No. 19-3227

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

WENDELL ANDREWS
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-3227
	)	
ROBERT L. WILKIE, Secretary of Veterans Affairs,	)	
	)	
Appellee	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should vacate and remand the parts of the January 17, 2019, Board of Veterans' Appeals (Board) decision that denied entitlement to separate ratings for the right and left knees under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5259, and to increased ratings in excess of 10% for chondromalacia of the right patella with degenerative joint disease (DJD) and for DJD of the left knee.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court of Appeals for Veterans Claims ("the Court") has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a), which grants the Court exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Wendell Andrews (Appellant) seeks the Court's review of the January 17, 2019, Board decision, to the extent that it denied entitlement to separate ratings for the right and left knees under DC 5259 and to increased ratings for chondromalacia of the right patella with DJD and for DJD of the left knee. Record Before the Agency (R.) at 1-24. He alleges that the Board clearly erred by failing to grant separate ratings under DC 5259 for the right and left knees and by relying on the September 2017 VA examination report that was inadequate for rating purposes. *See* Appellant's Brief (A.B.) at 1-17. He also asserts that because this case was issued pursuant to the Veterans Appeals Improvement and Modernization Act (AMA), it is necessary for the Court to clarify what rights he has before the Board if the Court vacates the Board's decision on appeal. *Id.*

The Secretary further notes that the part of the Board's decision granting Appellant entitlement to service connection for bilateral pes planus represents a favorable finding for Appellant that cannot be disturbed. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Similarly, the Court does not have jurisdiction over the parts of the Board's decision remanding the issues of entitlement to service connection for left hip and low back disabilities. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order) (a Board remand "does not represent a final decision over which this Court has jurisdiction").

Finally, the Board also denied the claim of entitlement to a disability rating in excess of 10% for left knee instability in the decision on appeal. *See* R. at 5 (1-

24). However, Appellant, in his opening brief to the Court, does not raise any arguments or allegations of error with that portion of the Board's decision. *See* A.B. at 1-17. As such, the Court should find that Appellant has abandoned that claim, decline to review the merit of that issue, and dismiss the appeal as to the Board's decision regarding that claim. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (*en banc*) (dismissing appeals of abandoned issues).

C. Statement of Relevant Facts

Appellant had active duty service from June 1978 to July 1979 in the Marine Corps. R. at 4151-52. The Regional Office (RO) received Appellant's original claim for entitlement to service connection for a back condition in November 1988. R. at 4141-44. Thereafter, in a March 1989 rating decision, the RO granted service connection for Appellant's chondromalacia of the right and left patella with separate evaluations of 0% effective November 30, 1988. R. at 4039-40. In response, Appellant promptly submitted a Notice of Disagreement (NOD) to the RO that same month. R. at 4032. As such, the RO issued the April 1989 Statement of the Case (SOC) continuing Appellant's evaluations for his service-connected chondromalacia of the right and left patella as 0%. R. at 4023-26; 4029-31.

Following, Appellant submitted a formal appeal to the Board in August 1989. R. at 4027-28. In a January 1990 decision, the Board remanded Appellant's claims for further development. R. at 4006-09. Thereafter, the RO issued the May 1990 Supplemental Statement of the Case (SSOC) that continued Appellant's

evaluations for his service-connected chondromalacia of the right and left patella as 0%. R. at 3989-92. Following, the Board denied Appellant's claims in its October 1990 decision. R. at 3973-80. Appellant did not seek further review of the Board's determination, so it became final.

Years later, Appellant submitted an informal claim for increased compensation for his service-connected chondromalacia right and left patella disabilities to the RO in December 1999. R. at 3954-55. The RO, in an April 2000 rating decision, increased Appellant's evaluations for his bilateral chondromalacia knee conditions to 10% effective December 13, 1999. R. at 3906-15. Appellant did not challenge the RO's determinations and therefore, the RO's decision became final.

