

Vet. App. No. 19-4123

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IN THE UNITED STATES COURT OF APPEALS  
FOR VETERANS CLAIMS

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STACEY D. DUFFEY  
Pro-se Appellant

v.

ROBERT L. WILKIE  
Secretary, of Veterans Affairs  
Appellee

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APPELLANT INFORMAL BRIEF IN SUPPORT OF APPEAL

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STACEY D. DUFFY  
1549 SADDLE TREE ROAD  
FRISCO, TEXAS 75036

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## CITATIONS TO RECORD BEFORE THE AGENCY

Paper copy of Records were officially requested & provided; pages are cited in Informal Brief in Support of Appeal.

### Pertinent Legal Criteria

The Court has jurisdiction to review whether the Board erred in failing to consider all theories of entitlement to VA benefits that are either raised by the claimant or reasonably raised by the record. See, ***Barringer v. Peake***, 22 Vet. App. 242, 244 (2008). More specifically, “the Board is required to adjudicate all issues reasonably raised by a liberal reading of the appellant’s [S]ubstantive [A]ppeal, including all documents and oral testimony in the record prior to the Board’s decision. See, ***Brannon v. West***, 12 Vet. App. 32, 34 (1998).

Secretary duty to assist a claimant includes, among other things, “providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.” 38 USC section 5103A (d)(1); see 38 CFR section 3.159(c) (2005). Additionally, 38 CFR section 4.1 (2005) requires that when applying the rating schedule:

“accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition.”

Further, 38 CFR section 4.2 (2005) requires that if an examination report used for rating a service-connected disability does not contain sufficient detail:

“it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.” Where the record does not adequately reveal the current state of the claimant’s disability,



VA must assist by providing the claimant a thorough and contemporaneous medical examination that considers the claimant's prior medical examinations and treatment. See, *Suttman*, 5 Vet. App. at 138; *Proscelle v. Derwinski*, 2 Vet. App. 629, 632 (1992); *Green v. Derwinski*, 1 Vet. App. 121, 124 (1991); 38 CFR section 4.1.

The Secretary is cognizant of the duty to give a liberal and sympathetic reading to the informal briefs of pro se Appellants. See, ***Szemraj v. Principi***, 357 F.3d 1370, 1373 (Fed. Cir. 2004) (stating that with respect to all pro se pleadings, VA must give a sympathetic reading by "determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations" (quoting *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001))); *Calma v. Brown*, 9 Vet. App. 11, 15 (1996); *De Perez v. Derwinski*, 2 Vet. App. 85, 86 (1992).

Disability evaluations are determined by applying the criteria as set forth in the VA Schedule for Rating Disabilities found in 38 CFR Part 4 and relevant diagnostic code(s). Disability ratings are intended to compensate impairment in earning capacity due to service connected disorder. 38 U.S.C.A. section 1155; Evaluation of a service-connected disorder requires a review of the veteran's entire medical history regarding that disorder. 38 CFR section 4.1 & 4.2; ***Schafraht v. Derwinski***, 1 Vet.App. 589 (1991). When a reasonable doubt arises regarding the degree of disability, such doubt will be resolved in favor of the veteran. 38 CFR section 4.3 If there is a question as to which evaluation to apply to veteran's disability, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating.

Where entitlement to compensation has already been established

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and an increase in the disability rating is at issue, the present level of disability is of primary concern. Although a rating specialist is directed to review the recorded history of a disability in order to make a more accurate evaluation, 38 CFR section 4.2, the regulation do not give past medical reports precedence over current findings. See, **Franciso v Brown**, 7 Vet. App. 55 (1994)

U.S. Court of Appeals for Veterans Claims (the Court) issued the decision in **Correia v. McDonald**, 28 Vet. App. 158, 166 (2016) concerning the adequacy of VA {spine, hips, knees, lower extremities-radiculopathy} orthopedic examinations. The Court in **Correia** held that the final sentence of 38 CFR section 4.59 requires that VA examinations include joint testing for pain on both active and passive motion, in weight-bearing and non-weight bearing, and, if possible, with range of motion measurements of the opposite undamaged joint.”

