United States Court of Appeals for Veterans Claims

Vet. App. No. 19-3227

WENDELL ANDREWS

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S BRIEF

Alexis M. Ivory
Barton F. Stichman
Richard Spataro
National Veterans Legal Services Program
1600 K Street, NW, Suite 500
Washington, D.C. 20006-2833
(202) 621-5679

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II. Whether the Board clearly erred by relying on VA examination reports in which the examiners failed to opine as to functional loss during a flare-up or when the knees were used repeatedly over time?

III. Whether, if the Court vacates the Board's decision and remands the case for readjudication, the Court should order the Secretary to treat the case expeditiously and provide Mr. Andrews with an opportunity for a hearing and to submit additional evidence?

STATEMENT OF THE CASE

The veteran, Wendell Andrews, appeals that part of the Board's January 17, 2019, decision, which denied entitlement to an increased rating in excess of 10 percent for chondromalacia of the right patella with degenerative joint disease (DJD) and an increased rating in excess of 10 percent for DJD of the left knee. Record (R.) at 1-24. This case was adjudicated by the Board of Veterans' Appeals in the direct review lane created by the Veterans Appeals Improvement and Modernization Act (AMA). R. 42-43; *See* Veterans Appeals Improvement and Modernization Act Pub. L. No. 115-44, 131 Stat 1105 (2017); 38 C.F.R. § 20.301.

STATEMENT OF FACTS

Mr. Andrews served on active duty in the United States Marine Corps from June 9, 1978 to July 5, 1979. R. 4151.

In April 2009, Mr. Andrews filed claims for, among other things, higher disability ratings for his service-connected bilateral knee conditions. R. 1244-1247. In conjunction with Mr. Andrews's claims for increase, a VA examination was afforded in September 2017. R. 968-978. He was diagnosed with DJD of the left knee and chondromalacia patella with DJD of the right knee. R. 969 (968-978). He reported pain that increased with standing and walking. R. 969 (968-978). He also reported functional loss/impairment. R. 969 (968-978). On examination, his range of motion on flexion was from 0 degrees to 90 degrees. R. 970 (968-978). It was noted that he had pain on examination that caused functional loss and pain; this was exhibited on both flexion and extension range of motion testing. R. 970 (968-978). He also had evidence of pain with weight bearing. R. 970 (968-978). It was noted that an additional factor contributing to his bilateral knee disability was less movement due to pain and adhesions. R. 972 (968-978).

The September 2017 VA examiner stated that he was unable to say without mere speculation if pain, weakness, fatigability, or incoordination significantly limited his functional ability with repeated use over a period of time. The rationale was "[f]lare-up of [Mr. Andrews'] XXXX [sic] condition was not present at the time of examination. In absence of [Mr. Andrews'] flare-up at examination, or after repeated use over time, it would be mere speculation to express in terms of the degrees of additional [range of motion] loss due to pain, weakness, fatigability, or incoordination." R. 971-972 (968-978). The VA examiner did not opine if pain, weakness, fatigability, or incoordination

significantly limited his functional ability during flare-ups because he said it was not applicable. R. 972 (968-978).

The September 2017 VA examiner also stated that Mr. Andrews had arthroscopic meniscal surgery of the right knee in 2004 and of the left knee in 1999. R. 976 (968-978). It was noted that he had a meniscal condition bilaterally that was manifested by frequent episodes of joint pain. R. 976 (968-978).

In an October 2017 Rating Decision, the Regional Office (RO) decided, among other things, to continue both the 10 percent disability rating for chondromalacia of the right patella with DJD and the 10 percent disability rating of DJD of the left knee. R. 937-938 (937-945). Mr. Andrews initiated a timely appeal in May 2018 regarding the disability ratings for the two knee conditions. R. 906-907. Also, in May 2018, Mr. Andrews opted into VA's Rapid Appeals Modernization Program (RAMP) initiative and elected the supplemental claim lane. R. 910.

As a result of opting into RAMP, the RO then issued an August 2018 rating decision that, among other things, continued both Mr. Andrews's 10 percent disability rating for chondromalacia of the right patella with DJD and the 10 percent disability rating of DJD of the left knee. R. 269-270 (R. 49-51, 269-282). In September 2018, Mr. Andrews timely filed a notice of disagreement with the August 2018 rating decision, and selected the direct review option. R. 42-43.