Many years passed, then Appellant sought increased compensation for his bilateral chondromalacia conditions again in September 2015. R. at 1457-66. The RO denied Appellant's claims in the subsequent December 2015 rating decision[1]. R. at 1289-1315. Following, however, Appellant was provided with and underwent a VA Knee and Lower Leg Conditions examination in September 2017. R. at 968-78.

At that time, Appellant was provided with an in-person examination and diagnosed with right knee chondromalacia with DJD and left knee DJD. R. at 968-69 (968-78). Most relevantly, while Appellant did not report any flare-ups of the

[1] The Secretary's notes that the RO reclassified Appellant's chondromalacia of the left patella claim as one for DJD of the left knee in this rating decision.

knees to the doctor, he did report having functional loss or functional impairment of the knees including, but not limited to, repeated use over time. R. at 969 (968-78). With respect to repeated use over time, the examiner indicated that he was unable to answer, without mere speculation, whether pain, weakness, fatigability or incoordination significantly limited functional ability with repeated use over time because a "flare-up of Appellant's condition was not present at the time of the examination." R. at 971-72 (968-78).

Afterward, the RO issued the October 2017 rating decision that continued the denial of Appellant's claims. R. at 913-46. In response, Appellant submitted an NOD with the RO's decision to the RO in May 2018. R. at 900-10. Significantly, Appellant also chose to opt-in to VA's Rapid Appeals Modernization Program (RAMP) and have his claims reviewed under the supplemental claim option. R. at 910 (900-10). Appellant was provided with the review he requested by the RO in the August 2018 rating decision. R. at 49-54; 269-82. In that decision, the RO continued the denial of Appellant's claims. *Id.*

In response, Appellant submitted correspondence to the RO in September 2018 indicating that he was appealing his claims to the Board and that he sought to have his claims reviewed by the Board under the direct review option, which was to be done based on the evidence of record at the time of the prior decision without evidence submission or hearing request. R. at 41-43. Thereafter, the Board issued the decision on appeal in January 2019. R. at 1-24. On May 15, 2019, Appellant filed his Notice of Appeal with the Court.

III. SUMMARY OF ARGUMENT

The Court should vacate and remand the parts of the Board's decision denying entitlement to separate ratings for the right and left knees under DC 5259 and to increased ratings for chondromalacia of the right patella with DJD and for DJD of the left knee.

More specifically, remand and not reversal of the portion of the Board's decision denying separate ratings under DC 5259 is warranted where the Board incorrectly applied the law and where the development needed with respect to Appellant's increased rating claims will directly impact and inform factual findings that will need to be made by the Board, regarding all claims, on remand. Regarding the part of the Board's decision denying increased ratings for chondromalacia of the right patella with DJD and for DJD of the left knee, the Board erred by not ensuring that VA complied with its statutory duty to assist. Precisely, the Board erred by relying on the September 2017 VA examination report that was inadequate for rating purposes to the extent that it failed to properly address the issue of the nature and extent of additional functional loss, if any, Appellant experienced during repeated use over time.

As a final matter, the Court should find that Appellant's request for the Court to order the Secretary to provide him with an opportunity to submit additional evidence or request a hearing on remand is an issue not ripe for judicial review or intervention where the evidence of record shows that Appellant was not deprived of those opportunities and where Appellant's argument is based solely on his need

for clarification of the law despite the law being clear that he is not entitled to those opportunities on remand as an absolute right.

IV. ARGUMENT

A. Standard of Review

The Court reviews the Board's findings of fact under the clearly erroneous standard. 38 U.S.C. § 7261(a)(4). The Supreme Court has held that a finding is clearly erroneous "when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (explaining how an appellate court reviews factual findings under the "clearly erroneous" standard), *quoting United States v. United States Gypsum Co.*, 333 U.S. 564, 595 (1948); *see Padgett v. Nicholson*, 19 Vet.App. 133, 146 (2005) (quoting same). In addition, the Supreme Court has held that under the clearly erroneous standard of review, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

In rendering its decision, the Board is required to provide a written statement of its "findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). 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 Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990*).* Section

7104(d)(1), however, does not require the Board to use any particular statutory language or "terms of art." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007).

