BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

19-1581

LUIS G. DE PAZ,

Appellant

v.

ROBERT L. WILKIE,
ACTING SECRETARY OF VETERANS AFFAIRS,

Appellee.

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STATEMENT OF THE ISSUES

I. The Board relied on the December 2017, April 2014, and September 2012 examinations to deny a rating in excess of 10 percent for the Veteran's right knee disability. Despite conceding that pain caused functional loss, the December 2017 examiner failed to specify where on range of motion (ROM) the Veteran's pain began. Further, the examiner failed to provide an opinion on the impact of repeated use over time on the Veteran's functional loss. Additionally, in a prior decision, the Board found both the September 2012 and April 2014 examinations inadequate because the 2012 examination was too remote and the 2014 examination merely used the results from the 2012 examination. Did the Board thereby fail to ensure compliance with the duty to assist in relying on examinations that lacked necessary information for the Board to adjudicate the Veteran's right knee claim?

II. The Board found the Veteran was not entitled to a rating in excess of 10 percent for his right knee disability. However, it failed to discuss all favorable and material evidence illustrating the extent of the Veteran's right knee condition such as impediments with balancing, pushing, crouching, and crawling and pain that caused fatigability and a lack of endurance. Additionally, it relied solely on ROM measurements and did not adequately address the Veteran's functional impairment. Did the Board err in failing to

account for all favorable and material evidence and improperly applying the law?

III. The Board found that the Veteran was adequately compensated for his right knee injury under diagnostic code 5261. However, the Veteran suffered from instability issues that the Board failed to address, and diagnostic code 5261 does not contemplate these symptoms of instability. Did the Board therefore fail to uphold its duty to maximize the Veteran's benefits in failing to consider and apply other diagnostic codes, including diagnostic code 5257, and conduct a separate rating analysis?

STATEMENT OF THE CASE

Luis De Paz served honorably in the United Stated Marine Corps from September 2000 to May 2004, earning the Good Conduct Medal, National Defense Service Medal, and Rifle Marksmanship Badge. R-5958 (R-5958-65) (Aug. 2012 Counseling Record); R-7246 (May 2004 DD-214).

During his first year in the Marine Corps, he injured his right knee while "squatting [and] running on wet cement." R-9665 (Sep. 2000 VA Treatment Note). Thereafter, "his knee hurt every time he flexed it." R-9663. His knee pain continued to get "worse over time." R-9655. And in 2001 he complained of his knee "giving out." R-9645 (Sep. 2001 VA Treatment Note). By 2002, a medical officer deemed the Veteran's knee condition "beyond the individual's control." R-9615. The

following year, a medical review board found that he could not "stand for more than 15 minutes and he [could not] run." R-9685 (R-9684-86). During his last year of service, his knee condition "only got worse" and he was "in more pain . . . than ever." R-9560 (R-9560-61). In February 2004, he filed a claim for compensation for his right knee pain. R-9836 (R-9830-45). By April, he was deemed ineligible "for reenlistment because [of his] physical disability." R-8117.

Two months after separation, the Regional Office granted service connection for Mr. De Paz's knee pain with an evaluation of 10 percent, effective May 16, 2004. R-9795 (R-9795-801). Mr. De Paz's knee pain continued to worsen, so he filed an increased rating claim for his knee in July 2006. R-9527.

In December 2006, Mr. De Paz reported that his "pain usually ke[pt] [him] from the most common of things, [like] family events, entertainment, recreation, and physical fitness." R-7099 (R-7099-101). The following year, VA continued the 10 percent rating for his right knee disability. R-9468 (R-9467-73). The Veteran failed to perfect his appeal and that decision became final. R-9351 (Jan. 2007 Notice of Disagreement); R-9251-52 (R-9238-54) (Oct. 2007 Statement of the Case).

In June 2008, he had "biomechanical imbalance issues." R-9131 (R-9129-31) (June 2008 VA Treatment Note). That October, he submitted an increased rating claim because his right knee "h[ad] gotten worse." R-9212. The following March his symptoms caused "burning, aching, and sharp" pain and caused a "lack of endurance and fatigability." R-9039 (9039-43) (Mar. 2009 Private Treatment Note). In May, the

Regional Office continued his 10 percent rating and this decision became final. R-9023 (R-9018-28) (May 2009 Rating Decision). The Veteran again submitted a claim for increased rating for his right knee in August 2012. R-8980 (R-8980-84).

During a September 2012 VA examination, he stated that his knee had "gotten worse every year" and he "gets pops and clicking that he has to walk off" and that his "knees swell almost nightly." R-1558 (R-1557-67). Additionally, the examiner found that objective evidence of painful motion for the Veteran's knee began at 125 degrees. R-1559. Further, the examiner noted pain on movement and swelling of both his knees. R-1562.

