

DOUGLAS L. HAILEY,)
Appellant,)
))
v.) Vet. App. No. 22-3061
))
DENIS McDONOUGH,)
Secretary of Veterans Affairs,)
Respondent.)

Pursuant to U.S. Vet. App. Electronic Rule 7, the following is the pagination of this PDF file:

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appeal 4

APPELLANT'S SOLZE NOTICE

This Court has directed that, in all cases before it, the parties are under a duty to notify the Court of developments that could deprive it of jurisdiction or “otherwise affect its decision.” *Solze v. Shinseki*, 26 Vet. App. 299, 301 (2013). This broad duty is continuing and encompasses “any development which *may conceivably affect*” the Court’s decision in a case. *Id.* at 302 (emphasis in *Solze*). When any such development occurs, it is “irrelevant” whether a party believes it *would* affect the Court’s decision because “that [is] not a question within the parties’ power to decide.” *Id.* The Appellant, Douglas L. Hailey (“Mr. Hailey”), understands the duty to apply in connection with procedural and substantive matters alike.

Accordingly, Mr. Hailey notifies the Court as follows. On February 8, 2024, the Board of Veterans Appeals issued a decision without having advanced his appeal on its docket. Attached hereto as **Exhibit 1**. The Board’s resulted in an Order denying a rating increase for his a remand on his claim for a higher level of special monthly compensation because the record of proceedings before the Board confirmed that VA’s April 2020 rating decision which granted Mr. Hailey service connection for his bilateral knee disabilities and assigned a 30 percent rating for each knee did not consider whether Mr. Hailey was entitled to a higher level of special monthly compensation. The Board’s decision acknowledges that in Mr. Hailey’s VA Form 10182 he had argued that SMC should have been considered by VA in its April 2020 rating decision.

Given the issue presently before a panel of this Court, the Board February 8, 2024 decision could determine either the impact or the affect this Court's resolution of the Mr. Hailey's pending appeal. He is therefore respectfully submitting this Notice. In that regard, Mr. Hailey submits that the Board's decision does not moot his appeal and if the panel has concerns that it could, he respectfully requests the opportunity to show cause why his appeal has not been mooted by the attached decision of the Board.

Respectfully submitted,

/s/ Kenneth M. Carpenter, Esq.

Kenneth M. Carpenter

Counsel for Appellant,

Douglas L. Hailey

Electronically filed on February 12, 2024

EXHIBIT 1

DOUGLAS L. HAILEY
28622 TUPELO RD
Menifee, CA 92584-8515



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: February 8, 2024

DOUGLAS L. HAILEY
28622 TUPELO RD
Menifee, CA 92584-8515

Dear Appellant:

The Board of Veterans' Appeals made a decision on your appeal.

<i>If your decision contains a</i>	<i>What happens next</i>
Grant	The Department of Veterans Affairs (VA) will contact you regarding next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached for additional options.
Remand	Additional development is needed. VA will contact you regarding next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at <http://www.vets.gov>.

Sincerely yours,

Outbound Operations

Office of the Clerk of the Board
Board of Veterans' Appeals

Enclosures (1)

CC: Daniel J. Marusak, Attorney

Daniel J. Marusak, Attorney
Greene & Marusak, LLC
P.O. Box 910
East Greenwich, RI 02818



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

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Sincerely yours,

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Office of the Clerk of the Board
Board of Veterans' Appeals

Enclosures (1)

CC: Daniel J. Marusak, Attorney



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
DOUGLAS LEE HAILEY
Represented by
Daniel J. Marusak, Attorney


Docket No. 200617-95127

DATE: February 8, 2024

ORDER

A rating in excess of 30 percent for a right knee disability is denied.

A rating in excess of 30 percent for a left knee disability is denied.

REMANDED

The claim for entitlement to a higher level special monthly compensation is remanded.

FINDINGS OF FACT

1. Despite pain and weakness, the Veteran's right knee disability has not resulted in extension being functionally limited to 30 degrees or worse, neither instability, nor meniscus problems have been documented. Flexion of the right knee has not been shown to be functionally limited to 45 degrees or less.
2. Despite pain and weakness, the Veteran's left knee disability has not resulted in extension being functionally limited to 30 degrees or worse, neither instability, nor meniscus problems have been documented. Flexion of the left knee has not been shown to be functionally limited to 45 degrees or less.