Finally, the Secretary further asserts that it is relevant to the Court's standard of review that the appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), ***aff'd*** 232 F.3d 908 (Fed. Cir. 2000). The appellant's burden also includes the burden of demonstrating that any Board error is harmful. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010).

Furthermore, arguments not raised in the initial brief are generally deemed abandoned, and the Court should find that Appellant has abandoned any argument not presented in his initial brief. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("courts have consistently concluded that the failure of an appellant to include an . . . argument in the opening brief will be deemed a waiver of the . . . argument").

B. The Court should vacate and remand the parts of the Board's decision that denied entitlement to separate ratings for the right and left knees under DC 5259 and to increased ratings for chondromalacia of the right patella with DJD and for DJD of the left knee.

a. Remand, not reversal, of the part of the Board's decision denying Appellant entitlement to separate ratings for the

right and left knees under DC 5259 is the most appropriate remedy in this case.

The Board's determination denying Appellant entitlement to separate ratings for the right and left knees under DC 5259 should be vacated and remanded because the Board erred by incorrectly applying the provisions of DC 5259 and because the development required as part of the vacatur and remand of Appellant's increased rating knee claims will directly inform further factual determinations that the Board must make on remand regarding all claims.

Particularly, where the Board has incorrectly applied the law or failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, remand is generally the appropriate remedy. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004); *Tucker v. West*, 11 Vet.App. 369, 374 (1998). Moreover, remand is appropriate where VA must make further factual determinations. *See Byron v. Shinseki*, 670 F.3d 1202 (Fed. Cir. 2012) (affirming remand decision of the U.S. Court of Appeals for Veterans Claims where further fact-finding was necessary); *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (recognizing that 38 U.S.C. § 7261(c) prohibits this "Court from making factual findings in the first instance").

Here, and with respect to Appellant's right and left knee claims, the Board concluded that separate ratings under DC 5259 were not warranted because "there is nothing in the record to indicate that the meniscus was removed, that it is dislocated or that there are episodes of 'locking' or effusion into the joint." R. at 13

(1-24); 15 (1-24). However, and as Appellant correctly notes, a partial meniscectomy is removal of a portion of the meniscus. *See* AB at 10-11 (1-17) (referencing *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, and as also noted by Appellant, 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 requirement it imposed. Accordingly, the Board incorrectly applied the provisions of DC 5259 when it required complete removal of the meniscus. As such, vacatur and remand for the Board to provide an adequate statement of reasons or bases that correctly applies the provisions of DC 5259 to the facts of Appellant's case is warranted. *See Gutierrez*, 19 Vet.App. at 10; *Tucker*, 11 Vet.App. at 374.

Vacatur and remand is also the appropriate remedy because the Board will be required to make further factual determinations on remand. Particularly, the Board, in considering the appropriateness of separate ratings under DC 5259, will have to determine whether the evidence of record demonstrates whether Appellant's manifestations caused by his meniscus conditions are the same or different from the manifestations of his currently service-connected knee disabilities rated under DC 5260. *See* 38 C.F.R. § 4.14 (noting that pyramiding is to be avoided and instructing that "the evaluation of the same manifestation under different diagnoses are to be avoided"); *Amberman v. Shinseki*, 570 F.3d 1377, 1380 (Fed. Cir. 2009). Moreover, while Appellant argues that reversal is the

appropriate remedy because "[t]he undisputed evidence of record is that symptoms of pain were attributed directly to his meniscal conditions of both knees" and "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", his contention, however, fails to appreciate the interconnectedness of all of his claims on appeal[2].