“[A] Board or Court reviewing an agency decision generally may not sustain the agency’s ruling on a ground different from that invoked by the agency. See, **Mayfield v. Nicholson**, 444 F.3d 1328, 1334 (Fed. Cir. 2006) (citing *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 87, (1943); *Sec. & Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

UNITED STATES COURT OF APPEALS  
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STACEY D. DUFFEY,  
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Vet. App. #19-4123

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**APPELLANT IN-FORMAL BRIEF IN SUPPORT OF APPEAL**

**ISSUES PRESENTED**

Did the Board of Veterans Appeals April 10, 2019 decision error in: **(1) deny Veteran increased rating** for: “right ankle strain, with degenerative arthritis & callosities, initially rated 10% percent disabling; WHERE issue remand to RO was (2) denied there was no [CUE] in its February 1995 rating decision that assigned 10% percent evaluation for a “Right ankle, strain, with degenerative arthritis and callosities, denied again on April 22, 2019 [SSOC].

**STATEMENT OF THE CASE**

**A. Jurisdictional Statement**

Appellate jurisdiction is predicated on 38 USC section 7252.



## B. Nature of the Case

Did the Board of Veterans Appeals April 10, 2019 decision error in:

(1) deny Veteran increased rating for: "right ankle strain, with degenerative arthritis & callosities, initially rated 10% percent disabling; WHERE issue remand to RO was (2) denied there was no [CUE] in its February 1995 rating decision that assigned 10% percent evaluation for a "Right ankle, strain, with degenerative arthritis and callosities, denied again on April 22, 2019 [SSOC].

## C. Statement of the Facts

1. Veteran had active duty service in the U.S. Navy from February 18, 1993 through October 28, 1994 when he was discharged from service due to a disability incurred in service {severe right ankle sprain} on October 13, 1993. Refer to U.S. Navy July 25, 1994 evaluation board findings: {**R.at pg.77-84**}

Complete rupture of the lateral ligaments; x-ray of the right ankle compared to the left showed widening of the syndesmosis between the distal fibula and the tibia. Underwent closed reduction of the distal tibiofibular syndesmosis holding it with a cortical screw, and splint; with screw removed on April 11, 1994. Bone scan showed



increased uptake of the right ankle, consistent with degenerative changes. Another MB on July 25, 1994 showed soft tissue swelling around the joint. X-rays obtained diagnosed early degenerative joint disease, status post (s/p) fracture of the right ankle that did not exist prior to enlistment.

2. On September 22, 1994 V.R. & C Division San Diego, CA. [**R.at pg.105**] received Veterans Application for Vocational Rehabilitation for Rt ankle S/P fracture; Bilateral Knee pain/swelling.
3. On October 27, 1994 Veteran [**R.at pg.105**] was sent notification letter denying claim for vocational rehabilitation benefits because Veteran did not meet the basic eligibility requirements of 20% percent rating or greater, and Veteran degree of service-connected disability to be no greater than 10% percent disabling.
4. On December 19, 1994 RO San Diego CA. [**R.at pg.106**] informed Veteran by letter on receipt of his application for compensation benefits.
5. On February 14, 1995 rating decision [**R.at pg.107-111**] on entitlement to service connection for: (1) Bilateral knee pain; arthralgia both knees denied as not established; (2) Degenerative joint disease of the right ankle was granted 10% percent rating. **Contrary** to rating examiner note it reviewed the following records in reaching its decision: \*Veteran Service medical treatment records from February 1993 through October 1994; and \* Veterans Affairs Medical treatment records October 1994 through February, 1995.
6. On February 23, 1995 RO San Diego CA. informed Veteran by

3.

letter on award of combined disability evaluation of 10 percent; AND **incorrectly applied** recoupment of compensation benefits in the amount of \$3,879.60 based on veteran receipt of disability severance; in contradiction with provision found at: 10 USC Section 1174(h)(2) {no deduction may be made from disability compensation for the amount of any separation pay, severance pay, or readjustment pay received because of an earlier discharge or release from a period of active duty if the disability which is the basis for that disability compensation was incurred or aggravated during a later period of active duty;} as required to immediately reimburse Veteran unlawfully withheld compensation benefits, and entitled amount of \$3,879.60 denied during period of recovery.

7. On December 7, 2000 Veteran filed letter with Department of Veterans Affairs for increase benefits. [R.at pg.110]

8. On July 24, 2001 VA Waco RO made a decision on Veteran claim for benefits received January 22, 2001; AND \*denied Bilateral knee service connection allegedly because: [R.at pg. 111]

“Treatment records received do not show the established diagnosis of a knee disability during military service or within one year of discharge, therefore, the claim has not been successfully reopened;”

\*denied increase DJD, right ankle because the evidence reviewed does not demonstrate marked limitation of motion of the right ankle joint to warrant the next higher evaluation; or entitlement to extraschedular rating; current 10% percent disabling is continued.