CONCLUSIONS OF LAW

1. The criteria for a rating in excess of 30 percent for a right knee disability have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1, 4.2, 4.7, 4.40, 4.45, 4.59, 4.71a, Diagnostic Codes 5256-5263.
2. The criteria for a rating in excess of 30 percent for a left knee disability have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1, 4.2, 4.7, 4.40, 4.45, 4.59, 4.71a, Diagnostic Codes 5256-5263.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty with the United States Marine Corps from November 1986 to November 1990.

A Board decision in July 2018 remanded the issues of service connection for bilateral knee conditions for further development. An April 2020 rating decision granted service connection for bilateral knees and assigned a 30 percent rating for each knee based on limitation of extension, effective November 24, 2009 (the date the Veteran's claim for service connection was received).

The Veteran timely appealed to the Board by filing a VA Form 10182 in June 2020 and selecting the Evidence Docket, a process under the Veteran Appeals Improvement and Modernization Act (AMA) which allowed him to submit new evidence within 90 days of VA receiving his VA Form 10182. The Veteran did not submit additional evidence during the above permissible evidentiary window, but his representative submitted written arguments. There is no relevant evidence submitted after the permissible evidentiary window.

Increased Rating

The Veteran is currently rated at 30 percent for each knee based on limitation of extension. He is seeking higher ratings for his knees.

Diagnostic Code (DC) 5261 evaluates limitation of knee extension. A noncompensable rating is assigned for extension limited to 5 degrees. A 10 percent rating is assigned for extension limited to 10 degrees. A 20 percent rating is assigned for extension limited to 15 degrees. A 30 percent rating is assigned for extension limited to 20 degrees. A 40 percent rating is assigned for extension limited to 30 degrees. A 50 percent rating is assigned for extension limited to 45 degrees. DC 5261, 38 C.F.R. § 4.71a

DC5260 evaluates limitation of knee flexion. A noncompensable rating is assigned for flexion limited to 60 degrees. A 10 percent rating is assigned for flexion limited to 45 degrees. A 20 percent rating is assigned for flexion limited to 30 degrees. A 30 percent rating is assigned for extension limited to 15 degrees. DC 5260, 38 C.F.R. § 4.71a

Normal ranges of motion of the knee are to 0 degree in extension, and to 140 degrees in flexion. 38 C.F.R. § 4.71, Plate II.

The rating criteria for evaluating musculoskeletal disabilities under 38 C.F.R. § 4.71a were amended effective February 7, 2021. 85 *Fed. Reg.* 230 (Nov. 30, 2020). However, the rating criteria for Diagnostic Code 5260 and 5261 were not changed.

Separate ratings under DC 5260 (limitation of flexion) and DC 5261 (limitation of extension) may be assigned for disability of the same joint. *See* VA General Counsel precedent opinion VAOGCPREC 9-2004rees. DC 5360, 38 C.F.R. § 4.71a.

A VA examination in February 2010 diagnosed the Veteran with bilateral quadriceps tendon calcification. On examination, his knees demonstrated extension to zero degrees and flexion to 90 degrees bilaterally with pain starting at 45 degrees. He was able to perform repetitive motion without additional loss of range of motion (ROM). The examiner indicated that there was weakness and tenderness of both knees, but there was no sign of edema, instability, abnormal movement, effusion, subluxation, or ankylosis.

A VA examination in December 2013 diagnosed the Veteran with bilateral patellar tendinopathy. On examination, his knees demonstrated extension to zero degrees and flexion to 135 degrees bilaterally. He was able to perform repetitive motion three times without additional loss of range of motion (ROM). The examiner indicated that pain and weakness during flareups would not significantly limit the functional ability of the knees. Muscle strength was 5/5. Joint stability testing results were normal. There was no history of recurrent patellar subluxation or dislocation noted, or any meniscal condition.

A VA examination in September 2019 diagnosed the Veteran with bilateral patellofemoral pain syndrome. On examination, his knees demonstrated extension to 20 degrees and flexion to 80 degrees bilaterally. He was able to perform repetitive motion for three times without additional loss of ROM. The examiner indicated that pain and weakness during flareups and after repeated use over time further reduced the flexion to 75 degrees bilaterally without further loss of range of extension. Muscle strength was 4/5 to 5/5. Joint stability tests results were normal. There was no history of recurrent subluxation or lateral instability, and there was no meniscal condition or ankylosis.

VA treatment records do not show symptoms worse than those reflected by the VA examinations.

