] range of motion” were contemplated by the 10 percent rating. R-11.

The Board was required to consider the functional loss factors in sections 4.40, and 4.45 and explain how it factored these limitations into its evaluation of the Veteran’s disability in terms of limitation of motion under DC 5260. *DeLuca v. Brown*, 8 Vet.App. 202, 208 (1994); *see Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011) (“The Board must explain, in the context of the facts presented, the rating criteria used in determining the category into which a claimant’s symptoms fall; it is not sufficient to simply state that a claimant’s degree of impairment lies at a certain level without providing an adequate explanation.”). Had the Board properly analyzed the above evidence, it may have found that, despite his range of motion measurements, the Veteran’s right knee disability functional loss resulted in limitation of motion equivalent to a higher rating under diagnostic code 5260.

The Board’s determination to deny a rating in excess of 10 percent for Mr. English’s right knee during the appeals period is conclusory, and does not adequately explain why the Veteran’s functional impairment did not warrant an increased rating. 38 U.S.C. § 7104(d). Since the Board failed to undertake this analysis, remand is required.

**II. The Board failed to comply with its duty to assist when it relied on an inadequate November 2016 VA examination, as the examiner did not comply with *Sharp*.**

After the parties directed the Board to discuss the Veteran's functional loss, the Board ordered a retrospective VA examination to determine the extent of the Veteran's "functional loss due to pain" during the appeal period R-156. The retrospective November 2016 VA examination was inadequate for adjudication purposes under *Sharp v. Shulkin*, 29 Vet.App. 26 (2017).

The 2016 VA examiner acknowledged that previous VA examiners had noted the Veteran's additional functional impairment during flare-ups. R-103-04. However, he failed to provide his own opinion about what the Veteran's functional loss would be during a flare-up occurring within the appeal period, or explain why such an opinion could not be provided, other than stating "[n]ot observed." R-111; *Mitchell*, 25 Vet.App. at 44. But "a bald statement that it would be speculative for the examiner to render an opinion as to the etiology or diagnosis is fraught with ambiguity." *Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010).

The examiner's failure to discuss the Veteran's functional loss during a flare-up prejudiced the Veteran. Where the Board considers entitlement to a higher rating under section 4.40, it must assign a rating "based on the § 4.71a criteria" because section 4.40 does not explicitly list any disability ratings. *Thompson v. McDonald*, 815 F.3d 781, 785 (Fed. Cir. 2016). "[T]he *VA Clinician's Guide* makes explicit what *DeLuca* clearly implied: it instructs examiners when evaluating certain musculoskeletal

conditions to obtain information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from the veterans themselves.” *Sharp v. Shulkin*, 29 Vet.App. 26, 34 (2017). Even when the Veteran is not experiencing a flare-up at the time of the examination, the VA examiner must “elicit relevant information as to the veteran’s flares or ask him to describe the additional functional loss, if any, he suffered during flares.” *Id.* at 35. The examiner then must “estimate the veteran’s functional loss due to flares based on all the evidence of record—including the veteran’s lay information—or explain why [h]e could not do so.” *Id.*

The November 2016 VA examiner failed to make any attempt at estimating the Veteran’s functional loss during a flare-up from all of the evidence of record, including the examiner’s own findings during the examination. R-110-11. Instead, the VA examiner checked the box for “[u]nable to say [without] mere speculation” and explained “[n]ot observed.” R-111. He also stated that “[i]t would be mere speculation for any medical provider to ‘fill in the blanks’ so far as missing information from 2008, 2009 and 2010 exams for rating is concerned.” R-100. He added “[t]he information is just not there . . . rendering an opinion based on what missing information ‘might’ have been there if it had been addressed in today’s . . . rating criteria would not be medically valid for any provider.” *Id.* However, “*DeLuca* and its progeny clearly, albeit implicitly, anticipated that examiners would need to estimate functional loss that would occur during flares,” so at a minimum, the 2016



VA examiner needed to explain why it would be speculative to opine on the Veteran's functional loss during a flare-up. *See Sharp*, 29 Vet.App. at 34; R-111. Because the examiner did not adequately explain the basis for his opinion, the Board could not rely on this examination to deny the Veteran a rating in excess of 10% for his right knee.

## **CONCLUSION**

Based on the foregoing, Mr. English cannot understand the precise basis for the Board's decision and the Court's review of that decision will be frustrated, making remand necessary. *See Tucker*, 11 Vet.App. at 374 ("Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.").

The Board misinterpreted and misapplied DC 5257 and failed to follow the JMR between the VA and Mr. English, when it failed to consider Mr. English's lay statements regarding instability in his right knee. Further, the JMR required the Board to discuss functional loss. The Board only reasoned that the Veteran's pain did not cause functional loss above that contemplated by a 10 percent rating. The Board's lack of adequate reasons or bases for its decision ignored favorable evidence to Mr. English.

The Board also failed to meet its duty to assist obligation when it relied on the November 2016 VA examination. The examiner's opinion refused to make a retrospective determination, despite providing no medical reason for his refusal.

The Board's decision that denied Mr. English's claim for an increased rating for his right knee should be remanded with instructions for the Board to properly apply the law and to provide adequate reasons and bases for its decision.

Respectfully submitted,  
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