Vet. App. No. 20-6259

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JOE N. BRADDY, JR.,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

SUPPLEMENTAL BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

I. ISSUE PRESENTED.....1

II. STATEMENT OF THE CASE 1-7

A. Jurisdictional Statement..... 1

B. Nature of the Case..... 2

C. Statement of Relevant Facts 2-3

III. SUMMARY OF ARGUMENT 7

IV. ARGUMENT: 7-20

A. Appellant Has Been Afforded Fair Process In this Case, and the Court Should Affirm the Board's Decision..... 7-20

1. Fair Process Generally..... 8-10

2. VA Afforded Appellant Fair Process..... 10-16

3. VA Provided Appellant with Reasonable Notice and an Opportunity to Respond to the Severance Decision Before the Board Decided His Request for an Increased Rating, Including the Effect of the Severance Decision on the Increased Rating..... 16-18

4. Neither the RO Nor the Board Suggested Such an Increase Was Possible Even if the Severance Stayed Intact when It Addressed the Merits of His Request for a Higher Rating..... 18-20

5. Appellant Was Afforded Fair Process and the Appropriate Remedy Is Affirmance..... 20

V. CONCLUSION..... 20

TABLE OF AUTHORITIES

FEDERAL CASES

Austin v. Brwon, 6 Vet.App. 547 (1994) 9-10
Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009) 9
Manlicon v. West, 12 Vet.App. 238 (1999) 14
Morris v. Derwinski, 1 Vet.App. 260 (1991) 18
Prickett v. Nicholson, 20 Vet.App. 370 (2006) 10
Smith v. Wilkie, 32 Vet.App. 332 (2020) 8-9
Sprinkle v. Shinseki, 733 F.3d 1180 (Fed. Cir. 2013) 8
Thurber v. Brown, 5 Vet.App. 119 (1993) 8, 9, 10, 17
Vickous v. McDonough, Docket No. 20-8195, 2022 U.S. App. Vet. LEXIS 459 (Mar. 30, 2022) 9
Williams v. Wilkie, 32 Vet.App. 58 (2019) 10

FEDERAL STATUTE

38 U.S.C. § 7252(a) 1

FEDERAL REGULATION

38 C.F.R. § 3.400 ..... 4, 12

RECORD CITATIONS

5-14 (July 21, 2020, Board Decision) ..... *passim*
28-41 (April 2020 SSOC (Increase)) 6, 16
354-56 (October 2019 Application for Increase Based on Unemployability) 6, 15-16
921-47 (November 2018 SOC (Severance)) 5-6, 14-15, 17, 18
1050-55 (December 2017 Board Decision) 5, 14, 17, 19
1107-10 (August 22, 2017, NOD (Severance)) 5, 13
1111-22 (August 18, 2017, Board Hearing Transcript) 4,10, 13, 19

1463-75 (March 21, 2017, SSOC)..... 4, 12, 17, 18
1476-78 (March 17, 2017, Rating Decision (Implementing Severance) (letter))..3-4, 12
1481-84 (March 17, 2017, Rating Decision (Implementing Severance (text))..3-4, 12
1487-90 (December 2016 Rating Decision (Proposing Severance) (letter))... 3, 11
1492-97 (December 2016 Rating Decision (Proposing Severance) (text))..... 3, 11
1953-60 (May 2015 Rating Decision)..... 3, 11
2038 (February 2015 Supplemental Claim) 3, 11
2567 (February 2013 Substantive Appeal) 3, 11
2574-2606 (December 2012 SOC (Increase))..... 2-3, 10-11, 19

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JOE N. BRADDY, JR., Appellant	)	
v.	)	Vet.App. 20-6259
DENIS MCDONOUGH, Secretary of Veterans Affairs Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S SUPPLEMENTAL BRIEF[1]

I. ISSUE PRESENTED

Whether the Court should affirm that part of the July 21, 2020, Board of Veterans' Appeals (Board) decision that denied entitlement to an initial disability rating in excess of 10% for status-post old post-traumatic ligamentous calcification parallel to medial metaphyseal region distal femur, also described as degenerative joint disease, of the left knee from July 21, 2009, to June 1, 2017.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252(a).

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[1] The Secretary files this Supplemental Brief pursuant to the Court's March 8, 2022, Order (Mar. 8, 2022, Order), which ordered the Secretary to file a supplemental brief addressing "whether [Appellant] was provided with fair process in this matter and, if not, the proper remedy." Mar. 8, 2022, Order at 3.