The RO continued his 10 percent rating, and the Veteran timely disagreed. R-8682 (R-8679-84) (Nov. 2012 Rating Decision); R-8667 (Dec. 2012 Notice of Disagreement). The following year, the Veteran began using a knee brace for his right knee to prevent it from buckling. R-7494 (R-7493-96) (July 2013 VA Treatment Note).

Mr. De Paz attended another VA examination in April 2014, during which the examiner noted that the "range of motion data [he used] was extracted from [a] 2012 PVAMC orthopedics visit." R-1290-91 (R-1287-301). The examiner wrote that the contemporaneous "exam was not helpful for range of motion assessment due to veteran's active resist[a]nce to flexion exam due to either anxiety or pain." *Id.* Further, the examiner noted that the Veteran "actively resisted at 105 degrees of flexion for both knees (a range of motion which would be highly unusual for

patellofemoral syndrome)." R-1291. The examiner was "unable to comment on repetitive usage at this time." *Id.*

A year later, the Veteran noted "[c]hronic pain" in his knee with associated symptoms to include "stiffness, giveway, [and] freq[uent] popping." R-6925 (R-6924-27). In February 2016, the VA issued a statement of the case, continuing the 10 percent rating. R-7067 (R-7035-71). The following month, the Veteran perfected his appeal, stating that that his "right knee symptoms have greatly increased" and he experienced "increased stiffness, less flexion, the knee g[a]ve out, there [was] more pain, throbbing, and popping, and the knee lock[ed] in extension." R-6335.

During a May 2016 Board hearing, the Veteran testified that he experienced "[a] lot of weakness" in his knee joint that "doesn't let [him] stand for a very long time." R-5763 (R-5759-85). If he dropped a pen he had to "kick it closer to the wall so [he] [could] get down, [and] use the wall to brace [himself]." R-5764-65. He described "constant chronic pain" rated at an "8, in [the] 1 to 10" scale. R-5762. His knee would "become[ ] inflamed" and he stated that "sometimes [he would] need to ice it down to bring the inflammation down." *Id.* His symptoms prevented him from "even pick[ing] . . . up [his two-year-old son] anymore because he was too heavy for him because it would just hurt." R-5775. In November 2017, the Board remanded the claim for a new examination to assess the current severity of the Veteran's right knee. R-3546-48 (R-3535-51). At that time, the Board indicated that the April 2014 examiner's "use of the prior range of motion [was] inadequate in determining the

current severity of Veteran's right knee disability," and it found the September 2012 examination "unduly remote." R-3545.

During the new examination the next month, the Veteran reported the "sensation of clicks[,] pops[,] and nails or needles insides of [his] knees with walking[,] stairs and squatting [and] lifting." R-794 (R-793-803). The examiner noted that the Veteran experienced flare-ups with "limited motion du[]e to pain[,]" and functional loss which "[l]imited standing[,] walking[,] and stairs." *Id.* However, the examiner was "[u]nable to say [without] mere speculation" whether pain, weakness, fatigability or incoordination significantly limited the Veteran's functional ability because he was "[n]ot examined after rep[ititions] over time." R-796. Additionally, the 2017 VA examiner noted that the right knee had abnormal ROM and stated that there was "[l]imited motion by pain" and that the "[p]ain noted on exam . . . causes functional loss." R-794-95. But he did not state where the pain began. R-794-95.

Around this time, the Veteran's knee pain was "so painful and constant, [that] it prevent[ed] him from helping with simple household chores and starting or completing any maintenance work on [their] home." R-2930 (R-2930-31) (December 2017 Girlfriend's Statement). A September 2018 examiner found that the Veteran's "[r]ight knee weakness [wa]s due to [his] right knee condition." R-206 (R-200-07).

In December 2018, the Board denied him entitlement to a rating in excess of 10 percent for a right knee disability. R-4 (R-3-19). It found that the "specific examination findings of trained health professionals and documented medical

treatment records [were] of greater probative weight than the more general lay assertions that a higher rating is warranted." R-16. Further, it found that the Veteran was both competent and credible to report his symptoms. *Id.* In addition, it found that "the evidence indicates that the Veteran's right knee disability has caused interference with standing or sitting, and pain contributing to additional functional loss or contributing to his disability," more closely approximating a 10 percent rating. R-15-16. At the same time, it remanded the issue of entitlement to TDIU. R-13. This appeal followed.

SUMMARY OF THE ARGUMENT

After honorably serving in the United States Marine Corps, Mr. De Paz returned home with a severe knee disability. Thereafter, his knee worsened, and he could no longer participate in activities that he previously enjoyed. Yet the Board denied a rating in excess of 10 percent for Mr. De Paz's right knee disability. The December 2017 VA examination, upon which the Board relied, failed to specify where on ROM his pain began and failed to include an opinion as to the impact of repeated use over time on his functional loss. The examination, therefore, lacked necessary information for the Board to adjudicate the Veteran's right knee claim.