Mainly, the evidence of record he uses to support his assertion are findings contained in the September 2017 VA examination report regarding frequent episodes of joint pain in both knees. *See* A.B. at 11 (1-17); R. at 976 (968-78) (September 2017 VA Examination). Notably, this is the same examination report that contains findings that Appellant experiences pain in his joints throughout range of motion that causes functional loss (which may already be compensated under his current ratings under DC 5260) and the same examination report that the parties agree is inadequate to the extent that it failed to properly address the issue of the nature of additional functional loss, if any, Appellant experienced due to pain during repeated use over time. *See* R. at 970 (968-78); A.B. at 11-14 (1-17); *Infra* at . The need for additional development, in the form of a new VA examination

[2] The Secretary wants to be clear that he did not mislead the Court in his March 5, 2020, response in opposition to Appellant's motion for a second staff conference when he stated that "the parties have an agreement in principle on the substantive issues involved in this appeal and there is no dispute pertaining to the merits of the claims or regarding any additional bases for remand" as he learned of Appellant's intention to seek reversal on this issue for the first time when he received and read Appellant's opening brief to this Court. *See* Secretary's Response at 2 (1-5).

and/or opinion, is determinative on the remedy issue because it could provide evidence warranting an elevation of Appellant's evaluations under DC 5260 that would preclude entitlement to separate evaluations under DC 5259 based on pyramiding. *See Lyles v. Shulkin*, 29 Vet.App. 107, 117-21 (2017) (noting that "where manifestations of a musculoskeletal disability causing additional functional limitation have not resulted in elevation of the evaluation pursuant to *DeLuca*, those manifestations have not yet been compensated for separate evaluation and pyramiding purposes", but remanding the veteran's left knee meniscal disability claim for the Board to determine whether a separate evaluation under either DC 5258 or 5259 was warranted or whether such evaluation would constitute impermissible pyramiding).

Because the Board incorrectly applied the provisions of DC 5259 and because additional development that will be undertaken as a result of the vacatur and remand of Appellant's increased rating knee claims will impact the factual analysis relevant to the Board's consideration of entitlement to separate evaluations under DC 5259 for both knees, the Court should vacate and remand the separate rating issue consistent with the controlling caselaw and with the Secretary's concession herein. *See Tucker*, 11 Vet.App. at 374.

b. The Court should vacate and remand the parts of the Board's decision denying entitlement to increased ratings in excess of 10% for the service-connected

chondromalacia of the right patella with DJD and the DJD of the left knee.

The Secretary agrees with Appellant that the Court should vacate and remand the parts of the Board's decision denying entitlement to increased ratings for Appellant's service-connected chondromalacia of the right patella with DJD and DJD of the left knee conditions. Particularly, the Secretary concedes that the Board erred by not ensuring that VA complied with its statutory duty to assist.

Specifically, once the Secretary undertakes the effort to provide an examination, he must provide an adequate one. *See Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). With respect to medical opinions regarding additional functional loss during flare-ups or repeated use over time, the Court has explained that the Board errs when it relies on an examination report in which the examiner states that it is not possible to describe additional functional loss during flares without directly observing function during a flare. *See Sharp v. Shulkin*, 29 Vet.App. 26, 34-36 (2017) (discussing *Deluca v. Brown*, 8 Vet.App. 202 (1995); *Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011), and *Jones v. Shinseki*, 23 Vet.App. 283 (2010)). The Court also explained that "the Court's case law and VA guidelines anticipate that examiners will offer flare opinions based on estimates derived from information procured from relevant sources. . .." *Sharp*, 29 Vet.App. at 35.

