

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-498

KENNETH GILYARD

Appellant

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee

CHISHOLM CHISHOLM & KILPATRICK
ALEXANDRA LIO
TESSA STILLINGS
One Turks Head Place,
Suite 1100
Providence, RI 02903
(401) 331-6300
(401) 421-3185 Facsimile
Representatives for Appellant

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STATEMENT OF THE ISSUES

Did the Board provide inadequate reasons or bases for denying a separate rating under 38 C.F.R. § 4.71a (2015) (diagnostic code 5257) where it determined the Veteran showed no evidence of subluxation or instability? Additionally, did the Board provide inadequate reasons or bases for its denial of a separate rating under 38 C.F.R. § 4.71a (2015) (diagnostic code 5259) where it determined the Veteran showed no evidence of dislocated or removed cartilage?

STATEMENT OF THE CASE

Kenneth Gilyard (“Veteran”) served on active duty from September 1980 to May 1993 in the Air Force. R-1439. In June 2006, Mr. Gilyard filed for compensation regarding his right and left knee disability as well as other disabilities. R-1274 (1268-79). A rating decision was issued in December 2008 in which the RO denied service connection for both the Veteran’s right and left knee injuries. R-1232-43. In January 2011, the examiner noted that the Veteran’s McMurry’s maneuver was “minimally uncomfortable.” R-2312-13.

During a March 2012 MRI, it was noted that Mr. Gilyard had “[s]evere degenerative joint disease in the medial compartment manifested as thinning of hyaline articular cartilage, joint space narrowing, and fragmentation of the posterior horn of the medial meniscus” and “[m]oderate degenerative changes in the anterior compartment associated with lateral patellar subluxation and a large patellofemoral joint effusion.” R-1200. In June 2012, Mr. Gilyard was awarded service connection

and a 10 percent rating for left knee arthritis effective September 2011. R-2337 (2332-41).

In December 2012, a VA examiner noted that there is a functional impact due to his knee because “the impact of the knee/lower leg condition(s) on the claimant’s ability to work is hard time walking and moving around.” R-740 (734-40). An increased rating for the Veteran’s left knee arthritis was denied in a January 2013 rating decision. R-686-98. The Veteran was noted to be wearing a brace and limping in May 2013. R-2190. A notice of disagreement for increased rating of left knee arthritis was submitted in June 2013. R-646.

In June 2013, Mr. Gilyard filed a claim for service connection for right knee disability, secondary to left knee disability. R-624. In October 2013, the RO issued the statement of the case. R-545-70. Mr. Gilyard filed a timely appeal to the Board in October 2013. R-540. In April 2014, the RO issued a rating decision in which it denied service connection for Mr. Gilyard’s right knee disability. R-456-68. In May 2014, the RO issued a supplemental statement of the case. R-443-48.

In May 2014, Mr. Gilyard filed a supplemental claim for his left knee replacement. R-454. In December 2015, the Board issued a decision denying Mr. Gilyard’s claim for increased rating for his left knee arthritis prior to April 2014. R-1-25. The Board stated:

The Board finds that a 10 percent rating is proper prior to Veteran’s total knee replacement in April 2014. This is because there is no evidence of ankyloses in the knee, no evidence of

subluxation or instability, no evidence of dislocated or removed cartilage and no evidence that flexion was limited to anywhere near the extent required for a compensable rating. The Board acknowledges the pain the Veteran experienced and that his motion was limited due to his disability. As such, a 10 percent disability rating to compensate for this loss of function was warranted pursuant to 38 C.F.R. § 4.40 and 38 C.F.R. § 4.45 as set forth in *DeLuca, supra*.

R-13. This appeal ensued.

SUMMARY OF THE ARGUMENT

The Board erred when it misinterpreted the law and failed to provide adequate reasons or bases for its conclusion that Mr. Gilyard was not entitled to a separate rating under 38 C.F.R. § 4.71a (2015) diagnostic code (“DC”) 5257 for his left knee disability. Mr. Gilyard is competent to provide lay evidence regarding his symptomatology of instability. The Board further erred when it misinterpreted the law and failed to provide adequate reasons or bases for its conclusion that Mr. Gilyard was not entitled to a separate rating under 38 C.F.R. § 4.71a DC 5259. Treatment records note a thinning of cartilage in 2012. R-2289.