In addition, the Board acknowledged that the April 2014 and September 2012 VA examinations were inadequate in its 2017 decision, yet in the current decision, it relied on these examinations. Specifically, the Board previously determined both that

the April 2014 examiner's ROM testing was not helpful in deciding Mr. De Paz's claim and that the September 2012 examination was too remote. Despite these inadequacies, the Board still relied on both examinations in its decision. If the Board had instead relied on adequate examinations, it might have determined that Mr. De Paz was entitled to an increased rating for his right knee disability.

Further, the Board failed to discuss favorable and material evidence illustrating the extent and severity of Mr. De Paz's right knee condition, such as impairments with balance and lack of endurance and fatigability. Yet, all this evidence is relevant, and the type that VA's regulations deem critical to understanding musculoskeletal conditions. Moreover, the Board provided inadequate reasons and bases as to why a higher rating was not warranted for Mr. De Paz's right knee disability, given his functional impairment.

Finally, the Board failed to account for the Veteran's symptom of instability, which is not contemplated in his rating or assigned diagnostic code, and further failed to conduct a separate rating analysis despite this unique symptom. However, diagnostic code 5257 specifically contemplates knee impairment with instability up to 30 percent. The Board, therefore, should have considered the applicability of this diagnostic code to maximize the Veteran's benefits.

Remand is, therefore, required for the VA to obtain new examinations and for the Board to provide adequate reasons or bases for its decision.

STANDARD OF REVIEW

The Board's determination regarding the level of a veteran's impairment under the applicable rating criteria is a finding of fact subject to the "clearly erroneous" standard of review. 38 U.S.C. § 7261(a)(4); *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). "'A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (quoting *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948)). This Court may hold a clearly erroneous finding unlawful and set it aside or reverse it. *See* 38 U.S.C. § 7261(a)(4).

The Court reviews claims of legal error by the Board under the *de novo* standard of review. *See Butts v. Brown*, 5 Vet.App. 532, 539 (1993) (en banc). The Board's interpretation of statutes and regulations is a legal ruling to be reviewed without deference by the Court. *See Lennox v. Principi*, 353 F.3d 941, 945 (Fed. Cir. 2003). A conclusion of law shall be set aside when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or unsupported by adequate reasons or bases." *King v. Shinseki*, 26 Vet.App. 433, 437 (2014); *see also* 38 U.S.C. § 7261(a)(3).

ARGUMENT

I. The Board failed to ensure compliance with VA's duty to assist when it relied on inadequate VA examinations to deny the Veteran's claim for an increased rating for his right knee disability.

The Board cited a lack of evidence demonstrating that the Veteran's ROM fell within the higher rating criteria as a basis for denying the Veteran a rating in excess of 10 percent. R-15-16. It relied on measurements from the September 2012, April 2014, and December 2017 VA examinations to support its opinion. R-13-16. However, these examinations were inadequate because they lacked necessary information for the Board to adjudicate the Veteran's claim. *See* R-1557-67; R-1287-301; R-793-803; *see Mitchell v. Shinseki*, 25 Vet.App. 32, 44 (2011).

a. The December 2017 VA examination was inadequate because the examiner failed to specify where on ROM Mr. De Paz's pain began and failed to include an opinion as to the impact that repeated use over time had on his functional loss.

The Board relied heavily on the ROM measurements provided by the December 2017 examiner to deny a higher rating for Mr. De Paz's right knee condition. R-14 (citing the December 2017 ROM data); *see* R-14-16; R-795. It found that a rating of "20 percent for a right knee disability [was] not warranted," based on the 2017 ROM measurements and the absence of "ankylosis of the knee, recurrent subluxation or lateral instability, or cartilage dislocation or removal." R-15-16. However, the 2017 examination was inadequate because it failed to specify where on ROM the Veteran's pain began. R-795-96. This information was required "so that the rating official can have a clear picture of the nature of the veteran's disability and

the extent to which pain is disabling." *Mitchell*, 25 Vet.App. at 44. In order to allow the Board to adequately rate a disability based on limitation of motion, the examination must adequately portray functional loss, to include describing the disabling effect of pain on motion. *DeLuca v. Brown*, 8 Vet.App. 202, 206 (1995). Consequently, the Board's reliance on this examination violated the law. *See id.*; *Mitchell*, 25 Vet.App. at 44.

The 2017 VA examiner noted that the Veteran's right knee ROM was "[a]bnormal or outside of normal range." R-794. Additionally, he found that the Veteran experienced "[l]imited motion du[]e to pain" and the "[p]ain noted on [the] exam . . . cause[d] functional loss." R-794-95. However, the examiner failed to state where on ROM the Veteran's pain began. *Id.* This was inadequate. In *Mitchell*, the Court held that it must be clear from the examiner's findings regarding ROM "whether *and at what point* during the range of motion the appellant experienced any limitation of motion that was specifically attributable to pain." 25 Vet.App. at 44 (emphasis added). These "determinations should, if feasible, be 'portraye[ed]' . . . in terms of . . . degree[s]." *Id.* Consequently, because the 2017 VA examination did not indicate *at what point* on ROM Mr. De Paz's pain began, the Board's reliance on it violated *Mitchell* and failed to adequately inform the Board as to the full extent of the Veteran's functional loss. *See id.*; R-794-95.