Here, Appellant was afforded and underwent a VA Knee and Lower Leg Conditions examination in September 2017. *See* R. at 968-78. At the time, the

physician noted that Appellant reported having functional loss or functional impairment of the joint being evaluated with repeated use over time. *See* R. at 969 (968-78). However, the examiner stated that he could not say without speculation whether pain, weakness, fatigability or incoordination significantly limited Appellant's functional ability with repeated use over time because "[i]n absence of the Veteran'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 ROM loss due to pain, weakness, fatigability, or incoordination." R. at 971 (968-78). The doctor's statement, nonetheless, runs afoul of the Court's holding in *Sharp* and renders the examination inadequate as it pertains to the issue of the nature of additional functional loss, if any, Appellant experienced during repeated use over time. As such, the Court should remand Appellant's claims so that the Board can ensure that Appellant is provided with a new VA examination and/or clarifying medical opinion that properly addresses the issue of the nature and extent of additional functional loss, if any, Appellant experiences during repeated use over time, consistent with the Court's holding in *Sharp*.

c. The Court should reject Appellant's attempt to have the Court order the Secretary to provide procedural processes that Appellant was not deprived of and that Appellant has no absolute right to under the law.

i. Appellant's need for clarification fails to raise an issue ripe for judicial review.

The Supreme Court has explained that "the basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). Accordingly, the ripeness doctrine requires that the challenge grow out of a "real, substantial controversy between parties" involving a "dispute definite and concrete." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). As such, the question in each case is whether the facts alleged show that there is a substantial controversy, between parties having adverse legal interests, "of sufficient immediacy and reality" to justify judicial resolution. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941).

Here, Appellant's request for judicial intervention is based solely on his assertion that he lacks clarity as to what rights he would have before the Board if the Court vacates the Board decision on appeal pursuant to the Secretary's

concession of error. It is not based on any dispute or evidence currently before this Court that he was actually denied any of those procedures prior to the issuance of the January 2019 Board decision currently on appeal. *See* A.B. at 15 (1-17). Indeed, the evidence of record shows that Appellant was afforded the opportunity to have his claims reviewed under an option that would have allowed him to submit additional evidence and have a hearing prior to the Board issuing the decision currently on appeal, but that he explicitly chose to forgo his opportunity to exercise each of those options. *See* R. at 43 (41-43) (Appellant selecting the direct review option indicating his desire not to submit additional evidence or have a hearing before the Board).

Because Appellant's contention is singularly based on an alleged lack of clarity and not on any prejudicial error committed by the Board in the decision on appeal, the Court should find the issue raised by Appellant lacks the fitness or ripeness necessary for judicial review or intervention. *See Abbott Labs.*, 387 U.S. at 149 (the Supreme Court espousing a two-step inquiry for ripeness in which a court must consider (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration"). The Court should also find that Appellant has failed to proffer any argument explaining what, if any, hardship he would suffer by the Court declining to intervene in the manner he has requested. *See* A.B. at 14-16 (1-17).

Particularly, and under the AMA, the Board no longer collects and develops evidence on the claimant's behalf and has no authority to affirmatively develop the

record if it finds that a duty to assist error occurred when the record was previously open. *See* 38 C.F.R. § 3.159(c) (noting that a claim is returned to the Agency of Original Jurisdiction (AOJ) upon identification of a duty to assist error on the part of the AOJ). Instead, the Board must remand claims to the AOJ when it determines that further development is necessary. *See* 38 C.F.R. § 20.802(a). When this occurs, an appellant's claim returns to the supplemental claim lane in which the AOJ provides the claimant with a readjudication of the claim, in the form of a new rating decision, which can then be appealed by the claimant under any of the various review lanes, to include one that would allow for the submission of evidence and/or a hearing. *See* 38 U.S.C. § 7113; 38 C.F.R. §§ 20.301, 20.302, 20.303.