B. Nature of the Case

Joe N. Braddy, Jr. (Appellant), appeals, through counsel, that part of the July 21, 2020, Board decision that denied entitlement to an initial disability rating in excess of 10% for status-post old post-traumatic ligamentous calcification parallel to medial metaphyseal region distal femur, also described as degenerative joint disease, of the left knee from July 21, 2009, to June 1, 2017. *See* Record Before the Agency (R.) at 5-14.

C. Statement of Relevant Facts

During the appeal of Appellant's initial rating for his then-service-connected left knee disability, in December 2012, the VA Regional Office (RO) issued a Statement of the Case (SOC) denying, in pertinent part, an initial evaluation in excess of 10% for Appellant's then-service-connected left knee disability. *See* R. at 2574-2606. It did not list severance of service connection for a left knee disability as an issue. *See id.* Instead, the RO explained that Appellant was initially granted service connection based on a November 2009 VA examination, but it noted that the "opinion seemed conflicting and the supporting rationale given seemed to support a finding that his current knee problems were not due to his left knee complaints in service." *Id.* at 2601. The RO further explained that Appellant was since provided a VA examination in December 2012 in which the examiner clarified that Appellant's current left knee disability was attributable to a post-service injury and not his military service. *Id.* at 2603. The RO notified Appellant that "[b]ased on this statement [by the December 2012 VA examiner], [his] claims

being referred to the Rating Activity for review of whether the service connection for this condition should be severed." *Id.* at 2603. It continued, "In the meantime, based on the evidence, the 10[%] evaluation for this condition is continued." *Id.* Appellant perfected his appeal in February 2013 and checked the box indicating he wanted to appeal "all of the issues listed on the [SOC]. R. at 2567.

In February 2015, Appellant submitted a Supplemental Claim, checking the box for "Increased Evaluation of the Disability(ies) for Which I Am Already Service Connected," and listing, "Knee Condition." R. at 2038. The RO issued a rating decision in May 2015 in response to that supplemental claim, which continued the 10% evaluation for Appellant's left knee. R. at 1953-60.

In December 2016, the RO issued Appellant a rating decision in which it proposed to sever service connection for his left knee disability based upon clear and unmistakable error, due to evidence received on December 19, 2012. *See* R. at 1487-90 (letter); 1492-97 (text). The letter informed Appellant that, because of this error, VA was proposing to stop benefit payments effective February 19, 2017, and that because of the error, VA was required by law to sever service connection "and consequently your compensation payments." *Id* at 1487. It further informed Appellant he had 60 days to "submit evidence to show that he proposed action should not be taken." *Id*. It informed him that he may submit evidence in person, through the mail, or via his representative. *Id*.

Appellant did not submit any additional evidence, and, on March 17, 2017, the RO issued a decision severing service connection for Appellant's left knee

disability effective June 1, 2017. *See* R. at 1476-78 (letter); 1481-84 (text). VA informed Appellant that, if he disagreed with the decision, he could submit a VA Form 21-0958, Notice of Disagreement (NOD). *Id* at 1477,

Four days later, on March 21, 2017, the RO issued a Supplemental SOC (SSOC) that continued the 10% evaluation for Appellant's left knee disability between July 2009 and June 2017; informed him that "[s]ervice connection has now been severed effective June 21, 2017"; and informed him that 38 C.F.R. § 3.400(o) provided that "[a] retroactive increase or additional benefit will not be awarded after basic entitlement has been terminated, such as by severance of service connection." *See* R. at 1472 (1463-75). Section 3.400 of title 38 of the Code of Federal Regulations was also quoted in its entirety earlier in the SSOC. *Id.* at 1466-71. The cover letter accompanying the SSOC also informed Appellant that, if he already filed a formal appeal and wished to continue his appeal, his response to the SSOC was optional. R. at 1463 (1463-64) (cover letter).

Appellant testified before a Member of the Board on August 18, 2017. R. at 1111-22. The Board Member listed the applicable issue on appeal as "entitlement to an initial rating in excess of 10[%] for degenerative joint disease of the medial compartment of the left knee from July 21st, 2009, to July 1st of 2017." *Id* at 1112. Appellant testified that he believed a higher evaluation was warranted for the left knee "from the period of 2009 to 2017" on the basis of the severity of the disability. *See id.* at 1113. Appellant's then-representative continued to limit his testimony to that timeframe. *See id.* at 1115. Severance was not discussed.