Additionally, the VA examiner declined to provide an opinion as to the impact of repeated use over time on the Veteran's functional loss, stating he was "[u]nable to

say [without] mere speculation" because the Veteran was "[n]ot examined after rep[itition]s over time." R-796. Yet in *Sharp v. Shulkin*, 29 Vet.App. 26, 33 (2017), the Court made clear that the Board may only accept a VA examiner's statement that he cannot offer an opinion without resorting to mere speculation after the examiner adequately "explain[s] the basis for his or her conclusion that a non-speculative opinion cannot be offered." It subsequently found a medical opinion inadequate where the examiner declined to offer an opinion regarding functional loss during flare-ups "without directly observing function under [such] circumstances." *Id.* at 35. Although the Court acknowledged that there are circumstances in which "specific facts cannot be determined," it made clear that the Board can only accept such a statement from an examiner "after determining that this is not based . . . on a particular examiner's . . . general aversion to offering an opinion on issues not directly observed." *Id.* at 33.

Here, the examiner's failure to provide an opinion as to the potential impact of repeated use over time on the Veteran's functional loss, simply because he did not observe him under those circumstances, R-796, violated the principles articulated in *Sharp*, 29 Vet.App. at 33-35. The examiner's failure to provide this information prejudiced the Veteran because, as discussed below, the Veteran reported functional loss due to pain such as an inability to bear weight on his knee, R-5765, and limited standing, walking, stair climbing, and squatting due to pain, R-794. Thus, an opinion on the Veteran's functional loss would have likely shed light on the extent of his

functional loss in these areas, allowing the Board to adequately rate the Veteran. *See Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (an opinion is adequate when it "describes the disability. . . in sufficient detail" so that the Board's evaluation of the disability will be a fully informed one); *see also Mitchell*, 25 Vet.App. at 44.

The lack of information in the 2017 VA examination renders it inadequate for adjudication purposes. *See Stefl*, 21 Vet.App. at 124; *see also Mitchell*, 25 Vet.App. at 44-45. Remand is needed to obtain a medical opinion that clearly states where on ROM testing pain occurs and adequately addresses whether Mr. De Paz's right knee disability causes functional loss after repeated use over time. The Board is required to seek clarification of the evidence and to return as inadequate an examination report that "does not contain sufficient detail," 38 C.F.R. § 4.2 (2019). *See also Barr v. Nicholson*, 21 Vet.App. 303, 311-12 (2007). Its failure to do so in this case violated the duty to assist and prejudiced the adjudication of Mr. De Paz's claim, requiring remand for a new examination that satisfies *Mitchell* and *Sharp*.

To that end, the Board was required to explain why the Veteran's symptoms—including pain and limited motion—were or were not enough to warrant a higher rating. *See* 38 C.F.R. § 4.71a (2019). However, the Board relied on the inadequate 2017 VA examination that failed to contain this information. *See* R-14-16; R-794-95. This failure prejudiced the Veteran because, had the Board considered the full extent of the Veteran's functional loss, it may have found that he deserved a rating in excess of 10 percent. For example, Mr. De Paz experienced "constant chronic pain," R-

5762, that was "so painful and constant, it prevented him from helping with simple household chores," R-2930. His knee became inflamed, R-5762, and he could not stand very long due to weakness, R-5763. He experienced an inability to bear weight on his knee, R-5765, and limited standing, walking, stair climbing, and squatting due to pain, R-794. In fact, "just knowing how much pain [he was] going to be [in] just from his knee alone prevents [him] from doing a lot." R-5762. Yet, the examiner failed to sufficiently describe the disabling effect of the Veteran's pain on motion. *See* R-793-803. As a result, the Board could not adequately consider whether the Veteran's symptoms warranted a higher rating. Thus, the Veteran is unable to understand the precise reasons or bases for the Board's decision and remand is required. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

b. The September 2012 and April 2014 examination were inadequate because the Board previously found these examinations insufficient for adjudicative purposes in its November 2017 decision.

The Board cited to both the September 2012 and April 2014 VA examinations in its decision as further evidence against awarding the Veteran a rating in excess of 10 percent. R-13-14; *see* R-1290; R-1557. However, the Board previously found, in its November 2017 decision, that the September 2012 examination was "unduly remote" and "too old for an adequate evaluation of the Veteran's current condition." R-3545.

