

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

WILLIE J. HUNT,)
)
 Appellant,)
)
 v.) Vet.App. No. 17-2072
)
DAVID J. SHULKIN, M.D,)
 Secretary of Veterans Affairs,)
)
 Appellee.)

JOINT MOTION FOR REMAND

Pursuant to U.S. Vet.App. R. 27 and 45(g)(2), Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, and Appellant, Willie J. Hunt, through their respective attorneys, respectfully move the Court to vacate and remand the March 22, 2017, decision of the Board of Veterans' Appeals (Board or BVA) that denied entitlement to a rating in excess of 20% for Appellant's service-connected right knee degenerative joint disease and residuals of arthrotomy¹. [R. at 1-21].

¹ The Veteran's right knee was service connected with a 10% rating effective December 4, 2003. [R. at 2032-2033 (July 21, 2004 Code Sheet)]. In May 2006, he sought an increased rating for the right knee. [R. at 2024 (May 18, 2006, VA Form 119)]. The VA deferred rating on that claim for increase on January 29, 2007. [R. at 1979 (Deferred Rating Decision)]. A May 2007 rating decision increased the rating for the right knee to 20%. [R. at 1940-1951]. The Veteran appealed that determination July 2, 2007. [R. at 1938]. The VA issued a SOC on September 2, 2009. [R. at 1789 – 1807]. Appellant timely filed a VA Form 9 on October 6, 2009. [R. at 1785]. The Secretary issued an SSOC on June 4, 2010. [R. at 1701-05]. The BVA held a hearing on February 22, 2013. [R. at 1381 – 1387]. The BVA issued a decision on May 15, 2013. [R. at 1366-1380]. The VA issued SSOCs on April 29, 2013 and on April 30, 2013. [R. at 1192-1200; R. at 3535 – 3542]. The BVA issued a remand decision on July 29, 2013. [R. at 1175 – 1182]. The Secretary issued an SSOC on October 28, 2013. [R. at 1132-1147]. The BVA issued a decision on March 5, 2014. [R. at 1112-1127]. Judge Pietsch vacated and remanded the BVA decision on April 28, 2015. [R. at 1009-1017].

BASIS FOR REMAND

The parties agree that remand is warranted because the Board erred by failing to set forth an adequate statement of reasons or bases regarding whether Appellant is entitled to a rating in excess of 20% for his right knee disability, to include whether separate ratings under Diagnostic Codes 5257, 5259, and 5260 are warranted. The parties additionally agree that the Board did not provide an adequate statement of reasons or bases for the finding that Appellant's statements are not credible "with respect to the origin, progression, and current severity of the right knee disability."

The Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; 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 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. See *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995),

On November 6, 2015, the BVA remanded the appeal to the regional office. [R. at 920-924]. The RO issued an SSOC dated August 2, 2016. [R. at 30-39]. The BVA issued the decision on appeal on March 22, 2017. [R at 2-22].

aff'd per curiam, 78 F.3d 604 (Fed.Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994).

Credibility Determination:

In the March 2017 decision, the Board initially found that Appellant's statements "with respect to the origin, progression, and current severity of the right knee disability lack credibility" based on the service treatment records noting a left knee injury, a 1993 VA examination where Appellant reported injuring his right leg playing basketball in service, June 2004 VA examination noting an injury to the right knee and surgery in 1971, and a 2012 VA psychiatrist who stated Appellant was not a reliable historian. [R. at 10-12 (1-21)].

The parties agree the Board erred because it did not provide an adequate statement of reasons or bases for its credibility finding. While the Board relied heavily on the service treatment records that indicate Appellant injured his left knee in service, the Board overlooked an October 1970 service treatment record that noted complaints of right knee pain since playing basketball a few days prior. [R. at 2147 (October 20, 1970 service treatment records)]. Furthermore, the parties agree that because service connection has been established for the right knee disability, any discrepancies in Appellant's statements regarding the origin of the right knee disability are irrelevant to the issue of the current severity and symptomatology of Appellant's right knee disability. With respect to the Board's finding that Appellant's statements as to the current severity of the right knee disability are not credible, the parties note the Board does not discuss any

evidence that demonstrates Appellant is malingering his symptomatology nor does the Board point to any other evidence that demonstrates Appellant's statements regarding the severity of his disability are not credible. Therefore, the parties agree remand is warranted, as the Board failed to provide an adequate statement of reasons or bases for finding Appellant not credible.

Disability Ratings:

The parties note Appellant is currently in receipt of a 20% rating under Diagnostic Code (DC) 5262, which rates malunion or nonunion of the tibia or fibula. 38 C.F.R. § 4.71a. In an April 2015 memorandum decision, the Court vacated and remanded an earlier Board decision because the Board failed to provide an adequate statement of reasons or bases for continuing to rate Appellant under DC 5262, when the record did not demonstrate Appellant had the requisite symptomatology to apply that DC. [R. at 1009-1017].