Four days later, on August 22, 2017, Appellant submitted an NOD relating to the severance of service connection through his then-representative. *See* R. at 1107-10. Appellant listed the date of the decision being appealed as March 17, 2017, and the issue as "severance of left knee condition." *Id* at 1109.

The Board issued a decision on December 17, 2017, that remanded all the issues then on appeal, including the initial evaluation in excess of 10% "from July 21, 2009, to June 1, 2017" for the left knee disability. *See* R. at 1050-55. The Board acknowledged that, during the course of his pending increased rating appeal, Appellant filed an NOD relating to the decision severing service connection in August 2017 but that he had not yet been issued an SOC and "the RO acknowledged [Appellant]'s NOD an additional action is pending." *Id.* at 1051-52. It found that the issue of the "increased rating claim for that disability is intertwined with the severance issue" and that it "must be remanded as the propriety of the severance . . . is still pending additional action from the AOJ." *Id.* at 1053.

Nearly a year later, in November 2018, the RO issued an SOC that confirmed the severance decision. R. at 921-47 (SOC and cover letter). It informed him, "To complete your appeal, you must file a formal appeal." *Id.* at 921. It noted that it had enclosed a "VA Form 9, Appeal to the Board of Veteran's Appeals, which you may use to complete your appeal." *Id.* at 921. It informed him that he "must" file the appeal "within 60 days of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action you have appealed. **If we do not hear from you within this period, we will close**

your case." *Id*. "If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires." *Id*. It informed him that, "After we receive your appeal, we will send your case to the [Board] in Washington, DC for a decision." *Id.* at 922. Appellant did not perfect his appeal.

Approximately 11 months after that, Appellant filed a VA Form 21-9040 Application for Increased Compensation Based on Unemployability." R. at 354-56. Appellant listed "chronic knee and back and shoulder" as a response to the question, "What service-connected disability prevents you from securing or following any substantially gainful occupation?" *Id* at 354. Appellant filled in blanks indicating that his disability affected full-time employment in 2010, that he last worked full-time in 2010, and that he became too disabled to work in 2011. *Id.*

In April 2020, the RO issued an SSOC that continued entitlement to an initial evaluation of 10% for the left knee from July 21, 2009, to June 1, 2017. *See* R. at 28-41. The SSOC reminded Appellant that his increased rating claim had been remanded by the Board in December 2017 as it was intertwined with the propriety of the severance. *Id.* at 36. It further informed him that service connection for his left knee had been severed and that, because he did not submit a timely substantive appeal relating to that issue, it became final. *Id.* The SSOC, therefore, informed Appellant that "Federal regulations provide that a retroactive increase or additional benefit would not be awarded after basic entitlement had been terminated, such as by severance of service connection." *Id.* at 36.

The Board issued the decision now on appeal in July 2020, R. at 5-14, and this appeal followed.

III. SUMMARY OF ARGUMENT

Appellant was provided fair process in this case, and the Court should affirm the Board's decision.

IV. ARGUMENT

A. Appellant Has Been Afforded Fair Process in this Case, and the Court Should Affirm the Board's Decision

The Court requested supplemental briefing from the Secretary addressing "whether [Appellant] was provided fair process in this matter and, if not, the proper remedy." Mar. 8, 2022, Order at 3. Appellant was provided fair process in this matter, and the Court should affirm the Board's decision. The Secretary will begin with an overview of fair process, demonstrate how fair process was afforded in this case, and then address the three concerns raised by the Court's Order, specifically (1) "whether VA did explain or should have explained to [Appellant] that he would be barred as a matter of law from receiving a higher rating for the 2009 to 2017 period if the severance decision stayed intact"; (2) "whether the RO and the Board by addressing the merits of his request for a higher rating for the 2009 to 2017 period without discussing the effect of severance suggested that such an increase was possible even if the severance decision stayed intact"; and (3) "what remedies may be available if the appellant was not afforded fair process during the course of proceedings leading to the Board decision on appeal." *See* Mar. 8, 2022, Order.