Additionally, the April 2014 examiner stated, and the Board noted, that the examiner's "range of motion data was extracted from [the] 2012 PVAMC orthopedics

visit." R-14; R-1290; *see* R-1570. The examiner's reasoning for using the previous measurements was that ROM testing on the day of the April examination was "not helpful . . . due to the [V]eteran's active resistance to [the] flexion examination due to either anxiety or pain." R-14; R-1290-91 (stating "either anxiety or pain (unclear to me today which was more likely)"). In turn, the Board also found, in its November 2017 decision, that the April 2014 examiner's "use of the prior range of motion [was] inadequate in determining the current severity of Veteran's right knee disability." R-3545.

The Board's prior statements about the inadequacy of the 2014 examiner's reliance on unduly remote measurements from 2012, combined with its subsequent remand to develop sufficient medical evidence of the current severity of the right knee, constitute an acknowledgement of the inadequacy of both VA examinations for rating purposes. *Cf. Correia v. McDonald*, 28 Vet.App. 158, 169-70 (2016) (finding that "when VA orders a medical examination . . . reflect[ing] either an explicit or implicit determination that there is insufficient medical evidence in the record" to adequately evaluate the veteran's disability, "the Board's determination that VA examinations of record are adequate and that VA therefore satisfied its duty to assist is clearly erroneous").

Despite the deficiencies of the September 2012 and April 2014 examinations, the Board afforded them "greater probative weight" than the Veteran's lay statements. R-16. Additionally, the Board cited the September 2012 examiner's measurements,

despite their acknowledged remoteness. R-13; R-1559; R-3545. And it cited the April 2014 examiner's statements, noting active resistance "due to either anxiety or pain," and his acknowledgement that he "was unable to comment on repetitive usage," despite his statements' legal deficiencies. R-14; R-1291. Therefore, the Board violated the duty to assist by relying on examinations it acknowledged were inadequate, and remand is needed for an examination that contains measurements sufficiently current to be probative to the Board's rating considerations of the Veteran's right knee disability. *See Tucker*, 11 Vet.App. at 374 (holding that "where the record is otherwise inadequate, a remand is the appropriate remedy").

In light of the foregoing, it remains unclear whether the April 2014 examiner's reluctance to form an opinion as to the effect of either pain or anxiety on ROM was based on proper consideration of all available information and records, rather than "the absence of procurable information or on a particular examiner's shortcomings or general aversion to offering an opinion on issues not directly observed." *Sharp*, 29 Vet.App. at 33; *see Jones v. Shinseki*, 23 Vet.App. 382, 390 (2010). Yet, the Board relied on both the August 2014 examiner's statements and the September 2012 examiner's measurements despite their legal deficiencies and failed to explain the precise basis for that decision. *See* R-13; *see also* 38 U.S.C. § 7104(d). Thus, the Board provided inadequate reasons and bases for its reliance on these examinations despite their inadequacies and remand is therefore required. *See Tucker*, 11 Vet.App. at 374.

II. The Board misapplied the law and failed to provide adequate reasons and bases as to why a rating in excess of 10 percent was not warranted due to the Veteran's functional loss.

The Board acknowledged that it must consider functional loss such as "pain, weakness, excess fatigability, or incoordination" when determining the appropriate rating of a Veteran's joint disability. R-15 (citing 38 C.F.R. §§ 4.40, 4.45, 4.59); *see also* R-12. In turn, it found that the Veteran's "right knee disability [did] not approximate to a 20 percent rating." R-16. However, in its final analysis, it failed to account for all favorable and material evidence, misapplied VA regulations when it relied solely on ROM scores to deny a higher rating, and inadequately assessed the Veteran's functional loss. R-14-15; *see DeLuca*, 8 Vet.App. at 205-06.

First, the Board did not account for all the favorable and material evidence of the Veteran's right knee functional limitations. In addition to the issues of pain and difficulty with standing, walking, sitting, and lifting that the Board referenced at R-13-14, Mr. De Paz's service-connected right knee condition *also* caused impediments with "balancing, pushing, . . . crouching and crawling." R-5960. Further, he described his pain as "throbbing" and "even going to the kitchen [was] painful, [which was] just 30 feet away." R-5781; R-6335. His symptoms prevented him from "even pick[ing] . . . up [his two-year-old son] anymore because he was too heavy for him because it would just hurt." R-5775. Moreover, his symptoms caused "burning, aching, and sharp" pain and caused a "lack of endurance and fatigability." R-9039.