For example, and in this case, if the Court agrees with the parties that Appellant's increased rating claims for the right and left knees should be remanded to provide Appellant with a new VA examination, those claims will only return to the Board for the Board to remand to the AOJ for the development required. Under the legacy system, after such examination, such claims would automatically then return to the Board. Under AMA, however, after Appellant undergoes the examination, he may select other review lanes and the claim may never return to the Board. *See* 38 C.F.R. § 20.802(c) (instructing that "[a]fter correction of any error identified in the Board's remand, the agency of original jurisdiction must readjudicate the claim and provide notice of the decision under 38 U.S.C. 5104, to include notice under 38 U.S.C. 5104C of a claimant's options for further review of

the agency of original jurisdiction's decision")[3]. So, while Appellant's rights on remand do not include the absolute right to a hearing or to submit additional evidence, as will be discussed in further detail below, as a practical matter, Appellant, under the specific facts of his case, may get the opportunity, after he has received a new examination and new rating decision (dependent on the review lane he chooses), to submit additional evidence and/or have a hearing regarding his claims in light of the Secretary's concessions of error here and the controlling statutory and regulatory provisions of the AMA as noted above. Accordingly, it would be premature for the Court to weigh in at this time. Therefore, the Court should determine that the issue is not ripe for judicial review or intervention and decline to issue an order in the manner requested by Appellant simply for clarification purposes.

ii. Alternatively, Appellant's rights on remand do not include a hearing or the ability to submit additional evidence as absolute rights under the law.

If the Court disagrees and finds that clarification is necessary, the Court should still decline to issue an order in the manner requested by Appellant because

[3] The Secretary acknowledges that the conceded duty to assist error in this case is being made only as it pertains to the increased rating claims and not the issue regarding entitlement to separate ratings under DC 5259. On remand, however, the Board may determine that the duty to assist error extends to the question regarding separate ratings and remand that issue to the AOJ for consideration with the IR claims. The Board may also determine that the record is sufficient to decide the issue and grant entitlement to separate ratings under DC 5259. The uncertainty regarding how the Board may treat the issue highlights the fact that it is premature for the Court to weigh in here and that there is no clear hardship to Appellant.

the controlling statutory and regulatory provisions do not entitle him to the right to a hearing or to submit additional evidence on remand as an absolute right under the law.

As Appellant acknowledges, the Secretary explained that when an appeal is returned to the Board via remand from the CAVC, in the AMA system, "such appeals would be placed on the same docket that the veteran was on previously."[4] 84 Fed. Reg. at 159; *see* A.B. at 15 (1-17). In this regard, and as noted above, Appellant explicitly chose to have his appeal reviewed by the Board under the direct review docket, which does not allow for the submission of evidence or a hearing request, a matter he was aware of when he selected that docket review option. *See* R. at 43 (41-43); 38 C.F.R. § 20.301. Accordingly, Appellant's appeal, if remanded to the Board by the CAVC, will be initially returned to the direct review docket for the purpose of having the increased ratings claims (and potentially the separate rating issue) remanded to the AOJ for correction of the duty to assist error and a new decision under the supplemental claim lane. *See Infra* at 16-18.

Because the direct review docket does not allow for the submission of evidence or a hearing request, it is clear in this case, that upon any remand by the Court, Appellant does not have any absolute or automatic right to submit additional evidence or request a hearing at the Board unless and until Appellant receives a

[4] Notably, Appellant does not dispute that his appeal should be returned to the same docket it was previously on before the Board, the direct review docket, if his appeal is remanded by the Court to the Board.

new decision by the AOJ and selects review of that decision under one of the lanes that allows for the submission of additional evidence and/or a hearing. As such, any order by the Court directing the Secretary to afford Appellant the opportunity to submit additional evidence and to request a hearing would be in direct contravention of the controlling statutory and regulatory provisions. *See* 38 U.S.C. § 7113(a); 38 C.F.R. § 20.301.