4.



9. On March 30, 2001 VA Waco RO notified Veteran on its responsibilities under the Veterans Claims Assistance Act of 2000.
10. On August 20, 2001 VA Waco RO provided Veteran information requested under Privacy Act & FOIA.
11. On June 9, 2011 VA Waco RO advise Veteran by letter working on your claim for: Degenerative joint disease, right ankle.
12. On August 26, 2011 VA Houston RO made decision on Veteran claim for increased evaluation received February 5, 2011: [**R.at pg.112**]

Assigned Zero (0)% evaluation for Scar, right ankle effective February 5, 2011; AND continued denial of increase rating in excess of 10% percent for; Right ankle strain with Degenerative Arthritis & Callosities concluding “review of the VA medical records databank revealed no recent treatment records for consideration; yet in contradiction state:

“VA examination conducted June 21, 2011 provided most recent comprehensive assessment of this disability and list your diagnosis as:

Right Ankle Strain w/ Degenerative Arthritis & Callosities

the formal diagnosis is changed to more accurately reflect your exact disability. Examination notes complaints of worsening right ankle pain with symptoms of weakness, stiffness, swelling, giving way, & fatigability. Currently taking Tylenol medication.

Exam of your **right foot** reveals signs of unusual shoe wear pattern and callosities (thickened skin);



Exam. Of your right ankle reveals painful motion, tenderness, and edema.

Review of the evidence does not show that you meet the requirements for the next higher evaluation.

Service connection for Scar, right ankle has been established as related to service-connected Right ankle strain w/DJD arthritis & callosities; a noncompensable evaluation is assigned for scars which are not considered disabling because of limitation of function of the affected part.

13. RO Janesville WI., March 25, 2016 rating decision erred in concluding NO REVISION warranted in earlier VA Form 21-6796 rating decision narrative on issue and decision dated February 14, 1995 where rating specialist conceded:

Effective November 1, 1994 Veteran was assigned 10% percent evaluation rating for:

“Degenerative joint disease of the right ankle” warranted due to “slight limitation of motion of dorsiflexion.”

RO February 14, 1995 decision rating specialist conceded VAE Noted: {range of motion 10 degrees dorsiflexion, and 45 degrees plantar flexion; eversion or external rotation, 0 degrees on the right, and inversion or internal rotation was approximately 25 degrees}; 38 CFR Part 4 section 4.59 Painful motion; incorrectly applied provisions found

at 38 CFR Part 4 section 4.71a diagnostic code **5270** [Ankle, ankyloses, of] which note warranted 40% percent evaluation rating where VAE range of motion diagnosis above meets definition of Ankle, ankyloses where regulation state:

{In plantar flexion at more than 40 degrees, or in dorsiflexion at more than 10 degrees, or with abduction, adduction, inversion or eversion deformity}, warrant 40% rating.

RO February 14, 1995 decision rating specialist further conceded that VAE stated: “there was no particular tenderness at the anterior talofibular ligament,” yet, rating specialist {failed to explain what was meant by no particular tenderness}. VAE noted scar over the lateral fibula, yet, (failed to rate painful scar}; where examiner noted the following other **musculoskeletal system aggravations** under reasons and bases:

Examination of the bilateral knee’s noted: “There was some tenderness of the right tibial tubercle; veteran was unable to squat fully; there appeared to be a prominent tibial tubercle bilaterally, but only the right was particularly tender. The left knee appeared to be chronically edematous.

***Diagnosis*** was: “Arthralgia of both knee’s;”  
defined as pain in joint or joints.

14. RO Janesville WI., March 25, 2016 rating decision erred in failing to provide credible rationale for assignment of a lesser evaluation rating, and continued denial of higher evaluation rating where RO reasons for decision failed to completely weigh Veteran condition {joint, cartilage,

& ligament, damage} noted in Military Service October 13, 1993  
examiner diagnosed condition as follow:

Complete rupture of the lateral ligaments; x-ray of the right ankle compared to the left showed widening of the syndesmosis between the distal fibula and the tibia. Underwent closed reduction of the distal tibiofibular syndesmosis holding it with a cortical screw, and splint; with screw removed on April 11, 1994. Bone scan showed increased uptake of the right ankle, consistent with degenerative changes. Another MB on July 25, 1994 showed soft tissue swelling around the joint. X-rays obtained diagnosed early degenerative joint disease, status post (s/p) fracture of the right ankle that did not exist prior to enlistment.