The Board failed to mention this favorable evidence in its decision. *See* R-10-16. And, although it recited some of the evidence relevant to the Veteran's functional losses, the only functional effects it actually assessed and considered in its denial were his reports of pain, weakness, and limited movement. R-10-15. This inadequate discussion amounted to a failure to discuss all favorable and material evidence, in violation of the law. *See* 38 U.S.C. § 7104(a); *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

VA's regulations direct adjudicators to consider these precise impediments. *See* 38 C.F.R. § 4.40 (defining a musculoskeletal disability as one that causes an inability to perform the normal working movements of the body and deeming it "essential" for ratings to be based on functional loss); 38 C.F.R. § 4.45 (requiring raters to inquire as to the presence of locomotion disturbance, sitting and standing interference, and excess fatigability, among other things, in rating joint conditions). Yet, here, the Board did not. *See* R-10-16. Because it both ignored, and failed to adequately assess, evidence that VA deems "essential" to rating orthopedic conditions, its decision must be remanded for it to consider all favorable and material evidence. *See* 38 C.F.R. § 4.40; *see also* 38 U.S.C. § 7104(a).

Second, Mr. De Paz's additional functional loss due to pain is severe enough to impact ROM beyond that which is contemplated by the disability rating assigned, thus his functional loss is compensable. *Thompson v. McDonald*, 815 F.3d 781, 785 (Fed. Cir. 2016) (concluding that evidence of functional loss must be considered "in

understanding the nature of a veteran's disability, after which a rating is determined based on the [section] 4.71a criteria"); *see also DeLuca*, 8 Vet.App. at 205-06. Section 4.40 "requires that the disabling effects of painful motion be considered when rating joint disabilities." *Cullen v. Shinseki*, 24 Vet.App. 74, 84 (2010) (citing *DeLuca*, 8 Vet.App. at 206).

As it acknowledged in its decision, the Board must discuss "any additional limitations a claimant experiences due to pain, weakness, or fatigue." *Id.* at 85; R-15; *see also Bond v. Shinseki*, 659 F.3d 1362, 1368 (Fed. Cir. 2011) (stating that the Board will not be deemed to have conducted an implicit analysis of a critical issue when the record is devoid of any evidence indicating the Board did conduct this analysis). Here, the Board acknowledged that Mr. De Paz's "right knee condition had functional impact on standing, walking, lifting, and carrying, all expected to cause flares," as well as the presence of pain on flare-ups. R-15; *see* R-797; R-802. Yet its analysis of the Veteran's overall functional impairment was insufficient. The Board merely stated that "the evidence indicates that the Veteran's right knee disability has caused interference with standing or sitting, and pain contributing to additional functional loss or contributing to his disability," more closely approximating a 10 percent rating. R-15. But it did not address functional impairment, and instead solely cited ROM limitations and the absence of ankylosis, recurrent subluxation, lateral instability, or cartilage dislocation or removal. R-15-16. This is an incomplete analysis of functional impairment because Mr. De Paz's functional losses need not cause additional ROM

losses to support his entitlement to a higher rating. *See Lyles v. Shulkin*, 29 Vet.App. 107, 117 (2017); *Sharp*, 29 Vet.App. at 31-32 (holding that a veteran may be "entitled to a higher disability evaluation than supported by mechanical application of the schedule where there is evidence that his or her disability causes additional functional loss.").

Adjudicators are required to look to sections 4.40, 4.45, and 4.59 to potentially craft "a higher musculoskeletal evaluation than would otherwise be supported by mechanical application of a given" diagnostic code for limitation of motion. *Lyles*, 29 Vet.App. at 117. That higher evaluation can be crafted based on "weakened movement, excess fatigability, incoordination, and pain on movement, *in addition to range of movement*." *English v. Wilkie*, 30 Vet.App. 347, 355 (2018) (emphasis added); *see also Thompson*, 815 F.3d at 785 (concluding that evidence of functional loss must be considered "in understanding the nature of a veteran's disability, after which a rating is determined based on the [section] 4.71a criteria").

Put another way, evidence that a claimant suffers from functional loss due to factors listed in sections 4.40 and 4.45 can support a higher rating, even if those factors do not actually decrease the claimant's ROM. Normal working movements are not limited to the ROM of a joint, but rather also encompass the ability to stand and walk, and the speed and efficacy with which a person can execute a movement. *See generally* 38 C.F.R. §§ 4.40, 4.45.

Focusing solely on actual losses in *mechanical* ROM, as the Board did here, effectively renders sections 4.40 and 4.45 superfluous and moot. *See Burton v. Shinseki*, 25 Vet.App. 1, 4-5 (2011) (noting the cardinal principle of construction that regulations should be construed so that no clause, sentence, or word is superfluous). *But see* R-15-16. If a mechanical application of the rating criteria—that is, the ROM within which a claimant can move—is all that the Board can consider when assigning a rating, there is no point in considering what factor underlies that loss. *See* 38 C.F.R. §§ 4.40, 4.45. And there is no purpose to a regulation that provides a "broad canvas" for understanding a veteran's disability if that understanding can have no impact on a veteran's ultimate rating. *See Thompson*, 815 F.3d at 786.