1. Fair Process Generally

The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has found fair process to apply only in very limited circumstances. *See Sprinkle v. Shinseki*, 733 F.3d 1180, 1185-87 (Fed. Cir. 2013). The Federal Circuit noted that the "fair process" doctrine was a creation of this Court, *see id.* at 1185 (explaining that the doctrine was created by this Court in *Thurber v. Brown*, 5 Vet.App. 119 (1993)), and also noted that, "[b]y its terms, the fair process doctrine is only triggered when 'evidence [is] developed or obtained by [the Board] subsequent to the issuance of the most recent [Statement of the Case] or [Supplemental Statement of the Case] with respect to such claim," *id.* (citing *Thurber*, 5 Vet.App. at 126). In *Sprinkle*, the Federal Circuit found that fair process was not violated when the RO developed additional evidence on remand through a medical examination, and then issued an SSOC that "provided a 'summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed'" "and that was 'complete enough to allow the appellant to present written and/or oral arguments before the Board.'" *Id.*

This Court has determined that the Board is obligated to ensure that it provides claimants fair process in the adjudication of their claims. *See Smith v. Wilkie*, 32 Vet.App. 332, 337 (2020). In *Smith*, this Court found the issue was whether fair process requires notice and an opportunity to respond when the Board proports to reverse its prior characterization in a non-final remand decision that evidence was credible or otherwise satisfactory to establish a fact necessary to

establish entitlement to VA benefits, and held that it did. *See id.* at 338. The Court found that fair process required that the appellant "be given notice of that proposed factual finding and provided the opportunity to submit evidence concerning his credibility or to support the now un-established element of his claim, the alleged in-service injury." *Id.* at 338.

The case law relating to fair process at this Court is less concrete then that at the Federal Circuit[2]; there does not appear to be a specific test, but it revolves around concepts of procedural regularity and basic fair play, *see Smith*, 32 Vet.App. at 337, and is grounded in reasonable notice of evidence to a claimant and a reasonable opportunity for the claimant to respond to it. *See Thurber*, 5 Vet.App. at 126; *see also Austin v. Brown*, 6 Vet.App. 547, 552 (1994) (holding the appellant's opportunity to respond was inappropriately limited to providing argument and comment, and not additional evidence, and also that, when the Board requested a medical opinion from its own Board medical advisor and that request contained the acting Board member's own opinion, fair process was

[2] In one nonprecedential memorandum decision, which the Secretary does not cite for precedential value but only for persuasive value, *see* U.S. Vet. App. R. 30(a), the Court reasoned that the fair process principle "was effectively an early stand in for constitutional due process in many administrative proceedings. When this Court first recognized the fair process principal in *Thurber*[], the Supreme Court had yet to decide whether applicants for government benefits had a property right in their expectation. Since that time, the Federal Circuit has held that the Due Process Clause of the Constitution applies to VA proceedings that determine eligibility for veterans' benefits." *Vickous v. McDonough*, Docket No. 20-8195, 2022 U.S. App. Vet. Claims LEXIS 459 at *4 (footnote) (Mar. 30, 2022) (citing *Cushman v. Shinseki*, 576 F.3d 1290, 1299-1300 (Fed. Cir. 2009)).

violated because the Board's procurement of that medical opinion was not done "in an impartial, unbiased, and neutral manner."); *Prickett v. Nicholson*, 20 Vet.App. 370, 380-82 (2006) (distinguishing between fair process and due process); *Williams v. Wilkie*, 32 Vet.App. 46, 58 (2019) ("At the core of both theories [due process and fair process] is an allegation that the veteran was denied notice and a meaningful opportunity to participate in the adjudication of his appeal.").

2. VA Afforded Appellant Fair Process

The record demonstrates that Appellant was afforded fair process at every step of both this appeal (relating to a higher initial evaluation for his left knee disability) and the proceeding that resulted in the severance of service connection for his left knee disability. In both instances he was afforded reasonable notice of evidence and adjudicative actions, and offered a reasonable opportunity to respond, including by submitting evidence. *See Thurber*, 5 Vet.App. at 126. There was nothing procedurally irregular about the adjudication of the two distinct matters (the higher initial evaluation and the severance), and, while the circumstances surrounding the matter involved in this appeal and the matter of severance may be unusual, nothing in the record demonstrates that they were in any way unfair.