In January 2019, the Board issued the decision on appeal and noted that Mr. Andrews timely appealed the August 2018 rating decision. R. 9 (1-24). The Board did not make any findings regarding whether the September 2017 VA examination was adequate

for either knee. R. 12-16 (1-24). The Board denied ratings in excess of 10 percent under Diagnostic Code 5260 during the period on appeal because no examiner or treatment provider found that that Mr. Andrews's flexion "was limited to less than 90 degrees during the period on appeal." R. 13,15 (1-24). The Board considered whether higher ratings were warranted because of additional functional loss due to pain, weakness, fatigability, and incoordination, but found that there was nothing that indicated that Mr. Andrews's pain caused functional impairment equivalent to the criteria for a rating in excess of 10 percent under the Diagnostic Codes based on limitation of motion of the knee. R. 13-14, 16 (1-24). In the evidence section of the decision, the Board noted that an April 2005 VA examination report clarified that the 2004 right knee surgery included a partial medial meniscectomy. R. 12 (1-24). The Board also noted that a March 2000 VA examination indicated that Mr. Andrews's left knee surgery was a partial and lateral medial meniscectomy. R. 15 (1-24). The Board then acknowledged the existence of Mr. Andrews's partial meniscectomies and episodes of pain, but stated that there was nothing in the record to indicated that the meniscus was removed or dislocated, or that there were episodes of "locking" or effusion into the joint. R. 13, 15 (1-24).

SUMMARY OF ARGUMENT

The Court should reverse the Board's January 17, 2019 decision denying Mr. Andrews separate ratings for each knee under 38 C.F.R. § 4.71a, Diagnostic Code 5259, because it is based on a clearly erroneous finding that Diagnostic Code 5259 makes a distinction between a partial or complete removal of the cartilage. In addition, the Board

made the clearly erroneous finding that there was nothing in the record to indicate that the meniscus was removed, since a partial meniscectomy is the removal of a portion of the meniscus. In the alternative, the Board decision should be vacated and remanded because the Board failed to provide an adequate statement of reasons or bases as to whether separate ratings under 38 C.F.R. § 4.71a, Diagnostic Code 5259 were warranted for his meniscal conditions.

The Board's decision denying Mr. Andrews increased ratings for his bilateral knee disabilities should be vacated and remanded because the Board failed to ensure compliance with the VA's duty to assist as the VA examination reports the Board relied upon are inadequate for rating purposes. The September 2017 VA examination report is inadequate because the examiner did not provide estimates of range of motion loss due to additional functional loss during flare-ups or after repetitive use. In addition, the VA examination report is inadequate because the examiner failed to provide an adequate rationale for his conclusory statements that he could not provide an opinion as to whether Mr. Andrews's repeated use of his knees over time and/or during flare-ups would result in any additional functional loss without resorting to mere speculation. Finally, the VA examination is inadequate because he did not identify what disability he was talking about, but instead just used boilerplate and identified the condition as "XXX."

The Board decision in this case was issued pursuant to some of the terms of the AMA. If the Court vacates the Board decision on appeal and orders the Board to issue a new decision, questions have arisen including whether the Board must (1) expedite the proceedings leading to the Board's new decision, (2) provide an opportunity for a hearing

at the Board; and (3) provide an opportunity to submit additional evidence to the Board. It would promote the interests of justice and ultimately conserve the resources of the Secretary, the Court, and the veteran for the Court to clarify with a precedential decision what rights Mr. Andrews has before the Board if the Court vacates the Board decision on appeal. No part of the AMA addresses the standards and procedures that apply to a case in which the Court vacates a Board decision made under the AMA and remands for a new Board decision. If the Court vacates the Board decision, then it should include in its instructions that the Secretary shall expedite the proceedings leading to the Board's new decision and provide Mr. Andrews with an opportunity for a hearing at the Board and to submit additional evidence to the Board for consideration by the Board.