RO November 1, 1994 rating decision erred in denying secondary service connection and erred in assignment of an initial 10% percent evaluation rating for Veteran {less than fully accurate} diagnosed service connected condition:

“Degenerative joint disease of the right ankle” warranted due to “slight limitation of motion of dorsiflexion;” with range of motion was 10 degrees dorsiflexion, and 45 degrees plantar flexion; eversion or external rotation, was 0 degrees on the right, and



inversion or internal rotation was approximately 25 degrees;

where rating specialist failed to rate {joint, cartilage, & ligament} “aggravation” where in-service diagnosis noted injury involve the “complete rupture of the lateral ligaments; x-ray of the right ankle compared to the left showed widening of the syndesmosis between the distal fibula and the tibia. Underwent closed reduction of the distal tibiofibular syndesmosis holding it with a cortical screw; failed to reference any recent Bone scan; where previous Bone scan showed increased uptake of the right ankle, consistent with degenerative changes. Another MB on July 25, 1994 showed soft tissue swelling around the joint. X-rays obtained diagnosed early degenerative joint disease, status post (s/p) fracture of the right ankle.

RO February 14, 1995 decision rating specialist further conceded that VAE examiner noted the following other presumptive 38 CFR section 3.307(b) “aggravated” secondary musculoskeletal system condition under reasons and bases:

Examination of the bilateral knee’s noted: “There was some tenderness of the right tibial tubercle; veteran was unable to squat fully; there appeared to be a prominent tibial tubercle bilaterally, but only the right was particularly tender. The left knee appeared to be chronically edematous.

**Diagnosis** was: “Arthralgia of both knee’s;”  
defined as pain in joint or joints.

15. RO March 25, 2016 decision, and prior rating decision(s) **failed to provide** complete evaluation rating in compliance with {section 4.40}

“Functional Loss” due to deformity, adhesions, defective innervation, or other pathology, or it may be due to pain, supported by adequate pathology and evidence by the visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part of which becomes painful on use must be regarded as seriously disabled. It is essential that the examination on which rating is based adequately portray the anatomical damage, and the functional loss, with respect to all these elements; and RO March 25, 2016 rating decision, and prior rating decision(s) - did not.

16. RO March 25, 2016 decision, and prior rating decision(s) **failed to comply** with regulatory provision found at 38 CFR section 3.309(a) which state: “the following diseases shall be granted service connection although not otherwise established as incurred in service if manifested to a compensable degree within the applicable time limits under section 3.307 following service in a period of war or following peacetime service;” WHERE RO February 14, 1995 decision rating specialist further conceded presumptive ***Diagnosis*** included: “Arthralgia of both knee’s;” defined as pain in joint or joints. 38 CFR Part 4 Section 4.45 {Joints} involved, weakened movement, excess fatigability, incoordination, impaired skill movement, painful movement, swelling, deformity, etc.

### SUMMARY OF THE ARGUMENTS

Board April 10. 2019 decision concede on [R.at pg.4] that matters comes before the Board of Veterans Appeals (Board) from a March 2016 rating decision of the Department of Veterans Affairs (VA)



Regional Office (RO) which continued a 10% percent rating for the Veteran's service-connected "Right Ankle" strain with degenerative arthritis and callosities.

Board decision {**R. at pg.5-6**} referred to the following VA ankle examination of March 2016, noted that Veteran reported current symptoms of chronic, daily pain with "giving way" and treatment with prescribed and over-the-counter pain medication; describes functional loss as not being able to walk or stand for extended periods. Range of motion testing revealed painful dorsiflexion to 15 degrees and plantar flexion to 30 degrees, which contributed to functional loss by limiting standing; Objective evidence of moderate pain on palpation of the lateral, medial and posterior ankle, causing the claimant to adjust, and evidence of pain on weight bearing. Additional factors contributing to disability; less movement than normal; disturbance in locomotion;



interference in standing; Muscle strength 4/5 for both plantar flexion & dorsiflexion; Right ankle joint instability revealed on anterior drawer testing; Examiner described the functional impact of the right ankle disability on Veteran's ability to perform occupational tasks as limiting extended walking or standing." Board [R. at pg. 7] failed to provide required diagnostic code comparative arguments as to why Veteran March, 2016 diagnosed dorsiflexion to 15 degrees and plantar flexion to 30 degrees, did not warrant higher 30% to 40% percent rating where diagnosis met section 4.71a [DC-5270] definition for rating musculoskeletal system Ankle, ankyloses of: "plantar flexion at more than 40 degrees, or in dorsiflexion at more than 10 degrees or which abduction, adduction, inversion or eversion deformity; OR plantar flexion, between 30 degrees and 40 degrees, or in dorsiflexion, between 0 degrees and 10 degrees.