While the Board found it would continue to rate Appellant under DC 5262 because it is more favorable to Appellant, the parties agree that the Board did not provide an adequate statement of reasons or bases that addressed whether Appellant could receive a higher combined rating for the knee disability under a more appropriate diagnostic code or multiple diagnostic codes that would entitle Appellant to a 20% rating or higher. Regarding whether Appellant would be entitled to a rating under DC 5257 for instability of the knee, the Board found Appellant could be entitled to a 10% rating for instability of the knee "if DC 5262 were not for consideration," because the Board considered symptoms of

instability when assigning the 20% under DC 5262. [R. at 14 (1-21)]. The Board then found a separate rating for limitation of flexion is not warranted because “The Veteran has been found to consistently not have flexion limited to 60 degrees or less” and because “the Veteran’s pain has not been shown by competent credible evidence to cause limitation of motion or other functional loss which would warrant a higher rating.” [R. at 15-16 (1-21)]. The Board then stated that, because the maximum rating under DC 5259 would only be 10%, and because those symptoms are already contemplated under DC 5262, a rating under both DC 5259 and 5262 is not permitted. [R. at 16-17 (1-21)].

Initially, the parties agree the Board did not provide an adequate statement of reasons or bases for the finding Appellant is not entitled to a compensable rating under DC 5260 for limitation of flexion. The parties note a December 2011 VA examination and an October 2013 VA examination assessed flexion to be limited to 80 degrees, with pain beginning at 40 degrees. [R. at 1509 (1506-1525 (December 2011 VA examination); R. at 1150 (1149-1154) (October 2013 VA examination)]. While the Board noted these findings in its discussion of the evidence, the Board did not address whether this evidence demonstrates that Appellant could receive a 10% rating for limitation of flexion. While the Board stated Appellant is not a credible historian with respect to his right knee, as discussed above, the Board did not provide an adequate statement of reasons or bases for that finding, or how it relates to the VA examiners’ findings of pain beginning at 40 degrees. The parties therefore agree remand is warranted for

the Board to address the December 2011 and October 2013 VA examiners' findings of painful motion beginning at 40 degrees and set forth an adequate statement of reasons or bases as to whether Appellant is entitled to a compensable rating for limitation of flexion. See *DeLuca v. Brown*, 8 Vet.App. 202 (1995); see also *Mitchell v. Shinseki*, 25 Vet.App. 32, 43-44 (2011).

Next, the parties agree the Board did not provide an adequate statement of reasons or bases that discussed whether Appellant is entitled to separate ratings under DC 5257, 5259, and 5260. The Court in *Lyles v. Shulkin* recently held that an evaluation under DC 5272 for instability or an evaluation under a diagnostic code for limitation of motion, or both, does not preclude, as a matter of law, the assignment of a separate disability rating under DC 5259 for a meniscal disability. *Lyles v. Shulkin*, ___ Vet.App. ___, No 16-0994, 2017 U.S. App. Vet. Claims LEXIS 1704, 2017 WL 5891831 (Nov. 29, 2017). In its March 22, 2017, decision, the Board noted Appellant could be entitled to a 10% rating under DC 5257 and a 10% rating under DC 5259, but did not explain why it continued to rate Appellant under DC 5262 as opposed to assigning ratings that would still amount to a 20% rating. [R. at 16-17 (1-21)]. Further, because the parties agree the Board did not provide an adequate statement of reasons or bases for finding Appellant is not entitled to a compensable rating for limitation of flexion, the parties agree remand is required for the Board to address whether Appellant is entitled to three separate compensable ratings under Diagnostic Codes 5257, 5259, and 5260.

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 and VA duties under the law as to the matters being remanded.

Upon remand, Appellant may submit additional evidence and argument on the questions at issue, and the Board "will reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991); see *Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992); *Kutscherousky v. West*, 12 Vet.App. 369 (1999). In any subsequent Board decision, the Board should provide 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). A copy of this joint motion for partial remand should be associated with the claims folder along with a copy of the Order for appropriate consideration in subsequent decisions. The Secretary shall provide this claim expeditious treatment as required by 38 U.S.C. §§ 5109B, 7112. As stated in *Forcier*, the terms of a joint motion for remand granted by the Court are enforceable. *Forcier v. Nicholson*, 19 Vet. App. 414, 425 (2006) ("We further hold that the Board has a duty under *Stegall* to ensure compliance with the terms of the agreement struck by the

parties, which form the basis for the ‘remand order’ even if they are not incorporated explicitly”).

WHEREFORE, the parties respectfully request that the Court vacate and remand the March 22, 2017, decision of the Board that denied entitlement to a rating in excess of 20% for the service-connected right knee disability.

Respectfully submitted,

FOR APPELLANT:

DATE: March 9, 2018

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DATE: March 9, 2018

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