ARGUMENT

Congress has imposed upon VA an affirmative duty to assist a claimant in substantiating his or her claim. *See* 38 U.S.C. § 5103A(a)(1). Once the Secretary endeavors to afford a medical examination, he must ensure that the examination is adequate. *See Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). If after reviewing an opinion the Board finds that it is "incomplete or otherwise insufficient, the Board *must* return [it] to VA." *Cox v. Nicholson*, 20 Vet. App. 563, 569 (2007) (citing 38 C.F.R. § 4.2) (emphasis added); *see also* 38 C.F.R. § 19.9(a).

Whether a medical opinion is adequate is "a finding of fact," which this Court reviews under the "clearly erroneous" standard. *See* 38 U.S.C. § 7261(a)(4); *Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990). A finding of fact is "clearly erroneous" when the

"reviewing court is left with the definite and firm conviction that a mistake has been committed." *Gilbert*, 1 Vet. App. at 52 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (internal quotations omitted).

VA regulations provide that "[d]isability of the musculoskeletal system is 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. This Court held that where a veteran's disability rating is based on loss of motion, compliance with section 4.40 requires the Board to ensure that it has obtained a medical opinion that addresses whether pain could significantly limit functional ability during flare-ups or when the joint is used repeatedly over time. *Mitchell v Shinseki*, 25 Vet. App. 32, 44 (2011); *DeLuca v. Brown*, 8 Vet. App. 202, 206 (1995). When feasible, "these determinations should . . . be 'portrayed' (§ 4.40) in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." *DeLuca*, 8 Vet. App. at 206; *see Mitchell*, 25 Vet. App. at 37.

In accordance with these principles, VA has concluded that the repetitive use test should generally administered to determine if there is any additional loss of motion due to pain or some other factor consistent with *DeLuca*. *See VA Adjudication Procedures Manual M21-1 (M21-1)*, Part III, Subpart iv, Chapter 4.A.1.c (change date May 2, 2019). VA has also recognized that this Court's decision in *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011), requires it to obtain a medical opinion where "the examiner must opine or the medical evidence must show whether pain could significantly limit functional ability . . .

when the joint is used repeatedly over a period of time . . . ." *M21-1,* III.iv.4.A.1.j (change date May 2, 2019).

If an examiner is unable to provide an opinion as to whether a veteran has additional limitation of motion during flare-ups or after repeated use without resorting to speculation, the examiner "must explain the basis for such an opinion or the basis must otherwise be apparent in the Board's review of the evidence." *Jones v. Shinseki,* 23 Vet. App. 382, 390 (2010); *see* Manual M21-1, Part III, Subpart iv.4.A.1.i. The rationale behind this requirement is so, among other things, the Board can ensure that the reason an opinion is not rendered is not because "some additional testing or information is needed, and possibly available, that would permit such an opinion . . . " *Jones,* 23 Vet. App. at 390. The Board must ensure that the examiner performed "all due diligence in seeking relevant medical information that may have bearing on the requested opinion," and the opinion was not "the first impression of an uninformed examiner." *Id.* at 389. In other words, before the Board may rely on such a medical "no opinion" to deny the claim, "it must be clear, from either the examiner's statements or the Board decision, that the examiner had indeed considered 'all procurable and assembled data,' by obtaining all tests and records that might reasonably illuminate the medical analysis." *Id.* at 390. In addition, the Board cannot validly rely on an examiner's conclusion that he or she cannot provide a medical opinion simply because the examiner could not directly observe the veteran or did not have "objective" evidence in the record. *Sharp v. Shulkin,* 29 Vet. App. 26, 35-36 (2017).

As with all decisions, the Board is required to provide an adequate statement of reasons or bases for its findings and conclusions on all material issues of fact and law. 38 U.S.C. § 7104(d)(1). To comply with this requirement, the Board must "account for the evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant, and provide the reasons for its rejection of any such evidence." *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table). The statement must be sufficient to enable a claimant to understand the precise reasons for the disposition of his or his claim and to facilitate judicial review. *See Norris v. West*, 11 Vet. App. 219, 224-25 (1998); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995).

I. THE BOARD'S FINDING THAT MR. ANDREWS IS NOT ENTITLED TO SEPARATE RATINGS FOR A MENISCAL CONDITION OF THE RIGHT AND LEFT KNEE UNDER 38 C.F.R. § 4.71a, DIAGNOSTIC CODE 5259, IS CLEARLY ERRONEOUS.