Limitation of extension

The evidence shows that despite pain and weakness, the Veteran's bilateral knee conditions have not resulted in extension being functionally limited to 30 degrees or worse. VA examinations in February 2010 and December 2013 both showed full range of extension. VA examination in September 2019 showed extension was limited to 20 degrees bilaterally, and the RO assigned the rating back to the date of claim, despite the fact that compensable limitation of extension was not shown until the 2019 examination, which did support the assignment of a 30 percent rating was granted based on limitation of extension. The Board will not disturb this favorable finding. Nevertheless, a higher rating is not warranted as it would require the extension to be functionally limited to 30 degrees or worse, which was not shown by the evidence.

In reaching this conclusion, the Board has considered the impact of functional loss due to pain or due to weakness, fatigability, incoordination, or pain on movement of a joint under 38 C.F.R. §§ 4.40 and 4.45. *See also DeLuca v. Brown*, 8 Vet. App. 202(1995). A minimum compensable evaluation for a joint disability is warranted for painful motion under 38 C.F.R. § 4.59. However, a rating in excess of the minimum compensable rating must be based on demonstrated functional loss. *Mitchell v. Shinseki*, 25 Vet. App. 32, 37 (2011).

Here, the Veteran has already received a 30 percent rating for each knee based on limitation of extension. VA examinations in February 2010 and December 2013 both showed full range of extension. VA examination in September 2019 showed the most restrictive range of extension being limited to 20 degrees bilaterally, but the Veteran was still able to perform repetitive use for three times without additional loss of ROM. The examiner considered the pain and weakness during flare-ups and after repetitive use over time, and estimated that there was no additional loss of extension even though the flexion was further limited by five degrees. Accordingly, a rating in excess of 30 percent for each knee based on limitation of extension is not warranted.

Other knee considerations

Here, the Veteran has consistently demonstrated flexion well in excess of even a noncompensable rating throughout the course of his appeal, during range of motion testing at at least three examinations. While that motion has been painful at times, it the Veteran's range of motion has not been shown to be functionally limited to 45 degrees of flexion or more. The Veteran has reported experiencing flare-ups of knee pain, but the examiner in 2019 estimated that during a flare-ups the flexion in the Veteran's knees would be reduced by pain to approximately 75 degrees. As such, even during flare-ups, it would not be shown that limitation of flexion would merit a separate rating.

The Board has also considered whether a separate rating may be assigned for instability, meniscal tear, ankylosis, impairment of the tibia and fibula or genu recurvatum (DCs 5257, 5256, 5258, 5259, 5262, and 5263). However, none of these issues has been shown, or alleged, to be present. As noted, stability testing

has been consistently normal on VA examinations. As such, these diagnostic codes are not applicable here and will not be discussed further.

The regulations for evaluating the knees were revised during the course of the appeal, but while 5257 changed significantly, the evidence has not suggested the presence of either instability or subluxation in either knee during the course of the appeal.

Accordingly, ratings in excess of 30 percent for either knee disability are denied.

REASONS FOR REMAND

A rating decision in February 2014 assigned a special monthly compensation (SMC) based on a single service connected disability ratable at 100 percent and additional service connected disabilities independently ratable at 60 percent. A rating decision in April 2014 assigned a SMC based on the Veteran's need for Aid and Attendance. A February 2015 rating decision assigned a higher level of SMC which has become final.

An April 2020 rating decision granted service connection for bilateral knee conditions and assigned a 30 percent rating to each knee. However, the rating decision did not consider whether higher level special monthly compensation was warranted. In his June 2020 substantive appeal (VA Form 10182), the Veteran argued that SMC should have been considered by the April 2020 rating decision.

Where entitlement to SMC is claimed by the Veteran or raised by the record in relation to the disabilities on appeal, entitlement to SMC must be addressed or an explanation for why the issue is not part and parcel of the increased rating claim must be provided. *See Akles v. Derwinski*, 1 Vet. App. 118 (1991).

Here, the failure to consider a higher level of SMC constitutes a pre-decisional duty to assist error. Accordingly, the issue is remanded.

The matters are REMANDED for the following action:

1. Adjudicate whether a higher level of special monthly compensation is warranted.



MATTHEW W. BLACKWELDER
Veterans Law Judge
Board of Veterans' Appeals



Attorney for the Board

Q. Wang, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

If you disagree with VA's decision

Choose one of the following review options to continue your case. If you aren't satisfied with that review, you can try another option. Submit your request before the indicated deadline in order to receive the maximum benefit if your case is granted.