## ARGUMENT

Appellant is in disagreement with Board decision {**R. at pg.7**} that noted the Board considered the **De Luca** factors of pain, weakness, incoordination, or instability, but did not find that these support a different conclusion in this case, particularly since painful motion of the ankle is substantially the basis for the finding of moderate disability; **incorrectly applied** Evaluation of a service-connected disorder requires a review of the veteran's entire medical history regarding that disorder. 38 CFR section 4.1 & 4.2; **Schafrath v. Derwinski**, 1 Vet. App. 589 (1991). When a reasonable doubt arises regarding the degree of disability, such doubt will be resolved in favor of the veteran. 38 CFR section 4.3 If there is a question as to which evaluation to apply to veteran's disability, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating.

Board decision failed to weigh [**DC-5262**] impairment of the Tibia and fibula noted in U.S. Navy September 12, 1994 evaluation board

against the presence of a current disability, is a finding of fact that the Court reviews under the “clearly erroneous” standard. *D’Aries v. Peake*, 22 Vet. App. 97, 103 (2008) & *McLendon v. Nicholson*, 20 Vet. App. 79, 82 (2006).

In addition, “An adequate examination” is based upon consideration of the veteran’s prior medical history and examinations and also describes the disability in sufficient detail so that the Board’s evaluation of the claimed disability will be a fully informed one.” *Id. at 310-11* quoting (*Ardison v. Brown*, 6 Vet. App. 405, 407 (1994)) (internal quotation marks omitted).

In addition, Board decision failed to consider that the regulation explains that a claimant may establish entitlement to benefits on a secondary basis by demonstrating that the disability is either (1) “proximately due to or the result of [an already] service-connected disease or injury,” 38 CFR section 3.310 (2014) (emphasis added), or (2)

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aggravated by an already service-connected disease or injury,” whether or not the additional impairment is itself a separate disease or injury caused by the service-connected condition. *Allen v. Brown*, 7 Vet. App. 439, 448 (1995) (en banc).

### **ARGUMENT**

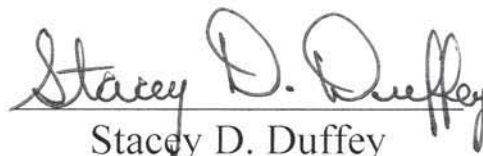
Board decision failed to consider veteran extraschedular arguments in support of his claim, including the report of chronic, daily pain, and his ankle “giving way” which limit his ability to stand or walk for extended periods as to the Veteran’s current level of disability; failed to weigh {**R.at pg.255**} “aggravation” secondary 02/14/1995 Bilateral knees AND, 08/15/2013 Lft Knee, chondromalacia Patella, status post arthroscopic debridement; 08/15/2013 Chronic lumbar DJD; & entitlement of TDIU “total disability.”

### **CONCLUSION**

WHEREFORE based on the evidence and arguments presented

above by the Veteran, demonstrate that the Court is left with one conclusion; Vacate and remand Board April 10, 2019 decision for proper readjudication.

Respectfully Submitted

A handwritten signature in cursive script that reads "Stacey D. Duffey". The signature is written in dark ink and is positioned above the printed name.

Stacey D. Duffey  
1549 Saddle Tree Road  
Frisco, Texas 75034

## CERTIFICATE OF SERVICE

I certify that on this 27<sup>th</sup> day of September 2019 Veteran filed the following Informal Brief in Support of Appeal with the U.S. Court of Appeals for Veterans Claims, 625 Indiana Avenue, N.W., Suite 900, Washington, D.C. 20004 with copy to the Office of the General Counsel 810 Vermont Avenue, N.W., Washington, D.C. 20420, sent by certified mail.

Respectfully Submitted

A handwritten signature in cursive script, reading "Stacey Duffey", is written over a horizontal line.

Stacey Duffey  
1549 Saddle Tree Road  
Frisco, Texas 75034