The December 2012 SOC relating to Appellant's appeal of the initial evaluation for his left knee disability did not list severance of service connection for the left knee disability as an issue (or matter) being decided in that document. *See* R. at 2577-2606. Instead, it informed Appellant that his "claim [for an initial evaluation in excess of 10% for the left knee] is being referred to the Rating Activity

for review of whether the service connection for this condition should be severed." *Id.* at 2603. It continued, "*In the meantime*, based on the evidence, the 10[%] evaluation for this condition is continued." *Id.* (emphasis added). Appellant perfected his appeal in February 2013 and checked the box indicating he wanted to appeal "all of the issues listed on the [SOC]." R. at 2567. This demonstrates that the SOC put Appellant on notice that the matters of an increased evaluation for the left knee, and severance of service connection for the left knee, were separate and distinct.

In February 2015, Appellant submitted a Supplemental Claim, checking the box for "Increased Evaluation of the Disability(ies) for Which I Am Already Service Connected," and listing, "Knee Condition." R. at 2038. The RO issued a rating decision in May 2015 in response to that supplemental claim, which continued the 10% evaluation for Appellant's left knee. R. at 1955-56. This demonstrates that in 2015 Appellant believed he was service connected for a left knee condition and continued to seek a higher rating, which was correct.

The December 2016 rating decision that proposed to sever service connection for Appellant's left knee disability informed him that this was based upon clear and unmistakable error, due to evidence received on December 19, 2012. *See* R. at 1487-90 (letter); 1492-97 (text). The letter informed Appellant that, because of this error, VA was proposing to stop benefit payments effective February 19, 2017, and that, because of the error, VA was required by law to sever service connection "and consequently your compensation

payments." *Id.* It further informed Appellant he had 60 days to "submit evidence to show that he proposed action should not be taken." *Id* at 1487. It informed him that he may submit evidence in person, through the mail, or via his representative. *Id*. This provided notice to Appellant of the proposed decision, the evidence it was based upon, and informed him of his opportunity to respond.

However, Appellant did not submit any additional evidence, and on March 17, 2017, the RO issued a decision severing service connection for Appellant's left knee disability effective June 1, 2017. *See* R. at 1476-78 (letter); 1481-84 (text). VA informed Appellant that if he disagreed with the decision he could submit a VA Form 21-0958, Notice of Disagreement (NOD). Again, VA provided Appellant notice and an opportunity to respond.

Four days later, the March 21, 2017, SSOC continued the 10% evaluation for Appellant's left knee disability between July 2009 and June 2017. *See* R. at 1463-75. It specifically informed Appellant that "service connection has now been severed effective June 21, 2017," and informed him that 38 C.F.R. § 3.400(o) provided that a retroactive increase could not be awarded after the severance of service connection. *See* R. at 1472 (1463-75). It further included 38 C.F.R. § 3.400 in its entirety. *Id.* at 1466-71. It also informed him that if he already filed a formal appeal and wished to continue his appeal, his response to the SSOC was optional. R. at 1463 (1463-75) (cover letter). This provided notice of the action taken by VA, i.e., it was prohibited from awarding a higher rating due to the severance of service connection; it gave the reason for that action, specifically

citing the relevant regulation that prohibited such action; and informed him of how to respond if he wished to continue his appeal of an increased rating.

Appellant testified before a Member of the Board on August 18, 2017. R. at 1111-22. The Board Member listed one of the issues as "entitlement to an initial rating in excess of 10[%] for degenerative joint disease of the medial compartment of the left knee from July 21st, 2009, to July 1st of 2017." *Id* at 1112. Appellant testified that he believed a higher evaluation was warranted for the left knee "from the period of 2009 to 2017" on the basis of the severity of the disability. *See id* at 1113. Appellant's then-representative continued to limit his testimony to that timeframe. *See id* at 1115. Here, the matter of severance was not directly discussed, likely because Appellant had not yet perfected his appeal to the Board as to that issue. Nevertheless, the issue as characterized by the Board, and as reiterated in the limitations on testimony presented by Appellant's then-representative, shows that Appellant knew service connection had, at that point, been severed effective in 2017.

Four days after his Board hearing, on August 22, 2017, Appellant submitted an NOD relating to the severance issue through his then-representative. *See* R. at 1107-10. Appellant listed the date of the decision being appealed as March 17, 2017, and the issue as "severance of left knee condition." *Id* at 1109. This indicates that Appellant knew how to disagree with the decision to sever, including that the issue was raised in a separate rating decision, and was able to

follow the regular procedures in order to do so, i.e., he filed an NOD in response to that rating decision.