Additionally, Appellant's reliance on the holdings in *Kutscherousky v. West*, 12 Vet.App. 369 (1999), and *Fletcher v. Derwinski*, 1 Vet.App. 394 (1991), as the authority for his request that the Court order the Secretary to provide him with an opportunity at the Board for a hearing and to submit additional evidence is misplaced as those cases are factually distinguishable from this one and are not controlling. Mainly, and as Appellant acknowledges, the Board decision currently on appeal in this case was issued pursuant to procedures of the AMA. *See* R. at 9 (1-24); A.B. at 14 (1-17). Notably, Appellant, in his opening brief to the Court, does not dispute the validity or clarity of the AMA procedures as espoused in the statutory and regulatory provisions referenced above. *See* A.B. at 14-16 (1-17). The appeals in both *Kutscherousky* and *Fletcher*, however, were both processed and adjudicated under the procedures as set forth under VA's legacy appeals system; a fact that cannot be deemed and overlooked as immaterial given the vast differences between VA's AMA system and VA's legacy appeals system.

Indeed, an examination of *Kutscherousky* highlights why it and *Fletcher* are not controlling in this case. Particularly, in *Kutscherousky*, the Court determined

that an appellant was entitled, as an absolute matter of right, to submit additional evidence and argument or to request a hearing upon remand by the Court. *See* 12 Vet.App. at 372. That decision "was ultimately based on Board Chairman Memorandum 01-95-06 because no regulation, including [38 C.F.R.] § 20.1304(a), addressed the submission of additional evidence and argument to the Board following a Court remand. *Williams v. Wilkie*, 32 Vet.App. 46, 53 (2019). However, there is no such internal policy in the AMA context and, as explained above, the statutory and regulatory provisions of the AMA, controlling in this case, clearly address when the record is open for the submission of additional evidence and for the opportunity to have a hearing, to include following a Court remand. *See Infra* at 16-19.

Additionally, "[t]he Court in *Kutscherousky* explained that providing an appellant with 90 days to submit additional evidence and argument to the Board after a Court remand was 'consistent with the shift of the claim upon remand by the Court from the Court's adversarial process back to the non-adversarial, ex parte adjudication process carried out on behalf of the Secretary.'" *Williams*, 32 Vet.App. at 54 (quoting *Kutscherousky*, 12 Vet.App. at 372). Stated another way, under the legacy appeals system, the appeal of the final Board decision to the Court (the shift from the non-adversarial process to the adversarial process and vice versa) marked the closing of the record and the reopening of the record upon remand from the Court. Under the AMA, however, this shift is no longer the determinative factor as to when the record open and closes in a particular appeal.

Instead, when and whether the record is open or closed at the Board is based on which review lane the veteran selects as articulated in his or her NOD. *See* 38 U.S.C. § 7015(b); 38 C.F.R. § 20.202(b).

In this regard, under the legacy appeals system, certification of the appeal and the transfer of records to the Board is the triggering event that opens a claimant's record at the Board and 38 C.F.R. § 20.1304(a) governs a claimant's procedural rights during the relevant time period espoused in that regulation. In *Kutscherousky*, the Court found that "the Board's mailing to the appellant of notice regarding postremand submission of evidence, is the functional equivalent of the § 20.1304(a) 'mailing of notice to the [appellant] that an appeal has been certified to the Board for appellate review and that the appellate record has been transferred to the Board', which notice routinely advises appellants of the § 20.1304(a) 90-day period . . . after the expiration of which the appellant may no longer submit additional evidence as of right.'" 12 Vet.App. at 372.

Under the AMA, nonetheless, the triggering event for the Board's jurisdiction over an appeal is not certification, but the filing of an NOD. *See* 38 C.F.R. § 20.201. Within the NOD, a claimant must indicate which of the three review options he or she requests, which then governs the evidentiary record before the Board. *See* 38 C.F.R. § 20.201(b). Under the authority of 38 U.S.C. § 7107, VA has implemented a limited policy for when a claimant can switch dockets at the Board (or change the parameters regarding the evidentiary record), which does not permit the switching of dockets on remand from the Court. *See* 38 C.F.R. §

20.202(c)(2) (requiring modification of NOD within one year of the date of the agency decision or within 60 days of the date the Board receives the NOD, whichever is later). Moreover, there is no equivalent internal, Board policy regarding modifying an NOD following a Court remand that is captured in post-remand notices sent by the Board in the AMA system, similar to the Board Chairman Memorandum in *Kutscherousky*, which makes the logic applied by the Court in *Kutscherousky* applicable here or in the AMA context.