This Court has the authority to reverse a finding of fact made by the Board if the Court determines that the Board's finding was clearly erroneous. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 52 (1990). A finding of fact is clearly erroneous when the reviewing court "'is left with the definite and firm conviction that a mistake has been committed'" even if there is evidence to support the finding. *Gilbert*, 1 Vet. App. at 52 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). However, if there is a plausible basis for the Board's finding, that cannot constitute clear error. *Gilbert*, 1 Vet. App. at 52-53.

As discussed in further detail below, the Board's finding that Mr. Andrews's bilateral knee conditions do not warrant separate ratings under 38 C.F.R. § 4.71a, Diagnostic Code 5259, is clearly erroneous.

It is well-established that VA has a duty to maximize a claimant's benefits. *See Bradley v. Peake*, 22 Vet. App. 280, 294 (2009); *Buie v. Shinseki*, 24 Vet. App. 242, 249 (2011). This duty is recognized in 38 C.F.R. § 3.103(a), which provides that VA must "render a decision which grants every benefit that can be supported in law . . . ." *See* 38 C.F.R. § 4.25(b) ("[T]he disabilities arising from a single disease entity, e.g. arthritis . . . are to be rated separately . . . ."). While "[t]he evaluation of the same disability under various diagnoses is to be avoided," nothing precludes the assignment of separate disability ratings for different conditions where none of the symptomatology for the separately rated conditions is duplicative or overlapping. 38 C.F.R. § 4.14. *See Esteban v. Brown*, 6 Vet. App. 259, 262 (1994).

The Board acknowledged Mr. Andrews's partial meniscectomies and episodes of pain, but stated that there was nothing in the record to indicate that the meniscus was removed, that it was dislocated, or that there were episodes of "locking" or effusion into the joint. R. 13,15 (1-24). Under DC 5259, a veteran is entitled to a maximum 10 percent disability rating for symptomatic removal of the semilunar cartilage. *Id*.

Contrary to the Board's statements that there was nothing in the record to indicate that the meniscus was removed (R.13, 15 (1-24)), the undisputed evidence of record is that he had a partial medial meniscectomy of the right knee (R. 12 (1-24)) and a partial and lateral medial meniscectomy (R. 15 (1-24)). A partial meniscectomy is removal of a

portion of the meniscus. *See Dorland's Illustrated Medical Dictionary* 1134 (32d ed. 2012) (noting that a meniscectomy is the excision of an intra-articular meniscus, as in the knee joint). Further, DC 5259 does not make a distinction between a partial or complete removal of the cartilage and the Board's statement did not provide any legal support for the notion that requirement it imposed. Thus, there is evidence that both his right knee and left knee warrant separate ratings under DC 5259.

Unlike most diagnostic codes, DC 5259 does not describe the symptoms that are required for the 10 percent disability rating; it only requires that the removal of cartilage be "symptomatic." *See id*. The undisputed evidence of record is that symptoms of pain were attributed directly to his meniscal conditions of both knees. R. 976 (968-978). Thus, the only permissible view of the evidence of record is that the Board's finding that separate ratings under DC 5259 were not warranted is clearly erroneous. Since the Board's finding is clearly erroneous, the Court should reverse the relevant part of the Board's decision and order the Secretary to grant Mr. Andrews separate 10 percent disability ratings under DC 5259 for both the right knee and left knee.

In the alternative, the Court should vacate and remand the Board's decision for the Board to provide an adequate statement of reasons or bases as to whether separate ratings are warranted under DC 5259 for both knees. *See* 38 U.S.C. §7104(d)(1).

II. THE BOARD CLEARLY ERRED BY RELYING ON A VA EXAMINATION REPORT IN WHICH THE EXAMINER FAILED TO OPINE ON FUNCTIONAL LOSS DURING A FLARE-UP OR WHEN THE KNEES WERE USED REPEATEDLY OVER TIME.