The Board stated that there is “no evidence of subluxation or instability” and “no evidence of dislocated or removed cartilage” without providing adequate reasons for failing to consider material evidence that discusses these symptoms. *See Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding that the Board is not required to discuss all evidence of record, but must discuss relevant evidence); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (The Board has a duty to provide reasons or bases for

the rejection of any material evidence favorable to the claimant). Thus, remand is warranted for the Board to provide adequate reasons or bases for its conclusion that the Veteran was not entitled to a separate rating under DC 5257 or 5259.

STANDARD OF REVIEW

The Court reviews the Board's decisions regarding claims for either increased ratings or for service connection under the clearly erroneous standard. A determination regarding service connection or the degree of impairment for purposes of rating a disability is an issue of fact. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996); *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); *Mense v. Derwinski*, 1 Vet.App. 354, 356 (1991).

However, 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)(1); see *Butts v. Brown*, 5 Vet. App. 532 (1993) (*en banc*). 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." *Butts*, 5 Vet. App. 532. The Court should determine whether the Board's decision, in which the Board failed to properly apply the law and failed to provide adequate reasons and bases for its decision, is in accordance with the law.

ARGUMENT

- I. **The Board failed to give adequate reasons and bases for its denial of a separate rating under DC 5257 and 5259 when it determined there was no evidence of subluxation or instability and no evidence of dislocated or removed cartilage.**

Pursuant to 38 U.S.C. § 7104(d)(1), the Board’s decision must include “a written statement of the Board’s 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[.]” This requirement is a fundamental means “to enable a claimant to understand the precise basis for the Board’s decision, as well as to facilitate review of this Court.” *D’Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (citing to *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990)). In order to comply, 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.” *Id.* (citing to *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)). The Board must also consider all relevant evidence of record and discuss all potentially applicable provisions of law and regulation. *Gutierrez v. Principi*, 19 Vet.App. 1, 7 (2004) (citing *Schafraath v. Derwinski*, 1 Vet.App. 589 (1991)).

In evaluating a service-connected condition, VA must rate the condition in a way so as to maximize the benefits for the claimant. *See AB v. Brown*, 6 Vet.App. 35, 38 (1993) (presuming that a claimant is seeking the maximum benefits allowed by law and regulation); 38 C.F.R. § 3.103(a)(2015) (noting VA's obligation to “render a

decision which grants every benefit that can be supported in law”); *see also* 38 C.F.R. § 4.7 (2015) (“Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating.”).

1. Diagnostic Code 5257

Mr. Gilyard’s left knee disability is currently rated at 10 percent under 38 C.F.R. § 4.71a, Diagnostic Code 5261. R-692. Under DC 5257, another potentially applicable diagnostic code, slight knee impairment due to subluxation or lateral instability warrants a 10 percent rating. 38 C.F.R. § 4.71a. Moderate subluxation or lateral instability warrants a 20 percent rating, and severe subluxation or lateral instability warrants a 30 percent rating. *Id.*

In the present case, the Board stated there is “no evidence of subluxation or instability.” R-13. However, the evidence of record reflects that Mr. Gilyard has suffered from both subluxation and instability. A MRI in March 2012 notes that there is lateral patellar subluxation in Mr. Gilyard’s left knee. R-1200. In an April 2012 treatment note, the Veteran is said to have “lateral patellar subluxation and effusion.” R-763. Again in May 2012, Mr. Gilyard was diagnosed with “lateral patellar subluxation.” R-832. In May 2013, it was noted the Veteran came to his appoint in a brace and limping. R-2106. Again in May 2013, the Veteran reported he had to wear a brace. In November 2013, the Veteran noted that his knee pops when he moves it.

R-518. The Veteran's knee pain causes issues with instability as he has to wear a brace while walking and still walks with a limp.

The Board's inadequate statement of reasons or bases prejudiced Mr. Gilyard because if it had properly considered the applicable rating criteria, it may have found that Mr. Gilyard is entitled to a rating under a separate applicable diagnostic code, DC 5257.