Because the law espoused in both *Kutscherousky* and *Fletcher* was borne out of considerations under the legacy appeals system, which was devoid of any regulations governing appellate rights following a Court remand in stark contrast to the AMA system, the Court should find that those cases are not controlling in this case, which is distinguished because of the fact that it stems from the AMA system. Accordingly, the Court should decline to order the Secretary to provide Appellant with an opportunity at the Board for a hearing and to submit additional evidence on remand, as Appellant requests, as it would contradict controlling AMA provisions. *See* A.B. at 14-16 (1-17). In fact, and if anything, the Court should issue an instruction, with any decision to remand Appellant's appeal back to the Board, that the Board is not bound by its holdings in *Kutscherousky* and *Fletcher* because this case is being processed under the AMA system and not the legacy appeals system. *See Kutscherousky*, 12 Vet.App. at 372 (Court noting the need to specifically provide a statement to the contrary of its holding, in ordering a

remand to the Board for adjudication or readjudication of a matter, when that holding is not for application).

iii. Lastly, there is no dispute or question regarding expedited proceedings as VA's regulations make it clear that a remand from the Court will be treated expeditiously by the Board.

There is no question or controversy as to whether Appellant's claims are entitled to expeditious treatment by the Board upon vacatur and remand by this Court.

Particularly, 38 U.S.C. § 7112 explicitly states that "[t]he Secretary shall take such actions as may be necessary to provide for expeditious treatment by the Board of any claim that is remanded to the Secretary by the Court of Appeals for Veterans Claims." Additionally, 38 C.F.R. § 20.800(d), which was established by VA as part of its amendment of the adjudication, appeals, and Rules of Practice of the Board of Veterans' Appeals regulations in response to the AMA, also clearly states that "[a] case remanded by the United States Court of Appeals for Veterans Claims for appropriate action will be treated expeditiously by the Board without regard to its place on the Board's docket." Similarly, 38 C.F.R. § 20.802(c), which was also established in response to the AMA, unambiguously states that "[t]he agency of original jurisdiction must provide for the expeditious treatment of any claim that is remanded by the Board." Furthermore, VA expressly stated that "[t]he AMA did not change the procedures at the Board for expediting cases returned from CAVC." VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 159. VA

further explained that "[c]onsistent with 38 U.S.C. 7112, the Board will continue to expedite the adjudication required by a CAVC remand." *Id.*

Accordingly, and despite Appellant's contention to the contrary, there is no question or controversy as to whether the Board must treat Appellant's claims with expeditious treatment. *See* A.B. at 14 (1-17) (noting that there is a question as to whether the Board must expedite the proceedings leading to the Board's new decision). Moreover, and assuming arguendo that there is a legitimate question surrounding this issue, that question, as noted above, has not arisen in this case as there is no evidence of record demonstrating that the Board has failed to provide Appellant's claims with expeditious treatment. Indeed, Appellant does not proffer any argument or reference any evidence of record demonstrating that the Board failed to provide expeditious treatment of his claims. *See* A.B. at 14-16 (1-17). As such, there is no need for the Court to include a special instruction compelling the Board to afford Appellant's claims expeditious treatment on remand where it has yet to deprive his claims of such treatment in contravention of the law.

V. CONCLUSION

For the foregoing reasons, Appellee Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits that the Court should vacate and remand the parts of the Board's decision that denied entitlement to separate ratings for the right and left knees under DC 5259 and to increased ratings for chondromalacia of the right patella with DJD and for DJD of the left knee.

Respectfully submitted,

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