The Board's December 17, 2017, decision remanded all the issues then on appeal, including the initial evaluation in excess of 10% "from July 21, 2009, to June 1, 2017" for the left knee disability. *See* R. at 1050-55. It acknowledged that Appellant had filed an NOD relating to the severance decision in August 2017, *id* at 1053, and found that the issue of the "increased rating claim for that disability is intertwined with the severance issue" and that it "must be remanded as the propriety of the severance . . . is still pending additional action from the AOJ." *Id.* This finding was not incorrect because Appellant had not perfected his appeal as to the severance matter (and in fact never did), but the next appropriate procedural step in the severance matter was for the RO to issue an SOC. *See Manlicon v. West*, 12 Vet.App. 238, 241-42 (1999). Indeed, the Board acknowledged that an SOC would be the next step, but indicated it was not remanding for compliance with *Manlicon* because "it appears the RO has acknowledged [Appellant's] NOD and additional action is pending[,]" and therefore found "this situation is distinguishable from *Manlicon*, where a [NOD] had not been recognized, and remand is not necessary at this time." *Id* at 1052.

The RO issued an SOC in November 2018 that confirmed the severance decision. R. at 921-47 (SOC and cover letter). It informed him that, "To complete your appeal, you must file a formal appeal." *Id* at 921. It noted that it had enclosed a "VA Form 9, Appeal to the Board of Veteran's Appeals, which you may use to

complete your appeal." *Id* at 921. It informed him that he "must" file the appeal "within 60 days of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action you have appealed. **If we do not hear from you within this period, we will close your case.**" *Id*. "If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires." *Id*. It informed him that, "After we receive your appeal, we will send your case to the [Board] in Washington, DC for a decision." *Id.* at 922. This notified Appellant of the action taken and what he needed to do next, and offered him an opportunity to respond (to take that action). But he did not perfect his appeal.

In October 2019, Appellant filed a VA Form 21-9040 Application for Increased Compensation Based on Unemployability." R. at 354-56. Appellant listed "chronic knee and back and shoulder" as a response to the question, "What service-connected disability prevents you from securing or following any substantially gainful occupation?" *Id.* at 354. Appellant filled in blanks indicating that his disability affected full-time employment in 2010, that he last worked full-time in 2010, and that he became too disabled to work in 2011. *Id*. This does not necessarily indicate that Appellant misunderstood anything about either matter discussed in this brief, i.e., the matter of the evaluation in excess of 10% for the left knee disability from July 21, 2009, to June 1, 2017, or the matter of severance of service connection for the left knee. *See id*. Indeed, Appellant listed a "back" disability as a "service-connected disability" that prevented him from securing and

following a substantially gainful occupation, despite the fact that he is not service connected for a back disability and never has been. *See id.*; *see also* R. at 13 (5-14) (noting that service connection had previously been denied for a back disability). Nothing in this application shows that VA did not give Appellant reasonable notice, or provide him with a reasonable opportunity to respond, or that Appellant even alleges as much.

Finally, in April 2020, the RO issued an SSOC that included the issue of entitlement to an initial evaluation in excess of 10% for the left knee from July 21, 2009, to June 1, 2017. *See* R. at 28-41. This informed Appellant that a retroactive increase could not be granted because service connection had been severed, and that the severance decision had become final because he did not file a timely substantive appeal relating to it. *See id* at 36.

Based on these facts, Appellant has been provided fair process, and the Court should affirm the Board's decision in this matter.

3. VA Provided Appellant with Reasonable Notice and an Opportunity to Respond to the Severance Decision Before the Board Decided His Request for an Increased Rating, Including the Effect of the Severance Decision on the Increased Rating