In the decision on appeal, the Board clearly erred in relying on the September 2017 VA medical opinion to deny Mr. Andrews ratings in excess of 10 percent for the limitation of flexion in each knee under 38 C.F.R. § 4.71a, DC 5260, because that opinion is inadequate for rating purposes. R. at 12, 14-15 (1-24).

During the September 2017 VA examination, Mr. Andrews reported pain that increased with standing and walking. R. 969 (968-978). He also reported functional loss/impairment. R. 969 (968-978). On examination, he had pain that caused functional loss and pain; this was exhibited on both flexion and extension range of motion testing. R. 970 (968-978). He also had evidence of pain with weight bearing. R. 970 (968-978). It was noted that the additional factor contributing to his bilateral knee disability was less movement due to pain and adhesions. R. 972 (968-978). While the VA examiner noted Mr. Andrews's reported flare-ups and his reports of functional loss that accompany flare-ups or when the knees are used repeatedly over time, the examiner failed to offer an opinion regarding any reduction in his range of motion during a flare-up or after repeated use. R. 971-972 (968-978). Thus, the September 2017 VA examination is not adequate to determine whether a higher rating is warranted. *See Mitchell*, 25 Vet. App. at 43-44; *DeLuca*, 8 Vet. App. at 206.

In addition, the VA examiner failed to provide an adequate rationale for why any opinion on additional functional loss after repeated use or during flare-ups would require resorting to speculation. The September 2017 VA examiner stated that he was unable to say without mere speculation if pain, weakness, fatigability, or incoordination significantly limited his functional ability with repeated use over a period of time. The

rationale was "[f]lare-up of [Mr. Andrews's] XXXX [sic] condition was not present at the time of examination. In absence of [Mr. Andrews's] flare-up at examination, or after repeated use over time, it would be mere speculation to express in terms of the degrees of additional [range of motion] loss due to pain, weakness, fatigability, or incoordination." R. 971-972 (968-978). The VA examiner did not opine if pain, weakness, fatigability, or incoordination significantly limited his functional ability during flare-ups because he said it was not applicable. R. 972 (968-978).

The September 2017 VA examiner's opinion regarding repeated use over time and flare-ups is inadequate because the examiner refused to offer an opinion without directly observing Mr. Andrews's functional capabilities during a flare-up or after repeated use over time, stating that to offer an opinion otherwise would be mere speculation. R. 971-972 (968-978). As the Court held in *Sharp v. Shulkin*, there is no requirement that the examiner directly observe the veteran before offering such an opinion, or have "objective" evidence. 29 Vet. App. 26, 35-36 (2017); *see Jones v. Shinseki*, 23 Vet. App. 382, 391 (2010). Instead, the examiner must elicit information from Mr. Andrews about his additional limitations following repeated use over time and during flare-ups and explain whether such information could be gleaned from the sources available to him/her. In addition, the VA examiner did not even identify the disability he was talking about, but instead just used boilerplate and identified the condition as "XXX" [sic]. R. 971-972 (968-978).

Since the examiner failed to provide the required opinions, the Board's reliance on the examination report to deny Mr. Andrews higher ratings violates this Court's holding

in *Colvin v. Derwinski*, 1 Vet.App. 171 (1991). In other words, the Board's finding that a disability rating in excess of 30 percent for his knee disabilities is not warranted amounts to an unsubstantiated medical opinion because there is *no* adequate opinion of record that addresses functional loss due to flare-ups or after repeated use. *See Colvin*, 1 Vet. App. at 175.

Thus, vacatur and remand are required for the Board to afford a medical opinion in which the examiner adequately addresses Mr. Andrews's additional limitation of motion during flare-ups or with repeated use over time. *See Chotta, v. Peake*, 22 Vet. App. 80, 85 (2008). At the very least, considering the inadequacies in the opinions discussed above, vacatur and remand are required for the Board to provide an adequate statement of reasons or bases for its reliance on them. *See* 38 U.S.C. § 7104(d)(1); R. at 1-24.