Review option	Supplemental Claim Add new and relevant evidence	Higher-Level Review Not Available Ask for a new look from a senior reviewer	Board Appeal Not Available Appeal to a Veterans Law Judge	Court Appeal Appeal to Court of Appeals for Veterans Claims
Who and what	A reviewer will determine whether the new evidence changes the decision.	Because your appeal was decided by a Veterans Law Judge, you cannot request a Higher-Level Review.	You cannot request two Board Appeals in a row.	The U.S. Court of Appeals for Veterans Claims will review the Board's decision. You can hire an attorney to represent you, or you can represent yourself.
Estimated time for decision	 About 4-5 months	Please choose a different option for your next review.	Please choose a different option for your next review.	Find more information at the Court's website: uscourts.cavc.gov
Evidence	 You must submit evidence that VA didn't have before that supports your case.			
Discuss your case with VA				
Request this option	Submit VA Form 20-0995 Decision Review Request: Supplemental Claim VA.gov/decision-reviews			File a Notice of Appeal uscourts.cavc.gov Note: A Court Appeal must be filed with the Court, not with VA.
Deadline	You have 1 year from the date on your VA decision to submit VA Form 20-0995.			You have 120 days from date on your VA decision to file a Court Appeal.
How can I get help?	A Veterans Service Organization or VA-accredited attorney or agent can represent you or provide guidance. Contact your local VA office for assistance or visit VA.gov/decision-reviews/get-help . For more information, you can call the White House Hotline 1-855-948-2311 .			

What is new and relevant evidence?

In order to request a Supplemental Claim, you must add evidence that is both new and relevant. New evidence is information that VA did not have before the last decision. Relevant evidence is information that could prove or disprove something about your case.

VA cannot accept your Supplemental Claim without new and relevant evidence. In addition to submitting the evidence yourself, you can identify evidence, like medical records, that VA should obtain.

What is the Duty to Assist?

The Duty to Assist means VA must assist you in obtaining evidence, such as medical records, that is needed to support your case. VA's Duty to Assist applied during your initial claim, and it also applies if you request a Supplemental Claim.

If you request a Higher-Level Review or Board Appeal, the Duty to Assist does not apply. However, the reviewer or judge will look at whether VA met its Duty to Assist when it applied, and if not, have VA correct that error by obtaining records or scheduling a new exam. Your review may take longer if this is needed.

What if I want to file a Court Appeal, but I'm on active duty?

If you are unable to file a Notice of Appeal due to active military service, like a combat deployment, the Court of Appeals for Veterans Claims may grant additional time to file. The 120-day deadline would start or resume 90 days after you leave active duty. Please seek guidance from a qualified representative if this may apply to you.

What if I miss the deadline?

Submitting your request on time will ensure that you receive the maximum benefit if your case is granted. Please check the deadline for each review option and submit your request before that date.

If the deadline has passed, you can either:

- Add new and relevant evidence and request a Supplemental Claim. Because the deadline has passed, the effective date for benefits will generally be tied to the date VA receives the new request, not the date VA received your initial claim. Or,
 - File a motion to the Board of Veterans' Appeals.

What if I want to get a copy of the evidence used in making this decision?

Call 1-800-827-1000 or write a letter stating what you would like to obtain to the address listed on this page.

Motions to the Board

Please consider the review options available to you if you disagree with the decision. In addition to those options, there are three types of motions that you can file with the Board to address errors in the decision. Please seek guidance from a qualified representative to assist you in understanding these motions.

Motion to Vacate

You can file a motion asking the Board to vacate, or set aside, all or part of the decision because of a procedural error. Examples include if you requested a hearing but did not receive one or if your decision incorrectly identified your representative. You will need to write a letter stating how you were denied due process of law. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion to Reconsider

You can file a motion asking the Board to reconsider all or part of the decision because of an obvious error of effect or law. An example is if the Board failed to recognize a recently established presumptive condition. You will need to write a letter stating specific errors the Board made. If the decision contained more than one issue, please identify the issue or issues you want reconsidered. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion for Revision of Decision based on Clear and Unmistakable Error

Your decision becomes final after 120 days. Under certain limited conditions, VA can revise a decision that has become final. You will need to send a letter to VA requesting that they revise the decision based on a Clear and Unmistakable Error (CUE). CUE is a specific and rare kind of error. To prove CUE, you must show that facts, known at the time, were not before the judge or that the judge incorrectly applied the law as it existed at the time. It must be undebatable that an error occurred and that this error changed the outcome of your case. Misinterpretation of the facts or a failure by VA to meet its Duty to Assist are not sufficient reasons to revise a decision. Please seek guidance from a qualified representative, as you can only request CUE once per decision.

Mail to:

Board of Veterans' Appeals
PO Box 27063
Washington, DC 20038

Or, fax:

1-844-678-8979