Appellant received reasonable notice and opportunity to appeal the severance of service connection before a decision was issued on his request for an increased rating, and Appellant was provided notice and opportunity to respond to how the severance affected his increased rating. Rather than the Board adjudicating the increased rating claim while Appellant's NOD regarding

severance remained unadjudicated at the RO level, the Board remanded the increased rating claim in order for Appellant to be provided notice of the RO's SOC on the issue of severance and an opportunity to appeal, before an SSOC was issued with respect to the increased rating claim and it was returned to the Board. *See* R. at 1052-53 (1050-55) (December 2017 Board Decision). Following the Board's remand, the RO issued an SOC continuing severance and Appellant had an opportunity to appeal the severance issue, *see* R. at 921-47 (November 2018 SOC), but Appellant did not do so. Further, the RO also provided Appellant with notice of how the severance affected his increased rating claim and an opportunity to respond when it had issued an SSOC with respect to the increased rating claim. *See* R. at 1463-75 (March 2017 SSOC). And even after the issuance of the March 17, 2017, SSOC, Appellant still had until 60 days after the November 2018 SOC (until January 2019) to perfect his appeal of the severance matter before it became final. *See* R. at 921 (921-47). As such, Appellant was notified of the RO's severance decision and its effect on his increased rating decision, and he was provided an opportunity to respond. *See Thurber*, 5 Vet.App. at 126;

VA informed Appellant that a retroactive increase in benefits was precluded for his left knee disability once service connection for that disability was severed. Specifically, the March 21, 2017, SSOC that continued the 10% evaluation for Appellant's left knee disability between July 2009 and June 2017 informed him that 38 C.F.R. § 3.400(o) provided that a retroactive increase could not be awarded after the severance of service connection. See R. at 1472 (1463-75); *see also id*.

at 1466-71. He therefore had actual notice of the legal landscape surrounding the interplay between his request for an increased evaluation and severance matter.

Even if Appellant did not have actual notice of the interplay between his request for increase and the severance matter, which the Secretary does not concede, he was presumed to have knowledge of that interplay because he is presumed to have knowledge of VA regulations. It is well-settled that claimants are charged with knowledge of VA regulations. *See Morris v. Derwinski*, 1 Vet.App. 260, 265 (1991).

Nevertheless, even after being informed that a retroactive increase could not be granted if service connection was severed and that he must file a substantive appeal as to the severance matter in the November 2018 SOC, *see* R. at 921 (921-47), Appellant chose not to appeal the severance or submit any additional argument or evidence with respect to the increased rating claim. This is unfortunate for Appellant, but it is not unfair. Appellant had notice of VA's regulation and the opportunity to submit evidence and argument at every step of the administrative process.

4. Neither the RO Nor the Board Suggested Such an Increase Was Possible Even if the Severance Stayed Intact when It Addressed the Merits of His Request for a Higher Rating

The procedural history of this case shows that neither the RO nor the Board suggested a retroactive increase was possible *if the severance stayed intact* when they addressed the merits of Appellant's request for an higher initial evaluation. As far back as the December 2012 SOC, Appellant was informed that severance

of service connection could have an impact on the left knee rating. *See* R. at 2603 (2577-2606). The March 2017 SSOC informed him that a retroactive increase for the left knee was impossible because service connection had been severed. R. at 1471-72 (1463-75). The August 2017 Board hearing took place before the severance became final because Appellant had not yet filed his NOD and failed to file his substantive appeal. The transcript shows that the Board member asked about the severity of Appellant's left knee condition, and that Appellant's representative (and the Board member) limited the issue to the period prior to severance. *See* R. at 1111-22. But nothing in the transcript shows that the Board member, or Appellant (or his representative), expressed any affirmative opinion that a higher rating for the left knee would be possible if the severance decision remained intact. *See* R. at 1111-22.

Similarly, the subsequent December 2017 Board remand acknowledged that Appellant had filed an NOD relating to the severance matter and remanded the request for a retroactive increased evaluation because the matters were intertwined. R. at 1053 (1050-55). This statement was correct, and it did not affirmatively state that a higher rating may be possible if the severance decision remained intact.

In short, there was never any affirmative suggestion by the RO or the Board that Appellant may have been entitled to a retroactive increase in his left knee disability evaluation if the severance decision stayed intact. While the Board may have, at times, remained silent on the issue, this makes sense because at those

times the severance matter was not yet final, and its final disposition would have an impact on whether a higher evaluation was possible at the time the Board made its final decision.

5. Appellant Was Afforded Fair Process and the Appropriate Remedy Is Affirmance

Appellant was afforded fair process in this case and the appropriate remedy is to affirm the Board's decision to deny an initial evaluation in excess of 10% for his left knee disability from July 21, 2009, to June 1, 2017.

V. CONCLUSION

The Court should affirm the July 21, 2020, Board's decision to deny an initial evaluation in excess of 10% for Appellant's left knee disability from July 21, 2009, to June 1, 2017.

Respectfully submitted,

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