III. IF THE COURT VACATES THE BOARD DECISION AND REMANDS FOR A NEW BOARD DECISION, THE COURT SHOULD ORDER THE SECRETARY TO PROVIDE MR. ANDREWS WITH AN OPPORTUNITY AT THE BOARD FOR A HEARING AND TO SUBMIT ADDITIONAL EVIDENCE

The Board decision in this case was issued pursuant to some of the terms of the Veterans Appeals Improvement and Modernization Act ("AMA"), Pub. L. No. 115-44, 131 Stat 1105 (2017). If the Court vacates the Board decision on appeal and orders that the Board to issue a new decision, questions have arisen including whether the Board must (1) expedite the proceedings leading to the Board's new decision, (2) provide an opportunity for a hearing at the Board; and (3) provide an opportunity to submit additional evidence to the Board. This issue arises in part due to the Secretary's

commentary in the Federal Register that, under the AMA, "CAVC remands require the Board to readjudicate the appeal based upon the same record previously before the Board," and, "accordingly, such appeals would be placed on the same docket that the veteran was on previously." VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 159 (Jan. 18, 2019).

It would promote the interests of justice and ultimately conserve the resources of the Secretary, the Court, and the veteran for the Court to clarify with a precedential decision what rights Mr. Andrews has before the Board if the Court vacates the Board decision on appeal. Taken together, the Due Process Clause of the Fifth Amendment, Title 38, U.S.C., and this Court's case law all require that the Board expedite the proceedings leading to the Board's new decision and provide the Mr. Andrews with an opportunity for a hearing at the Board and to submit additional evidence to the Board. In *Kutscherousky v. West*, 12 Vet. App. 369, 372 (1999), the Court held that after the Court vacates a Board decision and remands for a new Board decision, the appellant has the right to submit without a showing of good cause, additional evidence and argument, and to request a hearing before the Board at which the appellant may submit new evidence for the Board to consider. Congress has directed the Secretary to "take such actions as may be necessary to provide for the expeditious treatment by the Board of any claim that is remanded" by this Court. 38 U.S.C. § 7112. The Secretary's regulation implementing section 7112 provides, "A case remanded by the [Court] for appropriate action will be treated expeditiously by the Board without regard to its place on the Board's docket." 38 C.F.R. § 20.800(d).

No part of the AMA addresses the standards and procedures that apply to a case in which the Court vacates a Board decision made under the AMA and remands for a new Board decision. Thus, if the Court vacates the Board's decision that is the subject of this appeal, the Court should, citing *Kutscherousky v. West*, 12 Vet. App. 369, 372 (1999) and 38 U.S.C. § 7252(a) (this Court has the power to "affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate"), include in its instructions that the Secretary shall expedite the proceedings leading to the Board's new decision and provide Mr. Andrews with an opportunity for a hearing at the Board and an opportunity to submit additional evidence to the Board. Additionally, so the Board is clear as to the continuing applicability of this Court's holding in *Fletcher v. Derwinski*, 1 Vet. App. 394, 397 (1991), the Court should specifically order the Board to "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*, 1 Vet. App. at 397. "The Court has held that '[a] remand is meant to entail a critical examination of the justification for the decision.'" *Kahana v. Shinseki*, 24 Vet. App. 428, 437 (2011) (quoting *Fletcher*, 1 Vet. App at 397).

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, the Court should reverse the relevant part of the Board's decision dated January 17, 2019, and order the Secretary to award Mr. Andrews separate 10 percent disability ratings under DC 5259 for his service-connected left and right knee disabilities. At the very least, the Court should vacate and remand this part of the Board's decision with instructions that the Board provide an adequate statement of

reasons or bases for its findings and conclusions, as required under 38 U.S.C. § 7104(d)(1). In addition, the Court should vacate and remand the part of the Board's decision which denied entitlement to higher ratings for knee disabilities under DC 5260. If the Court vacates the Board's decision, it should include in its instructions that the Secretary shall expedite the proceedings leading to the Board's new decision and provide Mr. Andrews with an opportunity for a hearing at the Board and an opportunity to submit additional evidence to the Board. The Court should also order the Board to reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision.

Respectfully submitted,

Date: April 24, 2020

/s/ Alexis M. Ivory
Alexis M. Ivory
Barton F. Stichman
Richard V. Spataro
National Veterans Legal Services Program
1600 K Street, N.W., Suite 500
Washington, D.C. 20006-2833
(202) 621-5679

Counsel for Appellant