2. Diagnostic Code 5259

Under DC 5259 a 10 percent rating is warranted if there is "cartilage, semilunar, removal of, symptomatic." The Board here states there is "no evidence of dislocated or removed cartilage" however, the evidence shows that is not the case. R-13. The Board failed to give adequate reasons or bases for whether Mr. Gilyard warranted a separate rating under DC 5259 due to his knee cartilage.

In January 2011, a McMurry's maneuver test, which is a rotation test for demonstrating torn cartilage of the knee, was performed and noted to be "minimally uncomfortable." R-2312. A March 2012 MRI found the Veteran has "fragmentation of the posterior horn of the medial meniscus with marked thinning of the hyaline articular cartilage in the medial compartment." R-1200. "Severe degenerative joint disease in the medial compartment manifested as thinning of the hyaline articular cartilage with joint space narrowing." R-763.

The Board's inadequate statement of reasons or bases prejudiced Mr. Gilyard because if it had properly considered the applicable rating criteria, it may have found

that Mr. Gilyard is entitled to a rating under a separate applicable diagnostic code, DC 5259.

The Board's reasoning is inadequate because it gives no consideration to the above evidence and the Board failed to provide any discussion in determining that there was "no evidence of subluxation or instability" and "no evidence of dislocated or removed cartilage." R-13. The Board is legally required to consider and discuss all the relevant evidence in the record, as well as provide adequate reasons and bases when rejecting material evidence that is favorable to the veteran. *Dela Cruz*, 15 Vet.App. at 149 (finding that the Board is not required to discuss all evidence of record, but must discuss relevant evidence); *Thompson*, 14 Vet.App.at 188 (The Board has a duty to provide reasons or bases for the rejection of any material evidence favorable to the claimant).

Without a discussion of favorable material evidence which indicated subluxation, lateral instability, and cartilage, the Veteran is unable to ascertain the precise basis for the Board's decision. *Bowling v. Principi*, 15 Vet.App. 1, 6-7 (2001). Furthermore, the Board's lack of discussion frustrates judicial review by this Court. *Id.*; see also *Allday v. Brown*, 7 Vet.App. 517, 527 (1995) (the Board's statement of the reasons or bases for its decision "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").

The implementation of another diagnostic code is permitted if warranted under the circumstances of a particular case. See *Pernorio v. Derwinski*, 2 Vet. App. 625, 629

(1992) (an alternative diagnostic code than that applied by the RO may be appropriate under the circumstances, and where a claim is evaluated under this criteria, the VA adjudicator should explain the basis for this determination); *see also Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (“when the regulations do not provide diagnostic codes for a specific disorder, it is necessary for the VA to evaluate those conditions under codes for similar disorders or codes that provide a general description that may encompass many ailments.”)

“[S]eparate evaluations are allowed for separate disabilities arising from the same knee injury.” *Murray v. Shinseki*, 24 Vet.App. 420, 423 (2011). If the conditions at issue involve separate and distinct symptomatology, the veteran may be entitled to have multiple disorders rated under various diagnostic codes. *Esteban v. Brown*, 6 Vet.App. 259, 261-64 (1994) (holding that because none of the symptomatology for the appellant’s conditions were overlapping or duplicative the appellant was entitled to separate ratings for each condition). That is the case here. Despite the Board’s summary conclusion that “a 10 percent disability rating to compensate for this loss of function was warranted to 38 C.F.R. § 4.40 and 38 C.F.R. § 4.45,” R-13, the symptoms contemplated under DC 5261 do not include subluxation, instability, or damaged cartilage which Mr. Gilyard suffers from. 38 C.F.R. § 4.71a.

CONCLUSION

In view of the foregoing, the Board's decision that denied Mr. Gilyard separate ratings under DC 5257 or 5259 should be vacated and the appeal remanded with instructions for the Board to ensure that the law is properly applied and interpreted and to provide adequate reasons and bases for its decision.

Respectfully submitted,

Kenneth Gilyard,
By His Representatives,
CHISHOLM, CHISHOLM & KILPATRICK

By */s/ Alexandra Lio*
ALEXANDRA LIO

By */s/ Tessa Stillings*
TESSA STILLINGS
One Turks Head Place, Ste. 1100
Providence, RI 02903
(401) 331-6300
(401) 421-3185 (facsimile)