Specifically, section 4.45 lists six factors that must be considered when evaluating the extent of joint disability: (1) "Less movement than normal;" (2) "More movement than normal;" (3) "Weakened movement;" (4) "Excess fatigability;" (5) "Incoordination;" and (6) "Pain on movement." 38 C.F.R. § 4.45. Mr. De Paz's right knee has been shown to have less movement than normal, generally, as well as limited motion due to pain, in accordance with the first factor. R-14; R-794-95 (Dec. 2017 VA examination, noting "limited motion du[]e to pain" and abnormal ROM, limited to 110 degrees on both flexion and extension); *see* 38 C.F.R. § 4.45(a). He experienced "[a] lot of weakness" in the joint, potentially encompassing both "[w]eakened movement" and "[e]xcess fatigability." R-5763 (Aug. 2017 Board hearing, noting that weakness "doesn't let [him] stand for a very long time"); *see also* R-206 (Sept. 2018 VA

peripheral nerves examination, noting that "[r]ight knee weakness is due to right knee condition"); 38 C.F.R. §§ 4.45(c) and (d). Mr. De Paz's description of the process he would have to go through if he dropped a pen while alone, "kick[ing] it closer to the wall so I can get down, us[ing] the wall to brace myself," also speaks to his right knee's "[i]ncoordination, [or] impaired ability to execute skilled movements smoothly." R-5765 (Aug. 2017 Board hearing); *see* 38 C.F.R. § 4.45(e).

Finally, section 4.45(f) directs the adjudicator to consider "[p]ain on movement, swelling, . . . interference with sitting, standing and weight bearing." 38 C.F.R. § 4.45(f). Here, the record contains evidence showing that Mr. De Paz's right knee disability exhibits such impairments. For example, at his August 2017 Board hearing, the Veteran characterized his pain related to the knee as "constant chronic pain," stating that it was at an "8, in that 1 to 10" scale. R-5762; *see also* R-794 (Dec. 2017 VA examination, noting "chronic knee pain" that is "much worse on th[e] right" and use of "knee brace for knee pain on the right"). And "just knowing how much pain [he is] going to be [in] just from [his] knee alone prevents [him] from doing a lot." R-5762. In fact, "pain in [his] knee" was "so painful and constant, it prevented him from helping with simple household chores and starting or completing any maintenance work on [his] home." R-2930; *see also* R-797 (noting functional loss caused by pain). His knee would "become[ ] inflamed" and he stated that "sometimes I need to ice it down to bring the inflammation down." R-5762; *see also* R-794 (noting "both knees are puffy and they feel tight"). Due to weakness, he could not "stand for

a very long time" and "even in the sitting position" he "constantly [had] to move [his knee] as [he] fe[lt] tension building in it and just the pain level increasing in it." R-5763. The December 2017 VA examiner documented the Veteran's "[l]imited standing[,] walking[,] and stairs and squatt[ ]ing due to pain." R-794. Regarding his knee's inability to bear weight, Mr. De Paz stated that "how the joint is, [it] locks the other way, [so] that I have to sleep on my back to where I'm not putting that weight on it." R-5765. The 2017 examiner confirmed this limitation, stating that "[p]ain [was] ev[ ]ident on [the] exam on weight bearing." R-802.

Given the Board's acknowledgement that the Veteran reported weakness, pain, and his knee's propensity to "give[] out during various activities," it should have explained whether and how this functional loss did or did not justify the assignment of a higher rating. *But see* R-14. This failure to consider his functional losses prejudiced Mr. De Paz because, had the Board undertaken the appropriate evaluation of the Veteran's functional loss relative to his right knee, it might have found him entitled to a higher rating. *See English*, 30 Vet.App. at 355; 38 C.F.R. §§ 4.10, 4.40, 4.45, 4.59 (2019). Consequently, remand is needed for the Board to adequately account for all of the evidence bearing on Mr. De Paz's entitlement to a higher rating for his right knee disability, including his acknowledged functional losses. *See Thompson*, 815 F.3d at 785; *English*, 30 Vet.App. at 355; *Lyles*, 29 Vet.App. at 117; *Sharp*, 29 Vet.App. at 31-32.

III. The Board failed to uphold its duty to maximize the Veteran's benefits when it did not consider whether a separate rating was warranted for the Veteran's instability symptoms that were not compensated by his diagnostic code.

Mr. De Paz is service connected at 10 percent for his right knee disability under DC 5261, yet this rating does not contemplate his symptoms of imbalance and instability. R-12; R-5960; *see* 38 C.F.R. § 4.71a. Instead, the Board inaccurately found that "[t]hroughout the appeals period, the Veteran did not have . . . lateral instability," and failed to conduct a separate rating analysis. R-15-16. However, the Board has a duty to maximize the Veteran's benefits. *See Morgan v. Wilkie*, 31 Vet.App. 162, 168 (2019); *see also Bradley v. Peake*, 22 Vet.App. 280, 294 (2008). Here, the Board failed to uphold this duty because it dismissed the possibility of additional compensation for the Veteran's instability by not addressing favorable evidence of record. R-15-16; *see* 38 C.F.R. § 4.71a.

To that end, when a veteran has separate and distinct manifestations attributable to the same injury, he may be compensated under different diagnostic codes. *See Esteban v. Brown*, 6 Vet.App. 259, 261 (1994). VA cannot simply limit its analysis to a "mechanical application of the rating schedule." *Kuppamala v. McDonald*, 27 Vet.App. 447, 457 (2015). Instead, VA must, if necessary, "go beyond the criteria in the schedule to determine what level of impairment to earning capacity results from [a veteran's] unique symptoms." *Id.*; *see English*, 30 Vet.App. at 352-53. Moreover, the Court found in *English* that the Board cannot require objective evidence of lateral

instability of the knee to support a compensable rating under DC 5257. *English*, 30 Vet.App. at 352-53. Additionally, because "the entire rating schedule is governed by the average impairment in earning capacity resulting from service-connected disabilities," the Board should have referenced other applicable diagnostic codes in determining the level of impairment produced by Mr. De Paz's instability caused by his right knee disability. *Kuppamala*, 27 Vet.App. at 447.

Here, however, the Board failed to conduct a separate rating analysis despite Mr. De Paz's unique symptoms. *See* R-15-16; R-5960. For example, in 2008 the Veteran had "biomechanical imbalance issues." R-9131. Further, in 2012 his knee had "functional limitation" related to "balancing." R-5960. Yet, instability issues are not contemplated by DC 5261. 38 C.F.R. § 4.71a. DC 5257 specifically contemplates knee impairment with "lateral instability" up to 30 percent based on whether such instability is slight, moderate, or severe. *Id.*; *see English*, 30 Vet.App. at 352-53. In fact, the Board even mentioned this DC in its decision, but failed to properly apply the law in rejecting the Veteran's lay statements. *See* R-5; R-13; R-16. Rather, the Board found that the Veteran did not have "recurrent subluxation or lateral instability." R-16. However, "nothing in DC 5257 provides that objective medical evidence is required or is to be favored over lay evidence." *English*, 30 Vet.App. at 352 (citing 38 C.F.R. § 4.71a *and Petitti v. McDonald*, 27 Vet.App. 415, 427 (2015)); *see Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (Competent lay evidence is not inherently less probative than medical evidence.). The Board,

therefore, improperly limited its analysis to objective evidence of recurrent subluxation and lateral instability and failed to account for the Veteran's lay statements evidencing right knee balancing issues. *See* R-16; R-5960; R-9131. In light of the foregoing, the Board should have considered whether a separate rating was warranted for the Veteran's instability symptoms and remand is thus required. *See Morgan*, 31 Vet.App. at 167-68.

CONCLUSION

The Board's decision denying Mr. De Paz a rating in excess 10 percent for his right knee disability must be vacated and remanded for four reasons. First, the Board erroneously relied on the December 2017 VA examination despite its inadequacy. The examiner failed to specify where during ROM testing Mr. De Paz's pain began, in violation of the law. The December 2017 report also failed to provide an opinion as to the impact that repeated use over time of the Veteran's right knee had on his functional ability. The Board's decision, therefore, should be vacated and remanded for the provision of a new VA examination or, at least, an adequate discussion as to why one is not necessary given the deficiencies in the December 2017 examination.

Second, the Board relied on both the April 2014 and September 2012 VA examinations in denying the Veteran an increased rating claim for his right knee disability, yet these examinations were inadequate. The Board previously determined that both the April 2014 examiner's ROM testing was not helpful in deciding Mr. De

Paz's claim and that the September 2012 examination was too remote. However, despite these inadequacies, the Board relied on both examinations in its decision. The Board's decisions, therefore, should be vacated and remanded for the provision of new examinations or, for it to provide a valid rationale based off adequate examinations.

Third, the Board failed to discuss all favorable and material evidence illustrating the extent of the severity of Mr. De Paz's right knee condition, such as evidence demonstrating impairments with balancing and pushing, and throbbing, burning, sharp pain that caused a lack of endurance and fatigability. All this evidence is relevant to the adverse effects his right knee condition had on his ability to perform the normal working movements of the body, and it is the type of evidence VA's regulations deem critical to understanding musculoskeletal conditions. Furthermore, the Board erred in deciding that evidence indicated that Mr. De Paz's right knee disability more closely approximated a 10 percent rating because its inquiry failed to consider whether the entirety of his disability impairments and functional losses warranted a higher rating, even if his ROM measurements alone did not.

Finally, the Board failed to account for the Veteran's symptom of instability that is not contemplated in his rated diagnostic code. Further it failed to conduct a separate rating analysis despite his unique symptom of instability, and improperly limited its analysis to objective evidence of instability, failing to account for the Veteran's lay statements. Consequently, the Board's decision should be vacated and

remanded for it to provide adequate reasons and bases, account for all favorable and material evidence, and properly apply the law.

Respectfully submitted,

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